Humanitarian Intervention in Libya - a Critical Analysis.

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ABSTRACT: paper shall focus on the critical analysis of the recent trend of Humanitarian Intervention boosted by R2P by critically analyzing the case of Libyan intervention in an attempt to re-imagine future humanitarian interventions which may be more humane and ethical. The study gives a definition and brief history of the origin of the doctrine of Humanitarian Intervention along with the relevant UN provisions. It talks of Human Rights Regime and its role in justifying the doctrine of R2P. Giving the definition of Civil War it gives the relevant IHL provisions. It then examines four distinct case studies of humanitarian intervention that display the underlying discrepancies in the UNSC reactions and then moves on to give a brief history of Libya and rise of Gaddafi and his controversial policies. The study finally critically analyzes the Libyan Intervention briefly, concluding with recommendations.

Keywords: Humanitarian Intervention, Libya, International Humanitarian Law, UNSC, R2P, Human Rights, Civil War

Foreign Intervention has been an age old phenomena in the international law discourse. Yet, due to lack of universal consensus, there is no particular definition of ‘humanitarian intervention’ as the subject is controversial in its interpretation. In the words of Bhikhu Parekh:

Humanitarian intervention is “an act of intervention in the internal affairs of another country with a view to ending the physical suffering caused by the disintegrations or gross misuse of authority of the state, and helping create conditions in which a viable structure of civil authority can emerge”.

In 5th century St. Augustine was one of the initial advocates who said that “under certain circumstances, a sovereign was entitled to launch a ‘Just War.’” His views were endorsed by St. Thomas Aquinas in the late 13th century followed by Grotius in the 17th century and De Vitoria. De Vitoria in fact went to the extent of approving Spain’s cruel repression of the natives in the New World on the pretext of Just War.

The ‘father’ of international law, Hugo Grotius refined the “just war” doctrine by introducing the element of legal basis for justification of wars. In his work “De Jure Belli ac Pacis of 1625, he stated that states are entitled to exercise the right “vested in human society” on behalf of oppressed individuals.”


recommendation of use of force to alleviate human suffering is endorsed by Lillich, Vincent and Lauterpacht.

The modern concept of humanitarian intervention finds echo in the nineteenth century practices of states as confirmed by Fontyene, where they began invoking humanitarian grounds to create justification for their interventions. Some of such prominent cases were those for the protection of Christians against the Ottoman Empire, Lebanon-Syria, Armenia, Greek Independence War, Bulgarian Agitation, France-Syria in 1860-61 and Russian in Bosnia-Herzegovina 1876-1878, which were justified on humanitarian grounds.

Coming to the present times, the UN was conceived as a supra national body that would effectively curb arbitrary use of force. For this purpose, it applied the doctrine of non-intervention to all states making it a new universal norm on one hand and on the other, it permitted the use of force only in cases of self-defence or collective security measures under Chapter VII of the Charter. Threat to international peace and security was the only condition that possibly justified intervention in the internal matters of a state and this was to take place under the UN authorization.

Ironically, parallel to the introduction of non-intervention, the Human Rights regime emerged also under UN and promptly became the contradictory element to the non-intervention principle since Article 1 of the Charter emphasizes promoting respect for human rights and justice as one of the fundamental missions of the UN. Article 55 also states that the UN shall promote and respect the human rights and basic freedoms.
“Humanitarian intervention, as the most assertive form of promoting human rights at a global level was clearly incompatible with norms such as non-intervention and state sovereignty”. 3

This major lacuna has been gradually used by the states to misuse it for their vested interests especially since the advent of ‘Responsibility to Protect’ (R2P). Former UN Secretary General Kofi Annan was the main propounder of R2P which was adopted by UN members at the 2005 World Summit unanimously. To deliberate on the issue, the Canadian government had established the International Commission on Intervention and State Sovereignty (ICISS) in September 2000.

R2P for the first time acknowledged formally that it was a responsibility of the states to protect their people from war crimes, ethnic cleansing, genocide, and crimes against humanity. It also highlighted the fact that it was the duty of the international community to provide assistance to states to enable them to fulfil their ‘R2P’. In situations where ( it is clearly established that) a state fails to provide protection to its populace from human rights violations, the international community is supposed to take “timely and decisive” action conforming to the relevant provisions of the UN Charter. 2

Thus, human protection is the core objective of R2P.

R2P is supposed to encompass obligations that go far beyond military intervention and involves obligations like addressing the root causes of internal conflict thus fulfilling a responsibility to prevent. This is followed by the responsibility to react to situations of compelling human need with appropriate measures that could range from sanctions to military intervention. The last obligation which has proved the toughest is taking on the responsibility to rebuild by providing full assistance for reconstruction and reconciliation. 5

Before proceeding to the Libyan case, it is pertinent to look into four distinct types of Humanitarian intervention cases that reveal discrepancies in UN’s response. The first of these would be the case of Rwanda in 1994 where no military intervention took place despite an urgently felt need for it due to humanitarian crisis that had exceeded “100,000 violent deaths or more than 1 million refugees.” The second distinct case is that of Somalia where relief of the disaster was provided ignoring its political causes. The third variety was that of Haiti where relief of the disaster was provided along with imposition of political order by placing a particular local and friendly political figure. The fourth variety of intervention was seen in Kosovo where an ambitious task of reconstructing the complete political system was undertaken with the aim of setting up a liberal, democratic, and multicultural system.

Each of these varieties has several examples and each type was invariably initiated by the US and the West and each time the interventions have proved to be disastrous with long term damages. The common criterion of regime change is apparent in all of the cases.

The pluralist critics view them as tools of attaining US strategic and economic targets by misusing the mask of Humanitarian Intervention.

What compounds this situation is the fact of rapidly escalating civil- strife the world finds itself in that has been aggravated by the end of Cold War that brought significant changes in international relations. Intra-state conflicts have replaced proxy wars and inter-state conflicts. There have been instances of vested interests actually aiding the civil strife by covertly providing aid and logistical support to the antagonistic groups so that R2P may be applied for the purpose of regime change necessitated due to the latent resource war.

At this stage it is pertinent to deliberate upon Civil War itself and the International Humanitarian Law (IHL) that deals with it. Civil war is known by other names such as internal conflicts or non-international armed conflicts which include those conflicts within the:

“Territory of a state between the government forces and the dissident forces or other organized armed groups. Such a conflict falls within the category of non-international armed conflict or internal conflict...... This category of conflict falls within the scope of the Common Article 3 of the GC of 1949 and their Additional Protocol II (AP II) of 1977.” 6

One of the distinguishing features of internal conflicts is that it is not covered by the prohibition of threats or use of forces [UN Charter 2(4)] but by prohibition of interference in internal matters of a state [UN Charter 2(7)] - this provision reiterates the sovereign features of nations and the enforcement measures provided under Chapter VII are subject to appeal by the states. Humanitarian problems are bound to arise

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3 Kardas, op.cit. p. 3.
6 Other types of internal armed conflicts are (i) those with foreign intervention (“mixed conflicts”) - Intervention by a foreign state on the side of the governmental forces or in support of insurgents - uncertain legal situation. (ii) Other forms of violence within the territory of a state, internal strife, internal disturbances and tensions, state of emergency etc. (Such situations are not covered by I.H.L. - Protocol II, 1(2) - they rather fall in the scope of Human Rights and Civil and Political Rights, 1966.
due to armed hostilities and the Human Rights Law proves to be inadequate to deal alone with armed conflict situations.

Into all four conventions of 1949, a Common Article 3 was introduced, applicable in the case of armed conflict not of an international character occurring in the territory of one of the ‘High Contracting Parties’ and providing for such an event a list of fundamental rules the Parties are bound to apply as a ‘minimum’.

The scope of application of Article 3 requires a situation of armed conflict within the territory of a state when the -situation has gone beyond police action. There should be a collective character of hostilities on the insurgent’s side, with at least a minimum degree of organization and a responsible command capable of discharging humanitarian obligations.

It was found necessary for the rules of Article 3 to be more strengthened because its provision contains gaps with regard to civilian protection in cases of civil wars. Civilians are very often the main victims since they are used as a shelter by the insurgents in many cases.

This led to formation of two treaties that were named as the Additional Protocols to the Geneva Conventions, 1949. The Protocol I dealt with the Protection of victims of international conflicts and the Protocol II is meant for the Protection of the victims of non-international armed Conflicts. The Protocols were adopted on 8 June 1977. 7

Coming to the parallel legislative framework of the UN Charter, since the primary function of the UN was envisaged to be that of curbing wars, promoting peace and regulating the use of force; three clauses were placed in the UN Charter for the purpose of regulating the use of force by the states individually or unilaterally. These were Article 2(3), Article 2(4) and Article 51. Additionally, the regulations related to the use of force by the UN are specified in Article 39. 8

The Articles 55 and 56 deal with appraising the gravity of the situation. 9 Besides, with regard to regional arrangements, the Charter has made provisions in Article 52 and 53(1) of Chapter VIII. 10

The Libyan intervention is the recent example of R2P which was carried out supposedly for protecting the civilians who had begun rebelling in a pro-democracy movement against repressive dictatorship of Qaddafi. Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”

“Article 39 reads as follows: The UNSC shall determine the existence of any threat to the peace, breach of peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore inter-national peace and security.

Article 41 includes provisions dealing with measures which do not involve the use of armed force. If the UNSC considers that these measures are/or will prove to be inadequate, Article 42 includes provisions dealing with the right of the UNSC to: ‘take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security’.

“Charter articles 55 and 56 that may be called "appraisal norms" require continuing judgments about situations in terms of an international standard with an accompanying obligation to act to correct the situations if they depart from that standard (consider, for example, General Assembly Resolution 1514 (XV)).”

“Article 52 of Chapter VIII says: “Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the UN. The Members of the UN entering into such arrangements or constituting such agencies shall make every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council. The UNSC shall encourage the development of pacific settlement of local disputes through such regional arrangements or by such regional agencies either on the initiative of the states concerned or by reference from the UNSC.”

“Article 53(1) further specifies: ‘the UNSC shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the UNSC, with the exception of measures against any enemy state, as defined in paragraph 2 of this Article, provided for pursuant to Article 107 or in regional arrangements directed against renewal of aggressive policy on the part of any such state, until such time as the Organization may, on request of the Governments concerned, be charged with the responsibility for preventing further aggression by such a state’.”

8 “Article 2(3) reads as follows: All members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.”

“Article 2(4) reads as follows: 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 purpose of the United Nations.”

“Article 51 reads as follows: Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security

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Historically, native Libyans are the mixture of Arabs and Berbers. Libya since its early stage has been facing foreign domination by various nationalities like the Phoenicians, Carthaginians, Greeks, Romans, Vandals, and Byzantines. It said that since 1000 BC, Libyans had contacts with sub-Saharan Africans.

In AD 642 Arab established their rule on Tripolitania and Cyrenaica and in the next year reached Fezzan. Consequently, over the period, the Arabic language and Islamic culture spread all over the country. The name ‘Libya’ was used for all of North Africa, barring Egypt by the Greeks formerly but in 1934, Italy adopted it for the colony, which combined Cyrenaica, Tripolitania, and Fezzan. On December 24, 1951, Libya got independence through the recommendations of a UNGA Resolution that stated that Libya should become independent before 1952. Libya became United Kingdom of Libya, and a constitutional and hereditary monarchy under King Idris I was established. Oil was discovered in 1958 and it changed the fortunes of Libya. However, the fact that wealth was controlled by the elite led to rising discontent as common man suffered due to massive corruption that wrecked the stagnated administration which had religious legitimacy. Mu’ammar Abu Minyar al- Gaddafi orchestrated a coup d’état against the Libyan king in September 1969. Led by Gaddafi, the new Revolutionary Command Council (RCC) declared the new Libyan Arab Republic abolishing the monarchy. Rejecting both capitalism and communism, Gaddafi subsequently developed the ‘Third Universal Theory’ which was his own revolutionary ideology. His new political system combined socialist and Islamic theories for public welfare. He was practicing a form of direct popular democracy through which he rapidly became autocratic.

Gaddafi had been determining and shaping Libya’s foreign policy since his advent. His main foreign policy objectives were Arab unity, promotion of Islam, support for Palestinian cause, decimation of Israel, deconstruction of Western cultural and political legacy and influence in Africa and the Middle East and support for myriad other causes that had revolutionary intent. US began to be uncomfortable with Libya when it sensed interventionist and expansionist intent of the Libyan leader especially with Libya and Chad alliance because it considered it as a form of Soviet expansionism in the Third World and this worsened the hostility between US and Libya. It expelled the Libyan diplomats in US in May 1981 on allegation of supporting terrorism. Due to the ensuing Gulf of Sirte episode the relation between these two states worsened and US openly branded Libya a ‘terrorist state’.

In March 1982 the US announced an embargo on the export/import of Libyan oil and American technology. US defended its actions claiming that Libya had violated the accepted international norms of behaviour. Libya’s foreign operations promoting terrorism on an international scale kept damaging its relations with the US.

Things came to a head when a bomb exploded on Pan Am 103 Boeing 747 while flying over Lockerbie in Scotland in December 1988, killing all 259 people onboard and 11 on the ground. Gaddafi refused to hand over the two intelligence agents of Libya who were found guilty in the episode. This defiance led to the imposition of UN sanctioned trade and air traffic embargoes in 1992. Libya was obliged to fulfil the requirements stated in the UNSC resolutions passed in 1992 and 1993 before sanctions could be removed. Gaddafi’s refusal to cooperate led to Libya being politically and economically boycotted for most of the 1990s.

Resolution 731 had laid down four requirements according to which Libya was supposed to “surrender for trial all who were involved in the bombing and accept complete responsibility for their actions.” The Libyan government was also asked to “disclose all information regarding witnesses and documents along with any material evidence; that it pay appropriate compensation to the victims’ families; and that it should take a vow to renounce terrorism and support to terrorist groups and activities.”

Finally feeling the heat of international condemnation and sanctions, Libya surrendered the two Libyans suspects for trial in the Netherlands before a Scottish court in 1999. It also accepted full responsibility for the incident and paid compensation for the victims. Finally the UN sanctions were removed in September 2003. Libya

13 During the 1981 "war games" that the American Sixth Fleet conducted in the Gulf of Sirte, off Libya, two Libyan Russian-built SU-22 fighters attacked two of the U.S. modern F-14 Tomcats, which had taken off from the aircraft carrier Nimitz. The Tomcats returned the Libyan fire and the two SU-22 fighters were shot down. See "Fire and be fired on," The Economist (London), August 22, 1981.
also gave up weapons of mass destruction and began fully cooperating with conventions. This led to the restoring of full diplomatic relations between the US and Libya.

In 2011, anti-government protests that had spread in the Middle East, hit Libya as Gaddafi had managed to alienate many leaders of the Arab world as well as the Libyan nationalists, who did not approve of his foreign adventures and growing authoritarianism. This was compounded by the advent of mercenaries and Al-Qaida operatives from Afghanistan, creating multiple antagonistic groups that vied for hegemony.

Large defections from the government and Army in response to violent crackdown by the regime led to the formation of a militant group posing as opposition under the Interim Transitional National Council (ITNC). The rebels quickly took hold of most of the major cities in the country beginning with Tobruk and Benghazi.

The Libyan government unleashed a powerful military repression on the rebels causing high number of casualties. Despite rising demands, Gaddafi refused to resign and blamed the West for engineering the uprising with the motive of capturing Libya's oil in connivance with Islamic radicals who wanted to strengthen their platform and grip in Libya.

After many more developments and escalating violence, the UNSC unanimously passed the Resolution 1970, condemning the military attacks on civilians, categorizing it as crimes against humanity. On the basis of Chapter VII of the UN Charter, the UNSC demanded an immediate end to the violence and urged Gaddafi regime to provide safe passage for human rights workers and referred the Libyan case, since February 15, to the ICC. 17 The Gulf Cooperation Council (GCC) on 7 March called the UNSC to “take all necessary measures to protect civilians, including enforcing a no-fly zone over Libya, followed by Organisation of Islamic Cooperation (OIC). Finally, it was League of Arab States (LAS) whose call to the UNSC to impose a no-fly zone on Libya immediately, proved to be the decisive factor. 18

On March 17, the UNSC authorized the use of military force against Libya, including air and missile attacks and a no-fly zone through a Resolution. After two days, France and Britain started their military attacks on Libya through air and sea on Libya's air defences. US participated in the attacks but did not initiate it.

In August 2011, rebel fighters with the help of NATO air strikes gained rapid ground and finally on October 20, 2011, Qaddafi was lynched to death by the rebel troops in Surt.

When the legality of this intervention is explored, it is highly controversial as it was considered to be in complete violation of all international norms and international legal provisions of U.N. as well as the International Humanitarian Law. The acquisition of regional support provided by the Arab League that was necessary to justify a UNSC military intervention that was ostensibly carried out for humanitarian purposes; has raised international condemnation. Arab League’s role in the entire episode has faced a lot of flack. It has aided and abetted one of the most blatant violations of international humanitarian law with the ironic justification of R2P under the UN Charter’s Chapter VII, Article 42. Especially in the light of the fact that the Arab League members had ample military capacity to enforce a no fly zone themselves. The most stunning aspect of the regional support provided by the Arab League for humanitarian intervention on behalf of the ‘pro-democracy aspirants’ who were being crushed by Gaddafi’s forces, was that it was not a non-violent pro-democracy mass uprising but a splintered and largely leaderless mob of criminals that also had Al-Qaida links and were devoid of any concrete responsible command- one of the prerequisites for considering humanitarian intervention.

It also violated the core legal obligation of the UN Charter that requires member states to refrain from any use of force unless it can be justified as self-defence after a cross-border armed attack or mandated by a decision of the UNSC. The internal conflict situation in Libya was by no means an imminent threat to the nation that warranted this kind of action.

In fact, the abstention by BRICS countries and Germany, opposition by Italy and Turkey and negative voting by Algeria, Tunisia, Syria and the entire African Union was enough to provide the Arab League a strong legal basis for refusing any western intervention. The worst part is that Libya has been the looser in the whole exercise, becoming reduced from a developed state to a state in chaos.

Collateral damages of such interventions that have hidden motive of regime change by fuelling and aiding the civil strife are innumerable. One such fall out is the sinister rise of organizations like Islamic State of Iraq and Syria (ISIS) that is making news with its unprecedented acts of human rights violation in retaliation to Western manipulations that have caused grave damages to the people of the region. It is visible that using the moral high ground of human rights, these interventions have been violating peace, human rights and justice in reality.

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17 On 3 March, the ICC prosecutor said his office was investigating crimes against humanity that may have been committed by Gaddafi’s regime.

18 Council of the League of Arab States, Res. no. 7360, 12 March 2011, paras 1 and 2.
In this regard, the observation made by the Humanitarian agency ICRC as a deciding factor is of utmost importance as it speaks for civilian protection that has been endorsed in all religious philosophies and is the basic element of humanity. It says that: ‘... in deciding to order armed intervention under Chapter VII of the UN Charter, the UNSC cannot ignore the fact that its primary role is to restore peace. It cannot take such a decision without drawing up a consistent and comprehensive plan of action that addresses the situation as a whole and, in particular, deals with the underlying causes. While armed intervention in response to grave violations of human rights and International Humanitarian Law may be unavoidable in certain extreme situations, what we expect of the community of States is that they should not view either such intervention or the situations that have caused it as inevitable’. It further says that: ‘to systematically use armed intervention for humanitarian purposes would amount to an abdication by the international community of its true responsibilities: preventing conflict and promoting the basic values expressed in International Humanitarian Law.’

While the concept of R2P has been milked to its utmost, as seen in case of Libya, responsibility while protecting by process of further legislation is imperative. Besides, the sinister practice of regime change has to be replaced with workable solutions that are acceptable to all stakeholders- a small ray of hope has glimmered in case of the recent U.S.- Iran understanding.

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