

# Why is the Practice of Humanitarian Intervention so Controversial?

Written by Dominik Zimmermann

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DOMINIK ZIMMERMANN, APR 30 2014

### In Terms of the Establishment of Underlying Norms and Principles, Why is the Practice of Humanitarian Intervention so Controversial?

The idea of humanitarian intervention – that is the threat or use of armed force against another state motivated by humanitarian considerations[1] – is highly controversial as it has the potential to fluctuate between humanitarianism and imperialism. Whereas it is *prima facie* laudable if states collectively or even individually are willing to protect human rights beyond their own borders and in situations where existing international structures, such as the UN Security Council (UNSC), are precluded from acting, there remains a critical danger that a right to such intervention is abused to disguise mere power politics. Nevertheless, fuelled by the increased recognition of human rights, in particular the entitlement of every individual of a minimum level of protection from harm due to a common humanity, humanitarian intervention has developed into a lasting legal and political concept that is intensely discussed in both academia and among political actors. Especially in light of the support humanitarian intervention gained during the “golden era” of humanitarian activism,[2] the 1990s, it is justified to ask whether we are dealing with the formation of a regime and whether the necessary principles (in the sense of “beliefs of fact, causation, and rectitude”) and norms (understood as “standards of behavior defined in terms of rights and obligations”[3]) have been or are currently forming. Whereas the present essay does not aim to provide a conclusive answer to this question, it will – with the support of a review of existing practice and the relevant legal and political framework – attempt to shed light on the difficulties that are met in this process. The conclusion will summarize these findings and assess the potential for the transformation into a reliable, structured and rule-governed activity within the international system.[4]

At the outset, however, and in the interest of conceptual clarity, it should be mentioned that humanitarian intervention may either be undertaken by individual (unilateral) or a group of states (multilateral) or *by*, or *authorized by*, a competent international organization (collective).[5] The main difference is not so much the number of states intervening[6] as the mode by which a decision was taken to perform the intervention. This difference is of relevance when it comes to the legal context described below. Furthermore, the use of the term *intervention* entails, for the purpose of the present essay, the use of force in the affairs of a state so as to affect its course.[7]

#### 1. Humanitarian Intervention and International Law

The formation of a regime in the case of humanitarian intervention faces difficulties in particular in light of the relevant international legal framework with its system of collective security and core principles as devised by the UN Charter (UNC) having a significant influence on how humanitarian intervention can even be invoked or discussed. In particular, humanitarian intervention *prima facie* conflicts with the sovereign equality of states,[8] the obligation to settle disputes peacefully,[9] the prohibition of the use of force[10] and the principle of non-intervention in the *domain réservé* of states.[11]

##### (i) *Prohibition of the Use of Force, Obligation to Peaceful Dispute Settlement and Non-Intervention*

Perhaps the main difficulty of establishing norms and practices on humanitarian intervention stems from the conflict

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with the prohibition of the use of force. The UNC commits its Member States not only to settle international disputes by peaceful means<sup>[12]</sup> but also directly bans the threat or use of force.<sup>[13]</sup> Whereas it has been argued that intervention for humanitarian purposes is not directed against the territorial integrity and/or political independence of a state (which are the two central criteria mentioned in Article 2(4) UNC), the *travaux préparatoires* of the UNC indicate that these two conditions were meant to reinforce the prohibition and not to narrow its scope.<sup>[14]</sup> The International Court of Justice has therefore gone very far in strengthening the prohibition of the use of force even in light of the emergence of human rights and has stated that “the use of force could not be the appropriate method to monitor or ensure [...] respect” for human rights.<sup>[15]</sup> The question thus arises: can the use of force for humanitarian reasons be brought into conformity with such a broad prohibition?

The right to self-defence, which constitutes one of the traditional exceptions to the prohibition of the use of force, has often been invoked in conjunction with humanitarian concerns. Examples are Tanzania’s intervention in Uganda in 1979 and Vietnam’s involvement in Democratic Kampuchea (Cambodia) in 1978.<sup>[16]</sup> However, in both cases the motivation behind the use of armed force was a distinct and sought to meet the requirement of an “armed attack” having occurred against the intervening state. Humanitarian concerns were thus merely *added*.

A more relevant exception to the principle expressed in Article 2(4) UNC is the authorization to use force highlighted under Chapter VII UNC. In a sense, this is, at least from a legal point of view, the most unproblematic path to justify humanitarian intervention as it is “nothing but the use of military force authorized by the Security Council under Chapter VII UNC for the maintenance or restoration of international peace and security, in circumstances where there is a humanitarian aspect to the Council’s aims.”<sup>[17]</sup> It is particularly relevant as actions undertaken pursuant to Chapter VII UNC have been considered to trump the protection granted to UN member states by the reservation of domestic jurisdiction of Article 2(7) UNC.<sup>[18]</sup> As will be shown with the following overview of relevant state practice, a combination of the expansion of the territorial scope of human rights obligations, transboundary effects of serious human rights violations and the shrinking of the *domaine réservé* of domestic jurisdiction have led to a number of cases where collective humanitarian intervention was, arguably, authorized. A confirmation for this view may also be found in the judgment of the International Criminal Tribunal for the former Yugoslavia in the case *Prosecutor v Tadić*, where it was confirmed that the UNSC had classified merely internal armed conflicts as a “threat to the peace” and thus dealt with it under Chapter VII UNC.<sup>[19]</sup>

## (ii) Sovereign Equality and Human Rights

Sovereignty, which is both historically and currently at the heart of the international legal order and functions as the source for both the ban on the use of force and the prohibition of intervention,<sup>[20]</sup> entails the freedom of states to independently shape their internal order and external relations. Intervention, which always implies a forcible interference against the will of the lawful government that is affected, irrespective of the motivation of the action,<sup>[21]</sup> is thus in direct conflict with this notion. The main question is thus whether the humanitarian purpose of an intervention can decide when weighing between strict adherence to sovereignty and human rights protection in favour of the latter. However, the reference to human rights is a difficult one as it has itself the tendency to foster tension and conflict among states.<sup>[22]</sup> Whereas the body of international human rights recognized by international treaties, declarations and customary international law is constantly growing, it is far from certain whether (for the purpose of defining a humanitarian aim of intervention) human rights are inherent features of the world or require a consensus of the agents that are subject to it.<sup>[23]</sup> Whereas the former naturalist view could provide a justification for individual states to intervene, the consensualist view is more focused on reaching an agreement with other states on whether a particular human right is accepted and, as a result, whether its violation may justify forcible interference in another state. Overall, the difficulty of finding a minimum standard of human rights, which may be used in justifying humanitarian intervention, should not be underestimated. On the one hand, the UNC “reaffirm[s] faith in fundamental human rights, in the dignity and worth of the human person” in its preamble and proclaims the respect of human rights as one of its purposes,<sup>[24]</sup> demanding universal respect for and observance of human rights and fundamental freedoms for all.<sup>[25]</sup> On the other hand, only very few human rights, such as the right to life, the prohibition against torture and the prohibition against slavery, are commonly accepted to be among the rights that do not allow for any derogation<sup>[26]</sup> or are of a peremptory character<sup>[27]</sup> and thus could be used to define a minimum standard that may (if violated) justify intervention. It therefore appears that the application of this method grows with time since the

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prevalence of human rights over sovereignty still implies a restriction of the latter. Yet statements from the UN Secretary General appear to suggest that such a consideration is indeed plausible:

[I]f humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica – to gross and systematic violations of human rights that affect every precept of our common humanity?[28]

Finally, it may be argued that the practice of humanitarian intervention does not require an exception to or marginalization of the notion of sovereignty, since serious human rights violations often go hand-in-hand with events or actions that undermine the sovereignty of the perpetrating state. Whereas this concept of a *failed* state, namely a state which has lost the ability to exercise its legal capacity,[29] has been used in this regard, it rests on an uncertain practice.[30]

## 2. The Formation of Patterned Behaviour?

The most reliable way in which the formation of a regime may manifest itself is through patterned behaviour.[31] Although the existence of regularity in states' behaviour has been challenged as a sufficient explanation for the existence of a regime,[32] such behaviour is at the very least a necessary condition for the formation of a regime, as it indicates – in a very pure form – the convergence of states' expectation in a given area of international relations. Also in the case of the establishment of a right of humanitarian intervention, the above legal evaluation does not suffice alone, but must be supported by a review of relevant state practice. For this reason the following shall briefly describe some practical examples where the concept of humanitarian intervention was applied.

The UNSC has in a number of cases, especially in the 1990s, authorized enforcement measures under Chapter VII UNC due to human rights violations. One of the earliest and most relevant one was UNSC Resolution 688 which addressed the repression of Iraqi and Kurdish populations by Iraqi authorities.[33] The resolution was the first time the UNSC determined a threat to the peace without referring to the use of force between states as a reason. However, it would appear that it was rather the transboundary consequences than the suppression of civilians as such which caused the UNSC to make its findings. According to the Resolution's preamble, the UNSC was "[g]ravelly concerned by the repression of the Iraqi civilian population in many parts of Iraq" linking this to the "massive flow of refugees towards and across international frontiers and to cross-border incursions, which threaten international peace and security in the region". Moreover, Resolution 688 does not expressly refer to Chapter VII UNC as the legal basis, although the formulation "threat to international peace and security" in its paragraph 1 seems to suggest such an interpretation.

The situation in Somalia in the early 1990s, including civil war and anarchic conditions which caused some writers to qualify the state as the object lesson of a failed State,[34] lead the UN to a number of actions. After the UNSC in January 1992 decided, under Chapter VII UNC, to implement a "complete embargo on all deliveries of weapons and military equipment to Somalia"[35] and in March 1992 supported the UN Secretary General's (UNSG) plan to dispatch a technical team in Somalia,[36] it continued to authorize the UNSG and UN member states "to use all necessary means to establish [...] a secure environment for humanitarian relief operations in Somalia".[37] It is noticeable in this decision that only the situation *within* Somalia was used as a basis for the finding that the magnitude of the human tragedy constituted "a threat to international peace and security" which in turn triggered enforcement measures under Chapter VII UNC. This assessment was confirmed by the UNSC in the following years.[38] It should be emphasized, however, that the broad support in the UNSC for these resolutions was partially based on the conclusion that Somalia did no longer have an effective government, leading many UN Member States to assume that at least a conflict with the principle of non-intervention was avoided.[39]

Also, the civil war in Rwanda and the ensuing genocide in 1994 was the basis for the UNSC's classification of the situation, with reference to "the magnitude of the humanitarian crises" as a threat to the peace and its authorization of the "establishment of a temporary operation under national command".[40] Eventually, French Foreign Legion troops entered Rwanda, with US and British troops following on 22 July 1994.[41] However, the intervention was too late and too small to avert the genocide, having been delayed by discussions in the UN and among UN member states as

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to whether the turmoil was the result of civil or tribal war and whether the ongoing atrocities should be qualified as genocide.[42] In particular the prolonged hesitation of classifying the ongoing cruelty as genocide has been considered to delay the intervention of the UN by several months;[43] this appears as particularly serious considering that the genocide took a total of little more than one hundred days. In addition, the intervention in Rwanda, although having the backing of UNSC resolutions adopted under Chapter VII UNC, has sometimes been referred to as an example of the potential to abuse humanitarian intervention, since France prior to 1994 had been supporting the one-party Hutu State for many years.[44]

In the following years, the UNSC on several occasions found a threat to the peace due to humanitarian situations within a country. Following a military coup against the democratically elected government of Tejan Kabbah, the UNSC in October 1997 considered the worsening humanitarian situation in Sierra Leone coupled with the effects on neighbouring states as a threat to the peace in accordance with Article 39 UNC.[45] Whereas the Economic Community of West African States already in August 1997 mandated the Economic Community of West African States Monitoring Group (ECOMOG) to enforce sanctions and restore law and order in Sierra Leone, the UN was only retroactively informed of these actions in accordance with Article 54 UNC. However, by the time ECOMOG forces intervened militarily in February 1998, the UNSC had still not authorized any use of force and it was only later welcomed and supported by the UNSC,[46] which sometimes is interpreted as a *post de jure* legitimization of the intervention.[47]

Perhaps the most controversial and widely discussed instance of humanitarian intervention is NATO's campaign in Kosovo in 1999. It is significant because it constitutes the first time that a group of states explicitly justified their use of force against another state on humanitarian grounds in a context where there was no explicit UNSC authorization.[48] According to Alex Bellamy and Nicholas Wheeler, NATO had at least three motives for the intervention:[49] (1) a fear that the armies of the Federal Republic of Yugoslavia would repeat atrocities that had taken place in Bosnia some years prior; (2) that a continued conflict in the Balkans would establish transboundary effects, and (3) that the conflict could spread in the region. It is noticeable, however, that members of the NATO-led coalition, despite the lack of UNSC authorization, sought to justify the intervention by referring to relevant UNSC resolutions. Hence France considered that the use of force had been *implicitly* authorized by resolutions[50] because certain breaches provided for in those resolutions had occurred. Whereas this has not been accepted as a sufficient basis for the intervention, it is interesting to note that just as the UNSC did not authorize the use of force it did also not condemn it.[51] Despite attempts by some permanent members of the UNSC to adopt a resolution condemning NATO's intervention, the UNSC never made such a statement. As a result, while the intervention was violating the rules regarding use of force in the UNC, the UNSC was not prepared to reprimand these actions.

### 3. Conclusions

In a nutshell, the answer to the question why the practice of humanitarian intervention is so controversial lies in the involvement of opposing but often equally commendable interests, often expressed in the form of legal and political principles and norms. Be it solidarity and geostrategy, humanism and *realpolitik*, humanitarian intervention always involves two sides of the same coin that can either lead to salvation or abuse – but often both.[52] At the centre of this debate are a number of legal principles upon which the UN system is built and which have ensured a certain degree of stability following the end of World War Two. The prohibition of the use of force, unless authorized by the UNSC or undertaken in self-defence, is a historic achievement that must be defended against particular state or ideological interests. On the other hand, the international system is based on partially antiquated concepts such as non-intervention and sovereign equality, which states have a hard time abandoning due to the perceived stability that flows from them, even in light of the growing force of human rights and obligations for their protection.

This essay has shown, by reviewing a number of practical cases, that this struggle between norms and principles is an on-going one, as indicated by the use of the concept of failed states and transboundary effects in an attempt to justify humanitarian interventions, noted above. What is encouraging in this process is that the legal framework of the international system is largely followed, as shown for example by the fact that states seek to formulate a support from the UNSC even when there is none. On the contrary, it could also be claimed that the UNSC is slightly to blame for a potential abuse of the notion of humanitarian intervention, since the UNSC has on occasion decided to authorize

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military operations rather than undertaking such actions itself, which has blurred the relevant rules and principles.[53]

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[1] See for a more detailed but in essential parts identical definition J. L. Holzgrefe, *The Humanitarian Intervention Debate*, in: J. L. Holzgrefe and Robert O. Keohane, (eds.), *Humanitarian Intervention – Ethical, Legal, and Political Dilemmas* (Cambridge University Press, Cambridge, 2003), pp. 15-52, at p. 18; David N. Gibbs, *First Do no Harm: Humanitarian Intervention and the Destruction of Yugoslavia* (Vanderbilt University Press, Nashville, 2009), at p. 3.

[2] Thomas G. Weiss, *The Sunset of Humanitarian Intervention? The Responsibility to Protect in a Unipolar Era*, *Security Dialogue*, Vol. 35, No. 2, pp. 135-153, at p. 136.

[3] Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, *International Organization*, Vol. 36, No. 2 (Spring 1982), pp. 185-205, at p. 186.

[4] See Richard Little, *International Regimes*, in: John Baylis, Steve Smith and Patricia Owens (eds.), *The Globalization of World Politics* (Oxford University Press, Oxford, 5<sup>th</sup> ed., 2011), pp. 294-309, at p. 296.

[5] See, e.g., Peter Malanczuk, *Humanitarian Intervention and the Legitimacy of the Use of Force* (Het Spinhuis Publishers, Amsterdam, 1993), at p. 3.

[6] As also a collective intervention may be performed by only one State, if authorized e.g. by the UN.

[7] Cf., e.g., Merriam-Webster Dictionary, *intervention*, available at <<http://www.merriam-webster.com/dictionary>> (last visited: 30 November 2013). It is thus to be distinguished from so-called intervention by invitation which is usually understood to mean intervention by foreign troops in an internal armed conflict at the invitation of the

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government of the State concerned. See Georg Nolte, *Intervention by Invitation*, in: Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (Oxford, Oxford University Press, Online Edition, 2012), at para. 1. On the criterion of the absence of the State's consent to the intervention, see Peter Malanczuk, *Humanitarian Intervention and the Legitimacy of the Use of Force*, at p. 3.

[8] Article 2(1) UNC (Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 145 BSP 805).

[9] Article 2(3) UNC.

[10] Article 2(4) UNC.

[11] Article 2(7) UNC.

[12] Article 2(3) UNC.

[13] Article 2(4) UNC.

[14] Vaughan Lowe and Antonios Tzanakopoulos, *Humanitarian Intervention*, in: Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (Oxford, Oxford University Press, Online Edition, 2012), at para. 13.

[15] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14, at para. 268.

[16] Vaughan Lowe and Antonios Tzanakopoulos, *Humanitarian Intervention*, at para. 25.

[17] Vaughan Lowe and Antonios Tzanakopoulos, *Humanitarian Intervention*, at para. 15.

[18] Philip Kunig, *Intervention, Prohibition of*, in: Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (Oxford, Oxford University Press, Online Edition, 2012), at para. 32.

[19] *Prosecutor v Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction IT-94-1-AR72 [2 October 1995])*, at para. 30.

[20] Juliane Kokott, *States, Sovereign Equality*, in: Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (Oxford, Oxford University Press, Online Edition, 2012), at para. 1.

[21] On the opposite, and as mentioned above at fn. 7, intervention by invitation commonly refers to intervention by foreign troops in an internal armed conflict at the invitation of the government of the State concerned.

[22] Antonio Cassese, *International Law* (Oxford University Press, Oxford, 2<sup>nd</sup> ed., 2005), at p. 375.

[23] J. L. Holzgrefe, *The Humanitarian Intervention Debate*, at p. 19.

[24] Article 1(3) UNC.

[25] Article 55 UNC.

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[28] Kofi A. Annan, *We the Peoples – The Role of the United Nations in the 21<sup>st</sup> Century* (United Nations Department of Public Information, New York, 2000), at p. 48.

[29] Daniel Thürer, *The “failed State” and International Law*, *Review of the Red Cross*, Vol. 81, Issue 836, pp. 731-761.

[30] For another view on the discontinuation of a State's sovereign rights, see Fernando R. Tesón, *The Liberal Case for Humanitarian Intervention*, in: J. L. Holzgrefe and Robert O. Keohane, (eds.), *Humanitarian Intervention – Ethical, Legal, and Political Dilemmas* (Cambridge University Press, Cambridge, 2003), pp. 93-129.

[31] Donald Puchala and Raymond Hopkins, *International Regimes: Lessons from Inductive Analysis*, in: Stephen Krasner (ed.), *International Regimes* (Cornell University Press, Ithaca, 1983), pp. 61-91.

[32] See, e.g., Stephan Haggard and Beth A. Simmons, *Theories of International Regimes*, *International Organization*, Vol. 41, No. 3 (Summer 1987), pp. 491-517, at p. 493.

[33] UNSC Res. 688 (1991) (5 April 1991) SCOR 46<sup>th</sup> Year 31.

[34] See Robin Geiß, *“Failed States” – Die normative Erfassung gescheiterter Staaten* (Duncker & Humblot, Berlin, 2005), at p. 44 with further references.

[35] UNSC Res. 733 (1992) (23 January 1992) SCOR 47<sup>th</sup> Year 55.

[36] UNSC Res. 746 (1992) (17 March 1992) SCOR 47<sup>th</sup> Year 56.

[37] UNSC Res. 794 (1992) (3 December 1992) SCOR 47<sup>th</sup> Year 63.

[38] UNSC Res. 814 (1993) (26 March 1993) SCOR 48<sup>th</sup> Year 80; UNSC Res. 897 (1994) (4 February 1994) SCOR 49<sup>th</sup> Year 55.

[39] In UNSC Resolution 954, the UNSC e.g. referred to the “exceptional circumstances, including in particular, absence of a government in Somalia” (UNSC Res. 954 [4 November 1994] UN Doc. S/RES/954).

[40] UNSC Res. 929 (1994) (29 June 1994) SCOR 49<sup>th</sup> Year 10.

[41] Aidan Hehir, *Humanitarian Intervention – An Introduction* (Palgrave Macmillan, Hampshire, 2010), at p. 188.

[42] Aidan Hehir, *Humanitarian Intervention – An Introduction*, at p. 186-188; Nicholas J. Wheeler, *Saving Strangers* (Oxford University Press, Oxford, 2002), at pp. 220-221.

[43] Alan J. Kuperman, *The Limits of Humanitarian Intervention: Genocide in Rwanda* (Brookings Institution Press, Washington D.C., 2001), at p. 63.

[44] Cf. Alex J. Bellamy and Nicholas J. Wheeler, *Humanitarian Intervention in World Politics*, in: John Baylis, Steve

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Smith and Patricia Owens (eds.), *The Globalization of World Politics* (Oxford University Press, Oxford, 5<sup>th</sup> ed., 2011), pp. 510-525, at p. 515.

[45] UNSC Res. 1132 (1997) (8 October 1997) SCOR 52<sup>nd</sup> Year 83. This was eventually confirmed in UNSC Res. 1270 (1999) (22 October 1999) SCOR 54<sup>th</sup> Year 9; UNSC Res. 1289 (2000) (7 February 2000) SCOR 55<sup>th</sup> Year 96; UNSC Res. 1315 (2000) (14 August 2000) SCOR 55<sup>th</sup> Year 108.

[46] See UNSC Res. 1156 (1998) (16 March 1998) SCOR 53<sup>rd</sup> Year 68; UNSC Res. 1162 (1998) (17 April 1998) SCOR 53<sup>rd</sup> Year 68.

[47] Simon M Meisenberg, *Sierra Leone*, in: Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (Oxford, Oxford University Press, Online Edition, 2012), at para. 9.

[48] Nicholas J. Wheeler, *Saving Strangers*, at p. 242.

[49] Alex J. Bellamy and Nicholas J. Wheeler, *Humanitarian Intervention in World Politics*, at p. 516.

[50] In particular UNSC Res. 1199 (1998) (23 September 1998) SCOR 53<sup>rd</sup> Year 13 and UNSC Res. 1203 (1998) (24 October 1998) SCOR 53<sup>rd</sup> Year 15.

[51] Vaughan Lowe and Antonios Tzanakopoulos, *Humanitarian Intervention*, at para. 19.

[52] Based on this, Alfred P. Rubin comes to the conclusion that humanitarian intervention is “more likely to create misery than to elevate it”. Alfred P. Rubin, *Humanitarian Intervention in International Law*, in: Aleksandar Jokic (ed.), *Humanitarian Intervention – Moral and Philosophical Issues* (Broadview Press Ltd., Ontario, 2003), pp. 109-122, at p. 119.

[53] Cf. Nico Krisch, *Legality, Morality and the Dilemma of Humanitarian Intervention after Kosovo*, *European Journal of International Law*, Vol. 13, No. 2 (2002), pp. 323-335, at p. 334.

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