

STATE ACTORS, HUMANITARIAN INTERVENTION AND INTERNATIONAL LAW: REOPENING PANDORA'S BOX*

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INTRODUCTION

Despite the comfortable notion that modern man has attained a certain degree of civilization, recent history continues to furnish frequent examples of man's inhumanity to his fellow man. International lawyers have responded to this tragic inconsistency between "civilization" and the deeds of "civilized" men by reconsidering the classic customary law doctrine(s) of humanitarian intervention with a view to legitimating intervention by state actors in the territory of other states wherein gross violations of human rights are seen to occur. Such a reconsideration of a body of law which antedates the Charter of the United Nations and, as will be demonstrated, conflicts with it, makes apparent not only a deep concern for human rights values but also chronic frustration created by the self-enforcing character of international legal norms, a situation dictated by a world order firmly rooted in the nation-state paradigm.

This article is an examination of the current legal validity of the case for humanitarian intervention, in the context of international law as presently constituted under the Charter of the United Nations and as exemplified by the practice of states invoking the doctrine in one form or another. Early in the analysis some attention is paid to the genesis of the competing legal norms involved and concluding arguments are offered by way of both empirical observation and normative assessment of the problems thus raised.

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I. HUMANITARIAN INTERVENTION: DEFINITION AND HISTORICAL ANTECEDENTS

The term intervention, both in a general sense and in the more particular sense contemplated here, only has meaning in the context of relations between states. In this context, the starting point for an analysis of intervention by states in the affairs of other states is an appreciation of the doctrine of nonintervention,¹ a notion basic to the fundamental principle of the sovereign equality of states.²

The importance of this symbiotic relationship cannot be over-emphasized. Professor Falk has reiterated that "[n]onintervention is a doctrinal mechanism to express the outer limits of permissible influence that one State may exert upon another . . ."³ but it appears equally clear that the doctrine of nonintervention and the notion of state sovereignty are but two branches of the same tree. Under the contemporary international law of the United Nations, it may be said that this doctrine is functionally equivalent to the principle of domestic jurisdiction contained in Article 2, paragraph 7 of the Charter.⁴

¹ Some confusion arises as to whether the doctrine of nonintervention exists subject to certain exceptions where intervention may be justified, *inter alia*, on humanitarian grounds, or whether the exceptions themselves explain the scope of the doctrine. The Thomases have pointedly observed that ". . . the majority of publicists do not refer to non-intervention, the negative form, but discuss the doctrine of intervention and its juridical or political nature—admitting, however, that non-intervention is the rule by which states should conduct themselves, but stating that intervention is the exception. Non-intervention, then, is a restriction or limitation on intervention; and actually the interest in non-intervention arises from or has as its source those interventions which are carried on by states against other states in practice, and which either openly violate the rule of non-intervention or, according to some publicists, are legal or justifiable interventions—hence exceptions to the rule of non-intervention." A. THOMAS and A.J. THOMAS, JR., *NON-INTERVENTION: THE LAW AND ITS IMPORT IN THE AMERICAS* 67 (1956) [hereinafter cited as *NON-INTERVENTION*]. These observations have been subsequently borne out in the reverse approach taken by R. VINCENT, *NONINTERVENTION AND INTERNATIONAL ORDER* 3-16 (1974).

² "The rule of nonintervention can be said to derive from and require respect for the principle of state sovereignty.

Sovereignty can be a statement expressing the idea that 'there is a final and absolute political authority in the political community' and that '*no final and absolute authority exists elsewhere*.' Where such final and absolute authorities are collected together in international society, it can be said that the recognition by each of them of the other's authority within their own domains—recognition of a principle of state sovereignty—is fundamental to their coexistence." VINCENT, *supra* note 1 at 14, citing F. HINSLEY, *SOVEREIGNTY* 26 (1966).

³ "This is a fundamental conception in a *decentralized* legal order in which outer limits cannot be adjusted by central impartial institutions." Falk, *The United States and the Doctrine of Nonintervention in the Internal Affairs of Independent States*, 5 *HOW. L.J.* 163, 165 (1959) (original italics); R. FALK, *LEGAL ORDER IN A VIOLENT WORLD* 159 (1968).

⁴ "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 . . ."

Prior to the era of the Charter of the United Nations, the Permanent Court of International Justice had neatly summarized the essential thrust of the foregoing discussion.

Now the first and foremost restriction imposed by international law on a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.⁵

Thus, any theory of humanitarian intervention must offer a legitimate exception from this stated norm in contemporary international law.

Humanitarian intervention is a particular species of an exception to a rule; it is possible to look further into the character of the particular exception relevant to the present inquiry, in order to appropriately narrow its scope. Intervention by one state in the affairs of another state can and does take many forms—military, economic, diplomatic, social and cultural—but it is intervention in the strongest form (short of war),⁶ meaning “dictatorial interference in the sense of action amounting to a denial of the independence of the State,”⁷ which has dominated analyses of the legitimacy of humanitarian intervention both under general international law and especially in the post-1945 era of the Charter of the United Nations. Thus, the application of the use or threat of force by one state in the territory of another state has become basic to the analysis of the subject of humanitarian intervention. That assumption is reflected in the analysis presented in this article.⁸

the sole exception being collective action pursuant to Chapter VII of the Charter. The observation is Falk's, *supra* note 3, 5 How. L.J. 163, 165 (1959).

⁵ The S.S. *Lotus* (1927) P.C.I.J. ser. A, No. 9, 18-19.

⁶ “The nonintervention principle (and its concomitant exceptions) applied in the regime of peace. In the regime of war the law made no such demand of states, seeking to regulate only the conduct of war and not its incidence . . .” VINCENT, *supra* note 1, at 293; *see also* THOMAS AND THOMAS, *NON-INTERVENTION*, *supra* note 1, at 73.

⁷ L. OPPENHEIM, *INTERNATIONAL LAW*, § 134, at 305 (8th ed. 1955), H. LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* 167 (1950); *applied by* Lillich, *Forcible Self-Help by States to Protect Human Rights*, 53 *IOWA L. REV.* 325, 330 (1967). *See also* H. KELSEN, *PRINCIPLES OF INTERNATIONAL LAW* 64 (1952), quote continues as “for the right to undertake war remained a sovereign prerogative.” THOMAS AND THOMAS, *NON-INTERVENTION*, *supra* note 1, at 68. Such definitional terminology as “dictatorial interference” and “coercive” (*id.* at 72) in itself creates further definitional problems. *See* VINCENT, *supra* note 1, at 7-8. Nevertheless, it serves well enough to demonstrate the basic form of state-action herein considered.

⁸ “The essence of intervention is force, or the threat of force, in case the dictates of intervening power are disregarded . . . There can be no intervention without on the one hand,

It may now be stated that, for the purpose of this discussion, "[humanitarian] intervention occurs when a state or group of states interferes, [by the use of force] in order to impose its will, in the internal or external affairs of another state, sovereign and independent, with which peaceful relations exist and without its consent, for the purpose of maintaining or altering the conditions of things [when the intervening state finds that the condition or its removal is contrary to the laws of humanity]."⁹ Since this postulate clearly contravenes the fundamental principle of state sovereignty, the definition must presuppose the exhaustion of available alternatives. Thus, it conforms to the principle that special circumstances "legitimate" the normally illegitimate.¹⁰

Traditional international law distinguishes between two categories of intervention related to humanitarian considerations: the protection of nationals and their property abroad by the intervening state; and humanitarian intervention per se, where the basis for intervention is not the link of nationality between the persons sought to be protected and the intervening state, but the protection of individuals or groups of individuals from their own state or within the territory of a state where the governing authority permits gross abuses of human rights or itself maltreats its subjects in a manner which shocks the conscience of mankind.¹¹

the presence of force, naked or veiled, and on the other hand, the absence of consent on the part of the combatants." T. LAWRENCE, PRINCIPLES OF INTERNATIONAL LAW 124 (5th ed. 1913); Kelsen elaborates the notion of "dictatorial" to imply the threat or use of force, *supra* note 7, at 64; The Thomases, while acceding to the basic point, remonstrate that "the type of constraint or compulsion used by the intervening state is of little importance. The important point to be considered is whether constraint or threat thereof was used, whether by armed force or by diplomacy, whether concealed or open, whether direct or indirect. Therefore, interference to be intervention must constitute compulsion or threat thereof. And 'threat' is to be understood to mean that there is a direct or indirect request by one state that another do or refrain from doing something upon pain of compulsion." NON-INTERVENTION, *supra* note 1, at 69. More recently, Professor Thomas Franck has offered the following definition: "The theory of intervention on the ground of humanity is properly that which recognizes the right of one state to exercise an international control *by military force* over the acts of another in regard to its internal sovereignty when contrary to the laws of humanity." Franck and Rodley, *After Bangla Desh: The Law of Humanitarian Intervention By Military Force*, 67 A.J.I.L. 275, 277 n. 12 (1973). That definition has been adopted from Rougier, *La Theorie de l'Intervention d'Humanite*, 17 REV. GEN. DU DROIT INTL 468 (1910). Although it is admitted that coercion may take various forms, the use of force or threat thereof remains conspicuous in the practice of states wherever and whenever humanitarian intervention has been invoked.

⁹ This definition of humanitarian intervention is adapted from THOMAS AND THOMAS, who similarly defined intervention generally in NON-INTERVENTION, *supra* note 1, at 71.

¹⁰ *Id.* at 78.

¹¹ Cf. OPPENHEIM, *supra* note 7, at 312. "But there is a substantial body of opinion and of practice in support of the view 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

Both species of intervention evolved from Western European concepts developed during the nineteenth century. The legal impetus for protecting nationals abroad was prompted by the desire of "civilized" nations to guarantee certain minimum standards with regard to life, liberty and property to their citizens wherever they might be found and by whatever means necessary for the task.¹² The implied corollary was that nations professing such minimum standards had the power requisite for their enforcement against and within the territory of allegedly less civilized neighbours.¹³ Hence, it has been asserted accurately that the legal justification for the protection of nationals abroad was a direct product of nineteenth century imperialism¹⁴ and the practical exigencies of subjugating far away lands.

It is only fair to recognize that, since imperialism is a pejorative word to modern ears, the origins of the legal framework for the protection of nationals should be distinguished from its normative value once established.¹⁵ However, it must also be admitted that the genesis of legality for a particular rule of conduct—especially a permissive rule in derogation of a more pervasive legal norm—is attributable to and, at least to some extent, dependent upon the particular world view existing at the time of its incorporation into the international legal system. It follows that the validity of the rule need not be sustained necessarily by succeeding world views

and to shock the conscience of mankind, intervention in the interest of humanity is legally permissible."

¹² The means ranged from mere diplomatic protest to the use of military force. See E. BORCHARD, *THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD* 448-451 (1915); OPPENHEIM, *supra* note 7, at 309.

¹³ "The protection of citizens in a foreign country naturally involves the establishment and enforcement of some degree of law and order in that community. When order is neglected, or is impossible for the foreign government, then the more advanced state has a right to intervene for the protection of the life and property of its citizens." H. HODGES, *THE DOCTRINE OF INTERVENTION* 58-59 (1915).

¹⁴ The point is made rather strongly by Professor Falk, who refers to the "colonial system of domination and exploitation" in *Historical Tendencies, Modernizing and Revolutionary Nations and the International Legal Order*, 8 *How. L.J.* 128, 135-136 (1962). Moreover, "a striking degree of correspondence between the economic or political interests of certain large countries and the course of action followed by their governments on questions of protection can scarcely be denied" thus fitting the "imperialist" hypothesis. F. DUNN, *THE PROTECTION OF NATIONALS* 22-24 (1932).

¹⁵ Professor Lillich argues that "[w]hile it is true that 'the ideas of justice and fair dealing incorporated in the accepted norms of conduct for European nations were carried over into the wider sphere of the international society of the nineteenth century,' there is no need to apologize for attempting to establish a universal consensus behind justice and fair dealing." *Self-Help*, *supra* note 7, at 327-28; but see Franck and Rodley, *After Bangla Desh*, *supra* note 8, at 277, who are of the opinion that "[t]here are few more reactionary ideas ever to have sought the imprimatur of 'international law.'"

subject to shifts in power in the relations between states, although that might be the case.¹⁶

Initially, the right to intervene for the protection of nationals was accepted without question—at least by those states inclined to exercise it. This principle of “forcible self-help” was upheld almost without qualification by international treaty in the second Hague Convention of 1907,¹⁷ and it was distinguished from the concept of intervention *per se*, which was somehow limited to “only those forceful coercive measures designed to maintain or alter the political situation in another state.”¹⁸ Therefore, since the focus of intervention had nothing to do with the political independence of the target state, but instead involved the lives and property of nationals within its territory, it was argued that self-help in such a context was not intervention but “non-belligerent interposition.”¹⁹ In any event, the practical result of applying this principle was the paradox that “the individual in his capacity as an alien enjoys a larger measure of protection by international law than in his character as the citizen of his own State.”²⁰

Humanitarian intervention, on the other hand, was justified by its nineteenth century as well as subsequent proponents as “an instance of intervention for the purpose of vindicating the law of nations against outrage”²¹ without regard to the nationality of the

¹⁶ The breakdown of imperialism in all its forms, the passing of colonialism and the emergence of the so-called Third World as a new locus of political power exemplifies a radically altered world view since 1945. In respect of this phenomenon, Professor Falk has remarked that “[t]he use of diplomatic protection as a means to impose the external will of richer and more powerful nations inspired a hostile reaction on the part of capital-importing nations that were often the victims of such conduct. Non-colonial forms of imperialism relied rather heavily upon rules of international law to retain economic dominance, especially the rules and practices that allowed a nation to protect its nationals. . . . These rules were satisfactory so long as the capital-exporting nations possessed control over the character of international relations. However, it is obvious that insofar as international law developed to promote the interests of capital-exporting nations, it will not serve the interests of a world community where capital export is no longer coincident with political power.” Falk, *supra* note 14, at 133.

¹⁷ Convention for the Pacific Settlement of International Disputes, 18 October 1907, 100 BRITISH AND FOREIGN STATE PAPERS 298. The sole exception to application of the principle of forcible self-help was in respect of the recovery of contract debts. Convention respecting the Limitation of the Employment of Force for the Recovery of Contract Debts, 18 October 1907, 100 BRITISH AND FOREIGN STATE PAPERS 314.

¹⁸ Lillich, *Self-Help*, *supra* note 7, at 330.

¹⁹ BORCHARD, *supra* note 12, at 448; *see also* C. HYDE, INTERNATIONAL LAW 246 (2d ed. 1951).

²⁰ LAUTERPAUCHT, *supra* note 7, at 121.

²¹ “For it is a basic principle of every human society and the law which governs it that no member may persist in conduct which is considered to violate the universally recognized

victims of such vile behavior. In essence, the doctrine hinged on the concept of a threshold or minimum standard for the treatment of individuals within a state and for which the state was held responsible. Where the standard was violated it constituted an abuse of the sovereign rights of the offending state,²² and authorized intervention on grounds of humanity by other members of the international community. Hence, these basic considerations motivated jurists including Grotius, Wheaton, Heiberg, Woolsey, Bluntschli and Westlake to document the legality of such a concept.²³

The practice of states invoking human rights justifications antecedent to or in the wake of violations of neighbouring sovereignties is better understood in light of the foregoing distinction. This observation applies to precedents both prior and subsequent to the promulgation of the United Nations Charter in 1945, since the traditional categories of humanitarian intervention have been typically employed either in conjunction with or in contradistinction to principles set forth in the Charter.²⁴ However, with respect to the use of force by states for humanitarian ends, it is submitted that the utility of the two-fold classification of customary international law collapses for the purpose of assessing the legal propriety of humanitarian intervention in the post-1945 era entered at the conclusion of the San Francisco Conference.²⁵ With the possible exception of analogies to the inherent right of self-defense enshrined in Article 51 of the Charter,²⁶ it would appear that the identity of nationality between the objects of intervention (those persons who are threatened) and the intervening state sheds little light on the legitimacy of the use of force by one state in the territory of another state where the latter is subject to the prevailing norms exemplified by paragraphs 4 and 7 contained in Article 2 of the Charter.²⁷ Consequently, a consideration

principles of decency and humanity." E. STOWELL, *INTERVENTION IN INTERNATIONAL LAW* 51-52 (1921); LAUTERPACHT, *supra* note 7, at 32; OPPENHEIM, *supra* note 7, at 312.

²² THOMAS AND THOMAS, *NON-INTERVENTION*, *supra* note 1, at 77-78.

²³ Discussed in STOWELL, *supra* note 21, at 55-62. The determination of legality turned on "draw[ing] the line between the due exercise of sovereignty which the law of nations recognizes and the abusive insistence upon independent action without consideration of the equally important rights of other states and the interests of the commonweal." *Id.* at 455.

²⁴ See notes 28-38 and text *infra*.

²⁵ See generally UNITED NATIONS, *DOCUMENTS OF THE UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION*, in 22 vols. (New York, 1946) [hereinafter cited as U.N.C.I.O.].

²⁶ See D. BOWETT, *SELF-DEFENSE IN INTERNATIONAL LAW* 91-105 (1958).

²⁷ Although, as a practical matter, given the primacy of national interests and obligations as distinguished from the perhaps desirable though politically hazardous motivations of global "good Samaritans," this identity is usually present—at least in some degree—to war-

of the status ascribed to principles governing the use of force by states under the Charter will be most helpful in advance of examining the practice of states in the specific context of humanitarian intervention.

II. THE USE OF FORCE BY STATES UNDER THE UNITED NATIONS CHARTER

Article 1 of the United Nations Charter stated unequivocally the primary purpose of the new international organization: "[t]o maintain international peace and security . . ." ²⁸ The Charter confirmed the collective view of the international community that the use of force was no longer an acceptable or tolerable alternative for the redress of grievances between sovereign states. Article 2, paragraph 4 states that "[a]ll members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state"

The basic principle contained in Article 2, paragraph 4 illustrated a new and formidable emphasis on the sovereign equality of states within the community of nations. ²⁹ Paragraph 7 of Article 2 created a haven for sovereign prerogatives whereby "[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state," reserving *only* to the United Nations Organization the caveat that "this principle shall not prejudice the application of enforcement measures under Chapter VII." ³⁰

rant invocation of a right to intervene on grounds of humanity in the territory of another state.

²⁸ "[B]y the taking of effective collective measures to prevent or remove 'threats to the peace' and to suppress 'acts of aggression or other breaches of the peace.' It has been pointed out that the insertion of the words 'in conformity with the principles of justice and international law' encourages the claim that, unless law and justice are served, recourse to force may not be justified." L. GOODRICH, E. HAMBRO AND A. SIMONS, CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS 45 (3d rev. ed. 1969) [hereinafter cited as GOODRICH]. However, it should be noted that such a claim would apply only to the United Nations Organization (*i.e.*, the Security Council acting pursuant to the authority conferred under Chapter VII of the Charter) and not to independent state actors.

²⁹ The major powers agreed to the inclusion of the phrase "against the territorial integrity or political independence of any state" chiefly "in response to the demand of the smaller states that there should be some assurance that force would not be used by the more powerful states at the expense of the weaker ones." GOODRICH, *id.* at 43; *see* 6 U.N.C.I.O. 342-46 (1946). For texts of proposals by Honduras, Brazil, Columbia and Australia underscoring the necessity for such a guarantee, *see* 3 U.N.C.I.O. 233, 246, 349, 543, 587 (1946).

³⁰ The principle of "domestic jurisdiction" has constituted a perennial challenge to the competence of the United Nations to intervene in the affairs of states in pursuit of achiev-

The abandonment of the use of force by states as a legally sanctioned political tool in all cases, except those covered by the express reservation of "the inherent right of individual or collective self-defense" set forth in Article 51 of the Charter,³² signified a final renunciation by the members of the United Nations of the classical dichotomy in customary international law between the laws of *peace* and *war*. This departure was the culmination of considerable effort by leading state actors begun at the conclusion of the First World War. Thus, Article 2, paragraph 4 was a key aspect of the international community's response to what was deficient in Article 10 of the Covenant of the League of Nations,³³ and in the abortive efforts to stave off the spectre of new world conflict exemplified by the Treaty of Locarno³⁴ and the Peace Pact of Paris.³⁵

The drafters of the Charter squarely met the challenge of providing a more comprehensive restraining rule than the mere prohibition of a "resort to war," which was the approach taken in

ing greater respect for human rights. See Preuss, *Article 2, Paragraph 7 of the Charter of the United Nations and Matters of Domestic Jurisdiction*, 74 RECUEIL DES COURS 553 (1949-I). While it has been argued that the General Assembly "only has competence to promote voluntary cooperation between members" in pursuit of the goals set forth in Articles 55 and 56 of the Charter, that organ "has not accepted this claim and has acted on the premise that it does have competence to deal with such situations on the ground that Charter provisions dealing with human rights are being violated." GOODRICH, *supra* note 28, at 71; see his commentary on Articles 55 and 56, *id.* at 371-82; R. HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* 118-30 (1963). Moreover, see Article 2, paragraph 7, "the United Nations definitely has the legal right to use force for humanitarian purposes if the state violating basic human rights causes an actual threat to the peace." Lillich, *Intervention to Protect Human Rights*, 15 MCGILL L.J. 205, 212 (1969), citing McDougal and Bebr, *Human Rights in the United Nations*, 58 A.J.I.L. 603, 612 (1964); THOMAS & THOMAS, *NON-INTERVENTION*, *supra* note 1, at 384; see generally Gilmour, *The Meaning of 'Intervene' Within Article 2(7) of the United Nations Charter—An Historical Perspective*, 16 INT'L AND COMP. L.Q. 330 (1967).

³¹ For succinct summaries of the classical position, see BOWETT, *supra* note 26, at 117-20; I. BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 1-40 (1963); M. McDOUGAL & F. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER* 131-38 (1961).

³² See commentary of GOODRICH, *supra* note 28, at 342-53; BOWETT, *supra* note 31, at 9-12.

³³ The High Contracting Parties "undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League" and "not to resort to war" (Articles 10 and 11), the unauthorized act of which constituted "an act of war against all other Members of the League . . ." (Article 16). See generally A. ZIMMERN, *THE LEAGUE OF NATIONS AND THE RULE OF LAW, 1918-1935* (1936), F. WALTERS, *A HISTORY OF THE LEAGUE OF NATIONS* (1952).

³⁴ Treaty of Mutual Guarantee, done 16 October 1925, 54 L.N.T.S. 289.

³⁵ General Treaty For Renunciation of War as an Instrument of National Policy, done 27 August 1928, 94 L.N.T.S. 57, also known as the Kellogg-Briand Pact after its chief instigators, U.S. Secretary of State Kellogg and the French Foreign Minister Aristide Briand; see generally H. MILLER, *THE PEACE PACT OF PARIS* (1928).

the League Covenant and its inter-war progeny.³⁶ Subsequently, the practice of the United Nations, which represents an increasingly larger world family,³⁷ has reaffirmed the fundamental principle enunciated by the words contained in paragraph 4 of Article 2. Moreover, the scope and validity of the principle promptly received the imprimatur of the International Court of Justice.³⁸ While a detailed examination of these elements is beyond the scope of this inquiry, the following brief discussion of some of the highlights bears directly on the conclusions to be drawn from the study as a whole and the central argument advanced in this article.

A. The Quest For A Constraining Definitional Framework

A basic goal which had to be met in order to regulate the use of force by states was the achievement of a definition for its use sufficiently broad to preclude all uses culpable as acts of aggression by a state or group of states against another and, therefore, contrary to general principles of international law. The search for a definition of aggression began in earnest following the establishment of the League of Nations³⁹ and was imbued with

³⁶ Article 2 of the Locarno Treaty, *supra* note 34, provided for the parties' mutual undertaking "that they will in no case attack or invade each other or resort to war against each other," except in "the exercise of the right of legitimate defense," or by action pursuant to Article 16 of the Covenant, (or) action taken as a result of a collective decision of either the Council or the Assembly of the League. Article 1 of the Paris Treaty, *supra* note 35, pledged the parties to "condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another." On the Covenant provisions *see* note 34 *supra*.

³⁷ Membership in the General Assembly of the United Nations has increased from 55 nations in July of 1947, 1 U.N.Y.B. 1946-47 863-64 (1947) compared with 144 members as of 31 December 1975, 29 U.N.Y.B. 1975 1095 (1978).

³⁸ Corfu Channel Case [1950] I.C.J. REP. 4.

³⁹ In 1923, the Third Committee of the League Assembly submitted a Draft Treaty of Mutual Assistance, rejecting formal criteria defining aggression in favour of a system of *ad hoc* determinations on the basis of proposed guidelines including assessment of the attitude of the possible aggressor, propaganda and media coverage, L.N.O.J. Spec. Supp. No. 16, Annex 10, Pt. 1, at 203-09 (1923); *see also* the Draft Geneva Protocol initially adopted but later dropped by the League Assembly, where aggression was defined as a resort to war "in violation of the undertakings contained in the Covenant or in the present Protocol." L.N.O.J. Spec. Supp. No. 24, Annex 18, at 136-40 (1934); the Convention for the Definition of Aggression, *done* 5 July 1933, 147 L.N.T.S. 67 (1934); a pact between the Soviet Union, Estonia, Latvia, Persia, Poland, Roumania and Turkey, which termed any state an aggressor who, according to Article 2 of the Treaty: (1) declared war on another state; (2) invaded the territory of another state by force of arms; (3) attacked the territory, vessels or aircraft of another state; (4) instituted a naval blockade; or (5) supported armed bands within the territory of another state. *See generally* Wright, *The Concept of Aggression in International Law*, 29 A.J.I.L. 514, 520 (1956); J. STONE, *AGGRESSION AND WORLD ORDER* 27-40 (1958); Brownlie, *supra* note 30, at 352-358.

the same spirit which characterized the pursuit of the "renunciation of war as an instrument of national policy." Unfortunately, these early efforts were equally fruitless.

In the aftermath of the Charter, however, a succession of protracted negotiations⁴⁰ finally yielded the comprehensive definition of aggression set forth in Resolution 3314 (XXIX) of the General Assembly.⁴¹ Taking note of the report of the Special Committee on the Question of Defining Aggression⁴² and the resulting draft, adopted by consensus therein, and invoking the Charter and the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States,⁴³ the General Assembly adopted the recommended definition of aggression in Article 1.⁴⁴ The Article states that

[a]ggression is the use of *armed force* by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition.⁴⁵

Article 2 went on to point out that "[t]he first use of armed force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression," although the article also provided that the Security Council may, "in conformity with the Charter," conclude otherwise "in the light of other relevant circumstances."

The drafters in the Special Committee saw fit to enumerate six specific acts of aggression in Article 3 of the Definition, but for present purposes it is sufficient to note that "[t]he invasion or *attack* by the armed forces of a State of the territory of another State, or *any military occupation, however temporary*, resulting from such invasion or attack" qualifies as an act of aggression "subject to and in accordance with the provisions of article 2."⁴⁶

Article 4 contains the further precaution that "[t]he acts

⁴⁰ See Ferencz, *Defining Aggression: Where It Stands and Where It's Going*, 66 A.J.I.L. 491 (1972); and his *Defining Aggression—The Last Mile*, 12 COLUM. J. TRANSNAT'L L. 430 (1973).

⁴¹ G.A. Res. 3314, 29 U.N. GAOR, Supp. (No. 19), U.N. Doc. A/9615 (1974), reprinted in 69 A.J.I.L. 480 (1975).

⁴² 29 U.N. GAOR, Supp. (No. 19), U.N. Doc. A/9619 & Corr. I (1974). See also Badr, *The Exculpatory Effect of Self-Defense in State Responsibility*, 10 GA. J. INT'L AND COMP. L. 1, 18 nn. 52-62 (1980).

⁴³ See note 64 *infra*.

⁴⁴ Without vote at the 2319th plenary meeting, December 14, 1974; 69 A.J.I.L. 480 (1975).

⁴⁵ *Id.*, (emphasis added).

⁴⁶ *Id.*, (emphasis added).

enumerated above [in Article 3] are not exhaustive"⁴⁷ leaving scope for the Security Council to "determine that other acts constitute aggression under the provisions of the Charter."

And finally, Article 5, the last substantive section of the Definition, declares that

1. *No consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression.*
2. A war of aggression is a crime against international peace. Aggression gives rise to international responsibility.
3. No territorial acquisition or special advantage resulting from aggression is or shall be recognized as lawful.⁴⁸

Taken as a whole, The Definition of Aggression imports a clear restatement of the principle originally contained in Article 2, paragraph 4; indeed, the wording of Article 1 in the Definition is similar to that of the Charter. Further, it may be observed that this recent reaffirmation by the international community renders the principle even more basic to accepted state practice in that it asserts the identity between the use of force *per se*, except where it accords strictly with the provisions of the Charter,⁴⁹ and the pejorative concept of aggression for which "[n]o consideration of whatever nature . . . may serve as a justification"⁵⁰

B. Elaboration of the Rule Constraining The Use of Force By States

In 1949, the International Court of Justice was required to examine the onus created by Article 2, paragraph 4, when Albania challenged the legal propriety of a British minesweeping operation in Albanian territorial waters following the misfortune of certain of His Majesty's ships exercising the right of "innocent passage" in the Corfu Channel.⁵¹ The Court found Albania internationally responsible for the presence of the minefield and for damages to British lives and property and while the Court found

⁴⁷ *Id.*

⁴⁸ *Id.*, (emphasis added).

⁴⁹ Article 6 provides that the Definition is not to be construed as "in any way enlarging or diminishing the scope of the Charter" which would appear to oppose an interpretation extending the principle contained in Article 2, paragraph 4. Similarly, Article 7 states that the Definition does not abridge the "right to self-determination, freedom and independence, *as derived from the Charter*" (emphasis added), a provision clearly aimed at "colonial and racist regimes."

⁵⁰ G.A. Res. 3314 (XXIX), Definition of Aggression, Article 5, paragraph 1, *reprinted in* 69 A.J.I.L. 480, 482 (1975).

⁵¹ Corfu Channel Case [1949] I.C.J. REP. 4.

no violation of Albanian sovereignty in the initial passage of British ships, it was unanimous in condemning "Operation Retail," which followed not long after the ensuing damage to the convoy occurred.⁵²

With respect to the aforementioned British action, the International Court rejected the two-fold defense of the United Kingdom Government in passages which are now classic expositions of the rule in question. In answer to the assertion of "a new and special application of the theory of intervention by means of which the State intervening would secure possession of evidence in the territory of another State," the Court replied that it

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 such as cannot, whatever be the present defects in international organization, find a place in international law. Intervention is perhaps still less admissible in the particular form it would take here; for, from the nature of things, it would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself.⁵³

Further, in response to the plea of classifying "Operation Retail" as an acceptable form of self-protection or self-help, the Court reiterated that as

[b]etween independent States, respect for territorial sovereignty is an essential foundation of international relations. The Court recognizes the Albanian Government's complete failure to carry out its duties . . . are extenuating circumstances for the action of the United Kingdom Government. But to ensure respect for international law, of which it is the organ, the Court must declare that the action of the British Navy constituted a violation of Albanian sovereignty.⁵⁴

It has been argued cogently that the last statement quoted "is not free from the doubt that acts of self-help not manifested as 'a policy of force' may still be allowed by international law."⁵⁵

⁵² *Id.* The Court split on the issue of Albania's responsibility, 11 votes for to 5 against; the question of damages was reserved (10 votes to 6); and on the issue of innocent passage 14 votes to 2 against, in favour of no violation of Albanian sovereignty.

⁵³ [1949] I.C.J. REP. 4, at 35.

⁵⁴ *Id.* at 35.

⁵⁵ "The activities of the Royal Navy in the Corfu Channel were not immediately necessary for the protection of British subjects and their property . . ." D. O'CONNELL, IN-

Similarly, two arguments have been framed, in the context of the protection of aliens abroad, urging that such actions are not covered by the principle confirmed by the International Court.

The first argument equates the protection of nationals to the defense of the state. Such a view entertains a contractual theory, namely, that the state exists primarily "for the protection and promotion of the rights of the citizens, the individuals who comprise it."⁶⁶ The second argument proceeds upon the functional basis for distinguishing the protection of nationals, *i.e.*, rescue, from the (intended) infringement of the "territorial integrity or political independence" of the target state.⁶⁷

Proponents of the second form of argument see little to recommend an unambiguous analogy to "defense of the State." Dr. Bowett emphasizes that there is no *ipso facto* correlation between fundamental national interests and the interests of nationals abroad. "In practice it cannot be said that a threat to the safety of nationals abroad constitutes a threat to the security of the state."⁶⁸ Professor Lillich, on the other hand, voices criticisms more directly concerned with the attainment of enforceable human rights norms. "First, it would permit forcible self-help only where nationals of the acting state were the objects of protection: humanitarian intervention in its full scope would not be available under a self-defense rationale. Second, it undoubtedly would encourage the use of a greater degree of force by the acting state."⁶⁹

INTERNATIONAL LAW, Vol. I, at 327 (1965). Professor O'Connell remarks further that the effect of the judgment "was, in form at least, to deprive the United Kingdom of the free exercise of the right of innocent passage." *Id.* This latter comment appears deficient in its appreciation of the Court's separate opinion affirming the right of innocent passage (*supra* note 52) as distinguished from its assessment of the legal status of "Operation Retail."

⁶⁶ "Political theories of the social contract gave rise to the view that protection, as the duty of the state, afforded the consideration of the *pactum subjectionis*, and that protection of the nationals of the state was, in effect, protection of the state itself." D. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW 91 (1958) *citing* DUGUIT, ETUDES DE DROIT PUBLIC 288 (1901) and BLUNTSCHLI, THEORY OF THE STATE 305 (1898). Charles Fenwick offered a similar argument justifying the American intervention into the Dominican Republic in 1965, *The Dominican Republic: Intervention or Collective Self-Defense?*, 60 A.J.I.L. 64 (1966); *contra*, Bohan, *The Dominican Case: Unilateral Intervention*, 60 A.J.I.L. 809 (1966). *See generally* A. Thomas and A. J. Thomas, *The Dominican Republic Crisis, 1965*, 9 HAMMARSKJOLD FORUM 13-14 (J. Carey ed. 1967); Lillich, *supra* note 7, at 335-37.

⁶⁷ O'CONNELL, *supra* note 55, at 328; A. THOMAS AND A.J. THOMAS, *The Dominican Crisis*, *supra* note 56, at 14-15; D. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW, *supra* note 56, at 95; Lillich, *Self-Help*, *supra* note 7, at 335.

⁶⁸ BOWETT, SELF-DEFENSE, *supra* note 56, at 93.

⁶⁹ Lillich, *Self-Help*, *supra* note 7, at 337. For a discussion of self-defense by states, *see* Badr, *The Exculpatory Effect of Self-Defense in State Responsibility*, 10 GA. J. INT'L AND COMP. L. 1 (1980).

Neither of these arguments offers much in the way of legal persuasiveness, although the second proposition may be said to display a proportional, common-sense approach to situations where fundamental moral issues may be at stake⁶⁰ and thus possesses a strong intuitive appeal.⁶¹ However, the merits of such an approach furnish no adequate answer to the subsequent practice of the United Nations echoing the assessment of the International Court in *Corfu*.⁶²

The Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States adopted by the General Assembly in 1965⁶³ went beyond the prohibition against simple "armed intervention" in condemning also "all other forms of interference or attempted threats against the personality of the State." However, only the former was enumerated specifically.

More fundamental still was the catalogue of international legal norms embodied in the United Nations Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States.⁶⁴ In the Preamble to the substantive provisions of the Declaration, the General Assembly reaffirmed that "the maintenance of international peace and security" was "among the fundamental purposes of the United Nations." It stated further "that the strict observance by States of the obligation not to intervene in the affairs of any other State is an essential condition to ensure that nations live together in peace." Moreover, the Assembly considered it "essential that all States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State," in recognition of which "the progressive development and codification" of the enumerated principles in the Declaration was to be achieved.⁶⁵

⁶⁰ The celebrated "raid on Entebbe" comes immediately to mind in this respect. See note 123 *infra*, and accompanying text.

⁶¹ Such a position is exploited at some length by proponents of humanitarian intervention seeking to offer appropriate delimiting criteria. See note 148 *infra*.

⁶² See generally Higgins, *The Legal Limits to the Use of Force By Sovereign States: United Nations Practice*, 37 B.Y.I.L. 269 (1961); Fonteyne, *Forcible Self-Help By States to Protect Human Rights: Recent Views From the United Nations*, in HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 197 (R. Lillich ed. 1973).

⁶³ A/Res./2131 (XX) 20 U.N. GAOR Supp. (No. 14), U.N. Doc. A/6014 (1965).

⁶⁴ G.A. Res. 2625 (XXV) adopted without vote at the 1883d plenary meeting, 24 October 1970. *Reproduced in* 9 I.L.M. 1292 (1970).

⁶⁵ "It is noteworthy that the General Assembly declared further that the 'principles of the Charter which are embodied in this Declaration constitute basic principles of international law,' and appealed to all States, including, thus, non-members, 'to be guided by these principles in their international conduct and to develop their mutual relations on the basis

The leading principle of the Declaration constituted a classic restatement of Article 22, paragraph 4 of the Charter. It is also worth mentioning that the third principle contained in the Declaration, the "duty not to intervene," was expressly followed by the Special Committee on the Question of Defining Aggression in drafting Article 5, paragraph 1 of the Definition,⁶⁶ which was adopted by General Assembly Resolution 3314 (XXIX) in 1974.⁶⁷

Declarations such as the above "are not ordinary international treaties or conventions." Nevertheless, as Professor Louis Sohn has stated, "there is a wide consensus that these declarations actually established new rules of international law binding upon all States."⁶⁸ The proposition thus stated suggests the concept of instant customary law which is the product of an affirmative consensus of the international community arrived at in the forum of the United Nations.⁶⁹ Though perhaps not conclusive, the support generated for this idea certainly enhances its persuasive value as well as the legal weight attributable to the foregoing examples of United Nations practice.⁷⁰

C. The Need For Exceptions to the Rule in the Enforcement of Human Rights Norms

Considerable effort has been devoted to the documentation of a basic rule of international law and, more fundamentally, to both the genesis and evolution of the principle embodied by the rule. The contention so far advanced is that the rule does not admit of exceptions save those articulated in the Charter of the United Nations. Accepting the validity of this assertion, one confronts the essential dilemma posed by the need to preserve fundamental human rights in situations where especially gross violations occur but where the United Nations is unable to act or act quickly

of strict observance of these principles.'" Sohn, *The Shaping of International Law*, 8 GA. J. INT'L & COMP. L. 16 (1978).

⁶⁶ *Supra* note 42.

⁶⁷ *Supra* notes 41, 42, 44, 49, 50.

⁶⁸ Sohn, *supra* note 65, at 16.

⁶⁹ Sohn, *supra* note 65, at 17, 18. The proposition was applied to the Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, approved by G.A. Res. 1962 (XVIII) G.A.O.R. Supp. (No. 15), U.N. Doc. A/5515 (1964). See Cheng, *United Nations Resolutions on Outer Space: 'Instant' Customary Law?*, 5 INDIAN J. INT'L L. 23 (1965).

⁷⁰ Similar arguments have been made to the effect that international treaties of sufficient scope may create customary law binding on non-signatories. Baxter, *Multilateral Treaties as Evidence of Customary International Law*, 41 B.Y.I.L. 275 (1965-66); A. D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 103-66 (1971).

enough.⁷¹ The only alternative would appear to be independent state action directed on behalf of humanity. Indeed, to recall the classic passage from Jessup, "[i]t would seem that the only possible argument against the substitution of collective measures under the Security Council for individual measures by a single state would be the inability of the international organization to act with the speed requisite to preserve life."⁷²

One of the first goals of the initial participants in the United Nations experiment became the preservation of "human rights and justice" around the globe.⁷³ This intention was made explicit in the Charter of the United Nations,⁷⁴ although regrettably no corresponding effort was made to provide a mechanism for implementing these aims once they had been formulated.⁷⁵ Nonetheless, it cannot be suggested seriously in the wake of the Universal Declaration of Human Rights⁷⁶ and the more recent Covenants⁷⁷ setting forth the basic rights belonging to all individuals that there does not exist a substantial, ever expanding, international law of human rights received by and demanding the adherence of the international community.⁷⁸

The question, then, becomes whether the existence of this competing body of international law, and the concomitant moral point

⁷¹ Apparently one of the first and certainly "[t]he most difficult problem still confronting the framers of the United Nations' human rights program is that of devising effective procedures for enforcement." McDougal and Bebr, *Human Rights in the United Nations*, 58 A.J.I.L. 603, 629 (1964).

⁷² P. JESSUP, *A MODERN LAW OF NATIONS* 170 (1949).

⁷³ Declaration of the United Nations, 1 January 1942, 1 FOREIGN RELATIONS OF THE UNITED STATES, 1942, at 25-26 (1943), cited in L. Sohn, *The Human Rights Law of the Charter*, 12 TEX. INT'L L.J. 129 (1977).

⁷⁴ See U.N. Charter Articles 1(3), 55, 56, 60, 64, 68, 76, 87 and Preamble, reprinted in Sohn, *supra* note 73, at 129-31.

⁷⁵ "The Charter does not . . . define what exactly are the fundamental human rights and freedoms of which it speaks, nor does it make any mention of machinery to secure their observance." J. BRIERLY, *THE LAW OF NATIONS*, 293 (6th ed., 1963). Vincent observes that "[t]he Charter . . . was primarily concerned with building an order between states and not within them, with eliminating international war not civil conflicts. Its concern with human rights and fundamental freedoms, values whose defense would require an intrusion into a traditionally domestic matter, was more aspiration than legislation." VINCENT, *supra* note 1, at 236.

⁷⁶ Approved by G.A. Res. 217A (III), 10 December 1948, G.A.O.R. (III) U.N. Doc. A/810, 71-77.

⁷⁷ International Covenant on Economic Social and Cultural Rights, G.A. Res. 2200, 21 U.N. G.A.O.R. Supp. (No. 16), U.N. Doc. A/6316 (1966) 49-52; International Covenant on Civil and Political Rights, *id.* at 52-58; and Optional Protocol, *id.* at 59-60.

⁷⁸ See generally the materials contained in L. SOHN & T. BUERGENTHAL, *INTERNATIONAL PROTECTION OF HUMAN RIGHTS* (1975) and the companion volume, *BASIC DOCUMENTS ON INTERNATIONAL PROTECTION OF HUMAN RIGHTS* (1973).

of view projected from fundamental principles of humanity, somehow authorizes or at least justifies humanitarian intervention by one or more state actors in derogation of the longstanding rule which has dominated the discussion thus far. The issue is exacerbated in those instances where "there is a morally irresistible case for intervention"⁷⁹ and raises the subsidiary questions of how to distinguish appropriate cases for humanitarian intervention from those lacking legitimacy and how to furnish appropriate safeguards to prevent abuse.

Before examining this question and its corollaries directly, at least a partial answer may be obtained from a canvass of the practice of states invoking the "law of humanity" as the basis for intervention, both prior to the existence of the United Nations rule regulating the use of force by states, and in the era following the Charter.

III. STATE PRACTICE IN THE CAUSE OF HUMANITY: AN OVERVIEW

It has been suggested that "[t]he results of an historical survey are likely to depend on which instances the surveyor includes."⁸⁰ Bearing this in mind, the intention here is merely to treat briefly a few of the traditional and most controversial leading precedents cited under the rubric of humanitarian intervention. In deference to the claim that history reveals unanswered cases "crying out" for intervention on similar if not more persuasive grounds,⁸¹ it is appropriate to mention a few examples of such situations.

A. Humanitarian Intervention: Classic Cases

In 1860, the Concert of Europe authorized a French naval expeditionary force possessing some 6,000 troops to go to the rescue of the Christian Maronite population of Mount Lebanon in Syria who were then reported to be threatened by massacre by Muslim Druses, also subjects of the Ottoman Empire.⁸² The rationale for intervention was the protection of "Christian minorities," which was the basis upon which the Concert had intervened

⁷⁹ Farer, *Humanitarian Intervention: The View from Charlottesville*, in R. LILLICH, *HUMANITARIAN INTERVENTION AND THE UNITED NATIONS* 157 (1973).

⁸⁰ Franck and Rodley, *After Bangla Desh*, *supra* note 8, at 279.

⁸¹ *Cf. id.* at 290-98.

⁸² See generally the notes and diplomatic correspondence reproduced in SOHN & BUERGENTHAL, *supra* note 78, at 143-78.

"diplomatically" in 1842, establishing a separate local administration to protect the Maronite community.⁸³ This time, however, force was deemed necessary, but only by France, whom Great Britain suspected of having other than "humanitarian goals" for the assertion of a military presence in the Eastern Mediterranean.⁸⁴ Therefore, a six month time limit was imposed on the French occupation to restore order in the region. France managed to negotiate an extension for a total of nine months whereupon the expeditionary force was withdrawn. It is notable that Turkey consented to the kind offer of aid extended by the Concert, although it may be argued that under the circumstances no other answer was possible or, in any event, would have made any difference.⁸⁵

The humanitarian "intercession" by the Great Powers of Europe and the United States on behalf of the Armenian population of Turkey stands in marked contrast to the earlier action taken by the Concert in Syria.⁸⁶ Originally, Turkey was to have acceded to Russian occupation of Armenia for the effectuation of reforms pursuant to the Treaty of San Stefano in 1877. However, a new series of political priorities dictated a renegotiation under the Treaty of Berlin⁸⁷ the following year whereby Turkey was left on her own good behaviour to carry forward "improvements and reforms."⁸⁸ Still, some 200,000 Armenians "disappeared" between 1890 and 1913 and perhaps one million individuals perished prior to the negotiation of the Treaty of Sevres in 1920.⁸⁹ The treaty comprised the peace settlement with Turkey and included *inter alia* provision for the creation of a separate state to protect the remaining Armenian citizenry. Unfortunately, Turkey had no

⁸³ The Sultan of Turkey thereupon agreed in 1845 to appoint separate administrators with the appropriate religious affiliation of each of the two (Druse and Maronite) provinces of Mount Lebanon. *Id.* at 144; Franck and Rodley, *After Bangla Desh*, *supra* note 8, at 281; T. HOLLAND, THE EUROPEAN CONCERT IN THE EASTERN QUESTION 206 (1885).

⁸⁴ "In general it may be said that the British devotion to the preservation of the integrity of the Ottoman Empire was not matched by a similar French steadfastness of purpose . . ." R. ALBRECHT-CARRIE, A DIPLOMATIC HISTORY OF EUROPE SINCE THE CONGRESS OF VIENNA 109-10 (1958).

⁸⁵ "Turkish authorization recalls Fielding's remark in *Jonathan Wild*: he 'would have ravished her, if she had not, by a timely compliance, prevented him.'" Franck and Rodley, *After Bangla Desh*, *supra* note 8, at 281.

⁸⁶ See documents on the diplomatic efforts made by the United States and other governments between 1904 and 1917, reprinted in SOHN & BUERGENTHAL, *supra* note 78, at 181-92.

⁸⁷ 13 July 1878, 49 BRITISH AND FOREIGN STATE PAPERS 749.

⁸⁸ *Id.* at Article 61.

⁸⁹ Treaty of Peace Allied and Associated Powers and Turkey, 10 August 1920, Arts. 88-89 (did not come into force); reprinted in 15 A.J.I.L. (Supp.) 235 (1921).

intention of complying with the treaty, the Allies did not deem it expedient to force the issue,⁹⁰ and the renegotiations which resulted in the Treaty of Lausanne⁹¹ fell silent on the issue of Armenian statehood. The cautious pleas for affirmative action in the area of Armenian human rights tendered by the United States Ambassador in Turkey to Washington in 1915,⁹² simply verified that, in this particular instance, a policy of humanitarian intervention was not congruent with the governing priorities of statecraft.

Evidence of more disturbing examples of intervention and the failure to intervene is furnished in Hitler's reference to "assaults on the life and liberty of minorities; and [to] the purpose of disarming Czech troops and terrorist bands threatening the lives of minorities"⁹³ preceding the German invasion of Czechoslovakia. The apparent acquiescence of capable world powers—apart from the usual rhetoric—to the imminent extermination of European Jewry during the same period through to their actual elimination by the end of the Second World War⁹⁴ is a tragic example of the failure to intervene pre-emptively.

B. Post-1945 Practice of States

It has been observed after a careful pleading of the facts "that if ever there was a case for the use of forcible self-help to protect lives, the Congo rescue operation was it."⁹⁵ The complexities of

⁹⁰ 28 L.N.T.S. 12 (1924).

⁹¹ (Morgenthau) to Secretary of State Lansing, 11 August 1915: "I earnestly beg the Department to give this matter urgent and exhaustive consideration . . . It is difficult for me to restrain myself from doing something to stop this attempt to exterminate a race, but I realize that I am here as Ambassador and must abide by the principles of non-interference with the internal affairs of another country.", *reprinted in* SOHN & BUERGENTHAL *supra* note 78, at 187-88.

⁹² The following excerpt of a speech delivered by Charles Evans Hughes on 23 January 1924 concerning the priorities behind the Treaty of Lausanne illustrates the point. "In March, 1921, the Allied Powers clearly appreciated that it would be impossible, short of armed allied military intervention in Turkey, to impose the Treaty of Sevres. It would seem that at no time was such armed intervention seriously considered . . ." 18 A.J.I.L. 229, 237 (1924), excerpted in SOHN & BUERGENTHAL, *supra* note 78, at 193.

⁹³ Proclamation on the German Occupation of Bohemia and Moravia, 15 March 1939, 4 DOCS. ON BRITISH FOREIGN POLICY 1919-1939 (3d ser.) no. 259, at 257; I. BROWNLIE, *USE OF FORCE BY STATES* 340.

⁹⁴ On U.S. diplomatic efforts *see* HACKWORTH, 3 DIGEST OF INTERNATIONAL LAW 642-47 (1942), and FEINGOLD, *THE POLITICS OF RESCUE: THE ROOSEVELT ADMINISTRATION AND THE HOLOCAUST 1938-1945* (1970), *cited in* Franck and Rodley, *After Bangla Desh*, *supra* note 8, at 292-93.

⁹⁵ Lillich, *supra* note 7, at 340; Weisberg, *The Congo Crisis 1964: A Case Study in Humanitarian Intervention*, 12 VA. J. INT'L L. 261 (1972); *see generally*, SOHN & BUERGENTHAL, *supra* note 78, at 195-206.

the power struggles in this troubled region of the world following its independence from Belgian colonial rule in 1960 and the resulting intercession of United Nations forces at that time are beyond the scope of this discussion.⁹⁶ However, they do serve as an introduction to the situation prevailing in the fall of 1964 when the *de facto* government of Moïse Tshombe based in Leopoldville was confronted by the rebel movement of Christophe Gbenye in control of the Stanleyville district of the fragmented nation. Gbenye had arrested all the (white) "foreigners" who could be found, in retaliation against Belgian support of Tshombe. In response to some killings and Gbenye's threats of widespread massacre,⁹⁷ a combined British, American, and Belgian rescue operation employing American planes and Belgian paratroops landed in Stanleyville, rescued some 2,000 persons in four days and subsequently, in nearby Paulis, rescued several hundred more persons within a week. The serious and immediate nature of the perceived threat to human life,⁹⁸ the limited duration and strictly delimited purpose of the operation,⁹⁹ and the express consent of the Tshombe government to the planned intervention,¹⁰⁰ all enhanced the moral rectitude of the enterprise.

The Congo precedent was perceived far differently, on the other hand, by a significant number of Afro-Asian nations which expressed the view that it constituted "a flagrant violation of the Charter of the United Nations and a threat to the peace and security of the African continent."¹⁰¹ There also appeared to be

⁹⁶ For a convenient synopsis see DONELAN & GRIEVE, *INTERNATIONAL DISPUTES: CASE HISTORIES 1945-1970*, at 203-10 (1973); E. LEFEVER, *CRISIS IN THE CONGO, A UNITED NATIONS FORCE IN ACTION* (1965); C. YOUNG, *POLITICS IN THE CONGO, DECOLONIZATION AND INDEPENDENCE* (1965).

⁹⁷ "[W]e will dress ourselves with the skins of the Americans and Belgians . . ." quoted in 52 DEPT STATE BULL. 18 (1965).

⁹⁸ Letter from the Belgian Representative to the United Nations to the President of the Security Council, 21 November 1964, 19 *S.C.O.R. Suppl.*, U.N. Doc. S/6055 at 64-66 (1964); excerpted in SOHN & BUERGENTHAL, *supra* note 78, at 195-97.

⁹⁹ "This operation is humanitarian—not military. It is designed to avoid bloodshed—not to engage the rebel forces in combat. Its purpose is to accomplish its task quickly and withdraw—not to seize or hold territory." Statement of U.S. Government, Annex II of letter from U.S. representative to the United Nations to the President of the Security Council, 24 November 1964, U.N. Doc. S/6062, *S.C.O.R.*, *supra* note 98, at 188.

¹⁰⁰ ". . . I have authorized the Belgian and United States Governments to render my Government the necessary assistance in organizing a humanitarian mission to make it possible for these foreign hostages to be evacuated." Letter from Prime Minister Tshombe to the Secretary General of the United Nations, 24 November 1964, U.N. Doc. S/6060, excerpted in SOHN & BUERGENTHAL, *supra* note 78, at 197.

¹⁰¹ Memorandum annexed to letter from the Representative of Afghanistan (and representatives of 21 other members) to the President of the Security Council, 1 December 1964, U.N. Doc. S/6076 and Add 1-5. *Id.* at 203-04.

further suspicion in the matter of the cost in African lives of the preservation of the Western Europeans who were rescued.¹⁰²

Similar considerations were invoked by President Johnson when he ordered the landing by the United States of some 20,000 troops in the Dominican Republic in 1965.¹⁰³ However, this precedent appears less credible than the Congo example for a number of reasons: many more people perished after, rather than before, the American intervention;¹⁰⁴ the duration of the intervention by American troops was prolonged far beyond the time required to ensure the safety of the lives and property of Americans and others;¹⁰⁵ and, as a purely legal matter, the operative effect of Articles 15 and 17 of the Charter of the Organization of American States on the status of the *initial* act of unilateral intervention tainted the enterprise.¹⁰⁶ While all of these points have been debated at length,¹⁰⁷ it would appear safe to conclude that the

¹⁰² "The famous humanitarian operation of Stanleyville has just proved to us that one white . . . is worth thousands and thousands of blacks." Statement of Ambassador Ganao, 19 S.C.O.R. 1170th mtg. 15 (1964), cited in Franck and Rodley, *supra* note 8, at 288.

¹⁰³ See statement reprinted in 53 DEP'T STATE BULL. 20 (1965). For a summary of the facts see DONELAN & GRIEVE, *supra* note 96, at 254-58; relevant documents are reproduced in L. SOHN, CASES ON UNITED NATIONS LAW 1025-72 (2d ed., 1956); A. LOWENTHAL, THE DOMINICAN INTERVENTION (1972); J. SLATER, INTERVENTION AND NEGOTIATION, THE UNITED STATES AND THE DOMINICAN CRISIS (1970); THOMAS & THOMAS, *supra* note 1, at 56.

¹⁰⁴ The point has been made by Franck and Rodley, *After Bangla Desh*, *supra* note 8, at 287; "Although the Johnson Administration had proclaimed as one of the main purposes of the intervention the need to save Dominican lives in a bloody civil war, in fact most of the estimated three thousand Dominican deaths occurred after the intervention . . ." SLATER, *supra* note 103, at 203.

¹⁰⁵ United States Marines and paratroops landed in the Dominican Republic on 28 April 1965. And American troops continued to form the nucleus of the Inter-American Police Force (IAPF) which officially took over the task of maintaining order on 23 May 1965, and remained in the country following elections supervised by U.N. and OAS missions until 21 September 1966. DONELAN & GRIEVE, *supra* note 103.

¹⁰⁶ Articles 18 and 20 as amended by the Protocol of Buenos Aires, 1967, Treaty Series No. 1-C, O.A.S. OFF. REC., OEA/Ser. A/2 (Eng.) Rev. (1968). Article 18 provides that "[n]o 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." Article 20 states that "[t]he territory of a State is inviolable; it may not be the object, even temporarily, of military occupation or of other measures of force taken by another State, directly or indirectly, or any grounds whatever." See also the condemnations of the U.S. action as violations of the O.A.S. Charter pronounced by Senators Fulbright, 111 Cong. Rec. 23859-60 (1965), and Morse, *id.* at 11121. On the genesis of the norms embodied by these articles see Cabranes, *Human Rights and Non-Intervention in the Inter-American System*, 65 MICH. L. REV. 1147 (1967).

¹⁰⁷ In support of the legitimacy of the United States' intervention see generally THOMAS & THOMAS, *supra* note 56; Lillich, *supra* note 7, at 334-38. *Contra*, Franck and Rodley, *After Bangla Desh*, *supra* note 8, at 287; seeking to justify the United States action in legal terms is an arid pursuit, see Maclaren, *The Dominican Crisis: An Inter-American Dilemma*, 4 CDN. YRBK INT'L L. 178, 181 (1966).

spectre of another Communist nation in the Western hemisphere and the legacy of the Monroe Doctrine vied with the principles of humanity¹⁰⁸ in motivating the United States to intervene—and to stay until “appropriate” restoration of order was achieved.

In the aftermath of the Dominican Republic imbroglio, a far more serious example of human rights violations emerged where, in the view of a contemporary observer, “[t]hese circumstances clearly call for employment of the exceptional international legal institution of humanitarian intervention.”¹⁰⁹ No such intervention occurred on behalf of the Biafrans who were in the process of being exterminated during the Nigerian Civil War.¹¹⁰ British and American sentiments politically favored Nigeria; the United Kingdom continued to supply light armaments to the Nigerians while the United States maintained an arms embargo against both sides. The actual conflict spanned two years following the Nigerian invasion of the self-proclaimed independent state of Biafra in the summer of 1967 until “starvation, disease, and the waning of hope, ended Biafran resistance.”¹¹¹ It is notable that what relief of human suffering was undertaken came in the form of relief operations organized by the International Committee of Red Cross and several churches.¹¹²

Higher still on the scale of human rights deprivations was the untold suffering that occurred during the conflict resulting from the secession of East Pakistan from the Islamabad government to form the independent nation of Bangladesh.¹¹³ India invaded the

¹⁰⁸ Compare the statement of President Johnson, *supra* note 103, with his radio broadcast of 2 May 1965 where the President stated that the insurrection in the Dominican Republic had been usurped “by a band of Communist conspirators. . . . The American nations cannot, must not and will not permit the establishment of another Communist government in the Western hemisphere.” Excerpted in DONELAN & GRIEVE, *supra* note 96, at 256.

¹⁰⁹ Reisman, *Humanitarian Intervention to Protect the Ibos* (memorandum prepared and revised in September of 1968 with the collaboration of McDougal) in R. LILLICH, HUMANITARIAN INTERVENTION 167; for a synopsis of the Nigerian Civil War see DONELAN & GRIEVE, *supra* note 96, at 259-64; J. DE ST. JORRE, THE NIGERIAN CIVIL WAR (1972); A. KIRK-GREENE, CRISIS AND CONFLICT IN NIGERIA, A DOCUMENTARY SURVEY 1966-69 (1971).

¹¹⁰ “The resistance of the Biafrans was fortified by a deep fear of massacre, which was further sustained by the speeches of their leader, Ojukwu, and which the counter-promises of Gowon could do little to allay.” DONELAN & GRIEVE, *supra* note 96, at 262.

¹¹¹ *Id.* at 264.

¹¹² An excellent concise overview of the origins and practice of the International Red Cross may be found in the first of six lectures on Practice, Norms and Reform of International Humanitarian Rescue Operations delivered by B. Morse at the Hague Academy of International Law, 8 August 1977 (forthcoming: RECUEIL DES COURS, 1978).

¹¹³ See the case study of Nanda, *Self-Determination in International Law: The Tragic Tale of Two Cities—Islamabad (West Pakistan) and Dacca (East Pakistan)*, 66 A.J.I.L. 321 (1972). For basic background documents refer to *Documents: Civil War in Pakistan*, 4

disputed area amidst a massive outpouring of refugees for the purpose of securing the new nation's sovereign independence, "glad," to quote Ambassador Sen, "that we have on this particular occasion absolutely nothing but the purest of motives and the purest of intentions: to rescue the people of East Bengal from what they are suffering."¹¹⁴ The political benefits (and costs) for India of this action are not the concern of this discussion. But it is relevant to note that the brunt of the effort borne in the preservation of human life and dignity was undertaken by the United Nations' relief effort, the largest entertained since the conclusion of the Second World War.¹¹⁵ It can certainly be argued that "all this humanitarian assistance did not address itself to the root causes"¹¹⁶ of the conflict, but such an argument does not compel a conclusion supporting the unilateral use of force to address the problem thus raised.

The United Nations Relief Operation in East Pakistan (UNEPRO) assumes added precedential value in that, notwithstanding the *bête noire* of Article 2, paragraph 7 of the Charter, neither Secretary-General of the United Nations, U Thant, nor the Government of Pakistan "allowed" this chronic problem "to stand in the way of the relief of large-scale human suffering in a situation of internal conflict."¹¹⁷ Moreover, UNEPRO was from its inception clearly a result of the Secretary-General first approaching President Khan. Thus,

[t]he Secretary-General initiated the beginning of a body of law by relying explicitly upon the statement of fundamental purposes in the Charter, and his responsibility as the executive of the organization, to insure that human well-being was protected and humanitarian principles upheld.¹¹⁸

This selective analysis of relevant state practice will conclude with a brief look at three instances in which humanitarian interven-

N.Y.U.J. INT'L L. & POL. 524 (1971); Franck and Rodley, *The Law, The United Nations and Bangla Desh*, 2 ISRAEL YRBK ON HUM. RIGHTS 142 (1972).

¹¹⁴ Statement of the Indian Ambassador to the United Nations (Sen) before the Security Council, U.N. Doc. S/PV. 1606, 86 (1971), cited in Franck and Rodley, *The United Nations and Bangla Desh*, *supra* note 113, at 164.

¹¹⁵ 8 U.N. MONTHLY CHRONICLE (No. 7) 91 (July 1971).

¹¹⁶ Franck and Rodley, *The United Nations and Bangla Desh*, *supra* note 113, at 148.

¹¹⁷ Quoted from text of second Hague lecture (preliminary draft) delivered by B. Morse on the *United Nations Relief Operations in Bangladesh*, 9 August 1977 (forthcoming: RECUEIL DES COURS, 1978).

¹¹⁸ *Id.*

tion was claimed to have been legally employed, specifically, in the context of the protection of nationals at risk abroad. The first example is the seizure and recovery of the United States merchant ship *Mayaguez* in 1975.¹¹⁹ The ship and crew were captured by Cambodian naval units in what Cambodia claimed to be her own territorial waters.¹²⁰ The United States served a twenty-four hour ultimatum on Cambodian authorities, whereupon President Ford authorized first an air attack and, two days later, a Marine assault to effect a release of the ship and crew. The second attack took place *following* Cambodia's official broadcast that the ship and crew were no longer in custody.¹²¹ Secretary of State Kissinger's comment that "the impact ought to be to make clear that there are limits beyond which the United States cannot be pushed,"¹²² indicates that perhaps "pride" more than "humanity" was at the bottom of the American response to a perceived threat where the crew of the *Mayaguez* appeared to be in danger *only* during the rescue attempts of their countrymen. Naturally, such observations benefit from the security of hindsight; nevertheless, this unilateral resort to force by the United States and its apparent disregard of the offices of the United Nations, especially in a situation where the preservation of life was not immediately, if ever, in question, cogently illustrates the essential nature and value of the principles so far discussed.

The celebrated Israeli commando raid on Entebbe,¹²³ on the other hand, cannot be so lightly dismissed. The apparent legitimacy of the rescue operation freeing the 105 Jewish passengers holding Israeli or dual citizenship from the clutches of terrorists at the Ugandan airport in July of 1976 was heightened by the equally apparent complicity of the Amin regime with the terrorist plot.¹²⁴ Amin's notorious reputation could not help but increase support for the Israeli initiative.

¹¹⁹ See Paust, *Comment: The Seizure and Recovery of the Mayaguez*, 85 YALE L.J. 774 (1976); Note, *Pueblo and Mayaguez: A Legal Analysis*, 9 CASE W. RES. J. INT'L. 79 (1977); R. ROWAN, *THE FOUR DAYS OF MAYAGUEZ* (1975).

¹²⁰ Thailand and Vietnam also laid claim to sovereignty in this area. The official American position that the *Mayaguez* was seized on the "high seas" would thus appear to be more than questionable, if not spurious. Paust, *supra* note 119, at 781-84, 804-05.

¹²¹ *Id.* at 781.

¹²² N.Y. Times, May 17, 1975, at 1, col. 8.

¹²³ See Note, *Entebbe: Use of Force For the Protection of Nationals Abroad*, 9 CASE W. RES. J. INT'L L. 117 (1977); Kriit, *Self-Defense and Self-Help: The Israeli Raid on Entebbe*, 4 BROOKLYN J. INT'L L. 43 (1977).

¹²⁴ See the statement by Israeli Ambassador Herzog before the United Nations Security Council during the Entebbe debates, U.N. Docs. S/PV. 1939 at 36-50 (1977); S/PV. 1942 at

In practical terms, the Israeli commandos accomplished with consummate brilliance what they set out to do. It was a rare combination of circumstances that made the operation possible; the hostages remained lightly guarded in a location readily accessible to an airborne assault force and Israel had the element of complete surprise on its side. Thus, even though Entebbe may be cited with confidence as one of those "morally irresistible" cases, it is also true that the "success" of the enterprise and the particular circumstances allowing for that success go to the foundation of its legitimacy as a "political" and a moral act in the cause of humanity.¹²⁵

Strictly legal arguments, however, seem less persuasive. The argument of self-defense, taken together with variations of the *Caroline* doctrine¹²⁶ invoked by Ambassador Herzog before the Security Council¹²⁷ and subsequently by scholars,¹²⁸ would appear to be misplaced for several reasons. First, it is difficult to accept the proposition that danger to Israeli citizens in Entebbe airport, however grave, constituted any threat to the "territorial integrity" or "political independence" of the State of Israel.¹²⁹ Second, such an application of the doctrine of self-defense involves assumptions about the political nature of the nation-state which may no longer be considered valid.¹³⁰ Finally, the doctrine, strictly

35-42 (1977); and similarly Mr. Scranton (United States) U.N. Doc. S/PV. 1941 at 31 (1977); and Mr. Richard (United Kingdom) especially on the issue of the disappearance and apparent murder of Mrs. Dora Bloch, U.N. Doc. S/PV. 1940 at 42-45 (1977). *Contra*, statements of Mr. Abdalla (Uganda) U.N. Doc. S/PV. 1939 at 11-25 (1977); U.N. Doc. S/PV. 1943 at 56-62 (1977).

¹²⁵ The generally favourable disposition of the world community towards the Israeli action might have been radically altered had the commandos not succeeded in their objective or if a pitched battle had occurred. Professor Schwarzenberger, in discussing interventions of a more permanent kind (Guatemala, 1954; Hungary, 1956) has remarked that "[v]iewed in the light of the pattern of political sovereignty, it becomes intelligible why, in a system of power politics in disguise, some interventions are successful and, ultimately tend to become legalized and *vice versa*." INTERNATIONAL LAW AND ORDER 76 (1971).

¹²⁶ Secretary of State Webster envisaged a "necessity of self-defense, instant, overwhelming, leaving no choice of means and no moment for deliberation." 30 BRITISH AND FOREIGN STATE PAPERS 193 (1843). This classic formulation appears to exhibit a "good fit" with the facts of Entebbe except when one recalls that the doctrine was enunciated in the context of a pre-emptive strike in anticipation of an imminent violation of the "territorial integrity" of a neighbouring state. See J. MOORE, 2 DIGEST OF INTERNATIONAL LAW 409-12 (1906); Jennings, *The Caroline and Macleod Cases*, 32 A.J.I.L. 82 (1938).

¹²⁷ Cf. U.N. Doc. S/PV. 1939 at 52 (1977).

¹²⁸ The argument was put convincingly by Professor Yoram Dinstein during a Seminar on International Law and the Management of Conflict held at the Faculty of Law, Queen's University at Kingston, March 10, 1977. *But see* note 126 *supra*.

¹²⁹ See note 64 *supra* and accompanying text.

¹³⁰ The gradual recognition of individuals as "subjects" of international law separate and

construed, is self-limiting with regard to humanitarian intervention and ignores the moral basis for such a concept.¹³¹

The further suggestion, that Uganda's apparent complicity in the terrorist plot justified the Israeli intervention in accordance with the principles enunciated in the Declaration Concerning Friendly Relations and Cooperation Among States, is even less persuasive. The clause relied upon by United States Ambassador Scranton in the Security Council¹³² was taken and applied to the facts of Entebbe in a manner totally inconsistent with the context in which the statement appears in the Declaration. He offered it as explanation in part of the leading principle "that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State" ¹³³

A more recent episode involved the hijacking of a Lufthansa airliner in October of 1977¹³⁴ by an obscure terrorist group and culminated in an assault upon the aircraft and rescue of its passengers by specially trained German police at Mogadishu Airport¹³⁵ in Somalia. It recalled in many respects the earlier Israeli action. However, the two incidents are distinguishable on one basic point: the German rescue operation at Mogadishu was executed throughout with the explicit consent and active cooperation

distinct from their national governments belies the notion that there exists an absolute identity between the instrumentality of the state and the individuals who comprise it. Hence, individuals may now be entitled to bring grievances on their own behalf before international tribunals. Cf. Art. 25 of the European Convention on Human Rights of 1950, in force 3 September 1953, Council of Europe, *Collected Texts*, Section 1 Doc. 1 (7th ed., Strasbourg 1971); the Optional Protocol to the recent Covenant on Civil and Political Rights, *supra* note 77 (not yet in force); Article 14 par. 1 of the International Convention on the Elimination of all Forms of Racial Discrimination, adopted by A./Res. 2106A (XX) 21 December 1965, in force 4 January 1969. 20 U.N. GAOR Suppl. (No. 14), U.N. Doc. No. A/6014, at 47-51; compare with note 56 *supra*. Sir Hersch Lauterpacht has posited the view that "in relation to both rights and duties the individual is the final subject of all law." *INTERNATIONAL LAW AND HUMAN RIGHTS* 69 (1950).

¹³¹ Cf. Lillich, *supra* note 7, at 337.

¹³² "Every state has the duty to refrain from organizing, investigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force." Cited in U.N. Doc. S/PV. 1941 at 33 (1977).

¹³³ See note 64 *supra* and accompanying text.

¹³⁴ On October 13, 1977, a Lufthansa Boeing 737 jet liner with 92 passengers and crew aboard on a flight from Majorca to Frankfurt was forced by Arab-speaking gunmen to divert to Dubai via Rome, Cyprus and Bahrain. N.Y. Times, October 14, 1977, at 3, col. 1. The aircraft then proceeded to Aden, where the pilot appears to have been murdered, and finally to Mogadishu. *Id.*, October 18, 1977, at 1, col. 2.

¹³⁵ *Id.*, October 18, 1977, at 1, col. 6.

of the Somalian authorities.¹³⁶ Consequently, the legal issues coming into play in the Entebbe incident, and the fundamental issues upon which this discussion has focused, did not arise at Mogadishu. It was a simple and sincere act of comity between nations.

One might speculate on the pattern of German behavior had Somalia not responded to the crisis as it did. But the fact that Somalia did respond in a positive fashion to a manifest deprivation of human rights, coupled with an emerging world law to suppress acts of aerial piracy and international terrorism,¹³⁷ suggests that circumstances may not again—in the perception of individually aggrieved state actors—give cause for another Entebbe.

C. Practical Constraints: The Iranian Crisis

Very seldom do the practical circumstances surrounding a threat to the lives and safety of one country's citizenry within the territory of another allow for effective intervention on humanitarian grounds. One lesson of Entebbe seems to be that modern terrorists are not inclined to repeat mistakes.

The practical limitations of the doctrine became painfully evident in the recent crisis in Iran, which began with the attack on the United States Embassy in Teheran in November 1979 and continued with the subsequent taking hostage of its staff by militant student supporters of the Ayatollah Khomeini. As of this writing a few of the American hostages have been released by their captors, but the fate of the majority preoccupies not only the United States Government but the world. The flagrant disregard of the principle of diplomatic immunity by the Iranian action strikes at

¹³⁶ Klaus Bolling (spokesman for the West German Government) "read a statement issued jointly by the Government and the leaders of all the parties in Parliament that praised the Somali Government of President Mohammed Siad Barre and said that without full agreement and help from the Somali authorities the military action against the plane could not have been carried out and the passengers could not have been saved. Chancellor Schmidt sent President Barre a telegram saying 'We will never forget,' Mr. Bolling said." *Id.* October 18, 1977, at 12, col. 1.

¹³⁷ *Cf.* Convention on Offenses and Certain Other Acts Committed on Board Aircraft (done at Tokyo, 14 September 1963; in force 4 December 1969) 20 U.S.T. 2941, T.I.A.S. No. 6768, 704 *U.N.T.S.* 219; The Hague Convention for the Suppression of Unlawful Seizure of Aircraft (16 December 1970; in force October 14, 1971) 22 U.S.T. 1641, T.I.A.S. No. 7192; The Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (23 September 1971; in force 26 January 1973); European Convention on the Suppression of Terrorism reprinted in 15 *I.L.M.* 1272 (1976). See Franck and Lockwood, *Preliminary Thoughts Towards an International Convention on Terrorism*, 68 *A.J.I.L.* 69 (1974); Friedlander, *Terrorism and International Law: What is Being Done?*, 8 *RUTGERS-CAMDEN L.J.* 383 (1977).

the very heart of the international legal system and the ability of states to sustain relations with one another. A full assessment of Iran's challenge to the international order must await the completion of events. Nonetheless, the seriousness of the challenge is clear.

For present purposes, recognition of a perhaps obvious fact of the crisis in Iran will suffice. Early in November, the situation suggested that no application of force could effect a release of the hostages without virtually guaranteeing their certain death; they were reportedly heavily guarded, securely bound and possibly "booby-trapped" against forced rescue. Thus, it became clear to the Carter administration and to others that "it is beyond our power to produce the result we want by physical self-help."¹³⁸ While intervention could be contemplated for a variety of other purposes, e.g., teaching Iran a lesson or flexing its muscles to preserve the international reputation of the United States, these were not necessarily responsive to humanitarian considerations.¹³⁹

The Iranian crisis graphically illustrates the point that humanitarian intervention will fall short of fulfilling its primary objective so long as the human rights violator takes the comparatively easy precautions necessary to prevent access within acceptable levels of risk, which is precisely what the terrorists at Entebbe neglected to do.¹⁴⁰ Further, it appears that in such situations the only tenable recourse for achieving the humanitarian objective is through influencing the offender to do on his own what self-help by the offended state party cannot otherwise accomplish.

This kind of approach to the management of international conflict has been developed most extensively by Professor Roger Fisher at the Harvard Law School.¹⁴¹ The example of Iran may to a large extent lend credence to his views.¹⁴² The fact that the United States chose to resort to the Security Council,¹⁴³ to go to the Inter-

¹³⁸ Fisher, *Helping the Iranians Change Their Minds*, N.Y. Times, Nov. 10, 1979, at 23, col. 1; Burt, *U.S. Quandary In Iran Crisis: Use of Quiet Diplomacy Is Seen as Only Choice*, N.Y. Times, Nov. 9, 1979, at A12, col. 1.

¹³⁹ This is not to say that humanitarian considerations are the only ones at stake for the United States in the Iranian crisis—only that as a measure of the validity of the doctrine of humanitarian intervention *per se* they are clearly the most relevant.

¹⁴⁰ See note 125 *supra* and accompanying text.

¹⁴¹ See FISHER, *INTERNATIONAL CONFLICT FOR BEGINNERS* (1969); FISHER, *INTERNATIONAL MEDIATION: A WORKING GUIDE* (draft ed. 1978); FISHER, *POINTS OF CHOICE* (1978).

¹⁴² See *Diplomacy and Retaliation: What Did the U.S. Mean? And What Does Iran Want?*, text of interview by The Boston Globe, Nov. 22, 1979, at 1, 18, 19.

¹⁴³ The United States "strongly supported" Secretary General Waldheim's request of the Security Council on November 25th to deal with the Iranian crisis. N.Y. Times, Nov. 26, 1979, at A1, A13, A14, col. 3. On the eve of the new year the Security Council voted by 11 votes to 0 with 4 abstentions (Soviet Union, Czechoslovakia, Kuwait and Bangladesh) set-

national Court of Justice¹⁴⁴ and to place faith in the good offices of the Secretary General of the United Nations,¹⁴⁵ indicates some belief on the part of President Carter and his advisors that initiatives designed to influence the Ayatollah and his followers to amend their conduct ultimately would be more helpful than anything the United States could do on its own by force of arms. While grave doubts remain as of this writing concerning what politically acceptable approach¹⁴⁶ would work to secure release of the American hostages, it is significant that there was considerable support for the view condemning military intervention as an unacceptable alternative.

D. Overall Assessment

There are few good examples of humanitarian intervention. One writer, who was commenting prior to the Congo episode in 1964, expressed the view that "state practice justifies the conclusion that no genuine case of humanitarian intervention has occurred, with the possible exception of the occupation of Syria in 1860 and 1861."¹⁴⁷ Other commentators offer a more liberal interpretation of cases eligible for inclusion,¹⁴⁸ but the fact remains that, "[o]n balance, very little good has been wrought in its name."¹⁴⁹

ting a January 7th deadline for the release of the hostages after which time the adoption of economic sanctions against Iran would be considered. *Toronto Globe and Mail*, Jan. 1, 1980, at 1, col. 1.

¹⁴⁴ See Gwertzman, *U.S. Bids World Court Intercede with Iran for Release of Hostages*, *N.Y. Times*, Nov. 30, 1979, at A1; for text of U.S. brief to the court, *id.* at A16; for discussion and excerpts of the interim decision of the World Court calling for an immediate release of the remaining American hostages see *N.Y. Times*, Dec. 16, 1979 at 1.

¹⁴⁵ The current visit of Mr. Waldheim to Teheran in the first week of 1980 has not met with much success since, while he was able to confer with members of the Revolutionary Council governing Iran, the nation's acknowledged leader Ayatollah Ruholla Khomeini has refused to see the Secretary General. Reportedly, the Ayatollah "seems to feel that the United Nations is only a tool of the superpowers and that Mr. Waldheim, as its top officer, cannot be trusted." *N.Y. Times*, Jan. 4, 1980, at A1, col. 4.

¹⁴⁶ Apparently, delivering up the Shah of Iran as ransom does not fall within this category. As violations of human rights are so often the result of political acts for political ends, so, too, are humanitarian considerations politically determined. For example, in evaluating the Iranian crisis, Professor Roger Fisher assessed the priorities of the United States as follows: "Our purposes are, first, power—to preserve the reputation and prestige of the United States; second, peace—to enhance respect for international law and order, largely by avoiding bad precedents; and, third, success—to win the release of the hostages." *N.Y. Times*, Nov. 10, 1979, at 23, col. 1.

¹⁴⁷ I. BROWNLEE, *USE OF FORCE BY STATES* 340; for earlier support of a similar view see B. RODICK, *THE DOCTRINE OF NECESSITY IN INTERNATIONAL LAW* 49-50 (1928); DUNN, *supra* note 14.

¹⁴⁸ Lillich, *supra* note 7; *Cf.* earlier writers such as BORCHARD, *supra* note 12, HODGES, *supra* note 13 and STOWELL, *supra* note 21.

¹⁴⁹ Franck and Rodley, *supra* note 8, at 278.

Looking more closely at the particular examples cited in the foregoing discussion, it appears that the precedents offered by the intervention in the Congo, at Entebbe and most recently at Mogadishu exhibit the strongest justifications for intervention by state actors. Bangladesh is distinguishable from the point of view already taken in that *inter alia*, human rights deprivations received more attention from the non-political relief operation of UNEPRO than through India, the intervening state.

Two of the three "strong" cases, then, do not apply, at least insofar as the unlawful use of force is concerned, by virtue of the explicit consent to intervention given by the target state prior to the actual act of intervention. The uncertain political situation in the Congo, however, does raise the issue of what constitutes valid consent and by whom.¹⁵⁰ Nevertheless, recalling the definition of intervention originally offered by this analysis,¹⁵¹ the presence of consent operates to negate any conflict with either the principle opposing the use of force by states or the general principles of international law.¹⁵²

Thus, one is left with a consideration of Entebbe: a situation in which there are competing legal principles and the fundamental moral issue which cannot be ignored. It is appropriate to recall United Nations Ambassador Herzog's impassioned statement in defense of Israel before the Security Council after Entebbe that "[t]here is also a moral law, and by all that is moral on this earth Israel has the right to do what it did. Indeed, it had also the duty to do so."¹⁵³

IV. THE PREMISE OF HUMANITARIAN INTERVENTION: A REBUTTAL

The doctrine of humanitarian intervention makes what is essentially a moral argument: that there should be a legal foundation for the use of force where violations of fundamental human rights

¹⁵⁰ Cf. also the French intervention in Syria, *supra* notes 82-85.

¹⁵¹ THOMAS AND THOMAS, NON-INTERVENTION, *supra* note 9.

¹⁵² "If a state consents to an interference within its protected sphere of interests prior to or simultaneously with the act of interference, the act can be said to be legitimate by principles of traditional international law. The consenting state exercises its sovereign right in so doing, and the consent on the other hand grants the right to the intervening state. In reality this type of interference cannot be called intervention, inasmuch as intervention signifies an act or threat of compulsion or coercion of the will of a state by another, an imposition of the will of the intervenor. If consent is given freely, there is no imposition of will." THOMAS AND THOMAS, NON-INTERVENTION, *supra* note 1, at 99.

¹⁵³ U.N. Doc. S/PV. 1939 (1977) at 51.

cross an undefined frontier of acceptable human conduct. This argument speaks especially to those acts which are perceived by the international community as an intolerable affront to basic human dignity and to the collective conscience of mankind. Such acts continue to occur and they can be neither avoided nor ignored, as the precedent of Entebbe makes abundantly clear. But the salient point is that these situations generate "hard cases," to employ the terminology of Professor Ronald Dworkin,¹⁵⁴ in the sense that the moral principles behind the doctrine of humanitarian intervention are competing for precedence against what is more than a mere "policy" of nonintervention reflective of a majority consensus in the community of nations. Indeed, it should be recognized that the opposition to this doctrine of intervention also may be phrased in terms of humanitarian consideration.

Proponents of humanitarian intervention seek to fashion a legal framework under which state actors may violate the sovereignty of a delinquent state either unilaterally or in concert,¹⁵⁵ when it appears that the human rights offender will otherwise go unchecked. In appreciation of the potential for subversion of the doctrine¹⁵⁶ to self-serving national aspirations, these same theorists have attempted to circumscribe the doctrine through various delimiting criteria.

Typically, an evaluation of possible cases calling for humanitarian intervention would include the following criteria: the im-

¹⁵⁴ The present writer is here adapting in part Professor Dworkin's theory of judicial interpretation to be followed in instances where the law apparently gives no obviously "right answer" to the case presented. The theory presupposes that there is a right answer in every case and that this answer may be obtained through a process of discovering and weighing the principles governing the particular dispute, the outcome of which will decide the "rights" of the competing parties and ultimately whose rights are to prevail. Fundamental thereto is the notion that, generally, principles—statements determining the rights of individuals—prevail over policies—statements indicative of social goals—and not vice-versa. While the foregoing provides only the most simplistic view of a complex philosophical framework for legal analysis, the purpose is to apply the theory in simple terms, casting states in the role of individual "legal" persons in the community of nations. See Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975); see generally DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977) (esp. Chs. 1 to 4), and *No Right Answer?*, 53 N.Y.U.L. REV. 1 (1978).

¹⁵⁵ Quincy Wright has observed that "intervention does not gain in legality under customary international law by being collective rather than individual"; see *The Legality of Intervention Under the United Nations Charter*, 51 AM. SOC. INT'L L. PROC. 79, 86 (1957).

¹⁵⁶ An early proponent of the doctrine has emphasized that "(i)t is a big mistake, in general, to stop short of recognition of an inherently just principle, (merely) because of the possibility of non-genuine invocation." Fonteyne, 4 CALIF. W. INT'L L.J. 203, 269 (1974), citing Rolin-Jacquemyns, *Note Sur la Theorie du Droit d'Intervention*, 8 REV. DE DROIT ET DE LEG. COMP. 675, 679 (1876).

mediacy of violation of human rights; the extent of the violation; the presence or absence of an invitation to use forcible self-help; the degree of coercive measures employed; and the relative disinterest of the acting state.¹⁵⁷ All of these factors bear upon assessments of the legitimacy of the motivation behind particular cases of intervention, as the previously discussed examples of state practice have shown. A dilemma persists, however, as the intervening state is at the critical time both the actor and the sole judge in its own cause. Such a criticism may appear simplistic, when one considers that the need for a doctrine of humanitarian intervention emanates from the exigencies of a world-view still dominated by individual state actors.¹⁵⁸ Yet it is still a dilemma for which no satisfactory answer has been found.

Detractors from the doctrine are inclined to say that the lesson to be learned from the practice of states invoking the doctrine of humanitarian intervention speaks for itself,¹⁵⁹ and that advocacy of the doctrine of humanitarian intervention simply flies in the face of the accepted consensus of the international community.¹⁶⁰ However, such arguments are unsatisfactory because they do not fully meet the moral argument for humanitarian intervention. Thus, they frequently fall prey to the criticism that they offer no more than "an arid textualist approach"¹⁶¹ to existing international law, without appreciating the need to adapt the law—if necessary by fashioning exceptions to rules—in order to respond to the perceived and strongly felt needs of the international community.

¹⁵⁷ See Lillich, *supra* note 7, at 347-51; for a similar analysis see Nanda, *The United States' Action in the 1965 Dominican Crisis: Impact on World Order*, 43 DENVER L.J. 439, 475 (1966); de Schutter, *Humanitarian Intervention: A United Nations Task?*, 3 CALIF. W. INT'L L.J. 21, 29-30 (1973); Farer, *The View from Charlottesville*, *supra* note 79, at 150-52.

¹⁵⁸ The "great illusion of our times," according to Raymond Aron, is "the illusion that economic and technological interdependence among the various factions of humanity has definitely devalued the fact of 'political sovereignties,' the existence of distinct states which wish to be autonomous." PEACE AND WAR 748 (1966). The dichotomy between the international system of nation-states, and the relationships between individuals in a transnational society proves otherwise. *Id.* at 104-05.

¹⁵⁹ Franck and Rodley, *supra* note 8. A recent example would seem to be Vietnam's invasion of Cambodia.

¹⁶⁰ Professor Brownlie offers the view that North American scholarship largely in support of a (limited) doctrine of humanitarian intervention "is characterized by an isolation which is remarkable. A vast international literature . . . is virtually ignored. A spirit of internationalism, a professional survey of the mature sources of world literature since 1945, is not in evidence." Brownlie, *Some Thoughts on Kind-Hearted Gunmen*, in R. LILLICH, HUMANITARIAN INTERVENTION 144.

¹⁶¹ Claydon, *Humanitarian Intervention in International Law*, 1 QUEEN'S INTRAMURAL L.J. 36, 57 (1969).

Empirical conclusions on the self-serving practice of states, no matter how devastating, fail to effectively counter this kind of reasoning. But a competitive moral point of view underscored by the lessons of past experience offers a more persuasive rebuttal to the interventionist approach. Moreover, such a view can and should be entertained.

Opposed to the case for humanitarian intervention stands a basic rule of international law which, beyond the right of self-defense or a collective response of the international community, admits of no exception. This rule is at once a policy governing the international legal order and, more basically, an embodiment of the principle that the use of force is no longer a general right of states professing membership in the community of nations. The principle contained in Article 2, paragraph 4 of the Charter of the United Nations thus represents more than an international consensus binding state actors; it is essentially a higher law among nations viewed as fundamental to the survival not only of national entities but of mankind in its entirety. In this context it has been accorded the status of *jus cogens*,¹⁶² a "pre-emptory" norm of international law from which no derogation is permitted.¹⁶³

A rule of law has been clearly delineated which, at the same time, must be viewed as a statement of fundamental values. "The irreducible value, though not the exclusive one," to quote Alexander Bickel, "is the idea of law."¹⁶⁴ Thus, in contradistinction to opinions in support of humanitarian intervention, the normative force of this prohibitive rule¹⁶⁵ has been enhanced through the process of its gradual acceptance by the community of nations.

It may be considered trite to reiterate the old adage that hard

¹⁶² See Verdross, *Jus Dispositivum and Jus Cogens in International Law*, 60 A.J.I.L. 55, 60 (1966); Schwelb, *Some Aspects of Jus Cogens as Formulated by the International Law Commission*, 61 A.J.I.L. 946, 952 (1967); MCNAIR, *THE LAW OF TREATIES* 214-15 (1960); BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 500 (2d ed. 1973).

¹⁶³ The concept of *jus cogens* was developed pre-eminently in the context of the work of the International Law Commission on the law of treaties. See Report of the Commission to the General Assembly on the work of its Eighteenth Session, U.N. Doc. A/6309 Rev. 1, Pt. II, (1966) YRBK. OF THE INTERNATIONAL LAW COMMISSION, Vol. II, at 247; see Verdross and Schwelb, *supra* note 162; Onuf and Birney, *Pre-emptory Norms in International Law: Their Source, Function and Future*, 4 DENVER J. INT'L LAW & POL. 187 (1974). The existence of *jus cogens* as an accepted concept in international law has been accorded recognition in Article 53 of the Vienna Convention on the Law of Treaties. For the text of the Convention see U.N. Doc. A/CONF. 39/27, 23 May 1969; 63 A.J.I.L. 875 (1969); 8 I.L.M. 679 (1969).

¹⁶⁴ A. BICKEL, *THE MORALITY OF CONSENT* 5 (1975).

¹⁶⁵ "Law is more than just another opinion; not because it embodies all right values, or because the values it does embody tend from time to time to reflect those of a majority or plurality, but because it is the value of values. Law is the principal institution through which a society can assert its values." *Id.*

cases make bad law, yet contemporary invocations of the doctrine of humanitarian intervention appear to treat this dictum with somewhat less respect than it deserves. This criticism does not seek to cast aside the dilemma created by the hard cases; these situations must be faced squarely. Hence, there appears to be no way to reconcile the rare category of case exemplified by the Entebbe incident. But Entebbe remains a discrete event that has on its facts managed to withstand the test of much, if not all, world opinion. It offers no solid justification, legally or morally, for an independent legal doctrine which, by its very nature, would not be constrained by the apparent validity of such a precedent. At most, the rare case justifies itself and no more: even then, the claim is tenuous.

V. CONCLUSIONS

The case for humanitarian intervention is essentially misdirected. A history of black intentions clothed in white has tainted most possible applications of the doctrine. Even where intentions have been good, the use of force for humanitarian ends more often than not has become self-defeating, increasing the human misery and loss of life it was intended originally to relieve. Proponents of humanitarian intervention would do well to consider more carefully the predictably tragic consequences of this unfortunate paradox.

Humanitarian considerations cannot be severed logically or practically from the political act of a military deployment of the forces of one state in the sovereign territory of another. Most human rights deprivations constitute particularly cruel examples of political gamesmanship in the eternal struggle for power within and between states; but the concept of humanitarian intervention is little more than an exasperated recourse to the same power struggle. Different rules are called for. Since the struggle is ongoing, the conduct of the offender must change if abuses are to be effectively countered. Processes for influencing even the most odious international delinquents should, if at all possible, avoid legitimating the employment of actions in kind. None of these bring the immediate satisfactions of an apparently successful external act of aggression in the cause of humanity. But, apart from its rarity, that order of satisfaction becomes illusory when measured as a response to the evil it seeks to eliminate and human life is further cheapened in the result. Is there then sufficient grounds in fact or law for according this doctrine of humanitarian intervention the status of law among nations? One would hope that the answer is clear enough.

