HUMAN RIGHTS QUARTERLY

Human Rights, Humanitarian Intervention, and World Politics

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International law, and the world politics that creates and sustains it, has increasingly manifested a tension between the primacy of state sovereignty and other values that would challenge that primacy.[1] One of those challenging values is individual human rights. A persistent question is receiving renewed attention at the end of the twentieth century: is the international community entitled to override state sovereignty in the interest of protecting persons? United Nations action concerning Iraqi Kurds during 1991–1992 is but one manifestation of this renewed tension between state sovereignty and human rights.

Situations demanding intervention to protect persons present a number of fundamental questions. For human rights violations occurring materially within a territorial state, what principle prevails: state sovereignty, or the international community's interest in protecting human rights? How is the community interest to be manifested, by nonforcible or also forcible measures, and by whom executed, states or international organizations? Which internationally recognized rights, if any, might seem to qualify for international forcible protection? In this essay we focus on what has been traditionally called humanitarian intervention. We examine the legal status of the claimed prerogative of a foreign actor to use force within the territorial jurisdiction of a state, without the consent of the ruling authority, to ameliorate or terminate violations of internationally recognized human rights. This is not a technical legal question, if properly understood. It is a fundamental political question about authority in world politics.

In an era of rhetoric about a "New World Order," this Gordian knot has taken on renewed importance. Brian Urquhart, an experienced former United

1. William Coplin, "International Law and Assumptions about the State System," *World Politics* 17 (July 1965): 615, 629; Louis Henkin, "Law and Politics in International Relations: State and Human Values," *Journal of International Affairs* 44 (Spring 1990): 183–208.

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Nations official, has posed the issue as one of "Sovereignty vs. Suffering."[2] He writes, "many developments of our time challenge the validity of the principle of [state] sovereignty. . . . We are constantly reminded of growing global interdependence. It is thus all the more strange that concern for human suffering and human rights often tends to stop at borders."[3]

I. PRINCIPLES OF STATE SOVEREIGNTY AND NONINTERVENTION

The most fundamental principle of international law is state sovereignty, which is often misconstrued as national sovereignty. In international law the state is clearly sovereign and has the ultimate legal right to say what should be done within its jurisdiction. The state of Switzerland is sovereign within its territorial boundaries, not the four nations or peoples comprising that state: French-Swiss, German-Swiss, Italian-Swiss, and Romanish-Swiss. From the principle of state sovereignty, which is inherently linked to the idea of territorial jurisdiction, is derived the companion principle of nonintervention.[4] The government, the official voice of the state, indicates in a legal sense what should be public policy within the domestic jurisdiction of the state.

Our first point, beyond a necessary clarification of basic but often confused terms, is that while state sovereignty is a well recognized principle, its companion principle of nonintervention into particularly internal affairs (or domestic jurisdiction) has never been codified into a clear set of rules. The *principle* of nonintervention as found in treaties has been concisely defined as "dictatorial interference."[5] But what exactly is dictatorial interference? Certainly the use of foreign force within another state without consent would seem to constitute dictatorial interference, unless of course there were recognized exceptions. And can there be dictatorial interference short of forcible action? These are questions that have not led to clear rules in international law. There are no treaties and few court cases specifying the principle of nonintervention.

The principle of nonintervention has been formulated broadly. These formulations are affected in contemporary times by the numerous weaker states fearing severe restriction on their sovereign rights by more powerful states. Thus we find in the contemporary norms on nonintervention several

2. Brian Urquhart, "Sovereignty vs. Suffering," *New York Times*, 4 April 1991, sec. A, 11.
3. Ibid.
4. H. Scott Fairley, "State Actors, Humanitarian Intervention and International Law: Reopening Pandora's Box," *Georgia Journal of International and Comparative Law* 10 (Spring 1980): 29, 30.
5. Lassa Oppenheim, *International Law: A Treatise* (New York: Longmans, Grenn & Co., 1905), 305.

prohibitions not just against forcible interference but against nonforcible interference; and we find prohibitions on intervention into external as well as internal affairs of states.

The United Nations Charter, Article 7, paragraph 2 is a common starting point for an analysis of this principle:

> Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter.[6]

While this injunction against intervention is directed at the United Nations, it must logically also pertain to the states comprising that Organization. It is, however, important to note the last clause of Article 2(7): "but this principle [of nonintervention] shall not prejudice the application of enforcement measures under Chapter VII" [pertaining to sanctions authorized by the Security Council].

In 1965 the expanded UN membership adopted General Assembly Resolution 2131 (21 December) which reads in part:

> No State has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic, or cultural elements are condemned.
>
> No State may use or encourage the use of economic, political or any other type of measure to coerce another state in order to obtain from it the subordination of the exercise of its sovereign rights, or to secure from it advantages of any kind. Also no state shall organize, assist, foment, finance, invite or tolerate subversive terrorist or armed activities directed towards violent overthrow of the regime [government] of another state or interfere in civil strife in another state.[7]

These same words were written into another General Assembly resolution five years later, when that body adopted the much cited "Declaration On Principles Of International Law Concerning Friendly Relations And Cooperation Among States In Accordance With the Charter Of The United Nations," with the usual caveat that "[n]othing in the foregoing paragraphs shall be construed as affecting the relevant provisions of the Charter relating to the maintenance of international peace and security."[8]

Similarly broad prohibitions were written into numerous other fundamental legal or quasi-legal documents, as in Article 18 of the Charter of the Organization of American States and in the Principles of the Final Act of

6. U.N. Charter art. 7, para. 2.
7. G.A. Res. 2131, U.N. GAOR, 20th Sess., at 11, U.N. Doc. A/6014 (1965).
8. G.A. Res. 2625, U.N. GAOR, 25th Sess., at 121, U.N. Doc. A/8082 (1970).

the Helsinki Conference in 1975, commonly referred to as the Helsinki Accord emanating from the Conference on Security and Cooperation in Europe (CSCE) process.[9]

In an age of state interconnectedness and even interdependence, characterized by considerable influence across borders, it has thus far proven impossible to identify in a set of comprehensive rules the difference between permissible influence and impermissible interference and intervention. International relations and foreign policies center around states trying to get other states to do what they want done. Much of this interaction transpires according to what is usually termed pressure and inducement. The principle of nonintervention stands little chance of affecting behavior if it tries to exclude what occurs every day as normal world politics.

Indeed, several states that have been very supportive of the broad semantics of nonintervention have, however, departed from those rhetorical restraints in practice (e.g., Indian use of force in East Pakistan/Bangladesh in 1971, Tanzanian use of force in Uganda in 1978, Vietnamese use of force in Cambodia in 1979, Indian use of its air force to drop supplies to Sri Lankan Tamils in 1987).

Beyond state rhetoric and practice, the complexity of this subject matter has yielded little scholarly agreement.[10] Despite detailed legal studies of the various aspects of intervention and interference, whether forceful or otherwise, a precise meaning of nonintervention has not been articulated. A clear, comprehensive, and consensual distinction between permissible forms of influence, and impermissible interference and intervention, eludes us.

It is relevant to recall that in 1923 the Permanent Court of International Justice said in a dictum: "the question of whether a certain matter is or is not solely within the jurisdiction of a state is an essentially relative question; it depends on the development of international relations."[11] Therefore what was once essentially an internal matter, such as the question of a formal colony, could become essentially an international matter, as did indeed transpire with regard to colonies.[12] Hence there may be no permanent de-

9. Pieter Van Dijk and Arie Bloed, "Conference on Security and Cooperation in Europe, Human Rights and Non-intervention," *Liverpool Law Review* 8 (Spring 1983): 117–42; Tom J. Farer, "Intervention and Human Rights: The Latin American Context," *California Western International Law Journal* 12 (1982): 503–07.
10. See the diverging perspectives of intervention in Michael Akehurst, "Humanitarian Intervention," in *Intervention in World Politics*, ed. Hedley Bull (Oxford: Clarendon Press, 1984), 95–118; Rosalyn Higgins, "Intervention and International Law," in ibid., 29–44; Stanley Hoffmann, "The Problem of Intervention," in ibid., 7–28; and Lori Fisler Damrosch, "Politics Across Borders: Nonintervention and Nonforcible Influence Over Domestic Affairs," *American Journal of International Law* 83 (1989): 1–50.
11. *Nationalities Decrees in Tunis and Morocco*, Permanent Court of International Justice, Series B, No. 4, 24 (1923).
12. Paul Szasz, "The Role of the United Nations in Internal Conflicts," *Georgia Journal of International Law* 13 (1983): 345, 349.

marcation between internal and international affairs, between domestic and international jurisdiction within which authority is exercised, but only a sliding relative difference that may be identified in law, as driven by politics, for a given point in time. Thus, as a matter of principle, what was once impermissible intervention into domestic affairs may become permissible international action.

The relative distinction between human rights violations occurring essentially within a territorial state and violations occurring in essentially a transnational process clearly is germane. Violations of rights stemming from slave trading and international armed conflict were not seen as part of domestic affairs. That is precisely why personal rights affected by slave trading and international war were the first human rights to be dealt with by treaty in the international community, historically speaking. Such situations were already internationalized by the very behavior involved; thus, appeals to state sovereignty were inherently weakened.[13] Even violations of human rights occurring materially within a state may come to be seen as essentially part of an international or transnational process. Changing views in world politics and international law may weaken recourse to state sovereignty—or may weaken it in some ways but not in others. What was once forbidden interference does not have to remain so.

II. THE INTERNATIONALIZATION OF HUMAN RIGHTS

The internationalization of human rights has been increasingly recognized.[14] International law traditionally considered the relation between a state and its citizens to be a domestic affair, falling under the principle of state sovereignty. Individuals were objects of state action, but not international subjects with substantive and procedural rights in international law. Especially from 1945, and in an accelerated way from about 1970, international law has confirmed that individuals and peoples are at least partial subjects of international law, with extensive substantive rights and some procedural capacity to act.[15]

While there was some internationalization of human rights before 1945, as in the development of the International Labor Organization and its derivative treaties, and in such things as the Minority Treaties pertaining to

13. David P. Forsythe, *Human Rights and Development: International Views* (London: Macmillan, 1989).
14. Jack Donnelly, *Universal Human Rights in Theory and Practice* (Ithaca: Cornell University Press, 1989); David P. Forsythe, *The Internationalization of Human Rights* (Lexington, Mass.: Lexington Books, 1991); Forsythe, note 13 above.
15. Thomas Buergenthal, *International Human Rights in a Nutshell* (St. Paul, Minn.: West Publishing Co., 1988).

east-central Europe, and the Mandates Commission of the League of Nations, it was only with the creation of the United Nations that human rights became extensively internationalized. The promotion of human rights is one of the principal purposes of the United Nations as stated in the Charter, and Articles 55 and 56 levy a legal duty on states to cooperate in both the promotion and protection of individual human rights.

Supplementing the 1948 Universal Declaration of Human Rights (a General Assembly resolution adopted without dissenting vote and listing thirty basic principles),[16] two 1966 UN Covenants spelled out detailed rules for civil, political, economic, social, and cultural rights.[17] Other treaties sponsored by the UN system likewise specified detailed rights pertaining to matters such genocide, racial discrimination, political rights of women, nationality of married women, marriage, refugees, torture, children, freedom of association, and collective bargaining.[18]

Most states not only allowed these treaties to emerge out of UN bodies, but also more than half of the international community on average became legal parties to them. About a quarter of the international community, on average, accepted monitoring systems of varying strength for the supervision of the implementation of these internationally recognized human rights. Few were the states—like China, Saudi Arabia, and Myanmar—which objected explicitly to the overall process on grounds of at least interference if not intervention into their domestic affairs. It is true, of course, that about half of the international community did not accept specific legal obligations under the treaties, but this is different from regarding the internationalization of human rights as inherently a violation of state sovereignty. There is an overwhelming official consensus that at least discussion of human rights is a proper international subject matter, even if many disagreements remain over definition and implementation.[19]

Three regions developed separate human rights treaties: Western Europe, the Western Hemisphere, and Africa. A fourth, the Arab area, permitted some regional attention to human rights but short of a regional treaty. In two regions, Western Europe and the Western Hemisphere, monitoring agencies were created not only to recommend implementation but to order enforce-

16. *See* Universal Declaration of Human Rights, *signed* 10 Dec. 1948, G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948).
17. *See* International Covenant on Civil and Political Rights, *adopted* 16 Dec. 1966, *entered into force* 23 Mar. 1976, G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16), at 52, U.N. Doc. A/6316 (1966); International Covenant on Economic, Social and Cultural Rights, *adopted* 16 Dec. 1966, *entered into force* 3 Jan. 1976, G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16), at 49, U.N. Doc. A/6316 (1966).
18. Albert P. Blaustein *et al.*, *Human Rights Sourcebook* (New York: Paragon House Publishers, 1987).
19. David P. Forsythe, "Human Rights in the Post Cold War World," *The Fletcher Forum* (Summer 1991): 55–70.

ment. In the Council of Europe and the Organization of American States, human rights courts were created, with functional jurisdiction over twenty-six and twelve states respectively. These human rights courts were given functional sovereignty by state consent—viz., the court had the ultimate authority to interpret the meaning of the treaty in question, and to command state obedience. States had preliminary sovereignty, but used it to create functional sovereignty for an international agency.

Certainly in traditional Western Europe, for consenting states (which possessed initial but not ultimate sovereignty), the question of multilateral and unilateral *intervention* normally did not arise. Because twenty-six states had consented to substantive and procedural human rights rules for the protection of mostly civil and political rights, what transpired was authoritative international processes for determining and actualizing human rights. The subject matter of human rights was almost as fully internationalized as conceivable. In 1991 the Council of Europe approved an optional protocol (No. 9) to the European Convention on Human Rights, giving legal standing to individuals in the European Court of Human Rights, provided their petition was accepted by the European Commission on Human Rights. This protocol aside, in twenty-six states individuals could start a juridical process that led consistently to international judicial review of considerable state behavior about human rights. A similar process transpired occasionally in the Western Hemisphere.[20]

There were other diplomatic developments of considerable importance, such as the CSCE process, its Helsinki Accord of 1975, and the resulting diplomatic pressure on repressive states to liberalize and finally democratize their policies. This on-going diplomatic exchange now covers more than fifty states.

Because of the cumulative effect of these and other developments pertaining to the internationalization of human rights, the first summit meeting in 1992 of the members of the UN Security Council declared that the international community "no longer can allow advancement of fundamental rights to stop at national borders."[21]

Treaty law, diplomatic practice, and the somewhat murky subject matter of customary international law all make clear that the general subject matter of human rights is a proper part of international law and relations, thus no longer essentially within the domestic jurisdiction of states. The extensive attention to human rights in international context, including great specificity and broad if not always deep monitoring procedures, suggests that human

20. Burns H. Weston, Robin Ann Lukens, and Kelly M. Hnatt, "Regional Human Rights Regimes: A Comparison and Appraisal," *Vanderbilt Journal of Transnational Law* 20 (1987): 585–637.

21. "Excerpts from Speeches by Leaders of Permanent Members of U.N. Council," *New York Times*, 1 Feb. 1992, sec. A, 5.

rights has emerged as one of the major values to be pursued through world politics. Yet we have yet to broach the central concern of this essay: what is the international community entitled to do to protect human rights when a state does not give its consent to international action? What is the trend in contemporary world politics on this important dilemma?

III. FORCE—UNILATERAL AND MULTILATERAL

We focus here on interventionist policies involving force—viz., the use of units of a military establishment within the territorial jurisdiction of a target state without the government's consent. We do not address the subject of covert paramilitary activities, except in passing. It would appear that there can be nonforcible interference that constitutes dictatorial policy. For the most part, we leave that subject matter to others.[22]

The aspect of the principle of nonintervention which prohibits forcible interventionary action overlaps with the United Nations Charter, Article 2, paragraph 4, prohibiting threat or use of force in international affairs. International law has never been clear about the difference between aggression, forcible intervention, and violent breaches of the peace.[23] The dividing line between aggression and intervention is not clear. Are they two different types of breaches of the peace? Was the Israeli use of force in Lebanon in 1981 aggression, forcible intervention, or a violent breach of the peace? The UN Security Council dodged these distinctions by saying the Israeli action was a "clear violation of the Charter of the United Nations and the norms of international conduct."[24]

The large scale use of force involving armed conflict between two or more state military establishments, as in the Iraqi invasion and occupation of Kuwait in August 1991 and thereafter, can be properly viewed as entailing questions of aggression and self-defense under Articles 2(4) and 51 of the Charter. Use of force on a smaller scale, usually without extended fighting between two or more states, and without state consent, is the domain of forcible intervention.

We cannot, given the inherent overlap described, completely avoid issues of aggression and self-defense. Even a small scale use of force may affect the structure of a government or even a state, as demonstrated by Indian use of force in East Pakistan in 1971. Yet it bears emphasizing that our purpose is not to analyze the considerable corpus of law known as *jus*

22. Damrosch, note 10 above, 1–50.
23. Ian Brownlie, *International Law and the Use of Force by States* (London: Oxford University Press, 1963); L.C. Green, *Essays on the Modern Law of War* (Dobbs Ferry: Transnational, 1984).
24. U.N. Doc. S/RES/487, (1981), operative para. 4

ad bellum, pertaining to recourse to force. We remain focused on one question that sometimes overlaps with that broader body of law: can there be legally permissible forcible intervention without state consent to protect human rights, sometimes called humanitarian intervention?

A. State Self-Help

While particular states in particular situations have claimed a unilateral right of humanitarian intervention to take forcible action within the territorial jurisdiction of other states, presumably to protect the rights or welfare of individuals, close scrutiny of the historical record leads to the clear conclusion that no such right has ever been formalized by the international community. Contemporary developments, however, cloud this picture.

The claimed right to humanitarian intervention arose first with regard to a state's *own* nationals in a foreign state.[25] Over time the claim of humanitarian intervention apparently was switched to cover a state's forcible action in another state in behalf of *non-nationals*.[26] In contemporary world politics we now observe two legal claims for state forcible relief for human rights violations abroad: 1) humanitarian intervention for non-nationals, and 2) an extended concept of self-defense to cover nationals, at least to rescue them.

When India intervened in what was then East Pakistan in 1971, among its several legal justifications was a claim to humanitarian intervention to stop widespread political murder by Pakistani military units directed against ethnic Bengali.[27] On the other hand, both when Israel intervened in Uganda in 1976 to rescue mostly Israeli nationals held hostage at the Entebbe airport from an Air France plane, and when the United States intervened in Iran in 1980 to try to rescue detained Americans, both states claimed self-defense rather than humanitarian intervention.[28]

No treaty law exists regarding humanitarian intervention on behalf of non-nationals, and clearly the international community has refused to endorse such action.[29] There can be no customary right of humanitarian intervention without either that collective endorsement or a clear pattern of behavior including *opinio juris* (a clear pattern not only of forcible inter-

25. Buergenthal, note 15 above; P. Pradier-Fodere, *Traite de Droit International Europeen et American* (1885).
26. Ellery C. Stowell, *Intervention in International Law* (Washington: John Byrne & Co., 1921), 154–59.
27. Thomas M. Franck and Nigel S. Rodeley, "After Bangladesh: The Law of Humanitarin Intervention by Military Force," *American Journal of International Law* 67 (April 1973): 275–305.
28. Fairley, note 4 above, 53–57.
29. Akehurst, note 10 above, 95–99.

vention but also a belief that legal obligation has been created). The historical record shows there has been no formal *humanitarian* exception to the UN Charter's ban on threat or use of force by states in international relations.[30]

Most unilateral claims to humanitarian intervention have been explicitly rejected by some multilateral organization, including those claims by lesser developed states whose similarly underdeveloped colleagues comprise a majority in the UN General Assembly. Indian and Vietnamese uses of force in neighboring states have met the same diplomatic fate as when the United States used force in Grenada.[31] The General Assembly has rejected the legality of these interventions by comfortable if not overwhelming voting majorities. In 1979, The Assembly, for example, called for the withdrawal of foreign forces from Cambodia by a vote of ninety-one in favor, twenty-one against, with twenty-nine abstentions.[32] That body found the US use of force in Grenada a "flagrant violation of international law" by a vote of 108 in favor, nine against, with twenty-seven abstentions.[33]

There is also no treaty law regarding the claim of forcible rescue as part of extended self-defense, and the response of the organized community has been unclear. In the case of the Entebbe raid by Israel in Uganda as well as the US raid in Iran in 1980, there was no formal censure by any UN body, although both actions were widely criticized in addition to being supported in various circles. Some publicists have criticized the notion of including forcible protection of nationals abroad under self-defense as contrary to the original meaning of that latter concept.[34] In their view self-defense pertained to the political independence and territorial integrity of the state, not to nationals abroad. And for some states, allowing this extended concept of self-defense was to open a pandora's box. As the Cuban delegate said in commenting on the US use of force in the Dominican Republic in 1965, "If any powerful country could land troops on the territory of a small country in which some of its citizens happened to live or to own property, no weak country anywhere would be able to enjoy sovereignty or independence."[35]

On the other hand, if there is no right of unilateral humanitarian intervention, to disallow a claim of extended self-defense covering nationals abroad leaves a powerful state with no recognized means of protecting its nationals who find themselves in dire straits. Democratic states, committed

30. Lori Damrosch and David J. Scheffer, *Law and Force in the New International Order* (Boulder: Westview Press, 1991), 185–223.
31. The United States made a variety of legal claims in this case, including a right of intervention for law and order and democracy. *See* David P. Forsythe, *The Politics of International Law* (Boulder, Colo.: Lynne Rienner Publishers, 1990), 70–77.
32. U.N. GAOR, 34th Sess., Supp. No. 34, at 46, U.N. Doc. A/RES/34/22 (1979).
33. "The Situation in Grenada," *UN Chronicle* 20 (December 1983): 17.
34. Akehurst, note 10 above, 99–104; Fairley, note 4 above, 40–43.
35. "Dominican Republic, Security Council Considers Situation," *UN Chronicle* 2 (June 1965): 5.

to the dignity of their nationals, and capable of using force abroad, will, as a matter of fact, find it difficult not to act when nationals abroad are *in extremis*. Lillich was at least partially correct when writing: "it is a realistic assumption that no state with the capabilities to act will allow its own nationals . . . to be killed or injured abroad."[36] If the label of humanitarian intervention is only for non-nationals, and is highly controversial, a claim to extended self-defense seems the only legal claim left to such states, aside from the development of some new concept such as "armed rescue mission."

The reason that both claims—to humanitarian intervention (for non-nationals) and extended self-defense (for nationals)—remain controversial and thus unsettled is that the claims have been used by states to mask *raisons d'etat* apart from individual human rights and welfare. The past history of state use of force in another state supposedly to protect individuals involves perhaps only one case of genuine use of force for the benefit of persons unrelated to a states' strategic or commercial concerns—French intervention in Turkish Lebanon in 1860. Even then, some published opinion holds that Ottoman Turkey gave its consent to the operation, which by definition removed the label of intervention, and that the French had reasons in addition to humanitarian ones for the operation.[37]

In most contemporary incidents involving state use of force in another state, without the latter's consent, strategic or economic objectives were as important if not more so than protecting persons. India's intervention in East Pakistan (1971), Tanzania's intervention in Uganda (1978), Vietnam's intervention in Cambodia (1979), the US interventions in the Dominican Republic (1965), Cambodia (1975), Grenada (1982), Panama (1989), and Nicaragua (from 1982), *inter alia*, all manifested political objectives that went beyond protecting the rights of either nationals or non-nationals. That is why Hassan refers to unilateral claims of humanitarian intervention as nothing more than a form of *realpolitik*.[38]

The use of force led to a change of government in most of these cases and in one case the creation of a new state. In the Mayaguez case (United States in Cambodia), the Ford-Kissinger team seemed primarily interested in showing US toughness after withdrawal from Vietnam. With the exception of the Mayaguez affair, these interventions were structural, resulting in alteration of the structure of government or state, rather than being strictly humanitarian, that is, oriented to the rights and welfare of individuals. Iron-

36. Richard B. Lillich, "Forcible Self-Help by States to Protect Human Rights," *Iowa Law Review* 53 (1970): 344–45.
37. Istvan Pogany, "Humanitarian Intervention in International Law: The French Intervention in Syria Re-examined," *International and Comparative Law Quarterly* 35 (January 1986): 188–90.
38. *See* Farooq Hassan, "Realpolitik in International Law," *Willamette Law Review* 17 (Fall 1981): 859–912.

ically, in the light of subsequent events analyzed below, France objected to the US use of force in the Dominican Republic in 1965 because Washington went beyond rescue of its nationals to affect the governmental structure.[39]

Three points complicate the analysis thus far. First, cases of genuine, nonstructural humanitarian action *have* occurred in contemporary times without major political or commercial motivation, although they have been few in number historically.[40] We have already referred to Israel's Entebbe raid, as well as Carter policy in Iran in 1980. The United States used military force to extricate persons from both Liberia (1990) and Somalia (1991); France and Belgium did the same in Zaire (1991).[41]

Complicating matters considerably is the fact that in the case of French intervention in the Central African Republic (1979), the French action was *both* structural and rights oriented. That is, the French changed the structure of government by removing Bokassa I, but their motivations seemed strictly related to ending the atrocities institutionalized by his tyrannical rule. As Oscar Schacter has observed, however, this striking example of a combined structural and rights oriented intervention does not constitute a legal rule.[42]

Second, in some of these operations the beneficiaries of intervention were a mixed lot, comprising both nationals and non-nationals of the intervening state(s). This, of course, makes it difficult to separate claims to humanitarian intervention from extended self-defense. Such was the international support for the intervening state in some situations that detailed legal arguments were unnecessary. The notion of "armed rescue mission," but apart from self-defense, would cover this type of action. The use of "rescue mission" would make it more difficult for a state to use such a legal claim as a mask for strategic or commercial reasons, as has sometimes been the case with the claim of "humanitarian intervention."

Third, in none of these cases of state self-help or essentially unilateral action was an intervening state formally censored by the international community for the action. To a very great extent this was because the intervention was transparently to protect primarily the lives and fundamental dignity of persons in the state in question. Certainly in the cases of Liberia and Somalia,

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39. "Dominican Republic, Communications Received on Situation," *UN Chronicle* 2 (May 1965): 36.
40. As background we should note state humanitarian action occurring with the consent of the government, as when three Western states acted in the Belgian Congo in 1964 and when Germany acted at the request of Somalia in 1977. *See* Fairley, note 4 above, 53–55.
41. The French also intervened in Chad several times during the 1980s and 1990s, although there humanitarian motives may have been mixed with other concerns. Indeed, the US was asked repeatedly by other states to intervene in Liberia before it did so. *See* "European Diplomats in Liberia Seek U.S. Troops," *Washington Post*, 29 July 1990, sec. A, 20, col. 1–4.
42. Oscar Schacter, "The Role of International Law in Maintaining Peace," *Approaches to Peace: An Intellectual Map* (Washington, D.C.: United States Institute of Peace, 1991), 84.

it was clear that the United States sought no strategic or commercial advantage. And had, for example, the United States sought only to remove American medical students from the island of Grenada in 1983, without restructuring the government, it is likely it would have reduced considerably the criticisms of its action.[43]

State self-help to use force abroad for the benefit of endangered persons remains controversial in world politics and unclear in international law. Rejection of a claimed right of humanitarian intervention concerning nonnationals has been accompanied by tolerance of some interventions genuinely humanitarian. A claimed right of extended self-defense, covering nationals, has likewise been both criticized and tolerated, depending on the situation.

B. Multilateral Action

Chapter VII, Article 39 of the UN Charter states that the Security Council can "determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what [legally binding] measures shall be taken . . . to maintain or restore international peace and security." Under the Charter's Article 25, member states agree "to accept and carry out" decisions made by the Council with regard to Chapter VII, hence the legally binding nature of Council decisions on certain questions.

Therefore since 1945 the UN Security Council apparently has had the authority to authorize the use of force to correct human rights violations, as well as authorize nonforcible measures. With regard to human rights, this authority lay dormant for over two decades, was used twice in relation to nonforcible measures, and finally in 1991 was clearly articulated as a threat of force but never fully applied.

The cold war as well as other divisions among the permanent members of the Council made it politically impossible to apply this authority at all concerning any security question until issues of racism in southern Africa were brought before the Council. In 1966 and 1968 for the first time, the Council authorized binding economic sanctions on the white minority government in Salisbury, Rhodesia.[44] The 1966 resolution in question was, in fact, fuzzy about the exact legal basis for mandatory sanctions. Both a Rhodesian illegal declaration of independence (UDI) from the United Kingdom and minority rule were mentioned. But in the Council's 1968 decision

43. Forsythe, note 31 above.
44. U.N. Doc. S/RES/232 (1966); U.N. Doc. S/RES/253 (1968).

on Rhodesia, mandating comprehensive economic sanctions, human rights was identified as creating a threat to the peace meriting authoritative Council action.[45]

In 1977 the Council mandated an arms embargo against South Africa, and like the 1965 Rhodesian decision, it never articulated exactly what triggered its authoritative action aside from "the situation in South Africa."[46]

In 1991 the Council stated very clearly the linkage between human rights violations materially within the state of Iraq and an international threat to the peace. The Council, observing the Iraqi government's harsh repression of especially its Kurdish population, and observing the flight of many Iraqi Kurds into both Turkey and Iran, on 5 April 1991 adopted resolution 688 saying:

> The Security Council, Mindful of its duties and its responsibilities under the Charter of the United Nations for the maintenance of international peace and security, . . . [an implicit reference to Chapter VII]
>
> . . .
>
> 1. *Condemns* the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish populated areas, the consequences of which threaten international peace and security in the region;
>
> 2. *Demands* that Iraq, as a contribution to removing the threat to international peace and security in the region, immediately end this repression and expresses the hope in the same context that an open dialogue will take place to ensure that the human and political rights of all Iraqi citizens are respected;
>
> 3. *Insists* that Iraq allow immediate access by international humanitarian organizations to all those in need of assistance in all parts of Iraq and to make available all necessary facilities for their operations.[47]

The Security Council for the first time in its history stated a clear and explicit linkage between human rights violations materially within a state (although there were indeed international repercussions) and a threat to international security. Even the 1968 resolution concerning Rhodesia had not been so clear on this point. In this way the Council was able to threaten Iraq with sanctions in the event of noncompliance. Given that the Council had already explicitly authorized the use of force to liberate Kuwait from Iraqi control in late 1990, Iraq could not simply disregard S/RES/688 as mere rhetoric.

Subsequently Britain, France, the Netherlands, and the United States sent military units into northern Iraq without Iraqi consent to create a humanitarian enclave for the protection of Iraqi Kurds, claiming their action

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45. Vernon Van Dyke, *Human Rights, the United States, and World Community* (New York: Oxford University Press, 1970).
46. U.N. Doc. S/RES/418 (1977).
47. U.N. Doc. S/RES/688 (1991).

was consistent with S/RES/688.[48] Iraq eventually recognized *de facto* this humanitarian enclave by cooperating with UN personnel, some of them armed, who replaced military officials from the foreign states involved.[49] The four states, plus others, continued to use their military forces to supply the enclave up to the time of writing. During 1992 this outside force was applied to southern Iraq as well, in the name of protecting the rights of the Iraqi Shia.

While the Council never explicitly authorized military force in behalf of Iraqi Kurds, it implied that force might be used in the future, despite the fact that neither Iran nor Turkey was on the verge of armed conflict with Iraq over the Kurds. While Iraq never formally acknowledged the right of the foreign military force to enter its territorial jurisdiction, it grudgingly accepted the results of the actions of that military force, and cooperated to some extent with those managing the enclave. While some member states of the United Nations, especially developing states, began to criticize the Council and the Western states most involved as going too far, there was no formal censure of the involved states.[50]

The most fundamental point about this Council action vis-a-vis Iraq in 1991, against the background of Council action vis-a-vis Rhodesia and South Africa, is that the Council clearly has the legal authority to authorize armed action, or lesser coercive measures, to correct human rights violations materially within a territorial state.

If multilateral forcible action were authorized by the Council to protect persons, such action would not be prohibited intervention in the legal sense, because it apparently is consistent with Charter provisions. It is not traditional enforcement action in the sense of collective self-defense against aggression. It is not peacekeeping, as that process has been institutionalized in UN practice, relying as it does on consent of the parties involved. Thus it is a different use of force, meriting a separate label such as perhaps "armed rescue" or "police action for humanitarian reasons."[51]

With the exception of S/RES/678 of 29 November 1990, authorizing use of force for the liberation of Kuwait, the two other Council actions entailing mandatory sanctions did not involve traditional interstate aggression, but rather involved human rights violations materially within a state (Rhodesian complexities aside stemming from UDI). While violations of human rights

48. *See* "Emergency Relief for the Kurdish People: Communication from the President of the United States transmitting a Report on the Limited Introduction of U.S. Forces for the Kurdish People." 20 May 1991 (Washington, D.C.: GPO, 1991).
49. "Security Council Implements Resolution 687, Monitors Iraqi Disarmament, Creates Compensation Fund," *UN Chronicle* 28 (September 1991): 17.
50. Some states on the Council had tried to blunt this "southern" criticism by including in U.N. Doc. S/RES/688 the statement: "*Recalling* Article 2, paragraph 7, of the Charter of the United Nations. . . ."
51. The *New York Times*, 15 January 1992, sec. A, 10, carries a debate about these terms.

in Rhodesia and South Africa had international implications, some of which entailed violence, no other states in the 1960s and 1970s were threatening to attack Rhodesia or South Africa because of the human rights situation. The violations of rights were materially within a state, perhaps in the Rhodesian case within the United Kingdom, even if all of the results were not so contained.

Not every multilateral use of force in the name of protecting human rights, without the consent of the target state, is necessarily permissible. The collusion of the Organization of Eastern Caribbean States in what was essentially a US invasion of Grenada was clearly illegal.[52] The collusion of the Economic Community of West African States in what was essentially a Nigerian involvement in the Liberian internal armed conflict was certainly controversial, even if not condemned by either the United Nations or the Organization of African Unity.[53]

Is S/RES/688 a precursor to a series of events in which the UN Security Council will threaten or actually authorize international action, with force or less coercive measures, to protect persons without state consent? Prediction in politics is hazardous, but there is considerable opposition to such a development. Both China and India abstained from the vote on the resolution and Cuba, Yemen, and Zimbabwe voted against the resolution despite Iraq's notoriety as a pariah state. Furthermore, the mandatory sanctions imposed by the UN Security Council against white minority rule in Rhodesia and South Africa did not lead to their frequent use with regard to other types of violations of internationally recognized human rights.

Relatedly, international concern has also been attuned to the fact that state sovereignty was being used to deny international humanitarian protection and assistance to those in need. Even when a number of fundamental rights specified in the two 1966 UN covenants on human rights were being denied (e.g., rights to life, adequate nutrition, adequate health, adequate shelter, freedom from arbitrary detention, torture, and mistreatment), some governments used claims to state sovereignty to block international action that could have ameliorated these denials of rights. The term humanitarian or disaster assistance should not obscure the point that socio-economic or other rights of persons are at issue. The situation seemed especially dire for persons in internal war or public emergencies in places like Ethiopia, Sudan, Somalia, Liberia, Mozambique, and Sri Lanka, *inter alia*.

Southern policies—viz., of developing states—prevented the United Nations from acting without state consent. The same barriers, based on state sovereignty in legal terms, whatever their underlying political reasons, were

52. Forsythe, note 31 above.
53. Terry Mays, "Nigeria and ECOWAS Peacekeeping in Liberia," paper prepared for the ISA Atlanta meeting, April 1992.

also thrown up against the Red Cross and other non-UN actors.[54] There were examples of "cross border" operations by mostly nongovernmental organizations such as Physicians Without Borders (Medecins Sans Frontiers). In places like Afghanistan and Ethiopia some of this unauthorized humanitarian activity occurred, just as it had in the Nigerian internal armed conflict of 1967–1970.[55] But inter-governmental organizations like the United Nations, and quasi-official organizations like the International Committee of the Red Cross, were reluctant to act without state consent.

The general situation in the field was reflected at UN headquarters when in 1988 the General Assembly adopted A/RES/43/131 concerning "Humanitarian assistance to victims of natural disasters and similar emergency situations."[56] Far from establishing any so-called right to humanitarian assistance, the resolution reaffirmed "The sovereignty, territorial integrity and national unity of States" and recognized "that it is up to each State first and foremost to take care of the victims of natural disasters and similar emergency situations occurring on its territory. . . ."[57] From a concern for the rights and welfare of persons regardless of nationality, the best that could be said for this resolution was that it tried to get states to acknowledge a responsible use of state sovereignty. The resolution reflected political pressure to enhance international activity benefiting persons, but without a renunciation of the principle of state sovereignty.

When this same subject was reintroduced into the General Assembly in December 1991, the resulting resolution, with an extensive annex, more or less repeated the situation that had obtained in 1988. A/RES/46/143/Annex, constituting specific rules for humanitarian assistance, stated, *inter alia*: "The sovereignty, territorial integrity and national unity of States must be fully respected in accordance with the Charter of the United Nations. In this context, humanitarian assistance should be provided with the consent of the affected country and in principle on the basis of an appeal by the affected country."[58]

Once again the best the Assembly could do was to try to get states to exercise state sovereignty in a responsible manner, rather than to directly override it. This was sought by such wording as: "Humanitarian assistance is of cardinal importance for the victims of natural disasters and other emergencies."[59] The attempt was to change politics without a formal change in legal principles or their hierarchy.

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54. Larry Minear, "Humanitarian Intervention in a New World Order," *ODC Policy Focus* (December 1992).
55. David P. Forsythe, *Humanitarian Politics: The International Committee of the Red Cross* (Baltimore: Johns Hopkins University Press, 1977); Thierry Hentsch, *Face au blocus: La Croix-Rouge internationale dans le Nigeria en guerre* (Geneva: HEI, 1973).
56. G.A. Res. 131, U.N. GAOR, 43d Sess., at 1, U.N. Doc. A/RES/43/131 (1989).
57. Ibid.
58. Ibid.
59. Ibid.

Likewise on other matters, such as UN use of force in the armed conflict involving Serbia and Croatia in the former greater Yugoslavia, Southern states proved a drag on decisive UN action. The rights and welfare of individuals without regard to nationality was sacrificed to developing country concern about multilateral disregard of state sovereignty.[60] Some West European states wanted to coerce the principal parties into stopping their fighting, but they were unable to use the UN Security Council for this purpose because of reluctant developing countries—as well as some indifference from certain permanent members of the Council which were preoccupied with other matters. When the Secretary-General adopted the position that UN peacekeeping forces in the former greater Yugoslavia could only be withdrawn by Council action, several states like India insisted this would be a violation of sovereignty and thus prevented a formal resolution endorsing the Secretary-General's position.

Overall at the United Nations in the early 1990s, the states most supportive of multilateral action to protect the rights and welfare of persons within states were mostly blocked by the opposition of other states concerned with preserving traditional notions of state sovereignty. The states that could be called assertive, permissive, or supportive of international humanitarian action were mostly Northern, meaning developed. Some manifested a different notion of state sovereignty and nonintervention, which seemed true of most West European states who were at that time greatly restricting their sovereignty via the European Community and Council of Europe.

But most Northern states knew that with regard to human rights and welfare it would not be *their* sovereignty that was overridden by the United Nations. After all, neither the United Kingdom nor Spain was anxious to have the United Nations involved in Northern Ireland or the Basque region. After all, the United States, which was in favor of UN action in east Africa, was not in favor of giving the Inter-American Court of Human Rights functional sovereignty over human rights issues materially within US territory.

Most Southern or developing states knew very well that it was their jurisdiction that would be penetrated, their authority that would be superseded, and thus they were unwilling to accept more than some appearance of enhanced cooperation with international agencies in "emergency" situations—but without a formal denigration of traditional sovereign rights. They were willing to accept resolutions recommending relief corridors and humanitarian zones during internal wars or public emergencies, but such devices still had to be negotiated on the basis of state consent. In the past, such negotiations had been frequently unsatisfactory from a concern with human rights. Perhaps the developing states were still reacting to their colonial experience, or perhaps their cultures were not sufficiently supportive

60. Paul Lewis, "U.N. is Offering to Send a Force to Yugoslavia," *New York Times*, 28 Nov. 1991, sec. A, 1, col. 4.

of individual rights, but in any event, with the partial exception of policies toward Iraq, they were unwilling to elevate human rights over state sovereignty.

While multilateral authorization of force, and less coercive measures, to protect persons from human rights violations materially within the territorial state could be clearly legal, contemporary politics made such authorization difficult to achieve. The situation of the Iraqi Kurds in 1991–92 seemed more the exception than any new pattern of forcible protection of human rights at the expense of state sovereignty. UN Security Council police action for humanitarian reasons was legal in theory, as linked to a threat to or breach of the peace; it had yet to become a regular occurrence in world politics.

IV. GROSS VIOLATIONS?

Do certain types of rights violations trigger various types of humanitarian interventions? Can we say that some types of international action to protect rights are more justified than others because of the nature of violations? If all human rights are fundamental in the sense of being a means to human dignity, it is at least theoretically possible that some of those rights are more basic than others, thus justifying international protective action? UN Secretary-General Javier Perez de Cuellar, in his last Annual Report in the fall of 1991, wrote:

> It is now increasingly felt that the principle of non-interference within the essential domestic jurisdiction of states cannot be regarded as a protective barrier behind which human rights could be *massively or systematically* violated with impunity [emphasis added]. The fact that in diverse situations the United Nations has not been able to prevent atrocities cannot be accepted as an argument, legal or moral, against the necessary corrective action, especially when peace is threatened.[61]

This view suggests that "massive and systematic" violations of rights, especially linked to threats to the peace, give grounds for legitimate international action. But massive and systematic violations of what type of rights? While both the United Nations and the US Congress use the phrase "systematic pattern of gross violation of internationally recognized human rights," neither organization has been able to precisely define the phrase.[62] Scholarly studies of the phrase "gross violations" have likewise led to indeterminate results.[63]

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61. U.N. Doc. A/46/1, (1991).
62. David P. Forsythe, *Human Rights and U.S. Foreign Policy* (Gainesville: University Presses of Florida, 1988).
63. *See, e.g.*, Cecilia Medina Quiroga, *The Battle of Human Rights* (Dordrecht: Martinus Nijhoff, 1988).

One might logically think that imminent threats to life, whether from socioeconomic deprivation or from direct violation of civil rights (summary or arbitrary execution), could be considered most important—perhaps meriting at least multilateral intervention as authorized by the Security Council. But there is no clear pattern in this regard. Large numbers of persons lost their lives in the Horn of Africa from the 1970s to the early 1990s. Governments in Ethiopia and the Sudan, for example, used appeals to state sovereignty to block effective and impartial international protection and assistance for persons whose lives were at risk. The international community did not override these claims to state sovereignty, or even manage to establish humanitarian zones and corridors on any consistent or large scale basis.[64]

Whether or not the international community becomes concerned about the right to life of large numbers of persons seems serendipitous, perhaps affected greatly by coverage of Western communications media. In Somalia in 1992, the UN Security Council, recognizing the "unique" situation, declared by resolution that the situation inside Somalia fell under Chapter VII, then authorized "all necessary means" to create a "secure environment" for the delivery of humanitarian assistance. The Council also stated that in Somalia individuals had a right to that assistance, and anyone interfering with humanitarian assistance committed a war crime entailing individual responsibility.[65] Almost 30,000 troops were sent to Somalia under this resolution. This deployment was facilitated by the absence of effective government there.

On the other hand, the Council did not take similar action in Mozambique or other places of mass starvation or malnutrition. And in the past, the killing of at least a million persons in Cambodia in the 1970s produced virtually no international response.[66] Large scale killings in Burundi and Rwanda at different times, in East Timor in the face of Indonesian annexation, and in Guatemala during the 1980s brought no decisive international action.[67] The plight of the Iraqi Kurds in 1991 produced unusual Security Council action, although the fate of the Kurds was not notably more dire than non-Kurdish elements in the Iraqi population—e.g., Shiite Muslims in the Iraqi south.

By comparison, in the United States, with its emphasis on democratic rights, there have arisen public and private claims that there is a unilateral right of states under international law to use force to ensure the protection

64. Jason W. Clay and Bonnie K. Holcomb, *Politics and the Ethiopian Famine* (Cambridge: Cultural Survival, 1986); Lynn H. Stephens and Stephen J. Green, *Disaster Assistance* (New York: New York University Press, 1979).
65. S.C. Res. 794, U.N. Doc. S/RES/794 (1992).
66. William Shawcross, *The Quality of Mercy: Cambodia, Holocaust, and Modern Conscience* (New York: Simon & Schuster, 1984).
67. Jack Donnelly, "Humanitarian Intervention: Law, Morality and Politics," *Journal of International Affairs* 37 (1984): 320.

of political rights to democracy. This argument about structural intervention comes in two forms, and both have yet to be endorsed by the international community.

The first and more crude of the arguments in favor of a right to forcible action in support of democracy is called the Reagan Doctrine.[68] A telling argument against this claim in behalf of legitimate force against authoritarian governments is that it was only applied against weak Marxist satellites of the (former) Soviet Union such as Angola and Nicaragua. Friendly authoritarians, equally engaged in systematic deprivation of political rights, were never so targeted. Eminent legal scholars and most states recognized it as a political or moral crusade incompatible with contemporary international law, specifically *jus ad bellum*'s prohibition against use of force except for self-defense.[69]

The second and more sophisticated version of a unilateral right for states under international law to use force in behalf of democratic rights has been articulated by well known publicists.[70] The basic argument of these publicists asserts that, while true that traditional international law did not permit unilateral force for democracy, law must be updated by state policy to keep it current with changing values. Democratic government is now clearly endorsed by international law as the only form of legitimate government. Where, therefore, as in Panama in 1989, there was the election of a democratic government in internationally supervised elections, which was prevented by an authoritarian clique from exercising its rightful authority, states such as the United States are entitled to use force to help restore legitimate—viz., democratic—government.[71]

This claim, plausible on its face, has yet to be endorsed by the international community. On the contrary, both the UN General Assembly and the Organization of American States condemned US intervention in Panama as impermissible.[72] And once again one of the problems with this generic claim is that in world politics, it is used only in certain cases but not in others. The United States used force in Panama, in part, to secure democratic government but declined to do likewise in Liberia. Thus a plausible argument

68. Jeanne J. Kirkpatrick and Allan Gerson, "The Reagan Doctrine, Human Rights and International Law," in *Right v. Might: International Law and the Use of Force*, ed. Louis Henkin (New York: Council on Foreign Relations Press, 1989), 19–36.
69. *See* Louis Henkin, "Use of Force: Law and US Policy," in *Right v. Might*, note 68 above, 44.
70. Anthony D'Amato, *International Law: Prospect and Process* (Ardsley-on-Hudson, New York: Transnational Publishers, 1986); W. Michael Reisman, "Sovereignty and Human Rights in Contemporary International Law," *American Journal of International Law* 84 (October 1990): 866–76.
71. *See also* Farer, note 9 above; Damrosch and Scheffer, note 28 above.
72. "Assembly Demands Immediate Halt of United States Intervention in Panama," *UN Chronicle* 27 (March 1990): 67.

is put at the service of spheres of influence and traditional manifestations of *realpolitik* and hence mostly opposed by international reaction.

Moreover, the International Court of Justice (ICJ), in its 1986 judgment on the merits in the case of *Nicaragua v. the United States,* appeared to reject this argument even before it was formulated.[73] The Court knew that the United States had articulated an argument outside the court that it was entitled to use force against Nicaragua for human rights reasons (the United States did not participate in the substantive proceedings of the Court, having walked out in protest). According to Washington, since the Sandinista government of Nicaragua had promised the OAS to implement human rights, the United States was entitled to use force to hold Managua to its promise. But the Court said:

> Nicaragua is accused by the 1985 finding of the United States Congress of violating human rights. This particular point requires to be studied independently of the question of the existence of a "legal commitment" by Nicaragua towards the Organization of American States to respect these rights; the absence of such a commitment would not mean that Nicaragua could with impunity violate human rights. However, where human rights are protected by international conventions, that protection takes the form of such arrangements for the monitoring or ensuring respect for human rights as are provided for in the conventions themselves.[74]

In other words, there are OAS procedures for the peaceful resolution of disputes concerning human rights, and the United States is not entitled to use force as a substitute for these procedures especially as found in conventional law.

The Court's formulation is problematical, if only because some international procedures for the supervision of human rights are not always authoritative and effective. The Sandinista government had never given its consent to the functional jurisdiction of the InterAmerican Court of Human Rights, and thus that supranational authority did not pertain to Nicaragua (or to the United States for that matter). Still, the ICJ was expressing the long-standing view that peace was the primary value, even if it entailed some injustice.[75]

The Court then went on to say, however:

> [T]he use of force could not be the appropriate method to monitor or ensure [respect for human rights]. With regard to the steps actually taken, the protection of human rights, a strictly humanitarian objective, cannot be compatible with

73. Military and Paramilitary Activities (Nicaragua v. United States), 1986 I.C.J. Reports 14 (June 27).
74. Ibid., 134.
75. *See* Charles de Visscher, *Theory and Reality in Public International Law* (Princeton: Princeton University Press, 1957), 328.

> the mining of ports, the destruction of oil installations, or again with the training, arming, and equipping of the *contras*. The Court concludes that the argument derived from the preservation of human rights in Nicaragua cannot afford a legal justification for the conduct of the United States.[76]

This particular wording would seem to leave open the possibility that nonstructural humanitarian intervention might be legal. If use of force were directly linked to the rescue of persons, and were not diverted to attacks on the political economy of the state, it might fit within this judicial formulation. It would certainly be consistent with multilateral rescue missions authorized by the UN Security Council.

This 1986 Court judgment is, no doubt, not the last word on the question of force and human rights.[77] It is well to recall, however, that the court was speaking of *unilateral* state action, and about military operations directed against the structure of the state and not directly germane to the rights of persons.

V. CONCLUSIONS

International law, and the world politics that creates it and sustains it, still manifests an unresolved tension between the primacy of state sovereignty and growing international concern for human rights violations occurring materially within the territorial state. Such violations are now almost universally seen as essentially within world politics, rather than domestic politics. But this political and legal conceptualization, while it has led to extensive diplomacy in behalf of rights, has not led to consistent forcible action—or even nonforcible action—to guarantee internationally recognized human rights.

It is reasonably clear that when the Security Council manifests the necessary political consensus, it can link human rights violations to a threat to the peace, thus allowing itself to reach a legally binding decision leading perhaps to forcible or nonforcible action. S/RES/688 is a step forward in this regard, since it represents a clear statement of the linkage between rights violations inside a state and authoritative international action. But the case of the Iraqi Kurds in 1991–1992, overall, is at best a half-step forward in the international protection of human rights. The very fact that the intervening states did not seek explicit Council authorization for their use of force, but rather said such authorization was implied in S/RES/688, indicated their doubts about passage of such a follow-on resolution. Likewise, while the United States was prepared to use the United Nations in order to intervene

76. Note 73 above, 134–35.
77. *See* Henkin, note 69 above.

in Somalia, the United States and other important states were much more reluctant to intervene, especially with ground troops, in Bosnia and the wider Balkans.

It is not clear that in the future the Security Council, when dealing with a nonpariah state, will be inclined to take forcible action for human rights. Indeed, the attitudes of many developing states, as expressed in the General Assembly both on the Iraqi situation and on the related question of a human right to humanitarian assistance, make clear that they still elevate sovereignty over suffering.

These traditional attitudes affect not only the developing countries on the Security Council, but also permanent members with the veto like China, which may see themselves as a leader of the coalition of developing states. China's Premier Li Peng said at the 1992 UN summit of Council members: "the issue of human rights falls within the sovereignty of each country. A country's human rights situation should not be judged in total disregard of its history and national conditions. . . . China . . . is opposed to interference in the internal affairs of other countries using the human rights issue as an excuse."[78]

At that same 1992 UN summit, however, the Council members issued a declaration that said in part:

> The absence of war and military conflicts amongst states does not in itself insure international peace and security. The non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security. The United Nations membership as a whole needs to give the highest priority to the solution of these matters.[79]

Implementing this wording will, as we have shown in this essay, certainly prove difficult. According to various press reports, strong references to human rights in this 1992 declaration were reportedly diluted in deference to the wishes of China, and the Bush Administration postponed the publication of its annual human rights report again out of concern not to antagonize Beijing.[80]

Absent Council leadership entailing consensus among the permanent members (or at least a Chinese willingness to abstain) on the question of decisive action to protect human rights, as linked to threats to international peace, the world will find itself facing controversial claims to unilateral self-help, either under the notion of humanitarian intervention or extended self-

78. "Excerpts from Speeches by Leaders of Permanent Members of U.N. Council," *New York Times*, 1 Feb. 1992, sec. A, 5, col. 5.
79. "Security Council Summit Declaration: New Risks for Stability and Security," *New York Times*, 1 Feb. 1992, sec. A, 4, col. 2.
80. "State Department Cites China and Other Nations for Human Rights Abuses," *New York Times*, 1 Feb. 1992, sec. A, 6, col. 2,3.

defense. All that can be said with assurance on these matters is: a) such claims will continue to be without much collective endorsement because of the fears of weaker states about misuse; and b) the claims will be more tolerated to the extent that they are nonstructural and therefore genuinely directed at rescuing persons in limited action.

This does not completely rule out international toleration of structural intervention for human rights, as in the case of France and the Central African Republic. Indeed, in early 1992 there was serious discussion within the OAS of structural intervention to rid Haiti of an authoritarian government violative of many internationally recognized rights.

In the final analysis, while there has been a revolution concerning human rights in terms of legal theory and diplomatic practice, this revolution has yet to undermine the primacy of state sovereignty when it comes to forcible interference to protect individual rights. A North-South divide on this question has come to characterize United Nations proceedings most of the time (Iraq and Bosnia partially excepted),[81] and to guarantee that unilateral action remains controversial. The best that can be hoped for in the short term, most of the time, is that political pressures will result in state consent to various humanitarian zones, corridors, and policies that work to the benefit of persons—but allow particularly developing states to maintain abstract claims to sovereignty.

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81. During 1992, a number of Islamic developing countries pressed for *more* Security Council action to protect Muslims in Bosnia, aside from the consent of various fighting parties.