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FOREWORD

ETHICAL AND HUMANITARIAN CONCERNS ADD A NEW DIMENSION TO INTERNATIONAL SECURITY IN THE POST-COLD WAR WORLD

JUAN E. MÉNDEZ*

The editors of the *Journal* deserve to be congratulated for the idea of an issue dedicated to the ethical implications of international security issues. Until recently, international security was

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Mr. Méndez earned his law degree from Stella Maris University, a Catholic university in Mar del Plata, Argentina, in 1970. In his early law practice, he represented trade unions working for labor reform, but quickly became involved in representing political prisoners. As a result of this work, the Argentinian military dictatorship arrested him and subjected him to torture and administrative detention for a year and a half. During this time, Amnesty International adopted him as a "Prisoner of Conscience."

After his release from detention, Mr. Méndez moved to the United States where he worked for the Catholic Church in Aurora, Illinois, to protect the rights of migrant workers. In 1978, he joined the Lawyers' Committee for Civil Rights Under the Law in Washington, D.C., to help in the committee's wide-ranging civil and human rights programs. In 1982, the then-nascent organization now called Human Rights Watch asked him to start its Americas program and to open its Washington, D.C., office. For 15 years, he worked with Human Rights Watch, concentrating his efforts on human rights issues in the western hemisphere and helping to build the organization into one of the most widely respected human rights nongovernmental organizations in the world. In 1994, he became general counsel of Human Rights Watch, with worldwide duties in support of the organization's mission and with responsibility for the organization's litigation and standard-setting activities.

Since 1996, Mr. Méndez has served as executive director of the Inter-American Institute of Human Rights in Costa Rica where, among other things, he has had the opportunity to teach about human rights to police and military officers, lawyers, journalists, public officials, and others throughout the Americas.

The Helen Kellogg Institute for International Studies invited him to the University of Notre Dame as a guest speaker in 1994 and as a visiting fellow in 1996, during which time he taught in the L.L.M. program conducted by the Center for Civil and Human Rights. In 1998, the Center honored Mr. Méndez with its inaugural Reverend William E. Lewers, C.S.C., International Award for Distinguished Service in Civil and Human Rights.

the ultimate realm of *realpolitik*, that corner of foreign relations that was completely shielded from consideration other than as a narrowly conceived concept of each country's "national security." It was generally understood that the promotion and defense of human rights, generosity in development assistance, even urgent humanitarian concerns, necessarily yielded to the imperatives of a nation's security interests. As a matter of principle, this is still very much the case today because no nation can be expected to act against the peace and security of its own citizens, no matter what other values are supposedly involved.

The problem with a simplistic view of security is that it represents a barrier to the promotion of a nation's values into the sphere of international affairs, and generates cynicism about the possibility of projecting power to defend human dignity and to seek the realization of justice. This cynicism is exemplified in the maxim: a great nation has no permanent friends, only permanent interests. National security considerations are often seen as trumping all other "interests" or concerns that a powerful nation can pursue through its foreign policy and, thus, represent an objective limit, for example, to putting human rights at the center of that nation's foreign policy. It is certainly reasonable to place such a limit, but the elasticity of the concept of national security quickly creates contradictions and ambiguities in human rights policies. "Friends" are exempted from criticism on human rights grounds. Even rivals and adversaries are spared criticism: their might or their potential as a trading partner allows them to get away with very poor human rights records. The result is that a great nation reserves its best arsenal of human rights weapons for small and isolated countries. This is not bad in itself if the government of the small country really deserves criticism for human rights violations. But it is easy to see how the moral foundation of a human rights policy is undermined by this inconsistency.

At its extreme, the sovereign character of security considerations governing foreign policy tends to confuse peace with security. More precisely, it confuses peace with the undisturbed enjoyment of a State's interests abroad, and contributes to the maintenance of that status through military might, including the support of unsavory partners on the grounds of "international security" concerns. In many places, this absence of open conflict is anything but peace, since it clumsily conceals an absence of justice that breeds future and more deadly conflict just below the surface. It should come as no surprise, therefore, that oppressed people in those circumstances make foreign powers responsible for their plight.

Things began to change with the end of the Cold War. In the last twelve years, the world has seen the end of ideologically based dictatorships in a large number of countries. This historic event should have made it easier to inject ethical and human rights considerations into the foreign policy of Western nations, and in the long run probably will. In the meantime, however, the world has been shaken by the sudden emergence of ethnic and religious conflict and by the intractable nature of some fundamentalist regimes. Though we make efforts to understand the profound nature of ethnic and religious grievances among cultures that we had unjustly forgotten, we can also easily recognize that, in many cases, these new wars are fueled by hatred and intolerance stirred up by unscrupulous demagogues and opportunists.

Whatever the combination of long-standing and short-term causes, the fact is that international security in our day is threatened not by the influence of great powers, but by localized forces exploiting the fears of relegated communities about their future. These fears have to do with reshaping borders, but also with the prospect of their communities being divided, or of being forced to live with other communities under conditions of subservience or domination. These wars are characterized by the absence of restraints, since the local forces that unleash them do not feel beholden to any center of international power. There is no room for nostalgia for the "good old days" of the Cold War. It cannot be disputed, however, that the old bipolar order did contain some of these conflicts, if for no other reason than out of respect for the "sphere of influence" of each superpower.

At the beginning of the post-Cold War period, the international community responded to the emergence of ethnic and religious conflict with great ambivalence. These are not wars in which siding with one faction can result in immediate and easy gains in a competition with an ideological and strategic rival; so we thought we could simply forget about them. At other times, the ability of the West to wield some restraining influence has been greatly hampered by the post-colonialist nature of the relationship between certain States and the regions in conflict. In the case of the Balkans, on the other hand, it can be argued that Europe's (and specifically Germany's) eagerness to recognize new States emerging from the breakup of the former Yugoslavia prompted Serbian fears of a return to the disasters of World War II, which were immediately exploited by Milosevic and other former Communist bureaucrats instantly turned into Nationalist leaders.

Ignoring religious and ethnic wars was never an option, even if Western leaders tried to do so. Technological advances in the communications industry bring the human face of these disasters daily into our living rooms and to our desktop computers. The so-called "CNN phenomenon" limits the room for maneuver of Western and Northern leaders, as it creates an instant swell of public opinion. There is reason to condemn the superficiality of coverage, the lack of depth about root causes and policy options, and especially the quick move from one calamity to the other. But the images of human suffering do create the obligation to act.

Those images also facilitate the work of the international human rights movement because they favor the "mobilization of shame" that is this movement's greatest asset. In a few years, human rights organizations have become important actors in formulating foreign policy agendas. As they have wielded more influence, they have also faced larger challenges, including well-publicized criticism of their purported fundamentalism and refusal to compromise. In turn, they have had to become more sophisticated in their presentation of policy alternatives, and more professional and transparent in the way they collect information and present it to the public. In meeting that challenge, they not only maintain a high degree of influence, but they have also become an indispensable complement to the superficiality of television (and some newspaper) coverage of these events.

The information age and the West's strong adherence to freedom of expression have also made it harder to ignore conflicts that take place thousands of miles away from our comfortable surroundings. Our civil society now has access to government files and can offer analysis about our governments' responsibility for acting or for refraining from action in several places. Even as the debate about policy options of the last fifty years rightly goes on, revelations about Western governments' actions create a dissonance between our societies' self-images as Nations that love peace and justice and exert benevolent influence abroad, and the reality of what our agents actually do in faraway lands. In some cases, that realization may lead to paralysis and to turning our backs to conflict; mostly, however, it adds to the mobilization of shame and becomes a powerful incentive to act to correct past wrongs.

The factors briefly outlined in the preceding paragraphs have indeed created both the opportunity and the need to inject ethical and humanitarian considerations into the realm of international affairs. They certainly do not replace security concerns, but they contribute to a more nuanced understanding of what

each nation's security requires. In essence, ethical considerations are reflected in a willingness to consider human rights and humanitarian concerns as central to peace initiatives and to the intervention of the international community into localized conflicts.

The opportunity to include ethical considerations (human rights and humanitarian concerns) into the mix does not make decisions any easier, however. The international community must balance the need to save lives, to prevent genocide and war crimes, and to protect refugees and displaced persons against risks that are hard to assess in the post-Cold War conditions, precisely because of the unprecedented nature of those risks. For example, it is relatively easy to impose sanctions, such as trade embargoes, on a regime in order to curb its aggressive tendencies and even to create incentives for it to respect the lives and rights of its citizens. But sanctions very rarely produce an immediate change in behavior, and if they are prolonged, they almost always harm the innocent. In those cases, deciding when sanctions have run their course, or whether the screws have to be tightened even further, poses serious ethical dilemmas.

Some particularly catastrophic situations call for "humanitarian intervention." In the early 90s, and before the Somalia disaster, the world community was so enthusiastic about humanitarian intervention that two prominent Europeans, Bernard Kouchner and Mario Bettati proclaimed the *devoir d'ingérence*, more than a right, a duty of the international community to come to the rescue of persecuted peoples, if necessary, with the force of arms.¹ It is particularly hard to decide, however, how many casualties international forces are willing to "accept" as a consequence of their involvement; whether or not civilian monitors could make a difference and still operate in relatively safe conditions; and when to make an assessment that conditions are safe for refugees and displaced persons to return to their homes. Even designing an acceptable "exit strategy" in the words of Secretary of State Colin Powell, involves complex predictions about the behavior of rational and irrational actors. Unfortunately, while we calculate all these costs to our spirit of solidarity, thousands of lives are being lost.

The international community has also devised tools other than armed intervention and sanctions to deal with threats to the peace and security of humankind. Special tribunals have been

1. See generally LE DEVOIR D'INGÉRENCE (Mario Bettati & Bernard Kouchner eds., 1987); MARIO BETTATI, LE DROIT D'INGÉRENCE: MUTATION DE L'ORDRE INTERNATIONAL (1996).

formed to ensure that genocide, war crimes, and crimes against humanity do not go unpunished. The hope is that they will not only impose proper punishment on individual perpetrators of these crimes but that—by showing that impunity will not be allowed to reign—they will deter others from committing similar acts in the future. The United States enthusiastically supported the *ad hoc* tribunals set up for the Former Yugoslavia and for Rwanda, and was instrumental in propping them up when the political will to support them seemed to wane. The United States also champions similar solutions for Cambodia, East Timor, and Sierra Leone. Unfortunately, the United States is also one of the prime opponents to the creation of a permanent International Criminal Court as envisioned in the Rome Statute of July 17, 1998, which all of the allies of the United States heartily support.

This quest for justice has also resulted in the sudden practicality of an old notion: *universal jurisdiction* for genocide, war crimes, and crimes against humanity. The courts of democratic nations are thereby opened to apply criminal law and procedure to offenses committed in territories other than their own, by and against citizens of other countries. The eighteen-month detention in the United Kingdom of General Augusto Pinochet of Chile, pursuant to a warrant issued by a Spanish judge, has given rise to similar attempts to prosecute international outlaws when the courts of the countries they once ruled have proven themselves unwilling or unable to provide redress to the victims.

Justice making may sound less troublesome than the other solutions, at least from the perspective of ethical considerations. If that were so, it should be easy for the United States to support the creation of a permanent International Criminal Court. Unfortunately, the State Department, the Pentagon, and even the Justice Department have so far bought into a traditional isolationist distrust of international courts, withholding support on the grounds that such a Court would expose American servicemen to rogue prosecutors and politically motivated trials. This position has little merit, and it is certainly not based on ethical considerations; yet, so far it carries the day in the U.S. position regarding the Rome Statute.

From different quarters, critiques have been leveled at the insistence on trials for the perpetrators of abuse, on the grounds that these measures make peace more difficult by providing a disincentive to tyrants to surrender power or to lawless rebels to enter into peace agreements. It may be true that some perpetrators will never leave their positions of power unless they are assured impunity for their crimes. In that case, an ethical issue is certainly present. Will our insistence on justice for recent abuses

result in *new* human rights violations? Jose Zalaquett, of Chile, has argued that an ethics of responsibility (a concept he borrows from Max Weber) should guide each society in determining how far to go in pursuing justice for the crimes of the recent past.² Ethics of responsibility, however, should not be confused with pandering to the blackmail of criminals who are, in essence, threatening with more immoral acts unless we forgive them for the immoral acts they have already committed.

For all of the unanswered (perhaps unanswerable) questions posed above, this issue of the *Journal of Law, Ethics and Public Policy* is particularly timely. Since these complex problems do not lend themselves to clear-cut solutions, it is probably useless to try to come up with over-arching principles to apply to them on a one-size-fits-all basis. The complexity of the problems should not lead to neo-isolationist attitudes because great powers cannot shirk their responsibility for leadership. On the other hand, they should neither lead us to knee-jerk reactions to intervene with blunt instruments in any and every trouble spot in the world. Instead, they should prompt us to a rigorous, disciplined examination of the rich experiences of the past decade, including a dissection of the policy prescriptions applied in each place and their results. Failures (like Somalia, Rwanda, Sierra Leone, and Haiti) should elicit from us an even closer look. But we should also realize there have been successes in which the international community can rightfully take pride (El Salvador, Guatemala, South Africa and lately East Timor) even if the credit goes first and foremost to local democratic actors, human rights monitors, and peace activists.

This issue includes an interesting blend of country- and theme-specific analysis, and for that reason it is an important contribution towards the detailed examination that we have just advocated. For example, the relationship between environmental degradation, resource allocation, and the genesis of violence, studied by Professor Vayrynen, has not in the past received the attention it deserves. Paternal kidnapping, the subject treated by Susan Kreston, and international adoption, covered by Bridget Hubing, are fast becoming "new horizons" of the international human rights movement, as the latter focuses its attention on the rights of children. Babafemi Akinrinade and Tae-Ung Baik explore the value of international humanitarian law as a normative tool to deal with war crimes as offenses to our collective con-

2. See generally José Zalaquett, *Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations*, 43 HASTINGS L.J. 1425 (1992).

science, and they do so in two of the most difficult test cases: that of the conflict in Sierra Leone and during the Korean War, respectively. A country-specific focus is also to be found in Kathleen Lundy's treatment of the search for peace in Northern Ireland, a matter in which the United States has taken on particular responsibilities. Mel Gurtov and Ellen Mekjavich offer guidelines for intervention in humanitarian crises and for preventing future crises. Closer to U.S. law and policy, Karen Musalo, Lauren Gibson, Stephen Knight, and J. Edward Taylor examine the application of one of the most controversial aspects of this country's immigration policy: the expedited removal procedures enacted in 1996; and Emily Nyen Chang pays attention to what has become a glaring oversight: how deployment of U.S. troops abroad encourages a sex industry and its effect on women.

We hope that this issue of the *Journal* will encourage scholarly debate about these pressing issues. More importantly, we hope that it will signal the importance of treating ethical concerns involved in international security matters with the seriousness they deserve. If so, we will witness a time in which decisions concerning international security can be reached with more creative, more humane solutions than has been the case so far.