WHY HAS THE 2011 LIBYAN INTERVENTION WEAKENED THE FRAGILE PRINCIPLE OF HUMANITARIAN INTERVENTION AT INTERNATIONAL LAW?

– **Aldo Zammit Borda**[1]

This article provides a few remarks on the principle of humanitarian intervention in the context of the 2011 intervention in the Libyan Arab Jamahiriya. It firstly considers the contentious nature of this principle at international law. It proceeds to develop the argument that, even though the commission of international crimes by a government against its own population may not be considered as an "internal matter," one of the main reasons for which this principle has been resisted is for fear of abuse. The article concludes by noting, in this respect, that the non-circumspect manner in which the 2011 Libyan intervention has been undertaken may have contributed to the further weakening of this fragile principle.

I. The Controversial Nature Of Humanitarian Intervention In The Absence Of UN Security Council Authorization

Although humanitarian intervention may refer to a wide range of conduct from diplomatic representations through economic measures to the use of force and in a variety of circumstances, this article will confine itself to Greenwood's definition of the term, namely, "intervention of a military character (involving either the actual use of force or action in which military forces are deployed to a State with an implied threat of force if they are resisted). In addition, discussion will focus upon cases in which a substantial part of the population of a State is threatened with death or suffering on a grand scale, either because of the actions of the government of that State, or because of the State's slide into anarchy."[2]

In the context of the United Nations (UN) Charter, the central tenant concerning the use of force is Article 2(4), which states:

"All Members of the United Nations shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

Franck notes that "[a] 'right of humanitarian intervention' was mooted [in the international conference responsible for the drafting of the UN Charter] at San Francisco […] However, no such right made its way into the UN Charter. Even though its text does 'reaffirm faith in fundamental human rights,' it does not make provision for using force to implement that commitment."[3]

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[2] Greenwood, 'Humanitarian intervention: the case of Kosovo', in the Finnish Yearbook of International Law Vol. X (1999), at 161.

[3] T. M. Franck, Recourse to Force (2002), at 136.

In this context, Article 2(7) of the UN Charter is also relevant:

"Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII."

It is probably fair to say that the existence of a "right" of humanitarian intervention, without UN Security Council authorisation is, at the very least, controversial at international law.

At one end of the spectrum, some commentators consider that humanitarian intervention does not constitute an exception to the general prohibition of the use of force under Article 2(4) of the UN Charter. Harris, inter alia, considers that "[f]rom the state practice […] it has to be deduced that it is not generally accepted by states that unilateral or collective humanitarian intervention that is not authorised by the UN is lawful. In the absence of consensus, such humanitarian intervention is not an exception to the prohibition of the use of armed force by states in art. 2(4), UN Charter and in customary international law."[4]

Franck posits that "[i]t is much more difficult conceptually to justify in [UN] Charter terms the use of force by one or several states acting without prior Security Council authorization,\ even when such action is taken to enforce human rights and humanitarian values. The Charter's Article 2(4), strictly construed, […] makes no exception for instance of massive violations of human rights or humanitarian law when these occur in the absence of an international aggression against another state."[5]

It is submitted that commentators who consider that humanitarian intervention may be moral (legitimate) but illegal would also fall in this category.[6] Adopting a strict, positivist approach to sources of international law, as enumerated in Article 38(1) of the Statute of the International Court of Justice, it is only international conventions, custom and general principles of law which may create international law – not morality or even natural law considerations. And, while there is much truth in the proposition that "[…] a dichotomy between what is 'lawful' and what is 'legitimate' is undesirable […] in international law,"[7] and that it is, indeed, desirable to "bring closer together law and morality,"[8] these are normative arguments which are more concerned with what "ought" to be the case, rather than an accurate reflection of the lex lata.

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4 D. Harris, Cases and Materials on International Law (2011), 7th Ed., at 785.

5 T. M. Franck, Recourse to Force (2002), at 137.

6 For instance, Franck mentions the case of the view taken by the Kosovo Report of a Commission chaired by the eminent South African jurist Richard Goldstone, that the NATO intervention in Kosovo in 1999 was in a grey zone: "technically illegal but morally legitimate." See T. M. Franck, Recourse to Force (2002), at 170.

7 Greenwood, 'Humanitarian intervention: the case of Kosovo', in the Finnish Yearbook of International Law Vol. X (1999), at 145.

8 Tan, 'Enforcing cosmopolitan justice: the problem of intervention', in R. Pierik and W. Werner, Cosmopolitanism in Context (2012), at 162.

Similarly, the view that Article 2(4) of the UN Charter ought to be accorded a more "graduated reinterpretation" may be seen to fall within this category. Within this view, although state recourse to force in pursuance of a humanitarian intervention would continue to be illegal, in ascertainable circumstances, the consequences of such recourse could be "mitigated" by the imposition of no, or only nominal, consequences on states which, by their admittedly wrongful intervention, have demonstrably prevented the occurrence of some greater wrong.[9]

Another view does not exclude outright the legality of humanitarian intervention. For instance, an oft-quoted UK Foreign Office discussion paper concludes that "the best case that can be made in support of humanitarian intervention is that it cannot be said to be unambiguously illegal."[10]

At the other end of the spectrum, it has been argued that to contend that Article 2(4) of the United Nations Charter does not make any exception for humanitarian intervention is "to take too rigid a view of international law."[11] Greenwood, for instance, holds that some precedents – such as the intervention of the US, Britain and France in Iraq to assist Kurdish areas (1991), and the intervention of the Cease-Fire Monitoring Group (ECOMOG), further to a decision of the Economic Community of West African States, in Liberia (1990) – have to be considered as "substantial body of State practice in support of the existence of a right of intervention in an extreme case of humanitarian need,"[12] and that, in "extreme" cases, humanitarian intervention is possible even without an express or implied UN Security Council authorization.[13]

II. The Impermissibility Of Governments Committing International Crimes Against Their Own Populations

It is not intended, in this brief article, to examine the merits of the above viewpoints. What emerges clearly, however, is that the principle of humanitarian intervention is by no means uncontroversial at international law.

However, generally-speaking, the source of the controversy is not that governments wish to reserve for themselves the "right" to commit egregious crimes against their populations. Such an alleged right would be indefensible at international law. The protection of human rights and

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9 T. M. Franck, Recourse to Force (2002), at 139.

10 See UK Foreign Office Policy Document No. 148, UKMIL 1986; (1986) 57 BYIL 614. See also D. Harris, Cases and Materials on International Law (2011), 7th Ed., at 777; and Greenwood, 'Humanitarian intervention: the case of Kosovo', in the Finnish Yearbook of International Law Vol. X (1999), at 164.

11 Greenwood, 'Humanitarian intervention: the case of Kosovo', in the Finnish Yearbook of International Law Vol. X (1999), at 161.

12 Greenwood, 'Humanitarian intervention: the case of Kosovo', in the Finnish Yearbook of International Law Vol. X (1999), at 168.

13 Greenwood, 'Humanitarian intervention: the case of Kosovo', in the Finnish Yearbook of International Law Vol. X (1999), at 169.

dignity are firmly embedded in the UN multilateral system.[14] They are restated, inter alia, in such international instruments as the (non-binding) Universal Declaration of Human Rights (1948), the Genocide Convention (1948), the International Covenant on Civil and Political Rights (1966), etc.

Since the Nuremberg and Tokyo Trials, the logic of international criminal law has, moreover, moved to pierce the veil of state immunity and to bring the perpetrators of mass atrocities to account. These international criminal courts and tribunals are based, in part, on the "grave concern" of the international community at the commission of "systematic, widespread and flagrant violations of international humanitarian law".[15]

Furthermore, at the UN World Summit in 2005, states have reaffirmed the principle of responsibility to protect ("RtoP") which rests on three equally weighted and nonsequential pillars: (1) the primary responsibility of states to protect their own populations from four the crimes of genocide, war crimes, ethnic cleansing, and crimes against humanity, as well as from their incitement; (2) the international community's responsibility to assist a state to fulfill its RtoP; and (3) the international community's responsibility to take timely and decisive action, in accordance with the UN Charter, in cases where the state has manifestly failed to protect its population from one or more of the four crimes.[16]

In view of these developments, there is much truth in the argument that "[t]he development of international human rights law since 1945, through global agreements, such as the Genocide Convention and the International Covenant on Civil and Political Rights, and regional instruments, such as the European Convention on Human Rights, has reached the point where the treatment by a State of its own population can no longer be regarded as an internal matter."[17] Indeed, particularly, in light of the "international" character of atrocity crimes, such as genocide, war crimes and crimes against humanity, the argument that the commission of such crimes by a state against its own population should be regarded as a purely "internal matter" would fly in the face of the logic of modern international law.

However, this is not to say that these developments have displaced the prohibition on the use of force in Article 2(4) of the UN Charter. Greenwood dismisses Article 2(4) of the UN Charter as but "one" of the principles on which the United Nations operates which, he continues, must be "read in context, for the Charter also gives as one of the purposes of the United Nations the

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14 See, inter alia, the second preambular paragraph of the UN Charter: "We the peoples of the United Nations determined […] to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small […]".

15 See the fourth preambular paragraph of UN Security Council Resolution 955 (1994), 8 November 1994, Establishing the International Criminal Tribunal for Rwanda (ICTR) and attaches its Statute.

16 Bellamy, 'The Responsibility to Protect – Five Years On', 24 Ethics & International Affairs 2 (2010) 143, at 143.

17 Greenwood, 'Humanitarian intervention: the case of Kosovo', in the Finnish Yearbook of International Law Vol. X (1999), at 153.

promotion of human rights."[18] This view, however, seems to belittle the central tenant on which the UN multilateral system is founded, to wit, that members shall refrain from the threat or use of force in their international relations.

While undoubtedly other principles underlie this system, including the protection of human rights, it would arguably require a substantially high threshold of evidence to displace the central prohibition in Article 2(4) of the UN Charter. In this context, in arguing for the existence of a right to humanitarian intervention at international law, Greenwood refers to a handful of cases in which the unilateral use of force, without UN Security Council authorization, contained a humanitarian dimension, and to the fact that some "States have asserted a right of humanitarian intervention only in the most extreme circumstances of human rights violation and the United Kingdom practice makes clear that the United Kingdom Government considers that this right exists only in such circumstance."[19]

However, the fact that some states may have asserted such a right does not, ipso facto, mean that such a right exists. The creation of customary international law has to follow the normal process of extensive and consistent state practice and opinio juris, and may not be created on the basis of a normative argument – i.e. on the basis that such a right ought to exist, or simply because one or a few states have asserted such a right in the past.

Indeed, "[m]any governments, understandably, have been reluctant to see any relaxation of [the Article 2(4) of the UN Charter] prohibition. They fear that even if humanitarian action were effective, it would still constitute a dangerous precedent contributing to the gradual erosion of the Charter's basic rule requiring '[a]ll Members [to] refrain in their international relations from the threat or use of force against…any state…'. Weaker states, in particular, still cleave to Article 2(4) as their best defense against the historically demonstrated proclivity of the strong to teach manners to the weak."[20]

It is for these reasons that the principle of humanitarian intervention is still controversial at international law.

III. Some Criticisms Of Humanitarian Intervention

Greenwood discusses (and summarily dismisses), inter alia, three criticisms commonly levelled at humanitarian intervention, including:

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[18] Greenwood, 'Humanitarian intervention: the case of Kosovo', in the Finnish Yearbook of International Law Vol. X (1999), at 153.

[19] Greenwood, 'Humanitarian intervention: the case of Kosovo', in the Finnish Yearbook of International Law Vol. X (1999), at 170.

[20] T. M. Franck, Recourse to Force (2002), at 138. Consider, in this context, the 2003 US invasion of Iraq, which "provides a vivid example of an intervention widely seen as unjust." See Tan, 'Enforcing cosmopolitan justice: the problem of intervention', in R. Pierik and W. Werner, Cosmopolitanism in Context (2012), at 158.

1. Firstly, humanitarian intervention can be lawful only if undertaken by, or at least with the authority of, the Security Council;

2. Secondly, it has frequently been objected that there is no consensus about the existence of a right of humanitarian intervention or the conditions in which such a right exists;

3. Thirdly, a further objection often raised to humanitarian intervention is that it would be open to abuse. This is of course, a policy objection, rather than a reason for asserting that there is no right of humanitarian intervention in existing law.[21]

These three criticisms are closely interlinked. Some states may, with good reason, be "cynical" that there is such a thing as "purely humanitarian intervention."[22] There is a palpable sense that the acceptance of humanitarian intervention would open the door to abuse and, therefore, to the gradual erosion of the prohibition in Article 2(4) of the UN Charter which, as discussed, is considered by many states as a critical defence against foreign interference.

It is true that "[a]ll rights are capable of being abused,"[23] and that this, in itself, is no argument against humanitarian intervention. It is also true that even if humanitarian intervention were not accepted, "it doesn't follow that other pretexts couldn't be cooked-up if the government of a country as already set its mind on invading another."[24]

However, given the fragile and controversial state of the principle of humanitarian intervention at international law, it is submitted that due regard has to be accorded to the concerns of those states within the international community which understand and accept the beneficial role which humanitarian intervention may play in deterring the worst excesses of governments towards their own populations, but which fear that, if granted, the right of humanitarian intervention may be subject to abuse.

The first step in this direction would be to ensure a circumspect implementation of a humanitarian mandate, particularly one which has gained the support and authorization of the UN Security Council and, therefore, of the international community more generally. This was the case of the Libyan intervention in 2011.

IV. The Need For Circumspection With Regard To Humanitarian Intervention In Light Of The 2011 Libyan Intervention

It would appear self-evident that, in the interests of the development of the principle of humanitarian intervention and, in particular, in order to demonstrate that a right of humanitarian intervention without UN Security Council authorization, if more widely accepted, would be undertaken with circumspection and would not be abused, states undertaking humanitarian intervention with a UN Security Council authorization should undertake it with circumspection and, in particular, should not abuse their mandate.

In this context, the implementation of the humanitarian intervention mandate in Libya, in 2011, sadly appears not to have been undertaken with circumspection, further fuelling the fears

and cynicism of those who believe that the principle of humanitarian intervention, if accepted, would be abused by those states undertaking the mission.

On the basis, inter alia, of resolution 973 (2011),[25] the UN Security Council authorised "Member States […] to take all necessary measures to protect civilians and civilian populated areas under threat of attack"[26] in Libya. In this case, therefore, the intervention in Libya was authorized by the UN Security Council for an unambiguously humanitarian purpose.

Nevertheless, subsequent to this resolution, the coalition of states involved (including France, the United Kingdom and the United States) made public pronouncements that the purpose of their intervention in Libya was not exclusively humanitarian protection, but regime change. For instance, the UK foreign secretary declared that "Col Muammar Gaddafi 'cannot be part of the negotiation process, and that there must be a transfer of power'" (The Telegraph, 5 Jul 2011). Other coalition leaders made similar statements.

More substantially, however, these pronouncements were borne out on the ground. The coalition states took an active part in assisting the rebels' campaign to overthrow the government, with some countries, even sending limited ground forces, and undertaking various efforts to assassinate Gaddafi in bombing attacks.

It is significant that the final, critical – though, apparently, inadvertent – strike onto Gaddafi's convoy was propitiously dealt by the international coalition and it may appear uncanny how shortly after regime change was secured, the international intervention was wrapped up.

The point is that, in light of the 2011 Libyan intervention, how are states – even moderate states which are prepared to accept the benefits deriving from humanitarian intervention in the appropriate circumstances – not to be concerned that this principle would be abused? An idiom in the Maltese language states "Il-kelb il-mismut, kull ilma jaħsbu misħun" ("Once a dog is scalded, it believes all water to be boiling water.") In light of the non-circumspect manner in which the 2011 Libyan intervention, which was founded on a humanitarian purpose, has been undertaken, how are states to be confident that other humanitarian missions would not equally be undertaken in such a non-circumspect manner, especially if undertaken without the safeguard of a UN Security Council authorization?

It is for these reasons that, it is submitted, the 2011 Libyan experience has set back the cause and weakened the principle of humanitarian intervention at international law.

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25 UN SC Resolution 1973 (2011) of 17 March 2011, S/RES/1973 (2011).

26 ¶4.