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Response by Professors McDougal and Reisman

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We had not thought it necessary in a journal for international lawyers to spell out in detail the content of the doctrine of humanitarian intervention or to multiply references to establish its long and continuing authority. A venerable institution of customary international law, reconfirmed at the inception of the modern period by both Grotius and Vattel, humanitarian intervention has been regarded as accepted law by most contemporary international lawyers. The foundation of the doctrine has been the shared concern of the peoples of the world for the minimum conditions of the survival of humanity. The historic content of the doctrine is clearly stated by Professor Borchard in his classic book on The Diplomatic Protection of Citizens Abroad 14 (1922):

> . . . (W)here a state under exceptional circumstances disregards certain rights of its own citizens over whom presumably it has absolute sovereignty, the other states of the family of nations are authorized by international law to intervene on grounds of humanity. When these "human" rights are habitually violated, one or more states may intervene in the name of the society of nations and may take such measures as to substitute at least temporarily, if not permanently, its own sovereignty for that of the state thus controlled. Whatever the origin, therefore, of the rights of the individual, it seems assured that these essential rights rest upon the ultimate sanction of international law, and will be protected, in the last resort, by the most appropriate organ of the international community.

That this doctrine has been, and remains the authoritative expectation of the peoples of the world is documented by a host of sources.

It is curious that one so concerned for rigor in scholarship as Professor Marshall does not even quote the whole of the footnote he attacks. The portion he omits reads:

> "The International Law of the Future," 399 International Conciliation 268; 38 A.J.I.L. Supp. 55 (1944) provides: "Each state has a legal duty to see that conditions prevailing within its territory do not menace international peace and order, and to this end it must treat its own

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> population in a way which will not violate the dictates of humanity and justice or shock the conscience of mankind.

It may be added that this formulation represented a "community of views" of a large number of this country's most distinguished international lawyers, achieved after extended discussions under the auspices of the American Bar Association and with leadership from the late Judge Manley O. Hudson.

If Professor Marshall neglected to read a moiety of our footnote, he has rather carelessly misconstrued the half which did catch his eye. The Moore survey does indeed indicate the reluctance on the part of our government to become embroiled in humanitarian interventions. Reluctance is not equivalent to rejection. One hardly needs to note that such an operation is politically volatile and is undertaken only in the most exigent of circumstances. But Judge Moore's documentary collection abundantly demonstrates that our country has in fact intervened for purposes of humanitarian consideration and explains why. This trend of practice culminated in the U.S. intervention in Cuba, before which President McKinley said that

> If it shall hereafter appear to be a duty imposed by our obligations to intervene with force, it shall be without fault on our part and only because the necessity for such action will be so clear as to command the support and approval of the civilized world. (6 Moore, Digest 222)

President Buchanan's message in 1859, the single document from Moore which Professor Marshall does choose to cite, was delivered in regard to the *Mortara* case, an extremely complicated affair, many of the key facts of which were in doubt. Professor Marshall neglects to cite five instances of positive humanitarian intervention by the diplomatic instrument recounted on the preceding two pages of Volume Six of Moore's Digest, one of which was during the incumbency of President Buchanan!

We can only record perplexity about Professor Marshall's comment on Sir Hersh Lauterpacht's leading work on *International Law and Human Rights.* Marshall cites the following statement by Judge Lauterpacht to which, among others, we had adverted: "The law of nations, and, we say, the law of nature, by denying, as they needs must do, the absolute sovereignty of States, give their imprimatur to the indestructible sovereignty of man." Marshall describes this, for reasons unknown to us, as one of "several philosophic expressions of the author's aspiring outlook." However eloquent, this statement is, nonetheless, accurately descriptive both of international law and of most versions of natural law and, indeed, one hardly unique to Judge

Lauterpacht. Grotius,[1] Vattel,[2] Oppenheim,[3] Borchard,[4] and Guggenheim,[5] to name only some of the more prominent, have made comparable statements. The statement in Judge Lauterpacht's book to which our footnote made direct reference reads:

> International law has contributed in a more direct way to the maintenance of the rights of man and the protection of his welfare by the significant, though hesitating and infrequent, practice of humanitarian intervention such as that on behalf of the Greek people in 1827 and, subsequently, of the oppressed Armenians–and Christians generally–in Turkey; by the practice, which began in the middle of the seventeenth century, of safeguarding through treaties the right of religious freedom; by the long series of treaties of a humanitarian character ranging from slavery conventions to the imposing structure of conventions concluded under the aegis of the International Labour Organization; by the Minorities Treaties entered into after the First World War; and by the systems of mandates and trusteeship set up, respectively, after the two World Wars. (Id. at 120-121)

We regarded this as a statement of law, in the sense of a description of existing community expectation, and not as a mere philosophic expression of aspiring outlook. Similarly, Judge Lauterpacht's statement at page 186 of his book, corroborating the continuing internationality of human rights and the denial of the exclusivity of domestic jurisdiction if "such rights and freedoms were grievously outraged so as to create conditions which threaten peace . . ."[6] can scarcely be questioned. If it is possible for a careful reader to retain doubts as to Judge Lauterpacht's position on humanitarian intervention in the light of the above citations, he may consult a recent edition of Lauterpacht-Oppenheim, that vademecum of practicing lawyers, for an unequivocal reiteration of the above views:

> There is general agreement that, by virtue of its personal and territorial supremacy, a State can treat its own nationals according to discretion. But there is a substantial body of opinion and of practice in support of the view that there are limits to that discretion and that when a State renders itself guilty of cruelties against and persecution of its nationals in such a way as to deny their fundamental human rights and to shock the conscience of mankind, intervention in the interest of humanity is legally permissible.[7]

[1] GROTIUS, THE RIGHTS OF WAR AND PEACE, Chapter XXV, pp. 285-289 (Universal Classics Library ed. 1901).

[2] 2 VATTEL, DROIT DE GENS 56.

[3] OPPENHEIM, INTERNATIONAL LAW 347 (1905).

[4] BORCHARD, *op. cit.* at 14.

[5] 1 GUGGENHEIM, TRAITE DE DROIT INTERNATIONAL PUBLIC 289 (1953).

[6] UNCIO Doc. 723, I/1 A/19 at p. 10, cited in Lauterpacht, *ibid.*

[7] OPPENHEIM, INTERNATIONAL LAW 279 (7th ed. H. Lauterpacht, editor (1948).

There can, in short, be no question of Sir Hersh Lauterpacht's position on humanitarian intervention.

Professor Marshall's comment on Dean Murty's work is equally perplexing. As all students of international law know, one of the great controversies of the past two decades has been about the extent to which the inherited institutions of customary international law apply to the new nations. A number of scholars in the developing nations have taken the radical position that inherited customary law binds the new states only insofar as they explicitly accept it. While this is a doctrine which is dubious in terms of practice and theory, it has found some adherents. Hence the fact that Dean Murty, a leading Asian scholar, has associated himself with the customary doctrine of humanitarian intervention is an important datum confirming the continuing validity of the institution.[7a] The method by which Dean Murty reaches his conclusion is of only passing interest, yet the references he cites amply support his careful text. The reference to Hall[8] was undoubtedly intended to be to pp. 342-345, which offer a full discussion of humanitarian intervention with a reluctant recognition of its lawfulness under appropriate circumstances.

In our contemporary strife-torn world, with Biafra following quickly upon the continuing tragedy of Rhodesia and with perhaps even greater tragedies to come, Professor Marshall's bland demurrer to the entire institution of humanitarian intervention can only merit prompt consignment to complete oblivion. If a comprehensive survey of the more important past instances of humanitarian intervention, reflecting community expectations about the lawfulness of such measures is required to effect such consignment, the raw materials for such survey are readily accessible in many sources. We may cite as the more dramatic examples the Greek intervention of 1830, the Syrian intervention of 1860, the Cretan intervention of 1866, the Bosnian, Herzegovinan and Bulgarian intervention, the Cuban intervention of 1898-99, the Macedonian intervention of 1903 and the institutional practices of the League of Nations, the International Labor Organization and the United Nations. The numerous interventions by the United States from the Barbary intervention of 1858 through to the Cuban intervention and the many protestations on behalf of the Jews of Russia and Rumania are documented in detail in the sixth volume of

[7a] Significantly, a Nepalese scholar has taken an even stronger position on humanitarian intervention: Shruba Bar Singh Thapa, *Humanitarian Intervention* (unpublished dissertation, McGill University, 1968).

[8] HALL, A TREATISE ON INTERNATIONAL LAW (8th ed. Higgins, editor, 1924).

Moore's Digest. The humanitarian interventions in the Congo and in the Dominican Republic (the latter criticized on many grounds but not with respect to the validity of a humanitarian intervention in appropriate circumstances)[9] are matters of recent record.

Doctrinal examinations and confirmations, in addition to the many we have cited above, are found in 1 Guggenheim, Traite de Droit International Public 289 (1953), Rougier, La Theorie de l'Intervention d'Humanite, 1910 Revue Generale de Droit International Public 516, Stowell, Intervention in International Law 145 (1921), Oppenheim, International Law 145 (1905), Ganji, International Protection of Human Rights (1962). Recent American discussions are found in Lillich, *Forcible Self-Help by States to Protect Human Rights,* 53 Iowa L. R. 325 (1967), Nanda, *The United States Action in the Dominican Crisis: Impact on World Order* 43 Denver Law Journal 439 (1966) and Thomas & Thomas, *The Dominican Republic Crisis 1965* (1967).

The continuing authority of community expectations about the lawfulness of humanitarian intervention is greatly confirmed by all the contemporary developments associated with the United Nations. The repeated, insistent emphasis upon its underlying policies can only be regarded as strengthening, not weakening, the historic remedy. Article 1, paragraph 2 of the United Nations Charter affirms the right of self-determination of peoples and paragraph 3 commits the UN

> To achieve international cooperation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion . . .

The Charter's conception of human rights was articulated in detail in the Universal Declaration of Human Rights [10] (Resolution 217 A (111) of 1948). The Preamble to this Declaration, a luminously moving expression of human dignity, emphasized the Charter's conception of the inseparability of human rights and international peace. The first paragraph stated that

> . . . (T)he inherent dignity and . . . equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.

The second paragraph record that

> . . . (D)isregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind . . .

[9] *See,* for example, the remarks, in this regard, of Senators Morse, Fulbright and Clark in 111 *Congressional Record* 23369, 23001, 26183.

[10] Resolution 217 A (III) General Assembly, December 10, 1948.

The third preambular paragraph stated that

> . . . (I)t is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law . . .

Of the 29 articles of the Declaration, the most exigent in regard to humanitarian intervention are Articles 3 and 5. Article 3 provides that

> Everyone has the right to life, liberty and the security of person.

Article 5 provides that

> No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

A day before the General Assembly adopted the Universal Declaration of Human Rights, it adopted the Convention on the Prevention and Punishment of the Crime of Genocide.[11] This convention, a reexpression in explicit treaty form of fundamental policies long sought in customary international law[12] has been in force since 1951.[13] It is relevant to the contemporary institution of humanitarian intervention in that it explicitly characterizes actions which, under historic international law, would have justified third party intervention for humanitarian purposes. Article 1 of the Convention states that

> . . . (G)enocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

Genocide is defined as

> . . . (A)ny of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such.

The first three subsections of Article II offer itemization:

a) Killing members of the group;

b) Causing serious bodily or mental harm to members of the group;

c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.

The continuing validity of the basic policies underlying humanitarian intervention are, thus, reiterated in the operational Articles of

[11] 78 United Nations Treaty Series 277, Registration No. 1021.

[12] The explicit language of Article 1 of the Genocide Convention is "The parties *confirm* that genocide . . . is a crime under international law . . . "

For the historic policies underlying humanitarian intervention and now sought in the Genocide Convention, *see* the many references set out in our text above. *See also* McDougal and Arens, The Genocide Convention and the Constitution, 3 Vanderbilt L. Rev. 683 (1950).

[13] In accordance with Article XIII: ST/Leg/3, Rev. 1.

the Charter and the Genocide Convention. Insofar as human rights deprivations giving cause for humanitarian intervention constitute a "threat to the peace" or "breach of the peace" or "act of aggression," the Security Council, under Chapter VII of the Charter, is seized with a mandatory jurisdiction.[14] Should the Council be unable to function, the secondary competence of the General Assembly, under the Uniting for Peace Resolution,[15] becomes operative and the Assembly may execute duties and arrogate powers comparable to those of the Council insofar as its action is consistent with the major purposes and principles of the Organization.[16] But the Charter also creates a separate form of action for human rights deprivations. Article 55 of the Charter reaffirms that the United Nations shall promote

> (U)niversal respect for, and observance of, human rights and fundamental freedoms for all . . .

Article 56 transforms that commitment into an active obligation for joint and separate action in defense of human rights.

> All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.

Hence, the cumulative effect of the Charter in regard to the basic policies of the customary institution of humanitarian intervention is to create a coordinate responsibility for the active protection of human rights: members may act jointly with the Organization in what might be termed a new organized, explicitly conventional, humanitarian intervention or singly or collectively in the customary or international common law humanitarian intervention. Any other interpretation would be suicidally destructive of the explicit major purposes for which the United Nations was established.

The novel coordinate character of the humanitarian intervention now authorized is paralleled and illustrated in the Genocide Convention. Article VIII provides that

> Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in Article III.[17]

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[14] Charter Articles 24 and 39.

[15] Resolution 377A (V).

[16] On possible forms of Assembly action under this authority, *see infra* part III.

[17] It is important to note that the authority accorded to the United Nations is not directed to a specific organ, but rather to a "competent organ". Hence, the authority could become specific either to the Security Council, the General Assembly or, for that matter, the International Court of Justice.

Article V further enjoins parties to the Convention to effect national legislation providing effective penalties for persons guilty of genocide and Article VI removes the crime of genocide from the putative immunity of the claim of "Act of State." In short, parties to the Genocide Convention are obliged to enforce its policies separately as well as conjointly with the United Nations.

In the perspective of historic practice and of all the many recent United Nations measures for the promotion of human rights, measures reflecting the deepest contemporary demands and expectations of the peoples of the world, Professor Marshall's demurrer to the authority of humanitarian intervention would appear about as realistic as his characterization of Mr. Acheson's piece as "a mighty blast." It may be recalled that Justice Goldberg offered a different characterization, which could be of continuing relevance.