Humanitarian Military Intervention: Assessing the Need for Revision

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Using the example of humanitarian military intervention, critically assess the claim that the contemporary security environment requires revision of current legal and political practices.

On a stone wall at the memorial of the Dachau concentration camp, a promise is written in five languages: "Never Again" (Haass, 15: 2009). Yet in the decades since the Holocaust, mass atrocities have occurred all over the world, from Cambodia to Rwanda to Darfur, and international actors have repeatedly failed to mount an effective response to these crimes against humanity. The reasons for this are numerous and complex; however this paper shall focus on whether it is the legal and political practices which require reform with regards to humanitarian military intervention. For the purpose of this paper, 'humanitarian military intervention' shall be defined as 'the threat or use of force across state borders by a state (or groups of states) aimed at preventing or ending widespread and grave violations of the fundamental human rights of individuals other than its own citizens, without the permission of the state within whose territory force is applied' (Holzgrefe, 2003:18). In the interest of conceptual clarity, it must be noted that humanitarian intervention may either 'be undertaken by individual (unilateral) or a group of states (multilateral) or by, or authorized by, a competent international organization (collective)' (Malanczuk, 1993:3). However it is not the number of states intervening which is of primary significance to this paper, but rather the mode by which a decision is taken to intervene, as this is of relevance when examining the legal context. The fact that humanitarian military intervention pits traditional notions of state sovereignty against concern for protecting human rights has made it difficult for external countries or international organizations to step in, despite considerable acceptance in recent years of the concept of 'responsibility to protect', henceforth referred to as R2P.

This paper suggests that scholarly debates should stop focusing on whether the practice of humanitarian military intervention should be allowed or not, and rather acknowledge its existence and shift the debate towards evaluating the expected standard of behavior that must be adhered to during an intervention on humanitarian grounds. As argued by Portela (2000) 'given that humanitarian intervention exists, the law must rise to the occasion and evolve a framework to accommodate and regulate the phenomenon'. Portela goes on to claim that 'this is not difficult in International Law, especially since one of the special characteristics of International Law is that violations of law may lead to the formation of a new law, so that an international custom could be intentionally created'. This statement is clearly an oversimplification of very complex legal and political practices, which will be addressed further on when analyzing four potential reforms.

This paper shall critically examine the ways in which current legal and political practices, post 2001, may require revision. To do this, first a basic outline of the current legal practices in relation to humanitarian intervention shall be identified. Following this aforementioned R2P doctrine shall be critically examined in light of the current legal and political practices. This shall then lead into a discussion of four key possible legal reforms and then all the evidence presented shall be critically examined in terms of a requirement of revision on the legal and political practices surrounding humanitarian intervention.

The current international legal system is built primarily on the United Nations Charter, designed (and for good reason) 'to prize deliberation and consensus-building over swift response – exhaustion of nonmilitary measures over rapid

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escalation' (Waxman, 2009:8). However questions arise as to whether this legal system is likely to facilitate the kind of early, decisive and coherent action – especially with respect to military force – needed to effectively combat atrocity crimes. Even the United Nations acknowledges these concerns. For example, in a report of the UN High-Level Panel on Threats, Challenges and Change (United Nations, 2004), in paragraph 42, the report argues: "We have been struck once again by the glacial speed at which our institutions have responded to massive human rights violations in Darfur, Sudan" (UN High-Level Panel on Threats, Challenges and Change, 2004:19). Before attempting to analyze the claim that the contemporary security environment requires revision of current legal and political practices a brief historical account must be presented.

The nature of humanitarian military intervention has changed significantly over the last two decades, with the 1990's being identified by many scholars as a 'decade of humanitarian intervention' (Kaldor, 2007:16) during which the UN authorized several interventions on humanitarian grounds. For the purpose of this paper, the *contemporary* security environment will be taken to mean from 2001 until the present day with the following rationale. A key development in the evolution of humanitarian intervention was report published by the International Commission on Intervention and State Sovereignty (ICISS) 2001, the *Responsibility to Protect*. Commissioned by the Canadian government in response to a request from the then UN Secretary General, Kofi Annan, and led by former Australian foreign affairs minister, Gareth Evans, this report argues that a state has the responsibility to uphold its citizens' human rights. If it is unwilling or unable to fulfill this responsibility, such as in cases of mass killing, its sovereignty is temporarily suspended. In such cases, the responsibility to protect these citizens transfers to the international community (Pattison, 2010:3). Although the extent to which the notion of a R2P has been successfully implemented will be critically examined further on, following this report in 2001 'UN, state officials, and non-governmental organizations (NGO's) regularly began to use the language of the responsibility to protect in relation to serious humanitarian crises and military intervention (Pattison, 2010:4). Thus, on the face of it, this (non legally binding) agreement was something of a watershed moment for humanitarian intervention, which arguably 'seemed to mark the worldwide acceptance of the responsibility to intervene is response to the mass violation of basic human rights (Pattison, 2010:4)'.

At this point, it must be noted that international law can, and has been, interpreted in many different ways. However for the purpose of this paper the primary interpretation of international law shall come from an international legal positivist reading and this position shall be contrasted with that of Tesón's natural law theory. As elaborated upon by Pattison (2010) the main difference between international legal positivists and natural law theorists is their conceptual distinction between what international law is and what morality demands. As such, *lex lata* – the law as it is (*stricto sensus*) – is not the same as *lex ferenda* – the law as it ought to be. Whereas for natural law theorists such as Tesón', who 'rejects the separation of legal validity and morality; he asserts that what the current status of the law is on a certain issue, such as humanitarian intervention, also depends in part on what the law ought to be' (Pattison, 2010:49). In other words, *lex ferenda* affects *lex lata*. In the interest of having a clear and solid baseline this paper shall adopt the international legal positivist reading due to the way in which they outline how treaty and customary law can be identified. According to international legal positivists, 'international law is said to emanate exclusively from the free will of sovereign independent states. There is no law except what is posited by sovereign states' (Wight, 1991:36). Sovereign states can 'posit their will', that is consent to international law in two ways. The first is by agreeing to a treaty; the second is by engaging in a practice, which becomes a customary rule of international law over time as it is repeated (and which meets the requirements of *opinion juris*). In other words, for international legal positivism the two sources of international law are treaty and custom and, as such, moral consideration is not necessary for legal validity. However Teson argues, for the natural law theorists that 'neutral analysis of the two traditional positive sources of international law – custom and treaty – is impossible, and we should therefore interpret these sources according to the best moral theory for the purposes of international law' (Teson et al. 2003:939). Whilst this paper does not disagree that it is challenging to conduct a neutral analysis, it is essential that there is a clearly defined set of parameters in which international law functions, whereby the two sources of international law are treaty and custom. That is not to say that it is without fault, nor that it is the most effective, however it is undeniably a globally accepted framework, without which there would be even more confusion with regards to international law.

Therefore, this paper, in accordance with international legal positivists shall take the following position on the current legality of humanitarian intervention. Article 2(4) of the United Nations Charter provides a general prohibition on the

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use of force. This states that:

All Members shall refrain in their international relations from the threat of 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. (Charter of the United Nations, Chapter I, Article 2.4)

There are only two significant legal exceptions: unilateral or collective self-defense and Security Council enforcement action under Chapter VII of the United Nations Charter. This paper rejects the current (this could be an area for reform which shall be discussed further) existence of a third possible exception to Article 2(4), which would hold that unauthorized humanitarian intervention is legal because there is a customary international law for this practice, for the simple reasons that 'there is insufficient state practice to establish such a customary international law' (Byers and Chesterman, 2003:66). There is currently no widely accepted right or license among individual states to humanitarian intervention, as there is one to self-defense. However, as discussed by Mathias (2005) in 'The United States and the Security Council', the US has generally interpreted its and other states' authority to use force more broadly than many of its allies, especially with regard to self-defense. However, most state and legal experts would agree that there is no clearly established legal authority justifying armed intervention into another state to stop atrocities. Although this view is not universally held, and subject to exceptions (most notably in cases of genocide), this understanding of international law and the UN Charter 'reflects a view that resorting to armed force is an evil to be avoided wherever possible (Mathias, 2005:181). In the words of Italian international jurist Antonio Cassese:

Under the UN Charter system…respect for human rights and self-determination of peoples, however important and crucial it may be, is never allowed to put peace in jeopardy. One may like or dislike this sate of affairs but so it is under *lex lata* [law as it exists] (Cassese, 1999:25)

However at the close of the twentieth century, the idea of carving out an exception to the general prohibition on force in urgent cases of mass atrocities received a boost. Two cases in particular stand out; the first being the international communities failures to intervene to stop the 1994 Rwandan genocide and secondly NATO's intervention to stop Serbian ethnic cleansing in Kosovo in 1999. The UN Security Council was deadlocked in the face of the Serbian atrocities 'with Russia and China threatening to veto any authorization of force' (Waxman, 2009:9). However NATO intervened anyway their 'actions were, to a certain extent successful at preventing violations on the scale of the Bosnian war' (Pattison, 2010:44) and they did receive notable support from the international community. Indeed, the Independent International Commission on Kosovo concluded that NATO's action was 'legitimate, but not legal, given existing international law' (2000:289). Considering that, there has been a lack of effective action in response to human rights violations in Darfur, the Democratic Republic of Congo, northern Uganda and tragically even more countries. This led to understandable questions regarding the significance of an intervener's legal status. As Daniele Archibugi (2005:225) asks 'if humanitarian action can be successful at halting egregious violations of human without having the proper legal basis, why should we care whether an intervener has the legal right to intervene?' However, a legal doctrine of humanitarian intervention has not gained momentum since the Kosovo crisis, even though the case called into question 'the absolutist view that Security Council authorization is always required' (Reisman, 1999:860). Additionally, according to Baranovsky (2001) and Shulong (2001) both Russia and China remain hostile to it for 'ideological and self-interested reasons'. Indeed many states in the developing world oppose a right of humanitarian intervention, seeing it as eroding principles of sovereignty with the potential to be used as a pretext for imperialism.

Despite the lack of establishment of an international legal doctrine of humanitarian intervention, this paper maintains that the normative principle of the 'responsibility to protect' has emerged in its place. Whilst the R2P doctrine is a political rather than legal concept, at the UN World Summit in 2005 world leaders agreed by consensus in the final outcome document to the following points:

Paragraph 138: Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity (2005 World Outcome Summit, A/RES/60/1).

Paragraph 139: The international community, through the United Nations, also has the responsibility to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are

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prepared to take collective action, in a timely and decisive manner,*through the Security council, in accordance with the charter, including Chapter VII*, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their own populations (emphasis added) (2005 World Outcome Summit, A/RES/60/1).

This paper asserts that while R2P does not create any new legal obligations, it is an important political tool for shaping the normative terrain of intervention in several respects. As discussed by Waxman (2009), firstly, to those regimes, which perpetrate mass atrocities or allow them to occur within their borders, it rejects powerfully the argument that sovereignty shields them from international concern. Second, it emphasizes to the international community a responsibility to act when a regime is in major breach of certain duties, thereby providing 'political momentum for action'. However it must be noted that since the report was published in 2001, there were a number of compromises made by its 2005 World Summit formulation. The most significant, arguably, is that it reinforces the view that only the Security Council should administer collective action to enforce it, and whilst many see this as 'watering down the concept' (Waxman, 2010:11), this paper maintains that this is positive compromise. It is clear that there are still a number of UN member states who are skeptical of this doctrine and 'some of this hostility is rooted in broader ideological debates over sovereignty and noninterference with international matters, as well as with the uneven distribution of power in the security council. Some of it is due to the perceptions that the United States and others intend to use the concept self-interestedly. Some is also due to ambiguity of what exactly R2P means, in theory and in practice. The BRICS countries (Brazil, Russia, China and South Africa) have gone as far as to state that R2P can be used as 'a form of imperialism cloaked in humanitarianism' (Keeler, 2011) and the doctrine has also been called 'neocolonialist' (Luck, 2008:3) This paper is by no means claiming that the R2P doctrine is not without faults nor that it is a 'solution', only emphasizing that there have indeed been moves towards reform, at least politically if not legally, in the contemporary security environment.

As mentioned, the very features of the UN Charter that help resolve 'security crises peacefully make it difficult to generate the quick, decisive, and coherent action needed to deter or roll back mass atrocities' (Waxman, 2010:12). Rapid agreement is highly unlikely due to the fact that several permanent members of the Security Council are either ideologically hostile to interventions in general or self interestedly hostile to specific interventions. As discussed by Waxman (2010) once perpetrators, or perpetrating states, begin to commit mass atrocities, deliberation by the UN Security Council often produces 'watered-down responses'. Indeed, even if the Security Council eventually does authorize an intervention, this is unlikely to happen quickly simply because of the structure of the UN. The requirement of broad consensus and the UN Charter's 'preference for exhausting nonmilitary means before considering military options has tended to produce incrementally escalating threats, sanctions, and other measures over long periods' (Waxman, 2010:12).

For those who are dissatisfied with a strict interpretation of the UN Charter, this paper has considered four reform proposals. It must be noted that they are all being presented equally, as this paper is not concerned with finding the most suitable reform, but rather discussed the necessity for reform in the current security environment.

1. **Break the law when necessary.** This view proposes that in some exceptional circumstances, intervention without the authorization from the UN Security Council should be treated as morally and politically justified. Byers and Chesterman (2003) view this notion in the same way that domestic criminal law is sometimes analyzed; where 'criminal behavior is excused or punishment mitigated after the fact in light of exceptional circumstances of necessity' (Byers and Chesterman, 2003:198). The main cited example for this would be Kosovo, in which the NATO intervention was widely viewed as legitimate, even if not strictly legal.
2. **Reform internal UN rules, standards, and procedures.** This reform maintains that the system of the UN is fundamentally sound, but that it can be made more effective and efficient with soft law agreements between its members and through organizational reforms. There have been frequent recommendations (even mentioned in the initial R2P doctrine) to urge the five permanent members to agree amongst themselves not to deploy their veto in humanitarian crises. Essentially this reform aims to streamline UN Security Council decision-making and maintains that 'the UN system can be made to perform better from within' (Waxman, 2010:13).
3. **Push for new legal framework of humanitarian intervention.** For those skeptical of the fundamental

workings of the UN, this reform proposes the development of a humanitarian intervention doctrine, similar to the way self-defense operates as an exception to the rule that only the UN Security Council can authorize coercive force. However this reform has not gained wide support, in light of 'concern that such a principle would be susceptible to abuse (states masking self-interested intervention as humanitarian), and of strong negative reactions from Russia, China, and countries in the nonaligned movement' (Fletcher and Ohlin, 2008:44).

4. **Create new international institutional bodies.** If relying exclusively on the UN Security Council to authorize intervention does not stop mass atrocities adequately, another alternative is to create an entire new international institution, which is more responsive and effective. As Daalder and Kagan (2007) propose a standing collation of democratic states, which would act jointly, when the Security Council does not. They believe that this would be backed by commitment to liberal-democratic values and therefore more legitimate than the UN Security Council action. Crucially, it would be more effective because it would be less constrained by the need to satisfy the permanent members of the Security Council. It is proposed that these new international institutional arrangement would not replace the UN Security Council but rather build on existing ones such as NATO and stand ready to act when collectively deemed necessary among its membership.

In summary, it is clear that reforms 1 and 2 aim to preserve international law for the most part, but improve its functioning and as such could be called evolutionary reforms. The 3rd and 4th reforms, which have been proposed, are far more radical, with reform 3 aiming to change the very substance of international law, and reform 4 aiming to change the processes by which the law is applied. This paper asserts that in the current security environment there is an undeniable need for reform; however, whilst radical reforms might be appealing, the likelihood of their implementation is very slim, as it would have to go through the current UN Security Council. This paper maintains that the R2P doctrine was a significant political reform in the evolution of humanitarian intervention and, despite its numerous flaws; it is the closest there has been to international consensus. While the question posed does not require the viability of different reforms to be assessed, having examined the aforementioned reforms, the 2nd reform, (which aims to streamline the decision-making process in the UN), appears the most practicable and least revolutionary. Therefore, whilst it may not provide the most effective legal revision, it appears to be the one with the highest possibility of implementation. It is important not to be too pessimistic about the possibility of legal and political revisions, this paper highlights that the agreement of the doctrine of the R2P at the World Summit was a 'step in the right direction'. Whilst the doctrine does have its faults, which are not to be overlooked, the fact that it acknowledges that 'a state's sovereignty is conditional on the treatment of its population' (Pattison, 2010:247) truly brought the notion of humanitarian intervention to the forefront of the human rights discourse. The four reforms presented in this paper are only a small part of a much larger acknowledgement by the international community that humanitarian intervention is a focal issue in contemporary society. To conclude, it appears evident that there is an urgent need for a revision of current legal and political practices but crucially this does not mean the focus should solely be on legal remedies but rather political will as well.

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