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CRIME OF AGGRESSION UNDER THE ROME STATUTE AND EXCLUSION OF UNILATERAL HUMANITARIAN INTERVENTION

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Abstract

Unilateral humanitarian intervention is one of the most controversial issues in international law and relations. This controversy arises from the fact that while it serves a praiseworthy practice such as saving people suffering from gross human rights violations, it is illegal under international law. This article examines how this illegality fits the definition of the crime of aggression under the Rome Statute of the International Criminal Court. The main contention is that while the doctrine of unilateral humanitarian intervention constitutes an illegal practice of international relations, the International Criminal Court is not able to try the persons ordering military interventions for humanitarian purposes. This arises mostly because unilateral humanitarian intervention is in a "grey area" of international law.

Keywords: *Unilateral Humanitarian Intervention, International Criminal Court, Crime of Aggression, Rome Statute.*

ROMA STATÜSÜ KAPSAMINDA SALDIRI SUÇU VE TEK TARAFLI İNSANİ MÜDAHALENİN KAPSAM DIŞINDA KALMASI

Özet

Tek taraflı insani müdahaleler uluslararası hukuk ve uluslararası ilişkilerin en tartışmalı konularından biri olagelmıştır. Bu tartışmadan şurdan kaynaklanır: İnsani müdahale ağır insan hakları ihlallerinden dolayı acı çeken insanları kurtarmak gibi takdire şayan bir amaca hizmet etse de, uluslararası hukukta genellikle yasadışı olarak kabul edilir. Bu çalışmanın temel amacı, genellikle yasadışı olarak kabul edilen tek taraflı insani müdahale konseptinin Uluslararası Ceza Mahkemesi'nin kurucu metni olan Roma Statüsü'ne uygunluğunu incelemektir. Çalışmanın savunduğu temel fikir, her ne kadar tek taraflı insani müdahale doktrini uluslararası ilişkilerin yasadışı bir uygulaması olması da, Uluslararası Ceza Mahkemesi'nin insani amaçlarla askeri müdahale emri veren kişileri yargılama yetkisine sahip olmadığıdır. Bunun nedeni, tek taraflı insani müdahale konseptinin uluslararası hukukun "gri bir bölgesi"nde yer almasıdır.

Anahtar Kelimeler: *Tek Taraflı İnsani Müdahale, Uluslararası Ceza Mahkemesi, Saldırı Suçu, Roma Statüsü.*

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1. INTRODUCTION

Humanitarian intervention is a doctrine, essentially under international law and relations, used to refer to the use of military force undertaken by a state or group of states against another state whose inhabitants are subject to gross human rights violations committed either by the state itself or a non-state group which the state is insufficient to stop. Legal justification for using such a force against a state is the Security Council's authorization pursuant to the Charter of the United Nations. However, military actions for humanitarian purposes may be conducted without a prior Security Council authorization, and this conduct is referred to as unilateral humanitarian intervention.

The very core idea of the modern humanitarian interventions comes from the globalization of human rights throughout the 21st century. Accordingly, human rights are no longer at the mercy of individual states, but instead accorded to all humanity. As Professor Michael Reisman (1990: 869) argues, "no serious scholar still supports the contention that internal human rights are 'essentially within the domestic jurisdiction of any state' and hence insulated from international law." If states systematically violate human rights, Vincent (1986: 127) suggests, "then there might fall to the international community a duty of humanitarian intervention." Therefore, the dominant opinion among states and scholars favors the legality of Security Council authorized humanitarian interventions.

The more controversial issue is the legality of humanitarian interventions without prior Security Council authorization. The 1999 NATO intervention in Kosovo is a well-known example. As discussed in Part I below, the international community has not succeeded in reconciling the legitimacy of unilateral humanitarian intervention with its legality though this paper does not see such a necessity. However, the legal status of unilateral humanitarian intervention has become even more important after the Kampala Review Conference (2010), where the state parties gathered to finalize the definition and jurisdictional conditions for the crime of aggression defined under the Rome Statute of the International Criminal Court (ICC).

However, the new definition of the crime of aggression does not help the international community solve the uncertainty of the legality of humanitarian intervention. For instance, international law scholars do not have a precise answer for whether the ICC would have jurisdiction to charge the NATO leaders with the crime of aggression if the 1999 NATO intervention in Kosovo had been carried out after 1 January 2017 when the amendment regarding the crime of aggression enters into force.

This article argues that although unilateral humanitarian interventions are unlawful under international law, the ICC does not have jurisdiction over the leaders of the states undertaking such military interventions. To demonstrate this contention, Part I discusses the conflicting views among international community about the legality of unilateral humanitarian interventions and argues that they are unlawful under international law. Part II later very briefly explains the definition of the crime of aggression under the Rome Statute to determine the critical threshold issue, namely "manifest violation of the U.N. Charter." Part III critically explains why the ICC does not have jurisdiction over unilateral humanitarian intervention even though they are unlawful conducts in international law. Part IV finally concludes by summarizing the main points of this article.

2. LEGALITY OF UNILATERAL HUMANITARIAN INTERVENTION

The English term "humanitarian intervention" was used first by William Edward Hall in 1880 in a footnote in his book *International Law* (Hall, 1880: 247). Until the 1930s, the term humanitarian intervention was used "for the purpose of vindicating the law of nations against outrage" (Stowell, 1921: 51), "in the interests of humanity for the purpose of stopping religious persecution and endless cruelties in times of peace and war." (Oppenheim, 1905: 186) According to Ellery Stowell's definition (1921: 53), humanitarian intervention is "the reliance upon force for the justifiable purpose of protecting the inhabitants of another state from treatment which is so arbitrary and persistently abusive as to exceed the limits of that authority within which the sovereign is presumed to act with reason and justice." A modern definition of humanitarian intervention is "the threat or use of force by a state, group of states, or international organization primarily for the purpose of protecting the nationals of the target state from widespread deprivations of internationally recognized human rights." (Murphy, 1996: 11-12)

Although the doctrine of humanitarian intervention can be traced to the religious wars of the sixteenth and seventeenth centuries, its institutionalization is a creation of the nineteenth century (Fonteyne, 1974: 205-206; Heraclides, 2014: 26). From the middle of the nineteenth century, Jean-Pierre Fonteyne argues (1974: 215), a dichotomy appears between those championing the non-intervention principle and those who favor a more

flexible rule permitting humanitarian intervention. This dichotomy dramatically shifted since the establishment of the U.N. to a new discussion.

Under the contemporary discussion, there are two different types of humanitarian intervention. The first refers to interventions authorized by the Security Council. According to the view on which commentators mostly agree, the Security Council may legally take coercive steps to halt humanitarian catastrophes around the world if it determines that the crisis constitutes a threat to international peace and security (Franck, 2002: 137; Murphy, 1996: 284; Welsh, 2008: 536). Indeed, the Security Council, under its Chapter VII powers, can “determine the existence of any threat to the peace” (U.N. Charter art. 39), and “it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.” (U.N. Charter art. 42)

The second – and more controversial – type of humanitarian intervention is unilateral humanitarian intervention without prior Security Council authorization. A large majority of the international community considers unilateral humanitarian interventions illegal (Verwey, 1985: 377; Shen, 2001: 6; *Military and Paramilitary Activities*, 1986). In the post-Cold War world, there has been only one instance where unilateral humanitarian intervention occurred in any true sense - the 1999 NATO intervention. Although NATO comprises three permanent Security Council members and is the most powerful military organization in the world, the intervention was not exempt from being labeled as unlawful. According to the Independent International Commission on Kosovo (2000: 288-289), “the question of whether the intervention was legitimate has to be answered, especially since Kosovo may provide a precedent for further interventions elsewhere in the future. The Commission’s answer has been that the intervention was legitimate, but not legal, given existing international law.”

That the General Assembly disapproves of unilateral intervention is clear. In Resolution 2131 (1966), the Assembly concluded that “[n]o State has the right to intervene, directly or indirectly, *for any reason whatever*, in the internal or external affairs of any other State.” The very same language with an addition of “group of states” can be found in Resolution 2625 (1971). Similarly, Resolution 3314 (1974) defining aggression maintained that “[n]o consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression.”

There are very few states still supporting the doctrine of unilateral humanitarian intervention. In April 2000, the foreign ministers of the Movement of Non-Aligned Countries, representing nearly two-thirds of all countries and containing 55% of the world population, condemned “all unilateral military actions including those made without proper authorization from the United Nations Security Council” and rejected “the so-called ‘right’ of humanitarian intervention, which has no legal basis in the U.N. Charter or in the general principles of international law.” (Byers & Chesterman, 2003: 184). Most recently, in the United Nation’s 2005 World Summit Outcome, a historic outcome document with the largest gathering of world leaders in history, the General Assembly implicitly stated unilateral actions violate the U.N. Charter, and the Security Council is the right authority to take necessary steps (World Summit Outcome, 2005).

Commentators also argue that state practice does not support the legalization of unilateral humanitarian intervention (Verwey, 1985). Indeed, two relevant cases support state practice on this view. After the Indian intervention in East Pakistan in 1971, the Indian government initially argued that its action was justified by humanitarian motives. However, the Indian government later changed its argument, and proffered self-defense under Article 51 to justify its military action (Akehurst, 1984: 96). The Tanzanian case is another example of how a state failed to invoke humanitarian motives for its military use of force for unlawful enlargement. In 1979, Tanzania invaded Uganda and overthrew Idi Amin, whose government was extremely brutal and repressive to the point of frequent comparisons with Hitler’s Germany (Bazylar, 1987: 590). Despite the Amin administration’s inhumanity, Tanzania argued that it took action in self-defense, not for humanitarian reasons (Ronzitti, 1985: 103).

The arguments for and against the legality of unilateral humanitarian intervention are as well in connection with the interpretation of the ban on the use of force embodied in Article 2(4) of the U.N. Charter. There are two schools with regard to the interpretation of Article 2(4). While the restrictive school favors a narrow interpretation (a conditional ban on the use of force), the inclusive school prefers an extensive interpretation (an absolute ban on force) as explained below.

The first conflict is about the *travaux préparatoires*. On the one hand, it is argued that the negotiators at the San Francisco Conference deliberately left the terms of Article 2(4) ambiguous in order that states can lawfully

resort to force under exceptional circumstances (Lepard, 2002: 345). However, it is clear from the denouement of the French proposal at the San Francisco Conference that the drafters of the U.N. Charter did not wish a right of humanitarian intervention. The French proposal linking the protection of human rights with a “threat to peace” was discussed at the Conference and ultimately rejected (Burke, 2013: 37).

Nowhere does the U.N. Charter mention humanitarian intervention. It neither expressly prohibits nor allows this type of intervention (Benjamin, 1992: 121). Therefore, another argument could be that unilateral humanitarian intervention is not forbidden since there is no explicit prohibition. However, Michael Akehurst’s contention seems more convincing. Akehurst (1977: 16) maintains that “Article 2(4) means that every use of force is ‘inconsistent with the purposes of the United Nations’, unless the State concerned can point to some provision of the Charter (such as Article 51) which expressly authorises the use of force.”

Perhaps the strongest arguments of those advocating unilateral humanitarian intervention is that force must be directed “against the territorial integrity or political independence” of another state in order to be prohibited, and since an altruistic humanitarian intervention does not impair either the territorial integrity or the political independence of the target state, it does not violate Article 2(4) (Teson, 1988: 131). However, it still would be a clear foreign interference in domestic affairs of states without an authorization by the Security Council, which is constantly considered illegal by the U.N because it is a clear violation of the principle of non-intervention. Another weakness of this argument is that it moves forward from the pre-acceptance that every humanitarian intervention is altruistic. However, the intervening parties may have different motives, which brings us to the next argument against its legality.

Accordingly, unilateral humanitarian intervention creates the fear of potential abuse by stronger states that try to gain economic and political interests over weaker states (Delbruck, 1992: 891). The most obvious abuse was exercised by Hitler, who invoked the humanitarian intervention defense to justify Germany’s use of military force against Czechoslovakia.

Some commentators have argued that unilateral humanitarian intervention does not violate the U.N. Charter because one of the primary goals of the U.N. Charter is the preservation of human rights (Teson, 1988: 131). However, this argument would be insufficient to justify unilateral humanitarian intervention because individual states are not authorized to fulfill the protection of human rights purposes of the U.N. Rather, it is the duty of the Security Council (Reisman, 2008: 78).

It is certainly true that the doctrine of unilateral humanitarian intervention consists of altruism to some extent. However, this does not *prima facie* legalize an act that is not allowed in international law. There is no explicit allowance on which there is a consensus of states. That is why every discussion on humanitarian intervention should adopt the distinction in the report of the Independent International Commission on Kosovo (2000). In that report, the Commission rightfully considered the legality of unilateral humanitarian intervention separate from its legitimacy. The Commission found that although saving the people suffering from widespread deprivations of human rights is a legitimate act in international relations, the legitimacy of an act does not necessarily legalize it. Take a country in which gay marriage is illegal. The fact that a gay couple is legally forbidden to get married does not mean it is illegitimate in their consideration. They would live together as a married couple without a marriage certificate. The same would be valid under international law. The fact that humanitarian intervention without the Security Council’s authorization is legitimate does not necessarily mean it is legal to do so without the authorization.

3. CRIME OF AGGRESSION UNDER THE ROME STATUTE

The jurisdiction of the ICC is limited to the most serious crimes, which are the crime of genocide, crimes against humanity, war crimes, and the crime of aggression (Rome Statute art. 5(1)). The first three crimes are well defined both in the Rome Statute and other international treaties such as the Convention on the Prevention and Punishment of the Crime of Genocide and the Geneva Conventions of 1949. However, since the participants at the Rome Conference “could not reach a consensus on how to define the crime [of aggression] or the role [of] the Security Council [in the process],” defining the crime and introducing the conditions were left open as provided in Article 5(2) of the Rome Statute (Novak, 2015: 46).

At the Kampala Review Conference (2010), the state parties gathered to finalize the definition and jurisdictional conditions for the crime of aggression. “At the very last minute, at 1.45am on Saturday 12 June, the last day of

the Review Conference, a compromise was reached adopting the definition of the crime of aggression and the trigger mechanisms for the exercise of jurisdiction but delaying the entry into force until 1 January 2017" (Blaak, 2010: 11).

Article 8bis(1) defines "the crime of aggression" as,

the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

"Act of aggression" in Article 8bis(1) is defined as well by Article 8bis(2) as,

the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.

Article 8bis(2) also refers to Article 3 of United Nations General Assembly Resolution 3314 (XXIX) of 14 December 1974 to include a list of example qualifying as an act of aggression.

With a simple language, the ICC might have jurisdiction only over persons who committed crime of aggression. Besides, the aggression should reach a level that it, by character, gravity and scale, constitutes *a manifest violation of the U.N. Charter* and is directed *against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter*. In this sense, "plainly not all aggression is subject to the ICC's jurisdiction." (O'Connell & Niyazmatov, 2012: 201) ICC's jurisdiction, therefore, is limited to "only the most serious or flagrant cases" (Novak, 2015: 47).

Close to the date on which the amendment will enter in force, the discussion of the controversial issues on the crime of aggression has become more enthusiastic. The reason is, with Claus Kreß's explanation (2009: 1140), that "the law on the use of force suffers from . . . a 'grey area' [and] reasonable international lawyers will find it comparatively easy to identify those instances of the use of force which fall within the grey area." According to Kreß (2009: 1140), citing Elizabeth Wilmschurst, "a fair account of this list" comprises "anticipatory self-defence, forcible reactions to a 'minor' use of force of another state, armed interventions to rescue nationals, the extraterritorial use of force against a massive non-state armed attack, and genuine humanitarian intervention."

We have enough incident to believe that humanitarian intervention was a concern for some of the ICC negotiator countries, and the biggest reason was that the 1999 NATO intervention in Kosovo was labeled as "unlawful" by the international law authorities shortly before. For instance, as early as 1996 during the Preparatory Commission's meeting, the U.S. representative raised specific concerns regarding the humanitarian intervention (Press Release, 1996). Moreover, at the Kampala Conference, "the single most sensitive American proposal . . . purported to explicitly exclude genuine forcible humanitarian interventions from the scope of draft Article 8bis." (Kreß & von Holtendorff, 2010: 1250). Kreß and von Holtendorff (2010: 1190-1191) also observes that the NATO states favored a higher threshold for individual criminal responsibility while another camp (mostly the Non-Aligned countries) supported a more inclusive definition that referred to the list of acts contained in the General Assembly Resolution 3314.

It is safe to argue that the countries advocating the high threshold won the battle, because, to meet the threshold issue under the Rome Statute, an act of aggression must be a "manifest" violation of the U.N. Charter. Now, we need to turn to the discussion whether unlawful humanitarian interventions, strictly speaking every intervention altruistic in nature undertaken without a prior Security Council authorization, is a manifest violation of the U.N. Charter by its character, scale, and gravity, and therefore, falls within the jurisdiction of the ICC.

4. ICC JURISDICTION OVER UNILATERAL HUMANITARIAN INTERVENTIONS

As stated above, the negotiators at the Kampala Review Conference reached a consensus at the last minute. Andreas Paulus, the Chairman of Public and International Law at the Georg-August-University Göttingen, claims that this consensus is "artificial" because the current threshold issues and qualifiers make the definition a "dead letter." (Paulus, 2010: 1118-1124). Although the contention in this article is not that pessimistic, it is clear that because of the ambiguity in the definition, it is hard, if not impossible, to argue that the ICC may have jurisdiction over certain acts of aggression including humanitarian intervention.

To support this argument, the wording “manifest” will be examined in detail to see if humanitarian intervention is a manifest violation of the U.N. Charter. In other words, it will be argued that the ICC is not an appropriate authority to determine the “manifestness” of an act. By using relevant articles already in the U.N. Charter., it will be argued that the current definition of the crime of aggression does not trigger the jurisdiction mechanism for unilateral humanitarian interventions.

4.1. The Ambiguity of “Manifest”

We first need to resolve a possible confusion on our way. It might be questioned why this article even discusses whether humanitarian intervention gives raise to the jurisdiction of the ICC since the list provided by Resolution 3314 considers almost every single attack a violation while defining the crime of aggression. Although the objection may seem just, the negotiators at the Kampala Review Conference intentionally chose the word “manifest” to exclude certain type of aggression from the jurisdiction of the Court. Although Article 8*bis* gives place to a very similar list in its second paragraph, what triggers the jurisdiction of the Court is not the actions in the list, but their character, scale, and gravity. In this regard, Country A’s engagement against the territory of Country B does not constitute crime of aggression (under the Rome Statute) as long as it is a low density military conflict “by its character, gravity and scale.” Therefore, Resolution 3314 test cannot be applied to our analysis to determine whether an act constitutes manifest violation of the U.N. Charter.

As stated above, it is clear that the crime of aggression includes only certain acts of aggression. Nevertheless, the meaning of “manifest” is unclear. According to one of the best law dictionaries, manifest means “that which is clear and requires no proof; that which is notorious” (Bouvier’s Law Dictionary, 1890: 148). Similarly, manifest means “clearly revealed to the eye, mind, or judgement; open to view or comprehension; obvious” with the words of the *Oxford English Dictionary*. The first problem arises from the fact that the concept is very abstract here. What is obvious for one may seem completely uncertain to another, which is true especially in international law and relations. Where is that fine line if not every use of force does not amount to crime of aggression?

Additionally, the manifest illegality requirement - without a meaningful definition – contributes to the disagreement on the legality of unilateral humanitarian intervention. “The objective requirement of manifest illegality already has the effect of excluding from the state conduct element any use of armed force that falls into the ‘grey area’ of the prohibition on the use of force” (Kreß & von Holtzendorff, 2010: 1200).

Other explanatory terms are as well problematic. The term “character” should have taken no place in the Rome Statute. “‘Character’ . . . is so indeterminate that it is almost meaningless. It is entirely in the eye of the beholder – or, rather, the Court – to determine which use of armed force is of a ‘character’ that warrants treatment as an individual crime” (Paulus, 2010: 1121). The terms “gravity” and “scale” do not provide anything except implicitly recognizing that not every use of force is a crime of aggression. These terms are very subjective; their meanings vary from person to person. For instance, it is an unanswered question why those admitting that the 1999 NATO intervention in Kosovo was justified to protect the people of Kosovo do not recognize the same justification to Russia’s military operations over the South Ossetia on the basis of the protection of the people from Georgia – though this paper does not argue Russia’s intent was the protection of human rights. Similarly, it is hard to justify the United States’ unlawful intervention (or invasion) in Iraq in 2003 on the humanitarian grounds.

With the current definition, it is well-nigh impossible for the Court to fit the definition to the controversial cases. “Certainly, the definition would allow the Court not to prosecute any of these cases, thus limiting ‘manifest’ violations to the most egregious cases, such as Saddam Hussein’s attack against Kuwait in 1990. But this would almost certainly leave the definition a dead letter” (Paulus, 2010: 1124).

Some authors have proposed to make an explicit or implicit exception for unilateral humanitarian intervention in the Rome Statute (Leclerc-Gagne & Byers, 2009). Even the inclusion of the intent test together with manifestness, gravity, character, and scale of the use of force does not solve the problem. First, humanitarian interventions mostly have different motivations, and it is hard to determine what the predominant intent is (Krieg, 2013). Second, by considering the intent factor in humanitarian interventions, the ICC may undertake a political decision-making capacity, and the Court is not an appropriate organ for this (Kreß (2009: 1140-1141). Although Leclerc-Gagne and Byers claims that the Rome Statute should recognize an exception for unilateral humanitarian intervention (Leclerc-Gagne & Byers, 2009), “the legal status of humanitarian intervention without Security Council authorization remains uncertain after Kosovo and that this, in fact, is a good thing. The uncertain

legality of humanitarian intervention puts a very high burden of justification on those who would intervene without U.N. authorization” (Stromseth, 2003: 234).

Article 31(1) of the Vienna Convention on the Law of Treaties provides that all treaties must be interpreted “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.” After examining the purpose of the Charter based on its relevant articles, the U.N. practice, court holdings, and the changing nature of state practice regarding the international human rights abuses, I want to argue that protecting human rights is one of the purposes of the U.N. Therefore, since unilateral humanitarian interventions are altruistic in nature, their violation of the U.N. Charter does not give rise to the manifest illegality provided under Article 8bis.

4.2. Low Density “Manifestness” of Unilateral Humanitarian Intervention

Article 1(3) of the U.N. Charter provides, as one of the purposes of the organization, “[t]o achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction to race, sex, language, or religion.” Article 13 similarly states that the General Assembly has the power of “promoting international co-operation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.” Again, Article 55 provides that “the United Nations shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”

It is argued that “the human rights provisions of the Charter are sufficiently clear and precise to be able to give rise to specific obligations for member states” (Kamminga, 1992: 75). On many occasions, the International Court of Justice (“ICJ”) affirmed this conclusion. In the *Namibia* case, it held that “to establish . . . , and to enforce, distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter” (Advisory Opinion, 1970).

On another occasion, in *United States Diplomatic and Consular Staff in Tehran*, the ICJ went one step further by interpreting the human rights provisions of the Charter together with the Universal Declaration of Human Rights. It held that “[w]rongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights” (United States of America v. Iran, 1980).

The U.N. practice itself evidences my argument that protecting human rights is one of the purposes of the organization. For instance, in 1946, in a relatively early time regarding the human rights issues, an important precedent was set. The Indian government applied to the organization to complain about the discriminatory treatment of Indians in South Africa. South Africa claimed that under Article 2(7), the matter was essentially within its domestic jurisdiction and the U.N. could not interfere. The General Assembly rejected South Africa’s argument, and opined that “the treatment of Indians . . . should be in conformity with the international obligations. . . . Article 1(3) of the U.N. Charter provides, as one of the purposes of the organization, “[t]o achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.” Article 13 similarly states that the General Assembly has the power of “promoting international co-operation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.” Again, Article 55 provides that “the United Nations shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”

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Throughout the century, the U.N. launched public investigations, of one kind or another, into violations of human rights in Equatorial Guinea (1979), El Salvador (1981), Bolivia (1981), Guatemala (1982), Poland (1982), Iran (1982), Afghanistan (1984), Cuba (1988), Romania (1989), and Iraq (1991) (Kelsen, 2008: 98). Interestingly, among them, Equatorial Guinea, El Salvador, Bolivia, Guatemala, Iran, Cuba, or Iraq did not raise the argument of interference in their domestic jurisdiction (Kelsen, 2008: 98). Since only three of the states maintained that those investigations were not compatible with Article 2(7), it is yet more evidence of the changing *opinio juris*.

Besides those direct and indirect U.N. involvements into the violations of human rights, states have entered into mutual international obligations to protect basic human rights with several human rights conventions including, but not limited to, Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, Genocide Convention, and Convention on the Elimination of All Forms of Racial Discrimination. Although there are other treaties which have failed to obtain a sufficient number of ratifications to come into force, “[t]his does not [necessarily] alter the conclusion that the whole area of human rights is presently the subject of, at least theoretical permanent international attention” (Fonteyne, 1974: 240). Even though it could be argued that those conventions cannot necessarily create a basis to justify unilateral humanitarian intervention, it is neither irrefutable that there is, at least in theory, a universal protection over the fundamental human rights.

Additionally, human rights violations have been a concern of international society on the regional level. In this regard, the European Court of Human Rights has one of the most powerful enforcement mechanisms. With its 47 members, the Court carries out its work under the European Convention on Human Rights, and its judgments are binding on the parties.

In this regard, who can argue that the 1999 NATO intervention was illegitimate? While discussing when and how the protection of human rights becomes superior over state sovereignty, Thomas Franck (2003: 226) maintains that

Was the NATO action unlawful? Yes and no. Yes, in the sense that the prohibition in Article 2(4) cannot be said to have been repealed in practice by the system’s condoning of NATO’s resort to force without the requisite armed attack on it or prior Security Council authorization. Such a repeal is not supported by the members of the global system at this time. No, in the sense that no undesirable consequences followed on NATO’s technically illegal initiative *because, in the circumstances as they were understood by the larger majority of UN members*, the illegal act produced a result more in keeping with the intent of the law (i.e. “more legitimate”) – and more moral – than would have ensued had no action been taken to prevent another Balkan genocide. In other words, the unlawfulness of the act was mitigated, to the point of exoneration, in the circumstances in which it occurred.

This paper does not argue that the doctrine of unilateral humanitarian intervention is a well-accepted practice under the current international law. It is neither a predictable event in world affairs nor a lawful conduct. However, the above-stated U.N. articles regarding human rights, the holdings of the ICJ, and international treaties protecting human rights evidence that unilateral humanitarian intervention does not, by its character, gravity, and scale, violate the fundamental understanding of the U.N. Charter.

5. CONCLUSION

While attempts of international law scholars to convince the international community on the legality of unilateral humanitarian intervention continue, there does not seem a positive outcome in the near future as to change the dominant view. By the time the international community agrees, the legality of unilateral humanitarian intervention will remain unclear. This ambiguity will be much more visible after Article 8bis of the Rome Statute enters into force. However, the ICC will not have jurisdiction to decide on the legality of unilateral humanitarian intervention and prosecute the leader allegedly committing the crime of aggression, as long as it is in the “grey area” of international law.

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