THE LEGALITY AND FEASIBILITY OF HUMANITARIAN INTERVENTION

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ABSTRACT

Humanitarian intervention takes up one of the most disputed spheres of the international law as applied to the masses. The international order of post 1945 is based on the ban on the use of force in Article 2(4) of the United Nations Charter[1]. However, the cases of genocide, ethnic cleansing, and crimes against humanity present the following question that has lingered, can the law be inflexible when it faces mass atrocity? This paper looks at the issue of whether unilateral humanitarian intervention is legal under the current international law and evaluates whether it can be deemed either normatively or practically viable in spite of its dubious legality. It claims that such intervention is illegal according to positive international law since the law of treaty, customary or law of court does not acknowledge it as an exception. Nevertheless, the development of the Responsibility to Protect indicates a significant political and moral change, despite the fact that it does not establish a separate legal foundation of an unilateral use of force. The possibility of humanitarian intervention is still limited by structural constraints to the collective security system as well as geopolitical imperatives.

[1] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, art 2(4).

RESEARCH QUESTION

Is unilateral humanitarian intervention without United Nations Security Council authorisation lawful under contemporary international law, and if not, can it nevertheless be justified as a feasible normative development within the existing international legal order?

INTRODUCTION

The international law post 1945 was constructed in a way that had a strong ambition; to terminate war as a policy instrument. Simultaneously, the twentieth century proved that sovereignty may defend serious atrocities. Rwanda genocide, the Balkan ethnic cleansing, and other instances of mass atrocities have caused those who believe that non-intervention is always better, to rethink this notion. In cases where a state becomes counter pose to its population or is not willing to defend it, then an ethical conflict will emerge between reverence to sovereignty and the promotion of basic human rights. The question lies in whether the international law is permissive in taking on humanitarian intervention unilaterally in such cases. Otherwise, is it possible that the doctrine can be justified as a possible development of the legal order? This paper deals with the legality and the feasibility of the doctrine as two different questions yet connected to each other. The issue of humanitarian intervention cannot be viewed as a technical argument of interpretation of the Charter. It is indicative of a greater conflict concerning who and what international law is. Following the carnage of the Second World War, the UN architects attempted to build a legal order which would reduce the unilateral use of force to the lowest possibility. Article 2(4) in its prohibition was clearly wide-ranged, which was meant to seal the loopholes that the strongest states may use to justify the intervention on different grounds. The stability, predictability and sovereign equality were valued as the key conditions of peace. Nevertheless, the second half of the twentieth century brought with it a new rush counter current. At the same time, the emergence of international law of human rights and international criminal tribunals was an indication that individuals and not states only were becoming the key subject of international concern. This twin development has posed a structural straining on the legal system. On the one hand there is the adherence to the prevention of aggressive war, on the other there is the necessity of prevention of atrocity crimes. The broadening of the legal bases of intervention can be used to achieve humanitarian goals under specific situations, but this can also result in a relapse to selective and strategic applications of force. On the other hand, strict compliance to non-intervention can save the formal legality but

allow serious human misery. Such flexibility needs to be evaluated carefully via a doctrinal assessment to ascertain whether there is a current flexibility of the existing law or reform is necessary and not reinterpretation.

Defining Humanitarian Intervention

Humanitarian intervention is mostly perceived as the application of military power by one or more states on the territory of a different state, against its will, with the main aim of preventing or stopping the massive destruction of human rights. Three elements are crucial. To begin with, there is an intervention that entails force. Second, it is not done with the consent of the territorial state. Third, it has a declared purpose of humanitarian protection and not self-defence or expansion of territory. This is the difference between humanitarian intervention and collective security operations under Chapter VII of the Charter and based on the Security Council, as well as the natural right of self-defence under Article 51[2]. It is not also identical with the more general doctrine of the Responsibility to Protect, including the use of preventive, diplomatic, and rebuilding actions with the use of force.

The Charter Framework and the Prohibition of Force

Article 2(4) of the UN Charter provides a broad ban on the use of force.3 The clause has been generally recognized as representing the customary international law, and, in the opinion of many scholars, is a peremptory norm (jus cogens). The Charter has just two recognised exceptions: First, the use of self-defence against an armed assault under Article 51. Second, joint action permits under Chapter VII sanctioned by the Security Council. Humanitarian intervention is also not one of these exceptions. The silence in the text is important. The Charter makers knew justification of intervention before 1945 and decided to develop a system that would be based on collective security and not one where the nation would act alone. The Declaration on Friendly Relations supports the ban and reiterates the doctrine of non-intervention.5 The legal framework of the Charter does not leave much space to add some other implied exceptions.

Judicial Treatment

Jurisprudence of the International Court of Justice is a source of valuable advice. In the

[2] ibid arts 39–42, 51

Nicaragua case, the Court disregarded the fact that collective self-help or assistance might justify the resort to force on the territory of another state.[3] The Court put it clear that the respect to sovereignty and the ban on the use of force are still fundamental to international law. Equally, the Court in Corfu Channel stated that territorial sovereignty was relevant and unilateral intervention was not a legitimate action.[4] In the Armed Activities on the Territory of the Congo, the Court re-established rigid boundaries concerning the use of force and did not acknowledge the humanitarian considerations as a defence before the law.[5] Although the Court has never explicitly decided a claim of pure humanitarian intervention on that basis, its regular focus on Article 2(4) implies that it is unwilling to make any more exceptions than those which are explicitly recognised.

State Practice: Kosovo and Libya

NATO intervention in Kosovo in the year 1999 took place without the authorisation of the Security Council. States that were involved in the operation defended it as humanitarian by saying that there was need to avert ethnic cleansing. But most states denounced the move to be illegal. This vagueness is embodied in the formulation of the Independent International Commission on Kosovo which stated it as illegal but legitimate.[6] The approval by the politics or morality does not necessarily imply the legal validation. Any aspect that could argue that a new customary norm has emerged is undermined by the fact that a legal right to intervene is not widely accepted. Conversely, the 2011 intervention in Libya was approved by Security Council Resolution 1973.[7] The Council cited the Responsibility to Protect and justified all measures that would be used to protect civilians. The post-Libya events such as the replacement of the regime and extended political unrest created a lot of political backlash. Later crises like Syria have shown how the permanent members are becoming less and less willing to authorize force.

The Responsibility to Protect

The Responsibility to Protect was a creation of the 2001 report of the International Commission

[3] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, para 268.
[4] *Corfu Channel (United Kingdom v Albania)* (Merits) [1949] ICJ Rep 4.
[5] *Armed Activities on the Territory of the Congo (DRC v Uganda)* [2005] ICJ Rep 168.
[6] Independent International Commission on Kosovo, *The Kosovo Report* (OUP 2000) 4.
[7] UNSC Res 1973 (17 March 2011) UN Doc S/RES/1973.

on Intervention and State Sovereignty and it was approved in the 2005 World Summit.[8] Protecting populations against the genocide, war crimes, ethnic cleansing, and crimes against humanity is the key responsibility of the states. In case of failure, international community can intervene as an entity via the Security Council. It strengthens the Security Council authorisation. It is also not a legally binding status but political. However, R2P is a change in normativeness. It is an indication that mass atrocities are not domestic issues. Although this change has a political impact, the legal system of force use has not changed.

Can Customary Law Support Humanitarian Intervention?

To see a customary rule allowing humanitarian intervention come to existence, one has to have two elements consistent state practice and opinio juris meaning a belief that the practice is required or even allowed by law.[9] The state practice is still inconsistent and disputed. The so-called humanitarian interventions are rather rare and usually are accompanied with legal ambiguity. More to the point, it is very typical that states do not claim an expressed legal right to unilateral humanitarian intervention. They instead frame actions either in exceptional or sui generis terms. So far as such a right is not universally and regularly acknowledged, it can hardly be assumed that customary international law has been muted into allowing it.

Feasibility and Structural Constraints

Even in case humanitarian intervention would be considered as a morally desirable action, feasibility raises different issues. To begin with, the veto of Security Council restrains unanimous action. Even in critical situations, political competition is likely to block authorisation. Second, selective implementation is a danger of unilateral intervention. Powerful states can act in areas interest coincides and act passively in others, contradicting arguments of humanitarian consistency. Third, the instability after the interventions is a big concern. History proves that ousting regimes does not ensure the long-term security and peace. The distance between sustainable reconstruction and military intervention is very large. A combination of these structural issues implies that humanitarian intervention, regardless of its legality, has severe practical constraints.

[8] International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (2001).
[9] *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* [1969] ICJ Rep 3, para 77.

Conclusion

Unilateral humanitarian intervention that is not authorised by the Security Council is still illegal in the contemporary international law. The list of the Charter of the UN gives a comprehensive structure of the application of force and neither the area of treaties, nor customary law, nor the judicial system accepts humanitarian intervention as a self-sufficient exception. The Kosovo intervention showed moral urgency that was not grounded in the law. The intervention in Libya was not an abuse of a unilateral humanitarian right but rather legal as it was sanctioned by the security council. Responsibility to Protect is an expression of a shifting moral and political responsibility towards human protection, but does not change the law on unilateral force. The conflict between the sovereignty and human rights continues. The international law aims at avoiding aggression and atrocity, but its provisions rely on political agreement. It is not the extension of unilateral rights to employ the use of force, but the reinforcement of the mechanisms of collectivity, which can effectively react to mass atrocities without undermining the law order, that will be the challenge in the future. It turns out to be the weakness of legal formalism and moral idealism in the international system that the still continuing controversy of humanitarian intervention makes people see. On the one hand, the taboo on the employment of force has had a spectacular normative success. It has put a definite mark against which behavior is measured and has justified conquest and open aggression as a legitimate policy tool. Conversely, the fact that mass atrocities have continued to occur evidences that the very presence of legal norms does not ensure the successful security of vulnerable groups. The development of the doctrines like the Responsibility to Protect can be seen as aimed at attempting to reconcile these competing realities. In refusing to view sovereignty as a form of responsibility, the international community has come to appreciate that there is a sense of responsibility of states to populations. However, in this normative change, the focal place of the Security Council to sanction force has not been superseded. The fact that states are not willing to acknowledge a unilateral right of humanitarian intervention implies awareness of the risks involved in broadening exceptions of Article 2(4). Humanitarian rhetoric may also co-exist with geopolitical interests, and in the absence of objective oversight mechanisms, there is always a high probability of selective enforcement, as it has been historically demonstrated. Finally, the viability of humanitarian protection is not so much about the acknowledgement of new unilateral rights but it is more connected to the reinforcement of collective decision-making processes, the development of better early warning tools and the post-conflict rebuilding capabilities. The distance between moral aspiration and legal permissibility will

persist until the structural paralysis that afflicts the Security Council on occasions is dealt with in a meaningful institutional reform. Humanitarian intervention will remain to have an uncomfortable position, compelling in extreme situations, but bound by the underlying principle of international law to control and limit the application of force. This tension that cannot be resolved simply coincides with the fact that the international order is not simple, but a dynamic phenomenon.