Does the End Justify the Means?

Should Humanitarian Needs Render the Use of Force Lawful?

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The Prohibition of the Use of Force in a Nutshell.

The prohibition of inter- state use of force is the cornerstone of contemporary international law. The rule is enshrined in Article 2 paragraph 4 of the Charter of the United Nations and urges all member states to "refrain 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."

Only two exceptions with respect to this rule are incorporated in the system of the Charter. The first being, Article 51 which allows states to use of force by virtue of their inherent right of individual or collective self- defence in response to an armed attack against them. The second exception is the Security Council authorization under Chapter VII of the UN Charter. The Security Council under this chapter of the Charter in enlisted with the task to undertake any action, including military action, in the event of threat to the peace, breach of the peace or act of aggression. Such authorization had been given, inter alia, for the action taken in Somalia, Rwanda, Bosnia- Herzegovina, East Timor and Côte d' Ivoire.[1]

Lastly, we shall mention that a state's use of force in the territory of another state is perfectly lawful if it has the consent of the other's state. This is not considered an exception to the rule of article 2 paragraph 4 since it does not fall within the ambit of the prohibition. It is clear that in such cases where the host state gives consent to other states to intervene, the latter do not really use force against a third state. Accordingly, the action is considered to be outside the ambit of the Charter's prohibition. Of course, the consent given must meet certain conditions in order to be valid.[2] An example of consent- based use of force are the so-called Peacekeeping Operations, at least, it early days. They are conducted by the United Nations or under other regional bodies and must always fulfill the criteria of consent, impartiality and deployment of exclusively defensive force.[3]

The Doctrine of Humanitarian Intervention

The question which naturally stems from the above analysis is whether there is a right of states to unilaterally use force against other states in order to achieve humanitarian ends, ie when neither the SC has so authorized nor the territorial state has consented to such action nor there is basis for a lawful exercise of the right of self- defence. In other words is there a right to the so- called humanitarian intervention? Dealing exhaustively with the

[1] SC Res 794 (1992); SC Res 929 (1994); SC Res 1031 (1995); SC Res 1264 (1999) and SC Res 1464 (2003) respectively.
[2] For the validity of consent see Art. 20 ILC Articles on State Responsibility (2001).
[3] http://www.un.org/en/peacekeeping/operations/peacekeeping.shtml .

definitional difficulties of this doctrine is beyond the spatial confines of the present article;[4] Briefly, according to the International Commission on Intervention and State Sovereignty (ICISS) the doctrine of humanitarian intervention refers to "*action taken against a state or its leaders, without its or their consent, for purposes which are claimed to be humanitarian or protective* […]."[5] For the purpose of our question we can assume the best- case scenario- that the purposes are actually humanitarian, i.e. to end grave human rights abuses or to manage humanitarian catastrophes. To assess whether use of force is lawful, even in such a scenario, we may examine the pertinent rules of international law as they stand today.
All legal arguments supporting the existence of a right to humanitarian intervention revolve around the nature and the interpretation of article 2 (4) of the UN Charter and are the following:

Narrow interpretation of article 2 (4).

Article 2 (4) prohibits the "*use of force against the territorial integrity or political independence of any state*." It has been argued that this part of the wording of the article is crucial for the determination of the scope of the prohibition imposed. The UK, for instance, claimed in the *Corfu Channel* case (UK vs. Albania) that its use of force against Albania did not violate article 2 (4) because it did not threaten the territorial integrity or the political independence of Albania. The International Court of Justice rejected this argument.[6] Israel has also used this line of argumentation with respect to Entebbe's incident in 1976, finding though no acceptance by other states.[7] Such a view would allow states to use force against other states claiming abusively that the force used turns against an alleged humanitarian crisis and hence not against the territorial integrity or political independence.

This *a contrario* interpretation of article 2 (4) is rather weak and has been widely isolated among scholars.[8] Besides other theoretical and historical considerations, this position seems to ignore both the object and purpose of the article, which is clearly to flatly prohibit any interstate use of force. It is true that the Charter contains also other objectives such as protection of human rights (preamble). However, the balancing of the various objectives has been done by the Charter itself and is not left to the judgment of the member states.

ii. Non- peremptory nature of the prohibition of the use of force.

It is widely accepted that the prohibition of the use of force as enshrined in article 2 (4) of the Charter reflects customary international law. What is more a great majority of scholars endorse the view that the prohibition enjoys also a peremptory character. Nevertheless, this view is not uncontested. It is thus argued that a rule subject to exceptions

[4] On this see, *inter allia,* A. Hehir, *Humanitarian Intervention: An Introduction* (Palgrave Macmillan 2013), at chapter 1.
[5] ICISS Report, *The Responsibility to Protect* (2001), at 8.
[6] *Corfu Channel,* ICJ Reports (1949), at 34.
[7] SC 1942nd meeting (1976), at 102.
[8] See for relevant bibliography in O. Corten, The Law against War, at 498; See also UN Charter's Commentary, art. 2 (4) (Simma *et al.* eds), at 37, where stated that *"the terms "territorial integrity" and "political independence" are not intended to restrict the scope of the application of the prohibition of the use of force."*

does not qualify for acquiring a *jus cogens* status and that recent developments of the rule prove that it is not frozen in time as a peremptory nature would require (see for example the new concept of cyber-attacks).[9] A less stringent view supports that only the very core of the prohibition constitutes jus cogens, ie the one referring to aggression.[10]

The legal nature of the prohibition is crucial for our question. If article 2 (4) is to be considered a peremptory rule of international law, it can never be overruled by a new rule of customary or conventional nature. Article 53 of the VCLT is clear on this by saying that a peremptory norm "*can be modified only by a subsequent norm of general international law having the same character*." Conversely, if article 2 (4) is not a *jus cogens* rule -at least in its entirety- this would mean that a new customary rule regarding humanitarian intervention could emergence overruling or operating along with article 2 (4).

iii. Customary law rule on humanitarian intervention.

In the case that the *jus cogens* character of the norm is rejected or only the prohibition of aggression is to be considered as such, then there is room for a new customary rule on humanitarian intervention to emerge. State practice complemented by opinio juris becomes therefore necessary.

Occasionally, states have relied on the doctrine of humanitarian intervention. As it will be shown however below, state practice on this respect is rather sparse. The UK is actually the leading state supporting the existence of such a right. The UK Foreign and Commonwealth Office endorsed in 1992 the doctrine of humanitarian intervention by saying that "*international intervention without the invitation of the country concerned can be justified in cases of extreme humanitarian need.*"[11] In 2000 the UK Foreign Secretary submitted to the UN SG a guidance to intervention in response to massive violations of humanitarian law and crimes against humanity. In the case before the ICJ regarding the *Legality of the Use of Force (Yugoslavia v. Belgium, UK and others*) the UK and Belgium were the only countries to expressly endorse the doctrine of humanitarian intervention. In the words of the UK: "In the exceptional circumstances of Kosovo it was considered that the use of force would be justified on the grounds of overwhelming humanitarian necessity, without Security Council authorization." The other respondents of the case did not invoke it in their line of argumentation, whereas some had even previously explicitly rejected it.[12] What is more, Group of 77 (an organization that speaks for 132 UN Member States) adopted in 1999 a foreign ministers' declaration stating that the Ministers rejected the so called right of humanitarian intervention, which has no basis in the UN Charter or in international law.

A similar declaration was also adopted by the 115 States of the Non-Aligned Movement in 2000 and in the same year by the 57 Member States of the Islamic Conference

[9] For an extensive analysis of the relevant debate see J. Green, "Questioning the Peremptory Status of The Prohibition of The Use of Force" (2011) 32 *Michigan Journal of International Law* 215. See also *Nicaragua,* Merits, ICJ Rep. 1986, at 190.

[10] See for example the Report of the ILC 53rd Session (2001), at 283 (4) and GA Res 3314 (1974) which excluded considerations of political, economic, military and other nature as justification only for aggression, not referring generally to use of force.

[11] UK Materials on International Law, 63 BYIL (1992), at 826.

[12] See for example Germany's Declaration in the GA in 1999, A/54/PV.8, at 12.

Organisation. Generally, it is apparent that, NATO action against Yugoslavia is still strongly controversial and considered by the majority of states and commentators as illegal.[13]

All the above documents of course, except for the SC Resolution, are of soft law nature. This is indicative of the lack of consensus in the area. These documents present the general trend regarding the doctrine, which is a general reluctance of explicitly endorsing it. Even scholars who seem to believe that a right to humanitarian intervention should be legal because of its moral value, confirm that under contemporary international law such right does not exist.[14]

The Relevance of Humanitarian Needs in the SC Decision-making Procedure.

Humanitarian Intervention may have not been recognized by international community but humanitarian considerations are very often part of the international political agenda. The Security Council and more generally the United Nations being a political rather a legal organ takes into account humanitarian needs that that exist in various incidents. In a political speech the Secretary General of the United Nations mentioned in 2000 that: "Humanitarian intervention is a sensitive issue, fraught with political difficulty and not susceptible to easy answers. But surely no legal principle - not even sovereignty - can ever shield crimes against humanity." This statement foreshadowed the emergence of the "Responsibility to Protect" context. In 2001 the ICISS published a report on this. "Responsibility to Protect" usually refers to military action taken within the humanitarian concept, through the SC authorization though. As far as unauthorized intervention is concerned, the ICISS left open the question whether and under what circumstances such an intervention would be valid in legal terms and seemed to propose a balancing exercise by wondering: "*where lies the most harm: in the damage to international order if the Security Council is bypassed or in the damage to that order if human beings are slaughtered while the Security Council stands by?*"[15]

In 2004 the UN High-Level Panel on Threats, Challenges and Change in its report focused rather exclusively on the collective responsibility of states always associated with action by the Security Council. Its reference to the "*responsibility to protect of every state when it comes to people suffering from avoidable catastrophe […]*"[16] does not suffice for us to extract a conclusion for the allowance of humanitarian intervention. The 2005 Report of the Secretary General did not explicitly reject unilateral action nor however accepted it.[17] At the same year, the participants of the World Summit emphasized each state's responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. However, they declared that they are "*prepared to take collective action […] through the SC, in accordance with the Charter, including Chapter VII, on a case-by-case basis […].*[18] The SC Res. 1674

[13] UN Press Release GA/SPD/164 (1999); See also Byers and Chesterman, Changing the rules about rules? Unilateral humanitarian intervention and the future of international law in Holzgrefe and Keohane (eds.), *Humanitarian Intervention* (CUP 2003) at 184.
[14] *Inter alia,* A. Peters, "Humanity as the A and Ω of Sovereignty" (2009) 20 (3) *EJIL* 513.
[15] *Ibid.* at 6.37.
[16] UN Report of the SG's High Level Panel, A More Secure World: Our Shared Responsibility (2004), at 201.
[17] UN Doc. A/59/2005, In Larger Freedom: Towards Development, Security and Human Rights for All, at 111-113.
[18] UN World Summit, Outcome Document, at 138- 139.

(2006) reaffirmed these provisions of the Outcome Document. The UN Security Council has in recent years demonstrated its capacity and willingness to intervene in internal conflicts. It has already done so with respect to Libya where authorized a no-fly zone and protection of civilians (SC Res 1973/ 2011).

Conclusion

In the light of the above, it is submitted that international law as it stands today does not allow humanitarian intervention outside the framework of the UN Charter. Even those who support the moral value of it, do recognize that positive international law contains no pertinent right. What is more, state practice shows that humanitarian reasons are always a complementary and fall back justification accompanying classical legal reasoning. State's consent or SC authorization remain the only two possible ways for third states to initiate military action serving humanitarian objectives.