Introduction

In 2014, when the Syrian Civil War was in its third year, an early episode of the successful American television series *Madam Secretary* revolved around events in the fictitious 'Republic of West Africa', where 50,000 innocent civilians faced a campaign of ethnic cleansing by their government. Convinced that it was America's duty to help, the show's main character, a woman named Elizabeth McCord (played by Téa Leoni) as the Secretary of State, in her first few weeks in office, faces an administration convinced that saving the lives of thousands of people in Africa is nothing that would be in the national interest of the United States of America. Over the course of this episode of *Madam Secretary*, the protagonists discuss the political and moral implications of a military intervention to stop a possible genocide taking place on their watch. But for a popular show engaging with national and international events, it is remarkably silent about the law on such international operations. While the situation is eventually resolved through a military operation by the African Union, an organisation arguably capable of engaging in legal military 'humanitarian interventions',[1] this seems like a major gap in the storyline – the question of the legality of such operations under international law, particularly in light of the ongoing conflict in Syria and its rising death toll.

Several years later, the conflict in Syria continues without any coordinated military attempt to intervene to stop a humanitarian crisis that has global repercussions on an unprecedented scale. Red lines have been drawn, but crossed without consequence. While international military intervention does happen, it is not with the intention to stop the humanitarian crises, but to prop up a regime at least partly responsible for many of the atrocities that have caused millions to flee their home country. As the conflict continues, the framework of international law is

[1] E.g. Ben Kioko, 'The Right of Intervention under the African Union's Constitutive Act: From Non-interference to Non-intervention', *International Review of the Red Cross* 2003, 85(852), pp. 807–825.

employed by a growing number of academics in the language of 'humanitarian intervention', the language also used in the episode of *Madam Secretary*. Human rights, ethnic cleansing, genocide, these are all relatively new concepts in international law; 'humanitarian intervention', however, is not. It is a concept with a long history, a history that goes back at least to the nineteenth century, if not to antiquity. While this history has become more of a focus of attention since the German edition of this book was published in 2008, it is still a history very much used rather than studied. Recent attempts by some historians have taken an even wider approach to the question of 'humanitarian intervention' and understand 'intervention' not in the legal sense it has traditionally taken on in international law[2]. This book, however, is concerned with international law, as this is where the concept of 'humanitarian intervention' in the sense widely understood today originates.

Like the TV show, accounts of 'humanitarian intervention' in international law revolve around 'trigger' situations, the moment at which an already grave violation of human rights turns into an 'event' or 'international incident'[3] and international law is invoked to resolve the situation, usually through a justification for the use of military force 'when a State mistreated its own nationals in a way so far below international minimum standards "as to shock the conscience of mankind"'.[4] The connection between the legal justification and the historic event, however, is rarely as straightforward as in 1999, when the Kingdom of Belgium argued before the International Court of Justice on the Use of Force during Operation Allied Force that it took 'the view that this is an armed humanitarian intervention, compatible with Article 2, paragraph 4, of the Charter [of the United Nations], which covers only interventions against the territorial integrity or political independence of a State'.[5] This statement is the culmination of developments in international law that are concerned with the protection of values not originally associated with international law, namely human life and human dignity. Historically speaking, the individual, both as a person with feelings and a life to lose, as well as a member of the populace, has no place in international law, concerned as it originally was with the relations between royals and nations, not people. It will be shown that it takes

[2] E.g. some contributions in Brendan Simms and D. J. B. Trim (eds.), *Humanitarian Intervention – A History*, Cambridge University Press 2011.

[3] W. Michael Reisman and Andrew R. Willard (eds.), *International Incidents*, Princeton University Press 1988; Fleur Johns, Richard Joyce, and Sundhya Pahuja, *Events: The Force of International Law*, Abingdon: Routledge 2011.

[4] Richard B. Lillich, 'Humanitarian Intervention through the United Nations: Towards the Development of Criteria', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 1993, p. 559, quoting the classic formulation by Hersch Lauterpacht, in: Lassa Oppenheim, *International Law: A Treatise, Vol. I, Peace*, 8th ed, edited by H. Lauterpacht, London: Longmans, Green and Co, 1955, p. 312.

[5] Legality of Use of Force Case [Interim Measures], ICJ 1999, Federal Republic of Yugoslavia vs. 10 NATO member states [Belgium, Germany, France, Italy, Canada, the Netherlands, Portugal, Spain, United Kingdom, United States of America], www.icj-cij.org/docket/files/105/4515.pdf – Oral Arguments, 10 May 1999, CR 99/15.

quite a stretch of the imagination to invoke international law for the protection of the 'conscience of mankind'.

This book is a book about the history of international law, about the history in international law and about the stories we tell us when we talk about international law, about the histories constructed to fit a certain understanding of international law and about the history made by international law. It is just as much a book about history in international law as it is a book about current international law, because the histories and narratives constructed for international law live on in the memory and in the present of international law: The idea that international law may be able (or might need) to provide a legal justification for something intuitively considered 'moral' continues to fascinate lawyers and the wider general public alike. The question of the legality or legitimacy of so-called 'humanitarian intervention', the use of military force by one state or a group of states to protect the citizens of a third state from the violent oppression exercised by that third state's government, has entered popular culture, it is the subject of demonstrations, television series, and widespread international debate in academic and popular and political fora.

The purpose of this book is not to attempt to provide the definitive answer to this question, but to uncover some of the underlying narratives, hidden in the legal construct of 'humanitarian intervention', or, as it was known in its original manifestation in the nineteenth century, 'intervention d'humanité'. For what was not as widely known when the discussion over the legality of the use of force by NATO in the Kosovo case erupted in the late 1990s/early twenty-first century, has since become abundantly clear: 'Humanitarian intervention' is not a new idea. As this book argues, it is an idea that was developed as a legal doctrine under the very specific characteristics of nineteenth century law and evolved through a discussion in most of the important writings on international law in the nineteenth and early twentieth century, which – despite all the factual and legal changes since – already covered most of the problematic issues revolving around the legitimacy and legality of this type of intervention.[6] Throughout its history, the term 'humanitarian intervention' has developed a strong 'pull' towards legitimacy (though not necessary legality)[7] with relatively widespread consensus on its definition[8] and no consensus

[6] Doubts about the relevance of the historical development are expressed, for example, by Otto Kimminich, 'Der Mythos der humanitären Intervention', *Archiv des Völkerrechts* 1995, p. 431; Karl Doehring, 'Die Humanitäre Intervention – Überlegungen zu ihrer Rechtfertigung', in: Antonio Augusto Cançado Trindade (Ed.), *The Modern World of Human Rights*, Essays in honour of Thomas Buergenthal, San José, Costa Rica: Inter-American Institute of Human Rights 1996, p. 549; Shand J. Watson, *Theory and Reality in the International Protection of Human Rights*, New York: Transnational Publishers 1999, p. 245. But as is evidenced by, among many others, Christian J. Tams, *Enforcing Obligations* Erga Omnes *in International Law*, Cambridge University Press 2005, p. 93, the claimed historical narrative is part of the fabric of international law.

[7] Thomas Franck, *The Power of Legitimacy among Nations*, Oxford University Press 1990.

[8] A number of authors do not even provide any definition anymore, e.g. Michael J. Bazyler, 'Reexamining the Doctrine of Humanitarian Intervention in Light of the Atrocities in

on its legal standing. The term's pull towards legitimacy has had a tendency to overshadow the relevant legal and factual questions relevant to the application of the doctrine in practice, a trend that continues today.

The question of the legality of the use of force to save lives and to stop the use of force to destroy lives has troubled writers on international law for centuries and the founding fathers of international law discussed similar issues when asking under what conditions war could be considered just. Yet at some point in the historical evolution of international law, these questions came into a certain focus that is not only markedly different from the focus of previous centuries, but that also continues to shape the outlines of the current discussion of the legality of 'humanitarian intervention' and the so-called Responsibility to Protect. For all the uncertainties over the details of these questions, the core concept has always been clear: That international law should pass judgement on the use of (military) force by one state or a group of states for the purpose of stopping mass atrocities in a different country. Over the course of the centuries, not only has the language employed to describe the situations in which the question of whether there should be or was a legal justification for such use of force been remarkably consistent, the belief that this question was more than theoretical has also hardly waned.

An earlier version of this book appeared in German in 2008,[9] and first attempted an investigation into the historical legal evolution of the doctrine that takes into account the constructive nature of this evolution. The few enquiries into the history of 'humanitarian intervention' that have been published since have either focused on re-discovering that previous writers on international law had already discussed the question of 'humanitarian intervention' in the nineteenth century[10] or they have attempted to re-create an understanding of the interventions that brought forward this discussion in the first place.[11] A book making the connection between these two strands of enquiry for the English reader is still missing. This book aims to fill that gap by discussing the evolution of the doctrine of 'humanitarian intervention' in the context of the evolution of the international legal system in which the doctrine operates. It seeks to contribute to an understanding of the intellectual history of international law by recalling the histories that are told in international law. It is an updated and expanded version of the German book.

Kampuchea and Ethiopia', *Stanford Journal of International Law* 1987, p. 547, fn 1: 'There is little use in defining the doctrine of humanitarian intervention'.

[9] Mark Swatek-Evenstein, *Geschichte der 'Humanitären Intervention'*, Baden-Baden: Nomos 2008.

[10] Alexis Heraclidis, 'Humanitarian Intervention in International Law 1830–1939 – The Debate', *Journal of the History of International Law* 2014, 16, pp. 26–62. This applies, to a lesser extent, also to Alexis Heraclidis and Ada Dialla, *Humanitarian Intervention in the Long Nineteenth Century – Setting the Precedent*, Manchester University Press 2015.

[11] Gary J. Bass, *Freedom's Battle*, New York: Alfred A. Knopf 2008; Davide Rodogno, *Against Massacre: Humanitarian Interventions in the Ottoman Empire, 1815–1914*, Princeton University Press 2012.

The reason that the question of the legality of 'humanitarian intervention' has troubled writers on international law for centuries is not because of its immense practical relevance. Those familiar with the realities on our planet are mostly aware that it usually is less a question of normative uncertainties than the lack of political will that prevents decisive action in the face of mass atrocities like the genocide in Rwanda or the civil war currently raging in Syria. As its absence from the story arch of the aforementioned TV episode indicates, the rules of international law on the use of force may not be the significant factor they are sometimes made out to be. This is not to state that these rules may be losing significance, but to state that 'paramount' amongst the multifarious reasons why the United Nations 'finds it so difficult to intervene effectively for humanitarian purposes' are 'the inviolability accorded state boundaries and the consequent failure to agree to any legal right of humanitarian intervention', as some do,[12] is to blame the international system for – apparently: unwanted? – consequences. This explains why, despite the reluctance of some international lawyers to continue the discussion over 'humanitarian intervention',[13] it remains, as others claim, 'the most controversial issue in the whole of international law'.[14] Again, this is not for its practical relevance, but because the issues discussed under the rubric of 'humanitarian intervention' cut through the fundamental layers of international law in different and opposing ways.

As political scientist Robert H. Jackson has correctly pointed out:

> The debate on humanitarian intervention is not a debate between those who are concerned about human rights and those who [are] indifferent or callous about human suffering. Every decent person has these concerns. It is not even a debate about how to best go about preventing human suffering. That is an important question. But it is of secondary importance. It is a debate about the basic values of international society. Issues of justifiable armed intervention and justifiable warfare are being raised that are at the very foundations of international society.[15]

The enquiry into the historical evolution of this debate will show just how fundamentally the values at hand cut through the cornerstones of international law and, how, in fact, the *construction* of the legal arguments on 'humanitarian interventions' is inherently tied to the construction of a system of international law around the model of the (Western) European nation state. Consequently, this book is not interested in the question of whether or not 'humanitarian intervention' is or at some point in history was legal under international law. It does not seek to count the number of authorities writing on international law to come to a definitive

[12] David Fisher, 'Humanitarian Intervention', in Charles Reed and David Ryall (eds.), *The Price of Peace*, Cambridge University Press 2007, p. 105.
[13] E.g. Stephan Oeter, 'Humanitäre Intervention und Gewaltverbot: Wie handlungsfähig ist die Staatengemeinschaft?', in Hauke Brunkhorst (ed.), *Einmischung erwünscht?*, Frankfurt am Main: S. Fischer 1998, p. 37.
[14] Stephen C. Neff, *War and the Law of Nations*, Cambridge University Press 2005, p. 362.
[15] Robert Jackson, *The Global Covenant*, Oxford University Press 2000, p. 291.

conclusion, but instead seeks to de-construct the conditions under which 'humanitarian intervention' was considered by some renowned authorities on international law to be legal.

The history of 'humanitarian intervention' in general and especially its legal dimension is usually told in the language of humanitarianism and situated within the history of the evolution of international human rights protection. In recent years, in particular, historians and political scientists have turned their attention to the subject, which previously mainly received attention within the field of international law, and, again, the narrative places 'humanitarian intervention' in the context of human rights and humanitarianism, as embodied in the iconic title of Nicolas Wheeler's book *Saving Strangers*.[16] One of the purposes of this book is to challenge these narratives, for a close reading of nineteenth-century discourse in international law on the origins of what is now commonly referred to as 'humanitarian intervention' suggests that a more appropriate setting might be the history of 'imagined communities' (Benedict Anderson), the invention of tradition of the nation state for the purpose of establishing the nation state as defined by the European experience of the nineteenth century as the principal actor of international law. In a sense, the original project of 'humanitarian intervention' can be seen as a part of the 'constitutionalisation' or, in fact, the 'Europeanisation' of 'Europe'. The 'Europe' that we know today constituted itself in the wars and skirmishes that are part of the history of 'humanitarian intervention', by rearranging the borders of 'Europe' as was necessary to reaffirm a secular Christian identity as authentically *European*. In these conflicts, potentially multi-cultural societies with sizeable Muslim populations were – with the approval of writers on the international law of 'humanitarian intervention' – turned into predominantly Christian nation-states, creating national identities that mirrored their Western counterparts.

'Humanitarian intervention' is, in fact, a euphemism for violence, the use of military force for a specific aim. As the Australian philosopher C. A. J. Coady has forcefully pointed out: It needs to be insisted that invasion is what military intervention, in the strict sense, standardly involves.[17] For all the talk of humanitarianism and human rights cannot conceal the fact that 'humanitarian intervention' favours one type of violence over another; favours the violence of one side over the violence of the other. Kofi Annan, in his role as Secretary General of the Security Council of the United Nations, once famously said:

> Of course military intervention can be undertaken for humanitarian motives. There are times when the use of force may be legitimate and necessary because there is no other way to save masses of people from extreme violence and slaughter. [But] let's get right away from using the term 'humanitarian' to describe military operations.

[16] Nicolas J. Wheeler, *Saving Strangers*, Oxford University Press 2000.
[17] C. A. J. Coady, *Morality and Political Violence*, Cambridge University Press 2008, p. 76.

> Otherwise, we will find ourselves using phrases like 'humanitarian bombing', and people will soon get very cynical about the whole idea.[18]

This book hopes to show that while there need not be anything cynical about the idea of 'humanitarian intervention' as such, the application of the idea may be a very different matter. It is one thing to consider the Allied war effort in World War II justified, but quite another to present it as a 'humanitarian intervention'.

This book is interested in the way the doctrine of 'humanitarian intervention' evolved to justify the violence of military force and how this violence was portrayed in the narratives created to justify the existence of the doctrine. Violence is usually portrayed as an aberration, a mistake, a plan gone wrong or a type of illness, to be healed one day.[19] In the narrative of 'humanitarian intervention', however, the violence of the intervention is the violence which brings peace, uncharacteristically, not the violence of destruction, but 'therapeutic violence', the violence to end violence. Generations of jurists and writers engaged with the subject of 'humanitarian intervention' have been operating under the assumption that – in the words of one of the fiercest current critics of the instrument of 'humanitarian intervention' as an 'elite assault on sovereignty' – in the nineteenth century the European Great Powers 'dispatched troops abroad to stop mass killings in the Ottoman Empire' in (at least) 'three instances'.[20] But, as this books seeks to demonstrate, such simple causal connections only exist as narratives constructed by international lawyers with an agenda. This agenda might simply be the idealist belief that international law has something meaningful to say about the way to deal with the sometimes 'unimaginable atrocities' that give rise to the question whether or not to intervene. But that is precisely why this book does not claim to understand 'how international law works' or to understand 'humanitarian interventions' as cases of 'when international law works', but instead seeks to demonstrate what happens when international law is applied to 'make international law work' as an example of the use of the legal doctrine of 'humanitarian intervention'. Accordingly, while this is a book about the history of international law, it situates its topic at the crossroads between international history, legal history, and genocide studies, hoping to reconnect narratives that exist in international law almost in isolation to a broader history of international responses to atrocities since the nineteenth century.

[18] Remarks made by Secretary-General Kofi Annan to an International Peace Academy Symposium on Humanitarian Action, November 20, 2000 – available at www.un.org/press/en/2000/20001120.sgsm7632.doc.html, last accessed 6 October 2018.
[19] Jörg Baberowski, *Räume der Gewalt*, Frankfurt am Main: S. Fischer Verlag 2015, p. 25.
[20] Rajan Menon, *The Conceit of Humanitarian Intervention*, Oxford University Press 2016, p. 26, 78.