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**PROHIBITION OF THE USE OF FORCE
AND LEGALITY OF HUMANITARIAN INTERVENTION**

Summary

This article addresses the problem of the legality and legitimacy of humanitarian intervention in the light of contemporary international law and practice. The Author discusses this issue in the context of a potential conflict between State's sovereignty and its obligations under international human rights law. He points to the new concepts aimed at the legitimization, from the point of view of international law, of the use of force in defence of humanitarian values.

Keywords: International law, sovereignty, use of force, humanitarian intervention, human rights, Responsibility to Protect (R2P)

Introduction

The research issues suggested by the title of this article are broad and wide-ranging. Moreover, they refer to one of the fundamental principles of general international law, both positive and customary, which is the prohibition of aggression. This prohibition was extended in the Charter of the United Nations

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(hereafter “the UN Charter”) to include the prohibition of threat and the use of force and is now considered a peremptory norm. Such norms, which Article 53 of the 1969 Vienna Convention on the law of treaties defines as *ius cogens* norms, create obligations *erga omnes*.¹ R. Kwiecień emphasises the existence of peremptory norms and obligations *erga omnes* enable a hierarchisation of the rights and obligations resulting from international law.² In the context of this article, it is therefore necessary to refer to the axiological foundation of international law. This foundation rests on two core values, namely peace and justice, which should complement each other in the process of making and enforcing international law. Do they indeed complement each other? Can the priority of justice, understood particularly as the necessity to ensure the protection of the fundamental human rights as an obligation *erga omnes*, go as far as to justify the use of armed force without being legitimised by the UN Charter, hence without a mandate from the United Nations Security Council (hereafter “the Security Council”) required under Chapter VII of the Charter? This brings us to another question, based on what is nowadays a frequently discussed dichotomy: the sovereignty of States or effective protection of human rights? How far can we go in relativising the second (or perhaps the first) of the above two values: the value of peace? What is ultimately an arbitrary decision of using armed force without the legal basis specified in the UN Charter, as a sort of common constitution of the international community, undermines the very concept of international justice.³

The above questions alone show that the wide issues this paper is concerned with reflect its theoretical merit on the one hand, and, on the other, its particular relevance to international practice. Furthermore, they reflect the most significant directions in the evolution of international law with regard to its most important legal institutions. These institutions significantly evolved as part of the progressive development and codification of international law. That evolution in turn was clearly related to the profound transformation of international law

¹ This character of the rule prohibiting the threat or use of force was indicated by the International Court of Justice in the case concerning Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*), Merits, Judgement, ICJ Reports 1986, p. 100–101.

² R. Kwiecień, *Teoria i filozofia prawa międzynarodowego. Problemy wybrane*, Warszawa, 2011, p. 172.

³ For more on the inviolability of fundamental human rights as a value of international law, see A. Buchanan, *Justice, Legitimacy, and Self-Determination. Moral Foundations for International Law*, Oxford–New York, 2004, p. 71 *et seq.*

itself as a unique legal system, quite distinct from national law. One of the most characteristic developmental features of international law is its transition from the law of war to a law essentially regulating peaceful relations among States. A natural consequence of this process was the profound evolution of the permissibility of the use of force, and especially armed force. For centuries, international law accepted that the use of armed force was at the discretion of a sovereign State, while the *ius ad bellum* was perceived to be an element of a State's capacity to act and thus of its international personality. This acceptance was unconditional, even though various philosophical and religious doctrines were being used as the basis for such theoretical constructs as just war (*bellum iustum*) and unjust war (*bellum iniustum*). These concepts, however, did not automatically become legal norms, meaning that there were no normative rules prohibiting, or even only limiting, the permissibility of war.⁴

The evolution of international law, which in the present context involved a transition from the unconditional permissibility of the use of armed force as a lawful act, through limiting by treaty means the ability to conduct wars, to the total prohibition of war, significantly influenced the shape and character of contemporary international relations. What also changed was the essence of international law and its perception – it was no longer the law of war, but instead the law essentially regulating peaceful relations among States. Modern international law has gone even further by imposing in Article 2 (4) of the UN Charter a stricter prohibition, namely the prohibition of the threat or use of force.⁵ Authentic interpretation of this prohibition can be found in several resolutions of the United Nations General Assembly (hereafter “the UN General Assembly”), such as: the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, adopted on 21 December 1965;⁶ the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, adopted on 24 October 1970;⁷ and

⁴ For more on this, see T. Gadkowski, *Problematyka samoobrony na tle zakazu użycia siły zbrojnej w prawie międzynarodowym*, “Ruch Prawniczy, Ekonomiczny i Socjologiczny” 2013, Vol. 3, p. 5 *et seq.*

⁵ UN Charter, 1 UNTS XVI. For the Polish text, see Dz.U. (Journal of Laws) of 1947, No. 23, item 90.

⁶ UNGA Res. 2131 (XX).

⁷ UNGA Res. 2625 (XXV).

the Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, adopted on 18 November 1987.⁸

In order to discuss the issues suggested by the title of this article, it seems necessary to refer to the above-mentioned philosophical doctrine of just war (*bellum iustum*) and unjust war (*bellum iniustum*). The intellectual starting point of this doctrine was undoubtedly the Christian concept of natural law – a reference which seems entirely appropriate. Modern legal concepts legitimising the use of armed force comprise distinct elements of the Christian doctrine of just war whose expanded form and moral rationale was formulated by St. Thomas Aquinas. He revised the Augustinian theory of war and included the doctrine of just war in moral theology. Indeed, assuming that the underlying principle of natural law – *bonum est faciendum et prosequendum et malum vitandum* – is a moral one, it was obvious and reasonable for Thomas Aquinas to base his just war theory on moral criteria.⁹ It is only understandable, therefore, that according to this doctrine, a war could be just if the following three conditions were satisfied: firstly, it was waged by a sovereign authority (*auctoritas principis*); secondly, it had a just cause (*recta causa*); and thirdly, both belligerents had righteous intentions (*recta intentio*). In practice, States often justified their acts of war on moral grounds, and did so not because of a perceived legal obligation but rather for psychological reasons.¹⁰

It should be noted, however, that this and other philosophical and religious doctrines that differentiated wars and justified the legality of some of them were still a long way from limiting the permissibility of war and ultimately banning it under international law. In the 19th century, at the time when sovereign nation-States were being created, the classical form of the doctrine of just and unjust war was rejected. As a consequence, the existing concept of just war began to be interpreted as justified and authorised resistance to aggression, whereas unjust war meant plain aggression.¹¹ While an analysis of these philosophical

⁸ UNGA Res. 42/22 (VI Committee Res.)

⁹ Cf. R. Kwiecień, *Aksjologia prawa międzynarodowego a siła zbrojna w perspektywie historycznej*, in: *Świat współczesny wobec użycia siły zbrojnej*, ed. J. Kranz, Warszawa 2009, p. 28.

¹⁰ W. Czapliński, A. Wyrozumska, *Prawo międzynarodowe publiczne. Zagadnienia systemowe*, Warszawa 2014, p. 856.

¹¹ Cf. J. Gilas, *Prawo międzynarodowe*, Toruń 1977, p. 363.

concepts of differentiating and evaluating wars is not the aim of this paper, it is nevertheless essential to make at least a passing reference to them in the context of new trends in international law and practice regarding the use of armed force.¹² One of these trends is illustrated by the concept of humanitarian intervention, in which elements of the Christian doctrine of just war are clearly visible.

Prohibition of the use of force as a peremptory norm of international law

The normative nature of the prohibition of the use of force was established in the UN Charter of 26 June 1945.¹³ The wording of the relevant provision is a development of previous international legislation that marked the consecutive stages of the process of limiting the permissibility of war and its ultimate prohibition. This prohibition was formulated in the 1928 Kellogg–Briand Pact which banned war as a way of solving international disputes among States and an instrument of national policy in their relations with one another.¹⁴ This pact is justifiably considered landmark international regulation that enabled the transition from the *ius ad bellum* to the *ius contra bellum*.¹⁵

The UN Charter provides for an absolute prohibition of aggressive war, which forms the basis of the modern international legal order as a *ius cogens* norm.¹⁶ In light of the International Court of Justice's (ICJ) judgement on the Nicaragua case, this prohibition is not only a treaty obligation, but is also supported by customary law.¹⁷ The UN Charter repeats the obligation of settling disputes by peaceful means and, in fact, reinforces it by elevating the status of the principle

¹² For a classic analysis of this issue, see H. Grocjuż, *O prawie wojny i pokoju* (translated into Polish by R. Bierzanek), Vol. I, II, Warszawa 1957.

¹³ For the text of the UN Charter, see Dz.U. (Journal of Laws) of 1947, No 23, item 90.

¹⁴ For the text of the Pact, see 94 LNTS 57. For the Polish text, see Dz.U. (Journal of Laws) of 1929, No 63, item 489. For a commentary, see e.g., M. Król, *Zagadnienie agresji w prawie międzynarodowym*, Wilno 1939, p. 40 *et seq.*

¹⁵ See: Y. Dinstein, *War, Aggression and Self-defence*, Cambridge 2003, p. 78 *et seq.*; R. Kwiecień, *Teoria i filozofia prawa międzynarodowego. Problemy wybrane*, Warszawa 2011, p. 200.

¹⁶ W. Czapliński, *Skutki prawne nielegalnego użycia siły w stosunkach międzynarodowych*, Warszawa 1993.

¹⁷ Case concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America); ICJ Reports 1986, p. 95. For a commentary, see K. Łasak, *Użycie siły*, in: *Leksykon prawa międzynarodowego publicznego*, eds. A. Przyborowska-Klimczak, D. Pyć, Warszawa 2012, p. 528.

of peaceful settlement of disputes to that of one of the fundamental principles of international law, as listed in Article 2 (3). Provisions which are fundamental for the prohibition of the use of force are stipulated in Article 2 (4) of the UN Charter which defines the obligations of UN member States as follows: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations". Regardless of the wording of the prohibition, it is frequently considered that the above provision represents both a treaty and customary norm of modern international law – a peremptory norm.¹⁸ It should also be added that this prohibition was repeated in similar terms in subsequent international documents adopted by the United Nations (UN), and especially in the above-mentioned resolutions of the UN General Assembly: UNGA Resolution 2131 (XX), UNGA Resolution 2625 (XXV), and UNGA Resolution 42/22.

In practice, the wording of the provisions of the UN Charter prohibiting the threat or use of force pose numerous interpretation problems. The main cause of the difficulties is the very fact that what is being interpreted is one of the most fundamental obligations of States under modern international law. Another reason is the lack of legal definitions of basic terms used mostly in Article 2 (4) but also in other provisions of the Charter that are relevant to this prohibition. These issues have been extensively discussed in the literature with reference to such terms as "armed aggression", or "aggression".¹⁹ In the context of the present article, however, we should consider especially the different interpretations and definitions of the title term "force".

The core question that has been, and still is, raised in the literature regards whether the term "force" refers only to armed force, or also to its other forms, such economic force. In its widest sense, this word denotes any form of direct and indirect coercion, exerted not only through military, but also economic or political means. Nevertheless, the military aspect of such coercive action is crucial for a narrowed-down definition. Applied to the context of the UN Charter, these doubts raise the following question: does the term "force", as used in

¹⁸ E.g. W. Czaplinski, A. Wyrozumska, *Prawo międzynarodowe...*, p. 859.

¹⁹ Polish literature on this subject is extensive, see e.g.: J. Balicki, *Pojęcie agresji w prawie międzynarodowym*, Warszawa 1952; W. Morawiecki, *Walka o definicję agresji w prawie międzynarodowym*, Warszawa 1956; T. Gadkowski, *Agresja i jej nowe rozumienie u progu XXI wieku*, in: *Stary kontynent w nowym tysiącleciu*, ed. Z. Drozdowicz, Poznań 2002, p. 75 et seq.

Article 2 (4) of the Charter, refer only to armed force, which would be the narrow interpretation, or does it also cover other types of force, in particular economic force, as the broad interpretation of the term would suggest? An example often quoted in the literature is an amendment to the draft of that article of the UN Charter proposed by Brazil on behalf of a group of developing countries. The amendment aimed at including economic force in these provisions but was rejected.²⁰ We should note here that the Preamble of the Charter uses the term “force”, but only in the context of armed force.

As part of a comprehensive discussion of these issues, we should mention the detailed analysis of the topic in A. Jacewicz’s monograph. Based on grammatical analysis of the provisions of Article 2 (4) of the Charter, Jacewicz allows both the narrow and broad interpretation of the term “force”. The analysis performed by this author in the course of logical interpretation does not, in his opinion, produce enough compelling arguments to resolve the matter in favour of one of the two options. From the perspective of teleological interpretation, however, and especially in light of the UN’s principal objective of maintaining peace and security as well as in light of systemic interpretation, particularly in the context of the principles of international law specified in the UN Charter, the author’s view is unequivocally in favour of the broad interpretation of the term “force”.²¹

This view appears to be confirmed in some of the resolutions of the UN General Assembly. Without doubt, the most representative example is the above-mentioned Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations of 24 October 1970. The Declaration, adopted by consensus, is the codification of sorts of the legal principles of peaceful coexistence, among which the principle prohibiting the threat or use of force takes a particularly prominent position.²² In reference to the UN Charter, the Declaration defines the universal character of this principle by stipulating that all States have the duty to refrain in their relations with one another from the threat or use of force against the

²⁰ J. Symonides, *Zasada powstrzymania się przez państwo w stosunkach międzynarodowych od uciekania się do groźby lub stosowania siły*, Zeszyty Naukowe Uniwersytetu Mikołaja Kopernika w Toruniu 1969, Vol. 37, p. 71 *et seq.*

²¹ A. Jacewicz, *Pojęcie siły w Karcie Narodów Zjednoczonych*, Warszawa 1977, p. 159 *et seq.*

²² See e.g. J. Symonides, *Zakaz użycia siły we współczesnych stosunkach międzynarodowych*, “Stosunki Międzynarodowe” 1990, Vol. 11, p. 11 *et seq.*

territorial integrity or political independence of any other State, or in any other manner inconsistent with the purposes of the UN. In the provisions concerning the prohibition of interference in the internal affairs of States, the Declaration assumes the broad interpretation of the term “force”, and thus provides that: “No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind”. Similar wording is found in Article 32 of the Charter of Economic Rights and Duties of States, adopted on 12 December 1974.²³ It explicitly provides that: “No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights”. The above observations suggest one additional comment. The principle prohibiting the threat or use of force is obviously related to the other principles of international law specified in the UN Charter, and particularly in the provisions of Article 2. This connection is particularly evident in relation to the principle of non-interference in the internal affairs of States, as has already been pointed out when quoting the provisions of the 1970 Declaration. As regards the definition of the term “force”, some authors conclude therefore that even if we assume that economic force does not fall within the material scope of Article 2 (4), it clearly falls within the scope of Article 2 (7), concerning non-interference in the internal affairs of States.²⁴

Another argument for the broad interpretation of the term “force” is the fact that the fundamental regulations of international law prohibit the use of indirect force, understood as a State’s involvement in the use of direct force by another State. These are mainly, albeit not only, situations where a State allows its territory to be used for armed action against a third State. Such prohibition is explicitly formulated in the above-mentioned UN General Assembly Resolution 2625 (XXV), in the part concerning the prohibition of the use of force. It reads that: “Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force”. The ICJ specifically referred to these provisions in the above-quoted

²³ UNGA Res. 3281 (XXIX).

²⁴ W. Czaplinski, A. Wyrozumska, *Prawo międzynarodowe...*, p. 684; T. Gadkowski, *Problematyka samoobrony...*, p. 11.

judgement in the Nicaragua case, when the Court determined the scope of the prohibition of the use of force in customary law.²⁵

The wording of Article 4 (2) of the UN Charter allows the claim that in order to determine the scope of the prohibition of the threat or use of force, it is necessary to refer to the purposes of the UN, which are explicitly aimed at maintaining international peace and security. It is in this context, it would seem, that we should interpret the specific behaviours of States involving the use of force and especially armed force. Furthermore, the broad definition of the prohibition of threat or use of force, as adopted in the UN Charter, does not imply absolute prohibition. Nonetheless, the use of force is lawful only in situations defined in the Charter itself. They are: individual or collective self-defence (Article 51), use of force as part of the Security Council sanctions regime (Article 42), and the use of force against enemy States from the Second World War (Article 53).

According to R. Kwiecień, conformity with the Charter is a fundamental prerequisite for a given instance of the use of force to be deemed legal and legitimised.²⁶ This represents a so-called restrictive interpretation of the prohibition provided for in Article 2 (4) of the UN Charter, which limits States' ability to implement the *ius ad bellum* to the situations enumerated in the Charter.²⁷ Some authors, therefore, refer to the doctrine of just war and claim that the provisions of the UN Charter opened up a possibility of "lawful war" – a war that qualifies for the three exceptions to the imperative prohibition of the use of force.²⁸ A different interpretation of the prohibition in Article 2 (4), which may be described as extensive, draws on the literal interpretation of these provisions, thus the use of force will be unlawful only if it directly violates the territorial integrity or political independence of a State, or if it constitutes an action carried out in any other manner inconsistent with the purposes of the UN.²⁹ In reality, the latter interpretation allows States to undertake and legalise a far wider catalogue of actions involving the use of force. In the context of international practice, it

²⁵ ICJ Reports 1986, p. 126. For a commentary, see W. Czapliński, A. Wyrozumska, *Prawo międzynarodowe...*, p. 862.

²⁶ R. Kwiecień, *Teoria i filozofia...*, p. 201.

²⁷ W. Czapliński, *Interwencja w Iraku z punktu widzenia prawa międzynarodowego*, "Państwo i Prawo" 2004, Vol. 1, p. 19.

²⁸ For instance, R. Kwiecień, *Aksjologia...*, p. 74; the author refers to J.L. Kunza, *Bellum iustum and bellum legale*, "American Journal of International Law" 1951, Vol. 3, Issue 45, p. 528.

²⁹ For a commentary, see e.g. W. Czapliński, *Odpowiedzialność za naruszenie prawa międzynarodowego w związku z konfliktem zbrojnym*, Warszawa 2009, p. 20 *et seq.*

would be justified to say that this interpretation is broader than *de iure* exceptions to the principle prohibiting the use of armed force. According to that practice, the catalogue of *de facto* exceptions is considerably wider and reflects new trends in the use of force, the legality and legitimacy of which is in the process of being justified by emerging legal concepts. One of such concepts is the possibility of legalising the use of armed force by a State or States as a form of intervention (*interventio*).

Humanitarian intervention

“Intervention” is a very broad term which applies to a wide range of actions conducted on a varied scale. In the most general terms, the word denotes individual or collective authoritative interference by States or an international organisation in the internal affairs of another State. Such interference may be of a diplomatic, economic, or military nature. It should be added that international law provides for general prohibition of interfering in the internal affairs of States, which is specified in particular in Article 2 (7) of the UN Charter. The provisions of this article prohibit intervening in matters which are essentially within the domestic jurisdiction of every State, and this prohibition belongs to the catalogue of fundamental principles of modern international law. Although its scope is not precisely defined, we can assume that what lies at the core of this prohibited interference is an element of coercion, which is the most characteristic of military interventions but may be present in any other situation involving the use of force, and particularly armed force. Every instance of the use of force without a mandate from the Security Council, required under Chapter VII of the UN Charter, needs to be categorised. International practice shows that interventions without a mandate from the Security Council do take place, albeit with various intensity and mixed results. Such actions have been described as, e.g., intervention by invitation, intervention for the protection of citizens abroad, intervention to combat terrorism, intervention countering the proliferation of weapons of mass destruction, or democratic intervention. However, the most sophisticated legal concepts justifying the use of armed force without Security Council authorisation are undoubtedly those involving humanitarian intervention. As highlighted by J. Kranz, armed action carried out within the framework of humanitarian intervention is “more or less widely criticised for relativising the prohibition of

the use of armed force”.³⁰ Interestingly, it comprises certain elements which have in the past substantiated the above-mentioned doctrine of just war, as will be discussed below.

Humanitarian intervention is the subject of a vast body of literature that provides many definitions of this kind of military operation.³¹ As such, it is usually understood as the threat or use of force by a State, a group of States, or an international organisation directed against another State in order to protect its citizens from the effects of mass violations of human rights.³² An interesting definition of humanitarian intervention is quoted after the Danish Institute for International Studies by J. Zajadło. This definition describes such intervention as: “coercive action by states involving the use of armed force in another state without the consent of its government, with or without authorisation from the United Nations Security Council, for the purpose of preventing or putting to a halt gross and massive violations of human rights or international humanitarian law”.³³

Intervention defined in this way should be distinguished from intervention for the protection of citizens abroad, which is undertaken and carried out without a mandate from the Security Council.³⁴ The international legality of the latter does not raise considerable doubts, although that does not mean it is unreservedly accepted.³⁵ Of a different nature are military operations undertaken and carried

³⁰ J. Kranz, *Między wojną a pokojem: świat współczesny wobec użycia siły zbrojnej*, in: *Świat współczesny...*, p. 131.

³¹ E.g.: J. Zajadło, *Legalność i legitymizacja humanitarnej interwencji*, “Państwo i Prawo” 2004, Vol. 1, p. 3 *et seq.*; J. Zajadło, T. Sykuna, T. Widlak, *Humanitarian Intervention. Reflections of the special workshop at the 23rd IVR World Congress*, Gdańsk 2010; A. Szpak, *Interwencja humanitarna – aspekt prawny*, Toruń 2005, p. 8 *et seq.*; T. Nardin, M.S. Williams, *Humanitarian Intervention*, New York 2006. For an extensive bibliography on this topic, see: *Supplementary Volume to the Report of the International Commission on Intervention and State Sovereignty. The Responsibility to Protect. Research, Bibliography, Background*, Canada, December 2001, p. 227 *et seq.*

³² S. Murphy, *Humanitarian Intervention. The United Nations in an Evolving World Order*, Philadelphia 1996, p. 11 *et seq.*; see also F.K. Abiev, *The Evolution of the Doctrine and Practice of Humanitarian Intervention*, The Hague–Boston–London 1999.

³³ J. Zajadło, *Legalność i legitymizacja...*, p. 13; the English text comes from: Danish Institute of International Affairs, *Humanitarian Intervention: Legal and Political Aspects*, Copenhagen 1999, p. 11.

³⁴ S. Sykuna, *Interwencja humanitarna*, in: M. Balcerzak, S. Sykuna, *Leksykon ochrony praw człowieka*, Warszawa 2010, p. 153 *et seq.*

³⁵ Examples from international practice include military operations of the United States in Granada (1983), and Panama (1989), or Russia’s operations in Georgia (2008).

out to counter gross and massive violations of human rights committed by States on their own territory and against their own people. In practice, such a situation may happen in various States, namely dictatorships, as well as so-called failed States, rogue States, or ethnically diverse States, in which similar actions usually constitutes ethnic cleansings. Instances of mass and often extremely brutal violations of human rights – which are sadly present in contemporary international practice – validate the question of options for effective response of the international community which would be both realistic and consistent with the UN Charter. The international community's passive attitude may be, and indeed is, perceived as condoning such situations, whereas an active attitude that involves taking action and requires the use of force raises, and will continue to raise, various questions and doubts regarding in particular the legality and legitimacy of actions such as humanitarian intervention.

It is often noted in the literature that the origins of humanitarian intervention, and especially of the conditions for its permissibility, lie in the tradition of *bellum iustum*. It underwent considerable development at the end of the 20th century. Indeed, the 1990s are often referred to as a decade of humanitarian intervention.³⁶ It was during that decade that interventions were carried out in countries such as Somalia (1992), Rwanda (1994), Haiti (1992), and Yugoslavia (Kosovo – 1999).³⁷ They received mixed evaluation, with NATO's military intervention in Kosovo proving the most controversial. Its legality and legitimacy remains a bone of contention and a source of deep divisions.³⁸

Authors concerned with humanitarian intervention generally point to its four basic elements. Firstly, it is the form in which it takes place, i.e. the threat and the use of armed force.³⁹ Secondly, it is the entity (or entities) which undertake and carry out the intervention, i.e. a State, a group of States, or an international organisation. Thirdly, it is the cause for the intervention, i.e. a mass violation of human rights leading to a humanitarian crisis. It should be mentioned here that the fundamental norms of international law, which include the prohibition of

³⁶ The origins of humanitarian intervention are exhaustively discussed in: M. Kaldor, *Decade of Humanitarian Intervention: The Role of Global Civil Society*, in: *Global Civil Society Yearbook 2001*, eds. H. Anheier, M. Kaldor.

³⁷ See e.g. W. Czaplinski, A. Wyrozumska, *Prawo międzynarodowe...*, p. 501 *et seq.*

³⁸ E.g., The Independent International Commission on Kosovo, *The Kosovo Report. Conflict, International Response, Lessons Learned*, Oxford 2000.

³⁹ J. Zajadło questions the claim that a threat of the use of force alone should be considered actual intervention, see: J. Zajadło, *Legalność i legitymizacja*, p. 12.

genocide, or the prohibition of war crimes and crimes against humanity, have an *erga omnes* effect, meaning that it is in the interest of every State, thus also the international community as a whole, to abide by them. Moreover, some authors note that humanitarian intervention is a form of armed self-help that forces States to observe the fundamental norms of international law, which have an *erga omnes* effect. Consequently, if a violation of these norms inflicts damage on all States, then it is in the interest of all States to undertake and carry out such intervention.⁴⁰ Fourthly and lastly, it is the purpose of the intervention, which should doubtless be protecting the population of a third State from mass violations of human rights. As a rule, the protected parties are therefore the citizens of the State in which a humanitarian intervention is taking place. In practice, however, military operations carried out as humanitarian interventions are not free of the influence of political and economic factors which amount to the intervening State (or States) fulfilling its own objectives aimed at asserting or reinforcing its political dominance in a given region.

The wider discussion of humanitarian intervention has many different aspects. It has been noted, for instance, that no intervention involving the use of military force can be humanitarian, since such military action implies a form of coercion and the use of force. According to some scholars, the very term “humanitarian intervention” is therefore a semantic contradiction. On the other hand, refraining from taking action in the form of a humanitarian intervention by no means implies neutrality. In the moral dimension, to abstain from acting may be equal to taking the aggressor’s side; yet, according to the same moral standards, the protection of victims should take precedence over the protection of aggressors. Thus, the problem can be presented in the following way: if an armed intervention without Security Council authorisation undertaken to protect human rights that are being violated on a mass scale cannot be accepted as humanitarian, can non-intervention in this case be accepted as such?⁴¹ This contrast accurately reflects the highly complex nature of and dilemmas surrounding humanitarian intervention which must be considered from a moral, as well as political and legal standpoint.

⁴⁰ For instance, J. Kranz, *Między wojną a pokojem...*, p. 141.

⁴¹ Interestingly, some humanitarian interventions received *ex ante* authorisation from the Security Council (e.g., Rwanda, Somalia), while others were carried out without such authorisation (e.g., Kosovo).

Is it possible, however, to justify the claim that the practice of conducting humanitarian interventions without Security Council authorisation established a customary norm of international law and that this norm would legalise such interventions? The answer to this question cannot be a positive one. Even if practice is present (*usus*), it is neither universal, nor consistent. Furthermore, even greater doubts are raised by the lack of *opinio iuris*, which is necessary for a customary norm to be established. At best, therefore, we can talk of the process of establishing such a norm, or of it being *in statu nascendi*.

The above notwithstanding, if we assume that humanitarian intervention can be justified on moral and political grounds, then, even if we would rather not describe it as legal, we can surely talk of its legitimacy under contemporary international law. To do that, we can draw on the terminology used to support the doctrine of *bellum iustum*.⁴² This claim brings us to another point, namely that the conditions for just war are a sort of prototype of the criteria used for justifying humanitarian intervention.⁴³ The literature usually provides six conditions for the permissibility of humanitarian intervention. J. Zajadło categorises them as five objective criteria and one overriding subjective criterion.⁴⁴ They are the following:

1. A just cause (*recta causa*) which justifies the humanitarian intervention and is a direct reference to the doctrine of *bellum iustum*. As already emphasised above, a just cause is provided by a mass violation of human rights leading to a humanitarian crisis. Such is, undeniably, the classification of acts of genocide and, albeit not as readily accepted, that of crimes of war, crimes against humanity, and ethnic cleansings.
2. Right intention (*recta intentio*) which includes humanitarian motives, and in particular the willingness to stop the violations and a desire to restore just order.
3. Appropriate assessment of the effects of the intervention indicating a positive humanitarian outcome or, in other words, reasonable

⁴² P. Zajadło-Węglarz, *Interwencja humanitarna*, in: *Leksykon prawa międzynarodowego publicznego*, eds. A. Przyborowska-Klimczak, D. Pyć, Warszawa 2012, p. 88 *et seq.*

⁴³ E.g. J. Zajadło, *Studia Grotiana*, Gdańsk 2004, p. 185 *et seq.*; M. Fixdal, D. Smith, Humanitarian Intervention and Just War, "Mershon International Studies Review" 1998, Vol. 42, p. 285.

⁴⁴ J. Zajadło, *Legalność i legitymizacja...*, p. 13 *et seq.*

prospects of halting the mass violations of human rights as a result of the intervention.

4. The last-resort nature of military action. Intervention should be considered as a last resort, thus only when all available peaceful means have been exhausted. This condition is debatable since delaying action may exacerbate the humanitarian crisis resulting from a mass violation of human rights.
5. Observance of the norms of international humanitarian law of armed conflict during military operations undertaken within the framework of humanitarian intervention. The entity or entities carrying out a humanitarian intervention should abide by the standards of international humanitarian law, i.e. act with utmost care in that respect (*cum diligentia maxima*).
6. The legitimacy of the entity or entities authorised to carry out the intervention (right authority). This is a profoundly significant issue in the context of international law, and is related to the above question of legality and legitimacy of humanitarian intervention. Intervention undertaken on the basis of a mandate from the Security Council does not raise doubts. The remaining problem is that of the legality of intervention without this authorisation. What we are dealing with here is a clear conflict of values, namely a conflict between the international order based on the sovereignty of States on the one hand, and, on the other, the wider concept of justice with its moral and ethical dimensions in a situation of mass and brutal violations of fundamental human rights, including the right to live. The following two arguments may justify such intervention: firstly, the above-mentioned *erga omnes* effect of the fundamental norms of international law and secondly, the duty of States and international organisations to act in accordance with the principle *in dubio pro humanitatem*.

Final remarks

Discussing humanitarian intervention in the context of the prohibition of the threat or use of force requires several fundamental questions to be answered, including in particular the question of the legality and legitimacy of

humanitarian intervention under contemporary international law. The difficulty of these questions is increased by the fact that, when considering the institution of humanitarian intervention, we must take into account the potential conflict between a State's sovereignty and its obligations under international human rights law. If we adopt the restrictive interpretation of those provisions of the UN Charter which concern the lawful use of force, finding a compelling reason for carrying out a humanitarian intervention without the authorisation of the Security Council will be extremely difficult. We can obviously refer to obligations *erga omnes* resulting from international protection of human rights, as well as to the changing paradigm of sovereignty in international relations, and to the axiological order underlying the whole of international law, including the UN Charter. However, it would be advisable to try to achieve a comprehensive *de lege ferenda* approach to humanitarian intervention. Considering all the approaches to humanitarian intervention without Security Council authorisation discussed above, as well as the obvious challenges of implementing the required UN reform, it seems that a particularly interesting proposal is that of establishing, by treaty or customary means, a subsidiary right of humanitarian intervention outside the auspices of the UN Security Council.⁴⁵ At the same time we should not forget about a new legal concept which represents emerging trends in the use of force at the international level. It is the concept of the Responsibility to Protect which is believed to be free of the above-mentioned weaknesses of the concept of humanitarian intervention and as such provides its alternative.⁴⁶ A discussion of this topic was initiated by the Report of the International Commission on Intervention and State Sovereignty, prepared and published in 2001.⁴⁷ In its basic form, this concept represents a shift from the absolute definition of sovereignty towards sovereignty seen as responsibility. Indeed, sovereignty implies dual responsibility: classical external responsibility of States to respect the sovereignty of other States and internal responsibility to respect the dignity

⁴⁵ *Ibidem*, p. 15.

⁴⁶ For instance, V. Bilkova, *The Responsibility to protect – New beginning or end of the road for humanitarian intervention*, "Czech Yearbook of International Law" 2001, p. 75 *et seq.*; R. Thakur, *The United Nations, Peace and Security: From Collective Security to Responsibility to Protect*, Cambridge 2006, p. 71 *et seq.*; M. Swatek-Evenstein, *The 'Turn to History' in International Law and the Responsibility to Protect*, in: *Responsibility to Protect. From Principle to Practice*, eds. J. Hoffmann, A. Nollkaemper, Amsterdam 2012, p. 47 *et seq.*

⁴⁷ *Report of the International Commission on Intervention and State Sovereignty, Responsibility to Protect*, Ottawa 2001.

of people and the fundamental human rights.⁴⁸ The concept of the Responsibility to Protect consists of the responsibility to prevent, the responsibility to react, and the responsibility to rebuild.⁴⁹ It is therefore designed to shift the balance from intervention to the primary responsibility of States to protect their citizens and therefore fundamentally redefine the very principle of sovereignty.⁵⁰ Finally, the concept reflects new trends in the development of international law in relation to the evolution of its fundamental institutions, or, as noted by J. Zajadło, perhaps even represents a new philosophy of international law.⁵¹

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⁴⁸ R. Romiszewicz, *The New Challenge: Weak and Failed States*, in: *Towards the UN Reform. New Trends, New Responses*, ed. A.D. Rotfeld, Warszawa 2004, p. 6 *et seq.*

⁴⁹ J. Pattison, *The Responsibility to Protect and Humanitarian Intervention*, in: *Responsibility to Protect...*, p. 173 *et seq.*

⁵⁰ For more on this, see e.g.: A. Makarewicz, *Interwencja humanitarna czy ,odpowiedzialność za ochronę’?*, “Polski Przegląd Dyplomatyczny” 2003, Vol. 3, Issue 2, p. 71 *et seq.*; J. Symonides, *Przyjęcie zasady ,odpowiedzialności za ochronę’ w procesie reformowania Narodów Zjednoczonych*, in: *Prawo międzynarodowe – problemy i wyzwania. Księga Pamiątkowa Profesor Renaty Sonnenfeld – Tomporek*, ed. J. Menkes, Warszawa 2006, p. 514 *et seq.*; J. Zajadło, *Od interwencji humanitarnej do odpowiedzialności za ochronę*, “Międzynarodowe Prawo Humanitarne” 2010, Vol. I, p. 23; P. Zajadło-Węglarz, *Implementacja koncepcji odpowiedzialności za ochronę*, “Międzynarodowe Prawo Humanitarne” 2013, Vol. III, p. 241 *et seq.*

⁵¹ J. Zajadło, *Koncepcja odpowiedzialności za ochronę (Responsibility to Protect) – nowa filozofia prawa międzynarodowego?*, in: *Świat współczesny...*, p. 148 *et seq.*

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