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Dilemmas of Modern International Law
– Between Legal Inhumane Non-Intervention and Illegal Humanitarian

Abstract

Over the past decades, threats have arisen in the international security environment related to the functioning of weak and countries unable to fulfill their functions in ensuring security and basic human rights for their citizens, referred to in the doctrine as failed/failing states. The international community has responded with humanitarian intervention that is part of the concept of responsibility for protection (Responsibility to Protect). This article is devoted to the issue of placing this concept in positive international law (remarks *de lege lata*) and the resulting applications (*de lege ferenda* comments).

Keywords: *responsibility for protection, humanitarian intervention, use of force*

Introduction

The last decades have brought radical changes in the international security environment. Not only non-state actors, such as global terrorist organizations, but also weak, unable to perform their basic functions countries have become one of the main threats, and above all – in accordance with the Montevideo Convention (Leage of Nations 1933) – unable to exercise effective power on their territory.

The concept of failing/failed states arose in the doctrine (Aleksandrowicz 2018a, pp. 92, 50). This was related to, among others the inability of these countries to provide security for their citizens and other natural persons on theirs territory, which resulted not only in violations of security and public order, but also in massive violations of human rights and humanitarian disasters. Natural persons were exposed to the actions of various armed bands and groups, armed forces commanded by the so-called war lords, were victims of armed conflicts conducted without respecting the basic principles set out and universally recognized under ius in bello. It often resulted in armed interventions aimed at stopping such a humanitarian disaster and saving human life (Kranz 2009, p. 133).

The international community's response was to develop a concept of responsibility for protection, according to which military intervention by third countries may be allowed in such a situation (ICISS 2001). This concept – although it undoubtedly responds to contemporary threats – raises a number of controversies, as it does not quite fit into the current international security system based on the solutions contained in the United Nations Charter (1947).

Jerzy Kranz even described it as a necessity to choose between an illegal humanitarian intervention and a legal inhumane non-intervention: "whether and how long to look at mass violations of human rights in the state, applying the principle: kill them all, God will recognize his (...) collateral damages, caused during humanitarian intervention, are not offset by incidental profits, i.e. the number of dictatorships or massacres but the lives saved?" (Kranz 2009, p. 133).

From the point of view of international law in force, humanitarian intervention – which somewhat implements the principle of human rights protection – violates other fundamental principles, including principle of non-interference or sovereign equality of

states. This is one of the most important dilemmas of modern and international law (Zajadlo 2005, *passim*).

Basic principles of international law. Notes *de lege lata*

The foundations of the current international security system have been formulated in the United Nations Charter. It has not been left in any of them explicitly formulated, it is impossible not to notice that the creators of the Charter considered too strong countries as the main threat to international peace and security, which could impose their will on weaker countries, including using force or threatening to use it. The concept of threats to international security was inseparably connected with the state and its activity on the international arena. The starting point for the construction of the UN system was the implementation of the principle of *par in parem non habet imperium*, which was expressed in the form of the implementation of the concept of sovereign equality of states.

In the United Nations Charter, the objectives of the United Nations and the principles according to which Member States have committed themselves to act internationally have been specified. In the field of international security, the goals of the UN are defined in art. 1 clause 1 of the Card. Thus, the primary goal of the UN was to maintain international peace and security, using effective collective measures to prevent and remove threats to peace, suppress acts of aggression and other violations of peace, mitigate and settle – by peaceful, in accordance with the principles of justice and international law – disputes or situations that could lead to violations of peace. To achieve this goal in art. 2 clause 3 and 4, methods of conduct for states in the area of international security were established. The primary consideration should be to resolve international disputes by peaceful means in such a way as to prevent international peace and security and justice from being threatened, as well as to commit to refrain from the use of threats or the use of force against the territorial integrity or independence of any state.

From the point of view of maintaining peace and international security, three principles are particularly important: refraining from threats or the use of force, peaceful settlement of international disputes, and non-interference in the internal affairs of individual states.

The first of these principles states that "states in their international relations should refrain from the threat or use of force against the territorial integrity or political independence of any state, or in any other way incompatible with the purposes of the United Nations Charter" (Zgromadzenie Ogólne ONZ 1970). The commentary on the principles of international law that comment on this principle explicitly states that, first, the threat or use of force is a violation of international law and the United Nations Charter, and secondly that the war constituting aggression is a crime against peace, which causes liability under international law. In addition, each state is under an obligation to refrain from organizing, inciting, helping or participating in intra-state fighting or acts of terrorism in another state, or to accept organized activities on its territory aimed at committing such acts when the said acts involve threats or use of force.

Under the second rule, states should settle their international disputes by peaceful means in such a way that international peace, security and justice are not threatened. The commentary to this principle contained in the said Declaration adds that states parties to international dispute, as well as other states, should refrain from any activities that could exacerbate the situation in a way that threatens the maintenance of international peace and security.

The third of the principles referred to relates to the obligation not to interfere in matters falling within the internal jurisdiction of any State, in accordance with the United Nations Charter. According to the Declaration, no state or group of states has the right to interfere directly or indirectly for any reason in internal or external affairs of any state. Therefore, armed intervention and all other forms of meddling or attempting threats against the personality of the state or against its political, economic or cultural factors constitute violation of international law. In addition, no state should organize, help, incite, finance, induce or tolerate subversive, terrorist or armed activities aimed at overthrowing the power of another state's regime, or interfere in internal struggle in another state.

This is due to the fact that each state has the inalienable right to choose its political, economic, social and cultural system without interfering in any form by another state (Aleksandrowicz 2018a, pp. 155-164). The primary responsibility for following these principles lies with the United Nations Security Council.

Changes in the international security environment

The end of the 20th century brought a change in reality in the area of threats to international security. States – especially those with real power – showed far-reaching restraint in its use, armed assaults by non-state actors increasingly occurred, and above all – violations of human rights by such entities on a scale justifying the introduction of sanctions against them by the Security Council both non-military and military. An analysis of the Security Council's resolutions contained in these resolutions clearly indicates that it considered non-state actors to be a threat to international peace and security.

When analyzing statistics on armed conflicts, it is impossible not to notice that the sources of threats are not strong, highly developed and modern military forces with states that are military powers, but on the contrary – weak, failing states and non-state actors (Aleksandrowicz 2018a, pp. 92-95).

Less and less often we are dealing with armed conflicts (wars) fought by mass armies representing countries. Military operations are no longer the domain of governments or their representatives, they are increasingly being led by non-state armed groups defined as organized and armed opposition forces, motivated by clear political goals, operating independently of the state. These groups have an effective command structure and are described as partisans, militia, paramilitary organizations, self-defense organizations, and terrorist groups. From 2008, armed groups motivated by criminal goals are also included in this category, which – like in Mexico or Colombia – can challenge and fight evenly against state entities. As Robert D. Kaplan from the Stratford think tank notes. Global Intelligence, the number of deaths in the conflict in Mexico related to the armed actions of drug cartels in 2006-2011 reached 47,000. For comparison: the number of victims of the internal conflict in Syria in March 2012 reached 8,000 (Kaplan 2012).

Referring to the Institute for Strategic Studies data, Bolesław Balcerowicz reports that the number of non-state armed groups in 2007 was over 340, including 260 active, and the larger groups totaled about 800,000. members to 20 million regular soldiers of the state armed forces on a global scale (Balcerowicz 2010, p. 44).

The explanation of this state of affairs can be the results of research by Spencer R. Weart, who believes that war as a means of resolving international disputes has been

eliminated from relations between countries with established democracy, which are simultaneously politically stable, economically strong and have significant military power (Weart 2001, *passim*). Not only are these countries not waging wars, their international position and the power they represent are an effective deterrent to any possible state attackers.

However, while, as noted by Bolesław Balcerowicz, the nation-states losing a number of their attributes as a result of globalization processes, including those that caused conflicts, the role of non-state actors as sources of threats, also of an armed nature, increases such deterrence strategies do not work (Balcerowicz 2010, p. 44; Gaddis 2007, p. 519). It is clear that the state has lost its monopoly on the use of armed violence understood as legally sanctioned political activity.

Therefore, the thesis is justified that the basic source of threats are currently not strong, well-developed countries with strong, modern armies, but, above all, countries that are relatively weak in economic terms, undemocratic, with massive armies of the old type (often standing a step away from acquiring military nuclear technologies) and very weak countries, unable to exercise effective power on their territory, and non-state actors, which were described above as non-state armed groups.

The first category includes, above all, the so-called rogue or rascal states and failing/failed states. The rouges states are countries that are deliberately and intentionally violating international law, supporting terrorism, massively violating human rights, performing money laundering operations or participating in the production and smuggling of drugs, and the proliferation of weapons of mass destruction. A list of these types of countries is of course variable, these include North Korea, Yemen, Cuba and Iran, previously it had Afghanistan, Syria, Iraq and Libya (Aleksandrowicz 2011, p. 88). Some of them are perceived as a threat due to the potential for their disposal of nuclear weapons and means of delivery (Iran, North Korea). On the other hand, failed states are a threat because of their powerlessness because they generate phenomena such as organized crime growing in strength (see: piracy in Somali waters), facilities for terrorist organizations (e.g. in Yemen), humanitarian disasters (Sudan) etc.

Non-state organizations posing a threat to national and international security are a kind of emanation of phenomena which, as Ryszard Zięba notes, also occurred earlier, but "since the beginning of the 1990s their qualitative growth has been noticeable. This creates a new quality, i.e. a new threat to international security". Zięba indicates, among

others on nationalism and enical conflicts, terrorism and ransnational organized crime (Zięba 2010, pp. 344-348).

The concept of Responsibility to Protect

From the point of view of international law, the institution of humanitarian intervention has always caused disputes, because it clearly violated the basic principles on which international law was based in the modern era, and therefore the principle of sovereignty of states, according to which the state is the only decision-maker in relation to all entities and relations taking place its territory, which was associated with a ban on interfering in its internal affairs by other countries. The basic problem in this case was the issue of determining the scope of those internal affairs for which the principle of non-interference was in force. This problem became the subject of consideration of the Permanent Court of International Justice, which in 1923 stated inter alia "(...) the question of whether or not a particular matter is in the exclusive jurisdiction of the State is extremely relative; depends on the development of international relations (...) so it may happen that in a case which (...) is not generally governed by international law, the right of the State to exercise discretion will be limited by the commitments entered into with respect to other States. In such a case, jurisdiction, which essentially belongs solely to the State, will be limited by international law" (Permanent Court of International Justice 1923, p. 24).

Commenting on this thesis of the Tribunal, Aleksandra Mężykowska emphasizes that the assessment of whether a given case belongs to the internal competence of the state or not is primarily influenced by the development of relations between states. The Tribunal pointed out that the interpretation of international law institutions cannot ignore changes in the world and the evolution of international relations.

The quoted fragment of the advisory opinion clearly indicates the dynamic nature of the law and its institutions and the need to redefine them in the face of changes. This recommendation certainly does not apply only to the principle of non-interference, but also to other principles underlying the coexistence of states. Once established, the interpretation of the institution of law cannot be treated as unchanging, as this would preclude any development of law. However, it is worth remembering that in art. 13 of the

Charter, as one of the tasks of the UN General Assembly, support for the progressive development of international law is mentioned (Mężykowska 2008, p. 59).

In the light of the modern understanding of international law, and above all the development of the system of protection of human rights, it becomes clear that mass violations of basic human rights – whether due to the weakness of the state that cannot ensure the security of its citizens or the abuse of force against its own citizens by dictatorial rule – it ceased to be just a matter falling under the exclusive competence of the state.

What is more – as Jerzy Kranz put it – we are facing a dilemma, are we accepting humanitarian intervention or are we advocating inhuman non-intervention? (Kranz 2009, p. 133). Analyzing this issue, the cited author emphasizes that undemocratic countries sometimes try to invoke their sovereignty and the principle of non-interference in their internal affairs to justify violations of international law, including against their own people. "By mixing concepts, a fictitious conflict is created between the sovereignty of the state and the international law that applies to them. The primacy of state sovereignty would be limited to the acceptance of violations of international law, and the subordination of the state to international law would limit the sovereignty of the state. Violation of basic international law norms is hardly an element of sovereignty". Kranz adds that severe violations of human rights threaten international peace and security, and the Charter of the United Nations "does not give priority to protecting the state over the protection of its citizens". He also invokes opinions that "the prohibition on intervention ends precisely when there is a risk of failure to help" [French President François Mitterand] and that "some believe that justice should sometimes be sacrificed in the interests of peace. I question this view" [UN Secretary General Kofi Annan] (*Ibid*em, pp. 121-147).

In this context, a distinction should be made between those countries which undertake actions that are inconsistent with international law norms regulating peaceful dispute resolution, and thus violating the sovereignty of other states, e.g. by initiating armed conflicts, border provocations, financing terrorist groups (armed bands and groups) etc., and therefore conduct internationally a policy contrary to the principles of the United Nations Charter.

The second group will be countries that have a policy of mass violations of basic human rights in relation to their population, e.g. extermination, mass executions,

unlawful deprivation of liberty, etc. In this case, these activities take place on the territory of the state, and thus – in its internal sphere.

The third group are states that do not have (or are unable to perform) one of the three basic attributes of the state specified in international law next to territory and the population - effective power (Czapliński, Wyrozumska 2004, p. 133). One could risk the statement that they do not exercise their sovereign power – they can therefore be classified as "fragile" or "incomplete" states; the term "fallen" or "failing" is accepted in the doctrine.

From the point of view of international law, it is irrelevant what political system prevails in a given state if it meets the three criteria mentioned above – it is a state. Contemporary international law does not know the norm requiring the state to adopt a democratic system, it is a political demand rather than a legal requirement. This does not mean that the way the state treats its citizens remains an internal matter of the state. As early as 1970, the International Court of Justice recognized that the fundamental rights of the human individual, such as protection against slavery, racial discrimination or genocide, were *erga omnes* obligations, and thus universally binding. In the draft law on the responsibility of states prepared by the Commission of International Law and International Law, "a large-scale violation of an international obligation of fundamental importance for the protection of human life, such as prohibiting slavery, genocide and apartheid", was considered to be "serious breach of obligations under mandatory rules of international law" (Czapliński, Wyrozumska 2004, pp. 709-710).

Analyzing these issues, it is impossible not to notice that over the decades the category of internal affairs of the state has been narrowing, including in connection with the development of the concept of legal international protection for human rights.

Mass violations of human rights in Rwanda or former Yugoslavia at the end of the 20th century prompted the international community to examine in detail the problem of the legal possibility of conducting armed interventions in sovereign territory countries in the event of massive violations of human rights.

In 2001, the International Commission for Humanitarian Intervention and State Sovereignty published its Report in which it presented the concept of "responsibility for protection" (ICISS 2001). This concept assumes the existence of a state obligation to protect its citizens on its own territory. If the state fails to fulfill this obligation – whether as a result of its own weakness or as a result of abuse of power – other states

have a responsibility to respond to serious human rights violations. Such intervention may take preventive actions of a diplomatic (or more broadly non-military) nature, it may also have the character of the use of force, i.e. armed action, while the principle of sovereign equality of states and the prohibition of interference in internal affairs of the state may not constitute a legal obstacle to taking this action. type of activity. Intervening states are also responsible for providing support after the conflict in social reconstruction and reconciliation.

The report also lists the conditions for admission of humanitarian humanitarian intervention, indicating in particular:

- the just cause of massive violations of human rights;
- a legitimate goal, i.e. striving to stop these violations and save human life;
- the final nature of the measures taken, thus the possibility of taking military action only after diplomatic means, including those related to presenting the matter to the Security Council, have been exhausted;
- applying risk-proportional measures;
- rational perspectives for successful actions;
- acceptance of the intervention by the Security Council, and in its absence – intervention by regional organizations and attempts to obtain the approval of the Security Council post factum.

The authors of the Report have thus demonstrated political realism, taking into account the possibility of blocking the work of the Security Council by one of the great powers with the right of veto or even delaying its work in a situation of dramatic conflict in the country where the intervention is to take place. This limits the possibility of dragging SC deliberations at the expense of e.g. mass executions and multiplying the number of victims of a humanitarian disaster. However, the report does not allow the possibility of undertaking humanitarian intervention of an armed nature solely on the basis of a single state decision – approval of the international community is required, expressed by the position of the organization of a regional nature.

This seems to be a justified approach, because it limits (at least in the legal and political sphere) the possibility of abusing and justifying the realization of one's own interests by means of the armed force by the necessity of humanitarian intervention. It is worth recalling in this context that such justification was given, for example, by Russia, which invoked the concept of responsibility for protection by undertaking military

actions against Georgia in 2008, which was rightly recognized as "gross and unacceptable abuse of this concept" (Kranz 2009, p. 145)

The concept of "responsibility for protection", although not without problems, gains the right of citizenship in international relations as a basis for humanitarian intervention. This is evidenced by the fact that the General Assembly adopted a resolution referring directly to this concept during the world and anniversary summit in 2005 (United Nations 2005). It confirms the responsibility for protection on the part of individual states and the international community, and also emphasizes the need to carry out humanitarian interventions under the provisions of the UN Charter.

It should be noted in this context that the possibility of conducting various types of missions, including military, is provided for in the Treaty on European Union (TEU) as adopted by the Treaty of Lisbon. The Union may therefore undertake missions to protect the Union's values and serve its interests. These include joint disarmament operations, humanitarian and rescue missions, military counseling and support missions, conflict prevention and peacekeeping missions, crisis management missions, including peace restoration missions and post-stabilization operations conflicts. All these missions can contribute to the fight against terrorism, including by supporting third countries in combating terrorism in their territories (Article 43 (1) TEU).

In the political dimension, the treaty provisions were reflected in the provisions of the Global Strategy of 2016 (Common vision, joint action: Stronger Europe). It emphasizes the sense of responsibility of the European Union for maintaining international peace and security and indicates the need for an integrated approach to conflict situations. "In a more contested world, the EU will be guided by a strong sense of responsibility. We will be involved responsibly throughout Europe and the surrounding regions in the east and south. We will act globally to address the root causes of conflict and poverty and promote human rights (...) when force conflicts break out, our vital interests are at stake (...) The EU will engage in a practical and principled manner in peace-building ; it will also support human security through an integrated approach". According to the Strategy, implementing a comprehensive approach to conflicts and crises by consistently applying all policies at the EU's disposal is of key importance. "The EU will act at different levels of governance: conflicts like those in Syria and Libya often have a local, national, regional and global dimension and these aspects need to be addressed. In addition, we are unable to resolve any of these conflicts

alone. Lasting peace can only be achieved through comprehensive agreements based on a broad, deep and lasting regional and international partnership that the EU will promote and support" (Europejska Służba Działań Zewnętrznych 2017, pp. 46-50). It should be emphasized that the Strategy is of the opinion that both civilian and military capabilities are necessary to implement the provisions of the Strategy.

In 2003, the first European Union mission in Bosnia and Herzegovina and a military operation in the former Yugoslav Republic of Macedonia began. Since then, the EU has carried out 34 operations and missions on three continents – from the Balkans through the Palestinian Territories, Congo, Darfur, Somali, Afghanistan to Indonesia.

In 2017, the European Union conducted 10 civilian missions and 6 military missions and operations, involving 2,000 civilians and 3,300 soldiers. Operational Command (The Military Planning and Conduct Capability – MPCC) and a Joint Support Coordination Cell (JSCC) were established for the first time to improve the use of joint, i.e. civil-military, capabilities during missions (European Union 2017; Aleksandrowicz 2018b, pp. 98-99)

Conclusions. Notes *de lege ferenda*

One of the significant effects of changes in the international security environment is the fact that the international security system created under the United Nations Charter does not fulfill its role in many cases. An example of such a situation is the response of the international community to mass violations of human rights and humanitarian disasters. The lack of appropriate solutions results in the necessity to take *pre-legem* actions, and thus not so much in a manner inconsistent with applicable international law, as in areas not yet regulated by international law. Therefore, the principle applied to new threats is *necessitas legem non habet*.

An attempt to solve this situation was the adoption of the concept of Responsibility to Protect. It should be emphasized, however, that this is a reinterpretation of international law norms, and not the creation of new international law regulations, because there is no way to consider the Report as a source of international law.

Issues related to humanitarian intervention require urgent ordering, because in specific situations the international community faces the risk of taking necessary humanitarian actions that will not only fall within the sphere of *praeter legem*, but will

even have to be assessed as *contra legem*, and thus violating norms applicable international law. Jerzy Kranz referred to in the text described it as a dilemma of choice between illegal humanitarian intervention and legal inhumane non-intervention.

The prospects for solving this dilemma based on the existing competences of the UN Security Council are not optimistic. The decisions taken by the Council, as if in a lens, contain conflicting political interests of permanent members of the Council: attempting to solve a specific problem may always encounter one of them.

De lege ferenda, it should be noted that the international law regulations of the discussed issues must take into account two basic factors, namely the raising by authoritarian regimes as an argument of the principle of non-interference in the internal affairs of other states, and on the other hand - carrying out humanitarian intervention in order to realize the own political interests of states undertaking such actions (e.g. in the form of securing influence in the area affected by the intervention. Therefore, the legal requirement for the criteria for the legality of humanitarian intervention must include the consent of the international community (not necessarily as a whole, e.g. within the UN, but also within regional organizations, e.g. the European Union or NATO, or a coalition of states). Mass violations of human rights must be undeniably identified, and the governments of the countries in whose territory they occur must be unanimously assessed by the international community as authoritarian or incapable of exercising effective power and ensuring security for their citizens and others persons residing in this territory.

However, analyzing the development of the international situation in the second decade of the 21st century, it is difficult to be optimistic in this matter and assume that such regulations will not only be developed, but also widely accepted as sources of international law.

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