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**THE LEGITIMACY OF ARMED HUMANITARIAN INTERVENTION:
BASIC CONCEPTS**

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INTRODUCTION

1. The worldwide political changes that have taken place since the end of the Cold War have inaugurated a new phase in the evolution of the international humanitarian system which was set in place in the aftermath of World War II.
2. The first phase coincided with the postwar years. It was a foundational time. A new international humanitarian order was being built. Its main pillars were International Human Rights Law, International Humanitarian Law and the International Law of Refugees.¹
3. A second phase started in the 1960s, with the emergence of an international human rights movement, which later spread all over the world. The leading organizations of this movement credibly documented and denounced State abuses and mobilized pressure to stop them. It was the height of the Cold War. Countless peoples lived under dictatorial rule. Many countries suffered the ravages of internal armed conflict. New international human rights norms and intergovernmental protection mechanisms were approved or set up during this period. In the field of International Humanitarian Law, the most significant normative advancement was the signing of the two 1977 Protocols Additional to the Geneva Conventions of 1949.
4. The beginning of the third and present phase may be traced back to the early 80s. By then the values of human rights and democracy had gained unprecedented international legitimacy. Political change was rapidly unfolding everywhere. Numerous countries formerly subjected to dictatorial

¹ Up to that time, International Law had incorporated what we now call 'human rights norms' only in specific fields, such as labor rights and minority rights. International Humanitarian Law, which was much older - the first Geneva Convention dating back to 1864 - received a major new impetus with the four Geneva Conventions of 1949. International Refugee Law was virtually non-existent before the end of World War II.

regimes entered a process of what has come to be known as "transition to democracy". In parallel, in the post Cold War years, internal warfare, often rooted in ethnic, national or religious conflict, erupted in many countries. In some cases internal conflict was facilitated by the debilitation or dissolution of central State authority. Crimes against humanity and war crimes were committed during the course of these conflicts.

5. In response to these developments, three distinct sets of issues have gained prominence in the international humanitarian agenda:
6. First, a cluster of issues grouped under the term "truth, justice and reconciliation". These expressions refer to the need to build or rebuild a democratic system following a period of dictatorship or internal strife and to address, during that process, a legacy of human rights violations or war crimes committed in the recent past.
7. A second group of issues has to do with international criminal justice. More than forty years after the Nuremberg and Tokyo trials, the United Nations established new ad-hoc criminal tribunals: the International Criminal Court for the Former Yugoslavia and the International Criminal Tribunal for Rwanda.² On 17 July 1998, the Statute of the permanent International Criminal Court was approved. In parallel, since October 1998 there has been sharp upsurge of international activism by judges of various countries who seek to assert their prerogatives to prosecute crimes committed outside their territory on the basis of international norms which provide for universal jurisdiction for certain crimes. These new developments seem to have been inspired by the Pinochet case.³
8. A third set of issues relates to humanitarian action. It comprises questions of humanitarian assistance and the debate about the legitimacy of armed intervention in foreign countries for humanitarian reasons.
9. All three sets of issues appear to have stemmed from a determination of the international community to take a more active stance in preventing and stopping massive human rights violations and war crimes, and to bring the perpetrators to justice, so as to build an effective deterrent against the commission of such atrocities.
10. Of all these issues, the question of armed humanitarian intervention seems to raise the sharpest legal, moral and political doubts and dilemmas.
11. In the following section of this paper the state of the question concerning the legitimacy of humanitarian intervention is reviewed.
12. In the third and last section, traditional distinctions and requisites concerning the moral legitimacy of waging war are recalled. They derive from the opinion of classic authors and from the normative foundations of international humanitarian law. It is suggested that such distinctions and requisites may contribute to further the current debate on humanitarian intervention.

² Established, respectively, by UN Security Council Resolution 808 of 1993, and by UN Security Council Resolution 955, of 1994.

³ Augusto Pinochet, former military ruler of Chile, was detained in London on October 16, 1998, following an extradition request filed by Spain, who wished to try him for crimes against humanity.

THE STATE OF THE QUESTION

13. Since the early 90s the analyses and debates on humanitarian intervention have taken place mostly in three different environments: (i) within academic milieu, where it has been addressed mostly from the viewpoints of international law, international relations and moral philosophy;⁴ (ii) within the UN⁵; (iii) within the Foreign Ministries of some countries.⁶
14. The current state of the debate may be summarized as follows:
 - a) There seems to be "an irresistible shift in public attitude towards a belief that the defense of the oppressed in the name of morality should probably prevail over frontiers and legal documents."⁷ The world should not stand by idly in front of tragedies such as the ones that afflicted the former Yugoslavia, Rwanda and East Timor.
 - b) This change in attitude is also reflected in - or partly stems from - the contemporary developments in Human Rights Law and International Humanitarian Law which establish obligations for States and international organizations to collaborate in the international protection of basic human rights, the prevention of human rights violations and war crimes and the punishment of the perpetrators.
 - c) State sovereignty is thus being redefined. "States are now widely understood to be instruments at the service of their people, and not *vice versa*."⁸ This concept may call also for a new "broader definition of national interest ... which would induce States to find greater unity in the pursuit of common goals and values."⁹
 - d) Humanitarian intervention maybe is understood as one sub-set of the broader field of humanitarian action.¹⁰ A related but separate form of humanitarian action would be

⁴ Most of the academic literature focuses either on case studies of key situations such as those which arose in Somalia, Yugoslavia, Haiti, Rwanda and East Timor, or on a discussion of the political dilemmas of humanitarian intervention. Some analyze the conditions for the legitimacy of such intervention. For this article we take as a basis an article which brings together these trends and concludes by offering criteria to evaluate the permissibility of intervention on humanitarian grounds: Ved P. Nanda, "Tragedies in Northern Iraq, Liberia, Yugoslavia and Haiti - Revisiting the Validity of Humanitarian Intervention and International Law - Part I", *Denver Journal of International Law and Policy*, Vol. 20, N° 2, Winter 1992. It was followed by a second article by Ved P. Nanda, Thomas F. Muther Jr. and Amy E. Eckert, "Tragedies in Northern Iraq, Liberia, Yugoslavia and Haiti - Revisiting the Validity of Humanitarian Intervention and International Law - Part II", *Denver Journal of International Law and Policy*, Vol. 26, N° 5, Winter 1998.

⁵ UN Secretaries-General Javier Pérez de Cuéllar, Boutros Boutros-Ghali and Kofi Annan have all made relevant statements in their annual reports to the General Assembly. For this paper we take as the basis the reports of UN Secretary-General Kofi Annan on the work of the Organization to the UN General Assembly 52nd Session, Supplement N° 1 (A/52/1) of 1997; General Assembly 53rd Session, Supplement N° 1 (A/53/1) of 1998; General Assembly 54th Session, Supplement N° 1 (A/54/1) of 1999; as well as other statements by Kofi Annan, especially "Two Concepts of Sovereignty", published by *The Economist*, 16 September 1999. For understandable reasons, given his position, Secretary-General Annan does not directly address the question of the legitimacy of armed humanitarian intervention, but many of his remarks are pertinent to this debate.

⁶ For this paper we take as a basis *Humanitarian Intervention*, N° 13, April 2000, by the AIV (Advisory Council on International Affairs) and the CAVV (Advisory Committee on Issues of Public International Law), a policy advisory report commissioned by the Dutch Minister of Foreign Affairs. It is also worth mentioning that on September 14, 2000, the Minister of Foreign Affairs of Canada, Lloyd Axworthy, launched an International Commission on Intervention and State Sovereignty (ICISS), inviting the representatives of several other countries' governments to join it. The purpose of this initiative would be "to ensure that the indifference and inaction of the international community, in the face of such situations as occurred in Rwanda and Srebrenica, are no longer an option." (News reports).

⁷ Statement by UN Secretary-General Javier Pérez de Cuéllar. Report of the Secretary-General, in *UN Yearbook 1991*, para. 11, quoted by AIV CAVV.

⁸ Kofi Annan in "Two Concepts of Sovereignty", *loc. cit.*

⁹ *Ibid.*

¹⁰ Edmundo Vargas Carreño, *Humanitarian Action and State Sovereignty, Introductory Report to the International Institute of Humanitarian Law*, San Remo, 31 August-2 September 2000.

humanitarian assistance, whose object is to help victims or to alleviate a situation that constitutes an attack or threat to the lives of large numbers of people.¹¹ Humanitarian intervention "proper" refers to a situation when a State or group of States enters by force into the territory of another State in response to large-scale violations of human rights or war crimes that are taking place there.¹² However, others consider that humanitarian intervention is a misnomer, which may tend to blur the differences between armed intervention and the traditional field of humanitarian work and assistance.¹³

- e) To advocate the permissibility of international intervention (however strictly such permissibility may be construed) poses serious risks and challenges to the international community. Yet, on balance, humanitarian intervention should be supported, not only because it seems to respond to an inevitable trend, but rather because it shows "that humankind today is less willing than in the past to tolerate suffering in its midst, and more willing to do something about it."¹⁴
- f) It should be recognized that humanitarian intervention involves legal, moral and political questions and that they ought to be treated in conjunction. Further, it must be recognized that humanitarian intervention, which is not authorized by the Security Council on the basis of Chapter VII of the UN Charter, has, at best, tenuous support in international law.
- g) While there is a danger in attempting to introduce the notion of humanitarian intervention in international law, it must be accepted that it is also dangerous to refuse to regulate it. In the absence of regulations, intervention will continue to take place but without internationally accepted guidelines and without accountability of the countries which so intervene.
- h) It is not clear whether the permissibility of humanitarian intervention should be construed as a right, as a duty or, yet, merely as a set of criteria to judge the legitimacy of such action.
- i) As to the discussion of the requisites for the legitimacy of humanitarian intervention, most proposals take a "who-why-when-how and for how long" approach to the analysis of this question.¹⁵

¹¹ Vargas Carreño, *Op. Cit.* p. 6.; AIV CAVV, p. 6.

¹² The AIV CAVV report (p. 6) treats as a separate category the authorization to use force given by the Security Council on the basis of Chapter VII of the UN Charter in response to situations involving large-scale human rights violations in a given country.

It reserves the term humanitarian intervention for those which are unauthorized.

¹³ Misgivings about using the terminology of humanitarian intervention may explain why the above referred Canadian initiative (footnote 6) was labeled International Commission on Intervention and State Sovereignty.

¹⁴ Kofi Annan, *Ibid.*

¹⁵ Ved P. Nanda offers the following criteria to evaluate the permissibility of intervention on humanitarian grounds:

1. The Severity of the Rights Violations - The Necessity Criterion
 - a. Genocide
 - b. Gross, persistent and Systematic Violations of Basic Human Rights
2. The Nature of the Intervention - The Proportionality Criterion
 - a. Duration.
 - b. Was the force proper/excessive?
3. The Purpose of the Intervention
 - a. Humanitarian Concern?
 - b. Self-Interest?
 - c. Mixed?
4. Was the action:
 - a. Collective?
 - b. Unilateral?
5. Balancing Alternatives and Outcomes: Does the intervention maximize the best outcome? (*Op. Cit.*, 1992, p. 330).

The AIV CAVV report proposes an "assessment framework" as a minimum precondition for unauthorized humanitarian intervention, rather than a list of disconnected criteria. The main headings of such framework are put forward as follows:

1. Which States should be allowed to engage in humanitarian intervention?
2. When should States be allowed to engage in humanitarian intervention?

15. Many of the proposals formulated under such headings or following similar conceptual categorizations are insightful and sensible. Further, they are easy to communicate and be understood.
16. However, sometimes these analyses mix the questions related to the moral legitimacy of resorting to war, that is *jus ad bellum*, with the laws of war, that is *jus in bello*. Also, sometimes they mix issues, which have been dealt with separately in traditional moral thinking about just wars; for instance, "just cause" and "necessity". The point may seem purely academic. Yet, it is our contention that proper conceptual categorizations are essential to facilitate the debate on this issue. Further, we believe that while the question of humanitarian intervention does indeed have legal and political dimensions, as well as moral ones, it is the latter approach which provides the soundest conceptual basis for a set of criteria about the legitimacy of armed intervention.
17. In the next section, basic tenets of International Law concerning the use of force are analyzed. Then, centuries-old moral theories on just wars are used to discuss some of the criteria for the justification of humanitarian intervention that are currently being proposed, albeit under different headings.

CONCEPTUAL ELEMENTS FOR THE DISCUSSION OF THE LEGITIMACY OF ARMED INTERVENTION

18. As is well known, the *jus ad bellum*, that is the right to wage war other than for strictly defensive purposes or, by extension, the right to use force in international relations, was not a matter traditionally addressed by International Law.
19. Until World War I, International Law concerned itself mostly with the formalities for the initiation and cessation of hostilities and with describing the acts that were considered hostile. The substantive requirements for the legitimacy of the use of force in international relations, was dealt with mostly by ethicists. So was the right to resort to rebellion against the authorities.
20. Following World War I, International Law sketchily addressed the question of a right to wage war, but in the form of an emerging *jus contra bellum*. That is, International Law prohibited war, except for defensive ones.¹⁶
21. In the aftermath of World War II, this emerging *jus contra bellum* was emphatically asserted. The preservation of peace was one of the paramount considerations that led to the establishment of the UN.¹⁷ The UN was meant to harmonize collective measures for the prevention of threats to peace and the suppression of aggression.¹⁸ To that end, it could determine the existence of any threat to peace, breach of peace or act of aggression; make recommendations to maintain or restore peace;

3. What conditions should States satisfy during humanitarian intervention? and

4. When and in what way should States end their humanitarian intervention?

pp. 28-32.

¹⁶ War was partly outlawed by the Covenant of the League of Nations. It was completely prohibited by the Pact of Paris of 1928. But, as pointed out by Schindler, "resort of force short of war escaped that prohibition. In several cases during the interwar period, States carried out war-like operations against others while declaring that they were not conducting war but measures short of war." Dietrich Schindler, "The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols", in *Recueil des Cours, Collected Courses of the Hague Academy of International Law*, 1979, Vol. II (Sijthoff and Noordhoff, The Netherlands 1980), p. 125.

¹⁷ It is so stated in Art. 1 of the UN Charter. Art. 2. of the Charter establishes the principle of peaceful settlement of international disputes, the prohibition of intervention in the domestic jurisdiction of States and the general prohibition of the threat or use of lethal force in international relations.

¹⁸ Art. 1 of the UN Charter.

and, if necessary, approve measures that, as a last resort, could include action by military forces.¹⁹ Naturally, the right of individual and collective defense against armed attack was also recognized.²⁰ Numerous UN resolutions have confirmed and elaborated upon this *jus contra bellum*.

22. The Security Council has on occasions used its powers under Chapter VII. Yet, needless to say, the UN is not a supra national authority which can independently enforce its decisions. In practice, effective peace-making action by the UN requires the assent and/or cooperation of the leading military powers.
23. Other international norms contain some elements of *jus ad bellum* but mostly in the extended connotation of this term, namely as it applies to the right of peoples to rebel against oppression. The 3rd paragraph of the Preamble to the Universal Declaration of Human Rights states: "Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law". Protocol I, of 1977, Additional to the Geneva Conventions of 1949, deals with the so-called "wars of liberation", declaring that Common Article 2 of the Geneva Conventions includes "armed conflicts in which people are fighting against colonial domination and alien occupation and racist regimes in the exercise of their right to self-determination."²¹
24. Except for these references related to rebellion or to war against foreign domination or tyranny, there are no explicit bases for a right to humanitarian intervention in international law. At best such right may be considered as an emerging right deriving from the obligations that Human Rights Law and International Humanitarian Law impose on States.
25. It should be recognized that the reasons why International Law followed the path of affirming a *jus contra bellum* are found not only in the bitter lessons drawn from World War II, but in the post-war development of strategic nuclear capabilities by major powers and in the ensuing tensions of the Cold War. In such climate, it was feared that even the most strictly construed legal justification for the waging of non-defensive wars could open a possibility for international military escalation, with unthinkable consequences.
26. Thus, the new debate about humanitarian intervention is as much rooted in a genuine shift of public attitude as it is in the reality that the anxieties about nuclear warfare have subsided.
27. Yet, while the world has changed, international law still retains the constraints imposed by an old concept of sovereignty and by the Cold War situation.
28. Returning to the question of the moral requirements for the legitimacy of armed intervention, we will now sketch a framework drawn from classic writings of moral theory.²² It should be pointed out that some of the requisites which will be summarized henceforth, are clearly implicit in the already mentioned Preamble to the Universal Declaration of Human Rights and Art. 1(4) of Protocol I of 1977, Additional to the Geneva Conventions of 1949.

¹⁹ Chapter VII of the UN Charter.

²⁰ Article 51.

²¹ Protocol I, Art. 1(4).

²² The synthesis which follows is based in St. Thomas Aquinas' *Summa Theologica*, Secunda Secundae, Quaestio XI, taking also into account Francisco de Vitoria's *De Jure Belli*. Some of the same elements which stem from the writings of these two authors are found in many other authoritative texts, including Augustine's collection *De Civitate Dei* and Hugo Grotius' *De Jure Belli Ac Pacis*.

Legitimate authority

29. By legitimate authority Aquinas meant the authority of the ruler. It must be marked that he stated that the reason why a private individual may not declare war is that he can seek redress of his rights from the tribunal of his superior. Namely, the ruler alone enjoys the privilege of declaring war because he also has the power to adjudicate disputes and to effectively carry out other measures for the good of the commonwealth.
30. Modern international law does not accept medieval theories about the legitimacy of the ruler's authority. Instead, it stresses the democratic principle that "the will of the people shall be the basis of the authority of government."²³ Moreover, it has taken from States the right to wage war against other States and has bestowed such right on the Security Council, within the terms of Chapter VII of the UN Charter.
31. Yet, needless to say, the UN does not enjoy a world power equivalent to the one that States have over their territories. It cannot enforce by itself what may be considered as a compelling objective for the good of the international community. Whenever a democratic State finds itself in a similar situation, its laws will allow citizens to defend themselves and even will allow them to enforce the law in some circumstances (as exemplified by the legal institutions of legitimate defense and citizen arrest).
32. This asymmetry between the rationale for the ruler's authority and the actual reality of the UN, explains the different views being expressed in the current debate on the issue of who can legitimately authorize the use of international force for humanitarian reasons.
33. Many argue in favor of the existing legal *status quo*. Namely, only the Security Council may be considered the legitimate authority for decreeing the use of international force, provided that it acts in accordance to Chapter VII of the UN Charter. Some concede that such authority may also be exerted by the General Assembly if the Security Council fails to do so in time.²⁴ According to this view which favors of the *status quo*, there would be no need to elaborate a right to humanitarian intervention; at most the authority vested in the Security Council under Chapter VII of the UN Charter could be expanded to make clear that compelling humanitarian reasons may suffice for it to authorize the use of force, even is there is no demonstrable threat to international peace.
34. This position is not based on a purely legalistic attitude but also on reasons of prudence. It is feared that if international law opens the door of permissibility - however narrowly - for the use of non-defensive force in international relations, this would inevitably lead to abuses and to international instability.
35. On the other hand, from a moral and humanitarian standpoint, it is argued that it is not tenable to hold such a restrictive view on the legitimate authority to decide on humanitarian intervention. As a general rule, that authority may be said to rest on the Security Council or on the UN General Assembly. But under exceptional circumstances, unauthorized intervention must also be permissible.
36. Even if this last position is accepted, there are many specific questions that need to be answered. Would some States definitely not qualify as legitimate authorities either to intervene by themselves or jointly with other States? (For instance, States which themselves engage in human rights

²³ Universal Declaration of Human Rights, Article 21(3).

²⁴ Vargas Carreño, p. 15.

violations or which have not ratified the main human rights conventions²⁵). Ought "serious" States or neighbor States be preferred?

37. It is our belief that it would be more appropriate to analyze these specific questions under some of the headings mentioned below, such as rightful intention or necessity.

Just cause

38. On the debate about humanitarian intervention there is little disagreement about the contemporary content of the traditional requisite of just cause (however it may currently be labeled). The cause that justifies humanitarian intervention must be a situation in which fundamental rights are being violated on a large scale.
39. Today's legal and moral standards do not accept vengeance as a just cause for the use of international force, when "a nation or a State has to be punished for refusing to make amends for the wrongs inflicted by its subjects or to restore what it has seized unjustly."²⁶

Rightful intention

40. This requisite means that the belligerents should aim at redressing the situation which constitutes a just cause for intervention and aim also at securing peace and a state of affairs which may help to prevent its recurrence. They should not be guided by a desire to gain power or to obtain other advantages.
41. Needless to say, true intentions are often manifested after the intervention has taken place. Yet, the criterion of rightful intention may be useful to decide that certain actors are not morally qualified to undertake intervention, on the basis of their past or present behavior. Also, with a view to secure that this condition for the legitimacy of intervention is duly taken into account, accountability mechanisms may be set in place. For instance, it may be established that intervening States must "report to the Security Council immediately and in detail on the reasons for the operation, its scale, its progress and its likely duration."²⁷

Necessity

42. In the context of *jus ad bellum*, necessity has a different connotation than the well-known principle of military necessity, which is one of the basic normative criteria of the *jus in bello*. Military necessity indicates that a reasonable link must exist between a particular military action and the natural objective of waging war, which is to defeat the enemy forces.
43. As to *jus ad bellum* necessity means that force should be a measure of last resort, that is it should be employed when no other means can achieve the results being sought. Certainly, this requires a reasonable evaluation of the situation. It may not be necessary to exhaust all available means - political, diplomatic, economic - one after another, before proceeding by force. If immediate action is called for, because there is no reasonable hope that other means will yield results or because the situation is such that time cannot be wasted, the principle of necessity would be equally satisfied.

²⁵ It has been so proposed by the AIV CAVV report, pp. 28-29.

²⁶ Augustine, cited by Aquinas, *Op. cit.*

²⁷ AIV CAVV, p. 31.

Proportionality

44. From the standpoint of *jus ad bellum* proportionality has a different connotation than the *jus in bello* principle which prohibits attacks that may be expected to cause incidental loss of civilian life, injury to civilians or damage to civilian objects which would be excessive in relation to the concrete and direct military advantage anticipated.
45. The *jus ad bellum* requisite of proportionality requires a consequentialist moral approach: the costs and benefits of the intended intervention should be gauged. An intervention, which can be expected to cause greater harm than the evil that is being confronted, is not legitimate.
46. Proportionality also relates to the duration of the intervention. It must not extend beyond what is necessary to rectify the situation that prompted it. But it should not fall short of that objective either. It is not enough to stop human rights violations if conditions are not in place that may prevent the problems from reemerging.
47. The probability of success is sometimes mentioned as yet another, separate requisite for the justification of humanitarian intervention. However, the definition of proportionality given in this section, includes the probability of success. To wage war out of a sheer sense of duty, without a reasonable likelihood of success, is not morally acceptable.

Jus in Bello

48. The previous five requisites must concur for a decision to intervene in another country for humanitarian reasons to be legitimate. In addition, during the implementation of such decision, the intervening States should conduct the hostilities (or the subsequent military occupation, if it is the case) fully in accordance with the obligations imposed by International Humanitarian Law.
49. Conceptually, this last requisite does not relate to the right to wage war (*jus ad bellum*) but to the manner in which war is conducted (*jus in bello*). Yet, it is important to stress it both in order to affirm the paramount importance of scrupulously observing International Humanitarian Law and because disrespect for its norms may render illegitimate and intervention that was justified in principle.