HUMANITARIAN INTERVENTION IN INTERNATIONAL LAW

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ABSTRACT

This Article seeks to analyze the status of humanitarian intervention in International law. It traces the development of the term from Grotius and Gentili to positivist thinkers like Hobbes and Vattel. Ultimately, the State practice of pre and post-Charter era has been analyzed which plays an important role in its evolution. The question of the legality of humanitarian intervention is divisive and shrouded in dilemma. The Charter prohibits the use of force or threat of use of force against the political independence and territorial sovereignty of any State, thereby putting a prohibition on humanitarian intervention. The absolutist interpretation of this Article, which seems more appropriate prohibits every use of force immaterial of the purpose behind it. However, the emerging state practice and the inability of the States to maintain the sanctity of the Charter raises arguments defending the legality of humanitarian intervention. With contrasting but compelling arguments from both sides, it cannot be conclusively determined whether humanitarian intervention is legal or not. But it should be unanimously accepted that the need of the hour is a meticulously drafted framework governing the grounds and limits of humanitarian intervention.

Keywords: Use Of Force, Territorial Sovereignty, War, Absolutist Interpretation, State Practice, Legality.

INTRODUCTION

"The subject of intervention is one of the vaguest branches of international law. We are told that intervention is a right; that it is a crime; that it is the rule; that it is the exception; that it is never permissible at all."

P H Winfield, 1922

The question of humanitarian intervention and its legality is one that has baffled scholars for centuries. The term humanitarian intervention essentially means the act of one state interfering with another with altruistic intentions to prevent the gross abuse and neglect of

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human rights in the other state, where such state is not capable of preventing such abuse or is unwilling, or the state itself is actively involved in blatant violation of human rights. However, in the past decades, we have witnessed numerous instances of intervention by States for grinding their axe and extracting benefits from areas already ridden in deep turmoil under the ruse of humanitarian intervention. Though a bare perusal of Article 2(4) of the U.N. Charter reveals that humanitarian intervention is illegal as the article prohibits the use of force or threats of use of force against the political independence and territorial sovereignty of States, after introspection of recent State practices and views of various scholars, this question becomes more complex.

ORIGIN AND DEVELOPMENT OF HUMANITARIAN INTERVENTION

Tracing the development of humanitarian intervention depicts that it is unclear what this term encompasses. The early classical scholars did not draw any distinction between the use of force for war and intervention.[1] According to Cicero, even a single combat came within the ambit of war.[2] The earliest development of humanitarian intervention could be found in the work of Hugo Grotius, also known as the father of international law. His crucial work, *De jure belli ac pacis,* emphasized a systemized body of principles and practices on the *jus belli* or humanitarian intervention. He divides these principles into two sections based on the motive behind the intervention. These are- waging war against the immoral as punishment and waging war on behalf of the oppressed. Grotius bases the defense of the right to intervene or wage war against any state on the theories of natural law. The argument around which his theory revolves is that the states are not only bestowed with the power to assert their own rights and the rights of their subjects but being part of the international community, they can assert the rights of others as well. This gives them the power to take punitive action against the immoral enemy. This principle was later on criticized by positivists as it is very prone to be misused.

Gentili, one of the early jurists to develop the principle of 'sovereign accountability' gives an argument favoring the right of states to wage war against another for the purpose of protecting the oppressed.[3] He observes that there exists a society of all human beings who are connected by the kinship of nature. Thus, the subjects of other states are not outside this

[1] Vol.2 HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES, Translated by Francis W. Kelsley I § 2(i) (Lawbook Exchange 2021)
[2]Ibid I, i § 2(1)
[3] ALBERICO GENTILI, DE JURE BELLI LIBRI TRES, I xvi (Clarendon Press, 1933)

society, and abolishing this society would dismantle the very union of nature.[4] Grotius presents a similar concept in his work however, it differs from the one explained by Gentili as he explains the right to wage war on behalf of the oppressed as a legal right rather than a moral duty, which could be exercised on the violation and suppression of the hypothetical rights of that states' subjects.

Positivism And the Theory of Non-Interference The influence of Positivism saw theology and ethics, which formed the foundation of natural law, being divorced from the subject of international law and the emergence of the concept of the inviolable sovereignty of States. As highlighted by Hobbes, positivists are of the view that the sovereign is immune from any temporal accountability which leaves no room for the concept of intervening in other states even for benign purposes. Another positivist scholar, Christian Wolff criticizes the theory of Grotius and asserts that punitive war is not legal unless it is for the redressal of irreparable injury done to the state itself.[5] Later on, Vattel reasserted this in the following words- 'Did *not Grotius perceive that in spite of all the precautions, his view opens the door to all the zealots and fanatics, and gives to ambitious men pretext without number?'*[6] However, Vattel recognizes two exceptions where interference by other states becomes permissible.

Pre-Charter-Era- There has been a general consensus among some scholars that there was a recognition of the right of humanitarian intervention in customary international law. However, there is little evidence to prove the veracity of this statement. Most of the interventions cited by modern writers were for purely diplomatic purposes and did not involve any use of force. For instance, Austria-Hungary and Russia intervened for the protection of Christians in Macedonia in 1909. However, this intervention was limited to peremptory demand for payment of compensation and protection of the Christian population in the country.

The earliest example of true humanitarian intervention is the joint action of France, Russia, and Great Britain against the unjust and inhumane treatment of Greek insurgents in Turkey in 1827. Other examples include the intervention by Austria, Great Britain, France, Prussia, and Russia for stopping the ruthless execution of thousands of Christians at Mount Lebanon under the Ottoman Empire and the intervention by the United States in Cuba. However, the

[4] Ibid I, viii,4
[5] CHRISTIAN VON WOLFF, JUS GENTIUM METHODO SCIENTIFICA 636 (Clarendon Press 1934)
[6] EMERICH DE VATTEL, THE LAW OF NATIONS i § 7 (Carnegie Institution of Washington 1916)

status of humanitarian intervention cannot be conclusively determined and is marked by vagueness as war itself was not prohibited in this era.

THE QUESTION OF LEGALITY

The aftermath of the Second World War necessitated measures to curb the use of force in the international arena. This led to the passing of the U.N. Charter which clearly renounces war as an instrument of state practice and Article 2(4) prohibits the use of force or threat of use of force by nations. In the post-charter era, the legal debate among scholars regarding the present validity of humanitarian intervention is divisive, with both sides presenting concrete arguments and claiming a majority. The next section seeks to analyze the arguments of the opponents as well as the proponents of this theory.

Arguments for Illegality –

Article 2(4) of the U.N. Charter provides that – "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 provisions of this Act."[7]

This Article read with Articles 2(3), 39, and 42 makes it abundantly clear that the use of force by the States is prohibited in any form unless it has been expressly authorized by the Security Council on the ground of threats to international peace and security. Thus, in light of the above statement, the most appropriate interpretation of this Article is the absolutist interpretation provided by Sir Humphery Waldock[8] which suggests that the purpose of Article 2(4) is to prohibit the use of force in all forms of immaterial of the purpose behind it. Any kind of military intervention comes within the purview of this Article even if it is for altruistic purposes. Any other interpretation of this Article, which legalizes the use of force when it is not against the political independence and territorial integrity of the State is shrouded in doubtfulness as it contravenes the clear intention of the framers of the Charter to impose stringent restrictions on the use of force. Nicholas Sturchler rightly points out that including both the terms 'force' and 'threat of use of force', makes the domain of illegality expansive and not limited to merely cross-border military attacks.

[7] Charter of the United Nations, Article 2(4), 1945, United Nations
[8] HUMPHERY WALDOCK, THE REGULATION OF THE USE OF FORCE BY INDIVIDUAL STATES IN INTERNATIONAL LAW, 81 (Recueil De Cours 1952)

Referring to the *travaux preparatoires* makes it clear that the words 'against the territorial integrity and political independence of the State' were not meant to give a restrictive meaning to the prohibition on the use of force.[9] This is exemplified by the strong support of the members of the General Assembly prohibiting all unilateral uses of force except in the case of self-defense as mentioned in Article 51. Moreover, time and again the Security Council has condemned and declared illegal all uses of force notwithstanding their purpose or temporary nature. For instance, the temporary incursion of Rhodesia into Zambia was declared illegal. What matters is not the motive behind the intervention, but the very act of armed intervention which disrupts the territorial sovereignty of the State, and since preventing the gross violation of human rights would necessarily imply interference with the political independence of the State, every humanitarian intervention comes within the purview of Article 2(4). The only exceptions to this have been incorporated in the Charter itself, i.e., acting in self-defense[10] and authorization by the Security Council.

Another argument presented by the proponents of humanitarian intervention, especially Teson is that the words- '…or in any other manner inconsistent with the purposes of the United Nations.' leave ample room for the justification of humanitarian intervention[11] in the pursuit of other purposes enshrined in the Charter such as freedom, peace, and democracy. He asserts that the promotion of human rights is equally important as control of international conflicts and prohibiting humanitarian intervention under Article 2(4) would be a distortion. However, such a viewpoint is faulty as these references to human rights and the dignity of persons are made in a nonbinding context. These are merely goals that the U.N. seeks to promote and it does not give rise to any legal obligation on the signatories. The third purpose of the Charter mentions promoting and encouraging respect for human rights. Stretching the interpretation of these words to justify unilateral humanitarian intervention would be fallacious.

The Genocide Convention of 1948, which was passed as a response to the barbaric persecution by the Nazis, also becomes relevant when humanitarian intervention is in question. Often, Article 1 of this convention is resorted to by States to seek the legitimacy of the right to intervene in genocidal regimes. The Article states that the contracting parties agree that genocide would be a crime in any form and the Parties should endeavor to prevent

[9] S Chesterman, Just War or Just Peace 62 (Oxford University Press, 2000)
[10] U.N. Charter, Art 51, 1945, United Nations
[11] FERNADO TESON, A PHILOSOPHY OF INTERNATIONAL LAW 151 (Routledge 1998)

and punish it. Hence, the question that comes forward is whether such a convention can authorize the use of force for preventing genocides. While it is possible to include military intervention across borders under this Article, such an expansive interpretation of an important right is generally not preferred. Unless there has been an explicit recognition of this right, a conservative reading of the Article is preferred. Another hurdle in recognizing the implicit meaning of this Article arises in Article 103 of the Charter. As provided by Article 103, in case of conflict between the provisions of the Charter and obligations under any other international agreement, the Charter would prevail. This accords the Charter the status of a Constitution governing interstate relations and thus an obligation in contravention to it would be nullified.[12] Thus, it becomes legally impossible for a prospective treaty to lift the ban imposed upon humanitarian intervention by the Charter.

Thus, it becomes abundantly clear that relying on the black letters of the Charter, there is no legal room for humanitarian intervention. Moreover, history is replete with examples where States have advanced their imperialistic ideas under the ruse of humanitarianism. Thus, the use of force for any purpose has been prohibited to ensure peace and maintain the territorial sovereignty and political independence of the State.

Arguments for Legality

While a respectable majority of jurists and scholars adhere to the technical interpretation of the Charter which precludes humanitarian intervention, a substantial minority of scholars have expressed their views regarding the legality of humanitarian intervention in the face of gross abuse of human rights. They believe that sticking to the black letter law and turning a blind eye to the atrocities being incurred on innocents would do more harm rather than good. A recent example of this is the ongoing humanitarian crisis in Afghanistan. According to Oppenheim, '*When a State renders itself guilty of cruelties against and persecution of its nationals in such a way as to shock the conscience of mankind, intervention in the interest of humanity becomes legitimate*.' [13]Other scholars such as P Jessup, Fonteyne, Lilich, and

[12] Bardo Fassbender, Rediscovering a Forgotten Constitution: Notes on the Place of the U.N. Charter in the International Legal Order (Cambridge University Press 2009)
[13] L OPPENHEIM, INTERNATIONAL LAW 312 (8th edn. H Lauterpacht)

Reisman are also exponents of the view that humanitarian intervention should be legal in the face of grave humanitarian crises.[14]

Law is dynamic in nature and since the Charter has come into force, there have been significant changes in the international arena. Factors such as repeated violation of the provisions of the Charter, increasing cosmopolitanism, and sensitiveness towards human rights have necessitated looking outside the words written in the Charter and accommodating the growing state practices. The next section would examine such arguments which advocate the legality of humanitarian intervention.

Present enforceability of Article 2(4): The stringent prohibitions on the use of force only exists in the paper world of the Charter. The scenario presented by the real-world state practice is entirely different. Frequent violations and blatant disregard of the prohibition on the use of force have made an utter mockery of the Charter. Franck analyzed the pre-Charter and post-Charter practices of war and intervention and observed that not much has changed. According to him, the States have eroded this prohibition beyond recognition.[15] In International law, a rule loses its force by its constant violation and misuse and the same happened with Article 2(4). This violation becomes more prominent when powerful nations like U.S.A. and Russia are involved. For instance, the United States was unrestrained in its military ventures in Iraq, Afghanistan, and erstwhile countries after 2001. Similarly, this logic can also govern humanitarian intervention. If the present Article has become so non-obligatory for nation-states that they easily flout it and barely any action is taken against them, then on the same grounds use of force for humanitarian intervention should not be illegal.

Evolving State Practice: Despite the plain words of the Charter prohibiting humanitarian intervention, there has been a growing state practice that suggests the contrary. Various States have justified their interventions in the past years on humanitarian grounds. The central point of this argument is that the Charter is subject to the political and social environment in which it operates and the emerging normative ideas and humanitarianism compels us to reinterpret this Article in the light of the present scenario. The two major interventions which could be

[14] Daniel Wolf, Humanitarian Intervention, Vol. 9 Issue 1, MICHIGAN JOURNAL OF INTERNATIONAL LAW, 22-23, 1988
[15] Thomas M. Franck, Who Killed Article 2(4), Vol. 64, AMERICAN JOURNAL OF INTERNATIONAL LAW, 835 (1970)

cited as the aptest example of the emerging practice of humanitarian intervention are the intervention by India in Bangladesh and by Tanzania in Uganda.

In December 1971, India led an armed intervention in East Pakistan, present-day Bangladesh to stop the atrocities and inhumane actions of Pakistan in Bangladesh. Though India relied on the principle of self-defense to justify its actions, the Indian delegate before the Security Council also invoked the ground of humanitarianism for the intervention. Except China and Albania, the rest of the members were reluctant to condemn India's action and many countries even defended the intervention in the face of the overwhelming atrocities perpetrated by the Pakistani government on the Pakistanis. In the end, the Security Council did not pass any resolution against India and urged for a domestic political solution. This absence of condemnation indirectly amounted to a condonation of intervention.[16] Similarly, the absence of any negative reaction or condemnation by the world community of Tanzania's intervention in Uganda amounts to a silent acceptance of the principle of humanitarian intervention. These State practices are also in line with the purposes of the Charter as it grants paramount importance to maintaining international peace and securing human rights. This is clearly reflected in the Preamble and Article 1 of the Charter. Thus, it is time to reinterpret Article 2(4) in the light of changing world order.

Contingent Sovereignty- The legality of statehood is itself contingent on an acceptable standard of behavior by the government. If the State fails to protect the human rights of its subjects and becomes the perpetrator of iniquity, then it nullifies its claim for noninterference. The central idea of this argument revolves around the role of laws on sovereignty, rather than the laws on the use of force.[17] When there is a breakdown of the sovereignty of the State itself, any form of intervention would not amount to the use of force against another State. Allen Buchanan proposes that the legal framework of sovereignty should be interlinked with the protection of human rights by the State and made contingent on it.[18] Many scholars have already accepted this theory as sovereignty is an indiscernible part of Statehood and those who grossly misuse it should not be allowed to use it as a shield. In the present scenario, the old concept of absolute sovereignty has been depleted and none of the States can hide behind this shield to do whatever they please to do. Thus, when a State

[16] Supra note 14 at 16
[17] Ian Hurd, Is Humanitarian Intervention Legal? The Rule of Law in an Incoherent World, NORTHWESTERN UNIVERSITY, https://faculty.wcas.northwestern.edu/ihu355/Home_files/is%20hi%20legal.pdf
[18] Allen Buchanan, Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law (New York: Oxford University Press 2007)

loses its sovereignty by virtue of its gross violation of human rights, humanitarian intervention becomes legal.

The majority of the skepticism against humanitarian intervention arises from the fear of its misuse. They argue that history is replete with examples of countries taking defense of bogus humanitarian grounds to advance their ulterior imperialistic motives. However, it should be understood that every legal policy, rule, or doctrine is susceptible to being misused. This should not be a ground to argue for a ban on humanitarian intervention. Moreover, legalizing humanitarian intervention would require precise standards to which the States should adhere, this would result in a decreased probability of the misuse of the doctrine. Thus, the argument based on the probability of misuse is singly unpersuasive.

CONCLUSION

Tracing the evolution of the concept of humanitarian intervention, we find that there is no consensus in the international community regarding its' legality. Both the proponents and opponents of this theory present contradictory but plausible interpretations of the Article governing the use of force. The question of humanitarian intervention lies somewhere in the spectrum of legality and illegality. The opponents of humanitarian intervention rely on absolutist interpretation and strictly adhere to the words of the Charter. However, it is observed that in the present scenario, the words of the Charter have lost their effectiveness due to repeated violations by member States and emerging state practices. In this era, international law cannot be divorced completely from morality. States cannot be expected to stand and watch gross human rights violations and atrocities inflicted upon people. Thus, the golden mean would be to draw a framework that regulates the standards of the use of force for humanitarian purposes. This would address the concerns of the possible misuse of this provision as well as pave the way for intervention based on truly benign purposes.