SUFFERING AND SOVEREIGNTY:
CIVIL CONFLICT, COVERT AID AND INTERNATIONAL
HUMANITARIAN LAW

by

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The following text analyzes legal and political problems that arise when donor countries attempt to provide, or facilitate the distribution of, humanitarian aid to people in insurgent-controlled areas of another state without the consent of the government in question. The purpose is to find out how uninvited humanitarian relief operations (covert aid) can be justified given the existing legal treaties and recent developments in customary international law. The reason for doing so is to explore the impact which such aid has on the concept of state sovereignty and how this concept is undergoing change due to the increasing involvement of the international community through the work of the United Nations.

In the wake of recent humanitarian interventions, there is a shifting of concerns in favour of the welfare of civilians in civil wars over the interests to safeguard the security of the nation-state. In light of the above, the discussion here considers three civil conflicts: the civil wars in Nigeria and Ethiopia and the persecution of Kurds in Iraq.

The text concludes that covert aid may produce a beneficial effect besides helping those in need; its inherent challenge to state sovereignty promotes an incremental loosening of the ideological conflict between human rights and sovereignty by which the international community under the auspices of the United Nations can encourage a wider acceptance of human rights values.
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I.

Since the Second World War, more civilians have suffered human rights abuses, persecution, and genocidal extermination in civil wars than in international wars. Delivering international humanitarian aid to people caught up in internal conflicts has always been problematic because civil wars constitute the greatest challenge to a state's existence and legitimacy. This thesis examines the legal and political obstacles that arise when donor countries and aid organizations attempt to provide or distribute humanitarian relief to people in insurgent-controlled areas of a given state without the consent of the régime in question. The objective is to explore why the delivery of emergency humanitarian aid to countries ravaged by civil strife is, legally and politically, so difficult to undertake.¹

The legal obstacles to the delivery of humanitarian aid are the logical result of the manner in which the international state system has evolved, and the principles that guide the

¹ "Humanitarian" activity or concern is disinterested attention aimed at the victims of man-made or natural disasters. In the present context, the term denotes aid and emergency relief given to victims of violent conflicts between a régime and an insurgent force. Humanitarian relief is impartial in character and given without any adverse distinction based on race, colour, sex, language, religion or belief, national or social origin, or any other criteria (taken from Protocol 1).
interaction of the system's constituent units—that is, nation-states. The present analysis aims at a clearer understanding of these obstacles, in the belief that such an understanding constitutes a first step to overcoming the impediments and providing help to more victims in a wider variety of conflict settings. The perspective here is essentially an optimistic one. It points to a global spread of humanitarian values that favours greater respect for fundamental human rights. Owing to the mass media and increasingly sophisticated communications technology, human rights violations in civil wars have been brought to the attention of an ever-wider global constituency. The vivid images of human suffering have spawned revulsion and disgust, but also sympathy. As a result, an unprecedentedly broad humanitarian outlook has gained currency. It centers on the belief that it is morally correct to supply emergency relief—wherever necessary, and by whatever means possible—to civilian populations caught up in civil strife.

But when moral imperatives are brought to bear on the chaos of civil war, something is bound to get lost in translation. Protection of civilian populations is at best a secondary consideration for military leaders and government policy-makers embroiled in large-scale counter-insurgency campaigns. Their primary concern is to rid the national territory of rebels or dissidents and thereby preserve the sovereignty of the state, the authority of the régime, and the integrity of the national territory. These are all political
aims with profound legal consequences that deserve consideration.

What features of international law are most pertinent to such situations? The first feature is an injunction aimed at protecting states against outside interference and intervention: donors of humanitarian aid are granted no right to enter a given country to deliver aid, without the express consent of the régime in power. A second tenet grants the régime in power pre-eminence in dealings with the international community: non-governmental actors, such as insurgent forces, have no legal right to request delivery of foreign relief to inhabitants of zones they control or operate in. Both these injunctions have grown increasingly shaky as humanitarian considerations have been granted more and more weight. The discussion here will consider the conflicting interests of state sovereignty and humanitarianism, in the context of three specific civil conflicts: the civil wars in Nigeria and Ethiopia and the persecution of Kurds in Iraq. In all three cases, aid was distributed by international agencies to civilians in the insurgent-held territories of Biafra, Eritrea, and Kurdistan—without the respective régime's consent. This was a violation of international treaty law. From a humanitarian perspective, however, such covert delivery of aid was desirable. It provided material assistance to many refugees and war victims, while also launching the issue of

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2 A "right" implies the permission given or withheld by the signatories to international treaties.
humanitarian values versus state sovereignty to the forefront of the international agenda.3

II.

CIVIL CONFLICTS

In most countries where political institutions have been established since the Second World War, controversies and disputes have arisen that pit cultural, religious, or ethnic communities against one another. Particularly in former colonies — and more recently following the dissolution of the socialist bloc — communities and nations have found themselves increasingly embroiled in disputes over territory, identity, and resources.

Rather than dampening or mediating the clashes among this plurality of communities, modern political institutions and the forces of economic centralization have all too often fanned the flames of inter-ethnic conflict and civil war. Such wars are notable for the zero-sum viciousness that tends to characterize them. In particular, a complete lack of respect is often evident for fundamental rights of civilians whose allegiance régimes and insurgent armies seek to hold or secure (Jackson 1990, 149). In Angola, Somalia, Iraq, and the states of the former USSR and Yugoslavia, violence has taken on a

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3 By covert aid, we mean foreign aid to which an incumbent régime has not agreed in advance. If, for example, an insurgent force engaged in a civil war against a régime permits or invites foreign-aid deliveries into the territories it controls, and international agencies or governments provide such aid without first securing the consent of the ruling régime, then the aid is considered covert and constitutes an intervention under positive international law.
particularly horrible face—one for which grim terms like "genocide" and "ethnic cleansing" are used.  

Four general reasons can be cited to explain why such human tragedies in the context of civil strife seem to be on the increase:

(1) Since the establishment of the modern state system—and especially since the adoption of the United Nations Charter—the principle of sovereignty has given governments a sense of security from outside criticism, interference, and intervention. As a consequence, régimes have come to assume that their methods of governance—including their treatment of civilians—lie wholly within their jurisdiction.

(2) Since the end of the Cold War, impediments to the nationalist expression of minority aspirations have diminished. The power of certain African and Asian régimes, once bolstered by one or the other of the superpowers, has diminished relative to domestic opposition groups, including rebel and insurgent forces.

(3) The collapse of communism has prompted a worldwide surge in calls for more representative, popularly-supported governments. Totalitarian régimes could once justify their rule by reference to the global struggle between socialism and capitalism. Now these same régimes must secure domestic 

4 An ethnic group is a collection of people who can identify (real or imagined) common myths of origin and descent, common historical ancestry, some elements of a distinctive culture, a sense of group solidarity, a common territorial association, and frequently also racial characteristics by which they set themselves apart from other groups (Smith 1985).
support on its own terms in order to remain in command. In light of these new pressures, the temptation exists for régimes to seek support from population groups that exercise disproportionate control over national resources or cultural and religious institutions. The consequence is the likely alienation of minority groups.

(4) With the decline of dictatorial régimes comes the loss of régime control over information and the spread of "Western" values and ideals. One central value posits respect for fundamental human rights as a measuring stick of good or bad government. The use of international coercion to promote respect for human rights--through methods such as sanctions, embargoes, and humanitarian intervention--has grown in acceptability (Cooper 1993, 119-120; Falk 1971, 1-10; Greenwood 1993, 39; Judd of Portsea 1992).

Civil Strife, Sovereignty, and Humanitarianism

The hope for solutions to the many civil conflicts of today becomes less and less tenable within the framework of the existing state system. As civil or inter-ethnic violence spreads, and as different ethnies move away from peaceful negotiation and a willingness to share territory, resources and representation in federal-type states, more and more civilians die or suffer dreadfully. Angola, Sudan, Armenia, and Bosnia-Herzegovina are just some of the present situations where the rejection of political--i.e., federal--solutions to civil conflicts seems to perpetuate the suffering for civilians.
Similarly, the examples of Czechoslovakia, Ethiopia, and Bosnia may point to a renewed opportunity for many minority or ethnic groups to break loose from perceived patterns of "internal colonialism." There is no doubt that the Kurds, the Kashmiris, the Basques, the UNITA insurgents, or the southern Sudanese would like to have greater control over their own territories and, in most cases, independent statehood.

The process of change and fragmentation is a slow and painful one. It is threatening to those who cling to the modicum of security offered by established notions of a state system consisting of existing independent units and upheld by notions of an international balance of power. Those holding to these established conceptions, of course, take a rather dim view of secessionist groups and aspirations. Such groups have never had the legal right to struggle for political self-determination and/or independence. No recognition of the principle of self-determination exists in international treaties for groups or units other than nations who struggle toward freedom from colonial or racist oppression (Adelman 1992, 12 and n.22). And for many countries in which centralized control persists, or where the domestic political climate is unstable, the notion of rights for individual peoples is an unwelcome challenge to internal law and order, and to the position of government and military leaders.

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5 C.f. Declaration on the Granting of Independence to Colonial Countries and Peoples, UNGA Resolution 1514 (1960).
The result is that in the past, genocidal atrocities have not only remained unchecked by outside forces, but have often been tacitly sanctioned by countries whose foreign-policy interests or patterns of economic organization are similar to those of an offending state. Under international law, governments under siege by rebel forces can authorize their soldiers to kill all "enemies of the state"—while actions committed by the insurgent group are depicted as crimes punishable under state law. Atrocities committed by régimes against their own populations are legally immune from outside interference. Thus, at the level of international relations and law, there is a disequilibrium of political and military power and a firmly-entrenched emphasis on international security, reflected in a status quo that grants sovereign states the status of sole actors in international politics (Cassese 1986).

International law, as enshrined in international treaties, presents two major obstacles to the protection of civilians caught up in civil strife. First, it is not legal for regionally-specific (ethnic) groups to attain political self-determination when they lie within the borders of an

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6 A rebellion implies an organized and violent attempt to overthrow an existing government and to replace it with another. An insurgency is a regionally-specific war conducted by a dissident force against an established régime. Such an insurgency may attain the proportions of a full-scale war of secession when the dissidents manage to exert control over all territory they claim as theirs. A war of secession is the attempt by a regionally-definable group, led by a dissident armed force, to establish an independent state by means of violent struggle against the incumbent régime.
established sovereign state not ruled by a non-indigenous (colonial) minority. Second, it is not legal for outsiders to enter a state's territory without the express consent of the incumbent régime—even when the outsiders' objectives are purely humanitarian in nature. The distinction is always maintained in international law between what occurs among states, and what actions are taken within the boundaries of a given state.

Established procedures for humanitarian assistance reflect this status quo. Most aid deliveries to countries ravaged by violence occur with the agreement of the régime embroiled in civil conflict. But when governments are at war with groups of their own citizens (organized as rebel or insurgent forces), strong disincentives exist to permit international aid to reach rebel or insurgent-controlled areas. Such aid is viewed as tantamount to supporting the enemy's fighting capacity. Nor is a régime likely to permit the domestic enemy--insurgent forces--to request and oversee the delivery of foreign aid into zones of rebel operation, since these remain officially within the jurisdiction of the sovereign state authority. Perhaps to avoid undermining their own claims to sovereignty, donor countries have generally adhered to the principle of the sovereign rights of states, and have directed their humanitarian relief through official channels. The overarching assumption is that civil strife occurs within the domestic jurisdiction of a given régime. Thus, persecution of targeted groups of civilians in Tibet, Sri Lanka, Myanmar, East Timor,
Turkey, Angola, or Sudan has proceeded with relatively little political and humanitarian interference by other countries.

Apart from the principled preservation of state sovereignty, states in the international system have other pressing reasons to turn a blind eye to such human disasters: foreign policy concerns, economic interests, and considerations of feasibility or practicality. The wealthier countries of the industrialized world, in particular, thus leave themselves open to the charge that they do not care about the welfare of other states' citizens; a charge which will grow as Western governments are increasingly called upon by their own populations to "do something" about the inhuman treatment of citizens in war-ravaged countries. As noted, the public's exposure to the ravages of civil conflicts has shifted public opinion increasingly towards humanitarian values and a condemnation of régimes who can secure control over territory and citizenry only by the use of military force against civilians. This public pressure prompts western governments to search for solutions in the areas of foreign policy, international diplomacy, and humanitarian aid.

The result has been an increase in the willingness and capacity of outside actors to exert pressure and impose constraints on a régime's use of force to subdue domestic dissent. The role of the United Nations in this context has lately received considerable attention: the gradual development of the UN's "peace-making" role, as opposed to its traditional "peace-keeping" function, is seen as encouraging by those who
reject the notion of a state's sovereign prerogative to massively violate human rights (Boutros-Ghali 1992, 202-203).

As seen thus far, though, the possibilities for foreign intervention on humanitarian grounds are strictly limited under international treaty law. Only under international customary law are (covert) interventions for humanitarian purposes defensible. Customary law will be considered later; first it will be useful to clarify the concept of "intervention" as this relates to state sovereignty and conceptions of humanitarianism.

Intervention

Under international treaty law, a state has the right to exercise control over its territory and the populations therein. Movement of civilians can be checked by the government. This is usually done through the establishment of customs controls, where permitted by the country's infrastructure. But while a régime has the right to keep outsiders out and defend itself against unwelcome intrusions, it does not have absolute authority over the movements of its own citizens. Article 13(2) of the United Nations Universal Declaration of Human Rights (1948) stipulates that "Everyone has the right to leave any country, including his own, and to return to his country." The United Nations International Covenant on Civil and Political Rights (1966) restates the right to freedom of movement in Article 12(2): "Everyone shall be free to leave any country, including his own." Article
12(4) likewise stipulates that "No one shall be arbitrarily deprived of the right to enter his own country." However, Article 12(3) gives permission for the state to preserve law and order according to the interpretation it chooses: "The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order, ... or the rights and freedoms of others ..." (Laqueur 1990, 197-199, 215-220).

The distinction here is between entry into, and exit from a given country: the latter is a fundamental human right, but the former is contingent on an incumbent régime's granting permission. While countless refugees do travel across state borders, officially they are intruding if they fail to secure the permission of the régime in question. To intrude is to disturb, interrupt, influence, or interfere with: an intruder is someone who enters a place where he or she is not permitted to be, i.e., a trespasser. Intervention in a situation, on the other hand, means to take uninvited action in a situation in which the actor was not previously involved. While the term is commonly used to indicate entry by one or more states into another state's territory, with or without the use of military force, latter-day definitions of intervention are generally broader. They include non-military involvement such as propaganda, smuggling of marketable goods like drugs, use of economic sanctions, or any other form of interference in domestic policies or the domestic political process of a given country (Schraeder 1992, 2).
For the purposes of this thesis, the agents of intervention can be listed as uninvited civilians or uninvited military forces. Regardless, an intervention always aims at disrupting or changing social, political, economic, or military features of the target polity. It "connotes action in another's territory ... where purposes diverge and a threat is implicit. Two [or more] states are involved, but not in mutually acceptable activities" (Wriggins 1968, 218). This definition also serves for the sub-genre of humanitarian interventions. These may be covert or overt, civilian or military. The special feature of a humanitarian intervention is that it aims to relieve human suffering in a polity without the consent of the régime in question.7

Non-Intervention

Predictably, given the existing state system's emphasis on the sovereignty of its constituent units, non-intervention represents one of the oldest and firmest obligations of states under international law. This norm was first codified in the League of Nations Covenant, Article 10, which declares that "Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League" (Covenant of the League of Nations, 1919). The declaration set

7 Instances where a state intervenes with military force to rescue its own nationals also constitutes an intervention — but not a humanitarian intervention, as it is not intended to relieve the suffering of all people in the targeted territory.
the tone for all subsequent treaties, including the Convention on the Duties and Rights of States in the Event of Civil Strife (Havana, 1928), the Convention on Rights and Duties of States (Montevideo, 1933), the Treaty on Non-Aggression and Conciliation (Rio de Janeiro, 1933), the Americas Treaty Convention (1933) and the United Nations Charter (San Francisco, 1945). Further conventions that stress the principles of non-intervention and state sovereignty have been codified by the Organization of American States and the Organization of African Unity (Plano 1988; Joyner 1992, 230).

The principle is no less evident in the United Nations Charter, which stipulates in Article 2:7 that the organization is not authorized "to intervene in matters essentially within the domestic jurisdiction of any state ..." This article can be interpreted as referring to U.N. action alone, or to all the activities of member nations whether carried out under U.N. auspices or not. To underline the signal importance of non-intervention, the General Assembly in 1965 passed the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty. The declaration expressed concern over "the increasing threat to universal peace due to armed intervention and other direct or indirect forms of intervention threatening the sovereign personality and the political independence of States." It "solemnly declares" that

No state has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or
attempted threats against the personality of the State or against its political, economic and cultural elements, are condemned.

Also, no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the régime of another State, or interfere in civil strife in another State. (UNGA Res. 2131, XX)

Such emphatic condemnation of any and all intervention leaves precious little room for interpretations that may legitimize interference for the express purpose of saving or protecting human lives. But the trend in recent decades has been towards a more nuanced evaluation of intervention. On the one hand, intervention for military, economic, or political objectives is perhaps less acceptable than ever. Practices that until the end of the Second World War were seen by many governments as acceptable and often praiseworthy political strategies—such as military expansionism—are now political anathema in most Western countries. This can be observed in the case of the former Yugoslavia, for example, where international military involvement in furtherance of national political interests has been scrupulously avoided, for fear of destabilizing the situation still further and perhaps setting dangerous precedents for future conflicts (Coulmas 1993, 86).

What types of intervention are permitted under existing international treaties? International law grants that intervention by third parties is acceptable when the motive is to establish peace between the countries concerned. Thus an end to human rights abuses can be brought about incidentally when a cross-border conflict is the origin of the suffering,
even if the re-establishment of peaceable relations between states remains the primary concern. However, in the case of an isolated civil war that does not spill over to other states, third-party intervention is strictly ruled out. Only if the incumbent régime in question seeks outside assistance is such third-party involvement sanctioned. No clearer evidence exists for the bias in international law towards states rather than ethnic groups, "nations," or indeed individual citizens. No matter how tenable the claims for regionally or ethnically-based "national" self-determination, they invariably conflict with state sovereignty and the absolute authority vested in incumbent régimes.

On the surface, these principles of non-intervention provide a large measure of security for states and régimes. However, a glance at virtually any period of recent history demonstrates that the principle of non-intervention tends to be honoured more in the breach than in the observance. Military or non-military intervention has characterized relations among states no less since the drafting of the U.N. Charter than in previous eras. Indeed, the plethora of resolutions and treaties aimed at establishing relations of co-operation among states on the basis of mutual recognition of sovereignty can be seen as an attempt by member-states to bolster their security in the face of the constant real-world threat of intervention. (It is no coincidence that the most uncompromising rhetoric against intervention has issued from representatives of the generally poor and militarily-weak states that emerged from the
ruins of empire between 1948 and 1975.) The paradoxical element here is as follows: the rhetoric of non-intervention is ostensibly aimed at preserving the freedom of citizens from outside interference or exploitation. But the leaders of incumbent régimes responsible for drafting and promulgating resolutions on non-intervention are themselves the principal abusers of human rights and freedoms. The paradox makes it plain that in many, perhaps most instances, the primary consideration is the security of the incumbent régime, and its freedom — from foreign invasion, on the one hand, and domestic subversion, on the other. Accordingly, self-serving strategies of international treaty-making ensure that security for governments and states holds priority. Humanitarian concerns are granted a subsidiary place on the political agenda, achieving prominence only when they accord with "national interests."

III.

HUMANITARIAN LAW AND THE PROTECTION OF CIVILIANS

The principal objective of humanitarian law is to minimize unnecessary destruction of, or damage to, human life. Accordingly, specific norms and customs have evolved to establish rules of conduct for combatants and acceptable postures vis-à-vis civilian populations. It can be argued that these measures have achieved a considerable degree of success. Supporters can point to the thousands or millions of lives already spared because of injunctions against harming non-
combatants, or guidelines covering treatment of prisoners and wounded combatants:

Despite the harsh realities of violence throughout history, a generally acknowledged basic premise of humanitarian law is that destruction beyond actual military necessity is not only immoral and wasteful of scarce resources, but ... also counter-productive to the attainment of the political objectives for which military force is used. (Allen 1989, 15).

Conventions of modern warfare rest on the view that combatants are equal on the battlefield, and that non-combatants have the right not to be targeted or exploited for military purposes. As with the principle of non-intervention and actual practice, however, a powerful disparity exists between tenets of humanitarian law and the course of modern military conflicts. The three conflicts considered in detail here--Nigeria, Ethiopia, and Iraq--were all characterized by a ruthless targeting of civilians that resulted in massacres, persecution, and starvation. And when a military force perceives that gains on the ground can be obtained by disregarding moral, ethical, and legal standards, there is very little that can be done under international law to stop the violence. Because international treaties rest on the mutual consent of signatory states, political-military interests must be balanced with the rules and restrictions laid out in a given treaty text. Drafters of humanitarian law have always had to keep in mind the relative weight of moral principles (based on fundamental human needs) versus military objectives (notions of military "necessity" and political-economic interests). As combatants in the real world rarely sacrifice their military
interests for abstract moral principles, treaties designed to promote respect for human rights and needs must be formulated in such a manner as to conflict as little as possible with power-political concerns (Allen 1989, 15). The quandary for civilians caught up in a military conflict is clear and unfortunate. While the distinction between combatants and non-combatants is the basis for the protection of civilians in war, it is part of the calculus of war for modern military leaders to include civilians in their warfare tactics so as to inflict maximum damage on an enemy's power base and public morale.\(^8\)

The major instruments setting forth the laws of conduct in war include:

- The Declaration of Paris (1856), which limited sea warfare by abolishing privateering and specifying that a blockade had to be effective to be legally binding;
- The Geneva Conventions of 1864 (revised 1906), which provided for the humane treatment of wounded in the battlefield;
- The Hague Convention of 1899, which codified many of the accepted practices of land warfare;
- The Hague Convention of 1907, which added revisions concerning the rights and duties of belligerents as well as of

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\(^8\) This correlates, of course, with the shift from limited to "total" war that is commonly associated with the advent of the French levée en masse in the late 18th century and subsequent technological and strategic developments most closely associated with the American Civil War and the First World War.
neutral states and persons, while also introducing rules to govern the use of new weapons technologies;

- The Geneva Conventions of 1929, providing for the treatment of prisoners and care of the sick and wounded;
- The London Protocol of 1936 limiting the use of submarines against merchant shipping;
- The Geneva Conventions I to IV of 1949 for the protection of war victims, updating regulations concerning treatment of prisoners and of wounded and sick non-combatants and establishing new rules for the protection of civilians;
- The Geneva Diplomatic Conferences of 1949-77, which reaffirmed the development of international humanitarian law to apply to armed conflicts; and finally
- The Geneva Protocols 1 and 2 (1977), which re-emphasized the need to provide protection for non-combatants, civilians and prisoners in international and civil conflicts (Plano 1988, 193; UNESCO 1988, xvi-xvii).

In addition to these major agreements and treaties on rules of conduct in wartime, states have drafted both regional and international conventions, covenants, principles of customary law, and norms regarding the protection of refugees, fundamental human rights, aggression, genocide, and the rights and duties of states. All are designed to limit the activities of governments and military forces, and to encourage protection for and respect of human rights and needs. These agreements can be taken as evidence of a growing international consensus that civilians must be given protection in situations of strife.
and conflict. The U.N. Charter can be seen as the foundation of this body of human rights legislation, supported and strengthened by later treaties such as the Universal Declaration, the Genocide Convention, the U.N. Racial Convention, and the U.N. Covenants on Human Rights. The activities of the specialized agencies of the United Nations (UNESCO, UNHCR, and so on) should also be cited in this context (Buergenthal 1979, 15).

The U.N. Charter points to the importance of protecting and respecting human rights. But it does not provide for an effective power to rectify abuses of these rights when the abuse does not take place within a cross-border (international) context. The same is true for all previous and subsequent treaties laying down rules of warfare and protection of civilian populations. International treaties, beginning with the U.N. Charter, give régimes the de jure right to implement any strategy of control whatsoever over their territory and citizenry. Outside interference threatens not only these de jure rights but the régime's de facto capacity to govern.

Third parties, then—whether these be other states in the international systems, or aid organizations—can find little legal support in international treaties for covert humanitarian interventions, military or otherwise. They may, however, point to the oppressive nature of the régime in question (or, for that matter, of insurgent forces) and justify covert deliveries of aid on the grounds of fundamental human rights. They may also fall back on past practice that can be subsumed under the
aegis of customary international law. Such policies or appeals will be affected by a complex set of ethical and practical considerations.

The establishment of norms and laws for the protection of human beings in wartime is "based on the assumption that it is unlikely that war will be completely abolished and therefore [it] should be made as humane as possible" (Plano 1988, 193). But who, precisely, is to be considered part of the war effort? Since the French Revolution it has been customary for entire populations to be mobilized for the national war effort. Every civilian may be regarded by the enemy as somehow aiding or supporting military strategy. Likewise, delivery of any material good—even medical supplies or food aid—with a perceptible human benefit can be seen as bolstering a war effort: "the international community has never been able to agree on exactly what goods are contraband and what are unrelated to the war effort" (Plano 1988, 189).

The analytical thicket becomes more tangled still when the balance of forces in civil conflicts is considered. Accordingly, it is worth examining how humanitarian intervention in civil conflicts can be justified under both treaty and customary law. A discussion follows of the various international treaties that address the work of aid organizations and the circumstances under which it is permissible for them to distribute relief.
IV. THE LEGAL DOCUMENTS

The earliest treaty to address humanitarian intervention in the affairs of sovereign states is the Convention Establishing an International Relief Union of 1927. The convention stipulates clearly in Article 4 that "Action by the International Relief Union in any country is subject to the consent of the Government thereof" (in Macalister-Smith 1985, 202). Since that time, relief organizations have had to formally respect sovereign state authority.

The United Nations Charter

International peace and security are the primary objectives of the United Nations. The U.N. Charter begins with the claim that the purposes of the organization are:

To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace. (Article 1:1).


To develop friendly relations among nations based on respect for the principle of equal rights and self determination of peoples ... 

Article 1:3 calls for international co-operation to address problems of an economic, social, cultural or humanitarian character, while demanding that all nations promote and
encourage respect for human rights and the fundamental freedoms of all peoples.

Beginning with Article 2, the Charter focusses on the rights and duties of its members, that is, the signatory states:

The organization is based on the principle of the sovereign equality of all its Members (Article 2:1). ... All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state. (2:4).

While Article 1 left room for interpretation as to the intended subject of the text, from Article 2 onward there is no doubt whatsoever about who retains the rights of sovereignty and self-determination (Weiss 1991, 214). The members of the U.N. are granted equal status, equal rights, and equal obligations as sovereign actors. Their duties and responsibilities centre on respect for each other's sovereign authority over territory and domestic (internal) affairs. No state is permitted to intervene in the internal affairs of another state. The use of force is permitted only in self-defense, or to assist another state in its defense efforts if that state so requests (or if the U.N. Security Council issues an appeal for assistance).

Clearly, the dominant underpinning of these regulations is the survival and independence of states (Walzer 1992, 61-62). The rights of individual peoples are not addressed directly, except insofar as member nations are obliged to respect human rights (Article 1:3). The difficulty, however, is that the principal violators of human rights worldwide are incumbent régimes—not "nations," which are normally understood to
consist of communities of like-minded or ethnically-distinguishable peoples. Since the Charter does not clarify its use of the term "nations," the implication to be drawn is that states are nations when they function as such--that is, by providing peace and security for all their citizens.

For present purposes, the principal ramification of the Charter's evasive language is that no provision is made for the protection of civilians in violent conflicts occurring among nations or communities within the boundaries of a given state. However, the Charter does contain one provision for the protection of civilians that could potentially be seen as guaranteeing security to populations within a given state. The provision is first cited in Article 2:7 and explained further in Chapter VII of the Charter. Article 2:7 begins by stressing the U.N.'s obligation to abide by the principle of non-intervention in the internal affairs of sovereign states:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

For its part, Chapter VII provides for a United Nations force to preserve or restore peace where international conflicts have disturbed the peace among states. It makes the enforcement of peace possible when member states themselves are unable to solve problems that confront them in their dealings with one another:

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of
aggression and shall make recommendations, or decide what measures shall be taken ... to maintain or restore international peace and security. (Chapter VII, Article 39).

This potential use of force (political, economic, or military) constitutes the only leeway granted the United Nations to secure peace and promote respect for human rights outside the arena of inter-state diplomatic relations. Articles 41 and 42 in Chapter VII grant the Security Council the power to impose economic sanctions against an offending state, or to disrupt its transportation and communication networks. The Council is also given the power to take military action "by air, sea, or land forces as may be necessary to maintain or restore international peace and security" (Chapter VII, Article 42). Thus, when the Council determines that a threat exists to international peace, it can--by the unanimous vote of its permanent members--organize and wage a military intervention against the aggressor régime. This power was used in 1991 to expel Iraq from Kuwait, and to intervene forcibly in Somalia in 1992. However, for any U.N. action along these lines--sanctions, peace-keeping, or military intervention--to take place, the Security Council must unanimously endorse the proposals. Its members must agree that a régime is poised to violate, or has actually violated, international peace; only in such cases is a concerted political, economic, or military response possible and permissible.

As for disturbances of international peace, however, the principle of U.N. non-intervention still stands, albeit somewhat softened in the 1991 General Assembly resolution

The sovereignty, territorial integrity and national unity of States must be fully respected in accordance with the Charter of the United Nations. In this context, humanitarian assistance should be provided with the consent of the affected country and in principle on the basis of an appeal by the affected country.

While all United Nations agencies, affiliated organizations, and aid or relief efforts must thus accommodate themselves to the overriding principles of sovereignty and non-intervention, the word "should" softens these principles somewhat. Questions about the changing character of national sovereignty and the legitimacy of delivering uninvited humanitarian aid need to be addressed today because most of the conflicts in which the U.N. is now involved are in fact civil and inter-ethnic in nature.

Is it possible to rework or reformulate the principle of state sovereignty in a manner that might permit the international community to aid civilian victims of internal régime violence? In addressing this question, it is worth noting that the limitations placed on U.N. action vis-à-vis sovereign states do not necessarily obviate such action outright. Most civil conflicts, if they do not occur in a geographically-isolated setting such as a distant island, have an international dimension to them. Most civil wars and inter-ethnic conflicts generate refugee flows, while links may be established between insurgent forces and like-minded groups in neighbouring states. Furthermore, neighbouring states may become involved in a country's internal conflict when guerrilla
forces base themselves outside the national territory, or when ideological commitments bind such forces to foreign allies or sponsors. Thus, when Iraqi Kurds fled towards and into Turkish territory, Turkey could cite the exodus as a threat to international peace. The U.S.-led military intervention into northern Iraq could then be justified on these grounds (Greenwood 1993, 36). These cases appear to be exceptional, however. In general, a breach of international peace is not so easily ascertained or claimed. Taken in isolation, the U.N. Charter and the organization's various resolutions over the years seem to offer little possibility for the delivery of outside aid to civilians suffering human rights abuses at the hands of their own government. Other international treaties, however, do offer hope for change in this area, and these will considered in turn.

The Genocide Convention of 1948

Since the horrors inflicted on the Jewish people and others by the Nazis, the phenomenon of genocide has become a recognized reality. In 1948, the United Nations General
Assembly adopted the Convention on the Prevention and
Punishment of the Crime of Genocide. Under the terms of the
treaty, persons who commit or incite genocidal acts are liable
to punishment by the international community. But while
allegations of genocide are easy to make, they are difficult to
substantiate, partly because of the contentious nature of
definitions of the term. The second Article of the 1948
Convention defines genocide as

any of the following acts committed with intent to
destroy, in whole or in part, a national, ethnical, racial
or religious group as such:
a. Killing members of the group;
b. Causing serious bodily or mental harm to members of
the group;
c. Deliberately inflicting on the group conditions of
life calculated to bring about its physical destruction in
whole or in part;
d. Imposing measures intended to prevent births within
the group;
e. Forcibly transferring children of the group to another
group. (In Laqueur 1990, 203).

Because genocide is most frequently committed by régime
leaders and their military forces against domestic populations,
international action is required to punish the perpetrators —
given that they are unlikely to hold themselves accountable for
crimes against humanity. Such international intervention is,
however, a difficult proposition. No enforcement mechanism
exists that is powerful enough to bring perpetrators to trial
or impose punishment. The Convention provides for an
international penal tribunal, but none exists as yet. As a
result, signatories to the Convention are required to enshrine
its provisions into their domestic legal system, and to enact
domestic legislation aimed at punishing offenders. The paradox
is plain: when a régime itself has committed genocide, it is supposed to bring punishment on itself (Zeiler 1989, 590). Article VI provides that "persons charged with genocide ... shall be tried by a competent tribunal of the State [where] the act was committed, or by such international penal tribunal as may have jurisdiction" (in Zeiler 1989, 599). The punitive mechanism is still so weak as to render the Genocide Convention virtually unenforceable.

Two provisions of the Genocide Convention do, however, sketch a role and legal justification for humanitarian assistance in genocidal situations. Article IX provides that when disputes occur over the interpretation of the Convention or the fulfilment of its obligations, the International Court of Justice can provide arbitration. And Article VIII provides for referral of disputes to the United Nations:

Any Contracting Party may call upon the competent organs of the United Nations to take such actions under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in Article 3.

It seems that the permission granted the U.N. to take action in bringing alleged criminals to justice offers the best hope for future multi-lateral relief programmes to the victims of civil strife. It must be acknowledged, however, that any referral to an international body immediately and inevitably "encounters the obstacles of state sovereignty" (Zeiler 1989, 599). Fearing outside interference in their internal affairs, many
countries have withheld from signing the Convention. ¹⁰

International enforcement is only possible in the case of
countries that have ratified the Convention: Article 1 clearly
limits the Convention's range to "The Contracting Parties [who]
confirm that genocide, whether committed in time of peace or in
time of war, is a crime against international law which they
undertake to prevent and to punish" (in Laqueur 1990, 203).

Further difficulties arise in ascertaining precisely what
acts constitute genocide. Article 3 stipulates which acts are
punishable:

a. Genocide;
b. Conspiring to commit Genocide;
c. Direct and public incitement to commit genocide;
d. Attempt to commit genocide;
e. Complicity in genocide.

This should be viewed in conjunction with the more
concrete acts itemized earlier, i.e., those "committed with
intent to destroy, in whole or in part, a national, ethnical,
racial or religious group as such." The quandary lies in
"distinguishing genocide from deaths normally occurring in the
course of war" (Zeiler 1989, 605). Civilian casualties are a
feature of virtually all wars. It is the intent of the
aggressor that governs whether genocide can be held to occur
(Article 2). Consider the People's Republic of China's
attempts in the 1960's and 1970's to destroy the structure of
religious life in Tibet; the aid blockade imposed on Biafra by
the Nigerian military leadership; and the Khmer Rouge's forced

¹⁰ 107 countries have signed the Convention as of January
1992 (U.S. Department of State). They include Ethiopia and
Iraq.
The evacuation of the civilian population of Phnom Penh following the collapse of the Cambodian régime in 1975. All these actions caused the death and destruction of many lives and homes; all except the last (which was apparently class-based) could be seen as constituting an attempt to destroy a national, ethnic, racial, or religious group. But these patterns of persecution and tactical military measures were not necessarily implemented with the genocidal intentions specified by the 1948 Convention. Much the same argument can be made with regard to the persecution of Eritreans during the Ethiopian civil war, or the large-scale killing of Kurds in northern Iraq over the past three decades. The civil and military leaders responsible for these actions and policies will obviously not own to having aimed their aggression against a particular group. Rather, they will defend their actions on the basis of attempts to unify the country or secure the population against rebel attacks. In most cases, in-depth investigations of the aggressor's intent is possible only after the fact, when control over the territory or country in question has passed to a successor régime interested in prosecuting representatives of the ancien régime.\footnote{Thus the Vietnamese government was eager to encourage investigation of the violent acts committed by the Khmer Rouge in Cambodia, once the Vietnamese invasion had succeeded in deposing Pol Pot and his allies. Likewise, the Bangladeshi government had a vested interest in seeing Pakistanis punished for genocidal actions in the former East Pakistan (Zeiler 1989, 607 and 609).}

Perhaps the greatest impediment to concerted international action in such situations is the general failure of the
Convention and other treaties to address the role of non-governmental armed forces and civil war victims directly. If genocidal actions are occurring within the boundaries of a given state, mediation could occur between representatives of the international community and the dissident army that controls or operates in the areas where civilian casualties occur. This mediation could take place under the auspices of the U.N. Security Council, giving the dissident force an elevated status in international relations and securing its assistance in getting humanitarian relief to the victims. In many cases, providing or merely offering international recognition to the dissident force could be sufficient to compel an incumbent régime to cease its violent or genocidal actions.

The Geneva Conventions of 1949

Like the United Nations Charter, the Geneva Conventions mainly address military aggression and the protection of non-combatants in the context of international conflict situations. However, for the first time—in Common Article 3—consideration is given to the protection of civilians in conflicts within states. The problem this article tackles is that, while the objective of humanitarian law is to limit violence towards non-combatants, the signatories to the Convention (the High Contracting Parties, i.e., states) cannot be counted on to protect the lives of opponents in civil conflict. The same is true for the non-governmental parties to a conflict: insurgent
or dissident forces cannot be expected to attend to principles of civilian protection if they have nothing to gain by doing so. Thus, when the conflict is between régime forces and secessionist or dissident forces, both parties must be given some incentive to abide by the rules of war, in particular the injunctions against harming civilian populations. For incumbent régimes, a certain incentive may already exist. Régimes are in a position of sovereign authority over territory and resources, and they wish to maintain this control. Promoting responsible government, displaying concern for citizens, and adhering to international Conventions may allow régimes to bolster popular support and preserve their standing in the community of nations.

Dissident forces, however, might be said to have little motivation to abide by conventions that they did not ratify as full members. Even if they abide by them, there is generally little advantage to be gained internationally. What insurgents or secessionist forces seek most is recognition from the international community that they are fighting for a legitimate cause. Common Article 3 of the Geneva Conventions addresses this matter only obliquely, seeking to reassure member states that the existence of civil conflict does not obviate their claims to sovereignty:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces, who have laid down their arms and those placed hors de combat by sickness,
wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any similar criteria.

To this end, the following are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

a. violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
b. taking of hostages;
c. outrages upon personal dignity, in particular humiliating and degrading treatment;
d. the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court ...

(2) The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict ... The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

The last sentence is the crucial one for our purposes. It specifies existing régimes as the highest legal authorities; dissident forces that had no legal standing to begin with will not obtain any even by scrupulously adhering to the regulations in question. Furthermore, without internationally recognized legality, a non-governmental force cannot appoint, and expect to be supported by a third party—a "protecting power." This would imply in fact, if not in law, that an international status is conferred on the dissidents (Abi-Saab 1988, 223).

It is worth pausing briefly to examine the background of this article, to demonstrate that this bias towards the incumbent régime in situations of civil strife was not necessarily a given at the time the Conventions were drafted. The International Committee of the Red Cross (ICRC) had presented a draft of the article to the conference convened to
draw up the 1949 Conventions. The ICRC took a maximalist approach, stressing that all parties to an internal conflict should be bound to abide by the law of warfare—and, in return, granting them equal status before the law. The ICRC had proposed that "the application of the Convention ... shall in no way depend on the legal status of the Parties to the conflict and shall have no effect on that status" (in Abi-Saab 1988, 220). In other words, even though dissident forces were not legally recognized, they could obtain quasi-legal recognition by adhering to the convention's precepts. If other countries then recognized the dissidents as fighting for a legitimate cause and offered help, or if the dissidents requested that another country serve as "protecting power" and supply outside assistance, the civil war would become a quasi-international one, conferring on the non-governmental armed force the status of belligerent. Furthermore, these third states might, short of giving recognition to the belligerents, proclaim their neutrality towards both parties in the civil war. An example is sometimes drawn from the Nigerian civil war:

Biafra undoubtedly possessed the status of a belligerent, which required other nations to be neutral. However, some went further, and recognized Biafra as an independent state—which in legal terms it clearly was not—and such action was an intervention in the civil war. (Higgins 1972, 175).

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12 Belligerency implies a recognition by foreign countries that the non-governmental combatant in a civil war is pursuing a legitimate cause that merits international support (Plano 1988, 188).
It must be emphasized, though, that the status conferred on dissidents or belligerents comes about as the result of political, not legal, actions: it is contingent on the foreign policy interests of governments.

Belligerency as such is not incorporated into any international treaties, even though enshrining it in this manner might have saved numerous lives in past civil conflicts (Scruton 1982, 38; c.f. Gomulkiewicz 1988). The recognition of belligerency implies that anti-government or secessionist forces have the right to govern territories under their de facto control. Not surprisingly, the ICRC's draft of common Article 3 generated little enthusiasm among government representatives to the conference. Governments feared losing territory and authority to every dissident or secessionist armed force capable of launching a full-scale civil war. A granting of quasi-sovereign status to such forces would challenge the sovereign authority of the incumbent régime and open its modes of governance to international scrutiny. The régime would then have two choices: to accommodate dissident demands within a reformed political system, or to permit the national territory to be divided up along secessionist lines. By definition, there is no stronger threat to state sovereignty than secession, though successful secessionist movements are rare (Bangladesh and Eritrea are the most notable exceptions).\(^{13}\)

\(^{13}\) To avoid confusion with the successful secessions from the former Soviet Union or Yugoslavia, Bangladesh and Eritrea are the only countries that have obtained their independence
The constraints placed on the drafting convention's deliberations were thus considerable--and finally insurmountable. Common Article 3 of the 1949 Geneva Conventions "asks" the parties to a conflict to abide by the rules of war; but it does not impose an obligation on combatants to request humanitarian assistance when civilians are suffering. The Article also remains vague as to the nature of the conflict in which minimum standards of humanitarian protection are to be applied. Given the lack of external scrutiny, therefore, a High Contracting Party can simply deny the existence of a civil war or of civilian suffering, and thereby justify its rejection of foreign aid and international involvement. No force or authority is assigned the task of ensuring that minimum standards of civilian protection and security are met. Outsiders, third parties, or aid organizations such as the ICRC have no mandate to monitor the situation on their own initiative; they are incapable of enforcing adherence to the laws of the Convention in the face of opposition by the High Contracting Party. Even when states submit to outside scrutiny, they are not obliged--nor can they be forced--to abide by the minimum standards of protection for non-combatants.

In fact, it is precisely to avoid external involvement, in the form of investigations, scrutiny, or criticism, that the signatories of the Geneva Conventions have agreed to ban through violent and sustained struggle by insurgent groups to gain control over the territory they claimed.
outsiders, even the ICRC, from entering a country without a direct invitation by the incumbent government (Abi-Saab 1988, 223). The ICRC and other aid organizations can only "offer" their services, and only a High Contracting Party can formally request them. The disincentives to issuing such a request are manifest in situations where a government seeks to preserve at least the perception of full sovereign authority by minimizing the scale of internal conflict or denying its existence altogether. "This guarded approach, in deference no doubt to the traditional considerations of sovereignty under conditions of stress, rendered the application of common article 3 even more problematic" (Abi-Saab 1988, 224).

Thus the principle of sovereignty remains fundamentally intact. Each régime is legally permitted to campaign militarily against domestic guerrilla or rebel forces, even when the membership or support base of such groups constitutes a large proportion of the country's population. In non-international conflicts, basic human rights need not be recognized by an incumbent régime. Civilians in insurgent-held territories are subject to the laws and military policies of the government. The incumbent régime can declare illegal a wide variety of activities—even those with a strictly humanitarian purpose—when it believes that those activities favour the enemy (Meyer 1985, 273). Precisely this fear was given voice in Article 23 of the Conventions:

... The obligation of a High Contracting Party to allow the free passage ... [of essential goods such as food and clothing] is subject to the condition that this Party is satisfied that there are no serious reasons for fearing
a. that the consignments may be diverted from their destination,
b. that the control may not be effective, or
c. that a definite advantage may accrue to the military efforts or economy of the enemy...

... the Power which permits their free passage shall have the right to prescribe the technical arrangements under which the passage is allowed.

It is unlikely that the drafters of Article 3 intended to impose any greater obligation on the parties to a civil conflict than those which Article 23 imposes with respect to international conflicts (Ratnaike 1989, 391). The High Contracting Party is clearly granted the right to give citizens access to, or deprive them of, essential goods. These provisions arose from the perceived need to balance humanitarian concerns with the domestic political interests of member states, with attention as well to what régimes waging war refer to as "military necessity." Taken as a whole, the body of treaty law has no binding force beyond (a) the willingness of governments and dissident groups to abide by its injunctions, and (b) the international pressure other countries may apply to encourage compliance, short of violating international law themselves. Underlying humanitarian law, then, is a "vague mix" of political interests and basic human needs (Forsythe 1977, 171). As a result of these conflicting influences, the protection of civilians is severely hampered, and "despite the law on the books, efforts to help civilians in armed conflicts have been largely de facto rather than de jure" (Forsythe 1977, 169). Civilians, then, tend to occupy the lowest rung on the ladder of legal safeguards. When enemy soldiers are caught and interned as prisoners of war, they
often obtain greater protection and more intensive international legal consideration than civilian populations, which are "frequently viewed as nothing" (Forsythe 1977, 173).

The Geneva Protocols I and II

In collaboration with the United Nations and various governmental bodies, the ICRC in the 1970's drafted a set of Protocols additional to the Geneva Conventions of 1949 which were then (between 1974 and 1977) submitted to the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law (Draper 1979, 143). Governments along with governmental and non-governmental organizations took part in discussion of the draft texts, though only government delegates could vote on, sign, and ratify the final drafts.

A general concern among some representatives to the Conference--particularly the ICRC--was that the 1949 Geneva Conventions contained insufficient provisions for the protection of civilians, particularly in non-international conflicts. The need for further development and strengthening of this body of law was evident in the wake of violent civil conflicts in Vietnam, Cambodia, Nigeria, and the Middle East. Accordingly, Protocol 1 was intended to specifically address and regulate conflicts with an international or anti-colonial dimension — the traditional concern of humanitarian law — while Protocol 2, for the first time, clearly addressed the protection of civilians in non-international conflicts.
Like the Geneva Conventions, Protocol 1 deals with a broad set of concerns surrounding the protection of civilians and prisoners requiring medical attention and other aid. It also addresses the protection of installations vital for the survival of the civilian population, and delineates the function of humanitarian organizations appointed by incumbent régimes to deliver aid and protection under these circumstances. The Protocol focusses on conflicts that occur in an international context or within occupied territories. These consist of, on the one hand, cross-border disturbances acknowledged as such by incumbent régimes; and conflicts in occupied areas, that is, across previously established state borders. This latter situation can also be interpreted as occurring across cultural or ethnic boundaries within a single state because of the potential fluidity of state borders in times of civil or inter-ethnic conflict and nation-building. It follows that, as with Common Article 3 of the Geneva Conventions, the application of the first Protocol has spawned debate over whether non-governmental combatants should be accorded a place in humanitarian law. Articles 43, 44, and 96 deal with irregular armed forces, and Article 47 discusses mercenaries. All of these forces are held to constitute non-governmental combatants engaged in international conflicts, but clearly, they could theoretically be engaged in fighting against the government within a single state. Thus, while the term "national liberation movements" (NLMs) is not specifically used, the conflicts described could well amount to that (Allen
1989, 4, no.10; Abi-Saab 1991, 120). In order to cover all possible configurations of international and internal conflicts, Article 1:2 extends the scope of Protocol 1 beyond the Geneva Conventions. Thus, when conflict situations occur that do not fall under the aegis of these humanitarian law treaties, states are obliged to respect two more sources of international political norms: customary law, on the one hand, and "public conscience," which can be understood as prevailing moral and cultural values, on the other.

In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience. (Protocol 1, Article 1:2)

Other provisions in Article 1 make the following demands on member states:

The High Contracting Parties undertake to respect and to ensure respect for this Protocol in all circumstances.

This Protocol, which supplements the Geneva Conventions ... shall apply in the situations referred to in Article 2 common to those Conventions.

Article 2 of the Geneva Conventions states that in times of peace and war, the rules apply to all instances of declared and undeclared war among High Contracting Parties. And, as mentioned in the discussion of Protocol 1, the Geneva Conventions are also applicable in all cases of partial or total occupation of the territory of a High Contracting Party (Baxter 1988, 97). Protocol 1, Article 1:4 adds the following to its application:

The situations referred to ... include armed conflicts in which peoples are fighting against colonial domination and
alien occupation and against racist régimes in the
exercise of their right of self-determination, as
enshrined in the Charter of the United Nations and the
Declaration on Principles of International Law concerning
Friendly Relations and Co-operation among States in
accordance with the Charter of the United Nations.
(Protocol 1, Article 1:4).

This article thus states, albeit somewhat vaguely, that
populations struggling military against colonial domination,
alien occupation, or racist régimes are exercising their right
of self-determination. The conflicts in question should
therefore be regarded as international conflicts (Rengger 1990,
163). No shortage of sensitive questions derives from this
framework. Must fighting against colonial domination, alien
occupation, and racist régimes--particularly the last of these--necessarily be international in character? If so, where a
minority group claims it is being subjected to "internal"
colonialism or racial-ethnic discrimination by an incumbent
régime, it may claim the right to international protection by a
third party--a "protecting power." The claim to
"internationalization" of the conflict challenges other
countries either to recognize the sovereignty of the incumbent
régime and offer support to it; or to recognize the dissident
force as a quasi-international actor with a legitimate right to
self-determination.

Such attempts at "internationalization" are of course a
prime strategy for most dissident or secessionist forces. The
Ibos during the Nigerian civil war, the Eritreans until
recently, and the Kurds in Iraq have all appealed to other
countries for support and recognition. Recognition of the
legitimacy of a National Liberation Movement is, in turn, a political act, guided by the foreign policy interests of other régimes. Under the Protocol, however, to be considered "eligible" for quasi-recognition as a NLM or belligerent, the non-governmental armed force must be able to abide by all provisions and rules of humanitarian law. This requirement is found in Protocol 1, Article 96:3, and in Protocol 2, article 1:1. Article 96:3 provides that

> The authority representing a people engaged against a High Contracting Party in an armed conflict of the type referred to in Article 1, paragraph 4, may undertake to apply the Conventions and this Protocol in relation to that conflict by means of a unilateral declaration addressed to the depositary. Such declaration shall, upon its receipt ... have in relation to that conflict the following effects:

(a) the Convention and this Protocol are brought into force for the said authority as a Party to the conflict with immediate effect;
(b) the said authority assumes the same rights and obligations as those which have been assumed by a High Contracting Party ...

By authorizing non-governmental combatants (NLMS) to deposit a unilateral statement with the depository (the Swiss government) in which they declare their intention to be bound by the Protocols, the status of these combatants is "upgraded." Other countries can then view the liberation movements as having obtained a quasi-legal position that allows them to engage in international treaty-making. From the perspective of humanitarian assistant, the Protocols thus enable NLMS to strike agreements with donor countries or aid organizations and to officially request the delivery of outside aid to civilians
in dissident-controlled territory. Three major obstacles, however, remain to implementation of this process:

(1) The material inequality of the combatants in civil conflicts has yet to allow a dissident armed force to acquire the military capacity and level of political organization to abide by the treaty regulations in question, and thus to be bound by the Protocol.

(2) The status to which a NLM aspires is not granted merely by the "declaration" of intent to abide by the Protocols. Rather, it depends on the ratification of the Protocol by the incumbent régime of the state in which the NLM is active, and by other states who recognize the legitimacy of the NLM's cause.

(3) It is also possible for the High Contracting Party fighting the NLM to deny that Article 1:4 of the Protocol applies to the situation in question: that is, to claim that no colonial domination exists, the régime in power is not racist or engaged in alien occupation, and thus the conflict is not international. Final determination of the Protocol's applicability is still left to the High Contracting Party on whose territory the conflict occurs, and to other governments who might choose to side with one or the other of the combatants. As long as the conflict is viewed as a purely domestic one, the incumbent régime remains the sole recognized authority (this is discussed further in Protocol 2, Art. 18:2, below).
What realistic options then remain for non-governmental forces to secure the distribution of humanitarian relief in territories they control? Protocol 1 obliges all parties to a conflict, including non-governmental ones, to consent to humanitarian aid. Article 70 states that

If the civilian population of any territory under the control of a Party to the conflict [which includes non-government forces], other than occupied territory, is not adequately provided with the supplies mentioned in Articles 69 [food and medical supplies], relief actions which are humanitarian and impartial in character and conducted without any adverse distinction shall be undertaken, subject to the agreement of the Parties concerned in such relief actions. Offers of such relief shall not be regarded as interference in the armed conflict or as unfriendly acts.

Article 70 further grants rights and imposes obligations on both "the Parties to the conflict and each High Contracting Party" to facilitate and control the distribution of relief to non-combatants. Article 70:2 obliges official government forces along with non-governmental ones to respect fundamental human rights and protect non-combatants on both sides of a conflict:

The Parties to the conflict and each High Contracting Party shall allow and facilitate rapid and unimpeded passage of all relief consignments, equipment and personnel ... even if such assistance is destined for the civilian population of the adverse Party.

This places a direct obligation on national liberation or dissident forces, notwithstanding their tenuous legal status. Once an aid organization has been allowed to deliver aid, there must be supervision of its activities to ensure that they are impartial and exclusively humanitarian in nature. Thus, civilians caught up in violent conflict can only be protected
if one of the combatants agrees to take on the role of protector, consenting to and overseeing the work of foreign relief workers in the territory it controls. The difficulty here, as with so much other humanitarian legislation, is the advantage granted to incumbent régimes. Only governments are permitted to invite, consent to, or refuse international aid, while they are usually also seen as much better able to supervise and offer protection to foreign relief workers. However, régime oversight and protection can hardly be extended to territories under the control of "enemy" (insurgent or dissident) forces. Furthermore, the Protocol remains notably vague about the question of aid delivery into territories where the controlling parties refuse such aid. To encourage consent, Article 70:3 specifies that the parties to the conflict

(a) shall have the right to prescribe the technical arrangements, including search, under which such passage is permitted; [and]

(b) may make such permission conditional on the distribution of this assistance being made under the local supervision of a Protecting Power.

Article 71:1 concerns relief personnel:

Where necessary ... the participation of such personnel shall be subject to the approval of the Party in whose territory they will carry out their duties.

These articles do no more than state the obvious. The activities of aid organizations and the distribution of relief supplies cannot occur if the combatants are bent on actively opposing it. But the important point to note in the context of the progressive expansion of humanitarian law is that non-governmental forces are now given the right "to prescribe the
technical arrangements" of aid distribution (while also assuming the obligation of abiding by the principles of civilian protection). However, a non-governmental party to a conflict, whether that conflict be domestic or international in nature, is not permitted to consent to, or refuse aid from foreign countries or foreign aid organizations. Nor is it able to request that such aid be brought into territory it controls. No provision exists to give humanitarian aid agencies power over the distribution of relief—power that would override the authority granted the parties to the conflict. In other words, while all parties to a conflict can allow aid to enter territories they control, dissident forces or outside actors cannot act as "protecting powers" or override the unwillingness of a High Contracting Party to permit aid delivery and distribution.

Protocol 2 sets about making much the same points with less ambiguity. It arrives at the same basic conclusion: only state governments can request foreign aid. Nonetheless, this protocol represents the first humanitarian law provision dealing straightforwardly with the protection of civilians in internal conflicts. The treaty "applies to armed conflicts between contending parties which are in a position to meet its obligations" (Draper 1979, 149). As seen thus far, the difficulty with the 1949 Conventions and the first Protocol was the uncertain status of non-governmental combatants. Protocol 2 aims at introducing a definition of non-governmental combatants which would enable the rules of war to be brought to
bear on them, facilitating the protection of civilians and prisoners. Debate over the definition centred on higher-level and lower-level internal conflicts. The higher-level definition based itself on full-scale, classical civil wars such as the Spanish conflict (1936 to 1939) and the Nigerian civil war (1969 to 1970). The reasons for using such conflicts as a baseline are plain: they render it inherently more difficult for insurgent forces or NLM's to achieve the necessary high degree of military power and control over the territory they claim (Draper 1979, 150). Article 1:1 of the second Protocol defines the combatant as follows:

This Protocol ... shall apply to all armed conflicts which are not covered by Article 1 [of Protocol 1] ... and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

To avoid any confusion on this count, Article 1:2 of Protocol 2 specifies that:

This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

The obvious implication is that in order to be regarded as having a claim to NLM status, with the international community's concomitant acceptance of dissident forces' legitimate struggle for self-determination, non-state combatants must display a capacity to act as full-scale military powers with a potential for independent statehood. These standards are too high for most insurgent groups to meet.
Using the level of conflict intensity (power, violence, sustainability) as the defining criterion for non-governmental combatants gives incumbent régimes what they need most desperately: maximum freedom and time to suppress domestic insurgents before they become powerful enough to qualify as a fully-fledged dissident force, or worse, a NLM that can advance a claim to be engaged in an international war (under Protocol 1, Article 96:3).

Why, then, do dissident groups make great efforts to abide by the rules governing protection of civilians? They clearly hope that their chances of being recognized as a legitimate party to an internal conflict will increase thereby. To observe the rules of war is to demonstrate the power to observe such rules, with all the implications for international recognition this holds. Thus, secessionist groups such as the Biafrans, the Eritreans, and the Kurds have sought to portray themselves as deserving a nation-state by showing their capacity to abide by international law and imitate the functioning of an incumbent régime. Biafrans, for instance, managed to establish a Biafran Red Cross, their own "national" bank, and other quasi-autonomous political and economic institutions that promoted the image of a de facto newly-independent state (St. Jorre 1972, 224-227). The Kurds used "National Assembly" elections to "set out to show ... they are a democratic lot" able to organize themselves independently of the Iraqi government (The Economist 1992a, 46). A particularly salient example here is the Eritrean rebels' painstaking
attention to treatment of prisoners of war. This served to mute the image of the rebels as mere "irregular" forces, demonstrating their capacity to control the actions of their supporters on a broad scale, and showing their ability and willingness to abide by the tenets of international law.

Thomas Keneally's Eritrean travel journal includes a vivid description of this rebel policy:

Under blankets and beneath roof logs in a bunker, [the prisoner] awoke without any of the pain which had been with him when he ejected [from his Ethiopian military jet]. ... This was the very place at which he had aimed his bombs. ... He said [to his captors] in Amharic, 'Why don't you show your hand? When do I see the bastinado and the water torture?' ... 'Don't be anxious on the score of torture, sir [replied the Eritrean guard] ... 'We do not want to satisfy your arrogance. We'll subject you to something worse than that. We will treat you as if you were a prisoner of war under the Geneva Convention'.

(Keneally 1989, 103)

To clarify, while the Eritreans declared their intention to abide by the principles of humanitarian law, they did not deposit a statement with the Swiss government declaring their adherence to the provisions of the Protocols. Given that Ethiopia itself was not a signatory to the treaties, such a move might have been militarily counter-productive (Kooijmans 1991, 230 n.9; Ratnaike 1989, 390). Nonetheless, the Eritrean People's Liberation Front (EPLF) did manage to gain recognition as a National Liberation Movement outside the framework of humanitarian law: it was accorded international mediation privileges by the United in the late 1970s in an unsuccessful attempt to end the war by negotiations. The EPLF's failure to gain recognition under humanitarian law was grounded on accusations that, like the Ethiopian Army, it had confiscated
or destroyed aid deliveries and exacerbated the difficulties of relief distribution (Stern 1990, 342 n.37; Keneally 1989, 3-4, 27-30).

In the face of these complexities of status and recognition, the draft second Protocol sought to eliminate obstacles to rapid and unimpeded emergency relief across state borders. The ICRC drafted a provision expressing its misgivings concerning a governments' ability to deny access to victims, and suggested:

If the civilian population is inadequately supplied, ... the parties to the conflict shall agree to and facilitate, to the fullest possible extent, those relief actions which are exclusively humanitarian and impartial in character and conducted without adverse distinction. Relief actions fulfilling the above conditions shall not be regarded as interference in the armed conflict.

The parties to the conflict and any High Contracting Party through whose territory supplies must pass shall grant free passage when relief actions are carried out in accordance with the conditions stated in paragraph 1.

The parties to the conflict and any High Contracting Party shall in no way whatsoever divert relief consignments from the purpose for which they are intended or delay the forwarding of such consignments. (ICRC draft for Article 18 of Protocol 2, in Levie 1987, 565)

These measures would have enabled aid agencies to enter territory held by a combatant without the consent of the incumbent régime. Combatants, meanwhile, would have been obliged to grant access to all victims in need of aid. However, this proved too much of a challenge to established conceptions of state sovereignty. The final version of the 1977 protocols, then, failed to incorporate the ICRC's proposals on this score. Aid organizations, including the ICRC, are still dependent on the consent of incumbent régimes.
to deliver aid. The ICRC is given the right to initiate requests for the delivery of such aid, but can only "offer" its assistance. It should be noted that this restriction applies no less to aid organizations based in the country in question:

Relief societies located in the territory of the High Contracting Party, such as Red Cross ... organizations, may offer their services for the performance of their traditional functions in relation to the victims of the armed conflict.

--so specifies Article 18:1; but "The request or at least consent of the recipient state remains a sine qua non condition for the initiation of international relief assistance" (UNITAR 1982, 3). This is expressed in Protocol 2, Article 18:2:

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

* * *

To summarize, the three treaties examined here, drafted between 1949 and 1977, all stress the need for consent by incumbent régimes before international humanitarian relief can be distributed anywhere on the territory of a country engaged in international or civil war. If and when a non-governmental military force manages to exercise control over territory and carry out sustained and concerted military operations, and expresses its willingness (while demonstrating its ability) to implement the provisions of humanitarian law (under Protocol 1, Art. 96:3b), then such a dissident force or NLM can be granted the right to request that foreign aid be delivered to citizens
in territories under its control as this combatant force then acquires the same rights as a High Contracting Party.

On paper, these provisions give sovereign states most of the security provisions they need to survive a civil conflict. Incumbent régimes remain the sole authorities when it comes to relations with other countries or international organizations—until such time as NLMs manage to battle their way to de facto quasi-independence. Thus, dissident forces aspiring to secession or the overthrow of the established régime must first "prove" they are politically and military capable of fulfilling all the nation state's traditional obligations under humanitarian law. The problem is that, as the grim history of civil conflict in this century demonstrates, tens of thousands of civilians may die or suffer enormous deprivations before a NLM manages to attain the size and strength necessary for quasi-independent status (with attendant possible recognition by other countries). It appears now that these "halfway" provisions do an immense disservice to civilians caught between government and dissident guns.

Where else in international law can one seek avenues for the delivery of emergency humanitarian assistance to populations ravaged by civil war? A first signpost is offered by the case brought by Nicaragua against the United States at the International Court of Justice. The case is indicative of changes in customary law that increasingly appear to permit the delivery and distribution of humanitarian aid without the consent of incumbent régimes.
THE NICARAGUA-USA JUDGMENT:
Customary Law and Covert Aid

On June 27, 1986, the International Court of Justice (ICJ) issued its decision on the case brought by Nicaragua against United States support for Contra rebels. Apart from the central issues of non-intervention and covert military support, the Court also pronounced judgment on questions of human rights and humanitarian intervention (Teson 1988, 201). In the document of decision, the Court expressed a view contrary to that normally taken in the various treaties of humanitarian law, discussed above. The specific issue in the case at hand was whether a third party--the U.S.--had the right to support non-governmental forces (Contra rebels) on Nicaraguan soil. This marked a sharp departure from the previously-dominant framework addressing the rights of government versus dissident forces within a single state.

Simply put, the Court's decision was that intervention for the purposes of offering military assistance is illegal, in that it contributes to the use of force against a sovereign power. The Court decided that each State is permitted by the principle of State sovereignty to ... [be allowed] free choice of a political, economic, social and cultural system and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regards to such choices, which must remain free ones. (ICJ Merits 1986, 205)

However, the Court stated that foreign intervention strictly for the purpose of delivering humanitarian aid may be legal, if
that aid is directed not towards a specific group of combatants, but towards an entire population in need of humanitarian assistance. The ruling was based on customary considerations, that is, the moral claims and precedents of earlier humanitarian activities recognized as legitimate by the community of states. Thus, "American humanitarian assistance to the Contras since 1984 ... was lawful according to the Court" (White 1989, 544), as the U.S. government had allocated funds specifically for humanitarian relief.¹⁴ The Court's decision included the claim that

there can be no doubt that the provision of strictly humanitarian aid to persons or forces in another country, whatever their political affiliations or objectives, cannot be regarded as unlawful intervention or as in any other way contrary to international law ... (ICJ Merits 1986, Para. 242)

However, the Court noted that

[I]f the provision of humanitarian assistance is to escape condemnation as an intervention in the internal affairs of Nicaragua, not only must it be limited to the purpose hallowed in the practice of the Red Cross, namely 'to prevent and alleviate human suffering' and 'to protect life and health and to ensure respect for human beings,' it must also, and above all, be given without discrimination to all in Nicaragua, not only contras and their dependents. (ICJ Merits 1986, Para. 243)

The similarities between the Court's judgment and the ill-fated ICRC draft of Article 18 in Protocol 2 are striking. The ICJ decision constitutes by far the strongest statement in

¹⁴ The US Senate and the House of Representatives adopted and agreed to an appropriation of US$ 27 million beginning September 30, 1984 solely for humanitarian assistance to the Contras. Administration of these funds was taken out of the hands of the CIA and the Department of Defense (ICJ Merits 1986, Para. 97).
favour of legalizing foreign aid to victims in territories that are controlled by dissident armed forces.

While no formal provision is made for non-governmental combatants to request international aid (at least when the dissident or NLM army is not a party to the Protocols), foreign aid cannot realistically be distributed in a war zone without at least the tacit consent of a combatant in the territory it controls. If the incumbent government declares itself opposed to such aid distribution, the non-governmental combatants will have to disregard international treaty law and request foreign aid themselves. From a moral perspective, of course, such a "breach" of law is desirable. Without it, international aid might never reach the victims of civil conflict, and this concern assumes predominance in the ICJ decision: as White notes (1989, 547), "humanitarian assistance is the only lawful extra-national support for armed opposition groups whether recognized national liberation movements or not."^15

In arriving at its decision, the ICJ placed great emphasis on multi-lateral and bi-lateral treaties, as well as on U.N. resolutions and principles of customary international law. It is worth pausing a moment to examine the nature and significance of this latter tradition. Customary international law is based on rules of international conduct arising from practices and norms that governments have accepted, and adopted, as mutually beneficial standards by which to secure

^15 Although not discussed here, covert aid is delivered at times by non-governmental (privately supported) aid agencies in many countries of the Third World.
their interests. This accumulated body of formal and informal agreements and resolutions is bolstered when evidenced by state practice and clarified and formulated into precepts by judicial opinion. Together with a diversity of court decisions, such opinions and resolutions may be considered as binding customary international law (Charney 1988, 16-17, 21-22; Plano 1988, 272-273). Its strength is such that "the Court may not disregard the essential role played by general practice," and is instead "[b]ound by Article 38 of its Statute to apply, inter alia, international custom 'as evidence of a general practice accepted as law'" (ICJ Merits 1986, para. 184; Statute of the ICJ, Art. 38b).

While important tenets of customary law are often included in treaties, the ICJ decision was not enshrined in a treaty.  

Nonetheless, it represents a further maturation of legal principles that were already generally accepted, and can now be considered part of the corpus of international law. In the wake of the ICJ decision, it is now possible to justify covert humanitarian intervention in civil conflicts, when such

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This is scarcely surprising, in that most states, especially those already racked by internal conflict, will be reluctant to accept a treaty provision that permits delivery of international humanitarian aid. As we have seen, states will tend to perceive a threat to their sovereignty or support for enemy forces in this instance. Thus, the ICRC's draft for Article 18 of the second Protocol provoked fears that the auspices of "aid delivery" would be used to smuggle military hardware or other contraband matériel to dissident forces. Indeed, this seems to have occurred with the covert aid deliveries to Biafra during the Nigerian civil war, and both Ethiopian and Eritrean representatives accused each other of similar practices during their long conflict (Forsythe 1977, 187-188; Korn 1986, 5; Zeiler 1989, 595).
intervention occurs—by definition—without the explicit consent of the party or parties in control of a given territory. Of course, the ICJ stresses that any aid deliveries must fall strictly under the rubric of "humanitarian" assistance. But when an incumbent régime forbids or hampers the delivery of relief supplies, those attempting to deliver and distribute aid are compelled to subordinate the régime's objections and deal directly with the persecuted citizens or dissident forces in question. Clearly, any such situation constitutes a strong challenge to the principle of state sovereignty that underpins international treaty law.

**Intervention for Humanitarian Purposes**

The discussion so far has traced the lineage of legal thinking and decision on the issue of humanitarian aid delivery. How has such delivery tended to occur in the real world, and how does this reflect—and, in turn, shape—the legal dimension of the issue?

One of the earliest covert interventions for delivery of humanitarian aid was the United States' dispatching of food aid to Russia in 1919. Under Herbert Hoover, then-Director of European Relief, and under the auspices of the American Relief Administration, the U.S. managed to deliver aid to populations ravaged by famine and civil war without the consent of the ruling Bolshevik government. They managed to sidestep the régime's objections by channelling aid through the American
Friends Service Committee and various Quaker organizations on both continents (Nolan 1993, 29).

A number of military interventions, particularly in the nineteenth century, had a visible humanitarian component. However, because most if not all of these interventions were essentially grounded in perceived political and national interests, they had little or nothing to do with human rights as such (Humphrey 1973, vii). The best-known recent cases are India's military intervention in East Pakistan in 1971, to support the East's secession and the founding of an independent Bangladesh; India's covert intervention in Sri Lankan air space to drop relief supplies to Tamil insurgents in the 1980s (Allen 1989, 6); Tanzania's military intervention in Uganda in 1979 to overthrow the régime of Idi Amin; and Vietnam's invasion of Cambodia in 1979 to topple the Pol Pot régime (Weller 1991, 34). 17 All these interventions, military and non-military, resolved or helped to resolve large-scale violations of human rights, and this was often an important part of the stated grounds for intervention. But in all cases, intervention was mainly prompted and justified by more traditional considerations, such as the right to self-defence.

Doctrines of humanitarian intervention have an impressive lineage in western history, numbering among their supportive voices such eminent jurists as Grotius, Vattel, Guggenheim, Oppenheim, and Lauterpacht. Such doctrines generally rest on

17 A comprehensive discussion of past interventions with humanitarian motives or implications can be found in Franck & Rodley 1973, 277-294.
the view that "any state can intervene 'to prevent serious and large scale violations of human rights ... by another State regardless of the nationality of the victims'" (Ratnaike 1989, 392). Critics of this doctrine, however, have been no less numerous. They have tended to base their arguments on two main assertions. First, they contend that loosening the constraints on intervention would provide individual states or groups of states with a more ready justification to intervene in the affairs of other states, i.e., under the pretext of "humanitarian assistance." Second, the critics stress the practical difficulties of intervening in active civil conflicts against the wishes of incumbent régimes and their military forces. Only in rare cases, when state institutions have completely disintegrated and a régime's military forces have lost the ability to exercise control over territory, can a humanitarian intervention be mounted with some degree of success. This was possible, for example, in Somalia at the end of 1992. But a similar intervention in neighbouring Sudan, where civil war has raged for thirty years, would likely encounter insuperable obstacles. The Sudanese military is better equipped and the government it supports still holds sway over large areas of the national territory, as well as commanding wide recognition from the international community. In such circumstances, direct negotiations with the combatants,

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18 C.f., for example, Donnelly 1984, 1989, 260-263.
aimed at securing their consent to humanitarian assistance, seems the only realistic means to deliver aid.\textsuperscript{19}

VI. INTERNAL CONFLICTS AND COVERT AID: Nigeria and Biafra

Nigeria attained independence in 1960, but was left to develop its political and economic institutions within highly artificial state boundaries—the creation mainly of the colonial Royal Niger Company between 1885 and 1899. As Chamberlain (1985, 35) puts it, "The Yorubas of the Western Region, the Ibos of the Eastern Region, and the Moslem emirates of the North had little in common and sometimes heartily disliked one another." The difficulty of finding appropriate structures of political representation for the diverse ethnic communities led to political breakdown, military coups, and the persecution and counter-persecution of various ethnic groups.

In the mid-1960s, ethnic tensions flared into open violence in many parts of the country. They combined with a nearly perpetual air of political crisis in the national capital, Lagos. Owing to the favourable geographic location of their home territories—which included most of Nigeria's petroleum deposits—and to their noted entrepreneurial skills, the Ibos had succeeded in carving out a comparatively prosperous niche for themselves in the national economy.

\textsuperscript{19} For a discussion of the U.N.'s success in delivering food aid to insurgents in southern Sudan, via skilful negotiations that eventually brought the Khartoum government "on side," see Weiss and Minear 1991.
Eventually, this prosperity encouraged Ibo military leaders under Colonel Ojukwu to move first for regional autonomy and then for independence. The leaders initially laid claim to federal revenues deriving from the eastern (oil-rich) part of the country. On March 31, 1967, they went a step further by seizing control of the region's armed forces, governmental structures, and economic institutions. Two months after that, the Ibo leaders made a formal bid for secession and independence (St. Jorre 1972, 105-106; Palmer 1984, 878). The new country was to be called Biafra.

In justifying their move, the Biafran leadership claimed the Ibos had for several years been targets of Nigerian state persecution and victims of a policy of tribal genocide. But the ensuing civil war did not generate wide international acceptance of Biafra's independent ambitions. Only five countries (Tanzania, Zambia, Gabon, Ivory Coast, and Haiti) officially recognized Biafra's sovereign independence—all in 1968. Others—France, Portugal, and Sao Tomé—together with various aid organizations including the French Red Cross, the Joint Church Aid, and Caritas, offered covert support for the Biafran cause (St. Jorre 1972, 238; Frey-Wouters 1974, 468; Forsythe 1977, 192-193). The civil war lasted until 1970 and resulted in some one million casualties before the Nigerian military finally succeeded in crushing the Biafran rebellion.

The efforts of humanitarian aid organizations to deliver food and medicine for the war-afflicted zone spawned a number of controversies that relate directly to the concept of
sovereignty and the struggle to obtain or maintain it. "What began as an apparently cut-and-dried humanitarian problem," states St. Jorre (1972, 235), "finished in an inextricable tangle of politics, personal rivalries and passionate commitment."

Biafra's primary objective was to attain independence and sovereign statehood. Nigeria's goal was to prevent this at all costs. Because neither side could bring sufficient military force to bear to resolve the issue speedily and in its favour, both parties sought other means of advancing their cause. Humanitarian aid and the international attention it generated was perceived, and utilized, to buttress basic political interests. For the Nigerians, starvation among Biafrans would weaken the secessionists' commitment to independence and, ideally, bring about their surrender. To Biafrans, meanwhile, the starvation of children translated into international concern and--most importantly--sympathy, which, it was felt, could help prompt international recognition (St. Jorre 1972, 236). Towards this end, the Biafrans orchestrated a sophisticated publicity campaign, headquartered in Geneva, that succeeded in winning many Western governments and aid organizations to their side--though such support stopped short of full recognition.

Under the Geneva Convention, to which the Federal Government of Nigeria was a signatory, the Biafran war was an "internal" conflict into which outside agencies could be introduced only by the invitation of the incumbent, officially-
recognized government (St. Jorre 1972, 236). Thus, aid organizations were bound by the regulations of the Conventions-forced to negotiate with the Nigerian government in Lagos in order to bring relief into the country, in particular that intended for the population of the eastern region, i.e., Biafra. The Nigerian government permitted aid organizations to work on both sides of the battle lines, as long as the organizations respected the regulations and parameters laid down by the Nigerian authorities. But as the war grew in intensity—as more Biafran children starved, and as international media coverage prompted more countries to get involved in the conflict—the agencies became increasingly entangled in political issues, especially whether to support or oppose the cause of Biafran independence. The Nigerian government resented and opposed aid organizations which structured their work around Biafran requests or demands. In the end, the authorities in Lagos imposed a blockade on overland aid deliveries to Biafra, thereby exacerbating the famine in the eastern regions. In this manner, humanitarian aid became a political means by which both parties to the Biafran conflict sought to advance their cause. As noted, the central issue was sovereignty. Nigeria insisted on preserving its territorial integrity, while the Biafrans fought desperately to establish their right to self-determination and sovereign status. Neither the Nigerian government nor Biafra's leadership was willing to negotiate or compromise on the mechanisms for delivery of aid for fear that any such
compromise would erode their sovereignty over the territory they claimed. Thousands of Biafrans paid the price for this intransigence (Mudge 1969, 230).

In the face of the Nigerian régime's injunctions, most aid organizations and many western donor states supported efforts to deliver food aid and other relief supplies to Biafra, even if this meant disregarding the express wishes of the authorities in Lagos. In the end, many humanitarian organizations, including the two largest ones (the International Red Cross and Joint Church Aid), delivered relief supplies without the Nigerian government's consent--violating, as it happened, the terms of the 1949 Geneva Conventions. Only in the last year of the conflict did the ICRC halt these "covert" deliveries, while the French Red Cross continued them until the final collapse of the secessionist forces.

The ICRC thus chose to overlook the precise wording of the Geneva Conventions, and most other aid organizations did the same. Their general defence at the time was that although Lagos was granted legal right to control the entry of relief aid to the country, that right did not give the régime a free hand to engage in genocidal practices. "There was some acceptance within the ICRC, perhaps subconsciously, of the Biafran claim that Lagos was engaging in genocide" (Forsythe 1977, 193). While benefitting by this unofficial circumvention of the Convention, Biafra's leadership demanded that foreign aid be flown in from outside Nigeria. Their intention was to demonstrate Biafra's independence from Nigerian control,
goodwill, and transportation infrastructure— and to use night flights as convenient shields for the importation of military hardware and other military matériel:

Thus the [Biafran] gunrunners mingled with the foodrunners, as both they and the Federal pilots played hide-and-seek in the dark airspace over Uli and Umbilago airstrips. Biafra was unwilling to give up this nighttime shield, which was important to its military effort, even if a day airlift would bring in more guaranteed food. (Forsythe 1977, 188)

The deliveries were possible because the Nigerian air force did not have the capacity to intercept night flights over Biafran territory. Whatever capacity it might have had in this area was further reduced by a reluctance to shoot down relief flights. Accordingly, the Nigerians accused aid organizations of covertly helping the Biafran secessionists. The Biafrans retorted that Lagos was using the overland blockade and the starvation of civilians as a genocidal tool of war. The Lagos leadership sought to present the conflict as a domestic concern, while the Biafrans pinned their hopes on an internationalization of the conflict.

The activities of the ICRC thus acquired a political dimension. The organization's relief work was tantamount to support for Biafran independence, though it stuck to its official claim of neutrality and impartiality (Forsythe 1977, 187). In the final year of the war, friction between the ICRC and the Nigerian military command reached the boiling point. The federal government announced its intention to assert authority over all the territory it could control, along with all shipments of goods into the entire country. Hoping to put
an end to the night flights into Biafra, the Nigerian air force shot down a Red Cross plane on June 5, 1969. This forced the ICRC to admit it was abiding by a rather loose interpretation of the 1949 Geneva Conventions concerning intervention in the affairs of a sovereign state. After the downing of the Red Cross plane, the President of the ICRC agreed to abide by the letter of the Convention. Covertly, though, the organization still arranged for the transportation of relief into Biafra via the French Red Cross (Forsythe 1977, 193). The French Red Cross and the JCA, for their part, did not follow the ICRC's example. They continued covert relief flights into Biafra, exploiting the Nigerian government's inability to stop such activity. These organizations expressed the belief that the needs of starving civilians overrode the letter of international law, giving them the right to intervene as "revolutionary humanitarianists" (Forsythe 1977, 193).

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20 Recall that Article 23 of the Fourth Geneva Convention clearly stipulated that "the Power which permits ... free passage [of aid consignments] shall have the right to prescribe the technical arrangements under which such passage is allowed." The Convention further states that if the High Contracting Party—in this case, the Nigerian government—finds that consignments are being used for purposes other than those intended; that it is unable to control delivery of the consignments; or that advantages are accruing to the military efforts or economy of the enemy, it has the right to impose measures to curtail or control passage of the consignments in question. Not only did the covert night flights violate the basic principle of non-intervention, but the ICRC in general was not free to deliver aid in any manner to which the Nigerian government objected. The ICRC was bound by the Convention to modify its activities and follow the directives of the incumbent régime, which alone "had the legal right to set the terms of inspection for relief flights into the secessionist area" (Forsythe 1977, 192).
Ethiopia and Eritrea

Eritrea was first grafted on to Ethiopia as a result of the Italian invasion of 1935. In 1936, the Italians finally defeated Ethiopian forces and combined existing Ethiopian territory with Italian Somaliland and previously-independent Eritrea. In 1941, the Italians were driven out by British forces. Ethiopia was handed back its independence, while Eritrea remained under the temporary protection of the British.

In 1950, the United Nations General Assembly passed a resolution to unite Eritrea with Ethiopia under a federal constitutional system. The reasons for the decision were largely geopolitical. It was held that Ethiopia required access to the Red Sea coast, and that this would also secure Western interests in the region (ICJR 26, 1981, 11). As Keneally points out, "this forced twinning of the two nations" was carried out without a referendum to determine the opinion of Eritreans themselves (Keneally 1989, 126; c.f. Zeiler 1989, 591). The situation became more precarious in 1962 when the Ethiopian Emperor, Haile Selassie, annulled the federation and took full control of Eritrean territory.

Selassie ruled with a firm military hand until he was overthrown in a revolution in 1972. After a period of internal military struggle, Lt.-Col. Mengistu Haile Mariam emerged in 1977 as undisputed leader. He guided his régime into the "Soviet camp" and implemented a number of Stalinist-Maoist campaigns of agricultural collectivization that contributed to the country's poor food production in the 1980's (Pezzullo
With Russian and Cuban troops pouring into Ethiopia, Washington stepped up military support to neighbouring Somalia, along with Sudanese-based aid organizations near the Eritrean border. From the early 1970s, donations of food aid, medicine, and some military matériel were funnelled to Eritrea through the Sudan. Because of the generally Marxist orientation of Eritrean resistance forces, however, Western support gradually decreased until famine in the region was brought to international attention in 1984 (Shepherd 1985; Manning 1985).

From 1962 onwards, Eritrean forces waged a protracted struggle for independence, culminating in their astonishing defeat of the powerful Ethiopian military in 1992. During this epic conflict, Eritrean demands for self-determination were consistently ignored by the Organization of African Unity (OAU) and by the United Nations, whose clumsy creation of an Ethiopian federation had planted the seeds of the conflict in the first place (Frey-Wouters 1974, 470). The logistical difficulties of links with the outside world promoted a

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21 The Mengistu régime was finally overwhelmed by a combined assault of regional insurgent forces in May 1992. The military leader fled the country on May 21; a week later, Addis Ababa was captured by the joint forces of the Eritrean People's Revolutionary Democratic Front and the Oromo Liberation Front. After the fall of the régime, these groups disintegrated in face of the general breakdown of law and order throughout Ethiopia (Human Rights Watch 1992). Only in Eritrea did the EPLF remain in control and maintain a semblance of order (Brunold 1992). A referendum on May 24, 1993, showed the overwhelming majority of Eritreans to be in favour of independence, and Africa's newest sovereign state came into being shortly thereafter (Prunier 1993, 20). Eritrea became independent on May 24, 1993 and was admitted to the U.N. as the 183rd member on May 28.
tenacious self-reliance. The Eritrean Liberation Front (ELF), founded in 1960, was the first liberation movement to declare its intention to secede from Ethiopia. It was a mostly Muslim-dominated organization with bases of support in the Sudan and Saudi Arabia; its field of operations was the western lowlands of Eritrea (Prunier 1993, 20). During the 1970s and early 1980s, the movement proved unable to accommodate the aspirations of Eritrea's Christian population, which lived mostly in the highlands of northern and eastern Eritrea. The latter formed the Marxist Eritrean People's Liberation Front (EPLF), which eventually assumed predominance among rebel forces.

The Eritreans' initial successes in the field were reversed when the Soviets stepped in to support Mengistu's military. But even those opposed to the USSR in the international arena had little reason to advance the cause of Eritrean independence:

[N]o one seemed to want the Eritreans to win. Neither the Americans nor the Saudis, who wished to see Mengistu and the Dergue [the military dictatorship] fall and Ethiopia drop ripely back into their camp, nor the Russians, who were supplying military advice and arms. No one wanted an independent Eritrean republic along that stretch of Red Sea shore. (Keneally 1989, 83)

A blockade on relief supplies to starving populations and victims of war had already been implemented in the 1970s in an attempt to suppress the Eritrean resistance. The ICRC was denied permission to enter Eritrea. Despite worldwide publicity accorded the pervasive violence and civilian suffering in the region, the Ethiopian authorities rejected
outside requests for delivery of aid, claiming that no humanitarian emergency in fact existed (Forsythe 1977, 170). The prolonged civil war, along with other regional conflicts and widespread agricultural mismanagement, produced a series of droughts and, in their wake, the most severe starvation Africa has seen in modern times. The Ethiopian famine, which actually began in 1982, was brought to the world's attention only in October 1984, with the airing of BBC/NBC footage of starvation in the refugee camps scattered throughout the northern part of the country (Pezzullo 1989, 218). In a matter of days, the news coverage had spawned one of the largest international relief efforts in history. Most of the relief flooding into Ethiopia from 1984 onward entered at the southern coastal ports, actually part of Eritrea but under the military control of the Addis Ababa régime. In late 1984, the U.N. established an office for emergency relief in the Ethiopian capital. But while the international community contributed generous quantities of food and other aid, a more serious challenge was to distribute it to those in need. Apart from the difficulties posed by the country's topography and lack of transportation infrastructure, political obstacles hampered effective distribution of the aid to the Eritrean population (Zeiler 1989, 595; Bazyler 1987, 561). There are numerous indications that the Ethiopian government sought to achieve by starvation what it could not attain by force of arms: namely, the weakening of secessionist forces, and the coercion of civilian populations into abandoning their struggle
for independence and submitting to relocation and agricultural collectivization (Korn 1986, 4, 5; Bazyler 1987, 557-558; Ratnaike 1989, 382-383).

Several foreign aid organizations had established their relief operations in Sudan, either on the Red Sea coast or straddling the northern and western borders of Eritrea. As Korn notes (1986, 5):

A substantial part of the area hit by the drought was in the hands of Eritrean ... insurgents. Ethiopian government administration did not reach into these areas and the Ethiopian government had no independent means of delivering food there. Estimates of the population of these areas ran from 2.5m to 3.5m. There were only two effective ways of reaching these people: by trucking food through Ethiopian army lines into rebel-held territory, through a 'food truce' on both sides; or by bringing it into northern Ethiopia from Sudan. The former could be done only with Ethiopian government co-operation; the latter raised no such requirement but was sure to meet strong Ethiopian objections.

Various Western countries, including the U.S., supported cross-border, "back-door" aid programmes through private and semi-private organizations such as the American Catholic Relief Services and other agencies operating from Sudanese territory (Shepherd 1985, 54; Pezzullo 1989, 220; Human Rights Watch 1992, 52). Appeals were made to Ethiopian authorities to permit safer passage to the rebel-held territories, to facilitate the delivery of aid. But at a meeting with Western diplomats in the fall of 1984, Ethiopian Foreign Minister Goshu Wolde declared that "food is an element in our strategy" to combat the insurgents (Korn 1986, 5). Accordingly, the Ethiopian government seized numerous aid deliveries destined for Eritrea, offering various explanations aimed at soothing
international protests. To take just one example, in 1985 the Ethiopian military confiscated the entire cargo of a food-laden Australian vessel docked in the port of Assab. Part of the shipment was intended for transport to Port Sudan and thence overland into Eritrea and Tigray. Ethiopian officials defended their actions by claiming that such covert aid represented a flagrant violation of the most fundamental principles of International Law, namely [of] non-intervention in the internal affairs of states and respect for their territorial integrity. (Ethiopian Ministry of Foreign Affairs Press Statement, Jan. 16, 1985; cited in Ratnaike 1989, 385)

A similar requisitioning of transport trucks and food aid by Ethiopian customs officials was reported by the British "Band Aid" charity. The organization had also planned to deliver cargo directly to Eritreans through Port Sudan. But it stopped at Assab en route and was stripped of the aid intended for rebel camps along Eritrea's border with Sudan (The Independent, November 25 1987; cited in Hancock 1989, 15).

Another report of confiscated aid was received from Assab in May 1986:

government troops confiscated 51 tons of medicine, blankets, food, bedding and clothing bound for Eritrea ... Soldiers justified the action on grounds that the goods were destined for Eritrea, a province of Ethiopia ... Eritrea never saw the confiscated goods ... (in Bazyler 1987, 563 n.70).

Negotiations continued surrounding aid deliveries, and finally produced results in June 1985, when donor countries, led by the United States, met with the Ethiopian Foreign Minister in Geneva. In the face of mounting international pressure, Addis Ababa agreed to allow freer passage for aid
convoys into Eritrea and Tigray (Pezzullo 1989, 224). In the end, though, of all aid donated through the remainder of 1985, Eritrea received just five percent of total shipments (Ratnaike 1989, 396). "Some 90 to 95 percent of all western assistance went through government-held areas," particularly the ports and airports under Ethiopian control (Bazyler 1987, 561-562; Clay 1989, 237; Waal 1992, 395). This meagre quantity of assistance to Eritrea can be attributed, in part, to the general unwillingness of donor governments to deal directly with the EPLF or the Eritrean Relief Association (Ratnaike 1989, 396). But this formal respect for Ethiopian sovereignty did little to quell Addis Ababa's harsh allegations of Western support for the insurgents. Nor did it succeed in halting the régime's policy of agricultural collectivization that included the forcible resettlement of thousands of starving civilians (Bazyler 1987, 565-567). The military régime was also accused of appropriating, for military and resettlement purposes, vehicles marked for transportation of relief aid.22

The result of these events was the politicization of humanitarian relief--such that international aid organizations were unwilling participants in the Mengistu régime's efforts to advance the policy of population resettlement and Maoist-style collectivization (Clay 1989, 248-250, 252). Resettlement programs disturbed the already-fragile state of Ethiopian

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22 A detailed description of the effects food, hunger, foreign aid, and government policies had on the country and its population under the Mengistu régime can be found in Clay and Holcomb 1986.
agriculture, contributing to the further spread of famine (Zeiler 1989, 594). For the most part, agencies were permitted to distribute food only where the government chose in an effort to speed up the régime's resettlement programmes and its strategy of weakening Eritreans' and other minorities' claim to territory (Magistad 1987; Clay 1989, 253-255).

It should be acknowledged that the laws of war do recognize the strategy of blockade as a means of denying enemies access to military supplies (Mudge in Ratnaike 1989, 384). The pertinent question here, though, is whether a blockade on food and medicines intended for starving people violates the terms of treaties to which Ethiopia was a signatory. The Ethiopian government's arguments in this vein proceeded along two main lines. First, it offered the standard claim that outside interference in the country's internal affairs was illegitimate. It also regularly accused "third parties" of secretly shipping military matériel to the insurgents. Despite these attempts to sidestep international protests, however, there can be little doubt that the imposition of obstacles to the delivery of aid—for the express purpose of causing suffering among "enemy" populations—violated both the Geneva Conventions and the Convention on Genocide, both of which Ethiopia had signed. Under these treaties, a High Contracting Party has the right to carry out checks on the contents of aid shipments. It may also control transportation and distribution of aid in territories it controls, while it is also permitted to stop such shipments if
it finds "that a definitive advantage may accrue to the military efforts of the enemy" (1949 Geneva C., Art. 23c). However, the deliberate use of starvation as a policy tool in a war against regionally-based insurgent forces almost certainly constitutes genocide (Ratnaike 1989, 389). Common Article 3 of the 1949 Geneva Conventions gives at first glance a basis for providing covert humanitarian relief. Likewise, the obligation of humane treatment of non-combatants, enshrined in the same article, seems broad enough to impose a legal duty on High Contracting Parties to allow the free passage of humanitarian aid. But the aid deliveries that were intended or actually shipped in "covert" or "clandestine" operations fall outside the Geneva Convention's Common Article 3, and of course cannot be legally defended under the later Protocols either.23

The continuation of the civil war together with dry weather and poor harvests led to more famines in 1988 and 1989. The war again rendered aid delivery from the coast problematic (Pezzullo 1989, 227). "As of April 1988, approximately two and a half million people [were] trapped behind military lines with no access to international relief assistance" (Zeiler 1989, 595). By this time, the Ethiopian régime had expelled many aid workers and international agencies (including the ICRC) and blocked transport of famine relief to Eritrea, claiming this was necessary to preserve the unity and territorial integrity

23 While Ethiopia is not a member of the Protocols, the Mengistu régime's war tactics most certainly are not in line with the articles that prohibit starvation of civilians and indiscriminate attacks against them or against any installations necessary for their survival.
of the country—and to protect the relief workers.24 Once again, starvation was clearly viewed as an instrument to combat dissident forces and re-establish government control over the entire country (Clay 1989, 248; Zeiler 1989; Human Rights Watch 1992). Zeiler's appraisal (1989, 589) is emphatic: "Mengistu [was] engaged in a deliberate, genocidal attempt to starve the Eritrean people into submission."

Iraq and Kurdistan

The Kurdish people today number some 20 million, most of them in Turkey and Iraq with smaller communities on Iranian and Syrian territory. Their history bears some similarity to that of Eritreans. While no one doubted the distinctiveness of Kurdish culture, political and economic factors conspired to share out control over "Kurdistan's" territory among the four modern states. Two post-World War I treaties, signed in 1920 and 1923 under the auspices of the League of Nations, denied Kurdish nationhood and assigned the largest slice of Kurdish territory to Iraq.25

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24 "On 21 May [1988], Ethiopia ordered the ICRC to withdraw within two weeks 'all the material and food under its control' and threatened to carry out 'alternative measures' if this order were not executed ... 'the relief activities in Eritrea and Tigray will be implemented once the bandits [i.e., the EPLF] will have been crushed militarily" (ICJR 1988, number 40, 2).

25 The Treaty of Sèvres on August 10, 1920 urged Turkey to provide Kurds with the means of "autonomous development," but no provision was made for the implementation of such a policy, and international vigilance quickly lapsed. The Treaty of Lausanne (July 1923) dismissed Kurdish demands for autonomy, and divided what remained of the former Ottoman Empire (including all of Kurdistan) among Turkey, Iraq, Syria, and
After the Second World War, the Middle East emerged from colonial control. A central concern of the newly-independent states was the exploitation of oil deposits on their territories. In Iraq, concessions towards Kurdish self-government were blunted by disputes over territorial boundaries and control over oil wells. From the 1960s on, the Kurds have engaged in violent conflict with a succession of Baghdad régimes (Adelman 1992, 6).

In the early 1970s, the Iraqi government forbade both the ICRC and the Swedish Red Cross to provide assistance to civilians in the northern, predominantly Kurdish region of the country. Typically, it perceived the Red Cross presence in the northern areas as a threat to the régime's control over land and resources. "Despite widespread violence and [the sending of] supplies of weapons for Kurdish fighters by the United States and Iran," Iraq sought to limit foreign involvement to the extent possible. Baghdad "did not admit the existence of an internal armed conflict," insisting the war was really a domestic campaign against a handful of rebels (Forsythe 1977, 170). The greatest violence took place in the post-1970 era, and reached a qualitatively higher level still after the end of the first Gulf War. At that time, Kurdish insurgents suffered fierce persecution, including the indiscriminate use of poison gas against civilians.26 The "violations of human rights which

Persia (Iran).

26 It is noteworthy here that Iraq is a party to the 1925 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of
have occurred are so grave and are of such a massive nature that since the Second World War few parallels can be found" (ICJR 48, 1992, 60-61). The atrocities were made known in the west, but for geopolitical and economic reasons, Iraq was allowed to conduct its murderous campaign virtually unmolested—so long as it did not spill over into the territory of neighbouring states.

Iraq stepped beyond these bounds with its August 1990 invasion of Kuwait, and was duly "punished" by a U.S.-led and U.N.-approved expeditionary force. The Hussein régime's ignominious defeat in the second Gulf War prompted a wide-scale uprising of Kurds aimed at toppling the Baghdad government. This was again violently repressed with aerial and artillery bombardments (Adelman 1992, 7). The renewed campaign against the Kurds touched off a massive migration of Kurdish civilians towards the Turkish and Iranian borders in the spring of 1991. Turkey, anxious over the possibility of the influx sparking rebellion among Kurds in its own eastern territories, appealed for international help in stopping the exodus. Turkish troops even crossed into Iraq to force would-be refugees to turn back (Greenwood 1993, 35).

There is no doubt that the repression and slaughter of Kurdish civilians was in defiance of Common Article 3 of the Geneva Conventions, as well as other human rights agreement to which Iraq was a signatory, such as the 1966 United Nations Warfare.
International Covenant on Civil and Political Rights.\textsuperscript{27} The plight of the Kurds attracted significant international media attention in the wake of the Gulf War, when Iraqi repression reached its height. Enormous pressure was brought to bear on U.N. members to provide aid for the refugees. The Security Council agreed that humanitarian efforts were warranted, though it refrained from approving military intervention under Chapter VII (used earlier to legitimize the campaign to free Kuwait). However, allied forces chose to intervene militarily, their undertaking—dubbed "Operation Provide Comfort"—marked the first multi-lateral humanitarian intervention conducted with military assistance and approved by the international community through its representatives at the United Nations.

Warning that any military opposition by Iraqi forces would be met with retaliation, allied soldiers established "safe havens" in northern Iraq and in the south of the country (where another major rebellion against the régime had broken out) (Hashmi 1993, 57). Legal justification for the humanitarian intervention was found in Security Council Resolution 688, which expressed abhorrence of Baghdad's ill-treatment of Iraqi minority groups (1993, 36). The resolution

\textsuperscript{27} This treaty specified that "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind..." (Article 2:1), and that "In no case may a people be deprived of its own means of subsistence" (Article 1:2). Furthermore, the Covenant stresses that "Every human being has the inherent right to life" and that no derogation may be made of this and other provisions that set out the fundamental rights of all peoples (in Laqueur 1990, 217).
Condemns the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish populated areas, the consequences of which threaten international peace and security in the region; Demands ... that the human and political rights of all Iraqi citizens are respected; Insists that Iraq allow immediate access by international humanitarian organizations to all those in need of assistance in all parts of Iraq. (Security Council Res. 688)

Because large numbers of Kurdish refugees had crossed into Turkey, and because Turkey regarded this as a threat to international peace, the intervention could safely be defended under the rubric of the U.N. Charter. Allied troops claimed they were taking effective measures to prevent further aggression and to establish peace. These goals were met, but they had little if anything to do with the Turkish claim of cross-border transgressions. In fact, the Security Council's decision to intervene on the Kurds' behalf marked a striking departure from longstanding conceptions of sovereignty and intervention. Humanitarian intervention without the consent of the incumbent régime could now be defended as morally warranted—at least on those occasions when persecution of civilians managed to generate a critical mass of international sympathy. And as Iraq is, like Ethiopia, a party to the Geneva Conventions and the Convention on Genocide, and because Iraq took part in the drafting of the Protocols and expressed support for the principles enshrined therein (though it did not actually sign28, it was also possible—indeed, somewhat easier—

28 During the drafting conference, the Iraqis indicated that Article 14 (Protection of objects indispensable to the survival of the civilian population) was "of great humanitarian value, and there was certainly a place for it in Protocol II"
to invoke the rules of war and those governing protection of civilians in the effort to justify covert humanitarian aid.

The example of the Kurdish relief operation suggests that strategies may be found to deliver desperately-needed aid even without a drastic reformulation of the concepts of sovereignty and non-intervention. Promoting aid deliveries based on security agreements struck with whichever combatant is willing to sign may ultimately prove more beneficial to those suffering. The reverse of this argument, though, is that civil wars will remain as such; regional dissident forces will find it difficult to obtain international (political) recognition except insofar as they work to guarantee foreign aid deliveries and protect aid personnel in the territory they control. This means the political ambitions of dissidents and their civilian supporters are likely to be frustrated if the movement proves incapable of seizing full power in the short term. As the Kurds discovered, the international community remains willing to offer assistance when calamity strikes; but the political dimensions of the insurgents' struggle are likely to be skated over, and the rebel movement left to its own devices as soon as

(Levie 1987, 484). However, with regard to Article 18 (Relief societies and relief actions), the Iraqi delegate followed a line of argument that would be familiar to régimes in Nigeria and Ethiopia: the issuing of requests for foreign aid by rebel groups could constitute an infringement of state sovereignty. "It would be impossible for a legitimate Government to tolerate any form of acceptance or rejection of relief by a rebellious party, since to do so would amount to recognition of the sovereignty of such a group over the areas which it controlled" (Levie 1987, 583). The Iraqi delegation declared its willingness to reach consensus on Article 18 provided the sovereignty-threatening elements were withdrawn (Levie 1987, 597).
the emergency subsides. It is hardly surprising that many Kurds and relief officials bitterly condemn what they say is Western indifference ... When this operation [Provide Comfort] started, the West appeared to be giving support to the Kurds to encourage the refugees in Turkey and Iran to return. We [relief workers] came in with the understanding that the West had made a commitment to these people, but now we find it was just a short-term solution. (Hedges 1993).

VII.

MULTI-LATERAL HUMANITARIAN AID

The international community, under U.N. auspices, has no mandate to support the creation of new countries or autonomous regions for groups like the Kurds. The central difficulty here is that practical obstacles and political interests have left their mark on the Charter, as well as subsequent humanitarian law treaties. The sovereign status of states remains the foremost consideration. It is debatable, though, whether this primary principle should serve as an excuse to avoid the least savoury implications of sovereign statehood, and to promote greater respect for human rights worldwide. Some, like Humphrey (1980, 370), feel that primacy should now be accorded to basic rights:

It can no longer be argued that violations of human rights 'which shock the conscience of mankind' are essentially within [the] domestic jurisdiction [of sovereign states]. The difficulty lies rather in the fact that nowhere does the Charter authorize the United Nations or any of its organs to use force against a State unless there is a threat to the [international] peace, a breach of the peace, or an act of aggression.

In the case of a breach of civil peace, military "[i]nterventionist 'action' by the [U.N.] Organization to redress violations of human rights has not been regarded as
legitimate except in the case of large-scale racial
discrimination or presumably the threat of genocide" (Schachter
174, 408). Without appropriate mechanisms of enforcement,
minority groups who aspire to self-determination must struggle
relentlessly to establish control over territory. They can
also generate international attention and concern by crossing
international borders, and to seek recognition inter alia as a
dissident force under the terms of the 1977 Protocols, i.e., by
observing the rules of war and respecting fundamental human
rights. An earlier-cited example shows how far some movements
are willing to go: the Biafran leadership was prepared to
witness the large-scale starvation of children on its territory
for the purposes of garnering media attention and arousing
international compassion.

It is undoubtedly difficult for the United Nations (or the
ICRC) to overcome legal, political, and practical obstacles in
mediating among combatants in a civil war for the purpose of
delivering aid. U.N. peacekeeping forces have tended to be
successful when they were able to separate combatants and
maintain cease-fires; effective distribution of relief could
then follow. They have been far less successful, however, in
persuading people to live together rather than fight, or to
construct federal arrangements that promote trust and mutual
accommodation. But that is now the role the U.N. is being
asked to play in many international conflicts:

As a logical extension of peacekeeping and peace-building,
the U.N. is invited into country after country as the
midwife of political transition... When it is not invited,
it sometimes gets its foot into an unwelcoming door
through 'humanitarian' relief. This is what happened in northern Iraq. *(The Economist 1992b, 44).*

Consider the present situation in northern Iraq. There, the U.N. permitted relief to be sent to the Kurds fleeing Saddam Hussein's attacks. While the immediate emergency has subsided, U.S., British, and French forces are still involved in guarding a quasi-safety zone in northern Iraq that is becoming something of a U.N. protectorate—a compromise between Kurdish ambitions for independence and Iraq's territorial integrity (which few international actors wish to subvert, whatever their distaste for the ruling régime).

The Security Council's resolution paving the way for the campaign to expel Iraq from Kuwait points to new possibilities for post-Cold War co-operation among Security Council members. This same co-operation has facilitated aid deliveries to victimized groups in Iraq, Somalia, and Cambodia. To what extent, though, do such U.N. activities represent an evolution towards protection for people from persecution or genocide within their own country? Did U.N. member states cooperate in pursuit of humanitarian principles, or did they merely find common ground on which their separate national interests could be reconciled? Though doubts remain on this score, they have not diminished many observers' more optimistic assessment: that perhaps now the United Nations can become what it was originally intended to be, an organization that works to establish and maintain peace, promote humanitarian values among its member states and, by extension, within each of them:
In these past months a conviction has grown ... that an opportunity has been regained to achieve the great objectives of the Charter--a United Nations capable of maintaining international peace and security, of securing justice and human rights ... (Boutros-Ghali 1992a, 201).

The idea that the U.N. might increasingly use its power to intervene on humanitarian grounds gives hope to those committed to security for all people caught in international or civil conflict. The U.N.'s traditional approach in conflict situations--bargaining and pleading for cease-fires; placing peacekeeping forces between the combatants--is no longer the only strategy available, as recent events in Iraq and Somalia have demonstrated. The large-scale engagements of U.N. soldiers and affiliated humanitarian organizations (such as UNHCR, WFP, and UNICEF) suggests that the general preference for acting with the consent of incumbent régimes may be complemented by peace-making efforts undertaken in the face of the régime's opposition to international involvement.

The human suffering associated with military conflict naturally prompts many concerned observers to take sides. Humanitarian aid, while ostensibly apolitical, nevertheless is subject to be used to advance the political ends of a donor or a combatant. The U.S.'s use of assistance for Contra rebels and the Biafrans' politicization of foreign aid are vivid examples. But taking sides in a civil war often constitutes a threat to incumbent régimes, while not necessarily promoting greater protection of civilians. The alternative is an approach to humanitarian aid and a commitment to its effective distribution that challenges but does not threaten state
sovereignty and national security. Instances will no doubt arise where collective military action is required to protect the fundamental human rights of a given population, such as in Somalia or Iraq. But this does not mean that the incumbent régime in question must be stripped of its sovereign status entirely (Scheffer 1991, 157). The injunction against intervention enshrined in the U.N. Charter and various other resolutions and treaties is "not against the use of coercion per se, but rather [against] the use of force for specified unlawful purposes ... A humanitarian intervention seeks neither a territorial change nor a challenge to the political independence of the State involved" (Reisman 1973, 177). This was the conclusion drawn by the International Court of Justice in its deliberations over the Nicaragua-U.S. case, and it is in conformity with Article 2:4 of the U.N. Charter. The opportunity exists for covert delivery of emergency aid as a legal and realistic means of promoting fundamental human rights.

Collective humanitarian intervention thus acts to modify the conception of state sovereignty in a limited but progressive fashion. Sovereignty becomes conditional on how régimes treat their citizens (Weiss 1991, 212-213). For this re-orientation to prosper, however, international co-operation must be skilfully organized and efficiently managed. The U.N. remains the best available mechanism for such co-operation (Firmage 1971, 421; Reisman 1973; Gillies 1993). With its international mandate and generally-acknowledged neutrality,
the U.N. is able to apply diplomatic pressure and offer positive inducements to régimes aimed at the abolition of inhumane governance and respect for basic human rights.

The principal drawback to the U.N.'s operations in this area is the fact that "The United Nations, an inter-governmental entity, is necessarily far more attuned to the interests--political and humanitarian alike--of governments than of groups in armed opposition" (Weiss 1991, 207). Indeed, only a few non-governmental groups and organizations (such as the Palestinian Liberation Organization, the ICRC, and, prior to Namibian independence, the South-West African People's Organization) have obtained formal U.N. recognition. The U.N.'s best strategy might then be to adopt a neutral stance, stressing that its primary concern is with individual victims of aggression and their fundamental human rights as enshrined in treaties and U.N. resolutions and covenants. The organization's impartiality could thus be trusted even by non-governmental armed forces and secessionists. Such an approach could offer some hope of demonstrating that sovereignty and humanitarianism are not necessarily mutually exclusive. "The U.N.," Weiss notes (1991, 214), is emerging "as the most consistent respecter of ... sovereignty, even while working quietly behind the scenes to infuse it with a truly humanitarian content."

The existing treaties--from the Charter to the Protocols--are sufficient to justify multi-lateral humanitarian action (with or without the use of military force) when civilian
suffering has spilled across international boundaries. The ICJ decision on U.S. involvement in Nicaragua, meanwhile, permits non-military humanitarian intervention even when the incumbent régime withholds consent. The international community likewise sanctions "interference in the internal affairs of a sovereign state for humanitarian purposes, including the prevention of genocide (the risk of which continues to exist in Kurdistan) or famine (in Ethiopia and the Sudan) ... we began to see an interesting evolution away from the time-honoured rule against such interference in the case of Iraq and its treatment of the Kurds" (Swing 1991, 177). But no such collective enterprise is possible if U.N. members find themselves unable to cooperate. A certain harmony of interests and objectives is thus crucial—especially among the permanent members of the Security Council, who have in the past had a tendency to pursue divergent political interests in a given civil conflict.

Despite the evolution sketched above, the United Nations has yet to officially justify intervention on purely humanitarian grounds:

The reason ... is the apparent challenge that a right of humanitarian intervention--supported by military force if necessary--presents to the still sacrosanct notion of sovereignty, [which is] enshrined as the principle of noninterference in the domestic affairs of states under Article 2(7) of the U.N. Charter. (Hashmi 1993:57)

Humanitarian interventions have yet to be openly acknowledged as such by participating states. Perhaps an increasing number of precedents along the lines of the Somali, ex-Yugoslav, and Iraqi cases will be necessary before the practice can become an accepted international norm. The U.N.'s
humanitarian activities will no doubt induce a sweeping review of state sovereignty's latter-day status as the fundamental underpinning of the international political system. But as argued here, state sovereignty itself need not be pushed to the point of threatening international security in order for meaningful humanitarian action to take place.

VIII. CONCLUSION

Actions by third parties to the Nigerian and Ethiopian civil wars, along with the present quasi-humanitarian security provisions in place in northern Iraq, lend support to the proposition that states should be permitted to intervene on humanitarian grounds when an incumbent government displays an indifference to the fate of its subject population. When a régime actively engages in genocide or some other form of persecution of its citizens, other states can justify covert or overt intervention, so long as this is undertaken solely for the purpose of delivering humanitarian aid in a fair and non-discriminatory manner. When aid delivery to suffering people is actively opposed by an incumbent régime or by dissident forces, then multi-lateral action may be used to pursue covert, possibly military-backed, humanitarian interventions.

There can be little doubt that multi-lateral or bi-lateral aid delivery to civilians caught up in civil conflicts will remain the most difficult kind of humanitarian undertaking. Genuine successes have been attained in the past, though, and there is no reason to expect this positive record cannot be
built on and further expanded. Success is measured in terms of human lives protected, civilians saved from the brink of starvation, and combatants convinced to permit and protect aid deliveries. Towards these ends, diplomatic efforts to obtain consent from the parties to a conflict are an essential focus. Without the agreement of at least one of the combatants to protect relief workers and guarantee aid deliveries, aid cannot reach the victims of war. Even in the worst conflicts, the possibility may exist to secure the consent and protection of warring parties—whether such an agreement is based on narrow tactical considerations (e.g., a mutual interest in a cease-fire), moral compulsion, or political factors (such as the unwillingness of either side to risk alienating international public opinion) (Cooper 1993, 137).

It cannot be denied that the precarious balance of humanitarian concerns and military interests, along with the current lack of dependable mechanisms for monitoring and enforcement of corrective actions in the domestic arena, often make it tempting for régimes to violate basic principles of humanitarian law. "However, the positive factor ... [that promotes an] observance of international humanitarian law, as the outcome of the interests of the contracting parties, is the enlightened self-interest of those parties, founded on the desire both for constructive reciprocal treatment and for the avoidance of destructive reciprocity" (Macalister-Smith 1985, 33). No legal precedent exists for non-governmental combatants to request the delivery of outside relief into territories they
control (except *inter alia* by Protocol 1, Article 96). But this does not pose a problem so long as donors themselves remain willing to seize the initiative. And because the right of the ICRC and the U.N. to offer humanitarian assistance is now well-established, even without régime consent, it is reasonable to conclude that the means by which aid reaches those in need—whether those means are legal, diplomatic, political, economic, or even military—is secondary to the overriding desirability of its delivery.
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