

Is Humanitarian Intervention Legal?

Written by Lyal Sunga

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LYAL SUNGA, OCT 13 2008

Where collective security avenues are blocked, could a State, or States acting jointly, lawfully intervene militarily in another State's territory *without the permission of the Government of that State* to halt or prevent it from committing atrocities against its own people? What about intervention where the territorial Government is unable or unwilling to provide basic humanitarian assistance to its people in the face of natural or human-made disaster? Were the US and its coalition partners right after all to invade Iraq, if not to search for weapons of mass destruction or to destroy Al Qaeda (dubious claims from the outset), but to topple Saddam Hussein and to spread democracy, human rights and the rule of law? Should a country have stepped in militarily to save millions from starvation in North Korea a decade ago, or to extend urgent life-saving humanitarian assistance to the tens of thousands of Burmese people whose lives were devastated by tropical cyclone Nargis in May 2008? If the African Union-United Nations Mission in Darfur ultimately fails, should a State or States intervene to stop the mass slaughter, rape, torture, summary executions and forced displacement of hundreds of thousands of civilians? What about humanitarian intervention to aid people at risk from war, famine and disease in places where the State has failed, such as in Somalia, Sudan or Chad?

UN Secretary-General Kofi Annan underlined the problem in his 1999 General Assembly address: "... in the context of Rwanda: If, in those dark days and hours leading up to the genocide, a coalition of States had been prepared to act in defense of the Tutsi population, but did not receive prompt Council authorization, should such a coalition have stood aside and allowed the horror to unfold?" He urged that "the world cannot stand aside when gross and systematic violations of human rights are taking place" and he challenged the world community to develop the notion of humanitarian intervention "based on legitimate and universal principles".

Proponents of the classic 'doctrine of humanitarian intervention' argue that customary international law authorizes a State (State A) to take military action in the territory of State B, without State B's consent, to protect State B's nationals. As such, it should be distinguished very clearly from *collective security* under established UN or regional frameworks, such as 'peace keeping' or 'peace enforcement' or other similar blue helmet multilateral operations. 'Humanitarian intervention' involves the *unilateral or joint* use of armed force by a State or States against another State on such grounds as 'humanity', 'democracy' or 'human rights' and is based on the intervening State's *own unilateral* evaluation of the factual situation as well as its legality. The doctrine presupposes an exception to the general customary prohibition on the use of force in international relations. Humanitarian intervention must not be confused with a State's use of military force to protect *the intervening State's* nationals – an entirely separate and distinct ground which classic international law recognizes, perhaps as a form of the inherent customary right of self-defense. A controversial example arose in August 2008 when Russia sought to justify its use of military force in Abkhazia and South Ossetia on grounds it had to protect Russian nationals (many of whom seemed to be *ethnic Russians with Georgian nationality* who had been issued Russian passports in fact only very recently) – tactics Russia might conceivably employ also in Transdniestra (Moldova) or the Crimea (Ukraine).

The key distinguishing criterion of humanitarian intervention is that the intervening State acts strictly and purely out of genuine humanitarian motives, rather than out of any element of self-interest. First, the beneficiaries of intervention therefore must not be nationals of the intervening State. Second, the requirement that the intervening State must have no self-interest at all for the intervention to qualify as a humanitarian one has to be applied very strictly, otherwise it would open the door for more powerful States to legitimize their invasion and occupation of weaker States merely on the grounds that their actions were not based *purely* on self-interest, but also to a degree on a

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humanitarian element. Such a permissive rule of international law would conflict with the basic principle of sovereign State equality, and it would risk a dramatic rise in inter-State violence.

In the Fifth Century AD, St. Augustine advocated that under certain circumstances, a sovereign was entitled to launch a 'Just War' – a doctrine refined by St. Thomas Aquinas in the late 1200's and by Grotius in 1625. The Spanish Theologian de Vitoria justified Spain's brutal suppression of indigenous populations in the New World on Just War grounds. The term 'laws of humanity' first gained currency with the Triple Entente Powers' (France, Great Britain and Russia) joint military action in 1829 to protect Christians from Ottoman atrocities. 'Humanitarian intervention' was again invoked in reaction to large-scale Ottoman massacres of Christians in July 1840, during the Crimean War (1853- 1856) involving Britain, France and the Ottoman Porte, in 1876 in relation to the Porte's massacre of some fifteen thousand Christian subjects in the Bulgarian Uprising, and yet again in 1915, with regard to the Ottoman Empire's treatment of Christian Armenian minorities. The vague rhetoric associated with 'humanitarian intervention' lent itself to gross misuse. In a series of speeches and radio broadcasts, Hitler claimed that persecution of German ethnic minorities in foreign lands demanded Nazi intervention. Hitler reverted to the supposed need to protect minority rights to snatch first the Sudetenland and then all of Czechoslovakia, to re-unite the Saar region with Germany, and to pretend that Poland had attacked Germany, instead of the other way round.

The immense destruction of lives, dignity and property during the Second World War impelled the international community to strengthen the international collective security system and to limit more strictly the permissible uses of force in international relations. Article 2(4) of the Charter of the United Nations obliges all UN member States to: "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other way inconsistent with the purposes of the United Nations". As the International Court of Justice found in the *Nicaragua Case*, the Charter's prohibition on the use of force forms part of *jus cogens*, meaning that it overrides all other conflicting norms of lesser status, a position supported by many legal instruments, declarations and resolutions.

Since 1945, the question has therefore become: 'Does humanitarian intervention figure as an exception to Article 2(4) of the UN Charter?' A plain reading of Article 2(4) does not support the supposed legality of unilateral (or joint) military intervention for humanitarian considerations. In case Article 2(4) is not sufficiently clear in itself, General Assembly resolutions 2625, 3314 and 42/22 reflect the international community's view that Article 2(4)'s prohibition on the use of force in international relations must be interpreted broadly and possible grounds for exception have to be construed very narrowly. As Oscar Schachter warned back in 1991: "The idea that armed invasions could make the world 'safe for democracy' has had little appeal to governments. Memories of past invasions and seizure of power in the name of self-determination and freedom are still fresh in many parts of the world." Moreover, as the ICJ concluded in the *Nicaragua Case*: "The use of force could not be the appropriate method to monitor or ensure ... respect for [human rights]. With regard to the steps actually taken, the protection of human rights, a strictly humanitarian objective, cannot be compatible with the mining of ports, the destruction of oil installations, or again with the training, arming and equipping of the *contras*." The ICJ further commented that no general right of intervention existed and that intervention violated international law. Thus, while scholarly opinion has been divided over its legality, the UN Charter, key resolutions of the UN General Assembly, and the ruling of the International Court of Justice have made clear that unilateral or joint military intervention on humanitarian or related grounds, violates international law.

What about the argument that although international law may not yet recognize humanitarian intervention, State practice since 1945 evinces a *currently developing* customary rule of international law allowing for it? A brief review of the more plausible candidates for humanitarian intervention, namely, India's in East Pakistan (1971), Tanzania's in Uganda (1979) and Vietnam's in Cambodia (1978), reveals that they fail to make this case.

In February 1971, Pakistani President Yahya Khan deployed troops to East Pakistan to quell riots that broke out over the Government's inaction to deal with the massive devastation caused by a major cyclone which struck the territory in November 1970, and to nip growing separatist agitation in the bud. In March, Pakistan's Army began systematically to massacre civilians, murdering some 7000 persons in one night. On 26 March 1971, Major Ziaur Rahman declared the independence of the People's Republic of Bangladesh over a rebel-held radio station and

Is Humanitarian Intervention Legal?

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called upon all Bengalis to resist West Pakistan's armed occupation. By December 1971, Pakistani soldiers had slaughtered around one million civilians. Perhaps half a million women were raped. The Pakistani Army seems to have been under orders to intimidate the population and wipe out the intellectual elite in East Pakistan through massacres, assassinations, mass rape, systematic torture, forced disappearances and summary or arbitrary executions. Around 10 million took refuge in neighbouring India. Despite the very high number of atrocities that were being reported at the time, the five permanent members of the Security Council could not agree to declare the situation a threat to international peace and security and the USSR cast a veto. On 3 December 1971, India sent troops into East Pakistan to stop the violations and its Ambassador to the UN stated that "We have on this particular occasion absolutely nothing but the purest of motives and the purest of intentions to rescue the people of East Bengal from what they are suffering". On 6 December, India recognized Bangladesh. The same day, the Security Council failed again to reach agreement to address the extremely serious situation in the territory, adopting instead resolution 303, merely acknowledging the lack of unanimity among the permanent members and the Council's inability to exercise its primary responsibility for the maintenance of international peace and security, and referring the matter to the General Assembly as provided for in the Uniting for Peace resolution. The General Assembly responded on 6 December 1971 with resolution 2790 to coordinate international assistance, relief and repatriation efforts with regard to the refugees in Indian territory. The Assembly adopted resolution 2793 the next day which expressed grave concern over the India-Pakistan hostilities and qualified the situation as 'an immediate threat to international peace and security'.

India succeeded in stopping the violations and it pulled its forces out as soon as conditions seemed amenable for a peaceful end to the conflict. India made no attempt to acquire territory and it even incurred the risk of attack from Pakistan (which became a reality with Pakistan's bombardment of Indian airfields bordering West Pakistan on 3 December 1971). Yet it must be admitted that India's intervention definitely enhanced its own self-interests by weakening Pakistan and supporting East Pakistan's secession. India's action also dealt with the refugee problem which presented a growing financial and logistical burden as well as a source of potential instability. Perhaps more telling, India itself shifted its reasons for taking military action in East Pakistan from 'humanitarian intervention' to 'self-defense', a shift that calls into question the purity of its humanitarian motives. Franck and Rodley, writing in the *American Journal of International Law*, considered that the "Bangladesh case ... does not constitute the basis for a definable, workable, or desirable new rule of law which, in the future, would make certain kinds of unilateral military interventions permissible." In short, India's military intervention was not sufficiently clear of self-interest to count as a purely humanitarian one and it does not justify discarding or altering the basic prohibition on the use of force in international relations.

Turning to Tanzania's intervention in Uganda, it is true that Tanzania effectively stopped Idi Amin's brutal repression of certain tribal and ethnic groups which had resulted in the loss of between 300 and 400 thousand lives. On 12 October 1978, Uganda invaded Tanzania in an effort to annex the Kagera region, but in February 1979, Tanzania counter-attacked with the help of Ugandan insurgents, overrunning Kampala, installing Milton Obote as President, and forcing Idi Amin to flee Uganda. After several months of occupation, Tanzanian forces withdrew from Uganda. Tanzania used force only once it had been attacked by Uganda and it succeeded in halting the systematic murder of thousands more people. As in India's intervention in East Pakistan, humanitarian considerations seemed to have played an important role, but here again, its own security considerations took priority. Tanzania, like India, enhanced its own position in the region, and claimed to have acted on the basis of self-defense – an entirely distinct ground – which cannot be muddled with humanitarian intervention. The Government of Tanzania's own stated motives for its deployment of military force undercuts the proposition that it acted out of humanitarian considerations.

In the case of the Vietnamese intervention, Vietnam invaded Cambodia on 25 December 1978, took control of Phnom Penh on 7 January 1979 and drove the Khmer Rouge, which had terrorized the country since April 1975, from power. The Khmer Rouge's crimes against humanity had taken the lives of somewhere between 2 and 3 million Cambodians – an estimated quarter or a third of the entire Cambodian population. As in the case of the Indian and Tanzanian interventions, humanitarian considerations appear to have played a minor role in the Vietnamese calculus to invade, compared to its self-interest in enhancing the Soviet Union's influence in the region to counterbalance that of China. Like India and Tanzania, Vietnam cited self-defense as the reason for its intervention. Moreover, were Vietnam's motives purely humanitarian, it could have acted much earlier, it could have pulled its armed forces out of

Is Humanitarian Intervention Legal?

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its own accord instead of having to have been pressured to do so by the Soviet Union, and above all, it could have invited the UN to monitor the situation and broker a formal end to hostilities, none of which it did.

The doctrine of humanitarian intervention, from its Just War beginnings, through its development in the context of Major Power intervention against the Ottoman Porte, to its extreme misuse by Hitler, has been so open to manipulation that its legitimacy has been uncertain at best. Even in the more plausible cases, the intervening State's motives were not clear of self-interest, a fact that seriously undermines the claim that State practice supports a developing rule of customary international law permitting humanitarian intervention.

There are other serious problems with the argument that international law recognizes a right of a State, or States acting jointly, to undertake unilateral military intervention on humanitarian grounds, outside the UN or regional collective security framework. First, as a supposed right in international law, it would have to apply to all States equally, but would the Governments and peoples of the United States or the United Kingdom for example really want international law to allow North Korea, Sudan, Libya, Iran or the Democratic Republic of Congo to decide for themselves when and where they should attack another State, purportedly on humanitarian grounds? Or is humanitarian intervention meant only to be used by the rich and powerful States against smaller, weaker States, as much of the historical practice suggests? It is no answer to say that humanitarian intervention could be acceptable as long as it is overseen by multilateral authority. Either military action is carried out within the collective security framework, in which case it is UN or regional enforcement action that remains subject to multilateral oversight and control, or it is taken outside the collective security framework, in which case it is guided only by unilateral, i.e. subjective claims by the intervening State about the need for intervention, its legality and how it should be carried out. NATO's quite presumptuous intervention in Kosovo in March 1999 must be viewed as a rather dubious example from a legal point of view. Second, any sort of non-multilateral military action inevitably risks incurring large numbers of casualties as well as further escalation of the violence, which undermines rather than strengthens collective security, something demonstrated clearly in Iraq, for example. However much we may rejoice at Saddam Hussein's removal from power, the holding of Iraqi elections in 2005, the 'surge' and the 'Awakening', it has to be noted that Iraq Body Count has documented conservatively the civilian death toll since the launch of the war in March 2003 until October 2008 as approaching 100 thousand – certainly not a negligible number.

Stopping or preventing a Government from perpetrating gross and systematic violations against its people has to be lauded, but unilateral military intervention outside the auspices of collective security arrangements reflects power politics at the expense of the international rule of law and sovereign State equality. Despite what intervening Governments like to claim, it remains objectively difficult to avoid large numbers of civilian casualties. If military use must be deployed, it should be done according to international law and in such a way as to garner maximum support from the international community at large. All this points to the urgent need to reform the United Nations and its collective security organs so that 'responsibility to protect' moves from rhetoric to reality, and the door is not left wide open for strong States to dominate weaker States under the banner of humanitarianism', 'human rights', 'democracy' or the 'rule of law'.

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