

# Legality and Legitimization of Humanitarian Intervention

## New Challenges in the Age of the War on Terrorism

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*When does the universality of human rights and freedoms conflict with the legality of humanitarian intervention? This article explores the history of and problems with this issue. In addition, it pursues the problems of when and how to intervene to prevent humanitarian crises and how to reestablish peace after a military intervention. Three key responsibilities are identified: to prevent, to react, and to rebuild. This thorny ethical, political, and legal problem has been one of the most difficult in international law, and the author does not envision it being solved soon; however, the author points to real progress in multilateral conventions as hope for the future.*

**Keywords:** *humanitarian intervention; just war; legitimacy; sovereignty; universality of human rights*

### UNIVERSALITY OF HUMAN RIGHTS, STATE SOVEREIGNTY, HUMANITARIAN INTERVENTION

In the course of recent years' worldwide debate about human rights, two trends have been predominant: the question of the universality of human rights and freedoms of an individual and the issue of legality and legitimization of humanitarian intervention (Baehr, 2000). From the point of view of both the philosophy of law in general and the dogma of international law in particular, these issues are of a distinct nature; but on the other hand, their common points cannot be ignored (see Abiew, 1999, pp. 83-90).<sup>1</sup> Simply stated, advocates of the universality of human rights tend to be, by definition, more in favor of humanitarian intervention than their opponents who stand for cultural pluralism. And conversely, protagonists of humanitarian intervention, by definition, seek arguments for its legality and legitimization on the basis of moral universality rather than on the grounds of relativism.

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Heated debate about the issue of the universality of human rights started in world science in the 1980s and reached its culminating point in the mid-1990s, especially during the Human Rights Conference in Vienna in 1993 and mainly in connection with so-called Asian values. The issue of the character of human rights has dominated most present-day intellectual debates, that is, in political philosophy, between liberalism and communitarianism; in law philosophy, between positivism and nonpositivism; and in ethics, between universality and relativism. In these debates, almost all eminent ethicists, philosophers, political analysts, lawyers, and sociologists have participated, namely, R. Alexy, P. Alston, N. Chomsky, J. Donnelly, F. Fukuyama, J. Galtung, A. Gutman, J. Habermas, R. Howard, O. Hoffe, S. Huntington, A. McIntyre, W. Kersting, M. Nussbaum, J. Rawls, R. Rorty, M. Sandel, A. Sen, C. Taylor, and M. Waltzer among many others. It is characteristic that most of these authorities have recently expressed their opinion on humanitarian intervention as well, which confirms its relation to the issue of the universality of human rights (cf., e.g., Donnelly, 2002; Habermas, 2000; Hoffe, 1999/2000; Kersting, 2000, pp. 230-272; Waltzer, 2002). The above-mentioned names bespeak, not only formally, that the problem is of great importance, and the way it is solved may have far-reaching practical consequences. There is one more characteristic of this exemplary enumeration: I have mentioned only thinkers representing Western culture (or at least related to it), whereas the debate on the universality of human rights is a debate that spans civilizations, and scientists from the Islamic world, sub-Saharan Africa, and the Far East take an active part in it. This fact makes the problem even more complex, as there is no unanimity concerning the approach or even acceptance of the universality of human rights on either the intercultural level or within seemingly homogeneous Western thinking. According to Habermas (1999), this intellectual debate not only reaches across civilizations but also is a debate of "the West with itself" (p. 386).

In the past few years, this worldwide debate has lost its initial impetus, which was connected with the September 11 terrorist strikes and the subsequent declaration of war on terrorism.<sup>2</sup> Subtle philosophical ponderings on either the universality or relativism of human rights have been eclipsed by the question of the legality and legitimization of humanitarian intervention undertaken with the aim of stopping massive human rights violations. In literature, the question of the relation between the war on terrorism and humanitarian intervention is not unequivocal. On one hand, there are attempts to draw a parallel between preventive war and humanitarian intervention on the grounds of the tradition of the so-called just war; on the other hand, however, more and more often the question arises if the war on terrorism means the end of an era of "pure" humanitarian intervention as humanitarian motives are superseded with strategic national and international security targets—for example, Afghanistan and Iraq (cf. Lucas, 2003; Sung-han, 2003).

Although the debate on humanitarian intervention started earlier than arguments about universality, it can be dated back to the 1970s in connection with

several armed attacks that occurred at that time, especially in Eastern Pakistan/Bangladesh; but in both cases, it evolved in two different directions.<sup>3</sup> After 1945, and particularly after the passing of the Universal Declaration of Human Rights in 1948, the universal character of the basic rights and freedoms of individuals was accepted a priori, and the debate in world literature of the 1980s and 1990s aims at impairing, at least relatively, the postulates of universality. In the case of the debate about humanitarian intervention, we have quite a different situation. Regulation of Article 2 of the UN Charter initially excluded, also to some extent a priori, the possibility of applying humanitarian intervention as a means of solving conflicts both international and all the more, internal. The only two exceptions concerning the threat or use of force in international relations are either cases of self-defense or actions that enjoy UN Security Council authorization, according to procedure resulting from Chapter VII of the UN Charter in the case of threat to world peace and security. UN Security Council authorization following the procedure of the declaration *Uniting for Peace* (UN General Assembly, 1950) might be recognized as the third exception. These exceptions, however, did not initially assume the use of force with regard to humanitarian intervention in the present meaning of the institution, at least due to fairly wide interpretation of the so-called internal authority of the state resulting from Article 2 of the UN Charter. International practice, however, went in the other direction: During the 1960s and 1970s, cases of intervention in internal conflicts took place that can be recognized as humanitarian interventions from today's perspective and standpoint, even if those intervening claimed self-defense rather than humanitarian reasons (Abiew, 1999, pp. 102-131; Chesterman, 2002, pp. 63-83; Murphy, 1996, pp. 83-115; Wheeler, 2002b, pp. 55-136), for example, India's intervention in East Pakistan or to some extent, Tanzania's intervention in Uganda and Vietnam's in Cambodia.<sup>4</sup> As the system of international protection of human rights has evolved, the approach to the internal competence of the state in interpretation of the above-discussed rule of the UN Charter has changed. The process intensified in the 1990s after the fall of the Communist system and the end of the cold war (Abiew, 1999, pp. 137-222; Chesterman, 2002, pp. 127-162; Murphy, 1996, pp. 145-281; Wheeler, 2002b, pp. 139-284), and at the same time, humanitarian motives for intervention began to appear more often. From this point of view, NATO's intervention in Kosovo was a turning point as both the legality and legitimization of this action have been the subject of debates until the present day (in the most recent literature, compare, for example, Beestermoller, 2003; Holzgrefe & Keohane, 2003). The conclusion to the report of the Independent International Commission on Kosovo (2000) is the best example of this: "The Commission acknowledges that the NATO's military intervention was illegal, though legitimate" (p. 4). And it goes on further to state that "the lesson from NATO's intervention in Kosovo shows that there is a need to bridge a gap between legality and legitimization" (Independent International Commission on Kosovo, 2000, p. 10). The conflict between legality and legitimization is not a new question for lawyers, and it has always been the main

subject of philosophical and juridical debates. It was defined in a very explicit way by G. Radbruch in his conception of an antimony in three elements of the idea of law: security, purposefulness, and justice (for more about Radbruch's formula, see Alexy, 2002).<sup>5</sup> Never before has this conflict been so intense in theory and practice of international law as it is now, because never before has the dogma of unlimited state sovereignty in international relations been questioned on the strength of the arguments ensuing from the system of international human rights protection. It obviously does not mean that the golden mean for solving potential conflict between state sovereignty and international legal commitments concerning the protection of human rights has been found—merely, the importance of the problem has been recognized, as has been apparent in attitudes expressed toward the issue by the UN Secretary-General in recent years (cf., e.g., Lyons & Mastanduno, 1995). In 1991, J. P. de Cuellar stated that “the rule of not interfering in states’ internal jurisdiction cannot be a protection barrier behind which human rights could be violated on a massive or systematic scale with impunity” (Annan, 1998, p. 58). Boutros-Ghali (1992), de Cuellar’s successor, stressed that states’ sovereignty and their territorial integrity is still the basis of international relations but at the same time added, “The time of absolute and exclusive sovereignty has passed” (para. 17). The turning point in the process of recognizing the issue was the September 20, 1999, speech of the present UN Secretary-General, Kofi Annan, to the UN General Assembly in which Annan observed, “State sovereignty is being re-defined by globalization and international co-operation between powers. It is widely understood that the state should serve its citizens and not vice versa” (United Nations Press Release, 1999).

Radbruch (see Alexy, 2002) suggested that the potential conflict between legal security, purposefulness, and justice should be solved in favor of the first unless the injustice of the legal norm is to such an unbearable extent that the foul law should be replaced by the rule of justice itself. As a matter of fact, this can be applied to cases when procedural deficiency resulting from the definition in the UN Charter causes the international community to remain inactive while witnessing massive human rights abuses or even genocide, war crimes, and crimes against humanity. The problem of humanitarian intervention is the extreme normative exception, so it may be perceived as a conveyance of the so-called Radbruch formula in international relations.

The war in Kosovo was in itself a special case due to the character of the military action and the unclear position of the UN Security Council, yet at the same time, it became a pretext for attempts at reinterpretation of previously existing attitudes concerning both the question of the interdiction on the threat or use of force in international relations (UN Charter, Article 2, para. 4) and the principle of nonintervention in internal affairs of other states (UN Charter, Article 2, para. 7). It also worked as a stimulus to reflection on the role and future of the Security Council or even the whole system of the United Nations.<sup>6</sup> As a result, since 1999, the number of scientific papers concerning humanitarian intervention has

risen considerably and above all, there are now more proponents of the institution, although they give various and different reasons for their approving attitude to the possibility of military intervention aimed at preventing or ending massive violations of human rights.<sup>7</sup>

The need for the new approach to the legality and legitimization of humanitarian intervention was noticed in the mid-1990s—for example, Ramsbotham and Woodhouse (1996) attempted a “reconceptualization” of the institution, comparing intervention in Uganda with conflicts in Iraq, Bosnia, and Somalia. It must be stressed that the quest for a more-rational-than-before strategy of solving conflicts between state sovereignty and norms of international human rights protection continues to the present day. In contemporary literature, opinions stressing the necessity for rethinking humanitarian intervention from ethical, political, and legal points of view can be noticed more and more often. According to Lepard (2003), and as reflected in the title of his book, it is urgent to work out “a fresh attitude based on ethical foundations of international law.”<sup>8</sup> To a certain extent, the report of the International Commission on Intervention and State Sovereignty (ICISS; 2001a), created under the aegis of the Canadian government, may serve as an example of such an attitude. The document not only explicitly points to the urgent need for a legal-international definition of *humanitarian intervention* and conditions for its legality, legitimization, and operational efficacy but also places it in the background of strategies of contemporary international relations. It is very characteristic for the document that its authors suggested replacing the term *humanitarian intervention* with the notion *responsibility to protect* (ICISS, 2001a). The problem is not only when, under which conditions, and in what way to intervene but also how to prevent humanitarian crises and how to maintain peace after a military conflict and rebuild democratic, stable social structures and an economic infrastructure. The concept of responsibility to protect is threefold: the responsibility to prevent, the responsibility to react, and the responsibility to rebuild (ICISS, 2001a, pp. 19-46).

### DIVISION CRITERIA, CONFLICT IN VALUES

In the above-mentioned speech of September 20, 1999, Kofi Annan (United Nations, 1999) suggested that the notion of humanitarian intervention should be understood extremely widely and it should cover actions “from the most peaceful to the most forceful.” In fact, if the character of such interventions is taken seriously, situations when nonmilitary and purely humanitarian methods, such as the supply of food, medicines, and medical aid were applied, cannot be ignored. From this point of view, intervening subjects can be not only states but also nongovernmental organizations. We also cannot neglect the situations when the intervention is of military character but is undertaken at the request of the country in question that is unable to solve its serious internal problems. And last but not least, the theory and practice of international law distinguishes two

situations: when intervention is aimed at protection of its own citizens in another state's territory and when it is aimed at protection of citizens other than its own. In this respect, there has been a reasonable evolution of the institution of humanitarian intervention. Although in 19th-century practice the former prevailed,<sup>9</sup> being a cover for colonial and religious motives, present-day interventionism, according to Wheeler (2002b), is aimed mainly at "saving strangers." Throughout recent years, however, cases of the first type of intervention did take place (to a certain extent, American intervention in Grenada in 1983 or Panama in 1989 could be recognized as such), but in literature, they are called *intervention d'humanite* and they are distinguished from *humanitarian intervention* in the strict sense of the term (Kolb, 2003, p. 120).

From this standpoint, there is an internal semantic inconsistency in the term *humanitarian intervention*: if we say *intervention*, then not humanitarian but military and forced; and if we say *humanitarian*, then not intervention but aid. In the doctrine of international law, we have a rather opposite trend, as a certain paradigm has already been fixed and most authors have limited their definitions only to those actions of military and forced character determined by humanitarian motives and aims of the intervening state, group of states, or international organization without the permission of the state within whose territory intervention takes place. There are also two main criteria of the division of actions after 1945 that were classified as humanitarian interventions. The first is of chronological character, and its turning point is the end of the cold war—in literature, there is a clear distinction between interventions that took place in the 1960s and 1970s (e.g., the Congo, Dominican Republic, East Pakistan, Uganda, and Cambodia) and those in the 1990s (e.g., Iraq, Somalia, the former Yugoslavia, Rwanda, Liberia, and Haiti). As a result, this classification, although based on a formal time criterion, has a very deep political dimension. The second criterion, from the point of view of international law, is of a much more serious character. In this case, interventions are divided into those that enjoyed previous UN Security Council authorization (e.g., Iraq, Rwanda, and Somalia) and those that were undertaken without such authorization (e.g., Kosovo), even if it was tacit (e.g., Central Africa and Tanzania) or clear (Liberia) after the fact (Danish Institute of International Affairs, 1999, pp. 57-95). This classification is, in turn, of formal-legal character and is based on the existence or the lack of a UN Security Council resolution, but it results in material-legal application and interpretation of the UN Charter. It needs to be said that both criteria—the end of the cold war and UN authorization—in spite of appearances, are closely tied with each other, as the demise of the Communist system raised hopes for the end of the paralysis of the Security Council in authorizing humanitarian interventions (for more on this subject, see Dupy, 1993). Even if events of the past decade to a certain extent disappointed these hopes, the authors of the ICISS (2001a) report are nevertheless right when in conclusion, they appeal for an informal pact allowing superpowers to act *in dubio pro humanitate* (in favor of humanity), at least in cases of flagrant humanitarian crises that pose a threat to world peace and security.<sup>10</sup>

It is clearly seen that the issue of humanitarian intervention cannot be treated *per non est* (as it does not exist). It also cannot be considered in a selective and one-dimensional way—from the point of view of either ethics, politics, or law.<sup>11</sup> It is a phenomenon whose understanding and solving requires taking all three perspectives into consideration.<sup>12</sup> Moreover, on each of these three planes, very complicated theoretical and practical problems emerge and consequently, only a holistic approach makes it possible to elaborate a position free of internal contradictions.<sup>13</sup> The issue of humanitarian intervention can be considered only from the standpoint of an extremely positivistic interpretation of the UN Charter, particularly Article 2, paragraph 4 in connection with Article 2, paragraph 7. In the theory of law in general and in the theory of international law in particular, such a position in the past, especially in the context of the evolution of the theory of human rights, is in a sense *ex definitione* (from definition) a “nonpositivistic” theory that does not have to mean “legal-natural” at the same time. Obviously, the other question concerns whether this nonpositivism gives us an efficacious solution to all ethical, legal, and political dilemmas connected with humanitarian intervention. The matter is, however, of a different nature. Present debate on humanitarian intervention reflects only a wider tendency in legal science, that is, withdrawing from traditional legal “passivism” and turning to the position of legal “activism” that meets today’s requirements better. In international law, it means a withdrawal from traditional “statism,” with states and only states being in the focus of interest and at the same time passing over the subjectivity of individuals (Teson, 1998, p. 39). Legal justification for humanitarian intervention or its absence must have ethical and political foundations. Without ethical legitimization, humanitarian intervention may be perceived as a law of the stronger or a new form of colonialism. But also, conversely, without political legitimization, the debate may be reduced to empty moralism.<sup>14</sup> Otherwise, it is difficult to explain why humanitarian interventions are in the present time selective and why they have not been undertaken in Chechnya or Tibet. The answer to this question is, in fact, rhetorical.

Humanitarian intervention is connected with the question of values, which in normal conditions are not contradictory but in extreme situations, are in conflict with each other. These problems cannot be solved on the grounds of traditional positivism. The war in Kosovo is an example where the division between different positions concerning the attitude of international law toward morality is very clear.<sup>15</sup> The conflict between the value of state sovereignty and the value of international community responsibility for a universal system of human rights protection is basic from the point of view of the causes of humanitarian intervention. The problem can be considered *a retours* (conversely), however. It turns out, then, that from the standpoint of the course and results, humanitarian intervention may mean the conflict between the value of protection of human rights and the value of peace and interdiction on using force in international relations as the foundations of the present-day international community (Kirsch, 2002). In any case, employing the rhetoric of the Radbruch formula (see Alexy, 2002)



transferred to the international level, it can be said that in humanitarian intervention, we deal with the conflict between security and order versus justice (Danish Institute of International Affairs, 1999, pp. 14-17; see also Wheeler, 2002b, pp. 11-13). The problem concerns not only external forms and results of the institution but also is immanently embedded in its essence. In the literature of the subject, it is sometimes defined as the “internal legitimization of humanitarian intervention” (Buchanan, 1999).

### DEFINITION OF *HUMANITARIAN INTERVENTION*

Taking all of the above-mentioned proviso concerning the notion, types, and ethical, political, and legal implications of humanitarian intervention into account, it must be said that in contemporary literature of international law, definitions of a narrow character are predominant. A typical example may be S. D. Murphy’s suggestion that “humanitarian intervention is the threat or use of force by a state or a group of states or an international organization against the other state aiming at protecting its citizens from massive violations of internationally recognized human rights” (Wheeler, 2002b, p. 11). A similar definition can be found in the report of the Danish Institute of International Affairs (1999):

For the needs of the present report, humanitarian intervention is defined as a coercive action of states with the use of armed forces in another state without the permission of the state government, with or without UN Security Council authorization aiming at averting or stopping massive human rights or international humanitarian law violations. (p. 11)

Abiew (1999) suggested that the term should be understood as “coercive measures applied by a state, a group of states, an international organization or humanitarian agencies with the aim (or at least one of the main aims) to end massive human rights violations” (p. 18).

Such terminological suggestions are as plentiful as the contemporary literature on humanitarian intervention is vast (see the extensive bibliography in International Commission on Intervention and State Sovereignty, 2001b, pp. 227-336). There are very general definitions as, for instance, I. Brownlie’s (as quoted in Abiew, 1999, p. 18) mention of the threat or use of force aimed at human rights protection. Other authors, such as W. D. Verwey (as quoted in Abiew, 1999, pp. 12-18), limited the term only to military actions without the authorization of competent UN organs. It must be admitted that the latter approach has been gaining more and more proponents. It is assumed that at present, the main issue is legality and legitimization of so-called unilateral intervention undertaken without UN Security Council authorization, as so-called collective intervention with the formal approval of UN organs is today unquestionable (Brenfors & Petersen, 2000, p. 450; also similar are Ortega, 2001; Wellhausen,



2002, p. 47). The review of all possible approaches, however, would be beyond the limits of this article. I shall concentrate only on the attempt to reconstruct certain *loci communes* (common places) characteristic for the phenomenon of humanitarian intervention in present international relations as, despite some differences concerning details among individual authors, it is possible to establish a common core among the suggestions. It may be reduced to the following five elements:

1. *Humanitarian intervention* means the actual use of force. Some authors also have added the threat of using force, but it is not a universally accepted position. In fact, the question is if the mere threat of using force may be classified as the actual intervention or if it is within the limits of widely understood diplomatic means. In the above-accepted meaning of the term, *humanitarian intervention* does not cover actions not accompanied by military force that are confined exclusively to aims and methods purely humanitarian, especially if realized by nongovernmental organizations. In the last case, we should talk about humanitarian *aid* rather than humanitarian *intervention*. In the first, however, we deal with the use of force or at least as some claim, with the threat of force.
2. Although nongovernmental organizations play an important role during humanitarian intervention, their role in relation to the intervening subject has a subsidiary character. The subject may be an international organization, a state, or a group of states.
3. The causes of intervention are massive, internationally recognized human rights violations in a state within whose borders intervention takes place. This is a criterion of quantity, as the situation should reach a state defined as a humanitarian disaster (widespread deprivations of internationally recognized human rights).
4. The basic aim and motive of actions undertaken by the intervening state is to halt such violations. It is extremely rare, however, that interventions do not involve other political or economic interests of the intervening state. The point is that the humanitarian cause should be the primary cause.
5. In the case of humanitarian intervention, the aim is to protect nationals of a target state. It may happen, however, that among the protected subjects are citizens of the intervening state (see also Murphy, 1996, pp. 12-18).

### PERMISSIBILITY CONDITIONS OF HUMANITARIAN INTERVENTION

Such a formulated definition implies conditions of permissibility of humanitarian intervention. In the literature of the subject, various criteria of applying humanitarian intervention are given. According to N. J. Wheeler, permissibility conditions, that is, the legality and legitimization of humanitarian intervention, are given in four points: just cause, which the author suggests calling supreme humanitarian emergency; last resort; requirement of proportionality; and likelihood of positive humanitarian outcome (Abiew, 1999, p. 33). Coady (2002, pp. 24-31) supplemented the list with a definition of the right authority to undertake humanitarian intervention, and authors of the ICISS (2001a, p. XII) report added the right intention to it. In this way, we have five objective criteria (objec-

tive cause, exploration of other possible methods, proportionality of the applied measures, probability of efficiency, and humanitarian intentions) and above them, a subjective criterion (right authority if objective criteria are met). In connection with the latter, is the widely argued issue of right or even the moral (legal?) duty of humanitarian intervention (Coady, 2002, p. 25).

In this context, the most controversial question concerns, of course, the subject authorized for humanitarian intervention if the substantial premise is met. If the subject is authorized in one way or another by UN organs, then what is the pretext for humanitarian intervention when the foundation could be a threat to world peace and security? If, in turn, it may be a subject for intervention without such authorization and not in self-defense, then how, on the grounds of the UN Charter, can the legality of such military action be justified? And how does it relate to duties resulting from the system of international human rights protection and resulting in *erga omnes* (applicable to all)? It can be argued, following the ICISS (2001a) report, that the best solution is to adhere to the model of collective security formulated in the UN Charter. But what if the system is paralyzed, as it was in the past, by the unfounded—from the moral point of view—use of veto by a permanent member of the Security Council? And vice versa, who can guarantee that bypassing the UN system due to the political paralysis of basic UN organs will be, in practice, no more than a form of *Pax Americana*? This objection is often raised with regard to the actions of NATO in Kosovo and also to the war in Iraq, although the latter can hardly be recognized as an example of classic humanitarian intervention. The fact that Soviet interventions in Hungary, Czechoslovakia, or Afghanistan were once considered an indication of *Pax Sovietica* augments the ambivalence of the case (Gray, 2000, p. 62). On the other hand, the military interventions of the Soviet Union in Hungary in 1956 or in Czechoslovakia in 1968 and NATO's action in Kosovo in 1999 can hardly be put on the same plane.

Such questions and doubts are innumerable. At the same time, it is difficult to predict in which direction international law will evolve in the future: Will it return to a restrictive interpretation of existing norms (Gray, 2000), will it occasion the changing of the UN Charter, will it establish a new customary norm of law (D'Amato, 2001), will it lead to a reinterpretation of the UN Charter or the creation of a parallel system by "bypassing" its regulations (Holzgrefe & Keohane, 2003), or will it treat each case *ad casum* (applicable to the case) in categories of extreme exception, sometimes even at the cost of its legality (Simm, 1999; also see commentary by Byres & Chesterman, 2003; Cassese, 1999)? Today, these solutions, maybe excluding the latter, seem to be both controversial and doubtful when it concerns the possibilities and chances of their practical realization.

Defining an objective rationale of humanitarian intervention seems to be easier, although it also has its theoretical and practical difficulties. Just cause refers to the theory of just war (*bellum justum*); but at the same time, it is distinct from this theory, as it is limited to the problem of the protection of human rights

against massive violations (Fixdal & Smith, 1998; for more, see the classic work of Waltzer, 2000). Of course, difficulties concerning the “massive” criterion can be raised, but in this case such terms as *genocide*, *crimes against humanity*, or *war crimes*, as already defined in international law, may be helpful. Obviously, not every case of human rights violation may lead to humanitarian intervention, only those that result in a humanitarian crisis on a disastrous scale.<sup>16</sup>

Similar difficulties may accompany other substantial permissibility conditions of the discussed institution. Such difficulties are best seen in the example of NATO’s intervention in Kosovo. Even proponents of the intervention admit that the requirement of proportionality may be impaired as bombings were directed at not only military targets but also civilian targets, causing many casualties among civilians and destruction of both the natural environment and the economic infrastructure. On the other hand, the principle of last resort may be questioned, as it is still not clear if all diplomatic means and procedures provided in the UN Charter had been explored. Doubts concerning other permissibility conditions of humanitarian intervention, such as the right intention and positive humanitarian outcome, have been discussed earlier in this article.

### STRATEGIES AND THEORETICAL ATTITUDES TO HUMANITARIAN INTERVENTION *DE LEGE LATA AND DE LEGE FERENDA*

As mentioned above, the issue of humanitarian intervention is very complex from not only the ethical and political point of view but also (and possibly particularly) the legal point of view. This cannot mean, however, that we should give up attempts to solve its various aspects on the juridical plane as well. According to the Danish Institute of International Affairs (1999), there are four strategies regarding the issue of humanitarian intervention based on the existing international law:

1. Maintaining the present political-legal *status quo* on the grounds of the UN Charter and recognition of the permissibility of humanitarian intervention only on the basis of UN Security Council authorization after fulfillment of certain material-legal conditions (*the status quo strategy*);
2. Recognizing humanitarian intervention as an “emergency exit” from international law when the UN Security Council does not react due to a blockade of the decision-making process (*the ad hoc strategy*);
3. Introduction of a subsidiary law to humanitarian intervention in the treaty or customary course outside the system of the Security Council (*the exception strategy*);
4. Introduction of a general law for humanitarian intervention in the treaty or customary course (*the general right strategy*). (pp. 27, 112)<sup>17</sup>

It is seen *prima facie* that some of these strategies may in practice be faced with difficulties in realization. The first of them, the status quo strategy, seems to be too conservative from the point of view of the creation of the new paradigm of

sovereignty in international relations, not to mention duties *erga omnes* resulting from international human rights protection. The last, in turn—the general right strategy—would be on one hand “backwardness” in the progress of international law and reversion to the *ius ad bellum* (right to war) conception; on the other hand, it would pose a threat to international order and collective security. The future seems to be placed somewhere in between the strategies of “illegal extreme exception” and “subsidiary norms of international law.”

This position is also acknowledged in recent works of some specialists in international law. It must be stressed that proponents of humanitarian intervention are faced with a much more difficult task than their opponents criticizing the institution, particularly its functioning outside the UN system. For the latter, it is enough to adduce UN Charter regulations, whereas the former have to refer to rather sublime and at times even breakneck theoretical-legal constructions. A very interesting specification of proponents' views on humanitarian intervention has recently been compiled by Buchanan (2003). According to Buchanan, the theoretical justification of the legality (illegality) and legitimization of humanitarian intervention can be considered from three basic angles. The first justification is based on a reference to extralegal norms—even if humanitarian intervention is illegal because it is undertaken without UN Security Council authorization, it is justified by moral necessity (simple moral necessity justification). Such an approach is difficult for lawyers to accept; still, it is consistent with the above-described strategy of defining *humanitarian intervention* as not only an option, although illegal, but also the only “emergency exit.” Hence, some lawyers of international law, such as Teson (2003; cf. also Teson, 1997), seek not only the legitimization but also the legalization of humanitarian intervention using moral principles and arguments. This position is defined by Buchanan with the seemingly shocking term *lawful illegality justification*. It is an attempt to find a solution according to the rule of law in general. Even if the intervention undertaken without UN Security Council authorization violates norms (e.g., Article 2, para. 4 of the UN Charter), it is justified by core values of international law and the UN Charter in particular. From the standpoint of the theory of legal interpretation, it is, to some extent, giving less importance to the textual interpretation and advancing to the level of systematic interpretation. It would mean that to the strategies *de lege lata* and *de lege ferenda* should be added one more—the strategy of systematic reinterpretation of the UN Charter. The third possible approach presented by Buchanan is just as shocking for lawyers; he defined it as illegal legal reform. According to Buchanan, the existing system does not comply with the requirements and challenges of the present age. It especially concerns the subjective permissibility of humanitarian intervention to a specific procedure of its authorization by the UN Security Council. What did Buchanan suggest? In his opinion, in some cases it is necessary to break (*sic!*) the existing law to reform the legal system. To support his view, he pointed to two historic examples: the illegal actions of British ships aimed at

destroying the slave trade in the 19th century and the birth of the Nuremberg legal norms after 1945 (Buchanan, 2003, p. 136).

## CONCLUSIONS

It is clear that humanitarian intervention is accompanied by complex ethical, political, and legal problems both on practical and theoretical levels. The complexity of the matter has been long recognized in the science of international law. T. J. Lawrence wrote, "In international law there are only a few issues as complicated as those concerning the legality of interventions" (as quoted in Chesterman, 2002, p. 1). In this connection, I believe, the debate on their legality and legitimization will continue in the future. This assumption is confirmed by events that took place in recent years—in Sierra Leone, Liberia, or East Timor directly, and in Afghanistan, Iran, and the international war on terrorism indirectly. To a certain extent, the fact that a very clear-sighted and reasonable ICISS (2001a) report was recognized as the official UN document seems to be consoling.<sup>18</sup> It makes possible the further search for solving the problem of legality and legitimization of humanitarian intervention by compromise and other methods. The first real proposals for multilateral convention in the matter have already been made (Crawford, 2002, pp. 431-434).

## NOTES

1. Abiew (1999) drew attention to the connection between the universality of human rights and humanitarian intervention.

2. In spite of this, the issue of the universality of human rights is in the focus of interest of science. Of recent works on the subject, note especially the extensive monograph of Brems (2001).

3. Of the works of the time, see especially Lillich (1973). Some time later, the classic work edited by the prominent representative of the so-called English school of international relations was published (see Bull, 1984).

4. An interesting attempt to consider the problem of the use of force in international relations from the point of view of self-defense was made recently by Franck (2002, pp. 135-173). Within the accepted classification, Franck recognized, among others, the cases of so-called purely humanitarian intervention as, for instance, interventions in Bangladesh, Uganda, Cambodia, Central Africa, Iraq (in 1991), Sierra Leone, and Kosovo.

5. The fact that the conception comes from Radbruch is not surprising, as the problem of legality and legitimization was widely discussed in German legal science during the Weimar Republic (cf., more recently, Dyzenhaus, 1999; Jacobson & Schlink, 2000).

6. Proposals have been made for reforms of the system from the point of view of humanitarian intervention, including even the change of the UN Charter (see also the debate of various authors on these proposals in a recent issue of the *International Journal of Human Rights*, including "Introduction," 2002, p. 79, and especially Ayoob, 2002; Wheeler, 2002a). On possibilities and limitations of structural and procedural reform of the UN Security Council, see also Weiss (2003).

7. In literature, it is clearly seen in the example of the war in Kosovo with regard to which extreme attitudes are represented—from attempting to justify the legality of humanitarian

intervention (see Brenfors & Petersen, 2000) to recognizing NATO's action as a crime against humanity (Cohn, 2002).

8. Compare Lepard (2003) who approved of such redefined humanitarian intervention and Orford (2003) who was rather critical in her opinion, taking as the starting point intervention in East Timor.

9. On the subject of 19th-century interventionism, see Grewe (1884, pp. 573-583).

10. On the other hand, it must be admitted that in the 1990s, there was a considerable increase in Security Council engagement in realization of the United Nations's aims concerning human rights protection resulting from the UN Charter and especially in the context of humanitarian intervention (for more, see Alston & Steiner, 2000, pp. 648-694; Henkin, Neuman, Orentlicher, & Leebron, 1999, pp. 707-737; International Commission on Intervention and State Sovereignty, 2001a, pp. XIII, 75; Ramacharan, 2002).

11. Recently, attention was drawn by authors of works in Holzgrefe and Keohane (2003).

12. It seems to be necessary to expand the debate to an ethical discussion, as previous attempts to solve the problem on only political or legal planes have not brought satisfying results (Smith, 1999, p. 279).

13. In the context of relations between humanitarian intervention and the problem of universality of human rights, it is characteristic that the holistic approach is often suggested regarding the latter (cf., e.g., Belden Fields, 2003, pp. 73-99).

14. It concerns also the issue of universality of human rights (Falk, 2000, p. 4).

15. From this point of view, for example, Schieder (2000, p. 691) divided lawyers of international law into "legalists" who favor a restrictive interpretation of Article 2, para. 4 of the UN Charter and "moralists" who try to reinterpret the UN Charter because of the special case of the war in Kosovo; and this moralism can be "minimalistic" or "maximalistic," depending on what changes are suggested. This division, however, reflects only the general trend of returning to ethics in contemporary international law and its science (see Koskeniemi, 2002).

16. For example, one of the most troublesome problems in public opinion has been female genital mutilation in some cultures. It is not, however, sufficient cause for humanitarian military intervention but instead, for the activities of nongovernmental organizations (Treueblood, 2000, p. 464).

17. Rytter (2001) pointed to three solutions: maintenance of the existing status quo and exact interpretation of the UN Charter; development of the new doctrine of humanitarian intervention without the UN Security Council either of subsidiary or competitive character in relation to the present competence of this organ; and adoption of an ad hoc strategy recognizing humanitarian intervention as an emergency exit justified either by necessity or by moral norms.

18. The first commentaries on the International Commission on Intervention and State Sovereignty (2001a) report have already appeared. Of the most recent, see, for example, Roberts (2003), Warner (2003), and Thakur (2003).

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