

8

Domestic Jurisdiction, Intervention, and Human Rights: The International Law Perspective

Thomas Buergenthal

Introduction

Discussions of international human rights policies and practices invariably produce references to "intervention" and "domestic jurisdiction." These terms are also invoked, with predictable regularity, by governments accused of violating human rights as well as by governments unwilling to use their influence to prevent such violations.

As a matter of fact, the claim that this or that action or statement constitutes an "intervention in matters falling within our domestic jurisdiction" appears to be the most frequently relied-upon response to charges of governmental violations of human rights. It is consequently of utmost importance to examine the meaning of this international law concept and to determine what legal consequences it has for international efforts to ensure that governments respect human rights. This chapter will address these issues.

Prohibition against Intervention in the Domestic Jurisdiction of States

The prohibition against intervention in matters within the domestic jurisdiction of states is expressly recognized in all major international instruments dealing with the rights and obligations of states. The same is true of agreements establishing international organizations; its member states seek thereby to ensure that these entities are denied the authority to adopt measures or take action amounting to such intervention. Article 2(7) of the United Nations Charter is probably the best known of these provisions.¹ It reads as follows:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII [of the Charter].

The Charter of the Organization of American States contains a similar, albeit a more explicit, prohibition. It declares:

No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic and cultural elements.¹

The Member States of the Organization of African Unity proclaim, in like manner, their adherence to the principles of "non-interference in the internal affairs of States" and "respect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence."³

Some important international political instruments also give expression to the principle of nonintervention. Among the better-known recent pronouncements on this subject is the Helsinki Final Act. Its domestic jurisdiction clause⁴ reads as follows:

The participating States will refrain from any intervention, direct or indirect, individual or collective, in the internal or external affairs falling within the domestic jurisdiction of another participating State, regardless of their mutual relations.

They will accordingly refrain from any form of armed intervention or threat of such intervention against another participating State.

They will likewise in all circumstances refrain from any other act of military, or of political, economic or other coercion designed to subordinate to their own interest the exercise by another participating State of the rights inherent in its sovereignty and thus to secure advantage of any kind.

Accordingly, they will, inter alia, refrain from direct or indirect assistance to terrorist activities, or to subversive or other activities directed towards the violent overthrow of the regime of another participating State.

This language of the Helsinki Final Act draws on the pronouncement on intervention found in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, which was adopted by the General Assembly in 1970.⁵ On the subject of intervention the declaration provides, in part, as follows:

No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms

of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law.⁶

These pronouncements on the impermissibility of intervention in the domestic jurisdiction of states by other states or by intergovernmental organizations are, on the whole, little more than the codification of a well-established rule of general international law. It has its source in the doctrine of sovereign equality and independence of states, which is one of the fundamental principles of international law.⁷ This principle presupposes the right of each state to exercise its governmental functions within its territory or jurisdictional sphere in whatever manner it sees fit, unimpeded by competing foreign governmental entities, provided only that its activities do not interfere with the rights of other states or otherwise violate its international obligations.⁸ The proviso is critical, for a state which has assumed international obligations, either by treaty or under general international law, with regard to a subject previously within its domestic jurisdiction has to that extent internationalized that subject.⁹ Thus, for example, the undertaking by the participating states in the Helsinki Final Act that they "will refrain from an intervention . . . in the internal or external affairs falling within the domestic jurisdiction of another participating State," does not apply to those matters which these states have internationalized in treaties concluded by them.¹⁰

It is important to note that, in this context, the question of what constitutes "intervention" becomes relevant only *after* one has concluded that a given subject matter falls within the domestic jurisdiction of a state.¹¹ That is to say, to the extent that a matter has been internationalized, the traditional prohibition against "intervention in the domestic jurisdiction of a state" is inapplicable. Other prohibitions relating to the conduct of states in general remain applicable, of course. One such example is the prohibition against the threat or use of force,¹² but it is relevant whether or not the matter in dispute is domestic or international in character.¹³

Claims by governments that their conduct affecting human rights is a matter solely within their domestic jurisdiction frequently suggest that, under international law, "human rights" are by their very nature domestic issues. Implicit in this claim is the proposition that some matters are inherently domestic and consequently not "internationalizable." This view finds no support in contemporary international law and was authoritatively rejected long ago by the Permanent Court of International Justice. In its *Tunis and Morocco Nationality Decrees* opinion, the court declared that "the question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations."¹⁴ The court's analysis indicates that the phrase "the development of international relations" has reference to the legal obligations assumed by states with regard

to a specific subject.¹⁵ A contemporary statement of the rule, adopted by the Institute of International Law, thus quite properly declares:

The reserved domain is the domain of State activities where the State is not bound by international law. The extent of this domain depends on international law and varies according to its development.¹⁶

It is clear today that under international law neither "human rights" nor any other subject matter is deemed to be inherently domestic in nature. Whether or not human rights matters fall within the domestic jurisdiction of a state depends on the extent to which international law has internationalized the subject. The prohibition against intervention in the domestic jurisdiction of a state consequently applies to efforts by one government to have another government stop human rights violations only if, as between these states, neither human rights in general nor the specific conduct is the subject of international obligations. This conclusion demonstrates the importance of ascertaining the extent to which human rights have been internationalized.

The Internationalization of Human Rights

The adoption of the United Nations Charter ushered in a process leading to the gradual internationalization of human rights. This is not to say that under international law as it existed in the pre-World War II era all human rights issues were solely matters of domestic jurisdiction.¹⁷ Some international human rights law obviously predates the charter. Among that law are the treaties outlawing slavery and the slave trade, the conventions for the protection of certain national, religious, and linguistic minorities, as well as various humanitarian law principles applicable in time of war. A large body of international law relating to the treatment of aliens had also evolved long before the adoption of the charter. But these international obligations were either very limited in scope or concerned only certain special groups of people or countries. On the whole, however, international law, as it existed in the pre-World War II era, did not impose on states any general obligations regarding the manner in which they were to treat their own nationals.¹⁸ Issues concerning such treatment consequently involved matters within the domestic jurisdiction of the particular state. This being the case, the prohibition against intervention applied, enabling many a government to engage in brutal violations of basic human rights without having to answer for its conduct to other governments or before intergovernmental organizations. The doctrine of humanitarian intervention, which proclaims the right of states to put an end to governmental conduct "shocking the conscience of mankind,"¹⁹ might be regarded as an exception to this general proposition, but it never commanded the acceptance necessary to proclaim it a rule of international law.²⁰

The U.N. Charter effected a significant change in the preexisting legal conceptions by requiring the member states "to pledge themselves to take joint and separate action in cooperation with the Organization" in order "to promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion."²¹ These provisions of the charter are drafted in language that is intentionally vague. They nevertheless impose legally binding obligations on the member states.²² To the extent that the charter creates these obligations, no U.N. member state can claim that human rights as such are a matter within its domestic jurisdiction.

But the U.N. Charter does not internationalize all violations of human rights. It is consequently necessary to determine what human rights obligations U.N. member states are deemed to have assumed under the charter. As has been noted, the charter requires the member states "to promote universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion." Although the charter does not define "human rights and fundamental freedoms," today it is generally accepted that the rights proclaimed in the Universal Declaration of Human Rights and other major international human rights instruments supply the missing definition.²³ U.N. member states consequently have an international legal obligation "to take joint and separate action in cooperation with" the U.N. "to promote" universal respect for, and the observance of, the human rights proclaimed in these instruments. This undertaking does not require the member states to enforce each and every right listed in these instruments, if they have not also ratified them. But U.N. lawmaking practice indicates that the obligation "to promote" these rights will be deemed to be violated if a state systematically pursues governmental policies denying the enjoyment of these rights on a large scale, particularly rights that are most basic.²⁴ The term of art used in the U.N. refers to governmental policies evincing "a consistent pattern of gross violations of human rights."²⁵ This interpretation of the charter, which has evolved very gradually over the past thirty years, compels the conclusion that, as between member states, the prohibition against intervention in matters within the domestic jurisdiction of a state does not apply to governmental acts or policies involving a consistent pattern of gross violations of human rights.²⁶

A valid domestic jurisdiction defense can today as a result no longer be founded on the proposition that the manner in which a state treats its own nationals is *ipso facto* a matter within its domestic jurisdiction. Moreover, such a defense must also be deemed to be inapplicable to allegations relating to individual human rights violations or cases, provided it appears that, rather than being isolated instances, they are merely symptomatic of or result from the proscribed policies. It is consequently not impermissible for Government A to file an official protest relating to the manner in which Government B treats one of B's nationals and to threaten economic sanctions lest his conditions improve, if it can be shown that the conduct complained of is characteristic of B's overall human rights policies.

In addition to the U.N. Charter, there exist numerous treaties today that establish specific human rights obligations binding on the parties thereto.²⁷ No governmental measure, whether general or specific, which appears to violate the rights these treaties guarantee can consequently be deemed to fall within the domestic jurisdiction of the states that have ratified these treaties. Some of these agreements, notably the Genocide Convention and the U.N. Racial Convention, have been ratified by close to 100 countries. The number of states adhering to the International Covenants on Human Rights and many other human rights instruments is not yet as large; it is increasing daily, however. Thus, although it is entirely unrealistic to believe that all or even a majority of these states live up to their obligations under these treaties, it cannot be doubted that, among themselves, these states have internationalized the vast catalog of individual and collective human rights proclaimed in these instruments. This internationalization of human rights has greatly reduced, if not made practically insignificant, the domestic jurisdiction defense that was available to states under the international law of the pre-World War II era.

Intervention

A widely accepted interpretation of the international law meaning of "intervention" is that put forth by Lauterpacht, which reads as follows:

Intervention is a technical term of, on the whole, unequivocal connotation. It signifies dictatorial interference in the sense of action amounting to a denial of the independence of the State. It implies a peremptory demand for positive conduct or abstention—a demand which, if not complied with, involves a threat of or recourse to compulsion, though not necessarily physical compulsion, in some form.²⁸

According to this view, intervention can, but need not, involve the threat or use of force. It is, however, more than mere meddling, that is, commenting on this or that policy of another government. A formal diplomatic protest, accompanied by the threat, for example, that "if your government does not remedy the situation, we shall have to suspend our economic aid," might well meet Lauterpacht's criterion of "recourse to compulsion." But the matter is not free from doubt, particularly when we are dealing with human rights. The U.N. Declaration on Friendly Relations is relevant in this regard, for example, when it declares that "no State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantage of any kind" (emphasis added).²⁹ Whether economic coercion seeking to compel a state to change its human rights policies, for example, comes within this definition would under the declaration depend on

one's interpretation of the phrase "to secure from it advantage of any kind." The answer might well depend upon the ideological context shaping the relations between the governments involved.

To argue, as some have done,³⁰ that intervention is unlawful only if it involves the use of force or is backed by a threat of force is untenable. The U.N. Charter outlaws the threat or use of force by member states in their "international relations."³¹ This prohibition thus governs whether or not the subject matter of the intervention is "domestic" or "international" in character. But the injunction against intervention in domestic affairs applies, both under general international law and the U.N. Charter, only to matters within a state's domestic jurisdiction. It follows that acts of intervention that are impermissible when a matter is domestic must be deemed permissible when the subject has been internationalized. Intervention, if defined as "dictatorial interference," which is probably the most widely held view, must therefore encompass governmental measures that are less severe than the threat or use of force.³²

Conclusion

In discussing the human rights implications of U.S. foreign policy, it is vital to emphasize that the prohibition against intervention applies only to those human rights matters that have not been "internationalized." This means that the prohibition cannot be validly invoked by governments pursuing policies amounting to a consistent pattern of gross violations of human rights. Consequently, as long as the U.S. government, for example, ties the pursuit of its foreign policy objectives in the human rights field to measures designed to discourage gross violations of human rights, it will not run afoul of the prohibition against intervention in the domestic jurisdiction of other states. This is not to suggest that any and all measures taken by the United States in the furtherance of this objective will therefore necessarily be lawful. The use of armed force would be unlawful, for example, but its illegality is attributable to the fact that the United States has assumed specific international law obligations not to use force except in self-defense.³³ Cutting off diplomatic or military aid, for example, would not be unlawful in this context, and neither would other economic or diplomatic pressures designed to get states to comply with the human rights obligations they assumed under international law.

This analysis, if it is sound, suggests that U.S. government measures, not otherwise unlawful, designed to compel or encourage the observance of human rights, should be related directly to efforts to enforce human rights obligations accepted by the international community in the U.N. Charter and other international instruments. Such an approach, besides disposing of the intervention issue, will also refute the oft-heard charges that the United States seeks to impose *its* human rights values on the rest of the world. In the long run, the

success or failure of an effective U.S. human rights policy may well depend on the extent to which the United States succeeds in convincing the world that it is committed to promoting the human rights that embody mankind's shared aspirations rather than "American" or "Western" human rights as such, whatever they may be.

Notes

1. See, generally, Ermacora, *Human Rights and Domestic Jurisdiction* (Article 2, § 7, of the Charter), 124 *Recueil des Cours* 371 (1968); R. Higgins, *The Development of International Law through the Political Organs of the United Nations* 58 (1963); Preuss, Article 2, Paragraph 7 of the Charter of the United Nations and Domestic Jurisdiction, 74 *Recueil des Cours* 547 (1949).
2. OAS Charter, as amended, Art. 18. Note too that Article 19 of the OAS Charter proclaims that "no State may use or encourage the use of coercive measures of any economic or political character in order to force the sovereign will of another State and obtain from it advantages of any kind."
3. OAU Charter, Arts. III(2) and III(3).
4. Helsinki Final Act, Guiding Principle VI. The Final Act was signed on August 1, 1975. The text is reproduced in 14 *Int'l Legal Materials* 1292 (1975). For an analysis of Guiding Principle VI as it relates to human rights, see Henkin, *Human Rights and "Domestic Jurisdiction,"* in T. Buergenthal, *Human Rights, International Law and the Helsinki Accord* 21 (1977).
5. U.N. General Assembly, Res. 2625 (XXV) of October 24, 1970, [1970] *United Nations Juridical Yearbook* 105 (1972). On the lawmaking aspects of the Declaration, see Sohn, *The Shaping of International Law*, 8 *Geo. J. Int'l and Comp. L.* 1 (1978).
6. Res. 2625 (XXV), [1970] *United Nations Juridical Yearbook* 105, 108 (1972).
7. I. Brownlie, *Principles of Public International Law* 284 (2d ed., 1973).
8. L. Oppenheim, *International Law*, vol. I, 286-290 (8th ed., Lauterpacht, 1955).
9. Waldock, *General Course on Public International Law*, 106 *Recueil des Cours* 1, 178-179 (1962).
10. Henkin, p. 26.
11. Ermacora, p. 431; Waldock, p. 185.
12. U.N. Charter, Art. 2(4).
13. See, generally, J.N. Moore, *Law and Civil War in the Modern World* (1974); W. Schaumann, *Völkerrechtliches Gewaltverbot und Friedenssicherung* (1971).
14. *Nationality Decrees Issued in Tunis and Morocco*, Advisory Opinion of 7 February 1923, Permanent Court of International Justice, Series B, No. 4, at 24.

15. See Waldock, pp. 178-179.
16. [1954] *Annuaire de l'Institut de Droit International*, vol. II, at 150.
17. See, generally, L. Sohn and T. Buergenthal, *International Protection of Human Rights* (1973), where much of the pre-World War II international law relating to human rights is reviewed and extensive bibliographies are provided on this topic.
18. Oppenheim, p. 736.
19. See generally on this subject, E. Stowell, *Intervention in International Law* 51 (1921); Sohn and Buergenthal, p. 137.
20. Brownlie, *Humanitarian Intervention*, in Moore, p. 217. But see Lillich, *Humanitarian Intervention: A Reply to Dr. Brownlie and a Plea for Constructive Analysis*, in Moore, p. 229. See also R. Lillich, *Humanitarian Intervention and the United Nations* (1973); Franck and Rodley, *After Bangladesh: The Law of Humanitarian Intervention by Military Force*, 67 *Am. J. Int'l L.* 275, 277-295 (1973).
21. U.N. Charter, Arts. 55 and 56.
22. Sohn, *The Human Rights Law of the Charter*, 16 *Texas Int'l L. J.* 129, 131 (1977); Schwelb, *The International Court of Justice and the Human Rights Clauses of the Charter*, 66 *Am. J. Int'l L.* 337, 346-350 (1972).
23. Sohn, pp. 132-138; T. Buergenthal and J. Torney, *International Human Rights and International Education* 45-46 (1976).
24. For a review of this practice, see Henkin, pp. 26-27; A. Verdross and B. Simma, *Universelles Völkerrecht* 599-606 (1976). See, generally, *United Nations Actions in the Field of Human Rights* (U.N. Publ. No. E.74.XIV.2, 1974).
25. See, for example, U.N. ECOSOC Res. 1503 (XLVIII) of May 27, 1970, reproduced in L. Sohn and T. Buergenthal, *Basic Documents on International Protection on Human Rights* 111 (1973).
26. Buergenthal and Torney, pp. 75-79; Henkin, p. 27.
27. The principal international and regional texts are reproduced in Sohn and Buergenthal, *Basic Documents*. For the basic U.N. instruments, see *Human Rights: A Compilation of International Instruments* (U.N. Publ. No. E.78.XIV.2, 1978).
28. H. Lauterpacht, *International Law and Human Rights* 167 (1950).
29. See note 5, above. The Helsinki Final Act uses similar, albeit somewhat more ambiguous, language. See text, p. 112.
30. See, for example, Henkin, p. 36, who appears to espouse that view.
31. U.N. Charter, Art. 2(4).
32. It may well be that part of the confusion in the literature relating to the meaning of intervention results from the fact that in international diplomatic practice this term is used in a manner which suggests a dual meaning. One usage of the term intervention appears to refer only to military intervention and acts of a similar character. The other usage of the term is always contextually