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RESPONSE TO LARGE-SCALE ATROCITIES: HUMANITARIAN INTERVENTION AND THE RESPONSIBILITY TO PROTECT

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Abstract. *The United Nations has shown recurrent inability to respond to international threats caused by severe human rights violations and thus failed to perform one of its main function—preservation of international peace and security in the world. This evidenced gaps in the United Nations, caused mainly by the veto right in the voting system within the Security Council and limited powers of the General Assembly. The international community gave a twofold answer to this problem: radical humanitarian intervention and the recent concept of the responsibility to protect. The main problem with regard to humanitarian intervention is its legality—its compliance with the prohibition of the use of force. The responsibility to protect does not clash with the prohibition of the use of force, but its legal implications are rather vague—being intensively discussed in the international forum, the responsibility to protect has not yet appeared in any legally binding international document. This article discusses the legal significance of humanitarian intervention and the responsibility to protect, and aims to determine how they affect, if at all, the regulation of the use of force in the international relations, as well as how they respond to the issue of large scale atrocities in the world.*

Keywords: *humanitarian intervention, responsibility to protect, human rights, prohibition of the use of force, the United Nations.*

Introduction

Respect for a state's sovereignty and non-intervention in the internal affairs of another state have been substantive components of the international legal order since the peace of Westphalia. Until the middle of the twentieth century human rights were considered to be an internal matter of each state. Therefore, state's sovereignty acted as an inviolable shield even in the cases of gross human rights violations within the state. However, the Charter of the United Nations (the Charter) recognized respect for human rights as one of the purposes of the Organization¹ and thus elevated the protection of human rights to a matter of international concern. With this idea another was clear: inviolability of state's sovereignty can no longer be absolute.

The Member States of the United Nations (UN) limited their sovereign rights by entitling the Security Council to act, even by using force, when international peace and security is threatened, including cases when it is threatened by severe human rights violations. Moreover, the 'Uniting for Peace' Resolution authorized the General Assembly to take over certain powers of the Security Council, when the latter is in a deadlock. Despite these powers of the two principal bodies, the UN is still not always able to avert humanitarian atrocities in the world. Tragic episodes in the recent history that the UN failed to respond evidence the gaps in the UN system. The international community suggested a twofold answer to this problem: first, it responded with unilateral military interventions falling outside the scheme of the Charter; second, it came up with the responsibility to protect concept, primarily focused on minimizing the need for radical interventions.

The aim of this article is to discuss the significance of humanitarian intervention and the responsibility to protect and to determine how they affect, if at all, the regulation of the use of force in international relations. In the broader view, it is aimed to consider the clash of and the possible balance between the two core values of the international legal order: protection of human rights and prohibition of the use of force.

1. Gaps in the United Nations System

One of the main purposes of the UN is to maintain peace and security in the world.² The division of the powers among the UN bodies in this field was clarified by the International Court of Justice (ICJ) in its Advisory Opinion in the *Certain Expenses* case³ and reaffirmed in the *Palestinian Wall* case⁴. The ICJ explained that the Security Council has a primary but not exclusive responsibility for the maintenance of international peace

1 Charter of the United Nations, 24 October 1945, 1 UNTS XVI. Article 1(3).

2 *Ibid.*, Article 1(1).

3 The International Court of Justice, *Certain Expenses in the United Nations*, Advisory Opinion, 1962, I.C.J. Reports, 151, 163.

4 The International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004, I.C.J. Reports, 136, 149.

and security. The General Assembly may also make recommendations in this field with the limitation not to recommend measures while the Security Council is dealing with the same matter unless the Council requests it to do so.⁵ Thus, both the Security Council and the General Assembly are responsible for international peace and security.

Nevertheless, forced starvation of Ethiopians in the 1980s, the genocide in Rwanda, murder of Kurds in Iraq, Kosovo atrocities in the 1990s are only a few of the examples when the powers of the two principal bodies of the UN proved to be insufficient to prevent humanitarian tragedies. Most importantly, the present-day reality evinces that the previous lessons of witnessing disastrous episodes have hardly been learned. The Darfur crisis, which started in 2003, was referred to as a genocide by the U.S. as early as in 2004⁶, while in 2008 the chief prosecutor of the International Criminal Court charged the President of Sudan with masterminding a genocide campaign.⁷ Continuing for seven years now, Darfur crisis has taken lives of more than 300 000 men, women and children already and left more than 2.6 million people displaced.⁸ Despite the effort of the UN peacekeeping mission, which was deployed in 2007,⁹ the conflict has not been put to an end. This evidences that peacekeeping missions are sometimes insufficient to stop grave violence. However, the UN has not shown initiative to undertake tougher measures and authorize the use of military force against the Government of Sudan. The aforementioned examples confirm the recurring inability of the UN to perform its main function—to preserve international peace and security. This inability is caused by two main reasons.

The first reason is the veto right of the permanent members of the Security Council, which may paralyze the Council and prevent it from action when such action is indispensable. Under Article 24(1) of the Charter, the primary responsibility for the maintenance of the international peace and security belongs to the Security Council. For that purpose the Security Council is also entitled to authorize the use of force in international relations, if necessary.¹⁰ To exercise its primary responsibility, the Security Council adopts decisions, what requires an affirmative vote of nine members, including the concurring votes of permanent members.¹¹ This wording implies a veto right—a negative vote by a permanent member of the Security Council on a proposed substantive decision.¹² By exercise of the veto right it is possible to block substantive decisions of the Security Council. Thus, if a decision concerning the measures aimed to restore peace and security

5 Charter of the United Nations, *supra* note 1, Article 12(1).

6 Powell, C. L. *Testimony before the Senate Foreign Relations Committee* [interactive]. Washington D.C., 9 September 2004 [accessed 01-07-2010]. <<http://geneva.usmission.gov/press2004/0910CrisisinDarfur.htm>>.

7 The International Criminal Court, *Case the Prosecutor v. Omar Hassan Ahmad Al Bashir*, pre-trial [interactive]. [accessed 05-07-2010]. <<http://www.iccpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200205/related%20cases/icc02050109/icc02050109>>.

8 Amnesty International USA [interactive]. [accessed 10-07-2010]. <<http://www.amnestyusa.org/darfur/darfur-history/page.do?id=1351103>>.

9 UNSC Res 1769 (31 July 2007), UN Doc S/RES/1769, para. 1.

10 Charter of the United Nations, *supra* note 1, Article 42.

11 *Ibid.*, Article 27(3).

12 Simma, B. *The Charter of the United Nations: a Commentary*. Oxford: OUP, 2002, p. 514.

in a certain region is blocked by the veto of a permanent member, the Security Council is precluded from any action. Evidently, given the differing views and interests of the five permanent members, the veto right is likely to be used when adopting crucial decisions with regard to serious international threats. For example, the main impediment to any stronger action by the Security Council with regard to the Darfur situation has been China, which owns a 40 per cent share of Sudan's main oil producing field, and Russia, which is thought to be the main arms supplier to the Sudanese Government.¹³ It exemplifies that the preservation of national interests of the permanent members of the Security Council may become an obstacle for the Council to perform its main duty and to protect global interests.

The second reason is the limited powers of the General Assembly in the field of international peace and security. The first five years after the adoption of the Charter were sufficient to show that the Security Council may be prevented from exercising its primary responsibility due to the voting system peculiarities. Therefore, in 1950 the General Assembly adopted the Resolution 377 ('Uniting for Peace') (the Resolution). The Resolution foresees that when the Security Council is in a deadlock 'the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or an act of aggression the use of armed force if necessary, to maintain or to restore international peace and security'.¹⁴ Thus, when the Security Council is in a deadlock, the Resolution transfers the responsibility to restore the peace to the General Assembly. However, the rights of the General Assembly provided for in the Resolution are weak. First, the General Assembly can only make recommendations. Although the recommendations of the General Assembly are authoritative, they are not legally binding, as opposed to the resolutions of the Security Council adopted under Chapter VII of the Charter. Second, pursuant to the Resolution, the General Assembly can recommend to use armed force only in the cases of the breach of peace or an act of aggression (but not in the cases of a threat to peace and security). Human rights atrocities can constitute a threat to international peace and security¹⁵, but not a breach of peace or an act of aggression. Therefore, the Resolution is futile in the cases of humanitarian crises and hardly provides an alternative when humanitarian threat to peace and security occurs, and the Security Council is incapable of an adequate action.

In conclusion, the system of the UN as initially foreseen by the founding fathers of the Organization is imperfect and is not always able to serve as a guardian of interna-

13 Zygar, M. *Behind the UN Security Council Resolution: Chinese, Russian and Indian Oil Interests in Sudan* [interactive]. Global Research - Centre for Research and Globalization, 19 September 2004 [accessed 20-07-2010]. <<http://www.globalresearch.ca/index.php?context=va&aid=612>>; Reynolds, P. Pressure builds over Sudan embargo [interactive]. *World Affairs Correspondent BBC*. 8 May 2007 [accessed 20-07-2010]. <<http://news.bbc.co.uk/2/hi/6634639.stm>>.

14 UNGA Res 377 (V) (3 November 1950), UN Doc A/RES/377 (V).

15 Under UNSC Res 1296 (19 April 2000), UN Doc S/RES/1296; UNSC Res 1314 (11 August 2000), S/RES/1314, 'the deliberate targeting of civilian populations <...> and the committing of widespread violations of international humanitarian and human rights law in situations of armed conflict may constitute a threat to international peace and security'.

tional peace and security. The outrageous consequences these deficiencies may lead to increase the relevance of the problem.

2. Radical Response of the International Community: Humanitarian Intervention

2.1. The Lack of a Uniform Position towards the Legality of Humanitarian Intervention

The recurring failures of the UN to adequately respond to grave human rights violations on a massive scale did not leave the international community indifferent. Its reaction took the form of radical unilateral military interventions: Belgian interventions in Congo (1960, 1964, 1968), U.S. intervention in the Dominican Republic (1965), Indian intervention in East Pakistan (1971), Vietnamese use of force against Cambodia (1979), U.S. intervention in Grenada (1983) and Panama (1989/90), NATO intervention in Kosovo (1999)¹⁶ are only several of such examples. These interventions, falling outside the regulation of the Charter, received controversial appraisals. The international community admitted that it ‘failed in [the] response to the agony of Rwanda and thus have acquiesced in the continued lose of human lives’¹⁷, regretted its indifference and called for a review of the entire system in order to strengthen the reactive capacity.¹⁸ Nevertheless, when a few years after the Rwandan tragedy NATO demonstrated a completely opposite reaction to the Kosovo atrocities, it prompted fierce debates and a claim was brought against the Member States of NATO in the *Legality of the Use of Force* case. This case proved to be inadmissible and never reached the merits stage, thus leaving the ICJ without an opportunity to pronounce on the crucial question: whether unilateral military interventions on humanitarian grounds can find justification under the international law, and how do they comply, if at all, with the prohibition of the use of force provided in the Article 2(4) of the Charter and rooted in the customary international law.

2.2. Humanitarian Intervention and its Relation to the Charter of the United Nations

Article 2(4) of the Charter obliges every Member State to ‘refrain in its 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’. Preparatory works of the Charter confirm that Article 2(4) was intended to be an ‘all-inclusive prohibition; the phrase ‘or in any other manner’ was designed to ensure that there should be no loopholes’¹⁹. Nevertheless, it does not mean that this

16 Chesterman, S. *Just War or Just Peace? Humanitarian Intervention and International Law*. Oxford: OUP, 2001, p. 60–140.

17 Secretary-General. *Report on the Situation of Rwanda*. 31 May 1994, UN Doc S/1994/640.

18 *Ibid.*

19 Statement by a delegate of the United States to the San Francisco Conference 6 UNCIO 335 Summary Report of Eleventh Report of Committee (4 June 1945) cited in Chesterman, S., *supra* note 16, p. 49.

prohibition is absolute. The Charter itself authorizes two exceptions: the right of self-defense and enforcement measures undertaken by the Security Council under Chapter VII.²⁰

However, the contentious part is whether there may be any additional exceptions to the use of force prohibition that would cover the cases of the unilateral use of force for humanitarian reasons. In other words, whether the prohibition embedded in Article 2(4) may be modified through the customary international law beyond the exceptions provided in the Charter. The jurisprudence of the ICJ seems to answer this question in affirmative. In the judgment in the *Nicaragua* case, the ICJ held that ‘[t]he United Nations Charter <...> by no means covers the whole area of the regulation of the use of force in international relations’²¹. Christine Gray interprets this statement of the ICJ as recognizing the Charter provisions as capable of change over time through the state practice.²² Yet it is important that the prohibition of the use of force was indicated by the International Law Commission (ILC) as a conspicuous example of the *jus cogens* norms.²³ The ICJ quoted this position of the ILC in the *Nicaragua* judgment.²⁴ The *jus cogens* norm can only be modified by a subsequent norm of general international law having the same character.²⁵ Taking all this into consideration, it can be concluded that even if the prohibition of the use of force as it appears in the Charter can be modified through the state practice, this state practice should evidence the emergence of another *jus cogens* norm, and for that purpose it should be extremely consistent, widespread, uniform and, moreover, concern the protection of the value of a major importance in the international law.

2.3. Humanitarian Intervention and the Clash of the Two Core Values of the International Law

Article 1 of the Charter sets the purposes of the Organization. Both the protection of human rights and the maintenance of international peace and security, which is inconceivable without the prohibition of the use of force in international relations, are among these purposes. None of the purposes is supposed to be sacrificed for the sake of another—balance and harmony is what governs the relation between them. However, the problem of the legality of humanitarian intervention highlights the collision between the protection of human rights and the prohibition of the use of force, for it inherently raises a question: which of the two competing values should prevail?

20 Charter of the United Nations, *supra* note 1, Articles 42, 51.

21 The International Court of Justice, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, 1986, I.C.J. Reports 14, 94, para.176.

22 Gray, C. *International Law and the Use of Force*. Oxford: OUP, 2004, p. 7.

23 The International Law Commission, *Draft Articles on the Law of Treaties with Commentaries, Yearbook of the International Law Commission*, ii., 1966 p. 247.

24 *Nicaragua case*, *supra* note 21, 90, para. 190.

25 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) UNTS, vol. 1155, Article 53, p. 331.

International law scholars of the pre-Charter period, when the use of force as a means of solving international disputes was not absolutely excluded from the international law, inclined to support the idea of a just humanitarian intervention. For example, one of the most authoritative internationalists of that time, Sir Hersch Lauterpacht, suggested that humanitarian intervention balances the protection of human rights and peaceful international relations. As he explained, the rationale of humanitarian intervention is that peace is more endangered by severe violations of human rights than by attempts, through intervention, to ensure the respect for a human personality.²⁶ Moreover, he noticed that the Charter ‘in recognizing the promotion of respect for fundamental human rights and freedoms as one of the principal objects of the Organization, marks a further step in the direction of elevating the principle of humanitarian intervention to a basic rule of organized international society’²⁷. Admittedly, while Lauterpacht pronounced on the balance between the non-use of force and the protection of human rights, he did not refer particularly to unilateral intervention. However, it is important to look more carefully at his point of departure: although states are predominant subjects of the international law, they are only fictional institutions. In his words, ‘behind the personified institutions called States, there are in every case individual human beings to whom international law is addressed’²⁸. Presumably having the same point of departure, Judge Huber contended that ‘by denying the right of intervention in extraordinary cases, one would arrive at intolerable results: international law would become helpless in the face of injustices tantamount to the negation of human personality’²⁹. Thus, as the dominant pre-Charter position was to consider international law as serving primarily the interests of individuals, and states—only ‘personified institutions’ created by those individuals for their own sake, it follows that human rights should prevail over the states’ sovereignty at least in the most emergent cases.

Nevertheless, modern international law tends to favour the Charter’s regulation rather than possible customary modifications of it, allegedly foreseeing the right of humanitarian intervention as another exception to the prohibition of the use of force. Although the ICJ has never pronounced on the issue of humanitarian intervention, it denied the possibility to use force for the protection of human rights in the *Nicaragua* case. The ICJ held that while a state ‘might form its own appraisal of the situation as to respect for human rights <...> the use of force could not be the appropriate method to monitor or ensure such respect’³⁰. In the *Armed Activities in the Territory of Congo* case the ICJ provided a similar conclusion: ‘all States in the region must bear their responsibility for finding a solution that would bring peace and stability. The Court notes, however, that

26 Lauterpacht, H. *The International Protection of Human Rights*. In Lauterpacht, H., et al. (eds.). *Recueil des Cours* [Collected Courses]. vol. 70, i. Hague: Hague Academy of International Law, 1947, p. 10.

27 Lauterpacht, H. (ed.). *Oppenheim’s International Law*. London: Longmans and Co, 1947. 6th ed., i., p. 280. The same formulations repeated in 7th ed. and 8th ed.

28 Lauterpacht, H. *Private Law Sources and Analogies of International Law*. London: Longmans, Green and Co. Ltd., 1927, p. 156.

29 *British Claims in the Spanish Zone of Morocco*, 2 Reports on International Arbitral Awards, 1924, p. 615, 639.

30 *Nicaragua* case, *supra* note 21, 134 para. 268.

this widespread responsibility of the States of the region cannot excuse the unlawful military action³¹. However, it is not clear whether the ICJ intended to form a general rule that the use of force cannot be excused by the aim to protect human rights, or these pronouncements should be limited only to those particular cases. The position of Sir Ian Brownlie is much more evident in rejecting the right to unilateral humanitarian intervention. He contends that those international lawyers who support the right of humanitarian intervention place reliance upon a number of ambiguous episodes rather than the practice of states generally.³² Malcolm Shaw also agrees that humanitarian intervention is difficult to be reconciled today with Article 2(4) of the Charter.³³ Dame Rosalyn Higgins, on the other hand, is of a different position. She contends that humanitarian intervention is not contrary to and does not violate Article 2(4) of the Charter. According to her, this provision prohibits exclusively the use of force with the hostile intent, and humanitarian intervention has the sole intent to protect the rights of innocent people, therefore, it complies with Article 2(4) of the Charter.³⁴

All in all, although there is no consensus among the scholars as to the legality of humanitarian intervention, the prevailing current view leans towards the rejection of such right. While customary modifications of the prohibition of the use of force are not categorically rejected, the crucial question is whether there is sufficient evidence in the state practice to confirm that the right of humanitarian intervention has emerged under the customary international law, and, as the next section of this article shows,—the affirmative answer to this question is rather premature.

2.4. Validity of the Claims of the Customary Nature of Humanitarian Intervention

The ICJ in the *North Sea Continental Shelf* case clarified that to prove the existence of a customary rule, two elements need to be demonstrated: first, a settled state practice of acting in a way, required by that rule; second, the belief of states that such actions are obligatory (the so called *opinio juris* element).³⁵ The ICJ required the same elements to be fulfilled to establish a customary rule in the *Nicaragua* case.³⁶ However, *opinio juris*, as it was explained by the most prominent scholars, including Sir Hersch Lauterpacht³⁷ and Sir Ian Brownlie³⁸, although is a necessary ingredient, the existence of it can be as-

31 The International Court of Justice, *Armed Activities in the Territory of Congo (Democratic Republic of the Congo v. Uganda)*, 2005, ICJ Reports, para. 152.

32 Brownlie, I. *Principles of Public International Law*. 6th ed. Oxford: OUP, 2003, p. 712.

33 Shaw, M. N. *International Law*. Cambridge: CUP, 2008, p. 1155.

34 Higgins, R. *Problems and Process: International Law and How We Use It*. Oxford: OUP, 1994, p. 245–246.

35 The International Court of Justice, *North Sea Continental Shelf* (Federal Republic of Germany/Denmark, Federal Republic of Germany/Netherlands), 1969, I.C.J. Reports 3, 43, para. 77

36 *Nicaragua* case, *supra* note 21, paras. 184–185.

37 Lauterpacht, H. *The Development of International Law by the International Court*. Cambridge: CUP, 1958, p. 380.

38 Brownlie, I., *supra* note 32, p. 8.

sumed on the basis of evidence of general practice. Therefore, to prove that a customary rule has been established, it may be sufficient, in certain cases, to show that there is a widespread state practice, which is so extensive that evidences the *opinio juris* itself.

Since 1945, there have been around twenty instances of interventions on humanitarian grounds.³⁹ Nevertheless, there have been instances of the state practice evidencing quite the contrary—the reluctance of states to resort to the use of force in the conflicts within other states, even though those conflicts amount to genocide. Despite the Rwanda lessons, what regards the ongoing Darfur crisis, states are acting in the same way. While this may be seen as a mere indifference of states, it can as well be regarded as a confirmation that states do not believe having a right to unilaterally resort to the use of force in order to stop a humanitarian disaster in another state. The reaction of the international community to the NATO intervention in Kosovo seems to support the latter. This intervention was strongly opposed by the major powers—Russia, China and India.⁴⁰ The Secretary-General generalized the reactions of states to NATO actions in Kosovo by expressing his disapproval to unilateral resort to force without the authority of the Security Council: ‘what is clear is that enforcement actions without Security Council authorization threaten the very core of the international collective security system founded on the Charter of the United Nations. Only the Charter provides a universally accepted legal basis for the use of force’⁴¹. Finally, in the Ministerial Declaration produced by the Meeting of Foreign Ministers of the Group of 77 held three months after the NATO action, the ministers ‘rejected the so-called right of humanitarian intervention, which has no basis in the UN Charter or international law’⁴². This statement at that time represented the opinion of 132 states.

Consequently, the legality of humanitarian intervention remains contentious. It is hard to speak about the consensus within the international community with regard to this issue. Therefore, the conclusion is that while the Charter does not preclude the emergence of the right of humanitarian intervention, claims of the customary nature of this right are premature. Uncertainties in establishing two elements of a custom make the claims as to the customary right of humanitarian intervention doubtful, especially when this concerns the modification of the prohibition of the use of force, which is by general acknowledgment a *jus cogens* norm.

39 Chesterman, S., *supra* note 16, p. 60–140.

40 Lavrov, S. Statement in Security Council meeting ‘NATO military action against FRY’ United Nations [interactive]. 24 March 1999 [accessed 20-08-2010]. <http://www.un.int/russia/statemnt/sc/1999/99_03_24.htm#english>; UNSC Press Release NATO action against Serbian military targets prompts divergent views as Security Council holds urgent meeting on situation in Kosovo (24 March 1999) UN Doc SC/6657; Sharma, K. Statement in Security Council meeting ‘NATO military action against FRY’, United Nations [interactive]. 24 March 1999 [accessed 20-08-2010]. <<http://www.un.int/india/ind110.htm>>.

41 Annan, K. *Preventing War and Disaster: A Growing Global Challenge. Annual report on the work of the Organization*, 1999, UN Doc Supplement No.1 A/54/1, para. 66.

42 Ministerial Declaration adopted in the Twenty-third Annual Meeting of the Ministers for Foreign Affairs of the Group of 77. New York, 24 September 1999, para. 69.

3. The Concept of the Responsibility to Protect as an Alternative to Humanitarian Intervention

3.1. The Background of the Responsibility to Protect

The responsibility to protect was first mentioned in 2001, when the International Commission on Intervention and State Sovereignty (the Commission) released ‘The Responsibility to Protect’ report, which redefined collective security by introducing a concept of a shared responsibility. The Commission was formed under the sponsorship of the Government of Canada to develop a global political consensus about how and when the international community should respond to emerging humanitarian crises.⁴³ The report emphasized that where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, it becomes the responsibility of the international community to intervene for protection purposes.⁴⁴ These principles became known as the responsibility to protect and since the report of the Commission other governments, international officials, academics and civil society organizations have contributed to the concept’s evolving meaning in the international law.

The responsibility to protect doctrine was elevated to the global UN level, when it appeared in the two paragraphs of the 2005 World Summit Outcome document. These paragraphs acknowledged that ‘[e]ach individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity’ and that in the cases when it fails to do so, the international community should be ‘prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII (...)’⁴⁵. The relevant paragraphs of the World Summit Outcome were later quoted by the Security Council.⁴⁶ Before the responsibility to protect doctrine was unanimously accepted in the World Summit, it had also been mentioned in the reports of the Secretary-General.⁴⁷

Recent developments of the doctrine on the UN level have been reflected in the Secretary-General’s Ban Ki Moon’s report ‘Implementing the Responsibility to Protect’. This is the first comprehensive document from the UN Secretariat on the responsibility to protect entitled to implement the concept. The report clarifies the notion of the responsibility to protect, outlines measures and actors involved in rendering the norm operational. Based on the relevant paragraphs of the World Summit Outcome document, the Secretary-General suggested a three-pillar strategy: 1) the protection responsibilities

43 The Establishment and Progress of the Commission [interactive]. [accessed 15-08-2010]. <<http://www.iciss.ca/progress-en.asp>>.

44 The International Commission on Intervention and State Sovereignty. *Responsibility to Protect Report*, December 2001, p. XI.

45 UNGA Res 60/1 (24 October 2005), *2005 World Summit Outcome*, UN Doc A/Res/60/1, paras. 138-139.

46 UNSC Resolution 1674 (28 April 2006), UN Doc S/Res/1674 (2006), para. 4.

47 The High Level Panel on Threats. Report ‘*Challenges and Change, A More Secure World, Our Shared Responsibility*’, 2004, paras. 199–203.; Secretary-General, Report ‘*In Larger Freedom: Towards Development, Security and Human Rights for All*’, 21 March 2005, UN Doc A/59/2005, p. 35, 59.

of the state, 2) international assistance and capacity building, and 3) timely and decisive response to prevent and stop genocide, ethnic cleansing, war crimes and crimes against humanity. The Secretary-General recommended that the General Assembly meet to consider, based on this report, how the Member States will take the 2005 World Summit commitment forward.⁴⁸ In July 2009, the General Assembly, on the basis of the Secretary-General's report, started the debate on the implementation of the responsibility to protect. The outcome of this is the Resolution, by which the principles listed in the Charter and the relevant paragraphs of the World Summit Outcome were reaffirmed and a decision to continue its consideration on the responsibility to protect was made.⁴⁹

3.2. The Legal Significance of the Responsibility to Protect

The World Summit Outcome document recognized states' responsibility "to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII"⁵⁰. In the words of Noam Chomsky, "[a]t most the phrase sharpens the wording of Article 42 on authorization for the Security Council to resort to force"⁵¹. He further explains the reason why the right of humanitarian intervention has been hotly contested while the responsibility to protect was quite easily affirmed—it is that the rhetoric of the responsibility to protect adds nothing substantially new to the Charter's regulation.⁵²

It is hard to argue on this point, because the wording of the relevant paragraphs of the World Summit Outcome is sufficiently clear to assure that it is not the aim of this concept to modify the existing regulation of the use of force in the international relations, and thus it is not the euphemism of humanitarian intervention. The concept leaves the UN the sole authority to authorize the use of force. However, although it does not directly modify legal provisions, it definitely has a certain impact.

First, it focuses on the prevention of humanitarian crises, encouraging the states to stay vigilant. The outcome of this is, for example, the early warning system, which was advocated already in the Report by the Commission. The Commission indicated that to date, early warning about deadly conflicts had been essentially ad hoc and unstructured. The Commission pointed out that the UN headquarters was often identified as the logical place to centralize early warning. However, efforts to improve the UN early-warning capacity had so far fallen short, and essential intelligence-gathering and analytical capacity remained the non-UN sources. Therefore, the Commission emphasized the crucial need for a greater involvement by regional actors with intimate local knowledge and better location to understand local dynamics.⁵³ These thoughts have already been ap-

48 Secretary-General, *Report on Implementing the Responsibility to Protect*, 12 January 2009, UN Doc A/63/667.

49 UNGA Resolution 63/380 (7 October 2009), UN Doc A/Res/63/38.

50 World Summit Outcome, *supra* note 45, para. 139.

51 Chomsky, N. *Thematic Dialogue on the Responsibility to Protect* [interactive]. United Nations, New York, 23 July 2009 [accessed 29-08-10]. <<http://www.un.org/ga/president/63/interactive/protect/noam.pdf>>.

52 *Ibid.*

53 *Responsibility to Protect Report*, *supra* note 44, p. 21–22.

plied in practice. For example, the African Union established the early warning system mechanism, which aims at facilitating prompt response and action to prevent the outbreak and escalation of conflict.⁵⁴ Although the African Union by ‘response’ does not refer to the use of force, the use of force would most likely be unnecessary, if the conflict is detected at an early stage.

Second, the responsibility to protect concept may influence the states to take certain legal measures on the regional level. For example, the African Union included a provision, which asserts ‘the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity’⁵⁵ in its Constitutive Act. In other words, the Constitutive Act legitimizes humanitarian intervention on the regional level. Yet the legality of this provision is questionable as it is not clear how it reconciles with the Charter. It is usually explained that the right to intervene enshrined in the Constitutive Act of the African Union is firmly rooted in consensualism: states themselves consented to be intervened, and thus a consent legitimizes such an intervention.⁵⁶

In any case, although the Constitutive Act was adopted in the year 2000 (before the concept of the responsibility to protect was brought up on the world level), the responsibility to protect can encourage similar developments in the problematic regions. For example, despite past and present cases of human rights abuses, there are still no provisions in the regional Asia–Pacific mechanisms pertaining to the possibility of intervention in extreme cases of genocide, ethnic cleansing and crimes against humanity or reflecting the principles of the responsibility to protect. However, there are recent signs evidencing the perspectives of the improvement of the situation.⁵⁷

Consequently, the concept of the responsibility to protect is not as radical as the humanitarian intervention and does not change the existing regulation of the use of force in international relations. Being not yet included in any legally binding international document, it is rather *de lege ferenda*. Nevertheless, it has certain implications in the international law: it encourages conventional and customary developments on the regional level.

54 African Union Commission, Conflict Management Division of the Peace and Security Department, *Framework for the Operationalization of the Continental Early Warning System*. 2008 [accessed 01-08-2010]. <http://www.africa-union.org/root/AU/AUC/Departments/PSC/PSC/CD/5_Framework.pdf>.

55 Art. 4 (h) of the Constitutive Act of the African Union, 2000 [interactive]. [accessed 10-07-2010]. <http://www.au2002.gov.za/docs/key_oau/au_act.htm>.

56 For example, Kuwali, D. *The End of Humanitarian Intervention: Evaluation of the African Union’s Right of Intervention* [interactive]. [accessed 15-07-2010]. <http://www.hks.harvard.edu/cchrp/pdf/AJCR_vol9_no1_2009.pdf>; Gandois, H. *Sovereignty as Responsibility: Theory and Practice in Africa*, paper presented at the annual meeting of the ISA’s 49th Annual Convention [interactive]. San Francisco, 26 March 2008 [accessed 15-07-2010]. <<http://oxford.academia.edu/documents/0001/2134/GandoisISA2008paper.pdf>>.

57 For example, the establishment of the Asia–Pacific Centre for the Responsibility to Protect, the mission of which is to advance the responsibility to protect within the Asia–Pacific region and worldwide, and support the building of the capacity to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity (<http://www.r2pasiapacific.org/>).

4. Relation and Implications of Humanitarian Intervention and the Responsibility to Protect

Different states have different perceptions as to the relation between the humanitarian intervention and the responsibility to protect. During the General Assembly plenary debate on the responsibility to protect, Cuba, Sudan, Pakistan and the Democratic People's Republic of Korea insisted on referring to the responsibility to protect as identical to humanitarian intervention.⁵⁸ This is explainable by the fact that weak states view the responsibility to protect with distrust, suspecting it to be another Western tool for legitimate interventions into the weaker states. However, the responsibility to protect has different purposes than humanitarian intervention.

The responsibility to protect is far more constructive than humanitarian intervention, and while coercive military intervention may be a necessary component of the concept, according to the Responsibility to Protect report, 'prevention is the single most important dimension of the responsibility to protect'⁵⁹. Furthermore, by placing the responsibility to protect firmly on each state, the focus is on the protection of civilians from harm rather than on the rights of the foreign powers to intervene. Powerful and wealthy states have the responsibility to provide assistance to the weak states in ensuring the reduction of differences between ethnical groups, supporting the good legitimate governments, etc. If the prevention fails, the response (whether military or not) to an emerging humanitarian catastrophe should be collective and authorized by the UN Security Council.

Humanitarian intervention should only come into play in the extremely emergent situations, where the use of force is indispensable and the UN is prevented from actions because of its system imperfections, specifically, the deadlock of the Security Council. However, the responsibility to protect, being focused on the prevention of conflicts, should reduce the likelihood of such situations to the minimum. In other words, the responsibility to protect and humanitarian intervention have different purposes and roles: the former primarily aims to enhance the prevention of atrocities in the world, while the latter is meant to be a response to emergency situations when all other means fail to produce any effective result. Thus, from the teleological point of view, the responsibility to protect and humanitarian intervention complement each other: while the appropriate and effective implementation of the responsibility to protect should avert humanitarian catastrophes in the world, humanitarian intervention would remain the last resort in case the prevention fails and the UN is incapable of any action.

Nevertheless, the practical implementation of both of these institutes is much more complicated. First, while the responsibility to protect has decent purposes, when it comes to its application in practice, the problem of selectivity occurs. Chomsky indicates

58 International Coalition for the Responsibility to Protect, *Report on the General Assembly Plenary Debate on the Responsibility to Protect*, 15 September 2009, 7.

59 *Responsibility to Protect Report*, *supra* note 44, p. XI.

a few examples. Nothing serious is contemplated about the Eastern Congo catastrophe, where multinationals are once again being accused of violating UN resolution against illicit trade of valuable minerals and thus funding the murderous conflict. In another domain, there is no thought of invoking even the most innocuous prescriptions of the responsibility to protect to respond to massive starvation in the poor countries. The UN recently estimated that the number of those facing hunger has passed a billion, while the World Food Program of the United Nations has announced major cutbacks of aid because the rich countries are reducing their meager contributions, giving priority to bailing out banks. Several years ago UNICEF reported that 16,000 children died every day from the lack of food, many more from easily preventable diseases. The figures are higher now—in southern Africa alone there is a Rwanda-level killing. There is surely ample warning, but no thought of action under the responsibility to protect though it would be easy enough if the will was there.⁶⁰ These examples show that powerful states are likely to be highly selective about the regions they provide assistance to. It happens quite often, that if they do not see personal gain, they refrain from investing their money just for sole purposes of humanity and solidarity.

Second, it is doubtful whether the right to unilateral humanitarian intervention has emerged under the customary international law. When the legality of the right to unilateral humanitarian intervention is so uncertain, there are serious doubts whether a state, a group of them or an international organization would intervene another state to stop massacre thereby risking to expose itself to international responsibility. In an absence of any clear regulation it is unreasonable to expect a member of the international community to jeopardize itself for the sake of another state, especially if it does not have any secondary interests in the region concerned.

Therefore, admittedly, there is no clear answer as to whether the concept of the responsibility to protect and the alleged right of unilateral humanitarian intervention solve the problem of humanitarian crises in the world. However, there seem to be no easier alternative solutions. The only other alternative would be to strengthen the UN ability to properly respond to the threats to international peace and stability, thus, to avert situations of the deadlock. This could be done in two main ways: first, the reform of the Security Council's voting system—the elimination of the veto right at least with regard to the decisions on responsive military actions; second, the extension of the powers of the General Assembly, namely, in the cases when the Security Council is prevented from action. However, these solutions are extremely difficult to reach, because they would require amendments to the Charter. Therefore, it is essential to focus on the prevention of humanitarian crises, i.e. to further develop the concept of the responsibility to protect by encouraging and enhancing its implementation on the regional level, where it can be the most effective.

60 Chomsky, N. *supra* note 51.

Conclusions

Both the Security Council and the General Assembly have powers with regard to responding to the threats to international peace and security, *inter alia*, humanitarian catastrophes. However, the veto right of the permanent members of the Security Council may become an obstacle and prevent the Security Council from actions that are indispensable for halting an emerging humanitarian crisis. In such cases the General Assembly has too limited powers to overtake the responsibilities of the Security Council. Therefore, the UN turns to a deadlock leaving the international community to helplessly witness another tragedy.

The concern of the international community about the ineffectiveness of the UN in the cases of grave violations of human rights on a massive scale resulted in two supposed solutions: humanitarian intervention and the responsibility to protect. While the former is an extremely radical response challenging the existing international regulation of the use of force, the latter is much more moderate. The responsibility to protect focuses on the prevention of crises and even if the prevention fails, it emphasizes the sole authority of the UN to authorize the use of force against the state within which the crisis emerges.

From the theoretical point of view, humanitarian intervention and the responsibility to protect could complement each other. While the responsibility to protect is focused on the prevention of crises and provides support for problematic regions, humanitarian intervention could remain an *ultima ratio* in the situations of extreme emergency, the possibility of which the responsibility to protect should reduce to a minimum. However, in practice the states proved to be selective about the regions to provide support to. Of course, the concept is still developing and the situation may improve in the future, but it remains debatable for now. Furthermore, the legality of humanitarian intervention is contentious; therefore, the states are unlikely to resort to unauthorized use of force by risking to be exposed to international responsibility. On the other hand, the only alternative is to strengthen the ability of the UN to properly respond to international threats. This is, however, very difficult to reach, because amendments to the Charter would be necessary. Therefore, it is crucial to further develop the concept of the responsibility to protect by encouraging and enhancing its implementation on the regional level, where it can be the most effective.

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ATSAKAS Į DIDELIO MASTO ŽIAURUMUS – HUMANITARINĖ INTERVENCIJA IR PAREIGOS APSAUGOTI KONCEPCIJA

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Santrauka. Vienas pagrindinių Jungtinių Tautų tikslų – užtikrinti taiką ir saugumą pasaulyje. Tačiau ši tarptautinė organizacija ne kartą nesugebėjo atsakyti į tarptautines grėsmes, sukeltas sunkių žmogaus teisių pažeidimų, taip parodydama, kad Jungtinių Tautų sistemoje yra trūkumų. Tai daugiausia lemia veto teisės panaudojimas Saugumo tarybos balsavimo sistemoje bei per menkos Generalinės asamblėjos galios. Šie trūkumai neretai užkerta kelią Jungtinėms Tautoms imtis atsakomųjų veiksmų į tarptautines grėsmes – Ruandos, Darfuro tragedijos yra pavyzdžiai, liudijantys Jungtinių Tautų neefektyvumo tokiais atvejais pasekmių rimtumą. Tarptautinė bendrija į šią problemą pateikė dvilypią atsakymą: humanitarinę intervenciją bei pareigos apsaugoti koncepciją. Šiame straipsnyje analizuojamas šių dviejų institutų teisinis reikšmingumas – kiek tai keičia, jei apskritai keičia, tarptautinį teisinį jėgos nenaudojimo reguliavimą bei kaip tai prisideda prie didelio masto žiaurumų problemos sprendimo.

Pareigos apsaugoti principas daugiausiai nukreiptas į humanitarinių krizių prevenciją. Humanitarinė intervencija – jėgos panaudojimas prieš kitą valstybę, siekiant sustabdyti humanitarinę krizę joje – yra radikalus atsakas esant kraštutinėms situacijoms. Taigi teoriniu požiūriu humanitarinė intervencija ir pareigos apsaugoti principas galėtų papildyti vienas kitą – humanitarinė intervencija išliktų ultima ratio esant kraštutinėms situacijoms, kurių atsiradimo galimybę pareigos apsaugoti principas sumažintų iki minimumo. Tačiau praktikoje tokia dviejų koncepcijų harmonija ir jų įgyvendinimo efektyvumas yra apsunkinti valstybių selektyvumo bei teisinio reguliavimo netikslumo problemomis. Pagrindinė humanitarinės intervencijos problema yra jos teisėtumas – (ne)suderinamumas su jėgos naudojimo draudimu. Jungtinių Tautų Chartijos 2(4) straipsnis uždraudžia naudoti jėgą tarptautiniuose santykiuose – šis draudimas įtvirtintas ir tarptautinėje paprotinėje teisėje. Chartija nenumato teisės į humanitarinę intervenciją kaip jėgos nenaudojimo išimties, todėl pagrindinis klausimas yra – ar tokia teisė egzistuoja tarptautinėje paprotinėje teisėje. Valstybių praktikos ir opinio juris – dviejų tarptautinio papročio elementų – analizė rodo, kad tokie tvirtinimai kol kas yra per ankstyvi.

Pareigos apsaugoti koncepcija neprieštarauja esamam tarptautiniam jėgos naudojimo reguliavimui. Tačiau jos teisinė reikšmė yra neaiški – pareiga apsaugoti nenumatyta jokiai teisiškai įpareigojančiame tarptautiniame dokumente, dėl to ji kol kas laikytina de lege ferenda. Vis dėlto pareigos apsaugoti koncepcija skatina valstybių praktiką vystyti tam tikra linkme, ypač stiprinant regioninę humanitarinių krizių prevenciją. Taigi svarbu toliau plėtoti šią koncepciją, nes jos efektyvus įgyvendinimas paskatintų keisti jėgos naudojimo reguliavimą tarptautinėje teisėje, o šie pokyčiai būtini tam, kad būtų užtikrintas adekvatus atsakymas į dabartinius iššūkius.

Reikšminiai žodžiai: humanitarinė intervencija, pareigos apsaugoti principas, žmogaus teisės, jėgos naudojimo draudimas, Jungtinės Tautos.

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