

**HUMANITARIAN INTERVENTION/HUMANITARIAN ACTIONS
(translation)**

Complementary Report

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1. It must be preliminarily recalled that, despite much effort, the discussions pertaining to “humanitarian intervention” were not completed at the Santiago session. This does not mean that such discussions did not yield any result. Indeed, a resolution on the topic supported by a very large majority was then adopted. Yet, it must be acknowledged that this resolution tends to bypass most problems instead of solving them.

It will not come as a surprise that it is the principle of a resort to force for humanitarian purposes that fueled most objections. This is why, in the absence of any consensus on the matter, the President of the Institute – *i.e.* our colleague F. Orrego Vicuña – issued a declaration whereby he indicated that this aspect of the question had been submitted to a sub-group. The sub-group concerned was meant to be taken on the study of the question of the authorization of the use of force by the United Nations. R. Vinuesa was appointed rapporteur of this sub-group. It must also be recalled that the works of this sub-group led to the adoption of a resolution at the session of Rhodes. In this resolution, no – explicit or implicit – mention is made of humanitarian intervention.

M. Reisman was rapporteur of the sub-group “humanitarian intervention”. His excellent report was very comprehensive, pointing to the existence of a traditional “practice” as well as a more groundbreaking “responsibility to protect” whose success in the media have, in the meantime, become unquestionable. 10 years after its completion, the report of M. Reisman does not call for any additional substantive reflections or developments. It is true that the “responsibility to protect” continues to be celebrated with great enthusiasm, the UN Secretary General now reporting every year on the implementation thereof. Conferences and scholarly works on the topic have unsurprisingly continued to flourish. This quest – which is not entirely unprecedented – for a better protection of those in need thereof is probably much welcome. Yet, one can hardly deny that it remains difficult to

determine what such a responsibility entails from a legal point of view, that is the extent to which it modifies existing rules by creating new rights or obligations.

2. The two – maybe three – main limitations provided by the resolution can only be extracted from the “formal texts”, including their provisions, that have been adopted in the framework of this “responsibility to protect”. These limitations can be outlined as follows:

- an exclusive focus on genocide, crimes against humanity and war crimes – provided that for the second and third categories the crimes are of a “large-scale” character. Such a focus seems to limit what was originally conceived as an “intervention d’humanité” before being turned into “intervention humanitaire” during the debates in Santiago and into “humanitarian action” in the resolution finally adopted in Santiago. This focus seems to imply that some of these crimes can be of a small-scale character and that these small-scale crime, while being inadmissible, cannot consequently benefit from the regime set forth in the resolution.
- a call on the organs of the United Nations to use their statutory powers at their disposal to put an end to the three categories of crimes mentioned in the resolution, and especially on the Security Council which should consider such crimes as constituting a threat to the international peace and security pursuant to Article 39 of the Charter of the United Nations (II and III).
- the obligation to take measures “in accordance with international law” to put an end to the abovementioned crimes (IV). The resolution however fails to indicate which actions must be considered in accordance with international law and which actions must be considered contrary to it. In particular, the resolution falls short of addressing the legality of a resort to force for a humanitarian purpose, its article VI providing that the resolution “does not address the question of the lawfulness of military actions which have not been authorized by the United Nations”.

3. It is difficult to deny that, with the benefit of hindsight, what then appeared to be wise may now appear slightly bewildering. Indeed, by virtue of the abovementioned limitations, the substance of the resolution has turned very thin. Said differently, the relevance of these limitations can be seriously put into question.

a) There are weighty reasons to question the rationale of the restriction of the scope of application of the “humanitarian” intervention (assistance) to the three categories of crimes envisaged by the resolution (provided that the legality of such restriction can be upheld). Indeed, such a restriction of the scope of application turns intervention/assistance into a mechanism that supplements criminal prosecution. Such a consequence is idiosyncratic and

certainly very oblivious to some historical developments. It cannot be excluded that this is a mere and direct transposition of some preliminary findings reached within the framework of the debate on the *responsibility to protect*. Indeed, it is no coincidence that adding a fourth crime to the three abovementioned categories had originally been contemplated. Informed by the distressful events witnessed in the former Yugoslavia, it was then question of adding “ethnic cleansing” to the list of the abovementioned crimes. The introduction of this new crime, however, was eventually abandoned in the absence of any specific incrimination satisfying the elementary prerequisites of criminal law. According to the new version, it now suffices that such practices qualify as crimes against humanity. Whatever these latest developments, it does not make sense, in my view, to circumscribe the scope of application of humanitarian intervention or that of humanitarian actions by a reference to provisions of a purely criminal nature. Whilst situations of “ethnic cleansing” were never formally included in the scope of the *responsibility to protect*, the opposite view was defended for natural disasters (floods, droughts, heart quakes, volcanic eruptions) which had originally been an formal integral part thereof, just like the three abovementioned crimes. Yet, natural disasters were subsequently excluded from the scope of the “protective” provisions. It is noteworthy that a similar exclusion of natural disasters is found in the draft articles on the protection of persons in the event of disasters adopted by the ILC, following the reports presented by E. Valencia-Ospina. It must be noted however that the ILC draft articles emphasize that “the affected State” has the duty not to “arbitrarily” refuse assistance in such a situation¹. The motives of such the exclusion of natural disasters remain slightly unclear. It may be speculated that many – fragile – authorities have objected (or were believed to be likely to object) against a wider scope of application of such an assistance which may turn to be (partly) serving the interests of the intervening State.

The risk of abuse of such an assistance cannot be denied, at least as long as the “collective” decisions of United Nations – or those of any organization that could potentially replace it – cannot systematically supersede any individual initiatives, however good-intentioned the latter may be. Does that mean that any individual “assistance” that falls short of any authorization by the United Nations or any invitation by the State concerned should necessarily and systematically be refused? Such a conclusion would be too hasty. It must be recalled that when European powers “created” the doctrine of humanitarian intervention in the 19th century with a view to ensuring the protection of minorities persecuted in the declining Ottoman empire, such a

¹ See draft articles 10 et 11. See also the 3^d report (ILC, A/CN. 4/629, 31 March 2010) and *ibid.*, A/CN. 4/463, 11 May 2011).

doctrine was not strictly necessary from a legal point of view, for the resort to force was not prohibited at that time. Such a humanitarian use of force was probably also more justifiable in this context than in the case of a war of annexation only meant to seize a piece of territory. This is also what the early works of the Institut on the question seems to confirm. This being said, there is no doubt that, in the absence of prohibition of the use of force, there was then a greater room of maneuver. This however did not suffice to make humanitarian objectives – which at the same time came to manifest themselves in the emerging *jus in bello* – necessarily suspect of abuse.

This being said, what matters here is the determination of what is called – for reasons of linguistic convenience – a situation of humanitarian disaster. A situation of humanitarian disaster is understood here as being constituted of grave, systematic and widespread violations of fundamental human rights. The determinative factor is the breach itself, not the material cause thereof. Whether the State concerned does not want or is unable to ensure respect for such fundamental rights is irrelevant. In that sense, the “disaster” is not a self-sufficient condition. It is true that the State or any other subject – of private or public character – will have to incur responsibility if such a disaster originates in its wrongful abstention, especially if the latter constitutes a (particularly) serious breach. This is however not what matters the most in this context. What is determinative is the fact that fundamental rights are not (or no longer) respected. This raises the question of the means available to ensure (or restore) compliance. Such a question inevitably arises in connection with the breach of any rule of international law. Yet, it seems hardly questionable that the question of the means to ensure (or restore) compliance is particularly important when it comes to truly “fundamental” rights. Although it is uncontested that, as a matter of principle, the means to which it is resorted to ensure (or restore) compliance must be legal, the possible recourse to illegal measures is not automatically excluded in this case.

The “insufficiencies” of the law and those of the international “society” in these situations are well-known. It would be of no avail to dwell on them. It must nonetheless be recalled that most domestic legal systems prescribe an obligation to assist individuals whose life or physical integrity is being threatened. Under domestic law, compliance with such an obligation can occasionally justify the resort to illegal measures while non-compliance with such an obligation can be prosecuted. Such an obligation does certainly not exist under international law. Yet, the core idea behind it can lead us to accept the legality of humanitarian actions which may not be fully in accordance with international law.

b) According to article IV of the resolution adopted in Santiago, “actions to put an end” to the categories of crimes mentioned in the resolution “shall be conducted in accordance with international law”. This requirement is, once more, informed by the provisions adopted in the framework of the *responsibility to protect* which also explicitly exclude the resort to illegal measures.

The usefulness of this reference to the conformity with international law is not obvious. Indeed, it would not be without paradox if international law were to prohibit an action meant to bring an end to a humanitarian disaster as is understood above when it is in accordance with international legal rules. It seems uncontested that all the “sanctions” provided for by the law must be available in this respect. The opposite would be literally nonsensical. A resolution of the Institut is not necessary to recall such a platitude.

The only (actual) issue is accordingly to determine whether a breach of a rule can be justified or excused – according to criminal terminology – when it was committed exclusively or mainly to bring an end to a (serious) violation of fundamental rights. More specifically, the question is whether a unilateral use of force for this purpose could exceptionally be accepted. This is the very debate behind the question of humanitarian intervention, at least as long as the recourse to force, subject to self-defense, is prohibited by international law.

Article IV of the resolution seems *at first glance* to rule out such a practice, at least when it is not deemed in accordance with international law. But it is nowhere explicitly stated that such a practice is contrary to international law. And article VI of the same resolution remains slightly ambiguous in this respect, for it provides that the 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” one of the three categories of crimes mentioned in the resolution. This certainty does not mean that such actions are legal. But it does not mean either that they can never be so.

It must be recalled that such an issue goes beyond the mere issue of the use of force. Any breach raises the question of the possibility of an excuse or justification grounded in humanitarian objectives.

c) In article III, the resolution provides that “[t]he competent organs of the United Nations should use all statutory powers at their disposal to take prompt action to put an end to” the categories of crimes mentioned therein.

This provision probably reflects a position everyone will be sympathetic to. It is true that the use of the present tense in this provision would have been preferable, although it does not behoove the Institut to instruct the United Nations in any way. Moreover, there is no reason why such recommendation

could not concern all other international organizations in the limits of their respective powers.

Needless to say that providing interpretative guidance constitutes a radically different approach. This is what article II seeks to do by providing that the crimes mentioned in the resolution “should be considered as a threat to international peace and security pursuant to Article 39 of the Charter of the United Nations”. One can probably disagree with the appropriateness of such interpretative recommendations. Yet, it seems unquestionable that the Security Council enjoys an unqualified and unparalleled power in this respect and that, subject to manifest abuses, the Council is not accountable for the way it qualifies a given situation. Once one embraces the option of interpretative guidance, it might even be preferable to adopt a firmer language, even though it is very likely that such recommendations will not bear much effect in practice.

As a matter of principle, however, nothing precludes a situation from being qualified as a threat to the peace even if it does not originate in an illegal use of force. This is illustrated by the decision of the Security Council to resort to Chapter VII measures in the aftermath of the earthquake in Haiti in 2010.² It does not matter here whether the situation in Haiti illustrates the potential benefits of the *responsibility to protect*. And it is not certain that such a situation may ever provide underpinnings for an enlargement of the powers of the Security Council. It suffices that the Council decides, on the basis of its unfettered qualifying power, that there is a threat to the peace under article 39 of the Charter.

Advocating modifications of the Charter – modifications which would need to satisfy the very strict conditions of article 108 – would be another approach. It is not certain that this is the perspective which should be embraced by the Institut but for minor points of details. It seems more relevant for the Institut to stick to what it is qualified for, i.e. the law and what is required to modify it. This is in line with the Institut’s inner function. Indeed, its function is not to determine the content and the appropriateness of amendment. If this were the case, this function would be at best very secondary. This is so even if the Institut’s opinions may be of relevance given the legal constraints required by any modification. It is true that one could welcome the formulation of some “suggestions” by the Institut. However, this would not fall, once again, within the role of the Institut. Moreover, there is, in any case, much likelihood that such suggestions would remain, most of the time, unheard. It may be useful to recall here that, in its 2009 report on the implementation of the *responsibility to protect*, the UN

² Resolution 1927 (2010) of 4 June 2010.

Secretary General had suggested that permanent members of the Security Council pledge not to use their veto when the latter is seized of a situation involving crimes falling within the scope of the *responsibility to protect*. Albeit unsurprisingly, the proposal – which was somewhat candid – remained without effect.

d) In its article V, the Santiago resolution finally provides that “[i]nternational humanitarian law shall be strictly observed” if a “military action” to put an end to the categories of crimes mentioned in the resolution is undertaken.

The usefulness of this provision is, here too, unclear. It would be surprising that, in the case of a military action falling within the scope of humanitarian law, the rules of the latter could be deemed inapplicable, but for derogations expressly organized by such rules. Furthermore, it is superfluous to require these rules to be “strictly” complied with, for this is true for any legal rule, including those authorizing derogations to humanitarian law.

4. If one agrees with the observations formulated above, the following aspects of the resolution become rather evasive:

- what is left of what classically falls within the scope of humanitarian intervention understood in a traditional sense;
- the added value of the resolution when it comes to the understanding of (the functioning of) general international law, especially in the light of contemporary challenges;
- the “legal” relevance of the various “suggestions” or “recommendations” enshrined in the resolution, for one wonders whether these are mere wishes, guidance or anything else.

This being said, it also seems obvious that the resolution is undermined by the following:

- its kinship to the *responsibility to protect*, as the latter demotes the resolution to an “odd” accessory of criminal repression of the three categories of crimes mentioned in the resolution, at least when the crimes are of a large-scale character in the case of crimes against humanity and war crimes;
- its reference to rules of international law which are applicable and require compliance in any of these situations if their conditions of application are met;
- the hesitations shrouding “military actions” whose legality (legitimacy) cannot be formally determined on the basis of the resolution. It is noteworthy that debates in this respect have not allowed a clear identification of those tolerating such actions, those accepting them or those rejecting them;

- the mention of the resort to measures “in accordance with international law” meant to restore a situation where fundamental humanitarian obligations are respected;
- Uncertainties shrouding the exact scope of the obligation to “prevent” or to “put an end” to the categories of crimes mentioned in the resolution, in particular in connection with the nature of the measures which may or must be resorted to for this purpose.

Some proposals?

5. No clear position emerged from the debates which, in Santiago, were devoted to the issues raised by what is traditionally called “humanitarian intervention”. The question of the legality of the use of force then retained most of the attention. As was indicated in the second-to-last project of resolution, there was clearly no consensus regarding the lawfulness of military actions which have not been authorized by the Security Council.³ No reference to humanitarian intervention is made in the final resolution. Yet, the Declaration by the President of the Institut – its issue constituting a rather unusual practice – simply indicated that there are many divergences between the members’ positions in this respect. This is what led to the submission of the question of the authorization of the use of force by the United Nations to a subgroup in charge of making proposals.⁴ It must be recalled that the subgroup has, in the meantime, deemed that it was not in a position to perform such a task.

The foregoing explains why the Bureau asked the Secretary General to formulate suggestions on this question but only to the extent that useful propositions can be made. The question remains highly sensitive, for it requires one to engage with the lawfulness of a unilateral use of force which, subject to the case of self-defense, is prohibited. That the matter is delicate does however not constitute an obstacle to the formulation of suggestions. Moreover, this question is certainly not the only issue arising in this context. Yet, it surely remains the most important one.

Albeit I could be repeating some of the remarks formulated above, I deem it necessary to formulate a few preliminary remarks with a view to allowing meaningful progress on this difficult question.

- i. Notwithstanding the outstanding work of the rapporteur and the insightful character of the discussions that followed the propositions of the commission, it must be acknowledged that the substantive “added value” of the resolution adopted in Santiago is rather limited.

³ *Yearbook*, p. 339.

⁴ *Yearbook*, p. 366.

- ii. The enthusiasm for the responsibility to protect which accompanied the initiatives by (or in the framework of) the United Nations has polarized the study of the question of humanitarian intervention and narrowed it down to the categories of crimes mentioned in the resolution while simultaneously supporting a principled exclusion of any use of force. In my view, this orientation is erroneous. The essence lies with the humanitarian disaster as was understood above, irrespective of its specific causes. And it is because fundamental human rights are seriously violated (or are threatened to be) that one is inextricably confronted with the question of the adoption of measures necessary to ensure the safeguard of these rights. It does not matter at all whether such violations originate in (or have been prompted by) certain crimes. The existence of an objective situation of “disaster” should suffice. It goes without saying that crimes that could have been committed on that occasion will nonetheless need to be duly prosecuted.
- iii. In contrast to what has sometimes been contended, albeit implicitly, the resort to humanitarian intervention is not the manifestation of a “right” or some kind of “freedom”. It suffices that no legal claim is raised against the one resorting to humanitarian intervention for contravening an existing right, at least when the United Nations – and particularly the Security Council – have themselves refrained from “intervening”. Wording is, in this case, always sensitive. Sometimes one speak of legality, lawfulness, legitimacy, regularity or any similar wording. And great variations exist between French and English. It is noteworthy that the rapporteur favored the use of the word “lawful” rather than “legal”.

It would be of no avail to engage in vain discussions on this point. What must be made clear is that such an intervention is derived neither from the capacity nor the prerogative of the State resorting to it. It must rather be understood that no legal claim can be raised against such a State for the intervention of the latter if the situation of disaster is not questionable⁵. And such a legal claim can certainly not emanate from the State which must incur responsibility for having created or allowed the creation and continuation of the humanitarian disaster concerned. It is true that this should not go as far as a cause of justification in the proper sense of the term. Yet, it is probably in such a perspective that the “lawfulness” (*légalité*) must be apprehended in this case.⁶

The theory of *erga omnes* obligations have occasionally been invoked to justify such an “intervention”. Such conceptual detours are, in my view, unnecessary. Such a theory remains rather obscure, especially with respect to

⁵ *Yearbook*, p. 300.

⁶ See the intervention of T. Treves, *ibid.*, p. 306.

the interest that must be demonstrated by the one of the “omnes” invoking it in order to intervene for humanitarian purposes. There is neither a right nor an obligation properly so called that could be invoked. There nonetheless seems that a “responsibility” remains. And one of the relevant aspects of the discussions pertaining to the responsibility to protect is certainly that more emphasis has been put on the “duty” to provide humanitarian assistance, at least because responsibility – in the strong (political) sense of the term – is a burden more than a prerogative. It must, once again, be stressed that this does not entail a legal obligation properly so-called; yet, such a “responsibility” can be the expression of a duty, whether moral or political, inherent in the membership to an growingly institutionalized international “community”. And it would be exaggerated, as a matter of principle, to demote such a duty as being devoid of any legal relevance. Even if this duty does not give rise to any right or obligation properly so called, it can certainly impact, in a way or another, the understanding of the existing rules of international law.

6. Both the Institut, in its Santiago resolution, and those who studied the *responsibility to protect*, have contended that only measures in accordance with international law can be adopted to put humanitarian disasters to and end, at least if they originate in one of the three categories of crimes mentioned in the texts concerned. As was indicated above, such a contention seems without any clear usefulness. How could measures that are in accordance with international law ever turn contrary to it for the sole reason that they were adopted to bring an end to situations which are themselves grounded in blatant violations of some elementary international legal rules? If this were the case, this would be idiosyncratic.

The only interesting question is accordingly whether it is lawful or not to infringe international law to meet such an objective. According to an orthodox view, the answer is self-evident: such a breach, albeit informed by noble intentions, is prohibited, subject to what is allowed by the regime of countermeasures. But, as provided by 56/83 of GA on the responsibility of State of international wrongful act, counter-measures can only be taken by the injured State and must respect the conditions prescribed by articles 48 to 54. It is well-known that these provisions prohibit the resort to force by virtue of counter-measures.

This being said, it would be too hasty to infer from these provisions that any measure that is not in line with the conditions prescribed by the abovementioned provisions is necessarily unlawful. One possibility could be to “resuscitate” the old humanitarian intervention and understand it as applicable by virtue of customary international law, at least as long as no contrary practice or rule prohibits it explicitly. In this case, the question

would only be that of the limits of such a “intervention”... a question that would nonetheless remain contentious, especially against the backdrop of a growing influence and role of the United Nations.

Irrespective of whether there exists a solid customary practice or not, a certain overall coherence of law remains inextricable and the requirements thereof need to be kept in mind. It seems that any conclusion that could be inferred from a “sophisticated” analysis of the right to resort to force can only be accepted as long as they are compatible with the requirements dictated by the coherence of the law. This means that, at a time where an unprecedented attention is paid to the fundamental character of human rights, it would be somewhat paradoxical to raise a legal claim against a State having taken measures it deemed indispensable to ensure, to the extent of the means available to it, an elementary protection of such fundamental rights. This is true even if the urgency of the situation had seemed to require that such measures be adopted unilaterally. The foregoing is not of course not exclusive of the fact that such a State would remain, in due course, accountable for any measure it took.

7. As was indicated earlier, the abovementioned contention that the measures must be in accordance with international law only makes sense to the extent that it concerns measures that would otherwise be unlawful. It must be, once again, highlighted that, if such measures are lawful, there is hardly anything that can justify that they are opposed, unless one embraces rather hypothetical constructions like those of the abuse of right or abuse of power (*détournement de pouvoir*). It is true that it would be a bit exaggerated to construe the abovementioned contention as legitimizing any breach of a rule, especially if there are serious reasons to believe such a breach cannot effectively impact on the restoration of legality and the return to compliance by the State which seriously infringes or allows a serious infringement of fundamental rights. This being said, the measures referred to here should not be exclusively construed as measures involving the use of force. It is any type of “coercion” which could potentially be “legitimized” in this context. Indeed, it would be rather paradoxical that the most serious violation of international law – i.e. the unilateral recourse to force – could be tolerated, if not accepted, whilst measures falling short of the use of force remain prohibited. If one follows this “humanitarian” approach, it is any violation which, from this perspective, could be accepted, even more so if the most serious of these violations – i.e. a resort to force which has not been “authorized” – can be justified when it is *a priori* instrumental in the termination of a human disaster. This is, to some extent, reminiscent of the clean hands doctrine, even though the situation under discussion here ought to be distinguished from situations of diplomatic protection (see also the

separate opinion of Simma in the advisory opinion on the declaration of independence of Kosovo, Rec., 2008, pp. 478-481). Moreover, one cannot deny that there is a risk of disorder that necessarily accompany the adoption of such measures and that should be taken seriously. But such a risk does not suffice to oppose the principled acceptance of the abovementioned measures. With this in mind, an analogical reasoning seems to allow the use of three criteria that can potentially alleviate the abovementioned risk. These criteria were developed to address other situations but, in the specific context of humanitarian intervention, they can help limit the realization of the risks that accompany the adoption of such unilateral measures and, especially, those involving a unilateral use of force:

- *efficacy*: there is no necessity properly so called that the intervening State could invoke; yet there must be serious reasons to believe that the measure it adopts, and particularly the unilateral resort to force, can effectively bring the humanitarian disaster to an end – or at least contribute to the termination thereof – by allowing the return to a situation where most fundamental human rights are respected.
- *proportionality*: by virtue of a general principle, any breach of a rule, especially when the use of force is at stake, must be condemned if it is likely to cause disorders or damages which are disproportionate compared to those that the unlawful measure seeks to settle or prevent.
- *altruism/absence of personal interest/absence of self-interest (désintéressement)*: any breach cannot be accepted if it comes to serve the personal interest of the intervening State, whether intentionally and non-intentionally. For the sake of this criterion, the restoration of legality and the return to compliance with fundamental humanitarian obligations are not, in themselves, deemed to be to self-serving.
- *subsidiarity*: unilateral measures of a “humanitarian” character can only be taken as long as the normally competent authorities, and especially the Security Council if the matter pertains to the use of force, have remained idle despite the occurrence of serious violations of fundamental humanitarian obligations. A mere divergence of views as to the appropriateness of United Nations measures does not suffice to justify unilateral interventions. Exception to the foregoing may apply in very extraordinary circumstances, especially if the matter concerns the United Nations.

Responsibility and dispute settlement

8. It goes without saying that the State intervening unilaterally must bear responsibility for its own actions. This includes the reparation of the damage caused by its unilateral intervention, if the principle of such an intervention

or the conditions, or the modalities of its execution have been contravening international legal rules.

If a disagreement arises in connection with the lawfulness of the measures adopted by the “intervening” State, the relevant international legal provisions pertaining to international dispute settlement apply. It does not matter whether the settlement of the dispute is diplomatic or jurisdictional as long as it is efficient, ... which probably implies that it must be “fair”.

It is uncontested that, in international law, the constraining character of dispute settlement mechanisms is (very) limited. Subjection to dispute settlement hinges on the consent of the parties concerned. Practice shows how difficult it may be to secure such a consent. There is no obligation to subject oneself to a judge, despite the potential threat to equity that necessarily accompanies a political settlement of disputes. It must be acknowledged that such a view of international dispute settlement mechanisms may be the object of very diverging views. It could nonetheless be proposed that the “humanitarian intervening State” which does not subject itself to a jurisdictional dispute settlement mechanism proposed by the territorial State is presumed to have acted contrary to international law. Such a presumption would not legally affect the formal constraints of the dispute settlement mechanism concerned.

Caveat

9. In the previous paragraphs, mention has been made of fundamental human rights without spelling out the content thereof. It must be pointed out here that the content of such rights is not controversial when it comes to strictly individual human rights, irrespective of the substantive fluctuations that exist in this respect between the various pacts, conventions or treaties on that matter. Although they can be the occasional source of hesitations, such substantive divergences do not seem to require much attention by the Institut, unless it is decided to subject the content of such fundamental right to in-depth examination. Such an examination would need to be undertaken in a different framework.

Another – equally difficult – question that must be severed from the study discussed here is that of the possible extension of the scope of the resolution with a view to including rights of groups whether or not these groups constitute, formally speaking, a “people” for the sake of international law. In my view, the answer should remain – at least for the time being – negative. This is irrespective of the fact that some of the rights to which human beings are entitled can hardly be conceived short of any “collectivity”.

Annexe : Draft Articles

