Justified Exception to the Prohibition on Use of Force

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Justified Exception to the Prohibition on Use of Force

After nearly 76 years following the UN Charter, the dominant feature of the multilateral international order has shifted from a focus on states' sovereignty to the rights of the individual. It is now widely accepted that human rights are not the province of any one state's domestic affairs, but of importance to the entire international community. The UN Security Council sits atop the supra-state order, and holds the ultimate authority to initiate consensus-based, collective action so as to limit or prevent gross human rights violations. Yet, many times the Security Council is slow to act, and consensus is exceedingly rare. This begs the question: in the face of gross human rights violations and Security Council inaction, is unilateral humanitarian intervention justified? The present state of international law on the matter is unsettled and controversial to many. What follows is a discussion on the development of international law relating to unilateral humanitarian intervention, the permissibility of intervention for gross human rights violations, and justification for intervention under existing international law. I conclude that under the present multilateral regime, unilateral humanitarian intervention is legally justified, despite fears that the principle may be invoked for the purposes of cloaking acts of aggression.

Broadly, unilateral humanitarian intervention is the use of force by a state or group of states to protect individuals within the territorial control of another, outside state, from violations of "humanitarian or international human rights law."[1] Collective humanitarian intervention is the use of force sanctioned by the Security Council, and is deemed to represent action by all member states. While there exists little-to-no consensus on whether states hold a right to intervene in the affairs of other states on humanitarian grounds, a balanced view holds that the matter is unsettled and incomplete in regards to international law.[2] However, there remains a widely held opposing view emergent post-UN Charter that unilateral humanitarian intervention is illegal under contemporary international law.

Upholding state sovereignty has historically been drawn against safeguarding human rights, with human rights increasingly becoming the focal point of international law.[3] This exemplifies a gradual change in the priorities underpinning international human rights, humanitarian, and criminal law which originally, sought to protect the sanctity of states' sovereignty in the early years following establishment

[1] Phillip Morgan, 'Unilateral Deployment of Armed Force for the Protection of Human Rights' [2006] J. INT'L L. & POL'Y 1
[2] Chris O'Meara, 'Should International Law Recognize a Right of Humanitarian Intervention' [2017] 66 Int'l & Comp LQ 441, 442
[3] Ibid 442

of the post-UN Charter multilateral legal order.[4] Thus, whereas state sovereignty was once widely held to trump individual human rights, the two opposing interests are more apt to being balanced from incorporating a more "pluralistic" view of the role of the state. [5] Some go so far as stating that a state's sovereignty, and therefore its external autonomy, is contingent upon its recognition and preservation of human rights.[6] However, this remains a threshold determination, as state sovereignty remains fundamental to the post-UN Charter multilateral system, which implicitly promotes non-intervention.[7] Arguably, this pits humanitarian intervention as a lesser priority than preserving international peace and security, save for when human rights violations are so extreme that collective action is the sole option for saving lives, and is capable of being operationalised.[8]

Still, others reject this approach as false nuance and a blindness to the emerging subject of the supra-state legal order: the individual human. This view is not new, and was held by Lauterpacht more than 60 years ago;[9] however, its increasing intensity of relevance is. A more cosmopolitan view is that we have reached a point where all must "respect the dignity and basic rights of all the people within the state" . . . and that all states have, "the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity." This reasoning underpins notions of the 'Right to Protect', where state actors fail to assure certain basic protections of the individual. However, international law establishes space for *collective* action—not 'unilateral' action.[10] Collective action is the reserve of the Security Council, where in the event of global consensus on needed action, use of force carries implicit justification.[11] Perhaps the problem of 'Right to Protect' formulations is that they are entirely dependent on Security Council consensus, which for most, is impossible to achieve, as many unequivocally characterise the Security Council as ineffective.

Still, this suggests progress for the human rights movement, which gives weight to developing international human rights law: shifting the focal point of international law from state sovereignty to human rights is no easy feat, as the individual now holds legal power on an international scale, requiring states to collectively interact on the premise that individual liberties take priority.[12] However, problems remain in tying this to wholesale legitimation of humanitarian intervention under IHRL, particularly since

[4] ibid
[5] Ibid 443
[6] ibid
[7] ibid
[8] ibid
[9] Ibid 445
[10] Ibid 445-446
[11] Ibid 446
[12] ibid

international legal norms are predicated on peaceful "dispute resolution."[13] This stands despite wide recognition of IHRL principles being designated as *erga omnes*,[14] and therefore, the epitome of states' norm building.[15] The Security Council's willingness to consider and characterise humanitarian matters as a threat to global peace under its powers enshrined within Chapter VII exemplifies this fact.[16] Still the problem remains: the Security Council is widely panned as ineffective in limiting human rights deprivations of scale. Still, there remains the possibility for piercing the state-sovereignty-veil on the basis of human rights at the highest view of international law.[17]

Another view is more nuanced: states enjoy a level of immunity save for when they fail to safeguard certain core rights.[18] However, there remains a tenet of international law that undercuts this: state cooperation within the international legal plane is predicated on consent—an escape mechanism for the state that falls short of the norms underpinning the international legal order it previously acquiesced to.[19] Even the most robust of human rights regimes under the European Convention is predicated on consent.[20] International criminal law also 'virtue-signals' the primacy of human rights.[21] This is premised on an obligation to not commit crimes of atrocity exceeding whichever obligation placed on them by the state.[22] Thus, implicit in developed ICL is that the individual holds a preserved place above a state's sovereignty interests.[23] Thus, ICL, which has developed later than IHRL, also recognizes the primacy of individual rights over states' rights.[24]

Perhaps the best justification for unilateral humanitarian intervention lies in emerging development of universal jurisdiction, which is said to transcend territorial barriers in pursuit of norms that underpin the aims of international law.[25] It provides for state action regardless of overarching territorial considerations, so long as the acts requiring intervention surpass a threshold of severity.[26] This inevitably limits the grounds in which a state may intervene into the acts of another, but also situates

[13] Ibid 447
[14] Ibid 448
[15] ibid
[16] Ibid 448
[17] Ibid 449
[18] ibid
[19] Ibid 451
[20] ibid
[21] Ibid 456
[22] ibid
[23] ibid
[24] Ibid
[25] Ibid
[26] ibid

human rights concerns as the pinnacle of justifications for intervention.[27] Perhaps the linchpin to ICL in regards to human rights deprivations it that it ascribes responsibility to individual criminal actors, and not states.[28] This clearly jettisons the remit below that which is justified by unilateral, state humanitarian action.[29] Thus, the ICL focal point in terms of redressing human rights violations lies within its ability to effectuate prosecution of individuals rather than states.[30] This situates contemporary ICL onto a plane beyond that which would justify or demerit unilateral state humanitarian intervention, and by extension, onto a state's ability to prosecute such crimes of scale on a domestic level.[31]

It must be pointed out that all other threads of dispute and resolution still flow from state sovereignty—indeed a "deference" to state's sovereignty.[32] This is buttressed by the situating of state consent as the epitome of state obligation: norms are predicated on a state's willingness to be evaluated by the terms in which it has consented to.[33] While the right to unilateral humanitarian action may justifiably emerge, it remains contingent upon that right being limited by states' sovereignty and international peace concerns.[34] Still, there remains justificatory arguments for unilateral action within the law, 'necessity' being chief among them. It requires that peril be "grave and imminent."[35] However, the ICJ has ruled that this is the exception rather than the rule, and requires "exceptional circumstances" to become operational.[36] However, this justification remains illegal under Article 2(4) of the UN Charter.[37] It should be noted however that absent the prohibition under the UN Charter, developed law would suggest a justification for unilateral humanitarian intervention.[38] Implicit is this is the highly contested authority for a state to assess the Security Council's effectiveness in limiting gross human rights violations.[39] This has served as a delimiter to the emerging 'Right to Protect', and has indeed set its legitimacy in controversy.[40] Thus, within IHRL and ICL, there remains the need for greater exposition of that which justifies unilateral humanitarian intervention, though it must be added that its

[27] ibid
[28] Ibid 457
[29] ibid
[30] Ibid 458
[31] ibid
[32] ibid
[33] Ibid 460
[34] Ibid 462
[35] ibid
[36] Ibid 462-463
[37] ibid
[38] Ibid 464
[39] ibid
[40] Ibid 465

justification as it stands now remains primarily in doubt by the international community.[41] While brazen human rights violations are acknowledged as unacceptable by the international community, a real ability by the collective community remains untested absent a real sense of consensus among Security Council nations; unilateral humanitarian intervention remains more distantly legitimate as well.[42]

Most jurisprudence stemming from the post-UN Charter order presents a shift in humanitarian intervention from legal to illegal.[43] Arguably, this is so due to an intent to promulgate a collective system of state intervention.[44] Yet, it is plain within the law that certain crimes arising to crimes against humanity are said to be within the province of the "international community as a whole."[45] This supports the suggestion that non-humanitarian intervention falls outside of legally permissible state action.[46] Still, as Grotius pointed out, "bad men [do] not necessarily therefore cease to be right. Pirates use navigation, but navigation is not therefore unlawful. Robbers use weapons, but weapons are not therefore unlawful."[47] The tenet of proportionality remains in international law, depending on whether the matter of concern involves *jus ad bellum* or *jus in bello*.[48] This requires that measures employed are balanced against human rights deprivations; and that the risk to life is balanced against lives lost.[49] Proportionality is underpinned by the requirement of necessity: that no alternative means is capable of bringing about an end to atrocity so as to justify humanitarian intervention.[50] Absent this, any other means employed would not qualify as humanitarian intervention, but as an act of aggression.[51]

If a state deems the Security Council ineffective, and unilateral humanitarian intervention is framed a moral imperative, then resulting unilateral action under the present legal order acts at the "mercy of the international community," though precedent suggests that the international community is more likely to abstain from action.[52] The reasons for this has much to do with the inter-politics and power dynamics within the Security Council. However, this is not discussed here. Proponents of unilateral humanitarian intervention point to interventions by India into Bangladesh, Tanzania into

[41] ibid
[42] Ibid 466
[43] Martha Brenfors and Malene Maxe Peterson 'The Legality of Unilateral Humanitarian Intervention –A Defence' [2000] 69 Nordic Journal of International Law 449, 464
[44] Ibid 473
[45] Ibid 478
[46] ibid
[47] Ibid 480, citing *De Groot* [1925] De Jure Belli ac Pacis Libri Tres, Kelsey transl., Chap. XXV
[48] Ibid 481
[49] ibid
[50] Ibid 482
[51] Ibid 483-484
[52] *Morgan* (n 1) 1

Uganda, and Vietnam into Cambodia as emerging *jus cogens* supporting its legality. However, this has been largely rejected, as the interventions were pursued on invocation of 'self-defence' reasoning.[53] Further, most agree that these cases in isolation are not enough to establish a law widely accepted by all states.[54] The first true test on the legality of unilateral humanitarian intervention occurred during NATO's intervention in Kosovo, for the protection of ethnic Albanians in the region.[55] Unlike the previous examples mentioned above, NATO states invoked humanitarian intervention as justification to the Security Council.[56] Rather than deciding legality in this instance, the Security Council appeared to side-step the issue by issuing Resolution 1244 in acknowledgement of necessary protective action for Kosovo, but not answering whether NATO's intervention was permissible or legal.[57] In light of the gross human rights violations prevalent in Kosovo at the time, this move signalled Security Council impotence rather than a moment in establishing or reaffirming international law that acknowledges justified humanitarian intervention where certain conditions are met.[58] Indeed, some found this outcome absurd, with one commentator stating, "surely the UN Charter . . . is not a genocide pact."[59] It was further pointed out that under the present legal regime, intervening to stop the Holocaust would be illegal, and therefore totally antithetical to the premise that modern international law is underpinned by chief concern for the rights of the individual.[60] This calls into question the Security Council's ability to maintain peace and security—requirements that are explicitly set out in the UN Charter.

Under modern international law, the primacy of human rights over state sovereignty carries within it a justification for humanitarian intervention, whether collective or unilateral.[61] Brenfors and Peters offer a salient description of how this is so:

> The recognition of the universality and inviolability of human rights has significantly limited the personal supremacy of a state over its citizens. It is simply no longer accepted that a state treats its citizens any way it pleases, because the "attempt to guarantee freedom from foreign oppression, becomes a veil drawn over domestic oppression."[62]

[53] Ibid 2-3
[54] Ibid 3
[55] Ibid 4
[56] Ibid
[57] ibid
[58] ibid
[59] Ibid 5
[60] ibid
[61] *Brenfors and Petersen* (n 43) 461
[62] Ibid 462

It follows from this that where a state fails to assure fundamental rights to persons within its territory, its sovereignty rights ought to fail to operationalise.[63] Human Rights concerns ought to transcend borders, as the deprivations cannot be distilled into a 'domestic issue' categorically, but rather are of importance to the entire international community.[64] The state does not have 'personhood' in the sense that individuals do under international law, and therefore, its sovereignty is contingent on, *inter alia*, its provisioning of "rights and privileges" to its subjects, whether territorial or otherwise.[65] Further, Article 2(4) speaks specifically to the use of force against a state's territorial integrity and independence. Read narrowly, this would suggest that use of force on basis of humanitarian intervention falls outside the scope of Article 2(4).[66]

Similarly, Article 2(7) prohibits intervention into the domestic matters of another state; however, human rights have been deemed a matter of international, and not just domestic concern.[67] Indeed, among international 'peers', a state's legitimacy is arguably predicated on its adherence to international norms, above all being the preservation and protection of human rights.[68] Therefore, on basis of limiting or preventing gross human rights deprivations, humanitarian intervention can be considered justified under current international law. The countervailing view is rooted in the positivist view that Article 2(4) and Article 8 prohibits all non-self-defense use of force.[69] Also, that historically, states have rarely acted on purely humanitarian intentions[70]—also suggesting that all non-self-defense use of force is prohibited in the UN Charter. However, there exists no such blanket prohibition in the Charter. Rather, where humanitarian intent is superseded by non-self-defense justification for use of force, said force qualifies as a prohibited act of aggression. Still, it is inarguable that the post-UN Charter system places ultimate authority in the Security Council, and that collective action is solely within its province. The question then becomes whether in the face of Security Council ineffectiveness, a single state or group of states has the standing to judge the conduct of the Security Council, and act unilaterally in the face of Security Council stagnation.[71] Perhaps this is where the focus on states' sovereignty still resides; given the consensual nature of the multilateral system, when it fails, it is the

[63] ibid
[64] ibid
[65] ibid
[66] Ibid 467
[67] Ibid 466
[68] Ibid 462
[69] Kevin Jon Heller 'The Illegality of 'Genuine' Unilateral Humanitarian Intervention' [2019] 32 European Journal of International Law (forthcoming, 2021), 31
[70] ibid
[71] *Brenfors and Petersen* (n 43) 475

decision of norm-abiding states on whether to act, taking into consideration, *inter alia*, the Security Council's paralysis.

If it is accepted that the balance has tipped towards the supremacy of human rights over state sovereignty, and that the consented-to mechanism through the Security Council for intervention fails, unilateral intervention is likely the only other option to limit or end gross human rights violations committed by a state upon its subjects. Put differently: "when the system fails to enforce rights, recognised by the international community, a right to unilateral enforcement is triggered."[72] This is not to suggest a blanket right to invoke humanitarian necessity to justify unilateral use of force; rather, it qualifies as an exception, where in the face of credible threats to fundamental rights of individuals within a territory, coupled with Security Council ineffectiveness, intervening states are legally justified in seeking to limit human rights deprivations, and are perhaps morally required to do so.[73] This also does not suggest an abandonment of considerations of proportionality and necessity; rather, it is a threshold determination in light of these long standing principles of international law.[74] The criminalisation of acts of aggression remain intact, as the purpose for intervention is outside the scope of proscribed uses of force. On this view, unilateral humanitarian intervention is *legal*, and therefore legally justifiable by a nation seeking to limit state-promulgated atrocity in the face of overwhelming Security Council ineffectiveness.

[72] Ibid 475-476
[73] Ibid 499
[74] *Morgan* (n 1) 6