THE SECURITY COUNCIL AND HUMAN RIGHTS: LESSONS TO BE LEARNED FROM THE IRAQ-KUWAIT CRISIS AND ITS AFTERMATH

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INTRODUCTION

Throughout the crisis precipitated by Iraq's invasion of Kuwait in August 1990 human rights issues assumed considerable prominence, not only in the public debate and in media coverage, but also in much of the accompanying international legal discourse. In general terms, the "new world order",[1] whose advent was said to have been heralded by the successful outcome of the coalition's armed enforcement action (defined in terms of the successful eviction of Iraq from Kuwait), has been credited by at least some commentators with having a significantly enhanced human rights dimension, by comparison with the order that preceded it.[2] In particular, the follow-up measures designed to protect the Kurds in northern Iraq,[3] have been portrayed as representing not only an important vindication, but also a significant extension, of human rights principles.[4] Thus, for example, in its *World Report 1992*, one of the most authoritative international human rights monitoring groups, Human Rights Watch, welcomed the Kurdish measures as a "dramatic example of the breakdown of sovereignty as a defense for human rights violators".[5] The same report characterised the action taken by the United Nations Security Council as being "the first time that the international community had formally limited a sovereign nation's authority over its own territory essentially on human rights grounds".[6]

Such enthusiasm notwithstanding, there are strong grounds for questioning whether the multilateral human rights regime that the United Nations seeks to build has in fact been strengthened in any significant way by the outcome of the

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1 See generally Pisani E, *The Gulf Crisis* (1991); Moore JN, *Crisis in the Gulf: Enforcing the Rule of Law* (1992); and Bustelo M and Alston P (eds), *Whose New World Order: What Role for the United Nations?* (1991).

2 Abrams and Orentlicher, Letter to the Editor, *New York Times,* 14 April 1991, p 14 (The new world order, like the order contemplated in the UN Charter, "rests upon two pillars: a commitment to nonaggression among nation-states and a commitment to fundamental human rights".)

3 See text accompanying notes 74-95 below.

4 See text accompanying note 192 below.

5 Human Rights Watch, *World Report 1992* (1991), p 2.

6 Ibid.

Gulf War.[7] The "limitation" on Iraqi sovereignty which resulted from the measures taken to protect the Kurds warrants very close scrutiny in order to ascertain the extent to which it constitutes a valid precedent for such measures in the future. It is equally important to evaluate the accuracy of characterising the relevant measures as having been taken "essentially on human rights grounds". If this was in fact the case, the implications for the role of the Security Council in relation to human rights matters are significant; if not, then the basis on which the Council acted needs to be determined in order to ascertain what the potential implications might be in future cases.

These issues are of considerable practical significance, not least for the reason that Human Rights Watch's characterisation of the relevant events reflects a widely-shared perception. Two issues raised by that characterisation are of particular relevance from an international law perspective. The first is that there has been a deep and abiding pre-occupation, primarily on the part of governments, with the principle of sovereignty in the context of recent debates over human rights and humanitarian issues. It is not clear that this pre-occupation has been especially well-focused or productive, either from a human rights or broader international legal perspective. The second is a tendency to associate a strong commitment to the international promotion of respect for human rights with the use, if necessary, of forcible measures of some kind. In short, actions undertaken during the Gulf War and in its immediate aftermath, especially when considered in conjunction with recent developments in places such as Haiti, Bosnia-Hercegovina, and Somalia,[8] are widely perceived to have changed some of the long accepted ground rules in terms of the range of measures that might reasonably be contemplated by the international community in order to restore respect for human rights.

In seeking to examine these issues through the lens of the Gulf War and its follow-up the analysis that follows is not simply a *post mortem* dissection of an episode that is now passing quickly into history. Rather, it seeks to draw lessons for the future, both in terms of specific measures that might be taken and, more generally, in terms of new policy options that might have been opened up by the events in the Gulf. The aim of the analysis is threefold. The first is to demonstrate that many of the shortcomings in the UN response to the human rights aspects of the Iraq-Kuwait crisis have still not been remedied and indeed, in some quarters, have not even been recognised as such. The second is to consider, in light of the precedents that might or might not have been established, the future role that might be accorded to the Security Council in response to "humanitarian" crises which have a significant human rights dimension. The third aim is to consider whether, and if so, to what extent, the outcome should be seen to support the view favoured by some international legal

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7 This term is used for the sake of convenience, despite the obvious potential confusion with the earlier hostilities between Iran and Iraq from 1980 to 1988.

8 For a description of these developments see *Report of the Secretary-General on the Work of the Organization*, September 1992, UN doc A/47/1 (1992), paras 110-55.

scholars (and certainly by many press commentators) to the effect that increasing resort to the use of force to remedy international wrongs is acceptable provided only that an adequate human rights-based motivation is invoked.[9] While this article does not aim to provide a general critique of that view, it does argue that the outcome of United Nations actions in relation to the Iraq-Kuwait crisis is, at best, a poor precedent on the basis of which to advocate such an approach.

The 1990-91 Gulf Crisis cannot be usefully examined in complete isolation from some of the events that preceded it. This analysis therefore looks at the action taken by the United Nations in the human rights field in each of three analytically separable periods. They are: (1) the period of several years leading up to the invasion of Kuwait; (2) the period after the invasion and through to the Iraqi surrender and withdrawal; and (3) the period following the liberation of Kuwait and the application of the Security Council's cease-fire resolution to Iraq.[10] While the emphasis is on both the actual and potential role played by the Security Council, this must necessarily be examined within the broader context of the involvement of the other key United Nations human rights organs.

THE RELEVANCE OF HUMAN RIGHTS IN THE GULF WAR: SUBSTANTIVE OR MERELY RHETORICAL?

Before seeking to assess the implications for the development of international human rights law of the Gulf War it is appropriate to ask whether human rights issues were ever really a serious part of the international agenda in that context. While the present analysis is based on the assumption that they were, it must be acknowledged that there are strong arguments to support those who contend that questions of human rights were at best marginal, and perhaps even wholly irrelevant, in the overall crisis and its aftermath.

There are two major types of arguments that have been used in support of the view that no particular significance should be attached in the present context to any of the human rights rhetoric that accompanied statements about the

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9 See eg Moore, note 1 above, esp Ch 6; Reisman, notes 29-30 below; Scheffer, "The Persian Gulf Crisis", (1992) 22 Georgia J Int'l L 60 ("[T]he era of being intimidated by the provision [sic] of the U.N. Charter is over. The Charter is a flexible document and can be interpreted as such", ibid, p 63; and "we have reached the stage where ... the use of force ... is a legitimate tool for the enforcement of international law",. ibid, p 69); and Schermers, "The Obligation to Intervene in the Domestic Affairs of States", in Delissen A and Tanja G (eds), *Humanitarian Law of Armed Conflict: Challenges Ahead, Essays in Honour of Frits Kalshoven* (1991), p 583 (International responsibility for the protection of human rights "entails a right, in extreme cases even a duty, to intervene when States severely infringe human rights". For this purpose the international legal rules on intervention need to be revised, and since governments are "the natural enemy of intervention, such rules must be developed in non-governmental fora". Ibid, pp 592-93.)

10 For a valuable collection of documents pertaining to the first two phases (and the earlier history) see Lauterpacht E and others (eds), *The Kuwait Crisis - Basic Documents* (1991); and Bethlehem J (ed), *The Kuwait Crisis: Sanctions and Their Economic Consequences* (2 vols, 1991).

motivations for, and the objectives of, the Gulf War. In essence, these arguments reflect differing interpretations of the motives of the allied side during the conflict. In brief, they are: (1) the view that the Gulf War had nothing to do with world order and everything to do with assured access to cheap oil; and (2) the view that the resort to armed force to ensure Iraq's compliance with the decisions of the Security Council, was aimed almost entirely at ensuring respect for the principles of the non-use of force in international relations and respect for the territorial integrity of states.

The first of these arguments has been forcefully expressed by Andre Gunder Frank, a noted exponent of dependency theory[11] as an explanation of the economic plight of much of the Third World *vis-à-vis* the North. In a recent analysis Frank describes as a "lie" the suggestion that the aim of the "Gulf War was to protect the 'principle' of world order, international law and the Charter of the United Nations from lawless might-is-right violation".[12] Having dismissed all such "principled" explanations, he goes on to list various reasons for the preparedness of the allies to use military force against Iraq. They include: protection of oil supplies for the West; to counter domestic recession, "or at least its political consequences" in the United States and elsewhere;[13] "the defence of American economic and geopolitical interests world-wide";[14] and a desire on the part of the North to engage, and conquer, the South militarily.[15] It is not the purpose of the present analysis to examine these arguments critically. It is sufficient for present purposes to note that such explanations have been widely endorsed by different commentators and that, whatever their precise merits, they usually discount the relevance of human rights considerations, except perhaps as factors of the most minor relevance.

The second type of argument, which is clearly incompatible with the first, relies to a significant extent upon the repeated assertions by the allies, reflected in the relevant Security Council resolutions, that their overriding objective was to uphold the relevant UN Charter principles. Thus, to take but one example, the Australian Foreign Minister, Senator Gareth Evans, observed in the context of an immediate post-Gulf War assessment that the "essential defining characteristic of the new world order" was "co-operation by the major powers in the containment and resolution of conflict, under the umbrella of the United Nations and using its institutional processes".[16] He explicitly acknowledged that such a

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11 See, eg, Frank AG, *Dependent Accumulation and Underdevelopment* (1979).

12 Frank, "Third World War: A Political Economy of the Gulf War and the New World Order", (1992) 13 Third World Quarterly 267.

13 Ibid, at 268-69.

14 Ibid, at 271.

15 Frank suggests that the Gulf War may also be described as a Third World War in the sense that it "aligned the rich North, the rich oil emirates or kingdoms, and some bribed regional oligarchies against a Third World country". Ibid, at 267.

16 Evans, in Bustelo and Alston (eds), note 1 above, p 1 at 2.

characterisation did "not look at the new world order in terms of human rights ...".[17]

While different variations on these two competing analyses do not necessarily need to discount human rights entirely, they nevertheless generally imply that, to the extent that human rights rhetoric was used by the allies, no significance should be attached to it. In other words, official references to human rights concerns amounted to little more than rhetorical flourishes or embellishments. Those concerns are thus seen to have had little or no influence in terms of the management of the crisis as a whole, the decision to go to war, the way in which the war was fought or the policies that were pursued once a cease-fire had been obtained. Accordingly, it would be quite inappropriate to seek to assess the outcome of the War against criteria based upon any such statements.

This type of analysis would apply even more strongly to any suggestion that the role of the Security Council should be appraised in terms of its concern to ensure respect for human rights. The argument would go that while human rights rhetoric may have been part of the public debate, such concerns were not really on the agenda of the Security Council, either explicitly or implicitly. It would thus be misleading and unhelpful to introduce an extraneous issue (ie human rights) into the equation for the purposes of evaluating the Council's actions.

In contrast to these analyses, however, it is submitted that human rights rhetoric actually played a very important part in the campaign by the allies to secure the support they needed both from their own peoples and from other States within the United Nations context. This is not to say that the allies, having accomplished their military objectives, paid much more than lip service to human rights. The record clearly shows that they did not, but that is a separate issue to which we will return later.

In any *post hoc* evaluation of the war there is a risk that the rapidity and relative ease of the military victory by the coalition forces will have the effect of blurring, in the collective memory, the importance of the continuing quest for legitimacy and public support which was waged by the allied leaders throughout the entire period from the imposition of sanctions to the acceptance of a cease-fire. That quest was in fact constant and it was fuelled by a wide range of criticisms designed to undermine popular support for the Gulf War. In essence, these criticisms claimed that the allies were really motivated by their need for cheap oil, their desire to maintain Western hegemony in the Middle East, and by a desire to engage in some post-Cold War muscle-flexing. In seeking to refute such claims, allied leaders placed heavy reliance in their public pronouncements upon the need to protect the human rights of the people of Kuwait and on the desirability of freeing the people of Iraq from the tyranny and oppression under which they had been forced to live for so long.

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17 Idem.

This process is well described in the context of the public debate in the United States in the following passage:

> [The invasion of Kuwait] prompted a consensus [which had previously been notably absent] between the Bush Administration and Congress over the importance to United States foreign policy of Iraqi human rights abuses. The Administration appeared to have shifted its priorities in order to rally public support by appealing to the larger and more abstract moral concerns of the American people. By repeatedly emphasizing Iraq's brutality against foreign nationals, refugees, and prisoners of war (POWs), by alluding to Iraq's past human rights record ... Bush rallied the general public to a war not just for oil or money, but for humanity.[18]

While this strategy sometimes provoked unwelcome questions as to the extent of respect for human rights in Kuwait before its annexation by Iraq, it generally had the desired effect of reassuring community leaders, opinion-makers and individual citizens that the war was being fought not only in order to preserve territorial integrity but also to uphold more fundamental values. The latter were more appealing and more morally defensible (in the eyes of the general public) than state sovereignty or the upholding of what might otherwise have been thought to be a rather hollow conception of "law and order". Indeed it is submitted that much of the public support for the war within the countries making up the coalition was predicated upon the inclusion of human rights objectives as an integral part of the allies' overall aims.[19]

In some respects this view was reflected in a communiqué issued by the Ministerial Council of the Gulf Cooperation Council at the conclusion of the war. The Council, in noting "the return of legitimacy to Kuwait" acknowledged the support provided, *inter alia*, by "higher humanitarian values and principles".[20] A similar conclusion also emerges from a careful examination of the underlying principles upon which the international legal case in favour of United Nations action under Chapter VII was premised. In undertaking such an examination it is necessary to look beyond the formal rules invoked by the United Nations and the coalition partners and to consider the sources of the legitimacy that the action enjoyed in international law terms.

In his recent exploration of the concept of "legitimacy" in international law, Thomas Franck has drawn attention to Ronald Dworkin's notion that the "integrity" of a rule is a key factor in explaining its power to persuade or compel

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18 Labonski and Parker, "Human Rights as Rhetoric: The Persian Gulf War and United States Policy Toward Iraq", (1991) 4 Harv Hum Rts J 152 at 155–56 (footnotes omitted).

19 In this respect, the situation may be compared with Schachter's description of a particular conception of the principle of self-defense which, although apparently opposed to the view of the International Court of Justice and of many international legal scholars, nevertheless "continues to influence popular and official attitudes ...". Schachter, "Self-Defense and the Rule of Law", (1989) 83 AJIL 259 at 260.

20 UN doc A/45/1010 (1991) (also listed as S/22575 (1991)), Annex, p 1.

compliance.[21] As Franck notes, "a rule, standard or validating ritual gathers force if it is seen to be connected to a network of other rules by an underlying general principle".[22] In this context, the rule's legitimacy consists of "its ability to exert pull to compliance and to command voluntary obedience".[23] In the case of the measures taken against Iraq, the primary rules (in Weberian terms)[24] related to the maintenance of territorial integrity and rejection of the use of force. But the underlying secondary rule, on the basis of which the "legitimacy" and thus persuasiveness of the former are to be judged, was respect for those fundamental human rights values upon which modern conceptions of world order are based. It is submitted that the latter was the key element in ensuring the acceptability to the general public, as well as to many governments, of the United Nations' invocation of a breach of the Charter principles governing the maintenance of international peace and security[25] as the basis for its actions against Iraq.

The identification of human rights values as the legitimating element in the overall equation is consistent with recent analyses by a significant range of commentators.[26] Georges Abi-Saab, for example, has written of the transformation of the legal structures of the international community away from the emphasis of classical international law upon the principle of sovereign equality ("and its two necessary and sufficient consequences ... – the prohibition on the use of force and on intervention").[27] In his view these basic structures are moving beyond a purely inter-state framework in two separate directions: "by going to the sources themselves of the legitimacy of state power...; [and] by imposing positive obligations to act (to cooperate) which take into account, and extend the reach of, legal regulation to the *intra-state* level...".[28] In this analysis, human rights values are not merely relevant, but are in some respects central, to each of the new directions.

In a somewhat similar analysis, albeit leading to a rather different conclusion, Michael Reisman has written that:

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21 See Dworkin R, *Law's Empire* (1986), especially Ch 7.

22 Franck, "Legitimacy in the International System", (1988) 82 AJIL 705 at 741. He uses the term "legitimacy" "to mean that quality of a rule *which derives from a perception on the part of those to whom it is addressed that it has come into being in accordance with right process*". Id at 706 (emphasis in original).

23 Ibid, at 725.

24 See generally Gerth HH, and Wright Mills C, *From Max Weber: Essays in Sociology* (1948).

25 See for example SC Res 660 of 2 Aug 1990, second preambular paragraph.

26 For a sustained elaboration of this perspective see generally Cassese A, *International Law in a Divided World* (1986).

27 Abi-Saab, "La Reformulation des principes de la charte et la transformation des structures juridiques de la communaute internationale", in *Mélanges Michel Virally* (1991), p 1 at 7.

28 Id.

> The international human rights program is more than a piecemeal addition to the traditional corpus of international law, more than another chapter sandwiched into traditional textbooks of international law. By shifting the fulcrum of the system from the protection of sovereigns to the protection of people, it works qualitative changes in virtually every component.[29]

Provided that a shift of the fulcrum is not equated with the substitution of one overriding value for another,[30] it is difficult to reject Reisman's argument that human rights values have assumed a central and consistent role in international law. Indeed, in this vein, the UN Secretary-General observed in his 1990 annual report that "[t]he past year has seen the conversion of human rights from a subsidiary theme of the international discourse to a dominant concern".[31]

But what exactly is the relevance of this increasing centrality of human rights values in terms of the basic norms of world order to an analysis of the international legal implications of the events surrounding the Gulf crisis? Perhaps the most pragmatic response is to suggest that both the moral and the legal justification for the measures that were taken in the name of the United Nations would be considerably enhanced if it could be demonstrated that major long-term gains had been achieved in relation to the willingness and ability of the international community to promote respect for human rights. To put it another way, some of the criticisms that were made of the war could be much more readily refuted if human rights concerns could be shown to be a plausible and enduring part of the agenda both of the United Nations itself and of the coalition forces acting with its imprimatur. This assumption was alluded to (although not elaborated upon) in a report to Congress in February 1991 by the then US Assistant Secretary of State for Human Rights and Humanitarian Affairs, Richard Schifter:

> And, finally, there is the question of the aftermath of the world community's move to halt the international outlawry perpetrated by

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29 Reisman, "Sovereignty and Human Rights in Contemporary International Law", (1990) 84 AJIL 866 at 872. Reisman adds that "[p]recisely because the human rights norms are constitutive, other norms must be reinterpreted in their light, lest anachronisms be produced". Ibid at 873.

30 The conclusion of Reisman's analysis might be interpreted in this way. He argues that while intervention in defense of human rights should ideally only be undertaken in the name of centralized decision-making institutions, the current ineffectiveness of those institutions justifies unilateral humanitarian intervention in appropriate circumstances. Ibid at 875-76. In some respects this is simply a further application of the views espoused earlier in Reisman, "Coercion and Self-Determination: Construing Charter Article 2(4)", (1984) 78 AJIL 642. To that extent, they would in my view still fall foul of the entirely compelling objections raised by Schachter, "The Legality of Pro-Democratic Invasion", (1984) 78 AJIL 645.

31 *Report of the Secretary-General on the Work of the Organization*, UN doc A/45/1 (1990), p 10.

> Saddam Hussein. What will be the spillover effect for international support for human rights principles?[32]

In a similar vein, the US representative told the UN Commission on Human Rights in February 1991 that in "the six months since Iraq had assaulted Kuwait, the relationship between world peace and respect for human rights had become obvious. Nevertheless, the relationship had to be underscored ...".[33]

By contrast, however, the principal thrust of the analysis that follows is that, beyond the obvious vindication of the right to self-determination of the Kuwaiti people, measures which would have strengthened the international human rights regime and would have been consistent with the allies' rhetorical commitment to doing so were systematically avoided. In brief, four conclusions emerge. The first is that, for all of the United Nations' considerable achievements in the human rights field, the various procedures for dealing with violations were shown to be highly inadequate in the case of Iraq prior to the invasion of Kuwait. Secondly, the Gulf War had no significant specific human rights agenda, or even objectives (beyond Kuwait's liberation), despite much of the rhetoric that surrounded it. Thirdly, the system of collective security that is being pursued in the wake of the Gulf Crisis should have, and indeed if it to be effective must have, a significant human rights component. Finally, it is suggested that the Kurdish crisis that followed the cease-fire has not thus far been handled in a manner which is conducive to the creation of effective precedents designed to enable the international community to respond more effectively to comparable human rights violations in the future. In particular, the notion of a "duty to intervene" remains highly problematic, at least in the form in which it has been asserted to date.

As will be seen below, the significance of these conclusions could be downplayed on several grounds. In particular, it could be argued that the Security Council should, and perhaps even must, eschew the consideration of human rights matters *per se*. On this view, the avoidance of human rights matters is warranted not only for reasons of effectiveness and in order to maintain an appropriate division of institutional competences, but also in order to comply with the terms of the UN Charter itself. But such arguments demand the most careful scrutiny since the consequences of their acceptance would, in terms of the potential evolution of an effective notion of world order, be negative in the extreme.

This analysis is predicated in part upon the assumption that the conclusions drawn from the Gulf War and the events that followed it will significantly influence the international community's human rights policies in the years ahead. But it is precisely because of the significance that such precedents might subsequently assume, that governments are usually extremely cautious about creating them. The principal exceptions occur in cases in which the vast majority

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32 US State Department, *Country Reports on Human Rights Practices for 1990* (1991), p vii at x.

33 UN doc E/CN 4/1991/SR 33/Add 1, para 20 (Mr Blackwell).

of governments not only do not feel threatened but are also under some pressure (domestically and/or internationally) to support strong measures in a particular case. For this reason the existence of what might be termed a "pariah"[34] state is often a prerequisite to galvanising the determination and political will on the part of states which is required before they will be prepared to embrace innovative and effective measures designed to deal with major, pressing problems.

There are many examples that could be cited in this respect, but that of South Africa is perhaps the most important. In a somewhat perverse sense, it might even be said that the minority, white Government of South Africa has contributed more to the creation of a range of potentially effective international human rights procedures than any other government. To put it differently, were it not for the near universal condemnation of South Africa's racist policies, the international community would have been highly unlikely to have accepted a very significant proportion of the procedures that currently exist for exerting pressure in response to human rights violations in the world. It was essentially because there was a guaranteed and determined majority of states willing to move against South Africa that the relevant United Nations bodies were able to transcend some of the traditional concerns about respect for state sovereignty which would otherwise have militated in favour of inaction.

The situation which arose after the defeat of Iraq presented a comparable opportunity for the setting of significant precedents. There is, however, another way of proceeding in such circumstances and that is to seek to avoid the setting of precedents while at the same time winning support for measures which are deemed expedient in the particular case in question. In such circumstances there is a risk of measures being accepted which no government would, in the normal course of events, consider to be equitable or appropriate. Thus the real test of the international rule of law, and at the same time the greatest opportunity for affirming and strengthening it, arise in such situations. One of the objectives of the analysis that follows is to consider the extent to which any human rights-related precedents of enduring value were set in the months and years following the Security Council's condemnation of the invasion of Kuwait.

HUMAN RIGHTS IN THE PRE-INVASION PHASE

Prior to the invasion of Kuwait, Iraq had already established itself as a gross and flagrant violator of human rights. The US State Department, for example, reported in February 1990 that:

> Iraq's human rights record remained abysmal in 1989. Effective opposition to government policy is stifled; the intelligence services

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34 While this term is often used by academic commentators it has also been explicitly used in reference to Iraq by a senior US Government official. Robert Gates, Deputy Adviser for National Security Affairs, noted in a speech on 7 May 1991 that as long as Saddam Hussein was in power, "Iraq will be nothing but a pariah state". Quoted in United States Mission [to the UN in Geneva], *Daily Bulletin*, No 93, 21 May 1991, p 2.

> engage in extensive surveillance and utilize extra-legal means, including torture and summary execution, to deal with anti-regime activity. The civil rights of Iraqi citizens continue to be sharply limited, and Iraqis do not have the right to change their government. The freedoms of speech and press and of assembly and association are virtually nonexistent. Other important human rights problems include continuing disappearances and arbitrary detentions, lack of fair trial, widespread interference with privacy, excessive use of force against Kurdish civilians, and an almost total lack of worker rights.[35]

State Department reports in earlier years had been no less unflattering. And in the Annual Report released in 1991, following the invasion of Kuwait, the assessment was up-dated to conclude that "[a]lmost every category of human rights dealt with in this report is severely restricted or non-existent in Iraq".[36] Non-governmental organisations had offered a similar portrait. In the United States, Middle East Watch issued a major report which concluded that over a period of two decades virtually every important liberty, other than freedom of worship, had been denied to Iraq's 17 million people. It also drew particular attention to the severe repression inflicted upon the Kurds, including the use of chemical weapons in both 1987 and 1988.[37] Amnesty International had also documented a comprehensive array of gross violations of human rights.[38]

But despite the unanimous verdict of these observers, the case of Iraq was not able to attract sufficient attention from states to warrant any action within the framework of the United Nations human rights organs. Indeed in an important preview of the compartmentalization of approaches that was subsequently to characterize the Security Council's own actions during and after the Gulf Crisis, the Commission on Human Rights even failed to make any direct response to the use of chemical weapons against the Kurds in 1987 and 1988. While the Security Council called for, and received, a detailed report (which confirmed the allegations against the government of Iraq),[39] its resolution did not specifically

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35 US State Department, *Country Reports on Human Rights Practices for 1989* (1990), p 1411.

36 US State Department, *Country Reports on Human Rights Practices for 1990* (1991), p 1457.

37 Middle East Watch, *Human Rights in Iraq* (1990).

38 "Thousands of political prisoners, among them prisoners of conscience, continued to be detained without charge or trial or imprisoned after trials which reportedly did not satisfy international fair trial standards. Torture of political prisoners remained widespread. 'Disappearances' were reported and the government did not clarify the fate and whereabouts of thousands who 'disappeared' in previous years. Many of the 'disappeared' were believed to have been killed. Executions were also reported." *Amnesty International Report 1990* (1990), pp 125–26. For an earlier report see Amnesty International USA, *Iraq: Children, Innocent Victims of Political Repression* (1989).

39 UN doc S/19823 (1988). The expert who visited Iran and Iraq at the request of the Secretary-General reported that "[t]he clinical examinations I conducted in the Islamic Republic of Iran showed that the patients had been exposed to chemical

address the plight of the Kurds.[40] At the time the only human rights body to take any action was the Sub-Commission on Prevention of Discrimination and Protection from Minorities. Its response was limited, however, to a resolution in which it expressed its "deep concern" over "the [unspecified] reports of the increased use of chemical weapons, especially against civilian populations" and called upon the Secretary-General to produce a report of only the most general nature.[41] No mention was made of Iraq at any point in the 1988 or subsequent resolutions.[42]

The Commission also failed to respond to the broader range of alleged violations by Iraq, despite the fact that some of its own subsidiary mechanisms had drawn attention to the highly unsatisfactory situation. The Working Group on Enforced or Involuntary Disappearances had taken note of apparent violations in Iraq since 1986. By January 1990, it had recorded 2,992 outstanding cases of disappearances in Iraq and had received minimal cooperation from the government.[43] The Commission's Special Rapporteur on Summary or Arbitrary Executions had also reported a significant number and range of violations within Iraq in his January 1990 report. He referred specifically to various incidents involving large numbers of executions and to allegations that many people had died as a result of the forced mass relocation of Kurds in the north.[44] This litany was extended significantly in the reports submitted by the Working Group[45] and the Special Rapporteur[46] to the Commission in 1991. But despite these reports, consistent urging by non-governmental organisations such as Amnesty International, the International Commission of Jurists[47] and others that action should be taken in the case of Iraq was ignored by the UN's Commission of Human Rights throughout the late 1980s and again in 1990. This was due in part to a major lobbying effort by the Iraqi government which is described in some

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weapons. A large number of them were civilians." Ibid, p 16. See also UN doc S/19823/Add 1 (1988).

40 SC Res 620 of 26 Aug 1988. One of the co-sponsors of that resolution, the Federal Republic of Germany, subsequently indicated that it had, at the time, been "deeply concerned about the cruel treatment of the Kurdish minority in Iraq". UN doc S/PV.2982 (1991) p 72.

41 Sub-Commission Res 1988/27. The resulting report was contained in UN doc E/CN 4/Sub 2/1989/4.

42 Sub-Commission Res 1989/39 of 1 Sept 1989 ("Calls upon all States to strictly abide by their international obligations in this field", Ibid, para 2).

43 UN doc E/CN 4/1990/13, paras 191-98.

44 UN doc E/CN 4/1990/22, paras 255-66.

45 UN doc E/CN 4/1991/20, paras 217-36.

46 UN doc E/CN 4/1991/36, paras 269-89.

47 Thus, for example, the Secretary-General of the ICJ reminded the Commission in 1991 that "although human rights groups had time and again brought evidence to the Commission of the most horrible and widespread abuses committed by the Government of Iraq, the Commission had chosen to remain silent". UN doc E/CN 4/1991/SR 34, para 34 (Mr Dieng). Cf similar remarks by the representative of Amnesty International, E/CN 4/1991/SR 34, para 54 (Ms Jacques).

detail in the report by Middle East Watch,[48] but it could only have succeeded because a majority of the governments represented in the Commission were prepared to tolerate inaction.[49]

It was not until four weeks after the invasion that the UN's Sub-Commission on Prevention of Discrimination and Protection of Minorities took unequivocal action to condemn Iraqi violations (in both Iraq and occupied Kuwait) and recommended that the Commission should appoint a "Special Rapporteur" to study the situation.[50] The conclusion to be drawn from such tardiness is that the principal procedures established by the UN for responding to gross violations of human rights were found sadly wanting in the case of Iraq. This failure, in itself, should be sufficient cause for the international community to re-double its efforts to ensure an effective and timely response to gross violations of human rights.

More specifically, two conclusions emerge from this survey. The first is that the Commission on Human Rights continues to refuse to act in relation to situations in which the evidence of gross violations is incontrovertible. This means not that the United Nations is failing to do its duty but that States which are members of the Commission are prepared to countenance inaction, despite their protestations to the contrary. As long as this neglect continues, discussions about the need for early-warning systems and better reporting will be little more than smokescreens for the measure that is really required: a more consistent and transparent procedure for addressing and responding to situations involving gross violations.

The second, closely related, conclusion is that the Commission on Human Rights has developed a range of procedures (particularly those dealing with themes such as torture, disappearances, detention, summary executions etc)[51] which remain largely uncoordinated. In particular, it is possible (as the case of Iraq demonstrates) for a given State to be identified in several different reports but for those various reports never to be seen side by side with one another. It is

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48 *Human Rights in Iraq*, note 37 above, pp 121-22.

49 Iraq offered a different explanation for that inaction. On March 6, 1991 the representative of Iraq told the Commission that "for the past five years, the States which controlled the Commission on Human Rights - namely the United States of America and other Western countries - had tried to exploit the Commission for their own political purposes by submitting draft resolutions condemning Iraq. In the past, those attempts had failed because the other members of the Commission had not believed the allegations against Iraq." UN doc E/CN 4/1991/SR 54, para 105 (Mr Madhour).

50 Sub-Commission Res 1990/13 of 30 Aug 1990. UN doc E/CN 4/1991/2. The Sub-Commission had, one week earlier, issued a "strong appeal ... on the grounds of human rights and humanitarian law, to the Government of Iraq to facilitate the immediate departure from Kuwait and Iraq of the nationals of third countries". UN doc E/CN.4/1991/2, para 297.

51 For a description of these procedures and their functioning see Alston, "The Commission on Human Rights", in Alston P (ed), *The United Nations and Human Rights: A Critical Appraisal* (1992), pp 138-81.

highly desirable, therefore, that consideration be given by the Commission to requiring preparation by the UN Secretariat of a consolidated index to the reports which would clearly indicate which countries have been dealt with in which reports. This would facilitate cross-referencing of the various reports in respect to each individual country and greatly improve the overall picture that is currently being presented in a singularly fragmented (and as a result potentially distorted) manner.

HUMAN RIGHTS CONCERNS IN THE WAKE OF THE OCCUPATION[52]

The violations of human rights committed by the occupying forces in Kuwait from 2 August 1990 until their withdrawal some seven months later have been well documented.[53] As Human Rights Watch noted: "Graphic eyewitness testimony from Kuwaiti civilians to heinous human rights violations such as extrajudicial executions, torture, rape and large-scale arbitrary imprisonment filled newspaper columns and television screens around the world".[54] At the same time, greater attention was paid than ever before to the abysmal human rights situation within Iraq itself. This focus was undoubtedly motivated in part by genuine concern for the plight of the victims of oppression in both countries, but it also fitted conveniently into the allied powers' agenda of showing Saddam Hussein to be a tyrant and a despot as well as a warmonger. Such a showing was important in terms of maintaining public support in the West for the war. The human rights campaign probably reached its zenith when President Bush gave considerable prominence to a report by Amnesty International on post-invasion violations committed by the Iraqis.[55]

How then did these consistent expressions of concern about human rights violations manifest themselves within the context of international measures adopted by the United Nations to deal with the crisis as a whole? In the first place the General Assembly, building upon the resolution of the UN Sub-Commission, adopted a resolution condemning "the Iraqi authorities and occupied [sic] forces for their serious violations of human rights against the Kuwaiti people and third-State nationals and in particular the continued and increasing acts of torture, arrests, summary executions, disappearances and abduction...".[56] The Assembly also requested the Commission on Human Rights to pursue the matter at its next session.

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52 On some of the legal issues arising for the UN in this context see Warbrick, "The Invasion of Kuwait by Iraq", (1991) 46 ICLQ 482–92.

53 See eg US State Department, note 36 above, pp 1507–21.

54 Human Rights Watch, *World Report 1990* (1991), p 448. See also Phsicians for Human Rights, *Iraq–Occupied Kuwait: The Health Care Situation* (1991).

55 President's News Conference of 9 Oct 1990, reported in (1990) 26 *Weekly Compilation of Presidential Documents*, 1548 at 1553–54.

56 GA Res 45/170 of 18 Dec 1990, para 1.

Accordingly, at its session in February–March 1991, the Commission devoted considerable attention to the question. Kuwait's Planning Minister wasted no time on under-statement when he told the Commission that: "No people had ever suffered so much in so short a time, and their tragedy had stirred the conscience of thousands of millions of persons enamoured of peace. The whole world had turned to the Commission ...".[57] To reinforce its case, Kuwait submitted a detailed report to the Commission outlining the violations committed by Iraq.[58] After some impassioned debate the UN body responded by appointing two special rapporteurs. The mandate of the first was "to examine the human rights violations committed in occupied Kuwait by the invading and occupying forces of Iraq",[59] while that of the second was "to make a thorough study of the violations of human rights by the Government of Iraq".[60]

Two aspects of the relevant debates are of interest in this context. The first is that, although Iraq did not formally declare that it would not cooperate with the Commission, its representative expressed his constant opposition to the proposals and did not at any stage indicate, even implicitly, that cooperation would be forthcoming.[61] The second is that the Commission went out of its way in adopting the resolution on Kuwait to confine the Special Rapporteur's focus to the period of occupation and to exclude all subsequent developments. This was so despite the fact that by 6 March 1991, when the resolution was adopted, Amnesty International reports were already circulating in the Commission about abuses perpetrated by the returning Kuwaiti forces.[62] Indeed, perhaps in order to head off a specific proposal put forward by Iraq,[63] the Kuwaiti Permanent Representative, in introducing the resolution on behalf of its sponsors, informed the Commission that "he wished to reaffirm his Government's commitment to respect for human rights in accordance with the principles set forth in the Charter of the United Nations and the provisions of the International Covenants on

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57 UN doc E/CN 4/1991/SR 35, para 71 (Mr Al-Mutawa).

58 UN doc E/CN 4/1991/70.

59 CHR Res 1991/67 of 6 March 1991, para 9.

60 CHR Res 1991/74 of 6 March 1991, para 5.

61 See eg the statement by Iraq's representative prior to the adoption of CHR Res 1991/74 of 6 Mar 1991 in E/CN 4/1991/SR 54, paras 105–12 (Mr Madhour).

62 These reports were specifically referred to in the Commission by Iraq. See E/CN 4/1991/SR 54, para 18 (Mr Al-Kadhi). For critiques of human rights abuses occurring in Kuwait after it had been liberated see: Weinstein, "After the Storm: United States Policy Toward Post-War Kuwait", (1992) 5 Harv Hum Rts J 137; Lawyers Committee for Human Rights, *Critique: Review of the US Dept of State's Country Reports on Human Rights Practices 1991* (1992), pp 184–92.

63 The Iraqi proposal would have amended the terms of CHR Res 1991/67 of 6 March 1991 to include in the preamble a reference to "grave concern [over] current reports from Kuwait about the subjection of Arab citizens, Palestinians, Egyptians, Sudanese, and Iraqis in particular, to acts of revenge by the Kuwaiti armed forces and by armed civilians". It would also have expanded the Special Rapporteur's terms of reference to include "the acts of revenge currently being perpetrated by Kuwaiti forces against Arab citizens". UN doc E/CN 4/1991/L 90.

Human Rights...".[64] While such assurances were no doubt welcome, the opportunity might at least have been taken to urge Kuwait to ratify the Covenants to which its representative had referred.

But, as important as the Assembly and the Commission are within the United Nations hierarchy, they were somewhat marginal actors in relation to the Gulf Crisis. This is illustrated in part by the fact that the General Assembly which met continuously for some three months (from mid-September to mid-December), which happened also to coincide with the peak of the crisis, adopted only one substantive resolution dealing with the crisis. It was, as noted above, entitled "The situation of human rights in occupied Kuwait".

The Security Council, by contrast, was not only the epicentre of the relevant multilateral activity but virtually the solo actor. What then did it have to say about human rights in the context of the steady stream of resolutions that it directed at the Iraqis? The answer is: extraordinarily little. In order to substantiate this assessment it is necessary to review briefly the evolution of the Council's approach. Initially, its overriding concern was with the invasion, and the demand for a restoration of the *status quo ante*. But as early as its second resolution on the crisis the Council expressed concern at the "loss of human life and material destruction".[65] By 18 August a very narrow human rights interest had emerged: concern for "the safety and security of third State nationals in Iraq and Kuwait".[66] Over the next few months this was to be an important and recurring theme in the Council's resolutions.[67] It was subsequently joined by two other human rights-related concerns. The first, which was largely prompted by the allies need to reassure public opinion within their own countries that Iraqi children would not be starved to death by the embargo, was premised on the carefully formulated assumption that "circumstances may arise in which it will be necessary for foodstuffs to be supplied to the civilian population in Iraq or Kuwait in order to relieve human suffering".[68] The second concern related to respect for the Geneva Conventions (dealing with humanitarian law in times of armed conflict) in respect to diplomats, and subsequently, prisoners of war.[69]

Several conclusions can be drawn from the resolutions adopted by the Council during the eight month period from the time of the invasion on 2 August 1990 until the cease-fire resolution of 2 April 1991. The first is that there were virtually no specific references to the need for human rights to be respected. General statements to the effect that the UN Charter must be respected could certainly be interpreted as covering this issue, but the absence of anything more

64 UN doc E/CN 4/1991/SR 54, para 14 (Mr Al-Sabah).

65 S.C. Res. 661 of 6 Aug. 1990, 2nd preambular paragraph.

66 SC Res 664 of 18 Aug 1990, 2nd preambular paragraph.

67 Eg SC Res 667 of 16 Sept 1990 and SC Res 674 of 27 Oct 1990.

68 SC Res 666 of 13 Sept 1990, 2nd preambular paragraph.

69 For an analysis of these resolutions see Suy, "International Humanitarian Law and the Security Council Resolutions on the 1990-1991 Gulf Conflict", in Delissen A, and Tanja G (eds), note 9 above, p 515.

specific remains significant, especially given the frequent recourse to the concept in public discourse. Secondly, the Council assiduously avoided making any reference whatsoever to any specific human rights instrument as providing a foundation for any of its actions. Whereas the General Assembly specifically condemned Iraqi actions "in violation of the Charter of the United Nations, the International Covenants on Human Rights, [and] other relevant human rights instruments...",[70] the Council went to considerable lengths to avoid any comparable references. Thus, for example, in an unusually detailed preambular paragraph in resolution 674, the Council:

> [Condemned] the actions by the Iraqi authorities and occupying forces to take third State nationals hostage and to mistreat and oppress Kuwaiti and third State nationals, and the other actions reported to the Council such as the destruction of Kuwaiti demographic records, forced departure of Kuwaitis, and relocation of population in Kuwait and the unlawful destruction and seizure of public and private property in Kuwait including hospital supplies and equipment, in violation of the decisions of this Council, the Charter of the United Nations, the Fourth Geneva Convention, the Vienna Conventions on Diplomatic and Consular Relations and international law.[71]

The failure to refer to even a single human rights instrument by name in the context of an otherwise comprehensive and specific list of applicable treaties was all the more surprising in view of the fact that Iraq had been a party to both of the International Human Rights Covenants since their respective entries into force in 1976. In addition, the Iraqi Government had ratified, and was therefore bound by, several other major United Nations human rights treaties, including the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Punishment and Prevention of the Crime of Genocide and the Convention on the Elimination of All Forms of Discrimination Against Women.[72]

A third point of some significance is that the human rights abuses of its own citizens by the Iraqi Government, whether in the past, the present or the future, were never directly addressed by the Council during this period. This omission was especially notable in the context of the resolution laying down the many conditions in accordance with which the cessation of hostilities could be achieved. Thus resolution 687, which contains almost nine single-spaced pages of such conditions, covers matters ranging from the disposal of chemical and nuclear weapons materials, the payment of reparations, protection of the environment, the admission of emergency foodstuffs and measures to deal with terrorism, to the repatriation of non-nationals. But apart from calling for

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70 GA Res 45/170 0f 18 Dec 1990, para 1.

71 SC Res 674 of 27 Oct 1990, preambular para 3.

72 "Human Rights: Status of International Instruments as at 31 December 1990", UN doc ST/HR/5 (1991).

cooperation with the International Committee of the Red Cross in relation to detainees, the resolution makes no reference to human rights matters generally.

The fourth conclusion is that, although resolution 687 provided for the establishment of various forms of monitoring and supervision of Iraqi Government conduct, it entirely ignored the fact-finding investigation which the Commission on Human Rights had mandated several weeks earlier. It did so despite the fact that the Iraqi Government had never committed itself to cooperating with the Special Rapporteur in his investigation. The Security Council's resolution would have seemed an ideal opportunity to ensure such cooperation but the linkage was conspicuously avoided, despite the immense breadth of the other matters addressed in the resolution. It was hardly surprising, therefore, when the Special Rapporteur appointed by the Commission on Human Rights to investigate the situation in Iraq reported that he had not enjoyed full access to government officials in Iraq and had been unable to visit all of the areas that might have been appropriate.[73]

By way of concluding this part of the analysis, it is submitted that the deliberate exclusion of human rights issues from the Security Council's Gulf matrix during the second phase laid the groundwork for the crisis that erupted after the rout of the Kurds by Saddam's forces. It is therefore to that third phase of the Gulf Crisis to which we now turn.

RESPECT FOR HUMAN RIGHTS IN THE POST-WAR PHASE

The self-perceived first task of the Iraqi Government after the cease-fire was to suppress or eliminate all serious threats to its own security of tenure and domination of all aspects of the domestic order. The resulting plight of the Shi'ites in the South and of other groups throughout the country was rapidly over-shadowed by the massive exodus of Kurdish refugees fleeing the army onslaught in the North.[74] Initially, the United States and its allies expressed their deep regret at these developments but noted, reluctantly, that respect for the internal affairs of Iraq prevented an international response. By early April 1991 the situation had become so urgent that the French Foreign Minister, M Roland Dumas, urged that an international "duty to intervene" to prevent gross violations of human rights should be recognised.[75] While this proposal was based very

73 "Interview with Max van der Stoel, Special Rapporteur of the UN Commission on Human Rights on Iraq", 10 Netherlands Hum Rts Q (1992), p 277.

74 While the numbers involved were subsequently estimated at 1.5 million ("Over 1.5 million Iraqis escaped from the strife-torn cities during March and early April, crossing into Turkey and Iran, or fleeing into zones controlled by Kurdish rebels ... in the north or into the marshes in the south, beyond the reach of government forces": Human Rights Watch, note 5 above, pp 660-61), estimates at the time were even more numerous. The Foreign Minister of Iran claimed that over two million Kurds were affected while the leader of the Kurdish Democratic Party, Masud Barzani, put the figure at 3 million who had fled in order to escape the Iraqi Government's campaign of "genocide and torture against our people". (1991) 37 *Keesing's Record of World Events*, News Digest for April 1991, p 126.

75 "Paris Looks Past Laws in Bid to Aid Kurds", *Canberra Times*, 6 April 1991, p 7.

largely upon an earlier initiative promoted by French academics and human rights groups,[76] it differed significantly by linking the suggested reform to an amendment of the United Nations Charter. Given the very widely-shared assumption that any such Charter amendments would fail to attract the required level of support from states, the proposal was more of a *cri de coeur* than a major international legal initiative.

It was nonetheless timely, and it may not be coincidental that it immediately preceded a string of developments that were ultimately to lead to the creation of so-called "safe havens" for the Kurds in parts of northern Iraq and the involvement of allied troops in protecting and otherwise assisting them. For the purpose of analysing the significance of these developments, including the notion of the duty to intervene, it is necessary to recount briefly the chronology of relevant events.

On 2 April 1991 President Bush indicated that, in the view of the United States, respect for the principle of non-interference in the domestic affairs of other states was incompatible with more decisive and intrusive action in aid of the Kurdish refugees.[77] The clear implication was that the United States, while being prepared to contribute to any humanitarian measures that might be taken in cooperation with (or with the tacit approval of) the Iraqi government, was not prepared to go further at that stage.

On 5 April 1991 the Security Council adopted resolution 688 which both condemned, and demanded an end to, "the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish populated areas, the consequences of which threaten international peace and security in the region."[78] Two days later the United States, on the basis of a Presidential directive, launched "Operation Provide Comfort", the stated objectives of which were "to meet the humanitarian challenge unfolding in Iraq and to help alleviate the conditions of the refugees".[79] That operation was, however, explicitly limited in scope to the provision of foodstuffs, medical supplies, clothing, blankets, tents, etc to refugees outside of Iraq and the undertaking of a number of air drops into refugee-inhabited areas of northern Iraq.

On 8 April, the day after the US Operation began, a meeting of the European Council (the Heads of Government of the 12 European Community (EC) member states) endorsed a proposal by the British Prime Minister, Mr Major, for the establishment of "safe havens" within the borders of Iraq itself. It was never clear precisely what the EC leaders, or the main sponsor of the proposal envisaged. According to some reports the Kurds were to be enabled "to return, under UN protection, to many of their towns and villages inside Iraq. ...

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76 Bettati and Kouchner (eds), *Le Devoir d'ingerence*, (1987).

77 *New York Times*, 3 April 1991, p 1.

78 SC Res 688 of 5 April 1991, para 1. The full text of this resolution is reproduced in an Annex to this Article.

79 Information taken from a White House Fact Sheet of April 16, 1991 reprinted in *Backgrounder*, 18 April 1991 (USIS, Canberra), pp 2-5.

A Kurdish version of the Gaza Strip – a thin and supposedly temporary sanctuary just along the Turkish border – now seems the least that can be offered to the refugees."[80] The same report concluded that the "British scheme comes tantalisingly close to promising an international protectorate for whole chunks of Iraqi Kurdistan".[81]

It was at this stage that the press and commentators generally began to urge that a more adventurous initiative was required and to suggest that if international law had to be either re-interpreted or flouted, then so be it.[82] Subsequently, President Bush effectively abandoned his position emphasizing the need to desist from any humanitarian measures that would fall foul of the principle of non-interference in the domestic affairs of other states. At a press conference on 17 April he announced "a greatly expanded and more ambitious relief effort".[83] He explained its scope and objectives thus:

> Consistent with United Nations Security Council Resolution 688 and working closely with the United Nations and other international relief organizations and our European partners, I have directed the U.S. military to begin immediately to establish several encampments in northern Iraq where relief supplies for these refugees will be made available....
>
> ...[A]dequate security will be provided at these temporary sites by U.S., British and French air and ground forces, again consistent with United Nations Security Council Resolution 688.[84]

In the weeks that followed, the Iraqi Government's response was somewhat equivocal, perhaps unsurprisingly in view of the continuing negotiations in the Security Council over the terms of the reparations that the Government would be required to pay in relation to its acts of aggression and destruction in Kuwait. But by 9 May the UN Secretary-General informed President Bush that the Iraqis had rejected the idea of a UN police force operating within its territory once the

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80 "That Slippery Slope", *The Economist*, 13 April 1991, p 43.

81 Id.

82 Eg Flora Lewis, "Time for Action", *International Herald Tribune*, 6 April 1991, p 4; and Melvin Fagen, "Kurds, Shiites and Other Victims Are UN Business", *International Herald Tribune*, 15 April 1991, p 4. In *Time* magazine (International edition, 20 May 1991, p 16) columnist Michael Kramer underlined both the need to help the Kurds and, if necessary for that purpose, the appropriateness of ignoring the United Nations and any contrary interpretation of international law:

> So the U.N. is squeamish about protecting Iraq's Kurds from Saddam Hussein's vengeance. So what else is new? When has the U.N. ever risked insulting a country's leader by moving unilaterally to protect the lives and welfare of the people? Never, that's when.
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> ...
>
> If nothing works, if in the end the U.S. must stand alone, then so be it. No matter how unfair, unilateralism is sometimes a superpower's lot.

83 *Backgrounder*, note 79 above, p 1.

84 Ibid, pp 1-2.

coalition forces had departed. At the same time the then UN Under-Secretary-General for Special Political Affairs, Marrack Goulding, indicated that Iraq was continuing to insist that "the issue of Kurdistan is an internal matter".[85] Very soon after, however, Iraq agreed to a rather more modest proposal involving the creation of a UN force of up to 500 lightly armed police in the form of a United Nations Guards Contingent.[86] The function accorded to the Contingent was subsequently stated as being to protect "UN personnel, assets and operations linked with the UN humanitarian programme".[87] In effect, their role was to protect the Kurdish refugee camps, responsibility for the supervision of which was thereby passed from the coalition forces to the UN. The agreement that was made in April 1991 was subsequently renewed several times and will run until at least December 1992.[88]

In the short term there is no doubt that the establishment of "safe havens" by the coalition forces was successful. Hundreds of thousands of Kurdish refugees were enabled to return to Iraq and their relative safety was assured, at least for the time being. The operation lasted about three months and involved some 13,000 troops from the United States, the United Kingdom, France, the Netherlands, Spain, Italy and Australia.[89] The area of Iraq occupied by the coalition forces was estimated at 10,000 square kilometres.[90]

But while the welfare of the Kurds was an important concern, the press and other commentators wasted no time in hailing the arrangement as a major breakthrough in terms of the relevant principles of international law. In general, resolution 688 was portrayed in the weeks and months after its adoption as providing a sufficient legal basis for the authorisation of compulsory and, if necessary, forceful measures designed to protect the Kurds in certain parts of northern Iraq. The *New York Times* captured the spirit of that approach in an editorial leader on 15 April 1991. The analysis is worth quoting at some length because it identifies some of the key issues that, in my view, remain to be adequately resolved.

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85 "Iraq Baulks at UN Forces Takeover", *Canberra Times*, 11 May 1991, p 7.

86 The term "police" is used to distinguish the relevant personnel from peace-keepers or aid workers. The Memorandum agreed between the UN and the Government of Iraq specified the maximum number of Guards and authorised them "to carry side-arms (pistols/revolvers), which will be provided by the Iraqi authorities (subject to the approval of the United Nations with respect to make, model, calibre and munitions)". See Annex of 25 May 1991 attached to the Iraq – United Nations Memorandum of Understanding of 18 April 1991. UN doc S/22663 (1991), para 6 (reprinted in (1991) 30 ILM 860–62). The Annex and the Memorandum were subsequently updated and renewed in November 1991. See "United Nations – Republic of Iraq Memorandum of Understanding, 24 November 1991", reprinted in (1992) 4 Int'l J of Refugee L 113–17, paras 8 and 10.

87 Ibid, para 7.

88 Ibid.

89 (1991) 37 *Keesing's Record of World Events*, News Digest for April 1991, p 308.

90 *The Economist*, 11 May 1991, p 55.

> To invade a neighbouring state is to shatter long-standing global norms. But what of Saddam's subsequent domestic oppression of fellow Iraqis, bordering on genocide. Does that not likewise offend international rights?
> No, not even that, according to notions of international law honored until recently. ...
> Now the stark images of Kurdish refugees have forced yet more humanity on theory. Even as the United Nations declares the shooting over, it expresses institutional concern for starving civilians and its determination to provide some sort of safe haven and relief. In only a handful of cases in UN history has the Security Council declared, as it did on April 5, [Resolution 688] that an ostensibly internal matter posed a threat to international peace.
> The Kurds may lack military support abroad but they now have the law on their side, international authority for humanitarian assistance independent of the police action over Kuwait's sovereignty. With all the suffering that is now evident on the world's television screens – indeed, because of the suffering – concern for human rights now transcends borders and political interests, and may be taking hold. ...[91]

The UN Secretary-General, Javier Perez de Cuellar, endorsed rather similar sentiments only one week later in speaking at the University of Bordeaux when he observed that "we are clearly witnessing what is probably an irresistable shift in public attitudes towards the belief that the defence of the oppressed in the name of morality should prevail over frontiers and legal documents".[92] While there were clearly excellent reasons for the Secretary-General to urge the creative adaptation of international law to facilitate an adequate response to a crisis, it is more questionable whether this was appropriately formulated as a call for morality (which and whose?) to "prevail over" law. Mrs Margaret Thatcher had taken a similar tack several weeks previously when she mocked the "legal niceties" that prevented effective action.[93]

Even when the initial enthusiasm for the safe havens approach had dissipated, the representatives of some Western States and some human rights groups still continued to express the view that the initiative had established an international precedent of major proportions. The Austrian Foreign Minister was unequivocal in his speech to the UN General Assembly in September 1991:

> The Security Council, in an unprecedented resolution, has thus described the repression of the civilian population in Iraq as a threat to international peace and security. This decision is in my view a

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91 "Law on the Kurds' Side", *New York Times* editorial reprinted in the *International Herald Tribune*, 15 April 1991, p 4.

92 Secretary-General's Address at University of Bordeaux, UN Press Release SG/SM/1200, 24 April 1991, p 6.

93 "Want Another War?", *The Economist*, 13 April 1991, p 10.

> milestone in the history of our Organization. It will set an important precedent for our future work.[94]

The French Foreign Minister was equally enthusiastic:

> The United Nations could not remain passive in the face of the tragedy which threatened the very existence of the Kurdish people. For the first time, through a Security Council resolution, the United Nations affirmed that the sufferings of a population justified immediate intervention.[95]

These interpretations give rise to many questions, the most important of which would seem to be the following:

(1) what is the legal basis upon which Security Council resolution 688 was adopted and what are its implications in terms of Security Council practice with respect to human rights?; and

(2) what is the relationship between resolution 688 and the measures subsequently taken in reliance upon it?

SECURITY COUNCIL RESOLUTION 688: LEGAL BASIS AND IMPLICATIONS

The legal basis upon which the Security Council acted in adopting Resolution 688 has important implications both for the scope and nature of the measures that can be taken thereunder and for future cases in which the Council might be asked to address itself to human rights concerns. It is clear that, throughout the different phases of the Gulf Crisis, the Council went to considerable lengths to signal the basis upon which it was acting. In this respect the preambular provisions of the resolutions, the significance of which is often downplayed in other contexts, assumed major importance. But in this respect the preamble of resolution 688 is notable for the fact that it facilitates the drawing of different conclusions both by the participants in the Security Council debate itself and by observers.

1. The Trigger for Council Concern

While the media and some other observers were impatient in the face of suggestions that the Security Council lacked the formal competence required to be able to respond directly to the plight of the Kurds in northern Iraq after the cease-fire, the issue of competence was of major importance for many Council members. There were three major, inter-related arguments raised to support the view that competence was lacking. They were first the argument that the Council can only become involved in response to a breach of, or at the very least a clear threat to, the peace. The second was that the matters raised are within the exclusive competence of the General Assembly, rather than the Security Council. And the third, closely related to the others, was that the issue concerned the

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94 UN doc A/46/PV.12 (2 Oct 1991), p 41.

95 UN doc A/46/PV.6 (26 Sept 1991), p 92.

internal affairs of Iraq and was therefore not an appropriate concern for the Council, or any other international body, to take up.

(a) Must there be a threat to, or breach of, the peace?

In the Security Council debates preceding the adoption of resolution 688 the representative of Yemen noted that while the "draft resolution claims that there is a problem threatening international peace and security", his delegation did not "share that view".[96] He therefore drew the conclusion that the questions being dealt with were "not within the competence of the Security Council" which "is mandated only to safeguard international peace and security".[97] But although Yemen was subsequently to be among a group of only three states voting against the resolution,[98] its views on this point are by no means those of a small minority. While most academic commentators have rejected such arguments, some have not. Arntz, for example, has argued that internal situations are not within the Council's competence under Article 39 of the Charter because in that context an international or inter-state threat to, or breach of, the peace is required.[99]

Indeed, historically the view has long been put that the Security Council should confine its focus to issues of peace and security and should not concern itself with human rights matters *per se*. In so far as exceptions were tolerated it was in cases (such as those of Rhodesia and South Africa) in which the human rights violations were, in themselves, adjudged to constitute a threat to international peace, whether because of the resulting bellicosity of the countries concerned or that of their neighbours. In other situations, the Council has been notably reticent. Thus, for example, the Council refused to respond either to a 1988 appeal by Amnesty International "to act immediately to stop the massacre of Kurdish civilians by Iraqi forces"[100] or to an appeal by another non-governmental organisation, Article 19, to involve itself in the Salman Rushdie Affair.[101]

But in fact the Council's reluctance to deal with human rights issues does not come into play only in the context of the distinction between intra- and inter-state disputes. Thus, even in respect of major human rights problems arising in situations in which it is already involved, the Council has recently manifested a

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96 UN doc S/PV.2982 (5 Apr 1991), p 27 (Mr Al-Ashtal).

97 Id.

98 The voting was 10 in favor (Austria, Belgium, Côte d'Ivoire, Ecuador, France, Romania, USSR, UK, USA, and Zaire) three against (Cuba, Yemen and Zimbabwe) and two abstaining (China and India). UN doc S/PV.2982 (1991) p 52.

99 Arntz H, *Der Begriff fer Friendensbedrohung in Satzung und Praxis der Vereinten Nationen* (1975), cited in White ND, *The United Nations and the Maintenance of International Peace and Security* (1990), p 34.

100 *Amnesty International News Release*, AI Index: MDE 14/08/88, cited by Ramcharan, "The Security Council and Humanitarian Emergencies", [1991] Netherlands Quarterly of Human Rights, p 19.

101 Ibid, pp 20-21.

determination to avoid, or at least to minimize, concern with those dimensions of the situation. Historically, this has not always been the case and a number of early precedents may be cited to the contrary. A comprehensive 1982 survey by Sydney Bailey[102] points to some relatively rare, but nevertheless significant, examples in this regard. In Kashmir in 1948, for example, the Council called on India to undertake the release of political prisoners, to ensure the protection of minorities, and to respect the freedom of citizens who had fled because of the violence to return and exercise their civil rights without the fear of victimization. Specifically, India was asked to ensure that all residents of Kashmir, "regardless of creed, caste or party" would be "safe and free" in expressing their views and in voting on the question of accession and that there would be "freedom of the press, speech and assembly and freedom of travel... including freedom of lawful entry and exit".[103] Less than a year later, in the case of Indonesia, the Council called for the holding of UN-supervised elections for a constituent assembly and stipulated that the elections should be "free and democratic" and characterized by "freedom of assembly, speech and publication".[104] Similarly, during the Congo crisis the Council demanded that "all secessionist activities" should "cease forthwith".[105] That call brought a rebuke from the United Kingdom which feared that it set a precedent which would encourage "any State with a problem of a dissident minority within its own borders" to turn to the Council for assistance.[106]

While human rights-related concerns have been alluded to in recent years, the relevant provisions have been sparing and very limited in scope. This is confirmed by a review of the Council's Annual Report for the year immediately preceding the eruption of the Gulf Crisis (ie from 16 June 1989 to 15 June 1990).[107] During that period the Council adopted 22 resolutions dealing with eight different situations.[108] While virtually all of those situations had significant human rights dimensions to which the Council might appropriately have referred, the term "human rights" was in fact used only once and then in a

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102 Bailey S, *How Wars End: The United Nations and the Termination of Armed Conflict 1946–1964* (1982) Vol 1, pp 326–31.

103 SC Res 47 of 21 Apr 1948.

104 SC Res 67 of 28 Jan 1949.

105 SC Res 161 of21 Feb 1961.

106 SC 976th Mtg, 16 SCOR (1961) para 15.

107 Report of the Security Council to the General Assembly, UN doc A/45/2 (1990).

108 They were: "The situation in the occupied Arab territories"; "Central America: efforts towards peace"; "The question of hostage-taking and abduction"; "The situation in the Middle East"; "The situation in Namibia"; "The situation between Iran and Iraq"; "The situation in Cyprus"; and "The situation relating to Afghanistan". The only other matter on which the Council adopted a resolution concerned the admission of Namibia to UN membership. See list of resolutions in UN doc A/45/2 (1990) p 177.

preambular paragraph of a resolution concerning peace in Central America.[109] However, neither that nor any other resolution during the year in question included a reference to any specific international human rights instrument.[110] The Geneva Convention relating to the Protection of Civilian Persons in Time of War was referred to in two resolutions[111] and another made reference to four different treaties dealing with hostage-taking and hijacking.[112] While two resolutions called for the holding of "free and fair elections", the Council avoided developing that or related themes any further.[113] By contrast, when the murder of a member of a UN peace-keeping mission in Lebanon was reported, the Council not only adopted a broad-ranging resolution condemning "unequivocally all acts of hostage-taking and abduction"[114] but also took the opportunity to adopt a statement on the subject in the name of its President.[115]

Given that the precedents are mixed at best and consistently fairly negative at worst, what conclusions are to be drawn, in relation to this question, from resolution 688? After all, there is little doubt that the circumstances of this particular case provided an almost ideal context in which to develop such precedents as already existed. However, a closer analysis of the text of the resolution reveals that a careful effort has been made to avoid identifying breaches of human rights, no matter how grave, as providing a foundation for action by the Council. Thus, the third preambular paragraph underlines the view that the threat to international peace and security in this instance is not the repression itself but the "massive flows of refugees towards and across international frontiers and ... cross border incursions". This is spelled out even more clearly in the first operative paragraph in which the Council "*condemns* the repression ..., the *consequences* of which threaten international peace and security in the region".[116]

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109 SC Res 637 of 27 July 1989, second preambular paragraph. ("*Convinced* that the peoples of Central America wish to achieve a peaceful settlement of their conflicts without outside interference, including support for irregular forces, with respect for the principles of self-determination and non-intervention while ensuring full respect for human rights"). Note, however, that SC Res 643 of 31 Oct 1989 did contain a reference, in para 4, to the "inalienable rights to self-determination and genuine national independence" of the people of Namibia.

110 A draft resolution, relating to the Occupied Territories, according to which the Council would have referred, inter alia, to the "inalienable rights of all peoples ... proclaimed by the Universal Declaration of Human Rights" was vetoed by the United States on 7 Nov 1989. UN doc A/45/2 (1990), pp 20–21.

111 SC Res 636 of 6 July, fourth preambular para and SC Res 641 of 30 Aug 1989, fourth preambular paragraph.

112 SC Res 638 of 31 July 1989.

113 SC Res 637 of 27 July 1989, seventh preambular para (in relation to Central America); and SC Res 643 of 31 Oct 1989, para 8 (in relation to Namibia).

114 SC Res 638 of 31 July 1989.

115 UN doc A/45/2 (1990), p 47.

116 Second emphasis not in the original.

The impression that the establishment of a significant human rights precedent is being avoided is again strengthened by the absence of any reference to any international human rights instruments. Such references would have been entirely warranted, even if only in the preamble to the resolution, by the fact that Iraq has formally accepted various human rights treaty obligations. Instead of invoking such a clearcut basis for the action taken, the resolution contains only one reference to human rights and that only occurs when the Council "expresses the hope ... that an open dialogue will take place to ensure that the human and political rights of all Iraqi citizens are respected".[117] Even the terminology used is curious, given the distinction drawn between "human" and "political" rights which is quite inconsistent with UN practice according to which the umbrella term "human rights" clearly embraces political rights. Moreover, apart from this single expression of "hope", the remainder of the resolution is couched in terms of the provision of humanitarian assistance.

The conclusion that the Council's assertion of competence in this case was based almost exclusively on the identification of a threat to *international* peace and security[118] is reinforced many times over by the debates accompanying the resolution's adoption. Action in relation to the Kurds had already been foreshadowed by the United Kingdom when the Council was adopting resolution 687 on 3 April 1991. At that stage, specific reference was made to the importance of establishing "democracy and respect for human rights" in Iraq.[119] But the requests, submitted by three countries, calling for the Council to convene specifically to address the Kurdish and related problems were all extremely careful to rely upon the existence of a threat to peace and to emphasise the transboundary dimensions of the situation.[120] While many speakers in the

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117 SC Res 688 of 5 April 1991, para 2. The expression "human and political rights" is somewhat clumsy given that "human rights" clearly encompasses political rights.

118 A similar conclusion is reached by Malanczuk, "The Kurdish Crisis and Allied Intervention in the Aftermath of the Second Gulf War", (1991) 2 Eur J Int'l L, 114.

119 UN doc S/PV.2981 (1991), p 116 (Sir David Hannay) ("This Council must now urgently find an appropriate response to the human tragedy unfolding in the mountains of Iraq and along the Turkish frontier". Id.)

120 The requests were submitted by Iran, Turkey and France. Iran noted that "500,000 Iraqi civilians will try to cross the borders into Iran within ... the next few days" and stated that the consequences included "tension and chaos at the borders". It concluded by arguing that "[t]he magnitude of the suffering of Iraqi refugees, its international character and its consequences for international peace and security make a concerted international reaction by the Security Council ... a political and humanitarian imperative". UN doc S/22447 (4 April 1991) p 1. See also UN doc S/22436 (3 April 1991) from Iran. Turkey also cited "a threat to the region's peace and security" and specifically mentioned that many Iraqi "mortar shells have actually landed on Turkish territory". UN doc S/22435 (3 April 1991) p 1. The request from France was both more specific and more general. It asked the Council "to discuss the serious situation resulting from the abuses being committed against the Iraqi population in several parts of Iraq, and more particularly in the Kurdish-inhabited areas." It concluded by noting that "[b]y virtue of its repercussions in the region, this

subsequent debate drew attention to the violations of human rights taking place in Iraq, the vast majority of them were equally anxious to underline that it was the "transboundary impact", as the US representative put it, that warranted a Security Council response. The ambivalence thus reflected in some of the analyses is perhaps best illustrated by the Romanian statement. Having begun with a condemnation of Iraq for its human rights violations, the representative went to great lengths to emphasize that the resolution should "not create a precedent that could be used – or, rather, misused – in the future for political purposes".[121] Others were more blunt. Zimbabwe stated that the repression in Iraq was simply not an issue of which the Council should have been seized,[122] while Ecuador argued that "if we were dealing solely with a case of violation of human rights by a country within its own frontiers" it would clearly not be a matter for the Council.[123] India expressed the same view.[124] Perhaps the most surprising proponent of that approach, given that the draft resolution was co-sponsored by four of the five Western members of the Council,[125] was Canada. Its representative noted that "it was proper and within the mandate of the Council to act" on this matter because refugee movements "along with cross-border incursions [had posed] an undeniable threat to international peace and security".[126]

Indeed, in this entire Security Council debate France was virtually the only country that sought to establish the principle that human rights violations, in and of themselves, warranted a response by the Security Council.[127] We shall return to that argument below.[128] Suffice it to say, at this point, that the effort was not especially convincing. Indeed it would be extremely difficult to sustain the argument that the Council, by adopting resolution 688, gave even implicit endorsement to the French proposal. To the contrary, the other co-sponsors, along with the great majority of other states' representatives who spoke, went out of their way to embrace the trans-border, as opposed to the human rights, justification for action by the Council.

It must be noted, however, that in March 1992 the President of the Security Council was authorised by his colleagues to make a statement which did directly address human rights issues. His statement included the following passage:

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situation constitutes a threat to international peace and security." UN doc S/22442 (4 April 1991), p 1.

121 UN doc S/PV.2982 (1991), p 24–25 (Mr Munteanu).

122 Ibid, p 32 (Mr Zenenga).

123 Ibid, p 36 (Mr Ayala Lasso).

124 Ibid, p 62 (Mr Gharekhan).

125 The draft was co-sponsored by Belgium, France, the UK and the USA. UN doc S/22448 (5 April 1991).

126 UN doc S/PV.2982 (1991), p 92 (Mr Fortier).

127 UN doc S/PV.2982 (1991), p 92 (Mr Fortier).

128 See text accompanying notes 277–87 below.

> The Security Council remains profoundly concerned by the grave human rights abuses that, despite the provisions of resolution 688 (1991), the Iraqi Government continues to perpetrate against its population.[129]

While this statement is not unimportant, it does not constitute a major breakthrough for two reasons. The first is that it is in the form of a statement by the President rather than being reflected in a Council resolution. The second is that it is based directly on resolution 688, thus avoiding the issue of the basis on which the Council is prepared to focus on human rights issues.

(b) Does the Council lack jurisdictional competence to address human rights matters?

A second argument, closely related to, but nonetheless distinct from, the preceding one is that the General Assembly and other organs related to it (such as the Economic and Social Council and the Commission on Human Rights) have exclusive competence in the human rights/humanitarian fields and that the Council is thereby excluded from all involvement in those fields. Thus, in the Council's debate over resolution 688 the representative of Cuba argued this position at considerable length and clearly implied that the resolution was *ultra vires*. By adopting the resolution, he argued, the Council was disregarding its "obligations to act strictly in accordance with the functions granted to it by the Organization [by which, presumably, he meant the Charter] and not to think that the gods have given them permission to deal with various world problems in accordance with the interests of a transitory [sic] majority".[130] A similar position was put forward by both Yemen[131] and Ecuador. The latter's representative argued that if human rights-related measures were the only issue at stake, no matter how grave the violations, "the Security Council would not be the competent body to take them, given that Chapter IX of the Charter says that it is the General Assembly or the Economic and Social Council which would be competent bodies in such situations."[132]

This line of argument was subsequently taken up with particular gusto in August 1992 when the Security Council was asked by Belgium, France, the United Kingdom and the United States[133] to invite the Special Rapporteur appointed by the Commission on Human Rights to investigate alleged human rights violations in Iraq,[134] to appear before it. The proposal gave rise to

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129 UN doc S/PV.3059 (1992), p 18.

130 UN doc S/PV.2982 (1991), p 52 (Mr Alarcon de Quesada).

131 Ibid, p 27 (Mr Al-Ashtal).

132 Ibid, p 36 (Mr Ayala Lasso).

133 See UN docs S/24393, S/24394, S/24395 and S/24396 respectively.

134 Mr Max van der Stoel, a former Dutch Foreign Minister, was appointed pursuant to Commission on Human Rights resolutions 1991/74 and 1992/71. His reports, up until August 1992, are contained in: UN docs A/46/647 (1991); E/CN.4/1992/31; and A/47/367 (1992). As Special Rapporteur he had concluded, *inter alia*, that the human rights situation in Iraq amounted to a violation of Security Council resolution 688,

considerable debate, even though it was eventually adopted by consensus. That consensus served to conceal,[135] however, some very strongly expressed views to the effect that the Security Council is completely lacking in jurisdictional competence to consider human rights matters.[136] In turn, it was suggested that this lack of competence has quite far-reaching consequences. It would mean, in the view of Ecuador for example, that the Council could neither examine the report of the Special Rapporteur nor take a stand on it.[137] The exception, which was accepted by some but perhaps not all of the dissenting States, relates to human rights violations which are only a part of a broader situation which constitutes a threat to international peace or security. This exception was formulated by India in the following terms:

> The Council can focus its legitimate attention on the threat or likely threat to peace and stability in the region but it cannot discuss human-rights [sic] situations *per se* or make recommendations on matters outside its competence.[138]

The main stated concern of those delegations which opposed the invitation to the Special Rapporteur was that the respective institutional competences of the different organs, as provided for in the United Charter, be fully respected. "If the tendency of the Security Council to encroach on the mandates of other organs" is permitted to continue, warned the representative of Zimbabwe, it will lead to "a

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that immediate steps needed to be taken "before too much irreparable damage is done and too many individuals are victimized", and that a credible mechanism to monitor compliance needed to be put in place urgently. A/47/367, dated 10 August 1992 (one day before his appearance before the Security Council), paras 5, 27 and 28.

135 The dissension underlying the consensus is very well captured by the following statement by the President of the Council, speaking in both his Presidential capacity and as representative of China:

> In our view inviting Mr van der Stoel to participate in the meetings of the Council is inappropriate. The Chinese delegation therefore expresses its reservations in this regard.
>
> I now resume my capacity as President of the Security Council. ... If I hear no objection, may I take it that the Council agrees to extend an invitation ... to Mr van der Stoel?
>
> There being no objection, it is so decided.
>
> UN doc S/PV.3105 (1992), p 12 (Mr Li Daoyu).

136 The representative of Zimbabwe noted that "the issue of human rights belongs to the Commission on Human Rights and the General Assembly", UN doc S/PV.3105 (11 August 1992), p 11 (Mr Mumbengegwi); Iraq observed that the Council "has no mandate in matters of human rights", ibid, p 24/25 (Mr Al-Anbari); China stated that "the competence of the Security Council is to deal with matters bearing upon international peace and security. Questions of human rights ought to be dealt with by the Commission on Human Rights", ibid, p 12 (Mr Li Daoyu); and according to Ecuador "the Security Council does not have competence in matters relating to human rights", ibid, p 8 (Mr Ayala Lasso).

137 Ibid, p 8 (Mr Ayala Lasso).

138 Ibid, p 6 (Mr Gharekhan).

serious institutional crisis".[139] In India's view, "[d]eviation from the Charter" in relation to the different organs' respective spheres of competence "could erode ... confidence [in the UN] and have grave consequences for the future of the Organization as a whole".[140]

But these views were not shared by the majority of Council members. While the United States representative avoided making any general pronouncements on the scope of the Council's competence, he felt no compunction in discussing in considerable detail the nature and scope of human rights violations alleged to have been committed by the Iraqi Government.[141] The statements made by the representatives of Austria, Belgium, France, Japan, the Russian Federation and the United Kingdom all supported, in one way or another, the general proposition that the Council was fully entitled to consider human rights violations whenever it considered such a focus to be appropriate in the circumstances.[142] The most unqualified support for this approach came from Hungary, whose representative stated that:

> ...respect for human rights and the rights of national minorities is not merely a legal or humanitarian question. It is also an integral part of international collective security, as exemplified during and after the Gulf crisis, and also more recently in the conflict among the southern Slav peoples. Therefore it is indispensable for the Security Council, in the context of its peace-building efforts, to take an unambiguous and clear-cut stand for the protection of those rights whenever and wherever they are flagrantly violated".[143]

The contrary argument was subsequently endorsed by the Summit meeting of the Non-Aligned Movement held in Jakarta in August 1992. The Heads of State and Government adopted a Final Declaration in which, *inter alia*, they "emphasized the importance of ensuring that the role of the Security Council conforms to its mandate as defined in the United Nations Charter, so that there is no encroachment on the jurisdiction and prerogatives of the General Assembly and its subsidiary bodies".[144]

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139 Ibid, p 12 (Mr Mumbengegwi).

140 Ibid, p 6 (Mr Gharekhan).

141 Ibid, pp 35–39 (Mr Perkins).

142 Ibid, p 47 (Mr Hajnoczi, Austria); ibid, p 41 ("The repression that is being inflicted on the Iraqi people is not only a massive and flagrant violation of human rights, but, in addition, could once again gravely jeopardize the peace and security of the entire region": Mr Van Daele, Belgium); ibid, p 51 (Mr Rochereau de la Sablière, France); ibid, p 46 ("We consider the repression of [Iraq's] people and the denial of their human rights is a matter for the international community's concern and constitutes a threat to the peace and security of the region": Mr Hatano, Japan); ibid, p 42 (Mr Vorontsov, Russian Federation); ibid, p 54 (Sir David Hannay, United Kingdom).

143 Ibid, p 59 (Mr Budai).

144 Non-Aligned Movement doc NAC 10/Doc.1/Rev.1 (1992), para 31.

What then can be said on the merits of this dispute? In the first place, the jurisdictional objection cannot be dismissed out of hand. It must be conceded that, in terms both of selected instances of United Nations practice and of the views of some scholars, there is a case to be made in favor of the Council's lack of competence in human rights matters. By the same token, that case is very far from being overwhelming. Many arguments have been made on both sides and precedents can be interpreted as supporting each. While this is not the place for a full-blown recitation of the respective cases, there are two issues that warrant consideration. The first is the atter of competence, in terms of international law, and the second is the more pragmatic issue of efficiency and avoidance of duplication.

With respect to the first issue, the Charter confers upon the Council "primary responsibility for the maintenance of international peace and security".[145] While the latter phrase is not defined in the Charter, some guidance is provided by the related provisions thereof. Thus, for example, article 34 empowers the Council to "investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security". Similarly, article 39 clearly states that it is the Council which "shall determine the existence of any threat to the peace, breach of the peace, or act of aggression...". While a great deal of ink has been spilled over the interpretation of these provisions,[146] it is very difficult to contest the following conclusion (persuasively) offered by White on the basis of a comprehensive review of the arguments and precedents:

> [A] finding of a "threat to the peace" is, to a large degree, a political decision on the part of the Council, and so such a finding as regards a wholly internal situation is not precluded. Generally, however, the permanent members are not going to exercise this discretion unless the situation has potential international repercussions which could affect their interests, or even involve them in an escalating conflict.[147]

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145 UN Charter, art 24.

146 It must be noted, however, that most authorities have favoured clearly the view that the Council's powers are not to be interpreted restrictively *vis-à-vis* those of the other principal organs. See, for example Chaumont, "L'équilibre des organes politiques des Nations unies et la crise de l'Organisation", 1965 *Annuaire français de droit international*, p 431 at p 454; Kelsen H, *The Law of the United Nations: A Critical Analysis of its Fundamental Problems* (1950) ("The competence of the Security Council coincides to a great extent with the competence of the entire Organisation; for the performance of almost all legally important functions of the United Nations is conferred upon the Security Council either exclusively or together with the General Assembly." Ibid, p 216); and Goodrich L M, Hambro E, and Simons A P, *Charter of the United Nations: Commentary and Documents*, 3rd ed. (1969), pp 293-98.

147 White ND, note 99 above, p 36.

In other words, it is up to the Council itself to determine what matters it will treat as falling within its competence. In doing so, the Council must act in good faith and in conformity with the overall objectives of the Charter, even though the Charter does not formally oblige it to act "with due regard for principles of justice and international law".[148] Moreover, as is particularly clear from recent practice, once the Council has agreed to concern itself with a particular situation, it will not exclude human rights concerns from the purview of United Nations action taken in that regard. The recent cases of Cambodia and El Salvadaor make this point very clearly.[149]

The second issue is whether the involvement of the Council in human rights matters constitutes an undesirable, or even unacceptable, duplication of functions with an attendant reduction of effectiveness and a strong potential for causing confusion. This argument is not entirely without foundation. It is clear that if the Council were to take it upon itself to adopt general resolutions, of an essentially recommendatory nature, on a wide range of human rights situations it would quickly start to duplicate the functions of the General Assembly and the Commission on Human Rights. It is not, however, doing so. Rather, it has to date largely followed a more or less informal division of competences according to which promotional measures (broadly defined) are taken by the Assembly and the Commission, with more forceful (not necessarily always forcible) measures being the province of the Council.[150] Both the *travaux préparatoires* of the Charter, and extensive subsequent practice, confirm that there are no grounds for precluding simultaneous discussions of the same issue, although it is clear that specific measures by the Council (in the sense of the "exercising of its functions" under the Charter) preclude recommendations being made by the Assembly without the Council's request.[151] Similarly, the Council is never required to accept any determination made by the General Assembly as to whether a particular situation involves a "threat to the peace".

The same applies to the relationship between the Security Council and the Economic and Social Council (ECOSOC). As Bailey has noted in his painstaking review of the Council's practice:

> Both organs may deal with self-determination and other aspects of human rights, ECOSOC being required by the Charter to promote

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148 A proposal to obligate the Council to act on this basis was specifically rejected during the drafting of the Charter at the San Francisco Conference. See Russell RB and Muther JE, *A History of the United Nations Charter* (1958), p 656.

149 See generally *Report of the Secretary-General on the Work of the Organization*, note 8 above, paras 134 and 153 respectively.

150 It is very important, however, not to overstate the significance of this division. See, in particular, the Advisory Opinion of the International Court of Justice in the *Certain Expenses of the United Nations* case, ICJ Rep 1962, p 151 at 162–168. In particular, the Court makes clear that the Assembly is fully competent to take "action" in respect to a wide range of matters, provided only that it does not trespass on the powers reserved primarily to the Council under Chapter VII.

151 UN Charter, art 12 (1).

> these goals because they are necessary for friendly relations, the Security Council being called on to deal with situations in which their denial leads to friction or endangers world peace.[152]

Moreover, any suggestion that "encroachments" upon the competence of one principal UN organ by another might have dire consequences for the Organization is extremely difficult to reconcile with past practice. Various precedents, which have been clearly and consistently developed over the past forty odd years, have enabled the General Assembly to involve itself, one way or another, in a wide range of issues that, under a strict division of competences approach, would have been reserved for the Security Council.[153] Third World states have been particularly energetic in this endeavour. As a result, there is a strong element of flexibility apparent in the practice of the Organization when it comes to determining the institutional competence of different organs.

A final argument against the formal functionalist argument against Security Council involvement in human rights issues is to be found in the experience of all of the bodies concerned, which clearly demonstrates the futility of seeking to insist upon strict respect for any any such formal line of demarcation. Human rights questions are so inextricably part of such a wide range of situations that it would be impracticable to seek to sever those dimensions from the rest in any particular situation.[154] Moreover, the argument in favour of such strict issue-compartmentalisation is the antithesis of the widespread recognition that the Security Council can no longer afford to rely upon an outmoded, overly legalistic construction of the Charter which prevents the quest for comprehensive and enduring solutions to major international problems. The recent Annual Reports of Secretaries-General Pérez de Cuellar and Boutros-Ghali make this point with admirable clarity. So too did the communiqué issued by the first ever meeting of the Security Council held at the level of Heads of State and Government in January 1992. They specifically noted that:

> Election monitoring, human rights verification and the repatriation of refugees have in the settlement of some regional conflicts, at the request or with the agreement of the parties concerned, been integral parts of the Security Council's effort to maintain international peace and security.[155]

(c) Are human rights violations within Iraq an exclusively internal matter?

Except in the context of enforcement measures, article 2(7) of the UN Charter prohibits intervention in matters which are essentially within the domestic jurisdiction of any state. It was already evident at the time of its

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152 Bailey S, *The Procedure of the UN Security Council*, 2nd ed (1988), p 270.

153 See generally Peterson MJ, *The General Assembly in World Politics* (1986), pp 18–22.

154 For a useful review of some of the difficulties in this regard see White, note 99 above, pp 134–39.

155 UN doc S/23500 (1992), p 2.

drafting that the relationship between article 2(7) and articles 55 and 56 (committing the United Nations and its member states to cooperate to promote "universal respect for, and observance of, human rights") was ambiguous and unclear. While much has been written about this issue in the past 47 years,[156] it is now clearly established practice in the General Assembly and the Commission on Human Rights to treat human rights violations (assuming that they reach an unspecified, but not especially demanding, level of seriousness) as being, by definition, outside the *domaine réservé* of states. While governments threatened with United Nations scrutiny, such as China, continue to protest at the application of this rule, their protests are generally dismissed in a rather summary fashion by the Assembly or the Commission and the debate on the merits proceeds.

But notwithstanding the widespread acceptance of this interpretation of article 2(7), the adoption of resolution 688 provided an occasion for considerable discussion of this issue by the Security Council. It was a debate that the Council had not rehearsed for many years on such a scale.[157] While the great majority of the participants in the debate invoked article 2(7), widely diverging interpretations were attached to it. In general terms, three such may be identified. In stating the first position (which reflected that followed in practice by the Commission on Human Rights) the United Kingdom indicated that article 2(7), while being "an essential part of the Charter, does not apply to matters which, under the Charter, are not essentially domestic", such as human rights.[158] Germany was less legalistic in asserting simply that "it is the legitimate right of the international community to call for respect for human rights".[159] The second approach was considerably less direct. Thus, for example, several other Western states participating in the debate opted to downplay the issue by affirming "the validity and importance" of article 2(7) but at the same time citing the existence

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156 See generally Bernhardt, "Domestic Jurisdiction of States and International Human Rights Organs", (1986) 7 Hum Rts LJ 205; Bossuyt, "Human Rights and Non-Intervention in Domestic Matters", (1985) 35 Review of the International Commission of Jurists 45; Buergenthal, "Domestic Jurisdiction, Intervention, and Human Rights: The International Law Perspective", in Brown PG and MacLean D (eds), *Human Rights and US Foreign Policy* (1979), p 111; Henkin, "Human Rights and "Domestic Jurisdiction"", in Buergenthal T and Hall JR (eds), *Human Rights, International Law and the Helsinki Accord* (1979), p 21.

157 See generally Bailey, "The Security Council" in Alston P (ed), note 51 above, Ch 8.

158 UN doc S/PV.2982 of 5 April 1991, p 64–65 (Sir David Hannay). A similar view was subsequently expressed in less formal terms in the General Assembly by the Austrian Foreign Minister who stated that:

> ...concerns over human rights violations and inquiries with a view to safeguarding these rights cannot be considered interference in the internal affairs of a State. On the contrary, expressing concern in the area of human rights constitutes an important and legitimate element of international dialogue.
>
> UN doc A/46/PV.12, 2 Oct 1991, p 38/40 (Mr Mock).

159 UN doc S/PV.2982 of 5 April 1991, p 72 (Mr Rantzau).

of a threat to international peace and security as the basis on which the relevant measures were justified.[160] Even the United States was unprepared to bite the bullet. Thus its Permanent Representative told the Council that:

> It is not the role or the intention of the Security Council to interfere in the internal affairs of any country. However, it is the Council's legitimate responsibility to respond to the concerns of Turkey and the Islamic Republic of Iran.... The transboundary impact ... is what the Council has addressed today.[161]

This approach was taken up with enthusiasm by other states anxious to support the proposed measures but at the same time seeking to preserve as large a *domaine réservé* as possible. Some also sought to prevent significant human rights-based inroads being made in terms of the practice of the Council. Turkey, for example, recorded its view that article 2(7) "should be scrupulously observed".[162] Pakistan indicated that "as a matter of principle" it was "opposed to any form of interference in the internal affairs of any country, and this is especially so in the case of a brotherly, Muslim country...".[163] Romania, while expressing enthusiasm for the resolution as a whole, which it characterized as a humanitarian gesture in response to "a real threat to international peace and security",[164] nevertheless added that:

> Questions pertaining to the situation of various segments or components of populations from the ethnic, linguistic or religious points of view are matters of the national jurisdiction of States. In this respect no one can disregard the imperative nature of article 2, paragraph 7 .... We are indeed very happy to see this fundamental provision of the Charter well reflected in the draft resolution....[165]

The third approach apparent in the Council debates was to reject the proposals contained in resolution 688 on the grounds that they clearly transgressed the prohibition laid down in article 2(7). Both China and India abstained in the voting, primarily on these grounds.[166] Zimbabwe shared the latter's view that it was unaccepable for the Council to prescribe "specific measures" to resolve a "domestic conflict".[167] Yemen also objected that references to "political developments within Iraq" and to the need for "internal dialogue" were in violation of article 2(7).[168]

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160 For example Sweden, ibid, p 83 (Mr Eliasson).

161 Ibid, p 58 (Mr Pickering).

162 Ibid, p 8 (Mr Aksin).

163 Ibid, p 9 (Mr Marker).

164 Ibid, pp 24–25 (Mr Munteanu).

165 Id, p 23.

166 Ibid, pp 54–55 (China) and pp 62–63 (India).

167 Ibid, p 31 (Mr Zenenga).

168 Ibid, p 27 (Mr Al-Ashtal).

Iraq's position on this issue was both predictable and consistent.[169] On innumerable occasions following the liberation of Kuwait it accused the Council, the coalition states and its neighbours of interfering in its domestic affairs. In response to the cease-fire resolution (687) which it indicated it was accepting, despite major misgivings, because "it has no choice", Iraq called the resolution "an unprecedented assault on the sovereignty, and the rights that stem therefrom, embodied in the Charter and in international law and practice".[170] Its response to resolution 688 was consistent in this regard. Indeed its representative seems even to have anticipated that the Council would respond to the plight of the Kurds when the earlier resolution (687) was being adopted. Thus he told the Council at that time that "[i]t is cruel and cynical for any country, neighbouring or otherwise, to take advantage of the situation which Iraq and its Kurdish population are experiencing to interfere in Iraq's internal affairs...".[171] On the same day the representative submitted a letter to the Secretary-General implying that the government's repressive measures had succeeded and would accordingly be terminated.[172] Immediately before it was adopted, Iraq condemned resolution 688 as "a flagrant, illegitimate intervention in [its] internal affairs and a violation of Article 2 of the Charter...".[173] As noted below, such complaints were to be repeated many times once the "safe havens" initiative got under way.[174]

The Council's debate on article 2(7) was thus quite revealing. It served to confirm, if confirmation were needed, that the Security Council has, at least until very recently, operated in a world apart when it comes to human rights matters.[175] The discussion as to what might constitute illegitimate interference is reminiscent of debates held twenty years ago and more in the Commission and the Assembly.[176] The suggestion that measures such as calling for an end to repression and urging an open dialogue to ensure respect for human rights, or the making of any observations on minority rights, violate article 2(7) would today attract attention in the Commission or the Assembly only because of its patent incompatibility with practice that has long since been established and

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169 Although, if the seriousness with which a cry for help is likely to be taken is diminished by the frequency of its repetition (as in the fable about crying "Wolf" too often), then Iraq's claims that its internal affairs were being interfered in never had much hope of being taken seriously.

170 UN doc S/22456 of 6 April 1991, Annex, p 2.

171 UN doc S/PV.2981 of 3 April 1991, p 137 (Mr Al-Anbari).

172 UN doc S/22440 of 3 April 1991, p 1).

173 UN doc S/PV.2982 of 5 April 1991, p 17 (Mr Al-Anbari).

174 See text accompanying notes 211-12 below.

175 The Council has always been reluctant to address itself directly to the relationship between Article 2(7) and whatever measures it might have decided upon in reliance upon some other part of the Charter. See Guillaume, "Article 2, Paragraphe 7" in Cot JP and Pellet A (eds), *La Charte des Nations unies* (1985), p 141 at 158-59.

176 Cassese, "The General Assembly" in Alston P (ed), note 51 above, Ch 2.

accepted.[177] Yet the ethos prevailing in the Council in 1991 was apparently so detached from these developments in human rights doctrine in other United Nations fora that over 30 per cent of the Council's members expressed the view that article 2(7) should have been seen as preventing the adoption of resolution 688. It is equally striking that, at the same time, a majority of the remaining members were either reluctant to support the proposition that criticism of a state's human rights performance did not constitute interference or actually sought to cast doubt on it while supporting the resolution on other grounds.

If the debate had been clearly focused on proposals for forcible intervention in Iraq to uphold respect for human rights, these attitudes would be understandable. Indeed they would then have been supported by the weight of scholarly, as well, as governmental opinion.[178] Since it clearly was not,[179] media reports to the contrary notwithstanding, the views expressed can only be seen as confirmation of the extent to which the Council's members have succeeded in marginalizing human rights considerations in relation to the great majority of matters with which they are called upon to deal.

Equally surprising is the reluctance of states, within the framework of the Security Council's debates (let alone, of course, its resolutions) to place reliance upon the fact that Iraq had ratified various international instruments, thereby accepting specific obligations in the human rights and humanitarian law fields. The International Covenant on Civil and Political Rights, to which Iraq has long been a party, deals with, *inter alia*, the right not to be oppressed (implicit in a variety of formulations), the rights of members of minority groups and the right to participate in the political process. As Damrosch has noted: "States that have pledged at the international level to accord rights of political participation to their citizens are in a poor position to claim that nonforcible actions aimed at inducing compliance with that pledge constitute intervention in 'internal'

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177 See generally Schachter O, *International Law in Theory and Practice* (1991), ch XV; and Brownlie I, *Principles of Public International Law*, 4th ed (1990), ("... the domestic jurisdiction reservation does not apply if the United Nations agency is of the opinion that a breach of a specific legal obligation relating to human rights in the Charter itself has occurred". Ibid, pp 553–54). Cf Guillaume, note 151 above, pp 154–55, whose analysis suggests that relatively little development has occurred on this point since the UN Charter was adopted. His position is, however, probably determined in part by the fact that none of the authorities he cites were published later than 1972 and that he makes no reference to the recent (ie post–1975) practice of any of the major organs, and virtually none whatsoever to the practice of the Commission on Human Rights.

178 See generally Farer, "Human Rights in Law's Empire: The Jurisprudence War", (1991) 85 AJIL 117.

179 In reality, it is apparent that many Third World States, in particular, had reason to fear that some form of forcible intervention was being contemplated, but they did not say so openly and their article 2(7)–related objections were were not premissed on such fears but applied directly to the terms of Council resolution 688.

affairs."[180] Yet despite the added legitimacy that such a reference would have given to the proposed measures, only one state – the United Kingdom – referred to any specific international instrument.[181] Even then, the reference was to common article 3 of the Geneva Conventions of 1949 rather than to an international human rights instrument.[182]

It is noteworthy that when, at the end of 1991, the General Assembly came to focus its attention on the circumstances under which humanitarian assistance might be imposed upon a reluctant recipient the focus was not on article 2(7), as it had been in the Security Council, but rather on more broadly defined issues of sovereignty and interference with territorial integrity. We will return to that debate in the conclusion of this analysis.[183]

2. Does Resolution 688 Constitute a Chapter VII Enforcement Measure?

The preamble to resolution 688 opens by recalling the Council's responsibility, under the UN Charter, for maintaining international peace and security. It then recalls article 2 (7) of the Charter.[184] The significance of the latter reference is considered separately below.[185] Thereafter both the preambular and the operative parts of the resolution clearly specify that a threat to international peace and security exists. White has observed that such a statement has, according to the Council's past practice, generally been "recognised as representing an implied finding under Article 39"[186] (ie Chapter VII). But this need not always be the case. Thus, for example the International Court of Justice held in the *Certain Expenses of the United Nations* case that the

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180 Damrosch, "Politics Across Borders: Nonintervention and Nonforcible Influence Over Domestic Affairs", (1989) 83 AJIL 1 at 40.

181 One possible explanation for (or rationalisation of) this reluctance is the argument that human rights treaties establish what are in effect self-contained treaty regimes with the consequence that the only measures that can validly be taken to promote a State Party's compliance are those that are provided for in the relevant treaty itself. But while the representatives of some Eastern European Socialist Governments were wont to support such a position prior to the collapse of their regimes, (see Graefrath, "Responsibility and Damages Caused: Relationship Between Responsibility and Damages", 185 *Recueil des cours* (1985), 13 at 53) the argument was never given much credence by other international lawyers and it is a poor justification for the approach adopted in the Gulf War context. See generally: Simma, "Self-Contained Regimes", (1985) Neths YB Int'l L, p 111.

182 UN doc S/PV.2982 of 5 April 1991, p 66 (Sir David Hannay).

183 See text accompanying notes 261–66 below.

184 That paragraph provides as follows:

> 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.

185 See text accompanying notes 191 below.

186 White, note 99 above, p 39.

UN operation in the Congo was not an enforcement action under Chapter VII,[187] thus giving rise to suggestions by some commentators that such peace-keeping operations were based on Chapter 6 1/2 of the Charter.

Acting under Chapter VII, without explicitly so indicating, would thus not be unprecedented. In 1965, when the Council determined that the Rhodesian situation constituted a threat to international peace and security, Arthur Goldberg, the United States Permanent Representative, noted that the resolution did "not mention whether Chapter VI or Chapter VII is brought to bear. My Government agrees with this interpretation of the text."[188] In other words, the United States, probably in the interests of balancing its preparedness to act internationally with the reluctance on the part of some domestic constituencies to invoke Chapter VII, was happy with the ambiguity that had been achieved by the text.

But despite that precedent, taking action under Chapter VII without expressly so indicating would be a fundamental departure from the practice established by virtually all of the preceding resolutions adopted during the Gulf Crisis. That practice was remarkably consistent, beginning with resolution 660 which stated that the Council was "*acting* under Articles 39 and 40 of the Charter of the United Nations",[189] and going through to the cease-fire resolution (687) in which the Council noted that it was "*conscious* of the need to take the following measures acting under Chapter VII of the Charter".[190] By contrast, resolution 688 not only omits any equivalent formulation, but refers in the second preambular paragraph to Article 2(7) of the Charter, and reaffirms, in the seventh preambular paragraph, "the commitment of all Member States to the sovereignty, territorial integrity and political independence of all States in the area".

This reference, read on its own, is ambiguous. It could be taken as affirming that the Council has no intention of breaching the paragraph's principal injunction by interfering in Iraq's internal affairs. It could equally be read as invoking the exception contained in the paragraph in relation to Chapter VII enforcement actions. Assuming for the sake of argument that resolution 688 does authorize intervention within Iraq, then the latter interpretation would appear to be a necessary first step.

This interpretation is strongly reinforced by President Bush's statement of 17 April 1991 in which he asserted that while the new "relief" effort "constitutes an undertaking different in scale and approach", the basic policy remained the same as before: "All along I have said that the United States is not going to intervene militarily in Iraq's internal affairs...".[191]

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187 ICJ Rep 1962, p 151 at 166.

188 1265th Mtg of the SC, 20 SCOR (1965) p 15.

189 SC Res 660 of 2 Aug 1990, 3rd preambular paragraph.

190 SC Res 687 of 2 April 1991, 26th preambular paragraph.

191 *Backgrounder,* note 79 above, p 2.

Another means by which resolution 688 could conceivably have been linked to enforcement measures would have been to associate it directly with earlier resolutions and most notably the "umbrella" cease-fire resolution (687). In this way the argument could be made that 688 was intended as an extension to, and thus as a part of, the previous resolution (which clearly was adopted under Chapter VII). But this possibility is undermined by the absence of any such reference in either the preambular or operative parts of the resolution. Again, by contrast, many of the earlier Gulf-related resolutions were explicitly signalled (by means of an express preambular reference) to have been building upon their predecessors.

RESOLUTION 688 AS THE LEGAL BASIS FOR SUBSEQUENT MEASURES

In September 1991 the Dutch Foreign Minister, in a statement to the General Assembly, drew a direct and unequivocal link between the establishment of the "safe havens" in northern Iraq and resolution 688:

> Recently, we have witnessed intervention by our World Organization for the sake of protecting human rights. In the aftermath of the liberation of Kuwait a number of countries belonging to the international coalition provided a safe haven to Iraqi Kurds fleeing from repression and attempts at genocide by their own Government. This action ... implemented the relevant Security Council resolutions ... .[192]

The Foreign Minister did not elaborate any further upon the nature of the direct relationship between the safe havens initiative and the Council resolutions. Nor did he indicate the specific resolutions to which he was referring. It is clear, however, that resolution 688 must have been the primary reference point. But, it is by no means clear that that resolution does, in fact, provide a solid legal basis for the measures taken in relation to the safe havens. That question is of particular importance in determining whether precedents have thereby been created which will be of assistance in comparable situations in the future. These questions will be examined in relation to three areas: (i) the promotion of respect for human rights; (ii) ensuring access for humanitarian purposes; and (iii) the establishment of "safe havens".

Before proceeding, it may be noted that the effectiveness of the safe havens measures is not being called into question in this context. Overall, there is little doubt that the measures were at least partly successful in terms of stemming the massive flow of refugees, deterring further repression by Iraq's security forces and establishing the conditions under which many Kurdish refugees could return to Iraq with a degree of safety. Nor is the desirability of swift and forthright action in response to the Kurdish crisis being challenged.

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192 UN doc A/46/PV.6, 26 Sept 1991, p 54/55 (Mr van den Broek).

1. Promotion of Respect for Human Rights

Resolution 688, while by no means unprecedented in human rights terms, is important insofar as the Security Council has taken a clear stand in condemning acts of repression and demanding their termination. Its expression of hope "that an open dialogue will take place to ensure that the human and political rights of all Iraqi citizens are respected"[193] is also significant as an endorsement of the importance of political rights and of "open dialogue" as a means by which to promote them. Nevertheless, the Council does not mandate the taking of any specific measures for these purposes and the resolution does not envisage any particular follow-up in the event that the "rights of all Iraqi citizens" continue to be grossly violated. Thus, in stark contrast to some of the interpretations that have been offered, particularly by Western Governments, the resolution is of only limited value as a precedent in human rights terms.

2. Securing Access for Humanitarian Purposes

By contrast, in terms of securing access to Iraq for humanitarian organizations, the resolution breaks some new ground and uses strong and quite specific language. Thus the Council "*insists*" that the necessary access within Iraq be granted to "international humanitarian organizations" and appeals "to all Member States and to all humanitarian organizations to contribute" to the Secretary-General's "humanitarian relief efforts". The legal principles underlying these demands are not new. They derive ultimately from the commitment contained in the UN Charter to seek "to achieve international co-operation in solving international problems of ... [a] humanitarian character, and in promoting and encouraging respect for human rights ...".[194] That commitment has been reiterated and elaborated upon in various specific international instruments.[195] It should be noted that these principles were "codified" in a subsequent resolution adopted by the General Assembly designed to achieve "the strengthening of the coordination of emergency humanitarian assistance of the United Nations system".[196]

The resolution "insists" that access be granted and "demands" cooperation with the Secretary-General, but it does not specifically contemplate forcible action in the event of Iraq's non-cooperation. While the Council's decision "to remain seized of the matter" could have laid the groundwork for subsequent enforcement measures, the terms of the resolution itself nevertheless fall well short of giving substantive legal support to the notion of a "duty to intervene". This is not to suggest that the process accompanying the adoption of the resolution was not extremely effective. But it was the circumstances surrounding

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193 SC Res 688 of 5 April 1991, para 2.

194 Art 1(3).

195 For an analysis of these provisions see generally Macalister-Smith P, *International Humanitarian Assistance: Disaster Relief Actions in International*, (1985).

196 GA Res 46/182, Annex.

its adoption, rather than any new principles enunciated in the resolution itself, that secured its effectiveness.

Even prior to the adoption of resolution 688 Iraq had permitted some humanitarian organizations to operate within its territory.[197] In addition, in the period immediately preceding the resolution's adoption the Iraqi Government had offered to accept "an international mission to be formed by the Secretary-General or the Security Council in [sic] Iraq, with full guarantees for free movement and communications" to ascertain the facts and submit a report.[198] It subsequently expressed its annoyance that the resolution had been adopted despite its offer.[199] Two missions were in fact sent and the combined result was the signing of a Memorandum of Understanding by the Secretary-General's Executive Delegate, Sadruddin Aga Khan and the Iraqi Minister of Foreign Affairs, Ahmed Hussein. The scope and content of the Memorandum are significant. In it, both sides formally recognised "the importance and urgency of adequate measures, including the provision of humanitarian assistance, to alleviate the suffering of the affected Iraqi civilian population".[200] On this basis the Memorandum outlined a "basic framework for United Nations humanitarian action" which was said to be "intended to facilitate the task of coordination, effective implementation and monitoring of humanitarian assistance and relief operations".[201] Iraq welcomed UN efforts "to promote the voluntary return home of Iraqi displaced persons and to take humanitarian measures to avert new flows".[202] Accordingly, the Government agreed that the UN should "have a humanitarian presence in Iraq, wherever such presence may be needed".[203] That goal would be achieved through the establishment of UN "sub-offices and Humanitarian Centres (UNHUCs) in agreement and cooperation with the Government".[204] Having listed the basic humanitarian functions of the UNHUCs the Memorandum authorised the UN to "take urgent measures, in cooperation with the Government, for the early stationing of staff as well as the provision of assistance and relief in all designated centres and, as a matter of priority, those close to the Iraqi borders...".[205] The Memorandum also sought to spell out some of the basic principles for the implementation of the agreement: humanitarian assistance was to be impartial and all civilians in need were entitled to receive it; intergovernmental organizations, NGOs and other relief agencies were encouraged to participate in implementing the program; and all

197 UN doc S/22460, para 5.

198 UN doc S/PV.2982 of 5 April 1991, p 18-20 (Mr Al-Anbari).

199 UN docS/22460.

200 Iraq - United Nations Memorandum of Understanding of 18 April 1991, UN doc S/22663 (1991), (repr in (1991) 30 ILM 860-62, para 1.

201 Ibid, para 10.

202 Ibid, para 2.

203 Ibid, para 4.

204 Ibid.

205 Ibid, para 8.

measures of implementation were to be "without prejudice to the sovereignty, territorial integrity, political independence, security and non-interference in the internal affairs of the Republic of Iraq".[206]

It is clear that the threat of the coalition parties to establish safe havens (first mooted publicly almost two weeks before the Memorandum was signed) and to do so by force if necessary, undoubtedly served to stimulate and fortify the Iraqi Government's disposition to cooperate. Nevertheless, the acceptance of such comprehensive arrangements is probably without precedent in such a situation. In that respect, resolution 688 provides the basis for a significant breakthrough in terms of securing access for humanitarian organizations. Moreover, the Memorandum could prove to be an effective model for comparable arrangements at the request of the Security Council in future situations.

3. The Establishment of Safe Havens

This is by far the most problematic aspect of the measures that were taken in reliance upon resolution 688. As noted above,[207] when President Bush announced the initiative to establish safe havens for the Kurdish and other refugees (in a region subsequently dubbed "Bushistan") he twice insisted that the measures were "consistent with United Nations Security Council Resolution 688" (which had been adopted 12 days earlier). Not surprisingly, he did not go into any detail in order to substantiate that claim.

The suggestion that there was a direct link between the Council resolution and the safe havens measures has, however, been made by Human Rights Watch. Thus it warmly welcomed what it characterised as:

> ... the precedent set by the United Nations Security Council resolution authorizing military intervention by Western forces in northern Iraq, to provide for the basic needs of displaced Kurds and protect the 3.5 million strong minority from further slaughter at the hands of vengeful government troops.[208]

But in contrast to such accounts, a number of states had expressly made clear when the resolution was adopted their belief that no threat was involved, or intended, to Iraq's territorial integrity. For example, the observer from Ireland noted that:

> Any attempt to interfere with Iraq's sovereignty, territorial integrity, or political independence, would be unacceptable as well as detrimental to the prospects for peace and security in the region. The resolution ... makes this clear.[209]

For the most part, however, the issue was not debated, simply because none of the explanations offered in the resolution's support by its co-sponsors

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206 Ibid, paras 11, 16 and 20 respectively.

207 See text accompanying note 84 above.

208 Human Rights Watch, *World Report 1992* (1991), p 615.

209 UN doc S/PV.2982, pp 79–80 (Mr Hayes).

contemplated the possibility of forcible intervention for the purpose of establishing safe havens or for other ends. Similarly, it is difficult, at best, to derive from the provisions of resolution 688 such explicit, or even implicit, authorization as would be required to provide a formal foundation in international law for the entry into northern Iraq after 17 April by the coalition forces.[210]

Moreover, even if a binding obligation could be said to have been imposed upon Iraq by the terms of the resolution, it is at least open to question whether the forces that moved into northern Iraq could be said to have been merely contributing to the Secretary-General's humanitarian relief efforts as opposed to initiating their own. But that is a question which need not detain us further in this context.

Predictably, Iraq wasted little time in objecting to the entry of United States and other allied forces into northern Iraq. In a letter to the Secretary-General on 21 April the move was described as "a serious, unjustifiable and unfounded attack on the sovereignty and territorial integrity of Iraq".[211] In a subsequent letter, dated 14 May, to the President of the Security Council, Iraq elaborated upon this position:

> The United States and the European States cooperating with it, such as the United Kingdom, France and the Netherlands, have brought their armed forces into northern Iraq on the pretext that resolution 688 authorizes them to engage in such obvious military intervention in the internal affairs of Iraq and to violate its territorial integrity. This claim could not be farther from the truth, and the resolution does not grant any party any such authorization.[212]

In practical terms neither the desirability nor the effectiveness of the allied initiative can, at least in retrospect, be convincingly challenged.[213] But it is the strength of the legal case that can be made to support that initiative that will largely determine its value as a precedent for the future.

One argument that could be made is that Iraq, despite its formal objections, actually gave its implied consent by acquiescing in the measures that were taken. President Bush appears to have been counting upon such acquiescence when he noted that "all we are doing is motivated by humanitarian concerns. We continue to expect the government of Iraq not to interfere in any way with this latest relief

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210 The "coalition" was overwhelmingly American in composition at this stage. As at April 16 the White House reported that, of a total of 7,987 coalition "forces involved in Refugee Relief Operations in the North", 7,776 (or 97 per cent) were from the United States. *Backgrounder*, note 79 above, p 4.

211 UN doc S/22513 (1991), p 2.

212 UN doc S/22599 of 14 May 1991, Annex, p 2.

213 According to allied officials, the exercise enabled almost 460,000 Kurdish refugees to return from their mountain retreats to the safe havens. Even then, 13,000 were reported to have died in the mountains. "Allies Put Kurdish Death Toll at 13,000", *The Times* (London), 1 June 1991, p 7.

effort".[214] And indeed the events following the coalition forces' entry into northern Iraq appear, more or less, to have confirmed United States expectations in this regard.

Significantly, such a justification derives some support from a letter of 21 April from the Iraqi Foreign Minister to the Secretary-General which noted, *inter alia*:

> ...[T]he Government of Iraq, while opposing the steps taken by the United States forces and the foreign forces cooperating with them ..., has not hindered these operations because it is not opposed to the provision of humanitarian assistance to Iraqi citizens who are in need of it and because it wishes to avoid any complication that may prevent the return of all Iraqi citizens in security to their places of residence.[215]

But by the same token, it can be argued that in this and related statements the Iraqi Government has been carefully seeking to lay the foundations for a claim that it was acting under duress throughout the period following the surrender of its forces and that any legal agreements entered into under such circumstances are null and void.

It is not proposed to enter into the issue of possible legal responses that might be made in this regard. Oscar Schachter has sought to outline a legal case in support of the measures but it is not at all clear that even he is convinced of the strength of the case.[216] In essence he relies upon the finding that the persecution and flight of the Kurds constituted a threat to international peace and security and then argues that, because of the link between that situation and the previous international enforcement action "responsibility of a political and humanitarian character" was placed upon the coalition "to prevent massive attacks by Iraqi forces against noncombatants". He also draws consolation from the fact that the coalition forces did not exceed their mandate to provide basic protection by, for example, seeking "to impose an internal regime of autonomy or minority rights".[217] But while all of these factors are important in mitigating the harm that might have been done to the principle of non-intervention, they are not sufficient to justify the unilateral use of force in a situation not involving individual or collective self-defence within the terms of article 51 of the UN Charter.

It may also be assumed that the US Government would be able to present other plausible, if necessarily rather creative, arguments (possibly based upon a purportedly direct link between resolution 688 and its relevant predecessors

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214 Ibid, p 2.

215 UN doc S/22513 of 22 April 1991, Annex, p 2.

216 Schachter, "United Nations Law in the Gulf Conflict", (1991) 85 AJIL 452 at 469.

217 Ibid.

adopted under Chapter VII of the Charter) to support the measures taken.[218] But there is an inverse relationship between the degree of creativity required to make such a case and the extent to which an effective precedent is set for future reference. It is not necessary in the present context to arrive at a definitive determination as to whether or not the action taken to establish the safe havens can be legally justified by reference to resolution 688. Suffice it to say that the resolution clearly does not, *in itself*, provide the sort of foundation which is adequate to establish a precedent of wider applicability, as some governments have suggested. On the assumption that the ability to undertake such protective measures in future is desirable, the United Nations should begin to elaborate principles which would enable such measures to be activated, in accordance with procedures and processes laid down for the purpose. Only then will the international community be significantly closer to having accepted that there is a humanitarian duty to intervene and, more importantly, a duty to acquiesce in such intervention provided appropriate procedural safeguards have been respected.

WHAT WOULD AN EFFECTIVE HUMAN RIGHTS RESPONSE TO THE DIFFERENT ASPECTS OF THE GULF CRISIS HAVE LOOKED LIKE?

The armed enforcement action against Iraq under Chapter VII of the UN Charter, the arrangements set in place thereafter, and the measures taken in reliance upon resolution 688, contributed far less to the promotion of respect for human rights than they might have if the Council had been less averse to addressing the relevant issues squarely. Thus Amnesty International concluded, in July 1991, that "the steps taken so far are insufficient to address the critical human rights situation [in Iraq]; further measures of protection more specifically aimed at the durable and ongoing protection of human rights are still needed."[219] This can be seen by considering briefly the measures that might have been taken in the aftermath of Iraq's defeat and the liberation of Kuwait.

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218 An indication of the manner in which this case would be developed is contained in a note given by the US Permanent Representative to the UN to his Iraqi counterpart, part of which stated:

> Taking account of resolution 688, the Government of Iraq must understand that the international community is determined to provide for the necessary protection and security for refugees in Iraq as expressed in that resolution, with which Iraq must comply.
>
> ...
>
> Iraq must prove its intentions by providing the United Nations with all the mechanisms necessary to ensure the complete safety and protection of the operation and by moving rapidly to work with the Secretary-General and his representatives in the appropriate manner in order to implement this task.

UN doc S/22599, Annex, p 2.

219 Amnesty International, *Iraq: The Need for Further United Nations Action to Protect Human Rights*, July 1991, AI doc MDE 14/06/91, pp 6–7.

After those events, three major human rights issues emerged. They were: (1) continuing repression of the citizenry of Iraq by its government; (2) oppression of the Kurdish minority; and (3) violations of human rights for which the re-installed government of Kuwait was responsible. The question is: what measures might the Security Council have taken, either in the context of resolutions 687 or 688 or subsequently, in regard to these situations?

1. Repression in Iraq

The continuing repression of the citizens of Iraq by the Government of President Saddam Hussein could hardly have come as a surprise to anyone familiar with its all too consistent track record. Nevertheless, the options open to the United Nations for responding to such problems have historically been somewhat circumscribed. The main approach that has been developed to date by the Commission on Human Rights has been the preparation of a detailed report on the human rights situation prevailing in the country under scrutiny. As noted earlier, the Commission had already mandated the preparation of such a report on Iraq but the Council ignored the opportunity available to it in connection with resolution 687 to make the government's full cooperation a condition of the cease-fire arrangements.

Another, albeit more controversial, option open to the Council would have been to insist on the holding of free elections within a specified period of time (say, six to nine months). While such a specific requirement would have been without formal precedent, it would not have been out of place among all of the other conditions specified in resolution 687. Such an approach could have been justified on the grounds that it was a necessary element in the Council's program for restoring peace and security in the region. It could thus have been included as one of the terms upon which the Security Council was prepared to endorse a cease-fire, in which case it would have been a measure taken under Chapter VII of the Charter.[220] On that basis it would have avoided some of the controversy that could be expected to attach to such a proposal if made in the normal course of events.[221] The rationale for imposing such a condition could also have taken

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220 This is contrary to the position of Oscar Schachter who has commented that Council resolution 687 implicitly recognized the rights of the Iraqi people to self-government and basic political rights "by refraining from imposing constitutional decisions or changing the Iraqi regime". Schachter, note 216 above, at 468. But while such an analysis seems correct in relation to proposals to compel Saddam Hussein to step down, regardless of the will of the Iraqi people, it would not seem persuasive in relation to the holding of free and genuine elections, in accordance with Iraq's existing international treaty obligations.

221 The controversy is well reflected in the different terms of two resolutions adopted by different majorities in the General Assembly in 1990. In the first of them (GA Res 45/150 (1990), adopted by 129 in favour, 8 against and 9 abstentions) the Assembly stressed "its conviction that periodic and genuine elections are a necessary and indispensable element of sustained efforts to protect the rights and interests of the governed..." (para 2). In the second (GA Res 45/151 (1990), adopted by 111 in favour, 29 against and 11 abstentions) it affirmed "that it is the concern solely of peoples to determine methods and to establish institutions regarding the electoral

into account the relevant obligations freely undertaken by the government through its ratification of the International Covenant on Civil and Political Rights.[222] This is not to imply, however, that the Council has any authority to forcibly compel states parties to uphold such treaty obligations. It clearly does not, except to the extent that it is able to base any such actions upon the Charter provisions relating to international peace and security.

Had such a condition been adopted, it would have at least provided some grounds to hope for a change in government and would have obviated, or at least diminished, the need for both the British and American Governments to indicate that UN sanctions would not be lifted as long as Saddam Hussein remains in power. That position, publicly endorsed by UK Prime Minister, John Major,[223] and by President Bush,[224] drew a predictable, but not entirely unwarranted response from Iraq. It asked the President of the Security Council, in a letter, whether Mr Major's suggestion meant that the United Kingdom was "prepared to violate its obligations and responsibilities under the Charter and to do so in a premeditated way, without any valid legal reason and in blatant contradiction to those responsibilities?".[225] The letter also raised the issue of why, having complied with the provisions of the various Council resolutions, Iraq should be required to satisfy additional conditions imposed unilaterally and without any cover of legal authority. It is extremely difficult to understand how the Western position would be justified in international legal terms. Ironically, if appropriate human rights conditions had been incorporated into article 687 the situation would have been significantly different.

The failure of the Security Council to make any reference whatsoever to the need for genuine elections in this context highlights the difficulty of accepting the proposition that respect for democratic rights, including perhaps a right to democratic governance, has become a value of fundamental and even overriding importance in the international legal system. That does not mean, however, that such a condition should not be considered in the future in the event that the

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process, as well as to determine the ways for its implementation according to their constitutional and national legislation" (para 2). It is worthy of note that Iraq voted in favour of both resolutions.

222 As the General Assembly stated in its resolution 45/150 (1990) "the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights ... establish that the authority to govern shall be based on the will of the people, as expressed in periodic and genuine elections" (para 1).

223 In the course of a meeting of the European Council in Luxembourg on 8 April 1991 Mr Major put forward a four point plan which included "the maintenance of a total arms embargo against Iraq for as long as Saddam Hussein remained in power". (1991) 21 FCO Survey of Current Affairs 142.

224 Initially this position was attributed only to senior American officials but it was formally endorsed by President Bush in an address to the General Assembly in September 1991 in which he noted that "... we must keep the United Nations sanctions in place as long as he [Saddam Hussein] remains in power". UN doc A/46/PV.4, 24 Sept 1991, p 8.

225 UN doc S/22591 of 13 May 1991, Annex, p 2.

United Nations Security Council adopts measures under Chapter VII of the Charter resulting in the specification of measures that must be taken by the government concerned in order to justify the termination of the enforcement action.

2. The Oppression of the Kurdish Minority

The plight of the Kurds was a principal justification for the adoption of resolution 688 and for the measures subsequently taken by the coalition forces in northern Iraq. Yet, beyond a condemnation of the oppression and an expression of hope for the future, the Council took no measures designed to improve the long-term prospects that the human rights of the Kurds would be respected. In this regard various options might have been considered. A UN Special Representative might have been appointed to assist in the negotiations that were taking place between the Kurds and the Government in Baghdad over possible autonomy arrangements.[226] Regular reports could have been called for by the Council, to be prepared by carefully trained, independent UN-appointed monitors, to ensure at least medium-term monitoring of the situation in Kurdistan. The Council could have offered to oversee the implementation of any "autonomy" arrangements that both sides had expressed a willingness to adopt. A range of other related arrangements could also have been contemplated.

Another approach that might have been adopted would have been to focus, albeit somewhat indirectly, on the objective of promoting realization of the right of the Kurdish people to self-determination. Such an approach would not need to have been premissed on the assumption that secession from Iraq was required, or was necessarily even being sought. Some form of "permanent, secure, autonomous Kurdish region" had, however, been reported to have been identified by the United States as a possible objective of its policy in the region.[227] Similarly, the internal negotiations between the Government of Iraq and its Kurdish citizens have, since at least 1970, recognized the desirability of according a limited degree of autonomy which might ultimately be sufficient to satisfy the self-determination-related aspirations of the people concerned.[228]

Another option, canvassed publicly by Amnesty International in July 1991,[229] and subsequently endorsed by the Special Rapporteur appointed by the

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226 For an account of these negotiations see Human Rights Watch, note 5 above, pp 677-79.

227 "US Seeking Homeland for Kurds", *Canberra Times*, 5 May 1991, p 1. The report is said to be based upon a "confidential draft US military position paper", the relevant part of which is entitled "How to Change a Large Military Floodlight Into 1000 Flashlights".

228 See generally Short M and McDermott A, *The Kurds* (1985, Minority Rights Group Report No 23); and Hannum H, *Autonomy, Sovereignty and Self-Determination: The Accommodation of Conflicting Rights* (1986), Ch 9.

229 See note 219 above, p 7.

UN Commission on Human Rights,[230] would have been to establish a set of on-going monitoring arrangements in Iraq. The relevant body would be requested to report regularly to appropriate UN organs on the progress being achieved and on the measures required to be taken to ensure effective human rights protection.

In the event, the Council opted for none of those possibilities. As a result, the palliative measures adopted by the coalition partners, which were of major importance in the short-term, did little if anything to address the longer-term human rights problems of the minority group which was clearly at risk.

3. The Situation in Kuwait

Prior to the invasion of Iraq, Kuwait had a human rights record which had already drawn significant criticism from objective sources, even though it looked relatively good in comparison with many of its neighbours. The occupation and the abuses associated with it gave human rights issues considerable prominence in Kuwait at the time and it was appropriate that Kuwait's representatives in fora such as the Commission on Human Rights, the General Assembly and the Security Council should have expressed their outrage at the violations committed by the Iraqi occupying forces. In consonance with this approach, its Permanent Representative told the Security Council prior to the adoption of resolution 687 that Kuwait "will ensure, as it always has, respect for basic freedoms, human dignity and human rights for all".[231] Yet within days of the liberation serious human rights problems were being reported. As *Time* magazine reported several weeks later:

> From the first days after Kuwait's liberation, journalists and human rights groups have chronicled major violations – detentions, beatings, torture, summary executions – committed by Kuwaiti armed forces and vigilantes seeking revenge against those suspected of collaborating with the Iraqis. But the Bush Administration, which loudly denounced Iraqi atrocities in occupied Kuwait, has consistently played down charges of abuses by the gulf state the U.S. fought to liberate.[232]

The abuses that took place have subsequently been carefully documented by a number of human rights groups, including Amnesty International, Middle East Watch and the Lawyers Committee for Human Rights.[233]

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230 UN doc A/47/367 (1992), paras 17–26. "[G]iven the terms of Security Council resolution 688 ... it would seem almost imperative that some kind of instrument be developed to assess compliance by Iraq ... . Simply, an occasional visit by the Special Rapporteur is not enough." Ibid, para 17.

231 UN doc S/PV.2981 of 3 April 1991, p 21 (Mr Abulhasan).

232 "No Quick Fixes in Sight", *Time*, 3 June 1991, p 36 at 37.

233 See generally Weinstein, note 62 above; *Amnesty International Report 1992* (1992), pp 164–67; Human Rights Watch, note 5 above, pp 756–96; and Lawyers Committee for Human Rights, *Critique*, note 62 above, pp 184–92.

But despite the predictability of these problems, and the oft-avowed commitment of the Kuwaiti Government to ensure that they would not occur, the Council took no action to request Kuwait to consider ratifying some of the many human rights instruments (and especially the two International Covenants) that it has not yet ratified. Equally, despite its heavy involvement in the whole Gulf episode, the Council chose not to provide any encouragement to the restored Kuwaiti Government to respect human rights and it did not call for any reports on the situation in that regard. It would have been open to the Security Council to ask the Government to undertake voluntarily to facilitate the preparation of such reports by an independent UN-appointed monitor. Similarly, the Commission on Human Rights, at the direction of the Council, could have mandated the preparation of such a report.

CONCLUSION: FUTURE DIRECTIONS FOR THE SECURITY COUNCIL

1. Putting Resolution 688 into Perspective

It is apparent from the foregoing analysis that the Security Council has not in fact succeeded in establishing the key precedent that some observers have suggested is already in place as a result of the humanitarian action taken in relation to the Kurds in northern Iraq. The Council has not, as Human Rights Watch has suggested, "*formally* limited a sovereign nation's authority over its own territory".[234] Moreover, the measures that the Council endorsed in its resolution 688 were justified by the great majority of Council members not "essentially on human rights grounds"[235] as has been suggested, but rather on the grounds that there was a clear transboundary threat in the form of flows of refugees and displaced persons and rocket attacks across borders. Similarly, the provision of safe havens for the Kurds cannot reasonably be portrayed as having been undertaken in pursuance of the relevant Security Council resolutions, as suggested by the Dutch Foreign Minister.[236] Nor can the Council be said to have authorised "military intervention by Western forces ... to provide for ... basic needs .. and protect the ... minority from further slaughter".[237] Finally, claims to the contrary by the French Foreign Minister notwithstanding, resolution 688 does not provide a justification for asserting that "through a Security Council resolution, the United Nations [has] affirmed that the sufferings of a population justified immediate intervention".[238]

None of this is to question the desirability of the Security Council being able to exercise its various powers in such a way as to prevent massive violations of human rights from taking place, or to ameliorate the situation of those whose

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234 Human Rights Watch, note 5 above, p 2 (emphasis added).

235 Ibid.

236 See note 192 above.

237 See note 208 above.

238 UN doc A/46/PV.6 (1991), p 92 (Mr Dumas).

rights have already been grossly violated. The Council should have been able to act in such a way as to provide specific authorisation for the measures which were taken by the allied coalition to protect the Kurds. Until it is recognised, however, that most Members of the Security Council and probably the majority of other UN Member States have not yet reached the point of being willing to accept such measures, it will not be possible to begin putting in place the sort of arrangements that are required. In other words, there are at present no reasonable grounds for assuming that the Security Council is ready for a truly fundamental and radical departure from the positions that it has tended to take to date. That is not to say that its approach has not evolved significantly. It clearly has. Further evolution, however, will require a recognition that the expectations of world public opinion have changed significantly and will only be consolidated on the basis of a careful, step by step approach towards the building of an effective response to gross violations of human rights.

2. Removing the Remaining Obstacles

As the UN moves towards the celebration of its fiftieth anniversary, in 1995, there are far fewer barriers to human rights action by the Security Council than has ever been the case before. The Cold War has ended and with it the paralysis of the Security Council in the face of a likely East–West veto of any major initiative. The artificially rigid division of institutional competence has been broken down very significantly in recent years. And, perhaps most important of all, concern with human rights matters is no longer subject to the determined quarantine that kept it narrowly confined to the Commission on Human Rights and a few related bodies. As the Secretary–General noted in his 1992 Annual Report, "[i]ncreasingly, each area of our Organization sees the relevance of human rights in its own objectives and planning".[239]

Nevertheless, there continue to be legal, political and procedural obstacles in the way of the Council becoming a serious player in human rights issues. The political will is gradually increasing, but it will come to little until more thought is given to the challenge of devising workable and acceptable procedural arrangements. The legal dimension is, as argued below, the least problematic one.

In terms of the political dimensions of the issue, it has to be recognized that resolution 688 and the measures taken purportedly in pursuance of it were, in some ways at least, a conjuring trick. They were, in essence, designed to respond to powerful political rather than humanitarian pressures, while at the same time avoiding the setting of any precedents which might be used to justify unwanted measures in future situations of comparable need. A Chinese veto would probably have prevented the adoption of more carefully targeted measures, but there are few signs that any of the coalition partners, other than France, wanted a more effective, precedent-setting approach to be taken by the Council. In the

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239 *Report of the Secretary–General on the Work of the Organization*, note 8 above, para 109.

short term, resolution 688, combined with the unilateral measures taken by the coalition forces, achieved at least some of their objectives. In the medium and longer terms, however, the applicable principles of international law have yet to be extended in such a way as to ensure the legitimacy of taking such measures in the future.

Nevertheless, it must be conceded that since the events surrounding the adoption of resolution 688 there has been a significant sea-change in terms of the international community's preparedness to tolerate the continuation of gross human rights violations. The change is partly due to some especially brutal assaults, in the context of the Balkans, Somalia and elsewhere, against any notion of a humane world order. World public opinion, in particular, would now seem to demand a more forthright and effective response to those assaults,[240] the images of which are increasingly being beamed directly into billions of homes around the world. To a significant extent, such demands are directed at the Security Council. This is entirely appropriate as is demonstrated by the dramatic expansion in the activities of the Council in recent months and years. As the Secretary-General observed in his Annual Report in September 1992:

> In all of 1987, the Council met 49 times, whereas in the first seven months of 1992 alone there were 81 official meetings. ... In 1987, there were 360 bilateral consultations; in the first seven months of 1992, 598 took place. Similarly, in 1988 there were 43 consultations of the whole, yet the first seven months of 1992 produced 119. ... Fourteen Security Council resolutions were adopted in all of 1987. In the first seven months of 1992, there were 46.[241]

There are also practical reasons why the spotlight is on the Security Council. It alone is able to use the full panoply of powers provided by the UN Charter; the centrality of its role has been consistently reaffirmed, most recently by the International Court of Justice in its decision in relation to provisional measures in the case brought by Libya in relation to the Montreal Convention;[242] and,

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240 See for example the following comments:

> Can the United Nations meet the agonising challenge of Bosnia? Six months ago the members of the Security Council said that their organisation faced "a time of momentous change". The question now is whether it, and they, are up to the task. This is a rare foreign issue where public opinion has goaded reluctant diplomats who prefer to lead from behind.
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> "The New World in Grinding Disorder", *The Guardian Weekly*, Vol 147, No 7, week ending 16 Aug 1992, p 1.

241 See generally *Report of the Secretary-General on the Work of the Organization*, note 8 above, para 16.

242 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*), *Provisional Measures*, Order of 14 April 1992, ICJ Rep 1992, p 114 (reprinted in (1992) 31 ILM 662).

unlike other bodies which take (often very considerable) time to be convened, it can respond within hours.

In recent times there have been some encouraging signs that the international community is willing to contemplate an expanded role for the Security Council in relation to human rights and other issues not traditionally classified under the rubric of "peace and security".[243] This preparedness has manifested itself in the last five years or so in the Council's own practice. The most convincing proof in that regard would seem to be the extent to which human rights were included among the issues dealt with by the Council in relation to Cambodia and El Salvador as well as in resolution 687 relating to the Gulf cease-fire. The fact that the initial trigger for each of these initiatives clearly involved a threat to, or breach of, international peace and security is of only limited importance. Once the Council has acknowledged the centrality of human rights issues to the resolution of broader problems, it is difficult to see how it will be able to turn the clock back to the days when it sought to insist that different parts of the same issue were appropriately treated by entirely different bodies.

A major breakthrough in principle, which complemented those that had already happened in practice, occurred in January 1992 when the first meeting of the Security Council ever to be held at the level of Heads of State and Government adopted the following statement:

> 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.[244]

This constitutes a clear recognition that purely humanitarian issues, including grave violations of human rights, can amount to threats to international peace and security, thus warranting (and being sufficient to trigger) appropriate action by the Security Council. A number of participants in the Council's debate had called upon it to respond to serious human rights violations.[245] By the same token, others expressed reservations on this score. The underlying concern was perhaps best expressed by the Foreign Minister of Zimbabwe who acknowledged that the Council would, in the future, be called upon "to deal more and more with conflicts and humanitarian situations of a domestic nature that could pose threats to international peace and stability".[246] But while he considered that "[m]assive and deliberate violations of human rights or the existence of situations of oppression and repression can no longer be tolerated anywhere in the world",[247] he nevertheless expressed concern that such conflicts could be "used as a pretext for the intervention of big powers in the legitimate domestic affairs of small

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243 See for example Goodrich, Hambro and Simons, note 146 above, pp 293-98.

244 UN doc S/23500 (1992), p 3.

245 See UN doc S/PV.3046 (1992), p 9 (Dr Boutros Boutros-Ghali), p 51 (President Bush), and p 57 (President Perez of Venezuela).

246 UN doc S/PV.3046, p 131 (Mr Shamuyarira).

247 Ibid, p 130.

States" and that human rights issues might be "used for totally different purposes of destabilizing other governments".[248]

3. Redefining the Terms of the Debate: Humanitarianism, Intervention and Sovereignty

(a) The General Assembly's 1991 debate over "humanitarian assistance"

Such fears highlight the need to seek greater clarity of definition in relation to the key terms that have dominated the debate thus far if the Security Council is to be able to respond more effectively in the future to human rights violations. But despite the importance of that challenge, recent debates in United Nations fora do not give cause to expect the emergence of a consensus in that regard in the near future. That is partly because the connotations which different parties have sought to attach to terms such as "humanitarian", "intervention" and "sovereignty" have been highly divergent and, for the most part, quite unhelpful. Moreover, there has been little effort to tease out, or even identify clearly, the issues that are at stake. And even when the issues have been squarely addressed the positions that countries have endorsed have often lacked sufficient detail or nuance. This lack of conceptual clarity was particularly evident in the General Assembly's debates in late 1991 over the need for improved international measures for the provision of "humanitarian assistance". Any attempt to comprehend the current state of play must take proper account of the issues raised in the context of those discussions.

The debate took place on the basis of a comprehensive report prepared by the Secretary-General dealing with "all aspects of the handling of emergency situations, including early warning, prevention, preparedness and stand-by capacity, consolidated appeals and strengthened coordination and leadership".[249] While the report made it clear that it was concerned with man-made as well as natural disasters, it did not identify or address specific situations. Nevertheless, it was apparent from contributions made during the Assembly's debate that the range of situations on the agenda was very extensive. Thus, at one end of the scale, references were made to "classic" natural disasters such as the eruption of Mount Pinatubo in the Philippines, floods in Bangladesh, and tropical cyclones in the Caribbean. At the other end, the situation in the Balkans, the civil war in Liberia, the overthrow of the democratically elected government in Haiti, the refugee exodus from Albania and the civil war in Somalia were all addressed. By the same token, various Western delegations made it clear that the situation in post-war Iraq was especially prominent among their concerns.[250]

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248 Ibid, p 131.

249 "Report of the Secretary-General on the review of the capacity, experience and coordination arrangements in the United Nations system for humanitarian assistance", UN doc A/46/568 (1991).

250 For example: UN doc A/46/PV.6 (1991), p 92 (Mr Dumas, France); UN doc A/46/PV.39 (1991), p 12 (Mr van Schaik, the Netherlands); UN doc A/46/PV.41 (1991), p 51 (Mr Moore, USA).

While in principle the concept of humanitarian intervention was not on the agenda, in practice it was a dominant concern. The vast majority of Third World States took the opportunity to express their opposition to any form of forceful intervention in the affairs of a State, on the grounds of humanitarian concerns. The "right to intervene" was explicitly rejected by various States.[251] In doing so Cuba argued that "respect for the sovereignty of States is absolute" and that offering humanitarian relief in situations of political emergencies would open the way to "arbitrary and unilateral interventionist interpretations".[252] Mexico used almost identical terms in its condemnation of the notion.[253] Malaysia also referred in this connection to "the rights of States" as "a principle that must always be maintained".[254]

At the other end of the spectrum, Belgium argued in favour of a widely drawn right to humanitarian intervention; "the international community must help States to respect human rights, and force them to do so if need be".[255] While the Belgian proposal noted the desirability of using non-forcible means and also suggested procedural guarantees to reduce the likelihood of abuse of power by the intervening forces, the proposal envisaged not only forcible intervention by the United Nations but also by a State acting unilaterally: "In certain extremely urgent and flagrant cases, a State should be allowed to intervene on its own initiative to protect human rights".[256] The German Foreign Minister was much less specific but no less willing to countenance intervention. "When human rights are trampled under foot," he told the Assembly, "the family of nations is not confined to the role of spectator. It can – it must – intervene."[257]

Other Western nations were more nuanced in the positions they took. The Netherlands (on behalf of the European Community) and Malta both confined their remarks on these issues to the possibility of intervention in situations in which Governments were obstructing emergency aid.[258] France, having taken the lead in earlier discussions of the right to intervene, clearly felt the need to reassure other nations that its primary agenda was not at all interventionist. Its representative noted that:

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251 Eg China, UN doc A/46/PV.39 (1991), p 22 (Mr Jin Yongjian); Pakistan, UN doc A/46/PV.41 (1991), p 24 (Mr Marker); Tunisia, ibid, p 28 (Mr Ghezal); Iraq, UN doc A/46/PV.42 (1991), pp 43–44/45 (Mr Mohammed).

252 UN doc A/46/PV.42 (1991), p 33 (Mr Fernandez de Cossio Dominguez).

253 UN doc A/46/PV.39 (1991), pp 37–38 (Ms Dieguez Armas).

254 UN doc A/46/PV.41 (1991), p 86 (Mr Razali).

255 UN doc A/46/PV.27 (1991), p 52 (Mr de Keersmaeker, reading a speech prepared for delivery by the Belgian Minister for Foreign Affairs).

256 Ibid, p 54.

257 UN doc A/46/PV.8 (1991), p 29/30 (Mr Genscher).

258 UN doc A/46/PV.39 (1991), p 13 (Mr van Schaik, Netherlands); and UN doc A/46/PV.42 (1991), p 27 (Mr Camilleri, Malta).

> Humanitarian action respects sovereignty and State authority. It can in no way be used to intervene in affairs that are essentially under the authority of the nation. ... [H]umanitarian assistance should be a subsidiary action that is never taken unilaterally.[259]

Canada spoke in similar terms.[260]

(b) Defining the key terms

Anyone reading the debates of the Security Council and the General Assembly in relation to these issues cannot help but be struck by the frequency with which reference is made, by delegations with radically opposed viewpoints, to the importance of acting in a "humanitarian" manner and upholding state "sovereignty", and avoiding unwarranted "intervention". But it is equally apparent that each of these three terms is being used with such a degree of imprecision that, as a result, very little light is shed on their meaning in either legal or practical terms. While it is far beyond the scope of the present analysis to attempt even a rudimentary overview of the current status of each of these concepts, it is instructive to suggest several propositions that should be kept in mind in the context of the future evolution of this general debate.

The first is that the content of each of the concepts is closely related to that of the others. If the permissible limits of intervention are adjusted, then the limits of state sovereignty are affected accordingly. If the definition of what amounts to "humanitarian" action or assistance is expanded then that too may have implications both for what is deemed intervention and for what governments in the legitimate exercise of sovereignty may seek to resist.

The second proposition is that the concept of "sovereignty" (in terms of its external rather than its internal, or popular, dimensions) is by no means possessed of an immutable or unchanging content.[261] Rather than being a concept all of whose contours have been definitively mapped out in any international legal instrument such as the UN Charter or the Declaration on Friendly Relations,[262] its shape is susceptible to change over time, reflecting the evolution of both moral and legal thinking.[263] While principles of legal personality, political independence, jurisdiction over territory, and so on, are all

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259 UN doc A/46/PV.39 (1991), p 72 (Mr Kouchner).

260 UN doc A/46/PV.41 (1991), p 13 (Mr Fortier).

261 Beitz, "Sovereignty and Morality in International Affairs", in Held D (ed), *Political Theory Today* (1991), p 236 at p 243.

262 The Declaration on Principles of International Law concerning Friendly Relations and Co-operation Among States in accordance with the Charter of the United Nations, GA Res 2625 (XXV) (1970), contains a separate section entitled "The Principle of Sovereign Equality of States".

263 See generally Krasner, "Sovereignty: An Institutional Perspective", (1988) 21 Comparative Political Studies 86; Walzer, "The Moral Standing of States: A Response to Four Critics", (1980) 9 Philosophy and Public Affairs 212; and Beitz, "Cosmopolitan Ideals and National Sentiment", (1983) 80 Journal of Philosophy 591.

reflected in the international legal notion of state sovereignty, the precise boundaries of each of these principles is subject to change.

The third proposition is that the emergence of additional international obligations is the principal means by which the boundaries of these different concepts are adjusted. It is especially revealing in this regard to recall the debates that took place in San Francisco in 1945 when the drafters of the UN Charter were confronted with significant pressures to define what was meant by the term "sovereign equality", which was ultimately to become the first of the Principles recognised in the Charter.[264] Among the four elements of the term, that were carefully and deliberately recorded in the *travaux préparatoires* was the obligation to "comply faithfully with its international duties and obligations".[265] While obligations are usually freely accepted, duties may be imposed by the collective provided that the proper procedures for doing so are followed (ie action in conformity with the Charter itself).

It is thus consistent with this approach to accept the strong reassurances proffered by many states participating in the 1991 General Assembly debate as to the compatibility of respect for sovereignty with the need to contemplate forcible intervention for humanitarian purposes. Such reassurances are thus not necessarily to be read as precluding the pursuit of a definition of "sovereignty" which obligates a State to "facilitate assistance when the urgency of the needs make assistance necessary, including in cases of internal strife", to use the carefully chosen words of the representative of the International Committee of the Red Cross.[266]

The fourth proposition is that the sense in which the term "humanitarian" is being used in many of these debates is badly in need of clarification. The meaning attributed to it tends to range across the following spectrum: (a) action of almost any kind which is motivated not by any political agenda, nor mandated by any formal obligations, but rather undertaken for reasons of altruism; (b) the provision of emergency assistance in the supplies of food, water, shelter and essential medicines to the victims of natural (and perhaps also man-made) disasters; (c) the upholding of the provisions of international humanitarian law as reflected in the Geneva Conventions of 1949 and the Additional Protocols thereto of 1977; and (d) the upholding of both humanitarian law and international human rights law (the latter encompassing, as a minimum, the key civil and political rights provisions of the Universal Declaration of Human Rights). While the confusion thus generated is perhaps not always unintended, it

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264 The first part of Article 2 of the UN Charter states:

> The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following principles.
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> 1. The Organization is based on the principle of the sovereign equality of all its Members.
>
> ...

265 Russell and Muther, note 148 above, p 672.

266 UN doc A/46/PV.42 (1991), p 60 (Mr Fallet).

does have the effect of ensuring that much of the relevant debate is poorly focused and unlikely to lead to any clear conclusions being drawn. This is turn may well be intentional, based on the assumption that a clear question will lead to a clear answer, almost certainly in the negative, thus nullifying any prospects of a rapid and progressive evolution of the principles of international responsibility.

But whatever the exigencies of such political and diplomatic negotiations, there will soon come a time when appropriate distinctions need to be drawn between situations such as that in Somalia, involving massive death from starvation and the denial of needed medical supplies, and those such as that in the southern marshes of Iraq, involving "blatant violations of human rights" in the form of "military attacks against the civilian population".[267] To begin with, the type of humanitarian assistance required in the former situation is significantly different from that required in the latter, even though there may be similarities in some respects. The international legal provisions on which appropriate measures are to be based will be different. And, the principles of negotiation and compromise will be more acceptable in some situations than in others. None of this is to suggest that the two types of situations are necessarily different in every way or that the same general principles will never apply. The point is simply that efforts to clarify the appropriate limits of international action will need to move beyond a generalised discussion of "humanitarian assistance" as though that term encompassed the full panoply of measures being advocated by different states and to focus on specific types of measures that might be contemplated.

The fifth and final proposition to be made in this context is that, despite their inter-relatedness, effective humanitarian measures need not have any significant implications for sovereignty or require any form of intervention. There has been, as noted at the outset of this article, a tendency to assume that if the international community is to take a quantum leap in terms of the effectiveness of its responses to emergency situations (broadly defined), the use of force of some kind will almost inevitably be required. Yet one of the purposes of the present article has been to demonstrate that the procedures that are already in place for responding to human rights violations could be greatly strengthened and made more effective if the political will existed.[268] The reason for not opting for this approach relates to the perceived risk that such improved procedures might prove to be applicable in situations in which those who support them today might prefer a very different approach in relation to other situations tomorrow. The safer, but in regime terms far less satisfactory, alternative is to advocate forcible measures which, almost by definition, will be taken on an *ad hoc* basis and remain more readily under the control of their proponents.

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267 This is the description used by the Special Rapporteur on Iraq in his August 1992 report to the General Assembly. UN doc A/47/367, para 11.

268 For an indication of some of the measures that could be taken see Alston, note 51 above.

4. Defining Acceptable Criteria and Procedures

Immediately after the conclusion of the armed enforcement action in the Gulf, the UN Secretary-General, Javier Pérez de Cuellar, listed three "basic requirements for international law to become more effective in governing international relations". They are: (1) "it must not stagnate but must keep pace with change in the conditions of international life"; (2) "it must evoke a shared understanding and it must be seen to derive from the morality of international behaviour"; and (3) "it must not be applied selectively".[269] His unstated quest was for criteria which might enable the international community to become more "interventionist", while doing so in ways which would not be seen as arbitrary, selective, or unjustified. A little over a year later, his successor, Boutros Boutros-Ghali, posed a closely related question, but expressed it in rather more specific terms. Having noted that there are some disputes that "compel [the] attention" of the international community, he observed:

> We will need new standards of judgement: When does chaos in one country threaten a more general breakdown of order? When do acts of oppression transgress the bed-rock moral standards which humanity holds in common? And, when would a regional conflict, unless rightly resolved, tend to undermine the foundations of the international system?[270]

Without purporting to offer any answers, the Secretary-General went on to note that if "the very existence of [a State] is threatened, it affects all States". He also noted, in the same context, that "the rights of minorities must be given greater weight".[271] In addition to the two Secretaries-General, various state representatives have called for the adoption of such criteria. Thus, for example, in the 1991 Assembly debates, the Soviet representative urged the formulation of a body of "principles and norms of humanitarian solidarity".[272] Uruguay also called for the adoption of new international legal instruments,[273] while Malta suggested "the negotiation of ground rules with respect to timing and modality of access and continuous discussions with all parties concerning cross-border or cross-line assessment of needs, delivery of assistance, and international monitoring".[274] At the Security Council's special high-level meeting in January 1992, Zimbabwe called for "a careful drawing up and drafting of general principles and guidelines that would guide decisions on when a domestic situation warrants international action, either by the Security Council or by

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269 "Secretary-General's Address at University of Bordeaux", note 92 above, p 2.

270 UN Press Release SG/SM/1356, 10 September 1992, p 2.

271 Ibid, p 3.

272 UN doc A/46/PV.39 (1991), p 31 (Mr Lavrov).

273 UN doc A/46/PV.42 (1991), pp 6-7 (Mr Ehlers).

274 Ibid, p 27 (Mr Camilleri).

regional organizations".[275] It was suggested that the Council could entrust that task to the Secretary-General.

But despite the growing recognition of the need to formulate appropriate criteria or standards, very few attempts have been made to do so.[276] During the debate in the Security Council on resolution 688 France was alone in putting the proposition that human rights violations, in and of themselves, warranted a response by the Security Council. It was also the only state to explore the criteria that might be used in applying such a principle.

It stands to reason that no state would ever endorse such a proposition without seeking to add an appropriate qualification as to the type of violations that would suffice in order to trigger Council involvement. The prospect of the Council being able to react to any violation, no matter how minor or isolated, would not be welcomed by any informed observer. For this reason, the test proposed by France is worthy of note. Its representative first laid the groundwork by arguing that the Council "would have been remiss in its task had it stood idly by, without reacting to the massacre of entire populations, the extermination of civilians, including women and children".[277] The test to be applied was then stated in the following terms:

> Violations of human rights such as those now being observed become a matter of international interest when they take on such proportions that they assume the dimension of a crime against humanity.[278]

The most obvious problem with such a criterion is that, while it might perhaps be appropriate to describe the threshhold that is required to be attained in order to warrant action by the Security Council, it is patently unacceptable in relation to the mere expression of "international interest" in human rights violations.[279] It is now generally accepted that such expressions of international interest or concern are are appropriate in response to almost any case or situation involving human rights violations. Thus, if the French test were applied in relation to such actions it would contradict those assumptions to such an

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275 UN doc S/PV.3046 (1992), p 131 (Mr Shamuyarira).

276 Although, see Dupuy RJ, "L'action humanitaire", in Delissen A and Tanja G (eds), note 9 above, p 67 at 75 (calling for the elaboration of a general framework convention ("une convention-cadre de portée générale") which would contain only general obligations in relation to the provision and receipt of humanitarian aid. It would be supplemented by bilateral and regional accords which would be adapted to reflect the specific needs of the signatory states.)

277 Ibid, p 53 (Mr Rochereau de la Sablière).

278 Id.

279 Two trustees of the International League for Human Rights muddied the same waters in a letter to the editor of the *New York Times* in which they criticized President Bush's concern not to interfere in Iraq's internal affairs and concluded by noting that "[t]he Allies' punishment of Hitler's crimes against humanity at Nuremberg established that a government's gross violations of its own citizens' rights is far more than an internal affair". *New York Times*, 14 April 1991, p 14.

extent[280] that the matter, while needing to be flagged, is not worth pursuing in this context. But the question that remains is whether the proposed criterion is an appropriate one to trigger Security Council involvement. It may be noted that the question only arises if we are seeking to recognize that the Council is competent in situations which, although involving rights violations, do not otherwise constitute a threat to international peace and security. Otherwise, there would be no point in trying to establish a new, more inclusive, set of criteria.

Perhaps the major objection to accepting the "crimes against humanity" criterion is the difficulty which the international community has had for over four decades in defining the term. It seems unlikely, at least for the next few years, that a consensus will emerge from the work that has been done by the International Law Commission on a "draft code of crimes against the peace and security of mankind".[281] At the conclusion of the first reading, in 1991, the Commission's draft referred to "systematic or mass violations of human rights".[282] In its Commentary on that provision of the draft, the Commission sought to define the key terms "systematic" and "mass":

> ...[A]cts covered by the draft Code must be of an extremely serious character ... . The systematic element relates to a constant practice or to a methodical plan to carry out such violations. The mass-scale element relates to the number of people affected by such violations or the entity that has been affected.[283]

The Commission went on to note that the satisfaction of either criterion would be sufficient for a crime to have been committed, but added that isolated acts, "no matter how reprehensible", would not be covered by the draft Code.[284] The formulation drew very few comments from the Sixth Committee in its

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280 See for example Marie and Questiaux, "Article 55(c)", in Cot and Pellet, note 175 above, pp 863–84; and Schachter, note 177 above.

281 See eg the recent reports by the ILC's Special Rapporteur, Mr Doudou Thiam: ninth report, UN doc A/CN.4/435 and Add.1 (1991); and tenth report, A/CN.4/442 (1992).

282 The relevant part of the draft of article 21 provides that a crime, as defined by the Code, has been committed by:

> An individual who commits or orders the commission of any of the following violations of human rights:
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> – murder
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> – torture
>
> – establishing or maintaining over persons a status of slavery, servitude or forced labour
>
> – persecution on social, political, racial, religious or cultural grounds
>
> in a systematic manner or on a mass scale; or
>
> – deportation or forcible transfer of population.
>
> *Report of the International Law Commission on the Work of its Forty-Third Session*, UN doc A/46/10 (1991), Ch IV. D.2., art 21.

283 Ibid, para 3.

284 Ibid.

debates in 1991.[285] Although, the first reading text as a whole did attract a predictable range of comments about the need for caution and prudence in the further development of the draft.[286]

But despite the general importance of this work, it would not seem to be especially helpful for the purpose of providing a ready-made set of criteria for use by the Security Council in a related, but nonetheless significantly different, context. A further objection is that, in some contexts at least, the phrase "crimes against humanity" is confined to activities such as genocide, aggression and colonial domination. If used in that rather narrow sense it would be insufficient to warrant action by the Council in many instances in which criteria such as those used by the UN Commission on Human Rights ("a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms")[287] would clearly be satisfied. That might, of course, have been precisely the intention of the representative of France, but in that case the precedent that France seeks to establish is very considerably less extensive than the criteria put forward in other contexts in relation to the "duty to intervene".

But if the French proposal does not seem capable of resolving the issue, the question that remains is whether it is possible to define criteria or guidelines that might be useful? Despite the support expressed by various states for the idea of identifying criteria and perhaps even putting them in the form of an international instrument, the reality is that it will be very difficult to formulate, let alone obtain agreement on, any such list. This is partly a function of the extraordinarily diverse range of situations likely to arise and partly of the strong reluctance on the part of some states to embark upon any such enterprise. Moreover, it is usually easier, both politically and practically, to proceed with the development of precedents on a step by step basis, under the pressure of specific emergency situations, than to tackle the overall set of issues in the abstract. Thus, in the short term at least, it may be more productive to seek to identify a few general guidelines, of a largely procedural nature, for the Council to take into account.

Such general guidelines would appropriately be based on the statement, emanating from the Council's high-level, January 1992 meeting, to the effect that "humanitarian" sources of instability (which, in this context, would appropriately be interpreted as including massive human rights violations) "have become threats to peace and security".[288] This approach leaves the Council the option of addressing human rights situations directly and not only in so far as they arise in a secondary manner in the context of other situations. It would not, however, involve the abandonment of the requirement that, in order to qualify for consideration by the Council, any such matter should amount to a situation,

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285 "Topical summary of the discussion [on the ILC's Report] held in the Sixth Committee of the General Assembly during its forty-sixth session, prepared by the Secretariat", UN doc A/CN.4/L.469 (1992), paras 176-78.

286 Ibid, paras 98-104.

287 Economic and Social Council Res 1503 (XLVIII) (1970), para 1.

288 UN doc S/23500 (1992), p 3.

"the continuance of which is likely to endanger the maintenance of international peace and security".[289]

In interpreting this requirement, it should not be assumed that any situation whatsoever, provided only that it has some demonstrable human rights dimension, should be able to be brought before the Council. If only for reasons of conformity with the terms of the UN Charter this requirement should not be deprived of it significance through the making of a blanket assumption that any human rights violation amounts to a potential threat to peace and security. It is readily apparent that it would not normally be justifiable to seek to apply such a characterisation to, for example, a situation involving a number of isolated instances of comparatively mild violations of human rights. It would seem appropriate for the Council in making any such characterisation to seek to ensure: (1) that some basic division of labour, in terms of institutional competences, is maintained, at least to the extent that it is productive; (2) that the Council is not swamped with so many human rights situations that is unable to deal effectively with any of them; (3) that the Council is potentially able to achieve something that other UN organs are not; and (4) that opportunities for the abuse of any such procedure are somehow minimised.

But if the Council were to begin to address certain human rights situations, almost as a routine matter, how could it justify such a relatively radical departure from the position that it has tended to adopt for the first 45 years of its existence? The justification is, in fact, relatively straightforward. It is premissed on the fact that international human rights norms have gained far greater acceptance by states in recent years than was the case in the Council's early years. In addition, it reflects a now widespread acceptance of the linkage between human rights violations and the maintenance of world order. Various factors account for this new reality, including: the communications revolution (including what might be called "the CNN factor" – ie global television news coverage that reports actively and vividly on human rights violations that were once almost guaranteed to remain well kept secrets); a greatly heightened sensitivity to human rights violations and a growing intolerance of them (due, at least in part, to the consciousness-raising endeavours of non-governmental organisations); and a degree of global interdependence that ensures the relevance of violations in the context of aid, trade, technology transfer, environmental and other forms of cooperation and international interaction in general.[290] The new reality was well captured by Secretary-General Boutros-Ghali in his first major address to the Security Council:

> [The misuse of State sovereignty] may undermine human rights and jeopardize a peaceful global life. Civil wars are no longer civil, and

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289 UN Charter, Article 33(1).

290 This proposition is already reflected in international relations in the 1990s, even in the absence of the formal acceptance of human rights conditionality. See generally Alston, "Revitalising United Nations Work on Human Rights and Development", (1991) 18 Melb ULR 216, at 243–44.

> the carnage they inflict will not let the world remain indifferent The narrow nationalism that would oppose or disregard the norms of a stable international order and the micro-nationalism that resists healthy economic or political integration can disrupt a peaceful global existence.[291]

In other words, recognition of the linkage between human rights violations on the one hand and threats to peace and security on the other is no longer merely a reflection of the optimism of human rights advocates, but has become an accepted part of the mainstream wisdom. Under such circumstances, there is clear justification for the Security Council to concern itself with human rights matters in a way, and to an extent, that was inconceivable only a few years ago.

The practical implications of the adoption of this new approach by the Council need not be particularly dramatic. It has long been recognised that the Council's discretion in determining the existence of a threat to the peace was largely unfettered and that an element of subjectivity in the making of such judgments was unavoidable.[292] For those very reasons, attempts to specify a threshhold of gravity that must be reached before the Council would involve itself are difficult, if not impossible, to achieve. Neither quantitative nor qualitative minimum requirements are likely to be adequate (eg more than one thousand people dead) since, to take some hypothetical examples, the pre-meditated, cold-blooded, killing of a far smaller group might be sufficient to warrant action, as might large-scale torture or other acts of inhumanity involving no killings. Perhaps the only useful threshhold will be a basic and undefined requirement that the violations in question be "massive", "gross and persistent", "extremely serious" or attain some other such level of seriousness.[293] What will be important, instead, is for the Council to seek to achieve a rough degree of consistency from one situation to another.

Beyond that very general guideline, procedural safeguards will assume some significance. Thus the Council might develop a system whereby the Secretary-General or the principal human rights bodies are accorded important roles in drawing the Council's attention to situations deserving of its attention. This approach is entirely consistent with the proposal made by Boutros-Ghali in his first Annual Report in which he suggested that ways be explored "of

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291 UN doc S/PV.3046 (1992), p 9.

292 Goodrich, Hambro, and Simons, note 146 above, p 293 ("[A] measure of discretion is always involved in evaluating the facts of a situation, and the lack of any definition ... leaves considerable room for subjective political judgments."); and Cohen-Jonathan, "Article 39", in Cot and Pellet, note 175 above, p 655 ("Even in a case where the conflict is entirely internal to the state concerned, and where justificatory efforts in relation to international tensions are far from convincing, there is nothing to stop the Council majority from finding a threat to the peace". My translation).

293 For an illustration of the difficulty of moving beyond such general statements by seeking to make the application of such criteria "objective", consider the difficulties inherent in the approach proposed by the International Law Commission, note 285 above.

empowering the Secretary-General and expert human rights bodies to bring massive violations of human rights to the attention of the Security Council together with recommendations for action".[294]

The reference to "expert human rights bodies", if interpreted as referring to bodies composed of experts (as opposed to governmental representatives), would embrace the Sub-Commission on Prevention of Discrimination and Protection of Minorities and each of the six treaty-based expert supervisory bodies.[295] The Chairpersons of the latter bodies chose to interpret the reference in that way at their biennial meeting in October 1992 and endorsed the proposal by urging their own committees "to take all appropriate measures in response to such situations".[296] It would also seem appropriate for the Commission on Human Rights to be treated as an expert human rights body for this purpose.

Although these bodies have no direct or immediate line of communication with the Security Council they could transmit their suggestions direct to the Secretary-General with a request that he or she relay them on to the Council. For this purpose, as well as for transmitting his or her own recommendations, the Secretary-General would be fully justified in invoking article 99 of the UN Charter according to which he or she "may bring to the attention of the Security Council any matter which in his [or her] opinion may threaten the maintenance of international peace and security". While this provision has to date been under-utilised by successive Secretaries-General,[297] there is a growing acceptance of the view that a different approach ought to prevail in future.[298]

There should be a requirement that "massive violations" would only be brought to the Council's attention in this way in situations in which other potentially effective measures have been exhausted (in practical rather than legal terms), or there is a clear reluctance to act on the part of the appropriate UN organ. In addition, the determination that a threat to peace and security exists would, in any event, remain entirely the prerogative of the Council, as would its decision to take action or not.

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294 *Report of the Secretary-General on the Work of the Organization*, note 8 above, para 101.

295 They are: the Human Rights Committee; the Committee on Economic, Social and Cultural Rights; the Comittee on the Elimination of Discrimination against Women; the Comittee on the Elimination of Racial Discrimination; the Committee against Torture; and the Committee on the Rights of the Child.

296 "Report of the Fourth Meeting of the Chairpersons of the Human Rights Treaty Bodies, Geneva, 12-16 October 1992", (advance version of report to be issued as a document of the 47th General Assembly), para 42.

297 Smouts, "Article 99", in Cot and Pellet, note 175 above, p 1317.

298 It is noteworthy in this regard that the Non-Aligned Movement's Jakarta Summit Declaration urged that the Secretary-General "should be enabled to exercise" his Article 99 mandate and, for that purpose, should be provided "with adequate means to undertake activities expeditiously and effectively, particularly in the maintenance of peace and security". NAM doc NAC 10/Doc.1/Rev.1 (1992), para 34.

It would thus be inappropriate to assume that enforcement measures under Chapter VII, whether in the form of sanctions, military measures or something else, would almost inexorably follow once the Council had taken cognisance of a situation involving gross violations of human rights. It that were necessarily the case then there would be considerably more justification for the Council's existing reluctance to bite the human rights bullet. In fact, however, there are many lesser steps that the Council might take and still make a contribution that either cannot be, or is at least highly unlikely to be, made by the General Assembly or the Commission on Human Rights.

In this regard, it is essential that those who wish to reform the Security Council to enable it to respond to massive violations of human rights, and to take advantage of changing political and humanitarian perceptions, should keep in mind the debates in San Francisco over the nature of the role to be accorded to the Council within the family of nations. The role of global "policeman" was clearly and strongly rejected as being both undesirable and unworkable. Instead, its role was seen more in terms of an executive committee of states, seeking to manage global interdependence.[299] There is no justification, even in the dramatic events of recent years, for any reversal of the way in which that role is conceived. It remains the case that while an armed enforcement role might occasionally be warranted, it will risk being counter productive in a great many situations. Moreover, the proponents of a more aggressive approach to the use of force by, or under the auspices of, the Security Council have still not provided answers to the hard questions concerning the need for adequate safeguards against arbitrary or otherwise unwarranted measures by a body whose core composition remains singularly unrepresentative.[300] Acceptance of a much greater involvement by the Security Council in response to human rights violations need thus not be predicated upon a fundamental change in the Council's essentially non-military role in world affairs.

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299 For a discussion of these opposing conceptions in the context of the San Francisco conference see Russell and Muther, note 148 above, p 666.

300 For a brief but persuasive analysis along similar lines see Conforti, "Non-coercive Sanctions in the United Nations Charter: Some Lessons From the Gulf War", (1991) 2 Eur J Int'l L 110.

Annex

RESOLUTION 688 (1991)

Adopted by the Security Council at its 2982nd meeting, on 5 April 1991

The Security Council,

Mindful of its duties and its responsibilities under the Charter of the United Nations for the maintenance of international peace and security,

Recalling Article 2, paragraph 7, of the Charter of the United Nations,

Gravely concerned by the repressions of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish populated areas which led to a massive flow of refugees towards and across international frontiers and to cross border incursions, which threaten international peace and security in the region,

Deeply disturbed by the magnitude of the human suffering involved,

Taking note of the letters sent by the representatives of Turkey and France to the United Nations dated 2 April 1991 and 4 April 1991, respectively (S/22435 and S/22442),

Taking note also of the letters sent by the Permanent Representative of the Islamic Republic of Iran to the United Nations dated 3 and 4 April 1991, respectively (S/22436 and S/22447),

Reaffirming the commitment of all Member States to the sovereignty, territorial integrity and political independence of Iraq and of all States in the area,

Bearing in mind the Secretary-General's report of 20 March 1991 (S/22366),

1. *Condemns* the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish populated areas, the consequences of which threaten international peace and security in the region;

2. *Demands* that Iraq, as a contribution to removing the threat to international peace and security in the region, immediately end this repression and expresses the hope in the same context that an open dialogue will take place to ensure that the human and political rights of all Iraqi citizens are respected;

3. *Insists* that Iraq allow immediate access by international humanitarian organizations to all those in need of assistance in all parts of Iraq and to make available all necessary facilities for their operations;

4. *Requests* the Secretary-General to pursue his humanitarian efforts in Iraq and to report forthwith, if appropriate on the basis of a further mission to the region, on the plight of the Iraqi civilian population, and in particular the Kurdish population, suffering from the repression in all its forms inflicted by the Iraqi authorities;

5. *Requests* further the Secretary-General to use all the resources at his disposal, including those of the relevant United Nations agencies, to address urgently the critical needs of the refugees and displaced Iraqi population;

6. *Appeals* to all member States and to all humanitarian organizations to contribute to these humanitarian relief efforts;

7. *Demands* that Iraq cooperate with the Secretary-General to these ends;

8. *Decides* to remain seized of the matter.