

*Essay*

## UNILATERAL DEPLOYMENT OF ARMED FORCE FOR THE PROTECTION OF HUMAN RIGHTS<sup>†</sup>

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*This essay seeks to examine the unilateral deployment of force for the protection of human rights, both as to the current state of the law, and to the suggested solution to this controversial issue. While analogies are drawn to the protection of nationals abroad, this substantive doctrine is not discussed in detail.*

A right of unilateral humanitarian intervention to protect human rights and to enforce humanitarian law should exist within public international law; but the right should be confined to all but the most clear-cut of cases. Unfortunately the present state of the law does not appear to permit such action. States who wish to uphold such values must breach the law and throw themselves upon the mercy of the international community to mitigate the otherwise applicable penalty.

For the purposes of this piece, humanitarian intervention is defined as a use of force to protect a group of individuals who are not nationals of the state or states acting from violations of humanitarian or international human rights law.

Article 2(4) of the U.N. Charter states: “*All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the purposes of the United Nations.*” Exceptions are provided for in Article 51 (self-defense) and Chapter VII (uses of force authorized by the Security Council).<sup>1</sup> The existence and scope of any doctrine of humanitarian intervention over and above this is most controversial. How such a doctrine fits in with the U.N. Charter is somewhat unclear. While such a right is discernable in pre-Charter law, Article 2(4) appears to prohibit such actions. During the Cold War a number of commentators noted the inability of the U.N. collective security system to function effectively and as a consequence argued that Article 2(4) should be read in such a way as to allow a use of force to further the purposes of the United

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<sup>1</sup> Article 1(3) is not part of the use of force provision in the U.N. Charter.

Nations<sup>2</sup>—which included the respect for human rights.<sup>3</sup> However, while certain human rights are undoubtedly of a *ius cogens* status the prohibition on the use of force is also of a *ius cogens* nature, and one of the main themes of the United Nations system—more is required.

A second attempt to allow such actions to avoid the Article 2(4) prohibition is to argue that the latter part of Article 2(4): “*against the territorial integrity or political independence of any state, or in any manner inconsistent with the purposes of the United Nations*” qualifies the prohibition. However this would appear to be inconsistent with the drafting history of the Charter where the phrase was inserted as a further guarantee rather than as a qualification. Such an argument was advanced by the United Kingdom and rejected by the International Court of Justice (I.C.J.) in the *Corfu Channel Case*<sup>4</sup>: even minesweeping to protect navigation and collect evidence is considered to be a violation of the territorial integrity and political independence of any state. Thus, as noted by Higgins,<sup>5</sup> “*most uses of force, no matter how brief, limited, or transitory do violate a state’s territorial integrity,*” the Brownlie<sup>6</sup> rather than the Bowett<sup>7</sup> approach appears to be the orthodoxy.

While such a strict construction of Article 2(4)’s prohibition appears to make no exception for instances of even great violations of humanitarian law when such acts occur in the absence of an act of international aggression against another state,<sup>8</sup> the state practice is however not so simple. One must understand that it is possible to reinterpret the Charter or develop customary international law that may supersede certain provisions, although to do this a very high threshold of practice and *opinio iuris* is required.

Franck<sup>9</sup> notes a “patterned practice” suggesting either a graduated reinterpretation by the United Nations itself of Article 2(4) or the evolution of a subsidiary adjectival international law of mitigation. Proponents of such a right of intervention<sup>10</sup> argue that the necessary state practice and *opinio iuris* is present to assert such a right. D’Amato<sup>11</sup> argues that the Indian action in Bangladesh (1971), the Tanzanian action in Uganda (1978—overthrowing Idi Amin), and the Vietnamese invasion of Cambodia (1978) are

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<sup>2</sup> W. Michael Reisman, *Coercion and Self-Determination: Construing Charter Article 2(4)*, 78 AM. J. INT’L L. 642 (1984); note the response of Oscar Schachter, *The Legality of Pro-Democratic Invasion*, 78 AM. J. INT’L L. 645 (1984).

<sup>3</sup> Preamble, U.N. Charter, para. 2.

<sup>4</sup> *Corfu Channel (U.K. v. Alb.)*, Merits, 1949 I.C.J. 4 (April 9).

<sup>5</sup> ROSALYN HIGGINS, *PROBLEMS AND PROCESSES: INTERNATIONAL LAW AND HOW WE USE IT* 240 (1995).

<sup>6</sup> IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* (1963); *restated in* Ian Brownlie & C.J. Apperley, *Kosovo Crisis Inquiry: Memorandum on the International Law Aspects*, 49 INT’L & COMP. L.Q. 878, 884—85 (2000) (noting, upon examination of the travaux préparatoires, that the additional element to Article 2(4) is not intended to be restrictive, but rather to give more specific guarantees to small states).

<sup>7</sup> Bowett argues for a need for annexation or control: a mere trespass is not enough: D.W. BOWETT, *SELF-DEFENSE IN INTERNATIONAL LAW* (Frederick E. Praeger ed., 1958).

<sup>8</sup> Indeed such a right was mooted at San Francisco but did not make its way into the Charter.

<sup>9</sup> THOMAS M. FRANCK, *RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS* (2002).

<sup>10</sup> *HUMANITARIAN INTERVENTION AND THE UNITED NATIONS* (Richard B. Lillich ed., 1973); ANTHONY D’AMATO, *INTERNATIONAL LAW: PROCESS AND PROSPECT* (1995).

<sup>11</sup> Anthony D’Amato, *The Invasion of Panama Was a Lawful Response to Tyranny*, 84 AM. J. INT’L L. 516 (1990).

examples of such a right in action. This is however a viewing of the past through modern goggles, and incorrect.

While indeed India was not accused of aggression by the General Assembly, India did not rely on a legal justification of humanitarian intervention, rather it relied on the doctrine of self-defense.<sup>12</sup> Tanzania too did not attract condemnation for its actions, however it too relied on self-defense as its legal justification for its use of force—although this clearly could not justify the disproportionality of its response to what were in effect minor border provocations. The actions of Vietnam however attracted great condemnation from the international system, despite the extreme barbarity of the regime that was removed. Indeed the French Representative stated that: “*the notion that because a regime is detestable foreign intervention is justified and forcible overthrow is legitimate is extremely dangerous.*”<sup>13</sup> However one must question whether it was legal or perhaps geopolitical concerns that induced such a response. While the I.C.J. evaded the issue<sup>14</sup> in *Nicaragua*,<sup>15</sup> given the lack of practice during this period and the even more limited, if not absence of *opinio iuris* accompanying such acts it must be doubted whether such a doctrine of humanitarian intervention existed in this period prior to 1990. It would appear that such a “right” was considered incompatible with international law at least up until the 1980s.<sup>16</sup>

Greenwood<sup>17</sup> submits that such a right of humanitarian intervention is discernable from three particular episodes: the Air Exclusion Zone in Northern Iraq in 1991, the Air Exclusion Zone in Southern Iraq in 1992, and the ECOWAS action in Liberia and Sierra Leone. It is unlikely that these three episodes do truly depict such a right—the Iraqi instances must be placed within the geopolitical realities alongside the numerous Security Council resolutions (that would later come to the fore in 2003). The ECOWAS action can also be distinguished on the basis of its regional peacekeeping quality—thus, as Brownlie and Apperley<sup>18</sup> note, these three instances in themselves do not represent the sufficient congruent practice of the preponderance of U.N. Member States that is required to modify or re-interpret the provisions of the Charter<sup>19</sup>. It is interesting to note that while the United Kingdom’s justification for the AEZ in 1991 was based on humanitarian grounds, the United States instead relied on implied Security Council authority (the relevant resolutions not making explicit provision for the situation).

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<sup>12</sup> India argued the influx of refugees constituted a “civil aggression,” although this seems somewhat unconvincing in international law terms.

<sup>13</sup> S.C.O.R. (XXIV), 2109<sup>th</sup> Meeting, Jan. 12, 1979, 4.

<sup>14</sup> A short dictum addressed the matter, but it is not conclusive since it may be read as either rejecting the existence of the doctrine, or stating that the U.S. actions in themselves could not further any humanitarian objective. See CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 33 (2004).

<sup>15</sup> *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Merits, 1984 I.C.J. 392 (June 27).

<sup>16</sup> Michael Akehurst, *Humanitarian Intervention*, in *INTERVENTION IN WORLD POLITICS* 95–118 (Hedley Bull ed., 1984).

<sup>17</sup> Christopher Greenwood, *International Law and the NATO Intervention in Kosovo*, 49 INT’L & COMP. L.Q. 926 (2000).

<sup>18</sup> See Brownlie & Apperley, *supra* note 6.

<sup>19</sup> Indeed in Kosovo only the United Kingdom sought to evoke the AEZs as precedents: Christine Gray, *From Unity to Polarization: International Law and the Use of Force Against Iraq*, 13 EUR. J. INT’L L. 1 (2002).

Whether or not such a doctrine of humanitarian intervention exists or not came to a head during the NATO bombing campaign in Kosovo to protect the ethnic Albanian population of the province (Operation Allied Force). Rather than relying on some of the traditional legal justifications (in some cases fictions) a number of NATO states and supporters expressly invoked the doctrine of humanitarian intervention as the justification for their actions, both before the Security Council and in the preliminary objection stages in proceedings before the I.C.J.,<sup>20</sup> although other justifications were put forward such as that of the action of a regional organization (NATO) which had been acquiesced in by the United Nations. Indeed a resolution in the Security Council to condemn the NATO action was defeated 12/3.<sup>21</sup>

However the United Nations did not formally approve of the NATO action—Resolution 1244 is not retrospective acceptance of its legality, rather it appears to be a pragmatic acceptance of the need to provide for the future of Kosovo.<sup>22</sup> There were however strong statements made against the existence of such a doctrine by: Russia,<sup>23</sup> China,<sup>24</sup> India,<sup>25</sup> Cuba, and Belarus, and concerns were noted by Costa Rica, Brazil, and Mexico. China declared that such a doctrine promoting human rights over sovereignty “serves . . . to promote hegemonism under the pretext of human rights.”<sup>26</sup> In addition the Non-Aligned Movement formally rejected the existence of such a doctrine under international law.<sup>27</sup> Such a reaction to the NATO actions combined with the fact that while Germany<sup>28</sup> and the United States<sup>29</sup> supported the operation in Kosovo they did not see it as a precedent for future action, leads to the conclusion that the threshold and preponderance of state practice required to establish such a doctrine in international law is not present. Indeed such is the doubt surrounding the doctrine that it was neither invoked as a legal justification for Operation Enduring Freedom (Afghanistan, 2001) nor Operation Iraqi Freedom/OpTelic (Iraq, 2003).<sup>30</sup> It is important to note that while the Government of the United Kingdom may have used the language of humanitarian intervention in response to domestic opposition, it was not made part of the legal case for action,<sup>31</sup> in fact it was expressly denied as the basis for action by the Attorney General, although Lord Goldsmith did state that humanitarian intervention was a lawful basis for force under international law.

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<sup>20</sup> Legality of Use of Force (Yugo. v. Belg.), 1999 I.C.J. 124 (June 2) (noted by Christine Gray & Malcolm D. Evans, *Legality of Use of Force: Provisional Measures*, 49 INT'L & COMP. L.Q. 730 (2000)).

<sup>21</sup> Christine Chinkin, *The Legality of NATO's Action in the Former Republic of Yugoslavia (FRY) Under International Law*, 49 INT'L & COMP. L.Q. 910, 914 (2000).

<sup>22</sup> Although the argument may be made that the Security Council would not endorse any peace plan if it condemned the actions which led to it.

<sup>23</sup> S.C.O.R., (LIV), 3988<sup>th</sup> Meeting, Mar. 24, 1999, 2–3, per Ambassador Sergei Lavrov.

<sup>24</sup> S.C.O.R., (LIV), 3988<sup>th</sup> Meeting, Mar. 24, 1999, 12, per Ambassador Qin Huasun.

<sup>25</sup> S.C.O.R., (LIV), 3988<sup>th</sup> Meeting, Mar. 24, 1999, 16 (stating that “[t]wo wrongs do not make a right.”).

<sup>26</sup> S.C.O.R., (LIV), 4011<sup>th</sup> Meeting, June 10, 1999, 9.

<sup>27</sup> U.N. Press Release GA/SPD/164, Sept. 18, 1999.

<sup>28</sup> Antonio Cassese, *A Follow-Up: Forcible Humanitarian Countermeasures and Opinio Necessitatis*, 10 EUR. J. INT'L L. 791 (1999).

<sup>29</sup> Michael Byers & Simon Chesterman, *Changing the Rules About Rules?: Unilateral Humanitarian Intervention and the Future of International Law*, in HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS 177 (J.L. Holzgrefe & O. Keohane eds., 2003).

<sup>30</sup> Letter from the Permanent Representative of the United States, addressed to the President of the Security Council, J.D. Negroponte, S/2003/351.

<sup>31</sup> *Legal Assessment of the Use of Force Against Iraq*, 52 INT'L & COMP. L.Q. 1059 (2003).

## *Unilateral Deployment of Armed Force for the Protection of Human Rights*

This denial of the doctrine of humanitarian intervention and the confusion surrounding the doctrine, if it indeed currently exists, is not a desirable state of affairs. Tesōn<sup>32</sup> defends the doctrine on the basis of sovereignty and security of peoples. Tesōn argues that the ultimate justification for the continuation of the state is the protection of the natural rights of its citizens and that a government violating those rights forfeits domestic and international legitimacy. The counterargument is that respect for the sovereignty of nations secures peace while the Security Council powers are the safeguard against such humanitarian violations. This situation unfortunately produces a “*paradox of a good law producing a very bad result*,”<sup>33</sup> in the words of Franck: “*surely the UN Charter . . . is not a genocide pact*.”<sup>34</sup> Greenwood<sup>35</sup> declares: “*an interpretation of international law which would forbid intervention to prevent something as terrible as the Holocaust, unless a permanent member could be persuaded to lift its veto, would be contrary to the principles on which modern international law is based*.” While Tesōn’s argument goes too far one can of course see the desirability of such a right in extreme circumstances. It is estimated that 1.7 million<sup>36</sup> people died under the Khmer Rouge regime, through execution, starvation, and forced labor—one must question a rule that would allow such action to continue unchecked if the Security Council fails to act by reason of a deadlock.

Some of the arguments against such a doctrine focus on its expansive nature, and the opportunity for abuse.<sup>37</sup> The opportunity for abuse should not be of itself a reason for the denial of such a doctrine; as Higgins points out: “*There have been countless abusive claims of the right to self-defence. That does not lead us to say that there should be no right of self-defence today*.”<sup>38</sup> But significant controls would need to be placed on any such right, as Chesterman notes: “*While there may be reason to support vigilante justice in some lawless situations, this is a far cry from conceding that Sheriff’s badges should be handed out to any right-minded person with a gun*.”<sup>39</sup> One can only agree, thus such controls are essential and any doctrine (if admitted) must contain safeguards, especially when one considers that many nations have come close to, or have violated the norms of humanitarian law on at least one occasion from the perspective of another state.

Little study has been made of the matter, but any adoption of a doctrine of humanitarian intervention requires a review of the existing *ius in bello*. This is since many of the doctrines relating to targeting are designed for traditional conflicts, and not ones whose primary goal is to put pressure on otherwise civilian governmental leaders and ministers.

The United Kingdom has been one of the leading proponents of a doctrine of humanitarian intervention—and has laid out guidelines that are required to be fulfilled before such a doctrine may be invoked:

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<sup>32</sup>FERNANDO R. TESŌN, *HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY* (1997).

<sup>33</sup>FRANCK, *supra* note 9, at 175.

<sup>34</sup>FRANCK, *supra* note 9, at 182.

<sup>35</sup>Greenwood, *supra* note 17, at 930.

<sup>36</sup>Estimated figure from the Yale Cambodian Genocide Project.

<sup>37</sup>PETER MALANCZUK, *AKEHURST’S MODERN INTRODUCTION TO INTERNATIONAL LAW* 221 (1997).

<sup>38</sup>Rosalyn Higgins, *International Law and the Avoidance, Containment, and Resolution of Disputes*, 230 *Recueil des Cours* 316 (1991-V).

<sup>39</sup>SIMON CHESTERMAN, *JUST WAR OR JUST PEACE?* 56 (2001).

- Prior determination by the Security Council of a grave crisis, threatening international peace and security.
- Articulation by the Security Council of specific policies for the resolution of the crisis, the implementation of which can be secured or furthered by armed intervention.
- An imminent humanitarian catastrophe which, it is believed, can be averted by the use of force and only by the use of force.
- Intervention by a multilateral force.<sup>40</sup>

The Secretary of State's formulation certainly sets a high threshold. The requirements of Security Council involvement and determination significantly limit the scope of the doctrine. This admittedly restricts the doctrine to be used against states which are not permanent members of the Security Council or their allies, but it does acknowledge the primary responsibility of the Council for the maintenance of peace and security as the U.N. Charter requires. The second significant control mechanism is the requirement of an imminent humanitarian catastrophe; a mere violation of humanitarian law or human rights law is not enough. Thus the actions of the United States in Guantanamo or in Abu Ghraib, arguably violations of certain provisions of humanitarian law, are not enough to cross this threshold. There is a need for an exceptional factor for states to act without waiting for Security Council authorization. In considering whether this threshold is met one must consider the duration and targets of the violence and the evidence that implicates the authorities of the target state.<sup>41</sup> This threshold can only be supported since most states have at some point violated human rights norms. Such a threshold prevents international anarchy and restricts the right of intervention to only the most serious cases.

The other significant control mechanism within the guidelines is the requirement that states must act in a multilateral fashion—they may not act unilaterally. This is designed as a safeguard against a use of humanitarian intervention as a cloak for the aggression of regional superpowers. One must query whether this really is an effective safeguard since a superpower may easily enlist the support of a satellite state, thus lending legitimacy to the action according to this element of the guidelines.

Analogies can also be drawn to the rescue and protection of nationals abroad. While this doctrine too is controversial<sup>42</sup> it does not appear to require a multilateral force. The artificiality of this divide is readily apparent from the following example: State X invades State Y without lawful justification, citizens of State Z are endangered by this action and State Z sends in a small force to rescue them and airlift them from the country—it does this without the permission of State Y (which will not grant permission). The military passenger aircraft which State Z uses to rescue its nationals contains 300 seats—of which only 200 are required by Z nationals. How is it morally justifiable to rescue the 200 (potential legal justification: protection of nationals abroad), but to turn

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<sup>40</sup> Secretary of State's Formulation (reported by Vaughan Lowe, *International Legal Issues Arising in the Kosovo Crisis*, 49 INT'L & COMP. L.Q. 934 (2000)).

<sup>41</sup> *Id.* at 940.

<sup>42</sup> Note the reactions to the Entebbe Incident. However, also note that, since nationals are one of the ingredients of statehood, a construction of Article 51 is available to legitimize such actions which would not be available in humanitarian intervention.

*Unilateral Deployment of Armed Force for the Protection of Human Rights*

away from the aircraft 100 refugees who are citizens of State Y but members of an ethnic group which is persecuted in and by State X, when it is known that State X wishes to capture them and send them to die in labor camps (the justification of humanitarian intervention not being available under the guidelines since the use of force is unilateral)? Viewed from this perspective the line between the protection of nationals abroad and humanitarian intervention is very thin, the same action may constitute both simultaneously. Why should it differ in that multilateral force is required for one and not the other, and would it make any difference if State Z conferred citizenship upon this persecuted ethnic group?<sup>43</sup>

Unfortunately the state practice and *opinio iuris* is not such to justify a unilateral humanitarian intervention—even of a brief duration. What guidance should one give to a state that faces one of these hard cases? If a state still wishes to act it may do so, albeit unlawfully, and then throw itself upon the mercy of the international community to mitigate any otherwise applicable penalty, to bridge the gap between the law and a common sense of moral justice—the international community carrying out exactly the process that national justice does: conducting an international version of the approach taken in *R v. Dudley and Stephens*.<sup>44</sup>

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<sup>43</sup> *But see* Nottebohm (Liech. v. Guat.), 1955 I.C.J. 4 (April 6).

<sup>44</sup> *R v. Dudley and Stephens*, [1884] 14 Q.B.D. 273 (the famous Cabin Boy Case). See FRANCK, *supra* note 9. The indictment read: “That if the men had not fed upon the body of the boy they would probably not have survived to be so picked up and rescued, but would within the four days have died of famine. That the boy, being in a much weaker condition, was likely to have died before them. That at the time of the act in question there was no sail in sight, nor any reasonable prospect of relief. That under these circumstances there appeared to the prisoners every probability that unless they then fed or very soon fed upon the boy or one of themselves they would die of starvation. That there was no appreciable chance of saving life except by killing some one for the others to eat. That assuming any necessity to kill anybody, there was no greater necessity for killing the boy than any of the other three men.” The sentence was commuted by the Crown to six months imprisonment.