Bereich Forschung und Beratung
- Internationale Politik -

ARBEITSPAPIER

HUMANITARIAN INTERVENTION AND SOVEREIGNTY

- Mit deutscher Zusammenfassung -

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Sankt Augustin, November 1995

Contents

Zusammenfassung

Die vorliegende Studie untersucht die Auswirkungen humanitärer Intervention auf die staatliche Souveränität anhand der Aussagen der UN-Charta zum Recht auf Krieg. Der Autor geht dabei von einem positivistischen Ansatz im internationalen Recht aus.

Zunächst werden gewaltsame Interventionen untersucht. Die Studie behandelt in diesem Zusammenhang das grundsätzliche Gewaltverbot der UN-Charta nach Artikel 2(4) sowie die Hauptausnahmen hiervon, nämlich im Falle von Selbstverteidigung (Artikel 51) und von Gewaltanwendung, die durch den Sicherheitsrat gebilligt ist (Kapitel VII). Die angeführten Beispiele gewaltsamer Interventionen von Staaten zum Schutz eigener Staatsangehöriger oder zur Bekämpfung des Terrorismus belegen, daß die die UN-Charta von den Staaten in diesem Punkt nicht eingehalten wird. Einige Experten für Internationales Recht argumentieren daher, daß die Charta selbst nicht als verpflichtend akzeptiert wird. Es werden Beispiele von Interventionen einzelner Staaten mit humanitärer Dimension (insgesamt 11 Fälle: USA in Grenada 1983, Frankreich in Zentralafrika 1979, Tansania in Uganda 1979, Vietnam in Kambodscha 1978-79 u.a.) sowie nach Billigung durch den Sicherheitsrat nach Kapitel VII (3 Fälle: Korea 1950, Golfkrieg 1990, Somalia 1992) untersucht. Ein Beispiel für eine "rein" humanitäre Intervention kann zwar nicht gefunden werden. Die Praxis des als gerechtfertigte Gewaltanwendung angesehenen Schutzes eigener Staatsangehöriger oder der Bekämpfung des Terrorismus stützt jedoch die Schlußfolgerung, daß Menschenrechtsverletzungen, die Fluchtbewegungen bewirken, den Rang von indirekter Aggression einnehmen und damit Selbstverteidigung rechtfertigen können, da diese Fluchtbewegungen von anderen Staaten als destabilisierend betrachtet werden können.

Die Studie untersucht im weiteren eine Reihe von nichtgewaltsamen Interventionen durch Staaten, multilaterale Einrichtungen und Nichtregierungsorganisationen (NGOs). Das Verhalten dieser Akteure belegt, daß die Konzeption der Souveränität als absoluter Nichteinmischung unter deskriptiven Gesichtspunkten unzutreffend ist.

Die Betonung des Gewaltverbots der UN-Charta bewirkt die Vernachlässigung einer weiteren Dimension von staatlicher Souveränität, nämlich der Selbsthilfe. Sowohl Selbsthilfe als auch Nichteinmischung sind Aspekte von Souveränität, und sie stehen in einem Spannungsverhältnis zueinander. Eine zunehmende Akzeptanz des Prinzips gerechtfertigter humanitärer Intervention wäre daher nicht gleichbedeutend mit einer Entwertung von Souveränität. Die Nichtgewährleistung von Schutz für die eigenen Staatsangehörigen und Einwohner durch einen Staat kann - wegen möglicher Flüchtlingsströme - zu einer stärkeren Betonung der Selbsthilfe und der gerechtfertigten Selbstverteidigung im Zusammenhang mit gewaltsamer Intervention führen. Während man also durchaus argumentieren kann, daß der Rückgriff auf Interventionen mit zumindest teilweiser humanitärer Rechtfertigung das Konzept der Souveränität verändert hat und möglicherweise weiter verändern wird, so ist doch das Konzept der Souveränität an sich nicht überholt. Vielmehr modifiziert humanitäre Intervention das Konzept und die Praxis von Souveränität dadurch, daß das Nichteinmischungsgebot in seiner Bedeutung gemindert und die Selbsthilfe-Kompetenzen von Staaten stärker betont werden.

Seit Verabschiedung der UN-Charta hat sich das Konzept von Souveränität gewandelt. Das Verhalten von Staaten bei dem Schutz der eigenen Staatsangehörigen, der Bekämpfung des Terrorismus, in Kriegen und Bürgerkriegen usw. hat dazu geführt, daß das in der UN-Charta definierte *ius ad bellum* überdacht wird. Für die anhaltenden Veränderungen in der Definition und der konkreten Ausformung von Souveränität sind die genannten Veränderungen - zusammen mit nichtgewaltsamer Intervention durch Staaten, internationale Einrichtungen und NGOs - weitaus wichtiger gewesen als humanitäre Intervention.

Introduction

In the 1980s, a number of authors predicted the impending demise of nationalism (e.g., Hobsbawm, 1990). Subsequent events have proven that the forecast was manifestly wide of the mark (Moynihan, 1994; Keely, 1995a and 1995b).[1] More recently, authors foretell the coming decline and fall of the state. Newly vigorous self-determination (a result of resurgent nationalism) leads states to subdivide at a furious pace, rivalling decolonization and the break up of empires after World War I in the creation of new -- and presumably weaker -- states. Meanwhile, former colonies and client states, stripped of the economic, diplomatic and military support from the Cold War's great powers and lessened support from former colonial masters, have often imploded. Like a Potemkin Village, there are names on a map with virtually no state in place. No sitting government is in control. Schooling, medical care and basic social services are unavailable. Internal markets are primitive and virtually no external market is operative. Banking and monetary systems become worthless, sometimes by the hour. Afghanistan, Somalia, Angola, Liberia, Rwanda are on the list already and others, like Zaire, wait in the wings.

Secession and manifestly failed states are not the only harbingers of the decline and fall of the state. Even in strong states the capacity for governance is suspect. On the one hand, the sheer size of daily, legal financial transactions is beyond the capacity for government regulation. On the other, international organized crime, terrorist activities, and the felt need for private security rise at rates that alarm many capitals of industrial democracies.

More broadly, the new meaning of security emerging in the post Cold War world (Weiner, 1992/93 and 1993) has led visions that consign the state to the dustbin of history. Robert Kaplan (1994), in a February 1994 article in *Atlantic*, forecast impending anarchy from the combined threats of soft security issues (Keely, 1995a) like environmental degradation, poverty, crime, corruption, migration and disease. His chaos theory proposes an environmentally-driven lawlessness in which the state is irrelevant. Jean Raspail's novel, *The Camp of the Saints* (1982), in which about a million desperate Indians land from commandeered ships on the French Riviera, provides a literary vision in which the wretched inherit the earth. Samuel P. Huntington (1993) in a provocative and widely-read article in *Foreign Affairs*, proposed that a "clash of civilizations" will dominate geopolitics in the coming years. While Huntington himself acknowledges that "[n]ation states will remain the

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[1]. If the demise is not impending, other authors see it as inevitable, but are quite imprecise about when it might take place. Because all things will inevitably change, a prediction of fundamental restructuring put off to some vague future is hardly helpful. Fukuyama (1993, 275), for example, writes:

> Economic forces encouraged nationalism by replacing class with national barriers and created centralized, linguistically homogeneous entities in the process. [This curious idealism overlooks the role of the state apparatus in creating nationality identities, especially in the 19th century through education, military service, museums, folktale and folk music preservation, language policy, and so on (Keely, 1995b).] Those same economic forces are now encouraging the breakdown of national barriers through the creation of a single, integrated world market. The fact that the final political neutralization of nationalism may not occur in this generation or the next does not affect the prospect of its ultimately taking place.

In his recent memoir, *In Retrospect: The Tragedy and Lessons of Vietnam*, Robert S. McNamara (1995), former U.S. Secretary of Defense form 1961 to 1968, listed major 11 mistakes of U.S. involvement including underrating nationalism as a force in the world. Asked if those mistakes could be repeated, his unequivocal reply was: "Absolutely, not only can be but are being repeated" (Apple, 1995, 12). He cited Bosnia and Somalia. Fukuyama's "final political neutralization of nationalism" may allow nationalism ample scope to affect world affairs for a long time.

most powerful actors in world affairs," his vision, for less careful readers, adds to the impression that ideological forces rooted in culture will be the future battleground and will overwhelm state capacity to cope. And Matthew Connelly and Paul Kennedy (1994) unite ideology and chaos theory in a December 1994 article, again in *Atlantic*, that asks "Must It Be the West against the Rest?" Analyses like these, based on broad visions, add to the uncertainty of the search for a new world order.

In the context of this ideological and political uncertainty, intervention in the internal affairs of countries has appeared on the agenda of concerns. The direct intervention in Northern Iraq on behalf of Iraqi Kurds, with specific authority of the UN Security Council under Resolution 688, has sensitized the international community to the topic. At issue is the scope and meaning of sovereignty and the concrete impact on sovereignty from the actions of other states, under whatever auspices, and even of nongovernmental actors, purporting to provide protection and assistance in the face of humanitarian law violations. Even if humanitarian intervention is not about to destroy the state, do not such activities and the claims made to justify them fundamentally alter the state, making it and the doctrine of sovereignty shadows of their former selves?

The objective of this paper is to evaluate the implications of humanitarian interventions and their justifications for the doctrine and practice of sovereignty. While some attention will be given to the broad scope of modes of intervention, the focus will be on forceful -- military -- intervention. The inquiry draws on the literature in international law and international relations. The goal is not to produce a treatise on law, intervention or sovereignty. Rather it is to examine the factors likely to promote or discourage interventions justified on humanitarian grounds and what impact that would have on the state system. The investigation is meant to contribute to an understanding and assessment of humanitarian interventions, especially in light of recent attention to and discussion of them in different countries. At a minimum, the hope is to raise pertinent issues and point to factors that need discussion, even if readers disagree with some, or all, of the conclusions.[2]

The thesis of the paper is the humanitarian interventions, both forceful and otherwise, have already altered and will continue to alter the doctrine of sovereignty (understood as the right of a state to have no higher authority in its territory and to behave in its territory as it deems, without the interference of another state or coalition of states in its internal affairs carried out on its own territory). Humanitarian intervention, however, plays a subordinate role in what is a larger issue of the validity of the UN paradigm about *jus ad bellum*. Alteration of the doctrine and practice of sovereignty, however, does not necessarily mean only the constriction of sovereignty, because it also encompasses expansion of the self-help competencies that the UN Charter attempted to limit fifty years ago.

[2].The literature consulted is limited. Since the objective is not an exhaustive treatment for international lawyers or a complete assessment of the implications of interventions justified on humanitarian grounds for international relations experts or students of the politics of a specific country, there is no claim at an exhaustive study from a specific disciplinary perspective. The focus is also almost entirely on literature in English. The expertise of the author is in international migration, including law, history, and comparative practice and politics surrounding refugees, asylum, and internally displaced persons. This provides a perspective different from that of an international lawyer, a policy maker, an official of a multilateral agency, or a human rights advocate. It is hoped that the use of insights from many disciplines, focused on refugee and sovereignty issues that dominate humanitarian intervention situations, will enlighten discussion.

I International Law

A discussion of humanitarian intervention should start with foundational issues of the sources of international law about intervention and the influence of international law in regulating the behavior of states. For this investigation, the United Nations Charter framework will be used as the organizing structure. Following the work by Arend and Beck (1993), the issues of doctrine and practice in the use of force, within the UN framework, will organize the analysis and exposition.

A. Sources[3]

International law is the set of rules that states use to regulate their conduct. Each state recognizes no higher authority than itself in the regulation of affairs in its own territory, which is a definition of sovereignty. But interests of states and their members (citizens) extend beyond their own boundaries and states have an interest in making sure their sovereignty remains intact. Because there is no overarching authority to impose law and lawful behavior on states, states have adopted rules to regulate their interaction, including the use of force by states, rooted in their interest to maintain sovereignty.

The three generally recognized sources of international law are articulated in Article 38 of the Statute of the International Court of Justice (Arend and Beck, 1993, 5ff.): conventions or treaties, custom, and general principles of law. Treaties and conventions are formal agreements among two or more states that specify obligations and rights of the states parties to the agreement. Custom is not written, but a generalized pattern of behavior, recognized as such, and accepted as binding, i.e., states act that way because they perceive themselves as bound by law to behave in that way. Two ways of making the case that a custom does in fact exist is to consult court cases and the writings of qualified experts or publicists, as they are referred to in international law literature. These sources of learned opinion are not independent sources of law, but are referred to in Article 38 as means to determine rules of law.

Finally, general principles of law can provide rules of expected state behavior. Three types of general principle are important. The first are principles of domestic law like those governing what matters are still open to judicial decision (*res judicata*) or estoppel (the prohibition against alleging or denying a fact because of one's prior actions or words to the contrary). Virtually all domestic legal systems have such principles of evidence or procedure. Second, there are *a priori* principles, such as, agreements must be kept or sovereignty itself. The practice of agreements presumes an accepted principle that agreements are to be honored. Such a first principle is itself not the content of a treaty. Similarly, states claim sovereignty in their own right. No agreement with another state would add anything further to the claim that there is no higher authority in a country than the state exercising the sovereign power. Finally, there are "higher" principles like equity and humanity. As with the case of customary

[3]. The discussion of forceful intervention follows Arend and Beck (1993). The purpose is to briefly lay out the foundational understandings necessary to proceed. This brief review of basic matters also permits underscoring important issues that will affect later positions taken. As an example, some authors give weight to treaties unless they are formally abrogated. The discussion of tests of international law in Section I.B adopts the position that even a treaty has to be controlling to remain "good international law." Not all authorities agree with this position.

sources of law, one can look to court cases and learned opinion to test whether a claim about a general principle has validity.

B. Tests

The approach taken in this analysis is in the positivist tradition of international law. Ultimately the test of whether something is part of international law is if it is both authoritative and controlling. Authoritative refers to recognition by states that a rule is international law by referring to states' claims that it is. Additionally, court cases, learned opinion, resolutions in multilateral bodies referring to a rule all indicate that states recognize that there is a rule and acknowledge that it does or should affect state behavior. The controlling test refers to whether states act in conformity with purported international law. Evidence is needed to show that a law in fact governs the behavior of states under the appropriate circumstances. Many publicists write extensively about whether law is controlling. For example, Arend and Beck (1993), O'Brien (1990) and Bowett (1972), among many others, have done so concerning the UN Charter's prohibition of the threat or use of force and its exceptions.

The twin criteria that a law be authoritative and controlling is applied routinely to decisions about customary sources of law. In a positivist tradition, the twin test is applied also to general principles and treaties. This can mean that even when a treaty has not been formally abrogated, it may cease to be good international law if parties do not behave in accord with the provisions of the treaty. Even more radically, it may be possible that general principles lose their force if states no longer accept them in practice, regardless of past behavior. Recently, some human rights standards have been criticized as western cultural impositions, derived from the Enlightenment period and reflecting an overly individualistic and even atomized view of people and society. If such views prevail, a positivist view of international law would allow that general principles can lose force and even be replaced.

The use of the twin criteria is important for the current inquiry because it permits the possibility that treaties and covenants may cease to have power even if they have not been formally changed and even if they are still recalled and referred to at times, particularly if done so in a formalistic way. Despite ritualistic allusions, treaty and convention provisions may no longer be generally accepted as authoritative. More tellingly, they may be more honored in the breech than in the observance and, therefore, not controlling of state behavior.[4] For example, O'Brien (1990, 470) and Arend and Beck (1993, 45), among others, explicitly question the validity of aspects of the UN Charter framework about the use of force.

II Forceful Intervention

[4]. Perhaps it is not inappropriate to recall that this is a discussion of law and not morality. Future diminution or loss of human rights standards in law would be lamentable. The possibility, however, indicates that what is immoral may not be illegal in relations between states. International law may change in lamentable directions and that ought to be recognized.

A. The UN Charter and *Jus ad Bellum*

The UN Charter provides a useful framework for assessing the effect of humanitarian intervention on sovereignty. Humanitarian intervention, especially forceful intervention using military force or the threat of force if resistance is encountered, is a warlike act. The UN Charter explicitly addresses the use of force. The Charter was an attempt to radically alter international law about the use of force. The Charter framework limited the use or the threat to use force more than past treaties and tried to fashion a structure to settle disputes without recourse to force, by diplomacy, collective discussion, and mediation rather than war. The UN Charter, then, restricted sovereignty by limiting recourse to traditionally accepted measures of self help (Bowett, 1972; O'Brien, 1990). The Charter particularly redefined the extent of states' previously accepted *competence de guerre*, that is, the legitimate right to use war as a tool to seek state interests.[5]

The UN Charter made exceptions about recourse to the use of force both by individual states and by states acting collectively under UN auspices. In this section, the UN Charter framework will be reviewed in regard, first, to individual states and then in relation to international collective use of force under UN auspices. In each section, instances of forceful humanitarian intervention will be reviewed to provide the basis for drawing conclusions about the authoritative and controlling nature of the UN Charter and the implications for sovereignty.

B. Individual States -- Article 2(4)

The first chapter of the UN Charter outlines the aims and principles of the organization. In Chapter 1, Article 2, paragraph 4, the framers prohibited the use of force.

> All members shall refrain in their international relations from the threat or the use of force against the territorial integrity or political independence of any state or in any other manner inconsistent with the Purposes of the United Nations.

The prohibition of the threat or use of force went beyond the interwar Kellogg-Briand Pact of 1928 that outlawed recourse to war. Any use of force short of war, such as a reprisal, is also prohibited (Arend and Beck, 1993, 30-31). In short, the Charter attempted to severely limit the lawfulness of self help. As both O'Brien (1990) and Arend and Beck (1993) point out, the Charter gave preference to peace over justice. Unrighted wrongs, mistreatment of nationals, and actions that fell short of war were not to elicit reprisal, attack, or other uses of force. Peaceful stability was the goal. However, the Charter permits some exceptions to the general prohibition.

The Charter allows for four exceptions to the Art. 2(4) prohibition of the use of force. The two most important exceptions are for self-defense and for Security Council calls on the members to use force in situations where the is a threat to the peace or an actual breach of it.

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[5]. O'Brien (1990) notes that the Charter is generally considered to bind not only members of the United Nations, but it is customary law also. Of course, insofar as the twin test may lead to the conclusion that the Charter or some parts of it are not compelling even on members, its force as customary law for nonmembers would be equivalently nonbinding.

The other two exemptions are technical exceptions that relate to the transition period between World War II and the implementation of the Charter.[6]

Article 51 states:

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

The second exception of continued importance is the responsibility of the Security Council referred to in Art. 51, cited above, outlined in Chapter VII of the Charter. Chapter VII vests in the Security Council, in effect, the right to make war against states that threaten peace or have begun war. The specific content and application of Chapter VII powers will be discussed in detail below.

Articles 2(4) and 51 have been the objects of immense interpretation in writing and in praxis. The political and military contexts of 1945 are often discussed. At the time, the international community was winding down the second global conflict of the century. The Charter was developed and signed in a pre-nuclear weapons world. Use of force is to be avoided, and, as indicated above, a concern for justice was subordinated to prohibition of the use of force (O'Brien, 1990, 470). The exception in Art. 51 allowed for passive defense within a state's own territory. "[S]ubversive intervention, exported revolution, indirect aggression and transnational revolutionary warfare emphasizing terrorism" (O'Brien, 1990, 470) were not part of the daily fare.

In addition to context and what it contributes to interpretation, there are questions about the meaning of force and threat. The distinction to be made, if any, between armed attack and act of aggression came in for discussion. Did the Charter's framers mean to restrict self defense to reactions only to movement over the border by regular military, allowing for no preemptive strikes against clear military threats, especially those of a kind unknown or unexpected in 1945?

Four important interpretive issues have arisen in regard to Articles 2(4) and 51 for the issues analyzed in this study: anticipatory self-defense; the emergence of mixed civil/international conflicts; protection of nationals; and responses to terrorism.

The image presented by Art. 51, and the model implied by the Security Council's handling reprisals by states (O'Brien, 1993, 469-470), is a world at peace, with no internal challenges to sitting governments and the absence of covert operations or terrorism (including

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[6]. The first of these transitional exceptions is contained in Articles 107 and 53 to permit force against "enemy" states until the war ended. The second, contained in Article 106 of Chapter XVII, on transitional security arrangements, allowed the five permanent members of the Security Council to take action if the procedures for Security Council action have not been established. Those procedures and arrangements are referred to in Art. 43 of Chapter VII and include agreements to make military contingents available to the Security Council. Those special arrangements have never been concluded. Technically the permanent members could still act but Article 106 is thought of as practically a dead letter (Arend and Beck, 1993, 32-33).

state sponsored terrorism). In this peaceful world, a warlike state suddenly masses troops and sends planes to bomb a neighbor. Immediately in self defense, given no other alternative and no time to organize a United Nations response, a state may attempt to repulse the attacker.

What has taken place in actual instances is anticipatory moves to curtail capacity. These cases have included Israeli bombing of an Iraqi nuclear reactor in 1981, U.S. action against purported Libyan biological-warfare facilities, and attacks on terrorist training facilities and the command headquarters of terrorist organizations. The naval blockade by the U.S. at the time of the Cuban missile crisis and Israel's anticipatory attack to begin the 1967 Middle East war are other examples. In all these instances, the issue of anticipatory self-defense is raised. The question of anticipatory actions is fundamental to the question of reactions to terrorism and the distinction between reprisal and anticipatory defense, discussed below. The state initiators advance the argument that a passive self-defense doctrine is unrealistic, a UN response that will actually provide protection and security for the state threatened is unlikely or impossible to organize in the time needed, and self preservation requires defensive action (Arend and Beck, 1993, Ch. 5).

Protection of nationals is a clear instance in which states repeatedly have disregarded the prohibition against the use of force in favor of forceful initiatives to defend or extricate citizens. Some of the actions have been dramatic and made headlines, including the U.S. rescue of the crew of the ship *Mayaguez* in 1975 from Cambodia and Israel's commando attack in 1976 at Uganda's Entebbe Airport to extricate citizens taken hostage by Palestinian terrorists (Arend and Beck, 1993, Ch. 7).

Many publicists accept a "'restrictionist theory' which holds that intervention to protect nationals is impermissible" (Arend and Beck, 1993, 109-110 citing 15 different authors). Arend and Beck also cite seven other publicists who oppose the majority view and join them (Arend and Beck) in support of a right to intervene. Among them, Reisman (1971, as cited in Arend and Beck [1993, 107]) argues: "A rational and contemporary interpretation of the Charter must conclude that Article 2(4) suppresses self-help [only] insofar as the organization can assume the role of enforcer." Self help would revive when the United Nations cannot assume such a role. Arend and Beck (1993, 110) conclude that application of the twin test of a rule's being authoritative and controlling hardly leads to the conclusion that "a rule exists prohibiting intervention to protect nationals."

Civil and mixed conflicts include a range of wars fought to gain independence from colonialism, to fight apartheid, or establish socialism or democratic freedoms, to engage in self determination by secession and unification. In all these cases there are instances of intervention by outside states in the pursuit of various political goals. The influence of the Cold War and the justifications it provided for interventions led to advancement of reasons why Art. 2(4) did not apply.

The three most common rules for intervention in mixed conflicts are: proportionate counter-intervention; limited counter-intervention; and self determination (Arend and Beck, 1993, Ch. 6). Proportionate counter-intervention permits aid to a state if another state aids rebels, if the aid is limited to the territory of the state in conflict or to the territory of another intervening state if that state's aid rises to the level of the equivalent of an armed attack. The limited counter-intervention rule is the same as the proportionate rule except that it never allows for intervention beyond the territory of the conflicted state. The self-determination rule allows help to the state or rebels in a self-determination struggle and intervention by

other states has no effect on a state's right to intervene on either side. This last rule can be stretched to cover virtually any civil conflict.

Civil or mixed conflicts became not infrequent after the Second World War as decolonization proceeded and as ideological conflict between the Soviet and Western camps, especially the U.S., often developed into contests for influence in countries or regions, including involvement in civil wars from Southeast Asia, through Afghanistan and the Horn of Africa, to Central America. Third World states also claimed the right to intervene to fight colonialist or racist states. A non-intervention rule in conformity with Art. 2(4) was often articulated in UN debates. It, along with the limited counter-intervention rule, however, only weakly conform to the actions of states. Proportionate counter-intervention and self-determination support more accurately describe state behavior in the Cold War period.

Currently, the spate of new states emerging from self-determination claims raises questions about how many states can be accommodated and how thinly the earth's territory can be divided. International reactions to Russian handling of Chechnya or the Turkish incursion into northern Iraq to counter Kurdish separatists may indicate a declining appetite for supporting self determination. The post-Cold War acceptance of intervention in civil or mixed conflicts may change. The experience of the Cold War, however, should not be overlooked; it provides behavioral precedents for states to make a claim that intervention is permissible. The competing and conflicting rules about intervention made the law unclear in the Cold War period. It remains so.

The final area of disagreement about interpretation of Articles 2(4) and 51 involves the issue of terrorism, entwined as it is with anticipatory self defense and reprisals. The distinction between reprisal and anticipatory self defense has been questioned (e.g., Bowett, 1972; O'Brien, 1990, especially at note 259 which cites the relevant literature). Is a raid on a terrorist facility not an attempt to prohibit its use in the future for other terrorist attacks? The Security Council has usually treated such raids as reprisals. Each attack is judged as repayment for a terrorist incident and is a premeditated attempt to avenge death, injury, and destruction. Debates and discussions have applied the criteria discussed by Webster in the 1837 *Caroline* case which required the instant and overwhelming necessity of an immediate response, without premeditation, and no choice of means to react to an unexpected attack as criteria for self defense (Bowett, 1958, 58-60). Under those circumstances, a pattern of terrorist attacks is given no weight. In addition, terrorist facilities are often located in a way to increase the probability of collateral damage. Attacks on terrorist installations, therefore, may result in more casualties than the precipitating terrorist attack. To focus on balancing accounts of death and injuries to judge proportionality is fundamentally misleading in this case. "[T]he impact of terrorism goes far beyond the actual number of casualties it causes. This is the genius of terrorism as a means of coercion" (O'Brien, 1990, 459).

The Charter can fairly be said to have been developed without taking cognizance of terrorism, especially state-sponsored terrorism. Security Council reactions to instances of use of force in response to terrorism is usually condemnatory, following a plain reading of the Charter. Following the reasoning in the *Caroline* case, the *locus classicus* for the right of self defense by armed intervention in the territory of another state, states made the argument that any reaction to terrorism must be immediate, on the spot, proportionate, and directed only at the actual perpetrators of the terrorist incident. On the other hand, states like Israel and the United States have taken actions that they propose are self defensive and that other states label reprisals. Bowett (1972) and O'Brien (1990) find the reprisal and self defense distinction unrealistic because it unreasonably exposes states targeted by terrorists. The

behavior of states makes the establishment of an authoritative and controlling norm impossible (Arend and Beck, 1993, 173). The issue is contentious and disputed. There is ample recent precedent for any state that feels itself becoming a special target of terrorist activity to mount a justification of interventions to prohibit future attacks by terrorists, regardless of accusations of reprisals, which is O'Brien's (1990) conclusion about Israeli antiterrorist activities

These foundations for interpreting Articles 2(4) and 51 and even for questioning their applicability as international law in certain circumstances, given state practice, set the stage for a discussion of humanitarian intervention as an additional possible exception to Art. 2(4). Various organs of the United Nations have become increasingly concerned about large-scale human rights violations in recent years (Stavenhagen, 1991). The UN bodies are slow moving. The recent questioning of the content of human rights as overly individualistic at the International Conference on Human Rights in Vienna in November, 1993 and subsequent criticism, especially from Asian leaders, of purported western cultural imperialism in attempts to impose Enlightenment criteria on the world may foretell even greater challenges in he future. As noted above, the use of Resolution 688, although a Security Council resolution under Chapter VII powers (to be discussed below), put the spotlight on humanitarian intervention.

C. Humanitarian Intervention

Humanitarian intervention is not just an occurrence or issue of the last few years. Since the early post-World War II period, there have been a number of instances in which the humanitarian protection was advanced at least as one justification by states for their actions.[7]

Following Akehurst (1984), humanitarian intervention refers to "the use of armed force by a state (or states) to protect citizens of the target state from large-scale human rights violations there." The definition clearly distinguishes humanitarian intervention from protection of a state's nationals in another country with which it is sometimes linked. The definition underscores that what is discussed is intervention in another country, to protect that country's citizens from large-scale violations of rights. The object need not be the government of the offending state, but it usually is. The idea of large scale, while vague, indicates that intervention is not justified by the random, isolated act of injustice, but is in reaction to a pattern and practice that affects an appreciable number or proportion of the citizenry. Selective victimization of members of a specific group would also be a factor in determining that a state is approaching a level or degree of human rights violations that might justify intervention.

A number of scholars have reviewed examples of humanitarian intervention since World War II (e.g., Akehurst, 1984; Ronzitti, 1985; Teson, 1988; and Verwey, 1986). Arend and Beck (1993, Ch. 8) have the most recent and comprehensive examination of cases, which will provide the basis for the review presented here.

Arend and Beck (1993) review eleven cases since World War II that contain an element of humanitarian intervention. Each will be briefly described, noting the use and success of the humanitarian intervention argument to justify the forceful intervention.

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[7]. Bowett (1984), as cited in Arend and Beck (1993, 114 at footnote 20), notes that "we have no true example of a clear reliance on this right of intervention by any State since 1945."

Palestine Conflict, 1948: Both Arab and Israeli representatives justified their extraterritorial use of armed force before the Security Council in humanitarian terms. The Security Council basically rejected the arguments. In addition, the objectives of the belligerents makes recourse to humanitarian justifications suspect.

Belgium in the Congo, 1960: Shortly after independence, Belgium dispatched troops to protect its citizens and other Europeans from harm given the chaos of a coup. The troops stayed for months and assisted the Katangese rebels who seemed most supportive of Belgian commercial interests. The involvement of protection of nationals and the additional objectives indicated by troops remaining lead to questioning the humanitarian intervention label.

Belgium and the United States in the Congo, 1964: The United States and Belgium undertook a three-day operation to save some 2000 hostages under rebel control. The facts that nationals were being rescued (but not exclusively), that the government gave its permission, and that the operation also materially weakened the rebels and reduced its control of key assets led to questioning whether a true humanitarian intervention had taken place.

United States in the Dominican Republic, 1965: In the midst of a violent civil war without an effective government, the United States justified its action as an attempt to protect its nationals and other foreign nationals. The U.S. obtained authorization from the Organization of American States (OAS) and introduced a force of 20,000 to restore order. Because of this, plus the fact that both sides to the civil conflict consented to the military activities to restore order and because President Johnson stated that another communist regime in the hemisphere was intolerable, thereby introducing a geopolitical dimension, the humanitarian intervention justification seems thin.

India in East Pakistan, 1971: Pakistan's president, Yahya Khan, did not summon Parliament after elections in which the autonomy party of East Pakistan gained the majority. Protests were followed by martial law. The military operation included terrible human rights violations, as reported by an International Commission of Jurists report. Some ten million refugees went to India. India intervened, recognized an independent Bangladesh, and prevailed militarily in short order.

India first justified its actions on humanitarian grounds before the Security Council but deleted such references in the final version of the official record. While Akehurst (1984, as cited in Arend and Beck, 1993, 119) holds that the change of mind indicates that India realized the humanitarian intervention was not a sufficient justification, Teson dismisses India's change of heart as immaterial. "What really mattered, according to Teson, were not Indian objectives, but rather that 'the whole picture of the situation was one that warranted foreign intervention on the grounds of humanity'" (Arend and Beck, 1993, 119 citing Teson, 1988, 186).

The colloquy among publicists has some importance here. Akehurst focuses on state behavior and notes India's abandonment of the humanitarian intervention justification. Teson tries to make the argument that India need not have done that because the justification was sound. But state actions and motives are germane. India's objectives were not solely to preserve human rights. The end result of its action, the secession of Bangladesh, materially increased India's position as a regional power, especially vis-a-vis her major rival, Pakistan. The burden of refugees was also important. India's action had a humanitarian dimension and the human rights violations that took place during the Pakistani military operation were

inexcusable, weakened Pakistan's moral standing, and provided some latitude to India given the scale of the rights violations.

Indonesia in East Timor, 1975: Indonesia claimed humanitarian motives for intervention in the political turmoil preceding and anticipating independence of East Timor from Portugal. Indonesia's support for a pro-Indonesian faction, its repulsion of other intervention to protect human rights, and its annexation of East Timor (followed by massive deaths) provides little support for a humanitarian motive, much less a humanitarian justification for armed intervention.

South Africa and Cuba in Angola, 1975: South African intervention against the Soviet- supported MPLA group on behalf of the FNLA and UNITA has been questioned. The concern for black Angolans by a South African government was suspect. Hydroelectric assets were at stake. The geopolitical ramifications of Soviet influence with Cuban help on its door-step played a part. While the Security Council condemned South Africa's intervention as aggression against Angola, five states abstained, including the United States, which also wanted Cuban intervention condemned (Arend and Beck, 1993, 120-121).

Vietnam in Kampuchea, 1978-1979: Vietnam invaded Kampuchea at the end of 1978 and included in the force members of the United Front for the Salvation of Kampuchea. Vietnam prevailed and established members of the Front as the government, ousting the Khmer Rouge regime. Vietnam did not use a humanitarian intervention argument. Two wars were going on, it insisted. Reaction to Kampuchean aggression against Vietnam and a civil war in which it insisted that the United Front ousted the murderous Pol Pot regime. The horrible human rights atrocities of the Khmer Rouge make the humanitarian issue almost cry out for analysis in this case.

The Security Council did not seem disposed to brand Vietnam the aggressor and a milder resolution calling for all parties to depart had 13 votes, but the Soviet Union vetoed it. The General Assembly subsequently seated the Khmer delegation. Akehurst (1984, as cited in Arend and Beck, 1993, 122) concluded that the episode lent support to the conclusion that a consensus exited that humanitarian intervention was illegal. Teson, who supports the humanitarian intervention concept, did not include the incident in his analysis.

The Kampuchea incident is full of Cold War geopolitics, involving Sino-Soviet tensions, Sino-Vietnamese tensions about regional hegemony, and U.S. policy regarding Vietnam and Southeast Asia generally. The reign of terror under the Khmer Rouge was horrifying and the attempt of the Khmer Rouge to withdraw from the international community and the extremity of its ideology and practice were general threats to the system of states. Vietnam was generally rebuffed about its intervention and it clearly was acting for hegemonic reasons. Importantly, it did not use humanitarian intervention as a justification.

Perhaps what makes the Kampuchean case haunting is the enormity of the Khmer Rouge atrocities. The appeal of the humanitarian intervention argument includes its capacity to permit reaction against such activities which so repulse most people. It is almost too much to believe that a system of states and law could allow such an event to be ignored. If nothing can be done in the face of such atrocity, then for many people the very system is fundamentally flawed, if not inherently rotten. It is such visceral reactions and arguments that challenge states and international law to react.

Tanzania in Uganda, 1979: The Ugandan case has many parallels to the Kampuchean case. Uganda's Idi Amin committed outrageous human rights violations. Tanzania, like Vietnam, claimed two wars were going on. Tanzania was repelling Ugandan aggression, and there were Ugandan incursions into Tanzania and prior military reaction by Tanzania only months before the 1979 action. But Tanzanian troops helped topple Amin and stayed on to help install the new government.

Unlike the Kampuchean case, the UN Security Council did not take up this case and criticism was muted. Some mild criticism was voiced in Organization of African Unity meetings. There was palpable relief that Amin was gone, just as similar relief was expressed at the ouster of the Khmer Rouge. But Big Power politics was mainly absent in the Tanzania/Uganda case. The action was not approved as a humanitarian intervention, but other factors did not result in explicit condemnation as part of power plays among global or regional rivals.

France in Central Africa, 1979: France supported a coup while Emperor Bokassa was in Libya. Again, ruthless human rights violations had taken place, the scale of which is debated, but not the horror. French action seems to have an element of forestalling several planned coups that had Soviet backing. A succession of coups would have hurt French interests in Central Africa. The action went uncondemned in UN bodies.

United States in Greneda, 1983: The U.S. invasion was roundly condemned. The U.S. itself justified the action as a protection of nationals, a response to a legitimate government's request, that is the Governor General's request, and a collective action under Art. 52. The regional issue of Cuban influence was also clear. The humanitarian intervention motive is thin indeed.

This brief overview of a number of cases in which the humanitarian intervention motive has been alleged or claimed shows a mixed picture. What does not emerge is a clear acceptance of the principle of humanitarian intervention and a clear rule guiding when a state may undertake a humanitarian intervention or claim it as a justification for its actions. On the other hand, the treatment of interventions has not been evenhanded. Geopolitics clearly has colored reactions to interventions. The existence of horrible cases of human rights violations also impacted reactions, if only to allow a sigh of relief and a tendency to ignore the means to the desirable end of stopping horrible torture and other violations of fundamental human rights.

D. The Security Council -- Chapter VII Powers[8]

The United Nations Charter vests in the Security Council the authority to make a finding there is a threat to the peace, a breach of the peace, or an act of aggression. The Council can recommend ways to resolve the underlying problems. It also has the powers to decide to use sanctions of many sorts, like embargoes and breaking diplomatic relations, as well as the use of military force, called enforcement actions.

The Chapter VII powers provide the exception to the general prohibition of the use or threat of the use of force for those cases for which there is no other resort. The powers

[8]. This section also follows the presentation of Arend and Beck (1993) contained in their chapter 4, "Collective Use of Force under the United Nations Charter."

granted seem like a collective security system, except that the five permanent members can veto a Security Council resolution and thereby exempt themselves.

In three instances through 1992, the Security Council sanctioned collective use of force under Chapter VII powers: Korea, the Gulf War, and the Somalian Civil War.

Korea, 1950: Because the Soviet Union was boycotting sessions of the Security Council over the seating of Nationalist China, a series of three resolutions (Security Council Resolutions 82, 83, and 84) from June 25th to 27th, found a breach of the peace by North Korea in crossing the 38th Parallel. The resolutions recommended that states assist in repelling the attack and requested the United States to provide a commander for military forces. The authorization to use force was not binding on states. Arend and Beck (1993, 53) note that this was not a true enforcement. It also occurred because of the Soviet nonparticipation. The Soviet Union's return to the Security Council resulted in no further resolutions on Korea. The authorities to pursue the Korean war were in place.

The Gulf War, 1990: In the summer of 1990, the Security Council passed a number of resolutions condemning the Iraqi invasion of Kuwait and its attempted annexation, as well as explicitly invoking Chapter VII powers to sanction Iraq. Resolution 678 in November of 1990 authorized all necessary means to accomplish the required withdrawal of Iraq from Kuwait.

After the UN military alliance attacked and Iraq withdrew, Resolution 687 of April 2nd, 1991, required destruction of chemical, biological and nuclear weapons facilities, and ballistic missiles, subject to international inspection. Resolution 688 of April 5, 1991, required Iraq to give access to humanitarian aid organizations to give aid and to facilitate their work. A memorandum of understanding developed procedures which include no-fly zones and no Iraqi troops in the northern part of the country.

Some see Resolution 688 as a major opening wedge in the development of collective humanitarian intervention. It should be recalled that the resolution was passed in the context of a Chapter VII undertaking. It is not so clear that in itself it is a precedent for collective humanitarian interventions or provides legitimacy to the concept for its use by individual countries. To be sure, the Security Council could in the future declare massive human rights violations a threat to the peace and order forceful action against the offending state. In April, 1992, the Security Council ordered sanctions against Libya because of its support for terrorist groups and its refusal to extradite two persons accused in the Pan Am 103 bombing. Subsequently, in May, 1992, the Council ordered economic sanctions against Serbia for its actions in Bosnia.

The Somalian Civil War, 1992: On December 3rd, 1992, Security Council Resolution 794 authorized the use of force to secure a safe environment to deliver humanitarian aid. The situation in Somalia was found to be a threat to international peace and security, even though no external aggression had occurred. The Security Council explicitly referred to its Chapter VII powers in making the finding and authorizing means necessary to distribute aid.

In one sense, a use of Chapter VII powers is not a humanitarian intervention. The Charter authorizes the Security Council to make its findings and does not limit its judgements. However, the motivation of the Council in Resolution 688 and in the Somalian Civil war to deliver humanitarian aid are not without some importance to understanding the extent of the weight given to humanitarian motives in justification for interventions. Just as motivation of

states is important in evaluating the standing of rules of law, so the motivations of states acting collectively is instructive.

E. Analysis of the Attributes of Article 2(4) and Chapter VII Illustrations

The preceding reviews contain no case of a "pure" humanitarian intervention and in many instances, the humanitarian bias or motives are weak at best. Part of the explanation for this state of affairs lies in the conditions attached for a humanitarian intervention and part of it has to do with the nature of states and international law.

Arend and Beck (1993, 113) suggest four criteria for a humanitarian intervention.

> First, there must be within the target state an "immediate and extensive threat to fundamental human rights, particularly a threat of widespread loss of human life." [Citing Moore, 1969, 205, 264] Second, the intervention's specific purpose must be essentially limited to protecting fundamental human rights. Third, the forcible action must *not* be undertaken pursuant to an invitation by the legitimate government of the target state or done with that state's explicit consent. Fourth, properly speaking, a "humanitarian intervention" *per se* cannot be undertaken with the authorization of the Security Council... [Emphasis in the original and footnotes omitted.]

Conditions three and four basically limit an intervention to actions undertaken without authorization by the target state or under the UN Charter. The first condition indicates that the violations must be widespread and even demand loss of life as a justifying cause. There could be disagreement with the loss of life requirement, but in actual situations it may be a moot point.

The second condition, however, sets a high and possibly unreachable standard. The intervention can be undertaken for no other important reason than a humanitarian purpose. States hardly ever act on a single motive or without calculation of consequences. It is here that the nature of the state system and international law enter. For a state to act "essentially" for humanitarian reasons only would be a clear interference in the internal affairs of another state with no reason of state (no basis for self help) to justify its action. The state system assumes no higher authority in a state and therefore other states do not set themselves up as the arbiters of other states' behavior, except when it touches on their interests. For example, states resort to self help when they intervene to protect their nationals, regardless of the UN Charter, not for humanitarian purposes alone, but to protect their interests as a state. If their nationals can be trifled with and they stand by and do nothing, that may be an invitation to further aggressive testing of resolve and capacity to defend interests.

If every purported humanitarian intervention is subjected to a test that the intervening state's purpose is essentially limited to protecting human rights, with no other goal contaminating their motivation, then no state intervention will ever meet the test of being humanitarian. Whether a humanitarian intervention is legal is moot because there will never be a proper humanitarian intervention that merits evaluation regarding its legality. If, on the contrary, humanitarian motives and goals can be the main goal, or even one goal among many and not even the main goal, then an intervention can be found that meets a test of being humanitarian. The problem would remain, however, whether such humanitarian grounds for an intervention are sufficient under international law to justify the intervention.

The cases summarized provide examples in which the violation of human rights was so widespread and so ruthless that it elicited revulsion. The actions that led to the ending of such behavior, as in the cases of Bokassa, Idi Amin, and Pol Pot, lead to relief by the international community.

Reisman (1984) has argued that the purposes of the UN Charter included the promotion of human rights. The provision of security does not take precedence over promotion of human rights. If a government violates its citizens' human rights, another state may intervene. The government of the persecuting state may not claim that such an intervention is a violation of its state's sovereignty. The violation of sovereignty, Reisman (1990) argues, is the government's violation of the sovereignty of its people by its persecution of them. Intervention would protect the sovereignty of the people against the depredations of the sitting government. The concrete problems implementing such a norm are immense. It could become an excuse for all sorts of adventuresome interventions. Second, Reisman's problem is the overshadowing of the human rights goal of the UN Charter by an overemphasis on stability. His solution is to downgrade stability by weakening the force of Article 2(4). This does not balance competing goals, but substitutes one dominant goal by another.

An alternative view of large-scale human rights violations is that they almost inevitably lead to internal displacement and refugee flows (Keely, 1995b). The uncontrolled flow of citizens who cannot get the protection of their state is a threat to the stability of the receiving state, and perhaps to the state system itself given the demands on the international community to assist and protect refugees. The demands include financial costs, but also involve diplomatic, military and economic costs connected with addressing large-scale refugee flows. Does an offending government have no obligations under such a scenario? Are its actions totally devoid of any aggressive dimension? Does a state's abdication of responsibilities to act as a state should, does its failure to provide the normal protection to its citizens expected in the ordinary operation of the state system, have no consequences for that state? Is sovereignty inviolate regardless of the behavior of a state in its own territory and the consequences of that behavior for other states? These questions imply an alternate view. Human rights violations that result in refugee flows are the responsibility of the offending state. If they persist in behavior that threatens destabilization of another state, that is an act of indirect aggression. Such indirect aggression may rise to the status of the equivalent of an armed attack and permit self defense. Further, a state need not wait until refugees actually cross its border. Insofar as anticipatory self defense is permissible, wholesale human rights violations, because of their consequences for refugee production, can justify anticipatory self defense.

The reasoning can be applied to the UN Security Council's actions in northern Iraq, Somalia, and in regard to Serbian support of activities in Bosnia. An intervention was authorized because human rights violations are threatened one or more receiving countries and the state system generally. Widely shared values oppose violating fundamental rights to life, torture, rape, and so on. The objective of stopping such actions as a humanitarian goal is joined to the reason of state to prevent instability, even if this requires intervention and interference in the internal affairs of a country. Purposeful refugee production and gross human rights violations committed with disregard for their refugee consequences arguably revive self-help competencies in self defense for an individual state, analogous to the justification underlying the three examples of Chapter VII intervention authorized by the Security Council.

The Article 2.4 and Chapter VII cases reveal another pattern. There is a "latent doctrine" or operational code, in Reisman's phrase (1989), evident in the treatment of human rights violations. Even when humanitarian intervention is not explicitly embraced in verbal justifications by states and even when explicitly denied as legitimate by states and commentators, the factor of gross human rights violations seems to offer a mitigating circumstance. The sigh of relief when a particularly vicious leader or regime is removed from the scene and the less rigorous condemnation when the action reduces human rights violations or ends particularly horrible incidents indicates an unstated but understood code or latent doctrine. There are parallels in domestic legal systems in the practices of plea bargaining, reduced sentences, and even non-indictment by prosecutors when a criminal act involves death or injury to a vicious person. Vigilantism is roundly condemned, but sometimes condoned in practice. The more extreme the evil acts of the victim of a vigilante action, the more likely the effect of mitigating circumstances.

The repudiation of Article 2(4) in the case of protection of nationals is a case where toleration of a violation of the Charter arguably has led to the Charter no longer holding in that case (Arend and Beck, 1993). The rule seems to be that states may resort to self help in the case of maltreatment of their nationals in or by another state. While humanitarian intervention has not risen to that level, it arguably could. Currently, it at least seems to be a latent doctrine or operational code that provides mitigating circumstances that affect other states' reactions to some instances of forceful intervention.

F. Conclusion

Article 2(4) prohibits force or the threat of the use of force to settle international disputes. Given the exceptions in Article 51 and Chapter VII, are humanitarian interventions acceptable?

For individual states, the general opinion now is that states may not undertake humanitarian interventions. That conclusion is based on the premises that human rights violations in one state are not a threat to any other state and that humanitarian intervention must but undertaken essentially to prevent the human rights violations, untainted by other motives or goals. Human rights violations that lead to international migration by refugees clearly affects other states and the international system itself by demands made on the multilateral refugee regime. Mixed motivation for some contaminates the human rights goals included in armed intervention and vitiates their force. Given that 2(4) emphasizes peace over justice, any intervention undertaken with a "pure" justice goal would be outlawed. A more realistic view, however, would allow that a state has many motives for acting and would give weight to the relation between human rights violations and threats to stability of states due to refugee flows resulting from rights violations. In such a case, a state could argue humanitarian goals and motives as part of its justification for action.

Chapter VII actions can be taken by the Security Council for whatever reasons the Council decides that there is a threat to or a breach of the peace. Human rights violations could be the basis of such a finding. The probability of that, as indicated by the Somalian, Serbian and Iraqi cases, is increased when the effects on the international system are such that humanitarian aid and protection to people seems absolutely necessary in a situation. All cases to date are extreme. Whether a consensus will develop that earlier and even preventive action may be warranted is possible, but not a foregone conclusion. The three cases cited have not been resounding successes. One argument for their lack of success was that they were too

little, too late. A conclusion from that is earlier action. An equally likely conclusion, although not necessarily an equally correct one, is to avoid such intervention in the future because it is too risky, too expensive in every way, and too likely to fail.

The probable scenarios involving situations where widespread violations of human rights are involved are that humanitarian reasons will not be put forward as the sole reason by an individual country or by the Security Council to justify forceful intervention. Promotion of human rights will be used to help mitigate objections, opposition, or even sanctions for intervention by a state. The logic is that the appeal to humanity will lessen negative reactions or provide some sort of screen to other motives. In order to lessen objections to any intervention, there will be a tendency in the foreseeable future to have recourse, when possible, to multistate actions, even seeking Security Council approval of action. Finally, the issues of humanitarian interventions and the reappearance of widespread human rights abuses related to nationalism, ethnicity, and religion will lead to a reevaluation of the international refugee regime (Keely, 1995b). The reevaluation will probably not focus on basic documents like the statute of the UN High Commissioner for Refugees (UNHCR) or the Convention and Protocol on the Status of Refugees. Rather, the debate will focus on operational issues about the scope of the High Commissioner's role and mandate and the relationships between the UNHCR and other UN agencies.

III Non- forceful Intervention

A. Reality of Intervention

Sovereignty is not nearly so absolute as it is sometimes presented to be. In addition to the use of force to intervene, other mechanisms are intended to and do affect events in states. The intervenors need not be other states. Numerous examples exist of non-forceful intervention that usually are not so labelled, but which come to the same result. International lenders like the World Bank, the International Monetary Fund, and regional development banks (as well as private banks) all intervene by setting conditions to loans and requiring restructuring. To assert that states have a choice about accepting a loan and, therefore, that acceptance of restructuring or other conditions is a sovereign act stretches credibility.

Other actions like monitoring of elections or human rights situations by international observers also have an element of coercion. A state that refuses to cooperate may find itself isolated by its refusal to cede some sovereignty, even if done in a way that formally preserves the appearance of granting permission or inviting observers.

Finally, states impose sanctions on one another. Curtailing trade, freezing assets, or limiting access to other desired goods are meant to affect internal decision making about a variety of issues, including human rights, access to markets, and pricing structures.

B. Non-forceful Interventions for Humanitarian Purposes

Numerous examples exist of interventions to aid and assist people in need (Keely, 1991). In many countries, states, international agencies, and non-governmental organizations

(NGOs) have cooperated on cross border operations to provide relief. Operation Life Line in Sudan, similar efforts into Ethiopia and Afghanistan, are among the examples of trying to aid internally displaced persons.

The development of the concept that voluntary repatriation requires UNHCR presence in the repatriation country to monitor safety for returnees extends the limits of intervention for humanitarian reasons. Similarly, comprehensive peace settlements in Central America (the CIREFCA process), in Afghanistan, and in Cambodia all included processes that involved international actors helping to resettle, to start the development process, and to monitor events as part of peace making and peace building.

The International Committee of the Red Cross (ICRC) has the responsibility to monitor the Geneva Conventions on War. While ICRC almost always takes the route of quiet diplomacy and is careful about not having staff become *persona non grata*, that does not mean the agency is not powerful and effective. The ICRC has moral power and the Conventions have the force of law for signatories and customary law for other states. Thus, while formally the ICRC needs permission from a state to be present, it is not without some resources to attain entry and maintain presence.

In a similar way, many UN specialized agencies have influence to maintain a presence and intervene in internal affairs. Agencies that deal with technical subjects, like medicine and health, have specialized knowledge and networks of professionals, along with resources to affect events.

Finally, NGOs frequently intervene in internal affairs. Like international agencies, they bring monetary resources, specialized knowledge, moral force derived from their humanitarian purposes, and networks. Medical, human rights, refugee, women's groups and many other types of NGOs act in countries in many ways. Some, like Medicins sans Frontiers, are aggressive in pushing for the goals and behaviors they claim are within their special competence.

One strong element that NGOs have is the networking between like-minded groups and affiliates in many countries. This allows for solidarity and the transfer of tangible resources, personnel, expertise, access to people, media, and other sources of influence. Churches, labor unions, and political parties have long engaged in such international undertakings. Now organizations and agencies in human rights, environment, women's issues, refugee protection, the indigenous peoples' movement, and other areas engage in mutual help and support. Local NGOs are quite capable in their use of these resources and the flow is not a one-way street of resources and influence. States, however, often do not control these activities and complain about their influence. There is virtually no escaping the interpenetration of foreign and domestic NGO networks that influence domestic decisions.

C. Effects of NGO Actions for Humanitarian Purposes

Although communications and transportation permits the flow of ideas and resources in ways that far exceed past experience, most of these flows are not attempts to replace the state. Many NGOs try to pressure states to take even greater roles in their societies' lives. Some try to affect government and state and others try to sidestep the state. In general, however, NGO activity supports that state system, even when it challenges states to change. The work of NGOs, and especially the activities of foreign or international NGOs, affects

accountability and helps spread common standards of behavior for states. As such, they are sometimes a counterweight to government and supportive of some opposition factions. Their effects on sovereignty, however, are marginal compared to actions of other states and to the flow of ideas and resources generally. NGOs are a force for change and not necessarily unimportant in the areas where they work. Cumulatively, for example, the work of human rights groups has had important impacts, reduced suffering, and changed behavior. But states still carry out or tolerate human rights violations of enormous barbarity and proportions.

IV Humanitarian Intervention and Sovereignty

A. The Pliability of Sovereignty

A frequent mistake is to assume that sovereignty has a given meaning and is unchanging. This idealism is demonstrably false in the case of sovereignty. As a social construct, sovereignty should be expected to change with circumstances. For example, in the mechantilist era, sovereigns were concerned not so much to control immigration as to regulate and prohibit emigration. To populate was to rule. The United States and Great Britain fought the War of 1812 partially about the right of British citizens to expatriate themselves. It was only in the 19th century that western industrial countries systematically began to regulate immigration. Eventually, in the Declaration of Human Rights of 1948, the right of a person to leave his or her country and to return thereto was recognized as a basic human right. What had been essential to sovereignty in the past, control of emigration, became a human right. The essence of sovereignty changed from the right to prohibit expatriation to regulation of entry and conditions on the entrant into the territory.

It should come as no surprise in light of history that the content of sovereignty can change. The UN Charter itself, in its articulation of the norms of *jus ad bellum*, constrained the scope of self help as previously understood and agreed to. This attempt to redefine the rules for going to war constrained sovereignty in one sense. However, it increased sovereignty in the sense that states would be freer to act without fear of forceful intervention, if the Charter were followed.

B. Is Sovereignty Absolute?

The idea that a state may do whatever it wants in its own territory is an illusion. The nature of the state system itself requires cooperation on many matters. Intercourse among states from mail delivery, to rules on the high seas, to the more complicated and esoteric issues spawned by today's communications, transportation, and technology mean that no land is an island unto itself.

Even basic tenets of state relations affecting sovereignty are in tension. The competence to wage war and the right of non-intervention are of necessity in tension. In practice, one or the other is violated at various times. The very existence of international law and the difficulty of conceiving of a state system without some functional equivalent of international law means that states must enter into agreements. An absolutist vision of the sovereign state is a chimera.

The growth of social networks and technology make cooperation in economic and other spheres almost mandatory for states. In this atmosphere, the growth of economic unions and other forms of multilateralism are, practically speaking, no longer matters of choice for most states.

Finally, the sorts of non-forceful interventions by multilateral lenders and other sources of external pressure, already discussed, indicate that sovereignty is contingent.

If state sovereignty in changeable and contingent, then its scope and content can change, including the conditions under which a state's sovereignty must be respected and the conditions under which a state may lose sovereignty.

C. When a State Does Not Act Like a State, Does It Surrender Sovereignty?

The notion that a state must act like a state to maintain its sovereignty may sound like a novel doctrine, but it is implied by the doctrine of self help and in the modifications to the UN Charter emanating from state behavior since 1945. States acting multilaterally through the Security Council invoking Chapter VII powers in the case of Somalia also have recognized that an imploded state, incapable of providing the most fundamental order that will allow distribution of aid is a threat to the peace. When there is no operative state, sovereignty is hollow. Similarly, when a state sponsors terrorism, even if it does not directly engage in an armed attack of another state as Article 51 proposes, many states have decided that the sponsoring state can be attacked. Less forceful sanctions regarding trade and assets are frequently imposed. A variety of states have decided by their actions, as many scholars agree, that, Article 2 (4) notwithstanding, maltreatment of nationals allows for self help.

Does wholesale violation of human rights lessen a claim to a sovereign right to be left alone? The idea that human rights violations are a threat to state stability by means of the refugee flows that they almost inevitably spawn is becoming more noted (Ogata, 1994; Keely, 1995b). The notion of a relationship between human rights violations and instability via refugee flows, however, has not been translated into an authoritative and controlling rule justifying humanitarian intervention by an individual state or combination of states acting independently of the Security Council in response to wide-scale human rights violations. Criteria could be developed about the nature and level of such violations and proportionate responses outside UN auspices, as they have been in analyses of intervention to combat terrorism (O'Brien, 1990, 477). In the case of humanitarian intervention, such criteria have not been developed to date.[9]

D. Chapter VII and Humanitarian Intervention

Although some would bar any Chapter VII action from being labelled humanitarian intervention because it is authorized, the question remains whether the Security Council will have recourse to human rights considerations in deciding threats or breaches of the peace. The simple answer is that political issues will probably dictate the answer, not legal norms. The Charter gives wide latitude to the Security Council in making a finding about threats to peace. Greater acceptance of the link of human rights violations to instability by means of

[9]. See Section V, below, for a discussion of probable scenarios about sovereignty and humanitarian interventions.

refugee flows could induce a greater sensitivity to human rights behavior of states. A variety of mechanisms to respond exist, up to and including a variety of ways to bring force to bear.

As noted above, the Chapter VII arrangements differ from collective self defense because the five permanent Member States can exempt themselves through the use of the Security Council veto. Human rights criteria may be unevenly applied, therefore. In addition, prudence will also have a role in dictating whether action should be taken against a state. The costs and probability of success (and this includes the opportunity costs of a heavily burdened UN system) will enter the calculus. This underscores the conclusion that humanitarian reasons, if they become more dominant in UN decisions to intervene (and this would hold true for individual states that felt threatened by refugee flows), will be permissive rather than determinative. That is, humanitarian reasons may rise to the level of justifying an intervention, if it were undertaken, but they would not obligate a state or the UN under Security Council direction to intervene. States act for reasons of state and they should not be expected to be or to feel obligated to act when it is not in their interest, i.e., when intervention could harm and even destroy them. It can be expected that stopping human rights violations will remain subordinate to the objective of state survival for the potential intervening state.

Practically speaking, humanitarian reasons to justify an intervention probably will be advanced either by an individual state or in Security Council deliberations only in concert with other reasons that indicate a clear danger to the peace or, in the case of a state, that justify recourse to self help.

V. Is Sovereignty Changing?

The force of the UN Charter paradigm for *jus ad bellum* has been and continues to be questioned.[10] Reisman (1989) proposes that the Charter paradigm need not be questioned if sovereignty were understood to reside in the people and not in the government. In essence, human rights violations against citizens by a government would fall outside Article 2 (4) because intervenors would be helping the sovereign power. As such, they are not violating sovereignty. The practical difficulties, as noted, make this approach questionable. In addition, it fundamentally handles the tension between peace and justice by tilting in favor of justice, contrary to general interpretations of the Charter.

This analysis, based on prior work by the author (Keely, 1995b), suggests a framework that incorporates humanitarian intervention into the current Charter paradigm. Virtually all commentators would agree that a Chapter VII finding could rest on a threat to the peace because of uncontrolled refugee flows. The Somalian case has such a dimension. Whether that will happen in the future and how frequently are political questions.

Concerning intervention by an individual state or collection of states outside a Chapter VII undertaking, the present analysis leads in the same direction. Human rights violations may threaten a refugee-receiving country or region, and indirectly the community of states.

[10]. The thesis of Arend and Beck is precisely that the Charter paradigm is questionable as good law. Their discussions of terrorism, protection of nationals, and other topics are an extended presentation of the scholarly work that questions the authoritative and controlling nature of Article 2(4).

As with terrorism and other sources of aggression and warfare, Article 51 can be construed to permit anticipatory self defense to prevent or stop human rights abuses, to prevent or stop a refugee flow, and to help develop circumstances that would allow voluntary repatriation, the perennially preferred durable solution to refugee flows.

The challenges to the Charter paradigm stemming from state behavior since 1945 in the face of maltreatment of nationals by other states and terrorism, as well as the self-defense interpretation in response to refugee flows developed here, have the effect of reviving self help and expanding states' *competence de guerre* beyond the UN Charter framework. They give larger scope to preemptive self defense. Clearly, any evaluation that a plain reading of Article 2(4) is no longer good international law inherently alters the balance among the competing rights of sovereignty. That is exactly what the Charter set out to do in 1945 by reining in the use of force. The issue is whether self help has been revived in some instances, is in the process of being activated in others, and may be a force in the future in still other instances. Protection of nationals is virtually accepted as not bound by Charter norms. Anticipatory self dense is widely practiced in regard to terrorism. The threat of human rights violations to stability via refugees is increasingly noted and the implications have been drawn out in this study. Additional instances of recourse to human rights arguments in the future will be needed to make a more convincing case about international law.

Meanwhile, the content and scope of sovereignty already have changed and are in the process of changing. Those changes, in the current context, are coming from the challenges to the UN Charter paradigm about the rules for the use of force. These challenges, many unknown or unforeseen in 1945, include protection of nationals, terrorism, nuclear power, biological and germ warfare capabilities, mixed conflicts, and humanitarian intervention. It is increasingly recognized that human rights violations are no longer just a second or third order issue for international relations. From a hard-nosed, *real politik* perspective, they are a major worry in many places for their effects on stability, state survival, and international war and peace.

However, humanitarian intervention is not the main challenge currently to the UN Charter paradigm and it is not the main reason for the reallocation of weight among the competing elements of sovereignty. To single out humanitarian intervention as a threat to sovereignty, in fact a major contemporary threat, is to focus too narrowly, indeed to distort events. Protection of nationals and responses to terrorism, for instance, have been more influential in challenging the UN Charter framework and realigning sovereignty doctrine and practice. Finally, and perhaps paradoxically, like other challenges to the Charter paradigm, selective humanitarian intervention may preserve sovereignty, the stability of states, and the state system itself, which is needed, if the concept of sovereignty is to have any content or meaning in the real world and if the UN Charter goals of peace and security are to be attained and maintained.

Summary

Using a positivist approach to international law, this paper uses the United Nations Charter framework on the law of war to explore the impact of humanitarian intervention on sovereignty.

Focusing first on forceful interventions, the paper reviews the UN Charter's prohibition of the use of force enunciated in Article 2(4) and the major exceptions allowed for self defense (Article 51) and for Security Council authorized use of force (Chapter VII). Instances of forceful interventions by states to protect their own nationals in other countries and to combat terrorism indicate that states do not follow UN Charter. Some international law analysts argue that the Charter is not accepted as authoritative nor did it control the behavior of states in such cases. Examples of interventions with a humanitarian dimension by individual states (11 examples) and after a Security Council authorization following a Chapter VII finding (3 instances) are reviewed. While no illustration of "pure" humanitarian intervention is found, the analogy of the protection of nationals and combatting terrorism supports the conclusion that, because human rights violations that lead to refugee flows can contribute to destabilization, such violantions can rise to the level of indirect aggression and justify self defense.

The paper goes on to review a series of nonforceful interventions by states, multilateral agencies, and nongovernmental organizations (NGOs). These activities indicate that a conception of sovereignty as absolute noninterference is descriptively inaccurate. Further, the UN Charter prohibition of the use of threat of force downplays the self-help dimension of sovereignty. Self help and nonintervention are both aspects of sovereignty and are in tension. An increasing acceptance of a principle of justifiable humanitarian intervention, therefore, would not be equivalent to a diminution of sovereignty. Rather, it would shift emphases about expected and permitted state behavior. Nonfulfillment of expected state protection of its citizens and residents may result, because of refugee flows, in revival of self help and justifiable self defense involving forceful intervention. Thus, while recourse to interventions with at least a partial humanitarian justification arguably has altered and may further alter the doctrine of sovereignty, it does not destroy sovereignty. Rather, humanitarian interventions modify the doctrine and practice of sovereignty by deemphasizing noninterference and reviving self help competencies.

Finally, humanitarian intervention has played a subordinate role in whatever transformation has taken place in the doctrine of sovereignty since the adoption of the UN Charter. State behavior regarding protection of nationals, terrorism, mixed and civil conflicts, and other actions have led to questioning the *jus ad bellum* as stated in the UN Charter. These changes, along with nonforceful intervention by states, international agencies, and NGOs, have been far more important that humanitarian intervention in the on-going changes in the definition and concrete expression of sovereignty.

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