INTERNAL COLONIALISM AND HUMANITARIAN INTERVENTION

*M. Sornarajah**

I. INTRODUCTION

International lawyers generally agree that if a right of self-determination exists in international law,[1] it is exhausted once the process of decolonization ends.[2] The basic argument for this view relates to international security: to preserve the stability engendered by an international order based on a system of states, self-determination must not be extended beyond the context of decolonization to include a right of secession to minority groups. It is argued that the continued existence of the principle would legitimize the right of secession. As a result, states with a plurality of ethnic groups would be subject to the constant threat of secession. Because claims to secession often are asserted violently, other states might be tempted to intervene militarily to enhance their influence. The fear that internal strife may be an avenue by which major powers spread their influence or weaken their enemies is a real one. The promotion of a separate Baluchistan in Pakistan, or a Kurdistan in Iran, would have serious effects on those states and on their regions. Another reason for denying the right of self-determination following decolonization is that the concept of state sovereignty would be weakened. This concept reflects the positivist notion that only states are subject to international law and

---

*LL.B. (Ceylon), LL.M. (Yale), Ph.D. (London); Senior Lecturer in Law, University of Tasmania, Australia.

[1] Some lawyers doubt the existence of the right. *See* Green, *Self-Determination and the Settlement of the Arab-Israeli Conflict*, 65 AM. SOC'Y INT'L L. PROC. 40 (1971); Rostow, *The Illegality of the Arab Attack on Israel of October 6, 1973*, 69 AM. J. INT'L L. 272, 272 n.2 (1975). However, recent literature accepting the existence of the right is extensive. *See* L. BUCHHEIT, SECESSION: THE LEGITIMACY OF SELF-DETERMINATION (1978); J. CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 247-70 (1979); R. RIGO-SUREDA, THE EVOLUTION OF THE RIGHT OF SELF-DETERMINATION (1973); D. UMOZURIKE, SELF-DETERMINATION IN INTERNATIONAL LAW (1972); Chen, *Self-Determination*, in TOWARDS WORLD ORDER (M. Reisman & B. Weston eds. 1976); Suzuki, *Self-Determination and World Public Order*, 16 VA. J. INT'L L. 779 (1976).

[2] *See* R. HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS 90-106 (1963); Emerson, *Self-Determination*, 65 AM. J. INT'L L. 459 (1971). Emerson observed: "[T]he room left for self-determination in the sense of attainment of independent statehood is very slight, with the great current exception of decolonization." *Id.* at 465.

that matters occurring within a state cannot be the concern of international law.[3]

Yet, the traditional view is blind to the fact that many demands for self-determination have been made and will continue to be made outside the colonial context. Such claims are, in effect, pleas to the international community for assistance in achieving either secession or a restoration of rights. Rules should be fashioned to regulate the response of the international community where a demand for self-determination amounts to an invitation to other governments to espouse the cause of a minority party. Although acceptance of such an invitation would be intervention in a nation's internal affairs, it may be justified as humanitarian intervention. Competing interests and philosophies exist, however. On one hand, maintenance of the existing state system may require rejection of the principles of self-determination and humanitarian intervention. Conversely, protection of human rights of a minority may require that the claim and the intervention be regarded as legitimate. This article presents a framework for balancing these competing interests.

The prevalence of internal colonialism has been noted in studies of ethnic problems.[4] Internal colonialism results where an ethnic group in control of a government systematically exploits resources of the regions occupied by minority ethnic groups, "reducing the development of those regions to that of dependencies and allocating the members of minorities to specific roles in the social structure on the basis of objective cultural distinctions."[5] Typical results include an inequitable distribution of national wealth and of access to employment and educational opportunities. With local resources and income used primarily to serve the interests of the dominant ethnic or religious group, the resemblance to traditional colonialism is strong. At times, subservience is maintained by

---

[3] For a modern reassertion of the principle and a denial that it has been eroded by the growth of human rights law, see Watson, *Legal Theory, Efficacy and Validity in the Development of Human Rights Norms is International Law*, 1979 U. ILL. L.F. 609; Watson, *Autointerpretation, Competence and the Continuing Validity of Article 2(7) of the U.N. Charter*, 71 AM. J. INT'L L. 60 (1977).

[4] For an analysis of these studies, see Smith, *Towards a Theory of Ethnic Separation*, 2 ETHNIC & RACIAL STUD. 21 (1979).

[5] M. HECHTER, INTERNAL COLONIALISM: THE CELTIC FRINGE IN BRITISH NATIONAL DEVELOPMENT, 1536-1966 (1975); McRoberts, *Internal Colonialism: The Case of Quebec*, 2 ETHNIC & RACIAL STUD. 293 (1979). For the use of the concept to explain minority problems within the United States, see Anders, *Internal Colonization of Cherokee Native Americans*, 10 DEV. & CHANGE 41 (1971); Moore, *Colonialism: The Case of Mexican Americans*, 17 SOC. PROB. 463 (1970); Blauner, *Internal Colonialism and Ghetto Revolt*, 16 SOC. PROB. 393 (1969).

violent repression of minorities. Such conditions must concern international law, not only because of the violation of human rights involved but also because of their consequent impact on international peace.[6]

The relevance of international law may be justified on several grounds. First, it would be cynical in light of the present state of human rights law to argue that because the matter is within the domestic jurisdiction of a state, it should not concern the international community. The concept of sovereignty, which has been manipulated in the past to disguise violations of human rights, has developed to the point that international law requires "the protection of individuals from the dehumanizing acts of their own governments."[7] Second, internal colonialism violates rights which inhere in groups — rights created by modern developments in international law.[8] Third, uncontrolled intervention may increase if rules do not curb inherent temptations. For these reasons, the problem should be analyzed in light of the law relating to humanitarian intervention. If a threat to peace arises in a setting of internal colonialism, it can best be met by delineating the applicability of the principles of self-determination and humanitarian intervention so clearly that they cannot be abused. In the present international context, major world and regional powers avoid direct conflict with each other. However, they are not averse to interfering in ongoing domestic conflicts. Promotion of internal belligerence in the guise of support of self-determination threatens the territorial integrity of many states. As one commentator observed, many countries are more correctly termed state-nations rather than nation-states because they consist of a plurality of ethnic groups.[9] Once conflict occurs, the principle of humanitarian intervention may provide justification for more direct intervention to secure the rights of minority ethnic groups, thus affording the in-

---

[6] For the view that systematic violations of human rights should attract international concern, see McDougal & Reisman, *Rhodesia and the United Nations: The Lawfulness of International Concern*, 62 AM. J. INT'L L. 1 (1968). For the view that international norms on racial dominance, although formulated largely in the context of South Africa, are not restricted to that region, see Schwelb, *The International Court of Justice and the Human Rights Clauses of the Charter*, 66 AM. J. INT'L L. 337 (1972).

[7] Nanda, *International Legal Responses to the Destruction of Human Rights and Fundamental Freedoms in India*, 6 DEN. J. INT'L L. & POL'Y 19, 20 (1976).

[8] Dinstein, *Collective Human Rights of Peoples and Minorities*, 25 INT'L & COMP. L.Q. 102 (1976).

[9] Rejai & Enloe, *Nation States and State Nations*, 13 INT'L STUD. Q. 143 (1969). *See also* C. ENLOE, ETHNIC CONFLICT AND POLITICAL DEVELOPMENT (1973); A. RABUSHKA & K. SHEPSLE, POLITICS IN PLURAL SOCIETIES (1972).

tervening state a measure of control over the group and the territory occupied by it. Although this eventuality poses threats, it does not provide blanket justification for rejecting the principle of self-determination where minorities are subjected to systematic deprivations of human rights. In many cases, the denial of the right would amount to a de facto condonation of violation of rights of minorities. The principle of humanitarian intervention justifies the response of interested states to such claims and therein provides a sanction against the continued violation of rights of minorities. The solution to the problem lies not in the rejection of the principle of self-determination outside the colonial context, but in the formulation of limits within which it may operate. Without rules, the potential for exploitation will continue.[10] More worrisome is that an absence of rules may mean that the norm of the nonuse of violence will be eroded by expansive use of exceptions to the norm.[11]

At the outset, this article traces the scope of the principle of self-determination beyond the context of "salt-water" colonialism. With this background, the principle of humanitarian intervention and its validity in a situation of internal colonialism is analyzed.

II. SCOPE OF THE RIGHT OF SELF-DETERMINATION

The argument that humanitarian intervention by outside states is permissible to assist a minority group subjected to gross violations of human rights and which, consequently, claims the right to establish a separate state in the territory it possesses,[12] advances a principle that strikes at the foundation of the existing world order based on a system of states. It could be argued that such a principle attaches primacy to the protection of human rights, whereas the United Nations system is based on the notion of the sovereignty of states, noninterference with their internal affairs,

---

[10] In earlier times, interventions in Middle Eastern countries were justified as humanitarian intervention on behalf of Christians who were being persecuted. Modern writers regard such justifications as disguises for territorial aggrandizement. *See* note 59 *infra*.

[11] The only accepted exception is self-defense under article 51 of the United Nations Charter, but claims to further exceptions have been made on the basis of customary international law to include anticipatory self-defense (by Israel), intervention at the invitation of a sovereign (Soviet Union in Hungary, Czechoslovakia, and Afghanistan; U.S. in Vietnam), intervention to save the lives of citizens (the U.S. and Belgium in the Congo), and humanitarian intervention (India in Bangladesh). *See* parts IV & V *infra*.

[12] Possession of a well-defined territory by the minority is essential. Where no territory is possessed, despite racial persecution, a minority cannot claim the right of secession.

and the nonuse of force in the settlement of disputes. However, preservation of peace may require that claims to secession be dealt with by the international community. Hitherto, the technique for dealing with such situations, as evidenced during the Biafran and Bangladesh crises, has been to recognize overtly the sovereignty of the dominant state, to condone the atrocities committed, and passively to accept covert intervention in the dispute by interested states. It may be preferable to recognize a right to secession in certain well-defined circumstances. Thereafter, intervention by an outside state in an ethnic conflict within a state would be illegal, at least until the objective criteria giving rise to a right to secession in the minority are satisfied. Additionally, accepted criteria would provide time to seek an internal settlement of the conflict. Furthermore, established rules would act as a disincentive to the commission of atrocities against the minority in the first place.

A recognition of the right to secession in well-defined circumstances is realistic. Given the rise of religious and ethnic fervor, a future source of conflict could arise from claims to secession made by minority groups and by espousal of these claims by states having religious or ethnic ties with the minorities. The traditional refusal of the international lawyer to deal with these minority claims is no longer acceptable, given the implications of the problem for international peace.[13]

A. *Evolution of the Right of Self-Determination*

Although some deny its validity,[14] "the generally accepted view today is that the right of self-determination has become, in the last generation, an integral part of customary international law."[15] In addition to the fact that the principle is referred to in the

---

[13] The most recent pronouncement on this topic shows ambivalence: "The position is therefore that secession is neither legal nor illegal in international law, but a legally neutral act the consequences of which are, or may be, regulated internationally." J. CRAWFORD, *supra* note 1, at 268. In the *Western Sahara* case, the International Court of Justice, while recognizing by implication the principle of self-determination, decided that states should achieve independence through the decolonization process. [1975] I.C.J. 120 (separate opinion of Judge Dillard). However, some judges asserted the supremacy of self-determination over territorial integrity. *See id.* at 81 (opinion of Judge Nagendra Singh); *id.* at 173 (opinion of Judge Boni). For comments on the case, see Shaw, *The Western Sahara Case*, 49 BRIT. Y.B. INT'L L. 119 (1978).

[14] Green, for example, regarded the principle as *lege ferenda*. Green, *supra* note 1. *See* Rostow, *supra* note 1, at 272 n.2.

[15] J. CRAWFORD, *supra* note 1; Dinstein, *supra* note 8, at 106.

Charter of the United Nations[16] and included in a series of declarations and resolutions of the General Assembly,[17] state practice has resulted in the recognition of self-determination as a principle of international law. Whether the principle is exhausted once the process of decolonization ends remains a point of contention.

In view of the fact that the modern principle of self-determination evolved simultaneously with the rise of nationalism in Asia and Africa[18] and with the realization in the international community that colonialism was anachronistic, it has been argued that once the decolonization process is completed, the need for the doctrine of self-determination ceases.[19] A principle reason supporting this view is the fear that newly independent countries would disintegrate into smaller states on the basis of ethnic composition.[20] The newly independent nations of Africa and Asia are most susceptible to disintegration if claims to secession on the basis of ethnicity are permitted. Although they advance the principle of self-determination in a series of General Assembly resolutions, these states have been careful to exclude the right of secession from the principle of self-determination. Paragraph six of the Declaration on Granting of Independence to Colonial Countries and Peoples (1960), considered the principle constituent document of the modern principle of self-determination, states that: "Any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a country is incompatible with the purposes and principles of the charter of the United Nations."[21] Spokespersons of newly independent countries consistently deny the right of secession to ethnic minorities in other international

---

[16] U.N. CHARTER arts. 1, 55.

[17] In United Nations practice, a declaration is "a formal and solemn instrument," which "may by custom become recognized as laying down rules binding on states." 34 U.N. ESCOR, Supp. (July 1962) 15. (No. 8). A series of subsequent resolutions have endorsed the principle. *See, e.g.*, G.A. Res. 1654, 16 U.N. GAOR, Supp. (No. 17) 295, U.N. Doc. A/5100 (1961); G.A. Res. 2105, 20 U.N. GAOR, Supp. (No. 14) 99, U.N. Doc. A/6014 (1965); G.A. Res. 2326, 22 U.N. GAOR, Supp. (No. 16) 244, U.N. Doc. A/L. 541/Rev. and Add. 1 (1967); G.A. Res. 2908, 27 U.N. GAOR, Supp. (No. 30) 2, U.N. Doc. A/L. 677 and Add. 1 (1972).

[18] R. EMERSON, FROM EMPIRE TO NATION (1960).

[19] *See* Emerson, *supra* note 2. *See also* R. HIGGINS, *supra* note 2, at 104. For another viewpoint, see Sinha, *Is Self-Determination Passe?*, 12 COLUM. J. TRANSNAT'L L. 260 (1973).

[20] Rostow, Book Review (J. MOORE, LAW AND THE INDO-CHINA WAR (1972)), 82 YALE L.J. 829 (1973).

[21] G.A. Res. 1514, 15 U.N. GAOR, Supp. (No. 16) 188, U.N. Doc. N/323 Add. 1-6 (1960). On the impact of the resolution and its effect on article 2(7) of the Charter, see Emerson, *The United Nations and Colonialism*, in THE EVOLVING UNITED NATIONS: A PROSPECT FOR PEACE 83 (K. Twitchett ed. 1971). See also Emerson, *Colonialism, Political Development and the United Nations*, 19 INT'L ORG. 484 (1965).

forums.[22] A former Secretary General of the United Nations stated: "The United Nations has never accepted and does not accept and I do not believe it will ever accept the principle of secession of a part of its member state."[23] The attitude of the Organization of African Unity toward the Biafran secession indicated that its members did not favor the right of secession of a minority community.[24] Although repression of minority groups and claims to secession are not limited to developing countries, the concept of self-determination as a protective device has particular relevance to the states of Africa and Asia, which were divided into states by colonial powers without regard to the ethnic composition of the states created.[25]

Although claims to secession may induce a state to remedy oppression to forestall international scrutiny, when a minority group unsuccessfully asserts municipal law, appeal to the international community may be the sole alternative to war. Indeed, in situations where the minority has a territorial base and sufficient power, it may openly assert the right of secession.[26] In view of the fact that, unlike the League of Nations system, the United Nations has not provided adequate machinery for the redress of minority grievances,[27] recognition of a limited right of secession would be a potent mechanism by which the claims of a minority may be assessed by the international community.

---

[22] For a survey, see V. VAN DYKE, HUMAN RIGHTS, THE UNITED STATES AND THE WORLD COMMUNITY 87 (1970).

[23] Press conference with U Thant, former Secretary General of the United Nations, 7 U.N. MONTHLY CHRONICLE 34, 36 (1960).

[24] Nayar, *Self-Determination Beyond the Colonial Context: Biafra in Retrospect*, 10 TEX. INT'L L.J. 321 (1975). Article 111 (3) of the Charter of the O.A.U. affirms the principle of sovereignty and territorial integrity of each state. The O.A.U. Resolution of July 1964 declared that "all Member States pledge themselves to respect frontiers existing on their achievement of national independence." Art. 16 (1). However, several states entered reservations. The Somalis, who claimed that Greater Somalia includes areas of Kenyan and Ethiopian territory occupied by the Somali tribesmen, did not accept the resolution. *See* L. BUCHHEIT, *supra* note 1, at 178-89. Both Algeria and Morocco, which were involved in the Western Sahara dispute, entered reservations. *See* R. ANDEMICAEL, PEACEFUL SETTLEMENT AMONG AFRICAN STATES 11 (Unitar PS No. 5, 1972).

[25] C. ENLOE, *supra* note 9; A. RABUSHKA & K. SHEPSLE, *supra* note 9; H. TINKER, RACE, CONFLICT AND INTERNATIONAL ORDER (1977).

[26] For example, the following groups openly asserted such rights: the French in Quebec; the Basques in Spain; the Scots in the United Kingdom; the Nagas in India; the Tamils of Sri Lanka; the Kachins of Burma; and the Muslims of the Philippines.

[27] *See* Bruegel, *A Neglected Field: The Protection of Minorities*, 4 HUMAN RIGHTS J. 413 (1971).

B. *Self-Determination and the Right to Secession*

Unlike the League system, which placed considerable emphasis upon the protection of minorities,[28] the United Nations Charter stresses the protection of individual human rights. The difference may have resulted from the misconception, at least in Europe, that minority problems had been solved, or, perhaps, that protection of individual rights would ensure the protection of rights of minority groups. In any event, the later practice of international organizations associated with human rights placed greater emphasis upon racial discrimination than upon protection of rights of minorities.[29] An early observer of this trend, Sir Hersch Lauterpacht, commented: "It was a sign of political and moral retrogression in international relations after the Second World War that the aspect of protection of minorities received less attention than after the termination of the First World War."[30] In the thirty years that have elapsed since this observation, no change is discernible in the policy of the United Nations.

In the absence of a system of minority protection in the United Nations, the principle of self-determination, which has been developed in an ad hoc fashion at the United Nations, provides some protection to rights of minorities.[31] The aim of nations that contributed to the creation of the norm was to end the dominance of one group by another. Efforts to limit the principle to "salt-water" colonialism seem artificial when the broad objective of the principle is to end the dominance of one group by another.[32] That this was the objective behind the formulation of the principle by the United Nations appears from General Assembly resolutions in the field of racial discrimination and apartheid. To derive a system of minority protection from the various declarations and resolutions in the general area of race relations, the issues of self-determination and racial discrimination must be addressed.

---

[28] *Id.* at 425.

[29] *Id.* at 428; Dinstein, *supra* note 8; Humphrey, *The United Nations Sub-Commission on the Prevention of Discrimination and the Protection of Minorities*, 62 AM. J. INT'L L. (1968).

[30] H. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 353 (1950).

[31] Thus, Yoram Dinstein observed:

> In the world of reality, however, there is scarely a state today (even in Europe) which is free of minorities and their problems. In many places these problems have become only more acute in recent years. It is clear that the exclusive pursuit of individual human rights, without paying heed to the collective needs of minorities, is a counter-productive policy.

Dinstein, *supra* note 8, at 117.

[32] A. MAZRUI, TOWARDS A PAX AFRICANA 14-16 (1967).

The norm of nondiscrimination on ethnic or religious grounds is a principle of modern international law. The United Nations document most related to racial discrimination is the International Convention on the Elimination of All Forms of Racial Discrimination (1965).[33] The Convention reflects the ideas on equal rights of minorities recognized by municipal legal systems.[34] Quite independent of the Convention, Judge Tanaka, in the *South West Africa Case*, concluded that "the norm of nondiscrimination or nonseparation on the basis of race has become a rule of customary international law."[35] Because racial discrimination is based upon group membership, it could be argued that the goal is not only the protection of the individual against discrimination but also protection of the group of which he or she is a member.

Viewed in the context of preventing racial discrimination, self-determination has relevance as a sanctioning right, which emerges if the primary right of nondiscrimination is violated by a state.[36] In this light, self-determination is consistent with the theory of the unitary state, which permits groups within the state to opt out if the state no longer satisfies its obligation of conferring protection. This proposition is not based on an effort to construct a theoretical base. It exists in practice, as evidenced by United Nations documents which state that the right of self-determination is a right of "all peoples" and not only of people in non-self-governing territories. That such an expansive right would be used to support the claims of minorities to secession was a possibility considered and discussed prior to passage of the resolutions.[37] The British view, both official and academic, favored a broad construction, an attitude reflecting the consensus.[38] Indeed,

---

[33] G.A. Res. 2106a, 20 U.N. GAOR, Supp. (No. 14) 47, U.N. Doc. A/6014 (1965), *reprinted in* 15 INT'L & COMP. L.Q. 1059 (1966). According to one commentator this document "represents the most comprehensive codification in treaty form of the equality of races." Schwelb, *The International Convention on the Elimination of All Forms of Racial Discrimination*, 15 INT'L. & COMP. L.Q. 996, 1057 (1966). *See also* N. LERNER, THE U.N. CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (1970).

[34] McKean, *The Meaning of Discrimination in International and Municipal Law*, 44 BRIT. Y.B. INT'L L. 177 (1970).

[35] [1966] I.C.J. 284. The judgment of Judge Tanaka, according to Professor Brownlie, "contains what is probably the best exposition of the concept of equality in existing literature." I. BROWNLIE, BASIC DOCUMENTS ON HUMAN RIGHTS 455 (1971). But for criticisms of its use in human rights literature, see Watson, *Legal Theory, Efficacy and Validity in the Development of Human Rights Norms in International Law* 1979 U. ILL. L. F. 609.

[36] Fawcett, *The Role of the United Nations in the Protection of Human Rights—Is It Misconceived?*, in INTERNATIONAL PROTECTION OF HUMAN RIGHTS (A. Eide & A. Schou eds. 1968).

[37] L. BUCHHEIT, *supra* note 1, at 75-76; Dinstein, *supra* note 8, at 108.

[38] J. GUTTERIGE, THE UNITED NATIONS IN A CHANGING WORLD 51-56 (1969).

the resolutions were adopted with the knowledge that self-determination has meaning beyond the colonial context.

However, it appears from practice that claims to secession on the basis of self-determination are carefully circumscribed. This is apparent from a comparison of article six of the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples[39] with paragraph seven of the 1970 Declaration on Friendly Relations.[40] The former contains a prohibition of "any attempt aimed at the total or partial disruption of the national unity and territorial integrity of a country."[41] Paragraph seven of the 1970 Declaration on Friendly Relations reads as follows:

> Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign independent states conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.[42]

The 1970 Declaration recognizes a connection between equal protection of laws and the principle of self-determination in that it ensures the preservation of the territorial integrity of a state by rendering a state immune to the exercise of self-determination *only if* that state has protected the rights of all its people. This strong linkage between an obligation to protect human rights and the principle of self-determination in a document accepted as an interpretation of Charter principles supports the thesis that it is a sanction against the nonobservance of human rights.[43]

Although future problems will arise if the right is asserted by

---

[39] G.A. Res. 1514, *supra* note 21.

[40] G.A. Res. 2625, 25 U.N. GAOR, Supp. (No. 28) 121, U.N. Doc. A/8082 (1970).

[41] G.A. Res. 1514, *supra* note 21.

[42] G.A. Res. 2625 (XXV), *supra* note 40. The declaration proclaimed seven principles as being in accordance with the Charter, one of which was the right of self-determination of peoples. On the resolution, see Rosenstock, *The Declaration of Principles of International Law Concerning Friendly Relations: A Survey*, 65 AM. J. INT'L L. 713 (1971); Arangio-Ruiz, *The Normative Role of the General Assembly of The United Nations and the Declaration of Principles of Friendly Relations*, 137 RECUEIL DES COURS (Hague Academy of International Law) 421 (III-1972).

[43] This view is supported by Rosenstock, *supra* note 42, at 715. *See also* L. BUCHHEIT, *supra* note 1, at 94; Note, *Towards Self-Determination — A Reappraisal as Reflected in the Declaration on Friendly Relations*, 3 GA. J. INT'L & COMP. L. 145 (1973). However, Arangio-Ruiz states that "the whole part of the declaration concerning self-determination must be understood as a *de lege ferenda* formulation." Arangio-Ruiz, *supra* note 42, at 571.

violence,[44] in the context of apartheid, a violent assertion of the right of self-determination has not been frowned upon. In practice, the Security Council has regarded apartheid as a threat to international peace.[45] The resolutions of the General Assembly not only condone the use of violence against apartheid but also advocate the disbursement of aid to struggles against it. However, it would be short-sighted to limit application of self-determination to situations of racial inequity or suppression of the minority by the majority.[46] The South African system would be equally repugnant if it involved no racial overtones or suppression of the majority by the minority. The essential factor is the abuse of power by the dominant, controlling group, not race or numbers. If the use of violence to abolish apartheid in South Africa can be condoned by the international community, it perhaps is not too attenuated to suggest that violence against similar practices is legitimate. Without assistance from somewhere, violence will continue to escalate.[47] However, because abuse of the principle is possible, it is imperative that justification for intervention be limited.

A right to secession can arise only where internal remedies have failed. By this time, a state or international organization may have been approached or may have sought to intervene to settle the problem amicably. However, the power is initially with the state to avoid international concern.[48] As violence increases, foreign intervention is more likely. Refugee problems, religious or ethnic affinities,[49] the economic effects of the internal war upon

---

[44] Buchheit states that preference must be given to a right asserted in a nonviolent fashion. L. BUCHHEIT, *supra* note 1. This would be illogical. The method of assertion of the right depends on several factors, such as the absence of violent methods of repression of minority rights, and the existence of constitutional and other means of seeking redress.

[45] S.C. Res. 417, 418 U.N. Doc. S/INF/33 (1977); Johnson, *Sanctions and South Africa*, 19 HARV. J. INT'L L. 887 (1978).

[46] *See, e.g.*, G.A. Res. 3103, 28 U.N. GAOR, Supp. (No. 30) 96, U.N. Doc. N/9412 (1973), on the Basic Principles of the Legal Status of the Combatants Struggling against Colonial and Alien Domination. For a discussion of self-determination in the South African context, see Richardson, *Self-Determination, International Law and the South African Bantustan Policy*, 17 COLUM. J. TRANSNAT'L L. 185, 190-95 (1978).

[47] Krippendorf, *Minorities, Violence, and Peace*, 16 J. PEACE RESEARCH 27 (1979) (author argues that unless socioeconomic inequalities and discrimination are eradicated, resort by minority groups to terrorism and violence is unavoidable). *See also* H. LAUTERPACHT, *supra* note 30, at 352.

[48] Consider, for example, efforts to settle the problem created by Basque claims to secession by assuring them greater regional autonomy.

[49] The interest of Islamic states in the rebellion of the Muslims in Mindanao against the Philippines would be one example. At one stage, the Philippine government sought to negotiate a settlement through Libya. In the context of decolonization, a resolution was passed at a seminar of Indian teachers of international law that a colonial people have an in-

neighboring states, and the potential for a shift in the balance of power created by alteration of the status quo are variables that invite foreign intervention. Before unilateral intervention occurs it would be ideal if the international community imposed a solution by either creating a separate state or by promulgating and implementing constitutional protection of the minority within the existing state. Unfortunately, such a scenario is unlikely. On rare occasions, outside states may act in like fashion either in consultation with each other or individually to influence the outcome of the dispute.[50] However, in a majority of instances, states with varying interests would intervene to settle the outcome of the dispute. In these circumstances, the need for rules is clear. Fortunately, the existing doctrine of humanitarian intervention has safeguards against abuse.

III. HUMANITARIAN INTERVENTION

Classical international law permitted intervention to protect the interests of minority groups subjected to violation of human rights by recognizing the doctrine of humanitarian intervention.[51] The doctrine was accepted despite positivist notions of state sovereignty. Simply stated, certain principles of humanity transcend the idea of sovereignty. When violations of these principles occur, immunity from intervention provided by the doctrine of sovereignty offers no protection. Indeed, where humanitarian intervention is justified, the right of the entrenched government to summon assistance from outside parties should be suspended.

A. *Historical Evolution*

Humanitarian intervention, like self-determination, is a principle of natural law ideology that survives despite widespread acceptance of concepts of sovereignty and of noninterference in domestic affairs. The survival of the doctrine is facilitated both by the fact that ethnic and minority groups are separated by national boundaries and because sympathetic neighboring states exhibit

---

herent right "to seek external assistance to attain independence . . . ." Jain, *Seminar on the Role of the United Nations in the Development of International Law*, 65 AM. J. INT'L L. 582, 582 (1971).

[50] An example of such an unlikely situation (not in the context of self-determination) was the insurrection of 1972 in Ceylon (Sri Lanka) when the United States, Great Britain, the Soviet Union, India, Pakistan, and China gave assistance to the government.

[51] P. REMEC, THE POSITION OF THE INDIVIDUAL IN INTERNATIONAL LAW ACCORDING TO GROTIUS AND VATTEL 232 (1960).

concern for minority well-being.[52] In circumstances of violent repression, the doctrine of humanitarian intervention has long been acceptable, even in the heyday of positivist views.[53]

Instances of intervention during the nineteenth century support the concept of humanitarian intervention.[54] These incidents have been well-documented.[55] Reisman and McDougal,[56] and others,[57] consider these early cases to be clear recognition of the principle of humanitarian intervention. Gangi[58] and Brownlie,[59] however, explain nineteenth century intervention on the basis of treaty provisions, which permitted Christian states to intervene in the states of the Ottoman Empire to protect Christian minorities from atrocities. The dispute is one on which jurists seem equally divided.[60] Nonetheless, examination of state practice in the nineteenth century interventions indicates that, despite the existence of treaty rights of intervention, states claimed the right of intervention on humanitarian grounds, attaching primacy to that principle over their treaty rights as the justification for the intervention.[61] In view of such practice, whatever the true motives for

---

[52] Falk, *A New Paradigm for International Legal Studies: Prospects and Proposals*, 84 YALE L.J. 969 (1975).

[53] P. REMEC, *supra* note 51, at 232.

[54] *See, e.g.*, L. OPPENHEIM, INTERNATIONAL LAW 312 (8th ed. 1956).

[55] For a comprehensive analysis of these instances, see M. GANJI, INTERNATIONAL PROTECTION OF HUMAN RIGHTS (1962). The majority of the nineteenth-century incidents concerned Turkish atrocities against Christians (Greece, 1830; Syria, 1860; Crete, 1866; Bosnia and Bulgaria, 1878).

[56] Reisman & McDougal, *Humanitarian Intervention to Protect the Ibos*, in HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 167, 179-83 (R. Lillich ed. 1973).

[57] *See, e.g.*, Chilstrom, *Humanitarian Intervention Under Contemporary International Law: A Policy-Oriented Approach*, 1 YALE STUD. WORLD PUB. ORD. 93 (1974); Fonteyne, *Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity Under the U.N. Charter*, 4 CAL. W. INT'L L.J. 203 (1974). *See also* Behuniak, *The Law of Unilateral Humanitarian Intervention by Armed Force: A Legal Survey*, 79 MIL. L. REV. 157 (1978); Lillich, *Forcible Self-Help by States to Protect Human Rights*, 53 IOWA L. REV. 325, 333 (1967).

[58] M. GANJI, *supra* note 55, at 43. Ganji, however, agrees that although humanitarian intervention is not a doctrine of customary international law, "an intervention to put a stop to barbarous and abominable cruelty is a high act of policy above and beyond the domain of law." *Id.* However, Ganji believed that, because international organization is now under the aegis of the United Nations, only an intervention sanctioned by the United Nations could be considered legitimate.

[59] I. BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 342 (1963). *See also* Brownlie, *Humanitarian Intervention*, in LAW AND CIVIL WAR IN THE MODERN WORLD 217, 220-21 (J. Moore ed. 1974).

[60] For a list, see M. GANJI, *supra* note 55, at 41.

[61] For example, in the treaty following the Greek intervention of 1829, the major powers indicated that their actions were motivated "no less by sentiments of humanity, than by interest for the tranquility of Europe." BRITISH AND FOREIGN STATE PAPERS 633 (1829).

the intervention may have been, it should be understood that the practice of the European nations of the nineteenth century indicates recognition of the right of humanitarian intervention as a rule of customary international law.

B. *U.N. Practice*

Once it is accepted that the doctrine of humanitarian intervention forms a part of customary international law, the remaining question is whether the doctrine survives the provisions of the Charter prohibiting resort to the use of force (article 2(4)) except in self-defense (article 51) or under the authority of the Security Council (articles 42 and 43). Two views on this issue warrant examination.

The strict constructionist view is that article 2(4) contains an absolute prohibition against resort to armed force, except in the circumstances mentioned in article 51 and in situations where the Security Council takes enforcement action in accordance with the procedure outlined in chapter VIII of the Charter. Writing immediately after the Charter was drafted, Judge Jessup adopted this view.[62] If the Charter system, as envisaged by the Founders, had been put into effect, with a Security Council equipped to maintain international peace, there would have been merit in this interpretation. However, the failure of the United Nations to function in the contemplated manner has left states without an effective system of protection. Given this context, it is unrealistic to expect states to abide by the norm of abstention from force, particularly in situations where self-preservation is threatened or where the customary international law prior to the Charter permitted the use of force. It would accord with international expectations to formulate a rule that details exceptional situations in which principles of customary international law may be employed to justify the use of force.[63] The practice of states shows that this is the accepted norm.

The desire that the prohibition of the use of force not be eroded by exceptions other than those in the Charter has prompted a strict view of the prohibition of force in article 2(4).[64] However,

---

[62] P. JESSUP, A MODERN LAW OF NATIONS 169 (1948).

[63] The most recent example is the invasion of Uganda by Tanzania to overthrow the regime of Idi Amin. Legality was hardly questioned in the international fora since that intervention ended a universally condemned regime. *See* part V *infra*.

[64] Among them are Falk, *Conference Proceedings*, in HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 33 (R. Lillich ed. 1973); Rostow, *supra* note 1. *But see* I. BROWNLIE, *supra* note 59, at 298; Falk, *supra*, at 69.

there is general reluctance to maintain an absolute prohibition of the use of force due to the ineffectiveness of the United Nations system. Jessup recognized the possibility of permitting humanitarian intervention under the Charter in the exceptional instance where the Security Council is unable to act with sufficient speed.[65] Likewise, Rostow accepts the validity of humanitarian intervention by straining the principle of self-defense stated in article 51 to encompass it.[66] Others, who in the past supported a strict interpretation of article 2(4), have displayed uneasiness in holding to that view in light of the inability of the United Nations to deal with such situations as Biafra and Bangladesh.[67] McDougal, who formerly supported the strict view, has recently adopted a stance more amenable to humanitarian intervention.[68]

The strict view proceeds from a loyalty to the Charter system and the belief that any erosion of the norm against the use of force on the basis of the customary law that existed prior to the Charter would undermine the system. But the failure of the Charter system is a fact. States have intervened militarily in internal problems and justified their intervention on such bases of customary law as the invitation of the legitimate government,[69] the protection of nationals,[70] and the protection of human rights of minority groups.[71] Future efforts must be directed toward limiting these doctrines rather than clinging to the myth of the prohibition

---

[65] P. JESSUP, *supra* note 62.

[66] Rostow states: "The customary international law right of humanitarian intervention in situations of chaos and massacre survives under the Charter, presumably as a form of limited self-help under Article 51 to remedy catastrophic breaches of international law . . . ." Rostow, Book Review, 82 YALE L. REV. 829, 848 (1972).

[67] *See, e.g.*, Friedman, *General Course in Public International Law*, 127 RECUEIL DES COURS (Hague Academy of International Law) 200-14 (II-1969).

[68] McDougal, *Authority to Use Force on the High Seas*, 20 NAVAL WAR C. REV. 19, 28 (1967):

> I'm ashamed to confess that at one time I lent my support to the suggestions that Article 2(4) and the related articles did preclude the use of self-help less than self-defense. On reflection, I think that this was a very grave mistake, that Article 2(4) and Article 51 must be interpreted differently.

[69] Examples include the United States intervention in the Dominican Republic (1965) and in Vietnam; the Soviet intervention in Hungary (1956), in Czechoslovakia (1968), and in Afghanistan (1979); the French intervention in Zaire (1978) and in Chad and Western Sahara (1978). For commentary on these recent French interventions, see Hollick, *French Intervention in Africa, 1978*, 35 WORLD TODAY 71 (1979).

[70] Consider, for example, the American intervention in the Dominican Republic (1965) and the French intervention in Shaba, Zaire (1978).

[71] Examples of protection of human rights include the Indian intervention in Bangladesh (1972), the Vietnamese intervention in Kampuchea (1978), and the Tanzanian intervention in Uganda (1978).

of the use of force by the Charter. The United Nations has been inactive in the face of these interventions.[72] Recognizing the breakdown of the system under the Charter, the best approach is to formulate customary rules of international law in a manner least inconsistent with Charter norms.

The second view on article 2(4) is that, although the nonuse of force in international relations is a principle of modern international law, in the absence of an effective Security Council, it is necessary to retain certain rules of customary international law relating to self-help. In addition to the fact that recent events have undermined the strength of the Charter prohibition on the use of force, there are other reasons for rejecting the strict constructionist approach.[73] First, the strict constructionist approach to article 2(4) denies parity to other norms in the Charter. Although the preservation of human rights is an aim of the Charter,[74] in pursuance of which the organs of the United Nations have built an impressive jurisprudence,[75] absolute prohibition of the use of force, except in self-defense or if a threat to peace is found under article 39, would amount to a denial of human rights. Because the Security Council, in the context of Great Power rivalries, may not act, the international community may be compelled to witness atrocities. Jessup, who was among the first to insist upon a strict view of article 2(4), eventually recognized the continuing scope humanitarian intervention may have under the Charter system when he said: "It would seem that the only possible argument against the substitution of collective measures under the Security Council for individual measures by a single state would be the inability of the international organization to act with speed requisite to preserve life."[76] Because recent events show the inability of the United Na-

---

[72] On the United Nations response to some recent interventions, see K. MISRA, THE ROLE OF THE UNITED NATIONS IN THE INDO-PAKISTANI CONFLICT (1973). Misra's work highlights the irrelevance of the Security Council during the incident. The view is supported by Salzberg, *U.N. Prevention of Human Rights Violations: The Bangladesh Case*, 27 INT'L ORG. 115 (1973).

[73] Franck pronounced the demise of article 2(4) a decade ago. Franck, *Who Killed Article 2(4)? Or Changing Norms Governing the Use of Force by States*, 64 AM. J. INT'L L. 809 (1970). For a reply, see Henkin, *The Reports of the Death of Article 2(4) Are Greatly Exaggerated*, 65 AM. J. INT'L L. 544 (1971).

[74] Articles 55 and 56 clearly relate to human rights. The notion that the human rights provisions are not binding and have a subsidiary role to the norm of nonuse of force may be attributed to the influence of the views of Hans Kelsen. *See* H. KELSEN, THE LAW OF THE UNITED NATIONS (1950).

[75] *See generally* I. BROWNLIE, BASIC DOCUMENTS ON HUMAN RIGHTS (1971). For doubts as to the strength of human rights norms, see Watson, *supra* note 35.

[76] P. JESSUP, *supra* note 62, at 170. *See also* R. HIGGINS, *supra* note 2.

tions to act speedily or otherwise,[77] protection of human rights conflicts with a strict approach.

A second reason for avoiding a strict view is that the community of nations should be presumed to have agreed that previously-established means of protecting human rights survive. Article 7 of the General Assembly Resolution on the Definition of Aggression[78] has significance in this respect. Stated as an exception to the articles that prohibit resort to the use of force, article 7 indicates the acceptance on the part of states that once a minority's right to self-determination matures, it has the right to struggle against domination, as well as the right to receive support from other states in that struggle.

A third reason for rejecting a strict interpretation of article 2(4) is the movement in humanitarian law that confers protection on those involved in civil wars; a movement which suggests a growing recognition in international law of the rights of nongovernmental entities engaged in an armed struggle against the government.[79] The progressive assimilation of wars fought against colonial regimes with international armed conflicts for purposes of the application of the Geneva Conventions may be seen in resolutions of the General Assembly calling for the treatment of captured "freedom fighters" as prisoners of war.[80] These resolutions strengthen arguments that seek to confer protection upon the

---

[77] Henkin pointed out that the most appealing remedy, multilateral intervention under the aegis of the Security Council, was not politically feasible. Henkin, *Biafra, Bengal and Beyond: International Responsibility and Genocidal Conflict*, 66 AM. SOC'Y INT'L L. PROC. 96 (1972).

[78] G.A. Res. 3314, 29 U.N. GAOR, Supp. (No. 31) 142, U.N. Doc. A/9631 (1974). On problems relating to article seven of the Resolution, see Stone, *Hopes and Loopholes in the 1974 Definition of Aggression*, 71 AM. J. INT'L L. 224, 235-37 (1977).

[79] This movement has bridged the gap between the *laws* of war and the *law* of human rights. De Stoop, *New Guarantees for Human Rights in Armed Conflicts — A Major Result of the Geneva Conference 1974-1977*, 6 AUSTL. Y.B. INT'L L. 52 (1978); Draper, *Human Rights and the Law of War*, 12 VA. J. INT'L L. 326 (1972); Draper, *Humanitarian Law and Human Rights*, ACTA JURIDICA 193 (1979). The link between human rights law and humanitarian law was foreshadowed in an early paper. *See* Dunbar, *The Legal Regulation of Modern Warfare*, 40 GROTIUS SOC'Y TRANS. 83 (1955).

[80] G.A. Res. 2625, *supra* note 40. For the view that a political entity denied self-determination should be regarded as an international entity, see Abi-Saab, *Wars of National Liberation and the Laws of War*, 3 ANNALES D'ETUDES INTERNATIONALES 93 (1972). For a criticism of the view, see Baxter, *Humanitarian Law or Humanitarian Politics*, 16 HARV. INT'L L.J. 1 (1975); Baxter, *The Geneva Conventions of 1949 and Wars of National Liberation*, 57 REVISTA DI DIRRITTO INTERNAZIONALE 193 (1974). For the view that Biafra, an entity created by a claim to secession by an ethnic group, had status to be protected by the customary laws of war, see Nwogugu, *The Nigerian Civil War: A Case Study in the Law of War*, 14 INDIAN J. INT'L L. 13, 19 (1974).

nongovernmental party in civil wars and to lend support to the argument that any "people" having claims to territory by virtue of their historical and cultural ties to that territory should be treated as having international personality.[81] Because the Second Protocol confers protection, it is reasonable to argue that it also recognizes and attributes at least a limited personality to the nongovernmental party.[82] Indeed, in recent years, outside states have often recognized the insurgents as a new government or as a new state.[83]

A final reason to reject a narrow interpretation of article 2(4) relates to problems of vagueness. If varied notions of self-help continue to survive although not articulated with any measure of precision, claims to legitimacy of such action would be made on esoteric grounds, weakening the norm of the nonuse of force considerably more than if rules of self-help based on customary international law are recognized.[84]

It is possible to recognize expansive claims. One such claim is that where hostilities have reached the extent that the legitimate government has lost all control over events, intervention to restore order is permissible and is not a violation of article 2(4). Supposedly, no claims of violation of territorial integrity or political independence would be viable, as events occurring before the intervention would have made both factors nonexistent.[85] The weak-

---

[81] The recognition of the P.L.O. by several governments, including Austria and India, gives impetus to this view. Before the advent of colonialism, which divided Africa and Asia into states, the African and Asian "states" that existed were organized largely on ethnic lines and had personality, at least according to the natural lawyers. Alexandrowicz, *Empirical and Doctrinal Positivism in International Law*, 47 BRIT. Y.B. INT'L L. 286 (1975). It could be argued that this personality is revived in an ethnic minority (which was a state prior to colonialism), if its right to secession had matured as a result of denial of equality.

[82] During the Algerian civil war, the application of the *Fronte de Liberation Nationale* (F.L.N.) that the captured freedom fighters should be treated as prisoners of war was refused on the ground that the F.L.N. did not have a status to enjoy the protection of the Red Cross Conventions against a state that did not recognize it. The Swiss Federal Council declared the Algerian accession to the 1949 Conventions as "without juridical relevance" against France. *See* Greenberg, *Law and the Conduct of the Algerian Revolution*, 11 HARV. INT'L L.J. 37, 65 (1970). *See also* M. BEDJAOUI, LAW AND THE ALGERIAN REVOLUTION 207-20 (1961).

[83] J. CRAWFORD, *supra* note 1, at 268-69. Crawford refers to the Spanish civil war, Biafra, Algeria, Guinea-Bissau, and Indonesia. The recognition of the Palestine Liberation Organization as a government strengthens the argument that a minority group in possession of territory may be regarded as the government of a state.

[84] Chilstrom, *Humanitarian Intervention Under Contemporary International Law: A Policy-Oriented Approach*, 1 YALE STUD. WORLD PUB. ORD. 93 (1974).

[85] Other instances of such claims would be the assertion that a people without a territorial base have a right to create a state in territory formerly occupied by them, as their eviction amounted to an armed attack. The claim is one upon which the foundations of Israel is based. Another instance would be a claim that the people constituted a sovereign entity prior to conquest or annexation into the state.

ness of this claim is that it would lead to a negation of any control over the intervention by law because any intervening state could seek to restore order by assisting the party it favors. Another expansive claim, equally imperfect, is to justify the intervention on grounds of self-defense, arguing that protection of national interests may justify the intervention. Such justifications would have a deleterious effect on the norm of avoidance of force. A better approach is to recognize the customary principles permitting intervention, and to control them in a manner consistent with Charter objectives.

The consistency of the doctrine of humanitarian intervention with Charter principles should be conceded. If the protection of human rights is regarded as essential to peace, the best means to protect it, in view of the fact that the Security Council may not act, is through individual or collective intervention of states on behalf of the oppressed minority. One may be justified in concluding that Charter principles and the practice of states since adoption of the Charter are consistent with the principle expressed by Lord Shawcross, who said that "the rights of humanitarian intervention on behalf of the rights of man trampled upon by a state in a manner shocking to the sense of mankind has long been considered to form part of the recognized law of nations."[86]

IV. CONDITIONS IN WHICH HUMANITARIAN INTERVENTION MAY BE EXERCISED

Having argued that the principle of humanitarian intervention survives the Charter and has relevance in the contemporary world as a means of protecting oppressed minorities, other matters should be addressed. Among major concerns are the criticism that abuse may lead to greater confrontation among interested powers, that the creation of client-entities may ensue, and that a precedent for similar intervention in the future may be set. The possibility of abuse and consequent adverse effects upon international order render attractive the view of the adherents of an absolute prohibition of the use of force by states except in self-defense.[87]

Because of the nuclear stalemate between the Big Powers, proxy wars and interventions have become the means to enhance influence, particularly in newly-independent states of Africa and

---

[86] *Quoted in* A.J. THOMAS & A. THOMAS, NON-INTERVENTION 374 (1956).

[87] Henkin rejected the doctrine on the ground that it can be easily fabricated. Henkin, *supra* note 77.

Asia.[88] The doctrine of humanitarian intervention could be used to confer legitimacy upon an intervention initiated merely to achieve or maintain supremacy in a region. Recent history is replete with instances of intervention that were justified on lofty idealistic grounds, but which were, in reality, embarked upon in pursuit of national interests.[89] An example is the fraudulent assertion of self-determination for Sudetenland, which sparked the Second World War.[90] Nonetheless, Judge Tanaka said, "the denial of human rights can create a serious threat to peace and the trouble that may be engendered by intervention would be less serious in general than that which might be caused by abstaining from intervention."[91] A brief examination of interventions justified on humanitarian grounds since the signing of the Charter is warranted.

A. *The Congo Crisis (1964)*

The United States and Belgium were involved in a military action to rescue European, American, and other nationals held hostage by a rebel group during the Congo Crisis.[92] There was evidence that some of the hostages had been executed and the fear existed that others would suffer a similar fate.[93] In announcing the operation, the United States Department of State observed:

> This operation is humanitarian—not military. It is designed to avoid bloodshed—not to engage the rebel forces in combat. Its purpose is to accomplish its task quickly and withdraw—not to seize or hold territory. Personnel engaged are under orders to use force only in their own defense or in the defense of foreign and Congolese civilians. They will depart from the scene as soon as their evacuation mission is accomplished.[94]

Reviewing the circumstances of the intervention, Lillich reached the "inescapable conclusion that if ever there was a case for the use of forcible self-help to protect lives, the Congo rescue opera-

---

[88] R. FALK, LEGAL ORDER IN A VIOLENT WORLD (1968); J. ROSENAU, INTERNATIONAL ASPECTS OF CIVIL STRIFE 6 (1964).

[89] Barnet, *Patterns of Intervention*, in II THE VIETNAM WAR AND INTERNATIONAL LAW 1164 (R. Falk ed. 1969).

[90] A. J. THOMAS & A. THOMAS, *supra* note 86, at 374.

[91] Tanaka, *Some Observations on Peace, Law and Human Rights*, in TRANSNATIONAL LAW IN A CHANGING SOCIETY 242, 255 (W. Friedmann, L. Henkin, & O. Lissitzyn eds. 1972).

[92] For the factual background of the crisis, see Lemarchand, *The Limits of Self-Determination: The Case of the Katanga Secession*, 56 AM. POL. SCI. REV. 404 (1962).

[93] 51 DEP'T STATE BULL. 840 (1964); 52 DEP'T STATE BULL. 18 (1964).

[94] 51 DEP'T STATE BULL. 842 (1964), *cited in* Lillich, *supra* note 57, at 340.

tion was it."[95] Similar views have been expressed by others.[96] Frey-Wouters, however, has suggested that the operation, undertaken at an opportune moment, was not entirely selfless, as it facilitated the crushing of the rebel faction.[97] However, it is unwise to condemn the Congo operation on the ground that its motivation was not altruistic. A total lack of altruism on the part of the intervening state should not be a reason for condemnation if circumstances justifying humanitarian intervention are present.

The primary justification advanced for the Stanleyville operation emphasized the principle of humanitarian intervention.[98] However, there is some contention as to the applicability of the doctrine.[99] Brownlie suggested that the legality of the intervention was not based on the principle of humanitarian intervention but on the fact that the operation took place "with the authorization of the Government of Congo."[100] If a customary principle of international law that intervention is permissible if requested or authorized by the legitimate government survives the Charter, there is little reason humanitarian intervention, which is also a principle of customary international law, cannot be regarded as having survived the Charter.[101] The customary rule legitimizing intervention based on the request of a government is open to as much abuse as the principle of humanitarian intervention. For example, to legitimize an intervention, as the Big Powers have demonstrated, all that is necessary is to set up a puppet government and to extract an invitation to intervene. Brownlie's confident characterization of the Tshombe government as the "Government of Congo" demonstrates the difficulties that attend upon the justification.[102]

[95] *See also* Higgins, *International Law and Civil Conflict*, in THE INTERNATIONAL REGULATION OF CIVIL WARS 169, 176 (E. Luard ed. 1972).

[96] *See* Reisman & McDougal, *supra* note 56, at 186.

[97] HUMANITARIAN INTERVENTION AND THE UNITED NATIONS, *Conference Proceedings* at 58 n.5 (R. Lillich ed. 1973). *See also* Higgins, *supra* note 95.

[98] A criticism of the African states was that humanitarianism, on this occasion, had racial overtones in that an operation was mounted to save a few Europeans, while many Africans were being massacred. From this criticism proceeds the further criticism that the doctrine of humanitarian intervention provided a pretext for aiding a pro-Western faction. For an analysis of these criticisms, see Weisberg, *The Congo Crisis 1964: A Case Study in Humanitarian Intervention*, 12 VA. J. INT'L L. 261 (1972).

[99] For the status of the rule in modern international law, see Leurdijk, *Civil War and Intervention in International Law* 24 NETHERLANDS INT'L L. REV. 143 (1977).

[100] Brownlie, *supra* note 59, at 220-21.

[101] Brownlie denied that humanitarian intervention is a principle of customary international law. *Id.* However, in older texts, that principle is stated with as much weight as the principle of the legitimacy of intervention at the request of the legitimate government.

[102] The Tshombe government was not recognized by many states and did not possess sufficient control at the time of the invitation to be characterized as the "Government of Congo." On the insignificance of the Tshombe government's invitation to intervene in making the decision to intervene, see Weisberg, *supra* note 98, at 271.

Franck and Rodley, who also oppose the doctrine, seek to explain the legality of the intervention in the Congo by resorting to the doctrine, based on customary law,[103] that intervention to protect diplomatic personnel is permissible.[104]

The failure on the part of the Security Council to condemn the intervention could arguably be interpreted as implied approval of the legitimacy of humanitarian intervention on this occasion.[105] The intervention in the Congo crisis provides strong precedent for the argument that the principle of humanitarian intervention survives the Charter. From the point of view of fashioning norms limiting the abuse of humanitarian intervention, the importance of the Congo operation lies in the fact that it had a limited objective and was terminated upon achievement of that objective. In addition, peaceful means of securing the release of hostages were exhausted, perhaps setting precedent for the limiting rule that humanitarian intervention be preceded by efforts to remedy the alleged violation of human rights in a peaceful manner.[106]

B. *The Dominican Republic Crisis (1965)*

After the fall of the Trujillo dictatorship, which lasted more than three decades in the Dominican Republic, political and military factions vied for power.[107] When left wing groups emerged as leading contenders for power and as clashes between the factions developed, the United States landed 500 marines for the ostensible purpose of protecting American lives. The presence of American military personnel steadily increased.

Justifications advanced for the intervention were based on humanitarian grounds. Ambassador Bunker stated that "[t]he United States forces were dispatched purely and solely for

---

[103] Authority can be found in A. J. THOMAS & A. THOMAS, *supra* note 86.

[104] Franck & Rodley, *After Bangladesh: The Law of Humanitarian Intervention by Military Force*, 67 AM. J. INT'L L. 275 (1973).

[105] De Schutter, *Humanitarian Intervention: A United Nations Task*, 3 CAL. W. INT'L L. J. 21, 23 (1972).

[106] The United States delegate observed in the Security Council debate that "every means—legal, moral and humane, including the United Nations—was exhausted to protect their lives and secure their release, and all without avail." 19 U.N. SCOR (1174th mtg.) 12 (1964).

[107] The circumstances surrounding the crisis are detailed in the following works: A. LOWENTHAL, THE DOMINICAN INTERVENTION (1972); A.J. THOMAS & A. THOMAS, THE DOMINICAN REPUBLIC CRISIS (J. Carey ed. 1967). *See also* Meeker, *The Dominican Situation in the Perspective of International Law*, 53 DEP'T STATE BULL. 60 (1965); Nanda, *The United States' Action in the 1965 Dominican Crisis: Impact on World Order — Part I*, 43 DEN. L.J. 439 (1966).

humanitarian purposes, for the protection of lives not only of the United States citizens but the lives of citizens of other countries as well."[108] Similar statements were made by President Johnson and other administration officials.[109] Doubts have been expressed as to the validity of this justification.[110] Although the initial landing of 500 marines may be defended on this ground, the claim that humanitarian intervention is applicable to the entire operation is weak,[111] despite the limited success of efforts to set up a democratic government and the approval of the intervention by the Organization of American States.[112] The value of the Dominican Crisis to the doctrine of humanitarian intervention lies not only in providing an illustration of an abuse of the doctrine but also in the fact that a Great Power considered the doctrine sufficiently viable to excuse its intervention. A lesson to be drawn from the incident is that a prolonged operation, as opposed to a surgical strike, stands a lesser chance of being justified on the basis of humanitarian intervention.

C. *The Bangladesh Crisis (1971)*

The Bangladesh crisis and the intervention that ensued led to a successful assertion of the right to self-determination by the Bengali people and to the creation of an independent state.[113] The human agony involved in the crisis caused some adherents of the strict view of article 2(4) to soften their position and to rationalize the Indian intervention as consistent with their position.[114]

---

[108] 52 DEP'T STATE BULL. 854 (1965).

[109] *Id.* at 742.

[110] A. LOWENTHAL, *supra* note 107, at 104.

[111] A State Department adviser admitted as much. *See Conference Proceedings*, in HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 80-81 (R. Lillich ed. 1973) (remarks of Mr. Almondin).

[112] Fenwick, *The Dominican Republic: Intervention or Collective Self-Defense*, 60 AM. J. INT'L L. 64 (1966). These justifications are rejected by Bogen, *supra* note 107. *See also* Cabranes, *Human Rights and Non-Intervention in the Inter-American System*, 65 MICH. L. REV. 1147 (1967).

[113] For a survey of literature on the crisis, see Nair, *Survey of Source Material on Bangladesh*, 13 INT'L STUD. 324 (1974). The legal issues are analyzed in S. CHOWDHURY, THE GENESIS OF BANGLADESH (1972); S. MUKHERJEE, BANGLADESH AND INTERNATIONAL LAW (1971); Nanda, *Self-Determination in International Law*, 66 AM. J. INT'L L. 321 (1972), Nawaz, *Bangla Desh and International Law*, 11 INDIAN J. INT'L L. 459 (1971); Mani, *The 1971 War on the Indian Sub-Continent and International Law*, 12 INDIAN J. INT'L L. 83 (1972); Franck & Rodley, *supra* note 104; Joyner, *The 1971 Indo-Pakistani War in Retrospect*, 7 EASTERN J. INT'L L. 18 (1975).

[114] Thus, Friedman, for example, who supported a strict view of article 2(4), said in reference to the Indian intervention that "what was in formal terms an illegal action was

West Pakistan was physically separated from East Pakistan by a thousand miles of Indian territory. The people of the two wings were ethnically different; the only point of unity was the Islamic religion. The fact that the official language was Urdu and not Bengali, the fact that administration was centered in Lahore in West Pakistan, and the fact that wealth generated in the Eastern wing supported higher living standards in the West contributed to the resentment on the part of Bengalis. In response, the Awami League, a major political force, claimed secession from the West. Because the army was dominated by officers from the Western wing, which did not approve of the turn of events, the leader of the Awami League was arrested and charged with treason. The arrest led to widespread rioting and eventually the military government sent in troops. The soldiers, again drawn largely from the West, began a course of ruthless suppression, driving more than ten million refugees across the border into India.[115] As a result of the burden refugees cast upon India and the guerrilla activity from Indian territory against Pakistani troops, considerable tension developed between India and Pakistan. Difficulties continued to exist throughout the efforts to suppress the Bengali revolt. In December 1971, Pakistani aircraft bombed an airfield in North India, a location geographically removed from the scene of the revolt or border incidents. The bombing initiated direct hostilities.[116] Indian troops marched into the Eastern wing of Pakistan and, within six days, the Pakistani troops in East Bengal surrendered.

The Indian intervention has been acclaimed as the "clearest case of forceful individual humanitarian intervention in this century."[117] It also has been condemned on the basis that, whatever merit there may have been in intervening to suppress the obvious barbarity, the intervention was a violation of the United Nations norm prohibiting the use of force.[118] However, a consideration of

---

morally acceptable because of the intense revulsion against the brutal persecution of an ethnic group." *Conference Proceedings*, in HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 114 (R. Lillich ed. 1973). Similar views based on the distinction between law and morality were advanced by Falk, *supra* note 64, at 118.

[115] A. MASCARENHAS, THE RAPE OF BANGLADESH (1971).

[116] This fact makes it possible to justify the intervention as an act of self-defense as the east wing was still a part of Pakistan.

[117] Fonteyne, *supra* note 57, at 204. *See also* Fonteyne, *Forcible Self-Help by States to Protect Human Rights: Recent Views from the United Nations*, in HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 197 (R. Lillich ed. 1973).

[118] *See* Franck & Rodley, *supra* note 104.

the reasons advanced by the adherents of the second position indicates the untenability of that view.

A major argument that intervention was illegitimate is centered on the allegation that the intervention was not disinterested. This position relates to the possibility of abuse and has been advanced against the use of humanitarian intervention as a justification on other occasions.[119] The argument was formulated by Franck and Rodley in the following terms:

> Of the six principal cases of post 1945 military interventions in which humanitarian grounds, including various human rights and the right of self-determination were advanced as justification, four appear to be largely bogus—Hungary, the Dominican Republic, Vietnam and Czechoslovakia—while only two—the Congolese intervention and the Indian intervention in Bangladesh—arguably involve elements of real concern for human rights. In both the latter cases, while the motive or rescue was probably genuine, so were the self-interested political goals achieved by the intervening states.[120]

Despite Indian claims to the contrary,[121] there is little doubt that humanitarian concerns were not the primary factors behind the intervention. The situation presented India with an opportunity to weaken a traditional enemy and to attain supremacy in the region. There were other factors that precipitated intervention. The Indian Bengalis in West Bengal, which bordered East Pakistan, agitated for action by the Indian government. Refugees arrived in enormous numbers[122] and their maintenance was causing India considerable economic strain.[123] In addition, many of the refugees were Hindus and their subjection to ill-treatment on the basis of religion at the hands of Pakistani troops could have provoked religious strife within the predominantly Hindu, but secular, India. However, as stated previously, the presence of motives of self-interest should not detract from the validity of an intervention that achieves the task of protecting human rights. In an imperfect world, self-interest alone induces conduct that may be

---

[119] Consider, for example, the use of the doctrine to justify the intervention in the Congo and the Dominican crises. *See* Franck & Rodley, *supra* note 104.

[120] *Id.* at 285-86.

[121] During the U.N. Security Council debates, the Indian delegate stated that "we have on this particular occasion nothing but the purest motives: to rescue the people of Bengal from . . . suffering." 26 U.N. SCOR (1606th mtg.) 1, 18, U.N. Doc. S/P.V. 1606 (1971).

[122] Joyner, *supra* note 113; Marwah, *India's Military Intervention in East Pakistan, 1971-1972*, 13 MOD. ASIAN STUD. 549 (1979).

[123] The flood of refugees led to the charge that there was "economic agression."

regarded as morally obligatory. That is made evident by the fact that atrocities as grave as those perpetrated in Bangladesh have not attracted military interventions.[124] The simple fact that no national interest was served by interference made many crises in which there were enormous losses of lives pass without intervention. On policy grounds, the existence of self-interest should not affect the legality of humanitarian intervention. Therefore, at least on occasions where political expediency coincides with the existence of humanitarian grounds for intervention, human rights may be protected. The prescription of Franck and Rodley would mean that, in view of the inaction by the United Nations, the world and India would have stood by and watched the massacre of the Bengalis. That such a price must be paid to preserve the uniformity of a legal norm is unacceptable.

Another basis for disputing the ground of humanitarian intervention in the Bangladesh crisis is the view that, in the absence of permission from the international community, any intervention is illegal. This argument, premised upon the existence of an effective United Nations system, is stated by Franck and Rodley as follows: "What distinguishes all six post-1945 cases from the earlier instances is that each was undertaken without any prior sanction of the international community, this despite the rise of the United Nations system."[125] Unilateral intervention to uphold human rights is illegal, according to Bowett, for similar reasons. However, if this is to be an effective criticism of an intervention similar to that in the Bangladesh crisis, it must be demonstrated that the United Nations has provided effective machinery to prevent gross violations of human rights.[126] Inaction of the United Nations in the face of massive violations of human rights that have occurred since its inception[127] does not inspire confidence in the argument that the United Nations system has displaced any machinery

---

[124] Biafra provides an example. Brownlie cites massacre of Indonesian communists in 1965 and concludes that "the whole field is riven with political expediency and capriciousness." Brownlie, *supra* note 59, at 224. A cynic might reply that this criticism could be leveled at every field of international or domestic law.

[125] Franck & Rodley, *supra* note 104, at 286.

[126] Bowett, *The Interrelation of Theories of Intervention and Self Defense*, in LAW AND CIVIL WAR IN THE MODERN WORLD 39, 45 (J. Moore ed. 1974). *See also* De Schutter, *supra* note 105.

[127] Examples of violations include the Tibetan crisis, the massacre of the Indonesian communists, racial problems in southern Africa, the Biafran civil war, Bangladesh, Vietnam, and the Pol Pot regime in Cambodia.

for redress provided by the customary law.[128] It could be argued that approaches in the first instance must be made to the United Nations, before any individual action is taken. The Indian conduct prior to intervention supports this view. The Indian Prime Minister visited several European states and the United States requesting them to intercede in the crisis. Efforts were made at the United Nations to resolve the crisis. The intervention was undertaken only upon the failure of these efforts. The conduct of India may be interpreted as an awareness of an obligation to set into motion the United Nations machinery to deal with the situation and to alert the international community so that it may exert pressure to achieve a solution. Upon the failure of these alternatives, unilateral intervention may be the only remedy.

Certain commentators stress that intervention in the Congo can be distinguished from the intervention in Bangladesh. This distinction is made by Franck and Rodley,[129] who assume the legality of the Congo operation and assert that the government of Tshombe had invited the intervention, whereas the Bangladesh intervention was against the established government. Furthermore, the Congo intervention was designed to rescue a thousand hostages who were foreign nationals. The Indian intervention was intended to assist an alien people. Both principles, on the basis of which the distinctions are made, depend on customary law. Acceptance of their validity would enervate the general thesis supported by Franck and Rodley that the paramountcy to be attached to article 2(4) and to the Charter system precludes resort to any remedy outside the Charter.[130]

As to the first basis of distinction, if the invitation of the government does in fact legitimize intervention, there must be a determination of which party has control and the support of the people.[131] In the case of Tshombe, there was considerable doubt as to whether he had popular support or control. However, no doubt existed in the case of the Awami League, which had overwhelm-

---

[128] In a survey of the United Nations attitude to the crisis, Salzburg remarked on the primitive nature of the competence of the U.N. and its over-emphasis on article 2(7) and suggested reconsideration of U.N. machinery to deal with human rights situations. Salzburg, *supra* note 72.

[129] Franck & Rodley, *supra* note 104, at 287-88.

[130] It is possible to justify the position taken by Franck and Rodley that the two principles on which they base their distinction flow from the notion of state sovereignty, which underlies the U.N. system.

[131] Customary international law used the degree of control as a basis for distinguishing between insurgency and belligerency. *See* J. CRAWFORD, *supra* note 1, at 252-55.

ingly won the elections conducted under the auspices of the Pakistani army and had the constitutional right to form the government of the whole of Pakistan. The support given by the Awami League for the Indian intervention may appear more respectable than the invitation of the Tshombe government as a justification for the intervention in the Congo crisis. Where a minority has a territorial base and, after a course of persecution, seeks to assert its right to self-determination, it is artificial to argue that there is a legitimate government in that territory. To do so would be to place too great an emphasis on the notion of sovereignty and its indestructibility. It would not accord with the factual situation that the group in control of the territory should be regarded as the legitimate government.[132]

The reason for the second distinction depends on the survival under the Charter system of the customary law principle that a state may intervene to rescue its nationals exposed to danger in another country. However, the fact that those rescued in the Congo were aliens who did not have a link recognized by law with the intervening state and the argument that this distinguishes the Congo intervention from that in Bangladesh proceeds from a concept of sovereignty and ignores the ethnic and religious links that the persecuted people may have with the intervening state. Hyde emphasized these links in the following passage:

> It is conceivable that the tyrannical conduct of a state towards its own subjects might directly affect numerous classes of subjects of another state who were connected by blood with the victims of the ill-treatment. If the injury thus sustained was of periodic occurrence and felt by large numbers of the population of the outside state, the latter would doubtless assert the right to intervene. In doing so, it would find justification for its actions in grounds closely analogous to those of self-defense.[133]

Various commentators state that the precedential value of the Indian intervention is minimal as it was an effort to assert the rights of the majority against the minority. This point is not a criticism but an effort to limit the scope of the use of the Indian intervention as a precedent by pointing out that the Bengalis formed the overwhelming majority in the United Pakistan and that the party which they had supported had the constitutional right to form the government

---

[132] *Id.* at 268-69.

[133] Hyde, *Intervention in Theory and Practice*, 6 ILL. L. REV. 1, 6-7 (1911) [Illinois Law Review is now called Northwestern Law Review].

for the whole of Pakistan.[134] This argument is based on numerical factors rather than on principle.[135] The principle involved is the protection of a group from those who wield power over it. The significant element is power, not numbers.

Because the major objections to the Indian intervention in Bangladesh are lacking, one may conclude that the doctrine of humanitarian intervention justifies the Indian action. The incident provides a precedent on which rules limiting the exercise of the doctrine could be formulated. First, as in the case of the Congo crisis, there was an acceptance on the part of India that peaceful methods of solving the problem must be exhausted. The Indian diplomatic efforts prior to the intervention indicate the acceptance of the norm. Second, the intervention should be undertaken unilaterally only upon the failure of United Nations machinery to deal adequately with the situation. Third, there must exist the strong possibility of danger to the intervening country, or, in the alternative, some nexus with the repressed people. Fourth, there must be minimum interference with the internal administration of the country or with the establishment of governmental machinery in the new state, if the creation of one is necessary to protect the human rights of the minority.

The absence of condemnation of the Indian intervention by the international community amounts to a condonation of intervention in a civil war brought about by the consistent violation of a minority's right to equality and its consequent claim to self-determination. As Farer has stated, "where . . . groups are identified on the basis of hereditary or morally intolerable criteria and experience intense deprivation with respect to most societal values . . . there is a morally irresistible case for intervention."[136] The precedent provided by the Bangladesh crisis has made the law congruent with the morally favored position.

V. POST-BANGLADESH INTERVENTIONS

Since the Bangladesh crisis, there have been several military interventions. All of them, except the intervention of Tanzania in Uganda, have been justified on the basis of customary principles of international law other than humanitarian intervention. The

---

[134] Ved Nanda, *supra* note 113, at 323-24.

[135] Dinstein, *supra* note 8, at 104; K. MISRA, THE ROLE OF THE UNITED NATIONS IN THE INDO-PAKISTANI CONFLICT, 1971, at 138 (1973).

[136] Farer, *Humanitarian Intervention: The View from Charlottesville*, in HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 157 (R. Lillich ed. 1973).

French interventions in the African states of Chad and Western Sahara in 1978 were justified on the basis of invitations by the legitimate governments of these states.[137] The French intervention in May of 1978 in Zaire was justified both on the basis of an invitation and on the need to save European lives.[138] The Russian intervention in Afghanistan in December of 1979 and the Vietnamese intervention in Cambodia were also justified on the basis of invitation by the purportedly legitimate governments. In the case of the Cambodian intervention, which secured the ouster of the Pol Pot government, there was a basis for advancing humanitarian intervention as a justification in light of the fact that atrocities committed by that government were universally condemned. Yet, the fact that such justification was not advanced suggests that the international community would not accept an explanation based on humanitarian grounds when political reasons for the intervention grossly outweigh humanitarian ones. Nor would such a justification be made, when, as in the case of Vietnam, it would be futile to do so. The much feared abuse of the doctrine of humanitarian intervention has not materialized, even if account is taken of the theory that international legal norms are only ex post facto fabrications to support actions already taken in a country's national interest.[139] It is important to note that the doctrine of humanitarian intervention was not regarded as a proper justification by Vietnam for the intervention in Cambodia, although efforts have been made to so justify it.

The only intervention that went uncondemned by the international community was the intervention into Uganda by Tanzania.[140] The demise of Idi Amin, who had compiled an infamous record for violations of human rights, was greeted with applause rather than condemnation, illustrating worldwide approval of the downfall of the regime. The new government, established with the help of the Tanzanian troops, was recognized within days by many states. As Burrows argued,

> if Tanzania was courageous enough to do what several other states would have wished to do and if it was acting as the "international conscience" in replacing a regime which most governments believed to be abhorrent and whose domestic policies

---

[137] For an account of the French interventions, see Hollick, *French Intervention in Africa in 1978*, 35 WORLD TODAY 71 (1979).

[138] Le Monde, May 23, 1978, at 1, col. 1.

[139] K. HOLSTI, INTERNATIONAL POLITICS 415 (1972).

[140] Burrows, *Tanzania's Intervention in Uganda: Some Aspects*, 35 WORLD TODAY 306 (1979).

> violated all the international legal standards relating to human rights and fundamental freedoms, then its actions should be supported explicitly by that international community and by its law.[141]

Justification for the aborted American raid on Iran to secure the release of diplomats held as hostages in Teheran may be based on grounds other than protection of nationals abroad. Humanitarian reasons could be found to justify the raid, which technically amounted to an attack. Justifications for the American raid would have even greater validity than the Israeli raid on Entebbe, due to the fact that the American hostages, as diplomats, were entitled to the special protection of Iran.

In view of the many post-Charter interventions justified on the basis of humanitarian grounds, it is a bit late to argue that such interventions are illegal under the Charter. A more realistic approach is to devise objective criteria, which would control abuse and ensure the dominance of objective, rather than subjective, criteria. Objective criteria include (1) persistent violation of the human rights of a distinct group; (2) refusal to desist from such a course of conduct despite diplomatic efforts; (3) refusal to yield to pressure to desist from such conduct despite intervention by the United Nations and other nongovernmental organs; and, (4) existence of a climate of world opinion which would condone an intervention on humanitarian grounds.

VI. CONCLUSION

There is evidence of an evolution of a system of minority protection in international law through the extension of the principle of self-determination to include a right of secession in a minority possessing a definite territorial base. Such a right arises only as a sanctioning right in a situation where the right to equality of the minority group is denied consistently by the state. The right to secession is secured further by the doctrine of humanitarian intervention, which permits an outside state to intervene unilaterally in a situation where the minority's right to secession is repressed violently by the state. Secession may be resorted to only under special conditions. Certain of the requirements are (1) that prior efforts be made to solve the internal conflict peacefully;[142] (2) that

---

[141] The end of the rule of Emperor Bokassa of the Central African Republic passed without condemnation for similar reasons.

[142] This could be done by devolution of power (as in Scotland), by granting limited autonomy (Basque regions of Spain), or by creating a state within a federal system (the

where pressure cannot be brought to solve the situation internally, diplomatic and other international efforts be made; (3) that United Nations machinery be set in motion; and (4) that, failing all these measures, intervention by a concerned state is permissible. After an intervention has begun, precedents illustrate acceptance of further limitations, including: (1) that the intervention, to be justified on humanitarian grounds, be surgical, having as its primary purpose the ending of the violations of the rights of the minority; (2) that troops be withdrawn; and (3) that there be no participation in the formation of a new state created as a result of the intervention.

This scheme of minority protection to end internal colonialism has developed in modern international law. The scheme may be objected to on several grounds. An initial objection is that permitting a right to secession would dissolve the present international order based on a system of sovereign states.[143] However, it should be recognized that a consequence of the momentum achieved by the international movement for protection of human rights has been considerable erosion of the notion of state sovereignty. At any rate, the suggested system accords with the preservation of an order based on states to the extent that the possibility of the dissolution of a state can be obviated by the recognition and protection of minority rights.[144] Further arrangements such as the regional devolution of power, the creation of states with limited autonomy, and the creation of a new federal state within an existing federation are techniques that would diminish the validity

---

Nagas in India). It is accepted in the law of human rights that prior to an international forum being seized of the matter, there must be an exhaustion of local remedies. *See* Mohammed Kamal v. United Kingdom (application No. 8378/78), decided on May 19, 1980, by the European Commission of Human Rights. Also, where a declaration under article 41 of the Covenant on Civil and Political Rights is made and the optional protocol to the Covenant is signed by a state, the Human Rights Committee has the right to receive individual petitions against violations of human rights in the signatory state. However, such complaints would be entertained by the Committee only if local remedies provided by the law of the state had been exhausted. For formulation of criteria that would validate intervention on humanitarian grounds, see Lillich, *supra* note 57, at 344-51. *See also* J. MOORE, LAW AND THE INDO-CHINA WAR 185 (1972).

[143] D. LUARD, THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS 140 (1967).

[144] The option is with the state. The Indian Foreign Minister stated in the Security Council during the Bangladesh crisis that "it was not India which sought to dismember Pakistan. It was the oppressive regime of West Pakistan which had dismembered Pakistan by its actions." 9 U.N. MONTHLY CHRONICLE 34 (1972). In any event, once internal strife has become a civil war, it is futile to expect outside states not to intervene. Modelski, *The International Relations of Internal War*, in INTERNATIONAL ASPECTS OF CIVIL STRIFE 14, 20-24 (J. Rosenau ed. 1964).

of a minority's claims to self-determination. The strength of a claim would decline in direct proportion to the extent of the constitutional protection afforded the minority. The possibility of secession is not a threat to a state not bent on a policy of discrimination. On the other hand, a state that constantly subjects its minorities to abuse should not be allowed to take refuge in the inviolability of the international order of states. The dissolution of such a state would promote order by removing a problem that would otherwise remain as a constant threat to peace. By ensuring international concern only in circumstances where an absence of constitutional protection is evidenced, the system that has been outlined not only promotes the securing of rights of minorities through internal guarantees but also provides deterrence to states in the form of an accepted sanction.

A second objection is that if intervention in the circumstances described were permitted, frivolous claims would be made to justify interventions. However, frivolous claims can be discounted by analyses of accepted criteria, such as the extent of violation of human rights, the willingness of the parent state to restore values, and the viability of a new entity, if one is to be created. Secessions seldom succeed unless the international community is satisfied that some objective criteria requiring the creation of a new state exist.

The Charter system has devoted little attention to minority protection. In the absence of a Charter system that ensures the protection of minorities, a distinct scheme needs to be evolved. This article suggests that such a scheme has evolved on the basis of the principles of self-determination and humanitarian intervention. The task for the future remains the refinement of that scheme so that abuses may be prevented rather than the existence of the principles denied.