

forethought, deliberation and attention be directed toward the structuring of a coherent, consistent and effective international doctrinal approach to the growing phenomenon of humanitarian intervention in the internal affairs of the world's nations.

**HOLLOW VICTORY: HUMANITARIAN INTERVENTION
AND PROTECTION OF MINORITIES**

*by W. Michael Reisman**

A humanitarian intervention is a military intervention conducted in order to provide urgent relief from serious and persistent human rights violations. Prior to the creation of general international organizations, humanitarian interventions were effectuated by the unilateral action of one state in the territory of another, which, by the early twentieth century, would have been unlawful but for, arguably, the humanitarian justification. Now, *humanitarian intervention* also refers to interventions for humanitarian purposes by international organizations. Such organizational actions are significant, from a legal standpoint, only if the humanitarian impulse is the sole authoritative basis for the action in question. The term *humanitarian intervention* has also been used more generally for any strategic program with a human rights objective. I will use the term in its classic military sense.

In an international political system in which the political autonomy of national communities continues to be a key goal, the legalization of the intervention of one, invariably stronger state in the territory of another, on conditions determined *pro hac vice* by the intervenor, has long been resisted. That resistance has been tempered of late, if not by the higher moral consciousness of our generation (of which there is, alas, little evidence), then by the realization that grave human rights violations in one country, in an interdependent world, are increasingly likely to become, at best, awkward and, at worst, a serious problem for many other states: Internal problems are rapidly exported, in the form of refugees, economic disruption and the breakdown of interdependent public health regimes, among other problems. Resistance to humanitarian interventions may also be reduced if, whatever the mix of motives of the intervenor, the intervention is short term and limited to dealing with the cause of the human rights violations.¹

For many reasons, the potential lawfulness of particular humanitarian interventions is now taken for granted at the normative level: The statist conception of sovereignty has yielded to conceptions of popular sovereignty. Alas, for other reasons, the normative triumph has proved to be a hollow victory, for as the license of the law in this area has been extended, so too has the reluctance to act by the states and intergovernmental organizations that have been contingently empowered by the legal changes.

The factual predicate of humanitarian intervention is always grave and widespread human rights violations in a state whose government is either unable to arrest them or is itself their author. The way human rights violations occur, however, may vary widely. There are comparatively easy factual situations for humanitarian interventions; for example, a situation in which a homogeneous population is governed cruelly by a religiously or ethnically distinct, if not foreign, elite. The intervenors expel the governing elite, perhaps carve out a new state, and set a popular local elite in place. The new situation is relatively self-sustaining and the intervenor withdraws, confident that its military action and/or sacrifice has been successful. Another relatively easy factual

* Yale University Law School; former President, Inter-American Commission on Human Rights.

¹ But not always. Consider, for example, the Syrian intervention in Lebanon in 1982, with the tacit approval of the Arab League and the Security Council. To date, the forces of Syria remain in Lebanon.

constellation is one in which a local dictator engages in widespread human rights violations and is removed from the scene by the intervenors, thereby allowing an indigenous and popular government to be installed. These are, at least conceptually, simple humanitarian interventions because the objective of the intervention can be accomplished quickly, allowing the intervenor to exit cleanly, like a surgeon expertly lancing a boil.

But grave human rights violations often occur in circumstances that are far less convenient for humanitarian intervention. Where, for example, the human rights violations are the result of the suppression of large groups of nationals by another domestic group, an intervenor cannot simply go in, remove the problem and exit. Where the oppressed group (which can be a majority numerically) is scattered throughout the territory, the option of creating a distinct state and then merely policing its borders (even should the option be desirable) does not exist. It is not that the grave human rights violations are not patent. They may well be, but the putative intervenor, whether an individual state or a group of states operating under the aegis of an international organization, is deterred by the challenge of engaging in large-scale and long-term social and political reconstruction, in the course of which it is likely to find itself sinking into a quagmire. This is a particularly arresting consideration for the leaders of democratic states.

Because this is usually the situation in which acute minority problems that would warrant a humanitarian intervention occur, it is one of the critical reasons why the humanitarian intervention technique is likely to be used less successfully when the problem is the grave human rights deprivation of a minority. Catch-phrases such as “the Somali syndrome” import a single, traumatic experience as the cause of the reluctance, when, in fact, what is operating is a much more enduring appreciation of the complexity, indeed intractability, of certain recurring minority situations, an appreciation that synergizes with a cumulating sense of fatigue and, as a result, acceptance of the “inevitability” of grave human rights violations. The intervention in northern Iraq on behalf of the Kurds has underlined how difficult it is for the humanitarian intervenor to shape a discrete episode of assistance and then to withdraw. In Rwanda, the prospect of a long-term and conflictive operation, whose ultimate goals were unclear and whose outcomes were not foreseeable, deterred the international community from a humanitarian intervention. And in Bosnia–Herzegovina, where a significant international intervention on behalf of a beleaguered minority has been conducted, an appreciation of the complexity of the situation and a fear of being drawn into a nasty internal serial war has led the intervenors to restrict their role, often to little more than an *acte de présence*. In this respect, Professor Jane Stromseth, speaking to the Society in 1991, may have, if anything, understated the general indisposition when she predicted that secessionist disputes are unlikely to trigger Security Council involvement unless there is sustained violence directed against a minority population and a clear threat to international peace. Even in such a situation, she said, the Security Council may be reluctant to act.²

The hypocrisy with which the UN Security Council and General Assembly and the International Court of Justice (ICJ) have treated the situation in East Timor, and the jejune responses to the continuing large-scale human rights violations in Tibet, to name only two cases, confirm Stromseth’s gloomy prognosis. And if that is happening to a United Nations capable of calling upon the aggregate resources of the community of

² Jane E. Stromseth, *Self-Determination, Secession and Humanitarian Intervention by the United Nations*, 85 PROC. AM. SOC’Y INT’L L. 370, 374 (1991).

states, how much more reluctant are individual states likely to be to act in these circumstances?

This is not to say that the international community has yielded on the normative level: Some mistreatments of minorities by majority-backed governments, on whatever grounds, are plainly viewed as human rights violations that are of international concern.³ The problem is, simply, that the new authoritative international concern is likely to mean little in practical terms, unless the abusive treatment of minorities is deemed to “threaten the peace.” But in these situations, it is not the human rights deprivations suffered by the victims that are perceived as the compulsion or justification for action. The justification for action is found in the threats the situations pose to the rest of us. Consider one example: In Resolution 688, the Security Council did indeed “condemn . . . the repression of the Iraqi civilian population . . . including most recently in Kurdish populated areas.”⁴ But the explicit reason for the Council’s concern was that “the consequences [of the repression] . . . threaten international peace and security in the region,” specifically by causing massive outflows of refugees and cross-border incursions.⁵ Resolution 688 never used the words “human rights,” and, indeed, concern for the Kurds’ human rights was clearly secondary to the international complications their reactions to the repression by Saddam Hussein’s government were causing.

The preferred future with regard to minority protection would involve a clear normative commitment on the part of the international community to intervene and engage in whatever social reconstruction might be necessary to alleviate the violations of the human rights of a minority. The normative commitment would be matched by an ample commitment of resources, so that interventions could be accomplished inclusively when the circumstances required. The very credibility of the international potential for and commitment to responding to violations of minority rights would presumably deter many governments from encouraging or allowing an active politics of minority discrimination. The preferred future seems quite improbable.

The least preferred future would be one in which national elites returned to an international regime of “domestic jurisdiction.” In this regime, it would be implicitly understood that there would be shrill verbal denunciation of others’ abusive treatment of their minorities, but that no action would be taken. In this future, sectors of the media and nongovernmental organizations (NGOs) would decry abuse of minorities, as might certain reporting departments of the Executive and individual legislators. But governments, as a whole, concerned about economic and security relations, would carefully restrict external responses to symbolic action. Thus, international action would take place in parliamentary–diplomatic arenas where the “issues” at stake would be on the order of whether the Human Rights Commission “condemns,” “expresses concern” or “asks for information.” For different but converging reasons, everyone would pretend that the struggle over these words is important; developments within this limited span of verbal options would be reported in detail and subjected to the most minute scholarly examination; success in particular cases, as well as in terms of systemic evolution, would be measured in these terms.

The more likely future will probably be a blend of these two extremes. Rather than classic humanitarian interventions, there will be diplomatic and parliamentary denunciations, exclusions from certain formal international arenas, economic sanction strategies, active and even shrill NGO programs, but few military interventions, even for

³ There is, as Professor Stromseth has said, “a developing consensus that protection of the rights of minorities is a matter of international concern.” *Id.* at 374.

⁴ S.C. Res. 688, reprinted in 30 I.L.M. 858 (1991).

⁵ *Id.*

the limited purpose of ensuring the supply of humanitarian relief. There will be a preference for symbolic, post hoc actions, such as criminal tribunals and commissions of inquiry, which will be justified as important acts of "system-building" and as deterrents to future violations. Their real but latent function may be as catharsis for those whose moral codes condemn atrocities against minorities but who did nothing while the minority violations occurred. This pattern will, in a negative sense, have a self-fulfilling effect. In international law, as in all politics, there is an *ultima ratio*, and when it is clear that force will not be used to vindicate law, current and prospective violators quickly draw conclusions. The lack of effectiveness of the international system's response to minority rights violations will ultimately erode the effectiveness of the norms involved. Hence, there will be more gross violations of the rights of minorities.

This will present a crisis for the credibility of the international law of human rights, because many of the types of sanctions that are actually used may prove ineffective or ephemeral, as has been the case in East Timor and Tibet and may yet be the case in Bosnia-Herzegovina. Other sanctions, such as various economic programs, may actually strengthen the hand of the majority-backed government or cause widespread collateral damage to innocent people in the targeted states.

For these reasons, the prospects for humanitarian intervention on behalf of minorities seem inauspicious. A number of other ameliorative strategies may, nonetheless, be devised, though none promises to be as effective as would forceful termination of genocide or violent treatment of minorities, and that, of course, is what a human rights law worthy of the name really requires. Following are six possible strategies.

First, let us consider preventive actions. Given its current disposition, the international community may be willing to press for the incorporation, at the national level, of minority protection regimes in constitutions. At the very least, this process of internalization in national constitutions will increase the authority of regimes for the protection of minorities. The Hungarian constitutional paradigm as a technique of reinforcing the legal character of protection obligations may serve as an example.⁶ Regional organizations such as the Council of Europe and the European human rights system may intensify this demand by making membership depend upon assuming such normative commitments. The critical question will be whether, once in the door, later defections from those standards can be effectively sanctioned. I will discuss that question shortly.

Second, the prospects of the formation of a UN minority commission do not seem promising, for the reasons considered above. Insofar as such a commission would serve as a point of focus of the NGO community, which provides the electricity for the human rights movement, it might have some utility.

Third, more promising would be ad hoc or permanent consortia of NGOs to coordinate policy and maximize their influence through joint programs.

Fourth, the use of proxies for humanitarian intervention should be considered, either contingents from small states or private police forces and armies. The authorization of private police and armies turns on a host of complex policy issues that are beyond the purview of this paper.

Fifth, international tribunals and commissions of inquiry are generally after the fact. They do not relieve the human rights situation that stimulated them and may, indeed, make it more difficult to negotiate ameliorations, but they confirm the norms that were violated and, in this respect, may be psychologically satisfying to outsiders and, possibly, to the victims themselves.

⁶ See Note, *Hungary and a New Paradigm for the Protection of Ethnic Minorities in Central and Eastern Europe*, 32 COLUM. J. TRANSNAT'L L. 673 (1995).

Sixth, exclusion or suspension of a violator from formal international arenas may be attractive to governments that are otherwise reluctant to be drawn into an intervention quagmire. Exclusion is particularly attractive if the target government is, in any case, marginal to the functioning of the organization concerned. Thus, Fiji may be suspended from the Commonwealth, while China will not be suspended from the United Nations. Although many costs attend the strategy of exclusion, it is sometimes effective in underscoring international condemnation, which may have economic consequences. But the costs may also be high, in terms of disrupted economic ties, whose consequences often fall disproportionately on the weakest residents of the target state.

None of these strategies is sufficient, but, at the very least, some may sustain the norms at stake. Since the human rights program is concerned with people, protecting norms is a far-from-satisfactory substitute for urgent and timely action, so the struggle for those committed to creating an effective human rights system must continue.

REMARKS BY JEANE J. KIRKPATRICK*

The question of intervention on behalf of minorities is obviously part of a larger question of intervention on behalf of individual rights, human rights and humanity. I hope that everyone in the audience has read R.J. Rummel's *Death by Government*,¹ whose publication was an important event. It focuses on the inescapable truth that although most people have conceived of war as the scourge of humankind in our century, it is their own governments that have most often destroyed the largest numbers of citizens. The reason doubtless is that so many citizens are helpless in relation to their own government—as helpless as any minority—in which someone else enjoys a monopoly of force and provides no rights against the state. Rummel's book thus focuses on the central issue of human rights as against the state, but it also raises issues of intervention in the internal affairs of states.

If we are to seriously consider the question of forcible intervention on behalf of human rights of citizens of other countries, we are forced to face the possibility of intervention in the internal affairs of states that are seriously abusing the human rights of their own citizens. This concern has moved the issues of humanitarian intervention to the forefront of the concern of international relations, international law and human rights as an important aspect of the post-Cold War world. Questions of the rights, duties and legitimacy of intervention are central to the serious consideration of the role of states in promoting human rights in our time.

The reconstruction of the post-Cold War world has transformed the expectations of and practices of governments and scholars so rapidly that it has been hard to keep abreast of it, replacing criteria concerning the use of force and legalistic conceptions of rights and law with formulations flexible enough to be relevant to existing and emerging challenges, opportunities and catastrophes. As we meet, the UN Human Rights Commission is meeting in Geneva, and there will be a decision made today, tomorrow or next week whether to consider the charges against China concerning the violations of human rights in that country. A powerful political effort got under way months ago to prevent the consideration of the case of China as a possible violator of the rights of minorities in its own country. As I look at the politics of the Commission this year, I doubt that there will be action, although certainly there are sorely oppressed minorities in China who need protection—Tibetans, Muslims, Christians.

* Former U.S. Ambassador to the United Nations.

¹ RUDOLPH J. RUMMEL, *DEATH BY GOVERNMENT* (1994).