A Cautionary Note on Humanitarian Intervention

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ABSTRACT: In the Post-Cold War environment, the role of the military has been extended to include intra-state peace enforcement on humanitarian grounds. This raises issues of legality. In this paper, four arguments are advanced that a right of states to intervene in humanitarian emergencies now exists. Problems contingent upon such intervention are then examined.

Introduction

It is not difficult to share in the expressions of outrage at our impotence in the face of certain humanitarian emergencies and our failure to address some of the most appalling violations of human rights. And while British Foreign Secretary Douglas Hurd can speak of trying to find a middle path between "the saloon bar and Gladstone," a "damn the consequences" attitude, fuelled by anger and indignation, continues to find expression in many quarters. Here, a Professor of the Yale Law School, speaking in 1986, confronts international law on the issue of starving children in Biafra:

I don't know much about the relevant law. My colleagues here, who do, say that it's no insurmountable hindrance, but I don't care much about international law, Biafra or Nigeria. Babies are dying in Biafra... We still have food for export. Let's get it to them any way we can, dropping it from the skies, unloading it from armed ships, blasting it with cannons if that will work. I can't believe there is much political cost in feeding babies, but if there is let's pay it; if we are going to be hated, that's the loveliest of grounds. Forget all the blather about international law, sovereignty and self-determination, all that abstract garbage: babies are starving to death.

More succinctly, there is George Bush, on the eve of the Gulf War: "... If it's right, it's gotta be done." It may be a kindness to consider this the moral imperative colloquially rendered, particularly in view of the earlier invasion of Panama - "Operation Just Cause". Moreover, the Gulf War was not a humanitarian intervention, nor was there any significant obstacle in the way of its legal sanction by the United Nations (UN). Nevertheless, Bush's utterance can be taken as shorthand for what for many is the unsatisfactory tension between the prohibitive Article 2 (4) of the UN Charter and large-scale human suffering or gross abuses of human rights where the state is incapable, negligent or is itself the perpetrator. In common with popular sentiment, the theoretical debate which addresses the quandary of how to balance the claims of justice against the claims of international order is suffused with an aggrieved sense of urgency which naturally arises from our consideration of subjects so morally charged.

"Humanitarian intervention" has taken on something of the character of a clarion call in some quarters, but the legal and practical difficulties which lie in wait just beyond our impulses should give us pause. There is no question as to whether acts such as genocide and forced migration are the moral, legal, political and practical concern of the international community - they must be if the term "international community" is to have any meaning at all - but the urgency to act should alert us to the importance of taking care with the means we employ and the structures which we set in place. Of course, whatever the depth of popular feeling or the supposed strength of the "CNN factor", the deployment of military forces abroad is always founded on a hard-headed calculation of risk, and there is nothing to preclude humanitarian objectives on an agenda framed by more determinedly self-interested motivation. The point here is that the practical constraints on state action which were a feature of the Cold War are no longer operative, and a combination of other factors, by no means all media-driven, have created a climate of opportunity which has persisted in spite of - or perhaps because - the "old world order" has re-asserted itself. The risks are less obvious. "Humanitarian intervention", whether manifested
as a rallying cry, political justification, military mission or in other forms, is wonderfully satisfying in prospect; the reality is more problematic.

The first section will consider the proposition that a right of states to intervene in humanitarian emergencies now exists, can be deduced or can be codified. The argument is contingent, of course, on the assumption that international law is not, as some would have it, a disposable abstraction. After an argument favouring law enforcement under a UN purview, the paper outlines a number of practical issues pertinent to any discussion of humanitarian intervention - principally by way of "conceptual unpacking".

Although it may appear that legal and practical issues are an odd pairing, the concern here is that a largely instrumental approach to the question of humanitarian intervention is likely to be a poor servant of justice, particularly if international order and the Rule of Law are undermined, or if through ill-considered and precipitate action a bad situation is made even worse. Good intentions (a scarce enough commodity in international relations) are insufficient.

Is there a Right of Humanitarian Intervention?

Following the intervention in Iraq to assist the Shi'ites, the British Foreign Secretary Douglas Hurd claimed that "recent international law recognises the right to intervene in the affairs of another state in cases of extreme humanitarian need". Given the context of his remark, and the fact that the relevant Security Council resolution (688) was not framed under the Chapter VII (enforcement) provisions of the UN Charter, the "right to intervene" which Mr. Hurd asserted must be a right of states. Let us then first examine whether and by what means a right of state intervention can be determined in cases of extreme humanitarian need.

There are four approaches to the question, "Is there a right of humanitarian intervention?" The first, only part-mischievous, is the naive - that is, to ask it literally. The second is to abandon the search for a clarification of codified international law which has hitherto escaped the attention or interpretive skills of lawyers, and to consider whether a number of separate instances of state intervention for broadly humanitarian purposes can be construed as lawful if, taken together, they suggest the development of customary international law (Greenwood 1993). The third is to ask whether specific instances can be justified; that is, to concede the breach of an operative, prohibitive law, but to argue mitigating circumstances, against which intervention by a state can (or should) be judged. The fourth approach is to argue for codification of a right of state intervention.

The Naive Approach. This is advanced not for its plausibility, but because a certain category of state justification for intervention is tantamount to a literal treatment of the question. For example, in October, 1983, the US Ambassador to the UN, Jean Kirkpatrick, attempted to give a legal justification for the American use of force in Grenada. Before the UN Security Council, she argued that

"The prohibitions against the use of force in the United Nations Charter are contextual, not absolute. They provide ample justification for the use of force in the pursuit of the other values also inscribed in the Charter - freedom, democracy, peace..."

But if something more precise than peace, freedom and democracy is not codified, then what agent - or in this case, which state - is to do the pursuing, and under what circumstances? It is difficult to understand how the legal prohibitions in the Charter provide "ample justification" for their violation by states - however ambiguous they may appear to certain readers. Are we to have a right to "make the world safe for democracy"? Without a consideration of authority and agency, this kind of argument - which attempts to solve the problem by dissolving it - yields the rather unhelpful answer, "Yes, sometimes." We are then left with arguments from custom, from circumstance and the possibility of codification.

The Argument from Custom. The attempt to discern nascent customary international law on this matter is difficult on the grounds of definition, and both the generality and consistency of practice. More importantly, even if sufficient guiding principles could credibly be drawn from quite disparate cases, it is far from clear how these could operate beside the general prohibition of Article 2 (4).

While law constrains action, action itself also informs the formulation and interpretation of law. However, establishing custom in this field is made difficult by the fact that there is little redress against states which violate Article 2 (4). In what instances and by what means are we to establish that the international community has "condoned" a state intervention? Is a failure to condemn the same as to condone? Could one or more such instances so "condoned" be shown to possess common humanitarian features so as to provide a reliable and clearly-defined guide to future action? And while it may be plausible to assert that certain instances of humanitarian intervention have been condoned, a general right of humanitarian intervention does not necessarily follow. The larger the differences between the cited incidents, the more plausible it is to assert that each is a special case - which leads to the argument from circumstance. There is a parallel in civil law: there have been a number of cases recently of domestic killing, with the plea of provocation in mitigation. Some such pleas are more credible and draw a more sympathetic response than others - much as arguments before the General Assembly or the Security Council over state interventions - but it would be surprising if one were to hear calls for the codification of lawful killing under provocation. The designation "lawful killing" is an act of judgement which takes place within a legal framework that prohibits the taking of human life. The parallel is inexact, but telling for legal purposes. The international community