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MILITARY INTERVENTION IN CIVIL WARS: DO LAW AND MORALITY CONFLICT?

by

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Despite frequently heard statements to the contrary, nations today do not live in a Hobbesian world—that is, in a *pure* state of nature. Unlike the beasts of the jungle, mankind is forever talking about, and even doing something about, the extension of law to govern quarrels and disagreements among nations. The effective rule of international law is still a remote prospect, but the talk and the deeds—in modern times focused in international organizations such as the League of Nations and the United Nations—are part of the contemporary scene, and they considerably influence the play of both force and morals among the nations.

Neither the duty nor the wisdom of abiding by the relevant provisions of international law is unanimously acknowledged. There are those who argue that there is a morality that transcends law, and that a nation's acts may be moral even though illegal. Specifically with regard to the question of intervening in civil wars, the question can be framed thus: Are situations ever likely to arise where we as a nation should flout international law on the ground that intervention, rather than non-intervention, is the moral course of action? The answer, I believe, is no. I do not believe that law and morality can be so casually thrown into separate compartments, or that the supposed conflict is a necessary one.

Analysis will reveal, as I hope to show, that our national interests—which sometimes may mandate intervention—can be served by a proper regard for both law and morality.

I am well aware that the validity, including the consistency, of my position is by no means self-evident, and that I must give it some foundation before decorating the superstructure. Are legal prohibitions as flexible as I have implied? Is there any logic or policy in a system under which those affected by the law are entitled to weigh its importance and interpret it in their favor when considerations of morals or policy so dictate? And, if we look either at the classic texts on international law or at the Charter of the United Nations, do we not find, in the former, explicit injunctions against aid to either side in civil strife once the insurgents are recognized as belligerents, and, in the latter, prohibition of intervention in matters of domestic jurisdiction and of forceful violation of the territory or independency of any state?

There is distinguished support for the point of view that we can extract only a very rigorous set of prohibitions against intervention in civil strife from either the UN Charter or the classic texts.¹ But I believe that this absolutist position is based on unsound premises. Furthermore, I believe it can be

shown that the gulf between law and morals or policy in this context is not so wide or unbridgeable as is often supposed.

Looking first at such classic writings as those of Lassa F. L. Oppenheim, Sir Hersch Lauterpacht, Donald C. Hodges, and many others, one does find, in varying forms, the general position that civil war, as long as its course threatens no other nation, is an internal or "domestic" matter from which other nations must, in law, stand aloof. But these pronouncements must be read in the context of other passages in which exceptions to the rule—including self-preservation, maintenance of the balance of power, and the prevention of atrocities—are sometimes discussed with approval. The views of these writers of past generations are by no means unanimous or unqualified, and, great as is the respect in which some of them are held, theirs are mere learned opinions, not treaties or collective declarations of an official nature.

Much more important, however, is the fact that these writings are the product of a period when war was regarded as a lawful means of achieving national objectives. Our own Army's famous General Order No. 100, drafted by Dr. Francis Lieber, then of Columbia University, and promulgated in 1863, speaks of war not as something unlawful, but as "the means to obtain great ends of state, or . . . defenses against wrong"; and this remained the accepted view at least until after World War I and, in some quarters, much longer. Oppenheim himself described intervention as "*de facto* a matter of policy just like war."² Thus an intervention could always be "legalized" by a declaration of war, a device actually resorted to by Great Britain and Germany during the Venezuela dispute in 1901. The point has been cogently made by the late Professor Brierly:

The extremist form of intervention is war, and until recently modern international law . . . has not attempted to distinguish between legal and illegal occasions for making war There was a certain unreality in attempting to formulate a law of

intervention and at the same time admitting, as until recently it was necessary to admit, that a state might go to war for any cause or for no cause at all without any breach of law.³

Viewed closely, therefore, these pre-1945 condemnations of intervention do not really label it as intrinsically *unlawful*, but as *unneutral*. If a nation wished to preserve a state of neutrality with both the incumbent government and the insurgent belligerent, it had to stay out of the quarrel. Thus, prior to 1945, the law of intervention is really part of the law of neutrality rather than the law of war.⁴

The benchmark year is 1945, which witnessed the international adoption of the London Agreement under which the Nuremberg trials were held and the UN Charter. Both of these documents condemn and purport to render unlawful the initiation of aggressive wars, and both recognize, explicitly or implicitly, the right to use force in self-defense. The Charter embodies an international agreement that disputes be peacefully settled and that breaches of the Charter be dealt with by collective action

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through the UN organization, and it likewise prohibits interference in matters within a state's domestic jurisdiction. I think it is beyond argument that these documents worked a fundamental change in the legal structure of international society, that the provisions I have mentioned constitute binding international law to the full extent that any international agreement constitutes law, and that the US government is fully committed to observance of these limitations on the use of force.

But the foregoing statement of the problem is incomplete; indeed, it is only a beginning. The framers of the Charter saw clearly enough that the organization might disintegrate should the Security Council embark on collective forcible action over the objection of one or more of its Great Power members, and the so-called "veto" provision (Article 27) was adopted as a guard against that hazard. However, the result is that there may be, as there have been, situations in which collective enforcement through the United Nations is, in effect, embargoed. And the "uniting for peace" resolutions of the General Assembly, adopted during the Korean War, go only a very little way toward coping with that difficulty.

Well aware of these probable consequences, the Charter framers recognized the "inherent right of individual or collective self-defense" against "armed attack" (Article 51), as well as "regional arrangements" for dealing with "matters relating to the maintenance of international peace and security" which are "appropriate for regional action" (Article 52). The Charter thus explicitly envisages the legitimacy of individual or group resort to force outside the Charter's enforcement provisions.

But "outside" the Charter does not mean "in conflict with" it. Nothing in Articles 51 and 52 or elsewhere absolves states acting outside the Charter from respecting the purposes on which the Charter is based and its prohibitions against acts of aggression and other breaches of peace. From a legal standpoint, the question is whether these limiting provisions stand in the way of

American interventions of the type which many—including myself—would regard as pragmatically and morally justified. In my opinion, they do not.

There are, of course, problems in construing the general language of the Charter. "Self-defense" and "aggression" are words denoting abstractions, the application of which in particular instances will forever arouse disagreement. But that is a failing which afflicts many specifications of prohibited or protected conduct, as every lawyer knows. "Aggression" and "self-defense" are not meaningless concepts, and they are no less precise in contour than "negligence," "reasonable care," "due process of law," "equal protection," or "obscenity," to name only a few of the phrases that courts constantly wrestle with.

The primary difficulty is not with the wording of these provisions, but with the lack of any interpretive and enforcing authority which law-abiding nations will respect and other nations fear. It is idle to expect the emergence of such an authority in the foreseeable future; therefore, in the present turbulent state of international relations, and considering that the United Nations' actions are now generally restricted to investigative and conciliatory steps, we must expect continuing use of armed force. Those using it will seek to justify it under Article 51, and those opposing it will condemn it under paragraphs 4 and 7 of Article 2. Some of these justifications will be transparent, some debatable, and perhaps some well-founded. The judgments passed on these episodes by both the countries involved and the onlookers will be subjective and heavily influenced by ideological and bloc viewpoints.

In looking for objective factors to bring to bear on the interpretation and application of problematic Charter terms such as "domestic jurisdiction," "threat to peace," and "act of aggression," there are two factors I would like to stress. The first is that official spokesmen for the Soviet government, including General Alexsei Yepishev (Chief of the Political Department of the Soviet armed forces) and Stepan Chervonenko (Ambassador to France), last

year proclaimed extension of the so-called "Brezhnev Doctrine" not only to the forcible maintenance of friendly communist regimes anywhere in the world, but also to the use of armed force to overthrow "bourgeois" governments.⁵ This is flagrantly contrary to the Charter stipulations and, threatening as it does that the march of communism backed by force will always be an advance and never a retreat, greatly increases the risk to the security of other nations and the degree of danger to peace inherent in any Soviet intervention, such as Afghanistan.

The second factor is that, despite the mention of "armed attack" in Article 51 of the Charter, the right of self-defense should not be regarded as triggered only by such action.⁶ The world is much more tightly knit economically than it was when the Charter was adopted, and action involving no armed force may sometimes be more lethal than an armed attack. A good example would be the intentional blockage of the Strait of Hormuz by means of sunken ships, assuming such is technically feasible. That, or stopping the flow of Mideast oil by other means, might not only be economically disastrous to other nations, but also soon render them virtually defenseless, and would, I believe, furnish a basis for collective counteraction under Article 51.

In summary, I think it possible and indeed probable that the United States in shaping its policies will not have to face a conflict between morality and legality. The UN Charter is more like a constitution than a municipal ordinance; many of its provisions are like those in our Constitution which have been called "magnificent generalities," the intent of which is to provide a basis in the future, with changing circumstances, to do what needs to be done to preserve the essential structure intact.

In presenting this point of view, by no means do I suggest that our country should throw its military weight around except in circumstances of clear necessity. I would not countenance the cynical notion that because the Charter provisions are general they can be bent to any desired purpose. Use of the word

"intervention" does not obscure the fact that intervention by force of arms, unless the victim is both friendless and too weak to offer resistance, means war. Geopolitics is an even less exact science than domestic politics, and even unopposed interventions may entail ultimate consequences adverse to the intervenor.

For 60 years, nations have been in search of a more stable international order through international organization. The very fact that these efforts persist, despite the often discouraging course of events, bears witness to the depth of feeling which animates the aspiring architects. Why else do men of intelligence, with wide and varying opportunities to invest their energies, carry on the work of shaping declarations and norms for the governance of international relations? Despite the ambiguities in the General Assembly Declarations of 1965 and 1970,⁷ the general thrust of these unanimously adopted resolutions is unmistakably anti-interventionist.

I would like at this point to return for a moment to the matter of the "Brezhnev Doctrine," which I broached earlier, and the continued aggressive march of communism across the world's stage. The threat to world order posed by this communist march is sometimes facetiously equated to that posed by the Nazis, but in my opinion the importance of the question does not lie in trying to strike a balance of evil, but in noting differences between German Nazism and Soviet Communism which are, I think, pertinent to our present subject.

If one looks back at the situation in 1933 when Hitler took power and compares it with the situation in 1917 when the communist regime in Russia took power, the differences are extraordinary. Hitler came into power in a country which was heavily industrialized and possessed a large, well-educated middle class, extensive professional and technological resources, an extraordinarily impressive military history, and an officer corps of acknowledged competence. The communist authorities in Russia came to power in a country which had a thin layer of artists, intellectuals, engineers, scientists, and others,

but it was very thin indeed. Russia was underdeveloped, and had a low level of general education and scant technological resources.

What did the two countries do with what they had? The Germans, of course, created a military striking force of extraordinary strength, but with short staying power. Why was it that Britain, with far less resources than Germany, was able in 1940 to pass Germany in the production of aircraft? Why was it that when Albert Speer took charge of the German war economy in 1943 he was able to pick things up so much? It was because there was so much slack in the system owing to the superficial economic organization for war under the Nazis, typified by the lack of reliance on the industrial power of women, and many other things that could be mentioned.

In contrast, despite all their disadvantages, the Soviet Union has built up an enormous, well-equipped, and technologically developed military machine. More important than that, they have a decision-making procedure far better than anything the impulsive, now-brilliant, now-blind, sort of direction that the personality of Adolf Hitler produced.

Therefore, in terms of the degree of threat, it seems to me that there is no comparison between the two. The threat from communism, organized the way it is, is far the greater. Even more important than that is the fact that there was very little of Nazism that had appeal much beyond Germany's borders, while there are proclaimed values in communism that have a deep and wide appeal. Why did we have the proliferation of those who were called, at the time, "fellow travelers" in the 30s? Because there were many who had no interest in violent revolution, but regarded the Communist Party as offering the only road to stable race relations, unionization, and other social goals. Many of these values are still

proclaimed by communism. It has a wide intrinsic appeal. And, coming now to the present day, the Soviet Union has, at least until recently, been much shrewder than we in its sensitivity to and ability to exploit the worldwide move toward national self-determination and nationalism in general. Thus we have been repeatedly cast in the position of seeming to back the incumbent against the insurgent, and the "reactionary" values against the revolutionary nationalist aspirations of others.

This is obviously a factor which we haven't yet overcome, a factor which we must take account of in assessing not only the prospect of success in our military initiatives, but also the probable reaction in the rest of the world. Part of the opinion of the rest of the world is embodied in the United Nations and the prohibitions the Charter embodies. I suggest therefore that the value of due regard for the purposes and spirit of the Charter is not only legally and morally valid, but also is eminently practical as a matter of enlightened self-interest.

NOTES

1. See e.g. Derek W. Bowett, "The Interrelation of Theories of Intervention and Self-Defense," in *Law and Civil War in the Modern World*, ed. J. N. Moore (Baltimore: Johns Hopkins Press, 1974), pp. 38-50.

2. Lauterpacht, as editor, struck this passage from the 5th edition of Oppenheim's *International Law* (London: Longman's, Green, 1937) on the ground that he thought it inconsistent with other passages. See the 5th edition, vol. I, p. 265, note 3.

3. J. L. Brierly, *The Law of Nations*, 5th ed. (Oxford: Clarendon Press, 1955), pp. 308-09.

4. See Lassa F. L. Oppenheim, *International Law*, ed. H. Lauterpacht, 7th ed. (London: Longman's, Green, 1960), vol. II, pp. 659-60, for an implicit acceptance of the analysis above.

5. See "Soviet General Says Entire Bloc is Ready to Fight in Afghanistan," *The New York Times*, 12 April 1980, p. A6; and "Kremlin's European Policy," *The New York Times*, 22 April 1980, p. A14.

6. See the discussion of this point by Sir Humphrey Waldock in Brierly, *The Law of Nations*, 6th ed. (Oxford: Clarendon Press, 1963), pp. 417-18, the thrust of which appears to be unanswerable.

7. General Assembly Resolution 2151 (21 December 1965) and 2625 (24 October 1970).

