

Armed Humanitarian Intervention and International Law: A Primer for Military Professionals

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ALTHOUGH THE LAW of armed conflict adds an element of humanity to warfare while high-tech weapons with precision munitions add the perception of control, war is still armed conflict that causes both intended and unintended death and destruction. Therefore, we ought to be cautious when we think about using military force. This is particularly true when we consider undertaking missions or wars for humanitarian reasons.

This article examines the norms that govern when to initiate humanitarian intervention with military force. It also discusses accompanying considerations. In doing so it reviews applicable international law as an aspect of contemporary international relations. A comprehensive review of international relations and legitimate uses of military power could—and does—occupy entire books.¹ This discussion, however, limits itself to reviewing international moral and legal norms and how they affect decision-making about using force to intervene. Readers will note that these norms are the subject of scholarly and political debate. As such, their practical implications are constantly undergoing refinement.

Armed humanitarian intervention is the use of military force by a nation or nations to stop or prevent widespread, systematic human-rights abuses within the sovereign territory of another nation. An example is the action NATO took to stop ethnic cleansing in Kosovo. In this context, military force refers to operations involving direct attacks against persons and places. It does not refer to other military operations, such as providing humanitarian aid, peacekeeping, or stability and support operations that might result in the need to use force after units peacefully arrive with the consent of the host nation or parties to a conflict.

Military professionals should appreciate how civilian leaders determine when military force should be used. The meaning and effect of international law sometimes points only vaguely to the correctness of possible alternatives. As author Michael Desch remarks in *Bush and the Generals*, “The line between [civilian political and military operational] realms is not always perfectly clear, and sometimes military considerations affect political decisions, and vice versa.”² As military considerations likely play into decisions about armed humanitarian intervention, military officers should at least have an understanding of the issues. Commanders and staffs, particularly at strategic and operational levels, should be able to clearly identify, understand, and account for the practical, legal, and moral considerations that affect the decision to use force for humanitarian purposes, especially as they apply to the particular environment.

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PHOTO: A U.S. Army 501st Aviation Battalion CH-47 Chinook cargo helicopter carries a sling loaded Small Emplacement Excavator. These units were stationed at Camp Bondsteel, Kosovo, Serbia and were part of Task Force Falcon, which is the official designation for the US European Command forces assigned to the NATO led peacekeeping Kosovo Force during Operation Joint Guardian. (U.S. Army, SPC Angelica M. Harris)

First, we consider circumstances under which armed humanitarian intervention might be morally justified. We then discuss the legality of such action. Subsequently, we look at the United Nations Charter and discuss its key provisions, its domestic and international status as law, and the recent emergence of a concept called the “responsibility to protect.” We canvass practical considerations bearing on the decision to conduct an armed humanitarian intervention, and in doing so, we discuss the ways in which norms and political and practical considerations affect the ends, ways, and means of humanitarian intervention. Finally, we draw conclusions about the importance of necessity and proportionality, two traditional legal constraints on the use of force, that military professionals should find important and useful.

The Justice of Armed Humanitarian Intervention

Whether armed humanitarian intervention is morally justified, and if so, under what conditions, is among the most difficult questions to answer in international law and relations. All nations have rights of sovereign power, which has traditionally meant that they exercise exclusive political control within their borders. Intervention, especially by force against the political sovereignty or territorial integrity of another nation, has traditionally been considered aggression in international relations. Any such intervention has, by definition, moral, political, and legal ramifications.

As aforementioned, armed humanitarian intervention is the morally justified use of military force to stop or prevent widespread, systematic human rights abuses. What fits within this definition is open to broad interpretation when balanced against the ramifications of violating borders and sovereignty.

Just-war theorist Michael Walzer argues that armed humanitarian intervention is morally justified, perhaps even required, in response to “massacre, rape, ethnic cleansing, state terrorism, [and] contemporary versions of bastard feudalism, complete with ruthless warlords and lawless bands of armed men.”²³ While recognizing that intervention is contrary to the concepts of anti-imperialism and self-determination and the presumption against intervention in another nation’s internal affairs, he thinks it is “morally necessary whenever cruelty

and suffering are extreme and no local forces seem capable of putting an end to them.”²⁴

Walzer adds that armed intervention cannot be morally justified to promote “democracy . . . or economic justice or . . . other social practices and arrangements” that exist in other countries. In his view, it must be limited to ending conduct that “shocks the conscience of humankind.”²⁵

Political scientists Jerome Slater and Terry Nardin argue that “intervention is justified, at least in principle, in many cases where governments are responsible for substantial and systematic violations of human rights, even when such violations fall short of genocidal proportions.”²⁶ Slater and Nardin believe the seriousness of the human rights violation determines the degree of protection against intervention to which governments are entitled, arguing that “the grosser the violation [of human rights], the weaker the claim to such protection [from intervention.]”²⁷ This approach recognizes that intervention can occur through armed force or other coercive but peaceful instruments of political power. However, it does not help us determine when it is morally appropriate to end peaceful political coercion and begin military intervention.

International law expert Thomas M. Frank takes a legalistic approach to defining armed humanitarian intervention. He states that such intervention may be morally justified “if the wrong perpetrated within a state against a part of its own population is of a kind specifically prohibited by an international agreement (e.g., the Convention on the Prevention and Punishment of the Crime of Genocide; treaties regarding racial discrimination, torture, the rights of women and children; the International Covenant on Civil and Political Rights (ICCPR); and agreements on humanitarian law applicable in civil conflict.)”²⁸

With its reference to international legal instruments and the generally accepted concepts of morality and fundamental human rights they reflect, this position suggests legalistic justification for intervention in a wide variety of circumstances. The problem with this legalistic approach is that in international agreements, such as the ICCPR and those relating to the rights of women and children, some principles are so general that their meaning is ambiguous. For example, the absolute prohibition on subjecting any person to torture or

cruel, inhuman, or degrading treatment or punishment is a principle embodied in the ICCPR, which parties to the covenant cannot violate under any circumstances, according to the terms of that document (Article 7). However, the debate about what constitutes torture or cruel, inhuman, or degrading treatment in the current War on Terrorism demonstrates how difficult it is to rely on such vague terms to justify armed intervention. A nation seeking to intervene in another's internal affairs for self-interested rather than benevolent reasons can interpret such terms in a self-serving way. Furthermore, it is difficult to justify the use of military force as a remedy for all forms of racial, gender, or ethnic discrimination.

One can morally justify intervention by peaceful means in a wide variety of circumstances, but the moral justification for armed intervention is much more limited. It must take into account both the intentional death and destruction and the potential for unintended damage that the use of armed force will cause. In short, the moral justification for armed intervention is strongest when it is undertaken to prevent widespread, systematic murder or serious injury; that is, when the purpose of the use of force is to defend others from the force used against them. The concept of defending others from serious harm is a moral standard that Western legal tradition and U.S. rules of engagement (ROE) already incorporate.⁹

Proper moral grounds for armed humanitarian intervention exist when its use is necessary to stop wide-scale instances of the aforementioned forms of violence, whether or not the violent conduct constitutes genocide, ethnic cleansing, a war crime, or some other specific crime under international law. Rules of engagement for U.S. conventional forces have frequently authorized the use of force to defend noncombatants from serious crimes such as murder, physical assault, torture, or rape.¹⁰ In these instances, the ROE authorize Soldiers to use force, up to and including deadly force, to protect the victims. Use of military force is morally justified when there is widespread, systematic violence against innocent victims, regardless of what international humanitarian law or human rights advocates call that violence.

Many crimes constituting genocide under the statute for the International Criminal Court are

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merely special instances of common crimes, such as murder and aggravated assault. Other crimes are not necessarily violent, such as “forcibly transferring children of [one] . . . group to another group.” (See *The Rome Statute of the International Criminal Court*, Article 6.) The moral justification depends on unjustified violence, not the purpose, goal, or intent with which it (the violence) is carried out.

The authority to use deadly force does not mean that its use should be the first or only option to consider. In some cases, measures short of force might be sufficient to prevent or stop crimes against non-combatants. For example, diplomacy and the threat of armed intervention may end the violence without the need for armed force. Armed intervention is necessary and morally justified only when other forms of intervention are unavailable or exhausted.

It is conceivable that the violence justifying intervention can be so extensive, and the situation under



Rwandan refugee children plead with Zairean soldiers to let them cross a bridge separating Rwanda and Zaire. Their mothers had crossed moments earlier before the soldiers closed the border (20 August 1994). Ethnic slaughter in Rwanda and Burundi in the 90s called for armed intervention.

AP, Jean-Marc Bouju

which it is carried out so chaotic, that diplomacy would be ineffective or untimely. Rwanda's murderous 1994 civil war might be an example of such violence. In most cases, however, the perpetrators of the violence are part of, or acting on behalf of local governments. In these cases, nations should attempt diplomacy and other peaceful means to change the government's behavior.

Even when armed intervention is morally justified, it may not necessarily be consistent with international law. Although the law often reflects accepted moral standards, it does not always do so perfectly. It is to that topic we now turn.

The Use of Force under the UN Charter

The UN Charter governs the legal use of force between or among nations. Its primary purpose is to maintain international peace and security.¹¹ It functions in several ways, but four provisions are especially relevant to the topic of armed humanitarian intervention. First, the charter prohibits nations from using or threatening to use force in their international relations with each other.¹² Second, it demands respect for the political sovereignty of every nation.¹³ Third, the charter emphasizes that all nations are equal; that the sovereignty of each is entitled to the same respect.¹⁴ Fourth, the charter created the United Nations Security Council (UNSC)¹⁵ and vested it with the sole authority to identify and contend with "threat[s] to the peace."¹⁶ The UNSC's authority includes a monopoly on the use or threat of use of coercive force.¹⁷ (The term "coercive force" means any use of force not undertaken in individual or collective self-defense as authorized by Article 51 of the charter.) The purpose of the use or threat of the use of coercive force is to change the conduct of the nation against which the force is threatened or used. A simple example is the use of force to expel Iraq from Kuwait in 1991 after Iraq invaded Kuwait and refused to leave on its own.

Because the UN Charter is an international agreement, it has the status of international law. The U.S. has ratified the charter without reservation.¹⁸ Under international law, the U.S. must follow all provisions of the charter in good faith. The international legal term for this obligation is *pacta sunt servanda* [Latin for "pacts must be respected"], which the Vienna Convention on the Law of Trea-

ties defines as "the responsibility of all parties to an international agreement to follow its terms in good faith." Although the U.S. has not ratified this convention, it has recognized it as accurately reflecting international law.

As a properly ratified treaty, the UN Charter has the status of "supreme law of the land" under the U.S. Constitution.¹⁹ However, as is often the case in law, that statement does not present a complete picture of its actual domestic legal status. Beyond the Senate's advice and consent and some matters related to participation in the UN, Congress has not acted to domestically implement the essential legal requirements of the charter, including those regulating the use of force.²⁰ This failure to act means that the charter's provisions have not been made a part of U.S. domestic law that must be followed under threat of criminal sanction. Regardless, U.S. military and civilian officers swear to support and defend the Constitution, and that includes the injunction to respect treaties.

Doctrines U.S. courts developed over the years view the UN Charter as creating rights and duties between nations, not between or among their citizens. Therefore, with one possible exception, our elected political leaders are solely responsible for determining the meaning of the charter and other relevant international laws and the extent to which our nation will adhere to them.²¹

Rights to self-defense and prohibitions under the UN Charter. Under Article 51 of the UN Charter, a nation may only use force as part of its "inherent right of individual or collective self-defense."²² Article 2, paragraph 4 of the charter prohibits nations from using or threatening to use force against the "territorial integrity or political sovereignty" of other nations. Because of these limitations, nations often assert self-defense as a legal pretext for using force even when such a justification does not clearly apply to the circumstances of the violence. Such occurrences include circumstances that might qualify as grounds for an armed humanitarian intervention.

Article 51 allows nations to use force in individual or collective self-defense "if an armed attack occurs." Interpreted literally, this right only applies to the right to *respond* to force with force. Historically, defensive force under international law included more than this very circumscribed right. It

also included “anticipatory self-defense,” a concept whose validity under the charter is the subject of some debate.²³ Anticipatory self-defense has traditionally allowed a nation to use force against an attack when the threat was sufficiently imminent to justify interdicting it. This species of self-defense is arguably either an exception to Article 51 of the charter or included in the “inherent right” of self-defense that the charter preserves. However, some view anticipatory self-defense as contrary to the language of the charter.²⁴

Recently there has been discussion of the concept of preemptive self-defense. Some scholars use the term interchangeably with anticipatory self-defense.²⁵ However, preemptive self-defense is best understood as the use of force to attack a gathering—but not yet imminent—threat. Arguments often advanced in support of preemptive self-defense state that the gravity or nature of the threat is such that a nation cannot wait for it to develop further before defending itself, because the failure to act immediately would forfeit the practical ability to defend effectively against it.²⁶ The problem with this concept is that determining when a preemptive attack is appropriate or necessary is entirely subjective and open to abuse. Further, if interdicting imminent threats is potentially problematic under the charter, engaging gathering threats is even more so.

A nation’s right of self-defense in these circumstances is, under the charter, a legally complicated matter. Perhaps the best way for U.S. military officers to understand the self-defense concepts debated under the charter is to relate them to the concepts of hostile act and hostile intent that underlie ROE.

Under U.S. ROE, when a hostile act is clearly initiated, Soldiers may use force immediately in self-defense. Likewise, when hostile intent is clear even before a hostile act is initiated, the rules of engagement authorize the use of force. In each case,

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though, the ROE counsel using the minimum force necessary to counter the threat. They permit escalating the use of force if doing so is appropriate under the circumstances. Factors to use to determine what force is appropriate include the nature and imminence of the threat. If the threat is less imminent, the indications of hostile intent and the nature of the threat become more important in determining what force is appropriate.

Determining whether a threat exists and deciding the appropriate response to it are difficult for individuals in battlefield environments. These decisions are even harder for nations in the ambiguous world of international affairs. Nations must examine overt and covert diplomatic and military activities objectively to determine if force or some measure short of it is necessary or justified. For example, should the U.S. or Israel take its cues as to Iran’s intent from the statements of its president or from the actions of its supreme leader? Should Iran view two U.S. carrier groups entering the Persian Gulf as an imminent attack against its nuclear enrichment facilities or as a defensive force meant to protect friendly forces in the area? Perceptions will likely vary during these and other uncertain circumstances.

The debate is ongoing, and to date, there has not been international acceptance of the propriety of using force under the charter against either gathering or imminent threats. Preemptive self-defense is a potentially dangerous tool, and its status is even more doubtful under the charter than anticipatory self-defense.

A nation can claim self-defense to justify armed humanitarian intervention only if the attacking nation has directed violence against another nation or nations. The internal violence of one nation threatening to spread itself to another does not constitute an armed attack justifying self-defense. Refugee flows or other conditions that might threaten the internal stability of a neighboring country are also not armed attacks. Under the charter, nations must deal with such threats to peace through the UNSC.

The security council’s authority to use force. The UN Charter vests the UNSC with the sole authority to identify a “threat to the peace, breach of the peace, or act of aggression.”²⁷ Once the UNSC does so, it has virtually unlimited authority to select peaceful means for dealing with it.²⁸ After peaceful means have failed or the UNSC has decided they are



U.S. Navy, PHCM Terry C. Mitchell

U.S. Marine armored amphibious vehicles emerge from the surf onto the beach at the airport at Mogadishu, Somalia, 5 January 1992. The Marines were the vanguard of an armed U.S. intervention to alleviate starvation.

inappropriate, the charter allows the UNSC to consider using military force. It provides the council the authority to use force (or as happens most often, to authorize its member nations to use force) “to maintain or restore international peace and security.”²⁹

This authorization raises key questions. Can the UNSC use force to stop serious human rights abuses occurring solely within the sovereign territory of a nation? And if yes, to what extent? To answer we must consider two more principles contained in the charter: the principle against intervention in a nation’s internal affairs, and the principle of sovereign equality.

The charter contains important provisions that restrict international authority to intervene in the internal affairs of sovereign nations. In addition to prohibiting the use of force “against the territorial integrity or political independence” of another nation, Article 2, paragraph 7 states that “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* [of the Charter] (emphasis added).”³⁰

The plain meaning of this provision is that the UN should leave nations alone to resolve purely internal problems. However, the exception here is important. The UNSC may use or authorize force to counter threats to international peace and security. This authority is contained in the above-referenced Chapter VII of the charter. Further, given the principle of sovereign equality of nations, it is solely a matter for the UNSC to decide under the charter. Powerful or “more

advanced” nations or coalitions have no greater rights than their smaller or weaker neighbors to resolve problems forcibly within the latter’s borders.

What constitutes a threat to international peace and security in this context? Mass human rights violations and violence create internal displacements and refugee flows across borders. Refugee flows or internal displacements can be humanitarian crises. Whether they create true threats to international peace and security is a much more difficult question. When substantial cross-border violence breaks out, the case is almost certainly made. Beyond that situation, whether a threat to international peace and security warrants intervention, especially armed intervention, will depend heavily on the circumstances and the perceptions of the UNSC members.

It might be true, as Michael J. Glennon argues, that the UNSC violates the charter and undermines its own policy when it authorizes force in circumstances of purely intrastate violence.³¹ Given its broad authority over threats to international peace and security, the propriety of UNSC action in a given case will always be debatable. However, recent developments may affect the terms of the debate.

The Responsibility to Protect

In a December 2001 report entitled *The Responsibility to Protect*, the International Commission on Intervention and State Sovereignty (ICISS) formally articulated a concept now referred to as the “responsibility to protect” (R2P).³² The report responded to repeated pleas by then Secretary-General Kofi Annan to create unity around the fundamental principles of humanitarian intervention. Kofi Annan posed the following question: “If humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica—to gross and systematic violations of human rights that affect every precept of our common humanity?”³³

Subsequently, in December 2004, the UN’s High-Level Panel’s Report on Threats, Challenges, and Change stated that “there is a growing acceptance that while sovereign Governments have the primary responsibility to protect their own citizens from such catastrophes, when they are unable or unwilling to do so that responsibility should be taken up by the wider international community—with its spanning a continuum involving prevention, response to violence, if necessary, and rebuilding.”³⁴

The General Assembly incorporated R2P in Resolution 60/1, 2005 World Summit Outcome Document. This resolution articulates the responsibility of individual states to protect their populations from genocide, war crimes, ethnic cleansing, and crimes against humanity.³⁵ The document also recognizes a corresponding responsibility of the international community:

The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council... on a case-by-case basis in accordance with the Charter and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate.³⁶

Referring to R2P in Resolution 1674, which it adopted on 28 April 2006 and which addresses the protection of civilians in armed conflict, the UNSC reaffirmed the Outcome Document's provisions "regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity."³⁷ However, the UNSC did not explicitly endorse a broad authority to intervene in the event of a recognized humanitarian crisis.

Nonetheless, R2P purports to recognize the authority and obligation of the international community to intervene if just humanitarian cause exists. It states that "the core tenant of the [responsibility to protect] is that sovereignty entails responsibility. Each state has a responsibility to protect its citizens; if a state is unable or unwilling to carry out that function, the state abrogates its sovereignty, at which point both the right and the responsibility to remedy the situation falls on the international community."³⁸

Neither the General Assembly nor the UNSC resolutions have created new international law or amended the UN Charter, but R2P is a significant step in that direction. Still, there are no easy answers. The resolutions only convey the current sense as to what proper practice should be in the future. It remains for us to consider how these competing principles bear on the legality of armed humanitarian intervention.

The Legality of Using Force for Humanitarian Intervention

Some prominent scholars sensibly take the position that the UN Charter allows for legally justified armed humanitarian intervention only when the UNSC authorizes it.³⁹ As previously mentioned, at least one scholar believes the UNSC has no power to intervene in the purely internal affairs of a sovereign state no matter how dire the circumstances.⁴⁰ Others recognize an emerging state practice—ripening into a new customary legal rule—that individual states or regional organizations may unilaterally intervene if necessary to prevent genocide.⁴¹ It is possible for new rules of law created by the practice of nations to displace treaty obligations. However, this displacement is rare, and it is often difficult to determine whether a practice inconsistent with a treaty obligation is a violation of the treaty or a new, emerging rule of practice. (We have to defer to our national leaders to make these determinations.) The ICISS report actually supports this view, which the General Assembly's R2P resolution rejected by reaffirming action through Chapter VII of the charter and the UNSC. The ICISS report suggests that if the UNSC fails to respond to an obvious crisis, the General Assembly should take up the issue in emergency session. It also supports the idea that a regional or sub-regional organization may take action to avert the crisis, so long as it seeks subsequent authorization from the UNSC.⁴²

As a practical matter, the UNSC may authorize armed humanitarian intervention when it finds a threat to international peace and security. This option has been its somewhat inconsistent practice in the recent past.⁴³ The General Assembly's adoption of R2P reinforces this idea, but we do not know whether the world community will fully accept the R2P principle and the legal obligations it imposes. In addition, the permanent, veto-wielding members of the UNSC must also accept and implement R2P and, given the occasional strong objections of Russia and China to intervention in the past, this acceptance is by no means certain. The UNSC resolution, however, appears to welcome R2P.

Other Factors Affecting Humanitarian Intervention

Among considerations affecting the decision to intervene, one of the most important might be its chance of success. An armed intervention's

perceived and actual legitimacy depends on this chance. A successful intervention must not only stop the immediate suffering, but also prevent it from resuming once forces withdraw.⁴⁴ If the intervention is not successful, the force the nation uses to intervene will appear to be, and perhaps in reality will have been, unwarranted. That is, it will have resulted in additional violence that increased rather than prevented the suffering it sought to remedy.

Even if the intervention is initially successful, violence may resume after troops leave unless the conditions that led to it are corrected. Even now, eight years after NATO's armed intervention, the world is seeking a permanent resolution to the Kosovo crisis. While the U.S. supports independence or at least largely autonomous self-governance for Kosovo, such a resolution goes against the desires of both Serbia and Russia, with Russia holding a critical veto power in the UNSC.⁴⁵ For the entire period of this debate, NATO has had troops on the ground to monitor the situation and maintain the peace.⁴⁶

Given the potentially long commitments involved and the danger inherent in armed humanitarian intervention, the political will of the countries providing the intervening forces is an important consideration. To achieve the desired result, countries must remain committed to the armed intervention and any post-conflict operations that events might require, including peacekeeping and other stability and support operations.

A nation's political will depends on many factors. Perhaps the most important of these is the public's perception of whether or not the intervention is in the national interest. A nation's leaders justify placing and keeping its military in harm's way because it is in the national interest to do so. On the other hand, the international community and the population of the nation in which the intervention occurs will view such a pursuit of strategic interests with suspicion—even if the pursuit of these interests relates to the humanitarian crisis itself.

While it might be desirable to have a purely humanitarian motive for an armed intervention, there

is a genuine question as to whether that is realistic. There was little national interest for U.S. participation with NATO in the Kosovo intervention, whose purpose was primarily to assuage moral outrage and maintain the legitimacy of NATO. This lack of national interest resulted in severe U.S. operational limitations when the armed intervention began.⁴⁷

In comments on humanitarian intervention, one of the ICISS members recognizes the need for staying power: "For an intervention to be sustained, at least one state with the requisite military capacity must also have a stake in stabilizing the situation, as with Australia in East Timor."⁴⁸ What kind of "stake" in stabilizing the situation is proper? Obviously, it must be one that will maintain the public's willingness to expend money from the national coffers and put its military forces at risk.

If the stake in the situation is indefinite, such as "regional stability" outside of one's neighborhood in the international community, there is a risk of not having identified the interest in terms that a citizenry will understand or accept. But at the same time, identifying some tangible stake such as an economic interest may undermine international and local perceptions of the intervention's stated humanitarian motive by causing the operation to lose its appearance of legitimacy.

Proportionate Ends, Ways, and Means

What are the appropriate ends, ways and means of a humanitarian intervention? Narrow moral and legal justifications for armed humanitarian intervention require that the ends, ways, and means of both military and post-conflict operations clearly relate to the justifications for it. Much of the commentary on both humanitarian intervention and R2P supports this view.⁴⁹ While "regime change" might be inevitable in some or even most circumstances, we should not always presume it to be so. The factors that will most influence the selection of ends are the history of the conflict and any peaceful attempts to resolve the crisis before the armed intervention.

As always, the choice of legitimate ends will guide the selection of legitimate ways and means. Moral and legal justifications influence such selections. In the Kosovo intervention, significant disagreements developed over the overall concept of the air campaign.⁵⁰ Conducting effective military operations, ostensibly against only legitimate targets, produced

A successful intervention must not only stop the immediate suffering, but also prevent it from resuming once forces withdraw.

collateral damage that undermined international and domestic perceptions of legitimacy and hence support. These challenges were not rooted in political timidity about engaging legitimate targets, but resulted from the inherent paradox of using armed force for humanitarian purposes.

Two Conclusions: Necessity and Proportionality

What emerges from this examination is that armed humanitarian intervention is particularly bound by the constraints of “necessity” and “proportionality.” Consideration of both should underlie all strategic and operational planning and decision-making related to armed humanitarian intervention.

“Necessity” requires the armed intervention be necessary to stop or prevent widespread, systematic murder or serious injury, including torture, rape, and other serious assaults. This necessity arises when one

has exhausted all peaceful means of resolving the situation. Internal conflict and other social or political conditions, in and of themselves, do not create the legal or moral authority for armed humanitarian intervention.

“Proportionality” requires that the ends of the intervention be only those necessary for achieving the humanitarian purpose. Using armed humanitarian intervention to achieve specific national strategic objectives beyond the prevention of violent atrocities risks the operation’s real and apparent legitimacy at the international and local levels.

At both the strategic and operational level, the bottom line to armed humanitarian intervention is that the cure cannot be worse than the illness. If, in the course of protecting innocent victims, humanitarian intervention unnecessarily creates more victims, the legal and moral justifications for the intervention are undermined. Such is the challenge of legitimacy in armed humanitarian intervention. **MR**

NOTES

1. See, for example, Michael J. Glennon, *Limits of Law, Prerogatives of Power: Interventionism after Kosovo* (New York and Hampshire, UK: Palgrave, 2001).
2. Michael C. Desch, *Bush and the Generals*, *Foreign Affairs* 86, no. 3 (May/June 2007): 97-108 (emphasis added).
3. Michael Walzer, *Arguing About War* (New Haven, CT: Yale University Press, 2004), 68.
4. *Ibid.*, 69.
5. *Ibid.*, (internal quotes omitted).
6. Jerome Slater and Terry Nardin, “Nonintervention and Human Rights,” *The Journal of Politics*, 48, no. 1 (February, 1986): 92.
7. *Ibid.*
8. Thomas M. Franck, *Recourse to Force* (Cambridge University Press, 2002), 135.
9. See, for example, Rule 916(e)(5), Rules for Courts-Martial in the *Manual for Courts-Martial*, United States (2005).
10. See *Operational Law Handbook*, International and Operational Law Department, The Judge Advocate General’s Legal Center and School, (2006), 115-118.
11. *Charter of the United Nations* [hereinafter “UN Charter”], art. 1(1), <www.un.org/aboutun/charter/>.
12. UN Charter, art. 2(4).
13. *Ibid.*, art. 2(7).
14. *Ibid.*, art. 2(1).
15. *Ibid.*, art. 23.
16. *Ibid.*, art. 39.
17. *Ibid.*, arts. 41 and 42.
18. For a concise summary of events leading to the creation and U.S. ratification of the UN Charter, see, Office of the Historian, Bureau of Public Affairs, U.S. Department of State, *The United States and the Founding of the United Nations*, August 1941 - October 1945”, available at <www.state.gov/r/pa/ho/pubs/fs/55407.htm>.
19. U.S. Const. art. VI, sec. 1.
20. *United States Code*, Title 22, sec. 287, et seq.
21. This potential exception is the ambiguous war crime of “aggression” or “crimes against peace.” Some nations, including the U.S., have recognized “crimes against peace” or “aggression” as a war crime for which individuals may be held responsible. Readers should note that this crime would only apply to decision-makers at the highest level of a government. In spite of its long history, dating to the Nuremberg International Military Tribunals, a precise definition of “aggression” remains elusive and there is not yet full international acceptance of the notion that a nation’s individual decision-makers who order, plan, or conduct aggressive (rather than defensive) military operations can be held criminally responsible. Although it is not the purpose of this paper to define the international crime of “aggression” or its domestic status, it is important to recognize its tenuous existence and the potential gravity of using military force contrary to international law. For a discussion regarding the difficulty of defining this crime for use in the International Criminal Court, see <www.un.org/icc/crimes.htm#aggression>. Note that the U.S. has historically supported the concept of individual criminal responsibility for international military aggression, but has not joined the treaty creating the International Criminal Court.
22. UN Charter, art. 51.
23. See, for example, Ian Bowllie, *International Law and the Use of Force by States* (Oxford University Press, 1963), 42-44, 275-280.

24. Anthony Clark Arend and Robert J. Beck, *International Law and the Use of Force: Beyond the UN Charter Paradigm* (London: Routledge, 1993), 72-73.
25. *Ibid.*, 79.
26. *National Security Strategy of the United States* (17 September 2002), part V.
27. UN Charter, art. 39.
28. *Ibid.*, art. 41.
29. *Ibid.*, art. 42.
30. *Ibid.*, art. 2(7).
31. See Glennon, *supra* note 1, at 142-143.
32. International Commission on Intervention and State Sovereignty [hereinafter ICISS], *The Responsibility to Protect* (Canada, 2001), available at <www.iciss.ca/pdf/Commission-Report-pdf>.
33. *Ibid.*, at VII.
34. *A More Secure World: Our Shared Responsibility: Report of the High-Level Panel on Threats, Challenges, and Change*, UN Doc. A/59/565 at 56-57, para. 210 (2004), <www.un.org/secureworld/report.pdf> [hereinafter High-Level Panel Report].
35. 2005 World Summit Outcome, GA Res 60/1, para. 138 (24 October 2005).
36. S.C. Res. 1674, P 4, UN Doc. S/RES/1674 (28 April 2006).
37. *Ibid.*
38. Rebecca J. Hamilton, “Recent Development: The Responsibility to Protect: From Document to Doctrine – But What of Implementation?”, *Harvard Human Rights Journal* 19 (Spring, 2006): 290.
39. See, for example, Yoram Dinstein, *War, Aggression and Self Defense*, 4th Ed. (Cambridge University Press, 2005) 71-72; Arend and Beck, *supra* note 25, at 136.
40. Glennon, *supra* note 1, at 111-112.
41. Jack Donnelly, *Universal Human Rights in Theory and Practice*, 2nd Ed. (Ithaca, NY: Cornell University Press, 2003), 242-260; Christine Gray, *International Law and the Use of Force*, 2 Ed. (Oxford University Press, 2004), 45-49. It is possible for new rules of law created by the practice of nations to displace prior treaty obligations. However, this is rare, and it is often difficult to determine whether a practice inconsistent with a treaty obligation is a violation of the treaty or a new, emerging rule of practice. This emphasizes why we must defer to our national leaders to make these determinations.
42. ICISS, at XIII.
43. Glennon, at 112-120, surveys UNSC authorized interventions in Rhodesia (1965), South Africa (1977), Iraq (1991), Somalia (1992), Rwanda (1994), and Haiti (1994).
44. Walzer, *supra* note 3, at 20.
45. Jeremy Bransten, *Kosovo: U.S. Urges Independence ‘Now,’ Over Russian Objections* (Radio Free Europe), available at <www.rferl.org/featuresarticle/2007/06/145c6702-9437-49a8-a9a0-7d7e31bd842a.html>.
46. See NATO in Kosovo at <www.nato.int/issues/kosovo/index.html>.
47. See Wesley K. Clark, *Waging Modern War* (New York: Public Affairs, 2002), chapters 7-13 and David Halberstam, *War in a Time of Peace* (New York: Scribner’s, 2001), chapters 39-43.
48. See, for example, Arend and Beck, 128.
49. Ramesh Thakur, *The United Nations, Peace and Security* (Cambridge University Press, 2006), 258 n.18.
50. Halberstam, 444-450, 470-471.