Intervention to Protect Human Rights*

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During 1968, which the United Nations designated as International Year for Human Rights, numerous meetings, including the World Assembly for Human Rights held in March in Montreal and the International Conference on Human Rights which took place during April and May in Teheran, called attention to the substantial progress that has been made in the field of human rights since World War II. Most of this progress, of course, has been in the direction of clarifying or codifying the substantive law norms governing human rights. Comparatively little forward movement has been achieved in the direction of creating machinery to protect the rights of individuals throughout the world. The International Conference on Human Rights recognized this fact when, in its Proclamation of Teheran, it stated that "during this period [1945-1968] many important international instruments were adopted, but much remains to be done in regard to the implementation of those rights and freedoms . . ."[1]

Responding to the demands of several Canadian members for a procedural approach to the law of human rights, the International Law Association as far back as 1965 established a Committee on Human Rights to consider, *inter alia*, whether there should be a shift in "emphasis from the Definition of Human Rights to *Remedies* for infringement of Human Rights."[2] The Committee's Rapporteur, Professor Humphrey of Canada, stated in his *Interim Report* to the Helsinki Conference in 1966 that "the trend is now towards the establishment of international machinery and techniques for

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[1] J. Carey, *International Protection of Human Rights*, (1968), XIIth Hammarskjöld Forum, p. 105.

[2] Int. L. Ass., *Report of the Fifty-Second Conference*, (Helsinki, 1966), p. 754.

implementation, machinery and techniques, that is to say, which will provide for some kind of supervision and control of the conduct of States in the observance of the standards now established."[3] The writer has been associated with this Committee, first as a member of its Advisory Group and later as a formal member, for the past three years, and it is a pleasure to record that the Committee has fulfilled the ILA's mandate "to see the emphasis in this field shifted from definition to implementation."[4]

For last year's Buenos Aires Conference of the ILA, the Rapporteur submitted a detailed report on the procedural aspects of the international protection of human rights. Pointing out that "human rights without effective implementation are shadows without substance,"[5] he set forth in his report various possibilities for the implementation of the numerous human rights conventions and the norms of customary international law. Moreover, the Committee's Chairman, Mr. Justice Batshaw of Canada, asked the ILA to "record its continuing interest in the efforts to promote the cause of Human Rights and to improve the international machinery available for their implementation."[6] His suggestion was adopted by the Buenos Aires Conference and the ILA intends to continue its work in this area during 1969 and 1970.

At the same time that the ILA took an interest in this field, the Procedural Aspects of International Law Institute began a four-year research project on international procedures to protect human rights.[7] Noting Professor McDougal's observation that "the most difficult problem still confronting the framers of the United Nations' Human Rights Program is that of devising effective procedures for enforcement,"[8] it undertook to examine from a procedural perspective both the United Nation's recent efforts in the field and also past procedures which, in the absence of United Nations implementation

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[3] *Ibid.*, at p. 758.

[4] *Ibid.*, at p. xviii.

[5] Int. L. Ass., *Report of the Rapporteur of the Committee on Human Rights to the Fifty-Third Conference*, (Buenos Aires, 1968), p. 24.

[6] Int. L. Ass., *Addendum to the Report of the Chairman of the Committee on Human Rights to the Fifty-Third Conference*, (Buenos Aires, 1968), p. 2.

[7] The Institute, with headquarters at 200 Park Avenue, New York, New York 10017, sponsors and conducts research into various areas of procedural international law, disseminating the results of such research through monographs, articles, meetings, conferences and exchanges. Membership is open to all persons in the United States and abroad who are concerned with this area of international law. Persons interested in becoming Associate Members should apply to this writer, its Director, at the above address. See Note, *Procedural Aspects of International Law Institute*, (1966), 60 Am. J. Int. L. 816.

[8] McDougall & Behr, *Human Rights in the United Nations*, (1964), 58 Am. J. Int. L. 603, at p. 629.

action, may constitute the only methods for preventing human rights violations today. In particular, this writer's work, following the suggestion of the ILA's Rapporteur that the first chapter of any definitive work on the procedure of human rights should be an historical introduction emphazing the doctrine of humanitarian intervention and the law of state responsibility, has been to examine those two topics which historically are interrelated with the doctrine of forcible self-help.[9] This article will discuss them in some detail and then consider briefly how the world community may expand its role as a protector of individuals from governmental oppression.

I. Customary International Law

As Dean Huston has demonstrated in an exhaustive article on the United Nations Conference on International Organization, the framers of the United Nations devoted ample time in 1945 to debating the insertion into the *Charter* of numerous provisions concerning human rights, but left to a later day the methods by which those same *Charter* provisions might be made effective.[10] The result has been that whatever hopes the framers of the *Charter* had for progress in this area, at least on the procedural side, have not been realized. Doctor Korey, in a recent article, has observed that "if the United Nations has been extraordinarily successful during the past twenty years in formulating standards of conduct, it has been sadly negligent in creating institutions and procedures for translating these standards into actual observance."[11] As this writer's examination of the area progressed, it became apparent to him that the traditional concepts governing both intervention to protect nationals and humanitarian intervention, at least in the absence of United Nations action on the problems of enforcement, have considerable contemporary relevance. Indeed, in view of the present state of the international legal order, he is prepared to argue the legitimacy of a limited right of forcible self-help by states, collectively or individually, as a minimum enforcement measure to protect human rights.

Under the traditional rules governing the protection of nationals abroad, aliens, in contrast to nationals of a country, were accorded somewhat more extensive protection. Judge Lauterpacht, in his excellent book entitled *International Law and Human Rights*, noted

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[9] Int. L. Ass., *supra*, n. 2, at p. 759. See Lillich, *Forcible Self-Help by States to Protect Human Rights*, (1967), 53 Iowa L. Rev. 325, relied upon heavily in this article.

[10] See generally Huston, *Human Rights Enforcement Issues of the United Nations Conference on International Organization*, (1967), 53 Iowa L. Rev. 272.

[11] Korey, "A Global Ombudsman", *Saturday Review*, Aug. 12, 1967, at p. 20.

the paradox that "the individual in his capacity as an alien enjoys a larger measure of protection by international law than in his character as a citizen of his own State."[12] In short, by requiring a state to accord a minimum standard of treatment to aliens, traditional international law provided some protection for the human rights of individuals when abroad. The power to enforce compliance with these standards rested in the state to which the alien owed allegiance, with the measures available to the sanctioning state ranging from diplomatic notes through forcible self-help to actual war.[13] Of course, this traditional method of protecting nationals was a very crude one, but in the words of the ILA it "has nevertheless been an important means of protecting human rights,"[14] and numerous authorities evidence the fact that international law conclusively sanctioned the use of forcible self-help by states to protect the lives and property of their nationals abroad.[15]

Opposed to the doctrine of forcible self-help during its formative period and even today is the principle prohibiting intervention by states in the internal affairs of other states.[16] Since this principle has caused some confusion, to say the least, it is important to define it as particularly as possible, if only to exclude permissible techniques of coercion short of actual force.[17] For purposes of this article, it is convenient to adopt Lauterpacht's definition of intervention, namely, "dictatorial interference in the sense of action amounting to a denial

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[12] H. Lauterpacht, *International Law and Human Rights*, (London, 1950), p. 121.

[13] See generally E. Borchard, *The Diplomatic Protection of Citizens Abroad*, (New York, 1915), pp. 448-53.

[14] Int. L. Ass., *supra*, n. 2, at p. 759.

[15] "The right of the state to intervene by the use or threat of force for the protection of its nationals suffering injuries within the territory of another state is generally admitted, both in the writings of jurists and in the practice of states." D. Bowett, *Self-Defence in International Law*, (1958), p. 87. See also Dunn, *The Protection of Nationals*, (1932), p. 19; C. Hyde, *International Law*, vol. 1, 2nd rev. ed., (Boston, 1945), § 202, p. 647; P. Jessup, *A Modern Law of Nations*, (New York, 1948), p. 169; L. Oppenheimer, *International Law*, vol. 1, 8th ed., H. Lauterpacht ed., (London, 1955), § 135, p. 309.

[16] "It may be laid down at the outset that, as state-independence is the foundation of modern international law, non-intervention is the rule, intervention the exception." Winfield, *The History of Intervention in International Law*, (1922-1923), 3 Brit. Y.B. Int. L. 130, at p. 139. For an excellent description of the development of the "American international law" on the subject, see Cabranes, *Human Rights and Non-Intervention in the Inter-American System*, (1967), 65 Mich. L. Rev. 1147.

[17] F. Dunn, *supra*, n. 15, at pp. 18-20 *passim*. Otherwise "the subject of intervention becomes so vague that it slips outside the framework within which legal technique can operate usefully". R. Falk, *Legal Order in a Violent World*, (Princeton, 1968), p. 160.

of the independence of the State."[18] Thus, while all measures of forcible self-help may constitute intervention in the ordinary sense, when used as a term of art the word denotes and condemns only those coercive measures designed to maintain or alter the political situation in another state. The use of force *primarily* to proctect the lives and property of nationals of the intervening state,[19] depending upon one's conceptualistic preference, either is not intervention at all[20] or, if it is, becomes a legally justifiable one.[21]

A second traditional doctrine, that of humanitarian intervention, developed during the nineteenth century as the great powers sought occasionally to protect individuals and groups of individuals against their own states. Going well beyond the institution of the protection of nationals in that its invocation did not depend upon a link between the injured individuals and the protecting state or states, humanitarian intervention, in the words of Lauterpacht, sanctioned the use of forcible self-help "in cases in which a State maltreats its subjects in a manner which shocks the conscience of mankind."[22] Examples frequently cited of permissible intervention during the past century include the assistance furnished by Great Britain, France and Russia to the Greek revolutionaries in 1827, the numerous remonstrances in the late 1800s condemning Turkish treatment of Christians, and the protests by the United States in 1891 and 1905 against the treatment of Jews in Russia.[23] Although single states occasionally invoked this doctrine, in most instances several of the major powers acted collectively, unlike the typical protection of nationals situation. While, as Professor Wright has observed, "inter-

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[18] H. Lauterpacht, *supra*, n. 12, at p. 167.

[19] Note the italicized word. "The landing of American forces has, however, oftentimes been productive of intervention, as where the effort to protect American life and property has assumed a form that has been identified with and difficult to distinguish from, direct participation in a domestic conflict being waged for the control of the reins of government." Hyde, *supra*, n. 15, §202A, at p. 649. See text at and accompanying, nn. 48-49 *infra*.

[20] "Traditionally international law allowed individual States or groups of States to take appropriate measures in the territories of other States for protection and enforcement of their rights. Such action was not technically intervention." D. O'Connell, *International Law*, vol. 1, (Dobbs Ferry, N.Y., 1955), p. 326.

[21] "The landing of forces without consent, being unmistakably a usurpation of political authority, is *prima facie* intervention. The question is whether it is an intervention which is justifiable as an exceptional measure of self-protection." Waldock, *The Regulation of the Use of Force by Individual States in International Law*, (II-1952), 81 Recueil des Cours (Hague Academy of International Law) 455, at p. 467.

[22] H. Lauterpacht, *supra*, n. 12, at p. 32. See also E. Stowell, *Intervention in International Law*, (Washington, 1921), p. 53.

[23] See M. Moskowitz, *Human Rights and World Order*, (New York, 1958), p. 16.

vention does not gain in legality under customary international law by being collective rather than individual,"[24] the fact that more than one state has participated in a decision to intervene for humanitarian reasons lessens the chance that the doctrine will be invoked exclusively for reasons of self-interest.[25]

Attempts to justify humanitarian intervention on theoretical grounds under customary international law caused some problems. If nationals of the intervening state were involved, the same approach used to rationalize the application of forcible self-help to protect nationals abroad was available. However, when the situation involved only nationals of the offending state, a different theoretical justification was required. Generally, it was found in the forthright assertion that the doctrine of absolute sovereignty did not insulate states from interference by the international community when human rights violations reached shocking proportions. "When a state abuses its right of sovereignty by permitting within its territory the treatment of its own nationals or foreigners in a manner violative of all universal standards of humanity," conclude the Thomases, "any nation may step in and exercise the right of humanitarian intervention."[26] Hence, the doctrine appears to have been so clearly established under customary international law that only its limits and not its existence is subject to debate.

II. The Effect of the United Nations Charter

The effect of the United Nations *Charter* on the two doctrines just discussed has been given relatively little attention in the literature on human rights. The drafters of the *Charter,* as Dean Huston's study shows, paid no attention to whether these doctrines were to survive the *Charter,* and its signers, while obligating themselves to promote the protection of human rights, apparently were not bothered by the obvious fact that the *Charter* contains no enforcement provisions to compel compliance with its obligations. Furthermore, two provisions make it "very doubtful," in the words of Doctor Brownlie,[27] whether forcible self-help to protect human

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[24] Wright, *The Legality of Intervention Under the United Nations Charter,* (1957), 51 Am. Soc. Int. L. Proceedings 79, at p. 86.

[25] On the question of self-interest, see the discussion at nn. 60-65 *infra* and accompanying n. 67 *infra.*

[26] A. Thomas & A. Thomas, *The Dominican Republic Crisis 1965,* (1967), IXth Hammarskjöld Forum, p. 13. The latest discussion of humanitarian intervention may be found in McDougal & Reisman, *Comment,* (1969), 3 Int. Lawyer 438.

[27] I. Brownlie, *International Law and the Use of Force by States,* (Oxford, 1963), p. 433.

rights is still permissible under international law. In the first place, all states by Article 2(4) renounce "the threat or use of force against the territorial integrity or political independence of any state," subject of course to the self-defense provision contained in Article 51. Secondly, Article 2(7) prevents intervention by the United Nations "in matters which are essentially within the domestic jurisdiction of any state," except for the application of enforcement measures under Chapter VII. Until recently, there has been little discussion of whether these provisions prohibit the right to intervene with force to protect one's nationals or to protect nationals of a third state or the state against which the intervention is directed.[28]

Shortly after the establishment of the United Nations, Judge Jessup concluded that forcible self-help was no longer permitted because the *Charter* supplanted the individual measures approved by traditional international law.[29] However, he carefully entered the caveat that if the Security Council, "with its Military Staff Committee," was unable to act with the speed requisite to preserve life, then forcible self-help might be allowable.[30] The Thomases, in their study of the *Charter*, apparently come to the conclusion that only nonforceful measures may be used now by an individual state to protect its nationals in other states.[31] Thus, they comment ironically that "from a practical point of view it would seem that the *Charter* encumbers rather than advances the human rights and fundamental freedoms involved in the protection of aliens abroad."[32] They suggest two arguments which might be used to justify such action. First, that it does not impair the territorial integrity or political inde-

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[28] A recent graduate law thesis at the Institute of Comparative and Foreign Law, McGill University, is the first extended examination of the subject. See D. Thapa, *Humanitarian Intervention* (unpublished thesis, 1968). The writer concludes that "an absolutist view, that the Charter has abolished the customary principle of humanitarian intervention, is not defensible — this principle continues to exist as an exception to all rules, whether set forth by customary or conventional international law, which bans [sic] forceful intervention for such purpose". *Id.*, at p. 13.

[29] P. Jessup, *supra*, n. 15, at pp. 169-70. See also Wright, *supra*, n. 24, at p. 88: "I conclude that military intervention by states is restricted by the *Charter* to necessities of individual or collective self-defense, explicit treaty permissions or requests, or United Nations authorizations."

[30] P. Jessup, *supra*, n. 15, at pp. 170-71.

[31] A. Thomas & A. Thomas, *Non-Intervention*, (1956), p. 312.

[32] *Id.* The authors reach the same conclusion regarding humanitarian intervention. *Id.*, at p. 384. Parenthetically, they also observe that since the *Charter of Bogota* "establishes no clear-cut right for the OAS to intervene for humanitarian purposes, it can be said that as far as the inter-American system is concerned, human rights are now less protected than they were under general international law." *Id.*, at p. 390. See, Cabranes, *supra*, n. 16, at pp. 1159-61.

pendence of a state,[33] and secondly that, in any event, when it comes to the protection of nationals abroad intervention is permissible as an extension of the concept of self-defense.[34] For reasons stated elsewhere, this writer cannot accept the latter argument,[35] but it does not seem impossible to reconcile a limited right to intervene for humanitarian purposes with the strictures or Article 2(4).[36]

When it comes to Article 2(7), the United Nations definitely has the legal right to use force for humanitarian purposes if the state violating basic human rights causes an actual threat to the peace.[37] As the United Nations has learned from the Rhodesian and South African cases, and as it would have learned with respect to Biafra if it had had the courage to take up the matter, it is not always easy to devise procedures to implement resolutions in human rights matters.[38] Nevertheless, the United Nations has the power to take collective action, and perhaps someday, as Professor Falk hopes, we shall see "supranational interventions to overcome the intolerable injustices that are found today in Angola, Rhodesia, and the Republic of South Africa."[39]

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[33] A. Thomas & A. Thomas, *supra*, n. 26, at p. 15.

[34] *Id.*, at p. 13.

[35] Lillich, *supra*, n. 9, at p. 337.

[36] Doctor Reisman, in an excellent study of the Article 2(4) problem, agrees with this writer that a close reading of it indicates no prohibition of coercion *per se*, but rather the prohibition of the use of force for specified unlawful ends. "Since a humanitarian intervention seeks neither a territorial change nor a challange to the political independence of the state involved and is not only not inconsistent with the Purposes of the United Nations but is rather in conformity with the most fundamental preemptory norms of the Charter, it is distortion to argue that it is precluded by Article 2(4)." Reisman, *Memorandum Upon Humanitarian Intervention to Protect the Ibos*, (unpublished paper written with the collaboration of Professor McDougal, 1968), pp. 15-16. Accord, Harlow, *The Legal Use of Force... Short of War*, (1966), 92 U.S. Naval Institute Proceedings 88, at p. 97.

[37] See, *e.g.*, A. Thomas & A. Thomas, *supra*, n. 31, at p. 384. The domestic jurisdiction clause no longer shields states where grave breaches of human rights have occurred. McDougal & Behr, *supra*, n. 8, at p. 612. See generally Gilmour, *The Meaning of "Intervene" Within Article 2(7) of the United Nations Charter — An Historical Perspective*, (1967), 16 Int. & Comp. L.Q. 330.

[38] Yet, as McDougal and Reisman have stated with respect to Rhodesia, the quest must continue. "Failure to act there might not merely fail to fulfill contemporary policies in the inclusive promotion of human rights; it might, further, set back or undermine the whole United Nations program. In the most realistic sense, the impossibility of achieving perfection is scant justification for total inaction." McDougal & Reisman, *Rhodesia and the United Nations: The Lawfulness of International Concern*, (1968), 62 Am. J. Int. L. 1.

[39] Falk, *Historical Tendencies, Modernizing and Revolutionary Nations, and the International Legal Order*, (1962), 8 How. L.J. 128, at p. 150.

Assuming, however, that the United Nations generally will not act in situations where states might have acted individually in pre-Charter days, it might be useful to examine two recent situations and a pending one where forcible self-help was or could have been used by a single state or a group of states to mitigate outrageous violations of human rights. These situations are the Congo in 1964, the Dominican Republic in 1965, and Biafra at present.

With respect to the Congo, it will be recalled that in the fall of 1964, the rebel movement there had seized several thousand innocent persons and held them as hostages in violation of the Geneva *Conventions*.[40] Unable to obtain concessions from the Congo's recognized government, the rebels stated that " 'we will make our fetishes with the hearts of the Americans and Belgians, and we will dress ourselves with the skins of the Americans and Belgians.' "[41] Several dozen foreigners actually were slaughtered by their rebel captors during this period, and a captured telegram indicated that the rebel officer in charge of the hostages was under orders to exterminate them all should hostilities recommence in the region.[42]

Using United States planes and a British island for staging purposes, Belgian paratroopers mounted an airdrop which landed at Stanleyville and undertook an emergency rescue operation, evacuating 2,000 people of over eighteen nationalities within a four-day period.[43] The United States justified its participation on both the above grounds, pointing out that the operation was a humanitarian and not a military one, that it was designed to avoid bloodshed and not interfere with the outcome of the internal civil war then going on, and that it was limited in scope.[44] Certainly all these

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[40] " 'The rebels' action in holding and threatening hostages is in direct violation of the Geneva Conventions and accepted humanitarian principles. Moreover, the harassment and mistreatment of civilians have continued in rebel-held areas despite repeated protests and appeals from international organizations and interested governments." (1964), 51 Dep't State Bull., p. 841, reprinted in U.S. Dep't of State, *American Foreign Policy: Current Documents 1964*, (1967), at p. 770.

[41] (1965), 52 Dep't State Bull., p. 18.

[42] The foreigners killed included nineteen Belgians and four Dutchmen, two Americans, two Greeks, two Indians, two Portuguese, two Togolese, one Englishman and one Italian. *Id.*, partially reprinted in U.S. Dep't of State, *American Foreign Policy: Current Documents 1964*, (1967), at p. 777.

[43] (1964), 51 Dep't State Bull. 840, reprinted in U.S. Dep't of State, *American Foreign Policy: Current Documents 1964*, (1967), at p. 767; (1965), 52 Dep't State Bull. 16, reprinted in U.S. Dep't of State, *American Foreign Policy: Current Documents 1964*, (1967), at p. 776. Other estimates range even higher, (1965), 52 Dep't State Bull. 222.

[44] In the UN, Ambassador Stevenson stated that "while our primary obligation was to protect the lives of American citizens, we are proud that the mission

points are borne out by the facts, and, in view of the complete lack of action by the United Nations and the Organization of African Unity, the criticism heaped upon the United States for its role in this humanitarian venture comes as something of a surprise.[45] If ever there was a case for the use of forcible self-help to protect lives, in this writer's opinion the Congo rescue operation was it.[46]

With respect to the Dominican Republic intervention in April 1965, the facts are more complex and space precludes discussing them in detail here.[47] Suffice to say that by the end of the month the civil war going on in Santo Domingo had reached a balance and law and order had broken down completely. The United States, faced with the apparent alternatives of doing nothing or coming to the aid of one side or the other, rejected both approaches. Instead, it landed a small contingent of Marines to protect the lives of United Stated citizens in the country and to secure their immediate evacuation. According to critics such as Senator Fulbright, the true motive for this action was not humanitarian but anti-Communist.[48] While undoubtedly the Johnson Administration had no great desire to see

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rescued so many innocent people... from their dreadful predicament." (1965), 52 Dep't State Bull. 17, reprinted in U.S. Dep't of State, *American Foreign Policy: Current Documents 1964*, (1967), at p. 777.

[45] Replying to allegations bordering on the slanderous, Ambassador Stevenson told the UN flatly that he had no "apologies to make" about the operation. "We are proud of our part in saving human lives imperiled by the civil war in the Congo." *Id.* In one of the surprisingly few legal treatments of the Stanleyville operation, Falk concludes that "Stevenson's response was justified in most respects, although his heroic attempt to disentangle the rescue mission from the colonial past and the rebellious present is not altogether convincing. The fact remains that the United States cannot use military force in the Congo, unless authorized to do so by either the OAU or the UN, without engendering fury on the part of the more radical African governments." R. Falk, *supra*, n. 17, at p. 334. Yet earlier in his perceptive essay he specifically limits his criticism to the appearances and not to the legality of the operation. *Id.*, at pp. 329-31 *passim*. For a less balanced discussion failing to make this important distinction, see R. Barnet, *Intervention and Revolution*, (1968), pp. 249-51.

[46] It also is worth noting that the three powers acted with the express authorization of the Congo's recognized government, that they used only the reasonable amount of force necessary to accomplish the rescue, and that once they had completed their mission they immediately withdrew. See R. Falk, *supra*, n. 17, at p. 329.

[47] In addition to A. Thomas & A. Thomas, n. 26, *supra*, factual accounts may be found in the following studies: R. Barnet, *supra*, n. 45, at pp. 153-80; L. Miller, *World Order and Local Disorder*, (1967), pp. 149-65; and Nanda, *The United States' Action in the 1965 Dominican Crisis: Impact on World Order — Part I*, (1966), 43 Denver L.J. 439.

[48] Fulbright's famous speech to the Senate on the Dominican Crisis may be found in (1965), 111 Cong. Rec. 23855.

ex-President Bosch restored to power by a violent revolution, there appears to be sufficient evidence that the original motive of the United States in acting was dictated by humanitarian grounds, and that criticism of our operation in the Dominican Republic, which eventually culminated in the stationing of over 20,000 military personnel in the capital, should be directed towards the subsequent buildup and not the initial response.[49]

The use of forcible self-help in the Dominican Crisis involved one problem not present in the Congo situation, namely, the impact of Articles 15 and 17 of the *OAS Charter* which appear to contain an absolute ban against any type of intervention whatsoever.[50] The Thomases, who once interpreted these articles to prohibit the use of force in all situations, still acknowledge that they represent "a troublesome impediment to collective humanitarian intervention."[51] To the extent that the collective action that the OAS eventually took does not relate back and justify the continued presence of American troops in the Dominican Republic, the United States may have violated the *OAS Charter*.[52] If so, surely a gap exists in the western hemispheric system, a gap which can be remedied only by establishing

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[49] The Johnson Administration, for instance, rejected as "demonstrably incorrect" the contention "that danger to American lives was more a pretext than a reason for United States action." Mann, *The Dominican Crisis: Correcting Some Misconceptions*, (1965), 53 Dep't State Bull. 730, at p. 733, reprinted in U.S. Dep't of State, *American Foreign Policy: Current Documents 1965*, (1968), 1002, at p. 1005. "The facts show that Americans in Santo Domingo were in imminent danger of life and limb from rioting mobs." Meeker, *The Dominican Situation in the Perspective of International Law*, (1965), 53 Dep't State Bull. 60, at p. 64. Assuming the accuracy of "the facts", this writer agrees with Nanda that "the initial landing of four hundred Marines should be considered a permissible self-defense measure to protect the United States nationals." Nanda, *supra*, n. 47, at p. 471. But see R. Barnet, *supra*, n. 45, at p. 172.

[50] *OAS Charter*, art. 15: "No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State."

OAS Charter, art. 17: "The territory of a State is inviolable; it may not be the object, even temporarily, of military occupation or of other measures of force taken by another State, directly or indirectly, on any grounds whatever."

[51] A. Thomas & A. Thomas, *supra*, n. 26, at p. 22. See text accompanying n. 32, *supra*. Nevertheless, they have made a convincing case for the right to use forcible self-help in human rights situations. *Id.*, at p. 23. But see McLaren, *The Dominican Crisis: An Inter-American Dilemma*, (1966), 4 Cnd. Y.B. Int. L. 178, at p. 181.

[52] *Id.* See also Bohan, *The Dominican Case: Unilateral Intervention*, (1966), 60 Am. J. Int. L. 809, at p. 810: "If the absolute language of these acts [Articles 15 & 17 of the *OAS Charter*] must bend before the state's right of self-defense from real and immediato dangers, certainly the acts are not to be disregarded on the basis of protection of nationals."

OAS machinery to handle crises of the Dominican type or, even less likely, by amending the *OAS Charter* to permit limited self-help measures by individual states.[53]

Finally, the situation in Biafra is one that would have been ideal for collective humanitarian intervention of the nineteenth century type. However, as is well known, the United Nations has done nothing in the way of mounting a political or economic, much less military, campaign to prevent the widespread devastation and starvation which has taken place recently in the eastern part of Nigeria. U Thant, so free with his advice in other matters, has been studiously silent on the topic. Moreover, the OAU, with the exception of occasional utterances, has made no real effort to alleviate the situation of the Ibos. Apparently, Articles 2(4) and 2(7) are being used as handy excuses by all states, including Canada and the United States, who wish to avoid becoming involved. The Biafran tragedy differs from the Congo and Dominican situations only in the fact that nationals of the offending state alone are involved and not foreigners. Nevertheless, as pointed out above,[54] the doctrine of humanitarian intervention seems to be designed perfectly for this situation, and it should have been invoked long before now.[55]

III. Future Developments

Over two years ago this writer advanced the thesis that, pending the establishment of effective machinery on the international level to govern the minimum use of force in human rights situations, a limited right of forcible self-help existed despite the provisions in Articles 2(4) and 2(7) of the United Nations *Charter*.[56] This position certainly was a minority one then and still may be so today, but it continues to gain adherents annually. Initially, Professor Nanda, in an excellent survey of the impact of the Dominican Crisis on world order, concluded that a state's claim to intervene for the protection of its nationals should be considered permissible in appropriate situations.[57] Then Professor McDougal, reassessing his earlier

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[53] Both prospects seems unlikely at present. See generally Cabranes, *The Protection of Human Rights by the Organization of American States*, (1968), 62 Am. J. Int. L. 889.

[54] See text at nn. 22-26, *supra*.

[55] "We have waited too long and have already lost our innocence; if we cannot perfect, as a minimum, a system of humanitarian intervention, we have lost our humanity. If we sit passively by while the Ibos suffer genocide, we have forfeited our right to regain it." Reisman, *supra*, n. 36, at p. 47.

[56] See, n. 9, *supra*.

[57] Nanda, *supra*, n. 47, at p. 458.

view that the United Nations *Charter* precluded the use of forcible self-help, acknowledged that "if I had the opportunity to rewrite the book with Mr. Feliciano in which we mildly questioned the lawfulness of self-help less than self-defense, I think I would come out with a different conclusion, as many people have."[58] Finally, Doctor Reisman, in his study of the plight of the Ibos, has adopted the thesis that "individual or coordinated corrective non-UN humanitarian intervention is permitted as a substitute for functional enforcement of international human rights."[59]

Obviously, any procedure that allows a single state, or a small group of states, to use force without the prior authorization of a supranational body is a doctrine productive of possible abuse. Both Doctor Bowett and Professor Falk have warned us of this fact.[60] Moreover, Doctor Brownlie, who thinks that "any legal basis of the right of intervention is now extremely tenuous," actually takes the position that "as a matter of legal and international policy this is a beneficial development."[61] Balancing the need to protect human rights against the realization that non-humanitarian motives often may be at work, he apparently believes that world community policy requires an across-the-board prohibition of forcible self-help measures. This recommendation to forego the use of coercion, in the opinion of this writer, constitutes a classic example of throwing the baby out with the bath water.[62] Granted the dangers inherent in accepting a decentralized determination of when it is appropriate

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[58] McDougal, *Authority to Use Force on the High Seas*, (1967), 20 Naval War College Review, No. 5, 19, at p. 29. The work in need of revision is M. McDougal & F. Feliciano, *Law and Minimum World Public Order*, (New Haven, 1961). McDougal explains that "I'm ashamed to confess that at one time I lent my support to the suggestion 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... In the absence of collective machinery to protect against attack and deprivation, I would suggest that the principle of major purposes requires an interpretation which would honor self-help against prior unlawfulness. The principle of subsequent conduct certainly confirms this. Many states of the world have used force in situations short of the requirements of self-defense to protect their national interests." McDougal, *supra*, at pp. 28-29. Compare text at n. 30, *supra*.

[59] Reisman, *supra*, n. 36, at p. 17.

[60] D. Bowett, *supra*, n. 15, at pp. 104-05; Falk, *supra*, n. 17, at p. 161. "One need only recall that Hitler explained his invasions of Czechoslovakia and Poland by the need to rescue German minorities from oppression." *Id.*

[61] I. Brownlie, *supra*, n. 27, at pp. 298, 340.

[62] Professor Goldie uses the same *cliché* to arrive at the same conclusion. Goldie, *The Transvaluation of Values in Contemporary International Law*, (1967), 53 Iowa L. Rev. 358, at p. 362.

to embark upon a humanitarian mission,[63] the fact that a state's action in such a situation remains subject to review and revision by the world community offers some safeguard against the use of force for non-humanitarian purposes.[64] As McDougal and Feliciano observe:

> The characterization is of course made by an individual state at its own peril. It partakes, in other words, of the nature of a provisional determination in precisely the same way that a claim of self-defense does, and remains subject both to the contemporaneous appraisal of other individual states and to the subsequent review the organized community may eventually exercise... A policy of permitting individual initiative is, of course, again like the policy of allowing self-defense, susceptible to perverting abuse; but this susceptibility is an attribute common to all legal policy, doctrine, or rule.[65]

If one accepts this reasoning, then the first important task today is to clarify the various criteria by which the legitimacy of a state's use of forcible self-help in human rights situations can be judged.

Writers examining past practice have constructed a number of standards for evaluating the legitimacy of a claimed humanitarian intervention. Thus Professor Nanda, paraphrasing the legal arguments of the United States in the Congo operation, lists five criteria: 1) a specific limited purpose; 2) an invitation by the recognized government; 3) a limited duration of the mission; 4) a limited use of coercive measures; and 5) a lack of any other recourse.[66] Occasionally overlapping these criteria but also including several new ones, this writer has recommended elsewhere his own five tests by which a unilateral or near-unilateral use of forcible self-help should be judged: 1) the immediacy of the violation of human rights; 2) the extent of the violation of human rights; 3) the existence of an invitation by appropriate authorities; 4) the degree of coercive measures employed; and 5) the relative disinterestedness of the state invoking the coercive measures.[67]

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[63] "Part of the problem arises from the unreliability of any decentralized determination of when it is appropriate to intervene and the absence of any reliable centralized procedures. The risk of manipulation of verbal symbols would be reduced, though not eliminated, by entrusting the interventionary decision to an entity more embracing than the intervening state itself." R. Falk, *supra*, n. 17, at pp. 161-62.

[64] "Where circumstances require a unilateral humanitarian intervention, the operation should be submitted to inclusive authoritative appraisal as soon as possible." Reisman, *supra*, n. 36, at pp. 33-34.

[65] M. McDougal & F. Feliciano, *supra*, n. 58, at p. 416.

[66] Nanda, *supra*, n. 47, at p. 475.

[67] Lillich, *supra*, n. 9, at pp. 347-51. A comment is required on the last criteria. It is somewhat naive to suggest that "where the decision to intervene falls te a single state, it should be safeguarded by a requirement that the state be

Applying these criteria, it would seem that the Congo airdrop and the initial introduction of United States Marines into the Dominican Republic were permissible uses of forcible self-help in the absence of supranational action. Obviously the latter is preferable, but until the United Nations and perhaps the OAS and the OAU establish effective procedures for handling the problem their roles will remain essentially passive ones, with states having the motivation and possessing the capability for action resorting to it. Sooner or later, of course, the United Nations must create or adapt some institutions to regulate the use of force in humanitarian situations. Perhaps, as Senator Kennedy has recommended, the United Nations should establish an Emergency Relief Force.[68] Perhaps, as Doctor Reisman has suggested, the International Law Commission should consider drafting a *Protocol of Procedure for Humanitarian Intervention.*[69] What seems certain is that a good deal more work needs be done to find out just what additional procedures are needed and how they can be made binding upon states.

This second important task undoubtedly is less glamorous than work on the clarification and codification of the substantive norms of human rights that has occupied center stage for so long, but it is no less important. There already exists an abundance of literature in the area of substance: what is needed is some good old-fashioned field research on procedural techniques to bring the substantive law of human rights to bear on governments. Mr. Justice Frankfurter reminds us in his *Reminisces* that such creative research "requires a lot of digging. It's so much easier to think than to dig, but thinking without digging isn't very good thinking.[70] This writer's plea today, in the wake of Biafra, is for a few readers to pick up a shovel and have a go.[71]

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totally disinterested." Bogen, *The Law of Humanitarian Intervention: United States Policy in Cuba (1898) and in the Dominican Republic (1965)*, (1966), 7 Harv. Int. L. Club J. 296, at p. 311. As Bogen himself later acknowledges, unless it has some definite interest "no single government is willing to expend the money and manpower necessary for action." *Id.*, at p. 313. Thus, while it is patently unfair to suggest, as Barnet has concerning the Congo, that "the State Department's humanitarian concerns were aroused only when it appeared that Americans and Europeans might be the next victims", R. Barnet, *supra*, n. 45, at p. 249, it is a fact of international life today that states rarely take affirmative steps unless their own nationals are involved. Biafra is an unfortunate case in point. Great effort is needed to develop an "external constituency" which identifies with the victims of human rights deprivations regardless of their nationalites. See Falk, in J. Carey, *supra*, n. 1, at pp. 46-48.

[68] *N.Y. Times*, Feb. 9, 1969, p. 1, col. 4.

[69] Reisman, *supra*, n. 36, at p. 46.

[70] F. Frankfurter, *Felix Frankfurter Reminisces*, (1960), p. 74.

[71] See, *supra*, n. 7.