

# **Humanitarian Intervention**

The United Nations  
in an Evolving World Order

Sean D. Murphy

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## Editor's Foreword

*Humanitarian Intervention: The United Nations in an Evolving World Order* is the twenty-first book in the Procedural Aspects of International Law Series, the third to be published by the University of Pennsylvania Press. It also is extremely timely. As it goes to press, governmental and non-governmental officials probing the killing fields of Bosnia-Herzegovina and Rwanda are resurrecting memories that, in the last three to four years, have shocked the global conscience as has nothing since the Holocaust: tens and hundreds of thousands of desperate men, women, and children fleeing their homes and across borders to escape "ethnic cleansing" and other premeditated abuse; huddled refugees and *déplacés* crammed into squalor and further victimized by starvation and malnutrition, not unusually owing to deliberate policy; emaciated young men, some old, clutching barbed wire prison fences, eyeballs sunken, ribs protruding, the victims often of torture and comparable atrocity; gaunt, terror-struck women haunted by systematic rapes and assaults, coerced pornography, and their forced witness to the sadistic murders of their children, families, and friends; bloodied and dismembered bodies, some the consequence of indiscriminate warfare, others of savage massacres, scattered on city streets and country hillsides, or heaped one upon the other in open charnel pits swarming with flies; and more. The enormity of the horror is only partially revealed by the claimed statistics: in Bosnia-Herzegovina, as of the signing of the Dayton accord, more than 200,000 killed and an estimated 2.5 million driven from their homes since the outbreak of hostilities in 1990, the vast majority of them of Muslim faith; in Rwanda, between 500,000 and one million Tutsis exterminated during three months of fighting and up to 3.5 million external refugees and internally displaced persons since fighting began in 1994, an astounding three-fourths of the country's total population. In towns and villages with unfamiliar names, nearly every building damaged or destroyed, little or no running water, little or no electricity, little or no

government infrastructure. And as I write, Burundi threatens to do much the same, again.

These and other icons of late twentieth-century carnage and devastation, together with the post-Cold War revival of the United Nations Security Council, have prompted a clamor for forceful "humanitarian intervention," both unilateral and multilateral, that is perhaps unparalleled since the birth of the State system. Unparalleled but not surprising. ~~With the spread of market forces and new communications technologies making it each day more difficult to ignore happenings in other parts of the world,~~ it is not unreasonable that there should be an increasing worldwide desire to safeguard against the severe and widespread deprivations of human rights that arise from civil wars and from persecutions by autocratic governments. A central challenge for the next century will be, of course, how to reconcile existing constraints on the use of force with this increasing desire.

Sean D. Murphy, the author of this book, has anticipated this challenge with breadth, depth, acumen, and clarity. Formerly in the Office of the Legal Adviser of the U.S. Department of State and presently Counselor for Legal Affairs at the U.S. Embassy in The Hague, he has done so also with objectivity and sensitivity, capitalizing on his own governmental experience, but sparing from criticism no government, not even his own, when criticism is due.

Murphy writes, however, not to pronounce humanitarian intervention legal or illegal, moral or immoral, prudent or imprudent. Rather, viewing the values of justice and order as constituting a "fundamental dialectic" that requires accommodation constantly in everyday life, he explores the theory and practice of humanitarian intervention—"the threat or use of force by a state, group of states, or international organization primarily for the purpose of protecting the nationals of the target state from widespread deprivations of internationally recognized human rights" (pp. 11–12)—principally to assess the post-Cold War strengths and weaknesses of the United Nations and its Charter in this realm. He begins by placing the doctrine of humanitarian intervention in acutely nuanced theoretical and policy-oriented perspective. Next he considers the traditions, pre- and post-Charter, from which the contemporary international law on the use of force relative to human rights has emerged, and thereafter he examines the actual practice of states relative to humanitarian intervention up to the dissolution of the Soviet Union. Then, faithful to an enlightened methodological design, he considers, in a major chapter, six post-Cold War "incidents" of claimed humanitarian intervention: Liberia (1990), Iraq (1991–92), Bosnia-Herzegovina (1992), Somalia (1992), Rwanda (1994), and Haiti (1993–94). Separately and together, these case studies, rich in detail, provide a means for

considering the desirability and utility of both the United Nations and regional organizations with respect to humanitarian intervention, which consideration he does give in the next two chapters. Finally, in a concluding chapter, the author explores the issue of unilateral humanitarian intervention, that is, intervention not formally authorized by the United Nations. In a world where multilateral approaches, particularly through the United Nations and cognate regional organizations, are seen increasingly to present more viable options for assessing and validating, possibly even exercising, the use of force, the issue is of course not without controversy.

This monograph, then, a prodigious effort by a meticulous scholar, which in an earlier incarnation served as the author's S.J.D. thesis at the University of Virginia, constitutes a systematic legal analysis of the doctrine of humanitarian intervention, accounting not only for the history and practice of states relative to humanitarian intervention before and after the adoption of the UN Charter, but also for insights of relevance to the future operations of the United Nations, regional organizations, and states acting on their own in this field. As such, befitting the work of an international lawyer who studied under Richard Gardner, Louis Henkin, and Oscar Schachter at the Columbia Law School, who received his LL.M. degree in international legal studies under Philip Allot, Derek Bowett, and Elihu Lauterpacht at Cambridge University, and who earned his S.J.D. in international law under Richard Lillich and John Norton Moore at the University of Virginia, it adds significantly to the literature. So far the only known integrated study of humanitarian intervention relative to the United Nations since the end of the Cold War, it firmly establishes itself as the leading work on this critical subject for years to come.

Thus it is with pride that I launch my tenure as Series Editor of the *Procedural Aspects of International Law Series*. I do so, moreover, with pleasure. Dr. Murphy is as gracious an author as he is meticulous a scholar, and I thank him for his courtesy and care. Also, I thank my former research assistant, Jason L. Letcher, now a graduate of The University of Iowa College of Law, for his truly generous help in proofing and cite-checking the author's many footnotes.

Burns H. Weston

## Preface

When the Government of Iraq invaded Kuwait in August 1990, I was an attorney-adviser with the Office of the Legal Adviser of the United States Department of State in the section that handles politico-military affairs. For the most part, the international law issues that arose during that war could be addressed without great difficulty. Over the centuries, societies have developed normative constraints on the use of armed force in the conduct of foreign relations, and in the mid-twentieth century general consensus was reached among states that the use of military force for territorial aggrandizement was unacceptable. Consequently, the norms of international law posed no hindrance in rallying the international community to deploy a coalition of forces under the authorization of the United Nations to assist Kuwait in defending itself.

In the aftermath of that war, however, the Government of Iraq undertook ruthless and indiscriminate attacks against Iraqi Kurds in northern Iraq and against Iraqi Shiites in southern Iraq in an effort to quell rebel elements that challenged the Sunni-dominated regime of President Saddam Hussein. Here the international legal issues became more difficult, for the international community had to decide whether it should deploy forces into Iraq to assist Iraqi nationals in defending themselves against their own government. Shortly thereafter, other largely internal conflicts also cried out for intervention by the international community. In April 1994, for instance, Hutu militia in Rwanda systematically slaughtered at least a half million Rwandan Tutsis. In one incident in Nyarubuye, at a Catholic missionary compound, Tutsis were hacked to death while cowering midst the pews of the church and its adjacent classrooms; when the militia grew tired, they immobilized those still alive by slicing the tendons of their arms and legs, thereby allowing the militia time to rest before finishing the slaughter.

A central challenge for the next century rests in reconciling existing constraints on the use of armed force with the increasing desire to protect civilians and combatants from widespread and severe deprivations

of human rights that arise from internal conflicts due to civil war or to the persecution of groups by autocratic governments. Should states be allowed to intervene in the affairs of other states to prevent deprivations of human rights, an action commonly referred to as "humanitarian intervention?" If so, under what conditions should such intervention occur? Finally, how best can the international community organize itself so as to ensure that such interventions are timely and effective?

In a 1995 supplement to his Agenda for Peace, United Nations Secretary-General Boutros Boutros-Ghali correctly observed:

[S]o many of today's conflicts are within States rather than between States. The end of the cold war removed constraints that had inhibited conflict in the former Soviet Union and elsewhere. As a result there has been a rash of wars within newly independent States, often of a religious or ethnic character and often involving unusual violence and cruelty. The end of the cold war seems also to have contributed to an outbreak of such wars in Africa. In addition, many of the proxy wars fuelled by the cold war within States remain unresolved. Inter-state wars, by contrast, have become infrequent.<sup>1</sup>

The collapse of bipolar confrontation not only unleashed internal conflicts that heretofore were suppressed or at least controlled by that confrontation, but also unleashed in a fashion the collective security apparatus of the United Nations. Suddenly, in various situations, the members of the Security Council authorized the deployment of military forces under United Nations command, or more often under national command with United Nations backing, in an attempt to resolve forcibly what were largely internal, not transnational conflicts. Yet these deployments encountered tremendous difficulties, raising doubts about the true willingness of member states to provide the necessary military and financial support to the United Nations and about the ability of the United Nations to serve this function. Indeed, the Secretary-General's supplemental report may be read as a lament that after just a few years of trying to address conflicts "within states," the United Nations and its member states were confused, ambivalent, and battered by their efforts to build a "new world order" and uncertain how to proceed.

The outcome of the Iraq crisis, and of others that followed, prompted me to pursue an integrated legal study of the doctrine of "humanitarian intervention," with particular emphasis on the role of the United Nations in authorizing or itself conducting such intervention. My purpose is to explore the roots of contemporary norms on the use of force and on the protection of human rights, and then to relate them to con-

1. *Supplement to an Agenda for Peace: Position Paper of the Secretary-General on the Fiftieth Anniversary of the United Nations*, U.N. GAOR, 50th Sess., U.N. Doc. A/50/60 (1995).

temporary problems and possibilities that have arisen midst the aftershocks of the end of the Cold War. My observations and conclusions in this study are no doubt influenced and informed by my position as an attorney at the U.S. State Department; throughout, I have sought to draw upon my personal experience of observing how law affects the behavior of governments and international organizations. Moreover, in developing my own views, I have consciously sought the views of several of my colleagues in the Department. At the same time, I have sought to immerse myself in nongovernmental communities during formative stages of this project and to appraise the actions of the Government of the United States as critically as that of any other government. Indeed, all the views expressed herein are my own and do not necessarily reflect the views of any other persons or institutions, or of the United States Government. They reflect, simply, the views of one person who has sought to be as analytically objective as it is possible for any independent observer to be.

## Acknowledgments

In writing this book, I have received support from various quarters; a written acknowledgment is an essential (but all too insufficient) means of expressing my gratitude for that support.

In 1993, the Office of the Legal Adviser of the United States Department of State permitted me to take a one-year leave of absence, during which I collected and consumed most of the materials used for this book, conducted interviews, and completed an initial draft. Various colleagues in the Legal Adviser's Office and other parts of the Department read all or portions of this book and provided very helpful comments and corrections.

During my leave of absence, I was in residence at the University of Virginia School of Law. Funding during that period was generously provided by the University of Virginia School of Law, the Ford Foundation, and the Council on Foreign Relations, including funding for conducting research in Washington, D.C., New York, and Europe. In June 1993 I presented the views expressed in chapter 6 at a seminar organized in New York by the Council on Foreign Relations, which provided an opportunity for several of the Council's fellows and members to point me in the right direction at an early stage in the development of this book.

After my return to the Department, I was considerably aided by the vast library holdings of the Department of State and of the Library of Congress, which respectively lay claim to being the oldest and the largest libraries in Washington, D.C. Both the United Nations Information Center in Washington, D.C. and the Peace Palace Library in The Hague were invaluable resources for tracking down both mainstream and off-beat United Nations materials. The staffs at each of these institutions proved first rate.

My observations and conclusions in this book have benefited from those in the academic community with whom I have had the great fortune to study: Richard Gardner, Louis Henkin, and Oscar Schachter of the Columbia Law School; Philip Allott, Derek Bowett, Christopher



Greenwood, and Elihu Lauterpacht of Cambridge University; and Richard Lillich, David Martin, and John Norton Moore of the University of Virginia School of Law. Special thanks are owed to Professor Lillich who read and commented on this entire study, correcting errors, suggesting improvements to arguments even when they contradicted his own well-crafted views in this area, and providing the encouragement necessary to bring this project to print.

Burns Weston thoroughly edited this book, correcting a range of substantive and syntactical lapses, thereby making this a stronger effort. Professor Weston's ability to challenge without discouraging an author reflects a well-honed skill, if not an art. My thanks also to Jason Letcher, a 1996 graduate of the University of Iowa College of Law, who provided extensive cite-checking support.

Finally, my wife Julie—to whom this book is dedicated—has contributed an enormous amount of patience, encouragement, and general good humor in allowing me to complete this project, notwithstanding two other small projects for which we share responsibility, Jack and Lisa. Without Julie, none of this would have been possible.

To go to war for an idea, if the war is aggressive, not defensive, is as criminal as to go to war for territory or revenue; for it is as little justifiable to force our ideas on other people, as to compel them to submit to our will in any other respect. But there assuredly are cases in which it is allowable to go to war, without having been ourselves attacked, or threatened with attack; and it is very important that nations should make up their minds in time, as to what these cases are.

—John Stuart Mill, “A Few Words on Non-Intervention” (1859)

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## Introduction

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The collapse of the Soviet Union and the regimes of its allied states in the late 1980s was a seminal event in world relations. For more than forty years, the promise of “world order” heralded by the birth of the United Nations in 1945 lay unfulfilled, caught in a web of competing East-West ideologies. Powerful states, capable of projecting military force abroad, spoke in terms of political or economic justice but acted almost always with reference to maintaining the order of a bipolar balance of power—a game of cat and mouse in which rival factions battled worldwide, from the Korean peninsula to the Horn of Africa and beyond.

With the demise of the bipolar world, hopes reemerged for a “new world order,” a world where the dictates of ideological competition would give way to greater political, social, and economic cooperation, built on the pillars of international law and international institutions. A resurgent United Nations, a dramatic reduction in nuclear and conventional weapons, and a flowering of democracies evidenced new opportunities for enhancing such cooperation. In early 1991, a carefully built coalition of nations, operating under the formal authorization of the United Nations, successfully checked and repelled Iraqi aggression in Kuwait, raising hopes that finally the prohibition on the use of war as an instrument of national policy had moved from ideal to reality.

Unfortunately, a genuinely cooperative world order seems, at present, as elusive as ever. With the thawing of the bipolar Cold War world have come new threats among peoples of long-suppressed ethnic, religious, and cultural differences. As Yugoslavia disintegrated during the early 1990s and Serbs, Croats, and Muslims took to slaughtering each other, the international community watched and wondered whether this anarchy was the first of a series of events that would play out in Central Europe, the former Soviet Union, and elsewhere. At the same time, other civil wars raged, disease flourished, and children starved in various African countries, for example Somalia, the Sudan, Liberia, and Angola.

## 2 Introduction

Most striking about these post-Cold War crises has been the wanton disregard for basic human rights—the casual slaughter of innocents, the use of rape as an instrument of warfare, the indiscriminate shelling of civilians in their homes and on their streets. As the world moves into the twenty-first century, a critical question is whether, and if so how, the international community should forcibly intervene in the affairs of a nation whose citizens are subject to widespread human rights deprivations, an action commonly referred to as “humanitarian intervention.”

The United Nations Charter and the practice of states under the Charter recognize the right of a nation to use military force in self-defense and, as well, the right of the United Nations to use military force to address threats to international peace and security. The Charter, however, does not expressly recognize the right to use military force to protect the people of a state against their own governing authorities or from an overall breakdown in governmental authority, even when they face genocide, widespread violence, starvation, or disease. In the context of projecting military force, the Charter is oriented to the preservation of order, not the protection of human rights.

Yet when cases of widespread human rights deprivations occur, this Charter orientation raises a fundamental and serious question: can any order be durable if it is not just? As seen in the emergence of international human rights law since the enactment of the Charter, the international community increasingly is interested in promoting justice in international relations and international law—a natural outgrowth of philosophical and legal traditions that date back centuries.

The purpose of this study is to assess the controversy over humanitarian intervention as a dialectic of international law, a competition between the values of order and justice. The post-Cold War world is undergoing a process of change, a process the rudimentary object of which should be to reconcile a traditional norm disfavoring transnational projections of force with emerging norms favoring human rights and respect for the dignity of persons. The object of this study, therefore, is not to declare humanitarian intervention legal or illegal, moral or immoral, prudent or imprudent, but to explore issues of legality, morality, and prudence in humanitarian intervention from the standpoint of competing values of world order and with particular attention to the potentially greater use of the United Nations after the Cold War. (Though the United Nations is not a world government and though its powers and ability to generate and enforce its commands are constrained by political pressures and reliance on ad hoc economic and military actions, it nevertheless provides new opportunities for enhancing a just world order through the use of humanitarian intervention in appropriate situations. First, at our present stage in history, the United Nations provides the



most realistic opportunity for developing reasonable rules in this area, grounded in the common experience of states and created with the participation of those states. Second, it provides the best opportunity for achieving an authoritative decision-making process for assessing whether a particular instance of humanitarian intervention is in fact just and is in accordance with those rules. Third, it provides opportunities for humanitarian intervention to be conducted under the direct command of the United Nations or in close cooperation with the United Nations.

Unfortunately, there are considerable weaknesses in the United Nations as currently structured for conducting humanitarian intervention. The Security Council is expected to be the vehicle for authorizing such intervention. As an institution, however, the Security Council has no infrastructure for, and little experience with, the management of such crises. It is reliant on a few major powers for the economic and military support that is needed to accomplish large-scale interventions to address humanitarian crises. The domination of those powers raises serious questions about the legitimacy of the process by which the Security Council authorizes humanitarian intervention. And while it may be willing to authorize the use of force to conduct humanitarian intervention, it does so without clear guidelines or even general principles as to how the intervention should be conducted and what ultimate objectives should be sought. This is due partly to the lack of a textual or even philosophical basis within the UN Charter for the authorization of such interventions, partly to a tendency to draw upon principles that operate in traditional peacekeeping operations undertaken with the consent of a host government but which are not suited to humanitarian intervention, and partly to a desire by member states to conduct each intervention on an ad hoc basis with as little control by the United Nations as possible. Moreover, there is a disturbing tendency in recent interventions for one or more member states to rush into humanitarian intervention under the authority of the United Nations, only to withdraw their forces hastily a few months later, insisting that the United Nations assume responsibility for the intervention.

This study argues that these weaknesses must be addressed if efforts in this area are to succeed and makes recommendations to this end.

Chapter 1 focuses on what is meant by “humanitarian intervention,” a term fraught with ambiguity and subject to endless debate. The approach taken is to recognize that the concept of intervention encompasses a continuum of potential political, economic, and military actions by one state against another, but that a working definition of “humanitarian intervention” is best limited to the threat or use of force by a state, group of states, or international organization primarily for the purpose of protecting the nationals of the target state from widespread depriva-