



## ZÁSADY CUDZIEHO ŠTÁTU DO VNÚTROŠTÁTNEHO KONFLIKTU FOREIGN INTERVENTION IN INTERNAL CONFLICTS

*Stanislav Mráz<sup>1</sup>, Klaudia Hraniková Pytel'ová<sup>2</sup>*

Intervencia na pozvanie je stále kontroverznou otázkou. Piliermi medzinárodného práva sú jeho základné princípy, napríklad zásada nezasahovania, zákaz hrozby a použitia sily v medzinárodných vzťahoch. Cieľom článku je identifikovať intervenciu na základe pozvania v súvislosti s klasifikáciou ozbrojeného konfliktu a uplatňovaním medzinárodných noriem humanitárneho práva.

Kľúčové slová: ozbrojený konflikt, medzinárodné humanitárne právo, občianska vojna, zahraničná intervencia

The intervention by invitation is still a controversial issue. The pillars of international law are its basic principles, such as the principle of non-interference and the prohibition of the threat and use of force in international relations. The article aims to overcome the problem of identifying intervention by invitation in relation to the classification of armed conflict and the application of international humanitarian law standards.

Key words: armed conflict, international humanitarian law, civil war, foreign intervention

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### 1 INTRODUCTION

Since the end of the Second World War, the international community has been facing an increasing number of national conflicts. National conflicts have become the dominant form of conflict, with many countries justifying their participation in a national armed conflict by inviting one of the warring sides. This raises the issue of the ability to consent to intervention by the national authorities. Another issue in

<sup>1</sup> Prof. JUDr. Stanislav Mráz, CSc. Katedra medzinárodného práva, Fakulta medzinárodných vzťahov, Ekonomická univerzita, Dolnozemska cesta 1/b, 852 35 Bratislava 5, e-mail: stanislav.mraz@euba.sk

<sup>2</sup> JUDr. Klaudia Hraniková Pytel'ová, PhD. Katedra medzinárodného práva, Fakulta medzinárodných vzťahov, Ekonomická univerzita, Dolnozemska cesta 1/b, 852 35 Bratislava 5, e-mail: klaudia.pytelova@euba.sk

connection with an intervention by invitation is the question whether it is intervention or collective self-defense. In any case, consenting to military intervention is a controversial justification.

The theory of international law uses the term non-international armed conflict instead of the concept of national conflict. International humanitarian law or the law of armed conflict is, by its very nature, bound to the situation of armed conflict as such. The majority of its standards are exclusively applied during the conflict, while the minor part can also be applied in peacetime. But there is always a link to armed conflict; some standards are designed to prepare conditions for a conflict outbreak or to remove the consequences of the conflict. The definition of armed conflict and the determination of whether or not the signs of the term are present in specific cases are of the fundamental importance. „The protection which is offered by international humanitarian law in international or inter-state armed conflict is much wider than the protection offered in non-international armed conflict or armed conflict within the one country, although suffering remains the same or is even more difficult in a national armed conflict“ (Verhoeven 2007).

## **2 THE CONCEPT OF ARMED CONFLICT, NON-INTERNATIONAL ARMED CONFLICT AND INTERNATIONAL CONFLICTS**

The term *armed conflict* is significantly wider than the concept of war. It does not only cover international armed encounters, it requires a high level of combat and does not require a formal statement. Armed conflicts can be classified in different ways. For humanitarian law the classification between international conflicts and national conflicts is relevant. There are two different views on what criterion this distinction actually reflects. The first view is to the criterion of a territorial extent, according to which – if the conflict takes place in the territory of one country, it is national and if it is in the territory of two or more states then it is international. The second opinion is based on the criteria of the parties to the conflict, and therefore, if they are states – the conflict is international in nature, and if one of the parties, non-state insurgent army – this is a national conflict (Zagveld 2002). The distinction between the two basic types of armed conflicts is of fundamental importance in international law. For each type, a different legal regime applies. While international armed conflicts are governed by all four Geneva Conventions 1949, the 1977 Additional Protocol I and all Hague Laws, for non-international armed conflicts only the joint Article 3 of the Geneva Conventions, some Hague Laws and, in the event of a more violent conflict –Additional Protocol II of 1977 can be applied.

The position of their participants is different in both types of conflicts. In international armed conflicts, there is a clear distinction between combatants and civilians. Combatants have the right to participate in the fight, and they cannot be

prosecuted for this participation, while being understood as the legitimate aims of military action. Non-combatant civilians enjoy the protection of international humanitarian law and must not be attacked. In the case of capture, the combatants become prisoners of war. In the case of national armed conflicts, the status of combatant or prisoner of war does not exist.

Important military conflicts at present are so-called civil wars (which can be included to national armed conflicts). Under this designation, conflicts of varying kinds may vary, depending on their intensity, the actors involved, the reasons for the beginning, the goals, and so on. These national armed conflicts have taken place over the last period in many countries, Mozambique, Lebanon, Yemen, Syria, Nigeria, Angola, Chad, Afghanistan, Somalia. In many of these countries, at some stage, internationalization occurred on the basis of foreign intervention or intervention by UN units, so their regime was not unambiguous.

International humanitarian law has not had a united opinion on national armed conflict. Based on Article 3 of the Geneva Conventions international humanitarian law defines armed conflicts as non-international / national armed conflicts, in which one or more non-state armed groups are involved. The basic requirements for classifying the situation as a non-international armed conflict are:

- hostile actions must reach a degree of intensity (for example, if government is forced to intervene against rebel groups by military force, not police forces);
- non-state armed groups involved in the conflict must be considered as „party of the conflict“ as far as they are organized – and therefore under a certain command structure (having a responsible commander) and are capable of conducting military operations.

Second Additional Protocol complements and develops the common Article 3 without modifying the existing conditions by introducing a territorial control requirement. The Protocol provides that non-state armed groups must exercise such territorial control to „enable them to carry out uninterrupted and concerted military operations“. The Second Additional Protocol explicitly applies only to armed conflicts between government armed forces and dissident armed forces or other organized armed groups. The Protocol does not apply to armed conflicts occurring only among non-state armed groups. However, the definition of „non-international armed conflict“ (as set out in Article 1 of the protocol) can serve as a guideline on the extent of violence. Non-international armed conflict has a negative definition, it is not a „situation of internal riots and tensions such as rioting, isolated and sporadic acts of violence and / or other acts of a similar nature“ (Gleditsch 2002). Therefore – sporadic,

unorganized, non-political, violent riots – do not constitute an internal armed conflict. Based on the Correlates of War Project (COW), a civil conflict is understood to be a conflict in which at least 1,000 lives are lost in one year. The concept of internal armed conflict can be understood as a violent conflict where violence occurs primarily within the borders of one country (Brown 1996). And this type of dispute subsequently escalates in the form of lasting and extensive violence between two or more disparate factions, which calls into question the effective preservation of government power in that state.

The International Criminal Tribunal for the former Yugoslavia (1995) in the Tadic case described a national armed conflict as „long-lasting violence between governmental authority and organized groups or between such groups within a single state“. The ICTY definition contains three characteristics that must be met together. It is the intensity of the combat, its long-term nature and the organized character of the parties in the conflict. With these signs, national armed conflicts are differentiated from internal riots and demonstrations. In essence it is, „situations in which, without being an armed conflict in the true sense of the word, there are encounters in the territory of a particular country for meetings that are characterized by a certain degree of seriousness and duration and are associated with violence“ (Moreillon 1973). They can acquire a certain degree of seriousness and be oriented against the central government of the state as well as against another group within the state. In this situation, identifiable time and space-related manifestations of violence, the deployment of armed forces to suppress them, mass arrests, and other forms of endeavor to eliminate violence. Until the moment of identifying the situation as an internal armed conflict, it is covered by national law (though often largely repressive), as well as human rights protection (which is constantly in force). In relation to the intensity of combat – sufficient intensity is reached just only through open struggles of collective character which requires the deployment of the army or other armed forces, and which subsequently results in more casualties. Therefore, it must be manifestly more extensive than in the case of public unrest, isolated and sporadic violence, or actions of a similar nature. The long-term nature criterion reflects the attempts of international law to respond only to those phenomena that in some way prove their effective durability (or repetitive character) and, on the other hand, exclude of those which have only temporary nature. Under the organized character, it can be understood that the parties to the conflict have an armed force similar to a regular army, subject to internal discipline and responsible direction.

In essence, it can be said that a national armed conflict is a „military-type conflict that has a certain intensity and has a collective character because it affects the life of the entire society within the state“ (Kolb 2003). The application of international humanitarian law does not require the exercise of territorial control by a non-state rebel

group or its formal recognition as a fighting party. In contrast to international armed conflicts, the threshold for the applicability of international humanitarian law is increased, which is mainly related to the traditional fears of states that the civil war does jeopardize their sovereignty and over-interfere with their internal affairs.

National armed conflicts are also internally divided according to the combating sides, the intensity and the legal regime. According to the struggling parties, we know the vertical conflict, in which one of the fighting parties is the legal government and the other are insurgents, and the horizontal conflict, in which only armed groups of non-state character fight against each other. According to their intensity, national conflicts are divided into conflicts of higher intensity and lower intensity. In higher-intensity conflicts, the non-state rebel group controls part of the state's territory. Conversely, in conflict with lower intensity – there is no need for territorial control. Under the legal regime, it is possible to distinguish the conflicts governed by Article 3 of the Geneva Conventions, whether horizontal or vertical, which are generally less intense, and conflicts subject to the legal regime of the Second Additional Protocol (which are always vertical and have a higher intensity).

At the interface between national and international armed conflicts there are internationalised armed conflicts. These are conflicts that are in origin national in nature, but at certain point factual or legally internationalised changes occurred, resulting in the application of the standards created for international armed conflicts or, where applicable, the mixed legal regime. In a broader sense, it is possible to distinguish the subjective internationalization that occurs from the will of all sides of the conflict, and the objective internationalization, which is the result of the factual change of the form of armed conflict. The first group includes nowadays the less-used Institute of Recognition for the Fighting Party and the conclusion of special agreements. These agreements foreseen by Article 3 of the Geneva Conventions and Article 19 of the Hague Convention on the Protection of Cultural Monuments during Armed Conflict allow the parties to the conflict to extend to a particular national conflict the validity of some or all of the provisions in force during the international conflict. In the narrower sense, only those that have been subjected to objective internationalization are among the internationalized armed conflicts. The most frequent reason is the intervention of a foreign state or states, and / or the involvement of UN units, and / or the breakup of the state.

### **3 CONFLICTS WITH THE FOREIGN INTERVENTION**

Conflicts with foreign intervention are also armed conflicts in which „one or more states interfere with their armed forces in favor of one of the combating groups of a national conflict“ or „two or more States intervene with their armed forces each for another party“ (Verri 1988). Although, interference to the internal affairs of other

states has taken place in the past, in the bipolar world this number has risen sharply. Third-country engagement in civil wars continues, what is confirmed by events in the former Yugoslavia, the Democratic Republic of Congo, Libya, Yemen and Syria.

By the sources of international humanitarian law – the conflicts with foreign intervention are not specifically regulated. At the end of the last century, the focus was on the legality of the intervention as such, on aspects of *ius ad bellum*, and later moved on to the aspects of *ius in bello*, that is, to the legal regime applied to the conflicts. In this direction three main approaches have been gradually formed. The first insists on preserving the regime of national armed conflicts, the other advocates full legal internationalization of the conflict, and the third advocates a mixed regime. The greatest support has been given to a third approach which the conflict with foreign intervention for the purposes of legal qualification divides into a bundle of bilateral conflicts, and it means:

- the conflict between the government and the alien state that intervenes on the part of the insurgents for which the regime of armed international conflict applies;
- the conflict between insurgents and foreign governments intervening on the side of the government, which is of a national nature;
- and the conflict between two foreign states intervening on different sides of the conflict, which is of an international nature.

This approach was supported by the International Court of Justice in 1986 in the case of „Military and Paramilitary Activity in and Against Nicaragua“ (ICJ 1986). As part of this approach, in Nicaragua the situation was identified as the national conflict between the government and the units of „contras“ and as the international conflict between Nicaragua and the US. The advantage of this procedure is that it reflects the real situation on the battlefield and allows for taking into account both foreign intervention and the participation of non-state actors. Its disadvantage lies in the complexity of the legal regime which was introduced (and it also requires the parties to the conflict) to distinguish between different groups of persons among enemies / combating parties. There is also a risk that combatants, in order to avoid applying a more rigid regime, may be manipulated (for example, the intervening state can create a so-called „puppet government“ in the territory of the other state, which will assume responsibility for his conduct).

These disadvantages are one of the main reasons why lately part of the doctrine, as well as some international bodies, abandon a mixed approach and prefer its alternatives. For example, the ICTY Appellate Body used the model of full internationalization in the case of Bosnia and Herzegovina in the case of Tadic, and

stated that an armed conflict that breaks out into one country and is prima facie national can become international if:

- (a) another State interferes with the conflict by its units or alternatively,
- (b) where some of the participants in a national armed conflict act on behalf of that other State (ICTY 1999).

However, this attitude is not without problems, because some institutes of the legal regime of international armed conflicts, the institute of combatants and war prisoners – is very difficult to apply to the relations between the government and the rebels without further adaptation. In addition, in practical terms, the vision of internationalization, and hence the strengthening of legitimacy, could lead the rebels to pick an external intervention by themselves.

It seems that the mixed approach to the conflict with foreign intervention still dominates. It remains a question of whether this trend will intensify and result, for example, into the complete internationalization of a given type of conflict, or vice versa, the mixed approach will be weakened and reintroduced. Other ambiguousness relates to the definition of the term „foreign intervention“, which is sometimes narrowed only to the open engagement of foreign troops (Kosovo 1999, Afghanistan 2001). Sometimes the term is also used to broadcast military advisers if they are directly involved in military operations on the basis of the authority of their state or the support of paramilitary or terrorist groups operating on the territory of the State by other states.

#### **4 INTERVENTION BY INVITATION?**

In modern international law, the basic principle is that no state can use armed force against another. The ban on the threat and use of force in international relations has two legal exceptions, namely self-defense of the state and the use of military force adopted by the UN Security Council. However, it is possible to speculate that there is one more possible exception – humanitarian intervention, eventually military intervention on the basis of the invitation or consent of a government that is generally in need of assistance in combating opposition forces in its territory. However, many states intentionally justify military intervention in the territory of foreign states by their consent. In some cases, the reasoning was convincing, e.g. the interventions of France<sup>3</sup> or the United Kingdom<sup>4</sup> in the former colonies, even though the invitation in question

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<sup>3</sup> France has intervened several times in its colonies in Africa, in particular with the aim of restoring order after the military crashes.

<sup>4</sup> In 1964, the UK intervened in Tanganyika, Uganda and Kenya in order to help the government to suppress local unrest and revolt within the armed forces.

was provided by state bodies that have lost power in the state. However, on the other hand, it can be said that such, though „more convincing“ interventions are a potential form of abuse of power. In other cases, the reliance of the intervening State on the consensus has manifested itself as to be entirely unconvincing. For example, when the Soviet Union invoked the principle of state consent to the invasion of Hungary in 1956, to Czechoslovakia in 1968 or to Afghanistan in 1979 (consent was in this case forced or provided by the USSR itself). Developments in the years to come (especially after the Cold War) point to the increasing importance of the protection of individuals in international law and, above all, to the development of international human rights protection mechanisms. International human rights protection has become an argument for humanitarian intervention, partly for military intervention on invitation. Intervention, if not carried out under the aegis of the UN Security Council, involves interference with territorial sovereignty, interferes with internal affairs and is also a violation of the ban on threats and the use of force in international relations. On the other hand, it can now be said that the Security Council (as a guarantor of peace) fails and do nothing when it is needed and even necessary. So the fact remains that the regime created by the UN Charter, which is based on a ban on the use of force (without the approval of the UNSC) and the ban on intervention, fails. „This failure shows that double commitments – sovereign rights and sovereign responsibility – built up under the post-war international law system (after World War II) are often deeply contradictory“ (Hathaway 2013). The international legal theory has been divided into two camps in this respect. One group emphasizes the greater value and protection of human rights at the expense of state sovereignty and for that reason also advocates other than the two exceptions to the ban on the use of force. The second group of authors is inclined to sovereignty and rejects humanitarian interventions without the UN Security Council's approval, calling them illegal. Over the last decades, the debate over the term "sovereignty as a responsibility" has taken place in the international community, which is understood as an argument allowing for intervening by violating the sovereignty of another state (on which territory is suspicion of a humanitarian crisis).

What needs to be considered in relation to intervention on the invitation is the fact that violent intervention (by using force) can be more easily identified than nonviolent (only political intervention itself in internal affairs). The distinction between violent and non-violent interventions is mainly of legal significance, as different legal regimes apply to both of these interventions. However, both types are subject to the fundamental principle of international law, namely the principle of non-interference. In terms of scope, the intervention does not have to be as extensive as the war conflict. According to Higgins (1994), it does not matter what „short-term, limited or temporary“ is the act of intervention, and in terms of violent means of intervention,



„simple air strikes“ are enough to violently violate the territorial integrity of the state. Such armed actions are carried out on behalf of the state – if they are carried out by its regular armed forces or by other forces dispatched by the State, or in its name crossed the border. Violent action by one state actually involves consent from that state, eventually silent tolerance of offenses committed by non-state actors (supported by that state), including armaments and training of opposition forces (if they are occurred and then understood as indirect violent acts). In Nicaragua Case, the financial transfer itself was considered to be a violation of the principle of non-intervention, in support of certain groups, but this was not considered as an indirect use of force.

To a certain extent, it is necessary to distinguish between humanitarian intervention and intervention by invitation. Humanitarian intervention may be understood as „a threat or use of force beyond the borders of a State (or group of states) to prevent or end the extensive and gross violation of the fundamental human rights of individuals other than its own citizens without the permission of the State in whose territory the force is used“ (Holzgrefe – Keohane 2003). This definition essentially covers three elementary conditions for the classification of humanitarian intervention. Firstly, humanitarian interventions are interventions with the use of military force. These violent interventions need to be distinguished from the broader category of humanitarian actions that include related concepts of peaceful interference in the internal affairs of states such as peacemaking, peacekeeping or peace enforcement. Secondly, humanitarian interventions are carried out without the consent (and especially against the will) of the state on whose territory the force is used. And this approach distinguishes humanitarian intervention from military actions carried out with the consent of the legitimate government of the state (for example a UN mission led by the Australian Government in East Timor in 1999 with the Indonesian Government's official approval). Thirdly, military action has a clear humanitarian intention. However, we need to add that humanitarian intervention is a response to violations of fundamental human rights and freedoms (ie universal ones admitted on a global scale) and not violations of human rights as such.

The doctrine of intervention on invitation or consent is not exclusively embedded in any document, but is generally based on the UN Charter and the Draft Statute of the Commission on International Law on State Responsibility drawn up by the 2001 International Law Commission as well as on the legal conclusions of recognized experts. The consent of one State given to another State to use force within its territory is understood to be an expression of its sovereignty and is capable of being a circumstance excluding the unlawfulness of such an act and weakening the abovementioned principle of the use of force in *ius ad bellum*. Thus, if consent is valid, the use of force does not violate „territorial integrity or political independence“, but is,

by contrast, a manifestation of the sovereignty of the state and its political independence.

The presence of the doctrine of military intervention with the state's consent was explicitly mentioned in the DASR. The International Law Commission (ILC), in its commentary on individual articles, set out the conditions that states must comply so that consent and intervention itself can be considered as legitimate. From the point of view of ILC, valid consent requires compliance with conditions such as that: „Consent must be clearly defined and freely given. Consent must be genuinely expressed by the State, not only on the assumption that it would have agreed with that State if it had been asked to do so. Moreover, consent may be invalid due to fraud, corruption, misconduct, or use of coercion. Such concept is also hidden in the definition of „quest“ which „must be a manifestation of the will of the requesting State and its acceptance of the terms and procedures of military assistance“ (Institut de Droit International 2011).

Because the state is an abstract entity, there is a fundamental question – who is entitled to state the State's willingness to intervene? In many cases, the answer is clear and simple. Under international law, only a legally recognized state government may request and subsequently consent to the intervention on behalf of the state. In the case of Nicaragua, the ICJ said that „the intervention is permissible at the request of the government“, but the court also noted that „at the request of the opposition groups, the intervention of force in the territory of a foreign state is not allowed“. However, the problem arises in cases of conflict – in particular civil wars where violations of human rights are often widespread, and in the territory of one country – and where there are several entities seeking the status of a legally recognized government.

## **5 CONCLUSION**

Armed conflicts generally do not have a static character. These factual transformations pressure international humanitarian law to face new international challenges. Nowadays, new types of conflict are the most difficult to tackle, namely hostilities and conflicts with the fight against terrorism. These conflicts show some distinct features that differ from classical international and national armed conflicts. For this reason, it is sometimes difficult to incorporate them into traditionally used classifications.

New types of conflict are collectively referred to as two distinct types of national armed conflicts that arose after the end of the Cold War. These are identitarian and anarchic conflicts. Identitarian armed conflicts are armed encounters, in which large groups, based on a common identity, fight against each other, associating persons of the same race, nationality or religion. This groups use extreme means, such as ethnic cleansing or genocidal-type actions whose ultimate goal is elimination of an enemy group, including non-combatants. Anarchist armed conflicts are taking place in an

environment of disintegrating states, i.e., territorial entities that have lost the attribute of statehood – the government. The disintegrating state brings with it the state of anarchy, in which the various groups assert on the territorial limited part of the state territory. These groups do not have a responsible leadership or a clear agenda, and they mostly do not pursue political goals, just trying to use the chaotic situation to consolidate their own status, or enrich.

These conflicts create two major problems. The first concerns the applicability of international humanitarian law, when the low level of organization of the parties involved and the relatively low intensity of the fighting, the applicability appears to be controversial. The second problem is related to enforcing compliance with international humanitarian law. In a situation where the civilian population becomes the target of the fighting parties and they become also the ideal victims, the reasons for breaking the norms must be understood differently than in traditional civil wars, and control mechanisms must also be designed.

The concept of domestic armed conflicts is still „in diapers“. This is a logical complement parallel to armed international conflicts. Like a national conflict, internationalization can be achieved by the intervention of an external actor, so the international conflict can also „interiorized“ by withdrawing such an actor. As a rule, this occurs in conflicts that began as international meetings, and after the overwhelming victory of one state and the change of government in another – these fights are ended and are replaced by civil war. This includes the troops of the first state, but who continue to remain in the territory of the other state with his consent, or at the invitation of his government, which he himself had previously set up. A direct example is the situation in Iraq and Afghanistan.

Interiorized armed conflicts should be subject to national conflict regimes. However, it is questionable, when to do so and what weight should be added to the consent, respectively to the invitation by the new government. In the first point, it is possible to consider the moment of the formal formation of a new government, the moment of the first free elections, or the moment when the real power in the country gets to the political hands which are (somehow) connected to the foreign state. The second point can be dealt with in such a way that the foreign state remains an occupier, and the government which is placed there, is a puppet that has no right to act on behalf of the occupied state, or that such government is, since its affirmation in free elections, a legitimate representative of a state, and in its territory can tolerate the presence and activities of the troops without re-establishing the state of war.

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