

September 1989

Just War and Human Rights

Oscar Schachter

Follow this and additional works at: <https://digitalcommons.pace.edu/pilr>

Recommended Citation

Oscar Schachter, *Just War and Human Rights*, 1 Pace Y.B. Int'l L. 1 (1989)

DOI: <https://doi.org/10.58948/2331-3536.1000>

Available at: <https://digitalcommons.pace.edu/pilr/vol1/iss1/1>

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace International Law Review by an authorized administrator of DigitalCommons@Pace. For more information, please contact dheller2@law.pace.edu.

PACE UNIVERSITY
SCHOOL OF LAW
YEARBOOK OF
INTERNATIONAL LAW

Volume 1

1989

Number 1

LECTURE

JUST WAR AND HUMAN RIGHTS†

Oscar Schachter††

As my title indicates, this lecture concerns two abstract ideas. Both conceptions have a prominent place in international law; they have been discussed at length in the treatises and discourses of that discipline. They are not, of course, the exclusive property or concern of international lawyers. Philosophers, theologians, political scientists, constitutional lawyers and historians have pondered their meaning and consequences. But, that should not mislead us into thinking of these concepts as purely academic, even in the best sense. They are, above all, ideas that have powerfully influenced human conduct and continue to do so. Countless persons have died in wars proclaimed as *just*. Many others have given their lives in the cause of human rights

† The second annual Blaine Sloan lecture, was delivered on March 15, 1989. Presented in honor of Blaine Sloan, Professor Emeritus of International Law and Organization at Pace University, the lecture series is delivered each year to the University and Law School community in order to promote scholarly debate in international law.

†† B.S.S., J.D.; Hamilton Fish Professor Emeritus of International Law and Diplomacy, Columbia University.

which they considered more important than life itself. No, these are not academic topics, abstract as they seem and however learned the discussions about them. They are ideas that almost certainly will have an impact on your own lives (even more, I venture to suggest, than product liability or corporate buy-outs). The United States has been in four major wars during my life; in each one, ideas of justice and human rights were used to justify the wars and their human sacrifices. I am far from sure that they will be the last wars in which one or both of these ideas will have an impact.

The Doctrine of Just War

I do not intend to say very much about the history or philosophical underpinnings of the doctrine of *just war* and of the various conceptions of justice. My concern is with their contemporary manifestations in legitimizing the use of armed force across national borders. But some historical background is called for.

The idea or doctrine of *just war* has ancient roots. It appears in classical writings and then, more explicitly, in Christian theology. The important question of whether killing others in wars was a sin was answered by St. Augustine: not, he said, if one fought in a just cause. For centuries thereafter, theologians, philosophers and international lawyers filled the books with ideas for deciding on the *just* or *unjust* character of war.¹ They were, I find, generous in giving reasons to support their rulers' recourse to war. It was *just* to use force generally against wrongs, such as failure to pay debts or to interfere with teaching the gospel or to seek to achieve inordinate power. Powerful rulers seemed to have had no problem in finding a just cause to wage war against those thought to be weaker. Although this understandably produced some cynicism, the idea of just war remained the focus of serious thought on the most troubling moral problem of the times. It is a problem we still face; when are we justified, in sacrificing lives, in mass killing, for the sake of a higher end? In medieval times, *just war* theorists could consider

¹ On the *just war* doctrine, see W.V. O'BRIEN, *THE CONDUCT OF JUST AND LIMITED WAR* (1981); J.T. JOHNSON, *CAN MODERN WAR BE JUST?* (1984).

this question on the assumption of a common moral code, applied and sanctioned by ecclesiastical authority.

When ecclesiastical authority weakened with the rise of national States, the doctrine of the *just war* was largely replaced in the secular world by a quite different conception: the sovereign right of States to wage war for any reason, at any time. Not that the rulers ceased to proclaim the *justness* of their cause; nobody goes to war without blaming the enemy for its wrongs and provocations. But in the eyes of the law, the law of nations, the line between the just and the unjust war faded. It may seem surprising today that international lawyers, by and large, saw this as a positive development.² They had good reasons. For one thing, it was realistic. It recognized that there was no central institution, no court, to determine which side had the *just cause*. The Church no longer had the authority to do so. States as sovereign equals could not sit in judgment of each other. Every ruler could proclaim that his cause was *just*.

There was also a second reason that international lawyers welcomed the end of *just war* doctrine. If *just cause* did not matter and every State had the right to wage war, both sides could be considered as equal under the law. Limits could then be placed upon their conduct in war on the basis of reciprocity. It was difficult to achieve such limits when each side saw its cause as *just* and the enemy as an outlaw, entitled to no rights. Since both had equal rights, they could be subjected to equal duties, based on mutual interest. When you think of it, it is an extraordinary goal of international law to legitimize mass killing and the emotional violence of war and, at the same time, to impose limits for humanitarian reasons. Without reciprocity, a regulatory system could not succeed. As someone remarked, imposing restraints on the scope and conduct of war meant treating the conflict more like a prize fight than cops and robbers.³ Since wars were considered inevitable anyway, it was better to try to legalize and regulate conflicts than vainly to seek to prohibit them by holding that some wars were *unjust*.

The *ius ad bellum* had to be sacrificed, so to speak, for the *ius in bello*. Moreover, it was easier to maintain a law of neutral-

² See, e.g., J. WESTLAKE, *INTERNATIONAL LAW* 3 (2d ed. 1913)

³ Claude, *Just Wars; Doctrines and Institutions*, 95 *POL. SCI. Q.* 83 (1980).

ity and to bring conflicts to an end by negotiation if neither side was treated as an outlaw.

It is interesting to observe how these considerations still present themselves under the regime of the U.N. Charter. Under the Charter, we are supposed to distinguish between the law-breaker and those defending themselves or seeking to enforce the law. One could say, as the American Catholic Bishops did in their letter on nuclear weapons,⁴ that the only *just wars* today are those fought as self-defense or collective security. Yet in practice there is still reluctance in the U.N. to brand one of the parties to a conflict as the law-breaker, or aggressor. The reason is simple: the main objective is to bring an end to the fighting by peaceful means. The U.N. or any other intermediary does not get far by branding one of the parties an aggressor. The party thus branded does not accept the finding of guilt or welcome mediation by the one who has already determined its guilt. Moreover, branding a State as an aggressor raises the unpleasant prospect of doing something to stop the aggression, and that could involve more destruction and lives lost. I do not mean to say that it is always unwise to condemn a State for aggression; condemnation can impose costs on the guilty State and also affirm the importance of the Charter rule. But it is well to bear in mind why the other path is often taken (as it was in the recent Iran-Iraq War). We can more easily understand why international law moved away from the medieval idea of *just war* and why there is continuing ambivalence on the part of governments on the wisdom of adjudging guilt in cases of armed conflict.

There is, of course, an important difference between the traditional notion of *just war* and the Charter's conception of legitimate force. Under the Charter, force is not legitimized just because it is in the interest of justice. Force is allowed only in the interest of maintaining peace and for defense against aggression. The Charter, in this respect, clearly chooses peace over justice. It does not allow States to use arms to enforce treaties or rules of law. Some respected jurists have found this to be a grave defect. On rare occasions, governments have claimed a right to

⁴ National Conference of Catholic Bishops, *The Pastoral Letter on War and Peace: "The Challenge of Peace: God's Promise and Our Response,"* ORIGINS, National Catholic Documentary Service 13:1 (1983).

use force to protect their legal rights. The British and French argued that way in support of their invasion of Egypt in 1956 when the Suez Canal was nationalized. They lost the support of the U.S. and most other countries on that occasion and since then their argument has had little support.⁵

The Use of Force for Human Rights

The real challenge to the Charter's emphasis on peace has come from another direction; human rights. This may at first seem strange since human rights is so often viewed as the most idealistic of aspirations, the creation of philosophers and the unworldly. But when we reflect on its history, starting, for example, with the French Declaration on the Rights of Man and the French Revolution, it is evident that much blood has been spilled for its sake. Men and women have fought, often against great odds, for what we would consider today as their human rights. This is not the occasion to go into that history, but if we think about it, we should not be surprised that the strongest challenges to the principle of non-use of force are made in the name of human rights, more precisely, in the name of particular human rights. These challenges fall into three categories: one justifies armed force in the cause of national liberation and the struggle against alien domination and racist regimes; a second justifies force in the interest of democracy and against regimes not based on the consent of the governed (this finds expression in the Reagan doctrine); and, the third justifies force to end atrocities such as mass killings and large-scale deprivations of the necessities of life.

These three categories obviously fit into the broader concept of human rights. However, they select different rights and they have different supporters often strongly antagonistic to each other. Yet they tend to share a common legal argument directed against the interpretation of the Charter that I had suggested earlier.

One leg of their argument is essentially textual, addressed to the peculiar construction of the Charter's prohibition against

⁵ Schachter, *In Defense of International Rules on the Use of Force*, 53 U. CHI. L. REV. 113, 125-28 (1986).

the use and threat of force. That provision, they emphasize, does not prohibit the unilateral recourse to force in general. It only prohibits force against the political independence and territorial integrity of a State or in any manner inconsistent with the purposes of the United Nations. It is then argued that when force is used to protect human rights, it is not directed against the political independence or territorial integrity of a State nor is it inconsistent with the purposes set forth in the Charter itself. The nub of this argument is that when force is used in another country for a purpose recognized in the Charter itself, (one might say, a *noble* purpose) the force is not aimed "against political independence or territorial integrity."

Although this reasoning may seem, at first, a possible interpretation, it does not withstand analysis. Two specific reasons can be given. One is that any invasion or bombing of a State violates its territorial rights and its political independence. It requires an Orwellian interpretation of these terms to accept the idea that an *invader* would protect the *true will* of the people and, hence, would not deprive the invaded State of its independence or territory. The second ground for rejecting the permissive interpretation is that the maintenance of international peace is itself one of the purposes of the Charter - indeed, the very first. Hence, the use of force by a State in another country without that country's consent must be considered as inconsistent with a major Charter purpose. It is strange, if not absurd, to argue that the added reason for the illegality of force (namely, inconsistency with a Charter purpose) results in an exception to the general prohibition of force against political independence and territorial integrity. Moreover, it ignores the obvious point that force consistent with one purpose, *e.g.*, self-determination, would be contrary to the major purpose of maintaining peace.

Of course, an issue of this magnitude cannot be definitely answered by analysis of text alone, nor should it be. But since textual arguments have been made to justify far-reaching exceptions to the prohibition of Article 2(4), it is not of importance that they be answered. It is even more important to consider the ends and values that are at stake in this controversy. For no text adopted by governments can or should foreclose choices imposed by changing conditions and by new perceptions of ends and means. The U.N. Charter is, as often stated, a living instrument.

It is, like every constitutional instrument, continuously interpreted, molded and adapted to meet the interests of the parties.

This process is ensured by the generality of language, the broad range of the Charter purposes and principles and the inevitable ambiguities. It is also insured by the raw facts of international life: the great differences in power and wealth, the technologies of destruction and the misery and frustrations of the masses of people. These factors, and others, have an impact on how we construe and give effect to the Charter. The Charter sets forth ideals which nearly all can accept but it operates in a non-ideal world of clashing interests. No issues cut as deeply into these conflicts as those concerned with armed force. With or without the Charter, force must be both legitimated and limited in a society of independent States. The absence of a supreme authority only underlines this necessity. States, no more than individuals, can consider themselves entirely free to take up arms against another. No one, I believe, disputes that conclusion.

I come back to the question of justifying force for human rights, and to the three categories of justification I mentioned earlier.

1. *Force for Self-Determination and National Liberation*

I will begin with the controversial proposition that the use of force is and should be legitimate in the struggle of peoples for self-determination and national liberation. This proposition, prominent in the period of decolonization, has not disappeared with the end of the colonial empires. It is said to apply in other struggles against *alien domination* and racist regimes. Commentators have referred to it as the contemporary doctrine of *just war*.⁶ United Nations bodies have wrestled with it for some decades. Their resolutions are models of tortuous and equivocal drafting. Nonetheless, some conclusions can be drawn about the legal position accepted by most States. The key resolution in this regard is the well-known Declaration of Principles of International Law, adopted without dissent in 1970 after some ten

⁶ Claude, *supra* note 3.

years of study and debate by the U.N. General Assembly.⁷ Most States, including the United States, refer frequently to this resolution as an authoritative expression of the law of the Charter and related customary law.

The resolution recognizes, clearly enough, that people may use force to resist governments which deprive them of self-determination. This can be read as recognizing the *right to revolt*; a right that does not involve the use of force in "international relations" and, therefore, is not within the terms of Article 2(4). The resolution does go on to say that peoples struggling for self-determination "are entitled to seek and receive support" from external powers but such support must be "in accordance with the purposes and principles of the U.N. Charter."⁸ This last clause was emphasized by a number of governments (especially the Western group) as including Article 2(4). In short, they did not intend to make an exception to Article 2(4) in this case.

If the legality of foreign military support on behalf of national liberation movements were put to the International Court, I believe the judges would have to conclude that no such exception to the general prohibition has been accepted by the community of States. This conclusion was in fact expressed by Judge Schwebel, the U.S. member of the International Court, in his dissenting opinion in the *Nicaraguan* case.⁹ Although the issue was not before the Court and the judgment did not deal with it, Judge Schwebel did address it briefly. He concluded that:

. . . it is lawful for a foreign state or movement to give to a people struggling for self-determination moral, political and humanitarian assistance; but it is not lawful for a foreign state or movement to intervene in that struggle with force or to provide arms, supplies or other logistical support in the prosecution of armed rebellion.¹⁰

⁷ *Declaration of Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28) at 121, U.N. Doc. A/8082 (1970) [hereinafter *Friendly Relations resolutions*]. It is often referred to, in the trade, as the Friendly Relations resolutions.

⁸ *Id.*

⁹ *Military and Paramilitary Activities in and against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14 (Merits).

¹⁰ *Id.* at 351, para. 180.

Before leaving the subject of self-determination, I should mention that its place in the hierarchy of international purposes is by no means entirely clear. The Declaration of Principles which strongly affirms that right also includes the following paragraph: "Every state shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other state or country."¹¹

This paragraph reflects the position of most governments which may oppose some types of *alien rule* in other countries but are strongly opposed to foreign powers supporting national, ethnic or religious communities that seek separation or autonomy. We should, therefore, not be misled by the strong rhetoric in favor of self-determination in some places. The more realistic conclusion is that nation-States of all kinds share a common interest in opposition to self-determination claims that threaten their national unity.

2. *Force Against Repressive and Non-Democratic Regimes*

Even more contentious than the issue raised by the national liberation movements, has been the controversy regarding military aid given to insurgent forces seeking to topple allegedly repressive regimes. In these cases, Soviet-American antagonism has been in the forefront. Communist movements have often received military aid from the Soviet Union and its allies, and, on the other side, resistance forces opposed to leftist governments have obtained arms, training and advice from the United States and occasionally from other governments supportive of U.S. positions. The U.S. position, which has come to be known as the Reagan doctrine, justifies military support to *freedom fighters* in their armed resistance to pro-Soviet regimes.

From both a political and legal perspective, the Reagan doctrine in its broad formulation, goes beyond prior U.S. positions that had involved military aid to anti-communist forces. Under the Truman policy, announced in 1947 (and later elevated to *doctrine*), the U.S. undertook to give military and economic support to governments of "free peoples" resisting "subjugation by

¹¹ *Friendly Relations resolutions*, G.A. Res. 2625, *supra* note 7.

armed minorities or by outside pressure.”¹² In political terms, it supported existing regimes friendly to the United States against Soviet-supported revolutionary movements. From the standpoint of international law, it was, in one view, no more than aid to a government at its request for the purpose of maintaining law and order within the country; consequently, it did not involve force against the territorial integrity or political independence of the State. The U.S. military aid to Greece and Turkey, in accordance with the Truman doctrine, was not widely challenged on legal grounds. However, critics of the Truman doctrine among governments and legal commentators, contended that the U.S. aid involved an intervention in a civil war, thus violating political independence of the country. From the U.S. side, an additional argument was that the support of insurgents by a foreign power (the U.S.S.R.) justified U.S. aid to the government under the principle of collective self-defense.

These legal and policy issues became more controversial when in the 1960's the U.S. expanded its military aid to the South Vietnam government into a massive military action against both the internal insurgents (Viet Cong) and the government of North Vietnam which heavily supported the insurgency. Critics condemned the U.S. on several grounds: for aiding an unpopular government, for seeking to determine the political destiny of South Vietnam and for *internationalizing* a civil war by carrying it to North Vietnamese territory and that of neighboring countries. The principal U.S. legal argument asserted the right of collective self-defense on behalf of the independent State of South Vietnam. The U.S. bombings of North Vietnam and Cambodia were claimed to be a necessary and proportionate defense on behalf of the Republic of South Vietnam which had been subjected to armed attack by North Vietnam and the Viet Cong, supported by the north. The judgments on these factual and *category* differences have been left to the historians, but the American people quite clearly expressed widespread opposition to the war.

The Reagan policy of the 1980's went beyond the principle of aiding established regimes against Communist subversion. It

¹² For text, see THE PUBLIC PAPERS OF THE PRESIDENTS: HARRY S. TRUMAN 1947 178-79 (U.S. Gov't Print. Off. 1963).

was a response to the increase in the number of Third World governments that had been supported by the U.S.S.R. and were regarded as under its influence. A potential threat to U.S. security, along with a concern over denial of basic democratic rights, were given as reasons for U.S. action against the governments in question. Action to overthrow *unfriendly* governments had been taken by U.S. officials on previous occasions (Iran in 1953, Guatemala in 1954 and Chile in 1970) but they were meant to be covert acts supporting internal coups d'état. No serious attempt was made by the U.S. to justify them as legal. Indeed, the U.S. continued to maintain a strong position that subversion and indirect aggression were contrary to international law. The Reagan doctrine, in contrast, openly proclaimed the legitimacy of foreign military intervention to overthrow leftist *totalitarian* governments.

A variety of arguments were advanced by its proponents to support the Reagan policy. One such line of argument, especially favored by non-lawyers, considered the international law rules against unilateral use of force as relatively unimportant. They emphasized the *higher* values of national security and freedom.¹³ They also minimized the prohibitions of international law as dead-letter rules ignored by many States. In it was argued that violations by the U.S.S.R., and others and the failure of the U.N. to protect States by collective action have destroyed the underlying premises of the Charter principle renouncing the use of force. But it is important to note that, unlike such commentators, the U.S. Government itself has never argued that Article 2(4) is legally defunct; it has, on the contrary, condemned others for their violations and defended its own record of compliance.

Other arguments for the lawfulness of the principle of the Reagan doctrine attempt to find support in the Charter itself. One such argument seeks to rely on the Charter purposes and principles that support self-rule and political freedom by maintaining that a *contextual* interpretation supersedes a *restrictive* or *textual* reading of Article 2(4). One writer goes so far as to claim Article 2(4) to be a "means" only, and, therefore, sub-

¹³ KRAUTHAMMER, MORALITY AND THE REAGAN DOCTRINE THE NEW REPUBLIC 17, 18 (1986).

ordinate to the Charter ends.¹⁴ These arguments based on *higher purposes* are the same as those made to support the right to use force for national liberation or humanitarian ends. As noted earlier, they ignore the primary purpose of the Charter - to prevent breaches of the peace. They would deprive both Article 2(3) and Article 2(4) of nearly all their effect.

A further argument for the Reagan doctrine maintains that governments which deny political freedoms and democratic rights cannot be considered to be based on "the consent of the governed" and, consequently, they lack legitimacy in a political and legal sense.¹⁵ They are said to be no more than *de facto* regimes which should not represent the State or its people under international law. Accordingly, the use of force against such regimes by an outside power would not be against the territorial integrity or political independence of the State. This argument, standing alone, has never been presented as the official U.S. position, though it has been suggested in statements of supporters of the Reagan policy. The argument, if applied consistently, would have profound implications for the international system since many, if not most, governments of the world do not meet the main conditions of political democracy. To consider that deficiency as a sufficient basis to deny their legitimacy, and thereby to allow force to be used by other States against them would be a radical departure from the present rules of the State-system.

In its actual implementation, the Reagan doctrine has been rather more limited than its rhetoric. It has been confined thus far to providing military arms, supplies and, in a limited degree, military advisors to insurgent movements such as the contras in Nicaragua and the UNITAS in Angola. This aid has been given only to resistance forces fighting regimes that have been significantly supported with military and economic aid by the Soviet Union and other communist governments. It has been argued (though this is not clear) that the resistance forces receiving U.S. aid have had significant popular support. Assuming these factual

¹⁴ Reisman, *Coercion and Self-Determination: Construing Charter Article 2(4)*, 78 A.J.I.L. 642, 643 (1984). Compare with Schachter, *The Legality of Pro-Democratic Invasion*, 78 A.J.I.L. 645 (1984).

¹⁵ 1 JEANE KIRKPATRICK, LEGITIMACY AND FORCE 434-39 (1988).

propositions to be correct, it can be argued that the U.S. action maybe a *counter-intervention* against a prior illegal use of force by the Soviet-bloc States. On this hypothesis, the lawfulness of the U.S. intervention would be seen *prima facie*, as collective self-defense or a lawful counter-measure to the delictual conduct of the Soviet Union and its allies. Support by the U.S. (as well as by Pakistan) of the Afghan resistance could plausibly fit under collective defense, particularly in view of the U.N. resolutions condemning the Soviet intervention.¹⁶

The United States has not submitted the Reagan doctrine, as such, to the United Nations or any other major international forum. It can be safely predicted that, if it did so, it would be rejected by most States. The debate and vote on the Grenada invasion is indicative.¹⁷ Hardly any democratic governments supported that armed intervention, despite their antipathy to tyrannical and brutal governments. Nor have they argued that because such governments lack *political legitimacy* they may be overthrown by foreign powers.¹⁸ The idea that armed invasions could make the world "safe for democracy" has had little appeal to governments. Memories of past invasions and seizures of power in the name of self-determination and freedom are still fresh in many parts of the world. *Peoples democracies* have been imposed on unwilling peoples. States deeply committed to democracy have feared the manipulative and tendentious use of self-determination as a ground for foreign intervention. Governments of various shades of opinion have a common interest in rejecting a principle that would encourage their internal opposition movements to seek foreign military support to topple their allegedly non-democratic regimes. Moreover, the world in general has good reason to worry about the risks of escalation resulting from ideological wars, particularly those involving major powers. For all these reasons it is highly unlikely that the strong rhetorical version of the Reagan doctrine will be accepted as part of contemporary international law. This would still leave collective self-defense, as recognized in Article 51 of the Charter,

¹⁶ G.A. Res. 37/37, 37 U.N. GAOR Supp. (No. 21), U.N. Doc. A/C.6/37/SR.25 (1982).

¹⁷ G.A. Res. 38/7, U.N. Doc. A/Res/38/7 (Nov. 2, 1983).

¹⁸ See Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1641-45 (1984); Cutler, *The Right to Intervene*, 64 FOREIGN AFF. 96, 106 (1985).

as a legal basis for counter-intervention by a third State against illegal military intervention by a foreign power. This, too, is not without problems and a need for clarification. But, that is a subject that requires another lecture.

3. *Force for Humanitarian Ends*

Apart from self-defense, the strongest claim to allowing an exception to the prohibition of armed force would appear to be the use of force to save the lives of innocent human beings threatened by massacres, atrocities, widespread brutality and destruction. The U.N. Charter has not ended the sorry historic record of such inhumanity. Internecine wars, persecutions, forced expulsions, disappearances and the breakdown of order have been strongly condemned in international forums and by world opinion generally. Nonetheless, atrocities have continued, giving rise to a demand for humanitarian intervention to put an end to the slaughter and degradation.

In support, it has been argued that the renunciation of armed force could not have been intended to prevent such humanitarian interventions when other means, short of force, were proven ineffective. The interventions, if limited to humanitarian ends under conditions of necessity and proportionality, could not be against the territorial integrity or political independence of the State in question, nor could they be inconsistent with the purposes of the Charter. If the U.N. failed to take effective action and no other international body did, elementary humanitarian principles impose an obligation on States capable of taking protective measures to do so, including, if necessary, the employment of armed forces in the troubled countries.¹⁹

These arguments, appealing as they seem to be, have failed to win the explicit support of the international community of States or of any significant segment of that community. No United Nations resolution has supported the right of a State to

¹⁹ Support for use of force as humanitarian intervention can be found in Lillich, *Humanitarian Intervention*, in *LAW AND CIVIL WAR IN THE MODERN WORLD* 229-51 (Moore 1974); Bazylar, *Reexamining the Doctrine of Humanitarian Intervention in Light of Atrocities in Kampuchea and Ethiopia*, 23 *STAN. J. INT'L L.* 547-619 (1987); F. TESON, *HUMANITARIAN INTERVENTION* 130-37 (1988). *But see* BROWNIE, *HUMANITARIAN INTERVENTION IN LAW AND CIVIL WAR IN THE MODERN WORLD* 217 (Moore 1974).

intervene on humanitarian grounds with armed troops in a State that has not consented to such intervention. Nor is there evidence of State practice and related *opinio juris* on a scale sufficient to support a *humanitarian* exception to the general prohibition against non-defensive use of force.

It is true that, in a few cases, the action of an intervening army outside of its borders was seen as serving a humanitarian end because it saved innocent lives from death or injury. Whether these cases can be considered as precedents accepted as law is dubious, especially as no intervening State claimed a legal right based on that ground. Thus, when Indian troops acted to protect Bengalis in East Pakistan in 1971 from Pakistani troops, India asserted the action was necessary to protect its borders. It had also referred to the plight of the Bengalis and the benefit of Indian protection. But the U.N. General Assembly, by a very large majority, declined to support the Indian arguments and called on India to withdraw its forces. Despite much sympathy for the East Pakistan Bengalis, the great majority of States were clearly unwilling to legitimize India's armed action as a permissible exception to Article 2(4).²⁰

A second case that some lawyers have viewed as humanitarian intervention occurred when Tanzanian troops moved into Uganda following a Ugandan frontier incursion repulsed by Tanzania. Actually, Tanzania claimed self-defense rather than a right of humanitarian intervention. Its subsequent occupation of Uganda for some months helped to reduce the disorder and atrocities that had been features of the prior Ugandan regime of Idi Amin. Whether Tanzania's continued occupation was justified as self-defense is debatable. Some African leaders criticized Tanzania's action but understandably, many governments were not disposed to challenge its relatively benign occupation. It is hard to regard such non-action as accepting a right of unilateral intervention for humanitarian ends.²¹ What it does show is that governments hesitate to condemn a short-term military move against an egregious regime. Treating the Tanzanian case as a

²⁰ Franck & Rodley, *After Bangladesh: The Law of Military Intervention By Military Force*, 67 A.J.I.L. 275 (1983).

²¹ See N. RONZITTI, *RESCUING NATIONALS ABROAD AND INTERVENTION ON GROUNDS OF HUMANITY* 102-06 (1985).

precedent for the legality of humanitarian invasion seems more than dubious when we learn that the Obote regime installed by Tanzania was guilty of at least as many atrocities as its ousted predecessor.

A claim of humanitarian intent was used by Vietnam to support its armed action in Cambodia in 1978 against the Pol Pot forces. However, the main legal claim of Vietnam was that its armed forces had been requested by the Cambodian government in power. That claim was itself questionable since the Cambodian regime in the country owed its authority to Vietnam military support. The majority of States in the United Nations have rejected the Vietnamese contentions and called for the withdrawal of its troops.²²

One recent intervention that could be accepted as humanitarian in intent and effect was the French action in 1979 to depose the brutal leader of the Central African Republic, a former colony of France. The personal atrocities committed by Bokassa, the deposed leader, and the necessity to use force without delay were seen as adequate grounds for the French intervention.²³ France's explanation that it had acted for humanitarian ends and that such action was necessary was not challenged in international organs.

Our sympathy for victims of atrocities should not obscure the lessons of past invasions claimed to be humanitarian. Past armed interventions, going back to 19th century incursions by imperial powers, have shown that invariably intervening States have had their own political agendas. They imposed conditions that were not freely chosen by the people of the country in question. They often obtained special advantages and exacerbated internal conflicts. It is hardly surprising that governments have refrained from adopting a general rule for humanitarian intervention. Indeed, I believe no government has actually declared itself as favoring so broad an exception to the rule against force.

This should not mean that the cases of mass killings, genocide and other egregious violations of elementary principles of

²² *Id.* at 98-101.

²³ TESON, *supra* note 19, at 175-79. French troops took part in a bloodless coup to depose the *Emperor* Bokassa. Only three African States protested the French action.

humanity should be tolerated and that protective force should never be used by external powers. However, we do not get far in meeting the problem by formulating legal principles or guidelines on a general level. What is needed is institutional action for early inquiry and involvement in the incipient stages of threatening atrocities. A Hitler, a Pol Pot, or an Idi Amin should not be tolerated until thousands have died. If complaint and condemnation prove futile, individual States with the requisite capability should be called upon by the United Nations for forceful action under international auspices. The legal authority to do so exists in the Security Council if it can be reasonably held that the atrocities will sooner or later threaten peace and security. True, experience shows that consensus among the permanent members of the Council may not be easy to reach even in a situation where the atrocities are extreme and incontrovertible. Failing Council action, recourse to the General Assembly would provide an opportunity for community approval. With such approval, the use of force by individual States would have a strong moral justification and would probably be widely condoned rather than condemned. Even in the absence of such prior approval, a State or group of States using force to put an end to atrocities when the necessity is evident and the humanitarian intention is clear is likely to have its action pardoned. But, I believe it is highly undesirable to have a new rule allowing humanitarian intervention, for that could provide a pretext for abusive intervention. It would be better to acquiesce in a violation that is considered necessary and desirable in the particular circumstances than to adopt a principle that would open a wide gap in the barrier against unilateral use of force.

Concluding Remarks: The Choice to be Made

My position, in a nutshell, is that international law does not, and should not, legitimize the use of force across national lines except for self-defense (including collective defense) and enforcement measures ordered by the Security Council. Neither human rights, democracy or self-determination are acceptable legal grounds for waging war, nor for that matter, are traditional *just war* causes or righting of wrongs. This conclusion is not only in accord with the U.N. Charter as it was originally understood, it is also in keeping with the interpretation adopted by the great

majority of States at the present time. When governments have resorted to force, they have almost invariably relied on self-defense as their legal justification.²⁴ Whether or not that claim was well-founded, and clearly in some cases it was not, it is significant that it was advanced rather than the claims of human rights or justice. One might consider defensive war as the contemporary equivalent of *just war* (as the Catholic bishops have done).²⁵ But this is only a verbal point and does not change the legal principle.

You are of course still entitled to ask whether the restrictive rule *should* remain the law or whether States, particularly the U.S. and its allies, should seek a more permissive rule; for example, a rule that would adopt the Reagan doctrine and allow U.S. military forces and logistical assistance to support *freedom fighters*.

My own view is that this would be a mistake, a dangerous mistake. We live in a world of diversity, incorrigibly plural, where perceptions of freedom, well-being and self rule vary and often conflict in specific cases. They are not only theoretical or academic. The use of force on one side almost always provokes force on the opposite side. Moreover, the reality is that when powerful States intervene with force for good causes, their conception of what is good inevitably reflects their own interest, especially *vis-à-vis* contending forces. It is therefore not surprising that most governments in U.N. debates have viewed with skepticism the claims of other governments, large and small, that they acted only for defense or in the interest of freedom.

Does the renunciation of force, except for defense, mean that the moral claims of human rights are subordinate to sovereign rights and, in effect, to a statist philosophy? That may well be true in an abstract sense. In the more concrete sense of real world situations, armed interventions by foreign States have resulted more often than not in protracted wars and little freedom. Vietnam, Nicaragua and Angola are instructive examples.

To say that force may not be used for human rights does not imply giving up on efforts to achieve such rights through international efforts. The world has already taken large steps in

²⁴ See Schachter, *Self-Defense and the Rule of Law*, 83 A.J.I.L. 259 (1989).

²⁵ See J.A. DWYER, *THE CATHOLIC BISHOPS AND NUCLEAR WAR* (1984).

that direction. Virtually all agree that there is no Chinese Wall that seals off the internal conduct of a State towards its citizens from international scrutiny and censure. It is widely accepted that States are accountable internationally for their conduct. This has been implemented by the international fact finding and recommendatory bodies within the United Nations. In Europe and Latin America there are human rights commissions and courts. Only a few days ago, we had the astonishing and encouraging announcement by the Soviet Union that it would accept the compulsory jurisdiction of the World Court for disputes arising under six important human rights treaties. Americans cannot help observing that their government has only recently ratified the Genocide Convention with a reservation that excludes the compulsory jurisdiction of the Court.

To be sure, violations of human rights continue throughout the world and much needs to be done to ensure substantial compliance by most States with their commitments. There is no easy path to that end. But, it is far better to place our bets on that effort, than to open the door to, and thereby legitimize, armed intervention in the name of human rights and *just causes*.