https://doi.org/10.1017/S0265052504211025 Published online by Cambridge University Press

UNAUTHORIZED HUMANITARIAN INTERVENTION*

By Mark S. Stein

I. Introduction

In this essay, I offer a utilitarian perspective on humanitarian intervention.[1] There is no generally accepted precise definition of the term 'humanitarian intervention'. I will provisionally, and roughly, define humanitarian intervention as the use of force by a state, beyond its own borders, that has as a purpose or an effect the protection of the human rights of noncitizens or the reduction of the suffering of noncitizens.

From a utilitarian perspective, there is likely to be a deficit of humanitarian intervention in any state-based system, just as there is likely to be a deficit of foreign aid. Political organizations such as states care far more about the welfare of their own members than they care about the welfare of nonmembers. States often have the opportunity to reduce massive suffering among foreigners at comparatively small cost to their own citizens, but they fail to do so.

Besides this inevitable particularism, another factor works to limit humanitarian intervention: anti-intervention norms in international law and international politics. Even if a state were willing to spend its treasure and risk the lives of its citizens for the sake of foreigners, it might refrain from doing so because of these norms.

There is an exception to the anti-intervention norms in international law and politics. Any humanitarian intervention that is authorized by the United Nations Security Council has enormous legal and political legitimacy. The Security Council and the other organs of the United Nations can even, potentially, help to counteract the problem of particularism. The UN can help states to pool the costs and risks of humanitarian intervention and can provide a forum through which international suffering is made more salient to the people and leaders of states. The current UN secretary-general, Kofi Annan, has attempted to

* I acknowledge with thanks the comments of James Bernard Murphy, who is more distrustful of unauthorized humanitarian intervention than I am. For illuminating discussions of humanitarian intervention, I thank the contributors to the American Society of International Law Listserve, including Anthony D'Amato, Jason Beckett, Andre de Hoogh, Jorg Kammerhofer, Francisco Martin, Iheke Ndukwe, Jordan Paust, and Alfred Rubin.

[1] For another utilitarian discussion, see Peter Singer, *One World: The Ethics of Globalization* (New Haven, CT: Yale University Press, 2002), 106–49.

© 2004 Social Philosophy & Policy Foundation. Printed in the USA.

use his office to relieve international suffering and promote international human rights. As he said in his much-quoted *1999 Annual Report to the General Assembly*, "[T]he genocide in Rwanda will define for our generation the consequences of inaction in the face of mass murder."[2]

Since the end of the Cold War, the Security Council has authorized forcible humanitarian intervention a number of times. Rwanda in 1994 was actually one of those instances.[3] The failure of the international community to stop the genocide in Rwanda was not due to the resistance of what are considered the usual recalcitrant suspects on the Security Council (Russia and China), but to lack of will by those countries that could have intervened immediately in Rwanda, including France and the United States.[4] Other instances of Security Council-authorized intervention were Bosnia in 1992–94,[5] Somalia in 1992–95,[6] Haiti in 1994,[7] and East Timor in 1999–2002.[8]

Given the increased willingness of the Security Council to authorize humanitarian intervention, should states continue to undertake humanitarian interventions that are not authorized by the Security Council? During the 1990s, even as the Security Council was increasingly willing to authorize humanitarian intervention, the United States and its allies took military action on at least three occasions, for express humanitarian purposes, when the specific action was not authorized by the Security Council. I refer to the establishment of no-fly zones in Northern and Southern Iraq in 1991 and 1992;[9] the bombing of the Bosnian Serbs by NATO in 1995;[10] and NATO's Kosovo campaign against Yugoslavia in 1999.[11]

[2] *1999 Annual Report of the Secretary-General*, UN GAOR, 54th Sess., UN Doc. SG/SM/7136/GA/9596; available on-line at http://www.un.org/News/Press/docs/1999/19990920.sgsm7136.html [accessed December 4, 2002].

[3] S/Res/929, UN SCOR, 49th Sess., 3392nd mtg. (June 22, 1994). For accounts, see Inger Österdahl, *Threat to the Peace: The Interpretation by the Security Council of Article 39 of the UN Charter* (Uppsala, Sweden: Iustus Forlag, 1998), 59–65; Fernando R. Teson, *Humanitarian Intervention: An Inquiry into Law and Morality*, 2d ed. (Irvington, NY: Transnational Publishers, 1997), 258–62; and Sean D. Murphy, *Humanitarian Intervention: The United Nations in an Evolving World Order* (Philadelphia: University of Pennsylvania Press, 1996), 243–60.

[4] Few performed well during this crisis, and Annan himself has much to regret.

[5] For accounts, see Österdahl, *Threat to the Peace*, 47–52; Teson, *Humanitarian Intervention*, 262–66; and Murphy, *Humanitarian Intervention*, 198–217.

[6] For accounts, see Österdahl, *Threat to the Peace*, 52–58; Teson, *Humanitarian Intervention*, 241–49; and Murphy, *Humanitarian Intervention*, 217–43.

[7] For accounts, see Österdahl, *Threat to the Peace*, 65–70; Teson, *Humanitarian Intervention*, 249–57; and Murphy, *Humanitarian Intervention*, 260–81.

[8] This was with the acquiescence of Indonesia. S/Res/1272, UN SCOR, 54th Sess., 4057th mtg. (Oct. 25, 1999).

[9] For an account, see Murphy, *Humanitarian Intervention*, 165–98.

[10] For accounts, see Teson, *Humanitarian Intervention*, 264–65; and Murphy, *Humanitarian Intervention*, 212–13.

[11] A brief and admirably objective account of the background of the Kosovo campaign, from one of its supporters, is given in Ruth Wedgwood, "NATO's Campaign in Yugoslavia," *American Journal of International Law* 93, no. 4 (1999): 828–34, at 828–29.

https://doi.org/10.1017/S0265052504211025 Published online by Cambridge University Press

https://doi.org/10.1017/S0265052504211025 Published online by Cambridge University Press

In all three cases, there was some argument that intervention had been authorized by a prior Security Council resolution.[12] The Kosovo intervention gave rise to considerable controversy and commentary, and most commentators, regardless of whether they supported the intervention, agreed that it was not authorized by the Security Council.[13] The no-fly zones over Iraq were, in my opinion, also unauthorized.[14] I believe that the bombing of the Bosnian Serbs was in fact authorized under prior Security Council resolutions, but others disagree.[15] It is clear, in any event, that the specific actions would not have been authorized by the Security Council at the time that they occurred, as they were strongly opposed by Russia and China, two veto-bearing permanent members of the Security Council.

The 2003 invasion of Iraq also had humanitarian aspects. In the run-up to the war, the humanitarian justification was perhaps not predominant, but it became so after the war began. Here, too, there was some argument that Security Council resolutions authorized the invasion of Iraq and the overthrow of the Saddam Hussein regime, but a resolution explicitly authorizing the war would not have been approved by the Security Council.

The propriety of unauthorized humanitarian intervention is a major issue of international ethics and international law. In Section II of this essay, I discuss the legal issues surrounding humanitarian intervention. I spell out, in more detail than is usual, the major arguments based on the text of the UN Charter. I also focus on the legal consequences of intervention: the likely response of international bodies—such as the Security Council, the International Court of Justice (ICJ), and the International Criminal Court (ICC)—to arguments that might be presented to them.

In Section III, I discuss some of the ethical and policy issues surrounding humanitarian intervention. I describe my own utilitarian approach, discuss some nonutilitarian alternatives, and attempt to apply utilitarian theory to the problem. An ideal application of utilitarian theory would resolve all major empirical issues, such as whether the Kosovo intervention or the 2003 invasion of Iraq had good consequences overall, and whether alternative approaches would have produced better conse-

[12] On the general problem of ambiguous Security Council authorizations, see Jules Lobel and Michael Ratner, "Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-Fires, and the Iraqi Inspection Regime," *American Journal of International Law* 93, no. 1 (1999): 124–54.

[13] Commentaries by leading international law scholars are collected in "Editorial Comments: NATO's Kosovo Intervention," *American Journal of International Law* 93, no. 4 (1999): 824–62; available on-line at http://www.asil.org/ajil/kosovo.htm [accessed December 14, 2002].

[14] In accord with this view are Lobel and Ratner, "Bypassing the Security Council," 126, 132–33. See Murphy, *Humanitarian Intervention*, 184–98, for a more equivocal view.

[15] NATO was authorized to protect the safe havens, and Bosnian Serb forces were violating the safe havens. This was sufficient authority, even though NATO also had the broader purpose of compelling the Bosnian Serbs to agree to a settlement. For a contrary view, see Teson, *Humanitarian Intervention*, 265.

quences. I do not aspire to such an ideal. I offer opinions on some issues, but often I am content merely to describe the issues and map them onto utilitarian moral theory.

II. The Legal Status of Humanitarian Intervention

A. Authorized intervention

It is generally though not universally agreed that the Security Council has the authority, under Chapter VII of the UN Charter, to conduct or authorize humanitarian intervention.[16] The keystone of the Security Council's authority is Article 39 of the Charter, which states: "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."[17]

When authorizing humanitarian intervention, the Security Council typically determines that a humanitarian crisis poses a threat to the peace. Since the end of the Cold War, the Security Council has interpreted the term 'threat to the peace' broadly.[18] Humanitarian crises do have international consequences—in particular, the flow of refugees across borders—but in general such crises do not pose the threat of armed conflict across borders. Hence, there is some question whether humanitarian crises can be called threats to the peace. Nevertheless, Article 39 states: "The Security Council shall determine" the existence of a threat to the peace; it does not say, for example, that "in the event of a threat to the peace," the Security Council shall take action. The language of Article 39 expressly gives the Security Council the authority to determine what is a threat to the peace.

Article 2(7) of the UN Charter states that the Charter does not authorize the United Nations "to intervene in matters which are essentially within the domestic jurisdiction of any state."[19] This might seem to rule out authorized humanitarian intervention. However, Article 2(7) has a proviso: "[T]his [nonintervention] principle shall not prejudice the application of enforcement measures under Chapter VII."[20] In view of this proviso, Article 2(7) is generally not taken to limit the Security Council's authority under Chapter VII of the Charter. Also, it is questionable whether the violation of human rights can be considered a matter "essentially within the domestic jurisdiction" of states. Since the founding of the United Nations, there has been a progressive development of human

[16] Louis Henkin, "Kosovo and the Law of 'Humanitarian Intervention'," *American Journal of International Law* 93, no. 4 (1999): 824–28 (humanitarian intervention is lawful if authorized by the Security Council).
[17] UN Charter art. 39.
[18] See generally Österdahl, *Threat to the Peace*.
[19] UN Charter art. 2, para 7.
[20] Ibid.

https://doi.org/10.1017/S0265052504211025 Published online by Cambridge University Press

rights law, starting with the Universal Declaration of Human Rights (1948)[21] and the Convention on the Prevention and Punishment of the Crime of Genocide (1948),[22] and unfolding through the International Covenant on Civil and Political Rights (1966);[23] the International Covenant on Economic, Social, and Cultural Rights (1966);[24] and other multilateral conventions. Human rights law arguably takes humanitarian intervention outside the prohibition of Article 2(7), so that, once again, the Security Council's authority under Chapter VII of the Charter is unimpaired.

B. Unauthorized intervention

If humanitarian intervention is not authorized by the Security Council, its status under the Charter is considerably more dubious. Most attention focuses here on Article 2(4), the Charter's prohibition of the threat or use of force in international relations. Article 2(4) states: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[25]

Some interpret Article 2(4), in the context of the Charter as a whole, as prohibiting all use of force in international relations, with only two exceptions: (1) as authorized by the Security Council, and (2) in exercise of the right of self-defense recognized in Article 51 of the Charter.[26] Others disagree with this broad interpretation. They point out that the language of Article 2(4) imposes not a general prohibition, but three specific prohibitions.[27] They argue that unauthorized humanitarian intervention is permitted under the Charter if it (1) does not constitute the use of force against territorial integrity, (2) does not constitute the use of force against political independence, and (3) is not otherwise inconsistent with the purposes of the United Nations.

With regard to the specific terms of Article 2(4), some interpret the term 'territorial integrity' broadly; in their view, every territorial incursion is a

[21] G.A. Res. 217 (1948), available on-line at http://193.194.138.190/udhr/lang/eng.htm [accessed March 10, 2003].

[22] G.A. Res. 260 (1948), entered into force 1951, available on-line at http://193.194.138.190/html/menu3/b/p_genoci.htm [accessed March 10, 2003].

[23] G.A. Res. 2200 (1966), entered into force 1976, available on-line at http://193.194.138.190/html/menu3/b/a_ccpr.htm [accessed March 10, 2003].

[24] G.A. Res. 2200 (1966), entered into force 1976, available on-line at http://193.194.138.190/html/menu3/b/a_cescr.htm [accessed March 10, 2003].

[25] UN Charter art. 2, para 4.

[26] Bruno Simma, "NATO, the UN, and the Use of Force: Legal Aspects," *European Journal of International Law* 10, no. 1 (1999); available on-line at http://www.ejil.org/journal/Vol10/No1/ab1.html; and Oscar Schachter, *International Law in Theory and Practice* (Dordrecht, The Netherlands: Kluwer, 1991), 128–29.

[27] See Anthony A. D'Amato, *International Law: Process and Prospect* (Irvington, NY: Transnational Publishers, 1995), 56–72. D'Amato offers an exhaustive history of the terms 'political independence' and 'territorial integrity'.

https://doi.org/10.1017/S0265052504211025 Published online by Cambridge University Press

https://doi.org/10.1017/S0265052504211025 Published online by Cambridge University Press

violation of territorial integrity. This interpretation of 'territorial integrity' would once again turn Article 2(4) into a general prohibition. Under a more narrow interpretation of 'territorial integrity', a state violates the territorial integrity of another state only if it seizes part of the second state's territory.

It should be noted that even the more narrow interpretation of 'territorial integrity' poses a problem for humanitarian intervention on behalf of secessionist minorities. The Kosovo intervention ousted the state of Yugoslavia from its Kosovo province for the indefinite future, and the Northern no-fly zone over Iraq ousted the state of Iraq from the Kurdish areas in Northern Iraq for the duration of the Saddam Hussein regime. In both cases the intervenors ultimately disclaimed the intention of redrawing international boundaries, but some find it hard to see these interventions as anything other than the use of force against territorial integrity.

The term 'political independence' in Article 2(4) is also contested, particularly in the context of pro-democratic intervention. Under a broad interpretation of the term 'political independence', intervenors violate the political independence of a state when they change its political path in any way—for example, from dictatorship to democracy.[28] Some would disagree, claiming that the restoration or installation of democracy respects and indeed increases the political independence of a state.[29]

The import of the third prohibition in Article 2(4)—proscribing force otherwise inconsistent with the purposes of the United Nations—is also contested. Article 1 of the Charter lists "The Purposes of the United Nations." The first-listed purpose, and by nearly all accounts the primary purpose, is "To maintain international peace and security."[30] Seeing this as an overriding purpose, some aver, once again, that Article 2(4) prohibits all nondefensive force not authorized by the Security Council. However, the promotion of human rights is also listed as a purpose of the Charter, in Article 1(3).[31] As the threat of wide-ranging interstate war has receded, the promotion of human rights should arguably take on greater importance. This, essentially, is the position of Secretary-General Annan.

Also relevant to the legality of humanitarian intervention is Article 2(3) of the Charter, which states: "All Members shall settle their international disputes by peaceful means in such a manner that international peace and

[28] As noted below in Section II D, this may be the position of the International Court of Justice.

[29] This position is particularly identified with W. Michael Reisman. See W. Michael Reisman, "Haiti and the Validity of International Action," *American Journal of International Law* 89, no. 1 (1995): 82–84; and W. Michael Reisman, "Sovereignty and Human Rights in Contemporary International Law," *American Journal of International Law* 84, no. 4 (1990): 866–76.

[30] UN Charter art. 1, para 1.

[31] "To achieve international cooperation in . . . promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion. . . ." UN Charter art. 1, para 3.

security, and justice, are not endangered."[32] The requirement that disputes be settled so that "justice" is not endangered may leave some room for unauthorized humanitarian intervention under Article 2(3). At the very least, however, force could not be the first resort; there would have to be a genuine attempt to achieve a peaceful resolution in order to comply with Article 2(3). The Kosovo intervention arguably violated even this minimal requirement, as NATO presented rather extreme demands to Yugoslavia, on a "take it or leave it" basis, in the run-up to war. NATO's ultimatum would have required Yugoslavia to agree to allow NATO troops to operate anywhere in Yugoslavia (not just Kosovo) and would have set the stage for a referendum on independence by the Kosovars, to be held within three years. Both of these demands were dropped in the settlement that ended NATO's campaign.[33]

In addition to Charter law, the legal status of humanitarian intervention may be affected by the somewhat mysterious body of law known as customary international law. It is generally though not universally agreed that international custom can rise to the level of law if (1) it is sufficiently widespread, and (2) it is regarded as binding by states. Article 38 of the Statute of the International Court of Justice lists several sources of international law. The first-listed source is "international conventions" (including, of course, the UN Charter). The second-listed source is "international custom, as evidence of a general practice accepted as law."[34] There is great controversy over the content of customary international law, in the area of humanitarian intervention as in other areas.[35] Some find a strong prohibition against intervention in customary international law;[36] others find no prohibition against intervention.

A number of commentators believe that the Charter can, in effect, be amended through the processes of customary international law.[37] In theory, repeated humanitarian intervention without the authorization of the Security Council could establish a right to humanitarian intervention or even a general permission to use force in international relations. It has even been suggested that Article 2(4)'s prohibition on the use of force has already been abrogated through the processes of customary international law.[38] This is a minority position, to say the least.

[32] UN Charter art. 2, para 3.

[33] "Messy War, Messy Peace," *The Economist*, June 12, 1999, 15–16.

[34] ICJ Statute art. 38, para 1.

[35] For a discussion of some of the controversies, see Anthea Elizabeth Roberts, "Traditional and Modern Approaches to Customary International Law: A Reconciliation," *American Journal of International Law* 95, no. 4 (2001): 757–91; available on-line at http://www.asil.org/ajil/roberts.pdf [accessed March 10, 2003].

[36] As noted below in Section II D, this was the position of the ICJ in the *Nicaragua* case.

[37] Henkin, "Kosovo and the Law of 'Humanitarian Intervention'," 828; and Michael J. Glennon, *Limits of Law, Prerogatives of Power: Interventionism after Kosovo* (New York: Palgrave, 2001), 37–65.

[38] Michael J. Glennon, "How War Left the Law Behind," *New York Times*, November 21, 2002, sec. A, p. 37, col. 2.

https://doi.org/10.1017/S0265052504211025 Published online by Cambridge University Press

https://doi.org/10.1017/S0265052504211025 Published online by Cambridge University Press

There are many opinions as to the meaning of the Charter and the content of customary international law. While I have expressed some of my own opinions, I am not primarily interested in whether humanitarian intervention is legal or illegal in the abstract. I am interested in the possible legal consequences of humanitarian intervention. I will explore these consequences by considering what would happen if a target of intervention attempted to challenge the intervention as a violation of international law. The target state might try to press its case in a number of different forums, but each of these forums would present problems for it.

C. UN Security Council

Under Article 24(1) of the UN Charter, the Security Council has primary responsibility for the "maintenance of international peace and security."[39] A target of unauthorized humanitarian intervention might theoretically appeal to the Security Council, requesting it to take action against intervening states. But an appeal to the Security Council would fail if, as is likely these days, one or more of the intervening states was a veto-bearing permanent member of the Security Council, or if one or more of the intervening states was protected by a permanent member. The permanent members of the Security Council are the United States, the United Kingdom, France, Russia, and China.

During the Kosovo intervention, the Security Council was presented with a draft resolution that would have condemned the NATO bombing campaign against Yugoslavia.[40] The resolution was defeated, 12–3. Two permanent members, Russia and China, voted in favor of the resolution. Three permanent members, the United States, the United Kingdom, and France, voted against.

In the case of Kosovo, the veto power of permanent members was not necessary to the defeat of the proposed resolution condemning intervention. Things were different in the case of Nicaragua in 1984. The United States was then seeking to overthrow the Sandinista regime in Nicaragua. The motives of the United States were geopolitical rather than directly humanitarian, though one could say that the geopolitical goal of containing Communism was indirectly humanitarian in that Communism causes suffering.

In seeking to overthrow the government of Nicaragua, the United States mined Nicaraguan ports and conducted several naval attacks on Nicaraguan ports, oil installations, and a naval base. These operations were conducted or organized by the CIA. In addition, the U.S. armed and

[39] UN Charter art. 24, para 1.

[40] Belarus, India, and Russian Federation: Draft Resolution, UN Doc. S/1999/328 (Mar. 26, 1999).

trained the Nicaraguan "Contra" rebels who were seeking to overthrow the government of Nicaragua.[41]

Nicaragua sought to challenge U.S. intervention as a violation of international law, and its efforts still hold lessons for any target of intervention, humanitarian or otherwise. Nicaragua first sought relief from the Security Council against American military intervention. All of the members of the Security Council except the United States voted for (or abstained on) a mild resolution in favor of Nicaragua, one that did not take any enforcement action against the United States. However, the United States exercised its veto, and the resolution did not pass.

Nicaragua next sought relief from the ICJ. It achieved somewhat better results there, as discussed below.

D. International Court of Justice

The ICJ is the court of the United Nations; its statute is a part of the UN Charter.[42] Fortunately for "intervenees," the ICJ has shown that it is willing to enforce, or to attempt to enforce, prohibitions on the use of force contained in the Charter and in customary international law. Unfortunately for intervenees, the ICJ will not exercise jurisdiction over every claim that one state seeks to bring against another. The ICJ will only exercise jurisdiction over a state if that state has consented to jurisdiction in some way. This consent may be expressed in a treaty. The Genocide Convention, for example, gives the ICJ jurisdiction over claims arising under that treaty. The other significant way in which a state can consent to the ICJ's jurisdiction is to issue a declaration under Article 36(2) of the ICJ Statute (the 'optional clause'),[43] stating that it recognizes the jurisdiction of the court over future claims by another state that has accepted the same obligation under the optional clause.

Article 96 of the Charter provides that the General Assembly or the Security Council may request an "advisory opinion" from the ICJ on "any legal question." Conceivably, even if the ICJ could not exercise jurisdiction over a case against the intervenor state, the intervenee could persuade the General Assembly to request an advisory opinion on legal questions relating to the intervention. It is not certain that the ICJ would agree to deliver such an opinion, however.

There is very little likelihood that the ICJ will ever brand as illegal a humanitarian intervention authorized by the Security Council. There is a

[41] The facts regarding U.S. intervention in Nicaragua are laid out (accurately, in my view) in the ICJ's decision on the merits in the *Nicaragua* case: *Military and Paramilitary Activities in and against Nicaragua* (*Nicar. v. U.S.*), Merits, 1986 ICJ 14.

[42] UN Charter art. 92.

[43] ICJ Statute art. 36, para 2.

https://doi.org/10.1017/S0265052504211025 Published online by Cambridge University Press

https://doi.org/10.1017/S0265052504211025 Published online by Cambridge University Press

very large likelihood that the ICJ will brand as illegal any humanitarian intervention *not* authorized by the Security Council, if the ICJ ever squarely addresses the legality of such an intervention.

In the Kosovo dispute, Yugoslavia sought relief from the ICJ. Yugoslavia brought cases against ten of the NATO countries, seeking, among other things, a provisional measure (what in the United States would be called a preliminary injunction) ordering the NATO countries to cease their attacks. The ICJ refused to order the NATO countries to stop bombing. The NATO countries had raised jurisdictional objections, and the ICJ decided that it was not sufficiently persuaded that it had jurisdiction over any of the cases brought by Yugoslavia.[44] However, the ICJ did throw something of a bone to Yugoslavia in its decisions. The ICJ stated: "[T]he Court is profoundly concerned with the use of force in Yugoslavia . . . . [U]nder the present circumstances such use raises very serious issues of international law. . . ."[45]

The ICJ also retained all but two of the cases on its docket (it dismissed the ones against the United States and Spain). This left open the possibility that Yugoslavia could ultimately prevail on the merits after convincing the ICJ that it had jurisdiction. In the interim, of course, the NATO campaign was successful in ousting Yugoslavia from Kosovo, and there was a change of government in Yugoslavia. As of March 2003, the eight remaining cases filed by Yugoslavia are in a kind of limbo; possibly Yugoslavia will withdraw them.[46]

It is interesting to speculate on what would have happened if the ICJ had ordered the NATO countries to stop participating in the attack on Yugoslavia. My own view is that some of the European countries would have obeyed the ICJ's order.

In the *Nicaragua* case that began in 1984, the ICJ did issue a preliminary injunction and then a final judgment against the United States.[47] For complicated jurisdictional reasons, the ICJ in the *Nicaragua* case did not apply the prohibition on the use of force in Article 2(4) of the Charter; instead, the ICJ applied customary international law on the use of force, which it found to be essentially identical to Charter law. In its 1986 decision on the merits, the ICJ held that the United States had violated customary international law by using force against Nicaragua and had

[44] See Peter H. F. Bekker and Christopher J. Borgen, "World Court Rejects Yugoslav Requests to Enjoin Ten NATO Members from Bombing Yugoslavia," American Society of International Law, *ASIL Insights* (June 1999); available on-line at http://www.asil.org/insights/insigh36.htm [accessed December 14, 2002].

[45] *Yugoslavia v. Belgium*, Order of June 2, 1999, para. 17; available on-line at http://www.icj-cij.org/icjwww/idocket/iybe/iybeframe.htm [accessed March 10, 2003].

[46] As indicated and further explained on the ICJ website: http://www.icj-cij.org/icjwww/ipresscom/ipress2002/ipresscom2002-10_yugo_20020322.htm [accessed March 10, 2003].

[47] *Military and Paramilitary Activities in and against Nicaragua* (*Nicar. v. U.S.*), Request for Provisional Measures, 1984 ICJ 169 (Order of May 10); and *Military and Paramilitary Activities in and against Nicaragua* (*Nicar. v. U.S.*), Merits, 1986 ICJ 14.

https://doi.org/10.1017/S0265052504211025 Published online by Cambridge University Press

also violated customary international law by intervening in Nicaragua through military assistance to the Contra rebels.

The ICJ's 1986 decision on the merits of the *Nicaragua* case contains a number of passages that are hostile to the concept of humanitarian intervention:

> [T]he United States Congress . . . expressed the view that the Nicaraguan Government had taken 'significant steps towards establishing a totalitarian Communist dictatorship'. However the regime in Nicaragua be defined, adherence by a State to any particular doctrine does not constitute a violation of customary international law. . . . Nicaragua's domestic policy options, even assuming that they correspond to the description given of them by the Congress finding, cannot justify on the legal plane the various actions of the [United States]. . . . The Court cannot contemplate the creation of a new rule opening up a right of intervention by one State against another on the ground that the latter has opted for some particular ideology or political system. . . .
>
> 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. . . .[48]

Under the ICJ statute, decisions of the ICJ are theoretically nonprecedential; a decision "has no binding force except between the parties and in respect of that particular case."[49] In practice, the ICJ follows precedent rather closely, perhaps more closely than does the U.S. Supreme Court. The *Nicaragua* case in particular has been cited and followed numerous times. It has become the leading case on the use of force under the UN Charter, even though, strictly speaking, the Court did not apply Charter law.

Despite the *Nicaragua* decision, advocates of unauthorized humanitarian intervention might still entertain some hope that the ICJ will some day drop or moderate its opposition to such intervention. First, the world has changed since 1986. At that time, two contending political systems were in equipoise: democracy and Communist dictatorship. Now democracy is ascendant, and this development may influence the ICJ (more of whose judges now come from democratic countries). Second, the government in Nicaragua was by no plausible account a particularly horrible

[48] *Nicaragua* (merits), 1986 ICJ at paras. 263, 268.
[49] ICJ Statute art. 59.

https://doi.org/10.1017/S0265052504211025 Published online by Cambridge University Press

regime, in the context of its time and place. Possibly a truly repellent regime would receive less sympathy from the ICJ.

1. Territorial integrity and political independence, revisited. It will be recalled that a major issue bearing on the legality of unauthorized humanitarian intervention is the proper interpretation of the terms 'territorial integrity' and 'political independence' in Article 2(4) of the Charter. In the *Nicaragua* decision, the ICJ held that the United States had violated a customary-law obligation that was essentially identical to Article 2(4). The ICJ did not clearly specify whether the United States had violated Nicaragua's territorial integrity, or political independence, or both. However, in its opinions on provisional measures and on the merits, the ICJ did twice admonish the United States as follows:

> The right to sovereignty and to *political independence* possessed by the Republic of Nicaragua, like any other State of the region or of the world, should be fully respected and should not in any way be jeopardized by any military and paramilitary activities which are prohibited by the principles of international law, in particular the principle that States should refrain in their international relations from the threat or use of force against the territorial integrity or the political independence of any State, and the principle concerning the duty not to intervene in matters within the domestic jurisdiction of a State. (emphasis added)[50]

This passage suggests (to me, at least) that the United States had used force against Nicaragua's political independence, but had not necessarily used force against Nicaragua's territorial integrity. Hence, the ICJ did not endorse, in the *Nicaragua* case, the expansive definition of 'territorial integrity' mentioned above, according to which every territorial incursion is a violation of territorial integrity.

In 1996, the ICJ issued a closely divided advisory opinion on the legality of using or threatening to use nuclear weapons.[51] In that opinion, in the course of expounding on the meaning of Article 2(4), the ICJ made the following statement: "[I]t would be illegal for a State to threaten force to secure territory from another State, or to cause it to follow or not follow certain political or economic paths."[52] This once again suggests a broad interpretation of 'political independence' and a possibly narrow interpretation of 'territorial integrity'. While most commentators see the Kosovo campaign as more clearly a violation of territorial integrity than political independence (assuming it is a violation at all), the ICJ could potentially

[50] *Nicaragua* (provisional measures), 1984 ICJ 169, Order B(2); and *Nicaragua* (merits), 1986 ICJ at para. 288.
[51] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 ICJ 226.
[52] *Nuclear Weapons* case, 1996 ICJ at para. 47.

rely on the 'political independence' prong of Article 2(4) if it ultimately declares the Kosovo campaign to be unlawful.

2. Enforcing a decision of the ICJ. The UN Charter provides that a state that obtains a favorable decision from the ICJ can appeal to the Security Council for enforcement of the ICJ's decision.[53] In the Nicaragua dispute, Nicaragua appealed to the Security Council to enforce the ICJ's decision against the United States. The United States, of course, vetoed enforcement of the ICJ decision.

Does this mean that the whole ICJ procedure is meaningless, that it offers a target of intervention no more than a simple appeal to the Security Council? Not really. Decisions of the ICJ have a political effect even if enforcement is blocked by a veto in the Security Council, and states may comply with ICJ decisions even if they are able to block enforcement.

Because the United States vetoed enforcement, the *Nicaragua* case is sometimes seen as illustrating the problem of enforcing decisions of the ICJ, and more generally the problem of enforcing international law. Be that as it may, there is substantial evidence that the ICJ proceedings did affect the policy of the United States toward Nicaragua. As noted above, the ICJ issued a preliminary injunction against the United States in the *Nicaragua* case; it ordered the United States to stop mining Nicaragua's ports. In response to this preliminary measure, the U.S. State Department announced that the United States had stopped its naval attacks on Nicaragua the previous month (after Nicaragua's application with the ICJ had been filed), and that the attacks would not resume.[54] Moreover, the ICJ proceedings figured in the decision of Congress to cut off aid to the Nicaraguan Contra rebels in October 1984.[55]

E. International Criminal Court

A target of intervention might also seek relief from the new International Criminal Court. The ICC came into existence in July 2002, despite opposition from the United States.[56] While the ICJ can only hear cases against states, the ICC will hear cases against individuals, some of whom may be leaders of states.

[53] UN Charter art. 94.

[54] "Court's Ruling Acceptable, State Department Declares," *New York Times*, May 11, 1984, sec. A, p. 8, col. 1.

[55] Daniel Patrick Moynihan, *On the Law of Nations* (Cambridge, MA: Harvard University Press, 1990), 141–47; and Hendrick Smith, "Reagan Fighting to Win Aid for Anti-Sandinistas," *The New York Times*, May 7, 1984, sec. 1, p. 12, col. 1. (The dispute over aid "reached a climax in early April with revelations that the C.I.A. had directed the mining of Nicaraguan ports, reinforced by a subsequent ruling of the International Court of Justice that called for a halt in the mining and asserted that Nicaragua's independence 'should not be jeopardized by any military or paramilitary activities.' ") The Reagan Administration's attempt to obtain aid for the Contras in spite of the Congressional cutoff led to the Iran-Contra affair.

[56] See Curtis A. Bradley, "U.S. Announces Intent Not to Ratify International Criminal Court Treaty," American Society of International Law, *ASIL Insights* (May 2002); available on-line at http://www.asil.org/insights/insigh87.htm [accessed March 10, 2003].

https://doi.org/10.1017/S0265052504211025 Published online by Cambridge University Press

https://doi.org/10.1017/S0265052504211025 Published online by Cambridge University Press

Under its constitutive treaty (the "Rome Statute"), the ICC is supposed to exercise jurisdiction over four kinds of international crimes: genocide, crimes against humanity, war crimes, and the crime of aggression.[57] The crime of aggression is most relevant here. Unfortunately for intervenees, the ICC is not yet exercising jurisdiction over the crime of aggression, and may never do so. The parties to the Rome Statute could not reach agreement on issues surrounding the crime of aggression; they decided to defer those issues, hoping to resolve them by later amendment to the treaty. Such an amendment could become effective, at the earliest, in 2009.[58]

One outstanding issue is how to define the crime of aggression. Most definitions proposed for inclusion in the Rome Statute are based on the General Assembly's 1974 "Definition of Aggression" resolution, which in turn is based on Article 2(4) of the Charter, the Charter's prohibition on the threat or use of force.[59] Simplifying greatly, it appears likely that if the crime of 'aggression' is ever defined under the Rome Statute, a serious use of force in violation of Article 2(4) will be a crime of aggression.

Another outstanding issue regarding the crime of aggression is whether, as a precondition to any prosecution for the *crime* of aggression, the Security Council must determine that an *act* of aggression has occurred. Some believe that such a prior determination by the Security Council is required by the UN Charter; they point to Article 39 of the Charter, which states that the Security Council "shall determine the existence of any threat to the peace, breach of the peace, or act of aggression."[60] If the Security Council shall determine the existence of aggression, then arguably no other body may determine the existence of aggression. Others argue that the Security Council's power to determine the existence of aggression is not exclusive, at least in the context of international criminal proceedings.

If there can be no prosecution for the *crime* of aggression until the Security Council has determined the existence of an *act* of aggression, then the ICC will not be of much help to targets of intervention. However, there is great resistance, among parties to the Rome Statute, to allowing the veto of one permanent member of the Security Council to preclude a prosecution for the crime of aggression. Several proposals now under

[57] Rome Statute of the International Criminal Court, art. 5, para 1.

[58] Art. 5, para 2 of the Rome Statute provides: "The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations."

[59] For recent proposals, see "Discussion Paper on the Definition and Elements of the Crime of Aggression, prepared by the Coordinator of the Working Group on the Crime of Aggression," in *Report of the Preparatory Commission for the International Criminal Court*, 10th Session, UN Doc. PCNICC/2002/2/Add.2 (July 24, 2002); available on-line at http://www.un.org/law/icc/prepcomm/jul2002/english/pcnicc2002_2_add2e.doc [accessed September 29, 2002].

[60] UN Charter art. 39.

consideration would give the Security Council an initial opportunity to determine the existence of aggression, but in the case of a veto would allow final determination to be made by the ICC, or the ICJ, or the General Assembly.[61] My own compromise proposal (which I do not expect to be adopted) is that there can be a prosecution without Security Council approval up to the confirmation of charges against an accused party (similar to an indictment in the United States), but further proceedings would require the approval of the Security Council.[62]

If there could be any proceedings before the ICC on a prosecution for the crime of aggression, without the prior approval of the Security Council, targets of intervention would have a major new legal avenue. It would be very embarrassing for leaders of an intervening state to be the subjects of an ICC prosecution, even if the likelihood is small that they would ever fall into the custody of the ICC. It would also be easier for intervenees to confer jurisdiction on the ICC over a claim of aggression than it is for intervenees to bring a claim of unlawful force that is within the jurisdiction of the ICJ.[63] If the ICC ever begins to exercise jurisdiction over the crime of aggression, the possibility of being prosecuted for aggression may deter some unauthorized humanitarian interventions, for good or ill.

F. Charter law is not plastic

I previously noted the view of some scholars that Charter prohibitions on the use of force could be abrogated through the processes of customary international law. The Charter plasticity view has widely different normative implications, depending on whether force prohibitions are assumed to be (1) vulnerable but not yet abrogated, or (2) already abrogated. If force prohibitions are assumed to be vulnerable but not yet abrogated, Charter plasticity could be an additional reason to avoid humanitarian interventions, lest they lead to a general abrogation of prohibitions on the use of force between states. If force prohibitions are assumed to be already abrogated, Charter plasticity could *remove* international-law impediments to humanitarian intervention.

In any event, neither version of the Charter plasticity view is realistic, given the institutional framework I have described above. Anyone can make a grand pronouncement that the law is now "Y" rather than "X." But the ICJ, which is governed by the Charter, will never say that the Charter's prohibitions on the use of force are void. All of its decisions

[61] See Coordinator's Discussion Paper, available on-line at http://www.un.org/law/icc/prepcomm/jul2002/english/pcnicc2002_2_add2e.doc [accessed September 29, 2002].

[62] Mark S. Stein, "The Role of the Security Council in Prosecutions for the Crime of Aggression," *Accountability: Newsletter of the American Society of International Law, International Criminal Law Interest Group* 1, no. 1 (2002): 8–10.

[63] See Rome Statute, art. 12. By conferring jurisdiction on the ICC, intervenees would also subject their own leaders to possible prosecution before the ICC.

https://doi.org/10.1017/S0265052504211025 Published online by Cambridge University Press

https://doi.org/10.1017/S0265052504211025 Published online by Cambridge University Press

tend in the other direction; since the *Nicaragua* case, the ICJ has issued a number of decisions demonstrating that it takes a narrow view of the permissibility of the use of force under the Charter. There is not the tiniest cloud hanging over Article 2(4) in the ICJ's decisions.

The Security Council, similarly, will never give up its role in enforcing Article 2(4). All of the Security Council's resolutions on Iraq, from 1990 to 2002, grew out of Iraq's violation of Article 2(4) by its invasion of Kuwait. While the veto of permanent members prevents enforcement against them and their allies, the Security Council will never agree that Article 2(4) has been nullified so that all states are now free to use force in international relations.

And similarly, if the crime of aggression is ever defined as part of the Rome Statute, the ICC will never determine that the provisions of the Rome Statute as to the crime of aggression have become instantly obsolete, and that aggression is not a crime after all. As noted, the definition of the crime of aggression is likely to be based on Article 2(4) of the Charter.

The idea that Charter law can be modified in a way that would never be accepted by the ICJ or the Security Council reflects an anachronistic, pre-Charter view of international law. At one time, the behavior of states was almost the exclusive material of international law, but we now have respected international institutions. It is almost pointless to suggest that something is or could be law if these institutions will never accept it as law.

And if we look at the behavior of states, we would have to conclude, once again, that Charter law on the use of force is alive and well: it has considerable weight as a political norm. When the United States was moving toward a war with Iraq in 2002, most states expressed the view that such a war, if not authorized by the Security Council, would be a violation of the UN Charter. Faced with this opposition, the United States drew back, temporarily, from launching an unauthorized attack on Iraq. There could hardly be any greater proof of the viability of an international norm than if the most powerful state in the world prepares to violate that norm and then draws back, even temporarily, in the face of opposition from other states. Certainly there have been times, since the founding of the United Nations, when permanent members of the Security Council launched nondefensive military interventions with far less concern for the approval of the Council.

As long as the United Nations lasts, international law will never again permit the free use of force by states. There may be a small possibility that an exception to the law on force will develop for unauthorized humanitarian intervention—an exception some claim already to find in international law. Such an exception is possible because there are plausible interpretations of Article 2(4) that permit it. Given the ICJ's decisions on the use of force, however, it seems unlikely that the ICJ will smile on unauthorized humanitarian intervention in the foreseeable future.

I hasten to add that international law should not be the last word in international political morality. Perhaps states should undertake unauthorized humanitarian intervention even if such intervention is contrary to international law. I now turn to such issues of morality and policy.

III. Utilitarianism and Humanitarian Intervention

I take a utilitarian approach to humanitarian intervention: interventions, or rules concerning intervention, are right in proportion as they reduce the suffering of all concerned. I also believe it would be best to employ a utilitarian definition of 'humanitarian intervention': humanitarian intervention is the use of force by a state, beyond its own borders, that has as its purpose or effect the reduction of suffering among all concerned, including noncitizens of the intervening state.

Many would define humanitarian intervention in terms of action to protect human rights, and I have accommodated this view in my earlier, provisional definition of humanitarian intervention. I do not object to talk of human rights, especially if such talk contributes to the reduction of suffering. Nevertheless, the reduction of suffering should be the fundamental object. I note, for what it is worth, that a suffering-based definition of humanitarian intervention seems more consistent than a rights-based definition with the dictionary definition of the word 'humanitarian',[64] and with the generally accepted meaning of terms such as 'humanitarian aid', 'humanitarian organization', and even 'humanitarian law'.

A. Alternatives to utilitarianism

Many others also take a generally utilitarian approach to humanitarian intervention, whether or not they use the term 'utilitarian'. However, there are alternatives to a utilitarian approach. For example, a number of thoroughgoing deontological or rights-based positions are possible. Such positions are sometimes suggested by the rhetoric of some participants in the debate over humanitarian intervention.

It might be argued, on deontological grounds, that intervenors should be willing to pay any price to secure human rights abroad. Thus, the United States and NATO should have intervened in Chechnya, even if the result were a bloody war with Russia—even if the result were a bloody *nuclear* war with Russia.

A deontological position with nearly opposite consequences would be that intervention is prohibited unless the motives of the intervenor are pure: if the intervenor is partly or primarily motivated by geopolitical

[64] "[A] person promoting human welfare and social reform," *Merriam-Webster OnLine*, s.v. 'humanitarian'; available on-line at http://www.m-w.com/cgi-bin/dictionary [accessed December 5, 2002].

https://doi.org/10.1017/S0265052504211025 Published online by Cambridge University Press

https://doi.org/10.1017/S0265052504211025 Published online by Cambridge University Press

rather than humanitarian considerations, it must hold back. This position would rule out most if not all interventions, whether or not they are authorized by the Security Council. As political philosopher Michael Walzer and others have suggested, intervenors rarely if ever have purely humanitarian motives; most beneficial interventions occur when the geopolitical interests of the intervening state fortuitously coincide with the interests of humanity.[65] Examples often given are Vietnam's overthrow of the Khmer Rouge regime in Cambodia (1979) and Tanzania's overthrow of Idi Amin's government in Uganda (1979). Possibly America's overthrow of governments in Grenada (1983), Panama (1989), and Iraq (2003) also fits this pattern.

Another deontological position would be that intervenors must avoid inconsistency and hypocrisy with respect to the seriousness of human rights violations that they are seeking to remedy. This position would in effect require that we intervene everywhere (e.g., war with Russia over Chechnya, war with China over Tibet) or nowhere. And the likely choice of nowhere would be bad for all victims of oppression, not just those whom the intervenor otherwise would have helped. Humanitarian intervention shines a light on abuses that are similar to those committed by the intervenee, especially if failure to suppress these similar abuses seems hypocritical. The Kosovo intervention spawned charges of hypocrisy as to NATO's failure to intervene in Turkey (treatment of the Kurds), Indonesia (East Timor), and India (Kashmir). All three of these states have now improved their treatment of their respective minorities or breakaway groups. There are, of course, local factors in all three cases, but perhaps a part was played by additional publicity and additional pressure from allies generated as a result of the Kosovo campaign. To the old saw that hypocrisy is vice's tribute to virtue, we can add: hypocrisy shines virtue's light on vice.

There are also egalitarian alternatives to a utilitarian position on humanitarian intervention. Egalitarians would like to give more weight to the interests of those who are worse off than to the interests of those who are better off (at least, that is how utilitarians view the matter).[66] Egalitarians would prefer to see a larger amount of suffering by those who are or have been better off than a smaller amount of suffering by those who are or have been worse off.

In the area of humanitarian intervention, egalitarianism (at least, of the cosmopolitan variety) would require intervenors from wealthy countries to accept more casualties than would any variant of utilitarianism. Thus, on an egalitarian analysis, it might be right for the United States to sacrifice the lives or limbs of one thousand of its soldiers in order to save the

[65] Michael Walzer, "The Argument about Humanitarian Intervention," *Dissent* 49, no. 1 (2002): 29–37.

[66] John C. Harsanyi, "Rule Utilitarianism, Equality, and Justice," *Social Philosophy & Policy* 2, no. 2 (1985): 125–26.

lives or limbs of five hundred badly off young people in another country, even without considering the other benefits of intervention. This would be sacrificing a greater amount of utility for a more equal distribution of utility, a trade-off that egalitarians typically claim to favor.

Another possible alternative to utilitarianism is ethical nationalism, the view that states should give absolute priority to the interests of their own citizens. Under this view, it would be wrong to sacrifice the welfare of even one citizen in order to save the lives or relieve the suffering of any number of foreigners. An advocate of ethical nationalism would see humanitarian intervention as an immoral impulse.

Of course, it is also possible to have a mixed view, one that combines utilitarianism with other approaches. Legal scholar Fernando Teson, for example, delves very deeply into the rhetoric of deontology and trots out some stock arguments against utilitarianism, but ends up concluding that "other things being equal, humanitarian interventions that are likely to cause substantially disproportionate additional suffering should not be initiated."[67] Utilitarianism seems to be so large an element in Teson's mixed view that I am not sure it is possible to distinguish his view from utilitarianism in practice.

I will not defend here my utilitarian approach to humanitarian intervention (other than through the foregoing discussion of the alternatives). In what follows I will view the problem of unauthorized humanitarian intervention through the lens of utilitarian moral theory, but some of what I say may be of interest to devotees of other approaches.

B. Act or rule?

The debates about humanitarian intervention recall debates in moral theory about rule-utilitarianism, act-utilitarianism, and the place of institutions in utilitarian theory. Most discussions of humanitarian intervention are rule oriented: Under what conditions should a state (such as the United States) intervene? The most prominent possible rule, and one that arguably already exists, is that states should intervene only with the authorization of the Security Council. I will refer to this as the 'authorization rule'.

Suppose one thought, as the Kosovo intervention was about to be launched, that it would have good effects overall. One might still oppose the Kosovo intervention, based on the authorization rule. This would be similar to a rule-utilitarian approach, and if one's reasons for supporting the authorization rule were utilitarian, it would in fact be a rule-utilitarian approach.

[67] Teson, *Humanitarian Intervention*, 123.

https://doi.org/10.1017/S0265052504211025 Published online by Cambridge University Press

https://doi.org/10.1017/S0265052504211025 Published online by Cambridge University Press

Rule-utilitarians are vulnerable to embarrassment by situations in which obeying a generally beneficial rule would have disastrous consequences. Some such hypothetical examples conjured up by moral theorists are a little silly, but in the area of humanitarian intervention, the problem seems more realistically acute. Should states observe the authorization rule at the cost of allowing hundreds of thousands of people to die?[68] (Of course, if this is going to be a consequence of the rule, then it is hard to believe that the rule is beneficial overall.)

The same problem can beset adherents of other rules that have been suggested in the area of humanitarian intervention. Numerous writers have attempted to specify the conditions under which humanitarian intervention should take place. If these conditions take the form "Intervene only if X, Y, and Z," they are also vulnerable to attack by way of difficult realistic examples. For example, three worthy suggestions are that (1) intervening states should act through regional organizations; (2) intervening states should subject themselves to the jurisdiction of the ICJ and the ICC for all claims arising out of their intervention; and (3) intervening states should not bomb from high altitudes if doing so makes it difficult to distinguish between military and civilian targets. Suppose now that the United States had been prepared to intervene against genocide in Rwanda, but had not been able or willing to meet these and other worthy conditions. After all, the humanitarian impulse is a fragile thing, likely to be overridden by national interest, and such conditions would give the United States additional reasons not to intervene. Would it be better not to intervene in a Rwanda-like situation than to intervene without meeting the conditions?

Many theorists, following philosopher David Lyons, believe that rule-utilitarianism is always in danger of collapsing into act-utilitarianism. In the area of humanitarian intervention, such a merger would be effected by the rule: intervene so as to cause the best consequences, or intervene so as to minimize suffering overall.

Lyons suggests that while utilitarians can support institutions that limit by rules the direct pursuit of utility, they will behave in an act-utilitarian manner once they are inside those institutions.[69] There is some truth to this view, but there are reasons why utilitarians can sometimes be effec-

[68] To quote Annan again:

> To those for whom the greatest threat to the future of international order is the use of force in the absence of a Security Council mandate, one might ask—not in the context of Kosovo—but in the context of Rwanda: If, in those dark days and hours leading up to the genocide, a coalition of States had been prepared to act in defence of the Tutsi population, but did not receive prompt Council authorization, should such a coalition have stood aside and allowed the horror to unfold?

1999 Annual Report of the Secretary-General (details at note 2).

[69] David Lyons, *Rights, Welfare, and Mill's Moral Theory* (New York: Oxford University Press, 1994). For a utilitarian response, see William H. Shaw, *Contemporary Ethics: Taking Account of Utilitarianism* (Oxford: Blackwell, 1999), 192–96.

tively committed to institutions even if they are not fundamentally committed to them. One such reason would be a continuing lack of trust in the ability of agents, including themselves, to deviate from institutional rules in a utility-maximizing way.

In the area of humanitarian intervention, one's commitment to rules, and in particular to the authorization rule, is likely to be affected by one's attitude toward the United States. The United States is the country most able to project force beyond its borders. Is the United States a benevolent, huggable hegemon or a malevolent, reckless rogue? Doubtless the truth is somewhere between these two poles. I am disposed to believe that the effects of American intervention will likely be good; I know that others disagree.

C. Danger of abuse

Opponents of a humanitarian exception to the authorization rule fear that such an exception will be abused. It is important to distinguish between two different ways in which such abuse can occur. First, a perceived right of humanitarian intervention could lead states to label as 'humanitarian' wars that they undertake for other-than-humanitarian motives, and that they would have undertaken in any event. This would not be an unfortunate result. Of course, it is unfortunate when states launch bad wars, that is, those having bad consequences overall. But given that a state will launch a bad war, it is preferable that the state claim to be undertaking humanitarian intervention rather than offer some other pretext, such as self-defense. A state that claims to be undertaking humanitarian intervention has pledged, however hypocritically, to promote the well-being of people beyond its borders. Such a pledge can be held up to it by other states, and may even moderate its behavior.

The second possibility is that a perceived right of humanitarian intervention could lead states to wage bad wars that they would *not* have waged if they could not claim to be acting from humanitarian motives. This is the true danger of abuse. Consider a hypothetical brutal dictatorship in State X. The dictatorship, let us suppose, is hostile to the United States, which desires to replace it with a friendlier and more benevolent regime. A U.S. military intervention to overthrow the dictatorship would have humanitarian aspects. The people of State X would probably be better off under a replacement regime (at least, those who remained alive would be better off). However, military intervention would also be motivated by nonhumanitarian considerations, which might be paramount for American policymakers. Hypothetically, the nonhumanitarian objectives could lead the United States to start a war that would predictably cause far more suffering than it would cure, a war that the United States would not start if it could not claim a humanitarian objective and *also* would not start if it were acting solely from humanitarian motives.

https://doi.org/10.1017/S0265052504211025 Published online by Cambridge University Press

https://doi.org/10.1017/S0265052504211025 Published online by Cambridge University Press

Accordingly, those who mistrust the United States (and, presumably, every other state) could advocate adherence to the authorization rule even while conceding the argument I made at the beginning of this essay, that there is a deficit of humanitarian intervention because of the particularism of states. A perceived right of humanitarian intervention could lead states to launch interventions that have some humanitarian aspect, but that have bad consequences overall because they are primarily motivated by geopolitical considerations.

One does not need bad motives, of course, to get bad consequences. Mistakes can also lead to bad consequences, and there are plenty of mistakes in war.

Even if we trust our own country (e.g., the United States), we might mistrust other countries. In that event we might support the imposition of a globally effective authorization rule. Suppose we sat in a world parliament that could somehow enforce its laws. As utilitarians, we might support the authorization rule, even though we thought that our own country could produce good consequences by deviating from it, if we thought that all unauthorized force, considered together, would have bad consequences. And once we succeeded in passing the authorization rule, we would not be able to deviate from it.

Of course, we are not sitting in a world parliament. If our country refrains from using unauthorized force, this will not necessarily prevent other countries from using unauthorized force. Our country might just be giving up "good" wars only to see other countries continue to make "bad" wars.

If we are seeking political realism, it may even be a mistake to view the issue as whether unauthorized force by our country, or unauthorized force under a claim of humanitarian intervention, would have good or bad consequences overall. Citizens interested in a moral foreign policy may be able to affect some uses of force better than others. My own view, as I have said, is that the humanitarian impulse is fragile: the more purely humanitarian an intervention, the more likely it is to be a marginal case, one in which policy can be swayed. Conversely, where a state has a strong geopolitical interest in war, it is less likely to be held back. Therefore, if we support the authorization rule because of its generally beneficial effect, we may be more likely to impede good interventions than bad interventions.[70] I must admit, however, that the current American administration was dissuaded in 2002, at least temporarily, from using unauthorized force against Iraq, by the combined opposition of the American public and most of the world, in a situation where many members of the administration saw a strong geopolitical interest in attacking Iraq immediately.

[70] Not that strong geopolitical interests mean that the use of force should necessarily be opposed. Self-defense is a strong geopolitical interest.

D. The rules we have

We do not have an effective authorization rule that makes deviation impossible and so makes it unnecessary to calculate the consequences of deviation. But we do have a somewhat ambiguous authorization rule, as part of international law and international politics, and violating this rule can have some consequences.

As a political norm, the authorization rule varies in effectiveness depending on the political support that it receives in any given situation. In the period leading up to Security Council Resolution 1441 on Iraq,[71] the authorization rule received enormous political support, leading the United States to abandon, at least temporarily, its plan to attack Iraq without authorization. In the period leading up to the Kosovo intervention, the authorization rule received less political support. The difference was not a matter of law, in my opinion: the unauthorized Kosovo intervention was just as clearly a violation of international law as the unauthorized attack on Iraq. Or so it seems to me.

Sometimes the authorization rule has specifically legal consequences, which in turn have political consequences. Some states are reluctant to violate what they consider to be international law, even if it is naked law, unsupported by any judicial decision. And once law is applied by an international court, it gains greater and wider credibility. In the case of forcible intervention, the ICJ may brand the use of force as illegal and order the intervening state to stop, as in the *Nicaragua* case. And the ICC prosecutor may bring charges against the leaders of an intervening state, if the ICC ever begins to exercise jurisdiction over the crime of aggression.

Ultimately, such legal consequences will be political consequences only to the extent that they have political credibility with states. But international judicial and prosecutorial decisions do have political credibility—at least, they have greater credibility than naked law. The ICJ's decisions in the *Nicaragua* case may have helped to end direct American military operations against Nicaragua, and if the ICJ had ordered NATO countries to halt their participation in the Kosovo campaign, such an order may also have had a political effect.

Thus, the political and legal force of the authorization rule can affect the behavior of states in the area of humanitarian intervention. As a matter of prudence, in light of legal and political consequences, states might not intervene because of the authorization rule we now have—though they would intervene if there were no authorization rule.

A different question is whether the legal consequences of the authorization rule should be morally significant beyond their effect on the na-

[71] S/Res/1441, UN SCOR 57th Sess., 4644 mtg. (Nov. 8, 2002). For an explanation of this resolution, see Frederic L. Kirgis, "Security Council Resolution 1441 on Iraq's Final Opportunity to Comply with Disarmament Obligations," *ASIL Insights* (November 2002); available on-line at http://www.asil.org/insights/insigh92.htm [accessed March 7, 2003].

https://doi.org/10.1017/S0265052504211025 Published online by Cambridge University Press

https://doi.org/10.1017/S0265052504211025 Published online by Cambridge University Press

tional interest of potential intervenors. In act-utilitarian terms, this question becomes: Do the legal consequences of a particular humanitarian intervention make the total consequences of that intervention bad (not just for the intervenor, but for all people), where absent the authorization rule the total consequences would have been good?

If each humanitarian intervention eroded the authorization rule, making more likely the nonhumanitarian and nondefensive use of force, that would indeed be a negative consequence. I have already expressed my view that such erosion will not occur, and that it has not occurred as a result of previous humanitarian interventions. The ICJ will not hold that Charter prohibitions on the use of force have been abrogated, and the ICC will not hold that the Rome Statute provisions on the crime of aggression have been nullified before the ICC has even begun to exercise jurisdiction over that crime.

The idea that humanitarian interventions will lead to nonhumanitarian wars has been somewhat overtaken by events. In preparing the way for a war against Iraq, the United States advanced a very broad interpretation of the concept of 'anticipatory self-defense'. Under this novel view of self-defense, the United States was entitled to attack Iraq and overthrow its government because Iraq might pose a threat to the United States at some time in the nebulous future. This doctrine, if universalized, truly would signal the end of any effective prohibition on the use of force in international relations: in every conflict, it is always possible that one side will someday pose a threat to the other. Here there is a possibility of like cases leading to like cases; this seems more realistic than the possibility, feared by opponents of unauthorized humanitarian intervention, that like cases will lead to unlike cases.

Humanitarian intervention will not erode the authorization rule so as to permit the free use of nonhumanitarian and nondefensive force. It is more likely that any change in the law caused by humanitarian intervention will relate specifically to humanitarian intervention. On the one hand, if repeated cases of unauthorized humanitarian intervention establish a humanitarian exception to the authorization rule, that could be a positive development. On the other hand, there is the danger that humanitarian intervention in borderline cases can strengthen the authorization rule, as applied specifically to humanitarian intervention, so that it becomes more difficult to intervene in the future even when intervention is enormously beneficial. The *Nicaragua* case, in which the ICJ announced that force is not an acceptable means of promoting human rights, was at the very best a borderline case for humanitarian intervention. While there was a risk that Nicaragua would slip into Cuba-style totalitarianism, the human rights situation in Nicaragua was far better than in many other countries in Central and South America. The Kosovo case, in which the ICJ remarked that the intervention "raises very serious issues of international law," was also something of a borderline case. Yugoslavia confronted an

armed secessionist movement, and its response, while brutal, was not so brutal as to set it apart from other states confronting armed secessionism.[72]

Soft cases, I suggest, make bad law on humanitarian intervention. Probably the ICJ would not have been so quick to brand humanitarian intervention illegal, as in the *Nicaragua* case, if the intervenee was a state that was killing tens of thousands or hundreds of thousands of people. Fortunately, the ICJ has not yet addressed the merits of the Kosovo case and may never have to do so. If there is any possibility that the fall of Communism and other changed circumstances will cause the ICJ to moderate its position on humanitarian intervention, we should not foreclose that possibility by presenting it with another borderline case. So the broader legal consequences of unauthorized intervention may, after all, be a reason to err on the side of the authorization rule.

IV. Conclusion

Like many authors, I have discussed the authorization rule as an either-or proposition: comply or violate. Such an approach makes analysis simpler, but we should also remember that international politics as practiced is often ambiguous. It is not always clear whether an intervention is authorized.

Ambiguities aside, I might be asked: After all of this theorizing, do I support the authorization rule? Not as a hard-and-fast rule. States should sometimes intervene without authorization, if intervention would clearly reduce suffering.

Government, Dartmouth College

[72] The more serious brutality imputed to Yugoslavia, fairly or unfairly, was the brutality of the Bosnian Serbs against the Bosnian Muslims. The Bosnian tragedy colors the attitude of many toward the Kosovo intervention, including possibly some ICJ judges.

https://doi.org/10.1017/S0265052504211025 Published online by Cambridge University Press