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# THE DOCTRINE OF HUMANITARIAN INTERVENTION IN LIGHT OF ROBUST PEACEKEEPING

T. MODIBO OCRAN\*

**Abstract:** Since the 19th century, humanitarian interventions have often been treated as suspect because they may be used as mere vehicles for national aggrandizement, imposition of puppets in power, or for the institution of political and economic systems detested by the indigenous population. However, it is also recognized that atrocities do occur within states, which shock the conscience of humankind and trigger the urge to intervene to save defenseless people from carnage, starvation, and other inhuman conditions. The problem is to identify a set of criteria and forms of behavior that will enable us to distinguish between intervention as aggression and genuine humanitarian intervention. Moreover, even if we see humanitarian intervention as a moral imperative in a Kantian sense, we would still need to establish its validity as a legal construct. This Article revisits the criteria for making the relevant distinctions and concludes that with all the operational problems of United Nations (U.N.) peacekeeping, collective intervention by the U.N., or regional bodies sanctioned by the U.N. Security Council, is the approach most likely to conform with the U.N. Charter paradigm for conflict resolution.

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Are international [legal] norms effective, or is raw military might the only thing that can stop the villainous Foday Sankohs of the world? Is humanitarian intervention impractical, or is there some way of balancing both sovereign rights and global values?<sup>1</sup>

—Michael Hirsh

It might be best for all parties to let minor wars burn themselves out. . . . Policy elites should actively resist the emotional impulse to intervene in other people's wars—not because they are indifferent to human suffering, but precisely because they care about it . . . .<sup>2</sup>

—Edward N. Luttwak

## INTRODUCTION

Since the 1970s, dramatic instances of humanitarian intervention have brought the subject of such intervention to the forefront of international law discourse. In the 1990s, humanitarian intervention efforts occurred in Somalia, Liberia, Rwanda, and the former Yugoslavia. The intervention in Yugoslavia was, of course, not a simple case of humanitarian intervention. It involved an attempt to stem the tide of threats to international peace and security, as various parts of the former Yugoslavia attempted to establish their own national sovereignty.<sup>3</sup> But there was also a humanitarian aspect to it. It was a mixture of humanitarian intervention and U.N. Charter Chapter 7 enforcement measures in aid of international peace and security.<sup>4</sup> Other not-so-distant examples of humanitarian intervention include Vietnam's invasion of Cambodia and Tanzania's invasion of Uganda in 1979. The U.S.-led coalition that occupied the Kurdish areas of northern Iraq in 1990 in the aftermath of the Iraq-Kuwait crisis also justified their action in terms of humanitarian intervention.

The doctrine and manifestation of humanitarian intervention have remained highly controversial over the centuries, whether the intervention is carried out by individual states, groups of states, or by the U.N. under the aegis of collective security. Debate over the doc-

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<sup>1</sup> Michael Hirsch, *Calling All Regio-Cops: Peacekeeping's Hybrid Future*, 79 FOREIGN AFF., NOV.-DEC. 2000, at 2, 2.

<sup>2</sup> Edward N. Luttwak, *Give War A Chance*, 78 FOREIGN AFF., July-Aug. 1999, at 36, 37.

<sup>3</sup> See TIM JUDAH, *THE SERBS: HISTORY, MYTH AND THE DESTRUCTION OF YUGOSLAVIA* 185–90 (1997); see also MARCUS TANNER, *CROATIA: A NATION FORGED IN WAR* 253–74 (1997).

<sup>4</sup> See T. Modibo Ocran, *How Blessed Were the U.N. Peacekeepers in Former Yugoslavia*, 18 WIS. INT'L L.J. 193, 196–98 (2000) (providing an in-depth account of the Yugoslav crisis).

trine is very much alive today, flaring up in moments of national and international humanitarian crises. There are those who, like Michael Hirsh, take the validity of the doctrine for granted and mostly worry about practical and effective ways of carrying it out. When Hirsh wrote that the debate over humanitarian intervention was “for the most part, a phony debate,”<sup>5</sup> he was merely questioning the utility of a debate focusing on the role of the United States and the U.N. as the primary undertakers of peacekeeping operations, while regional peacekeeping efforts remained relatively untapped. Hirsh was not questioning the seriousness of the debate over the doctrine itself.

At the same time, we encounter scholars like Edward Luttwak, who revel in their disavowal of humanitarian intervention even in situations of great humanitarian tragedies such as Croatia, Bosnia, and Kosovo during the 1990s. Indeed, Luttwak is moved by the profundity of “war’s paradoxical logic” of bringing peace by letting the warring factions burn themselves out. Consequently, he views disinterested interventions as “a new malpractice that could be curtailed.”<sup>6</sup>

Does international law permit unilateral or collective resort to force in order to remedy a situation of wide-scale deprivation of the most fundamental human rights committed by a state against its own nationals, or by one state against the nationals of another state? Put differently, the problem is one of meshing the goals of global conflict-minimization through avoidance of external aggression with the global protection of human rights. The basic issues in this debate thus posit the problem of sovereignty versus the protection of certain universal human rights. In modern history, the principle of sovereignty was established under the Treaty of Westphalia of 1648, which brought an end to the Thirty-Year War and a long period of destructive religious conflict in Europe. The principle of noninterference in the affairs of another state is viewed as a corollary of the more basic principle of sovereignty, which, at the same time, continues to lose some of its absoluteness through the entry into a host of treaties by nation-states. Sovereignty indeed has lost much of its claim since the formation of the U.N., which is seen as a reflection of the community of nations and therefore a kind of auto-limitation on what individual states can do as responsible citizens of the world.<sup>7</sup>

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<sup>5</sup> Hirsh, *supra* note 1, at 2.

<sup>6</sup> Luttwak, *supra* note 2, at 44.

<sup>7</sup> See Oscar Schachter, *The U.N. Legal Order: An Overview*, in *THE UNITED NATIONS AND INTERNATIONAL LAW* 3–26 (Christopher C. Joyner ed., 1997); see also Paul C. Szasz, *General*

This Article considers some of the typical doctrinal positions for and against humanitarian intervention and suggests that the interventions carried out by the U.N. neutralize most of the trenchant attacks on such forcible intervention. At the same time, the U.N.'s actions raise peculiar institutional problems and continue to raise difficult, debatable international legal issues.

## I. GENERAL NOTIONS OF UNITED NATIONS PEACEKEEPING AND HUMANITARIAN INTERVENTION

Elsewhere, this writer has outlined the place of peacekeeping within the global conflict resolution mechanism and described the attributes of traditional or classical peacekeeping.<sup>8</sup> Peacekeeping is often contrasted with other forms of U.N. involvement in military and political crises around the world. First, there are the "peace enforcement" measures taken under Chapter 7 of the U.N. Charter, involving the explicit use of force to pursue an agreed end, such as the Gulf War of 1990–91. Second, there is peace-making, "the active involvement of the U.N. in the search for a peaceful settlement, through mediation and the use of good offices."<sup>9</sup> Third, there is "post-conflict peace-building," which Boutros Ghali has described as an "action to identify and support structures designed to strengthen and consolidate peace . . . often [started] prior to the end of a conflict, to hasten the establishment of peace on firm foundations."<sup>10</sup> Undertakings such as the repatriation and reintegration of refugees, mine clearance, and disarmament fall under the rubric of peace building.<sup>11</sup>

Part of the problem of U.N. peacekeeping in Croatia, and even more so in Bosnia, in the early 1990s, was that while its mandate had some enforcement aspects, it was not conceived as a peace enforcement operation in the manner of the 1991 "Desert Storm" operation during the Iraq-Kuwait conflict. In the case of direct peace enforcement operations, the warring parties' lack of consent to third-party intervention means that the interventionists assume a hostile envi-

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*Law-making Processes*, in *THE UNITED NATIONS AND INTERNATIONAL LAW* 27–64 (Christopher C. Joyner ed., 1997).

<sup>8</sup> See Ocran, *supra* note 4, at 196–98.

<sup>9</sup> Spyros Economides & Paul Taylor, *Former Yugoslavia*, in *THE NEW INTERVENTIONISM 1991–1994 UNITED NATIONS EXPERIENCE IN CAMBODIA, FORMER YUGOSLAVIA AND SOMALIA* 59, 64 (James Mayall ed., 1996).

<sup>10</sup> BOUTROS BOUTROS-GHALI, *BUILDING PEACE AND DEVELOPMENT—1994: ANNUAL REPORT ON THE WORK OF THE ORGANIZATION* at 246–57, U.N. Sales No. E.95.1.3 (1994).

<sup>11</sup> *See id.* at 265.

ronment and adopt the appropriate rules of military engagement, as well as appropriate levels of combat readiness and equipment. But what if, as in the case of The United Nations Protection Force (UNPROFOR), the peacekeeping operation established for the former Yugoslavia in 1992, and The United Nations Confidence Restoration Operation (UNCRO) mandated for Croatia in 1995, the forces maintained a peacekeeping mode with the old rules of engagement, while being ordered to distribute humanitarian assistance in the midst of war?

In the same publication already referred to, this writer has laid out the *modus operandi* of traditional peacekeeping.<sup>12</sup> First, there is the presence of supposedly disinterested outside assistance in a war situation to help the warring parties disengage themselves. The outsider is not expected to side with one party in order to win its objectives. Thus, the Korean and Iraqi missions of 1951 and 1990, respectively, were not peacekeeping operations, but rather enforcement measures carried out under Chapter 7 of the U.N. Charter. Second, the disinterested outside assistance, e.g., U.N., normally enters the theatre with the initial agreement of the parties, usually after an armistice or cease-fire agreement has been signed by the parties. Third, the rules of military engagement provide only for appropriate self-defense. The soldiers are therefore lightly armed, and are almost always outgunned by the disputants they are required to monitor. Fourth, at least in the early days, U.N. peacekeeping was confined to international, as distinct from civil wars, with the great exception of the Congo Crisis of 1960–64.

There have been new horizons in the modalities of peacekeeping as the international community becomes more embroiled in containing civil wars or other crises involving both domestic and international threats to peace. Some have described this new tendency in peacekeeping operations as “robust peacekeeping.”<sup>13</sup> Goulding names it “cease-fire enforcement, . . . a forceful variant of the traditional peacekeeping.”<sup>14</sup> Irrespective of the terminology adopted, the com-

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<sup>12</sup> See Ocran, *supra* note 4, at 196–99.

<sup>13</sup> “Peace operations have changed since the end of the Cold War. They are no longer limited to the interposition of small numbers of passive, unarmed observers. Today, they also include more complex and sometimes more *robust* uses of military resources to achieve a range of political and humanitarian objectives.” UNITED STATES DEPARTMENT OF STATE, *Administration Policy on Reforming Multilateral Peace Operations*, April 1994, 33 ILM 705, 706, at 809–10 (emphasis supplied) [hereinafter U.S. DEPT. OF STATE].

<sup>14</sup> Marrack Goulding, *The Evolution of United Nations Peacekeeping*, 69 INT’L AFF. 451, 459 (1993).

mon thrust is to emphasize various modes of filling the “doctrinal void” between peacekeeping and peace enforcement, which Ruggie has so aptly discerned:

Peacekeeping essentially attempts to overcome a coordination problem between the two adversaries: the peacekeeper seeks to ensure that both parties to a conflict understand the agreed-upon rules of the game and that compliance with or deviation from these rules is made transparent. Enforcement, on the other hand, is akin to a game of chicken: the international community, through escalating measures that threaten war-making and military defeat, attempts to force an aggressor off its track. Strategically, the United Nation’s new domain resembles a suasion game: because there is no clear-cut aggressor, U.N. forces, by presenting a credible military threat, seek to convince all conflict[ing] parties that violence will not succeed. International force is brought to bear not to defeat but to neutralize the local forces. . . . The military objective of the strategy then is to deter, dissuade and deny.<sup>15</sup>

Robust peacekeeping, or peacekeeping with credible and effective force, becomes especially relevant in situations where peacekeepers are asked to provide humanitarian assistance in the face of opposition by a warring faction seeking to use starvation or disease as instruments of war. Its relevance is even more apparent when peacekeepers are called upon to intervene in the prevention of genocide, carnage, or other acts of mayhem in the context of an ongoing civil war.

In the first crisis situation—the provision of humanitarian assistance—the peacekeepers will either have to surrender their mandate or force their way into the theatre of conflict to deliver food, medical supplies, and other forms of life-sustaining necessities. It is possible to advance a rather broad interpretation of “self-defense” to include the authority of U.N. peacekeepers to open fire on hostile soldiers at a roadblock bent on denying passage to a humanitarian convoy.<sup>16</sup> However, local U.N. commanders, very much aware of their organization’s institutional weakness, hardly attempt to live out this notion of self-

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<sup>15</sup> John Gerard Ruggie, *Wandering in the Void: Charting the U.N.’s New Strategic Role*, 72 FOREIGN AFF., Nov.-Dec. 1993, at 26, 29.

<sup>16</sup> See Goulding, *supra* note 14, at 455.

defense. The initial consent of the parties in conflict to the deployment of peacekeepers may even be withdrawn completely, at least for a period of time. A historic example of this possibility is the withdrawal by then-Egyptian President Nasser in May, 1967 of his country's consent to the United Nations Emergency Force (UNEF I) to deploy troops on its territory during the 1956 Egyptian-Israeli conflict.<sup>17</sup>

Goulding cites the examples of U.N. operations in Congo (Kinsasha) from 1960–64, and Somalia from 1992–95 to illustrate the point that such operations may initially be deployed as traditional peacekeeping operations, but could subsequently be transmuted into operations with authority to use force on a considerable scale when it becomes clear that the traditional mode would not achieve the overall purpose of maintaining peace and security.<sup>18</sup> In the case of Somalia, the U.N. Secretary-General, after recognizing that traditional peacekeeping could not effectively deal with the situation, compelled the Security Council to establish the United Nations Task Force (UNISOM I or Task Force) led by the United States, whose assignment was to build a more secure environment for humanitarian deliveries. A regular peacekeeping operation would then take over after the military situation had been put under control. The Task Force was ineffective because of the absence of the requisite degree of compulsion, as well as the presence of warlords in control of various parts of the territory, which made it unworkable for the U.N. commanders to establish an all-embracing agreement on the delivery of humanitarian assistance. Thus, the Security Council subsequently had to establish a new U.N. force under Chapter 7 of the U.N. Charter (UNISOM II, 1993–95) with the mandate to enforce secure conditions for humanitarian operations more effectively.<sup>19</sup>

In the former Yugoslavia, warlords operating within the self-proclaimed Republic of Serb Krajina in Croatia, soldiers of the renegade Muslim enclave controlled by Fikret Abdic in the Bihac Republic of Bosnia, as well as the political-military establishment in the Bosnian Serb Republic based in Pale, Bosnia, were all engaged in frequent obstructions of humanitarian convoys of UNPROFOR and UNHCR moving from Croatian ports and cities into so-called U.N. safe areas in Bosnia. When the task of containment became unmanageable for

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<sup>17</sup> See *id.* at 454.

<sup>18</sup> See *id.* at 452–53.

<sup>19</sup> See *id.* at 459.



UNPROFOR in Bosnia, the U.N. Security Council established, under Chapter 7 of the U.N. Charter, a peace enforcement unit composed of NATO member-states linked to the Office of the U.N. Secretary General in a rather confusing chain of command.<sup>20</sup>

In the second crisis situation, involving attempts to stop atrocities such as genocide or mass killings, the main postulate of traditional peacekeeping, namely, the deployment of non-lethal weapons in a posture of self-defense, clearly becomes inapplicable. This was manifested most tragically in the inability of U.N. forces to stop the massacre of Bosnian Muslims by Bosnian Serbs in Srebrenica in 1995.<sup>21</sup> In both crisis situations, the measures required to carry out the assigned tasks or to meet the expectations of the international community could hardly be distinguished from forcible humanitarian intervention.

Humanitarian intervention has been defined as "the justifiable use of force for the purpose of protecting the inhabitants of another state from treatment so arbitrary and persistently abusive as to exceed the limits within which the sovereign is presumed to act with reason and justice."<sup>22</sup> Oppenheim defined intervention generally as "dictatorial interference by a state in the affairs of another state for the purpose of maintaining or ordering the actual conditions of things."<sup>23</sup> Humanitarian intervention does indeed take a variety of forms: material assistance through relief, aid, or sanctions which consist of coercive, but nonmilitary pressure to end abusive practices; and the dispatch of military forces to remedy massive human atrocities. It is the latter form that is most forcefully challenged or contradicted in the current debate.

Humanitarian intervention encompasses armed responses to certain acts, whether done by outsiders or compatriots, which "shock the moral conscience of mankind." Such acts have been noted to include: (1) genocide, ethnic cleansing, war crimes, crimes against humanity, and other atrocities involving loss of life on a massive scale; (2) interference with the delivery of humanitarian relief to endangered civilian populations; and (3) the collapse of civil order entailing substan-

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<sup>20</sup> See *infra* Part IV.B.

<sup>21</sup> See JUDAH, *supra* note 3, at 239-40; see also Luttwak, *supra* note 2, at 38.

<sup>22</sup> E. STOWELL, INTERNATIONAL LAW 349 (1931); Jean-Pierre Fonteyne, *The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity Under the U.N. Charter*, 4 CAL. W. INT'L L.J. 203, 204 (1974).

<sup>23</sup> LASSA F.L. OPPENHEIM, INTERNATIONAL LAW 305 (H. Lauterpacht ed., 87th ed. 1955).

tial loss of life, in situations where it is impossible to identify any authority capable of granting consent to international involvement to help restore order.<sup>24</sup>

Humanitarian intervention may be carried out by a single state (individual intervention) or by a group of states (collective intervention). Either form could be "unilateral" or unauthorized. Unilateral intervention is essentially characterized by the lack of formal authorization from any universal or regional competent body. Unilateral intervention is thus distinguished from intervention by armed forces under the direct control of the U.N., such as in Korea, UNEF in Suez, Egypt, ONUC in Congo, or of appropriate regional organizations such as the Organization of American States intervention in the Dominican Republic in 1965.

## II. JUSTIFICATION FOR HUMANITARIAN INTERVENTION: A REVIEW OF THE DOCTRINAL ARGUMENTS

The traditional doctrine at customary international law often upheld the proposition that humanitarian intervention was never fully acknowledged as part of positive law.<sup>25</sup> In 1863, Sir W. V. Harcourt, writing on some perennial questions of international law, postulated that, "in the case of intervention as that of revolution, its essence is illegality, and its justification is its success."<sup>26</sup> However, it remained an open question whether the justification for humanitarian intervention was to be seen solely in terms of its success—like Kelsen's "principle of effectiveness" in the case of revolutions<sup>27</sup>—or whether one could establish some plausible moral and legal justifications for intervention without reference to its results.

In order to test the proposition that humanitarian intervention had never been accepted as part of customary international law, Fonteyne reviewed state practice starting from the 19th century, including examples from southern and eastern Europe. He cites the intervention in Greece by France, U.K., and Russia, between 1827 and 1830, to stop the massacres in the Greek areas of the Ottoman empire; the intervention by France in Syria from 1860 to 1861 following the massa-

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<sup>24</sup> See BARRY E. CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW* 1219–20 (3d ed. 1999).

<sup>25</sup> See Lauterpacht, *The Grotian Tradition in International Law*, 23 *BRIT. Y.B. INT'L L.* 46, 46 (1946).

<sup>26</sup> *Id.*; HARCOURT, *LETTERS OF HISTORICUS ON SOME QUESTIONS OF INTERNATIONAL LAW* 14 (1843).

<sup>27</sup> See Hans Kelsen, *WHAT IS JUSTICE?* 290 (1945).

cre in the Lebanese region of that country;<sup>28</sup> and the Russian intervention in Bosnia-Herzegovina and Bulgaria from 1876 to 1878, which was justified on humanitarian grounds. There was also the intervention in Macedonia from 1903 to 1908 and 1912 to 1913 by Bulgaria, Greece, and Serbia against the Turkish attempt to convert the people of that area to the Turkish religion and culture.<sup>29</sup> Fonteyne concludes that there was some consistency in practice since the latter part of the 19th century:

While divergence certainly existed as to the circumstances in which resort could be had to the institution of humanitarian intervention as well as to the manner in which such operations were to be conducted, the principle itself was widely, if not unanimously, accepted as an integral part of customary international law.<sup>30</sup>

In spite of these historic examples, the debate on humanitarian intervention continued, and remains unabated. There are two levels to the debate: (1) whether, as a matter of principle, interventionism ought to be allowed irrespective of the legal status of the doctrine; and (2) whether humanitarian intervention is permissible under international law. In the words of Fonteyne, there is the "question of principle" on the one hand, and the "question of norms" on the other.<sup>31</sup> Picking up the debate from the middle of the 19th century, the dividing line appeared to have been drawn between the supporters of sovereign independence and nonintervention, and the adherents of humanitarianism.

#### A. *The Philosophical Debate: The Question of Principle*

The Italian philosopher Mamiani, who was also described as the leader of the Italian "non-intervention" or "neo-nationalist" school of thought,<sup>32</sup> claimed in 1880 that the actions and crimes of the people within the limits of its territory do not infringe upon anyone else's rights, and thus, do not give a basis for a legitimate intervention. "Truly what positive right of the other peoples does one infringe

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<sup>28</sup> There was no actual mention of humanitarian intervention in that case, but it was quite clear that the real driving force for intervention was the outrage over the massacre of civilians.

<sup>29</sup> See Fonteyne, *supra* note 22, at 212-13.

<sup>30</sup> *Id.* at 235.

<sup>31</sup> See *id.* at 214, 226.

<sup>32</sup> See *id.* at 215.

upon? Have you ever heard it said that the law requires that one be only confronted with good example?"<sup>33</sup> The 19th century French scholar Pradier-Fodéré also stated:

The acts of inhumanity however condemnable they may be, as long as they did not affect nor threaten the right of other states, do not provide the latter with a basis for lawful intervention as no state can stand up in judgment of the conduct of others; as long as they do not infringe upon the rights of other powers or of their subjects, they remain the sole business of the nationals of the countries where they are committed.<sup>34</sup>

Latin American scholars, traditional champions of the noninterventionist principle, took the same approach in the early 20th century. L. Pereira, writing in 1902, postulated that, "[i]nternal oppression, however odious and violent it may be, does not affect either directly or indirectly external relations and does not endanger the existence of other states. Accordingly it cannot be used as a legal basis for use of force and violent means."<sup>35</sup> Other scholars point to the possible abuse of the doctrine of intervention. Intervening military forces are supposed to strive for neutrality in civil wars and are to be held accountable. Yet, the picture often created is that these forces are already a party to the tragedy when they arrive. "It is a delusion to think that they are neutral or above the fray."<sup>36</sup> There is a fear that if humanitarian intervention were allowed, it would give powerful states an excuse to intervene in the affairs of weaker states for selfish political purposes.<sup>37</sup> It is argued that such a right might indeed open a Pandora's Box, as there is no country that can claim a complete absence of human rights violations in its territory.<sup>38</sup>

Nevertheless, could one argue that acceptance of humanitarian intervention reflects a fundamental value choice that justifies some

<sup>33</sup> CARNAZZA-AMARI, *TRAITÉ DE DROIT INTERNATIONAL EN TEMPS DE PAIX* 557 (Montanari-Revest trans. 1880), *quoted in* Fonteyne, *supra* note 22, at 215.

<sup>34</sup> PRADIER-FODERE, *TRAITÉ DE DROIT INTERNATIONAL EUROPEEN ET AMERICAIN* 655 (1885), *quoted in* Fonteyne, *supra* note 22, at 216.

<sup>35</sup> Fonteyne, *supra* note 22, at 217 (citing L. PEREIRA, *PRINCIPIOS DE DIREITO INTERNACIONAL* 97-98 (1902)).

<sup>36</sup> Alex De Waal & Rakiya Omaar, *Can Military Intervention Be "Humanitarian?,"* 24 *MIDDLE E. REP.* 8, 8 (1994).

<sup>37</sup> Farook Hassan, *RealPolitik in International Law: After Tanzanian-Ugandan Conflict—"Humanitarian Intervention" Reexamined*, 17 *WILLAMETTE L. REV.* 859, 881-82 (1981).

<sup>38</sup> See LOUIS HENKIN, *HOW NATIONS BEHAVE* 145 (2d ed. 1979).

degree of interference in the political independence and sometimes even territorial integrity of the state intervened in? Lillich has noted that, "a prohibition of violence is not an absolute virtue [and must] be weighed against other values as well."<sup>39</sup> Grotius, the Dutch pioneer of international law, was among those who felt that international relations and international law ought to have a place for humanitarian intervention. He wrote:

Certainly it is undoubted that ever since civil societies were formed, the ruler of each claimed some especial right over his subjects . . . but if a tyrant . . . practices atrocities towards his subjects which no just man can approve, the right of human social connection is not cut off in such case.<sup>40</sup>

Arntz added his voice to the Grotian theme, stating:

When a government, even acting within the limits of its right of sovereignty, violates the rights of humanity, either by measures contrary to the interests of other [s]tates, or by excessive injustice or brutality, which seriously injure our morals or civilization, the right of intervention is legitimate. For, however worthy of respect the rights of sovereignty and independence of states may be, there is something even more worthy of respect, namely the law of humanity or of human society that must not be violated.<sup>41</sup>

Similarly Fiore, writing in 1885, asserted that, "inaction and indifference of other states would constitute an egocentric policy contrary to the rights of all; for whoever violates international law to the disadvantage of anybody violates it not only to the detriment of the person directly affected but as against all civilized states."<sup>42</sup> Indeed, one could say that by the turn of the 19th century, the principle of humanitarian intervention as a philosophical concept was strongly embedded in intellectual discourse. Decades later, Jenks would insist that, "the world community must recognize the need for external intervention

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<sup>39</sup> Richard B. Lillich, *Forcible Self-Help Under International Law*, 22 NAVAL WAR C. REV. 56, 65 (1970).

<sup>40</sup> HUGONIS GROTIUS, 2 DE JURE BELLI ET PACIS 439 (William Whewell trans. 1853).

<sup>41</sup> Rorin-Jacquemys, *Note Sur La Theorie du Droit d'Intervention*, 8 REVUE DE DROIT INTERNATIONAL ET DE LEGISLATION COMPAREE 675 (1876), quoted in Fonteyne, *supra* note 22, at 220.

<sup>42</sup> P. FIORE, NOUVEAU DROIT INTERNATIONAL PUBLIC 524-25 (Charles Antoine trans., 1885).

in cases not covered by the right of self-defense so defined [in Article 51 of the U.N. Charter], in which the world interest or the conscience of mankind is involved . . . .”<sup>43</sup>

B. *Legal Permissibility of Humanitarian Intervention: The Question of Norms*

Some eminent scholars often expressed doubts as to the legal status of the doctrine. Thus, Winfield stated in 1924 that, “whether [humanitarian intervention] is legal . . . must in the present state of practice be regarded as an unsolved point.”<sup>44</sup> Lauterpacht also admitted that, “[t]he doctrine of humanitarian intervention has never become a fully acknowledged part of positive international law.”<sup>45</sup> Of particular concern were the mixed motives with which states generally became involved in such intervention, as well as the real fear of abuse of such a doctrine. On the other hand, Fonteyne has already cited the classic examples of 19th century military humanitarian intervention to make a point that such intervention as a matter of state practice was quite acceptable under customary international law.<sup>46</sup>

In the period immediately preceding the First World War, the majority of legal scholars who wrote on the subject accepted the legality of humanitarian intervention. While some scholars continued to reject the validity of the doctrine, there were others that tried to reconcile the apparent contradiction in these basic positions. Lawrence, for instance, emphasized the difference between law and policy, giving priority to the latter in exceptional circumstances.<sup>47</sup> This is the so-called “double level approach,” in which an attempt is made to skirt the strictly legal analysis and to suggest that there is no inconsistency with taking a legal as well as a moral position on the matter.

Lawrence wrote, “[a]n intervention to put a stop to barbarous and abominable cruelty is ‘a high act of policy above and beyond the domain of law.’ It is destitute of technical legality but it may be morally right and even praiseworthy to a high degree.”<sup>48</sup> Similarly, while

<sup>43</sup> C. WILFRED JENKS, *A NEW WORLD OF LAW?* 30 (1969).

<sup>44</sup> P.H. Winfield, *The Grounds of Intervention in International Law*, 5 BRIT. Y.B. INT’L L. 149, 162 (1924).

<sup>45</sup> Lauterpacht, *supra* note 25, at 46.

<sup>46</sup> See Fonteyne, *supra* note 22, at 206–13.

<sup>47</sup> See THOMAS JOSEPH LAWRENCE, *THE PRINCIPLES OF INTERNATIONAL LAW* 129 (4th ed. 1910).

<sup>48</sup> See T. LAWRENCE, *THE PRINCIPLES OF INTERNATIONAL LAW* 129 (4th ed. 1910), *quoted in* Fonteyne, *supra* note 22, at 224.

expressing doubts as to the legality at customary international law of humanitarian intervention, Roxburgh wrote in 1920, "on the other hand, it cannot be denied that public opinion and the attitude of the powers are in favor of such interventions. It may perhaps be said that in time the law of nations will recognize the rule that interventions in the interest of humanity are admissible."<sup>49</sup>

Whatever the position existing in customary international law prior to the U.N. Charter, the question arises whether humanitarian intervention can be maintained as an acceptable doctrine of international law since the promulgation of that Charter in 1945. The International Law Association, in its report submitted to the International Commission on Human Rights in 1970, expressed the opinion that "the doctrine of humanitarian intervention appears to have been so clearly established under customary international law that only its limits and not its existence is subject to debate."<sup>50</sup>

Yet, we simply cannot ignore the 1970 General Assembly *Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations*, addressed to individual states, which proclaims "the duty not to intervene in matters within the domestic jurisdiction of any state, in accordance with the Charter."<sup>51</sup> This proposition was affirmed in an earlier General Assembly Resolution, *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty*.<sup>52</sup> Even more important in terms of the legal standing of the postulate against nonintervention was the judgment of the International Court of Justice (ICJ) in *Nicaragua v. United States*,<sup>53</sup> in which the court categorically stated that, "[t]he principle of non-intervention involves the right of every sovereign state to conduct its affairs without outside interference; though examples of trespass

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<sup>49</sup> LASSA F. L. OPPENHEIM, *INTERNATIONAL LAW* 229 (Ronald F. Roxburgh ed., 1920).

<sup>50</sup> International Law Association, *The International Protection of Human Rights by General International Law*, in INTERNATIONAL COMMISSION ON HUMAN RIGHTS, INTERIM REPORT OF THE SUBCOMMITTEE 11 (1970).

<sup>51</sup> G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 18, at 338, U.N. Doc. A/8082 (1970).

<sup>52</sup> See G.A. Res. 2131, U.N. GAOR, 20th Sess., Supp. No. 12, at 107-08, U.N. Doc. A/6012 (1965); see also Charter of the Organization of the American States, 2 U.S.T. 2394, 119 U.N.T.S. 3, as amended Feb. 27, 1967, 21 U.S.T. 607, art. 18 (providing "no State or group of states has the right to intervene directly or indirectly, for any reason whatever, in the internal and external affairs of any other [s]tate . . .").

<sup>53</sup> See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27).

against this principle are not infrequent, the court considers that it is *part and parcel of customary international law.*"<sup>54</sup>

The ICJ decision did not end the debate, because at issue is whether humanitarian intervention amounts to that form of intervention which goes against the political independence of the state, or even whether human rights are matters essentially within a state's domestic jurisdiction. But if the use of force in violation of the territorial sovereignty of another state is always illegal, then it is immaterial that force is used for a benevolent purpose or that the violation of the territorial sovereignty is only temporary. If we assume that the U.N. Charter does not address the issue in an unequivocal manner, and that the question is still open, can one legitimately argue that a new rule of customary international law of humanitarian intervention now exists as part of the law of nations? Here the question is whether there has been enough state practice, coupled with *opinio juris*, to establish such a rule.

Brownlie has categorically stated that, "it is extremely doubtful if . . . [humanitarian intervention] has survived . . . the general prohibition of resort to force to be found in the United Nations Charter."<sup>55</sup> The argument against a post-Charter doctrine of intervention proceeds from several angles. It is claimed that the U.N. Charter expressly prohibits the use of force or threats of force by states except in self-defense. No article of the Charter specifically mentions humanitarian intervention. In fact, international legal instruments subsequent to the Charter, including these cited above, have emphasized the point of nonintervention. Those instruments that have addressed the question of nonintervention make no distinction between intervention by a state acting unilaterally and intervention by a group of states acting in concert. In other words, if humanitarian intervention were unlawful, it would continue to be unlawful even if it were carried out by a group of states. During the 1963 U.N. General Assembly Debate on this question, the Mexican representative Gomez Robledo stated in the U.N. Sixth Committee: "Under Article 2 Paragraph 4 of the United Nations Charter, it was clear that the use of force was permissible in only two cases: enforcement action ordered by the Security

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<sup>54</sup> *Id.* at 106 (emphasis added).

<sup>55</sup> IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 342 (1963).



Council under Article 42, and in conformity with Article 51, individual or collective self-defense in the event of armed attack."<sup>56</sup>

The argument has also been made that it is hardly possible for such intervention to be carried out consistently with Article 2(7) without going against the territorial integrity or political independence of the state concerned. This is so because humanitarian intervention would usually require a change of government or even secession, and thus the foreign intervention would have had to fundamentally influence the domestic political process and organization of the state.<sup>57</sup>

Article 2(7) should not be confused with Article 2(4) with regard to the permissibility of intervention. Article 2(7) relates to the U.N. organization itself and precludes the organization from intervening in matters essentially within the jurisdiction of any state, with certain important exceptions regarding threats to peace, breaches of the peace, and acts of aggression.<sup>58</sup> However, Article 2(4), which deals with interstate relations, categorically prohibits the threat or use of force between states except in individual or collective self-defense.<sup>59</sup> Therefore, it may be argued that the nonintervention principle applies even more categorically to relations between states. In other words, even those who support some sort of intervention would admit that the basic Charter obligation of nonintervention in the domestic affairs of a state is quite clearly more relevant to interstate relations. For example, in the U.N. Sixth Committee debate in 1963 just referred to, the delegate from Cyprus, Rossides, asserted that, "a very clear distinction should be drawn between the concept of absolute sovereignty of states in relation to each other and that of the limited sovereignty of states in relation to the United Nations."<sup>60</sup> Rossides then went on to support intervention by the U.N.

Lillich made the following statement:

Two provisions make it very doubtful whether forcible self-help to protect human rights is still permissible under international law. In the first place, all states by Article 2(4) re-

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<sup>56</sup> U.N. GAOR 6th Comm., 18th Sess., at 113, U.N. Doc. A/C6/SR806 (1963) [hereinafter U.N. Doc. A/C6/SR806]. On this view, one might find it difficult to justify peacekeeping operations that do not necessarily fall under Chapter 7 enforcement action but sanctioned by the Security Council.

<sup>57</sup> See Fonteyne, *supra* note 22, at 255.

<sup>58</sup> See U.N. CHARTER art. 2, para 7.

<sup>59</sup> See *id.* arts. 2, para. 6, 51.

<sup>60</sup> U.N. Doc. A/C6/SR806, *supra* note 56, at 230.

nounce 'the threat or use of force against the territorial integrity or political independence of any state' subject of course to the self-defense provision contained in Article 51. Secondly, Article 2(7) prevents intervention by the United Nations 'in matters which are essentially within the domestic jurisdiction of any state' except for the application of enforcement measures under Chapter [7].<sup>61</sup>

Such views are buttressed by the important fact that the principle of intervention, which had wide acceptance by the time of the creation of the U.N., was not expressly provided for in the Charter in the matter of interstate relations but mentioned only with respect to the U.N. as an organization.

There are scholars who interpret the Article 2(4) prohibition of intervention as encompassing the entire range of possible interventions, thus ruling out any attempt to justify other cases of intervention. Giraud has argued that, "[a] restrictive interpretation has not been retained. The reason for [this] is that [the] interpretation does not correspond at all to the intentions of the drafters of the Charter."<sup>62</sup> According to him, the phrase referring to "the territorial integrity or [the] political independence" in Article 2(4) was added merely to satisfy small nations who wished to see the guarantee of Article 10 of the Pact of the League of Nations restated in the Charter, and not to restrict the scope of the prohibition of recourse to force.<sup>63</sup> Sir Humphrey Waldock was of the same view. He argues that Article 2(4) prohibits any threat or use of force between independent states except in individual or collective self-defense under Article 51 or in execution of collective measures under the Charter for maintaining or restoring peace.<sup>64</sup>

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<sup>61</sup> See Richard B. Lillich, *Intervention to Protect Human Rights*, 15 MCGILL L.J. 205, 208-09 (1969).

<sup>62</sup> See Giraud, *L'Interdiction du Recours a la Force—La Theorie et la Pratique des Nations Unies*, 67 REV. GEN. DR. INTL. PUBL. 501, 512-513 (1963), quoted in Fonteyne, *supra* note 22, at 242-43. Article 10 of the League of Nations Covenant provides, "the Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled." LEAGUE OF NATIONS COVENANT art. 10.

<sup>63</sup> Giraud, *supra* note 62, at 512-13.

<sup>64</sup> See Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 RECUEIL DES COURS 455, 493 (1952), cited in Fonteyne, *supra* note 22, at 243.

Wehberg has also remarked that the final part of Article 2(4), referring to the prohibition of the use of force "in any other manner incompatible with the purposes of the United Nations," should not be interpreted as implying any other authorized use of force.<sup>65</sup> Basing his argument on the preparatory work of the San Francisco conference on the U.N. Charter, he concludes that that phrase was added simply to guarantee that there would be no loopholes. Phillip Jessup has added his voice to this line of argument by concluding that:

The landing of armed forces of one state in another state is a "breach of the peace" or "threat to the peace" even though under traditional international law it is a lawful act . . . a modernized law of nations should insist that the collective measures envisaged by Article 1 of the Charter shall supplant the individual measures approved by traditional international law.<sup>66</sup>

Here, Jessup is disaffirming the validity of individual humanitarian intervention, and not necessarily that carried out under U.N.'s auspices.

To sum up the position of the anti-interventionists, there is no right to humanitarian intervention under international law. This has been made clear by U.N. General Assembly resolutions, declarations, and assertions, as well as by frequent condemnation of states that have employed humanitarian arguments to justify their actions in the domestic affairs of other states. State practice, even if it does not support the absence of humanitarian intervention, does not in their view answer the question completely. In none of the dramatic and clearly humanitarian interventions in the 1970s and 1980s, particularly the Vietnamese invasion of Cambodia and the Tanzanian invasion of Uganda, did the international community clearly recognize the actions as legitimate, even if they were not roundly condemned.

So, has the U.N. been acting illegally in all these years of humanitarian intervention? Alternatively, if such interventions through robust peacekeeping forces fit into the U.N. Charter paradigm of dispute settlement, is it because they are viewed as accepted exceptions to the avowed principle of non-intervention, or because they are not really cases of "interference" as the term is used in Article 2(7) of the

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<sup>65</sup> See Hans Wehberg, *L'Interdiction du Recours a la Force*, 78 RECUEIL DES COURS 7, 70 (1951).

<sup>66</sup> PHILIP JESSUP, *A MODERN LAW OF NATIONS* 169-70 (1958).

Charter? If such interventions fall outside the ambit of Article 2(4) and 2(7), what do we make of the powers of the Security Council under Chapters 6 and 7 of the Charter?

As expected, there are many other scholars and diplomats rooted on the side of interventionism in aid of human rights protection. It has been argued that Article 2(7) of the Charter has never been interpreted by the General Assembly and the Security Council as preventing action by the U.N. in serious cases of human rights violation. Recalling the discussions in 1963 of the 6th Committee of the U.N. General Assembly already alluded to, Rossides, the representative of Cyprus stated, "Article 2 paragraph 7 of the Charter has repeatedly been interpreted by the General Assembly as allowing the United Nations to intervene in the internal affairs of a state in case of a flagrant violation of human rights or the prohibitions of the Charter."<sup>67</sup> A more general principle is that no state should, under the cover of the principle of nonintervention in domestic affairs, commit acts contrary to the peremptory rules of international law. The implication is that, if such acts occurred, it should be within the right of other states under certain arrangements to intervene to rectify the situation.

Ermacora has stated categorically that, "the right to self-determination and the protection of human rights in matters of discrimination as far as 'gross violations' or 'consistent patterns of violations' are concerned are no longer essentially within the domestic jurisdiction of [s]tates."<sup>68</sup> Reisman has also claimed that human rights have been placed outside the reach of the Article 2(7) ban on intervention, even in cases not amounting to a threat to peace.<sup>69</sup> This position, of course, leaves open the question whether the nonintervention principle should be stricter for individual states. Fonteyne asserts that the U.N.'s practice in this area arguably indicates that human rights finally have been removed from the exclusive jurisdiction of states and lifted into the realm of international concern.<sup>70</sup>

Fonteyne has further argued that the interpretation of Article 2(4), to the effect that no other use of force is authorized by the U.N. Charter except in individual or collective self-defense under Article 51 or under the U.N. enforcement measures under Chapter 7, rests on a

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<sup>67</sup> U.N. Doc. A/C6/SR806, *supra* note 56, at 230.

<sup>68</sup> Felix Ermacora, *Human Rights and Domestic Jurisdiction*, 124 RECUEIL DES COURS 375, 436 (1968).

<sup>69</sup> See Michael Reisman, *Humanitarian Intervention to Protect the Ibos*, in HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 167, 189–91 (Richard B. Lillich ed., 1973).

<sup>70</sup> See *id.* at 179; see also Fonteyne, *supra* note 22, at 241.

view of the Charter as a closed structure of self-sufficient norms divorced from the preexisting body of rules of customary international law.<sup>71</sup> As for the argument that if nations wished to exclude humanitarian intervention from the U.N. Charter prohibition they would have done so explicitly, he responds that the contention raises the fundamental question whether the Charter must be construed as abolishing all preexisting norms of customary international law that it does not specifically and explicitly save, or whether it left unaffected those traditional rules which are not necessarily in contradiction with its own prohibitions and purposes. Fonteyne tends to favor the latter position for a variety of reasons, including the widely shared principle of domestic law that the technique of implicit repeal of preexisting laws must be applied only when contradictions with the new rules are unavoidable.<sup>72</sup>

Some scholars, while accepting the view that the Charter's prohibition of unilateral use of force is a necessary corollary to the attainment of the U.N.'s primary goal of maintaining international peace and security, have also taken note of the demonstrated inability or unwillingness of international organizations to cope with all situations of gross human rights violations. Consequently, they must acknowledge that the absolute interpretation of the Charter's prohibition on the use of force by states is an unworkable and unacceptable restriction upon resort to unilateral action in cases of extreme violations of the most fundamental human rights. They conclude that the world community, by its lack of adverse reaction to state intervention in all these circumstances, in practice condones conduct that, although constituting a formal breach of positive legal norms, appears "acceptable" because of higher motives of a moral, political, or humanitarian nature.<sup>73</sup> The impression given by this lack of adverse reaction to such specific cases is that states in fact confer on such actions the character of some kind of second-tier legality or sub-legality.<sup>74</sup>

Reisman has noted that, "[a] close reading of [Article 2(4)] will indicate that the prohibition is not against the use of coercion per se, but rather the use of force for specified unlawful purposes."<sup>75</sup> He argues further that, "[t]he preamble and critical first Article of the

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<sup>71</sup> See Fonteyne, *supra* note 22, at 243-44.

<sup>72</sup> See *id.* at 244.

<sup>73</sup> See HUMANITARIAN INTERVENTION AND THE UNITED NATIONS, *supra* note 69, at 64 (citing Professor Thomas N. Franck).

<sup>74</sup> See Lillich, *supra* note 69, at 61-62, 118.

<sup>75</sup> Reisman, *supra* note 69, at 177.

Charter, framed in the awful shadow of the atrocities of the war, left no doubt as to the intimate nexus that the framers perceived to link international peace and security and the most fundamental human rights of all individuals.”<sup>76</sup>

In this respect, Reisman and McDougal have placed a great deal of emphasis on Articles 55 and 56 of the U.N. Charter regarding the universal observance of human rights and fundamental freedoms, as well as on the pledge by all member states of the organization to take joint and separate action in cooperation with the U.N. for the achievement of the purposes set out in Article 55. The two eminent international lawyers interpret the thrust of these Articles as transforming the general commitment of the U.N. members to human rights into “an active obligation for joint and separate action,” and conclude that “humanitarian intervention represents a vindication of international law.”<sup>77</sup> Moreover, Article 51 of the Charter, dealing with the use of force as self-defense, has sometimes been used as a separate basis for humanitarian intervention with regard to missions to rescue nationals trapped in foreign countries. One such example is the Israeli rescue of its nationals on a hijacked plane in Entebbe airport in Uganda in 1976.<sup>78</sup>

Some other scholars, while not opposed to the doctrine of humanitarian intervention, prefer to base its validity on the prior consent of the parties involved or on a U.N. Security Council finding of a threat to international peace and security under Chapter 7 of the Charter. Thus, O’Connell has argued that, “[s]hort of giving unlimited scope to the concept of threat to the peace, there is no legal basis for [U.N.] intervention without the parties’ consent.”<sup>79</sup> In other words, she sees only two bases of authority for U.N. intervention in civil wars: (1) the prior consent of the parties to the conflict; or (2) a finding of a threat to international peace and security by the Security Council. Using these two parameters to discuss the Iraqi and Yugoslav crises in 1990 and 1991, she concludes that the U.N. “has not abandoned the Charter prohibition on intervention in civil war.”<sup>80</sup>

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<sup>76</sup> *Id.* at 171.

<sup>77</sup> McDougal & Reisman, *Response*, 3 INT’L LAWYER 434, 444 (1960).

<sup>78</sup> However, the extent to which the right to self-defense includes a right of protection of nationals abroad has been the subject of acute controversy in international law because it is difficult to equate protection of nationals abroad with the preservation of the state itself.

<sup>79</sup> Mary Ellen O’Connell, *Continuing Limits on U.N. Intervention in Civil War*, 67 IND. L.J. 903, 911 (1992).

<sup>80</sup> *See id.* at 903–04.

O'Connell recalls that as the fight to liberate Kuwait from Iraqi occupation ended, Iraqi Kurds began a rebellion against the Iraqi government and requested that the U.N.-sanctioned allied coalition liberate them. Questions about the legality of such intervention were raised. Despite pressure from France to sanction intervention, the Security Council granted only humanitarian aid and refused any aid that might change the political status quo. This decision was made regardless of the fact that in Security Council Resolution 688 the Council found that the Iraqi repression of the Kurds was a violation of international peace and security.<sup>81</sup> O'Connell notes that the U.N. action did not amount to illegal interference as they did not help the Kurds secede or rearrange Iraq's government.

But it is a fact that allied forces claiming the authority of Resolution 688 and the earlier Resolution 678, distributed food to the refugees, set up camps for them, and defended them against Iraqi attack by creating a protective zone and excluding Iraqi troops from the Kurdish region. It was not argued that they should help the Kurds win their fight; they were there only to grant humanitarian aid to the retreating Kurds. According to O'Connell, the allied or coalition forces were even eager to remove their troops from this humanitarian assistance to the Kurds, urging the U.N. to take over the task instead. U.N. peacekeeping troops did not assume this task until Iraq gave its consent in June, 1991.<sup>82</sup>

However, one would question the voluntary nature of the consent given to this deployment by Iraq, which then stood as a defeated nation. Was it a real case of consent, or simply the imposition of the U.N. deployment as a condition for allied withdrawal? How realistic is O'Connell's insistence on consent of the parties as a condition for entry? Are we referring to the consent of all the parties, or only of the government, which is invariably the party prosecuting the war against dissidents or would-be secessionists? The Kurds in Iraq would have been most willing to grant their consent to the occupation by the allied forces.

With regard to the former Yugoslavia, O'Connell recounts the origins of the crisis and notes that it was when the parties to the conflict—mainly Milosevic's Federal Yugoslavia acting for the Serb population and Tudjman's Croatia—appeared amenable to U.N. in-

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<sup>81</sup> See S.C. Res. 688, U.N. SCOR, 46th Sess., 2982d mtg. at 31-32, U.N. Doc. S/Res/688 (1991).

<sup>82</sup> See O'Connell, *supra* note 79, at 909.

volvement that the U.N. began to consider proposals for a peacekeeping force in that region. Could force have been legitimately used to enter the Yugoslav crisis at that point? O'Connell argues that the Security Council would have had to establish the existence of a threat to international peace and security before the U.N. or its surrogates could intervene militarily. Yet, she adds, at least in the initial stages no such threat could be found; "no outside states appear[ed] to be threatened by war or on the verge of intervening."<sup>83</sup> Thus, the only remaining avenue was to insist on the consent of the parties as a condition for entry. Indeed, on November 27, 1991, such consent was given and the Security Council promptly adopted a resolution authorizing a 10,000-person force.<sup>84</sup> It should be pointed out, however, that after the recognition of Croatia, Slovenia, and Bosnia-Herzegovina by Germany and other European countries, any reference to a merely internal crisis became inappropriate. Military assistance by Milosevic's Yugoslavia to the Serb nationalists in Croatia and Bosnia-Herzegovina, and Croatian counter attacks across the border in Bihac (northwestern Bosnia) and in territories occupied by the Bosnian Serbs, clearly constituted a threat to international peace and security. U.N. military presence from that point onward could be justified even in terms of O'Connell's criteria, provided a relevant Security Council Resolution was in place.

At any rate, O'Connell admits that intervention to distribute humanitarian aid would not fall foul of her clear stand against humanitarian intervention without consent. "Distribution of humanitarian aid, even against the wishes of a government in effective control, is not unlawful intervention according to the International Court of Justice."<sup>85</sup> O'Connell's objections seem to deal with the use of force by the U.N. to prevent the violation of human rights in general, including those that are internationally protected.<sup>86</sup> She seems to have no problems with humanitarian aid delivered through the use of force. But why should one, in principle, accept military nonconsensual intervention for the distribution of food, water, shelter, and other hu-

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<sup>83</sup> *Id.* at 910.

<sup>84</sup> Paul Lewis, *U.S. Offering to Send Force to Yugoslavia*, N.Y. TIMES, Nov. 28, 1991, at A1; see also S.C. Res. 721, U.N. SCOR, 46th Sess., 3018th mtg. at 44, U.N. Doc. S/23280 (1991).

<sup>85</sup> O'Connell, *supra* note 79, at 906. O'Connell cites the ICJ decision in *Nicaragua v. United States*, in which the court wrote: "There can be no doubt that the provision of strictly humanitarian aid to persons or forces in another country, whatever their political affiliations or objectives, cannot be regarded as unlawful intervention, or as in any other way contrary to international law." *Id.* quoting *Nicaragua v. U.S.*, 1986 I.C.J. at 14.

<sup>86</sup> See O'Connell, *supra* note 79, at 904.



manitarian aid, but not for such protection against genocide, mass slaughter, or mass torture? Is the "right" to food, water, and shelter any more valuable than the right to life, or freedom from torture, viewed by some national courts as part of *jus cogens*?<sup>87</sup> Of what use is food, water, or shelter to a people who are about to be exterminated or tortured to death?

When the ICJ in the *Nicaragua* case admitted the permissibility of "strictly humanitarian aid" as an exception to unlawful interventions, were the justices oblivious to the allegedly blanket prohibition of Article 2(7) of the U.N. Charter? Or were they consciously carving out an exception to Article 2(7) based on other provisions of the Charter, such as Chapter 7 measures or the human rights provisions; or were they basing this exception on rules of customary international law that might have survived the adoption of the Charter? At any rate, it seems clear that the *Nicaragua* case was concerned with claims of unilateral humanitarian intervention by one state, the United States, rather than intervention by U.N. forces carried out under Chapters 6 or 7 of the U.N. Charter. The Charter's enforcement measures under Chapter 7 certainly remain one basis for acceptable military intervention to aid certain internationally protected human rights, and not simply for humanitarian aid. One might be able to construct a justification without offending O'Connell's objection to giving unlimited scope to the concept of threat to the peace.

Indeed, Jost Delbruck has questioned the need to confine a threat to international peace and security to situations involving "the threat of using *military* force in the international, transborder relations of states,"<sup>88</sup> i.e., to the case of military forces leaving their national borders or launching missiles into other countries on a mission of aggression, such as Iraq's 1990 invasion of Kuwait. Delbruck looks to the recent practice of the Security Council to suggest that the language of Article 39 of the Charter could be interpreted more broadly to cover "state actions other than military threats to international peace,"<sup>89</sup> and that such actions could be incompatible with "an understanding of peace as an [international] legal order."<sup>90</sup> Thus, as far back as 1966, the Security Council, in its Chapter 7 condemnations and decisions on the racist regime of Ian Smith in then Southern

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<sup>87</sup> See, e.g., *Siderman de Blake v. Argentina*, 965 F.2d 699 (9th Cir. 1992).

<sup>88</sup> Jost Delbruck, *A Fresh Look at Humanitarian Intervention Under the Authority of the United Nations*, 67 IND. L.J. 887, 899 (1992) (emphasis added).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 900.

Rhodesia (now Zimbabwe), referred to the acts of that regime as “a threat to international peace.”<sup>91</sup> In the same vein, the Security Council in 1968 and 1977 consistently described the apartheid system of South Africa as a “threat to international peace.”<sup>92</sup> Similarly, the Security Council decried the persecution of the Kurds by Saddam Hussein’s regime in 1991.<sup>93</sup> In none of these three situations was the Security Council dealing with the departure of military forces of the condemned state crossing its borders to ravage its neighbors or other states.

If the Security Council was correct in its description of these situations, their attitude might be explained in at least three ways. First, the easiest would be to assert that genocide and massive human rights violations of similar dimensions, even if not immediately constituting a violation of international peace and security, could potentially become a threat to such peace because neighboring and other states having the persecuted ethnic or racial group as part of their population would eventually “gear up” and intervene to protect their “kith and kin.” Second, human rights repression that leads to a huge exodus of refugees to neighboring states could lead to serious tensions among the neighbors as the receiving countries begin to chafe under the pressure of large numbers of displaced persons and therefore attempt to force some of them back into their country of emigration. This situation could be characterized as a threat to international peace and security.<sup>94</sup> Third, as Delbruck suggests, we may assume that as the world community becomes increasingly “sensitized by such events” or, better yet, traumatized by such massive violations of human rights, some nations would feel justified in confronting the perpetrators and the situation would sooner or later escalate into an international military conflict.<sup>95</sup>

We would conclude that humanitarian intervention should be accepted in principle, but limited to situations where there is a threat to peace as broadly conceived, or where there is brutal suppression of the most fundamental types of human rights such as the right to life

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<sup>91</sup> S.C. Res 232, U.N. SCOR, 21st Sess., 1340th mtg. at 7, U.N. Doc S/7610 (1966).

<sup>92</sup> S.C. Res. 181, U.N. SCOR, 18th Sess., 1041st mtg. at 7, U.N. Doc S/5386 (1963); *see also* S.C. Res. 418, U.N. SCOR, 32d Sess., 2046th mtg. at 5, U.N. Doc S/12470 (1977).

<sup>93</sup> *See* S.C. Res 688, *supra* note 81, at 31–32.

<sup>94</sup> *See* Lori Fisler Damrosch, *Introduction and Concluding Reflection*, in *ENFORCING RESTRAINT: COLLECTIVE INTERVENTION IN INTERNAL CONFLICTS* 363–64 (Lori Fisler Damrosch ed., 1993).

<sup>95</sup> Delbruck, *supra* note 88, at 900.

or freedom from torture.<sup>96</sup> Further, it seems preferable to recognize a legal norm affirming that in certain extreme situations, where neither the U.N. nor the competent regional organizations can or wants to assume its responsibilities, a group of states may be temporarily relieved of their obligation of restraint in Article 2(4) so as to undertake the enforcement of international human rights.<sup>97</sup> It seems clear that the U.N. Charter, particularly in its Preamble and Article 1(3), demands a certain amount of justice and respect for the human person. From this it is reasonable to reject the allotment of an absolute value to the mere avoidance of armed conflict, and to uphold the conviction that certain extreme situations justify and require temporary departure from a nonviolent world in order to achieve a more permanent structure of justice.

With regard to the fear that the sanctioning of humanitarian intervention would lead to frequent abuse and misuse for other purposes or motives, it would seem wrong to fail to recognize an inherently just principle merely because of the possibility that others might invoke it for non-genuine purposes. While one can point to examples of humanitarian intervention where there was a remarkable lack of strong global condemnation in view of the odious brutality of the overthrown regimes, it would seem more effective to state a restricted norm accepting the legality of humanitarian intervention in well-defined specific situations than to insist on an approach in which the prospective humanitarian interventionists know that, regardless of their motives and the prevailing circumstances, they breached international law. In that event, their only consolation and hope is that the world community will remain silent on their infractions or admire them in secret.<sup>98</sup> But this would be an inadequate recognition of the sacrifices that individuals and states often make for the protection of defenseless human beings in distant lands who have no other relationship with the defenders except their common bond of humanity.

### III. THE PROBLEM WITH UNILATERAL AND REGIONAL HUMANITARIAN INTERVENTION

Some real or claimed humanitarian interventions over the past twenty years have indeed promoted fresh and wider perspectives on the doctrine: (1) the plight of the Kurds of Iraq in the wake of the

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<sup>96</sup> See Fonteyne, *supra* note 22, at 269-70.

<sup>97</sup> See Reisman, *supra* note 69, at 178.

<sup>98</sup> See Fonteyne, *supra* note 22, at 249.

Iraqi-Kuwait crisis in the early 1990s; (2) the crisis in Croatia and Bosnia in the former Yugoslavia in the early 1990s; (3) the U.S. invasions of Grenada in 1983 and Panama in 1989; and (4) the West African regional intervention in the carnage of Liberia from 1989 to 1996.

It seems clear that attitudes to humanitarian intervention become more negative when such actions are taken, not by U.N. peacekeepers or even by a group of states within a regional organization, but essentially by one state in the affairs of its neighbors. Where there has been long-standing and large-scale atrocities widely publicized on a global basis, an individual intervening state might escape condemnation or even win muted approval. Clear examples are the Tanzanian invasion of Uganda to oust Idi Amin in 1979, and the 1979 Vietnamese invasion of Kampuchea to oust the Khmer Rouge. But while the legal validity of such interventions might have remained an open question, their essentially humanitarian drive and motivation were beyond any serious doubt.

On the other hand, we encounter situations in which the motivations and justifications for intervention, as declared by the invading state itself, are multiple and equivocal and there is no statement as to which of the announced justifications is most significant. However, since the state or states concerned cite humanitarian concerns as one of their justifications for the intervention, it may be appropriate to include such cases in a general discussion of the doctrine and eventually to evaluate the strength of the claims made. This general discussion will take us outside our primary focus of U.N. peacekeeping operations and embrace the consideration of three well-known cases of claimed humanitarian intervention over the past twenty-five years—the 1983 intervention in Grenada by the United States and some members of the Organization of Eastern Caribbean states (OECS); the U.S. intervention in Panama in 1989; and the 1990 intervention in Liberia by ECOMOG, the military wing of the Economic Community of West African States.

### A. *Grenada*

The small Caribbean island of Grenada, 120 square miles in size, was invaded in October, 1983 by a U.S.-led force of some 8000 U.S. troops and 300 soldiers from seven Caribbean countries. Five of these Caribbean states were members of the subregional grouping, the OECS, to which Grenada also belonged. The intervention, named "Operation Urgent Fury," started in the capital city of St. George's on October 25, 1983, and had secured all of its military objectives and

defeated the local Grenadian army, the People's Revolutionary Army, by October 28th. By December 15, 1983, all U.S. combat forces had been withdrawn. "Fury" left in its wake at least ninety-five people dead, including more than thirty civilians, and about 430 wounded.<sup>99</sup>

In a statement on the Grenada events made before the U.S. House Committee on Foreign Affairs on November 2, 1983, Kenneth Dam, Deputy Secretary of State, offered two main reasons for the military intervention: (1) rescuing foreign and U.S. nationals before actual violence occurred; and (2) cooperating in the restoration of order. "This collective action was brought about by ten days of extraordinary events that had led to brutality and instability without precedent in the English-speaking Caribbean."<sup>100</sup>

The fact that members of the OECS participated in this essentially U.S. operation was cited as a case of "collective self-defense" under Article 8 of the OECS Treaty and Article 51 of the U.N. Charter. The irony in this argument lay in the fact that Article 8 specifically dealt with collective defense and the preservation of peace and security against external aggression. As Joyner has pointed out regarding the rather forced interpretation of this OECS Article, "the United States is not a party to the [OECS] Treaty and therefore legally lies outside the ambit of its concerns."<sup>101</sup> Moreover, in this particular case, "no external aggressor existed: Grenada, the state in question, was a treaty member . . . there is, in short, no provision for military action in instances other than those involving 'external aggression, including mercenary aggression.'<sup>102</sup>

Unlike the U.S. invasion of Panama six years later, the reasons given by Dam in his presentation before the U.S. House Committee did not mention the establishment of democracy as one of the invasion's objectives. "Our objectives," Dam stated, "do not encompass the imposition on the Grenadians of any particular form of government. They will determine their institutions freely for themselves."<sup>103</sup> Nonetheless, the two stated reasons still call for some examination in order

<sup>99</sup> See generally Terry Nardin & Kathleen D. Pritchard, *Case 502: Ethics and Intervention: The United States in Grenada, 1983*, in GEORGETOWN UNIVERSITY: PEW CASE STUDIES IN INTERNATIONAL AFFAIRS 12 (1990).

<sup>100</sup> Dep. Sec. of State Kenneth W. Dam, Statement on Grenada before the House Committee on Foreign Affairs (Oct. 25, 1983), quoted in Marian Nash Leich, *Rescue Operation by Armed Forces—Grenada*, 78 AM. J. INT'L L. 200, 200 (1984).

<sup>101</sup> Christopher C. Joyner, *Reflection on the Lawfulness of Invasion*, 78 AM. J. INT'L L. 131, 131 (1984).

<sup>102</sup> *Id.*

<sup>103</sup> Dam, *supra* note 100, at 204.

to establish whether Operation Urgent Fury was a legitimate episode in humanitarian intervention.

In principle, rescuing nationals from harm in a foreign country could qualify as humanitarian intervention and, more tenuously, as an exercise in national self-defense. Furthermore, intervention to put an end to brutality within the indigenous population of a foreign land and to restore public order among them has historically offered the best examples of humanitarian intervention. However, such claims have to be analyzed on a case-by-case basis in order to separate reality from pretext. Hence a brief factual background to the Grenada crisis is called for.<sup>104</sup>

Maurice Bishop, the popular leader of the leftist New Jewel Movement (NJM) in Grenada, seized power on March 13, 1979 and became Prime Minister and head of the People's Revolutionary Government (PRG). The Bishop team put into place a socialist-type socio-economic program, but a split soon developed within the team. One faction, led by the Deputy Prime Minister Bernard Coard, apparently felt that Bishop was not being radical enough and that he was "moving too slowly to consolidate a 'Leninist' restructuring of Grenadian society."<sup>105</sup> On September 25, 1983, Bishop was forced by the ruling party to share his leadership of the NJM, and on October 12th Coard attempted to force him out as Prime Minister. This marked the beginning of the collapse of governmental institutions, a breakdown in public order, and widespread brutality. Bishop was taken into custody and put under house arrest. A crowd of supporters, fired upon by troops, later succeeded in freeing him from arrest. Wishing to halt further violence, he surrendered to the military and was promptly executed. Several cabinet ministers and union leaders met the same fate. In the wake of these and other murders, the People's Revolutionary Army announced the dissolution of the government and the formation of a sixteen-member ruling military council led by General Hudson Austin. A "shoot-on-sight" curfew was imposed and scheduled to remain in effect until October 24, 1983. The U.S. invasion began the following day.

One group of foreign nationals prominently featured in the "rescue justification" of the intervention consisted of 354 American medical student residents at the True Blue and Grand Anse campuses of

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<sup>104</sup> Cf. Nardin & Pritchard, *supra* note 99. See generally Dam, *supra* note 100, at 204.

<sup>105</sup> Leich, *supra* note 100, at 200.

St. George's Medical School.<sup>106</sup> According to the Pew Case Study account of the intervention, the students never felt they were in danger in the days prior to the invasion. At a meeting of the students held on October 23, 1983, only ten percent expressed a desire to leave.<sup>107</sup> The Chancellor and the Vice Chancellor of the medical school did not believe the students were in danger and refused to make a public statement to the contrary. On October 24th, as four charter planes left St. George's airport, the students had the opportunity to depart the island if they wished. Thus, there was an unresolved and serious doubt concerning the extent to which U.S. citizens were endangered on the eve of the invasion. However, there remained the justification relating to the spread of brutalities and the breakdown of public order, the victims of which were predominantly the people of Grenada themselves. Leaving aside the matter of rescuing Americans and other foreign nationals, would the protection of Granadians have featured as a significant factor in the decision to invade?

Given the size, location, population, and the nature of its economy, Grenada, prior to the emergence of Maurice Bishop, had traditionally been considered "too insignificant to command the attention of senior government officials in Washington."<sup>108</sup> Grenada was not Panama. Soon after Bishop and his leftist NJM came to power, Grenada began to attract attention, particularly after its government voted with Cuba against the United States on a U.N. General Assembly Resolution on Afghanistan. The Carter Administration's policy was essentially to distance itself from Grenada. However, relations between the two countries worsened during the Reagan Administration. Apart from Grenada's record of human rights violations, U.S. hostility towards her was exacerbated by Bishop's growing links with Castro's Cuba and the pitch of his anti-American rhetoric. According to one account, Bishop once publicly referred to President Reagan as a "fascist."<sup>109</sup> The U.S. President, in turn, did not mince his words in manifesting his disgust with Grenada. In February, 1982, while announcing the creation of the Caribbean Basin Initiative—a regime of preferential tariff treatment of Caribbean exports produced with U.S. materials—President Reagan rejected Grenada's participation in the program and referred to the "tightening grip of the totalitarian left" in

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<sup>106</sup> It was estimated that there were 130 on the True Blue campus, and 224 at the Grand Anse end. See Nardin & Pritchard, *supra* note 99, at 11–12.

<sup>107</sup> See *id.* at 7.

<sup>108</sup> *Id.* at 1.

<sup>109</sup> *Id.* at 2.

the Caribbean. On a subsequent occasion, he attacked Grenada as bearing “the Soviet and Cuban trademark, which means that it will attempt to spread the virus among its neighbors.”<sup>110</sup> Finally, on March 23, 1983, while presenting his “Star Wars” plan to the American people in a nationwide address, President Reagan showed aerial reconnaissance photographs of Cuba, Nicaragua, and Grenada as evidence of the building of a “red triangle.”<sup>111</sup>

If President Reagan wished to disentangle Grenada from this Caribbean “red triangle,” and to stop the spreading “communist virus” in its tracks, the disturbances in that country would have provided him with a great excuse to launch an invasion. It is most unlikely that President Reagan was motivated to act out of chagrin for the execution of Bishop and his Marxist-Leninist ministers. It should be recalled that Bishop himself had written several letters to President Reagan requesting more normal diplomatic relations. His letters went unanswered. After President Reagan’s “Star Wars” broadcast on March 23, 1983, Bishop, sensing an impending invasion, flew to Washington to seek an audience with President Reagan. He did not succeed in this effort, and merely ended up with a forty-minute meeting with the U.S. National Security Advisor and the Deputy Secretary of State.<sup>112</sup>

President Reagan, who once described the Soviet Union as “the Evil Empire,” seemed obsessed with the threat of international communism. His foreign policy led to what became known as the “Reagan doctrine,” which he himself later extolled in a speech at the National Defense University on October 25, 1988:

Around the world in Afghanistan, Angola, Cambodia, and yes, in Central America, the United States stands today with those who would fight for freedom. We stand with ordinary people who have had the courage to take up arms against Communist tyranny. This stand is at the core of what some have called the Reagan Doctrine.<sup>113</sup>

Indeed, in countries such as Afghanistan, Angola, Cambodia, and Nicaragua, where the United States under the Reagan Administration did not directly intervene in its global ideological war, it provided assistance, including weapons, to its “freedom fighters.” In the case of

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<sup>110</sup> *Id.* at 3.

<sup>111</sup> Nardin & Pritchard, *supra* note 99, at 3.

<sup>112</sup> *Id.*

<sup>113</sup> Quoted in CARTER & TRIMBLE, *supra* note 24, at 1175.



Grenada, it was easier to do an ideological battle in the form of direct military intervention.

The Reagan Doctrine had no more credence in international law than the Brezhnev Doctrine, which purported to lend a hollow ideological justification to the Soviet invasion of Czechoslovakia in the summer of 1968.<sup>114</sup> Yet, it was probably the Reagan Doctrine, and not the doctrine of humanitarian intervention, that provided the justification for the American intervention in Grenada. A report submitted in 1984 by a special committee of the American Bar Association's Section on International Law and Practice reached the conclusion that "the military action initiated October 25th rests upon an unsteady legal foundation."<sup>115</sup>

### B. Panama

On December 20, 1989, under the Bush Administration, the United States invaded Panama. General Manuel Noriega, then *de facto* leader of Panama and "Commandante" of the country's armed forces, had been a good ally of the United States under both the Reagan and Bush administrations, but became an enemy after U.S. officials tagged him with involvement in drug trafficking into the United States and all forms of political malfeasance. Noriega had attempted to rig the May, 1989 elections of the national assembly and the presidency. This was unsuccessful, as his candidate lost to the opposition leader, Guillermo Endarra. Noriega refused to accept the results, and continued to maintain himself and his henchmen in power by force of arms. Apparently, the United States initially attempted to negotiate Noriega's voluntary surrender of power. When this and economic sanctions failed, President Bush launched a military offensive—"Op-

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<sup>114</sup> The doctrine was as follows:

[A] particular socialist state, staying in a system of other states composing the socialist community, cannot be free from the common interests of that community. The sovereignty of each socialist country cannot be opposed to the interests of that community. The sovereignty of each socialist country cannot be opposed to the interests of the world of socialism, of the world revolutionary movement. . . . Discharging their inter-nationalist duty toward the fraternal peoples of Czechoslovakia and defending their own socialist gains, the USSR and other socialist states had to act decisively . . . against the anti-socialist forces in Czechoslovakia.

*Id.* at 1170.

<sup>115</sup> Gordon et al., *International Law and the United States Action in Grenada: A Report*, 18 INT'L LAW 339, 339 (1984).

eration Just Cause”—comprising of approximately 26,000 military personnel to oust Noriega from power.

Reporting the invasion to the U.S. Congress the next day, Bush stated that he ordered the invasion “to protect American lives, to defend democracy in Panama, to apprehend Noriega and bring him to trial on the drug-related charges for which he was indicted in 1988, and to ensure the integrity of the Panama Canal Treaties.”<sup>116</sup> U.S. forces met some resistance in the early hours of the invasion, but within four days, Noriega’s forces had been routed, and on January 3, 1990, he had turned himself in to U.S. military authorities in Panama. He was then embarked upon a plane en route to Homestead Air Force Base in Florida to face trial for drug trafficking.<sup>117</sup>

In the above-mentioned report to Congress, Bush only made a general mention of a climate of aggression that had “place[d] American lives and interests in peril,”<sup>118</sup> specifically referring only to the killing of one U.S. Marine officer by the Panama Defense Forces (PDF) personnel, the beating and detention of a U.S. Naval officer, and threats to the officer’s wife. No incidents were alleged in the report regarding massacres carried out by Noriega’s supporters against fellow Panamanians. There was certainly no mention of carnage occurring in Panama involving American and Panamanian lives. In fact, within that short three-to-four day period of the U.S. invasion, there had been at least 400 Panamanian deaths in comparison to only twenty-three U.S. fatalities.<sup>119</sup>

Operation Just Cause led to lively debate among international law scholars in the United States, including sharp exchanges in the pages of the *American Journal of International Law* and the *Columbia Journal of Transnational Law*. Abraham Sofaer, then Legal Advisor to the State Department, argued that the Panama operation was both necessary and proportionate under international law; it was a justifiable use of force aimed at “restor[ing] the legitimate, democratic government selected by the people of Panama,” and that the

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<sup>116</sup> President George Bush, Report to Congress and Hon. Thomas S. Foley, Speaker of the House of Representatives (Dec. 21, 1989), in COVEY T. OLIVER ET AL., *INTERNATIONAL LEGAL SYSTEM* 1299 (4th ed. 1995) [hereinafter President’s Letter].

<sup>117</sup> For a detailed account of these events and the immunity and jurisdictional issues, see this Journal, Adam I. Hasson, Note, *Extraterritorial Jurisdiction and Sovereign Immunity on Trial: Noriega, Milosevic, and Pinochet—Trends in Political Accountability and Transnational Criminal Law*, 25 B.C. INT’L & COMP. L. REV 125, 127 (2000).

<sup>118</sup> President’s Letter, *supra* note 116.

<sup>119</sup> See *id.* at 1288.

threat or use of force is not inherently wrong.<sup>120</sup> Sofaer seemed to place the use of force to restore democracy under the rubric of humanitarian intervention.

Anthony D'Amato, another vibrant defender of the Panama invasion, focused on the human rights gains of the intervention to justify its validity under international law. He was enthused about "the human rights of Panamanian citizens to be free from oppression by a gang of ruling thugs."<sup>121</sup> He dismissed concerns about the unwarranted interference with the sovereignty and territorial integrity of Panama as "views . . . conditioned by a statist concept of international law."<sup>122</sup> The adherents of such views appeared incapable of "see[ing] through the abstraction that we call the 'state' to the reality of human beings struggling to achieve basic freedoms."<sup>123</sup>

According to D'Amato, if Article 18 of the Organization of American States (OAS) Charter could be cited for the proposition that no trans-boundary military intervention is permissible,<sup>124</sup> the OAS Charter is arguably a self-interested expression of the Latin American countries which sought to form a non-intervention cartel so that each would have free reign in their own nation. If human rights were to be taken seriously, one could not give much weight to the conspiracies among ruling elites that did not represent the views of their populations. Non-intervention treaties are not real rules of international law but quasi-rules invented by ruling elites to insulate their domestic control.<sup>125</sup> D'Amato viewed behavior such as the U.S. invasion of Panama and Grenada as milestones in the development of a non-statist concept of international law that would change previous nonintervention formulas such as Article 18 of the OAS Charter.<sup>126</sup> The real world, according to him, was changing faster than the statist paradigms of scholars, and tyranny was giving way to popular sovereignty. The invasions of Panama and Grenada had contributed to this momentum and might act as catalysts in this global revolution. Ruling elites who enjoy tyrannical control and regard themselves as secure from internal uprising can no longer regard themselves as insulated

<sup>120</sup> Abraham D. Sofaer, *The Legality of the United States Action in Panama*, 29 COLUM. J. TRANSNAT'L L. 281, 290 (1991).

<sup>121</sup> Anthony D'Amato, *The Invasion of Panama Was a Lawful Response to Tyranny*, 84 AM. J. INT'L L. 516, 516 (1990).

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *See id.* at 516-18.

<sup>125</sup> *Id.* at 522-23.

<sup>126</sup> *See* D'Amato, *supra* note 121, at 516-17.

from foreign humanitarian intervention.<sup>127</sup> Human rights law demands intervention against tyranny, and such intervention is legally justified and morally required.<sup>128</sup> But who might intervene in such situations? Multilateral or regional intervention, according to D'Amato, were preferable candidates. However, in his opinion, any nation with the will and resources may intervene to protect the population of another nation against tyranny.<sup>129</sup>

Just as Operation Just Cause had its supporters within international law circles in the United States, the military action triggered even more virulent opposition from other well-known scholars. Louis Henkin, reacting to Sofaer's defense of the invasion, debunked the suggestion that "a small exception for humanitarian intervention" in Article 2(4) of the U.N. Charter justified an invasion when few U.S. citizens were in fact threatened, especially when the nationals could have been rescued or protected without armed invasion: "There is no basis in law for such radical exceptions to Article 2(4)," declared Henkin.<sup>130</sup> Sofaer's views "eviscerates Art. 2(4)," and would unduly expand humanitarian intervention to permit any state to invade another "to impose the invading state's view and version of democracy."<sup>131</sup> Further, Sofaer's position that the threat or use of force was not inherently wrong was "surely not international law."<sup>132</sup> Henkin concludes that the United States "did not have even a color of justification" for the invasion of Panama.<sup>133</sup>

Tom Farer, equally strident in this criticism of the invasion as a case of humanitarian intervention, admits that operations to rescue a state's nationals might be permissible under international law.<sup>134</sup> The United States and some other states have consistently construed the U.N. Charter to allow rescue expeditions, and the international community generally has an expectation that those states that can will continue to invoke such a right. In addition, the U.N. has not specifically repudiated such a claim. Given the right of citizens overseas to state protection, a state's claim of rescue rights can be assim-

<sup>127</sup> See *id.* at 524.

<sup>128</sup> See *id.* at 519.

<sup>129</sup> *Id.*

<sup>130</sup> Louis Henkin, *The Invasion of Panama Under International Law: A Gross Violation*, 29 COLUM. J. TRANSNAT'L L. 293, 307 (1991).

<sup>131</sup> *Id.* at 309.

<sup>132</sup> *Id.* at 310.

<sup>133</sup> *Id.* at 313.

<sup>134</sup> See Tom J. Farer, *Panama: Beyond the Charter Paradigm*, 84 AM. J. INT'L L. 503, 505-06 (1990).

lated into the right of self-defense. Thus, the use of force to rescue nationals cannot be persuasively described as contrary to international law if the mission complies with the principles of proportionality and necessity, and is not tainted with ulterior motives. However, claimed Farer, President Bush would have had difficulty demonstrating that the Panamanian invasion met the limiting conditions.

Secondly, if the justification for the invasion was viewed in terms of the imperatives of a democratic system of government, the Bush Administration would need to argue that one state can force a change in the political machinery of another state for other reasons besides the protection of their own sovereignty—a theory which has received widespread international hostility.<sup>135</sup> Despite the fact that some countries withhold recognition of certain governments for ideological reasons, it is seldom argued by those refusing recognition that the new government did not have the protection that international law provides all other states.

Farer concludes that if the United States rested its justification for the invasion on any normative paradigm, it was not one that can be derived from the Charter.<sup>136</sup> He then takes a final swipe at D'Amato, arguing that any attempt at advocating a state's right of intervention in any other state in order to remove a government forced to maintain itself through the intimidation of the majority, might make such an advocate appear unwise. On the day Noriega was being flown to Florida under U.S. arrest, President Bush declared that he had accomplished all four objectives of his military intervention in Panama: "[T]o safeguard the lives of American citizens, to help restore democracy, to protect the integrity of the Panama Canal Treaties, and to bring General Manuel Noriega to justice."<sup>137</sup> However, as always, we must be able to distinguish between true objectives or reasons for actions, and pretextual aims or rationalizations.

Operation Just Cause had little to do with humanitarian intervention. It is a situation in which the claim of humanitarian intervention rings hollow, and actually does a disservice to the serious-minded struggle to establish the doctrine as a valid principle of international law. While the immorality of foreign state action may outweigh the interests protected by the non-intervention norm of international law,

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<sup>135</sup> See *id.* at 509–10.

<sup>136</sup> See *id.* at 514.

<sup>137</sup> Ved P. Nanda, *The Validity of United States Intervention in Panama Under International Law*, 84 AM. J. INT'L L. 494, 494 (1990).

it is certainly relevant in a claim of humanitarian intervention to establish the scale of alleged victims.<sup>138</sup> This raises the matter of proportion of the means and methods used by the intervening state to deal with the situation at hand. In the case of Panama, was it the number of American citizens and/or Panamanian nationals who were killed or maimed that turned the invasion into one of humanitarian intervention?

Bush listed the restoration of democracy among the objectives of his triumphant invasion of Panama. While it appeared that Noriega's foe, Endarra, was winning the vote count in the May, 1989 elections, the count was actually never completed. Thus, it was more accurate to refer to the ensuing problem as the disruption of the electoral process. At any rate, the "restoration" of democracy in Panama certainly does not require the same human rights protection as the push to assure humanitarian assistance to the sick and famished as in Somalia in 1992–1995 and Bosnia in 1994–1995, or the desperate incursions to curtail sustained massacres in Liberia in the late 1980s and Sierra Leone in the mid-1990s.

The "right to democratic governance" embraced by Franck and Rumage is still emerging. The level of moral sensitivity of the international community as a whole to such a right did not appear to have reached a stage in 1989–1990 whereby military intervention to enforce the right could be justified in terms of human rights protection. The right to democratic governance, even when it has finally emerged and become stabilized, would still need to pay allegiance to the more basic norms of non-intervention and self-determination. Democratic governance is a subset of self-determination; and self-determination as enshrined in Article 2(7) of the U.N. Charter seems virtually inseparable from the precept of non-intervention in Article 2(4). This explains Rumage's description of the norms of non-intervention and self-determination as "the literal DNA of the democratic entitlement. To proclaim their destruction is as futile as trying to kill one's ancestors."<sup>139</sup>

Similar to the intervention in Grenada, Operation Just Cause was not a valid case of humanitarian intervention. Ved Nanda was correct when he declared that the intervention in Panama was dictated by

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<sup>138</sup> See Sarah A. Rumage, *Panama and the Myth of Humanitarian Intervention in U.S. Foreign Policy: Neither Legal Nor Moral, Neither Just Nor Right*, 10 ARIZ. J. INT'L & COMP. L. 1, 34 (1993).

<sup>139</sup> *Id.* at 70.

U.S. political considerations, in disregard of the international law norms on the use of force in international relations.<sup>140</sup> Among the overriding U.S.'s concerns were: (1) uncertainties over the fate of the Panama Canal, as the Carter-negotiated treaties came closer to implementation; (2) the role of Panama in the U.S.-Central American drug trafficking; and (3) the intransigence of General Manuel Noriega.

### C. Liberia

Humanitarian intervention in Liberia was undertaken by a regional organization, ECOMOG, in contrast to those carried out by U.N. peace forces, such as those in the former Yugoslavia, during the earlier phase of the crisis, or by individual states as in the case of the United States in Panama. While the U.N. Charter entrusted the primary responsibility for maintaining peace and security to the U.N. Security Council in Chapters 6 and 7, it also recognized in Chapter 8 the potential contribution of "regional arrangements or agencies" towards the maintenance of peace and security in their respective corners of the world. The role of the Economic Community of West African States (ECOWAS) and its military wing, ECOMOG, in regional peacekeeping should be viewed from this broad perspective of the hopes and aspirations of the framers of the U.N. Charter.

The treaty establishing ECOWAS was signed by fifteen West African countries on May 25, 1975, and formally ratified by all signatories by June 19th. However, it was not until 1977 that ECOWAS was underway. The ECOWAS Fund [Fund]—an affiliate agency for cooperation and development—was later set up to help finance community projects in member states. In particular, the Fund was created to help less developed member states and to compensate states that suffered as a result of trade liberalization. Hence, our focusing on the military incarnation of ECOWAS, the "ECOWAS Monitoring Group," better known as ECOMOG. In May, 1978, at its Lagos Summit, ECOWAS ratified a non-aggression protocol. Up to that point, it was the most political step adopted by the member states in an organization that had been founded essentially to promote tariff elimination, aligned currencies, and the free movement of persons.

ECOMOG faced its first, and most difficult, test with the Liberian Civil War from 1989 to 1996. In December, 1989, Charles Taylor,

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<sup>140</sup> See Nanda, *supra* note 137, at 502.

leader of the National Patriotic front of Liberia (NPFL), and later President of Liberia, instigated a civil war to remove Samuel Doe as the dictatorial Liberian President. By July, 1990, all civil authority within Liberia had broken down. In August, 1990, members of ECOMOG, led by Nigeria, attempted to impose a cease-fire through military intervention. These operations were undertaken after the U.N. and the United States declined to intervene in the war.<sup>141</sup>

Not all ECOWAS member states supported the intervention in Liberia. In fact, the Ivory Coast and Burkina Faso supplied troops and arms to Taylor and the NPFL. While President Doe and Prince Johnson supported the intervention, Taylor vehemently opposed any foreign action and declared war against ECOMOG. After Johnson's forces killed Doe, he and the ECOMOG forces began to drive the NPFL from Monrovia. ECOMOG attempts at negotiating peace resulted in renege promises and unreasonable demands from Taylor.

As a result, ECOWAS established a government in Monrovia that was recognized by the Organization of African Unity (OAU). However, Taylor, with the support of his NPFL forces, established a *de facto* government controlling most of the country. The remains of Doe's forces regrouped to form the United Liberation Movement (ULIMO), and they attacked Taylor and the NPFL with the apparent support of ECOMOG.

A cease-fire agreement was signed in Cotonou, Benin under the auspices of ECOWAS, the OAU, and the U.N. The agreement, known as the "Cotonou Accord," added troops from Tanzania, Uganda, and Zimbabwe to the ECOWAS force. The U.N. Security Council then established the United Nations Observer Mission in Liberia [UNOMIL] to oversee the five-member transitional council created by the Cotonou Accord. Despite these measures, leaders of the three warring factions continued to harbor distrust of one another and the transitional government. A new peace initiative was put in place; however, a lasting peace failed because the initiative did not include the new faction that emerged after the Cotonou Accord. As a result, Liberia reverted to its pre-ECOMOG intervention condition. The civil war continued sporadically until the establishment of another interim government and the holding of the elections that led to the presidency of Charles Taylor.

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<sup>141</sup> See David Wippman, *Enforcing the Peace: ECOWAS and the Liberian Civil War*, in ENFORCING RESTRAINT: COLLECTIVE INTERVENTION IN INTERNAL CONFLICTS, *supra* note 94, at 157-203.



The Liberian Civil War shocked Africans, and indeed much of the world, by the extent of its carnage and human tragedy. From the standpoint of international law, the war provided a classic case study of massive violations of human rights and humanitarian law. It also revived the persistent political and academic controversy as to the legitimacy of humanitarian intervention in the domestic affairs of a sovereign state. Additionally, it brought into sharp focus the permissible role of regional organizations in the maintenance of peace and security.

Article 52 of the U.N. Charter permits regional organizations to secure peace and security in their area of interest. Art. 52(1) states:

Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.<sup>142</sup>

Art. 53(1) further states:

The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council . . . until such time as the Organization may, on request of the Governments concerned, be charged with the responsibility for preventing further aggression by such a state.<sup>143</sup>

Therefore, two issues could be raised regarding the authority for the ECOWAS intervention: (1) whether ECOWAS is a regional organization under Article 52(1); and (2) under what conditions are regional organizations authorized to take enforcement action pursuant to Article 52(1)?<sup>144</sup>

To qualify as a regional organization under Article 52, ECOWAS, as a regional arrangement, must deal with matters relating to the

<sup>142</sup> U.N. CHARTER art. 52, para. 1.

<sup>143</sup> *Id.* art. 53, para. 1.

<sup>144</sup> Anthony Chukwuka Ofodile, *The Legality of ECOWAS Intervention in Liberia*, 32 COLUM. J. TRANSNAT'L L. 381, 410 (1994).

maintenance of international peace and security; it must have a direct relation to the region.<sup>145</sup> First, while ECOWAS began purely as an economic union, it later incorporated into its charter the Protocol on Non-Aggression and the Protocol Relating to Mutual Assistance on Defense. These agreements authorized mutual assistance to settle disputes between states and assistance for internal disputes that were supported by outside forces. The protocols did not seem to have addressed internal conflicts.

Second, while the ultimate authority for determining what constitutes a threat to peace rests with the U.N. Security Council, regional organizations may call attention to threats to international peace and request authorization to take action themselves if a U.N. Security Council response is not forthcoming. Third, apart from the right to self-defense, enforcement action may be taken by a regional organization upon direct authorization from the Security Council. In sum, ECOWAS enforcement action could only be justified if it were: (1) an act of self-defense; (2) an act performed as a regional organization with the prior sanction of the Security Council; or (3) a peacekeeping action performed as a regional organization with the full consent of its members and in accordance with the U.N. Charter.

In his discussion of the ECOWAS involvement in Liberia, Ofodile concludes that the intervention "does not have any solid anchor in international law."<sup>146</sup> He has strong doubts about the validity of humanitarian intervention in general, and he asserts that even if the latter doctrine were valid, the ECOWAS intervention did not meet the avowed criteria for such validity. Furthermore, ECOWAS seemed to have acted beyond the powers granted to regional organizations by the U.N. Charter, since it failed to obtain the prior consent of the Security Council.

What needs to be emphasized, however, is that prior consent of the U.N. Security Council is not always possible. When large numbers of people are being tortured and slaughtered as the international community and the Security Council take their time to deliberate and reach a decision on possible intervention, it should be quite appropriate for a regional organization to act swiftly while continuing to seek approval and ratification by the Security Council. Indeed, in the case of ECOMOG, the Security Council not only recognized ECOWAS as an Article 52 regional organization, but subsequently issued a reso-

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<sup>145</sup> JULIUS STONE, *LEGAL CONTROLS OF INTERNATIONAL CONFLICT* 247-49 (1959).

<sup>146</sup> Ofodile, *supra* note 144, at 418.

lution imposing an arms embargo on Taylor and his NPFL forces and adopted other pro-ECOWAS measures.<sup>147</sup>

Moreover, we should take pains to distinguish between permissible actions under the U.N. Charter and decisions or actions of U.N. organs in specific situations. If we merely postulate that there is no validity for humanitarian intervention in cases where intervention is undertaken by a group of states rather than by troops deployed by the U.N., we rigidly commit ourselves to an understanding of the U.N. Charter that eliminates other plausible interpretations of Articles 2(4) and 2(7). It would be more defensible to assert that there is no right of humanitarian intervention if the intervening states undertake such measures outside the parameters of the U.N. Charter. This proposition does not confine intervention to U.N. peacekeeping operations *stricto sensu*. If the Security Council failed to act within three weeks of raging fratricide in country X, is it unthinkable to find a Charter validation of humanitarian intervention by a group of neighboring states during the fourth week?

ECOWAS deserved to be applauded in its intervention in Liberia despite its shortcomings. As a regional economic integration group that was still struggling to realize its primary goals of tariff elimination, free movement of factors of production, and a single monetary zone, it had the courage to establish a regional military arrangement to intervene and stop untold human suffering. At a time when the U.N. Security Council was vacillating, and the individual powerful countries of the world did not seem to give sufficient concern to the Liberian crisis, ECOWAS through ECOMOG acted commendably for the Liberian people and for Africa as a whole.

#### IV. RENDERING HUMANITARIAN INTERVENTION MORE ACCEPTABLE AND MORE IN COMPLIANCE WITH U.N. CHARTER PARADIGM

##### A. *Criteria for Legitimate Humanitarian Intervention*

Walzer, the moral philosopher, has argued that the principle of non-intervention in the domestic affairs of other states follows from what he terms the "legalist paradigm" of international relations.<sup>148</sup> This paradigm embodies the following set of propositions:

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<sup>147</sup> S.C. Res. 788, U.N. SCOR, 47th Sess., 3138th mtg., ¶¶ 2, 8, U.N. Doc. S/RES/788 (1992).

<sup>148</sup> See MICHAEL WALZER, *JUST & UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* 86 (2d ed. 1992).

[T]here exists an international society of independent states. . . . International [s]ociety has a law that establishes the right of its members, above all the rights of territorial integrity and political sovereignty. . . . Any use of force or imminent threat of force by one state against the political sovereignty or territorial integrity of another constitutes aggression and is a criminal act. . . . Aggression justifies two kinds of violent response: a war of self-defense, and a war of law enforcement by the victim and any other member of international society. . . . Nothing but aggression can justify war. . . . Once the aggressor state has been militarily repulsed it can also be punished . . . .<sup>149</sup>

In the face of this paradigm, military intervention by a state or group of states could literally constitute aggression even if carried out with the highest of motives if not done to repel an earlier aggression or as a form of international law enforcement.

However, Walzer is quick to add that we do not treat all interventions as a form of aggression; for the legalist paradigm contains within itself the element of exceptions, or “the rule of disregard.”<sup>150</sup> “The paradigm, unrevised, cannot account for the moral realities of military intervention.”<sup>151</sup> For one thing, intervention could be part of collective self-defense of the victim of aggression, involving the military repulsion and punishment of the aggressor through temporary reverse occupation. Moreover, intervention cannot be confined to collective self-defense against international aggression, for in the case of humanitarian intervention in a civil war, there is no clear aggressor to repulse and punish. An intervention to prevent massacre, mass starvation, enslavement, etc., would certainly represent a second plausible revision of the legalist paradigm. Walzer argues, “when the violation of human rights within a set of boundaries is so terrible that it makes talk of community or self-determination . . . seem cynical and irrelevant,”<sup>152</sup> and “when a government turns savagely upon its own people, we must doubt the very existence of a political community to which the idea of self-determination might apply.”<sup>153</sup>

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<sup>149</sup> *Id.* at 61–62.

<sup>150</sup> *Id.* at 86.

<sup>151</sup> *Id.* at 108.

<sup>152</sup> *Id.* at 90.

<sup>153</sup> WALZER, *supra* note 148, at 101.

Nonetheless, Walzer is correct in insisting that, since intervention often threatens the territorial integrity and political independence of invaded states, it must be justified. The burden of proof, according to Walzer, falls on any political leader who tries to shape the domestic arrangements or alter the conditions of life in a foreign country. This burden applies to an international organization as well. For what one state cannot do, a group of states are not permitted to do simply by virtue of sheer numbers. Granted the existence of a plausible and almost incontrovertible revision of the legalist paradigm in the case of humanitarian intervention, specific cases of humanitarian intervention always stand in need of justification. Walzer points out that we typically confront "mixed cases where the humanitarian motive is one among several."<sup>154</sup> There are clear rescue and emergency relief situations, but there may also be cases of economic interest, strategic considerations, plain-faced expansionism, and "benevolent imperialism." As he explains, "we worry that, under the cover of humanitarianism, states will come to coerce and dominate their neighbors."<sup>155</sup>

If we conclude with the proposition that the U.N. Charter did not remove the customary international law practice of humanitarian intervention, and that Articles 2(4), 2(7), and 51 could be read to allow intervention under certain circumstances, then our major task is to define the criteria for appraisal of the legality of alleged cases of humanitarian intervention. In other words, we must outline parameters that would help us define the permissible forms and instances of intervention. This is where Fonteyne and others have made a major contribution to international law by attempting to define criteria for assessing the legality of claims of intervention in aid of human rights protection.

Rougier was among the first writers to spell out an integral list of criteria for permissible intervention. He favored collective, disinterested intervention with the widest possible authority on a variety of policy and legal grounds.<sup>156</sup> Although he favored collective action, he emphasizes authority, which is increased if it is backed by traditionally powerful states. He lists three criteria for intervention: (1) the motivation to intervene comes from acts of state and not of individuals; (2) the acts in question violate the laws of humanity (rights to life, liberty,

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<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 106.

<sup>156</sup> See Rougier, *La Théorie de l'Intervention d'Humanité*, 17 REV. GEN. DR. INT'L PUBL. 468, 502 (1910), cited in Fonteyne, *supra* note 22, at 228.

and legality), not merely national positive law; and (3) that the intervention fulfill certain “circumstantial requirements,” such as opportunities for success, and the extent of the violation, etc.

Jean-Pierre Fonteyne, in his seminal 1974 article,<sup>157</sup> attempted to set forth more detailed criteria for judging the validity of particular cases of humanitarian intervention. He broke down his criteria into three subcategories: substantial, procedural, and preferential.

### 1. Substantive Criteria

A balance ought to be struck between the degree of destruction caused by the intervention and the importance of the rights being violated. As the unilateral use of force to prevent human rights violation is an extraordinary measure, it ought to be used only in response to substantial human rights violations on a large scale. However, gross violations to a smaller population may warrant the same reaction as lesser violations to a large population. The overall harshness of the violation, considering the extent of violation, numbers of people affected, and persistence, should be weighed against the degree of destruction necessary to halt the violations. This is the essence of Fonteyne’s obscure “cost-benefit” component of his criteria. If the violation is imminent or is actually taking place, a greater urgency for action exists. However, this ought not to be taken lightly. Rather the interventionist must be certain that the violation is imminent and will occur without intervention.<sup>158</sup>

We should consider the degree of relative disinterestedness of the intervenors. At its best, humanitarian intervention is altruistic. Yet, there is the tendency of most states not to get involved unless there is some political or national incentive for them. However, the “disinterestedness” standard is not to be taken as an absolute, as long as the overriding motive is the protection of human rights.<sup>159</sup> Furthermore, there should not be an unnecessary use of force. If force is necessary, it should be as unobtrusive as possible. There should also be no unnecessary “affectation” of the authority structures of the target state. In all aspects, the intervention should reflect humanitarian goals.<sup>160</sup> There should be no unnecessary duration of the operation; the intervention ought to last only for the period required to effect the hu-

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<sup>157</sup> See Fonteyne, *supra* note 22 and accompanying text.

<sup>158</sup> See *id.* at 260.

<sup>159</sup> See *id.* at 262–63.

<sup>160</sup> See *id.* at 265.

manitarian changes necessary to prevent the violations of rights and to help ensure the continued existence of that situation.

## 2. Procedural Criteria

Given the U.N.'s goal of conflict minimization, force ought to be the last resort. Universal and regional organizations are best suited for humanitarian intervention in a manner that is consistent with the interests of the world or regional community. Unilateral intervention should be taken only after it is apparent that such an organization will not take any effective action.<sup>161</sup> In order to assure acceptable levels of disinterest on the part of the interventionist, they ought to declare their motives as soon as possible to the world and regional organizations for appraisal.<sup>162</sup>

## 3. Preferential Criteria

To the extent possible, even when there is no action by international organizations, collective intervention is preferred over individual or unilateral measures.<sup>163</sup> Unilateral intervention ought to be avoided if possible by obtaining the clear and unambiguous consent or invitation of the *de jure* government of the state where the intervention is to take place.<sup>164</sup> Yet, absence of consent sought does not preclude the possibility of humanitarian intervention provided all the other requirements have been met.<sup>165</sup>

Fonteyne's cost-benefit analysis in this context calls for comment. It refers to the need "to balance the destruction that intervention would cause, and the size of the group affected by the violations, as well as the fundamental character of the threatened human rights."<sup>166</sup> "The preservation of values to be achieved by intervention must be weighed against the extent of the disruption of internal structures and domestic processes that will necessarily result from the foreign action."<sup>167</sup> Fonteyne himself admits that this criterion might be an extremely difficult one to apply due to its highly subjective character. One might add that it could also lead to callous decisions against in-

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<sup>161</sup> *See id.*

<sup>162</sup> *See* Fonteyne, *supra* note 22, at 266-67.

<sup>163</sup> *Id.*

<sup>164</sup> *See id.* at 267.

<sup>165</sup> *Id.* at 268.

<sup>166</sup> *Id.* at 259.

<sup>167</sup> Fonteyne, *supra* note 22, at 260 n.244.

intervention in desperately needed situations; for Fonteyne is of the following view:

Even in an extreme case of violation of the most fundamental human rights of a large group of people (such as in the case of the organized policy of genocide . . .), foreign intervention of a forceful nature would probably not be warranted if there is a reasonable prospect that the deprivations will end in the immediate future as a result of internal political or other processes.<sup>168</sup>

The criterion regarding the “avoidance of any unnecessary affectation of the authority structures of the state intervened in” also requires clarification. What this means is that there should be a severe limitation on alterations by the interventionist of the internal authority structures of that state, and that any action in that direction should be limited to those situations where “the overthrow of the government in power or even secession of a part of the population appears to be the only available means of putting an end to ongoing or threatened human rights violations of particular gravity.”<sup>169</sup> In this regard, Moore has remarked correctly that if the protection of human rights requires the overthrow of authority structures it would seem best to require U.N. authorization as a prerequisite for action. “To allow unilateral action in such cases would be to permit all manner of self-serving claims for the overthrow of authority structures.”<sup>170</sup>

#### B. *Some Nagging Operational Problems of United Nations Humanitarian Intervention*

When we contemplate the legality of humanitarian intervention, we must presume that collective action in the context of U.N. or regional organizations is more likely to ensure the relative purity of intentions required from the intervenors. This is not always forthcoming, and that explains why we are forced to grapple with the possibility of individual states undertaking that responsibility.

Clearly, U.N. intervention presents an easier case of humanitarian intervention. The deployment of armed U.N. peacekeeping forces can be presented partly as a case of diplomatic intervention. It is dip-

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<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 263.

<sup>170</sup> John Norton Moore, *The Control of Foreign Intervention in Internal Conflicts*, 9 VA. J. INT'L L. 205, 264 (1969).



lomatic to the extent that peacekeepers are generally deployed with the consent of the conflicting parties as part of the diplomatic process; but it is also forcible intervention to the extent that the personnel are members of armed forces. However, because U.N. peacekeeping generally partakes of the diplomatic process, it makes it less offensive and therefore more acceptable both in principle and in practice. Fonteyne's criteria outlined above quite clearly favors action by international organizations. First, global organizations, such as the U.N., through the Security Council; then regional organizations such as NATO and the OAU; and finally, subregional groups such as ECOMOG/ECOWAS in West Africa.

A general policy to lodge decisions on robust peacekeeping firmly in the hands of the U.N. Security Council, rather than with individual states or groups of states certainly blunts the image of self-aggrandizement and imperialism frequently associated with all forms of humanitarian intervention. Certainly, the loathsome feelings against intervening neighbors as meddling bystanders are displaced in the case of a multinational force established by the Security Council to deal with crimes against humanity and war crimes. Regional organizations such as NATO and ECOMOG/ECOWAS may also act appropriately under Article 52 of the U.N. Charter if the U.N. as a global institution does not wish to act in a timely fashion, so long as the Security Council is apprised of the conflict and intended action and expressly or tacitly approves it.

Indeed, there is the belief that the future of effective peacekeeping belongs to regional organizations such as ECOMOG. Thus, Michael Hirsh has argued that in the current post-Cold War period, neither the United States nor the U.N.:

[A]cting separately or in concert, could become some form of *globo-cop*. . . . Washington does not have the will for it, and the U.N. (thanks largely to American stinginess) does not have the way. . . . [A] new system is emerging on the ground, crisis by crisis. *Call it the rule of the regio-cops*. It is a hybrid system, dependent on both U.N. legitimization and local muscle.<sup>171</sup>

However, the preeminent role of the U.N. Security Council in this conceptualization does carry with it a number of actual and po-

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<sup>171</sup> Hirsh, *supra* note 1, at 2-3 (emphasis added).

tential concerns worthy of consideration and resolution. Goulding has identified five such areas of concern.<sup>172</sup>

1. By what criteria should the Security Council decide to use force? These criteria need to be well defined in order to avoid charges of double standards. In a possibly oblique reference to the attitude of the international community towards Israel in respect of the Middle East crisis, Goulding states:

There may be sound reasons why it is right to use force against Iraq, but not against other member states which continue to occupy their neighbor's territory contrary to the Security Council's wishes. . . . But if the Security Council is to escape the charge of double standards, . . . [the Council] and especially its western members, . . . need to be more careful in defining those reasons and getting them accepted.<sup>173</sup>

Moreover, the Security Council will have to explain why it appears more ready and willing to intervene in some parts of the world than in others. Why intervene to save human lives and reduce oppression in Bosnia and Kurdish Iraq, but not to the same degree in Rwanda or Angola?

2. How can the Security Council ensure that its use of force will succeed? Success is important to the credibility of the organization. The answer to the dilemma lies in the very careful appreciation of the military task and the deployment of sufficient force to ensure its success. In addition, a credible and practical end game must be defined so that withdrawal of the U.N. does not result in further problems.

3. Is the international community ready to pay for increased enforcement? Enforcement is vastly more expensive than peacekeeping. Some mechanism whereby the enforcement costs would be borne collectively by all member states would be preferable if enforcement is to increase the credibility of collective security. The ICJ established this principle for U.N. peacekeeping operations in the 1960s.<sup>174</sup>

4. Will enough member states be willing to contribute to enforcement operations given the increased risk of casualties? How many of those with the will and desire have the armament and training capabilities to engage in combat operations in unfamiliar terrain?

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<sup>172</sup> See Goulding, *supra* note 14, at 461–63.

<sup>173</sup> *Id.* at 461.

<sup>174</sup> See Certain Expenses of the United Nations, 1962 I.C.J. 151, 151 (Jul. 20).

It is desirable that any enforcement deployment would have troop contributions from a wide cross-section of the U.N. to reflect the composition of the organization.

5. How should command and control of peacekeeping operations be organized in the future? The existing structures at U.N. Headquarters in New York have found it increasingly difficult to meet the demands of increased peacekeeping activity. This is due to the fact that the command and control requirements of forcible intervention far exceed those of peacekeeping.

Indeed, problems of command and control and the extent of U.N. member states' commitment to multilateral peacekeeping were highlighted in the Presidential Decision Directive (PDD), a recent U.S. policy document on peacekeeping issued by the Clinton Administration in 1994. Even as the then U.N. Secretary-General Boutros-Ghali was reiterating his support for a U.N. standing army in October, 1994,<sup>175</sup> the sole superpower and the highest single financial contributor to the U.N. had just published a document on U.S. involvement in future U.N. peacekeeping operations whose implementation was bound to impinge upon the effectiveness of the unified nature of U.N. peacekeeping operations.<sup>176</sup>

The PDD addresses six major issues in potential U.S. involvement in U.N. peacekeeping operations: (1) making choices about which U.N. peacekeeping operations the United States will support; (2) reducing U.S. costs for U.N. operations; (3) U.S. policy regarding the command and control of American military forces in U.N. operations; (4) reforming and improving the U.N.'s capability to manage peace operations; (5) improving the way the U.S. government manages and funds peace operations; and (6) creating better forms of cooperation between the U.S. Executive, Congress, and the American public on U.N. peace operations. Of the greatest relevance to this Article are the prescriptions on U.S.'s potential participation in peacekeeping operations, the reduction of costs, and the thorny issue of command and control in relation to U.S. forces.

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<sup>175</sup> See Karen Breslau, *Interview of Boutros-Ghali*, NEWSWEEK, Oct. 3, 1994, at 52.

<sup>176</sup> See generally U.S. DEPARTMENT OF STATE, *supra* note 13. The paper referred hereto is a summary of a Presidential Decision Directive (PDD), signed on May 3, 1994 by President Clinton. The PDD was the product of an inter-agency review involving the following offices: The State Department; the Office of the Secretary of Defense; the Joint Chiefs of Staff; the U.S. mission to the United Nations; the Office of Management & Budget; the Central Intelligence Agency; and the National Security Council. See *id.*

As for the first matter, the PDD distinguishes between three categories of decisions and assigns differing levels and combinations of factors that enter into the decision-making process. There are situations in which the United States will merely vote for the establishment of a U.N. peacekeeping operation without necessarily participating in the operation itself. The United States may also vote for and decide to participate in such an operation, without the United States assuming any significant role therein. Then there are the cases in which the United States will vote for an operation and make a significant commitment of her military personnel. The factors taken into account in the decision making process become more involved as one moves higher up the ladder within those three categories.

Where the United States is simply deciding whether to vote for any kind of U.N. peacekeeping operations, the following factors will be taken into account:<sup>177</sup>

- (1) To what extent would U.S. involvement advance U.S. interests?
- (2) Is there "an international community of interest" in handling the problem at hand on a multilateral, i.e., global, basis?
- (3) Does the situation constitute a breach of, or a threat to, international peace and security, either in terms of international aggression or of urgent humanitarian disaster coupled with violence?
- (4) Has there been a sudden interruption of "established democracy" or a gross violation of human rights, coupled with violence or the threat of violence?
- (5) Does the proposed mission have clear objectives, along with the anticipated duration tied to these objectives; and has it set out realistic criteria for ending the operation?
- (6) Does the mission indicate where it fits "on the spectrum between traditional peacekeeping and peace enforcement?" If the mission is billed as a traditional peacekeeping operation, is a cease-fire in place; and is there consent of the parties for the deployment of peacekeeping forces?
- (7) If the mission is viewed as one of peace enforcement, how significant is the threat to international peace and security?

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<sup>177</sup> See *id.* at 11.

(8) How available are the means for the accomplishment of the mission, including the required forces and finances, and the appropriate coverage of the mandate?

(9) Are the political, economic, and humanitarian consequences of inaction considered unacceptable?

U.S. authorities are expected to make decisions on the cumulative weight of all the relevant factors without assigning any particular weight to any single factor. It appears that most of these factors address Fonteyne's substantive criteria for justified intervention, while a few are more relevant to his procedural and preferential criteria. Needless to say, however, Fonteyne's specific responses to aspects of these criteria, as well as the weight to be given to the stated factors, might have reflected a different value set from that of officials of the U.S. State and Defense Departments called upon to make decisions on, for example, Rwanda, Haiti, or the former Yugoslavia.

Where the United States is called upon to contribute personnel to U.N. operations, additional factors come into play in the decision making process. Here, U.S. national interests come to the forefront more explicitly than in the more general decision to approve a proposed U.N. operation.<sup>178</sup> Whenever U.S. personnel are expected to participate at any level in the operation, the United States would wish to assure itself that:

(1) The mission would advance U.S. national interests; that risks to American personnel have been weighed, and that such risks are acceptable presumably to U.S. decision-makers and ultimately to the American people;

(2) U.S. participation is indeed necessary for the operation's success;

(3) An endpoint for U.S. personnel participation can be identified in the mission plan;

(4) U.S. personnel, funds, and other resources are available;

(5) The Executive Branch can marshal domestic and congressional support for the U.N. operation; and

(6) The command and control arrangements as they affect U.S. personnel are acceptable to the U.S. authorities.

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<sup>178</sup> See *id.* at 12.

Finally, if U.S. personnel are to be called upon to contribute in a significant manner to the success of an operation under Chapter 7 of the U.N. Charter, i.e., enforcement measures, U.S. authorities will consider three additional criteria:

- (1) Is there a determination to commit sufficient (multi-lateral) forces to achieve the objectives?
- (2) Is there a plan to achieve these objectives in a decisive manner?
- (3) Is there a commitment "to reassess and adjust" the size, composition, and disposition of U.S. forces as necessary to attain the stated objectives?

The internationally accepted perspective on the four issues raised above is that a U.N. operation does not cease to be such an operation just because troops from major powers, or indeed from a superpower, are involved. If it is a U.N. operation, then the U.N. Secretary-General is administratively in charge of appointments, including the appointment of field commanders and their immediate assistants, unless the Security Council directs otherwise.<sup>179</sup>

At the same time, a U.N. operation, typically made up of troops from various parts of the world, starts off with different levels of professional competence and military resources. Contingents from certain countries might feel professionally superior and display this assumed superiority. There also might be differences in the foreign policy objectives of contributing states in regards to the particular geopolitical area of conflict. Will a particular nation seek to push its foreign policy agenda under the cover of a multilateral force? Finally, in the case of contributory states with a vigorous electorate and highly vocal public opinion holding a delicate democratic balance between the supporters and opponents of the government, the executive decision makers will continue to put a rather heavy weight on public attitudes to perceived and actual risks to their troops in the field.

Part of the PDD dealt with a rather touchy issue in command and control, namely, whether and to what extent U.S. troops should come under the control of non-U.S. military commanders within a multilateral force.<sup>180</sup> The document makes a distinction between command and control and "operational control." The former is defined as "the

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<sup>179</sup> This was amply demonstrated by the U.N. command structure in the Congo Crisis in 1960, and many other U.N. missions since then.

<sup>180</sup> U.S. DEPARTMENT OF STATE, *supra* note 13, at 16.

authority to issue orders covering every aspect of military operations and administration.”<sup>181</sup> Operational control, on the other hand, is viewed as a subset of command, involving the authority given for a specific time frame “to assign tasks to U.S. forces already deployed by the President.” The PDD insists that the U.S. President “will never relinquish command authority over U.S. forces,” but allows the President on a case by case basis to consider placing appropriate U.S. forces under the operational control of a competent U.N. commander for specific U.N. operations authorized by the Security Council. This may be done if it is to the advantage of the United States. Even in such cases, “the fundamental elements of U.S. command” will apply, including the capability of U.S. commanders to report separately to higher U.S. military authorities and to the U.N. Commander, and the right of the United States to take whatever actions it deems necessary to protect U.S. forces if they are endangered.

The Directive claims that “unity of command” remains a vital concern of the U.S. decision-makers. Yet, the tensions that may result from insistence on the so-called fundamental elements of U.S. command are not adequately resolved. In other words, when the rules of the U.N. unity of command clash head-on with those fundamental elements of U.S. command, which set of rules will govern? Indeed, the problems of command and control, and the sometimes unhappy mix of global and regional arrangements in this endeavor, came to the fore in Bosnia towards the end of the tenure of Boutros-Boutros Ghali as U.N. Secretary General.

In a report submitted in late 1994 to the Security Council on the future of U.N. forces in Bosnia, Boutros-Ghali laid out the options then open to the international community as he saw it.<sup>182</sup> The U.N. could either scale down the scope of its mandate to do what was possible as a traditional peacekeeping force, approve a more expansive mandate, or hand over to another international force, presumably under the authority of the appropriate Security Council Resolutions. The closest parallel to the third option would have been the role played by the United States, France, and Britain in the Iraq-Kuwait crisis under the rubric of various U.N. Security Council Resolutions.

However, the Secretary General’s first option of scaling down U.N. troops appeared to run counter to moves already made on the

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<sup>181</sup> See *id* at 15.

<sup>182</sup> See *Report of the Secretary General Pursuant to Security Council Resolutions 982 (1995) and 987 (1995)*, U.N. SCOR at ¶¶ 72–79, U.N. Doc. S/1995/444 (1995).

ground in Bosnia by the United States and two Security Council members with the most troops in the area, Britain and France. These countries were already massing their troops to give them enhanced capability to carry out humanitarian and "protection" activities. The debate on the Secretary General's report clearly constituted a landmark in the conception and the role of the U.N. force in the former Yugoslavia. The U.N. had certainly reached the crossroads from peacekeeping to peace enforcement. Russia's original opposition to the whole idea of adding more troops to create a Rapid Reaction Force (RRF) finally subsided, and the main question then became the composition and structure for such a force.

As it turned out, the RRF was finally established in December, 1995 under the name of Implementation Force (IFOR).<sup>183</sup> IFOR was given a good deal of discretion and flexibility to take all necessary measures to protect their troops in the performance of their mandate, including strong elements of enforcement.<sup>184</sup> Further, the resolution made it clear that there would be a "unified command and control" under NATO.<sup>185</sup> The U.N. Secretary-General's report accompanying the resolution added that the incumbent U.N. Peace Force Commander, who was then the foremost military authority in the theatre of conflict reporting to the Secretary-General, was to become the Deputy Commander of IFOR.<sup>186</sup> Quite clearly, the U.N. had been assigned to a position of less authority in the new arrangement. IFOR was seen essentially as a multinational force dedicated to peace enforcement and the protection of UNPROFOR in Bosnia, but set apart from the latter as a U.N. agency. If so, should this multinational force be partly financed by the U.N. or by the troop-contributing countries alone? Such questions, easy to pose but often hard to answer in meaningful practical terms, would continue to bedevil the execution of humanitarian intervention in the multilateral mode.

For some time now, the U.N. itself has become rather dissatisfied with its own effectiveness in peacekeeping operations, as well as with some of the assumptions embedded in the received peacekeeping doctrine over the past fifty years. As part of an effort to improve peacekeeping both doctrinally and operationally, the current U.N. Secretary-General, Kofi Annan, set up an independent panel on

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<sup>183</sup> See S.C. Res. 1031, U.N. SCOR, 50th Sess., 3607th mtg. ¶ 14, U.N. Doc. S/Res/1031 (1995).

<sup>184</sup> See *id.* ¶¶ 15, 17.

<sup>185</sup> See *id.* ¶¶ 12, 14.

<sup>186</sup> See generally *id.*



United Nations Peace Operations, "The Brahimi Panel,"<sup>187</sup> in March, 2000 to make a set of recommendations for improvement. On August 21, 2000, the Brahimi Panel released its report,<sup>188</sup> which addressed several pertinent issues. After throwing doubt on the relevance of the "prior consent" notion of peacekeeping in the conduct of intra-state conflicts, the report maintains that peacekeepers must be able to defend themselves and their mandate with "robust rules of engagement."<sup>189</sup> An under-funded and resource-strapped peacekeeping mission serves no one's interest. Thus, the Security Council should not finalize resolutions authorizing large peacekeeping missions until member states have pledged the necessary troops and resources.<sup>190</sup>

The Security Council, in its resolutions and other directives, should reflect the clarity of purpose and unity of effort that are required for successful peacekeeping operations, particularly when deployment is to take place in very dangerous situations.<sup>191</sup> While not calling for a standing U.N. army, the Brahimi Panel nonetheless summons member states to work together to form "coherent, multinational, brigade-sized forces," ready for effective deployment within defined time-lines. Also, each state is called upon to establish a national pool of military and civilian police officers and other specialists in readiness for such deployment.<sup>192</sup> Peacekeeping support staff at U.N. Headquarters must be strengthened, with an increase in funding.<sup>193</sup> Peacekeeping ought to be treated as a "core activity" of the U.N. rather than as a "temporary responsibility." Thus, headquarters support of peace operations should be funded through the regular U.N. budget, instead of the "Support Account" which is meant to be justified year by year and post by post.<sup>194</sup>

The Brahimi Panel clearly understands the critical role of the Security Council members and troop-contributing countries in the success or failure of projected missions. It therefore poignantly calls upon the U.N. Secretariat to "tell the Security Council what it needs to know, not what it wants to hear, when formulating or changing mis-

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<sup>187</sup> Named after its Chairman, former Algerian Foreign Minister Lakhdar Brahimi.

<sup>188</sup> See *Comprehensive Review of the Whole Question of Peacekeeping Operations in All their Aspects*, U.N. GAOR, 55th Sess., U.N. Doc. A/55/305-S/2000/809 (2000) [hereinafter *Comprehensive Review*].

<sup>189</sup> *Id.* at 10, ¶ 55.

<sup>190</sup> See *id.*

<sup>191</sup> See *id.*

<sup>192</sup> *Id.* at xi; see also *id.* at 15–16, ¶¶ 86–91; 17–29, ¶¶ 102–169.

<sup>193</sup> *Comprehensive Review*, *supra* note 188, at 33.

<sup>194</sup> *Id.* at 29–30, 33.

sion mandates."<sup>195</sup> Such candor will, no doubt, enhance the degree of preparedness of peacekeepers in aid of humanitarian intervention.

#### CONCLUSION

From the 1860s onwards, philosophers and legal scholars seemed increasingly receptive to the suggested legal validity of humanitarian intervention by individual states or group of states, acting outside the auspices of any international organization.<sup>196</sup> In the period immediately preceding World War I, the majority of writers had apparently accepted the legality of humanitarian intervention, even though there were still strong opponents of this position.<sup>197</sup> It seems fair to assert that immediately prior to the adoption of the U.N. Charter in 1945, humanitarian intervention was a fairly settled practice under customary international law, even if there was never unanimity on its legal status.

By the end of World War II, and certainly after the formation of the U.N. in 1945, Sir Harley Shawcross could confidently declare, at the Nuremberg Trials in 1946, that, "the right of humanitarian intervention, in the name of the rights of man trampled upon by the state in a manner offensive to the feelings of humanity, has been recognized long ago as an integral part of the Law of Nations."<sup>198</sup> However, some scholars still raise the uncomfortable but legitimate question whether this right of intervention survived the U.N. Charter, in view of the well-established principle of non-intervention codified in Articles 2(4) and 2(7) of the Charter.

Over the past two decades, there have been quite a few dramatic cases of unilateral military interventions, some of which have been castigated as self-serving and thus not motivated primarily by humanitarian goals. There have also been various U.N. peacekeeping operations, including those in former Yugoslavia and Rwanda, which had strong elements of humanitarian intervention.

Whatever the strengths of some of the doctrinal objections to humanitarian intervention, it is the view of this writer that the world cannot sit by in the name of a single doctrine of international law, i.e.,

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<sup>195</sup> *Id.* at 54, ¶ 4(d).

<sup>196</sup> See Fonteyne, *supra* note 22, at 219.

<sup>197</sup> *Id.* at 223; see also *supra* Parts I and II.

<sup>198</sup> H. Shawcross, *Expose Introduction au Procès de Nuremberg*, in Aroneau, *L'Intervention d'Humanité et la Déclaration Universelle des Droits de l'homme*, 33 *REVUE DE DROIT INTERNATIONAL, DE SCIENCE DIPLOMATIQUE ET POLITIQUE* 127 (1955).

non-intervention, while human beings are being butchered and tortured on a wide and persistent scale by their own governments, or by factions in a civil war; or when human populations are subjected to starvation and epidemic diseases as a result of political conflicts. There are other international law doctrines that will justify humanitarian intervention, especially if they are embarked upon by U.N. sanctioned regional and multilateral forces. The minimization of conflict is not an absolute virtue that ought to be pursued at the cost of all other virtues; it ought to be balanced with other virtues, including the promotion of respect for certain fundamental human rights.

Further, so long as we insist on the need for a well-defined set of criteria, it might be advisable, given the inability or unwillingness of international bodies to react to all cases of grave human rights abuses, to legally recognize that in these extreme situations a state may be temporarily relieved from its Article 2(4) restraints in order to take unilateral action to enforce critical rights. As Lillich stated thirty-four years ago, "to require a state to sit back and watch the slaughter of innocent people in order to avoid violating blanket prohibitions against the use of force is to stress black letter at the expense of far more fundamental values."<sup>199</sup>

When humanitarian interventions are undertaken not just in accordance with the U.N. Charter, but by U.N. peacekeepers or regional groups ratified by the U.N., the case for humanitarian intervention rests on even more solid ground. Even so, the multinational mode of intervention poses its own special problems, including the matter of command and control and the difficulty of implementing the generally agreed concept of unity of command. States contributing to U.N. robust peacekeeping operations should strive to downplay their parochial military professionalism and eschew narrow foreign policy agendas in the theatres of conflict. Only from this unified perspective and *modus operandi* can robust peacekeeping deliver a devastating blow to the forces of darkness that make humanitarian intervention a necessary part of our moral and legal duty.

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<sup>199</sup> Richard B. Lillich, *Forcible Self-Help to Protect Human Rights*, 53 IOWA L. REV. 344, 344 (1967).