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Humanitarian Intervention

Daniel Wolf*

INTRODUCTION

In response to the shock they experienced at discovering the barbaric murder of six million Jews perpetrated by Nazi Germany, the nations of the world in 1948 adopted the Genocide Convention in order to “liberate mankind from such an odious scourge” as genocide.¹ But despite this well intentioned goal, the international community has since failed to prevent the mass slaughter of human beings which has come very near to a recurring theme during the period after the defeat of the Nazis in World War Two.

Since the German genocide against the Jews, genocides have been perpetrated in Bangladesh, Rwanda and Burundi, Indonesia, Biafra, Uganda, and Kampuchea. Yet, despite the frequency with which such genocides have occurred and the revulsion they have sparked in the heart of the world community, the response of nations to crimes being perpetrated by a state upon its own citizens has been disturbingly acquiescent. Perhaps equally disturbing is the tendency to attempt to excuse such acquiescence as essential to the preservation of the international legal order, for in the final analysis it is the failure of the world community to provide redress for the victims of the very worst crime against humanity that most threatens to destabilize and destroy the law of nations.

Because it is virtually inconceivable that peaceful means of persuasion will influence a government bent upon mass slaughter of its citizens to mend its brutal ways, the prevention of genocide will almost always require forceful intervention on a large scale. The compelling need to prevent human misery and to see that justice is done will, therefore, inevitably clash with norms proscribing the use of force in international law. Since a great number of scholars view the United Nations Charter prohibition on the use of force as absolute except in cases of self-defense,² there has been a good deal of skepticism regarding the lawfulness of so-

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1. Preamble of the *Convention on the Prevention and Punishment of the Crime of Genocide*, G.A. Res. 260A (III), U.N. Doc. A/810 (1948) [hereinafter *Convention on Genocide*].

2. See *infra* notes 19 and 20.

called humanitarian³ intervention,⁴ even to prevent genocide. Such skepticism exists despite almost universal agreement that genocide — or the mass slaughter of human beings — is an international crime both by virtue of convention⁵ and by virtue of customary international law.⁶ Moreover, even the most ardent opponents of the doctrine of humanitarian intervention are perfectly willing to concede that the use of armed force, strictly tailored to prevent crimes against humanity, is not only morally blameless behavior, but is actually ethically commendable.⁷

This article argues that humanitarian intervention to prevent the mass slaughter by a state of its own citizens is not only a morally but a legally justifiable act under current norms of international law. The first section of the article discusses the traditional international legal rules concerning the doctrine of humanitarian intervention and their relevance to contemporary law. The second section analyzes the effect of the advent of the United Nations Charter on the legality of humanitarian intervention. Drawing on state practice and the opinion of the international legal community, the third section argues that the emergence of a post-Charter doctrine of humanitarian intervention now constitutes a new exception to the prohibition on the use of force. The fourth section analyzes the relationship between humanitarian intervention and the world legal order and concludes that there are compelling moral, jurisprudential, and policy arguments which favor recognition of a doctrine of humanitarian intervention. Finally, the fifth section delineates the accepted criteria for a lawful intervention on humanitarian grounds. The article concludes that, at a minimum, international law accepts the unilateral or collective use of armed force to prevent mass slaughter of human beings and leaves open the question of whether humanitarian intervention might not be justified in other circumstances, for example, involving apartheid or the systematic denial of human rights other than the right to life.

3. Humanitarian intervention has been defined as:

[T]he justifiable use of force for the purpose of protecting the inhabitants of another State from treatment so arbitrary and persistently abusive as to exceed the limits within which the sovereign is presumed to act with reason and justice.

E. STOWELL, *INTERNATIONAL LAW* 348 (1931). Compare Rougier, *La Theorie de l'Intervention d'Humanite*, 17 *REVUE GENERALE DE DROIT INTERNATIONAL PUBLIQUE* 468, 472 (1910).

4. Lauterpacht defines the term intervention as "dictatorial interference by a State [or group of States] in the affairs of another State for the purpose of maintaining or altering the actual conditions of things." I L. OPPENHEIM, *INTERNATIONAL LAW* 305 (8th ed. H. Lauterpacht 1955). Although the term dictatorial interference does not necessarily require the actual use or threat of armed force, this article is primarily concerned with armed intervention.

5. Convention on Genocide, *supra* note 1. See *infra* note 179 and accompanying text.

6. See *infra* notes 162–64 and accompanying text.

7. See, e.g., I. BROWNIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 301 (1963); Farer, *Humanitarian Intervention: The View from Charlottesville*, reprinted in *HUMANITARIAN INTERVENTION: AND THE UNITED NATIONS* 149, 151 (R. Lillich ed. 1973); Franck & Rodley, *After Bangladesh: The Law of Humanitarian Intervention by Military Force*, 67 *AM. J. INT'L L.* 275, 278 (1973); *infra* notes 11 & 125.

I. THE TRADITIONAL DOCTRINE AND PRACTICE OF HUMANITARIAN INTERVENTION

Whatever one might argue about the contemporary validity of the doctrine of humanitarian intervention, there is no question that during the nineteenth and early twentieth century the doctrine had gained widespread acceptance as a customary principle of international law. The origins of the doctrine can be traced to the inception of the modern period and finds its support in the writings of such classical theorists as Grotius⁸ and Vattel.⁹ But it was not until the late nineteenth and early twentieth centuries that a substantial body of state practice arose in which the great powers justified their forceful interventions abroad by alleging a need to protect individuals and groups of individuals against their own states.¹⁰

8.

There is also another question, whether a war for the subjects of another be just, for the purpose of defending them from injuries inflicted by their ruler. Certainly it is undoubted that ever since civil societies were formed, the rulers of each claimed some special right over his own subjects But if a tyrant . . . practices atrocities towards his subjects which no just man can approve, the right of human social connection is not cut off in such a case.

H. GROTIUS, 2 DE JURE BELLI EST PACIS, ch. XXV, at 438 (Whewell transl. 1853).

9.

[I]f the prince attacking the fundamental laws, gives his people a legitimate reason to resist him, if tyranny becomes so unbearable as to cause the Nation to rise, any foreign power is entitled to help an oppressed people that has requested its assistance.

E. DE VATEL, LE DROIT DES GENS, ch. IV, § 56 (Pradier-Fodere ed. 1863).

10. Most significant among these interventions were those carried out by European powers to protect Christian minorities from atrocities committed by Turkey. The Greek intervention of 1829, the Syrian intervention of 1860, the Cretan intervention of 1866, the Bosnia, Herzegovina, and Bulgarian intervention from 1876 to 1878, and the various Macedonian interventions just prior to World War I, all involved the invocation of humanitarian grounds by the intervening powers as justification. The majority of jurists consider that at least some, if not all, of these cases constitute legitimate examples of humanitarian intervention. See e.g., Behuniak, *The Law of Unilateral Humanitarian Intervention by Armed Force: A Legal Survey*, 79 MIL. L. REV. 157, 160–63 (1978); 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, 207–13 (1974); Lillich, *Intervention to Protect Human Rights*, 15 MCGILL L.J. 205, 209–10 (1969); McDougal & Reisman, *Communications*, 3 INT'L LAWYER 438, 441–42 (1969); Reisman with McDougal, *Humanitarian Intervention to Protect the Ibos*, reprinted in HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 167, 179–83 (R. Lillich ed. 1973); Sornarajah, *Internal Colonialism and Humanitarian Intervention*, 11 GA. J. INT'L & COMP. L. 45, 57–58 (1981). A minority view, however, maintains that because most of these interventions were based on treaty provisions authorizing the European powers to intervene militarily in the states of the Ottoman Empire to protect Christian minorities from atrocities, they do not support recognition of a broad right to humanitarian intervention. See I. BROWNLIE, *supra* note 7, at 342; Brownlie, *Humanitarian Intervention*, in LAW AND CIVIL WAR IN THE MODERN WORLD 217, 220–21 (J. Moore ed. 1974); M. GANJI, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 43 (1962). Compare N. RONZITTI, RESCUING NATIONALS ABROAD THROUGH MILITARY COERCION AND INTERVENTION ON GROUNDS OF HUMANITY 89–91 (1985) (describing some of the interventions in the Ottoman empire as based on grounds of humanity and others as based on treaty provisions). In his analysis of the texts

This record of state practice persuaded a majority of those writing during that period to assert the legal validity of intervention on grounds of humanity.¹¹ Borchard made perhaps what was the clearest statement of the doctrine when he wrote:

[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

of the relevant treaties, Fonteyne discovered that they did not, in fact, authorize armed intervention to enforce their provisions. See Fonteyne, *supra*, at 207–13. Moreover, as Sornarajah points out, an examination of state practice indicates that despite the invocation of treaty rights of intervention, states nonetheless “claimed the right of intervention on humanitarian grounds, attaching primacy to that principle over their treaty rights as the justification for the intervention.” Sornarajah, *supra*, at 57.

While the notorious cases in Eastern Europe constitute the most important examples of state practice involving humanitarian intervention, also deserving of mention are the United States’ interventions in Barbary in 1858 and Cuba in 1898, see Reisman with McDougal, *supra*, at 182–83, and the many protestations against the cruel treatment of political prisoners in Morocco in the beginning of the twentieth century, see Fonteyne, *supra*, at 206, and against atrocities committed on the Jews of Russia and Rumania, see McDougal & Reisman, *supra*, at 441–42. The latter cases involving protestations, however, are unpersuasive as evidence of state practice since they did not involve “the highly coercive character of an armed intervention.” Fonteyne, *supra*, at 206. And while the Cuban intervention was justified by President McKinley as in “the cause of humanity and to put an end to the barbarities, bloodshed, starvation, and horrible miseries now existing there,” and is certainly relevant, most contemporary writers view the prevailing American motive as having been the pursuit of long standing economic and political interests. Bogen, *The Law of Humanitarian Intervention: United States Policy in Cuba (1898) and in the Dominican Republic (1965)*, 7 HARV. INT’L L. CLUB J. 296, 297 (1966). Nevertheless, on the whole, the many cases during the nineteenth and early twentieth century in which states invoked humanitarian grounds to justify forceful intervention abroad constitutes sufficient evidence of state practice to permit recognition of the right of humanitarian intervention as a rule of customary international law.

11. Among those in this group were such noted authorities as Wheaton, see H. WHEATON, *ELEMENTS OF INTERNATIONAL LAW* 113 (8th ed. R. Dane 1866), Woolsey, see T. WOOLSEY, *INTRODUCTION TO THE STUDY OF INTERNATIONAL LAW* 73 (1876), Hall, see W. HALL, *A TREATISE OF INTERNATIONAL LAW* 265 (2d ed. 1884), Fiore, see P. FIORE, *1 NOUVEAU DROIT INTERNATIONAL PUBLIC* 521–22 (Antoine trans. 1885), de Lapradelle, see de Lapradelle, *Chronique sur les Affaires de Cuba*, 1 *REVUE DE DROIT PUBLIC ET DE SCIENCE POLITIQUE EN FRANCE ET A L’ETRANGER* 75 (1900), Manning, see W. MANNING, *COMMENTARIES ON THE LAW OF NATIONS* 97 (rev. ed. S. Amos 1875), and Oppenheim, see L. OPPENHEIM, *INTERNATIONAL LAW* 347 (1st ed. 1905).

For an excellent summary of the traditional works on the doctrine of humanitarian intervention see Oppenheim, *supra*, at 214–26. Although not all authors of this period supported a right to intervene on humanitarian grounds, many of those that did not, strongly affirmed the morality of such action. For example, Lawrence wrote that:

There is a great difference between declaring a national act to be legal, and therefore part of the order under which states have consented to live, and allowing it to be morally blameless as an exception to ordinary rules An intervention to put a stop to barbarous and abominable cruelty is “a high act of policy above and beyond the domain of law.” It is destitute of technical legality, but it may be morally right and even praiseworthy to a high degree.

T. LAWRENCE, *THE PRINCIPLES OF INTERNATIONAL LAW* 129 (4th ed. 1910). Accord, M. BERNARD, *ON THE PRINCIPLE OF NON-INTERVENTION* 33–34 (1860); W. HARCOURT (HISTORICUS), *LETTERS ON SOME QUESTIONS OF INTERNATIONAL LAW* 14 (1863); W. HALL, *A TREATISE ON INTERNATIONAL*

family of nations are authorized by international law to intervene on grounds of humanity.¹²

Those who asserted a right of humanitarian intervention in the late nineteenth and early twentieth century, however, did so at a time when the use of armed force was widely regarded by the international community as a lawful means of dispute resolution.¹³ It was not until the period between the two world wars, with the entry into force of the Covenant of the League of Nations and the Kellogg-Briand Pact, that the “civilized” nations of the world endeavored to outlaw war for all time.¹⁴ In light of the considerable freedom enjoyed by states to resort to armed force during the period, it is not surprising that the humanitarian intervention doctrine gained widespread acceptance. Those who resisted the doctrine did so not because they believed that international law always prohibited the first use of force, but rather because they thought that use of force based on humanitarian grounds violated the non-intervention principle. Believing that strict principles of sovereignty dictated that a state could treat its own nationals essentially as it saw fit,¹⁵ these writers concluded that humanitarian intervention constituted impermissible interference in the internal affairs of the target state.¹⁶

Law 344 (8th ed. P. Higgins 1924). The sympathy in favor of the doctrine of humanitarian intervention was such that, by 1946, Sir Hartley Shawcross, felt able to declare at the Nuremberg trials that:

[T]he rights of humanitarian intervention, on behalf of the rights of man trampled upon by a state in a manner shocking the sense of mankind has long been considered to form part of the recognized law of nations.

Quoted in A. THOMAS & A. THOMAS, *NON-INTERVENTION* 374 (1956). See also Int'l L. A., *The International Protection of Human Rights by General International Law*. Interim Report of the Sub-Committee, International Committee on Human Rights II (The Hague 1970) (“the doctrine of humanitarian intervention seems to have been so clearly established under customary international law that only its limits and not its existence is subject to debate.”).

12. E. BORCHARD, *THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD* 14 (1915).

13. See N. RONZITTI *supra* note 10, at 89–90.

14. Despite the prohibition on war, many scholars continued to assert that “the theory of humanitarian intervention had been assimilated by customary international law.” Fonteyne, *supra* note 10, at 224–25. See e.g., E. STOWELL, *INTERVENTION IN INTERNATIONAL LAW* 52 (1921); Rougier, *supra* note 3, at 472; H. MOSLER, *DIE INTERVENTION IM VOLKKERRECHT* 63 (1937); Mandelstam, *La Protection des Minorites*, I *RECUEIL DES COURS* 369, 391 (1923).

15. See Lane, *Mass Killings By Governments: Lawful in the World Legal Order?* 12 *INT'L L. & POL.* 239, 252 (1979).

16. Pradier-Fodere offers a classic statement of the non-intervention rationale for rejecting a right to humanitarian intervention when he writes:

The acts of inhumanity, however condemnable they may be, do not provide the latter with a basis for lawful intervention, as no state can stand up in judgment of the conduct of others. As long as they do not infringe upon the rights of the other powers or of their subjects, they remain the sole business of the nationals of the countries where they are committed.

I P. PRADIERE-FODERE, *TRAIT DE DROIT INTERNATIONAL EUROPEAN ET AMERICAIN* 655 (1885) quoted in Fonteyne *supra* note 10, at 216. Fonteyne also identifies Mamiani, Carnazza-Amarie, Heffter, Pereira, and Halleck as belonging to the rigid non-interventionist school. *Id.*, at 215–18.

In the modern world, the legal principles that guided the early evolution of the humanitarian intervention doctrine are no longer valid. Since the ratification of the United Nations Charter, prohibition of the use of force has become a peremptory norm of international law. Moreover, protection of human rights has been elevated to an international concern and is no longer considered a matter solely within the domestic jurisdiction of the individual states.¹⁷ While the traditional doctrine of humanitarian intervention developed primarily as an exception to the general principle prohibiting intervention in the internal affairs of states, the current validity of the doctrine depends on its having developed as an exception to the general principle prohibiting the use of force. The customary doctrine, therefore, has only marginal relevance today unless the United Nations Charter fails to prohibit absolutely the use of force or the practice of states in the post-war world has created a legally cognizable exception to the Charter prohibition.

II. THE UNITED NATIONS CHARTER AND THE DOCTRINE OF HUMANITARIAN INTERVENTION

Article 2(4) of the Charter of the United Nations provides that:

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.¹⁸

The majority of scholars who have analyzed the article 2(4) prohibition on the use of force would agree with the absolutist interpretation posited by Sir Humphrey Waldock when he writes:

[A]rticle 2(4) prohibits entirely any threat or use of force between independent states except in individual or collective self-defense under article 51 or in execution of collective measures under the Charter for maintaining or restoring peace.¹⁹

Not only is there widespread agreement among scholars on the absolutist interpretation of article 2(4),²⁰ but the prevailing view of the member states of the United Nations, as exemplified in General Assembly resolutions, also strongly

17. See *infra* notes 159.

18. U.N. CHARTER, art. 2, para. 4.

19. Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 RECUEIL DES COURS 455, 493 (1952).

20. See, e.g., I. BROWNLIE, *supra* note 7, at 342; L. HENKIN, *HOW NATIONS BEHAVE* 141 (2d ed. 1979); P. JESSUP, *A MODERN LAW OF NATIONS* 169–70 (1948); Hassan, *Realpolitik in International Law: After Tanzanian Conflict "Humanitarian Intervention" Reexamined*, 17 WILLAMETTE L. REV. 859, 883 & n. 167 (noting that no scholars of the Third-World countries have pronounced their concurrence with the view that article 2(4) allows for exceptions to the prohibition on the use of force); Franck & Rodley, *supra* note 7, at 276; and Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1633 (1984).

supports the view that the Charter prohibits all unilateral uses of force except in self-defense.²¹

There are, nevertheless, a growing minority of writers who argue that because "humanitarian intervention seeks neither a territorial change nor a challenge to the political independence of the state involved," it is inaccurate to conclude that it is precluded by article 2(4).²² This analysis contradicts both the plain meaning of article 2(4)'s language and the intent of its drafters to prohibit absolutely the use of force except in self-defense.

In order to interpret article 2(4) as allowing an exception to the use of force for humanitarian intervention, it is necessary to argue that where *the purpose* of the intervention is neither to impair territorial integrity nor to challenge political independence then there is no violation of the article. The language of article 2(4), however, prohibits all uses of force "against the territorial integrity or political independence of a state," and makes no exception for use of force when there is no evil purpose to violate territorial integrity or political independence. What matters is not the purpose of the violation, but the act of violating itself. An armed intervention, even if undertaken for the purpose of protecting human rights, violates the very essence of territorial integrity and, since it would necessarily require a change in authority structures to assure respect for human rights, would also be against the political independence of the target state.²³

Not only does an interpretation of the Charter which allows for humanitarian intervention contradict the clear language of article 2(4), but it also fails to take note of the fact that it was the unabashed *intent of the framers* to assure that there would be no exceptions to the prohibition on the use of force other than for self-defense.²⁴ Indeed, none of those advocating a *restrictive interpretation* of article 2(4) have even attempted to answer the persuasive evidence put forth that the territorial integrity and political independence language of the article was intended to strengthen, rather than weaken, the prohibition on the use of force.²⁵

21. See *infra* notes 135–138 and accompanying text.

22. Reisman with McDougal *supra* note 10, at 177. Accord, J. STONE, *AGGRESSION AND WORLD ORDER* 98–101 (1958); Lillich, *supra* note 10, at 212; Moore, *The Control of Foreign Intervention in Internal Conflict*, 9 VA. J. INT'L L. 250, 262 (1969); Thapa, *Humanitarian Intervention* 13 (1968) (unpublished thesis at McGill University Law School Library).

23. See, e.g., Akehurst, *Humanitarian Intervention*, in *INTERVENTION IN WORLD POLITICS* (H. Bull ed. 1984) (reference to territorial integrity in article 2(4) meant "territorial inviolability," which is violated by even a temporary humanitarian intervention); Behuniak, *supra* note 10, at 184; I. BROWNLEE, *supra* note 10, at 222; Fonteyne, *supra* note 10, at 255; Hassan, *supra* note 20, at 887; Suzuki, *A State's Provisional Competence to Protect Human Rights in a Foreign State*, 15 TEX. INT'L L.J. 231, 240 (1980).

24. See L. HENKIN, *supra* note 20, at 141.

25. See Fonteyne, *supra* note 10, at 242–44 (citing and agreeing with Giraud and Wenberg that territorial integrity and political independence language intended to strengthen prohibition on use of force). See also Clark, *Humanitarian Intervention: Help to Your Friends and State Practice*, 13 GA. J. INT'L & COMP. L. 211, 211 (1983).

Ultimately, it is difficult to escape the conclusion of Brownlie and others that it is "extremely doubtful" whether humanitarian intervention survived the "general prohibition of resort to force to be found in the U.N. Charter."²⁶

III. THE POST-CHARTER DOCTRINE OF HUMANITARIAN INTERVENTION

Because it seems clear that the United Nations Charter, as it was originally conceived, intended a blanket prohibition of the use of force, any argument for an exception to that principle must be based on state practice after enactment of the Charter. One area where such an exception seems to be well established is that of the use of force to protect nationals abroad.

A. Humanitarian Intervention to Rescue Nationals Abroad

While the principle of non-intervention traditionally gave states wide discretion to treat its own nationals as it chose, that principle did not give nations an unqualified right to abuse aliens within their borders.²⁷ Thus, Judge Lauterpacht noted the paradox that "the individual in his capacity as an alien enjoys a larger measure of protection by international law than in his character as a citizen of his own State."²⁸ When another state violated the minimum standard of treatment accorded to aliens, traditional international law sanctioned the use of forcible self-help by the state of the nationality to protect the lives and property of its nationals abroad.²⁹

Despite the Charter's prohibition on the use of force, the vast majority of jurists continue to affirm the right of a state to use armed force for the protection of its citizens suffering injuries within the territory of another state.³⁰ Indeed, with the exceptions of Brownlie³¹ and Ronzitti,³² most authors who affirm the absolute interpretation of article 2(4) also support the legal validity of the doc-

26. I. BROWNLIE, *supra* note 7, at 342. See also A. Thomas & A. Thomas, *The Dominican Republic Crisis 1965*, at 20 (Hammarskjold Forum 1967) ("In spite of a recognition of a right of humanitarian intervention by customary international law, strict principles of modern multilateral treaty law may have completely abolished the right.")

27. See Lillich, *Forcible Self-Help by States to Protect Human Rights*, 53 IOWA L. REV. 325, 326-27 (1967). See also Suzuki, *supra* note 23, at 241-42.

28. H. LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* 121 (1950).

29. See, e.g., Borcard, *supra* note 12, at 346-47; F. DUNN, *THE PROTECTION OF NATIONALS* 19 (1932); 2 C. HYDE, *INTERNATIONAL LAW* Section 202, at 647 (2d rev. ed. 1945); P. JESSUP, *supra* note 20, at 169; I L. OPPENHEIM, *supra* note 4, at 300.

30. See e.g., D. BOWETT, *SELF-DEFENSE IN INTERNATIONAL LAW* 87 (1958); L. MCNAIR, *THE LAW OF TREATIES* 209-10 (1961); VAN PANHYS, *THE ROLE OF NATIONALITY IN INTERNATIONAL LAW* 113-14 (1959); Lillich *supra* note 10, at 216; Nanda, *The United States Action in the 1965 Dominican Crisis: Impact on World Order —UN Part I*, 43 DENVER L.J. 439, 460 (1966).

31. I. BROWNLIE, *supra* note 7, at 301.

32. N. RONZITTI, *supra* note 10, at 64.

trine allowing for the rescue of nationals abroad through military coercion.³³ The rescue doctrine finds abundant support in the practice of states during the post-Charter era. The necessity of protecting the lives of nationals abroad has been invoked as a justification by the United States in the Lebanon intervention of 1958,³⁴ the Dominican operation in 1965,³⁵ the Mayaguez incident,³⁶ the hostage rescue mission in Iran,³⁷ and the Grenada invasion;³⁸ by the United Kingdom in the threatened intervention in Iran in 1951 and in the Suez crisis in 1956;³⁹ by Belgium in the Congo operations of 1960 and 1964;⁴⁰ by Egypt in its raid on Larnaca in 1978⁴¹ and in the rescue attempt on Malta in 1986; and finally by Israel in its raid on Entebbe in 1976.⁴² While it is true that a number of these interventions were severely criticized by a great number of countries, such criticism was primarily directed at the failure of the rescue mission to meet the strict requirements of necessity and proportionality, and not at the legality of the rescue doctrine as such.⁴³

Attempts to justify the rescue doctrine as a species of self-defense explicitly authorized by article 51 of the United Nations Charter are ultimately unavailing.⁴⁴

33. See, e.g., P. JESSUP, *supra* note 20 at 170–71; A. Thomas & A. Thomas, *supra* note 26, at 19; Schachter, *supra* note 20, at 1629–30; Waldock, *supra* note 19, at 457 (“But, if the United Nations is not in a position to move in time and the need for instant action is manifest, it would be difficult to deny the legitimacy of action in defense of nationals which every responsible government would feel bound to take, if it had the means to do so.”).

34. See, e.g., Wright, *United States Intervention in Lebanon*, 53 AM. J. INT’L L. 112 (1959); Nanda, *supra* note 30, at 451.

35. See, e.g., A. Thomas & A. Thomas, *supra* note 26; Bogen, *supra* note 10; Nanda, *supra* note 30.

36. See, e.g., Behuniak, *The Seizure and Recovery of the S.S. Mayaguez: A Legal Analysis of the United States Claims*, 82 MIL. L. REV. 157 (1978); Friedlander, *The Mayaguez in Retrospect: Humanitarian Intervention or Showing the Flag?*, 22 ST. LOUIS U. L.J. 601 (1978); Paust, *The Seizure and Recovery of the Mayaguez*, 85 YALE L.J. 774 (1976).

37. See, e.g., Note, *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 (1981); Stein, *Contempt, Crisis and the Court: The World Court and the Hostage Rescue Attempt*, 76 AM. J. INT’L L. 499 (1982); Comment, *The American Hostages in Tehran: The I.C.J. and the Legality of Rescue Missions* 30 INT’L & COMP. L.Q. 717 (1981).

38. See, e.g., Joyner, *The United States Action in Grenada: Reflections on the Lawfulness of Invasion*, 78 AM. J. INT’L L. 131 (1984); Moore, *Grenada and the International Double Standard*, 78 AM. J. INT’L L. 145 (1984).

39. See, e.g., N. RONZITTI, *supra* note 10, at 26–27, 28–30.

40. See, e.g., Note, *The Congo Crisis 1964: A Case Study in Humanitarian Intervention*, 12 VA. J. INT’L L. 261 (1972); N. RONZITTI, *supra* note 10, at 30–32.

41. See N. RONZITTI, *supra* note 10, at 40–41.

42. See, e.g., Green, *Rescue at Entebbe—Legal Aspects*, 6 ISRAEL Y.B. HUMAN RIGHTS 312 (1976); Krift, *Self-Defense and Self-Help: The Israeli Raid on Entebbe*, 4 BROOKLYN J. INT’L L. 43 (1977); Note, *Use of Force for the Protection of Nationals Abroad: The Entebbe Incident*, 9 CASE W. RES. J. INT’L L. 117 (1977).

43. See N. RONZITTI, *supra* note 10, at 58–61, 67.

44. A number of writers have attempted to justify the lawfulness of the rescue doctrine on grounds

The language of article 51 itself requires the occurrence of an "armed attack" against the state itself before a state can exercise its inherent right of self-defense.⁴⁵ But the argument that a threat to the safety of nationals abroad constitutes an armed attack upon the state itself requires a leap of logic that would justify a vastly disproportionate response by the state invoking its supposed right of self-defense.⁴⁶ Moreover, the self-defense justification for the rescue doctrine fails to explain those instances where states have used force where no attack on nationals has occurred but they are in imminent danger (*i.e.*, the Dominican Operation), and where the state upon whose territory the rescue occurs is not responsible for the attack (*i.e.*, the Egyptian raid on Larnaca and the Israeli raid on Entebbe).⁴⁷ Equally unpersuasive is the attempt to distinguish such rescue operations from humanitarian interventions on the grounds that the former are only temporary and seek no change in authority structures and, therefore, do not violate the territorial integrity or political independence of the target state.⁴⁸ The absolute prohibition on the use of force embodied in article 2(4) leaves no room for fine distinctions based on manipulations of the territorial integrity and political independence concepts, which were intended to strengthen, rather than weaken, the ban on the use of force.⁴⁹ Moreover, while it is possible to conceive of a temporary, surgical rescue mission that does not threaten political independence, such an uninvited use of force would, by definition, impair the territorial integrity of the invaded state.

Because the Charter provisions themselves provide no legal basis for the rescue doctrine, its current validity depends on the theory that state practice itself has given rise to a new customary rule which has modified the Charter prohibition on the use of force. Widespread recognition of the legality of the rescue doctrine by the legal community is especially significant in that it reflects the realization, confirmed by experience, that no state with the capability to act will

of self-defense. See D. BOWETT, *supra* note 30, at 91, 93-95; A. Thomas & A. Thomas, *supra* note 26, at 14; Waldock, *supra* note 19, at 467.

45. N. Ronzitti, *supra* note 10, at 69.

46. See I. BROWNIE, *supra* note 7, at 298-301, 429; N. RONZITTI, *supra* note 10, at 69; Fairley, *State Actors, Humanitarian Intervention and International Law: Reopening Pandora's Box*, 10 GA. J. INT'L & COMP. L. 29, 42-43 (1980); Hassan, *supra* note 20, at 888.

47. N. RONZITTI *supra* note 10, at 69.

48. See Franck & Rodley, *supra* note 7, at 283, (noting a factual distinction between the two cases, though not a legal one). For the theory that rescue of nationals abroad does not violate article 2(4), see Restatement Foreign Relations Law of the United States (Revised) Tentative Draft section 703, Reporters Notes No. 8 (April 12, 1985); D. O'CONNELL, 1 INTERNATIONAL LAW 328 (1965); A. Thomas & A. Thomas, *supra* note 26, at 14-15.

49. "The theory according to which the use of force for the protection of nationals abroad is lawful, since it infringes neither on the territorial integrity nor on the political independence of the States is by now, as has been stated, 'discredited.' The terms 'territorial integrity' and 'political independence' merely stand for 'territorial inviolability.'" N. RONZITTI, *supra* note 10, at 8 (citations omitted). See also notes 46-47 *supra* and accompanying text.

allow its own nationals to be killed or injured abroad.⁵⁰ If, in fact, as a result of post-Charter state practice, the right to rescue nationals abroad has emerged as a new customary rule of international law, then there seems no logical reason why state practice could not equally elevate the doctrine of humanitarian intervention to such status. The challenge for international scholars is to discover whether or not, as a result of state practice and the compelling necessity of preventing mass slaughter, that has already happened.

B. State Practice and Humanitarian Intervention To Prevent Mass Slaughter

1. Humanitarian Intervention Generally

While this article does not purport to argue that humanitarian intervention in contexts other than genocide is legally justifiable, there are a number of cases in the post-War era where states have invoked humanitarian grounds not amounting to genocide in order to justify their interventions. Examples of such interventions constitute relevant state practice insofar as the case for humanitarian intervention is far more compelling when the mass slaughter of human beings is at stake.

a. The Congo Crisis

In the fall of 1964, rebel forces in the Congo seized several thousand innocent persons and held them hostage in order to obtain concessions from the recognized government. After thirty-five of the hostages had been slaughtered and the rebel leader had threatened that if his demands were not met, "we will dress ourselves with the skins of the Americans and Belgians,"⁵¹ a joint rescue operation was staged using United States planes to transport Belgian paratroopers from British bases. In a four-day period, two thousand people of over eighteen na-

50. Lillich, *supra* note 27, at 345. Even Fairley who comes out strongly against both the rescue doctrine and the doctrine of humanitarian intervention admits the necessity of action in cases such as Entebbe. He quotes with approval the statement of Israel's United Nations Ambassador Herzog that "[t]here is also a moral law, and by all that is moral on this earth Israel had the right to do what it did. Indeed, it had also the duty to do so." Fairley, *supra* note 46, at 59.

51. 52 *Dep't of State Bull.* 18 (1965).

52. The Department of State issued the following statement in defense of the operation:

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. Personnel engaged are under orders to use force only in their own defense or in the defense of the foreign and Congolese civilians. They will depart from the scene as soon as their evacuation mission is accomplished.

51 *Dep't State Bull.* 842 (1964). Additionally, in the United Nations, Ambassador Stevenson stated that, "[w]hile our primary obligation was to protect the lives of American citizens, we are proud that the mission rescued so many innocent people of 18 other nationalities from their dreadful predicament." 52 *Dep't State Bull.* 17 (1965).

tionalities were rescued. The mission had been undertaken with the consent of the central Congo government and only after peaceful efforts to secure the release of the hostages had proved unavailing.

The United States justified its participation in the intervention as humanitarian and in order to save the lives of foreign and Congolese citizens, as well as its own.⁵² In the subsequent debates at the United Nations, Italy, Norway, France, Nationalist China, Brazil, and Bolivia, in addition to the participating powers, endorsed the use of force in this instance based, in large part, on the humanitarian exigencies.⁵³

Moreover, the Security Council failed to take any action condemning the Congo operation.⁵⁴ Of those nations that did condemn the mission, only three rejected the concept of humanitarian intervention while all the others were content to argue that the intervention was not, in fact, humanitarian in nature.⁵⁵

Despite one writer's opinion that "if ever there was a case for the use of forcible self help to protect lives, the Congo rescue was it,"⁵⁶ some authors contend that the Congo action is a poor precedent for the doctrine of humanitarian intervention.⁵⁷ The argument is essentially that the Congo intervention derives its legitimacy from the invitation of the Congo government and from the fact that the purpose of the mission was to rescue nationals. With regard to the argument based on consent, the invitation was somewhat problematic since there was considerable doubt whether the central government was in effective control of the country at the time.⁵⁸ Moreover, the intervening nations invoked the humanitarian argument as sufficient in and of itself to justify the operation.⁵⁹ On the other hand, the fact that the Congo action was undertaken to protect nationals does substantially weaken its precedential value as a purely humanitarian intervention. It is relevant, nevertheless, since the United States justified its action, at least in part, as a humanitarian intervention to protect the lives of citizens of the Congo and other foreign countries, as well as its own.

53. See 19 U.N. SCOR, (1173rd mtg.) at 3, U.N. Doc. S/PV. 1173 (1964) (Belgium); 19 U.N. SCOR (1174th mtg.) at 13, U.N. Doc. S/PV. 1174 (1964) (United States); 19 U.N. SCOR (1175th mtg.) at 4, U.N. Doc. S/PV. 1175 (1964) (United Kingdom); 19 U.N. SCOR (1177th mtg.) at 19–20, U.N. Doc. S/PV. 1177 (1964) (Brazil); 19 U.N. SCOR (1177th mtg.) at 26, U.N. Doc. S/PV. 1177(1964) (Nationalist China); 19 U.N. SCOR (1183rd mtg.) at 14, U.N. Doc. S/PV. 1183 (1964) (Bolivia); 19 U.N. SCOR (1176th mtg.) at 14–15, U.N. Doc. S/PV. (1964) (France); 2 U.N. Monthly Chronicle 11–20 (No. 1, 1965).

54. 19 U.N. SCOR Supp. (Oct.–Dec. 1964) at 328 U.N. Doc. S/Res 129 (1964); Nanda, *supra* note 30, at 477.

55. 19 U.N. SCOR (1170th mtg.) at 23, U.N. Doc. S/PU. 1170 (1964) (Ghana); 19 U.N. SCOR (1174th mtg.) at 2, U.N. Doc. S/PV. 1174 (1964) (United Arab Republic).

56. Lillich, *supra* note 27, at 340.

57. See I. BROWNIE, *supra* note 10, at 221; Franck & Rodley, *supra* note 7, at 287–88.

58. See Sornarajah, *supra* note 10, at 71.

59. Note, *supra* note 40, at 271 (noting that both the United States and Belgium "suggested that in the protection of human rights a request is not a *sine qua non* to forceful intervention").

b. The Dominican Intervention

In late April 1965, anti-rebel police and military authorities of the Dominican Republic informed the United States embassy that because of the complete breakdown of law and order in that country, they could no longer assure the safety of American lives. Subsequently, the United States landed a marine force in the Dominican Republic, justifying its action on the need "to protect the lives of Americans and the nationals of other countries in the face of increasing violence and disorder."⁶⁰ Countries allied with the United States including England, France, the Netherlands, Nationalist China, and Costa Rica supported the Dominican action on humanitarian grounds.⁶¹ Moreover, despite the fact that there is a strong argument to be made that the intervention violated the strict provisions of the Charter of the Organization of American States,⁶² the OAS itself not only passed a resolution endorsing the United States actions, but actually replaced the American marines with its own peace-keeping force.⁶³

The United States, nevertheless, came under considerable criticism both from communist countries and congressional leaders for its operation in the Dominican Republic.⁶⁴ But this attack, which has been joined by a number of international legal scholars, has been primarily leveled at the purity of United States motives given the failure of the American marine force to make a hasty exit from the island.⁶⁵ Whether or not greater geo-political considerations ultimately tainted the Dominican action, the vast majority of writers accept that, at least in its initial stages, the American military intervention was justified on humanitarian grounds.⁶⁶

c. The Grenada Invasion

On October 25, 1983, United States military forces invaded Grenada, ostensibly to save the lives of American nationals endangered by the revolutionary state of affairs then existing on the island. Although the mission resulted in the successful rescue of the 1,100 United States citizens resident on Grenada, the United Nations General Assembly bitterly condemned the United States' action

60. Statement of President Lyndon B. Johnson in *N.Y. Times*, May 1, 1965, at 6, col. 4 quoted in Lillich, *supra* note 10, at 341.

61. N. RONZITTI, *supra* note 10, at 34.

62. Lillich, *supra* note 10, at 215. See also Cabranes, *Human Rights and Non-Intervention in the Inter-American System*, 65 MICH. L. REV., 1147, 1171-75 (1967) (arguing that rule of non-intervention in the Inter-American system has undergone a "profound metamorphosis" as result of OAS approval of the Dominican operation).

63. Cabranes, *supra* note 62, at 1174-1175.

64. See Nanda, *supra* note 30, at 464, 469.

65. See, e.g., Schachter, *supra* note 20, at 1630. See also Nanda, *supra* note 30, at 469 (citing criticism of Senators Fulbright and Morse to the effect that Dominican action violated the proportionality principle).

66. See, e.g., Behuniak, *supra* note 10, at 174; Lillich, *supra* note 10, at 214-15; Nanda, *supra* note 30, at 471-72.

as a violation of international law by a larger majority than its similar condemnation of the Soviet invasion of Afghanistan.⁶⁷

The Grenada action is decidedly not a good precedent for the doctrine of humanitarian intervention. Indeed, unlike the operations in the Congo and the Dominican Republic, the United States sought to justify its behavior on the narrow grounds of protection of nationals abroad and specifically declined to invoke the broader doctrine of humanitarian intervention.⁶⁸ The action of the General Assembly, however, should not be taken as evidence of state practice rejecting either the rescue doctrine or the doctrine of humanitarian intervention. Criticism of the Grenada mission was primarily directed at the failure to show a genuine and imminent threat to the lives of American nationals, the failure to exhaust peaceful means, and the disproportionality of the military response.⁶⁹ Thus, such criticism establishes only that a rescue mission or a humanitarian intervention must meet strictly applied procedural and substantive criteria. It does not establish rejection of the humanitarian intervention doctrine *per se*.

2. Humanitarian Intervention To Prevent Genocide

The Congo and Dominican precedents are significant in that the intervening states invoked humanitarian grounds to justify what would otherwise have been a violation of article 2(4)'s prohibition on the use of force. But because these examples involved primarily the protection of foreign nationals rather than citizens of the target state, they could not by themselves establish a right of humanitarian intervention. It was not until the invasions of Bangladesh by India and of Uganda by Tanzania that sufficient state practice had emerged to revive the customary international law doctrine of humanitarian intervention.

a. The Bangladesh Crisis

In an attempt to quell protests, riots and demonstrations by groups seeking autonomy for East Pakistan, the Pakistan army moved into Dacca in March 1971. Within days, the army had launched a reign of terror, in which 10,000 East Bengalis were killed and a massive refugee movement to India began. To remedy the gross human rights violations inflicted upon the people of East Bengal by the Pakistan army and to stem the resulting endless flood of refugees across its borders, India, in December 1971, conducted an armed intervention into East Pakistan. In less than one week, the Pakistani army had surrendered, the widespread deprivation of human rights had come to an end, and a new state had been created in Bangladesh.

67. See Moore, *supra* note 38, at 153.

68. Robinson, *Letter from the Legal Adviser, United States Department of State*, 18 INT'L LAWYER 381, 386 ("We did not assert a broad doctrine of 'humanitarian intervention.' We relied instead on the narrower, well-established ground of protection of United States nationals.").

69. See Joyner, *supra* note 38, at 135; Schachter, *supra* note 20, at 1632.

While India justified its behavior as a lawful exercise of the right of self-defense in response to Pakistani air strikes just before the invasion, it also made recourse to a humanitarian argument. Before the United Nations Security Council, for example, the Indian delegate declared that "we have on this particular occasion nothing but the purest motives and purest of intentions: to rescue the people of East Bengal from what they are suffering."⁷⁰ In the face of overwhelming atrocities committed by the government of Pakistan in Bangladesh, the world community was noticeably reluctant to condemn India's actions. At the General Assembly debates, only two states, China and Albania, branded India as an aggressor, while Bhutan, the Soviet Union, and many Eastern-bloc states defended India by emphasizing the intolerable rights situation in East Bengal.⁷¹ The United States, for its part, opposed the use of force and urged that a political solution be found to the crisis.⁷² Ultimately, the Security Council failed to pass any resolution condemning the Indian intervention, and the General Assembly did no more than urge a domestic political solution and that India not violate the sovereignty and territorial integrity of Pakistan.⁷³ At least one jurist maintains that this "absence of condemnation of the Indian intervention by the international community amounts to a condonation of intervention" to prevent mass atrocities against a minority.⁷⁴

The majority of jurists who have written on the Bangladesh crisis regard India's actions, preventing the massacre of the population of East Bengal, as justifiable under international law.⁷⁵ Even those authors who maintain the action

70. Quoted in Franck & Rodley, *supra* note 7, at 276. The Indian delegate also went on to state:

I wish . . . to give a very serious warning to the Council that we shall not be a party to any solution that will mean continuation of oppression of East Pakistan people, whatever the pretext, whatever the ground on which this is brought about. So long as we have any light of civilized behavior left in us, *we shall protect them.*

Quoted in N. RONZITTI, *supra* note 10, at 96. While it is true that the humanitarian argument was not India's first line of defense, these statements rebut the assertions of those authors who claim that India did not attempt to justify its intervention on humanitarian grounds. See Fonteyne, *supra* note 10, at 204; Flinterman, *Humanitarian Intervention*, 26 CHITTY'S L.J. 284, 285 (1978); Hassan, *supra* note 20, at 884 n.167, 886 n.172.

71. N. RONZITTI, *supra* note 10, at 97.

72. *Id.*

73. *Id.*

74. Sornarajah, *supra* note 10, at 73.

75. See, e.g., Behuniak, *supra* note 10, at 176; Fonteyne, *supra*, note 10, at 204 ("[India's] course of action in the Bangladesh situation probably constitutes the clearest case of forceful individual humanitarian intervention in this century."); Lillich, *Humanitarian Intervention: A Reply*, in LAW AND CIVIL WAR IN THE MODERN WORLD 230 (J. Moore ed 1974); Sornarajah, *supra* note 10, at 71-73 (India's action meets all criteria for lawful humanitarian intervention including the failure of U.N. enforcement machinery, exhaustion of peaceful means, a nexus with the repressed people, and a minimum interference in the affairs of the target country); J. STONE, OF LAW AND NATIONS BETWEEN POWER POLITICS AND HUMAN HOPES 14-17 (1974); see e.g., Farer, *supra* note 7, at 158; Franck & Rodley, *supra* note 7, at 276; Friedman, *Comment*, in LAW AND CIVIL WAR IN THE MODERN WORLD 579 (J. Moore ed. 1974).

was illegal, admit that the intervention was morally condonable to prevent genocide.⁷⁶ Despite the argument of certain other publicists that India's motivation was based not on altruistic grounds but on its own national interest,⁷⁷ one must ultimately agree with no less an authority than the International Committee of Jurists when they state:

In our view the circumstances were wholly exceptional, it was becoming more and more urgent to find a solution, both for humanitarian reasons and because [of] the refugee burden . . . Events having been allowed to reach this point, it is difficult to see what other choice India could have made. . . .

In conclusion, therefore, we consider that India's armed intervention would have been justified under the doctrine of humanitarian intervention . . . We also consider that the degree of force used was no greater than was necessary in order to bring to an end these violations of human rights.⁷⁸

b. The Invasion of Uganda.

The barbaric cruelties perpetrated upon the people of Uganda by President Udi Amin are well documented. In eight years of repressive rule the Amin regime was responsible for the murder and torture of approximately 300,000 people. Nearly two months after an armed incursion by Uganda into Tanzanian territory, Tanzania's armed forces invaded Uganda in late January 1979. Despite the fact that Ugandan troops had returned permanently to within their borders many weeks before, Tanzania initially made the incredible claim that it was acting in self-defense.⁷⁹ By April 11, Tanzania's armed forces together with Ugandan rebel groups occupied the Ugandan capital and ousted Amin. The Tanzanian troops remained in Uganda long enough for a new government to take power and for normalcy to be restored.

Although Tanzania defended its action mainly on grounds of self-defense, it eventually did reveal an underlying humanitarian motive. The Tanzanian foreign minister declared that the fall of Amin was "a tremendous victory for the people of Uganda and a singular triumph for freedom, justice and human dignity."⁸⁰ Moreover, Tanzania's President Julius Nyerere stated that it was necessary to "punish" Amin for the aggression he had committed against Tanzania and the

76. See, e.g., Farer, *supra* note 7, at 158; Franck & Rodley, *supra* note 7, at 276; Friedman, *supra* note 75, at 579.

77. See Hassan, *supra* note 20, at 884 n.167; Friedman, *supra* note 75, at 577.

78. East Pakistan Staff Study, 8 THE REVIEW OF THE INTERNATIONAL COMMITTEE OF JURISTS, 23, 62 (1972).

79. N. RONZITTI, *supra* note 10, at 102.

80. Quoted in *id.*, at 103. See also Furley, *Uganda's Retreat from Turmoil*, 196 CONFLICT STUDIES 6 (1987) (Nyerere "considered it a humanitarian duty to 'liberate' Uganda from the tyrant"). Tanzania, however, initially denied that it had a legal right to overthrow Amin: "Tanzania has no right to enter Uganda in order to topple Amin. . . . The people of Uganda have that right." (quoting Nyerere) XI AFRICAN CONTEMPORARY RECORD B431 (1979).

genocide he had committed against his own people.⁸¹ Tanzania's pleas that its actions were justified by "the Uganda army's aggression against Tanzania" are ultimately unpersuasive.⁸² As an act of either self-defense or reprisal, the invasion of Uganda was a grossly disproportionate response. Moreover, Tanzania could not hope to establish the requisite necessity and the legitimacy of reprisals under international law is extremely questionable at best.⁸³ In the final analysis, if one is going to accept the legality of Tanzania's behavior, it is impossible to avoid the doctrine of humanitarian intervention.

As a matter of fact, the entire world community tacitly did accept the legality of Tanzania's actions. The Tanzanian invasion received no negative reaction from the world community whatsoever.⁸⁴ The United Nations did not even debate the issue and the Organization of African Unity did not censure the intervention with only two nations, Nigeria and Sudan, dissenting.⁸⁵ Moreover, by recognizing the new government almost without hesitation, the vast majority of nations seemed to approve quietly the turn of events in Uganda.⁸⁶

As with the case of the Indian intervention in Bangladesh, most commentators who have considered the Tanzanian invasion of Uganda have concluded that it was justifiable on humanitarian grounds.⁸⁷ Moreover, given the reaction of the world community, these scholars concluded that the Uganda case is evidence of a new international norm authorizing intervention on grounds of humanity.⁸⁸ While admitting that if ever humanitarian intervention was justified it was in Uganda, at least one author concludes nevertheless that even in this case, the legal criteria were not met.⁸⁹ The argument is based on the assumption that Tanzania's motives were not disinterested and that Tanzania failed to cease the operation after the humanitarian objectives had been accomplished. Although it is true that Tanzania desired to overthrow Amin, there was clearly a humanitarian component to its

81. Hassan, *supra* note 20, at 866, 872-73. See also XI AFRICAN CONTEMPORARY RECORD B394-95 (1979); N. RONZITTI, *supra* note 10, at 103.

82. Quoted in N. RONZITTI, *supra* note 10, at 105. See also XI AFRICAN CONTEMPORARY RECORD B395-96 (1979).

83. See C. THOMAS, *NEW STATES, SOVEREIGNTY AND INTERVENTION* 119 (1985).

84. See XI AFRICAN CONTEMPORARY RECORD B397 (1979); N. RONZITTI, *supra* note 10, at 105; Somarajah, *supra* note 10, at 74.

85. See Hassan, *supra* 42, at 866; N. RONZITTI, *supra* note 10, at 104-06; C. THOMAS, *supra* note 104, at 111-12.

86. See N. RONZITTI, *supra* note 10 at 104; C. THOMAS, *supra* note 83, at 113.

87. See, e.g., Chatterjee, *Some Legal Problems of Support Role in International Law: Tanzania and Uganda*, 30 INT'L & COMP. L.Q. 755, 767-68; Somarajah, *supra* note 10, at 59; Suzuki, *supra* note 23, at 239-40; Umozurike, *Tanzania's Intervention in Uganda*, 20 ARCHIV DES VOLKERRECHTS 301, 312-13 (1982).

88. See *supra* note 87. But see N. RONZITTI, *supra* note 10 at 111-12; C. THOMAS, *supra* note 83, at 104, 120 (denying Tanzania's invasion of Uganda indicates a new rule of humanitarian intervention, but conceding the morality of Tanzania's actions and that it may be beginning the development of an emerging norm of international law).

89. Hassan, *supra* note 20, at 912.

actions and to expect a more honestly altruistic motive is both unnecessary and unrealistic.⁹⁰ Finally, the continued presence of Tanzania's troops in Uganda was essential, for without them, there could be no return to normalcy.⁹¹ Given the moral imperative of putting an end to Amin's cruelty, Tanzania had no choice but to go into Uganda, and once in, Tanzania had no choice but to stay.

c. The Invasion of Kampuchea.

The murderous regime of Pol Pot in Kampuchea is surpassed only by that of Hitler's Germany in the death and terror it inflicted on innocent human beings. In less than three years of repressive rule, the Pol Pot regime was responsible for the murder of between two and three million people, or more than one third of the population of Kampuchea. The international community, although painfully aware of the terrible suffering, took no incisive measures to prevent the continued perpetration of atrocities in Kampuchea. Finally, on December 25, 1978, Vietnam invaded Kampuchea. Within weeks, Vietnamese troops occupied the whole of Kampuchea and replaced Pol Pot with a puppet government made up of elements from the so-called United Front. Almost eight years later, the armies of Vietnam continue to occupy Kampuchea.

Contrary to its response to the invasions of East Pakistan and Uganda, the world community widely condemned Vietnam's invasion of Kampuchea as a flagrant violation of international law. The General Assembly adopted a number of resolutions censuring the foreign intervention and calling for withdrawal of foreign forces⁹² but, failing to condemn Vietnam as an aggressor, was defeated only by the veto of the Soviet Union.⁹³ In the United Nations debates, the reaction ran closely along geo-political lines. Only the Soviet-bloc nations defended Vietnam's actions, pointing to the inhuman conditions in Cambodia and maintaining that Pol Pot had been overthrown by the internal forces of the United Front.⁹⁴ China and the Western states strongly criticized Vietnam's aggression in Kampuchea. Most significantly, many of these states, along with a handful of non-alligned countries, argued that Vietnam could not justify its use of force in order to protect human rights in Kampuchea.⁹⁵ Vietnam, for its part, while noting

90. See C. THOMAS, *supra* note 83, at 116–117, 119–20. See also *infra* notes 104–108 and accompanying text.

91. See C. THOMAS, *supra* note 83, at 117–18.

92. See N. RONZITTI, *supra* note 10, at 101.

93. 34 U.N. SCOR Supp. (Jan.–Mar.) at 27, U.N. Doc. S/13027 (1979) (draft resolution); 34 U.N. SCOR 92112th mtg.) at 1, U.N. Doc. S/PV.2112 (1979) (report of vote).

94. 34 U.N. SCOR (2108th mtg.) at 2, 4, U.N. Doc. S/PV 2108 (1979) (U.S.S.R.); *id.*, at 17, 18 (Cuba); 4 U.N. SCOR (2109th mtg.) at 3, U.N. Doc. S/PV. 2109 (1979) (Czechoslovakia); *id.*, at 8 (German Democratic Republic); *id.*, at 9 (Hungary); 34 U.N. SCOR (2111th mtg.) at 8, U.N. Doc. S/PV. 2111 (1979) (Poland); *id.*, at 10 (Bulgaria).

95. 34 U.N. SCOR (2108th mtg.) at 10, U.N. Doc. S/PV. 2108 (1979) (China); 34 U.N. SCOR (2110th mtg.) at 8, U.N. Doc. S/PV. 2110 (1979) (United States); *id.*, at 6 (United Kingdom); 34 U.N. SCOR (2109th mtg.) at 4, U.N. Doc. S/PV. 2109 (1979) (France); *id.*, at 2 (Norway); 34 U.N. SCOR

the atrocities committed by Pol Pot, argued that he had been overthrown by the United Front and that Vietnam's own presence was at the request of the local resistance.⁹⁶

Despite the negative reaction of the international community, the Kampuchean case does not constitute a negation of the doctrine of humanitarian intervention anymore than does the Grenada case constitute a rejection of the rescue doctrine. First, unlike the cases of Bangladesh and Uganda, the Kampuchea case sparked bitter Cold-War rivalries that shaped the reaction of the world community. Thus, strict questions of legality could be expected to have played only a minor role in the reaction of states. Moreover, the crucial lesson of the Kampuchea case is that the international community will not accept the invocation of a human rights rationale as a smokescreen for external aggression. An attempt by Vietnam to make resort to the doctrine of humanitarian intervention would have been patently unconvincing in light of its own atrocious human rights record, blatantly expansionist motivations, and continued hegemony over Kampuchea.⁹⁷ Finally, it would be impossible to deny the inherent morality of a truly humanitarian rescue mission to put an end of Pol Pot's genocide. Indeed, in the United States Senate, George McGovern advocated a humanitarian intervention in Cambodia.⁹⁸ In the final analysis, one cannot escape the inevitable question, whether despite the selfish motivations behind the Vietnamese invasion, are not the people of Kampuchea better off?

3. State Practice: Conclusions

Those scholars who deny that state practice supports a right of humanitarian intervention point mainly not to the cases where the right has been exercised, but to the cases where it has not. They argue that the failure to intervene to prevent mass slaughter in Armenia, Nazi Germany, Rwanda and Burundi, Nigeria, Indonesia, and Kampuchea makes any right of humanitarian intervention highly suspect.⁹⁹ While it is indeed tragic that the nations of the world have stood idly by as ruthless regimes have massacred literally millions of fellow human beings, it is a mistake to conclude that such inaction has undermined the validity of the

(211th mtg.) at 4, U.N. Doc. S/PV. 2111 (1979) (Nigeria); 34 U.N. SCOR (2109th mtg.) at 7, U.N. Doc. S/PV. 2109 (1979) (Bolivia); 34 U.N. SCOR (2110th mtg.) at 5, U.N. Doc. 2 S/PV. 2110 (1979) (Singapore); See also Comment, *Kampuchea: Representation and Recognition*, 30 INT'L & COMP. L.Q. 234, 235 (1981) (noting also that the Western States and ASEAN continue to recognize the Pol Pot government); *id.*, at 234 n.2, 235.

96. 34 U.N. SCOR (2108th mtg.) at 13, U.N. Doc. S/PV. 2108 (1979) (Vietnam).

97. See Sornarajah, *supra* note 10, at 74.

98. See Lane, *supra* note 15, at 245.

99. Franck & Rodley, *supra* note 7, at 290, 293-98. See also Farer, *The Regulation of Foreign Intervention in Civil Armed Conflict*, 142 RECUEIL DE COURS 291, 398-401 (1974); B. Harff, *GENOCIDE AND HUMAN RIGHTS: INTERNATIONAL LEGAL AND POLITICAL ISSUES* 8 (Monograph Series in World Affairs v.20 b.3 (1984)); A. Thomas & A. Thomas, *supra* note 11, at 373-74.

doctrine of humanitarian intervention. In the first place, international law does not require the constant utilization of a customary rule for it to remain valid.¹⁰⁰ Given the relative shortness of the post-Charter period and the relatively few instances of genocide in relation to other international events occurring during that period, state practice has, in fact, been fairly substantial. Perhaps, more importantly, however, the argument based on the failure to intervene proves only that there is no international legal *duty* of humanitarian intervention. But no one has claimed such an obligation. The argument is for a *right* of humanitarian intervention and thus the relevant body of precedent concerns the reaction of the world community when that right has been exercised.

Because states normally wish to avert their eyes even when millions are "dying in concentration camps or under the treads of tanks," many publicists are profoundly skeptical when these same nations seek to invoke humanitarian grounds to justify their interventions.¹⁰¹ They argue that history reveals that states will only intervene forcefully in another state when significant economic or political interests are at stake.¹⁰² Franck and Rodley thus conclude that "those waiting to catch the crumbs of human rights from the table where the powers feast on self-interest are not likely to be well nourished."¹⁰³

While it is difficult to find fault with this conclusion, it is nevertheless a mistake to argue that because states have not been motivated by purely altruistic concerns, there have been no genuine cases of humanitarian intervention in the twentieth century.¹⁰⁴ The opponents of humanitarian intervention ask too much when they naively seek to find acts vindicating human rights based on total disinterestedness. The unfortunate reality is that there will be a selfish political motivation behind almost every humanitarian intervention.¹⁰⁵ If there are compelling humanitarian grounds for intervention, there is simply no good reason why the presence of interests other than altruism on the part of the intervening state should bear on the legality of the action.¹⁰⁶ It is enough simply that political expediency coincides with humanitarian necessity.

The defense of protection of third persons in domestic criminal law systems provides a useful analogy. In such systems, an actor is justified in using deadly

100. See Behuniak, *supra* note 10, at 170; Fonteyne, *supra* note 10, at 234.

101. Franck & Rodley, *supra* note 7, at 294.

102. *Id.*, at 279. See also I. BROWNLIE, *supra* note 10, at 223; Farer, *supra* note 7, at 391; Hassan, *supra* note 2, at 881-82.

103. Franck & Rodley, *supra* note 7, at 290; N. RONZITTI, *supra* note 10, at 92.

104. See Fairley, *supra* note 46, at 58. See also I. BROWNLIE, *supra* note 10, at 223; Clark, *supra* note 25, at 212-13; Franck & Rodley, *supra* note 7, at 290; N. RONZITTI, *supra* note 10, at 92.

105. See, e.g., Behuniak, *supra* note 10, at 187; Fonteyne, *supra* note 10, at 261; J. STONE, *supra* note 75, at 344 (even action taken against Nazis not to prevent "abominations at home," but "adventures abroad").

106. See Bond, *Survey of Normative Rules of Intervention*, 52 MIL. L. REV. 51, 63 (1971); Fonteyne, *supra* note 10, at 261; Lillich, *supra* note 27, at 350; Sornarajah, *supra* note 10, at 65, 69-70.

force to protect third persons if, under the circumstances as the actor believes them to be, the person whom he seeks to protect would be justified in using such measures.¹⁰⁷ It matters not whether the actor has a personal stake in using deadly force against the aggressor, so long as the circumstances justify protection of the innocent third party. Similarly, the pertinent question in international law is not the selfish motivation of the intervenor, but whether intervention was necessary and narrowly tailored to prevent the mass slaughter of human beings.¹⁰⁸ Judged in this light, the unavoidable conclusion is that state practice during the post-Charter era has been sufficiently consistent to support revival of the right of humanitarian intervention as a customary rule of international law.¹⁰⁹

C. *The Current Doctrine of Humanitarian Intervention*

Although post-Charter state practice constitutes persuasive evidence of the legal validity of humanitarian intervention, there is far less consistency among the opinion of jurists and state actors on the legitimacy of the doctrine. But while on an abstract level many object to the right of humanitarian intervention, when faced with the concrete case in which a state uses force to prevent mass slaughter, they seem invariably to acquiesce.

1. *The Opinion of Learned Publicists*

The scholarly debate on the current legal validity of humanitarian intervention has been extremely divisive with both opponents and proponents of the doctrine claiming clear majorities.¹¹⁰ Despite the assertion of certain authors that the doctrine has no credibility whatsoever,¹¹¹ one cannot ignore the opinion of a writer like Oppenheim when he speaks out in favor of a right to intervene on humanitarian grounds. He writes:

[T]here is a substantial body of opinion and of practice in support of the view that there are limits to [the] discretion [of states in the treatment of their own nationals]

107. See B. HARFF, *supra* note 99, at 81.

108. *Id.*, at 37, 60.

109. See, e.g., Reisman, *Coercion and Self-Determination: Construing Charter Article 2(4)*, 78 AM. J. INT'L L. 642, 643 (1984); Sornarajah, *supra* note 10, at 59, 75; Suzuki, *supra* note 23, at 239–40.

110. The opinion of the leading scholars has a significant impact on the development of international legal norms. The Statute of the International Court of Justice, for example, provides that:

The Court, whose function it is to decide in accordance with international law such disputes as are submitted to it, shall apply: . . . judicial decisions and the teachings of the most qualified publicists of the various nations, as a subsidiary means for the determination of the rules of law.

I.C.J. Stat., art. 38, para. 1(d). Behuniak maintains that the majority of jurists are on the side of the humanitarian intervention doctrine. Behuniak, *supra* note 10, at 170.

111. See, e.g., Clark, *supra* note 25, at 211; Nanda, *supra* note 30, at 474; N. RONZITTI, *supra* note 10, at 108.

and that when a State renders itself guilty of cruelties against and persecution of its nationals in such a way as to shock the conscience of mankind, intervention in the interest of humanity is legally permissible.¹¹²

Oppenheim is not alone in this judgment. Among the contemporary commentators also supporting the legality of humanitarian intervention under proper conditions are Fonteyne,¹¹³ Jessup,¹¹⁴ Lillich,¹¹⁵ Moore,¹¹⁶ Reisman,¹¹⁷ the Thomases,¹¹⁸ and many others.¹¹⁹ Whether or not this group constitutes a majority, it clearly does represent a serious and substantial body of opinion in favor of the doctrine of humanitarian intervention. Moreover, despite the claim that no authors from non-Western countries have spoken out in favor of humanitarian intervention, proponents include jurists from Asia¹²⁰ and Africa.¹²¹

The contemporary opinion of learned publicists concerning the validity of humanitarian intervention is far from unanimous. But while a highly respected and authoritative body of literature continues to assert that the Charter prohibition on the use of force precludes humanitarian intervention,¹²² the trend is clearly in the opposite direction.¹²³ More importantly, of those scholars who reject the

112. L. OPPENHEIM, *supra* note 4, at 312. Cf. H. LAUTERPACHT, *supra* note 28, at 120 ff.

113. Fonteyne, *supra* note 10, at 258.

114. P. JESSUP, *supra* note 42, at 169.

115. Lillich, *supra* note 27, at 326.

116. Moore, *supra* note 22, at 263.

117. Reisman with McDougal, *supra* note 10, at 169.

118. A. Thomas and A. Thomas, *supra* note 26, at 19.

119. See, e.g., Int'l L. A., *Report of the Fifty-Second Conference* 759 (Helsinki 1966); Behuniak, *supra* note 10, at 186, 190; Bogen, *supra* note 10, at 300; Goldie, *The Transvaluation of Values in Contemporary International Law*, 53 IOWA L. REV. 358, 362 (1967); Korey, *A Global Ombudsman*, SATURDAY REVIEW, Aug. 12, 1967, at 20; McDougal, *Authority to Use Force on the High Seas*, 20 NAVAL WAR COLLEGE REV. 19, 29 (1967); and notes 141-43 *infra*. Stone *supra* note 75, at 89-101; and *infra* notes 12-22.

120. See Sornarajah, *supra* note 10, at 58-60; Suzuki, *supra* note 23, at 239-40; Thapa, *supra* note 22. See also McDougal & Reisman, *supra* note 10, at 441 (citing Dean Murty, a leading Asian scholar).

121. Adaramolo, *The Nigerian Crisis and Foreign Intervention: A Focus on International Law*, 4 NIGERIAN L.J. 76, 78 (1970); Umozurike, *supra* note 87, at 312-13.

122. See, e.g., I. BROWNLIE, *supra* note 10, at 222; J. BRIERLY, *THE LAW OF NATIONS* 403 (6th ed. H. Waldock 1966); Clark, *supra* note 25, at 211; Claydon, *Humanitarian Intervention and International Law*, 1 QUEEN'S INTRA. L.J. 36, 59 (1969); Franck & Rodley, *supra* note 7, at 299-303; M. GANJI, *INTERNATIONAL PROTECTION OF HUMAN RIGHTS* 42 (1962); Hassan, *supra* note 20, at 888-90; Lane, *supra* note 15, at 246-47; N. RONZITTI, *supra* note 10, at 108; Schachter, *supra* note 20 at 1629; Waldock, *supra* note 19, at 461; Wright, *International Law and Civil Strife*, 1959 Proceedings Am. Soc. Int'l L. 145, at 152.

123. See Fonteyne, *supra* note 10, at 246; Moore, *supra* note 22, at 264. One scholar who has changed his mind on the legality of humanitarian intervention writes:

I'm ashamed to confess that at one time I lent my support to the suggestion that article 2(4) and the related articles did preclude the use of self-help less than self-defense. On reflection, I think that this was a very grave mistake In the absence of collective machinery to protect

technical legality of humanitarian intervention, almost all are willing to excuse such conduct as a higher act of policy or morality that is "beyond the domain of law."¹²⁴ They argue that, in extremely grave circumstances, the failure to object on the part of the world community constitutes condonation of the conduct and, thereby, confers upon humanitarian intervention a kind of sub-legality.¹²⁵ Thus, there is virtual unanimity among international jurist that under proper circumstances, humanitarian intervention is justifiable on either legal or quasi-legal grounds.¹²⁶

There are four principal arguments advanced in support of the sub-legality approach. First, it is argued that a fully legalized doctrine of humanitarian intervention would increase the opportunities for abusive utilization. Second, proponents of the sub-legality view contend that the labeling of an intervention as a technical breach of the law imposes practical and psychological restraints on the use of force by states. Third, they maintain that an absolute legal prohibition on the use of force preserves the clarity, simplicity and predictability of the law. Finally, they argue that such an approach is in accordance with the Charter prohibition on the use of force.¹²⁷

This quasi-legality view of humanitarian intervention is, like a cucumber sandwich, ultimately unsatisfying. In the first place, it is difficult to perceive how a technical ban prevents abusive invocation of the humanitarian intervention doctrine or deters the use of force, when a prospective intervenor can rely on the silence of the world community to legitimize the intervenor's action. Indeed, the exact same conditions that would render the use of force lawful under the doctrine of humanitarian intervention would also bring the condonation of the world community under the sub-legality approach. Second, rather than providing clarity and predictability, the sub-legality approach is hopelessly vague and incomprehensible, as it erratically gives interventions a half-way legitimacy. An approach that recognized the complete legality of humanitarian intervention based on application of principled criteria would be far more simple and straightforward. Third, any system which assumes and tolerates "acceptable" breaches of its own basic principles sows the seeds of its own destruction by encouraging

against attack and deprivation, I would suggest that the principle of major purposes requires an interpretation which would honor self-help against prior unlawfulness. The principle of subsequent conduct certainly confirms this.

McDougal, *supra* note 119, at 28–29.

124. M. GANJI, *supra* note 122 at 43.

125. See Franck, in the debates of the Charlottesville Conference on Humanitarian Intervention and the United Nations (March 11–12, 1972), reprinted in HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 64 (R. Lillich ed. 1973); Friedmann, *id.* at 114. See also Brownlie, *Thoughts on Kind-Hearted Gunmen*, in HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 139–48 (R. Lillich ed. 1973); Franck & Rodley, *supra* note 7, 290–91, 304.

126. See Bogen, *supra* note 10, at 303.

127. For an excellent summary of these arguments, see Behuniak, *supra* note 10, at 181–82.

disrespect for the law. In the final analysis, the only argument that the sub-legality approach has to commend it is that it is consistent with a sterile and outmoded interpretation of the U.N. Charter.¹²⁸

The complete failure of the United Nations to heed the cries of the slaughtered millions in Cambodia, Biafra, Uganda, Burundi, Indonesia, Bangladesh, and the Sudan is more than ample testimony of the desuetude of the collective security arrangements envisioned in the Charter.¹²⁹ So long as the global conflict between competing ideological systems continues to paralyze the Security Council, the hope of United Nations action to prevent mass cruelty will remain unfulfilled.¹³⁰ It is in order to remedy the immorality of inaction in the face of state-sponsored slaughter that an increasing number of scholars have turned to the doctrine of humanitarian intervention. Given the breakdown of international enforcement machinery, it seems reasonable to recognize, in certain extreme cases, the legal right of a state to use force so as to provide a form of "substitute or functional enforcement of international human rights."¹³¹ Indeed, as early as 1948, Jessup envisioned the possibility of unilateral measures in the event that the international organization would be unable to act "with the speed requisite to preserve life."¹³² Today, Jessup's vision has become an unfortunate reality and thus it is important to reaffirm the principle that when a state "treat[s] its own nationals in a manner violative of all universal standards of humanity, any nation may step in and exercise the right of humanitarian intervention."¹³³

2. *The Opinion of State Actors*

Just as the majority of scholars have taken the view that article 2(4) prohibits all unilateral uses of force except in self-defense, the great majority of States during United Nations debates have favored an absolute interpretation of the Charter prohibition.¹³⁴ This concensus is embodied in U.N. Resolution 3314-XXIX on the Definition of Aggression which equates armed intervention with aggression and provides that "[n]o consideration of whatever nature . . . may

128. See Behuniak, *supra* note 10 at 182–83; Fonteyne, *supra* note 10, at 249.

129. Reisman, *supra* note 109, at 643. See also Fonteyne, *supra* note 10, at 237.

130. See Behuniak, *supra* note 10, at 178; Lillich, *supra* note 10, at 246; Sornarajah, *supra* note 10, at 71; Reisman, *supra* note 109, at 643.

131. Reisman with McDougal, *supra* note 10, at 178. See also Behuniak, *supra* note 10, at 186, 190; B. HARFF, *supra* note 99, at 20; Lillich, *supra* note 75, at 230; Fonteyne, *supra* note 10, at 258; Moore, *supra* note 22, at 263; Sornarajah, *supra* note 10, at 60. But see I. BROWNIE, *supra* note 126, at 145.

132. P. JESSUP, *supra* note 20, at 170.

133. A. Thomas and A. Thomas, *supra* note 26, at 19.

134. See Fonteyne, *Forcible Self-Help by States to Protect Human Rights: Recent Views from the United Nations*, in HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 209–11 (R. Lillich ed. 1973).

serve as a justification for aggression."¹³⁵ Additionally, the United Nations Declarations on the Inadmissibility of Intervention in the Domestic Affairs of States¹³⁶ and on Principles of International Law Concerning Friendly Relations and Cooperation Among States, while not mentioning humanitarian intervention explicitly, do condemn intervention in the most general terms.¹³⁷ Despite such sweeping language condemning aggression and intervention both in the General Assembly resolutions and in statements by the various delegations, there is very little specific condemnation of humanitarian intervention to be found during the course of the United Nations debates. At General Assembly debates on the Question of Defining Aggression and on Principles Concerning Friendly Nations and Cooperation Among States, representatives of Mali, Senegal, Jamaica, Chile, and the Netherlands spoke out in favor of humanitarian intervention to remedy gross human rights violations such as genocide.¹³⁸ Opposed to such a doctrine were Nationalist China, Panama, Israel, Mexico, Romania, and a handful of others.

Abstract declarations from the halls of the General Assembly condemning intervention in the broadest terms should not be taken as persuasive evidence of *opinio juris*. Theoretical statements interpreting the Charter as an absolute prohibition on the use of force are both popular and painless. But when nations are faced with a real-world case of intervention to prevent state-sponsored slaughter, they tend to show their true colors. In no single concrete case where extreme conditions warranted humanitarian intervention has the General Assembly or the Security Council explicitly condemned the intervening state for violating article 2(4)—Grenada and Kampuchea notwithstanding.¹³⁹ This silent acquiescence on the part of the vast majority of states constitutes important evidence of their approval of such conduct.¹⁴⁰

The inconsistency between nations' theoretical statements on the prohibition of the use of force and their actual, real-world responses to such use of force is manifest. India, for example, has always championed an absolute interpretation of article 2(4) during United Nations debates, but was still willing to invoke humanitarian grounds in order to justify its intervention in Pakistan.¹⁴¹ More telling perhaps is the widespread agreement among non-Western states at United Nations debates that article 2(4) prevents the use of force to protect nationals

135. G. A. Res. 3314 (XXIX), Definition of Aggression, 29 U.N. GAOR, Supp. (No. 19), U.N. Doc. A/9615 (1974), reprinted in 69 AM. J. INT'L L. 480 (1975).

136. G.A. Res. 12131 (XX) 20 U.N. GAOR Supp. (No. 14), U.N. Doc A/6014 (1965).

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

138. See Fonteyne, *supra* note 135, at 216 n. 78; N. RONZITTI, *supra* note 10, at 106–07.

139. See Fonteyne, *supra* note 10, at 245; Lillich, *supra* note 75, at 244.

140. See *supra* note 126.

141. See Hassan, *supra* note 20, at 886 n.172.

abroad.¹⁴² Yet, no one can seriously maintain that these states would not act, if their own nationals were in serious danger of losing their lives abroad, and they had the capacity to do so.¹⁴³ The fact that these states continue to reject the rescue doctrine at the United Nations debates has, thus, not prevented most international jurists from accepting the lawfulness of such rescue action.¹⁴⁴ Finally, in the rare instances where states have spoken out against humanitarian intervention in the context of a real world case, their statements have almost always been motivated by political, rather than by legal concerns. For example, states comprising the Organization of African Unity have consistently supported humanitarian intervention in South Africa, but rejected it in Biafra. France and Portugal, on the other hand, have attempted to block humanitarian intervention in South Africa, and supported it in Biafra.¹⁴⁵ The Soviet Union and its allies decried the rescue missions in the Congo and Dominican Republic, but supported Vietnam's invasion of Cambodia with humanitarian arguments. Similarly, the Western states unanimously supported the Congo action, while strongly condemning the Cambodia invasion.

In the final analysis, the conviction of most states and scholars who oppose humanitarian intervention is of questionable strength. When states are confronted with real-world instances of intervention to prevent mass slaughter which do not implicate intense global rivalries, such as Uganda and Bangladesh, they will not condemn them.¹⁴⁶ And when scholars who support an absolute interpretation of the prohibition on the use of force are challenged with the moral imperative of terminating genocide, they will go no further than to label armed intervention as a meaningless "technical" breach of the law. In the light of such *de facto* approval by scholars and states of every ideological tendency, an argument rejecting the legality of humanitarian intervention based on *opinio juris* is unpersuasive.

D. The United Nations Charter Revisited

The real-world practice of states has made an utter mockery of the Charter prohibition on the use of force.¹⁴⁷ Those living in the "paper world of the Charter," who stubbornly cling to the original intent of the framers,¹⁴⁸ would do well to remember the fate of the world community's feeble attempt to outlaw war

142. See Fonteyne, *supra* note 135, at 217; N. RONZITTI, *supra* note 10, at 63.

143. See N. RONZITTI, *supra* note 10, at 65-67. The Egyptian raid on Larnaca provides an empirical example of a non-Western state invoking the rescue doctrine. *Id.*

144. See *supra* notes 30-33 and accompanying text.

145. See Wiseberg, *Humanitarian Intervention Lessons from the Nigerian Civil War*, 7 HUMAN RIGHTS J. 61, 89 (1974).

146. *But cf.* N. RONZITTI, *supra* 10, at 108-10 (maintaining that censure of humanitarian intervention by states has been sufficiently widespread to reject the doctrine).

147. See Schachter, *supra* note 20, at 1620; Sornarajah, *supra* note 10, at 58.

148. Lillich, *supra* note 75, at 245.

during the 1920's when no satisfactory substitute was available.¹⁴⁹ Because the prospects for the effective operation of the U.N.'s collective enforcement machinery are virtually non-existent in today's world, it is essential that jurists adopt a "rational and contemporary interpretation of the Charter," that takes account of current state practice. Such an interpretation must conclude that when the United Nations is incapable of functioning as an international enforcer, "self-help prerogatives revive."¹⁵⁰ Failure to adopt an interpretation allowing for self-help to protect human rights will inevitably widen the "credibility gap" between the absolute non-intervention approach to the Charter and the actual practice of states.¹⁵¹ In this event, it will be all too easy to answer the question "[w]hether refusal to compromise on the principle of absolute non-intervention will not threaten the very principle itself."¹⁵²

Scholars who insist on a rigid interpretation of article 2(4) conceive of the Charter as a contract or a precisely drafted piece of legislation. Therefore, they argue, any dispute as to the meaning of the Charter provisions can be resolved by looking to the original intent of the drafters.¹⁵³ Moreover, they are unwilling to accept any modification in the obligations of the contracting parties unless the strict requirements of *rebus sic stantibus*—or fundamental change of circumstances—are met. Thus, because the argument from plain language and original intent support an absolute prohibition on the use of force and because the contracting states could have reasonably foreseen the failure of collective enforcement machinery, these scholars reject a contemporary interpretation of the Charter derived from state practice.¹⁵⁴

Because the language of the Charter is couched in broad phrases, which establish general principles and goals rather than specific rules, it resembles a Constitution far more than it resembles either a contract or a statute.¹⁵⁵ And, if it is indeed "a Constitution we are expounding," then it is essential that it be interpreted in light of the realities of contemporary state practice.¹⁵⁶ As Inis

149. C. RONNING, *LAW AND POLITICS IN INTER-AMERICAN DIPLOMACY* 83 (1963).

150. See W. REISMAN, *NULLITY AND REVISION* 850 (1971).

151. Lillich, *supra* note 75, at 248.

152. C. RONNING, *supra* note 149, at 83. Ronning further notes that:

It can of course continue to be honored in countless declarations and protests but if it does not square with the hard facts of international politics, that will be the extent of its honor.

Id.

153. See Farer, *supra* note 7, at 390.

154. See Farer, *supra* note 7. See also, I. BROWNLIE, *supra* note 126, at 145.

155. Wright notes that "[t]he Charter, as has often been pointed out, is not a model of precise drafting. It is full of ambiguities and even inconsistencies making impossible wide divergencies of interpretation and development." Q. WRIGHT, *INTERNATIONAL LAW AND THE UNITED NATIONS* 33 (1960). He continues, "the symbolic preamble and the broad assertions of purposes and principles, provide ample opportunity for supplementing, complementing, or modifying their apparent meaning." *Id.* at 33-34.

156. *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 407 (1819).

Claude suggests, “[w]hat the Charter purports to require is less significant than what its members require it to import”¹⁵⁷ Based on their practice, what the states require the Charter to import is a narrow exception to article 2(4) for humanitarian intervention to prevent mass slaughter.¹⁵⁸

Evidence of state practice alone is not sufficient to modify the Charter. It is also necessary to show that such state practice is consistent with the Charter’s general principles and purposes. This requirement is easily met as the Charter accords paramount importance to the international protection of human rights.¹⁵⁹ The Preamble of the Charter itself expresses the determination of the people of the world “to reaffirm faith in human rights” and “in the dignity and worth of the human person.”¹⁶⁰ Citing the preamble and the critical, first article of the Charter,¹⁶¹ Reisman notes that these provisions “framed in the awful shadow of the atrocities of the war, left no doubt as to the intimate nexus that the framers perceived to link international peace and security and the most fundamental human rights of all individuals.”¹⁶² This intimate nexus was strongly reaffirmed in the Universal Declaration of Human Rights which states that “the inherent dignity and . . . equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”¹⁶³ The Security Council is specifically empowered to adopt enforcement measures under Chapter VII against any state if it considers such measures necessary for the maintenance of international peace and security.¹⁶⁴ If the Security Council is powerless to take such measures, it would be consistent with the broad purposes of the Charter to interpret Articles 55 and 56, which authorize “joint and separate action” to promote “universal respect for, and observance of, human rights,” as including a

157. I. CLAUDE, *THE CHANGING UNITED NATIONS* 53 (1967).

158. See Sornarajah, *supra* note 10, at 58; note 108 *supra* and accompanying text.

159. See H. LAUTERPACHT, *supra* note 28, at 178 (“human rights and freedoms, having become the subject of a solemn international obligation and of one of the fundamental purposes of the Charter, are no longer a matter which is essentially within the domestic jurisdiction of the Members of the United Nations”); Lillich, *supra* 75, at 240.

160. U.N. CHARTER Preamble, para. 1(2)

161. Article 1 commits the United Nations “[t]o achieve international cooperation in solving international problems of [a] . . . humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms. . . .” U.N. CHARTER art. 1, para. 3.

162. Reisman with McDougal, *supra* note 10, at 171. See also B. HARFF, *supra* note 99, at 73 (noting that even the leading Soviet scholar, Tunkin, affirms existence of “close link between a state’s ensuring basic human rights and freedoms and the maintenance of international peace and security”); Suzuki, *supra* note 23, at 251–52.

163. G.A. Res. 217 A. 3 U.N. GAOR, (pt. 1) at 71, U.N. Doc A/810 (1948). The Universal Declaration of Human Rights is considered customary international law. See *South West Africa*, [1966] I.C.J. 4, 291 (dissenting opinion of Tanaka, J.) 441 (dissenting opinion of Jessup, J.); *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. 16, 31, 36. [1971]; *Western Sahara Advisory Opinion*, 1975 I.C.J. 12, 31–33.

164. U.N. CHARTER arts. 24, 39.

limited right of humanitarian intervention.¹⁶⁵ Interpreting the Charter to accord such a right would go a long way toward closing the credibility gap between the fantasy of an absolute prohibition on the use of force and the stark reality of state practice.

Acceptance of the view that state practice can, in effect, amend the United Nations Charter will by no means emasculate the prohibition on the use of force. Specifically, the fact that states have aggressively used force time and time again since the Charter's ratification means only that states have repeatedly violated article 2(4), not that they have, by their practice, modified the article's prohibition out of existence. The distinction between practice that changes a rule of law (humanitarian intervention) and practice that breaks a rule of law (aggressive use of force) is that in the former case, the state admits the characterization of its practice but simultaneously asserts that such practice does not violate the law, while in the latter case, the state simply denies the characterization of its practice altogether. Thus, in the case of a state carrying out a humanitarian intervention, the state will concede that its intervention was, in fact, humanitarian but will

165. Article 55 of the Charter reaffirms that the United Nations shall promote "universal respect for, and observance of, human rights and fundamental freedoms for all . . ." U.N. CHARTER art. 55. Article 56 provides that "All Members pledge themselves to take joint and separate action in cooperation with the organization for the achievement of the purposes set forth in Article 55." U.N. CHARTER art. 56.

This article argues that state practice has modified the Charter by providing a limited exception for humanitarian intervention to the article 2(4) prohibition on the use of force. Strangely enough, others who argue for such an exception seem to suggest that this was the actual intent of the framers:

Hence, the cumulative effect of the Charter in regard to the basic policies of the customary institution of humanitarian intervention is to create a coordinate responsibility for the active protection of human rights: members may act jointly with the organization in what might be termed a new organized, explicitly conventional, humanitarian intervention or singly or collectively in the customary or international common law humanitarian intervention. Any other interpretation would be suicidally destructive of the explicit major purposes for which the United Nations was established.

McDougal & Reisman, *supra* note 10, at 444. See also Suzuki, *supra* note 23, at 251–52. In another work, Reisman and McDougal actually contend that the "Charter strengthened and extended humanitarian intervention." Reisman with McDougal, *supra* note 10, at 171.

This article does not attempt to argue that the original intent of the framers of the U.N. Charter was to strengthen humanitarian intervention. On the contrary, it admits that the prohibition on the use of force was intended to be absolute. The argument presented here is that state practice has modified the Charter and that that modification is legitimate because it is not inconsistent with the Charter's general purposes. The article also rejects an interpretation of the Charter that attempts to reconcile humanitarian intervention with the language of article 2(4) or article 51. The article 2(4) argument that humanitarian intervention does not violate territorial integrity or political independence is untenable because it contradicts the plain language of the Charter and relies on original intent when the article was clearly intended as an absolute prohibition. See *supra* notes 23–47 and accompanying text. As for an article 51 argument based on self-defense, the proposition that a state acts in self-defense when it uses force to protect the nationals of the target state is too absurd to take seriously. See Akehurst, *supra* note 23, at 107; see also Fonteyne, *supra* note 10, at 252–53.

argue that the intervention still did not violate international law. And, in the case of a state that engages in aggressive use of force, the state will always deny it used force aggressively by invoking doctrines such as self-defense.¹⁶⁶ Moreover, unlike a humanitarian intervention, an aggressive armed intervention could never be consistent with the general principles and purposes of the United Nations Charter.

Acceptance of a new interpretation of article 2(4) based on the concept that state practice can amend it also ultimately poses a much smaller danger to the continued integrity of the prohibition on the use of force than does an argument for humanitarian intervention based on restrictive interpretation of the article's original language. An argument to amend the Charter's prohibition based on state practice necessarily requires consent by states of all ideological tendencies and, in light of the great reluctance of states to permit any new exceptions to the prohibition on the use of force, such ideological consensus will always create a significant barrier to change. On the other hand, an argument to allow a certain class of interventions based solely on a reinterpretation of article 2(4)'s language not only does not depend on the agreement of the international community, but can logically be made even in the face of the widespread disapproval of states. Moreover, any exception to the Charter's prohibition on the use of force arising from the practice of states will necessarily be narrowly defined and limited by the nature of that practice. In the case of the argument based on reinterpretation of articles 2(4)'s language, however, the exception to the use of force would sweep far more broadly as a state would need only assert that the purpose of its use of force was neither to violate territorial integrity nor political independence in order to stay outside the article's prohibition.¹⁶⁷ Ultimately, an argument for humanitarian intervention based on practice rather than purpose will be far less destructive to the Charter's prohibition on the use of force and far more conducive to a stable world legal order.

VI. HUMAN INTERVENTION AND THE WORLD LEGAL ORDER

The fear of abusive invocation of humanitarian intervention lies at the heart of the argument of virtually every scholar who rejects the doctrine. They fear that

166. The example of the international legal prohibition on torture is also instructive. The fact that many states routinely practice torture has not prevented courts and commentators from concluding that the prohibition on torture is now a customary rule of international law. *See, e.g., Filartiga v. Pena-Irala*, 630 F.2d 876, 880–85 (2d Cir. 1980), RESTATEMENT, FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) (1982). The principal reason for this is that states practicing torture almost never admit to such practice, nor do they ever assert an international legal right to torture their own citizens. On the contrary, it has been the experience of the United States Department of State that “[w]here reports of torture elicit some credence, a state usually responds by denial or less frequently, by asserting that the conduct was unauthorized or constituted rough treatment short of torture.” Memorandum of the United States as *Amicus Curiae* quoted in *Filartiga*, *supra* at 884.

167. *See supra* text accompanying notes 22, 23.

powerful states will hide their aggressive and imperialistic military adventures behind a spurious facade of lofty and idealistic motives.¹⁶⁸ They argue that history is replete with examples of states invoking bogus humanitarian grounds to justify their aggressive behavior.¹⁶⁹ These scholars are particularly fond of quoting Hitler's reference to the maltreatment of Aryan minorities before invading Czechoslovakia, but also cite such infamous post-war examples as the Soviet invasions of Hungary in 1956 and Czechoslovakia in 1968, the American invasion of Vietnam, and the Vietnamese invasion of Cambodia.¹⁷⁰

In the opinion of this author, the argument based on abuse is singularly unpersuasive. In the first place, if states have, in fact, invoked fraudulent humanitarian grounds in the post-Charter era, then the genie is already out of the bottle: States are obviously content to risk the condemnation of the world community and could care less if scholars are labeling their conduct a "technical" breach of the law. Moreover, the historical record only proves that abuse of the doctrine of humanitarian intervention is so obviously transparent as to render it harmless. Certainly, no nation was fooled by the humanitarian smokescreen for Hitler's invasion of Czechoslovakia or Vietnam's invasion of Cambodia as the negative reaction of the world community bears out.¹⁷¹

Because it requires the articulation of precise criteria by which to judge the legality of an intervention, the doctrine of humanitarian intervention actually enhances the ability of the world community to safeguard against abuse.¹⁷² Finally, and most importantly, the problem of potential abuse is "common to all legal policy, doctrine or rule."¹⁷³ The Soviet Union, for example, has justified its invasion of Afghanistan as a response to the invitation of local authorities. Yet, no one is seriously arguing for rejection of the principle that intervention upon the request of the host government should be unlawful. Similarly, in the case of humanitarian intervention, it would be a mistake not to recognize "an inherently just principle [merely] because of the possibility of non-genuine invocation."¹⁷⁴

The inherent morality of humanitarian intervention is almost universally ac-

168. See, e.g., I. BROWNLIE, *supra* note 126, at 148; Clark, *supra* note 25, at 213; Claydon, *supra* note 122, at 56; Farer, *supra* note 10, at 393; Franck & Rodley, *supra* note 7, at 290; Friedman, *supra* note 75, at 578; Hassan, *supra* note 20, at 910-11; Schachter, *supra* note 20 at 1629.

169. See, e.g., Franck & Rodley, *supra* note 7, at 286.

170. See letter from Adolf Hitler to Neville Chamberlain, reprinted in Franck & Rodley, *supra* note 7, at 284. See also *id.*, at 285-86.

171. See Fonteyne, *supra* note 135, at 220.

172. See Fonteyne, *supra* note 10, at 249; Lillich, *supra* note 10, at 218; Sornarajah, *supra* note 10, at 62. Criteria for evaluating the legitimacy of humanitarian intervention have been formulated by several scholars. See Behuniak, *supra* note 10, at 186-88; Fonteyne, *supra* note 10, at 258-68; Lillich, *supra* note 27, at 347-51; Moore, *supra* note 22, at 263-64. Broadly speaking they fall into three general categories: substantive, procedural and preferential.

173. M. McDUGAL & F. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER* 416 (1961).

174. Fonteyne, *supra* note 10, at 269 (quoting Rolin-Jacquemyns).

cepted.¹⁷⁵ Indeed, it seems mere sophistry to suggest that it is the duty of a state to sit back and watch as millions are mercilessly slaughtered in Nazi Germany, Bangladesh, Kampuchea, or elsewhere around the world.¹⁷⁶ As Westlake writes:

It is idle to argue in such a case that the duty of the neighbouring people's[sic] is to look on quietly. Laws are made for men and not for creatures of the imagination, and they must not create or tolerate for them situations which are beyond the endurance, we will not say of average human nature, since laws may fairly expect to raise the standard by their operation, but of the best human nature that at the time and place they can hope to meet with.¹⁷⁷

Unless the opponents of humanitarian intervention address the moral argument, they will be eternally condemned to "an arid textual approach" that sacrifices humanity and decency for the false sanctity of an abstract legal norm.¹⁷⁸

The normative argument for humanitarian intervention based on immutable abstract principles of natural law is unlikely to persuade those jurists who maintain that law is concerned only with actual behavior and is value neutral.¹⁷⁹ Nevertheless, the positivists' insistence that law can only be discovered through its sanctions should lead them to reject dogmatically the lawfulness of humanitarian intervention to prevent genocide.¹⁸⁰ Because "the protection of life is a minimum essential quality of any legal system," genocide, which destroys the basis of human existence, bridges the gap between law and politics.¹⁸¹ As Harff argues, the prohibition of genocide "is a component of both natural law and positive law; it signifies the point at which ethical ideals become identical with 'the logical ideal.'"¹⁸² Because protection against genocide must be the minimum guarantee of any juridical system, it is essential that the international legal order provide adequate sanctions. In a primitive legal system where there is no overarching authority to assure compliance with its rules, the only hope for such sanctions is that individual states will resort to the principle of self-help to punish those who would commit mass slaughter.¹⁸³

The international community has universally recognized that genocide is a

175. See Bogen, *supra* note 10, at 302–03; notes 124–26 *supra*, and accompanying text. Scholars who are opposed to humanitarian intervention but admit its morality include I. BROWNLIE, *supra* note 7, at 301; Farer, *supra* note 7, at 151; Franck & Rodley, *supra* note 7, at 278.

176. See, e.g., Behuniak, *supra* note 10, at 190; B. HARFF, *supra* note 99, at 25, 28; JENKS, A NEW WORLD OF LAW? 30 (1969); Lillich, *supra* note 27, at 344; Moore, *supra* note 22, at 263; Somarajah, *supra* note 10, at 70.

177. J. WESTLAKE, INTERNATIONAL LAW, 307 (1904).

178. See Fairley, *supra* note 46, at 61–62. In the midst of the Biafra tragedy, Arthur Leff presented the issue of humanitarian intervention in the starkest terms when he wrote: "Forget all the blather about international law, sovereignty and self-determination, all that abstract garbage: babies are starving to death. . . ." *Quoted in* Farer, *supra* note 7, at 151.

179. See B. HARFF, *supra* note 99, at 28. See also L. HENKIN, INTERNATIONAL LAW 4–5 (1980).

180. See, e.g., H. KELSEN, GENERAL THEORY OF LAW AND STATE 62 (1949).

181. B. HARFF, *supra* note 99, at 49. See also *id.*, at 31, 36.

182. *Id.*, at 36.

183. *Id.*, at 23, 37.

crime against the law of nations. Adopted in 1948, the Genocide Convention itself confirms that "genocide, whether committed in time of peace or in time of war, is a crime under international law," which the contracting parties "undertake to prevent and to punish."¹⁸⁴ It is not necessary that a state have expressed itself willing to be bound by the Genocide Convention or the other U.N. conventions on human rights,¹⁸⁵ because these instruments articulate customary minimum rules and, therefore, have the force of positive international law.¹⁸⁶ The protection of basic human rights has thus become a matter of international concern and it is now too late to argue that the domestic jurisdiction principle shields states in matters that shock the conscience of mankind.¹⁸⁷

The failure to apply sanctions when a state violates the "minimum obligation of national government" by slaughtering its own citizens undermines the credibility of the international legal system.¹⁸⁸ Thus, by finally "vindicating the law of nations against outrage," humanitarian intervention will help produce a more stable world order.¹⁸⁹ The need for coercive measures is all the more apparent since, as Fitzmaurice notes, the "loss of life and certain kinds of grave physical injury are irremediable. No subsequent action, remedy, redress or compensation can bring the dead to life or restore their limbs to the maimed. There is no remedy except prevention."¹⁹⁰ Given the paralysis of collective enforcement

184. CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE, Dec. 9, 1948, Art. I, 78 U.N.T.S. 280 (entered into force Jan. 12, 1951).

185. See INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, G.A. Res. 2200, 21 U.N. GAOR, U.N. Doc. A/6316; (1966) UNIVERSAL DECLARATION OF HUMAN RIGHTS, G.A. Res. 217A, U.N. Doc. A/810 (1948); Article 3 of the Declaration of Human Rights provides that "[e]veryone has the right to life, liberty and security of person."

186. See Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, [1951] I.C.J. 15, 23 ("principles underlying the Convention are principles which are recognized by civilized nations as binding on states, even without any conventional obligation"); L. SOHN & T. BUERGENTHAL, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 518-19, 522 (1973) (citing Montreal statement of unofficial Assembly for Human Rights that the "Universal Declaration of Human Rights constitutes an authoritative interpretation of the Charter of the highest order, and has over the years become a part of customary international law"). See also De Schutter, *Humanitarian Intervention: A United Nations Task*, 3 CAL. W. INT'L L.J. 21, 28 (1972); D. HARFF, *supra* note 99, at 14 (international law prohibits mass slaughter whether or not acts constitute genocide as defined in Convention on Genocide). *But see* Lane, *supra* note 15.

187. See *supra* note 17. See also DeSchutter, *supra* note 187, at 27; Ermacora, *Human Rights and Domestic Jurisdiction*, 124 RECUEIL DES COURS 371, 436 (1968); Lillich, *supra* note 27, at 338; Reisman with McDougal, *supra* note 10, at 172. The principle of article 2(7) of the United Nations Charter which prevents intervention by the United Nations "in matters which are essentially within the domestic jurisdiction of any state" is, therefore, inapplicable in cases involving serious violations of human rights. See Behuniak, *supra* note 10, at 179-80; Fonteyne, *supra* note 10, at 240-241.

188. B. HARFF, *supra* note 99, at 9. See also Suzuki, *supra* note 23, at 234-35.

189. E. STOWELL, *supra* note 14, at 51-52; See also Fonteyne, *supra* note 10, at 269; B. HARFF, *supra* note 99, at 65-67; H. LAUTERPACHT, *supra* note 28, at 32.

190. Fitzmaurice, *The General Principles of International Law Considered From the Standpoint of the Rule of Law*, 92 RECUEIL DES COURS 5, 173 (II-1957).

machinery, only the sanction of humanitarian intervention can protect the most basic values of human life and dignity.¹⁹¹ Although such a course will inevitably involve certain risks, the alternative of inaction is morally unacceptable and at least equally dangerous. As the Thomases put it:

[T]here is deemed to exist a conflict between the defense of human rights through external intervention and a consideration of international peace threatened by such intervention. Historical hindsight proves that in the long run the conflict is more apparent than real, for peace is more in danger from tyrannical contempt for human rights than from attempts to assert, through intervention, the sanctity of the human personality.¹⁹²

CONCLUSION

The argument against a right of humanitarian intervention is based primarily on an absolute interpretation of the article 2(4) prohibition on the use of force and the fear of abusive invocation of the doctrine. The reality of current state practice, however, has rendered the absolute prohibition of the Charter meaningless. Thus, there exists a compelling need for a contemporary and realistic interpretation of article 2(4) based on state practice that recognizes an exception to the Charter prohibition when force is required to prevent mass slaughter. Moreover, history has demonstrated that the fear of abuse is vastly exaggerated and that the international community has the capacity to distinguish between aggressive imperialistic uses of force and armed intervention to prevent mass slaughter. Ultimately, because there is no supranational police force and criminal court to prevent and punish gross derogations of international responsibility, the sanction of international law depends on the willingness of the international community to isolate and ostracize those who would transgress their international obligations. Yet, if international law divorces itself completely from morality, the international community will not object and violations will not only go unpunished, but also unnoticed. Having lost its sole power—the ability to influence behavior by persuasion—international law will face the danger of extinction. Recognition of the legality, as well as the morality, of the right of humanitarian intervention is, therefore, essential to the preservation and advancement of the world legal order.

191. See B. HARFF, *supra* note 99, at 7, 47, 66–67; Lillich, *supra* note 75, at 241. Some authors argue that the use of armed force to prevent mass slaughter will only increase death and human misery. See, e.g., I. BROWNLIE, *supra* note 10, at 224; Fairley, *supra* note 46, at 63. The historical record of Bangladesh, Uganda and even Kampuchea flies in the face of such claims. See e.g., Lillich, *supra* note 75, at 241.

192. See A. Thomas and A. Thomas, *supra* note 11, at 374.