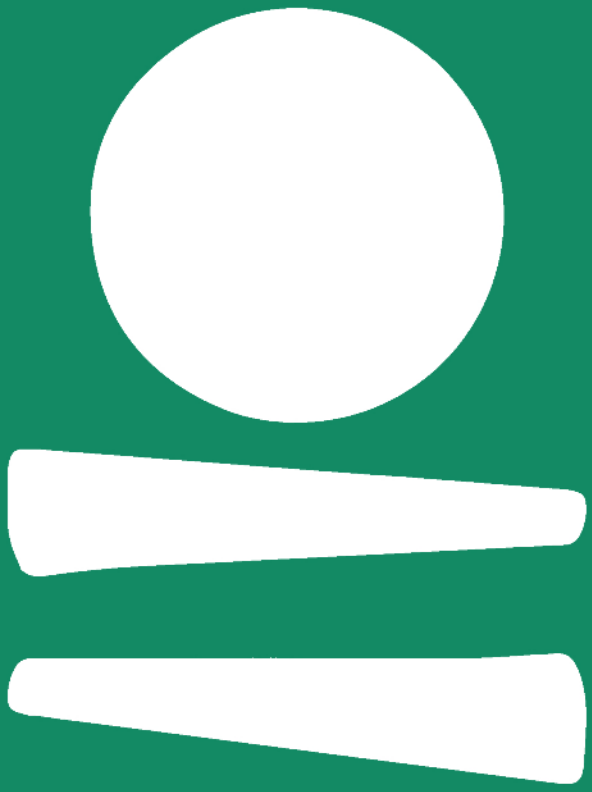
# Study Guide



## Human Rights Council

BITSMUN

United Nations Information Centre
for India and Bhutan

## NOTE FROM THE EXECUTIVE BOARD

Dear Delegates,

First of all we would like to extend a very warm welcome to the United Nations Human Rights Council of BITSMUN 2015. It is our very special honour that the secretariat saw us fit to chair this committee. Whether this will be your first MUN or one of many, we hope you have an incredible experience. In a MUN you have the opportunity of "learning by doing". Through experiencing the procedures of the United Nations and facing the challenges that diplomats face in real life one can come to understand the opportunities and obstacles of international politics. It has to be said that preparation is the fundament of every delegate in MUN. This background guide provides you with the general idea about the agenda, while attempts have been made to avoid any mistakes, errors might have crept in. Any part of the study guide cannot be accepted as proof for statements made by the diplomats in the committee.

We look forward of having a great experience with you.

Soumith Kasetty
(Chair)

Anirudh Vaidhyaa
(Vice-Chair)

Kushagra Agrawal
(Director)

## Description of the Committee

In March 2006, the UN Human Rights Council (HRC) was created to replace the United Nations Commission on Human Rights. Meeting three times every year at the United Nations office in Geneva, Switzerland, the Human Rights Council is the world's highest intergovernmental body for the promotion and protection of human rights. Although its decisions are not legally binding, the Human Rights Council can pass resolutions condemning or raising awareness about violations of human rights, appoint experts to study a particular issue in greater detail, or work with the Office of the UN High Commissioner for Human Rights to gather information on human rights issues and help states better protect human rights. The council is made up of 47 countries that are elected by a majority vote of the General Assembly. Each member state on the council is required to respect human rights in its own country, or face suspension of its council membership. The current membership of the council includes 13 African member states, 13 Asian member states, 8 Latin American and Caribbean member states and 13 European and other member states.

## GOVERNANCE AND SYSTEM

*SUB-BODIES AND PROCEDURES*

### Advisory Committee:

The Sub-Commission on the Promotion and Protection of Human Rights was the main subsidiary body of the erstwhile UNCHR. The Sub-Commission was composed of 26 elected human rights experts whose mandate was to conduct studies on discriminatory practices and to make recommendations to ensure that racial, national, religious, and linguistic minorities are protected by law. In September 2007, the Human Rights Council decided to create this into an Advisory Committee to provide expert advice. Its primary mandate is described as: "To undertake studies, particularly in the light of the Universal Declaration of Human Rights, and to make recommendations to the Commission concerning the prevention of discrimination of any kind relating to human rights and fundamental freedoms and the protection of racial, national, religious and linguistic minorities."

### COMPLAINTS PROCEDURE:

On 18 June 2007, the UNHRC adopted Resolution 5/1 to establish a Complaint Procedure. The Complaint Procedure's purpose is to address consistent patterns of gross and reliably attested violations of all human rights and all fundamental freedoms occurring in any part of the world and under any circumstances. Two working groups make up the Complaint

Procedure: the Working Group on Communications (WGC) and the Working Group on Situations (WGS).

## SPECIAL RAPPORTEURS:

Special Rapporteur is a title given to individuals working on behalf of the United Nations who bear a specific mandate from the UN Human Rights Council to investigate, monitor and recommend solutions to human rights problems. They are also called “Special Procedures". Some of these experts are called Special Representatives or Independent Experts. They address either specific country situations or thematic issues in all parts of the world.

## Validity of Reports:

Delegates please keep the validity of reports in mind while researching as we would be following the below structure very strictly in committee.

**Valid and Binding:**

1. All reports published by the United Nations and its agencies.

2. Reports by the Governments and its agencies (with respect to their country only).

**Valid but not binding, in the order of precedence:**

1. Reuters

2. Al Jazeera

3. Amnesty International

4. Human Rights Watch

5. Reporters without borders

**Not Valid but can be used for reference purposes or substantiate a statement:**

1. Any news report published by a recognized news agency or NGO.

**Not accepted under any condition:**

1. Wikipedia

2. WikiLeaks

3. Blog Articles

4. The Background Guide itself

# Legitimacy of Humanitarian Intervention

## Introduction:

The very term 'humanitarian intervention' is regarded as an obscene oxymoron by many. How can military intervention ever be humanitarian? Humanitarian intervention has long been justified and advocated by the western powers (the US along with the NATO) as an indispensable prerequisite in ensuring "peace" and "law and order" situation in countries hostile to the idea of democracy, equality and freedom. It has been strongly contested that the process of democratization of democracy or the transformation of nondemocratic regimes to a democratic one can today take place only through the corridors of humanitarian intervention.

Equally contested is the argument that democracy and its tall claims cease to exist or become redundant the moment intervention takes place. Intervention (especially a military intervention) marks the death knell of all democratic principles that the US led Western block espouses of. Proponents of this view argue that democracy is all about will and wishes of the people concerned. Since the State becomes the patron and represents the people's will and wishes, it is the concerned State authority whose consent is to be attained in all matters affecting the said state. Humanitarian intervention thus violates this basic doctrine of democratic political setup. Rather it is a dictatorship of the powerful countries over the mineral rich economically poor countries. Under the veil of enforcing/implementing/maintaining democracy the powerful countries, it has been often argued, have plundered the socio-political and economic fabric of the intervened countries.

In this background can we agree to one definition of 'humanitarian intervention'? What exactly do we mean by the intervention? Is intervention necessarily a military one or can it assume other manifestations too? Will acts such as economic blockades, diplomatic pressures, isolation in international politics etc. also account for intervention in the discourse of humanitarian intervention? Furthermore, what is humanitarian in humanitarian intervention? If at all humanitarian intervention is required then what are the conditions under which intervention can be justified? Should such an intervention be codified and should there be principles that must guide the conduct of intervention? Which authority should be the appellate authority in case these principles are violated and what shall be the jurisdiction of such an authority? However the most important of such questions is- is humanitarian intervention a right or a duty?

## The Dilemma on Humanitarian Intervention:

On 6 April 1994, President Habyarimana of Rwanda and several top government officials were killed when their plane was shot down by a surface-to-air missile on its approach to Kigali airport. Within hours, members of the Hutu-dominated government, presidential guard, police, and military started rounding up and executing opposition politicians. The army set up roadblocks at 50 to 100 meter intervals throughout Kigali. The airport was surrounded and sealed. Telephone lines were cut. Military intelligence distributed lists of the government's political opponents to death squads: "every journalist, every lawyer, every professor, every teacher, ever civil servant, every priest, every doctor, every clerk, every student, every civil right activist were hunted down in a douse-to-house operation. The first targets were members of the never-tobe0constituted broad-based transitional government.

Once the Tutsi leadership and intelligentsia were killed, the army, presidential guard, and the Interahamwe militia, the youth wing of the ruling Hutu party, began executing anyone whose identity cards identified them as Tutsis. When checking identity cards became too time-consuming, they executed anyone with stereotypical Tutsi features. Om 9 April, the Interahamwe militia directed by presidential guards hacked to death 500 men, women and children who had taken shelter in the Catholic mission in Kigali. In another incident, the Interahamwe shot 120 men and boys who had taken refuge in St. Famille Church in Kigali. Soldiers killed all and any wounded Tutsis who made it to hospital. One killer went so far as to thank hospital staff for providing a "Tutsi collection point." The Hutu radio station Radio Television *Libre Milles Collines* coordinated the killing. "You have missed some of the enemies [in such and such a place]," it told its listeners, "Some are still alive. You must go back there and finish them off…The graves are not yet quite full. Who is going to do the good work and help us fill them completely?" in Taba, the Interahamwe killed all male Tutsis, forced the women to dig graves to bury the men and then threw the children in the graves. "I will never forget the sight of my son pleading with me not to bury him alive," one survivor recalled. "[H]e kept trying to come out and was beaten back. And we had to keep covering the pit with earth until there was no movement left."

Massacres such as these became commonplace throughout Rwanda. An estimated 43,000 Tutsis were killed in Karama Gikongoro, a further 100,000 massacred in Butare. Over 16,000 people were killed around Cyangugu; 4,000 in Kibeho; 5,500 in Cyahinda; 2,500 in Kibungo. Other examples are not hard to find. By early may, one journalist observed that one bloated and mutilated body plunged over the Rusomo Falls on the Kagera River every minute. "Hundreds and hundreds must have passed down the river in the past week and they are still coming…A terrible genocidal madness has taken over Rwanda. It is now completely out of control." So many bodies littered the streets of Kigali that prisoners were detailed to load

them into dump trucks. As one eyewitness recounted, “Someone flagged [the dump truck] down and dragged [a] body from under the tree and threw it into the (…) truck which was almost full and people were moaning and crying, you could see that some were not dead.” The sub-perfect of Kigali prefecture later admitted that 67,000 bodies were disposed of in this way. In three short months, as many as 1 million Tutsis were shot, burned, starved, tortured, stabbed, or hacked to death.

The international community did nothing to stop the Rwandan genocide. A complete holocaust was only prevented by the military victory of the Rwandan Patriotic Front- a Tutsi guerrilla army based in the north of the country.

But what, if anything, should the international community have done to stop the carnage? Did it have a moral duty to intervene? Did it have a legal right to do so? What should it have done if the United Nations Security Council had refused to authorize a military intervention? If it had a duty to intervene, how could it have overcome the political barriers to intervention? And, most importantly, what measures should be taken to prevent similar catastrophes in future?

## Defining Humanitarian Intervention

What is humanitarian intervention? Humanitarian intervention is an ambiguous concept. According to J. L. Holzgrefe humanitarian intervention is

‘the threat or use of force across state borders by a state (or group of states) aimed at preventing or ending widespread and grave violations of the fundamental human rights of individuals other than its own citizens, without the permission of the state within whose territory force is applied.’

Ferdinand R. Teson, a staunch supporter of intervention, defines the humanitarian intervention ‘as the proportionate international use or threat of military force, undertaken in principle by a liberal government or alliance, aimed at ending tyranny or anarchy, welcomed by the victims, and consistent with the doctrine of double effect.’ According to Anthony Arend and Robert Beck for an action to count as forcible humanitarian intervention, it must be constrained to ‘protecting fundamental rights’ and should neither have the blessing of the United Nations (UN) nor the consent of the targeted government. However, not everyone agrees with this narrow definition of humanitarian intervention. For Oliver Ramsbotham and Tom Woodhouse the concept of intervention should encompass both ‘forcible’ and ‘non-forcible’ humanitarian intervention.

A broader definition of the term is forwarded by the political philosopher Bhikhu Parekh, who believes-

"Humanitarian intervention, as the term is used today is an act of intervention in the internal affairs of another country with a view to ending the physical suffering caused by the disintegration or the gross misuse of the authority of the state, and helping create conditions in which a viable structure of civil authority can emerge. Humanitarian intervention is not the same as humanitarian aid, which is only concerned to relieve suffering and not to create peace and order, nor is it to be confused with political intervention, which seeks to impose a specific structure of civil authority and was all too familiar during the cold war and is not altogether absent today. Humanitarian intervention is intended to help create conditions conducive to the creation of a structure of civil authority acceptable to the people involved. It differs from other forms of intervention in that it aims to ensure that the structure is evolved by or in cooperation with the affected parties and not externally imposed. The line is not easy to draw. Even if the intervening parties are genuinely disinterested, they have their own ideas on what is good for the country concerned, what is likely to last and what general political principles a new polity should satisfy; these might all be in conflict with those of the warring parties, as has proved to be the case in both Bosnia and Somalia. The intervening parties might then give in or, as is more likely, press their ideas. However disinterested they might be, most acts of humanitarian intervention cannot but involve at least some element of external imposition."

Gareth Evans and Mohamed Sahnoun argue that we need a shift in the way we think about humanitarian interventions. Rather than ask whether states have a right to intervene in a crisis within another state, states should come at the problem in terms of understanding their responsibility to protect.

The essence of sovereignty is responsibility, not control. Even holding to the side the realities of economic and financial globalization that limit state sovereignty, the international community has agreed that states do not have the right to do whatever they want to the humans living within their boundaries. A state can no longer massacre its population and make a serious argument that what it does is its own business. Ideology aside, state sovereignty contracted during the second half of the 20th century.

So, thinking about humanitarian intervention in terms of state sovereignty is dangerously out of step with international realities. If we are going to come up with a coherent justification for and procedural protections during military interventions for humanitarian purposes, we need a different frame.

In the first instance, states have a responsibility to protect their citizens. When a state cannot or will not live up to this responsibility then they lose (to some degree at least) their sovereignty. The question is no longer whether other members of the international

community should intervene; the question is whether the state can live up to its obligations. If it cannot, and the threat is extreme, then members of the international community have an obligation to intervene.

There are three advantages to coming at the challenge of humanitarian intervention from a responsibility to protect perspective:

1. The focus is on those who need the support. The question is not about the sovereignty of a state, but about the welfare and safety of humans at risk.
2. The state has the primary responsibility. The primary responsibility for the safety of citizens is the state. It is only when a state will not or cannot protect its citizens that outside intervention should even be contemplated.
3. React, prevent, rebuild. The responsibility to protect is a broad concept that involves not only the international community's responsibility to react to crises, but to act to prevent the crises and aid rebuilding the affected society as well.

Even after visiting these definitions of humanitarian intervention it is natural for the reader to raise two questions, namely what constitutes intervention, and what sorts of considerations count as humanitarian? We take each in turn. An act counts as intervention if it satisfies the following four conditions.

First, the state that is the object of intervention must be widely acknowledged to be sovereign. Intervention is a violation of a state's autonomy, and presupposes that the state in question enjoys the right to autonomy. To disperse a stray group of people who have declared themselves a state on a desert island is not an act of intervention, for the group is not recognised by other states as enjoying the right to autonomy and the concomitant right to their non-interference. Nor is it intervention if a state interferes with the affairs of a section of its own citizens who have unilaterally declared their independence from it.

Second, intervention implies that the act is designed to influence the conduct of the internal affairs of a state, and not to annex or to take it over. Hitler's invasion of Poland and the Soviet Union was a case not of intervention but war; European colonialism in Asia and Africa was not intervention, not even war, but conquest. The line between intervention on the one hand and conquest on the other is not always easy to draw nor is it fixed and stable. In some cases, such as British rule in India, colonialism began as trade but soon escalated into intervention, involved wars, and later led to the altogether different activity of annexing parts of India and eventually conquering the whole country. Broadly speaking intervention, as different from war and conquest, involves influencing the internal affairs of a state in a

specific direction without either taking it over or seeking to defeat it in a military confrontation.

Third, an act amounts to intervention if the country concerned is opposed to it. If it invites or welcomes outside help, then it is a case of giving support to a willing party and not an act of intervention. Difficult questions do arise as to the authority of the party inviting external help and how voluntary the invitation is. The government but not its subjects might invite external help, or vice versa. If the government is legitimate and enjoys broad popular support, then its attitude deserves to be considered decisive; however when the civil authority is a subject of deep and widespread dispute, or when there is no structure of authority, it is the popular attitude that best decides whether or not the external act amounts to intervention. Civil authority has no other basis than the fact that those subject to it acknowledge, accept and respect it; if they stop doing so, it becomes illegitimate, a usurper, with no right to speak and act for them. An equally difficult situation arises during times of civil war, when one faction might invite external help but others might condemn it. The decision as to whether or not an intervention has occurred would depend on which faction has a better legal title or a greater political authority to speak in the name of the fragmented community. If no such determination is possible, it is an intervention in the eyes of one but not the other parties to the civil war. If the various factions control clearly demarcated areas, whether or not it is an act of intervention depends on the attitude of the faction controlling the relevant areas of the country. When the civil authority has completely disintegrated and the country does not even have the fractured vertical order created by the warring factions claiming to represent and eventually to take over the entire country, the state may be said to have ceased to exist and the concept of intervention makes little sense. The people concerned are in a quasi-state of nature until such time as they reconstitute the state or become part of another.

Fourth, even as human beings constantly influence each other, so do states. Their immigration, trade, fiscal, foreign and other policies directly or indirectly influence the lives of the citizens of other states, sometimes with profound effects. We would be wrong to say that this amounts to interference in other states' internal affairs. Interference occurs when the influence is not inadvertent but intended, not incidental but direct and targeted, and pertains to areas in which the affected state is entitled to enjoy autonomy. Thus bribing politicians or journalists in another state, secretly funding its political parties, infiltrating the ranks of dissidents, requiring it to follow a specific set of policies on pain of economic sanctions, etc., are all acts of interference.

Nevertheless, the main problem with the humanitarian intervention is not the lack of consensus in defining the concept, but rather more contentious issues such as the legality

and the legitimacy of an intervention. Moreover, if the humanitarian intervention is just; in what circumstances should the intervention be justifiable?

## UN Charter and Humanitarian Intervention

The term humanitarian intervention does not find any direct reference in the UN Charter as such. However, the issue has been significantly addressed in it. The following are some of the articles of the UN Charter that deal with the theme of humanitarian intervention.
Article 1(1): To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of peace, and to bring about by peaceful means, and in conformity with the principles of jus- tice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.

Article 2(4): All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

Article 39: The Security Council shall determine the existence of any threat to the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 4 and 42, to maintain or restore international peace and security.

Article 42: Should the Security Council consider that measures provided in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea or land forces of Members of the United Nations.

It is intentional on the part of the executive board to have not provided the various interpretations of the UN Charter by legal scholars. This is done primarily with the intention to encourage the reader to think and interpret these legal positions themselves and relate it to their respective foreign policies. However, a suggestive reading in this regard that encapsulates the debate on UN Charter and humanitarian intervention is being provided at the end of this background guide.
Nonetheless, the United Nations Charter represented a new stage in the discussion of the relations between states in international politics in the background of humanitarian intervention. Its novelty was threefold. First, it extended the doctrine of non-intervention to

all states and abolished the privileged position the Western states had long claimed for themselves. Second, it permitted intervention in the internal affairs of a state only when international security was threatened. And, third, all such acts of intervention had to be authorized by the United Nations acting as a representative of the international community. The first principle established the equality of all states and recognised their claim to non-intervention; the second principle limited intervention to a clearly specified purpose, and placed the internal affairs of the state outside external interference; and the third principle regulated the mode of intervention. Thanks to the United Nations Charter the principle of non-intervention became a universal legal norm for the first time in history.

Although this was a desirable development, it also created problems. The United Nations Charter and the United Nations Declaration of Human Rights required all states to respect human rights, thus raising the question of how one could both demand such respect and insist on non-intervention. During its fifty years of existence the United Nations has often been called upon to end acute human suffering caused by such things as genocide, brutal civil wars, and ethnic cleansing, and in each case it was confronted with the moral dilemma posed by its commitments to both the statist paradigm and respect for human rights, to both the inviolability of the state and some conception of universal human community. These dilemmas are acutely highlighted by what has come to be called humanitarian intervention, a concept that both resembles and significantly differs from the earlier ideas of just and justified intervention.

## Is Humanitarian Intervention a Duty or a Right?

Humanitarian intervention can be viewed from the prism of natural Law. Natural Law is a doctrine that human beings have certain moral duties by virtue of their common humanity. Our common nature generates common moral duties- including, in some versions, a right of humanitarian intervention. Our moral obligations to others, they argue, are not limited to people with whom we are bound in community by contract, political ties, or common locale. We are obliged to help whoever we can and to be ready to form and promote decent relations with them. This general duty to help others is the most basic ground within this common morality for interference in the internal affairs of one nation by outsiders, including other nations and international bodies. The specific implications of the general duty to provide help depend on a number of highly contingent factors including respect for a nation's sovereignty and awareness of the limits of outside aid. But the normative ground is there and in extreme circumstances it can justify the use of force.

Borrowing the natural law notion of *societas humana*- the universal community of humankind, the defenders of humanitarian intervention argue that where a tyrant should

inflict upon his subjects such treatment as no one is warranted in inflicting, other states may exercise a right of humanitarian intervention.

Note that here what is being talked of is the right- not the duty- of humanitarian intervention. States have a discretionary right to intervene on behalf of the oppressed. But they do not have to exercise the right if their own citizens are unduly burdened in doing so. Natural law theorists who defend a duty of humanitarian intervention conceive it as an imperfect duty, like the duties of charity and beneficence. States may discharge it at their own discretion and in manner of their own choosing. The victims of genocide, mass murder, and slavery possess no "right of humanitarian rescue"- no moral claim to the help of any specific state.

Moral duties are often classified as perfect or imperfect. A perfect duty is one for which there is a corresponding right. For example, if I have a duty not to execute prisoners of war, you, as a prisoner of war, have a right not to be executed. An imperfect duty is one for which there is no corresponding right. Duties of charity, for example, require us to contribute to one or another of a large number of eligible recipients, no one of whom can claim our contribution from us as his due. Charitable contributions are more like gratuitous services, favours and gifts than like repayments of debts or reparations; and yet we do have duties to be charitable.

Although an imperfect duty of humanitarian intervention comports easily with the belief that states should privilege the well-being of their own citizens over the well-being of foreigners, it can have terrible consequences. The general problem is that intervention, even when it is justified, even when it is necessary to prevent terrible crimes-even when it poses no threat to regional or global stability, is an imperfect duty- a duty that doesn't belong to any particular agent. Somebody ought to intervene, but no specific state or society is morally bound to do so. And in many of these cases, no one does. People are indeed capable of watching and listening and doing nothing. The massacres go on, and every country that is able to stop them decides that it has more urgent tasks and conflicting priorities; the likely cost of intervention is too high.

If one is concerned about preventing or stopping genocide, mass murder, and slavery, an imperfect duty of humanitarian intervention will not do. If persons as such have rights then surely one ought not only to respect persons' rights by not violating them. One ought also to contribute to creating arrangements that will ensure that persons' rights are not violated. To put the same point somewhat differently, respect for persons requires doing something to ensure that they are treated respectfully. It is not enough for a state to refrain from

violating human rights itself. It also must create and participate in international institutions that prevent or stop gross human rights violations wherever they occur.

By contrast, many natural law theorists maintain that far from possessing an imperfect duty of humanitarian intervention, states have a perfect duty of non-intervention. Philosophers like Immanuel Kant content that states have a duty to refrain from interfering in each other's affairs for the same reason that individuals have a duty to respect each other's autonomy. To interfere in the government of another is opposed to the natural liberty of nations, by virtue of which one nation is altogether independent of the will of other nations in its actions. If any such things are done, they are done altogether without right. This argument rests on an analogy between persons and states. Just as persons are autonomous agents, and are entitled to determine their own action free from interference as long as the exercise of their autonomy does not involve the transgression of certain moral constraints, so, it is claimed, states are also autonomous agents, whose autonomy is similarly deserving of respect.

## Conditions for Humanitarian Intervention – Are there any?

Humanitarian intervention as defined above refers to the threat or use of force across state borders by a state (or group of states) aimed at preventing or ending widespread and grave violations of the fundamental human rights of individuals other than its own citizens, without the permission of the state within whose territory force is applied. Unauthorized humanitarian intervention refers to humanitarian intervention that has not been authorized by the United Nations Security Council under Chapter VII of the UN Charter. NATO's military actions in Kosovo are a prominent example of unauthorized humanitarian intervention.

Fernando Teson argues that human rights are intrinsic values and must prevail, where a choice has to be made, over the merely instrumental value of state sovereignty. Indeed, states may have not only the right to intervene but also the moral obligation to do so. Teson criticizes contentions that national borders, an obligation to obey existing international law, or concern about global stability have moral standing sufficient to override the duty to intervene when states are engaging in, or permitting, severe abuse of human rights. Teson acknowledges that innocent people are often killed or hurt in military interventions. To evaluate such actions, he employs the doctrine of double effect from just war theory: it is permissible for interveners to cause the deaths of innocent people if by doing so they prevent much greater harm, and if the damage they do so is unintended. Thus in this case it is a moral necessity to intervene in order to prevent widespread abuse of human rights.

Another condition in which humanitarian intervention is said to be permissible is the illegal legal reform premise. Such a justification could be used to defend intervention that is illegal

on strict textual grounds, such as NATO's actions in Kosovo in 1999, as a means of reforming the international legal system. Proponents of this view argue that it is difficult to bring about reforms in international order through legal actions such as treaties or efforts to change customary law because it lacks a coherent legislative process and the system has a strong status quo bias. Thus reforms, if desired, can be brought by adopting illegal actions which in the end become productive in the long run. Major advances such as those in the Nuremberg trials, have been made through actions that were arguably illegal under then-existing international law.

In simpler words this means that humanitarian intervention is permissible if it is intended to bring out reforms in the international politico-legal order. If the world has to be democratized, it is argued that, if required the authoritarian dictatorships where there is no respect for an ordinary man's human rights can be rightly intervened by other countries to lead a much necessary course correction.

When this principle is applied to the Kosovo intervention, political analysts find that NATO did not put forward a preferable alternative rule to the existing rules requiring Security Council endorsement of military intervention and that its actions do not, therefore, constitute a justifiable example of illegal legal reform.

Scholars argue that the international legal system should be reformed to fulfil values of human rights. If states override conventional international law but effectively protect human rights. More power to them. While some take a softer stand and argue that states seeking to promote human rights through intervention must meet a number of demanding criteria, and, in particular, must be able to show that the rule they endorse is likely to be superior to the rule they are breaking. The first view implies that NATO's action in Kosovo was justified because they were intended to uphold the human rights of the people therein. Whereas the second view believes that NATO was wrong in intervening Kosovo because it failed to provide a superior set of rules to the ones which it broke.

On the other hand scholars like Michael Byers and Simon Chesterman strongly defend the principle of non-intervention as firmly established, as a general rule, in international law. The argue that the UN Charter, customary international law and the repeated declarations of bodies such as the UN General Assembly, all have reinforced the non-intervention norm over the last six decades. In their view the United States, aided by a small group of Anglo-American lawyers, is seeking to loosen the constraints of the non-intervention norms, but opinion from Africa and elsewhere in the world remains strongly opposed. They believe that relaxing the non-intervention norm would alter the principle of sovereign equality- a principle manifestly as valuable to weak states as it is inconvenient to powerful ones. If

intervention is morally required, it should be defended as such and not used as part of an unwarranted attempt to revise by stealth the fundamental principles of international law.

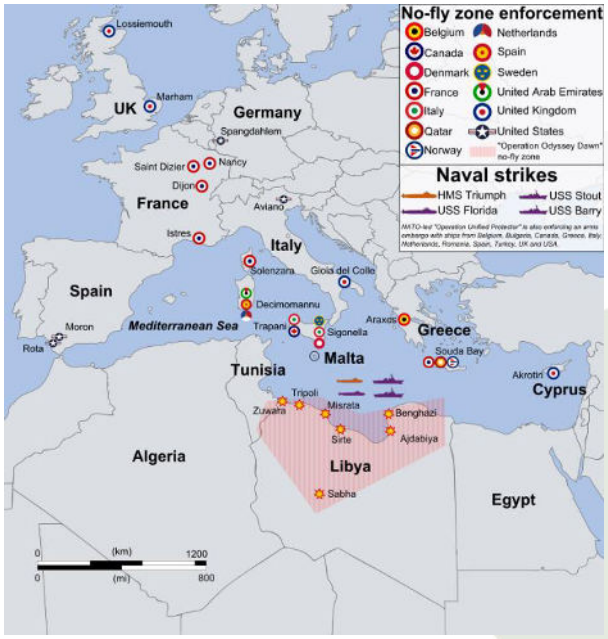
## Examples of Humanitarian Intervention

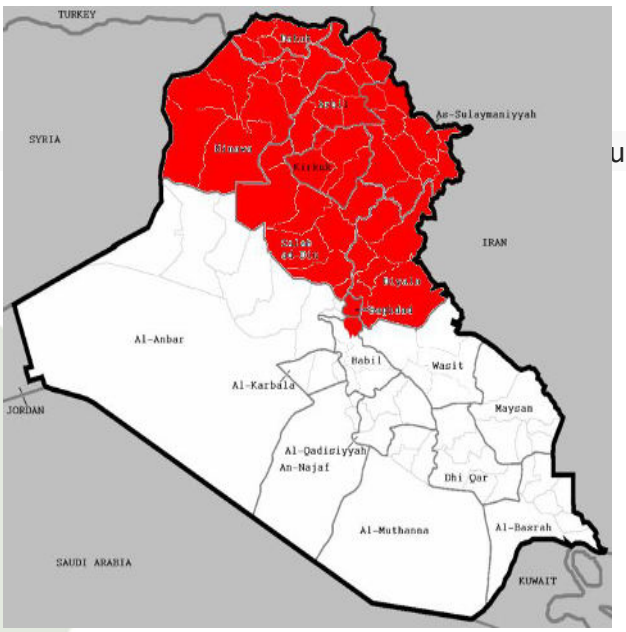
- **The United States in the Dominican Republic (1965)** - The Dominican Civil War, took place between April 24, 1965, and September 3, 1965, in Santo Domingo, Dominican Republic. It started when civilian and military supporters of constitutionally elected former president Juan Bosch overthrew acting President Donald Reid Cabral. The coup prompted general Elías Wessin y Wessin to organise elements of the military loyal to president Reid known as loyalists, initiating an armed campaign against the so-called constitutionalist rebels. Allegations of foreign support for the rebels led to an American intervention into the conflict, which later transformed into an Organization of American States occupation of the country.
- **India in East Pakistan (1971)** - The Bangladesh Liberation War, also known as the Bangladesh War of Independence, or simply the Liberation War in Bangladesh, was a revolution and armed conflict sparked by the rise of the Bengali nationalist and self-determination movement in East Pakistan and the 1971 Bangladesh genocide. It resulted in the independence of the People's Republic of Bangladesh. The war began after the Pakistani military junta based in West Pakistan launched Operation Searchlight against the people of East Pakistan on the night of 25 March 1971. India joined the war on 3 December 1971, after Pakistan launched pre-emptive air strikes on North India. The subsequent Indo-Pakistani War witnessed engagements on two war fronts. With air supremacy achieved in the eastern theatre; and the rapid advance of the Allied Forces of Bangladesh and India, Pakistan surrendered in Dacca on 16 December 1971
- **Vietnam in Kampuchea (1978-93)** - The Cambodian–Vietnamese War was an armed conflict between the Socialist Republic of Vietnam and Democratic Kampuchea. The war began with isolated clashes along the land and maritime boundaries of Vietnam and Kampuchea between 1975 and 1977, occasionally involving division-sized military formations. On 25 December 1978, Vietnam launched a full-scale invasion of Kampuchea and subsequently occupied the country and removed the Khmer Rouge from power.
- **Tanzania in Uganda (1979)** - The Uganda–Tanzania war was fought between Uganda and Tanzania in 1978–1979, and led to the overthrow of Idi Amin's regime. Idi Amin's forces included thousands of troops sent by Libya, and some Palestinian support
- **Britain, France and United States in Iraq (since 1991)** – These were military operations initiated by the United States, the United Kingdom, and some of the Gulf War allies, starting in April 1991, to defend Kurds fleeing their homes in

northern Iraq in the aftermath of the Persian Gulf War and deliver humanitarian aid to them.

- **NATO in Kosovo (1999)** - The NATO bombing of Yugoslavia was the North Atlantic Treaty Organisation's (NATO) military operation against the Federal Republic of Yugoslavia during the Kosovo War. According to NATO, the operation sought to stop human rights abuses in Kosovo, and it was the first time that the organisation used military force without the approval of the UN Security Council. The air strikes lasted from March 24, 1999 to June 10, 1999.
- **British military intervention in the Sierra Leone Civil War (2000)** - The United Kingdom began a military intervention in Sierra Leone on 7 May 2000 under the codename Operation Palliser. Although small numbers of British personnel had been deployed previously, Palliser was the first large-scale intervention by British forces in the Sierra Leone Civil War.
- **Coalition military intervention in Libya (2011**) - On 19 March 2011, a multi-state coalition began a military intervention in Libya to implement United Nations Security Council Resolution 1973. The United Nations Intent and Voting was to have "an immediate ceasefire in Libya, including an end to the current attacks against civilians, which it said might constitute crimes against humanity" ... "imposing a ban on all flights in the country's airspace – a no-fly zone – and tightened sanctions on the Qaddafi regime and its supporters." The resolution was taken in response to events during the Libyan Civil War, and military operations began, with American and British naval forces firing over 110 Tomahawk cruise missiles, the French Air Force, British Royal Air Force, and Royal Canadian Air Force undertaking sorties across Libya and a naval blockade by Coalition forces
- **2014 military intervention against the Islamic State of Iraq and the Levant (2014)** - In response to rapid territorial gains made by the Islamic State of Iraq and the Levant militants during the first half of 2014, and internationally condemned brutality, reported human rights abuses and the fear of further spill overs of the Syrian Civil War, many states began to intervene against ISIL in Syria and Iraq, and three states, later, intervened or surveilled on ISIL in Libya

The no-fly zone over Libya as well as bases and warships which were involved in the intervention

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UN Information Centre for India and Bhutan

# Questioning the status of Unlawful Combatants (Rights in an armed conflict)

## Introduction

*Camp X- ray, Guantanamo Bay*

The term 'unlawful combatant' became better known during the recent armed conflict in Afghanistan, when the Bush administration announced its decision to classify the captured Taliban soldiers and al-Qaeda fighters as unlawful combatants and, as a consequence, to deny them prisoner-of-war status. This has provoked a heated debate over the exact status and protection of such persons. In view of the current security situation around the world, it has been asserted ever more frequently that unlawful combatants are not entitled to any protection whatsoever under international humanitarian law. These statements are clouded in emotional rhetoric and are also dangerous, as they lead to a situation where certain persons in armed conflict are left in a legal vacuum. Yet every person has the fundamental and undeniable right to recognition before the law. It is the general principle of the four Geneva Conventions (1949)[*2] and their two Additional Protocols (1977)[*3] that every person in enemy hands must have some status under international law — that of either a prisoner of war or a civilian. There is no intermediate status: nobody in enemy hands can be outside the law.

## Defining an unlawful combatant

In international armed conflicts, the term "combatants" denotes the right to participate directly in hostilities. As the Inter-American Commission has stated, "the combatant's

privilege (...) is in essence a licence to kill or wound enemy combatants and destroy other enemy military objectives." Consequently (lawful) combatants cannot be prosecuted for lawful acts of war in the course of military operations even if their behaviour would constitute a serious crime in peacetime. They can be prosecuted only for violations of international humanitarian law, in particular for war crimes. Once captured, combatants are entitled to prisoner-of-war status and to benefit from the protection of the Third Geneva Convention. Combatants are lawful military targets. Generally speaking, members of the armed forces (other than medical personnel and chaplains) are combatants. The conditions for combatant/prisoner-of-war status can be derived from Article 4 of GC III and from Articles 43 and 44 of PI, which developed the said Article 4.6.

Generally speaking, a civilian is any person who does not belong to one of the categories of persons referred to in Article 4A (1), (2), (3) and (6) of GC III and Article 43 of PI (see PI, Article 50). Under the law governing the conduct of hostilities, as contained especially in Articles 48 et seq. of PI, and under customary international law, civilians are entitled to general protection against the dangers arising from military operations; in particular they may not be made the object of an attack. Except for the relatively rare case of a *levée en masse*, civilians do not have the right to participate directly in hostilities. If they nevertheless take direct part, they remain civilians but become lawful targets of attacks for as long as they do so. Their legal situation once they find themselves in enemy hands will be the crux of the following analysis.

Whereas the terms "combatant", "prisoner of war" and "civilian" are generally used and defined in the treaties of international humanitarian law, the terms "unlawful combatant", "unprivileged combatant/belligerent" do not appear in them. They have, however, been frequently used at least since the beginning of the last century in legal literature, military manuals and case law. The connotations given to these terms and their consequences for the applicable protection regime are not always very clear.

For the purposes of this article the term "unlawful/unprivileged combatant/belligerent" is understood as describing all persons taking a direct part in hostilities without being entitled to do so and who therefore cannot be classified as prisoners of war on falling into the power of the enemy. This seems to be the most commonly shared understanding. It would include for example civilians taking a direct part in hostilities, as well as members of militias and of other volunteer corps — including those of organized resistance movements — not being integrated in the regular armed forces but belonging to a party to conflict, provided that they do not comply with the conditions of Article 4A (2) of GC III.

If a person who has participated directly in hostilities is captured on the battlefield, it may not be obvious to which category that person belongs. For such types of situations Article 5 of GC III (PI, Article 45) provides for a special procedure (competent tribunal) to determine the captive's status.

The notion "unlawful combatant" has a place only within the context of the law applicable to international armed conflicts as defined in the 1949 Geneva Conventions and Additional Protocol I. The law applicable in non-international armed conflicts does not foresee a combatant's privilege (i.e. the right to participate in hostilities and impunity for lawful acts of hostility). Once captured or detained, all persons taking no active/direct part in hostilities or who have ceased to take such a part come under the relevant provisions of international humanitarian law (i.e. Article 3 common to the four Geneva Conventions, and Additional Protocol II, in particular Articles 4-6), as well as the relevant customary international law. The protective rules apply regardless of the way in which such persons have participated in hostilities (e.g. in accordance with IHL or not; in accordance with national law or not; etc.). Nor does it matter whether the person was a member of an armed rebel group, a member of the armed forces of a State or a civilian who (temporarily) took a direct/active part in hostilities.

In brief, unlawful combatants are either combatants who fail to follow the laws of war or civilians who take part directly in hostilities without being entitled to do so. It is most often the case that unlawful combatants disregard, in order to gain military advantage, the fundamental requirement that combatants distinguish themselves from civilians. Classic examples would be spies and saboteurs who, wearing civilian clothing, infiltrate enemy territory to collect information or to destroy designated objects. In the recent war in Iraq, the Fedayeen fighters dressed in civilian clothing and used civilians as human shields to protect themselves from attack. Another more recent, but also more alarming, form of unlawful combatants is civilians who have organised themselves as self-styled paramilitary fighters (not belonging to a party to the armed conflict).

The best known real-life examples would be Al Qaeda fighters who were not incorporated in Taliban military units as part of the Taliban armed forces according to Article 4 (A) (2) of the Third Convention (at least there is no evidence of such incorporation). A person is not allowed to wear two hats simultaneously: that of a civilian and the helmet of a soldier. Therefore, a person who engages in military raids by night while purporting to be an innocent civilian by day is neither a combatant nor a civilian. Such a person is a legitimate military target, but, once captured, an unlawful combatant is not entitled to prisoner-of-war status. Before the adoption of the Geneva Conventions, international law permitted armies to deal harshly with unlawful combatants, even allowing them to be shot after capture.

## Protection of Unlawful Combatants

Are unlawful combatants entitled to some form of protection under international humanitarian law, or are they completely excluded from the scope of its protection? If they are not protected by the Third Convention, then they are, logically, entitled to protection under the Fourth Convention. It may seem rather surprising that international humanitarian law should protect unlawful combatants. Those who take part in hostilities while not belonging to armed forces are acting deliberately outside the laws of war. Surely they know the dangers to which they expose themselves and therefore it would be simpler (one may say fairer even) to exclude them from the protection of international humanitarian law. However, the term 'unlawful combatant' has been used too lightly and applied to such trivial offences that it is not advisable to leave the accused at the mercy of those detaining them.

## Protected Persons

The Fourth Convention was devised to protect persons who 'at the given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals'. Although the definition of protected persons in the Fourth Convention seems all-embracing and appears to offer undoubted protection to unlawful combatants, such interpretation is subject to serious debates and controversy. By all means, it is true that the Fourth Convention does not cover all possible unlawful combatants, as Article 4 clearly limits its field of application in certain cases. It does not protect persons who are

(1) Nationals of the party or power in which hands they are,

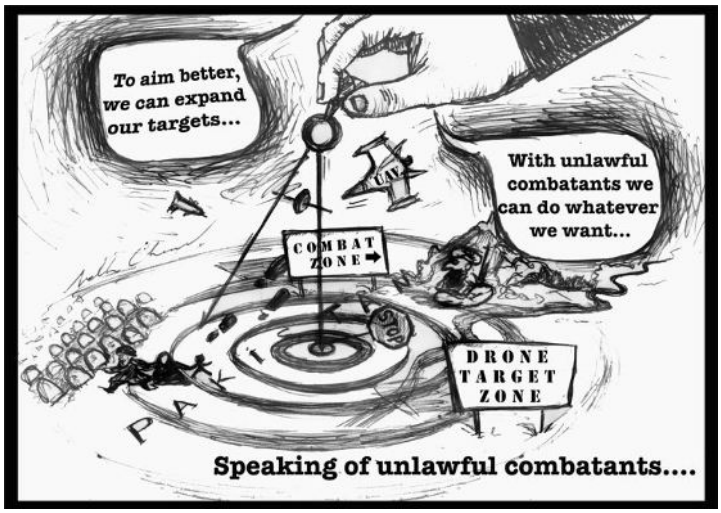
(2) Nationals of a state not bound by that convention,

(3) Nationals of a neutral state in the territory of a belligerent state, and

(4) Nationals of a co-belligerent state with normal diplomatic representation in the state in whose hands they are.

This would then mean that a person who does not meet the nationality criteria may be assimilated to enemy nationality for the purpose of protection under the Fourth Convention. For example, a British national residing a long time in Afghanistan and fighting there with al-Qaeda may be regarded as an Afghan national instead of British, and therefore a protected person.

## Examples of cases regarding unlawful combatants




1. In the wake of the September 11, 2001 attacks, the United States Congress passed a resolution known as the Authorization for Use of Military Force (AUMF) on 18 September 2001. In this, Congress invoked the War Powers Resolution and stated:

   That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harboured such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

   Using the authorization granted to him by Congress, on 13 November 2001, President Bush issued a Presidential Military Order: "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism". Which allowed "individuals ... to be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals", where such individuals are members of the organization known as al Qaida; or has conspired or committed acts of international terrorism, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy. The order also specifies that the detainees are to be treated humanely.

   The length of time for which a detention of such individuals can continue before being tried by a military tribunal is not specified in the military order. The military order uses the term "detainees" to describe the individuals detained under the military order. The U.S.

administration chooses to describe the detainees held under the military order as "illegal enemy combatants".

Despite opposition from the U.S. State Department, which warned against ignoring the Geneva Conventions, the Bush administration thenceforth began holding such individuals captured in Afghanistan under the military order and not under the usual conditions of Prisoners of War. For those U.S. citizens detained under the military order, U.S. officials, such as Vice President Dick Cheney, argue that the urgency of the post-9/11 environment called for such tactics in administration's war against terrorism.

Most of the individuals detained by the U.S. military on the orders of the U.S. administration were initially captured in Afghanistan. The foreign detainees are held in the Guantanamo Bay detention camp established for the purpose at the Guantanamo Bay Naval Base, Cuba. Guantanamo was chosen because, although it is under the de facto control of the United States administration, it is not a sovereign territory of the United States, and a previous Supreme Court ruling Johnson v. Eisentrager in 1950 had ruled that U.S. courts had no jurisdiction over enemy aliens held outside the USA.

There have been a number of legal challenges made on behalf of the detainees held in Guantanamo Bay detention camp and in other places. These include:

- On 30 July 2002, that the US did not have jurisdiction because Guantanamo Bay Naval Base is not a sovereign territory of the United States. This decision was appealed to the D.C. Circuit Court of Appeals, which upheld the decision, (along with a related case in March 2003 — see Al-Odah v. United States).
- On 10 November 2003, the United States Supreme Court announced that it would decide on appeals by Afghan war detainees who challenge their continued incarceration at Guantanamo Bay Naval Base as being unlawful,
- On 7 July 2004, in response to the Supreme Court ruling, the Pentagon announced that cases would be reviewed by military tribunals, in compliance with Article 5 of the Third Geneva Convention.[40][41]
- On 8 November 2004, a federal court halted the proceeding of Salim Ahmed Hamdan, 34, of Yemen. Hamdan was to be the first Guantanamo detainee tried before a military commission. Judge James Robertson of the U.S. District Court for the District of Columbia ruled in Hamdan v. Rumsfeld[42] that no competent tribunal had found that Hamdan was not a prisoner of war under the Geneva Conventions.

2. Israel, since the 2002 "Imprisonment of Illegal Combatants Law", makes theoretical distinctions between lawful and unlawful combatants and the legal status thereof.[65][66][67][68]

   The United Kingdom Crown Prosecution Service (CPS) makes the distinction. The CPS conducted a "thorough review of the evidence concerning the deaths of Sergeant Steven Roberts of the 2nd Royal Tank Regiment and Mr Zaher Zaher, an Iraqi national, at Az Zubayr, Iraq on 24 March 2003":[69][70]

   In reviewing the case, the CPS lawyer considered the possible view that, because of his behaviour, Mr Zaher had become an unlawful combatant and therefore under the Rules of Engagement, under which the [British] soldiers were required to operate, they would have been entitled to take offensive action against him. Under the Rules of Engagement and the Geneva Convention, unless a person is positively identified as being a combatant, they should be considered a civilian and treated accordingly.

   As the alternative view would be that Mr Zaher was not an unlawful combatant but a civilian, the reviewing lawyer also considered whether the soldiers could rely on self-defence. ...

   — Crown Prosecution Service

## SUGGESTIVE MATERIAL:

- Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States (1965), GA Res. 2131, UNGAOR, 20th sess., UN Doc. A/6220 (1965).
  "No state has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State."
- Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States (1970), GA Res. 2625, UNGAOR, 25th sess., UN Doc. A/8028 (1970).
  "Armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements are in violation of international law."
- GA Res. 54/172, UNGAOR, 54th sess., UN Doc. A/RES/54/172 (1999)
  *Legality of Use of Force (Yugoslavia v. Belgium)* a case in the International Court of Justice where Belgium was the lone NATO member to claim that Operation Allied Force was a legitimate exercise of a customary right of humanitarian intervention.
- http://www.icj-cij.org/icjwww/idocket/iybe/iybeframe.htm (5 March 2002)
- Corfu Channel Case (Merits), ICJ Reports, 1949, p.35; Nicaragua v. US (Merits), ICJ Reports, 1986, p.97.
- For the discussion on UN Charter and humanitarian intervention refer- 'Humanitarian Intervention: Ethical, Legal and Political Dilemmas' by J.L Holzgrefe and Robert O. Keohane (Read only page 37- 52)
- For theoretical introduction to humanitarian intervention refer- 'Rethinking Humanitarian Intervention' by Bhikhu Parekh.
- https://en.wikipedia.org/wiki/Unlawful_combatant
- https://en.wikipedia.org/wiki/Rasul_v._Bush
- http://www.juridicainternational.eu/?id=12632
- https://www.law.upenn.edu/live/files/2160-the-legal-situationpdf
- https://www.icrc.org/eng/resources/documents/misc/5lphbv.htm
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