

COMMENTS

There is No Norm of Intervention or Non-Intervention in International Law

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Professor Jianming Shen makes some good arguments to support his position that humanitarian intervention is unlawful under international law. However, his starting point is not one of them. He announces that there is a principle of non-intervention in international law that is so powerful that it amounts to a *jus cogens* prohibition. He bases his alleged principle on the United Nations Charter and the opinion of the ICJ in the Nicaragua Case. The “letter and spirit” of the Charter, in his opinion, monopolizes for the UN the use of force. To be sure, many people wanted the UN to monopolize the international use of force, but desire is no substitute for textual analysis. What the Charter is, and what some people want it to be, are two different things. The principle of the use of force is contained in Article 2(4), and the question of whether 2(4) is so sweeping as to monopolize all international uses of force is a textual question. As for the Nicaragua Case, it shows the ICJ at its worst. Bereft of adversary argumentation because of the withdrawal of the

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United States, the judges wrote briefs rather than opinions. The Case is a major doctrinal embarrassment for the reasons I suggested in *Trashing Customary International Law*, 81 AJIL 11 (1987).

In this new era of concern for human rights, I am sometimes surprised by retrograde statistes who want us to return to a Prussian conception of domestic jurisdiction that existed more in the positivistic theory of international law than in the actual practice of states. The positivists, from Bodin and Hobbes through Bentham and Austin, believed that “real law” was domestic law, that nations were “sovereign,” and that international law was a misnomer. But none of them were international lawyers, and none of them understood the preceding five millennia of state practice where trade and travel were more important than state boundaries. The laws of marque and reprisal, the medieval practice of capitulations, numerous humanitarian and religious interventions, the doctrine of the just war, the justification of colonialism, and above all the “denial of justice” which even the positivistic text writer Vattel recognized as allowing intervention if all else fails—these are direct customary-law antecedents to what might be called a right of intervention. Intervention was not viewed as an exception to some other principle. To be sure, over the past hundred years, especially with the end of colonialism, states have increasingly asserted the primacy of their domestic jurisdiction over that of international law. They use words like “sovereignty” without understanding Hans Kelsen’s powerful showing that international law *defines* the limits of state sovereignty. When writers use terms such as “sovereignty,” “the dig-

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nity of states,” the “inviolability of state territory,” “*jus cogens*,” and so forth, they are engaging in rhetoric. We should free our minds, as Wittgenstein urged, from the tyranny of words. International law is a matter of the careful analysis of state practice; it is too important a subject to be left to impassioned rhetoric.

Professor Shen appears to be one of these new statist. He joins the company of Professor A. Mark Weisburd, whose article *International Law and the Problem of Evil* has just been published in Volume 34 of the *Vanderbilt Journal of Transnational Law* 225 (2001), and Professor Alfred P. Rubin who is a leading exponent of the primacy of domestic jurisdiction but, unlike many of the others, writes from considerable knowledge of the classic development of international law. What bothers me about the statist—in varying degrees, depending on the particular writer, of course—is their ultimate position that no matter what a government does to its defenseless citizens, so long as the depredations occur within the territory of the nation-state, other governments have no right to intervene to prevent it. None of these advocates are Holocaust-deniers, but in principle they are arguing that a nation should be legally allowed to slaughter with impunity a racial, religious, or ethnic minority of its citizens without external interference, unless by the United Nations. They seem to forget that the United Nations is hobbled by the veto of the permanent members of the Security Council. In my view, there are times of severe moral duty where any nation that has the requisite military force should step up and prevent the slaughter. After all, isn't this what human rights are all about? After 1945 and the Genocide

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Convention and the Universal Declaration of Human Rights and the Nuremberg and Far East tribunals, we have been denying the impermeability of national boundaries. Governmental elites and their armies no longer have any right to inflict deadly harm upon their citizens.

Are we really supposed to shut our eyes to the killing of boys because they are Serbs, the raping of women because they are Muslim, the severe maltreatment of elderly persons because they are Croats? Do we shut our eyes because these things occur in a territorial portion of the planet known as, or formerly known as, Yugoslavia? Many of us are teachers of international law, and each year we are lucky to have classes of idealistic students. Must we teach them that a nation's "domestic jurisdiction" is such an important concept that it overrides their own basic sense of morality and justice? It was only a hundred years ago that the police and the courts in the United States refused to intervene to prevent husbands from battering and torturing their wives. The courts said that, "a man's home is his castle." When international lawyers speak of "domestic jurisdiction," we might read it as saying "a national bully's territory is his playground." Even today, some police officers are reluctant to answer "domestic violence" calls on the emergency phone line. But domestic violence is still violence; women and children can be brutalized behind the walls of a house or apartment. What would today's students think of a professor of international law who takes the position that the police and courts should not intervene in domestic disputes no matter how battered or brutalized a mother or

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her children might be? If you are unwilling to take this position in the classroom, but you support the exact same thing when it happens inside a state's boundaries, then I suggest it's time to ponder which you value more: abstract law or innocent lives?

Of course I agree with Professor Shen that bombing was an absurdly blunt instrument to use for the purpose of humanitarian intervention in Kosovo. The mentality behind it strikes me as similar to former Attorney General Janet Reno's decision to attack the house in Waco to "save the children," as she put it—an attack that wound up with all the children being horribly burned to death. We should always criticize the means by which policies are executed. But it doesn't follow that we throw out the policy because improper means were used. You don't shut down the entire police department because some police officers are trigger-happy sadists. I think it's a remarkable thing that our military is being used to intervene in situations abroad where there are mass atrocities amounting in some places to genocide. It would be much easier and cheaper to stay at home. But we are in a new era of consciousness where the plight of people we don't know makes a moral difference to us. This is a moral revolution in human civilization. We should applaud it at the same time that we try to improve it.

There are unfortunately some international law scholars who are statist because they want to curry favor with particular governmental elites. I don't for a moment suggest that Professor Jianming Shen is one of these, but I am somewhat distressed when I see him use the term "dig-

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nity” twice in the same paragraph when referring to states. In what sense does a state have “dignity”? If a state is butchering groups of its defenseless citizens, should we defer to the state’s dignity? Should we say that all the houses in a neighborhood have “dignity” that requires us to admire and respect them as houses, even though wife-battering and child abuse are occurring behind some of their walls? When you see the films of women and children being led into the gas chambers at Auschwitz at the direction of the Third Reich, does the word “dignity” come to mind in connection with the state of Germany?

Professor Shen would like to elevate the term “dignity” to become a rule of construction of Article 2(4). Thus, he says that the term *territorial integrity* in 2(4) “cannot be narrowly regarded as merely referring to the inalienability of a State’s territory. Rather, it refers to the *territorial sovereignty, dignity, and inviolability* of a State.” Now I would like to ask Professor Shen how he knows this? What makes him so sure that the phrase in 2(4) “cannot” be regarded as one thing but rather refers to something else? Where is his support? He cites nothing in favor of his interpretation. But when I claimed in the book that he kindly cites (*International Law: Process and Prospect*) that territorial integrity means inalienability of territory, I backed up my claim with exhaustive research into the meaning of the phrase “territorial integrity” covering the preceding several hundred years of international law usage. I cited treaties that used the term to summarize more specific provisions that provided for the inalienability of the signatories’ territories. This research took me a great deal of time and effort. The research is all spelled out in a

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chapter of the book just cited. I found that “territorial integrity” was a term of art in international law and diplomacy that was well known to most of the delegates at San Francisco who drafted the UN Charter, and should have been well known to any other delegates at that time who had an opportunity to comment on the draft of 2(4). What it *meant* in international law was that a state’s territory must be kept integral—that is, no parts of it may be forcibly separated and given over to another state. At the time of the Kosovo bombing, I took a position on this point that was directly opposed to the public statements of President Clinton and Prime Minister Blair. They called for the independence of Kosovo. I argued on the internet that it would be illegal to intervene in former Yugoslavia for the purpose of securing independence for Kosovo, because such a goal would directly violate Article 2(4). At the NATO fiftieth-year anniversary in Washington DC, a statement was issued that directly supported my legal position (of course, without mentioning names), and if you look back and read the papers carefully, Clinton and Blair dropped all talk thereafter of any independence for Kosovo. I don’t claim that this was much of a victory—in fact, not many people noticed it—but it does support the long-standing usage of “territorial integrity” that I found in my research on the phrase.

I acknowledged at the outset that Professor Shen made some good arguments, and one of them is a criticism of my position that my interpretation of 2(4) is only negative—that is, it allows for some non-UN military interventions. He points out that it is not positive in the sense that the intervention must be based on humanitarian

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grounds. I plead guilty to this charge. In 1983, I took a position that was totally contrary to that of the vast majority of international lawyers in the United States whether they were liberal or conservative: I supported the legality under Article 2(4) of Israel's brief military intervention in Iraq. See *Israel's Air Strike Upon the Iraqi Nuclear Reactor*, 77 AJIL 584 (1983). Professor Shen regards that air strike as a violation of Iraq's territorial integrity, and thus he joins company with most of the international scholars who condemned the attack twenty years ago. However, as several of my colleagues admitted after the Persian Gulf War, it appeared that I took the right position on the Israeli air strike after all. If Saddam Hussein had nuclear missiles in 1990, would the UN have intervened to stop him? What would the world look like today?

Humanitarian intervention must be grounded in morality, it must be principled, it must not violate Article 2(4), it must defer to UN intervention (if the UN is not blocked by the veto), and the cure cannot be worse than the disease (on this, we haven't yet had the last word about the Kosovo intervention). These are all norms, rules, and principles that I have tried to spell out in numerous writings over the past quarter century (see <http://anthonydamato.law.northwestern.edu/>).