

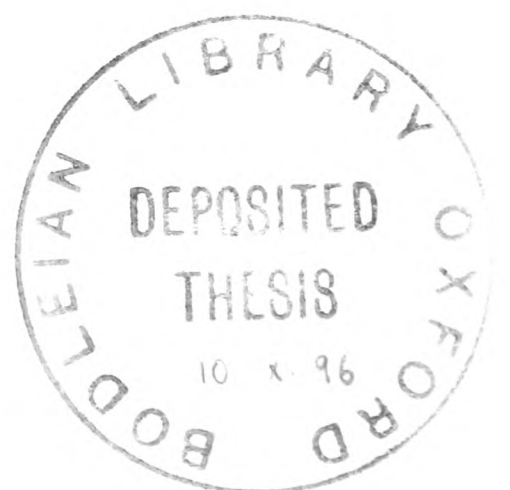
**HUMANITARIANISM AND MILITARY FORCE:
HUMANITARIAN INTERVENTION AND INTERNATIONAL SOCIETY**

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ABSTRACT

This thesis examines the theory and practice of humanitarian intervention in the modern states system. Humanitarian intervention is defined as the use of military force across state boundaries, against the wishes of the target government, to protect the people from intolerable misrule and grave abuses of human rights. The aim of this thesis is to examine the problem of humanitarian intervention from the perspective of international society. This thesis is divided into two parts. Part One defines the concept, considers the historical and intellectual milieu in which the idea emerged and evolved, and examines the different grounds upon which states have justified a right of intervention. Part Two considers the implications for international society. International society exists when states have shared rules, values, and a mutual concern for order. Three primary arguments are made in Part Two: (1) Humanitarian intervention can co-exist with the rules of state sovereignty, non-intervention, and limitations on the use of force; (2) Humanitarian intervention has performed the historic function of expanding the values of international society; (3) Practised under the right circumstances, it can help promote international order rather than subvert it. As this thesis demonstrates, a more in-depth understanding of how past theorists and practitioners of humanitarian intervention have approached the problem can enrich the current discussion.

CHAPTER ONE

INTRODUCTION

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INTRODUCTION

This thesis examines the problem of humanitarian intervention from a historical perspective. In particular, I am interested in the implications of humanitarian intervention for international society. This thesis, therefore, is not strictly a study in international law but integrates the legal, moral, and power political issues associated with humanitarian intervention. There are five primary questions which I attempt to answer: What are the historical and philosophical foundations of the idea? Under what circumstances have states claimed that there is a right of intervention? How has international society reconciled humanitarian intervention with the rules of this society? Has humanitarian intervention performed a useful function in the expansion of Western values? What are the implications for international order? As this thesis shows, the history of the theory and practice is not just of historic interest, but is highly relevant to contemporary debates over the use of force and human rights.

Needless to say, the problem of humanitarian intervention has occupied a central place in post-Cold War international relations. Humanitarian crises in Iraq, the former Yugoslavia, Somalia, Haiti, and Rwanda have raised difficult questions and moral choices. How should the international community respond when abuses of human rights are so persistent and widespread that they 'shock the conscience of mankind'?

For many, the solution lies in the deployment of arms and soldiers to protect the victims of such atrocities. The doctrine of humanitarian intervention, discredited during much of the Cold War era as a license for abuse and a threat to the inviolable principles of state sovereignty and non-intervention, has been revived with great vigour. While words have not always been backed with force, it is now routinely proclaimed that territorial and political sovereignty end when atrocities of unspeakable proportions begin.

The resurgence of interest has opened a wide debate as the merits and perils of this form of intervention are discussed and debated by policymakers, statesmen, diplomats, journalists, academics, and citizens alike. That the principle occupies such a high profile in the agenda of policymaking has brought forth a number of articles and books on this subject. There have been two dominant trends in the recent literature. First, international lawyers have predominantly been concerned with the implications of the doctrine and practice for contemporary international law.¹ The more policy-oriented, on the other hand, tailor their discussion to the practical problems of how to make the doctrine workable in practice.² Hence, Somalia and the former Yugoslavia serve as the points

¹ See for instance Barry M. Benjamin, 'Unilateral Humanitarian Intervention: Legalizing the Use of Force to Prevent Human Rights Atrocities', *Fordham International Law Journal* 16 (1992-93), pp. 120-158; Peter Malanczuk, *Humanitarian Intervention and the Legitimacy of the Use of Force* (Amsterdam: Het Spinhuis, 1993); David M. Kresock, 'Ethnic Cleansing' in the Balkans: The Legal Foundations of Foreign Intervention', *Cornell International Law Journal* 27 (1994), pp. 203-239.

² See in particular Richard N. Haass, *Intervention: The Use of American Military Force in the Post-Cold War World* (Washington, DC: Carnegie Endowment, 1994); Lori Fisler Damrosch, ed., *Enforcing Restraint: Collective Intervention in Internal Conflicts* (New York: Council on Foreign Relations Press, 1993); Adam Roberts, 'Humanitarian War: Military Intervention and Human Rights', *International Affairs* 69 (1993), pp. 429-449; Thomas G. Weiss, 'Intervention: Whither the United Nations?', *Washington Quarterly* 17, no. 1 (1994), pp. 109-128.

of reference for contemporary discussions. The wider historical perspective is lost. While there are good reasons to focus on the present, there are also sound reasons for examining the past.

In contrast to much of the contemporary discussion, this work examines ideas, issues, and problems before the end of the Cold War. This is not to downgrade the important developments and changes since 1991, but the goal of this study is to situate recent developments in the wider historical context.³ A glaring gap in the literature, both past and present, is the absence of works devoted to the history of the theory and practice. This is not to say this topic has been entirely overlooked, but that the history has been ill-served by cursory examinations. A common approach is to devote a few paragraphs citing Hugo Grotius and other authorities, followed by a few historical illustrations. Jean-Pierre L. Fonteyne's 1974 article is representative of this approach and has set the model for subsequent discussions.⁴ Articles published after 1991 have not added to the history of humanitarian intervention.⁵

³ On the relevance of history to international relations as an academic discipline, see Evan Luard, *Types of International Society* (London: Collier Macmillan Publishers, 1976), pp. 30-31; Stanley Hoffmann, 'An American Social Science: International Relations', *Janus and Minerva: Essays in the Theory and Practice of International Politics* (Boulder, C.O.: Westview Press, 1987), p. 21; Hedley Bull, 'International Theory: The Case for a Classical Approach', *World Politics* 18 (1966).

⁴ Jean-Pierre L. Fonteyne, 'The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity Under the U.N. Charter', *California Western International Law Journal* 4 (Spring 1984), pp. 203-270.

⁵ The literature on humanitarian intervention continues to grow. Yet, nothing directly addresses the history of the doctrine. See Nancy D. Arnison, 'International Law and Non-Intervention: When Do Humanitarian Concerns Supersede Sovereignty?', *Fletcher Forum of World Affairs* 17 (1993), pp. 199-211; Judy A. Gallant, 'Humanitarian Intervention and Security Council Resolution 688: A Reappraisal in Light of A Changing World Order', *American University Journal of International Law and Policy* 7 (1992), pp. 881-920; David J. Scheffer,

One objective of this thesis is to explore the richness of the doctrinal history in the Western tradition. This is not to say that the Western conception of humanitarian intervention is the only one. One could imagine the study of Islamic doctrines since there is much material in the Qur'an addressing intervention by Muslims to protect those ill-treated and oppressed by non-Muslims.⁶ This principle mirrors medieval Christian ethics which entitled the Prince to protect Christians from persecution. Another fascinating line of inquiry would be to examine the classic texts of Chinese political philosophy as well as modern writings and manifestos of the Chinese Communist Party to construct a Chinese doctrine of intervention. Given China's long history of viewing the rest of the world as 'barbarians', it would not be uncharacteristic to find strong statements favoring a right to intervene to protect those who cannot protect themselves. To limit the scope of this thesis, however, I am focusing exclusively on Western ideas.

As Chapter Three shows, the debate over the legitimacy of the use of force to protect another people has long been a part of Western legal and political thought.⁷ The origins of the idea can be traced to the Spanish controversy over the justice of the conquest of the New World, and later, to the broader debate over the right of rebellion related to Europe's

'Toward a Modern Doctrine of Humanitarian Intervention', *University of Toledo Law Review* 23 (Winter 1992), pp. 253-293.

⁶ See Sohail H. Hashmi's essay 'Is There an Islamic Ethic of Humanitarian Intervention?', *Ethics & International Affairs* 7 (1993), pp. 55-73.

⁷ While the 'classic' texts of international relations and law are consulted in this thesis, it is important to remember that classic texts were composed in contexts very different from the contemporary world, with different assumptions and points of reference. See Hedley Bull, Benedict Kingsbury, and Adam Roberts, eds., 'Introduction', *Hugo Grotius and International Relations* (Oxford: Clarendon Press, 1992), p. 38.

religious wars during the late sixteenth and early seventeenth centuries. Even then, the right to use force was not really problematic given the rudimentary definitions of state sovereignty. It was during the eighteenth century that the idea posed difficulties as the norm of non-intervention emerged in the works of Christian Wolff and Emerich de Vattel. During the nineteenth century, the doctrine was endorsed and practised by the Great Powers of Europe. Nineteenth-century doctrines were shaped by related ideas of the rights of individuals, the humanitarian desire to limit the effects of war, and notions of imperialism and racial superiority.

A central element in understanding the doctrine is the question when humanitarian intervention is justifiable. Under what circumstances have states justified a right of intervention? As Chapter Four demonstrates, it is inaccurate to view humanitarian intervention solely as military intervention to end misrule or abuse. Intractable civil wars fought with excessive brutality and anarchy arising from the internal weakness of the state structure have also been considered legitimate grounds for intervention. Each of these cases can produce a level of human suffering to warrant foreign intervention. The reason I stress this is because the nature of humanitarian crises in Bosnia, Somalia, or Rwanda has led many to assert that these are new types of problems which do not fit into traditional definitions of humanitarian intervention. As I show, the right to intervene to end internecine civil wars and to restore order in 'weak' states was a part of nineteenth-century theory and practice of humanitarian intervention. While the context has changed, these grounds for intervention are still relevant.

This thesis, however, is not solely concerned with re-examining history as an end in itself. What are of great interest and importance are

the implications of humanitarian intervention for international society.⁸ By 'international society', I am not using this loosely as a synonym for 'international community' or 'global community'. Rather, I draw on a tradition of international relations theory which posits that a society of states exists. In particular, three features of 'international society' are addressed here. First, a society exists when there are established rules regulating the conduct of members.⁹ These rules are not always clear, universally agreed, nor unchanging. Yet, rules exist and are observed; this is what distinguishes a 'society' from 'anarchy'. Second, a society exists when there are shared values. While there may not be unanimity, there remains a shared core of values, including some understanding of a minimum degree of humanity. Third, members of this society share a common focus—or as Martin Wight puts it, 'certain common purposes'¹⁰—in the maintenance of international order.

I explore the relationship between humanitarian intervention and each of these elements of international society in Chapters Five, Six, and Seven respectively. Chapter Five examines the impact of humanitarian intervention for the rules of international society is obviously an

⁸ In organising the thesis with a particular emphasis on international society, I am indebted to R. J. Vincent's *Human Rights and International Relations* (Cambridge: Cambridge University Press, 1986) and Paul Keal's *Unspoken Rules and Superpower Dominance* (London: Macmillan, 1983). Both works devote the first section to defining the concept and its historical evolution and then explore implications for international law, morality, and order.

⁹ As Bull and Watson point out, a society exists when the members 'have established by dialogue and consent common rules and institutions for the conduct of their relations, and recognize their common interest in maintaining these arrangements'. Hedley Bull and Adam Watson, eds., *The Expansion of International Society* (Oxford: Clarendon Press, 1984), p. 1.

¹⁰ Quoted from Terry Nardin, *Law, Morality, and the Relations of States* (Princeton: Princeton University Press, 1983), p. 3.

important issue to consider. A feature of international society has been the existence of three primary rules: (1) respect for state sovereignty, (2) duty of non-intervention in the internal affairs of others, and (3) limitations on the use of force. Since humanitarian intervention involves the use of military force across state boundaries to alter the policies of a state's treatment of its people, it is clearly in conflict with these rules. The question, then, is how does international society reconcile humanitarian intervention with these rules?

Chapter Five argues against the 'end of sovereignty' and the 'beyond Westphalia' thesis which posits that since the Peace of Westphalia of 1648, the norms of inviolable state sovereignty and duty of non-intervention were absolute, unchanging, and strictly prohibitive of humanitarian intervention.¹¹ The Westphalian model, as defined by the contemporary critics, never existed. State sovereignty as it has historically been understood has been defined as flexible rather than inviolable. For example, the residual idea of unity of mankind (which was central to the medieval theories of universal empire) was retained in the seventeenth-century natural law doctrine of universal solidarity. Even during the nineteenth century—a period often characterised as the rise of legal positivism in international law—international law and state practice reflected wide support for the idea of intervention to protect the subjects of another ruler. The so-called Westphalian system, therefore, is largely a myth created in the post-1945 era.

As this suggests, the strict principle of non-intervention put forth in the post-1945 era is perhaps an overly restrictive rule. It is understandable

¹¹ For a critique of the 'beyond Westphalia' view, see Stephen Krasner's essay 'Sovereignty and Intervention' in Gene M. Lyons and Michael Mastanduno, eds., *Beyond Westphalia?: State Sovereignty and International Intervention* (Baltimore, M.D.: John Hopkins University Press, 1995), pp. 228-49.

that weak states, especially those which gained their independence in the wave of decolonisation following the Second World War, would embrace an absolute duty of non-intervention. But, as this thesis shows, historically non-intervention has not been absolute. The protection of the subjects of another state was regarded by most nineteenth-century publicists as one exception to the duty of non-intervention. Critics may insist that allowing any exception to the rule of non-intervention weakens its moral force. But it can be argued instead that exceptions are not only normal for any legal rule, but desirable as well. Indeed, we should question any legal system which does not permit exceptions to a given rule since law is about limitations and exceptions.¹² The rule of trespass, for example, imposes a duty that neighbours stay off the private property of others. But he who trespasses in order to save a baby from a burning house is justified in his actions and immuned from criminal liability.¹³ Proponents of intervention, therefore, would argue that the rule of non-intervention gives way to acts taken to protect another people from gross violations of human rights.

If the principle of non-intervention allows exceptions, the question to ask how to structure an international society to allow for the right of

¹² The fallacy of ignoring that rules have exceptions is aptly captured by the statement: 'Judges and legal writers do not always find it convenient, practicable or important, in laying down general rules, to specify all the limitations and exceptions to such rules.' See *Losee v. Buchanan*, Commission of Appeals of New York, 51 N.Y. 476 (1873).

¹³ The American Law Institute, in drafting the Model Penal Code Section 3.02 (Justification Generally: Choice of Evils), commented that: 'This section accepts the view that a principle of necessity, properly conceived, affords a general justification for conduct that would otherwise constitute an offense. . . Under this section, property may be destroyed to prevent the spread of a fire. . . An ambulance may pass a traffic light. . . A developed legal system must have better ways of dealing with such problems than to refer only to the letter of particular prohibitions, framed without reference to cases of this kind. . .' Emphasis added. See *American Law Institute, Model Penal Code and Commentaries* (1980-1985), pp. 9-14.

humanitarian intervention. I argue in Chapter Five that three possibilities have been proposed: universal solidarity, dual-system of rules, and collective authorisation. Let me explain each briefly. In the universal solidarity approach, state sovereignty is a relative concept, balanced with the rights of humanity. A sovereign who massacres his own people oversteps the bounds of natural law and becomes a legitimate target of intervention since the ties of humanity override the claims of sovereignty. This was the natural law theory in the seventeenth century. The dual-system approach maintains that there are two sets of rules, one which applies to the inner circle of states, and another which applies to those outside. In the nineteenth century, humanitarian intervention was undertaken against those outside the circle of 'civilised' states. Collective authorisation grounds the legitimacy of intervention as the expression of the will of international society. I argue that the latter solution remains the most viable approach for legitimating intervention.

In considering humanitarian intervention as a problem for international society, it is also important to consider the impact of its theory and practice on the non-European world. This question is examined in Chapter Six. Despite the inclusive notion of 'international society', the structure of this society has always been conceptualised as a series of concentric circles. Historically, European states have self-consciously viewed themselves as an inner circle of 'Christian' and 'Civilised' states surrounded by the 'less' civilised peoples at periphery. While humanitarian intervention was on occasion undertaken against members within the inner circle, in general the doctrine was invoked and applied against states in the outer circles. This pattern in state practice raises difficult normative questions since it is difficult to disentangle 'humanitarian intervention' from colonial expansion and conquest. From the perspective of the intervenors, the aim was not just to conquer, but to

spread Western values. Advocates of intervention believed in the superiority of European values and the importance of imposing them on societies at the peripheries of international society.

The point here is not to engage in a well-rehearsed debate about 'cultural imperialism'. Rather, I explore the useful function this process has played in the expansion of international society. In the nineteenth century, states were formally categorised in international law as 'civilised', 'semi-civilised', and 'uncivilised'. To become a member of 'civilised' international society, a state had to meet a number of criteria. The two which are of interest to this discussion are (1) respect for the laws of civilised warfare and (2) respect for minimum standards regarding how states treated the people. While this was by no means the only method, humanitarian intervention played a crucial role in extending these values to the non-European world. The process, as Trachtenberg points out, was not just to 'push down the target countries; often the aim was to pull them up to European standards'.¹⁴ The aim of humanitarian intervention was to raise a people to standards of minimum humanity set by the core 'civilised' states. Whether states at the outer circles were able to adopt these values was one determinant of whether they were admitted to 'civilised' international society.

This process is still at work in contemporary international society. Recently there has been much discussion of 'democratic peace' and 'Kantian liberal internationalism'. How does humanitarian intervention fit into this debate? It can be argued that a 'liberal' international society has replaced the nineteenth-century conception of 'civilised' international society. As in the past, the immediate aim is to protect the victims of

¹⁴ Marc Trachtenberg, 'Intervention in Historical Perspective', *Emerging Norms of Justified Intervention: A Collection of Essays from a Conference of the American Academy of Arts and Sciences*, eds. Anne-Marie Slaughter Burley and Carl Kaysen (1993), p. 24.

human rights violations; but the larger objective is to 'lift' a people up to higher standards of justice. The desire to elevate another people has long been a part of 'liberalism' or 'liberal internationalism'. Interveners aim to ensure that a minimum degree of humanity is observed in how governments treat their own people and how combatants fight in civil wars. The ability and effectiveness of 'liberal international society' to expand its values through humanitarian intervention, however, is constrained by three factors: (1) the cohesion (or lack thereof) of the core, (2) greater costs of using force, and (3) aversion for occupation. This is an important departure from the nineteenth century when intervenors shared a common culture and the belief that colonialism ultimately resulted in the progress of civilisation and humanity.

This thesis, finally, examines the implications for international order. The maintenance of order has been a concern of states, especially the Great Powers. Chapter Seven argues that humanitarian intervention, if not placed under some form of constraint by international society, can be a threat to order. Yet, to insist categorically that violence, persecution, and grave abuses of human rights in another state do not warrant foreign intervention can also be subversive of order. Order is best maintained when the extremes are avoided. To temper the likelihood of abuse, it is important to restrict proper authority of who can intervene and require some form of collective authorisation. Once the decision to intervene has been made, decisive action should be taken. Ill-conceived and half-implemented interventions may undermine stability if the intervention neither solves the problem but makes it worse by driving a rift among the intervenors and causing a drain on economic and political resources.

For the victims of such atrocities, half efforts may be worse than no effort and indifference. An improperly conceived intervention which devotes too little resources or an intervention followed by a premature

withdrawal can actually aggravate the condition of those whom the intervenor seeks to protect. It is likely that those protected by the intervening army may be identified with the intervenors. The ruling government will view the victims as traitors or rebels who should be punished. An intervention which does not address the root cause of the problem by removing the source of the suffering may leave the victims in the grim position of being identified with the 'enemy' without any protection. Once the humanitarian army withdraws, the unrepentant government is likely to unleash its wrath on the people.

By examining the problem from the perspective of international society, this thesis adds to our understandings of humanitarian intervention.¹⁵ As I show, humanitarian intervention as a subject of inquiry raises problems for law, moral values, and stability which are best addressed within the international society tradition.¹⁶ Implicit in this thesis is an argument for this approach. As Terry Nardin and others have argued, the virtues of the scientific method and the flaws of the international society approach should not lead to one replacing the other.¹⁷ They are not mutually exclusive. The international society

¹⁵ The importance of examining intervention from the perspective of international society has been recognised. See Barry Buzan, 'From International System to International Society: Structural Realism and Regime Theory Meet the English School' *International Organization* 47 (1993), p. 352; James Mayall, 'International Society and International Theory', pp. 124-127; Nicholas J. Wheeler, 'Pluralist or Solidarist Conceptions of International Society: Bull and Vincent on Humanitarian Intervention', *Millennium: Journal of International Studies* 21 (1992), p. 463.

¹⁶ The merits of the international society approach, however, are not universally accepted. For an overview of criticisms, see Nardin, *Law, Morality, and the Relations of States*, pp. 27-29; Roy E. Jones, 'The English School of International Relations: A Case for Closure', *Review of International Studies* 7 (1981), pp. 1-13.

¹⁷ Nardin, *Law, Morality, and the Relations of States*, p. 29.

approach gives us the vocabulary and language—as well as the political, legal, and historical foundations which are lacking in other theories—for understanding the problem of humanitarian intervention. It asks questions, especially normative ones, which would otherwise left unasked.¹⁸ This is especially pertinent to our discussion since the discourse over human rights and the forcible protection of these rights inevitably raises moral questions. As Barry Buzan argues, one cannot fully understand the problem of humanitarian intervention outside a ‘fuller understanding of international society as a whole’.¹⁹

Clearly the theory and practice of humanitarian intervention are urgently topical. The desire to address pressing problems in Bosnia and in ‘failed’ states such as Rwanda is understandable because of the human impact. In focusing exclusively on contemporary issues, we lose sight of the relevance of history. There are enduring features and tensions of the states system which do not change despite the fact that international society has evolved. For instance, the recurring problem of how to balance the claims of humanity with the sovereignty of states still remains a central tension in post-Cold War international society. Insights made in the seventeenth or nineteenth century are still relevant despite the wide gulf of historical circumstance. As F. H. Hinsley reminds us, ‘if we need this understanding for its own sake we need it, too, for the light which it alone can throw upon international relations in our own generation’.²⁰

¹⁸ James Mayall, ‘International Society and International Theory’, *The Reason of States: A Study in International Political Theory*, ed. Michael Donelan (London: George Allen & Unwin, 1978), p. 122.

¹⁹ Barry Buzan, ‘From International System to International Society: Structural Realism and Regime Theory Meet the English School’, p. 352.

²⁰ F. H. Hinsley, *Power and the Pursuit of Peace: Theory and Practice in the History of Relations between States* (Cambridge: Cambridge University Press, 1963), p. 5.

PART ONE

CONCEPT AND HISTORY

CHAPTER TWO

THE CONCEPT OF HUMANITARIAN INTERVENTION

CHAPTER TWO

THE CONCEPT OF HUMANITARIAN INTERVENTION

In his discussion of 'interdependence' in the 1970s, Kenneth Waltz points out that catchwords or ubiquitous phrases usually go undefined.¹ It is sometimes presumed that the concept needs no clarification since most people either know what it means, or that they can recognise it. Since 'humanitarian intervention' has become a recurring concept in international relations, it is important to examine its meaning so that we can know what we are talking about. And certainly, we must do this before we can begin to consider its history, evolution, and the implications for international society. However, defining 'humanitarian intervention' is no easy task. This is especially problematic if we are talking *one* definition of the concept. We inevitably encounter objections. Which concept are we talking about? Whose concept? Are we talking about humanitarian intervention as it was understood in the nineteenth century? Or today? These are indeed valid questions. It is important, though, not to lose sight of the big picture. While there are differences in shades of meaning as the precise understanding of the concept has changed, there are also recurring elements and tensions. The aim here is to give an introductory definition highlighting these points.

¹ Kenneth Waltz, *Theory of International Politics* (New York: McGraw-Hill, Inc., 1979), p. 139.

Extraordinary Atrocities

At the core of the concept of humanitarian intervention is the idea that states can intervene in the internal affairs of another to end gross mistreatment of the people in that territory. In general, mistreatment arises from *sins of commission*. In other words, we are talking about crimes and brutalities committed by a government, or representatives of the government, against its own people. A state could be guilty of this in many ways. It could, for example, mistreat its people by persecuting a segment or minority of the population singled out because of race, religion, or ethnicity. It could wage a war of extermination or forced repopulation. Or, a government could use excessive force in putting down a rebellion or in suppressing an insurgency movement.

Mistreatment also results from *sins of omission*. In contrast to the previous discussion, the government may not directly be implicated. Religious or ethnic strife often erupts without the active participation of the ruling authority. The government in this case could be complicitious by tolerating such a state of affairs, either because it is unwilling or unable to put an end to such conflicts. It may be unwilling to restore order or protect the persecuted during ethnic violence because it harbours a bias against a particular group. This is especially common in a multiethnic society where one group dominates. Or, the government may have an expedient interest in seeing one side emerge victorious over another and consequently either condones or ignores atrocities committed. At the other end of the spectrum, inaction may be the result not of prejudice but internal weakness, when the government may simply not exist or cannot exert effective control over the territory.

Misrule in itself does not necessarily mean that there is a right of intervention. Indeed if there is a right of justifiable intervention every time a government runs afoul of its constitution, mistreats its citizens, or abuses its

powers, then almost every state, at one point or another, could become a target of intervention. In a less than ideal world, abuses and deprivations of human rights occur in many states. While regrettable, this is an ordinary—though not excusable or acceptable—state of affairs. This presents a difficult choice where the evils of the crime the government is accused of must be weighed against the perils of intervention. As a general rule the duty of non-intervention has been a positive development. Excessive interventionism may actually do more harm than good. The foundation of international society, especially since 1945, has been built upon the principles of state sovereignty and non-intervention. The presumption of legitimacy remains with the state, even ‘rogue’ states. The burden of proof lies with those who would trample on this framework.

It is important, therefore, to consider humanitarian intervention as a response not to mistreatment, but as a reaction to excessive abuse. Hence, an emphasis is placed on ‘extraordinary atrocities’. By ‘extraordinary’, I mean just that: ‘beyond the ordinary’ or ‘exceptional’. This is how Michael Walzer and R. J. Vincent resolve this definitional point. For Vincent, humanitarian intervention is reserved for ‘extraordinary oppression, not the day-to-day variety’.² Persecution and detention of political prisoners, while offensive to many, may not meet the threshold of ‘extraordinary’. Systematic detention and execution of a significant portion of an ethnic or religious group may be closer to meeting the test of extraordinary atrocity. This suggests that there is a line between ‘ordinary’ day-to-day abuse which must be tolerated by the international community and ‘extraordinary’ abuse which is not.

The problem is that this line has never been defined according to any objective criteria. While the total number of people killed matters, there is no sound way of offering an operational definition using numerical standards.

2 R. J. Vincent, *Human Rights and International Relations* (Cambridge: Cambridge University Press, 1986), p. 126.

Are we concerned with absolute numbers? Does the execution of 2,000 dissidents constitute an extraordinary atrocity justifying armed intervention? Should the threshold be at 20,000? Or 200,000? Or, are we concerned with relative number? Does the killing or forced migration of 5% of the population meet this threshold, or is the threshold at 50%? As with many 'hard cases' of law and morality, it is difficult to offer a precise standard to judge when certain acts may be justifiable which would not normally be condoned. Perhaps there is no way of making this distinction based on objective measures. Some things are better left unquantified, left to the judgment of policy, to be decided on an individual case by case approach.³

For this reason, the threshold between 'ordinary' and 'extraordinary' has often been presented as a normative one. The language used avoids any notion of quantification by appealing to universal norms instead. Oppenheim, for example, wrote that this line is crossed when the state treats 'its own subjects or part thereof with such cruelty as would stagger humanity'.⁴ Thomas and Thomas define extraordinary as mistreatment

³ Sir Hartley Shawcross, Chief Prosecutor for Britain at the International Military Tribunal at Nuremberg, argued that while criminality is not based on quantification, numbers are surely relevant in determining the magnitude of the atrocity. In his closing argument at Nuremberg, he concluded: 'The mere number of victims is not the real criterion of the criminality of an act. The majesty of death, the compassion for the innocent, the horror and detestation of the ignominy inflicted upon man—man created in the image of God—these are not the subjects of mathematical calculation. Nonetheless, somehow, numbers are relevant. For we are not dealing here with the occasional atrocities which are perhaps an incident of any war. . . We are dealing here with something entirely different; with systematic, wholesale, consistent action, taken as a matter of deliberate calculation—calculation at the highest level.' See *Trial of the Major War Criminals Before the International Military Tribunal*, vol. 29, Proceedings 19 July 1946-29 July 1946 (Nuremberg, Germany 1948), p. 467.

⁴ Lassa Oppenheim, *International Law*, 2 vols. (London: Longmans, Green and Co., 1905/1906), vol. 1, p. 327.

which violates 'all universal standards of humanity'.⁵ For Walzer and Vincent, a state crosses this boundary when it commits acts which shock 'the conscience of mankind'.⁶ This suggests that there are limits to what a government can do within its territory. There are norms or principles of behaviour that no government can violate without endangering its claim to legitimacy over the territory it governs.

There has been attempts to spell out the precise contours of international norms. One of the most fundamental norms established since the end of the Second World War is the prohibition of genocide. There is wide agreement in principle that genocide, as defined and prohibited under the 1948 United Nations Convention on the Prevention and Punishment of the Crime of Genocide, should not be tolerated. Article II of the Convention offers an operative definition of genocide which includes acts such as the killing, destruction, repopulation of members of a racial, ethnic, or religious group with the intent to destroy, in whole or in part, that group.⁷ Any

⁵ A.V.W. Thomas and A.J. Thomas, *Non-Intervention: The Law and Its Import in the Americas* (Texas: Southern Methodist University Press, 1956), p. 19.

⁶ Michael Walzer, *Just and Unjust Wars*. 2nd ed. (New York: BasicBooks, 1992), p. 107; Vincent, *Human Rights*, p. 44; Oppenheim's *International Law*, 8th ed., p. 312.

⁷ Article II of the 1948 Genocide Convention reads:

"In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group."

government (or warring faction in a civil war) which commits or conspires to commit genocide is subject to international criminal sanction. The 1948 Convention is significant not only because it authorises the creation of international penal tribunals to punish those accused of genocide (Article VI), but because it lays the legal foundation for international intervention. Article VIII calls upon any contracting party to initiate appropriate action under the Charter of the UN for the 'prevention and suppression of acts of genocide'. While Article VIII does not explicitly call for armed intervention, it does not exclude it either.

The problem, however, is that the term 'genocide' has become 'a carrier of ideological freight'.⁸ Thus, even if there may be wide agreement in principle that genocide is prohibited, there is no consensus as to when violence and brutality should be designated as a genocide. What an ethnic minority group would call a genocide the established ruling authority may label as the lawful suppression of a 'riot' or 'rebellion'. How the rest of the world view such disturbances is often contingent to ideological, religious, or racial affinities. Another obstacle stems from the unwillingness of governments to publicly recognise such atrocities as 'genocide' precisely because the 1948 Genocide Convention imposes obligations on contracting parties. When genocidal violence erupted in Rwanda in 1994, US policymakers were careful not to label the violence as 'genocide'. Thus, unless there is political will to prevent 'extraordinary atrocities' such as 'genocide', more precise definitions are appealing only to legal formalists and do not help victims of such atrocities.

Article II of the 1948 Genocide Convention is reiterated almost verbatim in the 1993 Statute of the International Tribunal for the former Yugoslavia and the 1995 Statute of the International Tribunal for Rwanda.

⁸ Thomas M. Franck and Nigel S. Rodley, 'After Bangladesh: The Law of Humanitarian Intervention by Military Force', *American Journal of International Law* 67 (1973), p. 304.

The Use of Military Force

Having discussed the level of abuse which may trigger an intervention, it is important to specify what is meant by 'intervention'. When we talk about humanitarian intervention, we are talking about the 'forcible' protection of another people. This is sometimes obscured by the technical term 'intervention', an invention of nineteenth-century international law.⁹ Yet, even nineteenth-century lawyers did not shy away from the fact that 'intervention' meant force. As Thomas J. Lawrence wrote, 'the essence of intervention is force, or the threat of force in case the dictates of the intervening power are disregarded'.¹⁰ Hence, most definitions specifically refer to the use of force. For example, Ellery Stowell described humanitarian intervention as the 'reliance upon force for the justifiable purpose of protecting the inhabitants of another state from treatment which is so arbitrary and persistently abusive as to exceed the limits of that authority'.¹¹

It is important to specify further that the use of force and intervention in this context mean armed force and armed intervention respectively. Thus, forcible protection refers narrowly to military actions.¹² This is an important distinction because some writers have turned to 'non-forcible humanitarian intervention'.¹³ Oliver Ramsbotham, for example, has argued for a need to

⁹ P. H. Winfield, 'The History of Intervention in International Law', *British Yearbook of International Law* 3 (1922-23), pp. 130-149.

¹⁰ Thomas J. Lawrence, *The Principles of International Law*, 2nd ed. (London: Macmillan & Co., 1897), p. 120.

¹¹ Ellery C. Stowell, *Intervention and International Law* (Washington, D.C.: John Byrne & Co., 1921), p. 53.

¹² H. Scott Fairley, 'State Actors, Humanitarian Intervention, and International Law: Reopening Pandora's Box', *Georgia Journal of International and Comparative Law* 10 (1980), pp. 31-32.

¹³ Oliver Ramsbotham, 'Humanitarian Intervention 1991-94: A Need to Reconceptualise?', unpublished paper presented at the London School of

reconceptualise humanitarian intervention to include a broad range of options.¹⁴ It is true that non-military forms of coercion can be effective in redressing mistreatment in another state. Diplomatic pressure or the threat of withholding of foreign aid, for example, are effective tools. Arms embargo and trade sanctions are other forms of coercion.¹⁵ While these non-military instruments of coercion may alter a state's internal policies regarding its treatment of its citizens, they are not considered in this thesis (and traditionally have not been considered) as humanitarian intervention.

For this reason, Adam Roberts's 'humanitarian war' is a better descriptor than 'humanitarian intervention' in that it highlights the military nature of intervention. More importantly, it also points out the problematic nature of using military force for humanitarian aims. The notion of a 'humanitarian war'—waging war to ensure that a minimum standard of humanity is observed—Roberts points out, poses an oxymoron.¹⁶ The 'humanitarian' objective of the mission is to save lives: yet, all wars, even humanitarian wars, involve risks to soldiers and civilians alike. It may even entail killing those whom the intervenor seeks to save. For this reason, not everyone agrees with the proposition that armed force is the optimal method to alleviate the suffering. One objection is that the use of force raises the level

Economics Workshop on Humanitarian Intervention and International Society, 18 March 1995.

¹⁴ *Ibid.*

¹⁵ See Lori Fisler Damrosch, 'The Collective Enforcement of International Norms Through Economic Sanctions', *Ethics and International Affairs* 8 (1994), pp. 59-75.

¹⁶ Roberts, 'Humanitarian War', p. 429.

of violence, thereby making it counterproductive much like pouring fuel on a fire in order to put out the fire.¹⁷

The possibility that humanitarian wars may undermine the goals of humanitarianism rather than further them should not be ignored. For this reason, the use of military force for humanitarian aims must be subject to the same moral and legal restraints which apply to other instances when force is used. For instance, the status of non-combatants should be respected and the methods of warfare should be consistent with the laws of war. More importantly, the rule of proportionality must be observed. The use of force should be reasonably calculated to achieving the objectives of the mission and care should be taken to minimise the destruction and loss of life. It has also been suggested that the deployment of force should be followed by a prompt withdrawal once the objectives have been achieved.¹⁸

Absence of Consent

The use of military force to provide humanitarian assistance and alleviate human suffering does not in itself constitute humanitarian intervention. The distribution of humanitarian assistance often requires the deployment of military force. A recent, classic example of this was during the aftermath of a cyclone in Bangladesh in May 1991 when the US launched *Operation Sea Angel* to save cyclone and flood victims. In total 8,000 US marines and sailors, using helicopters and amphibious landing ships, distributed over 6,000 tons of aid to 1.7 million people.¹⁹ Over 400 marines

¹⁷ This point was raised in Thomas Weiss, 'UN Responses in the Former Yugoslavia: Moral and Operational Choices', *Ethics & International Affairs* 8 (1994), p. 5.

¹⁸ Daoud L. Khairallah, *Insurrection Under International Law* (Beirut: Lebanese University, 1973), p. 282.

¹⁹ Thomas G. Weiss and Kurt M. Campbell, 'Military Humanitarianism', *Survival* 33 (1991), p. 451.

remained in Bangladesh for several months to help the government rebuild the devastated region. Though force was involved, the operation is not considered an example of humanitarian intervention since it was initiated upon the invitation of the host government.

For similar reasons, peacekeeping missions do not fall under our definition. This may seem an odd exclusion since the objectives of peacekeeping are similar to those of humanitarian intervention. At one level both aim to alleviate human suffering caused by violence and warfare. Both involve the use of military force if necessary. Yet, what distinguishes the two is consent. Obtaining the consent of all the warring factions has been an established principle of UN peacekeeping. What consent entails is a commitment from all the parties involved to respect the neutrality of the peacekeepers. This has been a way to minimise the risks to the countries which contribute troops to such operations. After all, few countries would be willing to place their soldiers squarely in the middle of the battlefield unless there are assurances that the neutral status of the peacekeepers would be observed.²⁰

Unlike humanitarian assistance or peacekeeping, humanitarian intervention is the use of military force to protect another people *without the consent* of the government which has control over the territory. Here the term 'intervention' is helpful because the essence of intervention has been defined as 'the absence of consent'.²¹ Military force, therefore, is applied in a hostile environment; it constitutes a hostile act against the state with sovereign jurisdiction. Such an operation is likely to be met with resistance. The target government may voice its objections through diplomatic channels. Or it may

²⁰ For more on the evolution of peacekeeping, see Marrack Goulding, 'The Evolution of United Nations Peacekeeping', *International Affairs* 69 (1993), pp. 451-464.

²¹ Lawrence, *Principles*, p. 120.

openly denounce the operation in public forums such as the Security Council. Alternatively, it may demonstrate its disapproval forcibly through armed resistance by ordering its armed forces to challenge the actions of the intervenor.

When considering the issue of consent, it is important that we are not inflexible about this. It is a guideline to allow us to distinguish humanitarian intervention from actions which have the endorsement or approval of the host government. This does not mean that an absence of consent or resistance of the government is the sole element to deciding what constitutes humanitarian intervention. In certain circumstances, consent may be obtained forcibly. In other words, the target government is presented with a *fait accompli* and asked to sign an accord or protocol acquiescing to the operation. Some jurists may exclude this from our discussion since consent is obtained. Yet, from a pragmatic point of view, just as a contract signed under duress is made against the will of the signator, forced consent is the same as an absence of consent in that the actions of the intervenor are taken against the wishes of the government in question.

Alternatively, consent may not be an issue under extraordinary circumstances when disorder within the target state is so widespread and rampant that whether the government has consented or not matters little. This situation can arise when a state collapses. Many weak states exist perilously close to the edge between being a 'quasi-state', as Robert Jackson²² puts it, and becoming a 'failed state'.²³ A state has 'failed' when all vestiges of political administration have ceased to function. Or, a state may be so engulfed by civil war and ethnic fighting that there are so many competing

²² Robert H. Jackson, *Quasi-states: Sovereignty, International Relations, and the Third World* (Cambridge: Cambridge University Press, 1990).

²³ Gerald B. Helman and Steven R. Ratner, 'Saving failed states', *Foreign Policy* 89 (Winter 1992-3), pp. 3-20.

factions struggling for power that no one faction can assert effective control over the territory and population. In both situations, consent is no longer an issue because there is no central government, recognised by the international community as either the *de jure* or *de facto* power, which can offer or deny consent.

Humanitarian Motive and Aim

Finally, having defined humanitarian intervention as the use of force in the absence of consent to protect another people from mistreatment, we must consider the question of motive and aim. This is perhaps the most difficult part of the concept. Since we emphasise the adjective 'humanitarian' before the nouns 'intervention' or 'war', it is important to consider what this means. In one sense, it suggests that the intervenor is motivated by humanitarian instincts and not national interests. Some critics require that the actions of the intervenor must be motivated purely by disinterested humanitarianism and that any inkling of alternative interest disqualifies its action as humanitarian. Since there are always costs and risks involved in any intervention, it is reasonable that states would have some interest. The point here is not to expect clean hands, but to inquire whether the motive is predominantly humanitarian.

In another sense, 'humanitarian' also refers to the aim or objective pursued. The aim of intervention is part of a spectrum of choices. Humanitarian intervention narrowly defined is about relieving the immediate suffering or mistreatment and ensuring that humanitarian assistance is provided. The tasks which the intervenor take on may include distributing relief supplies, providing medical assistance, and erecting temporary camps. It may even rebuild basic infrastructures such roads, hospitals, or water purification systems. Achieving these objectives may require that the intervenor work with non-governmental organisations (NGOs) such as the

International Committee of the Red Cross (ICRC) or Save the Children. In particular, it may involve the intervenor providing military cover so that aid agencies can operate safely and effectively.

Few would dispute this narrow definition of the objective. Where the issue becomes more controversial, however, is over how broad or narrow should the intervenor define its aim. Should the intervenor limit itself to the immediate source of the suffering? Or should it seek a more permanent solution? An intervention with minimalist objectives is likened to a surgical strike: get in, treat the people, and get out with as little impact on the political system as possible. Richard N. Haass writes, for example, that the aim of intervention is 'narrow, to provide food and/or other life-sustaining supplies (as well as protection) to peoples. It does not seek to change the overall political authority, but rather to minimise suffering until either the authority changes or its policies change'.²⁴ While the mission may require the use of force in hostile situations, the purpose of force is self-defense and defense of aid workers.

A more maximalist intervention, on the other hand, seeks to change the political regime. Humanitarian intervention from this view cannot be disentangled from political intervention. Tom Farer argues, for instance, that '[i]f we believe that in certain ineffable cases the dangerous expedient of humanitarian intervention should be attempted, we should concede the probable necessity of reconstructing the political order that created the imperious necessity'.²⁵ The rationale is that if the level of mistreatment is extraordinary enough to warrant intervention in the first place, then the aim of intervention must surely include the possibility of toppling the government

²⁴ Richard N. Haass, *Intervention: The Use of American Military Force in the Post-Cold War World*, p. 62.

²⁵ Tom Farer, 'Human Rights in Law's Empire: The Jurisprudence War', *American Journal of International Law* 85 (1991), p. 127.

which has brought on such crimes. An intervention which does not seek to alter the root cause of the suffering, some argue, is the worst of all possibilities. It endangers the lives of both the soldiers asked to intervene and the civilians who may be affected by the intervention, yet fails to bring a lasting solution. What is feared is that the target of intervention would degenerate to violence and anarchy upon the withdraw of the intervening army.

As the foregoing discussion demonstrates, the meaning of humanitarian intervention is far from obvious. Attempts to offer a more concrete and coherent explanation inevitably encounter further questions, further clarifications. I have not attempted, therefore, to offer an exhaustive definition. Instead, I have tried to sketch the main ideas behind the concept, to present a general picture of what we are talking about. As the next chapters show, the precise understanding of what is meant by extraordinary atrocities, the use of military force, the absence of consent, and humanitarian aims has changed and evolved. Nevertheless, it is important to have these elements in mind. The next chapter examines the historical origins and evolution of the concept.

CHAPTER THREE

HUMANITARIAN INTERVENTION: DEVELOPMENT OF AN IDEA

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The idea that military force can be used to protect another people from its ruler has a long historical tradition. This is sometimes obscured by contemporary discussions which often neglect the historical evolution. The aim of this chapter, therefore, is to give an overview of the history of the *idea* of humanitarian intervention. While theory and practice are interrelated, I am primarily interested in the emergence of the idea in Western political and legal thought, or as some have termed, international thought or international theory. This chapter examines the origins of the idea in the sixteenth and seventeenth century, traces its developments to the nineteenth century, and then considers the impact of changes after the First World War. The purpose here is not to cover all the major intellectual, military, or diplomatic trends, nor to give an exhaustive history. The point here is to touch upon the main stages in the development of the idea in order to set the context for later discussions.

Where to Begin?

Any discussion of the history of an idea must first justify the starting point. Why begin with sixteenth-century international thought? It seems that ever since men began to think about war and peace, they have thought about whether one community is justified in using military force to protect another

people from the hands of its ruler. Seneca (first century A.D.), for example, remarked in *On Benefits* that 'I may make war upon one who is not one of my people but oppresses his own'.¹ Similarly, St. Augustine (354-430) considered it a just war to 'punish the wicked and relieve the good from their suffering'. These ideas were put into practice during the Early Middle Ages as Roman emperors waged war, or threatened to wage war, to protect Christians from persecution by the Persians.²

During the High Middle Ages, the idea that a Christian prince could forcibly protect another people from mistreatment was a central part of the Crusades. In particular, the Church endorsed the right to wage war to protect fellow Christians from religious persecution in non-Christian lands. Gregory VII (c. A.D. 1073-1085), for instance, spoke of the justice of waging war to protect Christians 'slaughtered. . . like cattle' in Constantinople.³ Urban II (A.D. 1088-1099) reiterated this idea at the Council of Clermont in 1095 where he recounted in horrific detail of Christians being massacred in Jerusalem and Constantinople and urged the people to help their 'brethren who live in the east'.⁴ One can argue, therefore, that just war theory in the middle ages represents one strand of the idea of waging war to uphold the principle that

¹ Seneca, *On Benefits*, VII [xix. 8-9].

² Hugo Grotius, in discussing humanitarian intervention, remarked that in 'conformity with this principle Constantine took up arms against Maxentius and Licinius, and other Romans emperors either took up arms against the Persians, or threatened to do so, unless these should check their persecutions of the Christians on account of religion'. Hugo Grotius, *De Jure Belli Ac Pacis* (1625), trans. Francis W. Kelsey, ed. James Brown Scott (Oxford: Clarendon Press, 1925), p. 584.

³ Quoted in John Eppstein, *The Catholic Tradition of the Law of Nations* (London: Burns Oates & Washbourne, 1935), p. 94.

⁴ Oliver J. Thatcher and Edgar Holmes McNeal, eds. *A Source Book for Mediaeval History* (New York: Charles Scribner's Sons, 1905), p. 517.

no ruler can trample on the rights of Christians, even if he has jurisdiction over these people.⁵

The medieval theories generally have not been considered as a part of the history of humanitarian intervention because these ideas were put forth during epochs with very different ideas of sovereignty and the relations between communities. Medieval theories of international relations were shaped by the belief of universal empire, with the Church as the central authority. The notion of 'intervention', Russell points out, was irrelevant because the Church had the authority to intervene anywhere.⁶ This meant that communities within the Christian empire could not claim independence from the Church nor assert a right to govern free from interference. It was only with the decline of the Holy Roman Empire and the rise of the sovereign prince that this concept began to take root. By the sixteenth century, the conception of the world as divided into distinct communities was beginning to take form.⁷

For this reason, therefore, most accounts of the history of humanitarian intervention begin with post-medieval developments. But where precisely we should begin is still not clear. For some, the origins of the idea can be found in the works of the seventeenth-century Dutch jurist Hugo Grotius. Given that Grotius has been attributed as the 'father' of international law—an assertion open to dispute—it is no surprise that he would also be credited for advancing the idea of humanitarian intervention. Stowell's *Intervention and*

⁵ Roland Bainton, *Christian Attitudes Toward War and Peace* (London: Hodder and Stoughton, 1960), p. 114.

⁶ Frederick H. Russell, *The Just War in the Middle Ages* (Cambridge: Cambridge University Press, 1975), p. 305; Henry G. Hodges, *The Doctrine of Intervention* (Princeton: The Banner Press, 1915), p. 10.

⁷ Leo Gross, 'The Peace of Westphalia, 1648-1948', *American Journal of International Law* 42 (1948), pp. 33-34.

International Law (1921)⁸ cited Grotius as one of the earliest jurists to acknowledge the legality of this form of intervention. Sir Hartley Shawcross, in his closing argument at the Nuremberg Trials, invoked the work of Grotius to establish the right of intervention to protect human rights.⁹ This view was made popular by Hersch Lauterpacht's essay 'The Grotian Tradition in International Relations'. Lauterpacht argues that Grotius's classic work *De Jure Belli ac Pacis* (1625) offered the 'first authoritative statement of the principle of humanitarian intervention—the principle that the exclusiveness of domestic jurisdiction stops where outrage upon humanity begins'.¹⁰ It is a view which has frequently been endorsed by others.¹¹

While Grotius's contribution should not be understated, it is important that his role in shaping the idea, as with other claims about Grotius's originality, is not overstated.¹² Grotius was by no means the first to discuss

⁸ Ellery C. Stowell, *Intervention and International Law* (Washington, D.C.: John Byrne & Co., 1921), p. 56.

⁹ *Trial of the Major War Criminals Before the International Military Tribunal*, vol. 29, Proceedings 19 July 1946-29 July 1946 (Nuremberg, Germany 1948), p. 472.

¹⁰ Hersch Lauterpacht, 'The Grotian Tradition in International Law', *British Yearbook of International Law* 23 (1946), p. 46. R. J. Vincent is critical of Lauterpacht's assertion, calling it 'too zealous'. See R. J. Vincent, 'Grotius, Human Rights, and Intervention', *Hugo Grotius and International Relations*, eds. Hedley Bull, Benedict Kingsbury, and Adam Roberts (Oxford: Clarendon Press, 1992), p. 247.

¹¹ See, for example, Barry M. Benjamin, 'Unilateral Humanitarian Intervention: Legalizing the Use of Force to Prevent Human Rights Atrocities', *Fordham International Law Journal* 16 (1992-93), p. 127; J.D van der Vyver, 'Statehood in International Law', *Emory International Law Review* 5 (1991), p. 76; Susumu Yamauchi, 'The Ambivalence of Hugo Grotius: State Sovereignty and Common Interests of Mankind', *Hitotsubashi Journal of Law and Politics* 22 (1994), p. 9.

¹² G. H. J. Van Der Molen, *Alberico Gentili and the Development of International Law: His Life, Work, and Times* (Amsterdam: H.J. Paris, 1937), p. 678.

humanitarian intervention systematically. James Brown Scott, for instance, points to the sixteenth-century Spanish theologian Francisco de Vitoria (c. 1485-1546). Thomas and Thomas claim similarly that Vitoria's discussion of the right to protect the innocent 'might be compared to what would be called humanitarian intervention today'.¹³ More recently, Theodor Meron has argued that we should consider Alberico Gentili (1552-1608), the seventeenth-century Italian Protestant jurist, as the founder of the idea. Meron writes, the 'time has come to acknowledge that we are indebted to him (Gentili), more than any other writer of his era, for the concepts of common rights and interests of humanity and of humanitarian intervention'.¹⁴

Critics are right to challenge the myth that Grotius alone is to be credited with developing this idea. But to what extent that Gentili, or any other publicists, can be designated as the 'true progenitor' of the idea of humanitarian intervention, as Meron puts it, is open to debate. The purpose here is not to resolve this question but to consider the main contributors to the early history of the idea, to sketch a general road map of how the idea emerged in sixteenth and seventeenth-century international theory and developed to its present form. To this end, it is important not only to retrieve the expression of this idea but also to consider the historical context in which these views were put forth.

¹³ A. V. W. Thomas and A. J. Thomas, *Non-Intervention: The Law and Its Import in the Americas* (Texas: Southern Methodist University Press, 1956), p. 5.

¹⁴ Theodor Meron, 'Common Rights of Mankind in Gentili, Grotius, and Suarez', *American Journal of International Law* 85 (1991), p. 116.

Emergence of an Idea, 1500-1789

Sir Thomas More wrote in *Utopia* that wars to 'liberate an oppressed people, in the name of humanity, from tyranny and servitude' are just and virtuous.¹⁵ More's treatise was intended to be ahistorical, a reinvention of man and society. Yet, political ideas are rarely put forth in a vacuum: they are often in response to contemporary events or problems. It is important that we consider the historical emergence of the idea in the context of two central problems facing sixteenth and seventeenth-century Europe. First, Europe's confrontation with the non-European world and the problem of protecting Christians mistreated in the New World set the intellectual milieu for early Spanish discussions. Second, the debate of whether a right of rebellion against tyranny and oppression was permitted by natural law and whether third parties can offer military assistance provided the backdrop to early ideas of intervention in the seventeenth century.¹⁶

Europe's confrontation with the non-European world can be considered from two perspectives. In the sixteenth and seventeenth centuries (and indeed in the eighteenth and nineteenth centuries) the Christian and Islamic worlds collided. This was not a new conflict in international relations but had been played out over several centuries during the Crusades. In this context, theories of intervention were intertwined with the old debate of whether a Christian prince could protect Christians from mistreatment at the hands of 'unbelievers' or 'infidels'. The Spanish theologian Francisco Suárez, for example, was primarily concerned with this problem. While he rejected

¹⁵ Thomas More, *Utopia* (1516), eds. George M. Logan and Robert M. Adams (Cambridge: Cambridge University Press, 1992), pp. 87-88.

¹⁶ For an overview of the political theory of rebellion, see David Wootton's 'Introduction', *Divine Right and Democracy: An Anthology of Political Writing in Stuart England*, ed. David Wootton (London: Penguin Books, 1988).

any right to wage war to impose Christianity, he set out clear guidelines of when a Christian ruler may justly and lawfully wage war to defend Christians under attack. He even extended this right of protection to include the right to deprive the jurisdiction of 'infidel' rulers by creating a protected zone under which Christians may live free from persecution.¹⁷

The conflict between the European and non-European worlds was not solely between Christian Europe and the Islamic 'unbelievers' on the fringes European society. The discovery of the New World in 1492 presented a new twist to Europe's relations with the wider world. Europe's expansion to the New World provoked thoughtful debates in Europe regarding its rights and duties toward the newly discovered Indians. Spanish theologians and jurists, for example, debated whether the Spanish crown could wage war in order to protect the natives from persecution at the hands of their rulers. The fact that their opinions were solicited by the crown reflected the enormous influence which they wielded in the intellectual and political life of sixteenth-century Spain. Francisco de Vitoria, in particular, played a central role in shaping what Parry refers to as Spain's 'deliberate' and 'self-conscious' policy of expansion overseas.¹⁸

Vitoria came to consider the problem of intervention indirectly in the context of Spain's conquest of the New World.¹⁹ He argued that Spain could wage war to protect the natives from mistreatment. This may seem paradoxical given his criticism of Spain's conduct in the New World. In *De Indis*, delivered as lectures in 1539 at the University of Salamanca, he

¹⁷ Francisco Suárez, *Selections From Three Works*, trans. Gwladys L. Williams, et. al. (Oxford: Clarendon Press, 1944), p. 781.

¹⁸ J. H. Parry, *The Spanish Theory of Empire in the Sixteenth Century* (Cambridge: Cambridge University Press, 1940), p. 2.

¹⁹ All references to the works of Francisco de Vitoria are cited from Anthony Pagden and Jeremy Lawrance, eds., *Francisco de Vitoria: Political Writings* (Cambridge: Cambridge University Press, 1991).

dismissed or refuted many of the justifications offered for Spain's conquest. That Castilian Monarchy had universal jurisdiction was rejected. Nor could Spain invoke the Papal Bull of Donation issued by Alexander VI in 1493. Nor could Spain dispossess the Indians of their dominion based on *res nullius* principle or on the allegation that the natives were unbelievers or had sinned against natural law. More importantly, Vitoria dismissed the premise that the natives could be dispossessed of their territory on the claim that they were irrational creatures. On the contrary, the Indians were men, not beasts, capable of reason, with organised cities, marriages, laws, industries, and commerce.

Having defended the right of the Indians to dominion, Vitoria then set out grounds to justify why Spain could wage war against the natives. For example, if the natives violate the natural law principle of open borders by denying the Spaniards access to free trade, innocent passage, or by hindering the right of missionaries to preach openly, Spain would have a right of war. Vitoria further argued that war could be waged if the native rulers become oppressive or tyrannical against their own subjects. By oppression, Vitoria had in mind, first of all, the persecution of newly converted Christians. While Vitoria was clear that Spain was not permitted to impose its religion with force, he qualified that Spain had a right to protect those who have freely converted to Christianity from harm. If converts were harmed, killed, or otherwise prevented from practicing their faith, Spain could legitimately wage war on their behalf for the 'oppression and wrong they were suffering'.²⁰

By oppression, Vitoria also had in mind the right to protect the natives from 'oppressive laws against the innocent'.²¹ Again Vitoria was not giving

²⁰ Vitoria, *De Indis*, p. 285.

²¹ *Ibid.*, p. 288.

Spain the right to impose its religion. Spain was to respect the native religion so long as their religious rites did not entail the killing or slaughter of innocents. But because the Indians were alleged to have practised human sacrifice and cannibalism, this ban did not apply. Such practices were against the law of nations and law of nature since no ruler has the right to subject his people to unjust death nor can anyone freely choose to be sacrificed. It was to these crimes which Spain could also justify its war. To this end Vitoria permitted Spain wide discretion to use military force. He wrote, Spain could 'defend them from such tyranny and oppression'.²² And if the ruler refuses to abandon such rites altogether, he could lawfully be deposed by Spanish soldiers.

Vitoria's views on the right to wage war to protect the natives, however, were not universally endorsed. His theory of humanitarian intervention has been criticised for being an apologia for conquest and colonialism.²³ Contemporaries of Vitoria such as Melchor Cano (1509-1560)²⁴ and Juan de la Peña²⁵ rejected the idea of waging war to liberate a

²² Vitoria, *De Indis*, p. 288; *Lecture on the Evangelization of Unbelievers*, p. 347.

²³ It is simplistic to cast Vitoria as an apologist for conquest since his views were rather complex. On the one hand, he was repulsed by the greed and ruthlessness of Pizarro and his men. After learning of the massacre at Cajamarca and the assassination of the Inca Atahualpa (July 1533), Vitoria wrote: 'no business shocks me or embarrasses me more than the corrupt profits and affairs of the Indies.' Yet, in the same letter, he affirmed the right of conquest in stating that 'I do not dispute the emperor's right to conquer the Indies' but objected to the massacre since the Indians of Cajamarca did not threaten or injure the Christians. See Letter to Miguel de Arcos, 8 November 1534, in *Francisco de Vitoria: Political Writings* (Cambridge: CUP, 1991), pp. 331-33.

²⁴ M.M. Martinez, 'Las Casas on the Conquest of America', in *Bartolome de Las Casas in History*, ed. Juan Friede and Benjamin Keen (Dekalb: Northern Illinois University Press, 1971), p. 319.

²⁵ Anthony Pagden, 'Dispossessing the Barbarian: The Language of Spanish Thomism and the Debate over the Property Rights of the American

people from oppressive practices such as human sacrifice. One of Vitoria's staunchest critics, the Dominican cleric Bartolomé de Las Casas (1484-1566), argued that even if people were indeed being killed, it would have been better to refrain from war than to create greater suffering by protecting the oppressed.²⁶ In Las Casas's view, Vitoria unwittingly gave moral and legal justification for colonial conquest in allowing a right of intervention to protect the innocent.²⁷

Although Vitoria was much criticised by Las Casas, Francisco Suárez, one of Vitoria's most profound students at Salamanca, endorsed Vitoria's essential arguments. Suárez went beyond just restating Vitoria's position. In one sense, Suárez attempted to restrict this right. As Migdley points out, 'it does appear that there would be cases in which Vitoria would be more inclined than Suárez to favour intervention'.²⁸ We should remember that for Vitoria the right to protect the persecuted is an inherent right of natural law and *ius gentium* and not subject to the consent of those who are to be rescued. Suárez argued, on the other hand, that external intervention can be justified only when assistance is *requested* by the victims. He wrote, 'if [the injured party] does not entertain such a wish, no one else may intervene, since he who committed the wrong has made himself subject not everyone indiscriminately, but only the person who has been wronged'.²⁹ By linking

Indians', in *The Languages of Political Theory in Early Modern Europe*, ed. A. Pagden (Cambridge: Cambridge University Press, 1987), p. 95.

²⁶ Bartolomé de Las Casas, *In Defense of the Indians*, ed. and trans. Stafford Poole (De Kalb, Ill.: Northern Illinois University Press, 1974.), p. 192.

²⁷ Dr. Johnson remarked, 'I love the University of Salamanca; for when the Spaniards were in doubt as to the lawfulness of their conquering America, the University of Salamanca gave it as their opinion that it was not unlawful'. J. Boswell, *Life of Johnson*, vol. 1 (London, 1949), p. 281.

²⁸ E. B. F. Midgley, *The Natural Law Tradition and the Theory of International Relations* (London: Paul Elek, 1975), p. 90.

²⁹ Suárez, *Selections*, p. 817.

the right of intervention to the explicit consent of the aggrieved party, Suárez made it more difficult for states to abuse the doctrine by claiming to help those who may not necessarily want foreign intervention.

Another interesting development is Suárez's suggestion of partitioning a country in order to establish a protectorate. He was referring to the specific problem of protecting Christians living in non-Christian lands who were facing religious persecution. If the rulers in question fail to end the abuse and refuse to allow the Christians to emigrate, then the law of nations permits another recourse whereby 'the subjects in question remain in that territory, [but] the prince may be deprived (either of his sovereignty), or at least his power over such subjects'.³⁰ This solution would be an intermediary resolution which would avoid the costs and destruction of a full-scale war and while at the same time creating a protected sanctuary. Suárez cautioned that this solution should only be used sparingly, and only when the number of persecuted great, since an attempt to create a protected zone is likely to be met with much resistance, perhaps even leading to an open war between the parties.

The Spanish theory represents one strand of the early history of the idea. The idea of forcible protection of another people was not confined to Europe's confrontation with the non-European world. On the contrary, much of the sixteenth and seventeenth-century theories of humanitarian intervention emerged in the context of religious persecution within Christian Europe as the schism between Catholics and Protestants widened during the Reformation. For example, Jean Bodin's *Six livres de la république* (1576) and the political pamphlet *Vindicae contra tyrannos* (1579)—both important to the doctrinal history—were written in the context of the civil wars in France between the Protestants, or Huguenots, and the French Catholic rulers during

³⁰ *Ibid.*, p. 781.

the second half of the sixteenth century. Similarly, Gentili's and Grotius's discussions on the subject were reactions to the Dutch Revolt against Philip II of Spain.

Since Bodin is generally known for his strong theory of sovereignty, it is not immediately clear how he contributes to the history of the idea of humanitarian intervention. Bodin acknowledged that the struggle of the Huguenots was provoked by persecution. It was understandable that the Huguenots, as a minority, felt threatened by the Catholics seeking to stamp out heresy. Their fears were reinforced by repeated massacres carried out on orders from the Catholic monarch. For Bodin, however, this did not automatically mean they were entitled to rebel. The right of resistance advocated by the Huguenots contradicted Bodin's own doctrine of non-resistance. It does not matter how grave the crimes may be, Bodin wrote, subjects must not rebel against the king.³¹ Yet what Bodin denied the people he allowed to other princes. He wrote, '[f]or just as it is glorious and becoming, when the gates of justice have been shut, for someone, whoever he may be, to use force in defense of the goods, honor, and life of those who have been unjustly oppressed'.³² To this he added, 'it is a most beautiful and magnificent thing for a prince to take up arms in order to avenge an entire people unjustly oppressed by a tyrant's cruelty'.³³

In contrast to Bodin's *Six livres de la république*, the *Vindicae* was openly sympathetic to the Huguenots. Though its authorship has never been established with certainty, the treatise is generally thought to have been written by the Calvinist Du Plessis Mornay, advisor to Henry of Navarre. It

³¹ Jean Bodin, *On Sovereignty* (1576) (Chapters from *Six livres de la république*), ed. Julian H. Franklin (Cambridge: Cambridge University Press, 1992), p. 120.

³² *Ibid.*, p. 113.

³³ *Ibid.*

was of little surprise, therefore, that the *Vindicae* endorsed a right of rebellion. The *Vindicae* maintained that the legitimacy of the King's power rests with his obligation to a contract. Should the King rule justly, rebellion would be viewed as a rebellion against God and should be punished. Should the King become a tyrant, then there is a right of rebellion which the people (not individuals) can exercise. Indeed, it is even a duty to rebel. The King can be overthrown, and in some circumstances, even executed.³⁴ While these ideas were not novel nor particularly Protestant, since the Catholics of the League held similar views, its timely publication in 1579 was an attempt to justify the rebellion by the Huguenots.³⁵

Its publication in 1579 was also directed toward securing foreign assistance. As Dunning points out, the pamphlet was 'designed to justify the action of Elizabeth of England and some protestant princes of Germany in extending aid to the struggling Huguenots'.³⁶ The *Vindicae* set forth a strong claim that the Prince was entrusted with a duty to protect not only his subjects, but those of others as well. This universal obligation to fight injustice everywhere was ritualised in ceremonies where the monarch brandished his sword to the North, South, East, and West, signifying his duty to protect Christians everywhere in the world. The Prince has the right to wage war in order to 'aid the subjects of other princes, persecuted for true religion, or oppressed by manifest tyranny'.³⁷ The *Vindicae* concluded,

³⁴ J. W. Allen, *A History of Political Thought in the Sixteenth Century* (London: Methuen & Co., 1928), p. 320.

³⁵ *Ibid.*, p. 303.

³⁶ William A. Dunning, *A History of Political Theories: From Luther to Montesquieu* (New York: Macmillan Co., 1905), p. 56.

³⁷ *Vindicae contra Tyrannos: A Defense of Liberty Against Tyrants* (1579), trans. Junius Brutus, ed. Harold J. Laski (London: G. Bell and Sons, 1924), p. 215.

therefore, that 'if a prince outrageously overpass the bounds of piety and justice, a neighbour prince may justly and religiously leave his own country, not to invade and usurp another's, but to contain the other within the limits of justice and equity'.³⁸

The problem of rebellion and foreign assistance was not confined to the Huguenots and Catholic France in the late sixteenth century. The Dutch were also seeking independence from Spain during this time. When Philip sent in troops to suppress the movement, the seven northern provinces, led by Holland and Zeeland, formed the Union of Utrecht in 1579 (later known as the United Provinces of the Netherlands). The Proclamation of Independence stated the desire to be free from the Spanish 'tyrant and lawbreaker'. As with the Huguenots in France, the success or failure of the Dutch revolt hinged on foreign intervention, in particular, from England. Elizabeth's decision in August 1585 to send 5,000 soldiers under the command of the Earl of Leicester was crucial to Dutch independence.³⁹

The Dutch revolt and England's intervention set the background for Alberico Gentili's discussion on humanitarian intervention. In *De Iure Belli Libri Tres* (1598), Gentili made it clear that military intervention to end cruelty and mistreatment in another jurisdiction is a wise and lawful use of force.⁴⁰ While governments are entitled to punish their people within certain limits, this does not allow them to act inhumanely since 'nothing which is cruel is

³⁸ *Ibid.*, p. 277-78.

³⁹ J. H. Elliott, *Europe Divided 1559-1598* (Glasgow: William Collins Sons & Co., 1968), p. 311.

⁴⁰ Alberico Gentili, *De Iure Belli Libri Tres*, trans. John C. Rolfe, ed. Coleman Phillipson (Oxford: Clarendon Press, 1933). *Carnegie Classics of International Law*. The First Book was published in 1588; the Second and Third were published in 1589. The three were issued together in 1598 as *De Iure Belli Libri Tres*.

just'.⁴¹ To punish excessively is to 'overstep' the 'proper limit'. When subjects are treated 'cruelly and unjustly', Gentili continued, 'the principle of defending them' is legitimate. Even if the subjects deserve to be punished, the sentiments of 'humanity' and 'compassion' give third parties the right to step in to protect them no differently than a disinterested bystander would be justified to interfere in order to protect 'unjust sons against the cruelty of the father, and slaves against the inhumanity of their masters'.⁴²

In the Chapter 'On defending the Subjects of another Sovereign', Gentili took up the specific question of England's intervention in the Netherlands. Given that Gentili was an Italian Protestant living in England, the Regius Professor of Civil Law at the University of Oxford, and a good friend of the Earl of Leicester, it is no surprise that he would endorse England's policy. He praised the Earl as a 'great hero'⁴³ and cited England's intervention as an illustration of intervention to protect the persecuted. In his discussion of the right to protect a people from 'immoderate cruelty and unmerciful punishment', he concluded that England acted lawfully in assisting the Dutch against Spain, not only because they are 'grievously oppressed', but because they are friends of England.⁴⁴

For Grotius, as for Gentili, the revolt of the Netherlands against Spain was a recurring concern. This should not be surprising given that Grotius was Dutch and 'a patriotic supporter' of the Dutch struggle.⁴⁵ His views on the right of rebellion has sometimes been a source of confusion. One must reconcile his apparent contradictory positions of being both a 'conservative

⁴¹ Gentili, *DIB*, p. 245.

⁴² *Ibid.*, p. 76.

⁴³ *Ibid.*

⁴⁴ *Ibid.*, p. 77.

⁴⁵ Hedley Bull, *Hugo Grotius and International Relations*, p. 86.

rights theorist' and a 'radical rights theorist'.⁴⁶ His conservative tendencies can be explained in part due to the royal patronage he received from King Louis XIII of France when he composed his treatise. Careful not to offend his patron, Grotius rejected the notion that 'sovereignty resides in the people'.⁴⁷ His preference for domestic order and tranquillity comes at a cost of individual initiative in the political realm. And because no one is entitled to liberty and freedom as innate rights, the desire for freedom and autonomy cannot be a just cause for war or rebellion.⁴⁸

On the question of how subjects should respond to misrule, Grotius offered few options but to endure injustice. Obedience and respect for law and order should be in the minds of all citizens, even those mistreated since the preservation of civil society is preferable to having no society at all. Injustice, therefore, ought to be endured. Grotius instructed, 'if from any such case, or under other conditions as a result of caprice on the part of him who holds the sovereign power, unjust treatment be inflicted on us, we ought to endure it rather than resist by force'.⁴⁹ Rebellion against the state on the ground of mistreatment is not acceptable according to both the law of nature and the Gospels.⁵⁰ If the people are denied the right to protect themselves from great injustice, this seems to suggest that foreign assistance should be prohibited as well. For those who face 'unjust treatment', he offered little consolation but the unheroic advice of 'non-resistance'.

⁴⁶ Richard Tuck, *Natural Rights Theories: Their Origin and Development* (Cambridge: Cambridge University Press, 1979), p. 71.

⁴⁷ Grotius, *DJBP*, p. 103.

⁴⁸ *Ibid.*, see Book II, Chapter XI.

⁴⁹ *Ibid.*, p. 138.

⁵⁰ *Ibid.*, see Book II, Chapter IV.

The concern for maintaining domestic order in civil society pushed Grotius to defer to the powers of the state when it comes to how a ruler can treat his own people. Yet, it is important to stress that there is another side of Grotius. He never ceded states unlimited power nor did he intend to put subjects at the mercy of the ruler. He qualified his remarks on non-resistance, for example, by pointing out that the duty of non-resistance does not apply in situations of 'extreme and imminent peril'.⁵¹ If a ruler without provocation and just cause violently abuses his subjects, the people would be justified to 'take up arms in order to ward off the violence of those having superior authority'.⁵² Grotius himself even admitted that there is no contradiction between his support of state authority and a limited right of resistance. He pointed out that even Barclay, a 'staunch advocate' of royal authority, was willing to concede that subjects had a 'right of self-defence against atrocious cruelty'.⁵³

The situation in the Netherlands was one example of this. In *De Jure Praedae* (1604), Grotius established the grounds by which revolt was justified. Philip, in sending the Duke of Alba to suppress the revolt, had exceeded the bounds of his legitimacy. Spanish troops were accused of laying waste to the land, of destroying cities, and pillaging property. But in Grotius's opinion, what gave the Dutch a right of resistance was the 'slaughter of the innocent, rapine, and all other violent deeds of this kind'.⁵⁴ Philip, therefore, had crossed the line between just rule and misrule. Grotius concluded, 'For he who abuses sovereign power renders himself unworthy of sovereignty, and

⁵¹ *Ibid.*, p. 149.

⁵² *Ibid.*

⁵³ *Ibid.*, p. 150.

⁵⁴ Hugo Grotius, *De Jure Praedae* (1604), trans. Gwladys L. Williams (Oxford: Clarendon Press, 1950), p. 289.

ceases to be a prince, in consequence of the very act by which he converts himself into a tyrant'.⁵⁵

And when a ruler becomes a tyrant, ruling with such cruelty that the very existence of that society is threatened, Grotius saw nothing problematic about military intervention from a third party.⁵⁶ Natural law permits each individual not only to defend and enforce his own rights, but also that of others.⁵⁷ In his often quoted discussion of 'whether a war for the defence of subjects of another power is rightful' Grotius clearly argued that the prince is bound by natural law not to exceed the limits of just punishment. He asserted unequivocally that 'should [the ruler] inflict upon his subjects such treatment as no one is warranted in inflicting, the exercise of the right vested in human society is not precluded'.⁵⁸ It is important that Grotius made this a 'right' of international society which conveyed both moral and legal authority. The exercise of this right extends beyond mere diplomatic persuasion to the right of third parties to 'take up arms'.⁵⁹

Grotius qualified that intervention is justifiable only to protect the welfare of victims, not to further the national interest of the intervening state. He suggested that intervention must be disinterested in the sense that the intervening powers function much like a 'guardian, or some other person, [who] goes to law on behalf of a pupil, who is personally incapable of legal action'.⁶⁰ Just as a guardian has a fiduciary duty to protect and further the

⁵⁵ *Ibid.*

⁵⁶ See also Charles S. Edwards, *Hugo Grotius, The Miracle of Holland: A Study in Political and Legal Thought* (Chicago, Ill.: Nelson-Hall, 1981), p. 134.

⁵⁷ Grotius, *DJBP*, p. 411.

⁵⁸ *Ibid.*, p. 584.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

interests of those in his care, states taking up arms to protect the nationals of another must do likewise. The reserved right of states to protect those who cannot protect themselves ensures a minimum degree of humanity in international society.

The views put forth by Gentili and Grotius were influential in shaping subsequent discussions in the later part of the seventeenth century. Richard Zouche (1589-1660), Regius Professor of Civil Law at Oxford, a post held previously by Gentili, invoked the authority of Gentili and Grotius in vindicating England's right to intervene against Spain in the Dutch Revolt (*Jus Feciale* 1650).⁶¹ Similarly, Grotius's ideas on this subject reappeared in the works of the German jurist Samuel Pufendorf (1632-1694). In *De Jure Naturae et Gentium*, first published in 1672, Pufendorf examined the question of whether the subjects of another may be protected. He wrote, on 'this point we consult the view of Grotius'. It was Grotius, he pointed out, who put forth the principle that a third party may intervene to protect a people 'against the barbarous savagery of their superiors'.⁶²

Another important contribution to this idea can be found in the eighteenth-century treatise *Les Droit des Gens* (1758) by the Swiss diplomat Emerich de Vattel (1714-1767).⁶³ Vattel's interpreters have presented him as

⁶¹ Richard Zouche, *Iuris et Iudicii Fecialis, sive, Iuris Inter Gentes, et Quaestionum de Eodem Explicatio*, trans. J. L. Brierly, ed. Thomas Erskine Holland (Baltimore, M.D.: Lord Baltimore Press, 1911).

⁶² Samuel Pufendorf, *De Jure Naturae et Gentium Libri Octo* (1672), trans. C. H. Oldfather and W. A. Oldfather, ed. James Brown Scott (Oxford: Clarendon Press, 1934), p. 1307.

⁶³ Emerich de Vattel, *Le Droit des Gens, ou Principes de la Loi Naturelle, appliqués à la Conduite et aux Affaires des Nations et des Souverains* (1758), trans. Charles G. Fenwick, ed. James Brown Scott (Washington: Carnegie Institution, 1916).

both a critic⁶⁴ and advocate⁶⁵ of humanitarian intervention. In a sense, both interpretations are accurate. Vattel is perhaps best known for his development of the principle of non-intervention, following the lead of Christian Wolff (1679-1754). Yet, Vattel argued that any ruler who, by 'his insupportable tyranny', brings on a national revolt against him faces the peril of foreign intervention. There is nothing unlawful about intervention to topple tyranny; it is even honourable. He wrote, '[t]o give help to a brave people who are defending their liberties against an oppressor by force of arms is only the part of justice and generosity'.⁶⁶ In permitting foreign assistance to a revolutionary group seeking to overthrow an oppressor, Vattel's *Les Droit des Gens* became an influential work in Revolutionary America.⁶⁷

⁶⁴ Peter Remec writes: 'Vattel does not recognize any general right to punish crimes for the sake of human society in general. . . Humanitarian intervention to protect the fundamental rights of subjects of a foreign state is, therefore, an unjust and unwarranted interference in the affairs of that state. It is contrary to the perfect rights of freedom and independence of each nation.' Peter Remec, *The Position of the Individual in International Law According to Grotius and Vattel* (The Hague: Martinus Nijhoff, 1960), p. 232.

⁶⁵ Lauterpacht writes: 'Here, once more, we have the recognition—especially significant in the case of Vattel, whose respect for the sovereignty of states otherwise knows few limits—of the right of international intervention to safeguard the fundamental rights of individuals.' Hersch Lauterpacht, *International Law and Human Rights* (Archon Books, 1968), p. 119.

⁶⁶ Vattel, *Law of Nations*, p. 131.

⁶⁷ See Albert de Lapradelle's Introduction to Vattel's *Le Droit des Gens*, p. xxx. It is not surprising, therefore, that American revolutionaries, who portrayed their cause as a rebellion against the 'tyranny' and 'oppression' of George III, frequently cited Vattel to vindicate their revolt and their appeal to France for military aid. Hersch Lauterpacht, 'The Law of Nations, The Law of Nature, and the Rights of Man', *The Grotius Society* 29 (1943), p. 26.

Growth of an Idea, 1814-1914

Even with Vattel's contribution, humanitarian intervention was still a nascent idea in Western political and legal thought toward the end of the eighteenth century. The period between the Congress of Vienna and the First World War, however, marked an important transition as the concept of forcible protection of another people was transformed from a nascent *idea* into a more coherent *doctrine*. Where discussions in the sixteenth and seventeenth centuries were sometimes brief and tangential, the question of intervention in general, and the more particular problem of humanitarian intervention, were subjects of greater examination. While it would be an overstatement to say that this was the question of the day, that every major treatise in international law devoted a section to the idea of 'intervention for humanity' attests to its growing importance. More importantly, the fact that the idea was not confined to legal treatises but had entered the vocabulary of diplomacy and state practice indicated a wider awareness for the concept.

As with the earlier discussion, we must consider the context within which the discussion took place. The idea of non-intervention—that states have a duty to refrain from intervening in the internal affairs of others—developed in the eighteenth century by Christian Wolff, Immanuel Kant, and Emerich de Vattel, gained currency as a principle for foreign policy, particularly in Britain, and international law. For example, Richard Cobden, critical of Britain's propensity to intervene abroad, offered a theory of non-intervention based on crude national interests. He wrote, '[i]n truth, Great Britain has, in contempt of the dictates of prudence and self-interest, an insatiable thirst to become the peacemaker abroad; or if that benevolent task fail her, to assume the office of gendarme [sic]'.⁶⁸ The 'passion for meddling

⁶⁸ Richard Cobden, 'England, Ireland and America', *The Political Writings of Richard Cobden* (London, 1886), p. 10.

with the affairs of foreigners',⁶⁹ Cobden observed, was a part of the 'national character' of Britain. Instead, Britain ought to follow 'upon the *bona fide* principle (not Lord Palmerston's principle) of *non-intervention in the political affairs of other nations*'.⁷⁰

While states frequently violated this principle in practice, especially when national interests were at stake, the norm of non-intervention was a recurrent principle in international law and policy pronouncements. Every major legal treatise devoted a section to the principle of non-intervention. The American jurist Henry Halleck, for example, defined the rights of sovereignty to include the right 'to establish, alter, or abolish its own municipal constitution and form of government'.⁷¹ The principle of non-intervention was the necessary corollary of this. Halleck wrote, 'no foreign State can interfere with the exercise of this right'.⁷² Mountague Bernard, the Chichele Professor of International Law and Diplomacy at the University of Oxford, argued that the 'doctrine of non-intervention is therefore a corollary from a cardinal and substantial principle of international law. . . the burden of proof lies with those who would dislodge it'.⁷³

Few publicists maintained an absolutist position that intervention was categorically unlawful. It was generally agreed that while non-intervention should be the rule, there were circumstances which permitted intervention.

⁶⁹ Richard Cobden, 'Russia', *ibid.*, p. 254.

⁷⁰ *Ibid.*, p. 333. Cobden's emphasis.

⁷¹ Henry W. Halleck, *International Law*, 4th ed., ed. G. Sherston Baker, in 2 vols. (London: Kegan Paul, Trench, Trubner & Co., 1908), vol. 1, p. 101.

⁷² *Ibid.*

⁷³ Mountague Bernard, 'On the Principle of Non-Intervention' (Oxford: J. H. and J. A. S. Parker, 1860), p. 9.

Hence, the debate was really one over exceptions to the rule.⁷⁴ Interventions to preserve the balance of power and to counter a previous intervention were justifiable. The right of intervention to ward off 'imminent danger', more commonly known today as a 'preemptive strike', was also considered a possible exception.⁷⁵ More controversial was the idea that states could intervene to collect financial debts or to safeguard the lives and property of their nationals abroad. Latin American jurists condemned this ground for intervention; and for good reasons since Latin America was frequently the target of American interventions.⁷⁶

It was within the context of this discussion that the question of whether 'intervention for humanity' was an acceptable exception to the principle of non-intervention came to be considered. For the American jurist and diplomat Henry Wheaton, intervention for humanity was sanctioned by international law. By the eve of the First World War, the legality of humanitarian intervention was widely endorsed, especially by the Anglo-American school of international law. Sir Edward Shepard Creasy, T. D. Woolsey, T. J. Lawrence, John Westlake, Edwin Borchard, Henry G. Hodges, Amos Hershey, and William Lingelbach voiced their support. There was also

⁷⁴ See Paul A. Neuland, 'Traditional Doctrine on Intervention in the Law of Nations', unpublished dissertation, Georgetown University, 1971; Marc Trachtenberg, 'Intervention in Historical Perspective', in *Emerging Norms of Justified Intervention: A Collection of Essays from a Conference of the American Academy of Arts and Sciences* (1993), p. 16.

⁷⁵ Lawrence, *Principles*, p. 125.

⁷⁶ For more on the status of intervention and the various grounds of intervention in the nineteenth-century international law, consult P.H. Winfield's two articles 'The Grounds of Intervention in International Law', *British Yearbook of International Law* 4 (1924), pp. 149-162 and 'The History of Intervention in International Law', *British Yearbook of International Law* 3 (1922-23), pp. 130-149.

a Franco-Belgian school of thought, represented by Arntz, Rolin-Jaequemyns, Pillet, and Rougier which strongly favoured this idea.⁷⁷

This opinion was by no means universal. A body of writing, mostly from continental Europe, considered humanitarian intervention as unlawful. Publicists such as Pradier-Fodéré, Heffter, Gareis, F. V. Liszt, Funck-Brentano and de Floeckher endorsed this view.⁷⁸ Some jurists took a middle road by denying the legality while tolerating it on moral grounds. William E. Hall, for example, stressed that states intervening on humanitarian grounds were 'going beyond their legal powers'; their justification can only be 'a moral one'.⁷⁹ Similarly, T. J. Lawrence argued that the legality of this form of intervention was not certain but must be judged on the merits of each case.⁸⁰ He even suggested that it was a question of policy not law. He wrote: 'intervention to put a stop to barbarous and abominable cruelty is a question rather of policy than of law. It is above and beyond the domain of law. It is destitute of technical legality, but it may be morally right and even praiseworthy to a high degree'.⁸¹

The balance between the letter and the spirit of international law was most apparent in Oppenheim's *International Law*. Oppenheim wrote in 1905 that 'should a State venture to treat its own subjects or a part thereof with such cruelty as would stagger humanity, public opinion of the rest of the

⁷⁷ Malbone W. Graham, 'Humanitarian Intervention in International Law as Related to the Practice of the United States', *Michigan Law Review* 22 (1924), p. 317.

⁷⁸ Peter. Malanczuk, *Humanitarian Intervention and the Legitimacy of the Use of Force* (Amsterdam: Het Spinhuis, 1993), p. 10.

⁷⁹ William E. Hall, *A Treatise on International Law*. 4th ed. (Oxford: Clarendon Press, 1895), p. 308.

⁸⁰ Lawrence, *Principles*, p. 129.

⁸¹ *Ibid.*

world would call upon the Powers to exercise intervention for the purpose of compelling such State to establish a legal order of things within its boundaries sufficient to guarantee to its citizens an existence more adequate to the ideas of modern civilisation'.⁸² Yet, he acknowledged that since nothing in the law of nations actually guaranteed the 'rights of mankind', the juridical foundation for humanitarian intervention was tenuous. Its legitimacy was derived from public opinion, not international law. Oppenheim was optimistic, however, that as international law evolved, the legality of such operations would no longer be disputed, especially when authorised by the collective powers.⁸³

Whether humanitarian intervention was legal or not did not matter as much as the fact that it was generally tolerated in nineteenth-century international society. There were several contributing factors to the growth of the idea. Religious persecution of Christians in the Ottoman empire was again a recurring issue. Referring to the European war against the Ottomans to protect the Greeks in 1827, Henry Wheaton wrote:

The interference of the Christian powers of Europe, in favor of the Greeks, who, after enduring ages of cruel oppression, had shaken off the Ottoman yoke, affords a further illustration of the principles of international law authorizing such an interference, not only where the interests and safety of other powers are immediately affected by the internal transactions of a particular State, but where the general interests of humanity

⁸² Lassa Oppenheim, *International Law*, 2 vols (London: Longmans, Green and Co., 1905 and 1906), vol. 1, p. 347. All references to Oppenheim are from the 1st edition unless otherwise stated.

⁸³ Hedley Bull, 'The Grotian Conception of International Society', p. 63.

are infringed by the excesses of a barbarous and despotic government.⁸⁴

It would be inaccurate to suggest that without religious persecution in Turkey, the idea of humanitarian intervention would not have become widely accepted. The ideas of nationalism and national self-determination, for example, played a role in shaping the doctrine. Humanitarian intervention was intertwined with notions of intervention to liberate an oppressed nation. Not everyone was in favour of this idea. John Stuart Mill, for example, called on an oppressed nation to resort to self-help: if they are unwilling to risk their own lives, they do not deserve freedom.

Italian nationalists such as Garibaldi and Mazzini, however, were in favour of this view.⁸⁵ Mazzini argued, for instance, that the principle of non-intervention was a 'perversion of the original meaning of the principle' by suppressing the independence of nationalities.⁸⁶ It was invented to prevent a right of intervention to help an oppressed nation in its struggle against an 'despotic' government. Should 'glaring wrong' be inflicted on a nation, other nations are not 'absolved from all concern in the matter' simply because a border exist between them and the sight of the wrong.⁸⁷ All states should be allowed to help liberate nations trap in oppressive empires. Only when struggling *nations* have become independent *states* could the principle of non-

⁸⁴ Henry Wheaton, *Elements of International Law*, ed. George Grafton Wilson (Oxford: The Clarendon Press, 1936), p. 95.

⁸⁵ See the pamphlet 'Intervention: Duty or Crime' (London: Bell and Daldy, 1864), p. 11.

⁸⁶ Giuseppe Mazzini, 'Non-Intervention', *Life and Writings of Joseph Mazzini* (London: Smith, Elder, 1870), p. 301.

⁸⁷ *Ibid.*, p. 307.

intervention have any meaning.⁸⁸ Otherwise, non-intervention would simply be the doctrine of the 'status quo'⁸⁹ and international order would be a synonym for suppression.

Count Mamiani, considered the founder of the Italian school of international law,⁹⁰ allowed this justification as the only exception to the rule of non-intervention. He wrote,

if foreign armies come in to aid the people which justly, sword in hand, demands the autonomy stolen from it, they do not commit an act of intervention, in the modern sense of the word, because they are not violently interfering in the internal affairs of one identical political community, but they are aiding the cause of a nation against its external enemies, a thing which has always been reputed lawful and is quite in conformity with the most rigorous terms of international justice.⁹¹

The theory of intervention to protect an oppressed nationality was not just confined to the Italian school of international law. The British publicist, Sir Edward Creasy, for example, endorsed this classification of intervention, although he imposed stringent requirements. 'Before we approve of Intervention in behalf of an oppressed subject race' [here he is using race to mean nationality], he stipulated, 'it ought to be clear that the non-amalgamation of the two races has been due entirely to the haughty injustice of the dominant race, and that no fair hope of equal laws and equal franchises

⁸⁸ *Ibid.*, p. 302.

⁸⁹ *Ibid.*, p. 301.

⁹⁰ Malbone W. Graham, 'Humanitarian Intervention in International Law as Related to the Practice of the United States', p. 316.

⁹¹ Count Mamiani, *Rights of Nations, or the New Law of European States Applied to the Affairs of Italy* (London: W. Jeffs, 1860), p. 144.

has been held out of the subjugated and down-trodden nation'.⁹² W. E. Hall observed similarly that 'intervention for the purpose of checking gross tyranny or of helping the efforts of a people to free itself is very commonly regarded without disfavour'.⁹³

Also important was the growing idea human rights. This needs some clarification since 'human rights' is viewed as a development of post-1945 international law. To argue that traditional international law recognised and protected human rights would be wrong since nineteenth-century legal positivism maintained that only states have rights.⁹⁴ Yet, to suggest that the *idea* of 'human rights' is a recent phenomenon is also inaccurate.⁹⁵ The idea of inalienable rights of man was expressed in the writings of Locke, Montesquieu, Rousseau, Beccaria, Voltaire, Kant, Bentham, and John Stuart Mill and was influential in the political developments in revolutionary America and France.

While 'human rights' was not a phrase used with frequency nor understood as in the contemporary sense,⁹⁶ the similar ideas of 'rights of

⁹² Edward S. Creasy, *First Platform of International Law* (London: Van Voorst, Paternoster Row, 1876), p. 304.

⁹³ Hall, *A Treatise*, p. 303.

⁹⁴ *Ibid.*, p. 302.

⁹⁵ Murray Forsyth, 'The Tradition of International Law', *Traditions of International Ethics*, eds. Terry Nardin and David R. Mapel (Cambridge: Cambridge University Press, 1992), p. 29.

⁹⁶ In discussing the laws of war and the treatment of prisoners, James Lorimer did use 'human right': 'Life, being the source of all human right . . . must, as we have seen, be the first object of human economy, whether in peace or in war'. See James Lorimer, *The Institutes of the Law of Nations: A Treatise on the Jural Relations of Separate Political Communities*. 2 vols. (Edinburgh: Blackwood and Sons, 1883), vol. 2, p. 72.

humanity' or 'rights of mankind' were used instead in both policy statements and legal treatises.⁹⁷ For example, the Belgian jurist Arntz wrote:

When a government, although acting within its rights of sovereignty, violates the rights of humanity, either by measures contrary to the interests of other States, or by an excess of cruelty and injustice, which is a blot on our civilization, the right of intervention may lawfully be exercised, for, however worthy of respect are the rights of state sovereignty and independence, there is something yet more worthy of respect, and that is the right of humanity or of human society, which must not be outraged.⁹⁸

Humanitarian movements also played a role in development of the idea of universal rights. The campaign in Britain to abolish the slave trade reflected a concern for notions of humanity.⁹⁹ For abolitionists, slavery and the slave trade violated common laws of humanity. While they did not view the people of Africa to be on the same level of humanity, they argued that slaves were still a part of humanity and should be protected from inhumane treatment. In addition, there was also the humanitarian campaign to humanise warfare. The International Red Cross played a vital role in persuading governments to accept that certain minimum standards should be observed in warfare. These norms were gradually translated into codified rules of war in declarations, treaties, and military manuals.¹⁰⁰

⁹⁷ Lord Russell, in deciding to support France's intervention in Lebanon, saw Europe's action as undertaken to 'vindicate the rights of humanity'. See *Great Britain Parliamentary Papers*, vol. 68, No. 37.

⁹⁸ Quoted in Stowell, *Intervention and International Law*, p. 53.

⁹⁹ For a general discussion of the anti-slavery movement, see Frank J. Kingberg, *The Anti-Slavery Movement in England: A Study in English Humanitarianism* (New Haven: Yale University Press, 1926).

¹⁰⁰ Discussed in more detail in Chapter Four.

We cannot understand the growth of the idea of humanitarian intervention, however, without finally considering the intellectual milieu of 'civilisation' and imperialism.¹⁰¹ While the humanitarian concern for one's fellow man was often expressed, especially by the Victorians, humanitarianism was infused with paternalism and racial superiority. This was most apparent in the way the world was perceived by the Europeans as divided into different spheres according to one's position. For example, James Lorimer divided the world into 'civilized humanity', 'barbarous humanity', and 'savage humanity'.¹⁰² A more common depiction was the classification of 'civilised', 'semi-civilised', and 'uncivilised'.¹⁰³ Humanitarian intervention came to be viewed as the right of 'civilised' states to intervene to put an end to barbarous rule and despotism in the less 'civilised' world.

Notions of 'civilisation' and the lower races were also linked to the ethos of imperialism. As Hobson's work outlined, imperialism was justified in part by the desire to protect the 'lower races' 'in the cause of humanity'. One manifestation of this was the desire to end what were considered cruel and barbarous practices. Hobson recounted uncritically how the British 'suppressed the more noxious or offensive kinds of ceremonies practised by the Kaffirs'.¹⁰⁴ There was also the desire to protect the natives from internecine warfare among the tribes. Or, it was believed that bringing a

¹⁰¹ Since Chapter Six examines these issues more fully, I will not go into great detail here.

¹⁰² James Lorimer, *The Institutes of the Law of Nations: A Treatise on the Jural Relations of Separate Political Communities*. 2 vols. (Edinburgh: Blackwood and Sons, 1883), vol. 1, p. 101.

¹⁰³ See Wheaton, *Elements*, 6th ed., p. 45; Westlake, *Chapters on International Law*, p. 137.

¹⁰⁴ J. A. Hobson, *Imperialism: A Study*. 2nd ed. (London: George Allen & Unwin Ltd., 1905), p. 246.

'lower race' under the administration of a imperial government would protect them from the exploitation of chartered companies. Hobson observed, to 'abandon the backward races to these perils of private exploitation, it is argued forcibly, is a barbarous dereliction of a public duty on behalf of humanity and the civilization of the world'.¹⁰⁵

Theories of humanitarian intervention and imperialism were both grounded in the idea that foreign interference was for the good of the local people. On the right of 'civilised' states to intervene against 'lunatic' or 'imbecile' states, Payn wrote:

The interventions were undertaken on behalf of minor States in different stages of weakness, imbecility, and decay, and in every case it is arguable that the intervention was in the main for the benefit of the State in the affairs of which it occurred, and was salutary in its effects on that State.¹⁰⁶

This is not too different from notions of the 'White Man's Burden' and the 'Civilizing Mission' which gave 'civilised' states a special right of interference since it was ultimately for the benefit of the people.¹⁰⁷

These factors combined contributed to the growth of the idea of humanitarian intervention. One should not overstate, therefore, the notion that state sovereignty in the nineteenth century was inviolable since the growth and acceptance of humanitarian intervention was a direct challenge to this. As one critic pointed out, it would be legal fiction to erect a 'Wall of

¹⁰⁵ *Ibid.*, p. 231.

¹⁰⁶ F. W. Payn, 'Intervention Among States', *Cromwell on Foreign Affairs* (London: C. J. Clay and Sons, 1901), p. 91.

¹⁰⁷ Hobson wrote, 'such interference with the government of a lower race. . . must be attended by an improvement and elevation of the character of the people who are brought under this control'. Hobson, *Imperialism*, p. 232.

China' around each state, to assert that whatever happens within the wall is of no business to outsiders.¹⁰⁸

Decline and Resurgence of an Idea, 1919-1994

Thus far I have discussed the evolution of the idea as it emerged within conceptions of international society very different from the contemporary world. The development of the idea of humanitarian intervention in the nineteenth century coincided with ideas of Great Power management of world affairs and notions of imperialism and colonialism. Advocates of intervention never questioned the assumptions of superiority of European states vis-a-vis the non-European states which was at the foundation of the doctrine. Nor did they question the unequal relations between sovereign states and notions that the sovereignty of some states were more worthy of protection than others. Moreover, the premise of using military force as a way of resolving disputes between states and within states was not considered problematic at all.

The question we come to is what happens to the idea of humanitarian intervention after the First World War. What impact did changing notions of state sovereignty, equality of states, and increased restrictions on the use of force in the twentieth century have on the idea? One view is that the idea of humanitarian intervention became a vestige of the past, no longer tolerated in the new international order. The post-World War Two settlement and the founding of the United Nations system confirmed this decline. During much of the post-1945 era, the idea was criticised and dismissed as a throwback to an era in international politics of unequal relations, conquest, and imperialism.

¹⁰⁸ Payn, 'Intervention Among States', p. 74.

The decline of the idea can be observed in many places. Developments in international law after the First World War made it difficult to assert that the international community tolerated this principle.¹⁰⁹ Article 10 of the League Covenant, for example, urges all members to respect and protect the 'territorial integrity and existing political independence of all Members'. Article 15 removes matters 'solely with the domestic jurisdiction of that party' from deliberation of the Council. In addition, the lawful use of military force was subjected to a higher degree of restrictions. Article 13 of the Covenant stipulated that disputes between member states be resolved through arbitration. Legal instruments such as the General Treaty for the Renunciation of War, also called the Kellogg-Briand Pact of August 1928, and the Additional Protocol Relative to Non-Intervention signed at the Inter-American Conference for the Maintenance of Peace in 1936 further restricted the use of force for purposes other than in self-defence.¹¹⁰

The erosion of the idea was reflected in the opinions of publicists. If Brierly's and Oppenheim's treatises could be used as weathervanes for trends, then it is clear that the legitimacy of the idea had eroded considerably. Brierly's 1936 edition of *The Law of Nations* asserted, 'it involves a radical departure from the present basis of international law to maintain that a state's treatment of its own subjects is, in the absence of any treaty protection, anything but a domestic matter which it may decide at its own discretion'.¹¹¹ Arnold McNair, as editor of Oppenheim's *International Law*, arrived at a similar conclusion. He wrote, 'many jurists maintain that intervention is likewise admissible, or even has a basis of right, when exercised in the interest

¹⁰⁹ Brownlie, *Use of Force*, p. 342.

¹¹⁰ See Charles Fenwick, *The Organization of American States* (Washington, D.C.: Kaufmann Printing, 1963), pp. 137-143.

¹¹¹ J. L. Brierly, *The Law of Nations*. 2nd ed. (Oxford: Clarendon Press, 1936), p. 249.

of humanity for the purpose of stopping religious persecution and endless cruelties in time of peace and war. . . But whether there is really a rule of the Law of Nations which admits such interventions may well be doubted'.¹¹²

The declining legitimacy of the idea during the Interwar years was summed up by Hersch Lauterpacht. This is significant since Lauterpacht was a great champion of human rights and the forcible protection of these rights. He conceded in 1928 that 'no elaborate argument is necessary in the present stage of international law, in order to arrive at a condemnation, as a clear violation of the Law of Nations, of this form of intervention'.¹¹³ In comparison with the 'ideals and aspirations prevailing before the World War', it was clear that the right had lost much of its legitimacy in international law and practice. With much regret Lauterpacht concluded that 'it would appear that the conception of 'intervention for the sake of humanity' is less acceptable to civilized Governments than it was thirty or forty years ago'.¹¹⁴ He also asserted that since humanitarian intervention depended on the acceptance of fundamental rights of man which cannot be derogated, the fact that in 'many countries these rights have been abolished by positive law' undermined any notion of the recognition of human rights.¹¹⁵

This trend continued in the post-1945 era. Delegates at the San Francisco Conference specified clearly that states could not intervene in the internal affairs of others for the purpose of protecting human rights. The *travaux préparatoires* of the Charter suggest that concern for human rights does not give either the United Nations or states the right to violate domestic

¹¹² Both the McNair and Lauterpacht editions have the same passage. See *Oppenheim's International Law*, 4th ed., vol. 1, p. 270; *Oppenheim's International Law*, 5th ed., vol. 1, p. 255.

¹¹³ Lauterpacht, *Collected Papers*, vol. 3, p. 290.

¹¹⁴ *Ibid.*, vol. 2, p. 148.

¹¹⁵ *Ibid.*, vol. 1, p. 303.

jurisdiction. While the Charter encouraged the 'promoting' and 'respect' for human rights, adopted in Articles 1 and 55, the actual protection of these rights would be 'primarily the concern of each State'.¹¹⁶ To settle any ambiguities between the Chapter IX which encouraged the respect for human rights and Article 2(7) which safeguarded domestic jurisdiction, delegates reiterated that 'nothing in Chapter IX can be construed as giving authority to the Organisation to intervene in the domestic affairs of member States'.¹¹⁷

The scepticism toward the idea of humanitarian intervention was also reiterated in subsequent resolutions of the United Nations. The General Assembly's Declaration on the Inadmissibility of Intervention in Domestic Affairs of States and the Protection of Their Independence and Sovereignty (1965)¹¹⁸ and Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States (1970)¹¹⁹ condemned intervention in the widest sense. Both declarations contained the common article: 'No State has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State.' The latter declaration, however, hints that foreign intervention to help a people attain self-determination and freedom from foreign domination may be justifiable.¹²⁰ While this may suggest the recognition of a limited right of

¹¹⁶ See *Report of Sub-committee I/1/A to Committee I/1*. Quoted in Georg Schwarzenberger, *Power Politics: A Study of International Society*. 2nd ed. (London: Stevens & Sons, 1951), p. 630.

¹¹⁷ Schwarzenberger, *Power Politics*, p. 632.

¹¹⁸ UNGA Res. 2131 (XX), 21 Dec. 1965. Note that Article 8 of the Declaration qualified that the principle of non-intervention does not affect the authority of the UN to take action for the maintenance of international peace and security under Chapters VI, VII, and VIII.

¹¹⁹ UNGA Res. 2625 (XXV), 24 Oct. 1970.

¹²⁰ Under the title 'The principle of equal rights and self-determination of peoples', the Declaration stated: 'In their actions against,

humanitarian intervention, this passage was an oblique reference to armed assistance to national liberation movements and not an endorsement of humanitarian intervention. As Akehurst points out, during the drafting of these declarations, humanitarian intervention was expressly raised as a possible exception but was ultimately rejected. The failure of the Declarations to mention humanitarian intervention as an exception to non-intervention was therefore not an oversight.¹²¹

That the idea was under challenge for much of the twentieth century did not mean that it had disappeared from the theories of international law and relations. During the interwar years, for example, some argued that post-World War I international society was actually more tolerant of this right. This movement was influenced by the general mood of optimism and idealism of the interwar era, a spirit which E. H. Carr so devastatingly criticised.¹²² Many writers on international relations professed the neo-Kantian idealism that the devastation of war would lead to a fundamental reconstruction of the international order. Clark writes, the 'optimism that the League could, in fact, induce a change for the better in standards of

and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter.' This passage follows a previous paragraph noting that 'subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as a denial of fundamental human rights, and is contrary to the Charter.' UNGA Res. 2625 (XXV), 24 Oct. 1970.

¹²¹ Michael Akehurst, 'Humanitarian Intervention', *Intervention and World Politics*. Ed. Hedley Bull (Oxford: Clarendon Press, 1986), p. 109. These developments concided the International Court of Justice rulings circumscribing intervention in the *Corfu Channel* and *Military and Paramilitary Activities In and Against Nicaragua* cases. See ICJ Reports (1949), p. 35 and ICJ Reports (1986) pp. 106-110 and §268. Also see Nigel S. Rodley, 'Human Rights and Humanitarian Intervention: The Case Law of the World Court', *International and Comparative Law Quarterly* 38 (1989), pp. 321-333.

¹²² E. H. Carr, *Twenty Years' Crisis, 1919-1939* (London: Harper Torchbooks, 1964). First published in 1939.

international behaviour was explicitly connected with the magnitude of destruction in the First World War'.¹²³ This idealism often led to wishful thinking, contributing to the widening gap between reality and ideals.¹²⁴

Interwar idealism contributed to the development of the doctrine of humanitarian intervention in two ways. First, institutional developments of the League were interpreted as a move toward recognition of individual rights. The establishment of the League of Nations and the Permanent Court of International Justice, for example, was viewed as undercutting notions of absolute sovereignty and domestic jurisdiction. The League mandates and minority treaties were interpreted as evidence of a commitment to the rights of individuals. The creation of the International Labour Organisation to ensure a minimum degree of protection for workers suggested that the treatment of individuals was no longer exclusively a matter of domestic jurisdiction. The League also pledged its support to humanitarian agencies such as the International Red Cross. All these developments were viewed as creating an international environment supportive of the idea of humanitarian intervention.

Second, the perception of growing international solidarity and integration of peoples also furthered the idea of humanitarian intervention. The vision of a global village linked by a web of telecommunications is not a post-modern concept. Just as interventionists in the post-1991 international society speak of the irrelevance of territorial borders with the rise of CNN,

¹²³ Ian Clark, *Reform and Resistance in the International Order* (Cambridge: Cambridge University Press, 1980), p. 43.

¹²⁴ On interwar optimism, Bull observes that the 'distinctive characteristic of these writers was their belief in progress: the belief, in particular, that the system of international relations that had given rise to the First World War was capable of being transformed into a fundamentally more peaceful and just world order'. Quoted in Martin Hollis and Steve Smith, *Explaining and Understanding International Relations* (Oxford: Clarendon Press, 1991), p. 20.

interwar proponents of humanitarian intervention foresaw the rise of technology and communications as bringing human suffering closer to home. Stowell predicted that the right of humanitarian intervention 'becomes stronger every day with the spread of communications'. This was a development which could not be avoided, even if states adopted an extreme posture of 'national self-sufficiency and isolation'.¹²⁵ Thus, Graham concluded that 'the widened content of humanitarian intervention results not only from an awakened sense of international solidarity but also from the increased integration of international society, and that its exercise for the general welfare of mankind has been made possible on a new and vast scale'.¹²⁶

The influence of interwar idealism was most apparent in Ellery Stowell's *Intervention and International Law* (1921). Stowell's work remains the most authoritative argument for a right of humanitarian intervention. The influence of post-war idealism is summarised by Graham: Stowell's work 'illustrates aptly the wide connotation and extension given to the concept of humanitarian intervention by the general changes resulting from the war, quite apart from the League.'¹²⁷ Stowell believed that territorial and political boundaries should not be obstacles to the international protection of the oppressed. Stowell remained steadfast in his defense of the right in arguing that '[h]umanitarian intervention is of recent, but very vigorous, growth and tends to bind the whole world closer together in defense of elementary principles of justice'.¹²⁸

¹²⁵ Ellery C. Stowell, 'Humanitarian Intervention', *American Journal of International Law* 33 (1939), p. 736.

¹²⁶ Graham, 'Humanitarian Intervention in International Law', p. 328.

¹²⁷ *Ibid.*, p. 324.

¹²⁸ Stowell, 'Humanitarian Intervention', p. 736.

Stowell's optimistic forecast made in 1939 must have seemed naive when judged against the failure of the international community to prevent the genocide of the Jews during the Second World War. In a tragic twist of historical irony, however, the genocide sparked a renewed idealism in international law, reinvigorating the notion of inviolable rights of mankind and the universal duty to protect these rights. The opening and closing statements of the Chief Prosecutors at the International Military Tribunal at Nuremberg in 1945-46 were imbued with such sentiments. As a warning to future war criminals, Sir Hartley Shawcross, Chief Prosecutor for Britain, remarked in closing: 'dictators and tyrants. . . [who] debase the sanctity of man in their own country [act] at their peril, for they affront the international law of mankind'.¹²⁹

Shawcross then went on to affirm the right of humanitarian intervention in international law.¹³⁰ The principle that military intervention to protect human rights was lawful played a vital role in the legal argument leading to the conviction of the war criminals. The Prosecution had to overcome the legal objection put forth by the Defense that the Tribunal had no authority in international law to prosecute conduct which was protected by state sovereignty. To this Shawcross responded that 'absolute sovereignty in the old sense is, very fortunately, a thing of the past'.¹³¹ Even if the Tribunal were acting with proper authority, the indictments amounted to an *ex post facto* application of law, Counsel for the Defense argued. Shawcross countered that 'the right of humanitarian intervention by war is not a novelty

¹²⁹ Sir Hartley Shawcross, *Trial of the Major War Criminals Before the International Military Tribunal*, vol. 29, Proceedings 19 July 1946 to 29 July 1946 (International Military Tribunal, Nuremberg, Germany, 1948), p. 472.

¹³⁰ *Ibid.*

¹³¹ *Ibid.*, p. 463.

in international law' but had long been recognised as lawful since the days of Hugo Grotius.¹³² If intervention by force of arms was legal, he deduced, 'intervention by judicial process' must *a fortiori* be lawful.¹³³

The idea that 'crimes against humanity' is a matter of international concern and can be punished, put forth eloquently at Nuremberg, became a part of what was later referred to as the 'Nuremberg principles'.¹³⁴ One outgrowth of the Nuremberg Tribunal was the General Assembly's Convention on the Prevention and Punishment of the Crime of Genocide which made 'crimes against humanity' a crime under international law.¹³⁵ In principle this seems to suggest that intervention would be lawful to stop genocide, although the Convention was never put into effect as the proponents of humanitarian intervention would have liked.

The tension between the idealism and realism of international law was most apparent during the 1970s. India's invasion of Bangladesh in 1971 to put an end to brutal suppression of popular will by the Pakistani army, in which tens of thousands of Bangladeshi civilians were massacred by Pakistani soldiers, illustrated the tenuous status of humanitarian intervention in international law. On the one hand, the fact that India resorted to armed force to protect another people represented an important precedent in state practice affirming a right of intervention. In fact, India's initial official justification invoked the doctrine of humanitarian intervention. Yet, it later amended its official statements in the UN records and reformulated its justification as one of self-defense. As Farer points out, that India chose not to legitimate its

¹³² *Ibid.*, p. 472.

¹³³ *Ibid.*

¹³⁴ See the 1950 International Law Commission Formulation on the Nuremberg Principles, *Yearbook of the International Law Commission* 1950, vol. 2, pp. 374-78.

¹³⁵ Opened for signature on 9 December 1948.

actions as a humanitarian intervention even though it had a compelling case was indicative of the lack of confidence in the 'exculpatory power of a humanitarian motive'.¹³⁶

In the aftermath of Bangladesh, there was a growing debate seeking to restore the right in international law. A discussion, mostly among American academics, was conducted over whether humanitarian intervention must necessarily conflict with principles of the UN Charter. A conference at the University of Virginia in 1972, sponsored by the Carnegie Endowment for International Peace, addressed this question. While no consensus was reached, Michael Reisman and Myres McDougal made a strong case that the United Nation's commitment to the fundamental rights of individuals strengthened the legitimacy of humanitarian intervention.¹³⁷ To prohibit intervention to protect the victims of genocide and other extraordinary atrocities is to deny the common humanity of mankind.

For much of the twentieth century, proponents of the idea put forth their theories of humanitarian intervention to a largely sceptical world. The end of the Cold War in 1991, however, marked a significant shift. As US ambassador Thomas Pickering stressed, there is a 'shift in world opinion toward a re-balancing of the claims of sovereignty and those of extreme humanitarian need'.¹³⁸ Or as the former UN Secretary-General Javier Pérez de Cuéllar remarked, '[w]e are clearly witnessing what is probably an irresistible shift in public attitudes towards the belief that the defence of the

¹³⁶ Tom J. Farer, 'An Inquiry into the Legitimacy of Humanitarian Intervention', *Law and Force in the New International Order*, ed. Lori Fisler Damrosch and David J. Scheffer (Boulder: Westview Press, 1991), p. 193.

¹³⁷ See W. Michael Reisman and Myres S. McDougal, 'Humanitarian Intervention to Protect the Ibos', *Humanitarian Intervention and the United Nations*, ed. Richard B. Lillich (Charlottesville, V.A.: University Press of Virginia, 1973), p. 171.

¹³⁸ Roberts, 'Humanitarian War', p. 437.

oppressed in the name of morality should prevail over frontiers and legal documents'.¹³⁹ If much of the post-1919 era can be characterised as the period of erosion, the post-1991 era is one of resurgence. No longer is the idea confined to the discussion of academic lawyers and human rights advocates, sometimes dismissed as reformers.

A Full Circle?

This chapter has, in broad brush strokes, outlined the history of the doctrine of humanitarian intervention in political and legal thought. Whether justified or not, Hugo Grotius features prominently in this history. Many post-1991 discussions on this subject have paid due respect to Grotius's contribution.¹⁴⁰ But, it is important that the richer history of the doctrine's evolution is not lost. It is even ironic that Grotius has become so central. It is often overlooked that Hersch Lauterpacht, in his bold statement proclaiming Grotius as the first authoritative proponent of the doctrine, qualified his remark with a short footnote that Grotius never intended humanitarian interventions to be applied to 'the cruel treatment of a minority'.¹⁴¹ As Grotius wrote, 'if a king rules over several peoples, it can happen that he may wish to have one people destroyed for the sake of another, in order that he may colonize the territory thus made vacant'.¹⁴² If this is the case, victims of

¹³⁹ *Ibid.*

¹⁴⁰ See, for example, Susumu Yamauchi, 'The Ambivalence of Hugo Grotius: State Sovereignty and Common Interests of Mankind', *Hitotsubashi Journal of Law and Politics* 22 (1994), pp. 1-17.

¹⁴¹ Lauterpacht, 'The Grotian Tradition in International Law', p. 46.

¹⁴² Grotius, *DJBP*, Book III, Chp. IV, XI.

religious persecution and oppression may not want the Grotian doctrine invoked on their behalf.

An examination of the past reveals how ideas and doctrines in law and morality are shaped by contemporary issues and problems. For example, one cannot understand the historical emergence of humanitarian intervention without considering the old problems of protecting Christians in infidel land, as well as the new problem (in the sixteenth century) of protecting religious converts in the New World. Nor can one ignore the religious wars in Europe in the late sixteenth and early seventeenth-centuries. In the nineteenth century, the idea of humanitarian intervention was inextricably linked with Europe's relations with what was referred to as the 'less civilised' parts of the world. During the interwar and postwar years, there was a cleavage between ideals and reality: that humanitarian intervention was regarded in international law and state practice as unlawful did not change the opinion of 'optimists'. With the end of the Cold War, the 'optimists' were vindicated, as even sceptics were willing to reconsider this idea.

The resurgence of humanitarian intervention as an *idea* in international politics in the post-1991 era draws comparisons to the post-1919 period. The end of the First World War brought a surge of idealism, followed by a more pessimistic assessment. Interwar idealists believed that the increased integration of the world brought about by better understandings and communications would forge an international solidarity in which the sufferings of one people would be felt by all. Humanitarian intervention was to become an instrument of change to ensure 'higher standards of international ethics'.¹⁴³ As one commentator remarked, 'it is destined to become a fruitful means for securing through the international community the redressing of evils to which previous generations have been callous,

¹⁴³ Graham, 'Humanitarian Intervention in International Law', p. 328.

indifferent, and blind'.¹⁴⁴ Yet, by 1939, the principles upon which the doctrine was based were questioned. The failure of the international community to end the genocide against the Jews undermined optimistic predictions of humanitarian intervention as a tool of change.

Similarly, the resurgent idealism after the end of the Cold War has been met by grimmer realities. Not too differently from the interwar period, many embraced the idea of humanitarian intervention as the solution to the ills of humanity. Tyrants who oppress their own people, army commanders who slaughter civilians, and armed gangs who exploit war torn anarchy were put on notice that they were legitimate targets of intervention. However, the failure or unwillingness for international society to intervene in the genocide in Rwanda in 1994 has resulted in much re-evaluation of initial assumptions and aspirations of a new world order. The next chapter will examine in greater detail the practice of this idea.

¹⁴⁴ *Ibid.*

CHAPTER FOUR

GROUND'S FOR HUMANITARIAN INTERVENTION

CHAPTER FOUR

GROUNDINGS FOR HUMANITARIAN INTERVENTION

The previous chapter traced the idea of humanitarian intervention in Western political and legal thought. The primary emphasis was on the history of the concept. Humanitarian intervention, however, has been more than a principle: it has been put into practice in the relations between states. Either informally or officially, states have relied on it to justify the use of force. This chapter gives a historical overview of the application of this doctrine in state practice. The aim here is to set the historical context for discussions in Part Two. I draw on historical illustrations as well as contemporary examples of this form of intervention.

There have been three traditions of humanitarian intervention in state practice: (1) intervention to end intolerable misrule, (2) intervention to end internecine civil wars; and (3) intervention to restore order in response to internal weakness. These categories are somewhat artificial since they form a part of a spectrum where one often overlaps with another. For example, what begins as persecution of a religious or ethnic minority often leads to civil war. Civil war often degenerates to a bitter and disorderly war where no one side is able to assert control and anarchy and disorder follows. Nor is it clear that one type of conflict produces worse excesses than another. Persecution could become genocidal. Or, a civil war could lead become mutually destructive as one faction (or both) resorts to excesses on the battlefield as the means to victory. Similarly, anarchy and the collapse of authority could produce a

wave of tribal violence which engulfs an entire territory. Despite the blurring of the distinction, it is nevertheless useful to consider these categories separately.

Intervention to End Intolerable Misrule

The first category is humanitarian intervention to protect the victims of 'intolerable misrule',¹ that is, when the ruler or government commits atrocities against its own people. This does not mean that every time a government acts capriciously or violates its own constitution would intervention be justifiable, but only when misrule becomes exceptional. In the nineteenth century the practice of this form of intervention related to religious persecution. Misrule and persecution remain problems for contemporary international society. This section will first examine nineteenth-century doctrine and practice and then consider recent examples.

It is important that to say a few words about what is meant by 'intolerable misrule'. The emphasis on 'intolerable' is important because it suggests that a certain degree of misrule should be tolerated by both the population and international society.² Governments, like people, are far from

¹ This phrase comes from Morley's *Life of Gladstone*. In describing the Eastern Crisis of 1877-78 and the problems which confronted Gladstone, Morley wrote: 'Fierce revolt against intolerable misrule slowly blazed up in Bosnia and Herzegovina, and a rising in Bulgaria, not dangerous in itself, was put down by Turkish troops'. Quoted in Stowell, *Intervention and International Law*, p. 127.

² The emphasis on 'intolerable' is still a part on contemporary debate. Stanley Hoffmann, for example, writes of Michael Walzer's position: 'Communitarian liberals such as Michael Walzer are torn between the cosmopolitan and interventionist implications of their liberalism—when 'domestic brutality, civil war, political tyranny, ethnic or religious persecution' become intolerable'—and the noninterventionist and relativist implications of their communitarianism'. Stanley Hoffmann, 'The Crisis of Liberal Internationalism', *Foreign Policy*, no. 98 (Spring 1995), p. 170.

perfect. It is expected that they will be guilty of misrule on certain occasions. The right to rebel is reserved only for the severest form of misrule when, as Vattel put, the 'evils are intolerable and the oppression great and manifest'.³ The same can be said for foreign intervention. Whether or not humanitarian intervention is justifiable depends on the degree of misrule. The evils of the crime a government is committing against its own people must be balanced with the detriments of intervention to international society. In both cases, order within domestic society and in international society are important concerns.

When exactly the line is crossed between 'tolerable' and 'intolerable' has never been defined with any precision. T. D. Woolsey even admitted that this was beyond 'exact definition'.⁴ Nevertheless, some general definitions have been put forth. Woolsey offered the straightforward, though not very illuminating, definition that misrule is when 'some extraordinary state of things is brought about by the crime of a government against its own subjects'.⁵ For Vattel, a government crosses this line and inflicts 'insupportable tyranny' when it not only fails to fulfill the social contract, but actively seeks to destroy the very foundations of the security and welfare of the people. It is presumed that the power of the state must be used for 'welfare of the people and not for their destruction'.⁶ A ruler who violates all

³ Vattel, *Law of Nations*, p. 336.

⁴ Theodore Dwight Woolsey, *Introduction to the Study of International Law*. 5th ed. (London: Sampson Low, Marston, Searle, & Rivington, 1879), p. 44.

⁵ *Ibid.*

⁶ Vattel, *Law of Nations*, p. 24.

laws by 'threatening the safety of his people' puts himself in a state of war with the people.⁷

Historically what was considered as 'intolerable misrule' pertained to religious persecution. In general, this form of intervention was justifiable under traditional international law. Vattel, for instance, wrote: 'When a form of religion is being oppressed in any country, foreign Nations professing that form may intercede for their brethren; but that is the extent to which they can lawfully go, *unless the persecution is carried to an intolerable degree*, when it becomes a case of evident tyranny, against all Nations may give help to an unfortunate people'.⁸ Again, the emphasis was on 'intolerable'. Along the same lines, Wheaton maintained that the 'Christian powers thought proper to adopt for the protection of their religious brethren, oppressed by the Mohammedan rule'.⁹ Phillimore argued likewise that 'in the event of a *persecution* of large bodies of men, on account of their religious belief, an armed Intervention on their behalf might be as warrantable by International Law'.¹⁰

In the nineteenth century, this form of humanitarian intervention was practiced mostly against the Ottomans. The classic example is Europe's intervention in Mount Lebanon in 1860-61 to protect the Maronite Christians from the Druze Muslims.¹¹ During the first phase of the violence, an estimated 10,000 Christians were massacred and 100,000 made homeless. A

⁷ *Ibid.*

⁸ *Ibid.*, p. 134. Emphasis added.

⁹ Wheaton, *Elements*, p. 96.

¹⁰ Robert Joseph Phillimore, *Commentaries Upon International Law* (London, 1854), p. 474.

¹¹ Ian Brownlie acknowledges that the intervention in Lebanon is perhaps the only 'genuine' case of humanitarian intervention in the nineteenth century. Brownlie, *Use of Force*, p. 340.

second wave of violence swept across Damascus in late July, killing an estimated 25,000 Christians, in addition to several American and Dutch consuls.¹² While much of the violence was committed by the Muslim population, the Porte was accused of complicity in the massacres by disarming, but not protecting the Christians.¹³ The violence and brutality against Christians in Damascus outraged and ultimately moved Europe toward intervention.¹⁴ Before Damascus the British government adhered to a policy of non-intervention, arguing that the evils of intervention were so great that only 'extreme misconduct' could justify intervention. After Damascus, however, Britain supported France's proposal for the collective intervention by Concert powers.¹⁵

In an effort to resolve the crisis, the Concert powers met in Paris on 31 July 1860. The powers adopted a Protocol on 3 August stating the

¹² The killing of foreign nationals internationalised the conflict by bringing the conflict home to Europeans. Stanford J. Shaw and Ezel K. Shaw, *History of the Ottoman Empire and Modern Turkey*, 2 vols. (Cambridge: Cambridge University Press, 1977), p. 143.

¹³ Phillip K. Hitti, *Lebanon in History* (London: Macmillan & Co. Ltd., 1957), p. 439.

¹⁴ See 'Correspondence relating to the Affairs of Syria' in *G.B.P.P.*, vol. 68. Europe's outrage over the massacre of Christians was evident in the diplomatic dispatches. At the height of the violence in early July, Earl Cowley (British Ambassador to France) wrote to Lord Russell (British Foreign Secretary) of his meeting with M. Thouvenel (French Minister of Foreign Affairs). Even if Thouvenel's report of the massacres in Lebanon had exaggerated the level of atrocities, Cowley recounted, 'enough has occurred to excite universal reprobation' (No. 1). The sense of outrage was reiterated in the diplomatic despatches. Lord Loftus recounted his meeting with Count Rechberg in Vienna in which the Count expressed 'his indignant horror at this barbarous outrage, and his anxious desire to co-operate in any measures to arrest cruelties so revolting to the feelings of humanity' (No. 17). When the British government decided to support France's proposal for intervention, Lord Russell wrote that '[i]t is to be hoped that the measures now taken may vindicate the rights of humanity, so cruelly outraged in Syria' (No. 37).

¹⁵ *G.B.P.P.*, vol. 68, No. 49.

justification, method, and limitations of European intervention. It acknowledged that the Powers were motivated by the desire to stop 'the effusion of blood in Syria'. The 'prompt and efficacious measures' called for included the authorisation of a 'body of European troops, which may be increased to twelve thousand men, shall be sent to Syria to contribute towards the re-establishment of tranquillity'. It was agreed that France would contribute half of this number and would raise its deployment as necessary. Britain, Austria, Prussia, and Russia agreed to maintain 'sufficient naval forces' off the coast of Syria to assist if necessary. It was also concluded that the mission was intended not to last beyond six months.¹⁶

By the time the French force of 6,000 arrived in Lebanon, much of the task of restoring order had already been accomplished and a commission to investigate crimes committed by the Druze population already established. When the original mandate of six months passed, France requested and gained authorisation from the Concert powers to extend its occupation for another six months. French diplomats insisted that the presence of foreign troops was necessary to guarantee that Lebanon did not slide back into the conditions of violence and persecution which prompted intervention in the first place.¹⁷ This was not an unfounded concern. Violence between the two

¹⁶ For text of treaty, see *G.B.P.P.*, vol. 68.

¹⁷ This view was shared by Russia, Prussia, and Austria (*G.B.P.P.*, vol. 68., no. 238). As agreed, French troops were evacuated from Lebanon promptly after 5th of June. On 9 June, the Statute for Lebanon was signed in Constantinople by France, Britain, Austria, Prussia, Russia, and Turkey. The new government would become an autonomous region governed by a Christian Ottoman governor who would be appointed by the Porte with the consent of the signatory powers. Lebanon's government would have full executive power, with its own police force, and judiciary. Feudal privileges would be abolished. Religious rights of all groups were to be protected. This framework remained in place up to the First World War. Christian governors of Lebanon were for the most part 'efficient' and 'humane' and were able to protect the autonomy of Lebanon from the Sultan. A. H. Hourani, *Syria and Lebanon* (London: Oxford University Press, 1946), p. 33.

groups occurred in 1840, 1841, and 1842, 1845. The Concert Powers questioned whether the Ottoman authorities possessed either the ability or the will to secure the safety of the Christian population.

Turkey was once again the target of intervention in 1877-78. European powers were disturbed by reports of persecution committed by the Ottomans against the Christian population of Bosnia, Herzegovina, and Bulgaria in 1875 and 1876. In particular, the European powers were outraged by the ruthlessness with which the Ottoman army suppressed uprisings. Its army, for example, was accused of massacring 12,000 people, including women and children, in its campaign against Bulgaria. Reports of the 'Bulgarian Horrors', as it was referred to in Britain, pushed the governments of Europe toward collective action. A conference was convened at Constantinople in December 1876. The Porte's objection to the establishment of an International Commission to oversee the Christian population prompted another conference, this time in London, without the representation of the Porte. The Powers adopted the London Protocol in March 1877 calling for Turkey to again respect the religious rights of the Christian population.

When the Porte rejected the terms of the Protocol, Russia declared war on the humanitarian ground of forcible protection. The intervention was entirely a Russian operation. The fact that Russia had undertaken the operation unilaterally raised suspicions, especially in Britain, of Russia's design on Constantinople and Bulgaria. The Concert powers, nevertheless, endorsed the intervention and remained neutral throughout. The conflict did not last long as Russian forces thoroughly defeated the Turkish army. The war was brought to an end with the signing of the Treaty of San-Stefano on 19 February, 1878. Under the Treaty, later adopted as a part of the Berlin Treaty of 1878, the Christians would enjoy limited local autonomy. The Porte agreed

to ensure freedom of worship and to abolish discrimination on racial or religious grounds.¹⁸

In both illustrations, the Porte was accused of exceeding the limits of legitimate rule by attacking a segment of the population. Needless to say, intolerable misrule is a problem which still confronts international society. The main scope of humanitarian intervention in the post-1945 era has focused on intolerable misrule as a just ground for intervention. Hersch Lauterpacht's edition of Oppenheim's *International Law*, for instance, renders intervention as justified 'when a State renders itself guilty of cruelties against and persecution of its nationals in such a way as to deny their fundamental rights and to shock the conscience of mankind'.¹⁹ While this form of intervention no longer enjoyed the same status of legality as it did under traditional international law, this has not deterred states, on occasion, from intervening to protect the victims of intolerable misrule.

The Indian intervention in East Pakistan in 1971 is a particularly good example. What triggered India's intervention was the brutal suppression of popular will by the Pakistani army. When the government of Pakistan called off talks for a new constitution on 3 March 1971 after the Awami League had won all but two seats to the National Assembly the previous December's election, riots broke out. The Pakistani army entered Dacca to suppress the disturbance. It carried out a campaign of indiscriminate slaughter, destruction of villages, rape, and torture, leaving almost 10,000 civilians dead and creating a flood of refugees as millions fled across the borders to India. After months of diplomatic protests and indirect military assistance, the Indian government sent an intervening force on 3 December to put an end to the conflict. The Pakistani army was defeated, the Indian army promptly

¹⁸ Manouchehr Ganji, *International Protection of Human Rights* (Geneve: Librairie E. Droz, 1962), pp. 29-31.

¹⁹ Oppenheim's *International Law*, 8th ed., vol. 1, p. 312.

withdrew, and an independent state of Bangladesh was created in its aftermath.²⁰

A more recent example is the intervention of the allied coalition to protect the Kurds in northern Iraq after the Gulf War in 1991. Like the Bangladesh crisis, the humanitarian crisis in Iraq was the result of a familiar cycle: secessionism, rebellion, and suppression. In response to the Kurds's unsuccessful uprising, Saddam Hussein's Republican guard troops attacked the unarmed civilian population, creating a refugee crisis as 500,000 Kurds retreated to the freezing mountains. The combination of Iraqi troops attacking civilians with helicopter gunships and the inhospitable terrain presented the grave prospect of thousands of deaths. In response, the Security Council adopted Resolution 688 which condemned 'the repression of the Iraqi civilian population in many parts of Iraq' and appealed to member states to contribute to the humanitarian relief efforts.²¹ While Resolution 688 stopped short of explicitly authorising the use of force, the US, Britain, and France nevertheless launched Operation Provide Comfort to establish 'safe havens' to ensure the protection of refugees in Northern Iraq.

²⁰ For more on Bangladesh, see Michael Walzer, *Just and Unjust Wars*. 2nd ed. (New York: BasicBooks, 1992), pp. 105-107; Thomas Behuniak, 'The Law of Unilateral Humanitarian Intervention by Armed Force: A Legal Survey', *Military Law Review* 79 (1978), pp. 175-177. Also, Tanzania's intervention in Uganda provides another illustration of intervention to end misrule. In Uganda, up to 300,000 were executed during Idi Amin's rule. See Farooq Hassan, 'Realpolitik in International Law: After Tanzanian-Ugandan Conflict 'Humanitarian Intervention' Reexamined', *Willamette Law Review* 17 (1981), pp. 859-919.

²¹ SC Res. 688, 5 April 1991.

Intervention to End Internecine Civil Wars

A second problem which confronts international society is what to do about civil wars which rage with no end in sight. Civil wars often produce disastrous consequences for the population, creating humanitarian crises of enormous scale. At times, it is genocidal. As H.L. Henkin observes, 'civil wars are often ethnic wars and therefore literally genocidal on both sides'.²² In the nineteenth century, intervention to end civil wars was considered justified on humanitarian grounds. It was widely approved by publicists and put into practice. This section will first examine nineteenth-century doctrine and practice and then relate them to post-1945 international society.

To begin the discussion, we must first distinguish between the various levels of intrastate violence.²³ Misrule often leads to violence within a state when the victims of persecution mount an armed campaign against the ruling authority. Frequently this is an uneven conflict where the persecuted are

²² Quoted in Robert M. Chilstrom, 'Humanitarian Intervention Under Contemporary International Law: A Policy-Oriented Approach', *Yale Studies in World Public Order* 93 (1974), p. 105.

²³ While the lines of demarcation are not always clear, international law has designated non-international armed conflicts as falling under three categories: rebellion, insurgency, and belligerency. A rebellion is considered a 'localized' conflict or a brief and isolated challenge to the state. An insurgency differs from a rebellion in that it is a sustained conflict, carried over a longer period, over a wider territory, and involving more people. Yet, an insurgency movement is not recognised by both the government or third parties as a civil war. There are times, however, when both the established government and foreign powers may choose to confer belligerent status upon the insurgency. 'Recognition of belligerency' is an important status in that the belligerent 'resembles a state'. It represents an open acknowledgment that a civil war exists. For more on the classifications of non-international conflicts, see Heather A. Wilson, *International Law and the Use of Force by National Liberation Movements* (Oxford: Clarendon Press, 1988), Chapter 2; Richard A. Falk, 'Janus Tormented: The International Law of Internal War', *International Aspects of Civil Strife*, ed. James N. Rosenau (Princeton: Princeton University Press, 1964), pp. 197-210; Daoud L. Khairallah, *Insurrection Under International Law* (Beirut: Lebanese University, 1973).

powerless, poorly organised, and inadequately armed. This form of intrastate violence has traditionally been designated as a 'rebellion' under international law. Civil war, on the other hand, is a sustained armed conflict between two factions within a state, more or less evenly poised in battle for control of the same territory, or, with one faction seeking to secede from the governing authority. When a conflict reaches this level, difficult questions arise. What rights and duties do third parties have? Can interested states intervene for humanitarian reasons?

Whether states can intervene in civil wars has always been a controversial issue in traditional and contemporary international law. Palmerston maintained that in 'the case of a civil war, proceeding either from a disputed succession or from a long revolt, no writer on international law denies that other countries have a right, if they choose to exercise it, to take part with either of the two belligerents'.²⁴ Some publicists, such as W. E. Hall, felt that greater weight should be placed on the right of states to work out their own internal changes, although he admitted that intervention was justified in rare circumstances. In general, flexibility over absolutes dictated how third parties were supposed to regard civil wars. As Halleck pointed out, one cannot grant *every* revolutionary faction 'belligerent' status, conferring the rights and powers of a *de facto* sovereign state nor deny 'belligerent' status to *all* revolutionary parties. The extreme at either end is an unwise and unjust policy. A better rule is that '[e]ach case must be determined by its own peculiar circumstances'.²⁵

In general, nineteenth-century international society required that states refrain from intervention in civil wars. When a civil war seems intractable or is fought with excessive brutality, however, this restriction was relaxed to

²⁴ Halleck, *International Law*, vol. 1, p. 107.

²⁵ *Ibid.*, p. 558.

permit a right of humanitarian intervention. John Stuart Mill, for example, qualified that the principle of non-intervention does not apply in 'a protracted civil war, in which the contending parties are so equally balanced that there is no probability of a speedy issue'.²⁶ The rationale is that without external involvement, the conflict would continue to take its long and tortuous course. It would produce greater deaths and human suffering, until one side has exterminated the other. In this case, intervention would be considered just and necessary. Involvement can take the form of 'pacific mediation' (arbitration and advice).²⁷ If this does not produce a settlement, states could intervene to impose a resolution.

The protracted nature of a civil war is a complementary consideration to how the conflict is fought. If either side resorts to means which exceed a minimum level of humanity, intervention was also considered legitimate. On this question we need to consider the laws of war governing international wars and relate them to civil wars. Not everything is permitted warfare. What distinguishes wars from random violence is discipline and observance of rules. The customary laws of war require that armed conflicts are to be fought with 'proportionality', 'humanity', and 'chivalry'.²⁸ Combatants should not to inflict unnecessary injury or deaths or act out of vengeance. In addition, there are specific rules relating to the treatment of prisoners, the protection of non-combatants, as well as what weapons were permitted. These norms were gradually codified in declarations, treaties, and military

²⁶ John Stuart Mill, 'A Few Words on Non-Intervention', *Fraser's Magazine* December 1859, p. 774.

²⁷ Halleck wrote that 'when a State is desolated by a protracted civil war, foreign interference, by way of pacific mediation, in order to stay the effusion of blood, is not only justifiable, but is sometimes a duty imposed by humanity'. Halleck, *International Law*, vol. 1, p. 563.

²⁸ Oppenheim, *International Law*, vol. 2, p. 75.

manuals.²⁹ Violations of these rules, some argued, gives third states a right of intervention. Creasy wrote, 'aggravation and atrocity, as to make the offence one which civilized nations ought to treat as a gross offense against International Law', a third state 'would be justified in taking forcible means to repress such outrages'.³⁰

The pertinent questions to our discussion are whether the laws of war applied to civil wars; and if so, whether third parties could intervene for humanitarian reasons when they are habitually violated. The conventional view is that nineteenth-century international law 'is silent on the use of force within the borders of States'.³¹ Two reasons accounted for this. First, there was the positivist notion that since international law concerned the regulation between states, 'violence within a State was considered beyond the bounds of international legal regulation'.³² Second, the established government fighting a civil war seldomly recognises insurgents as 'combatants' protected under the international laws of war but instead is likely to treat rebels as 'traitors' punishable under municipal law.³³

²⁹ For example, 1856 Declaration of Paris Respecting Maritime Law; The Lieber Code (1863); 1864 Red Cross Convention; 1868 St. Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight; 1899 Hague Declaration 2 Concerning Asphyxiating Gases; 1899 Hague Declaration 3 Concerning Expanding Bullets; and the 1907 Hague Conventions (I-XIV). See Adam Roberts and Richard Guelff, eds., *Documents on the Laws of War* (Oxford: Clarendon Press, 1989) and Leon Friedman, ed., *The Law of War: A Documentary History—Volume 1* (New York: Random House, 1972).

³⁰ Creasy, *Platform*, p. 427.

³¹ Wilson, *National Liberation Movements*, p. 22.

³² *Ibid.*

³³ Indeed, these two issues have long complicated the regulation of civil wars in both traditional and contemporary international law. Common Article 3 of the 1949 Geneva Conventions addressed precisely this issue of protection of non-combatants in non-international armed conflicts. The 1977 Geneva Protocol II Additional to the Geneva Conventions of 12 August 1949,

Yet, to suggest that there were no norms and laws governing civil wars in the nineteenth century is misleading. The British government, for example, reminded the warring parties in the civil war of Two Sicilies in 1848 to observe the rules of civilised warfare.³⁴ Woolsey's treatise set guidelines regulating the conduct of the established government *during* and *after* civil wars. A government fighting to suppress or defeat an insurgent party should treat that party no differently than combatants in international wars. This requirement applied to both sides since 'the relation of the parties ought to be nearly those of ordinary war'.³⁵ Woosley maintained, therefore, that the 'same rules of war are required in such a war [civil wars] as in any other—the same ways of fighting, the same treatment of prisoners, of combatants, of non-combatants, and of private property by the army where it passes'.³⁶ The government which emerged victorious should show restraint in punishing the insurgents since 'a wise and civilized nation will exercise only so much of this legal vengeance'.³⁷

While there was no consensus, many publicists argued that humanitarian intervention would be justified when the laws of war were widely violated in civil wars. W. E. Hall conceded that a state facing an internal conflict should be left to work out its own problems 'so long as its

and Relating to the Protection of Victims of Non-International Armed Conflicts further bolstered the effort to protect non-combatants in internal conflicts. See Roberts and Guelff, *Documents*, pp. 447-468.

³⁴ Palmerston to Consul-General C. G. Dawkins (Venice), 5 April, 1848. Cited by Georg Schwarzenberger, 'The Protection of Human Rights in British State Practice', *Current Legal Problems* 1 (1948), p. 165.

³⁵ Woosley, *Study of International Law*, p. 240.

³⁶ *Ibid.*, p. 241.

³⁷ *Ibid.*

struggles do not actually degenerate into internecine war'.³⁸ While Hall did not explicitly advocate intervention, his qualification indicates that intervention would be appropriate when a civil war becomes excessively brutal on either side. John Stuart Mill, similarly, endorsed intervention when neither side can emerge victorious without 'severities repugnant to humanity'.³⁹ Manning even went so far as to stress that the only grounds for intervention is when civil order cannot be restored in a civil war without 'sufferings to humanity'.⁴⁰ For Sheldon Amos, '[g]ross acts of inhumanity persisted in on either side may, on grounds of humanity, properly precipitate intervention'.⁴¹

The classic example is the European intervention in Greece in 1827-28. The events which prompted intervention arose out of the problems nationalism and the claim for independent statehood. On 6 March 1821 Alexander Yipsilantis led the Greeks in an uprising which resulted in a large

³⁸ Hall, *A Treatise*, p. 303. Hall's choice of 'internecine' is appropriate. The *Oxford English Dictionary* defines 'internecine' as 'mutually destructive', derived from the Latin *internecio* for 'massacre' or 'slaughter'. It suggests a slide from disciplined fighting. It should be remembered that the legitimate use of force, according to both customary and positive international law, must be directed toward some specific military or strategic objective. The use of force in internecine civil wars, however, is closer to indiscriminate killing.

³⁹ Mill, 'A Few Words on Non-Intervention', p. 774.

⁴⁰ W. Manning argued: 'The only grounds on which interference with the affairs of a foreign State would now be held capable of justification are. . . the continuance of a revolutionary state of affairs in the foreign State under such circumstances in which it seems highly probable that, without such interference, either public order can never be restored at all; or can only be restored after such sufferings to humanity and such injuries to surrounding States as obviously overbalance the general evil of all interference from without'. W. Manning, *Commentaries on the Law of Nations*. Revised edition. Ed. Sheldon Amos (Cambridge: MacMillan & Co., 1875), p. 97.

⁴¹ Sheldon Amos, *Political and Legal Remedies for War* (1880), p. 158. Also Wheaton concluded that the 'rights of human nature wantonly outraged by this cruel warfare' was a just cause for intervention. See Wheaton, *Elements*, p. 87; Stowell, *Intervention and International Law*, p. 282.

number of Turkish casualties. The Sultan enlisted the help of Mohammed Ali, the powerful Pasha of Egypt. In early 1825, the Pasha sent his son, Ibrahim Pasha, along with an army of 10,000 to retake the Peloponnese from the Greeks. Ibrahim was ruthless. He laid siege to Mesolonghi and when the inhabitants attempted to escape during the month of April 1826, he ordered the massacre resulting in the death of 4,000 Greeks, many women and children.⁴² The massacre at Mesolonghi was a turning point in the war. As Woodhouse observed, 'Ibrahim's victory and his troops' inhuman exploitation of its so stirred the emotions of Europe that the full independence of Greece was in the end assured'.⁴³

Outraged by the brutality of the fighting in Greece, the European powers met in London in 1827. The Treaty of London⁴⁴ resolved to 'combine their efforts . . . for the object of re-establishing peace between the contending Parties, by means of an arrangement called for, no less by sentiments of humanity, than by interests for the tranquillity of Europe'. The Treaty called for an 'immediate Armistice' between the two parties and contained an Additional Article authorising enforcement measures. As Russia had long insisted, an armistice could not be achieved unless it was backed with the threat of unified and swift armed intervention by the Concert powers. Thus the Powers stated their intention 'to exert all the means which circumstances may suggest to their prudence, for the purpose of obtaining the immediate effects of the Armistice of which they desire the execution, by preventing, as far as possible, all collision between the Contending Parties'.

⁴² George Finlay, *History of the Greek Revolution*, in 2 vols (London: William Blackwood and Sons, 1861), vol. 2, p. 110.

⁴³ C. M. Woodhouse, *The Greek War of Independence* (London: Hutchinson's University Library, 1952), p. 113.

⁴⁴ The Treaty for the Pacification of Greece (6 July 1827), Protocol Relative to the Affairs of Greece (4 April 1826), Additional Article to Treaty of 6 July 1827 can be found in *G.B.P.P.*, vol. 27 (1828).

The Concert powers justified their actions in part on the humanitarian desire to end a protracted conflict which had produced such excesses on the battlefield. Hence, the Treaty expressed the Powers's 'desire of putting a stop to the effusion of blood, and of preventing the evils of every kind which the continuance of such a state of affairs may produce'. While diplomatic niceties may have left the impression that both parties were treated as moral equals, the Protocol of 18 October adopted by British, Russian, and French admirals was unambiguous. It made clear that the Turks were the perpetrators of uncivilised warfare against the Greeks. The Protocol stated: 'the Troops of this Pasha had not ceased carrying on a species of warfare more destructive and exterminating than before, putting Women and Children to the sword, burning the habitations'.⁴⁵

When the Porte rejected the Concert's proposal for mediation, Britain, France, and Russia despatched a joint naval squadron of 27 ships and 17,500 men to the Bay of Navarino. When the Turkish commanders fired on the British vessel *Dartmouth*, Admiral Codrington retaliated and the ensuing battle resulted in an one-sided victory for the Allied fleet.⁴⁶ Fearing that Russia would have a free hand in Greece, representatives of France and Britain met in London in June and July of 1828 to determine their role in last stages of the conflict. The Protocol of 19 July 1828 authorised France to send an expeditionary force to Morea to expel Ibrahim from Greece. On 30 August, General Maison led a force of 14,000 French soldiers into Petaldi. By the 5th of October, Ibrahim and the last of his soldiers departed from Navarino. France's involvement in the Greek affair finally came to an end when Prince

⁴⁵*British Foreign and State Papers*, vol. 14, p. 1050.

⁴⁶ Of the 65 Turkish-Egyptian ships at the beginning of the battle, only 5 survived. An estimated 4,000 sailors were killed. C. M. Woodhouse, *The Battle of Navarino* (London: Hodder and Stoughton, 1965), p. 111.

Otho, second son of King Louis I of Bavaria, arrived in Greece on 1 February 1833 with his own troops to assume the title as King of Greece.

Another illustration of intervention to end a civil war is the US intervention in Cuba in 1898.⁴⁷ To include this episode in the discussion of humanitarian intervention is controversial.⁴⁸ It would be simplistic to overlook the mixed-motives of the intervention since US did not act purely out of disinterest.⁴⁹ Yet, one would also be remiss to ignore the strong sentiments of outrage and humanitarianism which pushed the US toward intervention. The US government justified its actions on the ground that civil war in Cuba had lasted too long and that the human toll was beyond what the US was willing to tolerate. In particular, the US objected to General Weyler's policy of 'reconcentrados'—the forced repopulation of inhabitants from the

⁴⁷ US intervention in Cuba was an outgrowth of a protracted civil war waged between a people and its colonial authority. When a small group of revolutionaries instigated an insurrection in February 1895, General Arsenio Martínez Campos was sent to suppress the rebellion. Contrary to Spain's predictions, the rebellion was not short-lived and Campos was unable to bring the conflict to an end. General Valeriano Weyler y Nicolau arrived in Havana to replace General Campos in February 1896.

⁴⁸ For a general overview of the US intervention in Cuba and its place in the development of the doctrine of humanitarian intervention, see David S. Bogen, 'The Law of Humanitarian Intervention: United States Policy in Cuba (1898) and in the Dominican Republic (1965)', *Harvard International Law Club Journal* 7 (1966), pp. 296-315.

⁴⁹ There were several motivating factors behind the intervention. A domestic politics analysis would argue that 'Republicans made war on Spain in order to keep control of Washington'. See John L. Offner, *An Unwanted War: The Diplomacy of the United States and Spain Over Cuba, 1895-1898* (Chapel Hill, NC: The University of North Carolina Press, 1992), p. ix. An imperial theory explanation would stress the desire for territorial and commercial empire which motivated US decision to go to war with Spain. The fact that the US occupied Puerto Rico and extended the conflict by engaging (and defeating) the Spanish in the Philippines offers added evidence to the theory that the intervention was an excuse to wrest colonial possessions from Spain. See William Appleman Williams, *The Roots of the Modern American Empire* (London: Athony Blond Ltd., 1969) and Walter LaFeber, *The New Empire: An Interpretation of American Expansion 1860-1898* (Ithaca, NY: Cornell University Press, 1963), pp. 326-406.

rural countryside to fortified garrisons. Those who resisted were treated as rebels and punished as traitors. The combination of poor housing, sanitation, nutrition and health care in these camps produced a humanitarian crisis. Estimates by American observers at the time put the death toll at around 400,000, or more than a quarter of the population.⁵⁰ That the inhabitants of the camps were mostly women and children added to the moral indignation in the US.

As with the Porte in 1827, the Spanish government was now accused of exceeding the limits of legitimate rule by waging a war of repopulation and extermination. In June 1897, Secretary of State Sherman wrote to Enrique Dupuy de Lôme, Spanish Minister in Washington to protest the method of warfare. Sherman's telegram offered one of the strongest statements in the nineteenth century in support of the idea that not everything is permitted in internal conflicts. He wrote:

Against these phases of the conflict, against this deliberate infliction of suffering on innocent noncombatants, against such resort to instrumentalities condemned by the voice of humane civilization, against the cruel employment of fire and famine to accomplish by uncertain indirection what the military arm seems powerless to directly accomplish, the President is constrained to protest, in the name of the American people and in the name of common humanity. . . He is bound by the higher obligations of his representative office to protest against the uncivilized and inhumane conduct of the campaign in the Island of Cuba. He conceives that he has a right to demand that a war, conducted almost within sight of our shores and grievously affecting American citizens and their interests throughout the length and

⁵⁰ According to the historian Ernest May, after the war the number those who died as a result of the 'reconcentrados' policy was readjusted to 100,000. Ernest R. May, *Imperial Democracy: The Emergence of America as a Great Power* (New York: Harcourt, Brace, & World, 1961), p. 127.

breadth of the land, shall at least be conducted according to the military codes of civilization'.⁵¹

When it appeared that diplomatic protest and repeated calls for mediation had failed, McKinley outlined the case for US intervention before Congress. While McKinley set out commercial reasons, the humanitarian motive for intervention was a central theme of the speech. The war in Cuba had taken an enormous human toll.⁵² He declared that the 'forcible intervention of the United States as a neutral to stop the war, according to the large dictates of humanity and following many historical precedents where neighbouring states have interfered to check the hopeless sacrifices of life by internecine conflicts beyond their borders, is justifiable'.⁵³ Congress

⁵¹ *Papers Relating to the Foreign Relations of the United States (F.R.U.S.)* (1897), p. 507.

⁵² McKinley also added the sober reflection that humanitarian considerations were not the only motivations for US policy. He carefully listed the impact the war in Cuba had on US interests: the disruption to trade, damage to American private investments, and injury to American nationals in Cuba. Thus, his appeal to Congress was infused with both humanitarian and national interests: 'in the name of humanity, in the name of civilization, in behalf of endangered American interests which give us the right and duty to speak and to act, the war in Cuba must stop'.

⁵³ See *Messages and Papers of the Presidents*, in 20 vols., ed. Richardson (New York: Bureau of National Literature, Inc., 1897-1917), vol. 13, pp. 6281-6292. By 'many historical precedents', McKinley was probably referring to the European intervention in Greece. The parallel between the US intervention and Europe's intervention was drawn more explicitly by the American jurist Theodore Salisbury Woolsey. Speaking before the Yale Club in New York on 13 May 1898, Woolsey said: 'Take another instance of intervention on the ground of humanity, that of the powers in Greece, in 1827, resulting in the destruction of the Turkish fleet at Navarino and Greek independence. Here is a somewhat close parallel to our own action in Cuba. In both cases there was oppression, misgovernment, revolt, cruelty, and resort to a war of extermination. Ibrahim Pasha was the prototype of Weyler. Greece found sympathy and aid in liberal England, as Cuba has done here.' Theodore Salisbury Woolsey, *America's Foreign Policy* (New York: The Century Co., 1898), p. 74.

approved McKinley's request. The Joint Resolution recognised Cuba as a free and independent country, called for Spain to relinquish its authority, and authorised the President to deploy American forces to end the conflict. Between 22 to 26 June, 17,000 troops landed at Santiago de Cuba. By 17 July, the military objective of defeating the Spanish forces was achieved. With the assistance of the American Red Cross, the US Army distributed relief supplies to a starving and war-stricken population. The army also took on the task of restoring and maintaining civil order.⁵⁴

The interventions in Greece and Cuba, along with the opinions of publicists, offer strong support to the view that nineteenth-century doctrine and practice favoured humanitarian interventions to end protracted, internecine civil wars. In both Greece and Cuba, the intervenors stressed the protracted nature of the conflict and disregard for international mediation.⁵⁵ While the motivation for intervention in both examples were 'mixed', the outrage over methods of warfare was an important factor in the decision to intervene. In both examples, soldiers were accused of massacring unarmed civilians, including women and children, and inflicting unnecessary death and suffering. They were accused of waging a war of extermination and repopulation. Creasy argued, therefore, that crimes such as 'transplanting' a

⁵⁴ Between 1 January 1899 (when Spain officially relinquished rule) and 20 May 1902 (when the Republic of Cuba was formally declared), Cuba was governed by an American military governor directly accountable to the Department of War. Although Cuba nominally became an independent country on 20 May 1902, the Platt Amendment which gave the US a right of intervention meant that Cuba was a *de facto* protectorate of the US.

⁵⁵ The Greek conflict had been raging for six years before intervention. While the most serious fighting in the Cuban conflict occurred between 1896-1898, the conflict had been fought intermittently since the first Cuban insurrection in 1868.

people and 'repeopling' the territory in civil wars 'gave third States the right to intervene in the war'.⁵⁶

The question I now turn to is whether intervention to end civil wars has been accepted as a ground of humanitarian intervention in post-1945 international society. This form of intervention must overcome two obstacles. First, it must be shown that states are permitted to intervene in civil wars. This has been a source of controversy of law and practice, no less because practice has seldom followed law. The prevailing opinion in international law has been that in case of a rebellion, states are permitted to intervene on behalf of the established government, but not the rebels. When a conflict reaches the level of insurgency, states are either obligated to remain neutral or may assist the government (there is no agreement on this).⁵⁷ When the conflict becomes an open civil war, however, third states should remain neutral. In general, laws concerning internal conflicts have favoured the established government by prohibiting assistance to rebels, insurgents, and belligerents.⁵⁸ But because states have so often intervened in civil wars, it is questionable whether these restrictions are relevant. As Wilson points out, the proliferation of national liberation movements in the last forty years—and foreign assistance to these groups—has watered down the rule of non-intervention to the point that the exception has become the rule.⁵⁹

⁵⁶ Creasy, *Platform*, p. 430.

⁵⁷ Evan Luard argues that the UN 'has followed no consistent policy on the matter'. Evan Luard, *Conflict and Peace in the Modern International System*, 2nd ed. (London: Macmillan Press, 1988), p. 129.

⁵⁸ Wilson, *National Liberation Movements*, p. 33.

⁵⁹ Wilson writes: 'If the traditional rule has been non-interference when a government faces insurgency with some exceptions to the rule, the exceptions may now be more relevant than the rule.' *Ibid.*, pp. 31-32.

Second, it must be shown that violations of the laws of war in civil wars would give third parties a right of intervention. This raises the complex question of whether the laws of war are applicable to internal conflicts. According to contemporary international law, the laws of war are applicable if there is a recognition of belligerency.⁶⁰ But even in the absence of recognition, Article 3 common to the 1949 Geneva Conventions (Common Article 3) stresses the obligation for all parties in non-international conflicts to observe a certain minimum degree of humanity. This requirement was defined more explicitly in the 1977 Geneva Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of the Victims of Non-International Armed Conflicts (1977 Geneva Protocol II).⁶¹ In practice, however, applying the laws of war to internal conflicts has been far from successful. The established government is likely to designate an insurgent movement as an 'internal disturbance' and not an 'armed conflict'. This is an important legal distinction since Common Article 3 and the 1977 Geneva Protocol II do not apply to 'internal disturbance'. In general, how a government chooses to suppress an 'internal disturbance' is beyond the scope of international law.⁶²

Developments since 1991, however, suggest that international society considers humanitarian protection of the victims of civil wars as a legitimate ground for humanitarian intervention. The conflict in the former Yugoslavia, more particularly in Bosnia-Herzegovina, is important in this respect. The

⁶⁰*Ibid.*, p. 36; Khairallah, *Insurrection under International Law*, p. 28-29.

⁶¹ For full text, see Roberts and Guelff, *Documents on the Laws of War*, p. 447-468.

⁶² It has been argued that international law *should* recognise that a minimum standard of human rights should be observed, regardless of whether the government is fighting a civil war or suppressing disorder. See Meron, T. and A. Rosas. 'A declaration of minimum humanitarian standards', *American Journal of International Law* 85 (1991), pp. 375-381.

desire to limit the humanitarian impact of the civil war has been a primary concern prompting international involvement. Accusations of the violations of the laws of war by all sides fighting in the former Yugoslavia are well-known. While no side has clean hands, Bosnian Serb soldiers in particular have committed much of the atrocities. They have been accused of attacking non-combatants, massacring entire villages, carrying out systematic rape and torture, laying siege, waging a campaign of forced repopulation, or 'ethnic cleansing'.⁶³ The Commission of Experts established by Security Council Resolution 780 (1992) to investigate grave breaches of the Geneva Conventions classified the conflict as 'international' and ruled that the laws of war concerning international armed conflicts are applicable.⁶⁴ Hence, the Serbs stand accused of violations of the 1949 Geneva Conventions, the Genocide Convention (1951), and the 1977 Additional Protocols.

Also significant has been the Security Council's willingness, at least in principle, to authorise the use of force for humanitarian reasons, including in response to grave violations of the laws of war in a civil war. This is perhaps a contested position so I should clarify. From a pure legal standpoint, the legal justification for the use of force falls under Chapter VII. Violations of the laws of war are subsumed under the all-encompassing heading as a 'threat to peace and security'. The Security Council is not ready to admit a right of intervention strictly on the ground of the humanitarian desire to protect the victims of warfare or enforce the laws of war. Yet, one cannot sidestep the fact that outrages on the battlefield have precipitated UN involvement. Whether the Security Council, or any other state, will move from limited intervention

⁶³ For more on 'ethnic cleansing' and intervention, see David M. Kresock, "'Ethnic Cleansing" in the Balkans: The Legal Foundations of Foreign Intervention', *Cornell International Law Journal* 27 (1994).

⁶⁴ Rosalyn Higgins, 'The New United Nations and Former Yugoslavia', *International Affairs* 69 (1993), p. 481.

to a full-scale intervention is yet to be determined. What is clear is that there has been a normative shift which supports humanitarian interventions to end protracted, internecine civil wars, not unlike the nineteenth-century doctrine and practice.

Intervention to End Violent Disorder

Intervention in response to misrule or civil war is qualified by the presumption that only extraordinary circumstances justify intervention. It is presumed that governments are entitled to treat their own people or fight their own civil wars within certain limits. Hence, states must respect the sovereignty of others as a normal course relations unless exceptional abuses demand foreign intervention. There are circumstances, however, when the respect for state sovereignty has very little meaning because the government with nominal control or jurisdiction over a territory and population is perceived as weak, decaying, or non-existent. This presents considerable difficulties for international society. In practice, states have undertaken humanitarian interventions in response to the humanitarian problems accompanying the internal weakness of others. Internal weakness here refers to two conditions: when a state is beset by anarchy or exhibits an incapacity for self-government. This form of intervention has a distinct nineteenth-century ring. That post-Cold War international society confronts a similar problem of having to intervene in response to 'weak states' or 'failed states' suggests that international society remains stratified in ways not too different than in the nineteenth century.

What does it mean when a state falls into the condition of 'anarchy'? 'Anarchy' is sometimes defined as the 'absence of government in a society'.⁶⁵

⁶⁵ *Oxford English Dictionary*.

This is misleading because it is not the absence of government, but the absence of an *effective* government that is at issue. What constitutes 'effective' government is of course subject to broad interpretations. In the context here it does not mean whether a government can provide basic services such as paved roads, working sewage systems, or good schools. Rather, the standard is measured in the ability to fulfill the most rudimentary function of government: providing a minimum degree of law and order. All governments are obligated to take due diligence to prevent the outbreak of disorder and restore order should rioting occur. A state incapable of ensuring the basic security of the lives and property of both nationals and foreigners would be characterised as in a condition of anarchy.

There are several paths by which states reach this condition. While it is not always the case, revolutions and civil wars often result in a period of anarchy and disorder. This is especially true when fighting factions have struggled over a long period with neither side able to assert effective control over the territory to impose law and order. A similar state of affairs arise when the fighting is ill-disciplined and random, inflicting disproportionate casualties in the civilian population.⁶⁶ Anarchy can also result from a collapse of government authority. This process can be gradual, as when a state's control over the territory atrophies over a period of time. Or, it can be sudden, for example, when a succession crisis leaves no party in control. In either case, the government authority in place exists in name only, since it is either too weak to assert control, has ceased to function altogether, or cannot

⁶⁶ Hodges wrote: 'if anarchy and revolution persist in a certain country, regardless of the faction in power, and a considerable time has made evident the fact that neither faction can establish a government that is able to protect the life and property of its own citizens or those of foreign residents, then outside states would undoubtedly be justified in intervening in the name of humanity and social progress. . .' See Hodges, *The Doctrine of Intervention*, p. 21.

obtain enough support. Whatever the cause, a state which falls into a condition of anarchy becomes a legitimate target of intervention.⁶⁷

In practice, this form of intervention in the nineteenth century was motivated by humanitarian sentiments as well as national interest. There was the humanitarian desire to protect innocent men, women, and children from injury and death. While the protection of the local population was a concern, intervenors were generally more interested in protecting their nationals abroad endangered by the inability of the host government to suppress 'mob violence'.⁶⁸ This was justified on the ground of 'self-preservation' or 'self-defence' since the protection of its own citizens is a primary function of the state. This protective umbrella could be extended to citizens living abroad. In addition, this class of intervention appealed unambiguously to the desire to protect one's commercial interests. Lingelbach wrote, 'anarchy and crime not only shock the moral sense of the civilized nations, but also jeopardize commercial interests and render life and property insecure'.⁶⁹

A frequently cited example is the collective intervention in China in 1900 to restore order during the Boxer riots. Again, the motives for intervention were mixed.⁷⁰ During the spring and summer months of 1900, the province of Chihli was engulfed in a wave of anarchy and violence as the

⁶⁷ Westlake, *International Law*, vol. 1, p. 318; Hodges, *Doctrine of Intervention*, p. 21; Fiore, *International Law Codified*, p. 269.

⁶⁸ Borchard, *Diplomatic Protection*, p. 220. For more on the protection of nationals abroad in nineteenth-century international law, see Ian Brownlie, *Use of Force*, p. 289; Westlake, *International Law*, vol 1, p. 299; Westlake, *Chapters on the Principles of International Law* (Cambridge: Cambridge University Press, 1894), p. 105; Frederick S. Dunn, *The Protection of Nationals*. (Baltimore: Johns Hopkins Press, 1932); Philip Marshall Brown, *Foreigners in Turkey: Their Juridical Status* (Princeton: Princeton University Press, 1914).

⁶⁹ William Lingelbach, 'The Doctrine and Practice of Intervention in Europe', *Annals of the American Academy* 16 (July 1900), p. 17.

⁷⁰ The implications of Western imperialism and China are discussed in greater detail in Chapter Six.

Boxers attacked the foreign community.⁷¹ On 27 May, for instance, the Boxers attacked Kaolo Village, killing 68 Christians. By June they reached Tientsin and Peking and attacked both Chinese Christian converts and foreigners. Fearing that the Boxers would overrun the fortified compounds and carry out their threat to 'exterminate all foreigners', the foreign powers deployed a collective force under the command of Vice-Admiral Edward Seymour of Britain. On 7 June, an expeditionary force of 2,000 sailors and marines from Britain, Germany, Russia, France, the United States, Japan, Italy, and Austria landed at T'angku on their way to relieve the Peking Legations.⁷² The joint force entered the Peking and rescued the legations in early August.⁷³

The joint powers stressed the extraordinary level of criminal activity brought about by disorder and chaos. The Joint Statement adopted on 22 December 1900 stated:

⁷¹ The Boxer movement embodied anti-foreign and anti-Christian sentiments predominant in Chinese society at the end of the nineteenth century. Much of the tension was caused by native resentment of religious missionaries in China. People resented the Roman Catholics for interfering with local justice, of using their influence to help converts in litigations and disputes. The Boxers also detested the 'unequal treaties' and the gradual partition of China by the imperial powers. The Boxer movement was able to exploit these feelings. Its slogan of 'upholding the Ch'ing Dynasty and exterminating the foreigners' was widely popular with the people. A. H. Smith, *China in Convulsion*, vol. 1 (Shannon, Ireland: Irish University Press, 1972), p. 156.

⁷² This force was later strengthened by 1,700 Russians and 5,000 Japanese. H. C. Thomson, *China and the Powers* (London: Longmans, Green, and Co., 1902), p. 62.

⁷³ In total 66 foreigners were killed during the siege of Peking and 150 wounded. See Victor Purcell, *The Boxer Uprising* (Cambridge: Cambridge University Press, 1963), p. 252. For a more detailed account, see Henry Keown-Boyd, *The Fists of Righteous Harmony: A History of the Boxer Uprising in China in the Year 1900* (London: Leo Cooper, 1991).

During the months of May, June, July, and August of the present year, serious disturbances broke out in the northern provinces of China, and crimes unprecedented in human history, crimes against the law of nations, against the laws of humanity, and against civilization, were committed under peculiarly odious circumstances. . . These events led the foreign powers to send their troops to China in order to protect the lives of their representatives and their nationals, and to restore order.⁷⁴

As implied in the Joint Statement, the intervention was justified on the ground of protecting citizens and aliens. The Ch'ing Court was accused of not having taken the necessary steps to restore order. The failure to restore order could in part be explained by the fact that officials were sympathetic to the Boxer movement. For instance, after the first wave of violence in 1899, the Imperial Court issued a decree that the Boxers were 'militias' drilling for 'self-defense' and should not be outlawed.⁷⁵ Yet, it is questionable whether the Court, even if it wanted to, could have suppressed such a widespread movement since by 1900, the Ch'ing rulers were weak, ineffective, corrupt, and nearly bankrupt. Whatever the cause, the failure of the governing authority to bring an end to the conditions of anarchy, the Joint Powers felt, gave them a right of intervention.⁷⁶

⁷⁴ *F.R.U.S.* (1900), p. 244.

⁷⁵ Chester Tan, *The Boxer Catastrophe* (New York: Octagon Books, 1975), p. 54.

⁷⁶ Once order was restored, the foreign powers turned their attention to peace negotiations and indemnity. The final Treaty between China and the Powers was signed on 7 September 1901. China was obligated to pay an indemnity of £67.5 million to be paid over 39 years at 4% interest. The treaty also stipulated that governors of the provinces would suppress future hostilities against foreigners or be removed from office. Under the terms of the Treaty, the Powers agreed to evacuate troops from China on 17 September 1901. *Treaties and Agreements With and Concerning China, Volume 1 Manchu*

The slide to anarchy suggests that the target of intervention was at one time capable of self-government and that disorder is either temporary or a departure from a history of effective government. China and Turkey fell into this category: both were ancient civilisations facing a gradual weakening of state power. But there was another variation to this form of intervention: internal weakness was not the result of atrophy, but a result of a people who have yet to attain the requirements for self-government. Internal weakness, rather than temporary regression, reflects deeper incapacities. Montague Bernard wrote:

All men are not in fact completely free, nor are all States completely sovereign. There may be States in name, which are not such in reality—*Governments which labour under an incurable incapacity to govern*, and which a makeshift policy keeps alive under an irregular and capricious tutelage, in order to avoid, on the one hand, the embarrassments which would be occasioned by their fall, and to prevent, on the other, as far as possible, (for such efforts often come too late,) atrocious barbarities and gross oppressions.⁷⁷

The charge that some people exhibit an 'incapacity to govern' was recurrent in the nineteenth century. F. W. Payn, in 'Intervention Among States', for instance, rejected the notion that there ever could be an equality of states. To suggest that all states are of equal capabilities is as much a fiction as the suggestion that all individuals are of equal mental capacity. The reality, Payn argued, is that there will always be a hierarchy, between those who are 'of mature age' who are 'mentally and physically capable of managing their own affairs' and those who are not. The same is true for states in international society. He concluded, '[t]here is no fact no more certain in

Period (1894-1911), ed. John V. A. MacMurray (London: Oxford University Press, 1921), pp. 278-294.

⁷⁷ Bernard, 'Non-Intervention', p. 8. Emphasis added.

modern history than the lunacy or imbecility under which some States have laboured and continue to labour'.⁷⁸ This idea was also prevalent toward the eve of the First World War. E. C. Stowell, reminiscent of Bernard, wrote that 'international relations are complicated by the presence of a considerable number of states who, notwithstanding the formal recognition of their full legal status as members of the society of states, are not in fact always able to fulfill satisfactorily the requirements which international law imposes upon them'.⁷⁹

What is interesting is not so much this acknowledgment of higher and lower capacities, but the fact that intervention was considered a natural order of things against those who were perceived of as incapable of governing themselves or fulfilling their international obligations. Bernard, for instance, whose theory of non-intervention admitted almost no exceptions, argued that when confronted with a people with an 'incapacity to govern', 'the principle [of non-intervention] does not apply, and the hopeless infirmity which makes interference necessary is an evil that we have to deal with in the best way we can'.⁸⁰ More critically, Hodges pointed out how a 'barbarous' people was often accused of being 'unfit for self-government', thereby giving European states a right of intervention.⁸¹ When an advanced or mature state came into contact with a less developed people, 'intervention for humanity' could be undertaken to benefit the people as well as for the progress of civilisation and the world.

Much of Africa was brought under European control on this premise. Before the period of European colonial expansion, Europeans simply

⁷⁸ Payn, 'Intervention Among States', p. 68.

⁷⁹ Stowell, *Intervention and International Law*, p. 297.

⁸⁰ Bernard, 'Non-Intervention', p. 8.

⁸¹ Hodges, *Doctrine of Intervention*, p. 8.

regarded the Africans as different. By the 1860s, however, Europeans began to justify their colonial expansion into Africa on the notion that African societies were 'manifestly inferior' in every way, measured by moral, cultural, material, or political yardsticks.⁸² That African societies were not organised along the European model of central authority of sovereign statehood was 'interpreted as a sign that anarchy reigned'.⁸³ It was believed, therefore, that it was both a right and duty for Europeans to help the 'backward' peoples of Africa. Europeans were, so it was justified, in Africa to protect the natives from both dangers within and without. In the first instance, European presence was to bring good government to the people, to abolish barbaric rites, to impose peace on warring tribes. On the latter justification, a circular reasoning was put forth: European presence was necessary to protect the Africans from the deleterious effects of the slave trade and Chartered Companies.

The history of European imperialism in Africa is well-known so there is no need to go into greater detail here. Not often discussed is the way the policy of colonialism and trusteeships was intertwined with theories of humanitarian intervention. Those who advocated this were not just talking about intervention in the traditional sense of using military force to achieve a narrow objective and then getting out. Rather, they advocated the idea of *prolonged* intervention. It is interesting that Antoine Rougier's discussion of humanitarian intervention ended with the advocacy of a right of 'permanent intervention' if a people show no signs of being able to manage their own affairs effectively. Rougier wrote:

⁸² J. D. Fage, *A History of Africa*. 2nd ed. (London: Unwin Hyman, 1988), p. 353.

⁸³ John Lowe, *Rivalry and Accord: International Relations 1870-1914* (London: Hodder & Stoughton, 1993), p. 51.

When the violations of the law of human solidarity occur in the case of a barbarous or half-civilized State, in which the disorders have a durable and permanent character, the civilized powers must of necessity have recourse to a more energetic method of control—a control adapted to prevent the wrongdoing rather than to repress it or to cause reparation to be made. Instead of the right of ordinary intervention there then arises the right of permanent intervention.⁸⁴

Similarly, E. C. Stowell insisted that if states are going to intervene under these circumstances, they should be 'willing to assume a certain responsibility to supervise the incapacitated state and see that it fulfills its obligations'.⁸⁵

The practice of states intervening in response to anarchy or to protect those who cannot protect themselves in effect gave Europe and the United States a means to justify the expansion of 'sphere of influence' and colonial possessions.⁸⁶ The General Act of the Berlin Conference (1885) set forth the scheme where European states undertook the 'civilizing' duty of the 'inferior' peoples. This was institutionalised under the League Mandates system where much of Africa became 'Type C' Mandates. Article 22 of the League Covenant stated that 'peoples not yet able to stand by themselves' will be brought under the 'tutelage' of 'advanced nations' to form a 'sacred trust of

⁸⁴ Quoted in Alpheus Henry Snow, *The Question of Aborigines in the Law and Practice of Nations* (Washington: Government Printing Office, 1919), p. 190.

⁸⁵ Stowell, *Intervention and International Law*, p. 299.

⁸⁶ Hodges observed: 'How many times have we noticed European countries intervening, in the name of humanity, in some of the less civilized parts of the world? How many times have we noticed that the direct result of these interventions has been a Protectorate or Sphere of Influence? . . . It is also common knowledge that these Spheres of Influence and Protectorates almost inevitably develop into colonies for 'the better protection of mankind'. Hodges, *Doctrine of Intervention*, p. 21.

civilisation'.⁸⁷ As President Wilson suggested during the drafting of the League Covenant, the purpose was to 'lift' 'undeveloped peoples' to 'the next higher level'.⁸⁸ This implied a duty to develop the capacity for self-government where freedom of conscience and religion would be guaranteed. The practice of 'barbaric customs' such as cannibalism would be outlawed. It was also the duty of the mandatory power to bring good government, to create a legal and political framework to protect the people from oppression.⁸⁹

The doctrine and practice of humanitarian intervention in response to internal weakness of states were, of course, influenced by notions of racial superiority. It is for this reason that humanitarian intervention justified on this ground has been discredited in the post-1945 era since it contradicts the doctrine of equality. Equality, both in terms of equal sovereignty and racial equality, has become a part of international society.⁹⁰ Similarly, the idea that allegations of 'incapacity to govern' could be an excuse for 'permanent intervention' has also been discredited as antithetical to the norms of self-determination and decolonisation. The Declaration on the Granting of Independence to Colonial Countries and Peoples (1960) made it clear that

⁸⁷ See League Covenant in C.A. Kluyver, *Documents on the League of Nations* (Leiden, Netherlands: A. W. Sijthoff's Uitgeversmaatschappij, 1920), p. 359.

⁸⁸ Kluyver, *Documents on the League of Nations*, p. 15.

⁸⁹ As M. Yanaghita emphasised: 'The only satisfactory result which can at present be expected from the new judicial system is the deliverance of the natives from the troubles which are common to all uncivilized peoples, and which arise from the capricious jurisdiction of tyrannical chiefs'. Quoted in Quincy Wright, *Mandates Under the League of Nations* (Chicago: The University of Chicago Press, 1930), p. 243.

⁹⁰ R. J. Vincent, 'Racial Equality', in *Expansion of International Society*, p. 252.

'[i]nadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence'.⁹¹

Despite these normative developments, post-1945 international society still confronts many of the same problems encountered in the nineteenth century. As in the past, civil wars often degenerate to complete anarchy. In evaluating the Nigerian civil war of 1968, Robert Meade Chistrom observed that the most atrocious violations of human rights often occur when a civil war spirals out of control into 'violent anarchy'.⁹² Similarly, the complete collapse of a state remains a possibility. The Finnish jurist V. Saario argued that humanitarian intervention is appropriate and lawful 'when the administration of a State has completely collapsed because of internal unrest and the authorities have lost control of events'.⁹³ But not all states are vulnerable to these problems, only certain types of states. The rapid process of decolonisation has produced what Robert Jackson calls 'quasi-states'—that is, *de jure* states in name which have yet to fulfill the *de facto* obligations of statehood.

The deadly combination of civil war and collapse of state authority was all too evident in Somalia during 1992-93. In Somalia, the absence of any government whatsoever and the continuing civil war between rival armed factions made it difficult for aid workers to forestall mass starvation without military intervention.⁹⁴ In Rwanda, a similar reign of anarchy, combined with an even more violent civil war in 1994, produced a humanitarian crisis of genocidal proportions which was ignored by the UN and the US until it was

⁹¹ UNGA Res. 1514 (XV), 14 Dec. 1960.

⁹² Chilstrom, 'Humanitarian Intervention Under Contemporary International Law', p. 97.

⁹³ *Ibid.*, p. 98.

⁹⁴ See Jeffry Clark, 'Debacle in Somalia: Failure of the Collective Response', *Enforcing Restraint*, pp. 205-239.

too late. In both examples, the nineteenth-century idea that some states exist in name only is surely applicable. The irony, therefore, is that the practice of humanitarian intervention in response to anarchy and 'incapacity to self-govern', which in the nineteenth century was often abused, has become a realistic option for post-Cold War international society. In both Somalia and the Rwanda, the great powers were asked to intervene on humanitarian grounds to end grave abuses of human rights.

Despite the gains of decolonisation and the attainment of status of sovereign states, many of these so called 'failed states' are now portrayed in a way not unlike the way the non-European world was characterised by colonial powers. Helman and Ratner make the analogy of the deficient individual in domestic society to that of the 'failed states': 'Forms of guardianship or trusteeship are common response to broken families, serious mental or physical illness, or economic destitution. The hapless individual is placed under the responsibility of a trustee or guardian, who is charged to look out for the best interests of that person'.⁹⁵ This is much like Payn's notion of 'lunatic' or 'imbecile' states. There is also the comparison to the need to place 'minors' under a form of guardianship. Compare this to Hobson's observation that 'social ethics paints the motive of 'Imperialism' as the desire to bear the 'burden' of educating and elevating races of 'children'.⁹⁶

What Rougier once advocated as 'permanent intervention' has gained currency. Neo-colonialism, once ruled out during much of the post-1945 era, has been reintroduced as a legitimate idea. William Pfaff writes that much of Africa has been ravaged by 'postmodern barbarism unconnected to any

⁹⁵ Helman and Ratner, 'Saving Failed States', p. 12.

⁹⁶ Hobson, *Imperialism*, p. 222.

African past' and stands to benefit from a 'disinterested neo-colonialism'.⁹⁷ More importantly, the Kenyan professor Ali A. Mazrui has reached the conclusion that '[t]he successive collapses of the state in one African country after another during the 1990s suggests a once unthinkable solution: recolonization. . . under the banner of humanitarianism'. Mazrui has in mind the 'self-colonization' of Africa by Africans. He proposes the establishment of an African Security Council. The Council would have the authority to place 'dysfunctional' states under the 'tutelage' of others, redraw boundaries, and authorise a newly created Pan African Emergency Force to intervene during humanitarian crises.⁹⁸

As this chapter has shown, humanitarian intervention has been justified on the grounds of misrule, civil war, and internal weakness. There is too great a tendency to think of humanitarian intervention purely in terms of intervention to protect a people from its government. While the three grounds for humanitarian intervention emerged and were put into practice in contexts different from today, they are nevertheless highly relevant to international society today. Post-Cold War international society is confronted with these problems, especially with internecine civil wars undergoing in

⁹⁷ William Pfaff, 'A New Colonialism?', *Foreign Affairs* 74 (January/February 1995), pp. 2-6. He proposes that the former European colonial powers return to Africa to place these regions back into a tutelage. The former colonial powers have the most interest in seeing a stable Africa: Europe is the first destination for refugees; Europe is the main consumer of African mineral and agricultural goods. Europe is also best suited to deal with the region; many European states still have former colonial administrators, specialists, and scholars. Pfaff concludes that '[i]f anybody is competent to deal sympathetically with these countries, the Europeans are'.

⁹⁸ Ali Mazrui, 'Decaying Parts of Africa Need Benign Colonialism', *International Herald Tribune*, 4 August 1994. Also see Peter Lyon, 'The Rise and Fall and Possible Revival of International Trusteeship', *Journal of Commonwealth & Comparative Politics* 33 (1991), pp. 96-110.

'failed states'. If humanitarian interventions have long been a part of international society, how then does this society reconcile the tensions between the doctrine and practice of intervention with the laws of this society governing sovereignty, non-intervention, and limitations on violence. This question is addressed in the next chapter.

PART TWO

IMPLICATIONS FOR INTERNATIONAL SOCIETY

CHAPTER FIVE

HUMANITARIAN INTERVENTION AND INTERNATIONAL LAW

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HUMANITARIAN INTERVENTION AND INTERNATIONAL LAW

This chapter explores the implications of humanitarian intervention for international law. I am using 'international law' here in the broad sense to mean the rules which govern international society. By the 'rules' of international society, I am referring to the three primary rules of state sovereignty, non-intervention, and limitations on the use of force which have contributed to peace and coexistence.¹ Humanitarian intervention is a problem because it challenges these rules. If, as Chapters Three and Four have shown, humanitarian intervention has long existed in both the theory and practice of the modern states system, what has been its impact on these rules. How has international society attempted to reconcile the seemingly competing claims of rights of humanity with the rules of this society?

Historically several possible alternatives have been put forth. One solution is an international society where universal solidarity overrides the primary rules of this society. This was the natural law solution for humanitarian intervention in the sixteenth and seventeenth centuries. Another possibility is to establish an international society based on hierarchical rights and duties: that some rules apply to some states while not

¹ The emphasis on these three rules is a central part of the international society tradition. See Hedley Bull, *Anarchical Society*, Chapter 1; Ian Clark, *Reform and Resistance in the International Order* (Cambridge: Cambridge University Press, 1980), Chapter 1.

others. In other words, a society based on graded sovereignty much like the one which existed in the nineteenth century. A third alternative is to seek the authorisation of an international organisation for such actions. In this model, the rules of sovereignty and non-intervention are superseded by the common will of the collective whole. As argued in the conclusion, collective authorisation remains the best method in the contemporary setting for redressing the balance between the rights of sovereignty and human rights.

Forcible Protection and the Domestic Analogy

It is useful to begin the discussion by considering the domestic analogy. How does domestic society redress the balance between liberty on one hand and the need to ensure a minimum degree of protection on the other? In the domestic analogy, the state often interferes in the affairs of private households. This is not considered problematic since there is an acknowledged balance between the rights of the private sphere and the rights of society at large. In *On Liberty*, the classic liberal argument for a non-interfering state, John Stuart Mill argued that the government should not interfere with the liberty of individuals, not even for their own good. The presumption is that people are best to judge how to live their lives. Yet, Mill conceded that there are limits to the notion that a 'man's home is his castle', especially with regards to how parents can treat their children. Should parents become abusive or engage in activities injurious to the physical or moral welfare of the children, the state has the authority to intervene.

Based on the domestic analogy, the idea of one state, or group of states, intervening to protect the subjects of another state makes sense intuitively. There does not seem to be a problem. The reason I bring up the domestic analogy is that it has played an important role in shaping theories of humanitarian intervention. Gentili, for example, compared the international

right to protect subjects from the cruelty of the ruler just as 'we are right in protecting even unjust sons against the cruelty of a father'.² F. W. Payn argued similarly that not all actions are protected under the notion of 'liberty'. A father who abuses his children or turns his house into a brothel cannot claim the inviolability of privacy. Payn wrote, '[a] man's house is his castle only up to a certain point, and his right to preserve his privacy vanishes absolutely before the general right of humanity'.³ For Payn, this dictum was equally true for international society as well since 'the international life of States is nothing more than the life of individuals 'writ large''.⁴

The domestic analogy, however, is flawed in that in the domestic sphere, the state's right of intervention rests on the social contract, a concept lacking at the international level. The social contract tradition, as developed by Hobbes, Locke, Rousseau, and more recently Rawls, lies at the heart of Western conceptions of the duties and obligations between the governor and the governed. It is the basis for justifying political institutions, and more importantly, justifying why individuals in domestic society do not have unlimited freedom. In the state of nature, men are free to do as they like; the only rule is the rule of the strong. According to Locke, individuals leave the state of nature to form civil society. In doing so, they hand over certain rights and in return benefit from the government established. They are bound by the will of the community thus formed.⁵ The society as a whole can legislate and administer laws for the good of society.

² Gentili, *DIB*, p. 76.

³ Payn, 'Intervention Among States', p. 66.

⁴ *Ibid.*, p. 67.

⁵ John Locke, *Two Treatises of Government* (Cambridge: Cambridge University Press, 1994), *Second Treatise*, Chapter VIII.

The social contract gives the authority for the state to intervene to protect children from abusive parents. According to this model, the state has, first of all, the *legitimate authority* to do so. As the representative of the greater whole, it must enforce the rules and standards of this society. But just as important, it has acquired the *powers of enforcement*, that is, the ability to coerce. One central element of the modern state, as Max Weber observed, is the monopoly to use force. While this power may be distributed to different levels of society, shared between the central government, national armed forces, and the local police, the government ultimately has monopoly over the use of force. Hence, when confronted with the problem of protecting the welfare of children living under an abusive father, the state has both the *authority* and *power* to intervene. Should the parent resist forcibly, his actions would be considered unlawful and the full power of the state may be deployed to bring him to justice.

The domestic analogy, however, does not apply to international intervention to counter the oppressive rule of particular governments since no comparable social contract exists at the international level. In fact, social contract theorists never envisioned this to occur. Hobbes, for example, saw a social contract as necessary for domestic society but left the international realm in a state of war. More pointedly, Rousseau warned against attempts to forge a social contract at the international level since this would cause greater suffering and dislocations.⁶ There has never been an attempt at an international social contract. This is not to say that there have not been approximations. International organisations such as the Congress system of the nineteenth century, the League of Nations of the interwar years, and the

⁶ Jean-Jacques Rousseau, 'Saint-Pierre's Project for Peace', *Rousseau on International Relations*, eds. Stanley Hoffmann and David Fidler (Oxford: Clarendon Press, 1991), p. 100.

current United Nations are all attempts to move away from the anarchy of international life.

These organisations, however, are not social contracts in two respects. Unlike the contracting individuals who accept the severe limitations on freedom of action imposed by civil society, member states have not forfeited state sovereignty in place of a world government. States still remain the ultimate arbiters of their fate. Decisions about the primary goals of national interest are made at the capitals of respective nations rather than at the headquarters of a supracountry. Nor have member states disarmed and entrusted the responsibility for national defense in the hands of the central authority. Hobbes, after all, required that individuals lay down their swords and accept the protection of the Leviathan in return.

Rules of International Society

While there has not been a social contract at the international level, this does not mean that international life is a state of nature. It is somewhere in between the state of nature and the state of society. This intermediary quality of the nature of the international system is often characterised as 'international anarchy'. This may be an accurate reflection if 'anarchy' is used to denote the lack of an international authority or world government with the same power as that in domestic political society.⁷ Yet, if 'anarchy' is used here to mean an absence of law and order, then this would not be accurate. On the contrary, the international system is a society with clearly established rules. One need not have a central authority in order for rules to emerge; nor

⁷ Bull uses 'anarchy' in this sense. See Bull, 'Society and Anarchy in International Relations', *Diplomatic Investigations: Essays in the Theory of International Politics*, eds. Herbert Butterfield and Martin Wight (London: George Allen & Unwin Ltd., 1969), p. 35.

does the enforcement of these rules depend on the existence of a common authority.⁸

As international society has evolved, certain rules have been adopted, refined, and enforced by states through self-help. These rules have emerged as a way to maintain peaceful coexistence in international society; without them, international life would be much like Hobbes's conception of a state of war. We can divide these rules into primary and secondary rules (or constitutive and procedural rules). The primary rules of international society can be summed up as state sovereignty, the principle of non-intervention, and limitations on the use of force. Some examples of secondary rules are the principle *pacta sunt servanda*, freedom of the seas, laws of war, and diplomatic immunity. While secondary rules are important for facilitating international interactions, they are not essential. What is important to our discussion is the impact that humanitarian intervention has on the primary rules since these rules are essential to the existence and survival of international society.

The rule of state sovereignty is at the pillar of international society. Sovereignty, as Bull points out, has two components. There is, first of all, *internal sovereignty*. What this means is that the ruler has exclusive jurisdiction over the population in its territory: it has the authority to legislate and administer the laws of this society. This does not exclude the possibility of devolution of power. It does mean that there are no challengers to the power or legitimacy of the state nor are there challengers to the supremacy of the sovereign. It is important to remember that the emergence of state sovereignty marked the transition away from a society of competing feudal lords as political power was consolidated in a supreme ruler. There is also the notion of *external sovereignty* in that the ruler of the state has no higher authority to which it owes its allegiance. What goes on within the territory is

⁸ See Nardin, *Law, Morality, and the Relations of States*, Chapter 7.

the sole responsibility of the state. Its decisions and policies, including those regarding how to punish its people, are not subject to the approval of outsiders.⁹

The second rule of non-intervention is essentially a corollary of the first. If sovereignty means exclusive jurisdiction over what happens inside the walls of the state, any interference in the domestic affairs is a violation of sovereignty. State sovereignty implicitly implies that other states have a duty to refrain from interfering in the internal affairs of others. The principle of non-intervention is derived from the natural law principle of liberty. States, like individuals in nature, are perfectly free. To interfere in the internal affairs of a state is to violate this natural liberty. This idea, first developed systematically by Wolff, Kant, and Vattel in the eighteenth century, was a much espoused (although seldomly observed) rule in nineteenth-century international society. For much of the twentieth century, this has been the cardinal rule, incorporated as Article 2(7) of the UN Charter. To what extent the rule of non-intervention has given way to a limited right of intervention will be discussed later.

Like the first two rules, the third rule of limitation on the use of force in international society seeks to promote peace and order.¹⁰ The trend to limit the use of force has been a two-level process. In the internal relations *within* a state, the established government gradually assumed monopoly over legitimate use of force. In the external relations *between* states, there has been a trend to restrict proper authority to use force in the hands of the sovereign state. By reducing the number of actors permitted to use force, the aim has been to decrease the likelihood of wars while increasing the ability to manage conflicts should they arise. There has also been a trend to impose limits on

⁹ Bull, *Anarchical Society*, p. 8.

¹⁰ Bull, *ibid.*, p. 19; Clark, *Reform and Resistance*, p. 19-25.

when sovereign states can use force. This has long been a part of the just war tradition of *jus ad bellum*. Even in the nineteenth century, a period of Great Power interventions, there were restrictions on when force may be used. Since 1945 there has been a concerted attempt to impose even greater restrictions. Even the plea of self-defense is circumscribed by Article 51 of the UN Charter which restricts the use of armed force in response to an 'armed attack'.¹¹

These rules pose serious obstacles for humanitarian intervention. Unlike the domestic analogy, we see that humanitarian intervention is a problem for international society by challenging the primary rules of this society. It undermines the law of state sovereignty by breaching the political and territorial sovereignty of the state. A state which undertakes intervention is challenging the notion that a government has full, exclusive jurisdiction over its own citizens. It is stating that gross abuse and atrocities committed by the government against the people cannot be shielded from international society based on claims of domestic jurisdiction. When a state forcibly intervenes in order to protect the subjects (or citizens) of another state, it violates the second rule of non-intervention. There can be no greater act of interference in the internal affairs of another state than the transborder use of armed force to compel the target government to alter its policy. And since the actions of the intervening state involve the use of military force, humanitarian intervention conflicts with the third rule seeking to limit violence in international society.

¹¹ According to Brownlie, while customary law provides no clear guidance as to the lawfulness of 'pre-emptive' strikes, the right to take 'anticipatory measures' has increasingly been under challenge. Brownlie, *Use of Force*, p. 260.

Reconciling the Rules of Society With Claims of Humanity:

Three Approaches

A central problem, therefore, is reconciling the principle of humanitarian intervention with the rules of international society. It is important that we examine this question from a historical perspective since the rules of international society are not *a priori* philosophical precepts or inviolable laws of physics. As with any rules of domestic society, the rules of international society are social constructs, elements of human design. For this reason, they evolve, change, progress, and regress. The variability of the rules of international society is often ignored, especially by realists. As Barkin and Cronin argue, the rule of sovereignty is 'neither fixed nor constant' but is 'subject to changing interpretations'.¹² We should view the rules of non-intervention and restrictions on the use of force as subject to the same changing process. For this reason, I have chosen to consider the problem of reconciling humanitarian intervention with the rules of society as divided into three historical traditions to account for the fact that these rules have been changing.

What also complicates the equation is the fact that the rules of international society have always been under challenge. Since the primary rules we discussed above are the rules of the society of states, it is logical that they deal with the rights of states. However, there has been a pull in another direction toward the claims of humanity.¹³ That is, there have been repeated calls for the recognition that international society is more than about states,

¹² J. Samuel Barkin and Bruce Cronin, 'The State and the Nation: Changing Norms and the Rules of Sovereignty in International Relations', *International Organization* 48 (1994), p. 108.

¹³ See Hersch Lauterpacht, 'The Law of Nations, The Law of Nature, and the Rights of Man', *The Grotius Society* 29 (1943), pp. 1-33.

but also about individuals who inhabit these states. Hence, notions of 'common humanity', 'rights of humanity', and more recently, 'human rights' have been voiced. These voices, indeed, have been a part of the perpetual dialogue of international relations. The degree to which these claims have been accommodated by international society has never been fixed but has shifted as the nature of international society has changed.

Natural Law and Universal Solidarity

The question, then, is how to reconcile the rights of humanity with these rules? Is it possible to maintain both the primary rules as well as permit the right of humanitarian intervention? Historically there have been several ways of organising international society so that humanitarian intervention can exist alongside the rules of international society. The first model or solution to consider is the universal solidarity approach. This approach resolves the problem by allowing the claims of humanity to override state sovereignty. In other words, there was a hierarchy of rights, the rights of states being secondary to the 'common sentiments of humanity'. This solution was put forth by sixteenth and seventeenth-century writers such as Gentili, Suárez, and Grotius who shared common assumptions about natural law.

Before considering the universal solidarity approach, it is important to clarify that it should not be confused with the universal empire of the Holy Roman Empire during the later Middle Ages. The theory of universal empire or world government would not be a solution; rather than reconcile humanitarian intervention with the rules of this society, it abrogates the rules by destroying the society of sovereign states. Under the medieval Holy Roman Empire, there was no conception of the territorial state independent from the supreme authority of the Church. Without boundaries to demarcate the separateness of states, the use of force to protect the subjects of another

prince no longer poses a problem. Just as no household could claim absolute liberty, no prince would be able to claim an inviolability of domestic jurisdiction nor demand that the rule of non-intervention be observed. During the medieval period, Papal interventions frequently were authorised to end misrule in the kingdom of another prince.

By the late sixteenth century, the rules of international society were beginning to take root. It is sometimes wrongly asserted that the idea of state sovereignty emerged at the Peace of Westphalia in 1648. It is true that the emergence of a multiplicity of sovereign states, independent of a supreme authority, did not become a political fact until Westphalia. The Treaties signed at Münster and Osnabrück gave princes, bishops, and cities the right to internal and external sovereignty.¹⁴ The idea of the sovereign state, however, preceded Westphalia. As Gross points out, long before the Westphalian Settlement the supreme authority of the Pope and Emperor was under challenge. The Reformation and the Renaissance inspired a spirit of individualism and independence in politics.¹⁵ The Revolt of the Netherlands and the civil wars in France in the second half of the sixteenth century also helped forged the notion of political units independent from a central authority.

Early discussions in the late sixteenth and early seventeenth centuries recognised that the concept of intervention to protect the persecuted was potentially a problem. It was recognised that this idea was in conflict with notions of independence and sovereignty. Thus, Gentili opened up his discussion with Ambrose's observation that the great gods of mythology, Jupiter, Neptune, and Pluto, wisely demarcated their functions and territory so that there would be no conflict between them. This division, or separation

¹⁴ Nardin, *Law, Morality, and the Relations of States*, p. 57.

¹⁵ Leo Gross, 'The Peace of Westphalia, 1648-1948', *American Journal of International Law* 42 (1948), p. 28.

of power, applies to 'earthly sovereigns' as well. Hence, he qualified that his discussion on intervention was not an attempt to subvert the rule of sovereignty by establishing 'a supervision of one sovereign by another'.¹⁶ In the same way Grotius acknowledged that his endorsement for humanitarian intervention was in no way an attempt to subvert the right of every ruler to punish his subjects within just limits.¹⁷

That sovereigns were generally entrusted to govern their own people did not mean that sovereignty was absolute. The idea of sovereignty as representing absolute demarcation was not a part of the conception. Notions of sealed borders, absolute control over a territory, and of exclusive domestic jurisdiction were not a part of the early conception of state sovereignty. Europe in the late sixteenth and early seventeenth centuries was in a period of transition when the medieval universal empire was splintering into autonomous units yet the residuum of the medieval conception of the world had not vanished altogether. As J. N. Figgis points out, medieval notions of the 'unity of humanity' prevented the international polity from becoming a 'fortuitous concourse of atoms'.¹⁸

The concept of 'unity of humanity' meant many things, all of which were grounded in the natural law tradition. A central component of the natural law conception of the law of nations is the idea that there are certain immutable principles of nature which human laws cannot violate. All people, ruler or subject, aristocrat or pauper, are bound by the dictates of natural law. Since the duty of self-preservation is a first principle of natural law, it is logical that the denial of life is an offence to natural law. Should the ruler

¹⁶ Gentili, *DIB*, p. 74.

¹⁷ Grotius, *DJBP*, p. 584.

¹⁸ J. N. Figgis, *Studies of Political Thought from Gerson to Grotius* (Cambridge: Cambridge University Press, 1907), p. 217.

carry out the laws in his domain by slaughtering his population, he has exceeded the bounds of his legitimacy. Hence, what the ruler can do to his subject is constrained by natural law. For this reason Gentili and Grotius both concluded that should the ruler exceed the bounds of natural law in punishing his people, he can be deprived of his sovereignty.

Another important aspect of the natural law tradition is that sovereignty did not mean exclusive domestic jurisdiction to the exclusion of the solidarity or unity of humanity. This unity meant, first of all, that international society was not made up of detached sovereign states. Suárez pointed out that while each 'sovereign state, commonwealth, or kingdom' may constitute a perfect community in itself, it is still a part of 'universal society'.¹⁹ The bonds of this society are sometimes referred to as 'solidarity' or the 'solidarist' conception of international society. As members of this society, states share common rules, responsibilities, sentiments, and the mutual obligation to enforce the rules of this society. This society was considered by some to be universal in that no community can opt out of it.

The unity of humanity also meant that international society was not exclusively one populated by states. There was, as Grotius argued, a *humana civitas*, or the society of mankind. This idea was based on the natural law principle that all humans, by virtue of their humanity, belong to a common community. The bonds or ties of this community cannot be abrogated by artificial constructs of political or territorial boundaries. Gentili observed that when the subjects of another are cruelly mistreated, outsiders have a right to be concerned with their welfare because they are a part of human society. He concluded, 'as far as I am concerned, the subjects of others do not seem to me to be outside of that kinship of nature and the society formed by the whole

¹⁹ Suárez, *Selections*, p. 349.

world. And if you abolish that society, you will also destroy the union of the human race'.²⁰

The universal solidarity approach not only permits intervention, but obliges a sense of duty to protect the oppressed. Quoting Democritus, Grotius insisted that 'those who are oppressed by wrong-doing must be defended to the limit of our strength, and not neglected'.²¹ The *Vindiciae* advanced the argument further. The prince who neglects the oppressed was viewed as more contemptible than the tyrant. With biting disdain, he wrote that the 'foresakers of their brethren in their time of danger and distress, are more vile, and more to be abhorred than the tyrants themselves who persecute them'.²² He continued, 'the prince who, with a negligent and idle regard, looks on the outrageousness of a tyrant, and the massacring of innocents that he might have preserved. . . is much more guilty than the tyrant himself'.²³

The duty to protect one's fellow man is derived from the natural law idea of mutual assistance. Since the common sentiments of humanity tie all people together, we should not ignore a famine, flood, or other natural disasters just because they occur in another land. Similarly, oppression and persecution in another land should not be ignored. This was often expressed metaphorically with analogies to the human body. Just as each part of the body has its own function, but constitutes a part of the whole, all people, regardless of boundaries, ultimately form part of one body. An injury to one part is an injury to the whole: an infection in the leg will eventually infect the

²⁰ Gentili, *DIB*, p. 74.

²¹ Grotius, *DJBP*, p. 164.

²² *Vindiciae*, p. 224.

²³ *Ibid.*, p. 227.

entire body. Hence, injuries inflicted on one people are ultimately detrimental to the entire body of humanity.²⁴

The tension between the rules of international society and humanitarian intervention was resolved by a conception of state sovereignty and non-intervention which permitted intervention.²⁵ The two were not in conflict because, as Martin Wight argues, international society was conceived of as a society where the horizontal ties between peoples were considered more important, and could even 'override' the vertical ties between peoples and their rulers.²⁶ While sovereignty and non-intervention are rules which should be observed most of the time, they are not absolutes which cannot be suspended.²⁷ When the ruler exceeds the bounds of just punishment by treating his population with such cruelty, he can no longer claim obedience from the people. This also means that he can no longer claim exclusive

²⁴ Gentili, *DIB*, p. 68-69; *Vindicae*, p. 218.

²⁵ Michael Donelan writes: 'The Natural Law Man's theory is this: though we have no authority over other states, we have a duty to defend innocent people from being killed. The division of the human community into separate states does not mean that we abandon our fellow men to any treatment that their fellow citizens may choose to inflict on them'. Michael Donelan, *Elements of International Political Theory* (Oxford: Clarendon Press, 1990), p. 146.

²⁶ Martin Wight, *International Theory: The Three Traditions*, eds. Gabriele Wight and Brian Porter (London: Leicester University Press, 1991), p. 48.

²⁷ Wight writes, 'the independence and separateness of states is less important than the homogeneity of international society, and the inviolability of frontiers is subordinated to the illimitability of truth'. Martin Wight, 'Western Values in International Relations', in *Diplomatic Investigations: Essays in the Theory of International Politics*, eds. Herbert Butterfield and Martin Wight (London: George Allen & Unwin Ltd., 1969), p. 113.

jurisdiction. An oppressed people would therefore be justified in treating the tyrant as a 'usurper' and could legitimately ask for foreign assistance.²⁸

According to the universal solidarity approach, the form of assistance provided could include armed force. The use of force in this context would not violate rules limiting violence in the international sphere. Interventionists justified the use of force by arguing that there is nothing in the law of nature or international law which prohibits the use of force in general. There is nothing inherently unjust about using force; it is often not only prudent, but necessary to restore a situation closer to that of nature.²⁹ One must consider whether the use of force conflicts or conforms with the ends of society.³⁰ On this Grotius distinguished between 'the use of force which attempts an injury and that which wards it off'.³¹ In the case of forestalling a great human tragedy, military force is sometimes the only option to punish the ruler and restore civil society back on course toward the aims of security and tranquillity.

Dual-System of Rules

A second alternative to reconciling the rules of international society with humanitarian intervention is the dual-system approach. I am referring to an international society in which the members of this society do not share in equal rights and duties. Just as certain societies are inequitable in that some members of society enjoy greater protection, one can imagine an

²⁸ On Grotius's discussion of this, see Charles S. Edwards, *Hugo Grotius, The Miracle of Holland: A Study in Political and Legal Thought* (Chicago: Nelson-Hall, 1981), p. 134.

²⁹ Grotius, *DJBP*, p. 51.

³⁰ *Ibid.*, p. 53.

³¹ *Ibid.*, p. 51.

international society structured similarly. We can imagine an international society where the rules of state sovereignty, non-intervention, and the limitations on violence are observed in the relations between some states while ignored against others. A good place to find this hierarchical system is Europe's relations with the non-European world in the nineteenth century.³²

Before continuing it is important to trace the development of the rules of sovereignty and non-intervention toward the second half of the eighteenth century. In particular, the work of Christian Wolff incorporated these rules as fundamental elements in the relations between states. Wolff's *Iust Gentium Methodo Scientifica Pertractatum* (1749) has often been viewed as the 'birthplace of non-intervention'.³³ Wolff considered sovereignty and non-intervention as perfect forms. State sovereignty was viewed as something which was absolute to the extent that no party can interfere in the internal affairs of another.³⁴ To intervene is to destroy the perfection of sovereignty. Moreover, Wolff borrowed heavily from seventeenth-century theories of natural rights. States exist in perfect liberty, much like individuals in nature are perfectly free. To interfere with the internal affairs of any state is to violate this natural liberty.³⁵

Wolff, therefore, maintained that the principles of state sovereignty and non-intervention allowed no exceptions, not even claims of humanity. He denied a right of intervention to advance religion or avenge an injury to

³² For more on 'international dualism', see Jackson, *Quasi-states*, pp. 54-70.

³³ A.V.W. Thomas and A.J. Thomas, *Non-Intervention: The Law and Its Import in the Americas* (Texas: Southern Methodist University Press, 1956), p. 5; Wight, 'Western Values', p. 113.

³⁴ Wolff, *Jus Gentium*, pp. 130-31.

³⁵ *Ibid.*, p. 131.

one's religion.³⁶ Nor did he permit intervention to maintain the balance of power.³⁷ Most importantly, Wolff's theory of non-intervention precluded intervention to assist those who are oppressed by their own governments. He wrote:

If the ruler of a state should burden his subjects too heavily or treat them too harshly, the ruler of another state may not resist that by force. . . For no ruler of a state has the right to interfere in the government of another, nor is this a matter subject to his judgment. . . Since every nation ought to do all it can to make other nations also happy, but since it is not bound beyond that which is in its power. . . it may not resist by force the one who rules badly.³⁸

As Wolff suggested, how a ruler or government treats its own people is an internal matter, not accountable to the 'judgement' of others nor subject to international jurisdiction. This does not mean that interested parties could not, as Wolff put it, 'intercede' on the behalf of the oppressed. By 'intercession', Wolff was referring to non-military forms of interference ranging from friendly advice to diplomatic protests. Ultimately, though, the matter is an internal one, protected by domestic jurisdiction, which means that those interceding on behalf of the persecuted 'may rightly be refused'.³⁹

The Swiss diplomat Emerich de Vattel also played a significant, if not greater role in the development of sovereignty and non-intervention in international law. While Vattel conceded that intervention to help the oppressed was a justified exception, he nevertheless endorsed Wolff's idea

³⁶ Wolff, *Jus Gentium*, p. 132; p. 327.

³⁷ *Ibid.*, p. 332.

³⁸ *Ibid.*, p. 132.

³⁹ *Ibid.*, p. 325.

that state sovereignty and non-intervention should be the primary rules of international society. This should not be a surprise since much of Vattel's work was drawn from Wolff—something which Vattel himself conceded. By popularising Wolff's ideas, Vattel helped entrenched Wolff's dictum of non-intervention in public international law. Compared to Wolff's turgid prose, Vattel's *Le Droit des gens* was elegant and highly readable. It was reprinted and translated into many languages. It was the most frequently cited compendium on international law of its time. It played an important role in raising the consciousness in Europe of a body of the law of nations which was being developed to regulate the relations between states.

Wolff's and Vattel's conceptions of a society of states, with entrenched rules of sovereignty and non-intervention, was by the nineteenth century becoming a part of what was frequently referred to as the 'public law of Europe'.⁴⁰ These rules were widely affirmed in international legal treatises. Among international lawyers, it was widely agreed that sovereignty and non-intervention should be the rules and not the exceptions. These rules were also reinforced by the growing acceptance of legal positivism which had largely replaced the natural law doctrines of early international law. A common criticism of natural law school of international law is that it is often based on vague notions of universal principles which conflate law with morality. Legal positivism, on the other hand, claims to ground international law in the 'will of states' as observed in practice.⁴¹ Rather than rely on abstract principles drawn from the Judeo-Christian ethics, positivists view treaties and agreements adopted between states as the vital source of international law.

Legal positivism had important implications for the question of humanitarian intervention. Nineteenth-century positivists asserted that states

⁴⁰ Nardin, *Law, Morality, and the Relations of States*, p. 65.

⁴¹ *Ibid.*

are the only subjects of international law with rights and duties. Conflicts *between* states concern international law while conflicts *within* a state do not. In other words, individuals are relegated as objects of the state. For positivists, the natural law theory of humanitarian intervention based on universal solidarity had by the nineteenth century become an anachronism. It was becoming increasingly difficult to argue that what happens inside the walls of the state could be a concern for outsiders. W. E. Hall summed up the position of legal positivism:

International law professes to be concerned only with the relations of states to each other. Tyrannical conduct of a government towards its subjects, massacres and brutality in a civil war, or religious persecution, are acts which have nothing to do directly or indirectly with such relations.⁴²

Despite this trend, however, the concern for those who live under oppressive regimes and those who suffer from the brutality of internecine civil wars still remained. The naturalist sentiment that the 'dictates of humanity' must not be ignored remained a constant rejoinder in both the theory and practice of the relations between states. Tales of persecution and oppression in Greece and Lebanon (in the first half of the nineteenth century) and Bulgaria (during the late nineteenth century) fueled anti-Ottoman sentiments, making it difficult for European ministers to defend a strict policy of non-intervention. As a consequence, there was deep-rooted tension between the rules of international society and the desire to accommodate humanitarian intervention. As Fenwick observes, 'the writings of jurists of the late nineteenth century reflect the conflict between the response to the

⁴² Hall, *A Treatise*, p. 302. Carnazza Amari argued along the same lines that '[b]arbarous or civilized, lenient or violent, reactionary or progressive, it is she, and she alone, who has the right to govern the State'. Quoted in Payn, 'Intervention Among States', p. 76.

appeal of oppressed peoples and the maintenance of the principle of the independence of states which was becoming more and more sacred as the years went by'.⁴³

These tensions resolved in several ways. One possibility was simply to debunk the entire notion that the relations of states must be regulated by any fixed principles of international society. The cleavage between the law of Europe and the practice of states was perhaps as wide during the nineteenth century as it ever has been. Britain, for example, was both the great champion of the rule of non-intervention as well as its chief violators. Lord Palmerston and Gladstone both preached the rule of non-intervention but practiced the policy of intervention.⁴⁴ The notion of non-intervention as a rule governing the relations between states was ridiculed by many. The July 3, 1847 edition of the *Spectator* editorialised: 'Of all delusions the supposititious doctrine of non-intervention is the greatest. . . [it] has no more than a verbal existence'.⁴⁵ If states commonly disregarded this principle for the pursuit of national interest, why should this be a greater obstacle when states were interested in liberating the oppressed from a tyrannical government?

Another way around the problem was to argue that humanitarian intervention was an exception to the rules of international society. In this sense, the conflict between sovereignty and humanity no longer poses a problem because mitigating circumstances justify the breach of laws. It could be argued that extraordinary crimes committed by the government against its own people create such an exceptional set of circumstances that the general rules of international society do not apply. Lawrence argued that

⁴³ Charles G. Fenwick, 'Intervention: Individual or Collective', *American Journal of International Law* 39 (1945), p. 650.

⁴⁴ Trachtenberg, 'Intervention in Historical Perspective', p. 22.

⁴⁵ 'Nonintervention A Humbug', *The Spectator* 3 July 1847, p. 637-638.

‘intervention on the ground of humanity’ can be justified on the premise that in a ‘great emergency’ we can ‘set aside everyday constraints’. This is not to say, he continued, that these rules are not useful or observed. In fact, it is fair to say that sovereignty and non-intervention are observed ninety-nine percent of the time.⁴⁶

But since the non-European world was the target of humanitarian intervention, there is another interpretation. Nineteenth-century international society relied on a dual-system of rules, or two sets of rules of international society. There is a long tradition of this bifurcation in international law and relations.⁴⁷ The existence of this practice is well known.⁴⁸ Sir Robert Peel, in the Commons debate over the annexation of Sind in 1843, remarked that ‘there is some great principle at work whenever civilization and refinement come into contact with barbarism, which makes it impossible to apply the rules observed amongst more advanced nations’.⁴⁹

⁴⁶ Lawrence, *Principles*, p. 127.

⁴⁷ Jackson, *Quasi-states*, p. 54-55.

⁴⁸ See Ali A. Mazrui, *Cultural Forces in World Politics* (London: James Currey, 1990), especially Chapter 1.

⁴⁹ Quoted in David Gillard, ‘British and Russian Relations with Asian Governments in the Nineteenth Century’, *Expansion of International Society*, p. 90. Martin Wight also cites Hegel in this respect: ‘The civilised nation is conscious that the rights of barbarians are unequal to its own and treats their autonomy only as a formality’. See Wight, *International Theory*, p. 54. This view was not universally endorsed. Richard Cobden, for example, raised the motion ‘That, in the opinion of this House, the policy of non-intervention, by force of arms, in the internal political affairs of Foreign Countries, which we profess to observe in our relations with the States of Europe and America, should be observed in our intercourse with the Empire of China’. See House of Commons Debate, May 31, 1864, *Hansard CLXXV*, p. 933; John Morley, *The Life of Richard Cobden*, p. 909. This was an important early attempt to put China on a juridical equal footing with the rest of Europe and the United States. While Cobden did not outright suggest that China was a ‘civilised’ state, he urged that the same rules and obligations which bind ‘other great Powers of the civilised world’ should apply to China. See John Bright and

This dualism had important implications for intervention in general, and more importantly, for humanitarian intervention. The most apparent manifestation of this duality is the existence of graded sovereignty, or what Hedley Bull refers to as 'gradations of independence'.⁵⁰ The international society of sovereign states had expanded considerably during this period. This should not be confused with the expansion of 'civilised' international society, which was a more restrictive concept (discussed in the next chapter). The term 'expansion' is used here to mean that communities acquired the status of sovereignty. What was originally an European based society of sovereign states had expanded to incorporate former European colonies in the Americas such as the United States, Chile and Guatemala. As former colonies of European powers, these states had little difficulty gaining admission to the society as juridical equals of European states.

More complicated, however, were the entry of states (empires) in Asia such as Turkey, Persia, China, Korea, and Siam. Their sovereign status was not in dispute. In fact, the concession treaties signed between Europeans and the rulers of Asia were contingent on the sovereign status of the ruler with authority to conclude treaties. Similarly, it can even be argued that African societies were considered sovereign entities. The territory of African tribes was not designated *terra nullius* (as Australia was). As Charles Alexandrowicz and M.F. Lindley have argued, the acquisition of territory in Africa was largely through cession, occasionally through conquest, but rarely on the claim of *terra nullius*. That much of Africa was acquired through cession implied, as Jackson observes, that for the Europe's title to be valid, African states had to have been considered sovereign.⁵¹

James Rogers, eds., *Speeches by Richard Cobden on Questions of Public Policy*, 2 vols. (London, 1870), vol. 2, p. 138.

⁵⁰ Bull, *Expansion of International Society*, p. 125.

⁵¹ Jackson, *Quasi-states*, p. 70.

The entry of much of the non-European world into the society of states did not imply that they were equal sovereigns. There was a clear hierarchy of sovereignty. While Turkey and China were acknowledged to be sovereign states, they were not considered as 'full members' of the Family of Nations; at the same time they were not 'absolutely outside the Family of Nations'.⁵² They were somewhere in between. The fact that the European powers imposed restrictions on their sovereignty through the practice of extraterritoriality explicitly demoted their status. Similarly, Europe conferred sovereign status on the African tribes, but clearly did not view them as in possession of equal sovereignty. As M. F. Lindley pointed out, the sovereign status of African tribes was inferior, labeled as 'native sovereign' as compared to the 'advanced sovereign' status of the European powers.⁵³

The formal classification of the world into different grades of statehood suggests that sovereignty was an elastic concept: who has it?, how much of it?, and how strong is it? were relative to one's position in the hierarchy. Since non-intervention is the corollary of sovereignty, the degree to which one state was protected from intervention was likewise dependent on one's status. This had important implications for the non-Western world. Under this regime it was not contradictory for proponents of non-intervention to qualify that the rule does not apply outside the select circle of 'civilised' states. Vattel, for all his discussion of non-intervention, clearly did not consider the less 'civilised' as the beneficiaries of this rule. In fact, he permitted the more 'industrious' states the right to conquer and colonise the land of 'savages' if they fail to fulfill the natural law obligation to cultivate the land.⁵⁴

⁵² Oppenheim, *International Law*, vol. 1, p. 148-49.

⁵³ See M. F. Lindley, *The Acquisition and Government of Backward Territory in International Law* (London: Longmans, Green and Co., 1926), chapter 21.

⁵⁴ See Vattel, *Law of Nations*, p. 38 and p. 85.

John Stuart Mill made a similar conclusion, although for different justifications. Like many liberals of his day, Mill maintained that a people has a right to govern and manage its own affairs without interference from foreign powers. This rule is grounded in the notion the state represents the collective expression of individual rights: to interfere with the collective organisation is to violate the liberty of the individual. Yet, Mill was clear that the rule of non-intervention did not apply universally. He wrote:

To suppose that the same international customs, and the same rules of international morality, can obtain between one civilized nation and another, and between civilized nations and barbarians, is a grave error.⁵⁵

In addition, the same 'sacred duties which civilized nations owe to the independence and nationality of each other' do not apply in the relations with those who fall outside the perimeters of this society.⁵⁶ It is telling that Mill did not say 'every country' is entitled to govern its own affairs, but instead remarked that 'every *civilised* country is entitled to settle its internal affairs in its own way'.⁵⁷

In essence, nineteenth-century international society resolved the tensions by establishing a 'double standard'.⁵⁸ 'Civilised' states would respect the rules of international society in their relations with each other. The unspoken assumption was that they would not undertake humanitarian interventions against each other. It was no mere coincidence that in state

⁵⁵ Mill, 'A Few Words on Non-Intervention', p. 772.

⁵⁶ *Ibid.*; Lorimer, *Institutes*, vol. 1, p. 3.

⁵⁷ J. S. Mill, Letter to James Beal, 1865, *The Letters of John Stuart Mill*, ed. Hugh S. R. Elliot (London: 1910), p. 24. Emphasis added.

⁵⁸ Trachtenberg, 'Intervention in Historical Perspective', p. 23.

practice there were few examples of humanitarian interventions against 'civilised' states. Yet, these same restrictions did not apply to those outside this circle. While states beyond the domain of 'civilised' states enjoyed some protection under international law, they were not considered equal sovereigns nor could they invoke the principle of non-intervention in their own defence. Hence, humanitarian intervention was not problematic against the non-European world since it was accepted that the sovereignty of 'lower' peoples could be trampled upon in the 'higher' interests of 'humanity'.

Collective Authorisation

A third possibility to consider is collective authorisation. By collective authorisation, I am referring to humanitarian interventions authorised, that is, approved formally by international or regional organisations. This is not a novel concept in international relations. For many, collective authorisation remains the best solution to reconciling the conflicts between rules affirming the states system and the normative claims of human rights.⁵⁹ This section will first establish how international law since 1945 has shifted clearly against the legality of humanitarian intervention and then examine the various attempts put forth to reinterpret these developments. I will then consider collective authorisation as a way around these obstacles.

The United Nations system poses the conflict between state sovereignty and human rights in striking terms. On the one hand, the Charter clearly indicates that the protection of the political and territorial integrity of all states is central to the system. Article 2(1), for example, contains the important clause of 'sovereign equality' which gives all states the same

⁵⁹ Damrosch right points out that the UN Charter reflects two sets of core values— 'state system values' and 'human rights values'—which are sometimes at odds with each other. See Damrosch, *Enforcing Restraint*, p. 8.

juridical rights and duties as others.⁶⁰ Article 2(7) affirms the rule of non-intervention by maintaining that nothing in the Charter permits the UN to intervene in the domestic affairs of member states.⁶¹ Article 2(4) imposes greater restrictions with regards to when states can lawfully resort to force by requiring that member states 'refrain from the threat or use of force against the territorial integrity and political independence of any state'.⁶² This, of course, does not affect the right to use force in self-defense permitted under Article 51 or as a part of enforcement measures taken under Chapter VII.

At the same time, the commitment to human rights has been expressed with greater cogency than ever before. The list of human rights law is well-known. Articles 1, 55, 56 of the Charter clearly consider the respect and promotion of human rights as one of its purposes. Article 55, paragraph (c), for instance, defines one of the UN's goals as the promotion of 'universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion'. This has been reiterated in numerous declarations such as the Universal Declaration of Human Rights (1948), the Convention on the Prevention and Punishment of the Crime of Genocide (1948), the International Covenant on Civil and

⁶⁰ The obvious problem with this is that not all states have equal rights as evidenced by the fact that permanent members of the Security Council have veto power.

⁶¹ Article 2(7) states: 'Nothing contained in the present Charter 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; but the principle shall not prejudice the application of enforcement measures under Chapter VII.'

⁶² 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 manner inconsistent with the Purposes of the United Nations.'

Political Rights (1966), and the Helsinki Agreement (1975).⁶³ There has also been a growing body of international humanitarian law, or the laws of war, enumerating the duties of belligerents with respect to prisoners of war and non-combatants. There is a 'convergence' between international humanitarian law and human rights law in that it is no longer possible to assert that human rights can be downgraded during armed conflicts.

This duality between state rights and human rights has become a central issue in the attempt to reconcile humanitarian intervention with the UN system. This has often been attempted by reinterpreting the rules of international society, especially the rule of non-intervention. It has been argued, for example, that Article 2(7) does not proscribe humanitarian interventions by individual states since it refers explicitly to the non-intervention of the *United Nations* in the domestic affairs of member states but does not mention non-intervention of *states* in inter-state relations.⁶⁴ This is a weak assertion since the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States (1965)⁶⁵ and the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States (1970)⁶⁶ explicitly prohibit *states* from intervention.

Another argument is that Article 2(7) does not restrict the use of force to protect human rights because gross abuse of human rights does not fall

⁶³ For more on human rights and international law, see Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford: Clarendon Press, 1989); Paul Sieghart, *The Lawful Rights of Mankind* (Oxford: Oxford University Press, 1986); Jack Donnelly, *Universal Human Rights in Theory and Practice* (London: Cornell University Press, 1989).

⁶⁴ See Fonteyne, 'Customary International Law'.

⁶⁵ UNGA Res. 2131 (XX), 21 Dec. 1965.

⁶⁶ UNGA Res. 2625 (XXV), 24 Oct. 1970.

under the reserved domain of 'domestic jurisdiction'.⁶⁷ While this argument often relies on natural law theory of human rights as prior to the rights of states, this argument has also appealed to state practice. It could be argued that the practice of states has since 1945 gradually chipped away at 'domestic jurisdiction' as an all-encompassing shield to deflect international action. The UN, for example, has maintained that apartheid and the denial of self-determination by colonial powers constitute grievous violations of human rights and cannot be protected under the principle of 'domestic jurisdiction'. Fonteyne concludes, '[a]s a consequence, human rights have been placed outside the reach of the article 2(7) intervention ban, even in cases not amounting to a threat to the peace'.⁶⁸

Proponents of humanitarian intervention have also sought to challenge the scope of Article 2(4). It has been argued Article 2(4) does not apply in this context since the use of force for humanitarian aims is not directed at altering the 'territorial and political independence' of the target state.⁶⁹ Military intervention in this context is viewed as a surgical operation, entailing a swift entry, precise application of force to protect the victims, followed by a quick exit, all without altering the political landscape or territorial boundaries. Or, another interpretation focuses on the purpose upon which force is used. Article 2(4) urges all members to refrain from the use of force or the threat to use force 'in an manner inconsistent with the Purposes of the United Nations'.

⁶⁷ As Professor Ermacora concludes, gross abuse of human rights is 'no longer essentially within the domestic jurisdiction of States'. Quoted from Fonteyne, 'Customary International Law', p. 240-42.

⁶⁸ Fonteyne, 'Customary International Law', p. 241.

⁶⁹ Michael W. Reisman and Myres S. McDougal, 'Humanitarian Intervention to Protect the Ibos'. *Humanitarian Intervention and the United Nations*. ed. Richard B. Lillich. (Charlottesville, V.A.: University Press of Virginia, 1973), p. 177; Richard B. Lillich, 'Forcible Self-Help by States to Protect Human Rights', *Iowa Law Review* 53 (1967), p. 336.

But since the respect for human rights is clearly one of the purposes of the UN as set forth in Articles 1, 55, and 56, intervention to protect these rights would not be in violation of Article 2(4).

These attempts to accommodate humanitarian intervention during the Cold War period have largely fallen outside the mainstream of the opinion of jurists. Attempts to reconcile the 'human rights values' part of the Charter with the 'states system values' by reinterpreting the Charter are not very convincing. While the Charter sets forth an impressive agenda to promote human rights, there is 'persuasive evidence of a distinct hierarchy of purposes' in the Charter.⁷⁰ It is no accident that the discussion of human rights features most prominently under Chapter IX, which deals with issues of economic and social cooperation, and not under Chapter VII, which addresses threats to peace and security. Those who would like to see humanitarian intervention a part of international law, therefore, have engaged in an exercise of wishful thinking.

Indeed, if we look at the activities of the United Nations, the rulings of the ICJ, and the practice of states between 1945 and 1991, there is much evidence to support the claim that the protection of human rights ranked far below the protection of state sovereignty.⁷¹ The General Assembly's Declaration on the Inadmissibility of Intervention in Domestic Affairs of States (1965)⁷² and Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States (1970)⁷³ condemned

⁷⁰ Tom Farer, 'An Inquiry into the Legality of Humanitarian Intervention', *Law and Force in the New International Order*, eds. Lori Fisler Damrosch and David J. Scheffer (Boulder, C.O.: Westview Press, 1991), p. 190.

⁷¹ *Ibid.*

⁷² UNGA Res. 2131 (XX), 21 Dec. 1965.

intervention in the widest sense, prohibiting its practice even for the protection of nationals abroad. As Akehurst argues, 'if the use of force to protect nationals is illegal, the use of force to protect non-nationals (humanitarian intervention) must a fortiori be illegal'.⁷⁴ Moreover, during the drafting of these declarations, humanitarian intervention was raised as a possible exception but was ultimately rejected. The failure of the Declarations to mention humanitarian intervention as an exception was therefore not an omission.⁷⁵

It could perhaps be argued that delegates who drafted the two Declarations were not addressing intervention in the context of extraordinary emergencies, such as when a genocide is occurring. But even intervention to end genocide was ruled out as a lawful cause for humanitarian intervention. This question was put directly to members of the Special Committee on the Question of Defining Aggression of the UN Legal Committee in 1954. The representative of Greece raised the hypothetical whether State A, after making appeals for UN action in vain, could lawfully intervene to protect its 'co-national minority' facing the possibility of genocide in State B. This was a reformulation of the classic justification for humanitarian intervention in the nineteenth century. The prevailing opinion, however, was that armed intervention even to end genocide would constitute an act of 'aggression'.⁷⁶ If genocide—the most shocking and intolerable form of human rights abuse—cannot give justifiable grounds for intervention, this clearly would rule out

⁷³ UNGA Res. 2625 (XXV), 24 Oct. 1970. As Chapter 3 points out, the 1970 Declaration is generally viewed as sceptical of humanitarian intervention even though it contains language suggesting that foreign assistance to those seeking self-determination from foreign domination may be justified.

⁷⁴ Akehurst, 'Humanitarian Intervention', p. 109.

⁷⁵ *Ibid.*

⁷⁶ Official Records, General Assembly, 9th Sess., 6th Committee, 409th Meeting.

other forms of intervention to protect a people whose suffering has yet reached genocidal proportions.⁷⁷

When considered in conjunction with the judgments of the International Court of Justice, UN decisions have added significance. While the Court has not rendered a judgment on the legality of humanitarian intervention per se, its rulings on intervention in general make it difficult to assert such a right. In the *Corfu Channel* case, the Court was highly sceptical of what it termed the 'alleged right of intervention', noting that such a right has been the privilege of powerful states, giving rise to the most 'serious abuse' and thus has no 'place in international law'.⁷⁸ In the *Military and Paramilitary Activities In and Against Nicaragua* case (*Nicaragua v. United States* 1986), the Court ruled that US activities against Nicaragua constituted unlawful intervention. It reaffirmed in the strongest language of the duty of non-intervention in the internal affairs of states. Even if the United States had genuine human rights concerns in Nicaragua, it is beyond the scope of international law to use force to achieve those aims.⁷⁹

⁷⁷ That the Legal Committee in 1954 considered intervention to stop genocide as 'aggression' seems counter-intuitive, especially given the adoption of the Convention on Genocide only a few years before. International politics could probably explain much of the force behind this decision. The fact that the issue was raised by Greece was important. In raising this matter, Greece was referring to its co-nationals in Cyprus and Turkey. The protection of national minorities has long been a source of conflict between Greece and Turkey; any declaration which would seem to suggest that Greece could forcibly protect its co-nationals in Turkey would have threatened the peace and security of the region. Moreover, Israel, which led to effort to condemn Greece's suggestion, was concerned that this form of intervention would give its Arab neighbours a pretext to intervene on behalf of the Palestinians. The highly politicised nature of UN suggests that its declarations and decisions are not always good material for ascertaining principles and norms international law and state practice.

⁷⁸ ICJ Reports (1949), p. 35.

⁷⁹ ICJ Reports (1986), pp. 106-110. Also see Nigel S. Rodley, 'Human Rights and Humanitarian Intervention: The Case Law of the World Court', *International and Comparative Law Quarterly* 38 (1989), pp. 321-333.

In state practice, humanitarian intervention has not been met with wide acceptance either. When India invaded Bangladesh in 1971, for example, its actions were denounced by the Security Council as violations of the principles of non-intervention and territorial and political sovereignty. Similarly, Vietnam's intervention in 1979 to end Pol Pot's genocidal campaign was condemned on similar grounds. In the Security Council debate, not one state mentioned the right of humanitarian intervention despite the acknowledged atrocities.⁸⁰ Particularly revealing is the fact that while India's initial justifications appealed to humanitarian sentiments and the desire to protect the victims of the civil war, it later amended its comments to exclude references to the right of humanitarian intervention. The fact that even India, which could have put forth a strong case for humanitarian intervention, chose not to reflected the widespread scepticism toward military interventions to protect human rights in post-1945 international society.⁸¹

The conclusion to draw from this is that between 1945 and 1991, the balance was tipped in favour the rules regarding sovereignty, non-intervention, and restrictions on the use of force (except in self-defense and Chapter VII enforcement measures). Does this mean that there is no room for humanitarian intervention? This is where collective authorisation becomes important. The idea of intervention authorised by the international society, of course, predates the contemporary debate. Christian Wolff, for example, maintained that '[i]n the supreme state the nations as a whole have a right to coerce the individual nations, if they should be unwilling to perform their

⁸⁰ Akehurst, 'Humanitarian Intervention', pp. 96-97.

⁸¹ Farer, 'Human Rights in Law's Empire: The Jurisprudence War', p. 122.

obligation, or should show themselves negligent in it'.⁸² This is significant considering Wolff's strong views of the duty of non-intervention which proscribed the use force to forestall persecution or liberate an oppressed people.⁸³ But what Wolff prohibited individual states to undertake he allowed the society of states as a whole to do.

In the nineteenth century, many publicists viewed unilateral interventions as wholly different from collective interventions: the former was illegitimate while the latter was acceptable. On this Hall's discussion is instructive. Having rejected claims for any right of intervention, he went on to consider that '[a] somewhat wider range of intervention than that which is possessed by individual states may perhaps be conceded to the body of states, or to some of them acting for the whole in good faith with sufficient warrant'.⁸⁴ Hall thus maintained that an intervention undertaken for humanitarian reasons in which 'the whole body of civilised states have concurred in authorising it' would have a greater prospect of legitimacy.⁸⁵ While he did not go on to say that collective authorisation made it lawful, he nevertheless conceded that it would be justifiable according to morality and policy.⁸⁶

⁸² Wolff, *Jus Gentium*, p. 14. Charles Beitz offers this point as a counter-claim to Wolff's absolutism. See Beitz, *Political Theory and International Relations* (Princeton, N.J.: Princeton University Press, 1979), p. 75.

⁸³ Wolff, *Jus Gentium*, p. 132.

⁸⁴ Hall, *A Treatise*, p. 307.

⁸⁵ *Ibid.*, p. 304.

⁸⁶ Also, Arnold McNair and Hersch Lauterpacht, who edited the Fourth and Fifth editions of Oppenheim's *International Law* respectively, asserted that while public opinion may be in favour of humanitarian interventions, from a legal point of view such actions were in violations of the law. But should these interventions be 'exercised in the form of a collective intervention of the Powers', that would be a different matter. Both the McNair and Lauterpacht editions contain the same passage. See McNair,

It could be argued that during the 1945-1991 period, the Security Council had the authority to authorise humanitarian interventions. During the Legal Committee debates concerning intervention to end genocide, some delegates argued that it was justified only when taken in pursuance of Security Council authorisation under Chapter VII.⁸⁷ There is nothing in the UN Charter which prohibits international society, acting through the Security Council, to authorise a military intervention to protect human rights. While the Council's actions against Southern Rhodesia and South Africa were limited to coercive sanctions, there were no legal obstacles preventing it from authorising a military intervention.⁸⁸ For various reasons, the Cold War being a primary obstacle, the Security Council never invoked Chapter VII to authorise a humanitarian intervention to protect the victims of oppression and mass human rights deprivation.

The actions taken by the Security Council since 1991 represent an important transition. No longer paralysed by Cold War tensions, the Council has become more robust in authorising member states to use force for humanitarian protection. In doing so, it has moved toward a broad interpretation of 'threat to peace', applying this concept to internal repression, disorder, and gross violations of international humanitarian law. The Council, for example, declared the repression of the Kurds in Northern Iraq a threat to 'international peace and security'.⁸⁹ While the Security Council was careful not to authorise the use of force, it did not protest when the US resorted to force to protect the Kurds. In Somalia in 1992, the Council was

Oppenheim's International Law, 4th ed., vol. 1, p. 270; Lauterpacht, *Oppenheim's International Law*, 5th ed., vol. 1, p. 255.

⁸⁷ See Brownlie, *Use of Force*, p. 342.

⁸⁸ Lori Fisler Damrosch's essay, 'Commentary on Collective Military Intervention to Enforce Human Rights', in *Law and Force in the New International Order*, p. 218.

⁸⁹ SC Res. 688, 5 April 1991.

more direct in authorising the use of force in response to what it viewed as a threat to peace and security. Operative clause 10 of the Resolution 794 stated: 'Acting under Chapter VII of the Charter of the United Nations, authorizes the Secretary-General and Member States. . . to use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia'.⁹⁰

The actions of the intervenors in both cases were viewed as legitimate because of Security Council authorisation. The question, though, is whether collective authorisation must come from the Security Council or could regional organisations authorise interventions. This issue is open to interpretations. Article 53 of the Charter states that no 'enforcement action' by regional organisations can be taken without authorisation by the Security Council. When the US attempted to use the Organisation of American States to legitimate its intervention in the Dominican Republic in 1965, the Soviet Union objected on the grounds that 'enforcement action' by regional organisations violated Article 53.⁹¹ The Cuban delegate further argued that the creation of an inter-American force was illegal under Article 53. The US insisted that its actions and its efforts to enlist the OAS did not violate Article 53. The Dominican Republic episode suggests that the authority of regional organisations to authorise humanitarian interventions without the authorisation of the Security Council was in much doubt during the Cold War period.

The civil war in Liberia in 1989-90, however, offered a chance for regional organisations to assert its authority in responding to humanitarian

⁹⁰ SC Res. 794, 3 December 1992.

⁹¹ Leland M. Goodrich, et. al., *Charter of the United Nations: Commentary and Documents*. 3rd. ed. (London: Columbia University Press, 1969), p. 366.

crises.⁹² The intervention by ECOWAS invigorated the right of regional organisations to authorise humanitarian intervention. International reaction toward ECOWAS's intervention suggests at minimum that international society tolerates regional authorisation.⁹³ In this particular example, the Security Council's failure to address the problem was considered legitimate grounds for self-help. Whether regional organisations have legitimate authority to authorise humanitarian interventions still remains unclear. Tom Farer represents a prevailing opinion that while regional organisations can authorise interventions, they should report their activities to the Security Council for review.⁹⁴ The preference should be to secure prior Security Council approval, but this need not be absolute when the Council either fails to address the issue (as in Liberia) or is perhaps impeded by a veto.⁹⁵

Whether an international or regional organisation authorises intervention is not crucial to our discussion. The point is that collective authorisation represents a balance between rules governing the state system and concern for human rights. It is premised on the notion that the rules of international society, while vital to the existence of this society, are by no means absolute. When a state joins international and regional organisations, it is in fact making a pledge to forfeit absolute liberty when the society has

⁹² For much of 1990 Liberia was engulfed in a bloody civil war after Charles Taylor invaded with a rebel group on 24 December 1989 to oust President Samuel Doe. The fighting claimed the lives of 5,000, produced nearly half a million refugees, and displaced nearly one million people within Liberia (*Keesing's*, July 1990). Efforts were made to enlist the Security Council in January 1990. When it became clear that the Security Council would not intervene, Nigeria, Ghana, The Gambia, Guineas and Sierra Leone deployed a 4,000 strong force as a part of a joint peacekeeping force authorised by the Economic Community of West African States (ECOWAS).

⁹³ Farer, 'A Paradigm of Legitimate Intervention', p. 336.

⁹⁴ *Ibid.*, p. 333.

⁹⁵ *Ibid.*

deemed its actions in violation some common standards. The rules of international society, therefore, must give way to the collective will of international society. Once an authorised international body has weighed in, no state can claim an inviolable right of sovereignty and domestic jurisdiction. Hence, if humanitarian intervention is properly authorised by a wide body of states through an international forum, the tension between the rules of society and the claims of humanity no longer becomes a problem. When a state either violates common standards of human rights or slides into anarchy, the collective will of either the international or regional community can assert a right of intervention for humanitarian protection and the restoration of order.

As this chapter has illustrated, humanitarian intervention has been a problem in international law. The degree to which it is incompatible with the rules of international society has undergone important changes. Under the natural law based international society envisioned by Gentili and Grotius, the rights of humanity were balanced with the rights of sovereign prince. The notion of universal jurisdiction to protect the oppressed, a residuum of medieval theory, was still viable. In the nineteenth century, European states observed the rules among themselves but intervened against the wider world. Under the UN system, these approaches are no longer acceptable. The rules of state sovereignty, non-intervention, and limitations on violence are firmly in place. To justify humanitarian intervention on account of natural law obligations or the 'barbarian option' has been discredited. The theory and practice of humanitarian intervention, if they are to remain within the confines of international law, must rest with collective authorisation.

CHAPTER SIX

HUMANITARIAN INTERVENTION AND WESTERN VALUES

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This chapter explores the relationship between humanitarian intervention and the extension of Western values in international society. I argue that humanitarian intervention has been a means by which European states have imposed their values on states outside the inner circle. This chapter first examines briefly the problem of Western values in international society and explores the structure of international society as a series of concentric circles, with Western states at the center. It then argues how humanitarian intervention has been associated with the extension of Christian international society and 'civilised' international society. The question I turn to at the end of the Chapter is whether humanitarian intervention still performs—or seeks to perform—this function in the post-Cold War international society.

Western Values and International Society

The subject of Western values in international relations is a well-explored topic. It is often raised in the context of Western colonialism and imperialism. Ali Mazrui, for example, in *Cultural Forces in World Politics* examines the historical legacy of an international society originally composed of European Christian states in which international law was essentially the

laws of Christian Europe.¹ He raises the familiar argument that cultural forces have shaped the stratification of the world long before there was an economic hierarchy. More recently, Edward Said's *Culture and Imperialism* presents an insightful account of how European imperialism was rooted in cultural perceptions of the non-European world, a legacy which he contends is still with us in the way the West perceived and portrayed Iraq during the Gulf War.² As both Mazrui and Said have shown, the impact of Western culture, values, and ideas on the non-European world is a subject which cannot be detached from the analysis of world politics.

To the credit of the international society tradition, the forces of European culture and values in international relations are not overlooked. In contrast to Mazrui or Said, the international society perspective views the role of Western influences in a more positive light. For example, Martin Wight's essay 'Western Values in International Relations' details the positive impact of Western values: the modern states system, the concepts of state sovereignty and non-intervention, ideas of international solidarity, international society, and international law are important Western contributions. In addition, Western values have contributed to shaping conceptions of international morality, in particular, the 'place of the individual conscience in international politics, and the notion of ethical limits to political action'.³

Hedley Bull has also considered this question. The distinctive feature of past international societies, he points out, has been the 'common culture or civilisation' shared by member states. By this he means common religion, ethical code, language, or artistic traditions. The question for Bull and other

¹ Ali Mazrui, *Cultural Forces in World Politics* (London: James Currey, Ltd., 1990), in particular Chapter 1.

² See Edward Said, *Culture and Imperialism* (London: Vintage, 1994),

³ Wight, 'Western Values', p. 120.

international society theorists is the impact of decolonisation and the rise of a multicultural world to international society. If, as Bull observes, seventeenth and eighteenth-century international societies were held together by a shared 'sense of common values',⁴ it is important to ask whether this quality still exists in contemporary international society. If not, can contemporary international society function in the absence of common values? More importantly, how does the inner core of states sharing the same values expand or transmit these values to others?

It is to the second question that the rest of this chapter examines. Intervention as a means of spreading the values of international society has long been recognised. Martin Wight observes, for example, that intervention was a necessary tool by which to enforce and impose international standards.⁵ James Mayall contends that in Europe's relations with the non-European world, intervention became the instrument for 'extending the frontiers of the "known world" and bringing the benefits of enlightenment to peoples whose condition could be regarded as a function of their ignorance'.⁶ Similarly, Carsten Holbraad asserts that 'the idea of joint intervention by the great powers to extend Christian civilization' was an important part of nineteenth-century progressive thought.⁷ More recently, Marc Trachtenberg's essay 'Intervention in Historical Perspective' argues that intervention in the nineteenth century resulted in the 'imposition of European values'.⁸

⁴ Bull, *Anarchical Society*, p. 16.

⁵ Wight, 'Western Values', p. 111.

⁶ Mayall, 'International Society and International Theory', p. 127.

⁷ Carsten Holbraad, *The Concert of Europe: A Study in German and British International Theory* (London, 1976), p. 163.

⁸ Trachtenberg, 'Intervention in Historical Perspective', p. 21-27.

How extensively humanitarian intervention has played in this process, however, has not been fully appreciated. Nor has there been an attempt to consider the values imposed. As I show in this chapter, the relationship between the two can be traced to the origins of the theory and practice of humanitarian intervention. This is most evident in the nineteenth-century context of 'civilisation'. While the concept of 'civilisation' in international society has been fully explored by C. H. Alexandrowicz, Georg Schwarzenberger, and more recently, Gerrit Gong, the implications of 'civilisation' for humanitarian intervention have not been examined.

The Concentric Circles⁹ of International Society

Perhaps a good way to examine the function of humanitarian intervention in the expansion of Western values is to consider such interventions as undertaken by a select group of states against the wider world. This implies the stratification of states between 'us' versus 'them', or an 'inner' versus 'outer'. A familiar way of envisioning this division is to imagine a series of concentric circles. From this perspective, humanitarian intervention is an act undertaken by the inner circle against the outer circles. The aim is to diffuse or transmit the values of the inner core so that with time the frontiers of the inner circle can expand to incorporate states at the fringes of international society.

⁹ I am indebted to Buzan for the phrase 'concentric circles'. He writes, 'This interrelationship tells us much about how and why the contemporary global international society is organized into concentric circles'. Barry Buzan, 'From International System to International Society: Structural Realism and Regime Theory Meet the English School', p. 351. This concept, however, is a part of the international society tradition and has been used by others in exactly those terms.

As Galtung's work on the core-periphery structure of imperialism has shown, sometimes simple models have enormous explanatory power.¹⁰ For this reason, other scholars have employed the concentric analogy to conceptualise international politics.¹¹ International society as concentric circles not only has useful explanatory power, but accurately reflects the way Europeans have historically perceived themselves. They had self-consciously defined themselves against those outside the walls of their circle. The ancient Greeks viewed themselves as forming a civilised polity surrounded by barbarians. For Grotius, the same divide existed, although under different names. As Martin Wight notes, for Grotius there 'is an outer circle that embraces all mankind, under natural law, and an inner circle, the *corpus Christianorum*, bound by the law of Christ'.¹²

Seventeenth and eighteenth-century peace plans expressed this idea in terms of a 'frontier' between the Christian Republic and the rest of the world.¹³ Sully's 'Grand Design', published as a part of his *Memoirs* in 1638, clearly defined an inner circle which represented the 'whole Christian republic' surrounded by 'infidels'. Poland, which was at the edge of the 'frontier', was encouraged to augment its defensive perimeter by 'annexing to it whatever should be conquered from the infidels adjoining its own

¹⁰ Johan Galtung, 'A Structural Theory of Imperialism', *Journal of Peace Research* 13 (1971), pp. 81-94.

¹¹ Trachtenberg, 'Intervention in Historical Perspective', p. 16; Tucker, *Inequality*, p. 9; Buzan, 'From International System to International Society', p. 351; Sieghart, *The Lawful Rights of Mankind*, p. 49.

¹² Quoted in Jackson, *Quasi-states*, p. 54; Bull, Kingsbury, and Roberts, *Hugo Grotius and International Relations*, p. 14.

¹³ For a discussion on cognitive and political frontiers, see Mayall, 'International Society and International Theory', p. 126-130.

frontiers'.¹⁴ This view of Europe was not too different than that of the Crusades. And like the Crusades, Sully advocated internal unity to face a common external enemy. The aim was to 'establish peace in Europe and convert the continual wars among its princes into a perpetual war against the infidels'.¹⁵

Similarly, Saint-Pierre's *Project for Perpetual Peace* (1712) viewed Europe as a fortress in a literal and figurative sense. European states which bordered the Turks, African Corsairs, and the Tartars were referred to as 'frontier countries'.¹⁶ To defend Europe against the outsider, he advocated the construction of many 'fortresses' at the edges of Europe. Moreover, he reassured that 'the troops of the federation, posted on the *frontiers* of Europe, will stand permanently ready to drive back the invader'.¹⁷ Yet, fortress Europe was also a figurative demarcation of the world. Inside the walls of Europe lived a people, as he put, 'united by identity of religion, of moral standard, of international law'.¹⁸ In other words, they shared what Bull calls 'common values'. Those on the outside were perceived as unknown, unintelligible, and dangerous.

The idea of a civilized polity surrounded by the unknown savagery was not exclusively European. This construct was influential in eighteenth and nineteenth-century America. As Christopher Thorne argues, one cannot understand American political culture without recognising the pervasive

¹⁴ *Grand Design of Henry IV. From the Memoirs of Maximilien de Bethune Duc de Sully*, ed. David Ogg (London: Peace Book Company, 1939), p. 39.

¹⁵ Sully, 'Grand Design', p. 47.

¹⁶ Abbé de Saint-Pierre, 'Project for Perpetual Peace' (1712), *Rousseau on International Relations*, eds. Stanley Hoffmann and David Fidler (Oxford: Clarendon Press, 1991), p. 82.

¹⁷ *Ibid.*, p. 83.

¹⁸ *Ibid.*, p. 56.

influence of the 'frontier' mentality.¹⁹ This was especially true in the nineteenth century as expansion pushed the frontiers of American polity further West. In the influential essay 'The Significance of the Frontier in American History', published in 1880, Frederick Jackson Turner argued that the existence of the frontier has been an important element in the 'perennial rebirth' of America. Yet, the frontier was also a point of conflict where different civilisations clashed. Or more accurately, it was the fault line between different levels of civilisation. Turner wrote, 'the frontier is the outer edge of the wave—the meeting point between savagery and civilization'.²⁰

The conflict between savagery and civilisation which Turner spoke of was not a passing idea. This became a formal classification of states when the notion of concentric circles became an explicit part of nineteenth-century international law. W. E. Hall maintained that 'States outside European civilisation must formally enter into the *circle* of law-governed countries'.²¹ James Lorimer's 1883 *Institutes of the Law of Nations* proclaimed that '[a]s a political phenomenon, humanity, in its present condition, divides itself into three *concentric zones or spheres*—that of civilised humanity, that of barbarous humanity, and that of savage humanity'.²² Publicists and statesmen self-consciously viewed Europe and its offsprings in the Americas as a 'great Commonwealth of civilized States'.²³ To be a member of the inner circle was

¹⁹ On the continuing relevance of the 'frontier' in American political culture, see Christopher Thorne's 'American Political Culture and the Asian Frontier, 1943-1973' in *Proceedings of the British Academy* LXXII (1986), pp. 339-394.

²⁰ See Turner's essay in *The Frontier in American History* (1920), p. 3.

²¹ Hall, *A Treatise*, p. 14. Emphasis added.

²² Lorimer, *Institutes*, vol. 1, p. 101. Emphasis added.

²³ Creasy, *Platform*, p. 45.

to enjoy rights and privileges not accorded to outsiders. Conversely, to be outside this circle was to be castigated as 'beyond the pale of civilisation'.²⁴

Given this historical legacy, one can make a strong claim that the contemporary world is still divided along similar lines, with Western states still at the center. Mazrui, for example, interprets Article 4(1) of the UN Charter which restricts membership to 'peace-loving States' as continuation of the historical polarisation of states. Presumably Mazrui had in mind an international society divided between 'peace-loving States' as the inner circle surrounded by 'war-monger States' as the outer circle. Gerrit Gong, following the lead of Georg Schwarzenberger, questions whether the distinctions between states which observe 'human rights' and those which do not represent another manifestation of the divide between 'civilised' states and 'uncivilised'.²⁵ It is not clear that the demise of the idea of 'civilisation' has entirely removed such hierarchical distinctions from international politics.

To what extent, though, is it accurate that humanitarian intervention has been an instrument of the inner circle against the outer? To what extent has humanitarian intervention been the process for the imposition of Western values? Let us test this thesis against the three main phases in the history of the idea. I will explore, first of all, the role of humanitarian intervention in expanding the values of Christian international society from the sixteenth century to the end of the eighteenth century. Secondly, I will examine humanitarian intervention during the nineteenth century and consider how it was influential in imposing the values of 'civilised' international society.

²⁴ For examples of the rhetorical usage of 'beyond the pale of civilisation' in British foreign policy, see James Joll, ed., *Britain and Europe, Pitt to Churchill 1793-1940* (London: Nicholas Kaye, 1950), pp. 155, 167, 185.

²⁵ Gong, *The Standard of Civilization*, p. 91; Georg Schwarzenberger, *A Manual of International Law*, 4th ed. (London: Stevens and Sons, 1960), vol. 1, p. 14.

Finally, I ask whether a similar process at work with liberal ideologies and intervention. Is liberal international society imposing the values of liberalism on other states through humanitarian intervention?

Christian International Society

To argue that Christian states of Europe imposed their values on the wider world seems to contradict everything advocated by the natural law lawyers. The classical international lawyers maintained that differences of religion could not be a pretext for war. This was especially true in the late sixteenth and early seventeenth century when Europe was ravaged by religious wars. Gentili therefore concluded that the desire to defend a religion or impose a religion upon another people is an 'invention of the most greedy of men and to be cloaks for their dishonesty'.²⁶ This applied to the non-European world as well. One consistent theme of Vitoria's *De Indis* was the restriction that Europe had no right to wage war in the New World on the grounds that the Indians were unbelievers or that they practiced a non-Christian religion.

This did not mean that Christian Europe was completely prohibited from extending Christian values in the New World. On the contrary, natural law principles of open borders, hospitality, and brotherly correction meant that Europe could rightly send missionaries to preach the Christian faith. This was a right which the natives could not resist. Obstructing the work of missionaries was considered a just ground for war. The right to preach, however, did not give Europe the right to impose the civilisation and values of Christian Europe on the non-European world.²⁷ The operative word here

²⁶ Gentili, *DIB*, p. 40.

²⁷ On Suárez's attitude on this issue, Boyle writes: 'any motive of simply getting out to the new world and civilizing 'savages' hardly appealed

is 'impose', which suggests the use of armed force. On this Grotius was clear. Quoting Plutarch, Grotius remarked: 'To wish to impose civilisation upon uncivilized peoples is a pretext which may serve to conceal greed for what is another's'.²⁸ Similarly, Wolff maintained that 'if some barbarous and uncultivated nation is unwilling to accept aid offered to it by another in removing its barbarism and rendering its manners more cultivated, it cannot be compelled to accept such aid'.²⁹

While natural law theorists seem unequivocal on this matter, they left open an avenue by which Europe could in fact impose its values through the justification of humanitarian intervention. As discussed in Chapter Three, Vitoria's discussion of intervention arose out of the dual problems of whether Spain could lawfully wage war to protect the newly converted Christians from persecution as well as the innocent endangered by cannibalism and human sacrifice. The desire to protect innocents from such 'barbaric' practices has been a central element of the history of humanitarian intervention. Suárez, Gentili, and Grotius endorsed Vitoria's discussion.³⁰ Gentili wrote, for example, 'I approve of the more decidedly of the opinion of those who say that the cause of the Spaniards is just when they make war upon the Indians, who practised abominable lewdness even with beasts, and who ate human flesh, slaying men for the purpose'.³¹ Grotius similarly

to Suárez as a just reason for making war'. John P. Boyle, 'Francisco Suárez: On Preaching the Gospel to People Like the American Indians', *Fordham International Law Journal* 15 (1991-1992), pp. 940-41.

²⁸ Quoted in Bull, Kingsbury, and Roberts, *Hugo Grotius and International Relations*, p. 47.

²⁹ Wolff, *Jus Gentium*, p. 89.

³⁰ Suárez, *Selections*, p. 826; Grotius, *DJBP*, p. 505.

³¹ Gentili, *DIB*, p. 122.

remarked that 'we do not doubt that wars are justly waged against those. . . who feed on human flesh'.³²

The spectre of waging war to banish such practices was more than a theory endorsed by natural law writers. The history of the conquest of the New World is intertwined with the Europe's moral repugnance toward such acts. The Castilians were shocked that the Aztecs practiced human sacrifice and cannibalism.³³ On one particular occasion, Cortés demanded that Montezuma abandon such rites.³⁴ As Marina Warner argues, allegations of 'barbaric' rites were used by Europeans as evidence that the Indians and Europeans did not belong in the same circle. While theologians such as Vitoria gave theological and legal approval, castigating the Indians as beyond the domain of Christian Europe was also to justify the use of force. This divide between the inner and the outer was necessary in vindicating European presence. Warner writes, 'cannibalism helped to justify the presence of the invader, the settler, the trader bringing civilisation'.³⁵

Natural law theorists did not consider this as contradicting the requirement that Europe should not impose its civilisation abroad. Wars waged to end barbaric misrule are not the same as wars of conquest or religion. The distinction is that the former are for the 'defense of the innocent' while the latter are self-interested wars. Nor did this undermine the prohibition against waging wars on account of crimes against nature. Vitoria went to great lengths to argue why sodomy, fornication, or pederasty cannot be stopped with armed force even though these acts violate divine and

³² Grotius, *DJBP*, p. 505.

³³ Hugh Thomas, *The Conquest of Mexico* (London: Pimlico, 1993), p. 108.

³⁴ *Ibid.*, p. 318.

³⁵ Marina Warner, 'Cannibal Tales: The Hunger for Conquest', *The Reith Lectures, The Independent*, 24 February 1994, p. 18.

natural law.³⁶ Cannibalism and human sacrifice were different because these rites involve the killing of innocent people. In this context armed intervention was justifiable since natural law permitted a right for any ruler to defend innocent from unjust death. For this reason, Gentili concluded that wars to protect the innocent are just and beneficent, no different than a 'war of defence'.³⁷

This subtle distinction may not be persuasive for many. It is difficult to distinguish between permitting a right of humanitarian intervention to protect innocents from such barbaric practices and the imposition of European values. For the natives, cannibalism and human sacrifice were intrinsically linked with religious and cultural rites. To the Europeans, these rites violated the values of Christian Europe. Advocates of intervention, however, never framed their discussion in such particularistic terms. Instead, they relied on the presumption that their values were universal. Since all men, by natural reason, would not voluntarily offer themselves to human sacrifice and cannibalism, these rites are contrary to natural law.³⁸ And because natural law forbids such practices, international law follows suit. Thus Vitoria concluded that such acts are against the 'law of nations' (*ius gentium*); they are 'held in abomination by all nations who have a civil and humane way of life'.³⁹

It could be argued that this does not constitute an imposition of European values, but the enforcement of international law and norms. This is

³⁶ Vitoria, *Dietary Laws*, p. 224.

³⁷ Gentili, *DIB*, p. 125; Suárez, *Selections*, p. 826-27.

³⁸ Vitoria, *Dietary Laws*, p. 207.

³⁹ *Ibid.*, 207-209; Gentili, *DIB*, p. 124.

a bit circular since the laws and norms were established by Europeans.⁴⁰ The law of nations during this time was inextricably linked with natural law. Natural law, in turn, was closely associated with Christian divine law. Natural law writers such as Grotius conflated these principles. It is not unreasonable to argue, therefore, that to enforce international law is to enforce the laws of Christian Europe. By waging war to ban such rites, European powers had in fact imposed their values. This is made all the more evident by the fact that the non-European world was considered naturally as a part of international society. By making international society universal, European states could justify their actions in the New World as enforcing the law of nations which was binding on all people.

Civilised International Society

By the nineteenth century, notions of Christian Europe and Christian international society were replaced by the more secular concepts of 'civilisation' and 'civilised' international society.⁴¹ What was once regarded as the 'Christian law of nations' was replaced by the 'international law of civilized nations'.⁴² An important factor in this transition was the fact that international society was no longer considered all-inclusive. Whereas natural law theories of international society maintained that all communities are, by nature, part of international society, nineteenth-century positivists maintained

⁴⁰ Oppenheim wrote: 'The Law of Nations is a product of Christian civilization and represents a legal order which binds states, chiefly Christian, into a community'. Quoted in Hodges, *Doctrine of Intervention*, p. 94.

⁴¹ Rougier observed, what was once called 'the community of the Christian States' is now the 'community of the civilized States'. Quoted in Payn, 'Intervention Among States', p. 190.

⁴² Georg Schwarzenberger, 'The Rule of Law and the Disintegration of International Society', *American Journal of International Law* 33 (1939), p. 64.

that membership must be attained. This is often referred to as the doctrine of 'constitutive recognition',⁴³ which, according to Alexandrowicz, did not exist prior to the nineteenth century.⁴⁴ The concept of 'civilisation' became the barrier of entry for this 'constitutive recognition' regime. It was assumed that 'a certain level of civilisation was expected of communities' before they could be considered full members of international society.⁴⁵

This regime divided the world into concentric circles, with 'civilised' international society at the centre surrounded by 'semi-civilised' and 'uncivilised' peoples. Humanitarian intervention was considered the natural consequence in the interaction between higher and lower civilisations. E.D. Dickinson observed, it 'is suggested that the so-called interventions in the interests of humanity, wherever they can be justified legally, are really the consequence of differences in civilization'.⁴⁶ Hence, 'intervention is the normal order in connection with the protection of backward or partially civilized states. It is always held in reserve in the protection of more advanced states'.⁴⁷ The reasoning is a bit tautological: intervention against 'uncivilised' states is justifiable because their status as 'uncivilised' states makes them the legitimate targets of intervention.

⁴³ Jackson, *Quasi-states*, p. 61.

⁴⁴ C. H. Alexandrowicz, 'New and Original States', *International Affairs* 45 (1969), p. 467.

⁴⁵ Jörg Manfred Mössner, 'The Barbary Powers in International Law (Doctrinal and Practical Aspects)', *Grotian Society Papers 1972: Studies in the History of the Law of Nations*, ed. C. H. Alexandrowicz (The Hague: Martinus Nijhoff, 1972), p. 206; Hall, *A Treatise*, 2nd ed., p. 40.

⁴⁶ E. D. Dickinson, *The Equality of States in International Law* (Cambridge: Harvard University Press, 1920), p. 262.

⁴⁷ *Ibid.*, p. 263.

In this context humanitarian intervention was something 'civilised' states did to those in the outer circles.⁴⁸ This idea was explicitly expressed by some. The Russian publicist Frederic de Martens, for example, argued in *International Law of Civilized Nations* that the right is one not between 'civilised' states, but a right to be imposed on 'non-civilised' peoples. He wrote, 'Vis-a-vis non civilized nations. . . intervention by the civilized powers is in principle legitimate. . . These motives are not applicable to the relations between civilized powers'.⁴⁹ The French publicist Antoine Rougier asserted similarly that the first rule in determining the proper authority for humanitarian intervention must be the requirement that 'a State. . . be a full member of the society of the civilised States'.⁵⁰ It is also significant that W. E. Hall considered humanitarian intervention as having a greater prospect for legitimacy if it was authorised by 'the whole body of civilised states'.⁵¹

The aim of humanitarian intervention was to impose the values of 'civilisation' or 'civilised' international society. We can observe this process at work, first of all, by considering the recurring idea of 'humanity' and its relationship to 'civilisation'. The right of humanitarian intervention was presented as a right emanating from 'humanity'. Interventionists often justified forcible protection of another people as actions taken on behalf of 'humanity' to protect the interests and laws of 'humanity'. The Treaty of

⁴⁸ Kebedgy offered a dissenting opinion: 'In addition to the great difficulty of tracing with any degree of accuracy the line of demarcation between civilized states and those which are not, this restriction would seem to be useless, for why should we tie our hands in advance, if perchance atrocities should come to be committed by the sovereign or the government of a state which would be called civilized?'. Quoted in Stowell, *Intervention and International Law*, p. 65.

⁴⁹ Quoted in Fonteyne, p. 219.

⁵⁰ Alpheus Snow, *The Question of Aborigines in the Law and the Practice of Nations* (Washington, D. C.: Washington Printing Office, 1919), p. 189.

⁵¹ Hall, *A Treatise*, p. 304.

London of 1827 authorising the collective intervention in Greece cited that the 'common sentiments of humanity' were outraged by the Turkish mistreatment of the Greeks. Similarly, Lord Palmerston invoked the 'common grounds of humanity' to justify why Britain should protect the rights of Christians in Turkey in 1848. In the writings of publicists, the terms 'general interests of humanity'⁵² or 'right of humanity or human society'⁵³ were frequently used.

Despite the common usage, there was no definition of what precisely was meant by 'humanity' or who were included as a part of 'humanity'. Our understanding of 'humanity' today may differ from the way 'humanity' was intended to mean in the nineteenth century. It is crucial not to impart our own meanings back. 'Humanity' was often used in conjunction with 'civilisation'. At times, the two were used interchangeably. We see this in the codified laws of war. The Declaration of St. Petersburg (1868) linked the laws of civilised warfare with the 'demands of humanity'.⁵⁴ The Martens Clause in the Preamble to the 1899 Hague Convention II stipulated that the codified laws of war did not supplant customary law as it had been established between 'civilised nations, from the laws of humanity, and the requirements of the public conscience'.⁵⁵ Likewise, the Preamble of 1907 Hague Convention IV stated that one of the goals of the Convention was the 'desire to serve, even in this extreme case, the interests of humanity and the ever progressive needs of civilisation'.⁵⁶

⁵² Phillimore, *Commentaries*, p. 441.

⁵³ Payn, 'Intervention Among States', p. 72.

⁵⁴ Roberts and Guelff, *Documents*, p. 30.

⁵⁵ *Ibid.*, p. 4.

⁵⁶ *Ibid.*, p. 45.

We see this usage in legal treatises as well. In discussing the rules of warfare, for instance, Wheaton pointed out that the policy of destroying entire villages was 'so revolting to humanity, and so repugnant to the sentiments and usages of the civilized world'.⁵⁷ There was also a tendency to use 'humanity' as a synonym for 'civilisation'. Mill, for example, argued for a right of intervention should events in another country cause a 'scandal to humanity' or should they practice a form of warfare 'repugnant to humanity'.⁵⁸ Hall wrote how the laws of war since the seventeenth century have 'been continuously softened with the growth of humanity'.⁵⁹ In both examples 'humanity' could be replaced with 'civilisation' without really altering the meaning. There was, then, not much distinction between the understanding of 'humanity' and 'civilisation'.

In essence, the right to intervene on behalf of 'humanity' was the right to intervene on behalf of 'civilisation' or 'civilised states'. When proponents of intervention argued the need to uphold the 'laws of humanity', they were defending the 'laws of civilisation'. Just as the laws and norms of 'civilisation' were devised by an European standard, so too was the loose notion of the 'laws of humanity'. A good illustration can be found the Institute of International Law's conference in 1888 to determine the duties of 'civilised' states regarding the treatment of aborigines. Article VII of the declaration adopted emphasised that the natives were permitted to practice their religion so long as their worship was not contrary to the 'laws of morality and humanity'.⁶⁰ The definition of 'morality' and 'humanity' was defined

⁵⁷ Wheaton, *Elements*, p. 373.

⁵⁸ Mill, 'A Few Words on Non-Intervention', p. 766 and p. 744.

⁵⁹ Hall, *A Treatise*, 4th ed., p. 72.

⁶⁰ Snow, *Question of Aborigines*, p. 174.

according to European ethics and mores. Religious rites such as cannibalism and human sacrifice were viewed as violations of this standard.

Another way to make this argument is to show specifically how humanitarian intervention advanced the values of 'civilised' international society. To do this, we must first ask what precisely were the values of this society and relate them to humanitarian intervention. As Gerritt Gong's study illustrates, the 'standard of civilisation' used to measure the level of 'civilisation' entailed certain abilities or qualities. Gong lists five main components: (1) the guarantee of basic rights and properties, especially of foreigners; (2) organised political society with effective administration; (3) adherence to international law, including the laws of war; (4) fulfillment of international duties and obligations; (5) conformity to the norms and practices of 'civilised' international society, which would rule out the practice of suttee, polygamy, and slavery.⁶¹ The basis of the standard was essentially derived from the mores and laws of European civilisation. In principle states aspiring for membership would be able to understand the requirements for membership and undertake reform accordingly. But as Gong rightly points out, the standard was often obtuse, murky, and subjective.⁶²

Of the requirements of 'civilisation' listed above, the laws of civilised warfare and standards regarding the treatment of the population are relevant to the discussion of humanitarian intervention. The standard of civilisation played an important role in the development of the laws of warfare. It was increasingly recognised that 'civilised' states fought wars as humanely as possible. A direct correlation was made between the advances of civilisation with advances in the laws of war. Francis Lieber's 'Instructions for the Government of Armies in the Field' issued to Union troops during the

⁶¹ Gong, *The Standard of Civilization*, p. 15-21.

⁶² *Ibid.*, p. 21.

American Civil War (also known as the Lieber Code), for example, began with 'as civilization has advanced during the last centuries' as a preface to outlining the laws of warfare.⁶³ Similarly, the 1868 St. Petersburg Declaration outlawing the use of explosive projectiles under 400 grammes noted that 'the progress of civilization should have the effect of alleviating as much as possible the calamities of war'.⁶⁴

It was presumed that states belonging to 'civilised' international society fought according to the laws of 'civilised' warfare. The ability or the willingness to observe these rules was one manifestation of 'civilisation'. This affected those outside this circle as well. States aspiring for membership to this society must observe these rules in order to be considered 'civilised'. During the collective intervention of the Boxer Rebellion in 1900, for example, Japan was vindicated as a 'civilised' power when its troops fought with discipline and according to the laws of 'civilised warfare'.⁶⁵ Equally important, the ability to observe the laws of civilised warfare was the first criterion for a warring faction in a civil war seeking to the 'recognition of belligerency'.⁶⁶ Whether a belligerent was recognised as an independent state was contingent not only on effective control, but that it 'employed civilised methods' in attaining its independence.⁶⁷

Conversely, states which violated these rules were viewed as outside the inner circle of 'civilised' international society. Halleck, for example,

⁶³ Quoted in Gong, *The Standard of Civilization*, p. 75.

⁶⁴ Gong, *The Standard of Civilization*, p. 75.

⁶⁵ *Ibid.*, p. 141.

⁶⁶ Lawrence, *Principles*, p. 353; Westlake, *International Law*, vol. 1, p. 51; Hall, *A Treatise*, p. 35.

⁶⁷ Manfred Nathan, 'The Renaissance of International Law', *The Grotius Society Publications* 3 (London: Sweet & Maxwell, Ltd., 1925), p. 31.

maintained that certain practices such as poisoning the water-supply were 'condemned by all civilised nations'. States resorting to such measures 'would be regarded as an enemy to the human race and excluded from civilised society'.⁶⁸ To be excluded, though, was to be considered as 'uncivilised' and 'barbarous'. Special disdain was directed toward governments who committed acts of 'uncivilised warfare' against their own people. Creasy's discussion on the laws of war, for example, focused on the 'hideous barbarism' of the Ottomans who forcibly moved the Greek population elsewhere so that their land could be 'repeopled' by the Egyptians. Such atrocities were the speciality of the 'Oriental conquerors'. Creasy pointed out that even if the 'civilized nations of the West' had ever committed such acts, it would have occurred several centuries ago.⁶⁹

That the laws of civilised warfare should be observed in international wars was clear. To what extent the laws of civilised warfare applied to internal conflicts, however, was not an issue addressed comprehensively. This is important to our discussion of humanitarian intervention. As Chapter Four demonstrated, a wide body of opinion maintained that not everything was permitted in internal conflicts. Governments seeking to suppress revolts, rebellions, or open civil wars were not entitled to use any means at their disposal nor inflict excessive suffering. Fiore, for example, maintained that all sides of an internal conflict should observe the limits imposed by the laws of war. He wrote:

Let us assume, for instance, that a prince, in order to put down a revolution, violates all the generally recognized laws of war, has prisoners executed, authorises destruction, looting, arson, and encourages his supporters to commit those odious actions and others of the same kind; or

⁶⁸ Halleck, *International Law*, 4th ed., vol. 1, p. 620.

⁶⁹ Creasy, *Platform*, p. 430.

alternatively, let us suppose that it is the faction that [seized power] which engages in similar crimes.⁷⁰

What rights do third parties have in such situations? For Fiore, concerned states could intervene since the violation of the laws of war, even if confined within the borders of a sovereign state, nevertheless constitutes a violation of international law. Such disregard for civilised warfare constitutes an injury not only on the affected party but 'against all civilized States'.⁷¹

The classic cases of humanitarian intervention, Greece (1827) and Cuba (1898), were interventions prompted in part by the nature of the cruel warfare in civil wars. We can view these interventions as attempts to impose or enforce the rules of civilised warfare. While these rules were not codified until later, Turkey's actions were measured according to the customary laws of war. The brutal campaign against the Greeks outraged 'civilised' Europe. The Pasha's troops were accused of indiscriminate slaughter, extermination, and repopulation. It is interesting that Europe's intervention was later viewed as a precedent of intervention to uphold the laws of civilised warfare. A. G. Stapleton wrote in 1866 that '[i]t was not until the mode in which hostilities were conducted by the Turkish general, Ibrahim Pacha, became at variance with the recognized rules of civilised warfare, so as to give every European State a right of war against Turkey. . .'.⁷²

In Cuba, Spain's policy of 'reconcentrados' was viewed with similar disdain. President McKinley made clear the American government's displeasure of the means of warfare employed against the insurgents. In a

⁷⁰ Quoted in Fonteyne, 'Customary International Law', p. 221.

⁷¹ *Ibid.*

⁷² Augustus Granville Stapleton, *Intervention and Non-Intervention; or the Foreign Policy of Great Britain from 1790 to 1865* (London: John Murray, 1866), p. 32.

cable to the Spanish Minister, US Secretary of State demanded that Spain conduct its campaign 'according to the military codes fo civilization'.⁷³ In his address before Congress on 11 April 1898 seeking Congressional approval for US intervention, McKinley maintained that the charge of uncivilised warfare justified intervention. He pointed out how the conflict in Cuba had 'by the exercise of cruel, barbarous, and uncivilized practices of warfare, shocked the sensibilities and offended the humane sympathies of our people'. McKinley's speech was full of such rhetoric. In total, he mentioned 'humanity' (and its other forms such as 'human') thirteen times and 'civilisation' (and its other forms such as 'civilised' and 'uncivilised') seven times. He concluded that 'in the name of humanity, in the name of civilization, in behalf of endangered American interests which give us the right and duty to speak and to act, the war in Cuba must stop'.⁷⁴

How a state treats the inhabitants within its territory was also a concern of 'civilised' international society. Whether one state was 'civilised' or not depended on whether it can guarantee minimum protection of the population. It was often asserted that the 'rights of humanity' were immutable. The precise content of these rights, however, was something which was never clearly defined. It was widely assumed that 'civilised' states possessed the machinery of Western legal systems with codified laws which were enforced. As Westlake observed, 'where there is a society, there is law'.⁷⁵ For Rougier, 'civilisation' meant the existence of 'law of life, the law of liberty, and the law of legality'.⁷⁶ This meant that the 'individual shall not be subjected to a regime of a purely arbitrary character, and that the

⁷³ *F.R.U.S.* (1897), p. 507.

⁷⁴ *Messages*, vol. 13, pp. 6281-6292.

⁷⁵ Westlake, *Collected Papers*, p. 2.

⁷⁶ Snow, *Question of Aborigines*, p. 189.

established legal order shall not be arbitrarily violated'.⁷⁷ By Rougier's standard, a state which massacres its people or cannot not maintain a minimum degree of security for its inhabitants would fail the test of 'civilisation'.

By the late nineteenth century, it was widely accepted that a 'civilised' state treated its people with a minimum degree of humanity. During the interwar period, this requirement was an important factor in determining whether a state was a part of 'civilised' international society or not. In a speech before the Grotius Society in 1922 on the subject of the Baltic minorities, Baron Heyking observed:

No State is any longer permitted to disregard the main ethical principles on which the civilised world is based and which are anchored in the moral conscience of mankind. For instance, no nation is at liberty to introduce slavery, wholesale slaughter of innocent beings, robbery, immorality, and so forth. The Ten Commandments have a supernational authority. This is the reason that the Russian Soviet Republic is still not considered as a legitimate Power—although it has succeeded in holding its own—simply because it stands outside the pale of civilisation in its practice of rapine, murder, intimidation and bad faith. States which adopt similar methods, *in toto* or in part, endanger their position as members of the civilised commonwealth.⁷⁸

The important point is that not only were states which conducted their internal affairs in such 'uncivilised' manner cast outside the 'pale of civilisation', but that they were considered legitimate targets of humanitarian intervention. 'Civilised' international society believed that it had the right of

⁷⁷ *Ibid.*

⁷⁸ Baron Heyking, 'The Baltic Minorities', *Transactions of the Grotius Society* 7 (1922), p. 121.

intervention when a state mistreats its citizens beyond acceptable standards. Given the fact that Russia was relatively powerful, Heyking perhaps would not advocate the forcible protection of the Baltic minorities, a move which could have produced greater calamities and human suffering. Yet, such types of interventions were common in the nineteenth century against relatively weak states such as Turkey or China. Turkey was the target of numerous interventions justified by humanitarian desires to protect the persecuted, most notably in 1827, 1860-61 and again in 1877. Similarly, China became a target of intervention during the Boxer Rebellion of 1900 when the Ch'ing Court was unable to restore order and protect the lives and properties of subjects and foreigners.

To become a target of humanitarian intervention confirmed their status as outside 'civilised' society. Take, for example, the European intervention in Lebanon in 1860-61. The 1856 Treaty of Paris signed by the European powers and Turkey represented an attempt to bring Turkey into the European society. Yet, there was doubt whether the Sultan could fulfill the obligations as a European state.⁷⁹ The atrocities committed against Christians in Lebanon confirmed for many Europeans that Turkey had not yet attained a level of 'civilisation' sufficient to admit it as a equal member. The violence in Lebanon undermined Europe's confidence of Turkey's ability to fulfill the requirements of civilisation. For some it was evidence of Turkey's inferior status as a 'barbarous' state. Colonel Charles Churchill, witness to the events in Lebanon, exemplified this attitude best when he recounted in 1862:

The late atrocious proceedings, however, in Syria,—supported, countenanced, and abetted, as they undoubtedly were, by the first dignitaries in the empire,—have placed the Turks in such a detestable point of view,—have so clearly and unmistakably evinced the savage propensities

⁷⁹ Gong, *The Standard of Civilization*, p. 114.

which still lurk in their nature,—have so terrifically revealed their unmitigated hatred to our common Christianity,—that all further patience with them is felt to be not only superfluous but absolutely criminal; and outraged religion, humanity and civilisation alike demand the adoption of some such measures by the powers of Europe as may show these semi-barbarians that there exists both the will and the power to curb their presumptuous and bloody fanaticism.⁸⁰

Similarly, if there was any doubt about China's status prior to 1900, the Boxer Rebellion confirmed for many China's substandard 'civilisation'. China was condemned by the 'civilised' powers as guilty of crimes against the standard of 'civilisation'. In a Joint Statement adopted on 22 December 1900, the 'civilised' powers justified its intervention in response to 'crimes unprecedented in human history, crimes against the law of nations, against the laws of humanity, and against civilization, were committed under peculiarly odious circumstances'.⁸¹ The irony, as Gong points out, is that while the Boxers sought to eliminate the imposition of Western 'civilisation' in China, their actions gave the 'civilised' powers additional justification to impose the standard of 'civilisation'.⁸² Further concessions and extraterritoriality treaties were extracted from the Ch'ing Court on the argument that the lives and properties of foreigners needed greater safeguards given the Court's inability to deal effectively with the Boxer uprisings.

We can see, therefore, that humanitarian intervention was practised by 'civilised' international society to impose or spread the values of 'civilisation'.

⁸⁰ Charles Churchill, *The Druzes and the Maronites Under Turkish Rule* (London: Bernard Quaritch, 1862), p. 7.

⁸¹ *F.R.U.S.* (1900), p. 244.

⁸² Gong, *The Standard of Civilization*, p. 142.

The intervenors consciously viewed their actions as fulfilling this function. Russia, for example, saw Europe's intervention in China as 'a victory of European culture over Chinese barbarism' and a successful 'dissemination of civilisation' in the Far East.⁸³ More precisely, nineteenth-century interventionists considered humanitarian intervention as an instrument to impose the values of civilised warfare and humane treatment of the people. As Trachtenberg points out, this process was not necessarily to 'push down' the 'less civilised' but to 'pull up' to higher standards of 'civilisation'.⁸⁴ It was only when states outside the inner circle of 'civilisation' were able to fulfill these requirements were they incorporated as full members of 'civilised' international society.

Liberal International Society

The standard of 'civilisation' as a barrier of entry to full membership in international society, largely unquestioned for much of the nineteenth century, was challenged toward the end of the Second World War.⁸⁵ Its historical associations with racial prejudice and imperialism eventually led to its demise.⁸⁶ Admission into international society was no longer contingent

⁸³ David Buck, ed., *Recent Chinese Studies of the Boxer Movement* (New York: M. E. Sharpe, Inc., 1987), p. 210.

⁸⁴ Trachtenberg, 'Intervention in Historical Perspective', p. 24.

⁸⁵ As Schwarzenberger observed, 'in pre-1939 international law, the standard of civilisation had almost reached a vanishing point'. Schwarzenberger, *Manual of International Law*, 4th ed., vol. 1, p. 13; Gong, *The Standard of Civilization*, p. 89.

⁸⁶ I am indebted to Sharon Korman's thesis *The Right of Conquest* (Oxford, D. Phil. 1993) for the word 'demise'. She uses the word in the context of the 'demise of the right of conquest.' But, the word 'demise' has been used frequently in the international law and relations literature. See, for instance, Hedley Bull's Introduction to Gong's *The Standard of Civilization in International Society*: 'In dealing with its place in international law he traces

on fulfilling subjective standards of justice devised by European states. H. A. Smith observed in 1938 that '[c]onduct which in the nineteenth century would have placed a government outside the pale of civilized society is now deemed to be no obstacle to diplomatic friendship'. This indicated that in effect 'we have now abandoned the old distinction between civilized and uncivilized States'.⁸⁷ Removing this distinction meant that states were now on a juridical equal footing and referred to simply as 'sovereign states'.⁸⁸

It would be wrong to conclude that the standard had disappeared entirely after 1945.⁸⁹ The Statute of International Court of Justice, signed in 1945, still contained an article referring to the 'general principles of law recognized by civilized nations' (Article 38). Similarly, the Convention on Genocide included the statement that 'genocide is a crime under international law. . . condemned by the civilized world'. Yet, the use of such language in international law and relations was increasingly viewed as anachronistic. When delegates of the International Law Commission in 1949 objected to the use of 'civilized countries' on the grounds that the expression 'dated back to the colonial era with its concept of the 'white man's burden'', it was agreed

both its rise, by the first decade of this century, to the status of an explicit legal principle, and also its subsequent demise' (p. ix). Also, Nardin writes, 'the demise of the conception of the society of states as an exclusively European society' in *Law, Morality, and the Relations of States*, p. 67; Roberts and Kingsbury put forth 'the demise of natural law among the dominant jurisprudential theories in most of the main Western legal systems', *Hugo Grotius and International Relations*, p. 33.

⁸⁷ Quoted in Schwarzenberger, 'The Rule of Law', p. 66.

⁸⁸ Jackson, *Quasi-states*, p. 143.

⁸⁹ While the idea of 'civilised states' as an explicit classification of states is no longer a part of contemporary international law, it is sometimes still used loosely. Michael Barnett writes that 'modern, civilized states do not possess colonies, they do not settle their differences through war, they do not violate basic human rights'. Michael N. Barnett, 'The United Nations and Global Security: The Norm is Mightier Than the Sword', *Ethics & International Affairs* 9 (1995), pp. 43-44.

that the phrase would not be used in future proceedings.⁹⁰ The process of decolonisation and the new assertiveness of the Third World against old barriers and attitudes of colonialism and imperialism after 1945 further undermined the standard of 'civilisation'.⁹¹

The decline of the standard in the post-1945 era should not be interpreted to mean that such standards or admissions requirements no longer play an important role in international relations. As Gong and others have suggested, the standard of 'civilisation' reappeared as the standard of 'human rights'.⁹² Since the nineteenth-century concept of 'rights of humanity' was intrinsically linked with 'civilisation', it is reasonable to interpret the current 'human rights' as something not altogether different. But what has emerged since the end of the Cold War is not just the establishment of 'human rights' as a standard, but a broader phenomenon of 'liberalism' or 'liberal internationalism'. It can be argued that the a new standard of 'liberalism' has replaced 'civilisation' and that a 'liberal' international society has replaced 'civilised' international society. The main distinction between the standard of 'human rights' which Gong describes and 'liberalism' is that the latter emphasises 'democratic governance' as constitutive requirement for membership.

⁹⁰ Gong, *The Standard of Civilization*, p. 90; *International Law Commission Yearbook* (1949), p. 170.

⁹¹ The resentment of the Third World to the standard of 'civilisation' was evident during the Cultural Revolution in China when Chinese pamphleteers pointed out the hypocrisy and double-standard of 'civilisation'. A pamphlet published by China's Foreign Language Press contrast the crimes committed by the Europeans with their own standard during the suppression of the Boxer Rebellion: 'Such were the atrocities committed by the scions of 'Western civilization'! Such were their 'civilised' and 'rational' deeds!. . . [they] kept on howling. . . that the Chinese were 'uncivilised'. . .' See *The Yi Ho Tuan Movement of 1900* (Peking: Foreign Languages Press, 1976), p. 96.

⁹² See Gong, *The Standard of Civilization*, p. 91.

The idea of an inner circle of liberal states, of course, can be traced back to Kant's *Perpetual Peace* (1795). For Kant, lasting peace is built upon a league or union of what Kant referred to as constitutional republican states.⁹³ Kant was very clear about who belongs in the inner circle. States must have a 'republican constitution' to become a member of the league. By 'republican', Kant was referring to a system of government much like what we would call 'liberal democracies' today. Implicit in this is the requirement that republican states are obligated to treat their citizens with a certain degree of minimum protection of basic rights in the sense that a republican constitution would grant 'legal equality' for everyone.⁹⁴ And in the relations between states, members of the league were expected to observe the primary rule of non-intervention in the internal affairs of others.⁹⁵

Neo-Kantians such as Michael Doyle,⁹⁶ John Rawls,⁹⁷ and Fernando Tesón⁹⁸ have revived Kant's conception of a liberal international society. Most significantly, John Rawls, whose domestic political philosophy has often been compared with Kant's, has recently extended his liberal conception of

⁹³ See Andrew Hurrell, 'Kant and the Kantian Paradigm in International Relations', *Review of International Studies* 16 (July 1990), p. 183.

⁹⁴ Immanuel Kant, *Political Writings*, ed. Hans Reiss, trans. H. B. Nisbet (Cambridge: Cambridge University Press, 1991), p. 99.

⁹⁵ *Ibid.*, p. 96.

⁹⁶ It was Doyle's essay, of course, which set off much of the Neo-Kantian discussion. It is interesting that the confrontation between the liberal and illiberal world, while often leading to disastrous policies, have also had the striking success in certain cases of an 'expansion of liberalism'. Michael Doyle, 'Kant, Liberal Legacies and Foreign Affairs', *Philosophy and Public Affairs* 12 (1983), p. 333.

⁹⁷ John Rawls, 'The Law of Peoples', *Critical Inquiry* 20 (1993-94), pp. 36-68.

⁹⁸ Fernando Tesón, 'The Kantian Theory of International Law', *Columbia Law Review* 92 (1992), pp. 53-102.

the well-ordered society to the international sphere. Like Kant, Rawls considers what he calls 'liberal' societies as distinct from non-liberal societies. Moving beyond Kant, he flushes out the argument more fully by defining who belongs at the periphery of liberal states. 'Hierarchical' societies may not respect human rights and freedom of conscience to the same extent as 'liberal' societies, but they were not excessive. 'Tyrannical' regimes, on the other hand, not only do not recognise human rights, but are the worst violators. This is strikingly similar to the nineteenth-century conception of 'civilised', 'semi-civilised', and 'uncivilised'. In the same way that some states were not considered full members of international society, Rawls brands 'tyrannical' regimes as 'outlaws', beyond the domain of the family of nations.⁹⁹

What is important, though, is that the conception of an inner core of liberal states has been more than a theory. Western democracies have perceived themselves self-consciously in this way for much of the post-1945 period. Needless to say, during the Cold War, Western democracies envisioned themselves confronting the anti-liberal forces of Communism. They established institutions not only for self-definition, but also to define what they are not. With the end of the Cold War, the self-conscious conception of an inner/outer divide has not changed, although the threat to the core of liberal states has changed. The perceived monolithic threat of Communism has now been replaced by disorder and chaos erupting at the peripheries of liberal international society. This is aptly characterised by Singer and Wildavsky as 'zones of peace' versus 'zones of turmoil'. By the 'zone of peace', they have in mind Western democracies which enjoy 'wealth

⁹⁹ Rawls, 'Law of Peoples', p. 66.

and democracy'. Much of the underdeveloped world falls into the 'zones of turmoil', condemned to a cycle of 'poverty, war, tyranny, and anarchy'.¹⁰⁰

What distinguishes the inner circle of liberal states from others is not necessarily defined according to economic indicators, although the liberal states are also the wealthiest. What sets them apart are shared values. Drawing from Rawls, the values of liberal international society can be summed up as: (1) belief in the free market economy; (2) observance of international law; (3) pacific settlement of disputes; (4) democratic governance; (5) respect for human rights, including international humanitarian laws.¹⁰¹ This list is similar to the values of 'civilised' international society. Both place great emphasis on a minimum degree of humanity with regards to how governments treat their own people. Just as states which formed 'civilised' international society were not supposed to massacre their own people or treat them capriciously, members of liberal international society are expected to do the same.¹⁰²

These values are used to differentiate the core from the periphery. Just as the standard of 'civilisation' was used to exclude some states from full membership, the standard of 'liberalism' is also used to restrict membership. The concern for 'human rights' is the most important element of this new standard. Before Greece was made a full member of the European Economic Community in 1981, it had to demonstrate that it would be able to meet the standards of the European Convention on Human Rights.¹⁰³ This has recently become a requirement for membership in the European Union.

¹⁰⁰ Max Singer and Aaron Wildavsky, *The Real World Order: Zones of Peace/Zones of Turmoil* (Chatham, New Jersey: Chatham House Publishers, Inc., 1993), p. 3-7.

¹⁰¹ Rawls, 'Law of Peoples', p. 46.

¹⁰² Gong, *The Standard of Civilization*, p. 91.

¹⁰³ *Ibid.*, p. 92.

Eastern European states seeking membership must meet the requirements of the European Union's human rights standards. Albert Weitzel writes, 'human rights are indivisible and a State aspiring to membership in the Council of Europe is expected to ratify the European Convention on Human Rights and thus to respect all the specific rights enshrined therein'.¹⁰⁴

Liberalism, however, is not intended to be entirely a standard for exclusion. On the contrary, the salient feature of liberal international society is its desire to enlarge and expand its boundaries. Thus, in 1993 US National Security Adviser Anthony Lake spoke of the 'strategy of enlargement, the enlargement of the world's free community of market democracies'.¹⁰⁵ Enlargement was to become the new mantra for post-Cold War US foreign policy, replacing the doctrine of Containment. In the 1994 State of the Union Address, President Clinton therefore proclaimed that 'Democracies don't attack each other'. The policy prescription which follows is that 'ultimately the best strategy to insure our security and to build a durable peace is to support the advance of democracy everywhere'.¹⁰⁶ In reading Clinton's speech one is reminded of Kant's dictum that the pacific union of republican states 'should eventually include all nations and thus lead to perpetual peace'.¹⁰⁷

The existence of a liberal international society and its expressed wish to enlarge this society raise two important questions. How, precisely, do we enlarge the frontiers of this society? What is the place of humanitarian

¹⁰⁴ Albert Weitzel, *Human Rights Law Journal* 15 (1994), p. 255.

¹⁰⁵ Quoted in Richard Haass, 'Paradigm Lost', *Foreign Affairs* 74 (1995), p. 44.

¹⁰⁶ Quoted in John M. Owen, 'How Liberalism Produces Democratic Peace', *International Security* 19 (1994), p. 87.

¹⁰⁷ Kant, *Perpetual Peace and Other Essays*, ed. Ted Humphrey (Indianapolis: Hackett, 1983), p. 117.

intervention? Kant himself never really resolved the first question. To enlarge the frontiers of liberal international society, one must, first of all, spread the values of this society. Of the values listed above, democratic governance and respect for human rights are central to our discussion. Liberal international society would like to extend these values to illiberal states. This does not mean that intervention is the best method. Even the most ardent interventionists readily acknowledge that the costs of using military force—in terms of political and financial costs, not to mention the loss of lives and the danger of widening conflicts—far outweigh the advantages under normal circumstances.

There are other methods which come with fewer costs. Diplomatic pressure remains the least coercive form. Then there is the familiar carrot and stick approach in its different forms. Recognition is an effective tool in persuading a people wishing to become a state to embrace the value of human rights. Once a people seeking recognition actually attains the status as a sovereign state, it could be enticed to conform to certain standards of free elections, protection of minorities, and minimum respect for human rights by the prospect of membership in regional economic and security arrangements. Liberal states, working in coordination, can use foreign aid effectively to promote human rights.¹⁰⁸ If this does not work, there is always the possibility of economic sanctions, applied either unilaterally or through a collective organisation.¹⁰⁹

There are circumstances, however, when the use of military force may be necessary. It is here that humanitarian intervention enters the framework.

¹⁰⁸ See Mick Moore and Mark Robinson, 'Can Foreign Aid Be Used to Promote Good Government in Developing Countries?', *Ethics & International Affairs* 8 (1994), pp. 141-158.

¹⁰⁹ Lori Fisler Damrosch, 'The Collective Enforcement of International Norms Through Economic Sanctions', *Ethics & International Affairs* 8 (1994), pp. 59-75.

On this question there is no consensus within liberal international society.¹¹⁰ As Michael Joseph Smith has observed, the liberal tradition in international relations has been divided between those who advocate non-intervention and those who embrace 'benevolent interventionism'. This dichotomy is a familiar mode of discourse in post-Cold War international relations. There are those who adhere to the non-interventionist tradition and are therefore uneasy with the resurgent doctrine of humanitarian intervention. While democratic governance and respect for human rights are important values, sceptics consider the principle of non-intervention as an even more important value. The best way to spread this value to other states is exemplary non-interventionism.¹¹¹ Otherwise, liberal states intervening to protect human rights are likely to encounter deaf ears and the charge of double-standard when they insist 'illiberal states' refrain from intervention.

At the same time, 'benevolent interventionism' remains an important principle of liberal international society. Just as nineteenth-century interventionists were imbued with a sense of humanitarianism, some contemporary liberals want to apply military force for the betterment of mankind. This is made all the more salient given liberal international society's commitment to what has become, at least in their eyes, the universal value of human rights. How strongly one feels about something is often measured by the willingness to use force, even at the risk of having to make sacrifices, to defend these values. Thus, for liberal international society to issue high-minded declarations on human rights but refrain from intervention

¹¹⁰ Stanley Hoffmann, 'The Crisis of Liberal Internationalism', *Foreign Policy*, no. 98 (Spring 1995), pp. 160-164; Michael Joseph Smith, 'Liberalism and International Reform', *Traditions of International Ethics*, eds. Terry Nardin and David Mapel (Cambridge: Cambridge University Press, 1992), p. 212-215.

¹¹¹ Smith, 'Liberalism and International Reform', p. 213.

when these rights are persistently and atrociously violated leads one to question its commitment.

While both views occupy a place within liberal international society, the push for humanitarian intervention is strong. This does not mean that liberal states should state undertake this form of intervention lightly. On the contrary, as Fernando Tesón argues:

So humanitarian intervention. . . is subject to a number of moral constraints. . . The Kantian should strive to expand the liberal alliance by those means that are best suited to the realities she has to face, reserving the use of force for the most serious cases of oppression[. . .]¹¹²

If, as Tesón rightly points out, humanitarian intervention should be reserved only for the 'most serious cases of oppression', this begs the question what falls under that heading. We return to the perennial question which 'civilised' international society had to address: if one accepts the proposition that humanitarian intervention is justifiable, the problem then is defining when intervention is justified and when the violations become 'intolerable'.

Liberal international society is divided over this. Two views have emerged, between the 'promote democracy' and 'protect human rights' approaches. The first view includes the suppression of popular will or the overthrow of a democratically elected government as a reasonable justification for humanitarian intervention. Proponents of this policy draw on policy declarations by the CSCE and the OAS as indicative of support in state practice. The 1990 Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, for example, acknowledged the 'responsibility to defend and protect. . . the democratic order freely established through the will

¹¹² Tesón, 'Rawlsian Theory', p. 97. It is interesting that Tesón explicitly links humanitarian intervention with the expansion of 'liberal alliance'.

of the people'.¹¹³ Similarly, in response to the coup in Haiti in 1991, the Organisation of American States established powers to permit the organisation to take 'any measures' necessary to restore democracy in member states.¹¹⁴ From this perspective, the U.S. backed military intervention in Haiti in October 1994 to restore Jean-Bertrand Aristide represents a landmark precedent in favour of intervention to promote democracy.

The second approach discards any ambitions of promoting 'democratic governance' and concentrates primarily on protecting human rights in a very narrow sense. Objectives include relieving immediate human suffering, establishing protected zones, and separating the combatants. The goal is not so much to promote or impose the values of human rights, but to defend them from falling below a certain standard. Hence if aim of intervention to 'promote democracy' can be referred to as 'pulling up', the second variation is best referred to as 'halting a slide' below minimum standards. The aim here is not to promote liberal conceptions of democratic governance, but to ensure that the very minimum level of human dignity is respected.

Despite the initial optimism after the Cold War, enthusiasm for the more vigorous approach has waned. Since the task of 'pulling up' or 'lifting' a people to higher standards of humanity entails *de facto* neo-colonial administration or trusteeship, it is no surprise that few states, if any, are willing to bear such a burden. While colonialism came with costs as well as spoils in the past, today there are no economic or strategic benefits for

¹¹³ *International Legal Material* 29, p. 1309; Malvina Halberstam, 'The Copenhagen Document: Intervention in Support of Democracy', *Harvard International Law Journal* 34 (1993), pp. 163-175.

¹¹⁴ James A. R. Nafziger, 'Self-Determination and Humanitarian Intervention in a Community of Power', *Denver Journal of International Law and Policy* 20 (1991), p. 33.

assuming the trusteeships of 'failed states' in Africa or in situations when a state is so fraught with civil war that only an outside force can impose peace. Equally important, the ethos of colonialism no longer exists; few Westerners seriously consider it their duty to 'civilise' those at the fringes of liberal international society. While the values of liberalism would perhaps best be imposed through some kind of neo-colonial operation which entailed extensive 'nation-building', no state, especially after the debacle in Somalia in 1993, seriously considers it as its duty to entrench liberalism in illiberal regions.

CHAPTER SEVEN

HUMANITARIAN INTERVENTION AND INTERNATIONAL ORDER

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Thus far I have examined the problem of humanitarian intervention and the implications for the rules and values of international society. No discussion, however, would be complete without an examination of the question of stability in this society, and more broadly, of international order. This chapter first examines the relationship between intervention and order and then considers how the doctrine of humanitarian intervention is potentially a threat to order as well as a possible way for reinforcing order. Under the right circumstances, humanitarian intervention can strengthen rather than subvert order.

Intervention and Order

What is order in international society? What is meant by 'international order'? Hedley Bull, who thought deeply about order in world politics, offers this definition: 'By international order I mean a pattern of activity that sustains the elementary or primary goals of the society of states, or international society'.¹ This for Bull means, first of all, the preservation of the states system against the revival of a universal hegemon or empire. Implicit

¹ Bull, *Anarchical Society*, p. 8.

in this is the preservation of the independence and sovereignty of individual states. Second, order is also defined as peace in international relations. It is important to clarify what is meant by 'peace'. Peace here is not used to mean absence of war; war is sometimes necessary for the maintenance of peace. Instead, peace is the absence of war as the normal course of international relations, with the recourse to war only under exceptional circumstances.² What constitutes a threat to international order is anything which threatens to disturb these two goals.³

The concern for international order has been one of the hallmarks of the international society tradition. The focus on order opens up a wide field of inquiry. Bull, for example, divides his study of order into separate chapters, examining the institutions of war, balance of power, diplomacy, great powers, and international law from the perspective of international order. Bull's inquiry is representative of the international society approach. Isolating particular variables in relations to the larger problem of order allows us to better understand the concept of order and consider how order is maintained. What cannot be overlooked, though, is that this approach is not only analytic and descriptive, but is prescriptive as well. Thus, the question 'how does the balance of power contribute to international order?' contains its own answer that the balance of power plays a necessary and positive role in the maintenance of order.

This chapter examines how humanitarian intervention contributes to international order. Like war, intervention as an institution of international society is both a disturber and contributor of order. Non-interventionists are likely to emphasise how intervention is destructive for order. By permitting states a right to intervene in the internal affairs of others, order is undermined

² *Ibid.*, Chapter 1.

³ For more on international order in general, see Bull, *Anarchical Society*, Chapter 1; Clark, *Reform and Resistance*, Chapter 1.

since interstate conflicts occur more frequently. The primary goal of peace in international society remains elusive when intervention becomes the norm, not the exception. But the greater danger is that the very foundations of the Westphalian system—state sovereignty and independence—would be endangered by a right of intervention. Non-interventionists argue, therefore, that allowing exceptions to the rule of non-intervention opens the way for disorder in international politics.

Intervention can paradoxically be an instrument for maintaining international order. Trachtenburg rightly observes that in the nineteenth century, the Great Powers regarded intervention as necessary for ‘guaranteeing international stability’.⁴ The maintenance of the balance of power in Europe was predicated on intervention to ensure that no one power predominates and upsets the delicate balance. Similarly, intervention also contributes to order if it is used to enforce the rules of international society. Critics of intervention often condemn the act of intervention as a violation of international law without recognising that it is in fact one means by which law is enforced. As Lingelbach observed in 1900, ‘intervention. . . instead of being outside the pale of the law of nations and antagonistic to it, is an integral and essential part of it’.⁵ Intervention, therefore, can ultimately preserve the norms, rules, and laws of international society which are necessarily a part of international order.

⁴ Trachtenburg, ‘Intervention in Historical Perspective’, p. 17.

⁵ *Ibid.*

Humanitarian Intervention: Threat to Order

Since humanitarian intervention is a particular form of intervention, it can either threaten or reinforce order. Sceptics of humanitarian intervention have many good reasons to find this form of intervention a threat to international order. The first concern is the danger of crusading humanitarianism. Second, there is the fear that humanitarian intervention is too easily subverted by statesmen seeking to maximise national interest. Third, the danger is that the doctrine will ultimately undermine the rules of state sovereignty and non-intervention which are vital to international order.

What I mean by 'crusading humanitarianism' is a policy of fervent interventionism abroad to protect another people. 'Crusading in international relations', Adam Roberts points out, 'has a very doubtful record'.⁶ Those who fear that humanitarian intervention may lead to crusades draw upon historical parallel with crusades of the past. The notion that a ruler is entitled to protect not only his subjects, but those of others was a part of the medieval Christian just war doctrine to protect Christians during the Crusades. In late sixteenth and early seventeenth centuries, this idea was put into practice during the religious wars of Europe as Protestants professed the right to protect Protestants under Catholic rule.

It is feared that modern ideas of humanitarian intervention are part of this historical spectrum and may lead to the same form of crusading in international politics. One can see the logic of this argument in many ways. The doctrine encourages statesmen and citizens to think in terms of coming to the assistance of the oppressed and down-trodden. It appeals to one's humanitarian instincts to protect those who cannot protect themselves. But more importantly, it appeals to the instinct of self-righteousness.

⁶ Roberts, 'Humanitarian War', p. 445.

Contemporary notions of 'humanitarianism' and 'human rights' allow states to justify their actions as the fulfillment of a moral obligation to higher principles. The danger, Ernst Haas has warned, is that these broad concepts can lead to 'global evangelism'.⁷ Ultimately, the zeal to protect human rights and promote democracy everywhere may lead states away from restraint and prudence.

Although humanitarian intervention need not always end in crusading interventionism, the likelihood of this occurring is enhanced by two factors, neither of which is novel to the contemporary setting. There is, first of all, the recurring problem of nationalism and the protection of one's 'brethren' or 'co-nationalists' abroad. While international society is divided into sovereign states, the political and territorial boundaries of states are not coterminous with ethnic or religious boundaries. International society is not populated by isolated island republics where the inhabitants of a state do not have ties or concerns with those outside its walls. On the contrary, states in this society are inhabited by people who share historical, cultural, religious, or ethnic ties with those in other states. The solidarity one people may have for those who share a common heritage, coupled with the doctrine of humanitarian intervention, can be destabilising. This is especially true in regions with trapped minorities. The pressure for a state to undertake a 'humanitarian intervention' to liberate another people facing religious or ethnic persecution remains a critical factor which must be accounted for.

The extent to which humanitarian intervention becomes crusading humanitarianism is influenced by the strength of domestic forces. The suggestion that domestic forces alone are the impetus for interventionism perhaps overestimates the power of domestic pressure; however, domestic forces can be significant. Public opinion in Europe contributed significantly to

⁷ Michael J. Smith, 'Ethics and Intervention', *Ethics & International Affairs* 3 (1989), p. 12.

the decision to intervene in Greece in 1827. Byron, Hugo, and Pushkin stirred popular sentiments in their respective countries in favour of the Greek cause. As Phillips concluded, had the people of Europe not been strongly in favour of the Greek cause, the intervention would have been unlikely. Phillips wrote: 'It was the public opinion of Europe which forced the unwilling courts into a peaceful intervention'.⁸ One cannot ignore therefore the role of domestic forces altogether, since an interventionist public can push reluctant governments toward intervention. This is as true today, if not more so, as it was in the nineteenth century.

The strength of the domestic pressure for intervention is influenced by the press and media. The media, however, does more than just 'report'. It often has an aim. Tales of atrocities committed by Muslims against Christians in nineteenth-century Europe were reported in great detail, often exaggerated to compel the government to act. This was the case during the disorder in Lebanon during 1860-61. As J. F. Scheltema observes: 'Public opinion, wrought upon by letters in newspapers that live by catering to a public taste greedy for sensational stuff, went into hysterics over horrors far beyond the actual happenings and began to clamor for immediate intervention to stop the unspeakable Turk's slaughter of innocent, lamb-like Christians in their ten thousands'.⁹ Tales of the 'Bulgarian Horrors' in the British press also stirred up interventionist sentiments against Turkey in 1876-77.¹⁰ Similarly, the 'yellow press' in America played an influential role in shaping public attitudes in favour of intervention on behalf of the Cubans in 1898.

⁸ W. Alison Phillips, *The War of Greek Independence, 1821 to 1833* (London: Smith, Elder, & Co., 1897), p. 280.

⁹ J. F. Scheltema, *The Lebanon in Turmoil: Syria and the Powers in 1860* (New Haven: Yale University Press, 1920), p. 27.

¹⁰ A. J. Grant and H. W. V. Temperly, *Europe in the 19th and 20th Centuries: 1789-1939* (London: Longmans, Green, and Co., 1945), p. 377.

If the media was a force pushing governments toward intervention in the nineteenth century, the spread of global communications this century has only expanded the power of the media to influence popular opinion. The so called 'CNN' factor has made it more difficult for governments to remain idle while grave tragedies take place another land. This may be seen as a positive development. Yet, there is always the danger that instant communications would be no less susceptible to propaganda and prejudice. For example, images of alleged atrocities committed by the Bosnian Muslims against the Bosnian Serbs may be broadcast by Russian nationalists to persuade Russia to launch an intervention to protect their 'fellow Slavs' in Bosnia. On conversely, Iranian newspapers may recount in graphic detail Serbian atrocities against Muslims in order to fan popular support for an interventionist policy. In either case, the media has become a powerful factor in the decision to undertake (or not undertake) humanitarian interventions.

This leads to the second concern: the doctrine of humanitarian intervention is too prone to abuse. This is a familiar criticism, voiced frequently in past and contemporary debates. Robert Phillimore pointed out in 1854 that the doctrine of intervention in the 'general interests of humanity' is 'manifestly open to abuses'.¹¹ Why is the doctrine susceptible to abuse? A common charge is that statesmen and their advisors do not always have altruistic motives. On the contrary, the *raison d'état* of the statesmen is to maximise the self-interest of the state. Machiavelli reminded the Prince that the aim of war and intervention is to further national interest. Grotius was naive to assume that states which undertake intervention would be devoid of 'all ambition, all interest, and all cupidity'.¹² He qualified that a state intervening must act in a disinterested manner, no differently than a guardian

¹¹ Phillimore, *Commentaries*, vol. 1, p. 442.

¹² Mamiani, *Rights of Nations*, p. 183.

is entrusted with the task of protecting a minor for the child's own benefit.¹³ But, Bernard asks wryly, '[w]ho ever heard of an intervention which did not profess at least to be in the interest of the people?'.¹⁴

To point out that by nature states pursue national interest over humanitarian goals is neither an original or serious challenge to the doctrine of humanitarian intervention. A more interesting point is that the doctrine is inherently prone to abuse due to flaws in the theory itself. One argument is that there are no concrete standards to judge what level of atrocities can justifiably lead to external intervention. This has been a recurring problem throughout the doctrine's history. Gentili and Grotius offered vague generalisations that the ruler must not inflict punishments beyond what is permitted by natural law or that the ruler must not be 'cruel'. In the nineteenth century, it was often asserted that intervention was justified when the 'laws of humanity' were seriously violated.

Yet these ideas are subjective. Without agreed standards, the intervenor is free to determine when mistreatment becomes excessive.¹⁵ To borrow an analogy from municipal law, the intervenor becomes both the prosecutor and the judge. It is left up to each intervenor to judge whether violations in another country surpass the threshold between tolerable and intolerable abuse. More importantly, the intervenor decides when and who should intervene, and with how much force. For sceptics, this inevitably encourages the pursuit of selfish aims under the guise of humanitarianism. Amos Sheldon aptly summarised that 'states are apt to interpret the claims of

¹³ Grotius, *DJBP*, p. 584.

¹⁴ Bernard, 'Non-Intervention', p. 18.

¹⁵ Fenwick observed: 'Broad principles such as national security, independence, and equality must be reduced to concrete rules, whether by formal codification of the law or by the progressive adjudications of an international court of justice'. Fenwick, 'Intervention: Individual and Collective', p. 658.

humanity by making it demand whatever most favours their own interests. Therefore the assertion of such grounds of interference as humanity, or the Balance of Power, is always likely to be prompted by selfish and one-sided motives'.¹⁶

Indeed, sceptics point out that genuine cases of humanitarian intervention are hard to find. Ian Brownlie considers the European intervention in Lebanon in 1860-61 as the only instance of humanitarian intervention.¹⁷ Examples of states abusing this doctrine, however, are not difficult to find. In 1654 Oliver Cromwell justified England's right to intervene in the Spanish West Indies on behalf of the 'many millions of Indians so barbarously butchered by the Spaniards'. While humanitarian concern was a factor, it was secondary given England's desire to wrest the West Indies from Spain. Russia's unilateral intervention in Bulgaria in 1877-78 was prompted by the mistreatment of Orthodox Christians at the hands of the Turks as well as its expansionist desires to acquire territory in the Balkans and control of Constantinople. But perhaps the most blatant abuse of the doctrine was Hitler's public justification for the occupation of Bohemia and Moravia in 1939. In an official Proclamation made on 15 March 1939, Hitler insisted that German occupation was in response to the 'assaults on the life and liberty of minorities, and the purpose of disarming Czech troops and terrorist bands threatening the lives of minorities'.¹⁸

The likelihood that the doctrine may encourage crusading interventionism or allow states to cloak their own selfish interests is considered as ultimately a threat to international order. It undermines the

¹⁶ Sheldon Amos, *Lectures on International Law* (London: Stevens and Sons, 1874), p. 40.

¹⁷ Brownlie, *Use of Force*, p. 340.

¹⁸ *Documents on British Foreign Policy 1919-1939*, vol. 4, p. 257.

twin pillars state sovereignty and non-intervention. Mountague Bernard's lecture 'On the Principle of Non-Intervention' delivered at All Souls in 1860 is relevant today as it was then. On the question of how strictly international society should observe these rules, he argued that 'remember that you have to choose between submitting to it even when it galls you, and having no rule at all'.¹⁹ Unlike secondary rules, the rules of sovereignty and non-intervention are vital for international order because the 'whole fabric of international law' rests on these two principles. Permitting a right of humanitarian intervention erodes this foundation. He cautioned, 'destroy them and you destroy the system; impair them and you impair the system'.²⁰

In addition, Bernard also argued how relaxing the rule of non-intervention could also undermine the limitation of violence which is also crucial for international order. There is the ever-present danger of escalating interventions. He wrote, 'the evil has a natural tendency to propagate itself. One intervention begets and excuses another'.²¹ Those who insist on allowing for exceptions for the rule ignore the possibility that it is not possible to excuse some interventions while condemn others. He wrote, 'you cannot reserve to yourself, and to those with whom you sympathise, the privilege of breaking it at pleasure, and refuse the same liberty to others'.²² If international society were to tolerate humanitarian intervention as an exception to the rule, the danger is that intervention could become the rule and not the exception. Or as Chateaubriand remarked to the French

¹⁹ Bernard, 'Non-Intervention', p. 34.

²⁰ *Ibid.*, p. 7.

²¹ *Ibid.*, p. 6.

²² *Ibid.*, p. 34.

Chamber, what would be adopted would be a 'principle of eternal hostility' in which 'wars would be multiplied'.²³

Humanitarian intervention, therefore, is ultimately destructive for international order. As Bernard stated, intervention, even for humanitarian reasons, is ultimately 'fatal' to the 'peace of the world'.²⁴ Bernard made a crucial observation on the relationship between 'peace' and 'justice', a question not too different from the problem of order versus justice in contemporary debates. He remarked that peace is by no means the primary aim of international politics. Justice, truth, and the enlightenment of mankind are also goals worthy of pursuit. But, 'it is by peace that even these things are ordinarily served and promoted'.²⁵ While there are many good reasons to intervene to promote justice and humanity, a doctrine of humanitarian intervention is foolish because it ultimately destroys peace. An international society where war and disorder are commonplace may not necessarily promote justice or truth but may ultimately hinder these aims.

Humanitarian Crisis: Threat to Order

The argument that humanitarian intervention is a threat to order must be considered in connection with the opposing argument that humanitarian crises, if not attended to, could also threaten international order. The notion that internal conflicts can disturb regional and international stability is not novel. The Treaty of London authorising Europe's intervention in Greece in 1827, for example, justified its actions 'no less by sentiments of humanity, than by interests for the tranquillity of Europe'. Similarly, recent

²³ Quoted in Halleck, *International Law*, vol. 1, p. 104.

²⁴ Bernard, 'Non-Intervention', p. 6.

²⁵ *Ibid.*, p. 7.

humanitarian interventions authorised by the Security Council have been justified as necessary for the maintenance of 'international peace and security'.²⁶ Rather than subvert international order, it can be argued that humanitarian intervention promotes order. It is important first to establish how humanitarian crises threaten order, both at the regional and global level.

Arguments in favour of humanitarian intervention often begin with moral arguments: we should intervene because allowing thousands of people to suffer the indignities of extraordinary atrocities presents a moral cost that international society cannot bear. The discussion often turns to how humanitarian crises in other lands are outrages to human dignity and international conscience. It calls our attention to moral outrage. Lawrence argued, for example, that 'cruelty be so long continued and so revolting that the best instincts of human nature are outraged by it', states may step in to put an end to these events.²⁷ Because states are prompted by national interest, a more direct form of persuasion is to show how conflicts in another country affect the interests of states. John Westlake remarked, for example, that intervention 'in the internal affairs of another state is justifiable. . . when a country has fallen into such a condition of anarchy or misrule as unavoidably to disturb the peace, external or internal, of its neighbours'.²⁸

What impact do humanitarian crises have on the interests of other states? An internal conflict can seriously affect commerce and trade, thereby destabilising the economies of others. The European powers intervening in

²⁶ The now ubiquitous phrase 'threat to peace and security' was used frequently by E. C. Stowell. Stowell wrote, 'There is, however, still another ground for action, namely: when an unnecessary war between two independent states or a civil war unreasonably prolonged threatens the peace and security of international society. . .'. Stowell, *Intervention and International Law*, p. 282.

²⁷ Lawrence, *Principles*, p. 127.

²⁸ Westlake, *International Law*, p. 318.

Greece in 1827, for example, legitimated their actions on the grounds that the conflict was producing 'fresh impediments to the commerce of the States of Europe'.²⁹ Similarly, President McKinley explicitly made this connection when he declared that 'the right to intervene may be justified by the very serious injury to the commerce, trade and business of our people'.³⁰ In both interventions, military force achieved the aims of both humanitarianism and commerce.

There may be other self-interested reasons to intervene. A state torn by internal strife and civil war poses a nuisance to others. While the fighting between the insurgents and the government in civil wars is supposed to take place between the two parties, third parties are often caught in the hostilities. In the nineteenth century, piracy on the high seas posed a serious problem for states peripheral to the conflict. Europe's intervention in Greece in 1827 and the US intervention in Cuba in 1898 were prompted by a desire to end 'acts of piracy' which exposed the intervening powers to 'grievous losses'. Insurgent parties stopping and searching neutral ships on the high seas posed a direct threat to third parties. A comparable problem in the present context is the security threat posed by different factions in a civil war hindering the passage of neutral vehicles to search for contrabands. The danger here is that third parties may be drawn into the conflict either accidentally or through the deliberate sabotage by one party seeking to widen the conflict.

It is also often true that a humanitarian crisis in one state no longer becomes an internal conflict or a domestic matter because the violence and dislocation cannot be contained within the 'limits of the territory in which

²⁹ See the Treaty for the Pacification of Greece (6 July 1827), Protocol Relative to the Affairs of Greece (4 April 1826), Additional Article to Treaty of 6 July 1827, *G.B.P.P.*, vol. 27 (1828).

³⁰ Trachtenberg, 'Intervention in Historical Perspective', p. 25.

they rage'.³¹ There is the spillage effect when a conflict, as Westlake put it, 'boils over' into adjacent territories. The problem of frontier raids, for example, threatens the security of neighbouring countries. Insurgent parties fighting an oppressive government often operate from the territory of an adjacent state. They may launch swift military campaigns across the border and return to their home base. Or, conversely, government soldiers often pursue insurgent forces across borders. In either case, actions by both sides not only threaten the internal security of the third party, but also increase the likelihood of the conflict widening or spreading to other regions. For this reason Security Council Resolution 688 expressed the concern that 'cross-border incursions' in Northern Iraq 'threaten international peace and security in the region'.³²

An internal conflict can also affect neighbouring states in another way. The brutal misrule of a government, the violent suppression of popular will, or an intractable civil war often lead to a refugee crisis as thousands of people flee the violence. The states adjacent to Kuwait, the former Yugoslavia, Haiti, Somalia, and Rwanda have all faced this problem. The flow of refugee affects some states more adversely than others. Austria, for example, would be better able to withstand an onslaught of refugees from Bosnia and Herzegovina than would Albania. The danger, therefore, is not the effect this may have on states with entrenched institutions capable to cope with such an onslaught, but the destabilising effect which the flow of refugees may have on 'weak' states. The mass exodus of refugees from the civil war in Rwanda in 1994, for example, posed a serious threat to weak states such as Burundi. Not only was Burundi ill-equipped to deal with the refugee crisis, but the fact that

³¹ Westlake, *International Law*, p. 319.

³² Security Council Resolution 688 of 5 April 1991.

similar ethnic tensions exist there heightened the possibility of a region-wide conflict.

Allowing oppression to go unchecked can disturb order in other ways. A tyrannical regime is often a 'bad neighbour'. This point was made by Gentili in arguing that states should be permitted to intervene when a ruler abuses his own people. Quoting a Hebrew proverb, he observed that 'a bad neighbour is the worst of all diseases'.³³ England was right and justified to intervene because it was both 'expedient and necessary' for its own security against a tyrannical Spain.³⁴ The fear is that a government which persecutes its own people or wages a brutal and cruel war against a segment of the population is likely to be aggressive against its neighbours as well. If it is willing to massacre its people, what is to keep it from using force against its neighbours? To allow a tyrannical and oppressive government to trample on its own people would endanger stability in the entire region.

The greater danger is that oppression and persecution, if left unchecked by the international community, has the potential to threaten order at a global level. Woodrow Wilson recognised this clearly when he remarked to the Paris Peace Conference that 'Nothing, I venture to say, is more likely to disturb the peace of the world than the treatment which might, in certain circumstances be meted out to the minorities'.³⁵ What begins as a local conflict can lead to a global conflict as the great powers line up on opposite sides to protect their co-religionists. In the nineteenth century, the Balkans continued to be a source of instability as Russia and the Britain were divided over how to protect the Orthodox Christians from the violent misrule of the

³³ Gentili, *DIB*, p. 77.

³⁴ *Ibid.*, p. 78.

³⁵ Patrick Thornberry, *International Law and the Right of Minorities* (Oxford: Clarendon Press, 1991), pp. 40-41.

Ottomans. The contemporary Balkan crisis presents a similar danger if Russia withdraws its support from the European coalition and begin backing the Serbs with whom it has historic and religious ties.

Humanitarian Protection and International Order

Neither excessive interventionism and complete non-intervention, therefore, is satisfactory for international order. The question, then, is how to create a limited right of humanitarian intervention without undermining order. What measures should be taken to make it effective so that peace can be restored and a lasting solution achieved? If humanitarian intervention must be undertaken, it must, first of all, be restricted to proper authority. Second, there should be a preference for collective action. Third, the intervenor should be aware of the dangers and limitations of intervention and decide selectively when to intervene. Finally, if intervention must be attempted, the intervenor should pursue decisive action.

Limiting the Number of Actors

To satisfy the demands of humanitarian protection while at the same time maintain international order, there must, first of all, be some restrictions on who can legitimately claim a right of humanitarian intervention. This raises the issue of proper authority to use force. Just as domestic society is more orderly when proper authority is concentrated in the state, the same can be said for restricting the number of actors who can legitimately use force in international society. The fewer the actors, the greater the likelihood that the use of force will be limited and controlled. For the same reason, restricting the right of humanitarian intervention to sovereign states is important to maintaining international order.

Who has the proper authority to undertake humanitarian intervention is not an issue explicitly addressed in both traditional or contemporary international law. To determine this, we must rely on the more general discussion of proper authority to use force and extend the analysis and conclusion to our discussion. The authority to use force has been a recurring concern for just war theorists and international lawyers. It is the use of force upon proper authority which distinguishes it from 'mere brigandage or private killing'.³⁶ Thomas Aquinas stipulated that in order for a war to be just, it must be waged on the 'authority of the prince, by whose order the war is undertaken; for it does not belong to a private individual to make war'.³⁷ Between the late sixteenth century and the end of the eighteenth century, sovereigns gradually asserted control over the right to wage war. This was not entirely successful since monopolies and trading houses such as the East India Company had their own armies.³⁸

The nineteenth century marked an important transition as the authority to use force became the exclusive domain of sovereign states. Whether a war was waged by the proper authority of the sovereign state was an important determinant in its lawfulness. Halleck wrote in 1861 'where the war is duly declared or begun, and carried on by the proper authority of the State, it is a lawful war. . .'.³⁹ The sovereign state had the exclusive right to

³⁶ Hedley Bull, 'The State's Positive Role in World Affairs', *Daedalus* (Fall 1979), p. 117.

³⁷ Quoted in Wilson, *National Liberation Movements*, p. 14. Also see John Eppstein, *The Catholic Tradition of the Law of Nations* (London: Burns Oates & Washbourne, 1935), p. 83.

³⁸ Philip Lawson, *The East India Company: A History* (London: Longman, 1987), pp. 132-33.

³⁹ Halleck, *International Law*, p. 347.

use force, both within the state and across the borders.⁴⁰ The state's monopoly included the exclusive right to initiate measures short of war, including intervention. Halleck continued, the 'right of making war, as well as the right of authorizing retaliations, reprisals, and other forcible means of settling international disputes, belongs, in every civilized nation, to *the supreme power of the state*, whatever that supreme power may be, or however it may be constituted'.⁴¹

This development excluded many non-state actors from lawfully using force. Renegade warlords, for example, would not constitute proper authority. The actions of a subordinate general not authorised by the state would simply be considered a sort of 'robbery' and could be punished.⁴² Similarly, pirates and armies of banditti were casted outside the realm of lawful communities with the right to use force. International law had long been hostile to pirates. Vattel, for example, considered pirates as 'enemies of the human race'.⁴³ The Barbary Powers were considered by most authorities in the eighteenth century as falling outside the bounds of international law because of their piratical activity.⁴⁴ In nineteenth-century law, pirates were

⁴⁰ Wilson, *National Liberation Movements*, p. 15; Khairallah, *Insurrection Under International Law*, p. 98.

⁴¹ Halleck, *International Law*, p. 350; John S. Risley, *The Law of War* (London: A. D. Innes & Co., 1897), p. 77.

⁴² Halleck, *International Law*, pp. 346-347.

⁴³ Vattel, *Law of Nations*, p. 137.

⁴⁴ Jörg Manfred Mössner, 'The Barbary Powers in International Law (Doctrinal and Practical Aspects)', *Grotian Society Papers 1972: Studies in the History of the Law of Nations*, ed. C. H. Alexandrowicz (The Hague: Martinus Nijhoff, 1972), p. 205.

denied both status as a sovereign state and the right authority to use force. Halleck, for example, ruled the use of force by pirates as 'unlawful'.⁴⁵

This trend to exclude non-state actors from lawfully using force continued in post-1945 international law. The use of force by pirates is unlawful in contemporary international law.⁴⁶ But more importantly, there has been international collaboration to prohibit the use of force by 'private armies' and other armed entities not operating under the delegated authority of the state. As Reisman points out, the purpose of the so called 'private-army rule' in international law is to secure 'national and international stability'.⁴⁷ Rebels and terrorist organisations operate outside the realm of international law. Their resort to force is considered unlawful killing and violence. If these actors are without proper authority to use force in general, it is reasonable to conclude that they are also without authority to undertake humanitarian interventions. This is an important step in limiting the scope of proper authority.

A more complicated question is whether insurgent parties in civil wars or national liberation movements could claim authority for humanitarian intervention. This issue has not been directly addressed in traditional or contemporary international law. International society has recognised the right of insurgents to use force. The use of force by insurgency groups recognised as 'belligerents' was not considered unauthorised or random violence in the nineteenth century. Lawrence wrote, 'its armies are lawful

⁴⁵ It is interesting that Halleck also included the expeditions of the African corsairs as along the same category of 'armies of banditti', see Halleck, *International Law*, p. 347.

⁴⁶ Brownlie, *Principles*, pp. 243-244.

⁴⁷ Michael W. Reisman, 'Private Armies in a Global War System: Prologue to Decision', *International Law Essays*, eds. Myres S. McDougal and W. Michael Reisman (Mineola, New York: Foundation Press, Inc., 1981), p. 144.

belligerents, not banditti; its ships of war are lawful cruisers, not pirates; the supplies it takes from invaded territory are requisitions, not robbery'.⁴⁸ The right of national liberation movements to use force against the established government has been strengthened under contemporary international law. It is no longer accurate to assert that the use of force is the exclusive reserve of the sovereign state.⁴⁹

The question then is whether insurgents and national liberation armies are in possession of proper authority for humanitarian intervention. While insurgents recognized as lawful belligerents assume characteristics of a *de facto* state, there remains a 'broad and deep gulf' between recognition as a belligerent power and recognition as a new state.⁵⁰ Because the insurgent group is not a state, but only a community claiming to be one, its authority extends no further than the conflict: 'It has no rights, no immunities, no claims, beyond those immediately connected with its war'.⁵¹ It is doubtful, therefore, that an insurgent group has the authority to use military force for humanitarian purposes against another sovereign state. Such actions would be considered unauthorised violence. This might become an issue if the community which the insurgent army claims its support straddles the territory of several states. International society would not approve the use of force by the insurgent group to 'rescue' or 'protect' its supporters across state boundaries.

An even more complex and timely question is whether non-governmental organisations have proper authority for humanitarian intervention. The position of large chartered corporations such as the German

⁴⁸ Lawrence, *Principles*, p. 71.

⁴⁹ Wilson, *National Liberation Movements*, pp. 22-29.

⁵⁰ Oppenheim, *International Law*, vol. 1, p. 112.

⁵¹ Lawrence, *Principles*, p. 72.

East Asia Company, the British North Borneo Company, the British South Africa Company, and the Mozambique Company was not clearly established in traditional international law. They operated as surrogates of the state in colonial expeditions but functioned more like *de facto* states in relations with 'backward' territories. They wielded enormous power over the territory in which they operated: Lawrence observed, 'it legislates, it administers, it punishes, it negotiates, it makes war, and it concludes peace. As regards the native tribes, it exercises all the powers of sovereignty'.⁵² Yet, in international law, chartered companies were not sovereign states and lacked the authority to use force. Their recourse to arms was referred to as 'private wars' which, as Lawrence noted in 1895 'has long ago disappeared from civilised societies'.⁵³

This did not mean that they were precluded from lawfully using force or taking part in wars, however. The war between the armed forces of the British South African Company and the tribe of Matabele in 1893 was sanctioned under international law. Traditional international law permitted chartered companies to use force if authorised by the state, either explicitly or implicitly. That the Company was acting as a surrogate of Britain rendered the war lawful.⁵⁴ Ultimately though, the proper authority to use force rested with the sovereign state. The state assumed international responsibility for the actions of chartered companies.⁵⁵ Yet, the principle that sovereign states can delegate the rights of war to private associations effectively gave chartered companies wide powers to use force. Much of the task of colonial

⁵² *Ibid.*

⁵³ Lawrence, *Principles*, p. 290; Halleck, *International Law*, p. 347; Oppenheim, *International Law*, vol. 2, p. 58; Risley, *Laws of War*, p. 72.

⁵⁴ Lawrence, *Principles*, p. 332.

⁵⁵ *Ibid.*

expansion was undertaken not by the national armies of colonial empires, but by the private armies of chartered companies. In Britain, in particular, this was seen as a rather an inexpensive mode of colonial expansion.⁵⁶

These companies, however, were not just there to exploit the natives. While this was seldom put to good effect, their mandate was also to 'civilise' the people. It was up to these companies to carry out humanitarian aims of colonial powers. They were entrusted with the task of bringing order and good government to the African territory. The Royal Charter of the British South Africa Company, for example, set forth the responsibilities expected of the Company. It was the duty of the administrators to maintain civil order, through the formation of its own police force if necessary. The Company must work toward the abolition of the Slave Trade and other forms of domestic servitude. It must regulate the traffic of spirits so not to corrupt the morals of the natives. While the Company must not interfere with the religion of the people, this rule did not apply to situations when 'in the interests of humanity' it was necessary to put an end to barbarous practices. The overall aim of the Company, therefore, must be for the improvement of the natives.⁵⁷ If need be, military force could be used to achieve these objectives.⁵⁸ It seems, therefore, that private associations such as chartered companies could legitimately use force according to traditional international law.

The growth of non-governmental agencies in areas afflicted by humanitarian disasters raises an interesting comparison with nineteenth-

⁵⁶ Thomas Pakenham, *The Scramble for Africa* (London: Abacus, 1991), p. 342.

⁵⁷ *B.F.S.P.*, vol. 81 (1888-89), pp. 617-627.

⁵⁸ Lawrence pointed out that the chartered company could interfere with the religious rites of the natives for the 'purposes of humanity' and work toward the gradual abolition of the slave trade. Lawrence, *Principles*, p. 74.

century chartered monopolies. No moral parallels between the British South Africa Company and agencies such as the International Committee of the Red Cross (ICRC), Save the Children, and *Médecins sans Frontières* are intended. Rather, like the chartered companies, these organisations operate outside the arm of sovereign states, but at the same time, assume qualities of states.⁵⁹ They have budgets and administrative structures which rival or exceed the 'target' countries in which they operate. While the aim and motive have changed, these organisations have taken on some of the tasks left to chartered companies (and religious missionaries, I should point out) in the nineteenth century. In regions worst afflicted by anarchy and ethnic violence, the tasks performed go beyond humanitarian tasks of feeding the people and treating the wounded or the infirm to include the maintenance of civil order.

The ambiguous status of non-governmental agencies poses interesting, and important, questions with regards to humanitarian intervention. The rules regulating the role played by non-governmental relief agencies have undergone some changes. The 1949 Geneva Conventions and the 1977 Geneva Protocols emphasise the important role performed by organisations such as the ICRC. Yet, it was also stressed that the presence of these organisations must be based on the consent of the authorities.⁶⁰ Since 1991,

⁵⁹ It is important that in October 1990, the ICRC became the first NGO admitted with observer status to the UN General Assembly. Jarat Chopra and Thomas G. Weiss, 'Sovereignty Is No Longer Sacrosanct: Codifying Humanitarian Intervention', *Ethics & International Affairs* 6 (1992), p. 105.

⁶⁰ See 1949 Geneva Convention I, Article 9; 1977 Geneva Protocol II, Article 18(2). It has been argued that Article 18(2) should not be interpreted to mean that consent must be obtained in all circumstances. When it is not possible to 'determine which are the authorities concerned', 'consent is to be presumed' since the providing assistance is of 'paramount importance'. Furthermore, if the population is on the verge of starvation, the government in question cannot refuse relief without good reason. Refusal of assistance would be the 'equivalent to a violation of the rule prohibiting the use of starvation as a method of combat as the population would be left deliberately to die of hunger' and would constitute a violation of Article 14 of the Protocol. Yves Sandoz, Christophe Swinarski, and Bruno Zimmerman, eds.,

relief organisations have asserted a greater right to intervene.⁶¹ Private relief organisations provided emergency supplies in Eritrea and Tigray, and in Afghanistan against the express wishes of the government.⁶² When the General Assembly decided in 1991 to appoint a High-Level Emergency Relief Coordinator to oversee coordination of humanitarian assistance, the requirement of consent was downgraded. The language was deliberately vague and broad. Humanitarian organisations were authorised to intervene 'with the consent of the affected country'; no references to the 'state' or 'government'.⁶³

It may be asked whether the intrusion of relief organisations constitutes armed intervention. What is the distinction between the deployment of a national or multilateral military force and the deployment of doctors and aid workers? This distinction has increasingly been blurred since aid workers have had to arm themselves in self-defense. The shift in ICRC's operating procedure in Somalia is a good example. Historically the ICRC has declined armed escorts.⁶⁴ Yet, in Somalia the ICRC sought armed protection from local armed gangs to carry out its mission. In a climate of anarchical

Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (Geneva: Martinus Nijhoff Publishers, 1987), p. 1479.

⁶¹ The French Minister of Humanitarian Action has argued that organisations such as *Médecins sans Frontières* and *Médecins du Monde* have a right to intervene. In fact, the *le droit d'ingérence* movement has 'gone on to claim that it is not just a right which individuals and organizations may exercise but a duty, *un devoir*, to which the international community ought to give explicit legal recognition'. Geoffrey Best, *War and Law Since 1945* (Oxford: Clarendon, 1994), p. 381.

⁶² Thomas G. Weiss, 'Triage: Humanitarian Interventions in a New Era', *World Policy Journal* (1994), p. 60.

⁶³ Christine Ellerman, 'Command of Sovereignty Gives Way to Concern for Humanity', *Vanderbilt Journal of Transnational Law* 26 (1993), p. 368.

⁶⁴ A policy which dates back to its founding over a hundred years ago.

warfare, even the ICRC cannot presume that its international recognised symbol would safeguard its passage. If the situation becomes dire enough, the presence of aid workers is followed by armed intervention by their co-nationalists to ensure their safety.⁶⁵ The mandate of both Operation Restore Hope and Operation Turquoise included the protection of international aid convoys and the aid workers.

It is not at all clear, therefore, that the intrusion of humanitarian agencies is not 'forcible'. Whether the use of force comes in the form of hired armed escorts, as in Somalia, or in the form of national governments offering protection, it is becoming increasingly clear that humanitarianism is achieved through military force. The recourse to force in self-defense, while morally justified, could perhaps be justified legally under the 1949 Geneva Convention I which permit the Medical Service of combatants to defend themselves. Clause (1) and (2) of Article 22 suggests that medical units are allowed to arm themselves in self-defense or rely on escorts. This applies to medical units of agencies such as the national Red Cross Societies as well.⁶⁶ This, however, would not constitute proper authority for humanitarian intervention in the technical sense. For the time being, at least, non-governmental agencies are not permitted to organise their own armed force to undertake 'humanitarian intervention'. Their resort to force must be in self-defense, under extraordinary circumstances.

The legitimate authority to use military force is a jealously guarded right in international society. Since sovereign states are the primary architects of international law, it makes sense that they would restrict proper authority

⁶⁵ This is reminiscent of the nineteenth-century practice of armed intervention by national armies to protect missionaries abroad.

⁶⁶ L. C. Green, *The Contemporary Law of Armed Conflict* (Manchester: Manchester University Press, 1993), p. 215-216. Green makes the point that the crews of Red Cross hospital ships do not lose their protected status under the 1949 Geneva Conventions on account of being armed for self-defense.

to their own ranks. The trend has been to restrict proper authority for legitimate humanitarian intervention in the hands of sovereign states. In the nineteenth century, this was indeed a restrictive club, ruling out 'colonial protectorates' and 'semi-sovereign' entities, and as Chapter Six illustrated, states which were not 'civilised'. It was even argued that only the Great Powers should have authority. In the twentieth century, as the number of former colonies attained the sovereign status, the number of actors has obviously increased. Yet, contemporary international society still restricts authority to sovereign states (or international or regional organisations acting on behalf of states). It has narrowed the field of actors and made the use of force for humanitarian aims more predictable and manageable. This trend has been a positive development contributing to the maintenance of order.

Collective Action

In the previous section, it was argued that reducing the number of actors eligible for humanitarian intervention has helped maintain order. This section turns to how these actors relate to each other in undertaking this form of intervention. To ensure that humanitarian intervention does not undermine regional and global order, it is important that there is collective action. In Chapter Five, I discussed the importance of collective authorisation for international law. In this section, I want to examine more directly the importance of collective action for promoting international order. In particular, the question that I want to focus on is how collective intervention reduces the likelihood of abuse and why this is important for order.

Aware that the perennial criticism of humanitarian intervention is its likelihood to be subverted and abused, those who support this form of intervention have always relied on the preference for collective action as the way around this concern. Amos Hershey argued in 1912 that 'to prevent their

being used as mere pretexts, interventions on grounds of morality and humanity should be collective in character, i.e. there should be at least several participants, or if one nation intervenes, it should act as the agent or mandatory of the others'.⁶⁷ More recently, Bazylar maintains similarly that 'joint action lessens the chance that the intervention will be invoked primarily for self-interest'.⁶⁸ But just precisely how collective action reduces the likelihood for abuse has not always been spelled out clearly.

To address this question, it is important to distinguish between *collective authorisation* and *collective implementation* and consider them separately. As discussed in Chapter Five, collective authorisation refers to an intervention undertaken with the explicit and formal approval of an international or regional organisation. It relates to the decision-making framework for sanctioning the use of force. Collective implementation, on the other hand, relates to the actual enforcement action. It addresses the issue of how the composition of the intervening force is actually made up, whether it is made up of soldiers from one state or several. It is possible for an intervention to be collective in authorisation and unilateral in implementation. The intervention in Lebanon in 1860-61 was authorised by the Concert of Europe but carried out exclusively by French soldiers. Let us examine each of these questions separately.

Why is collective authorisation important for international order? While the domestic analogy is not always a good means of making a point, it is instructive on this issue. In domestic society, the authority to enforce the rules of society is the reserved domain of the state. In societies with a strong

⁶⁷ Amos S. Hershey, *Essentials of International Public Law*, revised ed. (New York: Macmillan & Co., 1935), p. 240.

⁶⁸ Michael J. Bazylar, 'Reexamining the Doctrine of Humanitarian Intervention in Light of the Atrocities in Kampuchea and Ethiopia', *Stanford Journal of International Law* 23 (1987), p. 616.

basis of legitimacy, there is no resistance to the state's use of force. This is because the state's action and decision to use force is usually carried out in good faith, or at least is perceived to be. Should it appear that the state deploys force capriciously or in violation of its own rules, then it is likely to encounter resistance. While illegitimate use of force may not always lead to revolution, there can be enough resistance to destabilise society. To some degree this applies to international society. In the absence of such an authority at international level, collective authorisation approximates the will of society and thereby reinforces the claim of legitimacy.

But it is not just that a course of action has been given the stamp of approval by a body of states which gives collective action a greater prospect of legitimacy. Not everyone is in agreement that collectivity equals legitimacy, however. There is no logical connection that the greater number of intervenors, the greater the chance for justice. Walker observed that 'powerful states whether acting alone or in combination are not incapable of injustice'.⁶⁹ Just because the partitions of Poland in the eighteenth century were authorised collectively did not render them more legitimate.⁷⁰ Nor does collective authorisation make what is an illegal act more legal because more states have taken part.⁷¹ Instead, the focus should be on the fact that collective authorisation best promotes legitimacy by establishing a system with built-in checks and balances.

⁶⁹ Thomas Alfred Walker, *Manual of Public International Law* (1895), p. 25.

⁷⁰ *Ibid.*

⁷¹ Charles C. Hyde remarked: 'On principle, a group of states acting in concert has no greater right of intervention than that possessed by a single state. The internationally illegal character of the conduct sought to be thwarted is not derived from the mere concert of opposing nations.' Hyde, 'Intervention in Theory and Practice', p. 9.

The necessity for such a system is especially important since what constitutes 'intolerable' misrule or 'extraordinary' atrocities is often disputed. A system which allows each state to determine whether intervention is warranted is inherently prone to abuse. As Fenwick remarked, 'for action is always arbitrary where the intervening state is the judge of its own case'.⁷² A system of collective authorisation overcomes that problem by requiring that states proposing humanitarian intervention must bring their case before a collective organisation. Through collective deliberation, the allegations of gross abuse of human rights can be scrutinised, substantiated, or refuted. If necessary, a fact finding commission should be established to investigate and verify atrocities. It is here that national interest actually helps ensure that interventions are humanitarian. States, naturally wary of each other and eager to protect their own interests, are therefore less likely to give their stamp of approval for an intervention which is not humanitarian, but serves the interests of the proposing state.

Historically, there have been various attempts to require collective authorisation, with varying degrees of success. Collective authorisation served nineteenth-century international society well and was vital to the maintenance of order. The fundamental rule of the European Concert, Metternich remarked, is that the Concert powers 'take no important step, do nothing which might endanger the general peace, without a previous joint understanding'.⁷³ This rule, while not always observed, was important for international order and vital to the long peace between the Congress of Vienna and the First World War. While the Concert never attained the organisational structure of contemporary organisations, potential threats to order were addressed through the so called 'Congress system' in which

⁷² Fenwick, 'Intervention: Individual and Collective', p. 658.

⁷³ C. de Grunwald, *Metternich*, English translation (London, 1953), p. 201. Also see Hinsley, *Power and the Pursuit of Peace*, p. 225.

conferences or congresses were convened to determine whether collective action was warranted. On numerous occasions British or French diplomats convened conferences to discuss the problem of the Ottoman empire. The interventions in Greece in 1827 and Lebanon in 1860-61 were undertaken only after authorisation from the Concert of powers.

With much less success, the League of Nations minority protection system was another attempt to subject intervention to protect the rights of minorities within a collective framework. Under the League system, minorities and states with grievances were invited to make their case before the Council. Disputes over interpretations of treaties were referred to the Permanent Court while verifications of violations were to be substantiated or refuted by the Department of Minorities. It was hoped that this would resolve the old problem of attributing blame as well as ensuring that violations were not inflated or exaggerated to give credence to an otherwise unjustified intervention. Most significantly, only the Council of the League could authorise actions to enforce minority treaty obligations.⁷⁴ No state could take it upon itself to intervene for the purpose of protecting the rights of minorities. This aim was to eliminate pretexts for intervention and thereby reduce potential conflicts.⁷⁵

The contemporary analogy is, of course, the Security Council. As an institution, the Security Council has many built-in checks and balances to ensure that humanitarian interventions are not taken for less than humanitarian reasons. Ideally, the system would work when member states

⁷⁴ Julius Stone, *International Guarantees of Minority Rights* (Oxford: Oxford University Press, 1932), p. 7.

⁷⁵ This improvement was acknowledged by Smith: 'The system of protection thus devised has advantages in that it grants the League an acknowledged right of intervention and a method of accomplishing it and in that it may remove the excuse by an outside power of intervention on behalf of oppressed minorities—a fruitful source of war.' Frederick Smith, *International Law*, p. 60.

with particular concerns about human rights violations or grave humanitarian disasters in a particular state would raise the issue before the Security Council. And if there are doubts as to the degree the violations, a commission of experts similar to the one created for the former Yugoslavia could be formed to substantiate allegations.⁷⁶ Having considered the evidence and weighed the costs of intervention as a possible threat to peace versus the humanitarian crisis which could also threaten peace, the Council is then to decide what action should be authorised. Under Chapter VII, the Security Council has the authority to call upon member states to use military force to put an end to disturbances which threaten international peace and security.⁷⁷

Collective authorisation through the Security Council could contribute to international order in two respects. First, the decision to use force would take on the lustre of legitimacy, as representing the will of international society. The fact that a multiplicity of states with varying national interests, cultures, and standards of justice could agree on collective action would help alleviate doubts as to the humanitarian nature of the operation. Second, and more importantly, the veto power wielded by the Permanent Members is important. Not unlike the Concert system, the Security Council system

⁷⁶ SC Res. 780 (1992) called for a Commission of Experts to investigate and obtain evidence of grave breaches of the Geneva Conventions and other violations of the laws of war in the conflict in the former Yugoslavia, and in particular, Bosnia and Herzegovina.

⁷⁷ Louis B. Sohn takes the argument a step further. He writes, 'to prevent any abuse of this right of authorised intervention', international society must establish a 'system in which an international institution would decide whether an intervention is necessary, who should be authorised to intervene, and how the intervention will be monitored'. Sohn proposes that the International Court of Justice be given the power to rule on whether an intervention authorised by the Security Council is justified. The target of intervention could petition the General Assembly for a Court ruling. Should the Court rule against the Security Council, the Council would be obligated to terminate the intervention. See Louis B. Sohn, 'How New Is the New International Legal Order'. *Denver Journal of International Law and Policy* 20 (1992), pp. 205-211.

requires that no major decision concerning the peace and security of international society can be taken without a prior understanding of the great powers. While not all Permanent Members need to vote in favour of a humanitarian intervention, their agreement not to obstruct or hinder the operation is vital for international order.

A strong argument can be made, therefore, that requiring some form of prior authorisation from a collective organisation should be obtained for humanitarian intervention. What is less certain, however, is the requirement of collective implementation. One can certainly see how a collective intervening force could promote order in several ways. For example, it would give greater weight to the claim that the intervention is on behalf of international society. The diversity and multiplicity of this force adds to the legitimacy of the operation. In addition, an intervening force comprising of contributions from many states reduces the possibility that any one national interest is advanced. More importantly, the presence of a multi-national force will also place a restraint to keep the operation from exceeding the bounds of the mandate and to ensure that the intervenors observe the rules of proportionality and other requirements of international humanitarian law.

Another positive effect is that the combined resources of several states would add to the effectiveness of humanitarian interventions. In a very narrow sense, this means pooling together resources to create an intervening force which can be 'overwhelming' and thereby lessen the resistance on the ground. But in a broader sense, collective enforcement reduces the costs for each contributor by distributing them. It would put into effect the 'burden sharing' principle by distributing the costs to several states. By 'costs', I am referring to, first of all, military costs: financing the logistics of getting arms and soldiers to the region of conflict, keeping them there, and replenishing supplies. Second, and more difficult to measure, are political costs: the use of force, even for humanitarian aims, entails risks for the soldiers. In any

society, especially in open, democratic ones, sending soldiers into combat comes with enormous political risks.

Subjecting the actual deployment of force to a collective framework would help ensure that no mission is undertaken without an agreement among the coalition. The drawback to this is that it can produce confusion and create a chain of command impossible to follow. For example, in Bosnia and Herzegovina during 1993, did the authority to use force rest with the Secretary-General, Security Council, NATO, and UNPROFOR commanders, or national governments? With so many potential sources of authority, disagreements were inevitable. This was most apparent over proposals for 'air strikes' to protect the 'safe areas' of Srebrenica and Sarajevo during the summer months of 1993.⁷⁸ Security Council Resolution 836 authorised member states, under the authority of the Security Council in coordination with the Secretary-General and UNPROFOR, to use 'all necessary measures, through the use of air power' to support UNPROFOR in protecting the safe areas.⁷⁹

How Resolution 836 would be implemented, though, was a source of controversy. In particular, a rift emerged over whether the Secretary-General's authorisation was required for air strikes. US Secretary of State Christopher wrote to the Secretary-General on 30 July 1993 maintaining that the US would ask its NATO allies, in coordination with the UN, to use air power against Bosnian Serb targets 'at times and places of NATO's own choosing. . . consistent with the authority already provided by Resolutions 770 and 836'. The Secretary-General responded on 2 August:

⁷⁸ Declared a UN 'safe area' by SC Res. 819, 16 April 1993. SC Res. 824, 6 May 1993, declared Sarajevo, Srebrenica and four other towns as 'safe areas'.

⁷⁹ SC Res. 836, 4 June 1993.

I have consistently taken the position that the *first* use of air power in the theatre should be *initiated by the Secretary-General*. . . In approving the report of the Secretary-General of 14 June 1993 in its Resolution 844, the Security Council has endorsed this approach. . . It is therefore my understanding that the decision to use air power in Bosnia and Herzegovina pursuant to UN resolutions *must continue to rest with the Secretary-General*.⁸⁰

The US position was not shared by other NATO allies. At a session of the NATO Council on 4 August, Canada, UK, Belgium, and France stressed the need for air strikes to be authorised by the Secretary-General.⁸¹ Their decision was in part motivated by the fact that they were the largest contributors to UNPROFOR and wanted to ensure that the US act with prior coordination. The US attempted a compromise by suggesting that air strikes to protect UNPROFOR need the Secretary-General's authorisation and air strikes against Bosnian Serb targets do not. In the end, the US conceded to objections and agreed that the choice of targets and initial authorisation for air strike must be approved by the Secretary-General.⁸²

There are other disadvantages of collective implementation. Rather than make interventions more effective, it can work against the effectiveness of an operation. There is, for example, the problem of tensions within the coalition. When two or three states have intervened together, Lawrence remarked, they are 'exceedingly likely to quarrel among themselves'.⁸³

⁸⁰ Rowe Gellman, 'NATO Sees UN "Flak" on Campaign in Bosnia', *International Herald Tribune*, 5 August 1993.

⁸¹ *Ibid.*

⁸² Jehl, 'US Cedes to UN an Air Strike Veto', *New York Times*, 7 August 1993. For general overview of UN authorisation, see Helmut Freudenschuß, 'Between Unilateralism and Collective Security: Authorizations of the Use of Force by the UN Security Council', *European Journal of International Law* 5 (1994), pp. 510-11.

⁸³ Lawrence, *Principles*, p. 134.

Increasing the number of actors in an operation increases the points of conflict and disagreement. One danger is that the coalition of states undertaking the intervention may be divided over the political or military objectives. Or, even if there is agreement over these matters, how to carry out these objectives can pose another obstacle. A state acting alone is better able to deal with a crisis: it can mobilise the necessary force without being hindered by the obligation to confer with coalition partners. It has been suggested, therefore, that humanitarian interventions are best authorised collectively but taken either unilaterally or under a single, unified command structure.⁸⁴

Despite the drawbacks, collective implementation still remains important to the legitimacy of an operation. Interventions which are properly authorised and collectively implemented are more likely to achieve the goals of humanitarianism. Without some form of checks and balance, states would invoke the right of humanitarian intervention without any constraint. By subjecting this form of intervention to collective judgement, we reduce the chances of its abuse and limit its application only in extreme cases. The overall effect of this would be to limit violence in international relations. It would protect the sovereignty and independence of states by permitting humanitarian intervention only as a rare exception to the rule of non-intervention.

⁸⁴ Graham argued: 'It does not seem likely that collective interventions will frequently occur, as such, in view of the difficulty of rapid mobilization of the requisite forces, and of the possibilities of friction illustrated only too frequently in certain of the inter-allied expeditions of a minor character during the late war. But as a principle of international law, it may safely be assumed that in future, while it will be altogether fitting and proper for the organs of the Society of Nations to confer authority, it will be left to some individual power to execute the mandate thus given, in the interests of expedition, harmony and simplicity'. Graham, 'Humanitarian Intervention in International Law', pp. 326-327.

Decisive Action

Humanitarian intervention can best promote international order only if it is decisive. The first criteria of decisive action is selectivity: that is, knowing when to intervene. To intervene everywhere is counterproductive if it decreases the effectiveness of each intervention by overstretching the resources of the intervenors. Yet, to intervene nowhere is also problematic. As we discussed earlier, humanitarian crises in one state may require external intervention. To ignore a conflict in an nearby country may be as unwise as allowing a neighbouring house to go up in flames since there is always a danger that what begins as an internal problem may have external consequences. It is important to find a medium between the two extremes. Interventions which are well-thought through and timely are most conducive for order.

Selectivity means, first of all, having a realistic assessment of what intervention demands. This requires an awareness of the limitations of external involvement and the perils of intervention. While the intervenor may be infused with self-confidence that the goals in pursuit are not only right, but attainable, it is important that the zeal to offer humanitarian protection does not lead one to underestimate the potential problems of intervention. Sir Vernon Harcourt's 'A Letter on the Perils of Intervention', written to persuade Britain against intervening in the American Civil War, is as insightful today as it was then. Harcourt warned against the foolishness of those who 'talk of intervention as if it were a light and easy affair'.⁸⁵ 'The records of history', he told us, 'will teach us that intervention has never been

⁸⁵ Sir Vernon Harcourt, 'A Letter on the Perils of Intervention', in *Letters on Some Questions of International Law* (Cambridge: Macmillan & Co., 1863), p. 42.

accomplished with Foreign-office rose-water alone'.⁸⁶ Those who are contemplating intervention are advised to consider:

Intervention may be wise, may be right,—nay, sometimes may even be necessary. But let us not deceive ourselves; intervention never has been, never will be, never can be short, simple, or peaceable.⁸⁷

Harcourt was not making the case that intervention should never be attempted, but rather, simply offering a cautionary voice. Conducted even under the best circumstances, this form of intervention is difficult and messy. To begin with, it is often difficult to judge who are the victims and who are the aggressors. This is especially true in internecine civil wars where brutality, excesses, and other violations of the laws of war are widespread on both sides. Again, the European intervention in Lebanon is instructive. It was not clear, at least in the eyes of British diplomats, which party was guilty of excesses during the violence which engulfed Lebanon in 1860. In a despatch to Lord Russell, British Foreign Secretary, Lord Dufferin wrote, 'it is idle to speak of the Christians as if they were saintly martyrs. They are as savage and bloodthirsty in their traditional warfare as any of their pagan neighbours'.⁸⁸

Intervening in an internecine conflict puts the intervening army in a difficult predicament where no option is particularly appealing. The dilemma facing the intervenor is presented aptly by Lord Russell. At times, the frustration that Europe had unwisely involved itself in an ancient conflict between two barbarous and uncivilised tribes in Lebanon was expressed.

⁸⁶ Harcourt, 'Perils of Intervention', p. 43.

⁸⁷ *Ibid.*, p. 47.

⁸⁸ *G.B.P.P.*, vol. 68, No. 233.

‘The Maronites have killed in cold blood in the last few months a number of Druse men, women, and children. The Druses revenge themselves by sacking and burning a Maronite village’.⁸⁹ Trying to impose peace where violence was so widespread was no easy task. As Lord Russell asked: ‘What is a foreign force to do in these circumstances? If the Commander undertakes to try and punish the offenders, he assumes all the duties and responsibilities of the internal administration of the province. If he refrains from interference, the foreign occupation is justly charged with leaving crime and outrage unpunished’.⁹⁰

Those considering intervention should also remember that there is no guarantee that the those whom you are seeking to protect will view you as a humanitarian army. In Greece, the same army which was hailed as the ‘liberators of Greece’ came under attack by irregular Greek soldiers during disturbances in 1833 when Argos descended into anarchy.⁹¹ For critics of intervention, this was enough proof that one should not be naive or self-congratulatory enough to think that those whom you are protecting would appreciate your assistance. Harcourt wryly remarked, ‘for five years a military occupation by one of the mediators proved indispensable, and, by way of interlude, the Greeks took to murdering their French protectors at Argos’.⁹² Harcourt’s words have a timely echo. As the intervening army in Somalia discovered, attitudes can change quickly: the intervening force may be viewed as humanitarian army one moment and castigated as an occupying army the next.

⁸⁹ *Ibid.*, No. 324.

⁹⁰ *Ibid.*

⁹¹ George Finlay, *History of the Greek Revolution* (London: William Blackwood and Sons, 1861), vol. 2, p. 285.

⁹² Harcourt, ‘Perils of Intervention’, p. 46.

That intervenors should be aware of the perils and costs of intervention is not to discourage or rule out interventions altogether.⁹³ Rather, it is a warning that the task should not be entered lightly. It is best, therefore, to be selective before intervention. But when the decision has been taken to intervene, the intervention must be sustained and decisive. On this T.J. Lawrence was clear:

They should intervene vary sparingly, and only on the clearest grounds of justice and necessity; but when they do intervene, they should make it clear to all concerned that their voice must be attended to and their wishes carried out.⁹⁴

To engage in half-efforts often do not produce a better result than non-intervention.⁹⁵ In fact, it can be argued that 'the most cruel is a mistaken and useless interference'.⁹⁶ It is cruel in that it has the tendency to aggravate the conditions of those whom the intervenors seek to help. Those protected by the intervening army will likely be viewed by the target government as having been responsible for attracting foreign intervention. In addition to being the disfavoured group persecuted because of race, religion, or nationality, the victims of oppression will be labeled as 'traitors' or 'rebels'.

⁹³ On whether the US should intervene in Mexico in 1913 to restore order and protect lives, Mr. Frederick R. Conder had this warning: 'It would be the most vital step taken by our country since 1898. It would probably mean the raising of an army of occupation of 300,000 men and the policing of the whole vast extent of Mexico. It might mean, too, that we would be tied up in Mexico for ten years to come. Inevitably it would mean much bloodshed and loss of life. It should only be done in the last resort to save one third of the continent from a relapse into anarchy and the destruction of its civilization'. Quoted in Hodges, *Doctrine of Intervention*, p. 88.

⁹⁴ Lawrence, *Principles*, p. 135.

⁹⁵ Richard K. Betts, 'The Delusion of Impartial Intervention', *Foreign Affairs* 73 (1994), p. 31.

⁹⁶ Harcourt, 'Perils of Intervention', p. 50.

Or in a case of a disintegrating state, the people protected under the umbrella of international intervention will also be viewed as responsible for the destruction of the state. The danger remains that an intervention intending to end persecution but fails to accomplish its goal leaves the victims to the wrath of their government once the humanitarian army withdraws.⁹⁷

To ensure that the wishes of the intervenors are carried out often requires that words are followed by armed force. Bertrand Russell once remarked that 'Metaphysicians, like savages, are apt to imagine a magical connexion between words and things'.⁹⁸ The same could be said about peacemakers seeking to impose peace with words alone. Those who wish to end bloody civil wars sometimes believe that self-righteous words, or moral pressure, alone will lead to peace between the parties. They think that peace conferences, declarations, and protocols will produce a lasting peace. Yet, as Lawrence reminded us, to 'scatter abroad protests and reproaches, and yet to let it be understood that they will never be backed by force of arms, is the

⁹⁷ The premise that foreign intervention should be averred because it makes conditions worse for the oppressed has a long historical tradition. During the Congressional debates in 1906 regarding US diplomatic intervention on behalf of the Jews persecuted in Russia, Secretary of State Root cautioned against intermeddling resolutions: 'I am rather inclined to think that they would tend, by producing irritation and antagonism, to aggravate the dangers of the unfortunate people whom they are intended to aid.' See Phillip C. Jessup, 'The Defense of Oppressed Peoples', *American Journal of International Law* 32 (1938), p. 119. This position, however, has often been characterised as too deferential to the government accused of such outrages. Hersch Lauterpacht responds: 'Another reason for abstaining from intervention has often been the consideration that outside interference, far from improving the position of victims of persecution, may, by drawing upon the wrath of their governments, achieve the contrary result. That consideration, although frequently described as realistic, must be regarded as contrary to experience. The fury of persecution receives an impetus not only from foreign acquiescence, but also from the hesitation and reserve of foreign intercession coupled with courteous admission that there is no right of intercession.' Hersch Lauterpacht, *International Law and Human Rights* (London: Archon Books, 1968), p. 32-33.

⁹⁸ Quoted in Carr, *Twenty Years' Crisis*, p. 30.

surest way to get them treated with angry contempt'.⁹⁹ If one party in the conflict is determined to continue fighting, peace must be imposed with military force.

The record of humanitarian interventions in the nineteenth century supports this point. For example, when Europe offered to mediate in the civil war between the Greece and Turkey, it discovered that treaties and protocols did not lead to peace. The Sultan did not bring to an end the brutal campaign against the Greeks simply because Britain, France, and Russia demanded that both parties end the fighting and observe an armistices. Rather, as Harcourt put it, 'armistice was not suggested but imposed'.¹⁰⁰ What brought about a settlement was not the 'moral force of their representations' but the 'overwhelming superiority of their resources'.¹⁰¹ Similarly, diplomatic protests and despatches did not bring about a resolution to the intractable conflict in Cuba. Spain ignored McKinley's calls for a policy of humane warfare according to the rules of civilised warfare. Only after McKinley waged a full-scale war was peace attained. If peacemakers want peace, they will have to back their lofty, stern words with force.

But it is not just the application of force, but overwhelming force which should be undertaken. On this point we are perhaps ill-served by the concept of 'intervention'. Intervention entered nineteenth-century international law as a classification of military action which is neither war nor peace, but somewhere in between. Intervention was understood as military action of a limited kind, more like a 'surgical operation'.¹⁰² The problem with this way

⁹⁹ Lawrence, *Principles*, p. 135.

¹⁰⁰ Harcourt, 'Perils of Intervention', p. 45.

¹⁰¹ *Ibid.*

¹⁰² P. H. Winfield, 'The History of Intervention in International Law', *British Yearbook of International Law* 3 (1922-23), p. 143.

of thinking is that it either leads the intervenor to think the task is easy, that there is a quick exit. Or more problematically, it lulls the intervenor into thinking that limited use of force will resolve the conflict. In reality, there is not much distinction between 'intervention' and 'war'. What begins as an intervention often results in a full-scale war when the target resists. Hence, if the intervenor wants peace it must prepare for war. If the degree of atrocities is as great to warrant interference in the first place, as in the case of genocide, then the application of force should be aimed at removing the source of the suffering.

A decisive intervention will not necessarily be neutral.¹⁰³ It is important to distinguish between peace-keeping from peace-enforcement. Impartiality is crucial to the former since peace-keeping operations are undertaken with the consent of all parties involved. Peace enforcement, on the other hand, is the use of force against a particular party to bring a resolution to a conflict. In principle the intervenor should choose the party with justice on its side. To intervene as an impartial party, Richard Betts argues, is to produce a stalemate. On the ongoing conflict in Bosnia, Betts writes:

¹⁰³ Nineteenth-century interventions were decidedly not impartial. The intervenors did not regard all parties as equals. Force was directed at one party for the benefit of another. The deployment of a joint naval squadron off the coast of the Bay of Navarino by the European powers, for example, was not a threat against both parties. Since Greece had already accepted the terms of the Treaty of London, the display of force was intended to persuade Turkey to accept the Treaty. Similarly, the mandate of French troops in Morea was not to act as mediating force interposed between the belligerent parties, but to expel Ibrahim's soldiers from Greece. The American intervention in Cuba was similarly partial. The military objective was to defeat the Spanish force in Cuba and assert control over the island. The naval blockade established around the northern coastline of Cuba was to prevent the Spain from assisting its soldiers and allow US ships to ferry an expeditionary force to Cuba. The landing of US troops at Santiago de Cuba was to defeat the Spanish and expel them from Cuba.

There, the West's attempt at limited but impartial involvement abetted slow-motion savagery. The effort wound up doing things that helped one side, and counterbalancing them by actions that helped the other. This alienated both and enabled them to keep fighting'.¹⁰⁴

Ultimately, a decisive intervention must bring about a more lasting solution. Graham observed, 'a mere sporadic intervention without permanent results is not remedial in character and leads nowhere'.¹⁰⁵ To achieve this, the intervenor must be aware that the objective is more than a military one. The aim of intervention must be to resolve the questions in dispute. On this Harcourt is again instructive. To intervene without resolving the 'bellicose questions' will not bring peace. It would 'simply be giving breath to the feeblest party in order to refresh him for another round'.¹⁰⁶ This inevitably requires some form of political intervention. While oppression and civil wars may be the result of ethnic or racial animus, the solution cannot sidestep political questions such as 'Who governs?' and 'Who has control of what territory?' after peace is imposed by military force.¹⁰⁷

For intervention to best promote order, the intervenor must remain engaged after the initial military and political objectives have been achieved. Withdrawing too early would endanger the whole aim of intervention if the target of intervention slides back into renewed fighting or descends back to violent anarchy. For this reason, it is often necessary that the intervenor remain in occupation for a period of time. How long the intervenor remains

¹⁰⁴ Betts, 'The Delusion of Impartial Intervention', p. 24.

¹⁰⁵ Graham, 'Humanitarian Intervention in International Law', p. 326.

¹⁰⁶ Harcourt, 'Perils of Intervention', p. 48.

¹⁰⁷ Betts, 'The Delusion of Impartial Intervention', p. 30.

depends on the level of atrocities, the degree the parties accept the political settlement, and the ability of the target of intervention to protect itself. Some interventions can result in a swift exit when the source of the atrocities is toppled. Intervention in civil wars, however, are likely to lead to prolonged intervention so to protect the peace. The intervening army, therefore, must remain to act as the guarantor of the peace settlement. Its job would be to protect all sides from renewed hostilities. An unwise and ineffective intervention has the potential to make things worse, to give a false sense of resolution. More importantly, it can undermine the credibility of the intervening powers.¹⁰⁸

As we see in this chapter, allowing states the unilateral right of humanitarian intervention can undermine international order. It gives states an additional reason to use force, allowing them to conceal selfish aims under the claim of humanitarianism. The danger is that anything which undermines the sovereignty of states will lead to greater violence in international life. But a strict adherence to non-intervention is also problematic since internal conflicts often produce external consequences. The task is to balance humanitarian protection with concerns for power political interests. Only then could order exist.

¹⁰⁸ Thomas G. Weiss, 'Intervention: Whither the United Nations?', *Washington Quarterly* 17 (1994), p. 123.

CHAPTER EIGHT

CONCLUSIONS

CHAPTER EIGHT

Utopians go to war only for good reasons: to protect their own land, to drive invading armies from the territories of their friends, or to liberate an oppressed people, in the name of humanity, from tyranny and servitude.

—Sir Thomas More, 1516¹

It has been said that the doctrine of 'intervention for humanity' in spite of the humanitarian purpose of those who formulated it, is, in the practice of nations, used fraudulently and as a means of covering conquest and exploitation with a veil of legality.

—Alpheus Snow, 1919²

CONCLUSIONS

This thesis has examined humanitarian intervention from an historical perspective, with a particular interest in how theory and practice have affected international society. I will summarise the arguments and reflect on broader, related issues.

One recurring problem encountered is the difficulty of defining 'intolerable misrule' and 'extraordinary atrocities'. It was even admitted that this was beyond exact definition. Without objective criteria, the intervenor must rely on moral values in judging when intervention is

¹ More, *Utopia*, p. 87.

² Snow, *The Question of Aborigines in the Law and Practice of Nations*, p. 195.

justifiable. This has been viewed as both a positive and negative feature. For the optimist, the fact that there is no fixed line to determine what is 'intolerable' can be an impetus for progress, as international society is 'lifted' toward higher standards of justice and decency. Persecution and oppression need not reach genocidal proportions before intervention becomes justifiable. Yet, for the pessimist, that no clear line can ever be discerned between 'tolerable' and 'intolerable' is the source of abuse. It is liable to encourage self-righteousness interventionism at best, and at worst, to provide a legal cover for conquest and colonialism.

As with many 'hard cases' of law and morality, the truth is somewhere in between. The very notion of 'lifting' a people up by lowering the threshold for justifiable intervention is clearly susceptible to abuse. The presumption that one knows what is best for another people, that one's standard of justice and human rights applies to another society is dangerous. Combined with the belief that one's own civilisation is superior, this principle may lead to crusading interventionism and colonialism. But to suggest categorically that those who have advocated this doctrine and put it into practice were Machiavellian opportunists or apologists for colonialism and conquest ignores the complex interplay between genuine humanitarian sentiments and paternalistic ideals of protecting a 'lower people'. It overlooks the fact that states, and people for that matter, are motivated by moral conceptions of right and wrong, of justice and injustice.³ States do not always intervene to advance national interest in a crude sense, but also to advance particular ideals or moral values.

The interesting question is the impact this has had on international society. International society has been governed by rules concerning

³ See David A. Welch, *Justice and the Genesis of War* (Cambridge: Cambridge University Press, 1993).

sovereignty, non-intervention, and limitations on the use of force. Humanitarian intervention poses problems for these rules. The tension between sovereign jurisdiction and claims of humanity has been an enduring feature of international society. To suggest that ever since the Peace of Westphalia intervention to protect another people was prohibited is far from accurate. The right of humanitarian intervention was accommodated and coexisted with the rules of sovereignty and non-intervention. This tension was resolved through the natural law notion of universal solidarity or the nineteenth-century system of bifurcated rules. The concept of the state with inviolable borders and the absolute duty of non-intervention is a feature of post-1945 international society.

The rules of sovereignty and non-intervention have clearly changed since 1991 as international society has become more tolerant of humanitarian intervention. This does not, however, lessen the importance of justifying why intervention should be permitted. The options put forth in the past are not just of historic interest, but are revived in the contemporary debate. It is now commonly voiced that states are entitled to intervene since international society is a global society of peoples who share common bonds and universal rights. This is not too different from the natural law theory of intervention. Or, the idea that some states are 'beyond' the pale and therefore legitimate targets of intervention has been expressed as well. Rawls argues, for example, that 'tyrannical' regimes are not entitled to the protection of the norm of non-intervention. This is a familiar theme, not unlike the nineteenth-century doctrine that 'semi-civilised' and 'uncivilised' peoples do not enjoy the full protection of international law.

Ideas and concepts discredited for much of the post-1945 era have been revived. 'Civilisation' and 'civilised states', and their opposites 'barbarian' and 'barbaric', once considered as anachronistic have re-entered

the dialogue. One prominent American politician remarked, for instance, the 'notion of a small band of *barbarians* directly taking on the *civilised* democracies and winning is a threat to the entire survival of stability on this planet, and we should respond to it with whatever level of coercion is ultimately required'.⁴ Similarly, the idea of colonialism has been revived. It has been suggested that the 'failed' states of Africa should be placed under UN trusteeship, neo-colonial administration by former colonial powers, or as Mazrui advocates, 'self-colonialism' by Africans. What was once unthinkable, deemed as contradictory to self-determination and decolonisation, as a throw back to 'White man's burden', has become a serious policy proposal.

Whether this is a positive development is open to debate. On the one hand, resurrecting the language and concept associated with nineteenth-century imperialism is sure to be offensive for many. There is the ever present danger of resorting to old racial stereotypes and prejudices. But, as Paul Sieghart points out, 'the concept of civilization is an important one, by no means confined to Western cultures, and in at least some of its aspects it has made substantial contributions to improvements in the rules of international law'.⁵ While we do not have to accept that there is an universal civilisation, every civilisation has a standard of justice. Massacres of unarmed civilians and genocide are unacceptable by any standard.

If 'civilisation' is to be revived with any meaning, however, it is important that an entire people is not cast as 'uncivilised' or incapable for 'civilisation'. Rather, it is to the rulers or military commanders who order such atrocities whom we brand as 'uncivilised'. Equally important,

⁴ 'Gingrich crusades to rid the world of barbarians', *The Times*, 20 July 1995, p. 10. Emphasis added.

⁵ Sieghart, *The Lawful Rights of Mankind*, p. 49.

soldiers who commit such heinous acts are condemned as well. The plea of subordination to military command does not excuse gross violations of human rights. As Article 7(4) of the Statute of the International Tribunal in Yugoslavia⁶ makes clear, obedience to superior orders does not absolve criminal responsibility but may be a mitigating factor in the punishment as justice requires.⁷

The purpose here is not to criticise or approve the revival of concepts such as 'civilisation' and 'uncivilised', but to consider what this means for the expansion of international society. The wave of humanitarian crises since 1991 suggests that the frontiers of international society have not come to a closure. An assumption of the post-1945 system was that the expansion of the society of sovereign states was coming to a close as former colonial empires were broken up to sovereign states. But

⁶ For text of the Statute, see Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), S/25704, 3 May 1993, reproduced in *International Legal Materials* 32 (1993), pp. 1159-1205.

⁷ The question of superior orders and criminal liability has undergone important changes. Prior to the end of the Second World War, U.S. and British military manuals maintained that soldiers who violated the recognised rules of warfare could not be punished if they acted on orders from superiors or the government. See *British Manual of Military Law*, Chapter XIV, § 443 and *United States Basic Field Manual*, Article 347. This position was changed in 1944, removing the immunity defense, so that Axis war criminals could not escape punishment. Consistent with this new approach, Article 8 of the Charter of the International Military Tribunal at Nuremberg stipulated that superior order could not excuse a defendant from criminal responsibility but may be considered a mitigating factor in punishment. The International Law Commission's Formulation of the Nuremberg Principles in 1950, however, dropped the idea of mitigation of punishment, but noted that each court could consider mitigation. The Statute of the International Tribunal in the former Yugoslavia (1993) explicitly re-affirms the position of the Nuremberg Charter that superior order, while not a defense to criminal responsibility, can be considered in the mitigation of punishment as justice requires. For the record of the International Law Commission's debate and Formulation presented to the General Assembly, see *Yearbook of the International Law Commission* 1950, vol. 2, pp. 270-72 and pp. 374-78.

as Robert Jackson's work has illustrated, many of these states exist only in name. The 'failed' state phenomenon in Somalia and Rwanda has forced international society to reconsider the once unchallenged principle that membership in this society is a right. This opens up difficult moral, legal, and political problems of how international society should relate to these entities and what actions should be taken to protect the people when weakness results in 'violent anarchy'.

The expansion of international society, however, has another meaning: the expansion of the inner circle. In the nineteenth century states such as Turkey, China, and Japan, while considered sovereign states, were not full members of 'civilised' international society. The values of 'civilisation' were to be imposed through intervention. Only when these states met requirements, including a minimum protection of the inhabitants and observance of the laws of war, were they finally admitted to the family of 'civilised' states. In the same way, international society remains stratified between an inner and outer circle. While there are many sovereign states, there is a core of states that view themselves self-consciously as a league or alliance of liberal democracies. The admissions requirements include minimum standards of human rights, respect for minority rights, and as some would require, democratic governance.

Liberal international society would like to see the frontiers of its inner circle expand to include, in principle, as many as possible. The question for liberal international society, though, is whether humanitarian intervention should be undertaken to ensure that states on the periphery observe a minimum degree of humanity in how they treat their people or fight a civil war. It must be remembered that the 'civilised' states of Europe which assumed the tasks of humanitarian intervention held strong assumptions about the role of Great Powers in the management of world affairs and colonial ethos of 'civilising' another

people. But more importantly, there were commercial and strategic benefits as well. The fact that these factors are no longer dominant in the equation has obviously dampened the enthusiasm for humanitarian intervention. Liberal democracies do not believe it is their duty to 'civilise', especially when the direct benefits from intervention are minimal.

The desire to spread Western values, however, is only one reason which states have undertaken interventions. There are other self-interested reasons for intervention other than imposing liberal values on the rest of the world. No different than in the past, internal crises have direct external consequences which naturally affect the national interest of others. Internal conflicts often 'boil over' to affect neighbouring countries. Armed incursions across borders and the flow of refugees fleeing violence and persecution threaten the internal security of others. At a more systematic level, what begins purely as a local conflict can destabilise regional stability. There is a greater likelihood of this occurring when a civil war between ethnic factions occurs within a region inhabited by multiple ethnic groups. There is the danger of a conflict widening as neighbouring powers intervene on behalf of one side.

Naturally states calculate the gains and losses any time a decision to send arms and soldiers abroad is made. Any discussion of humanitarian intervention must not ignore this aspect of the power-political equation. This crude national interest calculus, however, is not necessarily a recipe for non-intervention since non-intervention may not always be in a state's national interest. Indeed, even the most staunch isolationist would agree that intervention is sometimes necessary. The debate seems to be over the definition of 'national interest'. At one end of the spectrum is the neo-isolationist position that arms and soldiers should only be deployed to protect the territorial or strategic security of the state. Humanitarian

objectives cannot be the primary impetus for the use of force. At the other extreme is the view that containing crises at the periphery of international society and expanding the values of liberal democracy are in the interest of all liberal states.

While neither extremes agree on a definition 'national interest', both share the common belief that intervention can be justifiable under certain circumstances. As this suggests, both perspectives reject the notion of non-intervention. What remains, then, of the idea of absolute non-intervention? It would be premature to pronounce the demise of this principle in international politics. There is no evidence that developing countries have discarded their historical scepticism toward a right of intervention. It should be recalled that Zimbabwe, Yemen, and Cuba, expressing the Third World perspective, opposed Resolution 688 calling for assistance to the Kurds in Iraq in 1991. The representative from Yemen cautioned that Resolution 688 was a step away from the 'rules that have contributed to stability over the past four decades'.⁸ The scepticism of the Third World is understandable given that they, as the weaker members of international society, stand to benefit enormously from a legal regime which categorically prohibits intervention.

Criticism of intervention comes not only from the non-Western world. One of the strongest voices of absolute non-interventionism comes from within the tradition of international liberalism. While human rights and justice are both worthy goals, the value of non-intervention is the primary principle of international politics. A world rife with intervention is not going to promote justice but may in fact be its obstacle. The domestic analogy to this is the notion that the autonomy of the self is prior to the ends of the moral community. The protection of individual

⁸ S/PV. 2982, pp. 28-30, 31 (remarks of Mr. Al-Ashtal, Yemen).

rights is the first step to the foundation of a society of shared norms and values. Non-interventionists argue similarly that the duty of non-intervention is a first or primary principle necessary for the foundation of international society. Liberal non-interventionists insist that the best way to bolster the principle is through exemplary non-interventionism.⁹

The position of non-interventionism strikes many as indifferent to the plight of downtrodden peoples. Non-interventionists would respond that accusations of callous indifference must be measured against the view that indifference is desirable precisely because its opposite—benevolent interventionism—hinders the progress and development necessary for liberal societies to flourish. It is conceded that military intervention to overthrow a tyrant may relieve human suffering and oppression. Yet, this is only temporary succor until more fundamental changes take place at the root of society. The goal of long-term stability and good governance must come from within each society; it cannot be imposed externally. This view is grounded in John Stuart Mill's often quoted dictum that a people must earn, through blood and sacrifice, its own freedom.¹⁰

This strict doctrine of non-intervention, however, is much criticised. As a matter of law, the post-1945 strict notion of absolute duty of non-intervention has been seriously undermined. Given the changes in the last five years, it is difficult to sustain the view that international law no longer tolerates some form of intervention. The statements of the past and current Secretary-General, heads of states, and the actions of states all

⁹ Smith, 'Liberalism and International Reform', p. 213.

¹⁰ On Mill, Walzer writes: 'Mill generally writes as if he believes that citizens get the government they deserve, or, at least, the government for which they are "fit." And "the only test. . . of a people's having become fit for popular institutions is that they, or a sufficient portion of them to prevail in the contest, are willing to brave labor and danger for their liberation." No one can, and no one should, do it for them.' Walzer, *Just and Unjust Wars*, p. 88.

point to a recognition, at least in principle, that the boundaries of sovereignty end when outrages of humanity begin. As the former UN Secretary-General Javier Pérez de Cuéllar remarked, '[w]e are clearly witnessing what is probably an irresistible shift in public attitudes towards the belief that the defence of the oppressed in the name of morality should prevail over frontiers and legal documents'.¹¹

The absolutist position on non-intervention is especially difficult to defend in face of extraordinary atrocities. As the last five years indicate, intolerable misrule, brutal civil wars, and anarchy remain a part of everyday life in international society. Despite claims of enlightenment and progress, there is no evidence that international life will be more peaceful, humane, or orderly. If this is the case, the claim to use military force for humanitarian aims will continue to occupy a valid position in international discourse. Even if states wish to downplay the rhetoric of humanitarianism, it is questionable whether it can be successful. The so-called 'CNN Factor' has transformed public opinion as a force for intervention. Domestic pressure which pushes governments to intervene is of course not new but played a role in the nineteenth century. The immediacy and power of images, however, can pull a government into intervention, as the case of US intervention in Somalia illustrates.

Humanitarian intervention as an *idea*, therefore, remains a compelling force in international politics. The question is how to accommodate this phenomenon without creating disorder, unfettered interventionism, and abuse. Collective authorisation remains an attractive proposal, although not one without its problems. As observed in Chapter 7, collective authorisation through the Security Council gives intervention its legitimacy by characterising the action as the expressed

¹¹ Quoted in Roberts, 'Humanitarian War', p. 437.

will of international society. Yet, its virtue is also its limitation. Any system which requires consensus (or if not agreement, at least non-obstruction) is susceptible to paralysis. Security Council Resolution 688 was possible because China abstained. Louis B. Sohn's proposal requiring that all Security Council authorised interventions must be approved by the International Court of Justice runs into a similar problem. Requiring the Court's approval for intervention may reduce the likelihood of abuse but would not get at the problem of the veto power of permanent members.

Under a system of collective authorisation the viability of intervention is captive to the lone dissenter. For this reason, it may not be an attractive model. A variation of this is the view that Security Council authorisation should be obtained in good faith for all interventions; yet, if authorisation is denied, the right of self-help reverts back to the individual states. The right of self-help is essential to the enforcement of international law. States under direct attack, for example, should appeal to Security Council for assistance; yet, the inaction of the UN allows each state to exercise the inherent right of self-defense. This idea applies to humanitarian intervention. The rationale of this theory of intervention is that while international endorsement is preferable, states never abdicated their right to intervene to protect human rights. This model is highly appealing for a great power which prefers UN umbrella for diplomatic approval but refuses to be paralyzed by inaction, indifference, or ideological infighting in determining when, where, and how to intervene for humanitarian aims.

The 'go it alone, with or without the UN endorsement' approach to intervention, while appealing in some respects, is ultimately counterproductive for international order. For much of the post-1945 era international law has attempted to restrict the use of force by imposing

severe restrictions. Allowing states to ask for Security Council authorisation when it suits them but permitting them to act otherwise when denied authorisation is tantamount to giving states a free hand in deciding when to intervene. Consensus building, while frustrating and at times ineffective, is the building block for successful interventions. It enhances the legitimacy of the operation and creates a structure for burden sharing. But most importantly, it reinforces the principle that the use of force for humanitarian aims is an exception which can be justified only with the approval of the international community as expressed through the Security Council.

No doubt this rule encounters difficult moral problems. What happens when, for example, a permanent member vetoes a humanitarian operation even though all evidence points to the necessity and justice of intervention? Should the world sit idly by in the face of genocide simply because a permanent member objects to collective action? Should a state, or coalition of states, be condemned for launching an intervention? As a matter of law, lawyers may say yes. But from a moral perspective, few would denounce such action if indeed the objective was to protect a people from extraordinary atrocity. The international community may excuse such action; but this is very different than establishing a system where such actions are formally incorporated as lawful. This is a fine distinction, but not one which should be dismissed easily. Ian Brownlie offers an analogy to euthanasia: 'Euthanasia is unlawful, but doctors on occasion commit technical breaches of the law. . . It is very generally assumed that legalizing euthanasia would alter the moral climate and produce harmful abuse.'¹²

¹² Ian Brownlie, 'Humanitarian Intervention', in John Morton Moore, ed., *Law and Civil War in the Modern World* (Baltimore: John Hopkins Press, 1974), p. 223.

As with Euthanasia, or any other difficult areas of law and morality, no solution is free from second guessing. Humanitarian intervention as an idea in international politics, and the various attempts to implement this idea, is fraught with complex, at times intractable, choices. More than any other issue, it highlights the tensions between order and justice. Theorists and practitioners of international law and politics have striven to make sense of these two poles. If order is the primary objective, state sovereignty and non-intervention should prevail over claims of human rights. If justice is the chief objective of politics, the rights of humanity should supersede artificial boundaries. These two goals need not be exclusive, however. As this thesis has argued, humanitarian interventions, properly authorised, undertaken as the expression of the will of international society, can be a force for order as well as justice.

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