HUMANITARIAN INTERVENTION: CHALLENGING THE PRINCIPLE OF NON-INTERVENTION, UPHOLDING HUMANITY*

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Abstract

The United Nations (UN) was established under the notion of equality among member States. Such notion is exercised and crystallized through the principle of non-intervention. Over decades the principle of non-intervention has been the root of international relations in which it embodies a stringent rule that a state cannot intervene in another state's affairs. On the other hand, international law recognizes human rights as part of *jus cogens* and in several cases giving rise to *erga omnes* obligations. In cases where violations of human rights occurwithin a state,conflict ascends on which interests of the international community should be upheld since the principle of non-intervention and human rights are contradictory one to another. It is true that such conflict may be anticipated through Security Council (SC) action, but, is the SC on its ownreally effective? Several cases have indicated the failures owed by the SCand have left a shattering tragedy in the civilized history. This article will observe the newly emerging customary law of humanitarian intervention and argue the necessity in recognizing such intervention in contemporary international law despite the existence of the old established rule of non-intervention.

Intisari

Perserikatan Bangsa-Bangsa (PBB) didirikan atas dasar kesetaraan terhadap negara-negara anggotanya. Kesetaraan ini dilaksanakan dan telah dikristalisasikan melalui prinsip non-intervensi. Prinsip tersebut telah menjadi akar dari hubungan internasional dimana di dalamnya diatur aturan yang ketat bahwa suatu negara tidak dapat melakukan intervensi terhadap urusan negara lain. Dalam lain hal, hukum internasional mengakui hak asasi manusia (HAM) sebagai bagian dari jus cogens, *bahkan dalam beberapa kasus menimbulkan kewajiban*erga omnes. *Dalam kasus pelanggaran HAM di suatu negara, suatu konflik muncul terkait kepentingan mana yang harus dipertahankan oleh dunia internasional karena prinsip non-intervensi dan HAM tersebut bertentangan antara satu dengan yang lainnya. Memang benar bahwa konflik tersebut dapat diantisipasi melalui tindakan Dewan Keamanan (DK) PBB, tapi apakah DK sendiri sudah efektif? Beberapa kasus menandakan kegagalan dari DK, yang mana menjadi tragedi bagi sejarah manusia yang beradab. Artikel ini akan mengamati lebih lanjut hukum kebiasaan tentang intervensi humaniter yang mulai muncul dan menelaahkebutuhan untuk mengakui bentuk intervensi tersebut dalam hukum internasional kontemporer meskipun telah ada aturan tentang non-intervensi yang sudah lama terbentuk.*

Keywords: Non-intervention, violation of human rigths, and humanitarian intervention.

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A. INTRODUCTION

1. The Principle of Non-Intervention

The principle of non-intervention has been the core of international relations for over decades. The United Nations (UN) as an international organization possessing a universal character,[1]has acknowledged non-intervention as one of the core principles under its Charter by affirming the importance of States in refraining from any threat or use of force against other States.[2] The principle of non-intervention bestows States with absolute discretion in governing its own territory without any occasion to be disrupted by other States.

The General Assembly of the United Nations (GA) had also successfully adopted resolutions which acknowledge the principle of non-intervention. This is reflected in its resolutions such as GA Resolution 2131 (XX) of 21 December 1965 and Resolution 2625 (XXV) of 24 October 1970. A General Assembly resolution, although non-binding in character, could at times possess a normative value whereby in several circumstances can be a determining indication to assess the existence of a rule or the emergence of an *opinio juris* (Legality of the Threat or Use of Nuclear Weapons, 1996). According to Shaw, *opinio juris* is the factor that turns a practice into a custom and renders it part of the rules of international law (Shaw, 2008).The applicability of the principle of non-intervention is thus universally valid. In this regard, it extends its application even to States who are not members of the United Nations (Malanczuk, 1997). The International Court of Justice (ICJ) reaffirms practices pertaining to the binding scope of the principle of non-intervention and further affirmed it to be a part of customary international law.[3]

In the Corfu Channel case, the judges of the ICJ opined that the alleged right of intervention as the manifestation of a policy of force, gives rise to most serious abuses and cannot, whatever be the present defects in international organization, find a place in international law. This notion is also supported as interventions would generally be conducted only by the most powerful States, and might easily lead to perverting the administration of international justice itself (Corfu Channel case, 1949).Their subsequent judgment in *Nicaragua* also reaffirms the existence of such customary law whereby the court ruled that the principle forbids all States or groups of States to intervene directly or indirectly in internal or external affairs of other States (Nicaragua v. United States of America, 1986).

The principle of non-intervention in its development has unfortunately been used as a shield for State actors to legitimize violations of human rights in which the international community cannot intervene.

2. Human Rights as a Part of *Jus Cogens* and the Rising of *Erga Omnes* Obligations

Pursuant to Article 53 of Vienna Convention on the Law of Treaties, *jus cogens* is a peremptory norm of general international law accepted and recognized by the international community of States.

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[1] See Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character.

[2] This principle is codified within Article 2(4), United Nations Charter, hence, it could also be argued that this codification gives rise to a treaty obligation towards UN Member State to respect such principle.

[3] See *Corfu Channel case*, Judgment of April 9th, 1949: I.C.J. Reports 1949, p.4. (*Corfu Channel*), *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America). Merits, Judgment. I.C.J. Reports 1986, p. 14 (*Nicaragua*).

Jus cogens as a norm, does not permit any derogation and can be modified only by a subsequent norm of general international law having the same character. In relation to this, human rightsis increasingly perceived as part of *jus cogens*, one prime example of this matter is taken from the practice of the United Nations. In regards to human rights, the United Nations made a clear reference towards the universal respect of human rights as a State's purpose and that the all its members shall pledge to take joint or separate actions in order to achieve such purpose. This is implemented in various legal instruments adopted to accord the protection towards human rights, namely:

a. Universal Declaration of Human Rights (1948);

b. the Convention on the Prevention and Punishment of the Crime of Genocide (1948);

c. the International Convention on the Elimination of All Forms of Racial Discrimination (1965);

d. the International Covenant on Economic, Social and Cultural Rights (1966); the International Covenant on Civil and Political Rights (1966);

e. the Convention on the Elimination of All Forms of Discrimination Against Women (1979); the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984); and

f. the Convention on the Rights of the Child (1989).

The International Covenant on Civil and Political Rights (ICCPR) as one of the binding instruments governing the protection of human rights explicitly expressed that several rights cannot be derogated even during times of emergency. Pursuant to Article 4.2 of the ICCPR, such rights are:

a. the right to life,

b. the right of not being subjected to torture or to cruel, inhuman or degrading treatment or punishment, and without his free consent to medical or scientific experimentation,

c. the right of not being held in slavery;

d. the right of not being imprisoned merely on the ground of inability to fulfill a contractual obligation.

e. the right of not being held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed;

f. the right to recognition everywhere as a person before the law;

g. the right to freedom of thought, conscience and religion.

Hence, such rights are transformed into part of jus cogens due to their non-derogable character.

The *Barcelona Traction* case before the ICJ ruled that *erga omnes* obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human

person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law; others are conferred by international instruments of a universal or quasi-universal character. (Barcelona Traction, Light and Power Company, Limited, 1970). Thus, the violation of *jus cogens* rights will give rise to the *erga omnes* obligations.

A former Judge of the ICJ, Bruno Simma, also notes that when human rights are violated, there simply exists no directly injured State because international human rights law does not protect States but rather human beings or groups directly. Consequently, the substantive obligations stemming from international human rights laws are to be performed above all by the State bound by it, and not *vis-à-vis* other States. In such instances to adhere to the traditional bilateral paradigm and not to give other States or the organized international community the capacity to react to violations would lead to the result that these obligations remain unenforceable under general international law (Bruno Simma in Karl Zemanek, 2000).

However, the established status quo indicates that despite the *erga omnes* obligation owed to the international community to end violence and violation of human rights in a particular state, the principle of non-intervention still prevails. As the ICJ has noted in *Nicaragua*, "in any event, while the United States might form its own appraisal of the situation as to respect for human rights in Nicaragua, the use of force could not be the appropriate method to monitor or ensure such respect" (Nicaragua v. United States of America, 1986). Hence, such obligation is conferred solely to the United Nations Security Council.

B. DISCUSSION

1. Flaws within the United Nations Security Council

Bestowed by the competence to adopt a binding decision as stipulated under Article 25 of the UN Charter, the Security Council of the United Nations holds primary responsibility in the maintenance of peace and security. The Security Council may also authorize member States to resort to the use of force in situations that threaten international peace and security as seen from the practices in the authorizations to take all necessary measures in Iraq through Resolution 678 and Libya through Resolution 1973.

The execution of this enormous power however is not constantly in accordance with the purposes and objectives of the UN itself. As noted by Forsythe, the Security Council is primarily a political body, and its actions on human rights depend heavily on political will and political consensus, especially among the permanent members (Forsythe, 2012). An appalling example on how the Security Council had confused politics and humanity could be inferred during the 1994 genocide in Rwanda. In order to stop the ongoing violence in Rwanda, the Security Council initially established United Nations Assistance Mission for Rwanda (UNAMIR) which was mandated only to contribute to the security of the city of Kigali through Resolution 872. During the period of genocide, the Security Council reduced the number of UNAMIR to about 270 and changed UNAMIR's mandate.[4] However, such change still did

[4] See UN Security Council, *Resolution 912 (1994) Adopted by the Security Council at its 3368th meeting, on 21 April 1994*, 21 April 1994, S/RES/912 (1994) and Report of the Independent Inquiry into the Actions of the United Nations during the 1994 genocide in Rwanda (1999) available at http://daccess-dds

not grant UNAMIR the power to take effective action to halt the continuing massacres (Letter to the President of the Security Council, 1994). Countries such as Brazil, China and United Kingdom are reportedly against to the idea of intervention by the UN (Independent Inquiry Report, 1999). Such failure to take necessary measures eventually led to the death of approximately 800,000 people (Independent Inquiry Report, 1999). Hence, it would be difficult to solely rely on the Security Council since its political character could possibly lead to failure to act despite an urging predicament occurs.

Another flaw within the Security Council also could be perceived from the way it adopts a resolution. Pursuant to Article 27 of the UN Charter, the Security Council, in passing a resolution on substantive matter requires concurring votes of the permanent members, such rule indirectly establishes what is known as the veto power of the 5 permanent members of the Security Council (Köchler, 1991). Such veto power however, could be a defect at the same time as in several emergency situations, the Security Council failed to reach consensus due to vetos by its permanent members. The most recent case in relation to this is the 2012 conflict in Syria, where due to negative votes from two permanent members, the Security Council failed to adopt a resolution that would have extended the mandate of the United Nations Supervision Mission in Syria (UNSMIS) and which would have threatened sanctions on the country if demands to end the spiraling violence were not met (United Nations Department of Public Information, 2012).

Thus, several flaws within the Security Council should be an opportunity for the international community to contemplate and find another appropriate method in the event that international peace and security is grossly disturbed through violations of human rights. One of the possible solutions to end the predicament could be derived from the new emerging custom of humanitarian intervention.

2. Humanitarian Intervention: Effective Solution?

It is undoubtedly acknowledged that violation of human rights disturbs every individual's sense of humanity and leaves scars in the history of mankind. Recent developments have shown that the international community is getting more aware of the *erga omnes* obligation to stop human rights violation due to the failure to act by the Security Council. As noted also in the *Tadić* case, the impetuous development and propagation in the international community of human rights doctrines, particularly after the adoption of the Universal Declaration of Human Rights in 1948, has brought about significant changes in international law, notably in the approach to problems besetting the world community. A State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach (Prosecutor v. Duško Tadić, 1995).

Consequently, the obligation to end the violation of human rights is increasingly exercised through humanitarian intervention, which is defined as the threat or use of force across state borders by a state (or group of States) aimed at preventing or ending widespread and grave violations of the fundamental human rights of individuals other than its own citizens, without the permission of the state within whose territory force is applied (Holzgrefe, 2003). The General Assembly also took the same view whereby it is stressed to continue consideration of the responsibility to protect populations from

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genocide, war crimes, ethnic cleansing and crimes against humanity and its implications (General Assembly, 2005). The Constitutive Act of the African Union also adopts the same position, whereby Article 4(h) stipulates that, "the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity [...]." These instruments indicate the sense of legal obligation owed by the international community in exercising the notion of humanitarian intervention.

Several practices reflects the implementation of humanitarian intervention in addressing gross human-rights violation that occurred within a state, such as in Kosovo in 1999 and Uganda in1979whereby intervention took place without the authorization from the Security Council and with the purpose of ending the violation of human rights. In Kosovo, it is largely assumed that NATO air intervention against Yugoslavia falls within the ambit of the doctrine of humanitarian intervention, as the Alliance itself declared to have intervened on the basis of overriding humanitarian purposes (Kumbaro, 2001). The former Secretary-General, Kofi Annan, has blessed the outcome of such intervention as it referred that it is, "emerging slowly, but [...] surely, is an international norm against the violent repression of minorities that will and must take precedence over concerns of state sovereignty" (Annan, SG/SM/6949 HR/CN/898, 1999).

While in Uganda, Idi Amin's regime engaged in extreme, widespread human rights abuses in Uganda from 1971-1979. During his regime, it is estimated that 300,000 Ugandans were executed and thousands more were expelled. The horror however, stopped after Tanzania invaded Uganda and overthrew Amin's government in 1979. Amin fled into exile in Malawi and Tanzania (Nowrot & W.Schabacker). Hence, it could be argued that Tanzania's intervention in Uganda was because, by overthrowing the Amin dictatorship, it saved more lives than it cost (Holzgrefe, 2003).

Former Secretary-General of the United Nations, Kofi Annan, once questioned the prevalence of principle of non-intervention towards violation of human rights. He stated, "If humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica—to gross and systematic violations of human rights that offend every precept of our common humanity?" (Annan, 2000).

Responding to Annan's question, the Government of Canada established the International Commission on Intervention and State Sovereignty (ICISS). ICISS then launched a codification on the concept of Responsibility to Protect (R2P). Such concept provides a threshold on what kind of violations of human rights could render a just cause in launching a military intervention. The justifications are sets of circumstances, namely in order to halt or avert (International Commission on Intervention and State Sovereignty, 2001):

a. large scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation; or
b. large scale "ethnic cleansing," actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape.

Although R2P is considered as a different concept than humanitarian intervention, the rationale in which it was created was entrenched on the practices of

humanitarian intervention. Thus, R2P provides an even clearer understanding on the grounds and conducts where humanitarian intervention could be justified. Finally, as noted by the ICJ, it is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States (Continental Shelf, 1985). Several *opinio juris* accompanied by the practices as elaborated above indicate that the notion of humanitarian intervention deserves the status of customary international law. Thus, this rule of humanitarian intervention is a clear proof that human rights violation can be effectively stopped and at the same time fulfilling the *erga omnes* obligations to protect and preserve human rights.

C. CONCLUSION

In order to establish an equal world where there is no subordinate relationship between States, the principle of non-intervention has been recognized and upheld by the international community to be the leading norm to protect and preserve the notion of equality. Thus, a state is given absolute jurisdiction to govern its own territory.

However, the price for applying strict interpretation of such principle is overwhelming. The world has seen horrors as millions of people had been deliberately killed as a result of the failure of the international community to respond towards violation of human rights due to the prevalence of non-interventionism.

The international community can no longer be silent on this issue. A new paradigm is urgently needed to address human rights violation. Such paradigm can be derived from the rule of humanitarian intervention. This rule of humanitarian intervention allows States to intervene in another state's territory with the purpose of ending the ongoing violations of human rights. Several practices of intervention conducted on behalf of upholding humanity were proven to be effective in terminating the predicament of human rights violations. In addition, the rule of humanitarian intervention is also in accordance with the *erga omnes* obligation to respect human rights as noted in several international legal instruments and various publicists. Hence, the rule of humanitarian intervention should be acknowledged as part of international customary law providing that such rule is sustained through various *opinio juris* and practices.

To sum up this article, the author would like to quote the words of Gareth Evans, President of the International Crisis Group,

> "It has taken the world an insanely long time, centuries in fact, to come to terms conceptually with the idea that state sovereignty is not a license to kill - that there is something fundamentally and intolerably wrong about States murdering or forcibly displacing large numbers of their own citizens, or standing by when others do so." (Gareth Evans in Brian Barbout &Brian Gorlick, 2008)

BIBLIOGRAPHY

A. Books and Journals

Barbout, Brian & Gorlick, Brian. (2008). Embracing the 'responsibility to protect': a repertoire of measures including asylum for potential victims,

Int J Refugee Law 20 (4): 533-566. doi: 10.1093/ijrl/een035.

Frowein J.A. & Wolfrum R. (2000). Max Plack Yearbook of United Nations Law, Kluwer Law International: Netherlands.

Holzgrefe, J.L. (2003). Humanitarian Intervention: Ethical, Legal, and political dilemmas, University Press: Cambridge.

Malanczuk, Peter. (1997). Akehurst's Modern Introduction to International Law 7th Revised Edition, Routledge: New York.

Nowrot, Karste and Emily W. Schabacker., (1998). The Use of Force to Restore Democracy: International Legal Implications of the ECOWAS Intervention in Sierra Leone. American University International Law Review 14, no. 2: 312-412.

Shaw, Malcolm. (2008). International Law 6th Edition, Cambridge University Press: New York.

B. Conventions and Resolutions

Charter of the United Nations (1945).

International Covenant on Civil and Political Rights (1966).

Protocol on the Amendments to the Constitutive Act of the African Union, (2003).

United Nations General Assembly, Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, (1965).

United Nations General Assembly, Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, (1970).

United Nations General Assembly, 2005 World Summit Outcome, (2005).

United Nations Security Council Resolution 678 (1991).

United Nations Security Council Resolution 872 (1993).

United Nations Security Council Resolution 912 (1994).

United Nations Security Council Resolution 1973 (2011).

Vienna Convention on the Law of Treaties (1969).

Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (1975).

C. Cases

Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970, p. 3.

Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I. C.J. Reports 1985, p. 13.

Corfu Channel case, Judgment of April 9th, 1949: I.C.J. Reports 1949, p.4.

Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, p. 226.

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America). Merits, Judgment. I.C.J. Reports 1986, p. 14.

Prosecutor v. Duško Tadić, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, (Appeals Chamber decision, 2 October 1995).

D. Reports

International Commission on Intervention and State Sovereignty, The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty (2001).

Final Report for North Atlantic Treaty Organization, The Kosovo Crisis in an International Law Perspective: Self-Determination, Territorial Integrity and the NATO Intervention, (2001).

Report of the Independent Inquiry into the Actions of the United Nations during the 1994 genocide in Rwanda (1999) available at http://daccess-dds ny.un.org/doc/UNDOC/GEN/N99/395/47/IMG/N9939547.pdf?OpenElement.

Secretary-General Kofi Annan, We the Peoples: The Role of the United Nations in the Twenty-First Century, UN Doc. No. A/54/2000, (2000).

Secretary-General Kofi Annan, Secretary-General Calls For Renewed Commitment In New Century To Protect Rights Of Man, Woman, Child -- Regardless Of Ethnic, National Belonging, SG/SM/6949 HR/CN/898 (1999).

E. Others

Forsythe, David P. (2012). The UN Security Council and Human Rights, Friedrich-Ebert-Stiftung Global Policy and Development, available at http://library.fes.de/pdf-files/iez/09069.pdf.

Köchler, Hans. (1991). The Voting Procedure in the United Nations Security Council: Examining a Normative Contradiction in the UN Charter and its Consequences on International Relations, available at http://i-p-o.org/Koechler-Voting_Procedure-UN_Security_Council.pdf.

Letter dated 29 April 1994 from the Secretary-General addressed to the President of the Security Council, S/1994/518 (1994).

United Nations Department of Public Information, Security Council Fails to Adopt Draft Resolution on Syria That Would Have Threatened Sanctions, Due to Negative Votes of China, Russian Federation (2012), available at http://www.un.org/News/Press/docs/2012/sc10714.doc.htm.