

## **10<sup>th</sup> Commission**

### **Present Problems of the Use of Force in International Law**

#### **B. Sub-group on Humanitarian Intervention\***

### ***Problèmes actuels du recours à la force en droit international***

#### ***B. Sous-groupe sur l'intervention humanitaire\****

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Travaux préparatoires.....	239
Délibération.....	290
Résolution.....	365

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## TRAVAUX PREPARATOIRES

### Table of Contents

#### I. Preliminary Report

1. Introduction .....	241
2. Agencies of Intervention.....	242
a. The Security Council .....	242
b. The General Assembly .....	244
c. Regional Organizations.....	246
d. Individual States and Coalitions of States.....	247
3. Recent Cases of Humanitarian Intervention Without United Nations' Authorization .....	250
4. The Impact of Kosovo on Legal Analyses.....	252
a. Humanitarian Intervention : Legal and Political Aspects by the Danish Institute of International Affairs (1999) .....	253
b. The Kosovo Report on the Initiative of the Prime Minister of Sweden (2000) .....	255
c. Humanitarian Intervention by the Dutch Advisory Committee on Issues of Public International Law and the Dutch Advisory Council on International Affairs (2000).....	256
d. Fourth Report by the House of Commons Foreign Affairs Committee (2000) .....	258
e. The Responsibility to Protect by the International Commission on Intervention and State Sovereignty (2001).....	260
f. A More Secure World : Our Shared Responsibility by the Secretary-General's High-level Panel on Threats, Challenges and Change (2004).....	262
5. The Alternatives .....	263
a. Changing the Veto .....	264
b. Continuing the Ad Hoc Approach.....	265
c. Allowing Case-by-Case Interventions on the Basis of Specified Criteria.....	265

240	INSTITUT OF INTERNATIONAL LAW- SESSION OF SANTIAGO (2007)	
	d. Changing International Law to Allow Humanitarian Interventions.....	266
	<b>II. Provisional Conclusions</b> .....	266
	<b>III. Comments of the members of the sub-group</b> .....	267
	Comments by Professor Benedetto Conforti .....	267
	Comments by Professor Tullio Treves .....	272
	Comments by Professor Budislav Vukas .....	274
	Comments by Dr. Abdulqawi a. Yusuf .....	274
	Comments by Professor Karl Zemanek.....	277
	Comments by Dr. Roy S. Lee .....	277
	Comments by Ambassador Felipe H. Paolillo .....	282
	Comments by Professor Budislav Vukas .....	286
	Comments by Professor Karl Zemanek .....	288

## I. Preliminary Report

### Humanitarian Intervention : The Uncertain Evolution of a Responsibility to Protect in International Law : Preliminary Exposition and Questionnaire\*

“[T]he power of positive law is diminished if the gap between it and the common sense of values – justice, morality, good sense – is allowed to become too wide”<sup>1</sup>.

#### 1. Introduction

There is an increasingly acute tension between two fundamental policies of the international community : (i) the protection of the autonomy of individual states from outside interference, especially by other states, and (ii) a concern for the protection of and provision of remedy to the inhabitants of states in situations of extreme human rights violations. For several decades after 1945 the relationship between these primordial principles tilted in favor of state autonomy, thanks, in part, to the clarity of U.N. Charter Articles 2(4) and 2(7) and the lack of clarity and relatively inchoate character of fundamental international human rights norms. In this context, the general view was that a Humanitarian Intervention, understood as the use of force by an international organization, a state or group of states for the purpose of stopping massive human rights violations in another state, would be unlawful.<sup>2</sup>

In the past several decades, however, the *domaine réservé* of Article 2(7) has contracted while the international code of human rights has been articulated, elaborated and accepted, first, as a standard of achievement, subsequently, in part, as customary international law and later, for some prescriptions, even as *jus cogens*. As a result, legal uncertainty now exists with respect to the lawfulness of Humanitarian Intervention : Whether extreme human rights violations<sup>3</sup> in a state whose government has shown itself unwilling or unable to arrest them constitutes a situation in which the appropriate organ of the United Nations may authorize an intervention or a regional organization or another state or group of states, acting without the authorization of an international organization, may lawfully intervene

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\* The Rapporteur acknowledges the assistance of Viola Trebicka, J.D. Yale Law School, 2007 and Lisa Wang, J.D. Yale Law School, 2008.

<sup>1</sup> Thomas M. Franck, *Legal Interpretations and Change in HUMANITARIAN INTERVENTIONS* 211 (J. L. Holzgrefe and Robert Keohane, eds, Cambridge University Press, 2003).

<sup>2</sup> Confrères Lee and Conforti suggested that a discussion of humanitarian intervention include other forms of intervention besides military force, using Article 41 of the Charter of the United Nations as a starting point.

<sup>3</sup> Many members of the Commission drew attention to the lack of clarity of what constitutes “extreme human rights violations.”

militarily in order to provide a short-term remedy or longer-term reconstruction.

## 2. Agencies of Intervention

### a. *The Security Council*

There is no legal uncertainty with respect to the competence of the Security Council to engage in or authorize a Humanitarian Intervention. Both the language of the Charter and a limited amount of practice confirms that the Security Council is competent to conduct or authorize regional organizations or other states to conduct military operations within a state in which severe human rights violations are occurring. Article 2(7) prohibits U.N. interference in matters “which are essentially within the domestic jurisdiction of any state.” The only exception made is for “the application of enforcement measures under Chapter VII.” Chapter VII contains the powers which the Security Council may use to discharge its primary responsibility to “maintain and restore international peace and security.” The Security Council itself determines whether a situation or event threatens international peace and security. The trigger-contingency of a “threat to the peace” in Article 39 is open-textured. Since the Rhodesian incident, in 1967 it is clear that the Council can find that severe human rights violations within a state caused by the actions of its government, even absent manifest external consequences, can constitute a threat to the peace and serve as basis for Security Council action. At the time, Rhodesia was a controversial exception; the practice of the United Nations in the 1990s, however, has “shifted to a perception that internal violations of human rights could threaten international peace and security.”<sup>4</sup> Large-scale

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<sup>4</sup> SUSAN BREAU, HUMANITARIAN INTERVENTION: THE UNITED NATIONS & COLLECTIVE RESPONSIBILITY 238 (Cameron May, 2005). The first clear link between human rights violations within a state and international peace and security was Security Council Resolution 688 in the Iraq/Kuwait crisis, though it did not authorize a Chapter VII action. The operation in Somalia was the first in which the Security Council authorized intervention in an internal conflict under the terms of Chapter VII of the U.N. Charter without invoking possible cross-border dimensions of the conflict. (Resolution 794) However, even for the Security Council, the responsibility is not to protect but rather to maintain peace. Security Council Resolutions for Somalia, Bosnia and Herzegovina, Kosovo mention a responsibility to maintain peace and security and a grave concern for the violations of human rights and loss of material property, but never speak in terms of responsibility to halt the human rights violations per se or a responsibility to protect. The Resolution on Somalia (Resolution 733, 23 January 1992) recalls the Security Council’s “primary responsibility to maintain peace and security” and links the loss of human life and material damage to peace and security in the region. The Resolution on Bosnia and Herzegovina (Resolution 713, 25 September 1991) recalls the Security Council’s “primary responsibility to maintain peace and security” and links the loss of human life and material damage to peace and security in the region. J. Frowein and N. Krisch find that an evolution of the concept of a threat to the peace to include violations of human rights reflects the increased importance of the individual in the international legal order but it does not warrant the conclusion that any severe violation of human rights could give rise to [Security Council] action under Chapter VII. The [Security Council] enjoys its far-reaching powers only for matters of peace and security; it is not set up to enforce all overarching values of the international community. THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 725 (Bruno Simma et al, eds,

human rights violations are no longer buffered from international concern on the ground that they are “essentially within the jurisdiction” of the perpetrator-state.

Increasing legal clarity with respect to the authority of the Security Council, however, does not resolve the problem posed. The Security Council, for reasons which are too familiar to require elaboration, has proved itself on many occasions unable to secure the unanimity of its permanent members which the Charter requires to act effectively in cases of severe human rights violations. Either the Council has not acted or the compromises necessary for securing unanimity have produced ineffective or anodyne resolutions.

In this regard, the contribution of the High-level Panel (HLP) appointed by the Secretary General appears at once conservative, radical – and vacuous. The HLP Report said,

*We endorse the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent.*<sup>5</sup>

The conservative element of the HLP statement is that it merely confirms an authority that is clearly within the Security Council’s domain. As noted above, the Security Council has the competence to authorize military action under the broad “threat to the peace” contingency of Article 39 of the Charter and has done so for human rights matters since 1965. In this regard, the HLP statement even imports a certain retreat, as if relatively clear law had been reduced to the status of an “emerging norm” and, as such, had slipped back into the law-making womb, from which the HLP predicts it will emerge at some future moment. The notion of an “emerging norm” is itself rather slippery, especially with respect to the right or obligation to resort to violence. It is not obvious at what point an “emerging” norm emerges and can be relied upon. Further, given its relative lack of clarity as compared to a legislative or treaty enactment, it is not clear who is authorized to determine that the norm has finally “emerged.”

The apparently radical element of the HLP statement is that the heretofore discretionary vote of non-permanent members of the Council and the *librum veto*

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Oxford University Press, 2002).

<sup>5</sup> “A More Secure World: Our Shared Responsibility” in *Report of the High-level Panel on Threats, Challenges and Change*, United Nations General Assembly Doc. A/59/565, 2 December 2004, p. 57, para. 203 (hereafter *High-level Panel Report* or *HLP Report*). Of course, the High-level Panel was not an international law-making body nor is the Secretary-General, who established the Panel, someone who can contribute to “state practice.” Yet the process of international law making has certainly expanded to include many non-state participants. See W. Michael Reisman, *The Democratization of International Law-Making* in DEVELOPMENTS OF INTERNATIONAL LAW IN TREATY MAKING (Rüdiger Wolfrum and Volker Röben, eds, Springer, 2005).

of the permanent members are supposedly being transformed into a “responsibility” to take action when faced with severe human rights deprivations within a state. However, there is less in the HLP statement than meets the eye. The word “responsibility” does not appear in Hohfeldian analysis.<sup>6</sup> Significantly, it is not a “duty” to act.<sup>7</sup> And if it refers to a “power” to act, the Security Council already has it.

Nor is the “last resort” contingency for the use of force to arrest the types of massive violations, such as genocide, likely to provide cause for hope to their victims : Is the implication that the Security Council must patiently wend its way through diplomatic measures and economic sanctions before bombing gas chambers, crematoria or their latter day equivalents ?

The most constricting part of the HLP Report, however, is its implicit limitation of the authority to take actions to arrest massive or extreme human rights violations to the Security Council. Given the decision process of the Council, such intervention is unlikely to occur.<sup>8</sup> As a practical matter, Humanitarian Intervention is only likely to be undertaken by individual states or ad hoc coalitions of states. The HLP Report fails to address, other than by negative implication, whether other agents of the international legal process can act for the Council when it is effectively paralyzed. Or, perhaps, the negative implication is a sufficiently clear statement of its intention.

*b. The General Assembly*

The *Uniting for Peace Resolution*,<sup>9</sup> the *Certain Expenses Opinion*,<sup>10</sup> and, more recently, the *Wall Opinion*,<sup>11</sup> all recognize the responsibility of the United Nations General Assembly to exercise Chapter VII powers in circumstances which require such action but in which the Security Council proves to be paralyzed.

The *Uniting for Peace Resolution* provides that where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly *shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of*

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<sup>6</sup> See Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning* 23 Yale L. J. 16 (1913-1914). Responsibility is mentioned only to explain the usage of “liability,” which is the jural correlative of “power.”

<sup>7</sup> Confrère Conforti suggested that a “responsibility” or “duty” to protect is meaningless with reference to positive international law because there is no means of enforcement or remedies for inaction. There is only a *moral* duty to arrest serious violations of human rights.

<sup>8</sup> Confrère Lee drew attention to the issue of pressurizing the Security Council and General Assembly to act. Many members of the Committee suggested that a right to protect becomes more justified when all efforts have been exhausted, or in the face of paralysis of the Security Council.

<sup>9</sup> *Uniting for Peace* G.A. Res. 377, U.N.GAOR, 5th Sess., Supp. No. 29, at 10, U.N. Doc.A/1775 (1950).

<sup>10</sup> *Certain Expenses of the United Nations*, Advisory Opinion, I.C.J. Reports 1961.

<sup>11</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2003.

*a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security.*<sup>12</sup>

The jurisprudence of the International Court of Justice suggests that the Court is likely to find issues of human rights abuses within the scope of U.N. competence. In *Peace Treaties*,<sup>13</sup> the Court's decision implied that questions of international law cannot be considered matters essentially within the jurisdiction of a state. A similar implication was made in *Norwegian Loans*.<sup>14</sup> In *Certain Expenses*, the Court found that, as "each organ must, in the first place at least, determine its own jurisdiction" within the bounds of the Charter,<sup>15</sup> Assembly deployment of peacekeeping forces was not *ultra vires* if carried out for the fulfillment of one of the stated purposes of the United Nations. In the *Wall* opinion the Court equated the Assembly and Council by saying that the United Nations, "especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation" which the Court had found existed.<sup>16</sup>

May the General Assembly, then, as part of this required "further action" authorize a state or coalition of states to conduct a Humanitarian Intervention when major human rights violations are occurring within a state and its government is either responsible for or unable to halt them? If the constitutive innovations which were considered above are deemed to be lawful, the answer would appear to be that the Assembly may so authorize by certifying that, in its view, (i) there is a need to act under Chapter VII; and (ii) the Council has not done so. The Court's rather permissive approach to such findings in the *Wall* Opinion suggests that these matters are not objective but rather fall to the judgment of the General Assembly itself.<sup>17</sup> The extent to which in the exercise of its "secondary powers" the Assembly may "hitch a ride" on Charter Articles 25 and 103 remains unexplored. If the Assembly is competent to issue authorizations to regional organizations or individual

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<sup>12</sup> *Uniting for Peace* at para. 1. This authority has been used only rarely, notably in the 1950s during the Korean crisis and to establish the United Nations Emergency Force (UNEF) to secure and supervise the cessation of hostilities between Egypt and Israel in 1950. Soon it became clear that financial and military support of the major powers of the world were imperative for any successful enforcement action. More importantly, there was a lack of will – "those [major] power were not willing to see the General Assembly lead in this area; thus, the General Assembly simply could not go it alone." SEAN MURPHY, *HUMANITARIAN INTERVENTION: THE UNITED NATIONS IN AN EVOLVING WORLD ORDER* 120 (University of Pennsylvania Press, 1996).

<sup>13</sup> *Interpretation of Peace Treaties with Bulgaria, Hungary, and Romania*, Advisory Opinion, I.C.J. Reports 1950 (finding that the interpretation of the terms of an international treaty could not be considered as a question essentially within the domestic jurisdiction of a state).

<sup>14</sup> *Certain Norwegian Loans*, I.C.J. Reports 1957 (where in his separate opinion Judge Lauterpacht notes that though, prima facie, the conduct of a state may be within its domestic jurisdiction, numerous matters, such as the treatment of its citizens, are now the subject of treaties and customary rules of international law).

<sup>15</sup> *Certain Expenses Case* at para. 168.

<sup>16</sup> *Construction of a Wall* at para. 160.

<sup>17</sup> As noted in the *Certain Expenses* case, the General Assembly may determine its own jurisdiction.

states to conduct a Humanitarian Intervention in a particular case, it would appear that the action taken by these delegates would not constitute a violation of international law, unless it were conducted in ways that violated the *jus in bello*.

However, such actions could, if undertaken, precipitate a constitutional crisis within the United Nations, for they would pit the Assembly against those major powers in the Security Council which had blocked the Council from responding to the humanitarian crisis in the first place. In the past, some of such crises were referred to the International Court of Justice. Since 1962, the Court's opinions have tended to expand the competence of the Assembly. In international law, however, a judicial decision does not necessarily resolve a constitutional crisis.

*c. Regional Organizations*

Chapter VIII of the U.N. Charter envisions a contingent role for regional arrangements in matters relating to the maintenance of international peace and security. Other than making an effort "to achieve pacific settlement of local disputes,"<sup>18</sup> regional organizations may be, "... where appropriate, utilize[d] by the Security Council] for enforcement action under its authority."<sup>19</sup> However, regional organizations have no unilateral enforcement power.

*But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council, with the exception of measures against any enemy state....*<sup>20</sup>

Thus, a regional organization could be authorized by the Security Council or, under the theory explored in the preceding pages, by the General Assembly acting under *Uniting for Peace*, to undertake a Humanitarian Intervention. Without such authorization, a regional organization's conduct of a Humanitarian Intervention would constitute a violation of international law, in the absence of a persuasive theory under which unilateral action could be deemed lawful. The possibility of such a theory will be considered below.

It is interesting to note that Article 4, "Principles," subsection (h) of the Constitutive Act of the newly formed African Union prohibits any one member state from intervening in domestic affairs of another member state but establishes "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."<sup>21</sup> According to the Act, decisions of the Assembly are taken by consensus, failing which, by a two-thirds majority.<sup>22</sup> Further, "the

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<sup>18</sup> U.N. Charter, Article 52 (2).

<sup>19</sup> *Id.* at Article 53(1).

<sup>20</sup> *Id.*

<sup>21</sup> *Constitutive Act of the African Union*, Article 4 (g) states the principle of "non-interference by any Member State in the internal affairs of another."

<sup>22</sup> *Id.* at Article 7 (noting that "[t]he Assembly shall take its decisions by consensus or, failing which,

Assembly may delegate any of its powers and functions to any organ of the Union.”<sup>23</sup> Article 4 is, thus, a contingent invitation to intervene.<sup>24</sup> As the lawfulness of military action by regional arrangements and the lawfulness of intervention by invitation are under investigation by other Rapporteurs, those questions will not be addressed here.

Humanitarian Interventions authorized by the Security Council and possibly by the General Assembly could be lawful. Insofar as they are, a number of more specific legal questions arise:

1. What are the lawful modes (whether economic, diplomatic, military) of Humanitarian Intervention ?
2. After a lawful Humanitarian Intervention has taken place, who, in the absence of an effective local government, is authorized to supervise actions within the state that has been the subject of the intervention?
3. What are the international principles and rules that govern the occupation and reconstruction after a Humanitarian Intervention?
4. Which bodies are entitled to appraise and, when necessary, sanction the violations of international law that precipitated the Humanitarian Intervention?
5. Which bodies are authorized and which rules of law are to be applied for assessing the lawfulness of actions that have been taken as part of a Humanitarian Intervention?

*d. Individual States and Coalitions of States*

In 1995, in the Supplement to the Agenda for Peace, our Confrère and then-United Nations Secretary-General Boutros Boutros-Ghali, observed that

*[o]ne of the achievements of the Charter of the United Nations was to empower the Organization to take enforcement action against those responsible for threats to the peace, breaches of the peace or acts of aggression. However, neither the Security Council nor the Secretary-General at present has the capacity to deploy, direct, command and control operations for this purpose, except perhaps on a very limited scale.*<sup>25</sup>

After reviewing the modalities available to the United Nations “preventive diplomacy and peacemaking; peace-keeping; peace-building disarmament;

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by a two-thirds majority of the Member States of the Union.”)

<sup>23</sup> *Id* at Article 9 (2).

<sup>24</sup> Confrère Yusuf suggested that depending on the extent to which the principle is implemented at the African level, may, if successful, expedite not only the consolidation of the practice, but also its gradual acceptance as law at the universal level.

<sup>25</sup> *An Agenda for Peace: Preventive diplomacy, Peacemaking and Peace-keeping*, Report of the Secretary-General (17 June 1992) U.N. Doc. A/47/277 - S/24111, para. 77.

sanctions and peace enforcement,” Boutros-Ghali went on to say that

*[t]he United Nations does not have or claim a monopoly of any of these instruments. All can be, and most of them have been, employed by regional organizations, by ad hoc groups of States or by individual States...*<sup>26</sup>

Boutros Ghali's observation is particularly pertinent to Humanitarian Intervention. If a responsibility, a fortiori, a duty to protect has now reached parity with the principle of state sovereignty, but if formal authorized international institutions do not respond to particular events giving rise to this duty to protect, the question arises as to whether other actors are or should be contingently empowered *jure gentium* to act unilaterally in this regard. Professor Randelzhofer could not have stated it with more clarity or poignancy : “it becomes more and more intolerable to see grave violations of human rights within a State and see other States being banned by public international law from intervening.”<sup>27</sup> The High-level Panel Report plainly does not state that such a secondary, contingent competence now exists, but, curiously, in paragraph 207, it recommends that the prudential considerations it proposes for Security Council actions implementing the responsibility to protect should also be principles of general application : “We also believe it would be valuable if individual Member States, whether or not they are members of the Security Council, subscribed to them.”<sup>28</sup>

There is a great gulf here between international law on unilateral Humanitarian Intervention and the implication of Boutros Ghali's observation. The U.N. Charter codified a prohibition of a threat or use of unilateral force, with some very narrow exceptions. Article 2(4) enjoins members to “refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” As Charter Articles 2(4) and 2(7) make clear, unilateral Humanitarian Intervention is not, on its face, one of them. Some scholars, including your Rapporteur, have argued that implicit grounds upon which to base Humanitarian Intervention may be found in the language of the Charter in that a Humanitarian Intervention would neither constitute a violation of the territorial integrity or political independence of a state nor be in a manner inconsistent with the purposes of the United Nations. Arguments such as these have failed to win a consensus.<sup>29</sup>

The General Assembly has passed three resolutions on the general issue of intervention by states;<sup>30</sup> while indicating a general animus against intervention,

<sup>26</sup> *Id.* at para. 23.

<sup>27</sup> Randelzhofer in THE CHARTER 132 (Bruno Simma et al, eds.).

<sup>28</sup> *High-level Panel Report* at para. 209.

<sup>29</sup> See Randelzhofer in THE CHARTER 131 (Bruno Simma et al, eds.).

<sup>30</sup> The first Resolution, of 21 December 1965 (G.A. Res. 2131, U.N. Doc. A/6014) included a declaration (“Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and Their Independence and Sovereignty”), declaring that “[n]o State has the right to intervene, directly or

they acknowledge that certain special situations may justify military intervention. So far, “special situations” have been limited to decolonization. There is no consensus with respect to any other “special situations.”

On various occasions the International Court of Justice has addressed Article 2(4)'s prohibition on the threat or use of force. In each of these cases, the ICJ very narrowly construed the legal uses of armed force, leaving little or no room for unilateral Humanitarian Intervention to be included. In *Corfu Channel*,<sup>31</sup> the Court interpreted the prohibition on the use of force broadly, leaving the impression that under the U.N. Charter there are no implicit exceptions to Article 2(4). In particular, the Court held that incapacities of an international organization cannot be invoked to justify noncompliance with the prohibition on the use of force.<sup>32</sup> In *Nicaragua*<sup>33</sup> the Court reaffirmed the general character of the prohibition on the use of force – a rule, moreover, which it held to be part of customary international law and thus independent of the operability of the collective security system of Chapter VII of the Charter.<sup>34</sup> The Court also held that international law does not permit the use of armed force to redress violations of human rights in another state.<sup>35</sup> In *Nuclear Weapons*<sup>36</sup> the Court seemed to confirm that it still regarded self-defense against an armed attack and Security Council military enforcement action under Chapter VII as the only exceptions to the prohibition on the use of force.<sup>37</sup> In *DRC v. Uganda*,<sup>38</sup> the Court noted that though Security Council Resolutions recognized that all states in the region bear responsibility for bringing peace and stability, “this widespread responsibility of the States of the region cannot excuse the unlawful military action of Uganda.”<sup>39</sup>

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indirectly, for any reason whatever, in the internal or external affairs of any other State.” Para. 1. The second Resolution, of 24 October 1970 (G.A. Res 2625, U.N. Doc. A/8028), included a “Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations.” The third Resolution, of 14 December 1974 (G.A. Res. 3314, U.N. Doc. A/9631), entitled “Definition of Aggression,” stated that “no consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression.” Article 5. However, an exception was made in order not to prejudice the right of a people’s right to struggle for self-determination, freedom, and independence, and the right to seek and receive support to that end. Article 7. See MURPHY, HUMANITARIAN INTERVENTION 125.

<sup>31</sup> *Corfu Channel Case*, I.C.J. Reports 1949.

<sup>32</sup> *Id.* at 35.

<sup>33</sup> *Military and Paramilitary Activities Case*, I.C.J. Reports 1986.

<sup>34</sup> *Id.* at para. 188.

<sup>35</sup> *Id.* at para. 268.

<sup>36</sup> *Legality of the Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996.

<sup>37</sup> *Id.* at para. 38.

<sup>38</sup> *Case Concerning Armed Activities on The Territory of The Congo*, I.C.J. Reports 2005.

<sup>39</sup> *Id.* at para. 152. This is curious statement, as Uganda never claimed its actions to be excused on basis of Security Council Resolutions, but rather on the basis of self-defense.

### 3. Recent Cases of Humanitarian Intervention Without United Nations' Authorization

Despite the fact that (i) the explicit language of the U.N. Charter does not allow Humanitarian Intervention without Security Council authorization; (ii) the legal uncertainty of the scope of lawfulness of a secondary authorization by the General Assembly persists; and (iii) the absence of consensus on a *right*<sup>40</sup> of unilateral Humanitarian Intervention to protect victims of large-scale human rights violations, recent practice may suggest the emergence of a more nuanced regime in customary international law.

A bloody civil war in Liberia was the scene of large-scale human rights violations. By August 1990, a group of West African nations under the auspices of the Economic Community of West African States (ECOWAS) established a Standing Mediation Committee for the purpose of investigating disputes and conflicts within the community. The Committee concluded that

*[t]hese developments have traumatized the Liberian population and greatly shocked the people of the sub-region and the rest of the international community. They have also led to hundreds of thousands of Liberians being displaced and made refugees in neighbouring countries, and the spilling of hostilities into neighbouring countries.*<sup>41</sup>

In view of these internal and external effects, ECOWAS dispatched the Economic Community Cease-Fire Monitoring Group (ECOMOG) which succeeded in temporarily stopping the bloodshed and ethnic killing. The Security Council never authorized the ECOMOG intervention, but after its first successes the President of the Security Council did “commend” the efforts of ECOWAS. Even at this point the Security Council did not authorize ECOMOG to use “all necessary means,” despite the fact that there was a transboundary “threat to the peace.” Nonetheless, the reaction of the international community to the ECOMOG intervention was almost universally favorable.

The interventions in Northern Iraq in 1991 and Southern Iraq in 1992 took place against the backdrop of a worsening humanitarian situation due to a break-down in internal order in the aftermath of the forcible eviction of Iraqi troops from Kuwait. The intervening states contended that the intervention was based on Security Council authority, which had found a threat to international peace. Security Council Resolution 688 did not expressly authorize the interventions; it made no reference to Chapter VII nor did it contain any language authorizing the use of force. Resolution 687 authorized the use of force to expel Iraq from Kuwait, but it

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<sup>40</sup> Confrère Treves suggested framing the issue as a “right” to humanitarian intervention as opposed to a “duty” or “responsibility.”

<sup>41</sup> ECOWAS, Standing Mediation Committee, Final Communique of the First Session, 7 August 1990, para 8, *reprinted in* REGIONAL PEACE-KEEPING AND INTERNATIONAL ENFORCEMENT: THE LIBERIAN CRISIS 73 (M. Weller ed. 1994).

was concerned wholly with Iraq's invasion of Kuwait and terminated with the cease-fire agreement in Resolution 687. Thus, the 1991 and 1992 military actions against Iraq, insofar as they were Humanitarian Interventions, were unauthorized. The general view is that the predominant reason for the actions was an attempt to alleviate the suffering of the Iraqi people, and the intervening states avoided the Security Council because of the (realistic) fear that a resolution to intervene militarily would be vetoed.

The NATO intervention in Kosovo provides a recent and useful lens for examining *opinio juris* on this issue.<sup>42</sup> The manifest human rights violations then occurring in Kosovo might have been invoked as the sole basis of justification for the unilateral action. Yet no government relied exclusively or primarily on a theory of Humanitarian Intervention or on a responsibility to act to arrest egregious human rights violations. Rather, the intervention was largely portrayed as relying on Security Council Resolutions 1199 and 1203, which condemned Belgrade's violations of human rights in Kosovo. Significantly, however, the Resolutions did not include an authorization to act, whether through the Organization or unilaterally. Even when humanitarian reasons were invoked by states, they were cast as an exception rather than as part of an emerging rule.

The International Court of Justice in *Nicaragua* has stated that if a State acts in a way which is prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, its action confirms rather than weakens the rule. If this metric is used, the *opinio juris* in the Kosovo intervention would militate against an emerging norm permitting unilateral Humanitarian Interventions. The contentions of the intervening states, however, were more complex.

France relied on Former Yugoslavia's non-compliance with Resolutions 1199 and 1203, and argued that "the legitimacy of NATO's action lies in the authority of the Security Council."<sup>43</sup> Germany, by contrast, emphasized the humanitarian disaster that made military intervention necessary, but still argued that NATO's action, though unauthorized by the Security Council, was nevertheless consistent with the "sense and logic" of Council Resolutions.<sup>44</sup> The United States averred to having begun military action "only with the greatest reluctance" and focused on particular factual circumstances, foreshadowing a humanitarian catastrophe of

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<sup>42</sup> In the view of Confrère Vukas, the NATO intervention in Kosovo should not be considered a Humanitarian Intervention for two reasons: (1) the NATO intervention can be seen as support for the military efforts of the Albanian majority in Kosovo; and (2) the direct result of the bombardment was the death of more persons in Serbia (including Kosovo) than the total number of Milosevic's victims.

<sup>43</sup> Press Release, French Foreign Ministry, 25 March 1999, quoted in Jane Stromseth, *Rethinking Humanitarian Intervention: The Case for Incremental Change* in HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS 235 (J.L. Holzgrefe and Robert O. Keohane, eds., Cambridge Univ. Press, 2003).

<sup>44</sup> Bruno Simma, *NATO, the U.N. and the Use of Force: Legal Aspects*, 10 EUR. J. INT'L L. 1, 7 (1999).

immense proportions.<sup>45</sup> The U.S. submitted that the NATO military intervention “[i]n this context... [was] justified and necessary to stop the violence and prevent an even greater humanitarian disaster.”<sup>46</sup> But, as a formal legal matter, President Clinton relied primarily on the Former Yugoslavia’s non-compliance with Resolutions 1199 and 1203. The United Kingdom came closest in March 1999 to invoking Humanitarian Intervention as a distinct legal basis for NATO’s military action.<sup>47</sup> But later British statements linked the justification for NATO’s military action more directly to purposes articulated in Security Council Resolutions.<sup>48</sup> Belgium alone defended itself against Former Yugoslavia’s charges of illegality by characterizing NATO’s action as a “lawful armed humanitarian intervention,” taken to protect fundamental *jus cogens* values and to forestall a humanitarian catastrophe acknowledged by the Security Council.<sup>49</sup>

#### 4. The Impact of Kosovo on Legal Analyses

When the Security Council is unable to authorize intervention in a situation of large-scale human rights violations, unilateral Humanitarian Intervention, though often intensely demanded by significant parts of the global constituency, apparently continues to be of uncertain lawfulness. When international law forbids unilateral action to save lives but intense political and social pressure demands such action, there is a legal crisis. The intervention in Kosovo exemplified it. NATO’s intervention provoked strong responses from supporters and opponents of Humanitarian Intervention and several reports commissioned by states, the U.N.,

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<sup>45</sup> “Belgrade’s brutal persecution of Kosovar Albanians, violations of international law, excessive and indiscriminate use of force, refusal to negotiate to resolve the issue peacefully and recent military build-up in Kosovo.” Statement of Ambassador A. Peter Burleigh to the Security Council, 23 March 1999, S/PV.3988.

<sup>46</sup> *Id.*

<sup>47</sup> See UK Foreign and Commonwealth Office note of 7 October 1998 (arguing that force could be justified “on the grounds of overwhelming humanitarian necessity” without Security Council authorization, but that certain criteria “would need to be applied” quoted in Jane Stromseth, *Rethinking Humanitarian Intervention: The Case for Incremental Change* in HUMANITARIAN INTERVENTION 236 (J.L. Holzgrefe and Robert O. Keohane, eds.). See also Statement of Sir Jeremy Greenstock to the Security Council, 23 March 1999, S/PV. 3988 (“In these circumstances, and as an exceptional measure on grounds of overwhelming humanitarian necessity, military intervention is legally justifiable.”)

<sup>48</sup> In April 1999 Prime Minister Tony Blair stated that “[u]nder international law a limited use of force can be justifiable in support of purposes laid down by the Security Council but without the Council’s express authorization when that is the only means to avert an immediate and overwhelming humanitarian catastrophe. Any such case would in the nature of things be exceptional and would depend on an objective assessment of the factual circumstances at the time and on the terms of relevant decisions of the Security Council bearing on the situation in question.” Written Answer for House of Commons, 29 April 1999, *Hansard*, col. 245 quoted in Stromseth *Rethinking Humanitarian Intervention: The Case for Incremental Change* in HUMANITARIAN INTERVENTION 237 (J.L. Holzgrefe and Robert O. Keohane, eds.).

<sup>49</sup> *Argument of Belgium before the International Court of Justice*, 10 May 1999.

and other international organizations have explored the lawfulness of NATO action in Kosovo and, more generally, the lawfulness of Humanitarian Intervention. Together, these reports provide a broad review of perspectives on this issue in international law and also permit the jurist to measure the pulse of the international community as to whether there is an *emerging* principle “of the responsibility to protect,” or any other significant development with respect to Humanitarian Intervention.

The several pertinent reports are *Humanitarian Intervention : Legal and Political Aspects* by the Danish Institute of International Affairs (1999); *The Kosovo Report* by Initiative of the Prime Minister of Sweden (2000); *Humanitarian Intervention* by the Dutch Advisory Committee on Issues of Public International Law and the Dutch Advisory Council on International Affairs (2000); *Fourth Report* by the House of Commons Foreign Affairs Committee (2000); and *The Responsibility to Protect*, by the International Commission on Intervention and State Sovereignty (2001). Finally, it will be useful to revisit *A More Secure World : Our Shared Responsibility* by the Secretary-General’s High-level Panel on Threats, Challenges and Change (2004), in the light of the other reports. Because the analyses and conclusions of these reports could be of assistance to the Commission and Institut in deciding how to proceed, summaries are set out below.

a. *Humanitarian Intervention : Legal and Political Aspects* by the Danish Institute of International Affairs (1999)

The Danish Institute of International Affairs report considered that Article 2(4) of the U.N. Charter prohibits unilateral Humanitarian Intervention. The doctrines of state necessity and reprisals do not provide a legal basis for Humanitarian Intervention. The Danish Institute reviewed the International Court of Justice cases regarding the use of force, concluding that the Court regards the threat or use of unilateral force as incompatible with Article 2(4).

The Danish Institute sees pre-Cold War state practice as rejecting the possibility of a lawful Humanitarian Intervention. In the post-Cold War period, practice has been

*... neither sufficiently substantial nor has there been sufficient acceptance in the international community to support the view that a right of humanitarian intervention without Security Council authorisation has become part of customary international law. However, the amount of criticism from states seems less, and there has been implicit support from the U.N. after the fact when the intervention could be said to be truly humanitarian. State practice since 1990 may be seen as evidence of a greater acceptance that humanitarian intervention may be morally justifiable in extreme cases.*<sup>50</sup>

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<sup>50</sup> Danish Institute of International Affairs, *Humanitarian Intervention: Legal and Political Aspects* 93 (1999) (hereafter *Danish Institute Report*). (emphasis added)

Yet the Danish Institute ultimately proved ambivalent, for it conceded that Humanitarian Intervention may be “*justifiable* in extreme cases.”<sup>51</sup> On the one hand, the Institute asserted that there is no right of Humanitarian Intervention without Security Council authorization under existing international law.<sup>52</sup> On the other, the Institute stated that

*[i]n the end, international law is essentially a body of norms which states in their mutual relations have agreed upon – whether by treaty or custom – because, on balance, these norms are generally regarded as a viable and necessary framework for international co-operation and peaceful co-existence, objectives which in the long term serve the interest of all states. In addition, international law works through its enforcement mechanisms and through the inherent pressure for justification to which states are exposed.... Therefore, the political interests and normative concerns of states continue to play a crucial role in the actual compliance with and development of international law. Existing norms of international law can only survive if, generally, states accept them and actually comply with them. At times, vital political interests of states or shared moral convictions of a group of states may, however, outweigh the dictates of law and lead to acts which are not compatible with the existing general international norms – e.g. humanitarian intervention without Security Council authorisation.... At present, therefore, the dilemma of humanitarian intervention without Security Council authorisation is inescapable. There is no clear-cut solution which may reconcile the tension between the peremptory rule of international law that the use of force in international relations is prohibited and the political and moral desire and aspiration of many states to act in the face of atrocities causing large-scale human suffering within another state.*<sup>53</sup>

The Danish Institute anticipated the possibility of adjustments to the *lex lata* to accommodate the pressure of political interest and normative concerns. But rather than recognizing an “emerging” norm as did the HLP, the Danish Report recognized that this norm *could* emerge given the increasing tension between the normative considerations (of many, albeit not all, states) and the legal restrictions which many international institutions still impose. The Danish Report did not recommend overhauling the international legal system by a sweeping allowance of Humanitarian Intervention, but proposed treating unilateral Humanitarian Intervention as a legal exception – an “emergency exit” from the international legal prohibitions.

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<sup>51</sup> *Id.* at 95.

<sup>52</sup> *Id.* at 97.

<sup>53</sup> *Id.* at 97-98.

b. *The Kosovo Report* on the Initiative of the Prime Minister of Sweden (2000)

The Kosovo Report concluded that the NATO military intervention was “illegal but legitimate.”<sup>54</sup> It recognized that the intervention was illegal because of a lack of prior approval by the Security Council, however

*the intervention was justified because all diplomatic avenues had been exhausted and because the intervention had the effect of liberating the majority population of Kosovo from a long period of oppression under Serbian rule.*<sup>55</sup>

Looking to the future, the Kosovo Report deemed the time ripe for adoption of a “principled framework for humanitarian intervention” because “[a]llowing this gap between legality and legitimacy to persist is not healthy...”<sup>56</sup> The NATO intervention “laid bare the inadequate state of international law.”<sup>57</sup> Indeed, the report reasoned, that state may actually weaken the authority of and respect for the Security Council in the domain of international peace and security. To close this gap, the Report proposed agreement on an authoritative interpretation of the legal status of Humanitarian Intervention, which is currently “situated in a gray zone of ambiguity between an extension of international law and a proposal for an international moral consensus.”<sup>58</sup> The process through which the new doctrine would emerge would consist of three phases :

- i. a recommended framework of principles useful in a setting where humanitarian intervention is proposed as an international response and where it actually occurs;
- ii. the formal adoption of such a framework by the General Assembly of the United Nations in the form of a Declaration on the Right and Responsibility of Humanitarian Intervention, accompanied by [the U.N. Security Council] interpretations of the U.N. Charter that reconciles such practice with the balance between respect for sovereign rights, implementation of human rights, and prevention of humanitarian catastrophe;
- iii. the amendment of the Charter to incorporate these changes in the role and responsibility of the United Nations and other collective actors in international society to implement the Declaration on the Right and Responsibility of Humanitarian Intervention.<sup>59</sup>

On this basis, the commission projected two possible lines of development.

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<sup>54</sup> The Independent International Commission on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned* 4 (Oxford University Press, 2000) (hereafter *The Kosovo Report*).

<sup>55</sup> *Id.* at 4.

<sup>56</sup> *Id.* at 186.

<sup>57</sup> *Id.* at 290.

<sup>58</sup> *Id.* at 164.

<sup>59</sup> *Id.* at 187.

*The preferred approach would be to have the Charter adapted to [the above-mentioned] Humanitarian Intervention Declaration by upgrading human rights and conditioning sovereign rights on respect for human rights and the maintenance of the capacity to govern. An alternative approach would be to encourage UNSC interpretations of the Charter that moved explicitly in this direction on a case-by-case basis, building up a new authoritative approach to this subject along the lines of the Humanitarian Intervention Declaration.*<sup>60</sup>

Charter innovations by agreed “reinterpretation rather than formal amendment” have been part of U.N. history, “most notably associated with Dag Hammarskjöld’s tenure as Secretary General, particularly in the context of U.N. peacekeeping activities.”<sup>61</sup> But this approach presupposes general political agreement, the absence of which is, of course, the predicate of the problem with which the Report grapples.

c. *Humanitarian Intervention* by the Dutch Advisory Committee on Issues of Public International Law and the Dutch Advisory Council on International Affairs (2000)

This report anticipated the HLP by speaking of a “responsibility” for the enforcement of human rights. But the implications of this responsibility remain vague. Indeed, the Report manifested a deep ambivalence throughout, lodging the responsibility “primarily” in the state itself.

*Human rights have increasingly become a ‘shared responsibility’ of both states and the international community. The state remains – and must remain – primarily responsible for protecting individuals, but in this respect can be called to account by international forums....*<sup>62</sup>

Humanitarian Intervention, in the Dutch view, lies outside the U.N. Charter framework. Other than the three current exceptions in the Charter (Articles 42 and 53, Article 51 and the now-defunct Article 107), none of which apply to Humanitarian Intervention,

*Article 2(4) of the Charter lays down a preemptory ban (ius cogens) on the use or threat of force and hence does not leave any legal latitude for armed intervention on the territory of another state without the latter’s consent.*<sup>63</sup>

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<sup>60</sup> *Id.* at 190.

<sup>61</sup> The Report cites as an example of such “legislative” interpretation the conversion of the Article 27(3) requirement that Security Council decisions be supported by the ‘concurring’ votes of the five Permanent Members into a pattern of practice in which “abstentions” or absences are treated as equivalent to “concurring.” See *The Kosovo Report* at 190-191.

<sup>62</sup> Dutch Advisory Committee on Issues of Public International Law and the Dutch Advisory Council on International Affairs, *Humanitarian Intervention* 9 (2000) (hereafter *The Dutch Report*).

<sup>63</sup> *Id.* at 18.

Customary international law, in the Dutch view, “does not provide sufficient legal basis for unauthorized humanitarian intervention.”<sup>64</sup> The Report found a *developing* norm neither in customary international law allowing unilateral Humanitarian Intervention, in state practice (of which there are not many instances), nor in the *opinio juris* of states as expressed in the Official Records of the 54<sup>th</sup> United Nations General Assembly (September 1999) and the Provisional Verbatim Records of the Security Council. (Apparently the Dutch Report did not allow for non-state actors to shape international *opinio juris*.) “Not only there is currently no sufficient legal basis for humanitarian intervention without a Security Council mandate,” the Report concluded, “but also [ ] there is no clear evidence of such a legal basis emerging.”<sup>65</sup>

Despite the fact that it found no evidence of an emerging norm, the Report suggested, in a highly formalistic fashion, that

... [the] development of customary law is possible [even] if it conflicts with peremptory (*ius cogens*) rules such as the ban on the use or threat of force, [only if] that exception is deemed to form an integral part of the said *ius cogens* rules.<sup>66</sup>

Article 2(2) of the Charter is the lynchpin for this “integral part” of the theory : As Article 2(2) requires states to comply in good faith with obligations of the Charter, states are required to comply with the obligations of protection and promotion of human rights, spelled out in Article 55 and 56 of the Charter and other human rights instruments.<sup>67</sup>

*Barcelona Traction Light and Power Company, Ltd*<sup>68</sup> figured importantly in the theory propounded in the Dutch Report. There the Court held that there are certain rights in whose protection “all states can be held to have a legal interest.”<sup>69</sup> These are obligations *erga omnes*. As an example of the preeminence of human rights over other international and national law, the Report relied on,

...the pronouncement by the British Law Lords in March 1999 concerning the extradition of the former Chilean President Augusto Pinochet. This stated that, although the doctrine of state immunity is still of great importance, it cannot be invoked to protect a present or former head of state against prosecution for ‘international crimes in the highest sense’, such as torture.<sup>70</sup>

All of these examples indicate that the “international duty to protect and

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<sup>64</sup> *Id.* at 20.

<sup>65</sup> *Id.* at 23.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* This connection was first drawn in Myres McDougal and W. Michael Reisman, *Rhodesia and the United Nations*, 62 AM. J. INT'L L. 1 (1968).

<sup>68</sup> *Barcelona Traction Light and Power Company, Ltd*, I.C.J. Reports 1970.

<sup>69</sup> *Id.* at para. 33.

<sup>70</sup> *The Dutch Report* at 24.

promote the rights of individuals and groups has thus developed into a universally valid obligation that is incumbent upon all states in the international community, both individually and collectively.”<sup>71</sup>

Thus the Dutch Report seemed to be saying that a duty has been established without a corresponding power to fulfill that duty. Accordingly, it is “desirable that, as part of the doctrine of state responsibility, efforts be made to further develop a justification ground for Humanitarian Intervention without a Security Council mandate.”<sup>72</sup> The Report concluded that

*current international law provides no legal basis for such intervention, and also that no such legal basis is yet emerging. At the same time... it is no longer possible to ignore the increasingly perceived need to intervene in situations where fundamental human rights are being or are likely to be violated on a large scale, even if the Security Council is taking no action. In this connection, the [drafters] attach great importance to the growing significance of the international duty to protect and promote fundamental human rights.*<sup>73</sup>

Thus, while the report found an “international *duty* to protect [italics added],” this duty did not yet provide a legal basis for unilateral Humanitarian Intervention. But, in the Dutch view, it should. “A separate justification for humanitarian intervention *should* be worked out as part of the doctrine of state responsibility”<sup>74</sup> or, drawing on the Danish Institute Report, an “emergency exit” solution should be devised.

d. *Fourth Report* by the House of Commons Foreign Affairs Committee (2000)

*The Committee’s mission was “[t]o inquire into the foreign policy lessons of the Kosovo crisis and how the Foreign and Commonwealth Office might best promote peace and stability in the region.”*<sup>75</sup> *It drew on a wide range of legal authorities, all of whom, “ranging from... the sternest critic of the legality of NATO action, to... the firmest supporter of legality, agree that the provisions of the U.N. Charter were thus not complied with.”*<sup>76</sup> *The Report, too, concluded that NATO’s action was “contrary to the specific terms of what might be termed the basic law of the international community – the U.N. Charter....”*<sup>77</sup> *The Committee also concluded that “at the very least, the doctrine of humanitarian intervention has a tenuous basis in current international customary law, and that this renders*

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<sup>71</sup> *The Dutch Report* 24.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 34.

<sup>74</sup> *Id.* at 35 (emphasis added).

<sup>75</sup> House of Commons Foreign Affairs Committee, *Fourth Report* para. 3 (2000) (hereafter *The House of Commons Report*).

<sup>76</sup> *Id.* at para 126.

<sup>77</sup> *Id.* at para 128.

*the NATO action legally questionable.*<sup>78</sup>

Recognizing that NATO's military action, "if of dubious legality in the current state of international law, was justified on moral grounds,"<sup>79</sup> the Committee agreed with the Foreign Commonwealth Office "in its aim of establishing in the United Nations new principles governing humanitarian intervention."<sup>80</sup> The British Minister of State at the Foreign Commonwealth Office's proposal is cited in the report as follows :

*first, any intervention is by definition a failure of prevention. Force should always be the last resort; second, the immediate responsibility for halting violence rests with the state in which it occurs; but, third, when faced with an immediate and overwhelming humanitarian catastrophe and a government that has demonstrated itself unwilling or unable to prevent it, the international community should take action; and finally, any use of force in this context must be collective, proportionate, likely to achieve its objective, and carried out in accordance with international law.*<sup>81</sup>

The Committee noted that the implication of the principles above is that

*when the Security Council refuses to endorse an act of humanitarian intervention, that humanitarian intervention will rest on the very shaky basis of an evolving principle of customary international law which flies in the face of the plain words of the U.N. Charter. However, if there is no prospect of a new treaty text, then this will have to remain the fig leaf of legal respectability for actions which are generally thought to be morally entirely justified. As Professor Lowe put it in the case of Kosovo, the intervention took place because of "overwhelming moral imperatives and all the NATO states sought desperately to articulate the legal justification which would encapsulate that moral imperative."*<sup>82</sup>

In the Committee's conception of these principles for Humanitarian Intervention, "[t]he international community will not be *obliged* to intervene for humanitarian reasons even if it were legally possible for it to do so."<sup>83</sup> In its recommendation, the House of Commons Foreign Affairs Committee report was thus much more aligned with the Swedish Kosovo Report in asking for a gradual change in the U.N. framework to allow for a legal basis for Humanitarian Intervention. The Dutch and Danish reports, by contrast, saw it as more desirable (or perhaps plausible) to treat certain Humanitarian Interventions on a case-by-case basis, as exceptions to the rule.

e. *The Responsibility to Protect* by the International Commission on Intervention

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<sup>78</sup> *Id.* at para 132.

<sup>79</sup> *Id.* at para 138.

<sup>80</sup> *Id.* at para 144.

<sup>81</sup> *Id.* at para 141.

<sup>82</sup> *Id.* at para 142.

<sup>83</sup> *Id.* at para 144.

and State Sovereignty (2001)

The Commission interpreted the U.N. Charter as a “re-characterization” from “sovereignty as control” to “sovereignty as responsibility.”<sup>84</sup> Protection of human security, including human rights and human dignity, became one of the fundamental obligations of modern international institutions. This is manifested in a shift away from a “right to intervene” to “responsibility to protect” – an emerging “guiding principle.”

*While there is not yet a sufficiently strong basis to claim the emergence of a new principle of customary international law, growing state and regional organization practice as well as Security Council precedent suggest an emerging guiding principle – which in the Commission’s view could properly be termed “the responsibility to protect.”*<sup>85</sup>

The Commission discerned “Security Council precedent” in that

*[a]lthough [Article 42] powers were interpreted narrowly during the Cold War, since then the Security Council has taken a very expansive view as to what constitutes “international peace and security” for this purpose, and in practice an authorization by the Security Council has almost invariably been universally accepted as conferring international legality on an action.*<sup>86</sup>

The Commission concluded that it is arguable that

*... what the Security Council has really been doing in these cases is giving credence to what we described in Chapter 2 as the emerging guiding principle of the “responsibility to protect,” a principle grounded in a miscellany of legal foundations (human rights treaty provisions, the Genocide Convention, Geneva Conventions, International Criminal Court statute and the like), growing state practice – and the Security Council’s own practice. If such a reliance continues in the future, it may eventually be that a new rule of customary international law to this effect comes to be recognized, but as we have already acknowledged it would be quite premature to make any claim about the existence now of such a rule.*<sup>87</sup>

Thus, the Commission did not find a basis for proclaiming a new principle of customary international law for Humanitarian Intervention. But a “developing” legal basis for the foundations of the responsibility to protect as a guiding principle for the international community of states could be derived from :

- i. obligations inherent in the concept of sovereignty;

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<sup>84</sup> International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* 13 (2001) (hereafter *The Responsibility to Protect*).

<sup>85</sup> *Id.* at 15.

<sup>86</sup> *Id.* at 50.

<sup>87</sup> *Id.*

- ii. responsibility under Article 24 of the Charter for the maintenance of international peace and security (as a body acting to fulfill this responsibility on behalf of member states) – this qualifies the non-intervention dictum in Article 2(7)
- iii. specific legal obligations in human rights and human protection declarations, international humanitarian law and national law;
- iv. developing practice of states, regional organizations and the SC itself.<sup>88</sup>

The Security Council should be “the first port of call on any matter relating to military intervention for human protection purposes.”<sup>89</sup> The Commission, however, conveyed two important messages to the Security Council.

*The first message is that if the Security Council fails to discharge its responsibility in conscience-shocking situations crying out for action, then it is unrealistic to expect that concerned states will rule out other means and forms of action to meet the gravity and urgency of these situations. If collective organizations will not authorize collective intervention against regimes that flout the most elementary norms of legitimate governmental behaviour, then the pressures for intervention by ad hoc coalitions or individual states will surely intensify. And there is a risk then that such interventions, without the discipline and constraints of U.N. authorization, will not be conducted for the right reasons or with the right commitment to the necessary precautionary principles.*

The second message is that if, following the failure of the Council to act, a military intervention is undertaken by an ad hoc coalition or individual state which does fully observe and respect all the criteria we have identified, and if that intervention is carried through successfully – and is seen by world public opinion to have been carried through successfully – then this may have enduringly serious consequences for the stature and credibility of the U.N. itself.<sup>90</sup>

Finally, the Commission concluded that

*[w]here a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect.*<sup>91</sup>

The Commission endorsed the idea of the Security Council’s “responsibility to protect.” Still, as in the Danish and Dutch Reports, unilateral Humanitarian Interventions remain aberrations, possibly excusable morally but not legal.

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<sup>88</sup> *Id.* at XI.

<sup>89</sup> *Id.* at 53.

<sup>90</sup> *Id.* at 55.

<sup>91</sup> *Id.* at XI.

f. *A More Secure World : Our Shared Responsibility* by the Secretary-General's High-level Panel on Threats, Challenges and Change (2004)

The Panel Report, to which reference has already been made, also recognized the fundamental tension between the rights implied in sovereignty and the responsibility to protect human rights.

*The successive humanitarian disasters in Somalia, Bosnia and Herzegovina, Rwanda, Kosovo and now Darfur, Sudan, have concentrated attention not on the immunities of sovereign Governments but their responsibilities, both to their own people and to the wider international community.*<sup>92</sup>

The Panel conceived of sovereignty as responsibility; “today [state sovereignty] clearly carries with it the obligation of a State to protect the welfare of its own peoples and meet its obligations to the wider international community.”<sup>93</sup> Further,

*[t]here is 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.*<sup>94</sup>

More importantly, the High-level Panel recognized the special importance in addressing *unilateral* Humanitarian Intervention.

*The Security Council so far has been neither very consistent nor very effective in dealing with these cases, very often acting too late, too hesitantly or not at all. But step by step, the Council and the wider international community have come to accept that, under Chapter VII and in pursuit of the emerging norm of a collective international responsibility to protect, it can always authorize military action to redress catastrophic internal wrongs if it is prepared to declare that the situation is a ‘threat to international peace and security’, not especially difficult when breaches of international law are involved.*<sup>95</sup>

Recommendation 55 endorsed the “emerging norm” to which reference has already been made : there is a

*collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of humanitarian law which sovereign Governments have proved powerless or unwilling to prevent.*

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<sup>92</sup> *High-level Panel Report* at para. 201.

<sup>93</sup> *Id.* at para. 201.

<sup>94</sup> *Id.* at para. 29.

<sup>95</sup> *Id.* at para. 202.

This recommendation was premised on such acts constituting threats to international peace. Yet the High-level Panel's emphasis was on the responsibility to protect, *not* the right to intervene.

The HLP acknowledged that the veto in cases warranting a Humanitarian Intervention was a problem, which its promulgation of a responsibility to protect hardly solved. All that the Report could do was to “also ask the permanent members, in their individual capacities, to pledge themselves to refrain from the use of the veto in cases of genocide and large-scale human rights abuses.”<sup>96</sup>

Just as the *Responsibility to Protect* Report which preceded it, the High-level Panel Report failed to find any legal justification for unilateral Humanitarian Intervention.

## 5. The Alternatives

All of these reports concluded that there is no basis for unilateral Humanitarian Intervention in contemporary international law. They also concurred that there is a moral and political need for action in the face of large-scale human rights violations. The Danish Report and the Dutch Report preferred to maintain the general prohibition but to allow Humanitarian Intervention as an “emergency exit” which would have to conform to an “assessment framework” of procedural and substantive criteria. Thus, unilateral Humanitarian Intervention could be justified in particular instances and *could* even become lawful. By contrast, the Kosovo Report and the House of Commons Report aspired to change the U.N. framework in order to enable unilateral Humanitarian Intervention. The *Responsibility to Protect* and the High-level Panel Report spoke in terms of an emerging principle of a “responsibility to protect,” but they did not allow for unilateral action to discharge this responsibility. Plainly, the HLP Report accepted that a unilateral Humanitarian Intervention might have a strong moral base but, in its view, it would still constitute a breach of international law.

The Dutch Report acknowledged the resistance to Humanitarian Intervention : “One may conclude that it is above all Western countries that are seeking a justification for unauthorised humanitarian intervention.”<sup>97</sup> Russia, China, and India oppose it. In all, at least 133 states have issued statements opposing a right to unilateral humanitarian intervention. The Declaration of the South Summit held in Cuba in 2000 rejected “the so-called ‘right’ of humanitarian intervention, which has no legal basis in the United Nations Charter or in the general principles of

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<sup>96</sup> *Id.* at para. 256.

<sup>97</sup> *The Dutch Report* at 22 (notes that the Provisional Verbatim Records of the Security Council show that there is no universal *opinio juris* on the need for unilateral action in the face of large scale humanitarian disasters or on an emerging principle of a “responsibility to protect.”)

international law.”<sup>98</sup> Similarly, the Movement of the Non-aligned Countries meeting in Colombia in 2000 rejected “the so-called ‘right’ of humanitarian intervention, which has no legal basis in the United Nations Charter or in the general principles of international law.”<sup>99</sup>

Significantly, the Dutch Report assumed that only governments participate in the prescription of international law. In the twenty-first century, one can no longer gainsay the important role of international and transnational non-governmental organizations<sup>100</sup> and of international courts in, at the very least, framing issues, determining the terms of the debate, and elaborating on concepts. An example is the concept of a “responsibility to protect” itself, which may be in the process of eroding traditional sovereignty claims against Humanitarian Intervention.

*a. Changing the Veto*

A number of the Reports would obviate unilateral Humanitarian Intervention by breaking the Security Council deadlock in the face of humanitarian disasters, either through an adjustment in the veto power, making it impossible to cast a veto to thwart the Security Council’s exercise of the “collective international responsibility to protect,” or by securing an *a priori* pledge not to use the veto power in such situations. Thus, the High-level Panel Report asked the Permanent members to pledge not to use the veto power in cases of genocide or other large-scale human rights violations.<sup>101</sup> Professor Albrecht Randelzhofer, recognizing that in grave situations states will be tempted to intervene more and more often, also suggested that “it would be preferable that the practice of the Security Council makes the development of a [rule of customary law... making humanitarian intervention lawful] unnecessary.”<sup>102</sup> *The Kosovo Report* concluded that “the current system allowing any Permanent [United Nations Security Council] member to paralyze U.N. action through the use of the veto must be adjusted in a judicious manner to deal effectively with cases of extreme humanitarian crisis.”<sup>103</sup> But a constitutional amendment of the Charter in this regard is not likely to prove a panacea. Even if decisions on cases of extreme humanitarian crisis were to be made by a simple majority, the international community would still remain without a remedy, if that majority could not be mustered.

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<sup>98</sup> See Declaration of the South Summit, Havana, Cuba, April 10-14, 2000, para. 54.

<sup>99</sup> Movement of the Non-aligned Countries, XIII Ministerial Conference, Cartagena, Colombia, April 8-9 2000, Final Document, para 263.

<sup>100</sup> Confrère Zemanek observed that while non-governmental organizations are important players in Western civil society, they are less representative of people in Africa, Asia, and Latin America. Therefore, their role in the creation of custom is questionable.

<sup>101</sup> *High-level Panel Report* at para. 256.

<sup>102</sup> Randelzhofer in *THE CHARTER* 132 (Bruno Simma et al, eds.).

<sup>103</sup> *The Kosovo Report* at 198.

*b. Continuing the Ad Hoc Approach*

A second approach to be found in the Reports is an “ad hoc” strategy, in which humanitarian intervention is seen as an “emergency exit” from the norms of international law. This approach is the one favored by the Danish Institute’s Report and the Dutch Report. The Danish Institute elaborates.

This strategy keeps open the option to undertake humanitarian intervention in extreme cases if the Security Council is blocked. The ad hoc strategy does not, however, seek to challenge the existing legal order. On the contrary, it aims at preserving the Security Council as the sole centre for authoritative decision-making on humanitarian intervention by justifying such intervention without Security Council authorisation on political and moral grounds only, as an “emergency exit” from the norms of international law.<sup>104</sup>

This approach necessarily would mean that Humanitarian Intervention would be considered illegal. Yet in the Kosovo intervention case, the NATO states “explained why they viewed their military action as ‘lawful’ – as having a *legal basis within the normative framework of international law*.”<sup>105</sup>

*c. Allowing Case-by-Case Interventions on the Basis of Specified Criteria*

A third approach, recognizing, as do some of the Reports, the undesirability of branding a well-meaning and internationally popular intervention as “illegal,” has tracked the “customary law evolution of a legal justification for humanitarian intervention in rare cases.”<sup>106</sup> A scholarly advocate of this “incremental change” in legal justification, Professor Jane Stromseth, reasoned that

... the legal status of humanitarian intervention without Security Council authorization remains uncertain after Kosovo and that this, in fact, is a good thing. The uncertain legality of humanitarian intervention puts a very high burden of justification on those who would intervene without U.N. authorization. Yet this very ambiguity is also fertile ground for the gradual emergence of normative consensus, over time, based on practice and case-by-case decision-making.<sup>107</sup>

Professor Stromseth has tried to develop a formula for the application of the Danish and Dutch approach. In her view, an emerging norm is developing gradually over time, case by case, in support of the potential lawfulness of Humanitarian Intervention under exceptional circumstances. Particular incidents may be law-shaping events.<sup>108</sup> The Kosovo intervention and the intervention to

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<sup>104</sup> *The Danish Report* at 112.

<sup>105</sup> Stromseth, *Rethinking Humanitarian Intervention* 244 (emphasis in original).

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 233

<sup>108</sup> See W. Michael Reisman, *International Incidents: Introduction to a New Genre in the Study of*

protect Iraqi Kurds do reveal common elements : (i) serious violations of fundamental human rights involving loss of life perpetrated by a government that showed no willingness to stop; (ii) the inability of the United Nations Security Council to authorize military action, despite repeated expressions of Council concern about the threat the violations posed to peace and security; (iii) the necessity to use force to stop the human rights abuses committed by government forces; (iv) the proportionality of the military actions taken to the end of stopping the atrocities; (v) the fact that the interventions were undertaken by a coalition of states acting collectively; (vi) the fact that the interventions focused on stopping the atrocities, protecting individuals at risk, and stabilizing a situation that risked further humanitarian catastrophe; (vii) the fact that the states taking military action sought to defend their action as legally justified; (viii) the fact that the interventions were welcomed by the population at risk; and (ix) the fact that neither intervention was condemned by the Security Council.<sup>109</sup>

Professor Stromseth's approach at once affirms the non-intervention presumption at the Charter's core, but also provides indicators for controlled and non-abusive application of an evolving legal exception. Professor Stromseth suggests that a unilateral Humanitarian Intervention would be lawful when it meets these tests but she opposes a general *codification*.

*d. Changing International Law to Allow Humanitarian Interventions*

A potential fourth approach, namely, a more explicit, general right of Humanitarian Intervention, would be a radical challenge to settled international law. None of the Reports support this approach. As the Danish Report puts it

[The general right to intervention] could either be established through an amendment to the U.N. Charter, establishing a general right of humanitarian intervention in defined cases of massive human rights atrocities as a parallel to the right of self-defence, or outside of the Charter, thereby relativising the status of the United Nations. In other words, it would allow for humanitarian intervention without authorisation from the U.N. Security Council and leave humanitarian intervention to the states as a lawful option to be applied at their own discretion.<sup>110</sup>

## II. Provisional Conclusions

In the light of the review of doctrine and practice and the analyses in this Report, the Commission may consider proposing the following statements to the Institut:

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*International Law*, 10 YALE J. INT'L L. 1 (1984).

<sup>109</sup> Stromseth, *Rethinking Humanitarian Intervention* 244-255.

<sup>110</sup> *The Danish Report* at 113.

1. Massive deprivations of human rights may constitute threats to the peace within the meaning of Article 39 of the Charter of the United Nations.

2. The Security Council is competent to organize or delegate the conduct of Humanitarian Intervention for such threats to the peace.<sup>111</sup>

3. In circumstances in which the Security Council is unable to discharge its obligation under Chapter VII, the General Assembly is competent to exercise its “secondary responsibility” and to authorize the conduct of a Humanitarian Intervention.

4. When a competent body of the United Nations authorizes a Humanitarian Intervention, the intervention is governed by the principles of the international law of armed conflict and, whether the modality of intervention is economic or military, it must meet the tests of necessity, proportionality and discrimination.<sup>112</sup>

5. After a lawful humanitarian intervention has taken place, whether directed by the United Nations or by its delegate, the United Nations is the competent supervisory body. From the moment of the intervention until the return of sovereign power to the local government, the international law of belligerent occupation and more recent prescriptions on the responsibilities of occupiers to act in accordance with internationally protected human rights are to be applied.

6. International law does not yet permit unilateral Humanitarian Interventions that have not been authorized by a competent organ of the United Nations, but recent practice indicates that this may be in the process of adjustment. It appears that in grave circumstances, unilateral Humanitarian Interventions that have not received the authorization of the United Nations may be deemed lawful.<sup>113</sup>

### III. Comments of the members

#### *Comments by Professor Benedetto Conforti*

##### *1. Has a duty to protect entered into contemporary international law ?*

I don't think that an international “duty” to protect, i.e. a “duty” to resort to a humanitarian intervention, when egregious and massive violations of fundamental human rights occur in a country, now obtains. Who should carry out such a “duty” ? The United Nations or other universal or regional institutions, like the

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<sup>111</sup> Confrère Paolillo suggested that it may not be appropriate for the Institute to reiterate in a resolution a rule of the Charter and that this provisional conclusion be placed at the end of Provisional Conclusion 1.

<sup>112</sup> Confrère Paolillo suggested the tests of “necessity, proportionality, and discrimination” be elaborated into separate paragraphs.

<sup>113</sup> Confrère Paolillo disagrees with this sentence, on the ground that any form of codification of a right to intervene represents a dangerous expansion of the legitimate use of force beyond the exercise of self-defense and paves the way for abuse justified on grounds of humanitarian purposes.

NATO, the ECOWAS, etc. ? The single States ? As far as the United Nations are concerned (and, *mutatis mutandis*, the same applies to other international institutions) it is inconceivable that positive obligations, that is obligations requiring a certain conduct on the part of its organs, mainly the General Assembly and the Security Council, there exist. It is already difficult in municipal law to conceive such positive obligations with regard to supreme State organs, to say, in other words, that the Parliament has the duty to enact certain statutes or that the Government must adopt such or such act. However, where remedies exist (dissolution or revocation of the organ, judicial remedies, and so on) against the inactivity of the organ, such a conception is still possible. On the contrary, it is completely misplaced in the case of the General Assembly or the Security Council, given the absolute lack of remedies of this kind. No organ exists which can replace the Assembly or of the Council in the adoption of an act or to force them to undertake a course of action. On the other hand, with regard to individual States, the existence of a "duty" to intervene is hardly conceivable according to contemporary general international law, being evident that the States feel absolutely free to decide whether to react or not even against a widespread and severe violation of fundamental human rights.

Of course, if the words "duty", as well as "[collective] responsibility" to protect, are meaningless with reference to *positive* international law, they may make sense when used from a *moral* point of view. No doubt that, when genocide and other large-scale serious violations of human rights occur, there is a moral duty of the States and the international community as a whole to do something in order to arrest such course of action. However, the States and the international community are free, from a legal point of view, to react or not. This is true even as far as the Security Council is concerned, since its "primary responsibility" provided for in Article 24 of the Charter (and underlined by the High Level Panel) is to be understood as a mere way of stressing its competence vis-à-vis the other organs.

Having said that, the *communis opinio* emerging from the contemporary practice on the subject seems to clearly show that a *right* to protect has entered the general international law. To-day, neither the principle of State sovereignty nor the one on domestic jurisdiction can prevail over the need to intervene for ensuring the safety of a population. However, this is not the core of our subject. The very important and difficult problems to be solved are what are the actors who can exercise this right and by what means a humanitarian intervention may be carried out. The two problem pertain to Questions n. 3 and 4 and will be examined later on.

2. *What are the contingencies under which the duty to protect comes into operation ?*

I don't think that there is much to say on this subject. The need to intervene arises (to repeat the common formula employed nowadays) in the event of

genocide, crimes against humanity and violations of humanitarian international law in time of civil war. Before taking any action, it should be very clear that the Government itself, which adopt such a course of action, do not intend to abandon it.

3. *Which international institutions or actors, if any, are contingently authorized to engage in humanitarian intervention?*

4. *What are the acceptable modes of humanitarian intervention?*

The modes of intervention emerging from a well known practice are either (a) measures not involving the use of force, especially economic sanctions, or (b) measures involving the use of force. In my opinion, in answering to Question n. 3, we should distinguish between the first category of measures and the second one.

(a) with regard to the first, it is possible to adopt a more liberal approach, accepting that economic sanctions may be decided not only by the Security Council according to Article 41 of the Charter, but also by the General Assembly, which has no statutory competence on the subject, and even by international (regional) organizations or by individual States or groups of States acting unilaterally. Even if unilateral sanctions have been condemned by the General Assembly – emblematic is the case of the embargo adopted from the United States against Cuba – the condemnation was almost platonic and did not concern true widespread and severe violations of human rights, like genocide, crimes against humanity and war crimes. Moreover, economic sanctions unilaterally adopted often do not consist in rejecting previous obligations, but simply in refusing to undertake any economic relation with the Government concerned, an unfriendly measure which is at all times not illegal, indeed. Nor it is ever possible to separate the measures which are simply unfriendly from those which intend to cancel previous obligations. Last but not least, it does not seem that measures not involving the use of force, when adopted to react to the above mentioned crimes, meet a strong condemnation from the international community and universal public opinion.

(b) quite different is the situation regarding the reactions consisting in the use of force. Confronted with a very uncertain practice, the doctrine has advanced many arguments *pro* and *contra* humanitarian interventions outside the UN system, i.e. not carried out by UN forces or at least authorized by the Security Council. In particular, many attempts have been made - not only with regard to humanitarian interventions - in order to circumvent the strong duty of States to refrain from unilaterally using the force, set forth by Article 2, para. 4, of the Charter with the only exception of the self-defense as a reaction to an armed attack, laid down by Article 51. Sometimes the enlargement of the notion of self-defense has been upheld, sometimes - especially in the case of humanitarian intervention – new customary exceptions have been invented. By contrast, various authors, in connection with the attitude of some States, stick to the prohibition of unilateral use of force.

What can be synthetically said on such a difficult subject? In my opinion, the conclusion should be reached that general principles of international law, no matter whether they permit or prohibit the war, do not exist. The prohibition of the use of force is strictly linked to the UN system of collective security under the direction of the Security Council: if the system does not work, if and when the United Nations is unable to prevent a crisis or to intervene by military operations or other means provided for by Chapter VII of the Charter, then the prohibition does not work. When force is used, no matter whether for humanitarian reasons or for other reasons and the United Nations is unable to control it, the result is that international law is unable to govern the *jus in bello*. A war that is not authorized or controlled according to the Charter is neither legal nor illegal; it is beyond right and wrong in the international legal order; legally speaking, it pertains to the realm of indifference. Tragically, up to now international law has not been able to express any evaluation whatsoever of the use of force outside the United Nations system, and this system has quite unsuccessfully tried to fill the gap.

In my opinion the proper context in which the problem of the use of force is to be framed is that of the old and eternal principles of natural law, as it has been treated by centuries and centuries of theological and legal speculation. The old doctrine of “just war” – expressed up to the advent of positivism in the second half of the 19<sup>th</sup> century - should be resumed and adopted as a useful basis for discussing when and on what conditions the use of force is permitted. Some of the old and very reasonable rules expressed by that doctrine could still be applied to-day. First of all, this is true for the common idea that war is an extreme means to resort to when all other peaceful means have been exhausted. If applied to humanitarian interventions, this means that it is possible to resort to the use of force only when all attempts at convincing a Government to arrest atrocities against innocent people, and all measures not involving the use of force have proved useless. Another idea put forward by the doctrine of natural law is that a balance should always exist between war and the utility which is sought by using the force. As far as the humanitarian interventions are concerned, such an idea entails the very important consequence that the States aiming at intervening should carefully assess whether the intervention does not create much more damages than the benefits that are sought; in other words, the risk should be avoided of producing a situation like the one occurred in Iraq in recent times, that is a situation wherein the casualties provoked by the intervention among the civil populations are greater than that caused by the previous oppressive regime. Lastly, the principle of proportionality, which normally is applied to the self-defense, has always been applied by the doctrine of the “just war”, and should be applied, to all modes of use of force, including the humanitarian interventions.

At the end of his remarkable report the Rapporteur points out that the detailed analyses of the questions concerning humanitarian intervention “...may indicate a situation of partial international anomie, which may lead the Institut...to make

certain proposals *de lege ferenda*”. For the reasons I have expressed with regard to the use of force, it seems to me that the situation is exactly a “situation of anomie” and that the proposals made by the Institut *de lege ferenda* could have as reference the rules of natural law, i.e. – using the words used by one of the last representative of the school of natural law (P. Fiore) at the beginning of 20<sup>th</sup> century – “those supreme rules of moral individuals must abide by in order to ensure their coexistence”.

5. *After a humanitarian intervention has taken place, whatever the authorization by which it was undertaken, who is authorized to supervise actions within the State that has been the subject of intervention ?*

If the supervision has to be impartial, it should be entrusted to the United Nations or, in sectors of their competence, to specialized agencies. I don't see any other solution. Of course, this international organization may act...if they want to do so. The answer I have given to Question 1 (about the “duty” to protect) is applicable here, *mutatis mutandis*. As a consequence the Institut should only recommend that these international organizations become active.

6. *What are the international principles and rules that govern the occupation and reconstruction after a humanitarian intervention ?*

As far as occupation is concerned, all the rules of international law on the *occupatio bellica* should be applied. Among others, the rules on war prisoners should be applied to irregular forces who have fought during the civil war, including people suspected or accused of terrorism.

Concerning the reconstruction, here too is impossible to speak of a duty of States to contribute to the expenses. Only voluntary contributions could be recommended. And here too, the supervision should be entrusted to the appropriate international organization.

7. *Which bodies are entitled to appraisal and, when necessary, sanctions violations of international law that precipitated the humanitarian intervention ?*

With regard to the sanctions against the States or irregular forces occupying part of the country, this question is strictly connected with Question 3 (see the answer to that question, sub para. (a)). Concerning individuals, the international crimes should be punished either by international criminal Courts, when competent, other by the Courts of the States according to the principle of universal jurisdiction. However, I think that the punishment of individuals is not within the subject our Commission has to deal with.

8. *Which bodies are authorized and which rules of law are to be applied for assessing the lawfulness of actions that have been taken as part of a humanitarian intervention ?*

This is a very important question. In my opinion, the only reliable means of

assessing the lawfulness of the humanitarian actions is the judicial review. Only a judge can offer the necessary guaranties of an impartial assessment. Decisions by organs like the General Assembly or the Security Council (and *similia*) proceed by political motivations and cannot be impartial.

Which judge should proceed to the assessment ? It is difficult to envisage the intervention of an international tribunal, with the exception of the case wherein the jurisdiction of the tribunal is founded on a consensual instrument. When the international judiciary way is not practicable, then national judges should intervene, that is the judges of the acting State. Throughout my career as professor I have focused my teaching on the role of national judges as the best means of avoiding and reacting to a violation of international law by the States to which they belong. Still now, judges in many country are reluctant to apply international law and to review the actions of their Government; however in some others – for instance, in Italy – dramatic developments have taken place in that direction. Of course, the intervention of the national judges of the acting State is feasible when democracy and rule of law are predominant in such a State. However, I think that States intervening for humanitarian reasons do normally abide by democratic principles and the rule of law.

***Comments by Professor Tullio Treves***

1. It does not seem to me that a *duty* (i.e. an obligation) to protect or to intervene for humanitarian reasons has become part of international law. The word *responsibility*, although containing the concept of obligation, is far softer and may be read as including a moral duty.

The real question is whether there is a *right* to humanitarian intervention. I would suggest that the discussion be conducted referring to a “right” to protect (or to exercise humanitarian intervention) avoiding the terms “duty” and “responsibility”.

As regards the *right to exercise humanitarian intervention*, it would seem to me that, in a broad sense, it has become an accepted concept in international law. The difficulties it raises depend mostly, in my view, on the possibility of abuse the explicit proclamation of such right may entail, and the fact that the practice (esp. Kosovo) from which this right has emerged has at least some elements of abuse (lack of proportionality).

It may be discussed whether it is preferable to speak of a “right” or of a cause of justification of a behaviour that would otherwise be in conflict with the obligation not to use force. In my preliminary view, it is preferable to speak of a cause of justification. This would not question the principle of non use of force. Moreover it would permit to consider notions developed as regards, for instance, self-defence and state of necessity (proportionality, lack of alternatives)

This right cannot, however, be exercised (or this cause of justification cannot be

invoked) by whatever State or organization or in whatever circumstance. This is why the remainder of the questionnaire is very relevant.

2. Only the gravest situations justify humanitarian intervention : genocide, crimes against humanity and violation of the rules of humanitarian law.

3. Humanitarian intervention measures are included in the measures that the Security Council may take or authorize within the framework of Chapter VII of the UN Charter. If the situation justifying humanitarian intervention is qualified by the SC as a threat to the peace, it does not seem relevant to discuss whether there is a right (of the Council?) to humanitarian intervention. Recent practice of the Security Council seems to indicate that the situations mentioned above are included in the notion of threat to the peace. It may be discussed whether in certain cases the decision is *ultra vires*.

The real problem is whether States or Organizations can exercise humanitarian intervention without the SC's authorization. The positive answer to question Nr. 1 has anticipated a qualified positive answer to this question. It may be added that lack of alternatives would be a very relevant element in assessing the possibility to invoke such right. This would include the paralysis of the SC.

4. Non-forcible measures should have priority, even though an assessment of their effectiveness and of the sufferings they may entail for the population has to be made. This does not exclude that use of force may be justified provided it is the only viable alternative, it is proportionate and limited in time.

Intervention by groups of States or international organizations, following a transparent process of deliberation, is to be preferred to intervention by a single State.

5. Supervision should be taken up by the United Nations or by a regional organization authorized by it.

6. The law of occupation should apply. The basic principle should be to restore the occupied State's sovereignty through viable institutions in the shortest time. The usefulness for that purpose of UN-directed provisional government, of the involvement of the International Criminal Court, or of Reconciliation Commissions should be carefully assessed.

7. As regards individual violations, the jurisdiction of the ICC may be involved. The possibility of setting up ad hoc international tribunals should be considered. This should be done in light of the objectives of reconstruction and pacification. As regards violations of international law by States, action by the SC should be paramount. The involvement of the ICJ cannot be excluded if its jurisdiction can be founded.

8. Judicial organs should be competent, be they international or national, provided that due process and full publicity to the proceedings is ensured.

***Comments by Professor Budislav Vukas***

1. I share the Rapporteur's view concerning the developments of international law in respect of Article 2 (7) of the UN Charter. Therefore, I agree with the conclusion that the „code of human rights“ has become part of customary international law and partially even *jus cogens*. However, neither the exact contents of this code, nor the norms having the character of *jus cogens* have been precisely and authoritatively determined. Nevertheless, in my view, there is an „existing“ and not „emerging“ norm concerning the „collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent“.

2. The conclusion that the duty to protect has been installed in contemporary international law requires the answer to the question who made discharge this duty.

Notwithstanding the miserable present state of the United Nations, only the World Organization and the regional arrangements (under the conditions set in Chapter VIII of the Charter) are permitted to intervene by using any form of force. Individual States could be entitled to intervene only with the authorization of the UN. In permitting intervention, the United Nations must be sure that the reasons for intervention are humanitarian, and that there is no kind of political goals. Moreover, intervention should never be permitted if it is not sure that it will not cause additional sufferings to the population which the intervenor pretends to protect.

3. The above-mentioned restrictions in respect of the actors entitled to intervene are caused by the necessity to be objective in deciding on the intervention and in choosing the most appropriate measures necessary to repair or reconstruct the respective society. The intervention (including occupation if necessary) and reconstruction after an intervention should be governed by humanitarian law. However, this is a field where international law needs further development.

The supervision of humanitarian intervention should be accorded to a UN body having broad competences. The International Criminal Court should have the role already determined by its Statute.

***Comments by Dr. Abdulqawi A. Yusuf***

*A. General Comments:*

1. Armed intervention, by whatever name it is called, or however it is justified, is still viewed in most parts of the world with great suspicion and apprehension, unless it is carried out in the context of an operation duly authorized by the UN Security Council.

2. Although it is largely settled today that the UN Security Council has the right to authorize intervention on humanitarian grounds by characterizing the situation as a threat to the peace or a breach to the peace under Chapter VII of the Charter, this has come about more as a subsequent practice (and a very recent one at that) rather than as a Charter principle empowering it to do so.

3. Up to now, except for some actions under Chapter VII of the Charter following a determination that there was a threat to the peace or a breach to the peace, there is no evidence that the UN practice has given rise to a generally accepted right of humanitarian intervention in situations of mass slaughter, massive violations of human rights or of humanitarian law.

4. The tension between the normative constraints on armed intervention and the need to act against egregious and massive violations of human rights does not appear to have yet been fully resolved even within the United Nations itself. This was summarized by Secretary-General Kofi Annan in statement to the General Assembly in 1999 as follows:

“Just as we have learned that the world can not stand aside when gross and systematic violations of human rights are taking place, so we have also learned that intervention must be based on legitimate and universal principles if it is to enjoy the sustained support of the world peoples. This developing international norm in favor of intervention to protect civilians from wholesale slaughter will no doubt continue to pose profound challenges to the international community”<sup>114</sup>.

5. Thus, whether one calls it “duty to protect” or “right of humanitarian intervention”, there still appears to be a wide gap between what might be considered desirable and what constitutes the reality today in international law. We are clearly still at the stage of *lex ferenda*.

6. A very interesting development has however taken place in recent years in the African continent- a continent which had always been one of the most vociferous critics of humanitarian intervention due to the abuses associated with it in past, and a continent where many of today’s massacres and massive human rights violations are taking place. The Constitutive Act of the African Union provides as one of the basic principles of the Organization “ 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”<sup>115</sup>. This constitutes a major leap forward for the African Union whose predecessor – the Organization of African Unity- had as one of its guiding principles “Non-interference in the internal affairs of States”. It also represents an innovative legal proposition since it establishes for the first time in the history of regional arrangements or organizations the right to intervene in a Member State on

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<sup>114</sup> Statement of the Secretary-General to the UN General Assembly on 20 September 1999.

<sup>115</sup> Article 4 (h)

grounds of violation of human rights or humanitarian law. Consequently, a right to intervene on humanitarian grounds now exists in Africa where the Member States of the AU have consented to limit their sovereignty by treaty and to confer upon the organs of their intergovernmental organization the authority to determine the possible occurrence or actual existence of the circumstances calling for such forcible intervention<sup>116</sup>.

7. It is difficult to assess at this juncture the impact that this pioneering principle in the Constitutive Act of the AU will have on the gradual concretization of such a right in international law in general. Much will depend on the extent to which it is actually implemented at the African level and the experience gained with such implementation which, if successful, might expedite not only the consolidation of the practice, but also its gradual acceptance as law at the universal level.

#### *B. Specific Comments*

8. In light of the above general comments, my answers to the specific questions raised in the Rapporteur's draft are provided for the time being in very concise and telegraphic form subject to further elaboration during subsequent exchanges of views among the members of this sub-group of the Commission :

- a) Ref. question 1 : This does not yet seem to be the case, although there appears to be a manifest desire at the international level to bring such a norm into being. At the African level, the right of the AU to intervene on humanitarian grounds is already fully codified in its Constitutive Act.
- b) Ref. question 2 : In the case of the AU, these contingencies are clearly listed as follows : war crimes, genocide, crimes against humanity. The existence of those circumstances is to be determined by the organs of the Union.
- c) Ref. question 3 : The United Nations acting under Chapter VII of the Charter; a coalition of States authorized by the UN Security Council to undertake such action; or regional arrangements such as the AU provided their constitutions allow them.
- d) Ref. question 4 : Peace-keeping and peace-enforcement.
- e) Ref. question 5 : The organs of the same entity that authorized the intervention in the first place until such time as the situation is stabilized.
- f) Ref. question 6 : Principles and rules of international law in general, the Laws of war, humanitarian law, and any *lex specialis* in force in the context of a regional arrangement such as the AU.

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<sup>116</sup> See, Abdulqawi A. Yusuf "The Right of Intervention by the African Union: A New Paradigm In Regional Enforcement Action?" African Yearbook of International Law, Vol. 11, 2005, pp.3-21

- g) Ref. question 7 : The United Nations and its organs, including such judicial organs as may have been created under its authority, and regional arrangements whose members have consented through a treaty to such humanitarian intervention (e.g. AU), and the judicial organs of such arrangements, if any.
- h) Ref. question 8 : The United Nations and its organs, as well as the organs of regional arrangements whose members have consented through a treaty to such intervention acting under their respective charter and under international law.

These are very preliminary considerations and replies which will be further elaborated in future exchanges among the members of the Commission.

***Comments by Professor Karl Zemanek***

[...]

The Austrian philosopher Sir Karl Popper, who achieved fame in England after we had driven him out of the country by the “Anschluss”, formulated as quintessence of his theory of science : science advances through the right questions being asked. Yours’ are the right questions and I am looking forward to proceed accordingly. Please let me know when you expect answers on substance.

Incidentally I wish to draw your attention to a book, recently (2006) published in English by Duncker & Humblot of Berlin, which may have escaped your notice in far-away America. It’s by a young German scholar, Nicolas Kredel, who studied both in Germany (with Bruno Simma) and the US (Michigan). It’s title is “Operation ‘Enduring Freedom’ and the Fragmentation of International Legal Culture. Comparing US Common Law and Civil Law Perspectives on the International Use of Force”. It is really good and makes one understand some of the difficulties which obstruct a consensus on the matter.

I repeat my wishes for a good summer, Karl

***Comments by Dr. Roy S. Lee***

The question of the lawfulness or legality of “humanitarian intervention” is of course important and it is appropriate that your paper focused on this. I would like to raise a few issues needed further clarification. Also, I think we should go beyond the question of the legality. After all, our enquiry should be to find ways and means to deal with atrocious situations and to improve the terrible conditions of the victims. I suggest that we propose measures to drive the decision-making bodies to take appropriate action to remedy situations requiring protection.

In light of the above, I would like to submit the following points for consideration.

*1. Emphasis on black letter law first*

In your paper, you seem to suggest that the primary constraint on “humanitarian intervention” is article 2.7 which bars intervention in matters which fall essentially within the domestic jurisdiction. You appear not to attach any particular importance to the black letter law : the non-use of force.

My own view is that the prohibition of the use of force under article 2.4 of the UN Charter is still the written law today as it is formally subscribed by 192 States representing the entire international community. Written law cannot be changed, in my view, just because of non-observance by certain States.

Thus, the non-use of force is still the main constraining factor against “humanitarian intervention.” Under the existing system, there is no room for military intervention unless it falls within the two exceptions : self defense in response to an armed attack under article 51 and Security Council enforcement pursuant to Chapter VII. It is on this basis that more than 133 States denounced publicly unilateral military intervention. This should be our starting point before we proceed to construct or examine whether there is a right to protect. This fact will also help people appreciate the difficulties posed by “humanitarian intervention.”

*2. Core issues pertinent to “humanitarian intervention”*

We should make clear at the outset what constitutes “humanitarian intervention.” While the term is widely used, its constituent elements are by no means clear or understood, still less articulated. Knowingly or unknowingly, we tend to attach unstated assumptions to the term and then apply those unstated assumptions to different “situations” or “scenarios” that we have in mind. In my view, all these contribute to the controversy surrounding the subject. It is not a productive approach to evaluate a topic without a common understanding of the issues involved. We need therefore first to articulate and elucidate those essential constituent elements.

Your approach subtly avoided dealing with these issues. You used such terms as “extreme human rights deprivations,” “grave human rights violations” or “victims of large scale human rights violations.” Your examples included Liberia (1990), Northern and Southern Iraq (1991 and 1992), and Kosovo (1999). All these indicated that you have certain elements in mind but you do not specifically identify them.

I agree with Professor Conforti and Judge Treves who suggested that we looked into grave situations such as genocide, crimes against humanity and violation of the rules of humanitarian law. As pointed out by Dr. Jusuf, the AU Constitutive Act permits military action through collective decision-making in respect of grave circumstances involving war crimes, genocide and crimes against humanity. We all seem to agree on the types of situations on which we should focus. It would still be

useful if you could identify for us the essential elements common to these situations (e.g. civilian casualties, intensity of fighting, crimes involved, times lapsed, continuity etc), and establish certain requirements or thresholds that would constitute a situation deserving intervention. It would be easier to approach the subject matter if all the basic elements are clarified. The higher the tests or thresholds we set for such situations, the greater the justification for remedial actions.

In considering a grave situation of humanitarian concern and possible need for “intervention”, we should also evaluate whether the authorities supposedly in charge at the national level are able and willing to handle the situation. The absence of either the means or the will would justify the call for protection.

It would be helpful if you could suggest how we could assess willingness and/or inability in such cases. Some such factors might be unjustified delay, inaction over certain period, non-existent of a government, or paralysis of the justice system but there are doubtless others.

Another basic but difficult issue is how to evaluate the action or inaction of the Security Council. All the incidents referred to in your paper involved unauthorized use of military force, while the Security Council was “exercising ... the functions assigned to it...” (article 12.1). In all these cases, the Security Council prescribed measures under Chapter VII. The Council was actually managing those situations. It was not inactive. The principal disagreement among the members was that the Council did not take the “required” military actions some members wanted. Please note, the “required” action was never presented for a decision (e.g., Kosovo) .

I suggest therefore that our enquiry should distinguish two types of situations : (i) the Council is exercising its functions but the action taken is considered to be “inadequate” or “ineffective” by some members who favor military action; and (ii) the Council is taking no action at all (e.g., the subject is not on the agenda) or unable to take any action (e.g., a proposal was vetoed). Such distinction could refine our analysis. For instance, inaction or paralysis is, in my view, a better justification for taking action outside the Council, whereas a dispute over “adequacy” of actions would require more stringent tests. (The issues of decision-making in this regard are discussed in section 4 below.)

### *3. Means of Intervention*

I now turn to the issue of “intervention”. Again, we need to clarify what we mean. You raised this issue in your questionnaires and members of our group have also responded. Your paper focuses primarily on military force. I suggest that our enquiry should include other forms of intervention as well. Article 41 of the Charter is the starting point.

As mentioned, the purpose of our enquiry should be to explore different remedies that could help us provide assistance in grave humanitarian situations and

relieve civilian suffering. To limit intervention to the use of military force is to foreclose useful alternatives that could provide remedies to such situations. So, I suggest that we include in our consideration such other complementary measures as peacekeeping, technical assistance, freezing assets, severing diplomatic relations, expulsion of membership, denying accreditation and compulsory adjudication. Of course, it would not be possible to cover all these but surely a selection could be made.

#### *4. Who decides and who intervenes?*

Central to our enquiry are : what situations merit intervention; how to measure and who decides, whether the national authorities are unwilling or unable to deal with the situation; what constitutes intervention, who decides and who intervenes.

I agree that the Security Council is, under the existing system, the most competent and appropriate decision-maker to answer all these questions.

More difficult issues are : (i) who decides and how to decide whether the Council is “exercising” its functions, and if it is not exercising its functions, who should take the necessary action outside the Council; and (ii) who decides and how to decide whether the Council’s action is “adequate” or “effective”, and if so, who takes the “required” action.

With respect to the first group of issues, the General Assembly plays a role. But the procedure is not simple. An Emergency Special Session pursuant to General Assembly resolution 377 A (V) (“uniting for peace” resolution) can be convened within 24 hours if it is requested by the Security Council (on the vote of any nine members thereof) or by any Member with the concurrence of a majority (i.e. 96 member States) of members of the Organization (Rules 8 and 9 of the Rules of Procedure of the General Assembly). Interested States would have to gather sufficient support to pursue it and presumably, they would also need to conduct consultation and negotiate on such issues as the proposed action and the “intervening agent”.

I hope you could help us develop methodology or criteria to deal with particularly the second group of issues mentioned above which are really the core issues of “humanitarian intervention”.

#### *5. Pressurizing the Security Council into action*

Whether we like it or not, the Security Council is, under the existing system, the only legitimate institution to use force or to authorize its use. Our first duty is therefore to ensure that the Security Council carries out its prime responsibility in the maintenance of peace and security. Admittedly, this is more easily said than done. We should try at least.

The Security Council or the General Assembly only acts upon proposals from Member States. Proposals pertaining to international peace and security can be

initiated only from the capitals under mounting political pressure. Sometimes, reports from the media, NGOs and Civil society are influential.

At present, most first hand information about grave humanitarian situations around the world is generated by the press, NGOs and civil society active in the field. Their influential position should be utilized to drive the relevant policy makers at the national and international level to take the required action. Thus, they might be encouraged to submit their findings of grave humanitarian situations to their respective governments and Missions to the United Nations, Members of the Security Council, the Council's President, the President of the General Assembly and the Secretary-General. They should request these policy makers to take the necessary action. Some governments may be motivated by such "opinio communitatis" to initiate action in the appropriate institutions.

The President of the month of the Security Council has a role to play in organizing the Council's agenda. He might be persuaded to initiate consultations among the Council members regarding a grave humanitarian situation, in response to communications and complaints received. Although the Council would still need a proposal from a State to act, the initiation of consultation by the President might start a chain of reactions at the UN Headquarters and in the capitals.

The President of the General Assembly now maintains an office at Headquarters to monitor world affairs – a result of the UN reform to enable the General Assembly to play a more important role. Requests from the press, NGOs and civil society can certainly motivate the President to bring to Member States' attention a grave humanitarian situation. The President action also may trigger a chain of reactions and generate momentum. This can bring great political pressure to bear on the Security Council. Experience shows that when a monopoly is being challenged or competition is created, things might begin to move. The Council may be compelled to take action to forestall the General Assembly.

The Secretary-General has the competence under article 99 to bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace or security. By invoking this provision, the matter is placed on the Council agenda. This provision is, however, seldom invoked. Part of the reason may be that the Secretary-General bears the burden of proof. Overwhelming "opinio communitatis" from the media, NGOs and civil society can lend strong support to motivate the Secretary-General to propose the consideration of a grave situation. Even if article 99 is not invoked, he can serve as a conduit in transmitting the "opinio communitatis" to the Council which could build up pressure or mobilize opinion in the Security Council.

A combination of the above could lead to action by the Security Council or the General Assembly. The important thing is to make every effort to drive the appropriate UN organ to carry out its responsibility. A right to protect becomes more justified when all efforts have been exhausted.

Still, amongst the remaining unanswered questions are who decides and who should exercise this right to protect. Leaving them to unilateral decision and/or action is not appropriate. I hope you will help us develop a process that we could recommend to the Institut for consideration.

[...]

***Comments by Ambassador Felipe H. Paolillo***

Cher Confrère :

I am grateful for the very interesting report you submitted to the members of the 10th Commission, providing an outlook on the current state of the debate on the vast and complex problem of humanitarian intervention. I share many of the reflections stated therein, on which I would like to make some comments, but instead of commenting directly on them, I'd rather do it through a brief critical review of the provisional conclusions you propose as the basis for the adoption of a resolution by the Institute.

*General comment*

Firstly, I believe we should start by defining what is understood as "humanitarian intervention" for the purpose of the resolution. A definition of the term "humanitarian intervention" would enable a more precise determination of both the limits of the subject assigned to our Sub-Group and the scope of our conclusions. In my opinion we should focus, as I think you have, exclusively on the intervention carried out by resorting to the use of force, which is the form of intervention that most intensely generates what you call "the tension between ... the protection of the autonomy of individual states ... and the protection ... of the inhabitants of states in situations of extreme human rights deprivations". A possible definition could be the following : "The use of force by a State or group of States aimed at preventing or stopping massive deprivations of fundamental human rights in the territory of another State without its authorization"

I believe it is not advisable to extend our study to forms of intervention other than the military one, as it has been suggested by some of our colleagues. We must keep in mind that the theme assigned to the 10<sup>th</sup> Commission, of which our group is a Sub-Group, is "*Present Problems of the Use of Armed Force in International Law*". Moreover, we should recall that in its Session of Santiago de Compostela in 1989 the Institute dealt with the question of the intervention for humanitarian purposes in general and adopted a resolution on "*The protection of human rights and the principle of non-intervention in internal affairs*".

*Provisional conclusion 1*

I agree with the substance of this important conclusion, but in my view we should be more accurate with the description of the situations that may justify humanitarian interventions. Does the expression "massive deprivation of human

rights” cover all the situations of humanitarian crisis that may be considered threats to the peace? Are the conclusions to be adopted also applicable to the situations of humanitarian crisis arising from natural or environmental catastrophes or to the situations resulting from state collapse? The terminology used in recent documents and essays you mention in your report include, *inter alia*, the terms genocide, torture, war crimes, mass murder and rape, ethnic cleansing by forcible expulsion and terror, deliberate starvation and exposure to disease, crimes against humanity, etc.<sup>117</sup>

*Provisional conclusion 2*

An observation similar to the one you made in your report on the conclusion contained in para. 203 of the report of the High-level Panel can be made to provisional conclusion 2 in that “it merely confirms an authority that is clearly within the Security Council domain”. It does not seem appropriate that the Institute reiterate in a resolution the rule of the Charter empowering the Security Council to intervene in situations constituting threats to peace. However, I understand that it is perhaps inevitable to refer to the powers of the Council, especially if we deal in the following conclusion with the competence of the General Assembly on this matter. Therefore, instead of formulating it as a main conclusion, the contents of conclusion 2 should be placed at the end of the previous one adding, for instance, “...making the Security Council competent to organize or delegate the conduct of humanitarian intervention to prevent or put an end to such threats to the peace”.

*Provisional conclusion 3*

I suggest replacing the expression “secondary competence” by the words “secondary responsibility” of the General Assembly, to use the language of the Charter in its article 24 which deals with the “primary responsibility” of the Security Council.

*Provisional conclusion 4*

Conclusion 4 arises a few observations on my side, which briefly stated are the following :

a) The principle of the applicability of the international law of armed conflicts to humanitarian interventions and the criteria of legitimacy (tests) that the interventions must meet, should be treated in separate paragraphs;

b) The listing of the tests should be completed and somehow elaborated.<sup>118</sup> (I have to confess that I am not sure about the meaning of the test of “discrimination”

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<sup>117</sup> An additional and very minor observation on conclusion 1: The correct reference should be to the “Charter of the United Nations”, instead of “the United Nations Charter”.

<sup>118</sup> Some of the terms used to indicate criteria of legitimacy are the following: Just cause; right intention; last resort; proportional means; reasonable prospects (Report of the International Commission on Intervention and State Sovereignty); seriousness of the threat; proper purpose; last resort; proportional means; balance of consequences (High- Level Panel Report).

in this context. Does it mean, perhaps, that the assistance to the victims of the humanitarian crisis must be provided on a non-discriminatory basis?)

c) For the reasons explained in my general comment *ut-supra*, the reference to economic intervention in this conclusion should be deleted.

*Provisional conclusion 5*

I believe it is not necessary to identify the entity that must supervise the humanitarian operation, but if you deem it necessary, I suggest the following wording which seems to me more accurate:

“The competent body of the United Nations that authorized a humanitarian intervention is competent to supervise it”.

The second sentence of this conclusion is not clear to me. I am afraid I cannot see to which “more recent prescriptions” you refer to. Moreover, the expressions “the moment of the intervention” and the moment of the “return of sovereign power to the local government” do not provide clear chronological criteria. Actually, I feel inclined to delete this second sentence. A reference to the international law of belligerent occupation, if necessary, is better placed in conclusion 4, together with the reference to the law of the international armed conflicts.

*Provisional conclusion 6*

Conclusion 6 is the one which raises my main concerns. In my view only the first part of this conclusion should be kept, where it is stated that “international law does not [yet] permit [unilateral] humanitarian interventions that have not been authorized by a competent organ of the United Nations”. (I suggest the deletion of the words into square brackets). On this I am totally in agreement.

But I dissent with the second part of the sentence. I believe it would not be wise to have a resolution by the Institute stating that a customary rule is emerging according to which unauthorized humanitarian interventions may be considered lawful in certain cases. From the evaluation that you make in your report on recent practice, it becomes clear that in the current state of development of contemporary international law it does not exist, not even in *status nascendi*, any rule recognizing the lawfulness of an unauthorized armed intervention on humanitarian grounds, regardless the way such intervention is carried out.

During the more than sixty years since the Charter was adopted, those cases involving grave violations of human rights in the territory of one State in which neither the other States nor the UN bodies intervened to put an end to them, largely outnumbered those in which an unauthorized humanitarian intervention has taken place. Even then, in most cases of military intervention the stopping or prevention of massive human rights violations does not appear to be the dominant motive. The intervenors did not justify their actions by invoking the right to intervene for humanitarian purposes, or at least did not invoke only that right, but resorted to

other justifications such as the right of self defense. As you state in your report, neither the predominant doctrine, nor jurisprudence, let alone the vast majority of States in their official public declarations, have recognized the emergence of a rule which supposedly confers legality to an unauthorized use of force for humanitarian purposes. The rare armed interventions in which a certain degree of “tolerance” has been shown by the international community or its bodies, do not constitute a general practice that may have given rise to a right to intervene. These exceptional cases cannot modify a rule of *jus cogens* as the one contained in art. 2 § 4 of the Charter. Consequently, the final part of provisional conclusion 6 should be deleted.

Obviously, this position keeps unsolved the distressing “dilemma of humanitarian intervention”, eloquently stated by the UN Secretary General in 1999<sup>119</sup>, because by denying the existence of an emerging right to intervene to protect human lives, the moral duty to intervene becomes more critical.

I believe that no form of recognition of the right to intervene, as restrictive or conditioned as it may be, provides a solution to that dilemma. As it has been said so many times, any form of codification represents a dangerous expansion of the legitimate use of force beyond the exercise of self-defense and paves the way for abuse justified on grounds of humanitarian purposes. We should avoid the use of any language that can fan such danger.

Perhaps a partially satisfactory response to the dilemma might be found, not by legitimating any military action with humanitarian purposes, which carried out with no authorization always constitutes a violation of article 2, § 4 of the Charter, but by recognizing that when the intervention is conducted meeting certain conditions, the responsibility of the intervening State may be mitigated. This is not an *ex post facto* legitimating of an unlawful act. The intervention is still a violation of the obligation to refrain from resorting to force, but factors such as those mentioned in your report and in my footnote 2 *supra*, (or “threshold criteria” in the language of the International Commission on Intervention and Sovereignty) operate as extenuating circumstances of the responsibility of the violator. The international community should condemn the intervention through the competent

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<sup>119</sup> The Secretary General in his address to the General Assembly said: “To those for whom the “greatest threat to the future of international order is the use of force in the absence of a Security Council mandate, one might ask, not in the context of Kosovo but in the context of Rwanda, if, in “those dark days and hours leading up to the genocide, a coalition of States had been prepared “to act in defense of the Tutsi population, but did not receive prompt Council authorization, should “such a coalition have stood aside and allowed the horror to unfold ? “To those for whom the Kosovo action heralded a new era when States and groups of States can “take military action outside the established mechanisms for enforcing international law, one “might ask: is there not a danger of such interventions undermining the imperfect, yet resilient, “security system created after the Second World War, and of setting dangerous precedents for “future interventions without a clear criterion to decide who might invoke these precedents and in “what circumstances?” (A/54/PV.4, September 20, 1999)

bodies (the Security Council and the General Assembly) and hold the intervenor accountable with all its legal consequences, but its responsibility may be mitigated.

***Comments by Professor Budislav Vukas***

Dear Colleague,

Congratulations for your clear and concise text, which nevertheless encompassed all the main problems and opinions on the controversial and topical subject of Humanitarian Intervention. Thanking you for your precious text, please find some minor remarks of mine:

1. Without engaging in the general discussion of the conditions under which contemporary international law permits Humanitarian Intervention, there are two basic reasons why NATO intervention in Kosovo in 1999 does not satisfy the conditions for being considered as a Humanitarian Intervention:

a) The events in Kosovo at the beginning of 1999 did not cause more drastic sufferings of the local Albanian population than in the preceding decade. The behaviour of the Milosevic Government and various military units under his control caused violations of fundamental human rights of hundreds of thousands of people in many parts of the former Yugoslavia. Throughout that decade not only the states members of NATO, but also the UN itself used mostly diplomatic means, permitting violations of human rights of even such magnitude as the genocide in Srebrenica in 1995. Therefore, the statement contained in “*The Kosovo Report in the Initiative of the Prime Minister of Sweden (2000)*”, and quoted at p. 22 of your draft, reveals the real situation at the moment of the NATO intervention. The Swedish Kosovo Report stated that :

*all diplomatic avenues had been exhausted and because the intervention had the effect of liberating the majority population of Kosovo from a long period of oppression under Serbian rule (unemphasis added).*

Throughout this “long period of oppression” the leaders of the Albanian population had decided not to fight against the Serbian tyrannical rule; they organized a peaceful resistance and non-cooperation with the Serbian authorities. However, some time before the NATO intervention the Albanians changed their attitude : they commenced a military resistance, and therefore the NATO intervention can be seen as a support to the postponed military efforts of the Albanian majority in Kosovo.

b) The 1999 NATO intervention probably contributed to the fall of the Milošević regime a year later. However, the direct result of the bombardment was the death of more persons in Serbia (including Kosovo) than the total number of Milošević’s victims. Moreover, the NATO attacks caused the migration of tens of thousands of Albanians, Serbs, Roma and other minorities from Kosovo to the neighbouring countries.

For all these reasons, it can be concluded that the NATO intervention was undertaken for political reasons : in order to get rid of the Serbian maniacal leader, who had terrorized a great part of former Yugoslavia in order to realize the idea of a Great Serbia. The victims of his forces in Kosovo in 1998 and 1999 were only and excuse for the NATO intervention. There were many moments in the preceding decade when the international community should have intervened in order to save hundreds of thousands of his victims in the Balkans.

2. On pages 11 and 12 you indicate several questions concerning the international control of the actions taken by the state which has undertaken a Humanitarian Intervention : who can supervise actions within the state that has been the subject of the intervention ? (no 2); which bodies are entitled to appraise and sanction the violations of international law that precipitated the Humanitarian Intervention ? (no 4); which bodies are authorized to assess the lawfulness of actions that have been taken as part of a Humanitarian Intervention? (no 5)

The importance of these questions has been particularly obvious since 2003, during the intervention of the USA in Iraq. Although the American Government has created a mess in explaining the reasons for its intervention, some humanitarian elements have always been present in the arguments for the intervention and for the continuing presence of the American troops in this part of the world. This aspect of the intervention is the only one which was approved by the majority of the international community, taking into account the score of the cruel Saddam's regime. However, since the intervention in 2003, it has become clear that the intervening state does not care at all for humanitarian aspects of the intervention. The occupation of Iraq continues notwithstanding the approximately hundred victims (Iraqis and Americans) per day. Yet, notwithstanding the opposition of the American Congress, the occupation of Iraq goes on.

Taking into account this unfortunate intervention without United Nations authorization, I will try to suggest some possible answers to your questions I quoted above. As there can be no use of the Security Council, one should raise the question of this intervention and occupation violating international law in the General Assembly. As I suppose that the majority of the 192 states members of the UN do not approve the manner in which the American troops "help" the Iraqi population, the General Assembly could either adopt a substantive resolution on that case of "Humanitarian Intervention", or request the International Court of Justice an advisory opinion on the continuing American police activity in the Middle East.

3. Agreeing with your "Provisional Conclusions", I have some problems with conclusion no 6 (at p. 39). Namely, I wonder whether in the final phrase the conditions for "lawfulness" of unilateral Humanitarian Intervention should not been specified. Namely, the statement that "... unilateral Humanitarian Interventions that have not received the authorization of the United Nations may

nonetheless be deemed *lawful* if they meet the international *tests of lawfulness*” (emphasis added), does not give an answer concerning the permissibility of unilateral Humanitarian Intervention, but force the reader to go back to many preceding pages of the text.

[...]

**Comments by Professor Karl Zemanek**

Dear Michael,

First of all congratulations on your Report. To achieve a thorough, concise, and realistically balanced paper on that sensitive subject does you credit.

Though I concur with all six of your provisional conclusions, I wish to add what in the language of the Court would be a separate opinion.

I have some difficulty in sharing the optimism about the role of NGO's in the formation of custom (p.33). It is, of course, evident that they can and do have an influence on the creation of a new *opinio juris* via the media, but for becoming custom that *opinio* must be reflected in a 'general practice', which means the practice of states, not NGOs. Moreover, while NGO's are important players in the Western civil society, they are less representative of the opinion of people in Africa, Asia, and Latin America. It is therefore questionable whether they really express what the **world** wants.

Hence, while I do agree that massive deprivations of human rights may constitute threats to the peace within the meaning of Article 39 of the Charter, I have some doubt that either the Security Council or the General Assembly have already a **legal** 'responsibility to protect'. Politically and morally they certainly do have one. The reports of panels of serving and of onetime politicians may indicate a trend in the direction of upgrading the responsibility to protect to a legal duty, but I doubt that these reports are a faithful mirror of the existing *opinio juris* of governments. The disgraceful **practice** of the latter in the UN with regard to the slayings in Dafour suggests otherwise.

Moreover, I fail to understand what establishing a legal 'duty to protect' would achieve if the non-performance of the duty was not sanctioned. Which, in the case of the Security Council or the General Assembly, is unrealistic – to say the least. Unless, of course, non-performance is in the future to be claimed as a licence for unilateral humanitarian intervention. It is interesting to note that the Report of the International Commission on Intervention and State Sovereignty (para. 6.39) and the Report of the High Level Panel on Threats, Challenges and Change (paras. 197 & 206) content themselves with exhorting the Security Council to mend its ways without clearly pronouncing on the consequences of the failure to do so.

What I have said about the formation of custom applies equally to the potential lawfulness of unilateral humanitarian interventions. There are not enough relevant

cases to permit the generalization into a customary rule, although, here again, there is an undeniable trend in that direction. The danger of that conception lies not so much in the possibility that states engaging in a unilateral humanitarian intervention may pervert the purpose by their conduct as in the unilateral and unappealable determination that a case exists in the first instance. I have, therefore, a strong preference for your conclusions 2 and 3 but admit that, since the practice of the Security Council leaves much to be desired, states may under certain circumstances be tempted to act in its stead.

Should that happen, professor Stromseth's test of lawfulness (your p. 36) – which has a parallel in the criteria of legitimacy suggested by the High Level Panel to the Security Council for authorizing or endorsing the use of military force (para. 207) – is an intelligent and useful proposition to cut through the existing tangle of opinions – but nothing more. Academics do not make international law, they can only **propose** a plausible new interpretation of existing rules or necessary new law. Whether states will follow the course, develop a corresponding *opinio juris* and express it in their practice, only time will tell. If that should be the case, the necessity to prove the lawfulness of a humanitarian intervention on the basis of professor Stromseth's proposal, or of a similar set of criteria, will be a useful deterrent to abuse. Since it is one of the Institute's purposes to promote and encourage the rational development of international law, I support your conclusion 6.

## DELIBERATIONS DE L'INSTITUT

### Première séance plénière Dimanche 21 octobre 2007 (matin)

The *President* opened the first Plenary session at 11.55 a.m. and gave the floor to the Rapporteur of the 10th Commission's Sub-group on Humanitarian Intervention, Mr Reisman.

1. Massive deprivations of human rights may constitute threats to the peace within the meaning of Article 39 of the Charter of the United Nations.
2. The Security Council is competent to organize or delegate the conduct of Humanitarian Intervention for such threats to the peace.<sup>120</sup>
3. In circumstances in which the Security Council is unable to discharge its obligation under Chapter VII, the General Assembly is competent to exercise its "secondary responsibility" and to authorize the conduct of a Humanitarian Intervention.
4. When a competent body of the United Nations authorizes a Humanitarian Intervention, the intervention is governed by the principles of the international law of armed conflict and, whether the modality of intervention is economic or military, it must meet the tests of necessity, proportionality and discrimination.<sup>121</sup>
5. After a lawful humanitarian intervention has taken place, whether directed by the United Nations or by its delegate, the United Nations is the competent supervisory body. From the moment of the intervention until the return of sovereign power to the local government, the international law of belligerent occupation and more recent prescriptions on the responsibilities of occupiers to act in accordance with internationally protected human rights are to be applied.
6. International law does not yet permit unilateral Humanitarian Interventions that have not been authorized by a competent organ of the United Nations, but recent practice indicates that this may be in the process of adjustment. It appears that in grave circumstances, unilateral Humanitarian Interventions that have not received the authorization of the United Nations may be deemed lawful.<sup>122</sup>

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<sup>120</sup> Confrère Paolillo suggested that it may not be appropriate for the Institute to reiterate in a resolution a rule of the Charter and that this provisional conclusion be placed at the end of Provisional Conclusion 1.

<sup>121</sup> Confrère Paolillo suggested the tests of "necessity, proportionality, and discrimination" be elaborated into separate paragraphs.

<sup>122</sup> Confrère Paolillo disagrees with this sentence, on the ground that any form of codification of a

The *Rapporteur* began with a brief procedural history of the Report, noting that he had raised the topic's difficulty with the Secretary General at the time of the Sub-group's creation. The Secretary General had nonetheless considered it appropriate to address the issue, given its importance and notably the Kosovo intervention. The *Rapporteur* also pointed out that he had adjusted the Report following the submission of comments, many of which had been highly critical. Because of this high level of criticism, some of these comments had been annexed to the Report, rather than being incorporated into it. Certain criticisms had also been referenced in the Report's footnotes.

The *Rapporteur* proceeded to summarise his Report.

The *President* thanked the *Rapporteur* and noted the lack of widespread agreement on the issue. He opened the floor to debate and invited Mr Koroma to make his comments.

Mr *Koroma* thanked both the *Rapporteur* and Sub-group for their work and asked the *Rapporteur* why African States, which are just as committed as others to the prohibition on intervention in domestic affairs, were willing to accept Article 4 of the African Union's Charter. Secondly, given the Security Council's occasional unwillingness to discharge its responsibility under the UN Charter, there was a need to be creative in assisting it in this task.

M. *Ranjeva* remercie le *Rapporteur* pour la clarté de son exposé et pour le courage dont il a fait preuve en traitant de ce sujet. Il souhaite néanmoins faire part de quelques préoccupations quant au contenu du rapport.

Premièrement, le *Rapporteur* a mis l'accent sur le fait que l'individu est devenu le centre d'intérêt principal du droit international. Il s'agit là d'une tendance nouvelle dont la réalité n'est plus à démontrer, mais sur la nature et l'objet de laquelle convient néanmoins de s'interroger. Il est en effet incontestable que, dans la pratique, l'individu n'a aucune emprise sur la vie internationale (si tant est qu'il dispose même d'une emprise sur la vie nationale). Il sera donc nécessaire d'approfondir cette question pour faire en sorte que le droit humanitaire ait un sens.

Deuxièmement, M. *Ranjeva* revient sur un problème d'ordre sémantique relatif au point 4 du projet de conclusions. Ce point 4 utilise le vocable d'intervention « humanitaire ». M. *Ranjeva* se souvient que, lors d'une réunion à Accra en 1971, la notion de « droit humanitaire » faisait référence au *jus in bello*, et que c'était très généralement le cas à l'époque. La notion a cependant évolué et soulève, dans son acception actuelle, deux problèmes importants.

Le premier problème est que cette notion d'« humanitaire » est souvent utilisée comme prétexte pour ne pas aborder la question du droit de faire la guerre, en

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right to intervene represents a dangerous expansion of the legitimate use of force beyond the exercise of self-defense and paves the way for abuse justified on grounds of humanitarian purposes.

d'autres termes du *jus ad bellum*. Le second problème tient au fait que toute cette construction du droit humanitaire est liée à l'idée de responsabilité. Indépendamment du fait que cette notion de responsabilité est extrêmement difficile à définir - comme en atteste l'incapacité du High Panel cité par le rapport à en trouver une définition juridiquement viable -, cette construction conduit à une remise en cause de l'ensemble du système de sécurité collective mis en place par la Charte des Nations Unies. Celui-ci est fondé sur une renonciation au droit de faire la guerre, en contrepartie de laquelle les Etats se voient offrir la garantie de la protection du chapitre VII de la Charte. Or, l'intervention humanitaire remet en cause cette combinaison ; malheureusement, beaucoup refusent encore de le voir.

Mr *Sucharitkul* thanked the Rapporteur for his Report on a subject which could be considered as being not a particularly legal one. There remained a lot to be explored, above and beyond the events in Kosovo. The concept of humanitarian intervention has been used in many instances in Africa but also in South-East Asia. However this has proved problematic for South-East Asian States. Since the 1955 Bandung Conference, they have repeatedly affirmed the principle of non-interference in the internal affairs of other States. So too, since ASEAN's creation, its Member States have been keen to reaffirm the principle of non-interference. Recently, in the context of the crisis in Myanmar, it has been difficult for those States even to mention the existence of the crisis.

Mr Sucharitkul noted that South-East Asian States were willing to interfere in the internal affairs of other States in a non-military way; however, they would not interfere militarily. He also noted that in the case of Myanmar, those States counted on the good offices of the Secretary-General of the United Nations and on the many other existing mechanisms for the resolution of such crises. Those mechanisms should not be entirely disregarded, as was too often the case.

Mr *Dinstein* congratulated the Rapporteur for bridging over many disagreements on this delicate subject. However, he feared that the Rapporteur had not been entirely successful in this endeavour.

Mr Dinstein stated that he was a firm believer in the existing Charter of the United Nations. He noted that the Charter was binding on almost all States and that it was viewed by many as the closest equivalent of a constitution for the international community. Though there has been much talk of rewriting the Charter, he believed that an amended Charter would not yield better results. At any rate, it was certainly not the Institute's task to undertake such rewriting.

The Rapporteur had referred to several past cases of humanitarian intervention. However, of the instances cited, that of Liberia can in fact be considered as an example of intervention of ECOMOG-ECOWAS by consent. The Iraqi example provided by the Rapporteur was simply not relevant in this context. That left Kosovo as the sole case of humanitarian intervention carried out without the approval of the Security Council.

Mr Dinstein considered that the intervention in Kosovo was unlawful, although there were mitigating circumstances, in particular because the Security Council had previously determined in two resolutions that there was a threat to the peace there. Mr Dinstein strongly cautioned against the Institute endorsing “vigilante” recourse to the use of force. He recalled that even the 1948 Genocide Convention stipulates that, in the event of a dispute between two States parties, States only have two options for the settlement of the dispute: submission to the International Court of Justice or to a competent organ of the United Nations, namely the Security Council. There was no hint in the Convention that “vigilante action” by States would be legal.

Mr Dinstein then turned to the provisional Conclusions presented by the Rapporteur. Although one could hardly object to provisional Conclusion No. 1, he strongly disagreed with all the other provisional Conclusions.

Provisional Conclusion No. 2 mentioned that “the Security Council is competent to *organise or delegate* the conduct of Humanitarian Intervention” (emphasis added). Actually, the Security Council could not delegate its power and the term organisation was also a misnomer. The Security Council can mandate forcible action through a legally binding decision. It can also authorise the use of force, as it did in the case of Bosnia, although not that of Kosovo.

Regarding provisional Conclusion No. 3, Mr Dinstein insisted that the General Assembly had no power to substitute itself for the Security Council. As a consequence, the term “authorise” in this paragraph was not acceptable. Even the General Assembly’s 1950 “Uniting for Peace” Resolution did not grant to the General Assembly the power to authorise military action: the General Assembly could only recommend such action. In other words, the General Assembly was unable to fill the “much bigger shoes” of the Security Council.

The “economic measures” mentioned in provisional Conclusion No. 4 were completely irrelevant to the question of the use of force. Mr Dinstein also insisted that humanitarian intervention was entirely different from self-defence and that, as such, the three “tests” mentioned in provisional Conclusion No. 4 were used in the wrong context. Necessity and proportionality were customary conditions of self-defence and had no bearing on humanitarian intervention. In any event, discrimination was irrelevant even to self-defence. In fact, there was a third condition of self-defence and that was immediacy. It clearly emerged from the famous statement by Secretary Webster in the aftermath of the Caroline Incident, from which the three conditions were drawn.

Regarding provisional Conclusion No. 5, Mr Dinstein wondered what those “more recent prescriptions on the responsibilities of occupiers” might be. There had been no new prescriptions since the Hague Regulations of 1907 and Geneva Convention IV of 1949, with the exception of some additional references in Additional Protocol I of 1977. This was recently confirmed by the International Court of

Justice in the Armed Activities (Congo/Uganda) Judgment.

Provisional Conclusion No. 6 mentioned recent practice, indicating a “process of adjustment” regarding unilateral humanitarian interventions. Such a process simply did not exist. To the contrary, some NATO governments now regretted the course of action that had been taken in the case of Kosovo. They now believed that, instead, they should have applied further efforts to obtain a resolution from the Security Council. Pursuant to the UN Charter, only the Council had the power to legalise the action taken.

Mr Dinstein concluded by indicating that, should a Resolution similar to the present provisional Conclusions be submitted to the Institute, he would unfortunately have to vote against it.

Mme *Bastid-Burdeau* félicite le Rapporteur de la qualité de son exposé mais indique qu'elle est néanmoins largement en accord avec les propos de M. Dinstein.

Le vrai problème survient lorsque le Conseil de sécurité a qualifié une situation de menace contre la paix, ou a même menacé l'Etat concerné de sanctions, mais n'a pas pris de décision quant à une éventuelle intervention. En d'autres termes, le Conseil de sécurité a constaté l'existence d'une situation pouvant donner lieu à une intervention, mais n'a pas ordonné celle-ci.

Il est alors tentant - et les Etats ne s'en privent pas ! - de justifier une intervention unilatérale sur la base des résolutions antérieures du Conseil de sécurité, qui qualifiaient la situation de menace contre la paix. La question est alors de savoir si les Etats sont en droit d'agir sur la seule base de ces premières résolutions. Bien sûr, la difficulté est encore plus criante lorsque le Conseil de sécurité n'a même pas qualifié la situation de menace contre la paix.

Cette situation soulève donc deux problèmes : celui de la constatation et celui de la décision d'intervenir.

Si le Conseil de sécurité a constaté, par exemple, l'existence d'une violation massive des droits de l'homme, sa décision s'impose à tous ; la question de la constatation est alors réglée. La situation est plus compliquée lorsqu'il n'a pas procédé à une telle constatation. Celle-ci pourrait alors émaner d'un autre organe des Nations Unies. On pourrait ainsi imaginer que des juridictions compétentes en matière de droits de l'homme, ou le Conseil des droits de l'homme, soient en mesure de constater l'existence d'une violation massive de ces droits, et que cette constatation s'impose aux Etats. Quoi qu'il en soit, il est en tout état de cause exclu qu'un seul Etat puisse être compétent pour y procéder sans contrôle international.

Quant à la décision d'intervenir, qui fait suite à la constatation d'une violation massive des droits de l'homme, la question est celle du rôle des Etats. Nous nous trouvons ici face à un dilemme. Il y a, d'une part, l'interdiction du recours à la force et, d'autre part, l'impossibilité morale de laisser de telles violations être perpétrées : la *légalité* face à la *légitimité*. Il faut alors faire œuvre de juriste pour

régler ces situations exceptionnelles . Pour Mme Bastid-Burdeau, trois approches sont possibles . La première approche pourrait être d'établir une liste des cas dans lesquels l'intervention est toujours interdite, ce qui serait par exemple le cas lorsque la constatation de la violation a émané d'un seul Etat ; la deuxième approche d'établir une liste de cas dans lesquels l'intervention est toujours licite , mais cela serait évidemment très difficile ; et la troisième de reconnaître l'existence de situations d'exception et d'urgence. Des mécanismes de correction de ce type existent dans tous les systèmes de droit. En droit constitutionnel par exemple, on a souvent recours à des régimes d'exception dont la mise en œuvre fait l'objet de garanties procédurales : c'est ce qu'il faut chercher à mettre en place ici.

On pourrait ainsi imaginer les garanties procédurales suivantes : illicéité automatique de l'intervention unilatérale d'un seul Etat ; priorité donnée aux organisations régionales ; obligations de transparence, indiquant la nature et la durée de l'intervention ; obligation de limiter l'intervention dans le temps ou obligation de rapport au Conseil de sécurité, par exemple.

La mise en place de telles garanties permettrait d'offrir un cadre légal pour agir dans ces circonstances exceptionnelles et permettrait ainsi d'éviter le phénomène regrettable des justifications *a posteriori* de certaines interventions humanitaires par le Conseil.

Mr *McWhinney* appreciated the problems faced by the Rapporteur. He had had serious doubts about the practicability of the mandate of the sub-group and continued to consider the mandate to be too restrictive.

He was also concerned that the Report was almost entirely focused on the existing doctrine but failed to take into account the emerging body of State practice in the field. Many concepts developed in the doctrine were far removed from the practical concerns of States in their everyday practice. By way of illustration, Mr Lee had challenged the notion that inaction by the Security Council was tantamount to a non-decision by the Council. Mr *McWhinney* agreed with Mr Lee that in reality, in such cases, the Council might take a decision, namely that of not taking action, as had been the case with the failed US/British draft resolution in 2003 on Iraq. Mr *McWhinney* insisted that the Institute should conduct an empirical study in this field. Such a study was even more important since governmental legal advisers were very often bypassed by political advisers in such situations.

Mr *McWhinney* elaborated on the findings of the British House of Commons' Foreign Affairs Committee and noted that the issue of humanitarian intervention and the right to protect had often been discussed in other parliamentary *fora*. For instance, the notion of the "right to protect" had been extensively debated in the Canadian Senate from 1997 to 2000. It would be important for the Institute to include such practice in its Report, as well as the practice of Chile, which had been especially active in the Security Council during the 2003 Iraq crisis.

Mr *McWhinney* further noted that the Report could hardly be considered in

isolation from the Commission's three other Reports. He also insisted that the Institute had no mandate for a rewriting of the Charter of United Nations and that the permanent members of the Security Council in the post-Cold War era have had less influence on decisions taken by that body. The Institute should acknowledge that governmental legal advisers are, by definition, expert technical advisers and it should focus on providing them with practical recommendations.

M. *Bucher* se limite à deux brèves observations. La première est relative au point 6 du projet de conclusions : il serait nécessaire d'être plus affirmatif et de définir les conditions précises de l'intervention d'humanité. L'objectif étant de rapprocher la légalité de la légitimité, il convient de ne pas être si vague. L'Institut a un rôle de créateur ; il lui faut statuer sur le *rebuilding* du droit international.

La seconde observation est relative à l'ordonnancement du projet de conclusions. On a déjà souligné l'importance des précautions et des garanties procédurales ; il serait donc plus approprié d'appliquer les principes et les « tests » du point 4 aux hypothèses du point 6 du projet de conclusions. En d'autres termes, les principes généraux du droit des conflits armés pourraient aussi s'appliquer aux interventions d'humanité mentionnées au point 6.

M. *Kirsch* salue la qualité de la présentation du rapporteur et le courage dont il a fait preuve en acceptant ce mandat délicat. Il souligne que l'intervention humanitaire peut prendre d'autres formes qu'une intervention militaire. Il exprime certains doutes quant à la légalité des interventions mentionnées par le rapporteur. Le fait qu'une intervention ne soit pas condamnée ne signifie par nécessairement qu'elle soit licite ; cela peut s'expliquer par le fait qu'elle a été réalisée dans des circonstances exceptionnelles qui justifiaient l'exercice d'une certaine tolérance.

M. *Kirsch* indique par ailleurs qu'il lui semble impossible de modifier le système de veto existant ou d'amender la Charte des Nations Unies. Toute tentative en ce sens risquerait d'ouvrir la porte à des abus et se heurterait violemment aux intérêts des grandes puissances. La Charte n'est sans doute plus adaptée dans la mesure où le Conseil de sécurité n'a pas joué le rôle qui avait été prévu pour lui et où il a été confronté à des situations très différentes de celles prévalant en 1945. Il n'en demeure pas moins que rien ne l'a remplacée à ce jour.

La question est donc celle du rôle de l'Institut. S'il s'en tient au droit positif, la solution est très simple. S'il s'engage au contraire dans la voie d'une appréciation *de lege ferenda*, il n'aboutira sans doute pas à de meilleurs résultats car il n'existe, à ce jour, aucune évolution nette de la pratique en la matière. En conclusion, M. *Kirsch* considère que la matière n'est sans doute pas mûre pour une résolution de l'Institut.

M. *Salmon* se rallie à ce qui a été dit par MM. *Dinstein* et *Kirsch*. Il soulève entre autre deux points : d'abord, un peu terrorisé par la notion de légitimité qui n'est pas connue en droit international, il est contre l'idée que l'on puisse opposer la légalité à la légitimité. Ensuite, pour répondre à Mme *Bastid-Burdeau*, il ne faut pas oublier

les interventions entreprises par les organisations régionales, telle que celles de l'Organisation des Etats américains en Grenade et en République dominicaine.

The *President*, recalling discussions on the use of force at the Institute's Berlin Session and recognizing the time old nature of the problem, questioned whether it was possible to identify mechanisms enabling the separation of intervention premised on humanitarian values from those premised on political interests. The comments from the floor indicated that the answer was far from clear.

The President gave the floor to the Rapporteur so that he might respond to the comments on his Report.

The *Rapporteur*, responding to the President, stated that if the Institute took a more favourable approach to humanitarian intervention, allowing unilateral action in some circumstances, and even if one took into account Mrs Bastid-Burdeau's concerns, one would still not know if the intervention in question were genuinely altruistic. No one operates solely for altruistic reasons, political interests always being present. The question was therefore, whether despite those political interests, there might nonetheless be circumstances in which one could tolerate an intervention to prevent gross human rights violations. For instance, although tainted by political interests, to his knowledge no one, with the exception of the United States, saw as illicit Vietnam's intervention in Cambodia which terminated massive human rights violations by the Pol Pot regime. When Tanzania intervened in Uganda to oust Idi Amin's regime there was a short term political interest in doing so, but one could question whether the international community was not relieved that it had in fact taken place. If one were therefore to accept that humanitarian intervention results from mixed motives, especially when unilateral, the question remains whether one should be a legal purist or rather, admit that in an imperfect world such interventions can protect and promote human rights.

The *President* gave the floor to the Secretary General to report on the first round of elections.

La séance est levée à 13 h 00.

## **Deuxième séance plénière** – Dimanche 21 octobre 2007 (après-midi)

La séance est ouverte à 15 h 00 sous la présidence de M. *Orrego Vicuña*.

Mr *Reisman* thanked the Members for the attention they had given the report and for the comments they had provided and proceeded to deal with the issues that had been raised which might require some adjustments to the proposals set forth therein.

In response to Mr Koroma's question about Article 4(h) of the Constitutive Act of the African Union, which gives the Union the right to intervene in a member State pursuant to a decision of the Assembly in respect of serious violations, he noted

that this acceptance of intervention was counter to the fundamental principle of non-intervention and he did not have the precise explanation for this, although he noted Mr Koroma's suggestion that this Article might have been inserted as a way of averting Security Council action in this respect. He further observed that in addition to the drafting of Article 4, there were negotiations under way to prepare rules of engagement for such interventions. Mr Koroma had also pointed out that, if the Security Council could reach a consensus on a finding on humanitarian intervention, that would obviate the problem of unilateral action without Security Council consent. However, as the essential problem was what might happen when the Security Council was unable to act, to assume that the Security Council could provide such a finding avoided the problem. Moreover, it was not possible to ignore the implication of the claim by regional organisations that they may operate without Security Council authorisation which constituted a fundamental transformation. The constitutive acts of such organs made no reference to this course of action.

With regard to Mr Ranjeva's question about the rise of concern for the individual in international law, Mr Reisman noted that, in general, in societies that had undergone transformations, concern for the individual had been the critical factor, which might explain why there were new demands for protection under the law, both at the domestic and international levels. Whatever its origin, it was a given that international law in the twenty-first century would be grappling with the protection of the individual, which required some attenuation of the sovereign jurisdiction of the State. Mr Ranjeva had also pointed out that humanitarian intervention was intervention coupled with an adjective, that is, it was an excuse for military intervention. That was of course the case. It was precisely for that reason that there was general concern about opening up the possibility for self-defined unilateral intervention. The adjective "humanitarian" was a restraint only in so far as a third party might make a finding as to the gravity of the human rights violations in question and the need for intervention. He drew attention to the 1967 Security Council decision regarding the white minority government in Rhodesia which represented a fundamental constitutive change by the Security Council in respect of what constituted a threat to the peace. While the Smith Government had certainly been odious and abominable in terms of human rights principles, it had not really been a threat to the peace, any more than had been the Cédras regime in Haiti, which had also been called a threat to the peace. In the latter case, the Security Council had been willing to characterise the situation as a threat to the peace in order to evoke Chapter VII powers. Mr Sucharitkul's comment was related to the deeply rooted norm in the Bandung Declaration – the non-interference in the internal affairs of States. That might account for the inaction of ASEAN States with regard to serious human rights violations in the Asian region, such as what was happening in Myanmar, though it was not being suggested that this warranted a humanitarian intervention. It was necessary to underline the

difference between the interests of elites and the interests of individuals. The Bandung Declaration was a trade union agreement between elites, but it did not protect individuals when protection was denied domestically. Mr Reisman indicated that the text would be amended so as to mention that there were many non-interventionist methods for precipitating changes in situations where grave violations of human rights were taking place. At the same time, it should be noted that some violations of human rights did not afford the international community the leisure of going through a variety of steps before action was taken.

With regard to Mr Dinstein's suggestions for corrections in language, those would be revised in the sub-group. Mr Dinstein's approach was fundamentally different to the one taken by the Rapporteur in terms of international law-making. In Mr Reisman's view, the Charter of the United Nations could not be interpreted solely in terms of its original conception in 1945 or be seen as a type of constitution. The world of 1945 was different from the contemporary world; moreover there had been more than half a century of subsequent practice. Subsequent practice, Security Council practice and that of civil society with its preponderant concern for the individual must be taken into account in order to glean an accurate picture of international law now and what it might be in the future. In considering subsequent practice, one need assess whether to take into account the regrets of States for actions or inactions of the past, but it was unlikely that that constituted subsequent practice.

In terms of the interpretation of the "Uniting for Peace" resolution, the report gave an accurate reading of an assertion of power by the General Assembly. United States Secretary of State Dean Acheson originated the proposal for the resolution to use the General Assembly as an instrument of policy when the Security Council was blocked. It was assumed at the time that the United States would always be able to create a majority in the General Assembly. The text of the resolution had been drafted carefully after a series of negotiations. Nonetheless, it provided a wedge for mid-level powers and smaller States to claim a larger role in decision-making in the United Nations. In circumstances when States had been brought together, the General Assembly had shown what it could accomplish. Unfortunately, the resolution had not been used effectively to date and it would be preferable for the "Uniting for Peace" resolution to be used more.

With regard to provisional Conclusion No. 4 and the reference to economic measures, it was underlined that all instruments of policy should be used in terms of intervention. When economic measures were applied, these must always be of a targeted character and carefully constructed. With respect to the recommendation of the report in provisional Conclusion No. 5, it was asked by the Rapporteur whether anyone was suggesting that the law of belligerent occupation supplanted other applicable laws, such as human rights law.

Both Mr Salmon and Mrs Bastid-Burdeau had raised the question about the

difference between the notions of legality and legitimacy. Legitimacy was a term not used by the Rapporteur, though it was used in the governmental and non-governmental reports cited in the report. In the United States, the term “legality” was not used to assess if a certain action was appropriate; rather, the term “lawfulness” was used. The critical question was whether a humanitarian intervention was lawful, not whether it was illegal. The term “legitimacy” had been used in international law by Thomas Franck and in Europe to address a different problem – that is, when a legal enterprise was established and operating and whether the people subject to its authority saw it as legitimate. This was different both from legality and lawfulness. The crisis precipitated by humanitarian intervention was the growing gap between what was legal under the Charter of the United Nations and what people thought was right. The governmental and non-governmental reports summarised in the report suggested a deep disquiet about that gap. In this context, the term “lawful” was preferable and obviated the need to use the notion of “legitimacy”.

The observation of Mrs Bastid-Burdeau as to the interpretation of events was well taken. If the Security Council or the General Assembly (if it had a second competence) was able to make a determination, that reduced the danger of abuse with regard to humanitarian intervention. The reason for resorting to military force was not likely to be abused if there had been an appropriate finding by a competent body. If the Security Council was capable of acting, then that should be the body that made the determination. If not, then another collective body or coalition of unilateral actors might have to be given the authority to act.

On provisional Conclusion No. 6 with respect to the need for procedural guarantees, those were a good suggestion and would be incorporated into the text. Mr McWhinney had suggested that more State practice could be cited. However, there was not much more relevant practice. If there were concerns about expectations of what was right, it was appropriate to look not only at doctrinal statements, but also at official and non-official appraisals of jurists as to whether a particular action was legal, moral, or justified. When the initial sub-group had been formed, a discussion had been had as to whether to do a case study, and it had been decided that the present formula would be better for the deliberations of the Institute. The Rapporteur confirmed that his preference was for the law in action. With regard to Mr Bucher's suggestion that provisional Conclusion No. 6 be made more affirmative, this was accepted and changes would be made in this respect.

Mr Kirsch had raised a number of points, including the most pertinent question which related to what the function of the Institute was in this matter. The function was to be decided by the Institute. It might be useful to adopt some set of propositions based on the review undertaken. The Institute could also take no position on the matter or it could say that humanitarian intervention was always unlawful. The consequence of the latter action related to Mr Salmon's observation and question. If there was no attempt to determine the circumstances in which a

humanitarian intervention was lawful then the likelihood was that there would be less and less intervention. Mr Reisman stated that he himself had no qualms about saying that coercive humanitarian intervention might be appropriate in certain situations. Not to do so may put a heavy burden on those who did not allow for this possibility. Moreover, if no legal leeway for humanitarian intervention was given, including retroactive authorisation, then democratic States would find it politically difficult to send their soldiers into battle, which would ultimately reduce any possibility of humanitarian intervention.

The *President* proceeded to open the general debate on the report and suggested that the most appropriate way to proceed would be to reconvene the sub-group which would discuss the ways to come to a resolution on the matter.

Mr *Gaja* expressed his appreciation for the remarkable work done by Mr Reisman, which had clearly set out the options to be taken and made a debate on the matter possible. He made some suggestions as to what the Institute could add to the present debate as related to what could be recommended to the United Nations. First, he noted that, in the presence of genocide or massive violations of human rights, the United Nations had not just discretion to use the Security Council to make a finding as to a threat to the peace, but it was also an obligation of the United Nations to use all means to prevent and suppress such violations. Thus, the Security Council was only fulfilling an obligation that the United Nations possessed. Second, he agreed that the notion of threat to the peace had come to cover concerts that it was not originally intended to cover, one example being Security Council resolution 688 on the Kurds in Iraq, which was cited in the report. The notion of threat to the peace had also been stretched because of the cross-border effects of massive fluxes of refugees. Mr *Gaja* expressed the view that it was not necessary to encourage the Security Council to go on using this extensive concert of threat to the peace. Instead, he suggested that new powers of the Security Council under the Charter of the United Nations with respect to the need to respond to genocide and massive violations of human rights could be contemplated.

Mr *Degan* stated that it was possible to establish *de lege ferenda* some criteria for a genuine humanitarian intervention in order to distinguish it *ex post facto* from the unlawful use of force or an act of aggression. He suggested four cumulative criteria for a legitimate humanitarian intervention. First, there must have been systematic, repeated and large-scale international crimes committed by a State's authorities or with their compliance against their own population, mainly but not exclusively against members of some minority groups. This situation may have resulted in huge numbers of refugees in neighbouring countries causing a humanitarian crisis. However, unlike the right to self-defence for the protection of a State's citizens abroad, a humanitarian intervention was usually not performed by reason of a state of necessity, but rather because of the pressure of public opinion which had called for the immediate cessation of the atrocities. Second, the situation must amount to

a “threat to the peace” so that the Security Council would be obliged to take collective measures under Articles 41 or 42 of the Charter of the United Nations in order to restore international peace and security. Only where the Security Council was unable to take such enforcement action or to organise another regional organisation to do so may humanitarian intervention be justified. The text of the “Uniting for Peace” resolution of 1950 provided that the General Assembly could recommend collective measures, including the use of force, only for breaches of peace or acts of aggression, but not with regard to threats to the peace. This mechanism should be put in practice more often in order to fill the gap by way of customary law. Third, in these situations, regional organisations or groups of States that undertook a humanitarian intervention replaced the Security Council in its responsibility and became *de facto* organs of the international community. Such an objective entailed certain restrictions with regard to the aims of the States participating. Fourth, no State participating in such an intervention should gain for itself a benefit from the action, apart from the collective interest of the international community from the cessation of the crimes and the exodus of refugees. Fifth, the collective action of a group of States or regional organisations should have preference to the actions of a single State acting in the name of an organisation or States. But even such an action should have preference to the actions by a single State acting in its own name. Mr Degan cited the example of India which had acted unilaterally in East Bengal because of the huge number of refugees in its territory. He noted that that intervention had been acquiesced to by the United Nations and that soon afterwards, Bangladesh had become a full Member of the United Nations. Finally, the sixth criterion entailed that in any enforcement action, no international crimes may be committed, especially against civilians or other protected persons. In particular, States should not use the intervention as a chance to test new arms or methods or means of warfare. If international crimes were the cause of the humanitarian intervention, the intervening States must not commit the same or similar violations. In Mr Degan’s view, all these criteria were satisfied in respect of the NATO bombing action of 1999 in Kosovo. Nevertheless, NATO admitted that during that action it had used depleted uranium and cluster bombs and destroyed chemical plants causing widespread environmental damage. The International Criminal Tribunal for the former Yugoslavia had jurisdiction in respect of these acts under Articles 2, paragraph (c), and 3, paragraph (a) of its Statute. It was the duty of the prosecutor to undertake an impartial investigation but with complicity of the Tribunal, she had escaped that responsibility by appointing an ad hoc committee of experts whose names remained anonymous. On the basis of their final report, she did not commence an investigation.

Mr Degan indicated that he would vote in favour of the Resolution as prepared by the majority of the sub-group. But he underlined that in case that text dealt only with humanitarian intervention duly authorised by the Security Council, emphasis should be made that no humanitarian intervention may be accompanied by

violations of the means and methods of warfare and that international criminal courts could be competent to try any violations in these cases.

M. *Momtaz* considère qu'en sa qualité de membre du sous-groupe, il n'a rien à ajouter au rapport qui a été brillamment présenté par M. *Reisman*, si ce n'est deux brèves remarques. Sa première remarque est d'ordre terminologique, en ce qu'il partage l'appréhension exprimée par M. *Ranjeva* en ce qui concerne la connotation négative de l'expression « intervention humanitaire ». Il suggère d'utiliser plutôt celle d' « intervention d'humanité », dont l'équivalent anglais est peut-être difficile à trouver. Par ce changement, il entend souligner que l'intervention en question se ferait au nom de l'humanité. Sa deuxième remarque est relative aux conclusions provisoires. Il partage l'opinion de M. *Dinstein* quant aux difficultés de rédaction du point 4 du projet de conclusions et estime qu'il faudrait omettre toute référence à la modalité économique de l'intervention. Par ailleurs, il estime que ce même point vise des normes d'application de certains principes, sans pour autant les identifier. Ainsi, la proportionnalité est une norme d'application du principe fondamental de distinction en droit des conflits armés. Les normes d'application que sont la proportionnalité et la précaution doivent se comprendre par rapport au principe de l'interdiction d'une attaque indiscriminée. Enfin, il souligne que la finalité de ces interventions n'est pas celle d'un conflit armé classique. Cette finalité est la protection de la population civile, ce qui explique qu'il faille appliquer ces principes et normes en tenant compte de cet objectif. Dans une intervention d'humanité, l'objectif militaire n'a pas, en tant que tel, de raison d'être. Il faut en conséquence que la partie intervenante fasse preuve d'une retenue militaire particulière, afin que la population en faveur de laquelle l'intervention a eu lieu puisse le plus rapidement reprendre le cours normal de son existence.

Mr *Ress* was puzzled by the provisional Conclusions, as well as by the interventions of Messrs *Dinstein* and *Kirsch*. He wondered whether it was timely for the Institute to make a statement on this issue, when it had not yet come to a conclusive end. He could endorse the provisional conclusions, provided that they would explicitly mention their *de lege ferenda* character. He considered the Charter of the United Nations to be a moving and evolving instrument, which, according to Article 31 of the Vienna Convention, had to be interpreted in light of State practice and the practice of the United Nations organs. He insisted on the importance of taking into account subsequent practice. In agreement with Mr *McWhinney*, he considered the careful consideration of practice to be of utmost importance. In that regard, he suggested that the position of the individual within and outside the Charter had not been given enough attention. While the necessity to protect individuals was talked about, the position of individuals to call third parties to the defence of their rights was not addressed. In his view, however, this was a key element and addressing the vulnerable situation of individuals was a starting point for any intervention.

Mr *Ress* was hesitant about referring to the General Assembly as a subsidiary

means when the Security Council failed to authorise intervention. He considered that this was not really the way out of the dilemma since the General Assembly was even more a political body than the Security Council. It was not a fact-finding body able to report gross violations of human rights. Hence, he was of the opinion that efforts should be concentrated on the elaboration of a body which could objectively state such violations. In that regard, he was not fully convinced that bodies such as the European Court of Human Rights could fulfil such a function, and referred in this context to the Banković decision of the European Court of Human Rights. He suggested that what was most needed was a general and objective body able to assess factually the existence of gross violation of human rights, which should be done with the participation of the State concerned. He also referred to the remarks made by Mr Dinstein in relation to “retroactive approval” and stressed that such approvals would automatically favour the first action, pending approval. In his opinion, that was not a solution.

Mr *Hafner* reminded Members that the issue of humanitarian intervention had been hotly debated at the International Law Commission when it had discussed the Articles on State responsibility. He recalled that Article 19 of the first draft of the Articles consecrated the notion of “crimes of States”. When such a “crime” was committed, it was said that all States had a duty to bring it to an end. When the notion of “crime” was replaced, at the suggestion of Mr Gaja, by that of “serious breaches of obligations under peremptory norms of general international law”, the consequences of such breaches were again discussed. Here, again, it was said that all States were obliged to bring those violations to an end. However, such duty was mitigated by the fact that States had to “cooperate to bring to an end through *lawful means* any serious breach”, as laid down in current Article 41 of the Articles on State responsibility. Whether “lawful means” included forcible measures was open to question, and related to the interpretation of Article 2, paragraph 4, of the Charter of the United Nations.

Mr Hafner referred to Mr Ress’s suggestion of addressing the necessity of protecting individuals in international law. He wondered whether such notion of necessity did not have a correlation in customary law, as far as the elements of customary rules were concerned. Alternative to the “*opinio juris*” was indeed the idea of “*sive necessitatis*”; hence, he considered that the sentiment felt among the international community to do something about a situation of grave violations could be this “necessity” element of customary law. He concluded by complimenting Mr Reisman on his report.

M. *Rigaux* félicite aussi M. Reisman pour son rapport, relatif à un sujet particulièrement difficile. Il souhaite faire deux remarques. La première est relative à la notion même d’« intervention humanitaire », voire à celle d’« intervention d’humanité ». A son estime, quelle que soit la terminologie usitée, elle renferme un oxymore, c’est-à-dire une contradiction dans les termes. En effet, selon lui, il est quelque peu contradictoire de considérer qu’une opération militaire puisse avoir

des finalités humanitaires. Sa seconde remarque porte sur le point 6 du projet de conclusions présenté par M. Reisman, lequel constitue le seul élément des propositions suscitant la discussion. La question est en effet de savoir si, face à des circonstances particulièrement graves, une intervention peut avoir lieu en l'absence de toute autorisation onusienne. En ce cas, le projet de conclusions estime que cette intervention pourrait néanmoins être « lawful ». M. Rigaux pose la question de savoir s'il y a lieu en effet de considérer une telle intervention comme « légale », ou bien si le mot « lawful » doit s'entendre comme signifiant qu'elle pourrait être considérée comme « légitime » (« legitimate »). A ce sujet, il se demande si la position du rapporteur est de considérer que l'évolution de la coutume permettrait de déroger au texte de la Charte des Nations Unies.

M. Conforti se joint aux compliments qui ont déjà été adressés à M. Reisman. Les diverses interventions des membres lui suggèrent les quelques réflexions suivantes. Il considère que le problème essentiel est celui d'une intervention armée à finalité humanitaire en l'absence du consentement du Conseil de sécurité. Il estime à cet égard superflu de souligner que le Conseil est normalement compétent en la matière, ou encore de revenir sur les nombreuses discussions qui ont entouré la résolution « Union pour la paix ». Ces débats sont bien connus. La question essentielle est par contre de savoir ce que l'on peut faire lorsque de graves crimes sont commis. Que peut répondre l'Institut à cet égard, sachant que sa devise est « Justitia et Pace » ? A son estime, cette question juridique ressemble, *mutatis mutandis*, à celle qui s'est posée après la deuxième guerre mondiale lorsqu'il fut décidé de poursuivre les grands criminels de guerre nazis. A l'époque, de telles poursuites n'étaient pas sans susciter des difficultés du point de vue du droit positif. La formule retenue fut alors celle qui avait été avancée par Gustav Radbruch : lorsque l'application du droit positif conduit à des impasses intolérables pour la conscience humaine, elle doit céder le pas en faveur de comportements non prévus par le droit positif mais reconnus par la conscience comme requis. M. Conforti suggère que la difficulté pour l'Institut n'est pas tant de préciser les « conditions » dans lesquelles il serait possible d'intervenir que de trouver une manière d'exhorter le Conseil de sécurité à agir dans certaines circonstances extrêmes où les Etats pourraient intervenir pour des raisons de conscience. Faisant aveu de son âge, et face à l'épreuve de la mort qui se rapproche de lui, M. Conforti avoue être de moins en moins positiviste et reconnaît qu'il est des cas dans lesquels le droit positif ne peut pas empêcher que soient prises des actions dictées par les nécessités de la conscience collective.

As a member of the sub-group, Mr *Treves* wished to thank and congratulate Mr Reisman on his report. He considered the crux of the matter to be the second sentence of provisional Conclusion No. 6. He wanted to avoid the following two extremes: either considering that an intervention would be deemed legitimate without being lawful, or that such intervention had automatically to be condemned once it occurred. He suggested envisaging another draft, not phrased in terms of

lawfulness, but in terms of justification. "Could be justified" would, in his view, be preferable to "lawful". He recalled that, under certain circumstances, what was unlawful could nevertheless be justified under the law of State responsibility. Referring to some "mitigating" factors could also be a way forward, but he preferred to refer to the notion of "justification". This would of course require that the justifying circumstances be precisely listed, as suggested by Mrs Bastid-Burdeau.

Mr *Schwebel* congratulated M. Reisman both on the style and the substance of his report. He wondered whether the world should have done nothing in front of atrocities like the Holocaust, or the killings in Cambodia or elsewhere. He regarded the current debates surrounding the right of intervention as a sign of progress and referred to the famous words of Leo Gross, according to which "we do not have the international law we need because we need it". Referring to the rejection by the Security Council of a resolution drafted by the Russian Federation and condemning the Kosovo intervention by NATO countries, he suggested that the majority of the Security Council members probably did not consider such intervention as illegal, although matters were not so clear and certain. He underlined that in his view the Security Council did not lack any technique in that matter, but only political will, and that the political reality was such that the right to protect was proposed by democracies, while rejected by States who could be operas of intervention. Referring to Mr Dinstein's comments, he stressed that the subject was not ripe for any "official" codification, since such codification could only be regressive. Not being an "official" codifier of international law, the Institute could, however, find a way forward in that delicate subject.

Mr *Ando* congratulated the Rapporteur on his work on this difficult subject and made general remarks relating to the position of the individual in international law. He insisted that the main question was the use of the veto in the case of gross human rights violations and requested the Rapporteur to look at the issue in a more positive way: the real objective was to make it harder for the Powers concerned to cast a veto in the case of human rights violations.

Mr *Lee* saluted a very stimulating discussion on this delicate subject and made six points.

First, he suggested that the objective of the present paper should be to elaborate and clarify in legal terms the core issues involved in humanitarian intervention. The contribution of the Institute lies in providing a better definition of the terms involved, which were often used in contradictory ways by various authors. What constitutes a "humanitarian situation" should first be clarified. The report mentioned a number of situations, including large-scale violations of human rights, and confrères, Messrs Conforti and Treves, had made other interesting proposals. He preferred that such situations should be those resulting from genocide, crimes against humanity and large-scale war crimes. Whether the host government was

willing or able to take action should also be taken into account in evaluating a situation.

Mr Lee also suggested to distinguish the Security Council's total inaction from the Security Council's actions which were deemed by those as "inadequate" or "insufficient". The term "intervention" should be understood as much wider than just the use of military force, which did not often lead to any meaningful result. Other complementary measures, such as relief and economic development, should also be considered. It was important to prescribe a set of thresholds to define intervention. Mr Lee noted that the 1950 "Uniting for Peace" resolution had been transformed into procedural rules of the General Assembly and are readily available for application. They should be used more frequently.

Mr Lee finally wished that the Institute should look into ways to pressure the Security Council to act in cases of gross human rights violations. Relevant means could include resorting to the President of the General Assembly or calling for the Secretary-General to use the powers vested in him by Article 99 of the Charter.

Mrs *Xue* congratulated the Rapporteur and welcomed a very interesting report. She pointed to the fact that the prohibition of the use of force was one of the greatest advances in the history of humanity and that it should not be easily circumvented. Indeed, she was concerned that the efforts of the Institute would simply result in facilitating the use of force. Many non-European observers were perplexed as to how a military intervention could be qualified as "humanitarian" when it in effect resulted in the destruction of bridges, embassies, hospitals, etc.

Mrs *Xue* drew the attention of her confrères and consoeurs to the case of Rwanda where the Security Council had failed to send peacekeeping troops on the ground. The concern of the Council was a humanitarian one, namely that it would have been too dangerous to send troops to Rwanda. The question therefore was that of the responsibility of the Security Council and the Secretary-General, and of the organ competent for making the determination that the Security Council or the Secretary-General should be held responsible. Mr *Ress* had said that such a determination should be made by an impartial body, but, unfortunately, such a body did not exist in real life. In the end, legitimacy did not exist as such but was always claimed by all parties concerned; it was a subjective and not an objective reality. As a consequence, the Institute should restrict itself to seeking ways to improve the functioning of the Security Council and not open further breaches in the principle of the prohibition of the use of force.

M. *Dominicé* remercie le Rapporteur pour la qualité de son travail. Le rapport est conforme aux propos du Président lors de la session inaugurale, qui appelait à une inspiration humaniste dans les travaux de l'Institut. Il s'agit là d'un « éclairage » dans l'interprétation et l'application du droit international.

Cela ne signifie pas pour autant qu'il faille modifier les textes. Le texte de la Charte des Nations Unies ne doit pas être réécrit et l'exigence d'une autorisation du

Conseil de Sécurité avant toute intervention demeure. Toutefois, il existe des cas d'urgence humanitaire qu'il est impossible d'ignorer. A ce sujet, M. Dominicé préférerait d'ailleurs le vocable d' « action militaire de protection » à celui d'intervention humanitaire.

La grande question est donc celle de savoir qui peut constater l'existence d'un tel cas d'urgence humanitaire. Le grand absent en la matière est le Conseil des droits de l'homme des Nations Unies. Même si celui-ci a connu des débuts fâcheux, il reste, au moins en théorie, la conscience universelle en matière de droits de l'homme. On pourrait donc imaginer que le Conseil soit compétent pour constater l'existence de cas d'urgence humanitaire. En tout état de cause, l'Institut doit trouver une manière de dire qu'il est conscient du fait que, dans certains cas, une action militaire est possible mais que, à ce jour, les conditions de son exercice ne sont pas établies.

M. Mahiou remercie le Rapporteur de la clarté et la franchise de son exposé. Il note cependant que, si l'on décide de faire une brèche dans le principe d'interdiction du recours à la force, il faut l'accompagner de garanties procédurales et substantielles importantes pour éviter que le principe ne soit finalement privé de son contenu. Il note aussi que l'Institut doit s'adresser à tous les niveaux de décision internationaux : Nations Unies, organisations régionales et Etats.

Quant aux Nations Unies, l'Institut ne peut pas, et ne doit pas, proposer de révision de la Charte, mais seulement des changements dans la pratique du Conseil de Sécurité. Il peut en particulier souhaiter que le Conseil utilise son pouvoir de qualifier une situation de menace contre la paix de manière raisonnée. Ainsi, dans le cas du Kosovo, il n'existait tout simplement aucun problème à dimension internationale et M. Mahiou ne comprend pas pourquoi le Conseil est intervenu.

Quant aux organisations régionales, la seule que ses statuts autorise à ordonner une intervention est l'Union africaine. Le texte actuel de l'article 4 de ces statuts est pourtant trop vague et l'Institut pourrait proposer qu'il soit précisé, par exemple en mentionnant la notion d'atteinte aux droits de l'homme. Quant aux Etats, l'Institut doit souligner le fait qu'en aucun cas, la qualification préalable à une intervention ne peut émaner d'un seul Etat.

M. Mahiou propose par ailleurs des améliorations de forme et de fond au texte des points 1 à 5 du projet de conclusions. Le terme de « déléguer » au point 5 pose ainsi problème ; le terme de « superviser » serait beaucoup plus approprié. Il est en effet essentiel que le Conseil de Sécurité conserve toujours la supervision des opérations d'intervention. La validation *a posteriori* telle qu'elle a été pratiquée dans le passé doit être proscrite.

Le point 6 du projet de conclusions pose quant à lui de graves difficultés, et notamment sa dernière phrase, ainsi que cela a été souligné par plusieurs confrères et consoeurs. Le point essentiel est celui du refus de l'intervention unilatérale d'un seul Etat, sauf circonstances singulières excluant l'illicéité. Il faudrait préciser

quelles peuvent être ces circonstances singulières et en fournir le détail. On pourrait par exemple imaginer que les organisations régionales puissent intervenir après la saisine du Conseil de Sécurité, sous sa supervision et à condition de lui faire régulièrement rapport.

Mrs *Arsanjani* drew the attention of the Institute to the practical limitations faced by international organisations when trying to put together military forces for an intervention. This had been recognised by the Secretary-General of the United Nations in his communication on the notion of “coalition of the willing”: the practical limitations of the international community should be taken into account in every discussion relating to humanitarian interventions.

At any rate, humanitarian interventions were not about to disappear. The Institute should focus on making proposals regarding the substantial conditions for military action. In the wider context of the responsibility to protect, States must be able to compel the Security Council to make a determination regarding certain situations where the Council had failed to take action.

The *Rapporteur* welcomed the many stimulating remarks made during the day. He recognised that various confrères and consoeurs had very different views on the subject. However, he would limit his remarks to general points due to the likely fatigue of many Members of the Institute after an intense day of discussion.

Many confrères and consoeurs had expressed the view that the Institute should declare that the Security Council had an obligation to act in certain situations. This was in line with the concept of the responsibility to protect, which was now being widely questioned by the very same governments that had previously enthusiastically embraced it as a major advance.

He was however very concerned to have heard from some confrères and consoeurs that political judgments were always appropriate. Some actions were simply beyond politics. Mr Reisman even saw it rather obscene to ask whether it would be politically wise to act in order to stop the Holocaust or the slaughter of ethnic Chinese in Indonesia under the Suharto regime. Mr Reisman did not expect a pleasant century if such situations were to be considered as business as usual.

He also acknowledged the many fears of abuse expressed during the session. The Sub-group was conscious that any breach of the prohibition to the use of force might degenerate into a “dégringolade” of that prohibition.

One of the contributions that the Institute could bring to the field was an agreement on a new terminology. By way of illustration, although the French expression of “intervention d’humanité” could hardly be translated into English, he was in favour of putting forward the notion of “actions to arrest grave international crimes”.

Mr Reisman acknowledged the issue raised by Mr Ress and others of which body should be responsible for characterising the situation, for example, of gross violation of human rights. Although the proposal made by Mr Dominicé that the

Council of Human Rights be vested with such responsibility, he noted that in practice all those organs consisted of the same people sitting in a different room. Such solutions thus only moved the problem but failed to resolve it.

Mr Reisman further acknowledged further comments made by Mssrs Bucher, Momtaz and others. He also acknowledged the remark made by Mrs Arsanjani and deplored that the Security Council or regional organisations were often too slow to address the situation on the ground. As Secretary-Generals Boutros-Ghali and Annan had repeatedly said, those organizations should not be the only actors in such crises – the task of intervening more often than not needed to be delegated.

Mr Reisman finally noted that the Report was ultimately in the hands of the Institute but insisted that, at any rate, the possibility of a humanitarian intervention should always be and remain on the mind of governments preparing to commit gross and severe human rights violations.

The *President* thanked the Rapporteur for his Report and welcomed the many thoughts that were discussed and still remained to be discussed on this delicate subject.

La séance est levée à 18 h 10.

### **Cinquième séance plénière** Mardi 23 octobre 2007 (matin)

La séance est ouverte à 9 h 40 sous la présidence de M. *Orrego Vicuña*.

#### **Draft Resolution**

- I. All States are under an obligation to prevent or arrest [put an end to] within their jurisdiction or control genocide, crimes against humanity, war crimes and other serious violations of human rights.
- II. When genocide, large-scale crimes against humanity, large-scale war crimes or other serious violations of human rights are being committed, the Security Council should find that they constitute a threat to international peace and security.
- III. Competent organs of the United Nations shall take prompt action to arrest [put an end to] genocide, large-scale crimes against humanity, large-scale war crimes or other serious violations of human rights which have not been arrested [ended] by the State within whose jurisdiction or control they are occurring.
- IV. Actions to arrest [put an end to] genocide, large-scale crimes against humanity, large-scale war crimes or other serious violations of human rights shall be conducted in accordance with international law.

- V. Insofar as military action is required, the sole objective of such action shall be arresting [putting an end to] the genocide, large-scale crimes against humanity, large-scale war crimes or other serious violations of human rights. International humanitarian law shall be applied during and after the operation so as to secure the maximum protection of the civilian population.
- VI. There is no consensus with respect to the lawfulness of unilateral military actions to arrest genocide, large-scale crimes against humanity, war crimes or other serious violations of human rights. In recent practice, however, factors justifying such actions have included determinations of fact by or under the auspices of international or regional organisations that genocide, large-scale crimes against humanity, large-scale war crimes or other serious violations of human rights were being committed and were not being arrested [ended], significant collective support for the action, and the clear necessity, as a measure of last resort, of taking such action.

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### Projet de Résolution

- I Tous les Etats ont l'obligation de prévenir ou d'arrêter [mettre fin] les [aux] génocides, crimes contre l'humanité, crimes de guerre et autres violations graves des droits de l'homme se produisant sous leur juridiction ou leur contrôle.
- II Lorsque un génocide, des crimes contre l'humanité de grande ampleur, des crimes de guerre de grande ampleur ou d'autres violations graves des droits de l'homme sont commis, le Conseil de sécurité devrait considérer qu'ils constituent une menace contre la paix et la sécurité internationale.
- III Les organes compétents des Nations Unies agiront rapidement de telle manière à arrêter [mettre fin à] la perpétration d'un génocide, de crimes contre l'humanité de grande ampleur, de crimes de guerre de grande ampleur ou d'autres violations graves des droits de l'homme auxquels l'Etat sous la juridiction ou le contrôle duquel ils surviennent n'aurait pas mis fin.
- IV Les mesures prises afin d'arrêter les [mettre fin aux] génocides, crimes contre l'humanité de grande ampleur, crimes de guerre de grande ampleur ou autres violations graves des droits de l'homme seront mises en œuvre conformément au droit international.
- V Dans la mesure où une action militaire est requise, son seul objectif sera d'arrêter [mettre fin aux] les génocides, crimes contre l'humanité de grande ampleur, les crimes de guerre de grande ampleur ou les autres violations graves des droits de l'homme. Le droit international humanitaire s'appliquera pendant et après l'opération, de telle manière à assurer la plus grande protection de la population civile.

VI Il n'existe pas de consensus au sujet de la légalité des actions militaires unilatérales visant à mettre fin aux génocides, crimes contre l'humanité de grande ampleur, crimes de guerre de grande ampleur ou autres violations graves des droits de l'homme. Cependant, dans la pratique récente, les éléments de justification de telles actions ont inclus l'établissement, par ou sous les auspices d'organisations internationales ou régionales, du fait qu'un génocide, des crimes contre l'humanité de grande ampleur, des crimes de guerre de grande ampleur ou d'autres violations graves des droits de l'homme étaient perpétrés et qu'il n'y était pas mis fin, un soutien collectif significatif pour une telle action, et la nécessité de prendre une telle action en tout dernier recours.

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The *President* expressed that the *Rapporteur* would explain the background of his Report in order to answer questions and allow new observations. After that, a short debate would be held on the draft Resolution which was the result of amendments to the original draft submitted by the *Rapporteur*. Once this was done, each paragraph would be subject to discussion and, eventually, agreement. In case of failure to achieve a consensus, it would be possible to vote on the proposed wording.

The *Rapporteur* announced that the previous day the Sub-group had held a meeting and substantial changes to his first draft had been adopted. Therefore, the new draft that he now submitted for the consideration of the Plenary Session was a consensus draft. He also indicated that the conclusions expressed therein might not be exactly what was expected by each confrère individually but they strove to respect the very different opinions in a way that could achieve the support of the Institute.

The *Rapporteur* pointed out the major changes to the original draft. The expression "humanitarian intervention" was intentionally avoided, due to the fact that it was an emotive term and could be associated with non-accepted or abusive past military interventions. A functional term replaced it, namely, "actions to arrest [or to put end to] genocide, large-scale crimes against humanity, war crimes and other serious violations of human rights". He also stressed that the Session should decide whether or not to include the large-scale violation of human rights, due to the objections that he had already received from many confrères. As regards paragraph VI of the proposal, he stated that it was a long paragraph with confusing wording. For this reason, a new proposal made by Mr Salmon should be analysed. He subsequently invited the *President* to make observations to the draft.

The *President* said that the Session would first proceed to a short discussion on general issues. He would then invite confrères to express their points of view on specific paragraphs in order to ascertain whether amendments should be made in order to achieve a general consensus.

Mr *Schwebel* remarked that it was clear that an attempt to achieve an agreement

had been made. He expressed that the phrase to put end to “war crimes and other serious violations of human rights” should be rephrased or eliminated. It would be better to eliminate this phrase for two reasons: first, it was open-ended; second, it was unlikely to attract agreement either within the Institute or more widely. Finally he observed that the phrase “unilateral” in paragraph VI should be supplemented because it was not clear whether it referred also to multilateral actions not authorised by the UN, such as a “coalition of the willing” which undertook military actions.

Mr *Ress* endorsed the abovementioned opinion. He remarked that there was a fine line between legality and legitimacy which the draft intended to overcome by wisely using the term “justification”. He also expressed that the term “serious violations of human rights”, as used in the draft, was vague and a very open expression. He illustrated his position by mentioning the example of a government lacking independence of the judiciary akin to a dictatorship or a country that violated freedom of expression. There should be a qualification for such violations. He proposed to take out the entire notion. He pointed out that he disagreed with paragraph VI but he would express his point of view on this matter when the paragraph-by-paragraph discussion took place.

Mr *Bucher* requested more time to discuss the issues expressed. He disagreed with the draft Resolution in many respects. He sustained that, in accordance with article 8(a) of the Institute’s Statute, he made his observations based on his duty to contribute as much as possible to the work of the Institute.

The *President* expressed that the purpose now was to look at different perspectives on the draft Resolution and therefore, Mr *Bucher*’s comments and suggestions were welcomed.

Mr *Bucher* thanked the *President*, and then raised two categories of objections against the draft: first, due to the fact that some provisions used therein added little or nothing to international law; and, second, there were other expressions that were too brief, weak or incomplete and further development was required.

Mr *Bucher* turned to paragraph I. This text calls on States not to commit genocide or crimes against humanity within their territory, which is unnecessary. Second, with respect to paragraph II, which is addressed to the Security Council, recommending the use of “should” instead of “shall” was not necessary and it was not an important contribution to international law. Regarding paragraph III, it said that “prompt” action should be taken, which was an entirely new concept that necessarily should be opened to discussion during the plenary. He stated that the term “protection” is not explained. He also pointed out that the term “arrest” does not mean what “arrêt” means in French and should be rephrased. The term “intervention” disappeared but was substituted by “arrest”, the meaning of which was not clear. Turning to paragraph VI of the draft Resolution, two words are used: consensus and lawfulness. “Consensus” has no connection with the UN Charter.

He referred to the word “justification” as it related to “consensus” and “lawfulness”, this latter expression, in his opinion, being vague and confusing. As regards the use of justifying factors, they are listed in alternative ways, so that it seems that the mere presence of one of them could justify taking action. He provided some examples consistent with his assertion. In his view, this wording was dangerous and should clearly be modified.

Mr Bucher stated that the Resolution had to have as a fundamental principle, first, the protection of individuals, who are not mentioned in the draft Resolution. He stressed that in the case of genocide, basically, there are victims and they should be addressed as the centre of the protection. Second, the violation of human rights should be considered under the frame of the Resolution adopted in the Krakow Session. He said that there should be coherence with former expressions used by the Institute. He explained that in Europe the concept of human rights is broader than in other systems and countries. The term should be carefully reconsidered.

Mr Bucher referred to a working document he had prepared for the session.

**Intervention in support of protection of human life and human dignity  
in case of genocide, crimes against humanity and war crimes**

1. International law –
  - a) provides for the right of each individual for the protection of human life and human dignity in case of genocide, crimes against humanity and war crimes;
  - b) allows measures to be taken to prevent, prohibit and put an end to genocide, crimes against humanity and war crimes.
2. The United Nations has in priority the power and duty to enquire whether genocide, crimes against humanity and war crimes have occurred or are going to occur and whether they require measures to be taken.
3. The United Nations is competent in priority to decide upon the nature and the conduct of an intervention to ensure protection in case of genocide, crimes against humanity and war crimes and to ensure supervision of such an intervention.
4. International law is developing towards recognition of interventions to ensure protection in case of genocide, crimes against humanity and war crimes even in case authorization by the competent organs of the United Nations has not been obtained, provided such intervention receives significant collective support and that the absolute necessity as a measure of last resort has been investigated and verified in cooperation with the sources available within the United Nations and within any Regional International Organization concerned.
5. Any intervention to ensure protection in case of genocide, crimes against

humanity and war crimes is governed, if military forces are used, by the principles of the international law of armed conflicts, and in any case, it shall only take place if it is of absolute necessity as a measure of last resort and complies with the principles of proportionality and non-discrimination, and includes full protection of the civilian population.

Paragraphs 2 and 3 of the working document recognised the priority of the United Nations on this issue. Paragraph 4 of the working document envisaged the possibility at international law of intervention when there is a blockage preventing action by the Security Council, under three concurrent conditions: (1) the authorisation of competent United Nations organs has not been obtained (meaning that such authorisation has been requested and refused); (2) there is significant collective support for intervention; and (3) there has been investigation and verification that the measure is necessary as a measure of last resort. Paragraph 5 of the working document had recast the ideas of paragraph V of the draft Resolution so as to acknowledge the laws of armed conflict, the principles of non-discrimination and proportionality and full protection of the civilian population.

Mr Bucher then turned to paragraph III of the draft Resolution. The idea of intervention in the original draft included the concept of supervision of the intervening forces, which had been suppressed, and in his opinion, should be reinserted. Mr Bucher expressed his opinion with respect to paragraph VI of the draft Resolution. The current drafting was not adequate. It was unclear, in his opinion, whether authorisation should or should not be sought prior to State action.

The *President* thanked Mr Bucher for his contributions and suggested that some of these questions should be expressed once the discussion is made point by point.

*Lady Fox* congratulated the Rapporteur, whose report she supported. She stated that she would make three comments. First, in reference to the question of paragraph VI, differences among Members could be overcome by stating it as a proposal *de lege ferenda* where the rest of the paragraphs are indicated as obligations. Second, the problem of definitions exists, and in order to remain coherent, the draft should consider what was said at the Krakow Session which related to the 1994 and 1999 Geneva Conventions. Third, she proposed that the Institute should not try to legislate on political issues that are discretionary for the Security Council. She mentioned in this sense that Mr Salmon took that point in his project for amendment.

Mr *Kirsch* recognised the efforts made by the Rapporteur. He agreed that it would be good to include the idea of responsibility to protect the population and that a general consensus existed on protecting individuals. He endorsed the position sustained by other confrères regarding the fact that the expression “other serious violations of human rights” is vague and could be interpreted in dangerous ways. Turning to paragraphs IV and V, he requested to be enlightened whether they referred to *jus in bello*. In reference to paragraph VI, he agreed with the first

sentence but disagreed with the second sentence, in which the expression “justifying actions” could be misleading.

Mr *Degan* pointed out that the expression “and other large-scale violations of human rights” in paragraph V was very useful. It should be preserved in its current form in the draft Resolution. He said that, in 1998, the regime of Serbia suppressed the autonomy of Kosovo and introduced apartheid against the Albanian population. Under such parameters, a large-scale violation of human rights constituted a serious menace to the peace which is in accordance to the proposed paragraph II of the draft Resolution. He added that he understood that paragraph IV, when addressing the question of actions to arrest, not only related to military actions, which were the subject of the subsequent paragraph, but also to any other steps required to protect individuals. He finally stated in relation to paragraph V that a sentence should be added stating that international and humanitarian law shall be strictly observed to obtain the maximum protection of the population.

Mr *Pocar* congratulated the Rapporteur. He then questioned the structure of the draft Resolution. He said paragraph V seemed to be more a preamble than a provision. Turning to paragraphs II and III, there was a question of the verbs used. In paragraph II, it was intended not to impose upon the Security Council when it was called upon to decide whether a crime constitutes a threat to peace; but, in paragraph III, addressed to UN organs, the word “shall” is instead used. He asked what the meaning of “prompt action” was within this idea and whether it would include military action. The question should be clarified. In his view, paragraph V was not clear. He asked whether it referred to the Security Council, other organs or rather to unilateral actions and whether limited action by the Security Council would trigger the provision. Referring to paragraph I, he sustained that it may be better to include it as a preamble and not within the operative provisions.

M. *Salmon* signale la difficulté devant laquelle se trouvent ceux qui parlent le français, puisqu’il leur faut faire un projet de texte dans une langue qui n’est pas la leur. Il souligne qu’il est un peu perturbé par l’idée d’une présentation générale et d’une discussion paragraphe par paragraphe. Il remarque qu’il a reçu le texte uniquement hier soir et qu’il n’a pas eu le temps de l’étudier de manière suffisante. Pour cette raison, il a décidé de faire des commentaires uniquement sur les premiers paragraphes.

M. *Salmon* indique qu’il a proposé un amendement dont le texte figure ci-après :

I. All States are under an obligation to prevent or arrest [put an end to] genocide, crimes against humanity, war crimes and other serious violations of human rights.

II. Genocide, large-scale crimes against humanity, large-scale war crimes or other serious violations of human rights should be considered as a threat to international peace and security.

III. Competent organs of the United Nations should use all the constitutional powers at their disposal to ending genocide, large-scale crimes against humanity, large-scale war crimes or other serious violations of human rights.

Premièrement, il souligne que l'obligation d'arrêter un génocide doit peser non seulement sur l'Etat sous la juridiction ou le contrôle duquel le génocide a lieu, mais également sur tous les Etats. Il note que M. Gaja a proposé un amendement dans le même sens dont le texte est : « Delete in point I the words: “within their jurisdiction or control” ».

TEXTE DE L'AMENDEMENT,

Deuxièmement, M. Salmon indique qu'il se rallie à ceux qui demandent d'ajouter le mot « large scale » devant « serious violations of human rights ». Il note que l'Institut n'a pas à dire au Conseil de sécurité ce qu'il doit faire, serait-ce en utilisant la formule « should ». Il souligne que la seule chose que l'Institut peut faire, c'est de dire ce qu'il pense.

M. Salmon note que certains confrères estiment que le pouvoir d'autoriser une intervention appartient essentiellement au Conseil de Sécurité et qu'il peut également appartenir à l'Assemblée générale, dans les conditions de compétence qui lui sont particulières. Ceci étant, M. Salmon propose de remplacer « shall » par « should ». Il estime que les organes compétents des Nations Unies doivent exercer leurs pouvoirs constitutionnels.

M. Salmon indique qu'il n'a pas de remarques sur le paragraphe IV, mais qu'il a une série de remarques pour les paragraphes V et VI, et qu'il n'a pas eu le temps de les formuler.

Mr *McWhinney* sustained that there was an overwhelming consensus in favour of some actions when events such as described in the draft Resolution occurred. However, he expressed that not every aspect of the draft had been substantially discussed. But this did not prevent the Institute from continuing with the discussion. He agreed with the exclusion of the term “humanitarian intervention” due to the fact that other contemporary terms better defined the question. He also regretted that the issue of the African Union had not been extensively discussed. In relation to paragraph VI, he considered it difficult and he mentioned late confrère Roberto Ago who had the legal writing ability to avoid tendentious issues that could dissipate consensus. While Mr *McWhinney* did not suggest that this was the case here, he was in favour of deleting paragraph VI from the final Resolution. He thanked the President not only for accepting the discussion but also for accepting new debates.

Mr *Dinstein* complimented the Rapporteur for showing flexibility and taking many objections into account. However, he endorsed Mr Salmon's suggested amendments. He added that, in paragraph I, the term “arrest” in English was incorrect, because it did not have the same meaning as in French. The accurate

terminology should be “to terminate”, “to end” or “to stop”. Another comment relating to paragraph I was that it referred to prevention and termination but glossed over the issue of punishment or perpetrators, which is equally required of the State. He also felt uncomfortable with the expression “other serious violations of human rights” or even “other violations of human rights”. The expression “other” wrongly implied that all war crimes constituted violations of human rights. In fact, there were categories of war crimes that had nothing to do with human rights. For example, acts of pillage of government property were war crimes, yet had no nexus to human rights. He suggested that a reference might be made to “non-derogable human rights”. The phrase was not in dispute and it covered those human rights (like freedom from torture) that had to be observed at all times, irrespective of a state of emergency or even war.

Concerning paragraphs IV and V, Mr Dinstein drew attention to the fact that, whereas paragraph V was germane to the *jus in bello*, paragraph IV dealt with the *jus ad bellum*. Since the *jus ad bellum* is embedded in the UN Charter, he proposed to change the reference in paragraph IV from “international law” to “the Charter of the United Nations”.

As regards the first sentence of paragraph VI, Mr Dinstein thought that it should be confined to multilateral as distinct from unilateral actions. He agreed with Mr Rigaux’s proposal to eliminate altogether the second sentence of paragraph VI. But, in the event that the second sentence was retained, he wanted to register his opposition to the use of the word “justifying” which strongly implied that the acts in question were “lawful”. Mr Dinstein reiterated his position that these acts were not lawful unless decided upon by the Security Council. In the interest of compromise, he proposed to start the second sentence with the words: “In any event, factors that should be weighed in this context are: ...”.

The *President* indicated that Mr Feliciano, Mr Hafner and Lady Fox would be given the floor. For the sake of brevity, he requested speakers to go directly to the point.

The *Rapporteur* expressed that too many suggestions for changes had been made, but he would try to consider each one of them.

Mr *Feliciano* raised four specific points. First, the phrase “to prevent or to arrest” would be improved by using “to stop” and/or by the word “prompt”. Second, it was not clear whether there should be control or jurisdiction upon a territory and whether the actions being stopped had a relationship with any given territory in particular. In this situation, he wondered who might control the genocide, human rights violation, etc. Third, regarding paragraph III, he required a clarification by asking whether a right to a first refusal was stated therein. Fourth, and finally, referring to paragraph VI, he objected to the term “justifying” and the indication of factors that could justify military actions.

Mr *Hafner* pointed out that crimes against humanity are not necessarily related to

war. Turning to paragraph II, he said he was largely in favour of Mr Salmon's proposal, with only minor differences on the wording used. In relation to paragraph V, he raised the question of whose military help was required, and he understood that it could be derived from paragraphs II and III that only the United Nations were addressed; however, it should be clearly stated. Turning to the first sentence of paragraph VI, he shared the opinion of Lady Fox that rewording was necessary. In relation to the second sentence of the same paragraph, he was against dropping it, but in favour of Mr Feliciano's point of view. A cause of justification should be considered before acting.

Mr *von Hoffman* stated that he understood that the main issue was to state under what conditions humanitarian intervention was justified. In accordance with this, paragraph II required that genocide should be considered as a threat to the peace to justify intervention. He asserted that this was a kind of trick: if genocide as such does not allow humanitarian intervention and if intervention is only admitted where the violation of human rights constitutes a threat to the peace the scenario for intervention would be severely diminished. He wondered if this was a fiction, because he could hardly imagine a case of genocide in Africa that was not a menace to the peace under the aforementioned parameters and, therefore, not a reason to intervene.

Mrs *Xue* expressed that, being a new Member, she would make some contributions without ignoring the significant work already done. First, she fully understood the sentiment of the general public regarding insufficient proper action against outrageous violations of human rights, as had been seen in Rwanda and Timor. Secondly, she thought there was enough room to overcome the differences expressed in the meeting. As regards justifying cause, if the territory is under the occupation of armed forces, she expressed reservation. She said that, even though the expression "humanitarian intervention" had been removed from the draft Resolution, the actions described implied that States individually or collectively acting could use force. Regarding the first draft, she had serious objections, particularly regarding the term "action", and more important ones on the last paragraph in relation to the role of the United Nations and International Court of Justice. She noted the efforts made to overcome such objections and cited Mr Salmon's draft as an example.

Mr *Koroma* said that the history behind these paragraphs could not be forgotten. He pointed out that repeatedly the practice of human rights violation without any kind of intervention had been tolerated by mankind. Therefore, the Resolution not being an attempt to substitute the United Nations Convention on Genocide, but stating the position of the Institute, the differences should be overcome. In this sense, he felt that the positions were not so far apart and that maybe through an effort on the part of Messrs Reisman, Bucher and Salmon, a final Resolution considering many proposals could lead to one definite text. The fundamental idea behind this petition was to call on the United Nations to take action when human

rights violations are taking place.

Mme *Bastid-Burdeau* se propose de faire quatre observations visant à lever certaines ambiguïtés dans le texte.

La première ambiguïté concerne le paragraphe I. Mme Bastid-Burdeau approuve la mention de la punition du crime et reconnaît que l'Etat doit agir contre les personnes qu'il contrôle, mais rappelle que l'Etat a lui-même l'obligation de ne pas participer aux violations des droits de l'homme. Mme Bastid-Burdeau cite l'affaire concernant la violation de la convention sur le génocide devant la Cour internationale de Justice.

Mme Bastid-Burdeau note qu'il faut faire une distinction entre l'intervention du Conseil de sécurité, d'une part, et l'intervention des Etats, d'autre part. Elle rejoint ainsi les observations qui ont été faites à propos du paragraphe IV.

Mme Bastid-Burdeau revient par ailleurs la question de la nature et de la portée de la violation. Elle se pose la question de savoir si l'Institut doit prendre en considération les violations graves des droits de l'homme en tant que tels ou uniquement les infractions dans lesquelles les atteintes aux droits de l'homme constituent des menaces à la paix. Mme Bastid-Burdeau souligne les conséquences que cette différenciation peut avoir sur le rôle du Conseil de sécurité.

Mme Bastid-Burdeau fait enfin référence à la conduite des opérations. Elle pose la question de savoir si l'objectif de la Résolution n'est pas de donner quelques lignes directrices et d'indiquer quels sont les éléments que doivent être pris en considération.

M. *Mahiou* entend faire deux commentaires.

Le premier concerne l'expression « large échelle » et son emplacement. Il considère qu'en ce qui concerne le paragraphe I, il n'est pas nécessaire de faire mention de cette expression, car les Etats ont déjà l'obligation de mettre fin à des violations graves des droits de l'homme. En revanche, à partir du paragraphe II, cela peut se justifier car il y a une gradation. M. Mahiou note que c'est à partir du moment où ces violations atteignent une telle échelle qu'on pourrait penser qu'elles en viennent à constituer une atteinte à la paix internationale.

M. Mahiou considère ensuite qu'il n'est pas opportun de viser dans un même paragraphe l'action unilatérale éventuelle d'un Etat et une action multilatérale régionale, comme c'est le cas au paragraphe VI. Il considère que ces deux actions doivent être distinguées car elles ne sont pas de même niveau. Il propose deux paragraphes différents, bien qu'il ne soit pas personnellement favorable à un paragraphe concernant l'action unilatérale.

Mr *Tomuschat* said that, in his opinion, paragraph I was not necessary and should be deleted. The obligation of States to respect human rights was out of discussion whether violations are serious or not. Regarding paragraph II, he said that the

concept of “large scale” when it is related to crimes against humanity is a tautology as the latter notion necessarily includes the first one. Regarding paragraph III, he sustained that, in the 2000 summit of the General Assembly, it was considered the responsibility of any State to act in case of violation of human rights. He recommended resort to it to clarify notions.

Mr *Caminos* stated that he wrote an article many years ago using the term “collective humanitarian action” instead of “humanitarian intervention” which has may negative connotations, particularly in Latin America. Second, he supported the deletion of the expression “serious violations of human rights”, as suggested by Mr Tomuschat. Subsequently he supported deleting the term “large scale”. He also stated his support for Mr Dinstein to refer to the Charter of the United Nations instead of referring to international law. Turning to paragraph V, he suggested that, instead of the wording “insofar as military action is required”, the wording “insofar as military action is authorised with this objective” in order to make the phrase consistent with multilateral actions instead of unilateral ones.

The *President* suggested that, in view of the different comments and observations, it would be better to request the Rapporteur and the Members of the Commission to make an effort during the break to rephrase the paragraphs. Once that was done, the Session would proceed to discuss each one of the paragraphs and, if necessary, to submit them to a vote. He also took up the proposition sustained by Mr Koroma in order to request the Rapporteur and those confrères who presented alternative drafts to meet together during the break to make the amendments

The *President* invited the Rapporteur to respond to the Members’ comments that had been received from the floor.

The *Rapporteur* said he was appreciative of those comments on the work of the sub-commission. He was aware that the subject went to the heart of the interests of many of the Members. The Rapporteur had had the opportunity during the break to discuss with certain of the Members who had made comments. The Rapporteur proposed to refer to each of the draft Resolution’s provisions taking account for each of them the comments that had been made by the Members.

As regards paragraph I of the draft Resolution, the Rapporteur said that the reference to jurisdiction and control had been inserted by the Sub-group to avoid the implication that States had an *erga omnes* obligation to intervene. Whilst some Members would like to see a *de lege ferenda* provision in this respect, it was problematic. The deletion of a reference to other violations of human rights was acceptable, given that the notion of crimes against humanity would include the large-scale violation of human rights. The Rapporteur said he agreed to remove the phrase only after the first paragraph, because paragraph I is a statement of the general principle to which the State is obliged. As regards the responsibility to protect individuals, the Rapporteur said he was uncomfortable deleting this reference. Given the time he has spent looking at the issue, he felt the deletion of

this phrase would be a retreat in the project. The Rapporteur preferred to use the word “obligation” in this context, as he felt it reflected the *lex lata*.

As regards paragraph II of the draft Resolution, the Rapporteur said that he was comfortable with Mr Salmon’s suggestion for a slight adjustment. This paragraph had been the subject of some struggle for the Sub-group. As of yesterday there had been no reference to the Security Council. The Commission had on reflection thought it useful to introduce the reference in view, *inter alia*, of the comments by Mr Hafner to the effect that the Security Council was charged with finding threats to international peace and security as a term of art under the Charter.

As regards paragraph III of the draft Resolution, the Rapporteur said that it was also otiose to speak of “large scale” crimes against humanity as commented by Mr Tomuschat. The phrase would therefore be struck from the draft. The Rapporteur felt that a reference to constitutional provisions of the Charter was not necessary because the reference to “competent organs” covered this point.

As regards paragraph IV of the draft Resolution, the Rapporteur said that the distinction made by Mr Dinstein was correct, to the effect that this paragraph referred to *jus ad bellum* and was therefore not redundant with paragraph V. The Rapporteur said that, given the complex discussion of the previous day, the introduction of a reference to the Charter would confuse the entire thrust of the draft Resolution. He would prefer to use the expression “international law”, subject to a further paragraph-by-paragraph discussion.

As regards paragraph V of the draft Resolution, referring to situations where military action is required, the Rapporteur said it may have been drafted somewhat maladroitly. However, the Sub-group had intentionally not wished to specify upon whom the obligations fell.

As regards paragraph VI of the draft Resolution, the Rapporteur said that the second sentence had caused most confusion. The intention of the Sub-group had not been to indicate factors that would justify intervention in law but rather factors that have been invoked in practice and doctrine as factors that might justify intervention. The Rapporteur would be glad to take up the comment by Lady Fox to the effect that these factors could be indicated *de lege ferenda*. The proposed language would be adjusted.

The Rapporteur said he regretted that there was not time to consider in detail all the general comments that had been made. He had nevertheless reflected on those comments and talked separately to some of the Members so as to consider those comments for a new draft. He asked the President whether it would be appropriate to proceed to a paragraph-by-paragraph discussion of the draft Resolution.

The *President* agreed to the Rapporteur’s suggestion. The President said that if there was agreement on a paragraph, the discussion could move on. If not, then an alternative procedure would need to be devised.

M. *Ranjeva* considère qu'eu égard au débat de ce matin et à la réaction du sous-groupe, il serait bon d'attendre le rétablissement d'une certaine sérénité avant de procéder à un vote ou de prendre une décision. Il souligne que l'absence de Résolution n'est pas plus catastrophique qu'une Résolution jugée insatisfaisante par les Membres.

M. *Ranjeva* propose de poursuivre le travail en examinant non seulement la structure générale du texte, mais également les dispositions paragraphe par paragraphe. M. *Ranjeva* propose de voir si la sérénité au sein des membres de l'Institut permettra une décision définitive. Il souligne le désaccord concernant le paragraphe VI et pose la question de savoir si ce paragraphe peut trouver sa place dans un document de l'Institut.

M. *Ranjeva* estime qu'il serait catastrophique d'adopter un texte qui pourrait révéler un désaccord au sein de l'Institut.

Le *Président* demande à M. *Ranjeva* s'il fait une proposition au Rapporteur appelant le sous-groupe à se réunir pour une nouvelle session, ou s'il propose de laisser cela pour l'avenir.

M. *Ranjeva* répond qu'il a du mal à trouver une réponse très concrète. Il considère que l'assemblée doit prendre une décision.

M. *Marotta Rangel* remercie le Président et le Rapporteur. Il souligne qu'il est très difficile de prendre une décision sans que le texte et les amendements écrits ne soient disponibles.

M. *Salmon* souligne la contradiction de devoir prendre une décision sans avoir le temps de faire le travail d'une manière convenable. Il attire l'attention sur le fait qu'il faut avoir une bonne discussion sur chacun des paragraphes. M. *Salmon* note que cela permettra de faire en sorte que chaque problème soit soulevé dans les deux langues et sous la forme d'amendements. M. *Salmon* propose que le sous-groupe se réunisse, qu'il trouve une solution et revienne avec un texte. M. *Salmon* est en accord avec M. *Marotta Rangel* et note que les membres de l'Institut doivent avoir sous leurs yeux une nouvelle structure du texte.

M. *Salmon* remarque que le problème est que M. *Reisman* doit partir. Ceci étant, M. *Salmon* signale qu'il y a au fond deux solutions. Soit on continue sans lui, soit on reporte la discussion. M. *Salmon* considère que pour arriver à un résultat, il faudrait que M. *Reisman* laisse à quelqu'un de sa Commission la charge de faire le travail pour lui. M. *Salmon* signale qu'il y a de nombreuses questions qui doivent être soulevées et que le travail doit être fait de manière convenable.

Le *Président* demande à l'Assemblée s'il y a lieu de continuer cette session ou de poursuivre le débat lors d'une prochaine session.

M. *Conforti* indique que son avis est contraire à ce qui a été exprimé par ses confrères. Il indique qu'il n'a pas d'objections fondamentales. Il propose de

procéder à l'analyse paragraphe par paragraphe et d'arriver à une conclusion. M. Conforti signale que si on ajoute beaucoup, on ne finit jamais.

Mr *von Hoffman* said that there was a need to conclude the discussion on this subject during this Session. He thought that there was consensus on the great lines with the exception of paragraph VI, where the question was whether or not to omit its current second sentence completely. Simply stating that there was no agreement on the justification of unilateral military action was not useful. If possible, the Institute could formulate a certain policy, for example by indicating that recent practice showed that unilateral action might be legitimate in certain cases. Mr Broms said that the Institute should not be limited to recognising rules of existing law but should also be allowed to endorse principles that are in harmony with international society and if unilateral action was in such a situation then the Institute should endorse it.

M. *Tomuschat* partage le point de vue exprimé par MM. Marotta Rangel et Salmon. Il indique qu'il a besoin d'un texte. Il propose de continuer aujourd'hui et de trouver une solution. M. Tomuschat indique qu'il ne partage pas le point de vue exprimée par M. Ranjeva selon lequel il serait catastrophique pour l'Institut que la Résolution fasse ressortir un désaccord en son sein. Il remarque que l'Institut n'est pas une Cour. Il est mieux de dire que de cacher la divergence. Il note qu'il est nécessaire d'avoir un texte pour que le travail soit fait d'une manière convenable.

The *President* said that he, together with the Secretary General and the Rapporteur, proposed that, first, the Rapporteur should immediately convene the Sub-group to see how much accommodation was possible and return to the afternoon working session with a revised text. The working session would then see whether or not the revised text met the expectations of the Institute. If those expectations were not met, and that the subject was clearly the subject of a majority wish to move forward in discussing it, then a decision would be made on whether there was an opportunity to continue the discussion without the Rapporteur or instead to leave the discussion for another session of the Institute.

Mr *Roucounas* indicated that he had convened his own Commission early in the afternoon.

The *President* asked Mr Roucounas to reschedule his Commission's meeting accordingly, to which Mr Roucounas agreed.

The *Rapporteur* said that the observations that had been made from the floor were perfectly in order. He was very comfortable with the decision of the President and was confident that by early afternoon the Sub-group would have a clean text of the draft Resolution and a French translation. The Rapporteur said that he had no intention of hastening a decision and if there was no sufficient progress made later then an alternative procedure would be needed.

M. *Salmon* considère que c'est une proposition raisonnable. Il suggère que les

propositions soient données au sous-groupe afin qu'il dispose de l'ensemble des éléments de ce qui a été dit ce matin.

M. *Bucher* indique qu'il a présenté un document de travail qui traite de l'ensemble de la matière et que certaines observations ont été faites. M. Bucher souligne que le Rapporteur n'a pas fait de commentaire par rapport à ce document de travail et qu'il ne participe pas lui-même aux travaux de la Commission. M. Bucher pose la question de savoir s'il est encore autorisé à faire des propositions ou des amendements ou si son travail est devenu inutile.

The *President* responded to Mr Bucher saying that his proposal had been tabled and that the Sub-group would consider it along with all the other proposals. Mr Bucher's proposal would be reflected or not in the revised draft according to whether or not it was acceptable to the Sub-group. Mr Bucher could then make specific suggestions on the revised text.

La séance est levée à 12 h 40.

#### **Sixième séance plénière** 23/10/2007 (après-midi)

La séance est ouverte à 14 h 30 sous la Présidence de M. Orrego Vicuña.

#### **Revised draft Resolution**

- I. All States are under an obligation to prevent or promptly to put an end to genocide, crimes against humanity, war crimes and violations of human rights occurring within their jurisdiction or control.
- II. Genocide, crimes against humanity or large-scale war crimes should be considered as a threat to international peace and security.
- III. Competent organs of the United Nations should take prompt action to put an end to genocide, crimes against humanity or large-scale war crimes which have not been stopped by the State within whose jurisdiction or control they are occurring.
- IV. Actions to put an end to genocide, crimes against humanity, or large-scale war crimes shall be conducted in accordance with international law.
- V. If military action is taken, the sole objective of such action shall be putting an end to the genocide, crimes against humanity, or large-scale war crimes. International humanitarian law shall be strictly observed during and after the operation so as to secure the maximum protection of the civilian population.
- VI. There is currently no consensus with respect to the lawfulness of military actions which have not been authorized by the United Nations but which purport to have been taken to end genocide, crimes against humanity, or large-

scale war crimes. In recent practice and doctrine, however, factors which have been mentioned as possibly justifying such actions have included:

- (i) determination of facts by or under the auspices of international organizations that genocide, crimes against humanity, or large-scale war crimes were being committed but were not being stopped;
- (ii) significant collective support for the action; and
- (iii) the absolute necessity, as a measure of last resort, of taking such action.

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### **Projet de Résolution révisé**

- I. Tous les Etats ont l'obligation de prévenir ou de mettre rapidement fin à un génocide, aux crimes contre l'humanité, aux crimes de guerre et aux violations des droits de l'homme survenant sous leur juridiction ou leur contrôle.
- II. Le génocide, les crimes contre l'humanité ou les crimes de guerre de grande ampleur devraient être considérés comme une menace contre la paix et la sécurité internationales.
- III. Les organes compétents des Nations Unies devraient agir rapidement afin de mettre fin à un génocide, aux crimes contre l'humanité ou aux crimes de guerre de grande ampleur auxquels l'Etat sous la juridiction ou le contrôle duquel ils surviennent n'aurait pas mis fin.
- IV. Les actions [mesures] visant à mettre fin à un génocide, aux crimes contre l'humanité ou aux crimes de guerre de grande ampleur seront conduites [mises en œuvre] conformément au droit international.
- V. Si une action militaire est entreprise, son seul objectif sera de mettre fin au génocide, aux crimes contre l'humanité ou aux crimes de guerre de grande ampleur. Le droit international humanitaire sera strictement respecté pendant et après l'opération, afin d'assurer la protection maximale de la population civile.
- VI. A l'heure actuelle, il n'y a pas de consensus au sujet de la légalité des actions militaires qui n'ont pas été autorisées par les Nations Unies, mais qui prétendent avoir été prises afin [dont l'objectif affiché est] de mettre fin à un génocide, à des crimes contre l'humanité ou à des crimes de guerre de grande ampleur. Cependant, la pratique et la doctrine récentes ont fait état d'éléments pouvant justifier de telles actions, notamment :
  - (i) la constatation, par ou sous les auspices d'une organisation internationale, que les faits génocide, crimes contre l'humanité ou crimes de guerre de grande ampleur sont commis mais qu'il n'y est pas mis fin ;

- (ii) un soutien collectif significatif pour une telle action ; et
- (iii) la nécessité absolue de prendre une telle action en tout dernier recours.

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The *President* stated that a new text had been produced by the sub-group and invited Mr Reisman to explain the thrust of the new text.

Mr *Reisman* proceeded to introduce the new text approved by the sub-group, noting that a courtesy translation had been done in French, while the English version remained definitive. The new text incorporated amendments suggested by the Members, in particular section 2, paragraph 2 reflected the amendment of Mr Salmon and section 6 reflected the important point made by Mr Bucher.

The *President* stated that the procedure would be to go paragraph by paragraph through the Resolution to gauge the extent to which there was agreement and to advance in the most efficient manner possible. He then opened the floor for comments on paragraph 1.

Mr *Gaja* wished to make some comments upon the amendment he had made which had been rejected by the Rapporteur in order to explain its reasoning. The point was that the text of paragraph 1 implied that only those states on whose territory or under whose jurisdiction serious crimes are taking place have the obligation to prevent or suppress such crimes. In fact, all states have the obligation to do something to prevent such crimes from happening within their means. He stated that he would have no objection to a clarification on this in a preamble. This suggestion was not meant to imply that all states could resort to the use of force in the case of genocide, or other serious international crimes, but that all states have the obligation to take some measures within their means. This could be clarified by specifying that only lawful means could be used. The best way to proceed was to delete the words “occurring within their jurisdiction or control”.

M. *Salmon* note que, dans le même souci d'étendre l'obligation à tous les Etats, le texte qu'il avait proposé n'évoquait plus la notion de juridiction. Il propose deux solutions alternatives : soit une nouvelle phrase étendant l'obligation à tous les Etats, soit un nouveau membre de phrase : « sans préjudice des obligations des Etats tiers ».

The *President* noted that this could be an interesting idea as a way to proceed.

Mr *Reisman* asked Mr *Gaja* whether Mr *Salmon's* proposal would be acceptable to him. He noted that in the sub-group, several Members had been concerned about implying that the proceeding part of paragraph 1 involved the authority of third states which was why the words “within their jurisdiction and control” had been inserted, but he indicated that Mr *Salmon's* suggestion would seem to solve the problem.

The *President* observed that in the morning session, there had appeared to be a

consensus that not just any human rights violations were the subject of the Resolution, but only those which were widespread and massive in scale and intensity and he noted that, by contrast, the present text also included violations of human rights.

Mr *Reisman* agreed that this presented a drafting difficulty, and explained that the reference to violations of human rights was kept because of the inclusion of the words “within their jurisdiction and control”. If this phrase was kept then the crimes referred to in the paragraph would not have to be large-scale crimes. However, if the “without prejudice” clause was inserted, then the Resolution might have to refer to crimes against humanity and large-scale war crimes.

Mr *Koroma* asked whether the term “all states” included the state that is perpetrating the genocide, war crimes or human rights violations. As the article was presently worded, it seemed to be addressed to the culprit state. The text of the article was not clear in this respect. If the article did indeed refer to the culprit state, it was not clear how this gelled with the concept of humanitarian intervention. Moreover, he noted that human rights violations were committed in every state on a daily basis and hence would not constitute a sufficient basis for an intervention.

M. *Ranjeva* est en faveur de la suppression, dans le premier paragraphe, des mots « survenant sous leur juridiction ou leur contrôle ». Il souhaite que la résolution reste proche du texte de la convention relative au génocide, qui prévoit une obligation générale sans considération de territoire ou de juridiction. Il exprime par ailleurs quelques réticences quant à la proposition de M. Salmon. Celle-ci lui semble inviter à un travail d'exégèse sans fin alors qu'il serait plus simple de poser le principe indiscutable d'une obligation d'arrêter les violations. Il propose donc d'arrêter la phrase à « violation des droits de l'homme ».

Mr *Tomuschat* stated that he would keep the text as it stood. He noted that this was a fundamental Resolution and to start out with a “without prejudice” clause would weaken the overall strength of the Resolution. He cautioned that the question of third states obligations in the area of human rights was extremely complicated. There was a need to be realistic in the Resolution and for this reason he was not in favour of inserting this clause.

Mr *Roucounas* pointed out that usually legal texts referred to “acts of genocide” and not to “genocide” *in abstracto*.

M. *Gannagé* soutient le projet de résolution, mais souhaite qu'un préambule lui soit adjoind. Cela permettrait de fixer les principes sur lesquels repose celle-ci.

Mr *Dinstein* suggested not to deal with the title of the Resolution as long as the operative text had not been finalised. As the text stood, paragraphs I *et seq.* had little to do with humanitarian intervention. The entire issue of humanitarian intervention actually rested on paragraph VI, which remained controversial. As for

paragraph I, he thought that the text was beyond dispute, largely because it was independent of humanitarian intervention.

Mr Dinstein found the expression “violations of human rights” standing by itself to be completely inappropriate, and he proposed that the qualifying words “widespread or systematic” as well as “massive” or “large-scale” be inserted.

Mr Lee noted that since the Resolution was entitled “Humanitarian Intervention” the first paragraph could be read as an authorisation to intervene, despite the qualifying phrase at the end. This suggested that there was almost a blank cheque for intervention in case of war crimes, genocide or crimes against humanity. There was a need to clearly spell out the limitations in this regard.

Mr Reisman thanked the Members for their comments. He stated that he would try to remain faithful to the discussions of the sub-group in his responses. If a “without prejudice to the obligations of third states” clause was introduced then the paragraph would lose some of its coherence. It would be necessary to change “all states are” to “every state is” and in the third line “their jurisdiction” to “its jurisdiction”.

The *President* suggested that the session started to decide upon the various suggestions made. First, should the reference to human rights violations be kept or be deleted in light of the understanding that such violations are subsumed in the notion of crimes against humanity when they are of a sufficiently grave character, which was a question of the morning session. The President amended this proposition after Members indicated that such violations are not included in the notion of crimes against humanity.

Mrs *Arsanjani* explained that the intention of paragraph 1 was to move from a general obligation of every state to prevent and suppress human rights violations to the obligations of third states when there are massive violations of human rights. The purpose of the paragraph, as stated by the Rapporteur, was to provide a general statement about every state’s obligation to prevent human rights violations. That was why the qualification of “large scale” was removed. This was intended as a soft opening to the Resolution before getting to the obligations of third states.

M. *Salmon* souhaite que l’on vote d’abord sur la proposition de M. Dinstein et considère que les termes « violations des droits de l’homme » sont beaucoup plus faibles que les éléments mentionnés précédemment dans la phrase (génocide, crimes contre l’humanité, crimes de guerre) et que la proposition de M. Dinstein permet de résoudre le problème. La résolution ne doit pas laisser croire que les Etats tiers doivent s’intéresser à des violations mineures des droits de l’homme ; seulement à des violations graves. A défaut, il faudrait enlever du projet la notion même de « violations des droits de l’homme ».

Mr *Reisman* clarified that paragraph 1 made no reference to third states. The key obligations in human rights law falls on the territorial state. Thus, the inclusion of

the qualifying words “massive” or “widespread and systematic” would suggest that states are not obliged to prevent or suppress minor violations of human rights when committed in their territory. In order to address the possibility of third states to take measures, the first word “all” should be changed to “every”, the third word should be “is” and “their” should be changed to “its”.

Mr *Koroma* asked whether it followed that if genocide, crimes against humanity or massive violations of human rights were occurring in a state’s territory, then it was not under an obligation to put an end to it. This language was borrowed from that of the Genocide Convention, but the Convention referred to “Contracting parties” whereas this Resolution referred to “every state”.

The *President* expressed the view that the paragraph was perfectly reasonable and legal as it was because every state was responsible to prevent and suppress serious international crimes, and this was only possible if crimes were occurring in a territory under a state’s control. The possibility for other states to intervene was dealt with in proceeding paragraphs. If this paragraph was supposed to provide a general statement then it was correct as it stood.

He proceeded to ask whether there was agreement about the paragraph, as amended. He announced the results of the votes as 29 in favour, none against, 15 abstentions. The *President* stated that the paragraph was adopted as amended.

Mr *Caminos* noted that the paragraph just adopted referred to the crime of genocide, which should read “act of genocide”, which was the only crime of genocide.

The *President* stated that the drafting committee would look at that use of language.

Mr *Bucher* indicated that he would like to propose a new paragraph between paragraphs 1 and 2.

The *President* responded that more comments about paragraph 1 should be considered first.

Mr *Amerasinghe* pointed out that there should be a comma after the words “human rights”.

Mr *Lee* noted that the words “occurring within the jurisdiction or control of a state” modified all the crimes in the paragraph, not just human rights.

The *President* noted the proposal of Mr *Bucher* to add a paragraph.

Mr *Bucher* invited the Members to refer to the working document of the morning session, paragraph 1(a) of which was proposed as a new rule of the Resolution. He recalled that Lady Fox had recalled the emphasis upon the protection of the individual as a primary concern for international law and he proposed that provision was inserted after the first paragraph in this respect.

The *President* stated that it would be possible to refer to this in the preamble as this would extend to the whole Resolution, but that this could be left to the drafting committee.

Mr *Bucher* re-asserted that the proposal was to insert a new paragraph in the Resolution, which was not a matter of drafting.

The *President* proceeded to put the matter to the vote. He announced the result of the vote as 12 in favour, 11 against and 21 abstentions.

Mrs *Arsanjani* explained that she had voted against the proposal because the language in the proposed paragraph was too brief in comparison to what international law provided to victims.

The *Secretary-General* noted that the text of the proposed paragraph would need to be formally provided.

Mr *Bucher* responded that the text could be found in the working document of the morning session.

Le *Secrétaire général* rappelle qu'en principe, une version écrite et précise de la partie du document correspondant à l'amendement aurait dû être fournie aux Membres, pour éviter tout malentendu.

Mr *Bucher* stated that the document had been given to the Institute that morning and that it was stated in the session that the document could be used as an amendment to the Resolution.

The *President* explained that in order for the Secretariat to properly take into account the proposed text, it would need to be provided separately.

Mr *Tomuschat* expressed the view that the present text of the proposed new paragraph was not acceptable.

The *President* noted that view and proceeded invite comments on paragraph 2 of the draft Resolution.

M. *Ranjeva* souhaite que M. *Bucher* lise le texte de sa proposition.

Le *Président* précise que la version finale sera donnée au Secrétariat.

Mr *Bucher* read out the paragraph from the working document:

“International law provides for the right of each individual for the protection of human life and human dignity in case of genocide, crimes against humanity and war crimes”.

He stated that he was open to any suggestions of the drafting committee as to the final text.

M. *Salmon* juge qu'il n'y a pas lieu de procéder à un nouveau vote dès lors que le premier s'est déroulé de manière régulière. Le *Président* pourrait néanmoins demander à l'assemblée si celle-ci considère qu'il faut procéder à un nouveau vote.

The *President* consulted with the Secretary-General as to whether such a process was acceptable.

Le *Secrétaire général* estime que l'assemblée est souveraine et que la chose serait donc possible. Il pense néanmoins qu'il faut éviter de procéder à ce vote « à chaud » et il propose donc de reporter l'examen de la question à la fin de la session. En tout état de cause, il lui semble que la résolution ne devrait pas traiter de droits individuels, ou à tout le moins pas dans le corps du texte.

Mr *Reisman* noted that the assembly had voted for the inclusion of the paragraph and thus it would be incorporated, but that the drafting committee would work on the language and later the Resolution would be voted upon.

Mr *Hafner* also stated that since the paragraph had been voted upon, it had to be included, though it was still subject to the work of the drafting committee. He suggested that the paragraph could be shortened to state that "international law provides for the protection of the individual and human dignity".

The *President* responded that the drafting committee would look into that suggestion. He proceeded to invite the assembly to comment upon paragraph 2.

Mr *Dinstein* had a point of order with respect to the vote just taken on the new paragraph. In his view, it was improper to vote on new paragraphs, submitted from the floor, until the whole text of the Resolution as proposed by the sub-group had been voted on from start to finish. He explained that he had abstained in the vote merely on this ground, because in his opinion the procedure was wrong. He further suggested that the assembly should now address paragraphs II through VI of the sub-group's draft, postponing consideration of any additional paragraphs until the end of the discussion. The reason was that, at the end of the process, such additional paragraphs may prove redundant.

Mr *Dinstein* added that he thought that the language of the paragraph just adopted required redrafting. In particular, it was clear to him that the protection of human life and human dignity did not arise "in case of genocide". The protection ought to be "from" or "against", rather than "in case of", genocide. Still, subject to the semantic question of drafting, the result of the vote was clear. There was no point in trying to reopen the issue of substance after the vote.

Mr *Reisman* explained that paragraph 2 had been revised according to Mr *Salmon's* amendment. The language referring to the Security Council had been deleted as requested by a number of Members. There had been some objections to this deletion, but the language chosen was spacious enough to deal with all contingencies.

Mr *Dinstein* expressed the view that it was of the utmost importance to re-insert in the text the reference to the Security Council, and suggested that the matter be put to a vote. Given that only the Security Council was authorised to determine the existence of a threat to the peace under Article 39 of the UN Charter, a deletion of

a reference to the Security Council might be construed as an attempt to destabilise the existing international system. The text had to follow the legal scheme enshrined in the Charter.

Mr *Lee* shared the concern of Mr *Dinstein* but he could also appreciate the difficulty presented. He suggested that the words “falling within the meaning of Article 39 of the UN Charter” be inserted at the end of the phrase, which would clarify what was meant by international peace and security and would indirectly link it to the Security Council. The overall intention was to have an authorised body take the necessary action.

Mr *Pocar*, who was on the drafting committee for the French translation, noted that there were some differences in language between the meaning of “de grande ampleur” and large scale. He would agree to the suggestion of Mr *Tomuschat*, though he expressed some doubt as whether the Institute was covering what it wanted to because crimes against humanity constituted violations of fundamental human rights within the context of a widespread attack of the civilian population. But without a definitive understanding of attack, it was not clear whether isolated crimes would be sufficient for a humanitarian intervention.

Mr *von Hoffman* noted that if the Security Council was not referred to expressly in paragraph 2, then the paragraph left it open for unilateral action.

M. *Salmon* souhaite revenir sur le maintien de la référence au Conseil de sécurité dans le texte du projet de résolution. Il se joint aux observations de M. *von Hoffmann* et se rallie à la proposition de M. *Lee* d’insérer les termes « au titre de l’article 39 », ce qui permet de maintenir une référence non seulement au Conseil de sécurité mais aussi aux autres mécanismes prévus par la Charte.

M. *Ranjeva* indique qu’il était auparavant en faveur d’une référence au Conseil de sécurité, mais qu’il a maintenant changé d’avis. L’Institut n’a pas à dire au Conseil de sécurité ce qu’il a à faire ou à ne pas faire. Il suffit que le texte existant contienne déjà une référence claire et expresse à la Charte. La proposition de M. *Lee* risque de donner lieu à des problèmes d’interprétation qu’il vaut mieux éviter.

M. *Mahiou* est d’accord avec M. *Ranjeva* de ne pas citer le Conseil de sécurité, mais en revanche il estime nécessaire de se référer à l’article 39 de la Charte. Le seul texte qui traite de la menace contre la paix est l’article 39 de la Charte. La mention de la menace contre la paix dans le projet de résolution implique certes nécessairement une référence à l’article 39, mais la proposition de M. *Lee* reste intéressante car elle permet de clarifier cette référence, tout en évitant une mention directe du Conseil de sécurité.

Mrs *Xue* noted that it was problematic that particular criminal offences needed to be identified before the international community could take steps to end their occurrence. It should not be left to the Security Council to decide if particular

crimes were being committed, leaving a somewhat paradoxical situation.

M. *Momtaz* soutient le propos de M. Mahiou et indique qu'une référence à l'article 39 serait d'autant plus nécessaire que le paragraphe 3 du projet de résolution fait référence aux « organes compétents » des Nations Unies. Il ne faut pas oublier que l'Assemblée générale peut également agir dans certains cas, même si c'est au Conseil de sécurité que revient la responsabilité principale en la matière. Une référence à l'article 39 pourrait ainsi utilement servir d'introduction à l'article 3 du projet de Résolution.

M. *Marotta Rangel* revient sur la distinction entre crimes de guerre de « petite » ampleur et crimes de guerre de « grande » ampleur. Cette distinction est risquée et certains Etats pourraient s'en servir comme une excuse pour ne pas intervenir. Il souhaite donc l'insertion à l'article 2 du projet de Résolution d'une précision relative à cette distinction.

The *President* stated that it was necessary to vote upon the proposal to re-insert a reference to the Security Council.

Mr *Dinstein* suggested that, in order not to split the vote, the assembly should vote only upon Mr Lee's proposal of adding a reference to Article 39 of the Charter. This would also provide a good introduction to the next paragraph, and he urged the Rapporteur to accept it.

Mr *Reisman* noted that the draft circulated earlier had contained a reference to the Security Council and that this was removed pursuant to Mr Salmon's amendment. He stated that Mr Lee's suggestion as to the insertion of a reference to Article 39 of the UN Charter would be effective and would be consistent with paragraph 3.

M. *Salmon* soutient entièrement la proposition de M. Lee.

The *President* stated that the proposal was to keep the withdrawn reference to the Security Council and to add a reference to Article 39 of the UN Charter.

Mrs *Arsanjani* noted that the assembly may need to consider a qualification to crimes against humanity given the way that crimes against humanity are referred to in the statutes of international criminal tribunals or courts, which is to individual crimes.

Mr *Reisman* recalled that Mr Tomuschat had requested that "large scale" not be used to qualify crimes against humanity because these are always large scale. He suggested that this qualifying phrase "large scale" could be reintroduced in order to assuage the concern of Mrs Arsanjani.

The *President* announced the result of the vote on paragraph 2 as amended as 43 in favour, none against and 5 abstentions. He then opened the floor for comment on paragraph 3.

Mr *Reisman* noted that in light of the discussions of the morning, the reference that there be a reference to constitutional powers seemed to the sub-group to be

redundant because the word “competent” covered that.

Mr *Feliciano* asked the Rapporteur for some clarification as to whether paragraph 3 was intended to first require an opportunity for the competent organs to decide whether serious crimes were taking place before they took action.

Mr *Reisman* explained that this was the intention of the paragraph and the last part of the sentence made that clear. In addition, paragraph 1 emphasised that the responsibility for stopping the crimes from occurring was incumbent on the state upon whose territory they were occurring.

Mr *Feliciano* asked what would happen when the state on whose territory crimes were taking place did not have the resources to respond. Was there a requirement of exhaustion of means by the state?

Mr *Reisman* stated that the competent organs assumed responsibility only in circumstances in which the delicts had not been stopped. There was no intention to wrest responsibility from the primary state.

Mr *Koroma* made some suggestions to improve the text by having a definite article at the beginning of the text (i.e. “The competent organs”) and to include the words “large scale war crimes which have been perpetrated” rather than “have not been stopped” in the state. If the state did not stop the atrocities and they continued then the competent organs should take action.

Mr *Amerasinghe* noted that as a matter of consistency if paragraph 3 went with paragraph 2 then crimes against humanity should be qualified as large scale and then a comma would need to be inserted after “war crimes which have not been stopped”.

M. *Salmon* n'est pas certain que les termes « organes compétents » correspondent exactement au projet qu'il avait soumis en langue anglaise, et qui parlait de « constitutional powers ». En d'autres termes, il s'agit de demander aux organes concernés d'agir en utilisant tous les pouvoirs à leur disposition, et il y a là deux idées distinctes. D'une part, les organes ne doivent pas dépasser leurs pouvoirs constitutionnels et, d'autre part, ils doivent les épuiser. Ces nuances ont disparu avec l'utilisation du vocable de « organes compétents ». Il souhaite donc que sa proposition antérieure soit maintenue.

Le *Secrétaire général* exprime son soutien à M. Salmon.

M. *Salmon* indique qu'il est évident que les pouvoirs de chaque organe sont différents, mais qu'ils sont néanmoins importants ; il convient donc d'inciter chacun d'eux à les utiliser.

Le *Secrétaire Général* pense qu'il ne s'agit là que d'une question de rédaction.

M. *Ranjeva* exprime son accord avec M. Salmon. Il ne suffit pas de ne pas indiquer de quels organes il s'agit. La Cour internationale de justice, dans les affaires *Bréard et LaGrand*, a insisté sur l'obligation des organes de faire usage de

leurs compétences. L'Institut ne doit donc pas se limiter, de manière incantatoire, à viser les organes compétents ; il doit explicitement faire état d'une véritable « obligation d'agir ».

Mrs *Arsanjani* noted that there was a difference between “competent organs” and “organs of the United Nations”. “Competent organ” meant that an organ worked within its own sphere of authority as defined in its constitutive act. She understood that the “large scale” qualification of crimes against humanity would apply to paragraph 2 and proceeding paragraphs, but not to paragraph 1.

Mme *Bastid-Burdeau* se demande si le qualificatif de « prompt » concerne « l'action » ou « la fin du génocide ».

Mr *Tomuschat* proposed removing the reference to “large scale” given that UN organs should be concerned with all crimes against humanity even where they are not on a large scale. There was no need to add the additional qualification in this paragraph as there was in paragraph 2 which involved the Security Council.

Mr *Reisman* asked Mr Koroma to clarify his amendment to the paragraph, noting that he was not sure the amendment was necessary.

Mr *Koroma* stated that his proposal was to include the words “which have been perpetrated in the State”.

Mr *Reisman* did not have any problem with changing “by” into “in”. Mr Tomuschat's point was well-taken, although he found that it was a bit out of place in this draft Resolution which focused on genocide and large scale activities. Lowering the threshold should be avoided, whereby every human rights violation would be the subject of international organisational activity or unilateral action, so it was preferable to stay with the notion of large scale throughout the Resolution. In reference to Mr Salmon's point, he would have no objection to introducing language to the effect that the “competent organs should use all their constitutional powers”.

The *President* suggested that the various suggestions should be put to the vote. First, there was the suggestion that the word “in” substitutes “by”.

*Sir Kenneth Keith* had a point of order with respect to the exact proposal of Mr Koroma. In his view, Mr Koroma's proposal was to replace the phrase “which have not been stopped by the state” with “which have been perpetrated in the state”.

Mr *Reisman* stated that given where a state has failed to cease atrocities, there may be situations of genocide it was preferable to have the words “not stopped by the state”.

*Sir Kenneth Keith* clarified that he wanted to know if the proposal included the words “perpetrated in the state”.

Mr *Reisman* had no problem with this wording, though he underlined that the clause should not be limited to crimes committed by the State.

Mr *Hafner* expressed some confusion as to the meaning of “perpetrated in the State”.

Mr *Owada* noted that there was general confusion as to Mr Koroma’s proposal and how the Rapporteur had interpreted the proposal. He suggested that the emphasis of Mr Koroma’s proposal was on the fact that crimes were committed in a state, not on the fact that the state has not stopped the crimes happening. This change of emphasis would deprive the intention of the sub-group which was to focus upon the failure of the state to stop the crimes that leads to the authorisation for action to be taken.

Mr *Reisman* asked Mr Koroma whether, in light of the explanation given by Mr Owada, he was content with the language of the paragraph.

Mr *Koroma* stated that he was content with the language.

The *President* announced that the proposed amendment was thus withdrawn. He then noted the proposal of Mr Salmon to have the phrase “competent organs of the United Nations should use all the constitutional powers at their disposal to take prompt action”.

Mr *Reisman* read out the amended text of paragraph 3: “the competent organs of the United Nations should use all the constitutional powers at their disposal to take prompt action to put an end to genocide, large scale crimes against humanity, large scale war crimes or other serious violations of human rights which have not been stopped by state within whose jurisdiction or control they are occurring.”

The *President* asked the assembly whether the text was acceptable. He announced that all were in agreement. He stated that the sub-group would be asked to take guidance from the session. The Bureau would discuss the draft Resolution with Members of the committee.

La séance est levée à 16 h 00.

### **Neuvième séance plénière** – Vendredi 26 octobre 2007 (matin)

La séance est ouverte à 9 h 55 sous la Présidence de M. Orrego Vicuña sur le projet de résolution de la 10<sup>ème</sup> Commission, sous-groupe B. Vu l’absence du Rapporteur, M. Reisman, le Président a l’honneur de demander à M. Owada de prendre la place du Rapporteur.

Le *Président* annonce que le débat est arrivé au paragraphe IV.

#### **Revised draft Resolution**

- I. All States are under an obligation to prevent or promptly to put an end to genocide, crimes against humanity, war crimes and violations of human rights occurring within their jurisdiction or control.

- II. Genocide, crimes against humanity or large-scale war crimes should be considered as a threat to international peace and security.
- III. Competent organs of the United Nations should take prompt action to put an end to genocide, crimes against humanity or large-scale war crimes which have not been stopped by the State within whose jurisdiction or control they are occurring.
- IV. Actions to put an end to genocide, crimes against humanity, or large-scale war crimes shall be conducted in accordance with international law.
- V. If military action is taken, the sole objective of such action shall be putting an end to the genocide, crimes against humanity, or large-scale war crimes. International humanitarian law shall be strictly observed during and after the operation so as to secure the maximum protection of the civilian population.
- VI. There is currently no consensus with respect to the lawfulness of military actions which have not been authorized by the United Nations but which purport to have been taken to end genocide, crimes against humanity, or large-scale war crimes. In recent practice and doctrine, however, factors which have been mentioned as possibly justifying such actions have included:
  - (i) determination of facts by or under the auspices of international organizations that genocide, crimes against humanity, or large-scale war crimes were being committed but were not being stopped;
  - (ii) significant collective support for the action; and
  - (iii) the absolute necessity, as a measure of last resort, of taking such action.

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#### **Projet de Résolution révisée**

- I. Tous les Etats ont l'obligation de prévenir ou de mettre rapidement fin à un génocide, aux crimes contre l'humanité, aux crimes de guerre et aux violations des droits de l'homme survenant sous leur juridiction ou leur contrôle.
- II. Le génocide, les crimes contre l'humanité ou les crimes de guerre de grande ampleur devraient être considérés comme une menace contre la paix et la sécurité internationales.
- III. Les organes compétents des Nations Unies devraient agir rapidement afin de mettre fin à un génocide, aux crimes contre l'humanité ou aux crimes de guerre de grande ampleur auxquels l'Etat sous la juridiction ou le contrôle duquel ils surviennent n'aurait pas mis fin.
- IV. Les actions [mesures] visant à mettre fin à un génocide, aux crimes contre l'humanité ou aux crimes de guerre de grande ampleur seront conduites

[mises en œuvre] conformément au droit international.

- V. Si une action militaire est entreprise, son seul objectif sera de mettre fin au génocide, aux crimes contre l'humanité ou aux crimes de guerre de grande ampleur. Le droit international humanitaire sera strictement respecté pendant et après l'opération, afin d'assurer la protection maximale de la population civile.
- VI. A l'heure actuelle, il n'y a pas de consensus au sujet de la légalité des actions militaires qui n'ont pas été autorisées par les Nations Unies, mais qui prétendent avoir été prises afin [dont l'objectif affiché est] de mettre fin à un génocide, à des crimes contre l'humanité ou à des crimes de guerre de grande ampleur. Cependant, la pratique et la doctrine récentes ont fait état d'éléments pouvant justifier de telles actions, notamment :
- (i) la constatation, par ou sous les auspices d'une organisation internationale, que les faits génocide, crimes contre l'humanité ou crimes de guerre de grande ampleur sont commis mais qu'il n'y est pas mis fin ;
  - (ii) un soutien collectif significatif pour une telle action ; et
  - (iii) la nécessité absolue de prendre une telle action en tout dernier recours.

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Mr *Owada* began by noting that he had been asked temporarily to take over the position as Rapporteur of sub-group B on behalf of Mr Reisman.

He made some introductory remarks about the views of the sub-group on paragraph IV of the Resolution. While this paragraph had not precipitated a large number of problems in the general debate, there were two points that he wished to make. The first was that when discussion was had in the plenary on paragraphs I, II and III, the question of whether crimes against humanity should be qualified as 'large-scale' had arisen. Mr *Owada*'s understanding was that it was agreed that while there was no need to add the qualification to paragraph I of the Resolution, which referred to the general duty of states to prevent and put to an end such crime, paragraphs II, III and IV should indeed contain a qualification of 'large-scale' when referring to crimes against humanity. The reason for the difference was that in the latter cases, the Resolution was dealing with humanitarian action and intervention and therefore a higher threshold was required. The second point related to the plenary's previous discussion in which a suggestion had been made to change the phrase 'in accordance with international law' to 'in accordance with the United Nations Charter'. The sub-group had come to the decision to use the broader expression 'in accordance with international law' which would include those obligations arising under the United Nations Charter. Mr *Owada* then invited members to make comments.

The *President* thanked Mr Owada for his introductory remarks on the paragraph. He proceeded to ask the Members whether there were any views on this paragraph. Having received no indication of further comments from the floor, he announced that the paragraph was adopted. He then invited Mr Owada to make introductory remarks on paragraph V of the draft Resolution.

Mr *Owada* stated that he had some small comments to make from the viewpoint of the sub-group. He recalled that the introductory part of the paragraph had been changed from the previous draft which had provided 'Insofar as military action is required'. In accordance with the majority view of the sub-group, this had been changed to 'If military action is taken'. Secondly, he observed that crimes against humanity should also be qualified by the words 'large-scale' in this paragraph in order to be consistent with the previous paragraphs. Thirdly, the previous wording of 'International humanitarian law shall be applied' had been changed to "International humanitarian law shall be strictly observed".

The *President* thanked Mr Owada for his introductory comments and explanations and opened the floor for comment.

Mr *Gaja* called attention to the amendment that he had proposed for this paragraph. The purpose of this amendment, as was clear from the text, was to avoid the implication, that flowed from using the words "sole objective" that the Resolution ruled out any possibility of prosecuting the authors of the crimes. The proposed text was intended to remind states that there might be obligations relating to the repression of international crimes. Mr *Gaja* then read out the text of his amendment and stated that the new sentence should be placed between the first and second sentence.

Mr *Degan* stated that he was in agreement with the proposed amendment, however he was of the view that it should be placed at the end of the present text of paragraph IV and not between the first and second sentences.

Mr *Ress* stated that the point he wished to make had been covered by Mr *Degan*.

Mr *Kirsch* expressed his support for the amendment of Mr *Gaja* and for Mr *Degan*'s suggestion for its placement at the end of the paragraph. He raised the question of whether the qualification of 'large-scale' crimes against humanity was necessary given that such crimes by definition involved a widespread or systematic attack of the civilian population in pursuance of a policy of a State or organisation. This seemed to subsume the notion of large-scale, making further reference to the need for the crimes to be large-scale to be somewhat redundant.

The *President* asked Mr Owada whether he wished to comment upon the point raised by Mr *Kirsch*.

Mr *Owada* explained that in the discussion of the last meeting of the plenary the view had been expressed that apart from paragraph I, which dealt with a general statement, paragraphs II and III needed the qualification of "large-scale" in relation

to crimes against humanity for the reason that those paragraphs were not dealing with single acts of crimes against humanity, but an overall situation where there were massive violations of international humanitarian law and the commission of crimes against humanity, hence making the qualification of ‘large-scale’ crimes against humanity appropriate. In the sub-group, it was felt that this understanding was generally shared by the plenary.

Mr *Kirsch* noted that there was a distinction between crimes against humanity and war crimes on this issue. Moreover, paragraph II did not contain the qualification in relation to crimes against humanity. He drew attention to the example of the terrorist attacks of 11 September 2001 in the United States, which in his view also constituted crimes against humanity according to the definition he had previously cited, yet those attacks were only isolated acts. This suggested that the qualification of “large-scale” was redundant in the context of crimes against humanity. However, if the rest of the Members did not have a problem with the qualification, he would not press the matter further.

Mr *Treves* voiced his agreement with the amendment proposed by Mr Gaja and of the suggestion of Mr Degan as to its placement. He also tended to agree with the argument presented by Mr Kirsch in relation to the need for the qualification of crimes against humanity. He expressed some doubt as to the use of the adjective “strictly” in the third line of paragraph V. His impression was that if this word was deleted, there would be no damage to the paragraph and possibly some benefit as it would avoid any negative implication in terms of the need for the civilian population to be protected to the maximum extent possible.

Mr *Dinstein* considered that Mr Kirsch had raised an important point. However, he was not sure that the qualification “large-scale” was redundant in relation to crimes against humanity. While crimes against humanity must be part of a systematic and/or widespread attack on the civilian population, the notion of systematic only meant that the attack must be part of the policy of a State or organisation, while widespread merely refers to the geographic reach of the attack. Hence neither of these two notions conveyed the same sense as “large-scale”. He added that the case law of the International Criminal Tribunal for the Former Yugoslavia indicated that crimes against humanity also related to individuals (if the act is committed as part of a widespread or systematic attack against the civilian population).

Mr *Torres Bernárdez* des déclare d’accord avec la proposition de M. Gaja et estime aussi que l’amendement devrait se situer à la fin. Il est également d’accord sur la suppression du mot « strictly » et il s’interroge sur la pertinence de la référence à la « population civile ». D’après le texte, le droit international humanitaire doit être respecté strictement « so as to secure the maximum protection of the civilian population ». Selon M. Torres Bernárdez, il ne s’agit pas seulement de protéger la population civile, mais aussi les combattants et les installations visées par le droit international humanitaire. En se référant à la population civile uniquement, on

affaiblit le respect du droit humanitaire dans son ensemble. Il voudrait donc que l'on ajoute aux mots « droit international humanitaire » les mots « dans son ensemble ».

Mr *Degan* suggested that in the light of the negative experience of the NATO bombing against the former Yugoslavia, including Kosovo, the adjective “strictly observed” was necessary. The inclusion of the word “strictly” emphasised that the intervening states would not test new weapons in the battlefield under the guise of humanitarian intervention. He had proposed that particular amendment and would be grateful if it was adopted by the Institute.

Tout en étant favorable à l'amendement de M. Gaja, M. Bucher a des doutes sur l'opportunité d'utiliser l'adjectif « sole » pour qualifier le mot « objective » lorsque celui-ci est pris dans le contexte de la règle. Il se dit étonné que la règle ait seulement pour objectif de mettre fin au génocide, aux crimes contre l'humanité et aux crimes de guerre de grande ampleur. Dès lors que la deuxième phrase concerne la protection de la population civile, l'adjectif « sole » ne semble pas être à sa place. Il hésite cependant à soumettre un amendement formel dans ce sens, et aimerait entendre l'avis des Membres à ce sujet.

M. *Mahiou* souscrit à l'amendement présenté par M. Gaja, ainsi qu'à l'emplacement suggéré par M. Degan. Il est également en faveur du maintien du terme « strictement ». Enfin, il trouve la remarque de M. Torres Bernárdez utile. Lorsqu'il est dit dans le projet de Résolution « afin d'assurer la protection maximale de la population civile », on semble exclure les autres personnes visées par le droit international humanitaire. Il propose donc d'ajouter le mot « notamment » avant les mots « la protection de la population civile », ce qui était sans doute l'idée de la sous-commission.

Le *Président* donne la parole à M. Owada.

Mr *Owada*, in response to the proposal of Mr Bucher, explained that the purpose of the first sentence was to make clear that military actions had to be strictly confined to the purpose for which they had been adopted. The “sole objective” was thus important and notably had been in the draft since the beginning. With regard to Mr Mahiou's proposal to include the word “notamment”, the point was to make clear that international humanitarian law would be applied not only during the operation but also afterwards, the main objective being to protect the civilian population to the maximum extent possible. In this light, the inclusion of “notamment” would not damage the sentence, so it could be accepted, but this would be further discussed in the sub-group.

The *President* noted that there was still the question of whether the words ‘large-scale’ should be used to qualify crimes against humanity.

Mr *Owada* recalled that the sub-group had discussed this issue. Opinion in the sub-group had been divided because of the same arguments that Mr Kirsch had

presented. Some had taken the position that there was no need to qualify crimes against humanity as “large-scale”. The sub-group had ultimately come to the conclusion shared by Mr Dinstein that those paragraphs were not dealing with isolated acts that amounted to crimes against humanity, but rather large-scale crimes against humanity that could invite military action from third states and for that reason the wording “large-scale” was accepted. The text had been subject to a considerable amount of discussion on this point, but the sub-group remained at the disposal of the plenary.

The *President* stated that there was a need to decide upon two issues in respect of the first sentence. The first was whether the word “sole” was kept or not. As Mr Bucher did not insist upon this deletion, the President stated that the word was retained. Secondly, it was necessary to decide if the words “large-scale” should be used to qualify crimes against humanity. He asked the members to vote upon this amendment.

Le *Secrétaire général* annonce que le résultat du vote est le suivant : 23 pour, 4 contre et 11 abstentions.

The *President* stated that the amendment was thus retained. He further noted that it was necessary to decide on whether Mr Gaja’s amendment should be included as a second sentence as had seemed to be generally accepted from the morning’s debate.

Mr *Gaja* was of the view that this amendment would be best inserted as a second sentence, but since the majority of members appeared to prefer placing it at the end of the paragraph, he would accept this, though he noted that some further drafting might be required as a result.

The *President* asked Mr Owada to examine how this amendment could be placed at the end of the paragraph. He proceeded to move to the question of whether the word ‘strictly’ was to be retained or deleted from the last sentence. He recalled that Mr Owada had outlined the reasons for retaining the word ‘strictly’. He asked the Members to vote on this point

Le *Secrétaire général* annonce que le résultat du vote est le suivant : 22 pour, 10 contre et 10 abstentions.

The *President* stated that the word “strictly” was thus retained. The President then asked Mr Mahiou whether his proposal to include the word “notamment”, which in English might be translated as ‘in particular’, referred to last part of the sentence just before “afin d’assurer la protection maximale de la population civile”.

M. *Mahiou* répond par l’affirmative.

Mr *Tomuschat* raised a drafting point in English with regard to the phrase ‘so as to secure the maximum protection of the civilian population’ and suggested that the definite article was not necessary.

The *President* responded that this would be taken up by the drafting committee. He proceeded to ask the members to vote upon whether to insert the word “notamment”.

Le *Secrétaire général* annonce que la proposition est adoptée par 32 pour, 1 contre et 4 abstentions.

The *President* stated that the word “notamment” would be inserted. He then invited Mr Owada to make introductory comments upon paragraph VI.

Mr *Owada* first observed that this paragraph was the most difficult paragraph of the draft Resolution. He made one general comment on the viewpoint of the sub-group.

Everyone was aware that this was a delicate, controversial and difficult program for the draft Resolution. Opinions were divided as to the substance of the matter. The question was whether, despite those differences of opinion on the substance, the sub-group was nonetheless able to come up with a formulation that would satisfy the majority of the members of the plenary session and would still be a meaningful resolution of the Institute. The text of paragraph VI reflected the best efforts of the sub-group to achieve that objective. The point Mr Owada wished to make was that while some members wanted to emphasise the second sentence of paragraph VI which suggested that there might be an emerging norm of international law as derived from recent practice and doctrine, others were of the view that this was not the right direction to follow and that there was not an emerging rule in that context. Behind this divergence of views, there was the dilemma that had already been discussed, namely that on the one hand there was the fear of states abusing a right of humanitarian intervention and on the other hand, the need for some action to be taken when massive human rights violations and breaches of international humanitarian law were taking place. The resulting text was a compromise between those two positions. The emphasis was placed on the fact that there was currently no consensus on the issue. The existence of recent practice and doctrine on the issue was stated in the second sentence. That was what the sub-group had decided to produce.

Having given some general background on the paragraph, Mr Owada then made three drafting comments. First, he noted that from the viewpoint of consistency, there was a need to use the qualifying words ‘large-scale’ before crimes against humanity in line 3 of paragraph VI and in sub-paragraph (i). The sub-group had not reached a concrete conclusion on that point. Second, he recalled that in the earlier draft, a slightly different expression had been used instead of ‘factors which have been mentioned as possible’. The previous draft had provided ‘factors justifying such actions’. Mr Reisman had explained that the latter expression was not synonymous with factors deemed to justify such actions, but rather meant that such factors had been mentioned as possible justifications. In order to leave no ambiguity in this respect, the language had been changed to the present text. Mr

Owada observed that certain amendments to the paragraph had attempted to move the position of the Resolution in one way or the other. The sub-group had decided to take a neutral position. Without commenting upon the rightness or wrongness of these factors, the paragraph merely affirmed that certain factors had been mentioned as justifying military actions. Third, three sub-paragraphs had been introduced to the paragraph. While all the points contained in these sub-paragraphs had been included in the earlier draft paragraph, it was decided in the sub-group to separate these into three sub-paragraphs for reasons of drafting.

Finally, Mr Owada underlined that it was necessary to discuss the basic issue of which direction the Institute wanted to go on this issue. The general debate indicated that opinion remained divided. The sub-group had opted for a course of action that did not adopt a particular position. However the members would need to decide whether such an approach was sufficiently meaningful for the Institute.

The *President* thanked Mr Owada for his introductory remarks and agreed with Mr Owada that it was not opportune to open a general debate on the issue, but rather it would be best for the members to address themselves to specific questions.

In view of the fact that there was no consensus on the matter, the *President* suggested that an alternative approach was possible. Given that paragraph VI dealt with an exception to the rule on the use of force as set out in the UN Charter, it might be appropriate to refer this issue to the sub-group dealing with the authorisation of the use of force under the United Nations Charter, that is, the group led by Mr Vinuesa. It made sense that if there was a project dealing with certain principles and rules that would also be the place to consider any exceptions to the rules. That would mean that in this Resolution, a reference could be made to the fact that the Institute had discussed the matter and had decided to refer it to a different sub-group. This would be a way to avoid forcing a decision on this point while still giving it some thought. The discussion about this Resolution would also benefit the sub-Group in their work.

Mr *Vinuesa* thanked the *President* for his suggestion and agreed that there was a tremendous overlap in paragraph VI with the work of sub-commission on “L’*autorisation du recours à la force par les Nations Unies*”. The current issue was an exception to the topic. Whilst he was not advocating the deletion of paragraph VI, he did support the idea that it should be considered by the other the sub-Group and therefore encouraged deferring consideration of the present paragraph.

Mr *Lee* thought that two issues should be borne in mind. Firstly the word “consensus” which may mean an agreement but it may also, as Mr Lee understood it, mean a very high degree of agreement, in which case the qualification was far too high. Secondly Mr Lee identified three categories in relation to “authorised” or “unauthorised” actions: those which were unilateral; those which were undertaken by a coalition; and those undertaken by regional organizations. It was important to

distinguish the three categories as there was less consensus on the first and more on the second and third. This should be properly taken into account in the Resolution and there should perhaps be further discussion on the first category relative to unilateral action.

Mr *Schwebel* was of two minds regarding the paragraph. He could see some advantage in deleting it altogether. If this were not acceptable, the draft could be improved by the following amendments: instead of "consensus with respect to" in line 1, one could insert "international agreement upon". In line 2 where it stated "to have been", one could substitute "seen as justified". The word "mentioned" was inappropriate, as too casual. He objected also to the words "possibly justifying": either it justified action or it did not. The simplest formulation was "factors seen as justified". Regarding paragraph VI sub-paragraph (iii), Mr *Schwebel* objected to the reference to "absolute necessity" and would have preferred in its place "absolute humanitarian necessity", since surely that was the only thing that the sub-Group had in mind.

Mr *McWhinney* stated that when the first version of paragraph VI had appeared he had commented that he thought that it should be deleted, since it was argumentative. He noted Mr *Owada's* attempts to facilitate approval of the text which was now less objectionable in terms of style and legal drafting. However, hesitant as to whether there was enough time for more debate, Mr *McWhinney* now thought the paragraph should be transferred to Mr *Vinuesa's* sub-Group. This would allow for further consideration but it also provided an opportunity to revive a former Institut practice of inviting non Members of the Commission to submit written comments. Now was not the time to reach a consensus on the text under consideration.

M. *Remiro Brotons* dit qu'à son avis le paragraphe VI n'est pas une bonne politique législative. L'intervention d'humanité était bien connue lorsqu'on parlait de pays « civilisés » ; il s'agissait surtout de couverture pour les interventions des grandes puissances et n'avait rien à voir avec l'humanité. Aujourd'hui on essaie de profiter d'un sentiment d'intérêt public pour faciliter des objectifs d'une autre nature. On parle d'éthique ou de morale qui gouverne la décision d'intervenir dans des circonstances très diverses. Aujourd'hui personne ne veut aller au Darfour, même avec le consentement du Conseil de Sécurité. Le succès n'accompagne pas toujours les interventions armées et une intervention aggrave souvent une situation, comme cela s'est produit au Kosovo. Ce n'est pas l'article 2 paragraphe 4 de la Charte des Nations Unies qui doit payer les fautes du Conseil de Sécurité. Il faudrait plutôt réviser d'autres articles de la Charte. On ne peut pas violer les droits fondamentaux d'un groupe pour protéger un autre.

Selon M. *Remiro Brotons*, on devrait considérer l'intervention d'humanité sous un autre angle, à savoir celui de la responsabilité de l'Etat ou des Etats intervenants. Il souhaite la suppression du paragraphe VI et suggère de laisser la question ouverte

pour la sous-commission Vinuesa.

Mme *Bastid Burdeau* note que le paragraphe VI dans sa version actuelle mentionne les justifications qui pourraient être avancées pour justifier une intervention, mais que les conditions du déroulement de l'intervention ne sont pas évoquées. Pour cette raison elle soutient également le renvoi du paragraphe VI à la sous-commission Vinuesa.

Mrs *Infante Caffi* also favoured the subject's referral to Mr Vinuesa's sub-Commission. In addition she preferred "agreement" to "consensus" if paragraph VI were to be kept. She disapproved of the distinction between "unilateral" and "collective" humanitarian intervention and indicated that this should be clarified as soon as possible.

Mr *Tomuschat* considered that the Resolution should either include paragraph VI or be completely eliminated because it made no sense as a Resolution without that paragraph. He argued that it was precisely when there was individual intervention by a state or group of states that the lawfulness of humanitarian intervention arises. Therefore if the Resolution did not consider that contingency, it was left with no meaning whatsoever. He observed that paragraph VI did not caution against humanitarian intervention or vice versa, but it merely stated that there was no agreement about its lawfulness. He understood that there were many traumas of the past with regard to military interventions, but he underlined that in the current world human rights had a new meaning. He reminded the members about the atrocities committed by the Nazi regime before and during World War II in order to emphasise the danger of states not having the tools to respond in time to such crimes. It was not possible to rely on the Security Council to always take appropriate measures. Hence, it was necessary for the Institute to say something about the issue. He agreed largely with the comments of Mr Schwebel in that it was better to use the words 'no international agreement' rather than 'no consensus' to make it clear that there was no consistent *opinio juris* among nations, rather than no consensus among members. He found the wording of the second sentence "but which purport" to be a bit clumsy. He also expressed his preference for the word "invoked" rather than 'seen' in the fourth line as had been proposed by Mr Schwebel. He agreed with Mr Schwebel that the word "possibly" had to be deleted, so that the phrase would read, 'factors that have been invoked as justifying.' In addition, he agreed with Mr Schwebel's proposal to refer to "absolute humanitarian necessity" in sub-paragraph (iii).

M. *Rigaux* attire l'attention sur le fait qu'il a déposé un amendement tendant à la suppression de la seconde phrase qui commence avec le mot "cependant", estimant qu'elle est en contradiction avec la première phrase. Si on admet la formation d'une coutume autorisant l'intervention d'humanité unilatérale, cela serait contraire aux exigences de la Charte des Nations Unies. Il souhaite donc la suppression de la deuxième phrase. Il préférerait encore la suppression de tout le paragraphe, mais il

ne resterait alors plus grand chose à la résolution.

Mr *Cançado Trindade* was of the view that if there was no consensus on the aspects of the matter at issue dealt with in paragraph VI of the presently revised draft Resolution, there appeared to be no compelling reason for paragraph VI to be retained. Instead, paragraph VI should be deleted. Furthermore, the title of the presently revised draft Resolution, 'humanitarian intervention', did not faithfully reflect the contents of the revised draft Resolution, as it now stood. Nowhere in the revised draft Resolution did the word "intervention" – remindful of a sombre history and of a sad memory – of multiple victims of unwarranted recourse to force – appear. The revised draft Resolution expressly spoke of "actions" in paragraphs IV and V. As indicated by some *confrères* and *consoeurs* on the first day of general discussions on this matter, there seemed to exist cogent reasons for titling the presently revised draft Resolution "collective humanitarian action" instead of "humanitarian intervention". This would be more in keeping with the international rule of law, and with the relevant provisions of the United Nations Charter itself.

M. *Ranjeva* dit que la première phrase ne répond pas à sa préoccupation soulevée antérieurement qui est de faire la distinction entre ce qui est droit, ce qui est sanction de l'illégalité, et le problème de la responsabilité. Si l'Institut veut quelque chose sur l'intervention unilatérale, même humanitaire, il faut commencer par dire que c'est illégal. Ce n'est que dans une deuxième phrase qu'il faut admettre qu'il y a effectivement débat. Enfin, M. *Ranjeva* estime que le paragraphe devrait être renvoyé à la sous-commission Vinuesa.

Mr Owada stated that he would not respond to all the questions, but would focus on some drafting suggestions made from the viewpoint of sub-group B. There was a fundamental policy decision to be taken in accordance with the suggestion of the President. Three points on the drafting were made. One was the question raised by Mr Lee about the distinction between the different types of situations. On the issue of unilateral actions, it was felt that unilateral action was not a controversial problem; the issue lay more with the actions of regional organisations or alliances, which was why the reference to unilateral action was removed. The second point was that, from the view of the sub-group, the word "consensus" could be misinterpreted. This was not supposed to refer to the consensus of members, but of the international community. Mr Schwebel's proposal was a good one in this respect and would be taken into account. The third point related to the formulation that the sub-group had decided to adopt in order to eliminate the misunderstanding about the phrase 'factors justifying such actions'. The suggestions of Mr Schwebel and Mr Tomuschat might provide a solution to this. He also noted that an earlier draft had used the word "invoked", which could be reinserted if decided by the drafting committee. That should avoid any suggestion that these factors were part of an emerging rule of international law. He agreed that the insertion of the word "humanitarian" in sub-paragraph (iii) would make it clearer what sort of absolute

necessity was being referred to. With respect to the question of the Resolution's title, he recalled that the issue had been discussed in earlier sessions in which it had been said that the title "Collective Humanitarian Action" was preferable to "Humanitarian Intervention". Whether the word "collective" was necessary was debatable; the title could refer simply to "Humanitarian Action". The word "intervention" had certain political implications and historical underpinnings which needed to be considered. The sub-Group would consider alternative titles.

Mr *Dinstein* raised a point of order as regards the procedure to be followed. He suggested that votes should be taken in three sequential stages. First, the assembly ought to decide whether to transmit paragraph VI to a new commission. If so, that would be the end of matter. If the proposal is defeated, a second vote would be called for. This time the vote should be on the proposal by Mr McWhinney to delete from the Resolution paragraph VI in its entirety. Again, if so decided, that would be the end of the matter. A third vote should be in order only if the two other proposals are defeated. That would be on the motion by Mr Rigaux to delete the second sentence. If, and only if, all three proposals are defeated would there be any point in proceeding to vote on the text of paragraph VI with all the amendments attached thereto.

The *President* stated that the suggestion of Mr Dinstein was very practical.

He took up the suggestion of Mr Dinstein to vote first on the question of whether paragraph VI should be referred to the sub-group dealing with the use of force authorised by the United Nations so that the rule was discussed conjointly with the exception. If that proposal were accepted, then there would be a need for a reference in the present Resolution stating that the matter had been referred to the other sub-Group. This would not prejudice the substance of the issue. He proceeded to ask the members to indicate whether they were in favour of referring paragraph VI to the sub-Group on the United Nations.

Le *Secrétaire général* annonce que le résultat du vote est le suivant : 22 voix pour, 10 contre et 6 abstentions.

Le *Président* déclare que le paragraphe VI est dès lors renvoyé à la sous-commission Vinuesa.

Mr Owada recalled that he had responded to the suggestions that had been made about paragraph VI. He interpreted the decision just voted upon to mean that the draft Resolution still stood except for paragraph VI which would be transferred to another sub-group, so that sub-group B would continue to work on the text of paragraphs I to V of the draft Resolution. It was necessary to ask the plenary whether a reference to that decision to refer paragraph VI to the other sub-group should take the place of paragraph VI.

The *President* affirmed that the interpretation of Mr Owada of the decision taken was correct. The Resolution stood for paragraphs I to V. In respect of

paragraph VI, he asked Mr Owada to suggest a short sentence to convey that the matter had been taken up by the plenary and it was decided to refer the issue to the sub-Group dealing with the use of force authorised by the United Nations.

Mr *Gaja* suggested that, in view of the further work to be undertaken by the sub-group, it might be appropriate to include in paragraph IV a reference to the fact that the lawfulness of those actions not authorised by the United Nations would be dealt with by another sub-Group. Otherwise, the text of paragraph IV might suggest that military action could be taken because paragraph V talked about military action without any reference to an authorisation of the United Nations.

Mr *Owada* suggested that if Mr *Gaja* had a concrete formulation then this would be taken down by the sub-Group.

Mr *Kirsch* requested some clarification as to the title of the draft Resolution, noting that if paragraph VI were removed, then “Humanitarian Intervention” was not the appropriate title.

Mr *Pocar* stated that in light of the decision that had been taken – the interpretation of which he did not wish to challenge – he wondered whether it was wise to proceed with the Resolution without paragraph VI, which was extremely important in the structure of the Resolution. The remaining parts of the Resolution merely restated the law. It might be better to keep the Resolution in abeyance until the Vinuesa sub-Group had completed its work. The situation faced by the Institute could have been anticipated given the decision to have four sub-groups on a similar topic. The wisest approach would be to wait until the question had been clarified and then to re-appraise what to do and where to put the conclusions of the sub-group.

Mr *Degan* fully supported the suggestion of Mr *Pocar*. He stated that if this suggestion was not adopted then he would abstain from the rest of the Resolution, which in his view was very empty.

The *President*, in response to the suggestion of Mr *Pocar*, expressed the view that to the extent that the sub-group would propose language by which it would connect the Resolution to the work of the sub-group dealing with the United Nations, the Resolution still made sense. It contained rules which all were agreed upon, including the general obligation to prevent and put to an end acts of genocide and other serious international crimes, the principle that international law is to be applied, and the principle that the competent organs of the United Nations should take prompt action. These were all meaningful statements in themselves. The only question pending was the issue dealt with in paragraph VI which was being referred to the other sub-Group.

M. *Ranjeva* déclare partager le point de vue du Président. Il faut faire confiance à la sous-commission pour dégager les points importants et les répartir aux paragraphes pertinents. Quant aux points de désaccord, il faut laisser au sous-

groupe le soin de les traiter dans le sens le plus approprié.

Mr *Tomuschat* was of the view that paragraphs IV and V were intimately linked to paragraph VI. If paragraph VI was referred to the other sub-Group, this Resolution might appear as though the Institute was authorising unilateral humanitarian intervention. In this light, paragraphs IV, V and VI should all be referred to the other sub-Group. This would only leave paragraphs I to III which merely repeated the principles set out by the Responsibility to Protect summit meeting. He suggested that the members should wait before proceeding to adopt the rest of the Resolution.

M. *Torres Bernárdez* comprend M. Tomuschat, mais n'est néanmoins pas d'accord avec lui. Pour M. Torres Bernárdez, les paragraphes I à V ont du sens. Il y a peut-être des problèmes de rédaction avec le paragraphe V, mais il s'agit là d'une question qui relève du comité de rédaction.

M. *Ress* comprend la position de M. Tomuschat et c'est pour cette raison qu'il tient à souligner la proposition du Président qu'il fallait, soit dans un nouveau paragraphe VI mettre la référence à la sous-commission Vinuesa, soit au paragraphe IV - comme l'a proposé M. Gaja – mentionner que l'Institut a pris note du sujet mais qu'il n'est pas entré dans la substance dans cette Résolution. Il est donc absolument nécessaire d'avoir la référence soulevée par M. Tomuschat.

M. *Conforti* comprend M. Tomuschat, mais il estime qu'il serait plus simple de dire dans le paragraphe IV ou le paragraphe V qu'il s'agit d'actions « authorised by the competent forum of the United Nations to put an end ». Il en ressortirait que la résolution ne porte pas sur l'action unilatérale.

Mr *Hafner* shared to a certain extent the concerns of Mr Tomuschat in the interpretation of paragraphs IV and V without paragraph VI. There was a need to make clear that these two paragraphs did not prejudge the lawfulness of actions not authorised by the United Nations.

The *President* noted that his reading of some of the interventions was that some members were trying to reintroduce by the back door what had been left out by the front door. He suggested that Mr Owada and the sub-Group work on the wording for paragraph VI in a way that would ensure that the previous paragraphs made sense. It was important not to prejudge the issue. All the records of the amendments and discussion thereof should be considered by the sub-group so that they had a full background which to take a position against.

Mr *Lee* requested a clarification as to whether it was in the practice of the Institute in such circumstances where part of a Resolution has been referred to another sub-group to have a different title for the draft Resolution which would reflect the first five paragraphs.

The *President* stated that this suggestion was appropriate and could be looked at by the sub-group.

Mr *Owada* stated that the discussion had been extremely helpful for the sub-group. He had wanted to confirm the decision on referring paragraph VI to the other sub-group and the meaning of that decision in order that the work of sub-group B could continue with clear instruction. It was confirmed that the plenary had decided to omit paragraph VI from the draft Resolution while keeping intact paragraphs I – V in the form of the draft Resolution to be finalised by the sub-Group. The other question was whether the draft Resolution as drafted in this fashion could stand on its own and be meaningful in content as raised by Mr Degan. That point had to be clarified, either by vote or by the general will of the plenary. Otherwise sub-group B could not function properly. He understood from the instruction of the President and the plenary as shown in the decision that the sub-group would finalise and refine the text of the revised draft Resolution from paragraphs I to V as it stood. His suggestion, pursuant to the proposal made by Mr Gaja, was to add a new paragraph VI that would state that ‘this Resolution is without prejudice to the question of the lawfulness of military action not authorised by the United Nations’ and then add a footnote that would state ‘the question of the lawfulness of the military action not authorised by the United Nations will be addressed by the Institute in another Resolution’. Mr *Owada* stated that this was his preference because the footnote would serve as a useful reminder but it would sound somewhat odd as part of the Resolution. Another possibility was that suggested by Mr Tomuschat that the adoption of the Resolution (paragraphs I-V) be deferred until there was more discussion on the issue. As for the suggestion of Mr Ranjeva, the sub-group was not able to comply with the request, but hopefully the procès-verbal would clearly record the arguments made during the session.

The *President* noted that the suggestion of a reference to the decision made to refer the issue to another sub-group would be necessary in one way or another, so long as the ‘without prejudice’ clause really did mean that there was no prejudice to the issue. He further stated that the sub-group would probably need to examine the question of the title of the Resolution which would relate to paragraphs I to V of the Resolution, again without prejudicing the outcome of what happened to paragraph VI.

The session was closed at 12.25 p.m.

### **Dixième séance plénière** Vendredi 26 octobre 2007 (après-midi)

La séance est ouverte à 17 h 05 sous la présidence de M. *Orrego Vicuña*. En l’absence du rapporteur, M. Reisman, le Président invite M. *Owada* à présenter le deuxième projet de résolution révisée.

#### **Revised 2 Draft Resolution**

- I. International law provides for the right of each individual for 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 to put an end to genocide, crimes against humanity, war crimes and violations of human rights, 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 constitutional 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 stopped 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.
- V. If military action is taken, the sole objective of such action shall be putting an end to the genocide, large-scale crimes against humanity, or large-scale war crimes. International humanitarian law shall be strictly observed during and after the operation, in particular, so as to secure maximum protection of the civilian population. This is without prejudice to any obligation existing with regard to the repression of international crimes.
- VI. This Resolution is without prejudice to the question of the lawfulness of military actions which have not been authorized by the United Nations but which purport to have been taken to end genocide, large-scale crimes against humanity, or large-scale war crimes.\*

\* The question of the lawfulness of military actions which have not been authorised by the United Nations will be examined by the Institute in a subsequent session.

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### **Deuxième projet de résolution révisée**

- I. Le droit international consacre le droit de chaque personne à la protection de la vie humaine et de la dignité humaine contre le génocide, les crimes contre l'humanité et les crimes de guerre. Chaque Etat est obligé de prévenir ou de mettre fin sans attendre au génocide, aux crimes contre l'humanité, aux crimes de guerre et aux violations des droits de l'homme se produisant sous leur juridiction ou leur contrôle.
- II. Le génocide, les crimes contre l'humanité de grande ampleur ou les crimes de guerre de grande ampleur devraient être considérés comme une menace à la paix et à la sécurité internationales, conformément à l'article 39 de la Charte des Nations Unies.

- III. Les organes compétents des Nations Unies devraient user de tous les pouvoirs constitutionnels dont ils disposent pour prendre les mesures afin de mettre fin au génocide, aux crimes contre l'humanité de grande ampleur ou aux crimes de guerre de grande ampleur auxquels l'Etat sous la juridiction ou le contrôle duquel ils surviennent n'aurait pas mis fin.
- IV. Les mesures prises afin de mettre fin au génocide, aux crimes contre l'humanité de grande ampleur, ou aux crimes de guerre de grande ampleur seront mises en œuvre conformément au droit international.
- V. Si une action militaire est entreprise, son seul objectif sera de mettre fin au génocide, aux crimes contre l'humanité de grande ampleur, ou aux crimes de guerre de grande ampleur. Le droit international humanitaire sera strictement appliqué pendant et après l'opération, en particulier de manière à assurer la protection maximale de la population civile. Ceci est sans préjudice de toute obligation existante relative à la répression des crimes internationaux.
- VI. Cette Résolution est sans préjudice de la question de la licéité des actions militaires qui n'ont pas été autorisées par les Nations Unies, mais dont l'objectif affiché est de mettre fin à un génocide, à des crimes contre l'humanité de grande ampleur ou à des crimes de guerre de grande ampleur\*.

\* La question de la licéité des actions militaires qui n'ont pas été autorisées par les Nations Unies sera examinée à une session ultérieure de l'Institut.

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Mr *Owada* introduced the revised draft Resolution by insisting that it was in line with what had been decided in the morning. He regretted that he would have to leave later that day and that the Resolution would therefore have to be adopted before the end of that day. The Sub-group had met at lunchtime and inserted in the draft Resolution all the points that had been agreed upon in principle in the morning. Mr *Owada* hoped that this new text was a good reflection of what had been decided and proceeded to comment the title and each paragraph.

The title of the draft Resolution had been changed to the more neutral form of "Humanitarian Action". The French version of the text did not yet reflect that change because the Sub-group had failed to find a proper French equivalent in the limited time afforded to it. Mr *Owada* proposed that the matter be sent to the drafting committee.

The new paragraph I incorporated both the earlier version of paragraph I and the amendment adopted the day before, i.e. "every State is". The Members had earlier adopted the proposal made by Mr *Bucher* as paragraph Ibis but the Sub-group had chosen to make it the first sentence of paragraph I. Mr *Owada* suggested to delete the words "and violations of human rights" but noted that the words "within its

jurisdiction or control” would be maintained in any case.

The *President* suggested that, in order to speed up the process, the Members should make an immediate decision regarding the new title “Humanitarian action”. He asked whether any Member had an objection. No objection was raised and the new title was considered adopted.

The *President* further indicated that the Members had to make a decision regarding the deletion of the words “violation of human rights”. He asked whether that proposal would be totally unacceptable for any Member and suggested that, otherwise, it be accepted as the lowest common denominator acceptable to all.

M. *Tomuschat* suggère de remplacer les termes « right of » par les termes « right to ».

Mr *Schwebel* suggested that the first sentence should read “embodies the right of each” instead of “provides for the right of each”.

Mr *McWhinney* said that the French word “consacre” was stronger and better than the English words “provides for” and that the same idea should be reflected in the English text.

Mr *Owada* replied that the Members had already voted on the proposal made by Mr *Bucher*, i.e. the first sentence of paragraph I and that the other issues should be sent to the drafting committee.

The *President* agreed that such matters of form should be sent to the drafting committee and declared paragraph I adopted.

Mr *Owada* read out paragraph II and indicated that the text had not been altered since the original version presented by the Rapporteur.

No objection was made and the *President* declared paragraph II adopted.

Mr *Owada* read out paragraph III and indicated that it reflected what had been agreed upon in the morning.

Mr *Tomuschat* regretted that the French text “prendre les mesures” did not correspond to the English text “to take prompt action”.

M. *Audit* propose la formulation alternative de : “pour agir rapidement aux fins de”.

Le *Président* précise que ces questions seront réglées par le comité de rédaction et déclare le paragraphe III adopté.

Mr *Owada* read out paragraph IV and indicated that it reflected what had been agreed upon that morning.

M. *Ranjeva* avait cru comprendre que le terme “actes de génocide” serait généralement préféré au terme « génocide » dans l’ensemble de la résolution, notamment aux paragraphes II à IV.

Mr *Owada* acknowledged that this point had been raised earlier and was a valid remark. The International Court of Justice usually employed the term “acts of genocide”, but it would be incumbent upon the drafting committee to decide on that issue.

Le *Président* déclare le paragraphe IV adopté.

Mr *Owada* read out paragraph V and indicated that the new version included the amendment proposed by Mr Gaja earlier that day: “This is without prejudice to any obligation existing with regard to the repression of international crimes.”

Mme *Bastid-Burdeau* regrette le choix des termes “sans préjudice » et propose par ailleurs de fusionner cette dernière phrase avec la phrase précédente en remplaçant le point par un point-virgule. Elle propose également le terme français de « respecté » au lieu d’« appliqué ».

Mr *Owada* stated that merging the amendment of Mr Gaja with the preceding sentence would substantially alter the meaning of that amendment. He therefore asked Mr Gaja for his view.

Mr *Gaja* déclare qu’il ne faut pas lier les deux phrases car son amendement se rapporte à l’ensemble du paragraphe, et non pas à la seule phrase précédente. Il est opposé à la proposition faite par Mme Bastid-Burdeau.

Mr *Schwebel* did not understand at all the relevance of that last phrase and favoured its deletion.

Mr *Owada* noted that the confrères had already voted on, and adopted, that phrase and he did not think that this remained an open question.

Le *Président* confirme que l’amendement de M. Gaja a été adopté lors de la séance de la matinée, mais demande que l’objection de M. Schwebel apparaisse dans le procès-verbal.

Mr *Schwebel* was confident that Mr Gaja would explain to him the meaning of the phrase but was still certain that future readers would be baffled.

M. *Tomuschat* pense que les termes “in particular” sont mal placés et ne comprend pas à quel membre de phrase ils se rapportent. Il lui semble également que la proposition de M. Mahiou était « notamment » et non « en particulier ».

Mr *Owada* agreed with Mr Tomuschat and proposed that the words “en particulier” be replaced by the word “notamment”, in accordance with the proposal made earlier by Mr Mahiou. He further acknowledged that the words “in particular” could be moved elsewhere in the English version.

M. *Mahiou* soutient la deuxième proposition de M. Owada, qui correspond à sa suggestion initiale.

Le *Président* constate que le paragraphe V est adopté.

Mr *Owada* read out paragraph VI and hoped that it reflected what had been agreed upon in the morning. It had been decided that the original paragraph VI be omitted and further discussed in a later Session. However, the Sub-group proposed that new paragraph VI mentioned the substance of the matter but not the procedural issue of when the matter would be further addressed. The Sub-group therefore proposed that new paragraph VI state that the Resolution is without prejudice to the substantial question and that a footnote be added to the effect that the issue would be dealt with in a later Session. Mr *Owada* was keen to hear feedback from Members on this proposed course of action.

Mme *Bastid-Burdeau* n'a pas d'objection quant à l'économie générale de ce paragraphe et à la distinction introduite entre les problèmes de substance et de procédure. Elle craint néanmoins que la formulation retenue de « légalité de l'action militaire » ne préjuge de la qualification d'une telle action.

M. *Rigaux* n'a pas non plus d'objection sur le fond du nouveau paragraphe VI, mais pense qu'il serait plus approprié d'intégrer ces éléments dans un préambule. Il ne lui semble pas logique qu'une résolution évoque un point sur lequel l'Institut n'a pas pris de décision.

Mr *McWhinney* saluted the very fine job done by the Sub-group and the lapidarian quality of paragraphs I to V. However, he had never been in agreement with inserting the last sentence of paragraph V and proposed that that sentence be put in a new section together with the new proposed paragraph VI.

M. *Remiro Brotons* craint, avec Mme *Bastid-Burdeau*, que la formulation du paragraphe VI ne préjuge de la légalité des actions militaires concernées. Il serait en faveur d'une suppression du paragraphe VI et de la création d'un préambule, comme proposé par M. *Rigaux*.

Mr *Lee* expressed reservations on the drafting of paragraph VI, especially on the use of the words « without prejudice ».

M. *Ranjeva* remercie le sous-groupe pour la qualité et l'étendue de ses efforts, mais demeure en désaccord avec le texte final. Il trouve étrange d'arriver à un constat de carence dans le texte d'une résolution de l'Institut. Sur le fond, l'emploi du terme « licéité » lui semble par ailleurs extrêmement problématique, comme l'a souligné Mme *Bastid-Burdeau*. Il propose une formule plus simple pour le paragraphe VI qui serait : « la question des actions militaires [...] ne fait pas partie de la présente résolution ». La formulation actuelle lui semble préjuger de la licéité de telles actions, alors que le texte de la résolution devrait tendre à éviter tout problème d'interprétation.

Mr *Ress* said that, after that morning's discussion, he was personally rather happy with the result of paragraph VI. He would not propose to put this text in the preamble because it would weaken the Sub-group's decision and he would therefore prefer to leave it in the text. The central question was that of lawfulness.

He would have preferred for this to be addressed at the forefront of the draft Resolution. He would, however, endorse the draft Resolution as it stood.

Mr *Owada* expressed his thanks for the remarks that had been made. He recalled that the result of the morning's discussion was not to delete paragraph VI but instead to omit reference to the question of lawfulness, leaving it for a subsequent Session. Accepting a proposal that had been made by Mr Gaja, this point had been added to the text of the draft Resolution in the form of footnote. He added that, as a matter of substance, there was no outcome in this Sub-group on the issue of lawfulness. As a matter of procedure, this issue would be considered fully in a subsequent Session. He hoped that this would not reopen discussions on the substance of paragraph VI and that the current formulation would be broadly acceptable.

The *President* said that he personally favoured the proposal of Mme Bastid-Burdeau on the issue of lawfulness but that he was agreeable to Mr Ress's proposal. In a spirit of accommodation, he proposed two options: one was to keep the text as it was in its current form; an alternative was to add a statement by the President on the record regarding the meaning of the draft Resolution to the effect that the question of lawfulness was left to be considered by subsequent Sessions of the Institute. Such a declaration would make clear that the question of lawfulness was in no way pre-empted or prejudged by this approach. If this alternative was acceptable, the President could suggest appropriate language.

Mr *Vinuesa* said that it was strange to say that the draft Resolution was without prejudice to the question of lawfulness. This could be seen as taking for granted that unauthorised military actions were lawful even if contrary to the Charter. This would be confusing to the reader.

M. *Remiro Brotons* reconnaît que l'assemblée a déjà pris position lors de la séance de la matinée sur le paragraphe VI. Il note cependant que l'assemblée est souveraine et propose par conséquent la suppression du paragraphe VI et son insertion sous la forme d'une note de bas de page à la fin du paragraphe V.

M. *Mahiou* se rallie à l'approche proposée par le Président, qui consiste à tendre vers une rédaction la plus neutre possible. Le problème de la formulation actuelle tient à l'emploi des termes « licéité » et « qui n'ont pas été autorisées ». Il propose donc la suppression des termes « de la licéité », pour arriver à la rédaction suivante : « sans préjudice de la question des actions militaires [...] ».

M. *Ranjeva* remarque que M. Mahiou a repris sa propre proposition et la soutient. Il propose, à défaut, une rédaction alternative : « sans préjudice de la question de la licéité ou de l'illicéité des actions militaires [...] ». Cette solution permettrait de laisser la question ouverte et d'éviter le préjugé évoqué par Mme Bastid-Burdeau.

The *President* proposed to turn to the question of procedure. The first course of action was to take a quick vote on the compromise proposal of leaving a statement

on the record as described above. This had been done a number of times in similar situations. If this first proposal was not accepted, the second course of action would be to decide whether or not to retain a reference to the question of lawfulness in the draft Resolution. If this second course of action was not acceptable, then the third alternative would be to conclude with nothing.

Mr *Tomuschat* said that it was not clear to him what proposal would be put to a vote.

The *President* said that the proposal was to have a supplementary declaration on the record, as described above, but to delete nothing from the draft Resolution.

Mrs *Bastid-Burdeau* said that, as a point of order, the Session should vote first on the proposal of Mr Mahiou regarding the suppression of a reference to lawfulness.

The *President* said that such a vote would pre-empt the consideration of the other choices available to the Session. The *President* then proposed that the Session should proceed to a vote on the compromise proposal. The *President* accordingly proceeded to ask the Members present at the Session for a show of hands in favour of and against the proposal, as well as a show of hands of those who abstained from casting a vote for the proposal.

Le *Secrétaire général* annonce le résultat du vote : la proposition a recueilli 18 voix pour, 12 voix contre et 10 abstentions. La proposition est donc adoptée.

The *President* said that a Declaration would accordingly be drafted to give effect to the proposal that had just been approved. He thanked Mr Owada for his efforts in leading the discussion on the draft Resolution.

La séance est levée à 18 h 00.

### **Douzième séance plénière** Samedi 27 octobre 2007 (après-midi)

President *Orrego Vicuña* opened the session at 4 p.m.

#### **Revised draft Resolution No 3**

*The Institute of International Law,*

*Having* considered the subject of Humanitarian Action in the context of the objective of putting an end to genocide, large-scale crimes against humanity and large-scale war crimes;

*Approves* the following Resolution, together with a Declaration of the *President*, who was asked to issue this Declaration to express the understanding of the Institute in respect of the question of military actions which have not been authorized by the United Nations.

*The President's Declaration is as follows:*

“The Institute has discussed in detail the question of the lawfulness of military actions which have not been authorized by the United Nations but which purport to have been taken to end genocide, large-scale crimes against humanity or large-scale war crimes. While a number of members supported the view that such actions might be lawful under certain circumstances and observing certain conditions, a number of other members were of the view that this is not the case under present international law and in particular under the Charter of the United Nations.

In view of these differences of opinion and in consideration of the fact that another sub-group is specifically dealing with the Present Problems of the Use of Armed Force in International Law and the authorization to resort to the use of force by the United Nations, the Institute decided to refer this particular issue to that sub-group for further discussion in a subsequent session.

Accordingly, Article VI of the Resolution explains that its text does not address this issue, and therefore its referral to a different sub-group in no way preempts nor prejudices the continuation of the discussion on this issue in a subsequent session.”

*The text of the Resolution is 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.
- 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 authorized by the United Nations but which purport to have been taken to end genocide, large-scale crimes against humanity, or large-scale war crimes\*.

\* The question of the lawfulness of military actions which have not been authorized by the United Nations will be examined by the Institute in a subsequent session.

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### **Projet de Résolution révisé No 3**

*L'Institut de droit international,*

*Ayant considéré le sujet des Actions humanitaires dans le contexte de l'objectif de mettre fin au génocide, aux crimes contre l'humanité de grande ampleur et aux crimes de guerre de grande ampleur ;*

*Approuve la présente Résolution, de même qu'une Déclaration du Président auquel il fut demandé de faire part de cette Déclaration afin d'exprimer la position de l'Institut au sujet de la question des actions militaires n'ayant pas été autorisées par les Nations Unies ;*

*La Déclaration du Président est la suivante :*

« L'Institut a débattu de manière approfondie la question de la licéité des actions militaires qui n'ont pas été autorisées par les Nations Unies mais dont l'objectif déclaré est de mettre fin à un génocide, à des crimes contre l'humanité de grande ampleur ou à des crimes de guerre de grande ampleur. Tandis que certains Membres furent d'avis que ces actions peuvent être licites dans certaines circonstances et moyennant certaines conditions, certains autres Membres furent d'avis que tel n'est pas le cas en droit international contemporain, et en particulier selon la Charte des Nations Unies.

Vu ces différences d'opinions et considérant qu'un autre sous-groupe traite spécifiquement des problèmes actuels du recours à la force en droit international et de l'autorisation du recours à la force par les Nations Unies, l'Institut a décidé de renvoyer cette question particulière à ce sous-groupe afin d'en débattre lors d'une session ultérieure.

Par conséquent, l'article VI de la Résolution dispose que son texte ne porte pas sur cette question et, dès lors, son renvoi à un autre sous-groupe n'anticipe ni ne préjuge d'aucune manière le débat relatif à cette question lors d'une session ultérieure ».

*Le texte de la Résolution est le suivant :*

I. Le droit international consacre le droit à la protection de la vie humaine et de la dignité humaine contre le génocide, les crimes contre l'humanité et les

crimes de guerre. Chaque Etat est obligé de prévenir ou de mettre fin rapidement au génocide, aux crimes contre l'humanité et aux crimes de guerre et qui surviennent sous sa juridiction ou son contrôle.

- II. Le génocide, les crimes contre l'humanité de grande ampleur ou les crimes de guerre de grande ampleur devraient être considérés comme une menace à la paix et à la sécurité internationales, conformément à l'article 39 de la Charte des Nations Unies.
- III. Les organes compétents des Nations Unies devraient user de tous les pouvoirs statutaires dont ils disposent pour agir rapidement dans le but de mettre fin au génocide, aux crimes contre l'humanité de grande ampleur ou aux crimes de guerre de grande ampleur auxquels l'Etat sous la juridiction ou le contrôle duquel ils surviennent n'aurait pas mis un terme.
- IV. Les mesures prises afin de mettre fin au génocide, aux crimes contre l'humanité de grande ampleur ou aux crimes de guerre de grande ampleur seront conformes au droit international.
- V. Si une action militaire est entreprise, son seul objectif sera de mettre fin au génocide, aux crimes contre l'humanité de grande ampleur, ou aux crimes de guerre de grande ampleur. Le droit international humanitaire sera strictement respecté pendant et après l'opération, de manière à assurer notamment la protection maximale de la population civile. Le présent paragraphe est sans préjudice de toute obligation relative à la répression des crimes internationaux.
- VI. Cette Résolution ne porte pas sur la question de la licéité des actions militaires qui n'ont pas été autorisées par les Nations Unies, mais dont l'objectif déclaré est de mettre fin à un génocide, à des crimes contre l'humanité de grande ampleur ou à des crimes de guerre de grande ampleur\*.

\* La question de la licéité des actions militaires qui n'ont pas été autorisées par les Nations Unies sera examinée lors d'une session ultérieure de l'Institut.

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The *President* noted that the President's Declaration contained in the draft Resolution was purely factual. It recorded that there was a difference of opinion among Members, that the draft Resolution did not deal with humanitarian intervention as authorised by the UN and was without prejudice to this question. There were minor changes in the draft Resolution that had been introduced by the drafting committee. The draft Resolution was presented for consideration. He felt that it was not appropriate to vote on the President's Declaration because it merely took note of issues arising from the discussion and did not purport to prejudge questions of international criminal law.

Mr *Schwebel* suggested the deletion of the last sentence of paragraph 5 since it

seemed to obscure the meaning of the paragraph.

President *Orrego Vicuña* noted that the Rapporteur was not present to react and invited comments from the floor.

Mr *Gaja* noted that paragraph 5 had already been subject to a vote. He said that paragraph 5 was intended to leave open the possibility that measures could be taken against the individual authors of the said crimes. The majority of members had voted to include this last sentence in its current form and place. The provisions of paragraph 5 were “without prejudice” to the obligations of States relating to international criminal law as the draft Resolution did not seek either to determine what they were, nor to interfere with them.

Mr *Tomuschat* supported Mr Schwebel’s motion. He noted that the draft Resolution did not deal with international criminal law and its meaning was obscured as it now stood. He suggested that the clause be deleted.

M. *Torres Bernárdez* déclare être d’accord avec M. Gaja. Il souligne que le moment n’est plus à discuter d’amendements ; il est temps de voter.

Le *Président* demande aux Membres de l’Institut s’ils sont favorables à revenir sur cette question ou s’ils préfèrent maintenir le texte tel qu’il est.

Le *Président* note qu’il y a une majorité pour retenir le texte tel qu’il est. Il se propose dès lors de le soumettre au vote sans revenir sur l’amendement , chacun ayant été en mesure de faire connaître son point de vue.

Mme *Bastid-Burdeau* entend faire deux remarques sur la rédaction du préambule. Elle propose premièrement que l’expression « that such actions might be lawful » soit traduite non par « ces actions peuvent être licites » mais par « ces action pourraient être licites ». Mme Bastid-Burdeau trouve ensuite que la première ligne est un peu lourde et elle propose d’utiliser des lettres minuscules.

Le *Président* souligne que la langue originale était l’anglais.

M. *Ranjeva* propose d’inverser la dernière phrase du paragraphe 1. Il indique que la deuxième partie se fonde sur le droit international et la Charte des Nations Unies, tandis que la première ne discute pas de la licéité de l’intervention, mais des modalités qui peuvent la rendre licite. Il indique qu’il ne demande pas un débat sur ce point.

Le *Président* rappelle qu’il est préférable de ne pas toucher à la déclaration, sauf en cas d’erreur majeure, et il soumet l’ensemble de la résolution au vote des membres de l’assemblée.

Le *Secrétaire général* constate qu’il y a 31 voix pour, aucune voix contre et 2 abstentions. La résolution est dès lors adoptée.

Le *Secrétaire général* procède ensuite au vote par appel nominal.

Ont voté en faveur du projet de Résolution : M. Amerasinghe, Mme Bastid-

Burdeau, M. Caminos, M. Conforti, M. Degan, M. Dominicé, M. Feliciano, M. Gaja, M. Gannagé, M. Giardina, M. Hafner, Mme Infante Caffi, Mme Irigoin Barrenne, Sir Kenneth Keith, Mme Lamm, M. Lee, M. Mahiou, M. Marotta Rangel, M. Nieto-Navia, M. Orrego Vicuña, M. Ranjeva, M. Remiro Brotons, M. Ress, M. Rigaux, M. Ronzitti, M. Roucounas, M. Schwebel, M. Struycken, M. Torres Bernárdez, M. Treves, M. Verhoeven, M. Vignes, M. Yankov.

S'est abstenu : M. Tomuschat.

Exception faite d'une abstention, la résolution a donc fait l'unanimité parmi les membres présents.

Le *Président* déclare la résolution adoptée, et en félicite le Rapporteur.

M. *Domicé* demande au Secrétaire général des indications sur l'état d'avancement des travaux des diverses commissions.

Le *Secrétaire général* déclare que la question sera abordée le lendemain.

The President Orrego Vicuña closed the session at 16 h 20.

## RÉSOLUTION DE L'INSTITUT

The Institute of International Law,

Having considered the subject of Humanitarian Action for the object of putting an end to genocide, large-scale crimes against humanity and large-scale war crimes;

Approves the following Resolution, together with a Declaration of the President, who was asked to issue this Declaration to express the understanding of the Institute in respect of the question of military actions which have not been authorized by the United Nations:

The President's Declaration is as follows:

“The Institute has discussed in detail the question of the lawfulness of military actions which have not been authorized by the United Nations but which purport to have been taken to end genocide, large-scale crimes against humanity or large-scale war crimes.

While a number of members supported the view that such actions might be lawful under certain circumstances and observing certain conditions, a number of other members were of the view that this is not the case under present international law and in particular under the Charter of the United Nations.

In view of these differences of opinion and in consideration of the fact that another subgroup is specifically dealing with the Present Problems of the Use of Armed Force in International Law and the authorization to resort to the use of force by the United Nations, the Institute decided to refer this particular issue to that sub-group for further discussion in a subsequent session.

Accordingly, Article VI of the Resolution explains that its text does not address this issue, and therefore its referral to a different sub-group in no way preempts nor prejudices the continuation of the discussion on this issue in a subsequent session.”

The text of the Resolution is 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.

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 authorized by the United Nations but which purport to have been taken to end genocide, large-scale crimes against humanity, or large-scale war crimes.

L'Institut de droit international,

Ayant considéré le sujet des actions humanitaires destinées à mettre fin au génocide, aux crimes contre l'humanité de grande ampleur et aux crimes de guerre de grande ampleur ;

Approuve la présente Résolution, de même qu'une Déclaration du Président auquel il fut demandé de faire part de cette Déclaration afin d'exprimer la position de l'Institut au sujet de la question des actions militaires n'ayant pas été autorisées par les Nations Unies :

La Déclaration du Président est la suivante :

« L'Institut a débattu de manière approfondie la question de la licéité des actions militaires qui n'ont pas été autorisées par les Nations Unies mais dont l'objectif déclaré est de mettre fin à un génocide, à des crimes contre l'humanité de grande ampleur ou à des crimes de guerre de grande ampleur. Tandis que certains Membres furent d'avis que ces actions pourraient être licites dans certaines circonstances et moyennant certaines conditions, certains autres Membres furent d'avis que tel n'est pas le cas en droit international contemporain, et en particulier selon la Charte des Nations Unies.

Vu ces différences d'opinions et considérant qu'un autre sous-groupe traite spécifiquement des problèmes actuels du recours à la force en droit international et de l'autorisation du recours à la force par les Nations Unies, l'Institut a décidé de renvoyer cette question particulière à ce sous-groupe afin d'en débattre lors d'une session ultérieure.

Par conséquent, l'article VI de la Résolution dispose que son texte ne porte pas sur

cette question et, dès lors, son renvoi à un autre sous-groupe n'anticipe ni ne préjuge d'aucune manière le débat relatif à cette question lors d'une session ultérieure. »

Le texte de la Résolution est le suivant :

I. Le droit international consacre le droit à la protection de la vie humaine et de la dignité humaine contre le génocide, les crimes contre l'humanité et les crimes de guerre.

Chaque Etat est obligé de prévenir ou de mettre fin rapidement au génocide, aux crimes contre l'humanité et aux crimes de guerre et qui surviennent sous sa juridiction ou son contrôle.

II. Le génocide, les crimes contre l'humanité de grande ampleur ou les crimes de guerre de grande ampleur devraient être considérés comme une menace à la paix et à la sécurité internationales, conformément à l'article 39 de la Charte des Nations Unies.

III. Les organes compétents des Nations Unies devraient user de tous les pouvoirs statutaires dont ils disposent pour agir rapidement dans le but de mettre fin au génocide, aux crimes contre l'humanité de grande ampleur ou aux crimes de guerre de grande ampleur auxquels l'Etat sous la juridiction ou le contrôle duquel ils surviennent n'aurait pas mis un terme.

IV. Les mesures prises afin de mettre fin au génocide, aux crimes contre l'humanité de grande ampleur ou aux crimes de guerre de grande ampleur seront conformes au droit international.

V. Si une action militaire est entreprise, son seul objectif sera de mettre fin au génocide, aux crimes contre l'humanité de grande ampleur, ou aux crimes de guerre de grande ampleur. Le droit international humanitaire sera strictement respecté pendant et après l'opération, de manière à assurer notamment la protection maximale de la population civile. Le présent paragraphe est sans préjudice de toute obligation relative à la répression des crimes internationaux.

VI. Cette Résolution ne porte pas sur la question de la licéité des actions militaires qui n'ont pas été autorisées par les Nations Unies, mais dont l'objectif déclaré est de mettre fin à un génocide, à des crimes contre l'humanité de grande ampleur ou à des crimes de guerre de grande ampleur.