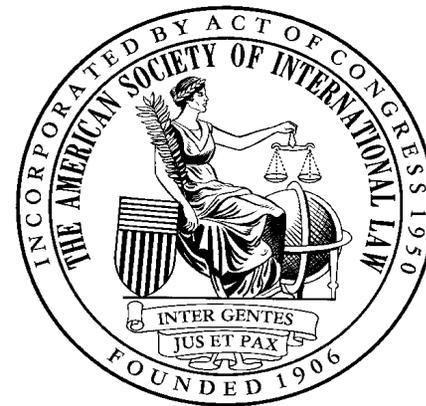


# *INTERNATIONAL LEGAL THEORY*

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***INTERNATIONAL LEGAL  
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## THE NON-INTERVENTION PRINCIPLE AND HUMANITARIAN INTERVENTIONS UNDER INTERNATIONAL LAW

The topic of this paper may appear less “theoretical” than other essays in this series, but I believe that the scope of the theory of international law extends beyond foundations to reach the jurisprudential and theoretical aspects of important practical issues in contemporary life. In addition to the macro or “big” foundational theories, the smaller micro or “petit” theoretical problems require scholarly discussion and debate.

In this paper, I will argue against unilateral interventions by one state in another’s affairs, by emphasizing the *jus cogens* and inviolable nature of the non-intervention principle and its corollaries as embodied in the UN Charter and customary international law. Given an increasing trend toward the negation of this foundation of international law, I consider it necessary to restate the fundamental principle of non-intervention and its corollaries (state sovereignty, non-use of force, etc.). Emphasizing that these principles are so fundamental as to constitute *jus cogens* norms from which no derogation is permissible, I argue that even interventions short of the use of force are incompatible with the principles of state sovereignty and non-intervention. I then examine the doctrine of and arguments for humanitarian interventions, and conclude that there is no such thing as legitimate unilateral and uninstitutionalized humanitarian intervention. I reiterate that the only legally justifiable intervention involving the use of force, absent self-defense, would be collective intervention, humanitarian or otherwise, with and under the authorization of the United Nations Security Council.

## NON-INTERVENTION AS A *JUS COGENS* PRINCIPLE AND HUMANITARIAN INTERVENTION

The principle of non-intervention, as one of the fundamental norms of international law, is embodied in the Charter of the United Nations and firmly established in state practice and customary international law. As early as 1793, this principle was introduced into the French Constitution providing that France would neither intervene in the public affairs of other States nor allow other nations to intervene in its own public affairs (1793 Constitution of France, art. 119). Non-intervention eventually became accepted by other major powers as a customary rule of international law. This legal principle was not affected by the decision of world powers to create the League of Nations, the Covenant of which provided that “[i]f the dispute between the parties is claimed by one of them, and is found by the Council, to arise out of a matter which by international law is solely within the domestic jurisdiction of that party, the Council shall so report, and shall make no recommendation as to its settlement” (League of Nations Covenant, Apr. 28, 1919, art. 15, para. 8). The Charter of the UN has further developed this principle by providing that nothing contained in it “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”, without prejudicing “the application of enforcement measures under Chapter VII” (UN Charter, art. 2(7)). Under the Charter, non-intervention has become one of the seven basic principles of the United Nations and indeed the entire international community. Further, the scope of non-intervenable domestic affairs has been extended from those that are “*solely* within the domestic jurisdiction” to those “which are *essentially* within

the domestic jurisdiction” of a state. Under the League of Nations Covenant, the scope of domestic jurisdiction was determined jointly by the State concerned and the Council, whereas the UN Charter not only does not require the Security Council or any other organ of the UN to “find” a matter to be essentially within the domestic jurisdiction of a state, but also does not require member States to submit such matters for settlement in accordance with the Charter. Consequently, either the UN itself or the State concerned may unilaterally determine if a dispute essentially falls within the domestic jurisdiction of that State. The only exception to the non-intervention principle under the Charter is for the implementation of measures taken under Chapter VII for the purpose of maintaining international peace and security.

That the non-intervention principle is also a general principle of customary international law has received general recognition. In this regard, the ICJ, in the *Nicaragua v. United States* case (ICJ Reports 1986, p. 14, paras. 202-204), profoundly observed:

The principle of non-intervention 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. As the Court has observed: “Between independent States, respect for territorial sovereignty is an essential foundation of international relations ([*Corfu Channel* case,] *I.C.J. Reports 1949, p. 35*), and international law requires political integrity also to be respected.... The existence in the *opinio juris* of States of the principle of non-intervention is backed by

established and substantial practice. It has moreover been presented as a corollary of the principle of the sovereign equality of States...

The principle has since reflected in numerous declarations adopted by international organizations and conferences..., e.g., General Assembly resolution 2131 (XX)... [T]he essentials of resolution 2131 (XX) are repeated in the Declaration approved by resolution 2625 (XXV), which set out principles which the General Assembly declared to be “basic principles” of international law...

... In a different context, the United States expressly accepted the principles ... appearing in the Final Act of the Conference on Security and Cooperation in Europe (Helsinki, 1 August 1975), including an elaborate statement of the principle of non-intervention; while these principles were presented as applying to the mutual relations among the participating States, it can be inferred that the text testifies to the existence ... of a customary principle which has universal application.

Resolution 2131 (XX) presents the General Assembly is Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, in which the Assembly “solemnly declares” that “[n]o state has the right to intervene, directly or indirectly, for any reason whatever, in the internal and external affairs of any other state” (G.A. Res. 2131/XX, 21 Dec. 1965, para. 1). The declaration condemns “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”. This principle is reiterated in almost the same wording in the section on “The

principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State” of the 1970 General Assembly Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (G.A. Res. 2625 (XXV), 24 Oct. 1970). This latter declaration not only condemns interventions, but also declares them to be a “violation of international law” and therefore subjects them to international liability.

The non-intervention principle is a necessary derivative from the principle of state sovereignty. Every state is sovereign and equal in law *vis-à-vis* every other. Being equally sovereign, a state is not subject to any form of foreign interference in its own domestic matters except by consent. Therefore, no intervention, whether economic, political, military or otherwise, is tolerable without explicit prior agreements under international law. Armed intervention or other forms of intervention involving the use of force are further prohibited by the principle of non-use of force (discussed below). Concerning the substance of the non-intervention principle, the ICJ stated (*Nicaragua v. United States*, *supra*, para. 205):

... As regards the ... content of the principle of non-intervention, ... in view of the generally accepted formulations, the principle forbids all States or groups of States to intervene directly or indirectly in the internal or external affairs of other States. 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, which defines, and indeed forms the very essence of, prohibited intervention, is particularly obvious in the case of an intervention which uses force, either in the direct form of military action, or in the indirect form of support for subversive or terrorist armed activities within another State...

The non-intervention principle is not only fundamental to the international legal system, but also peremptory in the sense that it cannot be modified or derogated from by the mere consent of two or more States in the form of a new practice or new treaty. Judge Sette-Camara, in his separate concurring opinion in *Nicaragua v. United States*, correctly states that “the non-use of force as well as non-intervention – the latter as a corollary of the equality of States and self-determination – are not only cardinal principles of customary international law but could in addition be recognized as peremptory rules of customary international law which impose obligations on all States” (*id.*, p. 199).

Cassese is similarly right when he writes that “[t]he importance of this principle [*i.e.*, the principle of non-intervention in the internal or external affairs of other States] for States leads one to believe that it has by now become part and parcel of *jus cogens*” (Antonio Cassese, *International Law in a Divided World*, 1986, p. 147). Also referring to *jus cogens*, a legal commentator convincingly observes that “[t]he strength and duration of support for the principle of non-intervention in state practice must surely qualify the principle for this status, reinforced as it is by the proscription on the use of force (itself

a main exemplar of *jus cogens*) contained in the United Nations Charter” (Dino Kritsiotis, “Reappraising Policy Objections to Humanitarian Intervention”, 19 Mich. J. Int’l L. 1005, 1042-43 (1998)). Many other writers have come to the same conclusion that the non-intervention principle is among those principles of international law that rise to the level of *jus cogens*.

Indeed, the *jus cogens* character of the principle of non-intervention is widely upheld by governments. The General Assembly, in its Declaration of 9 December 1981, made it clear that the non-intervention principle embodies the requirement that States “refrain from entering into agreements with other States with a view to intervening or interfering in internal or external affairs of other States” (G.A. Res. 36/103, 9 Dec. 1981, para. II(h)). Although this declaration, like many others, is not in itself law-making, it nevertheless restates the law, and at least reflects, to a large extent, the general legal conviction of States in this regard. At the time of the adoption of the declaration, 120 votes were in favor, 22 against, and 6 in abstention. As is observed, “no objections or misgivings were voiced when the resolution was passed, nor was its purport challenged – not even by the Western States which voted against it or abstained” (Cassese, *supra*, at 148). The general position of States that no agreement may be validly entered into in violation of the non-intervention principle strongly suggests that they regard this principle to be of a *jus cogens* character.

### **HUMANITARIAN INTERVENTION: AN EXCEPTION?**

Despite the unobjectionable *jus cogens* principle of non-intervention, “humanitarian intervention” has sometimes been claimed to constitute an exception to the general rule. In

the 1999 Kosovo crisis, the notion of “humanitarian intervention” was most frequently employed as a moral and legal justification for the NATO aerial bombing of Yugoslavia. In the hearings concerning Yugoslavia’s request for the indication of provisional measures in the *Legality of Use of Force* cases, for example, Belgium contended that NATO “needed to ... develop the idea of armed humanitarian intervention”, that “NATO ... felt obliged to intervene to forestall an ongoing humanitarian catastrophe”, that the NATO bombing “is a case of a lawful armed humanitarian intervention for which there is a compelling necessity”, and that “what has been taking place is armed humanitarian intervention justified by international law” (*Legality of Use of Force (Yugoslavia v. Belgium)*, Verbatim records CR 99/15 (translation), Belgium, 10 May 1999).

The doctrine of humanitarian intervention offers a seemingly principled excuse for departing from the non-intervention principle. However, this doctrine carries little legal or moral weight when carefully examined. The doctrine has never become an established principle of international law, even as a generally recognized exception to the established principle of non-intervention.

So-called humanitarian intervention, especially intervention with the use of military force, appears to be the product or part of a deliberate scheme to overstress individual human rights at the expense of national sovereignty and political independence. I admit that there are *bona fide* actors who are truly concerned with the humanitarian interests of individuals of other countries, and have no other motives to interfere in their domestic affairs, yet, the debate over the permissibility of unilateral humanitarian intervention, on the

whole, is *essentially a matter of interests, power and dominance*. Today, the notion of humanitarian intervention is of particular importance to powerful nations that no longer enjoy the same prestige and power as they did in the past to compel other nations and peoples, or to act as the “masters” of the world through colonial expansion and aggression. “Humanitarian intervention” is a high-sounding and convenient tool for maintaining, and yet concealing, their dominance and their supremacy. The notion has no meaning to the vast majority of small and weak States. As Shalom sharply pointed out:

What should a government do when some other government is violating its people’s rights? It should urge the violator to adhere to its international human rights obligations; it should use its diplomatic influence to try to end the abuses. Certainly, it should avoid supporting oppressive regimes. But generally it should not begin bombing the other country to punish human rights violations.

This is so for at least three reasons. First, because outsiders can rarely bring people freedom; freedom comes from one’s own activity. Second, because violence is so often counter-productive. And third, because the right of humanitarian intervention is an asymmetrical right – it is the right of the powerful to intervene in the affairs of the weak, and not vice versa. Humanitarian intervention, Richard Falk has reminded us, is like the Mississippi River: it only flows from North to South. Uruguay cannot use B-52s to punish Britain for its policy in Northern Ireland. Yemen cannot launch cruise missiles on Washington out of solidarity with the oppressed in U.S. cities. So we need to be very careful about a right that can

be enjoyed only by the powerful. See Stephen R. Shalom, “Reflections on NATO and Kosovo”, *New Politics*, Summer, 1999, [www.zmag.org/crisescurevts/shalomnp.htm](http://www.zmag.org/crisescurevts/shalomnp.htm).

Major powers have a dangerous tendency to exaggerate the need to deal with the human rights problems of third world States, as well as a tendency to downplay and minimize the sovereignty of such States. Major powers would never let other States intervene in the human rights problems in their own society, and their consciousness of sovereignty is just as strong as, and even stronger than, that of developing States. The United States, for example, while often intruding into the affairs of other nations by criticizing their human rights records, always rates its own territory, sovereignty, national security and self-interests above everything else. The scheme to over-emphasize the international aspect of human rights protection and to minimize State sovereignty, particularly through the doctrine of humanitarian intervention, best benefits the strong and the powerful and least protects the real interests of the small and the weak.

Needless to say, it is very important, for the sake of humanity, to prevent and to deal with humanitarian crises, to eliminate and to punish crimes against humanity, and to respect and protect fundamental human rights. On the other hand, and from the point of international law, it is at least equally important, and perhaps even more important, for states to respect each other’s sovereignty, political independence and territorial integrity. Existing international law entrusts to every state the sacred sovereign right to take necessary and appropriate steps to protect its own territory and sovereignty against secessionist movements, and especially secessionists that engage in terrorist or other violent activities. Simply

stated, no State should be allowed to encroach upon another State's sovereignty and territorial integrity in the name of protecting human rights and humanity. Human rights issues should only be resolved through methods and mechanisms recognized by international law.

There is no commonly acceptable standard of what humanitarianism means and what human rights embrace under international law. In the absence of common understanding, the concepts of "humanitarianism" and "human rights" are *bound to be abused* if the international community allows humanitarian intervention, or favors individual human rights over national sovereignty. The consequences of this kind of abuse use would be too dreadful to contemplate. One of the consequences of placing human rights above state sovereignty and therefore permitting humanitarian intervention, would be that the ordinary and predictable short comings of third-world states would be attacked as human rights violations. Such domestic problems would provide excuses and opportunities for major powers to intervene and to "dominate" weaker states. This abuse of the notions of human rights and humanitarian intervention would be disastrous to third-world States, and especially to those States with problems of ethnic conflict or secessionism. The potential abuse for abuse becomes enormous, whenever humanitarian intervention is treated without due care and restraint.

Humanitarian interventions, especially armed humanitarian interventions, often carry with them, or result in, the negation of the very "humanitarian" aims they claim to serve. Such interventions, when exercised subjectively will, kill, injure, destroy, and cause other unnecessary human catastrophes, often costing the lives of more people than those

they are alleged to save. Thomas criticized the humanitarian intervention argument in the context of the NATO bombing

... Dr. Jan Oberg of the Transnational Foundation in Sweden has argued that Madeleine Albright's and NATO's claims [on the total expulsions of the Albanians from Kosovo] are dubious. There was no such talk before the bombing began. The bombing was tied to the Rambouillet ultimatum to Yugoslavia that it either sign the Western diktat or get bombed severely. It had nothing to do with the post bombing humanitarian catastrophe.... Why did the West not plan for this contingency if it knew of such a plan? How could Milosevic have got rid of all Albanians from Kosovo when some 1,800 OSCE monitors and several more UNHCR and International Red Cross personnel, not to mention journalists, were in Kosovo before the ultimatum was issued? It was NATO that pulled them out although Yugoslavia had agreed to nearly all of the provisions of the political terms of Rambouillet. How was it that OSCE, UNHCR and other international agencies never knew or sensed any such plan? Finally, if NATO knew of such an ethnic cleansing plan, why did it not plan its bombing campaign more carefully?

... NATO's rush to bomb CAUSED the human catastrophe in Kosovo, as did Western interventions earlier in Croatia and Bosnia by promoting and rushing to recognize Croatia and Bosnia as independent states against the wishes of their Serbian populations. (R.G.C. Thomas, "NATO and International Law", May 17, 1999, <http://jurist.law.pitt.edu/thomas.htm>):

Thus, uninstitutionalized and unrestrained humanitarian intervention tends to create more human disasters and denials of rights. Again in the Kosovar example, NATO's military intervention in Yugoslavia achieved exactly the opposite of

what it sought to achieve. The bombing not only caused the deaths of thousands of civilians, including hundreds of Kosovar Albanians, but also directly aggravated the conflicts and hatreds between the Serbs and the Kosovar secessionists, intensified fighting and killings among them, and contributed to the floods of millions of refugees. Had the Kosovo crisis required military action by or on behalf of the United Nations, the Security Council would not have allowed impetuous and indiscriminate aerial bombing. Instead, it might have authorized a multilateral peacekeeping force as it did in the East Timor crisis. The NATO bombing, which was allegedly intended as a humanitarian cure, clearly made the “illness” and suffering of the ethnic Albanians as well as the Serbs much worse. These terrible human sufferings could have been avoided by a neutral, restrained and institutionalized and, most importantly, Security Council-sanctioned intervention through ground-troop peacekeeping.

Hannum noted, and I largely agree:

... [T]he time of absolute sovereignty has passed, and -- no state should be allowed to commit mass murder just because it is a sovereign member of the U.N. The problem, however, is precisely in deciding who should have the right first to determine when serious international crimes are being committed and, secondly, when to decide to use force to stop them.... [T]he U.N. Security Council might still be the most appropriate body to determine these questions even though it is subject to all sorts of political manipulation. But if we allow a single state or a group of states to decide for themselves when military intervention is a good idea, we run the risk of causing much more harm in the long

run than good. (“Is NATO Crossing the Line? Chat With International Law Professor Hurst Hannum”, ABC News, May 14, 1999,

[www.abcnews.go.com/sections/world/DailyNews/chat\\_hannum990514.html](http://www.abcnews.go.com/sections/world/DailyNews/chat_hannum990514.html)).

The harms of unilateral “humanitarian” interventions also extend to the encouragement that they give to secessions movements, promoting terrorism and other forms of violence, which disturb world peace and security, and may in the end work against the interests even of those who support intervention. As the British Foreign Office noted a decade and half ago, the benefits of making humanitarian intervention an exception to the non-intervention principle would be “doubtful” and “heavily outweighed by its costs” (U.K. Foreign Office Policy Document No. 148, 57 B.Y.I.L. 614 (1986), para. II.22).

Most importantly, as a matter of fact and law, *the concept of humanitarian intervention has no actual legal basis in international law*. As I discussed above, “non-intervention”, like the non-use of force, is a fundamental *jus cogens* principle of international law. Neither the United Nations Charter nor customary international law permits deviations from these principles to serve unilateral and often dubious claims of “humanitarian intervention”. In my view, attempts to make “humanitarian intervention” an exception to the principle of non-intervention are largely aimed at creating a convenient excuse for powerful States to continue their dominance over the world politically, militarily and otherwise. This alleged exception has never gained general support from the international community. Third-world countries, which

constitute the majority of States, are especially skeptical about the motives behind the Western proposition of humanitarian intervention and its prospects for abuse. The alleged humanitarian intervention exception (without the need of institutional approval) is nothing but the artificial creation in the “minds” of a handful of States and commentators. It is supported neither by the Charter and customary international law, nor by any alleged “emerging” general state practice. This “state of the law” has been re-affirmed by the International Court of Justice and recognized by numerous legal commentators, including many prominent writers on international law. It is also acknowledged by States at large, including some influential ones.

The International Court of Justice, in *Nicaragua v. United States* (*supra*, para. 268), rejected the argument that the use of force might be justified to protect human rights: In any event, while the United States might form its own appraisal of the situation as to respect for human rights in Nicaragua, the use of force could not be the appropriate method to monitor or ensure such respect. With regard to the steps actually taken, the protection of human rights, a strictly humanitarian objective, cannot be compatible with the mining of ports, the destruction of oil installations, or again with the training, arming and equipping of the *contras*. The Court concludes that the argument derived from the preservation of human rights in Nicaragua cannot afford a legal justification for the conduct of the United States...

The military and paramilitary activities of the United States against Nicaragua were far less aggressive and destructive than the NATO bombing of Yugoslavia. If the former was not an appropriate method for ensuring respect for human rights in Nicaragua, then the NATO bombing was even less legitimate.

Likewise, if the “mining of ports and destruction of oil installations” were incompatible with the “strictly humanitarian objective” of protecting human rights, then still less compatible with such objective would be the wanton killing and mass destruction with sophisticated weaponry carried out by NATO in a 78-day-long non-stop aerial campaign.

Many prominent legal scholars condemned intervention, as when Hall wrote a century ago that “no intervention is legal, except for the purpose of self-preservation, unless a breach of the law as between states has taken place, or unless the whole body of civilised states has concurred in authorising it” (W.E. Hall, *Treatise on International Law* (4th ed., 1895), pp. 303-304). If Hall represents an era that is too remote, we may be reminded by Schachter, who observed not long ago that “governments by and large (and most jurists) would not assert a right to forcible intervention to protect the nationals of another country from atrocities carried out in that country” (Oscar Schachter, “The Right of States to Use Armed Force”, 82 Mich. L. Rev. 1620, 1629 (1984)). Friedmann considered humanitarian intervention as “an infringement of the right of any state to determine its internal affairs and to decide the political, social, and economic regime without dictate or interference from abroad” (Wolfgang Friedmann, “Comment 4”, in *Law and Civil War in the Modern World* 574, 578 (J. Moore ed. 1974)). For Randelzhofer, one can find a place for the doctrine of humanitarian intervention *neither* in the UN Charter *nor* in customary international law (Albrecht Randelzhofer, “Article 2(4)”, in Bruno Simma, *The Charter of the United Nations: A Commentary*, 1995, pp. 106 *ff.*, at 123-124). To the list of publicists denying the existence of the alleged rule or exception of humanitarian intervention, we may add Michael Akehurst (*A Modern Introduction to*

*International Law*, 6th ed. 1987, pp. 260-61), D.W. Bowett (“The Interrelation of Theories of Intervention and Self-Defense”, in *Law and Civil War in the Modern World*, 1974, pp. 38, 45-46), Ian Brownlie (*International Law and the Use of Force*, 1963, pp. 340-42), S. Davidson (*Grenada: A Study in Politics and the Limits of International Law*, 1987, p. 120), Louis Henkin (*How Nations Behave: Foreign Policy*, 2nd ed. 1979, p. 145), P. Jessup (*A Modern Law of Nations: An Introduction*, 1968, pp. 169-70), and Wang Tieya (ed., *Guoji Fa (International Law)*, 1995, pp. 113-115), among others.

In his article on the NATO intervention, Simma rejected the assertion that a State or a group of States can have a right of humanitarian intervention without the Security Council’s authorization. Although he believed that there was only a “thin red line” between legality and NATO’s illegal use of force, he did not consider the current body of international law to include any unilateral humanitarian intervention exception (Bruno Simma, “NATO, the UN and the Use of Force: Legal Aspects”, 10 (1) *EJIL* (1999), [www.ejil.org/journal/Vol10/No1/ab1.html](http://www.ejil.org/journal/Vol10/No1/ab1.html)).

The question of the legality versus the illegality of so-called “humanitarian intervention” must be answered in light of the foregoing. Thus, if the Security Council determines that massive violations of human rights occurring within a country constitute a threat to the peace, and then calls for or authorizes an enforcement action to put an end to these violations, a “humanitarian intervention” by military means is permissible. In the absence of such authorization, military coercion employed to have the target state return to a respect for human rights constitutes a breach of Article 2(4) of the Charter. Further, as long as humanitarian crises do not transcend borders, as it were, and lead to armed attacks against other

states, recourse to Article 51 is not available. For instance, a mass exodus of refugees does not qualify as an armed attack. In the absence of any justification unequivocally provided by the Charter “the use of force could not be the appropriate method to monitor or ensure ... respect [for human rights]”...

... whether we regard the NATO threat employed in the Kosovo crisis as an *ersatz* Chapter VII measure, “humanitarian intervention”, or as a threat of collective countermeasures involving armed force, any attempt at legal justification will ultimately remain unsatisfactory.

As noted above, the validity of the alleged humanitarian intervention exception has even been questioned by the British Foreign Office when it observed the following in 1986 (57 B.Y.I.L. 614 (1986)):

[T]he overwhelming majority of contemporary legal opinion comes down against the existence of a right of humanitarian intervention, for three main reasons: first, the UN Charter and the corpus of modern international law do not seem to specifically incorporate such a right; secondly, State practice in the past two centuries, and especially since 1945, at best provides only a handful of genuine cases of humanitarian intervention, and, on most assessments, none at all; and finally, on prudential grounds, that the scope for abusing such a right argues strongly against its creation ... In essence, therefore, the case against making humanitarian intervention an exception to the principle of non-intervention is that its doubtful benefits would be heavily outweighed by its costs in terms of respect for international law.

Contemporary international law does not entirely forbid intervention. When a humanitarian crisis develops in a State or a region, the regional or the international community may offer humanitarian assistance in a neutral and impartial manner. For instance, for humanitarian purposes, a State may provide food and medical supplies to victims of serious human rights violations. In exceptional circumstances, the international community or its members may, by virtue of certain permissive rules, even have recourse to humanitarian intervention *short of the threat or use of force*, which would otherwise be illegal. In these special circumstances, States may resort to economic sanctions and other measures permissible under international law, against the perceived violators. The question remains who will be the judge of what constitutes a humanitarian crisis, what type of measures short of force may be taken to address a crisis, to what extent such measures may be employed, and by whom. Given the inherent subjectivity of individual States and potential for abuse, unilateral or multilateral resort to “humanitarian intervention”, even the threat or use of force, will not be desirable. The determination of (1) the existence of a serious humanitarian crisis, (2) the necessity for the international community to intervene and (3) the mode of intervention must be institutionalized and legitimized. Under the current framework of the international legal system, the UN Security Council would appear to be the only organ that can lawfully make such determinations.

In this connection, I have to agree with Thomas (*supra*):

... Can any state now bypass the UN Security Council and attack another state by invoking humanitarian considerations? NATO cannot unilaterally invoke the

1948 Genocide Convention, the 1948 Universal Declaration of Human Rights, and other humanitarian laws, and proceed to attack independent states. Only the Security Council can do so...

Likewise, Yoram Dinstein (*War, Aggression and Self-Defence*, 1988, pp. 88-89) convincingly wrote:

If violations of human rights are committed by a State in a manner persistent and systematic enough to be considered a threat to the peace of the international community, measures of collective security may be taken by the UN Security Council.... But no individual State is authorized to act unilaterally, in the domain of human rights or in any other sphere, as if it were the policeman of the world.

Armed “humanitarian” intervention, explicitly forbidden by both the principle of non-intervention and the principle of non-use of force, is the least justifiable. Unauthorized armed intervention is incompatible with the United Nations Charter and customary international law, under which a State or group of States is not allowed (1) to interfere in the internal or external affairs of other States, whether by peaceful or forceful means, or (2) to resort to the unilateral threat or use of force against another regardless of whether such military action is intended as or amounts to intervention.

The bottom line is clear: both within and outside context of the United Nations, no state may engage in so-called humanitarian intervention by resorting to the threat or use of force without the Security Council’s authorization. Such armed “humanitarian” intervention, absent the sanction of the Security

Council, will become legally possible only after the international community as a whole modifies the relevant provisions of the United Nations Charter and corresponding rules of customary international law, a change that is unlikely to take place any time soon.

#### A Loophole in Article 2(4)?

Another argument for unilateral or non-institutionalized humanitarian interventions. Was made by D'Amato more than a decade ago when he argued that the prohibition of the use of "force against the territorial integrity or political independence" of states was technical and did not incorporate all uses of force, and in particular did not include the concept of territorial inviolability, but instead was confined to "preventing the permanent loss of a portion of one's territory" (Anthony D'Amato, *International Law: Process and Prospect*, 1987, pp. 57-73). He recently added that the United Nations Charter "does not monopolize the use of transboundary military force". He gave a rather narrow interpretation of Article 2(4) of the Charter by maintaining that "[i]t prohibits the use of ... force (1) against the territorial integrity of a state, (2) against the political independence of a state, or (3) in any manner inconsistent with the purposes of the United Nations", and that it "therefore opens a small window for the use of force that falls outside of these three qualifications" (Anthony D'Amato, "International Law and Kosovo", *Translex* (Transnational Law Exchange), vol. 2, special supplement, May 1999, p. 1). D'Amato argues the NATO action was not taken against the "political independence" of Yugoslavia because there was "no attempt to take over its government"; nor could the action be said to be inconsistent with the purposes of the United Nations because one such purpose was

to promote and to encourage "respect for human rights"; therefore, as long as the goal of the action was not to separate Kosovo from Yugoslavia, *i.e.*, to violate the latter's "territorial integrity", the bombing would be legally justified (*id.*). D'Amato characterized such justification as "humanitarian intervention", arguing that "the NATO intervention appears to fall within these categories" of interventions that are "also consistent with Article 2(4) of the Charter", and "therefore can ... be justified under international law" (*id.*, p. 2). Paust echoed with D'Amato when he stated that Article 2(4) of the Charter "does not prohibit all threats or uses of armed force" and that "only three types of force are prohibited by Article 2(4)" (Jordan J. Paust, "NATO's Use of Force in Yugoslavia", *Translex Special Supplement*, May 1999, p. 2).

These arguments are hard to accept. The suggestion that the Charter does not monopolize the use of force is contrary to the letter and spirit of the Charter. The rules against intervention and aggression and other forms of the threat or use of force, save for the exceptional right of self-defense, had become firmly established by the time that the Charter was drafted. The Charter, by virtue of the agreement of the contracting parties, in fact creates and institutionalizes additional exceptions to the general rules of non-use of force and non-intervention. Thus, the Security Council, under Chapters VI, VII or VIII, is authorized to recommend or sanction non-military intervention measures *vis-à-vis* situations amounting to a threat to or breach of international peace, as an exception to Article 2(7). Or, under Article 42, the Council may decide upon coercive measures involving the use of force where severe breaches of the peace cannot be remedied by peaceful means – a legitimate departure from Article 2(4).

Dinstein long ago rejected such a narrow reading of Article 2(4) (Dinstein, *supra*, pp. 88-89):

... There is admittedly strong doctrinal support for the idea that forcible measures of “humanitarian intervention”, employed by Atlantica for the sake of compelling Patagonia to cease and desist from massive violations of international human rights, are permissible. In part, this approach amplifies the significance of the references in the Charter to the need to promote and encourage respect for human rights and fundamental freedoms. But, once more, the underlying assumption is that, because no change is sought in the territorial integrity of Patagonia and no challenge is posed to its political independence, the use of force by Atlantica in a humanitarian intervention does not come within the bounds of the prohibition in Article 2(4) [of the Charter].... However, the exponents of the putative right of humanitarian intervention minimize the link of nationality and uphold the protection of all individuals or groups of individuals (even against their own Government). Most commentators who favor humanitarian intervention studiously avoid the terminology of self-defence and insist that forcible measures on behalf of the victims of human rights violations are legitimate, not by virtue of compatibility with Article 51 (the exception clause) but as a result of being allowed in the first place by Article 2(4) (the general provision).

We believe that the adherents of humanitarian intervention misconstrue Article 2(4). *Nothing in the Charter substantiates the right of one State to use force against another*

*under the guise of ensuring the implementation of human rights.* If violations of human rights are committed by a State in a manner persistent and systematic enough to be considered a threat to the peace of the international community, measures of collective security may be taken by the UN Security Council.... But no individual State is authorized to act unilaterally, in the domain of human rights or in any other sphere, as if it were the policeman of the world [*italics added*].

“Political independence” does not simply refer to the maintenance of a State’s government. It is a term broad enough to cover a State’s *political* integrity, dignity and sovereignty to manage its own internal and external affairs free from any foreign interference. Such freedom is only subject to international law and other obligations to which it has consented by way of treaties or custom. Similarly, “territorial integrity” 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. Article 2(4) must be read as a whole and in the context of the entire Charter. The fundamental principles enunciated in the Charter are interrelated with one another, and each principle should be construed in reference to the other principles. Thus, “territorial integrity” cannot be read in isolation from “political independence” and the purposes of the United Nations, while “political independence” and “territorial integrity” cannot be properly understood without integrating the principles of sovereign equality, non-intervention and the peaceful settlement of disputes and other relevant provisions of the Charter, particularly those of Chapter VII.

Lauterpacht, in *Oppenheim’s International Law*, convincingly wrote with force that “territorial integrity,

especially where coupled with ‘political independence,’ is synonymous with territorial inviolability” (Lassa Oppenheim, *International Law*, 7th ed. by Lauterpacht, 1952, p. 154). What Article 2(4) and other provisions of Chapter II codify are principles of general international law, the exact contents of which do not depend upon or are not limited by the specific wording adopted in these provisions purporting to reflect such general principles. These general principles are also reflected in other relevant international instruments, including the Charter of the Organization of American States, which provides, *inter alia*, that “[n]o state ... has the right to intervene, directly or indirectly, ... in the internal or external affairs of any other State” and that “[t]he territory of a State is inviolable....” (OAS Charter, 30 Apr. 1948, 179 U.N.T.S. 3, arts. 18 & 20). Under Articles 27 and 28 of the Charter, a violation of the territorial inviolability of a State is considered to be an “act of aggression”, whether or not the intervention is an “armed attack” (*id.*, arts. 27 & 28). This and other evidence confirms that the fundamental principles of international law relating to non-intervention and the non-use of force, as embodied in the Charter, do not simply prohibit intervention and the threat or use of force aimed at dismembering a State or causing the permanent loss of a portion of its territory, but also proscribe any other form of intervention or use of force that otherwise offends a State’s sovereignty, international personality, dignity, territorial inviolability and political freedom from foreign interference.

The narrow interpretation of Article 2(4) is not only contrary to *lex lata*, but also dangerous and harmful to all nations. If we were to accept D’Amato’s proposition, then Mexican law enforcement officers would be entitled to come across the border into Texas to capture criminal suspects

without violating the “territorial integrity” of the United States, unless by doing so they designed to separate Texas from the federation. Similarly, any other country would be justified in flying over the territorial air space of the United States or sailing through its territorial sea so long as no attempt was made to alienate United States territory. Russia could launch a missile into the United States without violating Article 2(4) of the UN Charter. The Israeli raid on the Iraqi nuclear reactor in 1981 would be justified, even though the Security Council immediately condemned the action as a violation of Article 2(4) and general international law (U.N. Doc. S/RES/487 (1981), at 10, 75 Am. J. Int’l L. 724 (1981)). Indeed, for D’Amato and his supporters, NATO did not need to found its military intervention on humanitarian grounds so long as it could maintain that it acted neither to topple the Yugoslav government, nor to dismember Serbia or Yugoslavia, or to undermine with the purposes of the United Nations. D’Amato’s theory might also be utilized to justify international terrorist attacks and other forms of transboundary violence that even power states should fear enough to think twice before narrowing the scope of Article 2(4) of the Charter.

## Conclusions

The principles of non-intervention and respect for State sovereignty are so fundamental to the maintenance of peace and justice and so inseparable from one another that they constitute *jus cogens* principles both as a matter of treaty and customary international law. As a matter of treaty law, these principles prevail over any other treaty in case of conflict (Article 103 of the Charter). As a matter of *jus cogens* customary law, these principles may not be varied or derogated

from, and can only be replaced with newly created norms that have the same character.

The “humanitarian” intervention doctrine, although seemingly attractive, cannot be sustained as an exception to the non-intervention principle. International law does not recognize this alleged exception as such. It is true that serious violations of fundamental human rights should be condemned and may be actionable under certain human rights treaties and binding Security Council resolutions. Nevertheless, nothing in the Charter or general international law suggests that the fundamental principles of state sovereignty, non-intervention and the non-use of force may be discarded merely because of alleged human rights problems here and there. Violations of international law in one form do not justify violations in another, and particularly not violations of *jus cogens* rules such as the non-intervention principle and its corollaries. No State or group of States has the right to intervene unilaterally in the internal or external affairs of any other State regardless of the form of intervention. Unilateral or multilateral armed intervention, without the sanction of the Security Council, is especially impermissible, even when motivated by purely humanitarian motives. The Security Council is the only organ under our *lex lata* that can make “humanitarian” intervention an *ad hoc* exception.

Similarly, the pro-intervention argument based on a narrow reading of Article 2(4) of the Charter is without merit, because it wrongly interprets each sub-paragraph in isolation from the others, and the entire Article 2(4) in isolation from other relevant provisions of the Charter and the underlying customary principles of international law which altogether provide for the inviolability of a state’s sovereignty,

inviolability of its independence, inviolability of its territory, and security from foreign intervention in its domestic affairs.

There are appropriate channels under existing international law through which the international community can look into, and even intervene in, such crises. These channels include, for example, taking necessary steps by and through the Security Council, resorting to mechanisms provided for in certain human rights treaties, or appealing to the International Court of Justice or other international judicial or arbitral tribunals. In fact, the United Nations Security Council, in dealing with humanitarian crises in such countries as Iraq, Somalia, Rwanda, and most recently in East Timor, has specifically authorized measures that amount to collective humanitarian intervention, including armed interventions in some cases. At any rate, any intervention in a domestic humanitarian crisis must respect existing rules of international law and applicable treaty provisions. In other words, unilateral humanitarian intervention may not violate a state’s sovereignty or territorial integrity, because only the Security Council can approve international interventions.

NATO’s military action against Yugoslavia should not become a precedent in international law. A new rule permitting unilateral armed or unarmed humanitarian intervention would be useless to the powerless. It would only benefit powerful and dominant nations which would almost surely abuse their positions because of their history, habit and philosophy. The international community, especially the third world, should firmly oppose and resist any attempt to legitimate unilateral humanitarian intervention, particularly intervention involving the threat or use of force. This is not simply a human rights issue, but a major matter of principle

concerning the sovereign rights, vital interests and future fate of most states and their people. The existing international legal system already contains many unjust and unfair elements and institutions that certainly need to be improved and reformed to secure greater fairness, justice, equality and democracy for all members of the entire international community, especially developing States and their people. Nevertheless, before such reforms and improvements can happen, all States must follow existing international law despite its defects. An international legal system on the basis of rule of law, sovereign equality, non-intervention and the non-use of force, while inadequate, works on the whole more favorably towards the interests of the international community at large than would a chaotic and lawless system. The *lex lata* of international law embodies at least one truth: *might DOES NOT and should not be allowed to make right.*

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## THERE IS NO NORM OF INTERVENTION OR NON-INTERVENTION IN INTERNATIONAL LAW

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 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 statist 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. Certainly 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 dignity 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 34 Vanderbilt J. Transn. L. 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 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 911 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 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 "dignity" 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 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 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/>).

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## **INTERVENTION, IMPERIALISM AND KANT'S CATEGORICAL IMPERATIVE**

Professor Jianming Shen with vigor and eloquence has advocated a perspective on the place in international law of cross-national interventions. It is a position that, during the last decade, has become less fashionable in our trendy profession. It is nonetheless a perspective that must be paid heed to, if only because the views that he expresses are bound to reassert the suzerainty that they enjoyed in our discipline as the current miasma in international law of dictates on the basis of the special role of an “indispensable superpower” (or of an indispensable civilization) wears off. I cannot equal Professor Shen’s energy and erudition, so I shall use the opportunity afforded by this response to proffer some elementary thoughts why international law, as it emerges from this transitional phase, should not too readily disregard the prohibition on the use of force by one state or group of states to right wrongs that are taking place entirely within the acknowledged political boundaries of another state.

While the views that I shall put forward below may ultimately buttress Professor Shen’s conclusions, I want to begin by disagreeing with him on a fundamental point of procedure. To the extent that Professor Shen is contending that there is something static and inflexible about the way international law treats or should treat the principle of nonintervention, I’m in disagreement with him. The principle of nonintervention, it seems to me, has no more claim to being sacrosanct than a host of other principles in international law. Certainly, pedigree and history alone do not mandate the inviolability of a principle, particularly if these considerations come up against reason and practice. Indeed, Professor Shen himself notes that nonintervention is but one of seven pillars on which the current

public international legal order rests. The issue is not nonintervention simpliciter (collective or otherwise) versus humanitarianism, but rather, how at any given time, international law accommodates one to the other. The consequence is that international law is (like all law) dynamic. The accepted structural foundations of international law – namely that it arises just as readily from the interpretive intellect of jurists and expedient practices of diplomats and soldiers as from the reasoned commitments of statesmen and nation states – belies the notion of any immutable principle of international law. The particular province of international law scholars is the articulation of principles that may be deployed in gauging what essentially is a balancing act. The most that we can hope (and I shall argue, insist on) is that the yardsticks that we provide are not simply contingent on serving a narrowly defined national political interest. Viewed as a contribution to this process, Professor Shen’s obvious suggestion that the pendulum has swung too far away from the norm of nonintervention is a valuable contribution to an ongoing debate.

As we marched through the 1990s, it was obvious that the “international community” (or at least those who believe in the existence of such a community) became less and less reticent in approving of the use of coercion (economic as well as military) as a policy instrument. Whether this in fact reflected an increase in the actual application of force in interstate relations (my own view), or whether there was merely an increased appreciation or perception of the use of force as a policy tool, is, for the purposes of what I want to say here, not terribly significant. The point is that far from receiving outright condemnation or only mooted defense, the use of force came to be applauded by many international law

scholars as furthering various legal principles – usually framed as a “right.” “Humanitarian intervention” in defense of “democratic rights,” “the right to self-determination,” or “human rights” became broadly accepted in the West not as an occasional unfortunate aberration from international legal norms, but as integral to the post-Soviet international legal order. If the United Nations Security Council – or more accurately its five permanent members -- could be convinced to support coercion (as in the imposition of sanctions on Libya, or the expulsion of Iraqi forces from Kuwait), so-much the better. However, even in the absence of such support (as in the maintenance of “no fly zones” in Iraq, or of the NATO war with Serbia), the West, in defense of fundamental rights, should go-it-alone.

In one sense there’s something romantically glorious about the selflessness of 22 year-old American and British fighter pilots risking their lives to preserve the national aspirations of Mohammedan Shi’as, Kurds and Kosovars, or of Swiss prosecutors and American human rights lawyers affirming in international tribunals the human rights and personal dignity of Rwandan Tutsis and Bosnian women. But the story is not about the individual acts and commitments of these persons (nor of any single one of us, for that matter), notwithstanding the standard subliminal propaganda of juxtaposing against these acts and commitments, the contrasting devilish conduct of others such as Saddam Hussein or Slobodan Milosevic. Those of us, who reflexively are not turned-off by “postcolonial” scholarship (or those of us who, even if we are, at least take the time to read the history of the “European expansion”) find much of this glorification of the individual Western act over the barbarism of the non-Westerner all too familiar. The story that I’d rather tell to (or

hear from) an international law scholar, is (or should be) about the principles by which interests, ideas and institutions are made accountable to a community that transcends any single nation state.

As Professor Shen persuasively demonstrates, the new scholarship of “humanitarian intervention” sits uncomfortably on the shoulders of prior scholarship on nonintervention. The principle of “human rights,” if neutrally applied, should provide, one would think, at least the veneer of legitimation for humanitarian intervention. But the apparently one-way flow of the application of the principle, its exception-ridden definition, and the outright refusal to invoke it when applied to certain nationalities undermines this argument. The cursory dismissal by the Hague-based Yugoslavia War Crimes Tribunal Prosecutor of charges of war crimes against those NATO policy-makers who felt it perfectly acceptable to drop depleted-Uranium loaded bombs from three and more miles above their targets on civilian-loaded trains crossing bridges in densely populated cities (even as she doggedly insists that international law disenfranchises Serbians of the right to try Milosevic in their own court), or the equally dismissive treatment by many opinion-mongers in the West of recent revelations of atrocities by a respected former Senator in the U.S. and a decorated General of France, along with the differential approach by such countries as Belgium, Italy and Canada in considering accusations of war crimes levied against their nationals (even as they would have us applaud the beacons of light they shine on the misdeeds of African nuns and politicians), indicate that the interest-based taint on the deployment of the human rights doctrine is not exclusive to hypocritical politicians, but is an integral component of purportedly law-driven practice. Of course, theorizing and practicing law requires us to parse texts

and distinguish among related and unrelated facts and situations. But it is no longer tenable to maintain that the new human rights doctrine is an equal opportunity humbler of the powerful and mighty.

The one foundational concept in public international law that rivals the idea of human rights, of course, is “the S word,” sovereignty. Not surprisingly, proponents of the primacy of human rights appear to believe that the security of human rights lies in disparaging sovereignty. There are undoubtedly problems with the idea of sovereignty, not the least of which is that given its interdisciplinary usage, it does embody amorphous conceptions. As a legal proposition, however, the concept of sovereignty is reasonably well understood, and, more importantly, it is essential to the functioning of international law – even for the human rights practitioner. At core, sovereignty as a juridical notion embodies the truism that however compassionate or selfless the outsider may be, the best form of accountability is that which originates from within. Incidentally, this is a belief that is also at the heart of liberal democratic governance. Sovereignty, as a legal proposition, serves essentially to define the boundaries of the outsider and the insider. There’s nothing fixed about those boundaries; indeed, frequently, they are porous. National territorial boundaries have become the modern signifiers of the applicable borderlines, but territories have changed constantly, and increasingly new forms of communities having only minimal connection with physical territoriality are emerging. From the perspective of sovereignty, what is crucial is that members of such communities be allowed to experiment and figure out how best to cohabit with each other. The notion of rules from without imposed by an overarching dictatorship that knows best is surely not what those who argue for the

abandonment of sovereignty would not readily subscribe to. Yet, they never consider this risk. What explains the omission? Can it possibly be because those who are currently dictating the rules are confident that they will never be dictated to?

It has become now fashionable in international legal scholarship to invoke Kant’s writing on “perpetual Peace” as justification for much of current imperial legal thinking. Only “democratic societies,” we’re told, have a legitimate claim to deciding for themselves those rules by which they ought to be governed under international law. Putting aside whether this is an accurate and faithful rendition of Kant’s own views, it is worth reminding ourselves that there is an even better known Kantian proposition, the so-called “categorical imperative.” Paraphrased, in mandating rules of behavior, we ought to ask if the rules are such as we would apply, were positions reversed. Ultimately, it is the deficiency in the transference of our imaginative capacities that should give us pause in departing too hastily from the doctrine of nonintervention.

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## **THE NON-INTERVENTION PRINCIPLE AND INTERNATIONAL HUMANITARIAN INTERVENTIONS**

For nearly as long as the state system has been in existence, human rights have limited the authority of those states. Regrettably, effective enforcement of those norms does not yet rival their peremptory status in international law.

Consequently, humanitarian intervention – whether undertaken multilaterally when possible or unilaterally when necessary – remains a necessary enforcement mechanism for the protection of human rights. In his article, Professor Shen rejects unilateral action as a mechanism for enforcing human rights whether that action involves the use of force or not. He argues that any military, economic, or political intervention, for humanitarian or other purposes, can only be considered legitimate when approved by the international community through the United Nations Security Council. Shen's commitment to the sanctity of political community and the community's right to be free from intervention underlie his position. The right to govern the community to the exclusion of others, however, constitutes only one aspect of sovereignty. The concept of sovereignty contains inherent limitations that justify, and even require, humanitarian intervention to check gross violations of human rights.

The idea of sovereignty encompasses both rights and responsibilities. A government cannot accept sovereign rights without accepting the attendant responsibilities to those citizens who comprise the community. Along with the right to exercise control over a territory and the individuals belonging to it comes the responsibility to respect the fundamental rights of those individuals. If a government exercises political authority that derives from the rights of its citizens, it cannot

then disregard those same rights, on which its own authority rests, by committing gross violations of human rights. Political theorists have long recognized the connection between sovereign rights and responsibilities through the idea of the social contract. International law is beginning to incorporate this recognition as well through concepts such as legitimacy.

Increasingly, international law acknowledges that governments derive their power from the consent of those they govern (Thomas M. Franck, "The Emerging Right to Democratic Governance," 86 Am. J. Int'l. L. 46, 46 (1992)). The idea that sovereign power flows not from the exercise of force, but from the rights of the citizens who comprise the state, is a principle that states honor as much in its breach as in compliance. But even as dictators and despots simulate trappings of democracy through fixed elections or limited consultative structures, they underscore the power of governing through popular consent. Franck argues that citizen consent has attained the status of a rule to which members of the international community must conform (Id.). While the existence of holdouts and the occurrence of backsliding in new democracies casts some doubt on the consensus surrounding this norm, it is undeniable that it influences rulers to an unprecedented degree. The growing importance of governing through popular consent recognizes citizen consent as the origin of political sovereignty.

Because a sovereign power derives its authority from the rights of those comprising the community, it is bound to respect those rights and the limitations they place on sovereign power. The most fundamental rights include the right to life and to security of person, as well as prohibitions on practices such as slavery, torture, and genocide that follow naturally

from those individual rights. Several UN and regional treaties enshrine these fundamental rights. Like non-intervention, this relatively short list of fundamental rights has attained the status of *jus cogens*. The right to life and to security of person is protected in the Universal Declaration of Human Rights (Art. 3), the International Covenant on Civil and Political Rights (Art. 9), as well as regional documents such as the European Convention for the Protection of Human Rights and Fundamental Freedoms (Art. 5) and the American Convention of Human Rights (Art. 7). The international community has prohibited slavery in the Universal Declaration (Art. 4), the ICCPR (Art. 8), and regional human rights treaties. The Universal Declaration (Art. 5), the ICCPR (Art. 7), and the Convention against Torture and other Cruel, Inhuman or Degrading Punishment prohibit torture. Genocide has been outlawed by the Convention on the Prevention and Punishment of the Crime of Genocide, and this prohibition echoes through other human rights documents that prohibit genocide and protect the rights of groups to exist as such. Any community that claims to be a sovereign state asserts the right to sovereignty under international law. If the community makes such a legal claim, it must accept all of international law, including the peremptory rules that require respect for basic human rights such as these (Ellery Stowell, *Intervention in International Law* 59 (1921)). A sovereign community claiming independence under international law owes its fellow states respect for these fundamental legal duties.

Without respecting these fundamental rights, a sovereign cannot claim to exercise legitimate power even within the territory it controls. As the sovereign derives its authority from the rights of citizens, a sovereign that does not recognize the rights from which its power derives effectively undermines its

own legitimate authority. Where a state commits gross violations of human rights, the idea of a political community deserving of non-intervention seems ludicrous (Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* 101 (1977)). By contrast, where a state respects fundamental human rights, we should presume that community to be self-determining and entitled to the respect demonstrated by non-intervention. However, when a state violates those rights by committing genocide or other gross violations, the community does nothing to merit such respect and other states may legitimately intervene to protect members of the community who cannot defend themselves. Given the status of human rights as peremptory norms and as the basis for political authority, a dictator can no longer oppose sovereignty to the legitimate concern expressed by other members of the international community or the action taken to address egregious violations of human rights standards.

For these reasons, humanitarian intervention has historically enjoyed great support from publicists. While Shen has cited an impressive list of publicists opposed to humanitarian intervention, an equal number have advocated forcible intervention in cases of severe violations. For instance, Vattel writes that “if the prince, by violating the fundamental laws, gives his subjects a legal right to resist him, - if tyranny, becoming insupportable, obliges the nation to rise in their own defence, - every foreign power has a right to succor an oppressed people who implore their assistance.” (Emmerich de Vattel, *The Law of Nations* 155 (Joseph Chitty trans., 1883)). E.C. Stowell similarly advocated a right to humanitarian intervention as an enforcement mechanism (Ellery Stowell, *Intervention in International Law* 52-3(1921)).

Even Ian Brownlie, who himself opposes humanitarian intervention, acknowledges that the doctrine once enjoyed universal support (Ian Brownlie, *International Law and the Use of Force by States* 338 (1963)). Lauterpacht's Oppenheim, also cited by Shen, does allow for humanitarian intervention where a state commits grave human rights violations. While Lauterpacht concurs that a state can treat its own nationals according to "discretion," other states may intervene when that state treats its nationals "in such a way as to deny their fundamental human rights and to shock the conscience of mankind" (L. Oppenheim, *International Law: A Treatise* 312 (ed. H. Lauterpacht 1955)). This considerable list of publicists demonstrates that humanitarian intervention has enjoyed widespread support in the pre-Charter period.

Shen correctly regards the founding of the United Nations as the dawn of a new era in which the UN Charter set priorities for the international community and its legal system. Non-intervention does indeed form a cornerstone of the Charter system. However, the non-intervention principle is not an inviolable absolute. The survival of the right to intervene for humanitarian purposes, which existed prior to the creation of the UN and its Charter, must be read in light of the major purposes of this document. The UN Charter seeks to achieve both international peace and respect for human rights. These aims figure prominently in the Charter's statement of the UN's purposes. Member States intended for the United Nations "[t]o achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion." (U.N. Charter, art 1(3)). Other provisions of the Charter state that the U.N. shall

promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion" (U.N. Charter, art 55(c)). The prohibition on the use of force is very narrowly tailored. Article 2(4) of the Charter prohibits the use of force against another Member State's political independence or territorial integrity or "in any other manner inconsistent with the purposes of the United Nations." In light of the protection of human rights as a major purpose of the United Nations, it seems likely that the Charter's drafters intended for humanitarian intervention to survive the Article 2(4) prohibition against the use of force that is contrary to the purposes of the organization. Humanitarian intervention is the use of force in support of the purposes of the United Nations.

Among more contemporary publicists, many concur that Article 2(4) of the U.N. Charter does not absolutely prohibit the use of force, particularly in defense of human rights. Philip Jessup, taking the terms of Article 2(4) on their face, asserts that the Charter does not prohibit the use of force that does not threaten the territorial integrity or political independence of a state and where that use of force does not conflict with the purposes of the U.N. (Philip C. Jessup, *A Modern Law of Nations* 162-3 (1968)). Richard Lillich also advocated a limited right to intervene for humanitarian purposes. Although the UN Charter protects human rights, it does not provide a mechanism for accomplishing this end (Richard B. Lillich, "Forcible Self-Help by States to Protect Human Rights," 53 *Iowa L.R.* 325 (1976)).

In addition to the issues of Article 2(4), Shen raises the issue of Article 2(7) of the Charter and its limitation on the UN's right to inquire into Member States' domestic affairs.

While this provision seems to expand the scope of states' domestic jurisdiction and their ability to preclude international scrutiny, this provision must be read in light of the Charter's other provisions. In particular, the above-mentioned articles regarding the protection of human rights removes those issues from the scope of domestic jurisdiction. In short, because UN Member States have pledged to protect human rights, they cannot subsequently claim that human rights issues are solely, or even primarily, within their domestic jurisdiction.

If humanitarian intervention is justifiable, then who is authorized to intervene? Clearly the UN Security Council can, as Shen concurs, exercise its Chapter VII powers and intervene or authorize intervention by others. Since the end of the Cold War, the Security Council has authorized a number of peacekeeping operations with humanitarian dimensions. For example United Nations operations in Somalia, Cambodia, and the former Yugoslavia included dimensions for the protection of human rights. However, we have no guarantees that the Security Council will remain free of deadlock like that characteristic of the Cold War era. As long as the five permanent members of the Security Council retain their veto power, potential for deadlock threatens to undermine the United Nations' newfound effectiveness in addressing human rights violations.

In such instances, other actors must be willing and ready to undertake interventions that the United Nations cannot. Regional organizations, ad hoc coalitions of states, and single states may undertake humanitarian intervention where the United Nations is unable or unwilling to act. Clearly, UN or UN-authorized intervention will be preferable to unilateral action by states. Where an intervention has the approval of the

Security Council, it bears a stamp of legitimacy. Individual states, coalitions, and regional organizations are more likely to act based on mixed motives. However, the presence of a self-serving motivation alongside a humanitarian motivation does not necessarily undermine an intervention that achieves a positive outcome. India's intervention in East Pakistan in 1971 illustrates the principle that self-interest does not necessarily defeat a humanitarian purpose. The Pakistani army brutally repressed a secessionist movement in East Pakistan. India's invasion, which drove Pakistan out of the territory that would become Bangladesh, was clearly motivated by its continuing rivalry with Pakistan and concern over Bengali refugees flowing into India as well as a genuine horror at the abuses of the Pakistani army.

While Professor Shen is correct in raising the issue of abuse, it is not clear that cases where an actor intervenes with mixed motives, such as India's invasion of East Pakistan, constitute abuses that should be condemned. Indeed without such self-interested motivations, states may never act on humanitarian motivations alone. The international community can evaluate these interventions on a case-by-case basis to determine whether an intervention is humanitarian action undertaken with mixed motivations or an attempt at domination in a humanitarian guise. Given a choice between action by a unilateral actor and no action at all, unilateral humanitarian intervention will better protect the human rights of those populations that cannot defend themselves.

Ideally, the UN Security Council will continue to function free of deadlock and will authorize the use of force against gross violations of human rights. However, if conflict among permanent members of that body paralyzes the Security

Council, legal and moral considerations support the unilateral use of force to achieve a humanitarian purpose. When left up to regional organizations or unilateral actors, humanitarian intervention will become even more sporadic and arbitrary than it is when the Security Council acts. The lack of consistent standards and implementation raise the specter of abuse. Still, some enforcement of human rights norms is preferable to no enforcement at all.

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## **Humanitarian Intervention: A Response**

Professor Shen presents the case that humanitarian intervention, violates international law unless the Security Council has authorized it. I will argue that humanitarian intervention is not as clearly illegal as Professor Shen claims, so that limited intervention may be both appropriate and legal under some circumstances. This includes not only interventions that do not use force, but also the far more difficult cases when force is used, but justified on humanitarian grounds.

Professor Shen bases his argument, in part, on his belief that the NATO intervention in Kosovo exacerbated an already difficult situation. Whether NATO's actions in Kosovo made a bad situation worse or prevented a far greater human tragedy will be debated for years. Nonetheless, the wisdom of a particular intervention and the tactics employed are not relevant to our analysis of the legality of the principle of humanitarian intervention. There is no guarantee that an intervention authorized by the Security Council, which Professor Shen agrees would be legal, would be better managed or achieve better results than would an intervention by a single state or group of states. Accordingly, whether one views the results of the Kosovo intervention as a success or a disaster has no bearing on the legality of the intervention.

### **Interventions Not Involving the Use of Force**

Professor Shen argues that humanitarian interventions violate the principle of non-intervention in the domestic affairs of states that he contends is a *jus cogens* principle of customary international law. Similarly, article 2 (7) of the UN Charter

also prevents the UN from intervening in matters that are essentially within the domestic jurisdiction of any state.

There can be little doubt that customary international law includes at least a limited rule against interference in a state's domestic affairs, although it is debatable whether it has reached the level of *jus cogens*. But to concede a general principle of non-intervention does not entail the conclusion that humanitarian intervention is always illegal. The scope of the non-intervention principle must be considered. The critical issue here is what is included within a state's domestic jurisdiction. This is where Shen goes wrong.

The extent of a state's domestic jurisdiction (and the related principle of sovereignty) as recognized by customary international law is in flux. Since World War II, international law has increasingly recognized limitations on national sovereignty with respect to human rights. The prohibition on some human rights violations, such as genocide, has reached *jus cogens* status. A state violating human rights in contravention of international law is acting outside of its legal authority. As the ICJ stated in *Nicaragua v. United States*, "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." (para. 205). Consequently, a state acting in violation of international humanitarian law cannot be said to be exercising its legitimate domestic jurisdiction. As a result, the rule non-intervention would not apply.

Moreover, states may consent to interventions by entering into human rights conventions. For example, the Genocide Convention binds states to both prevent and punish

genocide. Since prevention of genocide may require intervention, by becoming parties to the Convention, states implicitly consent to interventions if necessary to prevent genocide. Under some circumstances, e.g., the breakup of Yugoslavia, intervention may also be justified by recognizing a region as an independent state and then asserting the right to collective self-defense under Article 51.

Professor Shen asserts that interventions will be legal only if sufficient consensus is obtained to amend the Charter and the corresponding rules of international law. It would be nice if it were possible to amend the charter so easily or to legislate changes in customary international law. However, amending the Charter is extremely difficult as it requires ratification of two-thirds of the UN's members including all five permanent members of the Council. As a result, this is not a viable possibility even if there were overwhelming agreement that an amendment is needed. Customary international law cannot be changed by mere resolutions of the General Assembly (which are not binding), but only by changes in custom. The increasing use of humanitarian intervention may indicate that such a change is underway. The difficulty of determining the state of customary international law highlights the need for a more systematic method for enacting and amending it.

### **Use of Force**

The legality of the use of force for humanitarian reasons is far more problematic. Article 2(4) of the Charter provides that "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 other

manner inconsistent with the Purposes of the United Nations." The Charter contemplates that force will be used only when authorized by the Security Council under Chapter VII. The problem is that the UN has seldom functioned as intended. The Security Council was intended to be a strong body in which the major powers would unite to ensure peace. However, the veto has largely prevented the Council from taking the necessary actions. Even when the Security Council does act, too often it acts too late to prevent serious harm. Like the US Constitution, the Charter may be interpreted either strictly or liberally. I favor a liberal construction that allows the UN to adapt to changes in the world order and to address matters and problems that were not anticipated when the Charter was drafted.

Professor Shen makes a strong case that the terms "territorial integrity" and "political independence" of Article 2(4) should be interpreted broadly to mean the inviolability of a state. This interpretation may be consistent with the original intent of the Charter. However, it is not the only possible interpretation. The alternative interpretation that "political independence" refers only to maintenance of the government and "territorial integrity" refers only to breaking up or annexing the territory of another state is also reasonable. Given the magnitude of many humanitarian crises and the frequent inability of the Security Council to take prompt, effective action, it is imperative to construe Article 2(4) to permit limited humanitarian intervention. Since force would be used against states that are themselves committing serious violations of international humanitarian law, the equities favor allowing intervention. This interpretation would not, as Professor Shen suggests, allow Russia to launch a missile into the United States or legalize Israel's raid on the Iraqi nuclear reactor. Article 2(4) also prohibits the use of force in any

manner inconsistent with the purposes of the United Nations. These uses of force would be inconsistent with the purposes of the UN, while force employed for humanitarian purposes would not.

Moreover, the apparent monopoly that the Charter gives the Security Council over the use of force was cast aside early in the UN's history. In an early instance of a liberal interpretation of the Charter, the Uniting for Peace Resolution of 1950 allowed the General Assembly to act when the Security Council was paralyzed by the veto. Thus, there is a long history of interpreting the Charter in a liberal manner when necessary to achieve the intended goals of the UN. Paralysis in the Security Council often prevents the prompt and effective response that humanitarian crises demand. So long as the Council cannot prevent humanitarian crises, it is reasonable to interpret the Charter to permit states to intervene when necessary. While the Uniting for Peace Resolution constitutes precedent that some use of force might be legal even if it is not authorized by the Security Council, there must certainly be some limits on this use of force.

Professor Shen is correct that intervention is an asymmetrical right. It will mostly be employed by the powerful states against weaker states, and will seldom be employed against strong states, irrespective of the magnitude of their human rights violations. But, this inequality is a fact of international affairs. All states are not equal. The five permanent members of the Security Council have a special status that for some respects places them above all other states. The military and economic power of other major states makes them less likely to be the subject of enforcement proceedings or other interventions. This inequality, while regrettable, does

not require that interventions should be rejected when they will be useful. The inability to protect human rights in all nations does not imply that efforts should not be made to protect rights where those efforts might be successful. Moreover, occasionally small states have engaged in humanitarian interventions. The intervention of Vietnam to prevent mass murder in Cambodia is one example. While the humanitarian crisis in Cambodia was enormous, that intervention was condemned, in large part because of fear that Vietnam had territorial ambitions. The difference in the response to the Kosovo and Cambodian interventions highlights the need for some standards that would clarify when and how interventions should be conducted.

Professor Shen is also correct that an unfettered right of humanitarian intervention is subject to a substantial risk of abuse. Without any international standards or oversight there is a danger that a claim of a humanitarian motive could be an excuse to justify actions taken primarily to benefit the "intervenor." Purely humanitarian motives are likely to be rare. Most interventions will have a mixed motive that couples an altruistic motive with a measure of self-interest. Certainly, when US Presidents declare that they will deploy US forces only when important national interests are at stake, ensuing interventions will always be suspect. Nonetheless, most recent interventions have had a clear humanitarian motive. For example, NATO's intervention in Kosovo was clearly intended primarily to protect the Kosovars from possible genocide rather than to benefit the NATO countries. A system of international authorization and oversight is desirable as it would reduce the prospect of abuse. A scheme modeled after the Uniting for Peace Resolution is one possibility, provided it would permit timely and effective action.

In an ideal world, the Security Council would take effective, timely action when faced with pending human disasters. However, its too frequent failure to do so requires that interventions be permitted outside of the auspices of the Security Council. Ideally, there should be some system of international oversight that can set appropriate standards and ensure that interventions are appropriate and proportionate to the harm they seek to prevent. However, until an effective system of international oversight can be implemented, it necessary and appropriate for individual states or groups of states to take reasonable actions when faced with substantial violations of international humanitarian law.

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## THE LEGITIMACY OF HUMANITARIAN INTERVENTION UNDER INTERNATIONAL LAW

Humanitarian intervention has always played an important part in international relations. Such interventions occur for two reasons: first, they are just, and second, because they are inevitable. On the question of justice, even the most extreme apostle of sovereignty, Jean Bodin, conceded that one sovereign should intervene to punish another for oppressing human goods, honor, or life – otherwise there would be no justification for sovereignty. (Jean Bodin, *Six livres de la République* (1583 edition) Book II, ch. 5, p. 609). The second reason is necessity. Some level of interference by governments or individuals to prevent human rights abuses must be legitimate under international law, for the same reason that some interference with others must always be legitimate under any legal system: because it cannot be totally avoided. Any action by a state, individual, group of states or group of individuals will have an effect on others, and to that extent interfere with them. The question for lawyers and philosophers cannot be whether intervention is legitimate (because a total prohibition would preclude all action) but rather when intervention is legitimate and to what extent. Law sets the limits on how much one person, group of persons, state or group of states may intervene to influence others, and establishes procedures for official interventions (enforcement) to prevent improper interventions (delicts or crimes). Some level of interference must be tolerated because all action is intervention, and total inaction would not be practical.

Philosophers and lawyers such as Jianming Shen who have sought to limit “intervention” by one person or state in the “internal affairs” of another are not engaged so much in

promoting a prohibition as in drawing a line – the line between what will count as forbidden “intervention” and what will not. Those actions of a state that we view as “internal” (or “private”, when speaking of individuals) will be protected from “intervention” or outside scrutiny. Those that we choose to count as “external” (or “public”) will not. When the Charter of the United Nations discourages United Nations intervention “in matters which are essentially within the domestic jurisdiction of any State” (Art. 2.7), the protected zone extends only so far as our conception of the state’s “domestic jurisdiction”, however we choose to define it.

Theories of law provide definitions for terms such as “intervention” and “domestic jurisdiction” that practice and treaties leave vague. Like all law, international law claims to deserve obedience, which (like all law) international law actually deserves only to the extent that it is just, or at least more just than other available alternatives. Most legal systems have a legislature to make laws, courts to interpret them, and systems of enforcement to make laws bind. But international law finds its content primarily in considering what *would be* just, and its obedience primarily in convincing states that international law *is* just, and therefore ought to be obeyed. Drawing the line between protected “domestic jurisdiction” and unprotected “human rights violations” depends largely on what would be just, and which line captures justice best.

### Sovereignty

The “sovereignty” of states, like the “liberty” of citizens is the bundle of rights that all states deserve as members of the international community. The United Nations Charter (to give one recent example) begins with the fundamental principle of

“sovereign equality” among its members (Art. 2.1). This implies that members shall settle their disputes by “peaceful means” (in accordance with justice) (Art. 2.3) and refrain from “the threat or use of force against the territorial integrity or political independence of any State” (Art. 2.4). Later United Nations documents such as the 1970 General Assembly Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States reaffirmed the basic importance of the sovereign equality of states, based on the principle of “equal rights and self-determination of peoples”, as established by the Charter (Art. 1.2) and customary international law.

The Declaration on Friendly Relations illustrates the process by which governments justify their power under international law, by connecting their national “sovereignty” to indisputable moral truths. The Preamble to the Charter of the United Nations declared the “equal rights of men and women and of nations large and small.” All men and women deserve equal rights, and therefore so do the nations into which they have associated themselves. From this it follows that the “peoples” of these nations should develop mutually “friendly relations”, on the basis of their “equal rights and self-determination”. (U.N. Charter Art. 1.2). Peoples deserve equal rights because people deserve equal rights. The Declaration on Friendly Relations “bear[s] in mind” the values of “freedom, equality, justice, ... respect for fundamental human rights”, and the “rule of law” (Preamble) while asserting a norm of non-intervention “in the affairs of any other state” (First “Convinced” clause). This juxtaposition is designed to imply that the two principles are inseparable.

The Declaration on Friendly Relations goes on to denounce any form of “coercion” aimed at the “political independence or territorial integrity” of any state, (Third “Recalling” clause) as

being (by implication) contrary to the state’s “sovereign equality” (“Reaffirming” clause). The Declaration strengthens the Charter’s prohibition on the “use of force” by forbidding “political” or “economic” coercion. States should not be “coerced”, because their peoples deserve “freedom and independence” (Declaration on Friendly Relations, explaining the First Principle). The Declaration on Friendly Relations properly criticizes “the subjection of peoples to alien subjugation, domination and exploitation” (Second “Convinced” clause), while prohibiting intervention “directly or indirectly, for any reason whatever, in the internal or external affairs of any other State”. (explaining the Third Principle)

### **Non-Intervention**

The Declaration of Friendly Relations provides a useful starting point for discussing the international norm against intervention, because the Declaration on Friendly Relations constructs the most extreme possible elaboration of the non-intervention norm. The Declaration prohibits even “indirect” intervention “for any reason whatever” in any “affairs” of state. Yet in order to justify this standard, and to secure compliance from states, even the Declaration on Friendly Relations must relate non-intervention to “liberty”, to “justice”, and to “fundamental human rights”. The Declaration must condemn “subjugation, domination and exploitation” and maintain the “equal rights and self-determination of peoples”. These qualifications help to clarify what will count as “intervention” and what are properly a state’s own internal “affairs” for the purposes of international law. Violations of liberty, justice and fundamental human rights, or other subjugation, domination and exploitation of a people, or the denial of the rule of law or

of a people's right to self-determination, cannot fall within the zone of a government's private affairs, which are protected against inter-state "intervention", because sovereignty and self-determination themselves cannot be justified as law, without reference to the universal principles of non-domination and fundamental human rights.

The Institute of International Law recognized the borders of states' protected "affairs" and limits of their inviolable "domestic jurisdiction" in its resolution on "La protection des droits de l'homme et le principe de non-intervention dans les affaires intérieures des Etats", adopted on the thirteenth of September, 1989 at Santiago de Compostela. The Institute considered that human rights, having been given international protection in the Charter of the United Nations and other charters and constituent instruments of international organizations, and commonly understood as including the rights described in the United Nations General Assembly's Universal Declaration of Human Rights of December 10, 1948, are therefore legally subject to "international protection" and not "matters essentially within the domestic jurisdiction of states" (Preamble).

The resolution of the Institute of International Law is not important so much as an authoritative statement of international law (although it is very good evidence of widely-accepted principles), as it is as a clear illustration of the reasoning that supports the international legal order. Although "intervention" in a state's domestic "affairs" would be improper, "measures" taken in response to violations of international human rights law are perfectly acceptable and indeed sometimes required by each state's duty of international solidarity in defense of human dignity throughout the world.

Under ordinary international law, as it has existed for centuries, states are entitled to take diplomatic, economic and other "measures", individually and collectively, against states that have violated their international obligations. Legitimate countermeasures in the form of retorsion or reprisals are not forbidden "intervention" under international law (Art. 2).

### **Humanitarian Intervention**

Humanitarian "intervention" (to use the word in its ordinary sense) is not prohibited international "intervention" (in the legal sense) because it does not trespass on a state's protected "affairs". The Institute of International Law recognized human rights as a direct expression of the dignity of the human person, and therefore the subject of each state's *erga omnes* obligation to every other state, so that "every state has a legal interest in the protection of human rights" everywhere. The Institute deferred to "a duty of solidarity among all states to ensure as rapidly as possible the effective protection of human rights throughout the world," (Art. 1) and noted that a "state acting in breach of its obligations in the sphere of human rights cannot evade its international responsibility by claiming that such matters are essentially within its domestic jurisdiction." (Art. 2)

Human rights violations cannot be considered as essentially within a state's domestic jurisdiction, because putting them there would discredit the underlying concept of "domestic jurisdiction" in international law. States exist, according to the theory of international law advanced by the United Nations Charter, to secure economic, social and cultural advances, to guarantee human rights and fundamental freedoms, and to implement national self-determination (U.N. Charter, Art. 1).

Releasing states from these obligations would undermine the foundations of their sovereignty, by discrediting the concepts of freedom and autonomy on which state sovereignty depends. Without individual rights there can be no state's rights. Governments deserve deference only to the extent that they serve the common good of all the citizens subject to their rule.

Humanitarian intercession cannot be prohibited "intervention" in a state's internal "affairs", because human rights violations are never wholly "internal" or "private" in the necessary sense of those words. But this does not justify indiscriminate or excessive humanitarian countermeasures to correct all human rights violations, whatever the circumstances. Like all other international measures, humanitarian countermeasures must be proportionate to the gravity of the violation, taking into account the interests of individuals and of third states, and all of the relevant circumstances (Cf. Resolution of Santiago de Compostela, Articles 2 and 4). The proper limits on humanitarian intervention to enforce international law against human rights violations depend less on the limits of "intervention" and "domestic affairs" (since human rights are never purely domestic) than they do on questions of proportionality, objectivity and enforcement.

### **Enforcement**

Measures or countermeasures against human rights violations may be justified as necessary for the enforcement of international law. But not all enforcement measures are justified. Different responses will be appropriate to different violations, and some violations will have to go unpunished when no appropriate remedy can be found. The International

Law Commission's Draft Articles on State Responsibility suggest some of the limits to measures that states may take in response to other states' violations of international law (or of obligations which "may be owed to another State, to several States, or to the international community as a whole" – Draft Art. 34). In their current form, the Draft Articles would preclude the threat or use of force in countermeasures "in a manner contrary to the Charter of the United Nations", or other measures in violation of fundamental human rights; in violation of humanitarian law; in violation of peremptory norms of general international law; or in violation of diplomatic inviolability (Draft Art. 52).

The Draft Articles on State Responsibility recognize that countermeasures "must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question". (Draft Article 52) This reflects the obvious truth that the punishment should fit the crime, but also raises pervasive problems of judgment in enforcing international law. Sanctions against human rights violations will have negative effects, not only on the governments that have violated international law, but also on the subjects that they rule. Military interventions will often hurt oppressed peoples. Economic sanctions almost always harm citizens far more than their oppressive governments. Indeed, rights-violating regimes often profit (as in Yugoslavia and Iraq) from economic sanctions, while their peoples starve.

The notion that subjects are in some sense collectively responsible for their government's violations of international law is particularly ill-considered in the case of human rights violations, when the citizens themselves fall victim to the state. In such cases swift sharp overwhelming military interventions

may be more justified than drawn-out economic sanctions regimes, when military interventions can quickly restore or establish democratic institutions, and respect for international law. The less democratic the government that violates human rights, the less appropriate economic sanctions will be for enforcing international law. Sanctions were more appropriate (for example) against Serbia, whose people were united in oppressing ethnic minorities, than against Iraq, whose dictator never enjoyed popular support.

### **Objectivity**

The examples of Serbia and Iraq, whose governments suffered for violating international law, while other equally culpable governments in Russia and China did not, raise the question of objectivity in humanitarian interventions. Large powerful states that violate international law do not face the same levels of enforcement that smaller weaker states do. Small weak states can seldom act to prevent human rights violations from occurring elsewhere. Large powerful states sometimes intervene. This raises two problems of objectivity. First, the problem of impunity, because the large states are immune from serious punishment. Second, the problem of poor judgment, when powerful states act alone. Given the absence of any legitimate international government, enforcement of international law will necessarily be partial, uneven, and favor the strong.

Some scholars suggest that *de facto* impunity for strong governments justifies an equal impunity for the weak, but this does not follow. Punishing weak oppressors establishes principles that also apply to the strong, and may sometimes be enforced against them. The problem of poor judgment raises

greater difficulties. Powerful states may make mistakes, or use human rights as pretence to dominate their neighbors. Given the *erga omnes* nature of human rights violations (*Barcelona Traction*) and every state's right to respond proportionately to violations of international human rights law, states must be constrained to judge violations and impose their sanctions correctly.

The test of veracity in international law is consensus. The greater the consensus, the greater the likelihood of truth. Like other foundational doctrines of international law, this doctrine of legal epistemology rests on the enlightened premise that people (and peoples) everywhere possess reason. If international law consists of rules of conduct deduced by reason from the nature of the society of nations, (Wheaton, *Elements* I § 14) then consensus clarifies the dictates of reason, and consent may modify them, in certain circumstances. This doctrine has two implications: first, that governments may act with greater certainty in enforcing international law when other governments agree with their judgments – multilateral decision-making is more accurate than unilateral action; second, that the views of non-democratic governments count for less in establishing the requirements of international law. Non-democracies speak only for their rulers, and not the captive subjects of their power.

### **The Use of Force**

“Intervention” in its strictest sense implies the use of force, which has a special status under the United Nations Charter. In Article 2, section 4 of the Charter, the members of the United Nations renounce “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”. This language would seem to imply that the use of force consistent with the purposes of the United Nations would be acceptable (Article I purposes include protecting human rights and the self-determination of peoples) but the Charter also puts the use of force into a special category, as being inherently threatening to international peace and security, and contrary to the principle that disputes should be settled by “peaceful means” (Article I § 1).

Reason and the nature of the society of nations indicate that force should be avoided as much as possible in resolving international disputes. The members of the Institute of International Law discouraged “the use of armed force in violation of the Charter of the United Nations” to enforce international human rights law (Resolution of Santiago de Compostela, Article 2). The Third Restatement of Foreign Relations Law endorsed “all remedies generally available for violation of an international agreement” (§ 703 (1)), but limited its conception of human rights enforcement to states that have exhibited “a consistent pattern of gross violations” of international human rights (§ 702 (g)). The Draft Articles on State Responsibility restricts its discussion of *erga omnes* violations to “serious breaches” involving “gross or systematic” harm (Draft article 41), and provides that countermeasures shall not involve any derogation from the “obligation to refrain from the threat or use of force as embodied in the Charter” (Draft Article 51 (1)(a)).

The United Nations Charter offers a mechanism through the Security Council for coordinating “measures” to be taken to maintain or to restore international peace and security (Article 39), which may extend to enforcing human rights norms, to the

extent that violations threaten international peace and security. The General Assembly of the United Nations also provides a vehicle through which states can reach consensus about the maintenance of international peace and security, and may make recommendations (Article 11 (1)), as the General Assembly did to encourage intervention against the “subjugation, domination and exploitation” of colonialism (Declaration on Friendly Relations; Declaration on the Granting of Independence to Colonial Countries and Peoples). Not all human rights violations necessarily threaten international peace and security, however, and the United Nations is not the only instrument for enforcing international law. The long-established practice of bilateral enforcement by arms remains available in response to serious and systematic violations of human rights law, such as slavery and genocide.

### **Humility**

The guiding principle in determining the existence and proper response to human rights violations under international law should be humility on the part of the governments involved. Those with the power to intervene or take measures to enforce international law should act with humility, understanding the limits of their objectivity and judgment. The chance of mistake and the costs of intervention favor overlooking minor or anomalous violations of human rights law. Even serious or systematic violations should be studied with care, and due deference to the judgment of others. Sometimes the costs of humanitarian intervention will outweigh the benefits to those oppressed.

Humility in judging violations encourages democratic techniques in assessing the need for humanitarian

interventions. Deference to the opinions of others requires consultation, and real deliberation. The actual structure of existing international institutions, such as the United Nations and the International Court of Justice, gives undue weight to the views of repressive governments, including many human rights violators and non-democracies. Consultation and deliberation become difficult and less reliable when governments shut their peoples out from the discussion. Non-democratic governments have no way of judging or constraining their own judgments of illegality, and therefore no valid basis for engaging in humanitarian intervention, except in cooperation with democratic states. Democratic states should seek the views of other democracies, and above all the perceptions of those on whose behalf they seek to intervene, before taking action.

The actual views of those oppressed carry particular weight in contemplating the method of enforcement, whether by arms, economic sanctions, or simple criticism of the oppressive regime. The enforcement of human rights law protects the interest in human dignity that all states owe to all others, but also shields particular individuals against particular harms. Humility requires not only that states should question their own judgments of harm, but also that they should measure their own interest in human dignity against the more direct sufferings of individual persons. When humanitarian intervention will harm its supposed beneficiaries too much, or against their wishes, it may no longer be justified.

### **Conclusion**

States will act to prevent human rights violations for the same reasons that people have always acted against injustice.

These include sympathy for the victims, fear of the perpetrators, and the general desire to establish legal principles by enforcing them against others. Legal action against human rights violators may be as trivial as verbal criticism, or as serious as armed intervention. The appropriate level of response depends on the circumstances. Nations deserve a zone of sovereignty or "domestic jurisdiction" within which to develop their own histories and cultures, but governments should never have and do not deserve a license to oppress or to exploit the peoples subject to their power. The sovereign rights of states derive from the human rights of individuals. Governments that deny human rights are violating international law.

The principle of non-intervention in the internal affairs of states does not extend to protect human rights violators, because human rights violations concern all human beings. To forbid humanitarian intervention would discredit international law, by denying the fundamental justice on which all law must rest. This does not mean that enforcement should be indiscriminate or disproportionate, so long as transgressions are punished as fairly and objectively as possible. Sometimes the use of force will be justified to put an end to serious breaches of human rights obligations, when gross and systematic violations such as slavery or genocide cannot be prevented in any other way, but all interference or intervention to enforce human rights should reflect international consensus after democratic deliberation, and due concern for the rights of others.

Humanitarian intervention is legitimate under international law whenever serious human rights violations can be prevented in no other way, so long as the states enforcing international

law respect the territorial integrity and political independence of the peoples that they protect. All nations have equal rights to self-determination, so that the people themselves may decide who their rulers will be. Governments that deny their peoples human rights and fundamental freedoms forfeit their right to rule. The limits of humanitarian intervention depend on the value of human dignity, the welfare of those oppressed, the objectivity of the enforcers, and their humility in the face of public opinion. As the framers of the United Nations Charter recognized: states must conform to the principles of justice and international law, or there will be no peace. (Cf. Art. 1.1).

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## HUMANITARIAN INTERVENTION AND LEGAL PRINCIPLES

Humanitarian intervention and its legality appeal to certain fundamental principles which influence and determine the course of legal reasoning. Disagreement on those principles leads to disagreement on the rules which attempt to regulate this area of state action. For instance, if sovereignty and independence are the guiding principles, non-intervention becomes their corollary. On the other hand, if human rights become the guiding principle, sovereignty and independence become conditional and intervention against human rights abuses becomes legal. (see Tsagourias, *Jurisprudence of International Law: The Humanitarian Dimension*, MUP, 2000)

This commentary will try to trace the principal assumptions which inform Professor Shen's position that humanitarian intervention is illegal, by comparing and contrasting them with the "opposite" assumptions which support the right to intervene. The commentary will then expose the contradictions that ensue in legal reasoning concerning the doctrine of humanitarian intervention.

Professor Shen's argument is based on the assumption that non-intervention is one of the fundamental norms of international law on which state relations are based. Non-intervention evolves from the principle of state sovereignty whose content remains vague although worshiped as sacrosanct. Whether sovereignty, independence and non-intervention as *lego-political* principles are so fundamental as to preclude any right to humanitarian intervention depends on political calculations than on legal considerations. Summarising the arguments used by Professor Shen, the principle of non-intervention provides a guarantee for

the vast majority of small and weak states against the powerful ones and humanitarian intervention is "essentially a matter of interests, power and dominance", therefore impermissible. However, it becomes obvious that the promulgation of the non-intervention norm is essentially a matter of interests, in this case of smaller states. The determination whether their interests are more important and take precedence over the interests of more powerful states (the definition of what is a weak, small or large and powerful state is elusive) is subjective and a matter of preference.

Another aspect of the position that non-intervention protects small states is its emotive character and, moreover, it divulges an unwarranted presumption of "small" state "innocence". As to the accusation that under the pretext of humanitarian intervention strong states seek power and dominance over the small ones, its opposite, that is non-intervention, also facilitates states' quest for power and dominance over their populations including the populations of small states. Does the state according to this reasoning have a *carte blanche* over its inhabitants? Any answer - negative or affirmative - triggers a medley of philosophical, moral, political, or legal investigations. It is our view that the state is an organic entity, not abstract as the notion of sovereignty would imply. Thus, sovereignty is organically tied to the welfare of the state's population and small states as well as large ones can be guilty of abuses or crimes against their inhabitants. Even if the concepts of human rights and humanitarianism are "bound to be abused", one could equally argue that sovereignty and non-intervention are "bound to be abused" by those committing human rights abuses or genocide.

To claim that humanitarian intervention should be forbidden because the motives of the intervenor(s) are not genuine begs the

question on how to identify these motives. In most cases we guess, presume, or stereotype. On the other hand, not to intervene is also a political act, the outcome of political calculations. In addition to this, both intervention and non-intervention interact with and can be justified within the existing legal discourse. Thus, humanitarian intervention can be justified as being below the threshold of the prohibited use of force in Article 2(4) of the UN Charter or as a customary right.

There are two other issues which should be touched upon. The first is the claim that non-intervention is a *jus cogens* principle that is a fundamental principle of international law against which no derogation is permitted. It is rather far-fetched to say that non-intervention has acquired such a status. Intervention is a subtle action and can take many forms from the most innocuous to the most forceful. All state relations have an element of intervention, political, economic and so forth. Treaties and agreements of whatever nature formalise modes of intervention whereas consent cannot override a *jus cogens* principle (see Article 53 and 64 of Vienna Convention). Which rules have acquired peremptory character is still debatable (is it non-intervention, the prohibition of the use of force or the rule against aggression?) and conflicts cannot be avoided. For instance, the prohibition on the use of force conflicts with other peremptory norms such as human rights or the prohibition of genocide. Again the contradictions become obvious and what principle takes precedence is a matter of predilections by the decisionmakers or commentators.

My final observation concerns the role of the Security Council, which according to the author can make humanitarian intervention an *ad hoc* exemption to the non-intervention rule. Such view does not sit comfortably with his previous observation

that non-intervention is a *jus cogens* principle unless someone believes that the Security Council is omnipotent and has/should have sweeping powers to do whatever it pleases. The crux of the matter is to identify those elements which would attribute legitimacy to the Security Council decisions. If, according to the author, power and interests condemn unilateral interventions to illegality, are they precluded from the Security Council's deliberations? Moreover, *ad hoc* exemptions to the rule based on the whimsical jurisprudence of the Security Council do not contribute to the rule of law. "Quis custodiet custodes ipsos"?

In the end, discussing the legality or illegality of humanitarian intervention becomes a futile rhetorical exercise in which almost any position can be legally and politically justified. What we should really address is the causes, effects and our reaction to events that shatter the lives of human beings.

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