

'First, Do No Harm...'¹

Ensuring *Humanitarian* Military Interventions

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“When I use a word”, Humpty Dumpty said, in rather a scornful tone, “it means just what I choose it to mean, neither more nor less”. Humpty Dumpty may as well be referring to the term ‘humanitarian intervention’ rather than ‘glory’ as he was in *Through the Looking Glass*, Lewis Carroll’s timeless work. The “splendidly fuzzy” ‘humanitarian intervention’ has had as many meanings as authors, lending itself for easy use and misuse (Whitman, 1994).

With increasing emphasis on political correctness, to define the intervention as ‘humanitarian’ seems to provide the necessary moral righteousness, development jargon and the language of rights, access to the fringes of international law, and, eventually favourable public opinion. While hegemony has an option to ignore international law and public opinion, their unilateral actions can become less controversial when there is support in law or favourable opinion. Increasingly, wars are being fought for ‘humanitarian’ concerns rather than on the traditional ground of ‘self-defence’. Even the Bush/Blair-led ‘coalition of the willing’ could not risk excluding a reference to the right to liberty and freedom of the Iraqi people in its justification for overthrowing the Iraqi regime. This sort of use and abuse of the language of humanitarianism and the subversion of rights is an example of what Baxi calls the politics of human rights.²

From a human rights perspective, the use of military force in interventions on ‘humanitarian’ grounds continues to pose a dilemma. It is inconceivable that the mass murder of citizens by states be treated as a domestic issue. Such veiling condones despotic regimes’ abuse of authority, and sacrifices the rights of peoples on the altar of state sovereignty. Therefore, in cases where a state is guilty of gross violations, an intervention to protect the citizens may be acceptable. Yet, creating such a ‘right’ of intervention ignores the possibility and probability of abuse. In practice, the ‘right’ would only be exercised by nations with expanded military capability. The ‘right’ would thus be available only to hegemony – global and regional, giving them a *de facto* license to police weaker ‘Target States’.³

Trapped within this dialectic in the context of the intervention in Kosovo, the jurist Richard Falk wrote that it is “jurisprudentially problematic *both* to regard ‘ethnic cleansing’ as intolerable to the international community and to condemn the form and substance of

the NATO interventionary response designed to prevent it". He further went on to refer to his defence of the double condemnation as posing the "essential normative challenge for the future: genocidal behaviour cannot be shielded by claims of sovereignty, but neither can these claims be overridden by unauthorised uses of force delivered in an excessive and inappropriate manner" (Falk 1999:848).

This essay seeks to examine and interrogate the myriad meanings, understandings and interpretations of 'humanitarian' within the context of 'humanitarian interventions'. The argument suggests that any solution to the above jurisprudential problem lies in a limited doctrine of humanitarian intervention. Such doctrine would set in place a process of sanctioning interventions on the basis of a clearly understood criterion.⁴

Any understanding of a doctrine of humanitarian intervention would thus be limited to a notion of exceptional necessity, rather than a right to intervene. Besides *being humanitarian*, these interventions would necessarily have to *be seen to be humanitarian* and accountable. The development of a limited intervention is also crucial to offset any unilateral right to intervention (based on state practice) in the post-Kosovo world. Although this understanding of a limited doctrine foresees largely regional forces or those involving a group of states, an intervention by a single state would be permissible as a last resort but with express sanction of the UN General Assembly.

The Changing Limits of Humanitarian Intervention

The term 'humanitarian intervention' has been used widely to mean different things. This confusion is not always unintentional. A loose concept of 'humanitarian intervention' often acts as initial justification and has assisted many 'adventures' by states. Thus, 'regime change' and intervening in failed states has been sometimes included within a conception of humanitarian intervention. Some authors have gone so far as to justify a military coup as an "internal humanitarian intervention" (Reyhan, 1997).

Such a setting breeds pessimism among other authors. "The term humanitarian intervention has gained great currency in recent years, yet a common definition is neither easy nor succinctly achieved" (Murphy, 1996: 8). Others have argued that a usable definition would be "extremely difficult to formulate and virtually impossible to apply rigorously" (Franck and Rodley, 1973: 305). A few are more cynical and suggest that ambiguities and obscurities in the exact meanings of the terms involved, 'humanitarian' and 'intervention', render any attempt to define humanitarian intervention useless. (Bazylar, 1987).

In his seminal work, Winfield (1922:23) notes that "intervention may be anything from a speech of Lord Palmerston's in the House of Commons to the partition of Poland". In the conservative world of international lawyers, however, intervention means dictatorial interference in the domestic or foreign affairs of another state, that impairs its independence. Most authors thus use the term 'intervention' in a specific sense: i.e., the use of military force against the territorial sovereignty of a state, however temporarily, without the consent of that state (Forbes and Hoffman, 1993).

Others, predominantly within political science, preferring a wider understanding of intervention, understand humanitarian intervention to include non-military action as well. A

good illustration is Harriss' *The Politics of Humanitarian Intervention* (1995), which uses the term in both contexts – as assistance and as intervention. Mario Bettati's *The Right to Humanitarian Intervention or the Right to Free Access to Victims?* (1992) deals almost exclusively with humanitarian-medical assistance. Weiss and Campbell (1999:451) refer to both the no-fly zones in Iraq and flood relief in Bangladesh as military humanitarianism – another term to add to the muddled list. Governments too are prone to this – a report by the US House of Representatives on 'humanitarian intervention' deals almost completely with issues of humanitarian aid and relief, but also uses the term to refer to use of force (US House of Representatives Select Committee on Hunger, 1992).

However, Pieterse (1998:4) correctly notes that the basic distinction between humanitarian assistance and humanitarian intervention is the use of coercion and armed force in humanitarian interventions. Although the use of other enforcement (armed police, etc.) measures during humanitarian assistance would blur the line, conceptually there remain clear differences between humanitarian assistance and humanitarian intervention. Other definitions have ranged from including the threat of use of force (Brownlie, 1974:217) to including mass Gandhian non-violent intervention (Parekh, 1998:145-46).

Humanitarian intervention, used in the generic sense, also includes UN, regional and unilateral interventions.⁵ However, Malanczuk (1993) points out that peacekeeping operations, UN or otherwise, can be differentiated from humanitarian intervention, as they are almost entirely with the agreement of the respective parties involved in the conflict. Similarly, intervention on request of, or with consent from, the lawful government of a state is not relevant to a study of humanitarian intervention, as such intervention would be deemed valid and compatible with state sovereignty. This would be closer to military assistance than humanitarian intervention.

The Threshold for Intervention

Questions have also been raised about whether there is a transnational and transcultural understanding of the term 'humanitarian'. Parekh (1998:146) notes that since what is humanitarian is culturally conditioned, there can be no neutral definition of humanitarian intervention. To complement this, Thomas and Reader (1998:125) illustrate the different standards of humanitarian intervention in a discussion on the accompanying Covenants to the Universal Declaration of Human Rights. Finnemore (1996) too charts the different meanings the word humanitarian has taken in different historical contexts. However, cultural objections can be limited by retaining a high threshold for any intervention. Further, some dimensions of universal human rights, e.g., protection against genocide, are now regarded as customary international law, and thus not threatened by cultural exceptions.

Tyagi (1995) argues that traditional humanitarian intervention meant the use of collective or individual force to protect and rescue own nationals abroad (e.g., the Israeli raid at Entebbe in Uganda). The second generation of humanitarian interventions saw claims of protection of minorities and enforcement of human rights (Vietnamese in Kampuchea, Indian in East Pakistan). Intervening in cases of 'failed states' incapable of fulfilling their responsibilities produced the third generation (recent interventions in Congo, etc). Fourth generation humanitarian intervention, Tyagi notes, is anticipatory, to prevent a humanitarian

crisis (the present situation in Zimbabwe demands an intervention).

Some scholars accept Tyagi's understanding of traditional humanitarian intervention.⁶ Others, however, dismiss it in their understanding of the widely accepted and classical definition of humanitarian intervention as "coercive action by one or more States involving the use of armed force in another State without the consent of their authorities, and with the purpose of preventing widespread suffering or death among the inhabitants" (Roberts, 2000:5).

In a 1999 report commissioned by the Danish government, the Danish Institute of International Affairs replaced "wide-spread suffering or death" with "preventing or putting to a halt gross and massive violations of human rights or international humanitarian law" (11). Klintworth (1989) notes that fundamental human rights ought to be threatened and the situation should be one of extreme deprivation that shocks the conscience with either sustained large-scale loss of life or imminent risk of a continuation thereof. An isolated incident cannot be justification for armed intervention, which should be a last resort after other peaceful options have been tried. Authors such as Guicherd (1999) have also argued that gross violations of humanitarian law can be grounds for a humanitarian intervention in the same way as gross violations of human rights.

Halberstam (1995:1) adds that the state in whose territory the intervention is taking place "must be unwilling or unable to protect" those for whom the intervention is taking place. Greenwood (1993) elaborates this point by clarifying that in cases where a state slides into anarchy, an intervention to prevent violations would be considered a humanitarian intervention since consent is no longer an issue.

Therefore, while there seems to be general acceptance that it is only gross or massive or large-scale violations of human rights that can justify intervention, there is no clear definition as to what constitutes "Gross Violations" (Pease and Forsythe, 1993:208). While Krylov (1995: 391) includes "creating conditions of intolerable suffering for large numbers" as a justification for intervention, Roberts (2000) points out that any criteria should not be based on numbers alone. Halberstam (1995:1) widens it further by referring to "grave injury". Other variations include Lauterpacht's "shock the conscience of mankind", Lillich's "substantial deprivation of human rights", and Murphy's "widespread deprivations of internationally recognised human rights", etc.

Further, opinion is divided on the issue of what rights would amount to fundamental human rights. While most tend to agree with Fonteyne (1974) that the right to life and freedom of torture should be regarded as fundamental rights, Murphy (1999) goes further and even foresees humanitarian intervention in cases of extreme environmental degradation. This lack of consensus could be overcome by relying upon the definitions of 'genocide', 'war crimes' and 'crimes against humanity' that have been adopted by the statute of the International Criminal Court (ICC).

The inconsistency in the past practice of interventions is glaring. This is well epitomised by the 1992 intervention in Somalia and the lack of intervention in Rwanda in 1994. The rhetoric of Somalia (we *must* intervene!) was lost in Rwanda, where despite the well-documented genocide, the world leaders merely made polite noises (umm...maybe someone *should* do something...). If there is a clear message from the last two decades, it is that there is no consensus on when a state should act militarily on grounds of

humanitarian concerns.

Given that national and other interests often play a larger role than humanitarian concern in the decision, or not, to intervene, the question of sufficient grounds for intervention becomes crucial. An agreement between states on when the threshold for intervention is reached is unlikely, but increasing clarity on 'gross violations' and 'crimes against humanity' in international criminal law bodes well for the future.⁷

Ensuring 'Clean Hands'

Crossing the threshold for intervention should not be the sole requirement for an intervention to take place. It is imperative that the intervening state act "with clean hands"; this must translate into humanitarian aims and objectives, humanitarian modes and means of intervention, as also an appropriate conclusion or result.

a) Exhaustion of All Peaceful Means

From a humanitarian and human rights perspective, military interventions must only be a last resort. As obvious as this may sound, in both Iraq and Kosovo serious questions can be raised as to the completion of negotiations and exhaustion of all peaceful means before the use of force. A procedure that works within the UN system, however, will ensure that such concerns would be dealt with – peaceful means as required by the UN Charter would have to be exhausted prior to use of force. The case of East Timor, when Indonesia was ultimately pressurised into giving its consent, is an example of the success of such means. Charney (1999) also suggests that a period of notice be given to the target state.

b) Placing of Evidence

The issue of determination of violations is also important, and would be an inbuilt procedure that requires international backing. The role of third party states and international organisations cannot be underestimated here. Roberts (2000) notes that allowing non-state parties to give testimony would assist in arriving at a conclusion, as would sending delegations to investigate particular cases, as in East Timor and Sierra Leone. Charney (1999) argues that such evidence should be publicly available. Nafziger (1999) suggests that UN bodies, including the UN Commission on Human Rights and its various mechanisms, can play a supplementary role. At the UN, the target state also has the opportunity to rebut the evidence and show why the intervention would not be required. In the case of Darfur, Sudan rebutted the evidence and appears to have succeeded in convincing a number of fence-sitting states that the intervention was not necessary.⁸

An important feature of the evidence before the international community is that a direct link must be made between the authorities in the target state and the violations in question. Thus, it has to be proved that the authorities are either guilty of committing the acts, unwilling to prevent the acts, or both. Straightforward in theory, Roberts (2000) notes that it has been far more difficult in practice, particularly in the 1990s. Robertson (1999) suggests using indictments by the International Criminal Court as indicators of this direct link. Such a process would indeed make the process equitable and give it judicial sanction. Given the strong resistance from a few powerful States to the ICC, this, however, is no foolproof solution.

c) Disinterested Interveners

While intervening states are obviously those who are able and willing, as far as possible the intervention should take place as a UN enforcement action involving a number of states. Where the intervention cannot be carried out as a UN action, it should preferably be carried out by a regional organisation or sub-regional organisation with the sanction of the UN. Operations like the one in East Timor are also welcome where one state (Australia) is willing to lead the operation but is not acting alone. Single states acting should however be a last resort in cases where there are no other willing parties.

The above-mentioned procedure already works for most UN operations. In the case of Rwanda, France (despite the vast colonial baggage) was sanctioned to intervene only as a last resort when no other states were willing to do so. Similarly in the case of East Timor – in the absence of any other state displaying the will, Australia led the military force that intervened, despite its well-known geo-political interest in Indonesia.

d) Clear Mandate

The mandate of humanitarian interventions has always been a difficult issue. Roberts uses the analogy of the need to provide both first aid and long-term treatment to medical cases (Roberts, 1993b:10). He notes that combining both can be difficult in international relations. Clarke and Herbst (1997) use the intervention in Somalia to make the same argument. There is, however, disagreement over whether 'nation building' interventions are feasible or even desired. Though such a decision would need to be based on particular facts and the willingness and commitment of the intervening states, there needs to be a clear mandate provided to and by the intervening state.

Ensuring Humanitarianism in the Intervention

The intervention in Kosovo showed that questions regarding the means, and the actual intervention itself, are crucial and demand attention. Jones (1995) observes the paradox that 'humanitarian interventions' are so titled because of their humanitarian motives, but their means and outcomes are often not so. While this section does not privilege humanitarian outcomes and means over motives, it argues that all three – motive, means and outcome – need to be humanitarian for an intervention to be classified as a humanitarian intervention. This section focuses on the manner in which the intervention is carried out while the next section discusses appropriate outcomes.

a) Use of Proportionate Force

For a humanitarian intervention to achieve its objectives, the means employed by it must be proportionate to the objective. The use of tactics such as high altitude aerial bombing is questionable in a humanitarian intervention. Although the use of military strategy seeking to limit own casualties is not in doubt in other conflicts, when a force is seeking to attain a humanitarian outcome, large-scale casualties in the target state are not in consonance with the humanitarian motives.

Furthermore, the laws relating to armed conflict should also bind all such interventions. In this regard, the use of weapons such as depleted uranium shells and cluster bombs, etc., is questionable. The International Committee of the Red Cross (ICRC) has, in an internal legal note, discussed the relationship between humanitarian intervention and international

humanitarian law (IHL). While humanitarian intervention is largely seen as a *jus ad bellum* question (in what situations can force be used) it must also respect IHL as *jus in bello* (the law that applies during conflict irrespective of the nature of the conflict) (Ryniker, 2001:30). For the retention of humanitarianism in spirit rather than in form and title alone, it is crucial for the intervening state to respect the laws of armed conflict and devise military strategy consistent with IHL.

b) Fixed and Limited Duration

Unlike the Indian intervention in East Pakistan and the Tanzanian intervention in Uganda, where the forces withdrew almost immediately, the Vietnamese intervention was criticised since its forces remained in Kampuchea for a decade. The post-1991 Allied 'no-fly zone' in northern and southern Iraq was also viewed with scepticism, because it continued for over a decade. However, the issue of duration is also contested. The French intervention in Rwanda was restricted to two months, and there was huge human cost for their compliance with the mandate since the French withdrawal led to a large refugee flow (Murphy, 1996). Klintonworth (1989) argues that in the case of Kampuchea as well, there was no doubt that had the Vietnamese returned, the Khmer Rouge would have re-established control. Similar claims are also made by the US and UK with regard to the interventions in Iraq, supposedly in the interest of protecting the Kurdish and Shiite population.

To overcome this hurdle, it is recommended that in the first instance, interventions be sanctioned for a limited period of time and renewed by the UN for further extensions. This would also be practical, and remove the problem of the 'reverse veto'. Chesterman (2001) shows how under the current system, unless a resolution terminating a previous mission is adopted, the mission continues with the same mandate and function. However, as in the case of the UN Military Observer Group in India and Pakistan, the task (of supervising the ceasefire after the war in 1965) is now redundant. The duration of the intervention would be directly linked to the mandate of the intervening forces.

Appropriate and Humanitarian Results

a) Change in Political Structures

As the Vietnamese intervention shows, the duration is also linked to the intended role and mandate of the intervening force. Murphy (1996) notes that though in theory a humanitarian intervention does not favour one group in a civil war over another or alter the political structure of a state, practice is very different and a regime change is an almost inevitable effect. While interventions cannot be sanctioned solely for the purpose of a 'regime change' and must fulfil the other requirements prior to an intervention, involvement in long term 'solutions' too is ethically questionable, and puppet regimes remain a threat. It is suggested that a case-to-case analysis is the best solution with regard such an issue.

The evaluation of a military intervention must thus use a number of indicators – whether the intervention achieved its stated and mandated objective; the extent of 'collateral damage' and loss; civilian casualties and destruction; the role of the intervening state in relation to the target state after the intervention, etc.

b) Accountability of the Intervening States

States that seek to intervene on humanitarian grounds *need* to be held responsible for

their action. However there remains little accountability where interventions take place outside UN control or involvement. Under the system followed by the UN, even if the states involved were in control of their own soldiers, they would be required to report regularly to the UN. Thus there would be a system of accountability (Fonteyne, 1974).

Charney (1999) suggests, valuably, that states participating in the intervention must consent both to suit in the International Court of Justice (ICJ) and the International Criminal Court (ICC) by any directly injured state for violations committed in the course of the humanitarian intervention. The infamous images of Abu Ghraib have brought this issue back into the limelight. It is however questionable whether such criteria would be agreed to, given that the US, Russia and China and various other states oppose any such jurisdiction before the ICC.

A Sobering Conclusion

This essay aimed to deconstruct 'humanitarian intervention' and its two conceptual components: 'humanitarian' and 'intervention'. In doing so it looked at what are the key factors and elements that would make an intervention 'humanitarian'.

The power given to the international community to determine when to act is not infallible. Even though it is hoped that the international community would act on clear criteria for intervention, *realpolitik* makes it unlikely that interventions will take place in all cases where they should. Greater involvement of the UN and increased stress on humanitarian means and outcomes, along with humanitarian motives, could lead to more scrutiny of interventions, thereby limiting abuse. However, even these improvements will not ensure that an intervention takes place when it is urgently required.

Further challenges await us. International organisations like Amnesty International and Human Rights Watch are gradually moving from a 'no-position' stand on humanitarian interventions to a situation where they often condone, support or even call for military intervention. Given the almost certain North-South divide on the issue, it's time for the global South to develop its own rights-based perspective and position on humanitarian intervention.

Humpty Dumpty would be proud.

I would like to acknowledge the suggestions made by Upendra Baxi and Sammy Adelman, amongst others at the University of Warwick Law School, where most of these strands of thought were developed.

NOTES

1. *Primum non nocere* – the general ethic of the Hippocratic Oath for physicians. Attributed to the Roman physician Galen.
2. As opposed to the politics *for* human rights that may reflect actual and consistent humanitarian concerns (Baxi, 2002).
3. The term 'target state' as distinguished from the 'intervening states[s]'. Murphy notes that it is an unfortunate term "within the context of humanitarian intervention since the objective of the intervention is not to attack or subjugate the will of a State, but, rather, to assist its nationals" (Murphy, 1996: 11-12).
4. Notions of interventions on grounds of human rights must also be understood within the use of force in

international relations. The practice of use of force re-interprets, stretches and even completely ignores the norms and law of use of force if the state is powerful enough to do so. In the past decade, besides the second Iraq war and the bombing of Afghanistan, the US also used air strikes against Kosovo, Sudan, Afghanistan and Iraq. The massive firepower and single-minded determination of the US and its allies in its destruction of Afghanistan in 2001 and Iraq in 2003, using and ignoring international law to suit their convenience in their pursuit for a 'better and safer world', provides one view, while the genocide in Rwanda and the present situation in Darfur complete the picture, reflecting the gravity of the task ahead.

5. Unilateral intervention may include intervention by more one country since its dominant meaning is an intervention without sanction of the UN rather than that conducted only by one nation (Greenwood, 1993:34).
6. Verwey, however, does not refer to nationality of the persons being protected in determining whether the action is a humanitarian intervention or not, thus bringing interventions to rescue own nationals as within the sphere of humanitarian intervention (Verwey, 1998). Teson argues similarly that there is no reason why protection of nationals of intervening states should be, by definition, less humanitarian than action undertaken to protect the nationals of the target state. He defines humanitarian intervention as "the proportionate transboundary help, including forcible help, provided by governments to individuals in another State who are being denied basic human rights and who themselves would be rationally willing to revolt against their oppressive government" (Teson, 1988:5). However, the right to intervene to rescue own nationals has often been argued by some states, including the US and Israel, to be an inherent extension of the right to self-defence, and is not generally seen to be included within humanitarian intervention.
7. However, concerns remain regarding the preventive nature of humanitarian intervention being blunted if there cannot be a pre-emptive intervention (Roberts, 2000). This view is supported by others, including the Danish Institute of International Affairs, While such a concern is valid, there must be sufficient evidence, and not mere speculation, for an intervention to have a valid basis.
8. A more cynical reading of the Darfur situation might suggest Sudan has been given too much credit for the lack of intervention. Perhaps it is Darfur's lack of geo-political importance and/or the lack of natural resources and contribution to the world economy that led to the lack of intervention.

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