LEGALITY OF HUMANITARIAN INTERVENTION & THE CASE OF AFRICAN UNION’S RIGHT OF INTERVENTION

Maushumi Bhattacharjee¹

ABSTRACT

In May 2001, all but one African state ratified a regional treaty, the African Union (AU) Constitutive Act, which provides for intervention inside AU member states against genocide, crimes against humanity and war crimes. The AU Constitutive Act is the first international treaty that institutionalized the cosmopolitan ideal of protecting people inside states against mass atrocities as a matter of common obligation.

The Article begins with discussing the legality of Humanitarian Intervention under International Law. It shall further analyse in depth this right of intervention of the African Union. A series of questions that follow are why did the state consider it necessary to include the intervention clause and how that clause would be implemented in practicality.

The objective of this article is to explain the AU’s right of intervention against genocide, crimes against humanity and war crimes in its normative and institutional context. The article shall also explain the right of intervention under international law.

¹ 4th Year BBA LLB Student, Institute of Law Nirma University
INTRODUCTION

The legality of humanitarian intervention is a highly debatable issue under International Law. It might appear that the concept of humanitarian intervention is actually in contravention to the United Nations Charter, but several cases have shown that it can be a legal way of preventing or mitigating the effects of wars or genocides. Humanitarian intervention is actually a part of the laws that govern the use of force it is mostly state practice that stands as a legal argument in its favour. The fact of the matter is that humanitarian intervention actually can be both legal and illegal as it is a constant battle between sovereignty of a state and primacy of humanity.

Article 2(4) of the UN Charter states 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 Purposes of the United Nations.”

Therefore the United Nations Charter basically takes away the right of states to intervene and use force in matters of settling disputes and try resolving their issues peacefully, as stated under Article 2(3) of the Charter. It gives power to the Security Council to maintain international peace and security (Article 24), through which it can take measures essential in that pursuit whether it is military action or other threats against the states (Article 42). Such intervention when authorised by the Security Council shall be explicitly seen as legal as long as it falls in line with its goals of maintaining international peace and security (Article 39). So basically the Carter takes away the rights of states to intervene into matters of other states and gives that right to a central authority namely the Security Council depriving the states to misuse such rights as legal channels of waging unnecessary wars.

The most major justification given for humanitarian intervention is the right of self defence. The concept states that a military response to an armed attack against a state can be justified on the grounds of self defence provided that it was a necessity and in proportion to the attack. For example, Operation Babylon which was the Israeli air strike that destroyed the Iraqi nuclear reactor under construction. Israel claimed self defence because according to their intelligence, the Iraqi nuclear reactor was designed to make nuclear weapons and not just to
be used for scientific research as the Iraqis claimed. Such an attack was neither a necessity nor a proportional one and was highly opposed by the international community and the Security Council, setting an example against the concept of intervention. Article 51 which states that “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs.” is thus legally separate from what is written and stated as illegal in Article 2(4) of the Charter. Humanitarian intervention has thus developed around this justification to use of force and is such presented before the legal environment.

The plain language of the Charter seems to prohibit any sort of intervention by the states other than self-defence. If we look at the famous Israeli raid under Operation Entebbe in response to the hijacking of an aircraft by the Palestinian hijackers in Uganda, the Organisation of African Unity (presently, the African Union) challenged Israel with an act of aggression. Even though the raid was strongly appraised by the western nations and also termed as an act of self-defence, many nations including the Swedish government saw the operation as a gross violation of the Charter and said, “Any formal exceptions permitting the use of force or of military intervention in order to achieve certain aims, however laudable, would be bound to be abused, especially by the big and strong, and to pose a threat, especially to the small and weak.”

Many international treaties have been formed following the Charter encourage humanitarian intervention, thus contradicting the Charter, like the Genocide Convention or the African Union Constitutive Act, which allow certain level of state intervention. However these treaties do not hold legal basis under International law, as the Charter acting as the constitutional law, under article 103 states that, “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”

Now let us see the Kosovo case. Discrimination of the Albanian population had worsened and a civil war like situation had arisen. After the experience of Bosnia where peace had been brought too late, the NATO countries felt that it was necessary to take control of the situation. After failed warnings by the NATO states that such violence will not be tolerated, they began

---

2 Gray, International Law and the Use of Force.
air strikes on the Serbian forces and defeated them forcing them to retreat from Kosovo. The intervention is surely in contravention with the provisions of UN Charter but the real question is, whether such humanitarian intervention, though illegal was legitimate. Even after several years since the NATO intervention in Kosovo, and after several discussions among the international community the basic attitude and feeling towards humanitarian intervention had not changed.³

THE CASE OF AFRICAN UNION’S RIGHT OF INTERVENTION

The Rwandan genocide is seen as one of the most disastrous failures of International Community in the history of mankind, a failure that resulted in the mass murder of about 800,000 people over a period of 100 days. One of the reasons for this failure was also the decision of United States to not intervene as it had no national interest in jeopardy.⁴ Could humanitarian intervention in Rwanda have saved thousands of lives just like the case of Kosovo or could it have made the situation worse?

African union is a continental union consisting of all 55 African states. It was launched with the aim of replacing Organization of African Union (OAU). In 2001 all states except one (Morocco) signed the African Union Constitutive Act. The treaty provided a right of intervention to the member states to prevent war crimes and genocides. This was certainly in contradiction with the age-old practice to strictly follow the principles of sovereignty and non–intervention by the African states. The dreadfulness of Rwandan Genocide and several other political factors were the reason behind the unanimous decision of African states to ratify the treaty.

The African Union is based on Cosmopolitanism which basically upholds humanity over sovereignty, thus violating the basic principles of International Law which does not allow intervention for humanitarian reasons.⁵ African Union and the Genocide Convention are

---


treaties that violate this principle of national law and are unethical to the sovereign centric international law.

Kofi Anan, the former UN Secretary General in his Millennium report had put forward a question before the General Assembly that how would one respond to situations like Rwandan Genocide which are grossly violating the human rights, if the international law dominantly believes that humanitarian intervention is just an attack to sovereignty of the states.\(^6\) In response to the report International Convention of Intervention and State Sovereignty (ICISS) was established by the efforts of the Canadian Government to prepare a comprehensive report studying the various political, legal and humanitarian aspects justifying and opposing intervention by states and formulating suggestions for alternative actions. The report was formed and submitted, and it carried heavy arguments in favour of humanitarian intervention and the Responsibility to protect doctrine was formulated. However these efforts were futile as there was no institutionalization of the framework reducing the entire report to merely an honourable argument.

THE RIGHT OF INTERVENTION OF AU\(^7\) RESPONSIBILITY TO PROTECT UNDER ICISS

There are certain reasons why ICISS report has used the word “responsibility” instead of “right” to intervene. One of the reasons was to make the language seem less aggressive and the other important intention was to include prevention and rebuilding also within the ambit of responsibility. The right to intervene in AU doesn’t contradict the responsibility to protect, however there are certain variations:

a) The Right to Intervene is used for crimes against individuals and communities and not the states.

b) The AU constitutive treaty binds the 55 member states of the AU and they share a collective responsibility against war crimes, genocides or crimes against humanity.

c) The right to Intervention only talks about intervening in cases of commission of such crimes within the union and does not talk about post intervention actions like


\(^7\) Short form for African Union used hereafter.
prevention of future crimes or rebuilding of the affected states, unlike the Responsibility to Protect.

d) The AU constitutive Act does not clarify as to what measures will constitute intervention in cases of such crimes whereas the ICISS Responsibility to Protect talks about military, political and economic measures. However the interpretation of Right of Intervention also includes non-military measures because political and economical intervention is not something new to the Union’s state practice.

IMPLEMENTATION OF THE RIGHT OF INTERVENTION

There are certain standards and criteria that have to be met before military intervention can be applicable. Six criteria have been enumerated by the ICISS which are also applicable in the case of AU. These criteria are:

a) Right Authority: The AU assembly passes the final verdict on application of military intervention and the verdict must achieve the consent of all member states of the Union. It does not require the consent of UN Security Council like in ICISS, but if any member state refuses to give consent for military intervention then the states will have to consult the UN Security Council before any military action is taken.

b) Just Cause: The AU Constitutive Act clearly specifies the cases wherein military action will be justified and that is to prevent war crimes, genocides and crimes against humanity.

c) Right Intention: The intention behind the military intervention should be stopping the violation of human rights and not undermining of the sovereignty or independence or territorial integrity of the states.

d) Last Resort: The last resort theory means that military action must only be taken once all other non-military methods of intervention such as a political dialogue or diplomatic discussions between the states were futile in solving the problem and the crimes against humanity have already begun.

---

e) Reasonable Prospects: The military intervention must not create a bigger problem than its trying to avoid and a balance must be maintained between the intervener and the states.

f) Proportional Means: The military intervention should not be grossly out of proportion and it must aim at controlling the situation with minimum casualties rather than blowing the whole thing out of proportion, in confirmation with the *jus ad bellum* standards.

The implementation of right of intervention in AU is done by specific institutions such as the AU Assembly, AU Peace and Security Council, African Standby Force and The Peace Fund.

**ARGUMENTS IN FAVOUR OF HUMANITARIAN INTERVENTION**

International law has not developed as an impulsive legal reform, but as responses to various historical events. International Law can thus be said is of dynamic nature and it is the law which largely depends on the changes in international relations between states. It also depends on the changing needs of the society, just like any other law, it is not stagnant but ever-changing in nature. The UN Charter was formed right after the world wars and its provisions reflected the need to maintain peace and security among the International Community. However, over the years several situations have risen to show the need for a change in the language of the UN Charter in order to incorporate Humanitarian Intervention and legalise it in the eyes of International community.

International law which derives its source from treaty law has constantly observed the formulation of treaties that do not strictly follow the Eurocentric principles mentioned in the Charter. Some say that Article 2(4) that prohibits wars has lost its significance and enforceability as there have been several violations within the international community. The use of drones by US and unprecedented drone strikes in Pakistan and Afghanistan is a latest example of how the clause is ignored and violated. What is to be noticed is that if the Charter is no longer in control of the use of force by states, then there is a need for a better and modified version of the Charter clauses in order to prevent misuse of their weakness with respect to enforceability of Article 2(4).
Some argue that humanitarian intervention has already been rendered as legal under international law on the basis of events that show consistent state practice. The key argument in their statement is that there is now a clash between the power of norms and power of state practice. Several cases show how states have used humanitarian intervention to justify their use of force. We have already discussed the Kosovo case above.

The case of AU’s right of intervention is clearly a case where a treaty has been formulated in contradiction to the charter and has given the power to their member states to intervene in cases of war crimes and genocides. This can be seen as a step in direction towards codification of modernistic views on humanitarian intervention. The Genocide Convention also sets a similar example. However it is necessary to formally legalise humanitarian intervention in the Constitutional Document and provide for its restrictive implementation bases on the criteria of ICISS report so that states do not see it as an opportunity to misuse their right by unnecessary intervention and use of force in other states. This can also be seen as a solution to the case of United States’ use of force through drone strikes against the Islamic countries. This could also be a defining way of stabilizing the Syrian crisis. Therefore, amending the Charter by taking examples from the African Union and the ICISS report, on the matter of humanitarian intervention shall be a positive and a definitive approach in such a sensitive and debatable matter.

There have been many discussions about whether the NATO intervention in Libya led by Obama was done with the humanitarian objective or a political one, that is, to bring down Quaddafi? While the intervention may meet the just cause and right intention principles, and may fair well in the test imminent threat and danger of genocide, many argue that there has been selective action when it comes to intervention by NATO states. Worse situations prevailed in the Rwandan crisis and also in recent Syrian crisis, yet humanitarian intervention seems be inconsistent in this respect.\(^9\) This only furthers the need for proper codification and clarification with respect to the subject of Humanitarian intervention by the UN.

Another argument made by several commentators is that if a country loses its sovereignty, then any kind of humanitarian intervention will be justified and not deemed to be illegal under the Charter. However this may not involve any responsibility to protect by external states, but an unstable government that no longer meets the minimum standards to claim

---

sovereignty will lose its protection against non-intervention. This can further be studied in light of the Libyan Case of intervention.

CONCLUSION

The debate over legality of humanitarian intervention is subject to various uncertainties and contradictory interpretations which exist concurrently and cannot be purged. However this does not mean that law must be ignored, but instead of blind following of a stagnant language of the Charter, the dynamic nature of International Law must be duly recognised and necessary amendments must be made in furtherance of such objectives. The legality of humanitarianism is therefore dependent on the theory of how law changes with time. The law may well be illogical, but it remains politically powerful and therefore important. The challenge for the international community is to find a balance between the rule of law and contradicting theory of its implementation.

The approach of the African Union in incorporating the Right of Intervention was a step towards upholding the cosmopolitan principles of preventing war crimes and crimes against humanity in their own state. A lot of work would be needed with respect to the implementation credibility of the intervention. Yet it still is the only treaty legally binding the right of intervention against genocide and crimes against humanity.