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Volume 17 | Number 2

Article 3

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2-1-1995

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# Humanitarian Intervention: Pros and Cons

NIKOLAI KRYLOV\*

## I. INTRODUCTION

The United Nations has demonstrated that it can effectively organize and influence international relations in many situations.<sup>1</sup> Nevertheless, some states have expressed an intent to change their policies toward U.N. intervention to reserve their right to use unilateral military actions in international relations.<sup>2</sup> States should reexamine various aspects of unilateral military operations, particularly in relation to the use of force for humanitarian purposes, because these acts have always been especially controversial.<sup>3</sup> The possible and concrete parameters of such interventions have been widely debated.<sup>4</sup> Although the United States has advocated the doctrine of humanitarian intervention, a majority of European international lawyers remains suspicious of unilateral military actions for humanitarian purposes.<sup>5</sup>

This Article argues that this skepticism is no longer warranted. Given the increased attention to human rights and the growing body of human rights conventions, an outright ban on any forceful

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1. See Oscar Schachter, *United Nations Law in the Gulf Conflict*, 85 AM. J. INT'L L. 452 (1991).

2. See Douglas Jehl, *Clinton Presses U.N. to Increase Its Force at Sarajevo If Necessary*, N.Y. TIMES, Sept. 27, 1994, at A1.

3. For a bibliography on the subject, see RICHARD B. LILICH, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY AND PRACTICE 604-06, 631-32 (2d ed. 1991).

4. Most theories are summarized in FERNANDO R. TESÓN, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY 251 (1988); see also NATALINO RONZITTI, RESCUING NATIONALS ABROAD THROUGH MILITARY COERCION AND INTERVENTION ON GROUNDS OF HUMANITY (1985).

5. See Ulrich Beyerlin, *Humanitarian Intervention*, 7 ENCYCLOPEDIA PUB. INT'L L. 37 (Bernhardt ed., 1987).

unilateral military action in support of human rights is not appropriate.

Parts II, III, and IV of this Article discuss the notion of unilateral military operations for humanitarian purposes and provide a historical background. Then, in Parts V, VI, and VII, this Article analyzes the legality of using force to secure a minimum international standard of human rights. Parts VIII, IX, X, and XI of this Article outline some guidelines for the use of force for humanitarian purposes and discuss the possibilities of abuse and the consequences of humanitarian intervention.

## II. BASIC DEFINITIONS

In general, there is no proper way to define the doctrine of humanitarian intervention.<sup>6</sup> “[A] usable general definition of ‘humanitarian intervention’ would be extremely difficult to formulate and virtually impossible to apply rigorously . . . .”<sup>7</sup> Nevertheless, a working definition may be useful to outline the scope of this Article.

Several notions of humanitarian intervention exist. Different scholars espouse either a broad or narrow definition of humanitarian intervention, and these differing approaches sometimes create confusion.

“Classical” humanitarian intervention<sup>8</sup> is the unilateral intervention for protection of another state’s nationals from human rights violations.<sup>9</sup> “The theory of intervention on the ground of humanity is properly that which recognizes the right of one state to exercise an international control *by military force* over the acts of another in regard to its internal sovereignty when contrary to laws of humanity.”<sup>10</sup> Recently, one commentator defined human-

6. Michael J. Bazylar, *Reexamining the Doctrine of Humanitarian Intervention in Light of the Atrocities in Kampuchea and Ethiopia*, 23 STAN. J. INT'L L. 547, 547, n.1 (1987).

7. Thomas M. Franck & Nigel S. Rodley, *After Bangladesh: The Law of Humanitarian Intervention by Military Force*, 67 AM. J. INT'L L. 275, 277 (1973).

8. In 1921, Ellery Stowell defined humanitarian intervention as “reliance upon force for the justifiable purpose of protecting the inhabitants of another state from treatment which is so arbitrary and persistently abusive as to exceed the limits of that authority within which the sovereign is presumed to act with reason and justice.” ELLERY C. STOWELL, INTERVENTION IN INTERNATIONAL LAW 53 (1921).

9. See Ulrich Beyerlin, *Humanitarian Intervention*, 3 ENCYCLOPEDIA PUB. INT'L L. 211, 212 (1981).

10. Franck & Rodley, *supra* note 7, at 277 (emphasis in original).

itarian intervention as "the proportionate transboundary help, including forcible help, provided by governments to individuals in another state who are being denied basic human rights and who themselves would be rationally willing to revolt against their oppressive government."<sup>11</sup> Some scholars understand humanitarian intervention to be a doctrine that deals with the right of states and international organizations to assist their nationals if they are subjected to human rights abuses.<sup>12</sup>

Humanitarian intervention can encompass any kind of nonforcible state action taken to prevent human rights violations in another country.<sup>13</sup> Sometimes humanitarian intervention is enlarged, including the use of armed force either for protection of nationals abroad<sup>14</sup> or with respect to rescuing nationals.<sup>15</sup> This type of humanitarian intervention is usually discussed as an aspect of self-defense.<sup>16</sup>

There are also two relatively rare definitions of humanitarian intervention: intervention by invitation<sup>17</sup> and by coercion. Some authors consider the use of coercion to rescue nationals abroad as diplomatic protection.<sup>18</sup>

This Article addresses only two unilateral military state actions: (1) classical humanitarian intervention and (2) rescue operations to protect nationals abroad.

Finally, it is important to note that all previous humanitarian interventions have been analyzed in some detail.<sup>19</sup> For the purposes of this Article, there have been no recent humanitarian

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11. TESÓN, *supra* note 4, at 5.

12. THOMAS BUERGENTHAL & HAROLD G. MAIER, PUBLIC INTERNATIONAL LAW IN A NUTSHELL 117 (1990).

13. Beyerlin, *supra* note 9, at 212; David J. Scheffer, *Toward a Modern Doctrine of Humanitarian Intervention*, 23 U. TOL. L. REV. 253, 266 (1992).

14. See Louis Henkin, *The Use of Force: Law and U.S. Policy*, in RIGHT V. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE 41 (1991); Michael Reisman & Myres S. McDougal, *Humanitarian Intervention to Protect the Ibos*, in HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 167 (Richard B. Lillich ed., 1973).

15. For example, Reisman and McDougal classify the Israeli rescue mission at Entebbe, where Israel rescued its nationals, as a lawful humanitarian intervention. See Myres S. McDougal & Michael Reisman, *Letter to the Editor*, N.Y. TIMES, July 16, 1976, at A20.

16. Beyerlin, *supra* note 9, at 212.

17. ANN VAN WYNEN & A.J. THOMAS, JR., NON-INTERVENTION 91 (1956).

18. See MYRES S. MCDUGAL & W.M. REISMAN, INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE: THE PUBLIC ORDER OF THE WORLD COMMUNITY 868 (1981).

19. See generally TESÓN, *supra* note 4, at 251. See also RONZITTI, *supra* note 4.

interventions. Therefore, this Article takes a theoretical approach while referring to some previous works for factual analysis.

### III. HISTORICAL UNDERPINNING

One scholar traced the origins of the doctrine of humanitarian intervention to the writings of some ancient theologians, particularly St. Thomas Aquinas, a thirteenth-century religious scholar. Aquinas argued that a sovereign had the right to intervene "in the internal affairs of another when the latter mistreats its own subjects beyond the limits of what seems acceptable."<sup>20</sup>

The roots of humanitarian intervention can also be traced to the "father of international law," Hugo Grotius,<sup>21</sup> who declared that if a tyrant "should inflict upon his subjects such treatment as no one is warranted in inflicting, the exercise of the right vested in human society is not precluded."<sup>22</sup> When this statement was made, the notion of human rights had not yet developed, and war was considered a legitimate means to conduct international relations. "[Hugo Grotius] told the monarchs of his day that they were not free to commit crimes and to perpetrate injustice either intentionally or externally. Tyrannous acts within their own state associations . . . constituted crimes for which these rulers were liable to punishment."<sup>23</sup> In 1758, Emmerich de Vattel argued: "If a prince, by violating the fundamental laws, gives his subjects a lawful cause for resisting him; if, by his insupportable tyranny, he brings a national revolt against him, any foreign power may rightfully give assistance to an oppressed people who ask for its aid."<sup>24</sup>

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20. Jean-Pierre L. 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, 214 (1974). This study contains a very thorough and detailed analysis of the historical and philosophical roots of this doctrine.

21. See LOUIS B. SOHN & THOMAS BUERGENTHAL, *THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS* 137-43 (1973).

22. HUGO GROTIUS, *DE JURE BELLI AC PACIS*, ch. VII, ¶ 2, at 584 (Francis W. Kelsey trans., 1925).

23. C. S. EDWARDS, *HUGO GROTIUS: THE MIRACLE OF HOLLAND* 136 (1981).

24. EMMERICH DE VATTEL, *THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW APPLIED TO THE CONDUCT AND TO THE AFFAIRS OF NATIONS AND OF SOVEREIGNS* 3 (Charles G. Fenwick trans., 1964).

## IV. PRE-U.N. CHARTER ERA

Only in the late nineteenth and early twentieth centuries did a substantial body of state practice arise, justifying forceful interventions abroad by alleging the necessity to protect individuals and groups against their own states.<sup>25</sup> Before the U.N. Charter (the "Charter") was adopted, a number of military missions were undertaken primarily for humanitarian reasons. For example, Russia intervened on behalf of Christians in Bulgaria, Turkey, Bosnia, and Herzegovina in the 1870s, and intervened in the Balkans during the nineteenth and early twentieth centuries.<sup>26</sup>

International lawyers considered this frequent practice to be legitimate. In particular, in 1905, Oppenheim stated:

[S]hould a State venture to treat its own subjects or a part thereof with such cruelty as would stagger humanity, public opinion of the rest of the world would call upon the powers to exercise intervention for the purpose of compelling such a State to establish a legal order of things within its boundaries sufficient to guarantee to its citizens an existence more adequate to the ideas of modern civilization.<sup>27</sup>

In 1910, French scholar Antoine Rougier articulated criteria to determine the legitimacy of using force for humanitarian ends.<sup>28</sup> In 1915, one professor explicitly stated: "[W]here a state under exceptional circumstances disregards certain rights of its own citizens, over whom presumably it has absolute sovereignty, the other states of the family of nations are authorized by international law to intervene on grounds of humanity."<sup>29</sup>

Similarly, missions to rescue nationals held hostage or otherwise endangered abroad were justified as self-defense. According to one scholar:

Traditional international law has recognized the right of a state to employ its armed forces for the protection of the lives and property of its nationals abroad in situations where the state of

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25. Daniel Wolf, *Humanitarian Intervention*, 9 MICH. Y.B. INT'L LEGAL STUD. 333, 337 (1988).

26. TESÓN, *supra* note 4, at 157-58.

27. LASSA OPPENHEIM, *INTERNATIONAL LAW* 347 (1st ed. 1905).

28. Antoine Rougier, *La Théorie de l'Intervention d'Humanité*, 17 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 468 (1910).

29. EDWIN M. BORCHARD, *THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD* 14 (1915).

their residence, because of revolutionary disturbances or other reasons, is unable or unwilling to grant them the protection to which they are entitled.<sup>30</sup>

Such operations complied with classic international law, in which the presence or absence of three realities determined whether the resort to force or war was necessary: (1) domestic support for the action—political reality; (2) anticipated forceful reaction of other powers—diplomatic reality; and (3) likelihood of the military operation's success.<sup>31</sup> Classical international law did not absolutely prohibit the use of force.<sup>32</sup> In 1922, one commentator emphasized that "[i]t always lies within the power of a State . . . to gain political or other advantages over another, not merely by the employment of force, but also by the direct recourse to war."<sup>33</sup> Many scholars have confirmed this argument. In particular, Judge Schwebel, in his dissenting opinion in *Nicaragua v. United States*, wrote: "In the pre-United Nations Charter era—or, at any rate, in the pre-Pact of Paris or pre-League of Nations era—states were free to employ force and go to war for any reason or no reason."<sup>34</sup>

At the beginning of the twentieth century, the legality of using force was gradually called into question. The creation of the League of Nations was one of the first steps toward regulating war.<sup>35</sup> The Covenant of the League of Nations created two innovations in international law. First, signatory states were obligated to use peaceful means to attempt to settle disputes and could not resort to war without first exhausting those peaceful means. Second, members of the League of Nations were authorized to judge the legality, under the Covenant, of a state's resort to war and to apply sanctions against such state if it violated the Covenant.<sup>36</sup> In any case, the relevant provisions of the Covenant

30. PHILIP C. JESSUP, *A MODERN LAW OF NATIONS* 169 (1948).

31. Lee Stuesser, *Active Defense: State Military Response to International Terrorism*, 17 CAL. W. INT'L L.J. 4 (1987).

32. LASSA OPPENHEIM, *INTERNATIONAL LAW* 177-78 (7th ed. 1952).

33. CHARLES CHENEY HYDE, *INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES* 35 (2d ed. 1945).

34. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 259, 362 (Jan. 10) (separate opinion of Judge Schwebel).

35. See Covenant of the League of Nations, art. 12, in *INTERNATIONAL LEGISLATION* 7 (1931).

36. C.H.M. Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 RECUEIL DES COURS 455, 469 (1952).

“made it very improbable that an aggression-minded state would ever succeed in resort war without a breach of its obligations under the Covenant.”<sup>37</sup> Although the Covenant restricted war, it did not address lesser forms of armed force,<sup>38</sup> in particular the use of force to rescue nationals endangered abroad.

The 1928 Treaty for the Renunciation of War (Kellogg-Briand Pact) explicitly condemned recourse to war to solve international controversies and renounced war as an instrument of national policy.<sup>39</sup> It was the first outright prohibition against the use of force in modern history. The signing of this Treaty basically outlawed aggressive wars, but the Treaty did not specifically prohibit the use of force to defend nationals or for humanitarian purposes.

Nevertheless, the doctrine of humanitarian intervention was not universally welcomed. Before World War II, there was a substantial divergence of opinion among the most prominent international lawyers.<sup>40</sup>

## V. LEGAL RESTRAINTS ON THE USE OF FORCE

The Preamble to the U.N. Charter outlines the U.N. members' determination “to save succeeding generations from the scourge of war” and “to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest.”<sup>41</sup>

Article 2 of the Charter requires that all members “settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.”<sup>42</sup> Most importantly, member states agree to a broad prohibition against use of force: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.”<sup>43</sup> These words undoubtedly represent the basic norm of

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37. J.L. BRIERLY, *THE LAW OF NATIONS* 408 (6th ed. 1963).

38. *Id.* at 442.

39. *See* General Treaty for Renunciation of War as an Instrument of National Policy, Aug. 28, 1928, 46 Stat. 2343, 94 L.N.T.S. 57.

40. *See* Fonteyne, *supra* note 20, at 223.

41. U.N. CHARTER pmb1.

42. U.N. CHARTER art. 2, ¶ 3.

43. *Id.* art. 2, ¶ 4.



contemporary international law with respect to the use of force.<sup>44</sup> On its face, the scheme is relatively straightforward:

Since the Charter of the United Nations was drafted and ratified in 1945, the nominal law on the international use of force has been clear—as law goes, remarkably clear. Its essential terms can be summarized more easily (and with less controversy) than most branches of the law of tort or contract.<sup>45</sup>

As is often the case in law, however, even the clearest scheme may create substantial difficulties and problems in its application and interpretation.

For example, in drafting the above quoted paragraph, the word “war” was deliberately omitted, although this word was used in the Covenant of the League of Nations and the Kellogg-Briand Pact of 1928.<sup>46</sup> The term was omitted because states can engage in hostilities without declaring “war” or calling it “war;” “force” is a broader term, which encompasses most military actions.<sup>47</sup>

The language of Article 2 has been subject to various interpretations.<sup>48</sup> Paragraph 4 of Article 2 prohibits the use of “force against the territorial integrity or political independence” of another nation.<sup>49</sup> At Dumbarton Oaks, the accepted language restricted “the use or threat of force in their international relations in any manner inconsistent with the purposes of the Organization.”<sup>50</sup> The words “against the territorial integrity or political independence of any state”<sup>51</sup> were added to the Charter at the insistence of smaller countries that wanted some assurance that the more powerful states could not use force at the expense of weaker states.<sup>52</sup> The late Sir Hersch Lauterpacht wrote, “territorial integrity, especially where coupled with ‘political independence,’

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44. Edward Gordon et al., *International Law and U.S. Action in Grenada (Special Report)*, 18 INT'L LAW. 331, 356 (1984).

45. Eugene Rostow, *The Politics of Force*, 24 Y.B. WORLD AFF. 38, 58 (1982).

46. LELAND M. GOODRICH ET AL., CHARTER OF THE UNITED NATIONS 43-60 (3d ed. 1969).

47. Oscar Schachter, *General Course in Public International Law*, 178 RECUEIL DES COURS 138 (1982).

48. Gordon, *supra* note 44, at 356.

49. U.N. CHARTER art. 2, ¶ 4.

50. Dumbarton Oaks Proposals, ch. II, ¶ 4.

51. U.N. CHARTER art. 2, ¶ 4.

52. See Doc. 442, III/3/20, 12 U.N.C.I.O. Docs. 342-46 (1945); GOODRICH ET AL., *supra* note 46, at 44-45.

is synonymous with territorial inviolability.”<sup>53</sup> On the other hand, it has been argued that the meaning of “force against the territorial integrity or political independence,” as was known to the 1945 drafters, is technical and does not encompass all uses of force.<sup>54</sup>

## VI. EVOLVING PRINCIPLES OF INTERNATIONAL LAW

The recent, post-Charter trends in the development of international law require analysis. Such principles as sovereignty, non-intervention, and respect for human rights are particularly important in exploring the legality of humanitarian intervention and rescue missions.

One of the main principles of international law is the principle of state sovereignty.<sup>55</sup> For centuries, sovereignty identified the nation-state as the legitimate actor entitled to international law protection.<sup>56</sup>

State sovereignty is the state's supremacy over its territory and its independence in international relations.<sup>57</sup> Such independence, however, cannot be understood as an absolute, entirely unbounded principle. Unlimited state power manifests itself in the absence of higher authority over the state when the state is not subordinated to the authority of other governments.

Sovereignty is a characteristic of state power, inseparably linked to concrete historical conditions.<sup>58</sup> Thus, the notion of state sovereignty cannot remain unchanged.<sup>59</sup> The measure of a state's sovereign rights at the beginning and end of the twentieth century differs widely. Early in the century, there were fewer multilateral treaties and international organizations. Therefore, states had fewer obligations. “A major intellectual requirement of our time is to rethink the question of sovereignty—not to weaken its essence, which is crucial to international security and cooperation,

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53. OPPENHEIM, *supra* note 32, at 154.

54. See ANTHONY D'AMATO, *INTERNATIONAL LAW: PROCESS AND PROSPECT* 57-73 (1987).

55. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 287 (6th ed. 1990).

56. See W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866, 866-69 (1990).

57. See *INTERNATIONAL LAW* 74 (G. Tunkin ed., 1986).

58. The national premise of sovereignty has been changing because “the pieces on the global chess board are changing.” Scheffer, *supra* note 13, at 260.

59. Reisman, *supra* note 56, at 869.

but to recognize that it may take more than one form and perform more than one function."<sup>60</sup>

Some objective factors, such as the general development of international affairs and interdependence, are also changing matters essentially within a state's domestic jurisdiction. Human rights are the best examples of diminishing respect for sovereignty. Such rights traditionally fell within the exclusive internal competence of states and were not regulated by international law. Therefore, human rights were deemed matters exclusively within each state's domestic jurisdiction.<sup>61</sup> Despite some noticeable changes in international law, in 1986, the Soviet concept of international law still provided that human rights would remain "primarily an internal affair of States."<sup>62</sup>

Arguably, human rights are no longer regarded as solely an internal state matter.<sup>63</sup> It is now difficult to support the contention that internal human rights are "essentially within the domestic jurisdiction of any state," insulated from international law.<sup>64</sup> On par with the development of international cooperation and reinforcement of world interdependence, citizens' rights and freedoms have transcended the borders of one state, gradually becoming common property. Thus, human rights are not *ipso facto* a matter within each state's domestic jurisdiction.<sup>65</sup> Rather, these rights are acquiring an international tinge. Through the adoption of the Universal Declaration of Human Rights in 1948, the Covenants of Human Rights in 1966, the European Convention of Human Rights in 1950, the Helsinki Accords in 1975, and the Copenhagen Declaration, human rights became a stronger basis upon which to challenge the preeminence of state sovereignty.<sup>66</sup> The International Court of Justice recognized that respecting human rights is an obligation *ergo omnes*, similar to the obligation

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60. Boutros Boutros-Ghali, *Empowering the United Nations*, 71 FOREIGN AFF. 89, 99 (Winter 1992/93).

61. See BUERGENTHAL & MAIER, *supra* note 12, at 127.

62. INTERNATIONAL LAW, *supra* note 57, at 353.

63. Even Russian scholars have recognized that human rights are no longer exclusively within domestic jurisdiction. Vladlen Vereshetin & Rein Mullerson, *New Mentality and International Law*, 3 SOVIET ST. & L. (1988).

64. Reisman, *supra* note 56, at 869.

65. BUERGENTHAL & MAIER, *supra* note 12, at 127.

66. *Id.* at 127-28.

to refrain from acts of genocide or aggression.<sup>67</sup> Furthermore, contemporary international law does not prohibit such intrusions.<sup>68</sup>

In a similar fashion, a new understanding of the principle of nonintervention arises when some matters, such as human rights, become the subject of international agreements. These agreements place human rights outside the state's exclusive domestic jurisdiction, making them a concern of the world community. Then-U.N. Secretary General Pérez de Cuellar stated in his annual report: "It is now increasingly felt that the principle of non-intervention with the essential domestic jurisdiction of States cannot be regarded as a protective barrier behind which human rights could not massively or systematically be violated with impunity."<sup>69</sup> This additional argument does not automatically give a state the right to use force for humanitarian purposes. Nevertheless, it provides additional support for humanitarian intervention.

Thus, the correlation between international prerogatives and the realm of inter-state regulation is changing. Numerous problems have left the bounds of domestic jurisdiction to become world community problems. This position does not violate the principle of sovereignty because states have voluntarily submitted international affairs issues to international regulation. This grant of power exists in conjunction with the principle of sovereignty rather than in spite of it. Moreover, legally proper agreements, in accordance with which mutual obligations are undertaken and definite legal authority is transferred to an international organization, serve to strengthen sovereignty.

By joining organizations and treaties, a state limits its authority but simultaneously acquires new benefits. Consequently, depriving states of certain rights and privileges should not be regarded negatively. Any international agreement or organization grants its members new rights, opportunities, privileges, and prerogatives. Thus, the term "limitation of sovereignty" is conditional. General human and national interests are connected, achieving a unified position.

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67. See Louis Henkin, *Human Rights and Domestic Jurisdiction*, in HUMAN RIGHTS, INTERNATIONAL LAW AND THE HELSINKI ACCORD 21 (Thomas Buergenthal ed., 1977).

68. *Id.*

69. JAVIER PÉREZ DE CUELLAR, REPORT OF THE SECRETARY-GENERAL ON THE WORK OF THE ORGANIZATION 12 (1991).

## VII. THE LEGALITY OF THE USE OF FORCE FOR HUMANITARIAN PURPOSES

### A. *Rescuing Nationals Abroad*

The late Judge Lauterpacht noted an obvious contradiction between domestic and international law. "[T]he individual in his capacity as an alien enjoys a larger measure of protection by international law than in his character as the citizen of his own State."<sup>70</sup> Under traditional international law, this inconsistency was permitted because states were obligated to treat aliens according to international law principles but were not required to treat their own nationals properly. Where a foreign state violated the minimum standard of treatment accorded to aliens, the aliens' state was justified under traditional international law to use force in self-defense to protect its nationals.<sup>71</sup>

After the U.N. Charter, the legal regime changed. As noted, contemporary international law prohibits the use or the threat of force. The right of self-defense is the one express exception to this general prohibition.<sup>72</sup> If necessary, the Security Council is empowered to use military measures.<sup>73</sup> Moreover, force may also be used against former enemy states<sup>74</sup> and by regional arrangements.<sup>75</sup>

It should be noted that neither the Covenant of the League of Nations nor the Kellogg-Briand Pact referred explicitly to this right of self-defense, which has been accepted in international law for centuries. In proposing the Pact, however, the French and U.S. governments expressed the view that a right of self-defense "is inherent in every sovereign state and is implicit in every treaty."<sup>76</sup> The United States asserted the following:

70. HERSCH LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* 121 (1950).

71. OPPENHEIM, *supra* note 27, at 300.

72. "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security." U.N. CHARTER art. 51.

73. *Id.* art. 42.

74. *Id.* art. 107.

75. *See id.* arts. 52-54.

76. H.R. DOC. NO. 639, 70th Cong., 2d. Sess. 36 (1928).

Every state is free at all times and regardless of treaty provisions to defend its territory from attack or invasion and it alone is competent to decide whether circumstances require recourse to war in self-defense. If it is a good case, the world will applaud and not condemn its action.<sup>77</sup>

By contrast, the U.N. Charter takes a different approach:

The U.N. Charter explicitly mentions and preserves this permission to resort to force in response to unauthorized coercion, describes it as an "inherent right," and recognizes that permissible coercion may be exercised by the target state individually, or by a collectivity of states, without prior authorization from the organized community (although, of course, subject to its subsequent appraisal).<sup>78</sup>

Because the main exception to the general prohibition against using force is self-defense, which is triggered only if there has been an attack on the state, the first question is whether the use of force against one's nationals abroad may be regarded as an attack against a state.

It is plausible that attacking nationals is an attack on the state. Using the theory of social contract between a state and an individual, it has been argued that:

[A]n injury to the nationals of a state constitutes an injury to the state itself, and that the protection of nationals is an essential function of the state. On this reasoning it is feasible to argue that the defense of nationals, whether within or without the territorial jurisdiction of the state, is in effect the defense of the state itself.<sup>79</sup>

Because population is an essential ingredient of a state,<sup>80</sup> whether the individuals are within or outside of the state's territory is insignificant.<sup>81</sup> It may have important practical consequences and may require different solutions, but as a matter of law, it

77. *Id.*

78. MYRES S. MCDUGAL & FLORENTINO P. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION* 126 (1961).

79. DEREK W. BOWETT, *SELF-DEFENCE IN INTERNATIONAL LAW* 92 (1958).

80. Derek W. Bowett, *The Use of Force for the Protection of Nationals Abroad*, in *THE CURRENT LEGAL REGULATION OF THE USE OF FORCE* (A. Cassese ed., 1986).

81. *But see* LOUIS HENKIN, *HOW NATIONS BEHAVE* 145 (2d ed. 1979). Louis Henkin does not consider an armed attack against the nationals located in a foreign state as an armed attack against the nationals' state. *Id.*

should be considered an attack upon a state giving rise to a right of self-defense.<sup>82</sup>

Cases of this form of armed intervention have not been infrequent in the past and, where not attended by suspicions of being a pretext for political pressure, have generally been regarded as justified by the sheer necessity of instant action to save the lives of innocent nationals, whom the local government is unable or unwilling to protect.<sup>83</sup>

U.N. Charter Article 51 does not mention any specific restrictions. Its sole requirement for exemption is an armed attack "against a Member of the United Nations."<sup>84</sup> There is no guidance as to where such attack must occur or how large the attack must be. Obviously, the murder of some German tourists in Miami is doubtful justification for the use of force in self-defense, but this example emphasizes the importance of taking a balanced approach to the problem.<sup>85</sup> Although there are no requirements or restrictions with respect to defense of nationals abroad, the danger is substantial. One commentator noted the following:

[T]o imperil the safety of a single national abroad is not to imperil the security of the state; and yet there may be occasions when the threat of danger is great enough, or wide enough in its application to a sizable community abroad, for it to be legitimately construed as an attack on the state itself.<sup>86</sup>

An assessment of state practice supports the argument favoring a right to use force to protect nationals abroad. In general, developed countries espouse this approach. As noted, the United States supports a right of self-defense in such circumstances. The United Kingdom shares this view. The Secretary of State for Foreign and Commonwealth Affairs informed the House of Commons on October 26, 1993:

We would not dispute that a state has the right in international law to take appropriate action to safeguard the lives of its citizens where there has been a breakdown of law and order,

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82. Stuesser, *supra* note 31, at 30-31.

83. Waldock, *supra* note 36, at 467.

84. U.N. CHARTER art. 51.

85. For an analysis of the balancing test, see *infra* Part VII.B.

86. BOWETT, *supra* note 79, at 93.

nor that there is any provision in the Charter of the United Nations that makes it unlawful to take such action.<sup>87</sup>

Interestingly enough, these similar legal positions did not prevent the United Kingdom from taking a different view during the Grenada invasion.<sup>88</sup> This inconsistency demonstrates that general similarity in legal positions does not necessarily warrant the same assessment of particular situations.

In the past, socialist countries regarded intervention to protect nationals abroad as unlawful.<sup>89</sup> Some developing countries have also adhered to this view; however, one should consider that during the Cold War the so-called "domino" effect often played socialist and western countries against each other. Virtually any country's military action would have immediately evoked the most vigorous criticism from countries of another block. Likewise, these countries would later try to even the score. Therefore, despite the fact that states' practices are generally important in assessing international norms, states' declarations during the Cold War varied dramatically from their actions and did not certify their true legal positions.

In this regard, it is significant that Russia modified its position. Until recently, the Soviet Union explicitly opposed any use of force to protect nationals abroad. In fact, the 1950 draft of the Soviet Union's Definition of Aggression expressly prohibited such protection.<sup>90</sup> This draft listed acts of aggression and a series of motives that could not be valid excuses for launching an act of aggression. "[A]ny danger which may threaten the life or property of aliens" was one such motive.<sup>91</sup> Some other countries, particularly the United Kingdom and Belgium, criticized this position:<sup>92</sup> "[B]y mistreating foreigners in its own territory a State committed an act of aggression against the country of which the foreigners were nationals; and in defending itself, the State concerned was exercising its right of self-defence."<sup>93</sup>

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87. W. C. GILMORE, *THE GRENADA INTERVENTION: ANALYSIS AND DOCUMENTATION* 61 (1984).

88. *Id.*

89. *Id.* at 58.

90. RONZITTI, *supra* note 4, at 50.

91. *Id.*

92. *Id.*

93. *Id.*



The Soviet Union's historical position is contrary to Russia's current position. Russia has officially welcomed the use of force to protect its nationals.<sup>94</sup> The shift in Russia's stance is obviously important because Russia and China were previously the only Security Council permanent members vigorously opposed to use of force to protect nationals abroad. Russia's change in position manifests the growing acceptance of the right to use such force in the world community. This recognition may prevent potential wrongdoers from endangering foreigners' lives and may make military interference possible.

Although the right to rescue nationals is part of self-defense and is, therefore, legitimate, it should be emphasized that a state has discretion to decide whether to use force. Accordingly, guidelines should be established to clarify the circumstances in which use of force is justified.

### *B. Humanitarian Intervention*

Using humanitarian intervention as a justification for the use of force is trickier and, candidly, less persuasive. Obviously, large-scale atrocities against the population of another state cannot reasonably be construed as self-defense. "[I]t seems impossible, in the absence of the link of nationality, to regard [humanitarian intervention] as a species of self-defense . . ." <sup>95</sup> Therefore, other justifications should be made.

The legality of humanitarian intervention should be appraised in light of the international human rights norms that have transformed dramatically over the last fifty years. Today, these norms impose much stronger obligations upon states to treat their nationals in accordance with international standards.<sup>96</sup> Several norms are aimed at safeguarding human rights. The Preamble of the U.N. Charter expresses the people's determination "to reaffirm faith in fundamental human rights, in the dignity of and worth of the human person," and a dedication "to ensure, by the acceptance of principles and the institution of methods, that armed force shall

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94. *Riga's Authorities Deport Two Russian Generals*, RUSSIAN PRESS DIG., Jan. 11, 1994, at 1.

95. Derek W. Bowett, *The Interrelation of Theories of Intervention and Self-Defense*, in *LAW AND CIVIL WAR IN THE MODERN WORLD* 38, 44 (J.N. Moore ed., 1974).

96. See, e.g., *International Covenant on Civil and Political Rights*, reprinted in *TWENTY-FOUR HUMAN RIGHTS DOCUMENTS* 18-30 (1992).

not be used, save in the common interest."<sup>97</sup> These provisions are frequently considered to legally justify or at least encourage humanitarian interventions.<sup>98</sup> Proponents of humanitarian interventions argue that these provisions of the Preamble, along with Articles 1, 55, and 56, create a positive obligation for member states' action defending human rights.<sup>99</sup> They assert that, under the Charter, human rights protections should be accorded the same weight as the maintenance of international peace.<sup>100</sup> "The repeated emphasis upon the common interest in human rights indicates that the use of force for the urgent protection of such rights is no less authorized than other forms of self-help."<sup>101</sup>

As noted, after the advent of the U.N., a substantial body of human rights conventions was adopted, exposing participating states to international scrutiny and imposing severe obligations. In particular, the Genocide Convention not only makes genocide an international crime, but authorizes its signatories to "undertake [efforts] to prevent and to punish" acts of genocide.<sup>102</sup> Moreover, in 1951, the International Court of Justice stated that "the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, *even without any conventional obligation*."<sup>103</sup> In other words, notwithstanding Convention participation, states have an obligation not to commit acts of genocide.

In another important decision, the Court specifically stated that, due to the importance of human rights, "all states can be held to have a legal interest in their protection."<sup>104</sup> The Court specified that "such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, *as also from the principles and rules concerning the basic*

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97. U.N. CHARTER pmbi.

98. See MYRES S. MCDUGAL ET AL., HUMAN RIGHTS AND WORLD PUBLIC ORDER 241 (1980).

99. U.N. CHARTER arts. 1, 55, 56. These Articles reaffirm the U.N.'s commitment to promote universal respect for and observance of human rights and fundamental freedoms for all. See *id.*

100. See LILLICH, *supra* note 3, at 603-04.

101. Reisman & McDougal, *supra* note 14, at 172.

102. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15, 24.

103. *Id.* at 23 (emphasis added).

104. Case Concerning the Barcelona Traction, Light and Power Co. Ltd. (Belg. v. Spain), 1970 I.C.J. 4, 134 (second phase).

*rights of human person*, including protection from slavery and racial discrimination."<sup>105</sup> This decision arguably has subjected states to international scrutiny and exposed them to the possibility of external pressure in the event of a violation;<sup>106</sup> however, the International Court of Justice's remedy for a violation was for avenging states to bring the wrongdoing states into court, rather than to wage war, no matter how briefly.<sup>107</sup> Nevertheless, humanitarian intervention may be justified as protecting basic human rights because such action is not waging war.<sup>108</sup> Where human rights are egregiously violated, a state should consider two conflicting obligations: the obligation to protect nationals abroad and the obligation to avoid the threat and use of force in international relations.<sup>109</sup> If the values embodied in the obligation to protect human rights outweigh those embraced in the obligation to refrain from using force, then a state may interfere to prevent human rights abuses.<sup>110</sup>

Additional arguments have been made in support of humanitarian intervention. As noted, humanitarian interventions were permitted under traditional international law.<sup>111</sup>

The advent of the United Nations neither terminated nor weakened the customary institution of humanitarian intervention. In terms of its substantive marrow, the Charter strengthened and extended humanitarian intervention, in that it confirmed the homocentric character of international law and set in

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105. *Id.* (emphasis added).

106. Some authors disagree with this argument. Natalino Ronzitti stated that: "while it is quite sure that the obligation to refrain from the use of force is embodied in a peremptory norm of international law, it is not at all sure that the duty to promote human rights is set forth in a *jus cogens* rule." RONZITTI, *supra* note 4, at 15.

107. 1970 I.C.J. at 4.

108. Theodor Schweisfurth raised similar arguments with regard to rescue operations. See Theodor Schweisfurth, *Operations to Rescue Nationals in Third States Involving the Use of Force in Relation to the Protection of Human Rights*, 23 GERMAN Y.B. INT'L L. 159, 163 (1980).

109. *Id.*

110. Theodor Schweisfurth's approach is a balancing test. He rejects a broad interpretation of the words "armed attack" in U.N. Charter Article 51, and argues strongly against waiving the ordinary meaning of these words. In this manner he justified rescue operations as protecting basic human rights. According to Schweisfurth, "it is more convincing when the State of nationality bases its rescue action on an obligation which aims at the protection of high values such as human rights than when it bases it on a right so widely contested." *Id.*

111. See Fonteyne, *supra* note 20, at 203-07.

motion a continuous authoritative process of articulating international human rights . . . .<sup>112</sup>

Even a literal reading of Article 2 of the U.N. Charter does not indicate an absolute prohibition on the use of force.<sup>113</sup> It only prohibits using force "against the territorial integrity or political independence of any state or in any other manner inconsistent with the Purposes of the United Nations."<sup>114</sup> If the use of force is employed consistently with other principles of the U.N. Charter without being directed against territorial integrity or political independence, it "may be commendable rather than necessarily forbidden by the Charter."<sup>115</sup> Therefore, if the force is employed for a legitimate purpose, such as to put an end to human rights abuses, it conforms with the U.N. Charter's fundamental principles.<sup>116</sup>

Many scholars have stated that the U.N.'s inefficiency and its failure to respond effectively to human rights deprivations justify humanitarian intervention.<sup>117</sup> An apparent objective of the U.N. founders was to create a mechanism that would provide for collective, rather than individual, responses to acts of aggression. The possible U.N. limitations became obvious soon after its advent. In 1948, it was argued for the first time that, under certain conditions, unilateral actions should be substituted for collective measures.<sup>118</sup>

It would seem that the only possible argument against the substitution of collective measures under the Security Council for individual measures by a single state would be the inability of the international organization to act with the speed requisite to preserve life. It may take time before the Security Council, with its Military Staff Committee, and the pledged national contingents are in a state of readiness to act in such cases, but the Charter contemplates that international actions shall be timely as well as powerful.<sup>119</sup>

112. Reisman & McDougal, *supra* note 14, at 171.

113. MCDUGAL ET AL., *supra* note 98, at 241.

114. U.N. CHARTER art. 2, ¶ 4.

115. See JULIUS STONE, *AGGRESSION AND WORLD ORDER: A CRITIQUE OF THE UNITED NATIONS THEORIES OF AGGRESSION* 43 (1958).

116. See Reisman & McDougal, *supra* note 14, at 177.

117. See THOMAS M. FRANCK, *NATION AGAINST NATION: WHAT HAPPENED TO THE U.N. DREAM AND WHAT THE U.S. CAN DO ABOUT IT* (1985).

118. JESSUP, *supra* note 30, at 169.

119. *Id.* at 170-71.

In other words, where the U.N. leaves a gap that cannot be replaced by lawful action other than the unilateral use of force, states are not obligated to refrain from using force under the U.N. Charter.<sup>120</sup> "To give up the right of self-help without obtaining any other adequate means of redress would simply have played into the hands of law-breakers."<sup>121</sup>

Unilateral use of force is not the best justification for humanitarian intervention because it implies some kind of illegality. It also suggests that humanitarian intervention is legitimate only to the extent that the United Nations is impotent and lacking in goodwill between its members. Humanitarian intervention may be tracked to ancient times and should not be justified solely through the inadequacy of collective measures. The logic of this argument, however, is still useful in structuring the criteria for humanitarian intervention.

[T]he establishment of machinery for collective security and enforcement was so basic a condition for the Members of the United Nations in surrendering their right under customary international law to use force for a variety of reasons, that failure by the Organization to create this machinery would partially relieve the Member States of their obligation of restraint under the Charter.<sup>122</sup>

Moreover, the growing body of rules compels states to use their best efforts to enhance human rights and protect them from violations.

The Soviet Union's position was to use the U.N. mechanism to cure human rights violations.<sup>123</sup> Even this mechanism was used only if there was a threat to or breach of the peace.<sup>124</sup>

Article VIII of the Convention on the Prevention and Punishment of the Crime of Genocide provides that any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of the act of genocide . . . . [R]esponse of the

120. See MCDUGAL ET AL., *supra* note 98, at 241.

121. Waldock, *supra* note 36, at 468.

122. Fonteyne, *supra* note 20, at 257.

123. Vladimir Kartashkin, *Human Rights and Humanitarian Intervention*, in *LAW AND FORCE IN THE NEW INTERNATIONAL ORDER* 202, 208 (Lori Fisler Damrosch & David J. Scheffer eds., 1991).

124. *Id.*

world community to violations of basic human rights and freedoms may manifest itself in various forms. However, it should be taken into account that measures employed must completely exclude humanitarian intervention involving the use of armed force if it is not appropriately authorized by the Security Council.<sup>125</sup>

As will be outlined later, the use of force should be the last resort, and collective measures are preferable to unilateral actions; if the collective machinery does not work, however, should the state be forced to leave victims without relief and allow the wrongdoer to continue? The obvious injustice of this proposition provides a basis for resorting to humanitarian intervention in exceptional circumstances where there is international consensus.<sup>126</sup> Such consensus presupposes that the international community acknowledges gross human rights violations and regards such humanitarian intervention with favor.

Although there has not been unanimity with respect to the customary norm of humanitarian intervention,<sup>127</sup> there have been a number<sup>128</sup> of precedents<sup>129</sup> leading to the conclusion that states are willing to use military force in extraordinary circumstances. Interestingly enough, several industrial countries' official positions may be interpreted to partially espouse the doctrine of humanitarian intervention. In 1983, Davis R. Robinson, Legal Adviser of the U.S. State Department, justifying U.S. action in Grenada, declared that the United States "did not assert a broad doctrine of humanitarian intervention."<sup>130</sup> Nevertheless, this language should not be construed to mean that the United States rejected the doctrine *per se*. In 1946, the United Kingdom's position was as follows: "[T]he right of humanitarian intervention, in the name of the Rights of Man trampled upon by the State in

125. *Id.*

126. Theodor Meron, *Commentary on Humanitarian Intervention*, in *LAW AND FORCE IN THE NEW INTERNATIONAL ORDER*, *supra* note 123, at 214.

127. *See id.*

128. Some scholars differ on this point. *See, e.g.*, Jack Donnelly, *Human Rights, Humanitarian Intervention and American Foreign Policy: Law, Morality and Politics*, 37 *J. INT'L AFF.* 317 (1984) ("[A] single case of action every decade or two, in the face of literally dozens of instances of inaction, in no way establishes humanitarian intervention as state practice.").

129. *See, e.g.*, TESÓN, *supra* note 4, at 155-200; RONZITTI, *supra* note 4, at 50.

130. Davis R. Robinson, *Letter From the Legal Adviser, U.S. Department of State*, 18 *INT'L LAW.* 381, 386 (1984).

a manner offensive to the feeling of Humanity, has been recognized long ago as an integral part of the Law of Nations."<sup>131</sup> On the other hand, a special study in the United Kingdom stated:

[The] overwhelming majority of contemporary legal opinion comes down against the existence of a right of humanitarian intervention, for three main reasons: First, the U.N. Charter and the corpus of modern international law do not seem specifically to incorporate such a right; secondly, state practice in the past two centuries, and especially since 1945, at best provides only a handful of genuine cases of humanitarian intervention, and, on most assessments, none at all; and finally, on prudential grounds, that the scope for abusing such a right argues strongly against its creation.<sup>132</sup>

During various U.N. discussions, humanitarian intervention has not received substantial support,<sup>133</sup> although some states have acknowledged it. At the Ninth Session of the Sixth Committee, the Dutch representative said that "force could be lawfully used to prevent 'the massacre in a foreign State of persons with whom we feel related for reasons of nationality.'"<sup>134</sup> According to the Dutch representative, "the use of armed force could be justified in the case of 'force majeure,' which is a general principle of law recognized by civilized nations."<sup>135</sup>

Sometimes the use of force in cases of human rights atrocities can be morally justified.<sup>136</sup> For example, Professor D'Amato argues:

Human rights law demands intervention against tyranny . . . .  
I do not argue that intervention is justified to establish democracy, aristocracy, socialism, communism or any other forms of government. But if any of these forms of government become

131. Fonteyne, *supra* note 20, at 226 (quoting H. SHAWCROSS, EXPOSÉ INTRODUCTIF AU PROCÈS DE NUREMBERG (1946)).

132. 57 BRIT. Y.B. INT'L L. 614 (1986).

133. RONZITTI, *supra* note 4, at 106.

134. *Id.* at 50.

135. *Id.*

136. *But see* Fonteyne, *supra* note 20, at 249-50. Fonteyne denies this moral argument.

This could only encourage States to run the risk, break the law, invoke some vague, plausible higher motive, and hope that the world community will fail to censor their conduct. In the long run such a situation must inevitably lead to an increasing authority deflation of international law in general, and of the Charter in particular. If States can 'acceptably' break the law for humanitarian reasons, why should it not be equally tolerable to violate it for other, perhaps morally less commendable motives as well?

in the Aristotelian sense corrupted, resulting in tyranny against their populations . . . I believe that intervention from outside is not only legally justified but morally required.<sup>137</sup>

In sum, all of the foregoing arguments are relatively fragile; however, the increasing body of human rights and growing number of binding legal obligations on states with respect to human rights create a situation where humanitarian intervention may be justified in extreme circumstances.<sup>138</sup>

#### VIII. CRITERIA FOR THE USE OF MILITARY FORCE

After discussing the history and legitimacy of humanitarian intervention, it is possible to conclude that the doctrine has a substantial basis in international law and may be used in extreme circumstances; the basic issue, however, is which circumstances should trigger humanitarian intervention. Obviously, international relations are too complicated to determine specific criteria for the application of humanitarian intervention in all circumstances. Nevertheless, some working standards may be formulated if humanitarian intervention is to exist in international law.<sup>139</sup> Such guidelines would be helpful for at least two reasons. First, specific criteria would aid in drawing the proper lines between genuine humanitarian intervention and its abuses. Second, clearly articulated standards should deter governments from violating their citizens' rights<sup>140</sup> and from abusing the right to humanitarian intervention.

Different arguments have been advanced to justify using force to rescue or protect nationals abroad: (1) an emergency need to save lives, (2) legitimate self-defense, and (3) non-derogation of territorial integrity and political independence of the state in whose territory the action occurred.<sup>141</sup> A classical study of the use of force enumerated three conditions under which a state may use force abroad in self-defense to protect its nationals. "There must be (1) an imminent threat of injury to nationals, (2) a failure or inability on the part of the territorial sovereign to protect them and (3) measures of protection strictly confined to the object of

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137. D'Amato, *supra* note 54, at 59.

138. See MCDUGAL ET AL., *supra* note 98, at 241.

139. Bazylar, *supra* note 6, at 598.

140. *Id.*

141. Schachter, *supra* note 47, at 145.



protecting them against injury."<sup>142</sup> Similarly, other criteria have been suggested to determine the legality of humanitarian intervention.<sup>143</sup>

The intervening states have invoked different arguments to support their actions. For example, in 1976, the Israeli delegate to the United Nations, justifying the Entebbe raid, stated that the Israeli action was self-defense for which they had "no choice of means and no moment for deliberation."<sup>144</sup> He also emphasized that the Israeli government only employed the amount of force strictly necessary to rescue its citizens.<sup>145</sup>

In suggesting criteria for using force for humanitarian purposes, one may conclude that many such standards should be similar to the criteria for using force in international relations. Obviously, this conclusion is not surprising because the same standards should govern any use of force in international relations. Additional criteria may be added as particular uses of force may warrant.

#### A. *Threat to Lives and Large-Scale Atrocities*

What constitutes "an emergency need to save lives" justifying the use of force?<sup>146</sup> It is easier to justify the use of force when a situation has become violent and there is an imminent threat to nationals' lives. In 1956, the United Kingdom sought to justify the Anglo-French invasion of the Suez in this manner.<sup>147</sup> The Lord Chancellor informed the House of Lords that "self-defence undoubtedly includes a situation in which the lives of a State's

142. Waldock, *supra* note 36, at 467.

143. Summarizing the works of Richard B. Lillich and John Bassett Moore, John R. D'Angelo outlined the following factors:

- (1) the immediacy of the human rights violation;
- (2) the extent of the violation of human rights;
- (3) an invitation from an appropriate authority to use forcible self-help;
- (4) the degree of coercive measures employed;
- (5) the relative disinterestedness of the intervening State;
- (6) minimal effect on authority structure;
- (7) prompt disengagement consistent with the purposes of the action; and
- (8) immediate full reporting to the Security Council and appropriate regional organizations.

John R. D'Angelo, *Resort to Force by States to Protect Nationals: The U.S. Rescue Mission to Iran and Its Legality Under International Law*, 21 VA. J. INT'L L. 485, 497 (1981).

144. See RONZITTI, *supra* note 4, at 55.

145. *Id.*

146. Waldock, *supra* note 36, at 467.

147. GILMORE, *supra* note 87, at 61.

nationals abroad are threatened and it is necessary to intervene on that territory for their protection . . . ."<sup>148</sup> In such a situation, the state may choose between repatriating its nationals or using force to save them. The decision depends on many circumstances. Generally, a peaceful solution is preferable.<sup>149</sup> In some instances, however, using force is the state's only alternative. The Israeli rescue action in Entebbe, Uganda, was the most evident example of state action when citizens' lives were in danger.<sup>150</sup> It was clear that Israeli lives were in peril and the Ugandan government had done nothing to protect or rescue them. In these circumstances, using force to rescue these citizens was both legitimate and justifiable.<sup>151</sup> The U.S. position was stated in the following manner:

Israel's action in rescuing the hostages necessarily involved a temporary breach of the territorial integrity of Uganda. Normally such a breach would be impermissible under the Charter of the United Nations. However, there is a well-established right to use limited force to protect one's own nationals from an imminent threat of injury or death where the state in whose territory they are located either is unwilling or unable to protect them.<sup>152</sup>

When the threat to human lives is imminent a state may use force, but there are many situations when the threat is not so obvious. For example, should a state be permitted to use force when there is substantial evidence of imminent danger to nationals? In other words, should a state be allowed to use force in anticipation of attack against its citizens? The answer has substantial practical effect because armed force is frequently used in the absence of an attack on nationals. This practice has given rise to much controversy among international lawyers.<sup>153</sup> In 1842, then-Secretary of State Webster utilized a formula, relating to the *Caroline* incident.<sup>154</sup> This formula has been cited as an

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148. *Id.* at 56.

149. Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1631 (1984).

150. See Leslie C. Green, *Rescue at Entebbe—Legal Aspects*, 6 ISRAEL Y.B. ON HUM. RTS. 312, 313 (1976); see also RONZITTI, *supra* note 4, at 37.

151. See McDougal & Reisman, *supra* note 15.

152. Protection of Human Rights, 1976 DIG. § 6, at 150-51.

153. Schachter, *supra* note 47, at 150.

154. See John Bassett Moore, *Destruction of the Caroline*, 2 DIG. INT'L L. 412 (1906); see also R.Y. Jennings, *The Caroline and McLeod Cases*, 33 AM. J. INT'L L. 87 (1938).

example of anticipatory self-defense, although it is quite controversial and not endorsed unanimously.<sup>155</sup> The British claimed they had a legal right to attack a vessel, the *Caroline*, on the U.S. side of the Niagara River in 1837 because the ship carried armed personnel to support an uprising in Canada.<sup>156</sup> Webster required the British government to show that the "necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation."<sup>157</sup> It also had to show that the Canadian authorities did nothing unreasonable or excessive because the necessity of the self-defense limits the acts that are justifiable.<sup>158</sup>

This formulation of self-defense is often cited as authoritative customary international law.<sup>159</sup> During the Security Council debates on the legality of the Israeli bombing of a nuclear reactor in Iraq, some delegates referred to the Webster formulation of the right of anticipatory self-defense as an accepted norm of international law, validating the right to use armed force in self-defense prior to an actual attack only where such attack is imminent with no time for negotiation.<sup>160</sup>

Regardless of different interpretations and controversial state practice, it is hard to deny the right to anticipatory self-defense in a nuclear age, which would require states to wait passively for their fate.<sup>161</sup> In 1946, the U.S. government offered a new interpretation of armed attack, entirely different from that which existed prior to the invention of nuclear weapons. It encompassed the dropping of an atomic bomb as well as "certain steps in themselves preliminary to such action."<sup>162</sup> These steps are also required for conventional warfare.<sup>163</sup> It can be argued that an armed attack

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155. *Id.* at 412.

156. *See id.*

157. *Id.* at 412.

158. *Id.*

159. Some international law scholars explicitly deny anticipatory self-defense. *See, e.g.,* Ian Brownlie, *The Principle of Non-Use of Force in Contemporary International Law*, in *THE NON-USE OF FORCE IN INTERNATIONAL LAW 24* (W.E. Butler ed., 1989); LAUTERPACHT, *supra* note 70, at 156; Henkin, *supra* note 14, at 41.

160. *See* Schachter, *supra* note 47, at 152.

161. *See* HENKIN, *supra* note 81, at 141.

162. Gordon, *supra* note 44, at 369; JESSUP, *supra* note 30, at 166-67 (both quoting U.S. Memorandum No. 3).

163. Rosalyn Higgins, *General Course of Public International Law*, 230 *RECUEIL DES COURS DE L'ACADEMIE DE DROIT INTERNATIONAL [R.C.A.D.I.]* 310 (1992).

on nationals abroad does not necessarily imperil a state's existence.<sup>164</sup> Ultimately, however, a state's fate is linked directly to its citizens' welfare.<sup>165</sup>

It is possible that anticipatory self-defense could become a pretext for interventions and gross international law violations.<sup>166</sup> The potential for abuse, however, arises with respect to any rights available to a state. Similarly, a right to self-defense in national law is subject to individual abuse, but this hardly justifies complete denial of this right.

Large-scale atrocities are the first prerequisite for humanitarian intervention.<sup>167</sup> The target state's government should be involved in killing, torturing, or creating conditions of intolerable suffering for large numbers of its own citizens. Because the right to life is a fundamental human right, the international community should not condone its violation.

This prerequisite raises the issue of what should be considered as massive killing or large-scale atrocity. The most obvious answer is that it should be a question of fact to be determined according to particular circumstances. The murder of one person is hardly a reason for humanitarian intervention, though human losses should not have to amount to millions to justify intervention. Without a doubt, any government practicing genocide may be a target of humanitarian intervention.<sup>168</sup> Interestingly enough, the Genocide Convention does not specify the number or percentage of a national, ethnic, racial, or religious group that must be killed to constitute genocide.<sup>169</sup> If any additional information is needed, it is incumbent upon the intervening state to acquire such information before deciding to intervene.

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164. Ian Brownlie contends that the phrase "armed attack" "strongly suggests a trespass." IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 278 (1963).

165. *See id.*

166. The International Court of Justice observed that a right to use force "in the cause of justice" would be "reserved for the most powerful states and might easily lead to perverting the administration of justice itself . . . . [A] policy of force such as [this] has in the past given rise to most serious abuses and . . . cannot, whatever be the defects in international organization, find a place in international law." *Corfu Channel Case (U.K. v. Albania)*, 1949 I.C.J. 4, 35.

167. International Covenant on Civil and Political Rights, *supra* note 96, art. 6 at 19-20.

168. *See Bazylar, supra* note 6, at 600.

169. *Id.*

Some scholars propose a balancing approach that would involve weighing "the amount of destruction which almost inevitably will be caused by armed intervention, and the importance of the human rights sought to be protected."<sup>170</sup> Others have argued for humanitarian intervention not only in cases of "genocide, enslavement, or mass murder, but also to put an end to situations of serious 'ordinary' oppression."<sup>171</sup> This approach, however, gives too much latitude to states, providing them with unlimited power to employ force in every incident violating human rights.

Although every human rights abuse is a violation of international law, it does not necessarily require the use of force. International law provides numerous alternative methods, such as diplomatic protests, public condemnations, and various sanctions. The response should match the abuse, and interventions should not be allowed for small-scale abuses.<sup>172</sup>

Is anticipatory humanitarian intervention permissible? Is it possible to draw a parallel with rescue operations to save nationals abroad? As noted, an argument has been made in favor of anticipatory use of force to protect nationals, but humanitarian intervention is definitely more unusual and should be considered with more care. The intervening state should have very clear evidence of atrocities. By only alleging the possibility or imminence of massacre, the intervening state does not have a substantial basis for invasion. Allowing states to intervene in the event of merely potential atrocities would create enormous risk of abuse. The intervening state would become not only a judge or arbitrator, but a supervisor that could dictate how to proceed. Even if the intervening state crosses the line, its action may be partially warranted in the event of ongoing abuses but is unlikely to be justified where atrocities are merely pending.

Humanitarian intervention is a remedy of last resort to be used only in situations of apparent and current massacre or other serious human rights abuses, after exhausting all other remedies. The intervening state should attempt all possible peaceful procedures before resorting to force.

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170. Fonteyne, *supra* note 20, at 258-59.

171. TESÓN, *supra* note 4, at 15.

172. See Bazyley, *supra* note 6, at 600.

In some circumstances, resort to other options may be useless. The intervening state may use force to stop atrocities when it is apparent that no other remedy is available or efficient. For example, where the atrocities will proceed with such speed that any delay—even informing the United Nations—may bring tremendous casualties, it is conceivable that the intervening state may immediately intervene and use force for humanitarian ends.<sup>173</sup>

### B. Necessity

No state should resort to armed force unless absolutely necessary. “Necessity comprises at least two elements: (1) the existence of a danger, and (2) the nonexistence of reasonable peaceful alternatives.”<sup>174</sup> Using Webster’s formula, in the context of the *Caroline* case,

[i]t must be shown that admonition or remonstrance to the persons on board the *Caroline* was impracticable, or would have been unavailing; it must be shown that daylight could not be waited for; that there could be no attempt at discrimination between the innocent and the guilty; that it would not have been enough to seize and detain the vessel; but that there was a necessity, present and inevitable, for attacking her in darkness of the night, while moored to the shore, and while unarmed men were asleep on board, killing some and wounding others, and then drawing her into the current, above the cataract, setting her on fire, and, careless to know whether there might not be in her the innocent with the guilty, or the living with the dead, committing her to a fate which fills the imagination with horror.<sup>175</sup>

At first glance, the danger requirement seems self-explanatory. As soon as danger is present, a state is free to exercise its right to self-defense. In other words, when an armed attack occurs, armed force may be used to rebut that attack. No future justification is necessary to warrant any action taken in self-defense;<sup>176</sup> however, particular cases can be more complicated. The international community is generally skeptical of any use of force. The necessity of using force is questioned especially when such action is an

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173. See *id.* at 607.

174. Stuesser, *supra* note 31, at 31.

175. Moore, *supra* note 154, at 414 (emphasis added).

176. Schachter, *supra* note 47, at 153.

anticipatory use of force or the threat to nationals' lives is longstanding.

The presence of danger is closely related to the justifiability of armed attack. As soon as an attack is imminent, the necessity for force is justified. Particular circumstances may raise additional questions, but as a matter of principle, an imminent attack warrants the use of force in self-defense.

The continuity of threat raises another issue. When a threat is impending, a state may use force to defend its nationals. Does the state still possess this right if it is not exercised without delay?

The rescue mission in Iran illustrates this problem. On November 4, 1979, fifty-two people were seized and held hostage at the U.S. Embassy in Tehran. Soon thereafter, the Security Council adopted Resolution 457, condemning the capture as illegal and calling for the immediate release of the hostages.<sup>177</sup> Several days later, the Security Council reiterated its call.<sup>178</sup> On December 15, 1979, the International Court of Justice issued an order demanding the release of the hostages.<sup>179</sup> The court pointed out that "a dispute which concerns diplomatic and consular premises and the detention of internationally protected persons, and involves the interpretation or application of multilateral conventions codifying the international law governing diplomatic and consular relations, is one which by its very nature falls within international jurisdiction."<sup>180</sup> The case was before the World Court despite Iran's refusal to cooperate with the International Court of Justice and the United Nations.<sup>181</sup> Because the case was presented to different bodies of the United Nations, it was argued that the United States did not have a right to use military force to rescue the hostages.<sup>182</sup>

Judge Lachs, in a separate opinion, stated that the United States, "having instituted proceedings, is precluded from taking unilateral action, military or otherwise, as if no case is pend-

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177. Case Concerning United States Diplomatic and Consular Staff in Iran (Hostage Case), 1980 I.C.J. 14.

178. *Id.*

179. *Id.*

180. *Id.*

181. See Joseph H. Crown & John H.E. Fried, *A Legal Disaster*, THE NATION, May 24, 1980, at 614.

182. See *id.*

ing.”<sup>183</sup> The International Court of Justice did not agree. It assessed the rescue mission as moderate and did not attempt to outlaw it. The Court’s only criticism was that the United States may have inflamed the situation, and defied the court’s earlier order:

[A]n operation undertaken in those circumstances, from whatever motive, is of a kind calculated to undermine respect for the judicial process in international relations; and to recall that in paragraph 47, 1 B, of its Order of 15 December 1979 the Court had indicated that no action was to be taken by either party which might aggravate the tension between the two countries.<sup>184</sup>

The critical question was whether the hostages were in imminent danger of being executed.<sup>185</sup> The environment in Tehran and the Iranian government’s threatening posture were decisive factors in the U.S. determination that rescue measures were appropriate. The timing was regarded as unimportant.

[T]he State whose nationals are in peril must be given latitude to determine whether a rescue action is necessary; there is no international body or third party in a position to make that judgment. The rescue action cannot therefore be characterized as illegal under international law. Whether it was wise in a political and military sense is a different matter.<sup>186</sup>

In sum, a state has the right to rescue its nationals immediately after their lives are endangered. An obscure threat, however, does not constitute endangerment. An actual attack—or at least an apparent threat where attack is imminent with no time to negotiate—must have occurred. A state may use force while its nationals are in danger when its use of force is the last resort. Because the world community is always very sensitive about the use of force, a state should do its best to show that all reasonable peaceful measures have been exhausted, leaving force as the final alternative.<sup>187</sup>

In some circumstances, resort to other options may be fruitless or inefficient. For example, the atrocities may be proceeding so

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183. Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. at 48.

184. *Id.* at 43.

185. See Schachter, *supra* note 47, at 147.

186. *Id.*

187. See Stuesser, *supra* note 31, at 31.



rapidly that any delay, no matter how brief, may result in tremendous casualties.

### C. *Exhaustion of Peaceful Measures*

A related problem is that of striking a balance between the use of force and peaceful means of settlement. Obviously, peaceful means are preferable, and every state is obligated to seek redress through such measures. Article 2 of the U.N. Charter provides that "all members shall settle their international disputes,"<sup>188</sup> and Article 33 requires that member states actively utilize peaceful means to settle any dispute likely to endanger international peace.<sup>189</sup> On the other hand, the prevailing view among international lawyers is that, in the absence of a special agreement, states have no international legal obligation to settle, or even attempt to settle, their disputes. In particular, absent special agreement, a state has no international legal obligation to submit a dispute with another state to impartial arbitral or judicial settlement.<sup>190</sup>

Any categorical answer to the choice between using force and seeking redress through peaceful means is unwarranted.<sup>191</sup> Despite a general trend in international law toward peaceful settlement of disputes, states are not obligated to exhaust peaceful means before resorting to forceful rescue of nationals. In a particular situation, a state should carefully balance all pros and cons of different means and choose the most efficient way to save its nationals' lives abroad. Different circumstances may dictate a variety of solutions. Ultimately, the state must decide whether to resort to force, negotiate, or use other peaceful means of settlement.

### D. *Preference for Collective Measures*

Among the peaceful alternatives to the use of force, one of the most critical is collective measures. Collective measures are generally preferable to unilateral action. They are more likely to succeed, and their legality is unlikely to be questioned, especially

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188. U.N. CHARTER art. 2, ¶ 3.

189. U.N. CHARTER art. 33.

190. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 903 cmt. e, reporter's note 3 (1986).

191. See Schachter, *supra* note 47, at 152.

by the United Nations. "Collective intervention therefore, in general, possesses a legitimacy which is normally denied to unilateral intervention."<sup>192</sup> International institutions, however, historically reflect numerous inefficiencies and failures. Therefore, the invading state must use its best efforts to gain support from the world community by exercising all possible peaceful means.

"The U.N. Charter embodies the expectation that, where possible, Member states will use collective security measures to avoid unilateral use of force."<sup>193</sup> In principle, the U.N. resolution is always preferable to unilateral actions. Unfortunately, international institutions often do not perform according to their original intent, and member states need them to be more effective.

Even in the Cold War's aftermath, the United Nations still is not an efficient mechanism to end human rights violations. Moreover, the United Nations has been an extremely ineffective law enforcement mechanism. Therefore, it is unlikely that states would rely heavily on the United Nations. They will continue to use force unilaterally. This unfortunate reality should not overshadow the fact that U.N. members must use best efforts to engage the U.N.'s collective forces. The Persian Gulf war is a perfect example of the U.N.'s potential.

Unfortunately, regional organizations have also been ineffective. It is unlikely that there is a single example of a regional organization's action stopping large-scale atrocities. In orchestrating the Grenada invasion, the United States clearly did not invoke the doctrine of humanitarian intervention.

Given the unfortunate fact that nations cannot rely on multinational efforts, there will be many unilateral interventions. Nevertheless, their best efforts should be used to engineer multinational actions.

### *E. Humanitarian Purposes*

The intervening states' motives are particularly important. To constitute humanitarian intervention, these motives should be genuinely humanitarian. The intervening state should not use humanitarian motives as a cover for ousting the target state's

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192. Evan Luard, *Collective Intervention*, in *INTERVENTION IN WORLD POLITICS* 158 (Hedley Bull ed., 1985).

193. *The Use of Armed Force in International Affairs: The Case of Panama*, in 47 *THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK* 666 (1992).

government or for other non-humanitarian ends. For example, with respect to the Congo operation, the State Department declared: "This operation is humanitarian—not military. It is designed to avoid bloodshed—not to engage the rebel forces in combat. Its purpose is to accomplish its task quickly and withdraw—not to seize or hold territory."<sup>194</sup> Such declarations support the argument that the intervention was genuinely humanitarian.

How can the mission's humanitarian purpose be reconciled with the violation of a state's territorial integrity? A rescue mission's main purpose is not to violate territorial integrity or political independence, but to protect nationals endangered abroad and secure a minimum international standard of human rights.<sup>195</sup> For example, in the Entebbe situation, it was not Israel's main purpose to violate Uganda's territorial integrity. The mission was in response to inhuman behavior and intended to liberate Israeli nationals held hostage. Therefore, the temporary and limited breach of Uganda's territorial integrity was justified.<sup>196</sup> The U.N. Charter usually prohibits such a violation of territorial integrity or political independence regardless of the grievance under which it arose.<sup>197</sup> Nevertheless, the action was permitted due to the extraordinary circumstances of this specific case and because of the well-established, albeit narrow, right to use force to protect nationals endangered abroad.<sup>198</sup>

Interestingly enough, some highly regarded lawyers argue that there was no violation of Uganda's territorial integrity or political independence.<sup>199</sup> One commentator stated that "Israel could plausibly argue that in the circumstances its raid at Entebbe was not a use of force against the political independence or territorial integrity of Uganda, or in any other way contrary to any purpose of the United Nations."<sup>200</sup> In addition, two other commentators wrote that "the action of the Israelis could not possibly have had

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194. *United States Cooperates With Belgium in Rescue of Hostages From the Congo*, 51 DEPT ST. BULL., Dec. 14, 1964, at 838, 842 [hereinafter *United States Cooperates With Belgium*].

195. MCDUGAL ET AL., *supra* note 98, at 247.

196. *See* Protection of Human Rights, *supra* note 152, at 150-51.

197. U.N. CHARTER art. 33.

198. *Id.*

199. *See* HENKIN, *supra* note 81, at 145; McDougal & Reisman, *supra* note 15.

200. HENKIN, *supra* note 81, at 145.

the effect of threatening the territorial integrity or political independence of Uganda.<sup>201</sup> If Israel's intention was other than purely humanitarian, the world's reaction to the mission would have been quite different.

### F. Proportionality

Proportionality is a fundamental component for determining the legality of using force<sup>202</sup> and is closely linked to the necessity of using force. In a letter to the British authorities, then-Secretary of State Webster included a requirement of proportionality:

It will be for [Her Majesty's Government] to show that the local authorities of Canada, even supposing the necessity of the moment authorized them to enter the territories of the United States at all, did nothing unreasonable or excessive, since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it.<sup>203</sup>

Proportionality limited the right to self-defense under classical international law. Although not specifically mentioned in Article 51 of the U.N. Charter, the Charter strictly maintains proportionality.<sup>204</sup> The proportion of force used in relation to the danger deserves significant consideration when drawing the line between lawful self-defense and illegal reprisals. Illegal reprisals "consist of action in response to a prior unlawful military attack, aimed not at defending oneself against an attack as it happens, but rather in delivering a message of deterrence against the initial attack being repeated."<sup>205</sup> In 1974, Acting Secretary of State Kenneth Rush wrote:

The United States has supported and supports the foregoing principle [a duty to refrain from acts of reprisal involving the use of force]. Of course we recognize that the practice of States is not always consistent with this principle and that it may some-

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201. McDougal & Reisman, *supra* note 15.

202. See Judith Gail Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT'L L. 391 (1993).

203. See INTERNATIONAL LAW: CASES AND MATERIALS 663-64 (Louis Henkin et al. eds., 1987).

204. See Beyerlin, *supra* note 5, at 213.

205. Higgins, *supra* note 163, at 308. "Reprisals would necessarily involve a violation of Article 2(4) . . . and, not being self-defence are not brought within the permissive use of force in Article 51." *Id.*

times be difficult to distinguish the exercise of *proportionate* self-defense from an act of reprisal.<sup>206</sup>

Proportionality, as well as necessity, has another practical importance. According to the International Court of Justice, a state's use of force can still be unlawful, even though it complies with the canons of necessity and proportionality.<sup>207</sup> Yet, if this activity is not necessary and proportionate, "this may constitute an additional ground of wrongfulness."<sup>208</sup>

Even though it is difficult to define, proportionality is an important question of fact.<sup>209</sup> Proportionality "requires functional reference to all the various factors relating to the opponent's allegedly aggressive coercion . . . which together comprise a detailed context."<sup>210</sup> Traditionally, the Security Council considered this detailed context in a narrow scope limited to the immediate attack that led to the state response. In this context, the U.N.'s negative response to the Grenada invasion demonstrated the world community's intention to limit self-defense and forbid it to be an instrument of intervention. The main cause of such a negative response was that, despite virtually unanimous consensus that only a short-term use of armed force is justified, the U.S. military forces remained in Grenada for nearly two months, long after those Americans who wished to be evacuated had left.<sup>211</sup> The lesson to be learned from the Grenada invasion is simple: the measures taken should be strictly confined to the purposes of protection and, in particular, military forces should not remain after exercising their protective function.

The numerous fatalities and actual threat to U.S. citizens rendered the invasion in Panama problematic. Despite the seriousness of the Panama situation, it did not warrant launching a full-scale invasion, eventually consisting of 12,000 American soldiers. This military attack was not proportional and resulted in the death of 26 Americans and over 700 Panamanians, mostly civilians.<sup>212</sup>

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206. Arthur W. Rovine, *Contemporary Practice of the United States Relating to International Law*, 68 AM. J. INT'L L. 720, 736 (1974) (emphasis added).

207. See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 122 (Jan. 10).

208. *Id.*

209. See Stuesser, *supra* note 31, at 37.

210. MCDUGAL & FELICIANO, *supra* note 78, at 243.

211. See Gordon, *supra* note 44, at 379.

212. See Ved Nanda, *The Validity of United States Intervention in Panama Under International Law*, 84 AM. J. INT'L L. 497 (1990).

In addition, severe and widespread physical devastation, property damage, and dislocation resulted.<sup>213</sup>

Nevertheless, it is plausible to argue that if more soldiers are sent to the battlefield, fewer fatalities may occur. In a contemporary war, the preparation of the military force may be the deciding factor. Therefore, it is conceivable that if fewer soldiers were used in the Panama invasion, there may have been many more casualties.

In comparison to the Panama invasion, Israel's response in the Entebbe incident was meticulously proportional. The United States specified that the right to protect nationals abroad, "flowing from the right of self-defense, is limited to such use of force as is necessary and appropriate to protect threatened nationals from injury."<sup>214</sup>

In this statement, the United States emphasized that its right to protect nationals abroad was limited and must adhere to certain standards. In 1976, this approach was also highlighted in the Legal Adviser of the Department of State's internal memorandum to the Secretary of State regarding this incident:

The Israeli military action was apparently *limited to the sole objective of extricating the passengers and crew, and terminated when that objective was accomplished*. The force employed seems reasonably justifiable as *necessary for the rescue of the passengers and crew: the killing of terrorists themselves for obvious reasons; the firing on Ugandan troops because they involved themselves in the conflict; and the destruction of Ugandan aircraft to eliminate the possibility of pursuit of the Israeli force*.<sup>215</sup>

Because this operation was carefully strategized, only three hostages, one Israeli commando, seven terrorists, and some Ugandan soldiers were killed.<sup>216</sup>

With respect to the Congo operation, commentators have specifically made this same point. "Personnel engaged are under orders to use force only in their own defense or in the defense of

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213. *Id.*

214. Protection of Human Rights, *supra* note 152, at 150.

215. Marian L. Nash, *Contemporary Practice of the United States Relating to International Law*, 73 AM. J. INT'L L. 122, 123 (1979) (emphasis added).

216. United Nations: Security Council Debate and Draft Resolutions Concerning the Operation to Rescue Hijacked Hostages at the Entebbe Airport, Aug. 5, 1976, 15 I.L.M. 1224.

the foreign or Congolese civilians. They will depart from the scene as soon as their evacuation mission is accomplished."<sup>217</sup>

The foregoing examples reemphasize the essence of proportionality. To be proportionate, a state's response should be "limited in intensity and magnitude to what is reasonably necessary promptly to secure the permissible objectives of self-defense."<sup>218</sup> Because a rescue mission aims to protect nationals' lives abroad, the proportional amount of force in such cases is that required to protect. The military operation should limit its scope to protecting lives and preventing future attacks. On the other hand, it should not be too restrictive. In principle:

[The rescue operation may allow] a state to retaliate beyond the immediate area of attack, when that state has sufficient reason to expect a continuation of attacks (with substantial military weapons) from the same source. Such action would not be "anticipatory" because prior attacks occurred; nor would it be a "reprisal" since its prime motive would be protective, not punitive . . . . Thus, "defensive retaliation" may be justified when a state has good reason to expect a series of attacks from the same source and such retaliation serves as a deterrent or protective action.<sup>219</sup>

A state undertaking a rescue mission should be careful to avoid civilian casualties. A commitment to save human lives should not be transformed into a brutal massacre of civilians. A state has an obligation to balance possible civilian casualties against the threat to nationals' lives.

Proportionality plays an important role in distinguishing genuine humanitarian intervention from abuses. As noted, actions of a state in self-defense should be proportionate to the attack. The same is true for humanitarian interventions. If an intervening state delays the evacuation of its soldiers after an invasion, this delay may indicate that the action has transcended the confines of appropriate humanitarian intervention. The world community generally views such activity with suspicion. Similarly, if an intervening state uses many more soldiers than necessary to stop a massacre, the world community may doubt the sincerity of the state's humanitarian motives.

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217. *United States Cooperates With Belgium*, *supra* note 194, at 842.

218. MCDUGAL & FELICIANO, *supra* note 78, at 242.

219. Schachter, *supra* note 149, at 1638.

## IX. THE POSSIBILITY OF ABUSE

Opponents of humanitarian intervention frequently use the possibility of abuse to support their position against intervention. Two such opponents argue that interventions for allegedly humanitarian purposes were a guise that "'permitted' outside powers to invade sovereign states for all sorts of spurious reasons, but primarily to prevent the indigenous populace changing the religion, or, especially, the socio-economic systems imposed by their governments."<sup>220</sup> Many countries are concerned that they are more likely to be a humanitarian intervention target than an intervening state exercising a right to humanitarian intervention.<sup>221</sup> Another commentator presented humanitarian intervention as "simply a cloak of legality for the use of brute force by a powerful state against a weaker one, and experience has shown how readily more powerful states have used the pretext of a higher good to impose their will and values on weaker states."<sup>222</sup>

Such violations and abuses pervade the history of international relations. The doctrine of humanitarian intervention has often been used to achieve unlawful and criminal ends.<sup>223</sup> Opponents of humanitarian intervention argue that "a rule of non-intervention commends itself to us because the contrary rule so readily falls prey to cynical manipulation."<sup>224</sup> There is another side to this argument. Even when humanitarian intervention is undertaken for proper ends and is relatively successful, it may cost too much in terms of human lives, injuries, and disruptions of normal life.<sup>225</sup>

The fact that the use of force for humanitarian purposes is susceptible to abuse or may lead to casualties is too important to ignore. In the contemporary world, it is too dangerous to provide some governments with an instrument that allows them to circum-

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220. Franck & Rodley, *supra* note 7, at 277-78.

221. R. George Wright, *A Contemporary Theory of Humanitarian Intervention*, 4 FL. INT'L L.J. 435 (1989).

222. *Id.* (citing Farooq Hassan, *Realpolitik in International Law: After Tanzanian - Ugandan Conflict "Humanitarian Intervention" Reexamined*, 17 WILLAMETTE L. REV. 859, 860 (1981)); Oscar Schachter, *The Lawful Resort to Unilateral Use of Force*, 107 YALE J. INT'L L. 291, 294 (1985).

223. See BROWNLIE, *supra* note 164, at 370. "[N]o genuine case of humanitarian intervention has occurred, with the possible exception of the occupation of Syria in 1860 and 1861." *Id.*

224. Milner S. Ball, *Ironies of Intervention*, 13 GA. J. INT'L & COMP. L. 313, 314 (1983).

225. See Wright, *supra* note 221, at 440.



vent conventional means of peaceful dispute settlement and increase their capacity to violate international law. Self-defense could become an avenue for serious international law violations just as freedom of speech, a cornerstone of democratic values, has been used as a pretext to justify racial or national superiority. Nevertheless, the potential for abuse and wrongdoing is not sufficient to compel rejecting humanitarian intervention. Even lawful and well-justified rules can be abused.<sup>226</sup> The potential for abuse is "common to all legal policy, doctrine or rule."<sup>227</sup>

The possibility of abuse of humanitarian intervention should not obscure the fact that a potential wrongdoer can usually find many other suitable excuses and pretexts. Although Adolph Hitler relied upon the doctrine of humanitarian intervention in his unconvincing attempt to legitimize annexing Poland and Czechoslovakia, nothing would have deterred him from using another pretext if the doctrine of humanitarian intervention had been unavailable.<sup>228</sup> Hitler would simply have found another false justification for invasion. The harm still would have occurred.<sup>229</sup>

"Foreign policy is too intricate a topic to suffer any total taboos."<sup>230</sup> On the other hand, humanitarian interventions "should not be allowed to become a regular and routine feature of the governmental process, cast in the concrete of unquestioned habit and institutionalized bureaucracy."<sup>231</sup> To prevent abuse, the foregoing criteria may be a useful guide to appraise an act's lawfulness.

## X. AGGREGATE CONSEQUENCES OF HUMANITARIAN INTERVENTION

Thus far, the analysis has focused on arguments concerning the legality of humanitarian intervention. Although there are numerous arguments favoring both sides, it is no longer conceivable to deny a state's right to use military force for humanitarian ends in extraordinary circumstances. In the final analysis, all arguments turn on the aggregate consequences of humanitarian

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226. *See id.* at 442.

227. MCDUGAL & FELICIANO, *supra* note 78, at 416.

228. Wright, *supra* note 221, at 443.

229. *See Bazyler, supra* note 6, at 584.

230. George F. Kennan, *Morality and Foreign Policy*, FOREIGN AFF. 205, 214 (1985/86).

231. *Id.*

intervention. It is a difficult issue with no clear answer because there are seldom simple answers in international relations, and it is practically impossible to anticipate all possible consequences. The following list of possible humanitarian intervention consequences is not exhaustive and is open to amendment and expansion. Nevertheless, prohibiting humanitarian intervention would not change the path of international relations. Most importantly, it would not prevent states from employing military force for humanitarian ends. At the very least, however, legalizing humanitarian intervention may make tyrants feel sufficiently threatened to change their approach to human rights.

The following list proposes aggregate consequences if humanitarian intervention is legalized ("action") and if it is not legalized ("inaction"):

*ACTION*

1. A new understanding of "sovereignty" and "non-intervention" would develop gradually.
2. The United Nations would not be considered a measure of last resort and faith in its ability to deal with human rights abuses would be reinstated.
3. Tyrants would feel threatened.
4. There would be an increased possibility of abuse in connection with humanitarian intervention.

*INACTION*

1. The archaic notions of "sovereignty" and "non-intervention" would be preserved.
2. The efficiency of international organizations would continue to be questioned.
3. Tyrants would feel safe in their abuse of human rights.
4. Human rights abuses may not become more prevalent internationally, but would continue within states' borders.

*ACTION*

5. Governments would attempt to prevent massive and outrageous violations of human rights to avert likely humanitarian interventions.
6. Human lives would be saved.
7. Humanitarian interventions would rarely be necessary.
8. The possibility of international sanctions or pressure would deter many states from using force. If the world community considers action in a given situation to be reprehensible, it may condemn such intervention. In any case, the world community's voice would be relatively important.
9. Even the most powerful states would not be immune from censure.
10. The faith in human rights and international protection of human rights would be reaffirmed.

*INACTION*

5. Powerful states would use human rights violations as a pretext for humanitarian intervention less frequently.
6. Human lives would be lost.
7. Humanitarian interventions would rarely occur.
8. The world community would condemn human rights abuses.
9. International organizations would continue to scrutinize state practices.
10. The faith in human rights and international protection of human rights would not be reaffirmed.

## XI. CONCLUSION

This Article does not offer a new approach to using force for humanitarian purposes; however, based on the foregoing, it may be concluded that rescuing nationals abroad through military coercion is a lawful exercise of a right to self-defense, provided that this right is discharged in accordance with the aforementioned criteria. The legality of such a right is less clear with respect to humanitarian intervention. Nevertheless, if force is employed according to the aforementioned guidelines, the world community will be more likely to consider it favorably.

