UDC 341.231.14:343

Prof. Aleksandar Donchev, PhD

KORNIZA PENALE-LIGJORE NDËRKOMBËTARE PËR MBROJTJEN E TË DREJTAVE UNIVERSALE DHE LIRIVE THEMELORE TË NJERIUT

МЕЃУНАРОДНА КАЗНЕНО-ЗАКОНСКА РАМКА ЗА ЗАШТИТА НА УНИВЕРЗАЛНИТЕ И ОСНОВНИТЕ ЧОВЕКОВИ ПРАВА

INTERNATIONAL CRIMINAL-LEGAL FRAMEWORK FOR THE PROTECTION OF UNIVERSAL HUMAN RIGHTS AND BASIC FREEDOMS

Abstract

The human freedoms and rights are foremost the basic content of the modern constitutional matter. However, the theoretical interest for this subject arose long before the first written documents. This interest comes form the human nature to be a social and political being that is active in the social community.

The human rights protected by international instruments, represent specific standards of conduct and public legal behaviour between the individual and the state, whereby the realisation of their basic values and principles is guaranteed.

The processes developed in the nineties of the XX century brought on radical changes on regional and national level, changes for which theoreticians and politicians claim to be part of the so called global state.

The global world represent mutually dependant, and not unified political systems on international plan. The point is that each country must adapt to the new reality.

Key words: globalisation, human rights and freedoms, international standards, humanitarian intervention, refugees

The idea of human rights, especially in international- legal frames, is one of the most impressive ideas and tendencies in international law after the II World War. It is a reflection of the emancipated consciousness of people throughout the whole world regarding the minimal standards of civilized behaviour.

As part of the process of legal regulation, the rights go through several stages:

- Creating new legal norms;
- Legalising the rights and obligations (legal behaviour);
- The stage of fulfilling the rights and obligations in social practice through factual behaviour of subjects; and
- The stage of legal protection through the enactments with state-legal character with indispensably inclusion of judicial bodies.

As a reaction to globalisation, the inefficient governments faced with brutal economy, are faced with problematic society, whose members are turning to ethical, religious and other already standardised entities. People are starting to find alternative values and emotions within the frames of the old and new religions. Sometimes these types of reactions are constructive, but they sometimes generate conflicts in the so-called society of discords. [29]

The issue of appropriate ratio between the safety and freedom in contemporary society was opened again in the new safe environment after the Cold War, and in the light of the changed concepts of safety and universal human rights and basic freedoms. While this ration in distant past (in the early communities in the so called natural state) came in the form of absolute freedom of the individual on the account of his safety, with the emergence of modern (sovereign) states, the absolute freedom of the individual became subordinated to the legal order of the state (the absolute freedom was

[29] Braun, L., Planet Condition, New York, 1990.

replaced with common good, which should be provided by the state for all its citizens).

The country as political organisation of society has a double role:

- ❖ provides inner order and peace and defence against foreign attacks; and
- ❖ represents a basic regulator in the guarantee of social-economic, political, educational and other functions in the society.

In the same time, the state is also a political force that represents a possible source of threats for the safety of its citizens. Therefore, with the development of the international community in the direction of global society, also strengthen is the normative and legal frame protecting the basic human rights and freedoms against abuse, i.e. threats by the contemporary state.

The legal composition of human rights and the humanitarian right is an integral part of the international law aimed toward protecting the individual, as well as his collective freedoms and rights. Human rights, as universal human destination, are also protected in times of trouble, or armed domestic or international conflicts, with the application of the norms of international humanitarian right.

The basic legal norms protecting the individual against the power of the state are part of the UNO system. Among more significant international documents related to human rights, we can mention: The Charter of the United Nations (CUNO), the Universal Declaration of Human Rights (1948), the International Convention for the Protection of Children's Rights (1979); International Covenant on Civil and Political Rights; European Convention of Human Rights; Helsinki Final Act.

Additional to the general instruments for the protection of human rights, some regional have been passed as well, such as; The African Charter of Human Rights (1981), adopted by the Organisation of African Unity; Inter-American human rights system, Charter of the Organisation of American States (OAS) (1948); American

Convention of Human Rights (1967); European Convention for Human Rights and Fundamental Freedoms Protection, adopted by the Council of Europe (1950); Regional arrangement of the Charter of UN though the Pact of the Arab League (1952), which are compulsory based on the international legislation for the protection of human rights.

Within this frames, for the first time in the history of modern international society the actions of the state toward its citizens were normative and legally limited. Today, it cannot be contested that the governments of contemporary states are controlled by the governments of other countries, the non-governmental organisations and the international organisations. [30]

It should be emphasized that the regiment of human rights within the UNO mechanisms in the Cold World period was significantly limited, mostly because:

- the opposing positions between the members of the United Nations Security Council that were causing constant blockade, and
- the importance of the generally accepted attitude that the use of force for the protection of victims from mass violation of human rights would represent violation of the UNO Charter. The same would allow the states to use force only in the case of self-defence.

The United Nations Security Council has clear authorities (chapter 7 from the General Charter of UNO), i.e. the right to decide on applying force in order to preserve "international peace and safety" but in the GC of UNO there are no clear provisions on decisions regarding interventions in the case of humanitarian disasters within the state itself.

At the end of the Cold War (1985-1990) the members of United Nations Security Council increased their political will to participate

[30] Wheeler, J. Nicholas in Dunne, Tim, Good international citizenship: a third way for British foreign policy, International Affairs, 2001.

in resolving international conflicts, as well as conflicts within the countries themselves (for example., the war between Iraq and Iran, Afghanistan, Angola, Namibia).

The difficult situation during the Iraqi attacks on the Kurds - the spring of 1991, the siege of Sarajevo - 1994, the starving of the people in Somalia - 1990/91, the torments of the civilian population in Kosovo- 1999 and in Macedonia in 2001, once again brought up the humanitarian actions within the countries themselves.

However, the respect for human rights and freedoms today includes the guarantee of the safety of citizens. Those rights are inalienable, unavoidable, and thus independent from any subjective evaluation by the legislation of individual countries. Just as all countries have the right to a safe existence and well-being, also all people have the same right, and the countries must protect that right.

There is a broad practice among countries where human rights are practised also in the time of armed conflicts. The resolutions adopted by the International Conference on Human Rights in Tehran 1968, as well as those adopted by the General Council of UN the same year, all point to human rights during an armed conflict. [31]

Article 2 from the International Covenant on Civil and Political Rights states that countries must observe and provide the rights recognised by this covenant to all individuals on their territory, that fall under their jurisdiction.

The obligation to treat prisoners in humane manner is mentioned in the Lieber Code, the Brussels Declaration and the Oxford Manual, and it is also codified in the Hague Rulebook. [32]

The demand to treat humanly the civilians and persons hors de combat is prescribed in the common article 3. from the Geneva Conventions, as well is in the specific provision of all four Geneva

[31] International Conference on Human Rights, Tehran 12. may 1968, Resolution No. XXIII; General Council of UN, Resolution No. 244 (XXIII), 19. December 1968.
[32] Liber Code, article 76; Brussels Declaration, article 23 (2); Oxford Manual, article 63; Hague Rulebook, article 4 (2).

Conventions[33] and the two Additional Protocols recognise the same as a fundamental guarantee,[34] it also prescribes the observance of other rights and freedoms in armed as well as in unarmed conflicts. It is forbidden to enforce on prisoners of war and persons hors de combat:

- torture, cruel and inhumane treatment and violence, as well demeaning and degrading treatment;
- physical punishment;
- mutilation, medical or scientific experiments or any medical treatments not accepted by the medical standards;
- rapes and other forms of sexual violence;
- slavery and slave trade;
- work without compensation or demeaning forced labour;
- taking hostages;
- using human shields;
- arbitrary deprivation of freedom
- accusation and conviction without a justly procedure and fair trail;
- collective punishment;
- not observing the religious believes

The meaning of the expression ,,humane treatment" is not explained in detail, even though some texts point out to the observance of dignity or prohibition of exploitation of persons.

After the Cold War, the international community was faced once again with the question whether humanitarian intervention in the inner affairs of a state is justifiable, if human rights and freedoms have been massively violated.

[33] Geneva Conventions, common article 3; First Geneva Convention, article 12 (1); Second Geneva Convention, article 12 (1); Third Geneva Convention, article 13; Fourth Geneva Convention, article 5 and 27 (1).
[34] I Additional Protocol, article 75 (1); II Additional Protocol, article 4(1).

Humanitarian intervention

In international relations, the intervention means arbitrariness and more or less violent interference of the state in the affairs which are the inner or external authority of another state. [35] the legal principle of not interlining together with the international prohibition of aggression belongs among the general rules of international law.

The contemporary international law represents eventual exemptions from the principle of not intervening (such as: humanitarian intervention, intervention with the consent of the concerned state intervention as an act of self-defence and reprisals). [36]

The Author of the international relation studies, Hedley Bull, characterised the intervention as "Involuntary interference of an external actor (actors) in the jurisdiction of the judicial authorities of a specific state or the broad independent political community".

The mentioned authors talk about involuntary interference and therefore their definitions is not neutral because it suggests that it is forced and thus already before hand characterised as a negative occurrence.

Therefore, it would be better to call it "Involuntary action by external actor (actors) in the jurisdiction of the judicial authorities of a sovereign state i.e. independent political community".

Each intervention unavoidably contains involuntariness and therefore the non-violent forms of action of a state or of the international organisation, such as the beliefs and the diplomacy, cannot be considered as an intervention. International entities who intervene, not just individual states or groups of states, but they can also be international institutions or other entities of international relations. [37]

---

[35] Turk D., Nacelo neintervencije v mednarodnih odnosih in mednarodnem pravu. Ljubljana, Mladinska knjiga, 1984. pg. 11.
[36] Turk D., Nacelo neintervencije v mednarodnih odnosih in mednarodnem pravu. Ljubljana, Mladinska knjiga, 1984. pg. 256-288.
[37] Kissinger, H., Treba li Amerika vanjsku politiku? Prema diplomaciji za 21. stoljece, Zagreb, Golden Marketing, 2003.

There are cases when the country alone calls upon the external actors for help in resolving internal conflicts and violence, so in such cases they are usually characterised as interventions in the internal affairs of the state. Sometimes, the external actor is invited by both sides of the conflict. [38]

Humanitarian intervention is an intervention in the inner affairs of a given state in order to protect the safety and well-being of its citizens. We can define as humanitarian only the interventions that really have the intent to protect the safety and well-being of the people.

Interpreting the content and defining the concept and its justifiability in practice arise from the relative novelty of humanitarian intervention. It is a measurement that is based on the greatest civilization achievements from the end of the twentieth century and represents a hope for the humanity of the twenty-first century. The propensity toward human rights, as universal, above the state, nation and people, even above the interests of local peace affirms those rights. It represents a warning for the autocrats or (even legitimate) groups of autocrats that the international -legal sovereignty of their state will not protect them against interventions from the international community if they are violating the universal rights of their population.

Thus, there are two concepts behind the humanitarian intervention that are inseparably connected among each other: the concept of the universal human rights and fundamental freedoms and the concept of safety. The understanding of this differentiates from country to country and until the international community manages to create a single standpoint what safety means, whose safety should be sought for, the human right and fundamental freedoms in same places will be respected less, in others more.

[38] For example, in 1990 El Salvador the government and the rebels called the UNO to help in solving the conflict.

Today, the burning question is whether the international community in the set of general globalisation quarantines the safety of states or individuals, regardless of their citizenship.

If the state is repressing the strive toward safety and well-being of its citizens, do other countries and international organisations have the moral right, even the obligation to intervene in such state?

Recognising the doctrine of humanitarian intervention would mean threatening the principles of sovereignty and non-intervention in a world where there is no agreement on which moral principles should be guiding the humanitarian intervention. [39] Even though there is no legally binding foundation of the humanitarian interventions, because the international community does not have a universal understanding of the concepts of safety and moral, the countries in the world, are still unified in the fact that there are specific cases of humanitarian crisis (genocide, slavery, mass tortures and prosecutions), which justify the humanitarian intervention. [40] That means that in given circumstances, only the moral principles are the ones that in exceptional circumstances justify the humanitarian intervention.

In expert literature, the authors supporting the humanitarian intervention in internal affairs of other countries make their arguments on the grounds of three basic presumptions.

First, that all people have equal moral interests, necessities and rights that should be observed when human right are seriously violated (torture, killing, slavery and imprisonment without a trail).[41]

In respect of the international humanitarian law, the Committee of human rights determined that the ,,protection in relation to the derogation, as it is stated in article 4 in the International Covenant on Civil and Political Rights, is based on the principles of

[39] Bull, H., Conclusion: Intervention in World Politics, Oxford, Oxford University Press, 1984, p. 193.

[40] Franck, T., After Bangladesh: The Low of Humanitarian Intervention by Force, American Journal of International Low, Vol. 67, 1974, p. 304.

[41] Wheeler, J. Nicholas in Dunne, Tim, Good international citizenship: a third way for British foreign policy, International Affairs, 1998, p. 847-870.

legitimacy and rule of law integrated in the Covenant as a whole. Since the elements of fair trail have been determined and which are guaranteed by the international humanitarian law during armed conflicts, the Committee thinks that there is no justification for derogation of these borders during exceptional circumstances. Only a court can judge and convict a person for his crimes. [42]

This shows how the international humanitarian law and human rights emphasize that the right to a fair trail is applied not just during armed or unarmed conflicts, but also in every other situation.

Second, that states should respect the interests and necessities of its citizens (the political state does not have the right to rule in such manner that will endanger the safe well-being of its population).

Third, that the humanitarian intervention can be successful. Many authors, that normally pledge for the protection of human rights, some do not support the humanitarian intervention due to the hesitations in respect of the success of such interference in the affairs of other countries).

The preparation of the doctrine of the humanitarian intervene-tion can be founded only on the preparation of a new joint interna-tional safety strategy (for example. under the umbrella of UNO) that will give the answers of the new complex safety challenges in inter-national environment (including the establishing of the universal human rights and fundamental freedoms). The natural law of each subject (individuals, people, state) to a self-defence („preventive" self-defence), remains the fundamental element of international contractual and common law.

Within those frames, the humanitarian intervention, actually represents a politics of removing the consequences when the rights of people have already been violated. However, in any case it is better to prevent the causes that result in this kind of violation of human rights, rather then solving them, after a violation has occurred.

[42] Committee of human rights, General commentary No. 29 (article 4 of the International Covenant on Civil and Political Rights), 24. July 2001.

Refugees and internally displaced people

As a consequence of armed conflicts or the threat of armed conflicts and mass violation of human rights, floods, earthquakes and other natural disasters, the number of people leaving their homes is constantly increasing. The total number of displaced people is at the moment estimated to around 50 million people, most of which are in Africa and Asia. There are several reasons that can be listed as reasons for them leaving their homes: the ethnic tensions, the oppression of minorities, intolerance, the absence of democratic procedures in the state, the undeveloped, unequal division of wealth, unemployment, extreme poverty and the influence of climate changes. The mass number of these people most often provokes problems in regions that they were not present before. The simple, quantitative needs for food, shelter, medical help and hygiene, as well as equal and adequate division, whereby the governments that should or already have received this type of people, are facing unsolvable logistic problems.

When these people that have been exiled for different reasons leave their homes, even their states, their interests are protected with the Refugee Convention of 1951, the Protocol of 1967 that specifically discusses the refugee status, as well as the Geneva Conventions of 1949 and their Protocols of 1977 if they are victims of armed conflicts.

Internally displaced persons are persons or group of people that were forced to leave their homes or places of permanent residence, unexpectedly as a result of armed conflicts, internal conflicts, systematic violation of human rights, natural disasters or disasters caused by people, and which have not crossed the internationally recognised border. [43]

[43] Lavoyer, Jean – Philippe, Special reporter for internally displaced persons, internally displaced people, Report of the symposium in Geneva, 23-25 October 1995.

The UN Convention related to the status of the refugees was formally adapted on 28 July 1951, with the purpose of solving the problem that arose in Europe after the Second World War,

According the Refugee Convention, a refugee is a person that due to a justified fear of exile on the grounds of their race, religion, nationality, associations to a specific social group or because of their political beliefs. [44]

The Refugee Convention also lists the cases when a person will not be accepted and defined as a refugee, i.e when the person:

- has committed a criminal act violating the peace, military criminal act or criminal acts against humanity, as it is defined in the international instruments created in order to predict the provisions for such criminal acts;

- has committed a serious crime, that is not political, outside the country where he sought refuge before he was admitted as a refugee in that country;

- is guilty of acts opposing to the goals and principles of UN. [45]

Due to the legal foundations of the work of the United Nations Commissioner for Refugees (UNHCR),[46] the Refugee Convention has been authorising for 30 years the Agency to help millions of people to start their lives anew.

The United Nations Commissioner for Refugees provides a protection of refugees that fall under the competence of this office, through:

[44] Article 1 from the Refugee Convention of 1951.

[45] Article 1, Paragraph (f) from the Refugee Convention of 1951.

[46] With the resolution 319 (IV) as of 3 December 1949, the UN General Council decided to establish the Office of the United Nations Commissioner for Refugees (UNHCR). It was established as an auxiliary body to the General Council on 1 January 1951, at the beginning for the period of three years. Since than the mandate of UNHCR was constantly prolonged for the following five years. The status of UNHCR was accepted by the General Council on 14 December 1950 as an Annex to the Resolution 428 (B). Its main office is located in Geneva, and there are local offices in more than 100 countries in the whole world.

- aiding in concluding and ratifying the international conventions for the protection of refugees, overseeing their application and proposing amendments to the same;

- aiding in specific settlements with the government, in performing any measures meant to improve the situation of refugees and reducing the number of those seeking help;

- assisting in governmental and private actions for instigating voluntary repatriation or assimilation within the new national communities;

- assisting in the acceptance of refugees within the territories of states, without the exclusion of those that are in the poorest categories;

- striving to attain permission for the refugees to transfer their private belongings, especially that what is necessary for their new settlement;

- attaining information from governments regarding the number and conditions of the refugees on their territory, as well as the laws and regulations referring to them;

- maintaining close contact with governments and intergovernmental organisations;

- establishing contacts with private organisations concerned with the problems of the refugees;

- facilitating the coordination of the actions of private organisation that are taking care of the refugees' well- being. [47]

Today, the Convention continuous to be the foundation stone of the legal protection of refugees. [48] Denmark was the first country

[47] Article 8 from the Statute of the United Nations Commissioner for Refugees (UNHCR).

[48] In Somalia, as of January this year, over 1700.000 people defected into the neighbouring countries, due to famine, drought and uncertainty. Million others left prepared from Libya, among which were refugees and asylum seekers, but also economical migrants looking for a better life somewhere else. Four filths of the refugees in the world live in developing countries and the resent crisis in Somalia, Libya and the Ivory Coast were an additional burden. As East Africa is fighting to

to ratify the Convention in 1951. Now, after sixty years, 148 countries (three quarters of the world population) have signed the Convention and/or its Protocol from 1967. Nauru was the latest one, which joined in June this year.

Literatures

- Braun, L., Planet Condition, New York, 1990.
- Wheeler, J. Nicholas in Dunne, Tim, Good international citizenship: a third way for British foreign policy, International Affairs, 2001.
- Turk D., Nacelo neintervencije v mednarodnih odnosih in mednarodnem pravu. Ljubljana, Mladinska knjiga, 1984.
- Kissinger, H., Treba li Amerika vanjsku politiku? Prema diplomaciji za 21. stoljece, Zagreb, Golden Marketing, 2003.
- Bull, H., Conclusion: Intervention in World Politics, Oxford, Oxford University Press, 1984.
- Franck, T., After Bangladesh: The Low of Numanitarian Intervention by Force, American Journal of International Low, Vol. 67,1974.

handle the toughest drought in 60 years, Kenya, Ethiopia and Djibouti have a accepted an average of 450,000 refugees from Somalia, and the numbers are increasing daily. Tunisia and Egypt have accepted the biggest part of the large number immigrants from Libya during the chaos of the Arab spring. Barely recovering from the long civil conflicts, Liberia represents a save-haven for over 150.000 Ivory Coast citizens that fled the post-election violence and the still uncertain situation in their home country. In comparison, the 27 member states of the European Union have jointly accepted around 243.000 asylum claims, i.e. around 29 percentage from the total number in the world.