

A WAY AROUND THE VETO


Written by Shweta Reddy Degalahal

5th year B.A,LL.B Student, Jindal Global Law School

After the Second World war, the main concern of international law was to regulate war between states and well- developed bodies such as the United Nations exist to regulate state conduct in war. The UN Charter is a fundamental part of the regulation and it prohibits the use of force on the part of individual states, and it authorizes the Security Council to make all decisions with respect to use of military force by States. Article 24 of the Charter establishes that the Security Council has the “primary responsibility for the maintenance of international peace and security”¹. This gave the power to enforce international order in the hands of the Security Council and the provision of veto in the hands of the permanent members meant that the power to ensure international peace and security was with the five major powers in the world. The existence of a close link between international security and protection of individual rights has been recognized by the United Nations post the Cold War era and the same was reflected in the document titled “Agenda for Peace” released by the Secretary General in 1992.² The document affirmed the right to intervene in a State of the United Nations under Chapter VII of the Charter to protect the human rights of the citizens of that State. This paper doesn’t argue against the legality of humanitarian interventions that are authorized by the Security Council. On the contrary, this paper discourages the unauthorized interventions by the international community and urges for deriving legitimacy before the intervention by the main organs of the United Nations and not after the intervention like in the Kosovo situation.

USE OF FORCE AND UN CHARTER

¹ UN Charter art.24

² UN General Assembly, “An Agenda for Peace,” Report of the Secretary-General, A/47/277, June 17, 1992. 

The UN charter allows for a use of force in only in two situations i.e. in case of self-defense under Article 51³ and by the UNSC authorization under Article 42.⁴ The non – intervention principle enshrined in article 2(7)⁵ of the UN Charter does not apply to measures taken by the Security Council or for the measures that are authorized by the SC. It has also been suggested that apart from having a right to intervene to protect the human rights of citizens, the United Nations also has a legal duty to intervene in cases of extreme human deprivations.⁶ Interventions authorized by the SC are usually called as collective humanitarian intervention and are totally legal and ensure that arguments of state sovereignty are not protected when the human rights conditions in a state “shock the conscience of the world”.⁷

It is only in the absence of the SC authorization under Article 42, that states try to fit in their intervention in the other exception to the use of force, the self – defense argument. The self-defense argument was used during the humanitarian intervention in East Pakistan by India, intervention in Uganda by Tanzania and intervention in Cambodia by Vietnam.⁸ In the absence of the UNSC authorizations for the intervention, the self-defense argument was used to steer clear of the strict prohibition of use of force envisaged under Article 2(4) of the Charter.

The gap between what was the legal thing to do and what was the morally right thing to do was crystallized in 1999 in the face of a very evident/ ethnic cleansing in Kosovo. The countries had to either follow the UN Charter and risk turning a blind eye to the situation because of a probable veto from Russia and China against authorizing a humanitarian intervention or to ignore the law and intervene for the greater good.⁹ NATO chose to ignore the gap between legality and legitimacy and intervened in the situation to do what was morally right. After the intervention, the independent experts’ International Commission on Kosovo found that even with a clear violation of the UN charter the efforts of NATO must be condoned,

³ UN Charter art. 51

⁴ UN Charter art. 42

⁵ UN Charter art.2 para 7

⁶ H.Schermers, *The Obligation to Intervene in the Domestic Affairs of States*, HUMANITARIAN LAW OF ARMED CONFLICT: CHALLENGES AHEAD (ESSAYS IN HONOR OF FRITS KALSHOVEN) 583,592

⁷ Sean D.Murphy, *The United Nations and Humanitarian Intervention*, HUMANITARIAN INTERVENTION: THE UNITED NATIONS IN AN EVOLVING WORLD ORDER, 282,299

⁸ Michael Ramsden, “*Uniting for Peace*” and *Humanitarian Intervention: The authorizing function of the U.N General Assembly*, 25 WASHINGTON INTERNATIONAL LAW JOURNAL 267(2016)

⁹ Jonathan I.Charney, *Anticipatory Humanitarian Intervention in Kosovo*, 32 VAND. J. TRANSNAT'L L. 1231 (1999)

as the overall net outcome had been positive. This gave rise to the doctrine of ‘illegal but legitimate’ and the same was seen as the only way to cross the gap created by legality and legitimacy. The military intervention of NATO in Kosovo is termed as unilateral humanitarian intervention due to the lack of authorization to invade the state sovereignty of another country.

Another example of such kind of unilateral action in recent times is in the case of Syria. The use of chemical weapons by Assad on his citizens has garnered lots of support in the international community for an intervention. The Independent International Commission of inquiry on the Syrian Arab Republic has made an assessment of the violations of human rights in the conflict since September 2011. Since the beginning of the conflict, the permanent members have not been able to contribute to help the citizens in Syria due to the divided vote between the West and Russia and China. Russia has used its power to veto for the 7th time in the last 5 years and China for the 5th time on resolutions that impose sanctions on Syria. This is a very infuriating scenario and the easiest option would be to intervene and protect the civilians. United States has even attempted to do that but the same cannot be condoned. Not condoning the illegal intervention doesn't amount to supporting the barbaric violations of human rights in the country.

The only reason such interventions had to be unilateral is due to the veto powers given to the permanent members in the Security Council. The idea behind incorporating the veto in the working of the Security Council was to ensure that important decisions with respect to the protection of international peace and security have the approval of the powerful countries in the world order. But the same power of those countries is hindering the function of the Security Council as the group formed by US, UK and France and the group formed by Russia and China never see eye to eye when it comes to condemning certain actions or authorizing the use of force owing to different national interests. After the NATO intervention, the international community was divided on their stance on the illegal but legitimate doctrine. For some, the concept of legitimacy was seen as a substitute for legality whereas for the others this doctrine was just an extension of the unbalanced world order where the powerful could invade the sovereignty of the another country and wait for the intervention to be completed to later on determine whether the international community would condone the action or “punish” the intervening state.

The fact that the some permanent members of the Security Council are misusing the veto in situations involving serious human rights abuses doesn't give a right to the other countries to act beyond the legal permissibility of the Charter and descend into anarchy. Due to the failure of the Council to prevent or react to the genocide in Rwanda or have any influence on the genocide in Kosovo, steps have to be taken by the international community to ensure that knee jerk reactions such as unilateral humanitarian interventions do not whittle away whatever legitimacy is left with the United Nations. One of the ways that was suggested to get the Security Council to do its job is the introduction of the Responsibility to Protect doctrine¹⁰, which are a set of principles that guide the discretion of the Security Council in granting an authorization for the use of force under the Charter. The subjectivity of the principles enshrined in the Responsibility to Protect Doctrine is the least of the problems associated with it. Even though R2P offers the criteria that need to be fulfilled to mitigate the consequences of an unlawful intervention, the control of the entire operation is still within the Security Council where the power of the veto with the permanent members will always (mostly) result in a deadlock. France had suggested a scenario where the permanent members of the Council abstain from using veto in cases that "involve mass atrocity crimes."¹¹ Keeping in mind the value of veto power to the permanent members, it would be an educated guess to believe that they will never support the proposal put forth by France. The following are the two suggestions that should be incorporated to ensure that we don't go back into pre- Charter, pre- League of Nations era.

INVOLVEMENT OF SECRETARY GENERAL AND OTHER SPECIALISED AGENCIES

¹⁰ International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVERIGNTY(December 2001), <http://responsibilitytoprotect.org/ICIS>

¹¹ Meetings Coverage, Security Council, U.N. Speakers Call for Voluntary Suspension of Veto Rights in Cases of Mass Atrocity Crimes, as Security Council Debates Working Methods, U.N. Meetings Coverage SC/11164 (Oct. 29, 2013).

Article 99 of the UN Charter¹², gives the Secretary General the *power* to bring the attention of the Security Council to matters that may threaten peace and security in his opinion. This activism of the SG should be coordinated with the power given to the UN agencies under the General Assembly resolution 46/182 which created the UN Department of Humanitarian Affairs. The resolution recommended the designation of a high level coordinator to the Secretary General who would then be responsible for¹³ :

- Processing requests for emergency assistance requiring a coordinated response
- Coordinating early warning systems
- Organizing needs assessment missions
- Serving as a central focal point with governments and nongovernmental organizations

The DHA can gather information and assist in coordinating responses to humanitarian deviations before the situation in the State does out of hand, so that efforts can be made by the international community to try to address the deviations diplomatically and not resort to intervention.

In addition to the DHA is the establishment of the UN High Commissioner that was given the task of protection and promotion of human rights.¹⁴ The primary purpose of setting up the Commissioner was to ensure that victims of human rights abuses have recourse in case of inactiveness from the Security Council. The commissioner should have the duty to provide regular reports to the Security Council on the States' where the possibility of human rights deprivations can arise. Other UN agencies, intergovernmental and non-governmental agencies should assist the commissioner in the mission of trying to determine cases of human rights deprivations. Security Council in Resolution 771 requested states and international organizations to provide it with information regarding violations of humanitarian law in the territory.¹⁵ The same was again done in Resolution 935 in 1994 wherein violations of humanitarian law within the territory of Rwanda were examined and reported to the SC¹⁶. Passing a general resolution, which instills a duty on the states to give periodic reports of the

¹² UN Charter art.99

¹³ G.A. Res. 46/182, U.N. GAOR, 46th Sess., Supp.No. 49, at 49, U.N.Doc. A/46/49(1992)

¹⁴ G.A. Res. 48/141, U.N. GAOR, 48th Sess., Supp.No.49, at 261, U.N. Doc. A/48/49(1994)

¹⁵ S.C. Res. 771, U.N., SCOR, 47th Sess., 3106th mtg. at 25, para 5, U.N. Doc.S/INF/48(1993)

¹⁶ S.C. Res. 935, U.N. SCOR, 49th Sess. 3400th mtg., U.N. Doc. S/RES/935(1994)

violation of human rights, will help the Security Council develop a preventive strategy that doesn't necessarily have to involve humanitarian intervention.

REINTRODUCE THE UNITING FOR PEACE RESOLUTION

The Uniting for Peace Resolution¹⁷ gives the power to the General Assembly to come up with an action in cases where there is an absence of unanimity in the Security Council with matters related to international peace and security. This resolution was used for the first time in 1950 in the case of Korea where the Soviet Union's veto made it very difficult for the UN to take any positive action.¹⁸ The question that arises is whether the granting the power to the General Assembly to authorize the States to use force clashes the resolution with the prohibition against the threat or use of force contained in article 2(4) of the Charter. The Resolution will not clash with the Prohibition mentioned in Article 2(4), so long as it can be proved that the action of member states in accordance with the recommendation can be attributed to the UN organization. (Just like how the SCRs are attributed to the UN organization)

The Uniting for Peace Resolution was introduced in 1950 to counteract the negative effect caused by the mala fide use of the veto power by the permanent members that obstructed the very objective of the United Nations i.e. to maintain international peace and security. It is well documented in Article 24 of the Charter that the Security Council bears the primary responsibility for the maintenance of international peace and security, but that doesn't mean that the General Assembly is completely excluded from those matters. The International Court of Justice in the Certain Expenses of the United Nations Advisory opinion¹⁹ affirmed that the responsibility of the Security Council to maintain the international peace and security in the world is not an exclusive duty and that the General Assembly, being the second main organ of the organization, has a secondary responsibility maintaining the same duty. In addition to the ICJ opinion, article 1(1) of the Charter mentions that the purpose of UN at large is to maintain international peace and security through collective measures.²⁰ As it has been established that the General Assembly does have the power to recommend on matters related to international

¹⁷ G.A. Res. 377 (V), (Nov. 3, 1950)

¹⁸ Supra Note 8

¹⁹ Certain Expenses of the United Nations (Advisory Opinion) [1962] ICJ Rep 1962, 168.

²⁰ UN Charter art. 1

peace and security, another important procedural element for triggering the duty of the General Assembly is the delegation of the said duty by the Security Council. The General Assembly cannot unilaterally decide to authorize a recommendation at the same time that the matter is being discussed in the Security Council. The Security Council has to refer the matter to the General Assembly under Article 12 of the Charter²¹ due to the inability to proceed on account of the mala vide use of the veto by one or few of the permanent members. According to Article 27(2), a procedural vote requires a qualifying majority of the Council i.e. 9 out of 15 votes hereby completely circumventing the veto power of the permanent members ensuring that the focus doesn't deviate from the objective of the organization.²²

By referring the matter to the General assembly any legality concerns with respect to the matter amounting to a threat to the peace, breach of the peace or act of aggression is avoided.²³

Opponents of this resolution believe that despite the power imbalance in the Security Council, greater weight must be given to the choices of bigger and power states as they do most of the heavy lifting to carry out the role of managing international security. This resolution doesn't dilute the powers of the veto that is granted to the permanent members i.e. in situations wherein the veto is not mala fide, and there is adequate reasoning that doesn't involve protection of the national interests of the permanent members in exchange of the fulfillment of the objection of the United Nations, the Security Council doesn't need to delegate the duty to the General Assembly. This resolution just breaks the holdup in the Security Council and provides the States with a body that can grant legitimacy to the interventions or sanctions if any, and the same will not be illegal with respect to the Charter and the international community need not wait for the outcome of the intervention or the sanction to determine whether it was legitimate or not. It is true that the Assembly could endorse a course of action that is ultra vires. But the fact that a majority of the states need to vote in favor of the recommendation gives the course of action far more legitimacy than unilateral humanitarian intervention without any organ of the United Nations supervising the same.

Using this resolution to give the power to the General Assembly take action against human rights abuses is justified as the UN charter grants the primary responsibility of protection of

²¹ UN Charter art. 12

²² Un Charter art. 27, para 2

²³ Andrew J. Carswell, *Unblocking the UN Security Council: The Uniting for Peace Resolution*, Journal of Conflict & Security Law (2013), Vol. 18 No. 3, 453–480

human rights to the General Assembly and not the Security Council. The same primary responsibility has been reiterated in the ICJ's Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory advisory opinion, where the court observed that the Council had focused on matters related to international peace and security and the General Assembly concerned it self with the humanitarian, social and economic aspects of the matter before it.²⁴

CONCLUSION

The absence of a global government, global police force and a global parliament creates a myriad of legitimacy issues with respect to the Security Council.²⁵ If states could intervene in other states without the authorization of the one body that has the primary responsibility to ensure that the same doesn't happen, the importance of an institution such as the United Nations is questionable. The concept of legitimacy is more flexible than the concept of legality. The inefficiency of the Security Council due to procedural issues such as the veto is not an excuse (nor is it a justification) to violate the provisions of the Charter. Proponents of unilateral humanitarian interventions believe that the Just war principles act as sufficient guidelines for States to determine when to intervene and the extent of the intervention. The determination whether an intervention is legitimate depends on the outcome of the intervention i.e. whether there was a net positive result achieved due to the intervention. So basically, the international community will individually decide whether dropping of bombs by the intervening state in the state with human rights abuses is valid or not after the bombs have been dropped. Hypothetically, what happens in cases where the intervention didn't result in a net positive result? The International community will condemn the action of the intervening state, but the loss of civilian life and the violations of the Charter cannot be rectified. In addition to that, there is no undisputed authority appointed to judge the legitimacy of the actions effectively.

²⁶A net positive result may not be achieved even after following the suggestions in this paper i.e. with the involvement of the General Assembly, DHA, UN High Commissioner and various

²⁴ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, 150 (July 9)^{[L][SEP]}

²⁵ Vesselin Popovski and Nicholas Turner, *Legality and Legitimacy in International Order*, UNITED NATIONS UNIVERSITY, (NOVEMBER 5 2008) <http://archive.unu.edu/publications/briefs/policy-briefs/2008/pb05-08.pdf>

²⁶ Danish Institute of International Affairs, *Humanitarian Intervention: Legal and Political Aspects*(1999) at 24

Non-governmental and intergovernmental organizations. But the difference is there is higher amount of checks and balance in the procedures suggested in the paper than the method followed at the moment and involving the General Assembly will at least ensure collective consensus over whether to intervene or not to intervene before the actual intervention takes place.

