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# Self-Determination and Humanitarian Intervention in a Community of Power

## Keywords

Self-Determination, Human Rights Law, International Law: History, War

# Self-Determination and Humanitarian Intervention in a Community of Power

JAMES A.R. NAFZIGER\*

The night can sweat with terror as before  
We pieced our thoughts into philosophy,  
And planned to bring the world under a rule,  
Who are but weasels fighting in a hole.

—W. B. Yeats<sup>1</sup>

In the gradual transition from a balance of power system of international relations to a community of power,<sup>2</sup> forces of both integration and fragmentation have gained momentum.<sup>3</sup> Economic integration of the European Community, for example, has been offset by political disintegration to the east and a resurgence of policy differences throughout the continent. In the Middle East, Iraq's acceptance of greater Kurdish autonomy may be a trade-off for reintegrating Iraq into regional and international relationships and restoring its access to foreign trade markets. China, Taiwan and the two Koreas acknowledged their political divisions in return for greater integration into global institutions. As these adjustments to a new order demonstrate, short-term fragmentation may enhance or detract from long-term integration. The forces are both comple-

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1. *Nineteen Hundred and Nineteen*, in *SELECTED POEMS AND TWO PLAYS OF WILLIAM BUTLER YEATS* 109 (Macha Louis Rosenthal ed., 1962). This passage, which concludes the stanza that begins, "Now days are dragon-ridden, the nightmare [r]ides upon sleep," reflects on the Irish "Troubles" following the 1916 Easter Rebellion during World War I. In *The Second Coming*, Yeats opens on a similar note of despair about the centrifugal tendencies of the world around him:

Turning and turning in the widening gyre  
The falcon cannot hear the falconer;  
Things fall apart; the centre cannot hold;  
Mere anarchy is loosed upon the world.

*Id.* at 91. The anxious, contemporary ring of these lines may soften if one considers the Wilsonian legacy from the same period of international institutions to help restore and maintain order.

2. "There must be, not a balance of power, but a community of power; not organized rivalries, but an organized common peace." Address by Woodrow Wilson to the United States Senate (January 22, 1917), reprinted in 40 *THE PAPERS OF WOODROW WILSON*: NOV. 20, 1916 - JAN. 23, 1917, 536 (Arthur Link ed., 1982).

3. See John L. Gaddis, *Toward the Post-Cold War World*, 70 *FOREIGN AFF.* 102 (1991) (discussion of the forces of integration in global communications, economics, security, ideas, and peacemaking; and fragmentation, especially of states such as the Soviet Union and Yugoslavia under internal pressures for self-determination by constituent republics and regions).

mentary and antithetical in the fluctuating circumstances of the post-Cold War era.

For lawyers, this process of change raises a welter of issues, of which claimed rights of self-determination and humanitarian intervention are prominent.<sup>4</sup> When should international law bless self-determination that fragments previously unified "nations," or authorize the use of force for humanitarian reasons? Is self-determination alone a valid justification for humanitarian intervention? What means of giving effect to either of these claimed rights are appropriate and feasible? When is unilateral intervention for humanitarian reasons acceptable in the absence of an effective system of peaceful dispute resolution and collective security under the United Nations Charter? What should be the role of the United Nations in implementing self-determination and humanitarian intervention during a transition to a community of power? When do concerns about human rights — whose immediate promotion and protection have generally been left to domestic authority — become issues of international peace and security? How can the UN reconcile its intervention on behalf of human rights with rules and principles of non-interference in the domestic affairs of states? How can multilateral mechanisms be improved to respond more efficiently and effectively to issues of self-determination and humanitarian intervention?

Answers to such questions have been exceptionally difficult for three reasons: (1) the vagueness of international standards for self-determination and humanitarian intervention, unilateral or collective; (2) the reliance of enforcement measures on an accurate description of often controversial facts and unilateral interpretations of critical events and norms; and (3) the fragility of multilateral means to avoid and resolve disputes. Although the concepts of self-determination and humanitarian intervention are well-established in diplomatic communication and enshrined in international legal debates, their content remains disappointingly vague. They do provide a basic vocabulary for claim and counterclaim and for resolving disputes. In spite of this, they have never assisted effectively in resolving concrete problems, except in the most obvious contexts. For example, although the issue of self-determination has figured prominently in debates about the Falkland/Malvinas Islands, the United Nations has come to no definitive conclusion about its applicability, because of confusion about the meaning and scope of the right.<sup>5</sup>

In the post-Cold War system, however, multilateralism offers a promising and practical alternative to jurisprudential hairsplitting and a jumbled practice of states to guide decisions about claims of self-determina-

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4. Among the troublesome legal issues of the post-Cold War era, self-determination and humanitarian intervention are singled out for attention in this article because of their growing prominence and interrelationship. International and regional institutions may also improve the implementation of both.

5. See MICHAEL AKEHURST, *A MODERN INTRODUCTION TO INTERNATIONAL LAW* 296-97 (5th ed. 1984).

tion and humanitarian intervention. The community of power, though still incipient, is becoming a reality. The end of East-West bipolarity and a confidence in the United Nations and regional frameworks has presented new opportunities for improved standard-setting, fact-finding and mediated responses to self-determination and humanitarian intervention claims. Of course, favoring multilateral responses to national crises of international significance is nothing new. What is new is the heightened capacity of multilateral institutions to do so.

This study will first revisit the battle-strewn terrain of self-determination and humanitarian intervention in order to highlight the aridity of those rights.<sup>6</sup> As the study later suggests, however, the post-Cold War era may be a good time for the global community to move on to the more fertile ground of multilateralism. It seems time, in other words, to shift attention and resources from endless debates about terminology and historical justification to more practical discussions about reconciling conflicting interests in an emerging community of power. The past is significant prologue to a consideration of alternatives for constructing a better world order.<sup>7</sup>

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6. The literature on these topics is vast. For bibliographical references, see BURNS WESTON ET. AL., *INTERNATIONAL LAW AND WORLD ORDER* 737 (2d ed. 1990) (self-determination and minority rights); *id.* at 964 (humanitarian intervention); FERNANDO TESÓN, *HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY* (1988) (humanitarian intervention).

7. Struggles of external and internal self-determination, like instances of intervention, are kaleidoscopic. For example, in just one month (March 1990, which the author randomly selected), the following events occurred: the first nonpartisan elections were held in the Soviet Union; Boris Yeltsin won a seat in the Russian Supreme Soviet; the Third Soviet Congress of People's Deputies repealed a constitutional guarantee of Communist Party monopoly; Mikhail Gorbachev was elected to a newly defined presidency with broader powers; the Supreme Soviet of Georgia denounced its incorporation 49 years earlier into the Soviet Union, apparently unwilling to wait for a 50th birthday cake; Estonia declared its right to secede from the Soviet Union; and Lithuania declared its independence, formed a coalition government, and was confronted by Soviet convoys and paratroopers.

Also in March 1990, Soviet troops began to withdraw from Hungary; free elections were held in East Germany; and Serbia assumed direct control of police in rebellious Kosovo, the ethnically Albanian, supposedly autonomous region. In South Africa, Nelson Mandela, recently released from prison, assumed leadership of the African National Congress; called for a continuation of United Nations sanctions against his country, and prepared for first-ever talks with President de Klerk, just as South African troops intervened in the "homeland" of Ciskei. Elsewhere in Africa, Namibia gained independence with help from the United Nations, after 75 years of South African control, and promptly became a U.N. member; France airlifted troops to reestablish order in Gabon, which had been torn by pro-democracy strikes and protests; and in Zimbabwe, Robert Mugabe, running against the historical tide, termed his party's landslide election a "mandate to create a one-party state." In Latin America, among other events: Grenada experienced a peaceful transition of governments after parliamentary elections; and Nicaragua ended its long civil war after United Nations-assisted elections, beginning a remarkable government transition under UN supervision. In Asia, India withdrew the last of its peace-keeping troops from Sri Lanka, and sent in its security police against Muslim insurgents in Kashmir. Coercive measures against political dissidents in China increased. See generally Peter Hayes, *Chronology 1990*, 70:1 *FOREIGN AFF.* 206 (1991).

## I. SELF-DETERMINATION

In today's world, a global identity crisis pits popular aspirations against national and international cohesion, ensuring that struggles for self-determination will play a major role in global affairs. In addition, global communication has introduced a new kind of domino effect, in which the achievement of liberty in one country seems to cause repressive regimes to topple, or at least to wobble, in others.<sup>8</sup> National issues of self-determination quickly become issues of international peace and security. Claims for *internal* self-determination — the right of peoples to determine their domestic political, economic and social systems democratically — have become as resonant as claims for *external* self-determination — the right of peoples to determine their institutions and way of life free of outside control or interference.

The origin of self-determination, as a right of peoples rather than individuals, lies in critiques of sovereignty by Grotius and Pufendorf and in the libertarian movements of the eighteenth century.<sup>9</sup> With its claim of inalienable rights, the United States' Declaration of Independence provided the cornerstone for a modern regime of popular aspirations. In the twentieth century, Woodrow Wilson and V.I. Lenin both championed the principle of self-determination.<sup>10</sup> The peace treaties following World War I established a nation-system in Europe and regimes of rights for minority populations based on what was then regarded as a fledgling principle of self-determination. The Covenant of the League of Nations established a measure of self-determination for mandated territories, but did not articulate a general principle.<sup>11</sup> The Atlantic Charter<sup>12</sup> influenced delegates to the San Francisco Conference in 1945 to incorporate a general principle of self-determination into Article 1(2) of the United Nations Charter. Accordingly, a central purpose of the organization is to, "develop friendly relations among nations based on respect for the principle of equal rights and *self-determination* of peoples, and to take other appropriate mea-

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What may be most striking about the events of March 1990, or any month in this extraordinary period of time, is the following: first, the variety of ways in which self-determination was expressed; second, the frequency of state intervention, sometimes assisting popular aspirations from inside and outside but too often suppressing them; and, third, the increasing role of United Nations intervention of various kinds on behalf of self-determination and democracy.

8. "A new kind of domino theory has emerged, in which the achievement of liberty in one country causes repressive regimes to topple, or at least wobble in others." Gaddis, *supra* note 3, at 103.

9. SARAH WAMBAUGH, A MONOGRAPH ON PLEBESCIDES WITH A COLLECTION OF SPECIAL DOCUMENTS 1, 4 (1920) (an excellent treatise on self-determination in the nineteenth and early twentieth centuries).

10. See ROBERT SCHAEFFER, WARPATHS: THE POLITICS OF PARTITION (1990).

11. For a summary of pertinent pre-World War II history, see Daniel Thürer, *Self-Determination*, in 8 ENCYC. PUB. INT'L L. 470 (Rudolph Bernhardt ed., 1981).

12. See Edward Laing, *The Contribution of the Atlantic Charter to Human Rights Law and Humanitarian Universalism*, 26 WILLAMETTE L. REV. 113 (1989).

tures to strengthen universal peace.”<sup>13</sup> Provisions in Articles 55,<sup>14</sup> 73<sup>15</sup> and 76(1)<sup>16</sup> were intended to confirm the principle. Article 21(3) of the Universal Declaration of Human Rights, which provides a customary elaboration of Article 55, states that, “The will of the *people* shall be the basis of the authority of government.”<sup>17</sup> This provision merits special attention. Although the Universal Declaration does not refer to self-determination by that term, Article 21(3) stands out in this first International Bill of Rights because of its attribution of a democratic right to a “people” rather than to individuals. The coincidence of the political will of the people with a full expression of self-determination is apparent. Some

13. U.N. CHARTER art. 1(2)(emphasis added).

14. Article 55.

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and *self-determination* of people, the United Nations shall promote:

- a. higher standards of living, full employment, and conditions of economic and social progress and development;
- b. solutions of international economic, social, health, and related problems; and international cultural and educational co-operation; and
- c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

*Id.* art. 55 (emphasis added).

15. Article 73.

Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end:

....

- b. to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement . . . .

*Id.* art. 73.

16. Article 76.

The basic objectives of the trusteeship system, in accordance with the Purposes of the United Nations laid down in Article 1 of the present Charter, shall be:

....

- b. to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement . . . .

*Id.* art. 76. (emphasis added).

17. Universal Declaration of Human Rights, art. 21(3), G.A. Res. 217, U.N. Doc. A/810, at 75 (1948) [hereinafter Universal Declaration].

have argued, therefore, that the Universal Declaration can be interpreted to endorse a political right of *internal* self-determination. Thus, what originated in the seventeenth and eighteenth centuries as an *external* right of people to be free of foreign domination, was arguably broadened under the Universal Declaration (and by reference, the Charter) into an *internal* right of democratic franchise.<sup>18</sup> This argument is controversial, however, both because it is based on a provision of the Universal Declaration that makes no explicit reference to self-determination and because the existence of a right of *internal* self-determination is itself controversial.

The right of self-determination has been most clearly recognized in the context of post-World War II decolonization. Indeed, the Declaration on the Granting of Independence to Colonial Countries and Peoples, which was unanimously adopted by the United Nations General Assembly, provided the first detailed articulation of the right.<sup>19</sup> The International Court of Justice helped develop the right of self-determination in two cases arising out of colonialism. In the *Namibia* case,<sup>20</sup> the Court affirmed the applicability of self-determination in non-self-governing territories. In the *Western Sahara* case,<sup>21</sup> the Court simply proclaimed the right of peoples to determine their political status by their freely expressed will. Numerous General Assembly and Security Council resolutions have applied a right of self-determination to condemn racist regimes, particularly in Rhodesia and South Africa, and to vindicate the rights of Palestinians.<sup>22</sup>

The most important provision for a general right of self-determina-

18. Jordan Paust, *International Legal Standards Concerning the Legitimacy of Governmental Power*, 5 AM. U.J. INT'L L. & POL'Y 1063 (1990).

19. The Declaration states:

2. All peoples have the right to *self-determination*; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

5. Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom.

Declaration on the Granting of Independence to Colonial Countries and Peoples, G. A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. A/4684 (1960)(emphasis added).

20. Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, 1971 I.C.J. 16 (June 21). See generally JOHN DUGARD, *THE SOUTH WEST AFRICA/NAMIBIA DISPUTE* (1973).

21. Advisory Opinion on Western Sahara, 1975 I.C.J. 12, 31-35 (Oct. 16, 1975).

22. For a partial listing of these documents, see Lung-Chu Chen, *Self-Determination as a Human Right*, in *TOWARD WORLD ORDER AND HUMAN DIGNITY* 198, 252, nn. 85-86 (W. Michael Reisman & Burns Weston eds., 1976).



tion is found in Articles 1(1) and (3) of the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights,<sup>23</sup> both of which entered into force in 1976. It is significant that the two Covenants correlate self-determination with political freedom, and that this is not explicitly limited to freedom from external (foreign) domination.

Other instruments substantiate this right of self-determination. The 1970 Declaration on Friendly Relations provides that, "By virtue of the principle of equal rights and self-determination . . . all peoples have the right to determine, without external interference, their political status . . . and every State has the duty to respect this right in accordance with the provisions of the Charter . . . [and] the duty to promote . . . self-determination of peoples . . ." <sup>24</sup> The Final Act (Helsinki Accords) of the Conference on Security and Co-operation in Europe (CSCE), which has played a significant role in reshaping Eastern Europe and the Soviet Union, provides a recital of the right of self-determination<sup>25</sup> that concisely encapsu-

23. The Covenants state:

1. All peoples have the right of *self-determination*. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. . . .

. . . .

3. The States Parties to the present Covenant . . . shall promote the realization of the right of *self-determination*, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

International Covenant on Civil and Political Rights, art. 1, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966); International Covenant on Economic, Social and Cultural Rights, *id.* at 49 (emphasis added)[hereinafter Covenants].

24. Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, G. A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1970) [hereinafter Declaration on Friendly Relations].

25. The Helsinki Accords state:

PRINCIPLE VIII

The participating States will respect the equal rights of peoples and their right to *self-determination*, acting at all times in conformity with the purposes and principles of the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of States.

By virtue of the principle of equal rights and *self-determination* of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development.

The participating States reaffirm the universal significance of respect for and effective exercise of equal rights and *self-determination* of peoples for the development of friendly relations among themselves as among all States; they also recall the importance of the elimination of any form of violation of this principle.

Conference on Security and Cooperation in Europe (CSCE): Final Act, Aug. 1, 1975, Principle VIII, *reprinted in* 14 I.L.M. 1292, 1295 (1975) [hereinafter Helsinki Accords] (emphasis added).

lates current thinking.<sup>26</sup>

Subsequent instruments of the CSCE have incorporated the following language: "We reaffirm the equal rights of peoples and their right to *self-determination* in conformity with the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of states."<sup>27</sup> Unfortunately, the CSCE documents do not elaborate the right any further, so that their reaffirmation of it might be interpreted either as boiler-plate language or, more likely, terms of art elaborated in other instruments.

The context of the CSCE reaffirmation suggests that the right of self-determination was intended to be quite narrow. In the Charter of Paris the right appears under the heading, "Friendly Relations among Participating States,"<sup>28</sup> rather than "Human Dimension."<sup>29</sup> The latter heading refers to the salient commitments of CSCE members in implementing human rights and fundamental freedoms. Because the "Human Dimension" section devotes particular attention to the rights of national minorities, it is reasonable to infer that, as in the Helsinki Accords, the internal rights of national minorities do not fall within the definition of self-determination in the Charter of Paris.

The Copenhagen Document<sup>30</sup> reinforces this construction. The ab-

26. Note these useful conclusions drawn from Principle VIII:

— One, it clearly applies to peoples within a sovereign state as it is addressed particularly to the states of Europe.

— Two, it does not apply to "national minorities" as such, since such groups are covered by Principle VII and in that respect are not accorded self-determination but only minority rights. It has been suggested that peoples enjoying a constitutional status in a multinational state (e.g. U.S.S.R. and Yugoslavia) are not minorities and hence have the right to self-determination. See Antonio Cassese [sic], *The Helsinki Declaration and Self-Determination, in HUMAN RIGHTS, INTERNATIONAL LAW AND THE HELSINKI ACCORDS* 83, 95-103 ([Thomas] Buergenthal ed. 1977).

— Three, the phrase "in full freedom" was intended to preclude coercion by a government in respect of the choice by the peoples of their internal regime or policies. This was made explicit by the sponsor, the Netherlands, and other supporting governments. *Id.* [at 102-103]

— Four, the principle also recognizes that self-determination must not disrupt the territorial integrity of states and therefore does not apparently sanction secession, but this is not inconsistent with recognition of internal free choice.

LOUIS HENKIN ET. AL., *INTERNATIONAL LAW CASES AND MATERIALS* 283 (2d ed. 1987).

27. These Post-Cold War instruments include CSCE: Charter of Paris for a New Europe and Supplementary Document to Give Effect to Certain Provisions of the Charter, Nov. 21, 1990, *reprinted in* 30 I.L.M. 190, 197 (1991) [hereinafter Paris Charter]; and Report of the CSCE Meeting of Experts on Peaceful Settlement of Disputes, Feb. 8, 1991, *reprinted in* 30 I.L.M. 382, 386 (1991) [hereinafter Valletta Report on Peaceful Settlement] (emphasis added).

28. Paris Charter, *supra* note 27, at 196.

29. *Id.* at 199.

30. CSCE: Document of the Copenhagen Meeting of the Conference on the Human Dimension, *reprinted in* 29 I.L.M. 1305 (1990)[hereinafter Copenhagen Document].

sence in the Copenhagen Document of a self-determination rubric suggests the limits of self-determination in the post-Cold War vocabulary for expressing a "human dimension" within the CSCE framework. The Valletta Report on Peaceful Settlement also seems to distinguish "self-determination" from other specific commitments undertaken by CSCE members to protect human rights in their territories. After declaring that, "the advancement of democracy, and respect for and exercise of human rights, are indispensable,"<sup>31</sup> the Introduction to the Valletta Report adds that, "they *also* reaffirm . . . [the right of] self-determination,"<sup>32</sup> as if to make the two kinds of rights disjunctive.

These post-Cold War instruments of the CSCE do not clarify the meaning of "national minorities" except to suggest that they are not protected by the right of "self-determination." The Copenhagen Document establishes that, "To belong to a national minority is a matter of a person's individual choice,"<sup>33</sup> thereby distancing the term further from an objective definition. Perhaps it is possible to know a national minority when one sees one, but impressions can be perilous.

Whether self-determination is a principle or a right once generated heated controversy. Although that jurisprudential controversy has been resolved in favor of establishing self-determination as a right, the normative ambiguity of the right is almost endless. The questions are legion and always have been.<sup>34</sup> For example:

1. Does the right apply only in non-self-governing territories, that is, primarily in the process of decolonization? In post-independence circumstances, does the right extend at least to all people trapped in conquered or ceded territories? Does it apply against occupying powers apart from other protections of international law? If so, must the majority of the people exercising the right actually reside in the territory of an occupying power?

2. If the right protects people, both in non-self-governing and self-governing territories against external interference, what may they determine exactly? Independence from indirect as well as direct foreign interference? Economic autonomy and effective, permanent sovereignty or control over natural resources? Preservation of ethno-cultural identity?

3. Does self-determination include the right of a people to secede from a state?

4. Which people constitute the "self" entitled to make determinations? Must the "self" embrace an entire population within a particular territory? If a group within a population may exercise the right, may subgroups assert the right as well? How can non-sovereign groups of people already possess a "right" of self-determination under international law if

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31. Valletta Report on Peaceful Settlement, *supra* note 27, at 386.

32. *Id.* (emphasis added).

33. Copenhagen Document, *supra* note 30, ¶ 32, at 1318.

34. See, e.g., WAMBAUGH, *supra* note 9, at 27.

they are still seeking the legal status to determine their selfhood? If sub-groups can be "selves," should the right be limited to well-defined nationalities? Or to "national minorities," at least to those minorities outside the scope of the CSCE? How are they to be defined? What are the criteria of eligibility? Size of the group? Power or influence? Cultural homogeneity? Historical purity? Economic viability? Subjective factors such as shared perceptions of group identity? Should percentage of support among a population be a criterion? Active support alone?

5. If multiple criteria are appropriate for defining the "self," how are they to be applied in concrete cases? What about Albanians in the Kosovo region of Yugoslavia? Afrikaaners in South Africa? The Kurds, spread among three states? Irish Catholics in Northern Ireland? Corsicans in France? The Basques in Spain? In France? In Idaho? Native American tribes? Newly organized tribes? Hispanics in Los Angeles or Miami?

6. May a sub-group opt out of the larger group's exercise of self-determination? The Soviet Republics having achieved external self-determination, what right of self-determination exists for Russian or other minorities within the new states? Does the existence of neighboring Russia, to which those Russian minorities could migrate, weaken their claim for greater autonomy in the newly independent states?

7. Does self-determination include a right of internal democratization? What, precisely, is the difference between internal self-determination and democracy? Does the right to self-determination imply broader human rights protections against encroachment by local authority? Would it entitle people to religious freedom in a theocracy?

8. If people may determine themselves to be truly independent of outside interference, how, logically, can the control and authority the people thereby establish be subject to any human rights standards or other external appraisal without their consent? Would not a full right of self-determination logically require an attitude of cultural relativism that accepts any internal practice, however barbarous, which has been "determined" by a particular group of people?

9. By what process may self-determination be exercised? Does the principle of nonviolence apply? Must a people first exhaust peaceful remedies before using force? Must they exhaust multilateral remedies?

10. To what extent may a people legitimately enlist outside support or intervention to facilitate their self-determination? Does implementation of the right of self-determination in one state justify humanitarian intervention by other states?<sup>35</sup>

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35. Paradoxically, such support may thereby threaten the exercise of true self-determination. John Stuart Mill and other purists have argued that a principle of non-intervention is therefore a necessary condition for people to be truly free; they must achieve freedom by themselves. Thus, a nation must be free of all foreign interference in order to engage in *internal* self-determination of its political, economic and cultural affairs. A contrary argu-

To be sure, community pronouncements and state practice have helped answer many of these questions, but the legacy of accepted and reliable authority is still meager. The term "self-determination" still means many different things to many different peoples (or selves).<sup>36</sup> Despite several decades of efforts to clarify the standards, there is unfortunately little prospect of international agreement in the near future. For example, the criteria for recognition of the "self" entitled to exercise self-determination are unsettled. Unfortunately, the most compelling criterion may be the extent to which a group of people is prepared to use force. Moreover, an insidious notion of cultural relativism inhibits what might seem to be a natural relationship between self-determination and human rights standards.<sup>37</sup>

Also, there is still no agreement on whether the right to self-determination extends to secession and other acts by people in self-governing territories. On the one hand, the right has been vindicated in a few self-governing territories such as the Soviet Union, paradoxically without the compulsion of the CSCE process. Post-colonial statements that purported to insulate independent states from claims of self-determination<sup>38</sup> are very questionable today. On the other hand, the *general* practice of states opposes an extension of the right to people in self-governing territories.<sup>39</sup> States understandably fear the threat to their sovereignty, and the global community as a whole fears the instability and potential violence inherent in the right. Hence, the inviolability of boundaries has become virtually an axiom of international relations, especially among governments of former non-self-governing territories. The result can be viewed as either a

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ment, however, is that full self-determination is not a necessary condition for freedom, and therefore, invited or otherwise permissible humanitarian intervention by outside forces does not necessarily impair a people's freedom to exercise self-determination. For an excellent discussion of Mill's theory, see TESÓN, *supra* note 6, at 26.

36. "The concept of self-determination cries for definition, and few agree on its content." BARRY CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW* 1236 (1991).

37. See, e.g., Jerome Elkind, Remarks, *Self-Determination: The Cases of Fiji, New Caledonia, Namibia, and the Western Sahara*, 1988 AM. SOC. INT'L L. PROC. 431.

38. For example, the Declaration on Friendly Relations, *supra* note 24, carves out a major exception to "the principle of equal rights and self-determination of peoples," as follows:

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

*Id.* at 123-24. As a statement of the principle of non-intervention, this provision has continuing validity, but as a statement purporting to insulate self-governing territories from internal self-determination, the provision is questionable.

39. Ved P. Nanda, *Self-Determination Under International Law: Validity of Claims to Secede*, 13 CASE W. RES. J. INT'L L. 257, 271-74 (1981).

double standard<sup>40</sup> — an external right obtains in non-self-governing territories but not in self-governing territories — or simply a customary definition of self-determination as “decolonization.”

Critics of a right of self-determination oppose it also for historical and institutional reasons. They argue that the right is little more than a battle cry which has failed to promote democracy. Furthermore, it has fostered nationalistic demagoguery,<sup>41</sup> specious forms of multiculturalism,<sup>42</sup> and the construction of “improbable ‘nation states’ ”<sup>43</sup> that lack an adequate civic culture. Consequently, traditional values of social assimilation and integration are sacrificed while both nations and world order are fragmented. In an era of ethnic and irredentist strife these dangers seem particularly pernicious.

Whether or not one agrees with such criticism, it is difficult to avoid skepticism about relying heavily on diplomatic discourse to vindicate claims of self-determination. United Nations-organized talks between Greek and Turkish Cypriots collapsed after the introduction of rhetoric about self-determination.<sup>44</sup> To be sure, recognition of the right has been generally effective in facilitating decolonization and providing a framework for limited multilateral settlement of competing claims. What has been missing until recently, however, is an effective community process for more precise rule-clarification, fact-finding and mediation to implement values underlying the right.<sup>45</sup>

40. AKEHURST, *supra* note 5, at 253.

41. SCHAEFFER, *supra* note 10, at 255.

42. For a trenchant commentary on the threat posed by identifying multiculturalism with group separatism in a national society, see ARTHUR SCHLESINGER, JR. *THE DISUNITING OF AMERICA: REFLECTIONS ON A MULTICULTURAL SOCIETY* (1991). See also Arthur Schlesinger, Jr., *The Cult of Ethnicity, Good and Bad: A historian argues that multiculturalism threatens the ideal that binds America*, *TIME*, July 8, 1991, at 14. That identification, “crystallizes the differences, magnifies tensions, intensifies hostilities.” Rather than an aspiration of *E pluribus unum*, “[t]he balance shifts from *unum* to *pluribus*.”

43. James Clad, *‘Democratic’ Unraveling in Third World*, *CHRISTIAN SCI. MONITOR*, July 24, 1991, at 19.

44. *A GLOBAL AGENDA: ISSUES BEFORE THE 46TH GENERAL ASSEMBLY OF THE UNITED NATIONS 53* (John Tessitore & Susan Wolfson eds., 1991)[hereinafter *GLOBAL AGENDA*].

45. A leading authority wrote in 1972 what has remained true for nearly two decades:

Particularly where it involves the emergence of new states on the world scene or the reshaping of old ones, self-determination is obviously a matter of legitimate international concern. The problem, to which no satisfactory answer has as yet been produced, is how one sets about regularizing and bringing under international control . . . essentially a right of revolution, justified by an appeal to principles of higher law . . . .

It would be a wholly new departure if norms were to be established by which claims to self-determination could be evaluated and the Assembly, the Security Council, or some other newly created international agency were empowered to take authoritative decisions, implemented in part, perhaps, through the elaboration of a collective process of recognition by the international community.

Rupert Emerson, *Self-Determination*, 65 *AM. J. INT'L L.* 459, 474 (1971).

## II. HUMANITARIAN INTERVENTION

The right of a state to intervene in another state's territory for humanitarian reasons has deep philosophical and historical roots. For example, Emerich Vattel, who greatly influenced American revolutionaries in their exercise of self-determination against the British Crown, argued in 1758:

If a prince, by violating the fundamental laws, gives his subjects a lawful cause for resisting him; if, by his insupportable tyranny, he brings on a national revolt against him, any foreign power may rightfully give assistance to an oppressed people who ask for its aid.<sup>46</sup>

Contemporary sources for a right of intervention include moral philosophy,<sup>47</sup> human rights law, and state responsibility for the lives and property of nationals.

A limited history of state practice reveals a number of military expeditions that were undertaken ostensibly for humanitarian reasons. Russia intervened on behalf of Christians in Bulgaria, Turkey, Bosnia and Herzegovina during the 1870's, and in the Balkans during the nineteenth and early twentieth centuries.<sup>48</sup> India intervened to aid Bangladesh's self-determination,<sup>49</sup> France intervened in the Central African Republic,<sup>50</sup> and four African States intervened in the Liberian Civil War.<sup>51</sup> On the other hand, humanitarian justifications of such abatement actions as those undertaken by the United States in the Dominican Republic,<sup>52</sup> Grenada,<sup>53</sup> and Panama<sup>54</sup> have been controversial.

Self-help measures or missions to rescue nationals held hostage or

46. Emerich Vattel, III *LAW OF NATIONS* 131 (Fenwick trans., 1964).

47. See TESÓN, *supra* note 6.

48. *Id.* at 157-58.

49. *Id.* at 179; Ved P. Nanda, *Self-Determination in International Law: The Tragic Tale of Two Cities — Islamabad (West Pakistan) and Dacca (East Pakistan)*, 66 *AM. J. INT'L L.* 321 (1972); Thomas M. Franck & Nigel S. Rodley, *After Bangladesh: The Law of Humanitarian Intervention by Military Force*, 67 *AM. J. INT'L L.* 275 (1973).

50. TESÓN, *supra* note 6, at 175.

51. See Robert A. Friedlander, *The Doctrine of Humanitarian Intervention: UN Precedents, US Policy and the Liberian Civil War*, *INT'L PRACTITIONER'S NOTEBOOK*, June 1991, at 29.

52. Ved P. Nanda, *The United States' Action in the 1965 Dominican Crisis: Impact on World Order — Part I*, 43 *DENV. L. J.* 439 (1966).

53. Compare TESÓN, *supra* note 6, at 188. See also Fernando Tesón & Fernando Doswald-Beck, *The Legality of the U.S. Intervention in Grenada*, 31 *NETH. INT'L L. REV.* 35 (1984); Christopher C. Joyner, *Reflections on the Lawfulness of Invasion*, 78 *AM. J. INT'L L.* 131 (1984); John N. Moore, *Grenada and the International Double Standard*, *Id.* at 145; Detlev F. Vagts, *International Law under Time Pressure: Grading the Grenada Take-Home Examination*, *id.* at 169.

54. See Anthony D'Amato, *The Invasion of Panama Was a Lawful Response to Tyranny*, 84 *AM. J. INT'L L.* 516 (1990); Tom J. Farer, *Panama: Beyond the Charter Paradigm*, *id.* at 503; Ved P. Nanda, *The Validity of United States Intervention in Panama under International Law*, *id.* at 494; Jennifer Miller, Note, *International Intervention — The United States Invasion of Panama*, 31 *HARV. INT'L L.J.* 633 (1990).

otherwise endangered on foreign territory resemble humanitarian intervention in the classic sense. They rely at least as much on self-defense and national security justifications as humanitarian ones. Examples of rescue missions include the American/Belgian air lifts in the Congo during the early 1960's;<sup>55</sup> the raid on the Entebbe airport by Israeli commandos;<sup>56</sup> President Carter's ill-fated helicopter operation to rescue hostages in Iran;<sup>57</sup> the intervention in Grenada;<sup>58</sup> and most recently, rescue of U.S. nationals during the Liberian Civil War.<sup>59</sup>

Like self-determination, humanitarian intervention has been fraught with ambiguity. For example:

1. What is "humanitarian?" One state's humanitarian jihad is a victim state's invasion. Human rights standards are often subject to varying interpretations and national security exceptions.

2. Does the term "humanitarian" embrace only interventions in the nineteenth century sense espoused by Vattel? That is, is intervention humanitarian only when its purpose is to protect residents in the territory of another state from human rights deprivations? If so, what magnitude or patterns of deprivation justify intervention? Do only deprivations of the most fundamental human rights justify intervention?

3. Does the term also embrace self-help or rescue missions on behalf of the intervening state's own nationals in the territory of another state? If so, under what circumstances and according to what criteria? May a state undertake a rescue mission only if the other state is unable or unwilling to protect the first state's nationals? To what extent must the intervening State exhaust peaceful alternatives in an emergency? In a rescue mission, does it matter whether those to be rescued are primarily citizens of the intervening state?

4. Do the nature, duration, purposes and outcome of humanitarian intervention matter? Does a principle of proportionality apply?

Unlike self-determination, the very existence of a right of humanitarian intervention is controversial. Justification for any intervention in foreign territory must be found either in a broad reading of Article 2(4) of the United Nations Charter,<sup>60</sup> or in an exception to that provision. Al-

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55. Harold L. Weisberg, Note, *The Congo Crisis 1964: A Case Study in Humanitarian Intervention*, 12 VA. J. INT'L L. 261 (1972).

56. See United Nations: Security Council Debate and Draft Resolutions Concerning the Operation to Rescue Hijacked Hostages at the Entebbe Airport, *reprinted in*, 15 I.L.M. 1224 (1976).

57. N.Y. TIMES, April 25, 1980, at A1; *id.* April 26, 1980, at A1.

58. Moore, *supra* note 53, at 149.

59. Friedlander, *supra* note 51.

60. The Article reads as follows:

*Article 2(4).*

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



though Article 2(4) has often been ignored by states — its “high minded resolve” still “mocks us from the grave”<sup>61</sup> — the essential message of restricting the threat or use of force remains a basic principle of international relations. We must take Article 2(4) seriously. It still provides the simplest expression of community expectations about non-intervention.

The language of Article 2(4) does, of course, provide a margin for arguing that *some* instances of humanitarian intervention are acceptable. For example, Entebbe-style “mop up” operations and lightning commando strikes to rescue hostages of whatever nationality may be acceptable. When prompt withdrawal follows, such actions do not significantly involve force “against the territorial integrity or political independence of any state.”<sup>62</sup> Such actions would therefore seem to be legitimate under Article 2(4). Some argue, however, that the original intent of the Charter was to prohibit *all* intervention in foreign territory that is not otherwise authorized.<sup>63</sup>

One writer makes the intriguing suggestion that if a state risks the lives of its citizens to achieve humanitarian ends, it ordinarily should *not* withdraw quickly. If there have to be intervening states in the real world, they should occupy the foreign territory long enough to ensure lasting achievement of humanitarian ends, the language of Article 2(4) notwithstanding. “If we believe that in certain ineffable cases the dangerous expedient of humanitarian intervention should be attempted, we should concede the probable necessity of reconstructing the political order that created the imperious necessity.”<sup>64</sup> Thus, although multilateral reconstruction of political order is generally preferable, when unilateral humanitarian intervention does take place, the intervenor may need to stay for a prolonged period of time before it can properly withdraw from the foreign territory.

State intervention in the territory of another state in order to implement a basic purpose of the United Nations may not be inconsistent with the Charter. Far from acting “in any other manner inconsistent with the Purposes of the United Nations,”<sup>65</sup> the intervening state’s actions are actually authorized by other Charter provisions. An example of this would be intervention for the purpose of enhancing self-determination, which is arguably sanctioned by Article 1. This argument might seem to be especially compelling as a justification for intervention to protect a *majority*

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Nations.

U.N. CHARTER art. 2(4).

61. Thomas M. Franck, *Who Killed Article 2(4)? Or Changing Norms Governing the Use of Force By States*, 64 AM. J. INT’L L. 809 (1970).

62. U.N. CHARTER art. 2(4).

63. Louis Henkin, *Use of Force: Law and United States Policy*, in RIGHT v. MIGHT 37, 39 (2d ed. 1991).

64. Tom J. Farer, *Human Rights in Law’s Empire: The Jurisprudence War*, 85 AM. J. INT’L L. 117, 127 (1991).

65. U.N. CHARTER art. 2(4).

people from violence and other violations of fundamental human rights by a *minority*, as in Bangladesh (East Pakistan) before it gained independence from Karachi.<sup>66</sup> The most common counter-argument, however, is that the Charter allows *no* human rights exceptions to its prohibition on the threat or use of force.<sup>67</sup>

The only explicit exceptions to Article 2(4) in the Charter are found in Chapters VII and VIII. Chapter VII contains provisions for self-defense or forceful measures authorized by the Security Council. Chapter VIII allows enforcement measures by regional arrangements or agencies authorized by the Security Council.

It has been argued that the justification for humanitarian intervention by states — “the right of governments to defend defenseless victims of oppression”<sup>68</sup> — is philosophically the same as that for self-defense under Article 51 of the Charter<sup>69</sup> — “the right of governments to defend the lives and property of their nationals which are threatened by foreign invasion.”<sup>70</sup> There is, however, no accepted *legal* identification between these two types of forceful action.

State practice before the U.N. Charter has led some to argue that the drafters of Article 2(4) intended to preserve a customary “right” of humanitarian intervention. The *travaux préparatoires* of the San Francisco Conference are inconclusive on this point.<sup>71</sup> Opposing arguments are that there never was a customary right of humanitarian intervention, that Article 2(4) replaces any inconsistent custom, that the Charter elsewhere establishes the only permissible exceptions to Article 2(4), and that a general principle of nonintervention now applies, regardless of humanitarian exigencies or acquiescence by states.<sup>72</sup> Another argument suggests a customary right of humanitarian intervention exists due to the Cold War reality of a stalemated United Nations, that is, that because adoption of Article 2(4) presupposed effective institutions, self-help measures are acceptable in the absence of these institutions.

66. One scholar has argued:

[T]he demands of self-determination [can be placed] above those of “territorial integrity” and of a “non-interventionist” stand on the part of the United Nations. For where violence is perpetrated by a minority to deprive a *majority* of political, economic, social and cultural rights, the principles of “territorial integrity” and “non-intervention” should not be permitted to be used as a ploy to perpetuate the political subjugation of the majority.

Nanda, *supra* note 49, at 336.

67. *See, e.g.,* YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENSE* 89 (1988). (“[N]othing in the Charter substantiates the right of one State to use force against another under the guise of ensuring the implementation of human rights.”).

68. Fernando Tesón, Remarks, 84 *AM. SOC. INT'L L. PROC.* 195 (1990).

69. U.N. CHARTER art. 51 (confirming “the inherent right of individual or collective self defense if an armed attack occurs against a Member of the United Nations. . .”).

70. Tesón, *supra* note 68.

71. TESÓN, *supra* note 6, at 130, 134, 136.

72. *See* Ian Brownlie, *Humanitarian Intervention*, in *LAW AND CIVIL WAR IN THE MODERN WORLD* 217 (John Norton Moore ed., 1974).

Even if the Charter preserves a customary right of humanitarian intervention, inter-temporal construction of subsequent state practice does not easily support its continued existence. One analysis of post-Charter interventions by states asserts that, "there is not a single case . . . where one state has intervened in another for the exclusive purpose of halting mass murder, much less any other gross violations of human rights."<sup>73</sup> Forceful actions by India in East Pakistan, Tanzania in Uganda, and Vietnam in Cambodia *might* have been justified on grounds of humanitarian intervention. Instead they were justified on the basis of self-defense from armed attack, "a claim not one of them could persuasively sustain. Their choice hardly suggests confidence in the exculpatory power of humanitarian motive."<sup>74</sup>

Unilateral intervention to support internal self-determination, democracy, or fundamental human rights is highly questionable on policy grounds as well.<sup>75</sup> Intervention may have the undesirable effect of inviting prolonged foreign hegemony, as in the Syrian and Israeli interventions in Lebanon.<sup>76</sup> A rule restricted to counterintervention in support of democratic forces runs the same risk. Thus, "a rule allowing humanitarian intervention . . . is a general license to vigilantes and opportunists to resort to hegemonical intervention."<sup>77</sup> Although this observation may be more colorful than accurate, it does serve as a general reminder that despite its charitable sound, humanitarian intervention can readily mask an illegal use or threat of use of force. A right to intervene for humanitarian reasons is dangerously subject to abuse.<sup>78</sup>

Several publicists have collaborated in formulating a list of criteria that, ideally, would define the legitimacy of humanitarian intervention. These criteria, drawn from the laws of human rights and armed conflicts, include the following: immediacy and extent of a specific threat to fundamental human rights; exhaustion of alternative remedies; good faith attempt to secure an authoritative invitation from the target state; minimal effect of intervention on authority structures in target state; minimal requisite force; relative disinterestedness of the intervening state or states; prompt disengagement after completion of the interventino; and full reporting to the Security Council and, as appropriate, regional organiza-

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73. Farer, *supra* note 64, at 121.

74. *Id.* at 122.

75. See Oscar Schachter, *The Legality of Pro-Democratic Invasion*, 78 AM. J. INT'L L. 645 (1984); CARTER & TRIMBLE, *supra* note 36, at 1236.

76. See Nicholas O. Berry, *The Conflict Between United States Intervention and Promoting Democracy in the Third World*, 60 TEMP. L. Q. 1015 (1987).

77. Ian Brownlie, *Thoughts on Kind-Hearted Gunmen*, in HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 147 (Richard B. Lillich ed., 1973)[hereinafter HUMANITARIAN INTERVENTION].

78. MALCOLM N. SHAW, INTERNATIONAL LAW 423 (1977); Louis Henkin, Remarks, *Biafra, Bengal, and Beyond: International Responsibility and Genocidal Conflict* 1972 AM. SOC'Y INT'L L. PROC. 95, 96.

tions.<sup>79</sup> These criteria provide an excellent basis for multilateral prescription, though unfortunately not an accurate description of state practice.

### III. ROLE OF THE UNITED NATIONS DURING THE COLD WAR

Most commentators prefer multilateral or collective intervention to unilateral intervention. Theoretically, multilateral action provides a more reliable consensus of support, checks abuses, and better ensures that intervention is warranted. Unfortunately, multilateral efforts were greatly inhibited, if not stymied, by Cold War politics. Vetoes of important measures by Permanent Members of the Security Council paralyzed the United Nations. The major powers simply kept self-determination issues off the multilateral agenda, except those whose airing served their respective foreign policy objectives. Whatever its legal status, unilateral action frequently became the only moral alternative to passive tolerance of brutality and irresponsibility.<sup>80</sup>

The United Nations has played an instrumental role in the process of decolonization, and has helped stabilize newly independent regimes.<sup>81</sup> The United Nations has adopted resolutions supporting claims for self-governance, imposed sanctions against racist regimes in Rhodesia and South Africa, supervised plebiscites, provided a forum for self-determination movements, received reports and inquiries from trusteeships and other non-self-governing territories, adopted criteria for testing the extent of self-governance, provided technical assistance to people on the path to independence, and installed military troops to protect democratic processes. As Secretary-General, Dag Hammarskjöld, in particular, exercised truly daring leadership in support of independence and of the interests of newly independent states.

On the other hand, the United Nations proved to be quite ineffective in post-colonial situations. It failed to predict ethnic conflicts, to give effect to the aspirations of people in the nominal "republics" of federations or unions, to mediate peaceful settlements of conflicts, to respond effectively to acts of secession such as those in the Congo (Katanga), Nigeria (Biafra), and Pakistan (Bangladesh). At least on New York's East River, self-determination was primarily a metaphor for independence, not for secession of people after independence nor for facilitating subsequent political and social change in self-governing states.

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79. Richard Lillich, *Humanitarian Intervention: A Reply to Ian Brownlie and a Plea for Constructive Alternatives*, in Moore, *supra* note 72, at 249.

80. "[I]f we cannot perfect, as a minimum, a system of humanitarian intervention, we have lost our humanity. If we sit passively by while the Ibos suffer genocide, we have forfeited our right to regain it." W. Michael Reisman, *Humanitarian Intervention to Protect the Ibos*, in HUMANITARIAN INTERVENTION, *supra* note 77, at 195.

81. "The U.N. served as the catalyst for the revolution of decolonization." Brian Urganhart, *The United Nations and its Discontents*, N.Y. REV. BOOKS, Mar. 15, 1990, at 11. The summary that follows in the text is drawn from LOUIS HENKIN ET AL., *supra* note 26, at 284.

The record of the United Nations as an instrument of humanitarian intervention was also negligible throughout the Cold War period. A prevailing interpretation of Article 2(7) of the Charter was that intervention by the organization for humanitarian reasons would be an invasion of a state's domestic jurisdiction. While regional organizations have assumed some leadership, such as the fledgling Organization of Eastern Caribbean States (OECS) in requesting U.S. troops in Grenada,<sup>82</sup> their freedom from superpower influence may be questioned. Furthermore, their immediate delegation of enforcement authority to nearby military powers illustrates the weakness of the United Nations system. General Assembly resolutions advocating material and moral support for national liberation movements in colonial territories stopped short of condoning humanitarian intervention. Finally, the United Nations has responded infrequently to unilateral acts of intervention within the superpowers' spheres of influence.

In sum, the United Nations was seldom given an opportunity to respond effectively to issues of self-determination and humanitarian intervention. The U.N. was limited by East-West spheres of influence that were impervious to multilateral investigation and response. Moreover, the United Nations was constrained by the reluctance of states, particularly newly independent ones, to recognize a *post-colonial* right of self-determination or a responsibility for multilateral humanitarian intervention on behalf of dissident groups.

#### IV. THE NEW REALITY OF A COMMUNITY OF POWER

Political conditions which prevented international institutions from playing a greater role during the Cold War have changed. Although the millennium has not yet arrived, the bipolar stalemate has ended. Whatever the historical explanation, East and West have begun working together to resolve fundamental issues, and to enlist the participation of multilateral institutions and processes. The Conference on Security and Cooperation in Europe (CSCE) specifically recognized, "with satisfaction the growing role of the United Nations in world affairs and its increasing effectiveness."<sup>83</sup> The Gulf War, in particular, stimulated East-West cooperation and practical decision-making within the United Nations. Although the Gulf War was unique in many respects, it nevertheless portends an accelerated emergence of a community of power, in the Wilsonian sense, to replace the bi-polar balance-of-power system. This emerging community of power also portends, however, a proliferation of self-determination and intervention issues that will test the strength of multilateralism. The set of circumstances that gave rise to collective action in the Gulf War will probably not be repeated. The disparate interests of the Permanent Members of the Security Council converged fortui-

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82. See *Text of Reagan's Announcement of Invasion*, N.Y. TIMES, Oct. 26, 1983, at A16. For a critique of the OECS's involvement in Grenada, see Joyner, *supra* note 53, at 135-38.

83. Paris Charter, *supra* note 27, at 198.

tously to produce agreement on enforcement action and humanitarian measures following the war. In Europe and the Soviet Union particularly, the lid is off the cauldron of bubbling ethnic, irredentist, and other nationalist animosities.<sup>84</sup>

Fortunately, a rejuvenated United Nations is also part of this environment. It is now a body capable of consolidating a community of power to address a formidable agenda of disputes, feuds, and conflicts. The United Nations is no longer, in one poison-pen image, a "baroque apparatus [in which] governments might, without abating their transgressions, go to church."<sup>85</sup> Instead of a place of sanctimonious ceremony, the United Nations is becoming, "a center for harmonizing the actions of nations in the attainment of [their] common ends."<sup>86</sup> As a service institution in the post-Cold War era, the United Nations can better facilitate self-determination, pre-empt unilateral humanitarian intervention by states, and initiate its own form of intervention and dispute settlement when necessary.

Three years ago, a major study advised the United Nations to "do less but do it better." The study observed that:

[T]he Security Council does not need to solve, or even ease, all of the world's problems to be valuable. It simply has to make a positive difference in resolving a few dangerous conflicts. Even one clear victory would begin to restore public faith in its potential.<sup>87</sup>

Now the five permanent members of the Security Council are cooperating, and the public perceives that the Council scored its "one clear victory" in the Gulf War.<sup>88</sup> The United Nations as a whole can seize the

84. *Mideast Diplomacy: Excerpts from Bush's Address to General Assembly: For a 'Pax Universalis,'* N.Y. TIMES, Sept. 24, 1991, at A14[hereinafter *Pax Universalis*]. In his remarks, President Bush referred variously to the "resumption of history," the "revival of history," and the "renewal of history" to free and invigorate people in the post-Cold War era. "Communism held history captive for years, and it suspended ancient disputes and it suppressed ethnic rivalries, nationalist aspirations and old prejudices." *Id.*

85. Hazzard, *Reflections: Breaking Faith — I*, THE NEW YORKER, Sept. 25, 1989, at 63, 96 (an acid indictment of the United Nations by a former employee).

86. U.N. CHARTER art. 1(4).

87. See A SUCCESSOR VISION: THE UNITED NATIONS OF TOMORROW 113 (Peter J. Fromuth ed., 1988)[hereinafter Fromuth].

88. Brzezinski has commented:

After years of ineptitude marked by Cold War divisions and unwillingness to condemn Third World aggressors, the United Nations reclaimed a major role in international relations. In legitimizing an international coalition that cut across established alliances, it helped bring about the defeat of Iraq. From the beginning the Security Council dominated the handling of the crisis, and its early moves quickly isolated Iraq diplomatically and economically. Most members of the General Assembly disapproved of Iraq's invasion, with its implicit threat to their own national existence, and allowed the great powers to work out a solution. Both the Arab League and the nonaligned movement were hopelessly divided and without resources to act.

With each successive step, and the coalition's obvious intention to persevere, pivotal states reversed deeply established policy positions: Turkey abandoned its aversion to intervening in any Arab conflict that did not directly involve its

moment to confirm its intended role of "building consensus among major players in the world scene."<sup>89</sup> The Gulf War established the ability of the Security Council to repel aggression, restore international peace and security, impose comprehensive sanctions, and see them enforced.<sup>90</sup> The credibility of the United Nations as a whole is thereby increased.

The Gulf War is of particular relevance to this article. It originated as a vindication of self-determination, and collective acts of humanitarian intervention were carried out in its aftermath. Security Council Resolution 688,<sup>91</sup> adopted after the Gulf War, exemplifies the reality of a competent United Nations. For the first time, the Security Council determined that a massive flow of refugees, or displaced persons in their own territory, namely the Kurds in Iraq, threatened international peace and security. Resolution 688 specifically condemned the repression of the Iraqi civilian population, particularly the Kurds; and it provided for, "immediate access by international humanitarian organizations to all those in need of assistance."<sup>92</sup> The resolution also incorporated a detailed memorandum of understanding between the United Nations and the Iraqi government. Precise terms of United Nations intervention were set out, including the establishment of Humanitarian Centers (UNHUCs) in areas designated by the United Nations.<sup>93</sup> Resolution 688 did not purport to decide any issues of self-determination involving Iraqi minorities, nor did it support military intervention for humanitarian reasons. It nevertheless broke new ground.

United Nations action on behalf of the Kurds was an extension of the impressive regime of authority and control by which the Security Council responded to the Iraqi invasion of Kuwait, the first time one member of the United Nations had purported to annex another by use of force. The

own security; Syria dropped its anti-Western stance and joined with the "imperialists" to topple an Arab rival; Iran did nothing to interfere with U.S.-engineered military operations, and it impounded the Iraqi military aircraft seeking a haven from the coalition's bombing; and Israel exercised uncharacteristic restraint, absorbing Iraqi Scud missile attacks and relying on U.S.-manned batteries of Patriot antiballistic missiles to protect its territory, thereby frustrating Saddam's attempt to transform the Gulf War into a new Arab-Israeli war.

With widespread support in the United Nations, countries like Jordan, Yemen, Libya, Algeria and the Sudan who tilted toward Iraq dared not challenge the blockade.

Zbignew Brzezinski, *Selective Global Commitment*, 70 FOREIGN AFF. 1, 8 (1991).

89. Fromuth, *supra* note 87, at 113.

90. Bruce Russett & James S. Sutterlin, *The U.N. in a New World Order*, 70 FOREIGN AFF. 69, 82-83 (1991).

91. U.N. SCOR, 45th Sess., 2982d mtg., U.N. Doc. S/RES/688 (1991), *reprinted in* 30 I.L.M. 858 (1991)[hereinafter S/RES/688].

92. *Id.* ¶ 3. "Such new world law comes as a warmly welcome aspect of the new world order." *The Law Learns From the Kurds*, N.Y. TIMES, April 14, 1991, at D18.

93. Memorandum of Understanding, U.N. Doc. No. S/22663, *reprinted in* 30 I.L.M. 860 (1990).

Security Council resolutions disclose a significant human rights orientation in the response to the invasion.<sup>94</sup> For example, Resolution 664<sup>95</sup> demanded that Iraq permit and facilitate the immediate departure from Iraq and Kuwait of third-country nationals. Resolution 677<sup>96</sup> struck a theme of self-determination, condemning "attempts by Iraq to alter the demographic composition of the population of Kuwait."<sup>97</sup> Resolution 678<sup>98</sup> authorized the use of "all necessary means"<sup>99</sup> to uphold and implement the resolutions," and requested all states to support the measures taken under the provision.<sup>100</sup> It also authorized the necessary means to, "restore international peace and security in the area."<sup>101</sup> Resolution 687,<sup>102</sup> which set forth armistice terms, enlisted Iraqi cooperation with the International Committee of the Red Cross to facilitate the repatriation of all Kuwaiti and third-country nationals.<sup>103</sup> During the Gulf War other United Nations bodies supplemented the Security Council's work. General Assembly Resolution 45/170<sup>104</sup> demanded Iraqi compliance with international humanitarian law, and the Commission on Human Rights addressed allegations of Iraqi government abuses of its own citizens.

Opinions differ on the validity and independence of the United Nations' role in compelling Iraq to withdraw from Kuwait and to comply with international law. Some observers dismiss the Security Council's twelve Gulf resolutions as little more than fig leaves to mask the naked power of the United States and its Coalition partners.<sup>105</sup> Others, however, place emphasis on the collective process through which the resolutions were adopted. These observers note the unprecedented cooperation in this kind of a crisis among Permanent Members of the Security Council, and the near-unanimity of the Security Council decisions. The United States, France and the United Kingdom strongly influenced the Security Council resolutions, but accepted the political nature of the process. Members have always been inclined to speak and vote their wills.<sup>106</sup> Thus,

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94. S/RES/660, 661, 662, 664, 665, 666, 667, 669, 670, 674, 677, 678, *reprinted in* U. N. DEP'T OF PUB. INFO., *United Nations Security Council Resolutions Relating to the Situation between Iraq and Kuwait* DPI/1104/Rev. 1—40059, Feb. 1991; S/RES/687, *reprinted in* 30 I.L.M. 847 (1991).

95. S/RES/664, *supra* note 94.

96. S/RES/677, *supra* note 94.

97. *Id.* preamble.

98. S/RES/678, *supra* note 94.

99. *Id.* ¶ 2.

100. *Id.* ¶ 3.

101. *Id.* ¶ 2.

102. S/RES/687, *supra* note 94.

103. *Id.* ¶ 30.

104. G. A. Res. 45/170 (1990).

105. See Burns H. Weston, *Security Council Resolution 678 and Persian Gulf Decision Making: Precarious Legitimacy*, 85 AM. J. INT'L L. 516 (1991).

106. Oscar Schachter, *United Nations Law in the Gulf Conflict* 85 AM. J. INT'L L. 542 (1991); Eugene V. Rostow, *Until What? Enforcement Action or Collective Self Defense?*, 85 AM. J. INT'L L. 506 (1991).



when the global community dialed 911, the United States may have been the first to answer. The U.S., however, did not simply grab its musket and run off to the emergency without consulting and gaining the approval of diverse members of the United Nations family.

Whatever the role of the United States, the Gulf War experience demonstrated the significance of going through the United Nations drill. Only by doing so can a state expect to enlist broad support for even the most commendable acts of principle, such as deterring aggression and restoring the peace. If the intent of the United States was didactic, to demonstrate that aggression does not pay, the only way to do so effectively was to multilateralize a military response. The resulting Coalition of forces contrasted markedly with unilateral U.S. interventions in Grenada and Panama, which never gained widespread support.

Resolution 688 specifically "recall[s]"<sup>107</sup> Article 2(7) of the Charter.<sup>108</sup> Presumably, then, the Security Council's highly interventionist program on behalf of the Kurds in northern Iraq is deemed to be consistent with Article 2(7). Thus, the misery of a suppressed population is no longer deemed "essentially within the domestic jurisdiction"<sup>109</sup> of a national government. Large-scale deprivations of human rights unquestionably threaten international peace and security; hence, they engage the Security Council's powers under Chapter VII. The Security Council's message of involvement recognizing the international implications of severe deprivation of human rights could not be clearer. Thus, Resolution 688 presaged a larger role for humanitarian intervention under international authority.

A narrow interpretation of Article 2(7) might also suggest that the Charter may question a state's use of force domestically. This argument at least challenges the state's right to quash an expression of self-determination by a group of people well on the way to independence recognized under international law. Of course, Article 2(4) speaks only to the threat or use of force by States in their *international* relations. Ordinarily, that provision would not seem to constrain a state from using force within its territory against its own people, even though suppression of self-determination might otherwise be "inconsistent with the Purposes of the United Nations."<sup>110</sup> In exceptional circumstances, however, a group of people completing a process of acknowledged self-determination may claim a limited international personality. Threat or use of force against them

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107. S/RES/688, *supra* note 91, pmbl.

108. The U.N. Charter states:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

U.N. CHARTER art. 2(7).

109. *Id.*

110. *Id.* art. 2(4).

would then fall within the prohibitions of Article 2(4). An early example was the Security Council's decision in 1947 concerning the Netherlands and the incipient state of Indonesia.<sup>111</sup>

Once the reality of an operational alternative under the U.N. Charter to unilateral measures is widely accepted, greater attention could turn to the task of making those alternatives more effective. As precedent, the United Nations has resolved numerous geopolitical disputes. For example, the International Court of Justice has successfully adjudicated numerous maritime boundaries in recent years. The U.N.'s pivotal roles in arranging a Soviet withdrawal from Afghanistan and helping bring peace to El Salvador are acclaimed; its involvement in ending civil strife in the Western Sahara, Cyprus and Cambodia may yet bring lasting peace and stability to those regions.

There is, however, room for improvement. The United Nations failed to respond effectively to Iraqi threats or forestall the use of force that initiated the Kuwaiti crisis. The Secretary-General's efforts to mediate a solution to the Kuwaiti crisis before the January 15, 1991 deadline were handicapped by the terms of twelve Security Council resolutions. These gave him almost no flexibility in trying to gain an Iraqi withdrawal from occupied Kuwait.<sup>112</sup> As another example, questionable draftsmanship and supervision invited mischief by the French government in the Secretary-General's mediation of the *Rainbow Warrior Affair*<sup>113</sup> between New Zealand and France. Cambodia's killing fields were both physical and diplomatic as long as the Permanent Members of the Security Council remained unwilling to cooperate in a common plan of action. At the pinnacle of formal dispute resolution, the World Court invited jurisprudential criticism in the *Nicaragua Case*<sup>114</sup> by what some viewed as a rather extravagant application of custom in response to sensitive issues of intervention.

None of these examples indicates a fundamental incompetence of the United Nations in either a general or technical sense of that word. What the examples do suggest, however, is a reliance of the United Nations on adherence by states to principles of good faith and cooperation. The examples above also illustrate the need to clarify the ground rules and broaden the bases of decision-making, in order to achieve a true community of power.

Clearly, the United Nations is constrained by financial and structural

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111. 5 DIGEST OF INTERNATIONAL LAW 384 (Marjorie M. Whiteman, ed., 1965)(whether the Netherlands violated international law by engaging in hostilities against Indonesia, at the time in the process of achieving *de facto* independence).

112. See Lucia Mouat, *United Nations' Multiple Roles at Odds in Confronting Gulf Crisis*, CHRISTIAN SCI. MONITOR, Jan. 22, 1991, at 5.

113. *New Zealand v. France*, April 30, 1990 (text of subsequent arbitration available from author).

114. *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27).

limitations. The Gulf War highlighted the need to maintain an endowment of financial pledges and other mutual assistance under Article 49 of the Charter. Money is needed in order to carry out more ambitious programs of humanitarian cooperation. Also, the Gulf War experience amplified debate about structural reforms, such as the composition of the Security Council. Serious consideration of such structural alternatives as expansion of the permanent membership of the Security Council, or elimination of the veto power, may therefore be needed in the new world order. Passage of Resolution 688 illustrates the advisability of reconsidering the current structure for making decisions under Chapter VII: only because of an abstention rather than a veto by China, a Permanent Member, did the Resolution succeed.

Other international and regional bodies can play a more important role. After all, the United Nations is not the sum and total of a community of power. In the aftermath of the 1991 military coup in Haiti, for example, the Organization of American States (OAS) established powers of humanitarian intervention that permit the organization to take "any measures" necessary to restore democracy in member states.<sup>115</sup> In its 1991 summit communiqué, the Group of Seven endorsed the post-Gulf war model as a basis for collective intervention to alleviate human suffering.<sup>116</sup>

The European Community has assumed the role of mediator in civil war disputes in Europe. The Community has provided fact-finders, observer teams, and other facilities to help bring information and reason to bear on national crises, beginning with the frustrating Croatian-Serbian imbroglio in a thoroughly fragmented Yugoslavia.<sup>117</sup> In the Moscow Concluding Document, the CSCE for the first time unanimously agreed to conduct investigations of human rights abuses in member states even without their consent.<sup>118</sup> Several states have called on international and

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115. See N.Y. TIMES, Oct. 2, 1991, at A6.

116.

We note that the urgent and overwhelming nature of the humanitarian problem in Iraq caused by violent oppression by the Government required exceptional action by the international community, following UNSCR 688. We urge the UN and its affiliated agencies to be ready to consider similar action in the future if the circumstances require it. The international community cannot stand idly by in cases where widespread human suffering from famine, war, oppression, refugee flows, disease or flood reaches urgent and overwhelming proportions.

*London Economic Summit Political Declaration: Strengthening the International Order*, July 16, 1991, WKLY COMP. PRES. DOC. 963, 964 (July 22, 1991).

117. See, eg., Alan Riding, *Europeans' Hopes for a Yugoslav Peace Turn to Frustration*, N.Y. TIMES, Sept. 22, 1991, at E3.

118. *Berlin Meeting on CSCE Council*, 19-20 June, 1991, 30 I.L.M. 1349 (1991). The Moscow Concluding Document addresses the CSCE "human dimension." See text accompanying and following note 27, *supra*. The document expands human rights-related commitments of CSCE members and the Human Dimension Mechanism of the CSCE. The mechanism involves a logical progression of steps for resolving human dimension issues within the region, culminating, if necessary, in mandatory investigation by the CSCE. First, however, a state may request that an expert mission visit its territory to provide good offices and medi-

regional organizations to assist struggling new democracies in establishing new institutions or in reviving dormant ones to protect human rights. These states have also advocated rethinking the scope of the non-intervention principle, in view of the new reality of collective initiatives.<sup>119</sup>

#### V. TOWARD A STRONGER COMMUNITY OF POWER

Within a larger community of power, members of the United Nations need to double their efforts to clarify the law of self-determination and humanitarian intervention. They should also improve processes for sorting out pertinent facts and reconciling opposing interpretations of those rights, and encourage mediation or other peaceful techniques for settling international disputes. It is still true today that, "No countervailing credo yet confronts the unraveling logic of self-determination. No universal mechanism exists to weigh the justice of competing ethnic claims. No international authority is yet willing, let alone able, to save failing sovereignties."<sup>120</sup>

Although a "countervailing credo" to self-determination may not be feasible or even advisable, the United Nations should clarify essential rules and norms. The collapse of UN-organized talks between Greek and Turkish Cypriots after introduction of self-determination rhetoric underscores the importance of a concerted effort to objectify and neutralize the term. The General Assembly should also confront the jurisprudential tension between its human rights initiatives and principles of non-interference. This might be undertaken by acting through the International Law Commission. The organization needs to seek a more definitive answer to the question: when, precisely, *do* human rights concerns become Chapter

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ation services or undertake other means assigned by the state to resolve a particular "human dimension" issue. The newly formulated mechanism invites all CSCE members to exercise friendly persuasion as a means of encouraging another member state to request such an expert mission. If the state refuses within a reasonable period of time, any six members of the CSCE may convoke a fact-finding mission to the recalcitrant state even without its consent. After completing an investigation (whether voluntarily invited or mandatorily imposed), the mission is instructed to prepare a report for submission to the CSCE's Committee of Senior Officials. In extraordinary circumstances, when time is of the essence, any nine CSCE members may request the CSCE to convoke a mandatory mission without waiting for the target state voluntarily to invite one. Letter from Ambassador Max M. Kampelman to the author (Nov. 8, 1991).

119. Ambassador Thomas R. Pickering, Address at Willamette University (May 12, 1991) (stressing the need for the U.N. to devote more attention to ways of intervening in states for of human rights purposes), in STATESMAN J. (Salem, Or.), May 13, 1991, at 2. See also CHINA POST, July 18, 1991, at 4 (Austria, France and Germany call for relaxation of principle of non-intervention to improve enforcement of human rights). See also *Pax Universalis*, *supra* note 84.

120. Clad, *supra* note 43. See also Emerson, *supra* note 45, at 474, 475:

Because of the great variety of situations, problems and claims, the decisions would undoubtedly have frequently to be of an *ad hoc* "political" nature . . .

. . . On the face of it, it is desirable that the United Nations be empowered to play a larger role in relation to the always hazardous issue of self-determination.

VII issues of international peace and security? Articles 1(3) and 55 are reconcilable with Article 2(7), but their mutuality needs to be formulated more explicitly and precisely.

Clarification of rules is, however, only a small part of the opportunities and responsibilities of a community of power. Improved mechanisms and procedures for organizational initiatives may be even more important. The United Nations Security Council might remain in session on a daily, year-round basis,<sup>121</sup> in order to monitor global stability and curtail crises while still incipient. An excellent example of the Security Council's ability to monitor and respond to crises of self-determination was its imposition of a mandatory, though unsanctioned, embargo on arms shipments to Yugoslavia.<sup>122</sup> This decision was built explicitly upon the precedent of the Security Council's initiatives to control the flow of arms during the Kuwait crisis preceding the Gulf War.

With greater financial resources, the Secretary-General could assume a larger role in supporting Security Council initiatives and undertake information gathering and fact-finding, contingency planning, preventive diplomacy, and support of regional dispute resolution. The Secretary-General can act under either Article 98 or Article 99 of the Charter.<sup>123</sup> For Example, under Article 98, the Secretary-General might make recommendations to the Security Council for appropriate action under Chapter VII of the Charter. A new office of Research and Collection of Information (ORCI) could enhance the ability of the Secretariat to carry out its responsibilities under both Articles 98 and 99 of the Charter. Specifically, the Secretariat can play a useful role in gathering facts and preparing background studies before referring delicate self-determination issues to the Security Council, as in the Yugoslavian crisis.

United Nations human rights bodies can play an expanded role in investigating and addressing issues of self-determination and deprivation of human rights. Foremost among these bodies is the U.N. Commission on Human Rights, which assumed an active role in Kuwait and Iraq, as-

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121. "The Security Council shall be so organized as to be able to function continuously." U.N. CHARTER art. 28(1).

122. See N.Y. TIMES, Sept. 26, 1991, at A4.

123. Article 98.

The Secretary-General shall act in that capacity in all meetings of the General Assembly, of the Security Council, of the Economic and Social Council, and of the Trusteeship Council, and shall perform such other functions as are entrusted to him by these organs. The Secretary-General shall make an annual report to the General Assembly on the work of the Organization.

Article 99.

The Secretary-General may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security.

U.N. CHARTER.

sisted by the appointment of Special Rapporteurs.<sup>124</sup> Other pertinent bodies include the Sub-Commission on Prevention of Discrimination and Protection of Minorities,<sup>125</sup> the Committee on the Elimination of Racial Discrimination,<sup>126</sup> and the special committees established under the two International Covenants on human rights.<sup>127</sup> Several types of human rights mechanisms offer particular promise: working groups with independent rapporteurs to address particular human rights issues (for example, self-determination); special rapporteurs to examine conditions in specific countries; committees to monitor compliance with human rights treaties, especially those with optional mechanisms for individual complaints; the Advisory Services program that provides technical assistance to states experiencing human rights-related conflict; and public information programs to heighten awareness of human rights mechanisms.<sup>128</sup> More ambitiously, the U.N. might establish a step-by-step process for investigating human rights similar to the Human Dimension Mechanism of the CSCE.

The U.N. successfully supervised free elections in Namibia, Nicaragua, and Haiti. This led to the adoption by the 45th General Assembly of a resolution that called upon the Secretary-General to establish a process for responding to requests by states for electoral assistance.<sup>129</sup> The next step might be to establish a standing United Nations electoral commission to assist in elections and the general process of internal self-determination. Free elections are, however, no guarantee of democracy or even self-determination.

In mediating and resolving disputes that are bound to occur, five organizational tasks are essential: 1) searching for formulas to avoid and resolve conflicts; 2) building consensus in whatever strategy is selected; 3) conducting behind-the-scenes negotiations; 4) providing face-saving exits from conflict; and 5) helping member states satisfy their obligations under Articles 1(3) and 33<sup>130</sup> of the Charter, by selecting the appropriate

124. HOWARD TOLLEY, JR., *THE U.N. COMMISSION ON HUMAN RIGHTS* 190 (1987); *GLOBAL AGENDA*, *supra* note 44, at 192 (role in Kuwait and Iraq).

125. Resolution 8 (VIII) of the U.N. Commission on Human Rights, 42 U.N. ESCOR, 23d Sess., 930th mtg., Supp. No. 6, at 131, U.N. Doc. E/CN.4/940 (1967) (specifically authorizing the Sub-Commission to review situations that disclose a consistent pattern of human rights violations).

126. *See International Convention on the Elimination of All Forms of Racial Discrimination*, Mar. 7, 1966, art. 8, 660 U.N.T.S. 195, 224.

127. *See Covenants*, *supra* note 23. The two committees are the Human Rights Committee (political and civil rights) and the Committee on Economic, Social and Cultural Rights.

128. *GLOBAL AGENDA*, *supra* note 44, at 172.

129. *See THE UNITED NATIONS ASSOCIATION OF THE UNITED STATES OF AMERICA, THE FORGOTTEN U.N.: AN INSIDE LOOK AT THE 45TH GENERAL ASSEMBLY* 1 (1990). *See generally International Observation of Elections*, 84 AM. SOC'Y INT'L L. PROC. 375 (1990).

130.

To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all

mode of dispute resolution. It should be possible for the Secretariat to respond routinely to popular claims for a greater measure of self-determination. An arrangement for on-going, third-party consultation might be sufficient, and failing that, impartial review of popular claims and governmental counterclaims.

The United Nations might establish a sort of multi-door international courthouse, perhaps in the Hague or Geneva. Here, claims relating to self-determination and intervention could be arbitrated or adjudicated. A preliminary requirement might be recourse to mandatory mediation or conciliation. Perhaps it is time to dust off the Clark-Sohn plan for a World Conciliation Board<sup>131</sup> that would provide expert mediators and conciliators to review issues of self-determination. The United Nations might also consider establishing a more formal tribunal with jurisdiction to hear cases involving issues of political and civil rights, secession and self-determination.<sup>132</sup> A general instrument on the settlement of disputes is another idea whose time may have come. Meanwhile, the 1990 United Nations Draft Rules for the Conciliation of Disputes between States<sup>133</sup> and the Handbook on the Peaceful Settlement of Disputes between States<sup>134</sup> provide a reliable framework for achieving a dispute settlement after negotiations have failed.

Regional arrangements, particularly in Europe, will be of growing assistance in resolving disputes before they ripen into serious conflict. For example, the Organization of African Unity (OAU) has mediated disputes in the Horn of Africa, between Algeria and Morocco, Mauritania and Senegal, and between Benin and Niger. The CSCE's new Conflict Prevention Centre and mechanism for resolving international disputes<sup>135</sup> holds promise. Particularly noteworthy are the CSCE's plans to seek new methods for the peaceful settlement of disputes,<sup>136</sup> "including *mandatory*

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without distinction as to race, sex, language, or religion . . . .

U.N. CHARTER art. 1(3).

*Article 33*

1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.

*Id.* art. 33.

131. GRENVILLE CLARK & LOUIS B. SOHN, *WORLD PEACE THROUGH WORLD LAW* 335, 340 (2d ed. 1960).

132. See generally LEE C. BUCHHEIT, *SECESSION: THE LEGITIMACY OF SELF-DETERMINATION* (1978).

133. Draft Rules for the Conciliation of Disputes between States, U.N. Doc. No. A/45/742 (1990), reprinted in 30 *I.L.M.* 229 (1991).

134. See *Progress Report by the Secretary General*, A/AC.182/L.68 (1990).

135. Paris Charter, *supra* note 27, at 207.

136. Valletta Report on Peaceful Settlement, *supra* note 27, at 384, 390.

third-party involvement,"<sup>137</sup> and to develop, "new procedures involving . . . the services of experts or a roster of eminent persons experienced in human rights issues . . . ."<sup>138</sup>

To strengthen the role of regional organizations, the Secretary-General might establish a permanent staff to coordinate the Secretariat and regional organizations on issues of self-determination. This permanent staff could also help strengthen regional facilities for resolving disputes without fragmenting global efforts. With technical and financial assistance from the United Nations, regional organizations could be more effective in helping ensure international peace and security. They have a strong stake in what happens in their neighborhood, or neighborhoods in the case of multi-regional states such as Egypt, the United States and some members of the European Community. Proper financing will be critical. For example, if the OAU had been better financed, it might well have succeeded in arranging an earlier ceasefire in the Chad civil war.<sup>139</sup>

When humanitarian intervention is unavoidable, the United Nations should multilateralize it by exercising its enforcement powers with Resolution 688 as precedent.<sup>140</sup> Alternatively, the United Nations should decide whether to authorize and regulate regional or unilateral intervention. Provisional measures under Article 40 could be used,<sup>141</sup> as in the Kuwaiti crisis preceding the Gulf War.

In the absence of an effective, on-going enforcement mechanism that is equipped to respond immediately to national crises of self-determination or other crises of human rights significance, the General Assembly and the Security Council might jointly adopt a resolution on humanitarian intervention. It should preempt unilateral actions. Accordingly,

137. Paris Charter, *supra* note 27, at 201 (emphasis added).

138. *Id.* at 200.

139.

Stronger regional organizations, supported by a United Nations providing economic and financial assistance, would obviate the necessity for the big powers to get directly involved in most cases. We saw that when the OAU was willing and almost able to protect Chad against Libya, but failed for want of adequate financing. The United Nations refused to provide financial assistance on the ground that this was a regional matter outside its jurisdiction—a technical point that could have been met easily by some clever arrangement, especially since the United Nations has been willing to support regional efforts in other peacemaking contexts such as the Contadora Group.

Louis B. Sohn, Remarks, 83 AM. SOC'Y. INT'L. L. PROC. 443 (1990).

140. S/RES/688, *supra* note 91.

141. Article 40.

In order to prevent an aggravation of the situation, the Security Council may, before making the recommendations or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable. Such provisional measures shall be without prejudice to the rights, claims, or position of the parties concerned. The Security Council shall duly take account of failure to comply with such provisional measures.

U.N. CHARTER art. 40.



member states would be authorized, *only* under the resolution, to undertake measures in other states that are deemed necessary to vindicate fundamental human rights. Such measures might include the use of force, *unless* the target state agreed within a reasonable period of time to submit immediately to fact-finding and conciliation procedures, and in good faith to carry out any resulting recommendations or decisions. Under Articles 98 and 99 of the U.N. Charter, the Secretary-General might continue to play a central role. Rescue missions requiring an immediate response would be an exception; these would be governed primarily by customary rules of law, such as immediacy, proportionality, and necessity. Thus, humanitarian intervention by one state would only be permissible under two circumstances: first, if a target state had declined to submit a dispute to impartial review within a reasonable period of time; second, if after agreeing to do so, the target state failed to comply in good faith with resulting recommendations or decisions. Humanitarian intervention would be subsumed within a process of community decision, and would be authorized only as a last resort when Article 33 procedures have failed. Effective community deliberations and collective initiatives, rather than unilateral argument and doctrinal justification of intervention, would become the hallmark of a new process of multilateral dispute resolution.

## VI. CONCLUSION

Issues of self-determination and humanitarian intervention abound in the post-Cold War era. To prevent these issues from ripening into serious threats to international peace and security, more preventive diplomacy, contingency planning and collective initiatives by regional and international institutions are sorely needed. In the community of power made possible by revived confidence of states in multilateralism, United Nations efforts should be pre-emptive rather than reactive, practical rather than legalistic. Perhaps the day will arrive when unilateral self-determination and humanitarian intervention will have become largely obsolete. Instead, turning these terms around, the global community will rely on international and regional organizations to make binding humanitarian determinations about self-interventions by states as well as foreign interventions. We may learn to rely, after so many battles, on the better angels of our nature and become more than weasels fighting in a hole.<sup>142</sup>

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142. First Inaugural Address by Abraham Lincoln (Mar. 4, 1861), *reprinted in* INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES, S. Doc. No. 10, 101st Cong., 1st Sess., at 133, 141 (Bicentennial ed. 1989).

