THE PRINCIPLE OF NON-INTERVENTION IN CONTEMPORARY INTERNATIONAL LAW: NON-INTERFERENCE IN A STATE’S INTERNAL AFFAIRS USED TO BE A RULE OF INTERNATIONAL LAW: IS IT STILL?

A summary of the Chatham House International Law discussion group meeting held on 28 February 2007.

The meeting was chaired by Elizabeth Wilmshurst. Participants included legal practitioners, academics, NGOs, and government representatives.


The event was sponsored by Clifford Chance.

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The meeting began with a quote from the Friendly Relations Declaration (UN General Assembly, 1970), which included under the principle of non-intervention the following paragraph:

No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law.

This was contrasted with a quote from the Prime Minister given during his Sedgefield speech in March 2004:

It may well be that under international law as presently constituted, a regime can systematically brutalise and oppress its people and there is nothing anyone can do about it … unless it come within the definition of a humanitarian catastrophe .... This may be the law, but should it be?

There are numerous examples, from both sides of the Atlantic, of statements over the last decade that appear to reject the principle of non-interference. As long ago as 1998, the US Iraq Liberation Act called on the United States “to support efforts to remove the regime headed by Saddam Hussein from power in Iraq and to promote the emergence of a democratic government to replace that regime.”
This illustrates the importance - perhaps some would say, the irrelevance - of the subject, not only for lawyers, but for all those concerned with international relations. In light of these statements from high officials, there must be a question whether non-intervention remains a general principle of international law. At the least there are questions about its content.

The more common term for the legal principle is “non-intervention”, though “non-interference” is also used. In many contexts the two terms seem to be interchangeable, but “non-interference” suggests a wider prohibition, particularly when used in addition to intervention. Yet as Oppenheim’s International Law puts it, “the interference must be forcible or dictatorial, or otherwise coercive, in effect depriving the state intervened against of control over the matter in question. Interference pure and simple is not intervention” (p. 432).

The principle of non-intervention is the mirror image of the sovereignty of States. As Oppenheim says, the prohibition of intervention “is a corollary of every state’s right to sovereignty, territorial integrity and political independence” (p 428). It is closely linked to the concept of domestic affairs, what the French tend to call domaine réservé, and also to the international legal limits on a State’s jurisdiction to prescribe and to enforce. What is prohibited is dictatorial interference in what the International Court of Justice referred to in Nicaragua as “matters which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy.” Since the reach of international law is constantly changing, so too is the line between what is, and what is not, covered by the principle of non-intervention.

The general principle includes the prohibition on the use of force, as set forth in the Charter. But the principle of non-intervention in the internal affairs of States also requires that a State not intervene in the internal affairs of other States in dictatorial ways not involving the use of force, for example making payments to political parties and other forms of interference in the internal political processes of the State.

It should be noted at the outset that intervention (even military intervention) with the consent, duly given, of the Government of a State is not precluded. Difficult questions may arise (e.g. Hungary; Czechoslovakia; Grenada; Panama; even Sierra Leone). ‘Intervention by invitation’ is notoriously open to abuse. Does the requesting Government have to be in effective control of the territory of the State at the time it makes the request, when it may just have been evicted from the capital or even have departed the country? It is sometimes suggested that intervention in a civil war on the side of the Government and at its request is unlawful, but there is little support for this in practice. Intervention on the side of those opposing the Government, on the other hand, is clearly prohibited. Whether there is an exception to the principle of non-intervention in the case of assistance to peoples seeking to exercise the right of self-determination remains controversial. Another question could be intervention in a State which has no government capable of issuing an invitation. (‘Failed States’ and ‘rogue States’ are not legal categories. Such terms are best avoided, at least in legal discourse.)
The existence of the principle

The sub-title “Non-interference in a state’s internal affairs used to be a rule of international law: is it still?” was intended to be rhetorical. There is no doubt that the principle of non-intervention remains well-established in contemporary international law. It is part of customary international law, as the International Court of Justice has reaffirmed on a number of occasions. And it is also reflected in many treaties, such as the Charter of the Organization of American States and the Constitutive Act of the African Union. While not expressly set out in the UN Charter, it is generally held to be implicit in various of its provisions, in particular the principle of the sovereign equality of States (Article 2.1). It was of course included in the 1970 Friendly Relations Declaration.

The International Court dealt with intervention in its very first case, Corfu Channel. Twenty years later, as we have already seen, the Court expounded on the principle of non-intervention in its 1986 judgment in the Nicaragua case: “The principle of non-intervention [so said the Court] involves the right of every sovereign State to conduct its affairs without outside interference; though examples of trespass against this principle are not infrequent, the Court considers that it is part and parcel of customary international law. [...] international law requires political integrity [...] to be respected” (para. 202). The Court went on to say that “the principle forbids all States or groups of States to intervene directly or indirectly in the internal or external affairs of other States” and that “a prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones. [...] the element of coercion [...] defines, and indeed forms the very essence of, prohibited intervention” (para. 205).

The Court also dealt with the principle of non-interference in its judgment of 19 December 2005 in Democratic Republic of Congo v Uganda, when it concluded “that Uganda had violated the sovereignty and also the territorial integrity of the DRC. Uganda’s actions equally constituted an interference in the internal affairs of the DRC and in the civil war raging there (para.165).

The principle includes the following aspects.

(a) The prohibition of the threat or use of force in international relations, as set forth in Article 2.4 of the UN Charter

This is the most important manifestation of the principle of non-intervention, yet the international law on the use of force is not usually thought of in terms of the principle. Action in self-defence, including the rescue of nationals where the territorial State is unable or unwilling to do so, does not infringe the principle of non-interference. On the other hand, threats to use force (which are of course contrary to the Charter but which nevertheless seem quite popular in some quarters) will often be seen as contravening the principle, even in cases where it is not clear that if the threat were carried out it would necessarily be unlawful.
(b) Article 2.7 of the UN Charter

Article 2.7 of the Charter of the United Nations provides that – "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII." Practice under Article 2.7 has developed over time, and its practical importance is by now significantly reduced.

An important point to bear in mind is that, with an activist Security Council, much of what may be seen as ‘intervention’ is in fact action authorised by the UN Security Council under Chapter VII of the Charter, and so does not infringe the principle of non-intervention.

‘humanitarian intervention’ and ‘the responsibility to protect’

The British Government was the leading advocate of an exceptional and limited right of States to use force to avert an overwhelming humanitarian catastrophe - not, it should be noted, a general right of humanitarian intervention. The claim was made in relation to the establishment of the safe havens in northern Iraq in the Spring of 1991, and restated in the following Parliamentary Answer in 1998 with reference to the events unfolding in Kosovo: “Cases have …arisen…when, in the light of all the circumstances, a limited use of force was justifiable in support of purposes laid down by the Security Council but without the Council’s express authorisation when that was the only means to avert an immediate and overwhelming humanitarian catastrophe … Such cases would … be exceptional and would depend on an objective assessment of the factual circumstances at the time and on the terms of relevant decisions of the Security Council bearing on the situation in question” (Baroness Symons, 14 November 1998).

There is a double reference to the Security Council in this quotation. Is it essential, under this doctrine, that the Security Council has pronounced on the matter? Given the wording of the Answer that would appear to be the case (at least in a negative sense). Indeed, Sir Franklin Berman, who was FCO Legal Adviser at the time of Kosovo, has emphasized the point in an article to be published in the 2006 Singapore Year Book of International Law, by suggesting a distinction “between the use of force in the protection of purely national interests, and the use of force in the common interest”. Having made this distinction, he concludes that States may in certain circumstances use force unilaterally on condition that they do so “in pursuit of purposes the Council itself has already laid down.” For present purposes, what is important is that in developing this thesis, Sir Franklin points out that “[w]hat the commentators [on the new doctrine] missed was that this element [that the action be in support of objectives laid down by the Security Council], one of many in a compound argument, was not being advanced as a positive empowering factor in its own right, but in a purely negative sense; in other words, it was there to make plain that the States in question were precisely not claiming for themselves the right to lay down the purposes of the international community in whose name they were acting, but were operating in aid of common purposes laid down by the only duly authorized organ, the Security Council.” In other words, the fact that the Council has laid down the common purpose is a necessary, but not sufficient, condition for States to act unilaterally.
In 1991 the United Kingdom’s position was a rather isolated one; in earlier cases which might have been seen as humanitarian interventions (India-Bangladesh; Tanzania-Uganda; Vietnam-Cambodia), the States concerned sought to justify their actions on other grounds, essentially self-defence, not on the basis of a right of humanitarian intervention. Has State practice subsequently developed to the point where a right to intervene on humanitarian grounds, to avert an overwhelming humanitarian catastrophe, can be said to have been established in customary international law, despite the silence of the UN Charter on the matter? The matter is still highly controversial. For those claiming the right it is difficult to demonstrate that State practice since Northern Iraq in 1991 or since Kosovo in 1999 has moved in their direction. The claim has not, in modern parlance, secured much ‘traction’. There is no hint of a unilateral right of intervention in the 2005 World Summit Outcome, quite the contrary.

The United States has not accepted any such right. It justified its actions to protect the Kurds in the North of Iraq and the Shia in the South, and the NATO action over Kosovo, on other grounds. As Mike Matheson, a former State Department lawyer has recently pointed out, “[i]n any event, there is a much stronger legal and political basis for forcible humanitarian intervention under the authorization of the Security Council under Chapter VII or VIII.” (Council Unbound, 2006) It is, in fact, along these lines that the United Kingdom and others had been working since shortly after Kosovo. In 2001, the British Government sought to promote criteria for the circumstances in which the Council should be ready to authorize the use of force in the face of an overwhelming humanitarian crisis. This was an attempt to develop the underlying policy for Council action, not international law as such. The British initiative did not bear fruit at the time.

Various other initiatives followed, stimulated by concern at the unilateralism inherent in the Kosovo action. The Canadian Government set up the International Commission on Intervention and State Sovereignty, which produced an influential report. The Secretary-General’s High-level Panel’s report of December 2004, and his own report In Larger Freedom of April 2005, which were in similar terms, proposed a series of criteria for when the Security Council should be prepared to authorize intervention.

But the General Assembly was not prepared to go so far. In the 2005 World Summit Outcome, the Heads of State and Government noted that “[e]ach individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity”. They went on to say that “[t]he international community, through the United Nations” also has the responsibility to use appropriate peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations. The key sentence then follows:

"In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity."

As a political commitment, the passage on “responsibility to protect” in the 2005 World Summit Outcome is potentially very significant, and shows how far States have come. What is important, legally as well as politically, is that the 2005 World Summit Outcome confirms that enforcement action to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity is within the Security Council’s powers
under Chapter VII. Any residual legal doubts in 2005 should have been swept away by the Summit Outcome. Moreover, the Assembly, that is to say, the membership of the United Nations as a whole, has clearly said that it expects the Council to take such action in appropriate cases, and the Council itself has acknowledged this.

Nevertheless, the reasons given in January this year by certain members of the Council for opposing action over Myanmar do not bode well for the application in practice of ‘responsibility to protect’. On 12 January 2007, the Security Council failed to adopt a draft resolution dealing with Myanmar, because it was vetoed by two permanent members of the Council, China and Russia. It would have called upon the Government of Myanmar to cease military attacks against civilians in ethnic minority regions; to permit humanitarian organizations to operate without restrictions; to begin without delay a substantive political dialogue, which would lead to a genuine democratic transition; and to release unconditionally Aung San Suu Kyi and all political prisoners.

China in particular explained its position at some length, asserting that “[a]ccording to the United Nations Charter, it is only those questions that constitute threats to international peace and security that warrant discussion by the Security Council.” The Chinese line was echoed by the Russian representative, who said that “we believe that the situation in that country does not pose any threat to international or regional peace. That view is shared by a large number of States, including, most importantly, those neighbouring Myanmar.” Where does this leave the Council’s role, so recently proclaimed by the General Assembly - and formally accepted, in the abstract, by the Council - in regard to ‘responsibility to protect’?

**c) International human rights law and mechanisms**

The growth of the international law on human rights, mostly in treaties (but also in customary international law), and in particular acceptance of the rights of States to criticise other States’ human rights record and the inter-State complaint mechanisms, has made a very large inroad into the domain réservé of States. One only has to recall the right of States to bring formal complaints under ICCPR and ECHR, and the various UN procedures. This is not so new; it goes back to the protection of minorities under the League of Nations.

**d) Vienna Convention on Diplomatic Relations, article 41**

It seems to be still well-established the diplomats should not interfere in the internal affairs of the State to which they are accredited. But even here, as the leading work on the subject points out, there is a “tension between the duty of a diplomat under Article 41 of the Vienna Convention, not to interfere in the internal affairs of the receiving State and the opinion of liberal States that human rights are a matter of legitimate international concern whose active promotion is a major part of their foreign policy” (E Denza, *Diplomatic Law* (2nd ed., 1998; see also Oppenheim, pp. 1068-9).

**e) Other applications of the principle**

If the existence, in customary international law, of the principle of non-intervention in the internal affairs of States is beyond doubt, its exact content not so clear. Outside the area of the law on the use of force, it is not always possible to be categorical about what is,
and what is not, prohibited by the principle. Much depends on the context, on the relations between the States concerned, and perhaps their level of political development.

The principle of non-intervention and the limits on a State's jurisdiction can be seen as related. Thus, when the United States sought to impose obligations on foreign companies extraterritorially in support of its own foreign policy objectives, this could be seen as improper intervention in the affairs of the States whose companies are affected and lead to counter-measures by them (Protection of Trading Interests legislation). For example, the 1982 American export controls in relation to martial law in Poland were widely seen as interfering with the foreign policy of other States.

Among other activities which, depending on the circumstances, contravene the principle of non-intervention are:

(a) Interference in political activities (such as through financial or other support for particular political parties or candidates, or even perhaps comment on upcoming elections or on the candidates;

(b) Support for secession. A classic example occurred in 1967, when President de Gaulle of France, while on an official visit to Canada, made a speech which was understood as pledging the support of France for the secessionist movement in Quebec. This was regarded as an interference in Canada's internal affairs, and the reaction was such that the President felt it necessary to terminate his visit;

(c) Seeking to overthrow the government - so-called ‘regime change’, especially in the case of 'rogue States'. The British Attorney General, for example, advised in March 2003, in the context of force being used pursuant to the authorization in Security Council resolution 678, that "regime change cannot be the objective of military action." The US recently accused Iran and Syria of interfering or intervening in Lebanon's internal affairs, by trying to overthrow the Siniora government. It has occasionally been suggested that intervention in order to restore (or establish) democracy is permitted under international law (e.g. it was one of the grounds given for the US invasion of Panama in 1989). "[S]uch a proposition is not acceptable in international law" (Shaw, International Law, 5th ed., p. 1048).

Discussion

Several issues were raised in the discussion. It was pointed out that the development of human rights had not rendered vacuous the principle of non-intervention; it was not lawful, for example, to use coercive action for the purpose of enhancing the democratic rights of citizens of another country, for example. The motivations and morality of intervention were discussed, with the speaker pointing out that while at times the United Kingdom does not offer a legal basis for its intervention, it often offers a moral one – that the intervention is "the right thing to do". This approach can lead to a "slippery slope" whereby, for example, India could invade Pakistan on the grounds that it wanted to introduce democracy. The suggestion was made that one way to avoid a slippery legal slope is to be prepared to act illegally – but that rendered the law useless, and was not to be recommended. The question of the scope of non-interference was discussed. The speaker reiterated that in his view non-interference is not limited to the use of force but includes "dictatorial", coercive interference, including interference in the political system. There is therefore a useful distinction that can be drawn between intervention through
the use of force, and intervention though other means. A question was raised regarding the role of refugees and asylum seekers in the United Kingdom, some of whom agitate to overthrow their home governments from London. It may be that funding of opposition movements from the United Kingdom is against the principle of non-interference, but simple protests may not be.

Members of the audience also brought up issues in relation to particular countries. In response to a question about China and Taiwan, the speaker noted that a claim to territory did not make the use of force lawful (e.g. the Argentine invasion of the Falkland Islands). In relation to Iran and the Non-Proliferation Treaty, the speaker pointed out that the NPT and the principle of non-interference impose separate, distinct obligations on countries and the two should not be confused. Finally, the question was asked whether suspension of a member state from the Commonwealth contravened the principle, when that State remained a member of the United Nations. This was acknowledged to be a difficult issue.

The question of remedies for breach of the principle of non-intervention was also discussed. It was pointed out that the International Court of Justice in the Nicaragua case allowed for “proportional counter-measures” against intervention. This can be difficult in practice when much of the intervention is covert activity.

The meeting concluded with the suggestion that this area of law was ripe for further study. A careful, interdisciplinary study might shed light on the current state of the law in this field. Perhaps there could be a process such as that which produced the (recently-published) Chatham House Principles of International Law on the Use of Force in Self-Defence. The law however could not be considered separately from the practice; a study of the law in isolation from what States did and considered lawful would not be useful.