

2006

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## Recommended Citation

Fernando R. Tesón, *The Vexing Problem of Authority in Humanitarian Intervention: A Proposal*, 24 *Wis. INT'L L.J.* 761 (2006),  
Available at: <http://ir.law.fsu.edu/articles/35>

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# THE VEXING PROBLEM OF AUTHORITY IN HUMANITARIAN INTERVENTION: A PROPOSAL

FERNANDO R. TESÓN\*

## INTRODUCTION

As is well known, the doctrine of humanitarian intervention raises a host of thorny issues: the threshold for intervention, the question of proportionality, the problem of last resort, the dilemma of whether or not to codify standards and procedures, and so forth. In this paper I will not address those issues; crucial and controversial as they are;<sup>1</sup> I will assume that they have been somehow settled. I will also assume that it is desirable to find alternatives to unilateral intervention. The question, then, becomes this: who should authorize humanitarian intervention? Any acceptable authorizing procedure must avoid over-intervention and abuse on the one hand, and under-intervention and inertia on the other. That is a daunting challenge in institutional design. Recent experiences show that both dangers are real, and, alas, the victims of such failures will be flesh and blood human beings, often the most vulnerable.

Before even starting to suggest an appropriate international procedure for humanitarian intervention, we must clarify what goals or values those institutions should serve. There are many possible answers to this: national interest (that is, for each citizen, the interest of his or her country); individual freedom; the rule of law; etc. I here suggest that the institutions for humanitarian intervention should serve *the cosmopolitan interest of humanity*, as opposed to the national interests of states and

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<sup>1</sup> See generally FERNANDO R. TESÓN, *HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY* (2d ed. 2005); *HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS* (J.L. Holzgrefe & Robert O. Keohane eds., 2003).

governments.<sup>2</sup> Here I leave undefined the full content of this interest, because for purposes of intervention it is fairly clear and minimal: to save persons from tyranny and anarchy, from the most brutal forms of oppression. (Notice that I talk about the cosmopolitan interest of humanity and not the interests of the international community, which can be easily interpreted as the interests of all the governments of the world, not of the people, and especially not those who are oppressed and victimized.)

Here I will discuss two alternatives that are on the table, as it were. The first is to make the United Nations Security Council, perhaps reformed in some way, the only body empowered to authorize humanitarian intervention. This is the option favored by a great majority of governments and scholars as well as by the International Commission on Intervention and State Sovereignty (ICISS).<sup>3</sup> In this view, the only acceptable procedure for humanitarian intervention is to obtain the authorization of the Security Council. Given the provisions of the UN Charter, such authorization is deemed to come from the international community: Article 24(1) expressly acknowledges such delegation of power.<sup>4</sup> Under this conception of legitimate international authority, neither a regional organization, such as the Organization of American States, nor a military alliance, such as NATO, can authorize humanitarian intervention. And, of course, unilateral intervention is unlawful since it is not a defensive use of force—the only unilateral military action deemed lawful, it is thought, under the charter.<sup>5</sup>

The second option, suggested by Allen Buchanan and Robert Keohane and endorsed by some (including myself), is to create a council of democratic states with good human rights records and traditions as the appropriate body to authorize intervention.<sup>6</sup> This proposal includes an array of safeguards to prevent abuse and deception from would-be interveners as well as to reduce information costs regarding the gravity of the situation and other factual matters.

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<sup>2</sup> I offer a cosmopolitan reconstruction of international law in FERNANDO R. TESÓN, *A PHILOSOPHY OF INTERNATIONAL LAW* 1-26 (1998). See also ALLEN BUCHANAN, *JUSTICE, LEGITIMACY, AND SELF-DETERMINATION: MORAL FOUNDATIONS FOR INTERNATIONAL LAW* (2004).

<sup>3</sup> INT'L COMM'N ON INTERVENTION AND STATE SOVEREIGNTY, *THE RESPONSIBILITY TO PROTECT* 47-55 (Dec. 2001), available at <http://www.iciss.ca/pdf/Commission-Report.pdf>.

<sup>4</sup> U.N. Charter art. 24, para. 1.

<sup>5</sup> U.N. Charter art. 33, paras. 1-2. I have criticized this restrictive view at length in TESÓN, *supra* note 1, at 164-67, 202-10.

<sup>6</sup> See Allen Buchanan & Robert O. Keohane, *The Preventive Use of Force: A Cosmopolitan Institutional Proposal*, 18 *ETHICS & INT'L AFFAIRS* 1 (2004).

I will argue here (contrary to what I earlier thought) that none of those alternatives is satisfactory. The Security Council is dysfunctional with respect to humanitarian intervention—dysfunctional for the purpose of protecting human freedom. A council of democratic states, while at first blush a better alternative, is also undesirable, and, paradoxically, it may be worse than what we presently have. I will propose here, as an ideal solution, a new body, the Court of Human Security. Composed of life-tenured independent judges, this body would be entitled to oversee not only humanitarian interventions, but also the whole range of responses, forcible and non-forcible, to humanitarian crises.

## I. IS THE SECURITY COUNCIL THE BEST SOURCE OF AUTHORITY?

### A. THE EXPERIENCE OF THE 1990S

It is quite common these days to hear wistful evocations of the 1990s, a time of optimism after the fall of the Soviet Union when the United States presided over an explosion of global prosperity and freedom, a time of economic and political globalization where, most of the time, international interactions really appeared, perhaps for the first time in a long time, as positive-sum games. There was a general sense then that the stark logic of the Cold War had given way to endless possibilities of cooperative behavior for the spread of respect for human rights and democratic rule and the expansion of free markets and consequent prosperity.<sup>7</sup>

An important feature of this era was, of course, the renewed Security Council. As is known, the Security Council authorized the use of force to address humanitarian crises on various occasions. This led a number of observers, myself included, to express optimism about the use of the United Nations, and the Security Council in particular, as an instrument for the advancement of human dignity and freedom in the world.<sup>8</sup> There was a growing sense that the international community *agreed* on the values that it should uphold and that there was an effective mechanism to promote those values, if necessary, by force. Only rogue

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<sup>7</sup> For an excellent analysis of this period, see Jane Stromseth, *Rethinking Humanitarian Intervention: The Case for Incremental Change*, in HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS, *supra* note 1, at 232.

<sup>8</sup> See TESÓN, *supra* note 1, at 279-312.

states and other recalcitrant dictators remained at the margins. There was a lessened sense of threat and a reinforced belief in the international community not just as a community of minimal interest but as a community of values.

For many, these hopes were shattered by the attacks of September 11, 2001, and by the sequel in Iraq and elsewhere. The generalized sense was that the world had returned, with new actors and new threats, to the zero-sum logic of the Cold War. The radical revolt against freedom and reason mounted by terrorism could not be confronted with the tools that had developed during the previous decade.

I share this sentiment to an important degree. However, looking back, I have concluded that, with respect to humanitarian intervention, we have unduly romanticized the 1990s. (No doubt some people over-praise the 1990s for partisan reasons, but I'll ignore that complication here.) To be sure, the experience of the nineties was preferable to the deadlock of the Cold War. Most importantly, the Security Council's practice laid to rest the doubts that many had about its legal power to authorize humanitarian intervention under Chapter VII of the UN Charter. Yet, a dispassionate assessment of the practice of the Security Council during that period discloses a number of serious dysfunctions and problems.

To begin with, some of those authorized interventions were unsuccessful. I am thinking primarily of the actions in Somalia and Rwanda. There were no doubt several reasons for this, but I think that one important reason was the inability of the Security Council to follow up, to monitor whether the action by the intervener was apt to achieve the humanitarian objective. And, in turn, this was caused by the impotence of the Security Council to curb the intrusion of national interest into the cosmopolitan humanitarian objective. There was also the question of dwindling domestic support (in the United States with regard to Somalia, for example), but that, in turn, can be linked to the tenuous standing of the authorizing body itself in the eyes of the public. The French intervention in Rwanda was even more dramatically unsuccessful as it led to the worst modern case of failure to intervene to prevent genocide in that country.

In addition, some of the (arguably) successful interventions suffered from substantive and procedural problems. The intervention in Haiti, for example, was directed not to prevent or stop massive loss of life but to reverse an unconstitutional transfer of power. My point is not that pro-democratic intervention is wrong; on the contrary, (as I've

argued elsewhere) I support pro-democratic intervention in Haiti-like cases. Rather, my point is that those who support the exclusivity of the Security Council's power to authorize intervention have an unresolved problem. They argue simultaneously that (1) the Security Council has quasi-absolute discretion in authorizing the use of force; and (2) the threshold for humanitarian intervention should be set very high, say, at massive loss of life, genocide, and the like. This view is inconsistent because the Security Council can authorize the use of force in situations that do not meet that standard, as it did in Haiti. Supporters of the Security Council as the authorizing body have not resolved this problem. I myself do not offer here a general answer but simply flag the issue. In Sierra Leone in 1997, the Security Council issued a retroactive authorization in apparent disregard of the common wisdom that authorization to use force should take place *before* the operation. Again, I express no view on this here except to say that the 1990s practice, which is sometimes praised without reservations, suffered from these substantive and procedural irregularities under the very theory presupposed by those who praised that practice.

And even the two authorized interventions that were reasonably successful, the use of force to protect the Kurds in Iraq in 1991 and NATO's bombing of Bosnia in 1994, did not address the root of the problem in any lasting way, as we now sadly know. Ironically, the most successful intervention of the 1990s was *unauthorized*—NATO's air campaign in Kosovo in 1998.

## B. GENERAL PROBLEMS WITH THE SECURITY COUNCIL

So, the 1990s practice yields, I think, mixed results and does not necessarily support the view that the Security Council is, ideally, the institution best equipped to enforce the interests of humanity as a whole. In addition to the lessons drawn from this practice (and maybe as evidenced by it), there are serious general problems with the Security Council that make it dysfunctional for humanitarian intervention.

### 1. Incentives

I have suggested that the interest in ending or preventing humanitarian crises is a cosmopolitan humanitarian interest, an interest that springs, as it were, from universal moral concerns that affect, and

reside in, humanity. States, on the other hand, have national interests, and international organizations are the fora where those interests clash or converge and are therefore hardly a depository of cosmopolitan humanitarian values. The Security Council is no exception.

## *2. Inertia*

The second problem with the Security Council, noted by many, is the danger of inertia, which leads, of course, to under-intervention. This was the case in Rwanda in 1994 and is the case today in Darfur, and there are other examples. (I would include Iraq but don't want to open that front in the debate,<sup>9</sup> as it is not necessary for my argument here.) The veto rules, by their very nature, are biased toward inaction. But even without taking the veto into account, any resolution needs nine votes.

Even in the 1990s, action by the Security Council was only possible because the United States was able to threaten or bribe council members (permanent and non-permanent) into acquiescence or support. That the available procedure to end massacres depends on one member being able to bribe or threaten others in order to get their votes to stop the massacres does not seem to be a very solid basis for any institutional framework. (Luckily, that hegemonic member is the United States, which, for all its failures, is sympathetic to freedom. Imagine what would happen if the hegemon were an "evil empire" inimical to human rights.) In short, the whole process seems removed from a cosmopolitan concern for humanity.

## *3. Arbitrariness of Veto Power*

The third problem is the moral arbitrariness of the veto power. Being a permanent member is an accident of history, and while some of the permanent members, because of their decent human rights records, may be better guardians of human freedom, others are not. And at any rate, it is not clear why even the decent permanent members of the Security Council should have more of a say on humanitarian matters than non-permanent members with equal or better human rights records. Of course, there is the problem of internalization of costs: it may be argued that states like the United States that will bear the brunt of intervention should have a veto on these matters. It is easy for Finland or Belgium to

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<sup>9</sup> See Fernando R. Tesón, *Ending Tyranny in Iraq*, 19 *ETHICS & INT'L AFFAIRS* 1, 1 (2004).

send Americans to fight. However, this view overlooks that we are talking about *permission* to use force, not *obligation* to do so, at least in the current state of world organization; therefore absence of veto power does not mean that unwilling states would have to intervene.

#### 4. Moral Legitimacy Deficit

The fourth problem is what I will call the Security Council's deficit in moral legitimacy. By this I do not mean what some authors have decried as the lack of geographical representation (lack of diversity, as it were) in the Security Council. On the contrary, with regard to humanitarian intervention, the fact that the Security Council is dominated by the West is one of its *good* features because (as much as political correctness seems to inhibit people from saying this) Western powers tend to be friendlier to human rights and democracy than others. What I mean is that voting and veto rights in the council are given to regimes that are tyrannical or otherwise unrepresentative. As is well known, no human rights credentials are required to serve on the Security Council. One of its permanent members, China, is a notorious human rights violator; another one, Russia, has serious deficiencies in that area. In addition, various tyrannical regimes at various times have served as non-permanent members. The problem here is twofold: first, governments that are human rights-unfriendly should not have the power to authorize or to veto prospective interventions. Second, undemocratic regimes do not represent their peoples, and therefore, on any plausible theory of agency or representation, their vote is morally blighted.

In the light of these deficiencies, the insistence that all humanitarian interventions should be approved by the Security Council reveals, I think, the lawyer's misplaced faith on *process*. Lawyers like process, any process. Maintaining the *forms* of law is to them important; so if there is in place an international decision-making procedure that involves voting, for example, then only this process will yield legitimate decisions. But the moral currency of any process is surely parasitic on the credentials of those who participate in it. To give a grotesque example, there is no value in the decision-making process that took place, say, within the Taliban's inner "cabinet." A decision by the Taliban leadership to stone women alive for adultery is not legitimized by members of the government voting to that effect any more than procedurally regular voting by the Mafia's governing council legitimizes the decision to perpetrate criminal acts. Procedures in the United

Nations organs, such as the Security Council, give the *illusion* of democratic legitimacy because, after all, governments are voting, and there are procedures in place to adopt decisions. It *looks* like a democratic legislature, but it takes little reflection to see that United Nations procedures are very distant from democratic procedures.

Democratic majority rule as a basis for collective decisions is engrafted in an individualistic political theory, in a constitution, that limits government and secures freedom or similar values. Because the international system does not secure individual freedom from rulers, the voting procedures have no moral currency. They represent, at best, procedures to secure a *modus vivendi* among rulers, but they are in no sense democratic, as that word is understood in political theory. Because of this deficit, the decisions to assist victims of grievous injustice should not depend on the acquiescence of rulers who at the very least do not represent their people and at the very worst are tyrants themselves.

## II. IS A COUNCIL OF DEMOCRATIC STATES A BETTER ALTERNATIVE?

In an important article, Allen Buchanan and Robert Keohane have proposed a complex system to oversee the use of force.<sup>10</sup> While their article deals with preventive war, they expressly suggest that the proposal can be extended to cover authorization for humanitarian interventions. They propose a system of sanctions designed to prevent abuses and misinformation on the part of prospective interveners. A central part of their proposal is to create a council of democratic states as an authorizing body should the Security Council be paralyzed by veto. This proposal appears as an improvement over the present system, given the aforementioned criticism of the Security Council, because if members are really democratic and really concerned with the cosmopolitan interest of humanity, the chances of effective and fair-minded decisions are significantly increased.

I am very sympathetic with this proposal, as shown by the fact that, until today, I had supported it. It fits nicely with my own Kantian normative view of international relations, where the hope for freedom and peace rests with an alliance of liberal states.<sup>11</sup> However, I have to concede, reluctantly, that these hopes are unrealistic and that this

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<sup>10</sup> Buchanan & Keohane, *supra* note 6.

<sup>11</sup> See generally TESÓN, *supra* note 2.

proposal cannot possibly work for a number of reasons related to the distortion of the meaning of human rights and the rhetorical use of human rights language to mask self-interest or hostility to individual freedom or free markets or both. This problem is endemic to the United Nations human rights machinery and to human rights scholarship, and, alas, it sometimes infects human rights NGOs themselves.

The problem is illustrated by the recent creation of a new United Nations organ, the Human Rights Council (HRC). The HRC was supposed to replace the largely ineffective and politicized Human Rights Commission. A crucial issue, of course, is who would serve. Is any government, regardless of their human rights record, eligible to serve? As is known, Western powers failed to establish a voting system and criteria for membership aimed at excluding tyrants from the HRC.<sup>12</sup> As the rules stand now, tyrants will be elected to the HRC. (It is a sad comment on the human rights commitment by the so-called international community that the United States and a few others were the only ones to vote against this masquerade.) Buchanan and Keohane could retort that this flawed HRC is not what they had in mind and that an appropriate “pure” council of democratic states could get the job done. This reply, however, is insufficient, for at least two reasons.

First, many governments (supported here, sadly, by many academics) manipulate the concept of human rights in various ways in order to dilute worries about tyranny and oppression and make tyrants more respectable. One way in which this is done, especially within the United Nations human rights system, is by advancing the thesis of equivalence of civil/political rights and socio/economic rights.<sup>13</sup> This deplorable doctrine allows brutal regimes that somehow can show economic improvement in some area to say that they are as good, or as bad, as those states that guarantee liberal freedoms and the rule of law. So, on this view, Cuba is no worse than Norway.

The other strategy to dilute human rights criticism is to exaggerate the gravity of violations by states that traditionally respect human rights. Thus, the fact that the United States resorted to illegal methods of interrogation or that it established military commissions is

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<sup>12</sup> See Scott R. Lyons, *The New United Nations Human Rights Council*, ASIL INSIGHTS, Mar. 27, 2006, <http://www.asil.org/insights/2006/03/insights060327.html>.

<sup>13</sup> Thus, for example, the 1993 Vienna Declaration proclaims that “All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.” World Conference on Human Rights, June 14-25, 1993, *Vienna Declaration and Programme of Action*, ¶ 5, UN Doc. A/CONF.157/23 (July 12, 1993).

regarded by critics of the West as a crime as serious as, say, the mass starvation and total suppression of civil liberties caused by the brutal North Korean regime. And a host of other regimes get off the hook as a result of this piece of propaganda: all the Muslim countries, including Iran, are able to say, with a straight face, that next to the United States they look pretty good. Of course, this is not new: during the Cold War, many people (and sadly, many academics) thought that, say, the pathetic attempt of Senator McCarthy to undermine freedom in the United States was morally equivalent to the thirty million people slaughtered by Stalin and the Soviet Gulags. So it is virtually impossible to get the United Nations to create a body with the characteristics that Buchanan and Keohane propose simply because anti-Western sentiment in the United Nations has succeeded in disfiguring the notion of human rights beyond all recognition.

I should pause here to say that, properly understood, civil and political rights are not, perhaps, the only moral-political values that matter. I believe that governments have an obligation to try to alleviate world poverty. I also believe that an important first step to achieve this is to promote open trade and freer immigration (but I cannot pursue the issue here<sup>14</sup>). However, from a philosophical standpoint, securing freedom (civil and political rights) has lexical priority over economic policy (for a number of reasons I cannot go into here), and, importantly, civil and political rights are the ones that are at the center of the humanitarian intervention doctrine (although I would include extreme deprivation as a possible rationale as well).

Second, as I pointed out above, the incentives that governments have are dysfunctional with respect to humanitarian intervention. The crucial failure here is caused by the logic of empire. More often than not, the United Nations has become a forum where many countries, including European countries, band together to frustrate the preferences of the United States, the world's only superpower. Advocating more power for the United Nations has become synonymous with curbing the power of the United States. Maybe this is a good thing, maybe not. I would say that it is a good thing if the United States wants to do something bad, and it is a bad thing if the United States wants to do something good. I am one of those who still believe that the United States is a force for good in the world (a dwindling crowd, it seems). But be that as it may, countries in the "democratic council" animated with a

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<sup>14</sup> See Fernando R. Tesón and Jonathan Klick, *Global Justice, Trade, and Poverty: A Case of Discourse Failure* (unpublished manuscript, on file with author).

desire to collectively contain United States power can hardly be expected to care about the cosmopolitan interest of humanity. If it is more important to contain imperialism than to free Iraq from the brutal rule of Saddam Hussein, then millions of persons will continue to suffer.

The experience of the establishment of the Human Rights Council shows this very clearly. The coalition of fifty-six Islamic states, of which only two (Turkey and Iraq) are democratic, can block the United States (or Denmark, for example, on account of having allowed the newspaper cartoons) from being elected to the Council. Again, it is hard to believe that, given current animosities between various groups of states and, in particular, animosity against the United States, those whose task should be to aid helpless victims of tyranny and anarchy will really be effective in doing so.

### III. A TENTATIVE PROPOSAL: THE COURT OF HUMAN SECURITY

To alleviate these problems, I propose to create a new international court, the Court of Human Security (CHS). The CHS would not be composed of governments or government representatives but of judges of undisputed integrity who are demonstrably knowledgeable about human rights, human freedom, and human security *and* demonstrably committed to the respect of human rights and genuine democracy.

I will not offer many specifics except to say that the selection and tenure of the judges should make them as independent as possible from governments. This requirement is crucial. The selection procedure must improve upon the one that governs the election of the magistrates of the International Court of Justice (ICJ). The ICJ is, I am sad to say, not entirely above suspicion in terms of impartiality, as shown by the recent advisory opinion on the wall that Israel is building on the occupied territories.<sup>15</sup> Perhaps one way to do this is to grant judges life tenure, as U.S. federal judges have (the ICJ judges are elected for nine-year periods). But that alone will not be enough. Persons who were government officials (other than judges) or politicians should not be eligible. Again, the main requirement is knowledge about, and

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<sup>15</sup> See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 I.C.J. (Gen. List) No. 131 (July 9) (forthcoming), available at 2004 WL 3587211 \*136, \*241 (Advisory Opinion) (Declaration of Buergenthal, J.) (complaining of the Court's refusal to even consider the security interests of Israel).

commitment to, individual freedom and democracy. The selection procedure should minimize the role of governments and expand the role of *demonstrably non-partisan* NGOs and other disinterested civil groups (not lobbyists or other political operatives).

The CHS would hear the evidence *ex ante* for any proposed intervention and would grant or refuse “warrants” to intervene, along the lines suggested by Buchanan and Keohane. This, of course, will not stop a powerful state, but it would significantly raise the costs of going ahead. One can even imagine, as these authors do, a system of sanctions for cases in which the applicant misrepresents the evidence. The CHS, however, would not be able to mandate intervention since military action is always permissible, not obligatory. It is a function of the resources of the state, and I cannot see how it can be made legally mandatory. The typical case, then, would be a state or coalition that contemplates intervention. The CHS would then hear the applicant in court, and, within a reasonable time dictated by urgency, it would authorize or refuse the intervention.

One of the obvious criticisms of this idea is that it is utopian. But I do not see why it is more or less utopian than the ICJ was when it was first proposed in the early twentieth century or than the International Criminal Court or than all the various other courts that we have dealing with crimes of war and crimes against humanity. Only a short while ago it was unthinkable that the world could make dictators accountable for their atrocities. In fact, this idea seems to me *a priori* more utopian than the idea of an independent court authorizing humanitarian intervention.

#### IV. CONCLUSION

My conclusion is grim. In the present circumstances, no state or group of states can serve as an acceptable authorizing body. Governments are caught in the logic of empire: the world’s superpower wants to get its way, and the rest of the world uses international organizations like the UN as a means to curb the superpower’s will. The United States, sensing this, resorts to unilateral behavior. Neither one nor the other, caught in this gigantic prisoner’s dilemma, will be in a position to advance the cosmopolitan interest of humanity.