



A DICHOTOMOUS PRACTICE OF INTERNATIONAL RELATIONS: THEORY BEHIND HUMANITARIAN INTERVENTION UNTIL WORLD WAR II

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Abstract

Use of force is no doubt one of the most important issues in international law and relations. Since the establishment of the United Nations., use of force was not successfully prohibited and was applied as a legal tool of international relations. The prohibition on the use of force in international affairs was directly related to a universally accepted norm of international relations, namely the principle of State sovereignty. However, some states have used this principle as a shield to abuse their subject and commit gross human rights violations, which aroused the question of humanitarian intervention. This article traces the history of the prohibition on the use of force and the theory behind humanitarian intervention from a period of almost 200 years. The main objective is to find the dominant opinion among international law scholars until the World War II.

Keywords: Prohibition on the Use of Force, Theory of Humanitarian Intervention, State Sovereignty.

ULUSLARARASI İLİŞKİLERİN TARTIŞMALI BİR UYGULAMASI: İKİNCİ DÜNYA SAVAŞINA KADAR İNSANİ MÜDAHALE TEORİSİ

Öz

Şüphesiz kuvvet kullanımı, uluslararası hukukta ve ilişkilerdeki en önemli konulardan biridir. Birleşmiş Milletler'in kurulmasına kadar, kuvvet kullanımı başarılı bir şekilde yasaklanamış ve uluslararası ilişkilerin meşru bir aracı olarak uygulanmıştır. Uluslararası ilişkilerde kuvvet kullanımına ilişkin yasak, doğrudan evrensel kabul edilen bir uluslararası ilişkiler normuyla, devlet egemenliği ilkesiyle, ilgilidir. Bununla birlikte, bazı devletler bu ilkeyi kendi egemenlik alanında bulunanların haklarını suistimal etmek ve ağır insan hakları ihlalleri gerçekleştirmek için bir kalkan olarak kullanmaktadır. Bu makale, neredeyse 200 yıllık bir sürede insani müdahalenin ardındaki teoriyi ve kuvvet kullanımı yasağının geçmişini ele almaktadır. Temel hedef, uluslararası hukukun önemli bilim adamları arasında II. Dünya Savaşı'na kadarki dönemdeki insani müdahale konusunda hakim görüşü bulmaktır.

Anahtar Kelimeler: Kuvvet Kullanımının Yasaklanması, İnsanı Müdahale Teorisi, Devlet Egemenliği.

INTRODUCTION

The Egyptian-Hittite peace treaty (also known as Kadesh Peace Treaty) was concluded in or around 1259 BC (Bryce, 2005: 277). Although it is not the oldest known treaty, it is the first known diplomatic and the oldest written agreement to survive to date (Barker, 2000: 2; Sayapin, 2014: 9). Its purpose was to establish and maintain peaceful relations between the parties (Barker, 2000: 2). The treaty provided that, among other matters, both sides would remain at peace and would not commit acts of aggression against each other (Barker, 2000: 2). Hence, as being one of the first treaties in history, it is noteworthy to show that the use of force¹ has been one of the most central issues in international relations and international law (Hurd, 2011:295; Värk, 2003: 27).

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¹ In this paper, "use of force" is used to refer only to conduct between states, but not between states and non-state actors or use of force by law enforcement officers unless indicated otherwise.



Despite this central place and the fact that the conduct of war has always existed between states throughout history, the understanding regarding the reasoning for the use of force has changed over years, although there has always been a justification to wage war. According to Corneliu Bjola, Professor of Diplomatic Studies at University of Oxford, the conduct of war was considered “a legitimate form [of] social action for acquisition of a throne in the age of dynasties (1400-1559); protection of religion in the age of religions (1559-1648); promoting state power in the age of sovereignty (1648-1789); achieving national independence in the age of nationalism (1789-1917);” and self-defense since 1945 with the U.N. (Biola, 2008: 630).

Besides the justification grounds, there has also been a shift on the legality of the use of force² under international law from an institutionalized legal state act to a new one, in which the conduct of war is universally restricted.

For thousands of years, there was no legal restriction on the decision to wage war (Heselhaus, 2009: 63). According to Saint Thomas Aquinas’ (1225-1274) natural law theory, war was “just” if it met three conditions: 1) it is waged by the authorities empowered to do so, 2) the cause is just, and 3) the intention is correct (Milojević, 2001: 583). Since the second and third were always easy to manipulate, the first one was the most important criteria at the time, because war was always linked with the sovereign (Milojević, 2001: 583). In this sense, the decision to wage war became an integral part of sovereignty.

This full authority to wage war caused a chaotic structure in international relations by allowing each single state to use the idea of unlimited sovereignty to wage war on another

² The meaning of “use of force” should be understood as using military force against a state or group of states for any purposes as it is defined under Article 8bis of Rome Statute:

“Article 8bis

Crime of aggression

1. For the purpose of this Statute, “crime of aggression” means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

2. For the purpose of paragraph 1, “act of aggression” means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:

(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

(c) The blockade of the ports or coasts of a State by the armed forces of another State;

(d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.”



state. Under the concept of state sovereignty, developed and institutionalized by Jean Bodin and others, a state had the full right to govern itself and its subjects without any interference from outside sources (Araujo, 2000: 1487-1532), and this authority inherently included the right to wage war (Fenwick, 1965: 126). Therefore, none of the states would accept any legal restrictions on their decision-making authority. “Since sovereignty was ‘deemed more or less unlimited thus neither the right to wage war could not come under any legal limitations’” (Milojević, 2001: 583).

Then, Hugo de Groot (1583-1645) — who is probably better known under the Latin version of his name, Hugo Grotius, and is generally regarded as the “father” of modern international law — introduced his new conception of war distinguishing *jus ad bellum* (whether entering into war is permissible) from *jus in bello* (the limits to acceptable wartime conduct) to create a balance between war and peace. Accordingly, “right of state to decide how to gain or protect some of its right . . . , then it can be used as the last resort . . . if other resorts are insufficient.” (Milojević, 2001: 583). This way introduced peaceful settlement of disputes by limiting the way of waging war, but not touching upon the right to wage war. Grotius did not live until the end of the Thirty Years’ War (1618-1648) in Europe, but his ideas on the use of force shaped some key decisions made at the Congress of Westphalia.

The new Grotian concept that war could be legally used as a last resort was consolidated with the Treaty of Westphalia of 1648, in which European states agreed to end the Thirty Years’ War, a devastating long war waged on religious grounds and territorial boundaries (Straumann, 2008: 173). Since the Peace of Westphalia, “the intervention by other states has been considered a major threat to international peace” (Heselhaus, 2009: 63), although it was not deemed illegal until the beginning of the twentieth century (Milojević, 2001: 584). The treaty paid great attention to the non-intervention principle (Hayman and Williams, 2006: 521; Jamnejad and Michael Wood, 2009: 349).³ The “[non-intervention] principle forbids all States or groups of States to intervene directly or indirectly in internal or external affairs of other States. A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely.” (Nicaragua v. United States of America, 1986: 108). However, a quick look at the period from 1648 until World War I (“WWI”) shows the apparent failure of the treaty, at least regarding the non-intervention principle.

Despite the failure of the 1648 Treaty, the efforts to limit waging war continued into the nineteenth century. Although the Hague Peace Conferences of 1899 and 1907, which were the first two tangible efforts in limiting use of force in external affairs of states, focused primarily on *jus in bello*, the legal and institutional mechanisms established by the Conferences were of major importance (Sayapin, 2014: 27). For example, the Second Hague Convention (1907) “drew up some formal rules for the start of wars.” (Heselhaus, 2009: 63) for the recovery of contractual debts, the Second Hague Convention even created “a substantive ban on recourse to armed force on the condition of a debtor state’s obligation to accept and submit to an arbitrational settlement.” (Heselhaus, 2009: 63). Nevertheless, these could not prevent emergence and later the horrors of the Great War.

As a response to the devastating experiences of WWI, the League of Nations Covenant of 1919 was the first effort worth noting to create a collective security system

³ It should be noted here that there are others arguing the principle of non-intervention was not relevant to the Peace of Westphalia, and did not occur until nineteenth century. See Krasner, 2000: 20.



whose main task was to maintain peace (League of Nations Covenant art. 11). States were first obliged to submit a dispute to inquiry, arbitration, or to the Council of the League (League of Nations Covenant art. 17). Any war had to be postponed until three months after the arbitrators' award or the Council's decision, and it was fully prohibited in the case that a state complies with those decisions (League of Nations Covenant art. 12). However, as Professor Momir Milojević of the School of Law at Belgrade University correctly points out, “the Pact did not oppose peaceful settlement of disputes to war as the only alternative, but only gave priority to the peaceful settlement of disputes which should reduce the possibility of applying violent means . . .” (Milojević, 2001: 586).

These efforts were not enough to bring a full legal restriction or ban on the right to wage war until the Kellogg–Briand Pact of 1928. The Pact, for the first time in history, outlawed the right to wage war.⁴ Moreover, unlike prior agreements, it did not leave any room to use arms to settle disputes by providing that “the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.” (Briand-Kellogg Pact art. 2). Most of the states, especially the European countries, joined the Pact probably because the entire world got tired of the devastating effects of long years of war. The remaining states of South Africa agreed upon similar restrictions with the Saavedra Lamas Treaty of 1933. Thus, a universal ban on war was achieved — at least by agreement on paper — for the first time, subject only to the right to self-defense.⁵ Unfortunately, the Pact did not work well in practice.

One of the two weaknesses of the Pact was its wording (Sayapin, 2014:36). The Pact prohibited only “war” rather than “the use of force.” Therefore, states such as Japan were able to bypass the Pact because they still could engage in war without declaring a formal armed conflict. Second, it was Hitler's Germany that destroyed the Pact by relying unlawfully on the self-defense exception to camouflage its aggression at the beginning of World War II (“WWII”). Despite its weaknesses, the Pact had a lasting impact regarding the use of force since its intentions were incorporated into the U.N. Charter in the 1940s.

WWII not only brought an end to the National Socialist Party in Germany, but it also created a universal organization which has had full authority on the use of force among states: the United Nations. The U.N., whose main purpose is to maintain international peace and security, has a Charter compatible with this purpose. It prohibits all states “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

⁴ Kellogg–Briand Pact art. 1, Aug. 27, 1928 (“The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn *recourse to war* for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another.”) (emphasis added) The pact was signed in 1929 by Belgium, Czechoslovakia, France, Germany, Italy, Japan, New Zealand, Poland, the United Kingdom and the United States. By that date, the following nations had deposited instruments of definitive adherence to the pact: Afghanistan, Albania, Australia, Austria, Bulgaria, Canada, China, Cuba, Denmark, Dominican Republic, Egypt, Estonia, Ethiopia, Finland, Guatemala, Hungary, Iceland, Latvia, Liberia, Lithuania, the Netherlands, Nicaragua, Norway, Panama, Peru, Portugal, Romania, South Africa, the Soviet Union, the Kingdom of the Serbs, Croats, and Slovenes, Siam, Spain, Sweden, and Turkey. Eight further states joined after that date (Persia, Greece, Honduras, Chile, Luxembourg, Danzig, Costa Rica and Venezuela). In 1971, Barbados also declared its succession to the treaty.

⁵ Although the Pact does not provide a self-defense exception itself, many states, when ratifying or joining it, declared that they did not deem defensive wars prohibited since all wars were prohibited under it without distinctions. For a further discussion. See Milojević, 2001: 588-592.



the United Nations.” (U.N. Charter art. 2, para 4). Two exceptions to this norm are those military attacks launched for the purpose of self-defense (U.N. Charter art. 51) and in the case of the Security Council’s authorization to maintain international peace and security under its Chapter VII powers (U.N. Charter Chapter VII).

The U.N. Charter can be easily seen as an extended and universal publication of the Peace of Westphalia in that they both recognize a strict non-intervention principle among states. The Charter clearly states that “[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state . . .; but this principle shall not prejudice the application of enforcement measures under Chapter VII” (U.N. Charter art. 2, para 7). Therefore, it might be persuasive to argue that the U.N. can only intervene in states in cases that would be appropriate only to ensure international peace and security under Chapter VII.⁶

However, another type of use of force — namely humanitarian intervention — has occurred for a long time and gained support from scholars. Humanitarian intervention is “saving strangers” (Wheeler, 2002). The primary focus of the discussion on humanitarian intervention involves the conflicts with state sovereignty (Ayoob, 2002: 81). To put it differently, there is, on the one hand, the sacred purpose of protecting those who heavily suffer from a cruel government or from an organization that has emerged due to the lack of a successful government. On the other hand, there is a universally accepted fundamental rule of international law and principle of international relations providing that all states have internal sovereignty and should be free from the interference of an external power. Which side should the international community take in the case of a humanitarian crisis? The answer has varied over time depending on the common inclination of the international community towards the international system.

Without determining the current position of state sovereignty, the analysis would be lacking. Section I of this paper focuses on the theory of state sovereignty and the non-intervention principle, which are considered *jus cogens* norms of international law. Section II, by tracing the historical theory behind humanitarian intervention, considers to what extent states can use state sovereignty and the principle of non-intervention as a shield to rule their subjects in their internal affairs. For this purpose, the section reviews the early international law writings of the scholastics and natural law theorists “recognizing the capacity of one sovereign to wage war on behalf of a people unjustly oppressed by another sovereign” (Chesterman, 2001: 7-8); later it considers the opposing doctrine of non-intervention, which arose during the seventeenth century with the rise of positivism in international law. Partly in response to this, humanitarian intervention did not emerge as a coherent term until the twentieth century, after which the term is recognized as an exception to the general principle of non-intervention.

1. HISTORICAL EVOLUTION OF STATE SOVEREIGNTY AND THE NON-INTERVENTION PRINCIPLE IN INTERNATIONAL RELATIONS

A basic feature of the modern international relations system is “the division of the world into sovereign states” (Abiew, 1999: 23). The premise of state sovereignty composes

⁶ U.N. Charter art. 39 provides that “the Security Council shall determine the existence of any threat to the peace, breach of the 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 international peace and security.”



most of the basic rules of international relations theory (Jackson, 1987: 521). “The beginnings of the theory of state sovereignty are found in Aristotle’s *Politics*, and the classic body of the Roman Law” (Merriam, 2001: 5). In *Politics*, Aristotle recognizes that there must be a supreme power in a state, and this power may belong to one, or a few, or of many (Merriam, 2001: 5). The Romans rendered the idea its clearest meaning that, “[t]he will of the Prince has the force of law, since the people have transferred to him all their right and power” (Merriam, 2001: 5; Solberg, 1990: xxiv).

Despite this literature, it is accepted that the first systematic definition of the term was made by the French jurist Jean Bodin (Arslanel & Eryücel, 2016: 26). According to Bodin’s definition, sovereignty is “[t]he supreme power over citizens and subjects, unrestrained by law” (Merriam, 2001: 7). With this definition, the term has an absolute, unlimited, single, indivisible and non-transferable meaning (Arslanel & Eryücel, 2016: 26). Although Bodin by no means desires a restriction on sovereignty, he expressly declares that every ruler is subject to the laws of God, of nature, and of nations (Merriam, 2001: 7).

To Hugo Grotius, sovereignty means “that power whose acts are not subject to the control of another, so that they may be made void by the act of any other human will” (Merriam, 2001: 7). Grotius did not insist upon the Bodin’s conception of absoluteness of sovereignty. Besides divine law, natural law, and the law of nations, Grotius sees also such agreements that are made between ruler(s) and ruled as restrictions on state sovereignty (Merriam, 2001: 11).

In *Leviathan*, Thomas Hobbes’ concept of sovereignty appears as far more absolute than in the theory of both Bodin and Grotius (Abiew, 1999: 28). In the language of Hobbes, “[t]he sovereign power, whether placed as in monarchy, or in one assembly of men, as in popular and aristocratically commonwealths, is as great as possibly men can be imagined to make it” (Merriam, 2001: 14). He, moreover, states that “he who considers it too great and will seek to make it less, must subject himself to a power that can limit it, that is to a greater” (Merriam, 2001: 14).

It is noteworthy that Bodin and Hobbes wrote their ideas on sovereignty after city-states had formed in Europe. Therefore, they tended to defend a high degree of sovereignty due to the disorders caused by the religious wars of the sixteenth and seventeenth centuries (Abiew, 1999: 28). Their theories played an important role in the development of state sovereignty because they “provided European rulers with a variegated menu of intellectual ideas from which they could draw to justify their policies” (Krasner, 1993: 263).

The term can be used today as referring to two meanings. The first refers to “internal sovereignty” which means “the power enjoyed by a government entity of a sovereign state, including affairs within its own territory.” (Black’s Law Dictionary 2014: 1524). According to John Hoffman, it is “a state’s absolute authority to rule over a specific geographical area and the people that live in the area” (Hoffman, 1998: 16). According to the internal sovereignty theory, the state, which is the only sovereign unit in a specific territory, will continue domestic politics in the framework of its own set of rules and will expect the citizens to comply with the rules (Hinsley, 1966: 26).

The second refers to “external sovereignty” meaning that a government’s power of dealing with foreign governments to defend the interests of its own country (Black’s Law Dictionary 2014: 1524). External sovereignty can be interpreted to mean that states emerge as equal subjects within the international system, and they do not interfere in the internal affairs of each other so that they can have a *de facto* autonomy inside their borders beside a *de jure*



recognition by other states (Arslanel & Eryücel, 2016: 26). As can be seen, the basic difference between internal and external sovereignty is that while there is only one supreme authority within domestic affairs, there are several in the international arena because all states within the international system have this equal sovereignty. Therefore, the international system illustrates a picture in which there is a chaotic environment because none of the states has to obey a superior sovereign since all independent states are equally represented (Brownlie, 1998: 287).

Stephen Krasner, on the other hand, adds two more aspects to sovereignty and classifies the term in four different ways:

- *Interdependence sovereignty* is the ability of public authorities to regulate the flow of information, goods, or people or capital across the borders of their state;
- *Domestic sovereignty* [internal sovereignty] refers to the formal organization of political authority within the state and the ability of public authorities to exercise effective control within the borders of the state;
- *International sovereignty* [external sovereignty] refers to the practices associated with mutual recognition, usually between territorial entities that have formal juridical independence;
- And *Westphalian sovereignty* refers to political organization based on the exclusion of external actors from authority structures within a given territory (Krasner, 2000: 3).

In this sense, Krasner's classification points to an important aspect of state sovereignty because the Peace of Westphalia (1648) is generally accepted as a milestone in the development of the theory (Abiew , 1999: 28; Cebeci, 2008: 28). According to Professor Francis Kofi Abiew of Political Science, "the European pattern of territorial entities ruled by sovereigns equal as between themselves received its confirmation [with the Peace of Westphalia]" (Abiew , 1999: 28). The institutions created with Westphalia aimed at maintaining order and stability in the international relations systems (Abiew , 1999: 29). Those institutions were a balance of power to prevent the rise of a more powerful state; the codification of rules of behavior through international law; and the use of international conferences to settle disputes (Watson. 1984: 23-25).

The Peace of Westphalia did not only create some institutions to maintain order in international relations, but it also marked a new era in the modern state system. Professor Jonathan Havercroft of International Political Theory at the University of Southampton claims that "before Westphalia, Europe was a complicated, overlapping network of multiple political authorities, none of which had a monopoly on political power. After Westphalia, states in Europe were autonomous sovereign entities with exclusive control over their territories, and a right to not have interference in their domestic affairs by foreign powers" (Havercroft, 2012: 121; see also Hayman and Williams, 2006:521; Jamnejad and Michael Wood, 2009: 349).⁷

⁷ It should be noted here that there are other scholars arguing the principle of non-intervention was not relevance with the Peace of Westphalia, and did not occur until nineteenth century. See Krasner, 2000: 20. This paper follows the common acceptance by international relations and international law theorists that although the principle of non-intervention did not take place as a common practice in international relations right after the Peace of Westphalia, it is very difficult, if not impossible, to precisely date when an idea comes into existence. However, after Westphalia, "non-intervention became standard and expected state practice . . . [in international relations]." (Philpott, 1999: 582.)



Therefore, the treaty recognized a divine authority of the domestic affairs of states, and paid great attention to the non-intervention principle.

Authors accept that Westphalia marked the foundation of the modern international system, because “the contemporary principle of state sovereignty in international law is non-intervention” (Abiew, 1999: 23). As Nicholas Onuf, Professor of International Relations at Florida International University, argues, “Vattel is among the first who argued that in order for a polity to exist it must possess sovereignty and be independent of other states” (Onuf, 1999: 297). Accordingly, the “[non-intervention] principle forbids all states or groups of states to intervene directly or indirectly in the internal or external affairs of other States. A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely” (Nicaragua v. United States of America, 1986: 108). As far back as 1749, Wolff clearly put the principle of non-intervention by saying that “for no ruler of a State has a right to interfere in the government of another, nor is this a matter subject to his judgment.” (Quoted in Benneh, 1995: 140).

Later actions by the international community regarding state sovereignty and the non-intervention principle are in harmony with the earlier theories. In this sense, the League of Nations Covenant laid the foundation for the modern rule of non-intervention.⁸

In this context, one could erroneously argue that contemporary international law does not foresee an exception allowing intervention in states where government is responsible for gross human rights violations. The next section, by tracing the history of the theory behind humanitarian intervention, considers to what extent states can use state sovereignty and non-intervention to shield their rule over their subjects from external interference.

2. HUMANITARIAN INTERVENTION BEFORE THE U.N.: DICHOTOMY AMONG SCHOLARS

The English term “humanitarian intervention” was used first by William Edward Hall in 1880 in his book *International Law* in a footnote (Hall, 1880: 247). Until the 1930s, the term humanitarian intervention was used “for the purpose of vindicating the law of nations against outrage,” (Stowell, 1921: 51) “in the interests of humanity for the purpose of stopping religious persecution and endless cruelties in times of peace and war.” (Oppenheim, 1905:186). According to Ellery Stowell’s definition, humanitarian intervention is “the reliance upon force for the justifiable purpose of protecting the inhabitants of another state from treatment which is so arbitrary and persistently abusive as to exceed the limits of that authority within which the sovereign is presumed to act with reason and justice” (Stowell, 1921: 53).⁹ Despite of this early definitions, “most commentators yesterday and today tend to regard Henry Wheaton as the father of the concept [of humanitarian intervention].” (Heraclides, 2014: 33).

The conceptualization of humanitarian intervention can be traced to as early as the writings of St. Thomas Aquinas (1225 - 1274), who maintains that “a sovereign is entitled to

⁸ League of Nations Covenant art. 15(8) provides that “if the dispute between the parties is claimed by one of them, and is found by the Council, to arise out of a matter which by international law is solely within the domestic jurisdiction of that party, the Council shall so report, and shall make no recommendation as to its settlement”.

⁹ A conventional definition of humanitarian intervention is “the threat or use of force by a state, group of states, or international organization primarily for the purpose of protecting the nationals of the target state from widespread deprivations of internationally recognized human rights” Murphy, 1996: 11-12.



intervene on the basis of religious solidarity in the internal affairs of another when the latter mistreats his own subjects beyond the limits of what seems acceptable” (Fonteyne, 1974: 241).

However, scholars tend to date the classical origins of what became known as humanitarian intervention to Hugo Grotius, who argued that the rights of the sovereign could be limited by principles of humanity (Chesterman, 2001: 9; Wheeler, 2002: 45). The father of the solidarist international society theory, Grotius considered that:

[t]here is . . . another question, whether a war for the subjects of another be just, for the purpose of defending them from injuries by their ruler. If a tyrant practices atrocities towards his subjects, which no just man can approve, the right of human social connexion is not cut off in such a case . . . [I]t would not follow that other may not take up arms for them. (Whewell, 2011: 277-278).¹⁰

Vattel, in 1758, seems to be in a dilemma to take a side between state sovereignty and humanitarian intervention. First, he states that:

[t]he sovereign is the one to whom the Nation has entrusted the empire and the care of government; it has endowed him with his rights; it alone is directly interested in the manner in which the leader it has chosen for itself uses his power. No foreign power, accordingly, is entitled to take notice of the administration by that sovereign, to stand up in judgment of his conduct and to force him to alter it in any way. If he buries his subjects under taxes, if he treats them harshly, it is the Nation's business; no one else is called upon to admonish him, to force him to apply wiser and more equitable principles. (Quoted in Fonteyne, 1974: 215).

Vattel, then, immediately maintains that “[i]f the prince, attacking the fundamental laws, gives his people a legitimate reason to resist him, if tyranny becomes so unbearable as to cause the Nation to rise, any foreign power is entitled to help an oppressed people that has requested its assistance.” (Quoted in Fonteyne, 1974:215).

Although the doctrine of humanitarian intervention can be traced to the religious wars of the sixteenth and seventeenth centuries, its institutionalism is a creation of the nineteenth century (Heraclides, 2014: 26). From the middle of the nineteenth century, Jean-Pierre Fonteyne argues, a dichotomy appears between those championing the non-intervention principle and those who favor a more flexible rule permitting humanitarian intervention (Fonteyne, 1974: 215).

Henry Wheaton stated in 1836, after the Greek independence war against the Ottoman Empire, that:

¹⁰ One of Grotius’s contemporaries, Samuel von Pufendorf, also maintained in 1682 that “common descent alone may be a sufficient ground for our going to the defense of one who is unjustly oppressed, and implores our aid, if we can conveniently do so.” von Pufendorf, 1964: 11.



[t]he interference of the Christian powers of Europe, in favour of the Greeks, who, after enduring ages of cruel oppression, had shaken off the Ottoman yoke, affords a further illustration of the principles of international law authorizing such an interference, not only where the interests and safety of other powers are immediately affected by the internal transactions of a particular State, but where the general interests of humanity are infringed by the excesses of a barbarous and despotic government (Wheaton, 1866: 113).

Naussau William Senior immediately responded to what Wheaton had conceptualized. Senior's view (in 1843) was that "interference for the mere purpose of preventing the oppression of Subjects by their Prince' was unlawful and dangerous, and made the lasting point that it was the privilege . . . of the strong against the weak" (Senior, 1865: 241).

One of senior's contemporaries, German Rodecker von Rotteck, tried to reconcile both views in 1845 by stating that "humanitarian intervention should be considered as a violation of law, but sometimes excused, or even applauded, as we excuse a crime" (Heraclides, 2014: 35. *See also* Friedrich Berner in Stowell, 1921: 472; Lawrence, 1895: 120-121).

In the 1850s, Robert Phillimore became involved in the debate by asserting that:

[i]ntervention by one Christian State on behalf of the subjects of another upon the ground of Religion, has, under certain circumstances, been practiced, and cannot be said, in the abstract, to be a violation of International Law . . . in the event of a *persecution* of large bodies of men, on account of their religious belief, an armed Intervention on their behalf might be as warrantable by International Law, as an armed Intervention to effusion of blood and protracted internal hostilities (Phillimore, 1853: 11; *see also* Rivier in Heraclides, 2014: 48).

Likewise, to qualify his position that "[i]nterference on the score of humanity or of religion can be justified only by the extreme gravity of the case," (Woolsey, 1860: 111) Theodore Woolsey asserted that interference can be justified on the ground that "some extraordinary state of things is brought about by the crime of a government against its subjects." (Woolsey, 1860: 111; *see also* Halleck, 1908: 103; Bluntschli (Quoted in Heraclides, 2014: 40).)

Mountague Bernard, the first chair of international law professor in Britain at Oxford, argued, in 1860, that "good . . . in any degree commensurate with the evil. On the contrary, even when it dethrones a tyrant, puts an end to a ruinous anarchy, or stanches the effusion of blood in a civil war, it has a direct tendency to produce mischiefs worse than it removes." (Bernard, 1860: 9) However, interestingly, after examining an exception where intervention may be admissible, and concluding that all exceptions are inadmissible, Bernard argued that "there is great difference . . . between rebellion and revolt" (Bernard, 1860: 23),¹¹ and in cases of revolt, "interference ceases to be intervention when that is done" (Bernard, 1860: 23)

¹¹ "A successful rebellion changes or government or a dynasty; a successful revolt makes two states out of one."



as in the case of the battle of Navarino which cannot be seen as simply an intervention in the internal affairs of the Turkish [E]mpire.” (Bernard, 1860: 23).

The trend in 1870s was to accept humanitarian intervention in a limited way only. The authors tended to restrict “its lawful application either to very specific circumstances or to situations involving certain categories of states only” (Bernard, 1860: 23). Edward Creasy, for instance, while admitting, “Intervention may be justifiable, and even a duty, in certain exceptional cases” (Creasy, 1876: 303), limited the application of humanitarian intervention to those cases only:

[w]here we intervene in behalf of a grievously oppressed people, which has never amalgamated with its oppressors as one nation, and which its oppressors have systematically treated as an alien race, subject to the same imperial authority, but in other respects distinct ... [or] where the King, or dominant party of a nation keeps up, in defiance of the State's fundamental Laws, a mercenary army of regular troops, especially if carefully organized and officered by men who are of creed, of politics, and of feelings alien from those held by the great majority of the population, and where, by this being done, all effective manifestations of the popular will, and the formation of a truly national force are rendered utterly impossible (Creasy, 1876: 303-305).

The French international lawyer, Paul Louis Pradier-Fodere, demonstrated one of the most detailed rejections of humanitarian intervention in the 1880s. He was of the view that:

[humanitarian] intervention is illegal because it constitutes an infringement upon the independence of States, because the powers that are not directly, immediately affected by these inhuman acts are not entitled to intervene. If the inhuman acts are committed against nationals of the country where they are committed, the powers are totally disinterested. The acts of inhumanity, however condemnable they may be, as long as they do not affect nor threaten the rights of other States, do not provide the latter with a basis for lawful intervention, as no State can stand up in judgment of the conduct of others. As long as they do not infringe upon the rights of the other powers or of their subjects, they remain the sole business of the nationals of the countries where they are committed (Fonteyne,1974:216).

Again, de Martens, in 1883, made an interesting distinction between states in which humanitarian intervention could be legal and illegal. Accordingly, de Martens put it that “vis-a-vis non civilized nations . . . intervention by the civilized powers is in principle legitimate, when the Christian population of those countries is exposed to persecutions or massacres. These motives are not applicable to the relations between civilized powers” (Fonteyne, 1974: 219).



In the 1900s, the dichotomy remained the same. Lafayette Pereira, as a traditional Latin American scholar, stated in 1902 that “[i]nternal oppression, however odious and violent it may be, does not affect, either directly or indirectly, external relations and does not endanger the existence of other States. Accordingly, it cannot be used as a legal basis for use of force and violent means” (Fonteyne, 1974: 217).

De Lapradelle, on the other hand, referring to the U.S. intervention in Cuba, stated that “[w]hereas it is true that States are sovereign, that sovereignty . . . has its limits . . . in international law . . . in the fundamental rights of humanity” (Fonteyne, 1974: 221).

In the period from 1900s to the establishment of the U.N., “the preponderance of supporters [of the humanitarian intervention] by comparison to those against intervention is even greater than in the previous phases,” argues Alexis Heraclides (Heraclides, 2014: 48). Indeed, John Westlake maintained, in 1910, that “[i]t is idle to argue in such a case that the duty of neighboring peoples is to look on quietly. Laws are made for men and not for creatures of the imagination, and they must not create or tolerate for them situations which are beyond the endurance . . .” (Westlake, 1910: 320).

It is very similar to what Lassa Oppenheim argued, in 1905, that “whether there is really a rule of the Law of Nations which admits such intervention may well be doubted . . . and it may perhaps be said that in time the Law of Nations will recognize the rule that interventions in the interest of humanity are admissible, provided they are exercised in the form of *collective* intervention of the Powers” (Oppenheim, 1905: 100).¹²

Charles Cheney Hyde, interestingly, while highly respecting state sovereignty dogma, felt obligated to make an exception in case where there is a racial connection between the oppressed people and the intervening state (Hyde, 1911: 6).

Although it is highly possible to extend the list of these great scholars who are against and in favor of humanitarian intervention, we should conclude with Nicolas Politis whose work was published posthumously. He asserted that

[e]very people has the right to organize itself as it wants, to choose and to change, at its convenience, the forms of its government, without other countries being in the position to oppose or to intervene in what are internal affairs — But . . . such a right will merit due respect on the principle that it makes reasonable use of it. If, on the contrary, it gives ground to abuses of power, if the rights of others are violated . . . and, in general, if the prescriptions of international morality and of international law are downtrodden, other countries are entitled to intervene; they could put into play the rules of international responsibility. (Quoted in Heraclides, 2014: 53-54).

¹² Oppenheim also states that “there is no doubt that, should a State venture to treat its own subjects or some of them with such cruelty as would stagger humanity, public opinion of the rest of the world would call upon the Powers to exercise intervention for the purpose of compelling such State to establish a legal order of things within its boundaries sufficient to guarantee to its citizens an existence more adequate to the ideas of modern civilization.” (Oppenheim, 1905: 347). See also Alexandre Merignhac, (Quoted in Heraclides, 2014: 51); Borchard, 1916: 14.



CONCLUSION

I examined a total of different 36 authors commenting upon the admissibility of humanitarian intervention during the period from 1880s to WWII. The clear conclusion is that the dichotomy among scholars, which Fonteyne points, runs through the doctrine of humanitarian intervention in this period (Fonteyne, 1974: 224). For instance, while 11 of them are decidedly against foreign intervention for purposes of humanity, 25 of them are in favor. Again, among those 25 who are in favor, there are basically 6 groups.

The first group including Wheaton, Heiberg, Woolsey, Halleck, Bluntschli, Creasy, Westlake, Merignhac, Amos, Hall, Manning, Borchard, and Politis, do not consider humanitarian intervention a violation of sovereignty and non-intervention norm. The second group including de Martens deliver the right to intervention only to civilized states. Similarly, in the third group including Phillimore, an intervention could be justified only when it is done for Christianity. According to the fourth group including Vattel, von Rotteck, Berner, Lawrence and Bernard, although it is a violation, an intervention can be excused for the sacred purpose of saving human beings. The fifth group including Fiore, Rivier and Oppenheim creates a more contemporary approach which is that an intervention is admissible when it is done collectively. Finally, the sixth group including Flyde makes an interesting exception to the general norm that intervention is legal if there is a racial connection between the states.

Although the dichotomy seems strict, it should be noted that there is a high acceptance rate of humanitarian intervention among scholars. For instance, 24 authors of 35 I have reviewed above accept humanitarian intervention as a legal method in international law, which corresponds about 68 per cent. This conclusion is well-matched with the work of Heraclis in which he examined 94 publicists active from the 1830s until the 1930s of whom 60 are supportive of humanitarian intervention, which corresponds 64 per cent of the total (Heraclides, 2014: 33). Therefore, although there were more scholars believing that humanitarian intervention should be a legal and legitimate tool of international relations, a consensus was not even close.

BIBLIOGRAPHY

- Abiew, F.K. (1999). *The Evolution of the Doctrine and Practice of Humanitarian Intervention*, The Hague, The Netherlands: Kluwer Law International.
- Araujo, R. (2000). Sovereignty, Human Rights, and Self-Determination: The Meaning of International Law, *Fordham International Law Journal*, 24(5) 1477-1532.
- Arslanel N. and Eryücel, E. (2013). Küreselleşme Sürecinde Egemenlik Kavramının Dönüşümü, *Atatürk Üniversitesi Sosyal Bilimler Enstitüsü Dergisi*, 17(1) 23-36.
- Ayoob, M. (2002). Humanitarian Intervention and State Sovereignty, *The International Journal of Human Rights*, 6(1), 81 – 102.
- Barker, J.C. (2000). *International Law and International Relations*, London: Continuum
- Benneh, E. Y. (1995). Review of the Law on Non-Intervention, *African Journal of International and Comparative Law*, 7, 139-157.
- Bernard, M. (1860). *On the Principle of Non-Intervention: A lecture delivered in the Hall of All Souls' College*, London: J.H. & J. Parker.



- Bjola, C. (2008). Legitimacy and the Use of Force: Bridging the Analytical - Normative Divide, *Review of International Studies*, 34(4), 627-644.
- Black's Law Dictionary (2014). (10th ed.).
- Borchard, E. M. (1916). *The Diplomatic Protection of Citizens Abroad or The Law of International Claims*, New York: The Banks Law Publishing Co.
- Brownlie, I. (1998). *Principles of Public International Law* (5th ed.), New York: Oxford University Press.
- Bryce, T. (2005). *The Kingdom of the Hittites*, New York: Oxford University Press.
- Cebeci, K. (2008). Küreselleşme Bağlamında Ulus-Devletin Egemenlik Gücünün Dönüşümü, *Sayıştay Dergisi* 71, 23-39.
- Chesterman, S. (2001). *Just War Or Just Peace?: Humanitarian Intervention and International Law*, New York: Oxford University Press.
- Creasy, E.S. (1876). *First Platform of International Law*, London: J. Van Voorst.
- Fenwick, C.G. (1965). *International Law* (4th ed), New York: Appleton-Century-Crofts.
- Fonteyne, J. (1974). The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity Under the U.N. Charter, *California Western International Law Journal*, 4 (2), 203-270.
- Hall, W.E. (1880). *International Law*, New York: Oxford University Press.
- Halleck, H.W. (1908). *Halleck's International Law or Rules Regulating the Intercourse of States in Peace and War Vol. I*, (4th ed.). London: K. Paul, Trench, Trübner & Co.
- Havercroft, J. (2012). Was Westphalia 'all that'? Hobbes, Bellarmine, and the Norm of Non-Intervention, *Global Constitutionalism*, 1(1), 120-140.
- Hayman, P.A. & Williams, John. 2006. Westphalian Sovereignty: Rights, Intervention, Meaning and Context, *Global Society*, 20(2), 521-542 (2006).
- Heraclides, A. (2014). Humanitarian Intervention in International Law 1830-1939: The Debate, *Journal of The History of International Law*, 16(1) 26-62.
- Heselhaus, S. (2009). *International Law and the Use of Force*, (Ed.) Aaron Schwabach and Arthur John Cockfield, *The Role of International Law and Institutions*, Paris: EOLSS Publishers.
- Hinsley, F. H. (1966). *Sovereignty*, New York: Oxford University Press.
- Hoffman, J. (1998). *Sovereignty, USA*: University of Minnesota Press
- Hurd, I. (2011). Is Humanitarian Intervention Legal? The Rule of Law in an Incoherent World, *Ethics & International Affairs* 25(3), 293-3130.
- Hyde, C. C. (1911). Intervention in Theory and Practice, *Illinois Law Review*, 6(1), 1-16.
- Jackson, R.H. (1987). Quasi-States, Dual Regimes, and Neoclassical Theory: International Jurisprudence and the Third World, *International Organizations*, 41(4), 519-549.
- Jamnejad, M. and Wood, M. (2009). Current Legal Developments: The Principle of Non-Intervention, *Leiden Journal of International Law*, 22(2), 345-381.
- Krasner, Stephen D. (1993), *Westphalia and All That*, (Ed.) Judith Goldstein and Robert O. Keohane, *Ideas and Foreign Policy: Beliefs, Institutions, and Political Change*, Ithaca: Cornell University Press.
- Krasner, Stephen D. (2000). *Sovereignty: Organized Hypocrisy*, New Jersey: Princeton University Press.
- Lawrence, T.J. (1895). *The Principles of International Law*, Boston: D. C. Heath & Co. League of Nations Covenant.



- Merriam, C. E. (2001). *History of the Theory of Sovereignty since Rousseau*, Ontario: Batoche Books.
- Milojević, M. 2001. Prohibition of Use of Force and Threats in International Relations, *Law and Politics*, 1(5), 581-604.
- Murphy, S. D. (1996). *Humanitarian Intervention: The United Nations in an Evolving World Order*, Pennsylvania: University of Pennsylvania Press.
- Onuf, N.G. (1994). Civitas Maxima: Wolff, Vattel and the Fate of Republicanism, *The American Journal of International Law*, 88(2) 280-303.
- Oppenheim, L. (1905). *International Law: A Treatise*, London: Longmans, Greene and Co.
- Phillimore, R.J. (1853). *Russia and Turkey: Armed Intervention on the Ground of Religion Considered As a Question of International Law* (2nd ed.), London: James Ridgway, Piccadilly.
- Philpott, D. (1999). Westphalia, Authority, and International Society, *Political Studies*, 47, 566-598.
- Politis, N. (1944). *La morale internationale* (Quoted in Heraclides, 2014: 53-54).
- Sayapin, S. (2014). *The Crime of Aggression in International Criminal Law: Historical Development, Comparative Analysis and Present State*, The Hague, The Netherlands: T.M.C. Asser press
- Senior, N.W. (1865). *Historical and Philosophical Essays (Vol. I)*, London: Longman, Green, Longman, Roberts, & Green.
- Solberg, W.U. (1990). *The Constitutional Convention and the Formation of the Union*, (2nd Ed.), USA: the Board of Trustees of the University of Illinois.
- Stowell, E.C. (1921). *Intervention in International Law*, Washington, D. C.: John Byrne & Co.
- Straumann, B. (2008). The Peace of Westphalia as a Secular Constitution, *Constellations*, 15(2), 173-188. U.N. Charter
- Värk, R. (2003). The Use of Force in the Modern World: Recent Developments and Legal Regulation of the Use of Force, *Baltic Defence Review* 10(2), 27-44.
- Watson, A. (1984). *European International Society and its Expansion*, (Ed.) Hedley Bull & Adam Watson, *The Expansion of International Society*, New York: Oxford University Press.
- Westlake, J. (1910). *International Law, Part I, Peace*, Cambridge: The University Press.
- Wheaton, H. (1866). *Elements of International Law* (R.H. Dana ed.), Boston: Little, Brown, and Co.
- Wheeler, N. (2002). *Saving Strangers: Humanitarian Intervention in International Society*, New York: Oxford University Press.
- Whewell, W. (2011). *Grotius on the Rights of War and Peace: An Abridged Translation*, New Jersey: The Lawbook Exchange.
- Woolsey, T. (1860). *Introduction to The Study of International Law*, New York: Charles Scribner & Co.

INTERNET SOURCES

- Briand-Kellogg Pact, (signed on Aug. 27, 1928). Available at http://avalon.law.yale.edu/20th_century/kbpact.asp, Last Date of Access: 18.01.2017.



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Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment of 27 June 1986, ICJ Rep. 14, at 108, para. 205, available at <http://www.icj-cij.org/docket/files/70/6503.pdf>, Last Date of Access: 17.01.2017.

Von Pufendorf, S. (1682). *De Officio Hominis Et Civis Juxta Legem Naturalem Libri Duo* (Moore trans. 1682), at Book II, chap. 16, para. 11 available at http://www.constitution.org/puf/puf-dut_216.htm, Last Date of Access: 17.01.2017.