

## NOTES

### **A Method of Direct Action: The Humanitarian Justification for Regime Change in Iraq**

“... *I have been gravely disappointed with the white moderate . . . who is more devoted to ‘order’ than to justice; who prefers a negative peace which is the absence of tension to a positive peace which is the presence of justice; who constantly says: ‘I agree with you in the goal you seek, but I cannot agree with your methods of direct action;’ who paternalistically believes he can set the timetable for another man’s freedom.*”<sup>1</sup>

#### I. INTRODUCTION

Following World War II, the nations of the world determined to avoid the devastation of a total world war.<sup>2</sup> The nations, in pursuit of that end, formed the United Nations and signed a pact to renounce the use of force and solve their problems through dialogue.<sup>3</sup> The nations sought not only to facilitate world peace, but also to advance justice and protect the rights of individual human beings.<sup>4</sup> Nonetheless, since the founding of the United Nations, much of the import of international law has been directed toward the preservation of peace without regard for justice or human rights.<sup>5</sup>

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1. Martin Luther King’s Letter from Birmingham Jail (Apr. 16, 1963), available at <http://almaz.com/nobel/peace/MLK-jail.html>.

2. See U.N. CHARTER pmbl. (stating purpose of United Nations as saving succeeding generations from scourge of war); *id.* art. 1, para. 1 (asserting purpose of United Nations to maintain international peace).

3. See *id.* pmbl. (explaining nations should practice tolerance and avoid force save for common interest); *id.* art. 1, para. 2 (noting purpose of United Nations to develop friendly relations among nations).

4. See *id.* pmbl. (claiming United Nations determined to reaffirm faith in fundamental human rights); *id.* art. 1, para. 3 (discussing purpose of United Nations to achieve cooperation in solving humanitarian problems); *id.* art. 55 (providing United Nations shall promote universal respect for observance of human rights and fundamental freedoms).

5. Ruti G. Teitel, *Human Rights in Transition: Transitional Justice Genealogy*, 16 HARV. HUM. RTS. J. 69, 80 (2003) (discussing history of transnational justice since founding of United Nations). Teitel analyzes the genealogy of transitional justice, which Teitel defines as the legal responses to the concepts of justice associated with changing political periods. See *id.* at 69. Teitel divides this genealogy into three periods, the first of which stretches from the Nuremberg Trials to the decline and collapse of the Soviet empire. See *id.* at 70. Teitel concludes that during this period, the aims of transitional justice shifted from the earlier goal of establishing the rule of law to the later goal of preserving peace. See *id.* at 80.

Despite the primary focus of international law on peacekeeping, there have always been theorists interested in advancing justice through international law.<sup>6</sup> Their theories of international justice seek to advance and protect the rights of the individual, but often conflict with the goal of peace.<sup>7</sup> One such theory is the doctrine of humanitarian intervention.<sup>8</sup> This doctrine justifies military action against regimes whose treatment of their own people is so arbitrary and inhumane that it shocks the conscience of the world community.<sup>9</sup>

Saddam Hussein's regime in Iraq appeared to be the kind of regime whose removal should be justified by the doctrine of humanitarian intervention.<sup>10</sup> His tyrannical reign included arbitrary arrest, detention, torture, and execution.<sup>11</sup> The doctrine, however, is only applicable when certain criteria are met.<sup>12</sup>

The primary question this Note addresses is whether the humanitarian intervention doctrine would have justified military action to facilitate regime change in Iraq.<sup>13</sup> The analysis of this question will consider the humanitarian intervention doctrine, including its present-day validity under the rules of international law.<sup>14</sup> The analysis will also address some of the shortcomings of international law in the realm of international human rights.<sup>15</sup>

The first part of this Note will discuss Saddam Hussein's regime in Iraq and provide examples of his long list of human rights abuses.<sup>16</sup> The next part will examine the rules justifying military action under international law.<sup>17</sup> Next, this Note will analyze the humanitarian intervention doctrine and consider the rules of its application.<sup>18</sup> Finally, this Note will apply the rules of the doctrine

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6. See Jean-Pierre Fonteyne, *The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity Under the U.N. Charter*, 4 CAL. W. INT'L L.J. 203, 235 (1974) (concluding humanitarian intervention doctrine widely accepted before United Nations charter signed); T. Modibo Ocran, *The Doctrine of Humanitarian Intervention in Light of Robust Peacekeeping*, 25 B.C. INT'L & COMP. L. REV. 1, 10 (2002) (discussing debate regarding humanitarian intervention).

7. See Ocran, *supra* note 6, at 11-12 (analyzing philosophical arguments behind humanitarian intervention doctrine). Ocran discusses the views of several scholars who argue that the prohibition of violence is not an absolute virtue. *Id.* According to these scholars, the use of violence is justified when a state violates the laws of humanity. *Id.*

8. See Ocran, *supra* note 6, at 11-12 (discussing philosophical underpinnings of humanitarian intervention doctrine).

9. See Ocran, *supra* note 6, at 8 (defining humanitarian intervention doctrine).

10. See *infra* notes 139-144 and accompanying text (illustrating Iraq's human rights abuses). The assertion that Saddam Hussein's human rights abuses justified the use of force against his regime is one of the main issues discussed in this note.

11. See *infra* notes 23-37 and accompanying text (highlighting Iraqi prisoner abuse under Hussein regime).

12. See Ocran, *supra* note 6, at 42-47 (discussing criteria for legitimate intervention).

13. See *infra* Parts II-III (considering whether humanitarian intervention doctrine would have justified removal of Saddam's regime).

14. See *infra* Part II.D (analyzing humanitarian intervention doctrine).

15. See *infra* Part III (considering shortcomings of international law).

16. See *infra* Part II.A (discussing Hussein's human rights abuses).

17. See *infra* Part II.B-C (examining rules justifying military action under international law).

18. See *infra* Part II.D.1-2 (discussing humanitarian intervention doctrine and criteria for intervention).

to Saddam Hussein's former regime to answer the basic question of whether the doctrine would have justified military action for regime change in Iraq.<sup>19</sup>

## II. HISTORY: THE SITUATION IN IRAQ AND THE STATUS OF INTERNATIONAL LAW

### A. *The Price of Order: Saddam Hussein's Iraq*

Any legal justification for the exercise of force requires an analysis of the unique factual background of the situation.<sup>20</sup> The use of force in international relations is justified only when certain conditions are met.<sup>21</sup> Accordingly, an examination of the facts of the Iraqi regime is appropriate.

The list of human rights abuses under Saddam Hussein's regime is long and well-documented.<sup>22</sup> The regime was responsible for the arbitrary arrest, detention, and execution of thousands of political dissidents.<sup>23</sup> Prisoners were held without trial, and were often tortured while in custody.<sup>24</sup> According to former prisoners, torture techniques included administering electric shock to the genitals, branding, beating, removing fingernails, amputating body parts without anesthesia, dripping acid on the skin, raping, and denying food and water.<sup>25</sup>

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19. See *infra* Parts II.D.3-III (considering application of humanitarian intervention doctrine to Iraq).

20. Matthew Scott King, *The Legality of the United States War on Terror: Is Article 51 a Legitimate Vehicle for the War in Afghanistan or Just a Blanket to Cover-Up International War Crimes?*, 9 ILSA J. INT'L & COMP. L. 457, 459-60 (2003) (discussing exceptions to general rule against use of force in international relations); see Ocran, *supra* note 6, at 29 (noting reasons for humanitarian intervention must be analyzed on case-by-case basis).

21. See King, *supra* note 20, at 459-60 (discussing circumstances for legitimate use of force under United Nations Article 51).

22. See *infra* notes 23-37 and accompanying text (describing human rights abuses in Iraq). The sources cited in this note are just a small fraction of the materials available that document the litany of human rights abuses in Iraq. The purpose of this Note is not to document these abuses, however, but rather to determine whether a humanitarian intervention in Iraq based on these abuses is permissible. Accordingly, this Note cites a basic summary of these abuses along with a few specific cases to demonstrate the nature and breadth of the human rights abuses in Iraq.

23. See HUMAN RIGHTS WATCH, IRAQ: THE DEATH PENALTY, EXECUTIONS, AND "PRISON CLEANSING" (Mar. 2003), available at <http://www.hrw.org/backgrounder/mena/iraq031103.htm> (discussing arbitrary arrest and execution in Iraq); UNITED KINGDOM FOREIGN & COMMONWEALTH OFFICE, SADDAM HUSSEIN: CRIMES AND HUMAN RIGHTS ABUSES (2002), available at <http://www.fco.gov.uk/Files/kfile/hrdossier.pdf> (discussing arbitrary arrest and execution in Iraq); U.S. DEP'T OF STATE, 2002 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (Mar. 31, 2003), available at <http://www.state.gov/g/drl/rls/hrrpt/2002/18277.htm> (discussing arbitrary arrest and execution in Iraq).

24. See AMNESTY INTERNATIONAL, IRAQ: SYSTEMATIC TORTURE OF POLITICAL PRISONERS (2001), available at <http://web.amnesty.org/library/Index/ENGMDE140082001?open&of=ENG-IRQ> (citing reports of torture of political prisoners in Iraq); HUMAN RIGHTS WATCH, *supra* note 23 (highlighting Iraqi practice of detaining prisoners without trial); UNITED KINGDOM FOREIGN & COMMONWEALTH OFFICE, *supra* note 23, at 5 (discussing Iraqi torture practices); U.S. DEP'T OF STATE, *supra* note 23 (detailing human rights abuses, including arbitrary detention and torture).

25. U.S. DEP'T OF STATE, *supra* note 23 (describing Iraqi torture practices).

There were numerous reports of prison cleansing programs, during which thousands of inmates were executed to rectify prison overcrowding.<sup>26</sup> At a single prison in 1983, the Abu Ghraib, 4,000 political prisoners were executed.<sup>27</sup> In at least two facilities, prisoners were locked in coffin-sized metal boxes that were opened for only thirty minutes each day.<sup>28</sup>

The Iraqi regime used systematic violence as a tool of repression.<sup>29</sup> For example, Fedayeen Saddam soldiers beheaded a woman in public after her husband, suspected of involvement in armed Islamic activities, fled the country.<sup>30</sup> In another case, Iraqi personnel injected a child with an agent that caused severe mental retardation in retaliation for the father's suspected opposition to the regime.<sup>31</sup>

The Iraqi regime conducted a program of genocide against the Kurds, evidenced by more than 16,000 disappearance cases documented by the United Nations Special Rapporteur.<sup>32</sup> Most of these missing persons were ethnic Kurds who disappeared during the 1988 Anfal campaign against the Kurds.<sup>33</sup> Human Rights Watch estimated that the total number of Kurds missing during the campaign was between 70,000 and 150,000, and Amnesty International estimated more than 100,000 disappearances.<sup>34</sup>

After the United States-led coalition invaded Iraq, troops discovered mass graves confirming many of these human rights abuses.<sup>35</sup> Troops found a torture chamber consisting of two tires, on which an interrogator would stand, with an electric cable used to electrocute the detainee as water poured into the room.<sup>36</sup> Elsewhere, troops discovered a gruesome video tape showing the punishment of Fedayeen soldiers, that depicted chopping off fingers, cutting off tongues, throwing people off multistory buildings, and a beheading.<sup>37</sup>

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26. See HUMAN RIGHTS WATCH, *supra* note 23 (discussing use of execution as prison cleansing tool in Iraq); UNITED KINGDOM FOREIGN & COMMONWEALTH OFFICE, *supra* note 23, at 12 (examining Iraqi mass executions of prisoners); U.S. DEP'T OF STATE, *supra* note 23 (highlighting prison cleansings in Iraq).

27. See UNITED KINGDOM FOREIGN & COMMONWEALTH OFFICE, *supra* note 23, at 12 (providing statistics regarding Iraqi prison cleansing).

28. See U.S. DEP'T OF STATE, *supra* note 23 (reporting Iraqi prison conditions).

29. See UNITED KINGDOM FOREIGN & COMMONWEALTH OFFICE, *supra* note 23, at 5 (describing systematic nature of torture in Iraq).

30. AMNESTY INTERNATIONAL, *supra* note 24 (detailing case of victim of public beheading without trial).

31. See U.S. DEP'T OF STATE, *supra* note 23 (describing child injected with agent causing mental retardation).

32. See U.S. DEP'T OF STATE, *supra* note 23 (discussing Kurdish disappearances).

33. See U.S. DEP'T OF STATE, *supra* note 23 (documenting Anfal campaign).

34. U.S. DEP'T OF STATE, *supra* note 23 (citing statistics regarding Anfal campaign).

35. See HUMAN RIGHTS WATCH, *THE MASS GRAVES OF AL-MAHAWIL: THE TRUTH UNCOVERED* (May 2003), available at <http://www.hrw.org/reports/2003/iraq0503/iraq0503.pdf> (detailing evidence of mass graves); *Iraqis Uncover Thousands in Mass Graves*, CNN (May 14, 2003), at <http://www.cnn.com/2003/world/meast/05/14/sprj.irq.main/> (reporting discovery of approximately 15,000 bodies buried in mass graves).

36. See *Report: Torture Chamber Found*, CNN (Apr. 2, 2003), at <http://www.cnn.com/2003/world/meast/04/02/sprj.irq.torture/> (describing torture chamber British Royal Marines uncovered).

37. See *Gruesome Videotape Allegedly Shows Brutal Fedayeen Saddam Punishment*, CNN (Oct. 30,

These are the kinds of human rights abuses that shock the conscience, and should justify humanitarian intervention in Iraq on moral grounds.<sup>38</sup> Although such an action might be regarded as morally permissible, or even as a moral duty, such intervention is not necessarily permissible under the rules of international law.<sup>39</sup>

*B. The Absence of Tension: Legal Justifications for Military Action Under Modern International Law*

According to the United Nations Charter, nations bear the general obligation to refrain from the threat or use of force against another nation.<sup>40</sup> This general obligation reflects the first goal listed in the United Nations Charter's preamble: "to save succeeding generations from the scourge of war."<sup>41</sup> Although the preservation of peace is not the United Nations' only goal, both the United Nations and international law have focused primarily on the preservation of peace from the end of the Nuremberg Trials through the Cold War.<sup>42</sup>

While there are few exceptions to the general obligation to refrain from the threat or use of force, international law does provide several legitimate exceptions to this general obligation.<sup>43</sup> Nearly all authorities agree that one state could lawfully exercise force against another in the following two cases: a nation's actions in individual or collective self-defense, or a nation's action pursuant to an explicit United Nations Security Council resolution.<sup>44</sup>

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2003), at <http://www.cnn.com/2003/WORLD/meast/10/30/sprj.irq.torture.tape/index.html> (discussing video tape found by United States troops).

38. See Ocran, *supra* note 6, at 12 (citing philosophical justification for humanitarian intervention). Ocran distinguishes the moral question of whether a state has a right to intervene in the affairs of another state based on human rights abuses from the legal permissibility of such intervention. See *id.* at 10. He advances the proposition that when a government engages in gross atrocities against its own people, the rights of humanity as a whole are violated, and another state would be morally justified to engage in a humanitarian intervention. See *id.* at 12. He notes, however, that the moral argument for humanitarian intervention does not necessarily justify such action under international law. See *id.* at 13.

39. See Ocran, *supra* note 6, at 12-13 (highlighting difference between moral imperative and rules of international law).

40. See U.N. CHARTER art. 2, para. 4 (stating general obligation to refrain from threats or use of force). Any nation that is a member of the United Nations bears this general obligation as a signatory to the United Nations Charter. Because this principle in the United Nations Charter is a restatement of customary international law, it arguably applies to all nations, whether or not they are United Nations members. See Davis Brown, *Use of Force Against Terrorism After September 11th: State Responsibility, Self-Defense and Other Responses*, 11 CARDOZO J. INT'L & COMP. L. 1, 4 (2003) (arguing United Nations Charter Article 2, paragraph 4 applies to all nations).

41. See U.N. CHARTER pmbl. (stating purposes of United Nations); King, *supra* note 20, at 459 (observing United Nations Charter's basic premise to outlaw war).

42. Teitel, *supra* note 5, at 80 (concluding aim of transitional justice during Cold War shifted to preservation of peace).

43. See Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1515 (2003) (discussing justifications for war under international law).

44. *Id.* (noting circumstances for lawful exercise of force).

The self-defense justification derives from United Nations Charter Article 51, which provides, in part, that: “Nothing in the present Charter shall impair the inherent right of individual or collective self defense if an armed attack occurs. . . .”<sup>45</sup> This inherent right of self-defense is limited because it directly conflicts with the sovereign equality of states and the obligation to refrain from use or threats of force in international relations.<sup>46</sup> The United Nations Charter therefore includes the constraint that there must be an “armed attack,” and any action in self-defense must be “immediately” reported to the Security Council.<sup>47</sup>

The International Court of Justice (ICJ) articulated the necessity of an “armed attack” when exercising force in individual or collective self-defense in *Nicaragua v. United States*.<sup>48</sup> In *Nicaragua*, the United States argued that it acted in collective self-defense by supporting the Contras because of a Nicaraguan attack on neighboring states.<sup>49</sup> The court held that Nicaragua had not committed an armed attack against neighboring states.<sup>50</sup> The United States’ use of force was illegal under international law because there was no armed attack against it first.<sup>51</sup>

As a further limitation on the inherent right of self-defense under international law, a state may only act in preemptive self-defense under certain circumstances.<sup>52</sup> Preemptive self-defense involves the use of force to stop an attack that has not actually occurred but is imminent.<sup>53</sup> Limitations on preemptive self-defense include the following: an armed attack must be imminent, there must be no practical alternative to the use of force, and the self-defense measures must be limited to those necessary to stop or prevent the attack.<sup>54</sup> Even with these limitations, however, many scholars still question the legitimacy of preemptive self-defense.<sup>55</sup>

A humanitarian intervention into Iraq could not be justified on the grounds

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45. U.N. CHARTER art. 51, para. 1 (articulating self-defense justification).

46. *See id.* art. 2, para. 1 (articulating principle of sovereign equality of all United Nations members); *id.* art. 2, para. 4 (stating general obligation to refrain from threats or use of force). The inherent right of self-defense allows one nation to use force and to violate the territorial integrity of another in response to aggression, if the circumstances warrant. *See Brown, supra* note 40, at 30. Therefore, the right of self-defense can supercede these principles, but only if the facts of the case warrant. *See id.* (arguing circumstances warrant self-defense action against terrorists in another state where circumstances warrant).

47. U.N. CHARTER art. 51, para. 1.

48. *See Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27).

49. *See id.* at 119 (considering United States argument that right of collective self-defense justifies actions).

50. *See id.* at 120 (noting absence of armed attack).

51. *See id.* at 123 (holding right of self-defense did not justify United States’ conduct).

52. *See Brown, supra* note 40, at 38 (discussing legal theory of anticipatory self-defense).

53. *See Brown, supra* note 40, at 37 (defining anticipatory self-defense).

54. *See Brown, supra* note 40, at 38 (discussing elements of anticipatory self-defense).

55. *See Brown, supra* note 40, at 39 (noting legitimacy of anticipatory self-defense not universally embraced).

of self-defense.<sup>56</sup> Iraq has not recently conducted an armed attack against any other state.<sup>57</sup> Without an armed attack, any collective or individual self-defense justification would stand on dubious legal grounds.<sup>58</sup>

The self-defense justification could arguably apply if the Iraqi regime sponsored terrorist activities that led to the September 11th attacks.<sup>59</sup> There has been, however, no evidence of a link between the September 11th attacks and the Iraqi regime.<sup>60</sup> Therefore, self-defense would not justify the use of force against Iraq.<sup>61</sup>

There was some evidence that the Iraqi regime maintained a weapons of mass destruction program, although none of the evidence was definitive.<sup>62</sup> The threat of weapons of mass destruction did not constitute an armed attack against any nation, but rather was a broad threat to the international community.<sup>63</sup> Any nation that wishes to use force to deal with broad threats to international peace and security must seek United Nations Security Council approval.<sup>64</sup>

Applying the doctrine of preemptive self-defense to justify military action against Iraq lacks merit because most authorities have rejected the doctrine.<sup>65</sup> The United States rejected the doctrine when Israel invoked it in 1981 to justify

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56. See *infra* notes 57-68 and accompanying text (discussing rules of international law regarding self-defense and humanitarian intervention).

57. See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27) (discussing nature of armed attack).

58. See *id.* (observing right of self-defense presupposes armed attack).

59. Brown, *supra* note 40, at 28 (analyzing whether September 11th attack constitutes armed attack under United Nations Article 51). Brown examines the right of a nation to use force against another in response to terrorist actions sponsored or endorsed by those nations. *Id.* He concludes that, under the right of self-defense, a nation may use force against another when that nation has sponsored or endorsed terrorist activities. *Id.* Applying this argument, if the Iraqi regime sponsored or endorsed terrorist activities that culminated in the September 11th attack against the United States, the United States could have responded against the Iraqi regime in self-defense under Article 51 of the United Nations Charter. *Id.*

60. See Henry J. Richardson, III, *U.S. Hegemony, Race, and Oil in Deciding United Nations Security Council Resolution 1441 on Iraq*, 17 TEMP. INT'L & COMP. L.J. 27, 32 (2003) (arguing United States' right of self-defense would not extend to Iraq without link between Iraq and Al Qaeda).

61. See *id.*

62. See HANS BLIX, UNMOVIC, AN UPDATE ON INSPECTION (Jan. 27, 2003), available at <http://www.un.org/Depts/unmovic/Bx27.htm> (claiming Iraq failed to provide adequate answers to questions about arms programs); Hurst Hannum, *Iraq, U.S., and the War on Terror: Bellum Americanum* 27 FLETCHER F. WORLD AFF. 29, 34 (2003) (concluding Iraqi regime likely attempting to develop chemical and biological weapons); Press Conference, Colin Powell, Iraq Declaration (Dec. 19, 2002) (on file with author) (commenting on incomplete Iraqi report to United Nations regarding weapons of mass destruction programs); Steven R. Weisman, Powell, in *U.N. Speech, Presents Case to Show Iraq Has Not Disarmed*, N.Y. TIMES, Feb. 6, 2003, at A1 (reporting on United States' presentation of evidence to United Nations Security Council on February 6, 2003).

63. See Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law: Use of Military Force to Disarm Iraq*, 97 AM. J. INT'L. L. 419, 422 (2003) (discussing United States' use of force against Iraq).

64. See *id.* at 422 (concluding nation should seek United Nations Security Council authority to use force to deal with threats to international peace).

65. See Hannum, *supra* note 62, at 34-35 (noting everyone except State Department lawyers rejected doctrine of preemptive self-defense).

the bombing of an Iraqi nuclear reactor.<sup>66</sup> In order for a nation to invoke the doctrine of preemptive self-defense, an attack must be imminent.<sup>67</sup> There was no evidence of imminent Iraqi attack using weapons of mass destruction or even conventional weapons.<sup>68</sup>

While a regime change in Iraq would not have been justified under the rules of self-defense, it would have been justified by a United Nations Security Council resolution authorizing the use of force.<sup>69</sup> United Nations Security Council authorization is the ultimate validator of the use of force in international relations.<sup>70</sup> Article 39 of the United Nations Charter grants the Security Council the authority to determine the existence of any “threat to the peace, breach of the peace, or act of aggression” and decide on a course of action.<sup>71</sup> Article 42 authorizes the Security Council to use military force where the peaceful measures in Article 41 are inadequate to deal with the situation.<sup>72</sup> Article 25 provides that the members of the United Nations agree to carry out the decisions of the Security Council in accordance with the United Nations Charter.<sup>73</sup>

### C. *The White Moderate: The United Nations Security Council*

As demonstrated in numerous cases, United Nations Security Council authorization for humanitarian intervention is not always possible.<sup>74</sup> In some cases, authorization would take too long and would come too late to abate a human rights emergency.<sup>75</sup> In other cases, the Security Council would refuse to intervene for political or institutional reasons.<sup>76</sup>

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66. See Hannum, *supra* note 62, at 34-35 (observing United States rejected doctrine of preemptive self-defense when Israel invoked it in 1981).

67. See Brown, *supra* note 40, at 37 (defining anticipatory self-defense).

68. See Richardson, *supra* note 60, at 32 (observing Iraq presented no credible threat against United States).

69. See *infra* notes 70-73 and accompanying text (discussing legality of Security Council resolutions authorizing use of force).

70. Brown, *supra* note 40, at 18 (considering Security Council authorization as ultimate validator of use of force in international relations).

71. See U.N. CHARTER art. 39, para 1.

72. See *id.* art. 41, para 1; *id.* art. 42, para 1.

73. *Id.* art. 25, para 1.

74. See *infra* notes 90-94 and accompanying text (discussing specific instances of United Nations Security Council inaction).

75. See Jeffrey Clark, *Debacle in Somalia: Failure of the Collective Response*, in ENFORCING RESTRAINT: COLLECTIVE INTERVENTION IN INTERNAL CONFLICTS 205, 206 (Lori Fisler Damrosch ed. 1993) (describing half-hearted United Nations and United States responses to Somalia tragedy); Jane E. Stromseth, *Iraq's Repression of Its Civilian Population: Collective Responses and Continuing Challenges*, in ENFORCING RESTRAINT, *supra*, at 77, 78-79 (characterizing initial response to plight of Iraqi Kurds and Shi'ites as internal affair for Iraq); see also Ocran, *supra* note 6, at 41-42 (arguing swift action without Security Council authorization proper in certain circumstances).

76. See Ocran, *supra* note 6, at 49 (calling for explanation as to why Security Council intervenes in certain areas but not others); Lee F. Berger, Note, *State Practice Evidence of the Humanitarian Intervention Doctrine: The ECOWAS Intervention in Sierra Leone* 11 IND. INT'L. & COMP. L. REV. 605, 605 (2001)

The United States and Great Britain argued that United Nations Security Council resolutions authorized military action to facilitate regime change in Iraq in 2003.<sup>77</sup> The countries reasoned that Security Council Resolution 687 imposed a series of obligations on Iraq, including disarmament obligations, and revived the authority to use force under Resolution 678.<sup>78</sup> The argument further contended that the Iraqi regime had not complied with Resolution 1441, which declared Iraq to be in material breach of its obligations under Resolution 687 and offered the Iraqi regime a final opportunity to comply with those obligations.<sup>79</sup> The argument claimed that, because the Iraqi regime did not avail itself of this final opportunity, Iraq had violated the obligations imposed by Resolution 687, and the use of force under Resolution 678 could be revived.<sup>80</sup>

Disagreeing with the argument by the United States and Great Britain, some Security Council members denied that international legal authority existed.<sup>81</sup> The Russian representative to the United Nations argued that no resolution expressly authorized the use of force in Iraq, and therefore no use of force was sanctioned by the Security Council.<sup>82</sup> Neither the Vietnamese nor the Brazilian representatives considered the use of force in Iraq to be authorized by the Security Council.<sup>83</sup>

Professor Harold Hongju Koh found the United States' argument unpersuasive, claiming that it would be unlikely that the Security Council

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(claiming Security Council often unwilling or unable to act in humanitarian intervention); *see also* Berger, *supra*, at 605 n.3 (noting when Security Council does act, it often does so reluctantly).

77. *See* U.N. S.C. Res. 678, U.N. Doc. S/RES/678 (1990) (authorizing action against Iraq if it did not comply with resolution 660); U.N. S.C. Res. 687, U.N. Doc. S/RES/687 (1991) (imposing obligations on Iraq including disarmament, restoration of international peace and security in area); Letter from the Permanent Representative of the United States, to the United Nations, Addressed to the President of the United Nations Security Council (Mar. 21, 2003), U.N. Doc. S/2003/351, *available at* [http://www.un.int/usa/s2003\\_351.pdf](http://www.un.int/usa/s2003_351.pdf) (citing Security Council resolutions authorizing United States action in Iraq); Lord Goldsmith, *Lord Goldsmith's Statement*, *TIMES* (London), Mar. 18, 2003, at A2 (presenting British Attorney General's official statement justifying war in Iraq).

78. *See* Letter from the Permanent Representative of the United States to the United Nations, *supra* note 77 (explaining United States' view of Resolutions 687 and 678); Goldsmith, *supra* note 77, at A2 (explaining British view of Resolutions 687 and 678).

79. *See* U.N. S.C. Res. 1441, U.N. Doc. S/RES/1441 (2002); Letter from the Permanent Representative of the United States to the United Nations, *supra* note 77 (discussing implications of Resolution 1441); Goldsmith, *supra* note 77, at A2 (presenting British interpretation of Resolution 1441).

80. *See* Letter from the Permanent Representative of the United States to the United Nations, *supra* note 77 (concluding Iraq's failure to comply with resolution 1441 authorized the use of force); Goldsmith, *supra* note 77, at A2 (stating British view that Iraq did not comply with Resolution 1441).

81. *See infra* notes 82-83 and accompanying text (citing opinions of members of international community).

82. *See* U.N. SCOR, 4721st mtg. at 8, U.N. Doc. S/PV.4721 (2003) (relaying Russian representative's view that no resolution authorized use of force in Iraq).

83. *See* U.N. SCOR, 4726th mtg. at 32, U.N. Doc. S/PV.4726 (2003) (recording Vietnamese representative's condemnation of unilateral action in Iraq); *id.* at 28 (recording Brazilian representative's concern regarding implication of military action without express Security Council authorization).

members who voted unanimously for Resolution 1441 intended to authorize a future use of force without explicit Security Council sanction.<sup>84</sup> Koh's conclusions gain greater credibility if one considers that, just before the invasion, the United States, Great Britain, and Spain circulated a draft resolution explicitly authorizing the use of force.<sup>85</sup> The three nations withdrew the resolution when it became clear that they could not secure the necessary votes on the Security Council.<sup>86</sup>

The intransigence of the Security Council in authorizing the use of force in Iraq demonstrated that the United States and Great Britain shared a tenuous interpretation of Security Council resolutions.<sup>87</sup> Security Council intransigence in this case also suggests that acquiring United Nations Security Council authorization is not always feasible when there is a need for humanitarian intervention.<sup>88</sup>

The Security Council has a long history of inaction with regard to humanitarian interventions.<sup>89</sup> The Security Council failed to intervene in Pakistan in 1971,<sup>90</sup> Liberia in 1982,<sup>91</sup> Rwanda in 1994,<sup>92</sup> Sierra Leone in

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84. See Koh, *supra* note 43, at 1523-24 (analyzing United States and British argument regarding Security Council resolutions).

85. Koh, *supra* note 43, at 1518 (analyzing events surrounding second resolution); see Murphy, *supra* note 63, at 424 (discussing circulation of draft resolution).

86. See Koh, *supra* note 43, at 1518 (explaining reasons for withdrawal of second resolution); Murphy, *supra* note 63, at 424 (noting withdrawal of draft resolution).

87. Koh, *supra* note 43, at 1523 (concluding United States and British argument unpersuasive). Professor Koh makes the point that the "revived force" argument relied on twelve-year-old resolutions passed by earlier Security Councils. *Id.* Furthermore, the United States and Great Britain could not muster nine Security Council votes in favor of war in Iraq from the same Security Council that passed Resolution 1441. *Id.* at 1518.

88. See Ocran, *supra* note 6, at 48-50 (discussing concerns with United Nations Security Council and humanitarian intervention). The author acknowledges that the primary argument that the United States and Great Britain presented for regime change in Iraq relied on the problem presented by the Iraqi weapons of mass destruction program, and that Iraq could have complied with Resolution 1441 by presenting a full and complete report of its weapons of mass destruction program and allowing weapons inspections. See U.N. S.C. Res. 1441, U.N. Doc. S/RES/1441 (2002). Resolution 1441, however, makes explicit reference to Iraq's failure "to end repression of its civilian population . . ." See *id.* This reference demonstrates that all Security Council members recognized the human rights violations in Iraq. See *id.* The Security Council's failure even to propose a humanitarian justification for regime change in Iraq demonstrated that, even though the Security Council knew about the human rights violations in Iraq, it would not authorize the use of force to stop them.

89. See *infra* notes 90-94 and accompanying text (discussing specific instances of United Nations Security Council inaction). The cases cited in this Note are not meant to be exhaustive, but to show that on a number of occasions, the Security Council declined to use force to end humanitarian crises.

90. Samuel R. Maizel, *Intervention in Grenada*, 35 NAVAL L. REV. 47, 67 (1986) (detailing events of Pakistani civil war). In March 1971, a civil war between East Pakistan and West Pakistan resulted in an orgy of killing, terror and destruction in East Pakistan. *Id.* A Security Council veto blocked United Nations action. *Id.* The conflict escalated until Pakistan attacked neighboring India, who forced Pakistan to surrender after twelve days of fighting. *Id.* Both sides committed atrocities. *Id.*

91. See Ocran, *supra* note 6, at 38-39 (detailing events surrounding Liberian humanitarian intervention). In December of 1982, Charles Taylor, leader of the National Patriotic Front of Liberia, instigated a civil war in Liberia which led to a breakdown of all civil authority in the country. *Id.* The carnage of the war shocked neighboring states. *Id.* at 40. The Security Council, however, declined to intervene, and members of the Economic Community of West African States intervened unilaterally. *Id.* at 39.

1998,<sup>93</sup> and Kosovo in 1999.<sup>94</sup> In each of these cases, there was genuine need for humanitarian intervention, but the Security Council did not act.<sup>95</sup>

When the Security Council fails to act to avert a humanitarian crisis, international law provides no universally recognized justification for the use of military force.<sup>96</sup> Several scholars have suggested, however, that when the Security Council fails to act, the doctrine of humanitarian intervention provides justification for individual nations to use force.<sup>97</sup>

*D. The Presence of Justice: Humanitarian Rights Justification for Military Action*

*1. Basis for the Doctrine*

The humanitarian intervention doctrine authorizes “the justifiable use of force for the purpose of protecting the inhabitants of another state from treatment so arbitrary and persistently abusive as to exceed the limits within which the sovereign is presumed to act with reason and justice.”<sup>98</sup> The doctrine

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92. See generally Victor Peskin, *Rwandan Ghosts*, LEGAL AFFAIRS, Sept./Oct. 2002, available at [http://www.legalaffairs.org/issues/September-October-2002/feature\\_peskin\\_sepoct2002.html](http://www.legalaffairs.org/issues/September-October-2002/feature_peskin_sepoct2002.html) (detailing events of Rwanda genocide). In April of 1994, Hutu extremists began slaughtering Tutsis and moderate Hutus. *Id.* at \*3. The extremists massacred between 500,000 and 800,000 people, including 10 United Nations peacekeepers, in 100 days of genocide. *Id.* The Security Council removed most of its forces stationed in Rwanda. *Id.* The genocide continued until the Tutsi-led Rwandese Patriotic Front took control of the area. *Id.*

93. Berger, *supra* note 76, at 616-19. A group of military officers overthrew the democratically elected government of Sierra Leone in May of 1997. *Id.* at 616. These officers formed the Armed Forces Revolutionary Council, which completely disregarded the rule of law. *Id.* at 617. AFRC soldiers engaged in arbitrary imprisonment, execution, rape, and torture of innocent civilians. *Id.* at 618. The United Nations Security Council condemned the AFRC coup d’etat, but failed to take immediate action. *Id.* at 617. In February of 1998, the Economic Community of West African States invaded Sierra Leone and brought an end to the humanitarian crisis. *Id.* at 622.

94. David Marshall & Shelley Inglis, *Human Rights In Transition: The Disempowerment of Human Rights-Based Justice in the United Nations Mission in Kosovo*, 16 HARV. HUM. RTS. J. 95, 98-99 (2003) (explaining history of Kosovo crisis). In 1998, fighting between the Kosovo Liberation Army and the Serbian regime reached a level that attracted international attention. *Id.* at 98. The Serbian regime orchestrated a campaign of genocide against Albanians in Kosovo that resulted in thousands of civilian deaths, significant numbers of rapes, burning and pillaging of communities, and the displacement of about 800,000 people from their homes. *Id.* at 99. The North American Treaty Organization, without explicit mandate from the United Nations, began an air campaign to halt the genocide in March, 1999. *Id.*

95. See *supra* notes 90-94 and accompanying text (citing specific examples of inaction by Security Council).

96. See Maizel, *supra* note 90, at 67 (considering whether right of unilateral intervention supplanted by humanitarian intervention under United Nations); Ocran, *supra* note 6, at 2-3 (noting debate over humanitarian intervention doctrine); Berger, *supra* note 76, at 607 (observing majority of jurists unconvinced of existence of humanitarian intervention doctrine).

97. See Maizel, *supra* note 90, at 64-65 (discussing humanitarian intervention as exception to general obligation to refrain from use of force); Ocran, *supra* note 6, at 20 (advocating unilateral action when United Nations fails to act to abate gross human rights violations); Berger, *supra* note 76, at 612 (concluding humanitarian intervention consistent with principles of United Nations Charter).

98. Fonteyne, *supra* note 6, at 204 (defining humanitarian intervention doctrine).

encompasses armed responses to acts which “shock the moral conscience of mankind.”<sup>99</sup> Many nations recognized humanitarian intervention as a principle of customary international law prior to the enactment of the United Nations Charter.<sup>100</sup> A question remains as to whether this principle has survived the enactment of the United Nations Charter, as it conflicts with Article 2 of the Charter, the general obligation to refrain from the threat or use of force in international relations.<sup>101</sup>

## 2. *Implications of the United Nations Charter*

The question of whether the humanitarian intervention doctrine survived the enactment of the United Nations Charter highlights a basic tension in the charter between the principle of state sovereignty and human rights principles.<sup>102</sup> The United Nations Charter affirms the notion of the sovereignty of all its member states.<sup>103</sup> United Nations Charter Article 2, paragraph 4, the general obligation to refrain from the threat or use of force in international relations, is based on this notion of sovereignty.<sup>104</sup> The United Nations

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99. Ocran, *supra* note 6, at 8 (discussing armed response under humanitarian intervention doctrine); *see also* Maizel, *supra* note 90, at 68 (citing criteria for humanitarian intervention including “shock the conscience of mankind” language); Berger, *supra* note 76, at 613 (stating legitimate intervention requires large-scale atrocity).

100. *See* Fonteyne, *supra* note 6, at 205 (explaining customary principle of humanitarian intervention); Ocran, *supra* note 6, at 13 (noting majority of legal scholars who wrote on subject accepted legality of humanitarian intervention).

101. *See* Koh, *supra* note 43, at 1515-16 (observing question remains as to when force may be used in defense of human rights); Maizel, *supra* note 90, at 64 (stating question remains as to whether humanitarian intervention doctrine survived enactment of United Nations Charter); Ocran, *supra* note 6, at 13 (noting doubts expressed by some scholars as to legal status of humanitarian intervention doctrine); Berger, *supra* note 76, at 611-12 (discussing whether humanitarian intervention prohibited by United Nations charter).

102. *See* Maizel, *supra* note 90, at 64-66 (discussing viewpoints on inherent tension within Charter); Ocran, *supra* note 6, at 20 (analyzing conflict between obligation to refrain from threat or use of force and human rights goals in Charter); Berger, *supra* note 76, at 611-12 (explaining conflict between human rights principles and prohibition of unilateral use of force in United Nations Charter). These authors highlight the human rights goals of the United Nations Charter, which calls for the promotion of “universal respect for, and observance of, human rights and fundamental freedoms for all. . . .” U.N. CHARTER art. 55, para. 1. The authors note that the human rights goal conflicts with the general obligation to refrain from the threat or use of force expressed in United Nations Charter Article 2, paragraph 4. *Id.* This general obligation flows from the principle of the sovereign equality of all United Nations member states. *See* Brown, *supra* note 40, at 4-5 (considering nature of, and obligations imposed by, sovereignty). The conflict discussed by Ocran, Maizel, and Berger stems from a conflict between two basic premises of the United Nations Charter: the lofty goals it proposes, such as human rights and fundamental freedoms, and notions of state sovereignty. *See* Gregory H. Fox, *The Right to Political Participation in International Law*, 17 YALE J. INT’L L. 539, 544 (1992) (stating all human rights law presents challenges to notions of state sovereignty).

103. *See* U.N. CHARTER art. 2, para. 1 (stating United Nations is based on principle of sovereign equality of all members); *id.* art. 2, para. 7 (providing United Nations not authorized to interfere in matters within domestic jurisdiction of any state).

104. *See id.* art. 2, para. 4 (providing general obligation to refrain from threats or use of force); *id.* art. 2, para. 1 (articulating principle of sovereign equality of all United Nations members); Brown, *supra* note 40, at 4 (discussing basis of general obligation to refrain from threats or use of force). Under international law, and as reflected in the United Nations charter, all states have equal rights to sovereignty and security. Brown, *supra*

Charter, however, also incorporates the goal of promoting human rights and fundamental freedoms for all persons.<sup>105</sup>

While the United Nations Charter affirms the principle of national sovereignty for all members, it does not define the nature of sovereignty.<sup>106</sup> Membership in the United Nations is “open to all other peace-loving states” that accept and are willing to carry out the obligations in the Charter.<sup>107</sup> As a practical matter, though, admission to the United Nations is a matter of mere political expediency, because all that is required for membership is Security Council recommendation and General Assembly approval.<sup>108</sup>

As international human rights law has developed, the notion of sovereignty has become connected with notions of legitimacy.<sup>109</sup> The United Nations codified a basic list of human rights in the Universal Declaration of Human Rights, in which the United Nations espoused the doctrine of popular sovereignty.<sup>110</sup> Later, nations ratified various international agreements recognizing human rights ideals and notions of popular sovereignty.<sup>111</sup> The

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note 40, at 4. These rights give rise to a duty imposed upon all states to avoid violating the rights of other states. *See id.* at 4-5. This duty is reflected in the United Nations Charter as the general obligation to refrain from the threat or use of force in international relations. *See* U.N. CHARTER art. 2, para. 4.

105. *See* U.N. CHARTER pmb. (reaffirming faith in fundamental human rights and in the dignity and worth of the human person); *id.* art. 1, para. 3 (encouraging respect for human rights and fundamental freedoms); *id.* art. 55, para. 1 (advocating promotion of respect for and observance of human rights and fundamental freedoms); *id.* art. 56, para. 1 (requiring all members to cooperate in achieving purposes in Article 55).

106. *See id.* art. 1-2 (providing principles and purposes of United Nations and membership criteria).

107. *Id.* art. 4, para. 1 (setting forth criteria for United Nations membership).

108. *See id.* art. 4, para. 2 (providing process for admission of new members to United Nations); *see also* Fox, *supra* note 102, at 547 (asserting international law of recognition paid little attention to manner in which regimes chosen). Fox studied the nature of sovereignty as it related to the legitimacy of governments. *See generally* Fox, *supra*, note 102. Fox presumes that governments which obtain power in violation of participatory rights do so illegally, and therefore should be considered illegal. *Id.* at 546-47. He notes, however, that the international law of recognition “has paid little or no attention to the manner in which regimes are chosen.” *Id.* Instead, recognition has been considered a matter of political expediency. *Id.* This aspect of recognition law appears to have been adopted by the United Nations Charter, which requires no formalities for membership aside from United Nations Security Council recommendation and General Assembly approval. *See* U.N. CHARTER art. 4, para. 2.

109. *See* Fox, *supra* note 102, at 551 (recognizing growing concern for domestic legitimacy on international plane); Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT’L L. 46, 46 (1992) (claiming governments increasingly seek legitimacy in their empowerment from international law).

110. *Universal Declaration of Human Rights*, G.A. Res. 217 (III) A, art. 21, U.N. Doc. A810 (1948); *see also* Fox, *supra* note 102, at 551 (citing popular sovereignty notions in Universal Declaration of Human Rights). The Universal Declaration of Human Rights provides that “[t]he will of the people shall be the basis of the authority of government. . . .” *Universal Declaration of Human Rights, supra*, art. 21, para 3.

111. *See* African Charter on Human and Peoples’ Rights, June 26, 1981, art. 13(1), O.A.U. Doc. CAB/LEG/67/3/Rev. 5, 9 I.L.M. 58, 61 (1981) (stating every citizen has right to participate freely in government); American Convention on Human Rights, opened for signature Nov. 22, 1969, art. 23(1)(b), 36 OAS T.S. 1, OAE/Ser. L/V/II.23, doc 21, rev 6, 9 I.L.M. 673, 682 (1970) (guaranteeing every citizen right to vote and right to run for office); Protocol (No. 1) to the Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature Mar. 20, 1952, Europ.T.S. No. 9, 213 U.N.T.S. 262, art 3 (stating obligation to hold free elections); *International Covenant on Civil and Political Rights*, G.A. Res. 2200 (XXI), U.N. GAOR, 24th Sess., Supp. No. 16, at 55, U.N. Doc. A/6316, art. 1 (1966) (providing principle of self-

result has been an increasing recognition that governments that exercise power illegitimately lack the right to state sovereignty.<sup>112</sup>

If a government that exercises power illegitimately lacks the right to state sovereignty, the doctrine of humanitarian intervention should not be considered illegal.<sup>113</sup> The doctrine creates the means for removal of an oppressor who has no right to the protection of the international community.<sup>114</sup> A close reading of the language of United Nations Charter Article 2, paragraph 4 supports this conclusion.<sup>115</sup> Article 2, paragraph 4 does not prohibit the use of force in all cases—it prohibits the use of force when “inconsistent with the Purposes of the United Nations.”<sup>116</sup> One of the purposes of the United Nations, set forth in Article 1, is “promoting and encouraging respect for human rights and for fundamental freedoms. . . .”<sup>117</sup> Because the purpose of the humanitarian intervention doctrine is the curtailment of a humanitarian tragedy, it is not inconsistent with the purposes of the United Nations.<sup>118</sup> Article 2, paragraph 4, therefore, does not prohibit it.<sup>119</sup>

### 3. *Legal Status of the Doctrine*

The international community has never fully embraced the doctrine of humanitarian intervention.<sup>120</sup> Opponents of the humanitarian intervention doctrine claim that rigid sovereignty prevails in relations between states.<sup>121</sup>

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determination); *see also* Fox, *supra* note 102, at 552-70 (discussing numerous treaties relating to participatory rights); Franck, *supra* note 109, at 79 (citing litany of international agreements recognizing rights of individuals).

112. *See* Fox, *supra* note 102, at 551 (examining growing concern among international community regarding domestic legitimacy); Maizel, *supra* note 90, at 65 (arguing right of self determination as giving rise to third-party assistance); Ocran, *supra* note 6, at 12 (arguing law of humanity outweighs sovereignty when government violates human rights).

113. *See* Maizel, *supra* note 90, at 65 (analyzing right of self-determination and third-party assistance); Ocran, *supra* note 6, at 12 (discussing justification for military action when government violates laws of humanity).

114. *See* Fernando R. Teson, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY 82-83 (1987) (considering government violating certain ethical constraints not entitled to protection afforded by state sovereignty); Fox, *supra* note 102, at 551 (observing notion of popular sovereignty encourages denial of recognition to illegitimate regimes).

115. *See* Michael Reisman, *Humanitarian Intervention to Protect the Ibos*, in HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 167, 177 (Richard B. Lillich ed., 1973) (analyzing United Nations Charter Article 2, paragraph 4 and its application to doctrine of humanitarian intervention).

116. U.N. CHARTER art. 2, para. 4 (stating general obligation to refrain from threats or use of force in international relations).

117. *Id.* art. 1, para. 3 (declaring promotion of human rights as one purpose of United Nations).

118. *See* Reisman, *supra* note 115, at 177 (noting no inconsistency between humanitarian intervention doctrine and purposes of United Nations).

119. *See* Reisman, *supra* note 115, at 177 (concluding United Nations Charter Article 2, paragraph 4 not applicable to doctrine of humanitarian intervention).

120. *See* Maizel, *supra* note 90, at 65 (discussing critics of doctrine); Ocran, *supra* note 6, at 13 (noting doubts expressed by scholars as to legal doctrine's status); Berger, *supra* note 76, at 611-12 (citing scholars who question status of doctrine).

121. *See* Ocran, *supra* note 6, at 16 (considering sovereignty argument of opponents of humanitarian

These opponents espouse a highly restrictive interpretation of United Nations Charter Article 2, paragraph 4 that excludes the doctrine.<sup>122</sup>

Proponents of the doctrine focus on the human rights aspects of the Charter.<sup>123</sup> They argue that the doctrine justifies the encroachment of a state's sovereignty when that state engages in human rights abuses that "shock the conscience of mankind."<sup>124</sup> While many proponents acknowledge the doctrine's lack of universal acceptance, they argue that the doctrine carries sufficient weight to be accepted as a customary principle of international law.<sup>125</sup> As more governments undertake humanitarian interventions, and more scholars write about them, the evidence to support the doctrine will become even more persuasive.<sup>126</sup>

#### 4. Criteria for Legitimate Intervention

Proponents of the doctrine limit its application to situations that meet certain

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intervention doctrine); Henry J. Richardson, III, "Failed States," *Self-Determination, and Preventive Diplomacy: Colonialist Nostalgia and Democratic Expectations*, 10 TEMP. INT'L & COMP. L.J. 1, 4-5 (1996) (observing doctrine of sovereignty protects weak states against wrongful outside pressure). The failed states doctrine would allow the international community to declare that a state is a "failed state" for reasons of human rights, economic loss, or political instability. Richardson, *supra*, at 4-5. The doctrine would call for members of the international community to intervene to remake the state and fix these problems. *Id.* In his denunciation of the "failed states" doctrine, Richardson argues that the notion of sovereignty protects smaller, weaker nations from wrongful domination by more powerful states. *Id.* at 36-37. Richardson criticizes the doctrine as "reminiscent of the worst excesses of the Cold War" where the major powers sought to topple governments thought to be too supportive of a particular ideology. *Id.* at 37-38. Richardson's arguments echo those of Latin American scholars, who believe that crimes within the limits of one territory do not infringe on anyone else's rights and therefore, do not give rise to a justification for intervention. See Ocran, *supra* note 6, at 11.

122. See Maizel, *supra* note 90, at 64-65 (noting critical views of flexible interpretation of United Nations Charter Article 2, section 4); Ocran, *supra* note 6, at 17 (discussing restrictive interpretation of United Nations Charter Article 2, section 4); Berger, *supra* note 76, at 612 (examining restrictive interpretation of Article 2, section 4).

123. See Maizel, *supra* note 90, at 65 (arguing humanitarian intervention doctrine promotes basic principles of United Nations); Ocran, *supra* note 6, at 20-21 (summarizing viewpoints of humanitarian intervention doctrine proponents); Berger, *supra* note 76, at 612 (noting lawful humanitarian intervention supports human rights principals extolled in United Nations Charter).

124. Fonteyne, *supra* note 6, at 243-44 (favoring flexible United Nations Charter interpretation including preexisting norms of customary international law); Ocran, *supra* note 6, at 25-26 (concluding humanitarian intervention not prohibited by United Nations Charter under certain circumstances); see also Maizel, *supra* note 90, at 64-65 (claiming United Nations Charter language flexible enough to support humanitarian intervention); Berger, *supra* note 76, at 612 (arguing lawful humanitarian intervention does not violate United Nations Charter Article 2, paragraph 4).

125. See Reisman, *supra* note 115, at 178 (claiming humanitarian intervention permitted under certain circumstances); Teson, *supra* note 114, at 245 (concluding right of humanitarian intervention consistent with United Nations Charter and supported by practice); Fonteyne, *supra* note 6, at 235 (arguing in favor of validity of doctrine); Maizel, *supra* note 90, at 64-66 (discussing views of opponents and proponents of doctrine); Ocran, *supra* note 6, at 18-19 (summarizing arguments of anti-interventionists and citing scholars who favor doctrine); Berger, *supra* note 76, at 607 (acknowledging scholarly support of doctrine but noting failure to accumulate enough supporting evidence).

126. See Berger, *supra* note 76, at 607 (discussing mounting evidence in favor of acceptance of doctrine).

criteria.<sup>127</sup> First, the offending nation must perpetrate a large-scale violation of human rights.<sup>128</sup> The nation or nations undertaking the intervention must possess a true humanitarian motive that amounts to more than a pretext for war.<sup>129</sup> Most proponents express a preference for joint action, although a single nation would be justified in intervening when it is apparent that no group would take any effective action.<sup>130</sup> All other remedies, including the possibility of United Nations Security Council action, must be exhausted prior to the intervention.<sup>131</sup> Once the intervention begins, it must be limited to the means necessary to halt the atrocity.<sup>132</sup>

The timing of the human rights violation is an important issue.<sup>133</sup> Most proponents agree that an imminent human rights violation would justify intervention if the intervening party reasonably believes that a humanitarian violation is about to occur.<sup>134</sup> The literature is silent, however, regarding application of the doctrine to a regime that perpetrated a large scale violation of human rights in the past, but remains in power.<sup>135</sup> At first blush, such an application of the doctrine seems to fall outside of its definition, as the purpose of the doctrine is to stop imminent or ongoing human rights violations.<sup>136</sup> It appears unethical, however, to allow an individual dictator who perpetrated a large-scale human rights violation to escape reprisal, especially if that dictator

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127. See Fonteyne, *supra* note 6, at 258-60 (discussing criteria for legitimate humanitarian intervention); Maizel, *supra* note 90, at 68 (describing requirements for humanitarian intervention); Ocran, *supra* note 6, at 42-47 (providing criteria for legitimate humanitarian intervention); Berger, *supra* note 76, at 613-15 (citing criteria for legitimate humanitarian intervention).

128. See Fonteyne, *supra* note 6, at 258-60 (explaining criteria for intervention); Maizel, *supra* note 90, at 68 (describing first criteria for humanitarian intervention); Ocran, *supra* note 6, at 44 (discussing first criteria for humanitarian intervention); Berger, *supra* note 76, at 613 (considering criteria regarding imminent or actual large scale atrocity).

129. See Ocran, *supra* note 6, at 44 (considering relative disinterestedness of interveners); Berger, *supra* note 76, at 613-14 (discussing need for overriding humanitarian motive).

130. See Ocran, *supra* note 6, at 46 (expressing preference for joint action); Berger, *supra* note 76, at 614 (considering preference for joint action).

131. See Maizel, *supra* note 90, at 68 (requiring no other peaceful means available and international community had opportunity to act); Ocran, *supra* note 6, at 45-46 (considering limits on use of force and preference for joint action); Berger, *supra* note 76, at 614-15 (stating preference for joint action and peaceful remedies).

132. See Ocran, *supra* note 6, at 44 (stating intervention should be as unobtrusive as possible); Berger, *supra* note 76, at 15 (providing intervention should be limited to that necessary to cease atrocities).

133. Fonteyne, *supra* note 6, at 260 (discussing application of doctrine when danger of atrocity imminent); Ocran, *supra* note 6, at 45 (noting imminent violation creates greater urgency for action).

134. See Fonteyne, *supra* note 6, at 260 (analyzing immediacy criteria for humanitarian intervention); Ocran, *supra* note 6, at 44 (stating imminent violation provides greater urgency for action); Berger, *supra* note 76, at 613 (considering imminent atrocity would warrant humanitarian intervention).

135. See Fonteyne, *supra* note 6, at 258-60 (discussing criteria for legitimate humanitarian intervention); Maizel, *supra* note 90, at 68 (describing requirements for humanitarian intervention); Ocran, *supra* note 6, at 42-47 (providing criteria for legitimate humanitarian intervention); Berger, *supra* note 76, at 613-15 (citing criteria for legitimate humanitarian intervention).

136. See Fonteyne, *supra* note 6, at 204 (defining humanitarian intervention doctrine).

has done nothing to ameliorate or provide reparations for the past abuse.<sup>137</sup> The world community, therefore, should regard humanitarian intervention as legitimate when the violation occurred in the past if the person or persons in the regime that perpetrated that violation are still in power and have made no attempt to ameliorate the abuse.<sup>138</sup>

### III. APPLICATION: THE HUMANITARIAN JUSTIFICATION FOR DIRECT ACTION

Saddam Hussein's regime in Iraq perpetrated many large-scale human rights abuses.<sup>139</sup> The most notable violation occurred during the Anfal campaign, when Hussein's regime perpetrated an ethnic cleansing program that slaughtered an estimated 70,000 Kurds in 1988.<sup>140</sup> Violations also include the regime's torture of prisoners, including political dissidents, and the prison cleansing programs.<sup>141</sup> While the Anfal campaign and the prison cleansing programs occurred over a decade ago in Iraq, human rights abuses on a smaller scale continued unabated until a United States-led coalition ousted the regime in 2003.<sup>142</sup> These human rights abuses violated the *International Covenant on Civil and Political Rights*, signed by Iraq, and the *Universal Declaration of Human Rights*, passed by the United Nations general assembly.<sup>143</sup> Hussein's regime met the first criterion for the humanitarian intervention doctrine, the perpetration of large-scale human rights abuses.<sup>144</sup>

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137. See Ocran, *supra* note 6, at 11-12 (discussing philosophical arguments surrounding humanitarian intervention doctrine). Ocran cites philosophers who argue that when a sovereign violates the rights of humanity, there exists a legitimate right of intervention. *Id.* at 12. These philosophers speak in terms of justice, not merely the pragmatic goal of halting or preventing oppression. *Id.* at 11-12.

138. See Ocran, *supra* note 6, at 11-12 (citing philosophical and moral arguments in favor of humanitarian intervention). Ocran points out that the laws of humanity must not be violated, and the laws of humanity are more worthy of respect than the rights of sovereignty. *Id.* at 12. If a sovereign, by an act which shocks the conscience of mankind, violates the laws of humanity, that sovereign should not be allowed to escape unpunished simply because the world community decided not to act in a timely fashion. *Id.* There should be no statute of limitations on crimes which shock the conscience of mankind. *Id.*

139. See *supra* notes 23-37 and accompanying text (considering human rights abuses by Saddam Hussein's regime in Iraq).

140. See *supra* notes 32-34 and accompanying text (examining data relating to Anfal campaign).

141. See *supra* notes 23-28 and accompanying text (discussing Iraqi regime's treatment of prisoners).

142. See *supra* notes 35-37 and accompanying text (discussing evidence of human rights abuses discovered by United States-led coalition).

143. See *International Covenant on Civil and Political Rights*, G.A. Res. 2200 (XXI), U.N. GAOR, 24th Sess., Supp. No. 16, at 55, U.N. Doc. A/6316, arts. 6-27 (1966) (specifying numerous human rights that Iraqi regime violated); *Universal Declaration of Human Rights*, G.A. Res. 217 (III) A, U.N. Doc. A810, art. 21 (1948) (declaring certain human rights to which all human beings entitled). Saddam's regime violated so many provisions of these treaties that an exhaustive listing would require citing nearly every article of each treaty. A few examples, however, are illustrative. Hussein's torture and arbitrary execution of prisoners violated Articles 6, 7, and 9 of the *International Covenant on Civil and Political Rights*. See *Universal Declaration of Human Rights*, *supra*, arts. 6, 7, 9 (recognizing rights to life and basic prisoners' rights). The Anfal campaign violated Article 6, paragraph 3 of the same treaty, which specifically forbids genocide. See *id.* art. 6, para. 3. Incidents of torture violated article 5 of the *Universal Declaration of Human Rights*. See *id.* art. 5.

144. See *supra* note 128 and accompanying text (discussing first criterion for humanitarian intervention

The next criterion for intervention requires that the nations undertaking the intervention must possess a true humanitarian motive amounting to more than a pretext for war.<sup>145</sup> In 2003, a United States-led coalition of forty-four nations invaded Iraq and ousted Saddam Hussein's regime.<sup>146</sup> The coalition did not furnish the humanitarian intervention doctrine as a justification for military action, but rather offered a justification based on Security Council Resolutions 1441, 687, and 678.<sup>147</sup> The basis of this argument was collective self-defense, as the Security Council Resolutions in question relate to Iraq's invasion of Kuwait in 1990 and its alleged possession of weapons of mass destruction.<sup>148</sup> This justification for war did not suggest any political interest in the destruction of Iraq, other than the furtherance of world peace.<sup>149</sup>

While the coalition's proffered justification for military action appeared altruistic, it is important to consider the possibility that Iraq's vast oil supplies might indicate a collateral political interest.<sup>150</sup> The coalition's actions since the invasion, however, have not substantiated this theory.<sup>151</sup> Four members of the coalition sponsored a Security Council resolution, which the Security Council passed, providing that all proceeds from the sale of Iraqi oil would be deposited in a development fund for Iraq.<sup>152</sup> Another resolution, sponsored by four members of the coalition and passed unanimously by the Security Council, affirmed the temporary nature of the coalition's occupation and provided for United Nations involvement and oversight in the creation of a new Iraqi

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doctrine).

145. See *supra* note 129 and accompanying text (stating nation undertaking intervention must possess true humanitarian motive).

146. See Murphy, *supra* note 63, at 425-26, 428 n.68 (detailing invasion of Iraq and documenting number of coalition members). Although the United States touted forty-four coalition members, only the United States, Britain, Australia, and Poland actually contributed combat forces. *Id.* at 428 n.68.

147. See *supra* notes 77-80 and accompanying text (considering coalition's legal justification for military action).

148. See U.N. S.C. Res. 678, U.N. Doc. S/RES/678 (1990) (providing authorization for use of force in Iraq); U.N. S.C. Res. 687 U.N. Doc. S/RES/687 (1991) (providing conditions of cease-fire); U.N. S.C. Res. 1441, U.N. Doc. S/RES/1441 (2002) (declaring Iraq in material breach of Security Council resolutions and providing further demands for disarmament).

149. Koh, *supra* note 43, at 1523-25 (considering legality of United States invasion of Iraq under international law). Koh laments the United States participation in the invasion of Iraq as a war waged in isolation. *Id.* at 1524-25. While he questions the legal justifications for the war, he admits that the war might solve the Iraqi problem. *Id.* at 1525. The tenor of Koh's analysis does not suggest an underhanded motive for the Iraqi invasion, but rather acknowledges that the United States possessed good intentions. *Id.* at 1526.

150. Richardson, *supra* note 60, at 69-70 (discussing impact of oil on passage of Security Council Resolution 1441). Richardson asks whether the international community would allow the United States to exploit Iraq's oil resources for its own economic objectives in an article published in the spring of 2003. *Id.* at 70. Richardson raised this question in an article published in the spring of 2003, before the United States-led coalition's invasion of Iraq. *Id.* at 28.

151. See *infra* notes 152-153 (examining evidence of coalition intentions toward Iraqi oil and future government).

152. U.N. S.C. Res. 1483, U.N. SCOR, 4761st mtg., U.N. Doc. S/RES/1483 (2003) (stating Security Council decision on Iraqi oil); U.N. SCOR, 4761st mtg. at 2, U.N. Doc. S/PV.4761 (2003) (recording sponsorship and unanimous on Resolution 1483).

government.<sup>153</sup>

The coalition's invasion of Iraq meets the preference for joint action criterion for humanitarian intervention.<sup>154</sup> The coalition consisted of forty-four members, although not all members contributed military or logistical support.<sup>155</sup> While the United States did provide most of the forces for the invasion, the political backing of forty-four nations suggests that the United States was not acting alone.<sup>156</sup>

The next criterion is whether the coalition exhausted all other remedies, including the possibility of United Nations Security Council action, before it invaded Iraq.<sup>157</sup> This question is difficult to answer because the coalition did not attempt to justify the war using the humanitarian intervention doctrine, and therefore the historical record is barren of attempts by the coalition to negotiate a peaceful resolution to the humanitarian problems in Iraq.<sup>158</sup> There is, however, a record of interaction between the United Nations and Iraq, including multiple requests by the United Nations Special Rapporteur that the Iraqi regime produce information regarding various abuses.<sup>159</sup> The Iraqi regime largely ignored these requests.<sup>160</sup> The history of interaction between Iraq and the United Nations regarding human rights abuses spans the twelve year period between the passage of Security Council Resolution 687 imposing obligations on Iraq in 1991 and the removal of Hussein from power in 2003.<sup>161</sup> During that time, Hussein's regime perpetrated numerous human rights violations without regard for the outcry of the world community.<sup>162</sup> It is unlikely that Hussein would have heeded further Security Council sanctions, had such sanctions been requested and imposed, especially considering his record of obfuscation relating to Resolution 1441 and his responses to the United Nations Special Rapporteur.<sup>163</sup>

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153. U.N. S.C. Res. 1511, U.N. SCOR, 4844th mtg., U.N. Doc. S/RES/1511 (2003) (providing Security Council review and resolutions regarding Iraqi situation); U.N. SCOR, 4844th mtg. at 2, U.N. Doc. S/PV.4844 (2003) (recording sponsorship and voting on Resolution 1511).

154. See *infra* notes 155-156 (considering coalition involvement in Iraqi invasion).

155. See Murphy, *supra* note 63, at 425-26, 428 n.68 (documenting number of coalition members).

156. See Murphy, *supra* note 63, at 425-26, 428 n.68 (detailing coalition members who contributed military or logistical support). *Contra* Koh, *supra* note 43, at 1523-25 (claiming United States politically isolated in world community).

157. See *supra* note 131 and accompanying text (discussing criteria requiring exhaustion of all remedies).

158. See *supra* notes 77-86 and accompanying text (considering coalition's justification for war with Iraq).

159. See U.S. DEP'T OF STATE, *supra* note 23 (citing various instances of United Nations Special Rapporteur requesting information from Iraq).

160. See U.S. DEP'T OF STATE, *supra* note 23 (observing Iraqi regime's lack of any response to Special Rapporteur's inquiries).

161. See U.N. S.C. Res. 687, U.N. SCOR, U.N. Doc. S/RES/687 (1991), available at <http://www.un.org/Depts/unmonic/documents/687.pdf> (imposing obligations on Iraq following first Gulf War); see also Murphy, *supra* note 63, at 425 (describing opening of coalition's invasion of Iraq).

162. See *supra* notes 23-37 (describing human rights violations and reactions of world community).

163. See Murphy, *supra* note 63, at 419-20 (discussing resolution 1441); see also U.S. DEP'T OF STATE, *supra* note 23 (examining Iraqi response to United Nations Special Rapporteur information requests).

The next criterion requires that intervention, once begun, must be limited to the means necessary to halt the atrocity.<sup>164</sup> The most important question regarding this criterion as applied to Iraq is whether the Iraqi regime's violations necessitated removal of the entire regime.<sup>165</sup> The answer to this question lies in determining what action is necessary to curtail the violations.<sup>166</sup> If the violation can only be abated by the removal of the regime, then the violation necessitates removal of the regime.<sup>167</sup> In the case of Iraq, Hussein used torture and cruelty as a means of systematic repression to support his control of the country.<sup>168</sup> The only way to stop those human rights abuses was to remove the regime that depended upon their perpetration for its survival.<sup>169</sup>

#### IV. CONCLUSION: A CRITICAL PERSPECTIVE

The humanitarian intervention doctrine justified the use of force to facilitate regime change in Iraq. The doctrine's application involves the resolution of controversial moral questions. The easy question is whether Hussein perpetrated human rights abuses, because the evidence plainly demonstrates that he did. The more difficult question is whether those abuses justified military action to remove Hussein's regime from power.

A war to eliminate human rights abuses runs the risk of causing more misery than the original abuse. In Iraq, Hussein's regime perpetrated continual abuses. The evidence found by invading forces suggests that his regime continued its abuses right up to the day of its removal. Had the regime not been removed from power, it is possible, even probable, that more torture, more prison purges, and more terror would have been perpetrated against the people of Iraq. While the costs of war are grave, the risk of further human rights abuses necessitated action. Considering the long history of human rights abuses, justice demanded action. Humanitarian intervention into Iraq was not only legally justified—it was the moral course of action.

Any application of the humanitarian intervention doctrine necessarily involves difficult choices, and therefore will likely draw strong criticism. Many critics have argued and will continue to argue that the doctrine itself lacks merit. Some might argue that war is an evil to be avoided at all costs, not a tool to be used to eliminate human rights abuses. War is an evil. Human rights abuse is also an evil. In many cases the only way to eliminate human

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164. See *supra* note 132 and accompanying text (discussing criterion regarding restraints on use of force once intervention begins).

165. See *supra* note 132 and accompanying text (considering extent of permissible use of force).

166. See *supra* note 132 and accompanying text (analyzing determination of necessary force).

167. See *supra* note 132. The use of force must be restrained to the means necessary to curtail the abuse. *Id.* If the abuse cannot be curtailed by any means other than removal of the regime, then removal of the regime is necessary. *Id.* Such a drastic measure is justified when it is necessary to curtail the abuse. *Id.*

168. See *supra* note 29 and accompanying text (discussing torture and murder as means of repression).

169. See *supra* note 29 and accompanying text (considering Hussein's use of torture to support his regime).

rights abuse is to use force against the abusers. In those cases, war is a necessary means to end the human rights abuse. So long as the application of the doctrine is limited to only those abuses that shock the conscience, direct action to abate a human rights abuse is justified.

Some might argue that this doctrine erodes notions of state sovereignty and places weaker nations at the mercy of more powerful ones. The doctrine of humanitarian intervention, however, does not significantly weaken the protections that weaker nations already have. Should a nation invoke the humanitarian intervention doctrine as a pretext, the Security Council could condemn the action and even render military aid. Any nation that would use the humanitarian intervention doctrine as a pretext for action would have a difficult burden to meet all of its criteria. Such a nation would likely find it far easier to invoke notions of preemptive self-defense to justify its actions.

A more difficult criticism of the doctrine would arise if a nation were to invoke a mixed justification, citing the humanitarian intervention doctrine as one among several justifications. In such a case, the nation would be invoking the doctrine to add weight to its argument for military action, rather than to completely justify it. Use of the doctrine in this manner might aid an otherwise dubious argument for military action. It seems unfair, however, to condemn a doctrine merely because of the potential for its misuse. Instead, the world community should adopt the doctrine with corollaries designed to prevent misuse.

The humanitarian intervention doctrine contains a particularly stringent criterion—that the human rights abuse must shock the moral conscience of mankind. Such a standard, while somewhat nebulous, at least provides a rule to screen out more frivolous applications of the doctrine. This criterion effectively prevents nations from employing the doctrine unless the targeted regime bears serious moral culpability for clearly illegitimate actions.

The argument for humanitarian intervention in Iraq is a strong one, but ultimately there is no court or governing body that can validate it. International law remains a system of rules that nations follow only voluntarily, or at the threat of other, more powerful nations. A rule becomes a tenet of international law only when a large part of the community of nations embraces and follows it.

As nations and scholars continue to recognize the growing importance of human rights and democracy, notions of sovereignty will continue to erode and notions of national legitimacy will become more and more important. Eventually the community of nations will need to develop tools for dealing with those states that the community of nations considers illegitimate. The humanitarian intervention doctrine provides one such tool for the international community.

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