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Command of Sovereignty Gives Way to Concern for Humanity

Christine Ellerman

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NOTES

Command of Sovereignty Gives Way to Concern for Humanity

ABSTRACT

This Note examines the legality of humanitarian intervention by tracing the historical justifications for nonintervention through modern interpretations of the U.N. Charter. Events leading to the change in the U.N. stance on humanitarian intervention are discussed. The Note also sets out criteria for justifiable intervention. The Note concludes that intervention can be justified to the extent that it is carried out for humanitarian purposes.

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I. INTRODUCTION

States, scholars, and the United Nations itself have long interpreted the United Nations Charter to prohibit foreign intervention in a state's internal affairs.¹ In 1992, however, the United Nations (U.N.) approved the United States military efforts to bring humanitarian relief to Somalia and Bosnia-Herzegovina.² This policy reversal reflects recent world events that have changed the way the international community views human rights. As the threat of superpower confrontation diminishes, the rights of individuals to live free from oppression, discrimination, and persecution eclipse other international concerns.³ Although the number of interstate conflicts is waning, intrastate conflicts are increasing. Internal disputes are erupting in warfare as traditional forms of government lose popular support.⁴ Unlike the victims of most interstate wars, the victims of the conflicts in places such as Somalia and Bosnia-Herzegovina are civilians who must struggle to survive the battles that will deter-

1. F.X. DE LIMA, *INTERVENTION IN INTERNATIONAL LAW* 53 (1971) (citing U.N. efforts to codify the principle of nonintervention).

2. See *infra* note 8 and accompanying text.

3. George Bush, Address to the 46th Session of the United Nations General Assembly in New York City (Sept. 23, 1991), in 27 *WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS* 1324, 1325 [hereinafter U.N. Address].

4. Iraq is perhaps the most visible example in modern times. In the aftermath of the U.N.-backed coalition's intervention to remove Iraqi soldiers from Kuwait, rebel armies attempted to overthrow Iraqi President Saddam Hussein. Hussein quashed the revolts. The brutal response to Kurdish insurrection caused some two million Kurds to flee to the mountains of northwestern Iraq. Howard G. Chua-Eoan, *Defeat and Flight*, *TIME*, Apr. 15, 1991, at 18; George J. Church, *The Course of Conscience*, *TIME*, Apr. 15, 1991, at 28. Saddam Hussein has gone to great extremes, including using poisonous gas, to quash rebellion. See *The Noose Tightens*, *NEWSWEEK*, Mar. 25, 1991, at 18-20; Patrick E. Tyler, 'Clean Win' in the War with Iraq Drifts into a Bloody Aftermath, *N.Y. TIMES*, Mar. 31, 1991, at 1.

mine the form and personality of the government under which they will live.⁵

As the international community witnesses civilian suffering, it demands that states such as the United States intervene.⁶ For reasons one time vital to the preservation of international order, international law prohibits intervention forceful enough to provide food and other nonmilitary assistance.⁷ Despite this historical rejection of humanitarian intervention as a justification for using force against a state, however, the U.N. has sanctioned limited interventions in Somalia and Bosnia-Herzegovina for the sole purpose of preserving human life.⁸

This Note examines the doctrine of humanitarian intervention and considers the factors underlying the international community's shift in attitude regarding the validity of such intervention. The Note then explores the U.N.'s history of nonintervention. It examines the controversy in the U.N. surrounding this change in attitude and the recent reinterpretation of the United Nations Charter (Charter) to allow armed intervention to reduce human suffering. Finally, this Note examines the United States potential role as guardian of human rights in the "new world order."

II. HUMANITARIAN INTERVENTION: DEFINITION AND HISTORICAL APPROACH

Under the theory of humanitarian intervention, a state may intervene in the internal affairs of another state if the government of the target state severely deprives its citizens of their basic human rights.⁹ The doc-

5. Sophronia S. Gregory, *How Somalia Crumbled*, TIME, Dec. 14, 1992, at 34, 34; *War in Bosnia—Herzegovina is Yugoslavia's Worst Nightmare Come True*, OTTAWA CITIZEN, Apr. 26, 1992, at A3.

6. See Sadruddin Aga Khan, *Help Iraq Help its People*, N.Y. TIMES, Sept. 14, 1991, at 19; Peter Maass, *Relief Supplies Won't Prevent Bosnia Tragedy*, U.N. AIDE SAYS, WASH. POST, Jan. 8, 1993, at A13.

7. See U.N. CHARTER art. 2, ¶ 7.

8. Paul Lewis, *Mission to Somalia: Painting Nations Blue*, N.Y. TIMES, Dec. 9, 1992, at A17 (describing U.N. intervention in Somalia); *Moslems Lay Down Ultimatum at Peace Talks, While Shells Hit Sarajevo*, AGENCE FRANCE PRESSE, Jan. 4, 1993 (describing the situation in Bosnia and U.N. involvement there) [hereinafter *Moslems Lay Down Ultimatum*].

9. ANN VAN WYMEN THOMAS & A.J. THOMAS, JR., NON-INTERVENTION 71 (1956); FERNANDO R. TESÓN, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY 5 (1988); see also HENRY G. HODGES, THE DOCTRINE OF INTERVENTION 1 (1915) (defining intervention as "an interference by a state or states in the external affairs of another without its consent, or in its internal affairs with or without its consent").

trine is a largely dormant, historically disfavored, and morally based principle of international law.¹⁰ States generally do not consider this doctrine to be a legal basis for using force against another state.¹¹ Moreover, there is no consensus among states that adhere to the doctrine on what actions the doctrine allows.¹²

The question of what intervention allows is the basis of the conflict surrounding the doctrine of humanitarian intervention. One side is the belief that intervention can never be legal,¹³ while on the other side is the growing concern for human rights and the desirability of legal intervention when violations reach a level that incites moral outrage.¹⁴

III. CHANGING VIEWS ON THE DOCTRINE OF HUMANITARIAN INTERVENTION

A. *The Dispute over Humanitarian Intervention*

Despite its disputed status, however, the legal doctrine of humanitarian intervention has a long and extensively documented history.¹⁵ Early

Humanitarian intervention can be defined as the right of one state to exercise international control over the acts of another when the target state acts contrary to the laws of humanity. THOMAS & THOMAS, *supra*, at 372. It is also defined as "the reliance upon force for the justifiable purpose of protecting the inhabitants of another state from treatment which is so arbitrary and persistently abusive as to exceed the limits of that authority within which the sovereign is presumed to act with reason and justice." ELLERY C. STOWELL, *INTERVENTION IN INTERNATIONAL LAW* 53 (1921).

10. THOMAS & THOMAS, *supra* note 9, at 61 (asserting nonintervention is preferred over intervention); TESÓN, *supra* note 9, at 111 (discussing the moral implications of the doctrine); H. LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* 32 (1950) (describing the use of the doctrine as sporadic and infrequent and casting doubt on its recognition in international law).

11. LAUTERPACHT, *supra* note 10, at 33. States tend to rely on other justifications for intervention that is humanitarian in nature. *Id.*

12. The doctrine's precarious standing may be partially attributable to the lack of agreement on how to define "intervention." It has been defined as "when a state or group of states interferes, in order to impose its will, in the internal or external affairs of another state, sovereign and independent, with which peaceful relations exist and without its consent, for the purpose of maintaining or altering the condition of things." THOMAS & THOMAS, *supra* note 9, at 71. Another scholar interprets intervention to mean "proportionate transboundary help, including forcible help, provided by governments to individuals in another State who are being denied basic human rights and who themselves would be rationally willing to revolt against their oppressive government." TESÓN, *supra* note 9, at 5.

13. THOMAS & THOMAS, *supra* note 9, at 74.

14. See TESÓN, *supra* note 9, at 15.

15. See STOWELL, *supra* note 9, at 55-62; LAUTERPACHT, *supra* note 10, at 33;

international law scholars considered all states equal and therefore intervention by one state into another was impermissible.¹⁶ Eventually scholars accepted that there are limits to a state's power to act in a manner that denies its citizens fundamental human rights to an extent that shocks the conscience.¹⁷ In theory, at least, international scholars recognized the validity of intervention based on the breach of these limits.¹⁸ States have not justified intervention with the need to rectify human rights violations because of their belief that relying on human rights abuses as a justification for intervention would upset an otherwise peaceful climate.¹⁹

Humanitarian intervention's potential for abuse is the basis of one of its criticisms.²⁰ Critics believe that once humanitarian causes become accepted bases for armed intervention in the affairs of states, illegitimate

TESÓN, *supra* note 9, at 15; LASSA OPPENHEIM, *INTERNATIONAL LAW* 347 (1905). Oppenheim asserts:

Should a state venture to treat its own subjects or a part thereof with such cruelty as would stagger humanity, public opinion of the rest of the world would call upon the powers to exercise intervention for the purpose of compelling such a state to establish a legal order of things within its boundaries sufficient to guarantee to its citizens an existence more adequate to the idea of modern civilization.

Id.; see also HODGES, *supra* note 9. "It is generally agreed that should the offense be continued, and be of such a nature as to shock all national morality, then an intervention may be permissible if an occasion should arise that would make it possible for this intervention to accomplish positive good." *Id.* at 87-88.

16. DE LIMA, *supra* note 1, at 11. "[T]o intermeddle in the domestic affairs of another nation or to undertake to constrain its councils is to do it an injury." *Id.* at 12 (quoting E. Vattel).

17. See HODGES, *supra* note 9, at 90. "[A]ny Sovereign may justly take up arms to chastise nations which are guilty of enormous faults against the laws of nature." *Id.* at 90 n.29 (quoting Hugo Grotius).

18. *Id.* at 90.

19. LAUTERPACHT, *supra* note 10, at 32. Lauterpacht criticizes this position on the grounds that "peace is more endangered by tyrannical contempt for human rights than by attempts to assert, through intervention, the sanctity of human personality." *Id.*

20. See Conference Proceedings (revised transcript of the March 11-12, 1972 Conference by the Procedural Aspects of International Law Institute on "Humanitarian Intervention Through the United Nations") [hereinafter Conference Proceedings], in *HUMANITARIAN INTERVENTION AND THE UNITED NATIONS* (Richard B. Lillich ed., 1973) [hereinafter *HUMANITARIAN INTERVENTION*]; Ian Brownlie, *Thoughts on Kind-Hearted Gunmen*, in *HUMANITARIAN INTERVENTION* 139, 147. "Humanitarian intervention, on the basis of all available definitions, would be an instrument wide open to abuse." *Id.* at 146. Jean-Pierre L. Fonteyne, *Forcible Self-Help by States to Protect Human Rights: Recent Views from the United Nations*, in *HUMANITARIAN INTERVENTION* 197, 218-20; Paul A. Neuland, *Traditional Doctrine on Intervention in the Law of Nations* 190 (1971) (Ph.D. dissertation, Georgetown University).

meddling will begin to be labeled "humanitarian."²¹ Safeguards against abuse, however, are available. Intervention through collective action would minimize the risk of abuse.²² If collective action is impossible and the only alternative is unilateral action,²³ many critics would urge non-recognition of the doctrine. Recent changes in the U.N.'s political status, however, have made collective action a valuable possibility.²⁴

The U.N. traditionally promoted and conformed to nonintervention principles.²⁵ For example, the U.N.'s Declaration of Non-Intervention,²⁶ promulgated in 1965, emphasizes the right of states to choose and operate their government without external interference. The declaration explicitly forbids intervention that threatens the sovereignty and political

21. Conference Proceedings, *supra* note 20, at 81-83 (discussing the problem of the superpowers intervening at their discretion and justifying it later). Humanitarian concerns have been used to justify questionable actions such as the United States involvement in the Dominican Republic and the U.S.S.R.'s intervention in Czechoslovakia. Fonteyne, *supra* note 20, at 218; Conference Proceedings, *supra* note 20, at 81-82; DE LIMA, *supra* note 1, at 49.

22. Collective action currently means action that occurs under the auspices of the United Nations. One example is the multistate intervention in Korea. See Michael J. Bazyley, *Reexamining the Doctrine of Humanitarian Intervention in Light of the Atrocities in Kampuchea and Ethiopia*, 23 STAN. J. INT'L L. 547, 602 (1987); cf. Jean-Pierre L. Fonteyne, *The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity Under the U.N. Charter*, 4 CAL. W. INT'L L.J. 203, 226-27 (1974) [hereinafter *Doctrine of Humanitarian Intervention*] (arguing multilateral action is not a practical remedy).

23. Conference Proceedings, *supra* note 20, at 33 (explaining the view that the Charter's prohibition of unilateral force is a necessary corollary to the U.N.'s primary goal of maintaining international peace); see also *Doctrine of Humanitarian Intervention*, *supra* note 22, at 246-47; BELATCHEW ASRAT, PROHIBITION OF FORCE UNDER THE U.N. CHARTER: A STUDY OF ART. 2(4), at 186 (1991).

24. Conference Proceedings, *supra* note 20, at 85. "[I]f we limit humanitarian intervention to global organizational intervention or its equivalent, then we are not talking about a real world. I don't think we can expect the United Nations to intervene actively through the use of force except in the most limited circumstances." *Id.*

25. DE LIMA, *supra* note 1, at 53-63.

While the [United Nations] has made numerous representations in human rights matters and has influenced decision by a variety of indirect modalities, it has undertaken direct or delegated use of the military instrument in the territory of a State only when public order either had disintegrated or was about to disintegrate into a state of violent anarchy in which no human rights could be sustained.

Michael Reisman, *A Humanitarian Intervention to Protect to Ibos*, in HUMANITARIAN INTERVENTION, *supra* note 20, at 167, 184.

26. *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty*, G.A. Res. 2131, U.N. GAOR, 20th Sess., 1408th plen. mtg., Supp. No. 14 (1965) [hereinafter *Declaration*].

independence of states.²⁷

Consequently, any armed intervention on behalf of human rights, no matter how commendable, inexcusably violates the principle of complete governmental autonomy.²⁸ Prohibition of armed intervention to preserve human rights or end human rights violations is a clear and simple rule. The international community resists deviation from the rule of nonintervention because exceptions might "erode psychological constraints on the use of force for other purposes."²⁹

For decades the policy of nonintervention has been vital to the maintenance of virtual world peace.³⁰ The desirability of this policy has diminished in the current climate of democratic revolution because it seems inconsistent that "though states are founded for the sake of life and liberty, they cannot be challenged in the name of life and liberty."³¹ International law, however, exists not to promote one type of government over another nor to protect the rights of individuals, but rather to protect the rights of legitimate governments.³² The current trend toward democratization may alter this perspective, but only if the general aversion to using force for any reason other than defense substantially diminishes.

B. *A Modern Outlook*

Recent events have created an awareness that only force can stop some serious human rights violations. Modern international law scholars likewise are beginning to acknowledge the necessity of intervention.³³ Principles that place the individual on equal footing with the state, rather than as a subject to its complete power, are garnering increasing support.³⁴

27. The Declaration states that "[n]o State has the right to intervene, directly or indirectly, for any reason whatever, in the internal and external affairs of any other State." *Id.*

28. Neuland, *supra* note 20, at 193; *Doctrine of Humanitarian Intervention, supra* note 22, at 248; THOMAS & THOMAS, *supra* note 9, at 67.

29. *Doctrine of Humanitarian Intervention, supra* note 22, at 248; *see also* TESÓN, *supra* note 9, at 163.

30. Donald C. Watt, *Keeping the Peace/U.N. New World Order? Just Too Many Scores to Settle*, THE INDEPENDENT, Dec. 6, 1992, at 12.

31. TESÓN, *supra* note 9, at 24 (quoting MICHAEL WALTZER, JUST AND UNJUST WARS 61 (1977)).

32. *Id.* Consequently, international law protects a totalitarian regime under which the individual has no right of liberty. The individual is merely a component of a class with certain privileges that the state may revoke at will. THOMAS & THOMAS, *supra* note 9, at 358.

33. TESÓN, *supra* note 9, at 5.

34. *Id.* at 7. As one scholar predicted in 1950, "as the feeling of general interest in humanity increases, and with it a world-wide desire for something approaching justice

Concerns for the rights of individuals are beginning to displace concerns for the protection of the sovereign.³⁵

The recent rise in democratic revolutions helps to explain the change in attitude toward armed humanitarian intervention.³⁶ In a democracy, a state's people create a government for their own benefit and protection.³⁷ Thus, a sovereign derives its rights from its citizens and has no separate identity.³⁸ If a sovereign fails to fulfill its obligations to its citizens, it forfeits its status as a legitimate government and thereby forfeits the protection of international law.³⁹ This reasoning is a variation on the historical consensus that when a state exceeds all reasonable limits on its authority, intervention becomes permissible.⁴⁰

As society's expectations regarding states' treatment of their citizens rise, international law must adjust accordingly. The traditional obligations of sovereignty must evolve to include a commitment to upholding basic human rights and an accountability for violations of those rights. Moreover, as the traditional ideals of nonintervention cease to satisfy societal expectations of international law, nonintervention must evolve into a more flexible doctrine. Circumstances that dictate this shift are the increased awareness of conditions around the world and the increasing cer-

and an international solidarity, interventions undertaken in the interests of humanity will also doubtless increase." HODGES, *supra* note 9, at 91. Furthermore, "future public opinion, and finally international law will sanction an ever increasing number of causes for intervention for the sake of humanity, where that cause is made the object of collective action on the part of a number of the larger powers." *Id.*

35. See, e.g., *Landscape of Death*, TIME, Dec. 14, 1992, at 30. "The harrowing faces of starvation, the inert shapes of death. These are images that have finally brought the world to Somalia's rescue." *Id.*

36. HODGES, *supra* note 9, at 91.

37. TESÓN, *supra* note 9, at 15. "From an ethical standpoint governments are, internationally and domestically, mere agents of the people. Consequently, their international rights derive from the rights of the individuals who inhabit and constitute the state." *Id.* at 111.

38. *Id.* at 16. Government control stems from people's giving up some of their rights in exchange for social order. Thus, if the government does not respect its citizens' rights, it loses its legitimacy and essentially its rights as a sovereign. *Id.* at 112.

39. *Id.* at 113. Tesón notes:

[B]ecause the ultimate justification of the existence of states is the protection and enforcement of the natural rights of the citizens, a government that engages in substantial violations of human rights betrays the very purpose for which it exists and so forfeits not only its domestic legitimacy, but its international legitimacy as well.

Id. at 15; see also David J. Scheffer, *Toward a Modern Doctrine of Humanitarian Intervention*, 23 U. TOL. L. REV. 253, 260 (1992).

40. See HODGES, *supra* note 9, at 88.

tainty of humanitarian intervention's success, which is generally assumed when one of the major international powers participates.⁴¹

IV. LEGITIMATE HUMANITARIAN INTERVENTION

A. *Background of Nonintervention and the United Nations Charter*

Many states in the international community adhere to the policy of nonintervention, and they find support for this position in their reading of the U.N. Charter.⁴² The doctrine of nonintervention, like the U.N. itself, developed out of principles of self-determination, choice of internal organization, and independence.⁴³ In theory, in order for states to develop their chosen forms of government, the international community not only had to discourage but also had to prohibit intervention.⁴⁴ Consistent with this belief, the majority of states consider the U.N.'s purpose to be maintaining international peace and security through restraint of intervening actions against states that satisfy a minimal standard of public order and human rights protections.⁴⁵ Members of the U.N., consequently, have interpreted the Charter in a manner based on the premise of virtual nonintervention in states' internal affairs.⁴⁶

A strict construction of the Charter permits the use of force in only two situations: self-defense and maintenance of international peace and security.⁴⁷ Article 2(4) requires states to refrain from using force to in-

41. See Strobe Talbott, *Dealing with Anti-Countries*, TIME, Dec. 14, 1992, at 35 (reporting that media coverage was the catalyst for action in Somalia). Humanitarian intervention is generally only considered an option if success is certain. HODGES, *supra* note 9, at 88.

42. DE LIMA, *supra* note 1, at 53-63. De Lima "trace[s] the various developments emanating from the efforts of the international community to come to grips with the principle of non-intervention—the antithesis of intervention." *Id.* at 53.

43. THOMAS & THOMAS, *supra* note 9, at 14; see also Neuland, *supra* note 20, at 99, 105-10. "A basic tenet of international law is the right of independence, internal and external; and as a consequence of internal independence a state must be free to manage its domestic affairs as it sees fit, subject to no interference from other states except to the extent to which international law binds it." THOMAS & THOMAS, *supra* note 9, at 359.

44. DE LIMA, *supra* note 1, at 13.

45. Fonteyne, *supra* note 20, at 219 ("Consciously sacrificing the alternative Charter goal of justice and promotion of even minimal human rights to the overriding concern for *minimum* public order, equated with sheer avoidance of forceful interactions *in international relations*, they try to fill all possible gaps in the system of Charter restrictions on forceful state initiatives.)"

46. See Watt, *supra* note 30, at 12 (describing the success of U.N. nonintervention policy).

47. TESÓN, *supra* note 9, at 128; Conference Proceedings, *supra* note 20, at 43;

terfere with "territorial integrity" or "political independence," and from using force in a "manner inconsistent with the Purposes of the United Nations."⁴⁸ Article 51 permits the use of force when a state acts in self-defense or in response to threats to international peace and security.⁴⁹ In further support of nonintervention, article 2(7) states that nothing in the Charter authorizes the U.N. to intervene in matters "essentially within the domestic jurisdiction" of a state.⁵⁰

The Declaration of Non-Intervention reinforces the traditional noninterventionist interpretation of the Charter.⁵¹ This document specifically provides that no state has the right to intervene in another state's affairs for any reason.⁵² States that voted for the resolution, some scholars argue, were consenting to an interpretation of articles 2(4) and 2(7) of the Charter that completely prohibits intervention.⁵³

The obvious and unfortunate effect of this strict construction is that it prevents the U.N. from acting to protect individuals from human rights abuses if a government chooses to repress its own citizens as a means of maintaining power and internal order. For many years, however, the U.N. has accepted armed humanitarian intervention in situations where human rights violations have attained such a level of severity that the U.N.'s Security Council asserts a need to act in order to preserve international peace and security.⁵⁴ In 1965, for example, the U.N. authorized intervention in Rhodesia (now Zimbabwe) when authorities in Southern Rhodesia proclaimed independence and the General Assembly believed that the proclamation would result in the continued denial of basic

Fonteyne, *supra* note 20, at 199-200.

48. U.N. CHARTER art. 2, ¶ 4.

49. The U.N. Charter provides:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

Id. art. 51.

50. *Id.* art. 2(7); see Scheffer, *supra* note 39, at 261.

51. *Declaration*, *supra* note 26; Conference Proceedings, *supra* note 20, at 43.

52. *Declaration*, *supra* note 26 ("No State has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State.").

53. Conference Proceedings, *supra* note 20, at 43.

54. *Id.* at 27; Reisman, *supra* note 25, at 188.

human rights to the Native African majority.⁵⁵ The Security Council called upon all states to refuse recognition of the Rhodesian Government's illegal authority.⁵⁶ It further resolved that the United Kingdom should put an end to the situation.⁵⁷ The U.N. justified these actions on the ground that the situation in Rhodesia constituted a threat to international peace and security.⁵⁸ Similarly, in 1991, the U.N. found the conflict in Somalia to be a threat to international peace and security despite the fact that the dispute did not cross the borders of any state.⁵⁹ The threat justified "legal" armed intervention because the sole objective was saving human life.

A state acting without the U.N.'s permission or approval can justify an act of armed humanitarian intervention only by claiming self-defense.⁶⁰ The "self-defense" claim may be expanded theoretically to include altruistic action taken by one state on behalf of another in order to restore world order.⁶¹ This approach allows the doctrine of humanitarian intervention to comport with presently acceptable theories of international law.

B. *Restructuring the Interpretation of the United Nations Charter*

Many scholars are suggesting, and the U.N. itself is considering, loosening the tight restrictions on use of force.⁶² A different interpretation of

55. Myers S. McDougal & W. Michael Reisman, *Rhodesia and the United Nations: The Lawfulness of International Concern*, 62 AM. J. INT'L L. 1, 3 (1968).

56. *Id.*

57. 10 UNITED NATIONS RESOLUTIONS: SERIES 1, 48 (Dusan J. Djonovich ed., 1989).

58. *Id.*

59. Lewis, *supra* note 8, at A17 (reporting that the Security Council declared that "the human tragedy caused by the conflict of Somalia" by itself was a threat to international peace and security); see also Christopher Greenwood, *Allies Invoke Unwritten Rule to Back Action*, THE TIMES (London), Jan. 9, 1993 (reporting that resolution 688 declared the situation in Iraq a threat to international peace and security).

60. Article 51 of the U.N. Charter excepts from the restriction on the use of force the "right of individual or collective self-defence if an armed attack occurs against a Member." U.N. CHARTER art. 51; Neuland, *supra* note 20, at 84; TESÓN, *supra* note 9, at 128.

61. Neuland, *supra* note 20, at 130-31. This position equates intervention to preserve the sovereignty of a member of international society with an action by a state to preserve its own sovereignty. *Id.* at 131.

62. See TESÓN, *supra* note 9, at 130-37 (interpreting the U.N. Charter as including protection of human rights as a primary goal); Fonteyne, *supra* note 20, at 213 (arguing that the Charter's prohibition of force should not apply to case of gross human rights violations).

the U.N. Charter maintains considerable restraint on the use of force but does not limit armed intervention for humanitarian purposes to the most extreme cases of human rights violations. Viewing the Charter in light of both of its stated purposes, the prevention of international warfare and the protection of human rights, this interpretation facilitates these goals.⁶³ The traditional strict interpretation of nonintervention, however, serves only the Charter's first purpose. It demands that states, as well as the U.N., resort to force only in response to aggression and only when peace and security are in jeopardy.⁶⁴ Adherence to this mandate, however, often precludes enforcement of the second stated purpose, the protection of human rights.

Some scholars argue that the two purposes are not inconsistent because the Charter's nonintervention principles were never intended to apply in the area of human rights violations.⁶⁵ By ratifying the U.N. Charter states undertook commitments, enforceable by the U.N., to human rights.⁶⁶ Other scholars urge that there is no inconsistency in the two purposes because the Charter is a living document and construing it in accordance with present purposes and expectations of the international community permits intervention to protect human rights.⁶⁷ State practices that violate human rights, including genocide, apartheid, and racial discrimination, must find no shield in nonintervention principles.⁶⁸

The provisions in the U.N. Charter regarding human rights allow for sanctioning armed intervention for humanitarian purposes.⁶⁹ The Preamble of the Charter states that one of the organization's goals is to "reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small."⁷⁰ The Preamble also provides that armed force shall

63. Conference Proceedings, *supra* note 20, at 60; see U.N. CHARTER art. 1.

64. U.N. CHARTER art. 51.

65. Fonteyne, *supra* note 20, at 206-09.

66. *Id.* at 200 (citing commentary of U.N. delegates as support for his arguments).

67. TESÓN, *supra* note 9, at 134-47.

68. Fonteyne, *supra* note 20, at 207-08.

69. Thomas G. Weiss, *New Challenges for U.N. Military Operations: Implementing an Agenda for Peace*, 16 WASH. Q. 15 (1993). "As efforts in Bosnia and Herzegovina, Somalia, and Iraq illustrate, humanitarianism has made its appearance as the driving rationale behind new international military forces. The precedent of human rights is therefore critical in looking toward future U.N. military efforts." *Id.*

70. U.N. CHARTER pmb. ¶ 1. Consistently with this statement and its purpose of protecting human rights, the U.N. has taken considerable action on behalf of the individual. DE LIMA, *supra* note 1, at 153.

The U.N. has also fulfilled its duty as required under the Charter to promote human rights by the adoption of: the Universal Declaration of Human Rights; the

only be used if it is in the "common interest."⁷¹ This phrase can be interpreted to mean interests that are "common to all individuals on earth," as opposed to all recognized governments.⁷² Under this interpretation, the use of force is justifiable and follows the mandate of the U.N. when it is necessary to protect human rights.⁷³

Furthermore, article 2(7) leaves room for armed humanitarian intervention. It states that the Charter does not authorize the U.N. to intervene in essentially domestic matters.⁷⁴ The word "intervene" may be interpreted quite literally to prohibit all types of interference in matters of domestic jurisdictions.⁷⁵ Prohibited intervention would then include creating committees and making recommendations on issues.⁷⁶ In practice, the U.N. often involves itself without objection in the peaceful resolution of domestic concerns.⁷⁷ In the alternative, intervention could be construed as any action taken by force or threat of force.⁷⁸ This position is also not accepted in practice.⁷⁹ The definition of intervention arguably evolves as attitudes evolve and varies depending on the interests in conflict. In the current international climate, however, interpreting article 2(7) to accommodate the new concern for human rights is legitimate and proper.⁸⁰

two Draft Covenants on Civil and Political Rights, and on Economic, Social and Cultural Rights; the 1948 Convention on the prevention and Punishment of the Crime of Genocide; and the 1954 Convention on the Political Rights of Women, to mention a few.

Id.

71. U.N. CHARTER pmb. ¶ 1.

72. TESÓN, *supra* note 9, at 133.

73. Reisman, *supra* note 25, at 177.

74. U.N. CHARTER art. 2, ¶7.

75. DE LIMA, *supra* note 1, at 175-76.

76. *Id.*

77. THOMAS & THOMAS, *supra* note 9, at 68.

78. U.N. CHARTER art. 33; DE LIMA, *supra* note 1, at 176-77 (placing an item on the General Assembly's agenda clearly is not considered a prohibited form of intervention under article 35). The U.N. also intervenes in passive ways. "It is generally agreed, [based on the drafting history of the Charter, and its] provisions of human rights that when there is a grave violation of basic human rights the U.N. is legally permitted to discuss, investigate and make recommendations." *Id.* at 181.

79. See Rajiv Tiwari, *United Nations: Assembly Approves Humanitarian "Supremo" Post*, INTER PRESS SERVICE, Dec. 19, 1991 [hereinafter "*Supremo*" Post]. If intervention were considered prohibited only when force is used, third world states would not protest the creation of a post whose only authority is to provide aid. They protest because the coordinator may act without the consent of the state to whom aid is being provided which they consider impermissible intervention. *Id.*; see also *infra* notes 165-84 and accompanying text.

80. See *Doctrine of Humanitarian Intervention*, *supra* note 22, at 241.

Article 2(7), furthermore, uses the adjective "essentially" to modify domestic matters in which the U.N. is precluded from intervening.⁸¹ Use of this subjective term, rather than a word such as "solely" may support the notion of nonintervention and qualify the scope of U.N. authority.⁸² If a state invoked this interpretation, however, the U.N. would be paralyzed in almost all matters.⁸³ Given the U.N. members' goals, it seems unlikely that they intentionally provided for the U.N.'s complete removal from the very disputes it was designed to remedy.

Under traditional Charter interpretation, while the U.N. promotes human rights, it cannot implement laws to protect them or to punish their violation.⁸⁴ As one scholar has written, under traditional interpretation the U.N. only has "techniques . . . to shame states which indulge in substantial and obvious transgressions of human rights rules."⁸⁵ This shame has limited effect on the government and offers no respite for the victims of the oppression. By legitimating humanitarian intervention, the U.N. would enable itself to act on behalf of the rights of individuals, even if the only threat to peace is the threat to the internal peace of a single state.

A more narrow reading of the second provision at issue, article 2(4),⁸⁶ which prohibits the use of force in a manner inconsistent with the purposes of the Charter, also allows armed humanitarian intervention. Strictly read, article 2(4) prohibits the use of force in only three situations, none of which are characteristic of humanitarian intervention.⁸⁷ First, article 2(4) forbids the use of force to impair the territorial integrity of the target state.⁸⁸ Humanitarian intervention does not result in a territorial conquest, but rather in restoring the people's rights.⁸⁹ Second,

81. U.N. CHARTER art. 2, ¶ 7.

82. THOMAS & THOMAS, *supra* note 9, at 144.

83. DE LIMA, *supra* note 1, at 216. By asserting that a matter brought to the attention of the General Assembly is of a domestic nature and that the state does not desire assistance, a state may prevent the U.N. from requiring it to comply with any peaceful resolution. This occurred when the U.N. began investigating reports of the Iraqi government's alleged use of chemicals against its Kurdish citizens. Iraq was able to halt the investigations by asserting that it was a matter of domestic jurisdiction. *A Welcome Infringement on Sovereignty*, STAR TRIB., Dec. 27, 1991, at A10.

84. Jack Donnelly, *Human Rights, Humanitarian Intervention and American Foreign Policy: Law, Morality and Politics*, 37 J. INT'L AFF. 311 (1984).

85. *Id.* at 337. The ability to mobilize world opinion may also be considered one of the United Nations strengths. Watt, *supra* note 30, at 12.

86. See TESÓN, *supra* note 9, at 130.

87. *Id.* at 131. See generally Fonteyne, *supra* note 20, at 214-15.

88. U.N. CHARTER art. 2, ¶ 4; TESÓN, *supra* note 9, at 131.

89. TESÓN, *supra* note 9, at 131. Legitimate humanitarian intervention is motivated

force is prohibited if it affects political independence.⁹⁰ Again, a true act of humanitarian intervention is intended to protect the people of a state, not to overthrow the government.⁹¹ Finally, force is not permitted if its goal frustrates U.N. purposes.⁹² Because an enumerated purpose of the U.N. is the protection of human rights, the Charter does not prohibit intervention to protect human rights. Moreover, applying traditional textualist interpretation, if the drafters had intended to prohibit all "transboundary force," they would have used language sufficiently specific to accomplish that goal.⁹³

The notion that states should stand silent and impotent to the heinous treatment of individuals simply because the abuse comes from the people's own government is no longer acceptable. Heightened awareness of the value of the individual, coupled with the technology that makes specifically targeted intervention possible, allows society "to fulfill the U.N. Charter's ambition of working to save succeeding generations from the scourge of war, to reaffirm . . . the dignity and worth of the human person, in the equal rights of men and women and nations large and small to promote social progress and better standard of life in larger freedom."⁹⁴ The achievement of these goals depends on heightened accountability of governments and a greater license for U.N. action to protect human rights.

C. *Criteria for Intervention*

To implement a workable humanitarian intervention policy, states must establish criteria by which to measure the legitimacy of intervention.⁹⁵ Scholars have suggested certain requirements for legitimate humanitarian intervention, including: disinterestedness of the intervenor; egregious human rights violation; consent; limited amount of force and duration; preference for collective action; and exhaustion of other remedies.

only by the international community's desire to end human suffering or restore human rights, not by a state's desire to conquer land area. *See id.*

90. U.N. CHARTER art. 2 ¶(4).

91. TESÓN, *supra* note 9, at 131. It is questionable, however, whether there actually can be intervention to preserve life that does not favor one government over another.

92. *Id.*; U.N. CHARTER art. 1.

93. TESÓN, *supra* note 9, at 130-31.

94. U.N. Address, *supra* note 3, at 1325.

95. Conference Proceedings, *supra* note 20, at 75-135; Scheffer, *supra* note 39, at 286 (setting forth question for formulating criteria).

1. Disinterestedness of the Intervenor

It is essential that an intervening state have little or no ulterior political motive for its intervention.⁹⁶ Scholars recognize the unlikelihood of a military action based purely on humanitarian notions and, therefore, suggest that so long as the principal reason for the intervention is the protection of human rights, the intervention will be valid.⁹⁷ There are obvious pragmatic problems of attempting to discern a state's true motives for intervening. General sympathy for a cause will help to remove the taint of politics, whereas an absence of sympathy will produce severe criticism and fuel political speculation.⁹⁸

Consideration of several factors in a postintervention review will assist in determining the morality of the intervention:

- (a) Did troops occupy the territory longer than necessary?
- (b) Has the intervenor demanded favors from the new government?
- (c) Did the intervenor seek to control the target state in ways unrelated to humanitarian concerns?
- (d) Has there been a restoration of human rights?⁹⁹

Moreover, the importance of sanctioning humanitarian intervention may outweigh concerns about the intervenor's political motivations. If the outcome is universally desirable, then it is irrelevant whether a state is intervening in its own interest.¹⁰⁰

2. Egregious Human Rights Violation

States generally agree that only the most severe situations justify armed intervention.¹⁰¹ The requirement of severity helps to assure the validity of the action and protects less powerful states.¹⁰² This limitation, however, does not answer the question of what human rights violations

96. TESÓN, *supra* note 9, at 115; *Doctrine of Humanitarian Intervention*, *supra* note 22, at 235, 261; Bazylar, *supra* note 22, at 602; R. George Wright, *A Contemporary Theory of Humanitarian Intervention*, 4 FLA. INT'L L.J. 435, 459 (1989).

97. Bazylar, *supra* note 22, at 602.

98. Wright, *supra* note 96, at 459-60. One way to assure disinterestedness is through the use of collective action. Collective action sacrifices the efficiency of unilateral action but is likely to result in a higher percentage of morally justified interventions. *Doctrine of Humanitarian Intervention*, *supra* note 22, at 228; Bazylar, *supra* note 22, at 604; see also *infra* notes 116-18 and accompanying text.

99. TESÓN, *supra* note 9, at 115.

100. Wright, *supra* note 96, at 460-61.

101. Bazylar, *supra* note 22, at 598; *Doctrine of Humanitarian Intervention*, *supra* note 22, at 235, 259; Wright, *supra* note 96, at 461.

102. Bazylar, *supra* note 22, at 598.

warrant intervention.¹⁰³ At one end of the spectrum, intervention would be allowed only in those situations where mass killing has occurred or is imminent.¹⁰⁴ At the other extreme, intervention would be allowed any time a government threatened any basic civil or political right.¹⁰⁵ A balancing approach would determine the extent of permissible intervention based on the extent of harm suffered.¹⁰⁶

3. Consent

The term consent applies to the general consent of people being helped, not the consent of the sovereign.¹⁰⁷ If the people of a state generally consent to their own government, intervention merely substitutes another state's judgment for that of its citizens.¹⁰⁸ One scholar broadens this concept by noting that while the people should consent, they may have been tortured into such a state of submission that they have lost their rationality and will to defy the government.¹⁰⁹ Therefore, the condition of being willing to revolt against the government must be qualified with a rationality requirement.¹¹⁰

Scholars who consider the sovereign's consent desirable recognize the precarious nature of such a requirement.¹¹¹ Consent of the target government may be a preferential criterion for armed intervention, but the ab-

103. In Somalia in 1992 the civilian population died from starvation and brutality at a rate of 1000 people a day. Bruce W. Nelan, *Taking on the Thugs*, TIME, Dec. 14, 1992, at 26-27. Bosnian health and security officials reported in January 1993 that 129,307 people, 12,894 of whom were children, have died or disappeared since the fighting began. *Moslems Lay Down Ultimatum*, *supra* note 8.

104. Bazylar, *supra* note 22, at 598. Bazylar would not allow intervention in cases of extreme torture but would allow it if killing was imminent. *Id.* at 600; Conference Proceedings, *supra* note 20, at 49. This author would require a "widespread loss of human life." *Id.*

105. TESÓN, *supra* note 9, at 117.

106. *Id.* at 116; *see also Doctrine of Humanitarian Intervention*, *supra* note 22, at 258. "The seriousness of the reaction against human rights abuses must be proportionate both to the gravity of the abuses and to the probability of remedying the situation." TESÓN, *supra* note 9, at 116.

107. TESÓN, *supra* note 9, at 120; *Doctrine of Humanitarian Intervention*, *supra* note 22, at 235; *see, e.g.*, Nelan, *supra* note 103, at 27 (reporting that the U.N. intervention in Somalia is the first ever undertaken without even pro forma permission).

108. TESÓN, *supra* note 9, at 119-20.

109. *Id.*

110. *Id.* at 119-21.

111. *Doctrine of Humanitarian Intervention*, *supra* note 22, at 268. Invalid consent may be expressed in a case where intervention is not truly warranted; conversely, where a significant number of human beings are in grave danger, intervention should not be precluded by lack of consent. *Id.*

sence of consent should not bar intervention when the other criteria have been met.¹¹² A variation on this approach is to require that the intervenor receive an invitation from someone, whether it be the government, the people, or the victims.¹¹³

4. Limited Force and Duration

The amount of force must be narrowly tailored to remedy only human rights violations,¹¹⁴ and the intervention should be proportionate to the abuse.¹¹⁵ This restriction, therefore, has two components: it must impact only those who have caused the violation, and the force of the impact must be in proportion to the harm being addressed.

5. Preference for Collective Action

Collective action represents one of the best means for establishing international law and justice.¹¹⁶ The involvement of more than one state in the intervention "tends . . . to depoliticize an otherwise highly violate situation."¹¹⁷ Although having more than one state involved does not per se make the intervention legal, it better ensures the disinterested status of an intervenor.¹¹⁸

112. *Id.* at 267-68.

113. Wright, *supra* note 96, at 458 (recognizing that an invitation from "the people" would be difficult to obtain; determining the "majority voice" would also be hard).

114. TESÓN, *supra* note 9, at 116. Many scholars support this criterion. See *Doctrine of Humanitarian Intervention*, *supra* note 22, at 263; Bazylar, *supra* note 22, at 604; Reisman, *supra* note 25, at 187; THOMAS & THOMAS, *supra* note 9, at 98.

115. TESÓN, *supra* note 9, at 116.

116. See, e.g., DE LIMA, *supra* note 1, at 218. The collective action principle emerged in the United States mission in Somalia; U.N. peacekeepers eventually will replace United States troops. Nelan, *supra* note 103, at 27. The timing of the replacement is uncertain, however, because the apparent lack of respect for U.N. forces counsels against a quick withdrawal by the United States troops. See Keith B. Richburg, *Somalis Protest U.N. Visit: Faction Turns Away Secretary General*, WASH. POST, Jan. 4, 1993, at A1.

117. Fonteyne, *supra* note 20, at 205. Another scholar contests this point and criticizes the U.N.'s past efforts which have done little to ensure morality. Wright, *supra* note 96, at 457.

118. Bazylar, *supra* note 22, at 602. While intervention does not gain legality through collective action, the presence of more than one state decreases the chance that an action is not based upon humanitarian motives. *Id.*; see also *Doctrine of Humanitarian Intervention*, *supra* note 22, at 235; THOMAS & THOMAS, *supra* note 9, at 98 (stating that if an act is illegal when done by one, it is illegal when done by many); Conference Proceedings, *supra* note 20, at 85; HODGES, *supra* note 9, at 91 (quoting Oppenheim as supporting humanitarian intervention if it is "Collective intervention of

6. Exhaustion of Other Remedies

Not all scholars who have attempted to define restrictions on the doctrine require the criterion of exhaustion of remedies.¹¹⁹ Often they omit this requirement on the assumption that the cost of intervention is simply too high for a state to undertake without first considering other options.¹²⁰ Others do not include it because some violations are so extreme that less intrusive measures would not work and would even worsen the situation.¹²¹

V. A NEW ERA

A. *Events Preceding Change*

In September 1991 President George Bush made a speech to the U.N. praising international cooperation and aspiring to a "new world order."¹²² He also spoke about protecting human rights and enforcing state compliance with "standards of human decency."¹²³ While he assured that no state would "surrender one iota of its own sovereignty," the underlying message suggested a legitimization of humanitarian intervention.¹²⁴

Other leaders in the international legal community have echoed Bush's message. Then U.N. Secretary General Perez de Cuellar said "[w]e have reached a state in the ethical and psychological evolution of Western Civilization in which the massive and deliberate violation of human rights will not longer be tolerated."¹²⁵ Additional support came from the Soviet Foreign Minister, Boris Pankin, who declared "substantive dis-

the Powers").

119. Bazyler, *supra* note 22, at 606. "If the intervenor did not first utilize peaceful procedures to effectuate its humanitarian ambition, but immediately jumped in with force, it is less likely that its motives were predominately humanitarian." *Id.*

120. Wright, *supra* note 96, at 456.

121. Bazyler, *supra* note 22, at 606; *see, e.g.*, Maass, *supra* note 6, at A13. A U.N. aide said people in Sarajevo are dying at such a high rate from starvation and cold that political action is needed in addition to humanitarian aid. *Id.*

122. *See* U.N. Address, *supra* note 3, at 1325.

123. *Id.* at 1327.

124. *Id.*; Leslie H. Gelb, *Why the U.N. Dog Didn't Bark*, N.Y. TIMES, Sept. 25, 1991, at A23. Former President Bush's speech contained "a revolutionary message about humanitarian intervention barely audible throughout the text, a message nonetheless sensed by representatives of despots and democracies alike that frightened all with its implications." *Id.*

125. Stephen S. Rosenfeld, *As Borders Come Down*, WASH. POST, Oct. 11, 1991, at A27.

cussion of specific human rights issues and matters of compliance with international commitments in this area cannot any longer be dismissed under the artificial pretext of interference in internal affairs."¹²⁶

The U.N. response to recent events confirms that it intends to adopt a policy of humanitarian intervention. For example, in December 1991, in what has been described as an "unprecedented act of humanitarian intervention," the General Assembly condemned Iraq for its treatment of its Kurdish population and insisted that it immediately allow humanitarian organizations access to its suffering people.¹²⁷ One year later, United States troops entered Somalia with U.N. permission to deliver much needed food.¹²⁸ Secretary General Boutros-Ghali described the purpose of their mission as one that would "restore hope for the Somali people."¹²⁹

The change in the U.N.'s attitude has several sources. One is the unprecedented change in the world's political landscape.¹³⁰ The trend is toward government by a state's people, and individuals are demanding respect for their rights and the rights of others. Another source of the changed attitude is the inordinately high number of disasters in the past two decades that have demanded humanitarian intervention. Over the past twenty years, natural disasters killed three million people and left eight hundred million homeless.¹³¹ These figures, although shocking, do not include the casualties of man-made disasters.¹³²

The creation of hundreds of thousands of refugees is one of the largest problems resulting from man-made disasters and internal conflicts and may be another factor that has led the U.N. to reconsider its stance

126. Rajiv Tiwari, *United Nations: Third World Resists Humanitarian Intervention*, INTER PRESS SERVICE, Nov. 6, 1991 (addressing the United Nations General Assembly on the topic of the U.N. system's shortcomings in responding to humanitarian crises).

127. See S.C. Res. 688, U.N. SCOR, 46th Sess., 2982d mtg., at 2, U.N. Doc. S/RES/688 (1991); Rosenfeld, *supra* note 125, at A27.

128. Lewis, *supra* note 8, at A17. "The soldiers are going into Somalia under their own commanders and their own flags though only after the United States sought and received formal permission to send them from the United Nations." *Id.*

129. *Id.* (reported as being part of Boutros-Ghali's message to the people of Somalia).

130. *Report of the Secretary-General on the Review of the Capacity, Experience and Coordination Arrangements in the United Nations System for Humanitarian Assistance*, U.N. GAOR, 46th Sess., Agenda Items 84(a), 97(b), and 143, at 2, U.N. Doc. A/46/568 (1991) [hereinafter *Report on Humanitarian Assistance*].

131. Paul Lewis, *Disaster Relief Proposal Worries Third World*, N.Y. TIMES, Nov. 13, 1991, at A9.

132. *Id.*

against humanitarian intervention.¹³³ Wars following the collapse of governments will worsen the refugee problem. Governments such as those in Yugoslavia and the Union of Soviet Socialist Republics have collapsed, spawning ethnic conflict.¹³⁴ A Note on International Protection that the High Commissioner submitted to the United Nations General Assembly addressed possible solutions to the refugee problem.¹³⁵ To control and assist refugees, the Commissioner suggested taking preventive action inside the affected states.¹³⁶ The Note identifies refugees as one of the problems that necessitate the development of "an effective emergency-response mechanism which would enable the international community to respond immediately and decisively to humanitarian emergencies."¹³⁷ The instigation of a method of protection fosters two concerns: the rights of individuals to leave their states and the necessary violation of sovereignty.¹³⁸ First, if actions actively encourage people to stay in their homeland, their right to leave freely will be impaired. Second, in order to improve the status within a state, U.N. members will have to enter the state, even if not invited. The Note acknowledges the enhanced role of the U.N. and cites the diminution of human rights violations as a challenge to growing global cooperation.¹³⁹

Under the "principles of international law, the humanitarian practices of international organizations, the principle of humanity, and guarantees of fundamental human rights," refugees have grounds for protection that "should ideally permit an individual to assert a claim, not only against his or her own country . . . but on the international community as a whole—a claim to its direct involvement on humanitarian grounds."¹⁴⁰ The international community is recognizing this need, and recent events indicate movement in this direction.¹⁴¹ The Commissioner concludes that "there might be value in examining how the legal foundations of this

133. See *supra* note 4.

134. *Note on International Protection (submitted by the High Commissioner)*, U.N. GAOR, 42nd Sess., at 2, U.N. Doc. A/AC.96/777 (1991) [hereinafter *High Commissioner's Note*].

135. *Id.* at 15.

136. *Id.* at 2. "Prevention in this context means the elimination of causes of departure—so that people will not feel compelled to leave—rather than the erection of barriers which leave causes intact, but make departure impossible." *Id.* at 11.

137. *Id.* at 15. The report also discusses the plausibility of assistance within the affected state or the creation therein of safety zones for refugees. *Id.* at 12.

138. Lewis, *supra* note 8, at A17.

139. *High Commissioner's Note, supra* note 134, at 13. "The challenge today is to . . . require States to eliminate violations of human rights in their territory." *Id.*

140. *Id.* at 15.

141. *Id.* at 16.

development could be strengthened."¹⁴² The need, therefore, for aid and prompt assistance to refugees is congruent with, if not identical to, the principle of intervention for the protection of human rights.

Other indications of the need for changing the structure of international law appear in the Secretary General's 1991 report entitled "Programmes and Activities to Promote Peace in the World."¹⁴³ In the section entitled "Future Perspectives," the Secretary General recognized that there has been a shift to a greater emphasis on issues such as human rights and the fulfillment of basic human needs.¹⁴⁴ Current Secretary General Boutros-Ghali appears to be attempting to implement his predecessor's ideas. In his report, "An Agenda for Peace," he recommends preventive deployment of U.N. troops as well as use of force in peacekeeping missions where conflict has already arisen.¹⁴⁵

B. *The United Nations Initiates Change*

The Economic and Social Council drafted a report that includes the recommendation of the European Council to improve emergency assistance by appointing a high level humanitarian aid coordinator.¹⁴⁶ Citing the U.N.'s unsatisfactory response to past catastrophes,¹⁴⁷ the report recognizes the need to improve the U.N.'s ability to provide aid efficiently.¹⁴⁸ The Secretary General responded with a report to the General

142. *Id.*

143. *Programs and Activities to Promote Peace in the World, Report of the Secretary-General*, U.N. GAOR, 46th Sess., Agenda Item 22, U.N. Doc. A/46/549 (1991) (describing certain programs and activities occurring throughout the world that are designed to promote peace).

144. *Id.* at 8. "The primary change which can be perceived is a shift to broader conceptions of components of peace and greater emphasis on issues such as human rights and the environment." *Id.* at 8-9.

145. *An Agenda for Peace*, U.N. GAOR, 47th Sess., at 8-12, U.N. Doc. A/47/277 (1992); see also Weiss, *supra* note 69, at 58: "As efforts in Bosnia and Herzegovina, Somalia, and Iraq illustrate, humanitarianism has made its appearance as the driving rationale behind new international military forces. The precedent of humanitarian intervention is therefore critical in looking toward future U.N. military efforts. *Id.*; see also Scheffer, *supra* note 39, at 275-86. This report, however, also speaks highly of state sovereignty, and reconciling its ambitious changes with traditional notions of sovereignty will be difficult. See Weiss, *supra* note 69, at 60.

146. *Special Economic and Disaster Relief Assistance, Report of the Economic and Social Council*, U.N. GAOR, 46th Sess., Annex, Agenda Items 12 and 85, at 2, U.N. Doc. A/46/288 (1991).

147. *Id.* (noting a cyclone in Bangladesh, crisis in the Horn of Africa, and the massive exodus of Iraqi refugees).

148. *Id.* In the U.N. debate about an emergency coordinator, France described previ-

Assembly on strengthening the coordination of humanitarian aid.¹⁴⁹ His report notes the recent escalation of disasters and the increased numbers of refugees and displaced persons.¹⁵⁰ The Secretary General identifies the basic goals of having sufficient and readily available resources and of achieving better coordination among those organizations that provide help.¹⁵¹ The U.N. General Assembly found the most controversial element of the report to be the request for an appointment of a high level coordinator.¹⁵² Although the report indicates that the handling of emergencies¹⁵³ would be the primary responsibility of the affected state,¹⁵⁴ it also expresses an intent to provide greater authority for U.N. intervention.¹⁵⁵

The report recognizes that there must be a single emergency relief coordinator which provides for the expedient and efficient delivery of aid to victims of natural and man-made disasters.¹⁵⁶ The U.N. has several organizations that provide assistance in emergencies, but the agencies tend to be poorly coordinated, ineffective, and their efforts often overlap.¹⁵⁷ The International Committee of Red Cross (ICRC) more specifically set out the current problems plaguing the provision of aid.¹⁵⁸ These include the need for eliminating duplication of aid, for recipient states to engage in long-term planning, and for eliminating any competition that

ous U.N. action as "fragmentary, case-by-case or blow-by-blow." U.N. GAOR, 46th Sess., at 69, U.N. Doc. A/46/PV.39 (1991) [hereinafter *Record of 39th Meeting*]; see also Maass, *supra* note 6, at A13 (describing the ineffectiveness of aid presently being provided in Bosnia).

149. See *Report on Humanitarian Assistance*, *supra* note 130.

150. *Id.* at 2.

151. *Id.* The report contains recommendations for stand-by capacity, stockpiles of relief support, teams of technical specialists for emergencies, etc. *Id.* at 2-7.

152. *Id.* at 6. Some of the duties of the coordinator are to draw upon the capacity of existing operational organizations that provide humanitarian aid, to identify complex and large scale emergencies that require system-wide response, to coordinate the response, and to negotiate access by operational organizations to emergency areas with the consent of concerned parties. *Id.* at 7.

153. *Id.* at 10.

154. *Id.*

155. *Id.* at 6. The report recommends appointment of a coordinator who would draw upon resources of existing organizations in order to facilitate timely response to humanitarian emergency situations. *Id.*

156. *Id.*

157. The U.N. also often works with the International Committee of the Red Cross and the International Organization for Migration, and the role of nongovernmental organizations is growing. *Id.* at 29-31.

158. U.N. GAOR, 46th Sess., 42d mtg., at 54, U.N. Doc. A/46/PV.42 [hereinafter *Record of 42d Meeting*].

might occur between existing humanitarian organizations.¹⁵⁹

The members of the General Assembly generally support better coordination.¹⁶⁰ Controversy surrounded the appointment of an emergency relief coordinator as a means of accomplishing this goal,¹⁶¹ however, and the members disagreed about the scope of the coordinator's power.¹⁶² The controversy stems from the need for a coordinator strong enough to act quickly to send aid when a need arises, yet without the power to act wholly independently, which could result in sending aid to states where intervention is inappropriate.¹⁶³ The potential for abusing this power is of great concern to many state leaders.¹⁶⁴

C. *Debate in the United Nations*

The debate over the appointment of a powerful emergency relief coordinator was vehement.¹⁶⁵ Leading those opposed to this specific type of coordination was Mr. Awoonor from Ghana speaking on behalf of a group of 77.¹⁶⁶ He expressed general support for the idea of making response to disasters quick and effective but emphasized that respect for sovereignty should not be sacrificed to meet this end.¹⁶⁷ He endorsed obtaining state consent prior to any interference as one of the "cornerstones

159. *Id.* at 54-55.

160. *See infra* part IV.C.

161. *Id.*

162. *Id.*

163. *Id.*

164. U.N. GAOR 3d Comm., 46th Sess., 51st mtg., at 2, U.N. Doc. A/C.3/46/SR.51 (1991). "The question of human rights should not be used to legitimize foreign interference or political pressure; but should be dealt with on the basis of the principles of neutrality, non-selectivity and objectivity." *Id.* (statement of Mr. Siddig from Sudan). The new world order must be one that will "promote human rights, not selectively, but rather universally, and be based on a genuine consensus, which applies the same rules to everyone." U.N. GAOR, 46th Sess., at 43, U.N. Doc. A/46/PV.21 (1991) [hereinafter *Record of 21st Meeting*].

165. U.N. GAOR, 46th Sess., 41st mtg., U.N. Doc. A/46/PV.41 (1991) [hereinafter *Record of 41st Meeting*]. For example, the delegate from China asserted that nations would act self-servingly in the name of human rights. U.N. GAOR, 46th Sess., at 50, U.N. Doc. A/46/PV.8 (1991) [hereinafter *Record of 8th Meeting*]. Also, the delegate from Ghana repudiated any claim that the resolution permitted uninvited intervention. Evelyn Leopold, *General Assembly Approves New Relief Aid Chief*, REUTERS LIBR. REP., Dec. 19, 1991.

166. *Record of 41st Meeting, supra* note 165, at 31 (statement of Mr. Awoonger of Ghana). The group of 77 represents a 128 member group of developing states. *Id.*

167. *Id.* "The respect for sovereignty which the United Nations system enjoins is not an idle stipulation that can be rejected outright in the name of even the noblest gestures." *Id.* at 34-35 (statement of Mr. Mohammed of Iraq).

in the democratic ideal itself."¹⁶⁸ He also expressed concern over addressing the "root causes" of emergency situations rather than waiting until the conditions within a state reach a level so egregious that intervention is warranted.¹⁶⁹

Iraq's delegate also expressed opposition to the appointment of a high-level coordinator.¹⁷⁰ Iraq blames foreign intervention in its affairs for the internal conflict among its ethnic groups and communities.¹⁷¹ The Iraqi delegate alleged that without the humanitarian component, the aid is merely intervention for political purposes, which is in direct conflict with the Charter.¹⁷²

The delegate from Uruguay also raised the issue of defining what level of emergency will warrant intervention.¹⁷³ He suggested that intervention occur only "when the capacity of States is overwhelmed by the scale of the events that the international community must raise the alert and come to the aid of those affected."¹⁷⁴ Despite his concerns, the Uruguayan delegate recognized that "the principle of non-intervention cannot stand as a protective barrier behind which the rights of peoples can be disregarded."¹⁷⁵ He concluded, therefore, that the international community may assist states in times of great emergency if that assistance not compromise the principle of national sovereignty.¹⁷⁶

India also expressed reservations about the proposed resolution and raised questions of who would decide when to intervene and what form the intervention would take.¹⁷⁷ While India's delegate recognized the need for more efficient relief efforts,¹⁷⁸ he asserted that "innovation calling for a reluctant abridgment of such sovereignty, must be strictly avoided."¹⁷⁹ He felt that the proposal placed too much of a political bur-

168. *Id.* at 36.

169. *Id.*

170. *Record of 42d Meeting, supra* note 158, at 48-50. "Humanitarian assistance cannot be imposed by the donors or by any State. The beneficiary must *a priori* agree to accept such assistance. Otherwise, it would be a case of coercion, which is incompatible with the humanitarian concept of aid." *Id.* at 44-45 (statement of Mr. Mohammed of Iraq).

171. *Id.* at 46.

172. *Id.*

173. *Id.* at 5.

174. *Id.* at 6.

175. *Id.*

176. *Id.*

177. *Record of 41st Meeting, supra* note 165, at 18.

178. *Id.*

179. *Id.* The delegate also declared that national sovereignty should not be diluted "even if the stakes are high." *Id.*

den on humanitarian agencies.¹⁸⁰

Other dissenters included Egypt, Chile, China, Cuba, and the Syrian Arab Republic.¹⁸¹ These states expressed the view that the members should consider other options for improving the current system.¹⁸² They claimed the proposal, which would allow intervention without invitation, was in violation of the principles of the U.N. Charter,¹⁸³ and they were particularly concerned about potential abuse.¹⁸⁴

Support for the appointment of a high-level emergency relief coordinator was as emphatic as the dissent. Arguments in support of the proposal centered on the extreme need for a coordinator.¹⁸⁵ The supporters of the proposal repudiated the claim that the coordinator would impinge upon sovereignty.¹⁸⁶ As the delegate from the Netherlands said, "[t]he fact that human dignity was denied and suffering tolerated too long without effective and timely action shows that there is an urgent need to deal with the problems and shortcomings in the delivery of emergency aid."¹⁸⁷ The Brazilian delegate bolstered this argument by asserting that even when states disagree on all other matters, they should still agree that the "wounded must be assisted, that the sick must receive adequate care, that suffering must be relieved."¹⁸⁸

The Norwegian delegate expressed the concern that political motives often prevent help from reaching suffering people.¹⁸⁹ Thus, there must be a fundamental change in attitude toward the behavior that allows such deprivation to occur.¹⁹⁰ France's delegate asserted that a strong coordinator would necessarily lead to an encroachment upon sovereignty.¹⁹¹ The French delegate explained that humanitarian action must

180. *Id.* at 19-20. "To expect [humanitarian bodies] to address the political aspects would only be overburdening them, making their mandates controversial and unworkable: in a word, hamstringing them with extraneous responsibilities". *Id.* at 20.

181. *Record of 42d Meeting, supra* note 158, at 31, 36, 42; *Record of 39th Meeting, supra* note 148, at 43.

182. *E.g., Record of 42d Meeting, supra* note 158, at 36 (Cuba's delegate suggested a need for some type of coordinating entity).

183. *Record of 39th Meeting, supra* note 148, at 51.

184. *Record of 42d Meeting, supra* note 158, at 42.

185. *Id.* Supporters asserted that swift action is essential to saving lives and preventing irreversible destruction. *Id.* at 51.

186. The delegate from Chile noted, however, that "it is up to the government affected to define the type of assistance required." *Id.*

187. *Record of 39th Meeting, supra* note 148, at 12.

188. *Id.* at 51.

189. *Id.* at 9-10.

190. *Id.*

191. *Id.* at 72. "Humanitarian action respects sovereignty and state authority. It can

respect sovereignty,¹⁹² which suggests that intervention requires the consent of the sovereign. He went on to assert that the principle of "subsidiary function" should be considered the premise for international humanitarian aid.¹⁹³ This principle holds that the states in the general region of the affected territory have the primary role of providing humanitarian assistance, and action should never be taken unilaterally.¹⁹⁴ The affected state has the primary responsibility for aiding its people and, therefore, has the responsibility of initiating and supervising the receipt of aid.

Other delegates reiterated that the coordinator will not in any way jeopardize sovereignty. As the delegate from Canada said, sovereignty is still guaranteed under the Charter.¹⁹⁵ Furthermore, in discussing the "right"¹⁹⁶ to assistance, the representative from the ICRC stated that

far from infringing upon the sovereignty of states, humanitarian assistance in armed conflicts as provided for by international law is, rather, an expression of the sovereignty. While states have an obligation to facilitate assistance when the urgency of the needs makes assistance necessary, . . . the task of the humanitarian organization is to guarantee the impartial nature of the assistance.¹⁹⁷

The plan may, however, require initiation before such guarantees can be made. As the delegate from the U.S.S.R. suggested, "acceptable principles, criteria, and forms of response" that are within the accepted limits of the U.N. Charter will develop over time.¹⁹⁸

The United States expressed its support for the proposed resolution¹⁹⁹ but avoided specifically addressing the concerns of the dissenters.²⁰⁰ The United States delegate asserted the need not only to address existing

in no way be used to intervene in affairs that are essentially under the authority of the nation." *Id.*

192. *Id.*

193. *Id.* (citing resolutions 43/131 and 45/100 which state that the territorial states have the "primary role in the initiation, organization, coordination and implementation of humanitarian assistance within their respective territories").

194. *Id.*

195. *Record of 41st Meeting, supra* note 165, at 13.

196. This right to assistance is "often not known, ignored or misinterpreted." *Record of 42d Meeting, supra* note 158, at 60.

197. *Id.* Whether or not the aid would be provided without a political price was also an issue. The delegate from China raised concerns about states acting self-servingly and imposing states' own beliefs on others under the guise of humanitarian assistance. *Record of 8th Meeting, supra* note 165, at 50.

198. *Record of 39th Meeting, supra* note 148, at 31.

199. *Record of 41st Meeting, supra* note 165, at 51.

200. *Id.* at 53.

problems, but also to seize the opportunity for change.²⁰¹

The contents of this debate typify the concerns that surround placing a significant amount of power in the hands of a single individual. The debate also demonstrates the gravity of any issue related to sovereignty. The smaller member states in particular are extremely wary of the creation of a strong international body with armies to serve under it.²⁰²

D. *A Battle for Human Rights is Won*

Despite serious concerns and reservations, U.N. members passed the resolution providing for the appointment of a High-Level Emergency Relief Coordinator in December 1991.²⁰³ The resolution states that "the sovereignty, territorial integrity and national unity of states must be fully respected in accordance with the Charter of the United Nations."²⁰⁴ However, it allows for humanitarian assistance "with the consent of the affected country and in principle on the basis of an appeal by the affected country."²⁰⁵ The wording provides the Coordinator with a significant amount of discretion when making a decision whether or not to intervene.

The clause that dictates respect for sovereignty does not give absolute deference to the state. It instead qualifies the restraint as being in accordance with the Charter.²⁰⁶ If in this new era the Charter's relaxed interpretation allows limited forms of intervention for humanitarian causes, then it will not be a violation of sovereignty for the Coordinator to allocate aid with only minimal consent.²⁰⁷

Furthermore, there is significance in the choice of the term "country" instead of "government" or "state." This choice allows the people of a "country" to offer their consent to intervention.²⁰⁸ Furthermore, the phrase "in principle on the basis of an appeal" is sufficiently vague to permit the Coordinator significant discretion. The effectiveness of the new position will depend upon who is appointed and what reaction the international community has to the coordinator's authority.

201. *Id.*

202. *See id.* The delegates from Pakistan, France, and Ghana spoke of their concern for sovereignty. *Id.* at 64, 34-35, 24.

203. "Supremo" *Post*, *supra* note 79.

204. *Id.*

205. *Id.*

206. *Id.* "The resolution says 'the sovereignty' territorial integrity and national unity of states must be fully respected in accordance with the Charter of the U.N." *Id.*

207. *Id.*; Scheffer, *supra* note 39, at 281.

208. *See* Scheffer, *supra* note 39, at 281.

VI. CONCLUSION: THE UNITED STATES ROLE IN A UNITED NATIONS THAT ACCEPTS THE VALIDITY OF HUMANITARIAN INTERVENTION

After debate over the sanctity of sovereignty, the U.N. authorized the United States armed intervention in famine-stricken Somalia.²⁰⁹ The Security Council did not obtain any form of consent²¹⁰ and even suspended the rule that prevents U.N. peacekeepers from firing until fired upon.²¹¹ It has become apparent to the members of the U.N. that it is nearly impossible to provide meaningful humanitarian aid without some use of force.²¹²

One international law scholar stated that the success of increased human rights intervention will depend upon those who lead the actions.²¹³ If the leaders are "progressive and genuinely committed to their own society and the human rights," then actions that they take outside of their own state to benefit mankind are more credible.²¹⁴ As the doctrine of humanitarian intervention gains legitimacy, the United States will undoubtedly take a leading role in the maintenance of international order.²¹⁵ Currently the U.N. needs the resources of the United States to embark on any major military operation.²¹⁶ To date, when the United States has committed its forces, it has also insisted on leading them.²¹⁷ As a result, the intervention occurs primarily in the name of the United States.²¹⁸ Funding is yet another problem. The United Nations funds are limited; therefore, the United States must finance any actions it takes on behalf of the United Nations.²¹⁹ Consequently, there is concern that the

209. Lewis, *supra* note 8, at A17 (reporting that United States troops went into Somalia with the permission of the U.N.).

210. *Id.*

211. Nelan, *supra* note 103, at 28.

212. Michael Ignatieff, *Intervention on the Side of Oppressed Legacy of 1992*, OTTAWA CITIZEN, Jan. 5, 1993, at A7.

213. Conference Proceedings, *supra* note 20, at 76.

214. *Id.*

215. Max Boot, *U.S. Foreign Policy Plate is Full*, CHRISTIAN SCI. MONITOR, Jan. 5, 1993, at 1.

216. Nelan, *supra* note 103, at 28. Former President Bush said, when reporting on the intervention in Somalia, that outside troops were necessary and only the United States was capable of providing them. *Id.*

217. Leslie H. Gelb, *The U.N. Chief's Dilemma: Must U.S. Help Mean U.S. Control?*, N.Y. TIMES, Dec. 31, 1992, at A13.

218. *Id.*

219. Lewis, *supra* note 8, at A17. "[W]ith its most recent intervention in Bosnia, the United Nations has been forced to acknowledge its own bankruptcy again by saying that it cannot pay anything toward the cost of an operation carried out in its name and that

United States appears to command more respect than the U.N.²²⁰

An issue for the United States is whether it wants the obligation of policing the world. The United States proved in Somalia it can easily move into a small state, secure it, and provide aid without losing many soldiers,²²¹ but not all areas that are in dire need of help will capitulate so easily.²²² Military success is a necessary if humanitarian intervention on behalf of human rights is to become acceptable; therefore, it is vital that the United States not undertake an action where success is questionable.²²³

Because of the complexity of the internal disputes involving human rights violations and the need for the support of the international community, the United States must remain a strong supporter of the U.N. while avoiding the image that it is dominating the organization.²²⁴ This will be difficult because the U.N. depends heavily upon the United States to perform many of its military functions.²²⁵ Similarly, to lend credibility to the U.N., the United States must relinquish control of some military operations to the U.N.²²⁶

Traditional international law doctrines must be revisited and revised in light of modern ideals and technology.²²⁷ The possibilities today are

participating countries must bear the cost of sending in their troops." *Id.*

220. While there was general mistrust of United Nations intentions in Somalia, once the United States soldiers arrived the warlords came together for discussions. Richburg, *supra* note 116, at A1.

221. Talbot, *supra* note 41, at 35. "Weak countries allow you to be daring, because the risks are lower." Nelan, *supra* note 103, at 29.

222. Nelan, *supra* note 103, at 29.

223. *Id.*

224. *Id.* at 29; Watt, *supra* note 30, at 12.

225. Gideon Rose, *A Balkan Vietnam*, N.Y. TIMES, Jan. 15, 1993, at A15 (comparing Bosnia to Vietnam).

226. "Just as the United States doesn't like others to take charge, other countries also don't like the United States to play a dominant role in the United Nations." Gelb, *supra* note 217, at A13 (quoting U.N. Secretary General Boutros-Ghali).

227. Reisman, *supra* note 25, at 195.

The validity of humanitarian intervention is not based upon the nation-state-oriented theories of international law; these theories are little more than two centuries old. It is based upon an antinomic but equally vigorous principle, deriving from a long tradition of natural law and secular values: the kinship and minimum reciprocal responsibilities of all humanity, the inability of geographical boundaries to stem categorical moral imperatives, and ultimately, the confirmation of the sanctity of human life, without reference to place or transient circumstances.

Id.; see also STOWELL, *supra* note 9, at 59-62. Reisman continues:

But why, we may ask, should the independence of a state be more sacred than the law which gives it that independence? Why adopt a system which makes it neces-

far beyond those conceived when the decision was made that states must be free from outside interference to develop and discover for themselves what an appropriate form of government should be. Historically, there have been compelling reasons for such a position; however, the time has come to hold the rights of individuals above the rights of states and permit intervention when too many lives are being sacrificed for political ideas.

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sary to gloss over constant violations of the very principles which are declared to be most worthy of respect from all? If, where such intolerable abuses do occur, it be excusable to violate at one and the same time the independence of a neighbor and the law of nations, can such a precedent of disrespect for law prove less dangerous to international security than the recognition of the right, when circumstances justify, to ignore that independence which is the ordinary rule of state life? Reisman, *supra* note 25, at 125.

