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How Can the Doctrine of "Humanitarian Intervention" Be Reconciled in International Law?

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This article will consider the ways in which the role of humanitarian intervention, which currently does not have any clear legal status, can be defended through international law. Using both realist and liberal cosmopolitan theoretical approaches, it will consider three notions of legitimacy to argue that humanitarian intervention can be justified – that is: legitimacy through humanitarian crises; humanitarian intervention supported through a creative interpretation and application of general principles of international law; and humanitarian intervention justified by morality and "natural law." It will consider the use of force that has taken place in Iraq, Afghanistan and Libya as case-studies and examples. A broader sense of legality will be argued to reconcile the notion that humanitarian intervention could be legalised – however, a restrictive factor remains with the horizontal rather than vertical nature of international law that requires the will of States. Thus the next best alternative will be considered.

Humanitarian intervention both before and after the adoption of the UN Charter has not gained the status of established international law to justify the use of force. From a pure legalist perspective, it is not permitted action. Nevertheless, there is support for the concept.[2] In the present day, one might assume that the use of force for humanitarian purposes is still subject to each state's understanding of a situation. Therefore, it is important to consider the legitimacy of "non-legal" action.

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[2] Vaughn Lowe and Antonios Tzanakopoulos, 'Humanitarian Intervention' (2010) Max Planck Encyclopedia of Public International Law <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e306#law-9780199231690-e306-div1-1> accessed 1st July 2014.

To consider any use of force as legitimate it must be perceived by other states as legitimate,[3] therefore it must be widely accepted as appropriate conduct. Usually, a state embarking upon the use of armed force will search widely for a legal justification, even if the argument is weak, in order to find support for the action. In Iraq (2003), the coalition sought to base their action on the 'legality' of UNSC-adopted Resolutions. In Afghanistan (2001), the USA based their argument on the 'legality' of self-defence.

Council inaction has been also been suggested as an argument for "non-legal" intervention.[4] If the maintainer of peace and security fails to do its job, then a state may be justified from a realistic and practical point of view in taking unilateral steps. Nevertheless, it is still not strictly 'legal' and thus, potentially 'illegal' under international law.

It could be argued that the failure of the UNSC to condemn what is, when viewed from a strictly positivist standpoint, 'illegal' action (such as that in Kosovo (1998-9)) gives it some legal status with possible precedent value.[5] If this is so, then the UNSC could authorise the use of force retroactively, including armed force, as long as it is within the spirit of the Resolution.[6] However, this view is problematic because it undermines the rule of law. In order to follow the law, one must know what that rule is at the time the transgression takes place. If this were not the case, then it would be impossible to know what the law was at any particular point in time, and therefore impossible to know if one was avoiding transgression. Moreover, not condemning a use of force is not necessarily the same as condoning it or making it legal. Perhaps a more suitable solution is that such use of force is 'tolerated.'[7] Legalists would not recognise any retroactive legality and would not consider legitimacy as a viable alternative. It would require a form of law to set aside the UN Charter.[8] However, from a realist and, even more so, a cosmopolitan per-

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[3] Peter G Stillman, 'The Concept of Legitimacy', [1974] 7 Polity 32, 35.

[4] Ruth Wedgwood, 'Unilateral Action in the UN System' [2000] 11 European Journal of International Law 349, 351: 'Council action comes late, lacks force, and focuses on 'neutral' humanitarian tasks that do not resolve a conflict.'

[5] Jordan J Paust, 'Use of Military Force in Syria by Turkey, NATO, and the United States' [2013] 34 University of Pennsylvania Journal of International Law 431.

[6] M G. Kohen, 'The use of force by the United States after the end of the Cold War, and its impact on international law', in M Byers & G Nolte (eds), *United States Hegemony and the Foundations of International Law*, (Cambridge University Press 2008)

[7] Ramesh Thakur, *The United Nations, Peace and Security,* (Cambridge University Press 2006) 216.

[8] ibid.

spective, there may be some broader justifications or legitimate reasons for engaging in strictly illegal uses of force.

Nevertheless, these arguments are legality in a broader sense. They do not always conform to a strict sense of legality or legalist theory. Kohen even suggests that US policies were not concerned with strict legality.[9] If this were so, then even legitimacy would be a weak argument if the reasons for intervention were purely of nationalistic interests. Nevertheless, the USA and any state engaging in the use of force should be required to justify its decision to the world community of states, including the UN. Therefore, whether legal or not, there will have to be a reason for each specific use of force.

The following considers various conceptions and models of legitimacy that could potentially provide a justification for the use of humanitarian intervention that has not yet gained the status of international law *per se*.

Legitimacy Through Humanitarian Crises – Justifications for Legalising the Doctrine of Humanitarian Intervention

Perhaps the most outstanding justification for the adoption of humanitarian intervention as a clear doctrine in international law is the notion of humanitarian intervention itself: the prevention of humanitarian catastrophes.

Former UN Secretary General Kofi Annan cautioned against placing a strict proviso on legality in cases of humanitarian crises.[10] Regarding Rwanda, he asked the General Assembly in 1999:

> 'if, in those dark days and hours leading up to the genocide, a coalition of States had been prepared to act in defense of the Tutsi population, but did not receive prompt Council

[9] M G. Kohen, 'The use of force by the United States after the end of the Cold War, and its impact on international law', in M Byers & G Nolte (eds), *United States Hegemony and the Foundations of International Law*, (Cambridge University Press 2008). Kohen states: 'the Bush, Powell, and Clinton doctrines were comprehensive explanations of overall United States policy regarding the use of force, irrespective of the matter of legality.' P. 199 see also the *Public Papers of the Presidents of the United States. George Bush*, 1992-93 (Washington, DC:USGPO, 1993), pp.2228 at 2230-31, where Bush states 'sometimes a great power has to act alone.'

[10] Edward C Luck, *UN Security Council - Practice and Promise* (Routledge 2007) 54.

> authorization, should such a coalition have stood aside and allowed the horror to unfold?'[11]

This is a clear example that an overwhelming obligation to forestall a humanitarian catastrophe should outweigh any specific legal rule to the contrary. What is interesting, however, is that no country offered support to prevent the genocide in Rwanda, thus highlighting a problematic side of the doctrine. Without a clear legal doctrine, there is no identification of the point in time when states should intervene. This leads to further questions about the 'amount' of suffering, which must be present. Could the doctrine be invoked to help ten citizens, or 100, or 1000, or more? This question would need to be clarified if the doctrine were to be adopted.

In *Yugoslavia v Belgium et al*,[12] Belgium argued that every state has a duty to intervene to prevent human disasters, and therefore every state must have a right to do so. Arguably, this is logical in that, if states are obliged to prevent human disasters, then it follows that they must have the corresponding right to enter a country with armed force to prevent such disasters. However, the solution to the extent of the catastrophe, as above, is still not answered. Exactly how many citizens need to be in danger for the use of force to be legal? There is no right answer, and one could argue that one life is enough. However, the risks to the interveners must also be assessed as part of the answer. This can only be done on a case-by-case basis. Furthermore, if every state has a duty to intervene, why was there no intervention in Rwanda? This only adds to the uncertainty concerning the current doctrine as it stands, without a clear adoption in international law.

Fletcher and Ohlin ask, '[i]s the humanitarian crisis legally sufficient to justify a violation of another state's territorial integrity on the basis of defense of others'?[13] The wording is different to the title of this article—but the idea is the same. Is the crisis 'enough' to warrant invading another state's territory? This question requires a clear answer, which at present international law is unable to give.

It is possible that subsequent State practice could result in a new interpretation of the Charter provisions that would permit intervention for humanitarian grounds or through the emergence of a new customary rule. This would require the general practice of States to be that of intervention when faced with humanitarian crises, and that States accept it as

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[11] https://www.un.org/press/en/1999/19990920.sgsm7136.html.

[12] CR 99/14 (May 10, 1999).

[13] George P Fletcher & Jens D Ohlin, *Defending Humanity – When Force is Justified and* Why (Oxford University Press 2008) 69.

law.[14] It is possible that the second element might fail, as states may not want to be bound by such a law. However, if they do choose to accept it, the 'reinterpretation' might, for example, require the reference to territorial integrity and political independence in Art. 2(4) to be read narrowly.[15] For a new customary rule to emerge, it would require the status of *jus cogens* as it would need to match the status of the prohibition on the use of force.[16] Presently, State practice fluctuates; humanitarian reasons are invoked but usually alongside another justification such as self-defence or UNSC authorisation.[17] This is because States are reluctant to establish a new doctrine of humanitarian intervention, as with the example of Rwanda, and intervention might then not only be permitted, 'but a state's failure to intervene might violate its international responsibilities.'[18] *Yugoslavia v Belgium et al* would suggest that states already have a duty to intervene, but this has not been enforced. If a state does not want to engage in a use of force and is compelled to act, it might not undertake the use of force as effectively as if it had chosen to act. Nevertheless, it would still have to comply with international law obligations compelling it to take responsibility for the situation. This would be a positive step, as opposed to no action at all.

The principle here is that for humanitarian intervention not to receive criticism, it must be applied consistently. Since States can use humanitarian reasons but intervene for other 'state' related policies, is the use of force an answer to a desperate humanitarian situation? It could be assumed that presently, States decide independently on a case-by-case basis when to intervene with an armed force. However, what is required is universal application, regardless of state politics. This would ensure that arguments proposed for the intervention are not self-serving. Therefore, the best possible answer is a defined doctrine, where at least an element

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[14] Statute of the International Court of Justice: Article 38(1)(b) "evidence of a general practice accepted as law."

[15] Vaughn Lowe and Antonios Tzanakopoulos, 'Humanitarian Intervention' (2010) Max Planck Encyclopedia of Public International Law <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e306#law-9780199231690-e306-div1-1> accessed 1st July 2014.

[16] ibid.

[17] ibid.

[18] 'The genocide in Rwanda was clearly horrific, but Clinton was not interested in sending U.S troops to stop it. In fact, [US] administration officials were unwilling to even refer to events in Rwanda as "genocide" because they felt this might imply a duty to intervene.' George P Fletcher & Jens D Ohlin, *Defending Humanity – When Force is Justified and* Why (Oxford University Press 2008) 131.

of motivation must be humanitarian and which permits States to act if they so wish but does not necessitate they must.

Humanitarian Intervention Supported Through a Creative Interpretation and Application of General Principles of International Law

This model of legitimacy is synonymous to "the mischief rule" in the domestic UK law of statutory interpretation. It would argue that, although there is no specific and applicable legal rule to support this kind of use of force, state practice in the area is consistent with this kind of intervention. Those uses of force that were within the "spirit" of international law, as opposed to the actual "letter of the law," would fit well here as well.

The idea of an international law based upon general principles of international regulation, developed and applied by states, is a liberal cosmopolitan idea developed by Ronald Dworkin. International law, in this sense, is not reducible to a system or series of technical rules.[19] Dworkin held the view that, if decisions are compatible with such principles of law, or at least with their implications, then they can be legitimate, even where detailed rules or precedents do not directly support them. Dworkin considers the political legitimacy of states as key. He accepts that the domestic policies of states can affect international law and relations. However, his theory has been criticised as 'ignor[ing] the crosscutting obligations that domestic political demands put on states and the potential that democratic political processes have to use international law as an instrument of change.'[20]

Too strict an interpretation of the UN Charter could also lead to a lawful non-intervention but one that does nothing to advance the role of international law. Kosovo could be an example of when the prohibition on unilateral uses of force seemed to be a case of good law producing bad results. In order to prevent this absurdity, one could look to the creative judicial deployments of the Martens Clause. The clause was introduced in the preamble to the 1899 Hague Convention II on the Laws and Cus-

[19] Ronald Dworkin, "The Model of Rules I," reprinted in *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977).

[20] George P Fletcher & Jens D Ohlin, *Defending Humanity – When Force is Justified and* Why (Oxford University Press 2008) 131.

toms of War on Land.[21] Unfortunately, there is no accepted interpretation of the Martens Clause—it was originally designed to provide residual humanitarian rules.[22] In its most restricted interpretation, the Clause serves as a reminder that customary international law continues to apply after the adoption of a treaty norm. A wider interpretation is that it provides for something which is not explicitly prohibited by a treaty (that is, is not *ipso facto* permitted). The widest interpretation is that conduct in armed conflicts is not only judged according to treaties and custom, but also to the principles of international law referred to by the Clause.[23] 'Where there already is some legal basis for adopting a more humanitarian position, the Martens Clause enables decision makers to take the extra step forward.'[24]

Taking the Martens Clause notion of legitimacy at its widest interpretation, the use of force in Iraq in the 1990's could fit here. The failure of Iraq to comply with the disarmament conditions of Resolution 687 could provide a reason to engage in armed force under the grounds of humanitarian intervention. If Iraq was clear in not wanting to disarm, then it could be assumed it had the intentions to use such weapons, resulting in risks to the civilian population.

In Iraq in 2003, the belief that WMD posed a real threat could lead to a rational use of the Clause again on the grounds of humanitarian intervention. Furthermore, if customary action were still to apply after the adoption of a treaty, then the role of anticipatory self-defence would also be a justified and hence a legitimate explanation.

In Libya, the use of force to remove Gaddafi would certainly be met by reasons of humanitarian intervention and public conscience. In the first instance, it can be argued that it was morally right to remove the dictator to enable a safe regime to be put in place. As the use of force in Libya was most certainly within the 'spirit' of Resolution 1973, it is perhaps the easiest to regard as legitimate.

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[21] The clause states: 'Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience.'

[22] Theodor Meron, 'The Martens Clause, Principles of Humanity, and Dictates of Public Conscience', [2000] 94 The American Journal of International Law 78, 79.

[23] R Ticehurst, 'The Martens Clause and the Laws of Armed Conflict', [1997] International Review of the Red Cross, No. 317. See also ibid 78-89.

[24] Theodor Meron, 'The Martens Clause, Principles of Humanity, and Dictates of Public Conscience', [2000] 94 The American Journal of International Law 78, 88.

Humanitarian Intervention Justified by Morality and "Natural Law"

Article 15 of the Covenant of the League of Nations states: 'the members of the League reserve to themselves the right to take such action as they shall consider necessary for the maintenance of right and justice.' This is a broad and perhaps unlimited standard, permitting the use of force based on state's individual interpretations of what is just and right.[25]

Moral legitimacy has no real legal basis in international law. It is concerned with philosophical ideals. 'Realists [would] question the basic premise that morality has anything to do with military engagement in the first place and they question that this type of intervention in another state's affairs contravenes the notion of independent statehood.'[26]

The famous example is that, it is *morally* right for one to save a drowning baby from the lake, but it is not a legal requirement. This concept can be transposed to the humanitarian intervention argument. Perhaps it is morally right for states to intervene to prevent humanitarian disasters, but who decides that the situation is severe enough that intervention is required? In some cases it might be obvious, but some might be marginal. Where should the line be drawn in interfering with a state's sovereignty? Without boundaries, the 'slippery slope' argument becomes a reality. It is this argument by which 'ad hoc mitigation rather than principled exception'[27] would seek to address.

It has been suggested that there are three broad categories that could be used to morally justify military engagement: response to "aggression", a pre-emptive strike against imminent or likely aggression, and a response to the threats against the lives and well-being of citizens of other states.[28] Nevertheless, these responses should be subject to proportionality and the long term and wide ranging consequences of initiating conflict.[29] It could be argued that the armed force used against Afghanistan in 2001 was to protect the lives of citizens; it could also be described as a re-

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[25] George P Fletcher & Jens D Ohlin, *Defending Humanity – When Force is Justified and* Why (Oxford University Press 2008) 74.

[26] John Janzekovic, *The Use of Force in Humanitarian Intervention – Morality and Practicalities* (Ashgate 2006) 43.

[27] Thomas Franck 'Comments on chapters 7 and 8' in M Byers & G Nolte (eds), *United States Hegemony and the Foundations of International Law*, (Cambridge University Press 2008) 265.

[28] John Janzekovic, *The Use of Force in Humanitarian Intervention – Morality and Practicalities* (Ashgate 2006) 50 citing Fotion and Elfstrom, *Military Ethics Guidelines for Peace and War.*

[29] John Janzekovic, *The Use of Force in Humanitarian Intervention – Morality and Practicalities* (Ashgate 2006) 50.

sponse to aggression. If the findings of WMD had been correct, then the invasion of Iraq in 2003 could have fallen within the category of imminent or likely aggression. One could assume that such use of force would be "proportionate", i.e., a response to terrorism and dangerous weapons. However, the consequences of initiating action could be more problematic. It would be an appropriate conclusion that neither Iraq nor Afghanistan are "safe" countries after the invasions, and civilian casualties in Iraq are estimated to have reached somewhere between 127,789 and 143,066.[30] As of February 2014, at least 21,000 civilians are estimated to have died violent deaths as a result of the war in Afghanistan. [31] The long-term effect of action in these countries might not seem proportionate to moral arguments to use force.

Furthermore, '[a]lthough moral arguments may be successful in the court of world opinion, one cannot walk into the Security Council conceding that a course of action violates international law and expect to prevail.'[32] It is clear that morality is not law.

Natural law theory is based on concepts of right and justice.[33] Historically, so long as a war was considered 'just', a country was entitled to pursue it. This is an old theory, which died out in the 15th and 16th centuries, but was revived in 1919, and with the Versailles Peace Treaty there has been a return to this line of thought, with the emergence of crimes against humanity and crimes of aggression.[34]

Walzer argues that 'morality, at least, is not a bar to unilateral action, so long as there is no immediate alternative available.'[35] This statement seems sensible in theory, but in practice, it is unworkable because it raises again the question: whose moral values and standards? Who judges that there is not a suitable alternative? The answers must come from states themselves, as they are the makers and enforcers of international law and relations, but if humanitarian intervention is based on what is just and right, it would be possible for weaker states to have a dominant majority enforced upon them—particularly when linked to states' individual interests.

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[30] https://www.iraqbodycount.org/ accessed 24th August 2014

[31] http://costsofwar.org/article/afghan-civilians accessed 24th August 2014.

[32] George P Fletcher & Jens D Ohlin, *Defending Humanity – When Force is Justified and* Why (Oxford University Press 2008) 134.

[33] R Ticehurst, 'The Martens Clause and the Laws of Armed Conflict', [1997] International Review of the Red Cross, No. 317.

[34] See C Schmitt, *Writings on War* (Polity 2011) 125-232.

[35] Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical* Illustrations (London: Allen Lane 1978) 107.

In order to win support, the U.S invasion of Iraq needed to be identified as a "just war."[36] Saddam Hussein was targeted, independently conforming to the notion of discrimination prevalent in just-war theory.[37] Still, a war can only be 'just' if the claims in relation to it are truthful. Furthermore, Falah *et al* suggests that: 'Domestically, failure in war undercuts the authority of political elites.'[38] Therefore, once a hegemonic state has engaged in warfare, there is pressure to continue with that act, even if arguments to the contrary appear. For example, the U.S and other nations claimed there was reason to believe Iraq had in its possession weapons of mass destruction, but later evidence suggested that this argument was incorrect; yet the use of force in the country continued. The continued use of force in Iraq was arguably based on broadly defeating terrorism and Iraq's blatant non-compliance with UNSC Resolutions.

Gilpin suggests that the US has engaged in the use of force to "transform" Islamic nations in their war against terror.[39] It could be argued that this goes against the UN Charter Article 2(7) and the preservation of state sovereignty. If this is correct, then how far can 'moral legitimacy' be taken? If armed force is taken in pursuit of such aims, then the claims of a moral justification are weak if there is no immediate threat to civilians. However, this particular interpretation of the Bush regime could be criticised as being anti-American. It could be argued that the US are trying to achieve global democracy and peace from terrorism, rather than specifically "transforming" all Islamic nations.

In *R v Jones and others*,[40] at para. 37, Lord Hoffman discusses the legal status of the 2003 Iraqi war: 'Many people thought that it was morally wrong and contrary to international law' and '[o]thers thought that it was justified, necessary and lawful.' This is an example of the deep-rooted problems with moral legitimacy. States will likely act on their own

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[36] G-W Falah, C Flint & V Mamadouh, 'Just War and Extraterritoriality: The Popular Geopolitics of the United States' War on Iraq as Reflected in Newspapers of the Arab World,' [2006] 96 Annals of The Association of American Geographers 142-164.

[37] Force can be morally justified if it can be employed in a discriminating manner. See John Janzekovic, *The Use of Force in Humanitarian Intervention – Morality and Practicalities* (Ashgate 2006) 38.

[38] G-W Falah, C Flint & V Mamadouh, 'Just War and Extraterritoriality: The Popular Geopolitics of the United States' War on Iraq as Reflected in Newspapers of the Arab World,' [2006] 96 Annals of The Association of American Geographers 142-164.

[39] Robert Gilpin, 'War is too important to be left to ideological amateurs' [2005] 19 International Relations 5, 10.

[40] *R v Jones and others; Aycliffe and others v Director of Public Prosecutions; Swain v Director of Public Prosecutions* [2006] UKHL 16, [2006] 2 All Er 741.

moral values, which may or may not be universal. Additionally, states that are "more democratic" would likely claim a right to intervene in oppressive regimes.[41] This would then affect the fundamental principles of sovereignty, non-intervention, and non-use of force.[42]

Natural law theory and moral legitimacy have the broadest interpretation of international law. At present, these are not legal doctrines in a strict sense, however sensible the theory may be. Cosmopolitan theory is the closest to natural law rights, arguing that there can be a higher category of law protecting universal rights. If the doctrine of 'just war', morality, and natural law rights were to be adopted as a part of international law, the use of force would be permitted because it is right. This encompasses, by default, all uses of force related to humanitarian intervention. It would be unclear where the use of force 'for the greater good' would be prohibited. In this scenario, it would be important to have a set of guidelines, for without guidance the breadth of any use of force would be vast.

If moral theory of the use of force were to become a legal doctrine, it would address when to act, when not to act, and how to act.[43] Yet the breadth of moral interpretations would ensure difficulties in coming to an exact agreement on these issues. Furthermore, it goes beyond an 'authorisation' to act to demanding action. Although some crises may be obscene, a forced action is not always likely to produce the best results. Therefore, the contemporary world is unlikely to see an emergence of a moral obligation to act.

Conclusion

Evidence suggests that the UNSC is often incapable of dealing with humanitarian issues. 'The Security Council did not intervene in Rwanda where over one million helpless people were killed, it did very little to confront the Bosnian Serbs during the first three to five years of the Balkans war, and it refuses to address the conflicts occurring in Liberia or Chechnya.'[44] With this in mind, it is easy to see why states may take matters into their own hands when faced with this type of situation.

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[41] George P Fletcher & Jens D Ohlin, *Defending Humanity – When Force is Justified and* Why (Oxford University Press 2008) 37.

[42] Nicholas J Wheeler, *Saving Strangers Humanitarian Intervention in International Society* (Oxford University Press 2000) 29.

[43] John Janzekovic, *The Use of Force in Humanitarian Intervention – Morality and Practicalities* (Ashgate 2006) 51.

[44] ibid 42.

As this article identifies, there are some theories of international law that could be used to justify the use of force for humanitarian purposes. Nevertheless, underlying these theories is the problem that even if the use of force could be justified, the infringement or transgression of the rule prohibiting the use of force remains intact.[45] Thus. none of the justifications discussed would satisfy a legalist. The use of force is still "illegal". This "illegality" would not, however, worry a sophisticated realist, who would argue that 'in international politics states can always find a justification for their actions because the rules are sufficiently indeterminate.'[46] Therefore, it is arguable that international law should be developed in this area to meet the current climate and prevent "illegal"—but necessary for humanitarian purposes—action from taking place. On the other hand, if broadened, could the realms of international law be further stretched by states seeking additional rights to intervene, or, furthermore, exceed the "new" law? The answer to this possible consequence is not clear, but worth considering.

Any exacerbation or exploitation of international law would weaken its role, and once it is weakened, less justifiable uses of force may appear.[47] Importantly, for custom to 'change' the law, it must, in some cases, break the law; what truly matters is state practice. If state practice is consistent and coherent, and without a world court to deliver justice for a technical breach, it is unwise to label uses of force as illegal. Such a label questions the use of force, which if used for one of the circumstances detailed above, has at least some credibility. The use of force should only be questioned when it is sheer aggression, and in such an event it is likely to quickly receive counter-force by an intervening state. It is those states who make international law, apply international law, and show respect for international law. Therefore, if the use of armed force is widely agreed-upon, it cannot be inherently illegal. 'International law does not exist in the abstract; rather it is what states make of it.'[48] It is pertinent to note that state politics may, and likely will, coincide with any explanation for armed force, but should not be the sole reason for intervention.

The Martens Clause is a useful tool to make sense of international law in addressing this issue. It would be absurd for a state, which could intervene, to sit by and watch genocide or similar disasters to continue. This

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[45] George P Fletcher & Jens D Ohlin, *Defending Humanity – When Force is Justified and* Why (Oxford University Press 2008) 34.

[46] Nicholas J Wheeler, *Saving Strangers Humanitarian Intervention in International Society* (Oxford University Press 2000) 9.

[47] George P Fletcher & Jens D Ohlin, *Defending Humanity – When Force is Justified and* Why (Oxford University Press 2008) 134.

[48] Oliver Corten, 'The Controversies Over the Customary Prohibition on the Use of Force: A Methodological Debate' [2006] 16 European Journal of International Law 803-822.

is a principle which works effectively in domestic law; the problem of the principle is the lack of a world court to provide jurisdiction. In practice, perhaps it is one of the best options available: restrictive enough to prevent the floodgates of unilateral action being taken, whilst recognising the acceptability of the use of force in certain cases.

Humanitarian intervention could have a legitimate claim through the role of custom and increasing state practice. If state practice were to be consistent, then it would be safe to assume that it is legitimate and a clear legal action.

Action taken outside the UN Charter is clearly a breach of sovereignty. However, it is questionable whether sovereignty should be restricted in cases of clear humanitarian crises. It is likely that the moral argument in support of intervention to prevent human suffering will always be greater. What is troublesome is the clear "illegal" nature of what could be termed moral action. If states wish a certain morality to be a part of international law, then they need to incorporate it into international doctrine in order to mitigate the argument of illegal but moral action.

'The 'illegal but justified' approach seeks to have the best of both worlds where the action is justified under act-utilitarianism, but the rule is justified under rule-utilitarianism.'[49] In practice, states can use force 'illegally' without sanction, but the 'illegality' of the use of force prevents an exacerbation of the rule.

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