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HUMANITARIAN INTERVENTION IN CONTEXT OF POSITIVE REALISM: WITH REFERENCE TO INDIAN INTERVENTION IN BANGLADESH 1971.

AUTHORED BY - SHRADDHA PANDEY

War is inevitable part of mankind. Earlier war was considered as just and unconditional. The development of International Humanitarian law aimed to regularize the conduct of states and individuals in war. It also authorized collective self-defense and intervention on humanitarian grounds against the any state involved in mass atrocities. Positive realism in the context is aimed a imagining an ideal circumstance and acting in the manner to achieve it. Jus ad Bellum developed with authorized intervention in International as well as non-international armed conflict. The six principles incorporated in Jus ad bellum included the proportional intervention and acting only if there is a reasonable prospect to success. In the context of India's Intervention in Bangladesh in 1971 although highly criticized was a need of the hour. India acted in self-defense and on humanitarian grounds with a strategic aim to resolve the conflict and liberate and protect the people of Bangladesh. Positive realism works as a visionary view combined with the action to meet the reality. This article tries to attribute the intervention by India and humanitarian law in general in consonance with Positive realism. It also establishes the concept of positive realism, a psychological concept into the legal context. The article is divided into four parts and is elaborated at length as discussed below.

INTRODUCTION

War is an inevitable part of mankind, ever since man began establishing power and control, war became a necessity. In earlier times, war was considered as just and required no condition, it was only towards the end of 19th Century, Henry Dunant realized the need to regularize the conduct of states and individuals in war. The Geneva Conventions thus developed and the concepts of 'Jus ad Bellum' 'Jus in Bello' and 'Jus Post bello' formed the basis of International Humanitarian Law (IHL). It developed post world-war II and found it's place in the United Nations Charter under Article 2 (7) read with 39, 41 and 42 of the charter which mentions that the states enjoy their own sovereignty and the United Nations have no right to intervene in the matters within the internal jurisdiction of the state unless the Security Council determines the existence of threat to international peace and security, if it so determines it can intervene through economic or military

intervention.¹ India was in the middle of the conflict facing borders issues with Pakistan on both sides in the west as well as the east. India was pressured by the international community to accept the refugees from east Pakistan. After being in the colonial regime for almost 400 years looted by the Britishers who even created chaos in the demography of the region before leaving the nation, India was still reviving itself when it had to face the crisis. I argue that India was legitimate in doing so as the conflict was extended by Pakistan to India following strikes on Indian defense bases and telecommunication structures that led to the war of 1971 known as ‘the Bangladesh Liberation War’ of 1971 marked with its end on 16th December, 1971. This article is divided into four parts- part one deals with the development of International Humanitarian law and laws of war; part two prescribes the concept of positive realism and its relevance with Indian intervention in 1971; part three discusses the brief history of Bangladesh’s problems, its effect on Indian territory and the outcome of war and at last part four deals with the conclusion. All of this is discussed as under:

THE DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW

International Humanitarian Law though not codified has traces reigning back into the history of wars. One such example of humanitarian laws was seen in the religious texts of Sikhism where the gurus preached for humanity even during the times of conflicts and crisis, it is the human conscience that a soldier is for the state but a wounded is for humanity. It was only in the second half of 19th Century following the Battle of Solferino and the influential position of Henry Dunant that his ‘memory of Solferino’ later laid down and developed into the texts of Geneva Convention 1864 for protection of wounded persons.

The Saint Petersburg declaration 1868 banning use of lethal weapon that exploded when coming in contact with soft substance like human tissue. The 1899 and 1907 Hague convention to regulate the manner in which laws are fought on land and other related aspects of law. This was marked as the beginning of the development of International Humanitarian Law in the pre-world war era.² The post world war witnessed the tremendous disaster with the use of advanced weapons and

¹ United Nations, Charter of the United Nations, 24 October 1945, <http://www.unwebsite.com/charter> (20 October 2023).

² International Review of the Red Cross, Vol.104, (2022) Pg.no. 1802 [How international humanitarian law develops \(icrc.org\)](https://www.icrc.org)

chemical based weapon, war had no rules and thus the atrocities were on the rise, grave danger was felt to the civilian life and civilian infrastructure. It became an utmost important aspect to stop the war during the Kellogg-Briand Pact in 1928 which aimed at completely eradicating the war. However, it failed miserably and few years later the world-war II emerged. It became evident that wars cannot be avoided but the conduct of parties to the war can be regularized thus various Geneva conventions and their additional protocols developed to regularize the war on land, air, sea and the determination of rights of the prisoners of war i.e., those persons who were captured in the war. The world-war II also witnessed the grave violation of human rights and thus, the International Humanitarian Law aimed the protection of those who faced violations that attracted international attention. It also found place in the United Nations Charter under chapter VII and later evolved into theories of Just war and Responsibility to Protect.

JUST WAR THEORY AND RESPONSIBILITY TO PROTECT:

Just war:

The Just war theory comprising of Jus Ad Bellum which prescribes the conditions on which the states may resort to war is primarily based on six principles- The war must be *just and proportionate*, it must be carried on with *right intention* and not ulterior motives, it must flow from an *authority*, there must be a *reasonable prospect of success*, and it must be the *last resort*. If any war goes against these attributes, it amounts to breach of International Law and attracts the application of United Nation's Charter and other developed conventions in this regard.

During the East Pakistan revolution and other wars which were fought in the cold war era, the functioning of the UN came to a standstill with major powers rising against each other to establish their global influence, thus, United Nation became ineffective in establishing and balancing its power. Post the Cold war period, the two major conflicts in former Yugoslavia and Rwanda saw grave violations of humanitarian rights, the UN Security Council established ad hoc tribunals for the same however, the process was elongated. The Kosovo-Serbian war in the late 20th century saw the intervention of NATO peacekeeping troops with an objective to put an end to the mass human rights violation and Genocide of ethnic Albanians and mass killing of civilians without the authorization of UN Security Council.

Responsibility to Protect:

It was the NATO's intervention in Kosovo that despite being criticized for violating the

international law against state sovereignty was lauded by Kofi Annan in his 2001 millennium report mentioning that the principle of state sovereignty cannot override the breach of peace and security and authorize the mass violation human right. This sparked the debate for responsibility to protect a document prepared by a commission formed by Canadian Government termed 'Responsibility to Protect' came into existence. The document was drawn in an effort to elaborate on 'State Responsibility' to protect its subjects, however, residuary power also lies with International Community which in times of international crimes committed as mentioned in the Rome Statute and Genocide convention along with Geneva Convention and additional protocols may attract intervention. Through responsibility to protect, international community may help another state in curbing the international crimes of genocide, crime against humanity and ethnic cleansing in a timely and effective manner which may derive force from the United Nations security council as well as its general assembly.³ The classic example of responsibility to protect three decades back by a third world country was India's intervention in Bangladesh during 1971 which was highly criticized by the International Community unless they themselves authorized it three decades later.

Indian Intervention in Bangladesh:

The colonial regime almost came to an end but with the destabilization and division of Indian Sub-continent into India and Pakistan. Not only the nations, but the region of Bengal was divided into two- East Bengal and West Bengal. The former became the part of Pakistan and the latter remained with India. Thus, the Pakistan was ambiguously divided into East-Pakistan (East Bengal) bordering eastern India and West- Pakistan bordering north west Indian Nation. This created a geographic barrier for India being the state lying between the rival nation created by the British colonizers rooted with hatred towards each other. The Problem that highly existed in Pakistan was lack of representation of East Pakistanis. The west Pakistan group considered themselves ethnically major despite the east being populous. The lack of representation and less rights of being heard sparked the fame of rebellion in East Pakistan for creating an autonomous ethnic state of 'Bangladesh.' In 1970 after years of protest and deliberations on inclusion of east Pakistanis in Government and Politics, Awami league emerged victorious which shattered the political standing of West Pakistan. The elections were called off and the regime of Sheikh Mujib was not accepted by Western Pakistani elites. this led to protest and mass demonstration for

³ United Nations, *Responsibility to Protect*, (2005).

freedom of East Pakistan. It was not only the political but economic reasons which led to the war. The population of east Bengal was more than that of the West. The Eastern Pakistani contributed to 62% of the revenue of Pakistan against an allocation of only 25% in return. The rest 75% was only used in the development of economy and pockets of West Pakistani authorities. The East Pakistani stood up against their demand for establishing their autonomy which was strongly resented by the Western Pakistan. In association with various local eastern Pakistan group such as Jamaat-e-Islami and its subsidiary combatants group Al-Badar and Al-Shams, it began its attack on almost anyone who tried to come in their way, they killed enormous number of Bengalis as well as targeted minority Hindus in Eastern Pakistan. Almost 30 million people were killed by Pakistani forces and 10 million seek refuge in the only neighbor country of India.⁴

India, despite having its own problems and issues faced posted colonial retraction, had enormous pressure to accept the refugees entering its territories to escape the persecution happening in their home state. India's resources allocation witnessed a major shift with the inclusion of refugees and the tensions increased within the Indian territory. It also served as an opportunity for India to redefine its borders with Pakistan so that it will no longer be the route to east and west Pakistan.

India raised call in the United Nations accusing Pakistan of International Crimes of Genocide of Hindu and East Bengalis, act of aggression and breach of Humanitarian Law. International community did not take a serious cognizance of the matter as it took in the case of Vietnam war. The Cold war situation aggravated with US favoring Pakistan to seek the communism in China and the Soviet backed India. After the continuous calls for seeking assistance by international community on humanitarian grounds with the country of India approaching UN and the Indian Prime Minister Mrs. Indira Gandhi taking a world tour to preach about the aggravated situation, mass atrocities and lack of resources and UN taking long time for a situation requiring immediate attention. The state took its firm stand to intervene in the crisis if the international community abstained from doing so.

It was in December, 1971 when Pakistan agitated by India giving refuge to eastern Pakistanis accusing it of providing military assistance and training go act against Pakistan, Pakistan bombarded various places in Jammu & Kashmir, Rajasthan, Punjab border, Agra and other places

⁴ European Foundation for South Asian Studies, *1971 Liberation war, birth of Bangladesh and comparison with present day Pakistan*, [1971 Liberation war, birth of Bangladesh and comparison with present day Pakistan :: EFSAS](#)

in India. Due to this, India had no option but to intervene militarily in its self-defense and on humanitarian grounds.

The Intervention of India was highly criticized by the international community particularly by the United States and a United Nations Resolution was also passed condemning the act of India in Pakistan which was termed as the Pakistan's Internal conflict which was then vetoed by Russia. However, the outcome of Intervention proved to be fruitful for both Bangladesh as well as India. It also resolved the prolonged conflict between east and west Pakistan and helped in stabilizing the region. Although not backed by UN Security Council as mentioned under article 39 of the United Nations Charter served as a classic example of Responsibility to Protect which developed in late 20th century. The action of India in Bangladesh liberation war was calculative, well planned and properly executed to achieve a favorable outcome that was estimated by the Indian state.

Understanding Positive Realism

Positive Realism is a branch of neo-realism which deals with the development and eradication of criticisms in the Realism. Kenneth Waltz in his 'Theory of International Politics' propounded neo-realism. The objectives of neo-realism are to prescribe state based international relations through structure. There exists no structure in international law and states are concerned with only self-interest despite being obligated at a global level. A realistic structure in international relation which currently exists is to seek the assistance of an International Body named United Nations, however, failure to do so attracts the authority to work towards self-interest. India worked towards the self-preservation and interest along with an optimistic outcome which it wanted to achieve. Positive realism works as a visionary view combined with the action to meet the reality. It is a branch of psychology and hence it is crucial to connect the context in legal concept. Positive Realism which has not attained a theoretical base in jurisprudence yet remains a branch of psychology, however, its legal traces can be seen right from the fact that the concept entirely focuses upon what the judges will decide shall be the law. Hence it can rightly be mentioned that "*Law is what the psychology of court decides.*"⁵ American legal realism focuses on the view that whatever law may be enacted by the legislation derives its force only through the process of interpretation by the judges of the court. A judge may deliver the decision influenced by factors such as social interest, public policy, his thoughts, ideologies and existing

⁵ Ishika Sareen, *American Realism & Its Future in India: A Study*, 4, INDIAN JOURNAL OF LAW AND LEGAL RESEARCH (2022), <https://www.ijlra.com/post/american-realism-its-future-in-india-a-study> (last visited Feb 7, 2024).

state of mind. One such example could be '*Bad Man Theory*' propounded by *Oliver W. Holmes* which is highly influenced by the sociological perception that a judge may make by physical appearance of an accused to deliver the judgment. The argument here is to draw a link between psychology and law. The article emphasizes on the interrelationship between law and psychology in understanding the concept and origin of 'Realism'. By '*Positive Realism*' we mean that an ideal scenario is hypothetically presumed to exist when acted in a manner that has reasonable prospect of success. This is exactly what one of the principles of Jus-ad-bellum highlights when intervening in an internal matter of another state engulfed in gross human rights violation. Thus, in the above case, when intervened in the matter of Bangladesh, its main objective was to curb the humanitarian as well as its own geographical crisis created by the colonial power.

CONCLUSION:

The article thus emphasizes the scope of humanitarian intervention in a positive realistic approach; however, such approach should be viewed in a modern sense of intervention to protect the subjects of any state against the unjust actions of a party to the conflict committing such atrocities. It should not be used as a tool for the state's expansion policy as the purpose is to work for the welfare of the civilians and non-combatants. In our context, even India when it intervened in the Bangladesh's conflict with Pakistan was with the sole aim of achieving a separate state for the East Bengalis whose partition was summed up by the colonizers ambiguously. Had India not intervened in the conflict, the crisis could have developed into a prolonged conflict as in the case of Israel-Palestine which would have led to the killings of thousands of innocent people living both ways. The existence of east Pakistan as was realized by India could pierce the whole country which could pause its development and long standing in the international community. Bangladesh and Pakistan too, have independently developed in the region. The intervening move by India is to be justified both on the ground of humanitarian intervention and self-defense. The positive realistic approach of Indian strategy led to the successful resolution of the crisis in a longer run. India's act of humanitarian intervention was criticized by the first world as it was opposed to their determined decision. India realized that if it did not intervene, there would be more bloodshed in the region which may result in global instability and a state of chaos in the south -Asian region. A similar move was witnessed during the late 1990s in Kosovo war where a first-world organization NATO intervened in the conflict situation, the action was then justified on humanitarian grounds which proved that the intention of creating international law was placed in the hands of the developed and not the developing or under-developed.