

Opinion

# The Arab Spring, Massive Violations of Human Rights and the Use of Force

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I must begin by saying that the topic of my presentation – ‘Massive Violations of Human Rights and the Use of Force’ in the context of the Arab Spring – was not one of personal design reached after moments of prolonged deliberation – but, rather, in a very good old-fashioned way, it was allocated to me by the conveners – of the annual conference for the British Institute of International and Comparative Law. I volunteer this background fact only because I think it would be quite useful to commence by explaining some of the challenges associated with the formulation of ‘massive violations of human rights’ of the Arab Spring and then relating that matter to the ‘use of force’ – itself quite an instructive term because it does tend to delimit our thinking about how States and international organisations strategise toward chosen ends, when, as we know full well, threats of force have become a rather significant part of modern international relations and are deserving of the same critical scrutiny afforded to uses of force under the regimen of the Charter of the United Nations.<sup>1</sup>

I am driven to make these introductory remarks because this invitation could equally have asked me to speak on the topic of ‘massive violations of international humanitarian law’ – a topic on which I am perhaps more qualified to share some thoughts – and which must surely have gained in thematic relevance since the International Committee of the Red Cross determined, in July 2012, that the hostilities in Syria had reached the dimensions of a non-international armed conflict – or ‘civil war’, as it has been widely reported.<sup>2</sup> Was the reference contained in the

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<sup>1</sup> According to which Member States of the United Nations “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 2 (4); emphases supplied). Recall, also, the *dictum* from *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion), where the International Court of Justice concluded that “[t]he notions of ‘threat’ and ‘use’ of force under Article 2, paragraph 4, of the Charter stand together in the sense that if the use of force itself in a given case is illegal—for whatever reason—the threat to use such force will likewise be illegal.” See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, [1996] ICJ Rep. 226 at 246, para. 47.

<sup>2</sup> N. MacFarquhar, ‘Syria Denies Attack on Civilians, in Crisis Seen as Civil War’, *New York Times*, 16 July 2012, p. A6. However, the International Committee of the Red Cross had actually concluded that “there is currently a non-international (internal) armed conflict occurring in Syria opposing Government Forces and a number of organized armed opposition groups operating in several parts of the country

invitation to massive violations of ‘human rights’, then, intended in some way to be limiting on the scope of my remarks, or were the conference conveners invoking the language of human rights in a much looser – dare I say more catholic and more embracing – sense so as not to be so restricting on my ambitions?<sup>2</sup> After all, there is a certain currency of opinion that seeks to claim victories for human rights all over the map of human history and well before any official incarnation within international law, as if the narrative of human rights had earlier been foretold in a series of coded vocabularies waiting to be inferred from the actions of imperial states.<sup>3</sup> Yet, such approaches seem to me to call out for even greater precision within the professional language that binds us as international lawyers, that informs our discourse and shapes the exchanges we make on a daily basis; after all, what good is the public international lawyer if they are not alert to these competing versions and visions for the concept of human rights?<sup>4</sup> Indeed, what is the public international lawyer if they are not an unsung linguist, committed protector of words, guardian of languages, litigator of meanings?<sup>5</sup>

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To be sure, the vast expanse of the term ‘human rights’ has been given some qualification, for I am to be considering only ‘massive violations’ thereof; I take it I need not be detained by mere or meagre violations of human rights arising from the Arab Spring. In other words, not *any* violation of human rights will do. At some level, this does seem to make eminent good sense, since it fits within the broader phenomenon of international law depicting certain thresholds for the violation of its terms: so, in the *Case Concerning the Military and Paramilitary Activities in and against Nicaragua*, for instance, the International Court of Justice distinguished between ‘the most grave forms of the use of force’ from what the Court called ‘other less grave forms’ in order to mark out the relevance of the right of self-defence in international law.<sup>4</sup> The emphasis, here, thus lies in the *extent* of the violation of the international law in question,<sup>5</sup> on the metric of intensity or gravity that defines the

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(including, but not limited to, Homs, Idlib and Hama). Thus, hostilities between these parties wherever they may occur in Syria are subject to the rules of international humanitarian law.” See ICRC Resource Centre, ‘Operational Update—Syria: ICRC and Syrian Arab Red Crescent Maintain Aid Effort amid Increased Fighting’

([www.icrc.org/eng/resources/documents/update/2012/syria-update-2012-07-17.htm](http://www.icrc.org/eng/resources/documents/update/2012/syria-update-2012-07-17.htm)) 17 July 2012. This is as it should be given the fact that the four Geneva Conventions of August 1949 use the term of an “armed conflict not of an international character”, as does the Second Additional Protocol to the Geneva Conventions of June 1977 Relating to the Protection of Victims of Non-International Armed Conflicts—although, as a matter of treaty law—their meanings do not coincide. Cf. common Article 3 of the Geneva Conventions and Article 1 (1) of the Second Additional Protocol. Syria is a party to the four Geneva Conventions, but not to the Second Additional Protocol: see

[www.icrc.org/IHL.nsf/\(SPF\)/party\\_main\\_treaties/\\$File/IHL\\_and\\_other\\_related\\_Treaties.pdf](http://www.icrc.org/IHL.nsf/(SPF)/party_main_treaties/$File/IHL_and_other_related_Treaties.pdf). It is, however, bound by the rules of customary international humanitarian law applicable in non-international armed conflicts, but the International Committee of the Red Cross has not defined its use of the term in its major study by J.-M. Henckaerts and L. Doswald-Beck (eds), *Customary International Humanitarian Law* (I—Rules; II—Practice), Cambridge: Cambridge University Press 2005.

<sup>2</sup> Consider the critique of Samuel Moyn in ‘Of Deserts and Promised Lands: The Dream of Global Justice’, *The Nation*, 19 March 2012.

<sup>4</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)*, Merits, Judgment of 27 June 1986, [1986] ICJ Rep. 14, at 101, para. 191 [hereinafter *Nicaragua Case*].

<sup>5</sup> Namely on the prohibition of force under the law of Charter—on which see supra note 1—or, better, its iteration in customary international law.

violation, as opposed to ‘the character of the treaty obligation’ that is in issue.<sup>6</sup> The International Law Commission would appear to have drawn from *both* of these methods of thinking in its orchestration of the notion of ‘a serious breach by a State of an obligation arising under a peremptory norm of general international law’ in its Articles on State Responsibility of August 2001.<sup>7</sup>

So, there is good company here; there is something of an established pedigree. But even though the term ‘massive’ might bring some qualification to our line of focus,<sup>8</sup> this still does not assist in helping us frame *which* human rights have been the subject of violation during the course of the Arab Spring, especially from the perspective of the possibilities of and for the *use* of force.<sup>9</sup> Are we, or should we be, concerned, for instance, with the massive violations that have occurred of the human right to expression, association and assembly in countries such as Tunisia and Egypt?<sup>10</sup> Or, to

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<sup>6</sup> B. Simma and C.J. Tams, ‘Reacting Against Treaty Breaches’, in D.B. Hollis (ed.), *The Oxford Guide to Treaties*, Oxford: Oxford University Press 2012, pp. 576–604, at p. 583. As would be the case with the concept of material breach from the 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331, defined as any ‘violation of a provision essential to the accomplishment of the object or purpose of the treaty’ (Article 60 (3) (b)).

<sup>7</sup> As *per* Article 40, which “establishes two criteria in order to distinguish ‘serious breaches of obligations under peremptory norms of general international law’ from other types of breaches. The first relates to the character of the obligation breached, which must derive from a peremptory norm of general international law. The second qualifies the intensity of the breach, which must have been serious in nature.”

See J.R. Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries*, Cambridge: Cambridge University Press 2002, p. 245. According to Art. 40 (2), “[a] breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.” Importantly, though, in respect of the prohibition of force in the *Nicaragua Case*, the Court only went as far as saying that the prohibition “is frequently referred to in statements by State representatives as being not only a principle of customary international law but also a fundamental or cardinal principle of such law.” *Supra* note 4, at p. 100, para 190. See, further, A.B. Mansour, ‘Consent’, in J. Crawford, A. Pellet and S. Olleson (eds.), *The Law of International Responsibility*, Oxford: Oxford University Press 2010, pp. 439–447, at p. 447.

<sup>8</sup> See, for instance, S.D. Murphy, *Humanitarian Intervention: The United Nations in An Evolving World Order*, Philadelphia: University of Pennsylvania Press 1996, p. 17. According to the International Law Commission, the term “gross” violation (or “failure by the responsible State to fulfil the obligation”): “refers to the intensity of the violation or its effects; it denotes violations of a flagrant nature, amounting to a direct and outright assault on the values protected by the rule. The terms [‘gross’ and ‘systematic’] are not mutually exclusive; serious breaches will usually be both systematic and gross. Factors which may establish the seriousness of a violation would include the intent to violate the norm; the scope and number of individual violations; and the gravity of their consequences for the victims. It must also be borne in mind that some of the peremptory norms in question, most notably the prohibitions of aggression and genocide, by their nature require an intentional violation on a large scale.”

Crawford, *supra* note 7, at pp. 247–248. See, further, P. Gaeta, ‘The Character of the Breach’, in Crawford, Pellet and Olleson (eds.), *supra* note 7, at pp. 425–426.

<sup>9</sup> And taking into account the consideration mentioned *supra* note 1.

<sup>10</sup> See K. Fahim and M. El Sheikh, ‘Report Says Mubarak Dictated Fierce Response to Egypt Protests’, *New York Times*, 3 January 2013, at p. A4. Navi Pillay, the United Nations High Commissioner for Human Rights, advised that while “[s]everal governments reacted in a violent and repressive fashion, leading to the loss of thousands of lives, torture, arbitrary detention, disappearances and other violence,” not all Governments had identical reactions: “the situation was different in Jordan, Morocco and Algeria, which also experienced protests, but in those countries the governments have responded with positive reforms.” See UN New Centre, ‘Arab Spring Shows Human Rights are For Everyone, Everywhere’, at: [www.un.org/apps/news/story.asp?NewsID=38898&Cr=north%20africa](http://www.un.org/apps/news/story.asp?NewsID=38898&Cr=north%20africa) (30 June 2011).

Further, the Bahrain Independent Commission of Inquiry considered that the internal law of Bahrain had “place[d] overly broad restrictions on the right of assembly, which is protected by the

take another example, should our interest span the threat posed to women's rights, where the rise of religious politics ushered by the Arab Spring has put itself on a collision course with personal rights?<sup>11</sup> And what of the rights of refugees – where some 700,000 have been projected to flee Syria for neighbouring countries on a count of 2,000 to 3,000 per day?<sup>12</sup> Or are we to confine ourselves to massive violations of only those human rights that are non-derogable, such as the right to life, the freedom of thought, conscience and religion as well as freedom from torture and cruel, inhuman or degrading treatment?<sup>13</sup> In considering these possibilities for action, it seems apposite to recall the General Assembly's condemnation in February 2012 of

“the continued widespread and systematic violations of human rights and fundamental freedoms by the Syrian authorities, such as the use of force against civilians, arbitrary executions, the killing and persecution of protestors, human rights defenders and journalists, arbitrary detention, enforced disappearances, interference with access to medical treatment, torture, sexual violence and ill-treatment, including against children”<sup>14</sup>

which appears to be an inventory of massive violations of a massive range of human rights secured under the system of the United Nations.<sup>15</sup> Is it the case that the use of force is properly to be contemplated for each and every one of these violations or set of violations?

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For the International Court of Justice in the *Nicaragua Case* in June 1986, there was to be no merit in posing such questions and, hence, no need for discriminating

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Constitution of Bahrain, the [International Covenant on Civil and Political Rights] and the Arab Charter [on Human Rights]. Law enforcement officials have ... the authority to take forceful measures to disperse individuals who have not committed specific acts of violence or taken substantial steps in that direction.” See *Report of the Bahrain Independent Commission of Inquiry*, 23 November 2011, pp. 312–313, para 1287, and, also, Z. al-Khawaja, ‘Bahrain, A Brutal Ally’, *New York Times*, 26 December 2012, p. A25.

<sup>11</sup> R.F. Sweis, ‘Arab Spring Fails to Allay Women’s Activities’, *International Herald Tribune*, 8 March 2012.

<sup>12</sup> N. Cumming-Bruce, ‘U.N. Says Syrian Refugee Numbers are Surging’, *New York Times*, 27 September 2012. Consider, further N. Cumming-Bruce & R. Gladstone, ‘In Appeal on Aid, U.N. Braces for Doubling of Syrian Refugees’, *New York Times*, 20 December 2012, p. A17.

<sup>13</sup> See, e.g., H.-J. Heintze, ‘On the Relationship Between Human Rights Law Protection and International Humanitarian Law’, *International Review of the Red Cross* 2004–86, pp. 789–814, at p. 791. On the practical significance of which, see *Report of the Bahrain Independent Commission of Inquiry*, supra note 10, at p. 40 (paragraph 105).

<sup>14</sup> General Assembly Resolution 66/253 (16 February 2012) (adopted by 137 votes in favour, 12 against, with 17 abstentions).

<sup>15</sup> Indeed, a subsequent resolution of the General Assembly—adopted on 3 August 2012 by 133 votes in favour, 12 against, with 31 abstentions—expressed its concern “about a raft of gross human rights violations being carried out by Syrian Government forces”: U.N. Press Release GA/11266, 3 August 2012. See, further, R. Gladstone, ‘After Council’s Deadlock, Syria is Criticized At U.N.’, *New York Times*, 4 August 2012, p. A7. Further afield, the Bahrain Independent Commission of Inquiry considered the matter of detention and prosecution in connection with expression, association and assembly alongside deaths arising out of the events analysed by the Commission; the use of force by Government actors; the manner of arrests; the treatment of persons in custody and allegations of enforced disappearances—in Chapter VI of its Report, concerning “Allegations of Human Rights Violations Against the Person”: *Report of the Bahrain Independent Commission of Inquiry*, supra note 10, at pp. 219–317. Chapter VII of the Report, dealing with “Other Human Rights Issues” considered: demolition of religious structures; terminations of public and private sector employment and dismissal of students and suspensions of scholarships: *ibid.*, at pp. 319–366.

between the violations of different protected human rights as far as the use of force was concerned. For, as a matter of principle, the Court had formed the view in paragraph 268 of its judgment that “while the United States might form its own appraisal of the situation as to respect for human rights in Nicaragua, the use of force could not be the appropriate method to monitor or ensure such respect.”<sup>16</sup> The Court then went on to say in the very same paragraph: “With regard to the steps actually taken, the protection of human rights, a strictly humanitarian objective, cannot be compatible with the mining of ports, the destruction of oil installations, or again with the training, arming and equipping of the *contras*.”<sup>17</sup> This latter statement might be thought to be incongruous with the general proposition that the Court had seemed to specify at least initially – namely, that the use of force is an impermissible method to monitor or ensure respect for human rights no matter the context – in that the Court now seems to be focusing on the immediate ends to which that force was employed by the United States (*e.g.* the mining of ports, the destruction of oil installations, or the support awarded to the *contras*) as the yardstick for its assessment: from this *dictum*, it would appear that not all uses of force comport with the “strictly humanitarian objective” as identified by the Court, and that it is only these uses of force that will incur the censure of international law. Nevertheless, it is this statement from the Court that has been taken to set it firmly on the side of those who believe that there exists no ‘right’ of humanitarian intervention in international law,<sup>18</sup> and as jurisprudence speaking against any additional exceptions to the prohibition of force of the Charter of the United Nations.<sup>19</sup>

Before we move to think about the modern relevance of the right of humanitarian intervention coming forward from the Arab Spring, it is important for us to observe that, on this reading of its judgment, the Court approached this issue very much in the manner in which my designated topic for today appears to have been formulated—that is to say that the Court began by rooting itself within the corpus of the international law of human rights,<sup>20</sup> specifically the principle or methods of holding elections within

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<sup>16</sup> *Nicaragua Case*, supra note 4, at pp. 134–135 (paragraph 268).

<sup>17</sup> *Ibid.*

<sup>18</sup> And announced as such: see N.S. Rodley, ‘Human Rights and Humanitarian Intervention: The Case Law of the World Court’, *International & Comparative Law Quarterly* 1989–38, pp. 321–333, p. 332; pp. 327–328.

<sup>19</sup> Although the Court did consider this matter in the context of the prohibition of intervention – where “[a] prohibited intervention must ... be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely” (*Nicaragua Case*, supra note 4, at p. 108, para 205)— after it had concluded its analysis of the right of self-defence as an exception to the prohibition of force. The Court recognised the relationship between these prohibitions: “The element of coercion, which defines, and indeed forms the very essence of, prohibited intervention, is particularly obvious in the case of an intervention which uses force, either in the direct form of military action, or in the indirect form of support for subversive or terrorist armed activities”. *Ibid.*

<sup>20</sup> Within the context and framework of the principle of non-intervention: *Nicaragua Case*, supra note 4, p. 106, para. 202 – and the prohibition of force (*ibid.*). So, the analysis that culminates in paragraph 268 of the judgment of the *Nicaragua Case* commences in para. 257 with the Court recapturing an earlier theme from its ruling regarding “the attitude of the United States ... linking United States support to the *contras* with the alleged breaches by the Government of Nicaragua of its “solemn commitments to the Nicaraguan people, the United States, and the Organization of American States”. “Those breaches,” said the Court, “were stated to involve questions such as the composition of the government, its political ideology and alignment, totalitarianism, human rights, militarization and aggression”. *Supra* note 4, p. 130, para 257. After the Court had completed its assessment of force as a method to monitor or ensure respect for human rights, it moved to consider the issue of the militarisation of Nicaragua—where it concluded that “in international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or

Nicaragua;<sup>21</sup> it then turned its eye to the alleged violations of this obligation by Nicaragua before considering the question of the permissibility of force in response to the aforementioned violations.<sup>22</sup> The Court concluded this section of its analysis by announcing that “where human rights are protected by international conventions, that protection takes the form of such arrangements for monitoring or ensuring respect for human rights as are provided for in the conventions themselves”,<sup>23</sup> very much taking us knee-deep into the thicket of relevant conventions themselves,<sup>24</sup> and asking us to abide by their every word – letter for letter.<sup>25</sup>

By adopting this approach, the Court was evidently *not* proceeding from the corpus or *lex specialis* of the *jus ad bellum*,<sup>26</sup> where the idea of a right of humanitarian intervention pre-dated any law concerning human rights or protection thereof, as is made clear from the very first edition of Lassa Oppenheim’s treatise on international law where it is declared that

“there is no doubt that, should a State venture to treat its own subjects or a part thereof with such cruelty as would stagger humanity, public opinion of the rest of the world would call upon the Powers to exercise intervention for the purpose of compelling such State to establish a legal order of things

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otherwise, whereby the level of armaments of a sovereign State can be limited, and this principle is valid for all States without exception.” Supra note 4, p. 135, para 269.

<sup>21</sup> As framed by the Court: *Nicaragua Case*, supra note 4, p. 132, para. 261. In this vein, the Court made particular reference to Article 3 (d) of the Charter of the Organization of American States (“[t]he solidarity of the American States and the high aims which are sought through it require the political organization of those States on the basis of the effective exercise of representative democracy”), as it did to Article 43 (f) of the same Charter (“[t]he incorporation and increasing participation of the marginal sectors of the population, in both rural and urban areas, in the economic, social, civic, cultural, and political life of the nation, in order to achieve the full integration of the national community, acceleration of the process of social mobility, and the consolidation of the democratic system”). Supra note 4, pp. 131, para. 259 and 132, para. 261 respectively. These represent the regional articulation of an idea in circulation at the universal level: see T.M. Franck, ‘The Emerging Right of Democratic Governance’, *American Journal of International Law* 1992-86, pp. 46-91. In respect of Nicaragua’s general relationship with human rights, consider, too, the formal finding made by the United States Congress on 29 July 1985, as reproduced in the *Nicaragua Case*, supra note 4, pp. 90-91, para. 169.

<sup>22</sup> Such that the matter becomes one of the *implementation* of “the obligation under general international law to respect fundamental human rights”, rather than on the normative character of the obligation: Rodley, supra note 18, at p. 329. The Court said as much in para. 262 of its judgment in the *Nicaragua Case*:

“[E]ven supposing that such a political pledge [i.e. in respect of the principle or methods of holding elections] had had the force of a legal commitment, it could not have justified the United States insisting on the fulfillment of a commitment made not directly towards the United States, but towards the Organization, the latter being alone empowered to monitor its implementation.”

Supra note 4, p. 132, para. 262.

<sup>23</sup> *Nicaragua Case*, supra note 4, p. 134, para. 267. And, earlier: “even supposing that the United States were entitled to act in lieu of the Organization [of American States], it could hardly make use for the purpose of methods which the Organization could not use itself; in particular, it could not be authorized to use force in that event. Of its nature, a commitment like this is one of a category which, if violated, cannot justify the use of force against a sovereign State”. Supra note 4, p. 133, para. 262.

<sup>24</sup> Supra note 21.

<sup>25</sup> *Nicaragua Case*, supra note 4, pp. 132-133, para. 262.

<sup>26</sup> And taking account of the overall framework the Court had adopted for its analysis: supra note 20.

within its boundaries sufficient to guarantee to its citizens an existence more adequate to the ideas of modern civilization".<sup>27</sup>

Importantly, Oppenheim presented this view in that part of his work – from the first volume, concerning the laws of peace – entitled “The Law of Nations and the Rights of Mankind”, where he took issue with the position of writers such as Johann Caspar Bluntschli, Georg Friedrich von Martens, Pasquale Fiore and Henry Bonfils, that “the Law of Nations guarantees to every individual at home and abroad the so-called rights of mankind without regarding whether an individual be stateless or not and whether he be a subject of a member-State of the family of Nations or not”.<sup>28</sup> Such rights of mankind were forerunners, we can assume, of the contemporary canon of human rights, and apparently included the rights of honour, life, health, liberty, property, the right of practicing any religion one likes, the right of emigration and the like.<sup>29</sup>

To take the route of Oppenheim, to begin at a different point in the vast spectrum of international laws is not to mean that we are dealing with a legal proposition of any greater degree of certainty or specificity than intervention undertaken to enforce human rights: “such cruelty as would stagger humanity” is a most evocative turn-of-phrase all told, but it really gets us no closer to knowing what this could mean in practice or how and why this route of reasoning happens by a different outcome – why there is at least some amenability to interventions whose interest is, to return to the wording of Oppenheim, “the ideas of modern civilization”.<sup>30</sup> For this, we have to turn to Oppenheim’s treatment of the prohibition of intervention in his treatise – which invokes the rule that intervention is forbidden by the Law of Nations, but “there is just as little doubt that this rule has exceptions”<sup>31</sup> – where we come across the following passage:

“That the Powers have in the past exercised intervention [in the interest of humanity for the purpose of stopping religious persecution and endless cruelties in time of peace and war] there is no doubt. Thus Great Britain, France, and Russia intervened in 1827 in the struggle between revolutionary Greece and Turkey, because public opinion was horrified at the cruelties committed during the struggle. And many a time interventions have taken place to stop the persecution of Christians in Turkey. But whether there is really a rule of the Law of Nations which admits such interventions may well be doubted. Yet, on the other hand, it cannot be denied that public opinion and the attitude of the Powers are in favour of such interventions, and it may perhaps be said that in time the Law of Nations will recognize the rule that interventions in the interests of humanity are admissible provided they are exercised in the form of a collective intervention of the Powers”.<sup>32</sup>

While this passage betrays the same contrast between positive rules of international law and the shifting tides of “public opinion of the rest of the world” encountered earlier,<sup>33</sup> it comes with the virtue of emphasising that the law might produce different

<sup>27</sup> L. Oppenheim, *International Law: A Treatise* (Vol. I: Peace), London, New York, Bombay: Longmans, Green & Co. 1905, pp. 346–347, para. 292.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*

<sup>30</sup> *Supra* note 27.

<sup>31</sup> *Ibid.*, at p. 182 (§134). See, also, *supra* note 19.

<sup>32</sup> *Supra* note 27, at pp. 186–187, para. 137 (emphasis in the original). See, further, D. Rodogno, *Against Massacre: Humanitarian Interventions in the Ottoman Empire, 1815–1914*, Princeton: Princeton University Press 2012, pp. 63–90 and G.J. Bass, *Freedom’s Battle: The Origins of Humanitarian Intervention*, New York: Alfred A. Knopf 2008, pp. 45–151.

<sup>33</sup> *Supra* note 27; or, here, “public opinion and the attitude of the Powers”.

outcomes or possibilities of action depending on *where* it is in the discipline that one initiates a given line of enquiry – and on *how* that enquiry is framed and then pursued. So, by way of pertinent example, the classic doctrine of the treatment of aliens in international law was never understood or conceived as providing *rights* of aliens,<sup>34</sup> and still less of their human rights,<sup>35</sup> though, it is true, modern sensibilities might drive us to think about how we might recast the terms of the historical narrative.<sup>36</sup> And, as we have seen with the *Nicaragua Case*, the Court examined the human rights obligations of Nicaragua,<sup>37</sup> but, on a fuller reading of its judgment, it did so from the perspectives of *both* the prohibitions of force and intervention<sup>38</sup> – and it is to this matter that we should now turn.

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Oppenheim was of course writing at a time when there was no general prohibition of war in place, quite apart from one concerning the threat or the use of force – of the order that we find in Article 2 (4) of the Charter of the United Nations.<sup>39</sup> That there is now such a prohibition is, of course, not in question; what *is* in question is whether States have sought, in the intervening decades and *via* their respective practices and accompanying *opinio juris sive necessitatis*, to qualify the *scope* of the prohibition of force and its kindred prohibition of intervention.<sup>40</sup> We can address this matter by asking what (if any) empirical grounding exists for upholding a right of humanitarian intervention for States in international law and, approached from this angle, the intervention that occurred in Libya in March 2011 is not all that helpful – for intervention there occurred pursuant to an authorisation from the Security Council under Chapter VII of the Charter of the United Nations.<sup>41</sup> It did not occur pursuant to any *right* of humanitarian intervention that States may have under international law – in other words, to any entitlement that exists independent of the arrangements set forth in the Charter: by virtue of the fourth operative paragraph of Resolution 1973 of March 2011, the Council authorised those member States “acting nationally or through regional organisations or arrangements, and acting in cooperation with the Secretary-General, to take all necessary measures ... to protect civilians and civilian populated areas under threat of attack ... while excluding a foreign occupation force of any form on any part of Libyan territory, and requests the Member States concerned to inform the Secretary-General immediately of the measures they take pursuant to the

<sup>34</sup> See M. Hakimi, ‘State Bystander Responsibility’, *European Journal of International Law* 2010–21, pp. 341–385, at p. 382.

<sup>35</sup> See, however, *supra* note 28 and text accompanying *supra* note 29. Also, cf. R.B. Lillich, ‘Intervention to Protect Human Rights’, *McGill Law Journal* 1969–15, pp. 205–219, p. 208 (“traditional international law provided some protection for the human rights of individuals when abroad”) with H. Lauterpacht, *International Law and Human Rights*, London: F.A. Praeger 1950, p. 121 (*viz.* “a larger measure of protection by international law”).

<sup>36</sup> Consider J.C. Hathaway, *The Rights of Refugees under International Law*, Cambridge: Cambridge University Press 2005, pp. 75–81.

<sup>37</sup> *Supra* note 21.

<sup>38</sup> *Supra* notes 19 and 20.

<sup>39</sup> *Supra* note 1. See, however, *supra* note 19 as well as the text accompanying notes 30 and 31 regarding the significance of the prohibition of intervention.

<sup>40</sup> *Supra* note 19. The International Court of Justice could have put it no better when it said, in the *Nicaragua Case*, that “[i]f a State acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State’s conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule”. *Nicaragua Case*, *supra* note 4, at p. 98, para. 186.

<sup>41</sup> See D. Bilefsky and M. Landler, ‘As U.N. Backs Military Action in Libya, U.S. Role is Unclear’, *New York Times*, 18 March 2011, at p. A1.

authorisation conferred by this paragraph which shall be immediately reported to the Security Council.”<sup>42</sup>

The Libyan episode, then, is properly recalled as an instance of the activation and exercise of the powers of the Security Council under the Charter of the United Nations, which was not only directed towards the civilians and civilian populated areas *under threat of attack*, but also for the purpose of enforcing the no-fly zone that had been created over the entire sovereign airspace of Libya – with “a ban on all flights in the airspace of the Libyan Arab Jamahiriya in order to help protect civilians” – in the sixth operative paragraph of the Resolution.<sup>43</sup> This is a very different practice from that which occurred in Iraq following the withdrawal of its armed forces from Kuwait in February 1991, when the United States, the United Kingdom and France proclaimed a no-fly-zone north of its 36th parallel, and, then, in August 1992, did the same south of its 32nd parallel<sup>44</sup> – and it is a practice more akin to the prohibition of military flights which the Security Council instituted over Bosnia and Herzegovina with Resolution 781 of October 1992,<sup>45</sup> with the accompanying authorisation to member States of the United Nations contained in Resolution 816 of March 1993 “acting nationally or through regional organizations or arrangements, to take ... all necessary measures” to enforce the prohibition.<sup>46</sup>

So, in my view, it behoves us not to confuse the descriptive powers of the term ‘humanitarian intervention’ with its function as a legal *justification* for force,<sup>47</sup> for an

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<sup>42</sup> This resolution was adopted by ten votes with five abstentions (Brazil, China, Germany, India and the Russian Federation). See U.N. Doc. SC/10200 (17 March 2011).

<sup>43</sup> In the seventeenth preambular paragraph of Resolution 1973, the Security Council considered that “the establishment of a ban on all flights in the airspace of the Libyan Arab Jamahiriya constitutes an important element for the protection of civilians as well as the safety of the delivery of humanitarian assistance and a decisive step for the cessation of hostilities in Libya”; on 12 March 2011, the Council of the League of Arab States had called for the imposition of a no-fly zone on Libyan military aviation amongst other things—and this was noted by the Council in Resolution 1973 (twelfth preambular paragraph). See, further, E. Bonner and D.E. Sanger, ‘Arab League Endorses No-Flight Zone Over Libya’, *New York Times*, 13 March 2011, at p. A1.

<sup>44</sup> As described in Murphy, *supra* note 8, at pp. 165–182; the southern no-fly zone was extended to the 33rd parallel in 1996. See, also, M.N. Schmitt, ‘Wings Over Libya: The No-Fly Zone in Legal Perspective’, *Yale Journal of International Law Online* 2011–36, pp. 45–58, at p. 49. Actions that are “likely to be invoked as evidence that there is a right of humanitarian intervention in international law”: C. Greenwood, ‘New World Order or Old? The Invasion of Kuwait and the Rule of Law’, *Modern Law Review* 1992–55, pp. 153–178, at p. 177.

<sup>45</sup> This prohibition did not apply to flights of the United Nations Protection Force, or to other flights in support of United Nations operations, including humanitarian assistance; the preamble to Resolution 781 expressed the determination of the Security Council “to ensure the safety of humanitarian flights to Bosnia and Herzegovina”. To similar effect, consider the seventh operative paragraph of Resolution 1973, where the Security Council decided that its prohibition of all flights in the airspace of the Libyan Arab Jamahiriya:

“shall not apply to flights whose sole purpose is humanitarian, such as delivering or facilitating the delivery of assistance, including medical supplies, food, humanitarian workers and related assistance, or evacuating foreign nationals from the Libyan Arab Jamahiriya and nor shall it apply to flights authorized by paragraphs 4 or 8 [i.e. protection of civilians and enforcement of compliance with the no-fly zone respectively], nor other flights which are deemed necessary by States acting under the authorization conferred in paragraph 8 [i.e. enforcement of compliance with the no-fly zone], to be for the benefit of the Libyan people, and that these flights shall be coordinated with any mechanism established under paragraph 8.”

<sup>46</sup> See Schmitt, *supra* note 44, pp. 49–50.

<sup>47</sup> A point I have developed in greater detail in my entry on humanitarian intervention for Oxford

intervention underwritten by the Security Council is patently not one in need of proving the existence of – or, indeed, of making any reliance upon – any *right* of humanitarian intervention under international law.<sup>48</sup> This seems to me to be the *first* of three points of significance about this particular resolution, and it concerns the categorisations we make or use for analytical purposes when considering claims under the *jus ad bellum*.

The second – and wholly related – point of significance to extract from Resolution 1973 involves the greater awareness that seems to be taking shape within the Security Council regarding the dangers associated with very broad authorisations for force, of the order witnessed in Resolution 678 of November 1990 (where the Council approved the use of all necessary means “to uphold and implement Resolution 660 (1990) and all subsequent relevant resolutions *and to restore international peace and security in the area*”).<sup>49</sup> As we now know, these emphasised words became some of the more contested terminologies over a decade or so later with the intervention in Iraq in March 2003,<sup>50</sup> and it would appear that something of a shift in focus has occurred in the practice of the Security Council from the scope or meaning of its language of “all necessary means”<sup>51</sup> – or “all necessary measures” from Resolution 1973 of March 2011<sup>52</sup> – toward the specific end or ends to which the Council’s authorisation for force is tied. This is the case even though some doubt may remain as to what these ends might be from situation to situation,<sup>53</sup> and it is this consideration which surely inspired the position of South African President Jacob Zuma that “the intention of Resolution 1973 was to protect the Libyan people and facilitate the humanitarian effort ... [and that it] was not to authorise a campaign for regime change or political assassination”.<sup>54</sup> Resolution 1973 would therefore seem to present a narrative as much about the *limitation* of force as about its authorisation: that authorisation is bound by specific terms (such as the protection of civilians and the civilian population, as well as the enforcement of compliance with the no-fly zone),<sup>55</sup>

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Bibliographies Online: D. Kritsiotis, ‘Humanitarian Intervention’, at:

[www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0021.xml](http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0021.xml).

<sup>48</sup> Notice how this term nevertheless consumes some of the analysis of S. Chesterman, “Leading from Behind”: The Responsibility to Protect, the Obama Doctrine, and Humanitarian Intervention after Libya’, *Ethics & International Affairs* 2011–25, pp. 279–285.

<sup>49</sup> Emphasis supplied. Also: Greenwood, *supra* note 44, pp. 170–171.

<sup>50</sup> See, e.g., V. Lowe, ‘The Iraq Crisis: What Now?’, *International & Comparative Law Quarterly* 2003–52, p. 859–871, at pp. 865–866.

<sup>51</sup> Greenwood, *supra* note 44, at p. 166.

<sup>52</sup> See P. Wintour and O. Bowcott, ‘Libya: The Legal Case for Deployment’, *The Guardian*, 21 March 2011, and, further, J.M. Lehmann, ‘All Necessary Means to Protect Civilians: What the Intervention in Libya Says About the Relationship between the *jus in bello* and the *jus ad bellum*’, *Journal of Conflict & Security Law* 2012–17, pp. 117–146.

<sup>53</sup> See, for instance, D. Akande, ‘What Does UN Security Council 1973 Permit?’, *EJIL: Talk!* ([www.ejiltalk.org/what-does-un-security-council-resolution-1973-permit/](http://www.ejiltalk.org/what-does-un-security-council-resolution-1973-permit/)), 23 March 2011.

<sup>54</sup> For the full text of these remarks delivered by President Zuma at the meeting of the African Union High Level *Ad Hoc* Committee on Libya in Pretoria, South Africa, in June 2011, consult [www.allafrica.com/stories/201106281220.html](http://www.allafrica.com/stories/201106281220.html) (26 June 2011). And, in his statement on the occasion of the U.N. Security Council Summit Debate in January 2012: “it is the view of the [African Union] that [Resolution 1973] of the UN Security Council was largely abused in some specific respects”. See [www.presidency.gov.za/pebble.asp?reid=5564](http://www.presidency.gov.za/pebble.asp?reid=5564) (12 January 2012).

<sup>55</sup> As opposed to the provision made for the emplacement and enforcement of an arms embargo in the eleventh operative paragraph of Resolution 1970 of February 2011, where the Security Council called upon

“all States, in particular States neighbouring the Libyan Arab Jamahiriya, to inspect, in accordance with their national authorities and legislation and consistent with international

and explicitly excludes certain incidences of force (*e.g.* in the form of a foreign occupation force).<sup>56</sup>

The *third* and final point of significance to mention from Resolution 1973 concerns the invocation by the Security Council of the so-called ‘responsibility to protect’ in the preamble to that resolution; there, the Council reiterated “the responsibility of the Libyan authorities to protect the Libyan population”,<sup>57</sup> following through from its earlier statement from the preamble of Resolution 1970 of February 2011 in which the Council had recalled “the Libyan authorities’ responsibility to protect its population”.<sup>58</sup> Both of these pronouncements are important for directing their terms toward the authorities in Libya,<sup>59</sup> and, in so doing, they unmistakably connect with the

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law, in particular the law of the sea and relevant civil aviation agreements, all cargo to and from the Libyan Arab Jamahiriya, in their territory, including seaports and airports, if the State concerned has information that provides reasonable grounds to believe the cargo contains items the supply, sale, transfer, or export of which is prohibited by ... this resolution for the purpose of ensuring strict implementation of those provisions.”

However, by virtue of the thirteenth operative paragraph of Resolution 1973, the Council replaced this provision with one that called upon:

“all Member States, in particular States of the region, acting nationally or through regional organizations or arrangements, in order to ensure the strict implementation of the arms embargo established by ... Resolution 1970 (2011), to inspect in their territory, including seaports and airports, and on the high seas, vessels and aircraft bound to or from the Libyan Arab Jamahiriya, if the State concerned has information that provides reasonable grounds to believe that the cargo contains items of supply, sale, transfer or export of which is prohibited by ... Resolution 1970 (2011) as modified by this resolution, including the provision of armed mercenary personnel, calls upon all flag States of such vessels and aircraft to cooperate with such inspections and authorizes Member States to use all measures commensurate to the specific circumstances to carry out such inspections.”

<sup>56</sup> *Supra* note 42.

<sup>57</sup> Fourth preambular paragraph.

<sup>58</sup> Ninth preambular paragraph.

<sup>59</sup> Indeed, in Resolution 1973, the Security Council deplored the failure of the Libyan authorities to comply with Resolution 1970 (second preambular paragraph) and went on to demand “that the Libyan authorities comply with their obligations under international law, including international humanitarian law, human rights and refugee law and take all measures to protect civilians and meet their basic needs, and to ensure the rapid and unimpeded passage of humanitarian assistance” (third operative paragraph). Furthermore, the Council condemned “acts of violence and intimidation committed by the Libyan authorities against journalists, media professionals and associated personnel and [urged] these authorities to comply with their obligations under international humanitarian law as outlined in Resolution 1738 (2006)” (sixth preambular paragraph); it deplored the continuing use of mercenaries by the Libyan authorities (sixteenth preambular paragraph) and it reaffirmed “its intention to keep the Libyan authorities under continuous review and underline[d] its readiness to review at any time the measures imposed by this resolution and Resolution 1970 ... including by strengthening, suspending or lifting those measures, as appropriate, based on compliance by the Libyan authorities with this resolution and Resolution 1970” (twenty-eighth operative paragraph). For its part, Resolution 1970 had urged the Libyan authorities to act with utmost restraint and respect human rights and international humanitarian law, ensure the safety of all foreign nations and their asset and facilitate appropriate departures from the country, ensure the safe passage of humanitarian and medical supplies, as well as humanitarian agencies and workers, into the country and immediately life restrictions on all forms of media (second operative paragraph) and to fully cooperate and provide necessary assistance to the International Criminal Court (fifth operative paragraph). In the twenty-seventh operative paragraph of Resolution 1970, the Council affirmed that “it shall keep the Libyan authorities’ actions under continuous review and that it shall be prepared to review the appropriateness of the measures contained in this resolution, including the strengthening, modification, suspension or lifting of the measures, as may be needed at any time in light of the Libyan authorities’ compliance with relevant provisions of this resolution”.

first of two components of the notion of responsibility to protect within the practice of the Security Council.<sup>60</sup> That responsibility is one in which, according to the World Summit Outcome Document of September 2005, each individual State bears “the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity,”<sup>61</sup> and, then:

“[t]he international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapter VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.”<sup>62</sup>

The fact that the Security Council had formed the view, in both Resolutions 1970 and Resolution 1973, that “the widespread and systematic attacks currently taking place in the Libyan Arab Jamahiriya against the civilian population may amount to crimes against humanity”<sup>63</sup> suggests that we are within the intended realm of the responsibility to protect—especially if the protection of populations *from* genocide, war crimes, ethnic cleansing and crimes against humanity is to be understood as encompassing an anticipatory dimension.<sup>64</sup>

Be this as it may, some have regarded that, with the passing of these resolutions by the Security Council, the responsibility to protect “is coming closer to be solidified as an actionable norm”,<sup>65</sup> while others have sought to pry apart the rhetorical properties of these resolutions from any legal significance that may accrue therefrom.<sup>66</sup> What is worth observing is that the Security Council has proceeded apace of “the deteriorating

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<sup>60</sup> See I. Cotler and J. Genser, ‘Libya and the Responsibility to Protect’, *International Herald Tribune*, 1 March 2011. As had been done in the tenth preambular paragraph of Resolution 1564 of September 2004, in which the Security Council recalled “that the Sudanese Government bears the primary responsibility to protect its population within its territory, to respect human rights, and to maintain law and order, and that all parties are obliged to respect international humanitarian law”. See, however, A. de Waal, ‘Darfur and the Failure of the Responsibility to Protect’, *International Affairs* 2007–83, pp. 1039–1054.

<sup>61</sup> 2005 World Summit Outcome Document, U.N. Doc. A/RES/60/1 (16 September 2005) ([www.un.org/summit2005](http://www.un.org/summit2005)), para. 138. And, further, that: “[t]his responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capacity.”

<sup>62</sup> *Ibid.*, para. 139. See, further, M. Payandeh, ‘With Great Power Comes Great Responsibility? The Concept of Responsibility to Protect within the Process of International Lawmaking’, *Yale Journal of International Law* 2010–35, pp. 469–516.

<sup>63</sup> Seventh preambular paragraph of Resolution 1973 and sixth preambular paragraph of Resolution 1970.

<sup>64</sup> *Supra* note 61, and, hence, the specification of action undertaken in a “timely and decisive manner”: *supra* note 62. See, also, A. Clapham, *Brierly’s Law of Nations: An Introduction to the Role of International Law in International Relations*, Oxford: Oxford University Press 2012, p. 464.

<sup>65</sup> R. Thakur, ‘UN Breathes Life into “Responsibility to Protect”’, *The Star*, 21 March 2011.

<sup>66</sup> See, for example, Chesterman, *supra* note 48.

situation, the escalation of violence, and the heavy civilian casualties” in Libya,<sup>67</sup> and that its authorisation of force ultimately derived not from any responsibility to protect but from the powers and procedures announced in Chapter VII of the Charter of the United Nations.<sup>68</sup> That, of course, is precisely what was envisaged by the responsibility to protect at the moment of its formal conception where recourse was made to various provisions of the Charter,<sup>69</sup> even though the resolutions of the Security Council have been imbued with references to violations of human rights *and* international humanitarian law.<sup>70</sup> Yet, throughout all of this, the Security Council has remained mindful of its primary responsibility for the maintenance of international peace and security under Article 24 of the Charter,<sup>71</sup> so that this institutional dynamic presents us with the possibility of an even further narrative beyond the enforcement of human rights.<sup>72</sup>

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This presentation has sought to emphasise the multiplicity of readings that can stem from a single episode of international relations, including the temptation to view ‘force’ as a means of responding to violations of human rights — or, as we have it here, massive violations of human rights. We have further endeavoured to resist this temptation by making reference to the ‘right’ of humanitarian intervention of States under the *jus ad bellum*, and to the fact that this needs to be distinguished from precedents occurring within the rubric of powers of the Security Council under the

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<sup>67</sup> Third preambular paragraph of Resolution 1973.

<sup>68</sup> So, in Resolution 1973, the Security Council determined that the situation in Libya “continues to constitute a threat to international peace and security” and specifically invoked Chapter VII of the Charter of the United Nations; ditto Resolution 1970, where the Council also mentioned Chapter VII—and the fact that it was “taking measures” under Article 41 of the Charter. Consider, too, the draft resolution on Syria proposed in the Security Council in July 2012, which condemned “the continued widespread violations of human rights by the Syrian authorities, as well as any human rights abuses by armed opposition groups, and recall[ed] that those responsible shall be held accountable” (sixth preambular paragraph), and where the Action Group for Syria expressed deep concern at “the failure to protect civilians, the intensification of the violence, the potential for even deeper conflict in the country and the regional dimensions of the problem”; Cf. *supra* notes 57, 58 and 60 and, also, the second and fifth operative paragraphs of an earlier resolution proposed for Syria (*infra* note 75), and, further, ‘Libya Bitten, Syria Shy’, *The Economist*, 31 January 2012. The full text of the resolution, proposed by France, Germany, Portugal, the United Kingdom, and the United States, is available as U.N. Doc. S/2012/538 (19 July 2012); the draft resolution was vetoed by Russia and China—and, along with draft resolutions in October 2011 and February 2012—was the third to suffer this fate: R. Gladstone, ‘Friction at the U.N. as Russia and China Veto Another Resolution on Syria Sanctions’, *New York Times*, 20 July 2012, p. A8. See, also, *supra* note 14.

<sup>69</sup> *Supra* note 62.

<sup>70</sup> *Supra* notes 59 and 60; the Council has also recalled the condemnations issued by the League of Arab States, the African Union, and the Secretary-General of the Organization of Islamic Conference “of the serious violations of human rights and international humanitarian law that have been and are being committed in the Libyan Arab Jamahiriya”: Resolution 1973 (tenth preambular paragraph).

<sup>71</sup> Sixteenth preambular paragraph of Resolution 1970. Ditto the eighteenth preambular paragraph of Security Council Resolution 2014 of November 2011 on Yemen—where the Council recalled “the Yemen Government’s primary responsibility to protect its population” (fourteenth preambular paragraph).

<sup>72</sup> See D. Kritsiotis, ‘International Law and the Relativities of Enforcement’, in J. Crawford and M. Koskeniemi (eds.), *Cambridge Companion to International Law*, Cambridge: Cambridge University Press 2012, pp. 245–268, at p. 248.

Charter of the United Nations.<sup>73</sup> To add to all of this, we now also have to contend with the diplomatic poetics of the responsibility to protect where, we have been advised, “[t]he vocabulary ... works ... as a language for conferring authority and allocating powers rather than as a language for imposing binding obligations and commanding obedience”.<sup>74</sup> The use of force unites these possible interpretations of State behaviour, but the Arab Spring has additionally made clear that other instruments for action exist at the international level in the event of “continued widespread and gross violations of human rights and fundamental freedoms”<sup>75</sup>: a no-fly zone has been declared for Libya by the Security Council, separate from the provision made for the enforcement of its compliance,<sup>76</sup> with all the connotations of the *threat* of force that that might entail;<sup>77</sup> the Security Council has also considered the threat of economic sanctions to meet the failure of the Syrian authorities to cease troop movements towards and all use of heavy weapons within population centres.<sup>78</sup>

The Charter of the United Nations identifies as one of the purposes of the organisation the promotion and encouragement of respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion;<sup>79</sup> its preamble reaffirms faith in these fundamental human rights, “in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small”. That preamble further specifies “that armed force shall not be used, save in the common interest”,<sup>80</sup> though we are on safe ground in assuming that this

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<sup>73</sup> To be sure, the Charter makes provision for the action of regional arrangements or agencies in Chapter VIII—so that the Security Council shall, “where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority”. However: “no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council, with the exception of measures against any enemy state ... until such time as the Organization may, on request of the Governments concerned, be charged with the responsibility for preventing further aggression by such a state”. Article 53 (1), 1945 Charter of the United Nations 1 UNTS XVI. See, also, Lillich, *supra* note 35, p. 212.

<sup>74</sup> A. Orford, *International Authority and the Responsibility to Protect*, Cambridge: Cambridge University Press 2011, pp. 25–26 (where “[o]fficials are not bound to ‘obey’ the responsibility to protect concept, and nor does the World Summit Outcome dictate the precise means by which the international community should implement the responsibility to protect”).

<sup>75</sup> As it was put in the first operative paragraph of a draft resolution of the Security Council on Syria in February 2012; the text of this draft is available at [www.nytimes.com/2012/02/01/world/middleeast/draft-of-security-council-resolution-on-syria.html?pagewanted=all](http://www.nytimes.com/2012/02/01/world/middleeast/draft-of-security-council-resolution-on-syria.html?pagewanted=all) (31 January 2012).

<sup>76</sup> Compare the sixth and eighth operative paragraphs of Resolution 1973.

<sup>77</sup> Consider *supra* note 1. If Article 42 of the Charter should be considered as stipulating measures “involving the use of armed force ... to be employed to give effect to [the] decisions [of the Security Council] (as per Article 41 of the Charter), it should be remembered that Article 42 mentions “such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security [and] may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.”

<sup>78</sup> Amongst other things: fourteenth operative paragraph of the draft Security Council resolution on Syria vetoed in July 2012, referred to the fourth operative paragraph of the same resolution—which also mentioned any failure of the Syrian authorities to “complete pullback of military concentrations in and around population centres, and to withdraw its troops and heavy weapons from population centres to their barrack or temporary deployment places to facilitate a sustained cessation of violence”.

<sup>79</sup> Charter of the United Nations, article 1 (3).

<sup>80</sup> A formulation seized upon for further comment by United Nations Secretary-General Kofi A. Annan in his Annual Report to the General Assembly in September 1999: U.N. Doc. SG/SM/7136, 20 September 1999 (“But what is that common interest? Who shall define it? Who will defend it? Under

opening flourish awaits to be hemmed in by the particulars of the principles that the organisation sets forth for its members — amongst which are included the prohibition of force<sup>81</sup> as well as the settlement of international disputes by peaceful means.<sup>82</sup> That said, according to the International Court of Justice in June 1986, “it was never intended that the Charter should embody written confirmation of every essential principle of international law in force”,<sup>83</sup> and, when one turns to the validations of customary international law, it is there found that the notion of human rights produces far too much of a generalisation to make any serious headway with the practice and normative direction of States on force and intervention. That notion does need to be broken down into discrete — and more manageable — propositions in order to ascertain any relationship that might evolve with force and with intervention,<sup>84</sup> for the empirical evidence may yield entirely different outcomes depending on whether we are considering action undertaken for the purposes of self-determination,<sup>85</sup> or for the prevention of a humanitarian catastrophe,<sup>86</sup> or in respect of the quartet of harms contemplated by the responsibility to protect<sup>87</sup> — or, indeed, for the enforcement of any of the particular human rights that have been flagged during the course of this presentation.<sup>88</sup>

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whose authority? And with what means of intervention? These are the monumental questions facing us as we enter the new century”). See, further, K. Annan with N. Mousavizadeh, *Interventions: A Life in War and Peace*, New York: The Penguin Press 2012, pp. 364–365.

<sup>81</sup> Supra note 1. See J. Stone, *Aggression and World Order: A Critique of United Nations Theories of Aggression*, Berkeley: University of California Press 1958, p. 96.

<sup>82</sup> Article 2 (3). And Article 33 (1) of the Charter: “The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice”. Furthermore, Article 2 (7) applies the prohibition of intervention to the United Nations, noting that “this principle shall not prejudice the application of enforcement measures under Chapter VII” of the Charter.

<sup>83</sup> *Nicaragua Case*, supra note 4, at p. 106 (para. 202) — which is why the principle of non-intervention by States “is not, as such, spelt out in the Charter”.

<sup>84</sup> Supra note 19.

<sup>85</sup> The self-determination of peoples is itself identified as one of the purposes of the United Nations (Article 1 (2) of the Charter), but it also features as the first of the human rights listed in both of the 1966 United Nations Covenants—on Civil and Political Rights, and on Economic, Cultural and Social Rights. See, further, V. Lowe, *International Law*, Oxford: Oxford University Press 2007, p. 108.

<sup>86</sup> Lowe, supra note 85.

<sup>87</sup> Supra notes 61 and 62. See, further, J. Crawford, *Brownlie’s Principles of Public International Law*, Oxford: Oxford University Press 8th ed., 2012, p. 757.

<sup>88</sup> *E.g.* as at the text accompanying supra notes 21 and 79.