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Humanitarian interventions without Security Council authorization

- A third exception to the prohibition on the use of force?

LAGF03 Essay in Legal Science

Bachelor Thesis, Master of Laws program

15 higher education credits

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Term: Autumn term 2022

Contents

Summary

In 1994 the international community stood idly by while an estimated 800.000 people lost their lives in a genocide in Rwanda. Five years later, NATO launched its military intervention in Kosovo, with the argument that it was a 'humanitarian intervention'. In both cases, the Security Council was unable or unwilling to act although it was supposed to act as the protector of world peace and security. The inability to prevent and to quickly end the genocide in Rwanda was a great failure by the international community which partially explains why some members within the international community did not want to repeat the same mistake in Kosovo five years later.

While the intervention in Kosovo was supported by many members of the General Assembly, it also rose some serious concerns regarding its legality. Kosovo was at the time an autonomous region within the sovereign state of Yugoslavia, and the intervention constituted a breach of the *non-intervention* principle as well as the prohibition on the use of force as stipulated in the Charter of the United Nations. The debate on whether 'humanitarian interventions' implies a third exception to the prohibition on the use of force or not was truly born.

In 2001, the *International Commission on Intervention and State Sovereignty* (ICISS) published a report on the doctrine of Responsibility to Protect (R2P). The doctrine was then acknowledged by the international community when it was included in the adoption of the World Summit Outcome of 2005. The adopted version of R2P was, however, limited compared to the suggestions of the ICISS report. It did not provide anything new concerning the possibility of a third exception to the prohibition on the use of force in the case of inability to act from the Security Council. The scholarly discussion regarding the legality of so-called humanitarian interventions have since then continued. The thesis examines the arguments regarding legality and investigates a framework on humanitarian interventions suggested by Ciarán Burke and applies it to the on-going conflict between Russia and Ukraine.

The question on the legality of humanitarian interventions remains, unfortunately, uncertain. The international community have however responded very differently to breaches of the prohibition on the use of force from case to case, suggesting some breaches are more acceptable than others – certainly in the case of gross human rights violations.

Sammanfattning

År 1994 såg det internationella samfundet passivt på medan uppskattningsvis 800 000 människor förlorade sina liv i ett folkmord i Rwanda. Fem år senare inledde NATO en militär intervention i Kosovo med argumentet att det rörde sig om en "humanitär intervention". I båda fallen var säkerhetsrådet oförmöget eller ovilligt att agera, trots att det var tänkt att agera som beskyddare av världsfreden och säkerheten. Oförmågan att förhindra och snabbt avsluta folkmordet i Rwanda får ses som ett stort misslyckande, vilket delvis förklarar varför vissa medlemmar av det internationella samfundet inte ville upprepa samma misstag i Kosovo fem år senare.

Även om interventionen i Kosovo stöddes av många medlemmar av generalförsamlingen väckte den också allvarliga farhågor om dess laglighet. Kosovo var vid den tiden en autonom region inom den suveräna staten Jugoslavien och interventionen utgjorde en överträdelse av principen om *non-intervention* och våldsförbudet enligt FN-stadgan. Debatten om huruvida "humanitära interventioner" innebär ett tredje undantag från våldsförbudet eller inte var härmed född.

År 2001 publicerade *International Commission on Intervention and State Sovereignty* (ICISS) en rapport om doktrinen Responsibility to Protect (R2P). Doktrinen erkändes sedan av det internationella samfundet när den inkluderades i antagandet av World Summit Outcome 2005. Den antagna versionen av R2P var dock begränsad jämfört med förslagen i ICISS-rapporten och innehöll inget nytt vad gäller möjligheten till ett tredje undantag från våldsförbudet vid oförmåga att agera från säkerhetsrådets sida. Den vetenskapliga diskussionen om lagligheten av så kallade humanitära interventioner har sedan dess fortsatt. I avhandlingen undersöks en ram för humanitära interventioner som föreslagits av Ciarán Burke, vilken sedan tillämpas på den pågående konflikten mellan Ryssland och Ukraina.

Frågan om humanitära interventioners laglighet är tyvärr fortfarande osäker. Det internationella samfundet har dock reagerat mycket olika på överträdelser

av våldsförbudet från fall till fall, vilket tyder på att vissa överträdelser är mer acceptabla än andra - särskilt när det gäller grova kränkningar av mänskliga rättigheter.

Abbreviations

FRY	Federal Republic of Yugoslavia
HRW	Human Rights Watch
ICISS	International Commission on Intervention and State Sovereignty
ICJ	International Court of Justice
NATO	North Atlantic Treaty Organization
R2P	Responsibility to Protect
UK	United Kingdom
UN	United Nations
USA	United States of America
VCLT	Vienna Convention on the Law of Treaties (1969)

1 Introduction

1.1 Background

In March 1999, NATO initiated its military intervention in Kosovo through an aerial bombing campaign. Kosovo was at the time an autonomous province within the predominantly Serbian state of the Federal Republic of Yugoslavia, (FRY).[1] Kosovo was regarded an important place for both the Serbian and Albanian national movements and therefore the status of the region was highly conflicted, leading to the Kosovo war.[2] The reason behind the NATO intervention in 1999 was the ill-treatment by the FRY authorities of the Albanian majority of Kosovo. The purpose of the intervention was that the FRY forces would withdraw from the region.[3]

The bombing campaign lasted 78 days before resulting in surrender by the FRY and withdrawal of its forces in the region. The legitimacy of the military intervention was immediately up for debate. USA and the UK stated in the Security Council that the basis for the bombing campaign was *humanitarian intervention,* while the action was considered illegal by China and Russia. A draft resolution to condemn the NATO action as a breach of art.2(4) of the UN charter was defeated by a large majority with only China, Russia and Namibia voting for condemnation.[4] Five years prior to the intervention in Kosovo, the international community stood by while an estimated 800.000[5] people were killed in a genocide in Rwanda. The inaction from the international community was widely criticized and HRW accused the major international actors of ignoring the genocide.[6] Military interventions are a delicate subject, both when they occur and when they do not.

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[1] David Harris (2010), *Cases and Materials on International Law*, 7th edn., Sweet & Maxwell, p.784.
[2] The Independent International Commission on Kosovo (2000), *The Kosovo Report*, p.33.
[3] Harris (2010), p.784.
[4] Ibid.
[5] Security Council Report (1999), S/1999/1257, p. 3.
[6] Human Rights Watch (1999), *Ignoring Genocide.*

24th of February, Russia launched its "special military operation" in Ukraine. Among the arguments for the operation, Putin claimed an ongoing genocide was occurring in Ukraine, and that the goal of the operation was to protect the victims of the genocide.[7] While this thesis will examine these arguments further, the argumentation showcases the relevance of the discussion surrounding "humanitarian interventions".

The UN charter contains a framework for collective security consisting of three pillars, the first two concerns peaceful dispute settlement and the prohibition of the use of force whereas the third pillar concerns the primary responsibility of the Security Council for the maintenance of international peace and security.[8] The system for collective security is therefore premised on the Security Council taking an active role regarding the maintenance and restoration of international peace and security. However, the Security Council is a political body, which often results in a state of deadlock between the members of the Security Council on the course of action. The veto power of the permanent members enables a single member to block the adoption of a resolution that the majority agrees upon, which have been difficult for the international community to accept in cases of gross human rights violations.[9] This raises the question of what can be done legally to end breaches of human rights when the Security Council is unable to act due to internal disagreements.

1.2 Purpose and research question

After the Second World War, international law fundamentally changed and began to grant individuals rights to protect them from the state. This evolution of international law, the transition from a state-centred system towards a more human-centred system can be referred to as the "humanization of international law".[10] However, there remains a tension between the principals of State sovereignty and the use of force related to protection of human rights.

[7] Aljazeera Staff (2022), *'No other option': Excerpts of Putin's speech declaring war*.
[8] Cecily Rose et al. (2022), *An introduction to Public International Law*, Cambridge University Press, p. 210.
[9] Ibid, p.227-228.
[10] Ibid, p.187.

The question thus arises of when and if States are legally excepted from the prohibition on the use of force, especially when disagreements between members of the Security Council hinders the authorization of military intervention in the case of humanitarian catastrophes. This thesis therefore aims to answer the following question:

To what extent can military humanitarian interventions be legally conducted without the authorization of the Security Council?

1.3 Methodology and Material

Since this thesis aims to examine the legality of so-called humanitarian interventions, a doctrinal legal method will be used to contribute to the assessment of *de lege lata*, the law as it exists. The doctrinal legal method is a type of research method that is widely used in legal education and legal scholarship. To determine the applicable law, the method is used to analyse, interpret and evaluate sources of law. The doctrinal legal method does not negate the importance of understanding the reality reached through empirical studies; on the contrary, it often needs constructive criticism through observations of the world. However, these external observations never in themselves affect the reconstruction of the norm that informs the work of legal doctrine.[11]

It is important to note that there is a difference between the structure of domestic and international law. In the vertical structure of national law, the supreme legal act usually consists of a constitution. In this case, the classification of the sources of law is not a major problem. Laws, decrees and case law that can be said to provide an indication of the applicable law are usually included, and the hierarchy between the sources of law is also established in the national legal order. The horizontal structure of international law, on the other hand, entails that the identification of the source of international law is less obvious when it comes to identifying the phenomena or facts that give

[11] Maria Nääv & Mauro Zamboni (ed.) (2018), *Juridisk Metodlära*, 2nd edn., Studentlitteratur, p. 24.

rise to the applicable law.[12] Art. 38 of the ICJ statute lists sources of international law that the court applies in its practice. The main legal sources listed in art. 38 are international conventions, international customary law, general principles of law, judicial decisions and judicial doctrine. The last two sources, judicial decisions and doctrine, are subsidiary sources and should not be considered sources equal to the first three but merely as a tool to determine applicable law.[13] However, since this thesis aims to examine a somewhat grey area of international law, judicial doctrine will be used to a large extent for academic purposes and to provide different arguments regarding the legality of humanitarian interventions. The R2P doctrine will be examined mainly through the ICISS report and the World Summit Outcome resolution of 2005. The thesis will in this regard also assess the legal development of R2P as a norm.

The research question of this thesis is a descriptive research question aimed to reveal the legal status of humanitarian interventions without authorization from the Security Council. The choice of the doctrinal legal approach will thus be favourable to ascertain what current law stipulates regarding humanitarian interventions.

1.4 Structure

First, this thesis will examine the articles of relevance within the UN Charter to determine the legality of humanitarian interventions, starting with the prohibition of the use of force followed by its exceptions as stated in the Charter. Second, the R2P doctrine and its legal prerequisites will be presented, along with a study of the implementation of R2P as a norm. Focus will then be on humanitarian interventions without authorization from the Security Council which will be followed by a section concerning the Russian aggression on Ukraine. Last, a discussion on the findings of the examination will be presented.

[12] Per Sevastik, (ed.) (2009) *En bok i folkrätt*, Norstedts Juridik, p.33.
[13] Ibid, p. 35.

1.5 Delimitations

Although this thesis will present relevant articles of the UN charter on the use of force and its exceptions, self-defence and enforcement under article 42 of the UN charter, will only be briefly examined. This is due to the aim of this thesis, to examine a potential third exception to the prohibition on the use of force through humanitarian interventions. Furthermore, the section on R2P will be focused on the Responsibility to React since this pillar is the most relevant with regards to the research question. However, the Responsibility to Prevent will be briefly overviewed since it is the first step of the R2P and should be considered before acting on the Responsibility to React. The last pillar of the R2P, Responsibility to Rebuild falls outside the scope of this thesis. While examining the Responsibility to React, focus will be on the question of Right authority. While the other criteria listed in this thesis are just as important for the R2P-doctrine, the question of Right authority is the most relevant to determine the legal possibilities of military interventions without authorization from the Security Council. Last, the short case study of Russia v. Ukraine will exclude the argument on self-defence, and solely focus on arguments relating to humanitarian interventions.

2 Use of force

2.1 The prohibition of the use of force

The UN was established in 1945 as a reaction to the horrors of the Second World War, with the primary aim "to save succeeding generations from the scourge of war" as stated in the preamble of the UN charter.[14] Therefore, it is to no surprise that the maintenance of world peace and security is of huge importance throughout the Charter. There is a distinction in international law between the rules that regulate when and for what purposes a state may use force against another state and those that regulate the way in which warfare must be conducted. The former rules are termed *jus ad bellum*, and the latter *jus in bello*.[15]

The general rule of the *jus ad bellum* framework follows from Art. 2(4) of the UN charter. The article statutes the prohibition of 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. While the concept of "force" has been widely debated since the adoption of the Charter in 1945, the prevailing perception is that it is limited to armed measures.[16]

The prohibition of the threat or use of force is also a rule of international customary law and is underlined by many states and scholars who regard it as a rule of *jus cogens*.[17] The ICJ supported this claim in the *Nicaragua* case.[18] Jus cogens norms, also referred to as peremptory norms, are a special category of international obligations from which no derogation is possible.[19] The peremptory nature of the prohibition on the use of force would at first glance suggest that any theories on humanitarian interventions never would be applicable in a legal manner. However, certain norms linked to human rights

[14] Charter of the United Nations, preamble.
[15] Anders Henriksen (2017), *International Law*, 1st edn., Oxford University Press, p. 261.
[16] Ibid, p.263.
[17] Rose (2022), p. 216.
[18] Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States) (1986), para. 190.
[19] Ibid, p. 94.

have also been recognised as *jus cogens* norms: the prohibition on torture, maritime piracy, genocide, slavery, war crimes and crimes against humanity.[20] Article 53 of the Vienna Convention on the Law of Treaties stipulates that a norm of *jus cogens* "can be modified only by a subsequent norm of general international law having the same character". Human rights norms, being on the same normative level as the prohibition on the use of force, would therefore seem to have the ability to derogate the Charter rule.[21] Burke further notes that:

> While peremptory human rights do not, in and of themselves, contain sufficient specificity concerning their enforcement and modalities of operation, such lacunae are remedied by the maxim *ubi ius, ubi remedium.*

This means that any remedy that flows from a peremptory human right must also have peremptory status, since the useful effect of the norms peremptory nature otherwise would be lost.[22]

2.2 Exceptions to the prohibition of the use of force in the UN Charter

The UN Charter constitutes two clear exceptions to the prohibition of the use of force. Art. 51 acknowledges self-defence as an exception to the prohibition following from art. 2(4). Art. 42 recognizes a second exception, the use of force with authorization from the Security Council.

2.2.1 Self defence

Art. 51 of the UN charter states the following:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken

[20] Ciarán Burke (2013), *An Equitable Framework for Humanitarian Intervention*, Hart Publishing, p. 307-308.
[21] Ibid, p. 308.
[22] Ibid.

> measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

The right to self-defence presupposes an armed attack which is not the same as a use of force. To be considered an armed attack, the use of force must be of a bigger scale compared to what falls within the concept of use of force in art. 2(4) of the UN charter. In other words, every armed attack includes the use of force, but not every use of force meets the criteria for an armed attack. As the article states, the self-defence could be collective, meaning that other states are allowed to assist the suffering state in the case of an armed attack.[23]

The right to self-defence has four requirements in order to be valid. The first one follows directly from the article whereas the other three follows from international customary law. The use of force can be used in self-defence only until the Security Council takes the necessary measures to maintain international peace and security. The use of force must be necessary, meaning a state cannot use force if it is not the only possible way to avert an armed attack. Furthermore, the use of force must be immediate - acts of retaliation is not permitted. Lastly, the use of force must be proportional and must not be used to a greater extent than what is reasonable with regards to the armed attack.[24]

2.2.2 Enforcement under Article 42

The other clear exception from the prohibition of the use of force is the one that has been authorized from the Security Council. Art. 42 of the UN charter gives the Security Council mandate to authorize military operations when

[23] Ulf Linderfalk (2020), *Folkrätten I ett nötskal*, 3rd edn., Studentlitteratur AB, p. 192.
[24] Ibid, p. 196-197.

non-coercive measures are insufficient to maintain or restore international peace and security.[25]

Two conditions must be fulfilled for the Security Council to decide upon authorization of the use of force. First, the Security Council must have determined the existence of "any threat to the peace, breach of the peace or act of aggression" which follows from art. 39 of the UN charter.[26] The word "peace" is in this instance synonymous with "international peace", thus excluding civil wars from the scope of art. 39. However, the Security Council have traditionally been quite liberal in its interpretation of the article, resulting in several cases of civil wars being considered a threat to the peace due to its impacts reaching beyond the national borders.[27]

Second, the Security Council can only decide upon military action if the non-coercive measures following from art. 41 have proven to be insufficient. This does not mean that the Security Council are bound to first decide upon a non-coercive measure and then note that it was insufficient in order to decide upon military action in accordance with art. 42. On the contrary, the Security Council can authorize military action without deciding upon actions stated in art. 41, if the assessment has been made from the outset that non-military measures will be ineffective.[28]

[25] Henriksen (2017) p. 267.
[26] Linderfalk (2020) p.197.
[27] Ibid.
[28] Ibid.

3 Responsibility to protect

The Responsibility to protect doctrine (R2P) was born in 2001 in the form of a report by the International Commission on Intervention and State Sovereignty (ICISS) entitled "The Responsibility to Protect". In its foreword, the controversy of humanitarian intervention is presented:

> External military intervention for human protection purposes has been controversial both when it has happened – as in Somalia, Bosnia and Kosovo – and when it has failed to happen, as in Rwanda. [29]

ICISS was an initiative sponsored by the Canadian government in response to the serious concerns about the legality of the 1999 intervention in Kosovo led by NATO. [30] The report was widely discussed and debated and the Responsibility to Protect was finally unanimously adopted in a resolution by the General Assembly in the World Summit Outcome of 2005.[31] However, it is important to note that the adoption of the R2P at the World Summit did not mean that the suggestions provided in the ICISS report was fully implemented. R2P was for instance limited by the World Summit to the most significant mistreatment of civilian populations such as genocide, ethnic cleansing and other crimes against humanity.[32] To clarify, the ICISS report should not be seen as a source of international law, but as an important document in order to understand the R2P doctrine.

In the report issued by ICISS, four basic, obligatory objectives were listed for any new approach to intervention on human protection grounds:[33]

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[29] The International Commission on Intervention and State Sovereignty (2001), *Responsibility to protect*, p. VII.
[30] Anne Orford (2011), *International Authority and the Responsibility to Protect*, Cambridge University Press, p. 1.
[31] UN General Assembly Resolution, A/RES/60/1 (2005).
[32] Charles Sampford and Ramesh Takur (ed), (2013), *responsibility to protect and sovereignty*, Ashgate Publishing Limited, p. 1; Orford (2011) p. 2.
[33] ICISS (2001) p. 11.

- establish clearer rules, procedures and criteria for determining whether, when and how to intervene;

- to establish the legitimacy of military intervention when necessary and after all other approaches have failed;

- to ensure that military intervention, when it occurs, is carried out only for the purposes proposed, is effective, and is undertaken with proper concern to minimize the human costs and institutional damage that will result; and

- to help eliminate, where possible, the causes of conflict while enhancing the prospects for durable and sustainable peace.

Furthermore, the report divides the R2P into three specific responsibilities. The Responsibility to Prevent, the Responsibility to React and the Responsibility to Rebuild.[34]

3.1 Responsibility to Prevent

As presented in the report, the Commission believes that the responsibility to protect implies an accompanying responsibility to prevent. As for the other aspects of the R2P doctrine, the responsibility to prevent is aimed for sovereign states. First, a firm national commitment to ensuring *fair treatment* and *fair opportunities* for all citizens is emphasized as a cogent foundation. However, since the failure of prevention can have international consequences, strong support from the international community is often necessary for the prevention to succeed. [35]

The Responsibility to Prevent boils down to addressing both the root causes and direct causes of internal conflict.[36] The scope of root cause prevention is wide; it may mean addressing political needs and deficiencies, tackling eco-

[34] ICISS (2001).
[35] ICISS (2001) p. 19.
[36] Sampford & Thakur (2013) p. 1.

nomic deprivation, strengthening legal protections and institutions or commence sectoral reforms to state security services such as the military. The "toolbox" for direct prevention consists of the same categories as root cause prevention, but the specific actions and measures used differ, due to the limited time available to make an impact. These actions may include assistance, incentives or threatened punishments. The goal of all these approaches is to avoid the need for coercive measures against the targeted state, even if cooperation is lacking.[37]

3.2 Responsibility to React

If preventive measures fail to resolve or contain the situation, interventionary measures by the international community may be required. The Commission emphasizes that less intrusive and coercive measures always should be considered before more intrusive ones are applied and that these measures only in extreme cases may include military action. Still, the Commission recognizes that even though the threshold is high, there are conditions that could make military interventions defensible if other precautionary principles are satisfied. [38]

In the report, the Commission points out that the starting point should be the principles of state sovereignty and non-intervention which are the main rules. Yet, the Commission acknowledges that there are exceptional circumstances where civilians are threatened with massacre, genocide or ethnic cleansing on a large scale that may require coercive military intervention. The Commission further states:[39]

> that even in states where there was the strongest opposition to infringements on sovereignty, there was general acceptance that there must be limited exceptions to the non-intervention rule for certain kinds of emergencies.

[37] ICISS (2001) p. 23.
[38] Ibid p. 29.
[39] Ibid p. 31.

The Commission elaborates on what precautionary principles that must be satisfied for an intervention to be just, listing six criteria for military intervention: *right authority*, *just cause*, *right intention*, *last resort*, *proportional means* and *reasonable prospects*.[40]

3.2.1 Right authority

The legitimacy of action on R2P is premised on the authority of the Security Council.[41] In the ICISS report, the Commission referred to the explicit character of the prohibitions and presumptions against interventions in the UN Charter and noted that no "humanitarian exception" is explicitly provided to these prohibitions, thus making the role of the Security Council critical for action on R2P.[42] The commission stated:

> Security Council authorization must in all cases be sought prior to any military intervention action being carried out. Those calling for an intervention must formally request such authorization, or have the Council raise the matter on its own initiative, or have the Secretary-General raise it under Article 99 of the UN Charter; and
>
> The Security Council should deal promptly with any request for authority to intervene where there are allegations of large scale loss of human life or ethnic cleansing; it should in this context seek adequate verification of facts or conditions on the ground that might support a military intervention. [43]

Although the Commission acknowledges the role of the Security Council in all matters concerning military interventions, it also questions whether there are any other options in the case of inability or unwillingness from the Coun-

[40] Ibid p.32.
[41] Cecilia Jacob & Martin Mennecke (ed.), (2020), *Implementing the responsibility to protect – A future agenda*, Routledge, p. 27.
[42] ICISS (2001) p. 49.
[43] Ibid p. 50.

cil to fulfil the role expected of it. As a possible alternative, the General Assembly is mentioned, from which support for military action could be sought through a meeting in an Emergency Special Session. Although the General Assembly lacks the power to decide upon action be taken, the Commission brings forward an interesting argument:

> a decision by the General Assembly in favour of action, if supported by an overwhelming majority of member states, would provide a high degree of legitimacy for an intervention which subsequently took place, and encourage the Security Council to rethink its position. [44]

Regional organizations are also mentioned as a further possibility on alternative means in the case of unwillingness or inability from the Security Council to fulfil its role as the protector of collective security. This argument is motivated by the fact that neighbouring states often suffers consequences such as refugee flows in the cases of human catastrophes. It is, however, questionable how much of an alternative option this really is to action taken by the Security Council, since action by regional organizations still depend on prior authorization from the Security Council. An interesting note is that approval in some cases has been sought *ex post facto*, for instance in Liberia and Sierra Leone.[45]

3.2.2 R2P as a norm

As earlier mentioned, the R2P-doctrine was introduced through the ICISS report in 2001, and formally acknowledged by the international community through the adoption of resolution A/RES/60/1 at the 2005 World Summit Outcome. Some members of the General Assembly were however resilient towards the implementation of R2P, due to concerns about possible misuse of R2P to be used to pursue foreign interests or to intervene in domestic affairs of other states. In other words, the conflict between state sovereignty and the

[44] ICISS (2001) p. 53.
[45] Ibid p. 53-54.

responsibility to protect and prevent human catastrophes made the implementation rather controversial, resulting in a far more limited version of the R2P than what was suggested from the ICISS report.[46] Any alternative means to act on the R2P through military intervention other than with the authorization of the Security council as mentioned in section 3.2.1 is neglected in the resolution:

> we are prepared to take collective action, in a timely and decisive manner, through the *Security Council*, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. [47]

According to Alex Bellamy, cited by Cecilia Jacob, the strengthening of the R2P norm among states was facilitated by the clarification "that the principle was essentially political and normative, that it conformed to the UN Charter and did not aspire to amend international law".[48] Despite the efforts made at the World Summit Outcome to adopt the R2P-principle, it failed to establish institutional mandates and mechanisms dedicated to the implementation of R2P. This had the consequence that the legitimacy of international collective action on R2P ultimately depends on the authority of the Security Council.[49]

[46] Jacob & Mennecke (2020) p. 110-111.
[47] A/RES/60/1.
[48] Jacob & Mennecke (2020), p. 27.
[49] Ibid, p. 30.

4 Humanitarian interventions without Security Council authorization

As presented in section 3, although alternative measures to intervene when the Security Council is unwilling to act was explored in the ICISS report of 2001, the World Summit Outcome 2005 did not give any support for any alternative means in its adoption of the R2P. On the contrary, the R2P seems to have had little effect on situations where the Security Council is unable or unwilling to act, offering no other solution than art. 42 of the UN charter in terms of "Right authority".

Relevant provisions of the UN charter were presented in section 2 of this thesis, and a legal positivist approach would suggest that the Charter leaves little room for an interpretation that would allow for military interventions of any kind if not authorized by the Security Council. However, with regards to the NATO intervention in Kosovo 1999, Belgium argued that the intervention was compatible with art. 2(4) of the UN charter. Belgium stated that the intervention was not against the territorial integrity or independence of the former FRY, but rather an intervention to rescue "a people in peril, in deep distress". Belgium argued that such an intervention was in fact compatible with the prohibition on the use of force since art. 2(4) only covers interventions against the territorial integrity or political independence of a State.[50] Although a creative argument, it seems questionable. According to the guidelines for treaty-interpretation in art. 31 VCLT:

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

[50] Harris (2010), p. 784-785.

Art. 2(4) of the UN Charter does not only prohibit the threat or use of force against the territorial integrity or independence of a State, but also in any "other manner inconsistent with the Purposes of the United Nations". As one of those purposes is to prevent any unilateral use of force, it would be hard to argue that the intervention was compatible with art. 2(4) alone.

Furthermore, although the ICJ ruled that it did not have jurisdiction to entertain the application from Yugoslavia concerning the legality of use of force, the court declared that when a dispute gives rise to a threat to the peace, breach of the peace or act of aggression, the *Security Council* has special responsibilities under Chapter VII of the Charter.[51]

4.1 Scholarly discussion

The scholarly debate over the legality of "humanitarian interventions" has been conflicted and wide, to say the least. While some scholars have claimed that humanitarian interventions are a second implied limitation on the prohibition on the use of force, others firmly deny that humanitarian interventions without Security Council authorization could ever be considered legal.[52] Burke claims that in the aftermath of the 1999 NATO intervention, the debate has consisted of legal positivists neglecting legality on the basis of the UN Charter on the one hand, and moralists declaring intervention legitimate on the other. Habermas, cited by Burke, said that this was "A war on the border between legality and morality".[53]

Burke presents a third option on the issue which he calls "An Equitable Framework for Humanitarian Intervention", where the question of legality would not be based upon interpretation of the UN charter nor on arguments based on morality, but rather on the general principles of equity in international law.[54] In his work, Burke proposes a two-part test for legality of humanitarian interventions. The first part consists of six criteria which must be

[51] Case Concerning Legality of use of force (Yugoslavia v. United States of America) (Provisional measures) p. 123.
[52] Harris (2010) p. 777-778.
[53] Burke (2013), preamble and p. 25.
[54] Burke (2013).

fulfilled before an intervention could be permitted whereas the second part concerns three conditions relating to the actual operation of the intervention itself. Burke lists the six criteria for humanitarian interventions:

1. A series of gross and systematic human right violations is committed;

2. By a State which has either signed human rights instruments or which has not consistently objected to the inclusion of human rights as part of customary international law.

3. It must be determined beyond reasonable doubt that a peaceable means of putting an end to the violations at hand will not be achievable in a sufficiently proximate time frame to prevent (further) gross human rights abuses from occurring or continuing.

4. There must be no means of immediate ending these violations via the machinery of the UN Charter, that is the Security Council.

5. It must be reasonably determined that only armed military intervention will suffice as an immediate and effective means of ending the violations.

6. Intervention is only permitted where it may be an effective solution and is not undertaken in vain. [55]

The second part of the test, the three conditions concerning the conduct of warfare, are presented as follows:

1. No state which itself engages in gross and systematic human rights violations may intervene (´clean hands´).

2. States must intervene with the principal purpose of ending such violations and may not profit unduly as a result of doing so. Above all,

[55] Ibid, p. 336.

any right to intervene must not be used as a cloak for other ends; otherwise this will constitute *mala fides*.

3. States must act equitably in enforcing equity and must refrain from unnecessary loss of civilian life and unnecessary suffering in attempting to accomplish the operation, the purpose of which is to protect life and end suffering.[56]

Note that Burke's model for legitimate humanitarian interventions addresses the concerns of misuse of humanitarian interventions to pursue national interests as mentioned in section 3.2.2, which was the main argument for the limitation of the R2P and the resilience towards military interventions that lacks authorization from the Security Council. It also seems to conform with the four obligatory objectives for humanitarian interventions as presented in the ICISS report, see section 3.

[56] Burke (2013), p. 338.

5 Russia v. Ukraine

On the 24th of February 2022, Russia declared its "special military operation" in Ukraine. In an attempt to justify the operation, Russia mainly argued that the operation was necessary and legal as an act of self-defence in accordance with art. 51 of the UN Charter. Although this argument is highly controversial and therefore worth of a discussion on its own, this thesis will instead be focusing on the second argument that Russia has put forward, claiming the military operation is justified as an act to prevent a "genocide" in Ukraine, thus reminding of a humanitarian intervention argument.[57]

Putin's speech highlights the relevance of the discussions on the legality of humanitarian interventions. Not only did he argue that the goal with the intervention is to "protect people who have been subjected to abuse and genocide by the regime in Kyiv for eight years", but also criticized prior interventions led by NATO and labelled them illegal.[58]

The actions of Russia have been condemned by many nations, and on 2nd of March 2022 the General Assembly adopted a resolution condemning the acts of Russia and demanding that the Russian Federation immediately cease its use of force against Ukraine.[59] In comparison, the draft resolution to condemn the intervention in Kosovo 1999 was defeated by twelve votes to three,[60] signalling at least greater political support of the NATO-intervention than of the acts of Russia in Ukraine.

While the legality of humanitarian interventions as an exception to the prohibition of the use of force remains uncertain (the next section of this thesis will further elaborate on this), it is interesting to test the legality of Russia's intervention of Ukraine with Burke's framework for equitable humanitarian interventions as presented in section 4.2. While the fulfilment of several criteria is

[57] Aljazeera (2022).
[58] Ibid.
[59] UN General Assembly Resolution, A/RES/ES-11/1 (2022).
[60] Harris (2010), p. 784.

dubious, one need to look no further than to the first criterion to question the legality of the intervention in the light of the framework.

The first criterion stipulates that a series of gross and systematic human right violations has been committed to permit a military intervention. This criterion conforms with the adaption of R2P at the World Summit Outcome 2005 in which R2P was limited to only the most significant mistreatment of civilian populations such as genocide, ethnic cleansing and other crimes against humanity.

Although Russia's allegations of genocide certainly would pass the first criterion if proven true, the veracity of this allegation must be questioned. Putin has offered little to no proof of his allegations which make it look like the claims are misused for political reasons.[61] Even if we were to accept that humanitarian interventions could conform with international law in certain circumstances, the Russian aggression does not seem to qualify, thus making it illegal regardless of whether humanitarian interventions can be conducted in a legal manner or not.

[61] Alexander Hinton (2022), *Putin´s claims that Ukraine is committing genocide are baseless, but not unprecedented*, The Conversation.

6 Discussion and conclusion

The questions concerning the function of the Security Council as the sole protector of international peace and security has perhaps never been as relevant as they are now, with one of the permanent members of the Council being the aggressor in an armed conflict towards a sovereign state and fellow member of the UN.

The political nature of international law makes it difficult to determine certain questions of legality, as in the case of humanitarian interventions:

> The authority of international law rests on a reasonable congruence between formally articulated norms and State behavior; when the two diverge too sharply, the former must adapt or lose their relevance.[62]

While it is easy to provide moral arguments in favour of interventions that succeed to prevent gross violations of human rights, this does not necessarily mean that they conform with international law. It is also important to note the importance of the conflicting interest, namely State sovereignty and the principle of non-intervention. It is no coincidence that attempts to declare alternative means to Security Council authorization has met great resistance from parts of the international community. Although the sufficiency of the Security Council in cases of human right violations can and has been widely criticized, it does provide security towards misuse of humanitarian interventions as a cloak to pursue national interests.

Fact is, the answer to whether humanitarian interventions can be conducted legally without authorization from the Security Council seems to differ depending on which method of interpretation that is used by the viewer, which is reflected in the scholarly discussion. However, whether the answer is sought through examination of the wording of the UN charter or the intended purpose behind it, the Charter itself seems to have been deliberately designed

[62] David Whippman (2001), 'Kosovo and the Limits of International Law'. *Fondham International Law Journal*, vol. 25 nr 1, p.131.

to exclude possibilities of military interventions if they lack authorization from the Security Council. Other sources of international law, such as the peremptory norms concerning human rights suggest that the Charter may be derogated if the remedies against human right violations call for it.

This brings to the somewhat unsatisfactory conclusion that the legality of humanitarian interventions without authorization from the Security Council remains uncertain. Legal or not, history has shown that humanitarian interventions are of high relevance in the international community. The political nature of international law means that state practice is of importance, not only to define applicable law, but to determine what actions that will be accepted by the international community or not. The 1999 NATO intervention in Kosovo is a great example of this. Even if one concludes that humanitarian interventions never can be conducted in a legal manner which would label NATO's intervention as illegal, the intervention had great political support within the international community, with the result that the intervention never was condemned as illegal by the General Assembly. On the contrary, the recent military operation enforced by Russia in Ukraine did not have the same amount of political support behind it, resulting in condemnation and orders to cease its operations.

To clarify, there seems to be situations where a breach of art. 2(4) of the UN charter is accepted by the international community and situations where it is not. Perhaps this is the real indicator of whether a humanitarian intervention should be considered legal or not. Acknowledging that there is room for humanitarian interventions in international law provides the possibility to construct a framework for how such an intervention must be conducted. A framework for humanitarian interventions, like the one presented by Burke, has the ability to separate acceptable interventions from the inacceptable ones. Such framework would also provide security against the potential misuse of humanitarian interventions, addressing the concerns expressed at the implementation of the R2P.

Due to the importance of state sovereignty and the uncertainty regarding the legality of humanitarian interventions without Security Council authorization, it is appropriate to note that humanitarian interventions should be viewed as a last resort when all other options fail. It is, of course, preferable if actions which undoubtedly follows from the UN Charter are sufficient enough to protect populations from gross human rights violations. Furthermore, it is of significance that the international community continue to treat arguments of humanitarian intervention with caution. It concerns a legal grey area and requires a firm framework to ensure that arguments to justify military operations does not hide behind the doctrine of humanitarian interventions if certain requirements are not met.

Such a framework should therefore be decided upon, with clear rules on whenever an intervention is legal or not, and with the sufficiency to protect humanity from the types of catastrophes that unfortunately has occurred far too many times. To conclude, and to concretize an answer to the research question on to what extent humanitarian interventions can be legally conducted; it does not exist nearly as great legal support for a third exception to the prohibition on the use of force (humanitarian interventions) as for the two stipulated by the Charter. The Charter is constructed to protect state sovereignty and to give the Security Council the sole authority as protector of world peace and security. However, the significance of human rights in international law cannot be ignored, and the international community have shown that breaches of art. 2(4) can be accepted in gross violations of human rights.

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