

Military Intervention without Security Council's Authorisation as a Consequence of the "Responsibility to Protect"

Tania Bolaños*

I. Introduction

The United Nations (UN) is an organisation created "to save succeeding generations from the scourge of war". It is the principal institution for building, consolidating and using the authority of the international community in order to fulfil the principles and purposes of the Charter of the United Nations, which endows its decisions with legitimacy. The United Nations' first and foremost obligation is to protect peace and security as well as to promote international cooperation, in order to solve, among other things, problems of social, economic and humanitarian nature and to encourage the respect for human rights and fundamental freedoms on a global scale.¹ In this regard, solidarity and cooperation between the members of the organisation play an important role in promoting human security.²

* LL.M., Germany; PhD Candidate, University of Heidelberg; guest researcher at Max Planck Institute for Comparative Public Law and International Law. E-mail: taniagicela@web.de. The author would like to express her gratitude to Professor Dr. Ulrich Beyerlin and Marc Schlagenhoff for critical comments on earlier drafts of this contribution. All views and opinions are personal.

¹ See Preamble and Art. 1, UN Charter.

² I. Voicu, "Solidarity and Security", *Romanian Journal of International Affairs* VIII (2002), 51 et seq. (52-54, 70); A.-M. Slaughter, "Security, Solidarity and Sovereignty: The Grand Themes of UN Reform", *AJIL* 99 (2005), 619 et seq. (622): "international security include[s] both state security and human security".

For example, when a State does not or is not capable of fulfilling its obligation to protect its people, the international community needs to compensate for this failure by offering the required assistance through the United Nations, especially when international peace could be affected as a result of the negligence on the part of the State.³ The main responsibility in maintaining peace and international security lies with the UN Security Council, which in case of acts of aggression, breach of the peace, or in the presence of internal armed conflicts, as well as of serious violations of human rights representing a threat to international peace, can decide what measures shall be taken in order to maintain or restore peace and security. Such recommendations or coercive measures include the use of armed force.⁴ Nevertheless, situations may arise where the Security Council does not act, or due to a veto of any of its permanent members can not take any decision. In these instances, the question arises whether, in order to save the life and goods of the civil population as well as to prevent violations of international law, the international community is under an obligation to act, and if it is, whether it is legally authorised to intervene without having obtained the Security Council's authorisation.

The aim of this contribution is to put forward thoughts on how to solve these problems, which are among the most controversial aspects of military intervention for human protection purposes.⁵ Consequently, the second part of this contribution analyses to what extent the concept of the responsibility to protect can justify (military) interventions by the international community in internal affairs of individual States. The third part focuses on the possibility of military intervention based on the primary meaning of the responsibility to protect, i.e. with prior authorisation of the Security Council pursuant to the UN Charter. The fourth part outlines the opposite positions. It outlines how the armed

³ A/59/565 of 2 December 2004, para. 29; Voicu, see note 2, 56; Slaughter, see note 2, 620; H. Köck, "Neutralität versus Solidarität", in: W. Hummer (ed.), *Paradigmenwechsel im Völkerrecht zur Jahrtausendwende*, 2002, 85 et seq. (104).

⁴ Arts 24, 39-42, UN Charter.

⁵ For a change of the terminology from humanitarian intervention to intervention for human protection purposes see: ICISS, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty*, 2001, available at: <www.iciss.ca/pdf/Commission-Report.pdf>; G. Evans, "From Humanitarian Intervention to the Responsibility to Protect", *Wis. Int'l L. J.* 24 (2006), 703 et seq.

force can legally be used by the international community without a prior Security Council's authorisation but in accordance with the obligation derived from the concept of the responsibility to protect where the Security Council fails to reach a decision. Finally, the fifth part analyses the possibility that the UN General Assembly recommends military enforcement actions because the Security Council was inactive or paralysed by veto cast. These analyses lead to the conclusion that military intervention for human protection purposes is normally authorised by the Security Council, but in certain limited instances may also be recommended by the General Assembly.

II. Responsibility to Protect⁶

Each UN member is obliged "to protect the welfare of its own people and meet its obligations to the wider international community".⁷ Hence, based on national sovereignty and the principle of non-intervention in matters essentially within the domestic jurisdiction of States,⁸ every country has to provide security and protection to its citizens and guarantee the exercise of their rights and fundamental freedoms.⁹ The economic differences cause nations to perform these duties differently; however, the important point is that all nations do fulfil them.¹⁰

Nonetheless, in some occasions the government may not be capable of fulfilling these obligations, and in some others the government itself may be the perpetrator of serious violations of human rights and human dignity. In these instances, the obligation of mutual assistance between States is engaged. It is based on the principle of solidarity, which strives

⁶ The concept of "responsibility to protect" comprises the responsibility to prevent, to react, as well as the responsibility to rebuild; however the references to the "responsibility to protect" in this contribution should be understood as reference to the responsibility to react.

⁷ A/59/565, see note 3, para. 29.

⁸ Art. 2 para. 7, UN Charter.

⁹ Köck, see note 3, (94-95); Slaughter, see note 2, (620); K. Annan, *Intervention*, Ditchley Foundation Lecture XXXV 26 June 1998, Press Release SG/SM/6613, (3); ICISS, see note 5, paras 2.7-2.15.

¹⁰ R. St. J. Macdonald, "Solidarity in the Practice and Discourse of Public International Law", *Pace Int'l L. Rev.* 8 (1996), 259 et seq. (281).

to foster common welfare on a national and international level.¹¹ This understanding is supported by the World Conference on Human Rights of 1993, the Universal Declaration on Human Rights and the Convention for the Prevention and Punishment of the Crime of Genocide, both of 1948, which among others underline the competence of the international community to promote and protect human rights.

Consequently, massive violations of human rights and international humanitarian law involve an attenuation of the principle of non-intervention, and legitimise actions taken by the international community in order to halt such violations. In this regard, the International Commission on Intervention and State Sovereignty (ICISS) stated that “where 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”.¹² In the face of war cruelty and the apathy of the established government, the international community cannot remain an observer. Thus, the responsibility to protect is not so much a right to intervene in an internal conflict, but rather an obligation to support the population in danger or under serious threat. Consequently, when the State itself does not protect its citizens or commits grave violations of human rights, the responsibility to protect is transferred from that State to the international community, that is entitled to take, if necessary, military actions to avert the crisis.¹³

Since the principle of non-intervention remained the general rule, and cases that justified military intervention by the international community were the exception, the scope of the concept of the responsibility to protect needed to be limited.¹⁴ At first, it was thought that any significant loss of human life as a consequence of mass atrocities in the context of internal conflicts or State repression, large scale ethnic cleansing, or even natural catastrophes, obliged the international community

¹¹ Köck, see note 3, 100.

¹² ICISS, see note 5, Synopsis 1 lit. B; as well as A/59/565, see note 3, para. 200.

¹³ A/59/565, see note 3, para. 201; A/59/2005 of 21 March 2005, para. 135; ICISS, see note 5, paras 2.31-2.33; S. Wills, “Military Intervention on Behalf of Vulnerable Populations: The Legal Responsibilities of States and International Organisations Engaged in Peace Support Operations”, *JCSL* 9 (2004), 387 et seq.; in regard to the obligation of the international community to avoid the crime of genocide see ICJ General List 91 (2007).

¹⁴ ICISS, see note 5, paras 4.10-4.14.

to act on the basis of the responsibility to protect.¹⁵ Some years later, the High-level Panel on Threats, Challenges and Change stated that the responsibility to protect of the international community is engaged in cases of genocide and other large-scale killing, ethnic cleansing by forcible expulsion and terror, and deliberate starvation and exposure to disease as well as in cases of serious violations of international humanitarian law such as rape.¹⁶ This concept was further specified by the General Assembly in the resolution based on the 2005 World Summit Outcome document. In this document the responsibility to protect was limited to cases of genocide, war crimes, ethnic cleansing, and crimes against humanity.¹⁷

Even though the notion of responsibility to protect is fairly recent – it appeared for the first time in the ICISS report of 2001 – and is still in evolution, it has doubtlessly met a growing acceptance so far. In fact, 149 nations sent the World Summit Outcome document to the General Assembly,¹⁸ which then adopted it as a resolution, thus giving a significant impulse to the notion and the obligations referred to as “responsibility to protect”.¹⁹

At the same time, it also limited the concept of humanitarian intervention by restricting the applicability of the responsibility to protect to the four cases stated above.²⁰ As a consequence, the responsibility to protect is not a viable argument for justifying any other kind of interventions which, unless carried out in accordance with the procedures

¹⁵ ICISS, see note 5, paras 4.19-4.27.

¹⁶ A/59/565, see note 3, paras 200-202.

¹⁷ See A/RES/60/1 of 24 October 2005, paras 138-140.

¹⁸ UN News Service, 16 September 2005, available at: <www.globalsecurity.org/wmd/library/news/un/un-050916-unnews05.htm>.

¹⁹ I. Winkelmann, “Responsibility to Protect”, in: R. Wolfrum (ed.), *MPEPIL online edition*, para. 13; S. Breau, “The Impact of the Responsibility to Protect on Peacekeeping”, *JCSL* 11 (2006), 429 et seq. (445-453); R. Hamilton, “The Responsibility to Protect: From Document to Doctrine – But What of Implementation?”, *Harv. Hum Rts. J.* 19 (2006), 289 et seq. (294-295); Evans, see note 5, 715.

²⁰ Winkelmann, see note 19, para. 20; ICISS, see note 5, para. 4.25; L. Brock, “Von der humanitären Intervention zur Responsibility to Protect: Kriegserfahrung und Völkerrechtsentwicklung seit dem Ende des Ost-West-Konflikts”, in: A. Fischer-Lescano et al. (eds), *Frieden in Freiheit, Festschrift für Michael Bothe*, 2008, 19 et seq. (29); Wills, see note 13, (389-390).

set out in the UN Charter, could be seen as a violation of international law and even as an acts of aggression.

There is a general consensus demonstrated by the practice of the Security Council that serious violations of human rights and international humanitarian law in any country can constitute a threat to the international, or at least regional, peace and security, and permit the activation of the collective security system established in Chapter VII of the UN Charter together with Chapter VIII where the participation of regional organisations is required to execute the relevant resolutions.²¹

Whether the responsibility to protect allows a military intervention by the international community without the prior authorisation of the Security Council, or whether on the contrary, the authorisation is a *sine qua non* requirement for the intervention, is much argued about. Doctrines as well as nations have opposite opinions on this subject, and the main positions will be analysed below.

III. Military Intervention Requires Prior Security Council's Authorisation

One position upholds that, based on an exegetic interpretation of the UN Charter, any use of force which is outside the parameters of the UN Charter is unacceptable. Indeed, the prohibition of the use of armed force is one of the fundamental principles of the UN Charter. Consequently, every military intervention constitutes an act of aggression unless it is justified by the exercise of the right of self-defence or is authorised by the Security Council.²² Moreover, bearing in mind that the Security Council chooses the UN members who are to carry out its

²¹ R. Cryer, "The Security Council and Article 39: A Threat to Coherence?", *JACL* 1 (1996), 161 et seq. (174); Brock, see note 20, (23); F. Grünfeld, "Human Rights Violations: A Threat to International Peace and Security", in: M. Castermans-Holleman (ed.), *The Role of the Nation-State in the 21st Century, Human Rights, International Organisations and Foreign Policy*, 1998, 427 et seq.; I. Österdahl, *Threat to the Peace, the Interpretation by the Security Council of Article 39 of the UN Charter*, 1998, 26 et seq.; K. Wellens, "The UN Security Council and New Threats to the Peace: Back to the Future", *JCSL* 8 (2003), 15 et seq. (43-46); M. Brown, *The International Dimensions of Internal Conflict*, 1996, 594.

²² Preamble and Art. 2 paras 4 and 7, UN Charter.

resolutions discretionally, it is possible to conclude that only they are authorised to intervene in order to execute the Security Council's resolutions. This means that no other nation can execute these resolutions *sua sponte* and even more none of them is allowed to initiate military actions against the territorial integrity of any other State, even if serious violations of human rights and international humanitarian law are being committed.²³

The UN Charter strengthens this interpretation when it refers to the actions of regional organisations which, due to their more accurate knowledge of and deeper insight into the specific regional situation, may be in a better position to execute measures of peace maintenance in their area of influence. In spite of the fact that such organisations are legitimated to adopt and execute coercive measures, the UN Charter clearly denies them the possibility to take coercive military measures without the Security Council's authorisation.²⁴ This prohibition does not provide for an exception regarding military intervention for human protection purposes.²⁵ Therefore only the Security Council can order military sanctions when they are necessary. To this end, it uses binding resolutions following the previous determination of a breach of or threat to peace or the existence of an act of aggression.²⁶

As mentioned before, when a State is unwilling or unable to fulfil the obligation of protecting its own population, it is the international community which should assume this responsibility. Rather than acting

²³ Art. 48 para. 1, UN Charter.

²⁴ Art. 53 para. 1, UN Charter; U. Villani, "The Security Council's Authorization of Enforcement Action by Regional Organizations", in: J.A. Frowein and R. Wolfrum (eds), *Max Planck UNYB* 6, 2002, 535 et seq. (538-540); C. Walter, "Security Council Control over Regional Action", in: J.A. Frowein and R. Wolfrum (eds), *Max Planck UNYB* 1, 1997, 129 et seq. (142); see also SCOR 17th Year 992d-998th Mtgs. of 14-23 March 1962 quoted by: L. Goodrich et al., *Charter of the United Nations Commentary and Documents*, 1969, 365 et seq.; M. Hakimi, "To Condone or Condemn? Regional Enforcement Actions in the Absence of Security Council Authorization", *Vand. J. Trans'l L.* 40 (2007), 643 et seq. (650-651).

²⁵ C. Greenwood, "Historical Development and Legal Basis", in: D. Fleck (ed.), *The Handbook of International Humanitarian Law*, 2008, 1 et seq. (9); J. Gonzalez et al., *Curso de Derecho Internacional Público*, 2008, 1035; Hakimi, see note 24, 644-650; A/RES/60/1, see note 17, paras 79, 139; Walter, see note 24, 157-158; ICISS, see note 5, para. 6.13.

²⁶ Arts 39-42, UN Charter.

directly, it does so through the Security Council to which the States conferred the primary responsibility in maintaining peace and international security in order to facilitate prompt and effective action.²⁷

All of the above lead to the conclusion that the Security Council, acting on behalf of the international community, has a monopoly in the use of armed force. Hence, the responsibility to protect must be assumed by the international community acting through the Security Council, which has the authority to take any kind of coercive measures, both of non-military and military nature.

Military intervention, in exercise of the responsibility to protect, is only permissible when non-military means would be or have proven to be inadequate and national authorities are manifestly failing to protect their population from genocide, war crimes, ethnic cleansing, and crimes against humanity. Only under these conditions have the members of the United Nations accepted to be prepared “to take collective action in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organisations as appropriate”.²⁸ Since the United Nations does not command its own army, whenever it is necessary to intervene militarily, the Security Council shall, based on Chapter VII, authorise the UN members to use armed force; or, based on Chapter VIII, mandate regional organisations with the execution of enforcement operations contained in Article 42 of the UN Charter.²⁹

The thesis that the responsibility to protect must be exclusively exercised by the international community and only through the Security

²⁷ Art. 24 para. 1, UN Charter; see also A/RES/60/1, see note 17, paras 79, 139; ICISS, see note 5, paras 6.1-6.27; A/59/565, see note 3, para. 203; A. Bellamy, “Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit” *Ethics & International Affairs* 20 (2006), 143 et seq. (164); ICJ Reports 1999, 916 et seq. (925, para. 33).

²⁸ A/RES/60/1, see note 17, para. 139.

²⁹ N. Bentwich, et al., *A Commentary on the Charter of the United Nations*, 1950, 97; G. Troost, *Die Autorisierung von UN-Mitgliedstaaten zur Durchführung militärischer Zwangsmaßnahmen des Sicherheitsrates in Recht und Praxis der Vereinten Nationen*, 1997, 174 et seq.; J. Quigley, “The Privatization of Security Council Enforcement Action: A Threat to Multilateralism”, *Mich. J. Int. L.* 17 (1996), 249 et seq. (250-254); Villani, see note 24, 536; D. Sarooshi, *The United Nations and the Development of Collective Security – The Delegation by the UN Security Council of its Chapter VII Powers*, 1999, 248 et seq.

Council is further supported by the obligations assumed by the Contracting Parties of the Geneva Conventions of 1949, which in their first common article provide that “the High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances”. This norm could imply, as the ICJ stated in its advisory opinion on the legal consequences of the construction of a wall in the occupied Palestinian territory, that “every State party to that Convention, whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with”.³⁰ It does not represent a *carte blanche* for States to enforce respect of the international humanitarian law regardless of the means. On the contrary, this postulate obliges each State to ensure respect for the norms while at the same time it has to respect the international law and the international humanitarian law itself. Therefore it cannot be used as a justification for intervening without the Security Council's authorisation. The obligations derived from the cited article will, however, constitute a base for the Security Council to adopt the corresponding military sanctions.³¹

Finally, it is important to mention that the notion of the responsibility to protect does not diminish the discretion of the Security Council to take military or non-military measures whenever a situation becomes a threat to peace, a breach of the peace or an act of aggression in cases different from the four cases triggering the responsibility to protect, as provided for in Article 39 of the UN Charter.

IV. Military Intervention Without Security Council's Authorisation

Throughout the history of the United Nations, situations have arisen where the Security Council, although having the responsibility to protect population against genocide, war crimes, ethnic cleansing, and crimes against humanity, has failed to do so, or in spite of discussing the matter did not adopt any effective measures to alleviate the crisis. These situations have caused States to seek recourse to unilateral military in-

³⁰ ICJ Reports 2004, 136 et seq. (199-200, para. 158).

³¹ Wills, see note 13, 413; ICJ Reports 2004, see note 30, 200, 202, paras 159, 163 lit. D.

tervention or to intervention through regional organisations on behalf of the vulnerable population.³²

Through a different interpretation of the UN Charter, while respecting its principles, some countries and part of the legal literature argue for granting States more options to act and to uphold the possibility of military intervention for purposes of human protection even in the absence of the Security Council's authorisation.

This interpretation is, among other things, based on the fact that the UN Charter, although it prohibits the use of armed force, provides for exceptions. The UN Charter itself allows in some circumstances and under certain conditions the use of armed force. An example of this is the case of individual or collective self-defence under Article 51 of the UN Charter. In case of armed attacks against a UN member, it permits the State to exercise the right of individual self-defence, and allows other States to intervene once the nation under attack has requested their assistance (collective self-defence).³³ In any case, the use of armed force cannot exceed the limits imposed by the principles of proportionality and necessity,³⁴ and will only be admissible until the Security Council adopts the necessary measures to restore peace.³⁵

The concept of the responsibility to protect has also been used to argue for the legitimacy of military interventions without the Security Council's authorisation. While according to Article 24 of the UN Charter it is accepted that the Security Council has the primary responsibility in maintaining the peace and security (including the human security), and that it is responsible to intervene on behalf of the community of nations, this responsibility is not necessarily exclusive.³⁶ Additionally, it is undeniable that occasionally the Security Council just remains inactive or even worse it cannot act because one or more of its permanent mem-

³² E.g. Rwanda and Kosovo.

³³ ICJ Reports 1986, 14 et seq. (103-106, paras 195-201).

³⁴ Greenwood, see note 25, 8-9; J. Gardam, "Legal Restraints on Security Council Military Enforcement Action", *Mich. J. Int. L.* 17 (1996), 285 et seq. (295).

³⁵ Greenwood, see note 25, 8; M.A. Osman, *The United Nations and Peace Enforcement – Wars, Terrorism and Democracy*, 2002, 90 et seq.; more about the current evolution of self-defence: T.M. Franck, "When, If Ever, May States Deploy Military Force Without Prior Security Council Authorization?", *Wash. U. J. L. & Pol'y* 5 (2001), 51 et seq. (57-62).

³⁶ ICISS, see note 5, para. 6.7.

bers block the resolution by exercising their right of veto against the decision of the majority.³⁷ In this context, part of the legal literature and the practice of some States affirm that when the Security Council does not act or is unable to do so, the United Nations has failed its obligation to protect. In these cases, this obligation should then be assumed by the international community through military interventions.³⁸

This interpretation would respect the UN Charter and would neither violate the prohibition of the use of armed force nor the principle of non-intervention as the UN Charter only prohibits the illegal use of armed force. This is evidenced by a detailed reading of Article 2(4) which forbids the use of armed force or threat to use armed force in a manner inconsistent with the purposes and principles of the United Nations. In fact, one of the UN goals is “to achieve international cooperation in solving international problems of an (...) humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms”.³⁹ If promoting and protecting human rights is one of the purposes of the United Nations, and this is exactly what is intended with the individual or collective military intervention, then it should not be forbidden even in the absence of the Security Council's authorisation.⁴⁰

³⁷ A. Pellet, “Le recours à la force, le droit et la légitimité. Notes sur les problèmes posés par le principe de l'interdiction du recours à la force armée en cas de carence du Conseil de sécurité”, in: A. Fischer-Lescano et al. (eds), *Frei-den in Freiheit, Festschrift für Michael Bothe*, 2008, 249 et seq. (252).

³⁸ A. Bannon, “The Responsibility To Protect: The U.N. World Summit and the Question of Unilateralism”, *Yale L. J.* 115 (2006), 1157 et seq. (1158); ICISS, see note 5, para. 2.27; S. Wheatley, “The Non-Intervention Doctrine and the Protection of the Basic Needs of the Human Person in Contemporary International Law”, *Liverpool Law Rev.* XV (1993), 198 et seq. (197-199); Hakimi, see note 24, 652-677.

³⁹ Art. 1 para. 3, UN Charter.

⁴⁰ Bannon, see note 38, 1161; Bellamy, see note 27, 163, 167; Brock, see note 20, 29; Greenwood, see note 25, 9; The ECOWAS intervention in Liberia and the intervention by US, British and French forces in Iraq in 1991 and 1992 are examples of interventions without the Security Council's authorisation invoking a right to resort to military action in cases of extreme humanitarian concern. The NATO States also relied on such a right when they intervened in Kosovo in 1999; ICJ Reports 1962, 151 et seq. (167-168); Hakimi, see note 24, 678-679; A. Randelzhofer, “Use of Force”, in: Charter Commentary, 131, quoted by A. Pellet, “The Charter of the United Nations: A commentary of Bruno Simma's Commentary”, *Mich. J. Int. L.* 25 (2003), 135 et seq. (149).

The ICISS report appears to encourage this sort of military intervention, since it recommends that where the Security Council fails to act, military intervention could be carried out by regional organisations as long as it is within the limits established by the notion of the responsibility to protect. This means:

- a) A State's inability or unwillingness to protect its own population.
- b) Inactivity of the Security Council.
- c) Intervention will only take place in cases of genocide, war crimes, ethnic cleansing, and crimes against humanity.

Additionally, such an intervention must comply with certain requirements, like the existence of a serious threat, right intention of the prospective interveners, the use of armed force as a last resource, the use of proportional means, and that the intervention has reasonable prospects of success. Only if all of these requirements are met, a military intervention without the Security Council's authorisation may be justified.⁴¹

Nevertheless, this recommendation was not included in the 2005 World Summit Outcome document and for that reason not accepted by the General Assembly. The General Assembly emphasises that the Security Council has the exclusive power to order and authorise military interventions: including cases of the responsibility to protect. The General Assembly does, however, agree that the Security Council's authorisation can be granted to regional or sub-regional organisations as well.⁴²

Even though regional organisations have intervened using military means without any clear order of the Security Council, in some occasions the approval has been obtained *a posteriori*: as in the case of the military intervention by the ECOWAS monitoring group (ECOMOG) in Liberia in 1992 and in Sierra Leone in 1997 or after the NATO intervention in Kosovo in 1999, when the Security Council did not condemn the event and afterwards created a peacekeeping and a peace enforcement operation.⁴³

⁴¹ ICISS, see note 5, paras 6.5, 6.31-6.35; Winkelmann, see note 19, para. 18; Franck, see note 35; E. Leiß, *Interventionen des Sicherheitsrates bei innerstaatlich begangenen Menschenrechtsverletzungen nach Kapitel VII der Charta der Vereinten Nationen*, 2000, 262 et seq.

⁴² A/RES/60/1, see note 17, paras 79, 139; Bannon, see note 38, 1163-1164; Evans, see note 5, 716.

⁴³ ICISS report, see note 5, paras 2.25, 6.5; Hakimi, see note 24, 666-677.

However, the possibility of an *a posteriori* approval cannot constitute a permanent basis for interventions without the Security Council's prior authorisation. An approval after the intervention does not legalise the intervention which therefore remains a violation of the UN Charter and international law. It only protects the interveners from adverse legal consequences. The community of nations cannot rely on the Security Council to approve the intervention once it has occurred merely because it was morally acceptable and in accordance with the notion of the responsibility to protect. The intervention remains, although it might be a legitimate one, an illegal intervention. Further, military interventions outside the UN framework could jeopardise the operation of the collective security system established by the UN Charter.⁴⁴

V. Military Intervention with Prior Recommendation by the General Assembly

Following the above analysis, the military intervention without Security Council's authorisation is not permitted. Consequently a few questions unavoidably arise: What to do in cases where the responsibility to protect is applicable but the Security Council does not act, or a resolution is vetoed by a permanent member? And how to intervene militarily without violating the UN Charter? While a definitive answer to these questions remains to be found, an intermediate approach that addresses the issues outlined above will be presented in the following.

As stated above, the responsibility to protect lies primarily with the State itself, but whenever a population is victim of genocide, war crimes, ethnic cleansing, and crimes against humanity, and the State in question is unwilling or unable to halt or avert it, the responsibility to protect is transferred to the international community. The international community is congregated in the United Nations, whose authority to validate military operations as a means to settle breaches of or threats to peace and protect civilians under imminent threat of physical violence is universally recognised.⁴⁵ Normally, the United Nations would act through the Security Council.⁴⁶ While the operation of the Security

⁴⁴ See Gonzalez et al., see note 25, 1034 et seq.

⁴⁵ ICISS, see note 5, paras 6.8-6.12.

⁴⁶ ICISS, see note 5, Synopsis 1. lit. B; A/RES/60/1, see note 17, para. 139; A/59/565, see note 3, para. 200; Evans, see note 5, 713.

Council could be obstructed as a result of the veto cast by a permanent member, this fact alone does not entitle States or regional organisations to intervene militarily without the United Nations' approval. However, neither does it release the international community from its obligation to protect the citizens at risk.

Consequently, since such a failure by the Security Council does not entitle the international community to act by itself, it appears to be necessary to exercise the responsibility to protect through the General Assembly, which is the only body of the UN where the community of nations as a whole is represented.

The ICISS was concerned that, as a consequence of such failures to act by the Security Council, humanitarian catastrophes would continue to arise throughout the world. It suggested that the General Assembly should endorse the military intervention in accordance with the procedures of the resolution "Uniting for Peace", developed in the context of the Korean War, as a solution to those situations in which the Security Council "*because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in a case where appears to be a threat to the peace, breach of the peace, or act of aggression*".⁴⁷

The permanent members of the Security Council enjoy prerogatives that allow them, through their negative vote, to impede the adoption of resolutions in the Security Council, preventing it from taking any decision. To counteract this fact, the resolution "Uniting for Peace" empowers the General Assembly to recommend all kinds of measures, even the use of armed force, in case of breach of the peace or acts of aggression. Such actions are subject to two conditions:

- a) The Council has failed to exercise its responsibilities as a result of a negative vote of one or more permanent members.
- b) There appears to be a threat to the peace, breach of the peace, or an act of aggression.⁴⁸

While some authors consider that this resolution has only been used twice, and that due to its age and its rare application, it would be difficult to use it again nowadays,⁴⁹ there is no doubt about the validity of

⁴⁷ ICISS, see note 5, para. 6.29; A/RES/377 A (V) of 3 November 1950; ICJ Reports 2004, see note 30, 150-151, paras 29-32; ICJ Reports 1962, see note 40, 163; C. Gray, *International Law and the Use of Force*, 2008, 260.

⁴⁸ ICJ Reports 2004, see note 30, 150, para. 30.

⁴⁹ Brock, see note 20, 31.

the resolution “Uniting for Peace”. Although it has been used only in a few instances, the Security Council and the General Assembly have taken several more decisions following the spirit of the resolution without explicitly making reference to it: the Council has referred situations to the General Assembly when, due to the veto of its members, it could not make a decision itself.⁵⁰ Finally, the proposition of the ICISS consists in applying the procedures of the resolution “Uniting for Peace” only in order to allow the General Assembly to make up for the failure to act of the Security Council, and not to encourage the General Assembly to take military measures whenever the Council rejects to order them.

1. Responsibility of the General Assembly Regarding Peace and Security Affairs

To maintain international peace and security, to take appropriate measures to strengthen universal peace, as well as to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained are among the purposes of the United Nations.⁵¹ Since they oblige not only the Security Council but all UN members, there is no reason to prevent the United Nations as a whole from acting in order to fulfil these purposes when the Security Council remains inactive. The General Assembly could compensate for the Security Council's failure to act, as it is also bound by the aims and purposes of the UN Charter.⁵²

On the other hand, Article 24(1) of the UN Charter states that “in order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carry-

⁵⁰ K. Hailbronner/E. Klein, “Article 10”, in: B. Simma (ed.), *The Charter of the United Nations. A Commentary*, 1994, 228 et seq. (234); Z. Drnas de Clemente, “Sentido y Alcance de la Determinación por parte del Consejo de Seguridad de una Amenaza para la Paz, Quebrantamiento de la Paz o Acto de Agresión”, in: Secretaría General de la OEA (ed.) *XXX Curso de Derecho Internacional, agosto de 2003, 2004*, 78 et seq. (92); C. Binder, “Uniting for Peace Resolution”, in: R. Wolfrum (ed.), *MPEPIL online edition*, paras 9-12.

⁵¹ See Preamble and Art. 1, UN Charter.

⁵² A/RES/377 A (V), see note 47; Binder, see note 50, paras 9-12; Drnas, see note 50, 87.

ing out its duties under this responsibility the Security Council acts on their behalf". The wording of this norm indicates that the relationship between the UN members and the Security Council is similar to that between principal and agent.

The maintenance of the peace was originally incumbent upon the UN members, who transferred this responsibility to the Security Council with the aim to guarantee a prompt and an effective action by the organisation. That is to say, they conceded to the Security Council a special function to be executed primarily by it. It does not mean that the UN members have renounced to the responsibility of maintaining and restoring the peace.⁵³ Indeed, the UN Charter also includes the General Assembly as a body in charge of maintaining peace⁵⁴ and furthermore, the ICJ has emphasised on several occasions that the Security Council has the primary, but not the exclusive responsibility of maintaining peace. Consequently, the General Assembly has a secondary responsibility, subsidiary to the Security Council, on this topic.⁵⁵

One might argue contrarily that the UN Charter clearly differentiates between the respective assignments and competencies of the UN organs in order to avoid contradictory decisions. With regard to the General Assembly, Article 12(1) clearly prohibits it to make recommendations about conflicts or situations that are being considered by the Security Council, unless requested to do so by the Security Council.⁵⁶

It seems then, that the procedure established in the resolution "Uniting for Peace" contradicts Article 12(1) of the UN Charter. Nonetheless, the mentioned article only prohibits the General Assembly to make recommendations when the Security Council is fulfilling its functions, i.e. when it adopts decisions in order to restore or maintain the peace and security.⁵⁷ The fact that the permanent members of the Security Council block the resolutions could be seen as a proof of the Security Council dealing with the issue, with the consequence that the General

⁵³ Ibid., 87-88.

⁵⁴ Arts 10-14 and 25, UN Charter; Hailbronner/Klein, see note 50, 233-235.

⁵⁵ ICJ Reports 1962, see note 40, 163; ICJ Reports 2004, see note 30, 148, para. 26; Hailbronner/Klein, see note 50, 234; Drnas, see note 50 (86-91); ICISS, see note 5, para. 6.7; Binder, see note 50, para. 20.

⁵⁶ K. Hailbronner/E. Klein, "Article 12", in: B. Simma, see note 50, 253 et seq. (255).

⁵⁷ See Art. 24 paras 1-2, UN Charter.

Assembly would be unable to refer to the same matter in spite of the veto.

However, the negative vote of the permanent members does not necessarily mean that the Security Council's majority have decided not to authorise the military intervention or any other coercive measure, or even that the Security Council reaches any decision at all. Indeed, when the Security Council is paralysed by the exercise of the veto, it cannot take any decision, neither deciding in favour or hindrance of a certain coercive measure, nor deciding not to discuss the case at all. Therefore at that moment and for the specific case, the Security Council does not act and does not fulfil its functions.

Consequently, the General Assembly is not bound by Article 12(1), and therefore could assume the matter and make recommendations about it.⁵⁸ The ICJ confirmed this reasoning in its advisory opinion on the legal consequences of the construction of a wall in the occupied Palestinian territory, in which it also gave the General Assembly the possibility to make resolutions regarding peace and security in cases where the Security Council is considering the case but it has not adopted any recent resolution.⁵⁹ Additionally, the competence of the General Assembly to decide about any questions relating to the maintenance of international peace and security is set out in Articles 10, 11 and 14 of the UN Charter. All of the above confirms the thesis that the responsibility to protect shall be exercised by the General Assembly on behalf of the international community when neither the State nor the Security Council protects the population in danger.

2. Competence of the General Assembly to Recommend the Use of Coercive Measures

While the competence of the General Assembly to make recommendations about peace and security issues is beyond doubt, it is debatable what type of recommendations it can make. Can the General Assembly recommend every kind of collective coercive measures, even those that imply the use of armed force?

As mentioned before, the General Assembly has the competence to discuss any questions or any matters within the scope of the United Na-

⁵⁸ Hailbronner/Klein, see note 56, 257; Binder, see note 50, para 21.

⁵⁹ ICJ Reports 2004, see note 30, 149-150, paras 27-30.

tions. Even more, the UN Charter determines that the General Assembly has the power to consider any questions in relation to world peace and security, as well as to take position in this respect and to make recommendations to States, the Security Council or both. Nonetheless, the UN Charter expressly denies the General Assembly the competence to recommend coercive measures as pointed out in the second part of Article 11(2): “any question on which action is necessary shall be referred to the Security Council by the General Assembly either before or after discussion”.⁶⁰

When the ICJ was confronted with Article 11(2) cl. 2, it interpreted the word “action” as “coercive or enforcement action”, referring to the coercive measures contained in Chapter VII of the UN Charter, which are of the exclusive competence of the Security Council.⁶¹ The ICJ in its advisory opinion on certain expenses of the UN stated that “the word ‘action’ must mean such action as is solely within the province of the Security Council (...) The ‘action’ which is solely within the province of the Security Council is that which is indicated by the title of Chapter VII of the Charter, namely ‘action with respect to threats to the peace, breaches of the peace, and acts of aggression’”.⁶² Additionally it reaffirmed that “it is the Security Council which is given a power to impose an explicit obligation of compliance if for example it issues an order or command to an aggressor under Chapter VII”.⁶³ However, it is the prevailing understanding of the legal literature and even of the Security Council that economic and diplomatic measures do not qualify as enforcement action, which includes military action only.⁶⁴

From all the above, it results that only the Security Council has the power to bindingly order coercive measures, which includes the use of armed force or the authorisation for States or regional organisations to use armed force in its name. However, this interpretation does not mean that the Security Council is at the same time the only instance empowered to recommend coercive measures.

⁶⁰ Arts 10-11 para. 2, UN Charter, see also ICJ Reports 1962, see note 40, 162-163; ICJ Reports 1999, 761 et seq. (773, para. 39).

⁶¹ ICJ Reports 1962, see note 40, 164-165.

⁶² *Ibid.*, 165.

⁶³ *Ibid.*, 163; see also ICJ, Reports 1999, see note 60, 773, para. 39; ICJ, Reports 1992, 114 et seq. (126, para. 42); Art 2 paras 5 and 25, UN Charter.

⁶⁴ Goodrich et al., see note 24, 366; Hakimi, see note 24, 650-651; Villani, see note 24, 538-540.

The notion of the responsibility to protect allows the UN members as principals to revoke the mandate conceded to the Security Council, when in cases of genocide, war crimes, ethnic cleansing, and crimes against humanity, the Security Council is paralysed by veto cast or remains inactive. As a consequence, the members of the UN reassume the responsibility to maintain peace and international security, along with the competences or means to fulfil this responsibility. This means that the States reassume the faculty to decide about coercive measures contained in Chapter VII of the UN Charter, including those which imply the use of armed force.

The only body of the United Nations in which all members have a seat is the General Assembly. Therefore it would be the most suitable forum for the international community to execute its re-established faculties. The fact that the discretion of the General Assembly concerning the scope of its recommendations is limited by Article 11(2) cl. 2, as mentioned above, does not prevent the General Assembly from making any recommendation in order to avert the crisis and to halt serious violations of human rights and international humanitarian law since the revocation of the Security Council's mandate by the UN members, effective only for the individual case, also removes this limitation. Further, this interpretation respects Article 1(1) of the UN Charter that allows the United Nations, and not exclusively the Security Council, to take all types of effective collective measures necessary to realise the safeguarding of world peace, which is the main objective of the UN.⁶⁵

The practice of the General Assembly confirms this interpretation. In several instances, it has recommended the implementation of coercive measures, both non-military and military ones,⁶⁶ although it should be noted that the majority have been non-military. Notable examples are the resolutions relating to the Korean War of 1951,⁶⁷ the Suez Canal crisis where the creation of a peace keeping operation was recommended,⁶⁸ the resolutions adopted when Israel occupied Arabic territo-

⁶⁵ Hailbronner/Klein, see note 50, 235; Binder, see note 50, para. 20.

⁶⁶ Drnas, see note 50, 92; Binder, see note 50, paras 9-12; ICJ Reports 1962, see note 40, 163, 168; ICJ Reports 2004, see note 30, 148, para. 26; Hailbronner/Klein, see note 50, 233-235; Drnas, see note 50, 88.

⁶⁷ A/RES/498 (V) of 1 February 1951; A/RES/500 (V) of 18 May 1951.

⁶⁸ A/RES/997 ES-I of 2 November 1956; A/RES/1000 ES-I of 5 November 1956; A/RES/1001 ES-I of 7 November 1956.

ries and the General Assembly requested its members to isolate Israel,⁶⁹ and those relating to the conflict between India and East Pakistan (today Bangladesh),⁷⁰ and even more explicitly the resolution regarding South Africa's illegal occupation of Namibia in which all States were called upon "in view of the threat to international peace and security posed by South Africa, to impose against that country comprehensive mandatory dealings with South Africa in order to totally isolate it".⁷¹ Further, regarding the construction of a wall in the occupied Palestinian territory, the General Assembly expressed its conviction that "the repeated violation by Israel, the occupying Power, of international law and its failure to comply with relevant Security Council and General Assembly resolutions and the agreements reached between the parties undermine the Middle East peace process and constitute a threat to international peace and security". At the same time it condemned the illegal Israeli actions in occupied East Jerusalem and the rest of the occupied Palestinian territory, in particular the construction of settlements in that territory.⁷² Additionally, the General Assembly requested an advisory opinion on the legality of the construction of that wall and recommended its members to act in accordance with the findings of the ICJ.⁷³

Finally, the notion of the responsibility to protect also implies the use of peaceful and non-military measures in the first place, and only when they are not viable or their result would be insufficient to halt violations, then the use of armed force constitutes an alternative. The General Assembly has to respect these requirements when recommending military interventions.⁷⁴

⁶⁹ A/RES/ES-9/1 of 15 February 1982.

⁷⁰ A/RES/2793 (XXVI) of 7 December 1971.

⁷¹ A/RES/ES-8/2 of 14 September 1981.

⁷² A/RES/ES-10/2 of 23 April 1997.

⁷³ A/RES/ES-10/15 of 20 July 2004.

⁷⁴ A/59/565, see note 3, paras 201, 203; ICISS, see note 5, paras 4.7-4.43; J. Frowein, "Article 42", in: B. Simma, see note 50, 628 et seq. (631).

3. Binding Effect of the General Assembly's Recommendations

The General Assembly can make binding decisions concerning internal questions of the organisation, such as the admission, suspension and expulsion of members, the election of members to different committees, as well as decisions on budget affairs and UN Charter amendments.⁷⁵ However, in most of the cases the General Assembly can only make non binding recommendations.⁷⁶

A recommendation is defined as "a legal act which expresses a desire, but which is not binding on the addressees".⁷⁷ The General Assembly has the competence to recommend collective enforcement measures, but it cannot oblige its members to respect, fulfil and execute these recommendations. The prerogative of adopting binding decisions regarding peace and security, i.e. the possibility to oblige other countries to carry out certain decisions, did not originally lie with the States. It is a power specifically created for the Security Council in order to allow it to fulfil its functions more efficiently.⁷⁸ Therefore, while in cases of inactivity of the Security Council, or of use of or threat to use the veto, the States may reassume their original responsibility to protect the population under imminent threat of physical violence and the power to recommend the military coercive measures needed to halt the crisis, they may however not extend their original scope of powers by assuming those of the Security Council. Since the States can only recover such power as they originally had, it remains the case that only the decisions of the Security Council create binding obligations on UN members in relation to the execution of coercive measures.⁷⁹

The non binding character of the recommendations should in practice not decrease their value or their effectiveness.⁸⁰ Since States or regional organisations interested in the military intervention will have brought the case before the General Assembly in order to obtain a recommenda-

⁷⁵ Arts 4-6, 23, 61, 97, 17, 108-109, UN Charter.

⁷⁶ Arts 10-14, UN Charter.

⁷⁷ Arts 10-14 and 25, UN Charter; Hailbronner/Klein, see note 50, (233-237).

⁷⁸ See Art. 25, UN Charter.

⁷⁹ Art. 25, UN Charter; ICJ Reports 1992, see note 63, 126, para. 42; ICJ Reports 1962, see note 40, 163; U. Beyerlin, "Sanktionen", in: R. Wolfrum, (ed.), *Handbuch Vereinten Nationen*, 1977, 376 et seq. (379).

⁸⁰ See Art. 2 para. 5, UN Charter.

tion regarding the use of armed force with the primary purpose of halting or averting human suffering, it is probable that in spite of the non binding nature of the recommendations, the promoters of the recommendation will enforce it when the General Assembly recommends the military intervention with a majority of at least two-thirds of the General Assembly's members present and voting.⁸¹

Furthermore, the approval of such a recommendation represents the interest of the community of nations in the face of a humanitarian catastrophe which constitutes a threat to the peace, and at the same time is a sign of their disposition to fulfil the recommendations.

This interpretation strengthens the collective security system, in the sense that the coercive measures which imply the use of armed force can only be executed after having been approved by the United Nations, which is the principal organisation in charge of maintaining and restoring the international peace and security.

VI. Conclusions

The inactivity of the Security Council in view of serious violations of human rights and international humanitarian law has led some States and regional organisations to intervene without the corresponding authorisation by the Security Council. However, the UN Charter does not provide for any kind of exception regarding the use of armed force for human protection purposes, traditionally known as humanitarian intervention. Not even the fact that the Security Council is paralysed because of the lack of unanimity of the permanent members justifies military interventions without the United Nations' approval. Disregarding this requirement could constitute a rupture of the collective security system conceived in the UN Charter.

The UN Charter expressly allows the use of armed force in cases of individual or collective self-defence, and in the presence of a threat to peace, breach of the peace or acts of aggression, provided that the Security Council authorises the use of military measures in accordance with Chapter VII of the Charter.

The States, exercising their sovereignty and following the notion of the responsibility to protect, are obliged to fulfil certain responsibilities to-

⁸¹ Art. 18 para. 2, UN Charter; see R. Wolfrum, "Article 18", in: B. Simma, see note 50, 317 et seq.

wards their citizens and the international community.⁸² When a State is not capable or unwilling to protect its population, or when the government itself is the perpetrator of serious violations of human rights and international humanitarian law, the international community has to assume the responsibility to protect the vulnerable population in cases of genocide, war crimes, ethnic cleansing, and crimes against humanity.

Since the four cases stated above could also threaten the international peace and the stability of the region, the collective security system is well suited to solve the crisis. Therefore, while the responsibility to protect should be exercised by the international community, the Security Council will be competent to take the necessary measures in order to protect the affected population and to halt the crisis.

However, the permanent members of the Security Council enjoy prerogatives that allow them, through their negative vote, to impede the adoption of resolutions in the Security Council, preventing it from taking any decision. Nonetheless, the negative vote of the permanent members does not necessarily mean that the Security Council's majority have decided not to authorise the military intervention or any other coercive measure, or even that the Security Council reaches any decision at all. Indeed, an affirmative vote of at least nine members, but without the concurring vote of all of the permanent members, would result in the resolution being blocked.⁸³ In other occasions, although having discussed the issue, the Security Council does not take any decision, it just remains silent. These situations constitute a failure of the Security Council to duly carry out its functions since it does not take any decision, neither deciding in favour or hindrance of a coercive measure, nor deciding not to discuss the case at all.⁸⁴

In such cases, and within the scope of the doctrine of the "responsibility to protect", the UN members would be permitted, in an exceptional manner and with effects only for the particular case, to reassume the re-

⁸² More relating to this dual responsibility D.W. Potter, *The Responsibility to Protect: No More Rwandas, The International Community and Humanitarian Intervention in the 21st Century*, PhD Thesis, University of Tasmania, 2006, 87 et seq., available at: <<http://eprints.utas.edu.au/1418/>>.

⁸³ See Art. 27 para. 3, UN Charter.

⁸⁴ The right to veto is a special prerogative, a power given also in order to maintain the peace and to impede tensions between the permanent members that would threaten the international peace and security much more. Therefore it should be accepted that military interventions, regardless of the use of the right of veto, remain problematic.

sponsibilities they transferred to the Security Council, and in this way, through the General Assembly, to recommend coercive measures, including a military intervention if necessary.

The recommendations of the General Assembly should in no way be considered as being more important than those of the Security Council. The recommendation by the General Assembly to intervene militarily in cases of genocide, war crimes, ethnic cleansing, and crimes against humanity can only be granted when the Security Council has not taken any decision. Permitting the General Assembly to recommend the intervention in spite of a negative decision by the Security Council would imply to reject the entire collective security system and the primary authority of the Security Council to decide about the maintenance and restoration of peace.

In conclusion, the recommendation of the General Assembly to use armed force has a legitimating effect for the States or the organisations that carry out the intervention. Since their actions are supported by the international community, they will not be considered as an international wrongful act.