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With specific reference to post-1990 developments, critical evaluation the scope of the doctrine of humanitarian intervention under article 2 of the United Nations Charter

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Abstract
This paper examines the roll-out of humanitarian intervention post - 1990 developments. It considers the interest that United Nations have in being able to access and implement Article 2 of the United Nation Charter. It shows also their willingness to use various humanitarian legal tools. The paper also outlines the various international and EU regulations that misuse and abuse the delivery of a broad doctrine of 'responsibility to protect'. Most importantly highlights the ongoing its uncertain scope and definition which can be misused for ulterior motivations. In this sense, just as much can go wrong with humanitarian intervention as can go right and, therefore, we must be sceptical before permitting the Security Council to extend the doctrine at will.

Keywords: article 2 united nation charter, humanitarian intervention, kosovo's precedent, annexation of crimea, un security council resolution 794, libya attack 2011, humanitarian intervention in georgia in 2008, humanitarian intervention in Ukraine in 2011

Introduction

Article 2 of the United Nations Charter provides for the seven fundamental principles by which the United Nations as an organisation is governed. Especially relevant for our purposes is Article 2(1) demanding respect for the sovereign equality of all states, Article 2(3) demanding the peaceful settlement of disputes to ensure that international security and peace are not endangered, and Article 2(4) demanding that states refrain from the use of force against the territorial integrity of another state. Article 2(7) further imposes an obligation on members not to intervene in essentially domestic affairs of other nations. With the requirement in Article 2(6) that members act in accordance with these principles, Article 2 at first reading appears to place many restrictions on members' ability to intervene in another nation, even for humanitarian reasons [1].

Meanwhile, Marjanovic (2015) defines 'humanitarian intervention' as, '…military force against another state when the chief publicly declared aim is the ending of human rights violations being perpetrated by the state against which action is directed [2].' One of the key sources of legitimacy for humanitarian intervention as an idea is the report of the World Summit of the United Nations General Council in 2005, which argued that all civilised nations, living in a global community, have a 'responsibility to protect' each other and the innocent who are being harmed by their governments [3].

The thesis of this essay is that Article 2 does provide some, albeit narrow, scope for humanitarian intervention, but this is ultimately justified because of the potential scope for abuse if the language was more permissive. This can especially be seen in relation to Russian intervention, purportedly for humanitarian reasons, in Georgia in 2008 and Ukraine in 2011. To this end, the essay will be divided into two sections: the first section will evaluate the scope of Article 2 as it is currently interpreted and the potential consequences of that scope, and the second section will evaluate the risks of widening the ambit of Article 2 to include an explicit responsibility to protect.

Article 2: Textual Evaluation

Kochler (2006) argues that the grounds for humanitarian intervention under Article 2 are strictly limited, even non-existent. He reaches this conclusion purely on a literal textual analysis of Article 2. He notes especially that Article 2(1) expressly declares the sovereign equality of all members. In other words, democracies with high protection of human rights are not afforded greater protection than dictatorships or countries rife with political or civil strife. This is followed by the instruction in Article 2(4) that countries must respect the territorial integrity of other nations and must refrain from actions which question this commitment. Again, this is not limited to democracies. Even dictators are entitled, under the Charter, to have the territorial integrity of their nation respected by other countries. Therefore, to Kochler, reading the language of each of the seven principles in a plain and literal sense, it is very difficult to find a basis for humanitarian intervention. All of the language in Article 2 prohibits action and no clause provides an express justification for humanitarian intervention [4].

One of the key criticisms of restricting the possibility of humanitarian intervention is that it fails to appreciate that intervention against the territorial integrity of another nation might be morally or ethically justified to protect innocent people from being murdered or harmed by the government of a sovereign state. A striking example of how Article 2 can be used to shield dictators and put the innocent in harm's way is the application brought to the International Court of Justice by the former Yugoslavia against the United Kingdom in April 1999. This was in response to the UK's involvement in NATO air strikes to protect Albanian Kosovans in Yugoslavia from being murdered by Yugoslavian leader, Slobodan Milosevic. In its application,

the Yugoslavian government alleged that the UK was acting contrary to the prohibitions in Article 2 of the Charter and that its military action was unlawful, despite being for protective purposes [5]. In a review of the data, third-party observations and literature, Seybolt (2007) estimates that between 5000 and 10,000 innocent lives were saved by humanitarian intervention against Milosevic [6]. This demonstrates that a highly restrictive interpretation of Article 2 against humanitarian intervention can operate detrimentally to the interests of innocent civilians.

A further example is the failure of the UN to authorise intervention in Sudan from 2003 onwards, when that country was experiencing civil war and a possible ethnic cleansing campaign orchestrated by President Omar Al-Bashir against non-Arabs. The UN's conclusion on Sudan was that war crimes had been committed, probably by both belligerents, but that it was not genocide [7]. To this day, no intervention has been authorised to protect civilians. Therefore, as the examples of Yugoslavia and Sudan show, humanitarian intervention can sometimes act to shield civilians from unlawful harm committed against them by sovereign states and the failure of Article 2 to expressly authorise intervention for protective purposes can put innocent lives at risk.

Having said that, the textual interpretation of Article 2 is always being modified and Kochler's (2006) narrow reading is certainly not the end of the matter. An interesting observation is found in a request for preliminary measures before the International Court of Justice concerning Belgium and intervention in Yugoslavia in 1998. The Belgian representative noted as justification for the intervention that Article 2(4), '…only prohibits intervention against the territorial integrity or political independence of a state' [8]. Given that this intervention was for humanitarian reasons and not geared towards undermining Yugoslavia as a state, the NATO intervention was not prohibited by Article 2(4) [9]. When the matter was discussed by the UN Security Council, it passed Resolution 1160 in 1998, which concluded that, '…if no peaceful resolution is found, additional measures and further action to restore peace and stability will be taken'[10]. The suggestion here that a 'peaceful resolution' might not be adequate necessarily implies that a 'forceful' i.e. military resolution might be regarded as legitimate and lawful. Therefore, contrary to Kochler's (2006) assessment, Article 2 might well permit humanitarian intervention in some circumstances.

Sima (1999) is critical of this argument and she addresses the comments by the Belgian representative before the International Court of Justice specifically. She argues that this interpretation would be ridiculous as it would mean that every intervention for any reason other than undermining the territorial integrity of a state would be permissible. Given that the purpose of the Charter is to deter aggression and invasions of sovereignty, this cannot be a logical proposition [11]. This is a very strong point, especially given that the UN Security Council did not expressly or implicitly endorse this interpretation of Article 2(4). Moreover, the language of the Article: 'All Members shall refrain…from…the use of force against the territorial integrity or political independence of any state…' does not read as a narrow prohibition only against intervention which seeks to undermine territorial integrity. Indeed, the wording is not: 'All Members shall refrain from force which seeks to undermine the territorial integrity of nations'. The wording does not state that if committed for positive purposes or if the action might be ethically justified, that the force would be lawful. Instead, it is a broad instruction prohibiting force against the territorial boundaries of a state. In this sense, Sima's (1999) criticism appears very strong.

Therefore, this appears to leave us with the same conclusion as we had after considering Kochler's (2006) material; that Article 2 appears to leave very little room, if any, for humanitarian intervention to protect innocent civilians and must be objectionable on this basis. The issue is made more complex, however, with the implicit acceptance by the UN Security Council in Resolution 1160 of 1998 regarding Yugoslavia (mentioned above) of the legitimacy of military action, despite Article 2. If a narrow reading of Article 2(4) as suggested by Belgium cannot achieve this, there must be something which justifies the UN's acceptance of humanitarian intervention.

An examination of some recent UN Security Council Resolutions may be helpful in providing some answers. UN Security Council Resolution 794 in 1992 regarding Somalia authorises members to take, '…all necessary measures to facilitate…urgent humanitarian assistance to the affected population in Somalia…' [12] and to use, '…all necessary means to establish as soon as possible a secure environment for humanitarian relief operations…' [13] For the avoidance of doubt, the Resolution: 'Calls on all Member States…to provide military forces…' [14] to achieve these goals. Therefore, despite no express reference being made to this, the Security Council appears to simply assume that there are exceptions to Article 2, particularly when using military action to ensure that humanitarian assistance can reach civilians.

This is seen more clearly in Resolution 1973 of 2011 regarding Libya, where the Council expressed its, '…determination to ensure the protection of civilians and civilian populated areas.' [15] The Council further stated that it, 'Authorises Member States…to take all necessary measures to protect civilians…while excluding a foreign occupation…' This particularly included a militarily enforced no-fly zone above parts of Libya [16]. Again, we see an implication not expressly justified that there is an exception to Article 2 when members wish to protect civilians using military force against action by a sovereign state which the Council regards as unlawful. Therefore, though its source is ambiguous and never expressly stated, the UN does appear to endorse some concept of humanitarian intervention, despite the supposedly absolutist language of Article 2. As such, the criticism that Article 2 fails to protect civilians from dictatorial actions taken by their state cannot be taken for granted.

Indeed, Coady (2002) argues that the UN Security Council had been especially adept in recent years at authorising no-fly zones in order to protect civilians. He gives the example of Bosnia in 1992-93. The Council passed Resolution 816 of 1992 and authorised members to take all necessary measures to enforce the no-fly zone that had already been imposed, but breached, over Bosnian airspace [17]. To Coady (2002), this demonstrates that the UN, especially post-1990, has been a very strong and decisive force for protecting civilians in some cases [18].

The thesis of this essay was that Article 2 provided for some narrow grounds for humanitarian intervention. It has been shown that contrary to the arguments of Kochler (2006) suggesting that Article 2 provided for no basis for protective

intervention, the UN Security Council has slowly and organically been developing its own doctrine permitting intervention in some circumstances. This has not been supported by an express invocation of law but its existence is unquestionable. This has especially been evident in cases where previous UN Resolutions to protect civilians have been breached (Bosnia in 1992-93), where the Council believes that civilians are in urgent need of protection from state attack (Libya in 2011), and in protecting the routes for humanitarian assistance for civilians (Somalia in 1992). Therefore, the UN has proved able to develop the interpretation of Article 2 so that it does enable the protection of civilians in some circumstances. In this way, the first part of the thesis of this essay has been made out. The next section of this essay will seek to demonstrate the potential negative consequences of this development of a doctrine of responsibility to protect.

Responsibility to Protect

One key criticism of this organic development in the scope of UN doctrines of humanitarian intervention is put forward by Legault (2000). He argues that in creating interpretations of Article 2 that run directly contrary to its language and purposes, the UN Security Council is acting like an 'autocratic oligopoly'. By this strong rhetoric, he means that the Council is acting in an undemocratic, arbitrary and unaccountable fashion; undemocratic and unaccountable because the Council is not subject to approval or removal by voters who must suffer the consequences of its decisions, and because its decisions are ultimately impossible to appeal against. The Council is also being arbitrary, according to Legault (2000), because it is not developing general approaches and tests on intervention but is making decisions merely on a case-by-case basis on a whim [19].

An interesting response to this criticism was made by UK Prime Minister, David Cameron MP, who in a House of Commons debate suggested that if the UN Security Council did not authorise humanitarian intervention in some cases, then the global community represented in the UN would be subject to the veto of countries, especially Russia and China, which do not have strong human rights records and who may wish to protect the interests of dictatorial regimes. Being permanent members of the Council, both China and Russia have the right to veto Resolutions. The Prime Minister specifically gave the example of Russia protecting the interests of President Assad of Syria by vetoing a UN Resolution calling for the President to resign in the midst of Syria's civil war [20].

The problem with this suggestion is that humanitarian interventions are complex events and it is not a simple matter that intervention will always protect the innocent and defeat wicked leaders. In their investigation on the consequences of the intervention in Iraq by the United Kingdom and the USA in 2003, Burnham, Lafta & Roberts (2004) estimate that between 110,000 and 120,000 civilians died in the immediate aftermath of the civil war that followed the overthrow of former leader Saddam Hussein. These numbers did not include those who died as a consequence of health infrastructure being destroyed during the war. Therefore, to Burham, Lafta & Roberts (2004), Iraq was arguably in a better position pre-intervention [21].

More disturbingly, Bunzel (2015) further highlights the possible link between Western intervention in Iraq and the creation of Islamic State. He suggests two possible theories: first, that armed jihadist groups, largely based in Afghanistan and Pakistan, took advantage of the power vacuum created by the overthrow of Saddam Hussein to enter the country and train and recruit terrorists. Second, Bunzel (2015) claims that because of the internment of prisoners that occurred during Western occupation, many jihadist sympathetic individuals were imprisoned together in close quarters to each other, making planning of terrorist attacks and identification of fellow jihadists far easier [22].

Worryingly, Iraq is not a single example of the unintended consequences of intervention. Pattison (2011) has researched the consequences of the UN intervention in Libya in 2011 via Resolution 1973, which was mentioned above. He suggests that, almost immediately after the killing of Colonel Gaddafi by rebel fighters, there was a rapid increase in the number of armed terrorists groups in operation, particularly ones expressing direct or indirect allegiance to Islamic State in Syria and Iraq. These terrorists emerged, according to Pattison (2011), through the breakdown in law and order that occurred through the removal of the head of state, which permitted the flow of weaponry and fighters into the country [23].

Therefore, the examples of Iraq and Libya demonstrate that we must be very careful before permitting the international community to intervene in the affairs of other countries, even for humanitarian reasons. Intervention can have serious undesirable unforeseen consequences. In this sense, while the possibility of intervention through a liberal interpretation of Article 2 can be beneficial as shown through the example of Yugoslavia and Kosovo, there are many negative consequences which may flow from the UN Security Council continuing to develop a doctrine of 'responsibility to protect'.

There is also the issue that it is very easy to misuse and abuse a broad doctrine of 'responsibility to protect' because, not being based on written clauses in the UN Charter, its definition and scope is uncertain. A striking recent example is the intervention of Russia in Ukraine in 2011. During this time, a civil war was raging in Ukraine in relation to the country's future political direction; specifically, whether further integration within the European Union and the Western world was beneficial, or whether the country should focus on Russia. Purportedly to protect historically ethnic Russian populations in Ukraine, the Russian President, Vladimir Putin, authorised the Russian military to enter Ukraine. Eventually, the Russian state annexed a part of Ukraine – the Crimea – and President Putin signed an order recognising Crimea as part of Russia [24]. The foreign policy organisation, Chatham House, has analysed the speeches and statements of Putin during this period and has noted that, alongside appeals to Russian identity, history and patriotism, the President has overtly used the 'responsibility to protect' as a key method in justifying his annexation. Particularly, Putin has focused on Russia's duty to protect those who are historically and ethnically Russian in Crimea from Ukranian fighters [25].

Unfortunately, Russia has history on this issue. In the early 1990s, South Ossetia and Abkhazia unilaterally declared their independence from the country of Georgia. The Russian state recognised these actions as valid declarations. However, in 2008, a new Georgian President wished to reclaim these states for Georgia militarily. In response to this, the Russian military was ordered to intervene in the conflict by President Medvedev. Moreover, the Russian

President signed executive decrees which attempted to integrate South Ossetia and Abkhazia into Russia economically through recognition of currency and removal of trade barriers [26]. Looking to a Russian Foreign Policy document from 2009, we can see the official Russian thinking behind this intervention. The document states that Russia recognised the right of the peoples of South Ossetia and Abkhazia to declare independence from Georgia and intervene, in part, to protect this right. Apart from that, the document states that Russia had a duty to protect civilians in the region who were ethnically and historically Russian [27].

Both of these examples show how the doctrine of 'responsibility to protect' can be abused or misused given that its definition and scope is unclear. In both interventions, the Russian leadership could assert and purport pure motivations – specifically, the desires to protect civilians and self-determination – but the results seem uncomfortably close to a mere extension of Russian power and influence. The protection of civilians did not require the annexation of Crimea and the protection of self-determination for South Ossetia and Abkhazia did not require the regions to be integrated economically into Russia. There is a strong case that both interventions were merely used as means to extend Russian territory and power; the relevant domestic struggles in Georgia and Ukraine being used as excuses to intervene. This strong potential for misuse provides another reason to be sceptical of an increasingly accepted responsibility to protect read artificially into Article 2.

Indeed, we do not just see this possible misuse in Russian examples. O'Connell (2013) mentions the intervention of the French military in Mali in 2013, purportedly to protect French and European civilians who could be victims of attacks orchestrated by Islamist terrorists residing within Mali. O'Connell (2013) notes that the French government did not claim that it had identified specific terrorists within Mali who were currently plotting an attack on French or European soil; indeed, the predominant Islamist group within Mali is Boko Haram, which largely concentrates on overthrowing the Malian state by violence, rather than foreign attacks on Europeans. Therefore, to O'Connell, this intervention was more likely a general attempt to destroy anti-Western fighters, rather than defend civilians from imminent attack [28].

As we can see, there is a very strong possibility that the development of a doctrine of responsibility to protect in Article 2 is seriously open to misuse and abuse, and the danger of serious unintended consequences. As well as sometimes protecting civilians as in Kosovo in the 1990s, it can lead to devastating consequences for civilians as in Iraq in 2003, it can lead to the proliferation of terrorist organisations from the collapse of the state as in Libya in 2011, and its uncertain scope and definition can be misused for ulterior motivations. In this sense, just as much can go wrong with humanitarian intervention as can go right and, therefore, we must be sceptical before permitting the Security Council to extend the doctrine at will.

Conclusion

This question concerned the doctrine of humanitarian intervention in Article 2 of the UN Charter. It was the thesis of this essay that Article 2 has been interpreted by the UN Security Council in a broad and liberal fashion so as to permit humanitarian intervention for a variety of protective reasons. It has been shown that the Council has permitted military intervention, especially no fly zones, in order to enforce existing UN Resolutions demanding the protection of civilians (such as Bosnia in 1993), in order to ensure civilian access to emergency food and medical supplies (as in Somalia in 1992), and to ensure the protection of civilians from imminent state attack (as in Libya in 2011). Therefore, this aspect of the thesis has been made out. However, the thesis continued that this organic development of a doctrine of responsibility to protect civilians was dangerous because of the serious negative consequences that come arise from humanitarian intervention. Particularly, we have seen that intervention for supposedly protective purposes can lead to mass civilian deaths (as in Iraq in 2003), can assist the proliferation of terrorist organisations due to the collapse of the law and order functions of the state (as in Libya in 2011), and, because the doctrine is not defined or limited expressly in the Charter, it can be misused easily (as in Russia in 2011). Therefore, in sum, while some limited intervention to protect civilians may be beneficial, we must be very sceptical of the organic development of the doctrine of responsibility to protect because it can lead to such devastating and dramatic consequences.

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