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## The Concept of Humanitarian Intervention Revisited

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# THE CONCEPT OF HUMANITARIAN INTERVENTION REVISITED†

Yogesh K. Tyagi\*

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Every case of humanitarian intervention gives rise to mixed feelings of hope and despair. Hope comes from the involvement of the international community, and despair comes from the fact that the state system is still too weak to meet its basic responsibility, namely, the protection of human dignity. Influenced by these mixed feelings, the present article attempts a new look at the concept of humanitarian intervention. In Part I, it examines the concept of humanitarian intervention. Part II analyzes the principal aspects of humanitarian intervention: the reasons for the intervention, the character of the target state, and the status of the intervenor. In Part III, the article examines the major issues involved in these interventions, particularly their objectives, validity, nature, and priority. This exercise exposes some striking inadequacies in the existing law relating to humanitarian intervention. An understanding and appreciation of these inadequacies would help in the evolution of a new international humanitarian order, the salient features of which are discussed in Part IV of the article.

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† This is a revised version of the First Mohammad Azhar Nomani Memorial Lecture delivered by the author on July 30, 1994 under the auspices of the Indian Institute of Public Administration, Regional Branch, Jammu, India.

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## I. THE CONCEPT

Humanitarian intervention is a fragile alliance of two different concepts: human rights and intervention. The concept of human rights is highly respectable, whereas the concept of intervention is highly problematic. The law applicable to humanitarian intervention has not only inherited the ambiguities present in both of these concepts, but has also generated ambiguities of its own through century-old, haphazard, and controversial practices of states and non-state entities.

The basis for a humanitarian intervention lies in the absence of a minimum moral order in the whole or a part of a state, which is inconsistent with fundamental humanitarian norms and unacceptable to other states or non-state entities. Such a state of affairs may provoke external forces to determine that the continuing existence of such a situation deprives the people of the target state of their legitimate rights and freedoms and also shocks the conscience of the international community. Prompted by such a determination, external forces may have to make a choice between the *status quo* and an attempt to correct the situation. They may decide to intervene in the target state if the expected utility of the corrective action is greater than permitting the *status quo* to continue. To ensure the legitimacy of such corrective action, they may rely either on traditional practices or on contemporary norms of legitimization such as a prior authorization by a regional or international intergovernmental organization. The decision to take action, as well as the choice of means, depends on the expected utility of corrective action. From this perspective, humanitarian intervention is an extraordinary exercise by external forces (another state, group of states, international organization, or a combination thereof) in the internal affairs of a target state in order to impose certain humanitarian values and practices on the latter. The following section examines the principal aspects of humanitarian intervention.

## II. PRINCIPAL ASPECTS

There are three principal aspects to every humanitarian intervention: the reasons for intervention, the character of target state, and the legal and moral status of the intervenor.

### A. *Reasons for Intervention*

Traditionally, powerful states resorted to humanitarian intervention, individually or collectively, to protect or rescue their nationals abroad.

This first generation of humanitarian intervention originated at a time when the use of force in international relations was not prohibited, and it continues even in the contemporary world where the prohibition of the use of force has become a peremptory norm of international law. The landing of British troops in China in 1927 for the protection of British subjects; the action by the United Kingdom in landing forces in Egypt in 1956; the intervention by the United States in Lebanon in 1958 and in the Dominican Republic in 1965; Belgium's action in the Congo in 1960; the Israeli rescue operation at Entebbe airport in 1976; and the joint Belgian, French, and U.S. intervention in the Shaba province of Zaire in 1978 are important examples of this category of intervention.

With the passage of time, the scope of humanitarian intervention has expanded to include actions to protect nationals of third states and even nationals of the target state, especially its minority groups. This expansion occurred primarily in the form of treaties for the protection of minorities during the League of Nations era. The establishment of the United Nations brought about a major change in the perception of humanitarian intervention. On the one hand, the U.N. Charter prohibited the use of force; on the other, it imposed an obligation on every state to protect human rights. As a result, the Charter firmly established state responsibility with respect to human rights and also curtailed the freedom of others to intervene in the internal affairs of a state, lest it lead to the use of force against the territorial integrity, political independence, or sovereignty of the state. The champions of humanitarian intervention extended the ambit of state responsibility and sought to restrict the prohibition on intervention in some circumstances. They continued to rely on the "inherent right" to protect or rescue nationals (both natural and juridical). In addition, they claimed joint responsibility (in fact, a right) to oversee respect for human rights all over the globe. Their position found support in jurisprudence that elevated human rights obligations to the status of *erga omnes* obligations (*à la* the *Barcelona Traction Co.* case).<sup>1</sup> On the basis of an argued *locus standi* with respect to all human rights matters, some states have exercised the "right" of intervention in the internal affairs of states whenever they felt it necessary and convenient to do so. Thus, claims to the protection of minorities, in particular, and the enforcement of human rights in general gave rise to the second generation of humanitarian intervention. The intervention by Great Britain, France, and Russia in 1827 in the Greece-Turkey struggle; India's intervention in East Pakistan (Bangladesh) in 1971;

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1. *Barcelona Traction* (Belgium v. Spain), 1970 I.C.J. 4 (Feb. 5), at paras. 33-34.

Tanzania's intervention in Uganda in 1978-79; the U.S. actions in Grenada in 1983, in Nicaragua in the mid-1980s, in Panama in 1989, and in Iraq in 1991; and the joint U.S.-Italian "Operation United Shield" in Somalia in 1995 are leading examples of this kind of intervention.

The emergence of certain "failed states," incapable of fulfilling their state responsibility and expressing their consent to the establishment of administrative structures and democratic institutions on their behalf, has introduced what may be called a third generation humanitarian intervention. The United Nations' operations in the Congo (ONUC), Cambodia (UNTAC) and Somalia (UNOSOM), and the European Union's involvement in Mostar (Bosnia-Herzegovina) belong to this generation of humanitarian intervention.

There is a growing concern in the international community about the need to promote and protect humanitarian standards all over the world. Past experience shows that once a humanitarian crisis breaks out, it is difficult to control. Instead of providing relief to refugees, for instance, it is better to arrest situations that create refugees. For this purpose, the United Nations and allied international institutions intend to evolve a preventive regime which includes an early warning system, preventive diplomacy, and post-conflict confidence-building measures. It has been suggested, therefore, that "[t]he United Nations should adopt automatic thresholds of civilian casualties that would compel deployment of large multinational forces within a matter of days."<sup>2</sup> As a result, a state might become the target of external action well before the eruption of a humanitarian crisis. This is what might be called a fourth generation humanitarian intervention. Recommendations made in *An Agenda for Peace* by Secretary-General Boutros-Ghali,<sup>3</sup> as well as many other new steps taken by the United Nations and its expert bodies and specialized agencies, represent the ongoing evolution of this innovative and inescapable generation of humanitarian intervention. The proposed U.N. intervention in Burundi, which has been opposed by the target state,<sup>4</sup> exemplifies anticipatory intervention. Supporters of such intervention argue that the responsibilities imposed on the international system and on international organization are finally being taken seriously. The original Hammarskjöld model of preventive diplomacy should give way to the

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2. Milton Leitenberg, *The Rwanda Massacres Should Have Been Prevented*, TIMES OF INDIA, Aug. 6, 1994, at 9.

3. Boutros Boutros-Ghali, *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-keeping*, U.N. SCOR, 47th Sess., Agenda Item 10, at 1, U.N. Doc. A/47/277 (1992) (Report of the Secretary-General pursuant to the statement adopted by the summit of the Security Council on January 31, 1992) [hereinafter *An Agenda for Peace*].

4. *Burundi Rejects U.N. Peacekeepers*, TIMES OF INDIA, Aug. 21, 1994, at 14.

Boutros-Ghali model. The proponents of this view care little about state sovereignty, an attitude characterized by their concept of "universal sovereignty." They contend that "humanitarian intervention should not be viewed as an affront to sovereignty, but as a necessary tool to preserve it."<sup>5</sup> The proponents of this view appear poised to transform international morality into a revolutionary legality.

The concept of humanitarian intervention has come a long way from the assertion of the right to rescue of nationals to the establishment of international tribunals to punish the violators of humanitarian norms. It has ignored the traditional distinction between humanitarian law and human rights law, and has embraced both sets of norms. Yet in the application of the norms there has always been little humanitarianism and more interventionism. The expanding willingness to use the concept of humanitarian intervention and the shrinking sensitivity towards the principle of state sovereignty are bound to reflect upon the scope of humanitarian intervention.

### *B. Target States*

Generally, sovereign states are the targets of humanitarian intervention. However, third generation humanitarian intervention has so far been carried out in territories lacking one of the attributes of statehood, i.e., a government. An entity that does not possess all the attributes of statehood is more vulnerable to external intervention. The main reason is that, conceptually, an intervention against such an entity does not constitute a violation of Article 2(4) or 2(7) of the U.N. Charter. Also, external forces have a temptation to impose on that entity the moral order of their choice without running the risk of counter collective security measures. Thus, the emergence of failed states and a neo-trusteeship system has enlarged the scope of humanitarian intervention.

### *C. Intervening Powers*

States are the primary actors in international relations. They are the original exponents and the chief perpetrators of first generation humanitarian intervention. They are also the principal participants in the succeeding generations of humanitarian intervention. The reasons for the primacy of states are clear. States fulfil a *parens patrie* role in respect of their subjects. They have the primary responsibility for the well-being of their subjects. They possess or are expected to possess the necessary

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5. David M. Kresock, "Ethnic Cleansing" in the Balkans: *The Legal Foundation of Foreign Intervention*, 27 CORNELL INT'L L.J. 203, 235 (1994).

capability and willingness to meet that responsibility. If they fail to do so, they lose their political legitimacy.

International intergovernmental organizations generally do not carry out first generation humanitarian intervention.<sup>6</sup> Their involvement in other types of humanitarian intervention depends on their objectives, purposes, legal personalities, political clout, and nexus with the theatre of intervention. For that reason, the League of Nations had a role to play in the protection of minorities during the inter-war period. Now the United Nations has a role in every case of humanitarian intervention. The European Union (EU), the Economic Community of West African States (ECOWAS), the Organization of American States (OAS) and the Organization of African Unity (OAU) have also occasionally dealt with humanitarian intervention in their respective jurisdictions. According to the letter and spirit of the U.N. Charter, especially Articles 1(4), 2(4) and 2(7), all cases of humanitarian intervention should be handled by the United Nations. In practice, however, states bring a matter to the United Nations only when there is no alternative. But the leading role of the United Nations in third and fourth generation humanitarian interventions is indispensable.

Of late, several nongovernmental organizations have also come to play a major, although not a leading, role in humanitarian intervention. Because of their inferior legal status in the international system, they themselves do not carry out humanitarian intervention. They do, however, often advocate, influence, and participate in second, third, and fourth generation humanitarian interventions. This fact is recognized by the U.N. Security Council in its several resolutions.<sup>7</sup> The International Committee of the Red Cross (ICRC) and Médecins Sans Frontières are

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6. The U.N. intervention in the case of Count Folke Bernadotte, the United Nations Mediator in Palestine, to seek reparations for the injuries suffered by itself and also by one of its employees, is probably the first instance of the United Nations intervention that approaches first generation humanitarian intervention. The possibility of rescue of U.N. peacekeepers, as for instance in Bosnia-Herzegovina, is another instance of such intervention. Also an attack on U.N. troops is an international crime, which may invite humanitarian intervention even of a punitive nature.

7. See, e.g., S.C. Res. 751, U.N. SCOR 47th Sess., 3069th mtg. at 1, U.N. Doc. S/RES/751 (1992); S.C. Res. 764, U.N. SCOR 47th Sess., 3093d mtg. at 1, U.N. Doc. S/RES/764 (1992); S.C. Res. 767, U.N. SCOR 47th Sess., 3101st mtg. at 1, U.N. Doc. S/RES/767 (1992); S.C. Res. 770, U.N. SCOR 47th Sess., 3106th mtg. at 1, U.N. Doc. S/RES/770 (1992); S.C. Res. 771, U.N. SCOR 47th Sess., 3106th mtg. at 1, U.N. Doc. S/RES/771 (1992); S.C. Res. 794, U.N. SCOR 47th Sess., 3145th mtg. at 1, U.N. Doc. S/RES/794 (1992); S.C. Res. 811, U.N. SCOR 48th Sess., 3182d mtg. at 1, U.N. Doc. S/RES/811 (1993); S.C. Res. 814, U.N. SCOR 48th Sess., 3188th mtg. at 1, U.N. Doc. S/RES/814 (1993); S.C. Res. 827, U.N. SCOR 48th Sess., 3217th mtg. at 1, U.N. Doc. S/RES/827 (1993); S.C. Res. 890, U.N. SCOR 48th Sess., 3323d mtg. at 1, U.N. Doc. S/RES/890 (1993).

two names that have been heard in connection with every case of humanitarian intervention in recent years.

### III. MAJOR ISSUES

The objectivity, validity, nature, and priority of humanitarian intervention are four major issues to be considered in any discussion of its lawfulness.

#### A. *Moral Objectivity*

In theory, the first and the foremost factor in the process leading to a humanitarian intervention is the interpretation of a situation, both in terms of hard facts and moral values. At the very first stage of this process, the intervening power has to determine whether the situation prevailing in the target state is in conformity with the minimum moral principles of state behavior. The following three sets of principles may serve as guidelines for reaching a correct moral judgment:

- (a) Universal principles, which find expression in international human rights instruments;
- (b) Principles followed by the intervening power internally (within its own territory) and externally (in international relations), which may be discerned from the law and practice of the intervening power; and
- (c) Principles applicable during normal conditions in the target state, as demonstrated by the practice of the target state.

Each set of these principles constitutes an autonomous moral order. It is practically impossible to find all three moral orders in harmony with each other. The next step is an objective assessment based on the ordered moral preferences of the intervening power. At that stage, the rational choice should be based on, first, universal principles; second, national principles in normal times; and third, principles in the practice of the intervening power to the extent that they are consistent with universal principles. In case of a dilemma regarding a rational choice, one should look into the following factors:

- (a) Whether the expected utility of humanitarian action for the target state (not that of the intervening power) is greater than that of inaction;
- (b) Whether the intervenor has eschewed its self-interest;



- (c) Whether the intervenor has made a rational choice of means and ends;
- (d) Whether the intervenor has exhausted all available non-coercive remedies to ameliorate the conditions of the affected persons; and
- (e) Whether the moral judgment and the ensuing action are in conformity with the basic principles of international law.

The first factor focuses on the interests of the affected people; the second implies the enlightened self-interest of the intervenor; the third points towards transparency in decision making; the fourth seeks to enforce the principle of pacific settlement of disputes; and the last requires a mechanism to test the validity of all important components of the humanitarian intervention, starting from the *locus standi* to the *modus operandi* of the intervenor. These factors taken together may help in determining moral objectivity.

In practice, we find that extraneous factors, mainly the self-interest of the intervening power, rather than objective morality, influence the interpretation of a situation for the purpose of humanitarian intervention.<sup>8</sup> We rarely find enlightened self-interest coinciding with humanitarian intervention. One commentator rightly states: "Those most capable of organizing collective action are the least capable of recognizing injustice, while those most capable of recognizing injustice are least able to organize successful collective action."<sup>9</sup>

When we observe the decision-making process relating to humanitarian intervention in action, we find that the pervasiveness of the electronic media, rather than the gravity of the humanitarian crisis, plays a greater role in getting an intervening power to act. The Rwandan crisis illustrates what may be called the "CNN effect" on the morality of the

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8. See Presidential Decision Directive 25, quoted in Elaine Sciolino, *New U.S. Peace-keeping Policy De-emphasizes Role of the U.N.*, N.Y. TIMES, May 6, 1994, at 1, 3. The directive addresses six major issues: (1) Making disciplined and coherent choices about which peace operations to support; (2) Reducing U.S. costs for U.N. peace operations; (3) Defining clearly U.S. policy regarding the command and control of U.S. military forces in U.N. peace operations; (4) Reforming and improving the United Nations' capability to manage peace operations; (5) Improving the way the U.S. government manages and funds peace operations; and (6) Creating better forms of cooperation between the Executive, the Congress and the American public on peace operations. See *The Clinton Administration's Policy on Reforming Multilateral Peace Operations* (Department of State Publication 10161, Bureau of International Organization Affairs, May 1994).

9. Michael L. Gross, *The Collective Dimensions of Political Morality*, 42 POLITICAL STUDIES 40 (1994).

international community. Events in Rwanda had been widely reported for a long time, but they hit the headlines only in mid-1994. Even that wave of print media publicity did not prompt the international community to act. The United States did not take action until July 25, 1994, one week after CNN started full-scale televised coverage of the refugee crisis. Thus the telegenic impact of human misery, not its very existence as such, seems to shape the objective morality of the international community.

### B. Legal Validity

There are very few opportunities for testing the legal validity of a humanitarian intervention. Since states generally do not wish to pay a price for their actions, they naturally avoid a legal and moral accounting of their intervention. Whenever they are forced to do so, they find the process unpleasant. For instance, the widely published judgment of the International Court of Justice in the *Military and Paramilitary Activities* case exposes the gaps in the legal and moral justifications of the U.S. humanitarian intervention in Nicaragua.<sup>10</sup> Also, the report of the U.N. inquiry group on the U.N. action in Somalia does almost the same.

There is a need to distinguish humanitarian intervention from humanitarian assistance. The difference exists in terms of their origins, applicable law, state practice, and the practice of international organizations. Humanitarian intervention raises doubts, whereas humanitarian assistance attracts appreciation. The former is a century-old concept, whereas the latter came into vogue in the twentieth century.<sup>11</sup> Despite its late entry into international jurisprudence, the concept of humanitarian assistance has acquired the status of a customary norm of international law. It has both *opinio juris* and state practice to support it. The *opinio juris* of states may be gleaned from their acceptance of various obligations under the Charter of the United Nations. It is a duty of all member states to extend every assistance to the United Nations (Article 2(5)) in the fulfilment of the Organization's objectives and purposes, including the promotion of international cooperation in resolving international problems of an economic, social, cultural, or humanitarian character and in promoting and encouraging of respect for human rights and for

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10. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27).

11. The League of Nations had been responsible for discussion and action in more fields of humanitarian endeavour than any organization in the pre-World War II history. It supported humanitarian assistance in cases such as the problem of epidemics in Poland and Russia in 1920-23. See F.P. WALTERS, *A HISTORY OF THE LEAGUE OF NATIONS* 101-03 (1952). This experience helped in building the social, economic, and humanitarian programs of the United Nations system.

fundamental freedoms without any discrimination (Article 1(3)). The purpose of international cooperation (Article 1(3)) finds extension in the principle of assistance (Article 2(5)), and both of them find extension in Article 49, which lays down the Members' obligation of mutual assistance, and also in Article 56 whereby they pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55, including the promotion of human rights and solutions of international economic, social, health, and related problems.

Besides these provisions in the U.N. Charter, there has always been an unwritten law that measures a nation's level of civilization by the yardstick of its humanitarian assistance to needy people. It has been a traditional way of life in the Orient, and has unquestionable moral sanctity in every religious faith.

As for the state practice of humanitarian assistance, there have been innumerable cases where most countries have responded to calls for such aid. Invariably they do it on an *ad hoc* basis, and almost all of them contribute to the regular budgets of various international organizations which provide relief and assistance to needy people and states. In fact, the concept of burden sharing, which has gained ground in the context of humanitarian assistance to refugees in particular, is an extension of the duty to extend humanitarian assistance. Even before the adoption of U.N. Security Council Resolution 688 (1991) on Iraq and Resolution 733 (1992) on Somalia, various states provided different forms of humanitarian assistance. If we adopt a dynamic definition of the term humanitarian assistance, by linking relief assistance with development assistance, then we find the Marshall Plan as the first instance of concerted state practice on the subject during the Charter era. The African Recovery Plan devised in the 1980s is another major instance of the same kind of action. It is not surprising, therefore, that the 1974 declaration on the establishment of the New International Economic Order (NIEO) has a provision for obligatory official development assistance at a level of 0.7% of the GNP of developed countries. Some of these countries have already reached the target, and others are not opposed to the idea of development assistance in principle, but have not accepted the target level because of financial constraints.

The difficulty arises when, on the one hand, we see reluctance on the part of developed countries to extend official development assistance as a matter of obligation, and on the other hand we find an overwhelming enthusiasm for the selective extension of emergency assistance to certain ethnic minorities. At this point, humanitarian assistance seems to lose its moral objectivity. When such assistance is extended without the

consent of the target state, then it falls into the definition of humanitarian intervention (or perhaps just plain intervention). The force and the legitimacy with which a state can claim the right or duty of humanitarian assistance are missing in this type of humanitarian intervention.

The practice of states in intervening on humanitarian grounds has been so haphazard, parochial, and controversial that it cannot create a customary norm of humanitarian intervention. This *lacuna* is strikingly borne out by the fact that whenever states have carried out a humanitarian intervention, they did so not because they felt legally bound to do so, but because they felt it convenient and desirable to do so. In other words, there was no *opinio juris* in favor of unilateral humanitarian intervention.

Under the U.N. Charter, however, Article 51 may permit humanitarian intervention in terms of self-defense under certain limited circumstances, and the Security Council may permit intervention as a collective security measure. As for the former, two points must be highlighted. First, the inherent right of individual self-defense cannot extend beyond the humanitarian intervention for the protection of one's own nationals, and that too is subject to controversy and the *Caroline* doctrine.<sup>12</sup> Second, the right of collective self-defense does not include the right of humanitarian intervention without consent because, as noted earlier, there was no customary norm respecting such interventions in the pre-Charter era. At best, what states have inherited under Article 51 is a spotty and doubtful state practice which totters on the anvil of the principle of the prohibition of the use of force. Although there are some instances of similar practice during the Charter era, nobody has claimed that they have created a customary norm of humanitarian intervention. Even a widespread practice, in the absence of an incontrovertible *opinio juris*, cannot give rise to customary norms. In almost all the cases of humanitarian intervention in the last fifty years, only the interventionist powers have supported the practice among themselves. On the other

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12. On April 24, 1841, U.S. Secretary of State Webster sent a note to British Foreign Secretary Fox regarding the British-United States controversies over the *Caroline* (1837) and *McLeod* (1840) incidents. The note contains a number of the constituent elements of the rules on self-defense, including the formulation that a state exercising the right of self-defense had to show "a necessity of self defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation," and that it "did nothing unreasonable or excessive." R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L L. 82 (1938). This formulation has received the approval of the International Military Tribunals of Nuremberg (1946) and Tokyo (1948), as well as that of the International Court of Justice in the *Corfu Channel* case (1949). GEORG SCHWARZENBERGER & E.D. BROWN, A MANUAL OF INTERNATIONAL LAW 149-50 (1976).

hand, a large number of law-making declarations and resolutions against intervention have been adopted during the same period.<sup>13</sup>

As for the most contentious issue, intervention without consent, the U.S. Restatement of Foreign Relations Law states:

Whether a state may intervene with military force in the territory of another state without its consent, not to rescue the victims but to prevent or terminate human rights violations, is not agreed or authoritatively determined. Such intervention might be acceptable if taken pursuant to resolution of a United Nations body or of a regional organization such as the Organization of American States.<sup>14</sup>

Experts agree that "there is scope for greater clarity, and indeed for an advance in thinking, on the legal aspects relating to the rights and responsibilities of the United Nations in providing humanitarian relief in circumstances where a sovereign request for assistance is not, for a number of reasons, forthcoming."<sup>15</sup> We may attempt to seek some clarity by understanding and appreciating the significance of consent in international law. We know that treaties and customs are the most important sources of international law, and that both of these attach great significance to the requirement of consent by sovereign states. But an unrestricted reliance on sovereign consent cannot be allowed to arrest the growth of new international humanitarian law. It would be unfair to say that in the absence of the consent of the host state the international community has no right to intervene to prevent apartheid, genocide, ecocide, starvation deaths, or other practices that shock the conscience of the international community. It is difficult to believe that the international community has the responsibility to protect historical monuments, but not the lives of human beings. There is a need to address the question of consent in a realistic manner. The moment the international

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13. The following two instruments, in particular, strengthen the principle of non-intervention: *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty*, U.N. GAOR, 20th Sess., Annex, Agenda Item 107, U.N. Doc. A/RES/2131 (1966); and *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, U.N. GAOR, 25th Sess., Annex, Agenda Item 8, U.N. Doc. A/RES/2625 (1970).

14. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 703 cmt. e (1987).

15. See Martin Griffiths & Peter Roth, *The United Nations Humanitarian Response 24* (Memorandum prepared under the auspices of the Development Studies Association, London, November 1992) (on file with the author). In his Maulana Azad Memorial Lecture at New Delhi on 9 September 1994, Boutros-Ghali also highlighted conceptual difficulties in humanitarian missions of the United Nations.

community encounters a situation where the target state or one of the parties to a humanitarian crisis refuses to grant its consent for humanitarian assistance or intervention, the first question that should be asked is why the consent is not forthcoming. The United Nations Human Rights Committee addressed a similar issue in the context of lack of compliance with the reporting obligations by states that are parties to the International Covenant on Civil and Political Rights. It came to the conclusion that non-compliance was not due to bad faith of states and that a variety of factors were responsible for cases of non-compliance.<sup>16</sup> The Committee developed various alternative strategies to promote compliance with Covenant obligations in general and reporting obligations in particular. If the premier human rights body of the United Nations system can engage in such an exercise, why cannot the premier security body and others conduct a similar exercise in cases of humanitarian assistance and intervention? The probing of consent constraints may help in finding a better solution to humanitarian crises and also in mobilizing greater support for humanitarian missions.

India's intervention in Sri Lanka in 1987 may be examined against this background. Because of its proximity — cultural, historical, geographical, and otherwise — and because of political and strategic necessity, India was in constant touch with and had the confidence of the Sri Lankan Government on the question of the Sri Lankan Tamils. It brokered an accord between the Government and the Tamils of Sri Lanka in 1987 for a peaceful settlement of this dispute. Time and again, India had asserted its position in favor of the territorial integrity and political independence of Sri Lanka. Yet, in June 1987, it was "driven" to humanitarian assistance/intervention. The intervention came in the wake of the Sri Lankan Government's move to impose a fuel and economic embargo on the Tamil areas and the launching of a military offensive against them. In such a situation of massive human suffering, India delivered food and relief supplies to the beleaguered Tamils in the North and East of Sri Lanka, first through relief boats under the aegis of the Indian Red Cross and its flag (Operation Poomalai). Such shipments were stopped by the Sri Lankan navy on June 2-3, 1987. Then India delivered humanitarian relief by air force planes (Operation Eagle) on June 4, 1987.<sup>17</sup> The emergency relief operation was completed within a couple of days and, happily, there was no human casualty in the dropping of "bread bombs." But there was a political and legal casualty. The

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16. See *Report of the Human Rights Committee*, U.N. GAOR, Hum. Rts. Comm., 42d Sess., Supp. No. 40 at 8, U.N. Doc. A/42/40 (1987).

17. See *IAF Drops Relief Supplies over Jaffna*, THE HINDU (Madras), June 5, 1987, at 1.

Sri Lankan Government called the Indian relief operation an act of "desperation" and lodged a protest with the U.N. Secretary-General. The U.S. Government expressed "regrets." The Government of China called the humanitarian operation an intervention in Sri Lanka's internal affairs. All the South Asian countries disapproved of the intervention, and the South Asian Association for Regional Cooperation (SAARC) did not condemn India only because of India's *de facto* veto. Sri Lanka did not raise this question at the United Nations because of its international isolation and also for fear of exposure of its questionable human rights record.

Six years later, one Sri Lankan human rights activist analyzed the legal aspects of the June 1987 incident and observed that the Indian intrusion into Sri Lanka's airspace without consent "may be characterised as a breach of the duty to respect the sovereignty of another state."<sup>18</sup> Similarly, an Indian academic published his analysis of India's intervention in Sri Lanka and made two important observations. First, the main intention of India's intervention was to put a halt to Sri Lanka's military approach to resolving the ethnic crisis by military means. In other words, the "bread bombs" had no more than a symbolic value. Second, as a result of the intervention, India had lost its credibility as a mediator.<sup>19</sup> In addition, the driving force behind the intervention was the domestic compulsion to satisfy the Indian Tamil people who felt that the government in New Delhi was not doing enough to protect their ethnic brethren in Sri Lanka. Because of the absence of resolute resistance to its June 1987 intervention, India did not pay attention to the dangers inherent in such an adventure. As a result, later on, it sent fifty thousand armed peacekeepers to Sri Lanka, who were known as the Indian Peacekeeping Forces (IPKF). Out of them, 1,200 died and 2,500 were injured. India spent about U.S. \$180 million on the IPKF operation in addition to salaries for its soldiers. The peacekeepers received so much ridicule and hatred that the Indian defense personnel were terribly demoralized. They went to Sri Lanka to protect the human rights of the Sri Lankan Tamils, and they came back home with the stigma of having violated the human rights of the very same Tamils. In addition to effects on the IPKF, the assassination of Rajiv Gandhi, the man who ordered the Indian action, at the hands of the Liberation Tamil Tigers Ealam (LTTE)

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18. Nirmala Chandrahasan, *Use of Force to Ensure Humanitarian Relief: A South Asian Precedent Examined*, 42 INT'L & COMP. L.Q. 664, 668 (1993).

19. S.D. MUNI, PANGS OF PROXIMITY: INDIA AND SRI LANKA'S ETHNIC CRISIS 102 (1993).

terrorists demonstrates the price of humanitarian intervention without consent.

The following conclusions may be drawn from India's intervention in Sri Lanka: Public pronouncements do not necessarily indicate the political motives behind humanitarian interventions; intervention should not be carried out without consent; dormant local forces should not be taken for granted; no amount of use of force can compensate for the non-cooperation of the parties concerned; there must be a constant review of the objectives and effectiveness of humanitarian operations; there must not be an expectation of a quick success, yet the invitation must not be overstayed.

The long-term success of an intervention/operation depends on three important factors. First, a sound legal basis needs to be established through a bilateral or multilateral agreement with the parties concerned, and when an institution like the U.N. Security Council is involved in the matter, all efforts should be made to secure consensus on the terms and conditions of the intervention. Second, right from the start, sincere efforts should be made to secure the political support of all the parties concerned. Third, adequate resources should be mobilised both for defusing a humanitarian crisis and for promoting the welfare of the people affected.

### *C. Problem of Priority*

History reveals many cases of humanitarian crises where external forces intervened, and it also reveals many more cases of arbitrariness, indifference, and inaction in the face of such crises. For instance, the United Kingdom intervened in Egypt to protect its nationals but it did not do so for its nationals in Uganda. The United Nations, the United States and many others were willing to intervene to restore the democratically elected leadership in Haiti, but not in Algeria or Nigeria. Obviously, the intervenor decides such matters on the basis of its own priorities, which are dictated by its national interest. Since different intervenors have different interests and different decision-making processes, humanitarian crises are bound to be dealt with differently and, invariably, arbitrarily through unilateral humanitarian interventions. This practice is not consistent with the principle of sovereign equality. It also casts doubt on the sincerity of the statement that the "international community cannot stand idly by in cases where widespread human



suffering from famine, war, oppression, refugee flows, disease or flood reaches urgent and overwhelming proportions."<sup>20</sup>

While an individual state or a group of states may be adventurous enough to behave in an arbitrary manner, the United Nations can ill-afford to follow suit. One of the main purposes of the Charter of the United Nations is to get the Organization involved in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and fundamental freedoms for all without any distinction. Where such a problem constitutes a threat to the peace or breach of the peace, the United Nations has the responsibility to deal with the problem to achieve more than one of its purposes. The United Nations has an overwhelming responsibility in the humanitarian field and, legally speaking, there is no escaping this fact. But the structure, resources, and decision-making processes of the various organs of the United Nations are not commensurate with these responsibilities. As a result, there is a gap between its responsibility and capability. Given the frequency of humanitarian crises and the extent of the international community's desire to respond to them, the United Nations faces difficult choices regarding the humanitarian crises in which it should involve itself. Bill Clinton put it rather bluntly when he said that the United Nations must learn when to say no.<sup>21</sup> The United States may have questionable criteria for making these decisions,<sup>22</sup> but the United Nations has none. The decision to terminate the U.N. humanitarian intervention in Somalia by March 1995 was prompted by the frustration felt on the spot, rather than by the application of well thought out criteria.<sup>23</sup> The absence of criteria for humanitarian intervention or for its termination gives rise to double standards in state practice and also in the practice of the United Nations. The presence of any such criteria, however, would violate the letter and spirit of the U.N. Charter. With this background we can discuss the Haitian crisis.

After a long dictatorial rule of the Duvalier family and the ensuing uncertainty for four years after its termination, Haiti held its first presidential elections on December 16, 1990, with the help of the United Nations. Jean Bertrand Aristide secured sixty-seven percent of the vote

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20. The declaration issued at the end of the London Economic Summit 1991. Cf. 1 OPPENHEIM'S INTERNATIONAL LAW 443 (Robert Jennings & Arthur Watts eds., 9th ed. 1992).

21. See President William Clinton, Statement at the Forty-Eighth Session of the General Assembly (Sept. 27, 1993), in U.N. Doc. A/48/PV.4, at 11 (1993).

22. See Sciolina, *supra* note 8.

23. See S.C. Res. 946, U.N. SCOR, 49th Sess. (1994).

and became the first democratically elected President of Haiti on February 7, 1991. Interestingly, the outgoing regime, in an obvious attempt to pose as greater champions of human rights, had acceded to the International Covenant on Civil and Political Rights a day earlier without any reservations or declarations. On May 17, 1991, the U.N. General Assembly unanimously approved an emergency aid program to build roads, to improve the water supply, and to rehabilitate school buildings throughout Haiti. But the Aristide Government could not complete even one year in office. On September 29, 1991, some renegade army officers, backed by neo-Duvalierists, the social elite, and the business community, overthrew the Government in a violent coup. Hundreds of people died and Aristide was arrested. While the coup leader called it "a correction of the democratic process," others condemned it.

From the first moment, the international community responded to the crisis in a systematic manner. The ambassadors of Canada, France, the United States, and Venezuela successfully intervened and persuaded the coup leaders not to kill Aristide but to allow him to leave the country in order to prevent widespread bloodshed. As a result, on September 30, 1991, Aristide left for exile in Caracas. Soon after, the United States suspended military and economic aid to Haiti, and the Government of France followed suit. The United States, France, Venezuela, and Argentina denounced the coup and demanded Aristide's return to power. On October 2, 1991, the OAS held an extraordinary session on Haiti. The next day, the U.N. Security Council did likewise. Both organizations echoed the demand for Aristide's return to power. At the request of Honduras, the question of democracy and human rights in Haiti was included in the agenda of the forty-sixth session of the U.N. General Assembly. On October 11, 1991, the General Assembly endorsed the OAS efforts, appealed to U.N. members to take measures in support of these efforts, and requested the Secretary-General to provide support to the Secretary-General of the OAS in the matter. On October 4-6, 1991 an OAS mission, led by its Secretary-General, visited Haiti, held consultations with coup leaders, and prepared the ground for collective action. Following this visit, on October 8, 1991, the OAS voted in favor of a trade embargo, the freezing of Haitian assets, the banning of arms sales, and the diplomatic isolation of the military junta. Prudently, this package of sanctions also included the provision of basic humanitarian aid to the Haitians. Significantly, the OAS rejected calls from Argentina, Costa Rica, and Venezuela for firmer action, including the threat of direct intervention by a multinational peacekeeping force. The OAS embargo was tightened in May 1992 by the barring of the supply of oil to Haiti. In addition, the OAS requested the European Community to impose a

trade embargo. The European Community did not comply with this request at first, but later responded favorably.

Under persistent pressure from the international community and under the auspices of the OAS, an important breakthrough came on February 23, 1992, when the United States-sponsored Washington Accord was concluded between the legislature of Haiti and President Aristide. The accord provided for Aristide's eventual return to power. The accord also contained some impressive features. First, intervention by any foreign forces was ruled out. Second, the accord allowed for matters of disagreement to be placed before a conciliation commission. Unfortunately, however, the accord encountered many difficulties in its implementation, including a ruling by the Supreme Court of Haiti that the implementation of the accord would be "unconstitutional."

After the coup, human suffering increased in Haiti and a large number of the Haitians felt compelled to leave their home. Because of their desire to seek refuge in the United States, the U.S. Government found itself under increasing pressure, both domestic and international. Its refugee policy in general, and the treatment of the Haitian refugees in particular, provoked several public protests and legal disputes.

In the wake of this situation, the U.N. General Assembly at its forty-seventh session adopted without vote two resolutions on the state of democracy and human rights in Haiti.<sup>24</sup> The U.N. Security Council picked up the theme of these resolutions, invoked Chapter VII of the U.N. Charter at the request of the Haitian delegation itself, and unanimously adopted Resolution 841 on June 16, 1993. Resolution 841 imposed wide-ranging worldwide sanctions on Haiti, targeting both state and non-state entities responsible for the situation there. The immediate effect of this resolution was that the movement for the restoration of democracy in Haiti gained momentum. The U.N. special envoy for Haiti successfully brokered the Governors Island Agreement on July 3, 1993. When the military junta refused to implement this agreement, the Security Council adopted Resolution 940 on July 31, 1994. Armed with this resolution, the United States mobilized its forces and intensified its peace offensive. Happily, the Carter mission secured a peaceful settlement at the last moment. As a result, President Aristide has returned to Haiti, the Security Council has lifted all sanctions against that country, the United States-led Multinational Force in Haiti (MNF) has been replaced with the United Nations Mission in Haiti (UNMIH),<sup>25</sup> and the

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24. G.A. Res. 20B, U.N. GAOR, 47th Sess., U.N. Doc. A/RES/47/20B (1993); G.A. Res. 143, U.N. GAOR, 47th Sess., U.N. Doc. A/RES/47/143 (1993).

25. S.C. Res 964, U.N. SCOR, 49th Sess., U.N. Doc. S/RES/964 (1994).

crisis will come to an end when foreign troops are finally withdrawn. In an interesting parallel development, the United States — the architect of humanitarian intervention and restoration of democracy in Haiti — has been criticized for its treatment of Haitian refugees. Such conflicting postures of intervenors highlight a few curves of the concept of humanitarian intervention.

#### *D. Individual or Collective Action*

There are more cases of humanitarian intervention by individual states than by collective bodies. After the establishment of the United Nations, however, the preference should go to the latter. In a mega-humanitarian crisis, in particular, an individual intervention may not only be ineffective, but it may also worsen the crisis. Yet a number of conceptual, geopolitical, and structural constraints hamper the active involvement of the United Nations in many cases of humanitarian crises. First, the debate on the interpretation of Article 2(7) of the U.N. Charter remains inconclusive and is likely to remain so. Second, there is the problem of multiple moral standards, which complicates the assessment of objective morality. This problem is compounded by the process of decisionmaking. Collective decisionmaking is more often correct, but is also more difficult than individual decisionmaking. Members of the General Assembly or the Security Council perceive their respective self-interests differently on different occasions. Therefore, the development of rational criteria for humanitarian intervention is no easy task. The veto power of the five permanent members of the Security Council hangs as a Sword of Damocles over the head of collective decisionmaking. Even if there were no veto, many countries would probably be averse to involvement in costly humanitarian missions.

The limited resources of the United Nations do not allow it to fulfill its humanitarian responsibility. For instance, the U.N. Secretary-General once said that the United Nations was not in a position to finance the humanitarian intervention in Haiti. He therefore urged the United States to lead and finance the multilateral forces to restore the democratically elected government in Haiti. Also, in order to monitor the implementation of the Lusaka Protocol for Peace in Angola, the United Nations Angola Verification Mission (UNAVEM II) has been enlarged only after the Angolan government's consent to share the financial burden.

As for the effectiveness of humanitarian intervention, the success of any military operation depends, *inter alia*, on command, control, and communication. In the case of a U.N. operation, the cooperation of Member States is also important. Unfortunately, each of these aspects has been weak in cases of humanitarian intervention by the United

Nations. The Military Staff Committee, which should be at the center of command-control-communication, is practically redundant. U.N. forces are generally a motley assembly of troops with different languages, different levels of training, different salaries, and sometimes mutually acrimonious relationships. The U.N. operation in Somalia is a case in point. Most of the U.S. troops there reported to the U.S. commander in Somalia; some of them reported to the Pentagon in Washington, D.C.; and none of them felt obliged to obey the U.N. commander. Indian and Pakistani forces did not have a friendly relationship on the Indian sub-continent, and were unlikely to achieve one on the Horn of Africa.<sup>26</sup> The result is that while a collective moral action is the most desirable course of action, particularly when we compare it with possible alternatives, its innumerable constraints bring it near to ineffectiveness. The more likely alternative is that a system based on the leadership of selective powers will continue to develop outside of the Article 43 framework.<sup>27</sup> The renaissance of the United Nations seems to be a glorious illusion in humanitarian matters. The humanitarian intervention in Rwanda may be examined against this background.

Rwanda, administered by Belgium as a U.N. trusteeship, gained independence in July 1962. Communal violence followed national independence. The conflict had its origin in the traditional tribal rivalry between the Hutu majority and the Tutsi minority. It forced about seventy thousand Tutsis to seek refuge in Uganda, with which Rwanda had a border dispute. In 1973, a Hutu leader, Major-General Juvenal Habyarimana, seized power in a military coup. Two years later he set up the National Revolutionary Movement for Development (NRMD). Since then, Rwanda had remained a one-party state. Habyarimana became the President of Rwanda after the December 1988 elections, in which he was the sole candidate. In December 1989, Rwanda faced severe drought, famine, and crop disease. Since ninety percent of its export earnings came from coffee, Rwanda suffered a severe economic crisis following the collapse of the International Coffee Agreement in July 1989. The Government of Rwanda introduced austerity measures to combat the economic crisis. In January 1990, it apprised diplomats in Kigali about the crisis. The European Community and the World Food Programme offered food, but this assistance proved inadequate.

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26. On the contrary, they were alleged to be operating at cross-purposes. See Dinesh Kumar, *Hints of Pakistan Hand in Somalia Killings*, *TIMES OF INDIA* (New Delhi), Sept. 2, 1994, at 7; M.K. Shukla, *Jawans' Kin in Dark on UN Relief*, *HINDUSTAN TIMES* (New Delhi), Sept. 11, 1994, at 11.

27. See Gregory L. Naarden, *UN Intervention After the Cold War: Political Will and the United States*, 29 *TEXAS INT'L L.J.* 231, 253 (1994).

The economic crisis in Rwanda, which had weakened the state system, sharpened the political crisis both inside and outside the country. The Rwandan refugees in Uganda, mostly Tutsis, had not been recognized as Rwandan nationals by the Government of Rwanda. On October 1, 1990, the Tutsi-dominated Rwandan Patriotic Front (RPF) forces, led by a Rwandan-born major-general of the Ugandan army, threatened the regime of President Habyarimana. Their demands included the return of all Rwandan refugees, the overthrow of the Habyarimana regime, and the reestablishment of Tutsi domination. The RPF scored some successes but no decisive ones. About 300 Tutsis were killed in clashes and about 3,000 were arrested in a security crackdown by the Government of Rwanda.

On October 4, 1990, Belgium sent 535 troops and France 300 to protect their nationals in Rwanda. Zaire also sent about 1000 troops. The Prime Minister of Belgium and the Chairman of the OAU initiated diplomatic efforts to end the fighting. They negotiated a ceasefire agreement on October 24, 1990. The Belgians led a diplomatic initiative, urging the creation of an African intervention force to supervise an eventual ceasefire. Following domestic criticism, however, Belgium withdrew its troops on November 1, 1990. President Habyarimana had agreed to allow all refugees to return to Rwanda, but argued for a regional conference to discuss the reintegration problem. The Dar-es-Salaam Summit was held to resolve the refugee crisis. In July 1992, the OAU deployed a military observer group at the Rwanda-Uganda border. On June 22, 1993, the U.N. Security Council, by its Resolution 846, authorized the establishment of the United Nations Observer Mission Uganda-Rwanda (UNOMUR). Meanwhile, the Arusha talks on a comprehensive peace agreement between the Government of Rwanda and the RPF continued. In January 1993, however, the RPF abandoned the peace talks. It was condemned by Belgium, France and the United States, as well as by the ICRC.

In February 1993, a company of French troops arrived in Rwanda to reinforce the French forces stationed there since 1990. The RPF accused the French troops of intervening on the government's side in the conflict. However, the French insisted that the troops had been deployed solely to protect French nationals, thought to number 400. In May 1993, peace talks at Kinyihira produced agreements for the creation of a buffer zone, a request to the United Nations for human, material, and financial assistance, demilitarization of Kigali, and demobilization of both governmental and rebel forces. The Arusha Peace Accords, envisaging the creation of transitional institutions and power sharing, were signed on August 4, 1993. By its Resolution 872 of October 5, 1993, the U.N.

Security Council set up the United Nations Assistance Mission for Rwanda (UNAMIR) to assist the parties in the implementation of the Arusha Peace Accords. But not enough progress was made in this regard. The Security Council expressed its concern on April 5, 1994. On the next day, President Habyarimana died in an airplane crash, which was caused by the firing of two rockets at Kigali airport. This incident inflicted a fatal blow on the Rwandan peace process. It unleashed a wave of violence in which half a million people, mostly Tutsis, the Prime Minister of the country, and ten members of the Belgian contingent serving with UNAMIR were killed and many more fled to neighboring countries. This was the worst manmade tragedy in recent times. Unfortunately, the Rwandese Government Forces (RGF), who had the responsibility to protect the people, had themselves inflicted this tragedy. Unable to cope with the violence, the Security Council decided to withdraw most of the peacekeepers from Rwanda. The withdrawal was a renunciation of moral responsibility and a violation of Charter provisions by the United Nations itself. As a result, the United Nations destroyed its credibility in Rwanda. This enabled some Rwandans to kill their benefactors. When the United Nations ran away from the crisis, relief workers of many voluntary organizations, especially the ICRC, continued to run their relief programs at a risk to their lives.

In the wake of the April tragedy, the RPF launched a fresh offensive from Uganda, achieved the decisive victory in mid-July 1994, and unilaterally declared a cease-fire on July 18, 1994. Following the RPF victory, the Hutu government went into exile. Its hate-mongering campaign called on all Hutus to follow the government into exile. Fearing a revenge massacre of Hutus by Tutsis, the Government of France requested its friends and the U.N. Security Council to send peacekeeping forces to Rwanda. While the friends of France turned down the request, the Security Council struck a compromise. By its Resolution 929 of June 22, 1994, the Security Council authorized member states of the United Nations to launch a temporary operation under national command and control, aimed at contributing to the security of refugees and civilians at risk in Rwanda, until UNAMIR was brought up to the necessary strength. It was a French idea, popularly known as Operation Turquoise, fiercely opposed by the RPF, politely ignored by French allies, and half-heartedly endorsed by the Security Council. Following the resolution, French troops came to Rwanda to provide humanitarian assistance to the civil-war-torn population. They established a safety zone in southwestern Rwanda, covering about one-fifth of Rwandese territory where more than 250,000 Hutus, including the militia responsible for mass slaughters, sought refuge. Many more Rwandans fled to

neighboring countries, but they could not escape dehydration, malnutrition, or epidemics. The perpetrators of genocide became victims of cholera. French forces came to protect Rwandans from revenge, but their role was reduced to burying epidemic victims. Following CNN coverage, the United States launched a massive relief operation. Some other countries, such as the United Kingdom, joined the humanitarian relief operation. While France, the United Kingdom, and the United States, as well as many relief organizations, were engaged in relief operations on a war footing, the United Nations was holding conferences to mobilize funds. Unfortunately, the nonaligned movement was sleeping while Rwandans were dying. Following the two-month mandate under Resolution 929 and having learned from the U.S. experience in Somalia, France pulled its forces out of Rwanda on August 21, 1994 although it had hardly achieved any of the objectives of the United Nations. The United Nations, the United States, and many others tried to persuade France not to go ahead with its withdrawal, but France refused to relent. As a result, thousands of Rwandans started leaving the French safety zone for refuge in Zaire. Zaire, however, closed its borders and its border security forces opened fire on asylum seekers. Of course, both the intervention and non-intervention of France came under attack at the hands of both the protagonists of inviolability of state sovereignty and the champions of humanitarian intervention.

Forced by the prospect of French withdrawal from Rwanda, the U.N. Security Council expanded UNAMIR. UNAMIR took over from Operation Turquoise on August 22, 1994. In the meantime, the Broad-Based Government of National Unity (BBGNU) had been installed at Kigali on July 19th. These two developments put the Rwandan peace process back on its rails. Shocked by the April tragedy, the Security Council adopted Resolution 955 on November 8, 1994, establishing the International Criminal Tribunal for Rwanda on the pattern of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia.<sup>28</sup> Rwanda opposed the resolution, but

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28. The two tribunals have many commonalities. First, both of them have been established under Chapter VII of the U.N. Charter. Second, both of them have similar statutes. Third, both of them are subsidiary organs of the U.N. Security Council, and, as such, both are dependent in administrative and financial matters on various U.N. organs. Fourth, the chief prosecutor of both the tribunals is the same person. Fifth, the members of the appeals chamber of the Yugoslav tribunal shall also serve as the members of the appeals chamber of the Rwanda tribunal. At the same time, there are quite a few differences between the two tribunals. Unlike the establishment of the Yugoslav tribunal, which was done in a two-stage process of two Security Council resolutions (Resolutions 808 and 827) the Rwanda tribunal has come out of a one step approach and a single resolution (Resolution 955). S.C. Res. 808,



promised to cooperate with the tribunal.<sup>29</sup> Everybody seems to favor the prosecution of the perpetrators of the genocide in Rwanda, but nobody is sure about the capability of the international community or state authorities to punish thirty thousand Rwandans responsible for the genocide. The prosecution and punishment of the guilty will jeopardize the chances of Hutu-Tutsi reconciliation, but the failure to do so may further damage the credibility of the United Nations. Earlier Rwanda ruined the image of the United Nations, and now it has presented the Organization with an opportunity to give a new dimension to the concept of humanitarian intervention.

#### IV. SALIENT FEATURES OF A NEW INTERNATIONAL HUMANITARIAN ORDER

The traditional international law of humanitarian intervention cannot be a good basis of a new international humanitarian law. Even contemporary practice is inadequate and controversial. Therefore, we have to strike new ground. In this process, we should note the following. First, the new international law of humanitarian assistance and intervention should address the inadequacies that have reduced the effectiveness of international law in general and human rights law in particular. The progress made in the creation of a new international humanitarian law should be tested in the light of its capacity to overcome the traditional inadequacies of international law. Second, although the eruption of humanitarian crises does not wait for the evolution of legal norms, the latter does require sufficient time to evolve. Therefore, while the regulation of humanitarian assistance and intervention with the help of a new international humanitarian law is a lofty long-term goal, there is a need to develop certain instant equitable norms to check the abuses arising out of the absence of clarity on the subject. Finally, however good a body of rules may be, its acceptance remains contingent upon all those niceties of law which make it such a conservative discipline. Therefore, the traditional law-making process may not help much in the evolution of a new international humanitarian law.

Broadly, we find the following inadequacies or weaknesses in international law: the lack of clarity, consistency, and credibility; the

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U.N. SCOR, 48th Sess., 3175th mtg., U.N. Doc. S/RES/808 (1993); S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993); S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955 (1994). Also, while the main aim of the Yugoslav tribunal is to force the Serbs to resolve the Balkan crisis, the chief objective of the Rwanda tribunal is to give a humane face to the Rwandan peace process.

29. S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955 (1994).

absence of a reliable dispute settlement mechanism; the lack of accountability of major international actors; the lack of mechanisms to make effective use of the people's power to address international controversies; and the increasing expectations of masses in face of the limited resources of international organizations. In addition, the nature of the international legal process is such that it provides plenty of opportunities for continuing controversies.

Despite the introduction of many progressive features during the U.N. Charter era, international law has not given up its image of being an international social contract of the Hobbesian kind. This image has not been improved by the handling of humanitarian crises in recent years. The end of the Cold War has not freed the international community from many traditional fears, and the United Nations has not been able to tap "peace dividends" for its humanitarian operations. On the other hand, certain developments at the domestic level may cause the United States to change its policy, thereby leaving humanitarian intervention to the United Nations.<sup>30</sup> These developments may influence the policies of other countries as well.

A vast majority of nations feel that the U.N. Security Council is an inappropriate body to evolve a new, just, and equitable humanitarian law particularly as it is dominated by the sole superpower. Instead, they repose more faith in the lesser known but better structured organs of the U.N. system, including the General Assembly. For instance, while Iraq has vehemently criticized the Security Council, it has not uttered a word against an organ like the Human Rights Committee which censured the Iraqi human rights record in no less critical language.<sup>31</sup> It is appropriate, therefore, that all the relevant organs and bodies, especially those that deal with human rights matters and economic development programmes, should be involved in the creation as well as the implementation of humanitarian norms even under Chapter VII of the Charter. In other words, the norm-creating process and the body of norms should reflect the will of states as well as that of non-state entities. The same values should be reflected in the implementation of humanitarian norms.

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30. Following the "Contract with America," the Republican-controlled U.S. House of Representatives voted on February 16, 1995, to cut or even eliminate U.S. payments for U.N. peacekeeping operations. H.R. 501, 104th Cong., 1st Sess. (1995). A similar measure was introduced in the Republican-dominated Senate. If adopted by the Senate and not vetoed by the President, the new measure would become law, thus reducing U.S. support for humanitarian intervention by the United Nations.

31. See *Report of the Human Rights Committee*, U.N. GAOR, Hum. Rts. Comm., 47th Sess., Supp. No. 40, at 150-58, U.N. Doc. A/46/40 (1991); *Report of the Human Rights Committee*, U.N. GAOR, Hum. Rts. Comm., 47th Sess., Supp. No. 40, at 49-58, U.N. Doc. A/47/40 (1992).

Since mankind is expected to survive indefinitely, short-term political gains should not obscure the need to evolve a broad-based body of norms which should be capable of responding to a humanitarian emergency without neglecting the need to attain long-term goals. None of the resolutions of the Security Council take this into consideration. By their nature, they reflect *ad hocism* and, in some cases, adventurism as well. Fortunately, there is a ray of hope in a number of developments. The first of these is contained in certain General Assembly resolutions, especially Resolution 46/182 of December 19, 1991. The guiding principles envisaged in this resolution may become salient features of a new international humanitarian order. In addition, such a regime should incorporate a dispute settlement mechanism which may be invoked by a party to a humanitarian crisis. The existence and operation of such a mechanism would make the regime of humanitarian intervention and assistance more transparent and acceptable to the international community at large. The creation of the office of the Undersecretary-General for Humanitarian Affairs is another welcome development. While it may not help much in attaining normative and operational transparency in the near future, it will certainly increase operational coordination. Yet another development which has promoted the cause of the evolution of a new and sensitive humanitarian order is the involvement of a large number of voluntary relief agencies, which also build worldwide public opinion. However, as noted earlier, the existing institutional order does not reflect the importance of these agencies or that of world public opinion in the decision-making process in cases of humanitarian assistance and intervention. Since relief agencies contribute substantially to humanitarian assistance and also command the confidence of relief-receivers, they should have an institutionalized participation in the decision-making process of any humanitarian assistance operation in which they are involved. Humanitarian assistance is too serious a matter to be left with state-centric bodies.

The U.N. Secretary-General rightly states: "Power brings special responsibilities, and temptations."<sup>32</sup> Whenever an institution or an individual is endowed with large powers, without corresponding checks and balances, there is a tendency to exercise them freely and sometimes arrogantly. This experience of every civilized state should raise concerns about the new role of the United Nations, especially that of the Security Council, in the maintenance of international peace and security. The abuse of power by the Security Council cannot be ruled out. The U.N.

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32. See *An Agenda for Peace*, *supra* note 3, para. 80.

Charter gives an impression that the Security Council can do no wrong. It does not envisage any mechanism to review Security Council action. Thus it is important to consider the need to evolve appropriate innovations to fill this gap. We must make it clear that an arbitrary interpretation of Charter provisions and implementation measures without prospect of redemption brings the concept of the rule of law into disrepute and makes the presence of "the principal judicial organ" of the United Nations redundant. The International Court of Justice should be given greater responsibility in preventive diplomacy, post-conflict peacebuilding, and the administration of the collective security system under Chapter VII of the Charter, especially in the determination of "the proper law applicable to a legal component of a dispute."<sup>33</sup> The Court's advisory opinions may be sought in the determination of a "threat to the peace, breach of the peace, or act of aggression" under Article 39 of the Charter, or on any other matter. For similar purposes, as well as for many others, the United Nations should also seek the services of an advisory council consisting of independent jurists, representatives of leading voluntary relief organizations, and representatives of major powers that do not have representation on the Security Council. It is true that determinations of "threats to peace" are largely political in nature, but the sense of fairness demands that all ways of securing peace should be explored before a coercive operation is launched. Moreover, the involvement of non-political organs in the administration of the collective security system would enhance the political legitimacy of the actions of the political organs of the United Nations. The Court's expertise should be sought in the determination of legality of actions by any organ of the United Nations.<sup>34</sup> It should be agreed by states that "all objections of unconstitutionality should in the last resort — that is, if the objection is maintained after the preliminary decision of the organ against which it is made — be referred to the International Court of Justice for an Advisory Opinion, and that such an Opinion should be

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33. What part the Court can and should now play in the collective security system has been articulated by Sir Robert Y. Jennings, President of the Court, in his speech concerning the 1991 report of the International Court of Justice submitted to the General Assembly. See Speech by Sir Robert Yewdall Jennings on the Report of the International Court of Justice, U.N. Doc. A/46/4 (1991), reprinted in 86 AM. J. INT'L L. 249, 252-53 (1992).

34. After a brief but in-depth analysis of the Court's order in *Libya v. United States* (1992), Thomas Franck considers the Court as "the ultimate arbiter of institutional legitimacy." He observes: "The legality of actions by any U.N. organ must be judged by reference to the Charter as a 'constitution' of delegated powers. In extreme cases, the Court may have to be the last resort defender of the system's legitimacy if the United Nations is to continue to enjoy the adherence of its members." See Thomas M. Franck, Editorial Comment, *The Powers of Appreciation: Who is the Ultimate Guardian of UN Legality?*, 86 AM. J. INT'L L. 519, 523 (1992).

final and binding.”<sup>35</sup> Hopefully, the proposed balance of power and accountability will enhance the credibility and effectiveness of the United Nations in the maintenance of peace and security.

## V. SUMMATION

The basic thrust of the concept of humanitarian intervention lies in the responsibility of the international community in maintaining the moral correctness of the nation-state system. In terms of state practice and the practice of international organizations, however, the concept has witnessed many changes over the years. The degree of those changes is not reflected in the law on the subject. Recent attempts to create *ad hoc* regimes of humanitarian intervention have increased the confusion. Uncertainties over future humanitarian crises, growing sensitivity of the public at large over humanitarian matters, shrinking willingness of leading states to shoulder the responsibility in risk-prone areas, and normative anarchy have not only questioned the efficacy of the existing law on humanitarian intervention but have also presented a powerful thesis for the evolution of a new law on the subject. The progressive development and codification of a new law of humanitarian intervention ought to reflect normative transparency, both in terms of substance and procedure. This is possible when not just the U.N. Security Council but also all other relevant organs of the U.N. system are involved in the process. Operational transparency is necessary to ensure the credibility of the intervenor, be that a state or an international organization. This is possible, *inter alia*, by giving precedence to humanitarianism over interventionism, by reforming the Security Council, by granting an appropriate legal status to the nongovernmental actors' participation in humanitarian intervention (including their role in the decision-making process), and by creating a dispute settlement mechanism available to the parties involved in humanitarian intervention. The achievement of such a normative and operational transparency seems to be a dream today. But it may nevertheless come true.

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35. Although these views were expressed on unconstitutional acts of the International Civil Aviation Organization (ICAO), they have equal significance for the United Nations. See Ebere Osieke, *Unconstitutional Acts in International Organizations: The Law and Practice of the ICAO*, 28 INT'L & COMP. L.Q. 1, 26 (1979).