

Humanitarian Intervention: The Case of the Kurds

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Introduction

The 1991 Gulf War was fought ostensibly to protect the principle of State sovereignty. States, specifically those which were members of the United Nations, could not be invaded, occupied and annexed by more powerful neighbours.

On 6 April 1991, Iraq agreed to a cease-fire though protesting its unjust conditions. The previous day, by a vote of 10–3, the Security Council adopted Resolution 688, denouncing the Iraqi repression of the Kurds and calling on all member countries to contribute to humanitarian efforts on their behalf. Within a matter of days, the suppression of the Kurdish rebellion was completed by Saddam Hussein, and nearly two million Kurds had fled.

Eventually, Britain, France and the United States intervened in northern Iraq to create a safe haven to which the Kurds could return. The same countries that had fought a war to protect the principle of the sovereignty and territorial integrity of States, now challenged the sovereignty of Iraq by intervening in a matter of ostensible domestic jurisdiction, and in a way that could potentially lead to the disintegration of the territorial integrity of Iraq.

The earlier expulsion of the Iraqi army from Kuwait was a military intervention by a multilateral force authorized by the UN. The later protective *humanitarian*¹ intervention also used the military, but in a

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¹ President Bush, in his press conference announcing American agreement to participate in providing relief camps for the Kurds within the territory of Iraq, was at great pains to stress its 'humanitarian' purpose as authorized by Security Council Resolution 688, since without such camps relief operations in the northern mountains of Iraq were impossible on the scale needed. 'Consistent with United Nations Security Council Resolution 688, and working closely with the United Nations and other international relief organizations and our European partners, I have

defensive manner; it was a multilateral action undertaken by three States rather than over thirty and *without* the *explicit* authorization of the Security Council. On 1 April, as the Kurdish revolt was being ruthlessly crushed, two of the West's Arab allies, Assad of Syria and Mubarak of Egypt met; they announced opposition to the splintering of Iraq, and Assad stated, 'What is happening in Iraq is an internal matter'.² Yet, after Bush's initial hesitation at the prospect of the possible 'Lebanonization' of Iraq and notwithstanding their stated priority of preventing Iraqi fragmentation,³ the British, French and Americans put troops into northern Iraq to induce the Kurds to return and to provide for their relief and protection.

Within just a few months two unprecedented initiatives had been taken in the post Cold War world, one to reinforce the sacred principle of State sovereignty and one which many would argue undermines that principle. This article is concerned with the latter.

1. Historical and Conceptual Background

1.1 Kurds

The Kurdish population is estimated at 20 million, and is divided among four States in the region, constituting 19–24% of the Turkish population, 23–27% of the Iraqi population, 10–16% of the Iranian population and 8–9% of the Syrian population.⁴ The Kurds speak two major dialects and are overwhelmingly Sunni. In the rural areas, there are also differences between Kurds who live in the plains and foothills, where large landlords control the economy, and the mountainous Kurds, where tribal control predominates in the largely pastoral economy, though ownership of land has been more recently

directed the U.S. military to begin immediately to establish several encampments in northern Iraq, where relief supplies for these refugees will be made available in large quantities and distributed in an orderly way.' (The *New York Times*, 17 Apr. 1991, A7) Though the army was being used because of the massive nature of the problem, the issue of protection was not ignored. 'Adequate security will be provided at those sites by U.S., British and French ground forces, consistent with the United Nations Resolution 688.' Bush called on other members of the coalition to participate. He also insisted that, 'We intend to turn over the administration of and security for these sites as soon as possible (the sooner the better as he responded to a later question) to the United Nations.'

² The *New York Times*, report by Youssef M. Ibrahim, 2 Apr. 1991, A4.

³ Thomas L. Friedman, *New York Times*, 4 Apr. 1991, front page. see also article by Elaine Sciolino in the *New York Times*, 18 Apr. 1991 (A6). Bush was reluctant on four counts. He did not want to: fuel Kurdish separatism, contribute to the dismemberment of Iraq, set a dangerous precedent for interference in the internal affairs of sovereign States, recommit American ground forces on Iraqi territory. Against those concerns were the ineffectiveness of the United Nations and private relief organizations in the face of the massive size of the problem and the inaccessibility of the sites for large scale relief operations and the fear of long term destabilization for Turkey.

⁴ Cf. David McDowall, *The Kurds*. London: Minority Rights Group Report, No. 23, 1985.

vested in tribal leaders. A rural to urban movement has also occurred, with large numbers of Kurds living in cities and forming professional and managerial roles. But in spite of the wide divergencies amongst Kurds in four different countries, in very different geographical regions, speaking different dialects, a Kurdish nationalist movement has long been active in the whole region.

Sheik Ubaydallah, the grandfather of Kurdish nationalism, was active in the 1880s, thereby defining the Kurdish nationalist movements as one of the older ones in the modern world.

The Treaty of Sèvres of 10 August 1920 with Turkey, following World War I, provided the Kurds with, 'an absolute unmolested opportunity to autonomous development' in the words of Point 12 of Woodrow Wilson's fourteen points. The provision was never implemented. The Treaty of Lausanne, signed in July 1923, totally ignored the claims of Kurds and divided the remaining Kurdish territory between Iraq and Iran. Chaliand blames the western interest in oil for the denial of recognition for Kurdish nationalism. A League of Nations Commission recommended that Kurdish territory remain part of Iraq, despite recognition that ethnicity should properly yield a separate Kurdish State. The rationale was the need to ensure the economic viability of Iraq.

Mullah Mustafa Barzani, a traditional leader and the father of Iraqi Kurdish nationalism, was expelled to Iran after World War II. He returned in 1958 when the rights of Kurds were first recognized following the coup by General Qasim and the creation of the new Iraqi republic. The autonomy of Kurds was based on a twelve point programme, but the government fell before they could be implemented. On 11 March 1970, following a decade of conflict at a cost of 60,000 casualties and 300,000 displaced, an agreement was signed with the Ba'th regime, which provided for Kurdish autonomy.⁵ The agreement promised official recognition of the Kurdish language in Kurdish areas, non-discrimination, affirmative action, administrative autonomy, equal economic development, repatriation, and, most important of all, the official recognition that Iraq was constituted of two principal nationalities—Arabs and Kurds who are recognized as having national as well as minority rights, *including guaranteed rights to self-rule*, proportionate representation in the Iraqi legislature and the Vice-Presidency of the republic. The agreement broke down after four years over disputes over the control of oil revenues and the territorial boundaries of the autonomous region.

On 11 March 1974, Iraq promulgated Act No. 33. It was passed without Barzani's concurrence because the Act weakened the 1970

⁵ Cf. Martin Short and Anthony McDermott, *The Kurds* London: Minority Rights Group Report, No. 23, 1975.

agreement and left critical disputes over oil revenues and the boundaries of the autonomous region unresolved. The Act provided for a regional *administrative* autonomous regime possessing only those powers specifically delegated by the State, with a subsidiary legal and financial system within the framework of the legal, political and economic unity of the Republic of Iraq. It also provided for recognition of both Kurdish and Arabic as *regional* official languages.⁶ Barzani turned to Israel for support, Soviet support having previously been withdrawn, and a new rebellion began.

The revolt was put down in 1975 at a cost of 50,000 killed and 600,000 displaced. Guerilla war resumed in 1979. In 1988, following the end of Iran-Iraq war, thousands of Kurds were killed, poison gas against the Halabja population allegedly killed 5,000, and 100,000 Kurds were relocated to 'strategic hamlets'.

Following the defeat of the Iraqi army and the withdrawal from Kuwait in 1991, uprisings again took place in the north and the south of Iraq to overthrow the Saddam Hussein regime. Both rebellions were quickly put down with the use of napalm and helicopter gunships against both rebels and civilians. In the north military action was again accompanied by harsh repression of the local population. The memories and the fear of mass slaughter among the Kurds were strong; they recalled the chemical weapons used to wipe out 5,000 men, women and children in Halabja only three years earlier, in 1988.⁷ The widespread support for the rebellion among the Kurds, the severity of the Iraqi repression, and the memory of the wanton slaughter of innocent civilians by Saddam Hussein's regime led to panic and a mass exodus of up to two million Kurds and flight into the mountains towards the Turkish and Iranian borders. Turkey claimed the harsh repression was a deliberate measure by Iraq to create a mass exodus and empty the country's northern territories of an unwanted minority.⁸

When the Turks would not let the Kurds into Turkey, despite foreign and domestic pressure on the government of Ankara, including a call from the U.S., the plight of up to a million Kurds, stuck, starving and exposed in the freezing mountains and inhospitable terrain of northern Iraq,⁹ compelled international action to initiate a safe

⁶ Iraq claims that it protects minorities other than the nationalist Kurds because it has incorporated legal provisions for separate religious courts for Armenians, Assyrians, Chaldeans and Jews with respect to their personal status (marriage, divorce, burial, child naming, etc.), (United Nations Sub-Commission on Prevention and Protection of Minorities, *Report*: UN doc. CCPR/C/1/Add.45 (1978), p. 12)

⁷ Cf. *New York Times*, 26 Apr. 1991, A1 and A4 (interviews with Kurdish refugees and relief officials indicating the importance of the memory of that previous slaughter).

⁸ Clyde Haberman reporting from Ankara, Turkey, *New York Times*, 12 Apr. 1991.

⁹ *The Toronto Star*, 20 Apr. 1991; *Refugee Reports*, Vol. XII, No. 3/4, March/April 1991.

enclave program in the north. Though the Iraqis officially rejected the action as an intervention in its domestic affairs,¹⁰ the Iraqi army generally did not challenge the British, French and Americans who built the camps for the Kurds. The Kurds began to return from the mountains. Their leaders, with Jalal Talabani, the son of Mustafa Barzani, apparently to the fore, once again negotiated their autonomy from the Baghdad administration.¹¹ On 18 May, the Kurdish rebel chiefs announced that they had reached an agreement in principle on a 20-point plan to introduce democracy to Iraq with separation of the Ba'th party from the State, free elections and a multiparty system. Differences remained, however, on the old sticking point—would the boundaries of the region include or exclude the Kirkuk oil-producing region; the Kurds seemed prepared this time to leave the control of the oil revenues in the hands of the central government.¹²

The question for this paper, is whether the humanitarian intervention by Britain, France and the United States was justified? Were they, in fact, ethically and legally *obliged* to intervene? And what is the extent and the limits which might characterize such an intervention?

¹⁰ The European Community proposal for a safe haven, which called for United Nations supervision (cf. report of Youssef M. Ibrahim, *New York Times*, 10 Apr. 1991, A6), was welcomed by Massoud Barzani, the Kurdish leader as 'a great humanitarian gesture' but denounced by Iraq as 'a plot against Iraq's sovereignty'. The legal basis for the proposal was 'the protection of a population from persecution' in the words of John Major, Prime Minister of Britain, under the UN 1948 Convention on the Prevention and Punishment of the Crime of Genocide. Article 8 allows 'competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide.' It makes *no* provision for a multilateral initiative. The Iraqi Foreign Minister, Ahmed Hussein Khudayer, in a letter to Secretary General of the United Nations, Javier Perez de Cuellar, denounced the allied camps as 'a serious, unjustifiable and unfounded attack on the sovereignty and territorial integrity of Iraq.' (*New York Times*, 24 Apr. 1991, A6)

¹¹ Minority rights are not the same as autonomy. Minority rights include the right to citizenship in the dominant State, the right to equal treatment by that State and under the law, the right to the entrenchment of those minority rights in State law, the right to retain *and maintain* the minority language and the right to maintain one's own schools supported by the State to the same degree as the majority population, though governed by requirements about a core curriculum and common standards. Autonomy includes the exercise of administrative self-governance on the political level of municipal functions, or provincial status which gives the minority limited political sovereignty in such areas as education, health, welfare, limited taxation powers, economic development powers, etc., but certainly excludes foreign affairs and defence. Justice Jules Deschênes defined a minority entitled to minority rights as follows: 'A group of citizens of a State, constituting a numerical minority *and* in a non-dominant position in that State, endowed with ethnic, religious or linguistic characteristics which differ from those of the majority of the population, having a sense of solidarity with one another, motivated, if only implicitly, by a collective will to survive and whose aim is to achieve equality with the majority in fact and in law.' (Jules Deschênes, *Proposal Concerning a Definition of the term 'Minority'*: UN doc. E/CN.4/Sub.2/1985/31 & Corr. 1 (1985), p. 30 as quoted in Hurst Hannum, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights*. Philadelphia: University of Pennsylvania Press, 1990, p. 61.

¹² Reuters, *Toronto Star*, 19 May 1991, A2.

1.2 Refugees

Traditionally, there are only three options for helping refugees. One is resettlement abroad, an option left in abeyance, if not dismissed outright, in the case of the Kurds, because of the large numbers and the current influx of refugees into the developed world already in process. Moreover, resettling the Kurds would play into Saddam Hussein's hands, allowing him to get rid of a large national minority hostile to his regime. Kurdish nationalists opposed resettlement for that reason. The refugees and the major countries of resettlement were united on this general policy, though, in practice, some Kurds would be allowed to resettle in countries like Canada and the United States, for example, to join family members under regular immigration programmes.

A second option is settlement in the countries of first asylum. Turkey, with its own Kurdish population of eleven million and with its own history of Kurdish rebellions and severe repression,¹³ adamantly opposed permitting the Kurds to enter Turkey, either for temporary refuge or as a permanent solution. In fact, relatively small groups were permitted to enter or forced themselves in to obtain some temporary relief. For a short period, Turkey considered allowing Kurds in *on a temporary basis* provided their resettlement abroad was guaranteed on the same basis as the developed world took in Southeast Asian refugees in the late seventies and early eighties. This suggestion was rejected by resettlement countries such as Canada. Iran, a country already host to about two million Afghans and several hundred thousand Iraqi Shiites, was more open to allowing the Kurds to cross the border for *temporary* relief,¹⁴ a response which initially received minimal support from the West.¹⁵ As Roger Winter, Director of the U.S. Committee for Refugees, remarked to the U.S. House of Representatives Committee on Foreign Affairs on 23 April 1991, 'Iran is the only one of the countries bordering Iraq that has—to date—acted in a consistent, admirable humanitarian fashion.'

The third option, traditionally conceived, is repatriation. But repatriation presumes that the refugees are *outside* their country of origin. The Kurds in Iran were, but those massed on the Turkish border, and of most concern to both the humanitarians and the for-

¹³ 'Turkey closed its southern border yesterday to an estimated 200,000 Kurds fleeing an onslaught by Iraqi forces,' Diana Jean Schemo reported from Diyarbakir, Turkey: *Toronto Star*, 4 Apr. 1991.

¹⁴ Hugh Pain of the Reuters News Agency from Haj Omran, Iraq. (Toronto, *Globe and Mail*, 15 Apr. 1991). On 8 Apr. 1991, the *New York Times* reported that Iran was closing its border, but the closure proved to be only temporary.

¹⁵ On 17 Apr. 1991, Canada announced an additional \$8.5 million in emergency aid, most for Iran (*Globe and Mail*, 18 Apr. 1991).

eign policy analysts and practitioners of Realpolitik, were not. They had fled from their homes in Iraq into the freezing mountains, but they were still within the borders of Iraq. They could not be repatriated to a country which they had not left. Repatriation had either to be redefined as the return of the refugees to their homes from one place in Iraq to another, making the sense of the term, *re patria*, absurd, or a fourth option had to be conceived, the return of an *internally* displaced population to their homes while safety and security was provided *within* their own country. But the postwar refugee lexicon defined refugees, quite aside from the ordinary language meaning which adamantly refused to enjoin such a theoretical distinction, as those who had been forced to leave and were *outside* the borders of their country.

Resettlement was an option developed for a relatively small portion of the world's refugee population, and is one increasingly viewed as impractical for any mass exodus. Settlement in the countries of first asylum was physically impossible for those refused entry into Turkey and politically impossible for those who had entered Iran. Repatriation is the preferred UNHCR option for all refugees, and seemed to be the only real option in the case of the Kurds in Iran. Unfortunately, though it is said to be preferred, that preference is often only rhetorical while hundreds of thousands of refugees are left to waste their lives away in 'temporary' refugee camps. Repatriation was not an option for Kurdish refugees still within Iraq, and circumstances demanded a new approach. The legal fiction that the internally displaced were not 'refugees' within the responsibility of the international community could no longer be sustained.¹⁶

¹⁶ One approach is to reconsider the international refugee regime in terms of its fundamental conceptions. Thus, attempts are made to reevaluate the classical 'definition' which helped create that conceptual framework for refugee policy; see, for example, J. Hathaway, *The Law of Refugee Status*, 1991; Carlos Ortiz Miranda, 'Toward a Broader Definition of Refugee: 20th Century Development Trends', 20 *Cal. West, Int. Law J.* 315-327 (1989-90); Scott W. Pentzer, 'Refugees After the Cold War: Rethinking the Definition from the Roman Catholic Perspective', United States Catholic Conference Migration and Refugee Services, April, 1991; Andrew Shacknove, 'Who is a Refugee?', *Ethics*, Chicago: University of Chicago Press, 1985. This is to be distinguished from the conceptual foundation for revising the international regime. Pentzer, for example, attacks the conceptual premise of a sovereign State system based on the self-interests of States (cf. Noyes E. Leech, Covey T. Oliver and Joseph M. Sweeney, *The International Legal System: Cases and Materials*. Mineola, N.Y.: The Foundation Press, 1973; Richard B. Lillich, *The Human Rights of Aliens in Contemporary International Law*. Dover, H.H.: Manchester University Press, 1984) in favour of analyzing the refugee regime from the perspective of the common good. The 'refugee definition' may be the point of entry, but the conceptual foundation for the attack is based on a transnationalist moral perspective 'without reference to practical constraints on the international means of assistance to those who may fall within the mandate: (p. 29) and with reference to 'a universal moral standard' which is essential to improving refugee policy'. (p. 22) What is that standard? 'Women and men have the right to cross borders to secure rights essential to the preservation of human dignity. (cf. David S.J. Hollenbach, *Claims in Conflict: Retrieving and Renewing the Catholic Human Rights Tradition*. New York: Paulist Press, 1979) Work,

1.3 Non-Intervention, Sovereignty and Self-Determination

Three concepts—sovereignty, self-determination and non-intervention—must be explained. Sovereignty has been perceived to mean absolute control of the territory and internal affairs of a country by the government of that country, however that government obtained power and no matter what it did with that power with respect to its own citizens.¹⁷ At the very minimum, sovereignty entails the ability by the government of that State to use coercive power within the territory under its authority and jurisdiction.¹⁸

Self-determination is a property of a people as a whole (or, in a different context, of individuals), not of governments. It is the right of a people to decide its goals, the rules by which it will achieve those goals and the methods to be utilized, and to bear the consequences of its actions. It is related to sovereignty when self-determination is applied to freedom from colonial rule and from foreign intervention.¹⁹ Sovereignty, as traditionally perceived, is the Weberian notion that the State has the monopoly on the control of coercive power intended to protect citizens from one another and from threats from other States, even though often used on the State's own citizens. Self-determination is about the locus of freedom, rather than the locus of power.

as well as freedom from persecution, civil war, famine, and the effects of natural disaster are all essential human needs.' (p. 28) In other words, refugees are to be defined in terms of economic and social rights and not just protective civil and political rights (cf. Louis Henkin, 'International Human Rights as "Rights"', in *Human Rights*, ed. J. Roland Pennock and John W. Chapman, New York: New York University Press, 1981; Elizabeth Clark Reiss, 'The Economic Refugee', *ACVAPS: Four Monographs*. New York: Council on Religious and International Affairs, 1985), but, at the same time, the 'basic human needs' approach still defines a refugee as someone crossing a border. In other words, the sovereign State is still the ultimate reference because, to be a refugee one must have fled the authority and territory of that sovereign State and now become the responsibility of transnational ethical actors.

¹⁷ Thomas M. Franck, New York University, doubted whether the creation of safe havens in northern Iraq was legal without a more explicit United Nations sanction; Allan Gerson, Chief Counsel to the United States Mission to the United Nations, defended the legality because the Western States were 'occupying powers'. W. Michael Reisman, Yale, justified the obligation and the right of humanitarian intervention in Iraq on 'humanitarian need'; Louis Henkin, Columbia Law School, was more circumspect, and the issue was whether Security Council Resolution 688 could be interpreted broadly enough to provide the prerequisite 'hechsher'. (cf. *New York Times*, 19 Apr. 1991, A4).

¹⁸ Self imposed limits on State sovereignty or *de facto* reductions in sovereign authority that result from various economic and political arrangements are not at issue here, though their 'voluntary' nature may often be in doubt.

¹⁹ 'UN and State practice since 1960 provides evidence that the international community recognizes only a very limited right to: external self-determination, defined as the right of freedom from a former colonial power, and internal self-determination, defined as independence of the whole State's population from foreign intervention or influence.' Hannum, *Autonomy, Sovereignty and Self-Determination*, above note 11, p. 49. 'Self-determination is concerned with a change in sovereign status and not with how sovereignty is exercised thereafter.' Harold S. Johnson, *Self-Determination Within the Community of Nations*. Leyden: A.W. Sijthoff, 1967.

The covenant of the League of Nations contained no recognition of the principle of self-determination of nations. Further, 'Positive International Law does not recognize the right of national groups, as such, to separate themselves from the State of which they form part by the simple expression of a wish.'²⁰ The principle of self-determination is not part of the 1948 Universal Declaration of Human Rights. It is only mentioned twice in the UN Charter, 'in the context of developing "friendly relations among nations" and in conjunction with the principle of "equal rights of peoples".'²¹

The intervention of the United Nations for the sake of self-determination of peoples began in 1960 with the adoption of the *Declaration on the Granting of Independence to Colonial Countries and Peoples*. That document was not aimed at the political rights of minorities, but exclusively against the subjection of *peoples* to *alien* subjugation, that is, against colonial regimes in non-self-governing territories, and for independence from *overseas* rule. If the principle of self-determination became recognized as a right by 1960, it was only with respect to colonial territories,²² and even then only in a context in which territorial integrity was considered the superior principle. African States have been clearest in subordinating self-determination to the principle

²⁰ *Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion Upon the Legal Aspects of the Åland Island Question*, League of Nations, *Off. J.*, Supp. No. 3 (Oct. 1920) at 5 as quoted in Hannum, *Autonomy, Sovereignty and Self-Determination*, above note 11, p. 29. For a discussion of Wilson's 'Fourteen Points' and the enunciation of the principle of self-determination of Nations, see Charles Jr. Mee, *The End of Order*. New York: E.P. Dutton, 1980. Wilson proposed the principle of self-determination be part of the Covenant of the League (though it was not), but even Wilson, in his proposal, made the principle subordinate to the sovereignty of States. 'The peace of the world is superior in importance to every question of political jurisdiction or boundary.' (Karl Josef Partsch, 'Fundamental Principles of Human Rights: Self-Determination, Equality and Non-Discrimination', in Karel Vasak and Philip Alston, *The International Dimensions of Human Rights*. Paris: UNESCO and Westport, CT.: Greenwood Press, 2 vols., 1982 p. 63.) In reality, nations achieved sovereign control only to the extent consistent with unravelling old enemy empires and the strategic and political interests of the victorious powers.

²¹ UN Charter, arts. 1, 55. Also Hannum, *Autonomy, Sovereignty and Self-Determination*, above note 11, p. 33. Belgium (cf. UNCIO, Doc. VI, 296) raised the issue of the equivocal use of 'people' as collectively comprising all citizens of a sovereign State *and* as a cultural nation. Belgium championed the use of 'people' to refer to the citizens of a State lest the charter justify intervention in the domestic affairs of a State to champion a cultural nation. This interpretation was supported by Hans Kelsen, *The Law of the United Nations*. London: Stevens & Sons, Ltd., 1950. Thus, equality of peoples came to mean the sovereign equality of all States.

²² Cf. Declaration on the Granting of Independence to Colonial Countries and Peoples, UNGA res. 1514, 15 UN GAOR, Supp. (no. 16), UN doc. A/4684 (1960). UNGA res. 2160 (XXI), 30 Nov. 1966, coupled with UNGA res. 2225 (XXI), 19 Dec. 1966, advocates self-determination of colonies and support of national liberation movements as not being an intervention in domestic sovereignty. The resolutions stated two basic foundations for a legal order—the territorial integrity of States and the right to self-determination of peoples. In UNGA res. 1541 (XV), 1962, Southern Rhodesia was determined to be non-self-governing because it was ruled by a minority group; this position was supported by the UK when unilateral independence was declared contrary to its earlier view that the UN had no competence to deal with issues since Southern Rhodesia was self-governing.

of territorial integrity. 'The whole task of national integration and nation building may require the denial of the right to ethnic self-determination in most territories as they emerge from dependency'.²³

When the issue of self-determination within the context of 'friendly relations among nations' was clarified in the 1970 Declaration on Principles of International Law Concerned with Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,²⁴ it was also clearly located as part of decolonization. The document stated repeatedly and unequivocally, 'Nothing in the foregoing shall be construed as authorizing or encouraging any action which would dismember *or impair* (my italics), totally or in part, the territorial integrity or political unity of sovereign and independent States.'

However, though it went on to say that, 'Every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State' and that, 'The territorial integrity and political independence of the State are inviolable', the principle of non-intervention was not absolute, but subject to States, 'conducting themselves in compliance with the principle of equal rights and self-determination of peoples.'

Further, the restriction on intervention was applicable to other States, not the United Nations itself. Thus, though the principles of sovereignty and non-intervention are supreme, they are not absolute and unqualified. They are subject to a State recognizing the principle of equal rights of peoples within its domain and their rights to self-determination without destroying the territorial integrity of the State. Sovereignty and non-intervention are subject to maintaining peace and friendly relations with neighbours. In any case, the principle does not rule out United Nations intervention.²⁵

Non-intervention refers to the restraint placed on other governments in attempting to intrude on the sovereign authority of the government of a State. It does not mean restraint of a State to prevent it from exercising authority within its borders against an attempt of a minority nation within its borders to exercise its right of self-determination, given the monopoly on the use of such force conferred on the State. The rule of non-intervention governs State to State relations, not State to people relations.

The Iraqi invasion of Kuwait violated all three norms in the most

²³ Yilma Makonnen, *International Law and the New States of Africa: A Study of International Legal Problems of State Succession in the Newly Independent States of Eastern Africa*. Paris: UNESCO, 1983, p. 462.

²⁴ UNGA res. 2625, Annex, 25 UN GAOR, Supp. (No. 28): UN doc. A/5217 (1970).

²⁵ United Nations Charter, art. 2(7) precludes UN intervention only in matters of domestic jurisdiction of a State.

extreme sense possible. Iraq not only infringed the sovereign authority over the territory and the people of another State, but it confiscated that territory and asserted its own absolute authority over those people, and did so by force of arms, without the consent of the people. The rationale for that action was the denial that the Kuwaitis were a separate people, with a legitimate right to make a distinctive determination, and the further claim that the territory and its people had been an historic part of Iraq, carved away by the interventions of the nineteenth century imperial powers, especially Britain.

Such a rationale is particularly fatuous when advanced by a State itself the product of the dismemberment of an empire, carried through at the cost of denying Kurdish self-determination. Unlike Iraq, Kuwait was already a separate sovereign realm, though its borders had not been properly demarcated. The issue for Iraq was not non-intervention, the rights of sovereign authority or the self-determination of a people, but the argument that the Kuwaitis were not a separate people at all.

Is the nation, a people, a product of State boundaries? Do State boundaries produce distinct nations, or is it rather language and culture common to an entire population which is the only and exclusive repository of political legitimacy?²⁶ Which comes first, the nation or the State? For Iraq, the answer with respect to its own citizens, was the State, but for the people in the surrounding territory, it was the Arabic nation that determines sovereignty. Quite aside from the total illogic of this position, the Iraqi actions against Kuwait again brought to the fore two fundamentally contradictory foundations for modern State legitimacy.

1.4 Nationalism

Woodrow Wilson had espoused the fundamental nature of *national* self-determination.²⁷ States were to be carved out of the old empires on the basis of the right of peoples to self-determination. Where

²⁶ Walker Connor, ('Self-Determination: The New Phase', 20 *World Politics*, 30, 1967) defines the principle of self-determination as follows: 'any people, simply because it considers itself to be a separate national group, is uniquely and exclusively qualified to determine its own political status, including, should it so desire, the right to its own State. The concept, therefore, makes ethnicity the ultimate standard of political legitimacy.' (p. 111-112) In my view, as shall become clear, ethnicity is not the ultimate, the unique or the exclusive standard of political legitimacy. I accept the State order as the fundamental basis for political legitimacy rather than a national order, but not an absolute or unqualified State system (cf. Ian Brownlie, *Principles of Public International Law*, 4th ed. Oxford: Clarendon Press, 1990; Alan James, *Sovereign Statehood*. London: Allen & Unwin, 1986), but one subject to a respect for minority rights, which in some cases entails a right to secession and the formation by that ethnic group of their own State.

²⁷ There are many scholars of both individualist and internationalist persuasion who see only destructiveness and negativity in nationalist movements, usually without recognizing the degree to which their own doctrines and beliefs arise out of the history of their own nation. Cf. Alfred Cobban, *The Nation State and National Self-Determination*. New York: Thomas Crowell, 1969.

national minorities had not been given their own State, or could not be included in States where they were the constituted majority, they would be given certain guarantees of protection. This was to be a fundamental premise of the League of Nations, but it was unworkable. The United Nations was founded on an alternative principle, the sanctity of States, whatever their constituent memberships. It was to be a system of States rather than nations, a system of rule-governed and bounded regimes each with a unit of membership in the global State system.²⁸ Nations came to mean States.

No theoretical problem with this system would have arisen had the united States of the world consisted of members who were nation-States. But it did not. Many, if not almost all member States, were bi-national, tri-national and multi-national. More importantly, most ruled without the consent of even the majority population, let alone on a basis which respected the rights of minority peoples.²⁹

In the words of a popular song,³⁰ nationalism was a memory system immune to the dominant ruling regime. The nationalist political systems of the Cree and the Mohawk, the Welsh and the Scots, the Basques and the Catalans, the Kurds and the Assyrians, the Estonians and the Armenians, could be suppressed, but not the feelings behind them. The State system of the world was, however, not to be based on affects, but on a rational, cognitive system of well-defined sovereign States with clearly demarcated borders and separate legal regimes.

Part of the problem underlying the nationalist principle of the League of Nations was not only its subordination to big power interests and the principle of sovereignty, or that various nationalities were intermixed with one another in various ways, but that nationalism seemed to be such an amorphous quality. On the one hand it was a matter of language, culture and memory, a generally involuntary process into which individuals were inculcated by birth. On the other

²⁸ What Craig R. Whitney called the 'hypocrisy over self-determination' (*New York Times*, 14 Apr. 1991, E2), because the United Nations enshrined the 'respect for the principle of equal rights and self-determination of peoples,' (my italics) in the United Nations Charter, is really the acceptance of one principle, drastically subordinated to another, the sanctity of sovereign States. Humanitarian intervention is not to be confused with intervention to support a secessionist movement or the right to self-determination.

²⁹ A distinction must be made between national self-determination and self-determination as self-rule. One can have either without the other, as in nationalist movements which result in independent States under dictatorial rule. The contrast with self-rule, for example, in Quebec, where the national group is part of a democracy which accepts the principle of national self-determination, but where that self-determination has not as yet expressed itself in a determination to exercise full sovereign control.

³⁰ We carry in our hearts the true country,
And that cannot be stolen,
We carry in our hearts the true country,
And that cannot be broken.

hand, nationalism was a matter of the will, not the heart, a matter of consent rather than sentiment, where members of a single nation accept a set of mutual rights and obligations towards one another. Ultimately, however, it became a political principle and an issue of legitimization of and by the State which emerged with political jurisdiction over the nation.

In the new world, the consent theory of national membership based on State membership became predominant; inculcation into the language, culture and memory system of the collectivity followed joining the State. In this settler nationalism, the State develops national pride and self-awareness. In the more traditional European type of indigenous nationalism, the attempt to consolidate cultural predominance over a specific territory governed by a single State became the norm. The nation preceded the State and was its foundation rather than the State becoming the instrument to forge a new nation. There was a third version of nationalism—pan-nationalism. When many members of a nation sharing a common language and culture live in a wide variety of contiguous political entities, nationalist movements frequently emerge which attempt to consolidate the various parts into one, where the whole nation would be governed by a single State. This has been the case of the pan-Italian, the pan-Germanic, the pan-Slavic and the pan-Arabic movements, all of which frequently posed a direct threat to minority nationalities in their midst.

Indigenous nationalism and pan-nationalism both make the cultural-memory characteristic of nationalism primary. State nationalism, a fourth type which is a by-product of decolonization in Africa and the denial of the national character of tribal culture, is like settler nationalism; both make the consent basis of the nation primary, even if the State, paradoxically, may exist to induce that consent.

Thus, depending on the type of nation involved, the State system was inherently unstable. Indigenous nations, in trying to consolidate their power over a territory and to suppress and even eliminate minority nations in their midst, began to export their military might, simultaneously using it as an emotive force to unite the members within the State into a new, consolidated nation. This was the path followed by the English and the French, the Italians and the Germans.

Settler nations, rooted more in consent theory and the doctrine that it was will, and not a naturally inherited culture and memory, that created the nation, were also unstable. In the extreme case, the United States of America, there was no natural territorial boundary to the exercise of that will. If indigenous nation-States became imperial-

ist to consolidate the national monopoly within the State, settler nation-States became expansionist because they had no inherent or historical boundaries within which to consolidate. Further, where expansionism emerged as manifest destiny, then it acquired a built-in rationale for the violent suppression of any attempt by part of that newly created nation to break away. For fate and destiny demanded the preservation and expansion of the State.

Pan-nationalists, by definition, were expansionist. Single nations in the pan-mode lived in many States. Intent on including all nations with a common culture within a single State, at the same time they ignored and even denied the right of minority nations within their midst to self-determination. This denial of minority rights reached its apogee, not in pan-nationalist States, but in the States that emerged at the end of the colonial era in Africa as they asserted sovereign control over a membership frequently made up of various tribal groups.

The Kurds were victims of a post-colonial State attempting to create a common Iraqi nationality, in which the ideology of the dominant group was, paradoxically, pan-Arabism. At the same time, many Kurds themselves espoused a pan-Kurdish nationalism which directly challenged the integrity of the four contiguous States where they made up some twenty million of the population. In Iraq, Turkey, Syria and Iran, anti-Kurdish nationalism was the one factor which united these otherwise disparate and conflict prone States. Finally, some advocates of Kurdish autonomy, indigenous Kurdish national movements *within* each of the States where they constituted large and unassimilable minorities, simply demanded that they be members of a State which (a) had their consent and, hence, legitimate authority over its members, and (b) recognized their rights as a minority nationality to protect their own language, culture and traditions. The problem was that if one combined *both* a consent theory of nationalism with a cultural basis for nationalism, then, as in the Quebec case, we have the formula for a strong separatist and eventually secessionist movement. It is very difficult if not impossible to reconcile consent *and* cultural nationalism, with its inherent propensity to demand full self-determination, with the integrity of the sovereign State system.

In this context, the crisis of the Kurdish refugees emerged. The settler States were unwilling to resettle the refugees because that would give Saddam Hussein a post-war victory over a rebellious minority. It would also disrupt the settler States, given the massive forced migration of the Kurds and the fact that the settler States perceived themselves already to be flooded with refugees seeking to become Americans, Canadians and Australians. Without resettlement guarantees, Turkey was unwilling to give the Kurds a safe

haven for fear it would fuel nationalist aspirations of their own 11,000,000 Kurds. Caught in a traditional refuge of many fleeing populations, the mountains, exposed to the elements, the lack of fresh water and food, Kurds began dying by the hundreds and thousands.³¹ But their plight was also exposed to the modern technology of television, the instantaneous transfer of the images of their suffering. The affective sympathetic response was worldwide and very strong. The elation and sweet taste of victory for the allies was soured by a very bitter aftertaste. The international world and, particularly the United States, had to act.

2. Analysis

2.1 Humanitarian Intervention

The spirit of Professor Wheaton's original specification of humanitarian intervention in 1836 is maintained in the following conception. He acknowledged the principle as justifying, 'interference when the general interests of humanity are infringed by the excesses of barbarous and despotic governments'.³² Professor L. F. E. Goldie, Professor of Law and Director of the International Legal Studies Program at the Syracuse University College of Law, best defined humanitarian intervention as follows: 'Humanitarian intervention should be seen as a gratuitous act to prevent the continuation of genocidal activities or policies of foreign governments against minorities which are their own and not the intervening States'.³³ In this article 'humanitarian intervention' refers to the *use of physical force* within the sovereign territory of another State by other States or the *United Nations* for the purpose of either *protection* or the *provision of emergency aid* to the population within that territory. In other words, the purpose must be overtly humanitarian, whatever self-interests it fulfils for the States involved, and those purposes may be either protection or relief or both. The agents may be the United Nations itself or other States. The tool will always include the use of military forces otherwise it is not properly 'intervention'.

Two separate and parallel major efforts at humanitarian assistance³⁴ emerged to help the refugees within Iraq. The first origin-

³¹ 'April is the Cruellest Month': The Flight of the Iraqi Refugees, *Refugee Reports*, Vol. XII, No. 3/4, March/April 1991.

³² As quoted by and according to Richard B. Lillich, *Humanitarian Intervention and the United Nations*. Charlottesville: University Press of Virginia, 1973, p. 25.

³³ Lillich, *ibid.*, p. 46.

³⁴ 'Intervention is defined in a broad sense as the purposeful and calculated use of political, economic, and military instruments by one country to influence the domestic politics or foreign policy of another country.' (Peter Schraeder, ed. *Intervention in the 1980's: U.S. Foreign Policy in the*

ated in the United Nations; the second in the actions of Britain, France and the United States. Only the latter could be properly called an act of humanitarian *intervention*.

The United Nations action took place under the auspices of the Secretary General of the United Nations, who first sent Eric Suy as a personal representative followed by Sadruddin Aga Khan, as an 'Executive Delegate' and leader of a United Nations Inter-Agency Mission for the UN Humanitarian Programme, not just for Iraq, but for Kuwait and the Iraq/Iran and Iraq/Turkey Border Areas, to negotiate an agreement with Saddam Hussein. The second unilateral effort, begun by Britain and France, initially against the protests and resistance of the United States but eventually led by them, aimed to set up a protected enclave in the north within Iraq to provide security for the largely Kurdish displaced persons. This was a clear act of 'humanitarian intervention' and not just an operation for the provision of assistance.

The two plans differed in a number of respects. The UN plan covered all of Iraq. The American-led plan covered only the north. Secondly, the Iraqi authorities agreed to the UN plan and signed an agreement with the UN setting out the terms and conditions for the provision of relief within Iraq. In fact, the agreement specifically states that it is a response to a *request from* Iraq. The plan poses no problem of unjustified intervention or infringement on the sovereign rights of Iraq. The Iraqi authorities denounced the American-led plan, however, as an illegal infringement on Iraqi sovereign authority.³⁵ Thirdly, the Iraqi agreement with the UN followed announcement of the plan to create a secure enclave in northern Iraq. In fact, it was hurriedly signed on 18 April 1991, two days after President Bush announced that huge refugee camps would be built in northern Iraq, protected by American, British and French troops. One possible inference is that the Iraqis were compelled, if not induced, to sign the UN agreement lest the de facto infringements on Iraqi sovereignty otherwise be legitimized.

Fourthly, the Memorandum of Understanding between the Iraqi government and the United Nations is directed towards the relief of the entire Iraqi population; Kurds or Shiites are not specifically mentioned and there are no limitations in the preamble. Clause 1, however, refers to the 'affected Iraqi *civilian* population', but the

Third World. Boulder: Lynne Rienner Publishers, 1989, p. 2.) In the narrow sense, it is the use of military force by one State to interfere in the internal affairs of another State. These definitions refer to the agents intervening and the tools used, but not the purpose. Humane or humanitarian intervention is a qualifier referring to the objective of the intervention as being the benefit of a deprived group within the domestic jurisdiction of the State in which the intervention takes place.

³⁵ *The New York Times*, 10 Apr. 1991, A8.

reference seems merely to refer to those for whom the relief is most important and urgent. The army is not excluded from receiving aid. Further, clause 11 specifically calls for the humanitarian assistance to be impartial for 'all civilians in need', without any priority for Kurds or those displaced or the degree of need, though clause 2 notes that the Iraqi government welcomes the *effort* to promote the voluntary return home of *Iraqi* displaced persons and the humanitarian measures to avert new flows. Clause 3 also refers to 'displaced persons', but the clause is a restriction on the function of the aid received and not a priority or focus of that aid; it is only to be used to provide for the *personal* (in contrast to collective) safety and humanitarian assistance and relief of the displaced persons, clearly implying that no other form of aid was to be given to the displaced population. Military and political assistance were clearly ruled out. So presumably was any assistance in enabling a collectivity to communicate through the provision of a telecommunication system, a radio network or even primary education for the children. Further, Clause 9 provided that humanitarian assistance and relief was to be 'provided *simultaneously* to the displaced *persons, returnees as well as all other populations*'. The American-led initiative was clearly focused on the displaced Kurdish civilian population and was without restrictions.

Fifthly, the UN plan depends for its implementation on the cooperation, logistical and financial support of the Iraqi authorities who are given responsibility for setting up relief offices, distributing aid and providing the transport to return the refugees. In fact, Clause 12 makes specific provision for the *Iraqi military* facilitating the safe passage of emergency relief, a provision not inclined to induce any Kurdish return. The American-led plan depends only on the Iraqis staying out of the way. The American, British and French will deliver the relief and provide the safety. The only common element in this respect is that in both cases, safety is to be the responsibility of military authorities, the American-British-French military in one case and the Iraqi military in the other. The American-led plan envisions the troops being replaced by a protective force under UN auspices.

There are a number of approaches to analyzing the two plans. One is historical. What were the circumstances that led to the creation of two such diverse approaches when the United States had presumably become the single superpower dominating the UN and the Security Council? Was Sadruddin Aga Khan really totally unaware of the American-led plan because he was cut off from international news during his intense negotiations with the Iraqis? Was the West totally unaware of his negotiations? Or was this a two track approach with each side aware of the others actions. If the latter, were the two plans intended to be complementary, or did the Secretary-General of the

UN disagree with the intrusion on Iraqi sovereignty entailed by the American-led plan?

What were the goals of the two different plans, quite aside from their ostensible purpose of helping the refugees, since the UN plan is specifically impartial with respect to aid for refugees and displaced persons in distinction from others in the Iraqi civilian population and does not exclude the military from receiving assistance?

What is the political and legal authority behind each of the plans? Could Secretary General Javier Pérez de Cuéllar authorize Sadruddin Aga Khan to sign an agreement on humanitarian aid with the Iraqi authorities without authorization. But without the support of the U.S., Britain and France, where would the voluntary donations come from? Does the Secretary General have the financial and political support for implementing such a plan if it runs counter to three of the major players on the Security Council? More critically, why would the Kurds return if the logistics and the security of the Kurds was to be left in the hands of the Iraqi military?

The issues for the UN plan are practical. The plan poses no challenge to international theory and practice. The issues raised are whether the plan is clear enough, whether it is fair and whether it could possibly induce any displaced person or refugee to return given the explicit role assigned to the Iraqi military. The plan initiated by Major of Britain and Mitterand of France, and urged on by Ozal of Turkey, and reluctantly eventually agreed to and led by the Americans, raises much more serious questions in its search for a basis in international law. Creation of a refugee enclave in the north, after a peace treaty was signed, was clearly intervention in the sovereign authority of Iraq. Javier Pérez de Cuéllar questioned whether the Americans, British and French could send troops onto Iraqi soil without the explicit authority of the Security Council. Security Council Resolution 688, passed by a 10 to 3 vote on 5 April, condemned Iraq for its repression of the Kurds as a threat to the peace and security of the region and called for member countries to provide humanitarian aid. It did not call for intervention or the use of force to protect the Kurds. Yet this resolution was used as the basis for justifying unilateral action and is the reference point for the U.S. State Department justification.

The action could no longer be justified as the responsibility of the Americans, British and French as occupying powers since the peace treaty removed that role for the allies.³⁶ The American-led coalition could also have based its position, but did not, on law rooted in morality which justifies the use of force to ensure humanitarian goals.

³⁶ This justification was used by Allan Gerson, U.S. counsel to the Mission to the United Nations.

The world seemed to be on the horns of a dilemma just as Europe has been with respect to Yugoslavia in the latter part of 1991. As one alternative, some form of international law is upheld which recognizes the sovereign authority of States, while using economic and humanitarian pressure to allow an international agency, with the agreement *and* cooperation of the sovereign authority, to provide humanitarian assistance to *all* civilians in need. Humanitarian assistance would be presumably undertaken under the obligation to provide relief, but no protection would be provided to displaced persons and refugees. There would be few if any real guarantees for the security of the displaced persons and refugees. A logistical and safety system would be run by the Iraqi military, a system guaranteed to induce fear rather than security in the minority groups who fled. In other words, a plan designed to be impartial was most likely to benefit only the population displaced by the UN authorized war effort and loyal to the Saddam Hussein regime and *not* serve the population of Kurds most in need. If the UN plan is supported under the 'obligation to provide protection', it would seem a forgone conclusion that it could not achieve its objectives.

The other alternative is to justify a 'right of humanitarian intervention' to protect threatened minorities, preferably under international rather than unilateral auspices, but international auspices which would be very difficult if not impossible to obtain given the current make-up of the Security Council at the time and the urgency of the situation.

Both plans were fundamentally flawed plans. The UN plan might provide relief, but it was unlikely to reach the target population most in need, and undermined rather than provided for the safety and security of that population. The American-led plan did not seem to be founded in international law and practice and was unlikely to receive endorsement of the Security Council. The 'obligation to protect', but without guarantees for the security of the refugees, or the 'right of humanitarian intervention' without the sanction of international law and perhaps also with no long term guarantee for the protection of the refugees either—these seemed to be the two opposite choices.

Though seemingly so opposed, in practice, the two plans were closely tied together. The obligation to protect, provided relief but no protection, and relief primarily to those who did not need protection; this plan seemed to become operative only *after* the right to intervention had already been in place, and possibly only as a device to delegitimize it. On the other hand, the right to intervention acquired some degree of international legitimacy and American leadership only if it was to be replaced by an international effort.

The conclusion seems incontrovertible. The only plan that will

deliver relief *and protect the refugees and displaced persons* is the American-led plan. Is there any way it can be reconciled with international law and norms even if it is not given overt international sanction by the UN? Does not any 'right of humanitarian intervention' make small countries, remembering a history of imperial intervention, shiver in their boots at the prospect of setting a precedent for great power intervention? Even the other permanent members of the Security Council, China and the former Soviet Union, given their own internal problems and chronic weaknesses, cannot welcome the emergence of any right to intervention even if it is restricted to an obligation to provide protection and relief without the consent of the sovereign authority of the State within which the relief was to be provided. Can unilateral action to provide humanitarian relief and protection by some States in the 'internal affairs' of another sovereign State be justified on humanitarian grounds?

2.2 The Right of Humanitarian Intervention -- The Obligation to Protect

The two principles are not only linked in the particular context of the Iraqi situation, but linked in theory as well. To have an obligation to protect without a right of intervention would be like insisting that a State was sovereign without giving it the monopoly on the use of coercive power. On the other hand, whenever a State, both within and outside its own jurisdiction, uses coercive power, the issue of political legitimacy is at stake. The way Iraq exercised and abused its right to use coercive power within the territory and upon the people under its own jurisdiction is directly related to the rights of other States to intervene, but only to the degree necessary and required to correct the abuse of that power and protect those affected, and only to the degree that protection is necessary to prevent a threat to peace and security.

In other words, Iraq as a sovereign State, was fully within its rights to repress the Kurdish rebellion without any intervention of any kind from third parties. Unlike Yugoslavia, Iraq was not a federal State with a minority constitutionally given some sovereign authority within a clearly demarcated territory. It was fully within Iraq's power to repress the Kurdish civilian population which backed the rebellion. However, the repression invited and justified the moral condemnation of other States and international bodies, a condemnation which could be accompanied by external actions (such as the continuation of the economic boycott) to induce the Iraqi military and secret service to cease and desist from their contemptible actions. But the Iraqi behaviour would not in itself justify military intervention. However, when the repression or fear thereof was so great as to cause mass flight and an exodus which not only endangered the lives of the men,

women and children in flight, but threatened the peace and security of the surrounding States, those States, or their allies, or the Security Council responsible for maintaining peace and security, would be justified in calling for external humanitarian intervention. In other words, the inducement of mass flight by the government of a sovereign State, which also endangered the peace and security of the surrounding States, provides grounds for intervention, but a qualified intervention, one which restricted the use of coercive power of the sovereign State but *not one which challenged the fundamental territorial integrity of that State.*³⁷

This position justifying *limited* humanitarian intervention is to be distinguished from other positions absolutely opposed to humanitarian intervention. 'What a State did to them (its own nationals) was its own business and beyond the reach of international law or any legal outside intervention short of war. But there may have been an exception to the rule. If, it was said, a State treated its nationals in such manner as to shock the conscience of mankind, other States could then intervene, if necessary, by force, to protect the persecuted nationals. This was called humanitarian intervention . . . partly because most if not all of them were motivated by political considerations that had nothing to do with human rights, it is questionable whether so-called humanitarian intervention was ever recognized as an institution of the law of nations. It was certainly never so recognized by the countries against which it was invoked.'³⁸

John Humphrey, the distinguished Canadian elder statesman of human rights, went on to say that, 'The controversy (over the use of force for humanitarian intervention), however, is now of historical interest only, for jurists who would now attempt to breathe life into the institution are faced with an insurmountable difficulty. By Article 2 (4) of the United Nations Charter all member States have pledged

³⁷ 'Article 2(4) (of the United Nations Charter) says exactly what it says—that you shouldn't use force to affect the territorial integrity of a State. I think this has been reconfirmed in the declaration of nonintervention. (GA Res. 2131, 20 UN GAOR Supp. 14, 1965)' (Joseph B. Samuels in Lillich, above note 32, p. 43). This objection refers to affecting 'the territorial integrity of the State', but not to an intervention clearly aimed at the protection of a minority population and explicitly not at the territorial integrity of that State. Art. 2(4) should not be confused with the rejection of the use of force across State lines under any circumstances; the issue is what are the circumstances?

³⁸ John P. Humphrey in Lillich, above note 32, Forward. John Stuart Mill (cf. Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*. New York: Basic Books, 1977, pp. 87–91) makes a similar argument. 'We are to treat States as self-determining communities, he (Mill) argues, whether or not their internal political arrangements are free, whether or not the citizens choose their government and openly debate the policies carried out in their name. For self-determination and political freedom are not equivalent terms . . . A State is self-determining even if its citizens struggle and fail to establish free institutions, but it has been deprived of self-determination if such institutions are established by an intrusive neighbour' (at p. 87).

themselves to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State or in any other manner inconsistent with the purposes of the United Nations. This excludes any recourse to humanitarian intervention, involving a threat or use of force, by any State or combination of States apart from the United Nations itself.'

If no State had the right to engage in humanitarian intervention, did the United Nations have that right? Professor Frey-Wouters, then of the Political Science Department of the City University of New York, recommended that, 'in the absence of Security Council authorization, collective direct military action should be avoided'.³⁹ Does the authorization have to be explicit, or could it be implied, which is what the United States did with Resolution 688? Further, why is unilateral as opposed to multilateral action not justified?

Professor John Norton Moore argued that, 'some unilateral competence is required if carefully constrained'.⁴⁰ He went on to elaborate that, 'There will be at least some circumstances in which effective multilateral action will not be available when needed. For one thing, the issues frequently arise in an emergency. Secondly, they frequently arise in a politicized context. For these and other reasons it is unrealistic, for the short run at least, to feel we are going to get effective multilateral action in all circumstances when it is needed. If we are going to have effective humanitarian action, then it must be at least partially unilateral . . . Such interventions should only be permissible in situations of extreme deprivation.'⁴¹

More importantly, a question even arises whether the United Nations itself has any right to intervene forcibly in the affairs of States even on humanitarian grounds. The difficulty resides not in Article 2 (7) of the Charter, which precludes any intervention by the United Nations 'in matters which are essentially within the domestic jurisdiction of any State,' because it can no longer be argued that violations of human rights 'which shock the conscience of mankind' are essentially within domestic jurisdiction. The difficulty lies rather in the fact that nowhere does the Charter authorize the United Nations or any of its organs *to use force* (my italics) against a State unless there is a threat to the peace, a breach of the peace, or an act of aggression. And if any of these conditions can be shown to exist, there would be no need for the United Nations to have recourse to any doctrine of humanitarian intervention, for—assuming that there was unanimity between (sic!) the permanent members of the Security Council—the United Nations could intervene on other more preemptory grounds.⁴²

³⁹ Lillich, above note 32, p. 107.

⁴¹ Ibid., p. 49.

⁴⁰ Ibid., p. 30.

⁴² Ibid., p. 49.

What Humphrey failed to recognize is that humanitarian intervention would be distinctively different in its goals and methods than other threats to the peace as instantiated by the very unique and different precedents created within months of one another in the use of force to repulse the Iraqi invasion, occupation and annexation of Kuwait and the use of force to protect the Kurds. One requires very aggressive military action; the second begins with a very defensive posture. Further, the first required the overt sanction of the Security Council. The second might only require its silence and the absence of condemnation of the use of force by other States to protect the Kurds. The latter sets a precedent by omission. Thus no new legal mechanism is needed, such as an amendment to the Charter, nor is a new legal hook needed when the threat to peace is sufficient in the limited case here.

In addition to the position opposing humanitarian intervention by other States even under limited circumstances for very defined and qualified purposes, there is a position advocating broad powers of humanitarian intervention. This position would justify humanitarian intervention for any significant and extensive breach of human rights by a State against its own population. This is the position of Fernando Tesón. Tesón goes much further in broadening the purposes of humanitarian intervention because, 'The normative force of the principle of State sovereignty is thus put to the difficult test in those instances where it clashes with our firm belief that individuals are entitled to claim fundamental human rights as moral barriers against the State.'⁴³ He then defined humanitarian intervention to suit his own conception as, 'the proportionate transboundary help, including forcible help, provided by governments to individuals in another State who are being denied basic human rights and who themselves would be rationally willing to revolt against their oppressive governments.'⁴⁴ His justification was that any State that so oppressed the human rights of its citizens had forfeited its legitimacy. 'Because the ultimate justification of the existence of States is the protection and enforcement of the natural rights of the citizens, a government that engages in substantial violations of human rights betrays the very purpose for which it exists and so forfeits not only its domestic legitimacy, but its international legitimacy as well.'⁴⁵

Such a doctrine reverberates with justifications for colonial interventions by colonial powers to protect their own citizens. It is a doctrine subject to conspicuous abuse. Richard A. Falk of the Princeton Law School stated that position very forcefully. 'I am very

⁴³ Fernando R. Tesón, *Humanitarian Intervention: An Inquiry into Law and Morality*. Dobbs Ferry, NY: Transnational Publishers, 1988, p. 4.

⁴⁴ *Ibid.*, p. 5.

⁴⁵ *Ibid.*, p. 15.

sceptical about the sensitivity of principal governments to the values at stake, the consistency of that sensitivity, so as not to feel comfortable about giving legal sanction to the doctrine of humanitarian intervention under contemporary conditions'.⁴⁶ Professor Brownlie seemed to be of the same position. 'My position is that humanitarian intervention, on the basis of all available definitions, would be an instrument wide open to abuse . . . as a matter of degree, the definitions of humanitarian intervention are woefully slack. Moreover, the safeguards attached to the definitions seem unworkable. Does a force sent in to halt racial oppression or the practice of slavery remain until the legislative and administrative structure maintaining the particular condition has been changed?'⁴⁷

However, Brownlie was not as absolute as this quote makes him appear. 'The only threat to the general international consensus (against the use of humanitarian intervention to justify the use of force within the territorial realm of another State), is the opinion that the principle of self-determination has modified the law relating to the use of force in various ways'.⁴⁸ In other words, in addition to at least an implicit authorization by the Security Council, the intervention should take place in some relationship to the principle of self-determination of national minorities within States.

If a contemporary right of intervention is to be linked with an obligation to provide relief and protection, it must directly deal with the issue of legitimacy. In fact, it is precisely because modern political theory has been unwilling to challenge the absolute authority of the State to use coercive power within the territory under its jurisdiction and against its own populations, to delimit when it is and when it is not legitimate to use such power, that a major if not the major cause of refugee flows is not tackled. The root cause of refugees is *not* economic underdevelopment, but the abuse of the monopoly of coercive power by the State on individuals and national minorities within the borders of the State's purportedly absolute jurisdiction.

The fact is, States are interdependent. That interdependence has been utilized in the past to develop a refugee regime in which other States picked up individuals ejected from a State when that State failed to fulfil its social contract to its members who gave up the use of coercive power in return for protection. That interdependence may have only developed as an obligation in practice when the world was totally divided among States and there no longer existed a 'state of nature', that is, a territory in which a State had not yet claimed sovereign authority, where the individual could begin again. In other

⁴⁶ Lillich, above note 32, p. 33.

⁴⁷ Ian Brownlie, 'Thoughts on Kind-Hearted Gunmen', in Lillich, above note 32, 139-148, at p. 146.

⁴⁸ *Ibid.*, p. 144.

words, the current refugee regime is a product of the spread of the sovereign State system over the whole earth where some sovereign States do not live up to their obligations to protect their citizens and govern without consent. But it is no longer a workable regime. The threat to the integrity of all other States is too real. The numbers cast off are too large, particularly when those who are not protected are not just selected individuals but large minority nations.

Further, States were not only based on providing protection to individuals so they could operate in the civil society. They were also founded to give rights to national collectivities. The fiction that a State was in a state of nature with every other State and that the only proper international legal regime was one of contracts between States which provided no rights of intervention in each others affairs can no longer be sustained. How a State treats its own individual citizens and minorities affects the viability of every other State. What is proposed is that the very same basis upon which the modern theory of the State was constructed—the obligation to provide protection—is the very same basis upon which the right to intervention can be justified, but then only in very qualified ways and by properly legitimized actors.

This does not mean domestic jurisdiction will be conflated with international jurisdiction, that the exact same norms that govern the conduct of States within its domestic jurisdiction will govern the conduct of States outside its jurisdiction.⁴⁹ There will be different norms covering the two areas and different principles of legitimization. The right to intervention will be very restricted and only recognized in cases where the State *both* fails to protect its own citizens *and* that failure jeopardizes the peace and security of other States. In other words, the legitimization of intervention is built on current understandings of State to State relations, rather than on their replacement with a radically new conception. Such a rationale for intervention goes far beyond the pressures of moral influence exercised by international human rights advocates. They use moral influence not force, and their actions are based on solid documentation; it is not intervention as we have defined it.

Similarly, such a rationale for humanitarian intervention is to be distinguished from those who recognize a transnational obligation to provide protection but without any right to intervention. The latter justifies agreements between legitimate international agencies and States, but without providing the international agency with an effective basis for the use of coercive power.

As Professor John Norton Moore stated the problem: 'Surely the

⁴⁹ 'A State's actions outside its territory, and against non-citizens, must be evaluated in terms of the political justification that grants the State the right to operate domestically.' Lea Brilmayer, *Justifying International Acts*, Ithaca, N.Y.: Cornell University, p. 2.

issue is whether we are able to develop a set of criteria for normative appraisal, so that we can determine when humanitarian intervention is normatively permissible, and when it is not. That is, what kinds of governmental actions, in mistreating one's own population or in intervening, should be impermissible'.⁵⁰

Thus far, the following restrictions or constraints have been introduced on the right of intervention:

1. The right is only to be used to provide relief and protection, and for no other purposes;
2. The right is only to be used when the use of coercive force by a sovereign authority is so extensive as to induce mass flight;
3. The right is only to be used when that mass flight is so extensive as to threaten the peace and security of the region;
4. The right to intervention is only to be exercised when it is authorized *either* by the immediately adjacent State whose security is threatened by the mass exodus *or* when it is explicitly endorsed by the Security Council.

There are many possible objections to recognition of such a right. For example, it may be argued that such a right of intervention is wrong in principle; or that, even with the restrictions provided, the right is cast too broadly; or that the right is cast too narrowly.

2.3 Casting the Net Too Broadly

The case against too broad an application of humanitarian intervention has been acutely summarized as follows: 'The instinct to act forcefully where misery is imposed by a human agency is often more intense than in the case of natural disaster, since compassion is reinforced by righteous anger. Yet, many decent men hesitate. Why? First, because where the good Samaritan must fight for the right to perform, he may end up causing more injury than he averts. Secondly, because the authorization of forceful intervention for humanitarian intervention may be abused: This is the problem of the thief in good Samaritan's clothing. Third, because unilateral recourse to force even for genuinely humanitarian purposes may heighten expectations of violence within the international system and concomitantly erode the psychological constraints on the use of force for other purposes'.⁵¹

The right to intervention, even if it is restricted to instances of mass flight to the degree necessary to provide relief and protection so that those in flight can return to their homes in safety, may be cast too broadly because it would justify intervention in too many countries on the pretext that the peace and security of surrounding States is

⁵⁰ Lillich, above note 32, p. 38.

⁵¹ Tom J. Farer, 'Humanitarian Intervention: The View from Charlottesville', in Lillich, above note 32, p. 152.

threatened. It might even justify intervention in the former USSR and China, although it is unlikely that any foreign power would be likely to exercise such a right today even if it could be justified in terms of both morality and international law and practice. As depicted above, interventions might also be justified in Afghanistan, Iran, Sri Lanka, Ethiopia, the Sudan, Somalia and Mozambique. A major factor contributing to refugee flight in some of these States, however, has been outside intervention. Moreover, outside powers do not have the capacity to intervene in all these cases, and it is unlikely that any intervention could be limited to relief and protection for the refugees and displaced persons.

Only one ground offers a sufficiently justifiable basis for intervention—the protection of minority populations. The flight of refugees from Afghanistan because of an ideological dispute, the accession to power of a fundamentalist religious regime in Iran and the ensuing mass flight, would not warrant intervention on the basis of current political theory and international law and practice; this would require truly reconstituting a new world order, a possibility discussed below. The exodus of refugees from Cambodia, because of the extreme horror occasioned by the accession to power of a millenarian terrorist regime might justify intervention under the Genocide Convention, but that requires separate exploration.

The only grounds for exercising a right to intervention is the recognition of the right of a people to self-determination. That recognition, in the post Second World War period, does not mean that intervention by outside parties is justified to support that *right* to self-determination exercised through the use or support of a rebellion against a recognized State authority. A State retains the monopoly on the use of force. A minority may rebel against that monopolization of force, and force as well as any other factors may determine the outcome. The right of a minority to self-determination does not alone justify intervention; what justifies intervention is,

- the use of coercive force by the State authorities on the civilian population;
- the use of force to such a degree that it causes a mass exodus; and
- the resulting mass exodus is a threat to peace and security.

In other words, two theoretical principles of the modern State system come into play—the right of national minorities to self-determination and the right of States to protect themselves. The mass exodus of that minority would effectively cancel forever the possibility of exercising the right of self-determination. But that alone would not justify intervention, a right in modern political theory which is not based on humanitarian principles. A mass exodus of the Mohawks from Canada would not justify the intervention of the United States into

the affairs of Canada, or, if Quebec becomes independent, the intervention of Canada into the internal affairs of Quebec. The protection of a minority population, with an inherent right to self-determination; is a necessary condition to justify intervention, but not a sufficient condition. An actual threat to the peace and security of the adjacent State would have to be established and invoked to justify intervention.

How would we differentiate a case which alleges a threat and one which produces a real threat? How do we establish that the threat to peace and security is not a pretext? We do it by way of limitations on the intervention—by restricting the objectives to the provision of relief and protection of the population in flight enabling them to return to their homes. But we need another restriction to ensure these restrictions are adhered to. If the initial intervention does not occur under international auspices and with the use of international forces, the intervening forces should be replaced, as soon thereafter as feasible, by an international police force.

We have thus added two further restrictions, one which qualifies those occasions of mass exodus that justify intervention to those situations in which a mass exodus of a minority population is occurring. The exercise of power which causes a mass exodus of the civilian population, such that the demand for the right to self-determination is eliminated once and for all, would abrogate the right of self-determination *as a right* altogether.

The second restriction qualifies the conditions of such intervention. It must be followed by a genuine effort to replace the intervening troops of another sovereign State as soon as possible with an international police force. In that way, the intervening power(s) receive no benefit from such intervention other than the preservation of peace and security.

There are five constraints on the external involvement in the domestic affairs of other States, other than constraints of Realpolitik, such as strident and effective regional opposition or the forceful opposition of major powers, such as the Soviet Union and China. They include: an implicit support of an international body; a minimal use of force; a restriction on the duration of the intervention; a restriction that intervention only take place in cases where minorities are under a perceived threat; and there is a mass exodus which is a threat to the peace and security of the region.

The intervention does not and must not be so extensive so that it fulfils a criterion of altering the regime of the State in which intervention occurs as Farer advocated. 'Rescue, if there is to be any, will require elimination of the threat at its source. The delinquent elite must alter its policies or be removed. There must, in other words, be direct and sustained involvement in the political process of the target

State.⁵² There need not be this direct and sustained involvement. A combination of the carrot of allowing Iraq to export oil again (critical if the Ba'th regime is to retain power) and the threat of continuing presence of foreign troops and the possibility of further intervention, can serve as a method of sidestepping the need for a long occupation or the removal of the elite from power. In other words, initial forceful intervention backed by other non-force measures might together mitigate the danger that Farer describes and thinks is inevitable.

Do the above grounds justify intervention where we might otherwise believe it was unwarranted? For example, would they justify the invasion of Palestine by five Arab States to prevent the partition of Palestine? After all, the Irgun had allegedly slaughtered over 200 men, women and children at Der Yassin, panicking the Arab population and contributing to mass flight and exodus. A minority nation in the partitioned portion of Palestine that was to become Israel fled in massive numbers, and one cause was attributed to an unjustified use of force.

Intervention would not be justified. First, plans for the intervention were in process prior to the instigation of mass flight. Secondly, the strongest army in the five nation pact, that of Transjordan, intervened to abrogate the self-determination of the Palestine people, not to facilitate its exercise.⁵³ Thirdly, the intervention took place contrary to the expressed will of the UN; the partition plan of the UN would have provided for the self-determination of the Palestinian people, although on only part of the territory which they claimed. Fourthly, the intervention took place expressly to prevent the self-determination of another people, the Jewish minority in the territory of Palestine. Finally, the intervention did not take place for humanitarian reasons, to provide relief and protection for the fleeing population, but to settle a political dispute in favour of one of the sides.

A justification for Arab intervention might be provided if the Israeli extreme right came into power and instigated a forcible transfer of the population from the West Bank across the border with Jordan. International intervention would be justified to provide relief for the fleeing population and for their protection *within* the West Bank, but not to settle the political dispute, even though the intervention did not occur within the sovereign territory of Israel but on disputed territory where the ultimate disposition had not been finally determined in accordance with international law and mutual agreements.

⁵² Ibid., p. 173.

⁵³ Cf. Minute by Write, 15 Jun. 1948, FO 371/68650/E8409/6. 'The Arab areas would always and certainly be divided up mainly between Transjordan and Egypt.' See William Roger Louis, *The British in the Middle East 1945-1951: Arab Nationalism, The United States, and Postwar Imperialism*. Oxford: Clarendon Press, 1984, p. 538.

Would international intervention be justified in Sri Lanka to protect the Tamils. No. Because the actions of the Sinhalese government have not induced a *mass* exodus. Large numbers fleeing a civil war are not to be equated with the forced expulsion of a whole minority in fear of massive, indiscriminate slaughter. Intervention might have been justified in Ethiopia or even in Kampuchea as a case of genocide.⁵⁴

The rationale above would certainly not justify the American interventions in the Dominican Republic, in Grenada,⁵⁵ in Lebanon and in Panama. They would not be cases of humanitarian intervention. Whether it would justify interventions on humanitarian grounds in the Congo,⁵⁶ in Nigeria,⁵⁷ of Tanzania in Uganda, particularly in light of the even worse atrocities committed by the Obote regime,⁵⁸ I leave open to question.

2.4 Casting the Net Too Narrowly

The above sets forth a doctrine of the right of intervention based on current international theory and practice and on the premise of sovereign States and their responsibilities towards one another. It has, admittedly, very restricted grounds for application. There are those who would argue that such grounds are so restrictive that it becomes, in effect, an apologia for only one intervention.⁵⁹ Further, a right of intervention which justifies unilateral intervention by any State merely opens a Pandora's box for abuse and future conflict. The right must be based on international, not unilateral action, under proper legal authority. Further, the right of humanitarian intervention must be based on the need to protect the rights of individuals and not just on the obligation to protect minorities who have begun to leave en masse. In fact, it is not properly called a right of intervention but an obligation to provide protection. The issue is not whether the international system may intervene, but that it *must* intervene. It would apply to the Cambodian slaughter of its own people, to the viciousness of the

⁵⁴ See Bazylar, 'Stopping the Bloodshed: The Doctrine of Humanitarian Intervention Re-examined in the Light of the Atrocities in Kampuchea and Ethiopia', *Stanford Journal of International Law*, 1987.

⁵⁵ Cf. William C. Gilmore, *The Grenada Intervention: Analysis and Documentation*. London: Mansell Publishing Limited, 1984.

⁵⁶ Cf. Weisberg, 'The Congo Crisis of 1964: A Case Study in Humanitarian Intervention', *Virginia Journal of International Law* (1972), p. 12.

⁵⁷ Cf. Weisberg, 'Humanitarian Intervention: Lessons from the Nigerian Civil War', *Human Rights Journal* (1974).

⁵⁸ Cf. Michael Richardson, *After Amin, the Bloody Pearl*. Atlanta: Majestic Books, 1980.

⁵⁹ Defenders of broad grounds for intervention include A. D'Amato, *International Law: Process and Prospect* (1987); Michael Reisman 'Coercion and Self-Determination: Construing Article 2 (4)', *American Journal of International Law* (1984); Luban, 'Just War and Human Rights', *Philosophy and Public Affairs* 169 (1979-80); Lea Brilmeyer, *Justifying International Acts*. Ithaca: Cornell University Press. 1989.

Idi Amin and Obote regimes in Uganda,⁶⁰ to the genocide of Jews by the Nazi regime. It is a doctrine which challenges the theory that the only remedy against an authoritarian rights abusing regime is a domestic one dependent on the right to rebel of the people themselves, but not on any outside authority and does so not because the consequences of those abuses are a threat to the peace and security of the area, but directly because the rights of the State's own citizens are being violated.

Post World War II human rights approaches focus on either civil and political rights, (rights of the individual to be protected from the excesses of the State,) or on social and economic rights, that is group entitlements. These protections and entitlements tend to ignore minority or communitarian rights rooted in theories of national self-determination. Such communitarian rights are matters of both protection and entitlement.⁶¹

Those who argue for broadened grounds for humanitarian intervention, however, base their case on the narrow grounds of a universal code of individual rights rather than on any principle of community rights. The argument depends on the premise that the relationship between a State and the individual members of that State, whose rights are being violated by the very State set up to protect that individual, cannot be insulated from outside interference. The issue of human rights, they argue, does not fall solely within the sovereign rights of States. As the Foreign Minister of Argentina argued at the UN Commission on Human Rights, 'The preservation of human rights was a legitimate interest of individuals and groups that went beyond the sovereignties and powers of the States and was also of concern to the international community'.⁶²

Nevertheless, humanitarian intervention, in the form of force to protect those whose human rights have been abused, has not been broadly supported. Though human rights do not fall within the exclusive jurisdiction of a sovereign State, the form of intervention to protect the rights of others has not thus far extended to the use of coercive force by outsiders to defend those rights.

Just as parents do not have absolute authority over a child, but a State has the right to intervene when a parent abuses a child because of the primary obligation of that State to provide protection, those in favour of a broadened right of humanitarian intervention argue that

⁶⁰ Cf. Farooq Hassan, 'Realpolitik in International Law: After Tanzanian-Uganda Conflict, "Humanitarian Intervention" Reexamined,' 17 *Willamette Law Review* 859 (Fall, 1981).

⁶¹ Cf. Frederick Harhoff, 'Institutions of Autonomy,' 55 *Nordic Journal of International Law*, 31 (1986); Hannum, *Autonomy, Sovereignty and Self-Determination*, above note 11.

⁶² Foreign Minister of Argentina, UN Commission on Human Rights, UN doc. E/CN.4/1984/SR.29 (1984).

an outside transnational body has an obligation to provide a similar type of protection. State authority cannot be so absolute as to give to that State the right to abuse its own members. The sovereignty of a State merely protects that State from intervention by *another State*. But that State is a member of the community of nations and has responsibilities, including responsibilities to its own citizens, which it is obligated to carry out. When that State fails, when it abuses that obligation, *a transnational body* has a duty to provide protection and, hence, the right to intervene.

The obligation to provide protection, in this case, entails an obligation to use force *against* a State which abuses the rights of its citizens, not under the laws of that State, but according to universal norms of human rights, adherence to which are conditions for membership in the community of States. This is the basis for who intervenes (a transnational actor) and the grounds for intervention (abuse by a member State of the rules of membership in the transnational authority).

The problem is that the rules of membership also exclude any such remedy as the right of intervention. The only rule justifying intervention is a threat to peace and security or, perhaps, massive genocidal actions. The abuse of individual rights of individual citizens is not normally a threat to peace and security. The precedent of the Nuremberg trials against Nazi war criminals cannot be invoked because they involved neither a right to humanitarian intervention nor an obligation to protect, but an obligation to punish those who, by their aggressive actions, have fallen outside strict domestic jurisdiction and under the authority of the victorious powers.

Can the debate over a State's rights and the obligation of supranational authority to intervene in that State to protect the equal rights of all its citizens provide a model justifying humanitarian intervention? This might be based on three assumptions:

1. the perpetrator of violations, the State, is a member of the United Nations as intervenor and subject to its rules;
2. the victim is a member of the intervening State;
3. the independence rights of the abusing State are subordinate to the obligations of the United Nations towards those who have been abused.

Only the first premise is, in fact, true if the doctrine is to be applied to the international realm. Individuals are not members of international bodies no matter how much transnational bodies are charged with protecting the rights of individuals. The second premise begs the question. Further, the second premise fails to point out a qualification of membership—the sovereign authority of a State over its own citizens and territory, ruling out any right to intervention. The key to

justifying international intervention by a transnational authority depends on two missing elements, the nature of membership and the entitlement to exercise the right of jurisdiction, neither of which is applicable in this case.

The construction of a basis for a broader theory, based on individual rights and individual membership in the world community and restricted to intervention by a properly authorized international actor, encounters too many problems. There are practical difficulties in involving an international authority in too many disputes where it lacks the tools to intervene effectively when the use of force is required, and where the politics of the organization create obstacles to intervention. Even in the most extreme cases, such as counteracting the apartheid regime in South Africa, *only moral influence and economic pressure* could be used. There is no theoretically coherent justification for intervention in the broader sense of protecting individual human rights. Only the combination of the rights of a nation to self-determination combined with the doctrine of threat to peace and security as outlined above provides such a justification. Though a right to humanitarian intervention for non-State actors has developed to justify protection by agencies such as the International Red Cross, it is always based on the concurrence of the allegedly abusing State and full recognition for its sovereign authority. It is not based on any qualification to that sovereignty which permits the use of coercive power to protect a threatened minority on its own territory. 'Critics of humanitarian intervention did not question the need for action both in cases of massacre and of the chronic mutilation of a whole people. What they did question was the need for a specific legal doctrine keyed to such events'.⁶³ Why we need a theoretical basis is precisely to prevent humanitarian intervention from being abused and, at the same time, to differentiate the actions appropriate to humanitarian intervention as distinct from those needed to repulse aggression.

2.5 The Principle of the Right of Humanitarian Intervention

There are those who, however sympathetic to the plight of the Kurds, would argue that a right to intervention, however restricted and qualified, sets a precedent for leading the world community into uncharted and dangerous waters. More importantly, however, it is theoretically unjustifiable.

The government of Iraq demonstrated its ability to ensure control over its territory and over its own citizens, the only condition for giving it legitimate authority. Consent of its citizens is not a condition for legitimation, let alone respect for individual and/or minority

⁶³ Farer in Lillich, above note 32, p. 158.

rights. Further, the opportunity and occasion for intervention followed the Iraqi defeat in an *international* dispute, whatever the Iraqis deemed it, where the intervening States on behalf of Kuwait and the old world order were much more powerful than Iraq. The *theoretical* basis for a humanitarian right of intervention is premised on States with equal status in the international community.

Jurisdiction depends on the mastery of the instruments of coercive power alone and not on the effects of the use of that power on a State's own citizens. It does not depend on whether the State is exercising the authority it has been given in a legitimate fashion to protect its own citizens. The adjudication as to whether that authority has been exercised legitimately and the resort to a challenge to that coercive power are both responsibilities only of its own citizens.

The above rationalizations of absolute and unqualified sovereign power and authority of an existing regime are but legal and theoretical legal fictions. They are no longer operable. All kinds of interventions are currently justified based on State to State contract theory, including all kinds of penalties, such as trade restrictions and boycotts, the latter being one form of an act of war. Sovereignty has already been qualified in the Helsinki accords and in the boycotts on the South African regime, but they have never entailed the use or threatened use of force on the territory of a sovereign State to protect a group of its citizens from the actions of that State.⁶⁴ The issue is not absolute sovereign power, but one form of qualifying that power which goes a step further than any actions to date. And it does so not by analogy with the State's own right to protect its citizens from each other, but by reference to existing terms of the contracts between State actors.

Implicit in international relations is a contract obligating each State to limit its own sovereign authority to use force to reinforce that authority when it does so in such a way that it denies the right of a national minority even to exercise its right to self-determination (as is entailed in a mass exodus) and, at the same time, threatens the peace and security of surrounding States. 'Humanitarian intervention as distinct from war, seems to me to have something to do with the specificity of the objective and with limitations on magnitude and duration of the undertaking'.⁶⁵

⁶⁴ This is not quite true. The case of the Indian action in East Pakistan in 1971 provides a precedent; cf. Rizvi, Hasan Askari, *Internal Strife and External Intervention: India's Role in the Civil War in East Pakistan (Bangladesh)*. Lahore: Progressive Publishers, 1981. As Walzer puts it, 'The Indians were in and out of the country so quickly, defeating the Pakistani army, but not replacing it, and imposing no political controls on the emergent State of Bangladesh': *Just and Unjust Wars*, above note 38, p. 105. After the UN's failure to do anything about the 'appalling brutalities' and massive violation of human rights' that took place in East Pakistan, the International Commission of Jurists justified the Indian response under the doctrine of humanitarian intervention (1972, p. 96).

⁶⁵ Richard A. Falk in Lillich, above note 32, p. 27.

The obligation of a State party to the 1951 Geneva Convention and the 1967 Protocol not to *refoule* an individual refugee qualifies that State's sovereign authority. For that State agrees to surrender the *right* to determine who can enter and stay on its sovereign territory, and a right to stay can be founded on the basis of international rather than national rules. But if a refugee producing State becomes so ethically deviant that, as a result of its exercise of sovereignty, thousands are driven to seek sanctuary in a neighbouring State, then the asylum State will only be able to maintain its own sovereign authority *and* its duty to protect refugees, a qualification of that sovereignty, if the influx is not overwhelming. To maintain its own ethical position and ensure its sovereignty, the asylum State is entitled to intervene and/or call on others to assist it to intervene to prevent a mass exodus.

The rationale for intervention in this paper does not go that far, though such a doctrine could be constructed on the basis of State to State mutual responsibilities. The doctrine of the right of humanitarian intervention has been restricted to the cases of the mass exodus of a minority nation which already has a right to self-determination, where the ability of the minority nation to exercise that right is limited by the jurisdiction of an existing sovereign State. In other words, two factors are at work justifying humanitarian intervention; the right of other States to self protection, not only for their physical being, but for their integrity and moral responsibility; secondly, the recognized right to self-determination of large national minorities within the borders of the offending State.

Further, unlike intervention based on a theory of individual rights and the responsibilities of non-State or transnational actors, this right to intervention is limited, since it does not challenge a State's sovereign authority over the territory and people under jurisdiction; it restricts how and when it can exercise that authority *only* after it has demonstrated a gross abuse of sovereign power. It is also broader, since it justifies the threat of the use of force by intervenors for very restricted purposes and over a very restricted territory.

Thus, as in the realist critique of this theoretical rationale for humanitarian intervention, and in contrast to transnational, cosmopolitan and some individual rights theorists, the State is considered to be the principal actor in international affairs. But the State is not an actor with absolute jurisdiction in its own domestic sphere and no jurisdiction whatsoever in the domestic sphere of other nations. Its domestic sovereignty is qualified, however limited that qualification may be. And its jurisdiction within the sovereign realm of other States and its right to intervention is also very restricted, in the objectives, the means utilized and the circumstances justifying intervention.