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Genocide and humanitarian intervention

JACK DONNELLY

Has post-Cold War international society developed new legal and political norms of justifiable humanitarian intervention? In what follows it is argued that, at least in the case of genocide, the answer would appear to be yes. The focus of the article, however, is on the complex interactions of the competing demands of law, morality and politics. It is argued that changing conceptions of security and sovereignty, driven in part by the deeper penetration of international human rights norms and values, have produced a political environment where the previously unchallengeable legal norm of non-intervention is beginning to give way. Nonetheless, the principle of non-intervention retains considerable force. In addition, there are serious problems of multilateral institutional (in)capacity that pose unusually difficult problems of unilateral action. As a result, justifying either humanitarian intervention or non-intervention today seems problematic. When faced with massive suffering, both intervening and not intervening often seem both demanded and prohibited.

Intervention and international law

This essay examines the legal, moral and political dimensions of humanitarian intervention – which, as we will see, regularly conflict – in light of emerging patterns of post-Cold War practice.¹ The priority previously given to the legal norm of non-intervention appears to be eroding. As a result, justifying either humanitarian intervention or non-intervention seems problematic in contemporary international society. When faced with massive suffering, intervening and not intervening seem both demanded and prohibited.

Intervention is ordinarily defined in international relations as coercive foreign involvement in the internal affairs of a state; violation, short of war, of a state's sovereign rights; 'dictatorial interference in the domestic or foreign affairs of another state which impairs that state's independence'.² 'Intervene' also has broader senses, as when we speak of intervening in a discussion. But to count even diplomatic expressions of concern as intervention, as many governments have in response to human rights criticism, renders the concept of little interest.

Foreign policy usually aims to influence the behaviour of other states, thus 'interfering' with their decision making. Diplomatic 'interference', however, seeks to persuade a state to alter its behaviour. Intervention is coercive; it seeks to impose one's will. Although non-violent coercion is possible – an economic boycott, for example, may be sufficiently punishing to be more coercive than persuasive – I will be concerned here only with armed intervention, which on its face is clearly illegal.

Territorial sovereignty obliges outsiders not to intervene in a state's internal affairs. Non-intervention is the duty correlative to the rights of sovereignty. As Article 2(7) of the United Nations Charter puts it: 'Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state.' This is reinforced by Article 2(4): '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.⁷

The legal presumption against intervention, however, can be overcome. For example, Article 2(7) concludes with the proviso that ‘this principle shall not prejudice the application of enforcement measures under Chapter VII’. Furthermore, as we shall see below, what is considered to be ‘essentially within the domestic jurisdiction of any state’ may change over time.

Humanitarian intervention and international law

An intervention is typically called humanitarian if undertaken to halt, prevent or punish systematic and severe human rights violations or in response to humanitarian crises, such as famines or massive refugee flows. The nationality of those aided is also important.³ Rescue missions to save one’s own nationals, although sometimes called humanitarian interventions,⁴ are more accurately seen as self-defence or self-help: they rest on the special bond between states and their nationals, as is underscored by the fact that rescuing states typically fail to assist local citizens facing similar suffering. Humanitarian interventions, to borrow the title of Nick Wheeler’s fine recent book, are about saving strangers.⁵

Is there a humanitarian exception to the general international legal prohibition of intervention? Prior to the end of the Cold War there clearly was not.⁶

Enterprising international lawyers have tried to find precedents in the behaviour of the European Great Powers in the Ottoman and Chinese Empires in the mid-nineteenth and early twentieth centuries.⁷ But even a casual student of history must be amused, if not shocked, by this notion. These interventions usually were restricted to protecting co-nationals or co-religionists. Some even sought not to alleviate suffering or eliminate discrimination but rather to impose preferential treatment for Westerners or Christians.⁸

Turning to the half century following the Second World War, although we find literally hundreds of regimes guilty of gross, systematic and persistent violations of internationally recognized human rights, we can count on our fingers, with digits to spare, the interventions with a central humanitarian intent.⁹ The regular practice of states when faced with grossly repressive regimes was *not* to intervene. And this was almost universally seen as a matter of obligation. As General Assembly Resolution 2625 (XXV) put it, ‘no state or group of states has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other state’. Furthermore, the United Nations Security Council, which perhaps had the legal authority, undertook no humanitarian interventions during the Cold War.

Contemporary international human rights law defines an extensive array of human rights that all states are obliged to respect. Implementation, however, has been left largely to individual states, typically only with modest supervision by international committees of experts with no coercive enforcement powers. The Universal Declaration of Human Rights, the International Human Rights Covenants and related multilateral treaties have created a system of national implementation of international human rights standards.¹⁰ ‘Governments by and large (and most jurists) would not assert a right to forcible intervention to protect the nationals of another country from atrocities carried out in that country.’¹¹ ‘It is not possible to construct a persuasive argument to legitimate the use of force for humanitarian purposes while remaining within the idiom of classical international law.’¹²

I will argue that a very limited humanitarian exception has emerged over the past decade and that, all things considered, this is probably a desirable development. But first we must consider the moral and political dimensions of humanitarian intervention.

The moral standing of the state

Does the state have a moral standing, or are its foundations purely political and legal? Michael Walzer presents a social contract justification of sovereign states, based on self-determination, that I find largely persuasive.¹³

Self-determination and non-intervention

Drawing heavily on John Stuart Mill's 'A Few Words on Non-Intervention', Walzer argues that the sovereign rights of states 'derive ultimately from the rights of individuals'.¹⁴ A sovereign state expresses the right of citizens collectively to choose their form of government.

But self-determination, Walzer argues (quoting Mill), is only:

... the right of a people 'to become free by their own efforts' if they can, and non-intervention is the principle guaranteeing that their success will not be impeded or their failure prevented by the intrusions of an alien power. It has to be stressed that there is no right to be protected against the consequences of domestic failure, even against a bloody repression.¹⁵

Our obligation is (only) to respect the autonomous choices of other political communities. 'A state is self-determining even if its citizens struggle and fail to establish free institutions, but it has been deprived of self-determination if such [free] institutions are established by an intrusive neighbor.'¹⁶

States that systematically infringe the human rights of their citizens violate both their international legal obligations and their moral and legal obligations to their citizens. These offences, however, do not authorize foreign states or international organizations to intervene. 'As with individuals, so with sovereign states: there are things that we cannot do to them, even for their own ostensible good.'¹⁷ Citizens have no right to good government, or (ordinarily) even to protection against bad government. And foreign states (and nationals) have neither a right nor an obligation to save citizens from their own government.

In grappling with the competing moral demands of universal human rights and self-determination, Walzer emphasizes respect for autonomy, while his critics¹⁸ emphasize the universal moral claims of the victims of suffering. This dispute reflects competing conceptions of 'the international community'. Walzer's critics give priority to the cosmopolitan moral community to which all individual human beings belong, without the mediation of states. Walzer, however, focuses on the society of states, which is not only a political community but also an ethical community with its own body of norms.

This dispute, however, is over the relative weights to be given to the demands of competing ethical communities. Even strong cosmopolitans grant some moral standing to at least some states. And even Walzer accepts humanitarian intervention in cases of genocidal massacre. Some humanitarian interventions *must* be morally permissible if the moral

standing of the state rests on self-determination, respect for autonomy, or respect for the rights of citizens.

Pluralism, paternalism, and political community

The closest thing that we have in the recent literature to a principled blanket denial of the legitimacy of humanitarian intervention is offered by Robert Jackson, who presents a powerful ethical, legal and political defence, based on the values of normative pluralism and anti-paternalism, of 'classical' international society's radical principle of non-intervention.¹⁹ Jackson argues that a full appreciation the ethical and political basis of international society requires us (regrettably but inescapably) to conclude that atrocities such as those in Bosnia and Kosovo are local tragedies rather than matters of international responsibility. 'Sovereignty is no guarantee of domestic well-being; it is merely a framework of independence within which the good life can be pursued and hopefully realized.'²⁰ A people has no right to be rescued from misrule. And international society has no right to come between a people and its government, even a brutal, tyrannical government.

Although I have considerable sympathy with the general thrust of this argument, Jackson clearly goes too far. Whatever the political or legal reasons to deny a humanitarian exception to a strong principle of non-intervention, such a position is ethically untenable – at least in a world of universal human rights.

We value pluralism not so much for itself but in so far as it reflects the autonomous choices of free moral agents. And not all choices deserve even our toleration, let alone our respect. The spread of international human rights values has substantially reduced the range of defensible appeals to normative pluralism. Unusually severe human rights violations thus may overcome a pluralist presumption against intervention. In much the same way, we rebel against paternalism because it denies autonomous agency. But unusually severe and heinous human rights violations, such as genocide and slavery, are such profound denials of individual autonomy that even a strong presumption against paternalism must give way.

As Walzer puts it, 'when a government turns savagely upon its own people, we must doubt the very existence of a political community to which the idea of self-determination might apply'.²¹ When human rights violations are 'so terrible that it makes talk of community or self-determination . . . seem cynical and irrelevant',²² the moral presumption against intervention may be overcome. Human rights violations that 'shock the moral conscience of mankind'²³ conclusively demonstrate that there are no moral bonds between a state and its citizens that demand the respect of outsiders.

In the post-Cold War era, such violations, especially genocide, are increasingly seen not simply as offences against the cosmopolitan values but also as offences against the ethical norms of the society of states. But before considering whether international law is moving closer to international ethics, and how we should resolve the competing claims of law and morality, we must consider the political dimensions of humanitarian intervention, which introduce still a third set of relevant norms.

Politics, partisanship and international order

States (and international organizations), in addition to being moral and legal agents, are political actors. Therefore, they should (also) be evaluated by political standards, which include not only the national interests of particular states but also the interests of both states and international society in international order.

One need not be a raving realist to suggest that political leaders are supposed to take into account the interests of their own states, in addition to acting in light of the demands of law, morality and humanity. And if the society of states has interests as well as values of its own, its members (states) may also appropriately take them into consideration. States thus may have good, even sufficient, political reasons for not intervening when they are morally and legally authorized – especially if we talking of a right, rather than a duty,²⁴ of humanitarian intervention. Right-holders ordinarily are at liberty to choose not to exercise their rights, for reasons that include their own costs or (in)convenience.

No less important is the fact that even successful, purely humanitarian interventions may threaten international order. The exclusive spheres of domestic jurisdiction provided by territorial sovereignty dramatically reduce the occasions for inter-state conflict. Humanitarian intervention reintroduces human rights violations and humanitarian crises as legitimate subjects of violent international conflict. Although perhaps desirable, all things considered, this is not without cost.²⁵

I want to focus here, however, on the political problem of partisan abuse. Throughout the Cold War era both the United States and the Soviet Union appealed to ‘humanitarian’ concerns and principles such as ‘democracy’ largely as masks for geopolitical, economic and ideological interests. There is thus strong historical support for Ian Brownlie’s claim that ‘a rule allowing humanitarian intervention . . . is a general license to vigilantes and opportunists to resort to hegemonial intervention’.²⁶

Moral principles (alone) rarely determine political behaviour. International legal precepts regularly are interpreted and applied with an eye to power. Adequately evaluating both individual interventions and proposals for a general authorizing rule thus requires political knowledge of how doctrines and precedents are likely to be used by those with the power to intervene.

In the political circumstances of the Cold War (and the immediate post-Cold War era), I argued strongly against a humanitarian exception to the principle of non-intervention.²⁷ Despite the strong moral case, the political and legal environments were so unpromising that giving priority to the danger of partisan abuse seemed the best course. There was a clear international normative consensus, across the First, Second and Third Worlds, that humanitarian intervention was legally prohibited. And genuinely humanitarian intervention was politically unlikely, both because of the veto in the Security Council and because there were few instances in which either superpower even desired to intervene for reasons that were centrally, let alone primarily, humanitarian. The problem during the Cold War was less too little intervention of the right kind than too much of the wrong kind. A pattern of superpower *anti*-humanitarian intervention, in places such as Guatemala, Hungary, Czechoslovakia and Nicaragua, was well established.

Normative and political changes in post-Cold War international society, however, suggest reconsidering such a blanket rejection. Partisanship remains a serious problem, and one that is likely to increase when bipolar or multipolar political rivalry reasserts itself. Interventions not authorized by the Security Council may undermine respect for international law and order, even if they have genuinely humanitarian motivations and consequences.

And the United Nations has proved no humanitarian panacea, as Rwanda so tragically illustrates. Nonetheless, changing conceptions of security and sovereignty – which are closely connected to the growing penetration of international human rights norms into the political thinking of ruling elites, political opposition movements and ordinary citizens around the globe – do seem to be moving international society closer to accepting an anti-genocide exception to the prohibition of intervention.

Changing conceptions of security and sovereignty

The standard referent of ‘security’ in international relations is national or state security, defined in primarily military and economic terms. Thus understood, there is no necessary or even obvious connection between security and human rights. In fact, ruling regimes have frequently viewed (national) security and human rights as competing concerns. Consider, for example, the national security states of Latin America in the 1970s, the states of the Soviet bloc during the Cold War, and the United States during the McCarthy era.

The 1975 Helsinki Final Act of the Conference on Security and Cooperation in Europe (CSCE) was one of the earliest concrete expressions of an international political vision of security directly linked to human rights.²⁸ The states of Europe, plus the United States and Canada, met primarily to ratify the European borders established after the Second World War and to lay the foundations for a more stable policy of *détente*. The most important elements of the Helsinki process, however, proved to be its human rights provisions.

The central concern for national security was not supplanted. It was, however, supplemented by a conception of personal security.²⁹ In a series of CSCE follow-up conferences, Western states emphasized the security of individuals and drew attention to the threats to that security, defined in terms of internationally recognized human rights, posed by (Soviet bloc) states.³⁰ Human rights were not merely addressed in a major security agreement between the superpowers; they were treated as a security issue.

The Helsinki process, however, did not challenge reigning conceptions of sovereignty. Other than public shaming, foreign states had no direct role in implementing human rights. Challenges to a rigid, legal positivist conception of sovereignty emerged from a more general diffusion of human rights values.

Sovereignty is typically defined as supreme authority: to be sovereign is to be subject to no higher authority. States often present their sovereignty as a natural right or an inescapable logical feature of their existence. In fact, however, it is a matter of mutual recognition: sovereigns are those who are recognized as sovereign by other sovereigns. And that recognition never has been unconditional. At minimum, states are required to control their territory and be willing to participate in the system of international law. Historically, other tests have been applied as well.

In the nineteenth century, full sovereign rights were extended only to states that met minimum standards of ‘civilization’.³¹ In contrast with imperial domination or colonial rule, Western states recognized (rather than denied or extinguished) the sovereignty of China, Japan, the Ottoman Empire and Siam. But the sovereignty of these ‘uncivilized’ states was treated as impaired. The Chinese description of this period as the era of unequal treaties nicely captures the situation: treaties were between sovereigns but not equals.³² I would suggest that human rights – or, more precisely, avoidance of genocide – is emerging as something like a new standard of civilization.³³

Aggression provides another model for understanding changing conceptions of sovereignty. Aggressor states forfeit their right to non-intervention, as Iraq so dramatically illustrates. Although they remain sovereign, their aggression authorizes international action that infringes their territorial integrity and political independence. States guilty of, or about to embark on, genocide may likewise forfeit the protections of the principle of non-intervention.

We might also think of individuals – or at least large groups of victims of violence – acquiring (very limited) international legal standing. Even under classical positivist conceptions of sovereignty, massacring *foreign* nationals in one's own territory was prohibited (as an offence against the state of which they were nationals). A comparable right for one's own nationals may be emerging. International society is in effect asserting a legitimate interest in the rights of all human beings threatened by genocide. Genocide is coming to be seen as an offence against international society as well as those directly attacked.

Perhaps the best evidence for such changing international understandings of sovereignty comes from a most unlikely source, the executive head of the United Nations, an institution that traditionally has treated sovereignty with the respect due to the holiest of religious relics. Kofi Annan argues that individual sovereignty, rooted in human rights, is taking its place in international relations alongside state sovereignty. 'When we read the charter today, we are more than ever conscious that its aim is to protect individual human beings, not to protect those who abuse them.'³⁴ And the Fall 2001 report of the International Commission on Intervention and State Sovereignty to the General Assembly promises to be a watershed event in international discussions of humanitarian intervention.³⁵

Substantial parts of the international community, including some leading powers, seem increasingly uncomfortable with, and perhaps even unwilling to accept, continued national authority for implementing the internationally recognized human right to protection against genocide. As Thomas Franck put it, soon after the Kosovo intervention, 'egregious repression of minorities is not a risk-free venture, especially for smallish states. That cannot be a statement of law, but, like law, it *is* a fairly accurate predictor of state behavior.'³⁶ To that I would add that such behaviour may signal, and help to generate, significant changes in the law.

Justifying the anti-genocide norm

The 1948 Convention on the Prevention and Punishment of the Crime of Genocide defines genocide as 'acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such' (Article 1). Many mass killings do not meet this authoritative international definition. For example, most victims of the Khmer Rouge were targeted for political reasons (although some minority ethnic groups, such as the Cham, were singled out for special attacks that probably did meet the treaty definition). And in some humanitarian crises – perhaps Somalia in 1992 or Eastern Zaire in 1996 – suffering has been largely unintended.

I will use 'genocide' in a looser sense to refer to any killing of large numbers of people in a particular place in a short time. Although international law and many national legal systems provide greater protection against racial and ethnic discrimination than against political discrimination, the trend in recent discussions seems to be toward treating mass

killing as mass killing ('genocide'), whatever the reason or modality. (The technically more correct term 'politicide' has not caught on outside a narrow group of scholars.)

The moral case for intervention against 'genocide' is relatively unproblematic. The nature of the crime even allows us to circumvent the notorious incommensurability of competing moral theories.

John Rawls distinguishes 'comprehensive religious, philosophical, or moral doctrines' from 'political conceptions of justice'.³⁷ Because the latter address only the political structure of society, defined (as far as possible) independently of any particular comprehensive doctrine, adherents of different comprehensive doctrines may reach an 'overlapping consensus' on a political conception of justice.³⁸ I want to suggest that there is an overlapping (rather than complete) political (rather than moral or religious) consensus today on the prohibition of genocide.

Whatever one's moral theory – or at least across most of today's leading theories and principles – *this* kind of suffering cannot be morally tolerated. Some such notion seems to underlie Jarat Chopra and Tom Weiss's idea of 'humanitarian space'.³⁹ It seems implicit in Walzer's appeal to abuses that shock the moral conscience of mankind. And I would suggest that the restriction of post-Cold War humanitarian intervention to action against genocide rests on the limits of strong overlapping international consensus.

Acting *only* against genocide, however, flies in the face of the principle of the interdependence of all human rights (and the underlying idea that human rights are about a life of dignity, not mere life). It also places us in the morally paradoxical position of failing to respond to comparable or even greater suffering so long as it remains geographically or temporally diffuse.

Nonetheless, when we consider the competing legal, political and ethical claims in contemporary international society, this seems to me the least indefensible option. In the absence of a clear overlapping consensus – which I think exists today only for genocide⁴⁰ – the moral hurdle of respect for the autonomy of political communities is very hard to scale, especially given the thinness of an active sense of cosmopolitan moral community. Politically and legally, the restriction to genocide reflects the continuing centrality of state sovereignty. And even an anti-genocide exception remains contested.

Changing legal practices

The Genocide Convention (Article 6) specifies enforcement through trial before 'a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction' – of which there were none until the 1990s. Nuremberg set a precedent for international judicial action, not armed intervention. And, as we have seen, prior to the 1990s there was no evidence of a customary right to intervene against genocide.

Today, however, we have both *ad hoc* and permanent international criminal tribunals. In addition, an emerging body of state practice can be read to support an argument for the emergence of an international legal right of humanitarian intervention. Debate in the legal literature thus increasingly addresses not whether humanitarian intervention is ever legally permissible but who has a right to intervene against genocide and when.

'Collective humanitarian intervention, when undertaken or authorized by the U.N., now meets with little controversy.'⁴¹ Although still something of an exaggeration, it is only

in the past decade that such a claim has become even plausible. During the Cold War, genocide simply was not treated as a threat to or breach of international peace and security (the only ground explicitly provided by the Charter for enforcement action). The Security Council, however, does seem to be moving toward an understanding of security closer to that outlined above – although, as Frederick Kirgis discreetly notes, the Council has been ‘disinclined to explain what it saw as the threat to international peace’ in its more humanitarian actions.⁴²

Actions not authorized by the Security Council, however, still are almost universally considered illegal. Louis Henkin spoke for most commentators when he wrote, following the Kosovo intervention, that ‘the law is, and ought to be, that unilateral intervention by military force by a state or group of states is unlawful unless authorized by the Security Council’.⁴³

But the moral arguments for humanitarian intervention should not be ignored. A world of lawyer kings would not be all that much more attractive than one of philosopher kings. If we are to confront seriously the problems posed by humanitarian intervention, we must weigh the full range of competing norms and claims against one another.

Over the past decade, international society has begun to allow for an increasingly complex interaction of law, morality and politics in assessing claims for the legitimacy of humanitarian intervention. Consider Kosovo in light of the ‘precedent’ of Rwanda. The Council’s refusal to authorize intervention until most of the damage was done provoked a powerful mixture of outrage and shame, both within the UN and in many member states. In Kosovo, having ‘learned the lesson of Rwanda’, NATO neither waited until the bodies were piled high nor was deterred by the lack of Security Council authorization. The response was outrage in many circles, and substantial unease even among many who accepted the intervention as justified.

Both sets of reactions seem to me appropriate. We see much the same tension in the conclusion of the Independent International Commission on Kosovo that the NATO intervention was ‘illegal but legitimate’.⁴⁴ To capture these crucial ambiguities and ambivalences, discussions of the ‘justification’ of humanitarian intervention need to be much more subtle and complex than they often have been, especially in the legal and moral literatures, which, understandably but ultimately unhelpfully, tend to focus on a single set of norms.

‘Justifying’ humanitarian intervention

A humanitarian intervention might be held to be justified only if (fully) ‘*authorized*’ in the sense that it meets the demands of all relevant standards. The force of the moral principle of self-determination and the legal principle of sovereignty give such a stringent conception considerable appeal. But there are other important and relevant senses of justification.

‘*Contested*’ justifications arise when different standards point in different directions.⁴⁵ Positive authorization, as I have defined it, requires that all relevant standards be satisfied: where *a* prohibits action but *b* permits it, *a* trumps *b*. But it is no less plausible to see *a* and *b* as offsetting, making the intervention both ‘justified’ and ‘unjustified’.⁴⁶ This seems to me the right way to assess genuinely humanitarian interventions not authorized by the Security Council: they are legally prohibited but morally authorized. Such interventions are particularly interesting because they are likely to be the focal points of change, the locus of the most important struggles over dominant norms and practices.

Two kinds of contested justifications merit special note. Some interventions are clearly prohibited but nonetheless '*excusable*'. Stealing food to feed one's family, for example, is clearly illegal. But we are disinclined to say that it is simply, or perhaps even all things considered, unjustified. Even in a court of law (let alone the court of public opinion) the moral obligation to one's family may carry considerable weight, especially at the time of sentencing. Thus the Tanzanian intervention that overthrew Idi Amin in Uganda, although a clear violation of international and regional law, met with only relatively modest verbal condemnation – and received considerable informal and popular support – because it removed a barbarous regime at relatively modest cost (assuming that we need not attribute the atrocities of the second Obote regime to the Tanzanians).

Contrast this with Vietnam's intervention that removed the Khmer Rouge in Cambodia. Read (as I think it can plausibly be seen) as an effort to impose a quasi-imperial regional hegemony, it was, at best, (merely) '*tolerable*'. If excusable interventions intentionally produce desirable outcomes, tolerable interventions produce good results largely unintentionally. Although good consequences carry some weight, intentions are also important to our evaluation.

An excusable act reflects an underlying norm with which we have considerable sympathy. We may even want to commend that norm: you *ought* to steal if that is truly the only way to feed your family. The principle underlying a merely tolerable act, however, cannot be widely endorsed. The positive humanitarian consequences are largely a fortunate accident: however thankful we may be for the results, we should not give much credit to those who produce them.⁴⁷

These varied senses of 'justified' reflect the pull of competing norms. The resulting confusion and complexities have led to regular attempts to formulate tests or criteria for permissible humanitarian interventions.⁴⁸ Although in many ways helpful, such lists at best identify factors that need to be taken into consideration, not necessary and sufficient conditions that define an unambiguous threshold of justifiability.

There is no simple, mechanical means for resolving the competing moral, legal and political considerations raised by most humanitarian interventions. 'The calculations are tortuous, and the mathematics far from exact.'⁴⁹ Usually we can only appeal to our best considered judgement and strive for arguments that, although not decisive, have a certain force. In the final section, I offer an illustration of such an assessment in the case of Kosovo.

Mixed motives and the problem of consistency

A different kind of conflict of standards arises when interveners have mixed motives. A growing number of states see preventing, stopping or punishing genocide as part of their national interest. But such interests rarely determine foreign policy when soldiers must be put at risk or when interveners face high financial and political costs. Humanitarian interventions thus are likely only when humanitarian motives are supported by more selfish national interests.

Any suggestion that such economic and political interests invalidate humanitarian motives and render an intervention unjustified, however, reflects an absurd moral perfectionism that is dubious even in individual action and is certainly misguided when applied to states. Even when political motives conflict with moral or legal norms – which is not always the case – we need to *balance* the competing motives for and consequences of both

action and inaction. The degree of humanitarian motivation certainly should be taken into account when judging an intervention. But the presence, even centrality, of non-humanitarian motives does not necessarily reduce its justifiability.

A variant on the theme of mixed motives is the charge of selectivity or inconsistency: because one did not intervene in A, which is in all essential ways similar to B, intervening in B is somehow unjustified. Consistency is desirable, for many political, psychological and even moral reasons.⁵⁰ But as Peter Baehr nicely puts it, ‘one act of commission is not invalidated by many acts of omission’.⁵¹ The fact that I have acted badly in the past ought not to compel me to act badly in the future.

Faced with multiple conflicting standards, the very notion of consistency becomes problematic. A state that supports genocide when committed by friends but intervenes against it when committed by an enemy may merit disdain, but not for inconsistency. Such behaviour shows great political consistency, a consistent lack of central humanitarian motivation. Inconsistency arguments usually prove to be instead arguments that give categorical priority to one set of standards – in the case of humanitarian intervention, usually law or morality – over another.

I have argued, by contrast, for an appreciation of the complex and contingent interaction of often competing moral, legal and political considerations. We may, all things considered, have good reasons to give priority to concerns of (il)legality or moral purity. But simple answers to the question ‘Is this humanitarian intervention justified?’ rarely are good answers, at least where there are either genuine humanitarian motives or significant humanitarian consequences.

Politics and the authority to intervene

The problem of the authority to intervene can also be reformulated in terms of competing standards of evaluation. The Security Council has the legal authority to intervene but has been, and is likely to remain, extremely reluctant to exercise it. Other actors, such as NATO in Kosovo, may have the will and the capabilities to intervene but they lack the legal authority. When faced with a conflict between legal and moral norms, I would argue that political considerations, rather than a corrupting influence, ought to weigh heavily in decisions to act and in judgements of such actions.

Enforcement action by the Security Council, beyond its legal attractions, has the political virtue of being unlikely in the absence of a central humanitarian aim. Although Council-authorized action may in principle reflect merely the shared selfish interests of the great powers, in practice this is improbable. A similar logic may apply to regional organizations that are not hegemonically dominated. The need to build political coalitions across states reduces the likelihood of partisan abuse.

Because great powers have historically engaged in many more *anti*-humanitarian than humanitarian interventions, multilateral rather than unilateral intervention is on its face to be preferred. But unilateral state power may save lives that would be lost while waiting for a more ‘pure’ multilateral intervention that never comes. Classic examples include India in East Pakistan (Bangladesh) and Vietnam in Cambodia.

Order, security, and even justice in the anarchical society of states cannot be separated from state power – which may be used for good as well as evil. Where intervention rests almost entirely on selfish national interests, with little broader support among other states

or in the target country, the ‘authority’ of the intervening state is much like that of the highwayman. But the action may be more that of a policeman when a state or group of states intervenes as a *de facto* representative of victims or of broader communities. Even a single state may act on behalf of broader moral or political communities – which may offer active or passive support, or the indirect ‘support’ of not opposing the intervention.

How should we handle claims of moral or political authority in the absence of the legal authority of Security Council authorization? The dangers of partisan abuse still seem to me sufficiently great that even when genuinely humanitarian motives are central such interventions usually should be considered only excusable. And we should deal with them case by case, as they arise, being especially wary of treating them as precedents. Developing a *doctrine* of humanitarian intervention without Security Council authorization, whatever its moral attractions, seems to me profoundly unwise.

This admittedly leaves regional and unilateral interveners in an awkward position. But that seems to me not merely preferable to the alternatives but fundamentally correct. We should take seriously, but not too seriously, the illegality of (humanitarian) intervention not authorized by the Security Council. This not only places an appropriate additional burden on interveners but may in the long run even put pressure on the Council to take more seriously the claims of the victims of genocide.

Judging the Kosovo intervention

With all of these considerations in mind, let us return to NATO’s intervention in Kosovo. To sharpen the argument, let us give the decision to intervene the most favourable possible interpretation. In particular, let us agree that genocide was either imminent or already under way.⁵² Without that, even the moral case is seriously undermined (except for some radical cosmopolitans).

Security Council action was blocked by the relatively ‘principled’ objections of Russia and China, as well as Russia’s selfish political interests in its relationship with Serbia. The OSCE, the most obvious regional actor, had neither the desire nor the legal authority to use force. A similar combination of legal and political constraints blocked action through the European Union or the Council of Europe. Unilateral action by the United States, however, was also unacceptable.

Nonetheless, the United States, Britain and many states of continental Western Europe were unwilling to stand by and allow genocide in Kosovo. Faced with a genuine dilemma, they decided, not implausibly, that intervention was the lesser of two evils. The decision can thus be seen as tolerable, perhaps even excusable.

Interveners in such cases, however, ought to bear the burden of demonstrating that their illegal behaviour is not culpable.⁵³ The leading powers were less than clear in their self-justifications, although in large part, it seems to me, because of their reticence to appeal centrally to humanitarian concerns.⁵⁴ Nonetheless, the United States in this case acted like a hegemon – a leader acting with normative authority and a collective purpose (in addition, of course, to power and self-interest) – rather than unilaterally or imperially.⁵⁵ And a Russian resolution rejecting the NATO intervention was not vetoed but defeated (on 26 March 1999) by a vote of 12 to 3.

As a liberal American whose political views were shaped during the Vietnam war, I must admit to being more than a bit uncomfortable with this (limited) defence of the

Kosovo intervention. Although I think that it is substantively sound in this particular case, it has considerable potential for partisan abuse and a very troubling ‘selectivity’. In most of the world there is neither a regional organization nor a dominant actor with the power, legitimacy and commitment needed to intervene successfully. The effective exemption of the permanent members of the Security Council from United Nations action, and a comparable effective exemption of leading regional powers such as Nigeria and India, only increases the problem of selectivity. Kosovo also raises the spectre of what might be called coercive regionalism, in which the target of action is not a member of the intervening ‘regional’ community.

But regionalism, and even *ad hoc* coalitions, may fill a gap when global institutions are unwilling or unable to aid victims.⁵⁶ And regional intervention is likely to increase the role of genuine humanitarian motivations, if only by increasing the number of (potentially competing) national interests that have to be accommodated. Selective humanitarian intervention, for all its problems, may be preferable to no humanitarian intervention at all.

Caution is in order. The presumption always ought to be against intervention not authorized by the Security Council. But that presumption may in rare cases be overcome.

Problems of authority, selectivity and inequality are likely to recur so long as we retain an international system structured around sovereign states – that is, for the foreseeable future. Perhaps, though, we are finally beginning to grapple with them, rather than leaving complete authority to sovereign states, even if they choose to exercise that authority genocidally. Giving full weight to both the moral limitations of intervening only against genocide and the very real dangers of partisan politics, this still seems to me a small but significant step forward for international human rights.

Notes

1. This essay was written before 11 September, which I will ignore other than to make three brief observations here. First, anti-terrorism, whether good or bad, is not humanitarian intervention. There are many different forms of evil in the world for which we have developed different international legal norms and political practices. Second, I am doubtful that the international political world has been radically transformed. But, third, to the extent that it has, the consequences for (national and international) human rights are likely to be negative. More generally, appalling as those events were, it would be a further tragedy if they diverted (already scarce) international attention and resources away from more important and widespread moral and humanitarian concerns such as malnutrition, grinding poverty, genocide, pervasive repression, systematic political misrule, and the regular indignities and human rights violations that most people suffer daily in most of the contemporary world.
2. Friedmann (1971), p. 40.
3. Murphy (1996), pp. 8–20, provides a good overview of definitional issues.
4. See, for example, McDougal *et al.* (1980). Pease and Forsythe (1993) provide a powerful brief critique. On the current legal status of rescue missions, see Wingfield (2000).
5. Wheeler (2000).
6. Franck and Rodley (1973) provide a classic statement (and defense) of this standard interpretation. See also Brownlie (1974). Lillich (1967) offers the best Cold War era argument for the legality of humanitarian intervention.
7. See, for example, Stowell (1921).
8. For a generally critical but slightly less jaundiced reading of pre-Charter practice see Murphy (1996), pp. 49–64.
9. The three prominent candidates – India’s intervention in East Pakistan, Tanzania’s intervention in Uganda, and Vietnam’s intervention in Cambodia – are thoughtfully discussed in Wheeler (2000), chs 2–4. More briefly, see Murphy (1996), ch. 4.
10. For introductory overviews of the international machinery, see Forsythe (2000), ch. 3 and Donnelly (1998b), ch. 4.

11. Schachter (1984).
12. Damrosch (1991), p. 96.
13. Walzer (1977, 1980). Kant (1983) offers an alternative route to a similar conclusion in Parts II and III of 'Theory and Practice' and the Definitive Articles of 'Perpetual Peace'.
14. Walzer (1977), p. 53.
15. *Ibid.*, p. 88.
16. *Ibid.*, p. 87.
17. *Ibid.*, p. 89.
18. See especially Beitz (1980), Doppelt (1978, 1980), Luban (1980), Slater and Nardin (1986), and Wasserstrom (1978).
19. Jackson (2000), pp. vii, 42, 178–182, 406–416.
20. *Ibid.*, p. 308.
21. Walzer (1977), p. 101.
22. *Ibid.*, p. 90.
23. *Ibid.*, p. 107.
24. For a strong argument against the idea of a duty of humanitarian intervention see Weisburd (2001). More briefly, see Murphy (1996), pp. 294–297.
25. Bull (1977), ch. 4, provides a classic discussion of the conflict between order and justice in international society.
26. Brownlie (1973). Kritsiotis (1998: 1022–1023) however, rightly points out that the potential for abuse does not establish that humanitarian intervention is illegal. The proper legal response to concerns of abuse should be to develop clear criteria for identifying abuse and safeguards against its occurrence. In other words, we are dealing here with a political or policy issue.
27. Donnelly (1984), and Anon (1993).
28. The United Nations Charter, especially in the Preamble and Article 1, explicitly links human rights with international peace and security. These moral and political aspirations, however, did not solidify into legal and political norms – let alone practice – in the following decades.
29. Today it is becoming standard to talk of 'human security' (for a useful annotated bibliography, see <http://www.humansecurity-chs.org/first/BIBLIOGRAPHY.html>). The Helsinki era conception, however, was substantially narrower. And today 'human security' is so frequently used in expansive senses to include almost all good things that I prefer this narrower (although less familiar) language.
30. See especially Thomas (2001).
31. Gong (1984), Schwarzenberger (1955).
32. Although rooted in crude Western self-interest, this was not simply hypocritical. Japan provides the classic example of a country 'graduating' to full status after having made the changes necessary to meet Western standards. See Gong (1984), ch. 6 and Suganami (1984).
33. I develop such an argument more fully in Donnelly (1998a). The uncomfortable overtones of abusive paternalism in this language underscore the potential for partisan abuse. Past abuse, however, is no reason to avoid doing the right thing in the future – although it does demand careful, sceptical scrutiny of allegedly principled behaviour.
34. http://www.economist.com/displaystory.cfm?Story_ID=324795.
35. See <http://www.iciss.gc.ca/menu-e.asp>. For related research and preparatory materials, see <http://web.gc.cuny.edu/icissresearch/discussion%20papers%20and%20rapporteurs%20reports.htm>.
36. Franck (1999).
37. Rawls (1996), pp. xliii–xlv, 11–15, 174–176, and Rawls (1999), pp. 31–32, 172–173.
38. Rawls (1996), pp. 133–172, 385–396.
39. Chopra and Weiss (1995).
40. In particular, there is nothing like a consensus on a right to democratic governance, which has been strongly championed by Franck (e.g. 1992) and has considerable resonance in US foreign policy.
41. Nanda *et al.* (1998). For partially dissenting views, see Alvarez (1996) and Gardam (1996).
42. Kirgis Jr. (1995).
43. Henkin (1999).
44. Independent International Commission on Kosovo (2000), p. 4. For similar arguments, see Simma (1999) and Cassese (1999). For arguments in favour of the legality of the Kosovo intervention, see Mertus (2000) and Alexander (2000).
45. Almost all interventions are likely to be contested in the sense that someone (other than the target) objects. I distinguish here between interventions that are *relatively* uncontested and those challenged by leading powers or a large number of states.
46. The abstract theoretical possibility of something being neither authorized nor prohibited has no apparent relevance to humanitarian interventions, given existing norms of sovereignty and non-intervention.
47. These references to consequences remind us that a full evaluation of an intervention must take into account how it was carried out. For reasons of simplicity and economy I have focused solely on the decision to intervene, with the proviso that good humanitarian consequences may provide some sort of mitigation in the case of otherwise unjustifiable interventions.

48. See, for example, Lillich (1967), pp. 347–350, Fonteyne (1974), Fairley (1980), Hassan (1981), Nanda (1992), and Charney (1999).
49. Weiss (1999).
50. For a thoughtful discussion of when and why selective interventions are problematic, see Brilmayer (1995).
51. Baehr (2000).
52. In support of this reading, see Mertus (1999), Physicians for Human Rights (1999), and Independent International Commission on Kosovo (2000), Annexe 1. If the reader cannot bring him/herself to accept this interpretation, what follows can be read as an illustrative discussion of a hypothetical case loosely modelled on ‘the real’ Kosovo.
53. A more complete assessment would require considering the rights of innocents, which were infringed by the excessive reliance on high-altitude bombing, and the obligations of proportionality. Even here, though, the picture is complicated by political realities. Could the intervention have been carried to its conclusion if several NATO pilots had been shot down? If not, did the positive humanitarian consequences that were achieved outweigh the costs to innocent civilians? These seem to me profoundly difficult questions.
54. Vital national interests played a surprisingly peripheral, tenuous and shifting role in the arguments of both the United States and Britain. Even Rieff (1999) who has been generally critical of United States policy in the region and who specifically attacked the handling of the Kosovo intervention after it was launched, allows that it was ‘undertaken more in the name of human rights and moral obligation than out of any traditional conception of national interest’.
55. The ancient Greeks rightly distinguished *hegemonia* from *arche*, ‘rule’, the standard term for what we translate as ‘empire’. (Contemporary Gramscians draw a similar, although somewhat different, distinction between hegemony and force.) The common use of ‘hegemonic’ to mean dominant obscures the crucial distinction between various senses of and means to domination. It also systematically slights the role of norms and authority in, and the reality of, international society in favour of a crude materialism that obscures the variety of international political practices and processes.
56. Some system of after-the-fact review, by the Security Council or even the General Assembly, might reduce the risks of partisan abuse. Unfortunately, there is no evidence that even an informal practice of review is emerging, and good reason to expect strong, and in the short run at least fatal (American) resistance to any such proposals.

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