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## ARTICLES

# THE LEGALITY OF HUMANITARIAN INTERVENTION

*Malvina Halberstam\**

### I. INTRODUCTION

In this paper I will suggest a definition of humanitarian intervention, give a brief historical overview of the debate about the legality of humanitarian intervention, and my conclusions on that question. I will only touch on the main points; the space allotted does not permit in-depth analysis.

### II. DEFINITION OF HUMANITARIAN INTERVENTION

The definition of humanitarian intervention I suggest is: The use of force by one state in the territory of another to protect persons who are in imminent danger of death or grave injury when the state in whose territory they are is unwilling or unable to protect them. First, there must be a threat of imminent death or grave injury. Second, the territorial state must be unwilling or unable to protect those endangered. A further requirement is that the intervening state withdraw once it has rescued those in danger or otherwise averted the danger.

These criteria are similar to those listed by Professor Schachter for what he states is a "type of humanitarian intervention" that is "generally accepted by jurists and many governments," a state's use of force "to rescue or protect its own nationals in imminent peril of injury in a foreign country."<sup>1</sup> The definition proposed would not, however, limit humanitarian intervention to

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\* Professor of Law, Benjamin N. Cardozo School of Law. This article is based on a paper presented at the Conference on Anarchy in the Third World, sponsored by the American Bar Association Standing Committee on Law and National Security, Washington, D.C., June 3-4, 1993. I wish to thank Esther Geuft, Cardozo '93, for her assistance with this paper.

<sup>1</sup> Oscar Schachter, *International Law in Theory and Practice: General Course in Public International Law*, 178 RECUEIL DES COURS 144 (Hague Academy of International Law 1982).

the protection of nationals.<sup>2</sup> The right of people not to be killed should not depend on whether the state of which they are citizens is in a position to protect them, wants to protect them, or is itself the source of the danger. Interestingly, the case which Professor Schachter considers "the classic application" of permissible humanitarian intervention, the Israeli action in Entebbe<sup>3</sup>, was not limited to the rescue of Israeli nationals.

Nor should it be a condition for the legality of the action that the intervening state is disinterested, as some have urged. States, like individuals, rarely act from purely idealistic motives.<sup>4</sup> The test of the legality of the intervention should be the *effect* of the action, not the motive.<sup>5</sup> As long as the action in fact prevented imminent death or injury and the intervening state withdrew once the danger was averted, its action falls within the definition of humanitarian intervention proposed, even if the state also had other motives.

### III. HISTORICAL OVERVIEW

The debate about the legality of humanitarian intervention may be divided into three periods: Customary International Law; U.N. Charter; Post-Cold War.

#### A. Customary International Law

The doctrine of humanitarian intervention goes back a long time. In their monumental treatise on International Protection of Human Rights,<sup>6</sup> Sohn and Buergenthal quote from a book published in 1579 which "justifies interference 'in behalf of neighboring peoples who are oppressed on account of adherence to the true religion or by any obvious tyranny.'" <sup>7</sup> Grotius, writing in 1625, asked "whether a war for the subjects of another be just, for the

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<sup>2</sup> Accord Louis Henkin, *Use of Force: Law and U.S. Policy*, in RIGHT v. MIGHT, INTERNATIONAL LAW AND THE USE OF FORCE 41 (2d ed. 1991) ("The exception, I believe, is not restricted to actions by a state on behalf of its own nationals."); David Scheffer, *Towards a Modern Doctrine of Humanitarian Intervention*, 23 U. TOL. L. REV. 272 (1992).

<sup>3</sup> Schachter, *supra* note 1, at 145.

<sup>4</sup> See RICHARD B. LILICH, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY AND PRACTICE 627 (2d ed. 1991).

<sup>5</sup> Accord ANTHONY D'AMATO, INTERNATIONAL LAW: PROCESS AND PROSPECT 222 (1987). ("What may turn out to be decisively important is what happens *after* the intervention.") (emphasis in the original).

<sup>6</sup> LOUIS B. SOHN AND THOMAS BUERGENTHAL, INTERNATIONAL PROTECTION OF HUMAN RIGHTS (1973).

<sup>7</sup> *Id.* at 138, citing W. A. DUNNING, POLITICAL THEORIES FROM LUTHER TO MONTESQUIEU 55 (1579), citing *Vindiciae Contra Tyrannos*.

purpose of defending them from injuries inflicted by their ruler," and answered that it is just if "a tyrant . . . practices atrocities towards his subjects which no just man can approve."<sup>8</sup>

There were also those who opposed humanitarian intervention under customary international law. They argued that such intervention would be misused by one state to gain control over another. Thus, an opponent of humanitarian intervention wrote:

Barbarous acts are committed by the thousands every day in some corner of the globe which no State dreams of stopping because no State has an interest in stopping them.

Whenever one power intervenes in the name of humanity in the domain of another power, it cannot but impose its concept of justice and public policy on the other State, by force if necessary. Its intervention tends definitely to draw the [other] State into its moral and social sphere of influence, and ultimately into its political sphere of influence. It will *control* the other State while preparing to dominate it. Humanitarian intervention consequently looks like an ingenious juridical technique to encroach little by little upon the independence of a State in order to reduce it progressively to the status of semi-sovereignty.<sup>9</sup>

Nevertheless, Sohn and Buergenthal conclude that humanitarian intervention is lawful under customary international law. In their view, that conclusion is supported by "weighty authorities" and "various instances in which the powers have intervened to prevent a neighbor from continuing to commit such abuses as constituted a violation of the universally recognized and generally respected rules of decent state conduct."<sup>10</sup>

#### B. U.N. Charter

After the United Nations was established, the differing positions on the legality of humanitarian intervention took the form of disagreement about the correct interpretation of the Charter. Some publicists argued that even if humanitarian intervention was permissible before the adoption of the U.N. Charter, it was prohibited by the Charter.<sup>11</sup> They argued that Article 2(4) of the Charter

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 140-41, quoting A. Rougier, "La Theorie de l'intervention d'humanite," 17 RGDIP 468, 525-526 (1910).

<sup>10</sup> *Id.* at 140.

<sup>11</sup> See, e.g., Ian Brownlie, *Humanitarian Intervention*, in LAW AND CIVIL WAR IN THE MODERN WORLD 217-228 (John Norton Moore ed., 1974); LOUIS HENKIN, HOW NATIONS

bars all use of force by one state against another.<sup>12</sup> Other publicists, however, took the position that the Charter did not prohibit humanitarian intervention.<sup>13</sup> Three arguments have generally been offered in support of that position. First, one of the purposes stated in the Charter is to promote human rights.<sup>14</sup> An interpretation of the Charter that prohibits humanitarian intervention would have the contrary effect.<sup>15</sup> Second, Article 2(4) prohibits the threat or use of force against "the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." If a state intervenes to protect persons from imminent death or injury in another state, because the latter is unwilling or unable to do so, and then withdraws, its actions are not directed against "the territorial integrity or political independence" of the first state, or otherwise "inconsistent with the Purposes of the United Nations."<sup>16</sup> Interestingly, even Professor Henkin, who has generally taken the position that the Charter "prohibits the use of armed force by one state on the territory of another . . . for any purpose, in any circumstances,"<sup>17</sup> would recognize some instances of humanitarian intervention as lawful on this basis.<sup>18</sup> The third argument is based on a state's right to use force in self-defense, affirmed in Article 51. If a state's citizens are attacked or in imminent danger of attack in another state, its use of

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BEHAVE 144-45 (2d ed, 1979); Jost Delbrück, *A Fresh Look at Humanitarian Intervention Under the Authority of the United Nations*, 67 IND. L.J. 887, 890, 892-93 (1992); Scheffer, *supra* note 2, at 258-59.

<sup>12</sup> Brownlie, *supra* note 11, at 219; Henkin, *supra* note 2, at 41.

<sup>13</sup> See, e.g., Richard B. Lillich, *Humanitarian Intervention: A Reply to Ian Brownlie and a Plea for Constructive Alternatives*, in LAW AND CIVIL WAR IN THE MODERN WORLD 230, 236 (John Norton Moore ed., 1974); Michael Reisman & Myres S. McDougal, *Humanitarian Intervention to Protect the Ibos*, in HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 172, 175 (Richard B. Lillich ed., 1973).

<sup>14</sup> "The Purpose[s] of the United Nations are . . . [t]o achieve international cooperation . . . in promoting and encouraging respect for human rights." U.N. CHARTER, art. 1(3); See also arts. 55, 56.

<sup>15</sup> Reisman & McDougal, *supra* note 13; FERNANDO R. TESÓN, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY 158-59 (1988).

<sup>16</sup> Reisman & McDougal, *supra* note 13, at 177, citing U.N. CHARTER, art. 2(4); Richard B. Lillich, *Forcible Self-Help by States to Protect Human Rights*, 53 IOWA L. REV. 325-34 (1967); John Norton Moore, *The Control of Foreign Intervention in International Conflict*, 9 VA. J. INT'L L. 205 (1969).

<sup>17</sup> Henkin, *supra* note 2, at 40.

<sup>18</sup> *Id.* at 41-42. Thus, he stated, "But Israel could plausibly argue that in the circumstances its raid at Entebbe was not a use of force against the political independence or territorial integrity of Uganda, or in any other way contrary to any purpose of the United Nations." LOUIS HENKIN, HOW NATIONS BEHAVE 145 (2d ed. 1979).

force to rescue them constitutes lawful self-defense under Article 51.<sup>19</sup> There are two problems with the last argument: (a) it greatly broadens the concept of self-defense and (b) it limits humanitarian intervention to citizens of the intervening state.<sup>20</sup>

### C. Post Cold War

The tenor of the argument has changed somewhat with the end of the cold war. The dissolution of the Soviet Union, the fighting and atrocities taking place in various parts of the world, have led some commentators to urge *collective intervention* under U.N. auspices.<sup>21</sup> Others, however, oppose humanitarian intervention even by the U.N., or by states acting pursuant to U.N. authorization.<sup>22</sup> They argue that the only exception in Article 2(7) to the prohibition against intervention by the U.N. in matters that are "essentially within the domestic jurisdiction of a state" is for enforcement measures under Chapter VII; that Chapter VII applies only if the Security Council finds a threat to the peace, breach of the peace, or act of aggression; and that as long as the state's conduct is not directed against another state it does not constitute a threat to the peace, breach of the peace, or act of aggression within

<sup>19</sup> Schachter, *supra* note 1, at 155; D. W. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW 91-105 (1958).

<sup>20</sup> It is not apparent why, if a state whose citizens' lives are in danger is unable to rescue them, another state willing and able to do so should be prohibited from rescuing them. Even more egregious in my view is the position that a state that intervenes to rescue its own citizens may not rescue the citizens of other states.

<sup>21</sup> Scheffer, *supra* note 2, at 258-59, 265. See also, *Report of the Secretary General on the Work of the Organization*, U.N. GAOR, 46th Sess., Supp. No. 1, at 10, U.N. Doc. A/46/1 (1991). ("It is now increasingly felt that the principle of non-interference with the essential domestic jurisdiction of States cannot be regarded as a protective barrier behind which human rights could be massively or systematically violated with impunity. . . . The case for not impinging on the sovereignty, territorial integrity and political independence of States . . . would only be weakened if it were to carry the implication that sovereignty, even in this day and age, includes the right of mass slaughter or of launching systematic campaigns of decimation or forced exodus of civilian populations.")

<sup>22</sup> See Lori F. Damrosch, *Commentary on Collective Military Intervention to Enforce Human Rights*, in LAW AND FORCE IN THE NEW INTERNATIONAL ORDER 215, 219 (Lori Fisler Damrosch & David J. Scheffer eds., 1991); Tom J. Farer, *An Inquiry into the Legitimacy of Humanitarian Intervention*, in LAW AND FORCE IN THE NEW INTERNATIONAL ORDER 190-191 (Lori Fisler Damrosch & David J. Scheffer eds., 1991). While Boutros Boutros Ghali did not address the question directly, he did not re-affirm the strong wording for humanitarian intervention in his predecessor's report in 1991, see *supra* note 20, and seemed to limit it to situations where there is "consent of the affected country." See *An Agenda for Peace: Report of the Secretary General*, U.N. GAOR, 47th Sess., Agenda Item 10 at para. 30, U.N. Doc. A/47/277 (1992).



the meaning of Article 39. Therefore, the Security Council cannot authorize intervention.<sup>23</sup>

#### IV. CONCLUSION

Because I agree with those who take the position that the U.N. Charter did not abolish the right of humanitarian intervention, I do not think that U.N. action is necessary to authorize it. Nor do I think that the Charter confers any special powers on the U.N. to take action in this area. In this respect, I agree with those who take the position that Chapter VII of the Charter, which provides for the imposition of various sanctions by the Security Council, including use of force against a state, is limited to situations in which the Security Council finds that there is "a threat to the peace, breach of the peace, or act of aggression" under Article 39. That language was clearly intended to apply to *international* threats to the peace, not to *internal* acts.<sup>24</sup> The Security Council can, of course, take the position that the danger of imminent death or grave injury to a large number of persons *within* a state also constitutes a threat to *international* peace, as it did in condemning Iraq's repression of the Kurds in 1991,<sup>25</sup> as it did in authorizing use of force in Somalia in 1992.<sup>26</sup> In today's interdependent world that may well be true in most—if not all—such situations.<sup>27</sup>

There is no objection to collective action under the auspices of the U.N., should states wish to do so. We should be wary, however, of *limiting* humanitarian intervention to collective action authorized by the Security Council. The legality of humanitarian intervention should not be subject to the veto power of any one state. The right of the Kurds not to be murdered by Iraq, the right of the Somalis to receive the food sent to save them from starvation, was not any less the year before the end of the cold war than it was the

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<sup>23</sup> See authorities cited *supra* note 21.

<sup>24</sup> See, e.g., *Statement of the Australian representative to the San Francisco Conference*, Doc. 969, I/1/39, 6 UNCTAD (1945), para. 16, that the last clause in what became article 2(7) of the Charter, excluding enforcement measures under Chapter VII from the ban on intervention in matters that are within the domestic jurisdiction of a state was unnecessary, because "[t]o take enforcement action for the restraint of aggression is not intervening in any way at all in a matter of domestic jurisdiction." *Id.* at 440.

<sup>25</sup> S.C. Res. 688, U.N. SCOR, 46th Sess., 2982d mtg., reprinted in 30 I.L.M. 858 (1991).

<sup>26</sup> S.C. Res. 794, U.N. SCOR, 47th Sess., 3145th mtg. (1992).

<sup>27</sup> In his Report on the Work of the U.N., Sec. Gen. Perez de Cueillar stated, "It seems to be beyond question that violations of human rights imperil peace," UNGA A/46/1 *supra* note 20, at 10.

year after. Yet, under an interpretation of the Charter that would permit humanitarian intervention only if authorized by the Security Council, the action taken to protect the Kurds and Somalis could not have been taken legally two years earlier and similar action might not be legal two years from now, should one of the permanent members decide to veto it because of its own political interests.<sup>28</sup>

I believe the customary rule of humanitarian intervention, which permits unilateral action, should be reaffirmed. That some states may misuse that right to intervene in another state for other purposes, or fail to leave once the danger has been averted, is not a reason to prohibit legitimate humanitarian intervention, any more than we prohibit legitimate self defense, or any other right, because it may be misused. Every legal right can be misused. Obviously, where the right involves use of force the consequences are more serious but, so are the consequences of a failure to act when people are in imminent danger of death or serious injury.<sup>29</sup>

I believe, however, that humanitarian intervention should be defined narrowly and precisely both to get the broadest possible support for its legality<sup>30</sup> and to avoid criticism, such as Professor Brownlie's, that "the opportunities for intervention will be very many."<sup>31</sup> I would, therefore, limit humanitarian intervention to situations in which there is danger of imminent death or injury, as stated earlier. That is not to say that intervention cannot be legal in other situations. I have argued elsewhere<sup>32</sup> that use of force in support of a democratically elected government which is barred

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<sup>28</sup> The assumption that in the post-cold war era the veto will no longer be a problem may not be correct. The situation in Russia is still unstable. The long range position of China is unpredictable. Indeed, given the surprises of the last decade, even states we consider predictable may not be.

<sup>29</sup> A state that uses force in another state based on unjustified claims of humanitarian intervention, or fails to leave once the danger is over, is, of course, violating article 2(4) and the Security Council can find that it has engaged in a threat to the peace, breach of the peace, or act of aggression and take such measures as it deems appropriate under Chapter VII.

<sup>30</sup> Damrosch, *supra* note 21, at 215; "[T]he legal community has widely accepted that the Charter does not prohibit humanitarian intervention by use of force strictly limited to what is necessary to save lives." Henkin, *supra* note 2, at 41.

<sup>31</sup> Brownlie, *supra* note 11 at 226.

<sup>32</sup> See Malvina Halberstam, *The Copenhagen Document: Intervention in Support of Democracy*, 34 HARV. INT'L L.J. 163 (1993). See also, The Committee on International Arms Control and Security Affairs and the Committee on International Law, *The Use of Armed Forces in International Affairs: The Case of Panama*, 47 N.Y.C.B. ASS'N. 607, 698 (1992), dissenting statement of Malvina Halberstam.



from taking office or deposed by force is and should be lawful. I would not, however, include such use of force in the definition of humanitarian intervention. It was not included in humanitarian intervention historically,<sup>33</sup> and, strong as the arguments are for the use of force in support of a democratic government, they are not as compelling morally as the arguments for the use of force to protect those in imminent danger of death or grave injury. Limited to intervention to save those in danger of imminent death or grave injury and coupled with a requirement that the intervening state withdraw once that has been accomplished, humanitarian intervention is not only lawful but obligatory, certainly morally, and perhaps, as Professor Tesón argues very persuasively,<sup>34</sup> legally.

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<sup>33</sup> See Thomas Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 84-85 (1992).

<sup>34</sup> Tesón, *supra* note 15, at 111-23.