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The sovereignty of nations: When is it proper to derogate the duty of nonintervention?

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Introduction

The doctrine of nonintervention, a staple of traditional international law, provides that each state should refrain from interfering in the domestic affairs of other states. This prohibition includes not only military intervention, but also, in Hersch Lauterpacht's formulation, all "dictatorial interference in the sense of action amounting to denial of the independence of the state."¹ Directly linked to this obligation is the notion of state sovereignty which has, at different times, enjoyed a wide and varied interpretation. However, as commonly understood, sovereignty implies that the only source of power within the geographic confines of a state is the state itself; hence any intervention in matters that are purely domestic would be illegal, for it implies another source of power in the state.²

The norm of nonintervention continues to be serviceable, and provides the primary foundation on which international laws and relations are erected, principally because it recognizes the need to accept and respect the geographic, ethnic, religious, and cultural integrity of nations.³ Furthermore, the norm internationalizes the doctrine of self-determination, and the acceptance that a viable state and its people have the right to exist without fear of foreign aggression or interference in purely domestic matters. In principle, this customary rule of nonintervention gives substance, and sustains the doctrine of state sovereignty.

The duty of nonintervention, however, is not based on moral grounds. It is predicated on the assumption that a state, once recognized as such by the community of nations, enjoys sovereign powers. This practice makes no distinction between a *de facto* sovereign power and the legitimate exercise of power in the sense that legitimacy derives from the governed.⁴ Nonintervention may also be given a different interpretation; which is, that the obligation of noninterference in a state's domestic matters is owed, not to the target state, but to the international community at large as a means to peace. This view comports well with the United Nations Charter, and its primary objective of world peace and security.⁵ Like the former, this alternate interpretation also lacks moral dimensions, for world peace and international security are insufficient basis to confer sovereign powers on any state, especially one that lacks the informed consent of its citizenry. It must then be the case that a state should be a legitimate sovereign in order to claim the benefits and the moral duty of nonintervention.

The defeat of Germany in the Second World War, and the subsequent birth of the United Nations in 1945 ushered in the modern human rights regime. Prior to this post-war era, human rights were not salient in the parlance of international law, and for good reason; nation-states were guided by the civility of the 'good-neighbor,' which meant that a 'good-neighbor' does not interfere or unilaterally intervene in matters of purely domestic character, and outside its territorial competence. Formally, the 'good-neighbor' ethos

came under the umbrella of state sovereignty, and to a large extent, continued to dictate how states dealt with one another even after the advent of the UN, and its consequence on human rights remained unchanged: states continued to regard human rights as domestic matters that should be dealt with domestically, any outside intervention was considered 'bad form' and an affront to the norm of state sovereignty.

In pre-UN era, international law was almost exclusively concerned with rules that informed and governed relationships amongst states; however, the creation of the United Nations formalized the international community's desire to internationalize human rights, and make them a proper domain of international law.⁶ This coupling of human rights and traditional international law has so far not created a stable and sustainable 'marriage'. The consequence has been a perennial tension between human rights law and the original elements of traditional international law (state sovereignty, nonintervention); solutions to this tension remain elusive, and have so far informed current debates on modern international law.⁷

One such debate is whether a state should be permitted to shield itself with the doctrine of state sovereignty while it engages in systematic violations of the internationally guaranteed rights of its citizens.⁸ Directly linked to this debate is the question of when the duty of nonintervention may be set-aside in observance of the moral 'duty' of humanitarian intervention? The commonly held view is that contemporary international law, as informed by the UN Charter and custom, forbids all forms of intervention in the affairs of a sovereign, even those compelled by humanitarian sentiments.⁹ A more radical view, and one that is rapidly gaining currency, begs to differ; it espouses the notion that the benefits of sovereignty should only be available to states with political and moral legitimacy, and that absent such legitimacy, the duty of nonintervention may be set aside on humanitarian grounds.¹⁰ This essay adopts the latter view on the assumption that modern international relations, and developments in the field of human rights would ultimately compel a different interpretation of customary international law, and create an alternative norm to that of nonintervention. NATO's actions in Kosovo in 1999 may have ushered-in the requisite 'wind' of change!

Contemporary And Customary International Law

In contemporary international law, treaties, declarations, and understandings generally constitute the primary modalities by which states bind themselves and create obligations. These modalities are considered *opinio juris* for they generally express statements of legal obligations and the legality of undertakings. Unlike traditional customary law that emphasizes state practice, the rules and regulations generated by contemporary international law tend to be idealistic and aspirational, and not expressive of reality;¹¹ and therein lies its strongest criticism -- it seldom describes state practices, but rather prescribes rules and obligations that should guide international relations and conducts.

Customary international law, however, is universally assumed to embody two elements – state practice, and *opinio juris*. The past behavior of a state in regard to particular matters, if consistent, gives evidence of state practice. *Opinio juris* requires that the state, in adopting a particular practice, believes that it is legally obligated to do so. The usefulness

of custom as a source of contemporary international law has been the subject of significant debate in recent years.¹² These debates notwithstanding, the case law of the International Court of Justice, and commentaries by legal scholars have re-emphasized custom as a resilient source of international law, especially in the area of human rights. But custom in its traditional understanding, cannot, in the light of recent developments in the international arena, play as big a role as it once did. But can an international norm develop on the basis of state practice or *opinio juris* alone? Kirgis asserts that it can, and that it will depend on the reasonableness of the rules created, and the overall importance of the action.¹³

NATO In Kosovo

The North Atlantic Treaty Organization (NATO) intervened in the civil and armed conflict in Kosovo in the spring of 1999 ostensibly to avert an “eminent humanitarian catastrophe” and to foreclose the potential destabilizing effects of the conflict.¹⁴ Then and now, questions abound on the lawfulness of the intervention, and its precedential consequences. There is unmistakable evidence that the armed forces of the Federal Republic of Yugoslavia (FRY), under the leadership of Slobodan Milosevic, committed gross international crimes against ethnic Albanians in the country. Ethnic Albanians are not, however, without blame, for they also inflicted horrible crimes against the Serbs;¹⁵ and as the conflict worsened, the incredible act of “ethnic cleansing” reminded the world of the Nazi’s holocaust.

NATO’s intervention through its bombing campaign was indeed a violation of customary international law, and the United Nation’s Charter that forbids states from forcible intervention in the domestic affairs of another state unless such action is sanctioned by the UN Security Council or undertaken on the grounds of self-defense.¹⁶ But the overriding question of import is whether, under contemporary international law, this norm of nonintervention may be breached on strong evidence of gross human rights violations.

The doctrine of humanitarian intervention may provide the best explanation for NATO’s activities in Kosovo. While this doctrine is not an exception to United Nation’s Article 2(4),¹⁷ it is also equally clear that contemporary international law, and the UN Charter prohibit states from gross violations of both humanitarian, and human rights laws. The duty to abstain from these violations is owed to the international community, and in the recent past, states have intervened in the domestic affairs of other states, e.g. Granada, Panama, northern Iraq, ostensibly on evidence of a breach of this duty.¹⁸ But these instances are seldom justified on the unequivocal right of humanitarian intervention; thus they lack the requisite precedential value to establish a norm that permits states to unilaterally or collectively intervene on humanitarian grounds. Unlike these other instances, however, the intervention in Kosovo is significant, and may have the capacity to change contemporary international law on state sovereignty.

State Sovereignty and the Duty of Nonintervention are not ‘Carved in Stone’.

In *Nicaragua v. US*,¹⁹ the International Court of Justice considered, among other issues, questions pertaining to the accusation of totalitarianism, and human rights abuses. In addressing these issues, the Court wrote:

“ The Court would not therefore normally consider it appropriate to engage in a verification of the truth of assertions of this kind. A state’s domestic policy falls within its exclusive jurisdiction, provided of course that it does not violate any obligation of international law. Every State possesses a fundamental right to choose and implement its own political, economic and social systems.”²⁰

The question of universal import in this instance, therefore, must be whether human rights abuses, and a State’s practice of totalitarianism that denies its citizens the basic elements of democracy are matters of exclusive domestic concern. The Court’s dicta in the Nicaraguan case answer this question in the affirmative, to which Teson responds ---

“..[T]he Court denied, as a matter of principle, its own power to discuss human rights and totalitarianism because, absent some commitment, they “essentially” fell within the domestic jurisdiction of Nicaragua. If this is what the Court meant, the court brushed aside one of the most cherished modern conquest of mankind: the notion that governments are not free to treat their citizens as they please, even if they are not parties to specific human rights convention.”²¹

The notion that States are free to adopt any economic and political system without outside interference is an old one, it reflects the essence of traditional international law, and the doctrine of state sovereignty. But it is important to note here that there cannot be a moral equivalency between a state’s freedom to choose, and the international rights guaranteed to its citizens. For, according to Teson, “words such as “freedom,” “autonomy” and “equal liberty” have a different and unclear meaning when used for nation-states than they do for individuals.”²² Furthermore, “ ...only persons can pursue rational ends and be autonomous in a moral sense, and we indeed have a moral duty not to interfere with their choices....But states are not persons, and although governments are made of persons, their moral rights.....are not grounded in any mystical qualities of the state...but in the consent of their subjects.”²³

Conclusion

Generally, an international norm may be replaced if it is consistently breached by states, and the new state practice acquires *opinio juris*. However, in a 1986 ruling, the International Court of Justice²⁴ stated that in order to replace the old rule, the new practice must be based on an alternative rule of law. Thus, depending on the grounds adduced by NATO, its action may be interpreted as based on an ‘alternative rule of law.’²⁵ But this interpretation runs into difficulties when applied to international laws based on treaties. The UN Charter’s prohibitions on forcible intervention is treaty-based, and according to the terms of the UN Charter, all international laws in conflict with the provisions of the Charter on or after the treaty went into effect are void.²⁶ This simply means that in order for NATO’s action in Kosovo to assume an international norm, article 2(4) of the UN Charter may have to be amended.

Article 2(4) of the UN charter forbids the unilateral use of force against another country even on purely humanitarian grounds.²⁷ The reason for this provision is sufficiently clear ---- the mighty and powerful can be mischievous! Even the collective use of force by like-minded nations to stop gross violations of human rights may run counter to UN prohibitions, unless such action has the explicit blessing of the UN Security Council. And herein lies the problem with the UN Security Council --- it seldom acts with a sense of urgency when it has to, and when it does the impetus to act is never exclusively humanitarian. Politics, and the biases of the more powerful member states have consistently guided its actions in terms of when and where.²⁸

While NATO's action in Kosovo is violative of contemporary international law, it may be justified on moral and humanitarian grounds. The sovereignty of a state is never absolute; its legitimacy derives, in the main, from its citizens, and when it elects to abuse the fundamental rights of those it purports to represent, then morality demands that it surrenders the benefits of sovereignty. NATO, by its action in Kosovo, may have nudged contemporary international law towards its inevitable path; the US simply followed that path into Iraq.

Notes:

¹ See David Luban, *Just War and Human Rights*; Philosophy & Public Affairs, 9, no.2, (Princeton Univ. Press), 1980, PP. 162-173.

² Ibid.

³ See Henry J. Steiner, and Philip Alston; *International Human Rights in Context*, 2nd Edition, (Oxford Univ. Press), 2000.

⁴ See David Luban, *supra* note 1

⁵ Ibid.

⁶ See Thomas Buergenthal; *International Human Rights*, 2nd edition, (West Group), 1995.

⁷ See Christine Chinkin, 'International law and human rights', in T. Evans (ed.). *Human Rights Fifty Years On: A Reappraisal* (Manchester Univ. Press, 1998), pp. 105-129.

⁸ See Fernando R. Teson, *Le Peuple, C'est Moi! The World Court and Human Rights*; *The American Journal of International Law*, Vol. 81, 1987, pp. 173-183.

⁹ See Patrick Thornberry, "Come friendly bombs..." – *International law in Kosovo*, in M. Waller, K. Drezov and B. Gokay (eds.) *Kosovo: The Politics of Delusion* (London and Portland: Frank Cass, 2001), pp. 45-58.

¹⁰ See David Luban, *supra* note 1.

¹¹ see Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*; *The American Journal of International Law* Vol. 95: 757, (2001), pp. 757-784.

¹² Ibid. at 758.

¹³ Ibid. at 760.

¹⁴ See generally Patrick Thornberry, *supra* note 8.

¹⁵ See Jonathan I. Charney, *Anticipatory Humanitarian Intervention in Kosovo*; *American Journal of International Law*, Vol. 93 Issue 4 (Oct., 1999), 834-441.

¹⁶ See generally Patrick Thornberry, *supra* note 8.; and Jonathan I. Charney, *supra* note 15.

¹⁷ See Charter of the United Nations, Art. 2(4), 1945.

¹⁸ See Jonathan I. Charney, *supra* note 15.

¹⁹ See (Nicar. V. US), merits, 1986, ICJ REP. 14, 127-37, 146 (Judgment of June 27).

²⁰ *Ibid.*

²¹ See Fernando R. Teson, *supra* note 7.

²² *Ibid.*

²³ *Ibid.*

²⁴ See (Nicar. V. US), *supra* note 19.

²⁵ *Ibid.*

²⁶ See Charter of the United Nations, 1945.

²⁷ *Ibid.*, Article 2(4).

²⁸ See Christine Chinkin, *supra* note 6.

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