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Barely Borders: Issues of International Law

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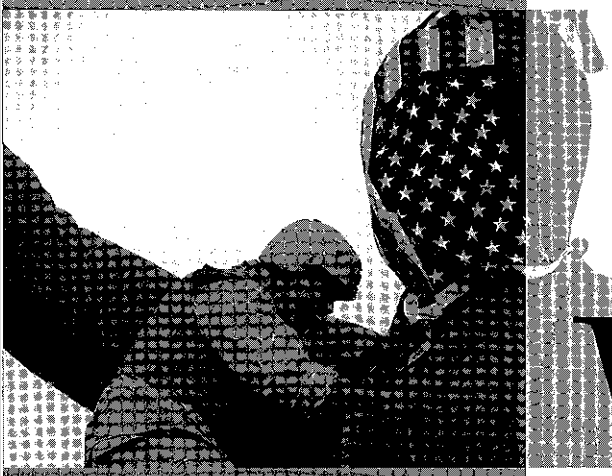

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Issues of International Law

Was the US-led attack on Iraq justified? The question comes from all corners of the globe, and answers are varied. Our collective response should be to cooperate in thoughtfully examining the practical constraints and legal limits to military intervention. The issue is not black-and-white, but multifaceted, and only by addressing it head-on can our international community hope to reach a consensus that will cement genuine autonomous international security for all.

As a cornerstone of international law for more than 350 years, the principle of non-intervention protected a range of different interests. Originally, it protected the sovereign prerogatives of the crowned heads who ruled Europe. While monarchies are not totally obsolete, the principle of non-intervention is now more likely to protect the democratic systems of self-determination and popular sovereignty. It has always helped to promote international peace and stability by discouraging the use of force against the territorial sovereignty and political independence of states. Today, both the reasons for the principle and the necessary exceptions to it can best be understood in terms of human rights.

When the current system of international law began to develop in Europe, it was built upon new rules of sovereignty and non-intervention. This system, unlike that of the hierarchical Holy Roman Empire that preceded it, is founded on the idea that each state is independent and has the same set of sovereign rights. Those who took responsibility for order and justice within the territorially-based state had all the rights of sovereignty under international law, including the exclusive right to make and enforce laws within that state. The principle of non-intervention promotes the peaceful coexistence of autonomous sovereign states by banning each of them from the use of force within the territory of the others.

International law recognizes each state's rights of sovereignty and territorial integrity but cannot guarantee that other states will respect those rights. The international legal system is weak in that it lacks the centralized legislative and judicial organs and coercive executive powers to enforce the rule of law at the national level. Due to this weakness, states must often rely upon self-help to protect their rights under international law. The classic form of self-help is self-defense.

The Right of Self-Defense

The most notable exception to the general principle of non-intervention stems from the right of self-defense. Customary international law develops when the behavior of states over time indicates they have accepted a rule of law. Under that law, two essential conditions limit the right of states to use force in self-defense. First, the use of force must be necessary. In an 1841 letter to British Minister of Foreign Affairs Henry Stephen Fox, US Secretary of State Daniel Webster described this requirement as "a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation." The second require-

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ment is that the acts of self-defense must be proportionate to the threat. This customary standard does not condition the right on a prior armed attack.

The rules of international law are built upon the premise that states, like people, have a natural right to defend themselves against the imminent threat of harm. Article 51 of the UN Charter states that "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations." To the extent that self-defense is an inherent right, the use of force in preemptive self-defense could be justified even without a prior armed attack. This topic raises difficult issues of how to define and apply workable legal standards in matters affecting national security.

Intervention on Behalf of Human Rights

Proponents see humanitarian intervention as a fundamental exception to the principle of non-intervention. The basis for this exception is the idea that the governments of sovereign states hold rights under international law only if they fulfill certain obligations, including the obligation to respect the fundamental rights and interests of the governed. As far back as 1625, Hugo Grotius noted in *The Law of War and Peace* that those rulers who "provoke their people to despair and resistance by unheard of cruelties, having themselves abandoned all the laws of nature, they lose the rights of independent sovereigns, and can no longer claim the privilege of the law of nations." This view was reinforced by developments at the national level, including such watershed events as the 1688 Glorious Revolution in England, the 1776 American Revolution, and the 1789 French Revolution. These events redefined the relationship between state and individual under both national and international law. The monarchies who exercised sovereignty in 17th century Europe were all sidelined or replaced. The values of democracy and popular sovereignty that brought such profound domestic changes had an effect upon international law as well. These changes accelerated in the 20th century as international law moved farther away from its original focus on the state-centered rights of sovereignty and began to stress respect for fundamental freedoms as a standard of governmental legitimacy. Nonetheless, the doctrine of humanitarian intervention remains quite controversial especially since the adoption of the UN Charter in 1945.

Intervention and Aggression

One key rationale for the principle of non-intervention is to promote the order and stability that are essential to the full enjoyment of human rights through local governmental rule. In his 1941 "four freedoms" speech, US President Franklin Roosevelt looked forward to a world in which all would enjoy "freedom from fear," once armaments had been reduced to the point at which "no nation will be in a position to commit an act of physical aggression against any neighbor, anywhere in the world."

The concepts of aggression and intervention are quite distinct, if related. Unlike intervention, which may at times be justified, aggression is an international crime that is unjustified by definition. Several members of the Nazi High Command were convicted of crimes against peace, defined by the Nuremberg tribunal as "planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances." In 1974, the UN General Assembly adopted a resolution defining aggression as "the use of armed force by a State against the sovereignty, territorial integrity or political independence

Opposite: **A US Marine prepares to pull down a statue of Iraqi President Saddam Hussein in Baghdad in April 2003.** ***Above:*** **US President George W. Bush signs the joint US Congressional resolution authorizing the use of force against Iraq.**

Photos Courtesy AFP/Getty Images

of another State, or in any other manner inconsistent with the Charter of the United Nations." The significance of this resolution is limited, however, because Article 39 of the Charter clearly states that Security Council alone is to determine the existence of aggression. The definition merely restates the language of Article 2(4) of the UN Charter and does nothing to resolve the inherent ambiguities.

The UN Charter

According to Article 2(4) of the UN Charter, "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 Purposes of the United Nations."

This language makes clear that the use of force can be justified under certain circumstances but invites debate on what those circumstances might be. A strict reading might suggest that a violation occurs whenever one state uses force on the territory of another. Another interpretation is that forcible intervention is not prohibited unless it compromises the territorial integrity or political independence of a state in a way fundamentally inconsistent with the purposes of the United Nations. Of course, the ambiguity of this UN Charter standard is no coincidence. It reflects the degree of consensus, or lack thereof, among the key framers of the UN Charter in 1995, namely the United States and the USSR. After almost 60 years of change in the international system, it is now time to develop an improved and clarified standard on intervention that has become a burning issue along with the problem of terrorism.

The UN Charter recognizes only two explicit exceptions to the prohibition on the threat or use of force: It may be used in self-defense as mentioned in Article 51 and the UN Security Council may authorize its use to protect or restore international peace and security as specified in Articles 39 through 42. Like other parts of the Charter, this broad prohibition reinforces the sovereign rights of the state. The Charter also affirms that the United Nations itself lacks the authority to intervene in the domestic jurisdiction of its members unless the Security Council, as referred to above, decides that international peace and security are at risk. This much of the Charter seems to support the view that state sovereignty should preclude any intrusive international action for the protection of human rights.

On the other hand, the UN Charter also heralds the emergence of a new international law of human rights that challenges the traditional concept of sovereignty. The Charter states in the Preamble and Article 1(3) that promoting and encouraging respect for human rights is one of the basic purposes of the United Nations, thereby signifying that human rights have become a matter of international concern and not merely a question within the domestic jurisdiction of states. The concept of an international law of human rights redefines state sovereignty by recognizing that the people within the state have rights under international law that the government of the state has the obligation to respect. This reconfiguration marks a radical departure from the traditional "state-centric" view of international law. International human rights treaties have solidified the status of human rights as part of international law.

But who will protect these human rights when the national government fails to respect and protect them? More importantly, who will act to prevent genocide and other shocking atrocities against civilians? In practice, the Security Council rarely authorizes the use of force for any purpose, so the issue arises as to whether a state or group of states, acting without the authorization of the Security Council, can validly claim a right to intervene for humanitarian purposes. The recent practices of states in this regard may foreshadow the development of new rules of customary international law on humanitarian intervention, but there is

The MoveOn Organization delivers one million signatures on an international antiwar petition to the UN Security Council on March 10, 2003.

Photo Courtesy AFP/Getty Images

still no global consensus on these rules.

The governments of many states, especially those that are small, militarily weak, non-democratic, or non-western, are understandably concerned that they might be targets of humanitarian intervention. They may feel that their sovereignty depends upon a strict interpretation of Article 2(4) which precludes humanitarian intervention without the sanction of the Security Council. Even when forcible intervention is the only way to protect the human rights of innocent civilians, it still may not be worth the costs. Officially recognizing a right of humanitarian intervention could destabilize the world by undermining the prohibition on the use of force. The values at stake are truly momentous, and the debate continues on the status of humanitarian intervention under current law. The NATO bombing of Serbia to assist the Albanian Kosovars reopened consideration of this issue, even before recent events in Iraq.

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Justifications for the Iraq War

One can briefly consider the 2003 intervention in Iraq to illustrate how different justifications for intervention may be used, or abused. A number of different legal justifications have been offered. The first is that the coalition acted to enforce a series of earlier Security Council resolutions calling for Iraq to eliminate its weapons of mass destruction. The problem with this argument is that it claims the legitimacy of the Security Council's authority for an intervention that the Council very carefully and specifically declined to authorize. While a long series of Security Council resolutions support the view that there were legitimate international objectives to be achieved in Iraq (WMD disarmament among them), but this is separate from the issue of whether forcible intervention was justified in pursuit of these, or any other, objectives.

Could intervention in Iraq be justified by the right of self-defense? US President George W. Bush argued before the invasion that Iraq's weapons of mass destruction posed a threat to the United States that was unacceptable in a post-September 11 world. There had been no prior armed attack by Iraq against the United States, and the Security Council had declined to authorize the use of force, so the US-led "coalition" intervened on its own authority based on evidence of an imminent threat. Although Article 51 of the UN Charter does not authorize the use of force in the absence of a prior armed attack, it is reasonable to conclude that the preemptive self-defense can be justified *in extremis*. Even so, there will always be questions about the imminence of the threat if not the proportionality of the response. This is particularly true of the intervention in Iraq. The armed intervention in Afghanistan can more easily be justified as necessary for self-defense.

Given the many reports of massive human rights violations by Saddam Hussein's regime, some have attempted, at least after the fact, to justify the invasion as an exercise in humanitarian intervention. But there are reasons to doubt that this was the principal motivation for US intervention in Iraq, and these questions compound concerns about the legality of any act of forcible intervention not authorized by the Security Council.

Humanitarian intervention is controversial due to doubts about its legality, and also because, in practice, there are typically unanswered questions concerning the popular will of the local people, the level of atrocities that warrant intervention, the responsibility for civilian casualties resulting from the intervention, and the possible ulterior motives of the intervening state. Oversight by more effective international institutions could help address these concerns but may not be on the horizon. There are difficult issues of where to draw the line balancing stability and non-intervention on the one hand and the risks and benefits of intervening for human rights on the other. One of those risks is that, in the worst case scenario, humanitarian intervention could itself become a pretext for aggression or oppression.

The Difficulty of Formulating a Clear Standard

It is extremely difficult to formulate hard, complete, and fair rules governing such fundamental matters as the right of self-defense and the right of humanitarian intervention. The ambiguity of the UN Charter's language on non-intervention and self-defense is illustrative of the difficulties involved. The ideal moral standards sometimes referred to as natural law can never be completely and perfectly captured in the concrete standards of positive (man-made) law. It is nonetheless important to develop and refine the standards of that law to the greatest possible extent.

When a vague doctrine can be invoked by states to justify the use of force, they will be tempted to overuse and abuse it. This is threatening to other states, particularly when those

claiming this license are the most powerful states. Without clear legal standards to limit it, the practice of humanitarian intervention threatens both to allow powerful states to dominate the less powerful and to undermine the friendly relations among states in general. However well-intentioned a policy of forcible intervention may be, the benefits may become outweighed by the adverse impact on overall international peace and security.

Realistic legal standards need to be flexible enough to accommodate the compelling humanitarian and security interests involved, yet concrete enough to permit the identification and condemnation of clear violations.

A Human Rights Perspective on Intervention

It would be naïve and perhaps foolhardy to insist on a rigid and idealized version of international law banning armed intervention in all circumstances. If international law is to remain relevant, its rules must adapt to conditions in the contemporary world. A combination of economic, social, and technological forces has made the world more interdependent than ever in terms of economics, culture, and security. At the same time, the values of human rights and popular sovereignty have transformed the relationship between the state and the individual. In light of all this, the rules of international law governing intervention and non-intervention need to be updated and clarified.

These rules, even as they stand today, can best be understood in terms of the human rights they seek to protect. A basic non-intervention rule is needed to discourage aggression and promote the global order and stability essential for the protection and enjoyment of all human rights. But non-intervention is a very state-centered principle. It assumes that national governments alone are responsible for human rights as well as all other matters "internal" to the state. Possible exceptions to the principle become relevant only when states fail to live up to these responsibilities.

In human rights terms, the line between internal and external matters is not always clear. When a national government prepares or launches an attack on another state, or allows others on its territory (such as terrorists) to plan such attacks, then the right of self-defense may trump the principle of non-intervention. Similarly, the natural rights of people may justify proportionate acts of forcible intervention in the targeted state. When the government of a state dramatically fails to respect, protect, and ensure the human rights of its own populace, whether due to loss of government control, or worse yet, due to state policies of oppression and persecution, then humanitarian intervention may be both legal and appropriate. Despite the inherent difficulty of formulating and updating them, it is imperative to develop new and improved rules in this area, reflecting the realities of the early 21st-century world.

US Exceptionalism

Some believe it would be impossible or even counterproductive to formulate better rules circumscribing the rights of self-defense and humanitarian intervention, especially as they might apply to the United States. Their reasoning is based on US exceptionalism: the idea that the United States should get special treatment and remain free from the legal restraints applied to other states. In many ways, the United States is a unique global power because its economy is overwhelmingly dominant, because no comparable military power exists in the world, and, because US capacities are often essential for the success of UN peacekeeping and other uses of force by multilateral institutions. Some conclude that the United States should retain absolute freedom of action, not only for its own sake but also for that of the international community since often, only the United States has the power and the will to act.

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The problem with the exceptionalist argument is that it ignores the rights, concerns, perceptions, and reactions of other states and therefore the ultimate costs of such a policy. A country that draws too freely upon extraordinary exceptions to the rules will inevitably pay a price in terms of its reputation and ability to mobilize international support. No state can claim a unique exemption from accountability and law without being perceived, at least by many, as unprincipled and opportunistic. Only those strongly convinced that the United States is a completely benevolent power will find this extreme form of exceptionalism to be palatable.

If the US government believes international standards

on the use of force are inadequate or too indefinite to safeguard legitimate state interests, it need not renounce the right to protect them. Instead, it should propose clarifications to the legal standards. The argument that no fair and effective international standards are possible is fatalistic and inadequate. In the past, the United States has stepped forward to provide leadership in defining legal standards applicable to self-defense, war crimes and other important matters of national and international security. The US government should provide similar principled leadership today.

US influence will be greater and US security will ultimately be enhanced if the US government participates in the development of more effective international laws and institutions, rather than attempting to stake out a special place beyond legal restraint. At some time in the future, another state with overwhelming military power may claim the right to forcibly intervene in the United States. It would be prudent,, for both humanitarian reasons and future self-interest, for the United States to help build a workable international law of intervention before that day comes.

History Will Be the Judge

Serious consequences hinge on any decision to intervene, especially if the intervention is condemned as illegal or proves to be ill-advised. Having intervened in Iraq on its own authority, with very limited international support, the United States now bears broad responsibility for all that ensues there. This responsibility weighs heavily upon this country in economic, military, political and human terms.

Failure to intervene can have its own costs. An imminent threat to national security, left unchallenged, could explode into a real crisis like that of September 11, 2001. In 1994, the world ignored warnings of possible genocide in Rwanda until it was too late and over 500,000 people were massacred, a failure to act that brought shame to all those who could have prevented the tragedy. Sometimes intervention is the right policy.

But given the specific dangers to which civilians may be exposed and the general possibility that the use of force may undermine international peace and security, the burden must be on the intervener to justify armed action. As incidents of intervention increase in frequency, the justification for such actions will be under even more scrutiny and criticism. Rarely will an international court have jurisdiction to rule upon the legality of any particular act of intervention. These judgments are usually left to world public opinion and, ultimately, to history.

Thomas Jefferson wrote the Declaration of Independence out of "a decent respect for the opinions of mankind." It was then important that the fledgling United States be seen not as a lawless group of revolutionists and lawbreakers, but as a thoughtful society motivated by the need to establish a legitimate and independent state. The world's view of the United States remains relevant today. It is important to any state seeking to guarantee its own security that it not be seen as the aggressor.

An Iraqi girl in the village of Abu Shawaich, located north of Nasiriyah, carries boxes to her family from a humanitarian aid drop-off site established by a US Army Civil Affairs unit.

Restoring human rights through armed intervention is difficult even when a quick military victory can be achieved. Local resentment of outside domination can complicate the realization of political objectives such as stability, prosperity and democracy. The involvement of the United Nations and other credible international institutions may help. Recent events in Afghanistan and Iraq show that some such international support will eventually be needed to bring ambitious policies of intervention to a positive conclusion. ■

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