Humanitarian Intervention

---From a right to intervene to a responsibility to protect

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Summary:

Humanitarian intervention has been one of the most controversial issues in international law. The seeking of justification of humanitarian intervention is now experiencing a shift from a right to intervene to a responsibility to protect. However, under the current international law, neither the right to intervene nor the responsibility to protect can find its justification in UN Charter or as a customary international law. China, as a Permanent Member of Security Council, which was considered to have consistently taken a rigid position opposing humanitarian intervention, since the end of cold war, began to take a flexible position in some specific cases of intervention.

Introduction

Humanitarian intervention, as one of the most controversial issues in international law and international politics, resurfaced, with NATO bombing Libya recently. Different from the bombardment on Former Yugoslavia in 1999, this military intervention in Libya was deemed to be authorized by UN Security Council which adopted Resolution 1973, 17 March 2011, which states: “authorizes member states ...to take all necessary measures to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya... ”¹. Although the resolution was heralded by proponents of humanitarian intervention and constructed as a legal license to use force against the dictator Gaddafi, it is hard to say there is a consensus on the military intervention among the international community. The fact

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¹ Resolution 1973(2011), adopted by the security council at its 6498th meeting, on 17 March 2011.
that the two permanent members, Russia and China who did not use the veto power to block the resolution, and other 3 members, Germany, Brazil and India abstained from voting for the resolution, shows that use of force to protect human rights is still questionable. Even some doubted that the genuine purpose of NATO’s intervention in Libya is not “motivated by any desire to protect the Libya people or further the cause of democracy but driven by profit interests and geopolitical imperatives that have nothing to do with the “humanitarian” pretenses of the major powers”. For international lawyers, the Libya case offers another chance to look into humanitarian intervention and where international law will be going in the 21st century.

1. The definition of humanitarian intervention.

Humanitarian intervention is not a new concept. The classical origins of what became known as humanitarian intervention lie in the emergence of a substantive doctrine of the just war in the Middle Ages. As early as in 1625, in *De Jure Belli ac Pacis*, the Dutch jurist Hugo Grotius used the term humanitarian intervention: where a tyrant should inflict upon his subjects such a treatment as no one is warranted in inflicting, other states may exercise a right of humanitarian intervention. J.L.Holzgrefe defines humanitarian intervention as the threat or use of force across state borders by a state (or group of states) aimed at preventing or ending widespread and grave violations of the fundamental human rights of individuals other than its own citizens, without the permission of the state within whose territory force is applied. In his definition, two types of behavior are excluded: non-forcible interventions such as the threat or use of economic, diplomatic, or other sanctions; and forcible interventions aimed at protecting or rescuing the intervening state’s own nationals, the reason of which is that the question of whether states may use force to protect the human rights of individuals other than their own citizens is more urgent and controversial.

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4 Hugo Grotius, *De Jure Belli ac Pacis* (Oxford University Press), Book II, ch.25.
5 J.L.Holzgrefe and Robert O.Keohane, *humanitarian intervention, ethical, legal, and political*
Sean Murphy’s definition is: humanitarian intervention is the threat or use of force by a state, group of states, or international organization primarily for the purpose of protecting the nationals of the target state from widespread deprivations of internationally recognized human rights.\textsuperscript{6}

Some authors categorized humanitarian intervention as multilateral intervention and unilateral intervention: the former refers to the use of force authorized by UN Security council, while the latter refers to the intervention exercised by a state or group of states without authorization of Security Council, like NATO’s intervention in Kosovo which was considered as a prominent example of unilateral humanitarian intervention. The issues surrounding unilateral humanitarian interventions have been the debate focus in the circles of international law. Thus I would like to narrowly restrict my topic to unilateral humanitarian intervention, although my conclusion is that multilateral humanitarian intervention is preferred.

2. The debate on the justification of unilateral humanitarian intervention.

Compared to multilateral intervention, which is justified on the ground of authorization of use of force from UN Security Council by Chapter VII of UN Charter, unilateral intervention has frequently been challenged and debated. After Kosovo, there emerged a heated debate on humanitarian intervention in western states and other parts of the world. Opponents of humanitarian intervention are convinced that any unilateral intervention involving use of force without authorization of UN Security Council for whatever purpose is in breach of the UN Charter. Proponents of humanitarian intervention attempted to find justifications in international law to defend the controversial unilateral intervention. In this part I like to display the various opinions and offer a brief analysis.

A. The provisions in the UN charter

Although there does not appear the term humanitarian intervention in UN Charter, many proponents in favor of humanitarian intervention tried to justify the intervention in the UN charter. Some suggests that since the UN charter does not expressly prohibit humanitarian intervention, humanitarian intervention should be permissible\textsuperscript{7}.

Some others believe that unilateral humanitarian intervention is not incompatible with Art.2(4) of the UN Charter. Under this theory, such intervention violates neither the territorial integrity nor the political independence of any state, as its objective is to stop the atrocities and not annex part of the state’s territory or create a dependent colonial government. Furthermore, unilateral humanitarian intervention is not inconsistent with the purposes of the United Nations as stated in the preamble of the Charter\textsuperscript{8}. That is, Article 2(4) of the Charter prohibits the use of force only against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the UN, while the purpose of the humanitarian intervention is to halt gross violations of human rights. Once the intervening state(s) accomplish the purpose of halting atrocities, they will withdraw from the target state whose territorial integrity or political independence will be left intact. It therefore can be argued that the Charter allows the use of force to halt massive violations of human rights, as long as the prohibited purpose listed are not also involved. This approach is particularly attractive from the humanitarian perspective insofar as it might help to remedy the inability of international law and institutions to take action against even the most serious international crimes, such as genocide\textsuperscript{9}.

Another justification lies in the purpose of the UN Charter and provisions regarding human rights, which actually imply a right to intervene for the protection of human rights. Pursuant to Article 1(3) of the Charter, one of the UN purposes is to achieve international cooperation in solving international problems of an economic, social,


\textsuperscript{8} Bartram S.Brown, Special Project: \textit{Humanitarian Intervention and Kosovo: Humanitarian Intervention at a crossroads}. 41 Wm and Mary L.Rev.1683.
cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion. In order to achieve the above purpose, the United Nations shall promote universal respect for and observance of, human rights and fundamental freedoms (Article 55) and all members pledge themselves to take joint and separate action in co-operation with the organization (UN) for the achievement of the purposes set forth in Article 55 (Article 56). These provisions implicitly endow one state with a right to intervene in the situation of another state only where there occur large-scale violations of human rights and the target state is unwilling or not able to prevent or stop these violations or the target state itself is the perpetrator.

**B. The customary international law**

Some scholars tried to find justifications under customary international law theory. They argue for the continued existence of a customary right of unauthorized humanitarian intervention before and after UN Charter. According to them, the state practice in the 19\textsuperscript{th} and early 20\textsuperscript{th} centuries established such a right; a right that was neither terminated nor weakened by the creation of the United Nations\textsuperscript{10}. But this theory does not seem to be very convincing. Neither sufficient state practice nor opinion juris exists to support this view. On the one hand, it is usually believed that, with promulgation of the UN Charter, all customary international law regulating the use of force in contradiction with Article 2(4) and other Charter provisions ceased to exist, otherwise, the Charter would have very limited significance\textsuperscript{11}. On the other hand, the practical problem of using customary international law to justify humanitarian intervention is that it is very hard to prove the two constituent elements: an established, widespread and consistent practice on the part of states; and a psychological element known as Opinion Juris. With regard to state practice, as the Restatement of the Foreign Relations Law of the United States notes: the practice necessary to create customary law may be of comparatively short duration, but it must be general and consistent. A practice can be general even if it is not universally


followed, but it should reflect wide acceptance among the states particularly involved in the relevant activity. Failure of a significant number of important states to adopt a practice can prevent a principle from becoming general customary law though it might become “particular customary law” for the participating states\textsuperscript{12}. However, looking back to the history of 19\textsuperscript{th} and 20\textsuperscript{th} century, it is very hard to find any undisputed case of unilateral intervention with purely humanitarian objectives. Those often cited as cases of humanitarian interventions, such as Indian intervention in East Pakistan, Tanzanian intervention in Uganda, Vietnamese invasion in Cambodia, were in practice not justified as humanitarian and certainly does not fulfill the requirement of consistent state practice. Actually, the intervening states in the cases listed above explained their actions not as exercise of a right or principle of humanitarian intervention, but rather as acts of self-defense; they chose to justify their uses of force from within the framework of the Charter rather to challenge its application\textsuperscript{13}. Even in the case of NATO’s intervention in Kosovo, NATO did not attempt to ground its intervention in any right of humanitarian intervention; most member states avoided asserting any legal justification at all, turning instead to morality to defend the action and emphasizing repeatedly that the intervention should not serve as a precedent for further action\textsuperscript{14}.

As for Opinio juris, it is even harder to prove since the opinio juris is a state of mind, there is an evident difficulty in attributing it to an entity like a state\textsuperscript{15}. There is little or no evidence that the international community considered such a right legally binding\textsuperscript{16}. Few scholars and few states support the view that international law at this time allows states to use force to protect human rights in the absence of Security

\textsuperscript{13} India’s ostensible justification of its invasion of East Pakistan was self-defense. Vietnam claimed that it was responding to a large-scale aggressive war being waged by Cambodia. Tanzania defended its overthrow of the Amin regime as an appropriate response to Uganda’s invasion, occupation, and annexation of the Kagera salient the preceding year. ECOWAS’s justification of its invasion of Liberia and Sierra Leone was that it was invited to intervene by the legitimate governments of those states. NATO defended Operation Allied Force on the grounds that it was consistent with Security Council Resolutions 1160,1199 and 1203.see J.L. Holzgrefe and Robert O.Keohane, humanitarian intervention, ethical, legal, and political dilemmas, Cambridge university press 2003, p48.
\textsuperscript{14} Saira Mohamed, Restructuring the Debate on Unauthorized Humanitarian Intervention, 88 N.C.L Rev.1275.
\textsuperscript{15} Malcolm D.Evans, International Law, Oxford University Press 2003, p.126.
\textsuperscript{16} J.L.Holzgrefe and Robert O.Keohane, humanitarian intervention, ethical, legal, and political dilemmas, Cambridge university press 2003, p45
Council authorization. As a matter of fact, the long list of UN General Assembly resolutions rejecting such a right argues against this claim. In the case of Kosovo, the General Assembly passed a resolution in 1999 by a vote of 107 to 7 (with 48 abstentions) denouncing the NATO’s intervention in Kosovo. More importantly, even states that have intervened to end heinous human rights abuses have been loath to invoke a customary right of unauthorized humanitarian intervention to defend their actions. All these indicate that not only is constant and uniform state practice lacking, but also is any sense that states undertaking humanitarian intervention believe their conduct is in accordance with the law, as is required to establish opinion juris.

3. From a right to intervene to a responsibility to protect

Considering the difficulties of reaching consensus among international community on whether there exists a right to intervene for human rights protection in international law, whether in UN Charter or as a customary right, there is a need to find another approach to humanitarian intervention, resolving the inherent tensions between state sovereignty and human rights protection. Especially after NATO’s unauthorized intervention in Kosovo which brought the controversy to its most intense head and non-intervention in Rwanda which did not prevent the genocide, the then-UN Secretary – General Kofi Anna made compelling pleas to the international community to try to find, once and for all, a new consensus on how to approach these issues, to forge unity around the basic questions of principles and process involved. As a response to this compelling plea, the International Commission on Intervention and State Sovereignty (ICISS) was established in September 2000 and developed the concept of responsibility to protect in its 2001 report.

Since its emergence, the concept of responsibility to protect gained its preeminence

17 Id, p48.
18 Saira Mohamed, Restructuring the Debate on Unauthorized Humanitarian Intervention, 88 N.C.L Rev.1275
in a short time as a novel idea\textsuperscript{20} among the international community though its status in international law is still controversial. In its report \textit{A More Secure World: Our Shared Responsibility}, the UN High-Level Panel on Threats, Challenges and Change stated that: there is a growing acceptance that while sovereign governments have the primary responsibility to protect their own citizens from such catastrophes, when they are unable or unwilling to do so, that responsibility should be taken up by the wider international community- with it spanning a continuum involving prevention, response to violence, if necessary, and rebuilding shattered societies. The High-Level Panel even treated the responsibility to protect as an emerging norm. \textit{In Larger Freedom: Towards Development, Security and Human Rights for All}, the UN Secretary-General also refers to the idea of an emerging norm of a collective responsibility to protect. And then the concept of the responsibility to protect was incorporated into the Outcome Document of the 2005 World Summit which contains two paragraphs (para.138 and 139) on the responsibility to protect. In resolution 1674, the Security Council made its first express reference to the concept, reaffirming the provisions of para.138 and 139 of the 2005 World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. And soon the concept of responsibility to protect became a key word in the Wikipedia Free Encyclopedia, which is defined as a recently developed concept in international relations that aims at providing a legal and ethical basis for humanitarian intervention\textsuperscript{21}. Special Adviser to the Secretary General with a focus on the Responsibility to Protect was appointed in 2008. In January 2009, UN Secretary General Ban Ki-moon issued a report entitled \textit{“Implementing the Responsibility to Protect”} which is the first comprehensive document from the UN Secretariat on the Responsibility to Protect, following Ban’s stated commitment to turn the concept into policy. And the UN General Assembly

\textsuperscript{20} Carsten Stahn describes this concept as partly “Old Wine in New Bottles”, saying “the responsibility to protect is not a completely novel idea. Some of the allegedly emerging elements of the concept have surfaced in the past.” see: Carsten Stahn, \textit{Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?} the American Journal of International Law, Vol.101.No.1(Jan.2007).

adopted its first resolution on the Responsibility to Protect on 14 September 200922.

A、The meaning of the responsibility to protect

After a comparative analysis of the four documents, the report of the International Commission on Intervention and State Sovereignty, the High-Level Panel report, the Report of the Secretary-General, and the Outcome Document of the 2005 World Summit, Carsten Stahn concludes that responsibility to protect is a multifaceted concept with various elements. Each of the four documents embodies a slightly different vision of responsibility to protect. And it is this divergence that explains part of its success because it could be used by different bodies to promote different goals23.

Among the four documents, the most comprehensive treatment of the concept was offered by ICISS. In order to solve the legal and policy dilemmas of humanitarian intervention due to the critical gap between the needs and distress being felt, and seen to be felt in the real world, and the codified instruments and modalities for managing world order, and help to carry the debate forward, ICISS thus made a conceptual change, shifting the focus from “the right to intervene” to “the responsibility to protect”. Different from the right to intervene, the concept of the responsibility to protect reverses the perceptions inherent in the traditional language and adds some additional ones: first, the responsibility to protect implies an evaluation of the issues from the point of view of those seeking or needing support, rather than those who may be considering intervention; secondly, the responsibility to protect acknowledges that the primary responsibility rests with the state concerned, and that it is only if the state is unable or unwilling to fulfill this responsibility, or is itself the perpetrator, that it becomes the responsibility of the international community to act in its place; thirdly, the responsibility to protect means not just the “responsibility to react”, but the “responsibility to prevent” and the “responsibility to rebuild” as well24. The responsibility to prevent embraces a

22 www.responsibilitytoprotect.org.
24 Report of the International Commission on Intervention and State Sovereignty, the Responsibility to Protect,
firm commitment of sovereign states and international community to prevention, efforts to build a better early warning system, root cause prevention efforts and direct prevention efforts like political, diplomatic, economic, legal and threatened punishments. The responsibility to react applies to the situations where preventive measures fails or the state concerned is unable or unwilling to redress the situation. wherever possible, coercive measures short of military intervention ought first to be examined and generally preferable. Military intervention applies only in extreme and exceptional cases and should be conducted under six threshold criteria: right authority, just cause, right intention, last resort, proportional means and reasonable prospects. The responsibility to rebuild means that if military intervention action is taken, there should be a genuine commitment to helping to build a durable peace and promoting good governance and sustainable development.

In the report of the Secretary General, Implementing the Responsibility to Protect, a terminological framework is proposed for understanding the responsibility to protect and a three-pillar approach is outlined: Pillar one stresses that States have the primary responsibility to protect; pillar two addresses the commitment of the international community to provide assistance to States in building capacity to protect; Pillar three focuses on the responsibility of international community to take timely and decisive action to prevent and halt genocide, ethnic cleansing, war crimes and crimes against humanity when a state is manifestly failing to protect its populations.

**B、The legal status of the responsibility to protect**

Although the term of the responsibility to protect is attempted to provide an easier acceptable legal and moral basis for humanitarian intervention than the concept of the right to intervene, it still provoked a lot of controversies which makes the status of responsibility to protect in international law unclear.

Some commentator sees the development of the concept of a responsibility to
protect as a logical outgrowth of a larger trend in international legal doctrine under which individuals increasingly became a subject of and actor in international law. Some asserts that after a series of international catastrophes and humanitarian interventions in the 1990s and 2000s, the responsibility to protect norm gradually gained widespread consensus and today stands as an important—even if controversial—pillar of international law. The UN high-Level panel even went so far to treat the responsibility to protect as an emerging norm. Some considers the inclusion of the concept in the Outcome Document as not only one of the most important results of the 2005 World Summit, but being testimony to a broader systemic shift in international law, a growing tendency to recognize that the principle of state sovereignty finds its limits in the protection of human security, a growing transformation of international law from a state-and governing–elite-based system of rules into a normative framework designed to protect certain human and community interests. Some argues that the answer to the puzzle how best to legally reconcile respect for the preeminent principle of state sovereignty with the critical human rights necessity of protecting municipal populations from their own government lies in the concept of the responsibility to protect.

However, from a positivist perspective, it is doubtful for the responsibility to protect being an alleged emerging legal norm. None of the above four documents in which responsibility to protect has been treated in depth can be regarded as generating binding international law under the classic sources of international law set forth in Article 38 of the Statute of the International Court of Justice. It also does not qualify as a customary international law because of the divergent state perceptions of this notion. In the 2005 World Summit, several states (Algeria, Belarus, Cuba, Egypt, Iran, Russia and Venezuela) expressed reservations about including the

27 Id.
29 Christopher C.Joyner, the Responsibility to Protect: Humanitarian concern and the Lawfulness of Armed Intervention, 47 Va.J.Int’l L.693
responsibility to protect in the Outcome Document. Some delegations argued that the concept was too vague and open to abuse. Others doubted that it was compatible with the Charter, noting that there is no shared responsibility in international law outside the responsibility of a state to protect its own citizens and the institutional mandate of the United Nations to safeguard international peace and security. Still others again questioned the legal nature of the responsibility to protect and sought to frame this idea in terms of a moral principle. Even the United States said that it would not accept that either the United Nations as a whole, or the Security Council, or individual states, have an obligation to intervene under international law.

The debate on the responsibility to protect continues after the 2005 World Summit. Although in the Resolution 1674 on the Protection of Civilians in Armed Conflict, and Resolution 1706 authorizing the deployment of UN peacekeeping troops in Darfur, the Security Council made references to the Responsibility to Protect, it can not jump to the conclusion that the responsibility to protect has evolved into a binding norm because the positions taken by Security Council members toward other similar situations are not consistent. In January 2007, China and Russia vetoed a resolution on the situation in Burma, arguing that Burma did not pose a threat to international peace and security in the region, and the internal affairs of the state did not have a place within the Security Council. Another example of resistance by Security Council members to apply responsibility to protect in specific situations was in the adoption of UN Security Council Resolution 1769, which authorized the deployment of a hybrid UN-AU force for Darfur. In addition, opposition from outside the Council came during the General Assembly’s 5th Committee bi-annual budget debate, where the Committee declined funding for the officer of the new Special Adviser on Responsibility to Protect because some members argued that the Responsibility to Protect had actually never been agreed to as a norm during the World Summit.

In 2009 General Assembly Debate on the Responsibility to Protect, the participating

32 www.responsibilitytoprotect.org/.
state delegates weighed whether that multifaceted and controversial concept provided sufficient legal grounds for collective intervention in national affairs. There is divide on the legal status of responsibility to protect among the states. Still some states like Nicaragua, Iceland, Sudan, Iran, expressed their doubts and concerns. Some states, including Venezuela, Cuba, and Nicaragua, argued that responsibility to protect lacked legitimacy and this lack of juridical standing implies that responsibility to protect could be in tension with the principles of the UN Charter.

4. The research on humanitarian intervention in China and Chinese government’s position towards humanitarian intervention

A The research on humanitarian intervention in China

Before NATO’s intervention in Kosovo in 1999, few scholars explored the issues regarding humanitarian intervention in Chinese Academics, partly due to the political sensitivity of the issues, partly due to the conservative atmosphere of Chinese academics. There were no books or papers specifically dealing with humanitarian intervention. The most frequently cited paragraph, which was considered to be mainstream opinion on humanitarian intervention, was from the textbook of International Law, edited by Professor Wang Tieya, a well-known international law professor in China. This paragraph reads as: as the historical experiences have shown, when humanitarian intervention is exercised as a right by a state against another state, it will be probably abused by the intervening states for their own self-interests. The so-called “humanitarianism” or “protection of human rights” is just a pretext to hide the genuine purpose of the intervening states. Therefore, the arguments that a

33 Nicaragua’s representative pointed out: at the present stage, it (the responsibility to protect) was easy to manipulate and could become a right to intervene.
34 Iceland’s delegate stressed that R2P must be seen as a means of reinforcing legality in international affairs and shoring up respect for the international system embodied in the United Nations; the concept should not become a license for illegitimate or arbitrary interference and aggression.
35 Sudan’s delegate said that giving the council the privilege of executing R2P would be tantamount to giving a wolf the responsibility to adopt a lamb.
36 Iran’s delegate emphasized that it should not be misused, or indeed abused, to erode the principle of sovereignty, undermine the territorial integrity and political independence of states, or intervene in their internal affairs.
state has a right to humanitarian intervention under international law are quite
dangerous and have been rejected by the majority of international community. As for
the collective measures or regional actions taken by international community to halt
the ongoing massive violations of human rights for the purpose of protection of
human rights, they are not interventions and should not be treated as cases to
establish the existence of the right or doctrine of humanitarian intervention. This
absolutist opinion has prevailed in Chinese academics at least until 2000.
NATO’s intervention in Kosovo in 1999 not only brought the controversy to its most
intense head, but offered an opportunity to revisit on humanitarian intervention.
There were some Chinese scholars who began to conduct a specific research on
humanitarian intervention, especially using NATO’s intervention as a case. Some
scholar contend that, under the current international law, especially within the
framework of UN Charter, unilateral humanitarian intervention is in contravene with
the principles enumerated in Article 2 of UN Charter, that is, state sovereignty,
on-interference in another state’s internal affairs and prohibition of threat or use of
force. The reasoning is as follows: first, state sovereignty, as the most important
international law principle, is the cornerstone underlying the international legal
system. Full respect for state sovereignty is crucial to maintain normal international
relations. The theory of sovereignty to be outdated or the supremacy of human
rights over sovereignty is misleading and rejected by most developing countries.
Because the military intervention deprives the target state’s de facto control over
certain matters which are usually considered to be within domestic jurisdiction of
one state, it definitely impinge the sovereignty of the target state and breach the
provision of Article 2(1) of the Charter.
Secondly, the principle of non-interference in another state’s internal affairs is
derived from the state sovereignty. Although Article 2(7) deals with the relationship
between UN and its member state, non-intervention has evolved into a customary
international law and has played a crucial role in maintaining international order. The

38 Chi deqiang, Humanitarian Intervention in International Law, Wuhan University Journal (Philosophy & social
Declarations of International Law Principles expressly provides that no state or group of states has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other state; consequently, armed intervention and all other forms of interference or attempted threats against the personality of the state or against its political, economic and cultural elements, are in violation of international law.

Thirdly, Article 2(4) expressly prohibits member state from the threat or use of force against territorial integrity or political independence of any other member state, or in any other manner inconsistent with the purposes of UN Charter. This prohibition of use of force has just two exceptions: self-defense (Article 51) and collective security measures under Chapter VII of the Charter. The Article 2(4) should be constructed in a strict manner and in combination with the intention of the framers of the Charter, the background of the Charter and the history of abolishment of force as a tool to exercise state policy. The opinion that Article 2(4) prohibits the threat or use of force just against the territorial integrity or political independence, while the purpose of intervention is to protect human rights rather than occupy or colonize the target state, thus it does not trespass the sovereignty of the target state, does not abide by the rules of interpretation of treaties provided in The Vienna Convention on the Law of Treaties and therefore is a twist of Article 2(4).

Unsurprisingly, most Chinese scholars take the similar views opposing the unilateral humanitarian intervention without UN Security Council authorization, condemning the NATO’s intervention in Kosovo\(^{39}\). Since 2000, more papers on humanitarian intervention have been published. Some scholar argues for a limited right of humanitarian intervention within the framework of UN system and proposes that international community should make criteria on legalization of humanitarian intervention so as to set a legal restraint upon abuse of humanitarian intervention. The criteria include: (1) intervention should be premised on the conditions under which the conscience-shocking, large-scale, human rights violations are ongoing or

\(^{39}\) See: Wan Exiang, Analysis on NATO’s War Against FRY and Bombing upon Chinese Embassy from International Law, Wuhan University Journal(philosophy & social science) 1999(4);
will occur imminently; (2) the humanitarian purpose of intervention should be overwhelming, while other political, economic or ideological considerations don’t exist or these considerations are subordinate to the humanitarian purpose. (3) only if various peaceful efforts are exhausted, humanitarian intervention can be resorted; (4) the political influence upon the regime of the target state should be limited to the least degree, (5) the intervention should be proportional to the severity of the situation; (6) the intervention itself should not pose a threat to international peace and security, or entails more suffering or pain than those which the intervention aims to prevent or halt; (7) once the task of humanitarian intervention is accomplished, the intervening force should withdraw from the target state as soon as possible. The decision on whether to intervene is the exclusive domain of Security Council.

B. Chinese state practice of humanitarian intervention

With its rising economic, political and military power, China, as a permanent member of Security Council, is playing a more important role in international arena. Chinese government’s positions and policies towards international issues will exert important influence to shape the future of international law. As far as the humanitarian intervention is concerned, Chinese state practice in this regard undoubtedly deserves being examined.

Recalling the history of humiliation from Opium war 1840 to 1949, and recognizing the extremely importance of state sovereignty, since its founding in 1949, China has consistently adhered to the policy of respect for state sovereignty and non-interference in internal affairs of other states in dealing with the relationship with other states. The policy of mutual respect for state sovereignty and non-intervention in internal affairs, with other three principles as a whole, entitled “Five Principles of Peaceful Co-existence”, is enshrined in Chinese Constitution and

41 Other three principles include mutual non-aggression, equality and mutual benefit, and peaceful co-existence. Five Principles of Peaceful Co-existence was for the first time incorporated in the Treaty on Tibet, concluded between China and India. And then these five principles became the basic norms regulating the relationship.
constitutes a cornerstone to build and develop foreign relationship with other states. Thanks to its consistent adherence to Five Principles of Peaceful Co-existence, China built good relationship with developing states and gained political support from them, which helped China to reenter UN in place of Kuomintang and take its seat as a permanent member of Security Council in 1971. The reentrance to UN made China more cherish the values of full respect for state sovereignty and non-intervention in each other’s internal affairs. Therefore, in various occasions, China always emphasizes its position that China fully respects for other state’s sovereignty and political independence, and opposes any threat or use of force to resolve international disputes, and opposes any forms of interference in other state’s internal affair for whatever reason, especially using human rights as a pretext. This opposition to humanitarian intervention reached its high point in NATO’s intervention in Kosovo.

The moment NATO launched bombing campaign, China immediately denounced NATO’s intervention as a blatant violation of UN Charter and of the accepted norms of international law. In its fullest denunciation of NATO’s intervention in Kosovo, China stated that, in the absence of UN authorization, NATO’s military strikes against the FRY seriously violated the Charter and norms of international law and thus set an extremely dangerous precedent in the history of international relations. And this war, waged in the name of humanitarianism, in fact produced the greatest humanitarian catastrophe in post-Second World War Europe and seriously undermined peace and stability in the Balkans. Additionally, China emphasized that the principle of respect for sovereignty and non-intervention in other state’s internal affairs has not eroded in the post-cold war. In Chinese perspective, sovereignty is the last defense for small and weak countries against foreign bullying.

Although China’s opposition to NATO’s intervention in Kosovo, there is some commentator who, after an examination of China’s state practice and official pronouncements in the following post-Cold War cases, contends that while China...
continues to champion a strong conception of state sovereignty in interstate relations, it has signaled a shift from an ideological insistence on noninterference toward a more pragmatic approach to humanitarian crises. This view is supported by Chinese attitudes towards the responsibility to protect and positions towards Libya.

Not like its unshaken opposition to the right to intervene, China took a very cautious approach to the concept of the responsibility to protect rather than a completely rigid resistance to it. And to some states’ surprise, China acceded to the Outcome Document endorsing the responsibility to protect. This indicates that China’s position towards humanitarian intervention took on some flexibility although China referred to the responsibility to protect as just a concept rather than an emerging norm. Just as its previous statements indicate, China doesn’t hope the concept of the responsibility to be crystallized into a formal international legal norm and opposed the formulation and adoption of specific criteria for determining when, where, and how humanitarian intervention should take place. In a statement at the Security Council Open Debate on the Protection of Civilians in Armed Conflict recently, China reaffirmed its position on humanitarian intervention and views towards the responsibility to protect. This is to date the most comprehensive policy statement regarding humanitarian intervention and the responsibility to protect. The statement includes four paragraphs.

The first paragraph emphasizes that the purposes and principles of the UN Charter must be strictly abided by when protecting civilians in armed conflict, and the primary responsibility to protect lies first and foremost with the state government concerned; when taking up the residual responsibility, the international community and external organizations must observe the principles of objectivity, neutrality and full respect for the state sovereignty, independence, unity and territorial integrity; any attempt at regime change or involvement in civil war by any party under the guise of protecting civilians must be prohibited. The second paragraph stresses the

\textit{id.}

\textit{id.}

importance of preventive diplomacy in conflict prevention and resolution, pointing out that peaceful means through dialogue and negotiation rather than military means are the effective ways to minimize the casualties of civilians and resolve the issues. This paragraph embodies China’s consistent opposition of use of force. The third paragraph warned not to attempt to willfully interpret the resolutions (Res.1970 and Res.1973) or to take actions that exceed those mandated by the resolutions. This warning is implicitly pointed to NATO’s interpretation of “all necessary measures” in Res.1973 under which NATO launched a bombing campaign against Libya\textsuperscript{48}. The fourth paragraph explores the importance of development and evolution of the norms of international humanitarian law in protecting civilians and urges the General Assembly to further discuss the responsibility to protect before reaching consensus.

With NATO’s bombing upon Libya in March 2011 being the common concern of international community, the controversies over humanitarian intervention resurfaced in international arena. Different from NATO’s intervention in Kosovo in 1999 which bypassed the UN Security Council’s authorization, the intervention of NATO in Libya got authorization from Security Council by Resolution 1973, which authorizes “Member States...to take all necessary measures ...to protect civilians and civilian populated areas under threat of attack” and decides to establish a No-Fly Zone in order to help protect civilians. Due to China’s consistent opposition of use of force and considering the positions of Arab League, the African Union and African countries, China abstained from the voting. While, in the explanation of vote, China did not speak of the frequently mentioned principle of non-intervention in other states’ internal affairs, which signaled at least a change of China’s position, that is, China no longer considers human rights atrocity as internal affairs of one state. This change is attested by China’s vote in favor of Resolution 1970, which imposes arms embargo, travel ban, and asset freeze upon Libya\textsuperscript{49}. And another fact that China made contact with the head of the “Transitional National Council” also shows China’s

\textsuperscript{48} In an explanation of vote after adoption of Resolution 1973, China’s Ambassador Li Baodong said “China always opposes the use of force in international relations. During Security Council consultations on resolution 1973, China and some other council members raised some specific issues. Regrettably, however, there is no clarification or answer to many of these issues. China has serious concerns over some elements of the resolution”.

flexibility of position towards Libya issues.

**Conclusion**

As a matter of fact, it is hard to come to a conclusion on humanitarian intervention. Under current international law, neither the right to intervene nor the responsibility to protect can justify humanitarian intervention. Furthermore, humanitarian intervention is not just an international legal issue. The motive of humanitarian intervention is not always “humanitarian”, often mixed with some political, economical, military or ideological considerations, which make it more complicated. So the controversy over humanitarian intervention will not come to an end. However, without a consensus on humanitarian intervention among international community, it will still be more difficult to effectively prevent or halt massive human rights violations.