

Right to intervene or not to be intervened: The Impact of International Humanitarian Interventions on State Sovereignty from an International Law Perspective

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Abstract— *Despite the clear ban stipulated in the United Nations Charter on the use of force against territorial integrity and political independence against sovereign states international interventions based on humanitarian purposes have become a common occurrence in the contemporary world. This paper examines the question of whether there is an established right in international law either to intervene or not to be intervened based on humanitarian grounds. This problem requires the examination of present-day international interventions ostensibly based on humanitarian purposes, whether to be allowed as of a right of the interveners or to be rejected as of a right of the target state subjected to such attempts. Recent developments in international law suggest the need for a reconceptualization of its traditional concepts and doctrines to better address the current issues from a legal perspective. Although non-intervention is a well-established principle, reflected in the provisions of the Charter of the United Nations in the aftermath of the Cold War period the need of intervention based on humanitarian purposes emerged profoundly due to the mass atrocity crimes perpetrated by or allowed by Sovereign states against their own citizens. As a result, different viewpoints on the issue of interventions should be balanced through a legal regime though such an endeavour is lacking at present. The concept of Responsibility to Protect (R2P) cannot be considered a rejoinder since it is more of political in character than legal. Therefore this paper emphasizes the need to develop suitable criteria and guidelines to regulate unavoidable humanitarian interventions launched to avoid or end humanitarian catastrophes and to ensure any potential abuse of such noble endeavours for achieving larger political goals by a polarized world.*

Keywords— *humanitarian intervention, use of force, sovereignty of states*

I. INTRODUCTION

International interventions based on humanitarian purposes are not uncommon in the contemporary world. They may take the form of military or non-military in nature but the end result would be the erosion of territorial sovereignty of states, which is an established doctrine of international law. Such interventions are justified by some claiming that exceptional measures may be needed in superseding the sovereignty of states to prevent an overwhelming humanitarian catastrophe and to rebuild societies after such damage. Nevertheless, some have vehemently objected interventions asserting such endeavours as undue interferences on the internal affairs of a sovereign state. The central research problem of this paper is whether there is an established right in international law either to intervene or not to be intervened. This problem requires the examination of present-day international interventions ostensibly based on humanitarian purposes, whether to be allowed as of a right of the interveners or to be rejected as of a right of the state subjected to such attempts. The secondary question examined in this paper is whether the emerging concept of 'Responsibility to Protect (R2P)' is able to reconcile these competing rights effectively based on international law principles.

This is a library based research. Scholarly work and secondary data will be used to analyse the issues and to reach at a conclusion.

One of the foremost principles of international law is the inviolability of the territorial sovereignty of individual states. Under international law other states must respect this territorial sovereignty.

Nevertheless, when a state perpetrates egregious violations of human rights and humanitarian norms another state may violate the former state's territorial sovereignty in order to protect the rights of its own people. In such situations, states should not use sovereignty as a shield to hide blatant violations of international law. On the other hand, powerful states may use interventions, by exploiting humanitarian grounds, to achieve their larger political, economic and other strategic purposes. The following sections of the paper will therefore examine the need to have sound legal principles to govern the intervention regime from a legal point of view.

II. SCOPE OF INTERNATIONAL INTERVENTIONS

The United Nations Charter requires member States to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state. However, in the aftermath of Cold War, a wave of interventions escalated in many jurisdictions claiming to end egregious human rights violations committed by a state against its 'own' people. This is relatively a new phenomenon (Kreide, 2009). Due to changing circumstances and the nature of interventions, development of a new set of justifications to legitimate interventions since the end of the Cold War is apparent.

Defining intervention is a complex endeavor, as there is no reasonable agreement among jurists as to the meaning and content of intervention in international law. The term 'international intervention' (II) has been defined differently, depending on different purposes. Intervention generally implies a breach of sovereignty of states. The term has been traditionally defined as an action committed to prevent a foreign state from denying fundamental rights and persecuting its own citizens in a way, which shocks the conscience of mankind (Oppenheim, 1955). Authors have generally accepted this basic definition, although some find the doctrine of humanitarian intervention as inherently vague. Therefore, a usable general definition of humanitarian intervention (HI) would be extremely difficult to formulate and virtually impossible to apply meticulously (Franck & Rodley, 1973). Holzgrefe (2003) has defined HIs as follows: "It is the threat or use of force across borders by a state (or group of states) aimed at preventing or ending

widespread and grave violations of fundamental human rights of individuals other than its own citizens without the permission of the state within whose territory force is applied".

According to Kernot (2006), this definition contains four important elements. First, intervention involves the threat or use of force, thus excluding non-forcible actions such as economic or political sanctions and diplomatic pressures. Second, the aim is to prevent human rights violations that are severe, widespread or systematic. Third, object of interventions do not limit only to the protection of the own nationals of the intervening state. Fourth, an intervention is performed without permission/consent from the state in question. Holzgrefe's definition may represent some of the characteristics of recent interventions launched by powerful nations after the Cold War period, i.e., NATO interventions in Yugoslavia and Libya, but cannot be accepted as reflecting the true nature of different forms of modern day interventions on the territorial sovereignty of States.

In the opinion of the researcher, this widely accepted definition is too narrow and limited only to the interventions combined with use of force. Use of force would be one of the strongest forms of intervention but milder modes of interventions, which too erode the integrity and right to self-determination of sovereign states occur frequently. The range and nature of resolutions passed by the Security Council since the Gulf War, relating inter alia to the former Yugoslavia, Somalia, Rwanda, Haiti and East Timor, have been interpreted as suggesting that the Council is willing to treat the failure to guarantee democracy or human rights, or to protect against humanitarian abuses, as either a symptom, or a cause, of threats to peace and security. For example, Libyan invasion is interpreted by many as of having the objective of regime change and the exploitation of natural resources.

Corell (2001) describes II as a coercive action by states involving the use of armed force in another State without the consent of its Government, with or without authorization from the UN Security Council, for the purpose of preventing or ending gross and massive violations of human rights or international humanitarian law. Murphy (2004) defines IIs similarly as: "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, whether or not the intervention is authorized by the target State or the international community.”

As said by Kreide (2009), intervention implies a breach of a nation’s sovereignty, premised on the definition of the norm of non-intervention. Modern writers prefer to define IIs with special reference to humanitarian interventions considering the changing face of the issue in the aftermath of the Cold War period, which is the focus of this paper as well. According to Enabulele (2010) “‘humanitarian’ intervention encompasses armed responses to certain acts, whether done by outsiders or nationals, which ‘shock the moral conscience of mankind’. Such acts include, firstly, genocide, ethnic cleansing, war crimes, crimes against humanity, and other atrocities involving loss of life on a massive scale; Secondly, interference with the delivery of humanitarian relief to endangered civilian populations; and thirdly, the collapse of civil order entailing substantial loss of life in situations where it is impossible to identify any authority capable of granting consent to international involvement to help restore order.” Problem with this definition is that if interventions performed with the consent of the target State as to whether such endeavours be considered as interventions. If the target state is relatively weak or under immense pressure, genuineness of the target state’s consent becomes questionable.

HI has also been defined as “.....the proportionate trans-boundary help, including forcible help, provided by governments to individuals in another state who are being denied basic human rights and who themselves would be rationally willing to revolt against their oppressive government”(Teson, 1988). Since Teson’s this definition includes nonmilitary intervention it is somewhat flexible but vague. It includes the word ‘help’ but not ‘military force’. It expands the notion of intervention to broader prospects than warranted. As said by Pattison, (2008) there are four defining conditions of ‘humanitarian’ intervention. First, HI is always a forcible military intervention that is carried out without the consent of the government of the state. The lack of consent and forcible nature distinguishes it

from the humanitarian assistance, which involves relief work done by international actors with the consent or at the request of the government. Second, intervention should take place where there is actual or impending grievous suffering or loss of life, not after the occurrence. Third, HI must have a humanitarian purpose. It should only be carried out with the purpose of ‘preventing, reducing, or halting actual or impending loss of life and human suffering. Therefore, interventions carried out for self-defense may not be a HI. Article 51 of the UN Charter permits use of force in self-defense. This defining condition distinguishes between HI and the War on Terror. While humanitarian intervention is aimed toward protecting against loss of life in the target state, the War on Terrorism is mainly concerned with eliminating the risk posed by some militants of the target state to the citizens of the intervening state.

Finally, humanitarian intervention should be carried out by an external power. If a state uses force to protect its own territory or citizens from rebels it cannot be defined as a humanitarian intervention, as it comes under the domestic jurisdiction of a state (Khosa, 2012). Makind (2001) explains the paradoxical relationship between regimes of intervention and sovereignty as obvious and inevitable. “Humanitarian intervention refers to the use of military force to provide humanitarian assistance. It is intelligible mainly in relation to state sovereignty. If there were no sovereignty to breach, there would be no intervention”.

Contemporary efforts on addressing issues pertain to interventions define the notion more broadly than the definitions examined above. For an example, the supplementary volume to the report of the International Commission on Intervention and State Sovereignty (ICISS, 2001) defines it as: “Intervention means various forms of non-consensual action that are often thought to directly challenge the principle of state sovereignty. The actual meaning of the term “intervention” can be derived from the contexts in which it occurs, in addition to the purposes for which it is invoked. Actions do not amount to intervention if they are based on a genuine request from, or with the unqualified consent of, the target state. Consent, if it is to be valid in law, should emanate from the legal government of a sovereign state and be freely given. Forms of

interference that fall short of coercion in the internal affairs of a state also do not amount to intervention.” This definition uses the term ‘coercion’ instead of use of force. Coercion can be defined to include other types of force without armed force, i.e., sanctions, warnings, prescription of international investigations disregarding the objectives of a sovereign state (case of Sri Lanka). The Report acknowledges the existence of wider definitions of intervention and the difficulties of welcoming too broad modes, such as, economic activities and foreign direct investments.

III. LEGAL FRAMEWORK GOVERNING INTERNATIONAL INTERVENTIONS

The issue of IIs and use of force is authoritatively regulated by the UNC. The Charter is a legally binding treaty for the member states and, to a certain degree, perceived as customary international law because a portion of the Charter evolved into international norms even for non-members of the UN (Oh, 2008). The ICJ commented in the *Nicaragua* case (1986) that “[t]he UN Charter...by no means covers the whole area of the regulation of the use of force in international relations” and that international law has developed under the influence of the UN Charter to such an extent that “a number of rules contained in the Charter have acquired a status independent of it”.

The Charter is widely seen as non-interventionist in its approach. The below discussion on Article 2(4) will establish this. It limits the right of states to use of force internationally to cases of individual or collective self-defence and to assistance in UN authorized or controlled military operations. Article 51 and Chapter VII include relevant provisions for this effect. Nevertheless, some of the provisions are overlapping or conflicting with others (Simma, 2002). Therefore, a detailed discussion based on the relevant provisions of the UNC is needed to examine the issues governing the legality of contemporary IIs or HIs. The following section of the research discusses those provisions and the underlying meaning of them.

A. *Analysing United Nations Charter Provisions relating to International Intervention Discourse*

The Charter includes a ‘Preamble’ which delineates the major reasons for its establishment, initial determinations of the membership, and its aims and objectives. Article 1 stipulates the purposes and principles of the organization. Since Article 2 deals with the issue of IIs in Article 2, a detailed examination of the ‘letter and spirit’ of the provisions therein, in order to analyse the legality of contemporary IIs is useful. It is important to note that Article 2 provisions remain unrevised yet regardless of the changing circumstances in the post-Cold War period.

Article 2 in general emphasizes the obligation of the UN and its Members to act in accordance with the principles included therein. Accordingly, Article 2(1) underlines the fact that the organization is based on the principle of sovereign equality of all its Members and thereby the need to preserve it. Putting this as the first paragraph of the Article indicates the intention of the UN to protect and respect the established doctrine of sovereignty of states. Article 2(3) highlights the need to get international disputes of the Members settled by peaceful means in a manner that international peace and security, and justice, are not endangered. This should be understood in light of the purposes of the UN as outlined in the preamble. The word ‘peace’ is used as the key word in the purposes, which highlights the strong intention and commitment of the organization to achieve peace for the world as its fundamental obligation. Therefore, all the subsequent provisions should be interpreted with due regard to the aim and purposes of the UN.

B. *Article 2(4) of the United Nations Charter*

The principal rule on the use of force is contained in Article 2(4) of the Charter, which provides a considerable limitation on the use of force by States. This provision went further than any previous international agreement in prohibiting the use of force. The Covenant of the League of Nations, the United Nations’ predecessor, had not prohibited war between States, but only provided a mechanism intended to allow states to resolve the underlying dispute prior to actually resorting to war. The 1928 Kellogg-Briand Pact contained a declaration by state parties that they “condemn recourse to war for the solution of international controversies and renounce it as an instrument of national policy in their relations with one another.” However, it did not cover the use of

force that was not a “war” (Simma,) It is much wider in scope than both the Covenant of League of Nations and the Kellogg-Briand Pact (Abbas, 2012). Article 2(4) stipulates: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations”. Due to the exceptions accepted in the pursuing Articles of the same text subsequently, it can be argued that this Article is not presenting an absolute prohibition. For example, Article 51 of UNC provides that; *“Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.....”* Chapter VII of the Charter provides for enforcement action authorized by the UN Security Council including use of force. Except these exceptions, the UNC prohibits the use of force strongly in Article 2(4). Nevertheless, some scholars argue that Article 2(4) is ambiguous at the margin and thus it is unwarranted. Simma, (2002) says that the wordings of Article 2(4) as ambiguous.

In addition to the exceptions allowed in Article 51 and the Chapter VII of the UNC, some scholars believe that humanitarian intervention has become a new exception (third exception) for states to justify the use of force against other states since interventions based on humanitarian grounds are used on a number of occasions. It seems that HIs are increasingly used to justify the use of force based on humanitarian grounds.

C. Article 2(7) of the United Nations Charter

Article 2 (7) extends the prohibition against IIs to the world organization as well but subject to the pursuing articles on right to self-defence and collective security. *Article 2(7)* stipulates that “Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.” This provision also confirms the strong intention of the founders of

the Charter on strictly limiting interventions or use of force against another sovereign state.

The above analysis shows that Article 2 of UNC in its entirety does not provide for a right of intervention under any ground. It prohibits interventions by one or more states against another.

IV. WHAT IS THE ‘RIGHT’: ‘TO INTERVENE’ OR ‘NOT TO BE INTERVENED’?

The above legal provisions establish the fact that there is no right of intervention based on which any intervening State justify their actions that violate the sovereignty and territorial integrity of any target State. However, the concern is when a State engages or permits the massive violation of egregious norms of human rights and humanitarian law to commit within their boundaries whether such behaviour should be tolerated by the rest of the world unconditionally. Can a target State invoke a right of non-intervention or not to be intervened grounded on the established legal principles on non-intervention and sovereignty of States? The answer is negative because, at present, State sovereignty is no more considered an absolute right in the contemporary world. Sovereignty is widely used as a yard stick to measure the readiness of states to discharge their obligations and responsibilities towards their own people and rest of the world. It has been subjected to many changes, challenges and constraints. Due to this transformation and increased state practice, international community expects certain behaviour from each and every state. States are duty bound to ensure human rights of all and in particular those who live within the jurisdiction of the respective States. Accordingly, state authorities are responsible for the safety and wellbeing of the citizens and to take appropriate steps to protect and promote their rights and needs. If they do not perform this obligation satisfactorily, scrutinizing their behaviour by the outsiders in unavoidable.

“I approached sovereignty not as a negative concept by which States barricade themselves against international scrutiny and involvement, but rather as a positive concept entailing responsibility for the protection and general welfare of the citizens and of those falling under state jurisdiction”.

The problem is whether the existing legal standards provide a satisfactory legal framework to govern the international community's claims or actions based on 'responsibility to protect' or 'right to humanitarian intervention'. In the contemporary world new issues and challenges, which too deserve international interventions in different forms, are emerging. When human rights and humanitarian norms are violated in Rwanda, Kosovo, Bosnia, Somalia, Iraq, Afghanistan and Libya the responses and reactions of the community of States were diverse. The actions taken in the case of Libya were not taken in the case of Syria. This selective approach suggests the danger of accepting a right to intervene. Similarly, gross violations occurred in the same jurisdictions invite for some form of intervention to halt or end human catastrophes unaddressed by the sovereign State. The issue has to be dealt with the introduction of guidelines or safeguards to regulate HI under very exceptional circumstances. However, this is not a third exception to the Article 2(4) of the UNC. Therefore, the present legal structure neither offer a right of intervention for States which wish to be the interveners in prospective situations nor a right of non-intervention as a shield to hide the egregious human rights and humanitarian law violations happened in target States.

Accountability of individual States as well as community of States is equally important in permitting or prohibiting interventions based on humanitarian grounds. Well established legal and institutional framework is an earnest and timely need in order to regulate and supervise the diverse forms of international interventions, their legality, suitability, credibility and rationality.

V. DOCTRINE OF 'RESPONSIBILITY TO PROTECT': IS THIS A REJOINDER ON THE ISSUE OF INTERVENTION?

The 'Responsibility to Protect' (R2P) doctrine posits that each State has a responsibility to protect its population from genocide, war crimes, ethnic cleansing and crimes against humanity. When States fail in this responsibility, the international community and individual States have a responsibility to protect people from serious human rights violations. The R2P was produced as a possible answer to halt repeated failures of the international community to

intervene in cases of on-going mass atrocities, such as in Rwanda and Kosovo. The concept was originated at the International Commission on Interventions and State Sovereignty (ICISS) in 2001. The concept sought to deflect attention from the controverted 'right' of some States to intervene, to the duties of all States to protect their own citizens (ICISS, 2001). The recommendations of the ICISS Report received powerful endorsement from the Secretary-General's High Level Panel on Threats, Challenges and Change (HLP) in 2004. It was subsequently adopted by the UN General Assembly in Resolution 60/1, the 2005 World Summit Outcome and has been cited by the UN Security Council in Resolution 1674 of 2006. The Secretary General in a Report in 2009 introduced a three pillar approach to implement the 'R2P', which was subsequently presented to the UN General Assembly.

Although 'R2P' has been widely accepted as a possible rejoinder to harmonize conflicting interest between intervening States and the target State it was invoked in Libya but not in Syria, despite the striking similarities of systematic human rights violations occurred in both territories. If the underlying rationale of the doctrine is to prevent and halt mass atrocities by framing sovereignty as a responsibility of the State to safeguard the well-being of its citizens, why has action been taken in one but not the other case? It demonstrates the weaknesses of this concept as a sustainable rejoinder.

'R2P' could attract the world attention when it is operationalized through UN SC Resolution passed on Libya. However, R2P is not a legal norm although it has certain legal dimensions. Accordingly, the implementation of 'R2P' ultimately based on politics and practicalities of the situation and involves a State's choice to assume responsibility on a case-by-case basis. Although 'R2P' sounds legal it is fundamentally a political act. Therefore, the idea of an apolitical humanitarianism may be a noble endeavour but is incompatible with the reality of international politics. Thus 'R2p' cannot be accepted as a rejoinder and it is unable to reconcile these competing rights effectively based on international law principles.

VI. CONCLUSION

As examined above non-intervention was a well-established principle in the aftermath of the Second World War and it has been reflected in the provisions of the Charter of the United Nations. Nevertheless, after the Cold War era the need of intervention based on humanitarian purposes emerged profoundly due to the mass atrocity crimes perpetrated by or allowed by Sovereign States against their own citizens. Therefore, different viewpoints on the issue of interventions should be balanced through a legal regime though such an endeavor is lacking at present. There is no particular right in international law either permitting the interventions or totally prohibiting any action against violating states thereby allowing them to use it as a shield to hide serious violations of international law.

Recent developments in international law suggest the need for a reconceptualization of its traditional concepts and doctrines to better address the current issues from a legal perspective. New guidelines or safeguards should be formulated with wide acceptance by the international community in order to address the issue of humanitarian intervention legally and effectively. 'R2P' cannot be considered a rejoinder since it is more of political in character than legal. It is the obligation of states, individually as well as mutually, to develop such a legal regime within the international law framework to achieve international peace and stability without jeopardizing the individuality and solidarity of sovereign States.

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