

Will Armed Humanitarian Intervention Ever Be Both Lawful and Legitimate?

Written by Monica Adami

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MONICA ADAMI, DEC 15 2017

An armed humanitarian intervention does not have a clear-cut definition. It can be inherent in legal derogations from the prohibition of the use of force, such as self-defence and consent of the state, or it can be an autonomous use of force in another state to protect people from human rights violations. The autonomous use of force can be an external and forcible intervention as in the classic definition of humanitarian intervention or it can be both an internal and external, military and non-military intervention as in the responsibility to protect (R2P).[1] Thus, it is necessary to clarify that this latter definition corresponds to the concept of armed humanitarian intervention here used while discussing whether a humanitarian intervention can be both lawful and legitimate.^[2] This essay will argue that an armed humanitarian intervention cannot be both lawful and legitimate at present, while mentioning that it can be possible in the future. This argument will be presented in four sections. The first will explain that an autonomous armed humanitarian intervention is illegal.[3] The second part will analyse the Libya case to show how humanitarian intervention tends to have a weak legitimacy.[4] However, the third part will change the tone of the essay. It will consider Libya and Syria to show how R2P still represents an aspiration to a lawful and legitimate humanitarian intervention.[5] The essay concludes by arguing that a lawful and legitimate humanitarian intervention can be possible under a developed R2P.[6]

Since the 18th century, the principle of non-intervention has dominated international law; this is evident from de Vattel's writings to the UN Charter.[7] This principle is naturally against any norm of humanitarian intervention, and there is, in fact, very little proof that international law allows states to militarily intervene in another state for humanitarian aims. Firstly, the *opinio juris* is against a norm of humanitarian intervention. For instance, most NATO members did not rely on the doctrine of humanitarian intervention to argue in favour of the legality of the use of force in Kosovo, in this way acknowledging that the right to intervene to end human sufferings is not present in the UN Charter or in the general principles of international law.[8] Secondly, it is often said that a norm of humanitarian intervention may be based on the possibility that customary law has developed through state practice.[9] It is possible that customary law prevails over treaty law but it is necessary to prove the desuetude of the treaty rule. Yet Art. 2(4) is part of the *ius cogens*, thus it can be overcome only by another rule of *ius cogens*, and no rule allowing humanitarian intervention can be part of the *ius cogens* and prevail over Art. 2(4).[10] Thirdly, there is the argument that Art. 2(4) impedes only the use of force that is inconsistent with the purposes of the UN and it is against the territorial integrity or political independence of another State.[11] However, this interpretation would require an agreed change of the meaning of Art. 2(4) and the parallel change of its application, which is not the case at present.

Furthermore, both the R2P and the "Uniting for Peace" resolution have not changed the illegality of an autonomous humanitarian intervention. Regarding the latter, this resolution is between the often said "never again" on one side and national concerns on the other, and the scale is likely to always lean to the second. This reality is particularly evident in the uncertain role of resolution 377 A in the post-cold war period. In fact, this resolution was created to support the position of western major powers, and as the vote of the Assembly does not guarantee anymore the support of their interests, it has not recently been used. It could be said that if the political will exists, the General Assembly may authorize a humanitarian intervention because the UN Charter permits implied and imperfect powers and UN organs, especially the Security Council and ICJ, have shown support for this interpretation, but ultimately the political will is missing.^[12] The R2P doctrine has not challenged the absence of a norm of humanitarian intervention.

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Paragraphs 139 and 138 of the 2005 World Summit Outcome document mentions collective intervention through the UN Security Council. However, it is far from contemporary law that, when the Security Council is paralysed, R2P represent a legal allowance to use force by a “coalition of the willing” or a regional coalition, as it was instead proposed in the 2001 R2P.[13]

In particular, the belief that the R2P was the basis for a legal and legitimate humanitarian intervention has been weakened after the UNSCR 1973(2011) on Libya. This is because that intervention seems to have been illegitimate when considering the R2P just cause threshold. In this way, it supported the argument that not only does R2P not change the law about humanitarian intervention, but it also demonstrated how humanitarian intervention tends to be manipulated.[14] For example, by analysing the principle of the right to intervene, it could be affirmed that NATO’s main goal in Libya was the protection of civilians. Yet, NATO’s priority quickly changed to the overthrow of Gaddafi, which resulted in the deaths of many Libyans. In particular, if NATO’s aim was only the protection of civilians, it could have tried to negotiate a ceasefire, imposed a no-fly zone, and bombed security forces that constituted severe threats to the populations.[15] On the contrary, NATO went much further by targeting Libyan forces in retreat and supporting rebels who opposed Gaddafi’s offer for a ceasefire.[16] It is sometimes said that regime change respected the Security Council Resolution’s mandate, as it was necessary to protect civilians. However, even if the regime change was necessary, NATO violated the Security Council resolutions by not acknowledging that Gaddafi was available to accept a ceasefire and by aiding the rebels’ dismissal of that ceasefire.[17] Ultimately, the intervention was legal because it was authorized by the UN Security Council, but there are doubts about the legitimacy of the action.

The R2P doctrine’s use in Libya clearly demonstrated that initial or supposed “good intentions” do not automatically imply the legitimacy of an armed humanitarian intervention.[18] Yet the illegitimacy of the Libyan campaign does not negate the possibility that R2P may become the basis for a both lawful and legitimate autonomous humanitarian intervention. Libya was, in fact, only partly an application of R2P. R2P includes the responsibility to prevent, to react and to rebuild. In Libya, the fulfilment of the responsibility to react is unquestionable, as the international community promptly reacted and intervened two days after the UNSCR 1973.[19] However, the responsibility to prevent does not seem to have been respected. In 2001 and 2005, R2P advocates stressed the non-military aspects of R2P and argued that the use of force be reserved as a last resort. Instead, force almost immediately followed the UN ultimatum to Qaddafi in Libya.[20] Finally, the responsibility to rebuild was the most significant failure of the legitimacy of R2P in Libya. The intervention extended the duration of Libya’s civil war by around six times and its death toll by approximately seven times, while also increasing humanitarian suffering, human rights violations, weapons proliferation, and Islamic radicalism. Since the end of the war, Libyans have endured insecurity and instability, while the UN has ignored the escalating violence.[21] Thus, Libya was not a legitimate application of R2P as it is interpreted in the manner of the South, the high-level UN Panel, and the UN World Summit.[22] Unfortunately, although Libya only partly applied the standards envisioned in R2P, many felt that its outcome discredited the entire idea of R2P, in the same way the invasion of Iraq limited the scope and application of the doctrine between 2001 and 2005.

Indeed, Syria has also paid a high price for the Libya intervention. Yet it has also demonstrated that there is still a basis for a lawful and legitimate humanitarian intervention under R2P. On the one hand, the Syrian crisis was exacerbated by the caution about another western invasion of a Muslim country. The proposed draft Security Council resolutions to end to the flow of arms, to dismiss of Bashar al-Assad, install a government of national unity, and hold free elections were blocked as 1973-type violations of a UNSC resolution’s mandate. The Chinese and Russian positions on Syria summarize the general opposition to any norm of humanitarian intervention.[23] They dislike intrusions into the sovereign affairs of Syria and do not recognize rebels as representatives with any national authority.[24] Additionally, they have considered the possible gains that the Syrian civil war can offer them, such as arms sales and energy opportunities. Overall, Syria demonstrates the complexity of developing both a lawful and legitimate humanitarian intervention framework, as a lawful humanitarian intervention would be a challenge to states’ interests and the latter would be a challenge to the legitimacy of an armed humanitarian intervention. Yet, on the other hand, Syria also demonstrates the fact that R2P has not already made an autonomous armed humanitarian intervention lawful and legitimate does not dismantle its potential. This is because, as Evans said, R2P was created not to establish a norm, but a new sense of moral and political obligation, and there seems to be a strong sense of

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legitimacy for an armed humanitarian intervention in Syria.^[25] In fact, the Arab League has criticized Bashar al-Assad and proposed a peace plan. The US and the EU have imposed sanctions. The Independent Commission of Enquiry established by the Human Rights Council has concluded that Assad's practices correspond to crimes against humanity. And, finally, the UN General Assembly has condemned Assad's violence.^[26] There is no decision by the UN Security Council, but the opposition and blame of the international community are evident. Hence, it appears that R2P has not been dismissed as much as it has not been implemented in Syria.

Finally, even though it may seem that this sense of morality is not created by R2P but by the atrocities committed in Syria, the point here is that it is felt that it is legitimate to do something to help Syria. The suggestion is thus to use this feeling to develop a legal and legitimate humanitarian intervention framework instead of diminishing it as an illegal and weakly legitimate use of force.^[27] However, one might ask why R2P and not other means? This is because R2P seems to be the only hope for a legitimate and lawful humanitarian intervention at present. Since UNSCR.1973 the UNSC has adopted different resolutions connected to R2P. This happened, for instance, in Mali, Sudan, South Sudan, Yemen, and the Central African Republic.^[28] Also, R2P is included in UNSCR 2117 (2013) about 'Small Arms and Light Weapons' and their non-proliferation and the UNSCR 2150 (2014) which dealt with the Rwandan genocide. Now, the next step could be the creation of a norm out of this renewed faith in the just war. Indeed, as suggested by Aidan Herir, a detailed and redefined R2P may be a future norm of humanitarian intervention, which may make the intervention legal while checking its legitimacy.^[29] Herir's main point is that R2P should be defined as a legal obligation to intervene, rather than a discretionary responsibility or right. Without discussing Herir's ambitious suggestions, the core of his reflection may make possible to have a lawful and legitimate humanitarian intervention, meaning that it would be used when, and only when, it can pragmatically improve the humanitarian condition on the ground, not when the threshold of gravity is reached or there is the political will.^[30] Ultimately, a legal and detailed obligation to protect may bring back R2P to its initial function: the creation of a lawful and legitimate humanitarian intervention.^[31]

In summary, today international law negates the legality of autonomous humanitarian intervention, and contemporary conflicts prove the difficulty to have outcome-based legitimacy. Yet neither international law nor contemporary conflicts totally negate the aspiration to have a lawful and legitimate humanitarian intervention under a new and developed R2P.^[32] Hence, even if today an autonomous armed humanitarian intervention cannot be both lawful and legitimate, this can be possible in the future if the R2P doctrine will be developed as a legal and detailed obligation to intervene.

Notes

[1] (Evans, Thakur, & Pape, 2013)

[2] The concept of legitimacy here used does not consider only the aim of the action, but also its outcomes.

[3] (Chomsky 2008)

[4] (Lopez 2015)

[5] (Thakur 2013)

[6] (Bajoria & McMahon 2011)

[7] (Lowe and Tzanakopoulos 2011)

[8] (O'Connell 2000)

[9] (Akande 2013; Simma 1999)

[10](Akande 2013;)

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[11](Tams 2009)

[12] (Ramsden 2016)

[13] (Evans 2013; Akande 2013)

[14] (Bellamy and Williams 2011)

[15] (Williams and Bellamy 2012)

[16] (Bellamy and Williams 2011)

[17] (Brown & Shahin 2013)

[18] (Thakur 2013: 73)

[19] (Bellamy and Williams 2011)

[20] (Williams 2011)

[21] (Bellamy and Williams 2011)

[22] (Chomsky 2008)

[23] (Thakur 2013)

[24] (Allison 2013)

[25] (Evans 2013)

[26] (Weiss 2014)

[27] (Milanovic 2017)

[28] (Weiss 2014)

[29] (Hehir 2012)

[30] (Verdirame 2013)

[31] There are no doubts that the legitimacy would be in doubt even in this case. How will be established what is legal and what is not? Who will decide what is right or what is wrong? Yet international responsibility means having the obligation to alleviate human sufferings and thus to try to interpret in good faith what is legal and what is not, what is right and what is wrong. Regardless, a legal and detailed obligation to intervene may guarantee more legitimacy than a coalition of the willing, but as it is not a reality at present, it is not possible to accurately evaluate this consideration.

[32](Narine 2016)

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Written by: Monica Adami

Written at: LSE

Written for: Stuart Gordon

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