

## Humanitarian Intervention and International Law

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### Abstract

The article aims to study the grounds of humanitarian intervention, analyse the rationale behind the use of force for humanitarian purposes in the context of international law while it lacks the clear-cut definition according to the UN Charter. In addition, the article examines the particular case of a humanitarian intervention that enables to comprehend the preconditions and criteria of intervention. It also looks at the controversial issues between the fundamental principles of international law and humanitarian intervention. The article clarifies the trends attempting to depict the aforesaid fundamental principles and humanitarian intervention as compatible institutions triggering the debates over establishing the humanitarian intervention as a customary law norm.

**Keywords:** humanitarian intervention, humanitarian purpose, NATO, Kosovo

### Introduction

Some scholars think that the humanitarian intervention could only be justified on the moral basis (Hall W.E., 1895, p. 309). According to the Declaration of UN General Assembly on the Inadmissibility of Intervention and Interference in the Internal Affairs of States, States should abstain from the armed intervention against other States or group of States, military occupation or any other form of interventions, or from any act of military, political or economic interference into the internal affairs of other State (Declaration of General Assembly, 1981).

The States should refrain from the exploitation and the distortion of human rights issues as a means of interference in the internal affairs of States, of exerting pressure on other States or creating distrust and disorder within and among States or groups of States (Declaration of General Assembly, 1981). Proponents of intervention counter by arguing that the establishment of the United Nations has "neither terminated nor weakened the customary institution of humanitarian intervention. First of all, the United Nations Charter emphatically stresses the importance of human rights, and requires its members to enforce human rights standards. As human rights have grown in importance in international law, it is no longer possible to rightly claim that human rights abuses within the borders of a sovereign state are solely the "internal" affair of that state (Merriam J., 2001, p.121).

The costs in human suffering throughout the world outweigh the benefits of the illegality of humanitarian intervention. The previous legality of humanitarian intervention should be revisited. Collective security mechanisms that were supposed to render humanitarian intervention obsolete have never functioned, and may never function, properly. These mechanisms therefore fail to prevent the occurrence of egregious human rights violations. The fear of potential abuse of the doctrine, while at one time legitimate, should no longer be the overriding concern in international law because modern technology enables states to detect pretextual invocations of the doctrine. The legality of humanitarian intervention under this scheme will not create incentives for the use of military force by governments which were previously deterred from using force by humanitarian intervention's illegality. Legalizing humanitarian intervention within certain limits strikes an effective balance between legitimate state sovereignty and the protection of human rights (Barry B., 1992-1993, pp. 157-158).

Traditionally, the term "humanitarian intervention" describes the threat or use of force by a state or group of states, designed to compel a sovereign to respect fundamental human rights in the exercise of its sovereign powers (Scheffer D., 1991-1992, p.264). According to this classic definition, to qualify as "humanitarian," the sole objective of the interven-

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tion must be to either end or prevent human rights violations (Farer T., 1991, p. 122). The idea of humanitarian intervention has expanded to cover interventions designed to ensure the safe delivery of humanitarian assistance to populations in dire need, as in the case of Somalia in 1992. Whether restricted to protecting human rights against violations committed by a sovereign or expanded to cover the provision of assistance, the classical definition of humanitarian intervention limits intervention to situations of pure humanitarian concern (Gordon R., 1996, pp. 43-45).

## The Use of Force on Humanitarian Grounds

Prior to the adoption of the United Nations Charter, a number of international military missions were undertaken for humanitarian reasons (Nowrot K., Schabacker E., 1998-1999, p.372).

The ratification of the United Nations Charter in 1945 severely curtailed the legality of unilateral military actions, including humanitarian interventions. Article 2(4) clearly prohibits "the threat or use of force against the territorial integrity or political independence of any state." This basic principle of non-intervention, grounded in the norm of state sovereignty, regulates international interventions in the post-Charter era. A limitation on the principle of non-intervention recognized in the United Nations Charter is found in Chapter VII, which permits the Security Council to authorize the use of force upon a finding of a threat or breach of international peace or when necessary for self-defense. It appears that with the ratification of the United Nations Charter, humanitarian intervention is only justified when there is a clear finding that the humanitarian situation implicates international peace. Consequently, the possibility of unilateral or unauthorized intervention appears completely precluded by the United Nations Charter" (Nowrot K., Schabacker E., 1998-1999, p.373).

In real-world practice, the UN is susceptible to the same sort of political pressures that any national legislative body faces, and thus quite often it will be unable to act even when it should. Supporters of intervention argue that the right to intervene should remain as a stopgap measure to be used when the Security Council is deadlocked and immediate action is required. Ostensibly, this right to intervene will be strictly circumscribed and governed by international law (Merriam J., 2001, p.123).

Traditionally, 'humanitarian intervention' is regarded as the use of military force in any form by a state against the other state targeted at coercing the latter to halt harsh violations of the human rights (Encyclopaedia of Public International Law, Edited by R. Bernhardt, 1992, p.926).

The fact that the United Nations adopts the promotion of human rights among its purposes does not contradict this finding. Although there is no general agreement on how to resolve a possible conflict between the different purposes and principles of the Charter, the order in which the purposes and principles are set forth indicates a substantive priority. In both the Preamble and Article 1, the prevention of war and the maintenance of international peace and security are listed before the promotion of human rights. Thus, the United Na-

tions Charter expresses a clear hierarchy by declaring peace "as the supreme value.., more compelling even than human rights." This does not mean human rights must always be subordinate to the maintenance of international peace and state sovereignty. It indicates, however, that the protection of human rights through military measures are primarily reserved to collective actions under the authority of the United Nations (Nowrot K. and Schabacker E., 1998-1999, pp.342-343).

Kofi Annan, the UN Secretary General (the 7th UN Secretary General in 1997-2006) suggested the Security Council to examine the possibility of coercive intervention according to the following criteria: 1) the violation of human rights and international humanitarian law; 2) ignoring the measures for the maintenance of peace; 3) the incapacity of local authorities to maintain order or their participation in violations; 4) limited and proportional use of military force which minimally affect local population (Helton A.C., Devecchi R. P., 2000, p.1).

Jacques Forster, Vice President of the Red Cross, in his keynote address at the Ninth Annual Seminar on International Humanitarian Law Geneva, March 2000, outlined the incompatibility of humanitarian action and military intervention. According to Forster, there is a clear-cut line between the outcome of humanitarian action and excessive military act. The humanitarian action targets at halting a conflict. In other words, it aims to defend the dignity of people and protect their lives, however, not to solve a conflict. In the opinion of the International Red Cross Committee, the humanitarian action cannot change the political action. These two realms should be clearly distinguished. Based on the same opinion, the humanitarian action cannot have a coercive nature. The experience showed that the humanitarian involvement either in political or military actions escalates the conflict rather than suspends it. The humanitarian action is successful only if the participants of such action act within the territory in need according to their regulations. Such environment is designated as 'humanitarian area'. The military intervention is necessary in observance with the humanitarian law and for the purpose of creating the relevant environment for the humanitarian action. The Humanitarian Intervention should not aim at military interventions (Humanitarian Intervention and International Humanitarian Law, 2000, pp.2-3).

Forster thinks that the use of military force by the international community can be applied only within the scope of the UN Charter. The International Humanitarian Law cannot be used to justify a military intervention since it has nothing to do with the use of force. Its role is strictly determined and limits the legitimacy of the use of armed force. In the course of a humanitarian action, the principle of neutrality and independence should be observed necessary to gain trust of all parties to the conflict. The peace can only be maintained by the actions framed within the mandate (Humanitarian Intervention and International Humanitarian Law, , 2000, pp.2-3).

## Preconditions and Criteria for the Humanitarian Intervention

Any framework proposed will have its critics; nevertheless, it

is not unreasonable to require certain basic criteria that must be met before a military operation can properly be called a humanitarian intervention (Merriam J., 2001, p.126).

The most common preconditions of humanitarian intervention are: a) massive and gross violation of human rights; b) exhaustion of all possible means of settlement of a dispute within the framework of the international law (Rukhadze N., 2009, pp. 48-49).

The criteria, a humanitarian intervention is to comply with are as follows: a) the intervention is to be undertaken only for the humanitarian purposes; b) the intervention should be multilateral and c) the intervention should be proportional (Rukhadze N., 2009, pp. 48-49).

In legalizing humanitarian intervention, the international community should follow certain criteria in a two-part inquiry. The first level consists of two absolute prerequisites. First, a state should use military force unilaterally only when verifiable and extreme human rights abuses exist that "shock the conscience. Only when human rights abuses are extreme is humanitarian intervention completely justifiable and beyond moral debate. Second, this use of force should only occur when the international organizations fail to fully address and prevent the extreme abuses. Collective action by the international community is inherently legitimate and always preferable to individual action (Barry B., 1992, pp.152-153).

The second level consists of supplemental caveats which do not have to be followed completely, but lend credibility to an intervention's legitimacy. These caveats are probative of the altruistic nature of the intervention. These caveats include a preference for multilateralism, a minimum use of force commensurate with preventing abuses, a relative disinterestedness by the intervenor in the affairs of the target state, and an exhaustion of peaceful measures to prevent the abuses. Because it is impossible to apply these caveats to every scenario, these caveats should not become absolute prerequisites (Barry B., 1992, p.153)

Determining the level of violations sufficient to justify intervention presents a dilemma. Inevitably, any lower limit established will meet with criticism from human rights groups. On the other hand, allowing intervention for any human rights violation is akin to having no doctrine at all; states may claim that policies that are counter to their own are "human rights violations" and elect to intervene. In order to justify military force, the human rights violations must meet two conditions. First, they must violate the highest norms of human rights - the right to life and the right to be free from physical abuse. Second, the violations themselves must be widespread and large in scale (Merriam J., 2001, p.129).

The term "human rights" encompasses a wide variety of physical, political, and economic rights, most of which were enumerated by the UN in the Universal Declaration of Human Rights. However, humanitarian intervention is a remedy designed only to protect the highest and most basic, physical human rights - the right to life, and the right to be free from torture and physical abuse. It would be hard to justify an aggressive military action to protect the right to marriage, the right to a free press, or the right to unionize all of which are enumerated in the Declaration. While these rights are very

important, they do not involve an immediate risk of physical injury or death, and they lack the urgency required to justify a war (Merriam J., 2001, p.130).

The source of the evidence is in many cases even more important for evaluating credibility than the content of the evidence. Ideally, the evidence provided will come from independent sources without an interest at stake in the outcome of the crisis. The closest thing to such an independent source is the United Nations itself; in theory, the competing interests of all the member states ensure that it operates with objectivity. Other sources widely regarded as credible will include the various nongovernmental organizations dedicated to protecting human rights, such as Helsinki Watch, Doctors Without Borders, and the International Red Cross. Finally, evidence provided by the intelligence agencies of the intervening state or organization can be used to augment the evidence provided by objective bodies. Evidence provided by a national intelligence agency may be suspect unless it is supported by evidence from other, disinterested sources (Merriam J., 2001, p.129).

To require that every other means must be exhausted would make every humanitarian intervention ineffective by virtue of being too late to prevent a tragedy. Exhaustion in the context of a humanitarian crisis should thus be a two-step process, with a "pre-crisis" phase and a crisis phase (Merriam J., 2001, p.131).

The sole objective of intervention must be to end the humanitarian emergency and prevent its resurgence. The purposes of the intervention should not be extended to include territorial conquest or liberation, the break-up of a state, or the toppling of a government. Such aims would destroy the disinterested humanitarian intent that is required for a legitimate intervention (Merriam J., 2001, p.133).

The use of force by the state should serve the protection of human rights when their lives and health are under threat. Therefore, according to the doctrine of humanitarian intervention, in order to consider the humanitarian intervention legitimate, it should be carried out for humanitarian purposes (Rukhadze N., 2009, pp. 53-54).

The humanitarian intervention should be multilateral (Benjamin B., 1992-1993, pp. 152-154). The more states that are involved in the intervention, the greater the legitimacy of the intervention, and therefore the less likelihood of an abuse of the doctrine. However, this should not be understood to require the presence of more than one state's military forces in the affected area. It may be that only one state will have the logistical capacity and requisite military power to intervene. Rather, this criterion requires that the endorsement of intervention be multilateral (Merriam J., 2001, p.135-136).

The criterion of proportionality should be observed during the humanitarian intervention. The humanitarian intervention should be followed by the stabilization of a situation. In other words, the intervention should not cause more severe consequences rather than its non-application. For the legitimacy of the humanitarian intervention, it should be proportional to the degree of force used by another party (Rukhadze N., 2009, p. 56).

## The NATO Humanitarian Intervention in Kosovo

The North Atlantic Treaty Organization carried out the humanitarian intervention in Kosovo, one of the former Yugoslavia provinces. Kosovo was mainly populated by Albanians who arrived from the neighbouring Albania and exercised the right to autonomy for many years. In 1989, this status was abolished that resulted in the resistance of Kosovo Albanians followed by their armed rebellion. In response, the central authority applied more severe and bloody measures against them. Specifically, these measures increased the severity of ethnic cleansing (having commenced at the time of abolishing their autonomy). Consequently, the hundred thousand refugees created economic hardship in neighbouring state (Alexidze L., Editor-In-Chief, 2003, p.415)

The joint measures of the UN, OSCE and NATO failed to generate any results. For the purpose of immediate dispute settlement, the NATO leadership decided to bomb the facilities of law enforcement authorities and the human resources of the central government positioned in Kosovo to force them leave the region. In 1998, this threat made the President of Yugoslavia Milosevic to agree on the deployment of OSCE observation mission and other monitoring agencies in Kosovo. However, it also failed to halt severe resistance victimizing the peaceful civilians. Eventually, Yugoslavia refused to sign the agreement which envisaged the restoration of Kosovo's autonomy (Alexidze L., Editor-In-Chief, 2003, pp. 415-416). In March 1999, the bombings started from Kosovo and continued beyond the entire territory of Serbia targeting the relevant facilities. It lasted for 78 days (Grant R., 1999, pp. 30, 37). The NATO air attack aimed at unconditional and safe return of the refugees (Merriam J., 2001, p.112).

The proponents of the doctrine of humanitarian intervention justify the intervention in Kosovo based on its humanitarian purposes.

The type of humanitarian crisis that prompts intervention is very likely itself a threat to state sovereignty. War crimes and crimes against humanity are crimes of universal jurisdiction precisely because they have a profound effect on the interests of all states. When war crimes go unpunished, they cause destabilization in surrounding states in the form of displaced refugees and the spread of armed conflict, which may lead to a larger war. It is thus in the general interest of all states to cooperate to prevent and punish war crimes, in order to prevent the outbreak of war and the resulting economic and political upheaval. (Merriam J., 2001, pp.117-118).

Prior to the humanitarian crisis of Kosovo, there was conflict between the Serbian military forces and the Kosovo Liberation Army for several years. The KLA attempted to protect the autonomy (the U.S. Department of State, 2000).

The United Nations High Commissioner for Refugees estimated that "the indiscriminate use of force by [Yugoslav forces] ... resulted in numerous civilian casualties and the displacement of over 230,000 persons from their homes. The UNHCR increased its estimate, stating "the year-long conflict has driven 400,000 people out of their homes (Merriam J.,

2001, p.137).

According to the UN Security Council Resolution N 1199, 50 000 refugees were left without shelter. The UNHCR reported children "dying in the cold" (Merriam J., 2001, p.141).

The Kosovo operation was preceded by months of diplomatic efforts to resolve the region's problems peacefully. The United Nations, the OSCE, NATO, the US, and the Balkans "Contact Group", all participated in increasingly urgent diplomatic moves in an effort to curb the violence and reach a political solution (Merriam J., 2001, pp.142-143).

In September 1998, the UN Security Council demanded from the Military Forces of Serbia to terminate the armed hostilities. The UN Security Council Resolution N1199 called for the ceasefire and required the parties to start dialogue between the Federal Republic of Yugoslavia and Albanian Authority of Kosovo. It would reduce the risks of a humanitarian catastrophe (Security Council Resolution, 1998).

The conflict resolution by diplomatic means culminated in February 1999 when the Contact Group (the USA, France, the Great Britain, Germany and Italy) reattempted a peaceful resolution of the conflict in Rambouillet (the surrounding area of Paris) by signing to the Peace Agreement. However, this attempt appeared to be vain. The Rambouillet Interim Agreement was signed by the Kosovo Albanians. The agreement prescribed to guarantee a political autonomy to Kosovo. The government of Yugoslavia disagreed to sign the document (Rambouillet Interim Agreement).

By early March 1999, the situation had become grave. Thousands were suspected dead or missing, and hundreds of thousands of refugees massed on the Yugoslav-Macedonian border were in immediate danger of losing their lives. A true humanitarian crisis now existed. At this time the UN should have intervened. However, the UN could not do so because the Security Council was deadlocked on whether to authorize military action. In the face of a paralyzed Security Council, and cognizant of the UN's earlier failure to avert the crisis in Bosnia, NATO elected to act unilaterally. The fact that the Security Council would not act allows NATO to rightfully claim that all other means had been exhausted (Merriam J., 2001, p.144).

The precedent set in Kosovo on exhaustion is clear and convincing - a state may unilaterally intervene only when all possible diplomatic initiatives have been pursued and the UN Security Council is unable to act. Future intervenors must ensure that they can establish an equally solid track record of diplomatic effort and UN deadlock (Merriam J., 2001, p.145).

Both the Kosovo leadership and the ethnic Albanian people welcomed the NATO intervention in Kosovo. On January 2, 1999, moderate Albanian political leader Ibrahim Rugova called for direct NATO intervention to secure the peace. In his New Years message, Rugova stated "we are convinced that the international verification mission and permanent NATO attention can calm down tensions in Kosovo." He went on to ask for NATO action, claiming that "only the deployment of NATO troops in Kosovo can bring about greater security for all the people - a precondition for the political settlement of the Kosovo problem." There was also wider evidence of a major-

ity opinion among the oppressed populace. When NATO forces finally occupied the region on June 12, 1999, enthusiastic and hopeful crowds waving banners welcomed the troops to Kosovo (Merriam J., 2001, p.146).

The self-imposed limited goals of the NATO operation have established a precedent for future humanitarian intervention. From the outset, NATO declared that it would cease hostilities once the Yugoslav army withdrew from Kosovo. NATO pointedly avoided demanding that Yugoslavia surrender sovereignty over the region. By clearly outlining the goals of the operation, NATO sent a clear message to other would-be intervenors that this operation should not be used to justify military intervention for non-legitimate means (Merriam J., 2001, p.149).

It is also worth noting that the NATO humanitarian intervention in Kosovo did not enjoy the full international support as it fell beyond the UN operation. In spite of this, the UN had never claimed that the Alliance was illegitimate in its action. Moreover, the UN sponsored the final NATO-Yugoslav peace talks signed on June 10, 1999. The NATO forces deployed in Kosovo under the auspices of the UN (Houston Simon, 1999, p. 1). These unofficial links between NATO and the UN confirm the impression that the UN has accepted (through lack of any significant condemnatory response) the NATO intervention (Merriam J., 2001, p.153).

In Security Council Resolution 1160, 31 March 1998 the Security Council acted under Chapter VII to impose an arms embargo on the FRY in accordance with Article 41. It therefore understood the situation to constitute a threat to international peace and security. It called upon all States to "act strictly in conformity with this resolution" (Chinkin C., 2000, p. 911).

In Security Council Resolution 1203, 24 October 1998 specific obligations were directed towards the Kosovo Albanian leadership: to comply with all relevant resolutions; to condemn terrorist actions; and to pursue its goals by peaceful means only. It also made demands of the Yugoslav Government: compliance with all relevant resolutions; full implementation of the Agreements of 15 October 1998 between itself and NATO; compliance with the OSCE Verification Mission and the NATO Air Verification Mission over Kosovo; and to be mindful of its primary responsibility for the safety and security of all diplomatic personnel and for the safe return of refugees and displaced persons (Chinkin C., 2000, p. 911).

Other States were only urged to provide personnel for the OSCE Verification Mission and resources for humanitarian assistance. It can be argued that the resolution envisaged the possibility of the use of force in its endorsement of NATO and OSCE agreements with Belgrade for the deployment of verifiers within Kosovo and its affirmation in paragraph that "in the event of an emergency, action may be needed to ensure their safety and freedom of movement"(Chinkin C., 2000, pp. 911-912).

This wording, however, assumes the use of force only for a specific and limited reason—the protection of the Verification Mission. It cannot be construed as a broader authorization of force. In the event, the Verification Mission left Kosovo immediately before the commencement of Operation Allied Force so concern for its safety did not figure in the decision to

use force (Chinkin C., 2000, p. 912).

It must be remembered that NATO's action, as State practice, will itself contribute to the affirmation of international law and thought must therefore be given to the precedent effect of the action (Chinkin C., 2000, p. 925).

## Conclusion

What is less clear is whether the intervention was "necessary", whether all other means of preventing the continuing violations of human rights had been sought, and whether the intervention was limited to humanitarian objectives (Chinkin C., 2000, p. 922).

A humanitarian intervention must be supported by many voices, and the existence of a humanitarian crisis be accepted by the world community as a whole (Merriam J., 2001, pp.135-136).

According to the International Law, the UN Security Council is responsible for the maintenance of international peace and security. In spite of this unfortunately mostly the United Nations could not make decisions timely to avoid international threats due to the interests of permanent members which can use the veto power and impede significant decision-making process in the Security Council. Based on the above-mentioned, the regional international organizations and states had to take responsibilities for maintaining peace regardless of violations of the requirements of the UN Charter. Simultaneously in such interventions, it is obligatory to meet preconditions and criteria of humanitarian intervention and achieve humanitarian purpose. Additionally, it should be taken into account that in the aforesaid situations there were no alternative tools to overcome the humanitarian crisis.

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