Humanitarian Intervention and International Law

Vladimir Ortakovski

University "St. Kliment Ohridski", Skopje, Macedonia

During the last decade of the 20th century, there were nine humanitarian interventions: in Northern Iraq, Bosnia, Somalia, Rwanda, Haiti, Albania, Kosovo, East Timor, and Sierra Leone. Of the cases cited, the consent of the home government was obtained in five cases and two others had explicit Security Council authorization. However, two cases were carried out without consent of the government or authorization by the UN Security Council: Northern Iraq and Kosovo¹. NATO bombing of FR Yugoslavia in 1999 received a particular attention and condemnation. Without UN Security Council's resolution for that "air campaign", there was justification that the action was about prevention of humanitarian catastrophe. This paper will attempt at identifying legal position of humanitarian intervention in international law; whether or not, and in what circumstances, it is safe to claim that there exists the right to humanitarian intervention. At the beginning of the 21st century, there has been extensive consideration of the "responsibility to protect" as a composite concept comprising the responsibilities to prevent humanitarian catastrophe, to react immediately when they do occur and to rebuild afterwards.² Such an approach may be seen as an effort to redefine the principle of humanitarian intervention in a way that seeks to minimize the motives of the intervening powers. The paper also deals with the relation and differences between humanitarian intervention and "responsibility to protect" concept.

Keywords: humanitarian intervention, use of force, responsibility to protect

Use of Force According to United Nations Charter

Article 2, paragraph 4, of the UN Charter provides: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations".³ For example, the International Court of Justice held that the United Kingdom's forcible intervention in Albanian waters violated Article 2, paragraph 4, rejecting the United Kingdom's argument that its actions did not threaten the territorial integrity or political independence of Albania.⁴

Article 2, paragraph 7, of the UN Charter goes on to provide:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State...but this principle is without prejudice to the application of

Vladimir Ortakovski, LL.D., Professor, Faculty of Security, University "St. Kliment Ohridski", Skopje, Macedonia.

¹ This list of cases, as well as elaboration regarding humanitarian intervention, see in: Adam Roberts, 2000, p.16.

² See International Commission on Intervention and State Sovereignty, 2001; UN, 2004, paras. 201-203; UN Secretary-General, *In Larger Freedom*, A/59/2005, paras. 16-22; World Summit Outcome, General Assembly resolution 60/1, 2005, paras. 138-139; Stahn, 2007, p. 99.

³ U.N. Charter Art. 2, para. 4.

⁴ Corfu Channel Case (U.K. v. Albania), 1949, I.C.J. 4, 35.

enforcement measures under Chapter VII.⁵

Chapter VII enables the Security Council in the event of any threat to the peace, breach of the peace, or act of aggression, to take measures to maintain or restore international peace and security. These measures may include the use of armed force, if necessary.

Article 51, however, specifically declares

nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.⁶

It is to be noted that Article 51 says nothing about any right of self-defense of a province in a member state or an oppressed minority in a member state.

The United Nations Charter envisages lawful use of force in three cases:

(i) as a result of a mandate from the United Nations Security Council acting under Chapter VII of the Charter;

(ii) in individual or collective self-defense (Dempsey & Hoyos, 2001);⁷

(iii) measures against enemy states during Second World War according to Article 107 of the UN Charter.⁸

The first case is part of the UN system of collective security. The second one is when the Security Council is not able to exercise its responsibility according to Chapter VII of the UN Charter, and the attacked state is forced to use individual or collective self-defense. Of course, third case is an anachronism in contemporary situation, when almost all states are UN member states, which means they are “peace-loving” and accept the obligations contained in UN Charter.⁹ It means that, by definition, they still cannot be “enemy states” (Ortakovski & Milenkovska, 2014).¹⁰

It has, nevertheless, been argued by some international lawyers that interfering by force in the internal affairs of another state to prevent an overwhelming humanitarian catastrophe is justified (Greenwood, 1999; Byers, 1999). According to this argument, the UN Charter cannot cover every eventuality that occurs and individual states must have the legal power to intervene to prevent genocide or widespread crimes against humanity until such time as the Security Council takes control.

Some international lawyers have claimed that international use of force without Security Council mandate may be justified:

(i) in self-defense which includes collective self-defense, protection of a state’s nationals abroad under certain conditions, and possibly anticipatory self-defense¹¹;

⁵ U.N. Charter Art. 2, para. 7.

⁶ UN Charter Art. 51.

⁷ The right of self-defense is subject to conditions of necessity and proportionality. See *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226, 245. The United States and United Kingdom's intervention in Afghanistan following the attacks on the World Trade Center and Pentagon in September, 2001, however, was justified as self-defense, according to United Kingdom Defense Minister Geoff Hoon.

⁸ UN Charter Art. 107: Nothing in the present Charter shall invalidate or preclude action, in relation to any state which during the Second World War has been an enemy of any signatory to the present Charter.

⁹ Article 4(1) of the UN Charter: Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.

¹⁰ UN Charter was signed on 26 June 1945 in San Francisco, while World War II was still on-going in the Far East.

¹¹ Some international lawyers are of opinion that there is no need for state to wait until an armed attack is actually launched before it can use force in self-defense; that might be too late. A state must be able to act in anticipation of an imminent attack.

(ii) with the genuine consent of the territorial state;¹²

(iii) in necessary and proportionate response to an unlawful but small-scale armed action by another state (Cassese, 2001). This group of authors, however, does not consider legally permissible the use of force to stop atrocities within other states.

Is Humanitarian Intervention Lawful

Humanitarian intervention can be defined as use of force without the authorization of the Security Council, and without approval for such action from state's government, to protect sections of a state's population from gross and persistent human rights abuses.

Is it safe to claim that the right of humanitarian intervention by individual states exists? Practice has been in general unfavorable to the concept, primarily because it might be used to justify interventions by more forceful states into the territories of weaker states (Akehurst, 1986). Nevertheless, in some situations, the international community might refrain from adopting a condemnatory stand where large numbers of lives have been saved in circumstances of gross oppression by a state of its citizens due to an outside intervention. It is possible that such a right might evolve in cases of extreme humanitarian need.

Is humanitarian intervention lawful? (Abiew, 1999) The legality of unilateral and multilateral humanitarian intervention by states continues to be highly disputed, given the Charter limitation on state's use of force as "self-defense". There are a few groups of lawyers regarding this issue in international law.

First, there are those who say that humanitarian intervention is unlawful (Chesterman, 2001; Brownlie & Apperley, 2000; Byers, 1999).

Second, some lawyers say that while humanitarian intervention is presently unlawful, it may one day become lawful, as an exception to the United Nations Charters system of collective enforcement, in closely defined circumstances (Cassese, 1999).¹³ Some in this group are keen to develop principles for humanitarian intervention but still within the United Nations Charter system. This would involve acceptance by the international community of a duty to protect human beings from large-scale loss of life or large-scale "ethnic cleansing".

Third, another group of experts speak of a grey zone, which goes beyond strict ideas of legality to incorporate more flexible views of legitimacy (Danish Institute of International Affairs, 1999).¹⁴ They make it clear that that there is no legal right of humanitarian intervention without Security Council authorization, but regret the asymmetry in the law between the means of enforcement and the potential for violations of international legal norms. They argue that a legal basis for humanitarian intervention ought to be made possible in certain clearly defined cases and make suggestions for amendments to the UN Charter to facilitate such intervention. There are two situations where such an intervention ought to be valid:

(i) in cases of severe violations of international human rights or humanitarian law on a sustained basis; and
(ii) when civil society is subjected to great suffering and risk owing to the 'failure' of their state.

¹² Collective self-defense requires a request by the state that regards itself as a victim of an armed attack. See *Military and Paramilitary Activities (Nicaragua v. U.S.)*, 1986, I.C.J. 14, 105.

¹³ Antonio Cassese suggests the following conditions: gross and egregious breaches of human rights, inability of the authorities to end them, inability of the Security Council to take coercive action, exhaustion of peaceful solutions, action by a group of states, with support (or at least non-opposition) of a majority of United Nations members, and with the limited purpose of stopping the atrocities.

¹⁴ Suggesting an ad hoc strategy of justifying humanitarian intervention, in extreme cases when the Security Council is blocked on moral and political, rather than legal, grounds.

Fourth, there are those who consider that a right of humanitarian intervention is emerging. Some of them go so far as to say that there is already a legal right of humanitarian intervention as a matter of last resort in extreme cases. Such a right arises where:

(i) there exists—or there is an immediate threat of—the most serious humanitarian emergency involving large-scale loss of life; and (ii) military intervention is necessary as the only practicable means for ending or preventing such loss of life (Greenwood, 2000).

The fifth group justifies military intervention in a natural disaster in another state as self-defense.

The Security Council has in several cases decided that problems within a state do represent a threat to international peace and security and has taken appropriate measures to remedy these problems. There is not, however, unanimity among the five permanent members on this issue. China and Russia, in particular, support the principle of non-intervention.

Practice and Opinions of States

Supporters of the opinion that humanitarian intervention could be exercised depending on specific situations, have in mind several examples of intervention. The intervention of India in what was East Pakistan in 1971 terminated repression over population in East Bengal and created space for Bangladesh to become independent state (Roberts, 2000)¹⁵. Interventions of Vietnam in Cambodia in 1978, and of Tanzania in Uganda in 1979, brought down authoritarian regimes of Idi Amin and Pol Pot. Vietnam's intervention was condemned by UN General Assembly, but it is true that great majority of population in Cambodia considered it as liberation from three year's exercised genocide by Pol Pot's regime. Interventions of India and Tanzania were not condemned by UN Security Council. Although, during the 1970s, humanitarian intervention was not elaborated, these cases seemed to be examples of positive effects of such interventions.

These interventions, as well as Israeli operation at Entebbe in 1976, were claimed by the states concerned to be in self-defense. According to the United Kingdom representative at the United Nations, United Kingdom's operations in the Falkland Islands in 1982 were an exercise of the inherent right of self-defense. The United States attack on Libya in 1986 was said to be on the grounds of self-defense, and the United States and United Kingdom vetoed a United Nations resolution condemning the attack.

Security Council Resolution 688 (1991) condemned the widespread repression by Iraq of its Kurd and Shia populations and, citing this, the US, UK, and France proclaimed "no-fly zones" in the north and south of the country.¹⁶ There was no express authorization from the UN. It was argued by the UK that the no-fly zones were "justified under international law in response to a situation of overwhelming humanitarian necessity".¹⁷

Generally, states are reluctant to allow any outside interference in what they consider to be their internal affairs. Until recently, position has been respected even where serious human rights violations have occurred. Opponents of the doctrine of humanitarian intervention point out that the history of the last 50 years has been one of non-intervention for humanitarian purposes and that many of the so-called precedents for humanitarian intervention were based on United Nations mandates (Byers, 1999; Roberts, 2000). Large states, such as Russia,

¹⁵ The Indian representative in the Security Council referred also to the motive of rescuing the people of East Bengal from what they were suffering.

¹⁶ See the views expressed by a Foreign Office legal advisor to the House of Commons Foreign Affairs Committee, UKMIL, 63 BYIL, 1992, pp. 827-828.

¹⁷ UKMIL, 70 BYIL, 1999, p. 590.

China, and India, have opposed the principle of humanitarian intervention, as have numerous members of the non-aligned movement (Roberts, 2000).

Nevertheless, the failure to intervene to prevent massacres in the former Yugoslavia in 1991-1995, where United Nations forces initially had a very narrow mandate concerned with the delivery of relief supplies, and in Rwanda led to much criticism and a reappraisal of the noninterventionist approach.

The Kosovo crisis of 1999 raised again the issue of humanitarian intervention (Simma, 1999; Annan, 1999; Henkin et al., 1999; Hilpod, 2001). The justification for the NATO bombing campaign, acting out of area and without UN authorization, in support of the repressed ethnic Albanian population of that province of Yugoslavia, was that of humanitarian necessity. There has been reluctance on the part of the states that supported the Kosovo action, without specific authorization from the Security Council, to set out precisely the legal grounds upon which action was taken. The UK Secretary of State for Defense stated that, "In international law, in exceptional circumstances and to avoid a humanitarian catastrophe, military action can be taken and it is on that legal basis that military action was taken".¹⁸ In a note circulated by the United Kingdom to NATO partners in October 1998, an additional criterion was mentioned: The proposed use of force should be necessary and proportionate to the aim of the relief of humanitarian need and strictly limited in time and scope to this aim (Roberts, 1999). The German, French, Italian, and Dutch governments were less specific but all placed emphasis on the need to prevent gross violations of human rights. The Chinese and Russian authorities, however, opposed any use of force without UN Security Council authorization.

The Security Council rejected a resolution condemning NATO's use of force, proposed by Russian Federation. After an agreement had been reached between NATO and Yugoslavia,¹⁹ the Council adopted Resolution 1244 (1999) which welcomed the withdrawal of Yugoslav forces from the territory and decided upon the deployment under UN auspices of international civil and military presences. According to this resolution, territory of Kosovo remained integral part of FR Yugoslavia. There was no formal endorsement of the NATO military action, but no condemnation (Shaw, 2008).

On January 12, 2010, a massive earthquake struck Haiti, essentially destroying the Haitian government infrastructure. According to remarks by Rene Magloire, former Minister of Justice and Special advisor to the president and Ministry of Justice, the presidential palace, the ministry of justice building, and the legislative palace were destroyed. Police stations and prisons were damaged, allowing thousands of detainees and prisoners to escape.²⁰ For five years, Rene Magloire and other justice officials had been working on re-establishing the Haitian judicial system and the rule of law (Malone, 2010). According to this opinion, such an environmental disaster with trans-boundary effects, loss of a vital global resource, or actions in violation of international environmental law, may no longer be regarded as matters of "domestic" jurisdiction.

Humanitarian Intervention and Responsibility to Protect

The initial report of the "International Commission on Intervention and State Sovereignty (ICISS)" in 2001, in the wake of 9/11, drew a distinction between the responsibilities of nations to protect their own citizens, and the responsibilities incumbent upon states confronting what the report termed "human protection

¹⁸ Cited according to: 70 BYIL, 1999, p. 586.

¹⁹ See 38 ILM, 1999, p. 1217.

²⁰ More than 200,000 died, more than 300,000 were injured, more than 450,000 became refugees, more than 400,000 homes were destroyed, more than 120,000 homes damaged, and more than a million people were left without shelter.

claims in other states” (International Commission on Intervention & State Sovereignty, 2001)

UN Secretary-General Kofi Annan commissioned a report from a “High-level Panel on Threats, Challenges and Change”, in 2004, designed to re-think the ideal of collective security in the UN Charter (United Nations, 2004). This Panel issued five basic guidelines, in the form of questions for the UN Security Council to consider, when deciding whether to authorize the use of military force (Lucas, 2011):

(a) Seriousness of threat: Is the threatened harm to State or human security sufficiently clear and serious, to justify the use of military force? In the case of internal threats, does it involve genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law, actual or imminently apprehended?

(b) Proper purpose: Is it clear that the primary purpose of the proposed military action is to halt or avert the threat in question, whatever other purposes or motives may be involved?

(c) Last resort: Has every non-military option for meeting the threat in question been explored, with reasonable grounds for believing that other measures will not succeed?

(d) Proportional means: Are the scale, duration and intensity of the proposed military action the minimum necessary to meet the threat in question?

(e) Balance of consequences: Is there a reasonable chance of the military action being successful in meeting the threat in question, with the consequences of action not likely to be worse than the consequences of inaction? (Bellamy, 2009)

It should be emphasized that humanitarian intervention differs from responsibility to protect in four important ways:

First, humanitarian intervention is only military intervention. Responsibility to protect, on the other hand, is first and foremost a preventative measure that stresses state responsibilities. Military intervention may only be carried out as a last resort, when all other, non-coercive measures have failed and when it is authorized by the Security Council (GSDRC, 2013):

1. The responsibility to prevent: addressing root causes of internal conflict, as the most important obligation.
2. The responsibility to react: responding to situations of compelling human need with appropriate measures that could include sanctions, prosecutions or military intervention.
3. The responsibility to rebuild: providing full assistance with recovery, reconstruction and reconciliation.

The second point is related to the first and: Responsibility to prevent is firmly rooted in international law, especially the law relating to sovereignty, peace and security, human rights and armed conflict. Humanitarian intervention, on the other hand, regularly violated Article 2.4 of the UN Charter, which outlines the territorial integrity of every sovereign state. Responsibility to prevent avoids this through the fact that a military intervention must either be authorized by the state in question or by the UN Security Council.

Third, while humanitarian interventions have in the past been justified through the prevention of human rights abuses, the responsibility to prevent focuses only on the four mass atrocity crimes: genocide, crimes against humanity, war crimes, and ethnic cleansing. The first three crimes are clearly defined in international law and codified in the Rome Statute that established the International Criminal Court. Ethnic cleansing is not a crime defined under international law, but has been defined by the UN as “a purposeful policy designed by one ethnic or religious group to remove by violent and terror-inspiring means the civilian population of another ethnic or religious group from certain geographic areas”.²¹

²¹ See http://www.un.org/ga/search/view_doc.asp?symbol=S/1994/674.

Finally, while humanitarian intervention assumes a “right to intervene”, the other concept is based on a “responsibility to protect”. Humanitarian intervention and the responsibility to protect both agree on the fact that sovereignty is not absolute. However, the responsibility to prevent doctrine shifts away from state-centered motivations to the interests of victims by focusing not on the right of states to intervene but on a responsibility to protect populations at risk.

On September 16, 2005, the United Nations General Assembly adopted by consensus a resolution recognizing the “responsibility to protect”. The core of the responsibility to protect is that “[e]ach individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity”.²² The international community has the responsibility to use diplomatic, humanitarian, and other peaceful means, and if those fail, may 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” when “national authorities are manifestly failing to protect their populations” from the four crimes.

Libya 2011 was the first case, where the UN Security Council authorized a military intervention citing the Responsibility to protect, following widespread and systematic attacks against the civilian population by the Libyan regime. The UN Security Council, unanimously adopted resolution 1970 on 26 February 2011, making explicit reference to the responsibility to protect. The Council also decided to refer the situation to the International Criminal Court. In resolution 1973, adopted on 17 March 2011, the Security Council demanded an immediate ceasefire in Libya, including an end to ongoing attacks against civilians, which it said might constitute “crimes against humanity”. NATO planes started striking at Gaddafi’s forces.²³

Conclusion: Status and Limitations of Humanitarian Intervention

The status of humanitarian intervention in international law remains controversial. A group of authors explicitly treat humanitarian intervention as unlawful (Chesterman, 2001; Brownlie & Apperley, 2000; Byers, 1999). Many states, such as Russian Federation, China, India, and non-alignment countries emphasize that humanitarian intervention is in clear breach with UN Charter. Military interventions without resolution of UN Security Council, or without invitation from regular government, are counter to fundamental principles of UN Charter: Article 2 paragraph 4 (ban on the threat or use of force); Article 2 paragraph 7 (non-intervention in matters which are essentially within the domestic jurisdiction of any State).

There are disputes concerning the moral legitimacy of military interventions in Bosnia, Rwanda, Somalia, and Haiti—interventions that frequently seemed to invoke moral obligations on the part of the “international community that appeared sharply at variance with provisions of international law” (Mohamed, 2010, p. 1278).

Some authors conclude that humanitarian intervention is not absolutely excluded (Roberts, 2000). In their opinion, states cannot, on moral and policy grounds, simply sit back and watch the commission of genocide or persistent crimes against humanity. Some of them emphasized that there should not be condemnation of humanitarian intervention when it saves many lives (not necessarily of the citizens of intervenient). However,

²² General Assembly Res. A/RES/60/1, Â 138, U.N. Doc. A/RES/60/1 (Oct. 24, 2005); and Security Council Res. 1674, Â 4, U.N. Doc. S/RES/1674 (Apr. 28, 2006) (the Security Council reaffirmed the provisions of paragraphs 138 and 139 of the 2005 World Summit Outcome Document regarding the responsibility to protect).

²³ NATO subsequently came under scrutiny for its behavior during the air strikes; concerns included the fact that the intervention quickly moved to regime change and that there were allegations regarding aerial bombardments that may have caused civilian casualties.

they disagree that humanitarian intervention is permitted as such in order to “restore democracy” (Shaw, 2008, pp. 1155-1158; Simma, 1999, p. 6).

Third group of authors are of opinion that right to humanitarian intervention already exists as last resort in extreme cases. Such right emerges when: (a) there is an immediate threat, or there is already going on, most serious humanitarian emergency situation, where large numbers of lives have been lost; and (b) military intervention is necessary as the only practical way to end or prevent such loss of life (Greenwood, 2000).

We can conclude that whether the right of humanitarian intervention currently exists, or is in development, or is simply to be tolerated by the international community, such intervention must be subject to certain limitations. These may be summarized as follows (Rogers, 2004):

(1) There must be the existence, or imminence, of a serious humanitarian situation—variously described as an overwhelming humanitarian catastrophe/gross and egregious human rights violations/an exceptional and most serious situation of emergency.

(2) The territorial state must fail to deal with the situation.

(3) The Security Council must fail to deal with the situation.

(4) Use of force is the last resort/the only practicable solution and peaceful solutions have been exhausted.

(5) Action must be collective.

(6) The purpose of the action must be limited to dealing with the humanitarian situation and those intervening must be disinterested.

(7) There must be a realistic prospect of achieving the desired result.

(8) The action must be reported to the Security Council.

(9) The action must be proportionate; it must not cause more harm than the harm to be alleviated.

(10) Any use of force must comply with international humanitarian law.

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