Denver Journal of International Law & Policy

Volume 20
Number 1 *Fall*

Article 6

January 1991

Rights, Intervention, and Self-Determination

Kevin Ryan

Rights, Intervention, and Self-Determination

Keywords

Self-Determination, International Law: History, Human Rights Law, Humanitarian Law, Politics, World Politics

Rights, Intervention, and Self-Determination

KEVIN RYAN*

Under current international law, military intervention, whether by one nation or a group of nations, is generally prohibited.[1] Article 2(4) of the United Nations Charter provides that member nations must refrain, "in their international relations from the threat or use of force against the territorial integrity or political independence of any State."[2] Similar prohibitions are contained in the charters of regional organizations such as the Organization of American States, the Organization of African Unity, and the League of Arab States.[3]

---

* M.A. Princeton University 1979, J.D. University of Denver 1991; Assistant Professor, Dept. of Justice Studies and Sociology, Norwich University. I am grateful to Ved Nanda, Paula Rhodes, Carlos Rosencrantz, and Dennis Lynch for their comments on an earlier version of this paper. I also thank the staff at the Hague Academy of International Law for their assistance during my stay there in summer 1990 and my philosophical friends Ron DiSanto, Steve Doty, Tom Duggan, and Bill St. John for their support and helpful criticism over the years.

1. The prohibition on the unilateral use of force was not part of customary international law prior to 1945 — at least, not clearly so. Since its incorporation in Article 2(4) of the U.N. Charter, however, the principle of nonintervention has been generally accepted as the heart of international law concerning the relations between states. *See* Falk, *Comments*, 69 AM. SOC'Y INT'L L. PROC. 192, 196-97 (1975) ("For the most fundamental postulate underlying the state system is the notion that one does not try to control political developments in foreign societies"); Ved P. Nanda, *Humanitarian Military Intervention*, 23 WORLD VIEW 23 (Oct. 1980) (existing rules of international law generally prohibit military intervention); TERRY NARDIN, LAW, MORALITY, AND THE RELATIONS OF STATES 269-70 (1983) (duty of nonintervention is one of, "certain principles of customary international law that are so basic that it makes sense to say that they reflect the requirements of society in the circumstances of international relations."); R.J. VINCENT, NONINTERVENTION AND WORLD ORDER (1974) (arguing on the basis of "world order principles" that nonintervention is not justified). The status of the nonintervention principle lay at the heart of the important debate between Professors Reisman and Schachter. *See* W. Michael Reisman, *Coercion and Self-Determination: Construing Charter Article 2(4)*, 78 AM. J. INT'L L. 642 (1984); Oscar Schachter, *The Legality of Pro-Democratic Invasion*, 78 AM. J. INT'L L. 645 (1984) [hereinafter *Legality of Invasion*]; and Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620 (1984) [hereinafter *Right to Use Force*].

2. U.N. CHARTER art. 2, ¶ 4. The U.N. General Assembly has taken steps to flesh out the implicit Charter norm of nonintervention. *See e.g.*, Declaration on the Inadmissability of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, G.A. Res. 2131 (XX) (Dec. 21, 1965). *See also* G.A. Res. 2255 (XXI) (Dec. 19, 1966); Declaration of Principles of International Law Concerning Friendly Relations Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV) (Oct. 24, 1970). The latter Declaration has been aptly described as an authoritative interpretation of the U.N. Charter. *See* Oscar Schachter, *International Law in Theory and Practice*, 178 RECUEIL DES COURS 113, 361 n.189 (1982 V).

3. *See* Organization of American States, art. 15, 2 U.S.T. 2394; Organization of African

In general there are two exceptions to this prohibition.[4] The first arises when the U.N. Security Council specifically finds that a breach of the peace, a threat to the peace, or aggression has taken place.[5] Under those circumstances the Security Council can use force against the transgressor, though the mechanism through which the Council would do this is not clear. Most scholars cite the United Nations action in Korea as an example of this exception.

Most nations, and many scholars, recognize humanitarian intervention as a second exception to the prohibition against the use of force. This

---

Unity, May 25, 1963, art. III, 2 I.L.M. 766 ("non-interference in the internal affairs of States"); League of Arab States, Mar. 22, 1945, art. 8, 70 U.N.T.S. 237 (each member "shall respect the form of government obtaining in the other states of the League . . . and shall pledge itself not to take any action tending to change that form"). *See also* Treaty of Friendship, Co-operation and Mutual Assistance (Warsaw Pact), May 14, 1955, art. 8, 219 U.N.T.S. 3 ("principles of respect for each other's independence and sovereignty and of non-intervention in each other's domestic affairs").

4. As Professor Reisman has argued: "Article 2(4) was never an independent ethical imperative of pacifism. In the instrument in which it appears, there is full acknowledgment of the indispensability of the use of force to maintain community order." Reisman, *supra* note 1, at 642. Further, a reading of the entire Charter should make it clear that, even when it was written, it was designed to safeguard what Myres McDougal and his students refer to as "minimum world public order." *See* MYRES S. MCDOUGAL & FLORENTINO P. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER, THE LEGAL REGULATION AND INTERNATIONAL COERCION (1961). Of course, the meaning of texts such as the Charter changes over time as the world takes on new shapes, as power shifts, and as new interpretive, jurisprudential, political and ethical theories are brought to bear on it. Thus, no legal document, certainly not an *international* legal document, has a single meaning written in stone forever. Each document is susceptible to endless variations and an ever-increasing multiplicity of interpretations. *See generally* Kevin Ryan & Jeff Ferrell, *Knowledge, Power, and the Process of Justice*, 25 CRIME & SOC. JUST. 178 (1986), and the literature cited therein.

The list of exceptions to the principle of nonintervention offers a case in point. The list can be longer or shorter depending upon how much weight a particular commentator gives to state practice. Activities such as antiterrorist reprisals, individual and collective enforcement measures, uses of force by states to protect their own nationals abroad, and others can be seen as exceptions to the basic principle because states practice such activities. *See, e.g.*, Anthony D'Amato, *The Concept of Human Rights in International Law*, 82 COLUM. L. REV. 1110 (1982) (arguing for the legitimacy of individual and collective enforcement actions); Anthony D'Amato, *Israel's Air Strike Upon The Iraqi Nuclear Reactor*, 77 AM. J. INT'L L. 584 (1983).

5. This exception falls under a provision of the U.N. Charter asserting as one of the purposes of the organization the prevention of the use of armed force except in the common interest. *See* U.N. CHARTER preamble. The Charter specifically addresses breaches and threats to breach the peace and the proposed U.N. response in Article 39. *See generally* Nanda, *supra* note 1, at 23. There appears to be a consensus among the nations of the world that military intervention is permissible under these circumstances. Of course, assertions of consensus are always overstatements, failing to capture the real disagreement underlying surface unanimity. Here the real disagreement is over the proper interpretation of the key phrases in Article 39 of the Charter: what constitutes a breach of the peace? what constitutes a threat to breach the peace? what is the meaning of "aggression"? Thus, although all nations seem to agree on the broad principle that this is an exception to the nonintervention doctrine, there is interpretive cacophony when it comes to the application of the principle to particular cases.

paper offers some thoughts on the legal and moral underpinnings of the use of armed force for humanitarian purposes. In particular, it explores the interrelationship between humanitarian intervention and the principle of self-determination, a principle increasingly cited in the contemporary world by secessionist and liberation movements. As these movements and "breakaway republics" move onto center stage in world politics, the time has come to examine the ways in which the principle of self-determination provides both a justification for and a limitation upon the use of force by one state against another. This paper attempts to begin that examination.

I. HUMAN RIGHTS VIOLATIONS AND THE USE OF FORCE

According to the proponents of humanitarian intervention, the use of armed force is permitted in cases where gross and persistent violations of human rights exist within a nation.[6] Crimes against humanity, even the imminent threat of such crimes, it is argued, justify military action against the government perpetrating such crimes, and although collective action under the aegis of the U.N. or a regional organization is preferred, intervention by a single nation is permitted in the absence of collective action.

The legal basis for this view is relatively straightforward. Many scholars contend that humanitarian intervention was valid under customary international law prior to the founding of the United Nations, and several interventions in recent years have been cited as evidence of the continuing validity within customary international law of such uses of force.[7] Of course, it is notoriously difficult to categorize a practice as cus-

---

6. *See* Michael J. Bazyler, *Reexamining the Doctrine of Humanitarian Intervention in Light of the Atrocities in Kampuchea and Ethiopia*, 23 STAN. J. INT'L L. 547 (1987); Claydon, *Humanitarian Intervention and International Law*, 1 QUEEN'S INTRA. L.J. 3, 36 (1969); SHELDON COHEN, ARMS AND JUDGMENT 79 (1989); ANTHONY A. D'AMATO, INTERNATIONAL LAW: PROCESS AND PROSPECT 226 (1987); INTERNATIONAL COMMISSION OF JURISTS, THE EVENTS IN EAST PAKISTAN 1971, 76-96 (1972), *reprinted in* RICHARD B. LILLICH & FRANK C. NEWMAN, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW AND POLICY 487 (1979); Michael J. Levitin, *The Law of Force and the Force of Law: Grenada, the Falklands, and Humanitarian Intervention*, 27 HARV. INT'L L.J. 621 (1986); Richard Lillich, *Forcible Self-Help by States to Protect Human Rights*, 53 IOWA L. REV. 325 (1967); Richard Lillich, *Intervention to Protect Human Rights*, 15 MCGILL L.J. 205 (1969); Richard Lillich, *Humanitarian Intervention: A Reply to Ian Brownlie and a Plea for Constructive Alternatives*, *in* LAW AND CIVIL WAR IN THE MODERN WORLD 231-32 (J.N. Moore ed., 1974); Myres S. McDougal & W. Michael Reisman, *Response by Professors McDougal and Reisman*, 3 INT'L LAW. 438 (1969); John N. Moore, *The Control of Foreign Intervention in Internal Conflict*, 9 VA. J. INT'L L. 209 (1969); Nanda, *supra* note 1; Reisman, *supra* note 1; W. Michael Reisman & Myres S. McDougal, *Humanitarian Intervention to Protect the Ibos*, *in* HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 177 (Richard Lillich ed., 1973); FERNANDO R. TESÓN, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY (1988); MICHAEL WALZER, JUST AND UNJUST WARS 101-08 (1977).

7. *See* Tesón, *supra* note 6, at 155-200. Tesón cites as evidence of the present customary law status of humanitarian intervention India's intervention in East Pakistan in 1971,

tomary international law. Nevertheless, a new basis for humanitarian intervention emerged with the founding of the United Nations. The Preamble to the U.N. Charter states explicitly that one of the purposes of the organization is the reaffirmation of "faith in fundamental human rights [and] in the dignity and worth of the human person."[8] Further, Articles 1 and 55 of the Charter commit the United Nations to promotion of universal respect for human rights and basic freedoms,[9] and Article 56 gives member nations an obligation to act, jointly or separately, to achieve the purposes set out in Article 55[10] — that is, Article 56 creates a duty to act to promote respect for rights and freedom.

These provisions have prompted scholars to suggest that furtherance of human rights is just as important in the framework of the United Nations as the principle of nonintervention set out in Article 2(4).[11] This

---

Tanzania's attack on Idi Amin's government in Uganda in 1979, France's intervention in Central Africa in 1979, and the United States military action in Grenada in 1983. Jean-Pierre L. Fonteyne, *The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity Under the U.N. Charter*, 4 CAL. W. INT'L L.J. 203 (1974). *See also* Anthony A. D'Amato, *Trashing Customary International Law*, 81 AM. J. INT'L L. 101 (1987). The classification of any one of these as a truly *humanitarian* intervention is dubious, however. The doubt is particularly strong in the case of the United States' intervention in Grenada. For a discussion of the Indian intervention in East Pakistan, see *infra* text accompanying notes 48-49. The Grenada intervention sparked a lively debate among international legal scholars. *See* Christopher C. Joyner, *Reflections on the Lawfulness of Invasion*, 78 AM. J. INT'L L. 131 (1984); Levitin, *supra* note 6; John N. Moore, *Grenada and the International Double Standard*, 78 AM. J. INT'L L. 145 (1984); Laura Wheeler, Note, *The Grenada Invasion: Expanding the Scope of Humanitarian Intervention*, 8 B.C. INT'L & COMP. L. REV. 413 (1985); Schachter, *Right to Use Force*, *supra* note 1, at 1640-41; Detlev F. Vagts, *International Law under Time Pressure: Grading the Grenada Take-home Examination*, 78 AM. J. INT'L L. 169 (1984). Professor D'Amato would add the United States' invasion of Panama to the list of humanitarian interventions. Anthony A. D'Amato, *The Invasion of Panama Was a Lawful Response to Tyranny*, 84 AM. J. INT'L L. 516 (1990). For a convincing critique of D'Amato's position, *see* Ved P. Nanda, *The Validity of United States Intervention in Panama Under International Law*, 84 AM. J. INT'L L. 494 (1990).

8. U.N. CHARTER preamble.

9. U.N. CHARTER arts. 1, 55.

10. U.N. CHARTER art. 56.

11. *See, e.g.*, Nanda, *supra* note 1. This view, however, is not universally shared. For instance, Louis Henkin contends: "[c]learly it was the original intent of the Charter to forbid the use of force even to promote human rights. . . . Human rights are indeed violated in every country. . . . But the use of force remains itself a most serious — the most serious — violation of human rights." Louis Henkin, *Use of Force: Law and U.S. Policy*, *in* RIGHT V. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE 61 (1989). Opponents of humanitarian intervention claim that the prohibition on the use of force embodied in Article 2(4) should be interpreted consistently with its plain language, so that permitting an exception for humanitarian uses of force is impermissible. *See* IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 342 (1963); Tom J. Farer, *Human Rights in Law's Empire: The Jurisprudence War*, 85 AM. J. INT'L L. 117, 121 (1991) (arguing that the original intent of the drafters of the Charter was to forbid any use of force, even for humanitarian purposes, and that state practice has not altered the contemporary meaning of the original text); Thomas M. Franck & Nigel S. Rodley, *After Bangladesh: The Law of Humanitarian Intervention by Military Force*, 67 AM. J. INT'L L. 275, 299-302 (1973); Schachter, *Right to Use Force*, *supra* note 1; Schachter, *Legality of Invasion*, *supra* note 1. The International Court

view is supported by extensive U.N. work in the human rights arena, beginning with the 1948 Universal Declaration of Human Rights.[12] Numerous other documents have followed, produced by both the United Nations and regional organizations, proliferating rights and reaffirming the world community's commitment to protection of rights.[13] Today there can be little doubt that there are certain core human rights recognized by international law and that nations which practice, encourage, or condone activities such as genocide, slavery or slave trade, murder, causing the disappearance of individuals, torture or other cruel, inhuman, or degrading treatment or punishments, and systematic racial discrimination, are in violation of international law.[14] Increasingly, states take what H.L.A. Hart has called the "internal point of view" toward human rights, treating rights as standards to evaluate each other and even themselves.[15]

Not every violation of human rights, however, is sufficient to justify military intervention into the affairs of another nation. How severe must violations of rights be in order to justify the use of force against another nation? I contend that if violations of human rights are (1) gross, (2) systematic, and (3) persistent, humanitarian intervention is justifiable to end

---

of Justice, in the Corfu Channel case, rejected a British claim to have used force in the cause of international justice. Corfu Channel Case (U.K. v. Albania), 1949 I.C.J. 4, 35 (Judgment of Apr. 9). The Court returned to the question of the validity under international law of intervention into the affairs of another nation in the Nicaragua case, arguing that the protection of human rights "cannot be compatible" with military actions such as those carried out by the United States in Nicaragua. Nicaragua v. United States, 1986 I.C.J. 14, 134-35 (Merits). For conflicting views on the Court's Nicaragua decision *see* Harold G. Maier, *Appraisals of the ICJ Decision: Nicaragua v. U.S. (Merits)*, 81 AM. J. INT'L L. 77 (1987).

12. G.A. Res. 217, U.N. GAOR, 3rd Sess., at 71, U.N. Doc. A/810 (1948).

13. *See generally* INTERNATIONAL HUMAN RIGHTS INSTRUMENTS (Richard Lillich ed., 2d ed. 1988).

14. This is not to deny that the "realm of rights" (to borrow a phrase from Judith Jarvis Thomson) is dynamic rather than static. JUDITH J. THOMSON, THE REALM OF RIGHTS (1990). Rather, the "list" of accepted rights is likely to grow and shrink over time, as attitudes are altered, balances of power shift, and the number and identities of those given a voice in the international legal forum change. (Professor Thomson would disagree with my claim that the realm of rights expands and contracts situationally.) Thus, human rights remains primarily a matter of customary international law, subject to all the forces affecting custom. For a useful discussion, see THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW ch. 2 (1989). For a useful caution against the proliferation of rights in international legal discourse, see Philip Alston, *Conjuring Up New Human Rights: A Proposal for Quality Control*, 78 AM. J. INT'L L. 607 (1984).

15. H.L.A. HART, THE CONCEPT OF LAW (1961). For an example of U.N. treatment of human rights as a basis for criticism of a member nation, see G.A. Res. 721, U.N. GAOR, 8th Sess., Supp. No. 17, at 6, U.N. Doc. A/2630 (1954) (condemning apartheid in South Africa).

Nations have, however, been less willing to call for or attempt armed intervention to stop rights violations. No nation felt strongly enough about rights violations to intervene in East Timor when Indonesia invaded in 1975. *See* Roger S. Clark, *The "Decolonization" of East Timor and the United Nations Norms on Self-Determination and Aggression*, 7 YALE J. WORLD PUB. ORD. 2 (1980). Nor did nations rally to the support of the Hutu in Burundi or the Kurds in Iraq, despite the ease with which their oppressors could have been stopped.

those violations.[16]

Gross violations of rights are those that are "particularly shocking" due to the centrality of the right and the gravity of the violation.[17] Gross violations affect certain "core" rights, which is to say those rights which come closest to universal recognition, and which are at the heart of what it means to be human. One of the philosophical sources of core rights — I do not say the only source — is the principle of autonomy, which provides that individuals should be free and equal in the determination of the conditions of their own lives. This means that they should enjoy equal rights (and equal obligations) in the specification of the framework which both creates and limits the opportunities available to them, so long as they do not manipulate this framework to deprive others of their rights.[18] From this basic principle flow a variety of rights, including those set out in the Universal Declaration of Human Rights, which are rooted in the notion of autonomy. They are designed to assure that the autonomy of individuals is made safe against community or governmental assault.[19] To the extent that these rights are necessary to true human autonomy, their violation, if it is systematic and persistent, justifies humanitarian intervention. To the extent that those rights can be abrogated without denying human autonomy, their violation is inadequate to justify military intervention, even if it is systematic and persistent.

In addition, gross violations of rights occurs if state action directly prevents the exercise of an individual's core rights. In other words, gross violations are so severe as to deny fully to some or all people within a territory the effective exercise of core rights. Partial limitations on rights are not gross violations, no matter how permanent those limitations may be, so long as some room is left for the exercise of the right in question.[20]

---

16. A similar conclusion is reached in MYRES S. MCDOUGAL, ET AL, HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN RIGHTS 239 (1980).

17. The wording is a variation of that contained in the RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §702 comment m [hereinafter Restatement]. What follows in the text adheres fairly closely to comment "m," although I seek to provide a more detailed treatment. *See also* Fonteyne, *supra* note 7, at 258 (setting out substantive, procedural, and preferential guidelines for the legitimacy of humanitarian intervention under international law).

18. *See* DAVID HELD, MODELS OF DEMOCRACY 271 (1987). *See also* J. COHEN AND J. ROGERS, ON DEMOCRACY (1983). Some scholars have gone so far as to suggest that the value of maximizing human dignity is the *raison d'etre* of the international legal order and should take precedence over all other competing claims. *See, e.g.*, Reisman, *supra* note 1.

19. I believe the principle of autonomy lies at the heart of the Declaration's guarantee of the liberty and security of persons, the prohibitions against slavery and torture, the right to equality before the law, the protection against arbitrary interference with privacy, family, home, correspondence and against attacks on honor or reputation, the right to free movement, including the right to leave one's own or another country, and the right to nationality.

20. Were I developing a thoroughgoing theory of rights, I would elaborate on how much room must be left for the exercise of any particular right. This is not the place for that theory, however. Suffice it to say that it is precisely at this point that cultural variations and situational contingencies play an important role in setting the boundaries of the realm of

Rights are essentially fences built around individuals which keep others out. A right establishes a certain "space" around a person, a "space" that is proper to, or an extension of, that person. Human rights, in this sense, are essentially property.[21] Just as an easement is not a violation of one's property right, so a limitation on a right is inadequate to constitute a denial of that right. A right is grossly violated only if the easement becomes so large as to encompass the entire property — i.e., the fence is completely gone, the space around a person invaded and placed under adverse rule, and the ability to choose the use to which the property is put has been entirely taken away.

Violations of rights are *systematic* if they are part of a "consistent pattern," or are a matter of "state policy."[22] Systematic violations include both overt governmental actions aimed at and effectively achieving the goal of violating core rights, and covert but institutionalized practices, the effect of which is to regularly prevent the exercise of core rights (e.g., slavery, apartheid, systematic racial discrimination).[23]

Finally, violations of rights are *persistent* when they are more than occasional or of short duration. Persistent violations are repeated, again and again, over time. Admittedly, it is extraordinarily difficult to determine how long a practice must endure to be persistent, but there are clear cases on the basis of which we can assess difficult cases. The Nazi persecution of the Jews provides an example and suggests key factors: the persecution was the stated policy of the state; it was carried out over a period of more than ten years; it was exported to other nations; and it was furthered through a range of different governmental activities as well as through officially tolerated, even condoned, popular persecution. While not all of these factors need be present, the presence of several suggests a persistent violation of rights is in progress.[24]

II. SELF-DETERMINATION AS A BASIS FOR INTERVENTION

Thus far, I have contended that where core human rights (those rooted in the principle of autonomy) are being grossly, systematically, and persistently violated, humanitarian intervention to end that violation is morally and legally permissible in principle. One of the implications of the principle of autonomy is that government is only justifiable if it and its policies are an expression of the self-determination of the people.[25] In

---

rights. The setting of these boundaries must always be a matter of practical reason rooted in the special features of the situation and flowing from the autonomous political action of the people in a specific community.

21. *See* C.B. MacPherson, *Human Rights as Property Rights*, 1977 DISSENT 72. A similar position is taken by THOMSON, *supra* note 14, at 205-26.

22. *See* RESTATEMENT, *supra* note 17, §702 comment m.

23. *See* Garver, *What Violence Is*, THE NATION, June 24, 1968, at 817.

24. This is another place where a fuller theory of rights must be much more elaborate.

25. The social contract tradition in political theory forcefully argues this point. *See, e.g.* JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Peter Laslett ed., 1988); Jean-Jaques Rous-

order to be autonomous, people must be involved in the specification of the framework, political, economic, and cultural, that both creates and limits the opportunities available to them. Autonomous people are people who, through speech and action, can participate in the creation and recreation of their social world.[26] This suggests that autonomous people must have the right to self-determination, and that the policies and programs of a government must be the products of, or at least consistent with, the autonomous action.

Articles 1 and 55 of the U.N. Charter specifically refer to the principle of self-determination. One of the basic purposes of the United Nations, according to Article 1(2), is to, "develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples . . . ."[27] Article 55 explicitly ties the principle of self-determination to respect for human rights and fundamental freedoms, providing that the UN promote, "universal respect for . . . human rights and fundamental freedoms," with a view to the creation of stability and well-being based in part on the principle of equal rights and self-determination.[28] As indicated above, Article 56 gives each member nation an obligation to implement the requirements of Article 55,[29] thereby creating a duty upon states to take action against a nation that denies self-determination to all or part of its people. Further, the principle of self-determination is implicated in Chapters XI, XII, and XIII of the Charter, which relate to non-self-governing and trust territories.[30] In the years since 1945, the principle has found its way into the International Covenant on Economic, Social & Cultural Rights,[31] the Declaration on the Granting of

---

seau, *The Social Contract*, *in* THE SOCIAL CONTRACT AND DISCOURSES (G.D.H. Cole ed. 1950); IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE (J. Ladd ed., 1965). Some philosophers argue that this requirement can never be fulfilled, and so no government is justifiable. *See* ROBERT P. WOLFE, IN DEFENCE OF ANARCHISM (1970). Others contend that the requirement can be satisfied, but only by a severely limited, minimal government. *See, e.g.*, ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974). Still others believe autonomy is consistent with a far less limited government. *See* JOHN RAWLS, A THEORY OF JUSTICE (1971); AMY GUTMANN, LIBERAL EQUALITY (1980).

26. To say people must be able to participate in the constitution of their social world is to assert that political action must be possible, not necessarily that all people take advantage of the occasions to speak and act. In a passive sense people constitute their social world no matter how oppressive their surroundings. *See* ANTHONY GIDDENS, THE CONSTITUTION OF SOCIETY (1984). The principle of autonomy, however, requires more than this minimal involvement. It requires *active* participation through speech and action in constructing and remodeling the economic, political, and cultural structures. *See* HANNAH ARENDT, THE HUMAN CONDITION (1958).

27. U.N. CHARTER art. 1.

28. U.N. CHARTER art. 55.

29. *See supra* text accompanying notes 8-10. *See also* U.N. CHARTER art. 56.

30. *See* U.N. CHARTER arts. 73-91. Article 73, in particular, obliges states administering non-self-governing territories "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 . . . ." U.N. CHARTER art. 73.

31. G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316

Independence to Colonial Countries and Peoples,[32] and the Declaration of Principles of International Law Concerning Friendly Relations.[33] In addition, the International Court of Justice has affirmed the right to self-determination in its advisory opinions in the Namibia and Western Sahara cases.[34]

The principle of self-determination is extremely complicated, and I do not intend to provide a full-scale analysis in this essay.[35] Long applied

---

(1967). Article 1 of the Covenant provides: "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." The same wording is repeated in Article 1 of the International Covenant on Civil and Political Rights, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966).

32. G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. A/4684 (1961). Interestingly, and in keeping with the fact that the current realm of international law is a system of states, the Declaration prohibits all attempts designed to achieve, "the partial or total disruption of the national unity and the territorial integrity of any state." Such a prohibition clearly cuts against most contemporary self-determination claims.

33. 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 (1971)("all peoples have the right freely to determine, without external interference, their political status and pursue their economic, social and cultural development, and every state has the duty to respect this right in accordance with the provisions of the Charter"). *See* C. Don Johnson, Note, *Toward Self-Determination — A Reappraisal as Reflected in the Declaration on Friendly Relations*, 3 GA. J. INT'L & COMP. L. 145 (1973). The principle is also contained in the Declaration on the Establishment of a New International Economic Order, G.A. Res. 3201, U.N. GAOR, 6th Special Sess., Supp. No. 1, U.N. Doc. A/9559 (1974).

34. Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16; Western Sahara (Advisory Opinion), 1975 I.C.J. 12.

35. An extensive, indeed exhaustive, literature exists on the meaning and application of the principle of self-determination. *See* M.C. Bassiouni, *'Self-Determination' and the Palestinians*, 65 AM. SOC'Y INT'L L. PROC. 31 (1971); LEE C. BUCHHEIT, SECESSION: THE LEGITIMACY OF SELF-DETERMINATION (1978); Lung-Chu Chen, *Self-Determination as a Human Right*, *in* TOWARD WORLD ORDER AND HUMAN DIGNITY 198 (W. Michael Reisman & Burns H. Weston eds., 1976); Yoram Dinstein, *Collective Human Rights of Peoples and Minorities*, 25 INT'L & COMP. L.Q. 102 (1976); Rupert Emerson, *Self-Determination*, 65 AM. J. INT'L L. 459 (1971); Robert A. Friedlander, *Self-Determination: A Legal-Political Inquiry*, 1 DET. C.L. REV. 71 (1975); HAROLD S. JOHNSON, SELF-DETERMINATION WITHIN THE COMMUNITY OF NATIONS (1967); Myres S. McDougal et al., *The Protection of Respect and Human Rights: Freedom of Choice and World Public Order*, 24 AM. U.L. REV. 919 (1975); Ved P. Nanda, *Self-Determination Under International Law: Validity of Claims to Secede*, 13 CASE W. RES. J. INT'L L. 257 (1981); W. OFUATEY-KODJOE, THE PRINCIPLE OF SELF-DETERMINATION IN INTERNATIONAL LAW (1977); MICHLA POMERANCE, SELF-DETERMINATION IN LAW AND PRACTICE (1982); DOV RONEN, THE QUESTION FOR SELF-DETERMINATION (1979); J.N. SAXENA, SELF-DETERMINATION: FROM BIAFRA TO BANGLA DESH (1978); SELF-DETERMINATION: NATIONAL, REGIONAL, AND GLOBAL DIMENSIONS (Yonah Alexander & Robert A. Friedlander eds., 1980); A. RIGO SUREDA, THE EVOLUTION OF THE RIGHT OF SELF-DETERMINATION (1973); Eisuke Suzuki, *Self-Determination and World Public Order: Community Response to Territorial Separation*, 16 VA. J. INT'L L. 779 (1976); Gebre H. Tesfagiorgis, *Self-Determination: Its Evolution and Practice by the United Nations and Its Application to the Case of Eritrea*, 6 WIS. INT'L L.J. 75 (1987); UMOZURIKE O. UMOZURIKE, SELF-DETERMINATION IN INTERNATIONAL LAW (1972).

only in the colonial context, granting *colonial* peoples a right to self-determination,[36] it has increasingly been used in the post-colonial age by separatist groups and secessionist movements around the globe as a justification for their activities.[37] Legal scholars — even the United Nations itself — have generally agreed that the principle of self-determination may well have applicability outside of the colonial context, though within rather strict limits.[38]

Perhaps the most difficult aspect of the right to self-determination is the delimitation of the "people" who possess it.[39] How large of a group is a "people?" What key characteristic of a group of humans distinguishes them as a "people?" Do all members of an ethnic group constitute a "people?" Do co-religionists or all speakers of a particular language constitute a "people?" Must all be members of a single tribe? Must all live within an already established geographical area? These are not easy questions to answer, nor is there any agreement on the answers among nations or legal scholars. Certainly, to be a "people" a group of persons must *see* themselves as a single people. But this standard is highly subjective and changeable. Surely something else, some objective fact or set of facts about the group, must be required.

For our purposes, let us imagine we have worked our way through these difficulties and have located the subject of the right to self-determi-

---

36. As Professor Nanda has pointed out, "self-determination, at least in the specific context of colonialism, has acquired the status of an established rule of customary international law." Nanda, *supra* note 35, at 259. *See also* Ofuatey-Kodjoe, *supra* note 35, at 147. *But see* S. Prakash Sinha, *Is Self-Determination Passe?*, 12 COLUM. J. TRANSNAT'L L. 260, 271 (1973) (insufficient evidence that self-determination has become a principle of international law); Gross, *The Right of Self-Determination in International Law*, *in* NEW STATES IN THE MODERN WORLD 136 (Martin Kilson ed. 1975) (decolonization insufficient to demonstrate the establishment of self-determination as a principle of customary international law).

37. *See, e.g.*, Agolo Auma-Osolo, *A Retrospective Analysis of United Nations Activity in the Congo and its Significance for Contemporary Africa*, 8 VAND. J. TRANSNAT'L L. 451 (1975); Lung-Chu Chen & W. Michael Reisman, *Who Owns Taiwan: A Search for International Title*, 81 YALE L.J. 599 (1972); John A. Collins, Note, *Self-Determination in International Law: The Palestinians*, 12 CASE W. RES. J. INT'L L. 137 (1980); Hazen, *Minorities in Revolt: The Kurds of Iran, Iraq, Syria, and Turkey*, *in* THE POLITICAL ROLE OF MINORITY GROUPS IN THE MIDDLE EAST 49 (Ronald D. McLaurin ed. 1979); David L. Johnson, Comment, *Sanctions and South Africa*, 19 HARV. INT'L L.J. 887 (1978); J. Robert Maguire, Note, *The Decolonization of Belize: Self-Determination v. Territorial Integrity*, 22 VA. J. INT'L L. 849 (1982); 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); CONOR C. O'BRIEN, STATES OF IRELAND (1972); Tesfagiorgis, *supra* note 35; Mark A. Thiboldeau, Note, *The Legality of an Independent Quebec: Canadian Constitutional Law and Self-Determination in International Law*, 3 B.C. INT'L & COMP. L. REV. 99 (1979); M.C. van Welt van Praag, *Tibet and the Right to Self-Determination*, 26 WAYNE L. REV. 279 (1979).

38. *See generally* Nanda, *supra* note 35, at 263-66 (assessing various arguments against applying self-determination outside the colonial context). For the purposes of this article, I will assume without argument that self-determination does have applicability outside of decolonization issues, though subject to limitations.

39. *See* works cited *supra* note 35.

nation, that we have isolated a people which we believe has a right to self-determination. What does that right confer?[40] There are two types of answers to this question, and both may be correct. The answers depend upon a distinction between external and internal self-determination. *External* self-determination has to do with the determination of the *national self*, and confers a right to independence to a people. *Internal* self-determination, on the other hand, relates to the governmental, economic, and social order within national boundaries; it confers a right to individuals and groups to participate in the creation and re-creation of internal social order. I think both the right to independence and the right to participate in the internal processes of social order construction are implicit in the principle of self-determination, and I can see no persuasive, principled way to eliminate either one of these aspects of self-determination from its legal meaning. Notice, however, the effect of such an understanding of self-determination on the permissibility of humanitarian intervention. A gross, systematic, and persistent denial of self-determination — that is, a denial of the rights of independence and to participation in internal, interactive processes — may justify humanitarian intervention in principle. This suggests that humanitarian intervention may be permissible to support liberation movements,[41] but, and this is an important limitation, *only* when the people seeking liberation have been grossly, systematically, and persistently denied an opportunity to determine themselves, to establish their own nation. In addition, dictatorship, if extended beyond moments of immediate crisis, generally violates the self-determination principle since it places into the hands of a single individual or group of individuals all power to determine the internal shape of a nation and prevents people from speaking and acting to constitute their own social order. Under a dictatorship the people are permitted no voice, are not listened to by their governors, and are prevented from speaking in certain ways. Any government that, in principle, prevents the exercise of people's right to internal self-determination is illegitimate, and efforts by outside forces to give a voice to the people are justifiable in principle.

Intervention, however, *must* seek to make room for the autonomous activities of the people inside a territory in order for the use of force to be

---

40. The literature on this question is inconclusive. *See* Ofuatey-Kodjoe, *supra* note 35.

41. Reisman argues that intervention to enhance popular rule is justifiable despite the seeming prohibition of Article 2(4). The "peoples" to which he would apply this, I believe, are already established nations suffering under a totalitarian yoke. There are several problems with his thesis, not least of which is that he does not extend it to include the self-determination of peoples, such as the Eritreans or the Kurds, who have not been permitted to establish themselves as a nation in the modern state system. In addition, Reisman seems to be far too sanguine about the virtues of intervention, for he appears to find any intervention aimed at the furtherance of self-determination to be justified under international law. This ignores the tendency of powerful or aggressive states to claim a humanitarian justification as a cover for non-humanitarian military adventures, the possibility that excessive force will be used by the intervener, and the likelihood that the consequences of forceful intervention will be worse (perhaps far worse) than the available alternatives.

justified. The intervening party must be seeking only to destroy the barriers to the exercise of self-determination, not to install its own favored form of economic, political, or cultural order. Self-determination, as Mill argued, is not the same as free *institutions*;[42] rather, it is more inclusive, describing less a particular institutional arrangement than a process by which a community arrives at that arrangement. A nation can be self-determining even if its people do not establish free political institutions. This means that self-determination is denied if an invader replaces the internal processes of creation by forcefully establishing *any* institutional arrangement, however free. Such a intervener has merely replaced one form of tyranny with another. Political freedom can be won only by the members of the community themselves, it cannot be imposed from without.[43]

III. LIMITATIONS ON HUMANITARIAN INTERVENTION

The discussion to this point may appear to present a tolerant conception of the justifiability of humanitarian intervention. But humanitarian intervention is not easily justified, and its exercise is severely limited in a number of ways. Further, these limits are rooted not only in the practical contingencies of particular cases, but in the very structure of the justifying theory itself. While humanitarian intervention may be justified in principle, its actual use will rarely be permissible because its use will run afoul of one or more of these limitations.

A. *Purity of Motive*

The first limit stems from what can be called the "purity of motive" requirement. The motives of the intervening nation must be "pure," meaning that the intervener must be seeking to end the violation of rights and *only* to end such violations.[44] Once the violations have ended, the

---

42. *See* John Stuart Mill, *A Few Words on Non-Intervention, reprinted in* THE VIETNAM WAR AND INTERNATIONAL LAW 24, 36-37 (Richard A. Falk ed., 1968).

43. The type of political institutions that emerge out of a process of self-determination depends upon the interactive processes of the political culture in a particular nation. Political institutions grown in the soil of another political culture cannot successfully be transplanted to nations whose cultural soil will not support them. This has been the experience of imposed U.S. modeled democracies in many parts of the world. *See* NOAM CHOMSKY & EDWARD S. HERMAN, THE WASHINGTON CONNECTION AND THIRD WORLD FASCISM (1979); PENNY LERNOUX, CRY OF THE PEOPLE (1980). *See also* GABRIEL A. ALMOND & SIDNEY VERBA, CIVIC CULTURE (1963).

44. *Compare* Comment, *Humanitarian Intervention in International Law: The French Intervention in Syria Re-examined*, 35 INT'L & COMP. L.Q. 182, 190 (1986); Franck & Rodley, *supra* note 11, at 278-79 ("must have occurred when the humanitarian motive is at least balanced, if not outweighed, by a desire to protect alien property or to reinforce socio-political and economic instruments of the status quo"). Michael Walzer claims to have found no examples of *pure* humanitarian intervention. "States don't send their soldiers into other states, it seems, only in order to save lives. The lives of foreigners don't weigh that heavily in the scales of domestic decision-making." WALZER, *supra* note 6, at 101-02. *See also* BROWNLIE, *supra* note 11, at 339-40; Farer, *supra* note 11, at 121.

intervening state must leave the field open for the self-determination of the now-liberated people. It is wrong to intervene on behalf of people and fail to respect their own ends by imposing one's own self-interested ends on them.[45] An intervention which, in reality, is designed to achieve the selfish purposes of the intervening party — e.g., to rid itself of an annoying, belligerent, or merely uncooperative neighbor, or to establish any vision of world order (no matter how benevolent) — exceeds this strict limitation, and, hence, is unjustified.

Notice how the principle of self-determination operates both as a justification for humanitarian intervention and as a limit on how it is practiced. Humanitarian intervention to end a denial of self-determination is permissible only when the people are free to engage in self-determination. If after the intervention they still will not have the opportunity to constitute for themselves the social order in which they will live, the intervention is not justified.

The purity of motive requirement has two significant implications. First, interventions with mixed motives — combining a desire to end a denial of rights with a desire to achieve certain selfish utilitarian goals of the intervener — are not justified, for it is not truly humanitarian in nature. Many commentators argue that mixed motives are permissible so long as "the overriding motive is the protection of human rights."[46] But it is highly unlikely that any state will confess to the nefarious motives underlying its decision to use armed force; instead, its public pronouncements will loudly proclaim that humanitarian concerns are uppermost in its thoughts. How is it possible to sift through the fog of public relations and ascertain what motive is "really overriding?" Further, one extremely difficult problem with any theory that refers to the motives of "states" is that a "state" cannot be the possessor of motives. State action is action by one or a group of individuals *in the name of the state.* These individuals may be working from a variety of motives, and it is possible that no two of the individuals will have the same motives or combination of motives. The motive of a "state," then, will always be a congeries of different motives. This difficulty is shared by both the mixed motive proponents and those, who insist that motives must be purely humanitarian. Nevertheless, where different motives appear to be behind the actions of a state, it is far easier to apply the purity of motive standard than to conduct the weighing process necessary to determine the "overriding" motive of state action.

More importantly, permitting mixed motives is to court the danger that the assertion of humanitarian concern will be merely a cover for other, quite different, actual interests.[47] With the assurance that other

---

45. *See* Levitin, *supra* note 6, at 652; WALZER, *supra* note 6, at 104.

46. Lillich, *Forcible Self-Help*, *supra* note 6, at 350-51. *See also* Ved P. Nanda, *The United States' Action in the 1965 Dominican Crisis: Impact on World Order* (pts. I & II), 43 DEN. L.J. 439, 475 (1966), 44 DEN. L.J. 225 (1967); Fonteyne, *supra* note 7, at 262.

47. This concern underlies Schachter's critique of Reisman's expansive view on the le-

motives are permissible so long as the humanitarian one is foremost, states will be encouraged to use force first and later engage in creative accounting to fit their actions into the balance sheet in the legally prescribed manner. The predictable result will be that powerful and aggressive states will be given a license to romp over their neighbor's soil in pursuit of selfish ends. Further, the only safeguard against such an eventuality is to recognize that the *only* justification for humanitarian intervention is to end the violation of human rights, and that particular interventions can only be justified if the intervener's motives are completely parallel with this justification.

Many writers cite the 1971 Indian intervention in East Pakistan as an example of humanitarian intervention.[48] But despite India's rhetoric, and despite the fact that conditions in East Pakistan would have justified humanitarian intervention, India's motives were mixed, and so *its* intervention was unjustified. Undoubtedly the series of massacres of East Pakistani Bengalis by West Pakistani troops constituted genocide, and, hence, would have justified military intervention to stop them. But India did not intervene to stop the massacres solely because doing so was the humanitarian thing to do. Rather, it was in India's interest to end the massacres and thereby solve a serious refugee problem. Further, India benefitted enormously by the secession of East from West Pakistan, for this ended a situation in which India was virtually surrounded by a relatively powerful nation with which relations were anything but cordial. Thus, the massacres provided a convenient pretext for carrying out an important goal of Indian domestic and foreign policy. It is highly unlikely that India would have invaded had it not stood to gain greatly from doing so: nations are usually reluctant to help others if it is not in their own interest. Thus, the motivating force behind the intervention was not humanitarian concern, but self-interest, and although in the abstract an intervention in East Pakistan was assuredly justifiable, *India's* intervention was not.[49]

Second, interventions which use excessive force — whether in terms of quantity of force, duration of involvement, or geographical extent of military action — are also unjustifiable. This is merely a restatement of the traditional principle of proportionality: force must be proportional to the size of the wrong being addressed.[50] Given that the purpose of hu-

---

gality of the use of force. *See* Schachter, *Legality of Invasion*, *supra* note 1.

48. *See, e.g.*, WALZER, *supra* note 6, at 105; COHEN, *supra* note 6, at 79. Curiously, India itself *did not assert* the violation of rights as the justification for its intervention, claiming instead that it acted in self-defense (a much less persuasive claim).

49. *See* Franck & Rodley, *supra* note 11 (reaching a similar conclusion). *Contra* Richard Lillich, Rapporteur, *The International Protection of Human Rights by General International Law, Second Interim Report of the Sub-Committee, in* REPORT OF THE INTERNATIONAL COMMITTEE ON HUMAN RIGHTS OF THE INTERNATIONAL LAW ASSOCIATION 38, 54 (1972).

50. For a recent statement of this principle in regard to humanitarian intervention, *see* Tesón, *supra* note 6, at 5. *See also* Nanda, *supra* note 1, at 24; Nanda, *supra* note 46, pt. I at 475; Moore, *supra* note 6, at 264.

manitarian intervention is to liberate people from their oppressors, the only force that is justified is the force that is necessary and sufficient to end the violation of rights. The use of excessive force, force that is disproportionate to the demands of the situation, renders the action unjustified. Lengthy involvement in the internal affairs of a nation beyond the time needed to inititate the process of self-determination, or taking advantage of a chaotic situation to push one's military forces into places where their presence is not necessary to foster self-determination, bespeak motives other than a concern for rights. The purity of motive requirement strictly limits the quantity, duration, and extent of the use of armed force to what *must* be used to end the violation of rights and forbids any use of force which flows from *any* other purpose.

B. *The Consequences of Intervention*

Additional limitations on humanitarian intervention are founded on the expected consequences of the use of armed force in any given situation. For humanitarian intervention to be proper in any given case, its *reasonably foreseeable* consequences must be better than the reasonably foreseeable consequences of each available alternative. This does not mean that humanitarian intervention must be the last resort; indeed, it may theoretically be the first resort. What is required is not that all the other alternatives be tried, but that they be considered seriously, and that when compared to intervention the other alternatives seem reasonably likely to produce worse results than intervention.

The consequences of international actions, particularly those involving the use of force, should be assessed on the basis of three considerations: justice, autonomy, and welfare.[51] An intervention that is likely to lead to a more just society is, in that regard, morally justified; an intervention that is likely to produce a less just social order is not.[52] Likewise, an intervention that enhances human autonomy is more likely to be justified than an intervention that diminishes autonomy. Finally, an intervention that increases human happiness, and especially one that reduces human suffering, is more justifiable than an intervention that increases suffering. In determining whether or not an intervention is justified as a means of correcting the grave wrongs against which it is directed, its probable consequences for justice, autonomy, and human welfare should be ascertained, and compared with the probable consequences of the

---

51. *See* Robert Audi, *On the Meaning and Justification of Violence, in* VIOLENCE 59 (Jerome A. Shaffer ed., 1971).

52. This essay is not the place to develop a theory of justice. In general, I conceive justice to be a micro-phenomenon, a local production of the interaction of people within narrowly defined groups. Thus, conceptions of justice vary from group to group, as well as from moral tradition to moral tradition. *See* ALASDAIR C. MACINTYRE, WHOSE JUSTICE? WHICH RATIONALITY? (1988). I am skeptical of any attempt to develop grand, macro-level theories of justice. Rather, justice must be defined — since there is no eternal essence of justice — in the terms of those to whose interrelations it applies.

available alternatives. Intervention is only justified if it is the alternative that realistically and foreseeably will produce the best consequences measured by these considerations.[53]

Considerations of autonomy make the consequences to the people whose rights were being violated of particular importance.[54] If the goal of intervention is to stop the violation of human rights, it is essential that it have a significant likelihood of success. If people are already being oppressed, military action against the government brings with it the great danger that the level of oppression and suffering, and the extent of human rights violations, will only be increased, initially as an internal response to the intervention, and in the long term as a corrective to those who may have supported (in whatever way) a failed intervention. A state contemplating intervention must carefully evaluate the probability that its action will actually liberate a people so that they can create a viable national self and participate in the constitution of their own social order. Interventions which seem unlikely to have these results are not justified.

Further, considerations of justice, autonomy, and welfare all suggest that states recognize that any use of force, coupled with an accepted claim that the use was permitted under international law, may very well have the result that armed attacks against peaceful governments will be legitimated, making it easier for other states with less admirable motives to use force in less justifiable circumstances.[55] A world in which armed force is too easily justified is one in which powerful and aggressive nations can bully other nations and claim international law (as they have histori-

---

53. Notice I do not base the legitimacy of the intervention on the actual consequences, but only on foreseeable consequences. It is foolish to expect states and their leaders to be seers who can know the precise consequences of their actions before they take them. Indeed, the book is never closed on the consequences of our actions, which keep on producing effects long, long after the actor herself has left the stage. Further, basing legal and moral condemnation (or approval) of the use of force on what ultimately occurs carries with it the possibility that less careful, perhaps less scrupulous, powerful states will act first (since they cannot be criticized at the time of action) and worry about justification later (maybe much later). Such a situation would only perpetuate and extend the dominance of a few wealthy, aggressive states.

54. Of course the intervening nation must also consider the effects of the intervention on its own people. But there is a danger here that can easily interfere with a nation's motives for intervention. If positive consequences to the intervening nation will flow from the intervention, it is all too easy to intervene, and then use the proper motives as an after-the-fact rationalization. In order to avoid this merely rhetorical use of the proper motives, a nation should look only at the negative consequences of its action on its people. To consider the positive consequences is to court the danger of being swayed by the wrong considerations. It may well be argued that this is an unrealistic requirement. But that a nation cannot successfully disengage the consequences to itself from its decision to intervene is merely one of the many reasons why intervention is unlikely to be justifiable in any actual case. Only if a nation does make its decisions on the basis of a disinterested desire to resist evil and a realistic assessment of the consequences to *others* (and not to itself, except insofar as those consequences are negative), is humanitarian intervention justified.

55. *See* Schachter, *Legality of Invasion*, *supra* note 1, at 649.

cally claimed God) as their co-pilot.[56]

IV. CONCLUSION

Circumstances may be such that the use of force against an oppressive regime may be justified. Still, application of the standards delineated above would generally lead to a realization that few interventions are valid legally or morally. It would be the rare case indeed in which humanitarian intervention is justified. The proposed standards are strict. Like all standards, however, they are not easy to apply and may not speak clearly in any given set of facts. Application of these standards requires extensive, detailed, and objective knowledge of the facts of the case at hand. Such knowledge may be beyond our abilities, at least in the contemporary world,[57] but in the absence of sure knowledge about actual events inside another country, and in the absence of any generally accepted international fact-finding process, nations must be extremely wary of using force, regardless of how legitimate that use may seem to be.

It is absolutely essential that nations refer cases of human rights violations to international bodies, to seek to find as broad-based a consensus as possible on the facts that allegedly justify the use of force. Most importantly, leaders and citizens of all nations must always keep in mind the plain and painful fact that war is obscene, that it means death and great suffering, and that a new world order must be founded upon a shared desire to forego the use of that obscene weapon and seek other ways to ensure that human rights are protected, self-determination is guaranteed, and international peace and security are created.

---

56. *See* Corfu Channel case, *supra* note 11, at 35.
57. *See* Ryan & Ferrell, *supra* note 4.