Brian D. Lepard

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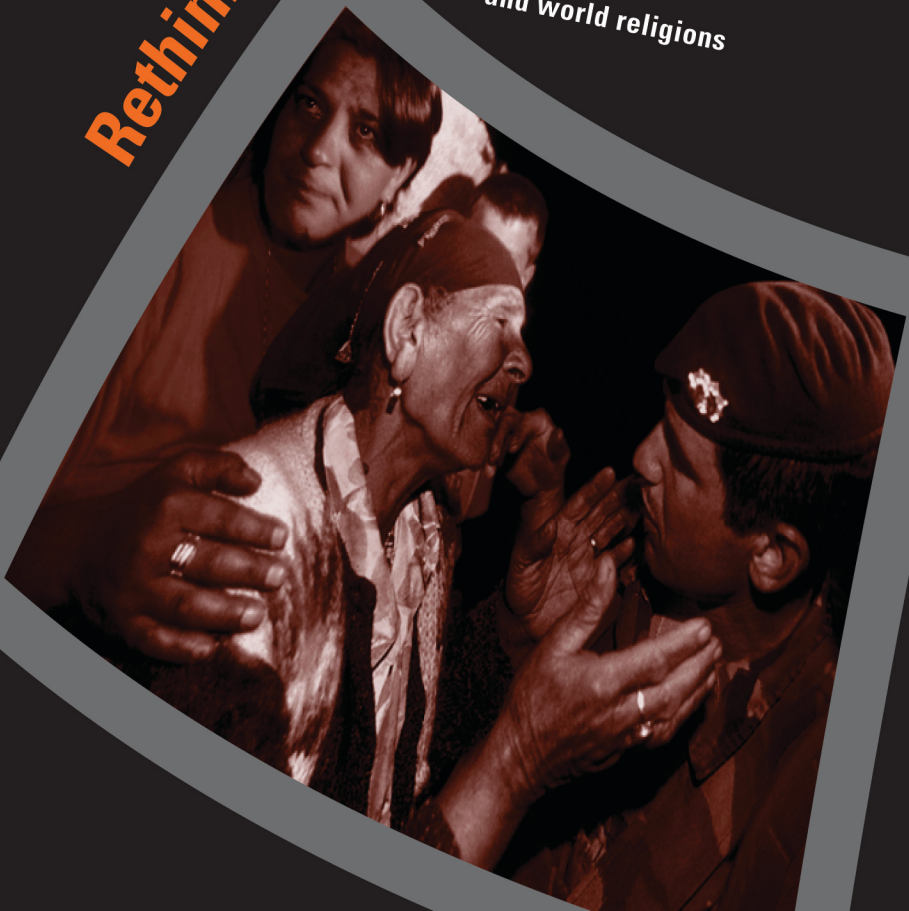

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In loving memory of my mother

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Preface and Acknowledgments

This book began many years ago as an inquiry into the legal issues surrounding humanitarian intervention—which I define as the use of military force to protect the victims of human rights violations. As I delved into the matter, however, I found that the legal problems of humanitarian intervention were inextricably intertwined with important ethical issues, including whether or not all countries and their citizens have a duty to come to the rescue of those whose lives are imperiled by the malicious behavior of their own governments or by armed factions. Indeed, a number of legal scholars had written books that drew upon the works of prominent Western philosophers in addressing the legal problems of humanitarian intervention.

It occurred to me that international law itself had begun to address many of these ethical issues, at least tentatively, and that within contemporary international law itself might be found the kernel of a number of fundamental ethical principles relevant to humanitarian intervention, such as principles insisting on respect for human rights and limiting the use of force in the international system. The most important fundamental ethical principle I found, and which I argue ought to be adopted as the standard by reference to which other principles should be prioritized, is that of the essential unity of all human beings as members of a single human family that is nevertheless diverse in individual thoughts and beliefs, cultures, nationalities, religions, races, and languages, and whose diversity ought to be valued as a precious asset of humanity.

As I researched these emerging ethical principles apparent in contemporary international legal texts, including the U.N. Charter and the Universal Declaration of Human Rights, another feature, however, began to emerge: a general congruence between these broad ethical principles and certain teachings of the scriptures of the world religions and philosophies. I have,

since my early childhood, been fascinated by religion, having been raised as a Bahá'í to believe that all religions teach the same eternal spiritual truths. I began reading the revered texts of seven religions and philosophies—Hinduism, Judaism, Buddhism, Confucianism, Christianity, Islam, and the Bahá'í Faith—to find out what they had to say about the moral problems of human rights, the use of force in general, and humanitarian intervention in particular. In these texts I discovered not only explicit moral teachings on these subjects, but also what I could not help but perceive as a remarkable convergence among them.

It also became apparent to me that this convergence among ethical principles evident in certain passages from religious and philosophical texts in fact helped to bolster the authority of similar principles under international law. And it also made it politically more probable that an approach to humanitarian intervention and international law grounded in principles that found support both in international legal texts and in revered religious and philosophical texts could be endorsed and accepted by governments and peoples representing a diverse array of cultures, many of which are rooted in particular religious and philosophical traditions.

The subject of humanitarian intervention and international law has proven to be a challenging one to write about, not only because of its inherent complexity, and the ethical dilemmas that it poses, but also because world events either prompting actual intervention on humanitarian grounds, or at least provoking a discussion of the possibility of such intervention, are becoming more and more frequent. I have accordingly found it necessary to focus on a number of case studies of interventions initiated before an arbitrary date—September of 1999. Numerous events relevant to humanitarian intervention have occurred between this date and the date of this writing, nearly two years later. These events include intervention in East Timor in September 1999; the debate on humanitarian intervention at the fifty-fourth session of the General Assembly in the fall of 1999; the decision of the international community not to intervene to protect Chechens against attacks by Russian forces; and the involvement of U.N. forces in Sierra Leone. I have touched on such developments, through June 2001, as they relate to the arguments in the book, but have not been able within the inevitable space limitations to give them a comprehensive treatment.

Further, the book was written before the horrific terrorist attacks on September 11, 2001, in New York City, Washington, D.C., and Pennsylvania, in which thousands of innocent lives were lost. These attacks prompted military intervention in Afghanistan by the United States and other countries

to apprehend the alleged perpetrators, most notably Osama bin Laden, and disable his al-Qaeda terrorist network. This military action led to both the fall of the Taliban, which had provided safe haven to bin Laden and his associates, and the establishment of an interim government. Beginning in late 2001 and early 2002, a U.N.-authorized multinational force was deployed to help provide security during the reconstruction of Afghanistan's political, social, and economic institutions. The book was also completed before the escalation of violence in the Middle East toward the end of 2001. While *Rethinking Humanitarian Intervention* does not dicuss these events, readers are invited to reflect upon the potential application of the principles developed in the book to them.

Readers who are unfamiliar with many of the technical terms used in the book—including terms from the disciplines of international law, international relations, religion, and philosophy—may find it helpful to refer to the short glossary that appears at the end of the work. (For more detailed definitions of international human rights terms, readers may wish to consult the more comprehensive and extremely helpful volume, Condé, *A Handbook of International Human Rights Terminology*.) The glossary also defines the new terms I have developed as part of my argument.

One of the fundamental ethical principles in contemporary international law that I identify, and that many passages from the revered moral texts of the world religions and philosophies can be interpreted to support, is that of consultation—of seeking out the opinions of others with the objective of learning from them, and if appropriate, revising one's own views. This book is a concrete example of the implementation of this principle, for it would have been impossible to accomplish without the generous input provided by numerous scholars and specialists from many disciplines, including those disciplines with which I was less familiar, who were graciously willing to share their expertise, ideas, and perspectives with me. Nevertheless, I bear full responsibility for any weaknesses in the book's arguments.

First of all, I must express appreciation to Sanford Thatcher, Director of the Pennsylvania State University Press, for his willingness to publish my manuscript and for the many ways in which he helped me produce a much better book. I also benefited enormously from the comments of two external reviewers for the press, Richard A. Falk, Albert G. Milbank Professor of International Law and Practice at Princeton University, and Robert C. Johansen, Professor of Government and International Studies and Director of Graduate Studies at the Joan B. Kroc Institute for International Peace Studies at the University of Notre Dame. My editor at the press, Andrew B. Lewis,

made many helpful suggestions, both stylistic and substantive. His keen insights are much appreciated.

This book could not have been written without the constant support of the deans of the University of Nebraska College of Law who served during the many years required for its research and writing—Dean Harvey S. Perlman, Dean Nancy Rapoport, and Dean Steven Willborn. I especially benefited from summer research grants provided by the Ross McCollum Law College Fund and offered by Dean Perlman and Dean Rapoport. Dean Rapoport also made many valuable specific suggestions about the manuscript.

This book could not have been written, too, without the devoted (and always good-natured) assistance of the staff of the Marvin & Virginia Schmid Law Library, including Angela Brannen, Julee Hammer, Kris Lauber, Richard Leiter, Michael Matis, Ariel Mink, Brian Striman, Rebecca Trammell, and Sally Wise. Kris Lauber deserves special recognition for her tireless efforts over many years to support my research. During the preparation of the final manuscript I enjoyed the outstanding services of two research assistants, Paul Butler and Sharon Joseph, both of whom not only helped check the accuracy of my citations and prepare the index for the book, but also provided many suggestions for improving the text. I also wish to thank my secretaries, including Kim Hailey, Darlene Svancara, and Vicki Lill, for their help with the preparation of the manuscript.

My colleagues at the University of Nebraska College of Law generously offered many suggestions relating to the book. I especially want to thank Robert Schopp and Matthew Schaefer for their extensive comments on portions of the manuscript, and Richard Duncan for his input about the book's overall approach. And the students in my international human rights law course provided, in the classroom, invaluable feedback regarding many of the ideas developed here.

I also benefited from the comments and recommendations of many colleagues at the University of Nebraska from other academic departments. In particular, I must warmly thank Robert Audi, Charles J. Mach Distinguished Professor of Philosophy; Sidnie W. Crawford, Associate Professor and Chair of the Classics Department; David P. Forsythe, Charles J. Mach Distinguished Professor of Political Science; and Jeffrey Spinner-Halev, Schlesinger Associate Professor of Political Science. They each went out of their way to provide extensive help.

I must express my appreciation to the many international law scholars who commented on the manuscript, or the parts of it that they reviewed. These include William R. Slomanson of the Thomas Jefferson School of Law, who not only offered many helpful suggestions with respect to Chapter 3, but also encouraged me to elaborate on my ideas in the form of a book;

Mark Janis of the University of Connecticut School of Law; Sean Murphy of the George Washington School of Law; Fernando Tesón of the Arizona State University College of Law; and Christopher G. Weeramantry, former Vice-President and current ad hoc judge of the International Court of Justice. I also thank Berta Esperanza Hernández-Truyol, Levin, Mabie, and Levin Professor of Law at the University of Florida Fredric G. Levin College of Law, and Lori Fisler Damrosch of the Columbia University School of Law, both of whom reviewed portions of the manuscript in connection with my application for academic promotion and offered many valuable comments. I also wish to thank the American Society of International Law, which gave me the opportunity to present preliminary research on the book at a panel discussion held at its Annual Meeting in April 1994.

I am indebted to the many scholars of religion and philosophy who have consulted with me on my analysis of the belief systems in which they specialize. These include Arvind Sharma of McGill University and Robert N. Minor of the University of Kansas (Hinduism); Michael J. Broyde of Emory University Law School and Lenn Goodman of Vanderbilt University (Judaism); Taitetsu Unno of Smith College and Dale Wright of Occidental College (Buddhism); Irene Bloom of Barnard College's Department of Asian and Middle Eastern Cultures and E. Bruce Brooks of the Warring States Project at the University of Massachusetts at Amherst (Confucianism); John Langan, S.J., Rose Kennedy Professor of Christian Ethics at Georgetown University, and Sidnie W. Crawford (Christianity); Khaled Abou El Fadl of the UCLA School of Law, Abdullahi Ahmed An-Na'im of the Emory University Law School, Syed Nomanul Haq of Rutgers University, Ann Elizabeth Mayer of the Legal Studies Department at the Wharton School of the University of Pennsylvania, and Abdulaziz Sachedina of the University of Virginia (Islam); and Firuz Kazemzadeh, emeritus, of Yale University (the Bahá'í Faith).

Furthermore, I am grateful to scholars who participated in two conferences held at Chapman University in April 1999 and in March 2000, the first on human rights and responsibilities in the world religions, and the second on ethics and world religions. I was able to present preliminary versions of much of the material in this book at the first conference and benefited greatly from the generous input participants were able to provide. I especially appreciate the assistance and encouragement of Arvind Sharma, Nancy Martin of Chapman University, and Joseph Runzo of Chapman University, who invited me to participate in these conferences and introduced me to many of their colleagues.

In June 1994, Brian Urquhart, Ford Foundation Scholar and former U.N. Under Secretary-General for Special Political Affairs, was exceptionally kind

in meeting with me to discuss U.N. peacekeeping problems and the idea of a rapid reaction force. I also had very helpful meetings with various officials of the U.N. Department of Peace-keeping Operations (DPKO) in June 1994, including Colonel Michel Couton, former Chief, UNOSOM Desk. All of them were exceedingly generous with their time. I further appreciate the assistance of Colonel Peter Leentjes, former Chief of Training at DPKO, who kindly provided me with a great deal of information about the U.N.'s peacekeeping training activities.

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The arguments in this book could never have been developed without the exceptional training and guidance I have received from my professors both at Princeton University and at Yale Law School. I am especially indebted to Richard A. Falk of Princeton University, and Leon Gordenker, Professor of Politics, emeritus, of Princeton University. I am also grateful to my international law teachers at Yale Law School, Harold H. Koh, W. Michael Reisman, and Ruth Wedgwood. All of them have served not only as teachers, but as lifelong mentors.

Finally, this book could not have been written without the inspiration and support of my family. In particular, I am grateful to my mother and father, who taught me the Bahá'í principles of the unity of religions and of the human family; to my wife, who gave me boundless support and encouragement, and offered many insights that much improved the book; and to my children, who have given me hope that the next generation may internalize and act upon the principle of the unity of the human family, and who were ever so patient when I needed to work on "dad's book"—a project that probably seemed as if it would never be brought to completion. Thanks to their understanding, it now has.

Abbreviations and Acronyms

BOSNIA	Bosnia-Herzegovina
DPKO	United Nations Department of Peace-keeping Operations
ECOMOG	ECOWAS Military Observer Group or Cease-fire Monitoring Group
ECOSOC	United Nations Economic and Social Council
ECOWAS	Economic Community of West African States
IAPF	Inter-American Peace Force [in the Dominican Republic]
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social, and Cultural Rights
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IFOR	Implementation Force [in Bosnia]
INTERFET	International Force, East Timor
KFOR	Kosovo Force
KLA	Kosovo Liberation Army
MFO	Multinational Force and Observers [in the Sinai]
MINURCA	United Nations Mission in the Central African Republic
MNF	Multinational Force [in Lebanon]
MONUC	United Nations Organization Mission in the Democratic Republic of the Congo
MSC	Military Staff Committee
NATO	North Atlantic Treaty Organization
NGO	Nongovernmental organization
OAS	Organization of American States
OAU	Organization of African Unity

OHCHR	Office of the United Nations High Commissioner for Human Rights
OIC	Organization of the Islamic Conference
ONUC	United Nations Operation in the Congo
OSCE	Organization for Security and Co-operation in Europe
PDD 25	*Presidential Decision Directive 25*
RDF	Rapid Deployment Force
RPF	Rwandan Patriotic Front
SFOR	Stabilization Force [in Bosnia]
U.N.	United Nations
UNAMIR I	United Nations Assistance Mission for Rwanda I
UNAMIR II	United Nations Assistance Mission for Rwanda II
UNAMSIL	United Nations Mission in Sierra Leone
UNEF I	United Nations Emergency Force I [in the Sinai]
UNESCO	United Nations Educational, Scientific, and Cultural Organization
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund
UNITAF	Unified Task Force [in Somalia]
UNMIH	United Nations Mission in Haiti
UNMIK	United Nations Interim Administration Mission in Kosovo
UNOMSIL	United Nations Observer Mission in Sierra Leone
UNOSOM I	United Nations Operation in Somalia I
UNOSOM II	United Nations Operation in Somalia II
UNPROFOR	United Nations Protection Force [in the Former Yugoslavia]
UNTAET	United Nations Transitional Administration in East Timor
Yugoslavia	Federal Republic of Yugoslavia (Serbia and Montenegro)

Note on Transliteration of Foreign Words and Names

Foreign words and proper names have been transliterated. In general, with a few exceptions, diacriticals have been used for words and names in Arabic, French, Hebrew, Pali, Sanskrit, and Serbo-Croatian. In the case of the few Chinese words referred to in the text, their Pinyin form has been used. In discussions of Islam and its revered moral texts, the Cambridge system of transliteration of Arabic has in general been used, while in discussions of the Bahá'í Faith and its revered moral texts, a modified form of the Cambridge system typically found in the Bahá'í Writings and literature has been employed.

Part One

The Problem of Humanitarian Intervention and International Law

1 The Need for a Fresh Approach

1.1. Humanitarian Intervention and International Law at the Turn of the Century

Few foreign policy issues during the last decade of the twentieth century elicited as much controversy as the use of military intervention for ostensibly humanitarian purposes, with some degree of force beyond the self-defense of military personnel authorized to help achieve these purposes—what I will call humanitarian intervention. Most often, but with notable exceptions, including the bombing of the Federal Republic of Yugoslavia (Serbia and Montenegro) (which I will refer to as "Yugoslavia") in the spring of 1999 by forces of the North Atlantic Treaty Organization (NATO), such intervention was conducted with authorization by the U.N. Security Council. Much of the controversy over humanitarian intervention has involved important issues under international law, including the legality of various forms of humanitarian intervention, with or without a U.N. blessing, and the extent to which international law regulates or ought to regulate how humanitarian intervention is conducted. The debate over these international legal issues is likely to persist in the new century, as humanitarian crises continually flare up and policymakers and lawyers are forced to grapple with them.

This book attempts to develop a new approach to some of the difficult problems raised by humanitarian intervention under international law. Because the pattern established during the last decade of the twentieth century was for most states or regional organizations to seek Security Council authorization for humanitarian intervention operations, or for the U.N. itself to undertake such operations, the book devotes proportionately greater attention to such forms of Council-authorized intervention, which I will often refer to as "U.N. humanitarian intervention." But it also addresses the legal problems associated with intervention not authorized by the Security Council.

One reason that humanitarian intervention has proven so controversial from a legal perspective is that it has underscored significant conflicts among legal norms in the U.N. Charter and contemporary international law. Some

norms tend to support humanitarian intervention, while others tend to oppose it.

Legal norms tending to support humanitarian intervention include the norms of international human rights law, international humanitarian law, and international criminal law. The U.N. Charter itself proclaims as a fundamental purpose of the U.N. the achievement of "international cooperation in . . . promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."[1] Under Article 55, the United Nations "shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all."[2] And under Article 56 "all Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement" of this purpose.[3] In 1948, the U.N. General Assembly adopted the Universal Declaration of Human Rights, which in turn was followed by the promulgation of numerous international human rights treaties, many of which have been widely ratified by U.N. member states. In keeping with these human rights norms, the international community has adopted a number of treaties relating to the conduct of war and providing protections for civilians and other vulnerable individuals, the most important of which being the Fourth Geneva Convention of 1949. And certain treaties, including those on genocide and torture, as well as the four Geneva Conventions, now require states to prosecute and punish individuals who commit particularly egregious violations of international human rights law and international humanitarian law.[4]

The existence of this expanding corpus of legal norms guaranteeing a minimal level of respect for human rights and human dignity suggests that in some cases military intervention in defense of these norms may be legitimate, and perhaps even required, under international law. Indeed, Chapter VII of the Charter empowers the Security Council to take economic or military enforcement action without the consent of the state or other parties involved when it determines the existence of a "threat to the peace," "breach of the peace," or "act of aggression"[5]—language that has been used by the Council to encompass certain human rights violations and to be the basis for authorizing humanitarian intervention.

At the same time, however, various norms in the U.N. Charter and contemporary international law appear to disfavor humanitarian intervention. These include the norms of state sovereignty, domestic jurisdiction, nonintervention, the pacific settlement of disputes, the nonuse of force, self-determination, and (in the case of U.N. humanitarian intervention) U.N.

impartiality. For example, Article 2(1) of the U.N. Charter affirms that the U.N. "is based on the principle of the sovereign equality of all its Members,"[6] and Article 2(7) declares that the U.N. may not "intervene in matters which are essentially within the domestic jurisdiction of any state," with the exception of enforcement measures taken by the Security Council under Chapter VII of the Charter.[7] Article 2(3) and Chapter VI of the Charter encourage states to settle their disputes peacefully and counsel against the resort to force.[8] Moreover, Article 2(4) of the Charter specifically declares that members of the U.N. may not threaten or use force against the "territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[9] This provision might be interpreted (as we will see in Chapter 11) as prohibiting humanitarian intervention by states without Council authorization. The Charter also establishes as a purpose of the U.N. the development of "friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples."[10] Humanitarian intervention by outside forces may be seen as interfering with the exercise of such a right of self-determination. Finally, humanitarian intervention may be perceived as violating a principle of U.N. impartiality, which is reflected in many Charter provisions.[11]

Before I embark on an elaboration of the fresh approach proposed in the book, which can help to reconcile these conflicting legal norms, let us survey the history of the current debate on humanitarian intervention. When the Cold War suddenly ended, optimism at first abounded. The way appeared to be clear for greater East-West cooperation and the thawing of the icy gears of the U.N. Security Council, whose peace-making role under the U.N. Charter had been subverted by the Cold War deadlock. The military success of the 1991 Gulf War, however fleeting, only reinforced the view shared by many observers that the world stood at the threshold of a new era—an era in which the U.N. would at last become an effective guarantor of world peace and even human rights.

Hopes that the end of the Cold War would usher in a period of relative peace and stability in world affairs were, however, quickly dashed by a veritable explosion of national, ethnic, religious, and tribal conflicts in numerous corners of the globe. Despite the intensity of these political upheavals, the U.N. appeared to be a promising instrument for containing their destruction, saving human lives, and safeguarding the human rights of civilians. The Security Council launched major new peacekeeping operations in these troubled regions. The number and scope of U.N. operations quickly mushroomed

and placed an unprecedented strain on the U.N.'s meager financial, human, and military resources.

Traditional peacekeeping operations began in 1956, when Secretary-General Dag Hammarskjöld formulated a plan for the United Nations Emergency Force in the Sinai (UNEF I) and defined the mission of U.N. peacekeeping as the interposition of U.N. troops between parties to a conflict to supervise an agreed truce or police a cease-fire line. As envisioned by Hammarskjöld, cardinal principles of peacekeeping were that the troops would remain only with the consent of all parties, that they would act impartially, and that they would use force only in self-defense. They were to be lightly armed, and they were not intended to engage in enforcement action.[12]

In contrast to this traditional peacekeeping paradigm, the new post–Cold War peacekeeping operations were not limited to the military function of monitoring a cease-fire line. Instead, they involved the coordination of a broad array of nonmilitary tasks, including humanitarian relief, electoral monitoring, and civilian policing. These multifaceted missions are often referred to as "second-generation" peacekeeping operations.[13] In addition, in many cases the Security Council exercised its powers under Chapter VII of the Charter to mandate large-scale economic sanctions against states committing gross human rights abuses.[14]

Perhaps most significantly, many Security Council–endorsed military operations, whether under U.N. command or consisting of multinational coalitions, attempted the use of military force in more robust ways that went beyond the self-defense of the troops involved to achieve these humanitarian objectives. These forays into military enforcement again invoked the Council's jurisdiction under Chapter VII of the Charter.[15]

The new U.N. humanitarian intervention arguably was born from the ashes of the Gulf War and as a result of the Security Council's precedent-setting decision to authorize a coalition of U.N. member states, spearheaded by the United States, to use "all necessary means" to dislodge Iraqi forces from Kuwait.[16] In the war's immediate aftermath, attempted revolts by Kurds in northern Iraq and Shi'ite Muslims in southern Iraq were cruelly repressed by Iraqi troops, driving hundreds of thousands of refugees across the borders into neighboring Turkey and Iran. Allied governments soon decided in the face of international popular pressure to establish "safe havens" for the Kurdish refugees and protect these enclaves with the threat or use of military force. They took the position that their action, dubbed "Operation Provide Comfort," was authorized by Security Council Resolution 688.[17]

The Kurdish operation was the precursor for many experiments with

humanitarian intervention during the 1990s. I examine six representative cases here. In five of these cases the Security Council endorsed the use of force other than in strict self-defense for primarily humanitarian purposes. These involved the safeguarding of humanitarian efforts and the deterrence of attacks against "safe areas" in Bosnia-Herzegovina (Bosnia); the delivery of humanitarian relief, and the promotion of national political reconstruction, in Somalia; the maintenance of public order and the protection of civilians in Rwanda following the devastating outbreak of genocide in that country in early 1994; the restoration of the democratically elected government of Haiti in late 1994; and the deployment of the multinational Kosovo Force (KFOR) in Kosovo in June 1999 following the NATO bombing campaign to allow a safe return of Kosovo Albanian refugees and to assist in rebuilding Kosovo's civilian institutions. In the sixth case—the NATO bombing campaign—humanitarian intervention was conducted without authorization by the Security Council. In the next section I review these six cases, discussing the last two, involving Kosovo, together. I follow up on this review with a brief survey of certain developments after the deployment of KFOR, including events in East Timor, Chechnya, Sierra Leone, and the Democratic Republic of the Congo.

1.2. Representative Cases of Humanitarian Intervention

1.2.1. Bosnia

Following the outbreak of war in the former Yugoslavia in 1991 after the Yugoslav Republics of Slovenia and Croatia declared their independence, as well as the subsequent imposition by the Security Council of an economic and arms embargo that was gradually strengthened in subsequent resolutions, the Security Council deployed a United Nations Protection Force (UNPROFOR) first to Croatia. In early 1992, the fighting spread to Bosnia, which also claimed independence, with Serbia and Croatia each supporting military efforts by Bosnian Serbs and Croats against the Bosnian government. In April 1992, Serbian forces initiated a major military campaign involving the terrorization of Bosnian Muslim civilians. In response to this brutal fighting, the Council authorized the extension of UNPROFOR into Bosnia.[18]

The U.N. soon recognized Croatia, Slovenia, and Bosnia as independent U.N. member states in May 1992—a recognition that converted the conflict in the former Yugoslavia from a "domestic" one to an "international" one

over which the Council could exercise jurisdiction under Chapter VII if it so chose. As noted earlier, the Council's jurisdiction under Chapter VII extends only to situations that constitute a "threat to the peace," "breach of the peace," or "act of aggression." The first two expressions are understood to refer only to "international peace." U.N. member states were clearly more comfortable dealing with the conflict as an international war, which unquestionably would not be covered by the domestic jurisdiction limitation in Article 2(7) of the Charter.

UNPROFOR's mandate was quickly expanded to include protection of the Sarajevo airport and the delivery of humanitarian relief in Bosnia generally.[19] Concerned about increasing attacks against UNPROFOR personnel, the Council instituted a ban on all military flights over Bosnia.[20] In February 1993 the Council called for the strengthening of UNPROFOR's security by providing it with "the necessary defensive means."[21] About a month later, the Council extended the ban on military flights to include all nonmilitary as well as military flights over Bosnia and authorized member states, acting nationally or through regional organizations, to take "all necessary measures" to enforce the ban.[22] NATO agreed to provide air support for this purpose as of April 1993. These bans were violated routinely without any adverse consequences.

In April and May 1993, after it had long become apparent that the Bosnian Serbs were engaging in a calculated and large-scale effort to eradicate the Bosnian Muslim population, the Council strongly condemned the Bosnian Serb atrocities (euphemistically dubbed "ethnic cleansing") and established so-called safe areas for the beleaguered Muslims, drawing in part on the earlier precedent of safe areas for Iraq's Kurds.[23] While UNPROFOR did not have a mandate actually to protect the safe areas through the use of deadly force, it was empowered in Resolution 836 to "deter" attacks on the safe areas, monitor a cease-fire, promote the withdrawal of non-Bosnian government forces, and occupy key points on the ground, as well as to continue to participate in the delivery of humanitarian relief. The Council also authorized UNPROFOR in carrying out this mandate to take necessary measures when acting in self-defense, "including the use of force, in reply to bombardments against the safe areas by any of the parties or to armed incursion into them or in the event of any deliberate obstruction in or around those areas to the freedom of movement of UNPROFOR or of protected humanitarian convoys." The Council further authorized all member states, again including regional organizations, to take "all necessary measures, through the use of air power, in and around the safe areas" to support UNPROFOR in its extended mandate.[24]

To implement this more ambitious mandate UNPROFOR developed an often uneasy relationship with NATO. As noted above, NATO supplied air power for use in enforcing the Council-declared "no-fly zone" and also in conducting sporadic attacks on Serbian military positions in an attempt to enforce compliance with Council resolutions calling for the withdrawal of heavy weapons from the perimeter of the safe areas. This was the first time the U.N. enlisted the assistance of a regional organization in undertaking enforcement action, even though such action by regional organizations at the Council's direction had been provided for in Chapter VIII of the Charter.[25] The British and French governments, which provided the bulk of UNPROFOR's peacekeepers, were far less keen than the U.S. government on air offensives out of concern for the safety of their troops and in keeping with their view of the conflict as primarily a civil war rather than a war of Serbian aggression. They, and the U.N. secretary-general, were convinced accordingly that UNPROFOR should, as a general rule, adhere to traditional peacekeeping doctrine and use force only in self-defense. At the insistence of the United States, however, on several occasions air strikes were either threatened or conducted.

The Council attempted to deal with the abhorrent practices of mass murder, torture, and rape that characterized the conflict in Bosnia primarily through judicial means rather than through the use of the military instrument. The Council established an ad hoc International Criminal Tribunal for the Former Yugoslavia (ICTY), again acting under the authority of Chapter VII, to try individuals accused of violations of international humanitarian law.[26]

NATO's unpredictable "pinprick" air strikes were unsuccessful in deterring the Bosnian Serbs from overrunning the safe areas of Srebrenica and Zepa in the summer of 1995 and committing mass killings of Muslim civilians.[27] The reluctance of U.N. contingents to use force against the Serbs contributed to a public perception of U.N. "humiliation," especially after these attacks. In December 1999 Secretary-General Kofi Annan issued a highly self-critical report on the U.N.'s failure to prevent the massacre of thousands of Muslim men and boys at Srebrenica after UNPROFOR troops abandoned the safe area.[28] In August and September 1995, NATO, under U.S. pressure, launched a massive bombardment of Serb military positions around Sarajevo, which, together with Croat and Bosnian government military successes, finally brought the Serb party to the negotiating table and paved the way for the Dayton Peace Accords. The Accords authorized the deployment of a multinational Implementation Force (IFOR) led by NATO.[29]

The entire UNPROFOR operation was frustrated by deep divisions among U.N. member states (including members of the Security Council and NATO)

concerning the scope of UNPROFOR's mission and the proper strategy for dealing with the conflict. Member states and U.N. organs took very different views of how to resolve the legal and ethical[30] tensions between concern for the human rights of civilians, on the one hand, and the goal of facilitating an early settlement by refraining from "excessive" uses of force and remaining "impartial," on the other. For example, members of the General Assembly sympathetic to the Bosnian Muslim cause succeeded in having a number of resolutions adopted urging the secretary-general to direct UNPROFOR to protect the safe areas and the Council to take stronger action to put a stop to ethnic cleansing and to close down the detention camps immediately.[31] On the other hand, Secretary-General Boutros Boutros-Ghali consistently maintained that UNPROFOR did not have a mandate, under relevant Security Council resolutions, to use force to protect the civilian population should civilians come under direct attack.[32] Many observers outside the U.N. system argued that the Council was legally entitled to adopt, and should have adopted, much stronger military measures to stop the practice of ethnic cleansing. They viewed the U.N.'s abandonment of the safe areas as a dereliction of legal and moral duties of catastrophic proportions.

IFOR's mission pursuant to the Dayton Peace Accords manifested greater agreement among participating U.N. member states than that of UNPROFOR. Because the fighting had ceased and the parties had granted consent to the deployment, contributing states were willing to give IFOR a strong mandate and put significant military resources at its disposal. As a result of the disagreements that marred UNPROFOR and U.S. perceptions of U.N. military incompetence, the United States insisted on a coalition model for the IFOR operation rather than a Security Council-controlled mission. However, President William Clinton and the parties sought a U.N. blessing for the operation, which was duly provided by the Security Council.[33]

Nevertheless, IFOR raised challenging legal and ethical issues of its own about the proper functions of U.N.-authorized military operations. One of the most controversial issues was the potential responsibility of IFOR (and its successor, the Stabilization Force, or SFOR) to apprehend persons who had been indicted by the ICTY, including Bosnian Serb leader Radovan Karadžić and military chief Ratko Mladić. Participating states showed reluctance to do so out of concern for the negative impact on continued peaceful implementation of the Accords—a position that drew much criticism from nongovernmental organizations (NGOs) and the media. As of June 30, 2001, neither Karadžić nor Mladić had been apprehended, although pressure was growing for their arrest after the transfer of former Yugoslav president Slobodan Milošević to the Hague on June 28 (see subsection 1.2.5).[34]

1.2.2. Somalia

The U.N.'s excursions into Somalia raised boldly the issue of whether U.N.-authorized military operations legally can or ethically should attempt to secure the delivery of humanitarian supplies in the middle of a "hot" conflict between warring parties within a state without their consent or pressure parties in a civil conflict to achieve a political settlement.[35] The collapse of the government of President Mohamed Siad Barre on January 26, 1991, resulted in fighting between rival political movements, including those led respectively by Ali Mahdi and General Mohamed Farah Aidid. Civil war tore the country apart and left it without any effective government whatsoever. Marauding soldiers from the various factions seized food supplies from an already-starving civilian population, contributing to a famine crisis of tremendous proportions, which in turn precipitated large-scale population movements into neighboring Kenya, Ethiopia, and Djibouti.

Following appeals for action by various regional organizations, in January 1992 the Council expressed its grave alarm "at the rapid deterioration of the situation in Somalia and the heavy loss of human life" and the Council's awareness of the "consequences on stability and peace in the region." It declared that "the continuation of this situation constitutes . . . a threat to international peace and security," and accordingly acted under Chapter VII to establish a mandatory general and complete weapons embargo.[36] Three months later, the Council decided to establish a U.N. security force to protect humanitarian activities, the United Nations Operation in Somalia (UNOSOM I).[37] Initially UNOSOM I was to deploy fifty unarmed military observers to monitor a cease-fire agreement between Mahdi and Aidid, and eventually, after consultations with the Somali factions, it was to put in place a larger force of five hundred to provide security for humanitarian operations.

The Somali factions agreed to the presence of unarmed observers but not the envisaged armed security force. Nevertheless, in Resolution 767, the Council warned that if the parties failed to cooperate with a view to deployment of the force it did "not exclude other measures to deliver humanitarian assistance to Somalia." In the same resolution the Council endorsed a comprehensive and urgent airlift operation.[38] At the same time, Secretary-General Boutros-Ghali was pursuing various diplomatic efforts through Under Secretary-General for Political Affairs James Jonah and a special representative, Mohamed Sahnoun.

In August 1992, the factions finally agreed to the deployment of a security force consisting of a contingent of five hundred Pakistani peacekeepers,

but disagreements among the factions in the ensuing months slowed the full deployment of the peacekeepers. By November 1992, the situation had continued to worsen. The secretary-general persuaded the Council to act decisively. After he presented the Council with five options, three of which involved military action under Chapter VII (including either Council authorization of a multinational force or establishment of a U.N.-commanded force, the latter of which he preferred in principle despite its practical problems),[39] the Council opted to accept an offer from President George Bush of the United States to send troops to protect the delivery of food supplies.

In Resolution 794, adopted on December 3, 1992, the Council determined "that the magnitude of the human tragedy caused by the conflict in Somalia, further exacerbated by the obstacles being created to the distribution of humanitarian assistance, constitutes a threat to international peace and security." Acting under Chapter VII, the Council authorized a multinational coalition led by the United States, known as the Unified Task Force (UNITAF), "to use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia."[40] This diplomatic formulation was clearly understood as permitting the use of force other than in self-defense and constituted a significant departure from traditional peacekeeping practice. The Council believed that such action was warranted in view of pervasive looting, attacks on aircraft and ships delivering humanitarian relief, and "widespread violations of international humanitarian law." The Council, evidently concerned about the risk of establishing a precedent for future uses of Chapter VII military operations for purely humanitarian purposes, painstakingly emphasized "the unique character of the present situation in Somalia" and "its deteriorating, complex and extraordinary nature, requiring an immediate and exceptional response."[41] UNITAF was welcomed by the local population and was able to undertake its humanitarian operations with relative success.

At the same time, major disagreements arose about whether UNITAF should attempt to disarm the factions in view of the continuing proliferation of small arms in the country. Initially, UNITAF interpreted its mandate as being limited to the protection of humanitarian relief operations.[42] However, cease-fire agreements signed by the factions in January 1993 provided that they would voluntarily hand over their heavy weapons to a cease-fire monitoring group consisting of UNITAF and UNOSOM I personnel. The militias placed their heavy weapons in weapons sites they declared to UNITAF, and UNITAF carried out routine inspections of the sites.[43]

UNITAF, believing that its humanitarian mission had been fulfilled,

announced its departure. But concern was growing that this short-term improvement would not last without a fundamental restructuring and rebuilding of the political and administrative apparatus of the former Somali state. Accordingly, the Security Council unanimously adopted on March 26, 1993, Resolution 814, which invoked Chapter VII of the Charter and expanded UNOSOM's mandate to include various proactive tasks designed to facilitate what came to be known as "nation building."[44] These tasks included the taking of enforcement action against factions engaging in hostilities and the seizure of small arms possessed by "unauthorized armed elements."[45] This was the first time troops under U.N. command (rather than the command of a particular state or states, as in the Gulf War) were permitted to use force other than in strict self-defense.

The formal transfer of authority from UNITAF to the enhanced UNOSOM (UNOSOM II) occurred in April 1993. Many countries participating in UNITAF, including the United States, designated portions of their existing troops to serve in the new U.N.-commanded force. Despite the presence of some troops already on the ground, the U.N. faced tremendous logistical difficulties in assembling additional adequately equipped troops and in coordinating the huge operation. Soon thereafter, a tragic incident occurred on June 5, 1993, when Pakistani peacekeepers returning from an inspection of a weapons storage site at Radio Mogadishu were ambushed, stranded, and fired upon for hours. Various relief contingents that ultimately attempted to assist the Pakistanis themselves came under fire and suffered numerous casualties. In the end, twenty-four Pakistani peacekeepers were dead.[46]

The Security Council reacted immediately and vigorously. The next day, it adopted a resolution authorizing punitive action against those responsible for the June 5 attack, which the Security Council assumed to be Aidid and other leaders of his faction.[47] It reaffirmed that the secretary-general was authorized under Resolution 814 to take "all necessary measures against all those responsible" for the attacks "to establish the effective authority of UNOSOM II throughout Somalia, including to secure the investigation of their actions and their arrest and detention for prosecution, trial and punishment."[48]

UNOSOM II attempted to implement its mandate to capture General Aidid and fellow leaders of his political faction, and to disarm the factions, by unleashing offensive attacks against faction strongholds, culminating in what amounted to a state of war. UNOSOM II ceased to be concerned about maintaining any perception on the part of the factions of its "impartiality." Numerous Somali civilians were killed, apparently, at least in many cases,

as a result of fire by UNOSOM II forces. Moreover, there were confirmed reports of the torture and murder of civilians by certain contingents.[49] On October 3, 1993, U.S. special operations forces that were not under the command of UNOSOM II attacked the Olympic Hotel in search of Aidid and were ambushed. Eighteen U.S. soldiers perished in the operation, which marked a turning point in UNOSOM II's fortunes. The U.S. government, subject to intense congressional pressure, decided to withdraw its forces by the end of March 1994, and numerous other countries followed suit. The Security Council, in a number of resolutions, authorized the reduction of UNOSOM II's force level and decided that its mission would be completed by March 1995.

1.2.3. Rwanda

In April 1994, U.N. member states were called upon to decide whether legally or ethically they could or should—or indeed, were required to—use military force to oppose one of the worst outbreaks of genocide since the Holocaust. That outbreak occurred in Rwanda.[50]

In mid-1993 the U.N. had deployed an observer mission in Uganda to monitor the border between Rwanda and Uganda, which had been the scene of incursions by the mainly Tutsi Rwandan Patriotic Front (RPF). The Security Council had also authorized, in October 1993, the establishment of a United Nations Assistance Mission for Rwanda (UNAMIR) to assist Rwanda in constituting a new government in accordance with a peace agreement negotiated in Arusha, Tanzania. Since 1973 Rwanda had been governed by a single party headed by Major General Juvénal Habyarimana, who was Hutu. Ethnic violence between Tutsi and Hutu had plagued Rwanda sporadically since its independence from Belgium in 1962.

Government forces, including the so-called *interhamwe* militias, unleashed an orchestrated campaign of genocide against the Tutsi population and moderate Hutu in April 1994, following Habyarimana's death in a mysterious plane crash.[51] UNAMIR's force commander, Romeo Dallaire, had warned U.N. headquarters even before the plane crash that a planned massacre was imminent, but his superiors directed him not to take the more robust preventive steps he had requested.[52] Moreover, problems of command and control hampered UNAMIR's ability to respond to the situation in the midst of the turmoil.[53] The Security Council's initial reaction was substantially to cut back UNAMIR's strength from its existing size of approximately 2,000 personnel to a token force of about 270, apparently believing that UNAMIR could play no useful role in the face of a bloodbath on such a massive scale.[54]

There is evidence, too, that some U.N. officials were concerned about maintaining an image of U.N. impartiality.[55] Opposition from the United States delayed efforts to revive UNAMIR, while U.S. officials were directed to refrain from characterizing the situation as one of "genocide" for fear of triggering obligations under the Genocide Convention.[56]

Eventually, on May 17, 1994, following the recommendations of Secretary-General Boutros-Ghali, the Security Council adopted Resolution 918, which approved an expanded mandate for UNAMIR, including the deployment of 500 Ghanaian peacekeepers, and an eventual increase in its size to 5,500 personnel to enable it to assist in the protection of displaced persons and refugees and to provide security for humanitarian areas and relief operations.[57] On June 8, the Council adopted Resolution 925, which formally authorized UNAMIR II and affirmed that UNAMIR II would contribute to the protection of displaced persons, refugees, and civilians at risk, including through the establishment of secure humanitarian areas, and would provide security for humanitarian relief operations.[58] However, continued foot-dragging by the United States and other countries, including African states, delayed efforts to launch UNAMIR II. Secretary-General Boutros-Ghali called this situation a "scandal."[59]

In the face of such equivocation, France expressed its concern about the urgent plight of civilians and offered to insert its own troops with the purpose of protecting civilians in designated areas from further attacks pending UNAMIR II's full deployment. The Council, although some members were wary of French political motivations based on its historical ties with the Hutu government, and despite the vehement opposition of the RPF to the French plan, nevertheless accepted France's offer to send in troops for a period of two months. In Resolution 929, adopted on June 22, 1994, the Security Council acted under Chapter VII to authorize France and other participating states to use "all necessary means"—the now common formulation denoting the use of nonconsensual force—to achieve the humanitarian objectives the Council had previously established for UNAMIR II in Resolution 925.[60] France invited others to join its intervention, but no other countries aside from Senegal offered to provide personnel. Assessments differ over whether the French troops carried out their mission with impartiality.[61] They did succeed in establishing a "safe zone" in the southwestern corner of the country in which primarily Hutu refugees, many of whom had actually participated in the massacres, sought protection.

France made it clear that its troops would stay for only two months, and in August 1994 they departed after the victory of the RPF forces, despite the pleas of U.N. officials for the troops to stay. The French withdrawal accel-

erated a massive exodus of largely Hutu refugees into Zaire and other neighboring countries. The United States agreed to send troops to eastern Zaire to assist in the delivery of food and medical aid and help prevent the spread of disease in overcrowded refugee camps. As the refugee crisis intensified, Secretary-General Boutros-Ghali attempted to persuade member states to establish a force to stem violence in the Zairean refugee camps, which were populated by Hutu militants as well as "innocent" refugees, but to no avail.[62] Zaire eventually closed many of the camps. Meanwhile, the Rwandan government insisted that UNAMIR be withdrawn, which occurred in early 1996. Armed attacks by Hutu supporters of the deposed government in the remaining Zairean refugee camps continued to wreak havoc, and in November 1996 it was reported that armed gangs were preventing refugees from returning to Rwanda and disrupting the flow of humanitarian aid. Many relief organizations pressured member states to send some type of force to eastern Zaire to prevent another catastrophic round of starvation. Eventually Canada led an effort to put together a coalition force, which was duly approved by the Council in Resolution 1080 of November 15, 1996.[63] However, the refugees were suddenly released, and they swarmed back into Rwanda, apparently relieving the immediate crisis.[64] The multinational force was never deployed.

As in the case of Bosnia, the Security Council responded to the atrocities by creating bodies to engage in criminal investigations and impose criminal sanctions after the fact. It established first a commission of experts to examine allegations of violations of international humanitarian law, including genocide, and later a Rwandan war crimes tribunal on the model of the ICTY to prosecute individuals responsible for the massacres, the International Criminal Tribunal for Rwanda (ICTR).[65]

In hindsight, many observers believe that a prompt and forceful U.N. response to the initial episodes of violence in April 1994 could have prevented the ferocious spread of the slaughter, which ultimately claimed up to approximately 800,000 lives.[66] President Clinton admitted during a trip to Rwanda in 1998 that the international community had failed adequately to respond to the crisis there, and he candidly characterized the atrocities as "genocide."[67] And an independent commission appointed by Secretary-General Annan produced in December 1999 a report on the U.N.'s conduct with respect to Rwanda that was harshly critical of all involved actors.[68] In May 2000, the Organization of African Unity (OAU) released a report by an International Panel of Eminent Personalities that also concluded that the international community had failed the people of Rwanda.[69]

1.2.4. Haiti

In July 1994 the Security Council took the unprecedented step of authorizing, for the very first time, the use of force to depose, in Haiti, a government that had overthrown a democratically elected government.[70] Soon after Raul Cédras seized power in September 1991 in a military coup that displaced the government of Father Bertrand Aristide, who had assumed office in December 1990 following elections supervised by the U.N. and the Organization of American States (OAS), the OAS imposed economic sanctions against Haiti. The U.N. secretary-general and the General Assembly made a number of attempts, in cooperation with settlement efforts by the OAS, to encourage Cédras to depart voluntarily. In early 1993 the General Assembly authorized the deployment of a mission to monitor human rights violations in Haiti.[71]

As the situation festered, a representative of the Aristide government, with the approval of the OAS, called for the imposition of mandatory economic sanctions under Chapter VII, which the Council duly imposed in Resolution 841, adopted on June 16, 1993.[72] The Council expressed its concern "that the persistence of this situation contributes to a climate of fear of persecution and economic dislocation which could increase the number of Haitians seeking refuge in neighbouring Member States."[73] In July 1993, Cédras and Aristide signed an agreement for Aristide's return on Governors Island in New York, and the Council accordingly lifted the economic sanctions.[74] It also authorized the deployment of a United Nations Mission in Haiti (UNMIH) to support implementation of the agreement.[75]

After armed gangs prevented the docking in October 1993 of the *USS Harlan County,* which was carrying U.S. and Canadian personnel, and other attempts by the Cédras government to obstruct the deployment of UNMIH, the Council unanimously reimposed economic sanctions.[76] In a subsequent resolution it authorized states to use necessary measures to ensure compliance with the sanctions, including the halting of inbound maritime shipping.[77] Although the sanctions created great hardship for Haiti's poor, the Council later tightened them.[78] After the Haitian leaders expelled the UN-OAS human rights monitors in July 1994, the United States, believing that military intervention was necessary to implement the 1993 Governors Island Accord and finally dislodge the illegal Cédras government, asked the Security Council for permission to deploy armed force there, apparently with the encouragement of President Aristide. Although many Council members had misgivings about the operation, they acquiesced.

In Resolution 940, adopted on July 31, 1994, by a vote of twelve to none, with two abstentions (Brazil and China), the Council authorized the United States and other member states to use "all necessary means" to facilitate the departure of Haiti's military rulers, the "prompt return of the legitimately elected President and the restoration of the legitimate authorities of the Government of Haiti, and to establish and maintain a secure and stable environment."[79] In the succeeding months the United States apparently attempted to scare the Haitian leaders out of power by threatening an impending invasion, which was to begin in September. Fortunately, thanks to an eleventh-hour agreement with Haiti's rulers secured by a team led by former U.S. president Jimmy Carter, U.S. troops entered peacefully. Although the peaceful nature of the occupation generally won international approval, the U.S. government's perceived insistence on acting unilaterally without effective consultation with the U.N. (other than seeking Council approval) provoked the resignation of the U.N. envoy to Haiti, Dante Caputo.

In March 1995 the U.S.-led coalition handed over responsibilities to a U.N.-commanded force, UNMIH, pursuant to Security Council Resolution 975.[80] Although formally under U.N. command, at the insistence of the United States UNMIH was commanded by a U.S. national. Following the completion of municipal and parliamentary elections in June 1995 and the election of a new president, René Préval, in early 1996, UNMIH was reduced to a token presence and succeeded by a variety of smaller and primarily civilian police operations designed to help develop a fully functioning and professional Haitian national police force.[81]

The apparent success of the Haiti operation concealed a number of underlying problems. While the international community viewed a possible military invasion led by the United States as expedient, many states harbored serious reservations about the precedent being established for great power-orchestrated intervention to restore democracy. They were particularly concerned about the legality of such intervention in the absence of an internal or international armed conflict, or widespread violations of the right to life on the scale of Somalia, Bosnia, or Rwanda, and about the apparent disregard of the Charter's scheme for U.N.-commanded military operations in favor of delegating control to a single, and powerful, member state.

1.2.5. Kosovo

Kosovo provided another litmus test during the late 1990s of the international community's attitudes toward the legality and ethics of humanitarian

intervention.[82] Kosovo, a province of Serbia, had been the home of ethnic (and primarily Muslim) Albanians, who constituted 90 percent of the population. Nevertheless, Kosovo had been considered by the Serbs to be an integral part of Serbia and contained numerous sites regarded as holy by the largely Orthodox Serb community. After the rise of Yugoslav president Milošević to power in the late 1980s, the Serbian government stripped Kosovo of the limited autonomy it had been allowed and launched a systematic campaign of discrimination against Kosovo Albanians, depriving them of jobs and reasserting firm Serb control over the province. At the same time, many members of the Albanian community pressed for independence from Serbia, and the Kosovo Liberation Army (KLA) undertook a violent campaign of "self-determination."

The Yugoslav and Serbian governments responded to these political stirrings in Kosovo with force. In March 1998, as attacks by Serbian troops against Kosovo Albanian civilians, as well as alleged members of the KLA, intensified, the Security Council imposed a mandatory arms and weapons embargo with the purpose of "fostering peace and stability in Kosovo." It expressed its support for a political solution to the claims of Kosovo Albanians for independence that would grant Kosovo a "substantially greater degree of autonomy and meaningful self-administration" while respecting the "territorial integrity of the Federal Republic of Yugoslavia." The Council further urged the prosecutor of the ICTY to begin gathering information related to the violence in Kosovo that might fall within its mandate and noted that the Yugoslav authorities had an obligation to cooperate with the ICTY.[83] As the situation in Kosovo continued to deteriorate, Secretary-General Annan, in a June 1998 speech, suggested that some form of U.N.-authorized military intervention might be warranted.[84] In September 1998, the Council indicated its concern at persistent reports of violations of human rights and of international humanitarian law. Again acting under Chapter VII, it demanded the cessation of hostilities, insisted that the Kosovo Albanian leadership condemn all terrorist action, called upon the parties to enter into a meaningful dialogue and to reach a negotiated political solution, and endorsed steps taken to establish a diplomatic monitoring mission.[85]

In October 1998, the United States was able to facilitate the negotiation of agreements between Yugoslavia and the Organization for Security and Co-operation in Europe (OSCE) and NATO allowing the OSCE to establish a ground verification mission in Kosovo and permitting NATO to undertake an air verification mission. The Security Council endorsed and demanded full implementation of these agreements, and further called for the prompt

investigation of all atrocities committed against civilians and full cooperation with the ICTY.[86] It welcomed Yugoslavia's commitment to guarantee the safety and security of the missions and affirmed that "in the event of an emergency, action may be needed to ensure their safety and freedom of movement"—thus hinting at the possible use of force to protect the observers.[87] The OSCE deployed observers, but the observers continued to report the commission of various atrocities by Serbian armed forces, including the massacre of Kosovo Albanians in the village of Racak in January 1999. Yugoslavia also expelled the head of the OSCE mission and refused to allow access by the prosecutor of the ICTY.[88]

In the wake of these disturbing developments, a Contact Group consisting of the governments of France, Germany, Italy, Russia, the United Kingdom, and the United States intensified efforts to achieve a political settlement. These efforts resulted in negotiations at the Rambouillet château in France in February 1999 between representatives of Yugoslavia and representatives of the Kosovo Albanian community. The draft so-called Rambouillet accords would have allowed substantial autonomy to Kosovo and permitted the deployment of a multinational NATO-led force to monitor their implementation. However, the talks ended inconclusively. A follow-up attempt was made at a Paris conference in mid-March 1999 to reach a similar agreement. The Kosovo Albanian delegation signed the document, but Yugoslavia's representatives refused, even with looming threats of NATO air strikes.[89]

Following these diplomatic failures, on March 24, 1999, NATO launched, without Security Council authorization, an air war against Serbia designed to deter attacks against ethnic Albanians living in Kosovo and to pressure the Serbs to agree to the text they had rejected at Paris. President Clinton declared that doing so was a "moral imperative."[90] He and other NATO leaders apparently believed that Security Council authorization was not possible because of threatened vetoes by Russia and China. Instead of deterring attacks, the massive NATO bombardment was followed by an evidently systematic campaign of terror, rape, murder, arson, and expulsions perpetrated by Yugoslav and Serbian forces, precipitating a massive refugee and humanitarian crisis in the region.[91] NATO countries declined to send ground troops and instead intensified the air campaign, which lasted nearly two and a half months.

At the beginning of the air campaign, which Russia bitterly opposed, Russia, Belarus, and India introduced a draft resolution in the Security Council that would have condemned the bombings.[92] The Council rejected the draft resolution by a vote of three in favor (China, Namibia, and Russia)

and twelve against, with no abstentions.[93] Meanwhile, Secretary-General Annan suggested that NATO had violated the U.N. Charter by acting without Security Council authorization.[94] At the same time, he insisted that the Yugoslav authorities immediately end their campaign of terror against the civilian population of Kosovo, withdraw their forces, allow the return of refugees and displaced persons, and accept the deployment of an international military force to provide a secure environment. When the Yugoslav authorities accepted these conditions, he said, he would then urge NATO to suspend its air bombardments. He also called for a lasting political solution following the cessation of hostilities.[95] In May 1999, the Council was able to muster agreement on a resolution urging increased humanitarian assistance to Kosovo refugees, calling for free access for U.N. and other humanitarian personnel, and pressing for continued work toward a political solution consistent with principles that had been adopted by the so-called G-8 countries (Canada, France, Germany, Italy, Japan, Russia, the United Kingdom, and the United States).[96] At the end of May, the prosecutor of the ICTY indicted Milošević and four other Serb leaders for violations of the laws or customs of war and crimes against humanity, including the murder, forced deportation, and persecution of Kosovo Albanians on political, racial, or religious grounds.[97]

In the course of the air war, NATO targeted many mixed- or civilian-use structures, including bridges, a heating plant, and the Serbian television and radio headquarters, which resulted in numerous civilian deaths. It used cluster bombs in populated areas as well as depleted uranium projectiles, and was alleged to have illegally caused damage to the environment.[98] Moreover, apparently accidental bombings took the lives of many more civilians, including occupants of the Chinese Embassy in Belgrade in May 1999. It was determined by a number of studies that by the end of the air campaign approximately five hundred civilians had died as a result of the NATO action.[99] Reputable human rights organizations concluded that NATO was responsible for violations of international humanitarian law.[100] On the other hand, it was also generally recognized that NATO had taken many precautions to reduce the number of civilian casualties. A committee appointed by the ICTY prosecutor concluded in a report released in June 2000 that there were no justifications for commencing an investigation by the Office of the Prosecutor of individuals acting under NATO's authority for possible prosecution for war crimes, crimes against humanity, or genocide, even though the committee admitted that the selection "of certain objectives for attack may be subject to legal debate."[101]

In early June 1999, Yugoslavia acceded to NATO demands, and the Security Council in Resolution 1244, adopted on June 10, 1999,[102] endorsed an agreement negotiated with Milošević by Finnish president Martti Ahtisaari and Russia's special representative Viktor Chernomyrdin, and also developed with the participation of U.S. deputy secretary of state Strobe Talbott. The agreement and the Security Council resolution called for the deployment of a multinational force, KFOR, "under United Nations auspices," and with "substantial [NATO] participation."[103]

Resolution 1244 authorized member states and relevant international organizations (such as NATO) to establish KFOR and to give it "all necessary means to fulfil its responsibilities." These responsibilities included deterring renewed hostilities, enforcing a cease-fire, ensuring the withdrawal of Serb and Yugoslav forces, demilitarizing the KLA, establishing a "secure environment in which refugees and displaced persons can return home in safety, [an] international civil presence can operate, a transitional administration can be established, and humanitarian aid can be delivered," and ensuring public safety and order. Resolution 1244 also authorized the secretary-general to establish a United Nations Interim Administration Mission in Kosovo (UNMIK), which would effectively take over the civil administration and economic reconstruction of Kosovo until such time as democratic self-governing institutions could be developed. The resolution further called for the promotion of "substantial autonomy and self-government" for Kosovo, in keeping with the draft Rambouillet accords.[104]

KFOR's deployment, however, was accompanied by a number of new disputes and problems. Tensions arose between NATO forces and the Russian contingent, which originally sought to control a sector of its own.[105] Many Kosovo Albanians protested the deployment of Russian troops, which were viewed as partial to the Serbs and as unwilling to support war crimes investigations.[106] Yugoslavia alleged, for its part, that KFOR did not adequately protect Serbs remaining in the province from attacks by ethnic Albanians, leading to a massive exodus of Serbs.[107] Violent clashes between Kosovo Albanians and Kosovo Serbs continued to erupt, as in Mitrovica in February 2000.[108] A number of incidents involving violations of human rights by KFOR personnel occurred, including the rape and murder of a Kosovo Albanian girl by a U.S. soldier.[109] And in early 2001, tensions spilled over into neighboring Macedonia, where ethnic Albanian extremists, apparently taking advantage of illegal arms shipments from Kosovo, launched a military campaign against the Macedonian government and the government responded strongly. These new tensions prompted the U.N. and NATO

members to consider whether and when military intervention in Macedonia was appropriate.[110]

Finally, some commentators faulted the peace agreement for failing to require the surrender of Milošević himself. Indeed, the agreement and Resolution 1244 generally did not permit KFOR access to territory outside Kosovo, including access to Belgrade, where Milošević consequently had a potential safe haven. After Yugoslav elections in September 2000, which brought opposition leader Vojislav Kostunica to power as president and forced Milošević's resignation, pressure intensified on the new government to turn Milošević over to the ICTY, despite Kostunica's pledge not to do so.[111] And according to press accounts, the secretary-general of NATO asserted that KFOR troops would apprehend Milošević if he visited Kosovo.[112] Subject to pressure to arrest Milošević before a March 31, 2001, deadline established by the U.S. Congress by which the president had to certify that Yugoslavia was cooperating with the ICTY in order to continue receiving U.S. economic aid, Yugoslav authorities stormed Milošević's residence on March 31 and eventually obtained his surrender.[113] Despite initial intentions to prosecute Milošević in Serbia, on June 28, 2001, the Serbian government, still under the influence of a threatened loss of Western economic aid, transferred Milošević to the ICTY for trial. The transfer contravened a Yugoslav constitutional court ruling holding a government decree requiring his transfer unconstitutional.[114]

With the deployment of KFOR, the U.N., which during the air campaign had been completely shut out from NATO decision-making, again assumed an important political and supervisory role in a humanitarian intervention operation. KFOR raised many of the same contentious legal and ethical issues as other U.N.-authorized humanitarian intervention operations during the 1990s. Moreover, the legality and morality of the original NATO intervention, without U.N. authorization, continued to elicit sharp disagreement among commentators.

1.2.6. Subsequent Developments

While many observers viewed the NATO intervention in Kosovo as unlikely to be repeated in other parts of the world, global events continued to challenge political leaders to consider the need for military intervention to avert potential humanitarian disasters. World leaders decided to intervene militarily in response to a number of crises and decided against military intervention in response to others.

For example, on August 30, 1999, the U.N. supervised a "popular consultation" of the East Timorese people. After the East Timorese overwhelmingly voted for independence from Indonesia, pro-government militias, with the apparent complicity of the Indonesian army, launched violent attacks against East Timorese and U.N. personnel. They began a widespread campaign of slaughter and arson, resulting in the displacement of hundreds of thousands of East Timorese civilians, many of whom fled to West Timor.[115] Pressure increased on political leaders to respond to the slaughter and protect East Timorese from further attacks. However, the U.N. Security Council failed to authorize any military deployment in the immediate aftermath of the rampage. Members apparently were reluctant to deploy a force without the consent of the Indonesian government, which balked at giving its approval, despite entreaties by a five-member delegation from the U.N. Security Council.[116] Eventually, in mid-September, Australia acquiesced to the secretary-general's request that it lead a multinational (but predominantly Australian) coalition. The deployment of the coalition force, referred to as the International Force, East Timor (INTERFET), was approved by Indonesia[117] and was authorized by the U.N. Security Council under Chapter VII of the Charter.[118] At its peak, INTERFET comprised approximately 11,000 soldiers from eighteen countries.[119]

The Security Council also approved the establishment of a United Nations Transitional Administration in East Timor (UNTAET), which was given overall responsibility for the administration of East Timor pending the organization of an elected Timorese government and included both an international civilian police force and military personnel.[120] INTERFET, which operated alongside UNTAET before it transferred complete authority to UNTAET in February 2000, was relatively successful in deterring further significant violence in East Timor, but pro-Indonesia militias continued to harass refugees in West Timor, and ruthlessly murdered three staff members of the United Nations High Commissioner for Refugees (UNHCR) on September 6, 2000.[121] The Security Council condemned the murders and insisted that the government of Indonesia take additional steps "to disarm and disband the militia immediately."[122] It further reiterated that those responsible for grave violations of international humanitarian and human rights law "should be brought to justice," with a role for the U.N. in that process.[123] In January 2001 the Council expressed its continuing concern about militia activity, underlined that "UNTAET should respond robustly to the militia threat in East Timor," and emphasized the need to bring to justice those responsible for serious crimes.[124] Despite the Council's call for justice, in May 2001 an

Indonesian court gave six former militiamen convicted in the killing of the three UNHCR staff members extraordinarily lenient sentences. Pressure intensified on the U.N. to establish an international tribunal to try serious crimes committed in East Timor in view of Indonesia's apparent lack of determination to do so.[125]

The East Timor crisis erupted just as the U.N. General Assembly was convening for its fifty-fourth session in New York. Both the East Timor and Kosovo crises prompted an extended debate on the subject of humanitarian intervention. Secretary-General Annan spoke in favor of a general right of the international community, through the Security Council, to intervene to prevent grave humanitarian disasters. He affirmed that "the core challenge to the Security Council and to the United Nations as a whole in the next century" is "to forge unity behind the principle that massive and systematic violations of human rights—wherever they may take place—should not be allowed to stand."[126] President Clinton likewise called upon the international community to strengthen its capacity "to prevent and, whenever possible, to stop outbreaks of mass killing and displacement."[127] At the same time, many governments, including that of China, expressed serious misgivings about the recognition of any right of humanitarian intervention.[128]

As the General Assembly convened in September 1999, Russia mounted another effort to suppress the simmering independence movement in the Russian republic of Chechnya. Russian troops surrounded the Chechen capital, Grozny, and began a systematic effort to oust, and in some cases apparently to terrorize, the civilian population. As Russian troops used more aggressive tactics, Western governments protested, but never seriously considered the option of military intervention, given their desire not to alienate an important power. The Russian action eventually quashed the Chechen independence fighters and subdued the civilian population, at least temporarily. But many accusations were made that Russian troops had acted wantonly and committed serious violations of international humanitarian law.[129]

Meanwhile, violence on the continent of Africa also continued to escalate. For example, in July 1999 a peace agreement was signed between the government of Sierra Leone and rebel forces led by Foday Sankoh. That agreement was reached with the diplomatic assistance of the Economic Community of West African States (ECOWAS) after two years of fighting following a military coup in May 1997 that ousted the democratically elected president, Ahmad Tejan Kabbah. The fighting involved government and rebel forces as well as a Nigerian-led multinational force, the Military Observer Group of ECOWAS (ECOMOG). ECOMOG was deployed under the aegis

of ECOWAS, and with the after-the-fact endorsement of the Security Council,[130] to help put an end to the unrest and to restore the authority of the democratically elected government. In July 1998 the U.N. Security Council had authorized the deployment of the United Nations Observer Mission in Sierra Leone (UNOMSIL) after the apparent restoration of the government to power.[131]

The July 1999 agreement quickly broke down, however, and rebel forces resumed an unprecedented campaign of terrorism against civilians that included attacks on, the abduction of, and the physical maiming of, children.[132] Rebel troops also took UNOMSIL and ECOMOG personnel as hostages. These acts, and the collapse of the July 1999 accord, prompted the Security Council to decide to replace the small UNOMSIL observer force with a peacekeeping force, the United Nations Mission in Sierra Leone (UNAMSIL), which was initially to consist of up to six thousand military personnel.[133] Acting under Chapter VII of the Charter, the Council decided that UNAMSIL could take "the necessary action to ensure the security and freedom of movement of its personnel and, within its capabilities and areas of deployment, to afford protection to civilians under imminent threat of physical violence, taking into account the responsibilities of the Government of Sierra Leone and ECOMOG."[134] In February 2000, following the decision of Nigeria, Guinea, and Ghana to withdraw their ECOMOG contingents from Sierra Leone, the Council expanded UNAMSIL's military component and provided for a transition from ECOMOG to UNAMSIL.[135] After clashes between the rebels and UNAMSIL forces, and the continued abduction of UNAMSIL personnel, the Council reinforced the military arm of UNAMSIL in May 2000,[136] and the United Kingdom deployed its own force outside of U.N. command to assist UNAMSIL. In July 2000, UNAMSIL conducted a successful military operation to rescue 222 surrounded peacekeepers and 11 military observers.[137] In response to this and other incidents, the Council in August 2000 decided to strengthen UNAMSIL's mandate, further reinforce its military component, and endorse reforms in its structure and command designed to address internal frictions among commanders and contingents that had emerged.[138]

Concerned about reported massive violations of international humanitarian law, the Security Council also asked the secretary-general to negotiate an agreement with the government of Sierra Leone to establish an independent special court to try persons accused of committing crimes against humanity, war crimes, and other serious violations of international humanitarian law as well as crimes under relevant Sierra Leonean law.[139] The sec-

retary-general successfully negotiated such an agreement.[140] In November 2000 the government of Sierra Leone and rebel forces signed a cease-fire accord at Abuja. In March 2001 the Council expressed its concern that the accord had not yet been fully implemented.[141] It also imposed economic sanctions against Liberia for providing support to the rebel forces in Sierra Leone.[142] However, the secretary-general reported that as of June 2001 there had been a significant improvement in the situation in Sierra Leone and the region, including the release of many abducted children.[143]

Alongside the civil war in Sierra Leone, the former Zaire, now known as the Democratic Republic of the Congo after the ascension to the presidency of Laurent Kabila in 1997, became the scene of an intense war involving troops from many African states, including Angola, Burundi, Namibia, Rwanda, Uganda, and Zimbabwe.[144] In a number of statements and resolutions, the Security Council implored all involved parties to seek a peaceful solution to the conflict and to respect international human rights and humanitarian law.[145] After the signing of a cease-fire agreement in Lusaka in July 1999, the Council authorized the deployment of U.N. military liaison personnel to assist the parties in implementing the agreement.[146] The Council subsequently expanded the U.N. mission to include a multidisciplinary staff of civilian personnel, together constituting the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC).[147] However, the Council indicated that it would not deploy additional U.N. military observers or personnel unless certain conditions relating to their security and freedom of movement as well as respect by the parties for the cease-fire agreement were satisfied.[148] After the assassination of President Kabila in January 2001 and the ascension to the presidency of his son, Joseph Kabila, who pursued more vigorous negotiations with relevant parties and political reform efforts, the Council, noting the secretary-general's conclusion in February 2001 that the above-mentioned conditions were being met, authorized the gradual enhancement of MONUC's military strength in early 2001, and MONUC troops began to be stationed in various parts of the country.[149]

During the year 2000 the United Nations and its members continued to examine and debate the problems they had experienced in undertaking humanitarian intervention missions as well as peacekeeping missions in general and whether and how they could improve their capacity to do so. Secretary-General Annan wrote a report on the occasion of the turning of the millennium ("2000 Millennium Report") in which he generally supported the concept of humanitarian intervention under U.N. auspices.[150] In August

2000, the secretary-general released a report by a high-level Panel on United Nations Peace Operations, chaired by Lakhdar Brahimi, the Algerian foreign minister.[151] The panel recommended many important reforms, which will be referred to in later chapters, and in November 2000 the Security Council adopted a number of decisions based on the recommendations in the panel's report.[152] In addition, in September 2000, the U.N. General Assembly held a "Millennium Summit" at which heads of state and government debated these and other proposals for enhancing the U.N.'s abilities to maintain and restore peace and security, and adopted a "Millennium Declaration."

1.3. Challenging Legal and Ethical Questions in the Debate on Humanitarian Intervention

The Security Council's bold experiments with humanitarian intervention in the five representative cases of U.N.-authorized intervention outlined in some detail above, NATO's unauthorized bombing of Yugoslavia, and recent events have raised a variety of challenging questions under international law, many of which involve the legal norms surveyed at the outset of this chapter. When can the Security Council lawfully declare human rights violations to constitute a threat to or breach of international peace, thus empowering it under Chapter VII of the Charter to authorize military action to redress those violations? Are there ethical principles related to legal norms that ought to guide whatever legal discretion it may have? Under what circumstances should the Security Council insist on the consent of involved states and parties, and when can it legally act without such consent? Again, what ethical principles are relevant in determining what degree of consent it ought to require before authorizing humanitarian intervention? Does humanitarian intervention with a U.N. blessing violate a norm of impartiality, thereby placing in jeopardy the U.N.'s traditional peacekeeping role? What other legal norms or ethical principles are relevant in defining "impartiality" for this purpose? What legal or ethical restraints exist or ought to exist on the Security Council's decision to authorize the use of force for various human rights-related purposes, and where it has legal discretion, are there any legal or ethical limitations on the type or degree of force it can authorize?

Indeed, one might ask whether or not the Security Council has a legal *obligation* to authorize force to put an end to human rights violations, such as genocide in Rwanda. Further, what ethical responsibilities does it have,

and how is the determination of its legal obligations affected by such responsibilities? What command and control arrangements are legally permissible or required for forces engaged in humanitarian intervention with the Council's authorization? Again, where the Council has legal discretion in deciding on command and control arrangements, are there any ethical principles that are relevant to the exercise of this legal discretion? In particular, are any such principles helpful in providing guidance to the Council on the choice between the use of U.N.-commanded operations, like UNPROFOR or UNOSOM II, and the delegation of enforcement tasks to regional organizations or to ad hoc coalitions, as in the cases of UNITAF, NATO's air role in Bosnia, French intervention in Rwanda, U.S. intervention in Haiti, and KFOR in Kosovo? What legal rules or principles govern or ought to govern the Council's decision-making procedure regarding humanitarian intervention, including use of the veto? How, if at all, should ethical principles affect the Council's decision-making procedure? And finally, is unilateral or regional intervention without Council authorization, as in the case of NATO's bombardment of Yugoslavia, legal under the U.N. Charter or contemporary international law? How do ethical considerations affect this legal problem? And when, if ever, can they override any legal restrictions on unauthorized intervention?

1.4. The Need for a Fresh Approach to Humanitarian Intervention and International Law That Identifies Relevant Ethical Principles and Takes Them into Account

These legal questions have proven difficult to resolve because they have brought into play many potential conflicts among the legal norms in the U.N. Charter and contemporary international law summarized earlier. These conflicts of legal norms in turn reflect conflicts of *ethical* principles underpinning these norms. Indeed, as suggested by these questions and case studies, legal issues related to humanitarian intervention are inextricably interwoven with important ethical problems.

Traditional methodologies for identifying and interpreting relevant international legal norms are inadequate to reconcile conflicting legal norms because they provide no basis for judging between competing ethical principles evident in these norms. Moreover, these traditional methodologies fail to provide guidance to the Council on how it should, ethically, exercise any legal discretion it may enjoy.

Thus, to resolve these conflicts of legal norms, and ultimately answer these

questions, it is necessary to have a legal methodology for identifying and interpreting legal norms related to humanitarian intervention that itself identifies relevant ethical principles and takes them into account. Such a methodology would help to indicate more precisely how the competing legal norms in the U.N. Charter and contemporary international law ought to be interpreted and reconciled in the context of humanitarian intervention, and how the Security Council ought from an ethical perspective to implement its legal discretion.

In particular, relevant ethical principles identified by a new approach to humanitarian intervention and international law must indicate, in some general fashion, which types of actors—including individuals, groups, nations, states, a global society of states, or a global community of individuals—should be entitled to which values, how these values are to be prioritized, and how conflicts among these values are to be reconciled. It is helpful in this connection to distinguish among individual-oriented, group-oriented, nation-oriented, state-oriented, interstate society-oriented, and humanity-oriented values.[153] Many international political theorists have drawn distinctions between "communitarian" theories, which stress either group-oriented, nation-oriented, or state-oriented values, and "cosmopolitan" normative theories, which endorse either interstate society-oriented or humanity-oriented values.[154] Domestic political theorists often emphasize a distinction between "liberal" theories, which give primary place to an individual-oriented value of freedom, and "communitarian" theories, which accord greatest importance to group-oriented values, typically at the level of the nation-state or local communities within it. Many ethical systems have multiple orientations.

Ethical principles incorporated in a new approach must also be capable of answering questions such as the following: Should humanity-oriented values take precedence over nation- or state-oriented ones, and if so, when? Should all human beings be regarded primarily as members of a human family, or rather primarily as members of particular national, state, or ethnic communities? What degree of respect ought to be accorded to communal identifications, for example, on the part of Bosnian Serbs or Kosovo Albanians? More generally, what ethical principles ought to guide relations with individuals in other communities?

We might also ask whether or not all human beings should be regarded as having equal dignity or equal human rights. Further, what ethical duties do individuals or governments owe to all other human beings? What duties do governments owe to their citizens? When, if ever, can the veil of state

sovereignty be pierced? Ethically, which human rights are the most important and thereby have a greater claim to Security Council attention? What rights do citizens have to participate in government decision-making? Are individuals morally responsible for gross human rights violations, and if so, when and why are apprehension and punishment appropriate? What obligations do individual citizens or groups within a state have to respect the law or to obey the central government? When is rebellion or secession ethically permissible?

We might further ask whether or not there are any ethical principles that ought to guide the process by which actors generally, including members of the Security Council or governments, make decisions concerning humanitarian intervention. In deciding on a response to humanitarian crises, how important is a principle of the nonuse of force and the promotion of negotiations? How is peace related to justice? What ethical obligations do governments have to honor treaty commitments, whether involving human rights or other principles relevant to humanitarian intervention, such as the nonuse of force?

The humanitarian intervention operations I discuss in this book have obviously raised important questions about the ethics of the deployment of military force. When, in general, is the use of military force justifiable? Is it permissible to use military force to thwart human rights violations, and if so, when? What humanitarian rules ought to apply to the conduct of humanitarian intervention operations? Is there ever a moral *obligation* to undertake humanitarian intervention, and if so, when? What does it mean, ethically, to act impartially in situations of ethnic conflict or those involving gross human rights violations—to benefit all sides equally or to side with the "victimized" population? All of these critical ethical questions require a system of ethical principles sufficient to answer—or at least to begin to answer—them.

Ethical principles underpinning a new approach to humanitarian intervention and international law must also provide guidance to the Security Council on whether it, and other actors, ought to obey directly particular norms, or instead act to maximize realization of particular values. The former position is often referred to as rule-oriented or deontological and the latter as consequentialist. Generally, deontological approaches prescribe adherence to behavioral norms and rules "for their own sake" and without regard to their indirect consequences. Consequentialism, on the other hand, endorses an overriding ethical rule according to which one must do whatever has the best consequences, measured in terms of certain posited values.[155]

Some recent approaches, including "virtue ethics," have emphasized the exercise of particular virtues as the essence of ethical behavior, and thereby also have a deontological character.[156] Many ethical approaches combine deontological, consequentialist, and virtue-oriented principles as so defined.

The ethical debate on the relative merits of deontological, consequentialist, and virtue-oriented approaches is relevant to humanitarian intervention because the Security Council, and U.N. member governments, have often been compelled to decide whether the "end justifies the means." Very often the Council has appeared to adopt a consequentialist orientation, as when it has authorized the use of "all necessary means" to achieve certain humanitarian objectives, such as the departure of Haiti's military rulers. In its war in Yugoslavia, NATO similarly appeared to take the position that it was authorized under international law to do whatever was necessary, within certain broad legal limits, including bombing structures that were also used by civilians, to achieve the desired goal of forcing Yugoslavia to accept its demands. But is such a consequentialist orientation ethically or legally proper? What should be the role of deontological principles, or principles of virtue, in guiding Council action in achieving humanitarian values? Does the Council in fact have a deontological duty, not only to ensure that certain limitations on military operations it authorizes are observed, but also always to authorize military intervention when gross human rights violations are occurring?

Ethical principles forming part of a new approach to humanitarian intervention and international law that is useful to the Security Council and U.N. member states generally must also be clear about what types of strategies ought to be employed for realizing the long-term humanitarian objectives that the Council or member states may legally seek to achieve. This is particularly important in cases like Bosnia or Kosovo, where the Council assumes significant responsibility for rebuilding a society in the aftermath of massive human rights violations and humanitarian intervention operations. More specifically, should the Council emphasize reform of the mental outlook and actual behavior of individuals; reform of the internal organization of groups or states, for example to reflect democratic principles; or a reorientation of relations among groups or states? These three possible strategies are analogous to American political scientist Kenneth Waltz's "three images" regarding the problem of interstate war. Waltz, in his classic 1959 study, *Man, the State, and War,* described three images of international relations, representing three distinct philosophical beliefs about the roots of war and the corresponding necessary means for realizing interstate peace. The first image maintains that war springs from the nature of human beings: "Wars result

from selfishness, from misdirected aggressive impulses, from stupidity. . . . If these are the primary causes of war, then the elimination of war must come through uplifting and enlightening men or securing their psychic-social adjustment."[157] The second image supposes that the problem can be found in the internal organization of states. For example, a second-image view might contend that if all states were democratic war would no longer occur.[158] The third image maintains that war results neither from the nature of human beings, nor from the internal organization of states, but from the interstate system itself. In particular, this view supposes that war is endemic to a world political system characterized by international anarchy, defined as the absence of authoritative norms backed by centralized coercion.[159]

Finally, ethical principles identified by a fresh approach to humanitarian intervention and international law must explicitly or at least implicitly relate its recommended strategies, whether first image, second image, or third image in character, to perceptions of human nature and the reformability of human and state behavior. In particular, they should clarify whether the Council or U.N. member states ought to be "pessimistic," "pragmatic," or "optimistic" with regard to these issues.[160]

A number of legal scholars have attempted to develop an approach to humanitarian intervention and international law that also incorporates ethical principles addressing many of these questions. For example, law professor and philosopher Fernando Tesón has put forward a pioneering and sophisticated philosophical and legal analysis of the practice of intervention, and constructed an argument favoring the legal and ethical legitimacy of both unilateral and collective humanitarian intervention that draws upon Kantian philosophy.[161] And international law scholar Sean D. Murphy has explored various legal issues involved in U.N. humanitarian intervention with careful attention to some of the ethical and philosophical issues it has raised.[162]

Building on these important efforts, to which I am greatly indebted, I will develop in this book a fresh approach to the identification and interpretation of legal norms relevant to humanitarian intervention. This approach includes a system for ascertaining relevant ethical principles and taking them into account. In particular, the approach is based on fundamental ethical principles that can be understood as endorsed by contemporary international law, including the U.N. Charter and emerging international human rights and humanitarian law, and that also are logically connected with a pivotal and preeminent ethical principle. That preeminent ethical principle is the unity of all human beings as equally dignified members of one human family, who in turn can, within a framework of unity, develop and take pride in

individual, national, ethnic, or religious identities. I will often refer to this as a principle of "unity in diversity."

An approach to humanitarian intervention and international law that is based on such fundamental ethical principles in contemporary international law, and most importantly on a preeminent principle of unity in diversity, can ultimately point the way toward solutions to the vexing legal and ethical problems raised by humanitarian intervention. One of its merits is that rather than seek guidance on relevant ethical principles in a particular philosophy, it first looks to the U.N. Charter and contemporary international law themselves for ethical directions. It also adopts as a guidepost the ethical principle of unity in diversity, itself endorsed by the U.N. Charter and contemporary human rights law. Further, I attempt to demonstrate that certain passages from the revered moral texts of seven world religions and philosophies may be interpreted as consistent with or even supportive of these principles. This potential congruence gives these principles additional credibility as foundations for a fresh approach to humanitarian intervention and international law in a world whose diverse legal cultures are historically linked to many of the ethical principles taught by these religions and philosophies.[163] For all these reasons, at a very practical level, the approach may be potentially acceptable to governments and peoples hailing from different U.N. member states and from a variety of secular and religious backgrounds.

On the other hand, several important limitations of the approach to humanitarian intervention and international law developed in the book must be underscored. Most importantly, the approach, while drawing on fundamental ethical principles evident in emerging international law, is primarily legal and is grounded in the tradition of international law. Indeed, it is by virtue of the "legal" character of the approach that it is appropriate to look to international law for guidance on relevant ethical principles. By contrast, it would be entirely possible to construct an approach to humanitarian intervention that is based on other ethical principles. It is conceivable that such ethical principles might be more meritorious, judged on the basis of certain posited ethical criteria, than those principles evident in international law and linked to a principle of unity in diversity. It is beyond the scope of this book to elaborate on alternative ethical theories or their advantages, or to engage in a rigorous philosophical analysis of fundamental ethical principles in international law. At the same time, the book does assert that the fundamental ethical principle of unity in diversity objectively deserves the status of foundational ethical principle, at least for purposes of developing an approach to humanitarian intervention and international law. This is in part based on

its pure ethical merits, which cannot be fully defended in the space available here, and in part based on its endorsement by emerging norms of international law, as elaborated at greater length in Part Two.

Second, my application of the fundamental ethical principles I identify to the resolution of particular problems of humanitarian intervention is necessarily subjective and preliminary. I have tried only to indicate what types of legal interpretations or reforms and policy initiatives these principles would tend to suggest, without pretending that they provide definite solutions. All the approach can do is to propose certain guidelines and tentative conclusions that can in turn serve as the basis for further inquiry and discussion.

Finally, the study has important limitations of scope. Most significantly, the focus of the book is on the problem of humanitarian intervention and international law. In examining this problem, the book necessarily examines a number of other subjects, including Security Council "collective security" action designed to repel an attack against a member state, such as the U.N.-approved actions against North Korea in 1950 and Iraq in 1991; traditional U.N. peacekeeping operations; those aspects of "second-generation" U.N. peacekeeping operations, such as election monitoring or civilian policing, that do not involve the use or threat of nondefensive military force; theories of human rights; and issues of Security Council procedure. The book cannot, however, address these subjects in any great detail.

1.5. The Organization of the Book

Part Two of the book develops the ethical and legal foundations of a fresh approach to humanitarian intervention and international law. Within Part Two, Chapter 2 outlines certain fundamental ethical principles relevant to humanitarian intervention that can be understood as supported by contemporary international law and as logically related to a principle of unity in diversity. As already indicated, it also attempts briefly to show that many passages from the foundational texts of seven world religions and philosophies may be interpreted as consistent with or supportive of each of these principles.

Chapter 3 develops, in light of the fundamental ethical principles identified in Chapter 2, new methodologies for identifying and interpreting international legal norms relevant to humanitarian intervention. It reviews the legal norms in the U.N. Charter and contemporary international law both favoring and disfavoring humanitarian intervention and seeks to help reconcile them through a new interpretive approach.

Part Three tackles in greater detail the particular controversial problems surrounding humanitarian intervention with U.N. authorization identified in section 1.3 in light of the ethical and legal framework developed in Part Two, and taking current political debates and trends into account. Chapter 4 examines the legal legitimacy of the Security Council exercising jurisdiction under Chapter VII by determining that human rights violations constitute a "threat to" or "breach of" the peace. Chapter 5 assesses the proper role and significance of the consent of target states or actors in decisions relating to humanitarian intervention. Chapter 6 looks at whether the Council violates a norm of "impartiality" when it authorizes military action in defense of human rights. Chapter 7 examines the legal and ethical legitimacy of the threat or use of force by the Council or forces acting with its blessing to achieve various human rights–related objectives and proposes legal and ethical guidelines on whether and when it can and should authorize the threat or use of force, and on how such force should be employed.

Chapter 8 shifts attention to the issue of whether the Security Council and member states are in fact legally or morally *obligated* to intervene militarily in certain cases of human rights violations—and to establish more effective mechanisms for facilitating humanitarian military action, such as a rapid reaction force. Chapter 9 investigates the controversial problems of the command and composition of multinational forces authorized by the U.N. to undertake humanitarian military missions. Chapter 10 turns to the Council's decision-making practices and asks, among other things, whether the permanent member veto ought to be reformed and how the Council can improve consultation among its members.

Within Part Four, Chapter 11 addresses the legality of intervention without Security Council authorization, and in particular, of the NATO bombing campaign against Yugoslavia. Finally, Chapter 12, constituting Part Five, offers an assessment, in view of the current political environment, of the prospects for implementing the fresh approach proposed in the book in the opening decades of the new century and new millennium.

Part Two

Developing the Foundations of a Fresh Approach

2 Identifying Fundamental Ethical Principles in Contemporary International Law and World Religions Relevant to Humanitarian Intervention

2.1. Introduction

In this chapter my primary purpose is to identify and briefly elaborate upon certain ethical principles relevant to humanitarian intervention and international law. The fresh approach to humanitarian intervention and international law that I develop in the balance of the book is based on these principles. These ethical principles have been selected based on two criteria: (1) that they are principles that may be understood as endorsed by contemporary international law, including the U.N. Charter and evolving norms of international human rights and humanitarian law, which I explore at greater length in Chapter 3; and (2) that they be logically related to the preeminent ethical principle of unity in diversity identified in Chapter 1. Thus, I attempt in this chapter to demonstrate that these principles find support in contemporary international law and also bear a rational relationship to the principle of unity in diversity. Hereafter I will use the term "fundamental ethical principles" to refer to principles satisfying both of these criteria.

In this connection, it is possible to divide fundamental ethical principles into three broad categories based on the degree to which the principles in question are logically and directly related to the principle of unity in diversity. Those principles which are most directly related to that preeminent principle will have the highest moral salience. These three categories, in ascending order of moral salience, are (1) *fundamental* ethical principles, (2) *compelling* ethical principles, and (3) *essential* ethical principles.

As just noted, I define "fundamental ethical principles" as all of those ethical principles endorsed by contemporary international law, including the U.N. Charter and international human rights and humanitarian law, which are deserving of *significant weight in relation to other ethical principles* because they bear *some logical relationship* to the preeminent ethical

principle of unity in diversity. "Compelling ethical principles" are those fundamental ethical principles which are deserving of *especially high weight in relation to other ethical principles* because of their *direct and immediate* logical relationship to the preeminent principle of unity in diversity. Finally, "essential ethical principles" are those compelling ethical principles which are so *closely related* to the preeminent principle of unity in diversity that they deserve the *highest weight* and therefore *cannot normally be overridden by other ethical principles*.[1] (See Fig. 1.) Based on this definition, the principle of unity in diversity is itself an essential ethical principle. Examples of each of these categories of principles will be provided throughout this and later chapters.

While this terminology could be applied to ethical principles solely with respect to their relationship to the principle of unity in diversity, and without regard to whether they also appear in contemporary international law, for purposes of this study I will limit each of these terms to principles that also satisfy the criterion of being implicitly or explicitly endorsed by contemporary international legal texts, consistent with the definition I have given of "fundamental ethical principles." Moreover, as we will see, these texts themselves often appear to give moral primacy to certain principles over others, which is also an important factor in determining their classification as fundamental, compelling, or essential.

Having suggested that these three broad categories of principles may, at least theoretically, be identified, I make no attempt in this study to establish a rigorous methodology for classification. Moreover, as I emphasize throughout this book, fundamental ethical principles are often in tension with one another. Thus, in categorizing particular principles, and in determining how to reconcile competing principles, careful judgment is required, as is consultation among all relevant decision-makers, in order to arrive at conclusions that take into account a variety of moral perspectives. All I seek to do in this chapter is to suggest that certain principles ought to be considered as meriting a particular status, based on a brief analysis of the extent of their endorsement by international legal texts and the apparent salience of their relationship to the principle of unity in diversity.

Those ethical principles satisfying the two threshold criteria, and thus qualifying as "fundamental ethical principles," may be viewed as enjoying additional persuasiveness as foundations for a fresh approach to humanitarian intervention and international law to the extent that many passages from the revered moral texts of seven world religions and philosophies *may* be interpreted as consistent with or supportive of them. Such support for

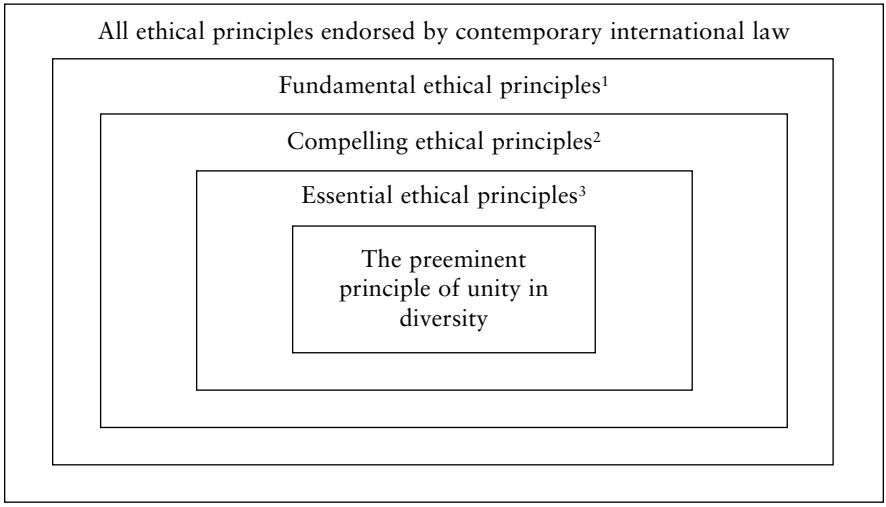

Fig. 1. A proposed classification of ethical principles

[1] Fundamental ethical principles are those ethical principles endorsed by contemporary international law, including the U.N. Charter and international human rights and humanitarian law, which are deserving of significant weight in relation to other ethical principles because they bear some logical relationship to the preeminent ethical principle of unity in diversity.

[2] Compelling ethical principles are those fundamental ethical principles which are deserving of especially high weight in relation to other ethical principles because of their direct and immediate logical relationship to the preeminent principle of unity in diversity.

[3] Essential ethical principles are those compelling ethical principles which are so closely related to the preeminent principle of unity in diversity that they deserve the highest weight and therefore cannot normally be overridden by other ethical principles.

these ethical principles in diverse revered moral texts bolsters their independent authority under international law because Article 9 of the Statute of the International Court of Justice implies that international legal jurisprudence, and especially that of the Court, ought to take into account the "main forms of civilization" and the "principal legal systems of the world."[2] These include those civilizations and legal systems drawing inspiration from these religions and philosophies.

At the same time, the fact that some passages in revered moral texts, which I do not discuss here, might be quoted that are apparently antithetical to these principles does not diminish the existing authority of these principles under contemporary international law. The fundamental authority of these principles under international law derives from their endorsement by legal

texts, not from the fact that isolated passages from a limited number of religious or philosophical texts may be interpreted to support them. But the fact that many passages from revered moral texts also support these principles can strengthen the legal authority they already enjoy through legal texts by demonstrating the existence of *potential* support for them in many of the major religious and philosophical systems of the world. I elaborate on the role of consideration of ethical principles in revered moral texts as part of a fresh approach to humanitarian intervention and international law in Chapter 3.

Accordingly, a secondary objective of the chapter is to suggest that selected passages from revered moral texts might be interpreted as consistent with or supportive of these principles endorsed by contemporary international law. In view of this limited objective, it should be emphasized that my treatment of revered moral texts is intentionally highly selective, and necessarily brief. It only scratches the surface of a rich primary and interpretive literature in each tradition. Moreover, I do not attempt to engage in a comprehensive analysis of these texts, to account for passages that seem to contradict fundamental ethical principles, or to resolve the complex problem of how best to interpret the texts. There is, of course, a wealth of scholarly literature that undertakes a far more rigorous examination of the treatment of ethics in various religious systems, including a consideration of passages that evidently endorse ethical principles antithetical to those I identify.[3]

I refer to certain passages from selected revered texts of seven world religions and philosophies showing potential support for fundamental ethical principles.[4] For purposes of this limited review, and for the sake of simplicity, I have chosen to focus on the seven religions and philosophies that have the most widely dispersed global membership according to a frequently cited survey. These religions and philosophies, in approximate descending order of geographic representation, are Christianity, the Bahá'í Faith, Islam, Judaism, Buddhism, Hinduism, and Confucianism and Chinese "folk religions."[5] While these religions and philosophies have been selected because of the degree of their worldwide representation, rather than the large number of their adherents, it also happens that these seven religions and philosophies are among the eight largest in total worldwide membership according to the same survey.[6] Adherents to them together represent approximately three-quarters of the world's population.[7]

Because of limitations of space, I have not been able to cover here traditional and indigenous religions, despite their important influence. Many of their essential beliefs relating to the ethical principles on which I focus, however, are similar to those of one or more of the religious and philosophical

systems I do cover. There are also many other prominent religions and philosophies that I have not been able to discuss, including Shintoism, Sikhism, Taoism, and Zoroastrianism. It should further be emphasized that my intention, in conducting the limited review in this chapter, is not to favor any particular religion or philosophy or revered text over any other.

I generally organize textual examples from revered moral texts in the approximate chronological order of the establishment of the religious and philosophical systems with which they are associated. In the case of Hinduism, which has existed for approximately four thousand years,[8] I focus on the Bhagavad Gītā, a poetic work recounting the teachings of the revered religious figure Krishna and composed around 200 B.C.E. The Gītā has recently been called the "chief devotional book" of Hinduism.[9] In the case of Judaism, I draw on the Hebrew Scriptures, which consist of the five Books of Moses (the Pentateuch or Torah), recording divine teachings as revealed to the prophet Moses, who taught and led the people of Israel around 1250 B.C.E.,[10] the books of the Prophets (Nebi'im), and the Writings (Ketubim).[11] With respect to Buddhism, I primarily focus on a core of scriptures generally regarded by all schools as authoritative.[12] These scriptures recount the teachings of the Buddha, who was born in Nepal around 563 B.C.E.[13]

In the case of Confucianism, I refer to passages from the Analects, the central book of Confucianism, which records many of the reputed sayings of Confucius, born in about 551 B.C.E., as well as passages from the works of a later Confucian teacher, Mencius, born in about 387 B.C.E.[14] With regard to Christianity, I draw on the books of the New Testament, which were recorded in the centuries following the life of Jesus, the center of the Christian religion, who was born around 4 B.C.E.[15] In the case of Islam, I refer primarily to the Qur'ān, because for Muslims the Qur'ān constitutes the word of God as revealed to the Prophet Muhammad (570–632 C.E.).[16] But I also draw on additional sources of authority under Islamic jurisprudence, including *hadīth,* or traditions, which are reported sayings or practices of the Prophet collected during the first couple centuries of Islam. Lastly, in the case of the Bahá'í Faith, I refer to the writings of its Prophet-Founder, Bahá'u'lláh (1817–1892); the writings of 'Abdu'l-Bahá (1844–1921), the son of Bahá'u'lláh and the authorized interpreter of his teachings; and the writings of Shoghi Effendi (1897–1957), the Guardian of the Bahá'í Faith.[17]

This demonstration that selected passages from revered moral texts may be understood as consistent with or supportive of fundamental ethical principles endorsed by contemporary international law based on particular (but often nontraditional) interpretations adds a degree of persuasive weight to these principles as legitimate foundations for a fresh approach to humanitarian

intervention and international law suitable for a multicultural world. And it makes it plausible to hope that believers of these faiths, including government officials, might be led to consider the merits of these principles if they have not already done so.

It may be asked why I choose to focus on revered moral texts as opposed to the practices of various religious or philosophical communities. It is true that a showing that particular practices support these ethical principles in contemporary international law would also enhance the persuasiveness of the principles. However, I emphasize the presence of consistent passages in revered moral texts because they add even greater persuasiveness to the legal authority of these principles. This is for the reason that, like normative statements of fundamental ethical principles in written and constitutive legal documents such as the Universal Declaration of Human Rights, revered moral texts are looked to by many believers as expressions of their highest ethical aspirations. Believers regard these texts as the most authoritative statements of ethical principles within their religious systems, even if believers fall short in putting these principles into practice, and even if many disagreements exist about how they are to be applied and reconciled in concrete situations.[18] Such texts might be analogized to national constitutions, which are often perceived by national courts as expressing, in very general terms, the bedrock legal principles upon which a national legal system is based.

It should be obvious, of course, that many U.N. member governments, many believers, and many secular thinkers dispute the validity of some or all of these fundamental ethical principles. As I demonstrate in Chapter 3, the U.N. Charter and contemporary international law also may be interpreted as recognizing certain principles, such as a strong principle of state sovereignty, that may conflict with these ethical principles, and that have been vehemently defended by many U.N. member governments. Further, these ethical principles have often been the target of intense intellectual and ethical debate. And countless and bloody wars have been waged, especially among religious believers, in opposition to them. Historically, the dominant interpretations of revered moral texts have frequently promoted principles that are in opposition to the ones I highlight. Thus, I argue only that it is proper to develop a fresh approach to humanitarian intervention and international law that is based on these ethical principles because almost all governments in the world have already rhetorically endorsed these principles through their adherence to, or assent to, relevant international treaties and declarations, and because these principles find support in certain passages from revered moral texts.

2.2. Unity in Diversity: The Unity of the Human Family Alongside a Respect for Other Social Affiliations and Individual Diversity

2.2.1. The Unity of the Human Family

A particularly important ethical principle recognized explicitly in the U.N. Charter and evolving international human rights law is that all individual human beings on the planet, whatever their race, ethnic background, nationality, sex, or religion, ought to be regarded as members of one human family. For example, the preamble to the Charter announces that "we the peoples of the United Nations"—not their governments as such—agreed to the Charter in order, first, to "practice tolerance and *live together in peace with one another as good neighbors*."[19] And the Universal Declaration of Human Rights, adopted by the U.N. General Assembly in 1948, refers in its preamble to "recognition of the inherent dignity and of the equal and inalienable rights of *all members of the human family,*" and proclaims in Article 1 that all human beings "are endowed with reason and conscience and should act towards one another *in a spirit of brotherhood*."[20] More recently, the Millennium Declaration adopted by the U.N. General Assembly in September 2000 refers to the United Nations as "the indispensable common house of the *entire human family*."[21]

I propose to regard such a principle of the unity of the human family as an essential, and indeed, as the preeminent, ethical principle for purposes of developing a fresh approach to humanitarian intervention and international law. This rank is at least implied by its featured location at the head of both the U.N. Charter and the Universal Declaration. This principle also earns credibility as a preeminent principle to the extent, as I demonstrate below, that many norms of contemporary international law support a variety of subsidiary ethical principles that flow logically from it. And while it is not possible here to mount a philosophical defense of this principle, it is sufficient for the purposes of this study to note that many ethicists have made compelling arguments in favor of its moral primacy.[22]

In keeping with the principle of the unity of the human family, it is ethically imperative to promote unity and cooperation among the individual members of the human family. This conception of the ethically ideal relations between human beings is also a reason for recognizing that each member of the human family is entitled to a basic respect and dignity. The principle of the unity of the human family thus requires an emphasis on humanity-oriented values as well as individual-oriented values.

The revered moral texts to which I refer in this book may be interpreted as expressing such a central belief in the unity of the human family. In particular, many passages in them, like those I cite from the U.N. Charter and the Universal Declaration, describe all members of the human race as neighbors, siblings, or parents to one another, or articulate a concept of "oneness" or "unity" among human beings. For example, the Bhagavad Gītā affirms that the whole world is united in God (11.7). In the words of one Hindu scholar, central to Hinduism is thus the belief that the "whole human family is one and basically indivisible."[23] According to the Torah, one should love one's neighbor (fellow) as oneself (Leviticus 19.18). Moreover, the Hebrew Scriptures affirm: "Have we not all one Father? Did not one God create us?" (Malachi 2.10).

Buddhist scriptures proclaim: "It is for the weal of the world that a Buddha has won enlightenment, and the welfare of all that lives has been his aim."[24] Indeed, the Buddha called for the cultivation among all individuals of a heartfelt concern for all human beings, of whatever race or nationality, a concern that is as intimate as the love of a mother for her only child: "Even as a mother watches over and protects her child, her only child, so with a boundless mind should one cherish all living beings, radiating friendliness over the entire world, above, below, and all around without limit. So let him cultivate a boundless good will towards the entire world, uncramped, free from ill-will or enmity."[25] And there is a passage in the Analects that appears to enjoin all human beings to regard one another as brothers. It is reported that one of Confucius's disciples advised another: "If a gentleman is assiduous and omits nothing, is respectful to others and displays decorum, then within the Four Seas, all are his brothers. Why should a gentleman worry that he has no brothers?" (12.5).

Jesus reaffirmed the injunction to love one's neighbor as oneself, and when asked by a lawyer to explain what he meant by "neighbor" for this purpose, Jesus related the story of the Good Samaritan, who when seeing a man who had been beaten and stripped by robbers, took pity on him, bandaged his wounds, and brought him to an inn (Luke 10.25–37). Jesus asserted that the Good Samaritan—the one who showed mercy—was a neighbor to the robbed man, thus affirming a universal definition of "neighbor" not contingent on any more particular human identifications. Jesus also echoed the words of Malachi quoted above in asserting that all people are God's children: "And call no one your father on earth, for you have one Father—the one in heaven" (Matthew 23.9). Similarly, according to St. Paul, "there is no longer Jew or Greek, there is no longer slave or free, there is no longer male and female; for all of you are one in Christ Jesus" (Galatians 3.28).

The Qur'ān affirms that all human beings were created by one God and thereby possess an inherent dignity and unity: "Mankind, fear your Lord, who created you of a single soul" (4.1). According to one *hadīth*, the "whole universe is the family of Allah," and to another, human beings are as "alike as the teeth of a comb."[26] And 'Abdu'l-Bahá proclaimed: "All peoples and nations are of one family, the children of one Father, and should be to one another as brothers and sisters!"[27]

2.2.2. The Positive Value of Communal and Individual Diversity within a Framework of Unity

The U.N. Charter and contemporary international law also recognize a companion ethical principle to that of the unity of the human family: that diversity both among familial, ethnic, national, and religious communities not coextensive with the community of humankind and among individuals is to be valued. Again, and for similar reasons, I suggest that this principle be considered a preeminent ethical principle along with the unity of the human family. This principle of respect for diversity calls for recognition of a role for individual-, group-, nation-, and state-oriented values. It suggests that individuals ought to have a right to participate and take pride in their membership in various communities, that unity among individual members of these lesser communities is ethically desirable, and that both individuals and these communities ought to have some degree of autonomy in charting their own futures. But it also requires that communal relationships be cultivated within a framework of the principle of the unity of the human family and humanity-oriented values, which have priority.

Together, then, the two principles of the unity of the human family and of respect for communal and individual diversity may be referred to as calling for "unity in diversity." The constituent principle of individual diversity will be elaborated in subsection 2.4.6; here I focus on support for the constituent principle of communal diversity within a framework of human unity.

Many passages from the U.N. Charter and sources of contemporary international human rights law, like the Universal Declaration, can be interpreted as supporting such a conception of unity in diversity. For example, the passage from the Charter's preamble referring to the desirability of the "peoples of the United Nations" living together in peace as "good neighbors" reflects an appreciation for the diversity of the world's "peoples" alongside the recognition that such diversity ought to be valued within the framework of a global "neighborhood." Article 1 of the Charter endorses a principle of "self-determination of peoples," but simultaneously indicates that this

principle must be the basis for the development of "friendly relations among nations," and is connected with a purpose of strengthening "universal peace."[28]

Likewise, the Universal Declaration guarantees respect for individual freedom of association and the right to "participate in the cultural life of the community."[29] However, it also provides that education "shall promote understanding, tolerance and friendship among all nations, racial or religious groups."[30]

The 1966 International Covenant on Civil and Political Rights (ICCPR) affirms in Article 1 that "all peoples have the right of self determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[31] An identical provision appears in Article 1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).[32] And Article 27 of the ICCPR provides that persons belonging to ethnic, religious, or linguistic minorities "shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."[33] Such rights, however, must be exercised consistently with respect for the human rights of all individuals, without discrimination based on factors such as "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[34] This implies that rights of self-determination and cultural rights are ultimately subordinate to a principle of respect for all human beings as members of one human family.

The Millennium Declaration refers to "our common humanity in all its diversity." It also asserts that "differences within and between societies should be neither feared nor repressed, but cherished as a precious asset of humanity."[35]

Many passages from revered moral texts can be interpreted as similarly recognizing the legitimacy of familial, religious, and ethnic communities. But contrary to many traditional communitarian interpretations, the texts can also be read as pervaded, like the international legal instruments I have described, by a larger concern with the whole human family and as acknowledging successive affiliations nested within an identification with the entire human race, thus endorsing a principle of unity in diversity.

For example, the Bhagavad Gītā explicitly recognizes the legitimacy of caste ties, while suggesting that such relationships and related social duties are ethically subordinate to a concern for all people. The Gītā states: "In a knowledge-and-cultivation-perfected / Brahman, a cow, an elephant, / And in a mere dog, and an outcaste, / The wise see the same thing" (5.18).[36] In

the Hebrew Scriptures, although the covenant with Moses apparently gives the Jews a favored status as a privileged people, the books of the later prophets often place Israel on a par in the sight of God even with nations that were its historical enemies and portray these nations as equally dignified members of God's creation. For example, according to Isaiah, "Israel shall be a third partner with Egypt and Assyria as a blessing on earth; for the Lord of Hosts will bless them, saying, 'Blessed be My people Egypt, My handiwork Assyria, and My very own Israel'" (Isaiah 19.24–25).[37]

Buddhist scriptures acknowledge the legitimacy of bonds of family and nationality, and certain Buddhist scriptures recognize respective duties between parents and children, and husbands and wives.[38] But according to Buddhist scriptures the Buddha also encouraged his followers to transcend these less inclusive ties in favor of a more universal outlook. For example, he taught that while identification with and love for one's country are healthy and legitimate sentiments,[39] they must be tempered by a more dispassionate awareness of the moral failings of all countries: "If you should hit on the idea that this or that country is safe, prosperous, or fortunate, give it up, my friend, and do not entertain it in any way; for you ought to know that the world everywhere is ablaze with the fires of some faults or others. . . . However delightful, prosperous, and safe a country may appear to be, it should be recognized as a bad country if consumed by the defilements."[40] According to one scholar, Buddhist scriptures classify as subtle mental defilements "racial feelings . . . national feelings . . . and egotism or personal and national pride."[41]

In the Analects, Confucius taught that individuals have important rights and duties within their family and their country. He and his disciples counseled loyalty to and respect for parents and siblings.[42] An oft-quoted passage in the Analects supporting the Confucian emphasis on role-oriented duties is the following: "The ruler is a ruler, the minister is a minister, the father is a father, the son is a son" (12.11). However, the Analects also could be interpreted as suggesting that these particular rights and duties are nested within a humanity-oriented framework. Mencius later affirmed that the carrying out by a prince of his kindness of heart "will suffice for the love and protection of all within the four seas," and that if a prince should fail to carry out such kindness to all human beings, then "he will not be able to protect his wife and children"—thus drawing an interdependent linkage between kindness toward one's kin and kindness toward all humanity, which is a requirement for the former.[43]

St. Paul's letter to the Romans, discussed in section 2.5, could be interpreted as leaving room for loyalties to governments and states, and there

are other passages in the New Testament suggesting the legitimacy of loyalties to smaller groups, including one's own family (see, e.g., 1 Timothy 5.8). But again, these loyalties can be understood in light of the story of the Good Samaritan, and Jesus's teaching that all human beings are children of one God, as subsumed under a principle of the unity of all members of the human family.

The Qur'ān also calls for the nations and peoples of the earth to be united in their diversity: "O mankind, We have created you male and female, and appointed you races and tribes, that you may know one another. Surely the noblest among you in the sight of God is the most godfearing of you" (49.13). Indeed, one of the signs of God is the creation of "the variety of your tongues and hues" (30.21). The Qur'ān praises pluralism and a "friendly" competition to do good works, as reflected in this verse: "If God had willed, He would have made you one nation; but that He may try you in what has come to you. So be you forward in good works; unto God shall you return, all together; and He will tell you of that whereon you were at variance" (5.53).[44] A perspective of unity in diversity is also supported by the Qur'ān's specific provisions calling for solidarity of the community of Muslims while allowing "People of the Book" to maintain their own religious legal systems and to practice a large measure of self-governance.[45]

The Bahá'í Writings, too, advocate taking pride in familial, national, and religious affiliations, while recognizing the fundamental unity of the human race. In the words of Shoghi Effendi, the purpose of the principle of the oneness of humankind as taught by Bahá'u'lláh "is neither to stifle the flame of a sane and intelligent patriotism in men's hearts, nor to abolish the system of national autonomy so essential if the evils of excessive centralization are to be avoided. It does not ignore, nor does it attempt to suppress, the diversity of ethnical origins, of climate, of history, of language and tradition, of thought and habit, that differentiate the peoples and nations of the world. It calls for a wider loyalty, for a larger aspiration than any that has animated the human race. . . . Its watchword is unity in diversity."[46]

2.3. The Golden Rule and the Importance of Good Deeds

2.3.1. The Golden Rule

The Golden Rule—that one should treat others as one would want to be treated, or in its negative formulation, that one should not treat others in a way one would not desire for oneself—can be understood as endorsed by

the Universal Declaration of Human Rights. Article 1 of the Universal Declaration declares that all human beings "should act towards one another in a spirit of brotherhood."[47] Further, it affirms in Article 29 that everyone "has duties to the community in which alone the free and full development of his personality is possible."[48]

The Golden Rule may be seen as logically connected to the principle of the unity of the human family and the basic respect for all members of that family that this principle implies. The Golden Rule follows from the strong moral bonds that ought to exist among family members, and thereby all members of the human race. This foundation for the Golden Rule implies that a condition ought to be attached to it: namely, that how one should want to be treated (and therefore should treat others) ought to be determined by other fundamental ethical principles related to the principle of unity in diversity, and cannot be governed by individual idiosyncracies or tastes.[49] The Golden Rule thus embodies a principle of impartiality based on adherence to fundamental ethical principles, which will be explored at greater length in section 2.9.

All the revered moral texts I examine contain some expression of the Golden Rule. And some require that others be treated better than one would treat oneself. Turning to specific revered texts, in the view of one scholar of the Bhagavad Gītā, "one of the most striking and emphatic of the ethical doctrines of the Gītā is substantially that of the Golden Rule." The Gītā's expression of the Golden Rule flows from its conception of "the oneness of man with his neighbors and with God."[50]

According to Judaic scholars, the Torah's most pivotal ethical injunction is to "love your fellow as yourself" (Leviticus 19.18)—an injunction that inspired Rabbi Hillel, centuries later, to formulate his "Golden Rule": "What you dislike don't do to others; that is the whole Torah. The rest is commentary."[51] Buddhist scriptures also emphasize the Golden Rule: "Since to others, to each one for himself, the self is dear, therefore let him who desires his own advantage not harm another."[52] One of the most important principles taught by Confucius in the Analects was that of reciprocity, which is essentially the Golden Rule. When one of Confucius's disciples asked, "Is there one saying that one can put in practice in all circumstances?" Confucius replied: "That would be empathy, would it not? What he himself does not want, let him not do it to others" (15.24).

Matthew records that Jesus also taught the Golden Rule: "In everything do to others as you would have them do to you; for this is the law and the prophets" (Matthew 7.12). Moreover, according to the Qur'ān, one should

prefer others to oneself. It lauds those who love "whosoever has emigrated to them," "preferring others above themselves, even though poverty be their portion" (59.9). The Bahá'í Writings also express the Golden Rule. Bahá'u'lláh stated that a seeker of truth "should not wish for others that which he doth not wish for himself."[53] He further extolled and reaffirmed the Qur'ānic verse just cited, and accordingly taught that one should prefer "his brother before himself."[54]

2.3.2. The Importance of Doing Good Deeds and Not Only Speaking Good Words

The evolution of legally binding standards protecting human rights in the last half century, following the adoption of the U.N. Charter, can be understood as a recognition by governments that the protection of human rights requires action, and not mere declarations of pious intentions. The necessity for such action is intimated in the preamble to the Universal Declaration, which states that it is proclaimed by the General Assembly "as a common standard of achievement for all peoples and all nations, to the end that *every individual and every organ of society,* keeping this Declaration constantly in mind, *shall strive by teaching and education* to promote respect for these rights and freedoms *and by progressive measures,* national and international, *to secure their universal and effective recognition and observance.*"[55]

Such a conception of the need for all individuals and governments to take concrete action to implement the ethical ideals of the Universal Declaration, and more generally of the ethical precedence of deeds over words, again can be understood as linked with the principle that all human beings are members of one human family. Because of this familial relationship, all individuals and their governments have corresponding obligations to act to promote the interests of other human beings, and not merely to preach the need for such actions.

There are passages in most of the revered moral texts that can be interpreted as emphasizing the importance of doing good deeds and not merely thinking spiritual thoughts or speaking laudable words. For example, the Bhagavad Gītā can be read as exhorting individuals to take action to help others out of a spiritual motivation: "Worship originates in action" (3.14). And the Gītā praises "virtuous deeds" (7.28). The Hebrew Scriptures, too, encourage the doing of just deeds, as reflected in the admonition: "Justice, justice shall you pursue" (Deuteronomy 16.20). Buddhist scriptures recount that the Buddha enjoined his followers to "be energetic, persevere, and try

to control your minds! Do good deeds, and try to win mindfulness!"[56] And according to Confucius, virtuous deeds are far more meritorious than virtuous words: "The gentleman is ashamed to have his words run beyond his deeds" (Analects 14.27). In fact, if a gentleman "sees what is right but does not do it, he lacks courage" (2.24).

In the New Testament, Jesus' formulation of the Golden Rule is a counsel to do good deeds for others. Moreover, Jesus criticized the scribes and the Pharisees for failing to "practice what they teach" (Matthew 23.1–3). Many of the Qur'ān's injunctions are calls to moral action, to deeds and to a struggle (*jihād*) in the path of God: "Such believers as sit at home—unless they have an injury—are not the equals of those who struggle in the path of God with their possessions and their selves" (4.97). And Bahá'u'lláh exhorted his followers to put spiritual principles into action: "Beware . . . lest ye walk in the ways of them whose words differ from their deeds. . . . Let your acts be a guide unto all mankind, for the professions of most men, be they high or low, differ from their conduct."[57]

2.4. Human Dignity, Human Rights, and Human Duties

2.4.1. The Equal Dignity of All Human Beings

The Universal Declaration of Human Rights proclaims the "inherent dignity . . . of all members of the human family" and affirms that all human beings "are born free and equal in dignity and rights."[58] Such a principle follows from the principle of the unity of the human family because all human beings possess an inherent and equal dignity as members of that family. None are outsiders, nonpersons, or subhuman, thus justifying their degradation or a diminution in their dignity. Accordingly, no discrimination is permissible on any grounds, including "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[59]

Again, passages from all the revered moral texts I consider can be interpreted as regarding all human beings (including women) as possessing an inherent and equal dignity.[60] For example, the Gītā contains many statements of the rule that one should treat all persons, including Brahman and outcaste, with the same respect, as indicated in the passage quoted earlier (5.18). This equal respect demands an equal concern for all human beings: "Brahman-nirvāna is won / By the seers . . . / Who delight in the welfare of

all beings" (5.25). The Torah teaches that God created humans in His own image (see, e.g., Genesis 1.27, 5.1), which means, in the view of many Judaic scholars, that humanity's duty is to become like God—to cultivate His spiritual attributes and to treat others with dignity and humaneness.[61] Jews are to feel genuine and personal empathy for foreigners: "You shall not oppress a stranger, for you know the feelings of the stranger, having yourselves been strangers in the land of Egypt" (Exodus 23.9). According to Buddhist scriptures, the Buddha taught that mankind belongs to one biological species.[62] In accordance with this humanity-oriented perspective, the Buddha's teachings assume the equal aptitude of members of all castes.[63] And in the Confucian tradition, there are passages in the Analects that might be understood as pervaded by a strong sense of the fundamentally equal dignity of human beings. For example, according to the Analects, what matters most is how one lives one's life: "By nature they are near each other; by habitual action they become farther apart. . . . It is the highest wisdom and the lowest stupidity that do not change" (17.2a/b).[64]

Jesus' teachings as reported in the New Testament uphold a concept of equal human dignity, for he often ministered to the needs of the most destitute and the outcasts of society. He also recognized their spiritual dignity: "Blessed are the meek, for they will inherit the earth" (Matthew 5.5). Similarly, a strong sense of the essential equality of human beings pervades the Qur'ān, as exemplified by the following passage: "We have honoured the Children of Adam and carried them on land and sea, and provided them with good things, and preferred them greatly over many of those We created" (17.72).[65] In his Farewell Sermon, Muhammad affirmed: "All of you come from Adam, and Adam is of dust. Indeed, the Arab is not superior to the non-Arab, and the non-Arab is not superior to the Arab. Nor is the fair-skinned superior to the dark-skinned nor the dark-skinned superior to the fair-skinned: superiority comes from piety and the noblest among you is the most pious."[66] And the Bahá'í Writings state: "In the estimation of God all men are equal; there is no distinction or preferment for any soul in the dominion of His justice and equity."[67] They further establish the equality of the races. Bahá'u'lláh counseled: "Close your eyes to racial differences, and welcome all with the light of oneness."[68] With respect to women, 'Abdu'l-Bahá affirmed that world peace cannot be achieved unless and until women assume full equality with men in the public sphere: "When women participate fully and equally in the affairs of the world, when they enter confidently and capably the great arena of laws and politics, war will cease."[69]

2.4.2. Universal Human Rights and Universal Duties to Respect the Human Rights of Others

According to the U.N. Charter and the Universal Declaration of Human Rights, the equal dignity of all human beings as members of one human family implies that each individual has certain human rights and that all other individuals have strong duties to respect those rights. In this connection, the preamble to the U.N. Charter proclaims that the "peoples of the United Nations" reaffirm "faith in fundamental human rights, in the dignity and worth of the human person, [and] in the equal rights of men and women."[70] Similarly, as already noted, the Universal Declaration recognizes the "equal and inalienable rights of all members of the human family," and affirms that all human beings are "born free and equal in dignity and rights."[71] It simultaneously declares, however, that everyone "has duties to the community in which alone the free and full development of his personality is possible."[72] These duties include, at least implicitly, duties to respect the "equal and inalienable rights" of others.[73] As suggested by the Universal Declaration, such mutual rights and duties can be understood as arising from a "familial" relationship among all human beings. The principle of the unity of the human family further implies that emphasis ought to be placed on the actual fulfillment of these ethical duties.

Passages from most of the revered moral texts I consider can be interpreted as supporting the concept of universal human rights and universal duties to respect those rights. Indeed, there is historical evidence that the values in revered moral texts helped inspire the concept of universal human rights. In the words of one political scientist, "the historical foundation of human rights lies in the humanist strand running throughout the world's great religions."[74] As demonstrated above, most revered moral texts can be interpreted as endorsing a conception of equal human dignity that is supportive of the concept of universal human rights. Of course, it is also true historically that interpretations antithetical to human rights principles have often prevailed, and there has been much debate about whether traditional religious systems actually recognize the concept of "human rights."[75]

It is not possible to resolve these difficult issues here, but only to suggest that some passages from revered moral texts are consistent with the concept of human rights and duties to respect the rights of others, and thereby support these fundamental ethical principles in the U.N. Charter and the Universal Declaration. Most of the texts I examine recognize some strong duties of all human beings toward all other human beings and for their

benefit. Special duties are owed to the impoverished, the injured, the vulnerable, and victims of oppression or tyranny. Further, many of the texts lay down a duty to come to the aid of others in defense of their rights, as I will explore at greater length in section 2.8.

For example, the Bhagavad Gītā counsels the cultivation of many personal virtues involving actions toward others, including generosity and unselfishness, compassion toward creatures, harmlessness (*ahimsā*), gentleness, and the nonuse of force.[76] The Hebrew Scriptures exhort Jews positively to stand up for the rights of the oppressed and the vulnerable: "Speak up for the dumb, / For the rights of all the unfortunate. / Speak up, judge righteously, / Champion the poor and the needy" (Proverbs 31.8–9). Indeed, the prophet Isaiah promised a time in which the oppressed would be liberated: the Savior would be sent as a "herald of joy to the humble, / To bind up the wounded of heart, / To proclaim release to the captives, / Liberation to the imprisoned" (Isaiah 61.1). According to Buddhist scriptures, deeds must be directed toward the betterment of fellow human beings: "The fair tree of thought that knows no duality, / Spreads through the triple world. / It bears the flower and fruit of compassion, / And its name is service of others." "Not to be helpful to others, / Not to give to those in need, / This is the fruit of Samsara [the world of birth and death]. / Better than this is to renounce the idea of a self."[77] On the basis of passages such as these, many contemporary scholars find support for the protection of human rights in Buddhist scriptures.[78]

In the Analects, Confucius similarly prescribed many duties owed to all other human beings, in particular duties of humaneness (*ren*). He also upheld duties of faithfulness, loyalty, fidelity, forbearance, respect, magnanimity, diligence, harmony, and kindness.[79] As many contemporary scholars of Confucianism are arguing, such duties and virtues may provide the basis for recognition of a number of human rights.[80] Likewise, many of the demanding ethical duties prescribed by Jesus, including the story of the Good Samaritan may help establish correlative rights of others.[81]

The following passage from the Qur'ān prescribes the virtues and duties of humanitarian concern, charity, and the release of slaves, apparently without regard to race, nationality, sex, or religion: "It is not piety, that you turn your faces to the East and to the West. True piety is this: to believe in God, and the Last Day, the angels, the Book, and the Prophets, to give of one's substance, however cherished, to kinsmen, and orphans, the needy, the traveller, beggars, and to ransom the slave, to perform the prayer, to pay the alms" (2.172). The emphasis on helping others, even those who are strangers,

is apparent in another Qur'ānic passage: "Be kind to . . . the neighbour who is of kin, and to the neighbour who is a stranger" (4.41). And believers are to give food to the "needy, the orphan, the captive" for the love of God. They are to say, "We feed you only for the Face of God; we desire no recompense from you, no thankfulness" (76.8–9).

Finally, the Bahá'í Writings emphasize basic human rights. According to 'Abdu'l-Bahá, "Bahá'u'lláh taught that an equal standard of human rights must be recognized and adopted."[82] And the Bahá'í Writings indicate that one attribute of human perfection is to "have regard for the rights of others."[83]

Human rights recognized in contemporary international law, and various revered moral texts, can in principle be categorized, like fundamental ethical principles, according to their moral importance. (See Fig. 2.) The most weighty rights might be described as "essential" human rights. By "essential" I mean that these rights are among the most minimal requirements for the enjoyment of equal human dignity. They deserve the highest moral weight because they are so closely related to the preeminent principle of unity in diversity. Further, because of their importance, they should normally preempt morally any potential reasons for not respecting them.[84] They may, however, like all rights, be subject to reasonable restrictions and specifications solely for the purpose, in the words of Article 29 of the Universal Declaration, of "securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."[85] However, in the case of essential rights, such restrictions must be very circumscribed and narrowly tailored to fulfill these purposes. I suggest below that certain human rights merit recognition as essential human rights, including rights to life, physical security, subsistence, freedom of moral choice, and protection from illegitimate uses of force, as well as a right to nondiscrimination in the enjoyment of these rights. (See Fig. 3.) However, it is not possible in this work to engage in a detailed inquiry into whether other rights merit this status.[86]

Essential human rights are a subcategory of what might be termed "compelling" rights, which are rights that morally are deserving of especially high weight because of their direct and immediate logical relationship to the preeminent principle of unity in diversity, and that morally merit a high degree of preemptive effect. Finally, we might conceive of compelling rights as a subcategory of "fundamental" rights, which are all of those rights recognized in contemporary international law which morally are deserving of significant weight because of their logical relationship to the principle of unity in diversity, and which morally merit a significant degree of preemptive effect.

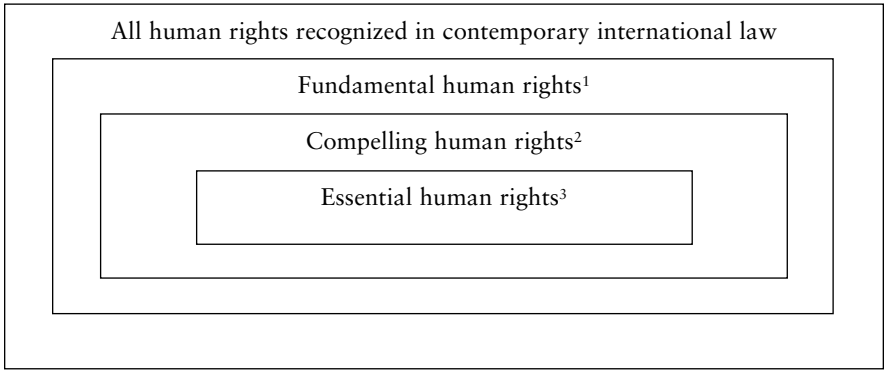

Fig. 2. A proposed classification of human rights

[1] Fundamental human rights are those human rights recognized in contemporary international law which morally are deserving of significant weight because of their logical relationship to the principle of unity in diversity, and which morally merit a significant degree of preemptive effect. They appear to encompass all of the rights recognized in the Universal Declaration of Human Rights.

[2] Compelling human rights are those fundamental human rights which morally are deserving of especially high weight because of their direct and immediate logical relationship to the preeminent principle of unity in diversity, and which morally merit a high degree of preemptive effect.

[3] Essential human rights are those compelling human rights which are among the most minimal requirements for the enjoyment of equal human dignity. They deserve the highest weight morally because they are so closely related to the preeminent principle of unity in diversity. Further, because of their importance, they should normally preempt morally any potential reasons for not respecting them.

Hereafter I will use the terms "essential," "compelling," and "fundamental" to refer to the moral rather than legal status of rights recognized in contemporary international law.

Compelling and fundamental human rights may also be subject to reasonable restrictions on their exercise for the purposes mentioned above. These restrictions may be proportionately broader than in the case of essential human rights. Again, I am not able here to elaborate on a methodology for classifying rights as compelling or fundamental. However, I suggest in Chapter 3 that certain rights, such as rights to consultation with governments, to participation in government through elections, and to freedom from discrimination in the enjoyment of all human rights, not only other essential ones, are best viewed as at least fundamental (and possibly compelling) rights, but not as essential rights.

Selected Essential Human Rights

The right to life and to physical security, including:
- The right to life
- The right to physical security
- The right to physical liberty
- The right to fair judicial processes

The right to subsistence, including:
- The right to adequate food
- The right to adequate clothing
- The right to adequate shelter
- The right to adequate medical care

The right to freedom of moral choice, including:
- The right to freedom of thought, conscience, and religion
- The right to freedom of opinion and expression

The right to protection from illegitimate uses of force, including:
- The right to observance of principles of necessity and proportionality
- The right of civilians not to be targeted
- The right of civilians not to be subject to uses of force that create an unreasonable risk of injury to them
- The right of the wounded or prisoners of war to humane treatment

The right to nondiscrimination in the enjoyment of the above rights

Fig. 3. Selected essential human rights

2.4.3. A Trust Theory of Government and Limited State Sovereignty

The principle that it is ethically desirable for individuals to identify with and associate with lesser communities and the principle that all human beings have equal rights and dignity as members of one human family suggest that the institution of government is legitimate as a means of fostering cooperation among members of various communities. They simultaneously suggest that one of the most important functions of governments, and authorities in general, is to uphold the rights and dignity of community members. That is, those individuals or institutions which enjoy power have ethical duties to act as trustees for the benefit of the community members over whom they exercise such power and to respect and protect their human rights. This means that the sovereignty of states must necessarily be limited by these fundamental ethical duties.

Such a trust theory of government and its concomitant principle of limited state sovereignty are implicit in evolving norms of international human

rights law, although (as I demonstrate in Chapter 3) the U.N. Charter can also be interpreted to support a more robust conception of state sovereignty. For example, under Article 56 of the Charter member states "pledge themselves to take joint and separate action in cooperation with the Organization" for the achievement, among other goals, of "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."[87] As we saw earlier, the Universal Declaration calls on governments, as an "organ of society," to strive to promote respect for human rights and freedoms and to take progressive measures for their universal and effective recognition and observance.[88] Moreover, according to the Declaration, governments are entitled to impose only such limitations on rights "as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."[89] This provision at least implicitly endorses a trust concept of government under which all laws must secure "due recognition" of the rights of citizens, must be for the benefit of citizens, and must, moreover, be consistent with a democratic society.

In this connection, passages from many of the revered moral texts I examine can similarly be interpreted as condemning tyranny and explicitly imposing duties on those who wield power to act justly toward those over whom they rule. The texts can be understood as treating rulers as trustees for the welfare of their people. To the extent the texts can be interpreted as promulgating a trust theory of government, the texts implicitly recognize rights on the part of individuals to such just treatment from their rulers. Accordingly, like the passages from the U.N. Charter and the Universal Declaration I have cited, they see the "sovereignty" of rulers as inherently limited by obligation to protect these human rights.

For example, the Hebrew Scriptures enjoin kings, rulers, and government officials to carry out a number of duties to their citizens, all of which are aimed at improving and safeguarding their welfare: "O God, endow the king with Your judgments, the king's son with Your righteousness; that he may judge Your people rightly, Your lowly ones, justly. . . . Let him champion the lowly among the people, deliver the needy folk, and crush those who wrong them. . . . For he saves the needy who cry out, the lowly who have no helper. He cares about the poor and the needy; He brings the needy deliverance. He redeems them from fraud and lawlessness" (Psalms 72.1–14). According to the Torah, kings themselves are subject to the law. Any king

of Israel must follow the revealed law and keep a copy of the Teaching by his side (Deuteronomy 17.18–20). Legal scholar Shabtai Rosenne has argued that classic "Jewish religio-legal teaching thus provides a forceful denial of the sacred egoism implicit in the notion of act of State, or Staatsräson, or Sovereignty itself."[90]

Buddhist texts affirm that kings have a duty, among other responsibilities, to maintain law and order for the benefit of the people and to promote their economic welfare.[91] In short, according to one Buddhist scholar, earthly power is "subservient to the rule of righteousness. . . . The state must be vigilant but human rights must not be interfered with." "Ultimate sovereignty resided not in any ruler, human or divine, nor in any body governing the state nor in the state itself but in Dhamma, the eternal principles of righteousness."[92]

Confucius regarded ruling in the interest of the people as the primary criterion for judging leaders.[93] Leaders are to rule kindly and justly; indeed, they are to be "solicitous of others" (Analects 1.5). Rulers should be generous in nourishing the people (5.16) and should "enrich them" and teach them (13.9). Mencius, too, emphasized the duties of rulers toward their subjects, for the people, and not the sovereign, are of highest value: "The people are the most important element [in a nation]; the spirits of the land and grain are the next; the sovereign is the lightest."[94]

Passages from the New Testament, and in particular a passage from Romans analyzed in section 2.5, might be understood as affirming that national governments are merely contingent entities with no divine sanction, except to the extent they rule justly. Further, when St. Peter and the apostles were charged with having taught the new religion in defiance of strict orders to desist, they replied: "We must obey God rather than any human authority" (Acts 5.27–29).

The Qur'ān, too, clarifies that only God has ultimate authority, and that all rulers are obligated to act justly toward their subjects.[95] According to the Qur'ān, only God is truly sovereign, for "to God belongs the kingdom of the heavens and of the earth, and all that is between them" (5.20). The Qur'ān states, in a passage seen as applicable to rulers as well as to all citizens: "God commands you to deliver trusts back to their owners; and when you judge between the people, that you judge with justice" (4.61). So also the Qur'ān affirms that King David was a trustee of God on earth and was required to rule justly: "David, behold, We have appointed thee a viceroy in the earth; therefore judge between men justly, and follow not caprice" (38.25). In keeping with these principles, the caliph was viewed as God's viceregent

or deputy on earth, who was bound to respect the limits of divine law and to observe justice in carrying out a divine trust.[96]

In the Bahá'í Writings, Bahá'u'lláh counseled rulers to treat their subjects with justice and humanity. He called upon them to recognize their duty to aid the oppressed and safeguard human rights: "For is it not your clear duty to restrain the tyranny of the oppressor, and to deal equitably with your subjects, that your high sense of justice may be fully demonstrated to all mankind? God hath committed into your hands the reins of the government of the people, that ye may rule with justice over them, safeguard the rights of the down-trodden, and punish the wrong-doers."[97] 'Abdu'l-Bahá explicitly emphasized the importance of governments ensuring "the free exercise of the individual's rights, and the security of his person and property."[98] For these and other reasons, according to the Bahá'í Writings, a passionate doctrine of state sovereignty must be rejected: "A world, growing to maturity, must abandon this fetish, recognize the oneness and wholeness of human relationships, and establish once for all the machinery that can best incarnate this fundamental principle in its life."[99]

The ethical principle of significantly limited state sovereignty that follows from a trust theory of government, as elaborated in the U.N. Charter and the Universal Declaration, as well as the revered texts I have cited, contrasts sharply with ethical theories that give primacy to state autonomy. These theories include, for example, those of the nineteenth-century German philosopher Hegel, who viewed nation states as "the absolute power on earth."[100] Further, the view of state sovereignty put forward in the U.N. Charter and the Universal Declaration, which is, we have seen, related to a principle of the unity of the human family, differs from the views of some contemporary communitarian theorists. For example, philosopher Michael Walzer at one time strongly defended the moral value of states and their autonomy, and argued against the existence, and moral relevance, of a global community of individuals.[101]

2.4.4. The Right to Life and to Physical Security

The principle of the equal rights and dignity of all human beings implies, above all, that all individuals have a right to life and to physical security—those essential and minimal protections of their physical existence necessary to allow them to carry on freely their physical, intellectual, and ethical endeavors. Such a right includes a right to physical freedom. Respect for a right to life and to physical security requires, too, that individuals accused of crimes,

and whose lives or physical freedom might be put in jeopardy by the required punishment for the charged crimes, enjoy appropriate procedural guarantees of fairness.

These rights might, for the above reasons, be described as "essential" rights, in keeping with the categorization system for human rights described earlier.[102] In this connection, the Universal Declaration of Human Rights appears to recognize the rights to life and to physical security, including physical liberty and fair judicial processes, as essential by giving them the most prominent place in the Declaration. For example, the first substantive right mentioned in the Universal Declaration, apart from a right to nondiscrimination in the enjoyment of rights, is "the right to life, liberty and security of person."[103] The following two articles prohibit slavery and torture, which may be seen as particularly egregious violations of the right to physical security and freedom.[104] And the next series of articles guarantees equal recognition before and protection of the law, the right to an effective remedy by competent national tribunals for human rights violations, freedom from arbitrary arrest, detention, and exile, the right to a fair and public hearing by an independent and impartial tribunal in connection with any criminal charges, and the right to be presumed innocent until proven guilty and not to be subject to ex post facto criminal punishments.[105] Moreover, the Genocide Convention, adopted a day before the proclamation of the Universal Declaration, confirms that genocide—which represents one of the most horrendous violations of a right to life and to physical security—is a crime under international law and obligates states parties to prevent and punish it.[106]

Once again, many passages from revered moral texts can be interpreted to endorse similar rights as particularly essential ones. Many of the texts condemn unjust killing and the commission of other indignities against the personal integrity and security of other human beings, whether by individuals or by governments. Further, many provide procedural protections for individuals accused of criminal acts and implicitly or explicitly thereby prohibit arbitrary detentions or executions.

The Gītā, for example, affirms that those who take pride in killing others, bragging "Yonder enemy has been slain by me, / And I shall slay others too" shall "fall to a foul hell" (16.14–16). The Torah prohibits murder. (See, e.g., Exodus 20.13.) Exodus contains in particular the injunction not to "bring death on those who are innocent and in the right" (Exodus 23.7). The Torah appears to emphasize the value of each and every innocent human life. In this connection, later rabbinical commentators held that if "heathens said to a group of men, 'Surrender one of you to us so that we may put him

to death, otherwise we will put you all to death,' they should all suffer death and not surrender one soul from Israel."[107] In addition, according to the Torah, a person suspected of murder may only be executed on the evidence of more than one witness to the actual crime, thus significantly reducing the cases in which the death penalty can legitimately be carried out.[108]

According to Buddhist scriptures, the Buddha prohibited killing and the arms trade.[109] The Buddha also insisted upon a number of procedural guarantees of fairness in the determination of guilt and punishment.[110] And Confucius in the Analects affirmed that rulers should not kill those "who have not the Way in order to uphold those who have the Way." He argued: "You are there to *govern*; what use have you for *killing*? If you desire the good, the people will be good" (12.19) (emphasis in original). Moreover, governments should not engage in, or permit, cruelty or killing: "If good men ran the state for a hundred years, one could finally rise above cruelty and abolish killing—true indeed is this saying!" (13.11).

Jesus reaffirmed the commandment that "You shall not murder" (Matthew 19.18). And he implicitly argued for certain minimal procedural protections aimed at guaranteeing fairness for those, like himself, accused of crimes. For example, Jesus insisted that the high priest not make unfair accusations against him, that a police official not unjustly strike him (John 18.23), and that the scribes and pharisees not neglect justice (Matthew 23.23). Similarly, the Qur'ān renews the Biblical injunction not to take the life of another, except as retribution for murder, or for criminal activity, and emphasizes the incalculable value of every human life: "Therefore We prescribed for the Children of Israel that whoso slays a soul not to retaliate for a soul slain, nor for corruption done in the land, shall be as if he had slain mankind altogether; and whoso gives life to a soul, shall be as if he had given life to mankind altogether" (5.35). And the Qur'ān instructs: "Kill not one another" (4.33). According to the Bahá'í Writings, "murder, theft, treachery, falsehood, hypocrisy and cruelty are evil and reprehensible. . . . If [a man] commits a murder, he will be responsible."[111] The Bahá'í Writings also indicate that all individuals, including those accused of crimes, must be guaranteed "equal rights to just treatment."[112]

2.4.5. The Right to Subsistence

From the right to life, understood as a right to all protections necessary simply for survival, it follows that all individuals must have a right to adequate food, clothing, shelter, and medical care—that is, a right to subsistence. This

must be considered another essential right because it is necessary for human existence.[113] In this connection, once again, the Universal Declaration provides, in Article 25, that everyone "has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services."[114] It is appropriate to recognize such a right as a morally essential one even if fulfillment of this right may require action on the part of many actors, not limited to governments, and even though its full implementation for all human beings may only be achieved through persistent efforts over a long period of time.

Many revered moral texts may be interpreted as recognizing such a right as morally essential. Certainly many passages from these texts suggest that all individuals, and indeed governments, have ethical obligations to aid the destitute and to help provide them with sufficient food, clothing, and shelter and the other basic necessities required for minimal subsistence. At the very least, the texts appear to recognize these as charitable obligations, which are supportive of the potential desirability of recognizing such a moral right.

Thus, according to the Bhagavad Gītā all individuals have an obligation to give to other "worthy" persons without any expectation of reciprocity (17.20–21). And the Gītā praises those who are "compassionate" (12.13) and who show "generosity" (16.1). Many laws in the Hebrew Scriptures similarly demonstrate a concern for those in need. The Torah states, for example, that landowners are required to devote a portion of their fields and produce to the needs of the "stranger, the fatherless, and the widow" (Deuteronomy 24.19–21). In the view of a number of commentators, these are not acts of charity but are entitlements of the poor.[115] Buddhist scriptures recount that the Buddha advised his followers to give voluntarily of their wealth to those less fortunate.[116] And in the Analects, Confucius enjoined rulers to provide for the welfare of their people, including ensuring that they have adequate food (12.7).

Jesus instructed the faithful to give their wealth to the poor (Luke 18.22). The Qur'ān recognizes economic rights, providing that "the beggar and the outcast" shall have a share in the wealth of those believers more generously endowed (51.19).[117] This precept was institutionalized in the law of *zakat,* which requires all Muslims to give a percentage of their wealth for the benefit of the poor.[118] And the Bahá'í Writings state: "Every human being has the right to live; they have a right to rest, and to a certain amount of well-being. As a rich man is able to live in his palace surrounded by luxury and the greatest comfort, so should a poor man be able to have the necessaries

of life. Nobody should die of hunger; everybody should have sufficient clothing; one man should not live in excess while another has no possible means of existence."[119]

2.4.6. The Right to Freedom of Moral Choice

The Universal Declaration recognizes rights to "freedom of thought, conscience and religion" and to "freedom of opinion and expression."[120] Such rights may be understood as consistent with an application of the overarching principle of unity in diversity to individuals as well as to the lesser communities with which they have a right to identify. In combination with the principle of equal individual dignity, the principle of unity in diversity implies that all individuals have a fundamental right to form their own thoughts and opinions, especially about religious and moral matters, and that a high degree of diversity in personal viewpoints, life plans, and communal identifications is valuable. Thus, each individual must have the right to freedom of thought, conscience, religion, opinion, and expression, and the right to make moral choices and act on those choices—freedoms and rights that I will often refer to together as "freedom of moral choice."

Freedom of moral choice is an essential human right, in the sense that without such a freedom, individuals cannot choose to accept and act on fundamental ethical principles, including the principle of unity in diversity. It is thus one of the minimal requirements for the enjoyment of human dignity and deserves the highest weight because of its intimate relationship to the principle of unity in diversity. It normally preempts any potential reasons for not respecting it. However, in light of the other fundamental ethical principles articulated in contemporary international law, freedom of moral choice is not morally unbounded; it must be exercised in accordance with these fundamental ethical principles, and in conformity with those "duties to the community in which alone the free and full development of [the individual's] personality is possible."[121]

Certain passages in many revered moral texts may be interpreted as consistent with such a principle of freedom of moral choice in contemporary international law and as recognizing its morally essential character. These include passages prohibiting compulsion in matters of religious belief. For example, some recent interpreters of the Gītā find in it the teaching of religious tolerance.[122] In the Hebrew Scriptures, the Ten Commandments are addressed to each and every individual, who chooses voluntarily to accept and become bound by God's covenant.[123] According to some Jewish com-

mentators, this principle of freedom of conscience provides the basis for a principle of freedom of expression.[124] Buddhist scriptures affirm that the Buddha exhorted individuals to investigate religious truth for themselves. "Do not ye go by hearsay, nor by what is handed down by others, nor by what people say, nor by what is stated on the authority of your traditional teachings. . . . But . . . when you know of yourselves: 'These teachings are not good . . . these teachings, when followed out and put in practice, conduce to loss and suffering'—then reject them."[125] Many scholars believe that Buddhist scriptures also suggest a tolerant approach to other religions.[126] And in the Analects Confucius seems to imply that no one can be deprived of his right to exercise his individual will: "The Three Armies can be deprived of their leader, but a common man cannot be deprived of his will" (9.26).[127]

Jesus challenged the people to judge the truth of his teachings for themselves through sincere spiritual search: "Anyone who resolves to do the will of God will know whether the teaching is from God or whether I am speaking on my own" (John 7.17). And his own behavior provided many examples of his respect for those of other faiths, including his praise of the Good Samaritan—a heretic. St. Paul exhorted believers not to judge others, because God will judge all, whatever their faith or nationality, based on their deeds, "the Jew first and also the Greek," for "God shows no partiality" (Romans 2.1–11).

Many Muslim scholars believe that the Qur'ān teaches that faith is inherently personal and must be secured by the free decision of each individual to turn toward God and revelation and to abide by ethical principles.[128] In their view, no one therefore has a right to compel others in religious belief. They cite in this connection the following Qur'ānic verse: "No compulsion is there in religion" (2.257). At the level of religious communities, the Qur'ān recognizes the right of Muslims to associate in a community of believers, or *umma*. (See, e.g., 3.100.) But there are numerous passages that show especial tolerance toward Jews, Christians, and other adherents of monotheistic faiths, referred to as "People of the Book," such as the following: "Say: 'We believe in God, and that which has been sent down on us, and sent down on Abraham and Ishmael, Isaac and Jacob, and the Tribes, and in that which was given to Moses and Jesus, and the Prophets, of their Lord; we make no division between any of them, and to Him we surrender'" (3.78). The Qur'ān extols both the Torah and the Gospel of Jesus: "We gave to [Jesus] the Gospel, wherein is guidance and light, and confirming the Torah before it, as a guidance and an admonition unto the godfearing" (5.50). The Qur'ān further states that the rules of the Gospel are to apply to the Christian community,

not the rules of Islam: "So let the People of the Gospel judge according to what God has sent down therein" (5.51). Even with respect to nonbelievers who are not People of the Book, the Qur'ān calls for mutual respect and toleration, such as in the exclamation: "To you your religion, and to me my religion!" (109.5). And in the context of relations with nonbelievers, the Qur'ān counsels: "Help one another to piety and godfearing; do not help each other to sin and enmity" (5.3).

Lastly, the Bahá'í Writings endorse religious concord, freedom of religion, and free speech, although they counsel moral restraint in speech. According to 'Abdu'l-Bahá, "just as in the world of politics there is need for free thought, likewise in the world of religion there should be the right of unrestricted individual belief. . . . When freedom of conscience, liberty of thought and right of speech prevail—that is to say, when every man according to his own idealization may give expression to his beliefs—development and growth are inevitable."[129]

2.4.7. Open-Minded Consultation

The principle of freedom of moral choice, together with the principle of unity in diversity, suggests that individuals or communities with diverse viewpoints ought to engage in frank and open-minded dialogue with the objective of reaching a consensus on solutions to common problems, and then implementing those solutions through unified action. The principles of freedom of moral choice and of respect for diversity emphasize the need for a candid exchange of views, from as many members of the relevant group as possible. At the same time, the companion principle of the unity of the human family (and of lesser communities) suggests that each participant ought to be willing to consider thoughtfully the merits of the views of others. Each ought to be motivated to find the solution best furthering the interests of the group in question, or legitimate ethical principles, rather than that participant's own interests. Such a conception of consultation as a fundamental ethical principle differs from traditional negotiation or bargaining, which involves the reaching of a compromise to satisfy competing self-interests.

There are passages in the U.N. Charter that appear to endorse such a conception of open-minded consultation. For example, the Charter's preamble indicates the intention of its founding peoples to "practice tolerance."[130] The fundamental purposes of the U.N. include the development of "friendly relations among nations" and the achievement of "international cooperation in solving international problems" and in promoting and encouraging respect

for human rights. Perhaps most significantly, the U.N. is to be "a center for harmonizing the actions of nations in the attainment of these common ends."[131] In this connection, the Charter empowers the General Assembly to "discuss any questions or any matters within the scope of the present Charter."[132] Further, in the Uniting for Peace Resolution, adopted in 1950, the General Assembly reaffirmed "the importance of unanimity among the permanent members of the Security Council on all problems which are likely to threaten world peace." It also recommended to the permanent members that they "meet and discuss, collectively or otherwise, and, if necessary, with other States concerned, all problems which are likely to threaten international peace and hamper the activities of the United Nations, *with a view to their resolving fundamental differences and reaching agreement in accordance with the spirit and letter of the Charter*."[133]

Certain passages from most of the revered moral texts I consider here can be interpreted as supporting the desirability of sincere and open-minded consultation among individuals or leaders as a method of problem-solving or investigating truth. For example, according to the Torah, one should "not be partial in judgment," but rather "hear out low and high alike" (Deuteronomy 1.17). Philosopher Lenn E. Goodman notes that based on the "Let us make . . ." of Genesis 1.26, the rabbis "remark that even God commences nothing without consultation."[134] Buddhist scriptures indicate that the Buddha stressed the need for an openness to other points of view. According to scholars, one is to give others the benefit of the doubt in conducting a dialogue with them and accept "all one honestly can of the other's position."[135] The parable of the blind men and the elephant, recounted in Buddhist scriptures, could be interpreted as conveying the concept that there are many aspects and facets of truth, which can only be perceived in its fullness through humble consultation rather than quarreling and dogmatic adherence to one's own limited perception.[136]

Various passages from the Analects suggest that the search for truth must be aided by consultation with, and learning from, others in a spirit of humility and detachment from one's own opinions. Confucius stated: "When I am walking in a group of three people, there will surely be a teacher for me among them. I pick out the good parts and follow them; the bad parts, and change them" (7.22).[137] The Analects implies that in the process of consultation individuals should look critically at their own views and shortcomings rather than criticize those of others: "To attack one's evils, but never attack the evils of others, is that not improving shortcomings?" (12.21). On the other hand, cordial consultation does not involve automatic adoption of

the views of others just to be like them: "The gentleman is harmonious but not conformist. The little man is conformist but not harmonious" (13.23). Indeed, Confucius implied a skepticism of simply following majority or popular views: "When the many hate him, one must always look into it; when the many love him, one must always look into it" (15.28).

There are several passages in the New Testament that appear to promote a process of open-minded consultation among the believers. For example, St. Paul said: "When you come together, each one has a hymn, a lesson, a revelation, a tongue, or an interpretation. . . . Let two or three prophets speak, and let the others weigh what is said. If a revelation is made to someone else sitting nearby, let the first person be silent. For you can all prophesy one by one, so that all may learn and all be encouraged" (1 Corinthians 14.26, 29–31). Likewise, one must consult humbly and, according to Jesus, look at one's own faults rather than those of others: "Do not judge, so that you may not be judged. . . . Why do you see the speck in your neighbor's eye, but do not notice the log in your own eye?" (Matthew 7.1, 3).

A number of verses in the Qur'ān endorse a principle of consultation (*shūrā*). For example, the Qur'ān states: "Take counsel with them in the affair; and when thou art resolved, put thy trust in God" (3.153).[138] And a *hadīth* approves of the expression of differing opinions in a search for truth. According to Muhammad, "if there is a difference of opinion within my community that is a sign of the bounty of Allah."[139] Another tradition states that the Prophet replied to a question about how, after his death, a problem should be dealt with that was not addressed by him or the Qur'ān as follows: "Get together amongst my followers and place the matter before them for consultation. Do not make decisions on the opinions of any single person."[140] There are many traditions recounting that Muhammad consulted with his followers and would accept a decision of the majority even if it differed from his own opinion (but not if it differed from the commands of the Qur'ān).[141]

Passages from the Bahá'í Writings also emphasize the importance of open-minded consultation. For example, Bahá'u'lláh affirmed: "Take ye counsel together in all matters, inasmuch as consultation is the lamp of guidance which leadeth the way, and is the bestower of understanding."[142] 'Abdu'l-Bahá described consultation as follows: "Consultation must have for its object the investigation of truth. He who expresses an opinion should not voice it as correct and right but set it forth as a contribution to the consensus of opinion, for the light of reality becomes apparent when two opinions coincide. . . . Before expressing his own views he should carefully consider

the views already advanced by others. If he finds that a previously expressed opinion is more true and worthy, he should accept it immediately and not willfully hold to an opinion of his own. By this excellent method he endeavors to arrive at unity and truth."[143]

2.4.8. The Participation of Citizens in Government Decision-Making Through Consultation

The ethical principles of consultation and of the duty of governments to act as trustees for the welfare of their citizens together imply that governments have a fundamental ethical duty to consult with their citizens and to take their views into account. Citizens therefore have a right to participate, through consultation, in government decision-making that affects them. The Universal Declaration appears to recognize such rights of participation in government. Indeed, Article 21 declares that everyone "has the right to take part in the government of his country, directly or through freely chosen representatives." It also affirms the right of "equal access to public service." Finally, it states that the "will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures."[144]

The ethical principle of consultation clearly supports the right to participate in the selection of leaders through free elections. But it also implies that the right to participate in elections, while important, is not as critical as the right *effectively to consult* with government leaders, because the mere fact that leaders are elected by the people does not mean that they will in practice consult with their citizens and seriously consider their views. Only through regular consultation can citizens be assured that their diverse views will be given adequate weight and consideration by rulers, whether those rulers are selected by popular ballot or otherwise. In this connection, some modern-day proponents of democracy have come to the view, after the election of intolerant and repressive leaders, that more important than such elections is the institution of liberal government, that is, of governmental structures that protect human rights, including by providing for regular consultation with citizens holding diverse viewpoints and with members of minorities.[145]

Passages in some revered moral texts may be interpreted as explicitly supporting the participation of citizens in government decision-making through consultation and elections. For example, there are passages in Buddhist

scriptures that endorse a social contract theory of governmental legitimacy based on selection of the king by the people as a whole. After his selection, the king is still only a person among others, but one now given the responsibility of acting for the benefit of all. One Buddhist scholar concludes therefore that "there is little doubt that Buddhism considers democracy to be the best form of government. . . . But the democracy that Buddhism favours is not merely a rule of the majority but the rule of the majority in conformity with the Dhamma or the principles of righteousness which the majority is acquainted with and tries to live by."[146]

Mencius enjoined rulers to consult with their people, and not just with their immediate advisers, when making any significant decision, including the appointment or firing of officials and the determination of whether an individual deserves the death penalty. But even if the people agreed to a course of action, Mencius stated that the ruler must independently look into the matter and determine that the course of action is right and appropriate—thus serving as a check on oppressive majoritarianism.[147] And, as I will discuss in section 2.8, in cases of humanitarian intervention Mencius also held that the people of the invaded state must be consulted about the appointment of a new ruler.[148]

Many contemporary scholars of Islam have argued that consultation among members of the community, and between the government and the community, is mandated by the Qur'ān. According to C. G. Weeramantry, for example, a ruler "has a duty to consult and draw his subjects into a democratic participation in the processes of government."[149] Riffat Hassan argues similarly that because "the principle of mutual consultation . . . is mandatory, . . . it is a Muslim's fundamental right to participate in as many aspects of the community's life as possible."[150] Abdulaziz Sachedina notes that under Sunni tradition, the "sovereign in the management of all the affairs of state should always be prepared to consult the community and to listen to the representations of the community. Neither side was to act independently of the other or to impose its own point of view."[151]

Turning to the Bahá'í Writings, Bahá'u'lláh praised republicanism and the institution of constitutional monarchy.[152] 'Abdu'l-Bahá lauded the "setting up of parliaments" and "the organizing of assemblies of consultation," which, he said, constitute "the very foundation and bedrock of government." And he suggested that "it would be preferable if the election of non-permanent members of consultative assemblies in sovereign states should be dependent on the will and choice of the people. For elected representatives will on this account be somewhat inclined to exercise justice, lest their reputation suf-

fer and they fall into disfavor with the public." But he also emphasized that members of these elected institutions must be "righteous, God-fearing, high-minded, incorruptible."[153]

2.4.9. The Principle of Individual Moral Responsibility and the Reformative, Deterrent, and Protective Purposes of Punishment of Criminal Behavior, without Vengeance

The principle of freedom of moral choice within the bounds of ethical duties implies that individuals are morally responsible for their actions, and therefore ought to be criminally responsible when they have violated those moral obligations which are appropriately codified in criminal law. It implies, too, that a primary purpose of criminal punishment ought to be to help criminals voluntarily to recognize their errors and reform their moral behavior. Moreover, if the rights of community members are to be respected, then other legitimate purposes of punishment are to protect such community members, prevent further violations of their rights, and deter future misconduct by the criminal or by others. The principle of human unity simultaneously suggests that any motivation of exacting vengeance must be rejected on moral grounds. And it also implies that individuals, including victims, ought to be allowed, and encouraged, to show forgiveness.

Many of these principles are endorsed in international human rights law, including international standards relating to the treatment of offenders, as well as in evolving norms of international criminal law. For example, Article 30 of the Universal Declaration emphasizes the moral obligation of every individual (as well as of every group and government) not "to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein."[154] Article 10 of the ICCPR provides in part that the "penitentiary system shall comprise treatment of prisoners *the essential aim of which shall be their reformation and social rehabilitation*"[155]—thus endorsing as a primary purpose of punishment the reform of the criminal. But as noted earlier, the Universal Declaration also permits legal limitations on rights, presumably including legal punishments of criminals, necessary to secure respect for the rights of others and to safeguard "morality, public order and the general welfare."[156]

These provisions implicitly advocate the goals of deterrence and protection of the safety of the community. Indeed, the objectives of deterrence of war crimes and crimes against humanity and protection of the community from them are explicitly endorsed in the preamble to the 1968 Convention

on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity. The preamble indicates that the states parties are convinced that "*the effective punishment* of war crimes and crimes against humanity is an important element in the *prevention* of such crimes [and] the *protection* of human rights and fundamental freedoms."[157] And the Rome Statute of the International Criminal Court, adopted in July 1998, likewise affirms that "the most serious crimes of concern to the international community as a whole *must not go unpunished* and that their *effective prosecution* must be ensured by taking measures at the national level and by enhancing international cooperation." It further expresses a determination to "*put an end to impunity* for the perpetrators of these crimes and thus to contribute to the *prevention* of such crimes."[158] All of these principles effectively rule out vengeance as a motivation for prosecuting and punishing crimes, including genocide, war crimes, and crimes against humanity.

Many passages from the world's revered moral texts may be interpreted as supporting some or all of these principles. For example, several passages emphasize individual moral responsibility. According to later prophets of the Hebrew Scriptures such as Ezekiel, individuals are responsible before the law for their crimes, a responsibility that can never be displaced onto another. (See Ezekiel 18.20.) Buddhist scriptures similarly indicate that each individual has a moral responsibility for his or her personal and official actions.[159] One scholar opines that from a Buddhist perspective this principle implies that state officials who violate the laws of war or commit crimes against humanity should be liable for prosecution and conviction under international law.[160] The Qur'ān recognizes individual responsibility for criminal conduct, based on such Qur'ānic verses as the following: "Whosoever does evil shall be recompensed for it" (4.122).[161] And the Bahá'í Writings affirm that human beings have the capacity to choose to do good or to do evil and bear responsibility for their choice.[162]

A number of passages from revered moral texts emphasize the importance of punishment as a means of reforming the criminal, as well as the long-term need for moral education to prevent crime. For example, in the Buddhist doctrine of punishment, according to one scholar, the first purpose is to reform, and only the second purpose is to deter.[163] And the Bahá'í Writings state: "The communities must punish the oppressor, the murderer, the malefactor, so as to warn and restrain others from committing like crimes. But the most essential thing is that the people must be educated in such a way that no crimes will be committed."[164]

Some revered moral texts imply that criminals ought to be punished to deter future misconduct and to protect the community, and are therefore not

entitled to compassionate treatment that would forgo such punishment. For example, Confucius was asked: "Requite malice with kindness: how about that?" He reportedly replied, "With what then will you requite kindness? Requite malice with uprightness; requite kindness with kindness" (14.34). This passage might be understood as requiring that wrongdoers be treated justly, not with kindness. And as just noted, the Bahá'í Writings indicate that punishment should be aimed at deterrence as well as the protection of members of the community. Indeed, they make clear that human rights violators must be dealt with justly, not compassionately: "Kindness cannot be shown the tyrant, the deceiver, or the thief, because, far from awakening them to the error of their ways, it maketh them to continue in their perversity as before."[165]

At the same time, many passages prohibit vengeance. Thus, the Torah affirms: "You shall not take vengeance or bear a grudge against your countrymen" (Leviticus 19.18). According to the Analects, hostility does not justify a violent response or vengeance, at least in interpersonal relationships. One of Confucius's disciples praises a friend who was "wronged, yet not retaliating" (8.5). Jesus taught a principle of forgiveness: "For if you forgive others their trespasses, your heavenly Father will also forgive you; but if you do not forgive others, neither will your Father forgive your trespasses" (Matthew 6.14–15). And St. Paul affirmed that one should "not repay anyone evil for evil." "Beloved, never avenge yourselves, but leave room for the wrath of God; for it is written, 'Vengeance is mine, I will repay, says the Lord'" (Romans 12.17, 19). A number of Qur'ānic verses call for forgiveness in interpersonal relationships rather than retaliation. For example, the Qur'ān extols those who "when they are angry forgive" and him "who bears patiently and is forgiving" (42.35, 41). Vengeance is also clearly condemned in the Bahá'í Writings: "Punishment is for the protection of man's rights, but it is not vengeance; vengeance appeases the anger of the heart by opposing one evil to another. This is not allowable."[166] For this reason, forgiveness is preferable in interpersonal relationships, but not on the part of the community with respect to a criminal.[167]

2.5. Respect for Governments and Law, with Rebellion Allowed Only as an Absolute Last Resort Against Tyranny

The principle of unity in diversity, with its emphasis on the moral ideal of social unity at all levels of society, including local, state, and international, implies a strong ethical principle of respect for governments and law at each

of these levels as a means of fostering such unity. On the other hand, the trust theory of government and the principle of limited state sovereignty certainly do suggest that where governments deliberately engage in widespread and severe violations of the essential rights of their citizens, rebellion ought to be allowed as a last resort, after any legal methods of consultation and peaceful resistance have been exhaustively attempted by the citizenry.

Such a strong principle of obedience to governments and law, with rebellion allowed only as an absolute last recourse, appears to be endorsed by the Universal Declaration of Human Rights. For example, as noted earlier, Article 29 affirms that everyone has "duties to the community" and is subject, in the enjoyment of his or her rights, to legitimate legal limitations that ought to be respected.[168] But the preamble also implies that rebellion may be morally permissible if no legal means of redressing human rights violations are available. It states that "it is essential, *if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression,* that human rights should be protected by the rule of law."[169]

Many passages from the revered moral texts I consider can be interpreted as endorsing similar principles. Some passages suggest that believers are to exhibit a significant degree of deference to political authorities and to civil law. But many passages seem to recognize that a duty of obedience may be overridden in cases of direct conflict between asserted political obligations and the demands of the most important ethical principles. In particular, these passages suggest the legitimacy of rebellion against tyranny as an absolute last recourse.

For example, the Hebrew Scriptures contain a general admonition to Jews to obey the government of the city in which they happen to reside, regardless of its form, and to promote its interests: "Seek the welfare of the city to which I [God] have exiled you" (Jeremiah 29.7). However, subsequent rabbinical commentary held that disobedience is justified if the law contravenes a religious command.[170] According to Buddhist scriptures, the Buddha advised monks to obey orders of a king only to the extent they were not "morally repugnant," but in any case counseled nonviolent resistance rather than the use of force.[171] Mencius likewise recommended peaceful resistance to a tyrannical ruler, while acknowledging the legitimacy of revolt as an absolute last resort in extreme cases.[172] In one passage, he suggested that relatives of a prince with great faults should first "remonstrate with him," and that if he does not "listen to them after they have done so again and again, they ought to dethrone him."[173]

Like the Hebrew Scriptures, certain passages from the New Testament

can be interpreted as counseling believers in general to obey those who have secular authority. Jesus, when asked by the Pharisees whether it is lawful to pay taxes to the emperor, replied: "Give therefore to the emperor the things that are the emperor's, and to God the things that are God's" (Matthew 22.21). According to St. Paul: "Let every person be subject to the governing authorities; for there is no authority except from God, and those authorities that exist have been instituted by God. Therefore whoever resists authority resists what God has appointed, and those who resist will incur judgment. For rulers are not a terror to good conduct, but to bad" (Romans 13.1–3). Nevertheless, other passages suggest that at least when sovereign commands contradict moral duties, the latter are to take precedence. Thus, as noted earlier, St. Peter and the apostles affirmed: "We must obey God rather than any human authority" (Acts 5.29). Even the above passage from Romans could be interpreted as resting on the assumption that authorities to whom obedience is owed indeed legislate in favor of morally good conduct and against morally bad conduct, thus allowing for legitimate disobedience when they do not.[174]

The Qur'ān evidently counsels individuals to obey those in authority, as well as divine commandments, in the following verse: "O believers, obey God, and obey the Messenger and those in authority among you. If you should quarrel on anything, refer it to God and the Messenger, if you believe in God and the Last Day" (4.62). This passage appears to advise believers generally to obey authorities. The passage can be read as referring to either religious or secular authorities, or both.[175] Significantly, under later Islamic jurisprudence, the duty to obey the laws and government applied even to Muslims living in territories under the jurisdiction of non-Muslim governments.[176] However, various jurists and interpreters have read passages in the Qur'ān and other *hadīth* as allowing rebellion under certain circumstances where the duty to safeguard justice is violated by a tyrannical government.[177] A relevant passage in the Qur'ān affirms: "So fear you God, and obey you me, and obey not the commandment of the prodigal who do corruption in the earth, and set not things aright" (26.150–52). Jurists finding support for a right of disobedience in cases of tyranny have also relied on a *hadīth* reporting Muhammad as saying, "If people see an oppressor and they do not hinder him, then God will punish all of them."[178]

In the Bahá'í Writings, Bahá'ís are enjoined to obey the governments of the territories in which they reside and to abstain from partisan politics because of its tendency to foster discord rather than unity. According to Bahá'u'lláh, Bahá'ís living in a country "must behave towards the government

of that country with loyalty, honesty and truthfulness."[179] However, they are encouraged to advocate the implementation of the basic ethical teachings of their faith and are permitted to resist governmental demands that violate its fundamental spiritual principles.[180] The Bahá'í Writings apparently do not explicitly address whether citizens in general have a right of rebellion against tyranny, but they clearly contemplate the pursuance of every lawful means to oppose unjust governmental decisions.[181]

2.6. Peaceful Relations Among States, the Interdependence of Peace and Human Rights, and Respect for Treaties

2.6.1. The Duty of States, Nations, and All Persons to Promote Peace, Cooperation, and Collective Action Among All States, and the Development of International Law

The principle of unity in diversity, which encompasses the principle of the unity of the human family, together with the principle of respect for law, suggests that all individuals and governments have a moral duty to promote peace, cooperation, and collective action among all states and the development of international law. In this connection, the U.N. Charter affirms in its preamble that the "peoples" of the United Nations are determined "to unite our strength to maintain international peace and security," "to employ international machinery for the promotion of the economic and social advancement of all peoples," and to "establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained." Member states of the U.N. are at least morally obligated to pursue its purposes, which include the development of "friendly relations among nations" and the bringing "about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace."[182]

According to the Charter, states as well as individuals have a moral duty to promote peace, cooperation, and collective action among states. By contrast, some political realists deny that the precepts of morality that may apply in the relations among individuals can permissibly be applied to those among states.[183]

In this connection, certain passages from revered moral texts can be read as also advocating the establishment of peace, cooperation, and collective action among human communities—including, by extrapolation, modern-day states—as an ultimate goal, as well as the development of global gov-

ernance structures. Some also implicitly or explicitly prescribe a duty among rulers to work toward these ends. For example, the Hebrew Scriptures can be interpreted as endorsing peaceful relations among independent nations, including the Jewish nation, within the framework of the universal ethical principles described earlier. The prophet Micah's vision of the future (which replicates that of Isaiah) is one of nations being united under a common law: "For instruction shall come forth from Zion, / The word of the Lord from Jerusalem. / Thus He will judge among the many peoples, / And arbitrate for the multitude of nations, / However distant" (Micah 4.2–3).[184] Buddhist scriptures foresee the eventual establishment of a world-statesman who will rule justly and impartially, "promoting both material and spiritual welfare on the principle of the equality of man." Nevertheless, such a world-ruler will come to exercise these responsibilities not by conquest, but by the force of example.[185]

According to the Qur'ān, nations and peoples were created in order to know and implicitly have peaceful relations with one another: "O mankind, We have created you male and female, and appointed you races and tribes, that you may know one another" (49.13). Moreover, the Qur'ān advocates a concept similar to that of collective security, as discussed in subsection 2.7.1. The Bahá'í Writings, for their part, recommend the establishment, by multilateral treaty, of a world federation among independent states in which "the autonomy of its state members and the personal freedom and initiative of the individuals that compose them are definitely and completely safeguarded." This federation would include a democratically elected world parliament that would adopt laws on appropriate subjects.[186]

2.6.2. The Close Interrelationship Between Peace and Respect for Human Rights

The principle of unity in diversity implies that "peace" should be understood, not only as the absence of war, but also as a process involving the development of ever more secure bonds of unity between members of a community. At the same time, this principle, together with the concomitant principles of respect for human rights and the implementation of a trust theory of government, suggest that such lasting social unity, and therefore peace, should be achieved through respect for human rights, and indeed that respect for human rights should be an integral component of a unified and peaceful social order. Violations of human rights, while not always leading to warfare, represent ruptures of the ideal bonds of social unity.

This conception of the interdependence of peace and human rights has

been recognized in the U.N. Charter and in the Universal Declaration. For example, Article 55 of the Charter suggests that the promotion of universal respect for human rights helps create "conditions of stability and well-being *which are necessary for peaceful and friendly relations among nations*."[187] And the preamble to the Universal Declaration declares explicitly that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and *peace* in the world."[188]

Several passages from revered moral texts can be understood as advocating a similar multidimensional conception of peace that includes not just the absence of war but also the realization of justice, which at least implicitly requires respect for human rights. For example, the Bhagavad Gītā simultaneously praises "harmlessness" and "uprightness" as virtues (13.7). According to many Judaic scholars peace among nations must be "established on righteousness and justice."[189] This intimate relationship between peace and justice is expressed by Isaiah: "The work of righteousness shall be peace, / And the effect of righteousness, calm and confidence forever" (Isaiah 32.17). Buddhist scriptures, too, imply that justice and peace are dynamically interrelated, and that on occasion justice may require the use of force in the short-term to achieve a deeper level of peace in the long-term, as analyzed in subsection 2.7.1.

The concept of peace reflected in the New Testament goes well beyond the absence of war, and includes righteousness and peace with God.[190] Indeed, Jesus, while preaching peace, also instructed the scribes and the Pharisees not to neglect "the weightier matters of the law: justice and mercy and faith" (Matthew 23.23). The Qur'ān also appears to consider peace and justice interdependent, especially in its teachings on collective security, discussed in section 2.7.1. According to one scholar, "peace is an outcome of a society in which there is concern for justice and not just the absence of conflict."[191] Finally, according to the Bahá'í Writings, "it is time for the promulgation of universal peace—*a peace based on righteousness and justice*—that mankind may not be exposed to further dangers in the future."[192]

2.6.3. The Duty to Honor Treaties

There are many statements in contemporary international law of the rule that states are obligated to fulfill their treaty commitments (*pacta sunt servanda*). Many of these statements imply that such an obligation has a moral as well as legal character. For example, the preamble to the U.N. Charter declares that the peoples of the United Nations are determined "to establish

conditions under which justice and *respect for the obligations arising from treaties* and other sources of international law can be maintained."[193] And, as noted above, in Article 1 it announces that one of the purposes of the U.N. is to bring about the peaceful settlement of disputes "in conformity with the principles of justice *and international law*."[194] Similarly, the 1969 Vienna Convention on the Law of Treaties affirms in Article 26 that "every treaty in force is binding upon the parties to it and must be performed by them in good faith."[195] The phrase "in good faith" suggests that this obligation has both moral and legal dimensions.

A strong principle of the moral obligation to respect treaties can be understood as related to the principle of the unity of the human family and the principle of peaceful cooperation among states. Treaties create expectations on the part of other states that should not be defeated, if at all possible, not only because doing so would lead to worse outcomes, measured in terms of the self-interest of the parties, or impair future dealings (prudential concerns), but because it would be disunifying and a breach of trust. Such a moral foundation for the obligation to observe treaties contrasts with the purely prudential justification offered by many contemporary political theorists.[196]

Many passages in revered moral texts can be interpreted as supporting a strong moral obligation of faithfulness to one's covenants, including treaties. For example, the Hebrew Scriptures recount the story of the Gibeonites in the Book of Joshua.[197] In this story, the inhabitants of Gibeon, fearful for their lives if Joshua knew they lived among the Israelites, deceived him and told him they came from a distant country. Joshua was therefore willing to make "a pact with them to spare their lives, and the chieftains of the community gave them their oath" (Joshua 9.15). But even after the Israelites learned of the Gibeonites' deception, the Israelite chieftains restrained their followers from attacking the Gibeonites, affirming: "We swore to them by the Lord, the God of Israel; therefore we cannot touch them" (Joshua 9.19). Although rabbinical commentators have differed in their interpretations of the story, each of the theories, according to legal scholar Michael J. Broyde, "presupposes that treaties are basically binding according to Jewish law."[198] This principle and its scriptural endorsement exercised an important influence on international legal theorists throughout the centuries; indeed, the discussion of the sanctity of treaties by the Dutch international law theorist Hugo Grotius (1583–1645) drew on various biblical sources, including the story of the Gibeonites.[199]

Buddhist scriptures teach the virtue of making solemn promises in good faith.[200] And Confucius counseled fidelity to promises: "First [the gentleman] carries out his words, and then he remains consistent with them" (2.13).

In the New Testament, too, Jesus endorsed the keeping of one's promises, but without swearing either by heaven, the earth, or Jerusalem. (See Matthew 5.33–35.) The Qur'ān teaches that one should fulfill one's covenants (see, e.g., 2.173). It also supports the sanctity of treaties, even between believers and unbelievers, except where the unbelievers violate them and attack the Muslim community (9.3–4, 12). It apparently emphasizes that stronger nations must not take advantage of their power to betray their treaty obligations; treaties bind large and small nations alike (16.93–94).[201] And, as discussed in the next subsection, the Bahá'í Writings call for the conclusion of a binding collective security treaty, with severe sanctions against violating states, thereby suggesting the sanctity of international treaty obligations.

2.7. Principles of Just War and the Humanitarian Conduct of War

2.7.1. The Fostering of Peaceful Methods of Dispute Resolution If at All Possible, But a Reluctant Endorsement of Ideally Collective Force as a Last Resort to Achieve Moral Ends (*Jus ad bellum*)

The principles of unity in diversity, of consultation, and of peaceful relations among states suggest that peaceful methods of social reform, persuasion, and dispute resolution are intrinsically preferable to the use of force. But the very imperative of protecting the fundamental human rights of community members, and indeed all members of the human family, as well as the security of the communities of which they form a part, seems to require that force may have to be used as a last resort, ideally on a collective basis and with the authorization of a legitimate authority, but if necessary through self-help and self-defense, to protect human rights or the security of these communities. In such cases, the intention in using force to pursue one of these legitimate moral ends must be limited to these ends.

These principles of just war or *jus ad bellum* have been recognized in part in the U.N. Charter and evolving international law, as I will argue in greater detail in the balance of this book. In particular, the preamble to the U.N. Charter declares that the peoples of the U.N. are determined "to unite our strength to maintain international peace and security, and to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest."[202] As we will see at length in Chapter 3, the Charter encourages the peaceful settlement of disputes,[203] and prohibits individual states from threatening or using force "against the

territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[204] But it also permits the Security Council to adopt such forcible enforcement measures "as may be *necessary* to maintain or restore international peace and security" should it consider that peaceful methods "would be inadequate or have proved to be inadequate" in thwarting a threat to the peace, breach of the peace, or act of aggression.[205] I will argue in Chapter 4 that the Charter's framers contemplated the possibility that such collective security action could be used, not only to protect the security of states (and implicitly of the people residing within them) from external threats, but also to protect victims of human rights violations from threats arising within a state, including from their own government. Finally, the Charter in Article 51 permits states to act in self-defense against armed attacks.[206] These attacks obviously may also threaten the life and physical security of residents of those states. The Universal Declaration, too, implies, as noted above, that citizens of a tyrannical state may have a right to resort to force in rebellion as a last resort.

Considering these provisions of the U.N. Charter and the Universal Declaration together, they imply a general ethical principle that force may be used, if at all, only if it is necessary and proportional to the achievement of moral ends, determined by reference to fundamental ethical principles. Such moral ends, including the protection of states and their residents against armed attacks, threats to the peace, breaches of the peace, and acts of aggression, and the removal of tyrannical and oppressive governments, ultimately relate to the protection of human rights. Given the risk that any uses of force will put at risk the essential human right to life and physical security, such an ethical principle should be regarded as a compelling ethical principle, and, indeed, as an essential ethical principle. It may be referred to as a *jus ad bellum* ethical principle of necessity.

Many passages from revered moral texts may be interpreted to support principles similar to those just described in contemporary international law governing when the use of force is justified. For example, the Bhagavad Gītā contains passages endorsing nonviolence and harmlessness (*ahimsā*) as a supreme virtue, and these have inspired many Hindu sects and, of course, Gandhi's principle of pacifism and nonviolent resistance.[207] Historically, the principle of *ahimsā* was reflected in the "Code of Manu," a document compiled in about 100 B.C.E., which counseled kings to employ conciliation and nonforcible means of dispute settlement, with war used only if it cannot be avoided.[208] Nevertheless, the poetic setting of the Gītā is a battle between Arjuna and an opposing army including some of Arjuna's kinsmen and

friends, and Krishna exhorts Arjuna to fight (do his duty as a member of the warrior caste) regardless of the consequences, because his soul is indestructible: "Therefore fight, son of Bharata!" (2.18). The idea that one may have a duty to fight could be interpreted as suggesting that violence may sometimes be required to secure justice.

The Hebrew Scriptures can be interpreted as emphasizing the central place of peace as a value. One is to love foreigners one resides with as oneself (Leviticus 19.34). Moreover, the Hebrew Scriptures' ultimate vision of the future includes the elimination of war. Isaiah prophesied that in the time of fulfillment God "will judge among the nations / And arbitrate for the many peoples, / And they shall beat their swords into plowshares / And their spears into pruning hooks: / Nation shall not take up / Sword against nation; / They shall never again know war" (Isaiah 2.4). International legal historian Arthur Nussbaum describes Isaiah's prophecy as the "most important contribution of the Jewish people to the history of international law" and as "a main root of modern pacifism."[209] However, restrictions on war in the Hebrew Scriptures are not absolute. There are many accounts in the Torah of battles waged by the Israelites against the seven nearby Canaanite nations and against Amalek, who were seen as enemies of the Hebrews and their faith (Deuteronomy 7.1–5, 20.15–18, 25.17–19). But the Torah can be read as suggesting that war is to be used only as a last resort: "When you approach a town to attack it, you shall offer it terms of peace" (Deuteronomy 20.10).

As is evident from the Buddhist prohibition against killing, the Buddha sought to guide humankind to a life of peace.[210] Buddhist scriptures urge kings not to "foster hostility towards neighbouring kings" and to "cultivate ties of friendship" with them.[211] But they also authorize wars of self-defense and military action necessary to uphold righteousness after all peaceful methods have been exhausted. The Buddha is recorded as stating, referring to himself in the third person: "All warfare in which man tries to slay his brother is lamentable, but he does not teach that those who go to war in a righteous cause after having exhausted all means to preserve the peace are blameworthy. He must be blamed who is the cause of war."[212]

Mencius abhorred war, and indeed in one passage from his works he seems to be willing to give up the entire Book of History rather than to give credit to its account of the violence allegedly perpetrated by the founders of the Zhou dynasty.[213] He further asserted: "There are men who say—'I am skilful at marshalling troops, I am skilful at conducting a battle!'—They are great criminals."[214] And in a related passage Mencius said that in "the 'Spring and Autumn' there are no righteous wars." On the other hand, he did

acknowledge that "instances indeed there are of one war better than another." Nevertheless, wars between hostile states could not be described as "corrective" or perhaps even "righteous" because, according to Mencius, "'correction' is when the supreme authority punishes its subjects by force of arms. Hostile States do not correct one another."[215]

Peace is central to the Christian ethic, both between persons and between nations. Jesus declared: "Blessed are the peacemakers, for they will be called children of God" (Matthew 5.9). And St. Paul counseled: "Do not repay anyone evil for evil, but take thought for what is noble in the sight of all. If it is possible, so far as it depends on you, live peaceably with all" (Romans 12.17–18). But the New Testament in certain passages appears to recognize that force may be required for particular purposes. Jesus did not advise a centurion to leave military service (Matthew 8.9–10), and in an encounter with soldiers John the Baptist counseled them to "be satisfied with your wages" (Luke 3.14). These and other passages[216] from the New Testament may be read as implicit endorsements of some role for military force,[217] or they may in the alternative be interpreted allegorically. Accordingly, contemporary theologians differ on whether the teachings of Jesus are strictly pacifist.

Many Christian theologians support "just war" approaches similar to those developed in the writings of St. Augustine and St. Thomas Aquinas. Aquinas, for example, asserted that there are three conditions for a just war. First, "the ruler under whom the war is to be fought must have authority to do so." Second, "a just cause is required—so that those against whom the war is waged deserve such a response because of some offense on their part." Third, the ruler must have "a right intention, to achieve some good or avoid some evil."[218] Building on Aquinas's analysis, contemporary Christian ethicists are in general agreement that to satisfy criteria of *jus ad bellum,* a war must have a just cause, be waged by a legitimate authority, be formally declared, be fought with a peaceful intention, be a last resort, have a reasonable hope of success, and use means proportional to the end sought.[219]

The Qur'ān contains verses promoting peace. It is referred to as "a Book Manifest whereby God guides whosoever follows His good pleasure in the ways of peace" (5.18). And the Qur'ān encourages arbitration and the peaceful settlement of disputes, as evidenced by a passage calling for the resolution of disputes by Muhammad (4.62). There are many examples of resort to conciliation and arbitration in the conduct of Muhammad and the history of the early believers.[220] At the same time, the Qur'ān contains norms regarding the legitimate use of force, and in particular, the concept of *jihād*.

Many Muslim scholars believe that the concept of *jihād* as it is developed in the text of the Qur'ān only permits the defense of oneself or others.[221] They rely on passages in which the Qur'ān specifically prohibits aggressive war, even against those who defile the Muslim faith, such as: "Let not detestation for a people who barred you from the Holy Mosque move you to commit aggression" (5.3). Further, the Qur'ān apparently allows resort to the collective use of force against a party in the wrong, should a peaceful settlement fail: "If two parties of the believers fight, put things right between them; then, if one of them is insolent against the other, fight the insolent one till it reverts to God's commandment. If it reverts, set things right between them equitably, and be just" (49.9).

In the Bahá'í Writings, Bahá'u'lláh encouraged the peaceful settlement of disputes among states and in general prohibited war. But Bahá'u'lláh also called for the establishment of a system of collective security by agreement of the world's rulers: "The rulers and kings of the earth must . . . consider such ways and means as will lay the foundations of the world's Great Peace amongst men. Such a peace demandeth that the Great Powers should resolve, for the sake of the tranquillity of the peoples of the earth, to be fully reconciled among themselves. Should any king take up arms against another, all should unitedly arise and prevent him. If this be done, the nations of the world will no longer require any armaments, except for the purpose of preserving the security of their realms and of maintaining internal order within their territories. This will ensure the peace and composure of every people, government and nation."[222]

2.7.2. The Observance of Humanitarian Rules in Military Action (*Jus in bello*)

If the only legitimate purpose for the use of force is ultimately to protect human rights (either of members of one's own community, or members of other communities who are also members of the human family), then it follows that limitations must be placed on how military action is conducted to protect the human rights of those individuals who may be put at physical risk by that use of force—whether combatants or civilians. Such limitations have been referred to as rules of *jus in bello*. Rules of *jus in bello* have been codified in emerging international humanitarian law, which I review in greater detail in Chapters 3 and 7. In particular, according to international humanitarian law, any degree of force used must be necessary and proportional to the military end to be achieved. Because of the ethical principle that force may only be used to achieve certain moral ends (ultimately relating to the

protection of human rights), it is appropriate to imply, therefore, from all of these legal standards, an *ethical* principle that force may only be used, if at all, in such a degree that it is necessary and proportional to the achievement of moral ends, determined by reference to fundamental ethical principles. I will refer to this as a *jus in bello* ethical principle of necessity.

The *jus ad bellum* and *jus in bello* ethical principles of necessity I have described may be integrated and referred to simply as a general "ethical principle of necessity." Such a principle requires that force may be used only if, and in such a degree that, *it would result in an overall net benefit, measured in moral terms and by reference to fundamental ethical principles, that exceeds the net moral benefit to be achieved by nonforcible alternative courses of action (including simple inaction) or by alternative levels or uses of force.* Although the principles of necessity and proportionality have often been regarded as distinct, they are ethically interdependent, as this test highlights, because even under the principle of proportionality, the use of force is "proportional" to the achievement of a particular moral end only when it is "necessary" when compared with other forcible or nonforcible alternatives for achieving the same moral end.

Further, according to contemporary international humanitarian law, uses of force may not be deliberately targeted against civilians, and even when they are not so targeted, they may not create an unreasonable risk of injury to civilians. Combatants, too, must be treated humanely if they are wounded or if they are captured as prisoners of war.

Given the purpose of all these principles to protect the life and physical security of civilians (and to a lesser degree, combatants), which are essential human rights, these principles themselves ought to be considered essential ethical principles. In addition, the right to protection from illegitimate uses of force that violate these principles ought to be regarded as an essential right.

There are precedents for such ethical principles of *jus in bello* in certain passages from the revered moral texts I examine, and many of these passages suggest the morally essential character of these principles. In particular, many passages forbid the targeting of civilians, especially vulnerable groups such as women, children, and the elderly. For example, the principle of *ahimsā* emphasized in the Gītā is also reflected in rules of humanitarian law found in the Hindu Code of Manu.[223] And the Torah contains a number of rules moderating the conduct of any type of war. When war is lawfully waged after an offer of peace, the Torah prohibits a "scorched earth" policy involving the defoliation of the captured land (Deuteronomy 20.19). Further, the twelfth-century jurist Maimonides laid down specific

regulations allowing civilians to seek refuge before an attack.[224] The requirement that civilians be allowed to flee before an attack indicates that noncombatants are not to be intentionally targeted.[225] Buddhist scriptures similarly can be interpreted as stressing the importance of humane conduct during military action.[226]

The Western just war tradition, which was inspired, in part, by the teachings of the New Testament, placed many humanitarian limits on the conduct of war. St. Augustine counseled moderation in war and the humanitarian treatment of prisoners, as well as immunity for noncombatants.[227] And St. Thomas Aquinas developed a general ethic that relied on the so-called principle of double effect. He stated that if our action has two effects, one we intend (for example, self-defense and saving our own life) and the other we do not (killing our attacker), then the morality of the act is judged only by its intended effect. On the other hand, he affirmed that even an "act that is prompted by a good intention can become illicit if it is not proportionate to the end intended."[228] The latter caveat laid the groundwork for the principle of proportionality in the conduct of hostilities.

With regard to *jus in bello,* the Qur'ān, various *hadīth,* and classical Islamic jurisprudence prescribe limitations on the conduct of war designed to ensure the protection of the most vulnerable civilians.[229] Scholars note, for example, that the verse enjoining fighting against "those who fight with you" (2.187) implies that no fighting is allowed by the Qur'ān except against combatants.[230] *Hadīth* also recount that Muhammad forbade the killing of women and children.[231] And the Qur'ān calls for the feeding of the "captive" (76.8). These passages in the Qur'ān and the traditions aimed at moderating the conduct of warfare found echoes in an early proclamation of the caliph Abu Bakr, in which he "warns his victorious soldiers to spare women, children, and old men; he exhorts them not to destroy palms and orchards, or to burn homes, or to take from the provisions of the enemy more than needed, and he demands that prisoners of war be treated with pity."[232] Significantly, under Islamic jurisprudence, treaties with non-Muslims regarding the humanitarian conduct of war were considered strictly binding and could provide additional protections.[233]

The Bahá'í Writings repeatedly condemn inhumanity and cruelty in war.[234] Nevertheless, they indicate that in the case of collective security action, sufficient force must be used against the government (but apparently not the people) violating a sacrosanct collective security treaty.[235]

2.8. The Permission and Obligation to Undertake Humanitarian Intervention in Extreme Cases

From the principles that I have discussed of the unity of the human family, human rights, and the ideally collective use of force if necessary to achieve moral ends ultimately relating to the protection of human rights, all of which are clearly recognized in the U.N. Charter and the Universal Declaration, it follows that humanitarian intervention to rescue human rights victims, in whatever state they happen to reside, should be morally permissible if certain conditions are satisfied. These conditions include respect for ethical principles of *jus in bello* and appropriate respect for relevant legal norms, to be explored throughout this book. Indeed, given the primacy of essential human rights, it seems at a minimum that it is necessary, and morally essential, that some avenue for humanitarian intervention be permissible in cases of widespread and severe violations of essential human rights.[236]

Moreover, humanitarian intervention may be morally required on balance in extreme cases, where there is no other way to put an end to human rights atrocities, depending again on the satisfaction of certain criteria. At the least, it appears morally essential that a minimal obligation on the part of governments, international organizations, and other actors (including individuals) be recognized to take some reasonable measures, individually or collectively, in response to widespread and severe violations of essential human rights, and in accordance with their abilities, even if these measures fall short of the use of military force.

An ethical permission and an ethical obligation to undertake humanitarian intervention, as well as those essential ethical principles just suggested, are not explicitly provided for in the U.N. Charter, the Universal Declaration, or contemporary international human rights law, as we will see at length in succeeding chapters. But these ethical principles logically follow from those mentioned earlier, which *are* expressly endorsed in these legal sources. And in the balance of this book I will argue that the U.N. Charter and contemporary international law can and should be interpreted to recognize these ethical principles. On the other hand, the critical question of whether and when humanitarian intervention is *legally* permissible or even required under the Charter and contemporary international law in particular circumstances is a far more complex issue, which much of the book is devoted to exploring.

Significantly, many passages from revered moral texts appear to endorse the permissibility of forcible humanitarian intervention, and in some cases to impose it as a moral obligation. Indeed, among those texts which discuss

humanitarian intervention, there is a surprising degree of consensus on its legitimacy and on the moral obligation to undertake it in egregious situations.[237]

For example, the Hebrew Scriptures and Judaic law can be read as specifically endorsing the use of limited force to rescue human rights victims. The Torah counsels Jews not to "profit by the blood of your fellow" (Leviticus 19.16). A verse in Psalms reads: "Judge the wretched and the orphan, vindicate the lowly and the poor, rescue the wretched and the needy; save them from the hand of the wicked" (Psalms 82.3–4). Kings are to save the needy who cry out and the lowly who have no helper (Psalms 72.12). The duty to rescue and inquire into the welfare of others apparently applies even to foreigners. In the words of Job, "I was a father to the needy, / And I looked into the case of the stranger" (Job 29.16). Moreover, individuals will be morally held to account if they claim ignorance as an excuse for failing to come to the rescue of another threatened to be killed. "If you refrained from rescuing those taken off to death, / Those condemned to slaughter—/ If you say, 'We knew nothing of it,' / Surely He who fathoms hearts will discern [the truth], / He who watches over your life will know it, / And He will pay each man as he deserves" (Proverbs 24.11–12).

The Code of Maimonides elaborates upon this duty of rescue: "If one person is able to save another and does not save him, he transgresses the commandment, *Neither shalt thou stand idly by the blood of thy neighbor* (Lev. 19:16)."[238] A failure to come to the aid of a victim is morally blameworthy because of the sacrosanctity of every single human life, but it is not subject to criminal punishment. Only the absolute minimum of force necessary for protection is permitted. Nevertheless, some errors of judgment about the minimum amount of necessary force are allowable in the interest of protecting the victim.[239] The duty of rescue creates, according to Michael J. Broyde's review of rabbinical commentators, the existence of a category of war that would include humanitarian intervention.[240]

Passages from Buddhist scriptures on just war (see subsection 2.7.1) appear to leave open the possibility of humanitarian intervention, for such a war would be considered for a "righteous" cause. And one contemporary scholar has argued that "Confucians would approve the use of force by one state against another state for the protection against abusive rule in the latter if properly carried out."[241] For example, in the works of Mencius it is recounted that the ruler of Qi invaded the state of Yan, whose ruler was "tyrannizing over his people." The people welcomed the intervention initially, and Mencius said he would approve of the annexation of Yan to Qi if the people of Yan

would be pleased with it. But the ruler of Qi himself then tyrannized the people of Yan. Mencius advised the ruler of Qi to restore his captives and appoint a new ruler of Yan after consulting with the people of Yan, and then withdraw from Yan.[242] These and other passages endorsing humanitarian intervention, but generally denouncing war,[243] in fact suggest that Mencius may have believed that "warfare is *only* justified when it is in the nature of 'humanitarian intervention.'"[244]

Christian theologians have often differed on how to reconcile a principle of nonviolence with the principles of Good Samaritanism and Christian love in cases where violence seems necessary to defend the innocent from attack. Some have urged the imperative of nonviolent resistance even in this case. Others have argued that the strong moral duty to defend the innocent as an expression of love may in some cases justify the threat or use of force. For example, theologian Paul Ramsey asks: "What do you imagine Jesus would have had the Samaritan do if in the story he had come upon the scene when the robbers had just begun their attack and while they were still at their fell work? Would it not then be a work of charity to resort to the only available and effective means of preventing or punishing the attack and resisting the injustice? Is not anyone *obliged* to do this if he can?"[245] Other theologians have also argued that the pacifist principles of the Sermon on the Mount may not apply to the Good Samaritan duty to *protect others*.[246] On this basis, contemporary Christian just war theorists have often been willing to endorse humanitarian intervention as a just war.[247]

Many of the early theorists of international law were influenced by the New Testament's teachings of concern for the entire human family and supported the legitimacy of humanitarian intervention for this reason. For example, both Catholic and Protestant internationalists like Alberico Gentili endorsed the concept of a "world-wide legal community. . . . From this—morally determined—concept of world community flows another idea, still rather vague, viz. that of humanitarian intervention. As all mankind belongs to the same community there is a certain obligation to come to the rescue of your fellow men in case they are oppressed."[248]

There is a passage in the Qur'ān appearing to authorize the use of force—and indeed, also to impose a duty to use it—on behalf of oppressed men, women, or children: "How is it with you, that you do not fight in the way of God, and for the men, women, and children who, being abased, say, 'Our Lord, bring us forth from this city whose people are evildoers, and appoint to us a protector from Thee, and appoint to us from Thee a helper'?" (4.77). Some commentators have further argued that humanitarian intervention is

supported by the Qur'ānic duty to uphold justice and the good and forbid the evil (see 3.100, 3.110).[249] Humanitarian intervention may also be justified by certain *hadīth*. For example, a *hadīth* authorizes the prevention of aggression against others. Muhammad affirmed: "Help your brother whether he is an aggressor or a victim of aggression." When asked how to help the aggressor, Muhammad replied: "By preventing him from carrying out his aggression as best you can."[250]

In the Bahá'í Writings, 'Abdu'l-Bahá affirmed that "the communities must protect the rights of man. So if someone assaults, injures, oppresses and wounds me, I will offer no resistance, and I will forgive him. But if a person wishes to assault [someone else], certainly I will prevent him."[251] Indeed, Bahá'u'lláh instructed all human beings to be "an upholder and defender of the victim of oppression."[252] One passage from the writings of Bahá'u'lláh might be interpreted as endorsing collective military intervention for purposes of preventing gross human rights abuses. Bahá'u'lláh exhorted all the rulers of the earth, not only to unite to implement a system of collective security protecting their countries, but also to cooperate to "shield mankind from the onslaught of tyranny."[253]

The fundamental ethical principles in contemporary international law supporting humanitarian intervention, and in particular collective humanitarian intervention, which I will analyze at greater length in succeeding chapters, and which are supported by these excerpts from revered moral texts, call for a relatively robust principle of humanitarian intervention based, in turn, on the preeminent ethical principle of the unity of the human family. By contrast, political and ethical theorists advocating the primacy of state-oriented values are more likely to disfavor humanitarian intervention on principle as an invasion of a protected sphere of sovereignty.[254] These fundamental ethical principles can also be contrasted with the views of other theorists who, while emphasizing humanity-oriented values, appear to believe that human rights victims are best left to fend for themselves. For example, John Stuart Mill contended that humanitarian intervention ought to be limited to cases where the victimized people have already rebelled. Mill argued that the "only test possessing any real value, of a people's having become fit for popular institutions, is that they . . . are willing to brave labour and danger for their liberation."[255] And philosopher Michael Walzer in his earlier writings would have allowed intervention only in egregious cases involving violations that "shock the moral conscience of mankind," including cases of massacres or "enslavement."[256]

The fundamental ethical principles I have identified in this chapter imply

that the exceptions to any nonintervention principle ought to be much broader that those suggested by Walzer.[257] Further, the strong obligation to rescue others as members of the same human family, coupled with the principle of obedience to government and the desirability of avoiding armed rebellion, implies that Mill's categorical limitation ought to be rejected. Indeed, these principles, especially when viewed in tandem with the principles of consultation and cooperative relations among states, arguably favor outside and collective humanitarian intervention over internal armed rebellion as a means of rectifying severe violations. Such a preference is similar (although it is not as extreme) to that apparently expressed by Grotius. Grotius explicitly held, based on the "mutual tie of kinship among men," that war might be waged on behalf of the subjects of another state when their ruler inflicts upon them "such treatment as no one is warranted in inflicting," including religious persecution. According to Grotius, other states may have this right of defense of innocent subjects even though the subjects themselves may not have a right of rebellion.[258]

2.9. Impartiality as Adherence to Fundamental Ethical Principles

All of the above fundamental ethical principles, taken together, but especially the principle of the unity of the human family, imply that the concept of "impartiality" ought to be defined, morally, as adherence to these fundamental ethical principles, both in intention and in fact, without regard to family relationships or other lesser communal ties. As I will demonstrate at length in Chapter 6, many provisions of the U.N. Charter, as well as historical U.N. practice, tend to support such a conception of impartiality.

Likewise, many passages from revered moral texts can be interpreted as endorsing such a conception. For example, the Gītā can be understood as calling for a scrupulous impartiality, in the sense of fulfilling one's duty to treat all human beings, even one's enemies, alike and in accordance with the same principles: "To friend, ally, foe, remote neutral, / Holder of middle ground, object of enmity, and kinsman, / To good and evil men alike, / Who has the same mental attitude, is superior" (6.9). In the Torah, judges and government officials are commanded to "govern the people with due justice" and to show "no partiality" (Deuteronomy 16.18–19). They are to hear all parties to a case, and decide based on justice, rather than fear of criticism by others, including the parties: "You shall not be partial in judgment: hear out low and high alike. Fear no man, for judgment is God's"

(Deuteronomy 1.17). All individuals must refrain from siding with the majority or multitude if doing so would result in a wrong (Exodus 23.2). Later rabbinical writings indicated that judges could best be impartial and fair by attempting to put themselves in the place of those whom they judged.[259]

According to Buddhist texts, kings must act impartially according to ethical principles, as explained in the following advice given to a king on hearing a lawsuit: "When a dispute arises, he should pay equal attention to both parties to it, and hear the arguments of each and decide according to what is right. He should not . . . act out of favouritism, hatred, fear or folly."[260] And in the Analects, Confucius called upon individuals to cherish virtue rather than partiality (4.11). Such faithful adherence to virtue constitutes impartiality: "The gentleman's relation to the world is thus: he has no predilections or prohibitions. When he regards something as right, he sides with it" (4.10).[261] Confucius opposed any form of partisanship and particularism: "The gentleman is broad and not partial; the little man is partial and not broad" (2.14). Brooks and Brooks interpret this saying as follows: "The gentleman is consistent at the level of large principles; the little man, at that of precise loyalties."[262]

In the New Testament, St. Paul implied in his letter to the Romans, as noted above, that God does not judge on the basis of one's nationality or religion; for "God shows no partiality" (Romans 2.9–11). And Jesus instructed his followers to love their enemies, in other words, to treat them with the same consideration as others (Matthew 5.43–48). The Qur'ān similarly affirms that one should act justly even if doing so is to one's own detriment, or that of one's family. The Qur'ān states: "O believers, be you securers of justice, witnesses for God, even though it be against yourselves, or your parents and kinsmen, whether the man be rich or poor; God stands closest to either. Then follow not caprice, so as to swerve; for if you twist or turn, God is aware of the things you do" (4.134). The Qur'ān suggests that one should act justly even toward one's enemies. In the words of the Qur'ān: "Let not detestation for a people move you not to be equitable; be equitable—that is nearer to godfearing" (5.11). And according to the Bahá'í Writings, impartiality means adherence to justice among all citizens and people, without favoritism: "Kings must rule with wisdom and justice; prince, peer and peasant alike have equal rights to just treatment, there must be no favour shown to individuals. A judge must be no 'respecter of persons,' but administer the law with strict impartiality in every case brought before him."[263] Elsewhere 'Abdu'l-Bahá defined impartiality and justice as meaning "to have no regard for one's own personal benefits and selfish advan-

tages, and to carry out the laws of God without the slightest concern for anything else. . . . It means to consider the welfare of the community as one's own."[264]

2.10. A Combination of Deontological, Consequentialist, and Virtue-Oriented Principles

These fundamental ethical principles recognized in contemporary international law, taken together, reflect a combination of deontological, consequentialist, and virtue-oriented approaches. As examples of their deontological aspect, they call for observance of certain minimal rules of proper social conduct toward fellow human beings, including prohibitions of violations of the right to life and physical security, the right to subsistence, the right to freedom of moral choice, and the right to protection from illegitimate uses of force, without discrimination. They also require obedience to strict ethical rules of *jus in bello* that apply regardless of the justness of the underlying cause and the adverse consequences to that just cause of complying with them.

At the same time, these principles encourage actions, otherwise permissible under minimal rules of conduct, that promote realization of the humanity-oriented values they endorse, including respect for the human rights of others, thus disclosing a consequentialist aspect.[265] And they encourage the cultivation and exercise of certain virtues, such as acting toward one another "in a spirit of brotherhood."[266] Such a combination of deontological, consequentialist, and virtue-oriented approaches may also be understood to be reflected in many of the revered moral texts, based on the passages mentioned above.

2.11. An Optimistic Yet Pragmatic Emphasis on First-, Second-, and Third-Image Prescriptions

2.11.1. A First-Image Emphasis, Alongside Second- and Third-Image Prescriptions

The principles of moral choice and of consultation together suggest that human social and political institutions must ultimately be reformed through a new moral outlook on the part of citizens and leaders, voluntarily pursued in consultation with others. To this extent, these principles have, in terms

of Waltz's images, a "first-image" emphasis. At the same time, these principles indicate the moral necessity of regulating the conduct of governments toward their citizens, which reflects a "second-image" orientation. And they support the development of international law as a means of reforming the conduct of interstate relations, which manifests a "third-image" concern.

Emerging international human rights law in fact integrates all three prescriptions, while emphasizing, in the long term, the importance of ethical education as the ultimate prerequisite for ensuring actual observance of human rights. For example, the preamble to the Universal Declaration states that every individual and organ of society must "strive by teaching and education to promote respect for these rights and freedoms."[267] And Article 26 of the Universal Declaration stresses the importance of education aimed at "the strengthening of respect for human rights and fundamental freedoms."[268] Moreover, the U.N. General Assembly has declared the decade 1995–2004 as the "United Nations Decade for Human Rights Education."[269] But the Universal Declaration and other human rights instruments insist that governments must reform their legal systems to guarantee respect for human rights, manifesting a second-image prescription. And the very trend in favor of the elaboration of international human rights treaties reflects a third-image orientation. The preceding analysis of certain passages from revered moral texts suggests that they, too, may be understood as advocating a similar combination of prescriptions for social reform.

2.11.2. A Fundamental Optimism About the Possibility of Moral and Social Reform, Accompanied by Pragmatism and a Degree of Realism

The ethical principles I have outlined, which are reflected in the U.N. Charter, the Universal Declaration, and other international legal instruments, manifest a pervasive optimism that individuals and states eventually can be convinced to adopt a view that all human beings ought to regard themselves as members of one human family, which in turn ought to be united in its diversity, and that everyone ought therefore to respect one another's fundamental human rights. These optimistic views inherent in evolving international human rights law are antithetical to the tenets of some realist theories, which assume that individuals (and consequently governments, which are made up of individuals) are incorrigibly selfish and committed to the values of power and domination.

However, as will become more clearly evident in later chapters, the principles found in the U.N. Charter and contemporary international human rights and humanitarian law also reflect pragmatism and a degree of real-

ism. They accept the legitimate role of governments and in general counsel respect for political authorities and law, rather than seeking in a revolutionary way to overturn the established political order. And they also manifest "realism" in their acceptance that force may be necessary to protect the security of states and their citizens. But certainly the U.N. Charter and its legal progeny imply that this realism should not be permitted to undermine the imperative of human beings continually striving to lead their lives in accordance with, and cause social institutions to reflect, these fundamental ethical principles. It is in this sense that these contemporary legal instruments and the ethical principles they espouse may be understood as based on an essential optimism in the long term and pragmatism in the short term. Such a perspective suggests the need to supplement short-term strategies for reform that take into account current political realities with long-term strategies that incorporate a faith in the ability of human beings and society to achieve higher levels of moral development over time. An essential optimism and pragmatism may also be understood as evident in many revered moral texts, at least according to certain interpretations.

2.12. Conclusion

This chapter has identified a number of fundamental ethical principles relevant to humanitarian intervention that may be understood as endorsed by contemporary international law, including the U.N. Charter and the Universal Declaration, and also as logically related to a preeminent ethical principle of unity in diversity. It has further attempted to demonstrate that these principles are supported by particular interpretations of selected passages from the revered moral texts of seven world religions and philosophies. This support provides an additional reason to accept these principles as foundations for a fresh approach to humanitarian intervention and international law appropriate for a multicultural society of states and individuals.

To assert that these fundamental ethical principles may all be found, explicitly or implicitly, in contemporary international law, and may all be viewed as related to a principle of unity in diversity, is not to deny that they are often in tension with one another. The pivotal concept of "unity in diversity" itself manifests an inherent tension. Nor does this assertion mean that even governments and individuals expressing general support for these broad concepts will not vehemently disagree about how they ought to be interpreted or applied in particular cases. The statements I have given of these principles are general and vague. As with the practical application of any

set of ethical principles, more often than not the "devil is in the details."

I suggest in Chapter 3 that more specific legal norms of the U.N. Charter and evolving international law may help to fill in some of these details. Simultaneously, where the concrete legal norms of the U.N. Charter and international law leave certain issues ambiguous, these ethical principles can help in arriving at better interpretations of the law. And where the Charter itself could be read to reflect principles at variance with these, the criterion that fundamental ethical principles be related to a preeminent principle of unity in diversity helps to reinterpret inconsistent principles, and thereby assists in reconciling competing legal norms in the Charter.

3 Identifying and Interpreting International Legal Norms Relevant to Humanitarian Intervention

3.1. Introduction

My purpose in this chapter is to develop, as part of a fresh approach to humanitarian intervention and international law, methodologies for identifying the sources of international law and for interpreting the U.N. Charter and contemporary international law in light of the fundamental ethical principles outlined in Chapter 2. I then apply these methodologies to the identification and interpretation, first, of specific legal norms that may pull in the direction of legitimizing military intervention in defense of human rights and, second, of legal norms that may exercise a prophylactic effect on military intervention for humanitarian purposes. These norms were summarized in Chapter 1. My objective in reinterpreting existing norms under the Charter and contemporary international law is to help reconcile competing legal norms relevant to humanitarian intervention to the extent possible. This account is necessarily general; Parts Three and Four contain a more detailed and rigorous identification and interpretation of legal norms relating to specific contemporary issues arising from humanitarian intervention.

3.2. Developing a Methodology for Identifying the Sources of International Law

A threshold question in the current debate on humanitarian intervention involves the status of particular norms as binding international law. This general question is relevant to humanitarian intervention for at least two reasons. First, it relates to the problem of whether there are sources of international law, including but not limited to the text of the U.N. Charter, that legally permit, regulate, or even require humanitarian intervention. Second, it is pertinent to a determination of whether particular international human

rights norms are binding upon states or actors that might be the targets of humanitarian intervention.

Under traditional "positivist" legal doctrine, norms are considered "law" and to be binding on states to the extent they arise from treaties or from customary norms that are generally accepted as law. This positivist doctrine results from an emphasis on state autonomy and sovereignty and the notions that only states can create international law and that states can be bound solely by their own free consent. Thus, treaties are binding only on states that explicitly consent to be bound by them. On the other hand, customary rules are binding on all states regardless of whether they have explicitly consented to them. However, the requirement of a preexisting voluntary "custom" among states again serves to emphasize the value placed on autonomous state practice. These rules regarding the "sources" of international law, which themselves are considered part of customary international law, are now codified in Article 38 of the Statute of the International Court of Justice. The Statute is a treaty appended to the U.N. Charter and to which all U.N. member states are parties. It is often regarded as an authoritative statement of the customary rules regarding the sources of international law. Under Article 38, the Court applies (1) treaties; (2) "international custom, as evidence of a general practice accepted as law"; (3) "the general principles of law recognized by civilized nations"; and (4) judicial decisions and the writings of scholars as subsidiary means for determining rules of law.[1]

The deluge of "declarations" by the U.N. General Assembly in the U.N.'s first half century, especially in the human rights field, has raised the question of whether they now constitute a fifth source of international law. Although General Assembly resolutions and declarations are formally "mere" recommendations, some governments and observers have asserted that declarations may possess at least persuasive weight as evidence of customary law or of general principles of law.[2]

State customs are generally regarded as attaining the status of customary international law when states (1) consistently engage in them ("consistent state practice") and (2) generally recognize that such behavior is legally required: "There must be present a feeling that, if the usage is departed from, some form of sanction will probably, or at any rate ought to, fall on the transgressor."[3] The latter requirement is referred to as *opinio juris*. The general recognition by most states of a customary norm's legally binding effect (*opinio juris*) thus becomes a sufficient criterion for its obligatory character with respect to *any* state, even one that has not consented to the norm, with the exception that states qualifying as "persistent objectors" to the norm are

not considered bound by it. Evidence that a usage has achieved the status of customary law is to be found by consulting, and weighing, a wide variety of sources relating to the practice of states, including diplomatic statements and correspondence, domestic legislation, and judicial decisions. In general, the practice must be uniform and consistent, but no particular duration is required.[4] Customary legal norms that have achieved a particularly high degree of consensus and from which no derogation is permitted are considered norms of *jus cogens*. They can only be modified by a subsequent norm of the same character. Examples of norms that have been recognized (at least by the International Court of Justice) as having this peremptory status include prohibitions on the use of aggressive force by states against other states, and prohibitions of genocide, crimes against humanity, racial discrimination, and slavery.[5] However, it is often unclear what standards in practice ought to be used to identify *jus cogens* norms. And more generally, the very notion of customary law created by consistent practice and by a belief among states that the custom is already law represents a paradox, "for it proposes that a customary norm can come into existence (i.e. become authoritative) only by virtue of the necessarily erroneous belief that it is already in existence (i.e. authoritative)."[6]

"General principles" of law include principles generally recognized in domestic legal systems, applied by analogy to international relations, such as prescription, estoppel, and *res judicata*. Such principles may be referred to as "general principles of national law." According to international legal scholar J. L. Brierly, the inclusion of general principles in the Court's Statute "is important as a rejection of the positivist doctrine, according to which international law consists solely of rules to which states have given their consent. It is an authoritative recognition of a dynamic element in international law, and of the creative function of the courts which administer it."[7]

General principles often overlap with customary legal norms (in which case I will describe them as "general principles of customary international law") and may include norms of *jus cogens*.[8] According to some jurists, general principles of law encompass, not only general principles of national law and general principles of customary international law, but also a uniform *natural* law based on reason that is binding on all states without their direct or indirect consent.[9] Needless to say, because of the uncertainty surrounding the scope of "general principles of law," the concept has elicited much controversy.[10]

In light of this current doctrinal framework, humanitarian intervention raises problems such as the following: Is U.N. humanitarian intervention

permitted by the Charter as a treaty? If not, or if the text of the Charter is ambiguous, can U.N. humanitarian intervention be supported by resort to a customary norm allowing such intervention? Is intervention justified by general principles of law? What sources of international law regulate the conduct of U.N. humanitarian intervention and bind the U.N. as an intergovernmental organization? Are there sources of international law, including the Charter, that obligate the U.N. to undertake humanitarian intervention? Similar questions may be asked of humanitarian intervention conducted by states or regional organizations without Security Council authorization. Other problems include: Is a given state bound legally by particular human rights norms even if it has not ratified relevant human rights treaties? Is there a "natural law" or "moral law" that is binding on all states and actors? What would be the source of such a universal natural or moral law? Under existing legal approaches, there are no clear answers to these questions.

An approach based on fundamental ethical principles in contemporary international law can, however, begin to provide at least some general answers. As I demonstrated in Chapter 2, it can reasonably be argued that a fundamental ethical principle pervading contemporary international law is respect for the existing structure of international law, coupled with (1) the pursuit of other fundamental ethical principles to the extent permitted by this structure, (2) the pursuit of reform of this structure along the lines of these principles, and (3) as a last resort, measured disobedience to established legal norms where obedience would gravely violate these principles.

It follows that an approach to the sources of international law based on these fundamental ethical principles would give provisional recognition to those sources already acknowledged by existing international law (i.e., treaties, customary international law, and general principles). However, where these sources themselves invoke moral concepts like peace or human rights, it would supplement them with reference to fundamental ethical principles as a means of resolving ambiguities in these existing sources or giving them more precise content. In the long term, such an approach would advocate the harmonization of specific norms of treaty law, customary law, and general principles of law with these ethical principles.

Under this approach, moreover, existing rules regarding the formation of international law by treaty would have significant moral weight of their own. There are a number of ethical principles supporting respect for all treaty obligations. First, as I argued in Chapter 2, respect for treaties is itself a fundamental ethical principle. Second, treaties are the product of negotiations

between governments, which in some cases may manifest elements of the concept of open-minded consultation. Third, the principle of freedom of moral choice at the individual level may justify giving weight to the choices of governments that take into account, in their political structures, the wishes of their citizens. Thus, there is a moral value that can be attached to the exercise of free choice to enter into obligations by such states. Fourth, the traditional requirement of state consent in the law-making process ought to be accorded some moral weight because of the ethical principle recognizing the legitimacy of emotional bonds of attachment to nations and states within the framework of a more inclusive sense of kinship with the entire human race. While these principles indicate that all treaties are entitled to respect, treaty obligations that are consistent with and help to implement fundamental ethical principles ought to be accorded special importance.

Turning to customary international law, it is first helpful to attempt to resolve the "paradox" identified earlier regarding the notion of *opinio juris*. I suggest that *opinio juris* be interpreted as a requirement that *states generally believe that it is or would be desirable now or in the near future to have an authoritative legal principle or norm prescribing, permitting, or prohibiting the conduct in question*. I have explained such an interpretation in more detail elsewhere.[11]

If we accept this interpretation of *opinio juris,* then we see that customary international law, to the extent it reflects state "consent" as evidenced by long-standing practice, and by a general belief among most states that a legal rule is desirable, is supported by a moral reasoning similar to that supporting treaties. Further, because of the ethical principles supporting peace, cooperation, and collective action among states, customary international law would appear to enjoy some degree of moral support as an institution developed by states to regulate their mutual affairs for such ends. But the moral weight of a particular customary practice will also be affected by the consistency of that practice with fundamental ethical principles.

In this connection, where decisions must be made about whether particular emerging norms that are candidates for recognition as customary norms ought to be determined to have achieved that status—for example, where doubts exist about the uniformity or universality of actual state practice, or about the existence of *opinio juris* as I have defined it—the consistency of a norm with fundamental ethical principles should be regarded as an important factor that can "tip the balance" in favor of recognition.[12] Further, under this interpretation of the *opinio juris* requirement, multilateral treaties and declarations, depending on their language and other evidence about the extent

to which they reflect states' views on the desirability of immediately recognizing certain universal legal obligations, can play an important role in determining whether *opinio juris* exists.[13] This is especially true where the treaties and declarations in question support fundamental ethical principles. Finally, in ascertaining the existence of a uniform state practice, greater weight than is traditional ought to be given to the "practice" of rhetorical state endorsements of principles or norms, such as in U.N. declarations, that are consistent with fundamental ethical principles. (See Fig. 4.)

In addition, while customary international law has traditionally been regarded as binding only on states, an approach based on fundamental ethical principles would confirm and reinforce more recent developments in international law suggesting that organizations of states, like the U.N., are also bound by customary international legal norms to the extent these norms are relevant to their organizational powers and mandates.[14] This extension of customary norms to bind international organizations is warranted by the principle that all actors wielding power have a moral obligation to act as trustees and therefore to employ their powers in conformity with ethical principles and the law.[15]

<table>
<tr><td colspan="2">Customary International Law
requires both:</td></tr>
<tr><td>Opinio Juris</td><td>Consistent State Practice</td></tr>
<tr><td>States generally believe that it is or would be desirable now or in the near future to have an authoritative legal principle or norm prescribing, permitting, or prohibiting the conduct in question; multilateral treaties supporting fundamental ethical principles are particularly relevant in determining whether this condition is satisfied</td><td>Can include the "practice" of rhetorical state endorsements of principles or norms, such as in U.N. declarations, that are consistent with fundamental ethical principles</td></tr>
<tr><td colspan="2">Is the principle or norm morally essential?</td></tr>
<tr><td>Yes</td><td>No</td></tr>
<tr><td>Jus cogens</td><td>Further analysis of jus cogens status is required</td></tr>
</table>

Fig. 4. Requirements for customary international law under a fresh approach

Similarly, the proposed approach would give recognition to the third contemporary source of international law, namely, general principles of law recognized among nations. (See Fig. 5.) Again, general principles that are consistent with fundamental ethical principles would be given greater emphasis. And in the determination of the "legal" status of particular principles their consistency with fundamental ethical principles, which already are endorsed by contemporary international law, would be a strong factor supporting their recognition as binding law. This suggested resort to fundamental ethical principles in determining the scope and weight of general principles of law is supported by the historical and interdependent relationship between general legal principles and ethical principles. Indeed, many "general principles" of national legal systems were derived from ethical principles. Finally, as in the case of customary law, general principles of law ought to be considered, as they now generally are, as binding on organizations of states as well as on states themselves.[16]

<table>
<tr><th colspan="3">General Principles of Law</th></tr>
<tr><td>General principles of national law</td><td>General principles of customary international law</td><td>General principles of moral law (appropriately specified compelling ethical principles)</td></tr>
<tr><td colspan="3">Are the principles morally essential?</td></tr>
<tr><td colspan="2">Yes</td><td>No</td></tr>
<tr><td colspan="2">Jus cogens</td><td>Further analysis of jus cogens status is required</td></tr>
</table>

Fig. 5. Elements of general principles of law under a fresh approach

The approach I suggest would also endorse the concept of *jus cogens* as a privileged category of customary international law or general principles. It would give particular weight to those recognized norms of *jus cogens* which are consistent with, or even a codification of, fundamental ethical principles. The approach would further propose as candidates for recognition as *jus cogens* norms those existing norms reflecting fundamental ethical principles which are essential and not just compelling, including principles requiring protection of what I referred to in Chapter 2 as "essential human

rights." These rights encompass, as we saw, rights to life, physical security, subsistence, freedom of moral choice, and protection from illegitimate uses of force. They also include a right to nondiscrimination in the enjoyment of these rights. Given this definition, genocide, crimes against humanity, war crimes, and torture all constitute violations of essential human rights, and therefore of *jus cogens* norms. These terms are defined later in this chapter.

Further, certain fundamental ethical principles that qualify as compelling or essential under the definitions in Chapter 2 ought, when appropriately specified, independently to be considered as norms of international law. They ought to be considered "general principles of moral law" which are legally binding on states even in the absence of treaty law, customary law, or general principles of national or international law already explicitly recognizing them. Such general principles of moral law are encompassed by the potentially broad net of the "general principles" language in Article 38(1)(c) of the Statute of the International Court of Justice. Moreover, given their compelling ethical character and their origin as ethical principles rather than simply legal obligations undertaken by states, these general principles of moral law ought to be considered as binding on international organizations and non-state actors, such as groups or factions within a state, as well as on states. (See Fig. 5.)

Based on the analysis in Chapter 2, and as elaborated later in this chapter and throughout this book, general principles of moral law include the following: (1) a principle prohibiting deliberate violations by governments, international organizations, or other actors of essential human rights; (2) a principle providing that force may be employed, if at all, only if, and in such a degree that, it is necessary and proportional to the achievement of moral ends, determined by reference to fundamental ethical principles (which I have referred to as the "ethical principle of necessity"); (3) a principle requiring that noncombatants not be deliberately targeted and that force not be used in a way unreasonably likely to injure them; (4) a principle requiring that some legal avenue for the use of military force to prevent or put an end to widespread and severe violations of essential human rights be available in the international system; and (5) a principle imposing an obligation on governments, international organizations, and other actors to take some reasonable measures, either individually or collectively, within their abilities to prevent or stop such violations. (See Fig. 6.) All of these principles are at least morally compelling. Indeed, these particular principles, based on the discussion in Chapter 2, qualify as morally essential because they deserve the highest weight and cannot normally be overridden by other ethical principles.

General Principles of Moral Law (appropriately specified compelling ethical principles)	*Jus cogens* because also an essential ethical principle?
Governments, international organizations, and other actors may not deliberately violate essential human rights	Yes
Force may be employed, if at all, only if, and in such a degree that, it is necessary and proportional to the achievement of moral ends, determined by reference to fundamental ethical principles (the "ethical principle of necessity")	Yes
Noncombatants may not be deliberately targeted and force may not be used in a way unreasonably likely to injure them	Yes
There must be some legal avenue available in the international system for the use of military force to prevent or put an end to widespread and severe violations of essential human rights	Yes
Governments, international organizations, and other actors are obligated to take some reasonable measures, either individually or collectively, within their abilities to prevent or stop widespread and severe violations of essential human rights	Yes

Fig. 6. Selected general principles of moral law

This proposal to recognize "general principles of moral law" under Article 38(1)(c) based on ethical principles explicitly or implicitly endorsed in more traditional international legal sources is, in fact, consistent with contemporary international legal jurisprudence and is supported by international legal precedent. For example, in the 1951 *Reservations to the Genocide Convention* case, the International Court of Justice recognized that general principles of law could include what it called "moral law." The Genocide Convention's purpose, according to the Court, was in part to "confirm and endorse the most elementary principles of morality." In deciding how to treat reservations to the Convention, it looked to this purpose and these principles.[17] In short, just as I propose here, the Court found in the Convention the expression of a compelling ethical principle prohibiting genocide that itself constituted a general principle of "moral law" binding on all states, whether or not they had ratified the Convention. Furthermore, in the 1949 *Corfu Channel* case, the Court held Albania liable to the United Kingdom for failing to warn British warships of mines laid in its territorial waters. The Court ruled that Albania's legal obligations to do so were not based on any treaty commitments, "but on certain general and well-recognized princi-

ples," which included "elementary considerations of humanity, even more exacting in peace than in war."[18]

Would all fundamental ethical principles identified in Chapter 2 constitute general principles of moral law under this proposed approach? They would not, and should not, because there is a critical distinction between law and morality that should be maintained. The ethical principle of obedience to the law as a means of fostering social order and unity implies the need to respect existing legal norms established by what legal philosopher H.L.A. Hart called "rules of recognition,"[19] and to distinguish these from ethical principles, which may, however, in extreme cases, justify disobedience to the law. Fundamental ethical principles may support particular sources of international law, and those sources should be interpreted and construed to promote fundamental ethical principles; but this is not tantamount to giving all these moral or ethical standards the force of law in and of themselves. Moreover, the existing rules for the identification of particular norms as international legal norms, which are codified in Article 38 of the Statute of the International Court of Justice and are entitled to significant respect, do not explicitly provide that all fundamental ethical principles constitute a source of international law.[20]

Nevertheless, as just argued, there is a place for some fundamental ethical principles that are endorsed in or implied by contemporary international law, and that are morally compelling or essential, independently to be considered part of currently binding international law. However, in translating such principles from ethical principles into general principles of law, the legal duties flowing from such principles ought to be narrowly tailored and circumscribed, appropriately specified, and made subject to certain prescribed conditions, in recognition that once such principles are regarded as imposing legal obligations, some form of sanction will, or ought to, be attached to their violation. The formulation of selected general principles of moral law I have provided reflects such an attempt at circumscription and specification of the general compelling ethical principles on which they are based.

As a practical matter, in determining which fundamental ethical principles should be regarded as at least morally "compelling," and thus as warranting classification as general principles of moral law, in keeping with my analysis in Chapter 2 it is necessary first to ascertain whether particular ethical principles bear a *direct and immediate* logical relationship to the preeminent principle of unity in diversity. It is also necessary to determine the general weight they are apparently given by contemporary international law,

including the U.N. Charter, the Universal Declaration, and international human rights and humanitarian law.

It should be emphasized that I am not proposing here a systematic methodology for determining just which fundamental ethical principles are sufficiently compelling to be considered general principles of moral law and therefore legally binding on states and other actors. For purposes of this book, I will suggest, particularly in this chapter and in Chapters 7, 8, and 11, only that certain principles deserve this status.

Finally, it may be helpful, as implied by the discussion in Chapter 2, to make some reference to revered moral texts to the extent that certain passages from them may be interpreted as supportive of particular fundamental ethical principles identified as candidates for recognition as general principles of moral law. This suggestion is in keeping with Article 9 of the Statute of the International Court of Justice, which requires that in the composition of the Court "the representation of the main forms of civilization and of the principal legal systems of the world should be assured."[21] The reference to the "main forms of civilization" may be read as encompassing civilizations inspired by different religious and philosophical traditions. The very requirement of such diversity in the Court's composition suggests the desirability of taking the revered moral texts of the world's diverse religions and philosophies into account in any such inquiry.

Such a legal inquiry into relevant passages from revered moral texts and demonstration that they may be interpreted as endorsing the compelling moral character of certain fundamental ethical principles, thus making them more credible candidates for recognition as general principles of moral law, is supported by the dissenting opinion of Judge Christopher G. Weeramantry in the International Court of Justice's 1996 advisory opinion on the legality of the threat or use of nuclear weapons.[22] Judge Weeramantry, in interpreting the normative content of contemporary international humanitarian law, turned to an examination of historical limitations on the conduct of war in various cultures, but most particularly in the moral texts of the world religions and philosophies. He undertook an analysis of relevant ethical principles in the scriptures and practices of Hinduism, Judaism, Christianity, Islam, and Buddhism.[23] He reviewed as well the writings of Grotius, and suggested that Grotius could have benefited from a review of "the vast mass of Hindu, Buddhist and Islamic literature having a bearing on these matters."[24] Judge Weeramantry explained his attention to the revered moral texts of these world religions and philosophies as follows:

> The problem under consideration is a universal problem, and this Court is a universal Court, whose composition is required by its Statute to reflect the world's principal cultural traditions. The multicultural traditions that exist on this important matter cannot be ignored in the Court's consideration of this question, for to do so would be to deprive its conclusions of that plenitude of universal authority which is available to give it added strength—the strength resulting from the depth of the tradition's historical roots and the width of its geographical spread.[25]

Which general principles of moral law also ought to be considered norms of *jus cogens?* Just as not all fundamental ethical principles deserve the status of general principles of moral law, so also not all general principles of moral law warrant classification as peremptory *jus cogens* norms that can even prevail over contrary treaty obligations. Rather, only those general principles of moral law based on essential ethical principles appear to deserve classification as *jus cogens* norms. To recall, essential ethical principles are those compelling ethical principles which are so closely related to the preeminent principle of unity in diversity that they deserve the highest weight and therefore cannot normally be overridden by other ethical principles. The moral precedence of these principles justifies granting the general principles of moral law derived from them peremptory status legally, if such general principles are specified in such a way that no violations of them may be justified under any circumstances. Whether general principles of moral law are based on essential ethical principles can be determined through a methodology similar to that just described for identifying general principles of moral law, including a secondary recourse to revered moral texts. (See Fig. 5.)

In the case of all the general principles of moral law I mentioned above, the fundamental ethical principles upon which they are based happen to be not only morally compelling, but also morally essential. Moreover, given the specifications and conditions I have suggested regarding the legal obligations flowing from each principle, no exceptions to observance of these general principles of moral law are justified. Accordingly, all of these particular general principles of moral law ought to be recognized as norms of *jus cogens*. (See Fig. 6.) There may be other general principles of moral law, however, that should not be recognized as having the status of *jus cogens*. I do not discuss such principles in this book.

Turning to the problem of treating U.N. declarations as a source of international law, I have already suggested that such declarations, and in partic-

ular the Universal Declaration, may be regarded as a source of fundamental ethical principles. Based on the preceding analysis, some of these principles may warrant recognition as general principles of moral law. Further, as I noted above, declarations can be evidence of *opinio juris,* of state practice, and of a general view among states that certain norms are already general principles of law. Finally, more significant and decisive weight should be accorded to declaratory norms that are consistent with the preeminent ethical principle of unity in diversity.

The legal methodology sketched here introduces a role for certain ethical principles that, while apparently endorsed as at least aspirational ideals by the U.N. Charter, the Universal Declaration, and other documents of contemporary international law, nevertheless have some independence from the will or consent of states to the extent they are not yet codified by treaty as binding legal obligations. It is therefore open to the objection that it undercuts the fundamental character of international law as a system of norms binding on all states because of their participation in a society of states, regardless of their particular religious, moral, or political beliefs. It could be seen as antithetical to a "practical" conception of international law and society.[26]

There are at least five answers to such an objection. First, the approach for the most part endorses contemporary rules of recognition of international legal obligations. It introduces a role for fundamental ethical principles only as a subsidiary aid to the identification and interpretation of traditional sources of international law. Second, as I demonstrated in Chapter 2, the fundamental ethical principles upon which the approach is based already are supported, directly or indirectly, by the U.N. Charter, the Universal Declaration, and related instruments. They do not constitute merely another form of "natural law" in the traditional sense, which is supposed to be derived solely from "reason" and the nature of the world and not from the will of states.

Third, these principles, as evidenced by their appearance in these widely accepted instruments, are universal in character. They thus are potentially acceptable to states of any culture. Moreover, I sought to demonstrate in Chapter 2 that passages from the revered texts of many religious and philosophical traditions in fact may be interpreted to be consistent with these principles. Accordingly, the approach proposed here is fundamentally different from historical theories that grounded international law exclusively in Christian morality or theology, for example. As noted above, the approach is also supported in this connection by Article 9 of the Statute of the International Court of Justice.

Fourth, the approach's reference to revered moral texts to confirm and enhance the authority of fundamental ethical principles in international legal texts is justified because ethical principles in revered moral texts historically exercised a profound influence on the development of international legal norms—an influence that I cannot explore here but which is well documented.[27] Indeed, much of the consistency of these ethical principles in international law—including the principle of *pacta sunt servanda*—with ethical principles in revered moral texts is not due to happenstance, but to their very origin in and endorsement by these texts. In effect, then, the approach suggested here merely attempts to help international law "return to" some of its important ethical roots.

Fifth, to the extent the proposed methodology introduces a moral quality into international legal reasoning regarding norms with a moral content, including those relating to human rights, it merely does explicitly what is already occurring implicitly. *Jus cogens* norms that have been recognized by the International Court of Justice in the human rights realm are already forms of moral law. In fact, the basis for distinguishing many *jus cogens* norms as superordinate appears to be their essential moral character, not mere uniformity of state practice.[28]

For all these reasons, then, the proposed methodology for identifying the sources of international law would not radically change or undermine the current character of international law. Rather, it seeks to reinterpret existing rules of recognition of sources of international law in a way consistent with fundamental ethical principles already appearing in those traditional sources.

Nevertheless, the proposed methodology could still be criticized as overly subjective, and indeed, as "circular," for it requires the legal analyst first to derive certain fundamental ethical principles from international law, and then to use those principles in ascertaining the content of international law and the status of particular legal norms. Both analytical steps involve the making of subjective judgments.

It is no doubt true that the proposed methodology requires the making of careful, and ultimately subjective, judgments. However, the approach does propose a preeminent ethical principle—that of unity in diversity—which, although imprecise, can help to identify a limited set of ethical principles apparent in contemporary international law that are logically related to it and that can provide guidance in particular cases. And this principle, and those logically related to it, can help the analyst judge the relative status of particular norms under international law, as I attempt to demonstrate in the

balance of the book. Moreover, as Chapter 2 sought to establish, the ethical principles upon which the approach is based find significant textual support in contemporary international law. They have not simply been created out of whole cloth. Finally, the proposed methodology avoids pure circularity—merely going from law to ethics and back to law—in that, after identifying a set of logically defensible general ethical principles apparent in international legal texts, it attempts to apply these *general* ethical principles to the problem of identifying and reconciling *more specific* legal norms.

3.3. Developing a Methodology for Interpreting the U.N. Charter and Other Treaties

Issues of treaty interpretation are central to determining the legitimacy of humanitarian intervention under the U.N. Charter, which itself is a treaty. Problems of treaty interpretation are particularly difficult where a treaty like the U.N. Charter explicitly invokes concepts with potent ethical content such as "peace" and "human rights." Norms relating to the interpretation of treaties are to be found in customary international law and also in the Vienna Convention on the Law of Treaties (Vienna Convention). The Vienna Convention attempts to codify customary rules of treaty interpretation and affirm their binding character for states that are parties to the Convention.[29]

Article 31 of the Vienna Convention provides that in general a "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." In addition, the Convention states that "there shall be taken into account" along with the context "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions," "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation," and "any relevant rules of international law applicable in the relations between the parties." Furthermore, a "special meaning shall be given to a term if it is established that the parties so intended."[30]

Notably, the records of the negotiations on the text of a treaty (the *travaux préparatoires*) are not taken into account under these primary rules of interpretation. Article 32 of the Vienna Convention indicates that the *travaux* and other "supplementary means of interpretation" may be used only in order "to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable."[31] The International Law Commission, which drafted these provisions, thus declined to treat the parties' intentions as an independent basis of interpretation. This "textual" approach is the one generally reflected in the Convention's final provisions. At the same time, the International Law Commission suggested that Articles 31 and 32 should be treated as dynamically interrelated rather than applied sequentially and mechanically.[32]

The International Court of Justice has indicated that the language of a treaty "must be interpreted in the light of the rules of general international law in force at the time of its conclusion, and also in the light of the contemporaneous meaning of terms."[33] It has often taken the subsequent practice of the U.N. into account in determining the meaning of the U.N. Charter, and has recognized "implied powers" under the Charter for the General Assembly and the Security Council which are consistent with the Charter's purposes.[34] At the same time, it has sustained the Vienna Convention's relegation of a secondary role to legislative history, declining to consider it if the text is unambiguous.[35]

Humanitarian intervention raises the problem of whether to give language in various articles in the U.N. Charter a "literal" interpretation generally in keeping with the Vienna Convention rules; a meaning according to what the Charter's framers originally intended, as determined in large part by an examination of the *travaux préparatoires;* a meaning derived from a more flexible approach that considers the Charter's "objects and purposes," which include the promotion and protection of human rights; or a meaning that takes certain extrinsic public policy principles or values into account. These varying approaches correspond, respectively, with the "textual," "intentions-of-the-parties," "teleological," and "public-policy" approaches to treaty interpretation.[36] As we will see at length in Parts Three and Four, these approaches have all been proposed, and hotly debated, with respect to the interpretation of such provisions as Article 39, which as noted in Chapter 1 allows the Security Council to take enforcement action when it determines the existence of a "threat to the peace," "breach of the peace," or "act of aggression,"[37] and Article 2(4), which prohibits the use of force by any member state against the "territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[38]

What do the fundamental ethical principles outlined in Chapter 2, and the preceding analysis of the sources of international law, suggest would be

the most appropriate approach to these treaty interpretation problems involving the U.N. Charter? I propose a treaty interpretation approach that takes these principles into account, and in particular the following three guiding precepts derived from them: (1) respect for (but not necessarily absolute deference to) *established customary norms of treaty interpretation* as reflected in the Vienna Convention; (2) respect for the *shared understandings* of the parties to the Charter, both original and contemporary, out of deference to the ethical principles supporting treaties described in section 3.2, including the principle of consultation; and (3) at the same time, recognition of the duty of individuals and governments *continually to strive toward progressive realization* of fundamental ethical principles.

These guiding precepts do not by themselves establish any particular "best" procedure for Charter interpretation, but I suggest the following as an attempt to apply all of them in a practical way. (See Fig. 7.) First, consistent with the rules of the Vienna Convention, a decision-maker charged with interpreting the provisions of the Charter would ascertain whether a Charter provision has an ordinary meaning in light of the objects and purposes of the Charter. Second, at the same time the decision-maker would refer to various supplementary means of interpretation, including, but not limited to, the views expressed by states during the preparation of the Charter. The object of the latter inquiry would be to ascertain not merely the parties' stated views, but their true *shared understandings* of their obligations.

1. Ascertain whether a Charter provision has an ordinary meaning in light of the objects and purposes of the Charter.
2. Refer to various supplementary means of interpretation including, but not limited to, the views expressed by states during the preparation of the Charter, in order to ascertain the parties' true shared understandings of their obligations at the time the Charter was adopted.
3. Consider the possible existence of new generally accepted understandings of Charter terms that alter either the ordinary meaning of the Charter or the parties' original understandings; such new shared understandings should prevail to the extent they are equally or more consistent with fundamental ethical principles.
4. If there are remaining ambiguities, favor interpretations of the Charter that best help to implement fundamental ethical principles.

Fig. 7. A proposed methodology for interpreting the U.N. Charter and other treaties

Third, in keeping with the approach's emphasis on respecting the parties' genuine understandings, the decision-maker should always (whether or not the *travaux* are ambiguous) consider the possible existence of new generally accepted understandings of Charter terms that alter either the ordinary meaning of the Charter or the parties' original understandings. Such new understandings, if they are genuinely shared by all U.N. member states or at least a very large majority of member states, ought to "trump" either an apparent ordinary meaning or original understandings *to the extent the new understandings are equally or more consistent with fundamental ethical principles*.

This aspect of the approach would allow for a dynamism in Charter interpretation. On the other hand, it would oppose changing the meaning of terms in the Charter as derived from prior rules (ordinary meaning or original understandings) on the basis of new political understandings that represent a move away from these principles. This caveat would help to implement the precept highlighted above that individuals and governments ought to be encouraged to adhere to all their treaty obligations and especially to voluntary commitments that promote realization of fundamental ethical principles. They should not be permitted to walk away from these commitments. On balance, then, the approach would continue to give great weight to the Charter's text and *travaux* and not permit new understandings to undercut Charter provisions, like those involving respect for human rights, that are strongly supported by fundamental ethical principles. This characteristic of the approach thus strengthens the stability of Charter interpretation.

Fourth and finally, if having considered the text of the Charter in light of its objects and purposes, supplementary evidence of the parties' original understandings, including the *travaux,* and any evidence of changed shared understandings, there are remaining ambiguities, then interpretations of the Charter would be favored that best help to implement these fundamental ethical principles. These ethical principles might be visualized as a "magnet" exerting a constant normative "pull" on interpretations of the obligations of states under the Charter, but never forcing them to recognize and fulfill legal obligations that they have clearly rejected for themselves. On the other hand, where the parties themselves were apparently edging toward understandings of their obligations that enhance implementation of fundamental ethical principles, this general approach to interpretation would encourage them to continue in this direction. Moreover, especially where certain fundamental ethical principles merit the status of general principles of moral law or *jus cogens* norms, the Charter ought to be interpreted consistently

with these principles and norms. However, it should be recognized that fundamental ethical principles, like the legal norms in the Charter, often come into tension with one another and thus cannot lead to definitive interpretations, but only relatively better or worse ones.

Chapter 4 will provide an opportunity to apply this approach in practice to the problem of interpreting Article 39's grant of jurisdiction to the Council to take enforcement action, and Chapter 11 will apply it to the interpretation of Article 2(4)'s prohibition of the use of force by states and Article 53's provisions on enforcement action by regional organizations. I will also apply the approach to resolve other treaty interpretation problems.

Is there any legitimate basis for introducing "fundamental ethical principles" into Charter interpretation, even in the background role I suggest? I have already demonstrated in the preceding analysis of sources of international law that there is, indeed, contemporary authority for such an approach. Many of the same arguments made there support equally, or with greater force, a role for fundamental ethical principles in Charter interpretation.

Perhaps most importantly, once again, most of these fundamental ethical principles are implicitly if not explicitly advocated by the Charter itself. Accordingly, any approach to Charter interpretation must involve some recourse to these or similar ethical principles. Of course, as I attempt to show in the balance of this chapter, the Charter also advocates competing ethical principles. This is why a background approach allowing the ethical principles in the Charter to be prioritized is necessary.[39] My suggested approach is based on the relationship of ethical principles apparently endorsed by the Charter and other sources of contemporary international law with the preeminent principle of unity in diversity.

In this connection, my proposed interpretive approach exhibits many similarities to, but also differs in certain key respects from, the highly innovative so-called New Haven approach to treaty interpretation developed by Myres McDougal and his associates.[40] Under the New Haven approach, the decision-maker is advised to identify the parties' "genuine shared expectations." However, when expectations are ambiguous or vague, the New Haven approach requires that treaty terms be interpreted with reference to "community policies" and "the goals of public order," and in particular the "overriding objectives of human dignity." Moreover, the decision-maker should not give effect to the parties' expectations when they "conflict with the goals of the system of public order."[41] Among those goals of public order which can override the parties' expectations, McDougal and his associates identify the goals of prohibiting the impermissible use of coercion and violations of

human rights and respecting the primacy of earlier treaty obligations over later ones by reason of the principle of *pacta sunt servanda*.[42] The approach developed here is very similar to the New Haven approach in that it emphasizes a search for the parties' understandings and counsels resolution of ambiguities in the parties' understandings by reference to certain principles and values, including respect for human dignity.

On the other hand, my proposed approach departs from the New Haven approach in several respects. First, it directs attention to the parties' "understandings" rather than their "expectations." The latter term implies an inquiry into what the parties *expected* a treaty to accomplish, which might include evaluations of extrinsic factors affecting performance, rather than an inquiry into the parties' understandings of the legal obligations they and other parties were undertaking.

Second, my approach gives somewhat less deference to current understandings of the states parties to the Charter. In particular, if current understandings constitute a regressive evolution compared with the text or original understandings as measured against fundamental ethical principles, the current understandings are not honored. The proposed approach thus prevents "moral backsliding." Indeed, this principle suggests that the doctrine of *désuétude,* under which certain Charter provisions might be rendered void through disuse, should not apply to obligations that reflect fundamental ethical principles. The New Haven approach, by contrast, places a great deal of emphasis on the parties' current expectations at the time of interpretive decision.[43]

Third, the proposed approach attempts to specify and generally rank the ethical principles to which reference ought to be made. The New Haven approach tends to refer to "community policies" without a great deal of additional specificity beyond the references to human rights and the principles of the nonuse of force and *pacta sunt servanda* mentioned earlier.[44] By comparison, the approach that I develop here focuses on those ethical principles which are endorsed by the U.N. Charter and contemporary international law and are consistent with a principle of unity in diversity. Depending on the historical era or political context, community "goals" or "policies" may or may not satisfy both these criteria.[45] In short, my proposed requirement that fundamental ethical principles be consistent with the principle of unity in diversity helps to clarify which principles in the Charter deserve priority.

I turn now to the identification and interpretation of norms in the U.N. Charter and in other sources of contemporary international law, many of which were summarized in Chapter 1, that tend to favor or oppose humanitarian intervention.

3.4. The Identification and Interpretation of Norms Tending to Favor Humanitarian Intervention

3.4.1. International Human Rights Law

Many supporters of humanitarian intervention see it as necessary to the enforcement of universally accepted norms of international human rights law. In their view, humanitarian intervention is legitimate precisely because these norms are now regarded as inviolable and as binding on all U.N. member states. Opponents of humanitarian intervention, on the other hand, either continue to challenge the universal validity of these norms, argue that only particular and narrowly circumscribed human rights violations warrant military intervention, or emphasize instead more peaceful methods of bringing about observance of international human rights law.

As we saw in Chapters 1 and 2, the adoption of the U.N. Charter represented a ground-breaking attempt to universalize the concept of human rights, and at a minimum to recognize it as a fundamental ethical principle. The Charter affirms in Article 1(3) that one of the fundamental purposes of the U.N. is to "achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."[46] Article 55 asserts that the United Nations "shall promote," among other economic and social goals, "universal respect for, and observance of, human rights and fundamental freedoms for all," while in Article 56 "all Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement" of this purpose.[47] Scholars have debated whether the pledge in Article 56 should be considered a legal obligation or merely a moral one. The most prominent reason offered in favor of regarding the pledge as a legal obligation is that the term "pledge" itself connotes a legal undertaking.[48]

The inclusion in Article 1(3) of promoting respect for human rights as a purpose of the "United Nations" as a whole appears to make it at least a *prima facie* purpose to be pursued by the Security Council, subject to any limitations on the Council's powers and functions, which I will briefly review later in this chapter. The U.N. Economic and Social Council (ECOSOC) is the primary body charged with promoting human rights,[49] and has established, in accordance with Article 68, a Commission on Human Rights, currently composed of fifty-three government representatives, to discuss human

rights issues.[50] The Commission on Human Rights has a subsidiary body, the Sub-Commission on the Promotion and Protection of Human Rights, which also conducts human rights studies. Both the Commission and the Sub-Commission often appoint independent "special rapporteurs" or "special representatives" who are charged with investigating human rights situations and preparing reports of their findings and recommendations.[51] In addition, the General Assembly has established the post of the high commissioner for human rights, who is the head of the Secretariat's human rights system and also can promote observance of human rights among governments.

As noted in Chapters 1 and 2, the Universal Declaration of Human Rights, originally drafted by the Commission on Human Rights, purports to spell out in greater detail the meaning of the "human rights and fundamental freedoms" referred to in the Charter. Many scholars believe that at least some of the rights mentioned in the Universal Declaration have become part of customary international law; a few regard the Universal Declaration *in toto* as having achieved that status.[52]

Although it is not itself a binding treaty, the Universal Declaration has exercised an extraordinary degree of influence during the U.N.'s first half century. It has constituted the legal pedestal supporting a proliferating corpus of international human rights law, formulated primarily under U.N. auspices and including both treaties and declarations. These treaties, we saw in Chapter 2, include the 1948 Genocide Convention. Under that Convention, states parties accept an obligation to consider genocide a crime under international law and to prevent and punish it.[53] The Convention defines "genocide" as

> any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.[54]

Under the Convention, persons charged with genocide must be tried either by a court of the state in whose territory the act was committed or by "such international penal tribunals as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction."[55] Article VIII of the Genocide Convention further allows any state party to "call

upon the competent organs of the United Nations"—which might include the Security Council—"to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide."[56]

The rights enunciated in the Universal Declaration and spelled out in greater detail in subsequent declarations and treaties such as the Genocide Convention can usefully be regarded as falling into three categories: first, "civil and political" rights, often referred to as "first-generation rights" and reflected in the ICCPR, adopted in 1966; second, "economic, social and cultural" rights of individuals, known as "second-generation rights," and elaborated in binding form in the ICESCR, also adopted in 1966; and finally, "third-generation rights," many of which are to be enjoyed by groups such as minorities.[57] First-generation civil and political rights mentioned in the Universal Declaration include, as noted in part in Chapter 2, freedom from invidious discrimination on the grounds of race, sex, language, religion, political opinion, nationality, property, birth, or other status; the rights to life, liberty, and security of the person; freedom from slavery or servitude; freedom from torture or other cruel, inhuman, or degrading treatment or punishment; the right to recognition before and equal protection of the law; the right to an effective remedy for human rights violations; freedom from arbitrary arrest, detention, or exile; the right to a fair and public hearing by an independent and impartial tribunal; the right to be presumed innocent until proven guilty and not to be subject to ex post facto criminal punishments; the right to privacy; freedom of movement and residence; the right to seek and enjoy asylum from persecution; the right to a nationality; the right to marry; the right to own property; freedom of thought, conscience, and religion; freedom of opinion and expression; freedom of peaceful assembly and association; and the right to take part in government, directly or through elected representatives.[58]

Economic, social, and cultural rights mentioned in the Universal Declaration include the right to social security; the right to work and to just and favorable conditions of work and to protection against unemployment; the right to rest and leisure; the right to a standard of living adequate for one's health and well-being and that of one's family, including food, clothing, housing, medical care, and necessary social services; the right to education; and the right to participate in the cultural life of one's community.[59] Third-generation rights recognized in various treaties and declarations adopted after the Universal Declaration include the right of peoples to self-determination, as affirmed in the first article of the two covenants; the right to development; and the rights of minorities.[60]

Apart from treaty obligations, states are considered bound by certain human rights norms that have achieved the status of customary international law or general principles of law, including norms of *jus cogens*. Moreover, many scholars and states have taken the position that these widely accepted standards have contracted the domain of domestic jurisdiction referred to in Article 2(7) of the Charter. As mentioned in Chapter 1 and discussed at greater length in subsection 3.5.1, Article 2(7) provides that "nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII."[61] Doubts continue to persist, however, about whether particular human rights are now recognized in customary international law or general principles of law, or instead are merely candidates for legal protection in future evolving customary norms or general principles.

These human rights standards have played a vital role in the current legal and ethical debate on humanitarian intervention. Although until recently the Security Council has hesitated to cite them explicitly in its resolutions, its debates make clear that concern for human rights and the recognition of states' obligations under these legal norms have been major factors in prompting U.N.-authorized military action as well as the NATO intervention in Kosovo. On the other hand, many critics of humanitarian intervention have emphasized the importance of achieving *consensual* improvement in human rights conditions through voluntary adherence to treaties and through the Charter-based human rights mechanisms I have described.

A number of controversial legal issues have arisen as part of the development of international human rights law that are relevant to the problem of humanitarian intervention. One issue is whether many ostensibly "universal" human rights standards are in fact Western versions of human rights that are not accepted in other parts of the world, and whether such a cultural variation ought to lead to moral skepticism about the possibility of identifying any rights as objectively valid.[62] This "relativist" challenge raises problematic issues for humanitarian intervention by calling into doubt the legitimacy of intervention to protect human rights that are alleged not to be globally recognized or objectively established. It is important that the Security Council and U.N. member states have a clear framework for evaluating the merits or deficiencies of such claims of relativity.

A second problem is that there are no clear standards for determining

how human rights ought to be prioritized legally[63] or morally. This deficiency is highly relevant to the debate on humanitarian intervention because military intervention, either with or without U.N. authorization, may only be viewed as appropriate when particularly important human rights are being flouted. Further, the ability to establish relative priorities among human rights violations would help the Security Council make difficult decisions about the use of limited financial and military resources when faced with simultaneous human rights crises in different parts of the world.

Although the Universal Declaration promulgates a number of first- and second-generation rights, it makes no explicit attempt to prioritize them. I did suggest in Chapter 2 that rights to life and to physical security might be inferred as having somewhat greater importance because they are listed first in the Universal Declaration. But Article 28 states simply that "everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized."[64] The Universal Declaration thus holds forth the ideal of the complete enjoyment of all the rights it proclaims. On the other hand, the ICCPR effectively elevates the status of certain civil and political rights it guarantees by making these rights immune from "derogation" by member states even in times of a "public emergency which threatens the life of the nation." These nonderogable rights are the right to life, including freedom from genocide; freedom from torture; freedom from slavery or involuntary servitude (but not forced or compulsory labor); the right not to be imprisoned on the ground of inability to fulfill a contractual obligation; the right not to be held guilty of a criminal offense that was not a criminal offense at the time of the act or omission; the right to recognition everywhere as a person before the law; and the right to freedom of thought, conscience, and religion.[65] Notably, the right to personal liberty and security, including freedom from arbitrary arrest and detention, is not safeguarded from derogation, nor is the right to freedom of opinion and expression.[66]

Some scholars have attempted to establish ethical criteria for determining which rights are more important than others. For example, political scientist Henry Shue, in a valuable and thoughtful analysis, has argued that the test for a "basic right" should not be whether a right is intrinsically more "enjoyable," but whether enjoyment of the right in question "is essential to the enjoyment of all other rights."[67] Shue suggests that such basic rights include "security rights," "subsistence rights," and "freedom of physical movement, as well as the liberty of economic and political participation."[68]

Other legal problems, which have already been mentioned, are determining

whether the Charter itself imposes legal obligations to respect human rights on all member states as such, and whether all rights mentioned in the Universal Declaration are likewise binding on all member states, either as customary international law or as general principles of law.

How can a fresh approach based on fundamental ethical principles begin to help resolve some of these current disputes concerning international human rights law, particularly as they involve humanitarian intervention? First, such an approach would clearly reject extreme versions of the notion that morally or legally one's human rights vary with one's culture—so-called "cultural relativism"—and would therefore affirm the universality of human rights. Unquestionably, different concepts of human rights currently exist as an empirical matter. But the nearly universal rhetorical endorsement by governments for the last half century of the human rights provisions of the Universal Declaration casts serious doubt on the proposition that governments cannot agree, at least in general terms, on the ideal of the human rights recognized in the Declaration. And my demonstration in Chapter 2 that selected passages from the world's diverse revered moral texts may be interpreted as affirming respect for human rights, including rights to life, physical security, subsistence, freedom of moral choice, protection from illegitimate uses of force, and nondiscrimination in the enjoyment of these rights, also tends to undercut any assertion that moral concepts inevitably must differ (even if they currently do) among cultures inspired by these diverse texts, and that we are obligated to accept therefore a rigid conception of moral relativity.[69] At the same time, the principle of respect for cultural diversity would allow for some reasonable degree of variability in permissible interpretations of particular human rights and methods of implementing them.

Furthermore, with respect to the problem of prioritization, an approach grounded in fundamental ethical principles would recognize all three generations of rights: "civil and political," "economic, social and cultural," and group rights. This is because the fundamental ethical principles outlined in Chapter 2 acknowledge duties of governments toward citizens, including duties to respect rights to life and physical security and to ensure fair judicial procedures in determining criminal guilt (i.e., civil and political rights); duties of governments, other organs of society, and fellow citizens to help the destitute and to work toward full implementation of a right to subsistence (i.e., economic rights); and duties of governments and citizens to respect the rights of others to form associations with various less-inclusive groups in accordance with the principle of unity in diversity (i.e., social and cultural rights).

As I will elaborate in my discussion of self-determination, these ethical principles also support recognition of certain rights of these groups themselves based on the principle of unity in diversity and a principle of respect for the cohesion of lesser communities (i.e., third-generation group rights). However, because of the emphasis in these ethical principles on the priority of individual-oriented and humanity-oriented values in keeping with the preeminent principle of the unity of the human family, the approach developed here would not permit assertions of rights on behalf of particular groups to undercut the rights of individuals or prevent the cultivation among their members of a more inclusive humanity-oriented perspective.

An approach based on fundamental ethical principles would see the fulfillment of all human rights recognized in contemporary international law as indispensable in the long run for the establishment of social unity and therefore peace.[70] However, as analyzed in Chapter 2, fundamental ethical principles in contemporary international law can be understood, particularly in light of the principle of unity in diversity and the concomitant principle of equal human dignity, as prioritizing certain rights as essential. To recall, these include rights to life, physical security, subsistence, freedom of moral choice, protection from illegitimate uses of force, and nondiscrimination in the enjoyment of these essential human rights. These essential rights ought to be given ethical priority. They coincide in large part with the list of nonderogable rights provided in Article 4(2) of the ICCPR. But unlike that list, they include the right to personal liberty and security as well as freedom of opinion and expression.

The term "essential" rights does not imply that other legally recognized human rights are not morally fundamental or important, or cannot be satisfied unless and until essential rights are enjoyed. Essential rights are merely a particularly important subset of a larger group of "compelling" human rights, as defined in Chapter 2, that in turn are a subset of "fundamental" human rights. (See Fig. 2.) All of the rights listed in the Universal Declaration of Human Rights would appear to qualify as morally fundamental in light of their logical relationship with the principle of unity in diversity. In particular, such fundamental rights include, as we saw in Chapter 2, rights to consultation with governments, to participation in government through elections, and to freedom from discrimination in the enjoyment of all human rights, not only other essential ones.[71] However, the rights just listed, while fundamental, appear to go beyond the most minimal requirements for the enjoyment of equal human dignity, and therefore are better considered not "essential." I leave open, given the space limitations of this study, the question

of whether some of these rights might qualify as "compelling" rights, and therefore be considered also as protected by general principles of moral law.

Essential rights would be granted a priori ethical preference should a ranking be required (for example, for purposes of determining when humanitarian intervention is warranted, as explored further in Chapters 4, 7, and 11). Of course, important tensions can exist among these essential rights themselves, and in any particular situation it may be necessary to determine *within* this group of rights which rights ought to be given preference in implementation over others. I cannot explore this problem more thoroughly here, but it is very possible that based on the fundamental ethical principles set forth in Chapter 2 essential rights can be further prioritized.

It should be noted that this particular list of essential rights, while quite similar to the list that Henry Shue identifies as "basic rights," is derived differently. One could argue that rights to freedom of conscience and expression, for example, do not satisfy Shue's definition of basic rights as rights whose enjoyment "is essential to the enjoyment of all other rights."[72] An approach based on fundamental ethical principles, and in particular the principles of unity in diversity and of equal human dignity, would protect rights to life, to physical security, to subsistence, to freedom of moral choice (including freedom of conscience and expression), to protection from illegitimate uses of force, and to nondiscrimination in the enjoyment of these rights regardless of whether they are viewed as "essential" to the enjoyment of all other rights, although in fact they clearly are required for the enjoyment of many other rights.

The methodology developed earlier in this chapter for identifying sources of international law and interpreting the U.N. Charter suggests that international human rights law ought to have a potentially broader reach and more binding character than it may now be understood to have. For example, the plain language in Article 56 of the Charter by which states "pledge" to take action to achieve promotion of respect for "human rights and fundamental freedoms," when interpreted in tandem with the fundamental ethical principle imposing a demanding moral obligation on all states and individuals to respect human rights, points to a clear conclusion that the Charter itself legally requires all member states to provide some minimal degree of protection for human rights and fundamental freedoms, which can be understood as including all fundamental human rights as I have defined them. In addition, the approach's emphasis on taking new shared understandings of U.N. Charter provisions into account to the extent these understandings further fundamental ethical principles suggests the legitimacy of

interpreting the Charter's minimal human rights provisions in light of the human rights norms elaborated in subsequent U.N. human rights treaties and declarations, and especially the Universal Declaration, which now reflect shared understandings of those Charter provisions.

Further, while I cannot here resolve doubts about whether all human rights recognized in the Universal Declaration ought to be regarded as having attained the status of general principles of law or customary international law, it seems clear that essential human rights, which are recognized by the Declaration, have a strong claim to be recognized as norms of customary international law, given their moral gravity. Moreover, as suggested in section 3.2, they ought independently to be considered general principles of moral law. The same conclusions follow with respect to compelling human rights that do not rise to the level of essential rights. Finally, essential human rights are strong candidates for inclusion in the category of *jus cogens* under the criteria for identifying *jus cogens* norms suggested in section 3.2. Many of the rights I have identified as "essential" are already considered *jus cogens* (e.g., the right to life, freedom from slavery, and freedom from racial discrimination). Those whose status as *jus cogens* is less clear under contemporary international law (e.g., rights to subsistence, to freedom of moral choice, to protection from illegitimate uses of force, and to guarantees of physical security) ought to be given recognition as *jus cogens* norms, with appropriate specifications, because they are essential rights. This means, at a minimum, that all governments, international organizations, and other actors are legally obligated not to engage in deliberate violations of these rights.

3.4.2. Duties to Protect Human Rights, Limitations on Rights, and the Obligation to Obey Governments and the Law

Although the treaties, declarations, and other documents I have described focus on the proclamation of human rights rather than on the specification of duties, especially on the part of individuals, or limitations on rights, some instruments have recognized that individuals also have duties to others and duties to respect legitimate legal limitations on their own rights.[73] Such duties and limitations are reflected in Articles 29 and 30 of the Universal Declaration, which I discussed in Chapter 2.

These duties and qualifications raise the problem of whether individuals have certain obligations under international law not to violate human rights or commit war crimes, or more positively to come to the rescue of victims of human rights violations. They also raise the question of whether the

Security Council should exercise caution in labeling situations as human rights violations without considering whether governments are merely seeking to enforce such reasonable limitations on rights. Further, they highlight the issue of under what circumstances, if any, severe human rights violations may justify rebellion against established governments.

On the account of duties and rights presented in Chapter 2 and in the preceding subsection, all human beings, while enjoying their own human rights, simultaneously have moral duties to respect the rights of others. Accordingly, the rights of any one person are limited by these moral duties. On the other hand, the principle of freedom of moral choice implies that not all moral duties that moderate the exercise of moral rights ought to be codified as legal duties whose violation would trigger the application of criminal sanctions. In general, it indicates that moral education is preferable to legal sanctions as a means of bringing about observance of those moral duties which coexist with, and regulate, the exercise of rights. Further, fundamental ethical principles require individuals to obey their governments, except in cases where doing so would grossly violate the most important fundamental ethical principles, including essential human rights. In extreme cases recourse to arms in rebellion may be permissible. But forcible rebellion should not be lightly condoned.

These principles are relevant to the interpretation of legal norms in the context of humanitarian intervention in a number of ways. First, they suggest that renewed attention ought to be paid by the U.N. and the world community, not only to clarifying the existence and scope of human rights-related legal norms, but also to identifying who is responsible for taking action to implement them—a question I explore in more detail in subsection 3.4.6 and in Chapter 8. Second, they imply that governments can legally adopt certain limitations on rights as permitted by Article 29 of the Universal Declaration. Third, as I discuss at greater length in subsection 3.5.4, they suggest that appropriate value should be attached to social order within currently constituted states, and that not every group claiming a right to self-determination should have the legal right to take up arms against the government, not to mention civilians, whenever it has grievances, however legitimate. Finally, at the same time, these principles reinforce the illegality of gross human rights violations by governments, and the ultimate legal right of citizens or the international community in cases of severe human rights violations to put a stop to those violations, or, at the extreme, to seek a change of government.

3.4.3. An Emerging Right to Democracy?

The Security Council-authorized intervention in Haiti to restore "democracy" vividly raises the question of whether democracy is a human right for all people and whether U.N. military intervention is warranted to put in place a democratic government. Throughout the last century democracy has increasingly been affirmed as an ideal of government, and even as a human right. I noted in Chapter 2 that Article 21 of the Universal Declaration provides that everyone "has the right to take part in the government of his country, directly or through freely chosen representatives," and calls for genuine and periodic elections. The ICCPR contains similar provisions.[74]

In 1990, the General Assembly adopted a resolution stressing member states' "conviction that periodic and genuine elections are a necessary and indispensable element of sustained efforts to protect the rights and interests of the governed and that, as a matter of practical experience, the right of everyone to take part in the government of his or her country is a crucial factor in the effective enjoyment by all of a wide range of other human rights and fundamental freedoms, embracing political, economic, social and cultural rights."[75] On the basis of these and other instruments, some commentators have asserted the existence of a legal "right to democratic governance."[76] Many have doubted, however, whether military intervention under U.N. auspices is the best way in the long run to uphold such a right.[77]

A fresh approach to humanitarian intervention and international law based on fundamental ethical principles would support these developments in the recognition of democracy and free elections under international law. At the same time, it would interpret the emerging legal right to participation in government as requiring, in addition to free periodic elections, actual implementation of human rights and consultation with citizens. It would stress the practical ability of citizens to make their voices heard in government circles. Moreover, it would recognize that the will of the majority may in some cases contravene fundamental ethical principles, including respect for human rights, and therefore cannot always be a proper guide for government conduct.

3.4.4. International Humanitarian Law

Humanitarian intervention has often been attempted in response to civil or international conflicts that have involved egregious human rights violations. In many cases it has been prompted primarily by perceived violations of

international humanitarian law. As noted in Chapter 2, there is a growing corpus of international humanitarian law, codifying principles of *jus in bello,* which regulates the conduct of warfare in the interest of protecting civilians and other vulnerable classes of persons, such as wounded soldiers or prisoners of war.[78] International humanitarian law incorporates treaty law, including the four 1949 Geneva Conventions and the Genocide Convention, as well as customary legal rules and general principles of law regarding the conduct of warfare, which now include many of the standards in the Geneva Conventions.

The Fourth Geneva Convention, which relates to civilians, sets out an extensive list of obligations of states parties to treat civilians (protected persons) humanely in cases of international armed conflict.[79] Many provisions of the Convention require parties to give certain humanitarian principles great weight, but allow "military considerations" to outweigh them in the judgment and discretion of the parties themselves.[80]

Article 3 of the Fourth Geneva Convention, which is common to all four Geneva Conventions, deals with noninternational armed conflicts. It imposes minimum obligations on parties to such an internal conflict to treat all noncombatants "humanely," without discrimination. In particular, it prohibits categorically certain acts directed toward noncombatants, such as "violence to life and person," including murder, mutilation, cruel treatment and torture; the taking of hostages; "outrages upon personal dignity, in particular humiliating and degrading treatment"; and the "passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples."[81]

All four Geneva Conventions contain provisions pertaining to "grave breaches" of the obligations imposed by the Conventions. States parties are generally required to provide effective penal sanctions for persons committing or ordering the commission of specified acts defined as grave breaches,[82] which include, among other acts, "wilful killing, torture or inhuman treatment," "willfully causing great suffering or serious injury to body or health," and the "taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly."[83] States parties are required to search for and prosecute persons suspected of having committed such grave breaches.[84]

In 1977, two additional protocols to the Geneva Conventions were adopted at a conference held under the auspices of the International Committee of the Red Cross (ICRC). The first (Geneva Protocol I) lays down enhanced stan-

dards for international armed conflicts. For example, Article 48 of Geneva Protocol I establishes a general rule that parties "shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."[85] Article 51 prohibits "indiscriminate attacks," which include attacks "which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."[86] This language is based on that in Article 57,[87] which lays down certain precautions that must be taken before an attack, including refraining "from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."[88]

These and other provisions in Protocol I generally reflect (although in the view of some commentators they also extend) customary rules and general principles of the *jus ad bellum* and the *jus in bello* requiring that uses of force be necessary and proportional to their military objective.[89] Such legal rules may be referred to as calling for a "legal principle of necessity."[90] Protocol I also extends the definition of "grave breaches" to include, among other acts, "making the civilian population or individual civilians the object of attack" and "launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects."[91]

Geneva Protocol II spells out numerous specific safeguards for internal conflicts. These safeguards are far more extensive than those set forth in common Article 3 of the four Geneva Conventions, but apply only to insurgencies reaching a high threshold of military organization and success.[92] Notably, the ICTR has jurisdiction over serious violations of common Article 3 as well as Geneva Protocol II.[93]

There are many gaps in the categories of persons obligated, or protected, by the Geneva Conventions and Protocols. For example, neither unorganized political factions nor traditional U.N. peacekeeping forces are bound or protected by the Conventions. In 1994, the U.N. General Assembly acted to fill the gap with respect to U.N. peacekeeping forces by adopting the Convention on the Safety of United Nations and Associated Personnel. (I analyze the issue of the application of international humanitarian law to military actions undertaken for humanitarian purposes at greater length in Chapters 7 and 11.)

The Rome Statute of the International Criminal Court, adopted in 1998, marks a further step in the evolution of international humanitarian law. It defines the crimes within the jurisdiction of the future Court to include (1) genocide, (2) crimes against humanity, (3) war crimes, and (4) the crime of aggression.[94] It provides extensive definitions of the first three of these crimes, many of which expand upon the definitions under the Geneva Conventions and Protocols and under customary international law, thus granting additional humanitarian protections.[95]

In this connection, it is now accepted that "crimes against humanity" are prohibited by customary international law. Article 6 of the Charter of the Nuremberg Tribunal defined crimes against humanity as "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal."[96] The Statute of the ICTY updated this definition of crimes against humanity to include imprisonment, torture, and rape, and indicated that the enumerated crimes constituted crimes against humanity when committed "in armed conflict, whether international or internal in character, and directed against any civilian population,"[97] while the Statute of the ICTR listed similar crimes "when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds."[98] The Rome Statute of the International Criminal Court added the crimes of (1) forcible transfer of population (in addition to deportation); (2) the severe deprivation of physical liberty (in addition to imprisonment) in violation of international law; (3) forms of sexual violence in addition to rape, such as sexual slavery, enforced prostitution, forced pregnancy, and enforced sterilization; (4) the persecution of any identifiable group or collectivity on national, ethnic, cultural, or gender grounds, or "other grounds that are universally recognized as impermissible under international law" in connection with any act or crime within the jurisdiction of the Court; (5) the enforced disappearance of persons; and (6) the crime of *apartheid*. The Rome Statute defines these crimes as "crimes against humanity" when they are "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."[99]

"War crimes" are also now considered to be prohibited by customary international law. War crimes may be understood as including grave breaches of the Geneva Conventions; other serious violations of international humanitarian law governing international armed conflict, including intentionally

directing attacks against civilians or indiscriminately using force with the knowledge that it will cause excessive loss of life or injury to civilians; serious violations of common Article 3 of the Geneva Conventions; and other serious violations of international humanitarian law applicable to noninternational armed conflicts.[100]

A new approach to humanitarian intervention and international law based on fundamental ethical principles can help to identify and interpret relevant norms of international humanitarian law. These principles suggest that significant emphasis should be placed on modern-day international humanitarian law—and that any doubts about its applicability ought to be resolved in its favor. They also imply that the ethical principle of necessity described in Chapter 2 and the ethical obligation not to target noncombatants deliberately and not to use force in a way unreasonably likely to injure them ought to be recognized as general principles of moral law having the status of *jus cogens*.[101] Such a recognition is warranted because these principles are morally essential, and moreover, they have been appropriately specified in such a way as to make it reasonable to impose them on states, international organizations, and other relevant actors as legal norms. In addition, in applying these norms (other than the norm prohibiting the deliberate targeting of noncombatants) as general principles of law (as opposed to ethical principles only), relevant actors would be given some reasonable degree of discretion to make the difficult judgments required, subject to objective appraisal to determine whether those judgments fall within reasonable bounds.

Fundamental ethical principles further indicate that provisions of relevant treaties codifying the legal principle of necessity, such as Geneva Protocol I, ought to be interpreted in light of the *ethical* principle of necessity—that is, by reference to the moral ends and consequences of the military action in question, and especially its impact on the protection of human rights. They consequently should be interpreted in a way that gives precedence to humane treatment of civilians and other protected persons above considerations of "military necessity," even where some discretion in judgment is currently allowed to belligerents. In particular, the treaties should be interpreted to require that uses of force that are not targeted at noncombatants but which are likely to injure them must be avoided if at all reasonably possible. This duty is especially compelling where the immediate objective of the use of force is not to save the lives of noncombatants, or otherwise to protect their human rights, but to achieve a primarily military objective only indirectly related, if at all, to the protection of human rights. Such an interpretation represents *an additional limitation* on the per-

missibility of actions likely to cause incidental harm to civilians in the case of military actions not directly aimed at protecting human rights, rather than a relaxation of the existing rules in the case of military actions that do have as their goal the protection of human rights. Likewise, formulations of the legal principle of necessity under customary international law or general principles of law should be interpreted consistently with the ethical principle of necessity. Interpreted in this way, the legal principle of necessity ought to correspond more closely with the ethical principle of necessity than under its traditional interpretation. I take up these issues in more detail in Chapter 7.

3.4.5. International Criminal Law

As suggested briefly in Chapter 2, and as alluded to in the preceding subsection, a growing body of international law now asserts that individuals are obliged not to commit egregious acts and imposes obligations on states or international courts or bodies to prosecute and punish individuals committing such acts. Although so-called international criminal law has longstanding roots in customary law relating to such crimes as piracy, the Nuremberg and Tokyo tribunals, which tried and convicted suspected war criminals after World War II, gave a new impetus to these evolving norms regulating individual conduct.[102] Indeed, numerous treaties, including, as we have seen, the Genocide Convention and the four Geneva Conventions, prohibit certain conduct by individuals and require states parties to prosecute individuals suspected of having committed those crimes. There is now an ever-growing corpus of such treaties and agreements. In addition to genocide, these relate to crimes against humanity, war crimes, terrorism, torture, and drug offenses. As noted in Chapter 1, the Security Council has created ad hoc criminal tribunals for the former Yugoslavia and Rwanda. And efforts to agree on the statute of a permanent international criminal tribunal finally bore fruit at the Rome Diplomatic Conference in July 1998.[103]

One controversial element of humanitarian intervention authorized by the U.N. is the use of military forces to apprehend persons suspected of committing genocide, crimes against humanity, war crimes, or other violations of international criminal law. This has raised a series of sensitive issues: Is it better to seek to arrest, try, and punish alleged war criminals or to win their cooperation in bringing about peace settlements? What are the legitimate purposes for the apprehension and punishment of violators of international criminal law? Are the use of international criminal tribunals, and U.N. efforts

to enforce apprehension, the most effective way to promote respect for international criminal law and basic standards of moral behavior?

The principles identified in Chapter 2 regarding criminal responsibility, together with the principle of the unity of the human family, suggest that an approach based on fundamental ethical principles would fully endorse the emergence of international criminal law. It would welcome the development of multilateral institutions, including the two ad hoc tribunals established by the Security Council and the new permanent international criminal court, designed to enhance the implementation of these norms of individual criminal responsibility. As will be explored in Chapter 7, it would also support the use of multinational forces to apprehend suspects charged with violating international criminal law in order to protect community members and to deter future violations.

3.4.6. Obligations to Undertake or Support Humanitarian Intervention

Do U.N. member states or the U.N. Security Council have the legal duty to undertake or support U.N. humanitarian intervention, or to strengthen the U.N.'s capabilities to carry out military operations in defense of human rights? Do individual states or regional organizations have a legal obligation to undertake humanitarian intervention if the Security Council fails to act? Regardless of the existence of legal obligations incumbent on the Security Council, U.N. member states or regional organizations, what *moral* obligations do these actors have? These questions have been at the forefront of the debate on humanitarian intervention.

The fundamental ethical principle of an obligation to undertake humanitarian intervention in extreme cases can help to resolve some of these questions, which will be explored in detail in Chapters 8 and 11. However, it is possible at this point to identify two general principles of moral law that may be derived from fundamental ethical principles. First, the strong moral duty of individuals, governments, and international organizations under these principles to aid human rights victims, coupled with the priority that must be accorded to respect for essential human rights, suggests that the morally essential obligation identified in Chapter 2 *to take some reasonable measures, either individually or collectively, within their abilities to prevent or stop widespread and severe violations of essential human rights, including genocide,* ought to be recognized as a general principle of moral law binding on both states and organizations of states like the U.N. Further, because of the morally essential character of this obligation and principle, it ought

to be recognized as a norm of *jus cogens*. Like many legal standards, the precise content of this legal obligation will have to be decided on a case-by-case basis. Moreover, the above formulation and specification of this obligation gives relevant actors some reasonable degree of discretion in determining what measures are most appropriate and within their abilities.

Second, the analysis in Chapter 2 suggests that it is morally essential, and therefore that there ought to be recognized a general principle of moral law requiring, that *some legal means be available in the international system for the use of military force to prevent or put an end to widespread and severe violations of essential human rights*. This legal means might include action by individual states, by regional organizations, or by an international organization like the U.N., or some combination of these approaches. It might be argued, of course, that all such forms of intervention ought to be permissible, in light of the strong ethical obligations that devolve on all states, regional organizations, and international organizations. But the importance of narrowly tailoring, circumscribing, and appropriately specifying legal duties flowing from compelling ethical principles when translating them from the ethical realm into general principles of law, emphasized earlier, indicates that from a legal perspective only *some form* of humanitarian intervention ought to be guaranteed under international law. Once again, this general principle ought to be considered a norm of *jus cogens* in light of the moral necessity of providing some effective means of rescue for victims of widespread and severe violations of essential human rights. (I elaborate on the application of this general principle of moral law to U.N. humanitarian intervention and to humanitarian intervention not authorized by the Security Council in Chapters 4 and 11.)

3.5. The Identification and Interpretation of Norms Tending to Oppose Humanitarian Intervention

A variety of legal norms in the U.N. Charter and contemporary international law potentially conflict with the human rights-related norms just discussed favoring humanitarian intervention. These legal norms tend to disfavor humanitarian intervention, and they often reflect competing ethical principles. As I suggested at the end of Chapter 2, the preeminent ethical principle of the unity of all individuals as equally dignified members of the human family, together with the principle of respect for communal diversity within this framework of unity, can help to reinterpret and reconcile such competing ethical principles and the conflicting legal norms they support.

3.5.1. State Sovereignty, Domestic Jurisdiction, and Nonintervention

When the Security Council authorizes military intervention in a member state because of human rights violations occurring within the state's borders, or member states or regional organizations undertake similar intervention without Security Council authorization, their actions directly challenge traditional conceptions of the rights of states to respect for their "sovereignty" and to freedom from intervention in their domestic affairs by other states as well as by the U.N. As we saw in Chapters 1 and 2, the U.N. Charter itself, while reflecting ethical principles of unity in diversity and respect for human rights, simultaneously upholds a principle of state sovereignty. For example, Article 2(1) of the U.N. Charter declares that the U.N. "is based on the principle of the sovereign equality of all its Members."[104] In keeping with this principle of state sovereignty, Article 2(7) affirms the "principle" that the U.N. may not "intervene in matters which are essentially within the domestic jurisdiction of any state," but provides that "this principle shall not prejudice the application of enforcement measures under Chapter VII."[105] A fundamental interpretive problem under Charter practice has been how to determine whether or not a given matter is to be considered one of essential domestic jurisdiction. Importantly, however, as the text of Article 2(7) indicates, this limitation does not apply when the Security Council is taking enforcement action under Chapter VII. Various General Assembly declarations and resolutions have reaffirmed a general principle of nonintervention by states in the domestic affairs of other states, including the 1970 Declaration on Friendly Relations.

The application of these legal norms raises important questions in the context of humanitarian intervention. For example, what are the precise boundaries of "sovereignty"? Are all states entitled to the same deference for their sovereignty, or are certain characteristics of states, such as the way they treat their populations, relevant? What categories of human rights violations, if any, should be protected by a principle of sovereignty against external intervention? What types of intervention by other states or by the U.N. are permissible? Does the permissibility of certain types of intervention depend on the nature of the human rights violated? When do human rights violations fall outside a state's essential domestic jurisdiction for purposes of Article 2(7)? How should the Security Council balance the Charter purpose of promoting respect for human rights with the simultaneous Charter purpose of safeguarding state sovereignty when exercising its discretion under Chapter VII?

From the perspective of an interpretive approach based on fundamental ethical principles, and particularly the principle of unity in diversity, it is clear from the analysis contained in Chapter 2 that, morally, the value that ought to be attached to the welfare, rights, and dignity of human beings far exceeds any value that should be ascribed to the "sovereignty" of states. This does not mean, however, that the norms of sovereignty, domestic jurisdiction, and nonintervention as expressed in contemporary international law—which together grant states a large degree of autonomy—are not independently supported by certain fundamental ethical principles. Indeed, they may be reinterpreted as being justified by the following fundamental ethical principles, in approximately descending order of importance and weight: (1) the principles of freedom of moral choice and of consultation, to the extent that citizens of a state have a voice in the decisions of their government and the government consults with them; (2) the principle that governments are obligated to protect the human rights of their citizens, to the extent they actually protect such rights; (3) the principle of unity in diversity, which calls for respect for emotional bonds of national or cultural identification as expressed in membership in a state, within a framework of world unity; (4) the principle of obedience to government; and (5) the principle of deference to existing legal norms, including those safeguarding state autonomy, to the extent they can be reconciled with fundamental ethical principles.

These principles favor a general subsidiary principle of allowing significant discretion to state governments, within the bounds of their obligations under existing international law as well as these fundamental ethical principles. The first and second principles also suggest that governments which enjoy the consent of their citizens, consult with them, permit them to participate in regular elections, and respect their human rights, especially their essential human rights, ought to be entitled to exercise a greater degree of discretion, and to greater protection by the norms of sovereignty, domestic jurisdiction, and nonintervention, than those that do not. At the same time the remaining principles indicate that all governments should enjoy a certain degree of *prima facie* protection.

Under the trust theory of government promoted by fundamental ethical principles, a government's most basic duty is to protect the essential human rights of its population and prevent, to the extent possible, their widespread deprivation. A government that violates this minimal duty by itself engaging in deliberate violations of essential human rights on a significant scale, or by intentionally tolerating such rampant violations by others (say, armed factional militias), should no longer be able to claim the same degree of legal

protection from outside intervention by appealing to the norms of sovereignty, domestic jurisdiction, or nonintervention.[106] I will argue that the U.N. Charter can be, and should be, interpreted to permit military intervention, at least under the authority of the Security Council pursuant to Articles 39 and 2(7), when a government violates this minimal duty. (I explore the boundaries of Articles 39 and 2[7] in Chapter 4.)

What about states that do not engage in or abet widespread violations of essential human rights, but that violate these rights occasionally, or persistently violate other (perhaps still compelling or fundamental) human rights? Under an approach stressing fundamental human rights, such violations ought to be at the least subject to international concern, criticism, and condemnation. International legal norms must be interpreted as allowing for these "soft" forms of "intervention." Fundamental ethical principles supporting such soft methods of intervention include those of international concern for all human beings as members of one human family and the desirability of consultation with and input from others as part of a government's efforts to improve its moral behavior.

But is military intervention warranted in such circumstances? Most governments in the world today are likely to fall short in their observance of some human rights, and fail to protect individuals against violations of even essential rights. Even in these cases, however, some form of limited U.N.-authorized military action may be morally justified, at least where it does not seek to overthrow an existing government but simply to put an end to human rights violations. (I address these issues in succeeding chapters, and investigate sovereignty and consent in more detail in Chapters 4 and 5.)

3.5.2. The Peaceful Settlement of Disputes

One of the most contentious issues in the current debate on humanitarian intervention involves whether or not disputes causing or potentially leading to human rights violations ought to be resolved through patient negotiations rather than military force. During the twentieth century, states recognized the value of attempting to settle disputes peacefully and without recourse to military measures, through mediation, conciliation, arbitration, or judicial settlement.

Chapter VI of the U.N. Charter established a program for the pacific settlement of disputes. Paragraph 1 of Article 33 of the Charter affirms that parties to any dispute whose continuance is likely to "endanger" international peace and security are first of all to "seek a solution by negotiation,

enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice." Paragraph 2 of that article empowers the Security Council merely to "call upon" parties to settle their disputes through such methods.[107] Under paragraph 1 of Article 37, parties to a dispute that have failed to settle it by pacific means are directed to "refer it to the Security Council." If such a dispute is referred to the Security Council and the Council believes that this dispute will endanger international peace and security, then it can decide whether to recommend, under Article 36, another method of dispute settlement or else "recommend such terms of settlement as it may consider appropriate."[108] Moreover, the Council is given authority to make recommendations to the parties of any dispute "with a view to a pacific settlement of the dispute"—but only if both parties request it to do so.[109] In short, as a general rule, the Council has only a power of recommendation in its capacity as mediator.

In practice, the U.N. Security Council has attempted to facilitate settlements of certain conflicts with a human rights dimension, and secretaries-general have honed a proactive role as impartial mediators *par excellence*. But these types of activities of the Council and the secretary-general in the human rights arena have historically been limited. At the same time, the U.N. has developed the concept of traditional U.N. peacekeeping, which represents another method for building a sustainable peace in the aftermath of an armistice, despite the absence of any explicit authorization for it in either Chapter VI or Chapter VII of the Charter.

Much of the current debate on humanitarian intervention has revolved around the inherent tension between a norm of pacific settlement and a perceived imperative to enforce norms of international human rights and humanitarian law. As suggested by the analysis in Chapter 2, fundamental ethical principles may help begin to resolve this tension. They counsel reliance on peaceful methods of dispute settlement, if at all possible, but imply, based in part on the principle of the unity of the human family, that human rights standards must be enforced, if necessary through military action. (I explore the problem of the pacific settlement of disputes in greater detail in Chapters 5 and 7.)

3.5.3. The Prohibition on the Use of Force Except in Cases Involving Self-Defense or Collective Security Action

As noted earlier, the U.N. Charter in Article 2(4) prohibits individual member states from threatening or using "force against the territorial integrity or political independence of any state, or in any other manner inconsistent

with the Purposes of the United Nations."[110] It thus purports largely to replace the customary law of *jus ad bellum,* which had regulated when states lawfully could resort to force in their relations with one another. This customary law had not prohibited war between states, but had at a minimum imposed the requirement that force be both a necessary and proportional response to a hostile act by another state (i.e., a *jus ad bellum* legal principle of necessity).[111]

The Charter explicitly allows forcible military action by states in two circumstances. First, the use of force by individual states or groups of states is permitted in self-defense as provided in Article 51. Article 51 states in part that nothing in the Charter "shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."[112] Second, the Security Council may direct that collective force be used against a threat to the peace, breach of the peace, or act of aggression, which the Council is empowered to do under Chapter VII of the Charter. Article 53 provides that in conducting enforcement action, the Council may utilize regional agencies, but that these agencies shall not take enforcement action without its authorization.[113] These provisions reveal the value that the Charter's framers placed on avoiding force generally, but also on protecting the autonomy of states. The Charter's legal focus on protecting the security of states and their residents against interstate war has not extended to the protection of people or groups within a state from internal war. There are no norms in the Charter or under general international law prohibiting civil conflict as such.

The precise limitations on the legitimate use of force laid down by Articles 2(4) and 51 have been the subject, through the U.N.'s first half century, of vigorous debate. This debate has in particular raised the question of whether or not the language in Article 2(4) prohibiting the use of force "against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations" is limiting language, thereby justifying the use of force for other purposes consistent with the U.N. Charter, such as the promotion of human rights or the achievement of self-determination. (I explore these issues in greater detail in Chapter 11.)

Turning to collective security action under Chapter VII as the second generally recognized exception to Article 2(4)'s prohibition on the use of force, Chapter VII stands in sharp contrast to the entirely voluntary character of Chapter VI proceedings. Under Article 39 the Council is authorized to determine the existence of a "threat to the peace, breach of the peace, or act of

aggression," and either to make recommendations *or to take binding decisions* on measures to restore peace.[114] Such measures can involve nonforcible measures under Article 41. These include economic or diplomatic sanctions such as "complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations."[115] But the Council can also authorize military measures. In particular, under Article 42, the Council has the power to "take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security" in case it should consider that nonforcible measures "would be inadequate or have proved to be inadequate." "Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations."[116]

The Security Council has almost exclusively relied on a Chapter VII finding that a human rights situation is a "threat" to international peace to justify the legitimacy of resort to force in cases of U.N.-authorized humanitarian intervention. The resulting action then arguably constitutes an "enforcement measure" exempt from the strictures of Article 2(7). But this practice raises the question of whether and when human rights violations can be regarded as a threat to (or even breach of) international peace, which in turn implicates the treaty interpretation problems identified earlier. Do human rights violations have to trigger transboundary effects that result in a clear threat of war between states? Or is it sufficient that they be of great gravity even without observable transboundary effects?

In general, an approach to humanitarian intervention and international law based on fundamental ethical principles would place a high priority on avoiding the use of force and on respect for those Charter provisions fostering pacific methods of dispute settlement and limiting the permissible reasons for threatening or using force. Moreover, it would endorse recognition of the ethical principle of necessity as a general principle of moral law, and, indeed, as a norm of *jus cogens,* for purposes of determining when the use of force is legally justifiable. The *jus ad bellum* element of that principle requires that force may be employed, if at all, only if it is necessary and proportional to the achievement of moral ends, determined by reference to fundamental ethical principles. (See Fig. 6.) The same integrated *jus ad bellum* and *jus in bello* calculus as described in subsection 2.7.2 would apply. Again, when applied as a general principle of moral law, the ethical principle of necessity would give states, the Security Council, and other actors some reasonable degree of discretion in determining how to engage in this calculus, subject to an objective determination of the reasonableness of their decision-making.

To the extent that some uses of force may be discretionary under the U.N. Charter and contemporary international law, the proposed approach would counsel the need for extreme caution and deliberation before a decision to use force is made. But it would possibly allow the ultimate resort to force in cases involving serious human rights violations. (I take up this central problem and the above questions as they relate to Security Council-authorized intervention in detail in Chapters 4 and 7. I discuss the problem of unilateral or regional intervention not authorized by the Council in Chapter 11.)

3.5.4. The Self-Determination of Peoples

The current debate on humanitarian intervention has also implicated a norm of self-determination, but ambivalently. On the one hand, when the U.N. or member states intervene to prevent repression of a people and denial of their right to self-government (as arguably was the case in Haiti and Kosovo), the norm of self-determination can be seen as supportive of such intervention. On the other hand, intervention has raised cries of prohibited armed interference with the "right" of a people (such as the Bosnian Serbs) to determine their own political system or to establish their own state.

The norm of self-determination of people belonging to various national, ethnic, racial, or religious groups exercised an important influence in the twentieth century based on a growing sense that these communities ought to be permitted a significant degree of autonomy vis-à-vis the state and other groups.[117] After first appearing in the League of Nations Covenant, the principle of self-determination found expression in the U.N. Charter, which announced as one of the U.N.'s purposes, we saw in Chapters 1 and 2, the development of "friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples."[118] The Charter gave impetus to the decolonization movement of the 1960s and 1970s by establishing a system of trust territories to replace the League of Nations mandates system. The Charter contained explicit provisions calling for independence of these territories as a long-term objective.[119] In addition, member states administering non-self-governing territories undertook "to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and of its peoples and their varying stages of advancement."[120]

As the Non-Aligned Movement came effectively to control the General Assembly, the principle of self-determination was affirmed in numerous declarations and treaties adopted under U.N. auspices. The 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples

elaborated upon the principle.[121] Further, as noted in Chapter 2, the developing states managed to include the principle of self-determination in Article 1 of both of the 1966 human rights covenants.

The Security Council has faced particularly acute moral, political, and legal dilemmas where the parties concerned attempt to justify human rights violations or violence against civilians or other groups, or at least claim immunity from international intervention, on the grounds of their right to self-determination. An approach based on fundamental ethical principles would recognize the legitimacy of individuals cultivating identities with their local, national, religious, or other communities, and making choices to associate with these communities and take pride in these associations. As we have seen, the principle of unity in diversity would allow for the pursuit of group-oriented values within a humanity-oriented framework. An approach emphasizing this principle would acknowledge that respect for the choices of individual members and cultivation of these group-oriented identities may require the development of certain institutions of self-government within a particular community and freedom from excessive control by other communities. The approach would therefore support the general ethical principle of self-determination of peoples as expressed in Article 1 of the two human rights covenants and in other international instruments, with "peoples" broadly understood to encompass all groups with which individuals may strongly identify.

On the other hand, the approach would interpret the ethical principle of self-determination, and these contemporary legal norms relating to self-determination, in light of the principle of unity in diversity and other fundamental ethical principles. Such other principles include the duty to respect the human rights of all individuals and the obligation to obey one's government. Accordingly, the approach would not prescribe political independence as the appropriate objective for every group of individuals who perceive themselves as forming a "community" and desire to form a separate state. Rather, it would encourage the development of political structures within states that allow significant decision-making autonomy to different groups, including minorities, as well as consultation with them. And it would insist on respect for the human rights of the individual members of those groups, while fostering an awareness of the fundamental unity of human beings within multiple levels of community.

Thus, the emerging international legal norms reviewed above ought to be interpreted in a way that will not permit groups and states to invoke a right of "self-determination" as an excuse to inflict human rights deprivations or

violations of international humanitarian law on particular individuals or groups. And international law ought gradually to be reformed explicitly to impose restrictions on the use of force by groups within states, which would be prohibited except in strict self-defense or justified rebellion.[122] In particular, for example, it ought to be recognized that groups taking up arms in pursuance of a claimed right of self-determination are bound, like states, to observe the ethical principle of necessity as a general principle of moral law.

At the same time, under existing international human rights standards, states ought to be prohibited from using large-scale force against their own citizens asserting a right of self-determination unless those citizens are themselves engaged in large-scale violence that does not constitute strict self-defense or justified rebellion. Any such uses of force by states ought to comply with fundamental ethical principles, including the ethical principle of necessity and the principle that unarmed civilians are not to be targeted, and ought to be aimed solely at reestablishing minimal order and respect for human rights.

It is not possible here to explore the difficult problems of achieving the correct balance between group rights and individual rights in reforming or creating political structures within a state, especially in the context of resolving civil conflicts. But fundamental ethical principles, and particularly the principle of unity in diversity, would certainly appear to support a federal approach that allows groups within a state significant decision-making autonomy on local matters.[123] They would also resist the purported solution of partition into independent states as the only "realistic" path to promoting domestic peace in such divided states or provinces as Bosnia and Kosovo. In the long term, fundamental ethical principles suggest the need to address ethnic claims to autonomy in a proactive and comprehensive global way, before the eruption of violence. This could be done, for example, through appointment by the U.N. of a special commission to study such claims. Such a commission could make recommendations for the adjustment of frontiers and the institution of federal structures in appropriate cases.

3.5.5. U.N. Impartiality

One reason that post–Cold War humanitarian intervention with Security Council authorization has triggered such controversy is because the use of military force under U.N. auspices appears to flout a norm of U.N. "impartiality." As pointed out in Chapter 2, fundamental ethical principles imply a conception of impartiality as adherence to such ethical principles. (I explore the specific implications of this view of impartiality and competing definitions in the current debate on U.N. humanitarian intervention in Chapter 6.)

3.6. Conclusion

In this chapter, I have, in light of the fundamental ethical principles outlined in Chapter 2, suggested new methodologies for identifying and interpreting norms of international law relevant to humanitarian intervention, and applied them very generally to help reconcile potentially conflicting legal norms under the U.N. Charter. Based on these principles and this legal framework, Part Three takes up the examination of a number of particular controversial issues surrounding U.N. humanitarian intervention. In general, each chapter in Part Three will first summarize the historical and current debate on the issue, with reference to the legal norms analyzed above. It will then suggest possible solutions to the relevant controversy, taking political realities and trends into account. Part Four, in Chapter 11, deals with the legality of humanitarian intervention without authorization by the Security Council, and is organized similarly.

Part Three

Some Problematic Issues Relating to U.N.-Authorized Humanitarian Intervention

4 Human Rights Violations as a "Threat to" or "Breach of" the Peace

Recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.
—The Universal Declaration of Human Rights

Absence of pride and deceit, Harmlessness, patience, uprightness. . . . This (all) is called knowledge.
—The Bhagavad Gītā (13.7, 11)

4.1. Introduction

As noted in earlier chapters, Article 39 of the U.N. Charter authorizes the Security Council to "determine the existence of any threat to the peace, breach of the peace, or act of aggression" and to take necessary measures in response to such a finding "to maintain or restore international peace and security." Article 2(7) generally prohibits the Security Council or the U.N. as a whole from intervening in matters "essentially" within a state's domestic jurisdiction, but this prohibition does not apply to enforcement action undertaken pursuant to Article 39 and Chapter VII. This chapter focuses on whether and when the Security Council may *lawfully* determine that human rights violations are a threat to the peace or breach of the peace under Articles 39 and 2(7) and thereby have a right to authorize military action to ameliorate those human rights conditions. This question concerns the "outer bounds" of the Council's permissible jurisdiction.

In this chapter I first lay out possible alternative definitions of "peace," "security," "international peace," "threat," and "domestic jurisdiction" as these terms appear in Articles 39 and 2(7) of the Charter. Second, in light of this definitional matrix, I consider very briefly the Council's historical record in labeling human rights deprivations as threats to the peace, thereby

providing the legal basis for action under Chapter VII. Third, I review the contemporary debate on this issue among U.N. member states and scholars in the context of U.N. humanitarian intervention. Finally, I apply the approach to Charter interpretation developed in Chapter 3 to reach some conclusions relating to the problem.

4.2. Alternative Definitions of Relevant Terms in Articles 39 and 2(7)

A key term in Article 39 is "peace." The word "peace" is notoriously relative and subjective. At least five distinct "levels" of peace might be identified, ranging from a "minimalist" definition to a "maximalist" one. These five levels of peace mark out finer gradations along the continuum between the two extremes of what political scientist John A. Vasquez refers to as "minimal peace" on the one hand, representing the absence of war or its threat between states, and "deeper peace," on the other, which "focuses on peace as a tranquillity that embodies certain positive characteristics and values (such as justice, equality, respect, etc.) that make the society generally free of violence and conflict."[1] These five levels are:

1. Peace as a temporary cessation of violence or military hostilities;
2. Peace as a cessation of or respite from violence or military hostilities coupled with arrangements, such as a peace agreement, designed to secure the continuation of a state of nonviolence;
3. Peace as such a semipermanent absence of violence supplemented by a minimal degree of social harmony or stability (for example, including stable diplomatic relations among states or the absence of widespread and severe violations of essential human rights within them);
4. Peace as all of the above with a higher level of diplomatic harmony in interstate relations or a fuller realization of human rights within states; and
5. Peace as all of the above plus an inner sense of "tranquillity" within the minds of individuals.

The term "security," as used in the phrase "international peace and security," reflects many of the same ambiguities. It potentially could also refer to five analogous different levels of "security."

The phrase "*international* peace" begs many questions. Does "international peace" refer to a condition of peace—however that is defined—*across*

the borders between states? (I call this the conventional or "interstate peace" definition of international peace.) Or can it be read more expansively to mean a condition of peace *among* U.N. member states, which would include conditions of peace *within* state borders as well as across borders? (I call this the holistic definition of international peace.) The same issues arise with respect to the concept of "international security."

The word "threat" is as problematic as the words "international peace" in Article 39. In context it is completely relative, potentially referring to any situation or event that bears some inverse probabilistic relationship to international peace, however defined. It is not clear just how great a degree of probability must exist, or whether threats other than military ones ought to count.

Another interpretive problem is to relate the notion of a "threat to international peace" in Article 39 to the limitation imposed by Article 2(7). Does the exception in Article 2(7) for enforcement action completely immunize the Council from the article's constraints when the Council otherwise finds a situation to constitute a threat to international peace? Or is Article 2(7) relevant in interpreting Article 39? How does the evolution of international human rights law affect the definition of "domestic jurisdiction" for purposes of Article 2(7)? All of these interpretive problems and alternative definitions have surfaced in the historical and current debate on treating human rights violations as threats to the peace.

4.3. A Short History of the Debate on Treating Human Rights Violations as a "Threat to the Peace"

The drafters of the Charter focused primarily on aggression or coercive threats between states, rather than internal disputes or human rights abuses within a state, and did not explicitly authorize the use of force to end human rights violations. In this connection, it is important to note that although the first sentence of Article 39 refers simply to a "threat to the peace," other language in Article 39 and the jurisdictional language of Article 24 make clear that the peace concerned is "international peace."[2] The balance of the analysis in this chapter will presume this meaning.

Most scholars have adopted the conventional view, as expressed by the prominent international legal scholar Hans Kelsen, that "international peace" in Article 39 of the Charter means the absence of interstate war: "'International' peace is to be distinguished from 'internal' peace, peace

within one and the same state. Hence it is not the purpose of the United Nations to maintain or restore internal peace by interfering in a civil war within a state."[3]

A year after the 1945 San Francisco Conference, at which the U.N. Charter was drafted, a nine-member commission appointed by ECOSOC proposed that pending the establishment of an international agency to monitor human rights, the Commission on Human Rights might be recognized as qualified "to aid the Security Council in the task entrusted to it by Article 39 of the Charter, by pointing to cases where violation of human rights committed in one country may, by its gravity, frequency, or its systematic nature, constitute a threat to peace."[4] ECOSOC did not adopt this particular proposal. But in 1948, many members of the U.N. involved in the drafting of the Genocide Convention asserted that genocide could constitute a threat to the peace; indeed, the Soviet delegate maintained that an "act of genocide was always a threat to international peace and security" and therefore should be dealt with by the Security Council under Chapters VI and VII of the Charter.[5]

Further, the Security Council itself has broadly interpreted its powers under Chapter VII in the manner suggested by the 1946 commission and the 1948 debates on the Genocide Convention. It has concluded, on a number of occasions, that a primarily domestic conflict or issue—including certain human rights violations—constituted a "threat to the peace" warranting the imposition of mandatory enforcement measures under Chapter VII of the Charter, typically in the form of economic sanctions. The Council first made a clear linkage between human rights violations and a "threat to the peace" during its efforts to eliminate racial discrimination in Southern Rhodesia (which I refer to as Rhodesia) and South Africa. In 1966, the Council adopted Resolution 232, which specifically referred to Articles 39 and 41, determined that the situation in Rhodesia constituted a "threat to international peace and security," imposed economic sanctions on Rhodesia, and reaffirmed the "inalienable rights of the people of Southern Rhodesia to freedom and independence."[6] A year and a half later, in Resolution 253, the Council made the sanctions more comprehensive and repeated its condemnation of "all measures of political repression, including arrests, detentions, trials and executions which violate fundamental freedoms and rights of the people of Southern Rhodesia."[7]

The Council's 1977 resolution establishing a mandatory embargo on arms transfers to South Africa "strongly" condemned the South African government for its "acts of repression, its defiant continuance of the system of *apartheid* and its attacks against neighbouring independent States." It deter-

mined that South Africa's acquisition of arms constituted a "threat to the maintenance of international peace and security."[8] Although the Council did not explicitly find that the human rights situation as such constituted a threat to international peace, its assertion in the resolution's preamble that the "policies and acts of the South African Government are fraught with danger to international peace and security" suggested such a determination.[9]

4.4. The Current Debate

As noted in Chapter 1, the U.N. Security Council has recently declared a variety of primarily internal situations of civil conflicts or human rights violations threats to the peace. These findings reflect a more general awareness on the part of the Council of the link between peace and respect for human rights, and an endorsement of deeper levels of peace. For example, in the Council's communiqué issued after a high-level meeting of heads of state and government in January 1992, it affirmed that "the absence of war and military conflicts amongst States does not in itself ensure international peace and security. The non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security. The United Nations membership as a whole, working through appropriate bodies, needs to give the highest priority to the solution of these matters."[10] And in a statement issued by the president of the Security Council on July 20, 2000, the Council asserted that "peace is not only the absence of conflict, but requires a positive, dynamic, participatory process where dialogue is encouraged and conflicts are solved in a spirit of mutual understanding and cooperation."[11]

Turning to particular cases described in Chapter 1, in Resolution 733, the Security Council concluded that the continuation of the situation in Somalia—involving "the heavy loss of human life and widespread material damage resulting from the conflict in the country" with "consequences on the stability and peace in the region"—constituted a threat to international peace and security.[12] Resolution 794, which authorized the deployment of UNITAF, declared that "the magnitude of the human tragedy caused by the conflict in Somalia, further exacerbated by the obstacles being created to the distribution of humanitarian assistance, constitutes a threat to international peace and security."[13] The Council did not make any explicit mention of refugee flows or effects on surrounding countries.

Numerous resolutions involving the conflict in the former Yugoslavia

declared that the situation there, including the practice of "ethnic cleansing," threatened international peace and security. For example, in February 1993 the Security Council took the signal step of declaring specifically in Resolution 808, which decided on the establishment of the ICTY, that the "widespread violations of international humanitarian law occurring within the territory of the former Yugoslavia, including . . . mass killings and the continuance of the practice of 'ethnic cleansing'" constituted a threat to international peace and security.[14]

With respect to the outbreak of genocide in Rwanda, in Resolution 929, adopted in June 1994, the Council authorized French intervention after determining "that the magnitude of the humanitarian crisis in Rwanda constitutes a threat to peace and security in the region."[15] In Resolution 955, adopted on November 8, 1994, the Security Council established the ICTR using its Chapter VII powers, having concluded that the situation of "genocide and other systematic, widespread and flagrant violations of international humanitarian law . . . committed in Rwanda" continued to constitute a threat to international peace and security. It also expressed the view that prosecutions would "contribute to the process of national reconciliation and to the restoration and maintenance of peace."[16] These statements in Resolution 955 are highly significant because they fail entirely to make any reference to cross-border effects and, moreover, appear to focus on the restoration of internal, rather than interstate, peace.

Concerning Haiti, in Resolution 841 of June 16, 1993, the Security Council expressed its concern that the persistence of the situation in Haiti contributed to a "climate of fear of persecution and economic dislocation which could increase the number of Haitians seeking refuge in neighbouring Member States." Based on this fear and a request from the Permanent Representative of Haiti for the imposition of economic sanctions, it determined that "in these unique and exceptional circumstances, the continuation of this situation threatens international peace and security in the region."[17] In Resolution 917 of May 6, 1994, the Council characterized—again with the caveat about unique and exceptional circumstances—the "situation created by the failure of the military authorities in Haiti to fulfil their obligations under the Governors Island Agreement and to comply with relevant Security Council resolutions" as a threat to peace and security in the region.[18] In Resolution 940, which authorized a multinational force to facilitate the departure of the military regime, the Council reiterated its determination that the situation in Haiti constituted a threat to peace and security in the region.[19]

With respect to Kosovo, in Resolution 1160 of March 31, 1998, the

Council first took action under Chapter VII without declaring a "threat" to international peace.[20] In Resolution 1199 of September 23, 1998, it explicitly affirmed that "the deterioration of the situation in Kosovo, Federal Republic of Yugoslavia, constitutes a threat to peace and security in the region."[21] In Resolution 1239 of May 14, 1999, adopted during the NATO bombing campaign, the Council recalled the provisions of international human rights law and international humanitarian law, and expressed its "grave concern at the humanitarian catastrophe in and around Kosovo" as well as its concern about the "enormous influx of Kosovo refugees" into neighboring countries and the increasing numbers of displaced persons within Kosovo and other parts of the Federal Republic of Yugoslavia.[22] And in Resolution 1244, adopted on June 10, 1999, the Council again determined "that the situation in the region continues to constitute a threat to international peace and security."[23]

These resolutions reveal an evolving willingness on the part of the Council to characterize situations involving the most deplorable of human rights violations—including genocide—as threats to international peace and security within the meaning of Article 39. The Council has often done so without regard to the existence of any actual effects on other countries. This trend was reinforced and confirmed in a resolution adopted in August 2000, in which the Council asserted that "the deliberate targeting of civilian populations or other protected persons, including children, and the committing of systematic, flagrant and widespread violations of international humanitarian and human rights law, including that relating to children, in situations of armed conflict may constitute a threat to international peace and security."[24] Of course, many member states, and the Council itself, have frequently emphasized the presence of cross-border effects, such as refugee flows.

The United States has at times endorsed an expansive definition of threats to or breaches of the peace. For example, in *Presidential Decision Directive 25* (*PDD 25*), issued in 1994, it took the position that a "threat to or breach of international peace and security" could include, in addition to interstate aggression, an "urgent humanitarian disaster coupled with violence" or a "sudden interruption of established democracy or gross violation of human rights coupled with violence, or threat of violence."[25] And a few Council member states have expressed concern at massive human rights violations and the belief that the Council has a moral responsibility to respond to them—apparently whether or not they directly threaten interstate war. For example, during the debate on Resolution 794 on Somalia, the representative of Morocco, although also citing the threat to the peace of the region,

made an independent humanitarian argument for Council jurisdiction: "In this unprecedented situation the Security Council became the only hope of saving thousands of old people, women and children, whose everyday suffering is hard to describe but the horrific pictures we receive daily of this tragedy have aroused the universal conscience."[26]

In the course of the debate on Resolution 955, establishing the ICTR, many delegations suggested, like the text of the resolution, that the gross violations of international humanitarian law committed in Rwanda were *ipso facto* threats to the peace. Thus, for example, the representative of Pakistan drew an absolute linkage between violations of international humanitarian law and a threat to international peace: "The Security Council has just adopted another landmark resolution clearly establishing that gross and systematic violations of international humanitarian law constitute a threat to international peace and security, a position firmly held by the Government of Pakistan."[27] In the debate on military intervention in Haiti, the representative of Argentina implied that the Council could legitimately act even in the absence of cross-border effects: "An end must be put to a humanitarian crisis so vast, and atrocities so unspeakable, that this Council has determined that they can no longer be hidden behind a border."[28]

During the debate on the deployment of KFOR, the representative of the Netherlands affirmed that "one day, when the Kosovo crisis will be a thing of the past, we hope that the Security Council will devote a debate to the balance between respect for national sovereignty and territorial integrity on the one hand and respect for human rights and fundamental freedoms on the other hand, as well as to the shift [in making respect for human rights more mandatory and respect for sovereignty less absolute]. This will not be a pro-Western or anti-third-world debate."[29] The Canadian delegate stated that "there is mounting historical evidence which shows how internal conflicts which threaten human security spill over borders and destabilize entire regions. We have learned in Kosovo and from other conflicts that humanitarian and human rights concerns are not just internal matters. Therefore, unlike the delegation of China, Canada considers that such issues can and must be given new weight in the Council's definition of security and in its calculus as to when and how the Council must engage."[30]

On the other hand, many states have been dubious about the legitimacy of treating any human rights violations as threats to the peace, even when they undoubtedly produced vast refugee movements. These states have emphasized that such refugee flows are more properly regarded as a humanitarian matter rather than one triggering Security Council jurisdiction. The

Haiti action was particularly troublesome to developing states. For example, during the debate on Resolution 940, the Mexican delegate declared that "the crisis in Haiti, in our opinion, is not a threat to peace, a breach of the peace or an act of aggression such as would warrant the use of force in accordance with Article 42 of the Charter."[31]

To avoid creating a precedent for a linkage between human rights and international peace in all cases involving human rights violations, the Council, in many of its resolutions authorizing humanitarian intervention by coalitions of states, including Resolution 794 on Somalia and Resolution 940 on Haiti, meticulously stressed the "unique" character of the situation. This type of language has two effects. On the one hand, it helps to mollify those states fearful of setting new precedents for Security Council–authorized military interventions to redress human rights violations. On the other hand, it may contribute to the fears of those same states that the Security Council is acting in an unprincipled manner in making determinations of threats to the peace based primarily on the military or strategic concerns of the permanent members of the Council.

In its 1992 *Lockerbie* decision,[32] the International Court of Justice had the opportunity to express an opinion on the scope of the Council's discretion under Article 39 to declare a situation a threat to the peace. In this case the situation was Libya's failure to extradite suspects in the terrorist bombing of Pan Am Flight 103 as demanded (at least implicitly) by prior resolutions. The majority of the judges generally deferred to the Council's discretion, concluding simply that the Council's adoption of Resolution 748, because it invoked Chapter VII, was binding on Libya, and therefore provisional measures requested by Libya were not warranted. Resolution 748 had imposed sanctions on Libya for its failure to comply with an earlier Council resolution, Resolution 731, urging Libya to respond to extradition requests from the United States, the United Kingdom, and France.[33]

The Court did not address the legality as such of the Council's determination.[34] But several judges emphasized the wide scope of the Council's discretion under Article 39 and Chapter VII.[35] Other judges, however, noted that the case raised problematic issues concerning the scope of the Council's discretion. For example, in a dissenting opinion Judge Bedjaoui implied that in some cases a Council determination could be *ultra vires* if the alleged "threat to the peace" was so remote that it revealed ulterior motives.[36]

The Security Council's new experiments with characterizing situations involving internal conflict or gross human rights violations as threats to the peace have also touched off a lively popular and academic debate on whether

the Security Council has excessively distorted the literal language of the Charter. For example, before the U.S. invasion of Haiti, the *New York Times* in an editorial charged that the U.S. government had "recklessly stretched the boundaries of what constitutes a threat to international peace and security under Chapter Seven of the U.N. Charter."[37]

In the academic realm, legal scholar Rosalyn Higgins, now a judge on the International Court of Justice, has called the characterization of human rights violations as threats to the peace a "legal fiction," observing: "No matter how much one may wish it otherwise, no matter how policy-directed one might wish choice between alternative meanings to be, there is simply no getting away from the fact that the Charter *could* have allowed for sanctions for gross human-rights violations, but deliberately did not do so."[38] Law professor Michael J. Glennon has defended the conventional definition of international peace and conservative interpretations of the terms "threat to" or "breach of" the peace. He has argued in the context of the Haiti intervention that "at a minimum, breach of the peace would seem to imply some violation of sovereignty or cross-border intervention causing armed conflict, and a threat to the peace would thus entail the creation of an unreasonable risk of such an occurrence. Absent these elements, the possibility of Security Council interference in member states' internal affairs is too great, and the Charter flatly prohibits the United Nations from intervening in matters within the domestic jurisdiction of states."[39]

Other legal scholars have pressed for a more flexible interpretive approach to Article 39. They have relied either on teleological or on policy arguments, and have emphasized the human rights purposes of the Charter as well as subsequent Security Council practice. For example, legal expert Lori Fisler Damrosch has rejected the need for proof of transboundary consequences to secure Council jurisdiction. She has pointed to the South African and Rhodesian precedents in which the Council "implicitly acted on the premise that serious human rights violations are themselves a threat to peace." She argues instead for the incremental development of Security Council precedents, asserting that "gradual growth in the Security Council's powers is fully consistent with methodologies of treaty interpretation, widely accepted in international law, that take account of the purposes of an instrument and practice under it; interpretation can accordingly be dynamic and teleological rather than static and literal."[40]

Still other scholars have appeared to argue, not only that the provisions of Article 39 ought to be interpreted liberally, but that ultimately the Council has discretion to declare whatever it pleases as a threat to the peace. For

example, Peter Malanczuk has stated that "in the end . . . the decision of the Security Council on what constitutes a threat to international peace and security is a political one and subject to its political discretion," subject to the requirements of international humanitarian law. He emphasizes that the Council has the authority to determine the scope of its own jurisdiction.[41]

Fernando Tesón points out that the Council's discretion to determine a threat to the peace, while apparently not explicitly subject to review by another U.N. organ such as the International Court of Justice, is not unconstrained by Charter law.[42] He goes on to craft an argument that focuses not so much on the words of Article 39, as on the existence, after decades of state practice under the Charter as a whole, of a customary right of collective humanitarian intervention under the auspices of the Security Council: "The better interpretation [of Security Council practice] is that, regardless of the language in which it cloaks its decision, the Security Council authorizes the use of force in two instances: to counter aggression and restore peace, and to remedy serious human rights abuses."[43] His argument implicitly adopts an interpretation of "international peace" as interstate peace and of a "threat to the peace" as a situation at least involving transboundary effects.[44]

4.5. Developing a Fresh Approach to the Determination of the Lawful Scope of the Security Council's Jurisdiction Under Chapter VII

4.5.1. The Limits of Traditional Interpretive Principles

As I will demonstrate in this section, traditional canons of interpretation provide little help in resolving the interpretive problems I have highlighted. However, reference to the approach to Charter interpretation suggested in Chapter 3 may shed some additional light on them, and I now apply that approach.

Before embarking on this interpretive exercise, however, it is necessary to address the argument that it is pointless even to explore the meaning of the terms used in Article 39 because of the wide political and legal discretion of the Council. The interpretive approach developed in Chapter 3 requires that these terms be given legal meaning and significance, most importantly because that approach accords substantial respect to the text of the Charter. Furthermore, the language of Articles 39 and 24 makes it clear that the Council is intended to be guided by certain standards in the exercise of its discretion. Fidelity to such standards is also called for by the fundamental ethical

principles of respect for law and for voluntary treaty commitments. Thus, it is necessary to define these terms because they do serve as bounds on the Council's discretion. In the following analysis I will focus on the meaning of the terms "peace," "threat to the peace," and "breach of the peace," because these are the jurisdictional terms used in Article 39, as well as the expression "international peace" and the terms used in Article 2(7). However, analogous points could be made about the term "security" and related expressions, such as "international security." I do not discuss here the possibility that human rights violations within a state might be considered "acts of aggression" within the meaning of Article 39.

4.5.2. Analyzing the Text of the Charter

Turning first to the problem of defining the word "peace" in Article 39, the Vienna Convention counsels resort to the "ordinary meaning" of "peace" in light of the Charter's "object and purpose." However, in Chapter 3, I noted that the Charter lists many purposes that could be related to a definition of peace, including not only the limitation of war, but also the realization of human rights and social and economic welfare. Indeed, the text of the Charter may plausibly be read as supporting all five of the possible definitions of "peace" reviewed at the beginning of this chapter.

Definitions calling for a level 1 or level 2 peace—involving either the temporary or more enduring absence of war between states—are of course supported plainly by the text of Article 2(4) and Chapter VII. They are also supported by the preamble to the Charter, which refers to a desire to "save succeeding generations" from the "scourge of war"—thus evincing the goal of establishing a long-lasting absence of war.

However, the Charter's declared purposes would also appear to support broader interpretations incorporating minimal or maximal social well-being (levels 3 or 4). We have seen that the preamble affirms, for example, that one of the purposes of the U.N. and its member peoples is "to practice tolerance and live together in peace with one another as good neighbors." The invocation of the concept of "neighborliness" could be interpreted as pointing to a deeper level of peace than mere absence of war. And Article 55 of the Charter views the "creation of conditions of *stability and well-being*" as "*necessary* for *peaceful* and friendly relations among nations." It accordingly commits the U.N. to promoting universal respect for human rights.[45] This provision asserts that social stability and well-being, including the enjoyment of human rights, are central elements and requirements of long-

lasting peace. I noted in Chapter 2 that a similar affirmation appears in the opening paragraph of the preamble to the Universal Declaration of Human Rights, quoted at the outset of this chapter, which proclaims that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and *peace* in the world."[46]

These passages imply that respect for human rights could be viewed as an essential component of a definition of peace. They therefore suggest the plausibility of at least a definition reflecting level 3 (incorporating minimal social stability and respect for human rights) and possibly also a definition reflecting level 4 (incorporating maximal social harmony and enjoyment of human rights). Definitions reflecting levels 3 and 4, which conceptualize peace as a condition transcending the mere absence of armed conflict, tend also to be supported simply by the use of the word "peace" in Article 39. The drafters just as easily might have given the Council competence to determine the existence of a "threat of war" or a "threat of armed conflict," but did not. The Charter could even be read as supporting the development of a more emotional sense of inner peace (level 5) to the extent it endorses in its preamble the practice of "tolerance" and living "together in peace with one another as good neighbors," and therefore a sentiment of unity.[47]

Despite the plausibility of all five definitions of "peace" under the Charter, a fair reading of the text would appear to provide the strongest textual support for definitions reflecting levels 1 through 3. For example, the text suggests that full observance of human rights (level 4) and an emotional sense of "neighborliness" (level 5) help to strengthen peace and render it more durable, but are not necessarily essential components of peace in the sense that peace cannot be said to exist without them. Such a reading is supported, for example, by the language in Article 55 of the Charter calling for the "promotion" by the U.N., rather than its guarantee, of respect for and observance of all human rights with a view to achieving "conditions of stability and well-being" that in turn "are necessary for peaceful and friendly relations among nations."[48] This language implies that the full observance of human rights should be gradually promoted, but not immediately required, as a means of strengthening long-lasting peace.

What light can the Charter's text shed on the best interpretation of "international" in the phrase "international peace"? First, if the Charter's references to peace are references to the absence of war between states, then "international" plainly refers to such peace between states, and nothing more. To the extent, as argued above, that the Charter can be read as endorsing more

expansive definitions of peace that take into account the level of individual well-being and respect for human rights within states, such a reading would tend to support the holistic interpretation of "international" identified earlier.

Many of the same passages of the Charter that support definitions reflecting a level 1 or level 2 peace also support the conventional interpretation of "international." Indisputably a major purpose of the U.N. was to prevent wars between states. A conventional interpretation also appears at first to be supported by Article 2(7). Essentially domestic matters presumptively would include conditions of civil peace or human rights within the borders of a state.

What textual support is there for a holistic interpretation of "international peace"? First, read as a whole, the text of the Charter clearly reveals that peace and human rights within all countries are considered matters of international concern.[49] In this connection, Myres S. McDougal and W. Michael Reisman argued that human rights violations within Rhodesia could adversely affect "international peace" even without physical transboundary effects because "in the contemporary intensely interdependent world, peoples interact not merely through the modalities of collaborative or combative operations but also through shared subjectivities. . . . The peoples in one territorial community may realistically regard themselves as being affected by activities in another territorial community, though no goods or people cross any boundaries."[50] While McDougal and Reisman's argument appears to be contingent on the existence of actual "shared subjectivities" in a particular case of human rights violations, the Charter seems *ipso facto* to make internal conditions of social peace and respect for human rights matters of international concern.

Second, and relatedly, the collective security system established by Chapter VII itself reinforces and institutionalizes the principle that war in one part of the world is a concern of all, even though it has no direct impact on third countries. What is without question is that if armed hostilities erupt between two states, the Council is competent under Article 39 to authorize collective economic sanctions or military action to put an end to the war. Indeed, under the language of the Charter, the Council "shall" take the action it believes is necessary to do so. This competence and responsibility to take action on behalf of the entire membership of the U.N. does not depend on the likelihood, for example, that the hostilities will erupt into a world war, or that any third state is likely to be drawn into the conflict. Even when the hostilities affect two states only, and no more, the Charter declares the conflict to be a matter of international concern and *responsibility*.

Third, Article 1 of the Charter declares that one of the purposes of the United Nations is not only to "maintain international peace and security," but to "take . . . appropriate measures to strengthen *universal* peace."[51] "Universal" peace implies peace both within and between states. It is possible to argue, of course, as suggested by Hans Kelsen, that this separate reference to "universal" peace was intended to draw a distinction between "international" peace—whose maintenance is the province of the Security Council—and a broader, "universal" peace, whose promotion is outside the powers of the Council under Article 24.[52] However, the other provisions cited above, when taken together, cast doubt on such a bright-line distinction.

Fourth, textual references simply to "peace," for example, in the text of Article 39 itself, could suggest an equivalence in the drafters' minds between "peace" anywhere and "international" peace. Even if the drafters did not believe these concepts were equivalent, it is significant that the U.S. representative in the 1948 debate on Palestine maintained that the naked reference to "peace" in Article 39 meant that the Security Council had the competence to deal with threats to or breaches of *domestic* peace.[53]

Regarding the problem of defining a "threat" to international peace, no probabilistic threshold of negative impact on peace is specified in the Charter, and no guidance is provided in the Charter. The Charter thus leaves open the possibility that human rights violations within a state might "threaten" international peace, however "international peace" is defined. The same ambiguity pertains to the Charter's use of the term "breach" of international peace.

What is the impact of Article 2(7) on these tentative conclusions allowing for the possibility of a holistic interpretation of "international peace" and a definition of "threat to international peace" that might include domestic human rights violations? First of all, Article 2(7)'s restriction does not apply to the "application of enforcement measures under Chapter VII." To the extent that the Council adopts a holistic reading of "international peace" and takes enforcement actions against threats to or breaches of domestic peace, including certain human rights violations, this second sentence of Article 2(7) would seem to immunize the Council from the domestic jurisdiction limitation.

Nevertheless, Article 2(7)'s strong policy against U.N. "intervention" in essentially "domestic" matters calls for caution in adopting a holistic interpretation of international peace. It underscores the need to justify such an expansive interpretation carefully. A holistic interpretation appears to survive such scrutiny, however, for the following reasons. First, the Charter-based arguments legitimizing international concern with social

peace and human rights would, at the very least, appear to cast doubt on whether internal peace is "essentially" a matter of "domestic jurisdiction." Indeed, the very obligations that member states undertake to promote internal social stability and well-being, including respect for human rights, in Articles 55 and 56 of the Charter would, even as a legal matter, appear to have extricated domestic peace and human rights from the protected sphere of essential domestic jurisdiction as of the date of the Charter's adoption.[54]

Moreover, by referring to "jurisdiction," Article 2(7) contemplates taking into account evolving conceptions of domestic jurisdiction under international law after the Charter came into effect. As the Permanent Court of International Justice stated in the *Nationality Decrees* case in reference to the construction of Article 15(8) of the League of Nations Covenant: "The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations."[55] The Permanent Court of International Justice referred to the word "solely" because the League Covenant used this term in Article 15(8).[56] The Charter, by contrast, substituted the word "essentially" for "solely." Did this change substantially constrict the range of permissible U.N. activities? I will examine the *travaux,* but a fair reading of the text itself suggests that once a matter is significantly regulated by international law as well as domestic law, it is no longer either "solely" or "essentially" within domestic jurisdiction.[57]

The word "intervene" in Article 2(7) is highly ambiguous. The Charter itself provides little guidance on its meaning. A basic cause of ambiguity is that "intervention" may be viewed as potentially ranging along a continuum from mere discussion or attempts at nonforcible persuasion, to the use of mandatory economic sanctions, and finally to forcible action, with the latter two actions generally being *coercive* in intent. In short, this textual analysis of both Article 39 and Article 2(7) highlights the ubiquitous ambiguity of these provisions.

4.5.3. Analyzing the *Travaux Préparatoires*

Under the approach to Charter interpretation proposed in Chapter 3, the *travaux* are to be given substantial weight in resolving textual ambiguities out of deference to the original shared understandings of states. But attention is also to be paid to the possibility of modifications of original understandings through new shared understandings and to the consistency of

possible interpretations disclosed by the *travaux* with the fundamental ethical principles outlined in Chapter 2.

First, evidence regarding the framers' intended definition of "peace" in Article 39 is mixed. On the one hand, many delegations obviously defined a threat to peace as a threat of armed hostilities. Indeed, several portions of the report of the drafting committee at San Francisco responsible for Article 39 refer interchangeably to a "threat of war" or a "threat to the peace."[58] On the other hand, the term "peace" was used more often in the debates, which again at least leaves open the possibility suggested by the text itself that the framers had in mind more expansive definitions of peace. This is also implied by a statement in the report of the subcommittee responsible for drafting Article 1 of the Charter. The subcommittee, while declining to add the maintenance of international "justice" as a primary purpose of the U.N. alongside maintaining peace and security, because of the vagueness of the term, noted that none of its members "wanted to contend the importance of 'justice' as a fundamental element of the purposes of the Organization, *or to contend that real and endurable peace can be based on anything other than justice*. On the contrary, all affirmed the above-mentioned conception."[59]

Some parts of the *travaux* seem to support the conventional interpretation of "international peace" and to reject the holistic interpretation. For example, while the *travaux* suggest that a breach of the peace can be something other than interstate *aggression,* they also indicate that the "breach" was thought of as a coercive attempt at influence *between states*.[60] The legislative history of Article 2(7) is also relevant in this regard. Some delegates expressed the opinion that the U.N. should not be permitted to "penetrate directly into the domestic life and social economy of the member states."[61] There is also support in the legislative history for an interpretation of "intervene" as encompassing any form of influence, including nonforcible persuasion.[62] Further, the drafting committee at the San Francisco Conference adopted in its report a clarification that members were "in full agreement that nothing contained in [the economic and social provisions of the Charter] can be construed as giving authority to the Organization to intervene in the domestic affairs of member states."[63]

Of course, this statement begs the question of which matters are to be considered domestic affairs. Indeed, Hans Kelsen notes that even though the presence of Article 2(7) means that the human rights provisions of the Charter are to be interpreted as restricted by Article 2(7), "the interpretation that the provision of Article 2, paragraph 7, is restricted by the [human rights provisions] of the Charter is not excluded."[64]

Moreover, the drafters of Article 2(7) clearly intended that its centerpiece and workhorse—the concept of domestic jurisdiction—would evolve over time.[65] Domestic jurisdiction was not to be a mere "technical and legalistic formula"; rather, the text could reflect progressive development.[66] H. V. Evatt, the Australian delegate—who is often considered the "architect" of Article 2(7)'s principle of nonintervention and at least was a key and fervent supporter of it—contended that the "line between matters of domestic jurisdiction and matters of international concern is not fixed and immutable. It is being altered all the time, as states agree—formally or informally—to handle more and more of their affairs in concert."[67]

This flexibility in the framers' conception of "domestic jurisdiction" suggests the possibility that they may have been willing to entertain a similarly evolutionary view of the meaning of "international peace." Such an interpretation of the framers' intentions is further supported by their discussion of Article 1(3)'s establishment of the achievement of international cooperation in solving "international" problems as a purpose of the U.N. The drafting committee rejected a proposal to eliminate the word "international," but explained that it was kept "on the understanding that *some problems, though at first sight they look national, could be considered essentially international, owing to the interdependence of nations in our civilization,* and fall within the purview of this paragraph."[68] This implies that certain problems could become in the future "international" by virtue of the evolving interdependence of nations. The committee went on to say, however, that "it was not desired to impose consideration of internal national problems on the Organization."[69]

If the drafters of the Charter apparently intended the concepts of "domestic jurisdiction" and "international peace" to have a fluid quality, so also did they understand the term "threat to international peace" to have an open-ended character. Ruth B. Russell and Jeannette E. Muther note that the U.S. delegation to the 1944 Dumbarton Oaks Conference in Washington, D.C., at which the Four Powers formulated the principles that became the basis for the U.N. Charter, rejected Chinese proposals to define "aggression." The U.S. delegation pointed out that "if anything should be defined, it was the basic concept of 'threat.' All agreed that this was impossible."[70] Regarding the expression "breach of the peace," the Americans and the British had favored use of this term over "aggression," a term endorsed by the Soviets, which had proved difficult to define and was too constrictive. In the end they compromised with the Soviets by agreeing to refer to both breaches of the peace and acts of aggression as triggers of Council jurisdic-

tion.[71] Thus, the term "breach of the peace," like "threat to peace," was intentionally left vague.

In general, then, the framers specifically refused to limit the Council's competence to determine whether a situation constituted a threat to the peace, breach of the peace, or act of aggression, and intentionally conferred upon it wide discretion in making this determination. In the words of the rapporteur of the relevant drafting committee, they "decided to . . . leave to the Council the entire decision, and also the entire responsibility for that decision, as to what constitutes a threat to peace, a breach of the peace, or an act of aggression"—especially in view of the impossibility of foreseeing every future contingency in which Council action would be appropriate.[72]

Perhaps most significantly, the records of the debates at San Francisco reveal that at least some participants—including Evatt—believed that the Council could legitimately declare violations of human rights within a state to constitute a threat to international peace, depending on the evolution of international law at the time. Evatt indicated during the debates that some delegations believed that the exception in the last clause of Article 2(7), allowing Council action under Chapter VII, was necessary "in order to enable the Security Council to deal with grave infringements of basic rights within a state."[73] In the earlier draft under consideration this exception was not limited to the "application of enforcement measures," but could also encompass Council recommendations in the face of any threat to or breach of the peace. Evatt successfully argued that the exception should be narrowed to permit only Council enforcement measures; otherwise the exception would completely undercut the domestic jurisdiction limitation in Article 2(7) as well as the noncoercive scheme of Chapter VI.[74]

Significantly, Evatt simultaneously contended that while the protection of minority rights (or presumably human rights) might not already be a matter of "international" as opposed to merely "domestic" concern, a clear statement in the Charter that minority rights are of international concern, or a future "formal international convention providing for the proper treatment of minorities," could make it such an international matter. If so, "it would be plain that nothing in [Article 2(7)] would limit the right of the Organisation to intervene."[75] Both the Charter itself, and scores of human rights treaties and declarations, now clearly establish the types of international standards to which Evatt referred. Thus, according to his own argument, human rights violations within a state are removed from the protected sphere of essential domestic jurisdiction.

Furthermore, a subcommittee of the drafting committee responsible for

Articles 1(3) and 2(7) of the Charter explained that it had rejected a proposal to replace the terminology establishing a purpose on the part of the U.N. to "promote" and "encourage" respect for human rights with a purpose to "assure" or to "protect" human rights. The subcommittee stated in its report that it did so because "assuring or protecting such fundamental rights is primarily the concern of each state." But importantly, it went on to affirm that "if, however, such rights and freedoms were *grievously outraged so as to create conditions which threaten peace or to obstruct the application of provisions of the Charter,* then they cease to be the sole concern of each state."[76] Again, therefore, the framers expressed the opinion that serious violations of human rights within a state lie outside the domain of essential domestic jurisdiction, apparently solely by reason of their gravity and degree of violation of the Charter's provisions rather than specific transboundary effects.

4.5.4. Current Understandings of the Security Council and U.N. Member States

Has the actual practice of the Security Council helped to clarify member states' understandings of the provisions of Articles 39 and 2(7)? One problem with interpreting practice is that it only reflects how far Security Council members were willing to exercise the Council's powers at a particular time, not necessarily their views about the *outer limits* of the Council's jurisdiction. I conclude that no clear shared understandings have emerged about the outer limits of the Council's competence under Articles 39 and 2(7). However, at least some states, and on occasion the Council itself, appear to have endorsed higher levels of peace and a holistic conception of international peace. Such states have accordingly supported a broader competence of the Council to address even human rights violations threatening only internal peace. I elaborate upon these points in the following discussion.

First, regarding Article 2(7), it is clear that Evatt's suggestion of the future legitimacy of Council concern with human rights conditions within a state has been confirmed by historical events. The vast majority of U.N. member states now consider the internal human rights situation within a country to be a legitimate subject of international concern and to fall outside the boundaries of essential domestic jurisdiction under Article 2(7).[77] States that have ratified human rights treaties have agreed that the human rights these treaties safeguard are no longer a matter of essential domestic jurisdiction. By virtue of emerging customary law and general principles of law relating to human rights, especially as broadly conceived under the approach developed in

Chapter 3, as well as the human rights provisions of the Charter itself, all U.N. member states have accepted a similar release of human rights matters from their essential domestic jurisdiction.

As we saw earlier, the Security Council has explicitly gone on record as upholding the legitimacy of treating human rights violations as threats to international peace in certain circumstances. A difficult problem is how to interpret this practice, which evidences many cross-currents in member state opinions. Many Council members have persistently defended the conventional interpretation of "international peace," while others have implied that gross human rights violations might be *ipso facto* threats to or breaches of international peace.

Turning to the interpretation of "threats to or breaches of international peace" in Article 39, the Council decisions on South Africa and Rhodesia point to a fundamental ambiguity. Although in each case there was some risk of outside military intervention, the Council appears to have been most concerned about the impact of those countries' racially discriminatory practices on the stability of their relations with their African neighbors and other interested states (such as the United Kingdom). That is, in the words of McDougal and Reisman, these situations adversely affected the "shared subjectivities" of neighboring governments and peoples.[78] This view implies that the Council had in mind at least a level 3 peace between states (involving stable diplomatic relations and not simply the indefinite absence of armed hostilities). The Council's resolutions on Somalia, Haiti, Rwanda, and Kosovo also reflect a concern with adverse effects on diplomatic relations with neighboring countries. In most of these cases there was no apparent serious risk of actual military hostilities with other states.

Indeed, the very absence of a serious risk of outside military intervention in most of these historical cases suggests that in addition to the Council's concern with the effects of gross human rights violations on a level 3 peace with neighboring states, it may also have concluded (without saying so in its resolutions) that the risk posed by these violations to domestic peace within the affected states was significant. The Council may have reasoned that resulting breaches of *domestic* peace would be of sufficient international concern to justify treating the breaches as "breaches of international peace" in their own right. In most, if not all, of these cases, the violations posed a quite real risk of fomenting or perpetuating civil war.

One could even persuasively argue that the Council declared that the situations in Rhodesia and South Africa constituted threats to the peace primarily on the ground that the discriminatory practices of the governments

involved were repugnant to international legal norms and were a legitimate subject of international action and concern by themselves—that is that by themselves they constituted a "breach of the peace," where peace is defined in level 3 terms as including the absence of widespread and severe violations of essential rights within a state. A similar argument could be made regarding Somalia, Bosnia, Rwanda, Haiti, and Kosovo. Such an approach is suggested in particular by the Council's recent practice of identifying violations of international humanitarian law in primarily internal armed conflicts (such as in Bosnia or Rwanda) as *the* threat to international peace.[79]

Of course, the fact remains that these are mere conjectures about the understandings of Council members. Further, the question of the Security Council's jurisdiction has given rise to the sometimes acrimonious debate among Council members and U.N. member states generally highlighted earlier. In short, Council practice, while suggesting the plausibility of expanded definitions of "international peace" and "threats to" or "breaches of" international peace, has not clearly indicated new shared understandings among U.N. member governments of the jurisdictional meaning of these terms.

4.5.5. Applying Fundamental Ethical Principles to Resolve Ambiguities

The foregoing analysis should make it clear that references to the text of the Charter, the *travaux,* and even current understandings do not clearly point to appropriate definitions of the terms used in Articles 39 and 2(7) for purposes of determining the legal boundaries of the Council's jurisdiction. In such a case, under the approach developed in Chapter 3, it is appropriate to resort to fundamental ethical principles as supplementary interpretive resources to help choose among plausible definitions.

First, regarding the definition of "peace," the text of the Charter, the *travaux,* and potential current understandings of the Security Council and member states could conceivably support all five definitions of peace, though with clear support for levels 1 through 3, less support for level 4, and still less support for level 5.

The fundamental ethical principles outlined in Chapter 2 support all five of these degrees of peace. They recognize that the term cannot be confined to its minimalist meaning of the temporary cessation of violence. In keeping with the principle of the unity of the human family and all those other ethical principles which follow from it, peace (whether within states or between them) must be envisioned as a much more dynamic condition and process, including observance of human rights and the cultivation of endur-

ing relations of cooperation and social stability through consultation. Accordingly, there must be a tightly woven interrelationship between peace and human rights, as exemplified by the passage from the Universal Declaration with which this chapter opened, as well as the following passage from the Bhagavad Gītā, which simultaneously praises "harmlessness" and "uprightness," and as elaborated in subsection 2.6.2 of Chapter 2.

Fundamental ethical principles thus pull us toward the level 3 definition of peace, which is the highest level best suggested by traditional interpretive methods. Such a peace would include minimal social stability and the absence of widespread and severe violations of essential human rights within states, as well as cordial diplomatic relations among them.

Genocide and crimes against humanity, based on their definitions under contemporary international law (see Chapter 3) would clearly qualify as widespread and severe violations of essential human rights for purposes of this definition of peace; thus, there is a breach of the peace whenever genocide or crimes against humanity occur. War crimes and acts of torture may also qualify as widespread and severe violations of essential human rights in their own right if they are sufficiently numerous and systematic, rather than isolated incidents. Of course, the very existence of a state of war (which war crimes presuppose) indicates that a level 3 peace is already absent.

A definition of peace that includes the absence of widespread and severe violations of essential human rights is defensible because it recognizes a moral equivalence between war and human rights violations that have a similar impact to war on the welfare and protection of human beings—the ultimate concern of fundamental ethical principles. That is, war today typically produces widespread loss of life; extensive violations of the physical security of civilians; large-scale deprivations of their ability to obtain adequate food, clothing, shelter, and medical care; stringent and pervasive restrictions on freedom of belief or expression; widespread illegitimate uses of force that injure or kill civilians; and persecution of particular ethnic, racial, or religious groups with the aim of depriving them of life, physical security, subsistence, freedom of belief or expression, or the right to be protected from illegitimate uses of force. It can reasonably be concluded, then, that when any of these same consequences follow from human rights violations, rather than a state of "war," "peace" cannot be said to exist in any morally meaningful sense.

Even if "peace" is regarded only as "interstate" peace, fundamental ethical principles support a conception of "peace" between states as at least a level 3 peace. A level 3 peace would require the absence of diplomatic hostility between states.

The question may be asked, why not go beyond a level 3 peace if fundamental ethical principles also could be interpreted as endorsing levels 4 and 5? The reason is that certain fundamental ethical principles, and the interpretive approach developed in Chapter 3, counsel against adoption of level 4 or 5. First, the adoption of a definition of peace as a level 3 peace and not higher levels for purposes of interpreting Article 39 is supported by the principle of resort, if at all possible, to the "ordinary" meaning of the term "peace." Violations of important rights that are nonetheless not morally essential, while they have the potential to cause civil unrest, do not represent the types of abuses that disrupt the overall stability or "peace" of a society as commonly understood. Similarly, sporadic violations of even essential rights are not equivalent to a breach of social "peace" in the ordinary meaning of the term. It is only when such violations become severe and widespread that the "peace" of a society becomes endangered. By analogy, occasional criminal acts within a community would not warrant calling it "crime-ridden" or "lawless."

At the same time, in light of the preeminent ethical principle of unity in diversity, it is appropriate to consider violations of essential human rights to constitute a breach of the peace if the violations are targeted against, and are widespread and severe within, a particular racial, ethnic, or religious community in a state, even if that community represents only a minority of the total state population. In such a case members of the victimized community cannot be said to enjoy "peace" in the ordinary sense of the term.

Second, there is no significant evidence that even some of the Charter's drafters conceived "peace" for Article 39 purposes as requiring full implementation of human rights, or that member states currently interpret peace in this way. Accordingly, the principle that parties to a treaty should not legally be pushed further than they reasonably have committed themselves counsels against advancing these deeper conceptions as currently legitimate interpretations of the term "peace" as used in Article 39.

Third, permitting the Council to define peace as the full realization of social ideals in the relations of citizens or states, or as requiring a particular moral attitude among citizens or state leaders, and to authorize forcible measures when these conditions fail to be achieved (as they inevitably will, everywhere), has problematic moral consequences. It would set up the Council as a military guardian of the full range of moral ideals. This could seriously impair realization of the principles of individual freedom of conscience and moral choice as well as the freedom of national communities to achieve moral ideals in their own way.

Turning to the problem of defining "international" in the phrase "international peace," the fundamental ethical principles identified in Chapter 2 strongly advocate a holistic definition. Those principles emphasize the organic unity of the human family. This emphasis suggests that an injury to anyone on the planet should, morally at least, be felt as keenly as an injury to a member of one's immediate family, or even to oneself. Recalling the words of Buddhist scriptures, we should care for others "even as a mother watches over and protects her child, her only child."[80] The preeminent principle of the unity of the human family indicates that peace within states is a legitimate subject of international concern and is a necessary prerequisite for the existence of a meaningful "international peace."

Fundamental ethical principles help confirm the legitimacy of the Council's adoption of a holistic definition, which we saw earlier was made viable by the text of the Charter, by the *travaux,* and by the apparent understandings of some Council member states. Under this definition, "international peace" can be construed as the presence of a minimal level of social peace, including the absence of rampant and severe violations of essential human rights, in all countries. This means, of course, given the prevalence of such violations, that "international peace" is being breached all the time.

One potential objection to the holistic approach endorsed here would be that it ignores U.N. member states' supposed original understandings of the limited scope of Security Council jurisdiction and therefore leads to a greater sacrifice of their autonomy and a violation of Article 2(7). In answer to this objection, I established earlier that all U.N. member states understood themselves to be granting a vast range of discretion to the Council to make Article 39 determinations without review by any other organ. Indeed, the Charter's framers recognized that the Council's enforcement actions could lawfully override entrenched norms regarding domestic jurisdiction. And they even contemplated that the Council could intervene in situations involving violations of human rights based on evolving conceptions of domestic jurisdiction. This wide grant of discretion to the Council negates any contention that states parties to the Charter never understood themselves to be consenting to expansive determinations of "threats to the peace" or "breaches of the peace," or to a holistic interpretation of "international peace," by the Council.

Fundamental ethical principles also confirm a strict construction of the term "essential domestic jurisdiction" within the meaning of Article 2(7) to the extent necessary to protect human rights. The protection of human rights, especially essential human rights, must, as established in Chapter 3, restrict

state sovereignty. These principles thus reinforce and confirm the foregoing textual analysis of the Charter as well as the shared understandings in this regard that have arisen over the course of the U.N.'s first half century. In particular, these principles confirm that the Charter itself should be interpreted as making human rights a matter of international jurisdiction.

Furthermore, I argued in Chapter 3 that it is appropriate to recognize certain compelling ethical principles as "general principles of moral law," including a principle prohibiting the deliberate violation of essential human rights. Such a prohibition should be recognized as imposing legal obligations on states even in the absence of relevant treaty or customary law. As a general principle of moral law, it thus serves as an independent ground for considering deliberate violations of essential human rights to be prohibited by international law and therefore to fall outside the realm of "essential domestic jurisdiction" for purposes of Article 2(7).

Turning finally to the concept of "threats" to international peace, it is important to observe, again, that the fundamental ethical principles outlined in Chapter 2 recognize a clear linkage between human rights and peace. "Peace" is intimately connected with respect for human rights and the fulfillment of justice more generally. In addition, although not all human rights must be realized in order for social "peace" to be said to exist, in order for such peace to be firmly established, in the long run it is essential that all governments and human beings strive to observe all human rights of others. That is, while some human rights violations themselves do not prevent social peace from existing (at level 3), if not remedied they can lead to rampant and severe violations of essential human rights that are themselves breaches of social peace, or they can simply lead to outright civil or interstate war. In this sense, they may fairly be described as "threats" to the peace.

The moral linkage between peace and human rights reinforces a similar connection we found to be recognized between these two values in the Charter, the *travaux,* and subsequent practice. This moral linkage supports a much broader conception of "threats to the peace" for purposes of determining the *lawful scope* of the Security Council's jurisdiction. This conception encompasses any human rights violations that *could potentially lead* to widespread and severe violations of essential rights. On this account, human rights violations potentially leading to pervasive and egregious violations of essential rights would constitute a threat to international peace because the latter themselves would be a *breach* of international peace.

However, even if minimalist definitions of "peace" are accepted (levels 1 or 2), and a conventional interpretation of "international" is adopted, there

may be justification for treating some significant human rights violations (whether of essential rights or not) as threats to international peace. This is because of the chain reaction experience has shown that significant human rights violations can trigger: significant violations can lead to widespread and severe violations of essential rights, which can lead either directly to interstate conflict or to domestic conflict that in turn can pose a risk of interstate conflict.

Can this suggested approach to the definition of a threat to international peace be justified based on the moral consequences of allowing such freedom of action to the Council? On the positive side of the ledger, expanding the permissible range of threats to international peace to include human rights violations threatening "international peace" as defined holistically allows for greater consistency than a "transboundary effects" test. Because such a test is not explicitly required by the text of the Charter, it should not be used to allow absurd results from a moral point of view. Under a transboundary effects test, losses of life on the same scale in different countries may or may not lead to lawful Security Council jurisdiction under Chapter VII merely on the basis of whether they produce refugee flows across borders or are likely under the circumstances to provoke intervention by particular states.[81] An interpretive approach focused on preserving human life and safeguarding other essential human rights would avoid such inconsistencies.

On the negative side of the ledger, an expansive interpretation of "threats" could allow practically unlimited Council power and discretion. It could lead to adverse consequences for the fundamental ethical principles supporting the legal norms of nonintervention and state sovereignty, including those of freedom of moral choice and respect for national diversity.

However, in the case of drawing the boundaries of permissible definitions of "threats," there are at least two important reasons for allowing the Council this degree of discretion. First, the concept of "threats" is by definition open-ended, and the Charter's drafters explicitly recognized its nebulous quality. Thus, original and contemporary understandings are not unreasonably defeated.

Second, there are institutional limitations on the Council's ability to exercise free-ranging discretion in defining "threats" to the peace in ways that significantly frustrate realization of the fundamental ethical principles supporting state autonomy. The Council's diverse composition, together with the requirement that any decision secure agreement of nine out of the Council's fifteen members (including, in the absence of any reform of the veto, the five permanent members), help to provide a check on decisions that

would "rashly" violate these fundamental ethical principles or on attempts by the permanent members to manipulate the Council and cause it to rubber-stamp their own self-interested interventions.[82]

It is worthwhile mentioning a final point in favor of the interpretation of the terms "threat to the peace" and "breach of the peace" developed here. In Chapter 3 I argued for the recognition of a general principle of moral law requiring that some form of humanitarian intervention (whether by states, regional organizations, or a competent international organization) be permissible in response to widespread and severe violations of essential human rights. I further argued, based on the ethical principles outlined in Chapter 2, that this is a *jus cogens* norm. This means that the community of states must provide *some* mechanism for undertaking humanitarian intervention, whether it be a possibility of intervention by individual states, or the possibility of intervention by a collective body such as the United Nations. To the extent that the Charter can best be interpreted as prohibiting the former (as I argue in Chapter 11 that it should be), this *jus cogens* norm strengthens the case for an interpretation of the language of Article 39, if otherwise possible (as I have established that it is), that would permit the Council to undertake or authorize humanitarian intervention in all cases involving widespread and severe violations of essential human rights or in which such violations are clearly threatened.

It should be noted that some scholarly commentators believe the U.N. Security Council might possess special jurisdiction under the Genocide Convention to authorize military intervention to redress gross human rights violations constituting or portending genocide.[83] However, as mentioned in Chapter 3, the Genocide Convention in Article VIII states only that parties may "call upon the *competent* organs of the United Nations to take such action *under the Charter of the United Nations* as they consider appropriate for the prevention and suppression of acts of genocide."[84] The underscored language implies that limitations in the Charter on the Council's jurisdiction in Articles 24 and 39 ought to be respected. There is nothing in the *travaux* of the Convention, either, that envisages enlarging the Security Council's jurisdiction to take enforcement action beyond the boundaries of Chapter VII. Indeed, a number of representatives, including the U.S. representative, opposed inclusion of language in Article VIII that would imply such an expansion by requiring parties to refer cases of genocide to the Security Council.[85] And at one point in the General Assembly's deliberations, its Sixth Committee voted to delete the predecessor of existing Article VIII on the ground that it added nothing to the Charter and was superfluous.[86]

4.6. Conclusion

To sum up, I have attempted to demonstrate that under conventional rules of treaty interpretation the question of whether a "threat to international peace" may include human rights violations cannot be definitely resolved in view of the language of the Charter, the *travaux préparatoires,* and subsequent state practice. Such a traditional analysis suggests, however, the possibility of broader conceptions of both domestic and interstate peace and an understanding of "international peace" in Article 39 as a reference to peace both within and among states. In this situation, it is appropriate to consult those fundamental ethical principles evident in the U.N. Charter and contemporary international law that were elaborated in Chapter 2.

These principles point toward an interpretation that views international peace as a condition dependent on the presence of peace throughout the world, in light of the principle of the unity of the human family. They confirm the more holistic conception of peace made viable by traditional modes of interpretation and tip the "interpretive scales" in its favor, at least as a matter of determining the lawful scope of Security Council jurisdiction. They also indicate that human rights violations may under certain circumstances be regarded as threats to the peace so defined, and that rampant and egregious violations of essential human rights may themselves constitute "breaches" of the peace. These legal conclusions go further than the rhetoric of many Council member states and the legal analyses of many international law scholars. Many such views and analyses see human rights violations as only legitimately constituting a potential "threat" to international peace rather than a "breach" of the peace, and identify such a threat only where there are clear transboundary effects.

Of course, the concepts that have been elaborated in this chapter in determining the Council's lawful jurisdiction—including the concept of widespread and severe violations of essential human rights—are by their very nature imprecise. An assessment in any particular case of whether the requisite level of human rights violations has been reached will necessarily be difficult. In the first instance, of course, it falls under Article 39 to the Council itself to make this assessment. Such an assessment, while inevitably challenging, must take into account varying perspectives and be the result of full and open-minded consultation among all Council members, as well as other actors with relevant knowledge and views to share. (I explore in more detail the nature of this required consultative process in Chapter 10.)

It should be emphasized, too, that this chapter has dealt only with the

problem of interpreting Articles 39 and 2(7) of the Charter as they currently exist. As just indicated, the fundamental ethical principles sketched in Chapter 2 place a great deal of emphasis on consultation and the gradual evolution of a shared commitment among states to implement these principles in their policies and in international law. In the long run, these principles indicate the desirability of openly debating these issues, and once some form of consensus becomes practical, of amending the Charter to affirm more explicitly the Council's jurisdiction to deal with human rights violations.[87]

Finally, even if under the existing text of the Charter the Security Council may lawfully determine certain human rights violations to be threats to or breaches of the peace, it does not follow that any and every violation of human rights ought to be considered by the Council as threatening international peace. Resolving the question of what types of human rights deprivations the Council ought to declare as threats to or breaches of international peace—and more particularly, ought to use military force to rectify—involves consideration of a number of factors, many of which will be explored in succeeding chapters.

5 Consent

[A fundamental principle of peacekeeping operations is] the consent of the government and, where appropriate, the parties concerned, save in exceptional cases.
—The Security Council

Blessed are the peacemakers, for they will be called children of God.
—Jesus (Matthew 5.9)

5.1. Introduction

This chapter seeks to answer a variety of challenging legal and ethical questions: Should consent always be required before military force is authorized by the Security Council for humanitarian purposes? If so, whose consent—the consent of states, group leaders, or the "people" themselves? And what degree of consent should be sought? How are answers to these questions affected by underlying legal norms of sovereignty, domestic jurisdiction, nonintervention, self-determination, and a right to democratic governance? Are there any factors that ought to outweigh the consent of certain actors, including legal norms involving the protection of human rights, observance of international humanitarian law, or the enforcement of international criminal law? In the end, this chapter attempts to develop general guidelines for when and how the Security Council ought to seek the consent of particular actors before authorizing the use of military assets in connection with humanitarian intervention.

It is important as a threshold matter to clarify the boundaries of my inquiry. In responding to a situation involving human rights deprivations or a civil conflict, the Council may choose to act under either Chapter VI or Chapter VII. Usually when the Council has invoked Chapter VII, it has determined that consent of the state or states concerned is not forthcoming.

However, Article 39 gives the Council discretion either to make recommendations—which can by definition be implemented only with the consent of the parties concerned—or to take binding and enforceable decisions. Accordingly, when acting under Chapter VII, the Council can decide to what extent it will insist upon some level of consent by certain parties. The question I examine in this chapter, then, is what legal or ethical principles ought to guide the Council in determining whether and to what degree it should seek the consent of involved actors either before *or* after it has determined that human rights violations constitute a threat to or breach of the peace (thus invoking Chapter VII). I first turn to an analysis of the historical and contemporary debate on consent, and then apply the approach developed in Part Two, including the fundamental ethical principles it identifies, to provide some preliminary responses to these questions.

5.2. The Historical Debate on U.N. Military Operations and the Consent of Target Actors

5.2.1. Sovereignty, Consent, and Military Action Under the U.N. Charter

We saw in Chapter 3 that a number of Charter provisions uphold member states' freedom of action and a requirement of consent to U.N. military operations. These include Article 2(7) and Chapter VI, which generally requires that no settlement can be imposed on a state without its contemporaneous agreement. On the other hand, member states clearly undertook obligations under the Charter that circumscribed their freedom. For example, they conferred on the Security Council authority under Chapter VII to adopt mandatory enforcement measures to rectify threats to or breaches of the peace or acts of aggression—with the recognition that they themselves might be the target of such action. At the same time, the framers imposed obligations on themselves to respect human rights and fundamental freedoms. These obligations by their very character as legal undertakings limited member states' legal freedom of action.

5.2.2. Sovereignty, Consent, and Traditional U.N. Peacekeeping

Since UNEF I—the first armed peacekeeping operation—the consent of the states involved has been a linchpin of U.N. peacekeeping practice. In his second and final report on the plan for what became UNEF I, Secretary-General

Dag Hammarskjöld stressed that "the Force . . . would be limited in its operations to the extent that consent of the parties concerned is required under generally recognized international law. While the General Assembly is enabled to *establish* the Force with the consent of those parties which contribute units to the Force, it could not request the Force to be *stationed* or *operate* on the territory of a given country without the consent of the Government of that country."[1] In fact, in 1967, when President Nasser of Egypt, about to launch an attack against Israel, requested that all UNEF I troops withdraw, Secretary-General U Thant felt obliged to accede to this request.[2] UNEF I's requirement of the consent of all relevant parties to the deployment of U.N. peacekeeping forces was seen as essential both to avoid unlawful infringement of the Charter's guarantee of each member state's sovereignty and to promote the cooperation of the parties and ensure the ultimate success of the operation.[3]

All subsequent peacekeeping operations launched during the Cold War were initially established with the consent of the states involved. Although state consent in some form has been a requirement for deploying peacekeeping troops, U.N. officials did not until recently see the consent of groups as indispensable, in keeping with the principle of *state* sovereignty. For example, the actions of the United Nations Operation in the Congo (ONUC) tended to oppose the secession of Katanga province and operated without the consent of the president of Katanga province, Moïse Tshombé. ONUC had been initiated by a 1960 request from the newly independent central government of the Congo to help restore law and order and oversee the withdrawal of the former colonial power, Belgium. However, following power struggles within the new government as well as the attempted secession of Katanga province, which had the support of Belgian forces and interests, the situation ultimately degenerated into a civil conflict.[4]

Even as to state governments, in practice the doctrine of consent was not always applied in so deferential a fashion as was suggested by the withdrawal of UNEF I. For example, in the case of ONUC, within the central Congolese government itself various contending political leaders, including Prime Minister Lumumba and President Kasavubu, charged the U.N. with partiality toward their rivals and attempted to direct its conduct in ways furthering their own political agenda. In response to these attempts, the U.N. defended its freedom to fulfill its original mandate and insisted on its "right to interpret [its mandate] in the absence of either clear directives or an impartial third-party adjudication."[5]

5.3. The Role of Consent in the Current Debate on U.N. Humanitarian Intervention

Recent U.N. humanitarian intervention operations have sparked an important debate on whether the customary requirement of host country consent to U.N. peacekeeping operations should continue to be observed in situations involving civil conflicts or gross human rights violations. In its handling of humanitarian intervention in the post–Cold War period, the Security Council has often rhetorically endorsed the principle of state sovereignty while acting without the consent of states or important political factions. In the view of many members of the Council, although it was obliged to pay due "respect" to the principle of sovereignty, and in general attempt to obtain the consent of involved parties, where consent was not possible and grave humanitarian values were at stake, the Council had the right and obligation to act even without consent.

For example, during the debate on Resolution 794 authorizing military force to protect the delivery of humanitarian relief in Somalia, the U.K. representative stated it was important to send a message to the Somali parties that "the international community has no wish to intervene in the internal affairs of their country, but that it cannot stand by and permit a humanitarian crisis of this magnitude to continue."[6] Somalia, however, was viewed as a special case, because, as stated by the secretary-general in his report recommending various options to the Council prior to the deployment of UNITAF, "at present no government exists in Somalia that could request and allow such use of force."[7] Thus, the U.N. could avoid the untidy problem of operating without the consent of the *government* concerned. Nevertheless, eventually UNOSOM II clearly acted without the consent of many important factions, including that led by General Aidid.

In Bosnia, UNPROFOR operated with the consent of the Bosnian government, which in May 1992 was admitted to U.N. membership. But UNPROFOR clearly did not operate with the full consent of the Bosnian Serbs.

The French intervention in Rwanda, like the deployment of UNITAF in Somalia, could be justified as an extraordinary measure not requiring the consent of the central government because that government had effectively ceased to function and was in the midst of a civil war with the RPF. As noted in Chapter 1, the RPF, however, was vehemently opposed to the French action.

In the case of Haiti, the Council was able to give itself some comfort that the authorized military action would not violate sovereignty by regarding Haiti's ousted democratically elected government as the legitimate govern-

ment of Haiti. That government requested the intervention. For example, during the Council's debates the representative of Argentina stated that the request from the legitimate Haitian government was of "decisive, truly key importance." The military action was aimed at restoring to the people of Haiti "the sovereignty of which it has been too long cruelly stripped."[8]

However, other Council members saw military action in Haiti as impermissible intervention in its internal affairs. In earlier debates on imposing economic sanctions against Haiti, the representative of China affirmed that the crisis in Haiti "is essentially a matter which falls within the internal affairs of that country, and therefore should be dealt with by the Haitian people themselves." Nevertheless, because of a direct request for action by the ousted legitimate government and by the OAS, China said it could support the sanctions.[9]

In the case of Kosovo, the Security Council took pains in Resolution 1244 to emphasize and reaffirm "the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other States of the region," while simultaneously reaffirming its call for "substantial autonomy and meaningful self-administration for Kosovo."[10] It was also able to rely on Yugoslavia's formal agreement to the deployment of KFOR.

Some delegations, however, expressed their uneasiness about Council involvement in Kosovo. For example, the Chinese delegate again emphasized China's concern about protecting sovereignty, declaring that it is "opposed to any act that would create division between different ethnic groups and undermine national unity. Fundamentally speaking, ethnic problems within a State should be settled in a proper manner by its own Government and people, through the adoption of sound policies. They must not be used as an excuse for external intervention, much less used by foreign States as an excuse for the use of force." The delegate further asserted that the "'human rights over sovereignty' theory serves to infringe upon the sovereignty of other States and to promote hegemonism under the pretext of human rights." But the delegate indicated that China would abstain from voting in part because Yugoslavia had already accepted the peace plan and because the resolution reaffirmed that country's sovereignty.[11]

During the NATO bombing campaign, the Indian delegate declared in the Council chamber that "we, along with the entire membership of the Non-Aligned Movement, have repeatedly said that the United Nations cannot be forced to abdicate its role in peacekeeping and that a peacekeeping operation can be deployed only with the consent of the Government concerned.

Quite apart from being a violation of Article 2, paragraph 7, of the Charter, a peacekeeping operation forced upon a reluctant Government or population stands little chance of success. Somalia established that. In Somalia, there was at least the excuse that State authority had crumbled, but that excuse does not even remotely obtain in the Federal Republic of Yugoslavia."[12] The Yugoslav representative declared that by adopting Resolution 1244 the Council "would in fact support the nefarious theory of limited sovereignty and open the floodgates to the unimpeded intervention and interference of the mighty and powerful in the internal affairs of other States."[13]

Earlier in the 1990s, with perceived U.N. catastrophes in Somalia and Bosnia blamed in part on operating without the consent of all parties, the Security Council itself had reevaluated its willingness to forgo consent. In a statement issued on May 3, 1994,[14] it recalled an earlier May 1993 statement, laying down operational principles for U.N. peacekeeping operations, which emphasized, as quoted at the outset of this chapter, that one of these principles is "the consent of the government and, where appropriate, the parties concerned, save in exceptional cases."[15]

The Council and its members have also typically expressed a preference for diplomatic negotiations among all parties and the reaching of consensual agreements. Thus, there was practically unanimous approval among Council members and other states of the Dayton Peace Accords. The representative of Ukraine, in expressing its support and commending the negotiators involved, even quoted, at the end of his intervention in the Security Council chamber, the passage from Jesus' Sermon on the Mount with which this chapter opened.[16] For similar reasons, as indicated by China's statement noted above, the Council was also able to approve the deployment of KFOR in Kosovo in June 1999 following the conclusion of a peace agreement with Yugoslavia, despite the fact that the agreement was obviously coerced to a large extent by the NATO bombing campaign. Finally, the Council has emphasized the importance, in the long run, of preventing human rights violations and armed conflicts, and addressing the roots of conflicts as well as their outward effects.[17]

In short, the Security Council has been torn between the norms of sovereignty, peaceful settlement of disputes, and consent, on the one hand, and the perceived imperative to assist human rights victims even without the consent of all parties, on the other. Some members have stressed the former norms, while others have emphasized the obligation to prevent human rights atrocities.

The vacillating debate within the Council chamber found echos throughout U.N. Headquarters and in the world at large. For example, Secretary-

General Boutros-Ghali declared in *An Agenda for Peace* that the "foundation-stone of [the U.N.'s] work is and must remain the State. Respect for its fundamental sovereignty and integrity are crucial to any common international progress. The time of absolute and exclusive sovereignty, however, has passed; its theory was never matched by reality. It is the task of leaders of States today to understand this and to find a balance between the needs of good internal governance and the requirements of an ever more interdependent world."[18] He appeared in this connection to cast doubt on the sanctity of consent as a foundational principle of peacekeeping operations, defining peacekeeping as the "deployment of a United Nations presence in the field, *hitherto* with the consent of all the parties concerned."[19]

At the same time, the secretary-general stressed the importance of respect for state sovereignty when internal conflicts are involved: "In these situations of internal crisis the United Nations will need to respect the sovereignty of the State; to do otherwise would not be in accordance with the understanding of Member States in accepting the principles of the Charter."[20] Moreover, when the problems with nonconsensual operations were rapidly becoming apparent, the secretary-general's enthusiasm for such operations waned. He came to reemphasize consent as a cornerstone for all U.N. military operations, except those conducted only with the U.N.'s authorization but not under its command. For example, in a *Supplement to an Agenda for Peace,* issued in 1995, he affirmed:

> The United Nations can be proud of the speed with which peace-keeping has evolved in response to the new political environment resulting from the end of the cold war, but the last few years have confirmed that respect for certain basic principles of peace-keeping are essential to its success. Three particularly important principles are the consent of the parties, impartiality and the non-use of force except in self-defence. Analysis of recent successes and failures shows that in all the successes those principles were respected and in most of the less successful operations one or other of them was not.[21]

For their part, U.N. officials on the ground consistently stressed the dangers of proceeding without the consent of local parties. Secretary-General Boutros-Ghali's special representative in the former Yugoslavia, Yasushi Akashi, was extremely cautious about authorizing NATO air strikes and constantly attempted to maintain open diplomatic channels with all factions—a stance that gave rise to frictions with the U.S. government.[22]

A number of international law scholars have endorsed the Council's sporadic recognition that human rights values held sacred by the international community may have to take precedence over a rigid respect for sovereignty and state consent.[23] Many of these scholars still emphasize, however, the *desirability* of intervening militarily with some degree of local consent. Other scholars view obtaining the consent of at least the responsible government (if not of all involved group leaders) as not only a prudential prerequisite but one legally mandated by respect for state sovereignty. For example, legal scholar Michael J. Glennon has decried recent U.N. interventions as unwarranted invasions of state sovereignty, arguing in favor of a reaffirmation of the principle of "noninterference in the internal affairs of sovereign states as embodied in the United Nations Charter."[24]

Finally, it goes without saying that governments, factions, and populations that have been the targets of U.N. humanitarian intervention have also felt strongly about a principle of consent. These legitimate concerns suggest that there is a pressing need to define clearly the legal and ethical role of consent in U.N. military operations in internal conflicts or situations involving gross human rights violations.

5.4. Developing a Fresh Approach to Consent

5.4.1. The Relevance of Fundamental Ethical Principles for Security Council Decision-Making Concerning Consent

As a threshold matter, from a purely legal standpoint the Council, when acting under Chapter VII, has no legal obligation to obtain the consent of any parties. This is made clear by the text of the Charter as well as the *travaux*. Although the Council thus has legal discretion, under an approach based on fundamental ethical principles in contemporary international law it ethically ought to exercise its discretion in accordance with a reasonable consideration and balancing of relevant fundamental ethical principles. Moreover, it has a legal obligation under Article 24 of the Charter to "act in accordance with the Purposes and Principles of the United Nations."[25] The purposes and principles explicitly endorsed in the U.N. Charter include many, if not most, of the fundamental ethical principles identified in Chapter 2. Thus, the Council is required legally to make a reasonable attempt to implement and reconcile those principles explicitly endorsed in the Charter in particular factual contexts, but it is not bound by them to take any particular action, such as obtaining consent.

Before turning to an examination of fundamental ethical principles relevant to consent, it should be underlined that in evaluating the issue of consent, it is important initially to ask, consent to *what?* It is essential that the Council first formulate an ideal strategy for addressing human rights violations within a state, one that preferably seeks to avoid any threat or use of force (as I argue in Chapter 7) and that also involves consultation with the involved government and factions, and even individual citizens (a point I will have more to say about below). This ideal strategy then becomes the initial subject of consent. If relevant parties are unwilling to agree to this ideal strategy, then the Council must formulate a second-best strategy, and so on, with strategies involving the nondefensive threat or use of force generally having a lower preference. But there is no substitute for an initial careful analysis by the Council of preferred strategies, including especially the consideration of nonforcible alternatives. Once the Council has identified and arranged potential strategies in preferred order, it is then in a position to undertake an evaluation of to what extent it will require consent from various parties. This evaluation must take into account fundamental ethical principles, which in turn, as explored in Chapter 3, are related to relevant legal norms.

We have seen from the foregoing historical analysis that the traditional requirement of state consent to U.N. military intervention is perceived as satisfying at least five legal norms under the U.N. Charter and international law: (1) state sovereignty, (2) domestic jurisdiction, (3) nonintervention, (4) a state-centered right of self-determination, and (5) a right to democratic self-governance. Other legal norms relevant to a requirement of consent, and often pushing in the direction of waiving it, include those of international human rights law, international humanitarian law, international criminal law, and the obligation of the Security Council to maintain international peace and security.

Fundamental ethical principles collectively supporting the above norms, in approximately ascending order of moral importance, include (1) contingent respect for political authorities with effective power; (2) respect for established norms of domestic and international law; (3) respect for cultural diversity and for the right of individuals to identify with a religious, national, or ethnic community within a framework of the unity of the human family; (4) respect for individual diversity; (5) freedom of moral choice; (6) consultation; (7) respect for human rights and humanitarian principles moderating the conduct of war; (8) the realization of social peace; (9) the Golden Rule; (10) observance of moral duties; and (11) the unity of the human family.

The suggested ordering of these principles is based on the analysis in Chapter 2, and in particular the evaluation of the logical relationship of each principle to that of the preeminent principle of unity in diversity. The last eight principles have the highest priority based on this relationship, although some fine distinctions might be drawn among them. Working backward through the list, as emphasized in Chapter 2, the preeminent principle of the unity of the human family—which ultimately regulates the companion principle of respect for diversity—implies, first, that all human beings have moral duties to all other human beings as members of that family, including observance of the Golden Rule. The emphasis on the moral ideal of unity also points to the importance of realizing social peace among all members of the human family. Similarly, it supports the principle of respect for the human rights of all and observance of humanitarian principles in the conduct of war. The principle of unity in diversity supports the principles of open-minded consultation, of freedom of moral choice, and of respect for individual diversity. However, these last principles ethically are bounded by ethical duties that follow directly from the principle of the unity of the human family, including the duty to respect the fundamental human rights of others.

Turning to the first three principles, which as a group have less moral salience than the eight just discussed, the principle of respect for cultural diversity cannot justify violation of those duties and principles essential to preservation of the unity of the human family or of fundamental human rights. Established norms of domestic and international law should generally be respected, but are entitled to less weight in and of themselves because they may or may not accord with other fundamental ethical principles. Finally, respect for political authorities with effective power is entitled to the least weight ethically because political authorities in power may or may not respect domestic and international law, and, more importantly, may or may not act in accordance with moral duties flowing from the principle of unity in diversity. Thus, such respect must be regarded as contingent.

In the following discussion, I proceed to explore more fully the impact of each ethical principle on the problem of whether and how consent should be sought respectively from the state government involved, relevant groups, or individual citizens. I have arranged each ethical principle in roughly ascending order of priority as just indicated. As these ethical principles increase in relative importance, they exert a greater presumptive force in favor of or against consent, depending on the circumstances.

First, the principle of granting contingent respect to political authorities who actually wield power suggests a reason for at least presumptively

attempting to obtain the consent of those actors who have *de facto* political control and thus are able to play a role in either furthering or inhibiting the realization of fundamental ethical principles within a society. This presumption, being based on effective power rather than legal legitimacy, can operate in favor of state governments as well as group leaders who exercise such *de facto* authority. It may grant particular priority to obtaining the consent of group leaders in situations where the state government has lost effective control, as in Somalia. On the other hand, where a state government is clearly in charge, this pragmatic presumption would place greater emphasis on securing the government's consent as opposed to that of group leaders in cases where the consent of all cannot be obtained. This presumption would have only minimal weight, and could be defeated (or strengthened as the case may be) by the more important ethical principles to be discussed in the following paragraphs. It thus differs from extreme "realist" approaches, which place supreme weight on respect for those entities with effective political power, usually assumed to be states.

Second, the Council must consider the principle of respect for established norms of law, including international law, as interpreted in light of fundamental ethical principles. While we have seen that the Security Council is not legally obligated to seek consent when acting under Chapter VII, it is obligated under Article 24 to act in accordance with the purposes and principles of the U.N.[26] These principles include those of state sovereignty and of nonintervention as expressed in Article 2(7). These principles are to be taken seriously in deciding on appropriate forms of U.N. intervention in humanitarian crises. They are not to be brushed aside lightly. Of course, given that the Security Council is required pursuant to Article 24 to conform its actions with all the principles and purposes of the U.N., other principles recognized in the Charter, such as respect for human rights, must be given similar weighty consideration by the Council. Thus, "respect for international law" cannot itself as an operative ethical principle provide much helpful guidance, except to indicate that some respect is due to state autonomy when it does not conflict with human rights norms. Similar considerations apply to the international legal norm of self-determination, which can also come into conflict with human rights in cases of armed conflict, but which likewise can support a presumption in favor of securing the consent of groups within a state.

A principle of respect for domestic law provides an additional moral ground for attempting to obtain the consent of those actors enjoying legal authority under that law. On the other hand, it also provides a reason to

discount a pragmatic presumption operating in favor of obtaining the consent of a party that does not enjoy legal authority where the legal authority grants such consent. For example, even if a recognition of *de facto* authority would permit an initial presumption in favor of obtaining the consent of the illegal regime of Raul Cédras in Haiti to any U.N.-authorized military intervention, the denial of such consent could be overridden by the consent of the lawful government, that of President Aristide. Indeed, the Security Council, and many legal commentators, correctly concluded that it was.

Third, recognition of the right of individuals to identify with a national or cultural community, which is sometimes coterminous with the boundaries of a state, and of the principle of respect for cultural diversity, can add even more support to a Council policy of obtaining consent either from states, leaders of particular groups, or individual members of these groups. Diversity can be respected by seeking to bring about human rights reforms with the voluntary consent of legitimate spokespersons for different cultures and communities. Moreover, the Council ought to recognize that many problems are better left to local, national, or regional solution by communities at each of these levels.

However, the quantum of additional respect to be accorded the opinions of community leaders in particular cases of proposed intervention will depend on three factors: first, the degree to which a strong sense of cultural community exists within the group, entity, or state concerned; second, the extent to which the human rights violations the Council seeks to remedy constitute practices endorsed by this unified culture (so that the principle of cultural diversity even becomes relevant); and third, the degree to which the "diversity" represented by these cultural practices falls within morally permissible bounds. If a state is torn by civil war between rival ethnic groups, it can hardly claim (as a state) to further a sense of existing "national identity." If particular human rights-related practices are not genuinely a central part of a given culture, or are opposed by most members of the group affected, then the principle of respect for cultural diversity gives weaker support to consent as a condition of U.N. humanitarian intervention. Finally, even if a political entity such as a state is culturally unified and if alleged violations are consistent with its culture, if those violations run counter to fundamental ethical principles, then the factor of cultural diversity is weakened as a reason for obtaining state consent, if not (depending on the severity of the violations' clash with fundamental ethical principles) wholly annulled.

Of course, differences of approach to the implementation of human rights should be acknowledged, tolerated, and even encouraged if the goal of par-

ticular policies is to promote human rights. Clear violations of any human rights should not be condoned, but there is room for encouraging the government concerned to rectify these violations voluntarily in ways consistent with a particular culture, which is the preferable solution in keeping with the principle of respect for cultural diversity.

Here we come to a cluster of other ethical principles—the last eight in the above list—all of which are morally of the most importance. It is quite difficult to draw bright-line distinctions about the relative weight to be accorded them, except to the extent that some fine gradations may be identified. In general, the Council must take into account the aggregate effects on implementation of these principles of requiring some degree of consent from various categories of actors. Taken together the impact of various strategies involving consent on realization of these principles may either strengthen the presumptions in favor of consent created by the first three principles I have already discussed or undercut them. A consideration of the impact of different strategies must ultimately be pragmatic and evaluate the practical effects, given existing power relationships, of proceeding with or without the consent of particular parties.

Thus, fourth and fifth ethical principles relevant to consent are those of respect for individual diversity and the exercise of free moral choice by individuals, which are closely related to one another. The latter principle counsels directly in favor of obtaining consent from the citizens of a state who will be immediately affected by humanitarian intervention, most importantly, the human rights victims themselves. And, as explored further below, the principle of freedom of moral choice entails obtaining public support for long-term efforts to improve human rights conditions in a society. It can also indirectly support obtaining the consent of group leaders, and of course of state leaders, but only if and to the extent that the group or the state employs decision-making procedures (not necessarily reflecting pure electoral democracy) that involve consultation with a broad range of citizens, including human rights victims. Where there are consultation mechanisms in place, and there is no evidence of contrary public opinion, the views of state or group leaders may gain added weight from this principle. But where the majority of individual human rights victims either support or oppose humanitarian intervention (or any Council-proposed response to human rights violations), the principle of freedom of moral choice counsels in favor of giving greater deference to their wishes. Similar conclusions follow with regard to the principle of respect for individual diversity.

Difficult tensions can arise when individual citizens or members of

different groups, factional leaders, and the state government disagree on whether U.N. intervention is warranted. We can expect that almost never will the views of all these actors be perfectly aligned. More often, as experience has shown, a state government will authorize some form of U.N. military presence without the support of all factional leaders or of the majority of individual members of a particular group within the state (as in the case of Bosnia), or the state government will object to an intervention supported by the vast majority of the individual members of a particular group, or by group leaders (as in the case of Haiti or Kosovo). There can be no hard and fast rules for resolving such conflicts.

Sixth, as I have already noted, the principles of respect for individual diversity and freedom of moral choice are intimately connected with that of consultation, which supports many of the same conclusions. The principle of consultation requires, first and foremost, that the U.N. Security Council itself take into account the views of—and ideally, consult directly with—those parties most affected by any proposed humanitarian intervention operation, especially individual human rights victims, but including factional leaders and of course government representatives. It is particularly important for the Security Council to consult with members of historically oppressed groups like women and minorities.[27] In approaching any situation involving human rights violations or potential human rights violations, the Council's first priority ought to be to engage in consultation with all these groups and to encourage consultation among them, with a view to avoiding any direct military intervention.[28] In addition, for the reasons given above, the views of governments that consult with principal factions and with citizens, even if their policies do not ultimately reflect majority opinion, should be given added moral weight.

I come now to a consideration of the role of a seventh principle, that of respect for human rights as a moral mandate. Given the moral primacy of observance of essential human rights, the Council should never consider the consent of states or group leaders, or even of affected individual citizens, to be a legal or ethical prerequisite for intervention when violations of these rights are already pervasive and extreme, especially in cases of genocide. In situations involving widespread and extreme violations of essential human rights, or threat of such violations, that would likely be remedied by intervention, presumptions in favor of consent based on the ethical principles already discussed may be undermined. The same is true where gross violations of international humanitarian law are occurring. While the Council should, as a matter of course, seek to obtain consent to intervention of any

kind in these circumstances, action should not be delayed because of a failure of consent. Somalia provides a poignant lesson concerning the dangers of tolerating substantial delays while the consent of the factions (or state government) concerned is sought, often to no avail, while millions starve (or suffer other violations of essential rights). A similar lesson is offered by the East Timor experience.

An eighth ethical principle, that of pursuing peace, is often at loggerheads with that of protecting human rights, as recent U.N. experiments with humanitarian intervention have so glaringly highlighted. Outside military intervention to secure the delivery of food relief, to protect designated "safe areas," or to restore secure conditions may only exacerbate fighting or at the very least prolong hostilities, a result that itself is morally undesirable. Experts conspicuously disagreed about whether it was preferable to seek peace without justice in Bosnia, or prolong the war in search of justice and the protection of beleaguered civilians. On the other hand, I argued in Chapter 4 that widespread and severe violations of essential human rights, including genocide, themselves constitute a breach of peace, thus making the evaluation of effects on "peace" as a morally desirable state of affairs more complex and certainly more sensitive to human rights concerns.

Ninth, the ethical principle of the Golden Rule adds yet another dimension to Security Council decision-making about consent. It suggests that members of the Council ought to consider, before deciding to proceed with a planned action without the consent of a particular actor, how they would react if they stood in the shoes of that actor and were forced to accept outside intervention without their agreement. Of course, as established in Chapter 2, to avoid the anomalies of a bare version of the Golden Rule, even this hypothetical question must be asked with fundamental ethical principles as a background value system informing the presumptive wishes of both the Security Council members and the actor in question. This modified version of the Golden Rule requires, in short, that Council member states be willing to play what philosopher Lawrence Kohlberg has called "moral musical chairs."[29]

Such a mental exercise among Council members is not simply a form of woolly mindedness. It is also eminently pragmatic. On the one hand, it provides an intuitive and very rough test for whether proceeding with or without the consent of particular parties satisfies the ethical principles examined here. On the other hand, it helps to inject needed perspective and possibly rescue the Council from disastrous overreaching. For example, in its decision-making concerning Somalia, had the Council attempted to put itself in

the shoes of the Somali people, rather than continuing to maintain a self-righteous posture of punishing General Aidid whatever the cost, it might have chosen to pursue a less aggressive military policy as well as a less politically intrusive stance on a negotiated settlement.[30] The same is true of the decision-making of NATO members concerning Kosovo. By playing "moral musical chairs," they might have recognized the importance of operating through the U.N. Security Council rather than without its authorization (a topic I take up in Chapter 11), and might have been much more restrained in their choice of bombing targets.

A tenth ethical principle relevant to consent is that of respect for moral duties. We have seen that respect for human rights is a moral *duty* incumbent on governments, group leaders, and indeed, all individuals. Accordingly, any moral or consequential benefits of securing consent must be weighed against harm to the human rights of victims and also the moral harm to the perpetrators that results from permitting them to shirk their moral duties.

Finally, the preeminent principle of the unity of the human family, like that of respect for human rights, can morally circumscribe the deference to be accorded to the consent of various actors under other principles. In the first instance, of course, it counsels in favor of obtaining the consent of all affected persons and parties wherever feasible, without discrimination. But where a party refuses to grant consent to some form of intervention because of its desire to persecute a particular ethnic or racial group, or to achieve political independence at any price on racial, ethnic, or religious grounds, the principle of human unity demands that such ethnocentric or separatist wishes be accorded little if any weight. And where one party seeks reconciliation and another does not, it would argue in favor of giving greater deference to the views of the first party.

For example, this principle would have supported a U.N. policy of discounting the views of the Bosnian Serb party in deciding whether or not to take military action in support of the protection of safe areas, and of giving greater weight to the views of the Bosnian government in light of its declared policy of maintaining a multiethnic Bosnia. The principle further would have counseled against simply carving up the state of Bosnia into independent ethnic enclaves and would therefore tend to support the spirit of the Dayton Peace Accords, which provided for a form of federalism. It thus favors a policy directly contrary to that endorsed by advocates of "realism," even sympathetic humanitarians, who often argue for acceptance of such a solution. It suggests the legitimacy of the Security Council using its powers under Chapter VII, as established in Chapter 4, to put pressure on parties to an

ethnic conflict like that in Bosnia or Kosovo to devise solutions that respect the principle of the unity of the human family while also giving some weight to communal ties, and to insist that ethnic factions not resort to violence to press their claims. For example, it implies that the Security Council properly put pressure on the KLA to disarm, and properly attempted to achieve a multi-ethnic Kosovo that was not partitioned.

Decision-making concerning the impact of these principles on consent requires attention to practical consequences. A Security Council policy of obtaining consent thus may be preferable in a particular situation because in fact only through consent can desirable results be obtained for needy populations without the risks and moral harms—such as loss of life through military confrontation with factions or governments—that might attend proceeding without consent. At the same time, the process of obtaining even nominal consent can be arduous and time-consuming, allowing positions on the ground to be consolidated and retrenchment to take place.

Finally, it should be noted that the approach suggested here, under which intervention may be justified in extreme cases based on fundamental ethical principles even against the wishes of at least some alleged human rights victims, appears to be distinguishable in this respect from approaches that would impose an absolute requirement that the "victims of oppression must welcome the intervention."[31] One can imagine, for example, cases in which an ethnic group fighting a separatist war is the target of a genocidal campaign but does not want U.N. intervention to put a halt to the genocide because the intervention would impede achievement of its military aims. However, the strength of the principle of respecting freedom of moral choice indicates that occasions when such intervention against the wishes of the human rights victims is warranted will be limited to those involving the most egregious human rights violations. In most of these situations, the victims will in fact welcome the intervention in any case, as exemplified by the response of Kosovo Albanians to the deployment of KFOR.

5.4.2. Developing Guidelines on Consent for Short-Term Security Council Action

What does the foregoing analysis indicate concerning the practical guidelines the Council ought to follow in deciding how to respond in the short term to human rights violations within a state, assuming it can lawfully assert jurisdiction as analyzed in Chapter 4? First, the Security Council should always attempt to consult with all involved parties, not just states, either directly through Security Council missions or through the secretary-general

and his special representatives, and seek their input on dealing with human rights violations in their own countries. Second, the Council should strive, through such consultations, to obtain the consent of these parties to any plan for dealing with human rights violations. Third, it should have contingency plans available if it should fail to secure the consent of certain key parties, thus avoiding the waste of precious time. Having other alternatives developed from the beginning increases the Council's bargaining leverage; at the same time, it helps prevent the U.N. from being held "captive" while people suffer and negotiations drag on, because a change of strategy to nonconsensual military employment could be effected comparatively quickly. Also, having forces available to deploy quickly to implement a consensual agreement can, of course, enhance the prospects for earlier agreement. In this connection, it is important for the Council to evaluate at the outset whether nonconsensual force may be required, to avoid a pattern of first slipping into consensual humanitarian assistance as the "easiest" option, and then finding that that very assistance is an obstacle to "ratcheting up" the level of military pressure.

Fourth, as these guidelines already indicate, the Council should not simply focus on obtaining formal approval of the state government in charge. It must also, to the extent possible, secure the consent of group leaders, and most importantly, have some way of ascertaining the wishes of individual members of the groups concerned and of individual citizens generally. It must develop capacities to enhance its intelligence concerning popular views. The Council, while it has increasingly recognized the importance of acknowledging groups and directly issuing instructions to them (especially in the cases of Bosnia, Rwanda, Somalia, and Kosovo), must continue this trend and disavow rigid adherence to the traditional presumption that it must only deal with a state's central government.

5.4.3. Consent and Long-Term Strategies for Improving the Enjoyment of Human Rights

The fundamental ethical principles outlined in Chapter 2 emphasize the importance of adopting a long-term view as well as a short-term one, and of putting in place those long-term reforms necessary to help members of the U.N. evolve toward full implementation of these ethical principles, including the observance of human rights. This long-term process essentially depends on securing voluntary changes by various actors in their behavior out of their own free choice, as well as consultation among actors on how they can best make these changes.

Military intervention is always a mere band-aid. It is thus essential for the Security Council to take steps to improve the long-term prospects for the consensual resolution of problems and the elimination of human rights violations. It must help to build the confidence of governments, group leaders, and citizens in its own good will and motivation to foster consensual improvements (to the extent possible). The Council must also, as part of such a long-term strategy, encourage the further development of the U.N. human rights system and that system's efforts to win the voluntary cooperation of states in improving the observance of human rights and to place "moral" and diplomatic pressure on states and group leaders to observe human rights.

In addition, the principles of freedom of moral choice and consultation confer on the concept of "consent" an even deeper significance than it has under contemporary interpretations of international law. In accordance with these ethical principles, consent must be viewed not as the mere exercise of a "naked" legal right to approve or disapprove of proposed U.N. action in response to human rights violations, but as a dynamic and powerful *process,* in which affected individuals and communities are fully involved in decision-making concerning their future.

In the context of humanitarian crises and serious human rights violations, this more holistic conception of "consent" has important practical consequences. It suggests how the Security Council can help societies address human rights concerns before outside military intervention becomes necessary, as well as how it can help societies rebuild following military intervention.

First, before military intervention is ever contemplated, the principles of freedom of moral choice and consultation indicate the importance of building patterns of local decision-making that respect human rights, as well as cultivating a deeper sensitivity to human rights among members of various national and less inclusive communities. These initiatives must be launched well in advance of the immediate and tragic crises that usually precipitate Council attention and action.[32] The principles of freedom of moral choice and consultation also support those efforts that have been made in recent years to develop "early warning" systems and facilitate "rapid deployment" of diplomatic personnel rather than troops.[33] More proactively, they imply the need for long-term educational programs directed toward cultivating within the hearts and minds of individuals, especially in strife-torn regions of the globe, a deeper awareness of the essential unity of the human family. Such education is indispensable as a means of breaking down the racial, ethnic, religious, and cultural prejudices that have so often fueled and propelled massive human rights violations.

The proclamation of the U.N. Decade for Human Rights Education (1995–2004)[34] is a step in the right direction, as are the human rights education programs conducted under the auspices of the Office of the United Nations High Commissioner for Human Rights (OHCHR). But these ventures ought to be expanded to incorporate not only the provision of *information about* international human rights standards, but also materials designed to help dispel age-old and destructive prejudices and foster the more emotional sense of unity and respect that alone can sustain enduring respect for human rights.[35] In this connection, many human rights advocates have come around to the view that educational programs must help cultivate genuine *empathy* for human rights victims.[36] Such educational programs might also include instruction in the principle of open-minded consultation as a means of resolving disputes. Although primary responsibility for such educational initiatives belongs with the U.N. Educational, Scientific, and Cultural Organization (UNESCO) and the relevant human rights organs of the U.N.,[37] it would be beneficial for the Council to coordinate its efforts with these organs and agencies, and to call for the development of special educational programs tailored to the needs of particular regions of the world.

In keeping with the principle of freedom of moral choice, these programs would not be designed to indoctrinate participants—although clearly the programs would convey a moral message of respect for diversity within a framework of human unity. Rather, they would be intended and structured to empower participants to overcome prejudices and find their own solutions to tensions within their local or national communities, before any form of international military intervention should ever become necessary. For the same reason, local interested groups ought to be encouraged to take the initiative in designing these programs and ensuring they meet local needs. And, consistent with the principles favoring state consent, governments in the affected regions would first have to agree to the introduction of any such U.N.-supported educational initiatives. Many governments, especially those bent on perpetuating prejudices for their own political purposes, might never consent to participation in such a program. On the other hand, some might find it more palatable if, like the U.N. Decade for Human Rights Education, it were universal in scope and not limited (by design, at least) to particular countries. Moreover, such a program might be far more politically acceptable than the prospect of outside military intervention or some form of formal U.N. trusteeship, which has been proposed by certain observers in cases of social and political disintegration,[38] and which effectively was the solution forced upon Yugoslavia for Kosovo because of its intransigence.

Bosnia, Kosovo, and Rwanda are prime examples of the ultimately explosive effects of prejudices that fester through lack of education in the preeminent principle of unity in diversity. If the U.N., and particularly the Security Council as chief guardian of international peace, had paid closer attention to the warning signs over the years, it is at least conceivable that long-term educational programs designed to build bonds between Bosnian Croats, Muslims, and Serbs, between Kosovo Albanians and Serbs, and between Hutu and Tutsi, might have mitigated some of the devastating ferocity of the killing or genocide that occurred in those troubled lands. Such initiatives might have prevented the election of cynical and prejudiced leaders who hatched genocidal plots, and instead allowed more tolerant-minded individuals to attain power and to reach political solutions to intergroup tensions in advance of the outbreak of human rights atrocities, without outside military involvement. An approach based on fundamental ethical principles would thus recognize the need to help individuals, particularly those in power, to change their moral outlook on relationships with other groups, and voluntarily to become "peacemakers" in their own countries, as Jesus encouraged his followers to do.

So far I have briefly touched on the problem of *prevention* of serious violations of human rights. An equally difficult issue concerns post-conflict (or what we might better refer to as post-human rights tragedy) peace-building. Here again, the principle of freedom of moral choice signals the importance of enhancing the capacity of local inhabitants and governments to rebuild, physically as well as spiritually, after a wrenching human rights crisis or civil war. The Dayton Peace Accords and the agreement negotiated with Yugoslavia in June 1999 represent welcome examples of this type of holistic peace-building initiative, which incorporates, not only a strong military component, but also efforts aimed at improving civilian policing and the building of more unified social institutions that can help forestall future violence or human rights violations.

Civilian police operations can play an essential role in helping to reestablish civil order and prevent outbreaks of renewed violence. In particular, because, unlike military personnel, civilian police are unarmed or only lightly armed, civilian police operations can avoid provoking feelings of intimidation on the part of the local population that might make future uprisings likely. Moreover, if civilian police forces in fact undertake their policing missions impartially and are able to deter criminal violations and to apprehend criminal suspects effectively, they can contribute to the cultivation of a genuine sense of security, fairly administered, among local residents.[39]

Most importantly, post-conflict peace-building efforts must include long-term educational programs to help build bridges between persons of different ethnic, racial, or religious backgrounds, as arduous and seemingly hopeless a process as that may be. In this connection, the Report of the OAU's International Panel of Eminent Personalities on Rwanda emphasized the importance of helping the people of Rwanda come to an understanding that "diversity, properly appreciated, strengthens a society. Unity in diversity has the potential to be a great strength."[40] Without such educational efforts, local governments and individuals will soon find themselves falling into the same patterns of behavior destructive to human rights, and be unable to assume full responsibility for solving their own conflicts. Such an outcome sadly may be on the horizon in Bosnia, and eventually Kosovo, after the withdrawal of NATO troops, and in fact occurred in Somalia following the U.N. pullout.

The goal of such educational and reconstruction initiatives must be to bring the involved parties into a process of solving their own problems. In many situations, the parties' intransigence may make the cultivation of such a self-directed process impossible, at least for a time. But the ultimate objective, even if it requires years of patient negotiation and efforts at long-term education (such as those recommended above), must always be the reestablishment of indigenous decision-making mechanisms. For example, in Kosovo, while KFOR may have to stay for perhaps as long as a decade to ensure the security of ethnic Albanians and Serbs, it will be necessary to establish forums for grass-roots dialogue between Albanians and those Serbs remaining in the province, coupled with appeals to fundamental ethical principles, with the goal of reviving some modicum of trust between them. And it will be necessary for both Albanians and Serbs to come to an understanding, even if only gradually, of the importance of avoiding vengeance and ultimately forgiving those who are associated with perpetrators of atrocities against them.[41] But even the possibility of such individual forgiveness can only come about when there is simultaneous confidence among the victimized population that effective legal processes are operating for the apprehension and trial of those individuals who committed such atrocities. Finally, it will be necessary to pave the way, through such efforts at mutual forgiveness and reconciliation, for free elections in which Albanians and Serbs can fully participate. Unfortunately, municipal elections in October 2000 were boycotted by most Kosovo Serbs and portend difficulties in ensuring full participation by both communities in future elections.[42]

To conclude, this exposition of a fresh approach to consent based on fundamental ethical principles indicates, on the one hand, the need to give the wishes and choices of governments, groups, and individuals even more serious long-term attention and a deeper significance than they have received in recent Council practice. On the other hand, it points to the possibility of giving consent less decisive weight in crisis situations where other fundamental ethical principles indicate that Security Council-authorized intervention is necessary. Such intervention, however, always raises the specter of *partiality*—a factor that can undermine any initial consent of local actors.

6 Impartiality

> The impartial and objective pursuit of the mandate, regardless of provocation and challenge, is essential to preserving the legitimacy of the operation and the consent and cooperation of conflicting parties. The effort to maintain impartiality, however, must not promote inaction. On the contrary, peace-keepers must discharge their tasks firmly and objectively without fear or favour.
> —U.N. Peacekeeping Guidelines

> The gentleman's relation to the world is thus: he has no predilections or prohibitions. When he regards something as right, he sides with it.
> —Confucius (The Analects 4.10)

6.1. Introduction

It has frequently been charged that the threat or use of military force for humanitarian purposes violates the time-honored principle of U.N. impartiality. Much of this debate has revolved around the meaning of "impartiality" in this context. Although the intense debate surrounding the concept of U.N. "impartiality" and its routine invocation in U.N. meeting chambers seems to indicate that the term has a settled definition, it does not. "Impartiality" is a fluid concept with many potential definitions. Essentially, these definitions can be organized within a two-dimensional matrix. The first dimension corresponds with the question, impartiality in whose view? The second relates to the appropriate standard against which impartiality is measured by the relevant observer.

Regarding the first dimension, we can generally identify three possible groups of definitions in the context of U.N. humanitarian intervention: (1) impartiality exists when the targets of intervention, whether governments, political factions, or individual members of affected populations, *perceive*

U.N.-authorized intervention to be impartial (according to one of the standards outlined in the following paragraphs); (2) impartiality exists when the U.N. or authorized member states *intend to act impartially* (according to some standard); or (3) impartiality exists when, *from the standpoint of an objective observer,* the U.N. or authorized member states *in fact act impartially* (according to some standard).

With respect to standards, there are at least three possible standards that might be adopted as the measure of U.N. impartiality from any of the above observational standpoints. The first standard defines impartiality as the conferral by the U.N. or authorized states of an "equal" additional benefit or detriment, or no benefit or detriment, on two or more parties to a conflict or situation involving human rights violations. In the case of U.N. humanitarian intervention, the relevant "parties" might be human rights victims and a government, or more commonly two sides in a civil war. This standard is typically referred to as "neutrality," and I will call it "impartiality as equal benefit."[1]

The second possible standard defines impartiality as the restoration by the U.N. or authorized states of the parties to some relative position (measured in terms of military power, controlled territory, or any number of other factors) deemed to be desirable. This position may be deemed desirable because, for example, it is seen as one of "equality" or "fairness" or is the position determined by a prior agreement between the parties. It may also simply be a status quo ante. Under this standard, impartiality may exist even if reestablishing the requisite position or parity between the parties requires that only one party be benefited. I will refer to this standard as "impartiality as restoration of a desirable position."

The third standard defines impartiality as conduct by the U.N. or authorized states that comports with some principle or rule that by its terms does not make the relative position of the parties a relevant criterion. Under this standard, impartiality may be realized even though in fact application of the principle or rule may incidentally benefit or harm one party more than another. I will call this standard "impartiality as adherence to principle."

The three categories within each of the two dimensions of observational standpoint and standard thus define nine conceivable definitions of "impartiality." (See Fig. 8.) Within each broad definition, there are countless variations possible, depending, for example, on the particular types of benefits or detriments that are emphasized, the factors used to define a desirable position, or the particular principle or principles according to which impartiality is to be evaluated. Moreover, some definitions can combine one or more

of these archetypes. All of these definitions have played some role in the historical and contemporary debates on impartiality and U.N. military action. I now turn to a review of these debates before exploring the ability of the interpretive approach developed in Chapter 3 to help identify which of these definitions ought to be applied to U.N. humanitarian intervention, and how.

6.2. The Historical Debate

6.2.1. Impartiality and Security Council Action Under Chapters VI and VII of the U.N. Charter

Although Chapter VI of the U.N. Charter promotes the peaceful settlement of disputes through Council mediation, which usually entails impartiality, it does not require by its terms that the Council be "impartial" in any of the ways described above. Nevertheless, the Council, under Article 24, is required to act in accordance with the principles and purposes of the United Nations, and this overriding duty must also govern any recommendations it makes under Chapter VI. To this extent, then, the Charter as a whole at least requires the Council to be "impartial" in the sense of making recommendations that are

		Impartiality in whose view?	
What standard of impartiality?	The parties	The U.N. or authorized member states	An objective observer
Equal benefit	Impartiality as perceived equal benefit	Impartiality as intended equal benefit	Impartiality as equal benefit in fact
Restoration of a desirable position	Impartiality as perceived restoration of a desirable position	Impartiality as intended restoration of a desirable position	Impartiality as restoration of a desirable position in fact
Adherence to principle	Impartiality as perceived adherence to principle	Impartiality as intended adherence to principle	Impartiality as adherence to principle in fact

Fig. 8. Alternative definitions of impartiality

consistent with the U.N.'s principles and purposes. But it does not require that the Council's recommendations not in fact benefit one party more than another, or be aimed at restoring the parties to some desirable position. On the other hand, in practice, the Council has often attempted to adhere to a conception of impartiality as equal benefit as perceived by the parties themselves ("impartiality as perceived equal benefit"). This is because a *perception* of impartiality (often defined by the parties as equal benefit) can facilitate the parties' willingness to follow the Council's recommendations.

It is common wisdom that the Council is *not* required to be impartial when taking enforcement action under Chapter VII and that Chapter VII enforcement action is not consistent with a principle of impartiality. Again, however, it is important to examine this claim within the framework of the definitions I have set out. What this oft-heard claim seems to represent is an assertion (1) that the Council, once it has decided to resort to enforcement action, does not care about being perceived as impartial by the parties, so this consideration does not affect its conduct; (2) that in taking enforcement action the Council's clear intent is to penalize one party or another; and (3) that in fact that party experiences a detriment compared to other parties.

These attributions of partiality to Security Council action under Chapter VII, however valid they seem to be, do not take into account the conceptions of impartiality as restoration of a desirable position or impartiality as adherence to principle. Where the Council acts against an aggressor state with the objective of restoring the independence of the victim state, its actions could properly be described as an attempt to put the parties in the same position of equal independence they were in before the aggression. Furthermore, even when the Council acts within a Chapter VII framework, it has a duty to abide by the principles and purposes of the Charter. In addition, it must find a "threat to the peace, breach of the peace, or act of aggression," and must determine that economic and diplomatic sanctions "would be inadequate or have proved to be inadequate" in order to authorize military action. Accordingly, another account of Security Council "impartiality" that differs from the conventional wisdom might be that the Council can be viewed as acting impartially even when it takes Chapter VII action as long as it complies with all of these standards and principles.

6.2.2. Impartiality and U.N. Mediation Efforts

Throughout the Cold War, member states saw the U.N. as a natural focal point for international mediation for two reasons. First, the office of the secretary-general was designed to be independent of national influences. Under

the leadership of Dag Hammarskjöld, the secretary-general came to be seen not merely as an administrator, but as a representative of a neutral "international" interest and an exponent of a vision of world community. In many situations, the secretary-general was able to take advantage of his symbolic role as representative of the international community at large to exercise "good offices" and serve as a diplomatic mediator in otherwise apparently intractable disputes.[2] Secretaries-general were largely able to play this role because they took great pains to foster the parties' own confidence in their lack of favoritism, thus facilitating negotiations, and they attempted to adhere to the Charter's recognition of the formal equality of states in their mediation efforts.[3] They tended, however, to give much less weight to another Charter principle, respect for human rights, in order to facilitate peace agreements.[4]

Second, the Security Council and the General Assembly, although populated by government representatives, could claim to speak with some measure of impartiality for the simple reason that their decisions required agreement by majority vote. This requirement tended to blunt the more extreme self-serving or partial views of particular member states and, through the arduous process of diplomatic negotiation, produce more balanced policies. Nevertheless. as the developing states came to exercise predominant influence in the General Assembly and use it to pursue what some states saw as biased anti-Israel or anti–South Africa policies, for example, Israel, South Africa, and their Western allies challenged the Assembly's impartiality as a mediator on such divisive issues.

6.2.3. Impartiality and Traditional U.N. Peacekeeping Missions

Turning to the application of the principle of impartiality in the U.N.'s first armed peacekeeping mission, in his final report on the plan for what became UNEF I, Secretary-General Hammarskjöld emphasized that the force's commander should be appointed by the U.N. and that he should be "fully independent of the policies of any one nation." This was in contrast to a Korea-style operation, in which the same type of independence would "obviously be impossible to achieve." He similarly stressed that the force should perform only those functions necessary to its mandate of securing and supervising the cessation of hostilities; it would not seek to influence the political balance in the conflict.[5] Subsequent armed peacekeeping missions during the Cold War era followed a similar policy and definition of impartiality as adherence to a cease-fire-determined mandate.

More recent U.N. peacekeeping training manuals tend to reinforce the conception of impartiality developed for UNEF I and other traditional first-generation peacekeeping operations. For example, the U.N.'s General Guidelines for Peace-keeping Operations, developed in 1995 and quoted in part at the outset of this chapter, define impartiality as follows:

> *The impartial and objective pursuit of the mandate, regardless of provocation and challenge,* is essential to preserving the legitimacy of the operation and the consent and cooperation of conflicting parties. The effort to maintain impartiality, however, must not promote inaction. *On the contrary, peace-keepers must discharge their tasks firmly and objectively, without fear or favour.* Importantly, neither side should gain unfair advantage as a result of the activities of a peace-keeping operation.
>
> At times a party may come to oppose elements of a settlement to which it had previously agreed and on the basis of which a peace-keeping operation had been mandated by the Security Council. In these circumstances, *impartiality should not be interpreted as equidistance between the mandate and a party's newly revised position. Rather, it is the Security Council mandate which manifests the legitimate will of the international community and which the peace-keeping operation is charged to uphold.*[6]

At the same time, the Peacekeeper's Handbook developed by the International Peace Academy counsels commanders of peacekeeping missions, within the boundaries of these responsibilities to adhere objectively to a mandate, to be "impartial, friendly, and fair" in their relations with the parties to a dispute, because such behavior will help engender perceptions of impartiality: "The importance of 'perceived impartiality' should be remembered. It is not enough to be impartial—you should be seen to be so."[7]

As this brief analysis suggests, U.N. doctrine integrates a number of the different paradigmatic conceptions outlined at the outset of this chapter, with some conceptions of impartiality nested within and being subsidiary to others. Thus, it appears that the U.N. has, first, primarily adopted a policy of impartiality as adherence to the principle of following the terms of cease-fire agreements or Security Council mandates. It is important to note that in the case of cease-fire agreements to which the parties have consented this principle builds in a prior requirement of consent. Second, within the boundaries

of adherence to this principle, the U.N. apparently has followed a subsidiary policy of doing what is necessary to enhance perceived impartiality, including showing no favoritism to one party or another (that is, providing what I have called equal benefits). But it has taken the position that actual compliance with the first guideline of principled adherence to the terms of an agreement or mandate will best help to sustain perceptions of impartiality among the parties. The priority of a conception of impartiality as principled adherence to the terms of prior cease-fire agreements of the parties or to a Security Council mandate explains why the U.N. has sometimes felt free to take violators of these agreements or of peacekeeping mandates to task by identifying and protesting violations, even though doing so may involve treating the parties unequally.

6.3. The Current Debate on Impartiality and U.N. Humanitarian Intervention

In some of the resolutions authorizing coalitions of member states to undertake humanitarian intervention, the Security Council has insisted that the forces act "impartially"—but without defining that term. For example, in Resolution 929, which gave the green light to France to place troops in Rwanda, the Council stressed the "strictly humanitarian character of this operation which shall be conducted *in an impartial and neutral fashion,* and shall not constitute an interposition force between the parties." It also affirmed that it was authorizing a "temporary operation under national command and control aimed at contributing, *in an impartial way,* to the security and protection of displaced persons, refugees and civilians at risk in Rwanda."[8] Unfortunately, these ritualistic reaffirmations of a principle of "impartiality" in the conduct of U.N. humanitarian intervention operations have done little to clarify just what specific meaning the Council is attaching to impartiality. When the current debate, both within and outside U.N. organs, is analyzed more intensively, we find that all three standards of impartiality outlined above have been put into play, even if they have not been explicitly articulated.

6.3.1. Arguments for Impartiality as Equal Benefit

Many observers have argued (at least implicitly) for a conception of impartiality in civil conflicts as equal benefit in military and political terms, as perceived by the rival factions themselves ("impartiality as perceived equal

benefit"). In the view of these observers, even if U.N. forces are merely perceived as favoring one side or another, they will violate a principle of impartiality. For example, in *Supplement to an Agenda for Peace,* U.N. Secretary-General Boutros-Ghali implicitly advocated a policy of deliberately avoiding *perceptions* of partiality by the parties, noting that one aspect of recent military mandates that had created problems was the behavior of U.N. troops "in a way that was perceived to be partial."[9] In the case of Rwanda, there is evidence that U.N. officials explicitly defended their reluctance to take stronger military action on the ground that the U.N. must not be seen as taking sides.[10] Some commentators maintain that certain U.N. officials followed the same course in Bosnia.

In keeping with an emphasis on impartiality as perceived equal benefit, many critics of U.N. humanitarian intervention believe that military intervention shatters the necessary sense of confidence of political factions and governments and in the long run undermines the U.N.'s historic role as trusted mediator. Giandomenico Picco has accordingly argued that the secretary-general should not be put in charge of humanitarian intervention operations with a Chapter VII mandate because doing so undermines "the Secretary General's impartial negotiating role."[11] Such observers may argue that human rights are thus best served through U.N. mediation in the long run. Or they may take the position that peace, which can best be brought about through voluntary cooperation by parties who perceive equal benefits, must take precedence over a fastidious concern for human rights, because peace preserves the most important human right, the right to life.

Some observers are willing to allow that the parties will not necessarily see the U.N. as neutral, but at least insist that the U.N. ought objectively to refrain, or at least attempt to refrain, from providing disproportionate benefits to one side or another ("impartiality as equal benefit in fact" or "impartiality as intended equal benefit"). This position incorporates doubts that parties in civil conflicts can ever be convinced that U.N.-authorized forces are not benefiting their opponents at their expense. Indeed, the evidence from the post–Cold War experiences with humanitarian intervention generally confirms that because the factions involved in civil wars are typically emotionally charged and committed to the cause of dominance by their particular group, or feel victimized (rightly or wrongly) by other groups, they tend to perceive any U.N. involvement as a disguised form of support for the opposition.[12]

Conceptions of impartiality as perceived equal benefit have been subject to criticism. For example, many observers blame the U.N. for adopting a

view of impartiality as perceived equal benefit and under the banner of preserving such "impartiality" turning its back on extreme human rights violations. According to Human Rights Watch, for example:

> Perhaps the major reason for the UN's downgrading of human rights concerns is the premium placed by the institution on the appearance of neutrality. UN officials tend to conceive of their role first and foremost as that of neutral mediators. Rather than stand for the active implementation of certain values—among them human rights standards—they see their primary role as that of passive arbitrators between parties in dispute.
>
> Human rights promotion is an early casualty of this preeminent quest for even-handedness. Because one side to a conflict often violates human rights more consistently than another, UN officials seem to fear that public criticism of human rights violations—the most readily available weapon to combat abuse—might spark charges of partisanship. UN officials might rebuff those charges by stressing their impartial application of universal standards, but instead they seem to compensate either by assigning blame with a broad brush to all parties (thus obfuscating responsibility) or by avoiding the topic altogether.[13]

Similarly, the independent U.N. commission on Rwanda declared: "Faced in Rwanda with the risk of genocide, and later the systematic implementation of a genocide, the United Nations had an obligation to act which transcended traditional principles of peacekeeping. In effect, there can be no neutrality in the face of genocide, no impartiality in the face of a campaign to exterminate part of a population."[14] And the Report of the OAU's International Panel of Eminent Personalities affirms that the "UN's insistent and utterly wrong-headed neutrality regarding the genocidaires and the RPF compromised its integrity and led it to concentrate on mediating an end to the civil war rather than saving the lives of innocent Rwandans."[15]

6.3.2. Arguments for Impartiality as Restoration of a Desirable Position

Arguments have also been lodged in the current debate for adhering to a conception of impartiality as restoration of a desirable position. These arguments span a broad spectrum, depending on just what position is asserted as desirable and in need of restoration. For example, the Organization of

the Islamic Conference (OIC) maintained in the Security Council chamber in April 1994 that the "international community as a whole must take urgent steps to restore the *status quo ante* in Bosnia and Herzegovina and demonstrate that they are prepared to stand up in defence of international law and morality by all necessary means at their disposal to stop the Serb aggression and atrocities."[16] Many Bosnian Serbs, for their part, viewed restoration of the status quo ante as undesirable and pressed for formation of a Greater Serbia. They saw U.N. action as interfering with that goal and therefore as partial toward the Bosnian government.

If a definition of impartiality as restoration of a desirable position measures that impartiality by reference to the parties' perceptions ("impartiality as perceived restoration of a desirable position"), then it is obvious, as this example makes clear, that because of differing opinions among the parties concerning the appropriate "desirable position," such impartiality may be impossible to achieve. Even an "objective" version of this definition ("impartiality as restoration of a desirable position in fact") or one based on the U.N.'s intent ("impartiality as intended restoration of a desirable position") begs the question of what relative position *ought* to be restored by U.N. forces—a question that is fundamentally value-laden.

6.3.3. Arguments for Impartiality as Adherence to Principle

A final set of opinions in the current debate on impartiality and U.N. humanitarian intervention conceptualizes impartiality as adherence to principle. Most partisans of this approach would measure such impartiality objectively, based on the extent to which the U.N. actually furthers or retards implementation of the relevant principle or principles ("impartiality as adherence to principle in fact"). But conceivably others might focus on preserving the parties' perceptions of the U.N.'s fidelity to principle ("impartiality as perceived adherence to principle"), or the U.N.'s own commitment to following principle ("impartiality as intended adherence to principle"). Once again, however, this set of opinions is a motley bunch, depending on the asserted principle that is the supposed benchmark of impartiality. Does impartiality mean adherence to a principle of absolute nonintervention? Of respect for state sovereignty? Of ethnic self-determination? Or of respect for human rights and the elimination of human rights violations?

All of these asserted principles have found a place in the current debate on U.N. humanitarian intervention. For many critics, any intervention in the "sovereign affairs" of a state without the uncoerced consent of the de facto

authorities—such as the U.N.-authorized occupation of Somalia, Haiti, or Kosovo—violates impartiality.

On the other hand, many Western observers, and certainly the Bosnian government, contended that the U.N. failed to adhere to overriding human rights principles when it declined to take more decisive action in Bosnia to put a stop to the practice of ethnic cleansing. For example, the representative of New Zealand told the Security Council in April 1994 that a U.N. policy of using force "to protect the safe areas and its own personnel should not be mistaken for partiality towards one of the parties to this dispute."[17] That is, impartiality consisted in adherence to the principle of protecting the safe areas, even if doing so happened to disadvantage the Bosnian Serbs more than the Bosnian Muslims.

A conception of impartiality as adherence to human rights principles is supported by emerging U.N. practice in the human rights arena. As noted in Chapter 3, the U.N. has developed numerous mechanisms for fact-finding and objective investigation of the human rights situation in various member states, including the use of special representatives, special rapporteurs, and working groups. The individuals serving in these capacities are charged with obtaining as reliable information as possible. They have certainly been subject in many cases to pressure from the states involved, and occasionally from higher-level U.N. officials, to "tone down" their conclusions in the interest of maintaining a positive relationship between the U.N. and the governments concerned. Nevertheless, this expanding practice has once again adopted a definition of "impartiality" for U.N. human rights investigators as adherence to a principle of obtaining reliable facts, regardless of the perceptions of the governments under review.[18]

As indicated in the above excerpt from a report prepared by Human Rights Watch, human rights organizations have similarly argued that U.N. criticism of human rights violations should be permissible because it simply represents "the impartial application of universal standards."[19] These organizations have maintained that a policy of impartiality as perceived equal benefit is misguided.

The Panel on United Nations Peace Operations strongly advocated adoption of an operational conception of impartiality as adherence to the principles of the Charter: "Impartiality for [United Nations] operations must . . . mean adherence to the principles of the Charter and to the objectives of a mandate that is rooted in those Charter principles. Such impartiality is not the same as neutrality or equal treatment of all parties in all cases for all time, which can amount to a policy of appeasement."[20] Moreover, the Panel

affirmed that "where one party to a peace agreement clearly and incontrovertibly is violating its terms, continued equal treatment of all parties by the United Nations can in the best case result in ineffectiveness and in the worst may amount to complicity with evil. No failure did more to damage the standing and credibility of United Nations peacekeeping in the 1990s than its reluctance to distinguish victim from aggressor."[21]

In this connection, political scientist Adam Roberts has supported what appears to be a conception of impartiality as adherence to more nuanced and complex ethical principles, including respect for human rights and the protection of human security. This requires the exercise of judgment rather than a rote commitment to providing equal benefits or eschewing any alliances with local parties, the prevalent definition of impartiality: "With respect to many conflicts, fairness in exercising judgement (including humanitarian action) may be a better guide to policy than impartiality, and may point in different directions."[22] Notably, in 1998 Secretary-General Annan appeared to endorse just such a definition of impartiality in U.N. peacekeeping operations and to reject a conception of impartiality as perceived equal benefit: "We have learned that while impartiality is a vital condition for peacekeeping, it must be impartiality in the execution of the mandate—not just an unthinking neutrality between warring parties."[23] And in his 1999 Srebrenica report, he urged reflection on "an institutional ideology of impartiality even when confronted with attempted genocide"—again, implicitly defining the traditional ideology as impartiality as perceived equal benefit.[24]

6.4. Developing a Fresh Approach to Impartiality and U.N. Humanitarian Intervention

6.4.1. Identifying Relevant Fundamental Ethical Principles

What counsels can the interpretive approach developed in Chapter 3, which is based on fundamental ethical principles, suggest about which of the definitions of U.N. impartiality, or which more nuanced combination of them, ought to be followed in the case of U.N. humanitarian intervention? First, the analysis in preceding chapters has highlighted a number of fundamental ethical principles relevant to these problems. As established in section 2.9 of Chapter 2, and exemplified by the saying from Confucius with which this chapter opened, primary among them is a principle of *impartiality as adherence to fundamental ethical principles,* in intention and in fact, without a

motive of benefiting one party or another or oneself except as called for by these ethical principles. I will show in the next subsection that this conception is supported by the U.N. Charter itself. And such a conception of impartiality is consistent with that developed in the U.N.'s 1995 peacekeeping guidelines also quoted at the beginning of the chapter, at least where the mandate of a peacekeeping force advances realization of fundamental ethical principles.

Relevant ethical principles, however, are complex and often in tension, and have different weights in different contexts. Thus, there can be no single "correct" definition of impartiality from a moral standpoint; the appropriate definition is instead dependent on the operative ethical principles in a particular situation. These ethical principles are affected by established legal norms regulating the conduct of a particular decision-maker. Under an approach based on fundamental ethical principles, the *perceptions* of the affected parties are less important than the actor's intent to act according to ethical principles and his or her objective success in doing so. Nevertheless, there is room under such an approach to consider parties' perceptions of impartiality where positive perceptions advance the fulfillment of ethical principles.

One of the most important ethical principles, as explored in previous chapters, is respect for essential human rights. Consequently, adherence to ethical principles can mean "taking sides," even decisively, if it is clear that one side is grossly violating essential human rights and that the consequences of not taking sides, measured in moral terms, will be far worse. These consequences can include allowing a situation of such gross violations to persist indefinitely. Adherence to fundamental ethical principles thus is not the same as morally high-minded waffling or taking "half-measures,"[25] which tend to be associated with the pursuit of impartiality as perceived equal benefit.

One litmus test of an action's consistency with fundamental ethical principles is the degree to which it would pass muster under the version of the Golden Rule described in Chapter 2. If an actor would be willing to be treated the same way he or she treats another person under similar circumstances, if he or she were to stand in the shoes of that person and were committed to applying fundamental ethical principles, then that factor tends to support a conclusion that the proposed treatment is motivated by fundamental ethical principles rather than self-interest (including an interest in promoting benefits for friends or allies). Accordingly, one necessary, but not sufficient, condition for defining impartial action is that the action be consistent with the Golden Rule.

6.4.2. The Application of Fundamental Ethical Principles to U.N. Humanitarian Intervention

If impartiality is ultimately measured against the totality of fundamental ethical principles that are relevant to a given situation, including respect for human rights, and even if the Golden Rule provides a "rule of thumb," how, in practice, should impartiality be defined? First, in order to ascertain relevant ethical principles it is necessary to identify the role of the actor whose impartiality is being judged. We have seen that an approach based on fundamental ethical principles presumptively endorses established laws and norms binding on a particular actor, unless they grossly violate these ethical principles, but interprets laws and norms, and counsels that allowable discretion be exercised, in accordance with these principles. The U.N. is therefore bound first by the legal norms contained in the U.N. Charter.

The Charter itself endorses a norm of "impartiality" and defines it by implication as *faithful adherence to the purposes and principles of the U.N.*, including its purpose of promoting human rights and fundamental freedoms. The Security Council is legally required by Article 24 to act consistently with those purposes and principles.[26] So are members of the Secretariat, who under Article 100 are to discharge their duties without seeking instructions from governments or outside authorities and to be solely responsible and faithful to the U.N.[27] Further, each member state "undertakes to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities."[28] According to Article 101, the "paramount consideration" in hiring decisions "shall be the necessity of securing the highest standards of efficiency, competence, and integrity."[29] These provisions appear to reject conceptions of impartiality based solely on the *perceptions* of member states or other authorities outside the U.N. In short, the text of the Charter appears to adopt a conception of impartiality as intended and objective fidelity to relevant principles, namely, the purposes and principles of the U.N.

Chapter 3 elucidated the notion that the meaning of Charter terms can be shaped by subsequent practice of the U.N. and its member states that evince a new shared understanding of those terms. Has U.N. practice, particularly in the peace and security and human rights fields, modified this conception of impartiality? The analysis earlier in this chapter demonstrated that, for the most part, it has not. While traditional U.N. peacekeeping operations have obviously strived to enhance perceptions among the parties of their own impartiality, they have ultimately been guided by a commitment

to principle—the principle of carrying out an agreed mission that in turn furthers the value of peace. The agreed mission, prior to the end of the Cold War, typically involved the monitoring of a cease-fire agreement. To some extent, peacekeeping operations thus also adopted a version of impartiality as objective restoration of a desirable position between the involved parties—namely, the position represented by the cease-fire line. But the desirability of that position itself was supported by the principles of consent and of promoting the peaceful settlement of disputes, both of which demanded respect for the agreed line.

The impartiality of peacekeeping operations has continued to be measured by U.N. officials by reference to an agreement of the parties, as confirmed in the U.N.'s 1995 peacekeeping guidelines. One party that violates an agreement more than another might therefore find itself subject to U.N. censure, despite the "unbalanced" treatment. This is not to say that the U.N. has not found itself in difficult positions, when the need to maintain the parties' support has collided with its commitment to upholding an agreement, as in the case of the withdrawal of UNEF I. Nevertheless, while the consent of the parties has helped justify a mission in the first instance, once the operation has been established, its mission statement has become the benchmark for judging its impartiality.

What emerges from this analysis is that the definition of impartiality suggested by fundamental ethical principles in the Charter itself, supplemented by reference to revered moral texts, helps to confirm and reinforce the predominant definition that has pervaded U.N. practice in the peace and human rights domains. This definition has, however, been threatened by a new preoccupation with defining impartiality as perceived equal benefit.

This conclusion implies that to the extent a cease-fire or other agreement is supported by fundamental ethical principles, it ought legitimately to serve as the standard against which impartiality is to be measured. There are cases where an agreement itself might so egregiously violate human rights or human rights-related principles of criminal responsibility that morally the U.N. ought not to accept it as a standard. One such case would be if an agreement granted permanent immunity to a leader accused of genocide or crimes against humanity, such as Slobodan Milošević, rather than simply failing to permit armed forces access to the territory on which such a suspect is likely to be found, as in the case of the June 1999 agreement with Yugoslavia. But these cases will be relatively rare. More difficult problems, however, arise where an agreement and consent cannot be obtained, despite the Security Council's best efforts at doing so as recommended in Chapter 5. Then the

Council must decide what principles ought to govern the mandate of a humanitarian intervention force and therefore serve as the benchmark for measuring impartiality. Here, the analysis in Chapter 3 becomes relevant in attempting to prioritize the principles and purposes of the U.N. in light of fundamental ethical principles.

In particular, the fundamental ethical principles outlined in Chapter 2 place a high priority on respect for peace and human rights. Moreover, they recognize, as we saw in Chapter 4, that "peace" itself requires at a minimum general respect for essential human rights. Accordingly, in designing a mandate, human rights should have a central place—a far higher place than they have often occupied in recent Council practice.[30]

In some situations, conflicts among legal norms and ethical principles endorsed by the Charter are minimal. It will be easier in these cases for the U.N. to achieve both impartiality as adherence to ethical principles and impartiality as perceived equal benefit. For example, in many cases the root causes of human rights violations may lie in misunderstandings and disputes between a government and a particular group, or among different groups within a country. Before these violations become extreme and animosities intensify to a critical level, the parties involved may be able to find compromises through dialogue that in turn lead to an improvement in human rights conditions. In such a favorable situation, the parties are more likely to see the U.N. as providing equal benefits, while the U.N. can simultaneously promote both peace and human rights.

The moral choices become more difficult to make as the severity of human rights violations escalates, particularly in a civil conflict. Here, the U.N. can face an apparent choice between the moral (and Charter-based) values of peace and human rights, as it allegedly did in Bosnia. It can take strong action against human rights violations, and thereby prolong a deadly war, or it can continue diplomatic efforts at a settlement, while decrying the violations but declining to use force to protect human rights victims. Under either strategy the parties are less likely to see the U.N. as providing equal benefits.

Similar moral conundrums arise in the case of blatant human rights violations by a government outside of a civil war, as in the case of Kosovo. Here, decisive military action in defense of the victims risks incurring the wrath of the government, sparking a war between the government and the interveners, and at the least squelching any hope of a cooperative "dialogue" in improving human rights conditions in the future. On the other hand, diplomatic efforts that put a premium on reassuring the government of the U.N.'s "impartiality" by attempting to enhance perceptions of equal benefit may

only allow the government to buy time while hundreds if not thousands of victims suffer or perish.

How can fundamental ethical principles help to resolve these moral dilemmas? Again, they indicate that respect for essential human rights is an indispensable element of "peace." Thus, extreme human rights deprivations must be remedied in preference to an unjust peace. Nor, as I argued in Chapter 5, would fundamental ethical principles condone ethnic separatism or carving up a country or province along ethnic lines. The positive consequences of such a division and the fragile "peace" it might achieve have to be weighed against the harm to the ethical principles of respect for human rights and the promotion of unity in diversity. These considerations are all important in designing Security Council mandates and justify adherence to mandates supported by these ethical principles.

However, within a primary guideline of adhering to agreements or Council mandates supported by fundamental ethical principles, including a high degree of respect for at least essential human rights, it is appropriate for the U.N. to attempt to moderate perceptions of its partiality among the parties, including perceptions of unequal benefit. It can first of all do so by ensuring that even when force is used, it is used impartially according to legal and ethical standards—standards on which I elaborate in the next chapter. Such impartial application of threats or uses of force can enhance the chances that the parties will eventually come around to seeing the U.N. as upholding universal legal norms equitably applied.

At the same time, the U.N. should not be cowed into tolerating violations of mandates or agreements supported by fundamental ethical principles in the name of enhancing perceived impartiality. Where the parties define "impartiality" by reference to perceived equal benefit, and insist on seeing the U.N. as aiding their adversaries, the U.N. has less "goodwill" to lose by employing force for human rights purposes, as long as it acts in a principled way and attempts to communicate the principled basis for its actions. Thus, the consequential benefit of striving mightily to maintain perceptions of impartiality may be illusory where those perceptions are so fragile and where the effort involves high direct costs in terms of other ethical principles. Bosnia and Rwanda provide compelling examples of the quixotic character of a single-minded quest for perceived impartiality.

There are also direct moral costs to pursuing a policy calling for doing whatever is necessary to enhance perceptions of equal benefit. Doing so can lead to the perpetuation of conflict, or human rights violations, by creating a stalemate. Some observers have argued that this was exactly the fate of the

U.N.'s policy of "impartiality" in Bosnia.[31] Impartiality as restoration of a desirable position is equally problematic from the standpoint of fundamental ethical principles when it conflicts with respect for human rights, unless the position itself is morally supportable, and, importantly, comports with human rights norms. As to restoration of a status quo ante reflecting an agreed cease-fire line or established borders, the question is whether fundamental ethical principles (including respect for an otherwise morally valid agreement among the parties) support such a policy. In this connection, existing borders, even if originally established without consent or by some form of colonial conquest, may be entitled to significant deference by virtue of the principle of respect for established political authorities and laws. In the long run, however, it is preferable to adjust borders by agreement to reflect fundamental ethical principles.

If the U.N. acts impartially according to mandates supported by the fundamental ethical principles identified in Chapter 2 and already endorsed by the U.N. Charter—most importantly, a principle of universal respect for the human rights of all humanity, without discrimination—then over time confidence will grow among member states and at least some political factions that the U.N. is attempting to act impartially according to these mandates and principles. They may come to believe that not every use of force is biased against them. This is a lengthy process and one that depends ultimately on the willingness of political factions and governments to develop a moral outlook consistent with the principles espoused here. However laborious this process may be, in the long run it will help to mitigate any short-term perceptions of partiality when the U.N. or its member states act according to principle.

7 The Use of Force

> The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 or 42, to maintain or restore international peace and security. . . . Should the Security Council consider that [nonforcible] measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.
> —The U.N. Charter

> How is it with you, that you do not fight in the way of God, and for the men, women, and children who, being abased, say, "Our Lord, bring us forth from this city whose people are evildoers, and appoint to us a protector from Thee, and appoint to us from Thee a helper"?
> —The Qur'ān (4.77)

7.1. Introduction

In this chapter I examine the legal and ethical problem of whether, when, and how the Security Council *may* or *should* authorize the threat or use of force to prevent or rectify human rights violations, whether arising from government oppression or in connection with a civil conflict. (I address the question, among others, of whether and when, legally or ethically, it *must* authorize the use of force for these purposes in Chapter 8.)

Building on the survey of contemporary international legal norms on this subject in Chapter 3, I first briefly review the historical debate on the legitimate collective uses of force by the U.N., including possibly for the purpose of putting an end to human rights deprivations. I then turn to a short account

of the current debate in the context of U.N. humanitarian intervention. In keeping with the legal distinction between *jus ad bellum* and *jus in bello,* within each of these sections I discuss both views about the appropriate circumstances in which collective force may or should be employed, and views concerning the appropriate types and degrees of force that may or should be used and the potential application of international humanitarian law to U.N.-authorized military operations. Finally, I develop a fresh approach based on fundamental ethical principles, and in this connection formulate certain guidelines on the use of force in humanitarian crises. These guidelines are intended to help channel the Council's discretion once it has established jurisdiction under Chapter VII.

7.2. The Historical Debate on the Legitimate Uses and Application of Collective Force by the United Nations

7.2.1. The Debate on the Collective Use of Force During the Drafting of the U.N. Charter

The League of Nations Covenant did not *ipso facto* prohibit war, nor did it obligate all League members to participate in collective security action against a state violating the Covenant's required pacific settlement procedures. Instead, in case of such a violation, the League of Nations Council was empowered only to *recommend* the military measures it decided were necessary.[1] In practice, the League never did employ military sanctions. The drafters of the U.N. Charter sought to remedy this "defect" in the League Covenant by providing for an enhanced system of collective security subject to Security Council discretion, as suggested by the passages from Chapter VII of the Charter with which this chapter opened, while still emphasizing the peaceful settlement of disputes. They laid down a dual system of negotiated peacemaking and peace enforcement in the handling of interstate disputes.

Moreover, the delegates to the San Francisco Conference perceived enforcement as encompassing, not only action to repel aggression, but preventive measures as well.[2] Article 40 of the Charter allows the Council, before taking action under Article 39, to "call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable."[3] Such provisional measures would represent a sort of "bridge" between peaceful settlement and wholesale enforcement action. The drafting committee responsible

for Chapters VI and VII of the Charter thus emphasized that "the Council would in reality pursue simultaneously two distinct actions, one having for its object the settlement of the dispute or the difficulty, and the other, the enforcement or provisional measures." The committee stressed, moreover, that "in the case of flagrant aggression imperiling the existence of a member of the Organization, enforcement measures should be taken without delay, and to the full extent required by circumstances, except that the Council should at the same time endeavor to persuade the aggressor to abandon its venture, by the means contemplated in [Chapter VI] and by prescribing provisional measures."[4]

These passages indicate that the drafters saw no inherent conflict or rigid demarcation among the Charter's provisions for peaceful settlement, provisional measures, and enforcement action. Rather, these were to be viewed as complementary courses of action that could be pursued simultaneously or sequentially by the Security Council as it deemed best under the circumstances.

7.2.2. Enforcement and the Korean War

Although the collective security system foreseen in Chapter VII of the Charter never came into operation because of Cold War animosities, North Korea's invasion of South Korea in June 1950 during a Soviet boycott of the Security Council fortuitously allowed the Council to act immediately. Under U.S. influence, the Council adopted a series of resolutions determining that the North Korean action constituted a "breach of the peace," calling for the withdrawal of the North Korean forces, and recommending that member states furnish assistance to repel the armed attack and coordinate their forces under the unified command of the United States.[5]

The return of the Soviet Union to the Security Council table in August 1950 prevented the adoption of any further resolutions by the Security Council on the Korean crisis. The mantle of political direction over the action passed to the General Assembly, which adopted the Uniting for Peace Resolution in September 1950. The Resolution attempted to respond to the problems created by the inability of the permanent members of the Security Council to achieve unanimity by permitting the General Assembly to recommend the use of armed force in these circumstances in response to a breach of the peace or act of aggression.[6] The Uniting for Peace Resolution in effect reaffirmed the General Assembly's commitment to the principle of collective security embodied in Chapter VII of the Charter.

7.2.3. The Use of Force in Traditional U.N. Peacekeeping Operations

The rules on the nonuse of force in traditional peacekeeping operations did not derive from the Charter; rather, as we have seen, they were improvised by Secretary-General Hammarskjöld. He decided that UNEF I troops were not to use force except in self-defense. They could not take the initiative in using force, but could only respond with force in case of "an armed attack upon them, even though this might result from a refusal on their part to obey an order from the attacking party not to resist."[7] This principle of nonuse of force except in self-defense continued to guide subsequent peacekeeping missions, at least until the post–Cold War experiments with humanitarian intervention. However, in practice the line between "defensive" and "offensive" action was often difficult to draw. This was most evident in the case of the ONUC, which ended up engaged in full-scale battles in Katanga province in the course of pursuing its mandate to apprehend and deport, by force if necessary, foreign military personnel and mercenaries.[8]

The extensive development of norms of international humanitarian law after World War II initially had little direct impact on the conduct of U.N. peacekeeping operations for the simple reason that those norms had been established to govern the behavior of troops under national command and engaged in active hostilities—not those under U.N. command whose mission was to police a cease-fire agreement.[9] Moreover, from a narrowly legal standpoint, the U.N. is not a party to the 1949 Geneva Conventions or other relevant treaties.

Despite these doubts about the formal applicability of international humanitarian law to U.N. military operations, early on U.N. officials expressed their intention to have U.N. peacekeeping forces observe at least the humanitarian *principles* underlying the Geneva Conventions and other treaties governing the conduct of hostilities. For example, the UNEF I regulations drawn up by Secretary-General Hammarskjöld provided that the "Force shall observe the principles and spirit of the general international Conventions applicable to the conduct of military personnel."[10] And in 1962, Secretary-General U Thant addressed a letter to the ICRC in which he reaffirmed that "UNO insists on its armed forces in the field applying the principles of these 1949 Geneva Conventions as scrupulously as possible."[11] Most experts have agreed that national contingents serving under the U.N. are directly bound to observe customary norms of international humanitarian law and any supplemental treaty-based rules (such as those in the Geneva Conventions) with

which their governments are obligated to comply as states parties and which apply under the circumstances.[12]

7.2.4. Enforcement and the Gulf War

Iraq's invasion of Kuwait in August 1990 touched off a heated debate among governments on whether and how force ought to be used to oust Iraq's troops. The United States pushed for a military option and ultimately won support for a coalition operation. However, many states believed that nonforcible methods, including the mandatory economic sanctions earlier imposed by the Council, ought to be given more time to work.[13] Further, there was controversy over whether coalition bombing raids violated international humanitarian law.[14]

7.3. The Current Debate on the Use of Force in U.N. Humanitarian Intervention

The current debate on the use of force in U.N. humanitarian intervention has focused on three legal and ethical issues. First, it has centered on the *relative "intrinsic" desirability or undesirability* from a legal or ethical standpoint of the Security Council authorizing various degrees of force as compared to employing alternative methods of influence. These alternative methods include diplomatic démarches, condemnatory resolutions or urgent appeals, fact-finding missions, the deployment of civilian police, and mandatory economic sanctions under Chapter VII. Second, the debate has reflected varying views about the *consequences* of each of these approaches in terms of realization of particular values such as the saving of human lives. Third, it has involved disagreement about the *degree and type of force* that ought or ought not, legally or ethically, to be employed. Perspectives on these three issues have varied, in part, depending on the particular function for which the use of force is proposed.

I first summarize the arguments that have been made in favor of using force or its threat to achieve a range of human rights-related objectives. These objectives are (1) ensuring the safe delivery of humanitarian supplies; (2) deterring armed attacks on civilians (especially in so-called "safe areas"), or actually defending civilians against armed attacks; (3) apprehending persons suspected of having violated international humanitarian or criminal law; (4) putting pressure on recalcitrant parties to continue negotiation or giving oppressive governments an incentive to cease human rights violations; and

(5) restoring or establishing democracy. I then review the arguments that have been articulated against the use of force for each of these purposes.

7.3.1. Arguments in Favor of the Threat or Use of Force

To many member states, U.N. officials, and academic observers, some use of force (or at least its threat) has appeared to be an effective way of achieving any number of the above objectives. Many of these supporters of the use of force have made arguments analogous to those made at San Francisco in 1945 regarding interstate aggression or hostilities.

First, regarding the protection of humanitarian relief, as we saw in Chapter 1 the U.N. Security Council broke new ground in permitting the nondefensive threat or use of force for this purpose in Somalia and Bosnia. Resolution 794, authorizing the use of force in Somalia to create a "safe environment" for humanitarian relief, won unanimous endorsement from Council members.[15] The Moroccan delegate affirmed that the "extremely tragic situation in that brotherly country requires speedy and energetic action. . . . There is no alternative but to launch a large-scale operation within the framework of Chapter VII."[16] Similar expressions of support for the use of force to protect humanitarian relief resounded in the Council chamber during its debates on Bosnia. For example, the Indian delegate declared: "The use of force is a matter of extreme gravity and it should be resorted to only in exceptional circumstances. We have no doubt whatever that the critical and desperate plight of the population demands urgent and effective response on the part of the international community and that such a response cannot and must not exclude the use of force. There should be no misunderstanding on this score."[17]

With respect to East Timor, the Security Council authorized the states participating in INTERFET, the multinational force deployed in East Timor, to "take all necessary measures" to fulfill INTERFET's mandate, which included the restoration of peace and security in East Timor and the facilitation of "humanitarian assistance operations."[18] In Sierra Leone, UNAMSIL's mandate was to include facilitation of the "delivery of humanitarian assistance."[19]

Secretary-General Annan has generally supported such efforts to protect humanitarian operations, if they are provided with the necessary means. He has noted in particular that where parties to a conflict "deliberately obstruct assistance to civilians," "the operation must have sufficient coercive capacity to ensure the implementation of its mandate (e.g., protection of humanitarian

assistance and of the population in the area) as well as the safety and security of its personnel."[20]

Some scholars joined the chorus in support of using U.N. troops to protect humanitarian relief and argued that troops engaged in this task ought to adopt a more proactive engagement policy. Political scientist Thomas Weiss, for example, lamented in 1994 that "although member states have been authorised to employ 'all measures necessary' [in Bosnia], UN troops have never fought a single battle with the numerous factions in Bosnia who routinely disrupt relief convoys."[21]

Turning to the threat or use of force to deter or repel attacks against civilians, including refugees and displaced persons, many Security Council delegates have stressed the moral importance of granting U.N. forces the authority to use force if necessary in carrying out their protection mandates. During the debates on Bosnia, many government representatives called for the Security Council to authorize the use of force to defend safe areas. Otherwise, they contended, the term "safe area" itself was nothing but a cruel deception, or, in the words of the Turkish delegate, "a joke."[22] In the case of Rwanda, New Zealand's delegate declared that it was important that UNAMIR "has the authority to act robustly in defense of its mandate and can take forceful action against militias or anyone else who threatens protected sites and populations."[23] During the Council's consideration of the report of the independent U.N. commission on Rwanda in April 2000, the Argentinian delegate affirmed that in cases "such as that of Rwanda, the mandate must include clear rules for the protection of civilians."[24] And the Canadian delegate declared that "the protection of civilians requires strengthening our disposition to intervene with force if necessary," in cases of "genocide, war crimes, crimes against humanity and massive and systematic violations of human rights and humanitarian law causing widespread suffering and loss of life." He therefore urged the Council to begin discussing guidelines relating to humanitarian intervention.[25]

In the case of Kosovo, numerous Council members supported the use of force to protect Kosovo Albanians, although some may have had doubts about the legality or wisdom of NATO's action without prior U.N. authorization. These views became evident in the Council's 12–3 vote, in March 1999, to reject a Russian-sponsored draft resolution condemning the NATO bombing campaign. For example, the delegate from the Netherlands stated that "there are times when the use of force may be legitimate in the pursuit of peace. The Netherlands feels that this is such a time."[26] And the Bosnian delegate declared that "military force is never a welcome option, but it is

sometimes the best, the only alternative among many bad options. It may be the only option available to save innocent lives."[27]

With respect to Sierra Leone, the Security Council apparently attempted to learn from its prior mistakes in drafting ambiguous resolutions that did not explicitly permit U.N. forces to act to protect civilians. The resolution establishing UNAMSIL specifically authorized the force to "take the necessary action to ensure the security and freedom of movement of its personnel and, *within its capabilities and areas of deployment, to afford protection to civilians under imminent threat of physical violence,* taking into account the responsibilities of the Government of Sierra Leone and ECOMOG."[28]

More generally, in a resolution adopted in April 2000, the Security Council stated its "intention to ensure, where appropriate and feasible, that peacekeeping missions are given suitable mandates and adequate resources *to protect civilians under imminent threat of physical danger*."[29] It indicated in this connection its "willingness to consider the appropriateness and feasibility of temporary security zones and safe corridors for the protection of civilians and the delivery of assistance in situations characterized by the threat of genocide, crimes against humanity and war crimes against the civilian population."[30] The Council had earlier expressed a readiness "to respond to situations of armed conflict where civilians are being targeted or humanitarian assistance to civilians is being deliberately obstructed."[31] And in a declaration adopted on the occasion of the Millennium Assembly in September 2000, the Security Council affirmed its determination to strengthen U.N. peacekeeping operations by including in mandates "effective measures for the security and safety of United Nations personnel and, *wherever feasible, for the protection of the civilian population*."[32]

Secretary-General Annan, in a sober assessment of the U.N.'s role in the capture of Srebrenica in the summer of 1995 and the massacre of thousands of men and boys, argued that the U.N. and its member states must do more to protect designated "safe areas" such as Srebrenica in the future: "When the international community makes a solemn promise to safeguard and protect innocent civilians from massacre, then it must be willing to back its promise with the necessary means."[33] He concluded: "The cardinal lesson of Srebrenica is that a deliberate and systematic attempt to terrorize, expel or murder an entire people must be met decisively with all necessary means, and with the political will to carry the policy through to its logical conclusion."[34]

Likewise, the independent U.N. commission on Rwanda recommended that

> planning for peacekeeping operations should whenever relevant include the prevention of genocide as a specific component. In situations where a peacekeeping operation might be confronted with the risk of massive killings or genocide it must be made clear in the mandate and Rules of Engagement of that operation that traditional neutrality cannot be applied in such situations, and the necessary resources be put at the disposal of the mission from the start.[35]

The Panel on United Nations Peace Operations similarly affirmed that "once deployed, United Nations peacekeepers must be able to carry out their mandates professionally and successfully and be capable of defending themselves, other mission components and the mission's mandate, with robust rules of engagement, against those who renege on their commitments to a peace accord or otherwise seek to undermine it by violence."[36] In particular, it argued that rules of engagement "should not limit contingents to stroke-for-stroke responses but should allow ripostes sufficient to silence a source of deadly fire that is directed at United Nations troops or at the people they are charged to protect and, in particularly dangerous situations, should not force United Nations contingents to cede the initiative to their attackers."[37] It further urged that "peacekeepers—troops or police—who witness violence against civilians should be presumed to be authorized to stop it, within their means, in support of basic United Nations principles."[38] And it asserted that in "some cases, local parties consist not of moral equals but of obvious aggressors and victims, and peacekeepers may not only be operationally justified in using force but morally compelled to do so."[39]

Secretary-General Annan, in responding to the report of the Panel on United Nations Peace Operations, generally approved of these recommendations, but clarified his view that they only apply to peacekeeping operations deployed with the consent of the parties concerned, and should not be interpreted "to turn the United Nations into a war-fighting machine or to fundamentally change the principles according to which peacekeepers use force."[40] The Security Council, upon consideration of the Report, recognized that peacekeeping operations must have, "where appropriate and within their mandates, a credible deterrent capacity," and undertook to ensure that mandates take into account "the potential need to protect civilians, and the possibility that some parties may seek to undermine peace through violence."[41]

Many scholars have criticized the U.N.'s sorry record in protecting civilians. For example, Adam Roberts has argued that the "lack of protection

for vulnerable populations, including in supposedly protected areas from Srebrenica to Sulaimaniya, has been shameful."[42] Indeed, he urges, humanitarian action may have to be accompanied by the threat or use of force in such cases "when those being assisted need security above all else. . . . If safety zones are to be proclaimed, there will normally have to be a will and capacity to deter attacks on them and to defend them."[43]

The first occasion during the post–Cold War period on which the Council called for the apprehension of persons suspected of having committed violations of international humanitarian or criminal law was after the vicious attack on Pakistani peacekeepers in Somalia on June 5, 1993. Members of the Council unanimously condemned the attack. They demanded the speedy arrest, detention, trial, and punishment of the perpetrators, who were assumed to be persons under the control of General Aidid. Almost all members expressed the view that immediate and forceful action against the involved parties was essential, both to deter future attacks on U.N. personnel, and to maintain the Council's credibility. For example, the representative of Pakistan affirmed that the "international community must act with swift and decisive fairness. . . . [I]t is imperative that we act in a manner which will swiftly bring to justice the perpetrators of this murderous defiance of the Council's authority."[44]

In many resolutions condemning violations of international humanitarian law in Bosnia and Rwanda, the Security Council asserted that violators would be held individually responsible. And the Council established war crimes tribunals to try individuals suspected of having committed such violations. Nevertheless, it did not explicitly authorize national or U.N. military forces to apprehend suspects. Indeed, UNPROFOR tended to ignore war crimes issues, and IFOR initially did not put a priority on hunting down suspected war criminals.[45] However, IFOR and SFOR found themselves under increasing pressure to arrest key suspects indicted by the ICTY. From 1997 through early 2001, a number of relatively low-level suspects were taken into custody. Secretary-General Annan, in a 1999 report on the protection of civilians in armed conflict, recommended in this connection to the Council that it should consider using Chapter VII enforcement measures to "induce compliance with orders and requests of the two existing ad hoc tribunals for the former Yugoslavia and Rwanda, respectively, for the arrest and surrender of accused persons."[46]

Because of political constraints in negotiating the text of Resolution 1244, KFOR was not explicitly authorized to arrest suspected war criminals responsible for the atrocities in Kosovo, including Milošević. But the resolution

could be read as indirectly authorizing such arrests by demanding "full cooperation by all concerned, including the international security presence, with the [ICTY]."[47] During the debates on Resolution 1244, a number of delegations supported the arrest of indicted war criminals. For example, the Malaysian delegate declared that the "arrest and prosecution of indicted war criminals is not only an issue of justice, but one that will have important and long-lasting effects on the process of re-establishing the rule of law and accomplishing reconciliation in Kosovo. . . . We strongly believe that, had the international community been more resolute in apprehending the leading indicted war criminals who were responsible for the atrocities in Bosnia and Herzegovina, the ethnic cleansing in Kosovo could have been averted."[48] Many NGOs shared this view. In July 1999 Amnesty International asserted that "KFOR troops should be instructed to search for and arrest all those indicted by the [ICTY] for responsibility for crimes under international law."[49] UNMIK in fact asked for KFOR's assistance in arresting indicted war crimes suspects, and KFOR carried out a number of arrests.[50] As noted in Chapter 1, however, Milošević was ultimately apprehended and turned over to the ICTY by Serb authorities rather than KFOR or SFOR.

With regard to the use of force to nudge parties to bargain, or to cease and desist from human rights violations, in the case of Haiti many members of the Security Council had by mid-1994 come around to the view that at least the threat of force was necessary to induce the illegitimate military leaders of Haiti to step down. After such an agreement was reached following the U.S.-led deployment in September 1994, U.S. Secretary of State Warren Christopher reported to the Council that "our willingness to exercise military force . . . has allowed us to reach an agreement for the peaceful restoration of democracy that has made the Mission safer for our coalition and for the Haitian people."[51]

Many Council members welcomed NATO bombing attacks against Bosnian Serb positions in August and September 1995 as an assertion of determination by the international community to uphold U.N. resolutions that could only further the achievement of a fair diplomatic outcome. For example, according to the French representative, "the actions under way are working in the service of a comprehensive diplomatic solution. Military firmness is an essential condition for the success of diplomatic action."[52] Indeed, during the 1999 NATO bombing campaign, the Bosnian delegate affirmed in the Council chamber that "we in Bosnia and Herzegovina would still be suffering the consequences of war—war itself—if no action had been taken in the fall of 1995. For three and a half years in Bosnia and Herzegovina, people promoted talks, and for three and [a] half years, the war, the geno-

cide, the aggression and the ethnic cleansing continued. Only after military intervention took place did diplomacy succeed."[53] In hindsight, Secretary-General Annan declared in 1999: "When decisive action was finally taken by UNPROFOR in August and September 1995, it helped to bring the war to a conclusion."[54]

In keeping with such a perspective, in early 1999 many states argued that the use of force was necessary to induce Yugoslavia to accept a peace plan permitting the deployment of a NATO force in Kosovo to restore security for ethnic Albanians. For example, the representative of the Gambia, upon the adoption of Resolution 1244, declared that the "international community could no longer afford the luxury of being a helpless spectator while the policy of ethnic cleansing was going on in Kosovo. It is regrettable that force had to be used to arrive at where we are today."[55] A year earlier, in June 1998, Secretary-General Annan, with Kosovo on his mind, had affirmed that "if diplomacy is to succeed, it must be backed both by force and by fairness."[56] After NATO launched its air attacks in March 1999, he reiterated that "there are times when the use of force may be legitimate in the pursuit of peace."[57] And in his 2000 Millennium Report, he declared: "Armed intervention must always remain the option of last resort, but in the face of mass murder it is an option that cannot be relinquished."[58]

The use of force to restore or establish democracy was most pointedly debated during the Council's consideration of Resolution 940, authorizing the use of force to reinstall the democratically elected government of Aristide in Haiti. During that debate, the representative of the Czech Republic heralded the resolution as marking the first time in its history that the Council had "authorized Member States to use all necessary means to restore democracy in a United Nations Member State, and to create conditions for a better and more dignified life for its population."[59] Many scholars supported the Haiti intervention and emphasized the emerging norm of democracy as deserving of international protection, including through military force if necessary.[60]

A number of observers who have endorsed the use of force in the foregoing circumstances have expressed the view that military action should be quick, strong, and unequivocal. For example, political scientist Thomas Weiss has drawn the lesson from the U.N.'s experiences in this area that "international military intervention in support of humane values should be timely and robust or shunned altogether."[61]

Further, one element in some arguments for the use of military force in support of human rights is that in the long run the measured threat or use of force may be preferable to economic sanctions. This is because the latter tend adversely to affect the lives and well-being of the civilian population,

while governing elites remain unscathed. Many observers have argued that moderate military force, by contrast, can in principle be aimed at the true perpetrators without also punishing the victims.[62] A number of studies have documented the very serious repercussions of some of the Council's experiments with prolonged economic sanctions for civilians.[63] Some Council members have cited these considerations as prompting them to approve of military action. For example, the Spanish delegate, during the debate on Resolution 940 on Haiti, indicated that the sanctions regime had "contributed to the prolongation of the suffering of the Haitian people, which was not the intention of the international community. In these circumstances it became necessary for the Council to consider the best way to achieve, with the desired speed and effectiveness, the objectives set by the international community."[64] The Security Council itself has stated its intention, in adopting measures to prevent armed conflicts, to "pay special attention to their likely effectiveness in achieving clearly defined objectives, while avoiding negative humanitarian consequences as much as possible."[65] And it has reaffirmed its readiness, whenever economic sanctions are adopted under Article 41, "to give consideration to their impact on the civilian population, bearing in mind the needs of children, in order to consider appropriate humanitarian exemptions."[66]

In this connection, Secretary-General Annan noted in his 2000 Millennium Report that "when robust and comprehensive economic sanctions are directed against authoritarian regimes . . . it is usually the people who suffer, not the political elites whose behaviour triggered the sanctions in the first place."[67] He has accordingly endorsed the concept of "targeted sanctions," including "financial sanctions, such as freezing of overseas assets, trade embargoes on arms and luxury goods and travel bans," which, he argues, constitute "a potentially valuable means for pressuring targeted elites, while minimizing the negative humanitarian impact on vulnerable civilian populations that has been a characteristic of comprehensive economic sanctions."[68] And the U.N. General Assembly has likewise affirmed, in its Millennium Declaration, its resolve to "minimize the adverse effects of United Nations economic sanctions on innocent populations."[69]

7.3.2. Arguments Against the Threat or Use of Force

Many states and observers have argued that military force is either an illegal, immoral, or simply politically ineffective means for achieving at least some of the objectives discussed above. Moreover, even those otherwise

believing in the intrinsic desirability of using force in certain situations frequently emphasize the negative consequences of the threat or use of force when employed in inauspicious circumstances. And some observers question the way force has been employed in recent U.N. humanitarian intervention operations, and emphasize accordingly respect for international humanitarian law and international human rights law.

Examples of all of these positions may be found in the Council's debates on humanitarian intervention. For example, after the disastrous events in Somalia, the representative of Brazil affirmed that "time has proved right those delegations in the Council which, like my own, have consistently maintained that this body should, to the fullest extent possible, seek to avoid the application of the extraordinary powers for enforcement action conferred upon it in Chapter VII of the United Nations Charter."[70]

During the Council's debate on Resolution 940 on Haiti, the Mexican representative argued that economic sanctions should have been given more time to work. Moreover, he stated that the "use of force in this case gives rise to grave legal and practical doubts, and we must not forget that history—from which we still have much to learn—has shown that military intervention in our hemisphere has invariably been traumatic; it has desolated cities, harmed and demoralized civilians, aroused historical resentment and, despite its high cost, not necessarily obtained its objective."[71] The Chinese delegate asserted that China advocated peaceful solutions to disputes or conflicts through "patient negotiations" and that it did "not agree with the adoption of any means of solution based on the resort to pressure at will or even the use of force."[72]

The Chinese representative made similar points during the Council's debates on Kosovo.[73] Likewise, during those debates, the Namibian delegate affirmed that in "numerous cases of conflict situations it has been the view of the Security Council—and rightly so—that military action is not the solution, but rather that peaceful means should be resorted to."[74]

Many states have emphasized that force ought to be employed sparingly and that political negotiations are the key to long-term success in resolving civil conflicts and putting an end to human rights violations. For example, during the debate on Resolution 794 authorizing UNITAF, the representative of Cape Verde stressed the need for "eliminating the underlying causes of the conflict" by promoting political negotiations.[75]

As I have just shown, some governments have questioned whether the threat or use of force, even if in principle legal and ethical, ought to be used in particular circumstances when the moral consequences of attempting to

do so are likely to be unhappy ones, given the U.N.'s meager capabilities and the current political climate. U.N. secretaries-general have expressed similar doubts. For example, Secretary-General Boutros-Ghali, in his 1995 *Supplement to an Agenda for Peace,* discouragingly concluded that in the contemporary political environment enforcement simply was not an option for the U.N.[76] He also noted the dangers of mixing peace enforcement with peacekeeping, stating that the dynamics of peace enforcement "are incompatible with the political process that peace-keeping is intended to facilitate" and that peacekeeping "and the use of force (other than in self-defence) should be seen as alternative techniques and not as adjacent points on a continuum, permitting easy transition from one to the other."[77] Secretary-General Annan expressed very similar views in his July 1997 reform proposals, pointing out that the "United Nations does not have, at this point in its history, the institutional capacity to conduct military enforcement measures under Chapter VII. Under present conditions, *ad hoc* Member States coalitions of the willing offer the most effective deterrent to aggression or to the escalation or spread of an ongoing conflict."[78] And in his 1999 Srebrenica report, he affirmed that "peacekeepers must never again be told that they must use their peacekeeping tools—lightly armed soldiers in scattered positions—to impose the ill-defined wishes of the international community on one or another of the belligerents by military means. If the necessary resources are not provided—and the necessary political, military and moral judgements are not made—the job simply cannot be done."[79]

One reason that the use of force for humanitarian purposes is widely criticized is that when the Council did explicitly authorize, if not require, the use of force, its action often appeared in hindsight to be hasty and militarily ill-conceived. For example, the Council's direction to the secretary-general to apprehend the persons suspected of being responsible for the June 5, 1993, massacre in Mogadishu—a direction necessarily implying the arrest of General Aidid—involved extreme military risks. It also threatened, as actually occurred, to place UNOSOM II contingents in a direct state of combat with local forces. The Commission of Inquiry established to investigate the lessons to be learned from the U.N.'s experiences in Somalia recommended that the U.N. refrain from undertaking future enforcement actions in internal conflicts. The Commission concluded that if the U.N. does engage in enforcement, "the mandate should be limited to specific objectives and the use of force would be applied as the ultimate means after all peaceful remedies have been exhausted."[80]

As Chapter 6 discussed, one particular consequence of the U.N.-approved

use of force in the eyes of many observers is that it has a very damaging effect on the U.N.'s perceived impartiality. Another consequence, of course, is the risk of severe casualties, a risk that has prompted many commentators to endorse less violent means of persuasion, including the imposition of economic sanctions. As we saw above, however, many observers with a consequentialist orientation are now reevaluating whether economic sanctions in fact save more lives in the long run.

Some commentators, too, insist that the Security Council is subject to legal limits on its ability to authorize the use of force, even if it is properly seized of a matter constituting a threat to or breach of the peace under Article 39. While it is generally acknowledged that the Charter grants the Council authority to permit or call for the use of force, it has been argued that the Council is still subject under the Charter and customary international law to existing *jus ad bellum* and *jus in bello* rules requiring the observance, at a minimum, of the legal principle of necessity.[81]

Turning to arguments concerning particular functions of military operations, with respect to the protection of humanitarian relief, early on in the U.N.'s involvement in Bosnia Secretary-General Boutros-Ghali expressed the view that traditional peacekeeping rules of engagement "already entitle United Nations troops to use force if prevented by armed persons from carrying out their mandate" to protect the delivery of humanitarian supplies.[82] In practice, however, UNPROFOR often refrained from using military force to break up attempts by Bosnian Serbs to halt humanitarian convoys, primarily out of a concern to foster perceptions of equal benefit.

Regarding the use of force to deter attacks on or protect civilians, some observers were critical of the Security Council for even authorizing the use of force in connection with the protection of civilians. They believed that the U.N. was in no position to make threats on which it could not follow through. Further, some argued that even if force was ethically desirable as a means of defending the safe areas, it was more likely to be successful if employed by NATO or some form of multinational coalition. For example, Secretary-General Boutros-Ghali himself affirmed that in the cases of both Bosnia and Somalia "existing peace-keeping operations were given additional mandates that required the use of force and therefore could not be combined with existing mandates requiring the consent of the parties, impartiality and the non-use of force. It was also not possible for them to be executed without much stronger military capabilities than had been made available, as is the case in the former Yugoslavia. In reality, nothing is more dangerous for a peace-keeping operation than to ask it to use force when its

existing composition, armament, logistic support and deployment deny it the capacity to do so."[83]

With respect to the use of force to apprehend suspected violators of international criminal law, some observers have argued that apprehension and punishment may only exacerbate tensions and frustrate the larger goal of achieving a negotiated settlement. This certainly seems to have been the initial attitude of NATO, as noted above, after it launched IFOR. Such an attitude may also have lay behind the failure of Security Council Resolution 1244 to allow KFOR to occupy Serbia and therefore to be in a position to arrest Slobodan Milošević.

On the use of force to prompt particular leaders to engage in more serious political negotiations, or to cease and desist from human rights violations, many governments and leaders believed that force was in the long run counterproductive. For example, Secretary-General Boutros-Ghali argued in *Supplement to an Agenda for Peace* that "pressing the parties to achieve national reconciliation at a pace faster than they were ready to accept," especially through the threat or use of force, could have negative repercussions.[84] Russia argued that the use of force against Yugoslavia in early 1999 dealt "a very powerful, a very grave and probably an irrevocable blow" to a negotiated settlement.[85] And many observers have criticized the use of force to establish democracy. For example, some scholars doubted whether the use of force was justifiable simply to restore democratic government to Haiti.[86]

7.3.3. The Debate on the Conduct of U.N. Humanitarian Intervention

U.N.-commanded forces, or forces acting with the U.N.'s authorization, have frequently been accused of violating either internationally recognized human rights or standards of international humanitarian law. For example, evidence has surfaced that UNOSOM II contingents from many countries, including Canada, Italy, and Belgium, engaged in unwarranted forceful action against civilians, as well as torture, rape, and even outright murder.[87] These incidents clearly undermined the U.N.'s credibility in Somalia, and helped to turn the local population against it. Of course, NATO's unauthorized bombing campaign, which led to the deaths of numerous Serb civilians in early 1999, raised even more troublesome questions, as did, to a lesser degree, the use of force by KFOR.[88] These concerns have prompted some observers to call for a clarification that the U.N. itself and states or regional organizations acting with its authorization should be bound by international human rights and humanitarian law.[89]

Member states, and the U.N. itself, have attempted to regulate the conduct of U.N. military operations, including humanitarian intervention, in a number of ways. First, under current practice, based on the Security Council mandate and terms of reference for a specific mission, the U.N. draws up "force regulations" or other guidelines laying down rules of engagement unique to that mission.[90] Second, in August 1999 U.N. Secretary-General Annan issued a secretary-general's bulletin titled "Observance by United Nations Forces of International Humanitarian Law" (1999 Secretary-General's Bulletin).[91] The bulletin applies to U.N.-commanded forces when actively engaged as combatants and recognizes a U.N. undertaking to ensure that such forces respect the "fundamental principles and rules of international humanitarian law."[92] These include principles calling for the direction of military operations only against combatants and military objectives and the taking of feasible precautions to avoid injury to civilians and the incidental loss of civilian life.[93]

Third, the drafters of the 1994 Convention on the Safety of United Nations and Associated Personnel (1994 Convention), which was aimed at the protection of U.N. troops, rather than the imposition of humanitarian obligations on them, nevertheless attempted to provide a modest degree of clarification on this issue. They assumed that the customary international law of armed conflict (which would include the standards in the Geneva Conventions) would apply to any U.N. forces deployed as "combatants" in Chapter VII enforcement operations. By contrast, operations, such as those in the former Yugoslavia and Somalia, whose mandates relied in part on Chapter VII but were not intended to be combat missions, would fall outside the reach of international humanitarian law. The drafters concluded that these operations therefore needed protection under the 1994 Convention.[94] The 1994 Convention affirms generally that it does not adversely affect any responsibility of U.N. or associated personnel to respect international humanitarian law or international human rights standards.[95]

7.3.4. Proposed Guidelines on the Use of Force

The current debate within U.N. organs on the legality and ethics of the threat or use of force under U.N. auspices for human rights purposes has spurred a number of scholars to attempt to develop more rational guidelines for the Security Council to follow. These guidelines have usually been based on earlier scholarly efforts to establish criteria for unilateral humanitarian intervention. To give just one example, the late international law scholar Richard

Lillich proposed the following criteria for the Council to use in authorizing U.N. humanitarian intervention:

1. "UN humanitarian intervention must be based on the actual existence or pending likelihood of gross and persistent human rights violations that shock the world's conscience."
2. "The intervention should be authorized, except in rare cases, only after all reasonable diplomatic efforts on the international and regional level have been exhausted and have failed to bring about the cessation of such human rights violations."
3. "The intervention must be strictly limited in scope to actions necessary and proportionate to bring about the cessation of such human rights violations."
4. "The intervening forces must begin their withdrawal as soon as reasonably possible, and in any event complete such withdrawal within a reasonable period after the cessation of such human rights violations."
5. "The intervention should preserve the territorial integrity of the target State, by which is meant that the State's boundaries, except in rare cases, should not be redrawn."
6. "The intervention should not interfere with the authority structure of the target State, except where the cessation of human rights violations clearly is dependent upon the removal of the central government."[96]

In a 1999 report on the protection of civilians in armed conflict, Secretary-General Annan recommended that the Security Council consider the imposition of enforcement measures in the face of massive and ongoing human rights abuses. He suggested that the Council consider the following factors:

> (a) The scope of the breaches of human rights and international humanitarian law including the numbers of people affected and the nature of the violations;
> (b) The inability of local authorities to uphold legal order, or identification of a pattern of complicity by local authorities;
> (c) The exhaustion of peaceful or consent-based efforts to address the situation;
> (d) The ability of the Security Council to monitor actions that are undertaken; [and]
> (e) The limited and proportionate use of force, with attention to repercussions upon civilian populations and the environment.[97]

7.4. Developing a Fresh Approach to the Threat or Use of Force to Prevent or Rectify Human Rights Violations

7.4.1. Identifying Relevant Fundamental Ethical Principles

A number of the fundamental ethical principles explored in Chapter 2 are relevant to the legal and ethical problems of whether and in what circumstances the U.N. Security Council may or should authorize the threat or use of force to prevent or remedy human rights violations in a member state, and how that force should be employed. Some principles have a direct, "deontological" impact on these problems.

First, I established in Chapter 4 that the U.N. Security Council legally has discretion under Chapter VII to determine that human rights violations constitute a threat to or breach of the peace, and therefore to authorize military action to prevent or redress those violations. Second, however, the principle of respect for norms of international law indicates that the Council legally must abide by any legal regulations of the use of force in the U.N. Charter, including in Chapter VII, and any relevant norms of customary international law or general principles of law. In this connection the approach to identifying the sources of international law and to Charter interpretation developed in Chapter 3 becomes relevant. I will apply that approach in more detail in the following subsections.

Moreover, where the Council has legal discretion, fundamental ethical principles should guide the exercise of that discretion. One of these fundamental ethical principles is that disputes should be settled peacefully, and that force is intrinsically undesirable and a course of action that should be avoided to the extent possible. However, as emphasized in Chapter 2, this ethical principle allows clear exceptions for the use of force *if necessary to protect and rescue others*. Thus, I argued in Chapter 2 that a fundamental ethical principle is the permissibility, under certain conditions, of the use of force for humanitarian intervention.

The principle of freedom of moral choice independently counsels against the threat or use of force. The use of force can impede the cultivation of genuine moral commitments to certain courses of action. At best, it can lead to a spiritless and resentful "going through the motions" compelled by the barrel of a gun, or the threat of bombardment. However, I noted in Chapter 5 that the principle of moral choice entails moral limits. Accordingly, threats or uses of force that are aimed solely at preventing the actor from transgressing these moral limits are not prohibited by the principle of freedom of

moral choice. Further, under the conception of impartiality developed in Chapter 6, the threat or use of force would be at least ethically permissible if it is "impartial" because it is employed in service of implementation of a mandate supported by relevant fundamental ethical principles without favoritism toward particular parties.

Finally, an important condition required for humanitarian intervention to be ethically permissible is satisfaction of the essential ethical principle of necessity. As applied to Security Council-authorized action, the ethical principle of necessity means that the Security Council should authorize a particular level and use of force (or threat of using such force) to rectify human rights violations *if and only if it would result in an overall net benefit, measured in moral terms and by reference to fundamental ethical principles, that exceeds the net moral benefit to be achieved by nonforcible alternative courses of action (including simple inaction) or by alternative levels or uses of force*. I suggested in Chapters 2 and 3 that according to the ethical principle of necessity special care must be taken not to injure civilians where the immediate objective of the use of force is not to protect vulnerable populations, but to achieve a primarily military objective related only indirectly to the protection of human rights.

So far I have analyzed principles having a direct bearing on the ethical permissibility or desirability of threatening or using force. But in Chapter 2 I observed that fundamental ethical principles also indicate the importance of taking the moral *consequences* of using force into account. The actual results of violence must fall within moral limits. Indeed, the ethical principle of necessity requires looking at the moral consequences, both positive and negative, of the use of force and nonforcible alternatives, and determining that on balance each of these nonforcible alternatives achieves an inferior net moral benefit.

From the standpoint of an approach based on fundamental ethical principles, negative effects and benefits would be measured in terms of the violation or realization of these principles and the values they promote, rather than some other yardstick like the successful achievement of military objectives. Indeed, the use of force can have very negative moral consequences—including death or injury to human beings and violations of other essential rights as well. Thus, an approach based on fundamental ethical principles would place primary emphasis on the effects on essential human rights in weighing moral benefits and detriments.

It also seems fair to conclude that in light of the moral imperative of protecting civilians and vulnerable groups, rules of international humanitarian

law designed to protect civilians must be scrupulously observed, and somewhat greater moral weight ought to be given to the security of civilians and members of these groups than that of combatants if a choice must be made. Nevertheless, the ubiquitous ethical principle of respect for *all* human life indicates that even the lives and security of military personnel are entitled to significant deference in evaluating the moral consequences of military action.

Most importantly, certain uses of force *can* bring about a result—elimination of human rights abuses—whose moral consequences are on balance favorable. This is why I argued in Chapter 2 that fundamental ethical principles evident in the U.N. Charter and contemporary international law authorize, and sometimes require, the use of force where doing so can alleviate the suffering of others.

In the following subsections I first suggest how these principles can be applied to the legal and ethical problems of whether and how force should be threatened or used with Security Council authorization to prevent or rectify human rights violations generally. I then address the legal and ethical problems of how force or its threat should be employed to achieve each of the human rights-related objectives described earlier.

7.4.2. Developing General Guidelines for Security Council Authorization of Military Force to Prevent or Rectify Human Rights Violations

I suggest, based on the approach sketched above and in earlier chapters, the following four general guidelines:

1. *Legally, the Security Council is bound by relevant international law in its decisions concerning whether force ought to be employed to prevent or remedy human rights violations, including the ethical and legal principles of necessity*.

It has been argued that under a strict reading of Article 1(1) of the Charter, which the Council is required to follow under Article 24, respect by the Council for principles of justice and international law is required only with respect to efforts to reach an "adjustment or settlement of international disputes or situations which might lead to a breach of the peace" and not with regard to enforcement measures.[98] An interpretive approach based on fundamental ethical principles, however, would, in the absence of a more explicit affirmation that enforcement actions of the Council are not governed by customary international law, hold that the Council is bound by customary norms of *jus ad bellum,* including the legal principle of necessity, to the extent these norms do not frustrate the Charter scheme and are reinterpreted, as they

must be, in light of the Council's unique powers and functions under the Charter.[99]

Such a conclusion is also merited by the language of the Charter itself, which commits the Security Council to upholding human rights principles via Articles 24 and 1(3). This commitment would include adherence to customary norms of necessity and proportionality insofar as one purpose of these norms is to alleviate severe violations of human rights of individuals that result from illegitimate uses of armed force. Further, the Charter contains specific limiting language in Article 42. Article 42 first requires that the Council "consider that the measures provided for in Article 41 would be inadequate or have proved to be inadequate" before authorizing enforcement action. This language involves a necessity analysis like that outlined above. Article 42 further indicates that after the inadequacy of nonforcible sanctions has been determined, the Council may take such action as may be "necessary" to maintain or restore international peace and security. Again, the action authorized is limited to "necessary" action.[100] An approach to treaty interpretation based on fundamental ethical principles requires that this language be given effect and be interpreted in light of the ethical principle of necessity.

Finally, as suggested in Chapters 2 and 3, the ethical principle of necessity binds the Security Council, like states and all actors, as a general principle of moral law and as a norm of *jus cogens*. Of course, as a legal norm, the principle must be narrowly tailored and circumscribed, as emphasized in Chapter 3, and by its nature leave some room for reasonable judgment by the Security Council in weighing moral consequences. What is legally required is that the Council engage in a serious and good faith effort to apply the principle of necessity and evaluate the moral consequences of various courses of action, and that its ultimate decision objectively reflect such a reasonable judgment.

Under the ethical and legal principles of necessity, the Council has a moral and legal responsibility to evaluate, before authorizing military measures, whether nonforcible options would be more effective in bringing about a positive change in the realization of relevant ethical principles, including an improvement in human rights conditions. These options potentially include the initiation or continuation of economic sanctions imposed under the authority of Article 41. As recent experience with economic sanctions has borne out, such an appraisal should take into account the likely impact of economic sanctions on the civilian population. Any adverse effects on the health and well-being of the population must be given great weight. For

example, it appeared that economic sanctions against Haiti were likely to continue to have a punishing effect on its impoverished population, thus helping to equal the balance of moral scales and at least render the option of military force a legitimate alternative.

Another cost of nonforcible measures that must be taken into account is the cost of delay. This may justify certain preemptive action, such as deployment of a rapid reaction force to serve a deterrent function, even though all diplomatic avenues have not been fully exhausted. There seems to be clear evidence, for example, that the immediate reinforcement of UNAMIR in Rwanda with units with appropriate weaponry and defensive capabilities could have prevented the loss of hundreds of thousands of lives, and that the Council's drawn-out efforts to call for political negotiations simply bought the perpetrators time to mow down more victims. It is also possible that the early, even if nonconsensual, deployment of U.N.-authorized ground troops in Kosovo might have forestalled the frenzy of slaughter and expulsions that evidently took place there following the failure of the Rambouillet and Paris talks and the initiation of NATO bombing. (I take up the issue of rapid deployment capabilities again in Chapter 8.)

The above formulation of the ethical principle of necessity is flexible and takes into account the Council's ability to authorize a wide array of nondefensive military actions, ranging from extremely limited uses of force (e.g., the firing of a warning shot in the air to deter attacks on relief convoys) to far more expansive ones (e.g., a large-scale invasion of Haiti). It also takes into account that the moral repercussions of inaction may vary with the nature and extent of the human rights violations concerned.

It goes without saying, based on the analysis in preceding chapters, that the toleration of widespread and severe violations of essential human rights would exact the highest moral toll and therefore possibly justify more intrusive forms of forcible intervention. The presence of widespread and severe violations of essential human rights is not, however, an absolute prerequisite for any Council-authorized uses of force, nor do such violations *ipso facto* warrant the use of force under this balancing approach. Lesser violations may also justify forcible action, although these should generally be less intrusive (for example, the nondefensive use of force against bandits or armed forces attacking relief convoys in order to protect the rights of victims to receive the intended supplies). In contrast to this more supple balancing approach, which appears also to be reflected in the criteria suggested by Secretary-General Annan, most legal criteria developed by scholars for U.N. humanitarian intervention assume that overwhelming force may be

employed by an intervening coalition or U.N. force and therefore limit the legitimate use of force to cases of "gross" human rights violations that "shock the conscience."[101]

2. *Ethically, the Security Council should not face an exclusive choice between traditional peacekeeping and a full-scale "offensive" operation such as was contemplated in Haiti and carried out against Iraq in the Gulf War. Rather, it ought to consider employing a wide range of threats or uses of force while also pursuing negotiations, just as the Charter's framers contemplated.*

Fundamental ethical principles indicate that military enforcement and reliance on pacific methods of dispute resolution need be not mutually exclusive, but rather mutually reinforcing. Both have an important role to play. Simply put, there are situations involving the massive loss of human life that morally demand enforcement action, including preventive action, to protect the lives of innocent civilians. When U.N.-authorized forces are adequately equipped, they may be in a position to carry out such a "dual-track" approach more successfully than they did in Bosnia, where they were wholly unprepared for such a role. Indeed, IFOR, SFOR, and KFOR provide examples of the type of operation that foresees a potential need for nondefensive uses of force but nevertheless pursues a primary mission of facilitating negotiations or the implementation of a political agreement.

The U.N.'s experiences have confirmed that at least some forms of forcible intervention do not have to impede the peaceful settlement of the disputes originally giving rise to a human rights crisis. In fact, by helping prevent large-scale bloodshed, forcible intervention can support negotiations for a peaceful settlement. Mass killings that are left unchecked only exacerbate tensions and reinforce the determination of the parties to fight on, as Rwanda and Kosovo so graphically demonstrated. Moreover, as the experience in Bosnia suggested, threats that are not backed up by military force may prolong the posturing of the parties, rather than encourage good faith negotiations. The Council's decision to authorize a large-scale invasion of Haiti under Resolution 940 certainly prompted and facilitated the agreement reached with Haiti's military leaders to step down. And while not authorized by the Security Council in advance, the NATO bombing of Yugoslavia, whatever its moral and legal shortcomings (which I analyze in Chapter 11), at least brought Yugoslavia back to the negotiating table and finally put an end to the atrocities in Kosovo (although it also exacerbated them in the short term).

To be sure, uses of force transcending strict self-defense have the poten-

tial to interfere with negotiations by calling into question in the eyes of the parties the U.N.'s impartiality. But given the evanescent quality of such perceptions when parties are rigidly committed to the advancement of their own interests, as examined in Chapter 6, this "cost" of the use of force is quite difficult to measure. This is especially true when uses of force objectively are impartial by reference to relevant ethical principles, such as protection of the civilian population. If U.N.-authorized forces adhere scrupulously to these principles, as argued in Chapter 6, and use force only in moderation, as argued here, then the parties may come around in the long run to trusting the U.N.'s motives.

In short, there needs to be a continuing dynamic between the two approaches of enforcement and negotiation. The challenge for future U.N. policymakers and U.N. member governments will be to decide when a situation demands the proactive use of force to defend certain standards of international human rights and humanitarian law or protect civilians, and when it requires the encouragement of negotiation and compromise. Under an approach based on fundamental ethical principles, what is important is to recognize, as did the Charter's framers, that the U.N. needs to have the capacity to employ both approaches to be effective. At the same time, as emphasized in Chapter 5, it is essential to recognize the inherent limitations on the use of military force. Force alone is incapable of achieving long-term improvements in human rights conditions in a given country and in the willingness of the parties themselves to respect ethical principles, including human rights.

3. *Legally, the Security Council must ensure that any U.N.-authorized humanitarian intervention mission operates in compliance with international humanitarian law and international human rights law, including, once again, the ethical and legal principles of necessity and other general principles of moral law.*

The same considerations mentioned above with respect to the *jus ad bellum* also lend support to the conclusion that the Council, and national or regional military forces acting with its authorization, are bound by customary norms of *jus in bello,* including the *jus in bello* legal principle of necessity.[102] The Council and such forces are further legally bound by those principles in the Geneva Conventions that are already regarded as part of customary international law or general principles of law and would be relevant to U.N. military operations.[103] The Council and national or regional military forces should also be considered legally bound by those norms of international human rights law that ought (under the approach to customary international law developed in Chapter 3) to be considered customary law.

Further, the Council and national or regional forces are legally obligated to comply with the general principles of moral law I identified in Chapter 3 and earlier in this chapter. These include the ethical principle of necessity, which applies as directly to the conduct of military operations (*jus in bello*) as to the decision whether or not to use force at all (*jus ad bellum*). They also include obligations not deliberately to violate essential human rights, not intentionally to target noncombatants, and not to use force in a way unreasonably likely to injure them. (See Fig. 6.)

Finally, national and regional forces participating in Council-authorized multinational coalitions are obligated to observe the provisions of international humanitarian and human-rights treaties already binding on involved member states. The same is true of national and regional contingents participating in U.N.-commanded operations.

The Security Council ought to extract commitments from member states or regional organizations participating in Council-authorized operations to observe the customary and treaty-based provisions of international humanitarian law and human rights law that apply to them, as well as the foregoing general principles of law, including general principles of moral law. Indeed, the ethical and legal principles of necessity demand that the Security Council provide in the future more guidance to the secretary-general (in the case of U.N.-commanded forces), regional organizations (in the case of forces deployed by them), or member states (in the case of ad hoc coalitions) on the appropriate mission of forces that it may authorize, indicate the general rules of engagement and guidelines on the use of force that should apply to the mission, and reaffirm that relevant rules of treaty law, customary international law, and general principles of law apply. The Council has too often abdicated this legal responsibility, using the intentionally vague formulation "all necessary means" in its resolutions, without limiting the discretion of national or regional forces to do whatever they please in any way.

The ethical principle of necessity, which is, I have argued, a general principle of moral law, has certain implications for standards appearing in the Geneva Conventions and Protocols. In particular, as suggested in Chapter 3, these standards ought to be interpreted in light of it. For example, Geneva Protocol I and the 1999 Secretary-General's Bulletin permit the incidental loss of civilian life as long as this loss is not "excessive" in relation to the "concrete and direct military advantage anticipated."[104] According to the ethical principle of necessity elaborated above and in Chapters 2 and 3, however, military considerations are permitted to be counted only insofar as they are instrumental to the achievement of moral ends, most importantly, the

protection of civilian populations, and can be given only the weight appropriate to those moral ends.[105] This means that, legally, even greater care must be taken not to create unreasonable dangers to civilians when the immediate objective of a use of force is to achieve a military goal not directly related to the protection of civilians.

It is clearly desirable to allow the U.N. legally to commit itself to abiding by the relevant norms in the Geneva Conventions and the 1977 Protocols. In this connection, a number of legal scholars have supported the establishment of a legal mechanism to allow the U.N. to undertake these obligations.[106] One option is to develop a means by which the U.N. can become a party to these treaties, with appropriate modifications. Such suggestions ought to be pursued vigorously. Certainly the 1999 Secretary-General's Bulletin represents at least a significant step in this direction.

The Security Council and U.N. member states legally must take effective steps to ensure that these legal standards are observed by personnel in practice, including through the provision of appropriate training.[107] From a perspective shaped by fundamental ethical principles, however, formal training in legal rules is not enough. Military personnel ought to have access to more comprehensive moral education, including in the fundamental ethical principles outlined in Chapter 2. Only when these principles are internalized will they have a direct impact on the behavior of soldiers in the field.[108]

4. *Ethically, the Security Council ought to ensure that uses of force it authorizes that otherwise comply with international humanitarian and human rights law also comport with fundamental ethical principles.*

This guideline implies that the Security Council ethically ought to take special care to avoid harm to noncombatants, even if such harm could be justified under relevant legal norms. And it implies that the Security Council ethically ought to ensure that U.N.-commanded forces abide by the "higher" standards in the Geneva Conventions and the two 1977 Protocols that may not yet, upon careful analysis, be part of customary international law or represent general principles of law, and urge states and regional organizations acting with its authorization to do so as well.

7.4.3. Developing More Specific Guidelines for Security Council Authorization of Military Force in Connection with Particular Human Rights-Related Functions

The above general legal and ethical guidelines in turn suggest more specific guidelines for the authorization of force by the Council for the five abovementioned purposes for which it has been employed as part of post–Cold War U.N. humanitarian intervention.

1. *It is preferable for soldiers operating under a Security Council mandate and charged with escorting relief convoys to threaten and use force only in their own self-defense, and to employ traditional peacekeeping techniques involving nonviolent resistance. But it may be necessary for them to adopt more robust military measures if there is a threat that relief convoys will be obstructed for any significant period of time. Accordingly, the Council should ensure that they have this capability*. The moral imperative of delivering humanitarian assistance to the needy must take precedence over concerns about adversely affecting perceived impartiality for all the reasons analyzed in previous chapters.

2. *The Security Council should authorize the threat or use of proportionate force to protect civilians in designated safe zones against threatened or actual violations of their essential human rights, including armed attacks, if the risk to civilian lives and security in the zones is real and direct. However, it must ensure that five conditions are met. First, the zones must be clearly designated and demilitarized so that they cannot be used as safe havens for combatants. Second, such threats or uses of force must satisfy the general ethical and legal principles of necessity. Third, such threats or uses of force must be impartial in the sense of being directed against any party launching an attack, even if one party or another is more likely to conduct such an attack. Fourth, the troops involved must have sufficient military resources to protect civilians as well as to defend themselves against retaliation. Fifth, the troops must be permitted to stay until such time as the safety of civilians can be assured without the need for an outside military presence. Moreover, even where safe zones are not specifically designated, the Council should take similar steps to permit troops acting with its authorization to use proportionate force to repel unexpected attacks on civilians that they witness and to ensure, in planning missions, that troops have sufficient training and military resources to do so.*

The above criteria support, for example, KFOR's mission and the specification of rules of engagement that permit it to use proportionate force to protect both Kosovo Serbs and Albanians. There was a high risk of harm to both Albanians and Serbs in the province. Further, the Council has taken steps to ensure that most of the above-mentioned conditions are satisfied. In particular, KFOR's protective zone was clearly demarcated (extending throughout the whole of Kosovo), and it was given a mandate to disarm all factions, including the KLA, operating in Kosovo.[109] In general its mandate was to use only necessary and proportionate force. KFOR took pains to act impartially by apprehending any persons, including Albanians, attacking any

other individuals, including Serbs. It appears that KFOR had, or could acquire through voluntary contributions, adequate military resources to carry out its mission and defend itself, despite initial obstacles. Although inter-ethnic violence persisted, KFOR appeared likely to be able to defend civilians. However, it needed to be given more specific guidance on its obligation to intervene more proactively where necessary to protect all civilians, especially Serbs. In addition, the Council must ensure that KFOR, or a replacement U.N.-commanded force, is able to remain until such time as the Council can be reasonably sure that civilians will not be subject to renewed attack once the force withdraws. It appears at the time of this writing that KFOR may need to be prepared for a stay as long as a decade.

3. *The Security Council should authorize the threat or use of force to apprehend individuals suspected of committing serious violations of international humanitarian and criminal law if (a) the threat or use of force involved in apprehending the suspects is unlikely to cause direct harm to civilians; and (b) the degree of force threatened or employed is the least necessary to attain the objective of apprehension, thereby complying with the ethical and legal principles of necessity. Where these conditions are not or cannot be satisfied, the Security Council should not abandon attempts to apprehend the suspects, but rather wait for more propitious circumstances.*

An approach based on fundamental ethical principles would generally favor apprehension and punishment of individuals who violate international humanitarian and criminal law based on the ethical objectives of protecting innocent civilians, deterring future misconduct by such criminals or would-be criminals, and ideally, reforming the mental attitude of the individuals involved. Accordingly, the Council should, ethically, pursue a policy of encouraging apprehension and refusing to grant amnesty to criminal suspects.[110] But the approach would not condone apprehension based on a motive of vengeance. And the use of force to apprehend and punish criminals may impose other morally relevant costs, such as the loss of human life, that must be weighed in the moral evaluation of necessity.

Whether the Council has a *legal obligation* to ensure the prosecution and punishment of persons violating international criminal law is a far more complex issue.[111] It is difficult to resolve in the space here whether there is such a norm under customary international law, given the relevance of state practice,[112] although, as I argue in Chapter 8, a strong case can be made that an obligation to prosecute and punish perpetrators of genocide ought now to be recognized as a norm of customary international law. And while, as just noted, and as elaborated in Chapter 2, fundamental ethical principles

favor punishment of criminals on a number of ethical grounds, other ethical principles allow for the possibility of forgiveness and may support alternatives to criminal prosecution and punishment, including the use, for example, of truth commissions or educational efforts aimed at reforming the moral behavior of human rights violators. These ethical principles indicate that a more careful analysis is required of whether or not the ethical principle endorsing prosecution and punishment of serious crimes is sufficiently morally compelling in relation to these other principles to warrant recognition as a general principle of moral law. It may well be that such a general principle ought to be recognized at least with respect to the most egregious crimes, such as genocide and crimes against humanity, but it is not possible to undertake the required nuanced analysis here.

UNOSOM II's efforts in Somalia to capture General Aidid and IFOR's initial approach to the apprehension of war crimes suspects in Bosnia exemplify the two extremes between which the Security Council should ethically attempt to navigate. On the one hand, UNOSOM II's use of massive firepower to hunt down Aidid resulted in an escalation of conflict in the streets of Mogadishu that in turn was likely to, and did, claim many civilian casualties. Further, these uses of force were disproportionate to the objective of apprehension and were more appropriate for an all-out war, which indeed is in substance what ensued.

IFOR's original "hands off" approach to the apprehension of indicted war crimes suspects in Bosnia, on the other hand, represents the other extreme to be avoided—a rejection of any serious efforts to take suspects into custody for fear of triggering renewed hostilities. This fear, while legitimate, must be weighed against the possibility of renewed violence arising from frustration among Bosnians that firmer action is not being taken to bring the perpetrators of the horrific crimes committed there to justice. And it must also be weighed against the independent force of the principle of moral responsibility and the principles of protecting populations and deterring future crimes. It seems clear that in Bosnia these factors point to heightened and persistent efforts to apprehend suspects, but not to the launching of a veritable war, as occurred in Somalia. Indeed, SFOR, beginning in 1998, appeared to be following such a new middle course, and in mid-2001 it made renewed attempts to apprehend Karadžić.[113] It is essential that efforts continue to apprehend indicted war crimes suspects. In this respect, it is morally problematic that KFOR was denied access to Serbia proper, thereby establishing a potential safe haven for indicted war crimes suspects such as Milošević. Nevertheless, this limitation on KFOR's jurisdiction appears to

have been morally permissible in light of the preeminent moral objective of ending the atrocities in Kosovo. Moreover, this limitation did not constitute any form of permanent amnesty for war crimes suspects.

4. *The Security Council should consider authorizing the threat or use of force against a government or political faction engaged in human rights violations in order to compel it to desist from those violations or persuade it to negotiate more seriously to end them only when the following conditions are satisfied. First, the human rights violations must be of such a character that they are likely to lead to widespread and severe violations of essential rights or to civil or interstate war. Second, diplomatic efforts, consultation, and other nonforcible methods of persuasion, including resort to the U.N. human rights machinery, or mandatory economic sanctions under Article 41, must have proved, or must be likely to prove, incapable of producing an improvement in the human rights situation. Third, the threat or use of force must be likely to reduce the violations, or prompt the violators to negotiate seriously to end them, without causing significant harm to civilians when measured against the severity of the human rights violations to be remedied, and without violating international humanitarian and human rights law as interpreted above. Finally, in accordance with the analysis in Chapter 5, it is desirable, but not essential, that at least a majority of the human rights victims support U.N.-authorized military intervention. Consent becomes less important a factor as the severity of the violations escalates.*

In most cases, a contemplated use of force that itself has the potential to injure or kill innocent civilians will only be morally justified if the human rights conditions themselves involve relatively widespread and severe violations of essential rights, or pose a high risk of leading to such violations, and if the use of force is carefully targeted to avoid civilian casualties to the extent possible and otherwise complies with international humanitarian and human rights law as interpreted in the preceding analysis. For example, the Council might conclude that a systematic campaign of discrimination against a racial or ethnic group—as occurred in Bosnia and Kosovo—is a harbinger of imminent physical harm to members of the group and may therefore justify a forcible preventive response that would pose some risk to civilians. In any case, genocide (as in Rwanda, Bosnia, and possibly Kosovo), widespread and systematic torture, severe and orchestrated attacks on civilians in violation of international humanitarian law, and large-scale willful deprivations of basic subsistence rights (as in Somalia) would most likely warrant military intervention under this standard. So would—far more controversially—

widespread and extreme restrictions on freedom of religion, conscience, or expression that cannot be morally justified.

It appears from an initial assessment that most of these criteria would have been met in the case of the NATO bombing campaign against Yugoslavia, had that campaign been authorized by the Security Council. First, the attacks against Kosovo Albanians had, by mid-March 1999, taken on a pervasive character which suggested that a large-scale and intensive campaign of expulsion and slaughter was imminent. Second, diplomatic efforts had been assiduously pursued under the auspices of the Contact Group and the OSCE, and a mandatory arms embargo had failed to deter Yugoslavia.[114] Third, given the evident success of NATO air raids in the fall of 1995 in persuading Yugoslavia to seek a peace settlement in Bosnia, it appeared that the threat or use of force against military targets was likely, at least in a relatively short time, to prompt Yugoslavia to negotiate seriously to end the oppression of the Kosovo Albanians. Fourth, a clear majority of the Kosovo Albanians supported military intervention to protect them.

The most problematic criterion is that such a use of force must not cause significant harm to civilians when measured against the severity of the human rights violations to be remedied, and that it not violate international humanitarian and human rights law. It might appear, especially in hindsight, that the attacks inflicted on the Albanians were so extensive that they justified the killing of a smaller number of Serb civilians. But according to the ethical and legal principles of necessity developed earlier, it is impermissible to undertake military action, such as bombing mixed-use structures like bridges, or using cluster bombs in areas significantly populated by civilians, that pose a very high risk of death or injury to civilians, where there is no direct protective benefit from such action. This casts doubt on the ethical, and indeed legal, permissibility of this aspect of the NATO action, although this assessment is necessarily preliminary given the limitations of this study.[115]

5. *The Security Council should authorize the use of force against an existing government to remove that government and to install a "democratic" government or one that otherwise will likely respect human rights (even if formally nondemocratic) only if the following conditions are met. First, the present government must be committing or tolerating widespread and severe violations of essential rights. Second, the degree of force employed must be unlikely to cause significant harm to civilians when measured against the severity of the human rights violations to be remedied, and must not violate international humanitarian and human rights law as interpreted above. Third,*

the contemplated use of force must be likely to succeed in installing a government that will itself respect at least essential human rights. Fourth, numerous attempts at diplomatic persuasion and consultation must have been made, and more coercive forms of nonforcible persuasion (e.g., economic sanctions under Article 41) must have been attempted, or else, if not attempted, would be likely to result in a lower level of human rights enjoyment. And fifth, it is desirable (but again not essential) that at least a majority of the human rights victims support U.N.-authorized intervention to replace the existing government.

It should be noted that these criteria are more restrictive than those for the use of force generally to put pressure on human rights violators to cease their oppression. This is because these criteria relate to the circumstances under which a government may be *overthrown* and not simply under which particular violations may be remedied through the threat or use of force. For example, the criteria require the actual presence of rampant and extreme violations of essential human rights, and not the mere threat of such violations, to justify the use of force to remove a government.

One particularly troubling issue raised by the Haiti intervention is when may a government be removed in order to restore electoral democracy. The argument in Chapters 2 and 3 suggested that the mere absence of "democratic" balloting procedures, while a violation of a fundamental human right to participate in government through consultation and elections, is not a violation of essential human rights. Accordingly, the absence of such procedures is not by itself a ground for permitting the use of force to remove an unelected government. On the other hand, force may be warranted to remove a government if the absence of elections is accompanied, as it often is, by rampant and egregious violations of essential human rights, such as government-instigated killings, torture or arbitrary arrests, or laws aimed at totally repressing freedom of religion, conscience, or expression. It is only justified, however, if the other criteria mentioned above are also fulfilled.

How does the Haiti intervention fare under these criteria? First, there is clearly a question whether the acts of murder and intimidation by armed forces under the control of Cédras, which did involve the violation of essential human rights, were on a sufficiently massive scale to satisfy the first criterion. I cannot definitively resolve this issue here. Second, the degree of force threatened to be used might well have produced excessive civilian casualties had the intervention been resisted, although the ease of a military

victory might have at least helped minimize the duration of hostilities. Third, there was a preexisting elected government that was ready to reassume power and that appeared willing to respect essential human rights. Fourth, numerous attempts at diplomatic persuasion and at economic coercion had in fact been made, without evident success in putting an end to the human rights violations, and with serious negative effects on the health and well-being of the general population. Fifth, the intervention appeared to have the support of those Haitians suffering at the hands of the regime (including Aristide himself). This analysis indicates that the first and second criteria appear to have been the most problematic.

7.4.4. Developing Guidelines for Security Council Action Under Chapter VII in Declaring Human Rights Violations as a Threat to or Breach of the Peace

At this point, it is now possible to take up a question left unanswered at the end of Chapter 4—when the Security Council *ought* to declare human rights violations as a threat to or breach of the peace under Article 39 in situations where it has the legal authority to do so. Given that the invocation of Chapter VII signals a willingness on the part of the Council to authorize force or coercive economic sanctions, Chapter VII should be resorted to relatively sparingly. Avoiding Chapter VII serves the goals of pursuing wherever possible nonforcible solutions to human rights problems and maintaining an atmosphere of cooperation with parties hosting U.N.-approved military contingents.

Nevertheless, as argued above, some degree of force or its threat may be necessary. Accordingly, in dealing with a situation of human rights violations, the Council ought to assume jurisdiction under Chapter VII *when, applying the above guidelines in advance, it concludes that the threat or use of force may be required, or that nonforcible, but nonconsensual, measures (such as economic sanctions) may be required*. This standard may open the door to more frequent reliance on Chapter VII, but the use of Chapter VII should not prevent continued efforts to involve the parties in negotiated and consensual resolutions of the root causes of human rights violations. Those efforts may still bear fruit as long as the parties understand that the invocation of Chapter VII is not always a prelude to large-scale hostile military action, but may only signal a willingness to authorize, for example, moderate uses of force to prevent wanton attacks against relief convoys.

7.5. Conclusion

The foregoing analysis has demonstrated that under an approach based on fundamental ethical principles in the U.N. Charter and contemporary international law, force may have to be used judiciously to rectify human rights violations. However, the Security Council, and U.N. member states generally, must overcome the temptation to see the use of force as a panacea. Recent experience has bitterly proven that it is not. While it can mitigate some of the worst violations, it cannot remedy their root causes, which are to be found in human minds and hearts. In the meantime, however, as suggested by Articles 39 and 42 of the Charter, with which this chapter opened, and by the subsequent quotation from the Qur'ān, fundamental ethical principles point to the importance of developing an effective enforcement capability for the U.N. and member states for the purpose of protecting human rights victims, and of a sense of duty to rise to their defense.

8 Obligations to Intervene or to Support U.N. Humanitarian Intervention

All human beings . . . are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.
—The Universal Declaration of Human Rights

Vindicate the lowly and the poor, rescue the wretched and the needy; save them from the hand of the wicked.
—Psalms 82.3–4

8.1. Introduction

In Chapter 7 I analyzed the problem of when the Security Council legally or ethically can or should authorize the use of force to achieve various human rights-related purposes. But the U.N.'s experiments with humanitarian intervention in the 1990s also raised important questions about the existence of legal or ethical *obligations* to intervene with force or to support U.N. humanitarian intervention. These questions involve three broad types of legal or ethical obligations that might be asserted. The first is an obligation of the Security Council itself to intervene in some way when gross human rights violations are occurring in a member state. The second is an obligation of U.N. member states to contribute personnel, equipment, or financing to missions that have been approved by the Security Council. And the third is an obligation on the part of the Security Council and all member states to take steps to enhance the U.N.'s ability to carry out humanitarian intervention, such as establishing a rapid deployment force (RDF). In the next two sections of the chapter I consider the historical and current debates on whether such obligations exist and what they require. In the fourth section I explore how a fresh approach based on fundamental ethical principles might address these questions.

8.2. The Historical Debate

8.2.1. Does the Security Council Have an Obligation to Intervene?

Article 24 of the U.N. Charter confers on the Security Council the "primary *responsibility* for the maintenance of international peace and security" and emphasizes that it acts on behalf of the entire membership in "carrying out its *duties* under this responsibility."[1] This language could be read as imposing a legal obligation on the Council to act to maintain international peace and security. Such an obligation is also implied by the text of Article 39, which provides that the Council "shall" determine the existence of any threat to the peace, breach of the peace, or act of aggression and "shall" make recommendations or decide what other measures should be taken. Further, at the San Francisco Conference, many delegations emphasized the responsibility that rested on the Council's shoulders. For example, the delegate from Norway stated that the "members of the Council were to be regarded as trustees of the community of nations with appropriate responsibility."[2] Of course, as noted in Chapter 4, the drafters did not refer specifically to any duty on the part of the Council to intervene in cases of severe human rights violations. But there was the suggestion that it might at least have the discretion to do so.

There are other provisions in the Charter that imply that the Council has general responsibilities as a principal organ of the U.N. to help promote respect for human rights and fundamental freedoms, one of the U.N.'s primary purposes. Under Article 24, the Security Council, in discharging its duties to maintain international peace and security, must act in accordance with this purpose, among others.[3] And the Security Council is independently bound by Article 55, which obligates the U.N. (and therefore its organs) to promote universal respect for and observance of human rights.[4] Although Article 60 does not list the Council as having a specific "responsibility" for the discharge of these functions,[5] U.N. practice has long suggested the legitimacy of Security Council concern with the promotion and protection of human rights.

During the Cold War, the Council was often prevented from exercising "responsibility" for the maintenance of peace by the permanent member veto. Nevertheless, there were cases in which members of the Council expressed the view that it had an obligation to intervene. For example, during the debate on the 1948 conflict in Palestine, the U.S. delegate urged that the Council had a *duty* under the Charter to act: "The Security Council has

a duty that is laid down in Chapter VII, and which we claim it cannot evade or avoid. The facts being perfectly clear, graphically described as a condition of warfare, how can the Security Council avoid this duty prescribed by Article 39 of the Charter?"[6]

8.2.2. Do U.N. Member States Have an Obligation to Contribute Personnel, Equipment, or Financial Support to Approved U.N. Military Operations?

The framers of the Charter resolved not to repeat the critical mistake they believed the League of Nations's founders had made in 1919—failing to give the League the military power to enforce its decisions. Indeed, in all the wartime planning for a future organization, there was a remarkable degree of consensus on the need to establish a legal obligation on the part of member states to place military contingents at the disposal of the organization.

At the 1944 Dumbarton Oaks Conference, all of the Powers, including the United States, endorsed the concept that the U.N. must have a permanent military force available to it.[7] The predecessor of Article 43 of the Charter won enthusiastic support at the San Francisco Conference.[8] Article 43 contemplates, in effect, the establishment of a permanent U.N. force comprised of national military contingents available to the Security Council for immediate call-up. It provides, in paragraph 1, that "all Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security."[9] Paragraph 3 states that agreements to make these contingents available "shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the Security Council and Members or between the Security Council and groups of Members and shall be subject to ratification by the signatory states in accordance with their respective constitutional processes."[10]

From the beginning of their consultations, the participants at the San Francisco Conference viewed the availability of such contingents as the cornerstone of the new security order. As the rapporteur of the committee charged with drafting the relevant provisions stated in his final report, the unanimous vote on the text of what became Article 42 of the Charter "renders sacred the *obligation* of *all* states to participate in the operations."[11] Under Chapter VII of the Charter, "military assistance, in case of aggres-

sion, ceases to be a 'recommendation' made to member states; it becomes for all an '*obligation*' which none can shirk."[12] Moreover, under a number of specific articles of the U.N. Charter, all member states have a positive obligation to assist in carrying out decisions and measures decided upon by the Council.[13]

As one of its first actions, the Security Council in early 1946 constituted the Military Staff Committee (MSC), which (as I explain in Chapter 9) was to exercise strategic direction over forces placed under the Council's control, and asked it to examine from the military point of view the provisions contained in Article 43. The delegations represented on the MSC unanimously agreed on a number of recommendations. However, several disagreements could not be resolved. These included, most importantly, the Soviet Union's insistence that contributions from each permanent member be exactly equal in size and composition, rather than roughly comparable. The Security Council was unable to reach a solution to this impasse, and the enterprise was abandoned, a casualty of the Cold War.[14] For the past half century Article 43 has been, politically, a dead letter.

In practice, U.N. peacekeeping missions during the Cold War relied exclusively on voluntary contributions. And no member state obligated itself under Article 43 or otherwise to provide the U.N. with military forces for use in either traditional peacekeeping operations, humanitarian intervention missions, or large-scale collective security actions.

Although participation in U.N. peacekeeping operations through the provision of troops and equipment has thus been voluntary, Article 17 of the Charter states that the expenses of the U.N. "shall be borne by the Members as apportioned by the General Assembly."[15] There was complete agreement on this provision at the San Francisco Conference.[16] But at the Conference the issue of financing U.N. military operations, as opposed to general U.N. expenses clearly contemplated by Article 17, was largely sidestepped. The general assumption of the delegates appears to have been that "the costs of military enforcement measures under Article 42 would be borne by the contributors of military contingents according to agreements concluded under Article 43, and that the great powers would bear the major part of the costs."[17]

The earliest peacekeeping operations, UNEF I and ONUC, raised the question of whether the expenses of these operations were "expenses of the Organization" subject to apportionment under Article 17 of the Charter. The Soviet bloc and France vehemently argued that they were not. The General Assembly requested an advisory opinion from the International Court of Justice, and in the 1962 *Certain Expenses* case, the Court held that

organizational expenses under Article 17 do indeed include the cost of peacekeeping operations. The Court also suggested that there is nothing in Article 43 that requires states to pay their own expenses, and that Article 43 agreements might well provide for certain costs of enforcement action to be borne by the U.N.[18] Since 1973, peacekeeping operations have been funded under Article 17 pursuant to a special peacekeeping assessment scale, which was recently reformed more closely to reflect the current economic ability to pay of each member state.[19] That scale requires the permanent members of the Security Council to pay comparatively more than their regular budget assessment rate, while developing countries pay comparatively less.

Concerns about balancing an obligation to contribute forces or financial resources to U.N. military operations against national control have always been at center stage. The Charter, primarily at U.S. insistence, sought to harmonize the requirement of a prior commitment by member states with constitutional procedures by providing, in paragraph 3 of Article 43, quoted at the beginning of this subsection, that any agreement to make forces available to the Security Council be approved in accordance with a member's own constitutional processes.[20] A similar compromise was hammered out in the U.S. Congress when it adopted the U.N. Participation Act of 1945: both houses of Congress were required to approve an Article 43 agreement, but once approved, the president was free to provide the designated forces for any particular action without further congressional assent.[21]

8.2.3. How Should the U.N.'s Military Capabilities Be Strengthened?

Despite the failure fully to implement Chapter VII of the Charter, during the Cold War a number of proposals surfaced for strengthening the U.N.'s military capabilities generally. None of these were aimed directly at humanitarian intervention. For example, the U.N.'s 1950 action in Korea was assembled on an emergency basis and represented an *ad hoc* response to the North Korean invasion. To address such breaches of the peace on a more systematic basis, the Uniting for Peace Resolution recommended, following the Korea model, that each member state "maintain within its national armed forces elements so trained, organized and equipped that they could promptly be made available, in accordance with its constitutional processes, for service as a United Nations unit or units, upon recommendation by the Security Council or the General Assembly."[22] The Resolution established a Collective Measures Committee to study this idea,[23] but in the end, in the tense atmosphere of the Cold War, its proposals were never adopted.

8.3. The Current Debate

8.3.1. Is There an Obligation on the Part of the Security Council to Intervene to Prevent or Rectify Severe Human Rights Violations?

The Council's new experiments with humanitarian intervention in the post–Cold War era have provoked a debate on whether it has a legal or ethical obligation to act decisively (including with military force as necessary) to respond to situations involving gross human rights violations. Many observers, including member states, have harshly criticized the Council for not taking more robust military action in the face of humanitarian crises. In so doing they have stressed its obligation to act. For example, in the words of the Omani delegate after the 1995 massacres in the safe areas of Srebrenica and Zepa, "Oman believes that there is an obligation—a moral obligation, a political obligation—on all members of the international community to work together united with one voice that would say 'No' to 'ethnic cleansing', 'No' to rape of Muslim women and 'No' to the continued violations of safe areas."[24] Non-Muslim states also expressed the view that the Council had a moral responsibility to act in Bosnia. The Venezuelan delegate, for example, earlier insisted that a "new world order cannot be based on a Security Council that is not capable of stopping genocide."[25]

In the case of Rwanda, the Nigerian delegate urged all states to contribute to an expanded UNAMIR because of the principle of the unity of the human family: "We call on the international community not to abandon the innocent civilians in Rwanda, because to let them down would be to let ourselves down. After all, we are part of the same common humanity."[26] And the Spanish delegate declared that the Council might be obliged to act under the Genocide Convention: "The international community cannot stand idly by when faced with these facts, particularly in view of the binding terms of the [Genocide Convention], which can be considered to form part of general international law."[27] Prime Minister Edouard Balladur of France later defended France's intervention on grounds of moral duty: "Was the entire international community to watch helplessly as such a tragedy unfolded? France did not think so and believed it had a moral duty to act without delay to stop the genocide and provide immediate assistance to the threatened populations."[28]

The independent commission appointed by Secretary-General Annan to investigate the U.N.'s role in Rwanda declared starkly: "The United Nations failed the people of Rwanda during the genocide in 1994."[29] It pointed a

finger, too, directly at the Security Council: It found that the Council's decision to reduce the size of UNAMIR was "difficult to justify" and declared that the "Security Council bears a responsibility for its lack of political will to do more to stop the killing."[30] The commission recommended that the secretary-general initiate "an action plan to prevent genocide involving the whole UN system." It affirmed: "More than five years after the genocide in Rwanda, the time has come to make the obligation under the Genocide Convention to 'prevent and to punish' genocide a concrete reality in the daily work of the United Nations."[31] The commission asserted that "the members of the Security Council have a particular responsibility, morally if not explicitly under the Convention, to react against a situation of genocide."[32]

Many members of the Security Council, when it had the opportunity to consider the commission's report in April 2000, concurred with the commission's critical findings about the Council's behavior, as well as with the commission's general recommendations.[33] Thus, for example, the Jamaican delegate declared that the "Security Council, the United Nations system and, indeed, the international community as a whole have a moral obligation to ensure that we do, in fact, have the will to prevent another genocide from ever occurring."[34]

The OAU's International Panel of Eminent Personalities similarly criticized the Security Council's failure to respond to the genocide in Rwanda in the following blunt terms:

> At the UN, the Security Council, led unremittingly by the United States, simply did not care enough about Rwanda to intervene appropriately. What makes the Security Council's betrayal of its responsibility even more intolerable is that the genocide was in no way inevitable. First, it could have been prevented entirely. Then, even once it was allowed to begin, the destruction could have been significantly mitigated. All that was required was a reasonable-sized international military force with a strong mandate to enforce the Arusha agreements. Nothing of the kind was ever authorized by the Security Council either before or during the genocide. . . . The significance of the Security Council's action should not be underestimated: Its refusal to sanction a serious mission made the genocide more likely.[35]

In Secretary-General Annan's 1999 report on the fall of Srebrenica, he engaged in a candid admission of moral culpability: "Through error, misjudgement and an inability to recognize the scope of the evil confronting us,

we failed to do our part to help save the people of Srebrenica from the Serb campaign of mass murder."[36] And he asserted, in his 2000 Millennium Report, that where crimes against humanity "occur and peaceful attempts to halt them have been exhausted, *the Security Council has a moral duty to act on behalf of the international community*. The fact that we cannot protect people everywhere is no reason for doing nothing when we can."[37]

After the commencement of the NATO bombing campaign against Yugoslavia in March 1999, the European Union declared in a statement to the Security Council that "we, the countries of the European Union, are under a moral obligation to ensure that indiscriminate behaviour and violence, which became tangible in the massacre of Racak in January 1999, . . . are not repeated. We have a duty to ensure the return to their homes of the hundreds of thousands of refugees and displaced persons."[38] The Canadian delegate affirmed that "we cannot simply stand by while innocents are murdered, an entire population is displaced, villages are burned and looted, and a population is denied its basic rights merely because the people concerned do not belong to the 'right' ethnic group."[39] The Malaysian delegate echoed this sentiment: "The international community cannot afford to stand idly by."[40] The Argentinian delegate declared that the "obligation to protect and ensure respect for [human] rights falls to everyone and cannot and must not be debated."[41] The Bosnian delegate regretted that NATO had to act without the sanction of the Security Council, but stated that "we would be even more concerned and dismayed if the Security Council were blocked and there were no response to the humanitarian crisis and to the legal obligation to confront ethnic cleansing and war crimes abuses."[42] The representative of Slovenia emphasized the special responsibility of the permanent members in this regard, and implicitly chastised Russia and China for evading such a responsibility.[43] Various scholars have expressed a similar view of the obligations of the Council and U.N. member states in cases of extreme human rights violations.[44]

Furthermore, as Chapter 3 noted, many states have become parties to a number of important international human rights treaties. Some of these, like the Genocide Convention and the 1984 Torture Convention, create a system of quasi-universal jurisdiction among states parties to prosecute and punish individuals who commit the crimes they enumerate. A growing number of scholars are now arguing that these types of treaties impose on the parties, and on the U.N. itself as the sponsor of the treaties, a legal obligation to take all possible steps to thwart such human rights violations, protect their victims, and prosecute and punish their perpetrators.[45]

On the other hand, many states, U.N. officials, and legal scholars have advanced the view that the overall design of the Charter imposes on the Council no legal duty to act in cases of gross human rights violations. For example, legal scholar Hans Kelsen argued that the Council is only "authorised, not obliged, to intervene with enforcement measures in a matter of domestic jurisdiction in case of a threat to, or breach of, the peace."[46] Similarly, law professor Sean D. Murphy, in a comprehensive and sophisticated study of U.N. humanitarian intervention, states that "to date . . . the notion of a 'duty to intervene' by the United Nations, regional organizations, or states does not appear present in international law."[47] He notes that such a duty, while present in the national laws of some countries, does not exist in all the principal legal systems of the world. Therefore, he concludes, it cannot constitute a "general principle" of international law. Nor, he maintains, is it recognized in customary international law.[48] Murphy argues that recognition of such a duty is problematic, and that if it ever did become a general principle of law, it "probably should be limited to situations where the rescue is based on the widespread endangerment of life (thus, the situation in Haiti would appear not to qualify) and where the risks to the intervening forces are minimal or nonexistent."[49]

The Council itself, in May 1994, appeared to take a restrictive view of its own obligations to undertake peacekeeping or humanitarian intervention operations by adopting cautious guidelines for initiating new peacekeeping missions. These guidelines outlined various criteria, including whether regional organizations are able to assist in resolving the situation; whether a cease-fire exists and the parties are committed to a political settlement; whether a clear political goal exists that can be reflected in the mission's mandate; whether a precise mandate for the operation can be formulated; and whether the safety of U.N. personnel can be reasonably assured.[50]

8.3.2. Are There Obligations to Contribute to U.N. Humanitarian Intervention Operations?

The advent of U.N. humanitarian intervention during the 1990s precipitated a heated debate on whether there are at least moral obligations to support U.N. peacekeeping and humanitarian intervention operations. As noted in Chapter 1, in May 1994, for example, Secretary-General Boutros-Ghali called the failure of Western countries to commit troops in Rwanda a "scandal."[51] In this connection, the secretary-general proposed rescuing Article 43 from the cobwebs of the Cold War.[52] A smattering of U.N. member states and

their leaders, including President Boris Yeltsin of Russia, rhetorically endorsed the idea of resuscitating Article 43.[53] And various scholars joined these government officials in supporting Article 43 agreements and their possible use to create an RDF.[54]

Nevertheless, states have demonstrated their true attitudes by their actions—or in this case, inaction. Apparently no U.N. member state is actively negotiating an Article 43 agreement with the U.N. With respect to U.S. policy, guidelines issued by the Clinton Administration in 1994 declared that the United States will support neither the execution of a formal Article 43 agreement nor the establishment of a standing U.N. army (presumably including an RDF).[55] And a bill introduced in May 2001 in the U.S. Congress would have prohibited members of the U.S. armed forces from participating in U.N. military operations under Chapter VI or VII of the Charter after the Rome Statute of the International Criminal Court entered into force unless certain exemptions from prosecution by the Court were guaranteed for participating U.S. personnel.[56] In short, the idea of "obligatory" contributions is simply off the table. Every state wants to reserve the right to decide when, where, and how to participate in U.N. humanitarian intervention operations—if at all.

Further, despite the International Court of Justice's holding in the *Certain Expenses* case, many member states, including the United States, have been remiss in meeting their obligations to finance U.N.-commanded peacekeeping and humanitarian intervention operations. And member states have shown a preference for funding directly and voluntarily multinational operations not under U.N. command, thereby circumventing the U.N. budgeting process and U.N. oversight. With respect to U.N.-commanded operations, permanent members of the Security Council like the United States have been unhappy with the U.N.'s special peacekeeping assessment scale, but in December 2000 the U.S., after vigorous lobbying efforts, persuaded other U.N. members to revise the scale to reduce the U.S.'s proportion of the peacekeeping budget.[57] At the same time, Secretaries-General Boutros-Ghali and Annan repeatedly emphasized the legal obligation of member states to pay their peacekeeping and regular dues.[58]

8.3.3. How Should the U.N.'s Capacities for Humanitarian Intervention Be Strengthened?

The U.N.-commanded humanitarian intervention operations launched during the 1990s exhibited serious problems with slow deployment. Once the Security Council has given the green light for a new operation, the U.N. must

begin the laborious process of contacting potential participating states and making arrangements to acquire the necessary personnel and equipment.[59] As a practical matter, only a few countries, most importantly the United States, can offer the U.N. the massive airlift and sealift capacity necessary rapidly to transport troops to the scene of a crisis.

Many observers have argued that the delays in the U.N. reaction to the situations in Somalia, Bosnia, and Rwanda, among others, resulted in the intensification of those crises, and that earlier intervention could have saved many lives. For example, Major-General Romeo Dallaire, force commander of UNAMIR at the time the April 1994 genocide erupted, has stated:

> If I had had [a standby rapid reaction force] available to me while I was the UNAMIR Force Commander sometime in mid-April 94, we could have saved the lives of hundreds of thousands of people. As evidence, with the 450 men under my command during this interim, we saved and directly protected over 25,000 people and moved tens of thousands between the contact lines. What could a force of 5,000 personnel have prevented? Perhaps the most obvious answer is that it would have prevented the massacres which took place in the southern and western parts of the country because they did not start until early May—nearly a month after the war had started.[60]

In addition to problems with achieving rapid deployment, U.N.-commanded peacekeeping and humanitarian intervention operations have tended, until recently, to be relatively small in size when compared with the magnitude of the tasks entrusted to them. For example, in Bosnia, U.N. forces organized to secure humanitarian relief efforts soon found themselves being asked to deter attacks on the U.N.-declared safe areas. These forces were not adequately equipped—or sufficient in number—for such a role.[61]

U.N. forces have also been plagued by difficulties in acquiring adequately trained troops as well as the necessary equipment—difficulties with particularly devastating consequences when the U.N. attempts forcible intervention.[62] In recent years, the U.N. has endeavored to ameliorate many of these problems, for example by creating standardized peacekeeping training manuals, while continuing to rely primarily on national training programs.[63]

In response to deficiencies such as these, governments and other observers have made a number of proposals for the establishment of an RDF that might be able to undertake some functions of humanitarian intervention. For example, after the U.N.'s slow response to the genocide in Rwanda, the delegate

from Djibouti declared that "if there is a lesson to be learned from this incredibly violent episode, it may be that . . . the United Nations must have a force not defined by national politics, a standing multinational force at the disposal of the Security Council. It is an unbelievable travesty for Rwanda to burn while the United Nations fiddles. The crime may lie, in fact, not in the violations of human rights and the killings, but in the fact that this can and perhaps will happen again, and we will be just as ill-equipped to deal with it then as we are now."[64]

In his January 1995 *Supplement to an Agenda for Peace,* Secretary-General Boutros-Ghali endorsed creating an RDF, at least for use in emergency situations that would otherwise call for more traditional peacekeeping troops: "Such a force would be the Security Council's strategic reserve for deployment when there was an emergency need for peace-keeping troops. . . . The value of this arrangement would of course depend on how far the Security Council could be sure that the force would actually be available in an emergency. This will be a complicated and expensive arrangement, but I believe that the time has come to undertake it."[65]

However, there was no chorus to join the secretary-general's *a capella* voice. The United States declared that it would not support an RDF,[66] and the Security Council as a whole likewise failed to endorse the idea.[67]

The United States and the Security Council were more enthusiastic about the "stand-by arrangements" program launched by Secretary-General Boutros-Ghali in 1993. The purpose of the program was to "have a precise understanding of the forces and other capabilities a Member State will have available at an agreed state of readiness, should it agree to contribute to a peace-keeping operation."[68] The program was limited by its terms, however, to traditional peacekeeping operations, rather than those involving peace enforcement, including humanitarian intervention. In this connection, a number of Western states—members of a group of sympathetic countries informally known as "Friends of Rapid Reaction"—proposed plans for an RDF, constituted as a pretrained multinational force that could be made available pursuant to the standby arrangements program. The headquarters of such a U.N. Standby Forces High Readiness Brigade was inaugurated in September 1997 in Copenhagen.[69] The Panel on United Nations Peace Operations welcomed this initiative and recommended that member states be encouraged to enter into partnerships with one another within the context of the standby arrangements system "to form several coherent brigade-sized forces, with necessary enabling forces, ready for effective deployment" in a short period of time after the adoption of a Security Council resolution.[70]

In the aftermath of the atrocities in East Timor, Secretary-General Annan also endorsed the idea of an RDF, arguing that it was important to develop a rapid response capability for the U.N.[71] And the Security Council, in an April 2000 resolution, while not specifically recommending an RDF, expressed its "intention to ensure, where appropriate and feasible, that peacekeeping missions are given suitable mandates and adequate resources to protect civilians under imminent threat of physical danger, *including by strengthening the ability of the United Nations to plan and rapidly deploy peacekeeping personnel, civilian police, civil administrators, and humanitarian personnel, utilizing the stand-by arrangements as appropriate*."[72]

Scholars and interested organizations also set to work after the Gulf War developing practical plans for creating a U.N. RDF. For example, Sir Brian Urquhart, who for forty years was in charge of U.N. peacekeeping, became a leading exponent of the concept of establishing a relatively small all-volunteer force of highly trained troops, "willing and authorized to take combat risks and representing the will of the international community."[73]

At present, however, no steps have been undertaken to implement any of these proposals for an RDF or any other form of permanent U.N. military force capable of engaging in humanitarian intervention as opposed to traditional peacekeeping tasks. Member governments, including the United States, are squeamish about the potential dangers faced by such a force, not to mention the cost of such a proposal and the diminution in national control. The United States's exclusive reliance on NATO during the 1999 Kosovo crisis demonstrates, again, its current insistence on operating through NATO, rather than on strengthening U.N. military capabilities.

8.4. Developing a Fresh Approach to Obligations

8.4.1. Identifying Relevant Fundamental Ethical Principles

It is clear from the analysis in Chapter 2 that fundamental ethical principles include the existence of a *moral obligation* of all individuals to help others in need and to promote and protect their human rights to the extent of one's ability. This obligation is a clear moral imperative, as suggested by Article 29 of the Universal Declaration and passages from revered moral texts, although the actual steps to be taken to discharge the obligation are apparently left to the discretion of the individual.[74] Moreover, it is clear from fundamental ethical principles, particularly the principle of the unity of the

human family, that one's "abilities" are to be assessed by oneself expansively rather than selfishly. Further, we saw in Chapter 2 that fundamental ethical principles emphasize the imperative of acting and the moral precedence of deeds over words.[75] And again, in keeping with the principle of the unity of the human family, these individual obligations are fundamentally humanity-oriented and world-embracing.

However, we have seen that fundamental ethical principles, and in particular the principles of respect for communal diversity and unity and for government, simultaneously recognize independent duties to lesser communities, including one's state. These group-oriented duties are "added to" the duty of concern for all human beings; they do not undercut or detract from this core and central moral duty. At the same time, their existence does mean that where one's resources are limited, it may be morally justifiable to provide greater assistance to fellow citizens who are in need than to citizens of other states who are in comparable need, if a choice has to be made.

The principle of "stacked" responsibilities also implies that those outside particular social groups such as states do not share the same level of moral responsibility for group members as other group members do. Outsiders are morally entitled to call upon these members to take primary responsibility for protecting the human rights of their compatriots. But outsiders are never absolved from their own independent, core responsibilities to protect the human rights of those within other social circles. These responsibilities persist even where it is the failure of others inhabiting the same circle to meet their primary obligations that requires outside action and concern. Ultimately, the preeminent ethical principle of the unity of the human family makes the human rights of all the concern and obligation of all.

We saw in Chapter 2 that fundamental ethical principles clearly impose moral obligations on governments, too. For example, governments have important obligations in their capacity as trustees for the welfare of their own citizens. But governments also have special obligations of their own toward individuals in other countries. In this connection, I argued in Chapters 2 and 3 that fundamental ethical principles impose a strong moral obligation on governments to take appropriate action (potentially military action) in defense of the oppressed in other states, preferably in cooperation with other governments. In addition, I contended that by reason of this morally essential obligation there should be recognized as a general principle of moral law, and a norm of *jus cogens,* a legal obligation of states (and also of international organizations) to take some reasonable measures, either individually or col-

lectively, within their abilities to prevent or stop widespread and severe violations of essential human rights.

This "background theory" of ethical and moral obligations derived from fundamental ethical principles helps to identify certain general principles of moral law, as just noted, and to quantify and interpret the legal obligations imposed by the U.N. Charter and contemporary international law. At the same time, the proposed approach does not require that all moral obligations necessarily be treated as grounds for imposing legal obligations. In the following subsections I apply this approach to the three practical issues in the historical and current debate that I have earlier identified.

8.4.2. Does the Security Council Have an Obligation to Intervene?

The foregoing analysis of the moral obligations of individuals and governments to protect human rights clearly establishes that the Security Council, as a body composed of state governments, and as an entity wielding some power over resources of its own, also has moral obligations to protect the human rights of all human beings. It cannot simply be considered a "political" body immune from moral obligations, because fundamental ethical principles insist that *all* political actors have moral obligations.

The Security Council's obligations are especially compelling when essential human rights are being systematically and flagrantly violated. Indeed, as I noted, many Council member governments, during the debates on humanitarian intervention, emphasized the moral obligations incumbent on the Council to act. These rhetorical affirmations of the Council's moral duties are congruent with fundamental ethical principles. The more difficult problem to be resolved, however, is whether the Council has a *legal* obligation under the Charter to act, and if so, what it has a legal obligation to do.

I noted in section 8.2 that the Charter itself, in "plain" language in Article 24, confers on the Council a "primary responsibility" to "maintain" international peace and security, which entails certain "duties." This is the language of legal obligation. This language imposes a legal duty of trusteeship, requiring the Council and its member governments to use their powers for the maintenance of international peace and security. This legal duty of trusteeship is confirmed and strengthened by the fundamental ethical principle of trusteeship elaborated in Chapter 2.

Further, Article 39's use of the imperative "shall" with reference to determinations of threats to or breaches of the peace, and corresponding action, imports a similar concept of legal obligation.[76] Such legal obligations are

consistent with the Charter's objects and purposes, which include to "maintain international peace and security."[77] This interpretation appears to be confirmed by the *travaux préparatoires,* which reflect several affirmations by delegates of the Council's "responsibility" to maintain international peace. Of course, during the Cold War that sense of "responsibility" was effectively eviscerated because the Council was politically unable to act. But as we have seen in the current debate on U.N. humanitarian intervention, many member states have once again reaffirmed the Council's responsibilities under the Charter.

In Chapter 4 I developed the argument that widespread and severe violations of essential human rights ought to be considered (ethically and legally) as *ipso facto* a "breach of the peace" within the meaning of Article 39. I also argued that any significant human rights violations could constitute a "threat" to international peace. If this account is accepted, then it follows that the Council has a legal as well as moral responsibility to consider and to take appropriate action under Chapter VII if it determines the existence of significant human rights violations.

Such an obligation to act in response to significant human rights violations does not arise solely through the textual exegesis of Chapter VII of the Charter undertaken in Chapter 4. The Council also has direct obligations to promote and protect human rights by virtue of its status as a primary organ of the U.N., which is charged with promoting human rights and fundamental freedoms as one of its primary purposes. It is true that Chapter IX of the Charter, and in particular Article 60, purports to vest responsibility for the discharge of the U.N.'s obligation under Article 55(c) to promote universal observance of human rights in the General Assembly and ECOSOC, without mentioning the Security Council.[78] However, under the interpretive approach developed in Chapter 3, this mere textual omission would not absolve the Council of legal duties imposed on the U.N. as a whole that are also supported by the fundamental ethical principle requiring all actors to promote and protect human rights, especially in light of the Charter's human rights purposes. The approach would support, as a better interpretation, the conclusion that while the Assembly and ECOSOC are charged with primary responsibility for promoting human rights, the Council retains a secondary legal responsibility to promote human rights simply by virtue of being a U.N. organ. This legal responsibility is reinforced by the moral responsibility the Council shoulders to safeguard human rights as a consequence of the political resources it possesses under the U.N. Charter. These resources include its powers to authorize mandatory sanctions as well as military action.

The Council also has independent moral responsibilities, and in some cases legal obligations, to respond to gross human rights violations under the terms of other treaties, including the Genocide Convention, the Geneva Conventions, and the Torture Convention. These moral responsibilities and legal obligations exist even though the U.N. as an institution is not a party to these treaties and therefore cannot be legally obligated by them directly.

The U.N. (and therefore the Security Council) is morally bound by the principles of these treaties for at least two reasons. First, the U.N. played a role (directly in the case of the Genocide Convention and the Torture Convention) in their adoption. Second, individual member states of the U.N., including members of the Security Council, have clear legal obligations as parties to these treaties. For example, all parties to the Genocide Convention "undertake to prevent and to punish" genocide as a crime under international law.[79] Under an approach to treaty interpretation based on fundamental ethical principles, this language ought to require that parties take every step legally possible to prevent genocide, including referral of the matter to the Security Council and encouragement of the Council to act.[80] The moral duty of each individual state party to take action to prevent violations of essential human rights would reinforce its legal duty to act under the Convention, a duty that many states have simply ignored. And the U.N., as an organization of states, most of whom are parties to the Genocide Convention, would then itself have at least a moral obligation to help these states fulfill their legal obligations to prevent and punish genocide.

Turning to legal obligations under these treaties, I argued in Chapter 3 that the U.N. and the Security Council are *legally* obligated to observe norms that are now part of customary international law. The approach to the identification of customary legal norms developed in Chapter 3 called for the recognition, as binding customary international law, of norms otherwise qualifying as candidates for being considered customary law under traditional rules if the norms further important fundamental ethical principles. Under this approach, the norm established by the Genocide Convention requiring the prevention and punishment of genocide, including the apprehension and prosecution of perpetrators of genocide, ought now, after a half century of adherence to the Convention by a large majority of U.N. member states,[81] to be considered part of customary international law, and therefore as legally binding on the Security Council. Resort to fundamental ethical principles, including a principle requiring that every effort be made to prevent harm to others, especially harm on such a devastating scale as genocide, helps to tip the scales in favor of recognizing this as a customary legal

obligation, despite possible doubts about its status under traditional sources analysis. These doubts might arise, for example, because of the lack of universal adherence to the Genocide Convention or the absence of a consistent state *practice* of preventing genocide or of rescuing its victims.

For similar reasons, fundamental ethical principles may help resolve doubts about whether other norms requiring the prevention, prosecution, and punishment of crimes against humanity, war crimes, and torture are now part of customary international law, and therefore are also legally binding on the Security Council. However, it is not possible in this book to undertake the more thorough investigation that would be required to establish the status of these norms as customary law, and the precise nature of the obligations they impose, even with the added "weight" provided by fundamental ethical principles.[82]

Finally, there are general principles of law that may require some form of U.N. intervention in response to human rights violations. Most importantly, as noted above and as suggested in Chapter 3, there ought to be recognized a general principle of moral law requiring governments, international organizations, and other actors to take some reasonable measures within their abilities to prevent or curb widespread and flagrant violations of essential human rights, including genocide, crimes against humanity, and rampant and systematic war crimes or torture. The Security Council is bound by this general principle of moral law.

The Security Council is thus legally obligated to take some reasonable measures to prevent or stop widespread and severe violations of essential human rights to the extent of, and within the boundaries of, its lawful powers under the U.N. Charter, as analyzed in Chapter 4. In keeping with that analysis, it is empowered and obligated to prevent and punish genocide because genocide, as a flagrant and large-scale violation of essential human rights, is a "breach of the peace." It can and must also take appropriate steps to respond to human rights violations that may be harbingers of an imminent campaign of genocide, because these violations would constitute "threats to the peace." And more generally, it is competent and obligated to take steps to prevent or put an end to all widespread and flagrant violations of essential human rights, or more sporadic violations that threaten to become widespread or to ignite or exacerbate internal or external war, thus amounting to a "threat to the peace."

I have thus far argued that the Council *does* have a *legal* obligation to take some potentially effective action in response to significant human rights violations based on the text of the Charter and on the above analysis of

customary international law and of general principles of law, including general principles of moral law. But is it required to authorize military intervention to thwart these violations?

Consistent with the foregoing exploration of the nature of moral and legal obligations to protect human rights, and of the analysis in previous chapters, the Council is never legally obligated, *ipso facto,* to decide on military intervention. Chapter VII grants the Council wide latitude for discretion. I have argued that this discretion must legally be exercised in accordance with relevant legal norms, as identified and interpreted by reference to fundamental ethical principles, but those norms and principles, we have seen, do not explicitly require military intervention. Even where military intervention may well be the best moral response, as in the case of genocide, for example, it cannot and should not be viewed as a legally mandated response, given the complex moral calculus involved.[83]

Fundamental ethical principles and these legal norms suggest, instead, that the Council is legally obligated under Article 39 of the Charter *in good faith* to examine any situations coming to its attention that *could potentially* be considered a threat to or breach of the peace. The Council should be considered legally required, based on an informed and thoughtful examination of the matter, to make an appropriate determination of whether particular human rights violations constitute a threat to or breach of the peace as defined in Chapter 4, to consider its moral or legal obligations to act as explored above, and to decide on a suitable response, which may involve military action, as suggested by the guidelines in Chapter 7. In the case of widespread and severe violations of essential human rights, it legally must take some action in response that has a reasonable chance of putting an end to the violations.

In short, both legally and morally, the Council cannot simply ignore situations involving human rights violations that might constitute threats to or breaches of the peace. It must at least carefully weigh these situations against the standards developed in earlier chapters. Doing so will require much enhanced cooperation with the secretary-general, the high commissioner for human rights, and other U.N. human rights organs, including the Commission on Human Rights.

This analysis of the Council's legal and moral obligations has a variety of other implications for its current practice regarding humanitarian intervention. First, it suggests that much of the rhetoric of certain Council members concerning human rights violations and its moral duty to respond is accurate. Second, however, the Council has also been far too tentative in indi-

cating how it will respond to gross human rights violations. Its May 1994 guidelines for authorizing new peacekeeping operations are unnecessarily restrictive and are based on an assessment of the Council's abilities that is too conservative. For example, they simply accept the U.N.'s current emasculated financial condition and member states' reluctance to suffer casualties as *faits accomplis,* without undertaking the more forward-looking assessment of abilities required by fundamental ethical principles and by the general principle of moral law mandating action in keeping with a state's or organization's abilities. Unfortunately, the failure to act as a result of applying such "objective" factors as those listed in the 1994 guidelines—which the United States argued it was doing in postponing Council action on Rwanda in May of 1994—can be morally and legally culpable. The Council's expression of a new determination to help protect civilians to the extent of its abilities, evident in its resolutions regarding East Timor and Sierra Leone, is certainly a step in the right direction.

Third, inevitably, in light of the U.N.'s current financial problems, the Security Council may have to make some hard choices about which situations deserve a strong response, especially where adequate responses appear to require a military component. In making such cost-benefit assessments, the Council may have to consider the nature and severity of the human rights violations occurring in different crises. The framework developed in earlier chapters placing priority on essential human rights may assist the Council in this challenging task of *triage*. Further, in deciding precisely how to respond to any given crisis, the Council must consider the practical likelihood of success of various courses of action, including the threat or use of military force, which in turn depends on a constellation of political factors. For these reasons, its responses to various human rights situations may well vary. Such morally principled variation does not by itself constitute a failure by the Council to fulfill its legal obligations under the Charter or general international law, as suggested by the analysis in Chapters 5, 6, and 7.

Fourth, all individual members of the Security Council have their own legal obligations to assist the Council in fulfilling these legal responsibilities. Their legal obligations arise from their service on the Council in the capacity of legal trustees for the entire U.N. membership. At a minimum, these obligations require that as Council members they seek to encourage the entire Council to take some reasonable action in response to widespread and severe violations of essential human rights, including through the introduction of appropriate resolutions.

Another, and related, implication of an approach based on fundamental

ethical principles is that a special ethical responsibility to protect human rights does devolve on the five permanent members of the Security Council. Morally, at least, the permanent members have special obligations because of the principle articulated earlier that those with greater resources—in this case, resources that include the political stature of a permanent seat as well as the power of the veto—bear correspondingly more salient obligations to protect the human rights of others. This sense of responsibility implicit in the text and structure of the Charter is confirmed by the *travaux,* in which many delegates stressed the special duties of the permanent members.

Moreover, as established above, all permanent members are bound, like all U.N. member states, by a customary norm requiring them to take steps to "prevent and punish" genocide. More generally, they are bound by the general principle of moral law requiring all states to take some reasonable steps, within their abilities, to prevent or thwart widespread and severe violations of essential human rights. They also have the same minimal legal obligations as all Council members to act as trustees for the benefit of the entire U.N. membership when exercising their powers on the Council. Accordingly, they are legally obligated to use their influence to allow the Council to take appropriate action in response to genocide and other widespread and flagrant violations of essential human rights, and to refrain from using their veto power in bad faith in a way that would frustrate effective Council action against genocide or similarly egregious systematic violations. (I return to the problem of the veto in Chapter 10.)

Finally, fundamental ethical principles suggest, in keeping with the principle of unity in diversity and the principle that states, like individuals, have "stacked" responsibilities toward social groupings of which they are members, that regional organizations have additional responsibilities toward states or people residing in states within their regions. This indicates the importance, explored in the next chapter, of developing mechanisms for enhancing cooperation between the Security Council and regional organizations in organizing and undertaking U.N.-authorized humanitarian intervention.

8.4.3. Is There an Obligation to Participate in or Contribute to U.N. Humanitarian Intervention?

The foregoing analysis suggests that when the Council decides on the need for and appropriateness of military action to prevent or stop human rights violations, all governments have a moral obligation to participate and make contributions that are consistent with their material resources. This moral

obligation derives from the fundamental ethical principle requiring action to thwart human rights violations, as well as the principle of cooperation and collective action with other states to achieve improvements in human rights conditions.

The question might be asked whether the general principle of moral law requiring some reasonable response to massive and severe violations of essential human rights also makes contributions legally obligatory where the Security Council has authorized a multinational military operation as just such a response. This is a difficult issue to resolve. It is important to keep in mind that the general principle of moral law, being narrowly tailored, gives states a significant degree of discretion. This suggests at a minimum that if certain states choose not to participate in Council-approved collective action, then they at least individually ought to take some action, diplomatic or otherwise, to assist in ending the violations, and certainly ought not to impede the collective action being undertaken by other states.

On the other hand, the existence of a moral obligation of participation and contribution does reinforce the *legal* obligation contemplated by Article 43. Moreover, it demands that Article 43 not be treated as a "dead letter" and that it be rescued from the treaty morgue. The principle of "no backsliding" from a legal obligation supported by fundamental ethical principles when a treaty text clearly indicates the obligation and its *travaux* confirm that obligation, as here, mandates continued emphasis on the obligation as a legal duty. In short, Article 43 ought to be taken seriously as a legal obligation. Under that article, the Council legally is obligated to take steps to initiate negotiations with member states as soon as possible. Moreover, in light of the special moral responsibilities devolving upon the permanent members of the Council, they ought to take the lead in advocating the initiation of Article 43 negotiations with all member states. They should serve as a model of behavior for other member states to emulate by executing their own agreements with the Council.[84]

Article 43 of the Charter acquires additional moral weight because it seeks to harmonize a moral duty to preserve peace (and therefore also to stop widespread and severe violations of essential human rights) with the principle of respect for the autonomous choices of states, within moral limits. It does so by "only" requiring the negotiation of agreements, which member states can freely shape to meet their own needs within the boundaries of any guidelines laid down by the Security Council.

Further, the conclusion and honoring of Article 43 agreements would increase the Council's certainty that it would have pretrained troops available—

thereby enhancing its ability to respond quickly to humanitarian crises. The key feature of such agreements is that having made the commitment, a state would not legally have the right to refuse to participate in a particular mission authorized by the Council. At the very least, the undertaking of a legal commitment to provide forces would place participating states under strong political and moral pressure to honor their pledges.

Recent experiences with U.N. humanitarian intervention operations demonstrate that a system of completely voluntary participation has its costs. There are certain tragic conflicts in which no single nation perceives that it has a sufficiently compelling national interest to become involved, certainly in view of the expected sacrifices in lives and treasure. A situation such as Rwanda or Kosovo presents a dilemma of collective action.[85] Every nation has the incentive to refrain from acting, in the hope that some other countries will make the necessary sacrifices. But if many nations contributed and made comparatively minor sacrifices, the situation could be brought under control much more quickly, to the clear benefit of the beleaguered local population.

Indeed, the doctrine of collective security in its pure form was intended to deal with state security as a problem of collective action. It proposes to deter states otherwise bent on waging aggressive war by calling for all states voluntarily to bind themselves not to initiate war and to come to the military aid of any other state that is the victim of an armed attack. It aims to achieve effective deterrence by rendering the obligation of mutual military assistance automatic; a state is not allowed to "opt out" of assistance because the attack on the victim state poses no threat to its own interests. It thus reflects a "one for all and all for one" approach to interstate security.[86]

In collective action dilemma situations such as those involving either state security or gross human rights violations, a strong consequentialist argument can be made on moral grounds that states should be compelled to contribute forces to joint military action. Indeed, this was the intent of Article 43. It is noteworthy that in the area of financing, member states theoretically accept the principle, embodied in Article 17 of the Charter, that they are all required to contribute to the funding of peacekeeping operations. The dilemma of collective action, coupled with the moral desirability of the ends to be achieved through collective U.N. measures and, indeed, the fundamental ethical principle supporting cooperative action with other states to protect human rights, again support the revival of Article 43.

However, the revival of Article 43 would raise an important ethical problem. If states were required to contribute troops to U.N.-approved human-

itarian intervention missions, which, we have seen, must often operate in extremely volatile environments with a high risk of casualties, then states would be forcing military personnel to put their lives at risk, not for national security or the protection of nationals, but for the safeguarding of the human rights of non-nationals. While, as I established above, all individuals may have a moral obligation to protect the human rights of others, doing so at the risk of one's own life is a supererogatory act that morally should not be compelled without at least some form of prior consent on the part of the personnel involved. This consideration strongly points to the desirability of establishing volunteer contingents that could be contributed pursuant to Article 43 agreements. (I return to this issue again in Chapter 9.)

It is also morally important that the burden of participation in humanitarian intervention be equitably shared. This is required by the very notion of a common responsibility of all individuals, and all states, to protect the human rights of all other human beings. But how is "equitable" to be defined? Both the Golden Rule and the principle that those with greater resources and abilities have correspondingly greater responsibilities point in a particular direction. They suggest a minimal level of burden-sharing for all states, because that is what each would expect of other contributors. But they also imply that this minimal level should be supplemented by further levels of contribution in accordance with a state's capabilities, which could include personnel, equipment, and of course, cash. If Article 43 were revived, the Council would accordingly need to establish general guidelines to ensure that contributions are generally fair and equitable according to this overall standard. These moral conclusions are very much in keeping with the philosophy underlying the current system of U.N. financial assessments under Article 17—that is, determination of assessments according to a member state's "ability to pay."

Thus far I have argued that a perspective anchored in fundamental ethical principles would support the reactivation of Article 43 to provide forces—ideally, volunteer forces—for humanitarian intervention operations. But that same perspective also highlights the limitations of a purely "legal" approach to Article 43. As Article 43's own depressing history demonstrates, even formal legal commitments will only be observed if states develop a *moral* sense of obligation to contribute. In a similar vein, political scientist Inis L. Claude Jr. has emphasized the need for a subjective sentiment of interdependence for collective security to function effectively. He argues that the "system will work only if the peoples of the world identify their particular interests so closely with the general interest of mankind that they go beyond mere recognition of

interdependence to a feeling of involvement in the destiny of all nations."[87] Pending political action to revive Article 43, member states can already work toward recognition of such a moral obligation in their own policies. They can take appropriate action to make voluntary contributions of resources toward U.N. peacekeeping operations within the framework of the current standby arrangements program and can further voluntarily provide these or additional contributions toward humanitarian intervention operations with a stronger enforcement mandate, such as KFOR.

Regarding the financing of humanitarian intervention authorized by the Security Council, similar fundamental ethical principles are operative. The clear language of Article 17, which is not considered a "dead letter" (but is at risk of quickly becoming so, given the current persistence of arrears by many states), imposes a legal obligation to make financial contributions to U.N.-commanded operations. This legal obligation is supported by fundamental ethical principles. Further, the ethical principles defining "equitable sharing" generally legitimize the U.N.'s current apportionment principle focusing on ability to pay. But they also support continued efforts to reform the U.N. financing system to ensure that assessment formulas accurately measure current economic ability to contribute. And from a moral standpoint, member states of the U.N. must do a far better job of honoring their financial commitments to the U.N. then they have done in recent years.

An approach such as that proposed here would be broadly pragmatic, but would not assume that the U.N.'s budget should remain etched in stone under all circumstances. On the contrary, this approach would evaluate the U.N.'s financial needs in light of the tasks that ought to be entrusted to it, rather than attempt to whittle away those tasks in order to stay within the confines of a preconceived financial ceiling. These needs include, we have seen, the capacity for military intervention for human rights purposes. Of course, member states should continue to emphasize pruning the U.N.'s more wasteful bureaucratic overgrowth, thereby effecting financial savings. But that effort should not compromise the U.N.'s primary missions of securing international peace and promoting universal enjoyment of human rights.

8.4.4. Is There an Obligation to Improve the U.N.'s Capacities for Humanitarian Intervention?

With respect to reform of the U.N.'s capacities to engage in effective humanitarian intervention, it is doubtful, even under a general principle of moral law requiring some reasonable action in response to widespread and flagrant

violations of essential human rights, that states are *legally* obligated to enhance the U.N.'s ability to engage in humanitarian intervention in any particular way—except, as just argued, through the negotiation of Article 43 agreements in good faith, as required by the terms of the Charter. This is because a significant degree of discretion is allowed to states under that general principle of moral law, and there are no other norms of international law requiring particular action.

However, fundamental ethical principles do indicate the *moral* imperative of pursuing such reforms vigorously. Some of these principles, as noted above, point in the direction of the desirability of relying on precommitments of forces by U.N. member states to any type of military arrangement that might be contemplated. In addition to having such direct implications for force structures, these principles suggest that various alternative reform proposals, including proposals for a standing RDF, or one composed of national contingents, should be evaluated in light of their consequences in terms of the realization of fundamental ethical principles.

With respect to an RDF, having an RDF capable of carrying out humanitarian intervention as well as peacekeeping missions could produce certain advantages. Such a force, by possessing the ability to intervene quickly even in "hot" conflicts, could save significant numbers of lives. Moreover, the existence of such a force would enhance the credibility of the Council and thereby deter would-be human rights violators. Of course, proposals for creating an RDF as an integrated force, or through the conclusion of agreements to provide contingents, are likely to be perceived, in the current political climate, as posing a significant threat to national control. Nevertheless, if support for the concept of shared humanitarian intervention responsibilities can be developed over time and through visionary leadership invoking fundamental ethical principles, the idea of such agreements or of reviving Article 43 may well not be as unrealistic as it seems today.

The creation of larger reserve forces—whether through binding Article 43 agreements or through other arrangements—would give the U.N. itself the capacity to conduct large-scale humanitarian intervention operations when necessary. This is a capacity, as to peace enforcement at least, that the U.N.'s founders viewed as essential. The need for some moderate enforcement capability has been demonstrated, for example, by the U.N.'s reliance on NATO air support in Bosnia, by the insistence of the parties to the Dayton Peace Accords that IFOR (and later SFOR) have more robust rules of engagement, and by the stronger mandate similarly given to KFOR. On the other hand, the establishment of such a reserve force, especially pursuant to

Article 43 agreements, would represent a major break with traditional notions of state sovereignty. This is particularly so because participating states would be forsaking control over a sizable number of their troops and significant military materiel.

It appears from the above analysis that the U.N. needs the capability to intervene quickly in human rights–related crisis situations involving the need for some threat or use of force other than in strict self-defense, as well as the capability to sustain over an extended period of time humanitarian intervention operations that may require an ongoing credible threat of force. These requirements suggest that it would be desirable to work toward establishing both (1) an RDF of modest size, able to be mobilized quickly, having unified training, and with the capability of engaging in humanitarian intervention involving the threat or use of force beyond self-defense; and (2) national contingents to serve as a larger-scale "reserve" force available to the Security Council upon its call, composed of troops which have undergone extensive training and preparation alongside those of other member states. Moreover, Article 43 would appear to be a useful vehicle for constituting an RDF and a large-scale reserve force for all the reasons articulated at San Francisco more than fifty years ago.

Enthusiasm for any of these types of proposals has faded in the current political environment. But the fundamental ethical principles recognized in the U.N. Charter and contemporary international law imposing a demanding moral obligation on all states individually and collectively to protect human rights require that these proposals continue to be considered seriously and that they, or similar proposals, be implemented.

8.5. Conclusion

An approach to humanitarian intervention and international law based on fundamental ethical principles clearly indicates that U.N. member governments and the Security Council have strong moral and legal obligations to all human beings on the planet, and that talk is cheap. What counts is the resolution to put sympathetic thoughts into appropriate action—to, in the words of Article 1 of the Universal Declaration, as quoted at the outset of this chapter, "*act* towards one another in a spirit of brotherhood," and in particular, as indicated by the following passage from Psalms, to "rescue the wretched and the needy" and to "save them from the hand of the wicked."

In the next chapter I turn to a more detailed examination of the controversial question of *how* multinational forces engaged in humanitarian intervention with the authorization of the U.N. Security Council ought to be commanded and constituted.

9 The Command and Composition of Multinational Forces Engaged in Humanitarian Intervention

The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine.
—The U.N. Charter

If you should hit on the idea that this or that country is safe, prosperous or fortunate, give it up, my friend, and do not entertain it in any way; for you ought to know that the world everywhere is ablaze with the fires of some faults or others.
—The Buddha (from Ashvaghosha, "Nanda the Fair")

9.1. Introduction: Defining the Problems of Command and Composition

What degree of control should the U.N. Security Council exercise over humanitarian intervention operations? In particular, should it command and direct them, supervise them, or merely authorize states themselves or regional organizations to undertake them? If it directs them, should it establish an integrated force permanently under U.N. command or instead rely on the assembly of national contingents? If it delegates enforcement authority to member states or regional organizations like NATO, how should it exercise supervision? What responsibilities does it have to ensure clear mandates for forces operating under its authorization or direction? How should it obtain access to expert military advice? What should be the national makeup of forces engaged in humanitarian intervention? Should such forces make use of contingents of personnel already enlisted in national military forces or rely on volunteers?

These questions—which I will refer to in a shorthand way as those involving "command and composition"—have been located at the stormy center

of the current debate on U.N. humanitarian intervention. They have evoked emotional opinions, and actions, on the part of member governments. At first blush, it may seem that the approach developed in Part Two could contribute little to these highly politically charged yet also technical military questions. But the approach can, at least, provide some legal and ethical principles at the conceptual level. I review these principles and their possible implications in the fourth section of the chapter, following a brief summary of the historical debate on these issues and the current debate on their role in humanitarian intervention.

Before proceeding to this analysis, it is helpful to clarify some definitions. Command issues involve three interrelated concepts: political control, strategic direction, and operational command. Political control connotes the authority to establish the broad political objectives of an operation. Strategic direction can be defined as "the translation of . . . political directives into military terms."[1] Finally, operational command involves the authority to commit specific military units to particular actions in the field to effect the military strategy of an operation. Operational command is sometimes referred to as "operational control." Although these distinctions are critical, I will often refer to these concepts together as "command and control," or more simply, as "command."

9.2. The Historical Debate

9.2.1. The Debate on the Command and Composition of Multinational Forces in 1945

The Charter represented a significant innovation in the command and control of international military forces. The Council was to be possessed of its own forces (contributed by member states), which it would control and over which it would exercise strategic direction and operational command during the period of their engagement. At the 1944 Dumbarton Oaks Conference, the delegates agreed that a centralized military staff was needed, in the form of a Military Staff Committee (MSC), which would advise the Council on the coordination and command of the contingents placed at the Council's disposal and be responsible for their strategic direction. The participants decided that the MSC would consist of the chiefs of staff of the permanent members, but that the MSC could invite other U.N. member states to participate in its work when needed.[2] As noted in Chapter 8, however, because of the Cold War the MSC never became functional.

The Dumbarton Oaks Conference, and later the San Francisco Conference, also approved Chapter VIII of the Charter.[3] Within Chapter VIII, Article 52 encourages the existence of regional arrangements or agencies relating to peace and security and pacific settlement efforts through these arrangements. Article 53 provides that the Security Council can utilize regional arrangements or agencies for enforcement action under its authority where appropriate, and that no enforcement action shall be taken by regional arrangements or agencies without the authorization of the Council. Article 54 requires that the Council be kept fully informed of regional activities.[4] Under the original Charter scheme, the United Nations was to enlist the assistance of regional organizations in peace enforcement primarily through the mechanism of special agreements under Article 43, which could be concluded with members or "groups of Members."[5] Finally, Article 48 of the Charter allows the Security Council to direct or authorize either individual states or "appropriate international agencies of which they are members"—which could include regional organizations—to take such action, including presumably enforcement action, as it considers appropriate.[6]

9.2.2. The Debate on the Command and Composition of U.N. Forces in Practice

The Korean War was the first occasion on which U.N. member states had to grapple with the practical problems of command and control of a U.N.-approved military operation. In Resolution 84, the Security Council recommended that member states coordinate their forces under the unified command of the United States and requested the United States to provide the Council with periodic reports on the action taken under the unified command.[7] As a practical matter, the U.S. government exercised command over the "U.N." forces in Korea.[8] The Collective Measures Committee established during the Korean crisis recommended, obviously following the model of the Korean action, that a U.N. force composed of national contingents be commanded by an "executive military authority"—namely, the military authorities of a particular member state or group of states, which might include the victim state.[9]

The development of the command and composition of U.N. *peacekeeping* forces took a very different course. Secretary-General Hammarskjöld laid down, in formulating guidelines for UNEF I, the principle that strict allegiance by the U.N. force commander to the secretary-general, who in turn was responsible to either the Security Council or the General Assembly, was essential to preserving the independence of U.N. military forces. He

affirmed that the "authority [of the commander] should be so defined as to make him fully independent of the policies of any one nation."[10] Such independence, he believed, was critical to the ability of the U.N. to win the consent of the states involved and to operate successfully in support of its limited military functions. Under the UNEF I structure, which in turn served as a precedent for all later armed peacekeeping operations, national contingents retained their "identity and organizational unity." They were controlled by their own national commanders, but national commanding officers were in turn responsible to the U.N. force commander.[11] This system of unified command under an international civil servant (the force commander) was in sharp contrast to the Korean system of command by a particular member state.

Secretary-General Hammarskjöld also developed the principles of diversity of composition and of the exclusion of permanent members in formulating plans for UNEF I.[12] In subsequent peacekeeping operations, too, the U.N. generally avoided the use of contingents from the superpowers or their closest allies in order to minimize the appearance of partiality to the superpowers.

With respect to recruitment, U.N. peacekeeping operations have always relied on contingents of national enlisted personnel, rather than volunteers, and there has never been an "integrated," standing U.N. peacekeeping force. However, in 1952 Secretary-General Trygve Lie proposed to the Collective Measures Committee the creation of a U.N. Volunteer Reserve of about 50,000 to 60,000 troops. Volunteers would be members of their national reserves and the conditions of their service would be determined by agreements between the U.N. and each participating state. The Collective Measures Committee failed to reach agreement on the secretary-general's volunteer reserve initiative, and it was withdrawn.[13]

9.3. The Current Debate

9.3.1. The Command and Composition of U.N. Peacekeeping Forces in General

Under current peacekeeping practice, and building on the UNEF I precedent, the secretary-general appoints a force commander, with the approval of the Security Council, and presents detailed military plans to the Council. The force commander is given command authority in the field over the operation and is operationally responsible for the performance of all its tasks. In many recent operations, the force commander has reported to the secretary-general through a civilian "special representative" of the secretary-general.

The governing documents of U.N. peacekeeping operations have provided generally that the chain of command runs down from the force commander through the commanders of national contingents.[14]

9.3.2. The Command and Composition of Operations Involving Humanitarian Intervention or Enforcement

The Gulf War first raised the issue in the post–Cold War political environment of how a major enforcement operation should be commanded and composed. It represented a return to the Korean model of authorizing a particular state or states to undertake an operation with the U.N.'s approval, but not under its direction. However, in the case of the Gulf War, no particular state was designated to act as agent for the U.N. Instead, states already participating in the arms and economic embargo against Iraq—without being mentioned by name—were authorized to take "all necessary measures" to restore Kuwait's independence. After the Security Council adopted the resolution authorizing forcible action, it ceased to play any supervisory role or to exercise any political control or strategic direction over the operation. And in keeping with the Korean precedent, the United States exercised *de facto* command over the participating national forces without any U.N. involvement.[15]

The experience with humanitarian intervention operations—including U.N.-commanded operations such as UNPROFOR and UNOSOM II as well as those organized under an ad hoc coalition model, such as UNITAF in Somalia or KFOR in Kosovo—has underscored the difficulties of coordinating command of multinational operations under U.N. auspices. Such coordination has been difficult to achieve within the U.N. military hierarchy itself, between the U.N. and regional organizations such as NATO, and between the U.N. and those member states contributing troop contingents. These difficulties reveal continuing disagreement among member states about how U.N. humanitarian intervention operations should be commanded.

A particular problem that has bedeviled U.N.-commanded peacekeeping operations, especially those that have attempted forcible humanitarian intervention, is the tendency of national contingent commanders to seek instructions from their home governments on strategic and military questions going beyond standard administrative matters. This tendency has often had devastating consequences. A compelling example is the death of eighteen U.S. soldiers in Somalia in October 1993 as a result of a raid on the headquarters of General Aidid. This raid was ordered, without notification to UNO-

SOM II headquarters, by the U.S. Central Command in Florida.[16] Because UNOSOM II headquarters was not informed in advance, no UNOSOM II contingents were able to reach the captured and wounded U.S. soldiers in time to save their lives.[17] In view of these tragic experiences, the Report of the Commission of Inquiry on UNOSOM II concluded that the "principle of unified command applicable to United Nations peace-keeping operations is even more essential in peace enforcement operations."[18]

Further, Secretary-General Boutros-Ghali emphasized, in his March 1994 report on improving U.N. peacekeeping, the need to ensure that participants in U.N. peacekeeping operations remain under the "exclusive operational command of the United Nations during the period of their assignment."[19] And the independent U.N. commission on Rwanda concluded, based on a review of problems with achieving unity of command in UNAMIR, that "it is essential to preserve the unity of United Nations command and control, and that troop contributing countries, despite the domestic political pressures which may argue the reverse, should refrain from unilateral withdrawal to the detriment and even risk of ongoing peacekeeping operations."[20]

The U.N. has also continued to experience difficult problems of coordination with the forces of regional organizations such as NATO. For example, UNPROFOR, while adhering fundamentally to a command-and-control structure modeled along the lines of more traditional peacekeeping operations, enlisted the assistance of NATO in enforcing a no-fly zone over Bosnia. This pioneering attempt to employ NATO air power in the service of a U.N. peacekeeping operation was, however, marred by numerous public disagreements on strategy between the U.N. commanders in the field and NATO.

Although Secretary-General Boutros-Ghali generally saw greater respect for U.N. operational control as the answer to the coordination problems in Somalia and Bosnia, the U.S. government drew a different lesson—one arguably at odds with the facts of the October 1993 incident in Somalia. The U.S. government inaccurately implied publicly that the troops involved in the incident were operating under U.N. operational control, or at least that the U.N. was to be blamed for the disaster.[21] By mid-1994, the United States was showing an unwillingness to permit U.S. soldiers to serve in U.N.-commanded peacekeeping forces where those forces could be involved in combat, and instead indicated that in these cases it would agree to participate only in ad hoc coalitions under U.S. or NATO operational control. In keeping with this approach, the United States insisted that the Security Council resolution on Haiti authorize the United States and other nations—not a U.N.-commanded peacekeeping force—to use "all necessary means"

to oust the military rulers there. Only once that task was accomplished (and any risk of combat had subsided) would the torch be passed, as it was in March 1995, to a U.N.-commanded force. The United States followed a similar policy on Bosnia. It would not permit U.S. ground troops to participate in any force deployed there under U.N. operational control—even if a meaningful peace agreement had been reached. Instead, it insisted on exclusive NATO control. This policy was accepted by the parties by the time they were coaxed to the bargaining table in the fall of 1995. This trend in U.S. government views reached its culmination in the NATO bombing campaign against Yugoslavia and in the organization of KFOR, which also followed an ad hoc coalition model and was controlled by NATO.

The new policy was first reflected in *PDD 25,* issued in 1994 as the outcome of the Clinton Administration's comprehensive review of U.S. policy on U.N. peacekeeping. *PDD 25* states in particular that

> the President retains and will never relinquish command authority over U.S. forces. On a case by case basis, the President will consider placing appropriate U.S. forces under the operational control of a competent U.N. commander for specific U.N. operations authorized by the Security Council. The greater the U.S. military role, the less likely it will be that the U.S. will agree to have a U.N. commander exercise overall operational control over U.S. forces. Any large scale participation of U.S. forces in a major peace enforcement mission that is likely to involve combat should ordinarily be conducted under U.S. command and operational control or through competent regional organizations such as NATO or ad hoc coalitions.[22]

PDD 25 furthermore asserts that U.S. commanders will always have the ability to communicate with their U.S. superiors and to ignore instructions they regard as illegal under U.S. or international law or as outside the U.N.'s mandate.[23]

As *PDD 25* suggests, the issue of placing U.S. troops under U.N. "command" has touched off an emotional debate in the United States. During the mid- to late 1990s, the Congress considered legislation that would generally prohibit U.S. troops from being placed under the command or operational control of the U.N. unless the senior military commander of the U.N. force or operation was a U.S. military officer serving on active duty. Any U.S. forces serving under U.N. command or control could continue to report independently to U.S. military authorities, and U.S. forces could be withdrawn at any time.[24]

At least some of the U.N.'s military fiascoes in conducting humanitarian intervention have been due to the absence of clear mandates. As noted in Chapters 1 and 7, it was often not obvious to participating member states or regional organizations, or U.N. force commanders, just what their purpose was, and whether or when they were entitled to use force. For example, by repeatedly using the phrase "all necessary means" to connote the authorization of forcible actions, without specifying which means might be necessary in the situation at hand, the Council has effectively abdicated responsibility to provide guidelines for the use of force. In some cases this has led to an apparent overabundance of caution in the absence of explicit Security Council guidance. Such caution was exemplified by Secretary-General Boutros-Ghali's conservative approach to utilizing NATO air power in Bosnia. In other cases, however, this open-ended delegation of decision-making authority has encouraged U.N.-authorized forces to employ force in a manner that was excessive, as in the case of UNOSOM II.

To accommodate the desire of states such as the United States for greater control over operations possibly involving combat, the Council has been increasingly willing to delegate humanitarian intervention responsibilities to member states or regional organizations, as just noted. When it has delegated enforcement responsibilities, the Council has allowed individual member states or regional organizations like NATO to assume strategic direction and operational control of the mission. This practice contrasts starkly with the U.N.'s traditional emphasis on the integrity of U.N. command, but of course echoes the arrangements in Korea and the Gulf War.

In the case of Rwanda, the Council authorized France and certain member states cooperating with France to establish and conduct a "temporary operation *under national command and control* aimed at contributing, in an impartial way, to the security and protection of displaced persons, refugees and civilians at risk in Rwanda."[25] The Security Council further requested participating states to coordinate closely with UNAMIR and to report to the Council on a regular basis. The Security Council resolution approving a U.S.-led invasion of Haiti was modeled in important respects on the resolution sanctioning the French presence in Rwanda. In particular, the Security Council acted under Chapter VII to authorize member states "to form a multinational force *under unified command and control,*" the implication being that the United States would supply the required unity of command.[26] The Council called for an advance team of military observers to establish means of coordination with the multinational force, to monitor the operations of the force, and to prepare for the deployment of UNMIH to replace the force. Again,

the Council requested the member states participating in the multinational force to report to the Council at regular intervals. The Council adopted a similar procedure vis-à-vis IFOR and SFOR, operating in Bosnia.[27]

The Security Council followed this same principle for KFOR, although it specified that the deployment of KFOR would be "under United Nations auspices." In particular, Resolution 1244 decided "on the deployment in Kosovo, under United Nations auspices, of international civil and security presences, with appropriate equipment and personnel as required." The resolution further authorized "Member States and relevant international organizations to establish the international security presence in Kosovo as set out in point 4 [of the peace agreement, attached as annex 2] with all necessary means to fulfil its responsibilities."[28] Point 4 of the agreement stated in part that the "international security presence with substantial North Atlantic Treaty Organization participation must be deployed under unified command and control."[29] Resolution 1244 also requested the secretary-general to report to the Council at regular intervals on the implementation of the resolution, "including reports from the leaderships of the international civil and security presences."[30] The Security Council's declaration that the international security presence was to function "under United Nations auspices" left ambiguous just how much supervision and control would be exercised by the U.N., and by the U.N. civilian mission, UNMIK, in particular. In practice, in August 2000 the special representative for Kosovo, Dr. Bernard Kouchner, who headed UNMIK, issued regulations that provided that "all KFOR personnel shall respect the laws applicable in the territory of Kosovo and regulations issued by the Special Representative of the Secretary-General insofar as they do not conflict with the fulfilment of the mandate given to KFOR under Security Council resolution 1244 (1999)."[31]

KFOR appeared, in turn, to provide yet another precedent for INTERFET, the Australian-led multinational force that was deployed to East Timor in September 1999. In Resolution 1264, the U.N. Security Council authorized "the establishment of a multinational force under a unified command structure" and granted states participating in the coalition the right to "take all necessary measures" to fulfill its mandate.[32] The Council anticipated that the coalition force would be replaced by a U.N. peacekeeping operation, UNTAET, which, as noted in Chapter 1, it was.[33]

The trend toward delegation has been prompted, not only by demands for greater control by participating states in dangerous operations, but also by a recognition by the U.N. of the limits on its abilities quickly to assemble a U.N.-commanded force in situations involving the likelihood of casu-

alties. For example, as noted in Chapter 7, both Secretaries-General Boutros-Ghali and Annan ultimately supported resort to ad hoc coalitions as the only workable means of undertaking enforcement action. Secretary-General Annan affirmed in his July 1997 reform proposals that "under present conditions, *ad hoc* Member States coalitions of the willing offer the most effective deterrent to aggression or to the escalation or spread of an ongoing conflict. As in the past, a mandate from the Security Council authorizing such a course of action is essential if the enforcement operation is to have broad international support and legitimacy."[34]

As suggested by Secretary-General Annan's statement, in most situations the practice of delegation has resulted from mere expediency. The Council perceived that the U.N.'s own organization was not capable of performing the required military functions, or powerful members of the Council refused to operate under U.N. command. In the case of Bosnia, however, the Council was willing to approve the deployment of IFOR by NATO, not simply because it was the expedient course, but also because of NATO's persuasive claim that the parties to the Dayton Peace Accords were confident that NATO could enforce them. And in Kosovo, the Council, in authorizing KFOR as a NATO-led force, could rely on the existence of an agreement with Yugoslavia calling for such a force. It also bowed, however, to the political reality that NATO countries insisted on a leadership role and on operating outside a U.N. command structure.

Despite its prevalence, the practice of delegation has been highly controversial, even within the Security Council chamber. The debate has often revolved around issues touched upon in preceding chapters. These include (1) whether such delegation is legal under Chapter VII of the Charter; (2) whether delegation to coalitions of "willing" states (or interested regional organizations) is more or less likely to win the consent of target states and their citizens; (3) whether ad hoc coalitions are more likely to act partially in the interests of one or more powerful intervening states; (4) whether delegation increases the risk of excessive uses of force, particularly when the empowering resolution uses the expansive phrase "all necessary means"; and (5) whether delegation represents an abdication of the Council's primary responsibilities under the Charter, or instead is a necessary measure to establish, in light of current political realities, an effective deterrent or fighting force. The practice of delegation has also highlighted the problem of defining the Council's proper relationship with regional organizations.

First, some scholars have argued that delegation is illegal under the provisions of Chapter VII of the Charter on the ground that Chapter VII

contemplated both strategic direction and operational control by the Council and the MSC.[35] Others, however, have defended its legality in light of the broad competence and discretion granted to the Security Council under Chapters VII and VIII.[36]

Second, some observers have argued that delegation risks allowing powerful states to impose their will on weaker ones, without the consent of the target government or the local population. It is notable in this regard that Yugoslavia had desired that KFOR be under the command of the Security Council, not NATO, and that it "reflect equal, regional and political representation which includes participation by countries such as Russia, China, India and non-aligned and developing countries from various regions of the world."[37] On the other hand, many developing states have argued that regional organizations, or prominent states in a particular region, "understand the dynamics of strife and cultures more intimately than outsiders, and thus they are in a better position to mediate."[38] Their military involvement, if any, may also be less suspect in the eyes of factions and the local population for the same reason, at least in particular cases.

In this connection, many regional organizations, in anticipation of a greater role in undertaking humanitarian intervention, whether as an integral part of U.N.-commanded operations or as a member of ad hoc coalitions, have attempted to strengthen their ability to do so. Before the Kosovo intervention, NATO, for example, had increased its involvement in multilateral peace and security operations such as IFOR and SFOR. Other regional organizations have also broached the idea of establishing more permanent capabilities to undertake regional peace and security operations. During the late 1990s African countries and the Organization of African Unity took steps, in consultation with the United States, to establish an African "crisis-response" force consisting of battalions from a number of African states.[39] As we will see in more detail in Chapter 11, the Economic Community of West African States (ECOWAS) has also engaged in a number of peacekeeping and peace enforcement tasks, primarily in Liberia and Sierra Leone.

Third, many observers have suggested that delegation gives a green light to historically powerful states to use their military assets to pursue policies that benefit themselves or their allies. For example, during the Council's debates on the establishment of IFOR, the representative of Pakistan affirmed that the "erroneous belief that global security can be subcontracted to regional or subregional organizations is intrinsically flawed, as it implicitly presupposes that members of a particular region are roughly equal to each other in size as well as economically and militarily. In reality this is not so.

The doctrine would benefit regional Powers, while smaller countries would be placed at a disadvantage. . . . Once a conflict has erupted, the United Nations should make strong interventions through the full use of peace-keeping and the enforcement of collective security."[40] Such dominance by one or more powerful states has often led to frictions among contingents participating in ad hoc coalitions. On the other hand, such dominance has been regarded by some observers as inevitable in the case of multinational coalitions, because coalitions require a militarily strong state, such as the United States or France, to take the lead in order for them to maintain internal cohesion while engaging in risky military actions.

Fourth, and similarly, it has been argued that the involvement of dominant states in ad hoc coalitions without close Security Council supervision or control makes the excessive use of force more likely. For example, Secretary-General Boutros-Ghali, despite his own ultimate advocacy of ad hoc coalitions for peace enforcement tasks because of the U.N.'s limited capabilities, cautioned that the delegation of enforcement tasks to groups of member states "can have a negative impact on the Organization's stature and credibility. There is also the danger that the States concerned may claim international legitimacy and approval for forceful actions that were not in fact envisaged by the Security Council when it gave its authorization to them."[41] And during the debate on Resolution 940 on Haiti, the Mexican delegate complained about the lack of a time-frame for the action and that "a kind of carte blanche has been awarded to an undefined multinational force to act when it deems it to be appropriate. This seems to us an extremely dangerous practice in the field of international relations."[42]

Fifth, observers have differed over whether delegation allows the Security Council to avoid its Charter-based responsibilities, or whether instead, while not ideal, it represents a pragmatic compromise that recognizes the reality that powerful states with the military assets necessary to undertake humanitarian intervention want significant control over those assets. For example, during the debate on Resolution 929, authorizing a French presence in Rwanda, many states, such as New Zealand, strongly expressed their preference for fortifying UNAMIR, a U.N.-commanded force,[43] and ultimately five Council members, including New Zealand, abstained in the voting on the resolution.[44] In fact, when the Council later debated Resolution 940 on Haiti, the delegate from New Zealand emphatically argued that "unless absolutely exceptional circumstances exist the United Nations itself should assume [humanitarian intervention] responsibilities. . . . The resource and management difficulties that the United Nations faces are undeniable, but

we believe they should be seen as challenges to be overcome, not as excuses for throwing in the towel and abrogating the responsibilities for international-dispute settlement under United Nations auspices which New Zealand and other Governments expect this Organization to fulfil."[45]

On the other hand, the U.S. government in particular has consistently stressed its preference for ad hoc coalitions on pragmatic grounds, including on the ground that forces of regional organizations often have superior military capabilities to U.N.-commanded forces. As the U.S. delegate stated during the debate on the deployment of UNITAF: "Cooperation will have to occur on a case-by-case basis, given the complexity of the post-cold-war order."[46] In the Council's discussions on authorizing French intervention in Rwanda, the U.S. delegate again supported the use of coalitions of the "willing and able to supplement United Nations peace operations in particular situations."[47] The U.S. representative similarly defended the Haiti action as consistent with "the precedents of Kuwait and Rwanda."[48]

Some states, while generally approving of the practice of delegation, have emphasized the necessity for strict Council supervision. Thus, for example, the French representative stressed with respect to KFOR that "it is the Security Council that is authorizing the Member States and the international organizations concerned to establish the international security presence in Kosovo."[49] The Canadian delegate stated that the adoption of Resolution 1244 "marks the effective re-engagement of the Security Council in the search for peace in Kosovo. . . . The Security Council can and must play a constructive leadership role in overseeing this process."[50] The representative of the Russian Federation likewise affirmed that the activities of the "international civil and security presences" in Kosovo "are to be carried out under the thorough political control of the Security Council."[51] The representative of the United Kingdom, on the other hand, emphasized the need for unified command under NATO, stating that "it will be essential to have a unified NATO chain of command under the political direction of the North Atlantic Council in consultation with non-NATO force contributors."[52]

Finally, as discussed at greater length in Chapter 8, a number of U.N. reform proposals have been made that relate to the command and composition of forces engaged in humanitarian intervention. For example, many proposals for an RDF or reserve forces have involved consideration of whether the U.N. ought to employ integrated forces versus national contingents, and volunteers as opposed to enlisted personnel from national armies. And the Gulf War experience—and disenchantment with the lack of any central U.N. command presence—spurred proposals for revitalizing the MSC.

In *An Agenda for Peace,* for example, Secretary-General Boutros-Ghali suggested giving a more responsible role in overseeing U.N. enforcement action to the MSC.[53] The permanent members of the Council—other than France, and to some extent Russia—were, however, unenthusiastic about the idea.[54] Nevertheless, in a resolution on peacekeeping adopted in November 2000, the Security Council undertook "to consider the possibility of using the Military Staff Committee as one of the means of enhancing the United Nations peacekeeping capacity."[55]

9.4. Developing a Fresh Approach to Issues of Command and Composition

In keeping with the approach developed in Chapter 3, I first consider the impact of specific legal norms in the Charter relating to the command and composition of forces engaged in humanitarian intervention under the authority of the Security Council, as interpreted in light of fundamental ethical principles. Where the Council has legal discretion, I then examine how fundamental ethical principles should guide its decision-making on command and composition issues. In undertaking this examination, I first review those principles exerting a direct "deontological" pull toward particular force structures, and then consider how different structures would affect, consequentially, realization of these and other principles.

First, the principle of respect for established laws and legal institutions underscores the importance of a careful analysis of the text of the U.N. Charter as well as subsequent U.N. practice for guidance on problems of command and force composition. The U.N. Charter clearly contemplated that the Security Council would have ultimate powers of strategic direction and operational command, through the MSC, over forces placed at its disposal. It also foresaw that these forces would be quite diverse in national composition, having been constituted through Article 43 agreements entered into, theoretically, by all U.N. member states. The *travaux préparatoires,* together with the MSC's subsequent abortive efforts to operationalize these concepts, further indicate the clear intentions of the Charter's framers in this regard. The Korean experience provided a very different model for both command and composition. But the debate that this model provoked among contributing states during the U.N.'s first half century at least showed the continuing normative force among many member states of principles of U.N. command and diverse composition. These principles, we saw, became hallmarks of the improvised practice of U.N. peacekeeping. In short, this

half-century record demonstrates that many U.N. member states, as well as the Charter's framers, placed significant emphasis on them.

On the other hand, the text of the Charter, together with the *travaux,* disclose that while multinational forces were to be made available to the Council to allow it to fulfill its primary responsibility of maintaining international peace, the Council was to have considerable discretion in determining just how to respond to a threat to or breach of the peace, including making recommendations or adopting binding decisions. The types of recommendations it can make are not subject to any express limitations. And the Charter does not rule out in principle the delegation of enforcement tasks to particular member states or to regional organizations. On the contrary, Article 53 allows the Security Council to call upon regional organizations (at least those qualifying as "regional arrangements or agencies") to take enforcement action on its behalf. And Article 48 leaves open the possibility that the Council may request that action be taken only by "some" U.N. members.[56] In short, the legality of delegation and of the predominance of one or several states in coalitions charged with certain enforcement responsibilities by the Council seems to be evident.[57]

Even if the Council has wide legal discretion in determining how humanitarian intervention operations are to be commanded and composed, however, fundamental ethical principles should guide its exercise of this discretion. The principle of the unity of the human family at the least indicates that approaches to command and composition issues that are animated by prejudices against troops of different nationalities must be rejected. Military competence ought to be determined independently of national origin. There will undoubtedly always be some frictions between contingents in a humanitarian intervention operation hailing from different countries and cultures, as UNOSOM II, UNAMIR, KFOR, and other multinational operations experienced. But under the approach analyzed here the objective would be to ameliorate the frictions rather than allow them to serve as a pretext for independent action that contravenes an existing command or coordination structure. In this connection, it is necessary for participating states to avoid the trap, implied by the quotation from the Buddha with which this chapter opened, of assuming that their own national armed forces are inherently superior to, or free of the faults of, others.

Indeed, the principle of human unity suggests a positive goal of building new systems of command and coordination among military personnel from different U.N. member states. It points to the need to develop such systems notwithstanding inevitable logistical obstacles, including differences in lan-

guage, military and social culture, and training and equipment, not to mention more potent inhibitors such as cultural prejudices. It therefore suggests that member states should not reflexively turn to unilateral intervention or to the ad hoc coalition model of action that has become so popular out of concern over such challenges. Instead, the principle of human unity indicates that what is important is pursuing the goal of *coordinated action* among member states under *effective Security Council supervision,* free of prejudices among contingents or individual soldiers of different nationalities. It implies, moreover, that the Council, as a symbol of unified action, has a crucial role to play in exercising political control over U.N.-authorized military forces.

Similarly, the principle of human unity places a premium on ensuring the widest possible participation in U.N.-authorized humanitarian intervention operations. It encourages approaches that draw upon the resources of many different member states, to the extent appropriate for a particular human rights problem or conflict.

The companion principle of respect for national and regional diversity underlines that even an approach to command and composition issues guided by recognition of the unity of the human family ought to be flexible. This principle counsels against rigid adherence to particular organizational conceptions that might be seen as suppressing the identity and role of national contingents, such as the establishment of an integrated, standing U.N. RDF under unified command and control. Other principles, as already noted, may point in this direction, but it is not *mandated* by the legal norms in the Charter or by the fundamental ethical principles identified in Chapter 2.

The preeminent principle of unity in diversity suggests that a variety of force structures might be suitable according to the needs of particular humanitarian intervention missions. Some might have more centralized command structures than others, and many might rely primarily on forces of regional organizations or of states in a particular region. Indeed, the principle suggests not only the legitimacy, but the general desirability, of involvement by states in the affected region or relevant regional organizations, in recognition of their correspondingly more weighty responsibility relative to states or organizations outside the region, as established in Chapter 8. Of course, even militarily capable regional organizations outside the region where the human rights violations are occurring have an independent duty to act solely by virtue of their greater ability to act, also as indicated by the analysis in Chapter 8.

The principle of respect for national and regional diversity therefore lends some support to the trend in favor of "coalitions of the willing and able."

Certainly such coalitions are morally permissible. But it follows from the principle of the unity of the human family that very "loose" coalition structures are not necessarily desirable. And fundamental ethical principles do not endorse the violation of covenants to respect U.N. command that governments have freely undertaken to observe. Such respect is, of course, independently called for by a fundamental ethical principle of fidelity to treaty commitments.

The fundamental ethical principles of consultation and of collective action among states to achieve morally desirable ends, including the protection of human rights, point to the same conclusions as the foregoing analysis of the impact of the principle of unity in diversity. The principle of consultation again promotes the desirability of multinational structures, with clear and open lines of communication. And the principle of collective action reinforces the importance, where possible, of employing multinational forces to undertake humanitarian intervention action.

The principles of unity in diversity, of consultation, and of collective action make the cooperation of many diverse states under a U.N. umbrella, whatever the specific command or coordination arrangements used, morally preferable to unilateral or regional action, other moral issues (e.g., that participating units have the requisite humanitarian intent) being equal. Likewise, they make the cooperation of states in a particular region through a regional organization morally superior to unilateral state action.[58]

As noted above, many member states have seen the practice of delegation as an abdication of a fundamental moral and legal responsibility on the part of the U.N. to respond to severe human rights violations. However, a careful analysis of the problem of U.N. command in light of the above ethical principles leads to a subtler conclusion. Again, what is most essential is that the Council exercise effective responsibility and oversight in fulfilling its responsibilities to ensure the protection of human rights. But it is morally and legally permissible for the Council, in keeping with the Charter's flexible scheme, to delegate some of the multiple tasks involved in effective protection, including military intervention, to particular member states or to regional organizations such as NATO. It can do so as long as all of the protections outlined in this and previous chapters are observed. Unfortunately, what the Council has often done—and which has prompted much criticism—is to write a "blank check" to particular member states. This indeed is both legally and ethically unacceptable, as I explored in Chapter 7. Furthermore, even if the Council can legally and ethically delegate certain functions, such delegation cannot, morally, excuse the Council from pursuing the longer-

term reforms in the U.N.'s humanitarian intervention capabilities that I discussed in Chapter 8.

The principle of freedom of moral choice has direct implications for the problem of force composition. It seems to endorse the use of volunteers and lend weight to those plans for an RDF, for example, which call for the direct recruitment of volunteers. Indeed, the extreme personal risks that troops face in conducting humanitarian intervention operations are a reason for ensuring, if at all possible, that individual members of intervening forces are allowed to choose, of their own free will, whether or not to make such a personal sacrifice for humanity-oriented values. Furthermore, if governments decide to contribute regular enlisted personnel who are recruited into national services on a volunteer basis, then those governments should at least alert those individuals before their enlistment that they may be deployed on high-risk humanitarian intervention missions. In short, while fundamental ethical principles encourage the taking of such risks on behalf of all other members of the human family out of recognition of a moral obligation to rescue human rights victims, they also strongly indicate that the choice to take such risks should be a voluntary one.

Of course, the correlative principle of government responsibilities for promoting the observance of human rights worldwide seems to legitimate force structures that rely on personnel enlisted in national armed forces. But because the principle of freedom of moral choice itself incorporates the concept that responsibility is best exercised out of voluntary commitment, where possible, on balance the principle certainly provides an edge to structures incorporating volunteers. Indeed, because a sense of identity with a world community is not yet commonplace among individuals generally, including members of armed forces, there are moral drawbacks to forcing personnel to participate in international humanitarian operations which they personally find repugnant.

So far I have touched on some of the direct "deontological" implications of particular fundamental ethical principles. However, these and certain additional principles come into play in a "consequentialist" way as well. That is, different force structures may lead to results that either promote or retard realization of these principles. Those principles most likely to be affected by the practical consequences of different force structures include the effective rectification of human rights violations; the limitation of the use of force; the avoidance of human rights abuses by intervening forces; the minimization of loss of life of military personnel; impartiality as adherence to a mandate and relevant fundamental ethical principles; and the desirability of obtaining the consent of target actors and populations.

I turn now to a consideration of what force structures would best promote implementation of these principles. In particular, I consider the relative advantages and disadvantages of U.N.-commanded operations and ad hoc coalitions. I focus on the importance of clear mandates and access to expert military advice, regardless of which of these models is used. Finally, I assess the relative merits and shortcomings of the use of integrated forces versus national contingents, volunteers versus enlisted members of national forces, and forces with a diverse national composition versus those that are limited in national membership.

First, regarding the relative advantages of U.N.-commanded operations, it would appear that U.N.-commanded forces have a greater potential to act impartially, that is, in accordance with Council-established principles. This is at least true to the extent that the U.N. force commander is able to identify these principles easily from Council resolutions and adheres conscientiously to them, and that national contingent commanders respect his or her authority. In most cases a U.N.-commanded force is also more likely to be *perceived* by affected parties as impartial, to the extent that the parties themselves have adopted a conception of impartiality as adherence to the terms of a mandate supported by ethical principles. For these reasons, the parties involved and the local population may in some cases be more willing to consent to the deployment of a U.N.-commanded force than an ad hoc coalition. Further, in principle, faithful adherence to U.N. command can help minimize the dangers to participating soldiers, as demonstrated by some of the problems of UNOSOM II, as well as enhance the prospects for satisfying humanitarian objectives. It can also reduce the risk of irresponsible and excessive uses of force. For all these reasons, the United States ought to reconsider the stance it has taken in *PDD 25* and more recently against the service of U.S. troops in missions under U.N. operational control.

Of course, U.N.-commanded forces unfortunately have often failed to achieve many of the consequential benefits I just mentioned, in large part because of the absence of clear mandates, the subversion by national contingents of U.N. command structures, and the lack of effective military advice to the Council. These deficiencies have frequently compromised the ability of U.N.-commanded forces, as in the case of UNOSOM II, to act faithfully in accordance with a Security Council mandate, to be perceived as impartial, to win the cooperation of the local population, to refrain from excessive uses of force and human rights abuses, to minimize casualties among military personnel, and ultimately, to improve the human rights conditions of the population they were deployed to benefit.

Indeed, the evidence suggests that ad hoc coalitions, including those led by regional organizations like NATO, can potentially satisfy a number of the above criteria as well as U.N.-commanded forces. The recent qualified successes of NATO in overseeing implementation of the Dayton Peace Accords and in leading KFOR indicate that regional forces can play a constructive and effective role in preventing or putting a stop to human rights violations. They highlight the fact that regional forces or ad hoc coalitions may be more militarily effective, may have a greater ability to use force where force is necessary, and may be welcomed by the local population if there is greater confidence in the forces or regional ties with them. They may in fact act relatively impartially, in accordance with a Security Council mandate, and even be perceived as impartial. And they may voluntarily control their uses of force. Many of these benefits have been achieved by ad hoc coalitions because they may be able to rely on an established command structure and have access to expert military advice, as in the case of the NATO-led coalitions of IFOR, SFOR, and KFOR. They also clearly have greater military resources than many U.N.-commanded operations.

At the same time, one particular disadvantage of ad hoc coalitions is the potential difficulty of coordinating military action among many states where a centralized and preexisting command structure is absent, and where mandates are unclear. In this connection, it is troublesome that KFOR's mandate left open a number of questions, including the extent to which KFOR should actively protect Kosovo Serbs from reprisals from returning Kosovo Albanians or the KLA. Ad hoc coalitions therefore require just as clear, if not clearer, mandates from the Security Council than U.N.-commanded operations. And to help achieve better coordination, it is essential that a forum exist for consultation among participating countries and that each feels that it has a say in decision-making. For example, the frictions that arose between NATO and Russia in KFOR might have been mitigated to some extent through more regular consultation.

Taken together, these considerations indicate that both U.N.-commanded operations and ad hoc coalitions have respective benefits, and that the U.N. must enhance its abilities to employ both types of force structures. They suggest the need to build new systems of military coordination between the Security Council and regional organizations, rather than either incorporating regional organizations wholly within a U.N. command or disclaiming all command responsibility for them. And they support the decision of the Charter's framers that the actions of regional forces should be under the watchful supervision, and control, of the Security Council—a decision that many member states again emphasized with respect to KFOR.

Indeed, in the case of either U.N.-commanded operations or ad hoc coalitions, it is essential for the Security Council to establish and for member states to respect clear mandates and a well-demarcated command-and-control structure, and for the Council to have access to expert military advice. In particular, the Security Council must provide mandates that are transparent and workable, given the resources committed to a particular humanitarian intervention operation. Otherwise, as experience has shown, the operations will be, and will be seen as, ineffective. Moreover, missions deprived of feasible and clearly specified mandates may fail to prevent the human rights violations that prompted their deployment. A lack of clear mandates also undermines the consent of target actors because they can no longer trust that operations will be conducted as closely as possible in accordance with these mandates. The operations are more likely to be perceived as partial by the parties because of the absence of a benchmark by which to measure impartiality. Further, ambiguous mission mandates leave the door open to excessive uses of force due to uncertainty, and differing understandings among member states as well as the secretary-general of what uses of force are permissible. These discordances can ultimately result in increased losses of life among both the populations the Council expects to assist and the intervening forces themselves. The same considerations point to the importance of well-defined rules of engagement, as emphasized in Chapter 7.

These considerations also highlight the need for a transparent command structure that is respected by all participating states, whether in U.N.-commanded operations or ad hoc coalitions. In the case of U.N.-commanded missions, commanders of national contingents and those contingents' home governments must respect the authority of U.N. commanders and not take actions that might undermine their operational control of U.N. missions. In this connection, U.N. command-and-control arrangements must be well defined, so that states placing their contingents under U.N. operational control know exactly what is expected of them. Similar considerations apply to ad hoc coalitions and indicate the need for the Council to specify which regional organization or state ought to take the lead in ensuring unified command and control for national forces acting with the Council's authorization. The Council could have explicitly given NATO this authority in Resolution 1244, but obviously refrained from doing so because of Russia's political sensitivities. Such an abdication of responsibility to recognize clear command responsibilities, even in the case of ad hoc coalitions, is politically expedient but ultimately injurious to the ability of ad hoc coalitions to under-

take their humanitarian missions effectively and without excessive uses of force or losses of life.

When the Council fails to receive expert military advice, its efforts to supervise and coordinate the deployment of humanitarian forces will be severely compromised, as history demonstrates. The Charter's framers saw the need for such an expert advisory body and therefore created the MSC. However, as noted earlier, the MSC has never been able to fulfill this function. Moreover, the fact that it is an exclusive "club" limited to representatives of the Council's permanent members generates little enthusiasm for its revival among the majority of the U.N.'s members. Nevertheless, there is a need for this body, reformed to be more representative, or some other body, to provide expert military advice to the Council. The Security Council would have the power to establish a new subsidiary body to provide military advice to it under Article 29 of the Charter. Article 29 provides that the "Security Council may establish such subsidiary organs as it deems necessary for the performance of its functions."[59]

To help the Council ensure that regional organization and states acting with its authorization understand and comply with its mandates, successfully achieve coordinated command and control, and (as recommended in Chapter 7) observe appropriate provisions of international human rights and humanitarian law, it is important for the Council to have a regular means of consulting with the organizations and states participating in ad hoc coalitions. Accordingly, for each authorized coalition, the Council might consider establishing a subsidiary committee (again under the authority of Article 29) to engage in such consultations and help it exercise its supervisory responsibilities. At a minimum, the Council should always insist on regular reports from organizations or states leading ad hoc coalitions.

Regarding the composition of forces engaged in humanitarian intervention, there is no experience to indicate whether or not an integrated model would achieve more favorable results on the ground than the contingent models that have been used in practice. However, it would appear that the primary advantages of integration are that it would facilitate (although clearly not ensure) the development of an *esprit de corps* based on an allegiance to the U.N., and that its members could more easily be trained and learn to operate as a unit. An integrated force might also exhibit greater impartiality by virtue of the ability to train participating soldiers in respect for U.N.-established principles and to secure their exclusive loyalty. However, it is conceivable that national contingents, especially those trained or earmarked for U.N. service, could be inculcated with similar ideals. Among the disadvantages of an integrated force

would be the difficulty of coordinating individual soldiers speaking different languages and having varied military backgrounds, as well as the cost of providing for centralized training and possibly also housing, feeding, and clothing such troops. But in the context of a new commitment to human unity as a fundamental ethical principle such costs might be seen as tolerable.

National contingents, on the other hand, would have the potential advantage of being composed of highly trained soldiers already accustomed to working together as an effective unit. They could also be brought together with other national contingents for periodic joint exercises, as in NATO practice. But there would be challenges—as there have been—in integrating national forces with distinct military cultures and in training them to operate as a cohesive whole. On balance, it appears that different structures may be appropriate for the various types of forces that may need to be created for different missions. For example, it might be more effective for an RDF to be an integrated force, while a larger reserve force could be composed of national contingents.

With respect to recruitment, the use of volunteers, whether for service in an integrated force or national contingents, would have the consequential advantage of producing highly motivated troops who might be more inclined to adopt a humanity-oriented outlook, implement relevant principles impartially, and learn to function as a unit and overcome differences in national culture and experience. Governments might also be more willing to allow their nationals to serve as volunteers, rather than to provide contingents from their regular forces. This might alleviate constitutional concerns in some countries, such as the United States. Moreover, as I have noted, there are strong ethical reasons for preferring that only soldiers who fully consent to place their lives at risk in dangerous humanitarian intervention operations are asked to do so. On the other hand, volunteers might include individuals with only limited or no prior military experience, thus requiring greater training efforts by the U.N. In addition, national armed forces might be fearful of losing valuable personnel who would find the conditions of U.N. service more attractive.

On balance, the use of volunteers, at least for an RDF, might provide the most ethically desirable, yet workable system. One perhaps more politically palatable option than creating an integrated volunteer force under permanent U.N. command, as proposed by such experts as Brian Urquhart, would be for states to set up volunteer contingents which can then be combined with volunteer forces from other states when needed.

The employment of troops from a geographically, culturally, and economically diverse array of states would have several consequential advan-

tages. It might help to ensure that the contributors themselves continue to view participation as beneficial, because of the sense that burdens are being shared. From the perspective of target populations, such a force with a diverse national composition could be more likely to be seen as acting impartially, depending on their own definition of impartiality. U.N. experiences have shown that those missions which have been dominated by commanders and troops of a particular nationality are most suspect of bias, while those that are genuinely diverse have a greater potential for commanding respect from all involved parties. Diverse forces may be more likely to act according to relevant principles, even if for the simple reason that contrasting national "interests" of the participants tend to cancel each other out, leaving a "remainder" of principled action. For these reasons, Secretary-General Boutros-Ghali correctly placed great stress on the importance of preserving the multinational character of U.N. forces.[60] These reasons also support the incorporation of as many national forces as possible in ad hoc coalitions.

On the other hand, the foregoing description of the "canceling out" process discloses some of the weaknesses of this argument. When divergent objectives clash, the result may be pure confusion, not adherence to a coherent set of principles. UNOSOM II is an example of such confusion, and KFOR has evidenced some of the same problems. This, at least, is the case unless the participating contingents and their commanders are already committed to these principles, and these principles in turn are reflected in a clear mandate and clear rules of engagement.

Finally, fundamental ethical principles support both short-term and long-term approaches. A short-term approach must take due account of the current political situation. States must therefore take steps to implement appropriate reforms in the current system for commanding and coordinating multinational forces engaged in humanitarian intervention. My analysis suggests the need to strengthen the Council's mechanisms for cooperation with regional organizations, including its oversight and supervision of operations undertaken with its approval, such as KFOR.

At the same time, in the long run, as many states have suggested in the Council chamber, the U.N. ought to build up its capacity for undertaking U.N.-commanded operations and develop unified force structures that can combine the assets of states and regional organizations with the benefits of diverse composition and centralized U.N. operational control. These structures could include an integrated or contingent-model RDF composed of volunteers, as well as a larger reserve force composed of national contingents of volunteers, similar to the all-volunteer reserve force proposed by Secretary-General Lie in 1952.

9.5. Conclusion

Any evaluation of the benefits and disadvantages of particular command and composition arrangements from the standpoint of fundamental ethical principles will be complex. The foregoing analysis indicates, most importantly, that the Council must adopt a flexible approach, but nevertheless exercise greater supervision over forces acting with its authorization. These requirements highlight the imperative of enhancing the Council's decision-making process.

10 The Security Council's Decision-Making Process

> [The General Assembly recommends] to the permanent members of the Security Council that . . . [t]hey meet and discuss, collectively or otherwise, and, if necessary, with other States concerned, all problems which are likely to threaten international peace and hamper the activities of the United Nations, with a view to their resolving fundamental differences and reaching agreement in accordance with the spirit and letter of the Charter . . . [and that they] advise the General Assembly . . . of the results of their consultations.
> —The Uniting for Peace Resolution (1950)

> Take counsel with them in the affair; and when thou art resolved, put thy trust in God.
> —The Qur'ān (3.153)

10.1. Introduction

This chapter turns attention to the debate on the legitimacy of the *process* by which the Security Council makes decisions regarding humanitarian intervention. This debate has included the prominent issues of the openness of deliberations among Council members themselves; the cultivation of collaborative relationships between the Council and other actors, including states, other U.N. organs and agencies, and NGOs, and their participation in the Council's deliberations; the relevance of a principle of treating like cases alike; and the Council's voting procedures, especially the veto. Because of space limitations I do not deal here with the important question of the Council's composition.

10.2. The Historical Debate

10.2.1. The Security Council Veto and Voting Procedure

During the drafting of the Charter in 1945, the great powers sought to protect their interests and ensure that no action by the Security Council could be taken against them or their allies by reserving a veto power for themselves. After amendments in 1965, Article 27 requires nine out of fifteen votes for substantive decisions, including the concurring votes (or at least abstentions, under Council practice) of the five permanent members.[1] The latter requirement means that any one permanent member can "veto" a decision of the Council. The former requirement means that the affirmative votes of at least four out of the ten nonpermanent members must be secured for a resolution to pass, which allows at least seven nonpermanent members to act together to block a resolution. This capability is often referred to as the "indirect veto."

The middle and smaller powers at the San Francisco Conference persistently expressed their concerns that the permanent member veto unfairly advantaged the great powers while providing no offsetting benefit for the lesser powers—and in fact, threatened to paralyze the very collective security system that the Charter so arduously erected. They were also unhappy with the guarantee the veto provided that enforcement action would only be undertaken against them; the lucky members of the veto club could ensure they would emerge unscathed.[2]

The onset of the Cold War provided the opportunity for many exercises of the veto, especially following the Korean experience. As noted in Chapter 7, Soviet vetoes, after the return of the Soviet representative to the Council table, prevented further action by the Council on the 1950 Korean crisis. The Council's impotence prompted adoption of the Uniting for Peace Resolution, which permitted the General Assembly to recommend military action in cases of a breach of the peace or act of aggression if the Council was stymied by the veto. Importantly, the preamble to the Uniting for Peace Resolution affirmed the importance of the Council's role, "and the duty of the permanent members to seek unanimity and to exercise restraint in the use of the veto."[3] And in the same resolution, as quoted at the outset of this chapter, the General Assembly recommended that the permanent members consult and resolve their differences. As I will discuss in more detail in Chapter 11, despite these appeals by the General Assembly, vetoes often blocked the Council from taking decisive action in situations involving the

most egregious human rights violations. For example, British and U.S. vetoes thwarted many attempts to impose stronger sanctions against Rhodesia and South Africa for their racially discriminatory practices.[4]

10.2.2. Participation in the Council's Deliberations and Relationships with Other Actors

To permit a sense of greater participation by all U.N. members, at the San Francisco Conference the delegates agreed to allow the General Assembly to discuss principles of cooperation and questions relating to the maintenance of international peace and security, and to make recommendations with respect to these principles and questions. But the Assembly was prohibited from making recommendations on its own initiative on any matter relating to international peace and security that was being dealt with by the Security Council.[5] In practice, this restriction has been considerably relaxed.[6]

Under Article 99 of the Charter, the secretary-general has the power to bring to the attention of the Council matters that in his view "may threaten the maintenance of international peace and security."[7] During the Cold War, Article 99 was only invoked formally in a few cases.[8] Secretary-General Boutros-Ghali cited Article 99 several times in support of his initiatives and more generally urged greater use of this power by the secretary-general to prevent grave humanitarian crises.[9] Secretary-General Annan similarly stressed the importance of Article 99 and Council action in response to situations brought to its attention by the secretary-general.[10] In the aftermath of Kosovo and East Timor, the Security Council itself urged greater use of Article 99.[11]

In principle the Charter contemplated consultation by the Security Council with ECOSOC. Article 65 of the Charter allows the Security Council to request assistance from ECOSOC.[12] However, during the Cold War, there were only a few instances of requests by the Council for assistance from ECOSOC and of cooperation between the two organs in areas related to the respective human rights competencies of each.[13] Moreover, the ECOSOC resolutions defining the competence of the Commission on Human Rights do not provide for direct requests from the Council to the Commission for human rights studies.[14]

Finally, the Council has permitted certain nonmembers, Secretariat officials, and other organizations to address it pursuant to Articles 31 and 32 of the Charter and Rules 37, 38, and 39 of the Council's Provisional Rules of Procedure. Under Article 31 of the Charter, U.N. member states that are not Council members may participate without a vote in the Council's

deliberations when it believes that the interests of those states are specially affected. Article 32 provides that nonmember states of the Council or the U.N. that are parties to a dispute shall be invited to participate in its deliberations on the dispute without a vote.[15] Rules 37 and 38 of the Council's Rules of Procedure allow the participation of U.N. member states not members of the Council pursuant to the Charter's provisions. Rule 39 permits the Council to invite members of the Secretariat and other persons to provide information or assist it.[16]

10.2.3. Consultation Within the Council

The Charter provides precious little guidance on how the Council should conduct its deliberations. The Council's Rules of Procedure are formal in character and do not govern how Council members actually engage (or fail to engage) in substantive consultations.[17] However, in 1950 the General Assembly, in the Uniting for Peace Resolution, recommended to the permanent members of the Security Council that "they meet and discuss, collectively or otherwise, and, if necessary, with other States concerned, all problems which are likely to threaten international peace and hamper the activities of the United Nations, with a view to their resolving fundamental differences and reaching agreement in accordance with the spirit and letter of the Charter."[18] During the Cold War this appeal had no practical effect.

Further, throughout the Cold War period the Council evolved the practice of making many of its decisions through private informal consultations, either among all Council members or smaller groups of members. According to one member of a permanent mission to the U.N., speaking during the 1980s, "all the *real* work of the Security Council is done in informal consultation. . . . Official meetings are like theater, performing a play written and conceived in informal consultations beforehand."[19]

10.2.4. Treating Like Cases Alike

The 1945 San Francisco Conference devoted little or no attention to the question of whether the Security Council was under any obligation to treat "like cases alike." Nevertheless, during the Cold War, many states accused the Council of adopting "double standards" by failing to take stronger action (usually due to great power vetoes or their threat) against Israel, Rhodesia, and South Africa. More generally, during the 1970s and 1980s there were widespread allegations that the General Assembly, U.N. human rights organs,

and to a lesser extent the Council employed double standards in decisions to criticize or not criticize various states committing gross human rights abuses.[20]

10.3. The Current Debate

10.3.1. Consultation Within the Council

One of the most controversial issues associated with Security Council-approved humanitarian intervention is the method by which Council members go about deciding on appropriate action. In many cases, key decisions have been made by the permanent five without serious consultation with nonpermanent members, who are then presented effectively with "take it or leave it" resolutions.[21] This "closed door" approach has frustrated many excluded nonpermanent members—a frustration evident in the debates on important resolutions authorizing humanitarian intervention under U.N. auspices.

For example, New Zealand complained about the practice in the context of the Council's response to the genocide in Rwanda. The New Zealand representative argued that "informal consultations of the Council do not provide an appropriate forum for Council members to explore with the Secretariat at the necessary working level the important but technical issues involved. Nor are bilateral discussions between individual Council members and the Secretariat a satisfactory alternative, because they do not permit the necessary interchange of ideas between a range of Council members. Thus, in the absence of a resolution of these important kinds of issues, in the tragic case of Rwanda the Council was forced to temporize. That was bad for the United Nations and very bad for the people of Rwanda."[22] Similarly, during the Council debate on the Haiti intervention, the Brazilian representative explained: "We consider it indispensable that consultations be held among all members of the Council and the parties directly or indirectly concerned with a given situation, in order to enhance the legitimacy and effectiveness of the Council's decisions."[23]

Scholars have echoed these concerns. For example, W. Michael Reisman describes a trend toward greater exclusiveness and secrecy in the Council's deliberations: "Like a parliamentary matryoshka (doll), [the Council] now contains ever-smaller 'mini-Councils,' each meeting behind closed doors without keeping records, and each taking decisions secretly. . . . All of these meetings take place *in camera* and no common minutes are kept. After the fifteen

members of the Council have consulted and reached their decision, they adjourn to the Council's chamber, where they go through the formal motions of voting and announcing their decision. Decisions that appear to go further than at any time in the history of the United Nations are now ultimately being taken, it seems, by a small group of states separately meeting in secret."[24]

The Council has made attempts to address some of these concerns about the secrecy of its deliberations. For example, in a statement issued in December 1994, the Council, following meetings with member states, indicated its intention "as part of its efforts to improve the flow of information and the exchange of ideas between members of the Council and other United Nations Member States, that there should be an increased recourse to open meetings, in particular at an early stage in its consideration of a subject."[25]

Despite these attempted reforms, when the Council is able to act, the permanent five exercise disproportionate influence and do not always consult with their nonpermanent colleagues. At the same time, the requirement of achieving a majority consensus among fifteen members has often resulted in watered-down resolutions that represent a "lowest common denominator" of agreement among member states. Adam Roberts has pointed out that this lowest common denominator has frequently consisted of reflexive authorization of the provision of humanitarian relief and the encouragement of negotiations, rather than more risky decisions "such as supporting one side or imposing a settlement by force."[26] And toward the end of the 1990s, the Council was often sidelined on major humanitarian intervention issues for the simple reason that the permanent members of the Council could not agree among themselves on appropriate action.[27] In his September 1999 address to the General Assembly, Secretary-General Annan emphasized that the "choice . . . must not be between Council unity and inaction in the face of genocide—as in the case of Rwanda, on the one hand; and Council division, and regional action, as in the case of Kosovo, on the other."[28]

10.3.2. Participation in the Council's Deliberations and Relationships with Other Actors

U.N. humanitarian intervention has revived old arguments and questions about the proper relationship between the General Assembly and the Council, including whether a formal procedure ought to be developed for ensuring that the Council listens to or takes into consideration General Assembly views in its decisions concerning humanitarian intervention. In this connection, W. Michael Reisman has suggested that the United States "initiate a

proposal in the Security Council for the formation of a 'Chapter VII Consultation Committee' of the General Assembly," which would be composed of twenty-one Assembly members "representing a range of regions and interests, to be selected annually by the Assembly." The Council would immediately notify the committee when it planned to take decisions under Chapter VII and would solicit the views of the committee. "As a result, the Council would always be apprised of representative Assembly views and the Assembly, for its part, would have the full benefit of the Council's perspective."[29]

Regarding relationships between the Council and U.N. human rights organs, we saw in Chapter 1 that the U.N., as part of peacekeeping or humanitarian intervention operations, has increasingly undertaken a variety of tasks concentrated on improving human rights conditions. These include such activities as improving the legal framework for the protection of human rights, training law enforcement personnel and members of the judiciary, deploying civilian police, working with economic aid organizations to improve the long-term prospects for social and economic development, and of course, providing humanitarian assistance to the victims themselves. The incorporation of these human rights-oriented endeavors in peacekeeping operations is a novel development. In the field these new initiatives have required an unprecedented level of cooperation between the military arm of peacekeeping operations (historically under the jurisdiction of the Department of Peace-keeping Operations [DPKO] and its institutional predecessors) and the numerous humanitarian departments and agencies responsible for the human rights component of these operations. These latter departments and agencies include UNHCR and OHCHR. Nevertheless, the Security Council itself has often failed to take advantage of opportunities to build strong relationships with these other U.N. organs and departments. Of particular note have been the Security Council's sometimes uneasy relationship with the Commission on Human Rights.[30] Notably, the report of the independent U.N. commission on Rwanda faulted the Security Council for failing to take into account the report of the Commission on Human Rights' special rapporteur on summary and extrajudicial executions about the human rights situation in Rwanda, which had forewarned of a possible coming genocide.[31]

During the late 1990s, the Council became more amenable to receiving reports from special rapporteurs of the Commission and input from other organizations and U.N. agencies involved in human rights and humanitarian issues, such as UNHCR, OHCHR, the ICRC, and NGOs engaged in

humanitarian work. For example, in February 1997 Council members met informally with various NGO representatives, who addressed the worsening situation in the Great Lakes region of Africa.[32] In addition, many Council members welcomed the holding of an open meeting in May 1997 on protection for humanitarian assistance activities and the participation of UNHCR, UNICEF, and the ICRC in its deliberations. They urged that in the future the Council invite these organizations to contribute their expertise early on in its consideration of various crises to improve its capacity to understand the situation on the ground and come to better-informed decisions.[33] In this connection, Secretary-General Annan has suggested that the Security Council ought to invoke the mechanism of Article 65 to establish and improve consultation between the Security Council and ECOSOC,[34] and the Security Council itself has supported such enhanced cooperation with ECOSOC.[35] In another positive development, during the period 1998 to 2001 the Security Council significantly increased the number and frequency of "open consultations" on thematic issues, including, for example, on the subject of women, peace, and security.[36] And the Council recognized the need for institutionalized consultations with other relevant actors with respect to problems in particular countries or regions.[37]

10.3.3. Treating Like Cases Alike

Many observers have criticized the Security Council for failing to treat like cases alike and thereby showing partiality to particular countries or regions of the world in its handling of post–Cold War humanitarian intervention operations. Numerous states have expressed concerns that the Security Council employs a double standard, and that the permanent members often have wielded their influence to carry out old-fashioned policies of great power domination.

For example, many Islamic states believed that the Council's failure to authorize forceful military measures to protect Bosnian Muslims disclosed an anti-Muslim bias. They instead urged the Council "to act in upholding the rule of law on a non-selective basis."[38] During the debate on Resolution 940 on Haiti, the representative of New Zealand stated: "We have the hope and the expectation that when the call next goes out for international assistance to restore democracy or to protect people in a humanitarian disaster in some other small and distant country, the United Nations and all the members of the Council will not be found wanting."[39] After the U.N. intervention in Haiti, the representative of the Russian Federation complained strongly

about the inordinate resources being devoted to the Haiti mission and demanded that the Council adhere to more consistent standards and procedures: "In our opinion, we are once again faced with a demonstration of double standards, which is simply intolerable in the activities of the Council."[40] Similarly, the U.N.-authorized deployment of KFOR in Kosovo aroused complaints that the Security Council was not giving sufficient attention to other deserving populations. For example, the representative of Argentina affirmed that "we should not forget that in other regions—particularly in Africa—thousands of human beings also wish to lead decent lives in peace and harmony. The international community should also extend its generosity to them and not fail them."[41] Such expectations of consistency were raised by President Clinton's statement in June 1999 to NATO troops in Macedonia that "if we can do this here and if we can then say to the people of the world, whether you live in Africa or central Europe or any other place, if somebody comes after innocent civilians and tries to kill them en masse because of their race, their ethnic background, or their religion, and it's within our power to stop it, we will stop it."[42]

In *An Agenda for Peace,* Secretary-General Boutros-Ghali echoed the concerns of member states advocating like treatment for like cases, affirming that the "principles of the Charter must be applied consistently, not selectively, for if the perception should be of the latter, trust will wane and with it the moral authority which is the greatest and most unique quality of that instrument."[43] And in his address to the General Assembly in September 1999, Secretary-General Annan insisted that if "the new commitment to intervention in the face of extreme suffering is to retain the support of the world's peoples, it must be—and must be seen to be—fairly and consistently applied, irrespective of region or nation. Humanity, after all, is indivisible."[44] The Security Council itself has, after allegations that it had paid insufficient attention to the plight of Africans, most famously in Rwanda,[45] reaffirmed its determination "to give equal priority to the maintenance of international peace and security in every region of the world and, in view of the particular needs of Africa, to give special attention to the promotion of durable peace and sustainable development in Africa, and to the specific characteristics of African conflicts."[46]

Scholars have similarly pointed out the need for greater consistency in Council decision-making involving humanitarian intervention. For example, legal scholar Christine Chinkin has criticized the Council's selectivity in authorizing humanitarian intervention, which "undermines moral authority."[47] And law professor Thomas Franck has similarly argued that the

Council must adhere to principled standards, rather than making ad hoc decisions.[48] He has also emphasized the importance of the *coherence* of a rule (or Council action) as opposed to mere "consistency." Franck draws a distinction between "coherence" and "consistency" as follows: "Consistency requires that 'likes be treated alike' while coherence requires that distinctions in the treatment of 'likes' be *justifiable in principled terms*."[49]

On the other hand, many commentators sympathetic to Council-authorized intervention specifically endorse a flexible, "political" approach to decision-making. They do so on the ground that developing hard and fast rules or criteria for intervention would tie the Council's hands and that a short-term strategy of responding selectively to humanitarian crises may help produce the body of experience necessary to support treatment of like cases alike in the long term, which is a desirable goal.[50] Thomas Weiss has similarly argued that "too many pleas for consistency or against inevitable selectivity amount to arguing that the United Nations should not intervene anywhere unless it can intervene everywhere. These objections justify inaction."[51] Finally, for some observers, inconsistency and "selectivity" in intervention decisions is a natural and defensible result of the fact that different U.N. member states have different strategic interests, which may legitimately be taken into account in making such decisions.[52]

10.3.4. The Security Council Veto and Voting Procedure

It has often proven difficult to muster unanimous support among the Security Council's permanent members for new humanitarian intervention operations, which can prevent rapid international action. One example of the problem is the slowness of the Security Council to react to the bloody genocide in Rwanda. The Council's torpid response was produced, in part, by the U.S.'s reservations about U.N. involvement beyond its capacities and by the implicit threat that the United States might exercise its veto. More generally, states supporting a particular resolution may engage in a variety of political trade-offs to win the support of a permanent member.[53] Despite these veto-induced problems, the existing permanent members adamantly refuse to relinquish their veto rights.

Another recent example of these problems was the threat of vetoes by Russia and China of any Council-approved military operations in Kosovo in early 1999. This threat prompted NATO countries to refrain from even attempting to win Council endorsement for the bombing of Yugoslavia. During the Council's debates on the NATO bombings and the deployment

of KFOR, many states—particularly NATO members, of course—complained about these perceived "abuses" of the veto privilege. For example, the representative of the Netherlands declared that while normally the Council should be involved in any decision to use force, "if . . . due to one or two permanent members' rigid interpretation of the concept of domestic jurisdiction, such a resolution is not attainable, we cannot sit back and simply let the humanitarian catastrophe occur."[54] In a later Security Council discussion of the prevention of armed conflicts, the representative of the Netherlands affirmed that "no matter when or how the debate on the veto will end, those who can wield it should exercise maximum restraint, in particular in situations of humanitarian emergency. If a permanent Council member uses or threatens to use its veto, it is duty-bound to explain to the world why it is blocking action by the Council."[55] During the debate on Kosovo, the representative of Malaysia declared: "It is regrettable that in the absence of a consensus in the Council—thanks, or rather, no thanks, to the irreconcilable differences among permanent members—the Council has been denied the opportunity to firmly and decisively pronounce on this issue, as expected of it by the international community."[56] On the other hand, following the passage of Resolution 1244 authorizing KFOR, the Gambian delegate expressed satisfaction that after division among Council members on Kosovo, "at long last, the Security Council is once more able to find unity around this issue and, above all, it is again able to assume its primary responsibility in the maintenance of international peace and security."[57]

10.4. Developing a Fresh Approach to the Security Council's Decision-Making Process

10.4.1. Implementing the Principle of Open-Minded Consultation in the Council's Deliberations

Chapter 2 identified a principle of open-minded consultation as a fundamental ethical principle—a principle that is supported by many passages from international legal sources, such as the Uniting for Peace Resolution quoted at the beginning of this chapter, and by passages appearing in the world's revered moral texts, including the Qur'ān, as exemplified by the verse that followed. As explained in Chapter 2, this principle calls for the frank exchange of differing points of view, but for the purpose of finding the truth or solutions to problems in accordance with ethical principles. This means

that participants must be willing to let go of their opinions as "theirs." Once out in the open and subject to critique, the ideas can be thoughtfully considered on their merits. Thus, consultation also seeks to take advantage of the different shades of truth that may be perceived by the various participants in consultation. "Consultation" in this special sense is much more than mere talking or bargaining; it is open-minded dialogue with this shared purpose. And it requires each participant to adopt an attitude of impartiality as adherence to fundamental ethical principles as developed in Chapter 6, and to forsake any attempt to favor one view over another on grounds other than consistency with these principles. This attitude exemplifies, in part, an aspect of the Golden Rule: a willingness to listen to the views of others, just as one would wish others to listen to one's own, and to step into their shoes to try to see the matter from their point of view.

This conception of consultation has been endorsed by a number of contemporary international political scientists, including Ernst B. Haas. It corresponds with what Haas has termed, in the context of international organizations, a process of "learning." According to Haas, "as the members of the organization go through the learning process, it is likely that they will arrive at a *common* understanding of what causes the particular problems of concern. A common understanding of causes is likely to trigger a shared understanding of solutions, and the new chain implies a set of larger meanings about life and nature not previously held in common by the participating members."[58]

How can this ideal concept of consultation be applied to the Council's deliberations on humanitarian intervention? First, the principle of consultation suggests the importance of meaningful dialogue among Council members with the objective of identifying the morally best method of responding to violations of human rights. Members of the Council must be willing to learn from the views of others rather than staunchly adhere to preconceived policy choices regardless of the moral persuasiveness of the views of other Council members. The permanent members, in particular, must adopt a less patronizing attitude toward nonpermanent members. They must include nonpermanent members in most of their discussions, not just for the purpose of "going through the motions," but to learn from them. The same attitudes must increasingly characterize their relationships with one another.

If this general prescription seems to call for an impossible "moralization" of foreign policy and disregard of power realities, it is worth pointing out that there are examples of Council discussions in which initial debate and dissension has gradually led to a process of mutual persuasion and eventual

consensus, even if imperfect. One example is the Council's approach to Haiti. Initially, most members of the Council were opposed to any use of force. But as a result of continuing intransigence by Haiti's military leadership, and more importantly, constant discussion and attempts at persuasion (particularly by the Western countries), many nonpermanent members were eventually convinced of the wisdom of this course of action. To take another example, the Council in recent years, especially after consultations on Secretary-General Annan's report on Srebrenica, and the U.N. commission's report on Rwanda, has expressed a new willingness to include an explicit authorization to protect civilians in the mandates of peace operations. In short, we can already see, in practice, glimmers of the ethical principle of consultation, even if it has never been (and never will be) perfectly realized in a political world.

Second, it is only through genuine consultation that the Council can legitimately and effectively undertake the tasks suggested for it in earlier chapters. We have seen that all of these tasks involve the assessment of human rights conditions in a country and other relevant facts, as well as the weighing of various legal and ethical principles, many of which are in tension with one another. Such a delicate balancing process necessitates the widest possible sharing of diverse perspectives and opinions, so that the decision process itself best contributes to the identification and realization of fundamental ethical principles. It also involves numerous assessments of the likely consequences of various alternatives measured in moral terms—assessments that can only benefit, again, from wide-ranging and often contradictory views.

Without open-minded consultation, important facts or moral considerations may easily be overlooked, or certain facts or considerations will be emphasized to the exclusion of others, exemplifying the phenomenon that social scientist Irving Janis identified as "groupthink."[59] To give one example, the Council would have benefited from a more open-minded and thorough debate on the appropriate response to the June 5, 1993, massacre of Pakistani peacekeepers. Instead, the instinctive reaction of leading members was to place the asserted "moral imperative" of capturing the alleged perpetrators, namely General Aidid, at the top of the Council's agenda, without weighing other morally relevant factors, such as the risk to civilians of launching an all-out and violent hunt for Aidid.

At the same time, without consultation, differing assessments of facts or relevant ethical principles can make Council action impossible or result in "least common denominator" decision-making. For example, the NATO members serving on the Council, on the one hand, and China and Russia,

on the other, might have had a greater chance of reaching a more consensual perception of the relevant facts in Kosovo, and of the most appropriate ethical principles that applied to those facts, had they engaged in full and humble consultation about them with one another in the weeks and months preceding the NATO bombing campaign.

In this connection, the Council must do a better job of using its public meetings to ensure a free and frank exchange of views, as well as to present clear and public explanations of the decisions it has taken. These elements of a more transparent procedure would improve the quality and moral relevance of the Council's decisions, while bolstering the Council's legitimacy. At the same time, although many observers have sharply criticized the practice of confidential informal meetings, the conception of consultation outlined above suggests that there is a place for confidential meetings, as long as the participants remain open-minded. Because publicity often only encourages political posturing and "playing to the cameras," the moderate use of confidential meetings may foster genuine, principle-oriented consultation.[60] But it is essential that the spirit in which these meetings are conducted be one of a sincere and open-minded search for the most effective alternatives in dealing with human rights violations that takes the views of all Council members as well as actors outside the Council into account. These meetings must not be motivated by a desire to promote exclusiveness among the most powerful members, or among particular regional groups, as has too often been the tendency.

10.4.2. Participation in the Council's Deliberations and Relationships with Other Actors

It is precisely because of the need to ensure the widest expression of diverse views that the Council should take action, not only to improve consultation among its existing members, but also to welcome into its deliberative process many other actors. It would be helpful for the Council to have the opportunity to interact directly, where possible, with representatives of factions or groups before taking important decisions affecting them. And the Council should also include representatives of local groups that are typically excluded from decision-making but are directly affected by Security Council action, such as women.[61] The Council might further develop its recent practice of establishing special missions, committees, or working groups to undertake contact with affected parties, in liaison with appropriate representatives of the secretary-general.[62] In this way the Council could improve its knowledge

about the positions of particular actors, while also opening a direct dialogue with them that may help to quell suspicions that arise when the Council is perceived as simply disregarding their views. Further, before taking a final decision on the use of military action, the Council should solicit the views of member states, including representative members of the General Assembly and potential troop contributors,[63] as well as relevant intergovernmental organizations and NGOs. Reisman's proposal for a Chapter VII consultation committee merits serious consideration for the reasons discussed here.

The Council must also strengthen its relationship, and open lines of communication and direct consultation, with the secretary-general. This means far more than the mere presence of the secretary-general at Council meetings or the receipt of written reports from the secretary-general. In keeping with the spirit of Article 99, it requires a willingness on the part of the Council to bring the secretary-general into many of its deliberations as a full consultative partner, even if a nonvoting one.[64]

It is particularly important for the Council to enhance its relationships with the human rights and humanitarian organs of the United Nations. These relationships must be developed beyond the current periodic participation of agency representatives in open meetings of the Council into a far more engaged, collaborative relationship. The Council might consider the possibility, for example, of inviting the U.N. high commissioner for human rights, special rapporteurs of the U.N. Commission on Human Rights or its Sub-Commission, representatives of various treaty-monitoring bodies such as the Human Rights Committee, and representatives of relief agencies and organizations, such as UNHCR, UNICEF, and the ICRC, to participate on a regular basis in its deliberations.[65] It should also establish regular consultations with representatives of ECOSOC, as originally implied by the Charter. Further, the Council could hold, although perhaps less frequently, special meetings with representatives of interested NGOs.[66]

Such regular consultations with other actors would allow the Council to become informed early on of potential trouble spots and gather more reliable facts. But they would also help it engage in a cooperative process of finding creative political and social solutions to potential conflicts and human rights problems before they reach the crisis stage. The Council must enter into a genuine dialogue with these organizations and actors with the objective of ascertaining the course of action that will best realize fundamental ethical principles. Such consultations should also involve UNESCO and provide an opportunity to investigate implementation of the types of educational initiatives suggested in Chapter 5.

Finally, it is essential that the Security Council establish regular and frequent consultations with regional organizations that are engaged in humanitarian intervention operations with the Council's authorization, such as NATO. In the past, it has allowed regional organizations to participate in its deliberations only occasionally.[67] It might consider, as suggested in Chapter 9, the establishment of a liaison committee to hold regular consultations with regional organizations like NATO that are assuming a lead role in Council-authorized humanitarian intervention missions.

10.4.3. Treating Like Cases Alike: Should the Security Council Develop Informal Guidelines for Humanitarian Intervention?

In earlier chapters I argued that the application by the Security Council of a fresh approach to humanitarian intervention and international law based on fundamental ethical principles involves a constant balancing process requiring the continuous exercise of judgment, at least on matters in which the Security Council has legal discretion. As just established, this process is critically enhanced through open consultation motivated by a shared desire among all participants to find solutions best satisfying these various principles.

This conception of the decision-making process required of the Security Council means that its decisions concerning humanitarian intervention may not, and should not, be easily harmonized with one another when judged by a unidimensional criterion, such as the number of human rights victims whose lives are in danger. An appropriate response will depend on a constellation of ethically relevant factors. Thus, the Council should not strive to "treat like cases alike" if doing so means abandoning the more nuanced ethical reasoning process I have advocated here in favor of achieving simple uniformity among cases that on their face seem to be similar. It should, rather, strive to engage in the appropriate process of principle-based ethical reasoning with the same seriousness and attention in all situations and with the same level of commitment to arriving at a morally best solution given the external constraints operative in each case. This conception of the required reasoning process generally corresponds with Franck's elaboration of "coherence" as distinguished from "consistency."

The Council's authorization of the use of military force to respond to human rights violations has so far exhibited neither facial consistency nor this deeper coherence. For example, the abandonment by the Council and U.N. member states generally of hundreds of thousands of Rwandans to a

savage death is simply morally indefensible. By contrast, the Council-authorized invasion of Haiti with the primary purpose of restoring a democratically elected government betrayed a lack of equal moral concern for citizens in other countries groaning under similarly repressive dictatorships. The problem is not so much that the Council did not authorize military intervention in these other countries, thereby creating a facial inconsistency. Rather, the problem is a lack of coherence in the Council's decisions, because it was obvious the Council was not making enough of a conscientious effort to determine an appropriate response to other situations involving similar human rights threats. Fortunately, the Council itself has recently recognized these deficiencies and at the time of this writing is paying closer attention to other regions facing human rights crises, especially Africa.

A lack of principle-based coherence is ultimately injurious to the Council's reputation and therefore effectiveness. The question then arises: Would it be advisable for the Council to articulate informal guidelines it will attempt to use in determining when to employ the military instrument in response to human rights violations?

The difficulty with the notion of guidelines is, as we have seen, that there is no simple "recipe" for deciding when military intervention is legally or ethically warranted. At the same time, the Council should consider the promulgation, via a Security Council statement issued by the president of the Council, of guidelines expressing the fundamental ethical principles I have developed here. These guidelines would simply affirm that the Council will, in its decision-making concerning humanitarian intervention, attempt to use these principles to interpret and apply the relevant legal provisions of the Charter and to determine an appropriate ethical course of action when it has legal discretion.

The Council might, for example, go on record as declaring that widespread and severe violations of essential human rights are tantamount to a "breach of the peace" within the meaning of Article 39. Such a declaration would warn potential perpetrators of the Council's assertion of competence to act against such violations, or lesser violations that threaten to rise to that level.

The Council might stress that it will pursue a policy of seeking the consent of all interested actors to any form of U.N. intervention, military or otherwise, based on the fundamental ethical principles I outlined in Chapter 5. But it could go on to affirm that these same principles may obviate a consent requirement in certain egregious cases. It might clearly enunciate its view of "impartiality" as adherence to relevant fundamental ethical principles, including the principle of respect for human rights. It could explicitly

reject, at least as the core definition of impartiality, a policy of having U.N.-authorized forces strive tenaciously to achieve and maintain perceptions of impartiality as equal benefit among all parties. This would put actors on notice of the Council's firm resolve to act impartially as measured by relevant ethical principles. This affirmation may, in the long run, enhance the involved actors' perceptions of the Council's impartiality, if they come around to accepting these principles themselves.

The Council might emphasize that it has available to it various degrees of the use of force, and that some of these may be appropriate to help secure the delivery of humanitarian relief, protect endangered populations, or achieve the other goals discussed in Chapter 7. It could go on record as acknowledging its own responsibilities to respond appropriately to human rights violations anywhere, and to strengthen the U.N.'s ability to provide an effective military response when one is called for. The Council could take this opportunity to stress the desirability of building up the U.N.'s own capacities, while also forging relationships with regional organizations able to undertake intervention under the Council's close supervision. It could, in keeping with the points made in this chapter, announce its intention to promote principle-based consultation among its members. Finally, as analyzed in Chapter 11, it could emphasize the legal and moral imperative of states and regional organizations seeking prior Council authorization before employing the use of force to prevent or rectify human rights violations.

The promulgation of such general guidelines would help motivate all actors to take fundamental ethical principles into account in the way they deal with their populations, with their members, and with one another. And it would constantly challenge Council members themselves to engage in serious, determined consultation about how best to implement these principles when the Council confronts particular human rights situations.

There is also an important role for the General Assembly in promulgating such general guidelines, especially given the Assembly's ability to represent the views of the entire U.N. membership. Accordingly, the General Assembly could also consider laying down recommended guidelines for the Council to follow in making decisions concerning humanitarian intervention, as well as for its own use if called upon to act under the Uniting for Peace Resolution, as proposed in Chapter 11.[68]

10.4.4. The Security Council Veto and Voting Procedure

A number of fundamental ethical principles are relevant to the debate on the Security Council veto and the Council's voting procedure generally, from

both deontological and consequentialist perspectives. First, no fundamental ethical principle directly supports the veto privilege other than respect for treaties and the existing provisions of the Charter. Sovereignty of the permanent members cannot sustain the veto. I argued in Chapter 3 that minimal respect for the sovereignty of all states is justified based on certain fundamental ethical principles, and that some states that observe moral standards in their conduct deserve a higher level of protection by the norms of state sovereignty, domestic jurisdiction, and nonintervention. But these ethical principles and standards should be applied coherently to all U.N. member states and cannot legitimate entrenched safeguards for the sovereignty of the permanent members. At the same time, no fundamental ethical principle of strict "equality" among states in itself indicts the morality of the veto, because fundamental ethical principles, and in particular, the trust theory of government and the principle of limited state sovereignty, address how states should behave in light of the power they possess—not how much power they ought to have.

Nevertheless, the fundamental ethical principles of unity in diversity and the Golden Rule do tend to suggest a moral preference against the veto. This is because the veto is a privilege conferred only, and permanently, on five states, without regard to any changes in the world political map that have occurred since 1945, and without regard to the moral merits or human rights records of these states. Further, applying the Golden Rule, the permanent members probably would not support the veto were they to play "moral musical chairs" and put themselves in the shoes of smaller powers.

A consequentialist analysis in terms of realization of the entire corpus of fundamental ethical principles identified in Chapter 2 reveals some ethical reasons in favor of the veto, and others against it. The requirement of permanent member unanimity arguably operates to increase the effectiveness of Council decisions by ensuring that the permanent members will work together.[69] To the extent such cooperation in humanitarian intervention enhances the effective enjoyment of human rights, this becomes a moral reason for retaining the veto.

However, as noted above, the requirement of unanimity among the permanent members of the Council can impede the ability of the Council to act in situations where a large majority of its members believe it should. At worst, the objection of at least one permanent member can block any action at all, as was the case during the forty-five years of Cold War gridlock, and as occurred with respect to Kosovo in March 1999. At best, it can lead to protracted negotiations among the permanent five, delaying Council decision-making and oftentimes resulting in ambiguous compromise resolutions

that provide inadequate guidance to the secretary-general or participating states or regional organizations, thereby endangering both troops and civilian populations.

Moreover, the veto imposes limitations on the Council's ability to act coherently in all situations of human rights violations that might merit its intervention, especially where a permanent member, or a close ally of a permanent member, is involved. For example, threatened vetoes by Russia and China prevented forceful Council action on Kosovo in March 1999, even though a clear majority of Security Council members appeared to believe that strong military action was warranted. At present, the veto ensures that the Council will never authorize military action to put a stop to human rights violations in permanent member states or their allies. This fact impedes the Council's ability to comply with a conception of impartiality as adherence to fundamental ethical principles and to act coherently.

In this connection, I argued in Chapter 8 that permanent members of the Council are in fact legally obligated under the general principle of moral law requiring all states to take some reasonable action within their abilities to prevent or thwart massive and flagrant violations of essential human rights, including genocide, to refrain from using their veto power in bad faith in a way that would frustrate effective Council action against such violations. They have similar obligations under the customary legal norm, also established in Chapter 8, requiring that all states take appropriate action to prevent and punish genocide. Their legal obligations in this regard are confirmed by the fundamental ethical principle of trusteeship, which reinforces Article 24's imposition of duties on the Council to act on behalf of the entire U.N. membership. Needless to say, at the present time permanent members do not recognize the existence of such legal and ethical restrictions on their use of the veto.

For all these reasons, then, it is ethically imperative that the veto system be reformed in some way. But what reforms are most appropriate? The ideal, from the perspective of fundamental ethical principles, would be the complete elimination of the veto. Many voices in the past few years have been raised in favor of this option. In the short term, however, a variety of partial steps might be taken, including amendment of the Charter to require a four-fifths majority, rather than total unanimity, among the permanent members.[70] This step would at least prevent one member alone from restricting the Council's ability to pursue what it decides is the best course after considered consultation. This reform would also have some net consequential benefits. It would preserve many of the advantages of the veto in ensuring

at least a large measure of permanent member support. And a dissenting state would face much political pressure not to circumvent or obstruct implementation of the Council's decision. Any such formalistic solutions, however, are likely to be unsuccessful without a changed attitude among the permanent five. Without this changed attitude, such procedural reforms have no hope of being adopted, as the seemingly interminable debate on Council reform within the last decade demonstrates.

Another intermediate action that would not require any Charter amendment would be for the five permanent members voluntarily to pledge to refrain from exercising their veto rights,[71] as the General Assembly recommended fifty years ago that the permanent members do. Richard Butler has suggested that the permanent members ought voluntarily to agree on informal rules for when, and with respect to what subjects, the veto or the threat of a veto can and cannot legitimately be used.[72] In this connection, the permanent members might eventually be persuaded that they ought to recognize at least ethical restraints on their exercise of the veto with respect to humanitarian intervention operations, particularly in cases of genocide, if not the legal restraints for which I have argued. Such voluntary recognition of ethical and legal obligations by the permanent members would have a number of moral merits. Most importantly, it would be consistent with fundamental ethical principles supporting state autonomy and moral responsibility.

10.5. Conclusion: The Need to Cultivate an Emphasis on Humanity-Oriented Values and Consultation in Security Council Deliberations

The foregoing analysis has highlighted some of the implications for the Security Council's decision-making process of fundamental ethical principles in contemporary international law. These principles suggest above all that individual members of the Council have a legal and ethical responsibility to adopt a humanity-oriented perspective in their deliberations, including an active concern with human rights, and to improve their capacity to undertake genuine open-minded consultation. Such a policy of deliberating and voting in the Security Council primarily by reference to humanity-oriented values rather than self-oriented or state-oriented ones, although difficult to implement, is hardly asking the impossible. Many U.N. member states, whether Council members or not, have clearly incorporated values other than self-interest in their foreign policies, particularly their policies toward multinational institutions like the U.N. To give one obvious example

relevant to this study, many states, from all corners of the globe, and including developing countries as well as permanent members of the Council and other developed countries, have been devoted supporters of U.N. peacekeeping, and more recently, of U.N. humanitarian intervention operations. They have sacrificed the lives of hundreds of their soldiers defending peace and human rights in foreign lands bearing no direct relationship to their own national security. They are to be commended for doing so.

The acceptance by member states of a humanity-oriented perspective would not mean that Council members would renounce any concern for their "national interests." I argued in Chapter 8 that governments still are obligated to look after the welfare of their own people, and to give them special regard. Rather, such a perspective would supplement these legitimate at-home concerns and responsibilities. It would expand the vision and policies of Council members beyond their own borders, as we saw in Chapter 8 the Charter and fundamental ethical principles require them to do. With such a shift in perspective and policy, even the current Security Council system could function quite well. While certain procedural reforms might facilitate realization of fundamental ethical principles, their implementation will ultimately depend on this change in member governments' outlook. The NATO bombing campaign against Yugoslavia in the spring of 1999 suggests, however, that many Western governments do not place a high priority on reforming the Council's decision-making procedure, but rather are willing simply to circumvent the Council altogether where they believe that doing so is necessary to respond to particular human rights crises.

Part Four

Humanitarian Intervention Not Authorized by the Security Council

11 The Legality of Humanitarian Intervention Without Security Council Authorization

> We, the Peoples of the United Nations [are determined . . .] to unite our strength to maintain international peace and security, and to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest.
> —The U.N. Charter

> The time must come when the imperative necessity for the holding of a vast, an all-embracing assemblage of men will be universally realized. The rulers and kings of the earth must needs attend it, and, participating in its deliberations, must consider such ways and means as will lay the foundations of the world's Great Peace amongst men. Such a peace demandeth that the Great Powers should resolve, for the sake of the tranquillity of the peoples of the earth . . . [to] shield mankind from the onslaught of tyranny.
> —Bahá'u'lláh

11.1. Introduction

In this chapter I consider the legality under the U.N. Charter and contemporary international law of humanitarian intervention by individual states or by regional organizations, for the purpose of protecting non-nationals in other states, without Security Council authorization. I focus as a case study on the unauthorized bombing campaign conducted by NATO in the spring of 1999 against Yugoslavia.

11.2. The Historical Debate

The practice of justifying unilateral military intervention on humanitarian grounds has a long pedigree, extending at least back to the early nineteenth century. Legal scholars who believe that tolerance by other states of this practice reflects the development of a customary norm of international law permitting unilateral humanitarian intervention typically cite a number of pre-Charter examples of such military action. These include intervention by Great Britain, France, and Russia in Greece in 1827–30 to protect Greek Christians from alleged Turkish oppression; by France in Syria in 1860–61 to restore order and protect Maronite Christians following earlier massacres; and by Russia in Bosnia, Herzegovina, and Bulgaria in 1877–78, ostensibly because of Turkish repression of the Christian population.[1] Other scholars, however, maintain that these interventions did not establish a customary rule of law permitting humanitarian intervention because they lacked genuine humanitarian motives.[2]

During the drafting of the U.N. Charter there was no discussion of whether humanitarian intervention had been previously allowed under customary international law or would be permissible or prohibited under the Charter. However, as noted in earlier chapters, the Charter's drafters adopted two provisions that might be read as prohibiting any use of force by one state against another, including for purposes of rescuing foreign nationals, except in accordance with Security Council authorization under Chapter VII or Chapter VIII, or as part of the individual or collective self-defense of states under Article 51. In particular, Article 2(4) states that "all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[3] Article 53 provides in relevant part that the "Security Council shall, where appropriate, utilize . . . regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council, with the exception of measures against any enemy state."[4] The "regional arrangements or agencies" to which Article 53 refers are those described in Article 52, which permits the existence of "regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action," provided that these "arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations."[5]

Despite the existence of these provisions, after the founding of the U.N. but before the Council escaped from the shackles the Cold War had fastened upon it, a number of member states and regional organizations engaged in military interventions in other states that had humanitarian overtones, or at least that were defended later as having humanitarian purposes. These interventions involved claims to protect either nationals of the intervening state or citizens of the target state suffering grievous treatment at the hands of their government. Commonly accepted lists of such Cold War–era interventions by individual states include India's 1971 invasion of East Pakistan (now Bangladesh) following the massacre of civilians by the West Pakistani army; Tanzania's invasion of Uganda in 1979, in which it deposed the government of Idi Amin; France's intervention in the Central African Republic in 1979; and the 1983 U.S. invasion of Grenada, which was justified by the U.S. government on the ground of protecting American lives and restoring order.[6]

In most of these cases of unilateral humanitarian intervention, the Security Council had no direct involvement. Typically it took no condemnatory action at all because of a permanent member veto.[7] Officials of the intervening state usually defended these actions on the ground that they represented an exercise of the right to collective self-defense protected by Article 51 or an act of unilateral self-defense to the extent nationals were allegedly threatened. Only rarely did governments assert that humanitarian objectives alone justified the interventions.[8]

During the Cold War, some scholars pressed for a narrow interpretation of Article 2(4) that would permit unilateral military intervention by one state in another to prevent gross human rights abuses. These scholars argued that such an intervention would not be aimed at destroying either the "territorial integrity" or the "political independence" of the target state, and, moreover, would be entirely consistent with the U.N.'s purposes, one of which is to promote universal human rights.[9] They discovered in the U.N.'s response to many of these incidents an implicit tolerance of uses of military force that tended to alleviate situations of extreme human suffering. At the same time, other scholars defended with equal vigor a broad interpretation of the prohibition in Article 2(4) that would preclude unilateral military action on the ground of humanitarian concern.[10]

On a number of occasions during the Cold War regional organizations deployed forces in member states with ostensibly humanitarian purposes. For example, in 1965 the OAS recommended the deployment of a U.S.-dominated Inter-American Peace Force (IAPF) in the Dominican Republic, following the intervention of U.S. Marines to rebuff opposition forces. The

OAS had not sought Security Council authorization for the IAPF, and the Soviet Union brought a complaint before the Security Council.[11] Other examples of intervention by regional organizations during the Cold War years include the intervention of predominantly Syrian forces under the auspices of the League of Arab States in the Lebanese civil war in 1976, and OAU intervention in the civil war in Chad in 1981.[12]

In several other cases as well during the Cold War, ad hoc multinational coalitions undertook various military tasks outside the framework of the U.N. or formal regional organizations, but generally with the consent of relevant parties. In 1980, the United States and nine other countries formed a Multinational Force and Observers (MFO) to conduct observation duties in the Sinai following the signing of the Camp David Accords. In 1982, after Israel's invasion of Lebanon, the United States, France, and Italy established an independent but loosely coordinated Multinational Force (MNF) to help evacuate Palestine Liberation Organization fighters. The force was withdrawn after suicide truck bombings of U.S. and French compounds.[13]

During the Cold War, a number of scholars proposed criteria for determining when humanitarian intervention action not authorized by the Security Council ought to be considered legal under existing international law. For example, Richard B. Lillich suggested as criteria: (1) the immediacy of the human rights violations; (2) the extent of the violations; (3) whether or not there is an invitation by the *de jure* government, which is not essential but is helpful to a conclusion that the intervention is legitimate; (4) the degree of coercive measures employed, in keeping with the principle of proportionality; and (5) the relative disinterestedness of the intervening state.[14]

11.3. The Current Debate

The 1990s witnessed, rather surprisingly, a number of cases in which states sought prior authorization from the Security Council before leading ad hoc coalitions to engage in humanitarian intervention. As noted in Chapter 1, the United States sought authorization in 1992 for UNITAF; France sought authorization for its 1994 intervention in Rwanda; the United States sought authorization for its 1994 intervention in Haiti; and Australia sought authorization for the deployment of INTERFET in East Timor in 1999. Furthermore, a nascent coalition of member states, including Canada, that contemplated intervention in the former Zaire in 1996 to protect refugees sought an advance resolution from the Council blessing the intervention, although the military action never took place.[15]

At the same time, on several occasions during the 1990s, regional organizations or individual member states, without prior Security Council authorization, deployed military forces with alleged humanitarian objectives and with mandates to use force in ways going beyond strict self-defense. For example, ECOWAS intervened in the Liberian civil war in the early 1990s, and deployed a military force (the ECOWAS Cease-fire Monitoring Group, or "ECOMOG") without the consent of the existing government of Samuel Doe and the contending factions. ECOMOG was mandated initially to restore law and order and ensure respect for a cease-fire. However, ECOMOG at times used robust military force and became directly involved in hostilities. It was viewed as a hostile party by some of the warring factions, particularly because of the predominant role of Nigerian forces within it.[16] The Security Council retroactively approved the operation without commenting on its original legality[17] and eventually arranged for the dispatch of a U.N. observer mission to operate in conjunction with ECOMOG.[18]

During 1997, the Security Council retroactively endorsed a French-sponsored multinational African force in the Central African Republic, whose participating states the Council authorized under Chapter VII to "ensure the security and freedom of movement of their personnel" in the face of the continued presence of armed militia members.[19] The next year it established a U.N.-commanded force, the United Nations Mission in the Central African Republic (MINURCA), to assist in the maintenance of security and stability in the Bangui region.[20]

Also in 1997, the Council retroactively authorized a Nigerian-led West African peacekeeping force in Sierra Leone (known once again as "ECOMOG") to "ensure strict implementation" of a Council-imposed oil and arms embargo against the military junta that had unlawfully seized power from the democratically elected government.[21] In mid-1998, after the restoration of the lawful government, the Council approved the deployment to Sierra Leone of UNOMSIL, part of whose mandate was to monitor the security situation as well as the role of ECOMOG in providing security.[22] A year later, in August 1999, the Council "commended" ECOMOG "on the outstanding contribution which it has made to the restoration of security and stability in Sierra Leone, the protection of civilians and the promotion of a peaceful settlement of the conflict," and urged all states "to continue to provide technical, logistical and financial support to ECOMOG to help it to maintain its critical presence."[23]

Most recently, in March 1999 NATO commenced a massive bombardment of targets in Yugoslavia, with the goal of inducing Yugoslavia to refrain from carrying out a systematic campaign of expulsion and killing of ethnic

Albanians in Kosovo and to persuade it to accept the terms of the draft Rambouillet and Paris accords. As noted in Chapter 1, Secretary-General Annan suggested that the bombings without Council authorization violated the U.N. Charter. And as discussed in greater detail in subsection 11.4.4, Yugoslavia filed a case against ten NATO countries before the International Court of Justice alleging the illegality of the bombings on a number of different grounds.

In the vigorous debate in the Council on the proposal by Russia, Belarus, and India to condemn the NATO bombings, members expressed divergent views on the legality of the unauthorized NATO action. The Russian delegate denounced the bombing as a flagrant violation of the Charter.[24] The delegate further charged that "no proposals on this topic were introduced in the Security Council by anyone. There was never any draft resolution; there were no informal discussions, not even in the corridors—at least not with one permanent member of the Security Council, namely, Russia. Those discussions never took place."[25] The Chinese delegate similarly deplored the NATO action as illegal and reiterated that "it is only the Security Council that can determine whether a given situation threatens international peace and security and can take appropriate action."[26] And a Yugoslav delegate specifically contended that the NATO action was "in direct contravention of . . . Article 53" of the Charter.[27] The Indian delegate lodged the same allegation.[28]

After the approval of KFOR in June 1999, the Brazilian delegate complained that "problematic precedents have been set in the resort to military force without Security Council authorization. These have neither contributed to upholding the Council's authority nor improved the humanitarian situation." He expressed the hope, however, that "the Security Council will build upon this day to find a new blend of realism and idealism that will translate itself into greater wisdom and true effectiveness. It is possible to hope, together with the Secretary-General, Mr. Kofi Annan, that, in the future, countries will not have to choose between inaction and genocide, intervention and Council division."[29] Similarly, the Argentinian delegate praised agreement on Resolution 1244 as confirming "the central and irreplaceable role of the United Nations, and in particular that of the Security Council and the Secretary-General."[30]

States that supported the NATO action tended most often to justify it as a "necessity"—implying that it was a moral necessity. For example, the U.S. delegate stated that "we believe that action by NATO is justified and necessary to stop the violence and prevent an even greater humanitarian disas-

ter."[31] The Canadian delegate declared that NATO had "no choice" but to take action.[32] The Gambian delegate affirmed: "At times the exigencies of a situation demand, and warrant, decisive and immediate action. We find that the present situation in Kosovo deserves such a treatment."[33] The Malaysian delegate regretted that "in the absence of Council action on this issue it has been necessary for action to be taken outside of the Council."[34]

The delegate from the Netherlands aligned himself with the secretary-general's statement that "the Council should be involved in any decision to resort to the use of force." But he said that when one or two permanent members (apparently a reference to Russia and China) rigidly interpret the concept of domestic jurisdiction and therefore prevent a resolution, "we cannot sit back and simply let the humanitarian catastrophe occur. In such a situation we will act on the legal basis we have available, and what we have available in this case is more than adequate."[35] Moreover, during the debate on KFOR, the Netherlands delegate affirmed that "the few delegations which have maintained that the North Atlantic Treaty Organization (NATO) air strikes against the Federal Republic of Yugoslavia were a violation of the United Nations Charter will one day begin to realize that the Charter is not the only source of international law." He maintained that evolving international legal standards were "making respect for human rights more mandatory and respect for sovereignty less absolute."[36]

The U.K. delegate explicitly defended the NATO action as legal and in conformity with the *jus ad bellum* principle of necessity: "The action being taken is legal. It is justified as an exceptional measure to prevent an overwhelming humanitarian catastrophe. . . . Every means short of force has been tried to avert this situation. In these circumstances, and as an exceptional measure on grounds of overwhelming humanitarian necessity, military intervention is legally justifiable. The force now proposed is directed exclusively to averting a humanitarian catastrophe, and is the minimum judged necessary for that purpose."[37]

The Slovenian delegate also articulated an extended defense of humanitarian intervention without Council authorization. He said that the use of force without Council authorization "is not a new phenomenon. It may be different from the kind of perfect world which we would all like to have, but it is a part of reality." He gave the example of India's 1971 invasion of East Pakistan. "That was a case of the use of force without the authorization of the Security Council and without reference to legitimate self-defence. Nevertheless, the situation of necessity was very widely understood in the international community. I think that the historical lessons that can be drawn

from that example should not be completely ignored today." The delegate also stated that because the Council had previously declared the situation in Kosovo to be a threat to international peace and security, Article 2(7) did not apply. He concluded by affirming: "The responsibility of the Security Council for international peace and security is a primary responsibility; it is not an exclusive responsibility. It very much depends on the Security Council, and on its ability to develop policies that will make it worthy of the authority it has under the Charter, whether the primacy of its responsibility will actually be the reality of the United Nations."[38]

As noted in Chapter 1, the Kosovo experience prompted an extended discussion of humanitarian intervention during the General Assembly's general debate at its fifty-fourth session. Many delegates were critical of the NATO intervention. Further, the General Assembly's Special Committee on Peacekeeping Operations, in its report released in March 2000, emphasized—without specific reference to the NATO action, but clearly with the NATO campaign in mind—"that, in accordance with Article 53 of the Charter, no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council."[39]

Both before and after the NATO bombardment commenced, legal scholars took varying positions on the legality of NATO military action, reflecting many of the same points made during the Council's own debates. For example, a number of scholars criticized the intervention, or even the threats that preceded it, as a violation of Article 2(4) and Chapter VII of the Charter.[40] Some scholars who were generally critical of the intervention argued, nevertheless, for a more contextual analysis of its legality.[41]

Other scholars, however—typically traditional supporters of the view that there has always been a customary right of humanitarian intervention—defended its legality. For example, Anthony A. D'Amato asserted that, under a flexible interpretation of Article 2(4), the intervention was legal as of mid-April 1999 because it satisfied the following criteria: (1) the "people in the target state (here, Kosovo) must be in severe jeopardy from their own government"; (2) the "projected damage caused by the intervention cannot be disproportionate to the jeopardy"; (3) the "intervening state must obey the humanitarian laws of war"; and (4) the "use of force must end when the humanitarian goal is accomplished."[42] Some more cautiously assessed the intervention, finding a number of potential factors that taken as a whole might be sufficient to tip the scales in favor of an overall assessment of legitimacy, if not legality.[43]

Some scholars and observers took the opportunity of the Kosovo experience to develop proposed criteria for legal (or at least "legitimate," even if not legal) intervention without Security Council authorization. For example, in a 1999 report the Danish Institute of International Affairs, while concluding that unauthorized intervention does not have a legal basis in existing international law,[44] identified five possible criteria that might form the basis of a future international consensus: (1) there are "serious violations of human rights or international humanitarian law"; (2) the Security Council "fails to act"; (3) the intervention is undertaken multilaterally, if possible; (4) any uses of force are necessary and proportionate; and (5) the intervening state or states are relatively disinterested.[45] And the Independent International Commission on Kosovo concluded that under existing international law the NATO intervention was "illegal, yet legitimate."[46] It noted that its conclusion was "related to the controversial idea that a 'right' of humanitarian intervention is not consistent with the UN Charter if conceived as a legal text, but that it may, depending on context, nevertheless, reflect the spirit of the Charter as it relates to the overall protection of people against gross abuse."[47] In keeping with such a perspective emphasizing legitimacy as distinguished from legality, the Commission articulated principles for determining as a threshold matter whether a claim of humanitarian intervention should be regarded as "legitimate" and for assessing its degree of legitimacy.[48]

11.4. Developing A Fresh Approach to Humanitarian Intervention Without Security Council Authorization

How would an approach to humanitarian intervention and international law based on fundamental ethical principles judge the legality under the U.N. Charter and contemporary international law of humanitarian intervention by states or regional organizations without prior Security Council authorization? Once again, I apply the approach to the identification and interpretation of legal norms developed in Chapter 3. I first examine whether under pre-Charter law humanitarian intervention was authorized under international law, and then examine if and to what extent the Charter has changed relevant legal norms and either permits or prohibits humanitarian intervention not authorized by the Security Council. I also look at the impact on this problem of contemporary sources of law other than the Charter.

11.4.1. Was Humanitarian Intervention Permissible Under Pre-Charter Law?

A preliminary question is whether under pre-Charter law humanitarian intervention was legal. Given that until the adoption of the League of Nations Covenant in 1919, no general multilateral treaties regulated the lawfulness of resort to force by states, the problem then is to determine whether there was a general principle of law permitting humanitarian intervention or a customary rule of law doing so.

I argued in Chapters 3 and 8 that there ought to be recognized a general principle of moral law imposing a legal obligation on governments, international organizations, and other actors to take some reasonable measures within their abilities to prevent or stop widespread and severe violations of essential human rights. Such measures may include the use of military force. I suggested, however, that such a general principle of moral law does not legally require the use of military force, even if in extreme cases (such as systematic genocide) such a forcible response may be morally required.

I also argued in Chapter 3 that there ought to be recognized a companion general principle of moral law requiring that some legal means be available in the international system for the use of military force to prevent or put an end to widespread and severe violations of essential human rights. Those legal means might include either action by individual states, action by regional organizations, or action by international organizations, or any combination of these possible forms of intervention. Because there were no international or regional organizations in the nineteenth century competent under their constitutive instruments to authorize or undertake humanitarian intervention, this principle of moral law implies that, for purposes of assessing the legality of humanitarian intervention actions in hindsight, states ought to have been regarded as having a legal right to carry out humanitarian intervention under certain circumstances. At a minimum, however, such interventions must have complied with the ethical and legal principles of necessity and other relevant norms of customary international law governing the conduct of military action recognized at the time.[49]

As noted above, there has been much debate among scholars about whether a customary norm of international law had developed by the end of the nineteenth century permitting humanitarian intervention by individual states. It is not possible to examine in detail here particular asserted instances of humanitarian intervention, or to assess whether they disclose, not only a consistent practice of intervention on humanitarian grounds, but also *opinio juris*—a belief among states that such a practice was legally per-

missible. According to the proposed interpretation of the *opinio juris* requirement set forth in Chapter 3, it is not sufficient that states have considered humanitarian intervention *morally* permissible; they must have believed that it was desirable to have a *legal* rule legitimizing such intervention. As the ongoing debate among scholars on the customary law status of humanitarian intervention during the nineteenth century demonstrates, the evidence is mixed on the question of whether or not a majority of states maintained such a belief that humanitarian intervention ought to be considered legally permissible.

The methodology for identifying and interpreting customary legal norms developed in Chapter 3 suggests that fundamental ethical principles can help "tip the balance" in favor of recognition of customary norms when the evidence for and against their legal status under traditional rules of identification is otherwise equal. One such principle is the strong moral obligation to come to the rescue of human rights victims, by military force if necessary. This principle was the basis for recognizing a general principle of moral law requiring that some form of humanitarian intervention be legally available. Thus, traditional rules for identifying customary international law, when combined with this general principle of moral law, may weigh in favor of recognizing the historical existence of a customary legal norm permitting humanitarian intervention, assuming again that at a minimum the ethical and legal principles of necessity, and any other relevant customary norms, were observed. However, I cannot definitively resolve this complex issue here. I am also not able to consider here the impact of the League of Nations Covenant on any preexisting legal norms as of 1919.

Instead, I will turn to a consideration of the legal effect of the adoption of the U.N. Charter in 1945, especially Articles 2(4) and 53 thereof, and to what extent these Charter norms ought to be regarded as modifying, or overriding, existing customary norms or general principles permitting humanitarian intervention by states. Further, I will examine the effect of legal obligations of states parties to the Genocide Convention. Finally, I will consider whether the Uniting for Peace Resolution may allow the General Assembly legally to authorize humanitarian intervention when the Council is stymied by a permanent member veto.

11.4.2. Analyzing the Text of the Charter

Article 2(4) of the Charter, despite the claims of supporters of an absolute rule against unauthorized humanitarian intervention, is not unambiguous. It does not simply prohibit the threat or use of force by one state against

another, without Security Council authorization, which the drafters easily might have done. Instead, it appears to impose a prohibition only on the threat or use of force by member states for certain purposes or with certain effects, namely, "against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." It thereby seems to leave open the possibility that there might be uses of force by one state in the territory of another that do not impair the other state's "territorial integrity" or "political independence" and are consistent with the purposes of the U.N., and that are accordingly permissible under Article 2(4). In particular, of course, because promoting human rights and fundamental freedoms is one purpose of the U.N. under Article 1(3), it might be argued, as noted above, that humanitarian intervention aimed solely at putting an end to human rights violations within a state, rather than acquiring its territory or impinging on its political independence, and that does not have such effects, might so qualify.

Such an interpretation is potentially supported by a passage in the preamble of the Charter, quoted at the outset of this chapter, which indicates that the U.N. was established to ensure "that armed force shall not be used, save in the common interest." The expression "common interest" is quite broad and it may be significant that the framers chose this expansive term rather than specifying only the maintenance of international peace and security, for example. Moreover, given the human rights provisions of the Charter, that "common interest" could be interpreted as including the protection of human rights.

Of course, because other purposes of the U.N. are to "maintain international peace," which might be read in its ordinary sense as including at the least the absence of war between states, and to "develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples," any use of force by one state in the territory of another without its consent might be viewed as a breach of international peace and therefore as inconsistent with the purposes of the U.N. If so, then even humanitarian intervention would be prohibited by Article 2(4).

The problem once again, as we saw at length in Chapter 3, is that the Charter establishes multiple and sometimes conflicting purposes for the United Nations, involving both human rights and the nonuse of force.[50] Accordingly, the text of the Charter itself is not sufficient to resolve the ambiguity inherent in the wording of Article 2(4).

On the other hand, the Charter does appear to impose a clear and absolute prohibition against enforcement action by regional organizations without

prior Security Council approval in Article 53. Several terms in the article, of course, disclose ambiguities—such as the scope of "enforcement action" and whether authorization must be prior or can be retroactive. In any case, it is somewhat curious that a similar explicit prohibition against enforcement action without Security Council authorization was not imposed on individual member states, as just noted in the discussion of Article 2(4). This omission raises a challenging question: Why would the framers adopt a more explicit prohibition on unauthorized enforcement action by regional organizations than on military action by individual states? This discrepancy again highlights the many unanswered questions and ambiguities lurking in the Charter's text.

11.4.3. Analyzing the *Travaux Préparatoires*

Under the interpretive approach developed in Chapter 3, it is appropriate next to examine the *travaux* as a means of ascertaining any original shared understandings of the Charter's framers that might help resolve some of these textual ambiguities. As a threshold matter, it must be noted and emphasized that there was no apparent discussion of the legality of unauthorized humanitarian intervention during the drafting of the U.N. Charter at the Dumbarton Oaks Conference or at the San Francisco Conference.

Regarding the text of Article 2(4), at the Dumbarton Oaks Conference the Four Powers agreed on the predecessor of this provision, which read simply: "All members of the Organization shall refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the Organization."[51] This language contains a similar ambiguity to that in the final text adopted at San Francisco, by implying that some unilateral uses of force might be consistent with the purposes of the U.N. This provision was adopted by the Four Powers with "little hesitation."[52] According to two prominent scholars, "this was considered a stronger pledge than the more conventional promise not to resort to violent means for the settlement of disputes."[53] And other scholars have expressed the view that the "phraseology was intended to achieve not only a maximum commitment of members, but also and more particularly to give the Security Council guidance combined with wide discretion in the interpretation and application of its responsibilities for the maintenance of international peace and security."[54]

At the San Francisco Conference, the smaller powers expressed concerns that the wording of the Dumbarton Oaks provision did not sufficiently restrict the unilateral use of force. The smaller states wanted "some assurance that

force would not be used by the more powerful states at the expense of the weaker ones."[55] A report of the drafting committee charged with considering the provision noted that "it was pointed out that the phraseology of paragraph 4 might leave it open to a member state to use force in some manner consistent with the purposes of the Organization but without securing the assent of the Organization to such use of force. It was felt, accordingly, that paragraph 4 should be reworded so as to provide that force should not be used by any member state except by direction of the world Organization."[56]

A number of delegations made proposals in this connection. For example, Costa Rica suggested amending the text of the Dumbarton Oaks provision simply to omit the phrase "in any manner inconsistent with the purposes of the Organization" "in order that the principle of abstention from the use of force may be absolute."[57] And Norway proposed to amend the provision to require member states to refrain from the threat of force or any use of force "not approved by the Security Council as a means of implementing the purposes of the Organization"—thus explicitly affirming that only Council-authorized threats or uses of force were exempt from the prohibition.[58]

A drafting subcommittee rejected all of these proposed amendments—along with similar amendments advocated by Bolivia, Brazil, and Iran—and instead adopted an amendment proposed by Australia.[59] Australia suggested that the words "against the territorial integrity or political independence of any member or state" be added to the text.[60] The rapporteur of the subcommittee noted that although the Norwegian amendment was rejected, the discussion on the Norwegian amendment "was very enlightening, and it helped to clarify the Australian amendment itself. . . . The Norwegian Government proposed that no force should be used if *not approved* by the Security Council. The sense of approval was considered ambiguous, because it might mean approval before or after the use of force. It might thus curtail the right of states to use force in legitimate self-defense, while it was clear to the subcommittee that the right of self-defense against aggression should not be impaired or diminished. It was furthermore clear that there will be no legitimate wars in any sense. It was on these understandings that the subcommittee voted the text submitted to you."[61]

In the plenary session of the drafting committee itself, the Australian amendment "provoked considerable discussion."[62] One issue that provoked such discussion was the potentially open-ended character of the language of Article 2(4). "The Delegate of Brazil said that the change, made in the text to incorporate the Australian amendment had not removed the element of

ambiguity about which he had previously spoken, and he suggested that, apart from the use of legitimate self-defense, the text as it stood at present might well be interpreted as authorizing the use of force unilaterally by a state, claiming that such action was in accordance with the purposes of the Organization. He suggested that it was essential to clarify this by some such wording as 'all members of the Organization shall refrain . . . from the threat or use of force unless such action was being taken according to procedures established by the Organization and in accordance with its decisions.'" The Norwegian delegate echoed these concerns and said that "the Committee should reconsider the present language which did not seem to reflect satisfactorily its intentions, and thought that in any case it should be made very clear in the Report to the Commission that this paragraph 4 did not contemplate any use of force, outside of action by the Organization, going beyond individual or collective self-defense."[63]

A number of delegations sought to provide assurances that no such use of force was contemplated. Thus, the Belgian delegate "suggested that the Delegate of Brazil had underestimated the effect of the modifications made in the original text, calling attention, particularly, to the phrase 'in any other manner.'" The U.K. delegate said that "he did not dissent from the reasoning of the Norwegian Delegate, but he thought that the wording of the text had been carefully considered so as to preclude interference with the enforcement clauses of Chapter [VII] of the Charter. As regards the concept embodied in the Australian amendment, he was convinced that the subcommittee had used most intelligible, forceful and economical language." Finally, the U.S. delegate "made it clear that the intention of the authors of the original text was to state in the broadest terms an absolute all-inclusive prohibition; the phrase 'or in any other manner' was designed to insure that there should be no loopholes."[64]

After this discussion, the committee rejected the Brazilian amendment by a vote of two to twenty-six.[65] The committee instead unanimously adopted the text of paragraph 4, with the Australian amendment and a minor technical change in the reference to the United Nations.[66]

In its final report to Commission I, the drafting committee again explained that its rejection of the Norwegian amendment did not allow for the unilateral use of force: "The Committee wishes to state, in view of the Norwegian amendment to the same paragraph, that the unilateral use of force or similar coercive measures is not authorized or admitted. The use of arms in legitimate self-defense remains admitted and unimpaired. The use of force, therefore, *remains legitimate only to back up the decisions of the*

Organization at the start of a controversy or during its solution in the way that the Organization itself ordains. The intention of the Norwegian amendment is thus covered by the present text."[67]

Turning to the legislative history of Article 53 of the Charter, the predecessor of Article 53 was adopted without dissent at the Dumbarton Oaks Conference. The Dumbarton Oaks provision reads in part: "The Security Council should, where appropriate, utilize [regional] arrangements or agencies for enforcement action under its authority, but no enforcement action should be taken under regional arrangements or by regional agencies without the authorization of the Security Council."[68]

The Four Powers were in absolute agreement on the second clause, that no enforcement action should be taken without Council authorization. Ruth B. Russell and Jeannette E. Muther report that "at the beginning of the talks, Great Britain declared that all regional organizations should be auxiliary to, consistent with, and under the supervision of the world body when matters of world security were involved. . . . It was agreed that the regional agencies should keep the Council informed of all their pertinent security activities, and the United States stressed that such groups should not undertake enforcement action on their own initiative." Both the Soviet Union and China also accepted these provisions.[69]

At the San Francisco Conference, however, the predecessor of Article 53 elicited sharp debate, primarily because the Latin American countries who were members of the inter-American system wanted to "eliminate the requirement of prior authorization by the Security Council before regional agencies could take enforcement action."[70] Various European states also sought to scale back the prior authorization requirement and permit regional organizations to act if the Security Council failed to do so. Australia, New Zealand, and the Arab states similarly desired to enhance the autonomy of regional arrangements.[71] After arduous diplomatic negotiations and maneuvers among the great powers, they reached a compromise solution. They maintained the relevant requirement in Article 53 intact, but specifically permitted individual or collective self-defense, prior to the time the Council should decide and be in a position to act, in a new provision that became Article 51. This compromise was accepted by the responsible drafting committee at the San Francisco Conference.[72] The Latin American countries as well as other countries sought to place on the record their understanding that Article 51 permits not only individual self-defense by a state victim of aggression, but also action by other countries that have established mutual assistance treaties with the victim state.[73] It was still clear to the participants, however, that

enforcement action outside of collective self-defense could only be taken with Security Council authorization. For example, U.S. Secretary of State Stettinius issued a press release which "declared that the new provision recognized the inherent right of self-defense but left unaffected the ultimate authority of the Security Council as the paramount organ in world enforcement action."[74]

11.4.4. Current Understandings of U.N. Member States and the Security Council

Have U.N. member states or the Security Council reached a new shared understanding of the meaning of Article 2(4) or Article 53 that would permit humanitarian intervention by individual states or regional agencies without Council authorization? Have these provisions authoritatively been interpreted in such a way by the International Court of Justice?

Looking first at decisions of the International Court of Justice, in 1949 the Court found that the United Kingdom had violated Albanian sovereignty when its ships undertook minesweeping operations in Albanian territorial waters that were not authorized by Albania. The Court rejected the United Kingdom's assertion that it had the right to intervene to secure property (the mines) constituting evidence in a future international case.[75] It relied on the following grounds:

> The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law. Intervention is perhaps still less admissible in the particular form it would take here; for, from the nature of things, it would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself.[76]

In the 1986 *Nicaragua* case, the Court was also called upon to address the principle of the nonuse of force, at least as it existed under customary international law.[77] The Court appeared to reject concern about violations of human rights in another country as a justification for unilateral military intervention by stating, "while the United States might form its own appraisal of the situation as to respect for human rights in Nicaragua, the use of force could not be the appropriate method to monitor or ensure such respect."[78] These statements have been sharply criticized by some commentators, who believe the Court ignored the evolution of international human rights law

and furthermore adhered to an unduly rigid interpretation of Article 2(4) as well as customary international law.[79] In any case, the Court did not squarely address the reach of Article 2(4) and the permissibility of humanitarian intervention under it.

The Court might have had a further opportunity to elucidate the scope of Articles 2(4) and 53 of the Charter in relation to humanitarian intervention in the 1999 case on the legality of the use of force brought by Yugoslavia against ten NATO countries, but it declined to indicate provisional measures in each of the ten cases on jurisdictional grounds. One of the grounds for jurisdiction alleged by Yugoslavia in each case was Article IX of the Genocide Convention, which provides in part that disputes about the responsibility of a state for genocide shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.[80] The Court concluded that it manifestly lacked jurisdiction under Article IX in the cases against Spain and the United States because of reservations made by those states with respect to Article IX.[81] In the cases against the eight other NATO countries the Court ruled that it had no *prima facie* jurisdiction under Article IX of the Genocide Convention because "the threat or use of force against a State cannot in itself constitute an act of genocide within the meaning of Article II of the Genocide Convention," and there was not yet any evidence that NATO's bombings "indeed entail the element of intent, towards a group as such, required" by that article.[82] However, the Court reserved final judgment on the issue for the merits phase of these eight cases.[83]

In the cases against Belgium, Canada, the Netherlands, and Portugal the Court also held that it had no *prima facie* jurisdiction under Article 36(2) of the Court's Statute, granting compulsory jurisdiction when both parties have made a declaration of acceptance of such compulsory jurisdiction. It noted that Yugoslavia's declaration of acceptance of the Court's compulsory jurisdiction, which was signed on April 25, 1999, by its terms did not apply to legal "disputes" that arose before that date. The Court held that because the NATO bombing campaign commenced on March 24, 1999, thereby giving rise to the dispute in question, Yugoslavia's declaration did not apply to the dispute.[84]

The Court did, however, state that it was "deeply concerned with the human tragedy, the loss of life, and the enormous suffering in Kosovo which form the background of the present dispute, and with the continuing loss of life and human suffering in all parts of Yugoslavia." It simultaneously indicated its profound concern "with the use of force in Yugoslavia," which raised "very serious issues of international law," and emphasized, without

further elaboration, that "all parties appearing before it must act in conformity with their obligations under the United Nations Charter and other rules of international law, including humanitarian law."[85] The Court also reaffirmed the responsibility of states for violations of international law, including international humanitarian law, emphasized that disputes relating to the legality of their acts are required to be resolved by peaceful means, and asserted that "when such a dispute gives rise to a threat to the peace, breach of the peace or act of aggression, the Security Council has special responsibilities under Chapter VII of the Charter."[86] These statements provide no clear indications of the Court's view of the legality of humanitarian intervention without Security Council authorization, although they could be read as implicitly expressing some sympathy for NATO's motives while also emphasizing the Council's special role.

The Security Council, for its part, has not explicitly stated an opinion on the general scope of Article 2(4). As noted earlier, it has often failed to condemn unauthorized military action with a possible humanitarian motive because of a permanent member veto. But the general sentiment of the majority of members has frequently been disapproving of such ventures. The Council has been more willing to tolerate the introduction of forces with the consent of the central government on whose territory they have been deployed.[87]

The General Assembly, in a number of declarations, has reaffirmed or sought further to define the reach of Article 2(4). For example, in the 1970 Declaration on Friendly Relations, mentioned in Chapter 3, the General Assembly elaborated on the prohibition in Article 2(4). The General Assembly also took the position that "armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law." On the other hand, the Declaration reiterated that its provisions were not intended to affect the powers of the Security Council under the Charter.[88] In the Declaration on the Threat or Use of Force adopted in 1987, the General Assembly reaffirmed the prohibition in Article 2(4) and declared that "no consideration of whatever nature may be invoked to warrant resorting to the threat or use of force in violation of the Charter."[89] And it simultaneously called on states to "strive to enhance the effectiveness of the collective security system through the effective implementation of the provisions of the Charter, particularly those relating to the special responsibilities of the Security Council in this regard."[90]

Neither the Declaration on Friendly Relations, the General Assembly's 1974 Resolution on the Definition of Aggression, nor the 1987 Declaration

on the Threat or Use of Force explicitly dealt with the problem of the use of force by one state to rectify gross human rights abuses in another, thus failing to endorse a practice of unilateral humanitarian intervention. And in 1991, the General Assembly adopted a resolution on humanitarian emergency assistance in which it affirmed that assistance "should be provided with the consent of the affected country."[91] The developing states "strenuously resisted any language that would imply a right to unilateral humanitarian intervention."[92]

Turning to Security Council practice regarding Article 53, the problem of the legality of the use of force by regional organizations without prior authorization by the Council was raised during the 1965 Dominican Republic crisis, described earlier. The Tenth Meeting of Consultation of Ministers of Foreign Affairs of the OAS had recommended the establishment of the IAPF to assist in the reestablishment of peaceful conditions in the country. The Soviet Union claimed that the establishment of the IAPF without Council authorization violated Article 53.[93] The U.S. representative argued that the IAPF's activities did not constitute "enforcement action," because they were similar to traditional U.N. peacekeeping missions.[94] Significantly, the U.S. representative reaffirmed, however, that "enforcement action, within the meaning of Chapter VII of the Charter, remains the prerogative of the United Nations and of the Security Council."[95] The majority of Council members, in discussing the problem, appeared to take the view that the OAS action was not "enforcement" because the resolution authorizing the IAPF was merely recommendatory,[96] and because the OAS "was carrying out a conciliatory mission, its forces were not there in support of any claim against the state, and its function was that of pacific settlement under Article 52 and not that of enforcement under Article 53."[97] The first resolution adopted by the Security Council (unanimously, with the concurrence of the United States) merely called for a "strict cease-fire" and cooperation with the secretary-general's representative.[98]

During the 1990s, the Council's retroactive approval of ECOWAS actions in Liberia and Sierra Leone, and of the French-led coalition force in the Central African Republic, might be interpreted as implying a tolerance of humanitarian intervention under the auspices of regional organizations or ad hoc coalitions, without prior Council authorization. The same conclusion might be reached with respect to the Council's failure after the 1991 Gulf War to protest the allied coalition's establishment of "safe havens" in Iraqi Kurdistan, even though military action had never been explicitly authorized by the Council in Resolution 688.[99]

However, the Council's very act of granting retroactive approval in the cases of Liberia, Sierra Leone, and the Central African Republic and its pattern of deploying U.N.-commanded observer missions to monitor the conduct of these regional operations suggest that the Council continues to believe that its authorization is desirable and legally required. For political reasons, it may simply have "looked the other way" during the early phases of these operations. Such a political stance is not tantamount to a consensual reinterpretation of Article 53 that would eliminate a legal requirement of Council authorization.

Perhaps most significantly, set against any practice on the part of individual states or regional organizations to use force without explicit Council authorization was the evolving pattern during the 1990s, prior to the NATO action with respect to Kosovo, of states seeking prior authorization from the Council for humanitarian intervention operations, even in other states that had traditionally been regarded as within the interveners' political "sphere of influence." Such a pattern could be interpreted as manifesting a belief by these states that prior approval was at least politically expedient, if not legally required.[100] In any case, it leaves doubt that those Charter provisions apparently requiring Council approval can be dismissed as a "dead letter." Indeed, as discussed in section 11.3, during the debates on Kosovo, many member states opposed the NATO action as a violation of Articles 2(4) and 53, or at least expressed reservations about its legality under these provisions.

The foregoing analysis reveals many differences of opinion among members of the Security Council and among members of the U.N. about the legality of humanitarian intervention operations not authorized in advance by the Security Council. There certainly does not yet seem to be a clear consensus that Articles 2(4) and 53 ought to be reinterpreted as legally permitting unauthorized humanitarian intervention. Many states may have believed that in extreme cases such intervention is *morally* permissible, as indicated, for example, by the refusal of a majority of Council member states to condemn the NATO bombing of Yugoslavia in March 1999. But this does not mean that they were convinced that as a legal matter Articles 2(4) and 53 ought to be interpreted to permit such unauthorized actions. On the contrary, many member states strongly stated their opinion that such unilateral or regional action should be undertaken with the authorization of the Council.

11.4.5. Applying Fundamental Ethical Principles to Resolve Ambiguities

Under the legal interpretive methodology developed in Chapter 3, it is appropriate to resort to fundamental ethical principles to resolve ambiguities in the text of the Charter that are not otherwise resolved by evidence of either

original or new shared understandings. (See Fig. 7.) That methodology places a strong emphasis, however, on original shared understandings, if they are clear, because of the ethical principles supporting state autonomy and consent. I showed above that the text of Article 2(4) is definitely ambiguous. But the *travaux* clearly indicate the existence of an original shared understanding among member states that Article 2(4) was not intended to permit the unilateral use of force in the territory of another state other than in individual or collective self-defense of a member state or pursuant to Security Council action under Chapter VII or VIII. As the U.S. delegate emphasized, there were to be "no loopholes." While some delegates, such as those of Brazil and Norway, expressed concerns about the ambiguity of the text, other delegates repeatedly and persistently reassured them that no other uses of force would be allowable. And this point was reiterated not only in the report of the drafting subcommittee, but also the report of the drafting committee as a whole to Commission I. Furthermore, not a single participant in the drafting suggested that the unauthorized use of force for humanitarian purposes would be permissible under Article 2(4).[101]

These original shared understandings are confirmed by the language of Article 53. It seems improbable that the drafters intended individual states to have a wider latitude for the use of force, outside of self-defense, than regional organizations. The *travaux* disclose no such intention. Indeed, the justification offered for not adopting similar "authorization" language in Article 2(4) was only to preserve states' right of self-defense, not any right to take unauthorized enforcement action.

Further, as I also demonstrated above, no new shared understandings have emerged that supersede this original understanding of the parties to the Charter. State practice in the 1990s as often evinced a willingness among governments to seek prior Security Council authorization as a willingness to forgo it. And the International Court of Justice, whose opinions are at least entitled to persuasive weight in any evaluation of the evolution of new shared understandings of parties to the Charter, has not squarely ruled on the scope of Article 2(4), but has at least implied that it precludes unauthorized humanitarian intervention.

In short, Article 2(4) ought to be interpreted as prohibiting unilateral humanitarian intervention not authorized by the Security Council. (I take up at the end of this chapter the question of whether the General Assembly, in lieu of the Security Council, can authorize such intervention.) This legal conclusion is supported by a number of fundamental ethical principles apart from the principle of respect for treaty norms—most importantly, the prin-

ciple of consultation (which a requirement of Council approval arguably furthers), and the principle calling for peaceful methods of resolving disputes and improving human rights conditions wherever possible.

In addition, such a construction of the Charter helps minimize the risk that individual states or regional organizations will cloak self-interested military ventures under the guise of "humanitarian intervention" by ensuring that humanitarian intervention will be legally sanctioned only when authorized by the Security Council pursuant to a decision following consultation among its members. Of course, it is still possible for one or more of the permanent members of the Council proposing a military action on ostensibly humanitarian grounds to persuade or cajole enough other members (including the other permanent members) to support, or at least not to oppose, a resolution endorsing that military action—thus rendering it "legal." On the other hand, as analyzed in Chapter 4, the requirement that at least four nonpermanent members support such a resolution provides a minimal procedural safeguard against such an abuse. However, the most important restraint on such an abuse in the long run, as highlighted by the argument in Chapter 10, must be the cultivation on the part of the permanent members of a more humanity-oriented outlook in their approach to carrying out their Security Council role and a desire to ensure the coherence of the Council's decisions relating to humanitarian intervention.

How should Article 53 be interpreted? Article 53 on its face imposes a far more explicit prohibition against "enforcement action" by "regional arrangements or agencies" without Security Council authorization. There is some ambiguity about which organizations qualify as "regional arrangements or agencies," a question to which I return briefly below in my discussion of the NATO action in Yugoslavia. In any case, the *travaux* confirm that, despite original vehement disagreements about the rule, the delegates settled on the inclusion of Article 51, permitting regional organizations to act without Council authorization only in defense of one of their members against an armed attack. It was agreed that any other enforcement action needed Security Council authorization. Again, no delegate asserted that regional organizations ought to be permitted to undertake humanitarian intervention without Council authorization. In this case, both the text and the *travaux* clearly suggest that humanitarian intervention by regional organizations without Council authorization is illegal.

Of course, as noted earlier, the text of Article 53 left open certain issues, including the scope of the term "enforcement action" and whether prior Council authorization is required. Should the term "enforcement action" be

read as including action by a regional organization that has the consent of the central government, or all relevant parties, like traditional peacekeeping operations? The text and the *travaux* suggest, in keeping with the logical connection of the term to Chapter VII, that the framers had in mind uses of force going beyond strict self-defense that also were not consented to by all relevant parties, and in particular the central government. Subsequent Security Council practice—particularly in the 1965 Dominican Republic case—suggests the development of a new shared understanding that the term does not encompass deployments by regional organizations with the consent of all parties, and may also not include deployments that are at least consented to by the central government.

If there is any ambiguity about whether there is such a new shared understanding, fundamental ethical principles suggest its legitimacy, at least in cases where an intervention has primarily humanitarian objectives and all parties consent to the intervention. Where the consent of all relevant parties is present, it seems clear that on balance fundamental ethical principles would permit humanitarian intervention to prevent or put an end to human rights abuses, assuming all the requirements I laid out in Chapter 7 are satisfied. However, where only the central government consents, but important group leaders do not, or a majority of citizens do not, certain ethical principles supporting consent, described in Chapter 5, are not served. The ethical evaluation of the propriety of humanitarian intervention is then more difficult to make, and any intervention ought to be subject to the consultative mechanisms required for Security Council action. In such a situation, a strong case can be made therefore that any military action ought to be considered "enforcement action" and subject to the strictures of Article 53.[102]

Another important interpretive problem associated with Article 53 is whether, assuming that humanitarian intervention by a regional organization constitutes "enforcement action" as just defined, *prior* Council authorization is required. The *travaux* do not clarify this point explicitly, but they do strongly suggest that prior Council authorization was contemplated. In practice, however, as we have seen, the Council has often retroactively endorsed action by regional organizations with a humanitarian focus. Indeed, the generally accepted view among scholars is that "it is reasonable to interpret Art. 53 to mean that [Security Council] authorization of 'enforcement action' need not be prior authorization."[103]

On the other hand, some scholars have argued that retroactive authorization cannot ratify earlier acts of a regional organization on the ground that doing so would represent an abdication of Council control and would

"encourage illegal acts, because regional agencies would be tempted to initiate enforcement actions in the hope that the [Security Council] would give its authorization afterwards."[104] In this connection, as suggested above, the failure of the Council in cases where it has retroactively authorized regional interventions to condemn the original interventions as a violation of Article 53 does not necessarily imply that Council members, or U.N. members generally, now believe that legally prior authorization is not required. There thus appears to be no such new shared understanding, and fundamental ethical principles become relevant in resolving the resulting ambiguity. The fundamental ethical principle of consultation, which is reflected in the quotations from the U.N. Charter and from the Bahá'í Writings with which this chapter opened, combined with the principle of unity in diversity, imply that any doubts about the interpretation of the text or the framers' intentions ought to be resolved in favor of strict, and prior, Council consultation and control. This means that some interventions may therefore be illegal initially, but that their legality can be cured going forward by a Council resolution approving of the operation (as in the case of ECOMOG in Liberia and Sierra Leone).

It should be noted at this point that some scholars have pointed to an additional possible basis for unauthorized humanitarian intervention by at least the permanent members of the Council—Article 106 of the Charter.[105] Article 106 states:

> Pending the coming into force of such special agreements referred to in Article 43 *as in the opinion of the Security Council* enable it to begin the exercise of its *responsibilities under Article 42,* the parties to the Four-Nation Declaration, signed at Moscow, October 30, 1943, and France, shall, in accordance with the provisions of paragraph 5 of that Declaration, *consult with one another and as occasion requires with other Members of the United Nations* with a view to such *joint action on behalf of the Organization* as may be necessary for the purpose of maintaining international peace and security.[106]

Scholars have observed, appropriately, that the conditions referred to in the article continue to exist, inasmuch as no Article 43 agreements have been executed.[107] Thus, the article remains effective. However, the best interpretation of the article, in light of the emphasized passages, and especially in the context of the other Charter provisions analyzed above, is that it only allows the five permanent members *jointly* to take military action to enforce

decisions of the Security Council calling for enforcement action. This is evident from the phrase "joint action on behalf of the Organization" and from the reference to the Council's "responsibilities" only under Article 42, which deals exclusively with the "taking" of military enforcement action (understood to involve forces supplied to the Council under Article 43 agreements), and not under Article 39, which grants the Council jurisdiction to "decide" what measures shall be taken to maintain or restore international peace and security.[108]

Although the *travaux* are somewhat ambiguous, such an interpretation is supported by a number of statements made by delegations during the discussion of this provision. For example, the U.S. delegate reassured other delegates that the "role of the Council during the interim period would include all its functions listed in the Charter in so far as the Council could perform those functions."[109] These functions could reasonably be understood to include the taking of a decision that force is necessary to maintain or restore international peace and security (or to rectify gross human rights violations).

To the extent that Article 106 or the *travaux* contain ambiguities, those ambiguities should be resolved in light of fundamental ethical principles. The principle of consultation, as explored earlier, clearly supports the above interpretation, because that interpretation would permit and require consultation among all Security Council members before a weighty decision that force is necessary is made.

Moreover, Article 106 apparently requires unanimity among the permanent five in carrying out enforcement measures by reason of its reference to "joint action."[110] In short, while Article 106 could well have future significance in cases where the Council decides that military action is required, and agreement on the methods of taking such action can be reached among the permanent members, it does not appear to provide any legal basis for undertaking humanitarian intervention not authorized by the Security Council.

Some scholars have argued that unauthorized humanitarian intervention might be permissible based on the legal doctrines of "reprisals" or of "necessity." It is not possible here fully to analyze these arguments. However, other scholars have pointed to persuasive authority indicating that under contemporary international law reprisals cannot lawfully involve the use of force, and that the doctrine of "necessity" cannot be invoked to justify violation of a treaty norm that explicitly or implicitly excludes the possibility of invoking a necessity defense—as Article 2(4), based on the above analysis, appears to do.[111]

Thus far I have established that Articles 2(4) and 53 ought to be interpreted as prohibiting unilateral or regional humanitarian intervention with-

out Council authorization. But does this mean that these Charter prohibitions should be regarded as having superseded, as of 1945, the general principle of moral law requiring that some form of humanitarian intervention be legally permissible, which I established earlier, and any preexisting customary norm permitting states to engage in humanitarian intervention? According to traditional (customary) legal rules, a subsequent inconsistent treaty obligation will trump a preexisting customary norm or general principle of law as to parties, based on the principle of *pacta sunt servanda,* except in the case of norms or principles that constitute *jus cogens*.[112] These rules are supported by the fundamental ethical principles of consultation and of freedom of moral choice, which place great weight on the explicit and voluntary agreements of states. At the same time, as I argued in Chapter 3, fundamental ethical principles support the preemptive effect as against treaty obligations of *jus cogens* norms, especially those *jus cogens* norms that codify essential ethical principles. However, they also support the principle that treaties ought to be interpreted, if at all possible, in a way consistent with *jus cogens* norms.

If the general principle of moral law, and any customary norm, permitting humanitarian intervention are "ordinary" legal norms, then it seems appropriate to recognize the Charter prohibitions as having superseded them, unless the Charter can be interpreted consistently with them. On the other hand, if they are norms of *jus cogens,* then they survived the adoption of the U.N. Charter and there is a question whether they take precedence over the Charter prohibitions or else can be reconciled with the Charter.

Given the doubts that still exist—and that certainly existed in 1945—about whether states generally believe that it is or would be desirable legally to permit unilateral humanitarian intervention, it is not possible here, as I indicated earlier, definitively to determine whether a customary norm permitting humanitarian intervention currently exists or existed in 1945. This is the case even though a more rigorous analysis might indicate that fundamental ethical principles should tip the balance in favor of recognition of such a customary norm. In any event, in light of the doubts about even the existence of the requisite degree of *opinio juris,* it is particularly difficult to determine whether such a norm constituted or currently constitutes a norm of *jus cogens*. If it is not a norm of *jus cogens,* then it seems clear from this analysis that the Charter cannot be interpreted as consistent with it and thus supersedes it.

On the other hand, it does seem appropriate, as I argued in Chapter 3, to recognize the general principle of moral law requiring that some form of

humanitarian intervention be legally permissible (under limited conditions) as a *jus cogens* norm. We then have a potential clash between this *jus cogens* norm and the prohibitions of the U.N. Charter. Does this clash mean that it is permissible to disregard, legally, the prohibitions in Articles 2(4) and 53? It does not. This is for the simple reason that the Charter *does* permit and *does not* absolutely prohibit humanitarian intervention, as I established in Chapter 4. The Charter simply requires that the intervention be authorized by the Security Council. This requirement is itself supported by fundamental ethical principles, including the principles of the nonuse of force, consultation, and impartiality. Such a requirement is likely to provide an incentive for the peaceful resolution of human rights problems, and uses of force that are collectively authorized by the Council are far more likely to be the product of some degree (however imperfect) of consultation among diverse Council members and to satisfy the conception of impartiality as adherence to relevant ethical principles elaborated in Chapter 6. It was certainly morally permissible for the Charter's framers to decide that any uses of force (presumably including humanitarian intervention) ought to be authorized by the Security Council in order to minimize uses of force and to ensure that such uses were the result of collective, and ideally consultative and impartial, decision-making. The Charter's provisions, particularly in Chapter VII, operate to regulate application of the *jus cogens* principle; they do not contravene it.

Thus, it is possible to view the U.N. Charter prohibitions and this *jus cogens* norm as consistent with each other.[113] It may be argued, of course, that during the Cold War the Charter's collective enforcement provisions were effectively rendered moribund, thus allowing for no real possibility of authorized humanitarian intervention. (A similar argument may be made today, in light of the apparent attitudes of China, and to a lesser degree, Russia, at the time of this writing.) Should not the general principle of moral law to which I have referred, particularly given its morally essential character, require a genuine political possibility of humanitarian intervention?

I believe that the better view is that the principle requires only a *legal* avenue for humanitarian intervention, because it is a principle of law, and not, despite its origins in fundamental ethical principles, a principle of pure morality. Legal procedures can always be frustrated by political stonewalling by relevant decision-makers; this does not mean that from a legal perspective the procedures are unavailable. In short, the political fact of the Council's deadlock during the Cold War (and to a lesser extent, today) may be relevant to the morality of unauthorized humanitarian intervention, as I discuss

below, but not to its legality. This is because the Charter itself certainly allows for a very real legal possibility of authorized humanitarian intervention.

We now come to a potential discordance between the Charter's prohibitions and the general principle of moral law that *obligates* states to take some reasonable measures within their abilities to prevent or stop widespread and severe violations of essential human rights. The Charter's prohibitions would appear to prevent fulfillment of these obligations in cases where the threat or use of force seems necessary to prevent or thwart such violations. However, this general principle of moral law does not legally require the use of force in all or even some cases, precisely because a decision to use force must be the product of a complex and nuanced decision-making procedure that involves weighing relevant consequences.

Once again, it is certainly permissible for states to seek to regulate this decision-making procedure, as long as force may potentially be allowed in cases where it appears necessary. Chapter VII's provisions are precisely such an attempt at regulation, and in particular, to require consultation among particular member states (namely, the members of the Security Council) as a condition of intervention. Because of the legally and ethically challenging evaluation required before deciding that military action is appropriate, as I have described throughout this book, consultation becomes especially important as a means of ensuring that military action is, indeed, legally and ethically warranted, and that such action does not in fact subserve a particular intervening state's self-interest. Again, therefore, there is (and was in 1945) no inherent conflict between the Charter's prohibition of unilateral forcible action and this general principle of moral law obligating member states to take reasonable measures in response to rampant and flagrant violations of essential human rights.

A number of legal commentators have argued that the Genocide Convention imposes obligations on individual states parties to resort to humanitarian intervention, and that these obligations may trump the Charter prohibitions on unauthorized uses of force, or at least require that they be interpreted to permit unauthorized humanitarian intervention.[114] These arguments involve the problem of how the Charter and a potentially inconsistent treaty ought to be interpreted in light of each other. Article 103 of the U.N. Charter explicitly provides in this connection that "in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."[115]

As we saw in Chapter 8, the text of the Genocide Convention obligates

parties to "prevent and to punish" genocide.[116] It does not specify that military action is required. The Convention's *travaux* also do not indicate that its drafters had in mind military action to "prevent" genocide. Military measures were only referred to indirectly in discussions of possible Security Council action under Chapter VII of the Charter.[117] There is no suggestion in the text or the *travaux* that the parties' obligations under the Genocide Convention ought not to be construed consistently with their obligations under the U.N. Charter, or that the Convention somehow overrides Articles 2(4) and 53.

In short, the Genocide Convention does impose obligations to prevent genocide, but these obligations must be fulfilled within the legal framework of the Charter. As I discussed at some length in Chapter 8, these obligations legally require parties to the Convention to bring to the Council's attention situations of genocide and to make every effort possible to persuade the Council to take appropriate action, including potentially authorizing the use of military force. In accordance with the analysis in Chapters 8 and 10, permanent members of the Council, all of whom are parties to the Genocide Convention,[118] are also legally obligated to exercise their veto powers in good faith, and not to veto resolutions aimed at preventing genocide based solely on considerations of national interest.

To summarize, I have concluded that under an approach based on fundamental ethical principles it is not legally permissible for states or regional organizations to undertake humanitarian intervention without Council authorization. This legal conclusion, however, is morally troubling in light of the political reality that one or more permanent members have recently tended to use their veto privilege, or even the threat of a veto, to block humanitarian intervention operations. Does this legal conclusion mean that human rights victims must accept that the legal niceties of the Charter—and in particular, the precious veto rights of the permanent members, coupled with the prohibitions in Articles 2(4) and 53—are morally allowed to sentence them to torture or death without hope of rescue?

It does not. In this chapter I have only sought to elaborate on the status of the law as it is (the *lex lata*). In light of fundamental ethical principles, this is not the ideal law as it should be (*lex ferenda*). The analysis of the veto in Chapter 10 makes clear that the veto is morally problematic and that every effort ought to be made to revise the Charter to limit its use, particularly with respect to decisions concerning humanitarian intervention. In view of the ethical principle of consultation, this Charter revision would be more desirable than acceptance of the veto and codification (in the Charter, or by a separate treaty) of criteria for legally permitting humanitarian interven-

tion without Council authorization. The principle of seeking, through legitimate channels, to reform existing law so that it more closely reflects fundamental ethical principles makes the pursuit of such reforms, ideally under the leadership of some or all of the permanent members, essential and imperative. The current state of the law is morally unacceptable.

At the same time, the current law is what it is. There will be cases of egregious and massive violations of essential human rights where the use of force is, realistically, the only way to put a stop to the violations and yet, because of the veto, the Security Council is paralyzed. The problem then arises whether or not, morally, it would be permissible in such a situation for a state or a regional organization to violate the legal prohibitions in Articles 2(4) and 53. I established in Chapter 2 that while fundamental ethical principles require adherence to legal norms, even those that are not morally ideal, they suggest that there are cases in which a violation of legal norms is morally justified if abiding by the law would severely frustrate fundamental ethical principles, and if every possible attempt has first been made to realize those principles through legal avenues.

Accordingly, all member states are obligated, morally, to bring situations involving threats of or actual rampant and flagrant violations of essential human rights to the attention of the Council in good faith and to do everything in their power to persuade the Council, and in particular the permanent members, to take appropriate action. They should at least attempt to have a resolution introduced in the Security Council authorizing action by an ad hoc coalition or by a U.N.-commanded force if force appears to be necessary.

Only if a resolution is so introduced and fails to be adopted because of one or more permanent member vetoes (otherwise attaining the required nine out of fifteen majority) would states be morally justified in taking military action in contravention of Articles 2(4) and 53. This moral requirement of a majority vote in favor is in keeping with the principle of consultation as well as a principle of respect for the provisions of the Charter, apart from the veto, to the extent possible.[119]

Further, any such action could only be taken in response to actual rampant and flagrant violations of essential human rights, or a situation in which violations on such a scale reasonably appear to be imminent. Such a limitation is necessary because of the extraordinary character of unauthorized intervention and the importance of respecting both the principle of the nonuse of force and those principles supporting the autonomy of states. Action in response only to "threats" of future widespread and severe human rights

violations that are not apparently imminent is, given the Charter's provisions, morally best regarded as the exclusive province of the Security Council. Finally, such an unauthorized humanitarian intervention action would only be justified morally if it complied with all of the restraints, both moral and legal, on Council-authorized uses of force I identified in Chapter 7.

If these criteria are met, then an unauthorized instance of humanitarian intervention may be justified morally based on fundamental ethical principles, but it would still not be legal. Supporters of establishing legal criteria for unauthorized humanitarian intervention may ask why, if intervention in such cases is morally justifiable, we ought not to recognize that the intervention should be legally permissible as well. Why accept such a discordance between the law and the requirements of morality?[120] The answer is twofold. First, as I have already suggested, the law *ought* to be reformed more closely to comply with fundamental ethical principles, most importantly, by limiting or eliminating the veto, and also by vigorously pursuing the other reforms recommended here for enhancing the U.N.'s capacities for humanitarian intervention. Second, if criteria for unauthorized intervention are to be developed, it is far preferable, in light of the principle of consultation and all the other ethical principles supporting the authority of treaties, that such criteria be developed consultatively by states through a revision of the Charter. This is the appropriate legal means for revising the law, and it should allow for full discussion and open-minded consultation.

There is also the possibility that if the Security Council fails to endorse a proposed unilateral or regional humanitarian intervention operation, the General Assembly might invoke the Uniting for Peace Resolution. The Resolution provides in part that "if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, *including in the case of a breach of the peace or act of aggression the use of armed force when necessary,* to maintain or restore international peace and security."[121] In particular, the General Assembly might conclude that massive and flagrant violations of essential human rights constitute a "breach of the peace" and recommend in a resolution that a humanitarian intervention operation proceed. Would such an Assembly resolution legalize the intervention?

I cannot fully resolve doubts about the constitutionality of the Uniting

for Peace Resolution, but the methodology for Charter interpretation developed in Chapter 3 leaves open the possibility that the Resolution itself represented important evidence of a new shared understanding among U.N. member states that Articles 10 through 12 of the Charter allow the General Assembly to recommend enforcement action when the Council fails to act. Article 10 generally permits the Assembly "to discuss any questions or any matters within the scope of the . . . Charter . . . and, *except as provided in Article 12,* [to] make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters."[122] Article 11 states in part that the General Assembly may discuss questions relating to the maintenance of international peace and security, and make appropriate recommendations, except as provided by Article 12. It further indicates that any "such question on which action is necessary shall be referred to the Security Council . . . either before or after discussion."[123] Article 12 affirms in part that while the Security Council "is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests."[124]

At the San Francisco Conference, the smaller powers contended that there should be no restriction on the Assembly's powers of recommendation like those in Article 12, because of the risk that a matter might become "frozen" in the Council. They correspondingly proposed that the Assembly should be able to declare by a two-thirds vote that the Council was not exercising its functions, and thereby acquire authority to make recommendations with respect to the matter in question. This proposal was not accepted by the great powers.[125] The *travaux* therefore appear to support a limitation of the Assembly's competence. They may even be read as suggesting that the framers' original intent was to preclude any Assembly recommendations on a matter under consideration by the Council, including in cases where the Council was in fact prevented from acting by the veto. However, the Uniting for Peace Resolution may be viewed as strong evidence of a new shared understanding, which would prevail over this original understanding, that the Assembly may act in the limited circumstances envisioned in the Resolution. Indeed, the vast majority of Assembly members, with the exception of the Soviet Union and four other allied states, and two abstaining states, supported the legality of the Uniting for Peace Resolution.[126] More generally, in the view of most commentators, by virtue of the Resolution and general practice of the Assembly, "Article 12(1) has become somewhat of a dead letter in so far as strict adherence to its language is concerned."[127]

Resort to fundamental ethical principles helps strengthen this new apparent shared understanding. For all the reasons analyzed in Chapter 10, especially the moral deficiencies of the veto, allowing the Assembly the type of competence indicated in the Resolution would on balance best implement these principles. Most importantly, it is consistent with the principles of unity in diversity and consultation, because Assembly action would require at least agreement by a two-thirds majority[128] of diverse U.N. member states, and would also require some form of discussion—ideally, open-minded consultation. And it would permit action in defense of the security and autonomy of states, which, I noted in Chapter 3, is a value that is supported by a number of fundamental ethical principles.[129]

Even if the Uniting for Peace Resolution legally permits the Assembly to recommend military measures in cases of a "breach of the peace" or "act of aggression," it does not by its terms authorize such measures to protect human rights within a state. Indeed, the drafters intentionally excluded the term "threat to the peace" as a ground for recommending the use of armed force, and the South African delegate, for example, placed on the record his country's understanding that the terms "breach of the peace or act of aggression" "signify exclusively a breach of the peace or an act of armed aggression *as between States*."[130]

However, the Uniting for Peace Resolution itself included an affirmation, at the end, that the General Assembly was conscious that "enduring peace will not be secured solely by collective security arrangements against breaches of international peace and acts of aggression, but that *a genuine and lasting peace depends also . . . especially upon respect for and observance of human rights and fundamental freedoms for all*."[131] John Foster Dulles, the U.S. representative, stated about this provision that it "reminds the Member nations that enduring peace depends not merely on security arrangements but also upon the observance of human rights and the promotion of economic well-being. . . . Too often in the past men have taken the false and superficial view that peace depends merely upon maintaining the *status quo*. The reality is that repression produces violent explosion unless the efforts at maintaining a peaceful order go hand in hand with efforts which advance the material, intellectual and spiritual welfare of mankind. This draft resolution commits us to that enlightened way."[132] This particular section of the Uniting for Peace Resolution was adopted without a dissenting vote.[133]

The aspirational wording of this affirmation of the interdependence of lasting peace and human rights might be read, as the South African representative wished, as a rejection of the proposition that human rights viola-

tions might constitute a "breach of the peace" permitting the Assembly to recommend collective enforcement action. On the other hand, it left open the door to an interpretation of "breach of the peace" like that I elaborated in Chapter 4. Indeed, the legal interpretive methodology developed in Chapter 3 for treaties, as applied by analogy to the Uniting for Peace Resolution, indicates that because the text and the *travaux* leave it unclear whether massive and severe human rights violations could constitute a "breach of the peace," fundamental ethical principles become relevant to help resolve the ambiguity. These principles suggest that the Resolution should be interpreted to permit the Assembly to authorize humanitarian intervention, at least in cases where massive and flagrant violations of essential rights are occurring or are imminent.[134] Certainly the general principle of moral law requiring that some means of humanitarian intervention be legally possible in the international system once again counsels in favor of such an interpretation.

In short, if states contemplating humanitarian intervention first seek authorization by the Security Council (the organ with primary responsibility for maintaining international peace and security), introduce an appropriate resolution, which obtains the required majority support but is vetoed by one or more permanent members, and then take the question to the General Assembly, which recommends such action pursuant to the Uniting for Peace Resolution, the action ought to be considered lawful under the Charter. This conclusion assumes that all the other conditions for lawful humanitarian intervention indicated earlier are also satisfied.

I suggested above that an unauthorized humanitarian intervention action might be morally justifiable if the intervening state or states first sought a Security Council vote on an authorizing resolution, which obtained nine affirmative votes but was defeated by one or more vetoes. Does the preceding analysis of the possibility of General Assembly action that would render the intervention legal imply that such a state or states have a moral obligation to seek an authorizing General Assembly resolution under the Uniting for Peace Resolution prior to undertaking any such mission? On the one hand, the fundamental ethical principle of exhausting all legal remedies before violating the law strongly counsels in favor of such a moral obligation.

On the other hand, there are several reasons why, depending on the circumstances of a given case, seeking General Assembly authorization may not be an absolute moral requirement. First, the General Assembly, unlike the Security Council, is not structured to hold emergency meetings easily and to act quickly in response to humanitarian crises. Thus, in an urgent case, seeking Assembly approval may lead to costly delays and thus may not

be morally required on balance. Second, the Security Council, under the Charter, bears the primary responsibility for maintaining international peace and security, including for authorizing forcible responses to threats to or breaches of the peace. The General Assembly's responsibility is secondary. Thus, morally, it is most important to obtain approval by a nine-member majority of the Council for any proposed humanitarian intervention action. Third, and finally, while I have suggested that General Assembly action to recommend a humanitarian military mission under the Uniting for Peace Resolution would be legal given an interpretation of the Charter and Resolution based on fundamental ethical principles, such an interpretation is by no means yet generally accepted by U.N. member states. By comparison, the Council's competence to authorize humanitarian intervention is more widely endorsed. This casts doubt on making referral to the General Assembly an absolute moral requirement, though clearly fundamental ethical principles indicate that states should as a general rule make every effort to obtain General Assembly action in the case of veto-induced Council paralysis.

What if a state or states contemplating intervention seek General Assembly approval, but the Assembly fails to adopt an authorizing resolution by the required two-thirds vote? Would any subsequent humanitarian intervention action be illegal, or at least immoral? In keeping with the above analysis, it seems fair to conclude that such action would not be legal, having failed to achieve either Council or Assembly approval. On the other hand, it might still be moral, on balance, depending on the degree of support the action garnered in the Assembly as well as on a constellation of other morally relevant factors, including the urgency of the human rights situation and the compliance of any uses of force with the legal and ethical standards set out in Chapter 7.

Would states or regional organizations ever be morally *required* to undertake humanitarian intervention without Council or General Assembly authorization? I cannot fully resolve this question here. However, I suggested in Chapter 8 that morally force might be the best reasonable response to widespread and flagrant violations of essential human rights. On the other hand, the strong ethical principle requiring adherence to international legal norms if at all possible suggests that as long as a state made every effort possible to persuade the Council to authorize the use of force as just suggested, it would be morally excused, according to fundamental ethical principles, if it chose not to take military action without Council authorization. But it would still be morally obligated to take all nonmilitary measures within its power, including encouraging negotiations, that

might help prevent or stop rampant and egregious violations of essential human rights.

How does the NATO action in Yugoslavia fare under this legal and moral analysis? First, it seems clear that the NATO bombing campaign was illegal under the U.N. Charter and contemporary international law because (1) it did not constitute an act of collective self-defense on behalf of a member of the NATO alliance or on behalf of a recognized state subject to an armed attack, under Article 51; and (2) the intervention was not authorized by the Security Council under either Chapter VII or Article 53. One can argue that NATO is not technically a "regional arrangement or agency" as defined in Chapter VIII of the Charter because it is a defensive alliance.[135] Even if this formally relieved NATO from compliance with Article 53, however, NATO and its member states would continue to be subject to the provisions of Article 2(4) and Chapter VII, which, I established earlier, only permit the nondefensive use of force if authorized by the Security Council.

Second, it is difficult to argue, based on the foregoing criteria, that the NATO action was nevertheless morally justified on balance in light of fundamental ethical principles. There is no apparent evidence that NATO members made any significant effort to win Security Council approval for military action. NATO members may well have accurately viewed Russian and Chinese vetoes as foregone conclusions, but they nevertheless should have made every possible effort to win support (or at least an abstention) for a Council-approved military action, as they later did with respect to KFOR. They should have at least attempted to introduce a resolution in the Council authorizing military action. Indeed, as I suggested in Chapter 8, NATO members that were also members of the Security Council were legally obligated to take these basic steps in their capacity as Council members if they believed the use of force to be required. Their failure to do so further contravened the ethical principle of consultation and the principle that every possible legal avenue of redress should morally be pursued before deciding to break the law for moral reasons.

In addition, the actual military action undertaken by NATO was problematic on a number of other moral grounds, as analyzed in preceding chapters. In particular, NATO might well have been justified in concluding that a systematic and flagrant campaign of expulsion and slaughter of Kosovo Albanians was imminent, and that only some sort of military action might prevent it. But it failed to take the one measure with the potential quickly to put an end to the actual atrocities: namely, the deployment of ground troops in Kosovo itself. And the conduct of its bombing campaign may have

violated a number of moral and legal restraints on the conduct of war aimed at protecting civilians, although it is not possible here to conduct the necessary careful assessment of NATO's compliance with international humanitarian law, especially as interpreted in light of fundamental ethical principles.

This is not to say that the NATO action did not have its moral merits. Certainly it eventually put an end to the slaughter and expulsions. And it was far preferable for NATO countries to act in consultation, as part of NATO, rather than individually. But the strong principle of respect for international law required, morally, that NATO also have made every possible effort, through the legal channels provided in the Charter, to seek U.N. action or at least approval first, and to ensure that the action itself complied with legal and ethical norms of *jus in bello*. The ethical principles supporting the NATO action, coupled with these ethical deficiencies, once again underline the imperative of pursuing all of the reforms advocated in preceding chapters.

Part Five

Humanitarian Intervention and International Law in the New Millennium

12 The Prospects for a Fresh Approach Based on Fundamental Ethical Principles

> Every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance.
> —The Universal Declaration of Human Rights
>
> Endeavor, ceaseless endeavor, is required.
> —'Abdu'l-Bahá

12.1. Introduction

As the international community enters the first decades of the new millennium, what are the prospects for acceptance of the fresh approach to humanitarian intervention and international law that I have developed in the preceding chapters, including the fundamental ethical principles it identifies? Is it destined to be viewed by historians as just another idealistic and utopian attempt to interject law and morals into an intensely political area? Or does it have the potential to influence legal discourse and policymaking, even in an era of skepticism about the feasibility and desirability of humanitarian intervention?

Acceptance of the proposed approach might occur at two levels. First, the legal methodology developed in Chapter 3 and the specific legal conclusions I reached in Parts Three and Four might be adopted by legal professionals, including judges on the International Court of Justice and members of legal departments of national foreign ministries. Second, the fundamental ethical principles that the approach identifies and on which it is based might be accepted, not only by these legal professionals as part of this methodology,

but by political leaders, who might give them more weight in formulating their policies on humanitarian intervention, and by citizens.

With respect to the first form of influence, I showed in Chapter 3 that various aspects of the proposed legal methodology for identifying and interpreting international legal norms relevant to humanitarian intervention are already supported by decisions of the International Court of Justice, thus increasing their chances for acceptance among jurists. I also indicated that Judge Christopher Weeramantry adopted a jurisprudential methodology in his dissenting opinions that looks to revered moral texts as supplementary sources of authority to bolster and help interpret international legal norms with an ethical content. It is to be hoped that Judge Weeramantry's innovations in this regard will be emulated by fellow jurists.

The second form of influence, while more difficult to achieve, is far more important if the approach is to have any practical impact. Unless and until government leaders accept and pursue fundamental ethical principles in their policies, the prospects for consensus on the fresh approach to humanitarian intervention and international law proposed here will be dim. Further, the development of a commitment among ordinary citizens to these fundamental ethical principles is essential. Even if leaders were to adopt policies in keeping with the recommendations I have made, these policies would likely be unsuccessful in the absence of broad, and ethically grounded, public support.

In the following section I evaluate the prospects for achieving support for these fundamental ethical principles among leaders and citizens, as well as for the legal conclusions and reforms I have advocated, and the positive and negative trends that may affect these prospects.

12.2. Future Prospects

The short-term prospects for achieving widespread support for the fundamental ethical principles outlined in Chapter 2, and therefore for implementation of the proposed approach to humanitarian intervention and international law by governments, are unquestionably mixed. A number of negative trends and forces are immediately evident.

First, many governments, while more than happy to lend their rhetorical assent to fundamental ethical principles evident in contemporary international law, including the U.N. Charter and the Universal Declaration of Human Rights, flout these principles daily in their conduct of foreign relations and in their relations with their own citizens. Such governments often

defend their actions by emphasizing those norms in the U.N. Charter which oppose humanitarian intervention, including norms of sovereignty, nonintervention, and domestic jurisdiction, and interpreting them in ways inconsistent with an ethical principle of unity in diversity.

Second, many governments, groups, and individuals are now espousing ideologies and doctrines, including ethnic or religious nationalism, that lay down a direct challenge to these principles. Indeed, the surge during the 1990s in the number of U.N.-authorized peacekeeping and humanitarian intervention missions was itself the outgrowth of a revival of extreme nationalism and ethnic or religious prejudice. Instead of developing an integrated value system characterized by interlocking, nested levels of identity, including above all identification with the entire human family, many leaders and individuals are adhering to rigid religious, ethnic, or nationalist ideologies that elevate membership in the favored group to the status of supreme and exclusive value.[1] Moreover, the ethical principles on which I have grounded the approach are unlikely to be accepted by believers who interpret their faith in a rigid, exclusivist way. Religious fanaticism is quickly spreading and poses a major challenge to widespread acceptance of these principles.[2]

A third obstacle to implementation of the fresh approach I have proposed is the unwillingness even among those U.N. member states which maintain that they have at least moral duties to intervene to put these principles into consistent action. Many governments have often appeared to be willing to undertake humanitarian intervention only when the costs were minimal, or the action furthered self-interested objectives as well as humanitarian ones. For example, the original intervention in Somalia was a relatively low-cost way of saving millions of lives from the ravages of starvation. When casualties and the expenses of intervention escalated, the United States and other participating governments were no longer interested. In Rwanda, the lack of any strategic interests led to nearly complete paralysis among the major powers, except for France, which had its own reasons for acting. In Bosnia, U.S. intervention only became possible when the risks were significantly lowered by a peace agreement. Even then, U.S. officials were chary of involving U.S. military troops in the business of apprehending criminal suspects. The same reluctance was initially evident in the international response to events in Kosovo. Rather surprisingly, NATO members did agree to the massive bombing campaign beginning in March 1999, but their persistent lack of interest in deploying ground troops prior to the formal adoption of a peace agreement demonstrated that concerns about casualties could easily outweigh any apparent moral imperative of preventing possible genocide. And

there were signs after the deployment of KFOR in the summer of 1999 that despite rhetoric about a new willingness to employ humanitarian intervention consistently (or even coherently), the Western powers were hardly in fact ready to transform their rhetoric into concrete, and of course costly, action in other troubled areas of the globe. Indeed, for many months they paid insufficient attention to the growing conflicts in Africa, including Sierra Leone and the Democratic Republic of the Congo, and quite deliberately declined to consider any strong response to Russia's actions against the civilian population in Chechnya.

Fourth, NATO's failure to seek Security Council authorization for its bombing campaign against Yugoslavia signals a disturbing trend among the Western powers to avoid compliance with the U.N. Charter when humanitarian imperatives (and political considerations) seem compelling to them. This trend casts serious doubt on the interest of the Western powers in vigorously pursuing the types of institutional reforms in the U.N., including limitation of the veto, necessary to allow the U.N. to fulfill its humanitarian intervention responsibilities.

Finally, equally problematic has been the strong opposition of some permanent members of the Council to humanitarian intervention on the grounds that such intervention violates the sovereignty of target states. China, we have seen, has persistently taken this position, and Russia did so with respect to Yugoslavia during the Kosovo crisis, thus preventing Council action before adoption of the June 1999 agreement. Many observers have alleged that China's position betrayed its sensitivities about scrutiny of its own human rights practices,[3] and that Russia desired to discourage the possibility of future international intervention in troubled regions of its own like Chechnya.[4] These types of negative attitudes toward humanitarian intervention, while by no means set in stone, could portend a return to the divisiveness and disunity that characterized permanent member behavior during the Cold War and a movement away from the evolution toward humanity-oriented values I indicated was necessary in Chapter 10.[5]

Is there any hope of reversing these trends impeding the widespread acceptance and implementation of the fundamental ethical principles underpinning the fresh approach I have developed? Over time (whose duration cannot be predicted with any accuracy), it seems that a variety of forces may help mitigate and ultimately redirect these negative trends.

First, there are signs that these ethical principles are gradually being accepted by increasing numbers of governments and citizens. The very willingness of governments to put their signature to, and often ratify, interna-

tional declarations and treaties endorsing the fundamental ethical principles outlined in Chapter 2 at least offers some reason to believe that in the long term they might be persuaded of the merits of these principles and to adopt these principles as ethical guides for action. There is evidence, including in the debates on Kosovo, that many states and government officials (but not all, of course) are increasingly receptive to the ethical principles I have identified, and to an interpretation of international legal norms that takes these principles into account. And the frustration evident among many states about NATO's unauthorized bombing campaign, coupled with the ability of the Council to seek at least a temporary "truce" among the permanent members with respect to the deployment of KFOR, led some states to hope "that a new inclination to find, within the Council, multilateral solutions to other serious problems affecting world security, will gradually emerge."[6]

More generally, there are signs that many of the ethical principles on which the approach is based may already be more widely endorsed than is popularly believed. It is possible to perceive, following the end of the Cold War, a gradual diffusion of these principles in secular as well as religious cultures—a trend that coexists with increasing ethnic and religious hatred and fanaticism. Numerous governments, NGOs, and citizens have shown themselves willing to make great sacrifices in blood and treasure to alleviate the suffering of human beings in distant parts of the globe. This willingness to move beyond traditional conceptions of self-interest and to act altruistically testifies to the presence of a growing concern for humanity on the value maps of both leaders and citizens. Indeed, NATO's intervention in Kosovo, which was difficult to justify on any traditional strategic grounds, is a recent example of the potential policy impact of such values, at least in particular political contexts. The willingness of governments, including those of the permanent five, to deploy their military forces in humanitarian intervention operations or otherwise to support or agree to the undertaking of such operations is a welcome development, and one for which governments deserve praise.

Among members of the general public, the popularly labeled "CNN factor" shows that many "average" citizens feel some degree of empathic concern for human rights victims. Moreover, at least in the United States, opinion polls routinely indicate a high level of support for the U.N.'s humanitarian activities and peacekeeping, including its experiments with humanitarian intervention. For example, polls have demonstrated majority support for employing military force through the U.N. rather than unilaterally; for U.N. peacekeeping generally; for the greater use of military force by U.N. missions

when necessary; for U.N. command over U.S. troops when the United States contributes only a minority of the total force; for the U.S. participation in UNOSOM II in Somalia, even after the October 1993 incident; for participation in U.N. operations when "innocent civilians are suffering or are being killed," "whether or not [participation] serves the national interest"; for military intervention to stop genocide; and for a standing U.N. peacekeeping force.[7] According to public opinion researcher Steven Kull, this support derives from individual moral concern, rather than a preoccupation with the "national interest."[8] Remarkably, in view of popular wisdom about Americans' lack of tolerance for casualties, polls conducted at the beginning of the 1999 Kosovo crisis showed that a majority of Americans would have supported the introduction of U.S. ground troops to prevent genocide there.[9] These polls demonstrate, at least on the surface, a certain prevalence of humanity-oriented values among members of the American public, and a potential recognition of the unity of the human family with attendant obligations to protect even those from another culture and of another religious orientation from genocide.

Second, there is evidence that leaders, and members of the public, are increasingly perceiving the empirical interdependence of states and peoples, which means that human rights atrocities in other states—particularly those which result in large-scale violence or population movements—pose a risk to peace and security, as well as respect for human rights, throughout the world. Thus, many are coming to recognize that the types of reforms recommended here are desirable even based on self-oriented values. For example, President Clinton, in defending the prospect of the use of force in Kosovo, affirmed that "America has a national interest in achieving this peace. If the conflict persists, there likely will be a tremendous loss of life and a massive refugee crisis in the middle of Europe."[10] And in a poll conducted in June/July 1994, 75 percent of the respondents agreed with the statement that "whenever it can, the U.S. should look beyond its own self-interest and do what's best for the world as a whole, because in the long run this will probably help make the kind of world that is best for the U.S."[11]

A third potential positive force is the impact of religion. Many of the fundamental ethical principles in contemporary international law outlined in Chapter 2, which some passages from revered texts may be interpreted to endorse, appear to be approved of by many devout believers, although not necessarily by the more extreme self-described devotees who grab headlines through violence or the virulent denunciation of other groups. In this connection, a number of sociological and psychological studies have found a

positive link between the internalization of the basic teachings of religion and freedom from racial, ethnic, or national prejudice. For example, psychologist Gordon Allport, in his classic 1950 study, *The Nature of Prejudice,* concluded that religious believers who subscribed to the ethnocentric inclinations of institutionalized religion tended to be more prejudiced, while those who had internalized the doctrines of the "brotherhood of man" and of the Golden Rule, which he described as common to all the great religions, were far more tolerant.[12]

Agreement on many fundamental ethical principles by a large number of believers is also evidenced by joint statements of gatherings of leaders and believers from the world religions and philosophies. These statements have endorsed as common beliefs ethical principles similar to these.[13] Furthermore, these fundamental ethical principles have not been confined to the pages of idealistic ecumenical documents. They have prompted actors representing a wide variety of religions and philosophies to take an active role in improving the prospects for realizing universal human rights. Many religiously motivated individuals and organizations have actively worked behind the scenes to promote political peace, including between rival religious groups. They have been able to serve as effective mediators by making appeals "on the basis of universal religious principles or on the basis of the specific warrants for conflict resolution that exist in each religion's theology."[14] Religion potentially has a unique capacity, then, to motivate humanitarian concern and action by people at all levels of society: "The great potential in world religions is that they can reach peoples around the globe more directly and more fully than any other societal institution."[15]

One practical advantage of the fresh approach I have developed is that government officials of different faiths may find it possible to support the fundamental ethical principles identified in Chapter 2 because they are shown not only to be endorsed by contemporary international law, but also to be consistent with particular interpretations of certain passages from the revered moral texts of the world religions and philosophies. Officials who are devout believers might be persuaded to consider the merits of this approach more seriously because of this demonstration. So also might officials of countries whose cultures have been strongly influenced by these religions and philosophies, including all five permanent members of the Security Council.

Of course, agreement among believers on the fundamental ethical principles in contemporary international law identified in Chapter 2 can only come about through a willingness to reexamine their foundational texts and traditions with open minds, to see points of potential congruence with these

principles, and to revise many long-standing beliefs and traditions that are inconsistent with them. More generally, it is essential to bring into dialogue governments, members of particular religions, and people of no religious faith, to consult about how these principles in contemporary international law can better be defined, harmonized, and implemented with respect to the problem of humanitarian intervention.[16]

A fourth force that may make support for the proposed approach possible is revived interest in promoting the type of moral education recommended in Chapter 5 and by the quotation from the Universal Declaration with which this chapter opened. U.N. member governments have at least taken initial steps to recognize the necessity for global education with a moral, human rights-oriented dimension. For example, the U.N. General Assembly has proclaimed the period 1995–2004 as the "U.N. Decade for Human Rights Education." One of the aims of the Decade, according to the Plan of Action prepared by the U.N. high commissioner for human rights, is to build a "universal culture of human rights through the imparting of knowledge and skills and the moulding of attitudes" directed to, among other goals, the strengthening of respect for human rights, the full development of the human personality, and the promotion of understanding among all nations and groups.[17] Thus, the Decade seeks, over time, to bring about far-reaching cultural changes that in turn will support wider diffusion of human rights values among government officials and members of the public. In this connection, numerous countries have adopted extensive human rights education programs.[18]

Fifth, leaders, at least in countries that are democratic or where officials otherwise enjoy public support, can have a significant impact on public attitudes, even if they cannot themselves change individual values. The recent history of humanitarian intervention underlines the critical role of inspired leadership by national and international officials. Where high-level political figures have offered a coherent and principled vision, as NATO leaders began to do with respect to Kosovo in early 1999, public opinion has responded favorably; where leadership has been absent, public support has waned. This suggests that public opinion is not merely a static "fact" to be taken into account in evaluating the practicality of humanitarian intervention, but a dynamic force that can be shaped by visionary leadership.[19] It also indicates that popular support for fundamental ethical principles and reforms in U.N. humanitarian intervention is likely to come about only if certain key leaders—and especially those of the permanent members of the Security Council—decide to promote these principles and reforms with all the means of persuasion at their disposal.

The mobilization of these forces against the negative trends identified earlier may eventually help give the "upper hand" to humanity-oriented values and result in more widespread support for those fundamental ethical principles already endorsed by the U.N. Charter and contemporary international law, and for the fresh approach I have suggested. Nevertheless, in view of the difficulties of changing the value systems of citizens and leaders in the short run, and the obstacles already mentioned, the immediate outcome of the current debate is not likely to be favorable to many of the proposals made in this book, although we may see sporadic interest in similar proposals as new crises require reflection on these problems.

For example, despite the intimations of some Council members that rampant and severe violations of essential human rights are tantamount to a breach of the peace, most Council members will be hesitant to make the forthright declaration of such an equivalence that I have suggested. They will instead be willing only to determine that particular violations constitute "threats to the peace" on an ad hoc basis. Regarding consent, the Council will probably continue to emphasize the consent of governments at the expense of that of groups or individual citizens, and to be hesitant to deploy operations without formal government approval. In the absence of a new consensus among Council members, the Council may fail to resolve confusion about the meaning of U.N. "impartiality" and continue to imply, at times, that it means the fostering of perceived equal benefit rather than adherence to fundamental ethical principles.

On the problem of the use of force, the Council will most probably continue to defer to the strategies of the permanent members and their willingness to use force to resolve particular humanitarian crises, rather than engage in the type of sophisticated and principled decision-making suggested by the guidelines proposed in Chapter 7. And while rhetorical assertions of the Council's moral and legal obligations to respond effectively to gross human rights violations will still be heard from time to time, the Council as a whole, and in particular its permanent members, are unlikely to go out on a limb and affirm publicly that they have such obligations. They are even less likely to act on them in today's political environment, which at least until the Kosovo operations was characterized by an excessive hesitancy to intervene.

Member states, particularly the permanent members of the Council, are likely to remain uninterested in strengthening the U.N.'s capacities for humanitarian intervention. And improvements in Council decision-making will be slow and incremental at best, given the continued and even increasing role of self-interest in the policies of many permanent members. Cultivating the

type of consultative and principled decision-making recommended in Chapter 10 will take a great deal of time and a new moral commitment on the part of Council members. Finally, where any degree of enforcement is required, it will probably be undertaken by ad hoc coalitions of states or regional organizations authorized by the Security Council, as in the case of KFOR, or without U.N. authorization at all, as in the case of the NATO bombing campaign. Indeed, we are likely to see more claims by NATO, and perhaps other regional organizations like ECOWAS, to conduct humanitarian intervention operations without Security Council authorization. At the same time, many influential member states, particularly the permanent members of the Council, will be reluctant to endorse a greater role for the General Assembly in authorizing humanitarian intervention missions under the Uniting for Peace Resolution, as proposed in Chapter 11.

Despite these relatively dreary short-term prospects for broad support for fundamental ethical principles and the fresh approach I have proposed, a recognition of the inevitable hurdles that the approach must overcome, and of the morally bleak present condition of world affairs, cannot justify complacency or pessimism. Integral to the approach, and to international human rights and humanitarian law, is an emphasis on constant effort to achieve a more moral world. In the words of the Bahá'í Writings, referring to the prospects for achieving universal peace through agreement of the world's leaders, and reflecting a simultaneous optimism and pragmatism that can be understood as pervading the entire corpus of international human rights and humanitarian law, not to mention many of the world's revered moral texts:

> True civilization will unfurl its banner in the mid-most heart of the world whenever a certain number of its distinguished and high-minded sovereigns—the shining exemplars of devotion and determination—shall, for the good and happiness of all mankind, arise, with firm resolve and clear vision, to establish the Cause of Universal Peace. They must make the Cause of Peace the object of general consultation, and seek by every means in their power to establish a Union of the nations of the world. . . . A few, unaware of the power latent in human endeavor, consider this matter as highly impracticable, nay even beyond the scope of man's utmost efforts. Such is not the case, however. On the contrary, thanks to the unfailing grace of God, the loving-kindness of His favored ones, the unrivaled endeavors of wise and capable souls, and the thoughts and ideas of the peerless leaders of this age, nothing whatsoever can be regarded as unattainable.

> Endeavor, ceaseless endeavor, is required. Nothing short of an indomitable determination can possibly achieve it.[20]

It is incumbent, therefore, on the Security Council and the General Assembly, and all U.N. member governments, with such a new "indomitable determination," to "strive . . . by progressive measures . . . to secure [the] universal and effective recognition and observance" of the human rights of all members of the human family, as called for by the passage from the Universal Declaration of Human Rights with which this chapter opened. They must creatively develop and implement a fresh approach to humanitarian intervention and international law based on fundamental ethical principles, and in particular, the preeminent ethical principle of unity in diversity. With a new spirit of open-minded consultation about how best to realize this and other fundamental ethical principles, the opening decades of the new millennium may yet witness major reforms in the global community's willingness, and capacity, to come to the rescue of desperate human rights victims. As members of the same human family, they deserve no less.

Notes

Notes to Chapter 1

1. U.N. Charter, art. 1, ¶ 3.
2. Ibid., art. 55.
3. Ibid., art. 56.
4. See the analysis of international criminal law in subsection 3.4.5 of Chapter 3.
5. U.N. Charter, art. 39.
6. Ibid., art. 2, ¶ 1.
7. Ibid., ¶ 7.
8. See generally ibid., art. 2, ¶ 3, and arts. 33–38.
9. Ibid., art. 2, ¶ 4.
10. Ibid., art. 1, ¶ 2.
11. See the analysis of impartiality in Chapter 6.
12. See generally Hammarskjöld, *Second and Final Report,* ¶¶ 4–12.
13. The unique characteristics of second-generation U.N. peacekeeping operations have been described in a number of studies, including Daniel and Hayes, *Beyond Traditional Peacekeeping*; Ratner, *The New U.N. Peacekeeping*; Warner, *New Dimensions of Peacekeeping*; and Woodhouse, Bruce, and Dando, *Peacekeeping and Peacemaking*.
14. See generally U.N. Charter, arts. 39, 41.
15. See generally ibid., arts. 39, 42, and the discussion of Chapter VII in Chapter 3.
16. See S.C. Res. 678 (1990), ¶ 2.
17. See S.C. Res. 688 (1991). For a more detailed account of the origins and conduct of the Kurdish operation, see generally Murphy, *Humanitarian Intervention,* 165–77, 182–98.
18. On the conflict in Bosnia and the former Yugoslavia, and U.N. involvement in it, see generally, e.g., Economides and Taylor, "Former Yugoslavia"; Murphy, *Humanitarian Intervention,* 198–217; and Steinberg, "International Involvement in the Yugoslavia Conflict." The following discussion draws in part on these sources.
19. See S.C. Res. 743 (1992); S.C. Res. 758 (1992); S.C. Res. 761 (1992); S.C. Res. 764 (1992); S.C. Res. 770 (1992); and S.C. Res. 776 (1992). See the discussion in Steinberg, "International Involvement in the Yugoslavia Conflict," 43–44, and Economides and Taylor, "Former Yugoslavia," 67–68.
20. S.C. Res. 781 (1992).
21. S.C. Res. 807 (1993), ¶ 8.
22. S.C. Res. 816 (1993), ¶¶ 1, 4.
23. See S.C. Res. 819 (1993), ¶ 1, and S.C. Res. 824 (1993), ¶¶ 3–4.
24. S.C. Res. 836 (1993), ¶¶ 5, 9, and 10.

25. See U.N. Charter, art. 53, which is discussed in more detail in Chapter 11.

26. See S.C. Res. 808 (1993), and S.C. Res. 827 (1993). On the jurisprudence of the ICTY, see generally, e.g., Jones, *The Practice of the International Criminal Tribunals,* 39–459.

27. On the capture of Srebrenica, see, e.g., Annan, *The Fall of Srebrenica,* ¶¶ 239–317.

28. See generally ibid.

29. On the negotiation of the Dayton Peace Accords, see generally, e.g., Holbrooke, *To End a War*.

30. Throughout this book I will use the terms "ethical" and "moral" synonymously.

31. See, e.g., G.A. Res. 48/88 (1993), ¶¶ 6, 21.

32. See, e.g., *Report of the Secretary-General Pursuant to Security Council Resolutions 982 (1995) and 987 (1995),* U.N. Doc. S/1995/444 (1995), ¶ 40.

33. See S.C. Res. 1031 (1995), ¶ 14.

34. See, e.g., Amnesty International Press Release, "Bosnia-Herzegovina: Srebrenica."

35. For more detailed accounts of the U.N.'s involvement in Somalia, see, e.g., Hillen, *Blue Helmets,* 183–223; Makinda, *Seeking Peace from Chaos*; and Murphy, *Humanitarian Intervention,* 217–43. The following review is based in part on these accounts.

36. S.C. Res. 733 (1992), preamble, ¶ 5.

37. See S.C. Res. 751 (1992).

38. S.C. Res. 767 (1992), ¶¶ 4, 2.

39. See *Letter Dated 29 November 1992 from the Secretary-General to the President of the Security Council,* U.N. Doc. S/24868 (1992).

40. S.C. Res. 794 (1992), preamble, ¶¶ 7–10.

41. Ibid., preamble.

42. On the disagreements over disarmament between Secretary-General Boutros-Ghali and the U.S. commander, see Makinda, *Seeking Peace from Chaos,* 71–72.

43. See United Nations, *Report of the Commission of Inquiry,* ¶ 40.

44. See generally S.C. Res. 814 (1993).

45. See *Further Report of the Secretary-General Submitted in Pursuance of Paragraphs 18 and 19 of Resolution 794 (1992),* U.N. Doc. S/25354 (1993), ¶ 57(b), (d).

46. See United Nations, *Report of the Commission of Inquiry,* ¶¶ 94–124.

47. See S.C. Res. 837 (1993).

48. Ibid., ¶ 5.

49. See the sources mentioned in Chapter 7, note 87.

50. On the international community's response to the genocide in Rwanda, see generally, e.g., Murphy, *Humanitarian Intervention,* 243–60; OAU, *Rwanda*; and United Nations, *Report of the Independent Inquiry on Rwanda*.

51. On the campaign of genocide against the Tutsi and its aftermath, see generally Des Forges, "*Leave None to Tell the Story*"; Destexhe, *Rwanda and Genocide*; Gourevitch, *We Wish to Inform You*; Prunier, *The Rwanda Crisis*; and OAU, *Rwanda*.

52. See United Nations, *Report of the Independent Inquiry on Rwanda,* 10–12.

53. See ibid., 35–36, 45–46.

54. See S.C. Res. 912 (1994), ¶ 8(c); *Special Report of the Secretary-General on the United Nations Assistance Mission for Rwanda,* U.N. Doc. S/1994/470 (1994), ¶¶ 15–18. See also the account in United Nations, *Report of the Independent Inquiry on Rwanda,* 20–22.

55. See United Nations, *Report of the Independent Inquiry on Rwanda,* 19 (reporting on a cable sent to the force commander from U.N. Headquarters emphasizing the importance of not compromising UNAMIR's impartiality); OAU, *Rwanda,* ¶ 15.19 (noting that the "daily media briefings in Nairobi by UN officials routinely carried the message of the UN's 'need to be seen to be neutral' or that 'we must not be seen to be taking sides'").

56. See Destexhe, *Rwanda and Genocide,* 35; OAU, *Rwanda,* ¶ 15.13.

57. See S.C. Res. 918 (1994), ¶¶ 3–6.

58. See S.C. Res. 925 (1994), ¶¶ 1–4.

59. "Transcript of Press Conference by Secretary-General Boutros Boutros-Ghali Held at Headquarters on 25 May 1994," U.N. Press Release SG/SM/5297 (1994), 3–4.

60. See S.C. Res. 929 (1994), ¶ 3.

61. For a relatively positive assessment, see Murphy, *Humanitarian Intervention,* 256–60. By contrast, the Report of the OAU International Panel of Eminent Personalities is generally critical of French hostility to the RPF and the refuge the French safe zone provided to many Hutu leaders involved in the genocide. See, e.g., OAU, *Rwanda,* ¶¶ E.S.43, 15.53–15.85.

62. See, e.g., "U.N. Chief Asks Troops for Rwandans," *New York Times,* November 22, 1994.

63. S.C. Res. 1080 (1996).

64. See, e.g., James C. McKinley, Jr., "Turmoil in Central Africa: The Overview; Zairean Rebels Rout Foes, Freeing Refugees in Camps; Aid Mission Now Uncertain," *New York Times,* November 16, 1996.

65. See S.C. Res. 935 (1994) and S.C. Res. 955 (1994). On the jurisprudence of the ICTR, see generally, e.g., Jones, *The Practice of the International Criminal Tribunals,* 463–643.

66. See, e.g., Dallaire, "The Rwandan Experience," 23; United Nations, *Report of the Independent Inquiry on Rwanda,* 3.

67. See, e.g., James Bennet, "Clinton Declares U.S., with World, Failed Rwandans," *New York Times,* March 26, 1998.

68. See generally United Nations, *Report of the Independent Inquiry on Rwanda.*

69. See generally OAU, *Rwanda.*

70. For more detailed accounts of U.N. involvement in Haiti, on which the following summary is based in part, see Kumar, *Building Peace in Haiti,* 41–50; Malone, *Decision-Making in the UN Security Council*; and Murphy, *Humanitarian Intervention,* 260–81.

71. See G.A. Res. 47/20B (1993).

72. S.C. Res. 841 (1993).

73. Ibid., preamble.

74. S.C. Res. 861 (1993).

75. S.C. Res. 867 (1993).

76. S.C. Res. 873 (1993).

77. S.C. Res. 875 (1993).

78. S.C. Res. 917 (1994).

79. S.C. Res. 940 (1994), ¶ 4.

80. See S.C. Res. 975 (1995).

81. See, e.g., S.C. Res. 1063 (1996); S.C. Res. 1086 (1996); S.C. Res. 1123 (1997); S.C. Res. 1141 (1997); S.C. Res. 1212 (1998); and S.C. Res. 1277 (1999).

82. For a more comprehensive account of the NATO action with respect to Kosovo, and of the deployment of KFOR, see Murphy, "Kosovo: Air Strikes Against Serbia" and "Kosovo: Deployment of Peacekeeping Force." See also, e.g., Ignatieff, *Virtual War,* and Schnabel and Thakur, *Kosovo and the Challenge of Humanitarian Intervention.*

83. See S.C. Res. 1160 (1998), preamble, ¶¶ 5, 8, 17.

84. See United Nations, "Secretary-General Reflects on 'Intervention.'"

85. See S.C. Res. 1199 (1998).

86. See S.C. Res. 1203 (1998), ¶¶ 1, 14.

87. See ibid., ¶ 9.

88. See, e.g., Jane Perlez, "Defiant Yugoslav Orders Expulsion of U.S. Diplomat," *New York Times,* January 19, 1999.

89. See Craig R. Whitney, "Talks on Kosovo Wind Up As Only the Albanians Sign," *New York Times,* March 19, 1999.

90. See "Address to the Nation on Airstrikes Against Serbian Targets in the Federal

Republic of Yugoslavia (Serbia and Montenegro)," March 24, 1999, in Clinton, *Public Papers,* 1:451.

91. Evidence about the systematic nature of the campaign, and the Serbian government's attempts to hide the bodies of murdered Kosovo Albanians, began to surface in mid-2001 thanks in large part to investigations by the new Serbian authorities. See, e.g., Carlotta Gall, "Serbia Finds Where Bodies Are Buried, and Investigates," *New York Times,* July 31, 2001.

92. See U.N. Doc. S/1999/328 (1999).

93. See U.N. Doc. S/PV.3989 (1999), 6.

94. See, e.g., Tom Bowman and Mark Matthews, "NATO Pummels Yugoslavia; Allied Ships, Jets Unleash Cruise Missiles and Bombs; 'Moral Imperative,' Clinton Declares; Scores of Military Targets Hit in First Day of Campaign; War in Kosovo," *Baltimore Sun,* March 25, 1999. Secretary-General Annan had earlier affirmed, in June 1998, that "only the Council has the authority to decide that the internal situation in any State is so grave as to justify forceful intervention." United Nations, "Secretary-General Reflects on 'Intervention,'" 7.

95. See *Letter Dated 9 April 1999 from the Secretary-General Addressed to the President of the Security Council,* U.N. Doc. S/1999/402 (1999).

96. See S.C. Res. 1239 (1999).

97. See "President Milosevic and Four Other Senior FRY Officials Indicted for Murder, Persecution and Deportation in Kosovo," ICTY Press Release, JL/PIU/403E, The Hague, May 27, 1999.

98. These aspects of the NATO operation were analyzed in independent reports by Amnesty International and Human Rights Watch. See Amnesty International, *"Collateral Damage" or Unlawful Killings?* and Human Rights Watch, *Civilian Deaths in the NATO Air Campaign*. They were also reviewed in the report by the committee appointed by the ICTY prosecutor to determine whether prosecutions should be brought against individuals acting under the authority of NATO, discussed below. See generally ICTY Office of the Prosecutor, *Final Report to the Prosecutor*.

99. See ICTY Office of the Prosecutor, *Final Report to the Prosecutor,* ¶¶ 53, 90 (summarizing the findings of the Human Rights Watch report and a report by the Federal Republic of Yugoslavia Ministry of Foreign Affairs).

100. See, e.g., Amnesty International, *"Collateral Damage" or Unlawful Killings?* and Human Rights Watch, *Civilian Deaths in the NATO Air Campaign*.

101. See ICTY Office of the Prosecutor, *Final Report to the Prosecutor,* ¶¶ 90–91.

102. The resolution was adopted by a vote of fourteen in favor, none against, and one abstention (China). See U.N. Doc. S/PV.4011 (1999), 9.

103. See S.C. Res. 1244 (1999), ¶ 5, and annex 2, ¶ 4.

104. See S.C. Res. 1244 (1999), ¶¶ 7, 9(a)–(d), 10, 11(a).

105. See, e.g., Robert Burns, Associated Press, "Bid for Peacekeeping Sector Snags Talks; Crisis in Kosovo, Russia's Role," *Boston Globe,* June 18, 1999, and Mitchell Landsberg, Associated Press, "NATO Blocks Russian Flights," *Des Moines Register,* July 5, 1999.

106. See, e.g., Roy Gutman, "Fearing the Russians: Albanians Oppose NATO Agreement to Turn Area Over," *Newsday,* July 8, 1999.

107. See, e.g., Carlotta Gall, "Belgrade Sees Grave Site as Proof NATO Fails to Protect Serbs," *New York Times,* August 27, 1999.

108. See, e.g., Carlotta Gall, "7 Killed and 9 Hurt in Kosovo Rampage, Worst Since War," *New York Times,* February 5, 2000.

109. See, e.g., Kim Sengupta, "Apocalypse Now," *Independent* (London), November 3, 2000, and Dave Clark, "OSCE Condemns Human Rights Violations by Kosovo's UN Justice System," *Agence France Presse,* October 18, 2000.

110. In March 2001 the Security Council condemned the extremist violence, urged the parties to reach a peaceful resolution to their disputes, and called upon KFOR to strengthen its

efforts to prevent illegal arms shipments. See S.C. Res. 1345 (2001), ¶¶ 1, 5, 6, 7, 10.

111. See, e.g., Rory Carroll, Ian Traynor, and Ian Black, "West Split on New Push to Get Milosevic: US and Hague Prosecutors Twist Belgrade's Arm to Hand Over Indicted War Criminal—But Italy Hints at Amnesty," *Guardian* (London), October 9, 2000.

112. See Michael Evans and Richard Beeston, "Britain Expands Kosovo Force to Quell Poll Violence," *Times* (London), September 18, 2000.

113. See generally Murphy, "Resumption of U.S. Diplomatic Relations with the FRY."

114. See, e.g., Marlise Simons with Carlotta Gall, "The Handover of Milosevic: The Overview; Milosevic Is Given to U.N. for Trial in War-Crime Case," *New York Times,* June 29, 2001.

115. See, e.g., Barbara Crossette, "U.N. Says a Quarter of East Timorese Have Fled," *New York Times,* September 8, 1999. For the results of a U.N. inquiry into the events in East Timor, see United Nations, *Report of the International Commission of Inquiry on East Timor.*

116. See, e.g., Seth Mydans, "Indonesia Says No to Timor Peacekeepers," *New York Times,* September 9, 1999.

117. See, e.g., Seth Mydans, "Indonesia Invites a U.N. Force to Timor," *New York Times,* September 13, 1999.

118. See S. C. Res. 1264 (1999), ¶ 3.

119. See, e.g., Michael Richardson, "East Timor Peace Force Is Held Up as a Model," *International Herald Tribune,* February 28, 2000.

120. See S. C. Res. 1272 (1999), ¶¶ 1–3.

121. See, e.g., Christopher S. Wren, "Summit in New York: Indonesia Rampage; 3 U.N. Aid Workers Killed in Attack in West Timor," *New York Times,* September 7, 2000.

122. See S. C. Res. 1319 (2000), preamble, ¶ 1.

123. Ibid., ¶ 3.

124. See S.C. Res. 1338 (2001), preamble, ¶¶ 7–8.

125. See, e.g., Kathy Marks, "Anger As Mob Gets 20 Months for Killing Aid Workers," *Independent* (London), May 5, 2001.

126. United Nations, "Secretary-General Presents His Annual Report."

127. "Remarks by the President to the 54th Session of the United Nations General Assembly in New York City," September 21, 1999, in Clinton, *Public Papers,* 2:1563, 1565.

128. See, e.g., Barbara Crossette, "China and Others Reject Pleas That U.N. Intervene in Civil Wars," *New York Times,* September 23, 1999.

129. See, e.g., Michael R. Gordon, "Russia Blockades Chechnya to Isolate Rebels," *New York Times,* November 10, 1999 (reporting that the U.S. State Department had alleged that Russia's military tactics were indiscriminate and violated Geneva Convention IV); Margaret Coker, "Killings of Civilians Alleged; Chechen Refugees Accuse Russian Soldiers of Committing Atrocities," *Atlanta Journal and Constitution,* February 5, 2000; and Michael Wines, "Rebels Destroy a Convoy Outside Chechnya," *New York Times,* May 12, 2000 (reporting that the Council of Europe dropped a threat to suspend Russia's membership based on allegations of human rights abuses by its troops).

130. See, e.g., S.C. Res. 1132 (1997), ¶¶ 3–4, 8–10, 18. I analyze the legality of military intervention for humanitarian purposes by regional organizations such as ECOWAS without the prior approval of the Security Council in Chapter 11.

131. See S.C. Res. 1181 (1998).

132. Such atrocities and acts of hostage-taking were condemned in a number of Security Council resolutions and statements. See, e.g., S.C. Res. 1231 (1999), ¶ 3; U.N. Doc. S/PRST/1999/13 (1999).

133. See S.C. Res. 1270 (1999), ¶¶ 8–9.

134. Ibid., ¶ 14.

135. See S.C. Res. 1289 (2000).

136. See S.C. Res. 1299 (2000), ¶ 1.

137. See, e.g., Associated Press, "Peacekeepers Are Rescued in Sierra Leone," *New York Times,* July 16, 2000. The Security Council expressed its support for this operation. See *Statement by the President of the Security Council,* U.N. Doc. S/PRST/2000/24 (2000).

138. See S.C. Res. 1313 (2000), ¶¶ 3–5.

139. S.C. Res. 1315 (2000).

140. See *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone,* U.N. Doc. S/2000/915 (2000).

141. See S.C. Res. 1346 (2001), ¶ 7.

142. See S.C. Res. 1343 (2001).

143. See *Tenth Report of the Secretary-General on the United Nations Mission in Sierra Leone,* U.N. Doc. S/2001/627 (2001), especially ¶¶ 2, 56, 70 .

144. See generally the description of the war in OAU, *Rwanda,* ¶¶ 20.42–20.70.

145. See, e.g., *Statement by the President of the Security Council,* U.N. Doc. S/PRST/1998/26 (1998), and S.C. Res. 1234 (1999).

146. See S.C. Res. 1258 (1999), ¶ 8.

147. See S.C. Res. 1279 (1999), ¶ 4.

148. See, e.g., S.C. Res. 1291 (2000), preamble; S.C. Res. 1304 (2000), ¶ 6; *Statement by the President of the Security Council,* U.N. Doc. S/PRST/2000/28 (2000).

149. See S.C. Res. 1341 (2001), preamble, ¶ 19; S.C. Res. 1355 (2001), ¶¶ 29–41; *Eighth Report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo,* U.N. Doc. S/2001/572 (2001).

150. See Annan, "*We, the Peoples,*" 47–48.

151. See United Nations, *Report of the Panel on United Nations Peace Operations.*

152. See S.C. Res. 1327 (2000). In June 2001, Secretary-General Annan issued a report on implementation of the Panel's recommendations as well as those of the General Assembly's Special Committee on Peacekeeping Operations. See Annan, *Report on the Implementation of Peacekeeping Recommendations.*

153. On the classification of values on the basis of their "orientation," i.e., the identity of their beneficiaries, see generally Rescher, *Introduction to Value Theory,* 17–18.

154. See, e.g., Brown, *International Relations Theory.*

155. See generally Pettit, "Consequentialism," 231.

156. For an example of an influential work reflecting this genre, see MacIntyre, *After Virtue.*

157. Waltz, *Man, the State and War,* 16. See generally 16–41.

158. See ibid, 80–123.

159. See ibid, 159–86.

160. In this connection, political scientist Martin Wight has identified three overall approaches to international relations based on these three tendencies, which he has termed, respectively, the "realist," "rationalist," and "revolutionist" traditions. See Wight, *International Theory,* 25–29.

161. See Tesón, *Humanitarian Intervention.*

162. See Murphy, *Humanitarian Intervention.*

163. On this historical linkage, see generally, e.g., Bentwich, *The Religious Foundations of Internationalism,* and the essays collected in Janis and Evans, *Religion and International Law.*

Notes to Chapter 2

1. I use the qualifier "normally" only because in certain circumstances other principles may require certain reasonable limitations or specifications regarding how these principles are fulfilled in particular cases. For example, in the case of a dangerous criminal an essential eth-

ical principle of respect for physical liberty may be overridden by the community's ethical interest in confining the criminal and protecting the community. In the case of essential ethical principles, such limitations must be very narrowly circumscribed, however. See also my discussion of essential human rights in subsections 2.4.2 and 2.4.4 through 2.4.6.

2. I.C.J. Statute, art. 9.

3. See, e.g., Bloom, Martin, and Proudfoot, *Religious Diversity and Human Rights*.

4. For a much more comprehensive and encyclopedic effort to identify and reproduce passages from the world's sacred texts showing convergences around various ethical principles, drawing on the expertise of many scholars, see Wilson, *World Scripture*. See also the "Declaration Toward a Global Ethic" adopted in 1993 by the Parliament of the World's Religions, which expresses certain shared ethical principles among the world religions and philosophies. For the text of the Declaration, see Küng and Kuschel, *A Global Ethic,* 11–39.

5. "Worldwide Adherents of All Religions by Six Continental Areas, Mid-1998." According to figures in the *1999 Britannica Book of the Year,* the seven religions and philosophies with the widest geographic representation, in descending order, are Christianity (238 countries), the Bahá'í Faith (221 countries), Islam (208 countries), Judaism (138 countries), Buddhism (128 countries), Hinduism (114 countries), and Confucianism and Chinese "folk religions" (91 countries, which is the higher of the figures given for Confucianism [15 countries] and Chinese "folk religions" [91 countries]). These figures should be viewed as approximations given the challenges of determining the exact geographic spread of the followers of these religions and philosophies.

6. See "Worldwide Adherents of All Religions by Six Continental Areas, Mid-1998." According to figures in the *1999 Britannica Book of the Year,* the eight largest religions and philosophies in descending rank order are as follows, including the percentage that their followers represented of the total world population in mid-1998 (5.929 billion): Christianity—1.943 billion, or 32.8 percent; Islam—1.165 billion, or 19.6 percent; Hinduism—762 million, or 12.9 percent; Confucianism and Chinese folk religions—385 million, or 6.5 percent; Buddhism—354 million, or 6.0 percent; Sikhism—22 million, or 0.4 percent; Judaism—14 million, or 0.2 percent; the Bahá'í Faith—7 million, or 0.1 percent. (All figures are rounded to the nearest million.) Despite Sikhism's ranking as the sixth largest religion, I have not included it because of the relatively small geographic distribution of its members, who reside in only thirty-four countries according to the *1999 Britannica Book of the Year*. The figure for Confucianism and Chinese folk religions combines separate figures for Confucianists and Chinese folk religionists (defined as followers of traditional Chinese religion, which can include followers of Confucian ethics). These figures are likely to be imprecise, and the definitions used in determining them similarly are open to debate.

7. Based on the figures indicated in the preceding note, the followers of these seven world religions and philosophies represented about 78.5 percent of the total world population in mid-1998.

8. See Zaehner, *Hinduism,* 3.

9. Edgerton, "Interpretation of the Bhagavad Gītā," 105. All quotations from or citations to the Bhagavad Gītā are from Edgerton's translation. See Edgerton, *The Bhagavad Gītā.*

10. Sidnie W. Crawford, correspondence with the author dated May 22, 1998.

11. Unless otherwise noted, all quotations from or citations to the Hebrew Scriptures are from *Tanakh: A New Translation of The Holy Scriptures*.

12. For background information on Buddhist texts, see generally Conze, *Buddhist Scriptures,* 11–16. This compilation contains many of these central texts.

13. See Smith, *The World's Religions,* 83.

14. See Brooks and Brooks, *The Original Analects*. All quotations from or citations to the Analects are from the Brooks and Brooks translation unless otherwise indicated. On Confucius's date of birth, see Smith, *The World's Religions,* 154. I am grateful to Irene Bloom for providing the probable date of Mencius's birth.

15. On the date of Jesus' birth, see Smith, *The World's Religions,* 318. All quotations from or citations to the New Testament are from the New Revised Standard Version of the Bible.

16. On the dates of Muhammad's birth and death, see Rahman, *Islam,* 11, 24. On the status of the Qur'ān in Islam, see generally 30–42. All quotations from or citations to the Qur'ān are from Arberry, *The Koran Interpreted,* and verses are numbered according to the system used in Arberry's translation.

17. For a more detailed history of the Bahá'í Faith and summary of its teachings, see Hatcher and Martin, *The Bahá'í Faith*. On the dates of birth and death of the central figures of the Bahá'í Faith, see Bowker, *The Oxford Dictionary of World Religions,* 5, 121, 894.

18. See, e.g., Smart and Hecht, *Sacred Texts of the World,* xi–xiii (the "world's sacred texts are potent sources of inspiration and behaviour and, more importantly, they play a crucial part in the formation of peoples' perception of reality. . . . [T]he scriptures of a particular community are normative for its worship, for doctrine and for behaviour").

19. U.N. Charter, preamble (emphasis added).

20. Universal Declaration, preamble, art. 1 (emphasis added).

21. G.A. Res. 55/2 (2000), ¶ 32 (emphasis added).

22. A principle of the unity of the human family has been endorsed by such venerated philosophers as Kant and Mill. It has also been implied in the ethical theories of contemporary philosophers such as Peter Singer. See, e.g., Kant, "Perpetual Peace," 107–8 (asserting that the "peoples of the earth have . . . entered in varying degrees into a universal community, and it has developed to the point where a violation of rights in *one* part of the world is felt *everywhere*") (emphasis in original); Mill, "Utilitarianism," 268, 284 (advocating an impartial concern for the happiness of all mankind that could be cultivated based on "the social feelings of mankind; the desire to be in unity with our fellow-creatures"); and Singer, *Practical Ethics,* 16–26, 232–34 (endorsing a "principle of equal consideration of interests" that implicitly recognizes the unity of the human family by prohibiting preferences based on race or nationality).

23. Sastry, "Hinduism and International Law," 552.

24. Ashvaghosha, "Buddhacarita," 15.14–25, in Conze, *Buddhist Scriptures,* 55.

25. Conze, *Buddhist Scriptures,* 186.

26. Quoted in Weeramantry, *Islamic Jurisprudence,* 133. On the principle of the unity of the human family in Islam, also see Weeramantry, *Islamic Jurisprudence,* 133.

27. 'Abdu'l-Bahá, *Paris Talks,* 140.

28. U.N. Charter, art. 1, ¶ 2.

29. See Universal Declaration, arts. 20, 27, ¶ 1.

30. Ibid., art. 26, ¶ 2.

31. ICCPR, art. 1, ¶ 1.

32. ICESCR, art. 1, ¶ 1.

33. ICCPR, art. 27.

34. Ibid., art. 2, ¶ 1.

35. Millennium Declaration, ¶¶ 5–6.

36. Edgerton has interpreted this passage as reflecting a high ethical standard similar to the biblical command that "Thou shalt love thy neighbor as thyself." See Edgerton, "Interpretation of the Bhagavad Gītā," 162–63.

37. On the later prophets' view of God as "the God of the whole world who judgeth and guideth all nations," see Bentwich, *The Religious Foundations of Internationalism,* 62–63.

38. See, e.g., de Silva, "The Concept of Equality in the Theravāda Buddhist Tradition," 81–82.

39. See ibid., 89.

40. Ashvaghosha, "Saundaranandakavya," in Conze, *Buddhist Scriptures,* 111.

41. Jayatilleke, "The Principles of International Law," 498.

42. See, e.g., Analects 1.2, 1.6–7, 2.20–21, 4.18.

43. Legge, *The Works of Mencius,* bk. 1, pt. 1, chap. 7, sec. 12 at 143.
44. On this principle, see, e.g., Rahman, *Major Themes of the Qur'ān,* 167.
45. See subsection 2.4.6.
46. Shoghi Effendi, *The World Order of Bahá'u'lláh,* 41–42.
47. Universal Declaration, art. 1.
48. Ibid., art. 29, ¶ 1.
49. On some of the difficulties of using the Golden Rule as a moral standard in the absence of certain caveats or limitations such as these, see generally Gewirth, "The Golden Rule Rationalized."
50. Edgerton, "Interpretation of the Bhagavad Gītā," 185, 191.
51. B.T. Shabbat 31a, quoted in Kellner, "Jewish Ethics," 86–87.
52. *Udâna* 5.1, quoted in Conze, *Buddhism,* 61.
53. Bahá'u'lláh, *Gleanings,* 266.
54. Bahá'u'lláh, *Tablets of Bahá'u'lláh,* 71.
55. Universal Declaration, preamble (emphasis added).
56. Ashvaghosha, "Buddhacarita," in Conze, *Buddhist Scriptures,* 62.
57. Bahá'u'lláh, *Gleanings,* 305.
58. Universal Declaration, preamble, art. 1.
59. Ibid., art. 2.
60. I cannot explore the important subject of religious views on the status of women here. For a detailed treatment, see, e.g., Sharma, *Women in World Religions*. Undoubtedly, many passages have historically been used to justify the suppression of women. For my argument it is sufficient to demonstrate that there are some clear statements of a general and universalizable principle of equality in many of the texts—a principle that can (and should) be read as encompassing women as well as other historically subjugated groups.
61. See, e.g., Kellner, "Jewish Ethics," 84–85.
62. See Salgado, "Equality and Inequality," 60–61.
63. See Smith, *The World's Religions,* 98.
64. Irene Bloom argues that this saying signifies both a "conviction of a fundamental similarity among human beings and the perception that individuals distinguish themselves through their personal development." Bloom, "Confucian Perspectives," 122.
65. See Rahman, *Major Themes of the Qur'ān,* 45–46.
66. Quoted in Weeramantry, *Islamic Jurisprudence,* 173.
67. 'Abdu'l-Bahá, *The Promulgation of Universal Peace,* 182.
68. Quoted in Shoghi Effendi, *The Advent of Divine Justice,* 31.
69. 'Abdu'l-Bahá, *The Promulgation of Universal Peace,* 135.
70. U.N. Charter, preamble.
71. Universal Declaration, preamble, art. 1.
72. Ibid., art. 29, ¶ 1.
73. See ibid., preamble.
74. Ishay, "Introduction," xiv.
75. See, e.g., Donnelly, "Human Rights and Human Dignity."
76. See Bhagavad Gītā 12.13–20, 13.7, 16.1–3, 18.51–53, and Edgerton, "Interpretation of the Bhagavad Gītā," 183–86.
77. Sahara, "Dohakosha," vv. 70–112, in Conze, *Buddhist Scriptures,* 179–80.
78. See, e.g., Unno, "Personal Rights and Contemporary Buddhism," 140.
79. See, e.g., Analects 1.6, 1.8, 1.12, 12.10, 15.27, 17.5.
80. For attempts to relate the principles of the Analects to contemporary human rights concepts, see many of the essays collected in de Bary and Weiming, *Confucianism and Human Rights*.
81. See, e.g., Harakas, "Human Rights," 18–19.
82. 'Abdu'l-Bahá, *The Promulgation of Universal Peace,* 182.

83. 'Abdu'l-Bahá, *The Secret of Divine Civilization,* 40.

84. On the principle that human rights have some degree of preemptive effect, see, e.g., Raz, *The Morality of Freedom,* 192 ("the special features of rights are their source in individual interest and their peremptory force, expressed in the fact that they are sufficient to hold people to be bound by duties").

85. Universal Declaration, art. 29, ¶ 2.

86. I thus do not exclude the possibility that other rights described in this chapter but not characterized here as essential rights may, upon careful examination, also deserve to be considered essential.

87. U.N. Charter, arts. 55(c), 56.

88. Universal Declaration, preamble.

89. Ibid., art. 29, ¶ 2.

90. Rosenne, "The Influence of Judaism," 149.

91. See Jayatilleke, "The Principles of International Law," 528–33.

92. Ibid., 472, 478.

93. See, e.g., Analects 13.16.

94. Legge, *The Works of Mencius,* bk. 7, pt. 2, chap. 14, sec. 1 at 483.

95. See, e.g., Weeramantry, *Islamic Jurisprudence,* 115–16.

96. See, e.g., Khadduri, *War and Peace,* 11–12, 14–18.

97. Bahá'u'lláh, *Gleanings,* 247.

98. 'Abdu'l-Bahá, *The Secret of Divine Civilization,* 115.

99. Shoghi Effendi, *The World Order of Bahá'u'lláh,* 202.

100. Hegel, *Hegel's Philosophy of Right* (trans. Knox), § 331 at 212.

101. See, e.g., Walzer, "The Moral Standing of States," 234–35. Walzer's views about sovereignty and humanitarian intervention appear in recent years to have come much closer to the principles described in the text. See, e.g., Walzer, "The Politics of Rescue."

102. Many human rights theorists have argued that the right to life constitutes the most essential human right, and that fair treatment is also an essential human right. See, e.g., Milne, *Human Rights and Human Diversity,* 124–31.

103. Universal Declaration, art. 3.

104. See ibid., arts. 4, 5.

105. See generally ibid., arts. 6–11.

106. Genocide Convention, art. I.

107. *Tosefta Terumot* 7.20, quoted in Hirsch, *Thy Most Precious Gift,* 65.

108. See Numbers 35.30, and Deuteronomy 17.6, 19.15. On the "virtual abolition of the death penalty" under rabbinic law by reason of these requirements, see Fishbane, "The Image of the Human," 19.

109. See de Silva, "Buddhist Ethics," 66.

110. See Jayatilleke, "The Principles of International Law," 522–24.

111. 'Abdu'l-Bahá, *Some Answered Questions,* 266–67.

112. 'Abdu'l-Bahá, *Paris Talks,* 154.

113. Many political theorists and philosophers have similarly argued in favor of a right to subsistence as a morally essential right. See, e.g., Vincent, *Human Rights and International Relations,* 143–50.

114. Universal Declaration, art. 25, ¶ 1.

115. See, e.g., Polish, "Judaism and Human Rights," 50.

116. See *Sutta Nipata, Maghasutta,* in Woodward, *Some Sayings of the Buddha,* 92–93.

117. On the recognition in the Qur'ān of rights of the indigent, see Rahman, *Major Themes of the Qur'ān,* 38–42.

118. See Weeramantry, *Islamic Jurisprudence,* 59–60; Rahman, *Major Themes of the Qur'ān,* 40–42.

119. 'Abdu'l-Bahá, *Paris Talks,* 131–32.
120. Universal Declaration, arts. 18, 19.
121. Ibid., art. 29, ¶ 1.
122. Such was the interpretation of Radhakrishnan, for example. See Minor, "The *Bhagavadgita* in Radhakrishnan's Apologetics," 169.
123. See generally Agus, "Religious Liberty in Judaism," 169.
124. See the discussion of the principle of freedom of expression in Cohn, *Human Rights in Jewish Law,* 107–28.
125. *Anguttara Nikaya* 1.188, in Woodward, *Some Sayings of the Buddha,* 189.
126. See, e.g., Abe, "Religious Tolerance and Human Rights."
127. Confucianism scholars E. Bruce Brooks and A. Taeko Brooks find in this affirmation "that even a humble fellow's 'will' is inalienable . . . the strongest statement so far [in the Analects] of what a modern reader might call individual rights." Brooks and Brooks, *The Original Analects,* 106.
128. See, e.g., Sachedina, "Freedom of Conscience and Religion in the Qur'an," 76.
129. 'Abdu'l-Bahá, *The Promulgation of Universal Peace,* 197.
130. U.N. Charter, preamble.
131. See ibid., art. 1, ¶¶ 2–4.
132. Ibid., art. 10.
133. Uniting for Peace Resolution, G.A. Res. 377C (V) (1950), preamble, ¶ (a) (emphasis added).
134. Goodman, "The Individual and the Community," 42.
135. Cox et al., "World Religions and Conflict Resolution," 272.
136. See *Udana* 4.4, in Woodward, *Some Sayings of the Buddha,* 190–92.
137. See also Analects 9.7, in which, according to a translation by Irene Bloom, Confucius says: "Have I knowledge? I have *no* knowledge. But if an ordinary fellow asks me a question—as if empty, empty—I knock it about from both ends until everything is yielded up." Bloom, "Confucius and the Analects," 53 (emphasis in original).
138. See also Qur'ān 42.36. On the concept of *shūrā,* see Rahman, *Major Themes of the Qur'ān,* 43.
139. Quoted in Weeramantry, *Islamic Jurisprudence,* 26.
140. Quoted in ibid., 92.
141. See ibid., 123–24.
142. Bahá'u'lláh, *Tablets of Bahá'u'lláh,* 168.
143. 'Abdu'l-Bahá, *The Promulgation of Universal Peace,* 72.
144. See Universal Declaration, art. 21.
145. See, e.g., Zakaria, "The Rise of Illiberal Democracy."
146. Jayatilleke, "The Principles of International Law," 524–25. See also 512.
147. See Legge, *The Works of Mencius*, bk. 1, pt. 2, chap. 7 at 165–66; Cheng, "Transforming Confucian Virtues into Human Rights," 150–51; and de Bary, "Introduction," 13.
148. Legge, *The Works of Mencius,* bk. 1, pt. 2, chaps. 10–11 at 169–72.
149. Weeramantry, *Islamic Jurisprudence,* 124.
150. Hassan, "On Human Rights and the Qur'anic Perspective," 60.
151. Sachedina, "Justifications for Violence in Islam," 133.
152. See Shoghi Effendi, *God Passes By,* 219.
153. 'Abdu'l-Bahá, *The Secret of Divine Civilization,* 17, 24.
154. Universal Declaration, art. 30.
155. ICCPR, art. 10, ¶ 3 (emphasis added).
156. Universal Declaration, art. 29, ¶ 2.
157. Convention on the Non-Applicability of Statutory Limitations, preamble (emphasis added).

158. Rome Statute, preamble (emphasis added).
159. See Jayatilleke, "The Principles of International Law," 506.
160. See ibid., 560.
161. On the principle of individual criminal responsibility in Islam, see, e.g., al-Saleh, "The Right of the Individual to Personal Security in Islam," 57–58.
162. See 'Abdu'l-Bahá, *Some Answered Questions,* 248.
163. See Jayatilleke, *The Principles of International Law,* 500, 505.
164. 'Abdu'l-Bahá, *Some Answered Questions,* 268.
165. 'Abdu'l-Bahá, *Selections from the Writings of 'Abdu'l-Bahá,* 158.
166. 'Abdu'l-Bahá, *Some Answered Questions,* 268.
167. See, e.g., ibid., 270–71.
168. See Universal Declaration, art. 29, ¶¶ 1–2.
169. Ibid., preamble (emphasis added).
170. See, e.g., Maimonides, "Kings and Wars," 214.
171. See Jayatilleke, "The Principles of International Law," 506, 527–28.
172. See de Bary, "Introduction," 8, and Legge, *The Works of Mencius,* bk. 1, pt. 2, chap. 8 at 167.
173. Legge, *The Works of Mencius,* bk. 5, pt. 2, chap. 9, sec. 1 at 392.
174. See, e.g., Ramsey, *Basic Christian Ethics,* 386.
175. See Hourani, *Reason and Tradition in Islamic Ethics,* 202 n. 31.
176. See Hamidullah, *Muslim Conduct of State,* 128–30.
177. On the law of rebellion in Islamic jurisprudence, see generally Abou El Fadl, "*Ahkam Al-Bughat*."
178. Quoted in Sachedina, "Justifications for Violence in Islam," 136.
179. Bahá'u'lláh, *Tablets of Bahá'u'lláh,* 22–23.
180. See letter on behalf of Shoghi Effendi dated December 21, 1948, quoted in Hornby, *Lights of Guidance,* 446.
181. See, e.g., the extracts from the utterances of 'Abdu'l-Bahá quoted in *The Compilation of Compilations,* 2:173.
182. U.N. Charter, preamble, art. 1.
183. See, e.g., Morgenthau and Thompson, *Politics Among Nations,* 12–14.
184. According to Jewish theologian Robert Gordis, Micah's vision conveys the notion of a binding international law and a world government voluntarily accepted by otherwise autonomous nations—a vision that is "a farsighted interpretation of nationalism, in which love of one's own people and loyalty to humanity represent two concentric circles." See Gordis, "The Vision of Micah," 282–83, 287.
185. See Jayatilleke, "The Principles of International Law," 539–40. See also 452, 493, 538–41.
186. Shoghi Effendi, *The World Order of Bahá'u'lláh,* 203. See generally 39–41, 202–4.
187. U.N. Charter, art. 55 (emphasis added).
188. Universal Declaration, preamble (emphasis added).
189. Bentwich, *The Religious Foundations of Internationalism,* 66.
190. See Bainton, *Christian Attitudes Toward War and Peace,* 54–55.
191. Sachedina, "Justifications for Violence in Islam," 155.
192. Extracts from the writings of 'Abdu'l-Bahá, quoted in *The Compilation of Compilations,* 2:165 (emphasis added).
193. U.N. Charter, preamble (emphasis added).
194. Ibid., art. 1, ¶ 1 (emphasis added).
195. Vienna Convention, art. 26.
196. For an example of such a prudential justification, see Stein, "Coordination and Collaboration." For an account of *pacta sunt servanda* as a moral rule, see Tesón, *A Philosophy of International Law,* 89.

197. See Joshua 9 and the analysis in Broyde, "Fighting the War and the Peace," 15–17.
198. Broyde, "Fighting the War and the Peace," 16.
199. See, e.g., Grotius, *De Jure Belli ac Pacis,* vol. 2, chap. 13, § 4 at 366–67.
200. See, e.g., "Bya chos" ("The Buddha's Law Among the Birds"), in Conze, *Buddhist Scriptures,* 89.
201. On the sanctity of treaties under Islamic law, see generally Weeramantry, *Islamic Jurisprudence,* 141, and Khadduri, *War and Peace,* 203–5, 220.
202. U.N. Charter, preamble.
203. See, e.g., ibid., art. 2, ¶ 3, which provides that all members "shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered."
204. Ibid., art. 2, ¶ 4.
205. Ibid., art. 42 (emphasis added).
206. Ibid., art. 51.
207. For an account of the principle of nonviolence in Hinduism and the Bhagavad Gītā, see Edgerton, "Interpretation of the Bhagavad Gītā," 185–86.
208. See Bühler, *The Laws of Manu,* chap. 7, ¶¶ 198–200 at 248.
209. Nussbaum, *A Concise History of the Law of Nations,* 9–10.
210. See, e.g., Ashvaghosha, "Buddhacarita," in Conze, *Buddhist Scriptures,* 51–52.
211. Jones, *The Mahāvastu,* 1:229.
212. Carus, *The Gospel of Buddha,* 148. See also the discussion in Jayatilleke, "The Principles of International Law," 549–51.
213. See Legge, *The Works of Mencius,* bk. 7, pt. 2, chap. 3 at 479. The author is indebted to Irene Bloom for pointing out this reference.
214. Ibid., chap. 4, sec. 1 at 479.
215. Ibid., chap. 2 at 478.
216. See, e.g., Luke 22.36–38.
217. For example, St. Augustine relied on some of these passages in asserting that Jesus did not prohibit war altogether. See, e.g., Augustine, *The Political Writings of St. Augustine,* 162–83.
218. Aquinas, *II-II The Summa of Theology,* qu. 40, 64–65.
219. See Wink, "Beyond Just War and Pacifism," 111.
220. See, e.g., Hamidullah, *Muslim Conduct of State,* 152–56; and Khadduri, *War and Peace,* 231–38.
221. See, e.g., Sachedina, "Justifications for Violence in Islam," 126.
222. Bahá'u'lláh, *Gleanings,* 249.
223. See Bühler, *The Laws of Manu,* chap. 7, ¶¶ 90–93 at 230–31, discussed in Nussbaum, *A Concise History of the Law of Nations,* 10.
224. See Maimonides, "Kings and Wars," 221–22.
225. See, e.g., Broyde, "Fighting the War and the Peace," 10–11.
226. See, e.g., Carus, *The Gospel of Buddha,* 149.
227. See, e.g., Augustine, *The Political Writings of St. Augustine,* 182–83.
228. Aquinas, *II-II The Summa of Theology,* qu. 64, 70.
229. On Islamic rules of *jus in bello,* see generally Sultan, "The Islamic Concept"; Weeramantry, *Islamic Jurisprudence,* 134–38; Hamidullah, *Muslim Conduct of State,* 194–95, 202–62, 275; and Khadduri, *War and Peace,* 102–8, 126–32.
230. See, e.g., Sultan, "The Islamic Concept," 37.
231. See the two *hadīth* reprinted in Peters, *Jihad in Classical and Modern Islam,* 13.
232. Nussbaum, *A Concise History of the Law of Nations,* 28.
233. See Hamidullah, *Muslim Conduct of State,* 207–8.
234. See, e.g., 'Abdu'l-Bahá, *Paris Talks,* 28–30, 106–9.
235. See, e.g., 'Abdu'l-Bahá, *The Secret of Divine Civilization,* 65.

236. Throughout this book I use various phrases that I intend to be synonymous with "widespread and severe." These are listed in the Glossary definition of "widespread and severe violations of essential human rights."

237. For a study confirming doctrinal convergences between Christianity and Islam on the legitimacy of and necessity for humanitarian intervention, see Ramsbotham, "Islam, Christianity, and Forcible Humanitarian Intervention."

238. See Maimonides, "Murder and the Preservation of Life," 198 (emphasis in original). This passage employs a more common translation of Leviticus 19:16 than that earlier quoted.

239. See ibid., 196–98.

240. See Broyde, "Fighting the War and the Peace," 2–7.

241. Chen, "The Confucian View of World Order," 35.

242. See Legge, *The Works of Mencius,* bk. 1, pt. 2, chaps. 10–11 at 169–72.

243. See the passages quoted from Legge, *The Works of Mencius,* in subsection 2.7.1.

244. Irene Bloom, correspondence with the author dated July 13–14, 1998 (emphasis in original).

245. Ramsey, *The Just War,* 501 (emphasis in original). See also Ramsey, *Basic Christian Ethics,* 166–84.

246. See, e.g., Bainton, *Christian Attitudes Toward War and Peace,* 63.

247. See, e.g., Kenneth R. Himes, "Just War, Pacifism and Humanitarian Intervention," *America,* August 14, 1993.

248. Kooijmans, "Protestantism and the Development of International Law," 107.

249. See, e.g., Hashmi, "Is There an Islamic Ethic of Humanitarian Intervention?" 62, 69.

250. Quoted in Nagler, "Is There a Tradition of Nonviolence in Islam?" 165.

251. 'Abdu'l-Bahá, *Some Answered Questions,* 271.

252. Bahá'u'lláh, *Gleanings,* 285.

253. Ibid., 249.

254. For an example of this view, see, e.g., Thomas, "The Pragmatic Case Against Intervention."

255. Mill, "A Few Words on Non-Intervention," 122. See generally 121–23.

256. See Walzer, *Just and Unjust Wars,* 101–8, especially 101, 107.

257. In fact, Walzer appears to have revised his views following the various events described in Chapter 1, including intervention (or nonintervention) in Somalia, Bosnia, and Rwanda. See Walzer, "The Politics of Rescue."

258. See Grotius, *De Jure Belli ac Pacis,* vol. 2, chap. 25, § 6 at 582, and § 8, ¶¶ 2–4 at 584; vol. 1, chap. 4, §§ 1–6 at 138–48.

259. See Cohn, *Human Rights in Jewish Law,* 196.

260. Jones, *The Mahāvastu,* 1:228.

261. Brooks and Brooks understand Confucius to be referring to "a standard of right determined *objectively,* and not given by prior personal commitment." Brooks and Brooks, *The Original Analects,* 15 (emphasis in original).

262. Ibid., 112.

263. 'Abdu'l-Bahá, *Paris Talks,* 154.

264. 'Abdu'l-Bahá, *The Secret of Divine Civilization,* 39.

265. See Universal Declaration, preamble.

266. Ibid., art. 1.

267. Ibid., preamble.

268. Ibid., art. 26, ¶ 2.

269. See G.A. Res. 49/184 (1994).

Notes to Chapter 3

1. I.C.J. Statute, art. 38, ¶ 1.
2. See, e.g., Henkin et al., *International Law,* 129.
3. Brierly, *The Law of Nations,* 59.
4. See generally ibid., 59–62, and Brownlie, *Principles of Public International Law,* 4–11.
5. See generally Brownlie, *Principles of Public International Law,* 514–17. On norms of *jus cogens,* see also article 53 of the Vienna Convention on the Law of Treaties. Vienna Convention, art. 53.
6. Finnis, "Authority," 180.
7. Brierly, *The Law of Nations,* 63.
8. See Brownlie, *Principles of Public International Law,* 18–19, 513–17.
9. See, e.g., South West Africa (Ethiopia v. South Africa; Liberia v. South Africa), Second Phase, 1966 I.C.J. 6, 250, 294–300 (July 18) (Dissenting Opinion of Judge Tanaka).
10. On this controversy, see, e.g., van Hoof, *Rethinking the Sources of International Law,* 131–51.
11. See Lepard, "Is the United States Obligated to Drive on the Right?" 154–67.
12. For a similar argument that the ascertainment of customary international law must occur within a broader moral framework, see Tesón, *Humanitarian Intervention,* 11–12.
13. See Lepard, "Is the United States Obligated to Drive on the Right?" 164–65.
14. On the principle that international organizations are bound by general international law, including customary international law and norms of *jus cogens,* see, e.g., Brownlie, *Principles of Public International Law,* 690, 696–97.
15. A related argument could be made that international organizations like the U.N. should be bound by the treaties to which their members are parties, such as the Genocide Convention. But the problems involved in imposing treaty obligations that are not customary norms on international organizations that are not parties to the treaties are too difficult to resolve in the space available here.
16. See Brownlie, *Principles of Public International Law,* 690, 696–97.
17. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15, 23 (Advisory Opinion of May 28). See also Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections, 1996 I.C.J. 595, 616 (July 11) (referring to this portion of the Court's Advisory Opinion of May 28, 1951).
18. The Corfu Channel, 1949 I.C.J. 4, 22 (April 9).
19. See Hart, *The Concept of Law,* 92–93.
20. Ian Brownlie has similarly argued that while "there is no Rubicon between law and morality," it is important to distinguish principles of morality from "those principles which achieve a legal status, as generally accepted by States." Brownlie, "Causes of Action in the Law of Nations," 41.
21. I.C.J. Statute, art. 9.
22. Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, 429 (Advisory Opinion of July 8) (Dissenting Opinion of Judge Weeramantry).
23. Ibid., 478–82.
24. Ibid., 482.
25. Ibid., 478. See also Judge Weeramantry's dissenting opinion in the 1999 case brought by the Federal Republic of Yugoslavia against Belgium, in which he made reference to Buddhist texts emphasizing the importance of the peaceful settlement of disputes, and indicated that such a reference "can significantly enrich the jurisprudence of this Court." Legality of the Use of Force (Yugoslavia v. Belgium), Request for the Indication of Provisional Measures (Order of June 2, 1999) (Dissenting Opinion of Vice-President Weeramantry), *available at* www.icj-cij.org.
26. See Nardin, *Law, Morality, and the Relations of States,* 3–24.

27. For an excellent collection of essays probing the historical influence of ethical principles in religious and philosophical texts on international law, see Janis and Evans, *Religion and International Law*. See also Bentwich, *The Religious Foundations of Internationalism*.

28. For a similar argument that *jus cogens* norms "are best understood as *moral* norms," see Tesón, *A Philosophy of International Law,* 93 (emphasis in original).

29. On the Vienna Convention, see generally Sinclair, *The Vienna Convention*.

30. Vienna Convention, art. 31, ¶¶ 1, 3–4.

31. Ibid., art. 32.

32. See Brownlie, *Principles of Public International Law,* 632–34.

33. Ibid., 634.

34. See generally ibid., 637, 687–89, 699–702.

35. See ibid., 635–36.

36. On the various schools of interpretation of treaties, see generally Sinclair, *The Vienna Convention,* 114–15.

37. U.N. Charter, art. 39.

38. Ibid., art. 2, ¶ 4.

39. For a similar argument emphasizing the need for resort to philosophical principles to allow a ranking of the multiple purposes set forth in the Charter, including the promotion of human rights, see Tesón, *Humanitarian Intervention,* 151–52.

40. For an exposition of this approach, see McDougal, Lasswell, and Miller, *The Interpretation of Agreements*.

41. Ibid., 41, 44. See generally 39–45.

42. See ibid., 107–9.

43. See ibid., 213–15.

44. On this point, see Falk, "On Treaty Interpretation and the New Haven Approach," 350–51.

45. Such a possible discrepancy between ethical principles and community policies or expectations as understood in the New Haven approach is identified and highlighted by Fernando Tesón. See Tesón, *Humanitarian Intervention,* 17–21.

46. U.N. Charter, art. 1, ¶ 3.

47. Ibid., arts. 55–56.

48. See, e.g., Schachter, "The Charter and the Constitution," 646–53. For an argument that the Charter does not impose a legal obligation on member states to protect human rights, see, e.g., Hudson, "Charter Provisions on Human Rights in American Law," 543–44.

49. See U.N. Charter, art. 62, ¶ 2.

50. See ibid., art. 68.

51. For a collection of essays reviewing the functions of these various bodies, see Alston, *The United Nations and Human Rights*.

52. See generally the discussion of the legal status of the Universal Declaration, with extracts from relevant legal materials, in Lillich and Hannum, *International Human Rights,* 122–76.

53. See Genocide Convention, art. I.

54. Ibid., art. II.

55. Ibid., art. VI.

56. Ibid., art. VIII.

57. For an analysis of the distinctions among these "generations," see Weston, "Human Rights," 264–67.

58. See generally Universal Declaration, arts. 2–21.

59. See generally ibid., arts. 22–27.

60. See, e.g., Declaration on Minority Rights.

61. U.N. Charter, art. 2, ¶ 7.

62. See, e.g., Pollis and Schwab, "Human Rights."

63. On the current difficulties of ascertaining whether particular rights have a higher legal status than others under international law, see generally Meron, "On A Hierarchy of International Human Rights."

64. Universal Declaration, art. 28.

65. See ICCPR, art. 4, ¶¶ 1–2 and arts. 6, 7, 8, 11, 15, 16, and 18.

66. These rights are otherwise protected by ICCPR, arts. 9 and 19 respectively.

67. Shue, *Basic Rights,* 19. See generally 18–20.

68. See ibid., 20, 22, 81–82. See generally 20–29, 65–82.

69. Several scholars have similarly argued that the commonalities they have identified between the treatment of freedom of conscience in Christian scripture and theology and in Islamic scripture and theology should give pause to those making the cultural relativism argument. See Little, Sachedina, and Kelsay, "Human Rights and the World's Religions," 218.

70. Similarly, governments have often affirmed that all rights are "universal, indivisible and interdependent and interrelated." Vienna Declaration, ¶ I(5). Many scholars have supported this view, especially in the context of women's rights. See, e.g., Hernández-Truyol, "Women's Rights as Human Rights," 622–29.

71. This suggested ordering of rights applies initially on a moral plane. While, as I argue, this moral hierarchy is useful in determining which rights *legally* ought to be considered part of international law (including as general principles of moral law or as *jus cogens* norms), I make no attempt in this book to articulate a comprehensive analysis of the relative ranking of rights under international law.

72. See, e.g., Nickel, *Making Sense of Human Rights,* 133, 140.

73. On the existence of individual duties generally under international human rights instruments, see Paust, "The Other Side of Right."

74. See ICCPR, art. 25.

75. G.A. Res. 45/150 (1990), ¶ 2.

76. See, e.g., Franck, "The Emerging Right to Democratic Governance."

77. See, e.g., Falk, "The Haiti Intervention."

78. For an analysis of contemporary international humanitarian law, see generally Best, *War and Law Since 1945*.

79. See, e.g., Geneva Convention IV, arts. 27–141.

80. See, e.g., ibid., art. 30 (requiring that the International Committee of the Red Cross [ICRC] "be granted all facilities" for the purpose of allowing protected persons to apply to it for assistance, but only "within the bounds set by military or security considerations").

81. Ibid., art. 3, ¶ 1.

82. See, e.g., ibid., art. 146.

83. Ibid., art. 147.

84. See, e.g., ibid., art. 146.

85. Geneva Protocol I, art. 48. See also ibid., art. 52, ¶ 2 (defining "military objectives" as "objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage").

86. Ibid., art. 51, ¶¶ 4, 5(b).

87. See ICRC, *Commentary on Geneva Protocol I,* art. 51, ¶ 1976.

88. Geneva Protocol I, art. 57, ¶ 2(a)(iii).

89. See generally Gardam, "Proportionality and Force in International Law," 406–10. Many legal experts adopt the view that the provisions of Protocol I relating to the obligation to distinguish between military and civilian objectives are customary legal norms. See, e.g., Bothe, Partsch, and Solf, *New Rules for Victims of Armed Conflicts,* 317.

90. As in the case of the ethical principles of necessity and proportionality described in Chapter 2, this terminology appears to be appropriate because of the interdependence of the

concepts of necessity and proportionality. Indeed, some legal scholars have argued that the principle of necessity incorporates the principle of proportionality. See, e.g., Bothe, Partsch, and Solf, *New Rules for Victims of Armed Conflicts,* 309 ("The principle of proportionality is inherent both in the principles of necessity and humanity upon which the law of armed conflict is based."). See also ibid., 194–95, and 309–10, n. 30.

91. Geneva Protocol I, art. 85, ¶ 3(a), (b).

92. On the scope of the Protocol, see Geneva Protocol II, art. 1.

93. See S.C. Res. 955 (1994), annex, art. 4.

94. Rome Statute, art. 5.

95. See generally ibid., arts. 6–8 (defining genocide, crimes against humanity, and war crimes).

96. Nuremberg Charter, art. 6(c).

97. See U.N. Doc. S/25704 (1993), annex, art. 5.

98. See S.C. Res. 955, annex, art. 3.

99. See Rome Statute, art 7, ¶ 1.

100. See generally ibid., art. 8, ¶ 2.

101. In this connection, some legal commentators have asserted that the legal rules of the Geneva Conventions and its Protocols constitute *jus cogens* norms by virtue of their humanitarian objects and purposes. See, e.g., Abi-Saab, *The Specificities of Humanitarian Law,* 270–73, 280.

102. On international criminal law, see generally, e.g., Paust et al., *International Criminal Law*.

103. See Rome Statute.

104. U.N. Charter, art. 2, ¶ 1.

105. Ibid., ¶ 7.

106. Secretary-General Annan has similarly argued for a reinterpretation of the Charter's conception of sovereignty: "The Charter protects the sovereignty of peoples. It was never meant as a licence for governments to trample on human rights and human dignity. Sovereignty implies responsibility, not just power." United Nations, "Secretary-General Reflects on 'Intervention,'" 3. And in his 2000 Millennium Report, he asserted: "To the critics [of humanitarian intervention] I would pose this question: if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, a Srebrenica—to gross and systematic violations of human rights that offend every precept of our common humanity?" Annan, "*We, the Peoples,*" 48.

107. U.N. Charter, art. 33.

108. Ibid., arts. 37, 36.

109. Ibid., art. 38.

110. Ibid., art. 2, ¶ 4.

111. See, e.g., Brownlie, *International Law and the Use of Force,* 40–44, 261–64.

112. U.N. Charter, art. 51.

113. See ibid., art. 53, ¶ 1.

114. Ibid., art. 39.

115. Ibid., art. 41.

116. Ibid., art. 42.

117. On the concept of self-determination in international law and practice, see generally, e.g., Cassese, *Self-Determination of Peoples*.

118. U.N. Charter, art. 1, ¶ 2.

119. Ibid., art. 76(b).

120. Ibid., art. 73(b).

121. See generally Declaration on the Granting of Independence to Colonial Countries and Peoples.

122. On the need to regulate the use of force by groups within a state, see Wedgwood, "Limiting the Use of Force in Civil Disputes."

123. Hans Küng has likewise suggested that "the solution . . . in cases of conflict is not the

'sovereign' nation state . . . but the widest possible cultural and political autonomy," and that "the goal should be a *federal model*." Küng, *A Global Ethic for Global Politics and Economics,* 125 (emphasis in original).

Notes to Chapter 4

1. Vasquez, "Understanding Peace," 274–75.
2. Article 24 indicates that member states "confer on the Security Council primary responsibility for the maintenance of *international* peace and security." U.N. Charter, art. 24, ¶ 1 (emphasis added).
3. Kelsen, *The Law of the United Nations,* 19. Nevertheless, Kelsen maintains that it is within the Council's discretion to determine that an internal conflict does pose a threat to international peace, meaning a threat of interstate war. See Kelsen, 731. On the other hand, a recent study on humanitarian intervention has argued that "it was hardly the intention of the framers of the Charter that internal conflicts and human rights violations should be regarded as a threat to international peace." See Danish Institute of International Affairs, *Humanitarian Intervention,* 62.
4. Quoted in Tolley, *The U.N. Commission on Human Rights,* 9–10.
5. U.N. GAOR, 6th Comm., 3d sess., 101st mtg. (1948), 409 .
6. S.C. Res. 232 (1966), preamble, ¶¶ 1–4.
7. S.C. Res. 253 (1968), ¶ 1.
8. S.C. Res. 418 (1977), preamble, ¶ 1.
9. See ibid., preamble.
10. *Note by the President of the Security Council,* U.N. Doc. 23500 (1992), 3.
11. *Statement by the President of the Security Council,* U.N. Doc. S/PRST/2000/25 (2000).
12. S.C. Res. 733 (1992), preamble.
13. S.C. Res. 794 (1992), preamble.
14. S.C. Res. 808 (1993), preamble. See also S.C. Res. 941 (1994), preamble.
15. S.C. Res. 929 (1994), preamble.
16. S.C. Res. 955 (1994), preamble.
17. S.C. Res. 841 (1993), preamble.
18. S.C. Res. 917 (1994), preamble.
19. See S.C. Res. 940 (1994), preamble.
20. See S.C. Res. 1160 (1998), preamble.
21. S.C. Res. 1199 (1998), preamble.
22. S.C. Res. 1239 (1999), preamble.
23. S.C. Res. 1244 (1999), preamble.
24. S.C. Res. 1314 (2000), ¶ 9. See also a similar statement in S.C. Res. 1296 (2000), ¶ 5.
25. *PDD 25,* 802–3.
26. U.N. Doc. S/PV.3145 (1992), 44.
27. U.N. Doc. S/PV.3453 (1994), 10.
28. U.N. Doc. S/PV.3413 (1994), 18.
29. U.N. Doc. S/PV.4011 (1999), 12.
30. Ibid., 13.
31. U.N. Doc. S/PV.3413 (1994), 4.
32. Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Request for the Indication of Provisional Measures, 1992 I.C.J. 114 (Order of April 14) [hereinafter *Lockerbie Case*].
33. See S.C. Res. 748 (1992), and S.C. Res. 731 (1992).
34. See *Lockerbie Case,* 1992 I.C.J. 126–27, at ¶¶ 41–46.

35. See, e.g., ibid., 160, 176 (Dissenting Opinion of Judge Weeramantry).
36. See ibid., 143, 152–53, at ¶¶ 20–21 (Dissenting Opinion of Judge Bedjaoui).
37. Editorial, "A U.N. License to Invade Haiti," *New York Times,* August 2, 1994.
38. Higgins, *Problems and Process,* 255 (emphasis in original).
39. Glennon, "Sovereignty and Community After Haiti," 72.
40. Damrosch, "Concluding Reflections," 356, 358.
41. Malanczuk, *Humanitarian Intervention,* 26.
42. See Tesón, *Humanitarian Intervention,* 230–31.
43. Ibid., 233.
44. See, e.g., ibid., 247–48, 253–54.
45. U.N. Charter, art. 55 (emphasis added).
46. Universal Declaration, preamble (emphasis added).
47. U.N. Charter, preamble.
48. Ibid., art. 55.
49. See, e.g., ibid.
50. McDougal and Reisman, "Rhodesia and the United Nations," 12. Secretary-General Annan has recently appeared to endorse this view, noting that internal conflicts can "spill over" into neighboring countries because of the spread of knowledge through mass communications. See United Nations, "Secretary-General Reflects on 'Intervention,'" 4.
51. U.N. Charter, art. 1, ¶¶ 1–2 (emphasis added).
52. See Kelsen, *The Law of the United Nations,* 282.
53. See U.N. SCOR, 3d sess., 296th mtg. (1948), 7.
54. Rosalyn Higgins and numerous other scholars have, on the basis of these human rights obligations in the Charter itself, taken the position that human rights practices of a state are not immunized from U.N. intervention by Article 2(7). See, e.g., Higgins, *The Development of International Law,* 118–28.
55. Advisory Opinion No. 4, Nationality Decrees Issued in Tunis and Morocco, 1923 P.C.I.J. (ser. B) No. 4, at 24.
56. League of Nations Covenant, art. 15, ¶ 8.
57. Kelsen, *The Law of the United Nations,* 776–77. See also Higgins, *The Development of International Law,* 74–76.
58. See, e.g., Doc. 943, III/5, *UNCIO Docs.*, 11:12, 18–19.
59. Doc. 723, I/1/A/19, *UNCIO Docs.*, 6:696, 702 (emphasis added).
60. See, e.g., Doc. 943, III/5, *UNCIO Docs.*, 11:12, 19 (referring to the term alongside an act of aggression against a member state).
61. Views of John Foster Dulles, in Doc. 1019, I/1/42, *UNCIO Docs.*, 6:507–8.
62. See generally Gilmour, "The Meaning of 'Intervene.'"
63. Doc. 861, II/3/55(1), *UNCIO Docs.*, 10:269, 271–72. See also Goodrich, Hambro, and Simons, *Charter of the United Nations,* 372.
64. Kelsen, *The Law of the United Nations,* 773–74 n. 7.
65. On this point and on the legislative history of Article 2(7) generally, see Goodrich, Hambro, and Simons, *Charter of the United Nations,* 63, 60–63.
66. Views of John Foster Dulles, in Doc. 1019, I/1/42, *UNCIO Docs.*, 6:507–8.
67. Views of H. V. Evatt, in Doc. 969, I/1/39, *UNCIO Docs.*, 6:436, 439.
68. Doc. 944, I/1/34(1), *UNCIO Docs.*, 6:446, 455.
69. Ibid.
70. Russell and Muther, *A History of the United Nations Charter,* 465.
71. See ibid., 464–65, and Hilderbrand, *Dumbarton Oaks,* 136–38.
72. Doc. 943, III/5, *UNCIO Docs.*, 11:12, 17.
73. Doc. 969, I/1/39, *UNCIO Docs.*, 6:436, 439. One of these delegations was France, which thought the clause should be "retained to cover, for example, dangers arising from the possible revival of another Nazi menace in Germany." Russell and Muther, *A History of the*

United Nations Charter, 905. France had also originally proposed adding at the end of the domestic jurisdiction reservation an exception for cases in which "the clear violation of essential liberties and of human rights constitutes in itself a threat capable of compromising peace." Quoted in ibid., 905 n. 12.

74. See Doc. 969, I/1/39, *UNCIO Docs*., 6:436, 438–40.
75. Ibid., 439.
76. Doc. 723, I/1/A/19, *UNCIO Docs*. 6:696, 705 (emphasis added).
77. See generally Simma, *The Charter of the United Nations,* 139–54.
78. See McDougal and Reisman, "Rhodesia and the United Nations," 12.
79. See, e.g., S.C. Res. 808 (1993), preamble (Bosnia); S.C. Res. 941 (1994), preamble (Bosnia); and S.C. Res. 955 (1994), preamble (Rwanda).
80. Conze, *Buddhist Scriptures,* 186.
81. On this moral problem with the transboundary effects test, see Rodley, "Collective Intervention to Protect Human Rights and Civilian Populations," 35.
82. See, e.g., Danish Institute of International Affairs, *Humanitarian Intervention,* 75 (noting that the Security Council's voting procedure rules out "the abuse of humanitarian intervention by a few states for purposes of national interest").
83. For a suggestion along these lines, see Roberts, *Humanitarian Action in War,* 25.
84. Genocide Convention, art. VIII (emphasis added).
85. See, e.g., U.N. GAOR, 6th Comm., 3d sess., 101st mtg. (1948), 411 (statement of Mr. Maktos of the United States).
86. See generally the debates in U.N. GAOR, 6th Comm., 3d sess., 101st–102d mtgs. (1948), 408–28.
87. For a detailed proposal for such amendments, see The Independent International Commission on Kosovo, *The Kosovo Report,* 195–98.

Notes to Chapter 5

1. Hammarskjöld, *Second and Final Report,* ¶ 9 (emphasis in original).
2. See generally United Nations, *The Blue Helmets,* 54–55.
3. See, e.g., ibid., 55.
4. For a brief account of ONUC, see Baehr and Gordenker, *The United Nations,* 83–88.
5. Higgins, *The Development of International Law,* 108.
6. U.N. Doc. S/PV.3145 (1992), 35.
7. *Letter Dated 29 November 1992 from the Secretary-General to the President of the Security Council,* U.N. Doc. S/24868 (1992).
8. U.N. Doc. S/PV.3413 (1994), 17–18.
9. U.N. Doc. S/PV.3238 (1993), 20–21.
10. S.C. Res. 1244 (1999), preamble.
11. U.N. Doc. S/PV.4011 (1999), 8–9.
12. U.N. Doc. S/PV.3988 (1999), 16.
13. U.N. Doc. S/PV.4011 (1999), 6.
14. *Statement by the President of the Security Council,* U.N. Doc. S/PRST/1994/22 (1994).
15. *Note by the President of the Security Council,* U.N. Doc. S/25859 (1993), 1.
16. U.N. Doc. S/PV.3595 (1995), 27.
17. In this connection, in November 1999 the Council held an open meeting on the role of the Council in the prevention of armed conflicts. See generally *Statement by the President of the Security Council,* U.N. Doc. S/PRST/1999/34 (1999).
18. Boutros-Ghali, *An Agenda for Peace,* ¶ 17.
19. Ibid., ¶ 20 (emphasis added).
20. Ibid., ¶ 30.

21. Boutros-Ghali, *Supplement to an Agenda for Peace,* ¶ 33.

22. On U.S. frustration with Akashi's policies, see, e.g., Paul Lewis, "U.S. Says U.N. Officers in Balkans Lack the Will to Block Serbs," *New York Times,* May 2, 1994.

23. See, e.g., Damrosch, "Concluding Reflections."

24. Glennon, "Sovereignty and Community After Haiti," 74.

25. U.N. Charter, art. 24, ¶ 2.

26. See ibid.

27. In this connection, the Security Council has stressed the importance of the equal participation and full involvement of women in efforts to maintain and promote peace, "and the need to increase their role in decision-making with regard to conflict prevention and resolution." S.C. Res. 1325 (2000), preamble. In particular, it has expressed its willingness to ensure that Security Council missions consult with local and international women's groups. See ibid., ¶ 15.

28. Historian Marc Trachtenberg has recommended determining how ordinary citizens and entire populations feel about intervention as well as "listening to people we are not used to listening to, and understanding the limits on our own power and, especially, on our own wisdom." Trachtenberg, "Intervention in Historical Perspective," 32.

29. Kohlberg, "Justice as Reversibility," 272.

30. For a suggestion that the U.N. could have pursued a negotiated settlement with Aidid as a popularly supported group leader, see Farer, "Intervention in Unnatural Humanitarian Emergencies," 7–13.

31. Tesón, *Humanitarian Intervention,* 126. Tesón indicates in this connection that in his view humanitarian intervention is simply "an extension of the domestic right to revolution" and its legitimacy therefore depends on the consent of the oppressed citizens involved. Ibid., 91–92.

32. As Secretary-General Annan has asserted, "the time has come to intensify our efforts to move from a culture of reaction to a culture of prevention." Annan, *Prevention of Armed Conflict,* ¶ 169.

33. Robert C. Johansen, among others, has advocated such nonmilitary preventive techniques. See, e.g., Johansen, "Limits and Opportunities in Humanitarian Intervention," 69 (endorsing "preventive development," "preventive education," "preventive [domestic] enforcement," and "preventive adjudication"). See also Lund, *Preventing Violent Conflicts.*

34. See G.A. Res. 49/184 (1994).

35. The General Assembly's "Declaration and Programme of Action on a Culture of Peace," adopted in 1999, appears to move in this direction by calling for actions to ensure "that children, from an early age, benefit from education on the values, attitudes, modes of behaviour and ways of life to enable them to resolve any dispute peacefully and in a spirit of respect for human dignity and of tolerance and non-discrimination." See G.A. Res. 53/243B (1999), ¶ 9(b).

36. See, e.g., Sherman, "Empathy, Respect, and Humanitarian Intervention." See also Minow, *Between Vengeance and Forgiveness,* 144–45 (advocating programs of education, including those aimed at cultivating empathy, as "vital responses to mass violence").

37. UNESCO is already taking steps to implement the types of educational programs suggested here in the Balkans, including Kosovo. See, e.g., "UNESCO Director-General Calls for Campaign to Restore Tolerance, Dialogue and Solidarity in the Balkans," UNESCO Press Release No. 99–135, June 18, 1999, *available at* www.unesco.org/opi/eng/unescopress/99–135e.htm.

38. See, e.g., Roberts, *Humanitarian Action in War,* 44–46.

39. On the expanding role of international civilian police operations with suggestions for how they can be better employed, see generally Oakley, Dziedzic, and Goldberg, *Policing the New World Disorder.* The report of the Panel on United Nations Peace Operations makes a number of specific recommendations for strengthening the U.N.'s ability to deploy civilian police personnel, including the establishment by member states of national pools of trained police

officers available for rapid deployment in U.N. civilian police operations. See generally United Nations, *Report of the Panel on United Nations Peace Operations,* ¶¶ 118–26, and annex 3, ¶ 10. Robert C. Johansen has offered another proposal meriting serious consideration—that the U.N. establish "its own permanent constabulary force, recruited from among individuals who may volunteer from all countries of the world." Johansen, "Limits and Opportunities in Humanitarian Intervention," 75.

40. OAU, *Rwanda,* ¶ E.S.69. As a step toward this goal, the program "Education for Peace" was launched in the Rwandan primary schools in 1996 "with the aim of fostering mutual understanding, tolerance, and conflict resolution." Ibid., ¶ 16.79. The report of the OAU's International Panel of Eminent Personalities praises such efforts and urges that "the school curriculum be directed towards fostering a climate of mutual understanding among all peoples." Ibid., ¶ 24.4(4). It further recommends that in all schools throughout the Great Lakes region of Africa a "common human rights curriculum with special reference to the genocide and its lessons" should be introduced, including "peace education, conflict resolution, human rights, children's rights, and humanitarian law." Ibid., ¶ 24.4(18).

41. Important steps have been taken toward establishing such an understanding. See, e.g., the "Airlie Declaration" adopted in July 2000 by Kosovo Albanians and Kosovo Serbs at a conference held in Virginia under the auspices of the U.S. Institute of Peace, in which representatives of both communities committed themselves to establishing peaceful accommodation and healing fresh wounds. See "The Airlie Declaration," July 23, 2000, *available at* www.usip.org/oc/events/airlie_declaration.html.

42. See, e.g., Ewen MacAskill, "U.S. Shift on Independent Kosovo Angers Allies," *Guardian* (London), October 30, 2000.

Notes to Chapter 6

1. This is the concept of neutrality found in the international law of the use of force. See, e.g., Brownlie, *International Law and the Use of Force,* 16–17, 402–4.

2. On the role of the secretary-general as negotiator and mediator, see generally Gordenker, *The UN Secretary-General and the Maintenance of Peace,* 159–202. See also Rivlin and Gordenker, *The Challenging Role of the UN Secretary-General.*

3. See, e.g., Gordenker, *The UN Secretary-General and the Maintenance of Peace,* 199–202.

4. See, e.g., Forsythe, "The UN Secretary-General and Human Rights," 226.

5. Hammarskjöld, *Second and Final Report,* ¶¶ 4(a), (b), 5, 8.

6. United Nations Department of Peace-keeping Operations, *General Guidelines for Peace-keeping Operations,* ¶¶ 31–32 (emphasis added).

7. International Peace Academy, *Peacekeeper's Handbook,* ¶ 15 at 377.

8. S.C. Res. 929 (1994), preamble, ¶ 2 (emphasis added).

9. Boutros-Ghali, *Supplement to an Agenda for Peace,* ¶ 34.

10. In addition to the sources identified in note 55 in Chapter 1, see also, e.g., African Rights, *Rwanda,* 1120–21.

11. Picco, "The U.N. and the Use of Force," 15.

12. Secretary-General Annan gave one example of such an attitude in a 1998 report on protection for humanitarian assistance: "Clearly, when parties to a conflict deliberately obstruct assistance to civilians as a major element of their respective military strategies, the provision (and protection) of humanitarian assistance, while essential, will not always be viewed by the parties as 'neutral.'" Annan, *Report of the Secretary-General on Protection for Humanitarian Assistance,* ¶ 25.

13. Human Rights Watch, *The Lost Agenda,* 5–6.

14. United Nations, *Report of the Independent Inquiry on Rwanda,* 50.

15. OAU, *Rwanda,* ¶ 13.9.
16. U.N. Doc. S/PV.3367 (1994), 26.
17. U.N. Doc. S/PV.3367 (1994), 56.
18. See, e.g., van Boven, "The Role of the United Nations Secretariat," 577 (arguing that U.N. human rights officers "are bound to act on the basis of a fair and objective application of the law in light of the facts").
19. Human Rights Watch, *The Lost Agenda,* 5.
20. United Nations, *Report of the Panel on United Nations Peace Operations,* ¶ 50.
21. Ibid., ix.
22. Roberts, *Humanitarian Action in War,* 84. See generally 82–84.
23. "Secretary-General Says Lessons Learned in Bosnia Must Be Applied Emphatically Where Horror Threatens," U.N. Press Release SG/SM/6598 (1998), 3.
24. Annan, *The Fall of Srebrenica,* ¶ 505.
25. See Richard Betts's critique of such alleged U.N. behavior as a misguided attempt to maintain "impartiality" in Betts, "The Delusion of Impartial Intervention."
26. See U.N. Charter, art. 24, ¶ 2.
27. Ibid., art. 100, ¶ 1.
28. Ibid., art. 100, ¶ 2.
29. Ibid., art. 101, ¶ 3.
30. In this connection, the report of the Panel on United Nations Peace Operations recommends that "before the Security Council agrees to implement a ceasefire or peace agreement with a United Nations-led peacekeeping operation, the Council assure itself that the agreement meets threshold conditions, such as consistency with international human rights standards and practicability of specified tasks and timelines." United Nations, *Report of the Panel on United Nations Peace Operations,* annex 3, ¶ 4(a).
31. See, e.g., Betts, "The Delusion of Impartial Intervention," 32.

Notes to Chapter 7

1. See League of Nations Covenant, art. 16, ¶ 2.
2. Doc. 782, III/3/41, *UNCIO Docs.*, 12:431, 434.
3. U.N. Charter, art. 40.
4. Doc. 943, III/5, *UNCIO Docs.*, 11:12, 19.
5. See S.C. Res. 82 (1950); S.C. Res. 83 (1950); and S.C. Res. 84 (1950). For an analysis of the legal issues surrounding the U.N.'s action in Korea, as well as the role of the United States, see generally Bowett, *United Nations Forces,* 29–60.
6. Uniting for Peace Resolution, G.A. Res. 377A (V) (1950), ¶ 1.
7. United Nations, *The Blue Helmets,* 53.
8. See, e.g., S.C. Res. 169 (1961), ¶ 4.
9. On this point, see, e.g., McCoubrey and White, *The Blue Helmets,* 155.
10. *Regulations for the United Nations Emergency Force, February 20, 1957,* U.N. Doc. ST/SGB/UNEF/I (1957), ¶ 44.
11. Roberts and Guelff, *Documents on the Laws of War*, 1st ed., 372.
12. See, e.g., ibid., 723.
13. See generally the debate on Resolution 678, reported in U.N. Doc. S/PV.2963 (1990).
14. For a defense of the coalition's actions, see Moore, *Crisis in the Gulf,* 156–65.
15. See U.N. Doc. S/PV.3145 (1992), 27–28.
16. Ibid., 44, 46.
17. U.N. Doc. S/PV.3106 (1992), 11–12.
18. S.C. Res. 1264 (1999), ¶ 3.
19. S.C. Res. 1270 (1999), ¶ 8(g).

20. Annan, *Report of the Secretary-General on Protection for Humanitarian Assistance,* ¶ 25.
21. Weiss, "On the Brink," 10.
22. U.N. Doc. S/PV.3367 (1994), 8.
23. U.N. Doc. S/PV.3388 (1994), 10.
24. U.N. Doc. S/PV.4127 (2000), 13.
25. Ibid., 24.
26. U.N. Doc. S/PV. 3988 (1999), 8.
27. Ibid., 18.
28. S.C. Res. 1270 (1999), ¶ 14 (emphasis added). Similar language was included in subsequent Council resolutions. See, e.g., S.C. Res. 1289 (2000), ¶ 10, and S.C. Res. 1313 (2000), ¶ 3(c).
29. S.C. Res. 1296 (2000), ¶ 13 (emphasis added).
30. Ibid., ¶ 15.
31. S.C. Res. 1265 (1999), ¶ 10.
32. S.C. Res. 1318 (2000), annex, § III (emphasis added).
33. Annan, *The Fall of Srebrenica,* ¶ 504.
34. Ibid., ¶ 502.
35. United Nations, *Report of the Independent Inquiry on Rwanda,* 55.
36. United Nations, *Report of the Panel on United Nations Peace Operations,* annex 3, ¶ 3.
37. Ibid., ¶ 49.
38. Ibid., ¶ 62.
39. Ibid., ¶ 50.
40. *Report of the Secretary-General on the Implementation of the Report of the Panel on United Nations Peace Operations,* U.N. Doc. S/2000/1081 (2000), ¶ 7(e).
41. S.C. Res. 1327 (2000), annex, §§ I–II.
42. Roberts, *Humanitarian Action in War,* 79.
43. Ibid., 84–85.
44. U.N. Doc. S/PV.3229 (1993), 6–7.
45. See, e.g., Steven Erlanger, "NATO Action Reflects Shift in Tactics," *New York Times,* July 11, 1997.
46. Annan, *First Report on the Protection of Civilians,* ¶ 38, recommendation 3.
47. S.C. Res. 1244 (1999), ¶ 14.
48. U.N. Doc. S/PV.4011 (1999), 16.
49. Amnesty International Public Statement, "Kosovo: Clarification into Police Functions."
50. See, e.g., "3 War-Crimes Arrests in Kosovo," *Chicago Tribune,* August 20, 1999.
51. U.N. Doc. S/PV. 3429 (1994), 3.
52. U.N. Doc. S/PV.3575 (1995), 5.
53. U.N. Doc. S/PV.3988 (1999), 19.
54. Annan, *The Fall of Srebrenica,* ¶ 497.
55. U.N. Doc. S/PV. 4011 (1999), 20.
56. United Nations, "Secretary-General Reflects on 'Intervention,'" 5.
57. Quoted in Barton Gellman, "U.S., Allies, Launch Air Attack on Yugoslav Military Targets; Two MiGs Reported Shot Down," *Washington Post,* March 25, 1999.
58. Annan, *"We, the Peoples,"* 48.
59. U.N. Doc. S/PV.3413 (1994), 24.
60. See, e.g., Reisman, "Humanitarian Intervention and Fledgling Democracies."
61. Weiss, "On the Brink," 9.
62. See, e.g., Pierce, "Just War Principles and Economic Sanctions," 112–13.
63. See, e.g., Damrosch, "The Civilian Impact of Economic Sanctions."
64. U.N. Doc. S/PV.3413 (1994), 19.

65. *Statement by the President of the Security Council,* U.N. Doc. S/PRST/1999/34 (1999).
66. S.C. Res. 1265 (1999), ¶ 16.
67. Annan, "*We, the Peoples,*" 50.
68. Annan, *First Report on the Protection of Civilians,* ¶ 54.
69. G.A. Res. 55/2 (2000), ¶ 9.
70. U.N. Doc. S/PV.3385 (1994), 9.
71. U.N. Doc. S/PV.3413 (1994), 4.
72. Ibid., 10.
73. See, e.g., U.N. Doc. S/PV.3988 (1999), 12.
74. Ibid., 10.
75. U.N. Doc. S/PV. 3145 (1992), 22.
76. See Boutros-Ghali, *Supplement to an Agenda for Peace,* ¶ 77.
77. Ibid., ¶¶ 35–36.
78. Annan, *Renewing the United Nations,* ¶ 107.
79. Annan, *The Fall of Srebrenica,* ¶ 498.
80. United Nations, *Report of the Commission of Inquiry,* ¶ 270.
81. See, e.g., Gardam, "Legal Restraints."
82. See *Further Report of the Secretary-General Pursuant to Security Council Resolution 743 (1992),* U.N. Doc. S/24848 (1992), ¶ 49.
83. Boutros-Ghali, *Supplement to an Agenda for Peace,* ¶ 35.
84. Ibid., ¶ 34. See also ¶ 33.
85. U.N. Doc. S/PV.3988 (1999), 3.
86. See, e.g., Glennon, "Sovereignty and Community After Haiti," 74.
87. See, e.g., Nick Gordon, "Somali Stain Ruins Image of UN Troops," *Sunday Times* (London), July 6, 1997; Richard Cleroux, "Canada Inquiry Attacks Somalia Mission," *Times* (London), July 4, 1997; Reuters, "Italy Says Its Soldiers Tortured Somalis," *New York Times,* August 9, 1997; and Robert Fox and Agence France Presse, "Belgian UN Troops Admit to 'Roasting' Somali Boy," *Daily Telegraph,* June 24, 1997.
88. For example, Amnesty International asserted after the fatal shooting of two ethnic Albanians in July 1999 by British troops participating in KFOR that the incident reinforced "the need for KFOR to operate, and be seen to operate, according [to] clear international human rights standards." Amnesty International Public Statement, "Kosovo: Clarification into Police Functions." As noted in Chapter 1, U.S. forces participating in KFOR were accused of misuses of force, and in at least one case, murder. For an analysis of KFOR's responsibility to observe international human rights and humanitarian law, see generally Cerone, "Outlining KFOR Accountability." Cerone believes that "it is unclear whether UNMIK regulations requiring public authorities in Kosovo to comply with international human rights law are applicable to KFOR."
89. See, e.g., McCoubrey and White, *The Blue Helmets,* 172–73.
90. For a collection of the governing documents and agreements relating to specific missions, see Siekmann, *Basic Documents*. On the role of rules of engagement in U.N. operations, and suggestions for future reform, see Zinni and Lorenz, "Command, Control, and Rules of Engagement."
91. U.N. Doc. ST/SGB/1999/13 (1999).
92. Ibid., ¶ 1.1.
93. See ibid., ¶¶ 5.1, 5.3.
94. See generally Bloom, "Protecting Peacekeepers," 624–26, and Convention on the Safety of U.N. Personnel, art. 2, ¶ 2.
95. See Convention on the Safety of U.N. Personnel, art. 20(a).
96. Lillich, "Humanitarian Intervention Through the United Nations," 658.
97. Annan, *First Report on the Protection of Civilians,* ¶ 67, recommendation 40.
98. See Kelsen, *The Law of the United Nations,* 16.

99. See the similar argument of legal scholar Judith Gardam, in Gardam, "Legal Restraints," 297–312, 318–19.

100. For a more comprehensive argument along these lines, see ibid., 294–312.

101. See, e.g., the first criterion developed by Richard Lillich and discussed in subsection 7.3.4.

102. For such an argument, see Gardam, "Legal Restraints," 312–20.

103. For a more extended analysis, see Bowett, *United Nations Forces,* 488–516.

104. See Geneva Protocol I, art. 51, ¶ 5(b); and ST/SGB/1999/13 (1999), ¶ 5.5.

105. For a discussion of the current practice, including in the Gulf War, of giving considerations of "military advantage" great weight in their own right, see Gardam, "Proportionality and Force in International Law," 406–10. The traditional interpretation of "military advantage" refers to any concrete and direct military goal—regardless of the ultimate ethical ends it may or may not serve. See, e.g., ICRC, *Commentary on Geneva Protocol I,* art. 57, ¶ 2218 (stating that a "military advantage can only consist in ground gained and in annihilating or weakening the enemy armed forces").

106. See, e.g., Gardam, "Legal Restraints," 319–20, 322, and McCoubrey and White, *The Blue Helmets,* 173.

107. It is noteworthy and commendable that in its resolution establishing UNTAET, the Security Council underlined "the importance of including in UNTAET personnel with appropriate training in international humanitarian, human rights and refugee law, including child and gender-related provisions, negotiation and communication skills, cultural awareness and civilian-military coordination." S.C. Res. 1272 (1999), ¶ 15. The Security Council included a similar provision in its resolution establishing UNAMSIL. See S.C. Res. 1270 (1999), ¶ 15. And in an April 2000 resolution, it indicated generally the importance of providing such training to personnel "involved in peacemaking, peacekeeping and peace-building activities." S.C. Res. 1296 (2000), ¶ 19. On current human rights training programs for peacekeepers, undertaken in cooperation with OHCHR, see generally Annan, *Report on the Implementation of Peacekeeping Recommendations,* ¶¶ 247–48.

108. Colonel Peter Leentjes, former chief of DPKO's Training Unit, believes that such moral education is the most important step that can be taken to minimize abuses by U.N. personnel, and needs to be incorporated in national training programs for peacekeepers. Col. Peter Leentjes, telephone interview with the author, February 3, 1998.

109. However, many observers believe that the KLA has not been adequately disarmed. See, e.g., Andrew Wachtel, "Kosovo After Milosevic," *Chicago Tribune,* October 8, 2000.

110. For a similar argument that the Security Council should decide in situations that constitute threats to international peace and security "that no amnesty for the perpetrators of atrocities shall be permitted or internationally respected," see Scharf, "Swapping Amnesty for Peace," 41. See also Annan, *Second Report on the Protection of Civilians,* ¶ 10 (arguing that "the granting of amnesties to those who committed serious violations of international humanitarian and criminal law is not acceptable").

111. I address the problem of the legal obligations of the Council in greater detail in Chapter 8.

112. See generally Scharf, "Swapping Amnesty for Peace," 34–39 (concluding that there is no duty under customary international law to prosecute crimes against humanity).

113. See, e.g., Nicholas Wood Foca and Peter Beaumont, "NATO Swoop Fails to Seize War Criminal Karadzic," *The Observer* (London), July 15, 2001.

114. Some commentators, however, argue that more serious diplomatic efforts could have been made, as evidenced by the later successful negotiations, including Russia and China, on the deployment of KFOR. See, e.g., Falk, "Kosovo, World Order, and the Future of International Law," 850–51, 854–55.

115. For more comprehensive assessments of the compliance of the NATO bombing campaign with international humanitarian law concluding that NATO committed many violations, see Amnesty International, *"Collateral Damage" or Unlawful Killings?* and Human Rights

Watch, *Civilian Deaths in the NATO Air Campaign*. However, as noted in Chapter 1, the committee appointed by the prosecutor of the ICTY concluded that there were not sufficient grounds to initiate prosecutions of any individuals acting under the authority of NATO for violations of international humanitarian law. See ICTY Office of the Prosecutor, *Final Report to the Prosecutor,* ¶¶ 90–91.

Notes to Chapter 8

1. U.N. Charter, art. 24, ¶ 1 (emphasis added).
2. Doc. 320, III/3/15, *UNCIO Docs*., 12:315, 317.
3. U.N. Charter, art. 24, ¶ 2.
4. Ibid., art. 55(c).
5. See ibid., art. 60.
6. U.N. SCOR, 3d sess., 296th mtg. (1948), 6.
7. See Russell and Muther, *A History of the United Nations Charter,* 467.
8. See the report of the Rapporteur of Committee 3 of Commission III in Doc. 943, III/5, *UNCIO Docs*., 11:12, 20–22.
9. U.N. Charter, art. 43, ¶ 1.
10. Ibid., ¶ 3.
11. Doc. 943, III/5, *UNCIO Docs*., 11:12, 20 (emphasis added).
12. Ibid., 24 (emphasis in original).
13. See U.N. Charter, arts. 25, 48–49.
14. See generally, e.g., United Nations, *Repertory of Practice,* 395.
15. U.N. Charter, art. 17, ¶ 2.
16. See Russell and Muther, *A History of the United Nations Charter,* 862–63.
17. Goodrich, Hambro, and Simons, *Charter of the United Nations,* 157.
18. Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter), 1962 I.C.J. 151, 166–67, 179–80 (Advisory Opinion of July 20).
19. See G.A. Res. 3101 (XXVIII) (1973), and G.A. Res. 55/235 (2000).
20. U.N. Charter, art. 43, ¶ 3. See generally Hilderbrand, *Dumbarton Oaks,* 149–51, 156.
21. See 22 U.S.C. § 287d (1994).
22. Uniting for Peace Resolution, G.A. Res. 377A (V) (1950), ¶ 8.
23. See ibid., ¶ 11.
24. U.N. Doc. S/PV.3564 (1995), 5.
25. U.N. Doc. S/PV.3200 (1993), 31.
26. U.N. Doc. S/PV.3377 (1994), 18.
27. U.N. Doc. S/PV.3388 (1994), 9.
28. U.N. Doc. S/PV.3402 (1994), 3.
29. United Nations, *Report of the Independent Inquiry on Rwanda,* 51.
30. Ibid., 37.
31. Ibid., 53–54.
32. Ibid., 38.
33. See generally the statements reported in U.N. Doc. S/PV.4127 (2000).
34. Ibid., 22.
35. OAU, *Rwanda,* ¶¶ E.S.33, E.S.36. See generally the Panel's discussion of the United Nations' role in ibid., ¶¶ 15.1–15.41.
36. Annan, *The Fall of Srebrenica,* ¶ 503.
37. Annan, "*We, the Peoples,*" 48 (emphasis added).
38. U.N. Doc. S/PV.3988 (1999), 17.
39. Ibid., 6.
40. Ibid., 10.

41. U.N. Doc. S/PV.3989 (1999), 7.
42. Ibid., 14–15.
43. U.N. Doc. S/PV.3988 (1999), 7.
44. See, e.g., Schermers, "The Obligation to Intervene," 588–93.
45. See, e.g., ibid.
46. Kelsen, *The Law of the United Nations,* 789.
47. Murphy, *Humanitarian Intervention,* 295.
48. See ibid., 295–96.
49. Ibid., 297. See generally 294–97.
50. *Statement by the President of the Security Council,* U.N. Doc. S/PRST/1994/22 (1994), 2.
51. U.N. Press Release SG/SM/5297 (1994), 3–4.
52. See Boutros-Ghali, *An Agenda for Peace,* ¶ 43.
53. See U.N. Doc. A/49/PV.5 (1994), 5.
54. See, e.g., Murphy, *Humanitarian Intervention,* 304–11.
55. See *PDD 25,* 802.
56. See *American Servicemembers' Protection Act of 2001,* H.R. 1794, 107th Cong., 1st sess. (2001), § 5.
57. See, e.g., Barbara Crossette, "After Long Fight, U.N. Agrees to Cut Dues Paid by U.S.," *New York Times,* December 23, 2000, and G.A. Res. 55/235 (2000).
58. See, e.g., Annan, *Renewing the United Nations,* ¶ 217.
59. In his 2000 Millennium Report, Secretary-General Annan stated in this connection: "Our system for launching operations has sometimes been compared to a volunteer fire department, but that description is too generous. Every time there is a fire, we must first find fire engines and the funds to run them before we can start dousing any flames. The present system relies almost entirely on last minute, ad hoc arrangements that guarantee delay, with respect to the provision of civilian personnel even more so than military." Annan, *"We, the Peoples,"* 49. The Panel on United Nations Peace Operations specifically recommended that the U.N. should aim to be able fully to "deploy traditional peacekeeping operations within 30 days after the adoption of a Security Council resolution, and within 90 days in the case of complex peacekeeping operations." United Nations, *Report of the Panel on United Nations Peace Operations,* annex 3, ¶ 7. Given the U.N.'s current capabilities, these are ambitious standards. Nevertheless, the Security Council called on all relevant parties to work toward meeting these timelines. See S.C. Res. 1327 (2000), annex, § IV.
60. Dallaire, "The Rwandan Experience," 23.
61. The report of the Panel on United Nations Peace Operations emphasizes, accordingly, the need for "bigger forces, better equipped and more costly, but able to pose a credible deterrent threat, in contrast to the symbolic and non-threatening presence that characterizes traditional peacekeeping." United Nations, *Report of the Panel on United Nations Peace Operations,* ¶ 51.
62. These difficulties are described in United Nations, *Report of the Panel on United Nations Peace Operations*. See, e.g., ibid., ¶ 108.
63. Colonel Peter Leentjes, chief of DPKO's Training Unit, telephone interview with the author, June 6, 1996.
64. U.N. Doc. S/PV.3388 (1994), 3.
65. Boutros-Ghali, *Supplement to an Agenda for Peace,* ¶ 44.
66. See Ambassador Albright, "Remarks on the Secretary-General's Report on Peacekeeping Outside the Security Council," U.S. Mission to the U.N., January 5, 1995, 1–2.
67. See *Statement by the President of the Security Council,* U.N. Doc. S/PRST/1995/9 (1995) (not mentioning an RDF).
68. *Stand-By Arrangements for Peace-Keeping: Report of the Secretary-General,* U.N. Doc. S/1994/777 (1994), ¶ 2.

69. See Annan, *Report on the Work of the Organization,* ¶ 60.

70. See United Nations, *Report of the Panel on United Nations Peace Operations,* annex 3, ¶ 9(a).

71. See Michael Richardson, "East Timor Peace Force Is Held Up as a Model," *International Herald Tribune,* February 28, 2000.

72. S.C. Res. 1296 (2000), ¶ 13 (emphasis added).

73. Brian Urquhart, "For a UN Volunteer Military Force," *New York Review of Books,* June 10, 1993.

74. For this reason, a decision to put one's own life at risk to rescue others may be viewed as a "heroic" or "supererogatory" act—one not absolutely morally required, but certainly morally praiseworthy.

75. In a similar vein, Secretary-General Annan stressed in a June 1998 speech that each individual "has an obligation to do whatever he or she can to correct injustice. Each of us has a duty to halt—or, better, to prevent—the infliction of suffering." And he suggested that each individual must take a share of the responsibility for the failure of the international community to intervene more effectively in Bosnia and Rwanda. See United Nations, "Secretary-General Reflects on 'Intervention,'" 8–9.

76. See in this connection the argument of legal scholars Michael Reisman and Myres S. McDougal that "insofar as human rights deprivations giving cause for humanitarian intervention constitute a 'threat to the peace' or 'breach of the peace' or 'act of aggression,' the Security Council . . . is seised with a *mandatory* jurisdiction." W. Reisman and McDougal, "Humanitarian Intervention to Protect the Ibos," 174–75 (emphasis added).

77. See U.N. Charter, art. 1, ¶ 1.

78. Ibid., art. 60.

79. Genocide Convention, art. I.

80. See ibid., art. VIII (providing that states parties may "call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide"). It is true that the *travaux* suggest that the drafters of the Genocide Convention wished to avoid imposing an *obligation* to report situations of genocide to the Security Council. But they also imply that the reason for not including such a provision was a concern not to *expand* the Security Council's jurisdiction under the Charter. See, e.g., U.N. GAOR, 6th Comm., 3d sess., 101st mtg. (1948), 411 (statement of Mr. Maktos of the United States), and the discussion in Chapter 4. I established in Chapter 4 that the Council is already competent under the Charter to assume jurisdiction in cases of genocide. Furthermore, in any case, I argued in Chapter 3 for the existence of a general principle of moral law requiring states to take some reasonable action to the extent of their abilities to prevent and thwart widespread and severe violations of essential human rights, and that this principle should be recognized as a norm of *jus cogens* that could override inconsistent treaty obligations. At the least, treaties like the Genocide Convention should be interpreted, if possible (as here), to be consistent with such a general principle of moral law.

81. As of June 11, 2001, 132 states were parties to the Genocide Convention, while 189 states were members of the U.N. See www.unhchr.ch/html/menu3/b/treaty1gen.htm.

82. For an argument that many of these norms are already part of customary international law, see Paust, "Universality and the Responsibility to Enforce International Criminal Law."

83. Compare Reisman and McDougal, "Humanitarian Intervention to Protect the Ibos," 178 ("in those extreme cases where the most minimal of human rights" are jeopardized, "forceful intervention . . . in the territory of another State is permissible and for parties to the Charter and the Genocide Convention *is mandatory*") (emphasis added).

84. It is instructive to note that Article 106 of the Charter provides that, pending the execution of a sufficient number of Article 43 agreements to allow the Security Council to take

enforcement action using forces provided pursuant to such agreements, the permanent members have an obligation to "consult with one another and as occasion requires with other Members of the United Nations with a view to such joint action on behalf of the Organization as may be necessary for the purpose of maintaining international peace and security." U.N. Charter, art. 106. This provision confirms the special responsibility of the permanent members to provide forces for use by the Council.

85. On dilemmas of collective action, see generally, e.g., Olson, *The Logic of Collective Action.*

86. On collective security in theory and practice, see generally Claude, *Swords Into Plowshares,* 245–85.

87. Ibid., 251.

Notes to Chapter 9

1. Bowett, *United Nations Forces,* 359.

2. See Russell and Muther, *A History of the United Nations Charter,* 472. See generally U.N. Charter, arts. 46, 47.

3. On the debate on what became Chapter VIII of the Charter, see generally Goodrich, Hambro, and Simons, *Charter of the United Nations,* 354–69.

4. U.N. Charter, arts. 52–54.

5. Ibid., art. 43, ¶ 3.

6. See ibid., art. 48.

7. See S.C. Res. 84 (1950), ¶¶ 3–6.

8. See Bowett, *United Nations Forces,* 36–47, 60.

9. See *Report of the Collective Measures Committee,* U.N. Doc. A/1891 (1951), ¶¶ 200–210.

10. Hammarskjöld, *Second and Final Report,* ¶ 4(a). See generally ¶¶ 4–5.

11. See generally *Report of the Secretary-General,* U.N. Doc. A/3694 (1956), ¶¶ 8–9, reprinted in Rosalyn Higgins, *United Nations Peacekeeping, 1946–1967: Documents and Commentary,* vol. 1, *The Middle East* (London: Oxford University Press, 1969), 279–80.

12. On the exclusion of permanent Council members, see *First Report on an Emergency International Force,* U.N. Doc. A/3289 (1956), ¶ 5, excerpted in Rosalyn Higgins, *United Nations Peacekeeping, 1946–1967: Documents and Commentary,* vol. 1, *The Middle East* (London: Oxford University Press, 1969), 301.

13. See *Report of the Collective Measures Committee,* U.N. Doc. A/2215 (1952), ¶¶ 87–92 and appendix.

14. See, e.g., Siekmann, *National Contingents,* 112.

15. See Cordesman and Wagner, *The Gulf War,* 227.

16. See Hillen, *Blue Helmets,* 207–8.

17. Col. Michel Couton, chief, UNOSOM Desk, interview with the author, U.N. Headquarters, New York, New York, June 10, 1994.

18. United Nations, *Report of the Commission of Inquiry,* ¶ 247.

19. Boutros-Ghali, *Improving the Capacity of the United Nations,* ¶ 26.

20. United Nations, *Report of the Independent Inquiry on Rwanda,* 36.

21. See, e.g., Patrick Cockburn, "Inquiry Urged into UN Deaths," *Independent* (London), October 9, 1993.

22. *PDD 25,* 807–8.

23. Ibid., 809.

24. See, e.g., *National Security Revitalization Act,* H.R. 7, 104th Cong., 1st sess., version 4 (1995), §§ 401, 402.

25. S.C. Res. 929 (1994), ¶ 2 (emphasis added).

26. S.C. Res. 940 (1994), ¶ 4 (emphasis added).
27. See, e.g., S.C. Res. 1031 (1995).
28. S.C. Res. 1244 (1999), ¶¶ 5, 7.
29. Ibid., annex 2, ¶ 4.
30. Ibid., ¶ 20.
31. UNMIK Regulation No. 2000/47, "On the Status, Privileges and Immunities of KFOR and UNMIK and Their Personnel in Kosovo," ¶ 2.2, August 18, 2000, *available at* www.un.org/peace/kosovo/pages/regulations/reg047.html.
32. See S.C. Res. 1264 (1999), ¶ 3.
33. See ibid., ¶ 10.
34. Annan, *Renewing the United Nations,* ¶ 107.
35. See, e.g., Quigley, "The 'Privatization' of Security Council Enforcement Action."
36. See, e.g., Sarooshi, *The United Nations and the Development of Collective Security,* 142–284, and Miller, "Universal Soldiers," 823–26.
37. U.N. Doc S/PV.4011 (1999), 5 (statement of Mr. Jovanović of the Federal Republic of Yugoslavia).
38. Weiss, "On the Brink," 12.
39. See, e.g., "An African Answer to African Wars," *Economist,* October 18, 1997, 45–46.
40. U.N. Doc. S/PV.3595 (1995), 32.
41. Boutros-Ghali, *Supplement to an Agenda for Peace,* ¶ 80.
42. U.N. Doc. S/PV.3413 (1994), 5.
43. See U.N. Doc. S/PV.3392 (1994), 7.
44. See ibid., 5.
45. U.N. Doc. S/PV. 3413 (1994), 22.
46. U.N. Doc. S/PV. 3145 (1992), 36.
47. U.N. Doc. S/PV. 3392 (1994), 6–7.
48. U.N. Doc. S/PV. 3413 (1994), 13.
49. U.N. Doc. S/PV.4011 (1999), 12.
50. Ibid., 13.
51. Ibid., 7.
52. Ibid., 18.
53. See Boutros-Ghali, *An Agenda for Peace,* ¶ 43.
54. See, e.g., Paul Lewis, "U.N. Plans by U.S. and France Clash: Proposal on a Military Panel Might Complicate Efforts for Preserving Peace," *New York Times,* February 2, 1992. In his speech before the forty-ninth session of the General Assembly, President Yeltsin supported revival of the MSC. See U.N. Doc. A/49/PV.5 (1994), 5.
55. S.C. Res. 1327 (2000), annex, § IV.
56. U.N. Charter, art. 48, ¶ 1.
57. See the more thorough and sophisticated argument of legal scholar Danesh Sarooshi on this point in Sarooshi, *The United Nations and the Development of Collective Security,* 142–284.
58. By contrast, other observers have apparently not believed that multilateral intervention is morally superior to unilateral intervention. See, e.g., Walzer, *Just and Unjust Wars,* 107.
59. U.N. Charter, art. 29.
60. See, e.g., Boutros-Ghali, *Improving the Capacity of the United Nations,* ¶ 25.

Notes to Chapter 10

1. U.N. Charter, art. 27. On the Security Council's voting procedure and practice, see generally Bailey, *Voting in the Security Council.*

2. See, e.g., the statement of the Canadian representative to Committee 3 of Commission III. Doc. 231, III/3/9(1), *UNCIO Docs.*, 12:303.

3. Uniting for Peace Resolution, G.A. Res. 377A (V) (1950), preamble.

4. For a discussion of vetoed resolutions on Rhodesia and South Africa, see Patil, *The UN Veto in World Affairs,* 148–89.

5. See U.N. Charter, arts. 11–12.

6. See Bailey, *The UN Security Council and Human Rights,* 1. I will analyze this restriction in more detail in Chapter 11.

7. U.N. Charter, art. 99.

8. See Simma, *The Charter of the United Nations,* 1044, 1048–57, and Bailey and Daws, *The Procedure of the UN Security Council,* 111–13.

9. See, e.g., Boutros-Ghali, *An Agenda for Peace,* ¶ 25(a).

10. See, e.g., Annan, *First Report on the Protection of Civilians,* ¶ 47, recommendation 13.

11. See *Statement by the President of the Security Council,* U.N. Doc. S/PRST/2000/25 (2000).

12. See U.N. Charter, art. 65.

13. See generally Bailey and Daws, *The Procedure of the UN Security Council,* 301–2.

14. See Tolley, *The U.N. Commission on Human Rights,* 10.

15. See U.N. Charter, arts. 31–32.

16. See generally Bailey and Daws, *The Procedure of the UN Security Council,* 154–66. Rules 37–39 are reprinted at 448–49.

17. See generally the Rules of Procedure, which are reprinted in ibid. at 441–54.

18. Uniting for Peace Resolution, G.A. Res. 377C (V) (1950), ¶ (a).

19. Quoted in Feuerle, Note, "Informal Consultation," 267 (emphasis in original).

20. On accusations of a U.N. "double standard" on human rights issues, see, e.g., Baehr and Gordenker, *The United Nations,* 115–16.

21. On the frequent post-Cold War practice of private meetings and informal consultations, see generally Bailey and Daws, *The Procedure of the UN Security Council,* 53–75. On informal "caucuses" of the permanent five, see 69.

22. U.N. Doc. S/PV.3388 (1994), 11.

23. U.N. Doc. S/PV.3413 (1994), 9.

24. Reisman, "The Constitutional Crisis in the United Nations," 85–86.

25. *Statement by the President of the Security Council,* U.N. Doc. S/PRST/1994/81 (1994).

26. See Roberts, *Humanitarian Action in War,* 15–16.

27. See, e.g., Judith Miller, "Security Council Relegated to Sidelines," *New York Times,* March 14, 1999.

28. United Nations, "Secretary-General Presents His Annual Report."

29. Reisman, "The Constitutional Crisis in the United Nations," 99.

30. See generally Bailey and Daws, *The Procedure of the UN Security Council,* 165, 302–3.

31. See United Nations, *Report of the Independent Inquiry on Rwanda,* 31.

32. See Paul Lewis, "U.N. Report Comes Down Hard on Rwandan Genocide Tribunal," *New York Times,* February 13, 1997, and Bailey and Daws, *The Procedure of the UN Security Council,* 75.

33. See, e.g., U.N. Doc. S/PV.3778 (1997), 22–23 (statement of Mr. Larraín of Chile).

34. See Annan, *1998 Report on the Work of the Organization,* ¶ 30.

35. See *Statement by the President of the Security Council,* U.N. Doc. S/PRST/2000/25 (2000). For recent examples of cooperation between the two organs on issues involved in the prevention of armed conflict, see Annan, *Prevention of Armed Conflict,* ¶ 40.

36. See, e.g., "Stronger Decision-Making Role for Women in Peace Processes Is Called for in Day-Long Security Council Debate," U.N. Press Release SC/6937 (2000).

37. See, for example, the recommendation of the Security Council mission to Sierra Leone

in October 2000 that "the Security Council and the Secretariat, ECOWAS, UNAMSIL troop-contributing countries and the Government of Sierra Leone need to consult through some form of continuous structure rather than simply a series of meetings held at regular intervals." *Report of the Security Council Mission to Sierra Leone,* U.N. Doc. S/2000/992 (2000), ¶ 55.

38. See, e.g., U.N. Doc. S/PV.3135 (1992), 35 (statement of Mr. Redzuan of Malaysia).

39. U.N. Doc. S/PV.3413 (1994), 22.

40. U.N. Doc. S/PV.3470 (1994), 4.

41. U.N. Doc. S/PV.4011 (1999), 19.

42. "Remarks to Kosovo International Security Force Troops in Skopje," June 22, 1999, in Clinton, *Public Papers,* 1:992, 993.

43. Boutros-Ghali, *An Agenda for Peace,* ¶ 82.

44. United Nations, "Secretary-General Presents His Annual Report."

45. In this connection, the independent U.N. commission on Rwanda heard many allegations that the international community exercised double standards when faced with the risk of a catastrophe in Rwanda "compared to action taken elsewhere." United Nations, *Report of the Independent Inquiry on Rwanda,* 44.

46. S.C. Res. 1318 (2000), annex, § II.

47. Chinkin, "Kosovo," 847.

48. See, e.g., Franck, *Fairness in International Law and Institutions,* 218–44.

49. Franck, *The Power of Legitimacy,* 144 (emphasis in original).

50. See, e.g., Damrosch, "Concluding Reflections," 360–63.

51. Weiss, "On the Brink," 8.

52. See, e.g., Henry S. Bienen, "The Morality of Selective Intervention; Foreign Policy: We Should Act Only Where We Can Assist a Positive Outcome—in Bosnia, Say, But Not in Rwanda," *Los Angeles Times,* June 22, 1994.

53. For example, the United States reportedly agreed to support Russian demands for Council authorization of its "peacekeeping" operations in Georgia as the price for Russian support of Resolution 940 on Haiti. Daniel Williams, "Powers Assert Influence in Peacekeeping Roles: Independent Missions Lack U.N.'s Idealism," *Washington Post,* July 30, 1994.

54. U.N. Doc. S/PV. 3988 (1999), 8.

55. U.N. Doc. S/PV.4072 (1999), 29.

56. U.N. Doc. S/PV.3988 (1999), 10.

57. U.N. Doc. S/PV.4011 (1999), 20.

58. Haas, *When Knowledge Is Power,* 24 (emphasis in original).

59. See Janis, *Victims of Groupthink*.

60. For similar arguments in favor of informal consultations, see Feuerle, Note, "Informal Consultation," 290–94.

61. It is encouraging to note in this respect that recent Council missions, discussed in the following note, have met with members of civil society, religious leaders, representatives of political parties, genocide survivors, and women's organizations. See, e.g., *Report of the Security Council Mission to the Great Lakes Region, 15–26 May 2001,* U.N. Doc. S/2001/521 (2001), ¶¶ 3, 46–49, 91–93.

62. The Council has already established special missions of Council members to investigate the situations, and hold discussions with relevant parties, in a number of states, provinces, or regions, including the Democratic Republic of the Congo, East Timor and Indonesia, the Great Lakes region of Africa, Kosovo, and Sierra Leone. These missions have produced helpful reports and recommendations. See, e.g., U.N. Doc. S/2000/416 (2000) (Democratic Republic of the Congo); U.N. Doc. S/2000/1105 (2000) (East Timor and Indonesia); U.N. Doc. S/2001/521 and Add. 1 (2001) (Great Lakes region); U.N. Doc. S/2001/600 (2001) (Kosovo); and U.N. Doc. S/2000/992 (2000) (Sierra Leone). The Security Council has expressed its willingness to consider the use of such Council missions, with the consent of host countries. See *Statement*

by the President of the Security Council, U.N. Doc. S/PRST/2000/25 (2000), and S.C. Res. 1327, annex, § V.

63. In a June 2001 resolution the Security Council emphasized its intention to improve consultations with current and potential troop-contributing countries. See generally S.C. Res. 1353 (2001).

64. The independent U.N. commission on Rwanda emphasized in its report the importance of "direct personal contacts between the Secretary-General and the Security Council as a whole, and with its members"—contacts that it found to be insufficient in the case of Rwanda. United Nations, *Report of the Independent Inquiry on Rwanda,* 48.

65. In this connection, Secretary-General Annan has urged that the Security Council make greater use of human rights information and analysis emanating from the U.N.'s various human rights bodies, as well as other reliable sources, "as indicators for potential preventive action by the United Nations." Annan, *First Report on the Protection of Civilians,* ¶ 47, recommendation 15.

66. In this connection, Article 65 might be interpreted as authorizing the Security Council to request assistance from NGOs having consultative status with ECOSOC.

67. See generally Bailey and Daws, *The Procedure of the U.N. Security Council,* 166.

68. The Independent International Commission on Kosovo recommended in this connection that the General Assembly adopt a "Declaration on the Right and Responsibility of Humanitarian Intervention." See The Independent International Commission on Kosovo, *The Kosovo Report,* 187, 190.

69. In this regard, Adam Roberts and Benedict Kingsbury have argued that, among other benefits, the veto "has contributed to a sense of responsibility and a habit of careful consultation among the permanent five." Roberts and Kingsbury, "Introduction," 41.

70. It is interesting to note that such a "super-majority" system of permanent member voting was proposed by a U.S. State Department committee before the 1944 Dumbarton Oaks Conference. See Hilderbrand, *Dumbarton Oaks,* 25.

71. See, e.g., *Our Global Neighbourhood,* 241.

72. See Butler, "Bewitched, Bothered, and Bewildered," 10–11.

Notes to Chapter 11

1. See the list of potential candidates for classification as humanitarian intervention provided in Scheffer, "Toward a Modern Doctrine," 254–55 n. 4. For an argument that such examples demonstrate acceptance of the doctrine of humanitarian intervention before 1945, see Tesón, *Humanitarian Intervention,* 177–79.

2. See, e.g., Brownlie, *International Law and the Use of Force,* 338–42.

3. U.N. Charter, art. 2, ¶ 4.

4. Ibid., art. 53, ¶ 1.

5. Ibid., art. 52, ¶ 1.

6. For detailed accounts of these operations and an analysis of their character as legitimate humanitarian actions, see Tesón, *Humanitarian Intervention,* 179–223.

7. For example, immediately after the Indian invasion of East Pakistan, the Security Council, despite lengthy consultations, failed to adopt any condemnatory resolution as a result of Soviet vetoes. After the hostilities ended, it adopted a resolution demanding merely that the cease-fire be observed and calling for the withdrawal of troops "as soon as practicable," without criticizing India. See S.C. Res. 307 (1971), ¶ 1. See generally Tesón, *Humanitarian Intervention,* 207–10, and Nanda, "A Critique of the United Nations Inaction," 60–63.

8. See, e.g., Schachter, "The Right of States to Use Armed Force," 1628–33.

9. See, e.g., Lillich, "Humanitarian Intervention: A Reply to Ian Brownlie"; McDougal,

Lasswell, and Chen, *Human Rights and World Public Order,* 240–42; Reisman and McDougal, "Humanitarian Intervention to Protect the Ibos," 177–78; and Tesón, *Humanitarian Intervention,* 146–74.

10. See, e.g., Brownlie, "Humanitarian Intervention"; Franck and Rodley, "After Bangladesh"; and Schachter, "The Right of States to Use Armed Force," 1628–33.

11. See generally United Nations, *The Blue Helmets,* 649–58; Diehl, *International Peacekeeping,* 121; and Goodrich, Hambro, and Simons, *Charter of the United Nations,* 366–67.

12. See, e.g., Diehl, *International Peacekeeping,* 121–22.

13. See generally ibid., 58–60, 132–33.

14. See Lillich, "Forcible Self-Help," 347–51. For another example of a Cold War-era attempt to develop criteria for judging the legality of intervention on humanitarian grounds, see McDougal, Lasswell, and Chen, *Human Rights and World Public Order,* 246–47.

15. See generally subsection 1.2.3.

16. See generally Murphy, *Humanitarian Intervention,* 146–65.

17. See, e.g., S.C. Res. 788 (1992), ¶¶ 1, 8–10.

18. See S.C. Res. 866 (1993).

19. S.C. Res. 1125 (1997), ¶ 3.

20. See, e.g., S.C. Res. 1159 (1998), ¶¶ 9–18.

21. S.C. Res. 1132 (1997), ¶ 8.

22. See S.C. Res. 1181 (1998), ¶ 6(a), (b).

23. S.C. Res. 1260 (1999), ¶ 3.

24. See U.N. Doc. S/PV.3988 (1999), 2–4.

25. Ibid., 13.

26. Ibid.

27. Ibid., 14.

28. Ibid., 15–16.

29. U.N. Doc. S/PV. 4011 (1999), 17.

30. Ibid., 19.

31. U.N. Doc. S/PV.3988 (1999), 5.

32. Ibid., 6.

33. Ibid., 8.

34. Ibid., 10.

35. Ibid., 8.

36. U.N. Doc. S/PV. 4011 (1999), 12.

37. U.N. Doc. S/PV.3988 (1999), 12.

38. Ibid., 19–20.

39. See *Report of the Special Committee on Peacekeeping Operations,* U.N. Doc. A/54/839 (2000), ¶ 157.

40. See, e.g., An-Na'im, "NATO on Kosovo Is Bad for Human Rights"; Cassese, "*Ex iniuria ius oritur*"; Charney, "Anticipatory Humanitarian Intervention in Kosovo"; Franck, "Lessons of Kosovo"; Henkin, "Kosovo and the Law of 'Humanitarian Intervention'"; and Simma, "NATO, the UN and the Use of Force."

41. See, e.g., Falk, "Kosovo, World Order, and the Future of International Law."

42. D'Amato, "International Law and Kosovo." See also Mertus, "Reconsidering the Legality of Humanitarian Intervention," 1787 (arguing that "although the explicit Charter provisions permitting force do not appear to be applicable to the intervention in Kosovo, the Charter may be read as implicitly permitting and even mandating the action").

43. See , e.g., Wedgwood, "NATO's Campaign in Yugoslavia," and Reisman, "Kosovo's Antinomies."

44. See Danish Institute of International Affairs, *Humanitarian Intervention,* 94–95.

45. Ibid., 103–11. See also 125–26 (endorsing the first, second, and fourth criteria as the most important).

46. The Independent International Commission on Kosovo, *The Kosovo Report,* 186.
47. Ibid.
48. See ibid., 192–95. For another example of a post-Kosovo attempt to develop criteria for unauthorized humanitarian intervention, see Brown, "Humanitarian Intervention at a Crossroads," 1722–41. Brown suggests that either direct Security Council authorization "or the failure of the Security Council to act upon reliable reports of widespread atrocities should be a minimum legal requirement for any armed humanitarian intervention." Ibid., 1726.
49. It may appear anachronistic to evaluate the legality of nineteenth-century interventions by reference to a general principle of moral law that was derived, as we saw in Chapters 2 and 3, in part from ethical principles in the U.N. Charter and other post-1945 legal instruments. There are at least three responses to such a concern. First, the assertion in the text explicitly indicates that the relevant legal appraisal is being undertaken in hindsight only. Second, for purposes of such a retrospective legal appraisal, it seems appropriate to treat general principles of *moral* law as predating the particular contemporary legal texts that explicitly recognize the ethical principles upon which they are based by virtue of the compelling moral character of these principles. Ethical principles, once identified and recognized, are by their nature not limited in time or space. Finally, the analysis in Chapter 2 of revered moral texts indicates that there were strong endorsements of these principles even before the U.N. Charter by highly regarded moral texts—endorsements, we saw, that in part led many early international law theorists, including Grotius, to approve of the legality of humanitarian intervention.
50. In this connection, see Goodrich, Hambro, and Simons, *Charter of the United Nations,* 45 (noting that the "possible conflicts between different purposes and principles" of the U.N. have "particular relevance to Article 2(4)"). See also 51–52.
51. Dumbarton Oaks Proposals, Chapter II, ¶ 4, reprinted in Russell and Muther, *A History of the United Nations Charter,* 1019.
52. Goodrich, Hambro, and Simons, *Charter of the United Nations,* 44.
53. Russell and Muther, *A History of the United Nations Charter,* 456–57.
54. Goodrich, Hambro, and Simons, *Charter of the United Nations,* 44.
55. Ibid., 44–45.
56. Doc. 382, I/1/19, *UNCIO Docs.*, 6:303, 304.
57. See *UNCIO Docs.*, 6:560.
58. See ibid., 564.
59. See Doc. 739, I/1/A/19(a), *UNCIO Docs.*, 6:717, 720.
60. The text of the Australian amendment, which is substantially identical to the final version of Article 2(4), is reproduced in *UNCIO Docs.*, 6:557.
61. Doc. 739, I/1/A/19(a), *UNCIO Docs.*, 6:717, 720–21 (emphasis in original).
62. Doc. 784, I/1/27, *UNCIO Docs.*, 6:331, 334.
63. Ibid., 334.
64. Ibid., 334–35.
65. Ibid., 335.
66. Doc. 810, I/1/30, *UNCIO Docs.*, 6:342. The delegate of Norway abstained in the vote.
67. Doc. 944, I/1/34(1), *UNCIO Docs.*, 6:446, 459 (emphasis added).
68. Dumbarton Oaks Proposals, Chapter VIII, Section C, ¶ 2, reprinted in Russell and Muther, *A History of the United Nations Charter,* 1026.
69. Russell and Muther, *A History of the United Nations Charter,* 472–73.
70. Ibid., 688.
71. See ibid., 688–90.
72. See generally ibid., 688–706.
73. See ibid., 704.
74. Ibid., 701–2.
75. See The Corfu Channel, 1949 I.C.J. 4, 32–36 (April 9).

76. Ibid., 35.

77. See Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), 1986 I.C.J. 14 (June 27).

78. Ibid., 134, at ¶ 268.

79. See, e.g., Fernando Tesón's critique of the *Nicaragua* decision in Tesón, *Humanitarian Intervention,* 267–312.

80. Genocide Convention, art. IX.

81. See Legality of Use of Force (Yugoslavia v. United States of America), Request for the Indication of Provisional Measures (Order of June 2, 1999), ¶¶ 21–25, 29, *available at* www.icj-cij.org, and Legality of Use of Force (Yugoslavia v. Spain), Request for the Indication of Provisional Measures (Order of June 2, 1999), ¶¶ 29–33, 35, *available at* www.icj-cij.org.

82. See, e.g., Legality of Use of Force (Yugoslavia v. Belgium), Request for the Indication of Provisional Measures (Order of June 2, 1999), ¶¶ 40–41, *available at* www.icj-cij.org (hereafter cited as *Yugoslavia v. Belgium*).

83. As of the date of this writing, June 2001, the Court had not yet reached the merits phase.

84. See, e.g., *Yugoslavia v. Belgium,* ¶¶ 22–30. A number of judges, including Judge Weeramantry, dissented from this decision. See, e.g., *Yugoslavia v. Belgium* (Dissenting Opinion of Vice-President Weeramantry), *available at* www.icj-cij.org. Judge Weeramantry also argued that the fundamental principle of the peaceful resolution of disputes merited the issuance of provisional measures. See ibid.

85. *Yugoslavia v. Belgium,* ¶¶ 16–17, 19.

86. Ibid., ¶¶ 48, 50.

87. On this point, see generally, e.g., Goodrich, Hambro, and Simons, *Charter of the United Nations,* 53.

88. See generally Declaration on Friendly Relations.

89. Declaration on the Threat or Use of Force, preamble, ¶ 1(3).

90. Ibid., ¶ 1(27).

91. G.A. Res. 46/182 (1991), annex, ¶ 3.

92. Murphy, *Humanitarian Intervention,* 371.

93. See, e.g., U.N. SCOR, 20th sess., 1222d mtg. (1965), 14.

94. U.N. SCOR, 20th sess., 1222d mtg. (1965), 5. Such an interpretation of "enforcement" as not encompassing traditional peacekeeping missions is supported by the decision of the International Court of Justice in the *Certain Expenses* case, in which the Court found that UNEF I and ONUC did not constitute "enforcement actions" within the meaning of Article 11 and Chapter VII of the Charter. See Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter), 1962 I.C.J. 151, 166, 170–72, 175–77 (Advisory Opinion of July 20).

95. U.N. SCOR, 20th sess., 1222d mtg. (1965), 5.

96. See, e.g., ibid., 24–25 (statement of Mr. Ramani of Malaysia).

97. Goodrich, Hambro, and Simons, *Charter of the United Nations,* 366–67.

98. S.C. Res. 203 (1965), ¶¶ 1, 3. See the discussion in Goodrich, Hambro, and Simons, *Charter of the United Nations,* 55.

99. See S.C. Res. 688 (1991), ¶¶ 2–3 (demanding that Iraq immediately end repression of the Iraqi civilian population, including the Kurds, and insisting that Iraq allow immediate access by international humanitarian organizations to those in need of assistance).

100. See, e.g., Murphy, *Humanitarian Intervention,* 364–66, 375.

101. For a view that the *travaux* "can be read either way," see Tesón, *Humanitarian Intervention,* 156. See generally 154–56. For a view similar to the one I put forward, see Brownlie, *International Law and the Use of Force,* 265–68.

102. For a similar argument insisting on the need for consent of all relevant parties, espe-

cially in "failed states," to avoid the requirements of Article 53, see Murphy, *Humanitarian Intervention,* 345–47.

103. Simma, *The Charter of the United Nations,* 733. See generally 733–34.

104. Ibid., 734.

105. See, e.g., Mertus, "Reconsidering the Legality of Humanitarian Intervention," 1776–77 (arguing that "intervention in disputes such as Kosovo can be viewed as legitimate Article 106 collective actions undertaken only out of necessity because of failures by the United Nations").

106. U.N. Charter, art. 106 (emphasis added).

107. See, e.g., Simma, *The Charter of the United Nations,* 1150.

108. See ibid., 1150–51 (noting that although the five permanent members "still have the competence to jointly decide on and to execute military enforcement measures on behalf of the UN" under Article 106, a "determination by the [Security Council] . . . on the existence of a threat to the peace, breach of the peace, or act of aggression (Art. 39), and its decision on the necessity of military enforcement measures as provided for in Arts. 42 and 43 would still be required.").

109. Doc. 704, III/3/36, *UNCIO Docs.*, 12:400, 403. See also the additional clarification by the U.S. delegate reported in Doc. 1095, III/3/50, *UNCIO Docs.*, 12:557, 559.

110. This appears to have been the understanding, for example, of the Egyptian delegate. See Doc. 1095, III/3/50, *UNCIO Docs.*, 12:557, 559.

111. For an analysis of the authority referred to in the text, see Danish Institute of International Affairs, *Humanitarian Intervention,* 84–87.

112. See generally Vienna Convention, arts. 26, 53.

113. This consistency is not surprising given that the general principle of moral law requiring some form of humanitarian intervention to be legally permissible was derived in part from fundamental ethical principles appearing in the U.N. Charter.

114. See, e.g., Reisman and McDougal, "Humanitarian Intervention to Protect the Ibos," 173–78.

115. U.N. Charter, art. 103. The Vienna Convention recognizes that Article 103 preempts its usual rules for applying successive treaties on the same subject matter. See Vienna Convention, art. 30, ¶ 1.

116. Genocide Convention, art. I.

117. See generally, e.g., the debates in U.N. GAOR, 6th Comm., 3d sess., 67th–68th mtgs., 101st–102d mtgs. (1948), 37–54, 408–28. On the overall lack of discussion of military intervention, see also Schabas, *Genocide in International Law,* 491.

118. See the list of parties as of June 11, 2001, available at: www.unhchr.ch/html/menu3/b/treaty1gen.htm.

119. By comparison, the Independent International Commission on Kosovo would regard unauthorized humanitarian intervention as potentially "legitimate" (even if not legal) in a case not only where an authorizing resolution fails because of the actual exercise of the veto, but where the "failure to have recourse to the [Security Council] is due to the reasonable anticipation of such a veto, where subsequent further appeal to the General Assembly is not practical." See The Independent International Commission on Kosovo, *The Kosovo Report,* 194.

120. For a criticism of such a discordance, see, e.g., Fonteyne, "The Customary International Law Doctrine," 249–50.

121. Uniting for Peace Resolution, G.A. Res. 377A (V) (1950), ¶ 1 (emphasis added).

122. U.N. Charter, art. 10 (emphasis added).

123. Ibid., art. 11, ¶ 2.

124. Ibid., art. 12, ¶ 1.

125. See generally Goodrich, Hambro, and Simons, *Charter of the United Nations,* 129, and Russell and Muther, *A History of the United Nations Charter,* 760–61.

126. The Uniting for Peace Resolution (which was comprised of three separate resolutions)

was adopted as a whole by fifty-two votes to five, with two abstentions. The two abstaining states were India and Argentina. See U.N. GAOR, 5th sess., 302d mtg. (1950), 347.

127. Goodrich, Hambro, and Simons, *Charter of the United Nations,* 133. See also Bailey, *The UN Security Council and Human Rights,* 1.

128. See U.N. Charter, art. 18, ¶ 2.

129. For a similar conclusion that under the Charter the General Assembly can recommend enforcement measures if the Council fails to act and "peace is imperilled," and therefore that this aspect of the Uniting for Peace Resolution is legal under the Charter, see Bailey and Daws, *The Procedure of the UN Security Council,* 296.

130. U.N. GAOR, 5th sess., 299th mtg. (1950), 299 (emphasis added). For the similar understanding expressed by the representative of Yugoslavia, see ibid., 303.

131. Uniting for Peace Resolution, G.A. Res. 377A (V) (1950), ¶ 14 (emphasis added).

132. U.N. GAOR, 5th sess., 299th mtg. (1950), 294.

133. The vote was fifty-four votes to none, with one abstention. See U.N. GAOR, 5th sess., 302d mtg. (1950), 346.

134. For a similar argument that the General Assembly can lawfully authorize humanitarian intervention through the Uniting for Peace Resolution and more generally under the Charter, see Reisman and McDougal, "Humanitarian Intervention to Protect the Ibos," 190. For an argument that the "Uniting for Peace Resolution is no legal basis for the authorisation of humanitarian intervention" because the Resolution only allows the General Assembly to recommend military action in the case of a breach of the peace or act of aggression, see Danish Institute of International Affairs, *Humanitarian Intervention,* 61.

135. Bruno Simma explains this argument in Simma, "NATO, the UN and the Use of Force," 10.

Notes to Chapter 12

1. On the resurgence of religious nationalism in the wake of the Cold War, see generally Juergensmeyer, *The New Cold War?*

2. On religious fanaticism, see generally "Religious Militancy or 'Fundamentalism.'"

3. See, e.g., Barbara Crossette, "China and Others Reject Pleas That U.N. Intervene in Civil Wars," *New York Times,* September 23, 1999.

4. See, e.g., Tina Rosenberg, "Editorial Observer; A Bad Year for the World's Border Guards," *New York Times,* July 2, 1999.

5. On the existence of such a trend among the permanent members within the last few years, see generally Butler, "Bewitched, Bothered, and Bewildered."

6. U.N. Doc. S/PV.4011 (1999), 17 (statement of Mr. Fonseca of Brazil).

7. See Kull, "What the Public Knows That Washington Doesn't."

8. Ibid., 113.

9. See, e.g., R.W. Apple Jr. and Janet Elder, "Americans, in Poll, See U.S. Involvement Growing," *New York Times,* April 8, 1999 (reporting that in a New York Times/CBS News poll, 65 percent of the respondents said that stopping the Serbs from destroying Albanian communities and allowing refugees to return was a good enough reason for sending in ground troops to end the fighting in Kosovo).

10. "The President's Radio Address," February 13, 1999, in Clinton, *Public Papers,* 1:190.

11. Kull, "What the Public Knows That Washington Doesn't," 114.

12. See Allport, *The Nature of Prejudice,* 451–53, 455. See generally 444–57.

13. See, e.g., Küng and Kuschel, *A Global Ethic.* See also the "Commitment to Global Peace" signed by religious and spiritual leaders at the Millennium World Peace Summit of Religious and Spiritual Leaders held in New York in August 2000, *available at* www.millenniumpeacesummit.org/declaration.html.

14. Johnston, "Looking Ahead," 332–33. See also Annan, *Prevention of Armed Conflict,* ¶ 147 (emphasizing the positive role that religious organizations can play in preventing armed conflict).

15. Falk, "Panel #1 Presentation," 23.

16. On the need for a public discourse between believers and nonbelievers based on a "theo-ethical equilibrium," defined as "a rational integration between religious deliverances and insights and, on the other hand, secular ethical considerations," see Audi, *Religious Commitment and Secular Reason,* 130, 130–39.

17. "Plan of Action for the United Nations Decade for Human Rights Education, 1995–2004," ¶ 2, in Office of the United Nations High Commissioner for Human Rights, *United Nations Decade for Human Rights Education, 1995–2004* (1995), 7.

18. See, e.g., Andreopoulos and Claude, *Human Rights Education for the Twenty-First Century.*

19. For a similar argument, see Luck, "The Case for Engagement," 82.

20. 'Abdu'l-Bahá, *The Secret of Divine Civilization,* 64, 66.

Glossary

Term	Definition
'Abdu'l-Bahá	The son of Bahá'u'lláh, Prophet-Founder of the Bahá'í Faith, and the authorized interpreter of his teachings (1844–1921)
ahimsā	In Hinduism, a principle of harmlessness and the nonuse of force
Analects	The central book of Confucianism, which records many of Confucius's reputed sayings
Bahá'u'lláh	The Prophet-Founder of the Bahá'í Faith (1817–1892)
Bhagavad Gītā	In Hinduism, a poetic work associated with the revered religious figure Krishna and composed around 200 B.C.E.
breach of international peace	A ground for authorization by the Security Council of enforcement action under Chapter VII of the U.N. Charter; interpreted in this study as including widespread and severe violations of essential human rights. See Chapter 4.
The Buddha	"The Enlightened One"; the historical person born in about 563 B.C.E. whose teachings are recounted in Buddhist scriptures
coherence	A requirement that differences in the treatment of apparently "like" cases be justifiable based on certain principles. (Compare with "consistency.")
collective security	A security system in which all states agree to come to the military assistance of any state among them that is attacked by another
Commission on Human Rights	The U.N. intergovernmental body exclusively concerned with promoting human rights; a subsidiary body of the Economic and Social Council (ECOSOC).

common Article 3	Article 3 of each of the four Geneva Conventions of 1949, which provides certain protections to noncombatants in the case of noninternational armed conflicts
communitarian theories	Normative theories of international relations that emphasize group-oriented, nation-oriented, or state-oriented values
compelling ethical principles	Those fundamental ethical principles which are deserving of especially high weight in relation to other ethical principles because of their direct and immediate logical relationship to the preeminent principle of unity in diversity. See Fig. 1. For examples, see Fig. 6.
compelling human rights	Those fundamental human rights which morally are deserving of especially high weight because of their direct and immediate logical relationship to the preeminent principle of unity in diversity, and which morally merit a high degree of preemptive effect. See Fig. 2.
Confucius	A revered Chinese sage, born in about 551 B.C.E.
consequentialist ethical approaches	Ethical approaches that endorse an overriding ethical rule according to which one must do whatever has the best consequences, measured in terms of certain posited values
consistency	A requirement that like cases be treated alike. (Compare with "coherence.")
consultation	A fundamental ethical principle calling for frank and open-minded dialogue with the objective of reaching a consensus on solutions to common problems, and then implementing those solutions through unified action
conventional definition of international peace	International peace as a condition of peace *across the borders between* states
cosmopolitan theories	Normative theories of international relations that emphasize interstate society-oriented or humanity-oriented values
crimes against humanity	Crimes defined in the Rome Statute of the International Criminal Court, the Statutes of the ICTY and ICTR, and Article 6 of the Nuremberg Charter. According to the Rome Statute, they include such acts as murder, extermination, enslavement, deportation, imprisonment, torture, rape or other sexual violence, persecution on var-

	ious grounds, and the enforced disappearance of persons "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack." Rome Statute, art. 7.
customary international law	Law created by the customs of states; it requires (1) consistent state practice and (2) *opinio juris*, a general recognition by states that such behavior is legally required. (See my interpretation of the *opinio juris* requirement in section 3.2 of Chapter 3 and in Fig. 4.)
customary legal norm	A norm that satisfies the above requirements for recognition as customary international law
deontological ethical approaches	Ethical approaches that prescribe adherence to behavioral norms and rules "for their own sake" and without regard to their indirect consequences
désuétude	Disuse; a doctrine according to which certain treaty provisions may be rendered void through disuse
Economic and Social Council (ECOSOC)	One of the principal organs of the U.N.; it has a limited membership and is responsible for promoting human rights and social and economic development generally
essential ethical principles	Those compelling ethical principles which are so closely related to the preeminent principle of unity in diversity that they deserve the highest weight and therefore cannot normally be overridden by other ethical principles. See Fig. 1. For examples, see Fig. 6.
essential human rights	Those compelling human rights which are among the most minimal requirements for the enjoyment of equal human dignity. They deserve the highest weight morally because they are so closely related to the preeminent principle of unity in diversity. Further, because of their importance, they should normally preempt morally any potential reasons for not respecting them. See Fig. 2. For examples, see Fig. 3.
ethical principle of necessity	The essential ethical principle, and general principle of moral law, providing that force may be employed, if at all, only if, and in such a degree that, it is necessary and proportional to the achievement of moral ends, determined by reference

	to fundamental ethical principles. As so defined, the principle integrates *jus ad bellum* and *jus in bello* principles.
first-generation human rights	Civil and political human rights; reflected in the ICCPR. See subsection 3.4.1 of Chapter 3.
first image	The image of international relations, identified by political scientist Kenneth Waltz, which maintains that war results from the nature of human beings
Fourth Geneva Convention (1949)	One of the four 1949 Geneva Conventions; it relates to civilians and sets out an extensive list of obligations of states parties to treat civilians humanely in cases of international armed conflict; also referred to as Geneva Convention IV
freedom of moral choice	The right to freedom of thought, conscience, religion, opinion, and expression, and the right to make moral choices and act on those choices
fundamental ethical principles	Those ethical principles endorsed by contemporary international law, including the U.N. Charter and international human rights and humanitarian law, which are deserving of significant weight in relation to other ethical principles because they bear some logical relationship to the preeminent ethical principle of unity in diversity. See Fig. 1.
fundamental human rights	Those human rights recognized in contemporary international law which morally are deserving of significant weight because of their logical relationship to the principle of unity in diversity, and which morally merit a significant degree of preemptive effect. See Fig. 2. They appear to encompass all of the rights recognized in the Universal Declaration of Human Rights.
General Assembly	A principal organ of the U.N. in which all U.N. member states are represented and which has the authority to discuss matters within the scope of the Charter and to make recommendations to member states
general principles of customary international law	General principles of law that are also customary legal norms
general principles of law	General principles of law recognized by states, which may include (1) general principles of national law, (2) general principles of customary international law, and (3) general principles of moral law. See Fig. 5.

general principles of moral law	Legal obligations flowing from compelling or essential ethical principles, and that are narrowly tailored and circumscribed, appropriately specified, and subject to certain prescribed conditions. This study argues that such general principles of moral law should be recognized. For examples, see Fig. 6.
general principles of national law	General principles recognized in domestic legal systems, applied by analogy to international relations, such as prescription, estoppel, and *res judicata*
genocide	According to the Genocide Convention, "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group." Genocide Convention, art. II.
grave breaches	Particularly serious violations of the Geneva Conventions and of Geneva Protocol I, as defined in those treaties, which states parties have an obligation to prohibit by criminal law and for which they are obligated to bring prosecutions
group-oriented values	Values that benefit groups
hadīth	Reported sayings or practices of the Prophet Muhammad collected during the first couple centuries of Islam (also referred to as "traditions")
Hebrew Scriptures	The five Books of Moses (the Pentateuch or Torah), the books of the Prophets (Nebi'im), and the Writings (Ketubim)
high commissioner for human rights	The coordinator of the United Nations human rights system
holistic definition of international peace	International peace as a condition of peace *among* U.N. member states, which includes conditions of peace *within* state borders as well as across borders
humanitarian intervention	The use of military intervention for ostensibly humanitarian purposes, with some degree of force beyond the self-defense of military personnel

	authorized to help achieve these purposes; as used in this study the term does not include traditional U.N. peacekeeping operations or civilian police operations
humanity-oriented values	Values that benefit all of humanity
impartiality	See the definitions explored in Chapter 6 and listed in Fig. 8.
individual-oriented values	Values that benefit individuals
international criminal law	International legal norms providing that individuals have obligations not to commit certain egregious acts, and imposing obligations on states or international courts or bodies to prosecute and punish individuals committing such acts, which include genocide, crimes against humanity, war crimes, and torture
international human rights law	International legal norms providing protections for the human rights of all human beings
international humanitarian law	International legal norms that regulate the conduct of warfare in the interest of protecting civilians and other vulnerable classes of persons; these norms include treaty norms, such as those in the four Geneva Conventions of 1949, the two 1977 Protocols, and the Genocide Convention, customary laws of war, including the legal principle of necessity, and general principles of law; treated for purposes of this study as synonymous with *jus in bello*
interstate society-oriented values	Values that benefit states as members of a society of states
Jesus	The revered founder and center of the Christian faith, born in about 4 B.C.E., and, in Christian belief, the Son of God as well as God in human form
jihād	In Islam, a struggle, either spiritual or physical, in the path of God
jus cogens norms	Peremptory norms of customary international law or general principles of law from which no derogation is permitted. They include prohibitions of genocide, crimes against humanity, racial discrimination, and slavery. See also Figs. 4, 5, and 6. Fig. 6 contains examples of general principles of moral law whose *jus cogens* status should be recognized.
jus ad bellum	International legal norms regulating the legality of resort to war

jus in bello	International legal norms regulating the conduct of war; treated for purposes of this study as synonymous with international humanitarian law
just war theories	Theories about when resort to war is justified
Krishna	A revered religious figure in Hinduism, playing a central role in the Bhagavad Gītā; regarded as a manifestation of God in human form (see Bhagavad Gītā, 10.14, 11.47)
laws of war	International legal norms regulating resort to and the conduct of war; treated for purposes of this work as synonymous with *jus ad bellum* and *jus in bello*
legal principle of necessity	The *jus ad bellum* and *jus in bello* principle under general principles of law, customary international law, and treaty law requiring that any uses of force must be necessary and proportional to the achievement of the military objective; reinterpreted in this study in light of the ethical principle of necessity
level 1 peace	Peace as a temporary cessation of violence or military hostilities
level 2 peace	Peace as a cessation of or respite from violence or military hostilities coupled with arrangements, such as a peace agreement, designed to secure the continuation of a state of nonviolence
level 3 peace	Peace as a semipermanent absence of violence supplemented by a minimal degree of social harmony or stability (for example, including stable diplomatic relations among states or the absence of widespread and severe violations of essential human rights within them)
level 4 peace	Peace as a level 3 peace with a higher level of diplomatic harmony in interstate relations or a fuller realization of human rights within states
level 5 peace	Peace as a level 4 peace plus an inner sense of "tranquillity" within the minds of individuals
lex ferenda	The law as it should be; a proposed legal norm not yet recognized as legally binding
lex lata	The law as it is; a legal norm already recognized as legally binding
Mencius	A Confucian teacher born in about 387 B.C.E.
Moses	The major prophet of Judaism, who taught and led the people of Israel around 1250 B.C.E. The Torah consists of the five Books of Moses.

Muhammad	The Prophet of Islam (570–632 C.E.)
nation-oriented values	Values that benefit nations
natural law	Law that is based on reason and the inherent nature of the world; it is independent of law created by states through treaties, custom, or general principles
operational command or operational control	The authority to commit specific military units to particular actions in the field to effectuate the military strategy of an operation
opinio juris	One of the two requirements for customary international law; it consists of the subjective belief by states that they engage in a practice because they are legally obligated to do so; reinterpreted in this study as a general belief by states that it is or would be desirable now or in the near future to have an authoritative legal principle or norm prescribing, permitting, or prohibiting the conduct in question. See Fig. 4.
pacta sunt servanda	The rule of customary international law and a general principle of law that states are obligated to fulfill their treaty commitments
principle of proportionality	The principle under international law that any uses of force must be proportional to the military objective to be achieved; treated and reinterpreted for purposes of this study as a component of the ethical and legal principles of necessity
Qur'ān	The Holy Book of Islam, which for Muslims constitutes the Word of God as revealed to the Prophet Muhammad
ren	In Confucianism, humaneness
second-generation human rights	Economic, social, and cultural human rights; reflected in the ICESCR. See subsection 3.4.1 of Chapter 3.
second-generation peacekeeping operations	Peacekeeping operations involving the coordination of a broad array of nonmilitary tasks, including humanitarian relief, electoral monitoring, and civilian policing
second image	The image of international relations, identified by political scientist Kenneth Waltz, which maintains that war results from the internal organization of states
secretary-general	The chief administrative officer of the U.N. and

	the head of the U.N. Secretariat, one of the principal organs of the U.N.
Security Council	One of the principal organs of the U.N. It is composed of fifteen member states, including five permanent members, and is primarily responsible under the U.N. Charter for the maintenance of international peace and security.
self-determination	Under international law, a principle that "peoples" have the right to determine their own political institutions and direction
self-oriented values	Values endorsed by an actor that benefit that actor
Shoghi Effendi	The Guardian of the Bahá'í Faith and authorized interpreter of the writings of Bahá'u'lláh and 'Abdu'l-Bahá (1897–1957)
shūrā	In Islam, a process of consultation
state-oriented values	Values that benefit states
strategic direction	The translation of political directives into military terms
Sub-Commission on the Promotion and Protection of Human Rights	A subsidiary body of the Commission on Human Rights composed of independent experts
third-generation human rights	Human rights beyond first- and second-generation human rights, including rights enjoyed by groups, such as minorities. See subsection 3.4.1 of Chapter 3.
third image	The image of international relations, identified by political scientist Kenneth Waltz, which maintains that war results from the interstate system itself
threat to international peace	A ground for authorization by the Security Council of enforcement action under Chapter VII of the U.N. Charter; interpreted in this study as including significant human rights violations that could potentially lead to widespread and severe violations of essential human rights. See Chapter 4.
Torah	The Books of Moses in the Hebrew Scriptures
traditional U.N. peacekeeping	The interposition of U.N. troops between parties to a conflict to supervise an agreed truce or police a cease-fire line
traditions	See *hadīth*
travaux préparatoires	The records of the negotiations on the text of a treaty

unity in diversity	An essential ethical principle, considered preeminent for purposes of the approach developed in this study, emphasizing the unity of all human beings as equally dignified members of one human family, who in turn can, within a framework of unity, develop and take pride in individual, national, ethnic, or religious identities
virtue ethics	An ethical approach that emphasizes the exercise of particular virtues
war crimes	Serious violations of international humanitarian law that are subject to criminal prosecution, including (1) grave breaches of the Geneva Conventions, (2) other serious violations of international humanitarian law governing international armed conflict, including intentionally directing attacks against civilians or indiscriminately using force with the knowledge that it will cause excessive loss of life or injury to civilians, (3) serious violations of common Article 3 of the Geneva Conventions (which is applicable to noninternational armed conflicts), and (4) other serious violations of international humanitarian law applicable to noninternational armed conflicts. See, e.g., the definition in Rome Statute, art. 8.
widespread and severe violations of essential human rights	Tantamount to a breach of international peace according to the argument in this study; may include any of the following: genocide; crimes against humanity; numerous and systematic war crimes or acts of torture; widespread loss of life; extensive violations of the physical security of civilians; large-scale deprivations of their ability to obtain adequate food, clothing, shelter, and medical care; stringent and pervasive restrictions on freedom of belief or expression; widespread illegitimate uses of force that injure or kill civilians; or persecution of particular ethnic, racial, or religious groups with the aim of depriving them of life, physical security, subsistence, freedom of belief or expression, or the right to be protected from illegitimate uses of force. In this book I use a variety of terms synonymously with "widespread," including "massive," "pervasive," "rampant," and "systematic," and a similar variety of terms synonymously with "severe," including "egregious," "extreme," and "flagrant."

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