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Unauthorized Humanitarian Intervention in World Politics

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ABSTRACT

This essay aims to address the question of whether there is sufficient state practice to justify humanitarian intervention in the absence of a United Nations Security Council mandate, as required by international law. In the first portion, this essay presents the concept of humanitarian intervention, mapping its origins with reference to the views of Hugo Grotius, Emer de Vattel, and Alberico Gentili until the emergence of Article 2(4) of the Charter of the United Nations. In the second portion, this essay deals with the North Atlantic Treaty Organization's (NATO) military intervention in 1999. Pointing to Kosovo, this essay concludes that there is sufficient state practice to justify the practice of humanitarian intervention in world politics since state practice sets a precedent for customary norms of international law.

Introduction

To what extent does international law allow for the use of force for unauthorized humanitarian intervention[1] and is there sufficient state practice to justify the assertion that a right to humanitarian intervention exists? Humanitarian intervention without United Nations (UN) Security Council authorization generates enormous debate regarding its legality and legitimacy in world politics. While unauthorized humanitarian intervention clearly contradicts *de jure*[2] black letter law under Article 2(4) of the Charter of the United Nations, humanitarian concerns continues to be cited by states as a *de facto*[3] legitimate reason for using force. The UN Charter, ratified in 1945, is the "overriding public law of international society" (as cited in Fassbender 2009, 77). Under Article 2(4) of the UN Charter, states must refrain in their international relations from the threat or use of force against other states (Charter of the United Nations and Statute of the International Court of Justice 1945, 3). This paper examines the conflict between the rules of international law and the legitimacy of state practice of humanitarian intervention, when the Security Council fails to authorize action in the face of human suffering and rights abuses. I support the 'illegal but legitimate' line of reasoning as advanced by the North Atlantic Treaty Organization's (NATO) 1999 intervention in Kosovo; recognizing that because the law is not necessarily just, circumstances may allow for non-compliance with the law. I argue that despite the UN Charter Article 2(4) outlawing the use of force against sovereign states without Security Council approval, unauthorized humanitarian intervention is legitimate to the extent that it is consistent with a set of practices which are internationally recognized as legitimate, notwithstanding its consistency with written law that is enforced by judicial bodies. That states are justified in their use of force for humanitarian purposes because state practice sets a precedent for customary norms of international law, trumping treaty law[4] like Article 2(4) of the UN Charter. In combination with the political and moral norms of the international community, unauthorized intervention for humanitarian purposes in contemporary world politics is supported.

The Roots of Humanitarian Intervention

The present debate about unauthorized humanitarian intervention cannot be fully grasped without discussing the pre-UN Charter context on the use of force which contemporary international law is based upon. The study of humanitarian intervention is traced back to classical scholars of international law such as Grotius, Vattel, and Gentili (Rytter 2001, 125).

1 Unauthorized humanitarian intervention refers to the use of force by a state or group of states or an international organization against another state, aimed at preventing or ending massive violations of the fundamental human right of individuals other than its own citizens ('strangers') or of international humanitarian law, without the permission of the state within whose territory force is applied and without the authorization of the UN's Security Council.

2 De jure describes a set of practices recognized by law as a matter of right or fact.

3 De facto describes a set of practices that is not recognized by law but is accepted as legitimate.

4 Treaty law refers to written agreements of international law between consenting states and which has been ratified.

These legal theorists believed that a "war to rescue an oppressed people and to punish injustice was a just war" (Rytter 2001, 125). Vattel regards the independent sovereign state as an actor in international relations to which a 'law of nations' applies (Glanville 2013, 19). In this context, Vattel suggests a society of independent states to which European nations are members and to which this "law of nations" applies (Glanville 2013, 18). Consequently, European states are duty-bound to one another, requiring member states to respect positive law in addition to natural law. Positive law[5] obliges states to tolerate other states' behaviour so long as it does not infringe on the liberty and independence of others within the society, "no matter how 'illegal and condemnable' the offending state's actions" (Glanville 2013, 19). However, Vattel asserts that there is a right to intervene to rescue the oppressed that is based on a natural law of morality and justice. These views contradict the eighteenth-century principles of sovereignty and non-intervention, and illustrate the tension between the rule of non-intervention and the need to protect people from tyranny (Glanville 2013, 20). In this context humanitarian intervention appeared as a fully-fledged doctrine during the nineteenth century (Heraclides 2015, 23-25). Humanitarian intervention in the nineteenth century is understood as interference in another state's affairs despite the norms of non-intervention and sovereignty, "for the purpose of vindicating the law of nations against outrage," or in the interests of humanity (Heraclides 2015, 24). For example, Britain, France, and Russia cited a 'humanitarian duty' to stop Turkish massacres of Greeks as the basis for their intervention in the Greek War of Independence (1827-1830) (Heraclides 2015, 24). However, this general acceptance of 'just war' shifted in the twentieth century, as principles of non-intervention hardened alongside the establishment of legal doctrines, including the 1928 Kellogg-Briand Pact (which attempted to prohibit the use of force in international relations) and the ratification of the UN Charter (the consequences of which are discussed below). Nevertheless, the desire to protect human rights in the international community did not fade. We now see the evolution of humanitarianism from a general duty against tyranny to an operation outside of the rules of black letter law which preserve sovereignty and non-intervention principles.

Article 2(4) of the UN Charter

In a classical interpretation of the UN Charter, Article 2(4) codifies the rule of non-force in public international law. However, there are two legal exceptions to the prohibition of force, one of which is found in Articles 39, 42, and 44. These articles grant the Security Council the power to authorize force in response to a threat to peace and security in accordance with Chapter VII of the UN Charter (Charter of the United Nations and Statute of the International Court of Justice 1945). The application of Articles 39, 42, and 44 under Chapter VII in combination with Article 2(4), transfers a

5 Positive law (otherwise called "Man's Law") refers to a set of rules which have been established by an authorized legislature in a political community made up of individuals and which does not claim to be derived from a natural set of principles.

state's previously held right to use force to the Security Council. Thus, Security Council-sanctioned intervention is unambiguously legal, provided it conforms to the Council's authority over "threats to international peace and security" (outlined under Chapter VII and Article 39) (Hurd 2011, 296). Otherwise, Article 2(4) clearly does not permit the use of force without a Security Council mandate. Accordingly, the Security Council is the sole UN organ with the authority to legalize the use of force.

This interpretation of Article 2(4) has been repeatedly upheld by the International Court of Justice (ICJ), exemplified by the Court's rejection of the United States's (US) 1986 application for humanitarian intervention in Nicaragua (International Court of Justice 1986). The Court stated that "while the United States might form its own appraisal of the situation as to respect for human rights in Nicaragua, the use of force could not be the appropriate method to monitor or ensure such respect," rendering the actions of the US in violation of international law because they occurred without permission from the Security Council (International Court of Justice 1986, 124; Rytter 2001, 133). Thus, unauthorized humanitarian intervention is not allowed according to the UN Charter's plain text.

However, this interpretation ignores other relevant considerations, such as the political and moral dimensions of law not considered in Article 2(4). Indeed, there are moral situations "in which the unilateral use of force to overthrow injustice begins to seem less wrong than to turn aside" and comply with the rules of law (Brenfors and Petersen 2001, 454). Further, since contemporary international relations have been redefined by globalization, situations involving human rights violations are no longer categorized as the domestic affairs of a state. Rather, upholding human rights is a global concern, which suggests that Article 2(4) cannot be seen as the absolute legal rule with which we judge state practice.

State Practice and Customary International Law

What qualifies as legitimate must be understood in the context of state practice, as when a "norm has been repeated in practice in the international community, so to be generally accepted, it becomes part of [customary] international law as a general principle" (Brenfors and Petersen 2001, 485). On this view, state practice trumps the treaty law that the UN Charter is based upon because it has the power to modify the legal rules against the use of force. However, in accordance with international legal theory, state practice must be accompanied by a subjective acceptance by the international community (formally called "*opinio juris*") in order to gain the status of customary rule (Wheeler 2001, 148-149). From a classical legal interpretation of the post-UN Charter period, *opinio juris* of unauthorized humanitarian intervention does not exist because the rule of non-force has been repeatedly upheld by various resolutions and declarations pertaining to non-intervention and sovereignty such as in the 1987 Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations (Wheeler 2001, 149). I do not deny that these promotions of non-force show that *opinio juris* rejects the

right of unauthorized humanitarian intervention in the immediate post-UN Charter period. However, since the end of the Cold War and the fall of the Soviet Union in the 1990s, 'new interventionism' emerges wherein violations of Article 2(4) are no longer condemned by the Security Council and the broader international community as they previously were. Instead, intervention is largely endorsed by the international community (Brenfors and Petersen 2001, 486). This trend provides evidence of *opinio juris* that was previously absent from international law prior to the 1990s and which contradicts preceding resolutions and declarations of non-intervention and sovereignty as cited by the classical legalist view. Bearing this in mind, contemporary state practice must be viewed as setting new precedents of customary norms which alter the legally binding character of non-force under Article 2(4) and are supported by *opinio juris*.

NATO's 1999 Intervention in Kosovo

As stated, state practice in the post-Cold War period has established new customary norms in international law which support the legitimacy of unauthorized humanitarian intervention, irrespective of Article 2(4) (Morkyte 2011, 129). NATO's unauthorized humanitarian intervention in Kosovo in 1999 sets this precedent. In 1998, the Serbian military under the direction of President Milošević sent forces into the region, then a part of Serbia, in response to Kosovar insurgents. The government campaign ultimately proved to be an effort to ethnically cleanse the region of its majority Albanian Muslim population (Scharf 2013, 160). The UN Security Council determined that the Serbian government was violating the human rights of the Kosovo-Albanian Muslims, which constituted a threat to international peace and security, so they called for the cessation of violence in three resolutions (Wheeler 2001, 145). However, the Security Council did not authorize the use of force because Russia threatened to veto any such attempt, because the country wanted to avoid setting a precedent for intervention in post-Soviet states (Scharf 2013, 160; Wheeler 2001, 145). Acting without authorization, NATO launched a series of aerial bombing attacks ("Operation Allied Force") (Scharf 2013, 161). NATO insisted that there was a legal justification for their use of force, reasoning that the Security Council determined that there was a threat to peace and security but failed to act (Scharf 2013, 162-164). Opposing actors argued that because no definite authorization had been extended, NATO had breached international law. Indeed, the NATO intervention was illegal, insofar as black-letter law prohibits the use of force outside the UN Charter's exceptions. Nevertheless, NATO successfully convinced the international community that their actions were consistent with the spirit of international law, irrespective of Article 2(4) (Wheeler 2001, 147). NATO's action was endorsed by the European Union, the Organization of Islamic States, and the Organization of American States with little public dispute over the necessity of the action to prevent more human suffering and rights violations – applying a political and moral perspective rather than one of *de jure* law (Scharf 2013, 165).

In response, Russia proposed that NATO's

action be condemned by the Security Council like previous instances of unauthorized intervention, but their plea was rejected (Brenfors and Petersen 2001, 496). Instead, the Security Council adopted Resolution 1244, which "put in place the foundations for the international civil and security presence in Kosovo that accompanied the end of hostilities," and can be interpreted as providing an after-the-fact authorization (Scharf 2013, 165). Therefore, I argue that Resolution 1244 provided *opinio juris* confirming the status of customary law. This is best illustrated by the International Commission on Kosovo's statement: "The Commission acknowledges that NATO's military intervention was illegal, though legitimate" (Zajadlo 2005, 36). From this point of view, NATO's Kosovo intervention was a turning point for customary international law.

Concluding Remarks

Throughout this essay, I have considered the legality of humanitarian intervention in the absence of the Security Council's approval as required by the UN Charter's Articles 39, 42, and 44 and in violation of Article 2(4)'s rule of non-intervention. Using NATO's 1999 intervention in Kosovo, I have supported an 'illegal but legitimate' line of reasoning that allows for the conclusion that irrespective of Article 2(4), states are justified in their use of force for unauthorized humanitarian purposes. This is because state practice since the 1990s following the collapse of the Soviet Union gives precedent for the development of customary norms of international law which characterizes contemporary international relations. Regarding Article 2(4), despite illegality according to black-letter law, unauthorized humanitarian intervention is a legitimate state practice.

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