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Intervention under International Law

M.N.S. SELLERS[†]

INTRODUCTION

The lawfulness or legitimacy of "external" intervention in the "internal" affairs of sovereign states is one of the most basic controversies in modern international law. The question arises in three separate but related forms: When is intervention lawful? When is intervention legitimate? And when should intervention occur? Discussion here will focus on the legal question, but legitimacy, morality, and brutal reality all form and sometimes trump the law. They dictate the parameters within which all legal determinations take place, including the legality of cross-border interventions. By "intervention" I mean any activity by one state or its agents that influences the actions or attitudes of another state, but particularly the threat or use of force, because force is particularly intrusive, particularly persuasive, and often particularly resented by those subjected to its power.

Since its earliest elaboration by Hugo Grotius¹ and Emer de Vattel² international law has rested on a simple analogy and two basic premises: just as every human being should be free and equal and independent in all those things that concern her or his private interests, so too each state should be free and equal and independent in all those things that concern that state's domestic or "sovereign" affairs.³ As reaffirmed by the United Nations Charter, this requires both that all nations promote "respect for human rights and

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1. *See generally* HUGO GROTIUS, *DE JURE BELLI AC PACIS* (1625) (providing one of the earliest theories of international law).

2. *See generally* EMER DE VATTEL, *DROIT DES GENS* (1758) (further developing the foundations of early international law).

3. *Cf.* U.N. Charter pmbl. (declaring that the United Nations seeks to "reaffirm faith in fundamental human rights . . . [and] in the equal rights of men and women and of nations large and small").

fundamental freedoms for all"⁴ and that outsiders not interfere in "matters which are essentially within the domestic jurisdiction of any state."⁵ More specifically, there should be no threat or use of force "against the territorial integrity or political independence of any state."⁶ This raises the questions: what rights are "fundamental"?; which actions violate a state's "independence"?; and above all, what constitutes the "domestic" or "internal" province of states?

I. THE DOMESTIC JURISDICTION OF STATES

If, as Vattel, Grotius, and the Charter of the United Nations suppose, states (like individuals) should be free and independent and enjoy some zone of autonomy that others must respect, it follows that they have an autonomous legal domain of "domestic jurisdiction" over their own "internal affairs." The domestic jurisdiction of states includes those areas that international law does not reach and that in some circumstances international law should actively protect against the improper interventions of others. Domestic jurisdiction begins where international jurisdiction ends and embraces those areas not appropriate for international control. The difficulty of regulating "intervention" arises in drawing this jurisdictional line. Some issues do or should belong to the exclusive jurisdiction of states. Some issues are or ought to be subject to the overlapping or complementary jurisdiction of both domestic and international law. Some issues are or should be solely the province of the international rule of law.

Drawing the jurisdictional lines between different levels of governance is a ubiquitous problem, already well-rehearsed in the jurisprudence of American federalism or the relationship between the laws of the European Union and the laws of its disparate members. Judges and others must discern which issues are properly cosmopolitan, and which issues are more properly parochial.⁷ The United Nations Charter is far from being the only or decisive determinant of international law, but it does embody some broadly accepted principles about the parameters of international concern, beginning with the importance of fundamental human rights, and the

4. *Id.* art. 1, para. 3.

5. *Id.* art. 2, para. 7.

6. *Id.* art. 2, para. 4.

7. See PAROCHIALISM, COSMOPOLITANISM, AND THE FOUNDATIONS OF INTERNATIONAL LAW (M.N.S. Sellers ed., 2012) (discussing the boundaries between international law, national jurisdiction, and the private autonomy of individuals).

dignity and worth of the human person.⁸ There are also foundational international commitments to "justice", to "freedom", and to the "economic and social advancement of all peoples", so that "armed force shall not be used except in the common interest."⁹

These very broad international interests raise the question whether anything remains that is the essentially "internal" or "domestic" affair of states, sufficiently to exclude the international community, or the strictures of international law, from interceding to regulate events. This category of the purely internal or domestic jurisdiction is rapidly shrinking. Just as in the United States, it has become clearer with the passage of time that commerce, the environment, manufacturing, farming, and even crime need regulation from the federal government to achieve a just and beneficial rule of law in the States, so too increases in communication and technology push more and more areas of law into the jurisdiction of international institutions and international authorities. Whether by treaty, by custom, or by the simple nature of the world, much that once seemed domestic has become international, or must be international, if it is to be regulated at all.¹⁰

II. FUNDAMENTAL HUMAN RIGHTS

Fundamental human rights and the inherent dignity of real human beings provide the template and model for the sovereign rights and self-determination of states, reflecting the extent to which human rights have always been, a central concern of international law.¹¹ The Universal Declaration of Human Rights in 1948 and later the human rights covenants have been extremely useful in clarifying those fundamental human rights in which the international community has the most direct interest.¹² This interest turns out to extend very broadly, reaching almost everything that is necessary for human dignity and happiness. Each step in the greater articulation of international human rights has narrowed the scope of domestic jurisdiction, by clarifying the duties of states to their subjects, and the concern of international law for the dignity of humanity everywhere.

8. U.N. Charter pmbi.

9. *Id.*

10. For example, the internationalization of commerce (the W.T.O.), environmental regulation (the U.N.F.C.C.C.), and the protection of peace and security (the United Nations Security Council).

11. *E.g.*, THE DECLARATION OF INDEPENDENCE (U.S. 1776).

12. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

The International Covenant on Civil and Political Rights (ICCPR)¹³ and the International Covenant on Economic, Social and Cultural Rights (ICESCR)¹⁴ both illustrate the vast jurisdiction of contemporary international law, and a possible limitation on its application to particular cases. Both covenants start by recognizing the inherent dignity and the “equal and inalienable rights of all members of the human family” as the “foundation of freedom, justice, and peace in the world” and both demonstrate the very strong interest of the international community in protecting fundamental human rights.¹⁵ But they also go on to insist that all peoples have the right to self-determination.¹⁶ By virtue of that right, they freely determine their political status and freely pursue their economic, social, and cultural development.¹⁷ Fundamental human rights are best enjoyed in a strong and coherent community, and this inescapable reality provides the point of contact between sovereignty and liberty, linking collective identity with individual justice.

III. INDEPENDENCE

There is an inherent and fundamental value in the freedom and independence of states and their peoples just as there is an inherent and fundamental value in the freedom and independence of individual human beings. States deserve freedom and independence precisely because they are made up of real human beings who value community and share culture, customs, and local circumstances. These local circumstances may vary considerably from place to place. Geographical particularities, as well as historical and cultural traditions, can be dramatically different in different parts of the world

13. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171.

14. International Covenant on Economic, Social, and Cultural Rights, Dec. 16 1966, 993 U.N.T.S. 3.

15. International Covenant on Civil and Political Rights, *supra* note 13, pmbl.; International Covenant on Economic, Social, and Cultural Rights, *supra* note 14, pmbl.

16. International Covenant on Civil and Political Rights, *supra* note 13, art. 1, ¶ 1; International Covenant on Economic, Social, and Cultural Rights, *supra* note 14, art. 1, ¶ 1.

17. *Id.*

and among different peoples. This requires and justifies significant variations in local law and customs.¹⁸

Justified differences in local law and customs suggest the benefit of “subsidiarity” – the principle that jurisdiction and decision-making powers should devolve as much as possible to local authorities, provided that local authorities respect the overarching standards of general international law. This means that in most areas of law, jurisdiction is not very often purely domestic or international, but rather overlapping. International law deputizes states (for the most part) to enforce and implement universal human rights and other international norms internally. But when states fail or refuse to implement these rights, or even themselves violate basic standards, their obligations to the international community persist. States that violate the universal human rights of their subjects are also violating fundamental principles of international law.

Human rights violations committed by the governments of states or their agents present the starkest example of possible conflict between the right to independence and fundamental human rights, the two foundational principles of modern international law.¹⁹ All violations of fundamental human rights are also violations of international law, but enforcing them or any other international law constrains the independence of states. States owe their duty to respect universal human rights not only to those individuals whose rights should not be violated, but also to the international community as a whole, and to every other state and people.²⁰ Human rights are *erga omnes*, in that they concern everyone, and everyone has the right to take countermeasures. But any response to such violations must respect the domestic jurisdiction of the state concerned,²¹ and be proportionate to the offenses that have been committed.²²

18. See PAROCHIALISM, COSMOPOLITANISM, AND THE FOUNDATIONS OF INTERNATIONAL LAW, *supra* note 7.

19. See MORTIMER N.S. SELLERS, *REPUBLICAN PRINCIPLES IN INTERNATIONAL LAW: THE FUNDAMENTAL REQUIREMENT OF A JUST WORLD ORDER* (2006) (discussing independence and universal human rights as some of the essential principles of a republican system of international law).

20. INSTITUT DE DROIT INTERNATIONAL, *LA PROTECTION DES DROITS DE L'HOMME ET LE PRINCIPE DE NON-INTERVENTION DANS LES AFFAIRES INTÉRIEURES DES ETATS* [THE PROTECTION OF HUMAN RIGHTS AND THE PRINCIPLE OF NON-INTERVENTION IN INTERNAL AFFAIRS OF STATE] (1989) available at http://www.idi-ii.org/idiE/resolutionsE/1989_comp_03_en.PDF.

21. U.N. Charter art. 2, para. 7.

22. See SELLERS, *supra* note 19, ch. 21.

IV. INTERVENTION

“Intervention” is a term of art in international law. Everything that anyone ever does is an intervention in the strictest sense of the term, to the extent that it has an effect or an influence on someone else. We all have and should have very broad rights of intervention, in this ordinary sense, over almost everything we encounter, because we do and should enjoy a great freedom of action. Intervention is a continuum, ranging from criticism to coercion. The legality, legitimacy and practical value of an intervention will vary according to two variables: the intrusiveness of the intervention contemplated and locus of jurisdiction over its target. Intended interventions may be barred either because the effects of intervention would be too severe or because the subject matter of the planned intervention is no business of those who want to intervene.

My primary concern here will be with intervention by force, both because it is the most intrusive form of intervention and because the United Nations charter so explicitly forbids the use of force “against the territorial integrity or political independence of any state.”²³ Lesser interventions may also be problematic,²⁴ but do not so starkly present the underlying conflict between independence and justice. The United Nations is barred from intervening in matters that are “essentially within the domestic jurisdiction of any state”²⁵ and it may be assumed that a similar prohibition also applies to interventions by the states themselves.²⁶ Interventions by force must meet a very high standard, and face a near absolute prohibition when they violate the “territorial integrity”, the “political independence” or the “domestic jurisdiction” of any state.

This is not to say that intervention by force is never warranted. The Charter of the United Nations contemplates the use of force at the direction of the Security Council (Art. 42), in self-defense (Art. 51), through regional arrangements (Art. 52), and in other ways that are not incompatible with the purposes of the United Nations or the territorial integrity and political independence of states.²⁷ Thus the

23. U.N. Charter art. 2, para. 4.

24. See SELLERS, *supra* note 19, ch. 21.

25. U.N. Charter art. 2, para. 7.

26. See e.g., VATTEL, *supra* note 2, at 37–38 (discussing the injury done to states by external intervention in their “affaires domestiques.”).

27. U.N. Charter art. 2, para 7.

limits of legal intervention by force, like the concept of “domestic jurisdiction”, ultimately depend on the principles and purposes that justify the international order itself, including fundamental human rights, the dignity and worth of the human person, the equal rights of men and women, and the equal rights of nations, large and small.²⁸

V. LEGALLY JUSTIFIED INTERVENTION

The clearest example of a legally justified intervention by force under the traditional *ius gentium* was intervention to remove and punish a tyrannical ruler, who oppressed the people subject to his rule. Jean Bodin, the apostle of sovereignty, admitted already in the sixteenth century that “it is a most beautiful and magnificent thing for a prince to take up arms in order to avenge an entire people unjustly oppressed by a tyrant’s cruelty.”²⁹ Vattel explained more prosaically that rulers lose the right to rule when they violate the purposes that justify their authority.³⁰

This raises the question whether interventions to prevent oppression, to defend fundamental human rights, to protect the dignity and worth of the human person, or to secure the equal rights of men and women, or of nations large and small (to echo the words of the Charter) are in fact or ever can be restricted by international law. States parties to the Convention on the Prevention and Punishment of the Crime of Genocide undertook to “prevent and to punish” the crime of genocide³¹ and there have been a number of recent military interventions both under the authority of the United Nations Security Council, as in Libya in 2011,³² or without Security Council approval, as in Kosovo in 1999³³ that have been justified by those who intervened as being necessary to prevent “humanitarian catastrophe.”³⁴

28. *Id.*, pmb.

29. JEAN BODIN, ON SOVEREIGNTY 113 (Julian H. Franklin ed., 1992) (translating JEAN BODIN, SIX LIVRES DE LA RÉPUBLIQUE (1586)).

30. VATTEL, *supra* note 2, at 22 (“... puisqu’elle n’aurait plus aucun droit elle-même, si elle vouloit opprimer une partie des Citoyens.”).

31. Convention on the Prevention and Punishment of the Crime of Genocide, art. 1, Dec. 9, 1948, 78 U.N.T.S. 277.

32. See S.C. Res. 1973, U.N. Doc. S/RES/1973 (Mar. 17, 2011) (demanding an “immediate ceasefire,” establishing a no-fly zone, and authorizing states to “take all necessary measures” to protect civilians).

33. See Press Statement, Dr. Javier Solana, Secretary General of the N. Atl. Treaty Org. [NATO], NATO (Mar. 23, 1999) (noting “no alternative [was] open but to take military action”).

34. *Id.*

The problem to be confronted in evaluating armed intervention against genocide, or to prevent crimes against humanity, or otherwise to enforce international humanitarian law, arises less from determining the legality of such interventions in principle than in applying the law and its principles to specific cases. Even the worst violators of human rights standards and fundamental freedoms in their own internal affairs, such as the Putin regime in Russia, cite international human rights standards and the principles of humanitarian intervention to justify their invasions and interference in the internal affairs of other nations.³⁵ Those culpable for the recent Russian interventions in and occupations of the internal territories of Georgia, Moldova, and Ukraine all purport to respect the requirements and humanitarian principles of international law, while violating them in practice. Thus even the most oppressive states concede the principle that tyranny justifies intervention, to justify their own oppressive and illegal invasions.

VI. BAD FAITH

The Russian example illustrates the problem of bad faith in international law. Grotius followed Cicero in identifying good faith (“*bona fides*”) as the ultimate basis of international justice.³⁶ For although law and justice may at times be somewhat obscure, good faith clarifies the result, by referring to the purpose of the enterprise.³⁷ When the law is clear, as in the prohibition of aggression, malefactors will invent their own spurious facts, to justify their crimes.³⁸ In the absence of strong enforcement mechanisms, this opens the interpretation and application of international law to significant abuse. Aggressors will present their attacks as legitimate intervention, and criminals will decry their just punishments as unwarranted interference. The Putin regime has done both.

35. See e.g. *Transcript: Putin defends Russian intervention in Ukraine*, WASH. POST (Mar. 4, 2014), http://www.washingtonpost.com/world/transcript-putin-defends-russian-intervention-in-ukraine/2014/03/04/9caded1a-a3a9-11e3-a5fa-55f0c77bf39c_story.html (vigorously defending Russia’s intervention in Ukraine).

36. See GROTIUS, *supra* note 1, at 608 (“Fide enim non tantum republica quaelibet continetur, ut Cicero dicit, sed et maior illa gentium societas.”).

37. See *id.* at 609 (“Et iustitia quidem in caeteris sui partibus saepe habet aliquid obscuri: at fidei vinculum per se manifestum est . . .”).

38. Vladimir Putin, Address Concerning the Annexation of Crimea (Mar. 18, 2014) available at <http://eng.kremlin.ru/news/6889>.

Even states seeking to act in good faith will make mistakes when they act as judges in their own cases. The endorsement of the Security Council, or the North Atlantic Treaty Organization, or the European Union, or the Organization for Security and Cooperation in Europe, or some other multi-state deliberative forum with significant participation from liberal constitutional democracies will give even well-intentioned and generally law-abiding states greater assurance of legality in their international interventions than they would or should have, when acting on their own. Multilateral interventions, pursued with the approval of international deliberative bodies, will be more likely to be accurate in their assessment of the law and facts than deliberation wholly among the officials of any single nation. This points to the great importance of deliberative procedure in determining the substance of any international legal requirement. Good faith requires a certain humility in considering the opinions of others.

The requirement of good faith in applying the laws governing international intervention to the facts of particular cases reflects a fundamental distinction dividing the Grotian discipline of international law from the Hobbesian field of international relations. International law rests on universal principles, human dignity, and the value of humanity as a whole. The field of international relations studies power and personal advantage. International law, like all law, claims to seek and implement justice and promote the common good of all those subject to its rule. Whether or not this can ever be or become entirely true, justice and the common good put significant constraints on development of law in practice. Purported laws that depart too far from widely shared perceptions of justice and the common good will lose their ability to influence human behavior. This is particularly true of international law, for which strong enforcement mechanisms do not yet exist, beyond the public opinion of states and their citizens.

VII. LEGITIMACY

Some international lawyers have asserted (for example) that the NATO intervention in Kosovo was “illegal,” but nevertheless “legitimate.”³⁹ Whether or not this was true in fact, the claim serves

39. See e.g., Anne-Marie Slaughter, *Good Reasons for Going Around the U.N.*, N.Y. TIMES, Mar. 18, 2003, at A33 (“But in the end, the Independent International Commission on Kosovo found that although formally illegal -- the United Nations Charter demands that the use of force in any cause other than self-defense be

to remind us that on vital questions such as international interventions, arguments from legality are not the final word. All law claims to realize justice, but if law fails to do so in practice, other institutions will assert themselves. The concept of “legitimacy” in any given context signifies having met the standard required for the practice in question. The standard for international law is justice. International law that fails to advance international justice, loses its claim on our fidelity, on our obedience, and even on our interest in what the law may or may not require, according to its own terms.

Law arises from the collective effort to embody legitimacy in determinate rules and institutions. The only difference between legal and other supposedly legitimate action is that law is mediated by procedures that make legality more concrete. But in the case of international law, these procedures are radically incomplete. Lawyers and judges must find international legal rules in international conventions, in international custom, in the general principles of law recognized by civilized nations, in judicial decisions, and in the teachings of the most highly qualified publicists.⁴⁰ None of these have sufficient institutional authority entirely to supersede the direct appeal to external standards of justice. Such authorities as “custom” and “teachings” of the publicists constitute “evidence” of the law rather its source, which ultimately arises in “those rules of conduct which reason deduces, as consonant to justice, from the nature of the society existing among independent nations.”⁴¹

Powerful states respect and obey international law (when they do so) primarily because they believe international law to be *legitimate*, according to the universal standard of legitimacy for law, which is that law should achieve or approximate justice more effectively than would be possible in the absence of law, or by direct appeals to justice. States acting in good faith, when they contemplate intervention, will look first to the law, and to the general principles of law accepted by civilized nations. They will deliberate if possible, in the context of multinational institutions, and decide, when they can, in consultation with other nations that respect the international rule of

authorized by the Security Council -- the intervention was nonetheless legitimate in the eyes of the international community.”).

40. *E.g.* U.N. Charter arts. 33–38 (creating the International Court of Justice).

41. HENRY WHEATON, *ELEMENTS OF INTERNATIONAL LAW* 20 (R.H. Dana, Jr. ed., 8th ed. 1866).

law. Legitimacy in the light of justice is the ultimate measure of international law, and therefore of international intervention, and unilateral intervention, without the approval of other nations, is unlikely to be either lawful or legitimate, because it has not survived the burden of persuasion, which is the best measure of validity in international law.

CONCLUSION

External interventions to prevent or punish “internal” violations of international law will continue to occur for the same reasons that people have always acted against injustice. These include sympathy for the victims, fear of the perpetrators, and the general desire to establish just legal principles by enforcing them against violators. Nations deserve a zone of sovereignty or “domestic jurisdiction” within which to develop their own histories and cultures, but governments never have the license to oppress or exploit the peoples subject to their care. The sovereign rights of states derive from the human rights of individuals. Governments that oppress their subjects are violating international law, and should expect to face consequences if their violations persist.

External interventions can be legal under international law and legitimate *sub specie aeternitatis* whenever serious humanitarian catastrophes require them and so long as the states enforcing international law respect the territorial integrity and political independence of the peoples they protect. All nations and their peoples have the right to self-determination, so that the citizens themselves may decide who their rulers shall be. Just as foreign powers have no right to interfere in a state’s internal affairs, so too local governments that deny their subjects’ human rights and fundamental freedoms forfeit their right to rule. The limits of external intervention depend on the value of human dignity, the welfare of those oppressed, the good faith of the enforcers, and their humility in the face of public deliberation. Sometimes the use of force will be justified to put an end to serious and systematic attacks on human dignity, but this cannot become the pretext for imperial aggression.

Without justice, there will be no peace.⁴²

42. Cf. Universal Declaration of Human Rights, *supra* note 12, pmbl.