

THE LEGALITY OF HUMANITARIAN INTERVENTION

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ABSTRACT: *The humanitarian intervention is a concept in evolution that is widely accepted, but also controversial at the same time. The legality of humanitarian intervention is a controversial issue because on the one hand the intervention contradicts the Charter of the United Nations and on the other hand it is developed through state practice. The international system of security is based on concepts such as non-interference and the sovereign equality of states, concepts by which States do not give up because of the stability that derives from them, even in terms of increasing the evaluation for human rights and the obligation of states for the protection of these rights. The use of force against a state is prohibited if it is unauthorized by the Security Council of the United Nations, or is not taken for self-defense. In international life the disputes between countries should be resolved peacefully. This general prohibition of the use of force causes the difficulty of establishing norms and policies on humanitarian intervention. Nothing in the United Nations Charter creates the possibility that the use of force for humanitarian purposes to be understood differently from any other type of the use of force. Can the use of force in the form of humanitarian intervention be considered legal, according to this existing international legal environment? Does the practice of humanitarian intervention support the legality of the intervention?*

KEYWORDS: Humanitarian Intervention, Use of Force, State Sovereignty, The Practice Of Intervention

INTRODUCTION

Entry

The humanitarian intervention means the use of force by a state, group of states or by an international organization against a country which systematically violates the rights of its citizens or is unable to protect these rights.¹ While on one hand the idea of humanitarian intervention is laudable, as states collectively or individually are willing to protect human rights beyond their borders, in situations where international structures such as the United Nations can not react for various reasons, it remains a critical risk that the right to humanitarian intervention to be used in an abusive way by stronger policies.²

The concept of humanitarian intervention has evolved being considered in some way as an additional for international norms governing the use of force. This concept has come to take an important position alongside the concept of self-defense and the authorization of the United Nations Security Council as a legal reason to wage a war. It was developed as a legal and

¹ J. L. Holzgrefe, *The Humanitarian Intervention Debate*, in: J. L. Holzgrefe and Robert O. Keohane, (eds.), *Humanitarian Intervention – Ethical, Legal, and Political Dilemmas* (Cambridge University Press, Cambridge, 2003), pp. 15-52, at p. 18; David N. Gibbs, *First Do no Harm: Humanitarian Intervention and the Destruction of Yugoslavia* (Vanderbilt University Press, Nashville, 2009), at p. 3.

² Dominik Zimmermann, *Why is the Practice of Humanitarian Intervention so Controversial?*, Apr 30 2014, www.e-ir.info/author/dominik-zimmermann

political concept that is discussed intensively as in the academic level and as among political actors, taking into consideration the wider international recognition of human rights.

The humanitarian intervention is a concept that is widely accepted, but is contradicted in the same time. The main issue that we are prepared to discuss is whether humanitarian intervention is legal under international law. This is a question for which there have been various debates and that is likely to get an uncertain response, because the humanitarian intervention itself seems to oppose the principles established in the Charter of the United Nations. On the other hand, developments in state practice have contributed to make humanitarian intervention legitimate in certain circumstances.³

We can say that the practice of humanitarian intervention exists in a space between legality and not legality, a space where each case of practice can be consistent or inconsistent with international law. Humanitarian intervention can lead to the rescue of human lives, but can also be abusive. In the center of the debate on the legality of humanitarian intervention are a number of legal principles on which is built the United Nations system, which has provided a certain degree of stability after the end of the War World II. The prohibition of use of force against a state, if it is unauthorized by the Security Council or is not taken in self-defense, represents an achievement that should be protected against specific state interests or ideologies.⁴

The right on the use of force

The international humanitarian law deals primarily with the regulation of the relations between states in time of war. This sort of right includes well-developed corps on the conduct in war and the possibility of using armed force. These corps of law originates in the Christian doctrine of natural law, were developed with major European regulations in the XIX century and made further progress with the codification of this right in XX century.⁵

The most important part of the international law on the legality of recourse to war by any state is the Charter of the United Nations. The United Nations Charter in Article 2/4 bans the war, and also prohibits the threat to use force against the territorial integrity or political independence of any state. In international life the disputes between states in each case should be resolved by peaceful manners.⁶ This is a general ban, maintained in the section of the Charter, which sets out the main and common obligations for the membership in the United Nations Organization and the organization itself.⁷ So, the right of the state to wage war is not recognized by current international law. Any State that makes an aggression and uses the armed force for the purposes of his foreign policy, commits a violation of international humanitarian law.⁸

³ Ian Hurd, Is Humanitarian Intervention Legal? The Rule of Law in an Incoherent World, [faculty.wcas.northwestern.edu/~ihu355/Home_files/is hi legal.pdf](http://faculty.wcas.northwestern.edu/~ihu355/Home_files/is%20hi%20legal.pdf)

⁴ Dominik Zimmermann, Why is the Practice of Humanitarian Intervention so Controversial?, Apr 30 2014, www.e-ir.info/author/dominik-zimmermann

⁵ James Turner Johnson, Ideology, Reason, and the Limitation of War (Princeton, N.J.: Princeton University Press, www.worldcat.org/title/ideology-reason-and-the-limitation-of-war

⁶ Article 2(4) UNC (Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 145 BSP 805).

⁷ Richard Jolly, Louis Emmerij, and Thomas G. Weiss, UN Ideas That Changed the World (Bloomington, Ind.: Indiana University Press, 2009).

⁸ Arben Puto, "E Drejta Ndërkombëtare Publike", published by Marin Barleti 2009.

Article 2/4 of the United Nations Charter only prevents invasive wars, those wars which aim at the acquisition of the assets of other countries and not wars for self-defense. The wars of self-defense against an aggression cannot be considered illegal. The United Nations Charter does not prohibit the right of a state to use force in the exercise of his right of self-defense, or the right of other states to assist the attacked state.

Article 51 of the Charter of the United Nations expressly provides the right of self-defense: "Until the Security Council takes the necessary measures to maintain peace and international security, no provision of this Charter shall affect the inherent right of legitimate self-defense, individually or collectively, in case that a member of the United Nations becomes the object of an armed attack".

It's obvious that the Charter of the United Nations gives two contributions that form the core of the current legal regime on war. First, it outlaws the use of force by individual states and secondly entitles the Security Council of the United Nations to take all decisions and collective measures involving the use of force.⁹

The United Nations Charter charges the Security Council "the primary responsibility for maintaining international peace and security". The Security Council may undertake measures it considers necessary for this purpose, including military action against other countries. In this way, the drafters of the Charter concentrated the obligation for the implementation of international rule in the hands of the great powers of the time, and sought to ensure the development of peaceful relations between other countries, depriving them from the independent legal channels of war. This decision was made as a result of the lessons learned from the two world wars, after which the aggression by a state may be faced better by a collective response involving the use of force. Thus, the intervention authorized by the Security Council of the United Nations is certainly legal, since it is in accordance with the authority of the Security Council on "threats to international peace and security".¹⁰

The general prohibition of the use of force causes the difficulty of establishing norms and policies on humanitarian intervention. In regard of the prohibition of the use of force, the International Court of Justice has gone much further than the Charter of the United Nations in strengthening the ban on the use of force, even in the light of emergency situations for human rights and has stated that the use of force cannot be an appropriate method to monitor or to ensure the respect for human rights. In this way, the question arises: Can the use of force for humanitarian purposes be placed within an appropriate framework, while such a broad ban on the use of force exist?

Is the humanitarian intervention legal?

If we accept that the existing international law environment, prohibits the use of force to resolve international disputes, except the cases when the use of force is authorized by the Security Council of the United Nations, or is legal for reasons of self-defense of a State, can we consider legal the use of force in the form of humanitarian intervention?

⁹ Ian Hurd, *Is Humanitarian Intervention Legal? The Rule of Law in an Incoherent World*, [faculty.wcas.northwestern.edu/~ihu355/Home_files/is hi legal.pdf](http://faculty.wcas.northwestern.edu/~ihu355/Home_files/is%20hi%20legal.pdf)

¹⁰ B. Martenczuk, "The Security Council, the International Court and Judicial Review: What Lessons from Lockerbie?" *European Journal of International Law* !, 10, no.3, 1999, p 517-47.

The establishment of a regime in the case of humanitarian intervention faces difficulties because of the existence of international collective security system and the fundamental principles maintained in the Charter of the United Nations. No provision of the United Nations Charter creates the possibility that the use of force for humanitarian purposes to be understood differently from any other type of use of force. However, by the end of the XIX century the majority of people accepted that a right of humanitarian intervention exists, and this presumption was based on the wide scale of recognition of human rights and the necessity to internationally insure the respect for human rights.

In addition to the United Nations Charter, a number of international treaties refer to the human rights and fundamental freedoms. These include the Convention against Genocide,¹¹ which in its Article 1, states: "The Contracting Parties confirm that genocide, despite carried out in times of peace or war, is a crime under international law which they undertake to prevent and punish". However we must except that the lack in the Genocide Convention of an explicit recognition of such an important right like the right of intervention shows that its use is not allowed.

The treaties that created the Organization of American States and the African Union also consider permissible the use of coercive collective action against member states and thus can be considered some times as legal paths towards humanitarian intervention. The establishing act of the African Union creates "right of the Union to intervene in a member state pursuant to a decision of the Assembly on serious circumstances such as: war crimes, genocide and crimes against humanity".¹² This is a collective right of the Union, not an individual right of Member States and in this way it is similar to the authority for intervention of the Security Council of the United Nations related to its member states. The Organization of American States on the other hand, explicitly prohibits the intervention across borders, but at the same time it engages itself to maintain democratic governance in its member states and describes the democratic governance as inseparable from the respect for human rights.¹³ The binding power of this organization is limited to the suspension from the organization of the membership of the state that does not respect the obligations.

Amore precise answers on these issues gives the Charter of the United Nations, according to which in the absence of an attack, only the Security Council can act. If we rely on the justification of the most typical case of humanitarian intervention, which was that of NATO in Kosovo, we can say that it was "illegal but legitimate".¹⁴ Thomas Frank agrees that this intervention was illegal, but notes that international justice is sometimes better placed by breaking the law than by respecting it and this is the case of NATO in Kosovo.¹⁵ This is a

¹¹ Convention on the Prevention and Punishment of the Crime of Genocide. Adopted by Resolution 260 (III) A of the United Nations General Assembly on 9 December 1948, www.hrweb.org/legal/genocide.html

¹² Ian Hurd, *Is Humanitarian Intervention Legal? The Rule of Law in an Incoherent World*, [faculty.wcas.northwestern.edu/~ihu355/Home_files/is hi legal.pdf](http://faculty.wcas.northwestern.edu/~ihu355/Home_files/is%20hi%20legal.pdf)

¹³ Inter-American Democratic Charter, September 11, 2001, Lima, Peru; www.oas.org/charter/docs/resolution1_en_p4.htm.

¹⁴ Hannes Peltonen, *Right And Responsibility, What Kind Of Right Is The Right Of Humanitarian, Intervention?* EUI Working Papers, SPS No. 2006/03, cadmus.eui.eu/bitstream/handle/1814/4357/SPS%202006.03.pdf?

¹⁵ Brownlie, "International Law," p.16; and Franck, *Recourse to Force*. See also Bruno Simma, "NATO, the UN, and the Use of Force: Legal Aspects," *European Journal of International Law* 10, no.1 (1999); and Anthea Roberts, "Legality vs. Legitimacy: Can Uses of Force Be Illegal but Justified?" in Philip Alston and Euan MacDonald, eds., *Human Rights, Intervention, and the Use of Force* (New York: Oxford University Press, 2008.)

position that suggests that the idea of sovereignty is not absolute as it is usually claimed. Other values may be more important than the pursuit of this principle.

The practice of humanitarian intervention

Despite the debate that exists on the legality of humanitarian intervention, we cannot ignore all the developments in the practice of intervention. Defending this concept Thomas Weiss and Ramesh Thakur under lined the statement that Annan made "State borders will not be seen as protection for war criminals and mass murderers."¹⁶ This idea was further institutionalized with the doctrine of "The Responsibility to Protect". The World Summit of 2005, included as statement made by all states in the General Assembly of the United Nations on "their willingness to undertake decisive and timely collective actions" for humanitarian purposes, of course only with the approval of the Security Council.¹⁷

The Security Council of the United Nations in some cases, particularly in the 1990s, has authorized coercive measures under Chapter VII of the Charter of the United Nations, in response of the human rights violations. One of the earliest was the Resolution 688 of the Security Council, which was dealing with the repression that the Iraqi authorities exercised against the Iraqi and Kurdish population.¹⁸ With this resolution, the Security Council for the first time determined that there was a threat to peace without referring to the use of force between states.

Another case was the situation in Somalia in the early 1990s, where civil war and the anarchy conditions, created the idea of a failed state,¹⁹ led the United Nations to undertake some actions. The Security Council of the United Nations decided in January 1992, under Chapter VII of the Charter to implement a "complete embargo on all delivery of weapons and military equipment to Somalia",²⁰ and in March 1992 endorsed the plan of the Secretary General of the United Nations to send a technical team to Somalia. In the decision of considering the situation of human tragedy as a threat to international peace and security led as the legal basis only the internal situation of Somalia and the conclusion that there was not an effective government in Somalia at that time.

Later, the civil war in Rwanda and the genocide that followed it was the basis for classifying the situation as a threat to peace by the United Nations' Security Council and for authorizing a "temporary operation under a national command".²¹ French troops entered Rwanda and were followed by British and American troops on 22 July 1994. However, the intervention was done too late and was insufficient to avoid genocide, because it was delayed due to the discussions

¹⁶ Thomas G. Weiss and Ramesh Thakur, *Global Governance and the UN: An Unfinished Journey* (Bloomington, Ind.: Indiana University Press, 2010); see also the essays in *Diplomatic Academy of Vienna, The UN Security Council and the Responsibility to Protect*.

¹⁷ World Summit Outcome: Fact Sheet"; www.un.org/summit2005/presskit/fact_sheet.pdf; accessed January 10, 2011.

¹⁸ UNSC Res. 688 (1991) (5 April 1991) SCOR 46th Year 31

¹⁹ Robin Geiß, *"Failed States" – Die normative Erfassung gescheiterter Staaten* (Duncker&Humblot, Berlin, 2005), at p. 44 with further references.

²⁰ UNSC Res. 733 (1992) (23 January 1992) SCOR 47th Year 55.

²¹ UNSC Res. 929 (1994) (29 June 1994) SCOR 49th Year 10.

in the United Nations, whether the situation was a result of the civil or tribal war, and if the atrocities that were ongoing should be considered as genocide.²²

In October 1997, the Security Council considered the deterioration of the humanitarian situation in Sierra Leone and the effects that it may cause to the neighboring countries as a threat to peace, in accordance with Article 39 of the Charter.²³

The most controversial and debated case can be considered the humanitarian intervention in Kosovo by NATO in 1999, where were used the humanitarian reasons to justify the bombing. Kosovo is the first case that a group of states justify the use of force against another state only on humanitarian grounds at a time when they had not received authorization by the Security Council of the United Nations.

According to Alex Bellamy and Nicholas Wheeler,²⁴ NATO had several motives for intervention: The fears that the armies of the Federal Republic of Yugoslavia will repeat the atrocities they had done in Bosnia several years ago; that another ongoing conflict in Balkan could create effects across the borders and the conflict could spread in the region. States that led NATO coalition, despite that they did not obtain the authorization of the Security Council of the United Nations, sought to justify the intervention by referring to Council resolutions. France claimed that the use of force in Kosovo has been authorized by the Security Council resolutions if we consider that in Kosovo occurred in violations that were provided in these resolutions.²⁵ The Security Council of the United Nations did not authorize the use of force in Kosovo, but he also neither condemned it.²⁶ Despite the efforts by some permanent members of the Security Council of the United Nations to adopt a resolution in order to condemn the intervention of the NATO in Kosovo, the Security Council of the United Nations did not contest these actions even though the intervention was violating the rules regarding the use of force envisaged in the Charter of the United Nations.

Michael Glennon admits that the use of humanitarian intervention in some cases represents a violation of the international humanitarian law on the use of force.²⁷ While other authors claim that these interventions cannot be considered as violation because states have recreated their legal obligations around a new legal principle.

We should accept that State practice affects the development of the law and it became evident with the progress that the concept of humanitarian intervention made. However, despite all debates in international law, the idea of the implementation of law remains strong in

²² Aidan Hehir, *Humanitarian Intervention – An Introduction*, at p. 186-188; Nicholas J. Wheeler, *Saving Strangers* (Oxford University Press, Oxford, 2002), at pp. 220-221.

²³ UNSC Res. 1132 (1997) (8 October 1997) SCOR 52nd Year 83. This was eventually confirmed in UNSC Res. 1270 (1999) (22 October 1999) SCOR 54th Year 9; UNSC Res. 1289 (2000) (7 February 2000) SCOR 55th Year 96; UNSC Res. 1315 (2000) (14 August 2000) SCOR 55th Year 108. ²³ Jonathan I. Charney, Anticipatory humanitarian intervention in Kosovo, <http://www.questia.com/googleScholar.qst?docId=5001866798>

²⁴ Alex J. Bellamy and Nicholas J. Wheeler, *Humanitarian Intervention in World Politics*, at p. 516.

²⁵ In particular UNSC Res. 1199 (1998) (23 September 1998) SCOR 53rd Year 13 and UNSC Res. 1203 (1998) (24 October 1998) SCOR 53rd Year 15.

²⁶ Vaughan Lowe and Antonios Tzanakopoulos, *Humanitarian Intervention*, at para. 19, opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law

²⁷ Michael Glennon, "The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter," *Harvard Journal of Law and Public Policy* 25 (2002), pp. 539-58,

international politics. States continue to be convinced that they must apply the law and not violate it.

The relationship between sovereignty and humanitarian intervention Sovereignty is a concept which as in historical terms, as well as in the present serves to determine the freedom of states to independently develop their own internal order and external relations.²⁸ The intervention, which always involves the use by force against the will of the government of the state which is affected by the intervention, regardless of the motive of the action is in conflict with the notion of sovereignty.²⁹

In our time it is increasing the body of international human rights recognized by international acts. The Charter of the United Nations, in its preamble "reaffirms faith in fundamental human rights, in the dignity and worth of a man" and proclaims respect for human rights as one of its goals, seeking the general respect and supervision of the freedoms and fundamental rights for all.³⁰ However, the issue of the respect for international human rights is a difficult one because it carries the trend of promoting tension and conflict between states.³¹

Yet it cannot be stated with certainty whether the violation of human rights can justify the intervention by force in another state. However, the extension of the idea about human rights is a strong argument in favor of humanitarian intervention, according to which flagrant violations of human rights must be punished regardless of the state whose citizens are those with whom is abused.³²

The main contradiction exists between the strict application of sovereignty on the one hand and the need for protection of human rights on the other. Recent events, from Rwanda to the Balkans, Libya, etc., have highlighted tensions between humanitarianism and sovereignty.³³ Sometimes it is argued that the two concepts, the sovereignty and the humanitarian intervention are in fact complementary to each other more than contradictory in the sense that sovereignty depends on how a government respects the obligation to protect its people. According to this view, the humanitarian intervention is legal because the legal protection for sovereign states deceives if the state is engaged in the worst kind of abuse with the rights of its citizens.³⁴

It is still very significant the statement of the Secretary- General of the United Nations, Kofi Annan, who in his speech at the General Assembly of the United Nations in 1999, raised the dilemma: "If humanitarian intervention is an unacceptable attack to the sovereignty, how should we respond to Rwanda and Srebrenica, to large and systematic violations of human rights that affect mankind?"³⁵

²⁸ Juliane Kokott, *States, Sovereign Equality*, in: Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (Oxford, Oxford University Press, Online Edition, 2012), at para. 1.

²⁹ Article 2(1) UNC (Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 145 BSP 805).

³⁰ Article 55 UNC

³¹ Antonio Cassese, *International Law* (Oxford University Press, Oxford, 2nd ed., 2005), at p. 375.

³² Chris Abbott, *Rights and Responsibilities. Resolving the Dilemma of Humanitarian Intervention*, September 2005, sites.tufts.edu/jha/files/2011/04/a180.pdf

³³ Vaughan Lowe and Antonios Tzanakopoulos, "Humanitarian Intervention," in Rüdiger Wolfrum, ed., *Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2010).

³⁴ Penelope C. Simons. *The Ploughshares Monitor* December 2000 Volume 21 Issue 4, ploughshares.ca/pl_publications/humanitarian-intervention-a-review.

³⁵ Kofi A. Annan, *We the Peoples – The Role of the United Nations in the 21st Century* (United Nations Department of Public Information, New York, 2000), at p. 48.

According to Fernando Tesón, sovereignty serves to human values and those who commit major violations of these values should not be allowed to hide behind the concept of sovereignty.³⁶ In the document entitled "An Agenda for Peace" in 1992, Secretary General of the United Nations, Boutros Ghali stated that the "time of exclusive and absolute sovereignty has passed." A decade later, Gareth Evans and Mohamed Sahnoun wrote that "even the strongest supporters of state sovereignty should recognize that no country has unlimited power to do whatever he wants with his people."³⁷

After the NATO intervention in Kosovo, the Independent International Commission on Kosovo concluded that the NATO action was legitimate but illegal.³⁸ He stressed that the intervention of NATO was unlawful because it did not receive prior authorization of the Security Council, but it was legitimate because it was justified by the exhaustion of all diplomatic means and resulted in the unblocking of the majority population of Kosovo from Serb oppression.

A question that is often raised is whether the international community should stay without doing anything and allow that genocide occur, in cases when the Security Council fails to act?

It is clear that an organization such as NATO cannot use force without a mandate of the Security Council of the United Nations. But is it right to allow large and systematic violations of human rights, with serious humanitarian consequences?

The doctrine of "The Responsibility to Protect" adopted by the General Assembly of the United Nations in 2005, has prompted a redefinition of the concept of sovereignty as responsibility. According to this doctrine, the rights that belong to sovereign states are in balance with their responsibilities. When a civilian population suffers from serious abuses of human rights and the state in question is unwilling or unable to avoid them, the principle of non-intervention should pave the way for international responsibility to protect that population.³⁹

CONCLUSIONS

The issue on the necessity of respecting international human rights carries the tendency of promoting tension and conflict between states. The extension of the idea on human rights is a strong argument in favor of humanitarian intervention, according to which the flagrant violations of human rights must be punished regardless of the state whose citizens are the ones with whom is abused. Nevertheless, yet is not possible to give a definitive answer on whether the violation of human rights can justify the armed intervention in another state.

The doctrine of "The Responsibility to Protect", adopted by the General Assembly of the United Nations in 2005, has prompted a redefinition of the concept of sovereignty as a

³⁶ Fernando R. Tesón, "The Liberal Case for Humanitarian Intervention," in J. L. Holzgrefe and Robert O. Keohane, eds., *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas* (Cambridge: Cambridge University Press, 2003), p. 93.

³⁷ Gareth Evans and Mohamed Sahnoun, "The Responsibility to Protect," *Foreign Affairs* 81, no.6, (2002), pp. 99-101, at 102.

³⁸ Independent International Commission on Kosovo, *Kosovo Report: Conflict, International Response, Lessons Learned* (Oxford: Oxford University Press, 2000).

³⁹ Annan, Koffi 2000, "We the Peoples": The role of the United Nations in the 21st Century, "United Nations, *International Peacekeeping* 2, 140-156.

responsibility. According to this doctrine, the rights belonging to sovereign states are in balance with their responsibilities. In certain cases, the idea of sovereignty is not absolute as it is usually claimed. Other values may be more important than the implementation of this principle.

Despite all the debates that take place in the international law on the possibility of establishing a legal framework for the development of humanitarian interventions, the idea for the implementation of the law remains strong in international politics. States continue to be convinced that they must apply the law and not violate it.

But, although there is a debate on the legality of humanitarian intervention, we cannot rely only on the right of non-interference as provided by law, because this way we would ignore the developments in the practice of humanitarian intervention. However, it must be said that yet there isn't a consensus on the legality of the intervention. The law may be incoherent, but it still remains politically in power.

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