

1997

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Recommended Citation

Lillich, Richard B. (1997) "Kant and the Current Debate Over Humanitarian Intervention," *Florida State University Journal of Transnational Law & Policy*. Vol. 6: Iss. 3, Article 5.

Available at: <https://ir.law.fsu.edu/jtlp/vol6/iss3/5>

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Cover Page Footnote

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Address

KANT AND THE CURRENT DEBATE OVER HUMANITARIAN INTERVENTION

RICHARD B. LILLICH*

When Professor Dicke asked me to make a brief address at this symposium on the relevance of Immanuel Kant's famous essay "Perpetual Peace" to the current debate over the legitimacy of humanitarian intervention—presumably U.N.-authorized as well as unilateral—I told him that while I had studied Kant as a college student several decades ago and actually had taught Kant during a jurisprudence seminar I had offered when I was a young professor, I had not reread *Perpetual Peace* in many years and—frankly—had never reexamined it during the course of my various studies over nearly thirty years on the doctrine of humanitarian intervention. He replied that that was all the more reason why I should give this talk and, at least from my perspective, he was right, for as Professor Fernando Téson of Arizona State, an Argentine jurist now living in the United States, recently remarked in his article "The Kantian Theory of International Law," upon which I draw heavily today, "[t]he themes developed in *Perpetual Peace* have extraordinary contemporary relevance."¹ This is especially true in the case of humanitarian intervention, as I hope to be able to demonstrate today.

Professor Dicke, who obviously knows how to organize a symposium, also gave me my marching orders. First, he gently suggested, I should give an interpretation of the Fifth Preliminary Article, which in my Cambridge text translation reads: "No state shall forcibly interfere in the constitution and government of another state."² Secondly, I should comment on the relationship between this seemingly absolute prohibition against intervention in the domestic affairs of a state and the doctrine of humanitarian intervention in international law. Finally, I should offer my views on what

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1. Fernando R. Téson, *The Kantian Theory of International Law*, 92 COLUM. L. REV. 53, 56 (1992).

2. IMMANUEL KANT, *Perpetual Peace: A Philosophical Sketch*, reprinted in KANT: POLITICAL WRITINGS 93, 96 (Hans Reiss ed. & H.B. Nisbet trans., 2d ed. 1991) (1793).

Kant's judgment would be on the current debate, at least in legal circles, over humanitarian intervention. I shall try to fulfill his expectations on all these counts, although I am somewhat hesitant as to the third. Coming from the University of Virginia, it is very much like being asked, "What would Mr. Jefferson's views today be on affirmative action or gays in the military?"

Before turning to these three questions, however, some discussion of how the doctrine of humanitarian intervention has evolved might be helpful—especially for non-international lawyers. One of the ironies in international law, especially after the Congress of Vienna, was that while states were allowed to wage war, they were supposedly forbidden from intervening in the domestic affairs of other states. Thus the greater threat to international peace was legitimized, the lesser condemned. To this prohibition against intervention, however, soon was added a corollary rule, namely, that a state or a group of states might intervene in another state to put an end to gross human rights violations that had reached intolerable proportions. That rule, the doctrine of humanitarian intervention, permitted such action when a state had mistreated its own citizens in a manner so far below international minimum standards as, quoting the long-standing leading treatise in English, "to shock the conscience of mankind."³ Although many international lawyers like Professor Brownlie of Oxford, question the doctrine's legal pedigree,⁴ a substantial number, like Professor Falk of Princeton, with whom I agree, believe that the practice of states before 1945 "exhibits many instances in which intervention was prompted by humanitarian considerations that one can condemn only by waving too vigorously the banners of sovereignty."⁵

With the coming into force of the U.N. Charter—particularly Articles 2(4) and 2(7)—the continued validity of the doctrine of unilateral humanitarian intervention became problematic, if not, as Professor Farer, now of Denver, suggests, actually illegal. Certainly the Charter contained no explicit provision permitting either its member states or the organization itself to take forceful action, even in extreme situations, to compel a state to stop slaughtering its

3. 1 L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 312 (H. Lauterpacht ed., 8th ed. 1955).

4. See IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 338-42 (1963). Compare Ian Brownlie, *Humanitarian Intervention*, in *LAW AND CIVIL WAR IN THE MODERN WORLD* 217 (John Norton Moore ed., 1974) with Richard B. Lillich, *Humanitarian Intervention: A Reply to Ian Brownlie and a Plea for Constructive Alternatives*, in *LAW AND CIVIL WAR IN THE MODERN WORLD*, *supra*, at 229.

5. RICHARD A. FALK, *LEGAL ORDER IN A VIOLENT WORLD* 161 (1968).

innocents. Indeed, Article 2(4) contains a nonintervention provision (which is somewhat similar to Kant's Fifth Preliminary Article), prohibiting "the threat or use of force against the territorial integrity or political independence of any state" However, U.N. enforcement action for the maintenance of peace and security is specifically excepted from Article 2(7)'s prohibition against U.N. intervention in "matters which are essentially within the domestic jurisdiction of any State," an exception that, as we shall see, has been used since the end of the cold war to justify U.N., or perhaps one should say U.N.-authorized, humanitarian interventions.

Whatever one thinks of these provisions in the U.N. Charter, it soon became apparent that there was tension between the Charter's primary purpose, the maintenance of peace and security, and its secondary—but of growing importance—purpose, the promoting and protection of human rights. In the late 1960s, I advanced the view that absent effective U.N. humanitarian intervention, unilateral or collective intervention by states was not precluded in cases involving gross deprivations of basic human rights.⁶ Shortly thereafter, Professors McDougal and Reisman of Yale, in their famous memorandum "Humanitarian Intervention to Protect the Ibos," strongly urged U.N. humanitarian intervention in Nigeria, but, in its absence, also recommended unilateral or collective action by one or more states.⁷ In the 1970s, the International Law Association attempted to draft a Protocol on Procedure for Humanitarian Intervention, but its efforts foundered on the question of whether, if a veto in the Security Council blocked U.N. action, unilateral humanitarian intervention was permissible.⁸ During the 1980s, there was much legal literature on the topic, but, with an occasional exception, it added little new to the debate.⁹ One then rightly could conclude, as did Professor Weston of Iowa, that: "[I]f we are to limit humanitarian intervention to global organization intervention or its equivalent, then we are not talking about a real world. [We cannot] . . . expect the United

6. See Richard B. Lillich, *Forcible Self-Help by States to Protect Human Rights*, 53 IOWA L. REV. 325, 344-51 (1967); see also Richard B. Lillich, *Intervention to Protect Human Rights*, 15 MCGILL L.J. 205, 206-07 (1969).

7. Michael Reisman & Myres S. McDougal, *Humanitarian Intervention to Protect the Ibos*, in HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 167 (Richard B. Lillich ed., 1973).

8. See, e.g., *The International Protection of Human Rights by General International Law: Second Interim Report of the Sub-Committee*, in INTERNATIONAL LAW ASSOCIATION, REPORT OF THE CONFERENCE 38 (1972).

9. The most significant exception was FERNANDO R. TÉSON, *HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY* (1988).

Nations to intervene actively through the use of force except in the most limited circumstances."¹⁰

The situation, however, changed dramatically after 1990 with the collapse of the Soviet Union and the end of the cold war. The Security Council had set precedents in 1968 and 1977 by finding Rhodesia's human rights violations and South Africa's system of *apartheid* to constitute a "threat to the peace" under Article 39 of the Charter, justifying the application of mandatory economic sanctions and an arms embargo under Article 41 and Article 42, respectively.¹¹ Nonetheless, these situations were so entwined with the issues of self-determination and *apartheid* that their precedent value for situations involving other gross violations of human rights—no matter how heinous—seemed problematic. The same cannot be said of the Security Council resolution in 1991, which protected Iraqi nationals, primarily Kurds, from further repression by Iraq;¹² the 1992 resolution authorizing the U.N. Secretary-General and cooperating member states "to take all measures necessary [a code phrase for possible military action] . . . to establish a secure environment for humanitarian relief operations in Somalia as soon as possible";¹³ and the 1994 resolution, certainly the most important instance of U.N.-authorized humanitarian intervention to date, again authorizing member states—obviously the United States and a handful of its allies—"to use all necessary means" to oust the rogue military regime and ensure the return of the legitimately elected president and other authorities to Haiti.¹⁴

This last landmark resolution represents a significant general precedent for U.N.-authorized humanitarian intervention, especially since the September 1994 occupation of Haiti has turned out to be surprisingly successful and hence a model for future U.N. actions. Followed up by another resolution replacing the U.S.-led multinational force with a 6,000-troop U.N. military mission,¹⁵ it further develops the framework for U.N. humanitarian intervention and underscores the proposition that when there is the political will and

10. Conference Proceedings, pt. III, in HUMANITARIAN INTERVENTION AND THE UNITED NATIONS, *supra* note 7, at 85 (remarks by Prof. Burns H. Weston).

11. See S.C. Res. 253, U.N. SCOR, 23d Sess., 1428th mtg. at 5, U.N. Doc. S/RES/253 (1968) (imposing economic sanctions on Southern Rhodesia); S.C. Res. 418, U.N. SCOR, 32d Sess., 2046th mtg. at 5, U.N. Doc. S/INF/33 (1977) (imposing an arms embargo against South Africa).

12. See S.C. Res. 688, U.N. SCOR, 46th Sess., 2982d mtg. at 31-32, U.N. Doc. S/INF/47 (1991).

13. See S.C. Res. 794, U.N. SCOR, 47th Sess., 3145th mtg. at 63, U.N. Doc. S/RES/794 (1992).

14. See S.C. Res. 940, U.N. SCOR, 49th Sess., 3413th mtg. at 2, U.N. Doc. S/RES/940 (1994).

15. See S.C. Res. 975, U.N. SCOR, 50th Sess., 3496th mtg. at 3, U.N. Doc. S/RES/975 (1995).

courageous leadership by one or more of the great liberal democracies, the U.N. possesses all the authority it needs to prevent human rights violations in crisis situations and, it is hoped, to assist shaky states on their way to becoming effective democracies.¹⁶

With this explanation of how the doctrine of humanitarian intervention has evolved in mind, let us now turn to the first of Professor Dicke's three questions, "How should one interpret Kant's Fifth Preliminary Article on nonintervention?"

In 1962, Professor Waltz of Swathmore, reading the Fifth Article to mean that "[a]s a matter of right, no state can interfere with the internal arrangements of another,"¹⁷ labeled Kant "a non-interventionist liberal."¹⁸ Leaving aside the definition of liberal, was Kant actually a noninterventionist? His commentary to the article, asking rhetorically what could justify intervention, seems at first blush to answer the question with one word: nothing. Certainly it may not be justified by "any sense of scandal or offence which a state arouses in the subjects of another state," he writes, since such a reaction "is not the same as an injury to the latter."¹⁹ Clearly, such a response is incompatible with contemporary international law, which views at least a minimum core of basic human rights to be rights *erga omnes*, rights of international concern which are so important that any state has standing to protect their violations by another state. However, in his next sentence, Kant enters a caveat that seems to justify many humanitarian interventions today—in Bosnia, or Somalia, for instance: "But it would be a different matter if a state, through internal discord, were to split into two parts, each of which set itself up as a separate state and claimed authority over the whole. For it could not be reckoned as interference in another state's constitution if an external state were to lend support to one [part], because their condition is one of anarchy."²⁰ Thus, by his own words, Kant seems to be an interventionist, at least where anarchy exists, as it does today, for instance, in the Central African Republic or Liberia.

Moreover, one should not focus exclusively on the Fifth Preliminary Article. It must be read in the context of all that Kant presents in *Perpetual Peace*, especially the First Definitive Article

16. See Richard B. Lillich, *The Role of the U.N. Security Council in Protecting Human Rights in Crisis Situations: U.N. Humanitarian Intervention in the Post-Cold War World*, 3 TULANE J. INT'L & COMP. L. 1, 11 (1995); see also John C. Pierce, *The Haitian Crisis and the Future of Collective Enforcement of Democratic Governance*, 27 L. & POL. INT'L BUS. 477 (1996).

17. Kenneth N. Waltz, *Kant, Liberalism, and War*, 56 AM. POL. SCI. REV. 331, 337 (1962).

18. *Id.*

19. KANT, *supra* note 2, at 96.

20. *Id.*

stating that "the civil constitution of every state shall be republican"²¹ and shall be founded upon the principles of freedom and equality, and the Second Definitive Article providing, as Professor Delbruck has told us, that "the right of nations shall be based on a federation of free states."²² By "republican," Kant meant what today we would call a liberal democracy, a society that provides full respect for human rights, including freedom, due process, and equality. By "free states," Kant meant, according to Professor Tésou, states that were "united by their moral commitment to individual freedom, by their allegiance to the international rule of law, and by the mutual advantages derived from peaceful intercourse."²³ Thus it can be argued that Kant's nonintervention principle is dependent upon compliance with the First and Second Definitive Articles. If this proposition is correct, then nonintervention, to the extent that it is called for by the Fifth Preliminary Article, applies only among freedom-loving states, and liberal democracies should be free to argue that they have the right to intervene to protect citizens in states engaging in gross human rights violations.²⁴ As my international law colleagues will recognize, this reading of Kant supports the arguments of Professor Franck of N.Y.U. for an emerging right of democratic governance,²⁵ coupled with Professor Reisman's case for U.N., collective or unilateral humanitarian intervention to protect human rights in fledgling democracies.²⁶

My remarks so far, I believe, also answer Professor Dicke's second question, "What is the relationship between the textually broad prohibition of intervention in the Fifth Preliminary Article and the doctrine of humanitarian intervention?" Read carefully and in the context of the First and Second Definitive Articles, the prohibition would appear to be far from absolute, permitting interventions in situations where gross violations of human rights are occurring or can reasonably be anticipated to occur.

Finally, what about Professor Dicke's last question, not so legal as speculative, but certainly the most intriguing, "What would Kant's judgment be on the current debate on humanitarian

21. *Id.* at 99.

22. *Id.* at 102.

23. Tésou, *supra* note 1, at 86.

24. *See id.* at 93; *see also* TÉSON, *supra* note 9, at 70 ("As Kant argued, because a principal aim of the parties in the original position is to secure freedom, they will agree on a rule of non-intervention applicable only among just states.")

25. *See* Thomas F. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 90-91 (1992).

26. *See* W. Michael Reisman, *Humanitarian Intervention and Fledgling Democracies*, 18 FORDHAM INT'L L. J. 794 (1995).

intervention?" Kant, as we know, was no fan of world government.²⁷ The U.N., of course, is far from being a world government; indeed, it more closely resembles Kant's federation of free states, although the requirement that it be open only to "peace-loving states which accept the obligations contained in the present Charter and . . . are able and willing to carry out these obligations"²⁸ has never been read to require either peaceful behavior or respect for basic human rights from prospective members. Nonetheless, I believe that Kant would recognize that states, having given the U.N., through its Security Council, the right under Article 39 to determine what constitutes a threat to, or a breach of, the peace and the right under Articles 41 and 42 to authorize economic or military actions, plus having obligated themselves to carry out its decisions under Article 25, had bestowed enough of their sovereignty upon this international organization to enable it to engage in U.N. or U.N.-authorized humanitarian interventions in states which have descended into anarchy, states which engage as a matter of course in gross violations of human rights, and states that otherwise have shocked the conscience of the international community. Thus I believe he would have approved of the U.N.'s action in the case of Haiti and would support similar action with respect to the Central African Republic or Liberia today.

As for collective or even unilateral humanitarian intervention, putting aside the question of whether the U.N. Charter preempts such action, I see no reason why the Fifth Preliminary Article, as I have argued, should be interpreted as precluding such humanitarian interventions; nor do I believe that Kant, were he asked today, would interpret it so. The international community increasingly views the right to democratic government as a basic human right, and its violation as a potential threat to the peace.²⁹ Thus where anarchy reigns, military coups replace elected governments, or states consistently engage in gross human rights deprivations against their own citizens, and where by reason of the veto (actual or silent) or for other reasons the Security Council refuses to act, I would be surprised to find Kant reluctant to approve at least the possibility of collective or even unilateral humanitarian intervention. Nevertheless, as one of the earliest advocates of an international organization

27. Tésou, *supra* note 1, at 86.

28. U.N. CHARTER art. 4(1).

29. See Franck, *supra* note 25, at 90-91; see also Christina M. Cerna, *Universal Democracy: An International Legal Right or the Pipe Dream of the West?*, 27 N.Y.U. J. INT'L L. & POL. 289, 327 (1995).

capable of achieving a lasting peace, I would imagine that he, like me, would hope that the U.N. would be the principal initiator of humanitarian interventions in the future, as well as the developer of effective strategies for the building or renewal of democratic regimes in those states against which it, however reluctantly and episodically, decides to take action.