

CONFERENCE ON THE FUTURE OF HUMANITARIAN INTERVENTION

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“To intervene or not: The dilemma that will not go away”

Keynote address by

Mr. Hans Corell
Under-Secretary-General for Legal Affairs
The Legal Counsel of the United Nations

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Ladies and Gentlemen,

First, let me say what a great pleasure it is to be among you and to participate in the discussions of the very important topic of this conference: the Future of Humanitarian Intervention.

When I looked at the program, it struck me that there is not much that is left open. We will discuss the history of humanitarian intervention, policy reasons for and against, the current state of the law on humanitarian intervention, options for legal and institutional reform and the role of regional organizations as well as rules of conduct during humanitarian interventions.

The question I asked myself was: in what way can I contribute to the discussion as a keynote speaker, in particular since the purpose of the conference is to seek to find the nexus between law, policy and ethics in the analysis of and discussions about the future of humanitarian intervention?

I decided to challenge you on the theme: “to intervene or not: the dilemma that will not go away.”

For the purpose of my intervention, I will use the definition of humanitarian intervention proposed by the Danish Institute of International Affairs, namely, “coercive action by States involving the use of armed force in another State without the consent of its Government, with or without authorization from the UN Security Council, for the purpose of preventing or putting to a halt gross and massive violations of human rights or international humanitarian law”.¹

This topic has of course been discussed extensively in the past. However, I think that it is fair to say that the speech by the Secretary-General to the General Assembly of the United Nations on 20 September 1999 triggered a very intense debate, which reflected sharply contrasting views on the topic. In

particular, a clear divide seemed to emerge in the Assembly between North and South – between industrialized countries and developing countries.

Since the debate in the General Assembly, many have focused on the topic, and great efforts are now being undertaken to bring the thinking forward. This conference is yet another demonstration of this.

May I suggest that it is with a certain agony that the issue is discussed. The need for intervention is widely recognized, but the conflicting interests, in particular state sovereignty, present themselves with equally convincing force, at least in the eyes of some.

At the heart of the matter lie the Charter of the United Nations and its system of collective security and the concepts of sovereignty, fundamental human rights and international humanitarian law.

As a point of departure, I think that we can all take it as accepted that state sovereignty can no longer be interpreted in the way it was recognized in Westphalia in 1648, but has to be construed in the light of later developments, in particular, in the fields of human rights law and international humanitarian law.

The way in which the United Nations, and, specifically, the Security Council, acted in Rwanda and Kosovo caused a vivid debate on criteria for humanitarian intervention and whether it would be possible to codify these criteria. The focus has been on the Charter as well as on the possibility of developing norms outside the Charter. The fact that most conflicts today seem to be intrastate is also an important factor in this context.

Furthermore, the argument has been made that the very concept “humanitarian intervention” is not appropriate. Rather, what we are faced with is

a “responsibility” for the international community to act in order to protect those whose rights are being violated.

Let us first look at the issue in a legal perspective. I will concentrate on the basic rules of the Charter, the role of the Security Council, the role of the General Assembly and the role of regional organizations.

The well-known provisions in Article 2, paragraphs 4 and 7, will no doubt be discussed during this conference. Suffice it to say that Article 2, paragraph 4, requires all Member States to 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. Paragraph 7 of the same Article lays down that nothing contained in the Charter shall authorize the United Nations to intervene in matters, which are essentially within the domestic jurisdiction of any State. However, there is a very important exception: this principle does not prejudice the application of enforcement measures under Chapter VII.

Today, it is commonly understood that these rules must be read in conjunction with other provisions of the Charter, in particular those focusing on the protection of fundamental human rights.

Of particular importance is Article 39 of the Charter. Under this provision, the Security Council *shall* decide what measures shall be taken in accordance with the Charter (Articles 41 and 42), to maintain or restore international peace and security. This means that the Council has a right out *obligation* to act. The question is whether the Council can find a common position when the need arises.

In the autumn of 1999, with the debate in the General Assembly fresh in everyone’s memory, I ventured to say that the Council would in the future act

under the eyes of an increasingly well-informed general public. I thought that the members of the Council would agree that they would have to act with credibility in these situations; or they would leave others with no other choice but to act on their own in disregard of the letter of the Charter. I asked whether such action, providing that it is proportionate, would be seen as a violation of its spirit. My assumption was that it would not be seen as a violation of the spirit of the Charter, at least in the eyes of the general public.

Against this background, I suggested that the members of the Council have, in a sense, the same responsibility to protect the Charter and its viability as national legislative organs have to protect the Constitution of the State.²

It would come as no surprise to you that as the Legal Counsel of the United Nations I will also now defend the integrity of the UN Charter. Let me make clear, though, that I speak in my personal capacity and have to make the customary disclaimer that the opinions I express do not necessarily reflect the views of the United Nations.

The question has been raised, whether the Charter should be amended or if some other option should be chosen.

From a legal point of view, it would of course be possible to attempt to codify situations where humanitarian intervention would be allowed. However, I think that it is more realistic to look at humanitarian intervention in the same way as “necessity” under national law. Normally necessity is not codified; rather, its very nature is such that you can identify it when it occurs.

If one enters upon a codification exercise, it would of course be necessary to open the Charter for discussion. We all know what difficulties this would entail. Also, because of the sensitivity that humanitarian intervention has provoked in developing countries, I fear that it would be very difficult to mobilize the

necessary majority in the General Assembly for any amendments to be adopted. To this, add the need for ratifications by Member States in accordance with Article 108 of the Charter.³

The alternative could be to attempt to codify criteria outside the Charter. However, as I have pointed out on earlier occasions, this brings into focus the relationship between the Charter and any other international legal instrument. Even if a reasonable number of Member States would ratify a separate treaty, this treaty would have to be construed in light of Article 103 of the Charter. This provision will not permit any separate regime to take precedence over the Charter. I recall that Article 103 provides that, “in the event of a conflict between the obligations of the members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail”.

So, this means that even if attempts were made to codify situations where humanitarian intervention could or should be undertaken, the problem with a possible conflict with the Charter of the United Nations would not go away.

Another way of solving the problem, suggested in the debate, is to reform the Security Council. It is said that a reform of the Council would enhance its credibility both amongst industrialized nations, who think that they should have a greater influence on the Council, as well as among developing countries, who believe that they should be more equally represented on it.

It may be that a more “legitimate” Council would facilitate a common understanding on how to deal with situations that might require humanitarian intervention in the future. However, I am not convinced that the problem would go away simply because the composition of the Council was different. First, there would be more members on the Council, each of them in a position to influence

the outcome of the decision. Secondly, the nature of the problem would not be different; the members would still be faced with the same dilemma.

Another solution mentioned in the debate is action through the General Assembly. Reference has been made to the “Uniting for Peace” resolution.⁴ This would require the adoption by a two-thirds majority of a resolution recommending Member States to take collective measures in a situation where the Security Council fails or is unable to take action.

As many have pointed out, there are several reasons why the General Assembly may not be able to solve the problem. Quite apart from the fact that the Assembly is not in a position to act with the same speed and effectiveness as the Security Council (in these matters, the Assembly lacks the ability to adopt resolutions that are binding on Member States), the political problem of the resistance against humanitarian intervention demonstrated by many developing countries would probably block this option.⁵

Another possible solution would be to rely on regional organizations. As is well known, several such organizations have been involved in conflict prevention and peace building in later years.

It should be noted that Articles 52 through 54, which deal with regional organizations, are very flexible. First of all, it is not necessary to identify in advance organizations that would be authorized to undertake action. Notably, the Charter does not even mention organizations. The term used is “regional arrangements or agencies”. This means that there is a broad spectrum of options available here – even arrangements that are formed for the very purpose of solving the particular problem with which the United Nations is faced. However, there is one exception to the flexibility, namely Article 53, which explicitly provides that “no enforcement action shall be taken under regional

arrangements or by regional agencies without the authorization of the Security Council".⁶

Basically, this means that referring the issue to a regional arrangement does not make the problem go away from the Security Council. In making such a reference, the Council will be faced with exactly the same question that it had to tackle in the first place: will it authorize the use of force?

It would seem that, from a legal point of view, it is very difficult to tackle the problem; the same issues keep coming back to the Security Council in one way or other.

Is the solution, then, to amend the Charter? I am sure that you know that there are many legal scholars who believe that it is highly undesirable to have a new rule allowing humanitarian intervention. They fear that any such rule could provide a pretext for abusive intervention.

For my part, I revert to what I said a while ago about not attempting to define "necessity". From this perspective, the matters that arise will simply have to be dealt with by the Security Council. If the Council is unable to act, then, according to some, it is better to accept a violation of the Charter in a situation where this is considered necessary in the particular circumstances, than to adopt rules that might risk driving a wedge into the barrier against unilateral use of force established by the Charter.

Let us now shift our focus from the law to the second element in your deliberations: the policy issue. Here, there are many aspects that could be mentioned.

First, the Security Council would have to consider whether the situation at hand warrants humanitarian intervention. Many questions arise in this context.

One important question is what precedents are being set. I recall in this context that in the wake of the debate in the General Assembly in September 1999, many warned against a general tendency to engage in humanitarian intervention. They were afraid that such a development could lead to aspirations in many areas in the world. They meant that such interventions risked creating situations that, driven by a built-in logic, could develop into new conflicts that would have to be dealt with at the international level.

Another important question is whether the United Nations can master the necessary resources to engage in a humanitarian intervention. In this context it is important to note that it is not only the military action that has to be taken into consideration. On the contrary, the most likely situation is that, once a military action is undertaken, other demands will present themselves instantly. It is against this backdrop that States will have to assess the resources available for the contemplated action.

At an early stage in the operations of the United Nations Mission in Kosovo (UNMIK) and the United Nations Transitional Administration in East Timor (UNTAET) certain common denominators emerged.

One important conclusion to be drawn from these missions is that a humanitarian intervention may very well entail that the territory in question will have to be governed by the United Nations. As experience already demonstrates, this means that the Organization will have to undertake a very demanding task.

One very clear conclusion is also that, in parallel with any humanitarian assistance that would have to be given, there is an immediate requirement of putting in place a system for the administration of justice. Civilian police, a judiciary and a correctional system have to be developed almost instantaneously. Otherwise criminality will very quickly take hold.

Please note that here we also experience a shift in the scope of the UN obligation. Article 39 lays down an obligation to act, but leaves it to the Security Council to decide when the criteria for action are met. Once the Security Council decides to act, the obligation assumes another dimension. The obligation to uphold law and order then emerges as an absolute. In addition, these tasks will have to be fulfilled with full respect for international standards for the protection of human rights.

Another important policy consideration is how the United Nations will be seen in the area once the initial military operation is terminated. Without going into detail, I think that the situations in Kosovo and East Timor are clear indications. The situation in which any United Nations mission would find itself is both complex and dangerous.

The limited time at my disposal for this keynote address does not allow a deeper analysis of these issues. Suffice it to say that, even if the legal basis for a humanitarian intervention would be clear and even if, in principle, the members of the Security Council would be in agreement, there are still important policy considerations to be made before a final solution can be arrived at. In particular, unless sufficient resources can be mobilized, there is great risk that a humanitarian intervention may fail, drawing criticism upon the United Nations and the States that engage in the operation.

But how does this cautious approach harmonize with the ethical side of the problem? This is one of the great concerns of Secretary-General Kofi Annan. In his Millennium Report to the General Assembly last year he said: "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 offend every precept of our common humanity?"⁷ The Secretary-General maintains that the problem is one of responsibility; in

circumstances in which universally accepted human rights are being violated on a massive scale, we have a responsibility to act.

The question is to what extent this is accepted by Member States of the Organization. Of particular interest is of course how the permanent members of the Security Council react. Ultimately, the decision is a political one, although based on Article 39 of the Charter.

In this context I should like to quote one participant in the debate. A few weeks ago, I happened to come across a book, "*Six Nightmares*", written by Anthony Lake, National Security Adviser to President Clinton from 1993 to 1996. He discusses the role of the United States in situations of internal conflicts in other States and notes that such conflicts will have great effects on the interests of his country. He then goes on to say:

"In addition, there is a moral imperative that is all the deeper with our superpower status. How can America sit on the sidelines when innocent civilians are being slaughtered, or starved, or made to suffer before our eyes? We lose credibility on other issues if we turn our backs on humanitarian tragedies. More important, it is wrong to do so. With our great power comes great responsibility and leadership in human as well as geopolitical terms. Not acting, when you can, is as much a decision as becoming involved. This does not mean that we *must* always act. But there are consequences when we do not." ⁸

I think that these arguments can be made also with respect to other States and in particular to the members of the Security Council, the custodians of the collective system for peace and security in the world.

But also here, there are dilemmas. One, in particular, deserves mentioning, namely the so-called CNN syndrome.

In cases where human rights violations and crimes against humanity are presented on our TV screens, it is very easy to build up a pressure that would make it possible for governments to move. We know, however, that there are many conflicts and that some of them are sometimes referred to as “forgotten”.

This means that also in the ethical perspective, there are problems in the sense that, probably, the resources that the United Nations can collectively master will not be sufficient to deal with all the situations that might develop and where there is a need to act.

Ladies and gentlemen,

So far, I have only presented you with a number of dilemmas circling around the specific dilemma that will not go away: to intervene or not. You may argue that it is very easy to present problems and that it is much more difficult to come up with constructive ideas. I am prepared for such criticism. But I think that it is important to be honest and to admit the limitations that exist. However, let me contribute the following thoughts.

First of all, I think that we all agree that conflict prevention, early warning and other elements designed to nip in the bud any threats to peace and security would be preferable. However, this is not what we are discussing here. To refer to such activities would be to avoid the question on which we should focus.

From the ethical perspective, I think that the issue is relatively simple: we cannot accept in the twenty-first century, that fundamental human rights are violated and that crimes against international humanitarian law are being committed on a large scale without consequences. Several steps have been taken lately, including the establishment of international criminal tribunals.⁹ From the ethical viewpoint, there is no way we can escape the moral obligation.

However, the realities have to be faced; the political or policy issues must be taken into consideration. Unless the necessary resources can be mobilized, it is simply not possible for the Organization or, if you so wish, a group of States, to take the necessary action. In this situation we might be left with no choice. We may be unable to act. Let us hope that in the future we will not find ourselves in that situation.

This brings us back to the legal area again. Here my proposal would be to focus on humanitarian intervention only with the participation, authorization or approval of the United Nations, i.e. the Security Council. The option of preparing guidelines to define situations where humanitarian intervention would be permitted has been suggested. Even if I am doubtful about the idea of elaborating and codifying the criteria legitimizing humanitarian intervention, I would not discourage a study of such criteria for the purpose of formulating guidelines. However, if such guidelines were meant for the Security Council, would not the Council have to accept them? Will not such an exercise present the same problem for the Council, although in a more principled way, as when the Council is faced with a specific situation? It may, therefore, not be easy for the Council to agree on such general principles or guidelines.¹⁰

Against this background, I would like to revert to my initial plea that the members of the Council simply have to defend the integrity of our system for collective security and unite in situations where human rights are violated or crimes against international and humanitarian law are committed on a large scale. I admit that there could be situations where there is ambiguity. However, in retrospect I think that we all must agree with the Secretary-General in his analysis of the situations both in Rwanda and in Kosovo: those situations warranted action by the Security Council. In neither case was the Council able to unite.

I am sure that we all hope that we will not experience such situations in the future. A determined action by the Security Council in situations where it is obvious to any informed observer that action is required is the best defence against attempts, however legitimate and honourable, by governments or groups of governments to invoke human rights ideals and violations of humanitarian law as a basis for action on their own. As history shows, this would open the way for actions that, on closer analysis, are based on self-interest rather than on the ideals that are invoked. This poses a major threat to the system of collective security laid down in the Charter.

In my view, the dilemma will not go away. But I am convinced that there is a solution – within the Security Council itself. The members of the Council hold the key to this solution. And they are all aware that they are the custodians of a system of collective security that would be very difficult to restore, if destroyed.

Thank you for your attention.

¹ *Humanitarian Intervention: Legal and Political Aspects*. Danish Institute of International Affairs, 1999, page 11.

² *From Territorial Sovereignty to Human Security*. In: Proceedings of the 28th Annual Conference of Canadian Council on International Law, Ottawa, October 28-29, 1999. See also <http://www.un.org/law/counsel/info.htm>

³ Article 108 stipulates that amendments to the Charter shall come into force for all Members of the United Nations when they have been adopted by a vote of two thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two thirds of the Members of the United Nations, including all the permanent members of the Security Council.

⁴ GA resolution 377(V) of 3 November 1950.

⁵ This, of course, presents another dilemma, namely whether in a situation where the Security Council actually decides to intervene, this action by definition is taken against the will of a large number of Member States.

⁶ An obsolete reference to enemy states that follows is omitted from the quotation.

⁷ *"We the peoples: the role of the United Nations in the twenty-first century"*. UN Doc.A/54/2000, para. 217.

⁸ Anthony Lake, *Six Nightmares*, Little, Brown & Company, New York, 2000, page 115.

⁹ The development in the 1990's, in particular the establishment of the international criminal tribunals and the International Criminal Court, is truly remarkable from both a political and legal point of view. This development will necessarily have an impact on the way in which the Security Council will apply Article 39 of the Charter in the future.

¹⁰ There is of course the possibility that the Council itself might develop such guidelines. An initiative in this direction has been taken. Another important contribution is foreseen this autumn, when the International Commission on Intervention and State Sovereignty will present its report to the Secretary-General. This Commission was initiated by the Government of Canada and consists of a group of 12 eminent persons from diverse national and professional backgrounds around the globe. It is co-chaired by Gareth Evans, President of the International Crisis Group and former Foreign Minister of Australia, and Mohammed Sahnoun, Special Advisor to the UN Secretary-General. It is said that the purpose of the Commission is to build a broader understanding of the problem of reconciling intervention and sovereignty and to foster global political consensus on how to move from polemics, and often paralysis, towards action within the international system, particularly through the United Nations.