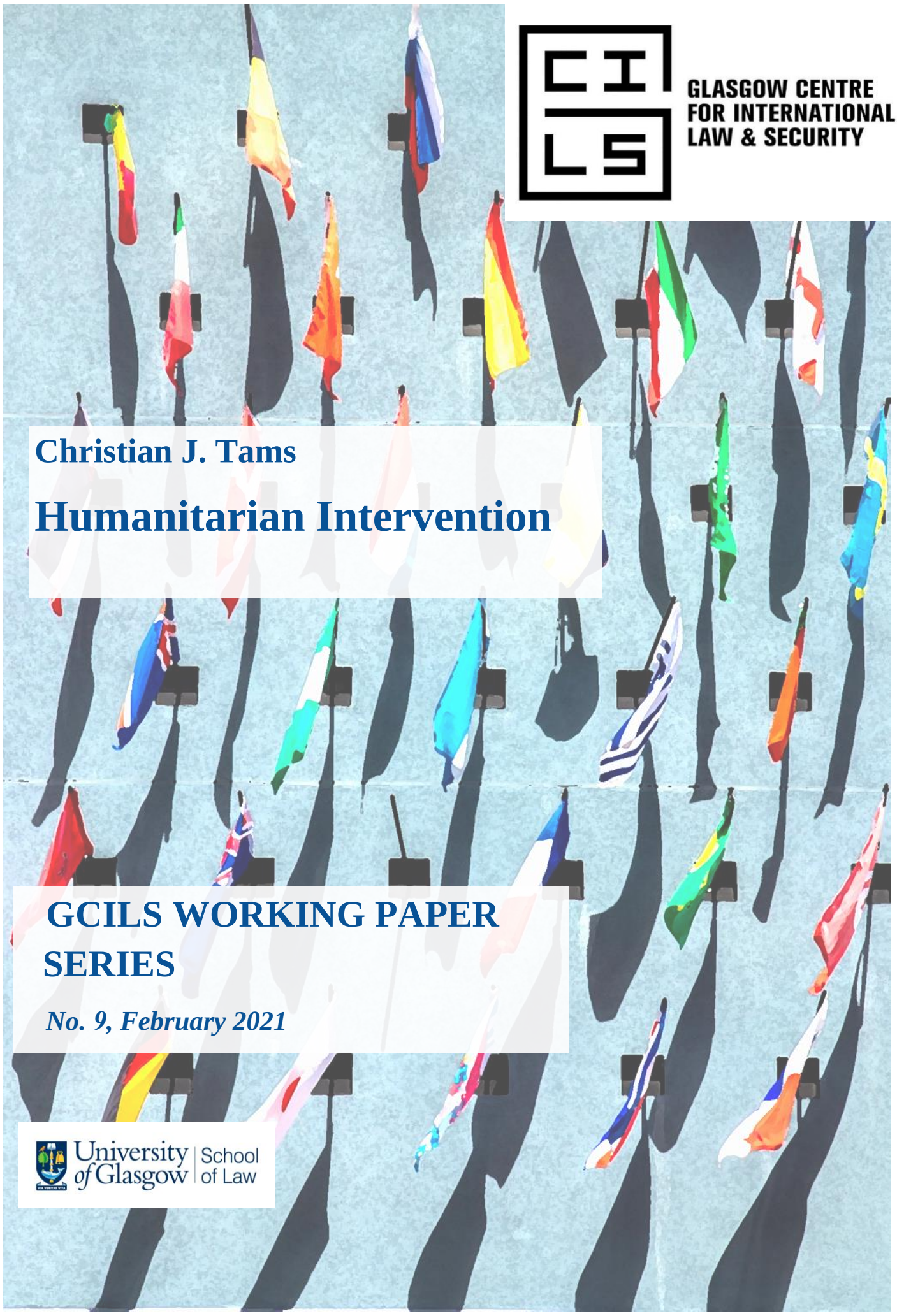

GLASGOW CENTRE FOR INTERNATIONAL LAW & SECURITY

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Humanitarian Intervention

GCILS WORKING PAPER SERIES

No. 9, February 2021

University of Glasgow | School of Law

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[Forthcoming in Binder et al., *Encyclopedia of Human Rights* (Elgar)]

1. Introduction

Debates about humanitarian intervention come with heavy baggage: this is a concept that polarises and divides. It does so for a reason. When States use force abroad, and claim to do so to protect human life from urgent threat, the stakes are high. A forcible intervention may be the only way of preventing a major humanitarian catastrophe (so how could international law stand in the way?). Conversely, the allegedly humanitarian motive may be pure rhetoric, cynically used and abused to mask military ambition (which international law must not tolerate). Generations of international lawyers, relying on finer versions of such considerations, have discussed whether international law permits humanitarian interventions. The academic debate has often been prompted by real-life crises, viz. forcible interventions that -- perhaps alongside other motives -- responded to a humanitarian catastrophe. India's intervention in East Pakistan (resulting in the emergence of an independent Bangladesh - 1971), Tanzania's invasion of Uganda (resulting in the toppling of Idi Amin - 1978), Vietnam's invasion of Cambodia (leading to the overthrow of the Khmer Rouge - 1979), and France's intervention in the Central African Republic (resulting in Emperor Bokassa's removal - 1979) are prominent examples. Some of the more recent practice is dominated by measures taken by groups of States, acting without an unambiguous mandate by the United Nations, or stretching the terms of an existing mandate -- such as western African States' interventions in Liberia (1993) and Sierra Leone (1997), the US-UK-French interventions to protect Kurds in Northern Iraq (1991-); NATO's *Operation Allied Force*, against Serbian targets, justified to stop atrocities in the Kosovo in the spring of 1999; or the involvement of many States in the Libyan civil war of 2011. However, to appreciate the debate properly, it is necessary to take account also of US claims that invasions in Panama (1989) or Grenada (1983) were required to restore democracy, and Russia's argument that force was needed to defend human rights of Russians living on Crimea (2014).

From the mere listing of these instances, it is clear that debates about humanitarian intervention respond to a real concern: How should international law strike a balance between (a) an interest in protecting human rights and (b) the need to restrict the use of military force -- how can it facilitate responses against grave human rights abuses without opening the door to abuse?

As discussed in the following, the legal debate about humanitarian intervention is a relatively narrow one, in which answers turn on the proper construction of a small number of legal rules. It is narrow because the term 'intervention' in this context is generally understood to describe *military actions*. [There is nothing natural about this: elsewhere in international law, intervention is viewed as a broader concept, denoting coercive measures of a forcible and non-forcible character, and perhaps even covering anything ‘from a speech in Parliament by Palmerston to the partition of Poland’ (Winfield 1922-23, 130).] Forcible humanitarian interventions implicate the prohibition against the use of military force, international law's "cornerstone rule" (ICJ 2005) set out in Article 2(4) of the United Nations Charter and general international law. This in turn implies a focus on the post-WW2 legal order, in which the contemporary regime governing recourse to military force was established. Section 2 sets out this regime and shows that its restricts the scope for force to be used lawfully. Section 3 outlines how humanitarian interventions might fit into this framework. Section 4 concludes.

2. The Legal Framework

Agreed at the end of WW2, the UN Charter adopted a strong policy against “the scourge of war” (UN Charter, Preamble). According to Article 2(4) of the Charter, States, "in their international relations", are to "refrain from any threat or use of force". This ban on force is general in scope: it covers all uses or threats of force that are directed "against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." While the latter language leaves some room for discussion, the thrust is clear: international law, from 1945 onwards, has emphasised limits to the right of States to use force unilaterally.

The Charter's ban on force is subject to two express exceptions. (A third one, permitting the resumption of force against enemy States, has become obsolete.) Force can be used in self-defence (Article 51 of the Charter) and if the Security Council authorises it (Article 39, 42).

By contrast, the Charter does not - at least not expressly - recognise a self-standing right of States unilaterally to use force to for humanitarian purposes. It endorses the idea of human rights in principle (see notably Articles 1(3), 55, 56 of the Charter), but does not lay down specific human rights guarantees. Still less does it translate concern for human rights into a license to use force. The matter was considered, but a few years after Germany had justified its intervention in Sudetenland on humanitarian grounds, drafters needed little reminding that such an exception might be open to abuse. The Charter framework, as agreed in 1945, provides little support for the concept of humanitarian intervention. (See Franck 2002, 14-19.)

Since 1945, the Charter framework has evolved considerably, but it continues to shape legal debates. Three developments are particularly relevant. *First,* the general ban on force - novel in 1945 - has become a central pillar of the international legal order. Regularly affirmed in major documents such as the *Friendly Relations Declaration,* the *Agenda for Peace*, or the *In Larger Freedom* report, it forms the lynchpin of the contemporary international legal order, and it is enhanced by ancillary rules, eg prohibiting the recognition of forcible annexation and criminalising aggression. As regards its scope, discussion since 1945 has clarified that international law outlaws not only large-scale invasions aimed at territorial gain or political subjugation, but also 'lesser', temporary, uses of force against another state (ICJ 1949).

Second, while the Charter stopped short of specifying binding human rights, it has become a catalyst for subsequent normative developments. Multilateral treaties, international practice and judicial decisions have forged a widely accepted international bill of rights; and some consider that international law has moved from an inter-State to a “human-being-oriented approach” (ICTY, Appeals Chamber, Tadic case (Interlocutory Appeal), ILM 35 (1996), 32, at para. 97). The tension between human rights protection and the ban on force, merely latent in the Charter, has arisen acutely. However, as far as unilateral uses of force are concerned, the rise of human rights has not been 'translated' into a license to use force -- quite to the contrary. While numerous mechanisms have been established to ensure that States committing human rights violations can be held accountable in some form, these purposefully focus on peaceful measures of enforcing human rights.

Third, the rise of human rights has left its mark on the UN collective security system. Under Chapter VII of the Charter, the Security Council can take or authorise a broad range of forcible

and non-forcible measures to maintain international peace and security. In order to do so, it needs to determine, under Article 39, that a particular situation amounts to a threat to peace, breach of the peace or an act of aggression. Initially intended to cover inter-State conflicts, Chapter VII of the UN Charter has been 'opened up' to accommodate human rights concerns. Beginning in the 1960s, and increasingly from the 1990s, the Council has recognised that large-scale human rights abuses (perhaps coupled with their destabilising impact on the region) amounted to a 'threat to peace'. In response to large-scale humanitarian crises -- eg in Haiti, Rwanda and Somalia during the first half of the 1990s, East Timor in 1999, or more recently in Libya 2011 -- the Council has authorised member States to take appropriate measures, including forcible ones. The scope of these authorisations has often been controversial, as reflected in debates about *Operation Allied Force* (which, according to a minority view, the SC had authorised in SC Res 1441) or about foreign military intervention in the Libyan civil war of 2011 (based on a broad reading of SC Res 1973). Yet as a matter of principle, it is no longer seriously disputed that the SC, as part of its primary responsibility for the maintenance of peace and security, can authorise the use of force in defence of human rights -- in fact, for a while it was even alleged that in particular dramatic crises, it was required to do so. While the latter claim seems difficult to accept (simply because there are no indications that the Council would accept such a limitation of its decision-making power), contemporary international law clearly accepts the lawfulness of 'collective humanitarian interventions' with UN mandate. This marks a major conceptual shift, but one that comes with stringent procedural safeguards. In line with the regular rules governing SC decision-making, such a mandate requires the permanent members to agree (or at least, not to disagree) (Article 27(3) of the Charter). For most of the UN's existence -- the 1990s being an exception -- such agreement has been difficult to reach. Since the early years of the UN, attempts have been made to carve out some (secondary) role for the General Assembly, which has asserted a competence to 'unit[e] for peace' if the SC is blocked (GA Res. 377(V)). In recent years, this 'Uniting for Peace' procedure has however not been employed to address threats to peace. As this is so, the debate about humanitarian interventions without UN mandate remains live. To this we now turn.

3. Discussion

It is a curious debate, if only because it reveals a deep divide between bright-line claims advanced in the academic debate, and the decidedly 'muddied' practice of States. Notwithstanding claims in the literature (see eg Reisman/McDougal in Lillich 1973; Glennon 1999; Téson 2005), the available evidence makes it extremely difficult to argue that contemporary international law recognises a right of humanitarian intervention. However, to stop there is to miss an important point, which is part of the 'muddying through': while not explicitly accepting a right of humanitarian intervention, the international community has, on occasion, accepted the effects of such interventions with surprising ease.

(a) The first point goes to the practice of States. As indicated above (section 1), since 1945, a number of States have forcibly intervened in States that engaged in gross human rights violations - there is no shortage of practice. Does this practice reflect a new, unwritten exception to the ban on force? The better view is that it does not. The most obvious argument is that, since 1945, intervening States have been very reluctant to invoke the concept of humanitarian intervention, even where they ostensibly used force to protect human rights (see Gray 2018, 40-42). To illustrate, when Tanzania intervened in Uganda in 1978, it claimed to respond to border incursions by Ugandan forces, described (with significant exaggeration) as the “unprovoked and unpremeditated war of aggression launched by Idi Amin against the United Republic of Tanzania,...” (Letter to the UN Secretary-General, UN Doc. S/13141): whatever its true motives, Tanzania's legal argument was based on self-defence. India's intervention in East Pakistan (1971) and Vietnam's invasion of Cambodia (1979) follow a similar pattern: the humanitarian catastrophe was mentioned, but both States built their legal case around self-defence, as an accepted exception to the ban on force. In more recent practice, the pattern has been varied, but not changed: when western and other States bombarded targets in Serbia, Libya or Iraq, they mainly claimed to act in pursuit of Security Council resolutions. The UK's insistence that in establishing and 'policing' a no-fly zone in Northern Iraq (to protect Iraqi Kurds), it had acted ‘in support of’ UN Security Council Resolution 688 is an example in point. Significantly, when the Federal Republic of Yugoslavia challenged NATO bombings in proceedings before the ICJ in the so-called *Kosovo cases*, only one of ten respondent States invoked the concept of humanitarian intervention -- and it did so only in the early phase of the proceedings; all others relied on other grounds (ICJ 1999, 124). Writing in 2011, Lowe and Tzanakopoulos noted that in the legal arguments of intervening States, humanitarian "was

never the sole justification but was always combined with a universally accepted exception to the prohibition on the use of force, such as self- defence or authorization by the Security Council" (Lowe/Tzanakopoulos, para 31). Since then, the United Kingdom has explicitly claimed that "if action in the Security Council is blocked, ... it is permitted under international law to take exceptional [forcible] measures to avert a humanitarian catastrophe" (House of Commons 2014, 25-26). In their Constitutive Act, the member States of the African Union seem to take a similar position: Article 4(h) of the Constitutive Act expressly recognise the Union's right to "intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity". But to date, these views have remained exceptional (and the latter provision has yet to be invoked). On balance, States - including those that have actually used force - do not assert a right of humanitarian intervention.

Judging from the community's response to forcible interventions, this may have been a wise choice. A majority of States has often dismissed real or potential precedents of humanitarian interventions. It has certainly done so where the humanitarian motive seemed a mere pretext (eg Russia-Crime 2014), or where no humanitarian emergency of dramatic proportions existed (eg US-Grenada 1983, US-Panama 1989). But even where there was clearer evidence of a humanitarian emergency, large numbers of States have gone out of their way to preclude the recognition of a new exception on the ban on force. Nowhere could this be seen more clearly than in the international reaction to the bombing of Yugoslavia in 1999 in *Operation Allied Force*. While the campaign prompted debate within many western States, a clear majority of UN member States emphasised the ban on force. In their Ministerial Declaration of 24 September 1999, the Foreign Ministers of the Group of 77 (speaking on behalf of circa 130 States) rejected "the so-called right of humanitarian intervention, which had no basis in the UN Charter or in international law" (G77 Declaration 1999).

(b) All this fatally weakens arguments that contemporary international law recognises a right of humanitarian intervention. However, international practice is not a clear-cut as the preceding discussion might suggest. It also reflects the international community's surprising willingness to accept, or at least tolerate, the effects of forcible interventions where these plausibly advanced a humanitarian cause. Such acceptance, or toleration, has taken a number of forms. It can be seen, for example, in the relative absence of protests against France's military intervention in the coup toppling Emperor Bokassa. It may be one reason for the willingness

with which the international community accepted Tanzania's dubious invocation of self-defence as a justification for its removal of Idi Amin. It could explain why, in the 1990s, many States initially were prepared to accept western States' reliance on SC Res. 687, 688 as an on-going license to use force against Iraq. (The argument fared much worse during the second Iraq war of 2003.) In these and other instances, protests by territorial States (Iraq, Pakistan, Uganda, etc.) were ignored, and their attempts to bring the matter before UN fora often went unheard. Similarly, the Security Council, when it got involved in the Kosovo crisis, seemed to 'move on' from the illegal use of force quickly.

Given prominent views to the contrary, it is worth reiterating that this occasional toleration does not amount to a recognition of a right to unilateral intervention: practice lacks consistency, and it is marked by the convenient accommodation of outcomes in individual instances, or of resorting "to a legal fiction" -- viz. self- defence, SC mandate -- to make arguments "more palatable" (Franck, 145) to an international community that is adamant not to admit express new exceptions to the ban on force. The practice of occasional toleration makes for an uneasy tension between the law as proclaimed and the law as (not) applied. While this tension can be felt in many areas of international law, it is particularly significant in the presence of a 'cornerstone rule' such as that banning military force. It suggests that despite the constant affirmations of the importance of the Charter regime, intervening States will exceptionally be considered to have crossed no more than a "thin red line" (Simma 1999, 6).

(c) Because of this pragmatic approach, States may hope to 'get away' with their unlawful use of force where these plausibly serve a to avert humanitarian emergency. Practice however remains rather erratic: it is difficult to predict which forcible interventions stand a chance of being tolerated. Various attempts have been made to clarify the legal situation. At the global level, these seem to have yielded little result. The aftermath of the Kosovo crisis and *Operation Allied Force* saw some convergence around a number of criteria that would make humanitarian interventions 'legitimate': this has been said to be the case where the use of force respond to (i) a humanitarian emergency of major significance, that is (ii) well-attested and that (iii) cannot be addressed through measures short of force or (iv) action by the United Nations; furthermore, the intervention ought to be carried out with (v) a limited amount of force, preferably used by (vi) a disinterested States and (vii) preferably acting collectively. However, all this was couched in terms of 'legitimacy', not as a debate about (il)legality; and

of course it avoided tricky questions, such as: what qualifies as a 'humanitarian emergency'? what amount of evidence is required? when is the SC unable to address a matter (as opposed to deciding that force is not a suitable means of addressing it)? etc.

If anything, documents focused on the state of international law reflect "the continued reluctance of States to accept a right of humanitarian intervention outside the confines of the UN Charter" (Lowe/Tzanakopoulos, para. 46): for example, in the 2005 World Summit Outcome, UN member States (six years after Kosovo, in a surprising display of papering over divisions of opinion) "reaffirm[ed] that the relevant provisions of the Charter are sufficient to address the full range of threats to international peace and security" (para. 79). Perhaps tellingly, post-Kosovo debates have seen the emergence of a new notion -- that of Responsibility to Protect (R2P) - which seemed to permit a continuation of old debates within a new, more holistic framework. But that is a different story.

4. Conclusion

75 years after the entry into force of the UN Charter, debates about humanitarian intervention seem gridlocked. As it stands, international law does not permit States to use force to protect human rights abroad: no new exceptions to the ban on force has emerged in international law. Collective humanitarian interventions, undertaken with Security Council mandate, are no doubt permissible; but in times of strategic confrontation between the Council's permanent members, the prospect for them is slim. Looking ahead, one might envisage an increased role for the General Assembly: an intervention recommended by the General Assembly might stand a strong chance of being tolerated; and the same could be true for humanitarian interventions with a robust regional mandate -- eg on the basis of provisions like Article 4(h) of the Constitutive Act of the African Union. Yet so far, during decades of debate, concerns about abuse have proved to be the most powerful consideration.

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