

REVIEWS:

**HUMANITARIAN INTERVENTION AFTER KOSOVO: IRAQ,
DARFUR AND THE RECORD OF GLOBAL CIVIL SOCIETY**

**Aidan Hehir,
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To intervene or not to intervene, that is the question which Aidan Hehir addresses in his recent study on humanitarian intervention. Several authors have argued that since the NATO intervention in Kosovo, a new normative framework, or ‘normative thesis’ as Hehir labels it, has emerged which governs humanitarian intervention. According to this thesis, states can intervene without Security Council authorisation in cases of gross violations of human rights. Hehir persuasively argues that the normative thesis is incorrect in two respects. First, it fails to significantly alter the conduct of states in the post-Kosovo era. Second, this failure is not due to the misapplication of the normative thesis by states. Rather, the normative thesis is inherently flawed and thus does not provide a viable alternative to the existing system of international law. Hehir therefore proposes his own solution to the problem of humanitarian intervention, which aims to strengthen rather than to weaken international law.

Hehir begins his argument by describing the problem of humanitarian intervention as a conflict between international law, sovereignty and human rights. He opines that international law does not prohibit humanitarian intervention as such, but requires that Security Council authorisation is obtained in advance. Since the Security Council has proven to be rather reluctant to provide such authorisation, the question comes to the premise what to do then. Should we wait passively for an authorisation that may never be given, or should we search for ways to circumvent the Security Council, thus undermining international law and the sovereignty of states? Hehir outlines two possible answers to this question. The first is labelled as the ‘realist’ position. It holds that moral actors constitute a menace to international order and hence opposes humanitarian intervention. The second answer is the normative thesis, asserting that state sovereignty must be made subordinate to human rights. Humanitarian intervention is allowed when grave breaches of human rights occur, provided that certain criteria are satisfied.

The normative thesis was ostensibly realised through NATO’s intervention in Kosovo in 1999. Operation Allied Force was conducted in

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the absence of Security Council authorisation to relieve the suffering of many in the Kosovo area. Even though the intervention was generally considered to be contrary to international law, it was justified on moral grounds. The intervention was 'illegal but legitimate'. The Kosovo intervention was widely hailed as the triumph of human rights. Western states had finally taken their responsibility and acted to uphold them even if their national interests were not directly concerned.

The intervention in Kosovo appeared to constitute a precedent for the new interventionism, grounded on the normative thesis. However, by studying the cases of East Timor (1999), Afghanistan (2001), Iraq (2003), and Darfur (2003-), Hehir shows that this belief proved false. Within two months after the conclusion of the intervention in Kosovo, Western states were reluctant to react to the situation in East Timor. They maintained that it was imperative to gain consent of the Indonesian government before any action could be taken. This stands in sharp contrast to the rhetoric advanced only months earlier regarding Kosovo. The failure to establish a new interventionism became apparent in a different way in Afghanistan. Despite the rationale behind the intervention in Afghanistan being so obviously security-oriented, it was felt that a humanitarian angle had to be contrived to facilitate both international and domestic support. This signalled a trend towards the misuse of humanitarian terminology to justify intervention, which also became apparent in the invasion of Iraq. When the support for the invasion declined due to the exposé of the intelligence failure regarding the non-existent weapons of mass destruction and the lack of any link between Saddam Hussein and al-Qaeda, great emphasis was again placed on the moral aspect of the intervention. Even though the security-oriented rationale proved largely false, the invasion was still justifiable on humanitarian grounds, so it was claimed. Finally, the Western reluctance to respond to the humanitarian disaster in Darfur is further proof of the failure of the new interventionism.

Hehir goes on to argue that the blame for this record of reluctance since Kosovo does not derive solely from the nefarious impulses of certain states or leaders within states. Rather, the normative thesis itself was, and is, fundamentally flawed and thus a key contributing factor in the evolution of international relations post-Kosovo. The normative thesis has three inherent flaws. First, it overestimates the power of global civil society to influence the behaviour of Western states. Whether or not states intervene depends to a large extent on their national interests rather than on the prevailing opinion within global civil society. For instance, even though global civil society has repeatedly urged states to intervene in Darfur, none have done so. The Kosovo intervention thus appears to be a lucky coincidence of national interest and humanitarian need rather than a precedent of the new paradigm governing humanitarian intervention. Second, the presumption that certain moral criteria, proffered by many proponents of the normative thesis as a substitute for the constraints imposed by positive international law, would constrain state behaviour has proven mistaken. The criteria are malleable and

can be interpreted in multiple ways, and are thus open to abuse. Third, the strategy advocated by the normative thesis increases the power of states in crucial respects by affording it a position of certain importance in the strategy.

Hehir argues that the normative thesis is untenable and even detrimental to the system of international relations. The prescriptions advanced by the normative thesis are regressive and threaten international peace and stability. First, by subverting the power of the Security Council, the UN system as a whole is challenged.¹ Second, the restraints on the use of force have weakened, for the moral constraints that substitute for the UN system have proven rather ineffective. Third, by creating a schism between civilised and uncivilised states, the risk of abusing moral justifications for self-interested intervention is significantly increased. Finally, the prevalence of moral criteria for deciding on whether to launch a humanitarian intervention may create incentives for groups to escalate internal conflicts in order to provoke an intervention on their behalf.²

According to Hehir, the world cannot remain inactive in the face of humanitarian catastrophes. The realist position is therefore untenable. As he convincingly shows in the preceding chapters however, the normative thesis is not an option either. He therefore proposes a third way, based on reforming international law, which would accommodate most objections from both sides. The solution comprises two elements. First, it seeks to address the need for legal clarity regarding the relationship between human rights and sovereign inviolability. Second, it seeks to address the institutional reforms required to make such clarification effective.

Hehir argues that the normative thesis has misdiagnosed the problem of humanitarian intervention. It assumed that states wanted to intervene, but international law barred them from doing so. Hehir maintains the converse. In order to accommodate the problem of humanitarian intervention, international law should not be marginalised but rather further developed, so that it will be able to override national state interests. Hehir asserts that sovereignty is not unlimited. The problem with the normative thesis, rather than that it puts restraints on state sovereignty, is that the decision whether to interfere in a sovereign state is made by a subjective entity. Hehir therefore proposes certain institutional reforms, amongst which is an objective arbitrator within the UN to judge whether or not to intervene. Since that arbitrator should not be dependent upon individual states, it should also have its own army.

¹ Some maintain that the Security Council must be subverted by arguing that the UN somehow neglected to employ the tools at its disposal. Hehir forcefully argues that this does not equate with the facts. The blame can only be reasonably attributed to the members of the Security Council rather than the UN.

² This also holds for intervention by the UN, of course. The risk of creating 'escalation imperatives' is increased by the normative approach, though, since in that case media attention will probably play a more important role in decision-making.

As a conclusion, Hehir concedes that the solution he proposes is enormous in scale and that it is therefore unlikely that these provisions will be adopted anytime soon. Nonetheless he contends that his route is more likely to materialise than the prescriptions advanced by the normative thesis. Yet even if Hehir shows us the right direction, the urgent question remains what has to be done in current situations. Given the fact that the Security Council does not authorise humanitarian intervention in Darfur, should we sit still or should we rather circumvent the legal restrictions and interfere? Hehir unfortunately does not provide an answer to this important and pressing question.