

Humanitarian Intervention: A Legal Analysis

Written by Kirthi Jayakumar

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KIRTHI JAYAKUMAR, FEB 6 2012

Over the last forty years, a number of governments have justified unilateral military action with reference to the “customary law” of military humanitarian intervention in one form or another, and without exception, the international community has refused to recognize these actions as legitimate.[1] But this “customary law” is reckless and offers absolutely no guidance to the manner in which the intervention itself should be conducted. If there is to be humanitarian intervention, there should be a coherent humanitarian justification coupled with a proper procedural and substantive legal regime to underwrite it.

Humanitarian intervention is a means to prevent or stop a gross violation of human rights in a state, where such state is either incapable or unwilling to protect its own people, or is actively persecuting them. Many scholars identify the 1990s as a ‘decade of humanitarian intervention’, during which the UN authorized several interventions on humanitarian grounds.[2] During the 1990s, even as the Security Council was increasingly willing to authorize humanitarian intervention, the United States and its allies took military action on at least three occasions, for express humanitarian purposes, when the specific action was not authorized by the Security Council.[3] Some instances of intervention, though unauthorized, have been declared legitimate – like NATO’s intervention in Kosovo in 1999. More recently, the military intervention in Libya, though frowned upon by several states in the international community, can be said to be lawful since it was authorized by the Security Council in Resolution 1973, in ostensible exercise of its powers under Chapter VII of the UN Charter.

As Noam Chomsky argued, “for one thing, there’s a history of humanitarian intervention. You can look at it. And when you do, you discover that virtually every use of military force is described as humanitarian intervention.” Chomsky precisely pointed out everything that is wrong with the way humanitarian intervention is frequently justified and carried out: There is a quick resort to military force without relying on force itself as a last resort; there is always an ulterior motive that predisposes a state’s decision to intervene; and, many a time, the intervention itself is unilateral and unauthorized. Therefore, it is no longer about whether a state should intervene or not, but rather, that a law should be brought into place for the state that intervenes to conform to, in its *modus operandi*.

The most important principle in international law is the inviolability of the territorial sovereignty of states. The principle of respect for the territorial integrity of states is well founded as one of the linchpins of the international system, as is the norm prohibiting interference in the internal affairs of other states.[4] Article 2(4) of the UN Charter preserves the territorial integrity and political independence of states by forbidding any use of force, or threat of use of force against either. The accepted exception to this principle, which has now become a peremptory norm from which no derogation is permissible or *jus cogens* as it is known,[5] is only the right to self-defence under Article 51 of the UN Charter, and Collective Security measures under Chapter VII of the UN Charter.

In pre-Charter law, there was some support for the consideration of humanitarian intervention as legal.[6] Early recognition of the doctrine of humanitarian intervention as acceptable in international relations is widely attributed to the works of the 17th century Dutch author Hugo Grotius, also known as the Father of International Law.[7] Specific invocation of the doctrine of humanitarian intervention by intervening states arose mostly in the latter half of the 19th Century.[8] However, things changed after the Second World War, when all uses of force were beginning to be outlawed – admittedly with major exceptions – except in the permissible pursuit of self-defence. When the UN Charter came into force, it “completely divorced the legal system from the pre-existing body of rules under customary

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international law.”[9] The legislative history of the UN Charter shows that the drafters clearly intended to render illegal all excuses for resorting to military force, except those explicitly stated in the Charter. Therefore, with Article 2(4) replacing pre-Charter law, there seems to be some sort of a discrepancy in reconciling present-day events involving humanitarian intervention and the letter of the law as it stands. A cursory perusal of Article 2(4) does not suffuse any intervention on humanitarian grounds with legality, unless one follows a radical mode of legal interpretation and reads in additional words that are not already there in the text.[10] Judicial interpretation endorses a similar perspective. In the *Nicaragua Case*,[11] the ICJ had explicitly ruled that the use of force could not be the appropriate method to monitor or ensure respect for human rights, that there is no general right of intervention in international law and, therefore, intervention violated international law. Although humanitarian intervention does exist in state practice, and although state practice is deemed a source of law as under Article 38 (1) (a) of the Statute of the ICJ,[12] considering the hegemony of the sources of law in the same provision, there is a generally accepted notion that state practice cannot over rule treaty and customary law, both of which denounce the use of force except in self-defence.[13]

Despite its putative illegality, there is no denying that Humanitarian Intervention exists. The conspicuous lack of legally “binding” material governing humanitarian intervention has led to a situation of legal black holes. There is no legal rule governing the exception of humanitarian intervention to the use of force, as there is for the use of collective security measures and self-defence. Commentators in support of humanitarian intervention argue that if humanitarian intervention were legal, the very cost of the potential abuse of pretextual interventions would outweigh any benefit from altruistic interventions.[14] A pretextual intervention is essentially a case of a state’s use of military force in another state in pursuit of its own gain and not for the protection of human rights.[15] An altruistic intervention is one that is rooted in the core value of protecting human rights.[16] That a state will not intervene in another state unless it has something to gain is obvious, and these concerns make sense. What is being ignored or perhaps misconstrued in the term “legal” is that it is not only to be legitimized by being accorded legality, but that it is to be “legally regulated”. According legality to humanitarian intervention does not mean a blind acceptance of humanitarian intervention as permissible in law, but that it is acceptable only if it adheres to a predetermined yardstick. Seeing as though the right to self-defence is being regulated by law, there is little doubt that a legal provision would be adequate in helping streamline the deployment of humanitarian intervention.

The basis of intervention on humanitarian grounds is that it is no state’s prerogative to allow the wanton disregard and violation of human rights, and therefore, if such wanton disregard and violations take place, another state, or other states may intervene to put an end to them.[17]

Given that humanitarian intervention exists, the law must rise to the occasion and evolve a framework to accommodate and regulate the phenomenon. This is not difficult in International Law, especially since one of the special characteristics of International Law is that violations of law may lead to the formation of a new law, so that an international custom could be intentionally created.[18]

Some experts argue that intervention on humanitarian grounds must be approved by the Security Council to stand the test of legality.[19] If humanitarian intervention is to be authorized by the Security Council, and if it is not a unilateral measure, then can it not be considered legal under the ambit of Chapter VII of the Security Council? While in principle, it can be construed so, there have been plenty of instances when the Security Council has failed in its responsibility for collective security.[20] It is in extreme cases in which the most fundamental human rights are massively threatened, that the United Nations and regional organizations – paralyzed by great power disagreements over the sacrosanct principles of sovereignty and non-intervention, outside of the colonial and para-colonial contexts – have been unable or unwilling to take any significant measures.[21] Furthermore, Chapter VII speaks of what the Security Council may do, but does not govern intervention on humanitarian grounds per se, nor does it explain the what, how, why or when of a possible intervention on humanitarian grounds.

Though it is a step in the right direction to understand and recognize the fact that the Security Council must be the authorizing body, it is equally important to have a roadmap of sorts drawn up for the organ to evaluate each situation and determine whether it warrants intervention. In terms of the provisions the legal framework could contain, there are several aspects that must be handled. It should ideally mandate prior permission from the Security Council, emphasize the “humanitarian” factor as a prerequisite motive or at least the most preponderant amongst other

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motives, mandate the resort to military force as a last resort, most importantly, provide for the UN's oversight and accountability to the Security Council in carrying out such a mission, and generally advocate the need to adhere to accepted principles of respecting human rights of the people in the state that is intervened in.

A legal instrument or provision in itself is not a safeguard. A law cannot guarantee complete success of every endeavour of intervention on humanitarian grounds. But, with a law in place, a minimum standard of accepted behaviour and procedure is set. An accepted standard could well prove to be useful in setting right the chaotic state of affairs as they exist presently. At a time when the practice has already been oft employed in foreign policy, there is no doubt that a state can intervene on humanitarian grounds. Scholarly debates should stop focussing on whether the practice should be allowed or not, and shift to evaluate the expected standard and yardstick of behaviour that must be adhered to during an intervention on humanitarian grounds. The fact is that humanitarian intervention is here to stay, and instead of trying to get rid of it there is more prudence in allowing the lesser evil of a streamlined and legally-regulated form of humanitarian intervention to continue. When such a modus of intervention is accommodated under the rubric of the law with a clearly enunciated 'expected yardstick' to adhere to, its practical implementation can be subjected to control, and can be streamlined to bring in good results.

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[1] Alex de Waal and Rakiya Omaar *Can Military Intervention be "Humanitarian"?* <http://www.merip.org/mer/mer187/can-military-intervention-be-humanitarian>; The authors explain that the "customary law of humanitarian intervention" comprises the classic examples of 19th-century military "humanitarian intervention" when Britain, France and Russia cited persecution of Christians in Muslim-ruled territories of the Ottoman Empire. Britain intervened in Greece in 1830; France sent a military expedition to Syria and Lebanon in 1860; Britain sent troops to Crete in 1866.

[2] For instance, see Mary Kaldor, *Human Security: Reflections on Globalization and Intervention* (Polity Press, Cambridge, 2007), p.16.

[3] Some of these instances include the establishment of no-fly zones in Northern and Southern Iraq in 1991 and 1992, the bombing of the Bosnian Serbs by the NATO in 1995, and the NATO's Kosovo campaign against Yugoslavia in 1999.

[4] Malcolm N. Shaw, *International Law* 488 (6th ed., 2008).

[5] Yearbook of the ILC, 1966, vol. II, p. 248.

[6] See for instance H. Ganji, *International Protection of Human Rights*, New York, 1962; N. J. Wheeler, *Saving Strangers: Humanitarian Intervention in International Society*, Oxford, 2002; R. Goodman, 'Humanitarian Intervention and Pretexts for War', 100 AJIL, 2006, p. 107; R. B. Lillich, 'Forcible Self-Help by States to Protect Human Rights', 53 Iowa Law Review, 1967, p. 325, and Lillich, 'Intervention to Protect Human Rights', 15 McGill Law Journal, 1969, p. 205, and Lillich, 'Humanitarian Intervention Through the United Nations: Towards the Development of Criteria', 53 Za"oRV, 1993, p. 557; T. M. Franck and N. S. Rodley, 'After Bangladesh: The Law of Humanitarian Intervention by Military Force', 67 AJIL, 1973, p. 275; J. P. Fonteyne, 'The Customary International Law Doctrine of Humanitarian Intervention', 4 California Western International Law Journal, 1974, p. 203; Chilstrom, 'Humanitarian Intervention under Contemporary International Law', 1 Yale Studies in World Public Order, 1974, p. 93; D. J. Scheffer, 'Towards

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a Modern Doctrine of Humanitarian Intervention', 23 University of Toledo Law Review, 1992, p. 253; D. Kritsiotis, 'Reappraising Policy Objections to Humanitarian Intervention', 19 Michigan Journal of International Law, 1998, p. 1005; N. Tsagourias, The Theory and Praxis of Humanitarian Intervention, Manchester, 1999.

[7] See OPPENHEIM, *supra* note 5, at 312. "Humanitarian intervention derives from the teachings of Grotius." J.D. van der Vyver, Statehood in International Law, 5 EMORY INT'L L. REV. 9, 76 n.323 (1991).

[8] Jean-Pierre L. Fonteyne, The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity Under the U.N. Charter, 4 CAL. W. INT'L L.J. 203 (1973); Michael J. Bazylar, Reexamining the Doctrine of Humanitarian Intervention in Light of the Atrocities in Kampuchea and Ethiopia, 23 STAN. J. INT'L L. 547 (1987).

[9] Fonteyne, n.12, at 243-244.

[10] The rules of interpretation of statutes generally allow courts to interpret texts and statutes to avoid ambiguity. In domestic legal systems, sometimes, there are judges who "add" words into a legal provision, to "clarify" the meaning of a term.

[11] ICJ Reports, 1986, pp. 14, 94; 76 ILR, pp. 349, 428.

[12] Owing to a lack of any other legal instrument suggesting a list of sources, this article has been cited.

[13] W.D. Verwey, Humanitarian Intervention Under International Law, 32 NETHERLANDS INT'LL. REV. 357 (1985); Franck & Nigel S. Rodley, After Bangladesh: The Law of Humanitarian Intervention by Military Force, 67 AM.J. INT'L L. 275, 305 (1973).

[14] For instance, see Ian Brownlie, *International Law and the Use of Force by States* 338 (1963).

[15] Oscar Schachter, The Right of States to Use Armed Force, 82 MICH. L. REV. 1620 (1984).

[16] *Ibid.*

[17] See Fernando Teson, 'Humanitarian Intervention: An Inquiry into Law and Morality' 5 (1988) "[B]ecause the ultimate justification of the existence of states is the protection and enforcement of the natural rights of the citizens, a government that engages in substantial violations of human rights betrays the very purpose for which it exists and so forfeits not only its domestic legitimacy, but its international legitimacy as well."

[18] Clara Portela, 'Humanitarian Intervention, NATO and International Law: Can the Institution of Humanitarian Intervention Justify Unauthorized Action?' <http://www.bits.de/public/pdf/rr00-4.pdf>

[19] See for instance Mark S. Stein, 'Unauthorized Humanitarian Intervention' http://www.pegc.us/archive/Articles/Stein_UnauthHumInt.pdf on p.14 and Seybolt, Taylor B., Humanitarian Military Intervention: The Conditions for Success and Failure (2007). Oxford: Oxford University Press, 2007.

[20] Jean-Pierre L. Fonteyne, The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity Under the U.N. Charter, 4 CAL. W. INT'L L.J. 203 (1973) at 237.

[21] *Ibid.*

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