

HUMANITARIAN INTERVENTION AND FLEDGLING DEMOCRACIES

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The past three years have consolidated expectations about the lawfulness of humanitarian intervention in circumstances in which the lives of large numbers of a population are in danger and such government as is there is either non-existent, ineffective, or itself the threat to basic human rights. In northern Iraq, a far-reaching and now long-term humanitarian intervention has been accomplished under the aegis of the United Nations. In Liberia, a sub-regional economic union supplied the nominal authority for a substantial humanitarian intervention, led by Nigeria. France intervened in Rwanda with United Nations sanction, and the United States entered Haiti under U.N. authorization and with the agreement of the legitimate government. The tragedies of Somalia, Bosnia-Herzegovina, and the southern Sudan have not been remedied by humanitarian intervention, collective or unilateral. The obstacle has not been uncertainty about the prospective lawfulness of such action, but the uncertainty about feasibility.

The flow of international communications suggests that in some of these circumstances, even a unilateral action would have been accepted. This is not to say that all legal problems about the international doctrine of humanitarian intervention have been dispelled. The pressure on U.N. Charter Chapter VIII and its potential for authorizing the creation or recreation of hegemonical spheres of influence is disquieting. But none of this has, at least yet, tainted the conception of lawful humanitarian intervention.

I wish to address a cognate problem, on which authority expectations continue to be less certain: support, through the various modes of humanitarian intervention, for democratic governments that find themselves imperiled by violent domestic anti-

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democratic forces. The substantive law here is clear. Popular government is an internationally prescribed human right. Article 21(3) of the Universal Declaration on Human Rights provides: "The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures."¹

The tendency among some diplomats, and even human rights lawyers, to see the violation of the right to democratic government that is expressed in Article 21 as lamentable, of course, but somehow less urgent than other human rights violations, is a serious error. It should not take a great deal of imagination to grasp what an awful violation of the integrity of the self it is when men with guns evict your government, dismiss your law, kill and destroy wantonly and control you and those you love by intimidation and terror. When that happens, all the other human rights that depend on the lawful institutions of government become matters for the discretion of the dictators. And when that happens, those rights cease. Military coups are terrible violations of the political rights of all the members of the collectivity, and they invariably bring in their wake the violation of all the other rights. Violations of the right to popular government are not secondary or less important. They are very, very serious human rights violations.

International human rights, it bears repeating, are matters of international concern. They are not shielded by domestic jurisdiction. Indeed, this aspect of the international law of human rights has even affected the law of recognition. A verifiably popular government has become an important component of the international legitimacy of an elite.

Violations of popular sovereignty are increasingly subjected to international condemnation. Even in our hemisphere, with its long and melancholy history of interventions and its understandably acute concern for national sovereignty, the Santiago Declaration of the Organization of American States ("OAS") has committed the members of the OAS to some regional action when a democratically elected government has been over-

1. *Universal Declaration of Human Rights*, art. 21(3), G.A. Res. 217A (III), U.N. GAOR, 3d Sess., pt. 1, at 75, U.N. Doc A/810 (1948) [hereinafter *Universal Declaration*].

thrown.²

It is encouraging that the international community, as a whole, has made a clearer commitment to democracy, and that so many actors have come to the realization that democratic government enhances protection of human rights and reduces the likelihood of aggression. With U.N. action in Haiti this year, we may be seeing the beginning of a meaningful and not merely rhetorical United Nations commitment to support democracy. A corresponding doctrine of unilateral humanitarian intervention to prevent or reverse violations of the fundamental human right to popular government continues to be less certain, as if this right were somehow less important or urgent than other rights.

This was not always the case. In 1961, Tanganyika became independent.³ In January 1964, one week after a revolution in neighboring Zanzibar,⁴ Tanganyika's small army mutinied. Julius Nyerere, the President, turned to Britain for aid and a small contingent of Royal Marines flew in and suppressed the mutiny in one day. The death toll amounted to three mutinous soldiers killed. There were no civilian injuries and no marine casualties.

As soon as it was over, Nyerere broadcast to his people that "an army which did not obey the people's government was not an army of that country and was a danger to the whole nation." The next day, he sent a letter to the House of Commons, thanking "with deep gratitude . . . the help which has been given by Britain to Tanganyika." Evidently that was politically incorrect. The next day, Nyerere publicly apologized to his people for asking Britain to restore order.⁵

Tanzania, as it is now called, may not be a political paradise, but there have been no more coups and there have been constitutional transfers of power. Unfortunately, the Tanzanian case was not precedential. Consider the Gambia.

2. *The Santiago Commitment to Democracy and the Renewal of the Inter-American System*, O.A.S. General Assembly, 3d plen. sess. (adopted June 4, 1991), at 1, O.A.S. Doc. OEA/Ser.P/XXI.O.2 (1991); *Representative Democracy*, O.A.S. General Assembly, 5th plen. sess. (adopted June 5, 1991), AG/RES. 1080 (XXI-0/91), O.A.S. Doc. OEA/Ser.P/XXI.O.2 (1991).

3. *Tanzania*, in *THE STATESMAN'S YEAR-BOOK 1994-95* 1268, 1268 (Brian Hunter ed., 131st ed. 1994) (1864).

4. *Id.*

5. *East Africa*, KEESING'S CONTEMPORARY ARCHIVES, Mar. 21-28, 1964, at 19,963.

The Gambia had been one of Africa's few successful multiparty democracies since Sir Dawda Jawara won the presidency in 1970 in the nation's first post-independence democratic elections. Although the Gambia remained poor, a series of Jawara governments had compiled a respectable record in freedom of the press, independence of the judiciary, and respect for human rights.⁶

On July 23, 1994, a small group of disgruntled army officers in the national army of some 800 people ousted Gambia's elected government in a bloodless coup that had been planned and mounted in less than twenty-four hours.⁷ After that, as the inimitable Yogi Berra is supposed to have put it, "it was *deja vu* all over again." The self-proclaimed and multiply oxymoronic provisional military president, a twenty-nine-year-old recent graduate of a military-police training course in the United States, promised that this would be a "coup with a difference."⁸

Where have we heard that before? Predictably, the new military dictatorship reneged on its pledge to announce a timetable for a return to democracy by the end of September.⁹ It has barred all political activity, arrested dissenting journalists and confined ministers of the former government to house arrest.¹⁰ Twenty years earlier, Britain had flown a small force into Tanzania, put the mutinous troops back in the barracks and the elected government back in Government House and left.

The international response to the destruction of the Gam-

6. See, e.g., U.S. DEP'T OF STATE, *THE GAMBIAN RIGHTS PRACTICES 1993 (1994)*, available in LEXIS, NEWS Library, CURNWS File; James Roberts, *Soldiers Take Over in Gambia; 2,000 UK Tourists Trapped*, INDEPENDENT, July 24, 1994, at 12. But see Peter da Costa, *Gambia Politics: Multiparty Advocate's Tolerance Was His Undoing*, Inter Press Service, July 25, 1994, available in LEXIS, Nexis Library, INPRES File (noting institutionalized corruption of Jawara's regime, in addition to outstanding human rights record).

7. Pap Saine, *Gambia's Capital Calm After Coup*, Reuters World Service, July 24, 1994, available in LEXIS, Nexis Library, REUTER File; *Soldiers Take Power in Bloodless Coup; Other Developments*, FACTS ON FILE WORLD NEWS DIG., Sept. 8, 1994, at 644 A2, available in LEXIS, Nexis Library, FACTS File.

8. Howard W. French, *Waiting for the 'Difference' in Gambia's Military Coup*, INT'L HERALD TRIB., Aug. 30, 1994, available in LEXIS, Nexis Library, IHT File.

9. Justice Fofanneh, *Gambia-European Union: Further Sanctions Imposed on Junta*, Inter Press Service, Oct. 13, 1994, available in LEXIS, Nexis Library, INPRES File. The junta has since delayed the restoration of democracy to December 1998. *U.S.-Gambia: U.S. Cuts All Aid to Gambia*, Inter Press Service, Oct. 28, 1994, available in LEXIS, Nexis Library, INPRES File [hereinafter *U.S. Cuts All Aid*].

10. Howard W. French, *In Gambia, New Coup Follows Old Pattern*, N.Y. TIMES, Aug. 28, 1994, § 1, at 4.

bia's democracy was quite different. President Jawara, like Nyerere, asked for military action to restore democracy. A U.S. warship was off the coast of the Gambia on the day of the coup, but Washington refused to intervene, despite the U.S. Ambassador's contention that the seventy marines on board could stop the coup.¹¹ For ten days, the United States did not even officially condemn the coup. Finally, it announced that, in light of the coup, it would review security and development assistance to the Gambia.¹² On October 28, the United States cut off all but humanitarian aid to the Gambia,¹³ and will close its AID mission in the Gambia in early 1995.¹⁴

Europe's concern for the violation of democracy was scarcely less tepid. Within three weeks, Britain, Germany, and the European Union were praising the officers for the peaceful nature of their coup, and threatening to cut off aid only if democracy were shunted aside.¹⁵ Now those states have suspended development aid to the Gambia.¹⁶ But that indication of displeasure, which is surely an *opinio juris* in favor of human rights, does not restore democracy. It punishes the population at large, whose members are already the victims of the violation of their fundamental political rights. Consider Haiti.

In 1991, after decades of dictatorship by the Duvaliers, the Haitian people installed a popularly elected president, Jean-Bertrand Aristide. Every aspect of the election was monitored by international organizations and confirmed as free and fair.¹⁷

11. Richard Dowden, *Deposed President Calls for Help; Gambia's Sir Dawda Jawara Breaks His Silence to Describe to Richard Dowden, Africa Editor, the Military Coup Which Overthrew a Model Multiparty Democracy with a Unique Human Rights Record*, INDEPENDENT, Sept. 26, 1994, at 11.

12. *U.S. Condemns Gambian Coup*, Xinhua News Agency, Aug. 2, 1994, available in LEXIS, Nexis Library, XINHUA File. The United States initially offered only to mediate between Jawara and the military junta that ousted him. *U.S. Steps In as Gambia Coup Mediator*, Agence Fr. Presse, July 24, 1994, available in LEXIS, Nexis Library, AFP File.

13. *U.S. Cuts All Aid*, *supra* note 9.

14. Pap Saine, *Long Civil Rule Handover Worries Gambians*, Reuters World Service, Oct. 25, 1994, available in LEXIS, Nexis Library, REUTER File.

15. *Africa News Highlights 1700 GMT Aug 13*, Reuters World Service, Aug. 14, 1994, available in LEXIS, Nexis Library, REUWLD File.

16. *EU Suspends Aid to Gambia in Reaction to Continued Military Rule*, EUR. RPT., Nov. 11, 1994, available in LEXIS, Nexis Library, EURRPT File. The World Bank, which initially had cut off aid to the Gambia, has since restored some funds. *Gambia's Leader Links Ex-Finance Minister to Plot*, Reuters World Service, Nov. 15, 1994, available in LEXIS, Nexis Library, REUTER File.

17. See Georges A. Fauriol, *Inventing Democracy: The Elections of 1990*, in THE HAI-

But authoritarian habits die hard. Within months, the army, an ill-trained force of some 5000 men, seized power, expelled Aristide, and suppressed popular protest in what became the most violent dictatorship in Haitian history. Almost immediately, the stream of refugees across the Florida Straits swelled to a torrent.¹⁸

Once again, the Nyerere strategy was not followed. Economic sanctions were applied. Economic sanctions are effective when the target is a rational economic maximizer. The Haitian military elite may have been rational, but there was no evidence that it was losing sleep over the economy. Thus, all the sanctions accomplished was to reduce the Haitian economy, already the poorest in the hemisphere, to rubble while creating economic opportunities for the military elite. With remarkable enterprise, the military elite added the contraband business to their narco-traffic portfolios. Repression and economic desperation escalated. The torrent of refugees hemorrhaged. Meanwhile, the army, with no casualties from sanctions, remained brutally in control and the Duvalierist Macoute, reborn as Fraph and Ataches, were back.

The villains of the piece would still be there and the great bulk of the population would still be suffering if the United States had stuck by its economic guns. Instead, Washington came to its senses, acknowledged that economic sanctions were a failure, pressed the United Nations for authorization and, on that basis, intervened militarily, as the Multinational Force, to restore the democratically elected government.

Since the United Nations was formed in 1945, many new, small states have become independent. Most started with an elected government and high aspirations for democracy. But most lacked democratic traditions and, in particular, traditions of military subordination to civilian authority. In state after state, elected governments were overthrown. Democracy acquired a new definition: "one man, one vote, once." International law was turned on its head as spokesmen for military gov-

TIAN CHALLENGE: U.S. FOREIGN POLICY CONSIDERATIONS 49, 53, 57 (Georges A. Fauriol ed., 1993) (discussing actions of international observers to 1990 Haitian presidential election); INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, ANNUAL REPORT, 1990-91, at 468, OEA/Ser. L/V/II.79 rev. 1 (1991).

18. Howard W. French, *Fleeing Haitians Fear Army More Than Perils at Sea*, N.Y. TIMES, Nov. 22, 1991, § 1, at 1.

ernments twisted words like "sovereignty," "domestic jurisdiction," and "internal affairs" to block international scrutiny. Soon everyone, even Nyerere, was speaking this way. Any outside unilateral effort, as in Tanganyika, in 1963, to restore an elected government by forcing mutinous troops back to their barracks, was sure to be condemned in international fora (most vociferously by representatives of non-democratic governments) as an imperialistic rape of national sovereignty. These rhetorical broadsides were delivered with scant concern for the absurd. In 1979, when French paratroopers flew in and forcibly removed the self-styled Emperor of the Central African Empire, Jean Bedel Bokassa, a certifiable villain, certain other governments had the temerity to protest France's action when the matter was raised in the Security Council. They actually alleged an unlawful violation of the sovereignty of the Central African Republic! A representative of the new government in Banjul turned and accused the accusers for not intervening sooner on behalf of the Central African people.¹⁹

When the United States removed the Noriega regime in Panama, and installed the government that had been brought to power in an internationally certified free and fair election, the then-Sandinista Government of Nicaragua said: "Once again an offense has been committed against our peoples. Once again an attempt is being made to make brute force appear to be law. Once again the principles which are the foundation of international relations have been violated."²⁰ The Permanent Representative of Nicaragua went on to cite sections of the Charters of the United Nations and the OAS to establish "[t]his flagrant violation of Panama's sovereignty and territorial integrity."²¹ And this, at the very moment, as we now know, that the then Nicaraguan government was itself engaged in trying to overthrow an elected government in El Salvador.

Reading speeches like these, one almost forgets that the action removed Manuel Noriega, who had suppressed popular sovereignty and refused to allow a government chosen in an inter-

19. See generally W. Michael Reisman, *Old Wine in New Bottles: The Reagan and Brezhnev Doctrines in Contemporary International Law and Practice*, 13 *YALE J. INT'L L.* 171 (1988) (surveying international legal regime governing spheres of influence and military intervention in peripheral states).

20. U.N. SCOR, 44th Sess., 2899th mtg. at 3-5, U.N. Doc. S/PV.2899 (1989).

21. *Id.* at 4.

nationally-supervised election to take power. In this odd calculus, those matters are not important. "No argument," the Nicaraguan diplomat said, "can possibly justify intervention against a sovereign state."²²

One would hope that anachronistic speech will be the last time the international community is subjected to such a cynical manipulation of international law. For make no mistake, it is a manipulation of international law.

The U.N. Charter is based on "respect for human rights and fundamental freedoms"²³ and endows the Security Council with the power to respond to violations of the basic right to democracy. The Universal Declaration of Human Rights explains that, in the political sphere, this means free and fair elections.²⁴ During the Cold War, members of the Security Council talked human rights and democracy but felt that they had to view military coups in developing countries in terms of their own strategic interests. With the exception of the usurpation of power in Rhodesia by a minority white government, which the Security Council condemned and sanctioned, one superpower or the other was likely to veto incipient international action to restore a legitimate government.

The Cold War has ended and a remarkable new international consensus on the importance of political democracy, in its own right and as an indispensable precondition to the achievement of other human rights, has emerged. Suddenly, the Security Council seems capable, among other things, of protecting defenseless people from one particularly grave and, alas, widespread threat to the peace: greedy and ambitious officers and other thugs and bandits who seize power in fledgling democracies. But the United Nations, as a whole, is still unable to make this consensus operational. At least one Permanent Member of the Council has shown no passion for the international protection of political human rights.²⁵ Many other governments that send their representatives to the U.N. General Assembly are per-

22. *Id.* at 6.

23. U.N. CHARTER art. 1, ¶ 3.

24. *Universal Declaration*, *supra* note 1, art. 21, at 75.

25. *See, e.g.*, AMNESTY INTERNATIONAL, PEOPLE'S REPUBLIC OF CHINA: CONTINUED PATTERNS OF HUMAN RIGHTS VIOLATIONS IN CHINA (1992) (documenting China's violations of political human rights); *China: No Progress on Human Rights*, HUM. RTS. WATCH/ASIA, May 1994, at 1 (discussing China's crackdown on dissenters).

sonally concerned, perhaps with reason, about the consolidation of an effective international norm requiring democracy and the popular responsiveness of governments. In regional organizations, there are usually enough military or military-based governments to block action to protect democracies.

Who's left to do the job?

My colleague and friend, Professor Ruth Wedgwood, says no one. In a recent study, she expressed skepticism for the notion of the unilateral use of force to restore a democracy: "The emerging norms of the United Nations, the Organization of American States, and the Conference on Security and Cooperation in Europe have not ratified the use of unilateral military intervention."²⁶

The issue, I submit, is customary international law, which all of us play a role in shaping. Whether Professor Wedgwood proves to be right depends on what customary law is made. My friend, Professor Thomas Franck, in an important, indeed indispensable article on the emerging right to democratic governance, wrote in a similar vein: "[As a policy matter,] entitlement to democracy can only be expected to flourish if it is coupled with a reiterated prohibition on . . . unilateral initiatives."²⁷ With respect, I submit that exactly the opposite is the case.

The combination of a commitment to democracy, coupled with an unwillingness to allow for its unilateral enforcement, if that is the only alternative, has led to uses of economic sanctions that can only be called trigger-happy. The good news about these economic sanctions is that they confirm that the international community views the right to constitutional government as a basic human right and its violation as a threat to the peace. Economic sanctions, no less than military sanctions, require such a characterization as a prerequisite to their application, and with

26. Committee on International Arms Control and Security Affairs & Committee on International Law, *The Use of Armed Force in International Affairs: The Case of Panama*, 47 REC. ASS'N B. CITY N.Y. 604, 688 (1992) (citation omitted) (text by Ruth Wedgwood). Professor Wedgwood restates her analysis in Ruth Wedgwood, *The Use of Armed Force in International Affairs: Self-Defense and the Panama Invasion*, 29 COLUM. J. TRANSNAT'L L. 609 (1991). *But cf.* Malvina Halberstam, *The Copenhagen Document: Intervention in Support of Democracy*, 34 HARV. INT'L L.J. 163 (1993) (discussing Copenhagen Document, which supports states' action in defending democratically elected governments from overthrow).

27. Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 84-85 (1992).

good reason. Economic sanctions are as destructive as military sanctions and far less discriminating as to their target. They do not distinguish between combatants and non-combatants. The bad news about economic sanctions for these violations is that, more often than not, they severely punish the victims while enriching the villains.

The results are anomalous: the international commitment to democracy, but the disposition to authorize only economic sanctions to vindicate it in cases of violations of the democratic rights of peoples, produce sanctions programs destructive of the innocent rather than action that promises to be effective in deterring or removing the thugs and reinstating the government of the people. This approach to the problem ensures the continuing violations of the democratic aspirations of people by the thugs and bandits who continue to shelter behind the terms "territorial integrity" and "sovereignty."

Obviously, we must develop an organized and genuinely international method for maintaining democratic processes in new states. But to say it is not to have it. In many cases, some members of the Security Council will not authorize international action in support of internal democracy. In the short run, effective international protection of fledgling democracies will depend on decisive action by the great industrial democracies.

Hopefully, smaller states will join in, but if their prior approval and active participation is a prerequisite, there will not be much action. If the great democracies back up their insistence on respect for constitutional democracy in all other states with a claim of a customary right to unilateral humanitarian intervention for its violation, that norm, in itself, will act to deter coups. Customary international law with respect to the protection of property has been made and sustained by individual action. Democracy is no less important, in its own right and as an indispensable strut for the protection of other rights.

The proposal I am submitting to you is not ideal. It will only be applied to smaller and weaker states and there is always the danger that it will be used, as in the past, as a fig leaf for intervention. That danger is now minimized when the government that has been usurped was elected in internationally monitored free and fair elections. That is why no one protested in December 1990, when the United States put the Panamanian police

who tried to overthrow the Endara Government back in their barracks or in November and in December, 1989, when U.S. planes boxed in the Philippine air force and helped quell an incipient coup against Mrs. Aquino.

Restoring democracies is not always that simple. Sometimes it is messy, unpleasant, costly, susceptible to abuse even when the intentions of the intervener are relatively pure, and sometimes it is susceptible to denunciation even when the intentions of the denouncer are not. As in Algeria, it is hard to determine the right thing to do when the government about to be brought to power through a democratic election espouses a manifest program to violate fundamental human rights. Even when it is clear, external action may simply not be feasible. And even when the issues are clear and the mission is feasible, the results don't always seem stellar. As Panama, Grenada, and the Philippines show, reinstating a government chosen in an internationally supervised free and fair election does not, *ipso facto*, solve all national problems. But that is not the objective of the exercise. The purpose of this type of humanitarian intervention is to let people have the government they selected in a free and fair election.

Given the nature of the problem, sanctions are rarely the answer. They may make us feel virtuous, but they just punish the innocent, while failing to deter or dislodge the usurpers of legitimate government and the serious offenders of human rights. Their frequent use in these types of cases manifests, I submit, a failure to think through and accept the horror of military usurpations of democracy, the gross violation of human rights involved, and the avalanche of human rights violations that follow.

Democracy is a right guaranteed by international law and the condition *sine qua non* for the realization of many other internationally prescribed human rights. Democracy may also be the *sine qua non* of international peace, for the evidence is mounting that democratic countries do not attack each other.²⁸ Democracy will not take root in many new states if outsiders do

28. See generally Bruce Russett, *Politics and Alternative Security: Toward a More Democratic, Therefore More Peaceful, World*, in *ALTERNATIVE SECURITY: LIVING WITHOUT NUCLEAR DETERRENCE* 107 (Burns H. Weston ed., 1990) (setting out and explaining empirical data that democracies do not fight one another).

not commit themselves to doing what is necessary to sustain it.
The doctrine of humanitarian intervention allows such action.