

Eclipsing Sovereignty:
The Legitimacy of Humanitarian Intervention¹

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"We were so riveted to the problem of sovereignty..., but a country's sovereignty doesn't give it the right to do what was happening in the Sudan."

-US Official²

In the wake of recent humanitarian crises and varying international responses to such situations, the debate with respect to international intervention on humanitarian grounds has grown dramatically.³ There are calls for more intervention while, at the same time, many of those who might be targets of intervention have raised the specter of sovereignty, claiming "domestic jurisdiction" for their genocidal acts. While there is increasing international support for interventions to respond to a variety of humanitarian crises, the issue of the legitimacy of such actions by the United Nations or other bodies has not been fully articulated.

This paper is an attempt to establish a legitimate basis for humanitarian intervention in a world of nominally sovereign states. I do this from two perspectives. First, I examine the legal discussions regarding such intervention, and I argue that a norm of justified intervention can be found in the UN Charter, the Universal Declaration of Human Rights and human rights covenants, as well as developing practice. Second, I examine the moral legitimacy of such actions. Specifically, I argue that beyond whatever basis may be present in international law for human

¹This paper is a significantly rewritten excerpt from my dissertation entitled *The New Sovereignty: The Changing Humanitarian Agenda in the Emerging Global Order*. Previous versions benefitted from comments from Gil Loescher, George Lopez, Bob Johansen, and Sharon O'Brien. Further, I am particularly indebted to the individuals at the UN High Commissioner for Refugees, International Committee of the Red Cross, and other organizations in Geneva who generously provided me with their time and insights on the issues addressed here in October and November 1993. They are cited anonymously in the text because while some people were comfortable with being identified, others were less so. The research for this article was partially supported by a Zahn Research Travel Grant from the Graduate School of the University of Notre Dame.

²Director of US Office of Foreign Disaster Assistance, quoted in *Internally Displaced in Africa*, (Washington, DC: Refugee Policy Group): 37.

³The bibliography provides a comprehensive overview of the recent humanitarian intervention literature.

rights and intervention to protect those rights, one can find a foundation for such rights in the very nature of the state system. Further, I argue that sovereignty cannot be a basis to prevent humanitarian intervention because the responsibilities which accrue to states mean that human rights must be seen as a part of the definition of sovereignty, rather than in opposition to it. In addition, within the concept of sovereignty, there is not only a right for the international community to violate international boundaries on behalf of human rights, but an obligation to do so. This derives from a reconceived notion of the relationship between the individual and the international community which has begun to evolve in recent years.

What is required, in other words, is to break free from what Camilleri and Falk call the "sovereignty discourse," which they characterize as "a way of describing and thinking about the world in which nation-states are the principal actors, the principle centres of power, and the principle objects of interest."⁴ It creates the illusion that the current array of power and authority is natural and acts "as a 'fundamental source of truth and meaning'"⁵ for discussion of power and rights and legitimacy. The focus of the discussion needs to move from states as objects of intervention and their right not to be intervened in, toward the subjects of humanitarian action -- people -- and their rights outside any narrow view of state sovereignty as well as their place within the broader international community. I argue that moving away from the sovereignty discourse where states are the final arbiters of rights involves reconceptualizing sovereignty to include human rights such that states or the international community cannot ignore abuses of those rights.

I thus conclude that a legitimate basis for multilateral humanitarian intervention can be found both within international law and recent practice, and a moral geography which transcends international legal norms.

⁴Joseph A. Camilleri and Jim Falk, *The End of Sovereignty?: The Politics of a Shrinking and Fragmenting World*, (Brookfield, VT: Ashgate Publishing Company, 1992): 2.

⁵*Ibid.*, p. 11.

Access and Intervention

Intervention in the emerging global order is a multi-faceted phenomena. At its core are transborder forceful efforts to influence a government or the outcome of an internationally-relevant situation, regardless of whether a government is involved. It can include activities such as overthrowing a government or annexing territory by force. However, it can also include more ambiguous forceful action which may involve government acquiescence or resistance, may include the acquiescence or resistance of a rebel group, and is done by a state or international governmental organization, to address a security or humanitarian problem in a particular territory (recognizing, of course, that the two frequently cannot be separated). *Humanitarian* intervention involves a situation where the humanitarian aspects are the primary factors in the decision to intervene and are the main focus of the action, including action within the traditional security realm which may mitigate the humanitarian situation.

Outside of the strict realm of intervention, one can point to the concept of humanitarian access. This includes instances where the UN or aid organizations negotiate with governments to gain access to affected populations in the midst of civil wars or other humanitarian emergencies, or where humanitarian access is obtained without the consent of a government, with no military component in both cases. The distinction between the two is important. First, it is only state or state organizations which have the resources to undertake interventions, while a wide variety of actors can engage in humanitarian access activities. Second, the legal basis for humanitarian access is somewhat different than that for intervention. Third, the different nature of the two activities has implications for how they may be conceptualized within discourses about sovereignty.

One significant question is the extent to which peacekeeping activities might fall under the rubric of intervention. Certainly traditional peacekeeping operations would not since the basic premise is that all parties to a conflict have accepted the peacekeepers' presence. Further, the military component of traditional peacekeeping has been relatively small. However, there have been instances recently where peacekeepers have found themselves in rather ambiguous situations where not all parties have accepted their presence, where they have come under significant attack

by one or more of the parties to a conflict, or where the mandate of the peacekeeping operation has been gradually changed to include increasingly more enforcement (that is military) activities. At this point, such as in the cases of Somalia and the former Yugoslavia, the line between peacekeeping and intervention becomes significantly blurred, and the international community is drawn into interventionary activity whether it had intended it or not.

Intervention: The Legal Framework

The legal status of humanitarian intervention is contested. However, one can say at the beginning that, in general, intervention violates most interpretations of customary as well as codified international law. The basis of this prohibition is the recognized status of states as sovereign. That is, states are regarded as the primary unit of organization and political integrity in international affairs. International law is concerned, essentially, with interactions between states, and what happens inside a state, including the treatment of nationals within their state, is outside of the purview of international law. As will be discussed below, one may be able to find exceptions to this rule; it is, nonetheless, a commonly accepted rule. Yet, individuals are also increasingly becoming subjects of international law,⁶ with a concomitant relative decline in the stature of states.

As opposed to earlier times when the use of force in international affairs was regarded as a state's right, there has evolved a general presumption against the use of force. This presumption that the use of force is unacceptable was codified in the Charter of the United Nations, article 2(4) of which states: "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." This does not address economic coercion which, as long as it did not include military activity such as a blockade, would presumably be legal.⁷ However, since most conceptions of, and indeed actual actions of,

⁶Jarat Chopra, "The New Subjects of International Law" *Brown Foreign Affairs Journal* (Spring 1991): 27-30.

⁷Other documents, such as the Charter of the Organization of American States, specifically include economic interference. Article 15 of the OAS Charter states: "No State or group of States has the right to intervene directly or

intervention include military activity, article 2(4) would seem to outlaw unilateral or bloc intervention. Article 51 of the Charter codified another principle of international law which allowed the use of force by a state in self-defense. Article 2(7) proscribes most intervention by the United Nations:

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.

Within this paragraph, however, are two phrases which raise flags regarding the legality of UN action. First, there is the problem of deciding exactly what falls under the domestic jurisdiction of a state. Generally, it has been assumed that just about anything which does not go beyond a state's border is within the exclusive jurisdiction of the state. This includes form of government, economic arrangements, and the way a government treats its people. Falk denies that states have actually exercised the autonomy which is generally attributed to states:

[I]n fact, the domestic order has never enjoyed autonomy in any strict sense. It is now commonplace to accept the interdependence of economic, cultural, and military affairs. In fact, nations have always had a vital concern with what goes on elsewhere, even if elsewhere is a foreign state. Sovereignty only confers a primary competence upon a nation; it is not, and never was, an exclusive competence.⁸

This primary competence would, presumably, include whatever is essentially domestic, as opposed to what might affect another state. Falk's essay was written thirty years ago, and would have been very hotly contested then. While it may still be contested today, there is a growing awareness that the world is becoming more interdependent and that massive human rights abuses, for example, affect other states by creating refugee situations in other countries.

In addition to being concerned with these direct effects and consequences, there have evolved in the international system certain principles which are recognized as unchanging. These

indirectly, for any reason whatsoever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic and cultural elements."

⁸Richard Falk, "The Legitimacy of Legislative Intervention by the United Nations," in Roland J. Stanger, ed., *Essays on Intervention* (Ohio State University Press, 1964): 36.

fall under the term *jus cogens*, or principles from which there can be no derogation. These include, among others, prohibitions against torture, slavery, and genocide. They are manifestly illegal under international law, and therefore would not fall under domestic jurisdiction. They have been codified in various treaties and conventions; however, regardless of whether or not a state has ratified these conventions, it is still bound by these principles. Not all governments have ratified these conventions (although all members of the UN have accepted the Universal Declaration of Human Rights (UDHR)), but the fact of their existence further demonstrates the acceptance, as well as the actuality, of Falk's analysis of interdependence. In fact, as Newman has observed: "we have plenty of precedents to establish that crimes against humanity [including genocide] are not essentially within the domestic jurisdiction."⁹ Or, as Kutner has written, "Article 2, paragraph 7 of the Charter which precludes the United Nations from interfering in matters which are 'essentially within the domestic jurisdiction of any state' may not be interposed because the member states have obliged themselves to promote fundamental human rights."¹⁰ More generally, a number of observers have argued that the Universal Declaration of Human Rights has authority beyond being "a common standard of achievement for all peoples and nations." Reisman notes that it is "now accepted as declaratory of customary international law."¹¹ Delupis argues that the UDHR is perceived as having "considerable authority."¹² In fact, she argues that it contains rules which are *jus cogens*:

I submit that a number of rules contained in the Universal Declaration of Human Rights are peremptory norms from which derogation, either by legislation or treaty is not permitted. Furthermore, a number of rules laid down in the conventions on genocide and slavery also have this character and bind third states by virtue of forming part of the general principles of international law.... the Universal Declaration, which does not itself constitute a binding document, lays down rules which, irrespective of whether they are embodied in a binding document or not, are binding as customary international law. No

⁹Frank Newman in Richard B. Lillich, ed., *Humanitarian Intervention and the United Nations*, (Charlottesville: University of Virginia Press, 1973): 111.

¹⁰Luis Kutner, "World Habeas Corpus and Humanitarian Intervention," *Valparaiso University Law Review*, 19 (Spring 1985): 611.

¹¹W. Michael Reisman, "Sovereignty and Human Rights in Contemporary International Law," *American Journal of International Law*, 84 (October 1990): 867.

¹²Ingrid Delupis, *International Law and the Independent State*, (New York: Crane, Russak, 1974): 132.

state can rightly believe after the Nürnberg trials that international law, in the absence of treaties, contains no rules which forbid atrocities and genocide.¹³

Most recently, the 171 states at the World Conference on Human Rights reaffirmed, in the Vienna Declaration, the universality of human rights. The declaration recognized that "the promotion and protection of all human rights is a legitimate concern of the international community."¹⁴

Further, what is considered essentially domestic changes. As the Permanent Court of International Justice maintained in 1923: "the question of whether a certain matter is or is not solely within the jurisdiction of a state is an essentially relevant question; it depends on the development of international relations."¹⁵ Therefore, as Pease and Forsythe observe, "there may be no permanent demarcation between internal and international affairs, between domestic and international jurisdiction within which authority is exercised, but only a sliding relative difference."¹⁶ Thus, colonialism, which was not considered to be an international issue became one. And, the rights of individuals and groups have found their place on the international agenda. The actual role of the international community with respect to such issues may still be somewhat ambiguous and in a state of flux, but that is the nature of a system where terms of reference seem to change from time to time. In fact, attempting to fix a boundary between the domestic and the international is futile and misleading.¹⁷

¹³Delupis, p. 133.

¹⁴World Conference on Human Rights, *The Vienna Declaration and Programme of Action*, (United Nations Department of Public Information, June, 1993): 30.

¹⁵Quoted in Kelly-Kate Pease and David P. Forsythe, "Humanitarian Intervention and International Law," *Austrian Journal of Public and International Law*, 45 (1993): 3.

¹⁶Pease and Forsythe, p. 3.

¹⁷As Robert Pastor points out:

The search for the right boundary line between domestic rights and international responsibilities is a futile one, based on an errant premise of bifurcated jurisdictions. In the contemporary world it is hard to find an issue or an interest that is either wholly domestic or completely international. Most issues or problems are domestic, with a residual component that is international. For example, the famine in Somalia has domestic origins and in the long term can be resolved only by Somalis, but the international community has a residual humanitarian responsibility to prevent massive starvation....

The search for a boundary between domestic and international affairs is worse than useless; it is misleading. The primary issue should be *not* the division of responsibilities between governments and IOs but how the international community should perceive and respond to collective problems.

Robert A. Pastor, "Forward to the Beginning: Widening the Scope for Global Collective Action," in Laura W. Reed and Carl Kaysen, eds., *Emerging Norms of Justified Intervention: A Collection of Essays from a Project of the American Academy of Arts and Sciences*, (Cambridge, MA: Committee on International Security Studies, 1993): 138.

Having demonstrated that there is a certain class of activities which are recognized as not being within the realm of domestic jurisdiction, or, more properly, that most issues have some sort of international component, what can one then say about how violations of humanitarian principles should be handled? One way of looking at it is by reference to the last phrase of article 2(7) of the UN Charter which refers to Chapter VII of the Charter. Chapter VII deals with actions -- military as well as nonmilitary -- which can be authorized by the Security Council. Article 39 refers to a "threat to the peace, breach of the peace, or act of aggression" which might justify UN military action. It can be argued that certain acts, while violating the principles of *jus cogens* or other principles might, nonetheless, not be a threat to the peace. As Falk points out, however:

One can assert the preliminary legitimacy of United Nations intervention [in such situations as internal wars] merely by suggesting the very obvious threat to international peace that exists whenever nuclear nations invest their prestige and power in the outcome of an internal war. Wherever action is necessary to eliminate such risks, the United Nations seems authorized, if not obliged, to take action.¹⁸

In addition, Falk suggests that the UN can act when "domestic insurgency express[es] fundamental preferences of the world community."¹⁹ A threat to the peace might also occur when an internal war or other situation, such as a famine, created a situation where there is massive movement of people across state boundaries, as has happened in a number of instances in recent years. Finally, one might include "fundamental preferences of the world community," as expressed in the documents and principles discussed above, without requiring that an insurgency be taking place. Of course, having to resort to a "threat to the peace" as the basis for humanitarian action is inherently statist and is firmly rooted in the sovereignty discourse because it is only states which can be affected by a "threat to the peace."

One can also imagine other action taken by the UN which is not military in nature. Indeed, there already exists a certain amount of human rights machinery in the UN, including the UN Human Rights Commission. However, past practice has shown that as presently constituted these mechanisms cannot deal effectively with massive human rights abuses. There are essentially

¹⁸Falk in Stanger, pp. 48-9.

¹⁹*Ibid.*, p. 49.

no enforcement mechanisms which work in a timely, efficient, and consistent manner. The best that can be done is to attempt to pressure governments through UN diplomatic channels, publicize the abuses, and, possibly, call for an economic boycott of the offending country by member states. These activities, unless an economic boycott became debilitating, would not fall under the above definition of intervention, but rather would be more properly called attempts to interfere, using means which are generally regarded as legal. In addition, the United Nations (or other bodies) could take part in other activities which come under the heading of gaining access without there necessarily being a military component.

Unilateral Humanitarian Intervention

Before discussing further UN action, a discussion of non-UN unilateral action is in order. Throughout the history of states, the predominant, indeed almost exclusive, actors in any type of intervention, including humanitarian intervention, have been states. Until very recently, anyway, this makes sense. With no kind of centralized, universal organizations such as the UN, there were no other kinds of actors to engage in intervention. Of course, most of these interventions had nothing at all to do with humanitarian motives. They were for the gain of the intervening state, whether for territorial, economic, or ideological reasons. While states were regarded as sovereign entities, the use of force was still sanctioned. However, by the time of the League of Nations and the Kellogg-Briand Pact, which attempted to outlaw aggressive war, and certainly with the coming into existence of the UN Charter, the use of force by one state against the other was deemed by the international community to be aggression and therefore illegal. Essentially the only exception to this was the use of force in response to aggression -- self-defense -- as is outlined in the UN Charter. The use of force for the protection of nationals was also put forth as an exception.²⁰

²⁰One case, in particular, is put forth as a positive example of this exception. This is the case of the Congo in 1964. In this case, there was a civil war going on in the Congo and the rebels took 2000 noncombatant resident aliens hostage to get concessions from the government. After the rebels threatened to kill the hostages, Belgian paratroopers, using US planes and British facilities went into the rebel area -- at the invitation of the central Congo government -- to rescue the hostages, which occurred within four days. The foreign troops were promptly removed. Although African members of

The UN Charter and post-1945 legal practice²¹ seem to uphold the doctrine of nonintervention. Yet, there are many legal scholars who argue vociferously for the right of unilateral humanitarian intervention.²² In addition, Shawcross, in 1946, declared that "the right of humanitarian intervention, in the name of the Rights of Man trampled upon by the State in a manner offensive to the feeling of Humanity, has been recognized long ago as an integral part of the Law of Nations"²³ which the UN Charter did not change. More recently, Teson has argued that:

[F]orcible action to stop serious human rights deprivations is permitted by international law, properly construed.... [T]he best interpretation of relevant treaty materials and state practice is that humanitarian intervention is consistent with the present international legal order.²⁴

the UN condemned this action, it is generally viewed as being lawful. See Michael J. Bazzyler, "Reexamining the Doctrine of Humanitarian Intervention in Light of the Atrocities in Kampuchea and Ethiopia," *Stanford Journal of International Law*, 23 (Summer 1987): 587-88; Lillich, ed., p. 57. Other examples of this kind of intervention labeled, at least partly, as humanitarian intervention, are the invasions by the US of the Dominican Republic in 1965, Grenada in 1983, and Panama in 1989. In reality, the humanitarian label was nothing more than a fig leaf for other motives. As Fairley observes about the Dominican case:

this precedent appears less credible than the Congo example for a number of reasons: many more people perished after, rather than before, the American intervention [as was the case with the invasion of Panama]; the duration of the intervention by American troops was prolonged far beyond the time required to ensure the safety of the lives and property of American and others [as was also the case in Grenada, where, in addition to "rescuing" the medical students which the US claimed were in danger, the US troops also overthrew the government which it did not like]. . . .

H. Scott Fairley, "State Actors, Humanitarian Intervention and International Law: Reopening Pandora's Box," *Georgia Journal of International and Comparative Law*, 10 (Winter 1980): 50. See also Bazzyler, p. 586; Lillich, ed. p. 56.

Yet, another observer perceives a boost for the doctrine of humanitarian intervention in the Dominican case: "The value of the Dominican Crisis to the doctrine of humanitarian intervention lies not only in providing an illustration of an abuse of the doctrine but also in the fact that a Great Power considered the doctrine sufficiently viable to excuse its intervention." M. Sornarajah, "Internal Colonialism and Humanitarian Intervention," *Georgia Journal of International and Comparative Law*, 11 (1 1981): 67. It is hard to see, however, how the crass manipulation of this doctrine can actually be interpreted as supporting it.

²¹Take, for example, the Corfu Channel Case of 1949, where Albania, in 1946, had laid mines which sank two British destroyers. In the judgment, the International Court of Justice, while finding for Britain, dismissed Britain's claim of an

alleged right of intervention as the manifestation of a policy by force, such as has, in the past, given rise to most serious abuses and as such cannot, whatever be the present defects in international organization, find a place in international law. Intervention is perhaps still less admissible in the particular form it would take here; for, from the nature of things, it would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself.

See Bazzyler, p. 575.

²²The term unilateral intervention includes bloc intervention. The motivations and interests of one state will probably be the same for a group of like-minded states.

²³Quoted in Bazzyler, p. 577.

²⁴Fernando R. Teson, *Humanitarian Intervention: An Inquiry into Law and Morality*, (Dobbs Ferry, NY: Transnational Publishers, Inc., 1988): 5 (italics in original).

A significant reason why these, and many other, scholars support unilateral humanitarian intervention is that the UN has not met the original expectations of collective actions in response to "threats to the peace" and the like.²⁵ One need only to look at the widespread violations of human rights worldwide and the paucity of UN response to these activities, as well as the lack of machinery to deal with these issues, to see this point.²⁶ Certainly the late and inadequate forceful response to the genocide in Bosnia-Herzegovina illustrates this, although, as will be discussed below, one might discern a small crack in the wall of indifference.

States act in their own interest, and usually any action which might be in the interest of another state, group, or individual is secondary to the acting state's interests. So it is with any kind of intervention, including humanitarian intervention. It is difficult to find examples where states have acted unilaterally with little or no self-interest²⁷ to help foreign nationals in another state. Two recent examples which are put forth as unilateral humanitarian intervention will illustrate this point. These are India's invasion of East Pakistan in 1971 in response to the slaughter by the West Pakistan Army and Tanzania's invasion of Uganda in 1979 to overthrow Idi Amin's brutal regime.

India's intervention in Pakistan resulted in the creation of the state of Bangladesh from what had been East Pakistan. The East Pakistanis were being brutally treated by West Pakistan. The West Pakistan army was slaughtering East Pakistanis on a massive scale and engaging in rape and pillage. An estimated 9 million refugees flowed across the border into India, certainly enough to be identified as a threat to international peace and security under contemporary usage of the

²⁵For example, Fonteyne states: "the establishment of machinery for collective security and enforcement was so basic a condition for the Members of the United Nations in surrendering their right under customary international law to use force for a variety of reasons, that failure by the Organization to create this machinery would partially relieve the Member states of their obligation of restraint under the Charter." Quoted in Bazyley, p. 579.

²⁶Bazyley, pp. 578-81.

²⁷Discussion of self-interest in this manner [as in conflict with upholding human rights] is meant to reflect the current reality that, in general, states do not include the protection of human rights as a major factor in calculating national interest. This may be changing somewhat, as at least a few states have to deal with the fallout of human rights abuses, especially refugees crossing their borders, or as others see the upholding of human rights as conducive to long-term international stability and democratic processes of decision-making. A new view of self-interest may emerge in the future; however, since self-interest does not, in general include human rights, the ensuing discussion will be premised on this reality.

term, and also enough to create an interest in the conflict on the part of India.²⁸ The East Pakistanis demanded independence and, in light of what was happening, India invaded and defeated the West Pakistan army. The state of Bangladesh was created. Although the Indian ambassador to the UN stated that "we have on this particular occasion absolutely nothing but the purest of motives and the purest of intentions: to rescue the people of East Bengal from what they are suffering,"²⁹ this was not a selfless act on the part of India. India and Pakistan were longtime rivals, and this crisis gave India the opportunity to decrease its rival's power. Even given this motive, however, many observers credit this action as being a leading case of humanitarian intervention. For example, Fonteyne states that India's "course of action in the Bangladesh situation probably constitutes the clearest case of forceful individual humanitarian intervention in this century."³⁰ Yet, in the end, India did not invoke the doctrine of humanitarian intervention when it invaded.³¹ Also, as Fairley points out, "the brunt of the effort borne in the preservation of human life and dignity was undertaken by the United Nations' relief effort, the largest entertained since the conclusion of the Second World War."³² One hundred and five members of the General Assembly supported a resolution declaring India's actions unlawful. Therefore, Hassan concludes, given the General Assembly vote and the fact that India did not invoke this doctrine, this case was not a true application of the doctrine of humanitarian intervention.³³

The second case put forth as supporting humanitarian intervention is Tanzania's invasion of Uganda in 1979. Idi Amin's regime in Uganda from 1971 to 1979 has been recognized as one the most brutal regimes the world has seen. The government engaged in massive human rights abuses, and as many as 300,000 Ugandans may have been executed. Yet, President Julius Nyerere's decision to intervene was motivated at least in part by nonhumanitarian interests. There was very little activity on the part of the outside world in response to Amin's barbarity. The West

²⁸Aristide Zolberg, Astri Suhrke, and Sergio Aguayo, *Escape From Violence*, (New York: Oxford University Press, 1989): 144.

²⁹Quoted in Fairley, p. 52.

³⁰Quoted in Bazyley, p. 589.

³¹Bazyley, p. 589.

³²Fairley, p. 52.

³³Hassan, in Bazyley, pp. 589-90.

only instituted modest economic sanctions after several years and provocations involving US and British nationals, and African and Islamic countries resisted admitting that the situation was a legitimate international concern. There was long-standing animosity between Uganda and Tanzania, and in the fall of 1978 Uganda attempted to annex 710 square miles of Tanzanian territory, although Tanzania forced out the troops by December. Tanzania invaded in 1979, overthrowing Amin. While the invasion created economic hardships on Tanzania, it would seem plausible to conclude that at least the timing, and possibly the fact of the invasion itself, can be explained by self-interest. While one observer notes that the invasion was limited and that "events in Uganda proceed today without effective Tanzanian interference," another notes that several thousand troops were left behind in Uganda after Amin's troops were eliminated and that Tanzania itself seemed reluctant to use humanitarian intervention as a justification at the July 1979 OAU summit.³⁴ As Martha Finnemore writes: "In fact, Tanzania went out of her way to disclaim responsibility for the felicitous humanitarian outcomes of her actions. She claimed only that she was acting in response to Amin's invasion and that her actions just happened to coincide with a revolt against Amin inside Uganda."³⁵

Given that the legality of unilateral humanitarian intervention is contested, and given that, at least in the above instances, national interest played a part in these actions, what can or should be done regarding such unilateral actions? Can unilateral action be severed from national interest? It would seem highly doubtful that this would occur. The commitment of troops and other resources means that the intervening state must see some compelling reason for it to act. It seems highly unlikely that either the elites or the public in any country would see much value in sending troops to be killed for something which did not entail some sort of gain for the intervening state.³⁶ As in most foreign relations, and especially in this area of military matters, current state

³⁴See Bazyler, pp. 590-92; Jack Donnelly, "Human Rights, Humanitarian Intervention and American Foreign Policy," *Journal of International Affairs*, 73 (Winter 1984): 316-17.

³⁵Martha Finnemore, "Constructing Norms of Humanitarian Intervention," prepared for delivery at the 1994 Annual Meeting of the International Studies Association, Washington, DC, March 29-April 1, 1994, p. 33.

³⁶The ongoing reluctance and ambivalence in the United States with respect to committing troops to a UN force in Bosnia-Herzegovina certainly demonstrates this attitude.

practice does not begin with humanitarian motives. Falk is not sanguine about this possibility of separating out state interests:

I am very skeptical about the sensitivity of principal governments to the values at stake, the consistency of that sensitivity, so as not to feel comfortable about giving legal sanction to the doctrine of humanitarian intervention under contemporary conditions.³⁷

Intervention, in general, is done by large states to small states; indeed, it would be foolish for a small, weak state to attempt action against a much larger state. In addition, intervention is usually even more restricted to great powers. Yet, it is difficult to point to any act of intervention which they have undertaken and label it as humanitarian, or even having much of a humanitarian component at all.³⁸ As Falk observes: "[great power intervention] is inevitably going to be connected with foreign policy because that is what the decisions ultimately relate to, whether or not or under what conditions to project power in foreign societies."³⁹ For this reason, Ellen Frey-Wouters suggests that non-aligned states would be better candidates to conduct humanitarian intervention activities. Yet, it would be hard to find such states which would have the capacity to engage in such activities. Even if one could find a non-aligned state, "good-faith neutrality... is very difficult to achieve."⁴⁰ In addition, William Rogers points to a number of other reasons why unilateral intervention should not be sanctioned:

any time the great powers intervene unilaterally, the destabilizing effect is so substantial and the encroachment to individual national personalities in the target State (and in all of the States which have identified themselves with the target State) and the consequences in terms of values affected are so great, that a very powerful presumption, in my judgment, is created against any great power intervention.

We see the constant misuse of the excuse of protection of one's own nationals for great power purposes. . . .⁴¹

And, of course, the excuse of protecting nonnationals is open to abuse, too.

Finally, some point to the actions on the part of several countries on behalf of Kurds in Iraq after the Gulf War as an argument for unilateral intervention. The question of whether those

³⁷In Lillich, ed., p. 33.

³⁸The actions of the US in Somalia may be one instance, which will be discussed below.

³⁹In Lillich, p. 73.

⁴⁰In Lillich, pp. 52-3.

⁴¹In Lillich, pp. 71-2.

activities were unilateral or done within the mandate of resolution 688 is debatable.⁴² However, if one does accept that they were outside the bounds of UN action, this still might not be reasonable justification to accept unilateral intervention. As Payam Akhavan argues:

the consequences of the Allied actions in Iraqi Kurdistan are unquestionably positive from a human rights perspective and evince a compelling argument in favour of a permissive rule allowing for unilateral humanitarian intervention by armed force. However, the fact that "pro-democracy" American invasion in countries such as Grenada, Nicaragua and Panama -- which was actuated by very different and questionable motives -- is arbitrarily equated by some jurists with "humanitarian intervention," underscores the potential for abuse of such a doctrine.⁴³

Yet, as Burns Weston points out: "if we are to limit humanitarian intervention to global organizational intervention or its equivalent, then we are not talking about the real world."⁴⁴ As will be seen, at least up to the present time, Weston is essentially correct, although this may be changing somewhat. Some support unilateral intervention because the machinery -- such as the Military Staff Committee -- was never established in the UN, as well as the fact that it has been virtually impossible to get the members, and especially the permanent members, of the security council to agree and act. John Moore points out that at least sometimes multilateral action will not be feasible, such as in an emergency or in a highly politicized context. He would allow unilateral action under very stringent criteria, including "immediate threat to fundamental human rights, particularly a threat of widespread loss of human life." Other values would include

⁴²The resolution stated, in part, that the Security Council:

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 remove the threat to international peace and security in the region, immediately end this repression and express 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....

⁴³Payam Akhavan, "Lessons from Iraqi Kurdistan: Self-determination and Humanitarian Intervention against Genocide," *Netherlands Quarterly of Human Rights*, 11 (1 1993): 49.

⁴⁴In Lillich, p. 85.

proportionality and the use of the minimum amount of force, and sensitivity to the relationship between the values being upheld and the force used. At the same time, self-determination must not be undercut.⁴⁵

Ellen Frey-Wouters takes a slightly different position. Acknowledging that unilateral action is not permissible, she "admit[s] that forceful unilateral intervention may have to be practiced in certain unique and extremely genocidal situations, but international law need not authorize or encourage it."⁴⁶ In essence, this is a call for international civil disobedience, which, presumably, would be recognized as being "right," even if not legal. She goes on to say that "forceful unilateral action however humanitarian in intent, cannot be condoned as legal, even when acting in lieu of the duly established mechanism, lest the abuse of that unilateralism destroy the whole basis for legally constituted process."⁴⁷

The arguments against unilateral intervention are compelling. The inability of states to act out of purely humanitarian motives is well established. But if humanitarian objectives are achieved does this matter? If states will not act unless they have an interest in the situation -- ideological, political, strategic, economic -- should they be given an excuse to pursue these motives? The last thing the world needs are self-appointed police who decide, as much as on state interests as humanitarian interests, when to intervene in other states. Throughout history, the self-appointed police have shown themselves to be singularly incapable of not abusing their position, and there is no prospect for this changing in the future. Without a legal prohibition, states might feel even more free than they do now to engage in intervention. In addition, the principle of reciprocity should be brought into the equation. Certainly, the great powers would not want other states intervening in their affairs. Yet, one might conjure up instances where, while not genocidal within the state, might have similar consequences. For example, the United States has vast stores of grain, produced as a result of protectionist policies, which sit for years and ultimately are wasted.

⁴⁵In Lillich, pp. 49-50.

⁴⁶In Lillich, p. 107.

⁴⁷Ibid., p. 108.

In light of the fact that there are millions dying around the world because of a lack of food, it would seem reasonable that the states in which these people are starving would have a certain justification for using forceful means to acquire this grain.⁴⁸ Yet, even though mass suffering -- possibly on the scale of genocidal regimes which might be intervened in -- could be alleviated with this grain, it is doubtful that this claim would be recognized by many states, and certainly not by the states with grain.

Finally, R.J. Vincent puts forth three reasons why the doctrine of nonintervention should be upheld: 1) there is no guarantee of impartiality, 2) the action might be unwelcome because it comes from outside, and 3) there is no common morality which transcends borders from which one could derive principles of intervention.⁴⁹ The first has already been dealt with. The second reason is especially pertinent to former colonies and other states who have had a history of foreign intervention of one type or another.⁵⁰ Of course, this is not restricted to these states; indeed, a people with a healthy dose of nationalism, or just a feeling that it is up to them to determine their own destiny, might see such an action in this light. The third reason, to a large extent, is true, although one could make the case that the prohibition against genocide, in its position as *jus cogens*, would qualify as a transcendent moral principle, as would other human rights principles. In addition, below I will further discuss other ways to derive a compelling interest in humanitarian situations, as well as a right, and possibly even a duty, to intervene on the part of certain types of international organizations. Even if there were a common moral framework, as has already been discussed, states do not, in general, act for moral reasons.⁵¹ Thus, it would seem that unilateral humanitarian intervention is illegitimate, and probably should continue to be so.

⁴⁸In fact, they would have a better claim than states, such as the US, which use or threaten to use force to ensure the flow of oil or other "strategic" minerals to their shores.

⁴⁹R. J. Vincent, *Nonintervention and International Order*, (Princeton: Princeton University Press, 1974): 345.

⁵⁰Interestingly enough, this particular condition does not seem to obtain in the recent US invasion of Panama. An overwhelming majority of the population seems to have supported the US action. What the feeling would have been if the invasion had not been as immediately successful -- in terms of getting Noriega out of power -- and if more lives had been lost may be a different question. Indeed, as the US backed away from its proclaimed responsibility to provide a massive influx of aid, opinion began turning against the US somewhat.

⁵¹Of course, states frequently have a moralistic foreign policy with which they try to impose a certain moral outlook on other states, such as the superiority of capitalism over socialism. But this just further demonstrates the lack of transcendent morality recognized within the framework of foreign policy.

Regional and Global Humanitarian Intervention

Accepting the assumption that unilateral action is not legitimate, this leaves two other options -- regional and global action. Regional humanitarian intervention would include action by organizations such as the Organization of American States (OAS) or the Organization of African Unity (OAU), and the global organization would, of course, be the UN. These two options will be discussed below.

The UN Charter, as well as much subsequent action by the UN, while reaffirming the basic principle of nonintervention, also affirms the protection of human rights as a goal. While some may argue whether or not the protection of human rights is put in a primary or secondary position in the Charter with regard to intervention, it is nonetheless recognized as something within the UN's competence. Falk observes: "The renunciation of [unilateral] intervention does not substitute a policy of nonintervention; it involves the development of some form of collective intervention."⁵² While establishing the legality of UN action above, a few of the problems surrounding such action were mentioned. The most basic problem is that the UN, through the Security Council, has not chosen, or been able, to act. Most conflicts and situations where there have been gross violations of human rights have, until recently, been viewed by the superpowers through the lens of Cold War rivalry, which has made it virtually impossible to get them to agree, as they must along with the other permanent members, to any kind of action. There have been, of course, peacekeeping operations which, while falling somewhat outside of the what the Charter originally envisioned, have been useful in cooling down conflicts. However, this is not the kind of action that might ultimately be needed.

Richard Falk calls for UN legislative intervention which he sees as the lesser of evils:⁵³ "The advantage of overcoming colonialism or racism by world community standards, rather than by protracted civil war, commend the adoption of a more radical approach to legislative intervention

⁵²Falk in Stanger, p. 36.

⁵³*Ibid.*, p. 53.

by the United Nations.”⁵⁴ Yet, the UN did not take action during the genocidal reign of the Khmer Rouge in Cambodia, or, as already pointed out, in Bangladesh or Uganda. Falk points out, however, that there was consensus for the peacekeeping action in the Congo in 1960, as well as for the UN censure of Portugal’s administration of Angola,⁵⁵ and there was consensus on the issue of *apartheid* in South Africa, although no real action was taken by the UN to bring about the end of the *apartheid* regime. Back in 1964, Falk was hopeful on the possibilities for UN consensus and action: “In general, world community policies in these areas [of human rights] are already giving precedence over traditional deferences to national sovereignty.”⁵⁶ This hopefulness has not been fully realized by any means. Yet, there are a few positive signs thirty years later. The superpower conflict has receded, and there has been renewed interest in, and reliance on, the United Nations. There has also been more great power, and general international, cooperation in attempting to resolve conflicts, such as in Angola, Namibia, and Cambodia. There has also been a renewed interest in human rights. Unfortunately, this has coincided with what appear to be increasing human rights problems, including famine, brutal regimes, refugees, and other grave humanitarian situations.

Even with hopeful signs, can UN action, being the result of one big power play, be seen as more legitimate than unilateral action? The UN, and particularly the Security Council, is a reflection of state interests -- especially those of powerful states -- and at times has been paralyzed by these interests. This has changed somewhat in recent years, but the UN has not come anywhere near being an autonomous actor above state interest, and thus these interests will come into play whenever a response to a humanitarian situation is contemplated. Yet, the UN can come closer to expressing universal outrage at human rights abuses than any other body. Given the extreme difficulty which the UN has had in the past in engaging in any kind of collective action, it is unlikely that the ability to intervene will be abused in the future.⁵⁷ And, there have

⁵⁴*Ibid.*, pp. 57-58.

⁵⁵*Ibid.*, pp. 51, 54.

⁵⁶*Ibid.*, p. 51.

⁵⁷However, one could argue that the way the United States acted with respect to the UN in obtaining its blessing in prosecuting the Gulf War was an abuse of the system.

been instances where the UN has recently taken some concrete action in humanitarian situations. In fact, recent events have moved one observer to remark: “The rapidity of change and the scope of these new collective efforts have turned on its head the long-standing question of whether the UN could do *anything* useful; today, the question is whether the UN can do *everything*.”⁵⁸

UN responses have been selective and will continue to be so. To a large degree, the response to a particular crisis has depended upon the interest and will of one or more great powers, and this is likely to continue. However, this selectivity does not necessarily delegitimize all UN humanitarian interventions. Even though there may be certain instances where action will not be taken to respond to a humanitarian crisis, the world may be in for a period of time where it must take what it can get. That is, while situations like the Sudan may be ignored by the international community, and the response to Somalia was belated, this does not mean that we should not accept that which can be done -- including a rather late intervention in Somalia -- while at the same time trying to make international reactions more uniform and speedy.

Several recent instances of UN involvement demonstrate the still tentative and ambiguous nature of forceful UN action. The first is Security Council resolution 688 and the actions taken to protect the Kurds in Northern Iraq after the Gulf War. Resolution 688 “insist[ed] that Iraq allow immediate access by international humanitarian organizations to all those in need of assistance in all parts of Iraq....” The actual legitimacy of this resolution was vigorously debated. On the one hand, France argued that massive human rights abuses, even if not accompanied by threats to international security, were worthy of intervention by the Security Council, which “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.”⁵⁹ China, on the other hand, which abstained on the vote for 688, made reference to the “domestic jurisdiction” clause in Article 2 (7). Further, the resolution made it clear that it was not violations of human rights but

⁵⁸Pastor, p. 134. (*italics in original*)

⁵⁹French representative to the UN Security Council, quoted in Akhavan, p. 44.

the consequences of those violations -- refugees as threats to peace and security -- which provided the basis for Security Council action.⁶⁰

The United Kingdom, France, and the United States declared, first, a "no-fly zone" in Northern Iraq (as well as in Southern Iraq where the Shi'ite population was threatened), and second, a plan to create Kurdish enclaves, protected from the Iraqi military, and introduced forces to carry out this plan. These countries relied on resolution 688 to legitimize their actions. Yet, resolution 688 did not specifically authorize this use of force, and the Secretary-General did not request it, although he did, in the end, acquiesce in the intervention.⁶¹ Thus, while the Allied powers were engaging in activity which responded to the *spirit* of resolution 688, it did not carry out its activities with respect to the *letter* of the resolution.

This activity was, clearly, a violation of Iraqi sovereignty. This led to a curious situation where those who, just months earlier, took forceful action to uphold the sanctity of state sovereignty, were undermining that same concept.⁶² Further, these actions demonstrate an increased willingness, on the part of at least some of the more powerful state actors on the international scene, to take forceful action on behalf of human rights which has the effect of undermining sovereign authority.⁶³

In Somalia, the Security Council approved a plan by the United States to provide a substantial number of troops to restore order and ensure that humanitarian aid could get to where it was needed. In the months following the intervention, the country was wracked by much less violence and the threat of starvation receded dramatically. The UN subsequently took over the operations from US forces.

⁶⁰Akhavan, p. 44. The preamble to resolution 688 made reference to "the repression 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...."

⁶¹Howard Adelman, "Humanitarian Intervention: The Case of the Kurds," *International Journal of Refugee Law*, 4 (1992): 19-21; Akhavan, pp. 44-5.

⁶²Adelman, p. 4.

⁶³Of course, given the rhetorical (and, one could argue, military) excesses which the United States, especially, directed at the Iraqi regime, and given the initial reluctance to be involved in the humanitarian mission, one could also argue that this was just a situation where the US was just taking advantage of an opportunity to undermine its sworn enemy.

The case of Somalia is unique because there was no sovereign authority within Somalia which would be the focal point of either negotiations or intervention. Second, there was an obvious "threat to the peace" as a result of the massive flows of refugees fleeing the fighting. This means that while there is an indirect connection between human rights and UN action, the main rationale for action was still the traditional threat to the peace, although the conception of this threat has changed. Yet, the instance of Somalia also indicates, perhaps, the glimmerings of change in the reasons for a major actor on the international scene -- namely the United States -- to become involved in forceful action. In Somalia, there were no direct economic or strategic interests of the US⁶⁴ -- as opposed to the situation in Iraq -- which were threatened by the continued instability and starvation, the bases on which the US has traditionally acted. Thus, the United States -- after, it must be pointed out, a significant period of delay and soul-searching -- committed troops to what, at least from the US perspective, must be seen as an essentially humanitarian mission. The fact that the US pulled out after the US public finally realized the potential costs of such a commitment only partially takes away from a dramatic change in policy.

Mention must also be made of UN action, or inaction, in the former Yugoslavia.⁶⁵ The "ethnic cleansing" which has been carried out against Muslims in Bosnia-Herzegovina surely qualifies as genocide. Yet, the response has been generally muted. Several thousand UN peacekeepers were put on the ground to protect aid convoys; yet, the peacekeepers have had a very circumscribed mandate with regard to the use of force. This has meant that commanders on the

⁶⁴However, some have argued that domestic political factors within the United States played a significant role in the timing, as well as the actual fact, of the intervention. Certainly, there was a long period of time before the intervention during which the US could have acted and did not. One might also point to the "CNN Factor." That is, to many it appears that the United States and the rest of the world may only respond to humanitarian emergencies when the world media focus on a particular situation, showing graphic pictures on the evening news, thus leading to domestic pressure to "do something." If this is so, then humanitarian responses will continue to be highly selective. However, it may also point to a situation where domestic pressure is felt on the international scene. Further, it may also force a partial reconceptualization of the way "state" action actually occurs. That is, rather than just focusing analysis on how the apex of power in a particular country -- presidents, prime ministers, etc. -- reacts to a given humanitarian disaster, it may also be important to include the role of the media and publics as crucial determinants of foreign policy. To the extent that President Bush felt pressure to intervene in a situation where there were no "vital strategic interests," this should be seen at least partly as an exercise in popular sovereignty, and the subsequent action as an expression of the will of the country as a whole.

⁶⁵For an in-depth discussion of the situation in the former Yugoslavia see James B. Steinberg, "Yugoslavia," in Lori Fisler Damrosch, ed., *Enforcing Restraint: Collective Intervention in Internal Conflicts*, (New York: Council on Foreign Relations, 1993): 27-76.

ground have had to rely almost entirely on negotiations to get aid through to where it is needed, frequently resulting in delays of weeks or months. The UN and NATO have periodically made bold statements regarding the need to use force to ensure that aid can get through to where it is needed and, in a couple of instances, to end the Serbian siege of a couple of Muslim enclaves, including Sarejevo. However, even in the face of demonstrated genocide, hundreds of thousands dead, and two million refugees, the international community generally failed to take forceful action to address the situation. The only exceptions to this have been a few instances where NATO forces have bombed Serbian forces which have violated the so called "safe zones" around the enclaves, which turned out not to be very safe at all. Yet, until the spring and summer of 1995 -- more than three years after the genocide became apparent to the world community -- these were very limited and did not result in significant improvements in the situation.⁶⁶ Only then did NATO expand its air strikes, to such a degree that, along with Bosnian gains on the ground, the Serbs finally negotiated an end to the war.⁶⁷ In addition, the UN imposed sanctions on Serbia for its support of the Bosnian Serbs. The very late use of force seemed to have changed the tide of the conflict. This demonstrates that the course of the entire conflict may have changed dramatically if force had been used three years earlier.

Those supporting UN involvement in the conflict used three intertwined justifications for that involvement. These are that the refugee situation, the humanitarian situation resulting from the war, and the human rights violations perpetrated by the Bosnian Serbs threaten international peace and security. Certainly, the hundreds of thousands of refugees impacted neighboring states, as did the prospect of the conflict spreading to more states. Here, again, is an instance where humanitarian concerns are perceived as being important and within the mandate of the UN Security Council. At the same time, however, this is also another case where these concerns have been forced into the rubric of "international peace and security" rather than standing on their own

⁶⁶"U.S. Bombs Bosnian Serbs," *The Associated Press* [Online], (April 10, 1994), Available: USENET Newsgroup: clari.news.fighting.

⁶⁷"NATO Strikes At Serb Base," *The Associated Press* [Online], (May 26, 1995), Available: USENET Newsgroup: clari.world.organizations; "Chronology of Conflict in Former Yugoslavia," *Reuters* [Online], (October 5, 1995), Available: USENET Newsgroup: clari.world.organizations.

as justifications for UN action. The human rights situation, by itself, did seem to provide the necessary justification for involvement by the Conference on Security and Cooperation in Europe (CSCE), as evidenced in the Moscow Declaration of October 1991. However, it took many months just to get human rights monitors into Serbian areas, albeit without Serbian consent.⁶⁸

The international reaction to the Rwandan genocide of up to one million people was a significant failure. The UN had knowledge that a genocide was being planned, but this information seems to have gotten lost in the bureaucracy.⁶⁹ Once the genocide began in the wake of the assassination of the Rwandan and Burundian presidents on April 6, 1994, the international community took little action. In fact, most of the 2,500 peacekeeping troops in Rwanda as part of the 1993 Arusha peace accords were withdrawn. On May 17 that the Security Council expanded the United Nations Mission in Rwanda (UNAMIR) to 5,500 troops, but they were not deployed at the time.⁷⁰ It was not until the French, acting under a Chapter VII mandate, intervened in one part of the country in June that any forceful action was taken to stop the genocide or protect potential victims. It was a limited intervention and was tied up with French interests in Rwanda,⁷¹ but it is credited with possibly saving 12,000-14,000 lives (mostly Hutu, with whom France had connections). Beyond this, the international community took no forceful action to stop the genocide.

Another recent case is that of Haiti. After the first elected President, Jean Bertrand Aristide, was overthrown in a *coup* on September 30, 1991, the UN took little action. However, it did impose mandatory sanctions, including an oil embargo, on Haiti in June 1993. Security Council Resolution 841, which imposed the sanctions, made reference, yet again, to threats to

⁶⁸See Steinberg in Damrosch, ed., pp. 52-5.

⁶⁹"UN was warned of Rwanda genocide, newspaper says," *Reuters* [Online], (November 25, 1995), Available: USENET Newsgroup: clari.world.africa; Cable from Gen. Romeo Dallaire, UNAMIR/Kigali to BariilDPKO/UNations, New York, regarding "Request for Protection for Informant," January 11, 1994. The informant, a "very very important" government official, claimed that his forces could kill up to 1,000 people in 20 minutes.

⁷⁰For an overview of the Rwanda crisis and UNAMIR, see "United Nations Assistance Mission in Rwanda," Program on Peacekeeping Policy, George Mason University [Online], Available: World Wide Web, Path: <http://ralph.gmu.edu/cfpa/peace/unamir.html>.

⁷¹Bruce D. Jones, "Intervention without Borders: Humanitarian Intervention in Rwanda, 1990-94," *Millennium: Journal of International Studies*, 24 (2 1995): 226-33.

international peace and security, as evidenced in the refugee situation. It also took into account the wishes of the recognized government.⁷² However, Damrosch maintains that Resolution 841's most important aspect was that

the Haitian sanctions resolution goes farther than any other to date in applying universal, mandatory, and severe economic sanctions to influence a domestic political crisis over democratic governance. Its cautious wording (stressing more than once the "unique and exceptional" circumstances) cannot hide its precedential significance.⁷³

The sanctions were partially suspended in August 1993 when it seemed that the *coup* leaders were implementing the Governor's Island agreement which was to restore Aristide to power. They were reinstated two months later after it became obvious that the *de facto* authorities were not implementing the agreement in good faith.⁷⁴

After this time, the pressures for international action continued to mount, most dramatically with the waves of refugees fleeing Haiti. On July 31, 1994 at the urging of the United States, the UN Security Council passed Resolution 940 by a 12-0 vote which authorized member states to "use all necessary means" to return Aristide to power. The US heightened its rhetoric regarding its will to intervene over the ensuing month and a half and US military ships were moved into position off of Haiti. Finally, a settlement was reached with US representatives after the military leadership found out that a US invasion force was on its way and paratroopers would land in a few hours. Aristide returned to Haiti on October 15, 1994.

Haiti, on the one hand, represents a significant shift in international practice with regard to forceful action for humanitarian ends, and on the other, also demonstrates the continuing ambiguities as the international community attempts to come to agreement on when and how to intervene in humanitarian situations. Regarding the first, this was the first time that the Security Council authorized the use of force to reinstall a democratically elected leader ousted in a *coup*. There have been many other instances where the UN has taken little or no action. The motives of the United States, which pushed for and carried out the intervention, were mixed, but were also

⁷²Lori Fisler Damrosch, "Epilogue," in Damrosch, ed., pp. 375.

⁷³*Ibid.*

⁷⁴*Ibid.*, p. 376.

different than in other instances of US intervention. Certainly foremost on the minds of US leaders was the continued flow of refugees from Haiti, most of whom were trying to get to the United States. However, this demonstrates the ways in which humanitarian crises can become international, leading to action against a government in power. The threat, rather than the actual use, of force was used by the international community to violate the sovereignty of a state which fit all of the traditional conditions of statehood. That the *de facto* government of Lieut. Gen. Raoul Cédras was *not*, however, recognized by the international community, sets a precedent that human rights matter when determining the legitimacy of a government.

The ambiguities associated with this instance are threefold. First is the amount of time it took for the international community to react. It was two years before the UN took its first decisive actions, and it was only after the mandatory sanctions were in place that Cédras began taking the UN or OAS seriously.⁷⁵ And, it took another year for the Security Council to authorize the measures which ultimately proved necessary to restore Aristide to power. Second, although the UN Security Council authorized the actions the US ultimately took, and threatened to take, it was a completely US operation. The UN representative was not even notified before the US launched its ultimately aborted invasion. This points to the fact that the UN still does not have the necessary resources and procedures in place to deal with this kind of situation. Third, the basis for Resolution 841 was, again, a threat to "international peace and security in the region." While, in one sense, this illustrates yet again an expanding view of what kinds of situations the UN can and should be involved in, it also represents the continuing attempt to fit new situations into old categories. That is, as long as the Security Council does not make the basis of its actions humanitarian, there will still be uncertainty and ambiguity regarding exactly when it can act. While recent actions are a positive sign with respect to humanitarian action, this concern, along with the long time periods in which it has acted and the unevenness of its actions, still leaves significant doubt and ambiguity regarding the course of UN action.

⁷⁵*Ibid.*, p. 375.

There is thus a mixed record with respect to forceful action on the part of the UN to deal with dire humanitarian emergencies. Such action has been cast in terms of responding to threats to the peace, enabling the international community to finesse the question of sovereignty. However, as noted at the beginning of the article, using this as the basis for action, first, can lead to a situation where the concept of a threat to the peace is expanded to such an extent that it is rendered meaningless. Second, waiting for a situation to evolve to a situation which might be considered to have dire international consequences under traditional meanings of a threat to the peace may lead to a worsening of the humanitarian situation. Thus, more thought should be given to legitimating forceful humanitarian action more directly through evolving notions of the relationship between sovereignty and human rights.

Given that the UN can intervene, and given that some instances where a police action might be needed immediately to prevent or stop massive violations of human rights, whereas even in the best of circumstances the UN does not act quickly, how can such action be taken in a timely matter? One possibility might be to create a standing rapid reaction capability for the UN, comprised of troops earmarked by governments which would be ready on a moment's notice to be deployed in the event of a humanitarian emergency. One such proposal has recently been put forth by the Canadian Government.⁷⁶ In addition to expediting the deployment of UN forces, it might also act a deterrent. However, there is still the problem of getting the Security Council to act in the first place. In addition, such a force might not act as a deterrent until it had been used in a couple of instances and the international community had actually demonstrated its will to use it in situations of humanitarian need.

A number of observers would prefer regional collective action over UN action. A major premise is that humanitarian intervention should be the result of an expression of community standards. A regional organization may, in some instances, be able to have a more true expression of community than a global organization. John Moore lays out three reasons for preferring

⁷⁶"Towards a Rapid Reaction Capability for the United Nations," Government of Canada, Department of Foreign Affairs and International Trade, [Online], (September 1995), Available: World Wide Web Path: <http://www.dfaic-maeci.gc.ca/english/news/newsletr/un/rap1.htm>.

regional action.⁷⁷ First, it might be more effective. There may be greater expertise on local issues within the regional organization.⁷⁸ In addition, it may be easier to get such action without having to deal with the veto in the Security Council or some political block in the UN. Second, it may have a better chance of keeping out great power involvement, which might otherwise distort or attempt to control the action for national ends. Third, the parties to a dispute might prefer a regional forum. Of course, a dictator who might be overthrown by such an action would prefer no action at all, but the other states in the region who will also be affected in one way or another by any kind of intervention might view action which they have a greater hand in implementing more favorably than UN action.

There are many problems associated with regional action, many of which are the same as in the case of the UN. The main problem is that regional organizations have been as reluctant as the UN to act. For example, they did not act in any kind of decisive way in the cases of Uganda, Bangladesh, and Cambodia. Ambassador Akwei from Ghana, talking about the OAU during the UN debate regarding the Bangladesh intervention, stated:

The Organization of African Unity knows that once intervention in the affairs of a Members State is permitted, once one permits oneself the higher wisdom of telling another Member State what it should do with regard to arranging its own political affairs, one opens a Pandora's box. And no continent can suffer more than Africa when such a principle [of nonintervention] is thwarted.⁷⁹

While, as has been shown, atrocities such as genocide cannot be regarded internal political affairs, Akwei expresses legitimate concerns coming from a history of hundreds of years of colonial domination and interference in Africa. The same attitude would apply to Latin America, where, for several hundred years at the mercy of the European powers, it is now still perceived by the dominant power in the region -- the US -- as its backyard. Thapa, too, does not see humanitarian intervention on the part of the OAU as a real possibility:

⁷⁷In Lillich, p. 100.

⁷⁸For example, there has been much debate since the beginning of the Somalian operation about the nature of Somalian society, especially with respect to whether its social structures can or cannot be fit within traditional Western conceptions of social and political organization, which might have consequences for how negotiations and other activities should be undertaken. The OAU might be more sensitive to these issues.

⁷⁹Quoted in Bazyley, p. 614, note 320.

the African Organization, a loose association of African states, lacks among its members a coherence of aims and principles, so that it has proven of little use in the handling of regional problems. Particularly, inhumane treatment, unless at the hands of white rulers, does not come among its list of immediate concerns; which casts doubt as to whether any collective action of the African organization for [humanitarian intervention] purposes would be forthcoming if the necessity arose.⁸⁰

While concerns might be justified, at the same time this cannot be used as a shield by states to prevent legitimate action by of the international community on behalf of human rights.

More generally, one can point to other impediments to regional action. First, most regional organizations do not have the institutional capacity to take effective action. The one exception to this -- NATO -- has shown itself to be extremely reluctant to act in cases where it might, particularly in the former Yugoslavia. In addition, frequently regional organizations may have a particular stake in a conflict, or one or more of the main members of an organization may also be parties to a conflict or other humanitarian emergency. Further, the members of an organization may be so deeply divided as to preclude agreement on a course of action. Finally, leaders may be reluctant to approve of any action which could provide a precedent which might be used against them in the future.⁸¹

However, a few recent examples illustrate at least a partial shift on the part of some of the governments in these regions. First, a number of Latin American countries did support forceful action to return Aristide to power. These included Argentina and the thirteen member Caribbean Community, several of whom offered a token contribution to the US force. Many of the larger Latin American countries did not support an invasion -- Brazil and Venezuela abstained on Resolution 940 -- but did support the outcome of the threatened action.⁸² Although support for

⁸⁰Quoted in Bazzyler, p. 614, note 320.

⁸¹Thomas G. Weiss, David P. Forsythe, and Roger A. Coate, *The United Nations and Changing World Politics*, (Boulder: Westview Press, 1994): 33-9.

⁸²"Caribbean: Caricom Countries Pledge Support for Invasion of Haiti," *Inter Press Service*, [Online], (August 30, 1994), Available: Nexis; "Rio Group: Presidents Call for Haitian Regime to Step Down," *Inter Press Service* [Online], (September 10, 1994), Available: Nexis; "Haiti Accord Greeted with Relief in Latin America," *Reuters North America Wire Service* [Online], (September 19, 1994), Available: Nexis; "Haiti: Latin America Leaders Breathe Sigh of Relief," *Inter Press Service* [Online], (September 19, 1994), Available: Nexis. For an in-depth discussion of the role of the OAS during the first two years after Aristide was removed from power see Domingo E. Acevedo, "Haiti," in Damrosch, ed., pp. 119-156.

an invasion was by no means unanimous, the very fact that some Latin American countries did express support for intervention signals a dramatic shift away from the previous total nonintervention stance. One observer sees this as part of a precedent for greater support for humanitarian intervention which could have far-reaching consequences:

But a precedent is being created that could well rescue some future democratic government in Nicaragua or Trinidad or even Paraguay from the hands of its own soldiers -- and, more importantly, will deter the soldiers from seizing power in many more countries. It is not just an American initiative, and it is not just business as usual.⁸³

Second, in the case of Rwanda, the head of the OAU supported a UN force -- as opposed to an African force -- to help restore order and end the genocidal killings.⁸⁴

A third example is the intervention in Liberia by the Economic Community of West African States (ECOWAS). In Liberia, a civil war begun at the end of 1989 plunged the country into total chaos, resulting in near genocide, refugees, and very clear threats to international peace and security as a result of the refugees flows as well as the spread of fighting to neighboring states. Even though called on by many Liberians to do so, the United States did not intervene, seeing no strategic interest and claiming that it was an African problem, to be solved by Africans. The UN Security Council, too, failed to take action. Indeed, the two African states serving on the Security Council at the time rejected Security Council involvement, not wanting to set a precedent.⁸⁵ About eight months after the civil war began, ECOWAS established the ECOWAS Cease-fire Monitoring Group (ECOMOG). Although it was supposedly for monitoring a cease-fire, it clearly had to impose a cease-fire first. While it has been partially successful, including imposing a two year cease-fire, fighting has continued, and at times, ECOMOG has found itself taking sides against one of the parties to the conflict, a group headed by Charles Taylor, a former Liberian official who was in exile, and whose forces began the civil war.⁸⁶

⁸³Gwynne Dyer, "Beyond Haiti: Armies in the Western Hemisphere Take Note: Coups Will Not Be Tolerated," *The Gazette (Montreal)* [Online], (September 20, 1994): B3, Available: Nexis.

⁸⁴OAU Questions Exclusively African Force for Rwanda," *Reuters* [Online], (May 5, 1994), Available: USENET Newsgroup: clari.world.africa.

⁸⁵David Wippman, "Enforcing the Peace: ECOWAS and the Liberian Civil War," in Damrosch, ed., pp. 164-5.

⁸⁶*Ibid.*, pp. 167-175.

The international reaction to the ECOWAS intervention, and the grounds put forth for the intervention, both demonstrate a gradual shift in thinking regarding intervention. As Wippman points out, "[f]rom the outset, the international community's response to the ECOWAS intervention in Liberia has been, for the most part, one of guarded approval."⁸⁷ Many states and international organizations, such as the OAU, European Community, and the Security Council supported ECOWAS' various initiatives with respect to the civil war, and the Security Council passed Resolution 788, imposing an arms embargo on Liberia. The general response to the actual intervention has been very muted, with little condemnation, and ECOMOG has been generally supported by the people within Liberia. The main basis put forth for the intervention was humanitarian, including ending the "massacre of innocent civilians," and this was generally accepted by the international community, at least by acquiescence. In fact, the OAU, Security Council, and European Community all supported the humanitarian outcomes of the intervention while at the same time downplaying the fact that force was used.⁸⁸ Perhaps one of the most significant statements came from the Secretary-General of the OAU, Salim A. Salim:

for an African government to have the right to kill its citizens or let its citizens be killed, I believe there is no clause in the charter [of the OAU] that allows this.

To tell the truth, the charter was created to preserve the humanity, dignity, and the rights of the African. You cannot use a clause of the charter to oppress the African and say that you are implementing the OAU charter. What has happened is that people have interpreted the charter as if to mean that what happens in the next house is not one's concern. This does not accord with the reality of the world.⁸⁹

A few other African leaders supported this view, although most probably would not. However, the fact that the head of the OAU would make a statement like that and that these views would be considered legitimate for debate demonstrates change in thinking about what sovereignty entails and what kind of intervention may be legitimate.

Both the United Nations and regional organizations have been reluctant to act in a variety of situations, and have demonstrated ambiguity in when and on what basis any type of

⁸⁷Ibid., p. 175.

⁸⁸Ibid., pp. 175-81.

⁸⁹Quoted in Ibid., p. 181.

humanitarian intervention should occur. Yet, both have acted forcefully in a few situations of humanitarian crises, if somewhat belatedly. This will probably continue to be the case for the near future as the international community struggles to resolve the serious questions raised by such humanitarian emergencies and examines how they relate to both traditional concepts of international peace and security and traditional concepts of sovereignty. Further, in some situations the UN may be in a better position to act. It has more resources and more of a background in conducting many different types of operations, and, with the somewhat hopeful signs mentioned above, might have a greater propensity to seriously consider human rights as a basis for action. Yet, the UN might also authorize a regional organization to actually carry out any actions. In Bosnia-Herzegovina, the UN essentially authorized NATO to carry out certain forceful activities within the context of a mandate from the UN, as was in the case with the US in Haiti.

Humanitarian Access

At the beginning of this paper I made a distinction between humanitarian access and humanitarian intervention. Humanitarian intervention is premised, for the most part, on the use of force for humanitarian ends, and may have as its eventual outcome the removal of a repressive regime. Humanitarian access, on the other hand, does not necessarily entail the use of force and is focused on ameliorating the immediate humanitarian situation, not the broader political and military aspects. In addition, it has as its focus the rights of individuals, developed to the greatest extent in times of war, to receive humanitarian assistance, and the rights and duties of the international community to provide it. In addition, a much wider array of actors is involved in gaining and maintaining access than is the case in intervention.

The problems and questions posed with respect to humanitarian access and sovereignty are numerous. First, to what extent has the recognition of a right evolved such that access may no longer be considered a violation of sovereignty? Second, to what extent is there a *duty* as opposed to a *right* on the part of the international community to provide humanitarian assistance and

ensure that humanitarian access for a wide array of humanitarian organizations is maintained? Third, since the focus of international law and the sovereignty discourse has been states, can NGOs which have little to no international personality actually violate sovereignty when they provide unauthorized humanitarian aid?

Recent years have provided a number of instances where humanitarian access has been needed and has been gained, with or without the permission of the state. Sometimes such actions have been put in terms of challenges to state sovereignty. In other cases, the question of sovereignty has not been directly raised, although one might interpret the actions as undermining sovereignty nonetheless. These have included declarations by the General Assembly and independent actions by humanitarian NGOs. In addition, the Geneva Conventions and Protocols have provided an important basis for action by the International Committee of the Red Cross (ICRC) and other organizations.

The main body of law on which the ICRC and others base their activities and their claim that there is a right to assistance is the 1949 Geneva Conventions and the two Additional Protocols of 1977. The original conventions related solely to international armed conflict, whereas Protocol II broadened the realm of action somewhat to include non-international armed conflict. Article 59 of the Fourth Geneva Convention provides for a right on the part of civilians to receive humanitarian assistance during wartime.⁹⁰ Under Article 9 common to the First, Second, and Third Geneva Conventions, and Article 81 of Additional Protocol I, the ICRC has the right of initiative during international armed conflicts. In addition, Article 3 of the four Geneva Conventions provides for that same right. This means that the ICRC (and other humanitarian organizations) can offer humanitarian assistance to those in need during war.⁹¹ Further, according to Article 70 of Protocol I such offers, made impartially, should not be

⁹⁰Arthur C. Helton, "The Legality of Providing Humanitarian Assistance Without the Consent of the Sovereign," *International Journal of Refugee Law*, 4 (3 1992): 375.

⁹¹Denise Plattner, "Assistance to the Civilian Population: The Development and Present State of International Humanitarian Law," *International Review of the Red Cross*, (May-June 1992): 251; Maurice Torrelli, "From Humanitarian Assistance to 'Intervention on Humanitarian Grounds?' *International Review of the Red Cross*, (May-June 1992): 231.

considered an unfriendly act;⁹² that is, it is not a threat to the sovereignty of the state to which such assistance is offered. As one observer has put it: "As this right of initiative has been legally accepted by States, it cannot be denounced as undue interference when exercised. By recognizing this right, States have simply expressed their sovereignty."⁹³ However, if it can be thought of as an act of sovereignty, then perhaps it is an act within a broadened concept of sovereignty which includes more responsibilities with respect to humanitarian issues and human rights.

Regarding internal conflict, Article 18 of Protocol II reads:

If the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival, such as foodstuffs and medical supplies, relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken subject to the consent of the High Contracting Party concerned.

While this provides for consent, as Denise Plattner points out, "when correctly interpreted, it means that such agreement *must* be given if the necessary conditions are fulfilled [impartiality and neutrality], and for as long as the relief operation is taking place on the territory controlled by the legal government."⁹⁴ Or, as she maintains with respect to Article 70 of Protocol I: "The agreement of the State is needed, but this is in no way a matter of discretion...."⁹⁵ Further, Articles 54 of Protocol I and 14 of Protocol II outlaw attempts to starve a civilian population.⁹⁶

Thus, a right to receive humanitarian assistance exists,⁹⁷ and the ICRC and other organizations have a right to offer such assistance. And, the state in question has an obligation to accept such offers of humanitarian assistance. Even if a state does not provide consent, perhaps maintaining that an armed conflict, as such, was not occurring, Michael Bothe has argued that the

⁹²Plattner 92, p. 261.

⁹³Torrelli, p. 232.

⁹⁴Plattner, p. 260. (*italics added*)

⁹⁵*Ibid.*, p. 258.

⁹⁶*Ibid.*, p. 257.

⁹⁷As Plattner puts it: "Humanitarian law recognizes that the civilian population of a belligerent state is entitled to receive assistance." Plattner, p. 251.

ICRC can lawfully act unilaterally in undertaking humanitarian relief action.⁹⁸ Further, the right to act is also recognized in the case of rebel-held territory. Torelli makes the observation that:

Article 3 common to the four Conventions constituted a veritable legal revolution because it meant that each State agreed, in the humiliating situation in which its authority was flouted, that its relations with the sector of the population rebelling against it would thenceforth be governed by international law.⁹⁹

That is, the government of a state cannot stop humanitarian action in a part of its territory which it does not actually control. Thus, an aid organization need only obtain the permission of the rebel authorities on the ground (such as happened in the case of the cross border relief operations in Eritrea and Tigre province in Ethiopia during the famine and civil war). Yves Sandoz has argued that Article 3 "in practical terms authorizes the ICRC (or any other impartial humanitarian body) to enter a territory without the agreement of the government that still represents the entire State internationally."¹⁰⁰ In addition, even when a government denies that an armed conflict is occurring, Sandoz writes that the ICRC "could not forswear its action in a large area of the territory of a state over which the government has lost control simply because that government denied the obvious."¹⁰¹ With respect to medical assistance, the Medico-Legal Commission of Monaco has maintained that

in non-international armed conflicts, under Article 3 common to the four Geneva Conventions, a non-governmental medical organization is entitled to perform its activities in territory controlled by any governmental or non-governmental party provided that it has obtained the prior consent of the party concerned.¹⁰²

The ICRC has taken great pains to make clear that its activities are neutral and impartial and are not aimed at undermining the sovereignty of the state in which it is operating. Because of this, there is a great reluctance on the part of the ICRC to be involved in any operation which uses outside military forces as escorts for aid convoys which could (perhaps correctly in some cases) be interpreted as favoring one side or the other. Thus, the concept of humanitarian access is useful

⁹⁸Michael Bothe, "Relief Actions: The Position of the Recipient State," in Fritz Kalshoven, ed., *Assisting the Victims of Armed Conflicts and Other Disasters*, (Dordrecht: Martinus Nijhoff Publishers, 1989): 96.

⁹⁹Torelli, p. 233.

¹⁰⁰Quoted in *Ibid.*, p. 234.

¹⁰¹*Ibid.*

¹⁰²Quoted in *Ibid.*, p. 234.

because it divorces humanitarian aid from larger political and military considerations, including threats to sovereignty, focusing on civilian victims instead. However, some within the ICRC do question whether, in fact, maintaining a right to assistance and access does not call into question traditional concepts of sovereignty. Certainly, insofar as a state is obliged to accept assistance in situations where it cannot provide for the needs of its populations itself, certain responsibilities with respect to individuals within the state are added to the rights normally associated with state sovereignty. Thus, one official maintained that ICRC action is not a threat to state sovereignty because the evolving concept of sovereignty includes such activities.¹⁰³ There is thus a certain body of law -- referred to as international humanitarian law -- which provides for a right to receive humanitarian assistance, a right to offer such assistance, and, according to some interpretations, and right to provide such assistance regardless of the wishes of a government.

The UN High Commissioner for Refugees (UNHCR), which plays a major role in providing humanitarian relief, is also reluctant to portray its activities within countries of origin as any kind of intervention or invasion of sovereignty. One UNHCR official rightly pointed out that UNHCR cannot "intervene" in a country,¹⁰⁴ and this is certainly correct insofar as I have characterized intervention as involving forcible action. Another noted that while some its activities may be characterized as "intrusions," it is not identified as a sovereignty issue by UNHCR.¹⁰⁵ Yet another official, while articulating the idea of sovereignty involving duties as well as rights, also expressed the view that UNHCR could not attack sovereignty head-on. Part of this has to do with the fact that UNHCR is dependent upon the international community for financial support. Further, however, he expressed concern that we not undermine the state as the basis of international society. That is, while he recognized an expanded notion of sovereignty which includes responsibilities toward citizens, and while also recognizing that individuals are part of an international community outside of one's state borders, he also noted that undermining the state

¹⁰³Interview with ICRC official, November 1993.

¹⁰⁴Interview with UNHCR official, November 1993.

¹⁰⁵Interview with UNHCR official, November 1993.

would undermine international stability.¹⁰⁶ One can thus see how far the sovereignty discourse reaches. Even some who see significant problems with the sovereignty paradigm reify one of the main tenets of the discourse -- the centrality and necessity of the state -- in order to create a particular kind of system in which human rights and humanitarian action can be ordered. Yet, this reification, even when it includes humanitarian aspects, still reinforces the idea of an international community with rigid loci of power and authority which, I would argue, corresponds less and less to the way more and more people are experiencing the world.

Yet, even though UNHCR and other organizations do not publicly portray their work as challenging sovereignty, this is, indeed, what they are doing in some instances. In fact, as one UNHCR official suggested, we may be at a point where "the UN continues to do lip service to national sovereignty while acting as if national sovereignty were not really a concern."¹⁰⁷ The issue of internally displaced persons -- those who are in refugee-like situations within the borders of their country of origin -- is one of the most significant issues which has confronted UNHCR in recent years.¹⁰⁸ UNHCR has been involved with aiding the internally displaced, although it has been in the context of an agreement with the government. Sometimes, however, this agreement may be not completely voluntary. For example, in the case of the Iraqi Kurds, the situation which produced the agreement to allow UN aid and protection to Iraqi Kurds (and others) was not particularly auspicious for a purely voluntary decision. First, Iraq had just been soundly defeated in a war. Second, the countries which defeated Iraq had announced their intention to create a safe haven for the displaced. As Howard Adelman observes: "One possible inference is that the Iraqis were compelled, if not induced, to sign the UN agreement lest the de facto infringements on Iraqi sovereignty otherwise be legitimized."¹⁰⁹ That is, Iraq engaged in an act of sovereignty -- allowing foreign troops onto its soil (the same troops which had just defeated it in a war) -- to maintain a fiction that its sovereignty was not being violated.

Perhaps this kind of situation is what led one individual at UNHCR to argue that sovereignty and problems of consent are "mirage questions."¹¹⁰ That is, consent to gain access on the part of UNHCR and other governmental bodies to IDPs and others in need may not be as hard as some might think. In addition, however, he pointed out that NGOs are usually already on the ground in situations where UNHCR wants to gain access. One instance where NGOs had success where agencies tied to intergovernmental organizations have had less success in gaining access was in Ethiopia. In this instance, a wide variety of NGOs, in cooperation with the aid wings of two rebel organizations, provided aid to millions of starving Ethiopians against the will of the Ethiopian government. In fact, the government did all that it could, including bombing aid convoys, to prevent this aid from getting through. Much of this aid was provided at least somewhat covertly by governments, but it was NGOs which carried out operations, crossing into Ethiopia from the Sudan. Thus, one could say that states were silent co-conspirators in undermining the sovereignty of a government which was deemed to have violated its duties toward its people.¹¹¹ As the Refugee Policy Group has observed, "innovative individuals and organizations, inside and outside of the UN system, have found ways around the constraints of sovereignty."¹¹²

One organization which has argued for a right of humanitarian access and which has acted on that perceived right is *Médecins du Monde*. It has carried out clandestine, unsanctioned humanitarian activities in such places as Afghanistan, El Salvador, South Africa, and Ethiopia.¹¹³ Another French medical group, *Médecins sans Frontières*, has been engaged in similar activities. Both of these groups, as well as the French humanitarian movement in general, have been spurred

¹⁰⁶Interview with UNHCR official, November 1993.

¹⁰⁷Interview with UNHCR official, November 1993.

¹⁰⁸UNHCR's mandate does not officially include aiding the internally displaced. Rather, it is focused on assisting refugees who fall within the traditional interpretation of the term -- those who have crossed a border fleeing persecution.

¹⁰⁹Adelman, p. 19.

¹¹⁰Interview with UNHCR official, November 1993.

¹¹¹See Kurt Mills, "Humanitarian Intervention: Responding to the Situation in Ethiopia," Occasional Paper 3:OP-3, Joan B. Kroc Institute for International Peace Studies, University of Notre Dame, Fall 1992, esp. pp. 29-43; Hiram A. Ruiz, "Early Warning Is Not Enough: The Failure to Prevent Starvation in Ethiopia, 1990," presented on April 6, 1990, at Yale University's Allard K. Lowenstein International Human Rights Law Project's 1990 Symposium, "Refugees: Facing Crisis in the 1990s." For an in-depth look at the role of humanitarian organizations in Ethiopia, see William DeMars, *Helping People in a People's War: Humanitarian Organizations and the Ethiopian Conflict, 1980-1988*, Dissertation, Department of Government and International Studies, University of Notre Dame, 1993.

¹¹²Refugee Policy Group, "Internally Displaced in Africa," p. 42.

¹¹³Bernard Kouchner, "Morals of Urgent Need," in Kalshoven, ed., pp. 56-7.

on by the involvement of Bernard Kouchner, formerly the French Minister for Humanitarian Affairs who has argued that providing humanitarian assistance is both a right and a duty.¹¹⁴ In fact, however, even before Kouchner became part of the French government, it had been at the forefront on this issue. For example, in October 1987, the French President stated:

As suffering can be experienced by any individual, it is universal. The right of victims to be succoured when they call for help, and to be succoured by volunteers who see themselves as professionally neutral in fulfilling what has come to be known as "the duty of humanitarian intervention" in situations of extreme emergency, will certainly be included one day in the Universal Declaration of Human Rights. For no State can be considered sole proprietor of the suffering it causes or harbours.¹¹⁵

Over the past few years, the General Assembly has passed several resolutions regarding humanitarian assistance. At the urging of France, the General Assembly adopted resolution 43/131, entitled "Humanitarian assistance to victims of natural disasters and similar emergency situations." Although this resolution did try "to get states to acknowledge responsible use of state sovereignty... [and] reflected political pressure to enhance international activity benefiting persons..."¹¹⁶ - that is, trying to reinforce the marriage of responsibility and rights in sovereignty -- it nevertheless also reaffirmed the primacy of state sovereignty and territorial integrity. In 1990, it passed resolution 45/100 which discussed the need to create humanitarian corridors for relief assistance. While not focusing specifically on the issue of consent, it nevertheless pointed to one way in which issues of access might be worked out.¹¹⁷ One instance where such negotiated access was successful, at least for a while, was Operation Lifeline Sudan. In 1989, after having expelled aid workers, Sudan invited them back in. It allowed aid agencies to enter parts of Sudan controlled by rebel forces. The operation only lasted about six months. However, it led to a situation which prompted the Sudanese Minister of Social Welfare to remark: "We have, in effect, conceded sovereignty over a large part of our territory to the United Nations."¹¹⁸ Thus,

¹¹⁴ See *Ibid.* See also Bernard Kouchner and Mario Bettati, *Le Devoir d'ingérence: peut-on les laisser mourir?* (Paris: Denoël, 1987).

¹¹⁵ Quoted in Torrelli, p. 229.

¹¹⁶ Pease and Forsythe, pp. 15-6.

¹¹⁷ Torrelli, p. 245.

¹¹⁸ Quoted in Larry Minear, *Humanitarianism Under Siege: A Critical Review of Operation Lifeline Sudan*, (Trenton, NJ: Red Sea Press, 1991): 99.

while he also said that such sovereignty could be reclaimed, this was a recognition that in order to deal with a grave situation within Sudan's borders and meet its obligations inherent in sovereignty, the government had to agree to activities which undermined that sovereignty. Aid workers were eventually expelled, and continue to be denied access on and off by the government, which has renewed its war against insurgents in the south. Yet, this was also an indication that the international mood is changing with regard to what constitutes responsible conduct toward one's citizens.

The General Assembly also passed resolution 46/182 in 1991, which states that "humanitarian assistance should be provided with the consent of the affected country..." This is significant because consent is weaker than an active request from a government. In the case of Iraq, while the agreement stated that UN activity was on the basis of a *request* from Iraq, in reality Iraq just provided pro forma *consent*. In addition, one could make the argument that as long as a government did not actively object to humanitarian action it has provided consent. Further, that passage made a reference to "the consent of the affected country" rather than to the consent of the government. This raises the possibility that the people of a country, through some other representative than the government, could request humanitarian assistance and that the UN could respond based on that request, regardless of what the government wanted. That is, the sovereignty of the people could override the sovereignty of the state.

In fact, numerous individuals involved with carrying out humanitarian activities have noted that the international community in general, and especially those in the Third World which have been the most jealous guardians of their sovereignty, have taken a slightly softer line. That is, while the G77 countries have seen humanitarian access as a challenge to their sovereignty, many of them are becoming less adamant with regard to preventing such access. This is especially the case in Africa, where more states are willing to accept such interference on humanitarian grounds. The issue of sovereignty does not come up to the same extent that it used to only a few years ago.¹¹⁹

¹¹⁹ Interviews with UN and US officials, October and November 1993.

Perhaps this is because aid agencies do not frame the issue in terms of incursions on sovereignty, and thus some countries are more willing to provide access. This does not mean, however, that such activities still do not pose challenges to the theory and practice of sovereignty. Indeed, such activities do raise questions regarding the content and extent of sovereignty such that sovereignty is in a state of "permanent evolution" according to one official at the ICRC (which has *not* been confrontational on the issue of sovereignty).¹²⁰

However, even if the conceptual questions regarding access and sovereignty do not arise, there are, nonetheless, still significant operational issues, especially in the context of internal conflict. The problems are perfectly illustrated in the case of Bosnia-Herzegovina. Even though UNHCR and other agencies had a right to gain access to affected populations, they were unable to because they were physically blocked by one of the parties to the conflict which was not upholding its responsibilities under international humanitarian law. That is, even though organizations such as the ICRC and UNHCR go to great pains to portray their operations as purely humanitarian and neutral¹²¹ (harder for UNHCR when the UN also has troops on the ground or has otherwise interceded in a significant way in a conflict), in many instances they are still unable to gain humanitarian access to affected populations. The main operational problem, then, is that while the international community has the right to gain access, it has not, at the same time, demonstrated the will, except on a couple of occasions, to ensure that humanitarian aid gets to where it is needed through the use of force. As one UN official put it, human rights has won the struggle with sovereignty but does not know what to do with the victory.¹²²

With respect to international and state practice, then, one can identify several different contradictory trends with respect to humanitarian access and intervention. One can point to the UN Charter and ways in which it has been interpreted to find a right for the UN to intervene on humanitarian grounds. Further, over the past few years it has intervened in a few situations which

¹²⁰ Interview with ICRC official, November 1993.

¹²¹ Interviews with ICRC, UNHCR officials, November 1993.

¹²² Interview with UN official, November 1993.

have had significant humanitarian components. Yet, the foundation for such activity has been threats to international peace and security, not human rights, and thus human rights have not been cast as coming into conflict with and overriding state sovereignty. At the same time, however, it is obvious that humanitarian concerns *have* taken precedent over state sovereignty. With regard to humanitarian access, there is a body of law which recognizes the right of individuals to receive humanitarian aid and which requires that governments accept that aid. And, there has been some shift on the part of those most resistant to claims of access in the not too distant past toward more acceptance of responsibilities in this regard. Yet, this has not kept other operational issues from preventing such access from taking place. What is needed, then, is a succinct statement of the conditions under which humanitarian intervention and access can take place. First, however, we must consider a few of the other moral issues with regard to humanitarian intervention.

Moral Issues

A paper like this cannot hope to address the many moral questions associated with the issues of human rights, sovereignty, and humanitarian intervention. What follows will be an overview of the core issues.

Until very recently, the debate over humanitarian intervention has been premised on the existence of a particular and widespread view of state sovereignty which insulates a state from intervention and which should only be violated in the most extreme circumstances, if even then. Most of the discourse has been about legal issues, as outlined above. However, those particular issues are not the only relevant ones, nor are they necessarily the best arguments with respect to finding a legitimate basis for humanitarian intervention. Although there have been many developments in international human rights and humanitarian law this century, international law is still based upon state action and acceptance. Thus, accepting legal positivism means acknowledging that, for the most part, states do not have limits on their power unless they accept those restrictions. And, those that accept such restrictions usually are not the ones who will be targeted for intervention in the first place.

Others would like to rely on natural law to identify restrictions on state power and to provide a basis for intervention. That is, some turn to scriptures or other teachings from religious thought, or to a supposed natural order of things to find a basis for basic human dignity as a natural and absolute good. However, this is problematic because its basis cannot be pointed to in any concrete way. Saying it derives from god helps little because there are so many different views of religion that arguing something derives from god is highly problematic. Basing a law on a supposed natural order of things beyond religion does not get one much further, for how does one identify such an order?

This may seem excessively nihilistic. However, if instead we realize that our realities, our ways of interpreting the world are socially constructed, and thus imbued with social purpose, we can recognize that any view of law or any social idea, such as sovereignty, is contingent, but the firmness or ephemeral nature of this contingency is based upon the idea, structure, or institution we are concerned about. This is as true in law as in other realms: "State-societies do not have any inherent legal powers.... To claim legal power, as much for a state as for any private citizen, is to acknowledge social purpose."¹²³ One might conclude, therefore, that states may be restricted in their conduct at least insofar as they violate this social purpose.

Investigating this social purpose leads to the conclusion that sovereignty, rather than being focused on the rights of governments, should, instead, be focused on the relationship of individuals to sovereign entities -- states -- and the rights contained therein. It also requires us to look both inward from the state, or downward to a lower level of aggregation, and outward, or upward to encompass wider portions of the international community.

Theoretically, states exist for the well-being of their inhabitants. The primary function of states is that of protection. In other words, the state exists to ensure that its citizens are able to live their lives free from the fear that an outside force will interrupt their lives.¹²⁴ A reasonable extension of this would be that the inhabitants of a state should also be as free from internal

¹²³ Philip Allott, *Eunomia: New Order for a New World*, (New York: Oxford University Press, 1990): 256.

¹²⁴ Of course with the increased permeability of borders, it is hard for the state to carry out even this function.

persecution as from external persecution. For, there would be no reason to protect people from external threats if they were mistreated at home. Thus, the social function of states is to ensure the ability of people to live.

If, then, the state exists only for the purpose of enabling the individuals who comprise the state to live their lives relatively peacefully, and for no other purpose, then one cannot say that sovereignty ultimately rests with the state. Rather, it rests with individuals within the state. They may turn over part of their sovereignty to the state as a condition for protection and to enable the state to engage in activities which will provide for various needs of the individuals, but, ultimately, this is only a loan which, theoretically, can be called in whenever the state is not fulfilling the conditions implicit in the loan.¹²⁵

If sovereignty rests with individuals what does this actually mean? In other words, are there certain rights which go along with this sovereignty -- fundamental human rights? As I have noted, there are many such rights recognized within the realm of positive international law. However, for purposes of this discussion, I contend that recognizing the state as a socially constructed institution with the social purpose of providing security for its inhabitants would be incomprehensible without at the same time linking that social purpose to each and every individual within its realm. In other words, since the social purpose of the state is to enable its citizens to live, then it makes sense to recognize that social purpose as a right for each person. States may hold these rights in trust, but cannot violate them for *raison d'etat*.

Thus, the right to live is the most basic right. In addition, individuals are not only protected from abuse and assured of basic protections, "the people" are seen as sovereign. This is the concept of "popular sovereignty" -- the state must be beholden to the people. As the UDHR states, the basis of authority is the will of the people. It determines a state's legitimacy: "Political legitimacy arises from the people's will -- it does not descend deductively from the Westphalian

¹²⁵ This is similar to various social contract theories. However, whereas Locke used natural law to provide a base for the intrinsic rights of people over state-centric positive law, I want to suggest that these rights can be derived from the social purpose of the state itself rather than a nebulous and unidentifiable natural order of things.

principles of state sovereignty."¹²⁶ Of course, determining the will of the people is problematic.¹²⁷ To a large extent (although possibly not in every circumstance), this leads to various conceptions of democracy to determine this will. Regardless, the state is nothing more than the sum of its parts.

One might also expand the concept to include the right to live in a certain way. One part of this right would be freedom from torture and other persecution -- such as unwarranted detention, discrimination, or mass movements of populations, which, while not necessarily threatening the actual life of an individual -- although in many instances it might, such as in a case where people were deprived of food -- precludes the individual from using his or her right to live. Further expanding this right would include the right to what Michael Walzer calls a "common life" -- in other words the right to self-determination, the ability to decide how you will lead your life politically, socially, culturally, etc. There are, of course, limits to this, especially when one group's "common life" infringes on another group's "common life." This probably comes closest to the true meaning of the nation-state -- a group of people who have certain things in common socially, culturally, and linguistically and who have established a "common life" together. Territorially boundaries might (contingently) be put around this group to protect the inhabitants' freely chosen, noninfringing way of life.¹²⁸ It is the existence of such a common life that claims to sovereignty and nonintervention are founded upon. Thus, we have three building blocks of sovereignty -- people, the people, and peoples (those pursuing a common life).

What is important here is that if a government violated any of these rights -- and therefore was not carrying out its social function -- it could be declared illegitimate and the people could call in their loan of sovereignty. Philip Allott provides a similar view:

If you claim to have a legal power, if you seek to act on the basis of a legal power, you acknowledge the legal system which creates the power and which confers it on you, and

¹²⁶ Lawrence T. Farley, *Plebiscites and Sovereignty: The Crisis of Political Illegitimacy*, (Boulder: Westview Press, 1986): 145.

¹²⁷ Even defining who "the people" are is problematic and can be an exercise in marginalization.

¹²⁸ See Michael Walzer, *Just and Unjust Wars*, New York: Basic Books, 1977, pp. 53-8.

you acknowledge that the power is in principle limited, and you acknowledge the specific limits of the power.¹²⁹

Thus, those who are acting within the realm of the socially constructed state must accept the purposes of that entity in order to be able to claim legitimacy for their actions.

Within the above framework, however, the place of the individual in the world as a whole is still murky. The space outside national boundaries is perceived as somehow different from the space enclosed by constructed, yet ephemeral, boundaries. Is this necessarily the case? Of course not. Those in power over the centuries have created an illusion of an "inside" and an "outside." Inside the state, there is a feeling of belonging (usually) and a feeling that "we're all in it together," and there are limits (at least within certain societies) to what might be done. Outside, there is not the same feeling of comradeship, and the limits on state action are not the same.

Yet, this dichotomy can be seen as the contingency it is. Benedict Anderson writes that national communities are "imagined communities" which are "both inherently limited and sovereign." The nation "is *imagined* because the members of even the smallest nation will never know most of their fellow-members, meet them, or even hear of them, yet in the minds of each lives the image of their communion."¹³⁰ These communities, however much power they may have in the minds of their citizens, are ideas, constructed within the minds of those citizens. There is nothing "natural" about them, although they may seem as such. And, in fact, national communities are just one of a number of communities we each recognize as having some sort of claim to our loyalties. We may say "my country right or wrong," but we also may feel similar feelings about our state or province, our region, our city, our neighborhood, or even non-territorially-bound entities. Some of these might even be more important than our particular country. So why not also go the other way? A feeling of being European exists along with nationalist sentiment within the particular countries that comprise Europe. And Europe is just as much a creation as is France or Germany. It should not, then, be too great a step to also imagine

¹²⁹ Allott, p. 313.

¹³⁰ Benedict Anderson, *Imagined Communities: Reflections on the Origins and Spread of Nationalism*, (New York: Verso, 1991): 6.

the entire earth as an encompassing community. We are not familiar with most of the people within this imagined community; rather, the scale is just different. Further, this need not be our only allegiance; we can still keep our other allegiances to our nation, our province, our city. What changes in this perspective is that those who are citizens can also be considered as humans. This involves, in other words "dethron[ing] the statist paradigm"¹³¹ where people are defined in relation to their state rather than in relation to each other and the wider global community.

I will take one other step in this constructivist view of community. Above, human rights were tied to the social purpose of the state. Similarly, we can investigate the social purposes of international institutions. These institutions are created by states in order to deal with interdependence and permeable borders. States, as established above, have as their social purpose providing a decent environment for the individuals within the borders of the state to live. Since international institutions are created by entities with a social purpose, they must also be tied in with that social purpose. Thus, individuals can be tied to international institutions and to each other within a framework which recognizes them as humans as well as citizens. They are citizens within a global community as well as within national (and other) communities, and this means that the global community has certain responsibilities to its citizens, regardless of the (imagined) state in which they reside.

The implications for the discourse on humanitarian intervention are far-reaching. The most fundamental question with respect to responding to violations of human rights is whether there is a right or a duty on the part of some outside entity to intervene to stop the atrocity. I have already argued that there is a right to intervene, at least on the part of the United Nations. Genocide and other human rights abuses violate the social purpose of the state. When this happens, the government becomes illegitimate because it cannot claim that it is working within the social framework which provides it with its rights and duties in the first place. But what about an actual duty or responsibility to intervene? As Walzer points out: "If rights don't require us to

intervene... then it is difficult to see why they should be called rights."¹³² It is more than just rights, though, which justify and require humanitarian intervention, it is acts "that shock the moral conscience of the world."¹³³

In addition to tying the individual to the state, I have also argued that the individual is connected to the larger global community. There are many types of international organizations created by states. Because they are created by entities with a social purpose (states) they must also be tied in with that social purpose in various ways. They thus have an obligation to ensure that social purpose is carried out. When the social purpose is violated within a particular state, the international community, which has been developed along the lines of states and thus must support the social purpose of those entities, *must* respond to the violations. The nature of the response will depend upon the nature of the sector of the international community. Thus, the United Nations, which has both a recognized interest in human rights, as well as the ability to undertake the forceful actions under discussion, has an *obligation* to take these actions.

Further, such humanitarian intervention should not be conceived of within the conventional terms of intervention:

Governments and armies engaged in massacres are readily identified as criminal governments and armies (they are guilty, under the Nuremberg code of "crimes against humanity"). Hence, humanitarian intervention comes much closer than any other kind of intervention to what we commonly regard, in domestic society, as law enforcement and police work.¹³⁴

This is, indeed, how any kind of humanitarian intervention must be viewed -- as a police action. The domestic analogy can be overdrawn, but here it is appropriate. Domestic police enforce the laws and, theoretically, the common moral code of society. At the international level, it is next to impossible to find a transcendent global morality. Yet, I *have* identified a way to provide for a certain minimum level of moral conduct with respect to states. Therefore, the intervening entity would be enforcing the common morality of the world with regard to the social purpose of states

¹³²Michael Walzer, "The Moral Standing of States: A Response to Four Critics," *Philosophy & Public Affairs*, 9 (Spring 1980): 223.

¹³³Walzer, *Just and Unjust Wars*, p. 107.

¹³⁴*Ibid.*, p. 106.

¹³¹Richard Falk, *Revitalizing International Law*, (Ames, Iowa: Iowa State University Press, 1989): 10.

(as well as international law, especially with respect to genocide). This police action differs from military action in this regard. It is not for the expansion of state power or for economic or ideological reasons, but to enforce international civility.

Thus, beyond the rights, duties, and obligations we can find in positive international law, we can also point to a basis for a right and a duty of humanitarian intervention within the very concept that governments use to shield themselves from intervention -- sovereignty. What comes next, then, is to delineate the circumstances under which such intervention should be carried out, by whom, and in what manner.

Criteria for Humanitarian Access and Intervention

I have made a distinction between access and intervention. Access has a focus on providing humanitarian aid to a needy population by a wide array of agencies and organizations, and hopefully will not require a significant military operation alongside. In addition, it cannot address larger political issues. Humanitarian intervention, on the other hand, has a wider focus which may go beyond aiding needy populations and may involve wider political and military issues. Thus, while there is overlap between the two, they are still somewhat conceptually distinct, and thus the conditions under which they may be engaged in may be somewhat different.

The conditions under which humanitarian organizations may provide aid are straightforward. The primary condition is, of course, that there must be a needy population, such as one facing mass starvation. This, after all, is the conceptual focus of humanitarian access. This usually occurs in times of civil conflict, although other instances of humanitarian disasters may also provide this condition. In addition, the government must be either unable or unwilling to provide for the needy population. It is at this point that a right to ignore the wishes of the government is legitimate because it is not fulfilling its obligations to its citizens. If, however, a government is truly willing but unable, then relief may be negotiated with the government without resorting to claiming a right to humanitarian access.

Finally, those providing aid must observe neutrality. This is a primary component of International Humanitarian Law which provides for a right to receive and provide assistance. That is, the organization providing aid must not side with or against the government or other parties involved in a conflict. Yet, there may be times when a situation is so grave that an organization cannot keep silent about the situation. This will be especially so in cases where providing aid has become a long-term response and the situation requires some other sort of action. The question becomes whether providing aid actually helps to support the underlying conditions which has led to the humanitarian crisis and whether publicizing the situation, while possibly inducing stronger action -- intervention -- would also hurt those in need. This becomes a question because to the extent that gaining humanitarian access is an operational problem rather than one of sovereignty, the actual operational ability to provide aid may be undermined or disrupted by various parties if they are criticized. Many organizations maintain that they have to work with strict neutrality; in fact, they would not be able to operate without it. Yet, others say that they have a responsibility to criticize human rights abuses wherever they occur. Doing so, however, may also mean that their ability to provide humanitarian aid is severely circumscribed. While neutrality, in general, should be observed, there is probably also room for some organizations to violate that neutrality in certain circumstances, essentially those which might require intervention.

The conditions under which humanitarian intervention may be legitimately contemplated are much stricter and the criteria must be more precise because the possible consequences are much more severe than in the case of humanitarian access. They are as follows:^{135,136}

¹³⁵The following criteria parallel traditional just war theory in a number of respects. For example, the National Conference of Catholic Bishops requires that the following principles be met when deciding whether or not a war is just: 1) just cause (or widespread gross violations of human rights); 2) competent authority (multilateral action); 3) comparative justice; 4) right intention (overriding humanitarian motive); 5) last resort (exhaustion of other remedies); 6) probability of success (related partially to limited action); and 7) proportionality (limited action). In addition, two conditions must be met in fighting a war: 8) proportionality (limited action) and 9) discrimination (limited action). However, I do not consider just war theory to be particularly useful or relevant in assessing the issues discussed in this paper or in the wider context of a nuclear-filled world. Space considerations preclude an in-depth analysis of the relevance of just war theory. However, a few observations are in order. First, while this may not have been the original intent of Augustine and Aquinas when they first put forth their just war formulations several centuries ago, most recent discussion of just war theory has been used to justify various wars and interventions (witness the US invasion of Panama in 1989 named "Operation Just Cause") rather than as a restraint on the use of violence. Second, one of the main criteria of just war theory is that of right intention, which means that any killing (of civilians for example) must not be intended, even though it may be foreseen. So, even though one knows that many people are going to die, this is beside the point

1) *Widespread Gross Violations of Human Rights* The primary criteria for contemplating humanitarian intervention is the presence of massive atrocities, either imminent or actually carried out by a government. This would include mass killings, deprivation of food, or other activities which result in massive loss of life. No precise number can be put forth,¹³⁷ but once a situation reached the point where many thousands or millions of lives are being lost or at risk of being lost, this criteria would probably be met. In addition, a situation where a significant portion of a specific ethnic or religious group were threatened -- falling under the definition of "genocide" in the Genocide Convention -- would qualify for humanitarian intervention.¹³⁸

2) *Multilateral Action* As discussed above, unilateral action is illegitimate for a number of reasons. Any action should be taken by either the UN or a regional organization.¹³⁹ Depending on the situation, one might be more preferable than the other. Of course, both the UN and regional organizations have been essentially unable to carry out this type of action, and even with

(except insofar as it relates to other criteria) as long as it is not intended. Third, in today's nuclear world, it is hard to see how just war theory may be applicable, although some, such as William V. O'Brien, see the possibility of limited nuclear war as justified within the just war tradition. Fourth, as Robert Holmes points out, just war theory accepts the morality of violence which would occur in a just war without further scrutiny. Finally, humanitarian intervention, as discussed above does not need to be conceived of in terms of a just war. Rather, it should be thought of as global police action. This may seem like semantic games, but if the world is evolving in the direction of a global civil society where human rights are upheld as global values and protected as a result of global decisions, then, appropriating the domestic analogy, humanitarian intervention would not be in the mold of past war between states, but rather as police enforcement, albeit police enforcement on a larger scale. A good recent overview of just war theory can be found in Jean Bethke Elshstain, ed., *Just War Theory*, (New York: New York University Press, 1992), including the essays by Robert Holmes "Can War Be Morally Justified? The Just War Theory" and William V. O'Brien "The Challenge of War: A Christian Realist Perspective."

¹³⁶These criteria are similar, but not identical, to criteria put forth by a number of other observers. See, for example, Bazzyler, pp. 598-607; Barabara Harff, *Genocide and Human Rights: International Legal and Political Issues*, Vol 20, No. 3, Monograph Series in World Affairs, (Denver: University of Denver, 1984): 24-5; Sornarajah, esp. 73-7 (focuses on instances of self-determination and secession); David J. Scheffer, "Challenges Confronting Collective Security: Humanitarian Intervention," in *Post-Gulf War Challenges to the UN Collective Security System: Three Views on the Issue of Humanitarian Intervention*, (Washington, DC: United States Institute of Peace, 1992): 1-14.

¹³⁷As Harff (p. 12) points out: "It is difficult enough to identify the elements of genocide -- a diverse set of deadly strategies on which states embark to eliminate certain unwanted people -- without requiring an answer to the question, 'how many?' A criterion which requires 'counting the dead' implies that genocide [or other widespread gross violations of human rights] cannot be diagnosed until after the fact, and thus defeats the purpose of recognizing and, more ambitiously, stopping genocidal practices."

¹³⁸This paper has not addressed the question of monitoring or deciding when genocide or other gross violations of human rights are occurring. Recognizing, publicizing, and getting relevant decision-makers to recognize and act upon such abuses can be a complicated and sometimes politically-laden process. On defining and recognizing genocide see Helen Fein, ed., *Genocide Watch*, (New Haven: Yale University Press, 1992). See also Harff, pp. 14-17 for some of the shortcomings of the definition of genocide in the Genocide Convention.

¹³⁹Finnemore argues that the international normative structure with regard to multilateralism has evolved over the past fifty years, "making multilateralism not just attractive but imperative." Finnemore, p. 38.

some hopeful signs, this places significant restrictions on any type of humanitarian intervention. When the UN has taken forceful action in the past, it has authorized member states or regional organizations to act on its behalf. If the UN became truly serious about forceful action in defense of human rights, the most expedient arrangement would be to have a stand-by force -- possibly individually recruited by the UN and under the direct command of the UN -- already assembled and available to be deployed in short order. In fact, there have been various proposals for the creation of such a force. However, this is unlikely to occur in the foreseeable future. Thus, any action is likely to take the form of a coalition, such as in the Gulf War. However, unlike the Gulf War, the participant states in a coalition should have an overriding humanitarian motive, rather than being in the position of acting as mercenary forces for the UN, fulfilling their particular agendas in the process. Otherwise, the decision to take action, as well as the way in which it is carried out, can be corrupted.

3) *Overriding Humanitarian Motive* The motives for intervening must be humanitarian in nature. If individual states were permitted to engage in this action it might be very difficult to satisfy this condition. However, considering that any action will be more like a police action enforcing the laws and morality of a universal or regional organization at the behest of such an organization, made up of many different states with different interests, this will not be as much of a problem. There may be cases where concrete humanitarian issues are combined with security issues. In fact, this may be the most likely scenario for intervention. In this case, as long as the humanitarian motives are still primary and not ancillary or used as a pretext for intervention, security interests, such as regional stability, may be present. As Akhavan writes:

humanitarian intervention must be evaluated not only within the confines of inter-State relations and interests, but rather, primarily on the basis of the participation and interests of those who are the actual victims of gross and flagrant human rights violations such as genocide.¹⁴⁰

4) *Limited Action and Proportionality* The use of violence to stop violence is of dubious moral quality at best, and great care must be taken that the force used is proportional to the

¹⁴⁰Akhavan, p. 42.

situation. Since humanitarian intervention is being sanctioned only in response to mass violence and killing, the question of using violence for situations which are not violent, or relatively not violent, will not come up. However, the force used should be as "surgical" as possible -- realizing, at the same time, that such precision is generally impossible -- so that only the absolute minimum amount of force is used, and that which is used is proportional to the situation which is being remedied. Also, the forces should only stay as long as it takes to stop the mass violence and loss of life. Sometimes, this might mean deposing a ruling despot and perhaps putting a country under UN trusteeship for a time.

5) *Respect for Self-Determination* The intervening entity must respect the values and institutions of the people. It cannot attempt to impose its own political or other system on the people. It must "enter... into the purposes of [the] people"¹⁴¹ and not try to frustrate them.

6) *Outcome Better than Previous Situation* Related to respect for self-determination, the government which comes into power must have the support of the people -- be democratic, however one defines that, or include some notion of popular sovereignty -- and the situation in general must be "better."

7) *Exhaustion of Other Remedies* The intervening entity must try all other avenues of peaceful conflict resolution before resorting to force. These would include UN and other resolutions and diplomatic missions, as well as economic sanctions.¹⁴² Yet, there might also be instances where, because the threat is so massive and the situation is evolving so rapidly, that there might not be time to implement a wide array of other measures before resorting to more forceful action.

Sovereignty and the Legitimacy of Humanitarian Intervention

Human rights abusing governments rely on sovereignty as a shield to protect them from scrutiny and to enable them to carry on their practices free from outside interference. However,

¹⁴¹ Walzer, *Just and Unjust Wars*, p. 104.

¹⁴² See Harff, pp. 79-80 for a clear delineation of what these actions should be in the case of potential or actual genocide.

in the course of reviewing international law and recent practice, as well as reconceptualizing the position of people within the framework of sovereignty, I have demonstrated several things. First, individuals have a right to receive humanitarian assistance. Second, international organizations have a right, in certain instances, to gain access to provide such assistance without regard for the wishes of the government as well as to engage in more far-reaching intervention in certain types of instances. Third, the international community may have not only a right but an obligation to provide assistance and to intervene in cases of widespread gross violations of human rights.

On a more conceptual plane, individuals can be conceived of as having a different relationship with the wider community beyond the state, and states have obligations toward individuals within the wider community beyond their supposed sovereign realm. That is, the state is no longer the absolute mediating focus between the individual and the international community. Rather, the welfare of individuals is now the direct concern of the international community, and states, as members of the international community, have obligations towards those individuals when the international community determines they are in need.

These rights and obligations come into play when a state, or at least certain actions of a state, has been found to be illegitimate. That is, when a state violates human rights or cannot meet its obligations *vis a vis* its citizens, those citizens have a right to ask for and receive assistance and the international community has a right and obligation to respond in a manner most befitting the particular situation, which may involve, in some way, ignoring the sovereignty of the state in favor of the sovereignty of individuals and groups. This is the most direct and damaging challenge to the sovereignty discourse with its traditional notions of state sovereignty, and represents a significant paradigm shift in the way the relationship between the individual and the international community is conceived, as well as the way in which the legitimate loci of power and authority are constructed.

In practice, this challenge has been taken up by the international community, albeit in ambiguous and sometimes contradictory ways. In the cases of Bangladesh and Uganda, India and Tanzania engaged in what some see as illustrative cases of humanitarian intervention, although

neither country used this argument. In the case of the Kurds, the international community responded, somewhat reluctantly, with a clear violation of Iraqi sovereignty. In Somalia, to the extent that one could talk about Somali sovereignty, the international community, again, took action on humanitarian grounds which undermined the norm of nonintervention. In both of these cases, findings of threats to international peace and security (based, especially, on refugee flows) rather than specific humanitarian criteria were used to justify the interventions. In other instances, there have been cases where UNHCR and many NGOs have either pushed the limits of state sovereignty or ignored it altogether when attempting to gain humanitarian access to affected populations. Sometimes this is recognized by humanitarian practitioners as violating sovereignty, but other times a more benign gloss is put on these activities so as not to raise the ire of governments. In still other situations, the international community has done little to deal with widespread violations of human rights, even when there seems to be consensus that it can and should act.

Humanitarian intervention in the post-cold war era has been extremely selective, and will probably continue to be so. Some would argue that this fact, itself, is enough to call into question the legitimacy of such actions. However, this is too simplistic a reaction. It is likely that the world will continue to see more Rwandas and Bosnias and Somalias. The international community is not going to intervene in certain powerful states, nor is it going to respond in the same fashion to all humanitarian emergencies. Forsaking action in all situations because the powerful states may only choose to act in a few is an abdication of the responsibility which I have tried to lay out in this paper. Coherent and consistent responses to all situations would enhance the legitimacy of humanitarian interventions and allay the fears of some regarding inconsistency. However, we are not living in particularly coherent times, and this situation is likely to continue for some time as the emerging global order begins to take shape. Perhaps we should accept whatever human rights protection we can get, while at the same time recognizing it is not enough and hope that as the international community recognizes its responsibilities it also decides to act upon them.

Thus, it may be that even as a normative revolution is taking place with regard to the rights and responsibilities inherent in claims to sovereignty, the will of the global community to adjust to this reorientation has not kept up. The basis for the right and obligation to undertake forceful action on the part of the global community to protect human rights is established. What has not been established is the will of that wider community to act on this responsibility in a coherent and principled manner.