´ HUMANITARIAN ´ INTERVENTION : THE NEAR EAST FROM GLADSTONE TO RAMBOUILLET

I. A SEMANTIC APPROACH

Some semantics are needed to begin with. As many international law concepts the word ´ intervention ª is borrowed from civil law. It points out a procedural act through which a person wants to enter into a legal dispute between two litigants. Article 62 of the Statute of the International Court of Justice reads :

Article 62

1. Should a State consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene.
2. It shall be for the Court to decide upon this request.

There are more offensive forms of intervention. Day to day life and ordinary language provide some examples. A passer-by will come between a man abusing a child or an animal and the victim. Neighbours will interpose against a man hitting his wife. Such "interventions" can be deemed "humanitarian" since they purport to shield a weak being from its tormentor.

Intervention has acquired a more specific meaning at international law. When two States are at war, it is the action through which a third-State will join its forces to one of the belligerent armies. Intervention can also occur within the domestic sphere, either during a civil war (as in Spain in 1936 for instance) or to protect a minority living in that State against the abuses of the majority.

II. THE BASIC RULES OF INTERNATIONAL LAW ACCORDING TO THE CHARTER OF THE UNITED NATIONS

Article 2

The Organization and its Members, in pursuit of the Purposes stated in Article I, shall act in accordance with the following principles :

1. The Organization is based on the principle of the sovereign equality of all its Members.

…

4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political

> independence of any State, or in any other manner inconsistent with the purposes of the United Nations.
>
> …
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> 7. Nothing contained in the present Charter shall authorize the United Nations to untervene in matters which are essentially within the domestic jurisdiction of any State or shall require the Members to submit such matter to settlement under the present Charter, but this principle shall not prejudice the application of enforcement measures under Chapter VII.

The threat and the use of force are dealt with in Chapter VII of the Charter. Article 39 to 51 confer the Security Council an exclusive power to the use of armed forces against a Member State. According to Article 39, the measures to which the Security Council is empowered and of which "military measures" are to be taken in the last resort, depend on "the existence of any threat to the peace, breach of the peace, or act of aggression" (Article 39). Moreover :

Article 51

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security…

It is thus incidentally, when dealing with the competence of the Security Council that Article 51 recalls "the inherent right of individual or collective self-defence". The phrasing of the French version is more traditional : "*le droit naturel de légitime défense*".

The sole exception to the prohibition of the threat or use of force laid down in Article 2, 4, of the Charter are, concerning the States, the right to self-defence, and the competence of the Security Council under chapter VII.

Before going into the field of the so-called "humanitarian intervention" one has to analyze some concepts.

Self-defence is limited to the case of an "armed attack". The idea of an "anticipating self-defence" (*légitime défense préventive*), i.e. the right to use armed forces to prevent an attack deemed imminent is discarded by a majority of the doctrine.

Gross and systematic violations of human rights and, more specifically, abuses whose victims are members of a minority cannot be considered any more to be enclosed "within the domestic jurisdiction" of a State in which the Security Council is prevented to "intervene" (Charter, Art. 2, 7). In the past human rights were deemed to fall within each State's "*domaine réservé*", which has long been the doctrine of the USSR and of some Third-World countries. According to the actual conception and practice, the Security

Council is empowered to characterize such grave and massive violations of fundamental rights as a violation of an international obligation laid down by treaties, among others, the two Covenants of the United Nations on fundamental rights and freedoms, and as "a threat to the peace" under the wording of Article 39 of the Charter.

III. "INTERVENTION OF HUMANITY" AND "HUMANITARIAN INTERVENTION"

Before as under the United Nations Charter, the question has to be raised whether a State, a group of States or an international organization other than the Organization of the United Nations are empowered to intervene within the territory of another State in order to prevent the carrying on of grave violations of human rights.

A summing up of the international practice prior to World War I can be found in the motivation of one of the judgements of the American military Tribunal which was set up under Control Council Law Nr 10. That jurisdiction which took its seat in Nuremberg has not to be confounded with the International Tribunal which is more notorious. In their zone of occupation the American authorities sent to judgement a series of German officials who were accused of grave violations of human rights. There were ten cases, the third one being the *Justice Case*, whose scope was to criminalize the functioning of "justice" under the Third Reich. While the jurisdiction of the Nuremberg International Military Tribunal was restricted to crimes of war and crimes committed against the nationals of other belligerant States, the American military Tribunal did also deal with crimes committed by the Nazi authorities against their own nationals. It was thus necessary to justify such an extent of American jurisdiction on German nationals for crimes against or abuses of other German nationals.

"The family of nations is not unconcerned with the life and experience of the private individual in his relationships with the state of which he is a national. Evidence of concern has become increasingly abundant since World War I, and is reflected in treaties through which that conflict was brought to a close, particularly in provisions designed to safeguard the racial, linguistic and religious.minorities inhabiting the territories of certain states, and in the terms of part XIII of the Treaty of Versailles, of June 28, 1919, in respect to labour, as well as in article XXIII of that treaty embraced in the Covenant of the League of Nations".

"The nature and extent of the latitude accorded a state in the treatment of its own nationals has been observed elsewhere. It has been seen that certain forms or degrees of harsh treatment of such individuals may be deemed to attain an international significance because of their direct and adverse effect upon the rights and interests of the outside world. For that reason it would be unscientific to declare at this day that tyrannical conduct, or massacres, or religious persecutions are wholly unrelated to the foreign relations of the territorial sovereign which is guilty of them. If it can be shown that such acts are immediately and necessarily injurious to the nationals of a particular

foreign state, grounds for interference by it may be acknowledged. Again, the society of nations, acting collectively may not unreasonably maintain that a state yielding to such excesses renders itself unfit to perform its international obligations, especially in so far as they pertain to the protection of foreign life and property within its domain.* The property of interference obviously demands in every case a convincing showing that there is in fact a causal connection between the harsh treatment complained of, and the outside state that essays to thwart it.

*"Since the World War of 1914-1918, there has developed in many quarters evidence of what might be called an international interest and concern in relation to what was previously regarded as belonging exclusively to the domestic affairs of the individual state; and with that interest there has been manifest also an increasing readiness to seek and find a connection between domestic abuses and the maintenance of the general peace. See article XI of the Covenant of the League of Nations, Unites States Treaty, volume 111, 3339.ª (Hyde, "International Law," 2d rev. ed. vol. I, pages 249-250.)

The international concern over the commission of crimes against humanity has been greatly intensified in recent years. The fact of such concern is not a recent phenomenon, however. England, France, and Russia intervened to end the atrocities in the Greco-Turkish warfare in 1827.

President Van Buren, through his Secretary of State, intervened with the Sultan of Turkey in 1840 in behalf of the persecuted Jews of Damascus and Rhodes.

The French intervened and by force undertook to check religious atrocities in Lebanon in 1861.

Various nations directed protests to the governments of Russia and Rumania with respect to pogroms and atrocities against Jews. Similar protests were made to the government of Turkey on behalf of the persecuted Christian minorities. In 1872 the United States, Germany, and five other powers protested to Rumania; and in 1915, the German Government joined in a remonstrance to Turkey on account of similar persecutions.

In 1902 the American Secretary of State, John Hay, addressed to Rumania a remonstrance "in the name of humanity" against persecutions, saying, "This government cannot be a tacit party to such international wrongs."

Again, in connection with the Kishenef [Kishinev] and other massacres in Russia in 1903, President Theodore Roosevelt stated:

"Nevertheless there are occasional crimes committed on so vast a scale and of such peculiar horror as to make us doubt whether it is not our manifest duty to endeavor at least to show our disapproval of the deed and our sympathy with those who have suffered by it. The cases must be extreme in which such a course is justifiable. The cases in which we could interfere by force of arms

as we interfered to put a stop to intolerable conditions in Cuba are necessarily very few."

Concerning the American intervention in Cuba in 1898, President McKinley stated:

"First. In the cause of humanity and to put an end to the barbarities, bloodshed, starvation, and horrible miseries now existing there, and which the parties to the conflict are either unable or unwilling to stop or mitigate. It is no answer to say this is all in another country, belonging to another nation, and therefore none of our business. It is specially our duty, for it is right at our door."

The same principle was recognized as early as 1878 by a learned German professor of law, who wrote :

"States are allowed to interfere in the name of international law if 'humanity rights' are violated to the detriment of any single race."

Finally, we quote the words of Sir Hartley Shawcross, the British Chief Prosecutor at the trial of Goering, et al. :

"The rights of humanitarian intervention on behalf of the rights of man trampled upon by a state in a manner shocking the sense of mankind has long been considered to form part of the [recognized] law of nations. Here, too, the Charter merely develops a preexisting principle."

We hold that crimes against humanity as defined in C.C. Law 10 must be strictly construed to exclude isolated cases of atrocity or persecution whether committed by private individuals or governmental authority. As we construe it, that section provides for punishment of crimes committed against German nationals only where there is proof of conscious participation in systematic government organized or approved procedures amounting to atrocities and offenses of the kind specified in the act and committed against populations or amounting to persecutions on political, racial, or religious grounds.

Thus, the statute is limited by construction to the type of criminal activity which prior to 1939 was and still is a matter of international concern. Whether or not such atrocities constitute technical violations of laws and customs of war, they were acts of such scope and malevolence, and they so clearly imperiled the peace of the world that they must be deemed to have become violations of international law. This principle was recognized although it was misapplied by the Third Reich. Hitler expressly justified his early acts of aggression against Czechoslovakia on the ground that the alleged persecution of racial Germans by the government of that country was a matter of international concern warranting intervention by Germany. Organized Czechoslovakian persecution of racial Germans in Sudetenland was a fiction supported by "framed" incidents, but the principle invoked by Hitler was the one which we have recognized, namely, that government organized racial persecutions are violations of international law".

There is nothing to add to that summarized story of the so-called ´ intervention of humanity ª. Everywhere a powerful State intervenes into the domestic affairs of a weak State. In the XIXth century, the Ottoman Government (*la Sublime Porte*) was the prey to European States pursuing the protection of Christian subjects not without more mundane ambitions. Tsarist Russia considered itself as the natural defender of all peoples of orthodox faith, with the undisclosed ambition to reach the "warm seas". The US-Spanish war in Cuba is all the more relevant since that island was subjected to an American protectorat after it conquered its "independence". The Sudeten-crisis which is hinted at in the Military Tribunal's judgement is another instance of the abuses the so-called "*intervention d'humanité*" can bring about.

It is worthwhile to deal more at length with the relationship between European great powers and the Ottoman Empire since they were focussed on the christian populations of the Balkans. What would be known as the Crimean war started through an easy victory of Russia on the Ottoman Empire. France whose Emperor (Napoléon the Third) had some disputes with the Tsar and the British Government which did want to restrain Russian ambitions in the Straits partly disguised under the pretention to protect the christian population of the Balkans did join their forces to Turkey. Sardinia (Piedmont) was allowed to play with the grown-ups. That bloody and unnecessary war ended with the defeat of Russia. The peace treaty which was signed at Paris on March, the thirthiest, 1856, had two main reasons to pass into history. One is that the Ottoman Empire was, for the first time, admitted into the closed ("charmed") circle of the "christian" nations. The other reason is that Article IX of the Treaty contained a promise of the Sultan to abolish any discrimination of religion or of race in the administration of the christian subjects.

Sir Arthur Evans witnessed in August and September 1875 the beginning of an insurrection in Bosnia and Herzegovina. During 1876 the relationship between the Ottoman Empire and its subjects went from bad to worse. Bosnia-Herzegovina and Bulgaria became the most troubled areas in the Balkans. Gladstone was appalled by the brutal repression of the Bulgarian rising. In Bosnia-Herzegovina the cases of discontent were partly economic ones and the Muslim population participated into some popular movements against the Ottoman authorities. In July 1876 Serbia (which was *de facto* independent since 1815) and Montenegro (which never fell entirely under the Ottoman rule) declared war on the Ottoman Empire. Serbia performed miserably and was only saved from Ottoman re-conquest by the intervention of the Russian government which forced the Turks on an armistice in November. As an ominous sign of further developments, both principalities conceived between themselves a sharing of Bosnia-Herzegovina : Bosnia to Serbia and Herzegovina to Montenegro.

Russia declared war on the Ottoman Empire in 1877. By early 1878, Russian troops were almost at the gates of Istanbul. An armistice was entered into on January 31th, 1878. Peace negotiations were held at San Stefano, a small villegiature on Marmara sea (where Istanbul airport is nowadays situated) and the Ottoman Empire was coerced into accepting a "Preliminary Treaty of Peace". The Treaty was a kind of *Diktat*, meeting the main objectives of the

Russian policy and as such it was unpalatable to Great Britain whose Navy had been dispatched in waters close to San Stefano. It did not please either to Austria-Hungary which had exchanged views with Russia on its stake on Bosnia-Herzegovina, and to which the Russian-Turkish agreement did not afford anything. Acting on behalf of a disinterested Great Power, Chancellor Bismarck appeared as an "honest broker" and invited the Powers to a Conference in Berlin in order to pull down San Stefano. Nothing could be more agreeable to Great-Britain whose Prime Minister Disraeli was a staunch supporter of the Ottoman Empire. The Treaty of San Stefano was implicitly superseded by a treaty concluded at Berlin on July the 13th, 1878. Some Russian aims were achieved, for instance the constitution of Bulgaria into an autonomous principality. The most interesting provisions for our purpose concerned the attribution to Austria-Hungary of the occupation and the administration of the provinces of Bosnia and Herzegovina (Art. XXV), and the numerous articles guaranteeing individual rights of non-discrimination and liberty of religion in the regions where the population was mixed (which was the case everywhere). Such provisions were already present in the San Stefano treaty and they fundamentally differ from the Sultan's declaration in the Paris Treaty of 1856 under two headings. On the one hand the diplomatic language used twenty-two years before to placate the Sultan's susceptibility was displaced by contractual obligations. But on the other hand, there was a *quid pro quo* : even if most of the obligation were assumed by the Ottoman Empire in favour of its Christian minorities, similar duties of non-discrimination were laid down on the new States such as Bulgaria (Art. IV, al. 2 and XII), Montenegro (Art. XXVII and XXX), Serbia (Art. XXXV and XXXIX), Rumania (Art. XLIV). Article LXI of the Berlin Treaty reproduces a provision of the Treaty of San Stefano (Art. XVI) by which Turkey is obliged to ameliorate the condition of its Armenian subjects and to protect them against Kurds and Circassians. Although Armenia was out of the Balkans those provisions deserved a mention since they will be violently breached through the genocide of the Armenians.

The Great Powers gathered up some spoils from the "sick man" of Europe : Austria-Hungary as has already been said, Russia to which some conquered territories remained (Art. LVIII) and Great-Britain whose support to the Sultan was compensated by a right of occupation of Cyprus. Later on Austria-Hungary annexed Bosnia-Herzegovina (1908) and Great-Britain did the same with Cyprus (1914).

It is also in 1876 that a prominent Belgian scholar and politician, Gustave Rolin-Jaequemyns, who was among the founders of he International Law Institute, wrote an influential paper on "international law and the actual stance of the Eastern question" (see note 6). He strongly supported the practice of "*intervention d'humanité*" as it had been applied *vis-à-vis* the Ottoman Empire. He concludes in favour of a legal principle "resulting from history and from the treaties, authorizing the collective intervention of Europe into the domestic matters of Turkey, with a view of the interest of general peace and humanity". In the first years of the XXth century a French lawyer professed the same opinion pushing to the extreme the difference between civilized people and "barbarians" ("*la sphère de l'humanité barbare*"). There are also "half-civilized"

(*mi-civilisés*) of which the Ottoman Empire is the best illustration. In agreement with Arntz (note 16) Rougier poses as a basic rule of the intervention of humanity the disinterestedness of the action in favour of human rights. He casts some doubt on the compatibility of the U.S.-Spanish war in the case of Cuba, with that criterium. But European policy as against the Ottoman Empire did not either comply with that condition.

The two Balkan wars (1912-1913) throw light upon the diminishing power of Turkey, the rivalries between monarchies of recent date, the horror of nationalistic wars and the pervasive influence of the European powers which were subdivided in two groups : Austria-Hungary, Germany and Italy (Triple Alliance or *Triplice*), Great-Britain, France, Russia (*Triple Entente*). It would transform the Sarajevo crisis into a European war. The annexation of Bosnia-Herzegovina in 1908 was a turning-point of no-return since, before a client State of Austria-Hungary, Serbia sought assistance from France and Russia. Moreover, the Ottoman Empire which in the past relied on English protection became more and more close to the German Empire.

The First Balkan War (1912-1913) waged by Bulgaria, Greece and Serbia against Turkey ended with the defeat of that country : at the London Conference (30 May 1913), the Ottoman Empire had to cede a larger portion of its European territories. The three victorious powers could not agree on the sharing of the spoils and Bulgaria attacked its former Allied. Turkey seized the opportunity to regain some ground and Bulgaria remained isolated with very little of its conquests left (peace of Bucarest of August the 10th; 1913). The most relevant fact for our purpose was the brutality and the savagery of war methods. The international public opinion was so horrified that the Carnegie Endowment for International Peace set up a commission of eight member entrusted with an inquiry. The report of the commission was made public in July 1914, which made it immediately irrelevant. But the conclusions were devastating for the contending armies. The prejudice that Turkish armies had a monopoly of cruelty had to be dismissed : grave violations of the law of war and of the basic principles of humanity had been committed by all armies and, what seemed more astonishing, by christian soldiers between themselves and against the civil population of another christian country, although all belligerants professed the same orthodox faith.

The dislocation of Yugoslavia in the 1990s seemed to Serbia an opportunity to realize the dream of a "Great Serbia". It attacked Slovenia and Croatia and later on made a deal with Croatia to share the territory of Bosnia-Herzegovina, which once more was at the centre of Balkan turbulence. Very far from any humanitarian intervention, European countries and the United States witnessed massacre, ethnic cleansing and ethnic rapes. Srebenica, which was placed under the protection of the United Nations, remained unprotected in the presence of European contingents which did not *intervene* at all. American public opinion was incensed at the Administration’s policy on Bosnia-Herzegovina. The impotence of the United Nations found some kind of alibi in the creation of an International Criminal Tribunal for the former Yugoslavia. The Rwanda genocide did not fare any better.

The war of Kosovo was the first and last instance of a "humanitarian intervention", this expression disguising an international war.

Previously fêted as a responsible interlocutor, president Milosevic was changed into the villain of the piece. The Serbian forces were defeated and forced to leave part of the national territory, the statute of the province remaining unclear : up to now the United Nations did not accept the independence of the territory which is claimed by the actual majority of its population.

During the last decade the United States have launched three wars, against Iraq, in Kosovo and against Afghanistan. Only the second one was presented as a "humanitarian intervention". The other two were based on the old theory of the just war. As it was handled in the Kosovo war, "humanitarian intervention" meant the use of armed forces by a State or a group of States against another State. Historically the precedents are few and the link between the "*intervention d'humanité*" of the XIXth century and the contemporary "humanitarian interventions" are negligible. When States such as Bulgaria, Greece or Serbia attacked the Ottoman Empire it was for gaining territory. With the exception of Austria-Hungary and Russia, the Great Powers never intervene militarily against Turkey, they used diplomatic methods, threat and obtained compensation for their "*bons offices*". Neither did the dismemberment of Turkey after World War One obey to any policy of protection of fundamental people's rights. The Asian territory of the Ottoman Empire was carved to satisfy the colonial ambition of the major powers, France and Great-Britain. Armenia and the Kurdish people were sacrificed.

The link between the XIXth and the XXth century does not consist in the continuity of legal concepts (from intervention of humanity to humanitarian intervention) but in the permanence of socio-cultural and political realities. Bosnia-Herzegovina remained during centuries a multicultural entity, formed of Croats, Serbs and Islamized Slavs (the Bosnians). She was exposed to the territorial ambitions and irredentist policies of two more potent neighbours, Croatia and Serbia. No external interference in the Balkan quagmire has ever been devoid of afterthoughts. The idea of disinterestedness which is at the core of humanitarian intervention is a shibboleth without any real significance.

Not only is the vocabulary of the theoricians of the so-called "*intervention d'humanité*" old fashioned and obsolete, it never corresponded to any reality. The idea that a State or a group of States can use armed force against another State with a disinterested intention is false and munipulative. Moreover, any link between the XIXth century and the XXIth one has to be discarded because the United Nations Charter contains sharp and new rules on the use of force. Besides self-defence, the use of force has become a monopoly of the Security Council. No State, no other international organization as the NATO or the European Union is empowered to resort to war in order to vindicate gross violations of fundamental human rights.

Since the theory of humanitarian intervention has always been invoked and used by powerful Western States against impotent States of what is

nowadays called the Third-World or the developing countries, the last group of States has systematically rejected the doctrine itself. The same stance has been recently taken up by the Group of 77 (now 133) which assembles the "non-aligned" countries, a group constitued at the time of the Cold War and of which President Tito of Yugoslavia was a staunch supporter.

With some exceptions, the doctrine of humanitarian intervention is generally deemed incompatible with the very strict rules of the United Nations Charter on the prohibition of the use of force. It must be stressed that the doctrine was conceived but not really put into practice at a time (before World War One) where aggression was not prohibited by international law. War was a licit way of pursuing any policy, why not a humanitarian one ?

The International Court of Justice never adhered to the doctrine of the so-called humanitarian intervention. In one of its first cases, between the United Kingdom and Albania, where the former State did engage into investigations into the latter's territorial waters, the Court made the following ruling :

> The Court cannot accept such a line of defence. The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and as such cannot, whatever the present defects of international organization, find a place in international law. It is perhaps still less admissible in the particular form it would take here ; for, from the nature of things, it would be reserved to the most powerful States, and might easily lead to perverting the administration of international justice itself.

The World Court adhered to the same doctrine in the Nicaragua case : 268. In any event, while the United States might form its own appraisal of the situation as to respect for human rights in Nicaragua, the use of force could not be the appropriate method to monitor or ensure such respect. With regard to the steps actually taken, the protection of human rights, a strictly humanitarian objective, cannot be compatible with the mining of ports, the destruction of oil installations, or again with the training, arming and equipping the *contras*. The Court concludes that the arguments derived from the preservation of human rights in Nicaragua cannot afford a legal justification for the conduct of the United States, and cannot in any event be reconciled with the legal strategy of the respondent State, which is based on the right of collective self-defence.

A series of cases is now pending before the International Court of Justice, brought by Yugoslavia (Serbia and Montenegro) against the States involved in the Kosovo war and the judgement of the Court must be awaited with the utmost attention.François Rigaux

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