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HUMANITARIAN INTERVENTION AND RELATIONAL SOVEREIGNTY

1. INTRODUCTION

Humanitarian intervention with military force has no firm theory under the international legal apparatus because sovereignty, the inviolate claim of a nation-state against all others, is a legal shield against outside intervention in a nation's internal affairs. The United Nations (UN) Charter under Article 2(4) prohibits the "threat or use of force" against another state, even when civil bloodshed is creating humanitarian disasters. The Charter allows only two exceptions to this prohibition: Article 51 in Chapter VII of the Charter allows a nation to use force in self-defense if an armed attack occurs against it or an allied country, and the United Nations Security Council (UNSC) is authorized to employ force to counter threats to breaches of international peace. Humanitarian intervention rests upon the unconvincing fiction of the danger that a civil conflict may spill over a nation's borders, at least if it is to be justified under the UN Charter.

A better account of the fate of national sovereignty in cases of international humanitarian intervention in human rights disasters derives from what I call a theory of "relational sovereignty." This theory arises under today's conditions of globalization and describes the role of the sovereign government as an obligation to meeting its citizens' civil, political, social, and economic needs, according to the government's capacity, and always working for its citizens' good. A government fails in its governance role when its murderous, corrupt, or persistently neglectful actions lead to serious human rights harms. Under the theory of relational sovereignty, widespread and extreme harm to citizens is evidence that sovereignty is no longer an absolute shield against international intervention. Put differently, relational sovereignty puts human rights at the heart of good governance.

A widespread and extreme humanitarian crisis alters sovereignty in two ways: First, citizens rather than the government are seen as the bearers of their national sovereignty. If their government no longer represents their best interest, the nation's sovereignty no longer coalesces in its government. Second, citizens rely on the international community to express their sovereign interest in good governance when they themselves

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are unable to depose a government that harms them. In other words, their national borders have metaphorically fractured, allowing other nations in the international community to step across to their assistance. When sovereignty is seen this way – as an obligation of attentive governance, which the international community can insist upon on behalf of a nation's citizens – it need not be breached when humanitarian intervention takes place.

This temporary dispersal of national sovereignty from a nation's citizens to the international community is easiest to map onto humanitarian crisis of murderous civil conflict. It is more difficult to map onto humanitarian crises of malnutrition and starvation. But I argue here that humanitarian intervention may also be justifiable for massive cases of letting-die, such as starvation and disease. In other words, national sovereignty cannot shield corrupt or neglectful governments that fail to distribute essential sustenance – food, medical care, and essential services – to their citizens in exigent circumstances. International morality is invoked not only for the commissions of nation-states, but also for their omissions. My argument is that widespread death by malnutrition or disease should make a government just as culpable as death by civil violence, where the government has the capacity to prevent starvation and disease and fails to do so. When a government *negligently* fails to prevent a national crisis that leads to widespread death, that government's claim to inviolate sovereignty *qua* other nations or the international community is invalid.

But expanding humanitarian intervention into a general license for war against repressive regimes is dangerous. The equitable principles of fairness show that humanitarian interventions should be restricted to very few situations. In what follows, I set out the problems with the legal apparatus of humanitarian interventions under Chapter VII of the UN Charter, and how this apparatus is out of step with an emerging notion of sovereignty. Using relational sovereignty as a theory for lowering the defense of sovereignty against the legitimacy of international humanitarian interventions, and using familiar principles of equity and individual rescue in tort, I set out three limiting principles for international humanitarian intervention and then briefly test these against the ongoing US invasion and occupation of Iraq.

2. THE PROBLEM WITH INTERVENTIONS UNDER CHAPTER VII OF THE UN CHARTER

The last decade of humanitarian intervention has been a patchwork of inconsistent justifications, too-often sluggish international responses, and

varying degrees of efficacy in bringing assistance to failed states. On the face of Chapter VII of the UN Charter, intervention in purely civil unrest contravenes the principles of national sovereignty. There is no mention in the Charter for intervention on purely humanitarian grounds. And yet there have been several Chapter VII interventions in recent years. In each of the humanitarian crises of Somalia, Rwanda, Haiti, and Bosnia, the UN has authorized intervention across national borders. In each of these cases, internal national conflicts were incongruously reinterpreted as wars that could spill into other nations so that Chapter VII could be made to fit.

Not surprisingly, these awkward interpretations are contested. For example, in 1994, the UNSC passed Resolution 940 to justify an international military mission to Haiti under its Chapter VII powers, citing fears that the civil conflict in Haiti threatened the region's peace and security. In fact, Haiti's problems were specific to its own politics and history and were unlikely to cross its borders. The UN intervention was opposed by many Latin American countries and led to the charge that the real motive was not humanitarian but political – namely, to restore democracy and the rule of Jean-Baptiste Aristide.[1]

The fiction is that an internal human rights crisis may spill over a nation's borders and pose a threat to regional peace and security. But the "breach of regional peace" fiction does not easily apply to a human rights crisis in a remote part of island nation that has little impact on its neighboring nation-states. For example, when in 1999 rampaging Indonesian militiamen were slaughtering East Timorese by the hundreds, this human rights crisis did very little to threaten the peace or security of any other country in the region. In the absence of grounds for a Chapter VII intervention, even more creativity was called for. UN Secretary-General Kofi Annan issued a statement that senior Indonesian officials risked prosecution for crimes against humanity if they did not consent to the deployment of an available multinational force. Annan insisted that the Indonesian government either step in end stop the killing, or alternatively, consent to the deployment of international troops, failure to take one option or the other. Not surprisingly, Indonesian took the second option would result in Indonesians being held criminally liable for human rights violations.[2] The humanitarian intervention in East Timor has given rise to what has been termed the "Annan Doctrine": a loss of the traditional prerogatives of sovereignty in the face of crimes against humanity.[3]

Some scholars argue that Article 2(4) of the UN Charter prohibits *any* military intervention in other states on the grounds of purely internal violations of human rights. Others argue instead that the recent humanitarian interventions that have occurred with a UNSC resolution under Chapter

VII have created a de facto exception to Article 2(4). Still others argue that humanitarian intervention may be morally justified, albeit not legally justified, without a formal UNSC Resolution. In such cases, some other record of the UNSC's condemnation of the target country's human rights record is sufficient, and the lack of any formal UNSC Resolution simply reflects international politics rather than any lack of genuine humanitarian concern. This occurred in relation to the 1999 NATO attack on Serbia that successfully rescued the Albanian Kosovars from Serbian ethnic cleansing. NATO acted because the UN could not. Richard Goldstone, chair of the subsequent Independent International Commission on Kosovo, concluded that even though the Kosovo intervention did not have the backing of a UNSC resolution, it was never the less a *legitimate* intervention. NATO's actions had resolved a humanitarian crisis and had widespread support within the international community and civil society. Furthermore, the Commission argued that the gap between legal and legitimate humanitarian interventions is dangerous and needs to be removed by specifying the conditions for humanitarian intervention. In other words, what matters more than a legal permission to intervene is a moral permission to intervene. This moral permission legitimates the intervention, even though it cannot render the intervention fully legal under the terms of the UN Charter.

The legal constraints upon international humanitarian intervention are out of step with the moral urge to prevent loss of life in a nation with a humanitarian crisis. Efforts to fit humanitarian intervention into the existing international legal apparatus are fictions, crafted so that international action may follow international moral opprobrium. They are, more honestly, a simple judgment by the international community that a nation's government has failed its citizens. I want to suggest that the "Annan Doctrine" deployed in East Timor is the way ahead. It shows the sovereign – here, the Indonesian government – bargaining directly with the international community through the UN over human rights standards and trading some of the traditional prerogatives of sovereignty for freedom from international criminal prosecution. In this way, the sovereign answers not only to its own citizens for its failures of responsibility, but answers also to the international community. The stakes of the negotiation are sovereignty. Sovereignty is not only a duty of government to protect the human rights of its citizens, but a bargaining chip in international negotiation over humanitarian intervention, with the international community acting on behalf of a nation's citizens.

3. RELATIONAL SOVEREIGNTY

In the twentieth century the view was that national sovereignty applied universally to all nations with a seat at the UN table, but that it did not

impose a practical requirement to assist people in need in other lands. It suggested that we need not be morally troubled that other people in other lands need our care. Under the twentieth century metric, international sovereignty was a "thin" responsibility – at heart, merely a duty or obligation each state owes to all others to observe national borders.[4]

Sovereignty today is best understood as vastly more complex. Economic interdependence between nation-states has grown, accelerating with the end of the Cold War, the expansion of the European Union (EU) and the growing influence of the World Trade Organization and the World Bank. More subtly, the proliferation of regional and international organizations has led to a diffusion of state influence beyond their sovereign borders. This distribution is uneven, and often unjust. Even so, globalization has blurred the distinction between domestic politics and international politics. What was once seen as a parochial national issue may now become a matter of regional or international concern.[5]

This growing transnational awareness of the plight of another nation's people has in part been the product of the last decade's expansion of human rights as an international rhetoric of demand aimed at governments by citizens and outsiders alike – a rhetoric that is simultaneously elaborated in international human rights treaties. Much of the human rights rhetoric, as well as the content of many international human rights treaties, is a "wish list" that goes far beyond a nation's capacity or political will to fulfill. Even so, new global and international communities are judging national compliance against international human rights standards. The UN, regional systems like the EU and the Inter-American systems, and myriad non-governmental organizations, have both direct and indirect input into human rights issues today. Claims that states have violated their citizens' human rights, either overtly or simply by maldistributing essential goods in exigent circumstances, come from sources both inside and outside the state. Ever-expanding economic, cultural, and intellectual interdependencies between states, and between the citizens of states, are forging tenuous bonds of interest and concern across national borders. Do these bonds – much more tenuous than the bonds of shared citizenship of a state, and contingent upon international communication – amount to a moral relationship that crosses state borders? And if it does, how should it influence the moral calculus about coercive interventions in a state's human rights abuses of its citizens?

Relational sovereignty proposes that sovereignty today is dependent on the measure of care by government for its citizens and that the international community may step in militarily to enforce this care. Sovereignty, in other words, carries a more expansive definition than it used to. Relational sovereignty describes sovereignty as an emerging set of obligations among

citizens, governments, and the international community, with two dimensions. The first is a duty upon governments that correlates with the activities of their citizens, even if those activities extend beyond the nation's borders. For example, the activities of the US government extend beyond the borders of the United States not only because of US military and economic interests, but also because US citizens have myriad capital, corporate, professional, and recreational interests and activities beyond US borders. Second, relational sovereignty describes the interest that one country may have in the quality of governance in another country. For example, the nations of the EU have an interest in the quality of governance of nations applying to join the Union, and an improving human rights record is an important chunk of the EU accession process. In other words, sovereignty is a qualitative function rather than an unconditional status, and a function that may be assessed by citizens and the international community alike. A nation's claim to sovereignty – the sort of strong claim that under the traditional definition of sovereignty would have kept other nations at bay and beyond its borders – will not necessarily be recognized by other nations. This is especially so if a government is creating a human rights crisis. Relational sovereignty places such interactive judgments at the center rather than the periphery of responsible governance.

Relational sovereignty can be applied to humanitarian intervention. International peacekeeping activities of the last decade have emphasized the growing role of international human rights norms when considering the need to override sovereignty to protect a nation's citizens. In 1999, the UNSC's resolution authorizing the intervention of international peacekeeping in Kosovo referred to the resolution of "the grave humanitarian situation in Kosovo."[6] And more recently in 2004, Kofi Annan urged the UNSC to take action in the Darfur region of Sudan, citing "strong indications that war crimes and crimes against humanity have occurred . . . on a large and systematic scale".[7] When national sovereignty is seen as a normative standard that is conditioned upon a government's good human rights performance, this decade's peacekeeping and humanitarian missions create a new principle for humanitarian intervention. National sovereignty will not deter the international community when a state is committing human rights abuses. National governments must discharge their duty of care towards their citizens, and the "court" of international opinion passes judgment. The international community acts as proxy for a state's citizens in judging its care for them. If the sovereign fails to treat its citizens within the bounds of human decency, the social contract between the ruler and the ruled collapses, and an assessment of that

government's failings becomes a tripartite negotiation between sovereign, citizens, and the international community.

4. THREE PRINCIPLES LIMITING INTERNATIONAL HUMANITARIAN INTERVENTION

Widespread recognition exists that the UN Charter is out of step with contemporary international conditions. The 2004 UN Secretary-General's High Level Panel on Threats, Challenges, and Change[8] emphasized the interconnectedness of terrorism and civil wars, and extreme poverty. In welcoming the Panel's report, Annan enthused about the "opportunity to refashion and renew our institutions," including a more systematic and effective mechanism for intervention in humanitarian crises. In the meantime, while this reform process takes place, the gap between legal and legitimate justifications for interventions in humanitarian crises should be closed. In a world of complete justice, no government would ever seriously harm its citizens, either directly through violence or indirectly through incompetence, corruption, or maldistribution of social and economic goods. But there is no complete justice. At the same time, the extreme step of military intervention should meet an extremely high standard of clear need, even more so if intervention does not fit Chapter VII conditions of threatening regional peace and security. I want to offer the legal principle of equity as a way of justifying and containing the new global awareness of harm a state does to its citizens, pending full recognition of the legitimacy of humanitarian intervention under the theory of relational sovereignty. Equitable principles can balance the benefits and the dangers of humanitarian intervention.

Equity has its historical foundation in both morality and law. When, in the early days of modern courts, the letter of the law failed to provide a remedy for deserving plaintiffs, judges used their discretion to grant a remedy "in equity." Without a statute to guide them, judges have created the "common law" by articulating equitable principles that are so taken-for-granted that they do not need the authority of constitutions or legislation. The common law has in this way created fundamental legal principles that courts have elaborated over the years. These principles of equity have become the fail-safe of courts that ensure that justice is done. In these situations, "equity intervenes when there is no adequate remedy at law."[9] Courts fall back to equitable remedies in order to "provide fairness in a particular case of law."[10] In other words, equity allows a court to fill the gaps of formal laws so that justice and fairness may prevail.

Equitable principles are already part of international law, and have been applied in international judicial decision-making to ensure justice and fairness to the state parties. For example, the Statute of the International Court of Justice (ICJ) lists general principles of law recognized by civilized countries as one of the four sources of law, and the Court assumes that it is always entitled to have recourse to the use of equity. Equity, states the Court, is "implicit in the functions of a world tribunal."[11] One recent example is the Court's decision in the case about the Israel-Palestine wall. The Court directly cited equitable remedies, with all of the opinions referring to the "basic fairness" to the people of both territories, with Judge Owada stating:

> Consideration of fairness in the administration of justice requires equitable treatment of the positions of both sides involved in the subject-matter in terms of the assessment both of facts and of law.

Equity should provide relief when the lives of innocent civilians are at risk:

> Condemnation of the tragic circle of indiscriminate mutual violence perpetrated by both sides against innocent civilian population should be an important segment of the Opinion of the Court.[12]

My argument here is that equitable principles and equitable doctrines can be applied to sovereignty, describing the duties of government towards its citizens and constraining intervention by the international community. Using equity, together with principles of interpersonal rescue under traditional tort law, I suggest three threshold conditions for intervention.

The first condition is that the humanitarian crisis must be widespread and extreme for intervention to be justified. This test already de facto exists in international law and has been applied over the last decade to interventions in cases of genocide and widespread civil murder and mayhem.[13] I argue that this test ought also apply to interventions that seek to alleviate mass starvation and disease. The crucial element for both types of widespread harm is the culpability of the national government in either causing or allowing such harm. The second threshold condition is that intervention must be welcomed by a firm consensus of injured citizens within the ailing state. Of course, this test is difficult to establish because it requires an *ex ante* assessment of popular support for intervention. It is easy to assume popular support for intervention when there is some reliable institutional litmus of public sentiment, as when in 1999 the UN intervened in the East Timor mayhem after the overwhelming "yes" vote of the East Timorese referendum seeking secession from Indonesia. But

such clear evidence is usually not available because oppressive governments rarely allow institutional expressions of unpopular sentiment about them. Finally, the third threshold test requires that international intervention do some good, and at very least, do no harm. This is also hard to establish: it requires excellent information about the politics, the capacity, and the popular preferences of the country where intervention might take place, and this information must point to the strong likelihood that intervention can improve conditions in the recipient country. If these three conditions are not in place, then intervention is unlikely to produce improved human rights. When they are, intervention can rightly be seen as an urgent expression of assistance to another nation's people in need. Improving respect for human rights is the raison d'être of humanitarian intervention.

4.1 Threshold Test 1: Conditions Must be Extreme and Widespread

International law holds that a nation's absolute sovereignty is sacrosanct and should be respected by other states. Despite this, military intervention, either multilateral or unilateral, has been justified under international law in the last decade where civil conflict was causing death or physical harm to innocents.[14] But whereas intervention has been a measure of last resort in halting civil conflict, military intervention has not been justified in other situations of widespread death to innocents, such as terrible malnutrition, starvation, and disease, even when those terrible circumstances have arisen from a government's culpable inaction. The international community typically intervenes in such cases by sending economic aid, both immediate aid with food and personnel, and longer-term economic aid for building a country's infrastructure. Yet corruptly governed countries, even those with very low internal revenues, still resist international economic incentives to prevent malnutrition and disease through better distribution of scarce social goods. Zimbabwe, for example, has high rates of government corruption and high rates of infant mortality and death from disease, including HIV-Aids. It has widespread poverty caused by its government. At the same time, Zimbabwe is resistant to international pressure to reform its politics. For countries that lie beyond indirect international influence, is there another way to incentivize their governments to distribute social goods more equally among their citizens? Where a Chapter VII intervention on the grounds or regional peace and security is not justified, and international economic incentives are not reducing the death toll, should there be an alternative rationale for forced intervention in a government's harm to its citizens?

One approach could be to revisit the justifications for military humanitarian intervention and ask: Is there a philosophical difference between intervention for genocide and intervention for mass malnutrition and starvation caused by corrupt or negligent governance? Why should a slow death through starvation be categorically different from a swift death by machete? The total numbers of deaths of citizens does not distinguish the cases, nor does the pain and anguish experienced by their victims. If it is accepted that the philosophical rationale for humanitarian intervention is the international community's interest in protecting the suffering citizens of a nation, surely this ought equally apply to death delivered by degrees over weeks and months. Equity looks to the moral culpability of a party for the harm of a victim. The test is justice and fairness, not just sovereignty. The key justification for international humanitarian intervention ought be a government's culpability in causing, or failing to prevent, the widespread death of innocents, rather than the method of causing those deaths.

The test of widespread harm has already emerged for international intervention in civil carnage. For example, after the civil and political crises in Rwanda and Kosovo, Annan stated that military intervention could be legitimate if there is an acute human rights crisis and if all diplomatic efforts have failed. Annan's test could be read to mean that military intervention may also be justified for widespread starvation through a government's negligent or intentional failure to distribute minimally necessary goods and essential sustenance. Governments that fail miserably in their duty to ensure their populations' well-being, either through bad intentions or through corruption or negligence, are surely failing in the obligations of the sovereign to care for its citizens.

States that have no capacity – commonly referred to as "failed states" – are outside this first threshold test because those governments are not the direct cause of the conditions causing the deaths of citizens. The crucial element here is a government's capacity to help its citizens. And surely there is no moral difference between deaths caused by a government's failure to keep the peace and deaths caused by a greedy government's failure to distribute social and economic goods among all its population. There is little practical difference either: recent studies have shown that the perception that intervention in civil war is straightforward is simply wrong. Instead, it is more realistic to acknowledge that intervention is always complicated, and its success or failure depends much more upon long-term support than it does on the initial justification for intervention. Death by civil violence and death by corruption or neglect ought to be treated equivalently, equally justifying military humanitarian intervention if the harms are as equally widespread.[15]

Applying this to the US invasion of Iraq, for example, a true humanitarian intervention would have depended upon more widespread harm. This threshold test would rule out humanitarian intervention in Iraq because human rights abuses there, though extreme in some cases, were not as widespread as either mass starvation or large-scale ethnic cleansing.

4.2 Threshold Test 2: Intervention Must be Welcomed by the Victims

The common law does not demand that an individual accept help from a bystander. The law of equity has applied this in the area of medical assistance, crafting the equitable doctrine of self-determination. This is defined as "one's ability to exert autonomy over one's own person, which includes the right to prevent unwanted bodily invasion and, therefore, the right to refuse unwanted medical treatment."[16] As long as a person has the rational ability of an adult, he may refuse medical treatment. Applying this principle to international military intervention, equity suggests that just as people may refuse medical intervention, citizens also may make a political choice not to be saved from their sovereign's tyranny. In other words, international intervention must only take place if the beleaguered citizens of a nation-state wish it. Using East Timor as an example, I want to suggest that this idea of consent is already forming de facto in the international system. From 1975 to 1999, there had been active resistance among the East Timorese people to Indonesian rule – resistance that was regularly reported in the international press and was a subject of heated diplomacy between Indonesia and other nations. When the 1999 referendum in East Timor voted overwhelmingly for independence from Indonesia, the UN's decision to send troops to stop civilian murder was easy. The East Timorese had expressed a clear mandate for the UN to step in on their behalf.

But in many cases of widespread civil unrest or widespread starvation and disease, there is no such unambiguous expression of the popular will as there was in East Timor. What information can the international community rely upon? Even more problematically, what are the moral obligations of the international community if it seems that a population consents to its own violation? Equity is a guide here. Sometimes, an individual's refusal of medical treatment may be overridden where there are other interests, such as the preservation of life, the prevention of suicide, the protection of innocent third parties, and the integrity of medical ethics. But the courts are extremely cautious about stepping over apparent consent to self-harm. For example, in *Gray v. Romeo*, 697 F. Supp. at 580, a 1988 decision of the US District Court of Rhode Island, the court stated:

> Although Marcia Gray has a constitutional right to refuse life-sustaining medical treatment, no right is absolute . . . Accordingly, Marcia Gray's right must be balanced against

competing governmental interests that include: the preservation of life, the prevention of suicide, the protection of innocent third parties, and the integrity of medical ethics . . . Upon examination, Marcia Gray's interest in self-determination outweighs all governmental interests.

Marcia Gray had the right to make a self-harming decision in refusing food and hydration. The same question needs to be asked about a nation's people who seem to be acquiescing in their own government's harm or neglect. The equitable doctrine of self-determination can either act as a brake on intervention by imputing to citizens their preference to suffer under a corrupt or violent government rather than have outsiders come in and impose solutions, or it might act as a justification for intervention by imputing that citizens could not possibly consent to the degree of extreme and widespread harm in their country.

The second threshold test will also be hard to satisfy in most cases, as most corrupt or authoritarian governments do not take the pulse of their citizens' feelings. Absent a referendum such as in East Timor, there must be clear evidence of such a groundswell of popular opinion that there is likely to be very little insurgent reaction against international intervention and very high levels of cooperation with those intervening forces in the days and weeks following invasion. Applying this to the US invasion of Iraq, for example, would have called for better empirical knowledge of the human rights conditions in Iraq, and would have meant taking seriously those provisions in the 1991 UNSC resolutions that referred to human rights by, for example, sending human rights monitors as well as weapons inspectors to Iraq. Anything less than East Timor's expressions of popular will must be viewed with extreme caution. Intervention must be informed by opinions of people currently living under a repressive government and not only the views of a vocal diaspora of past inhabitants.

4.3 Threshold Test 3: The Intervention Must Produce More Good than Harm

Finally, the third threshold test requires that international intervention ought only take place where it will do good, and at very least, do no overall harm. Returning to the individual rescue analogy, equity does not require a bystander to be a Good Samaritan and help another in distress. But if bystanders choose to intervene, two conditions apply: first, they must intend to help the victim; and second, at very least they must not do harm. If the bystander causes more harm to the victim, it raises the question of misfeasance or bad intent on the part of the bystander. Applying equity to international law, humanitarian intervention into another nation's human rights crisis ought to bring an improvement, and

at the very least, must not make the human rights situation worse. If conditions worsen, the Good Samaritan has not been so good after all. Equity emphasizes two things: first, that humanitarian motivations must seek predominantly to help the people of another nation and not to pursue other geopolitical agendas; and second, intervention must improve, or at very least not worsen, conditions for the citizenry. Like Threshold Test 2, this makes intervention harder not easier, to justify. Improvement in conditions for citizens in the recipient country must be substantial, and not likely to be outweighed by harms that may come from insurgent resistance to the international forces. Improvements in living conditions must occur immediately, instantly providing relief from ghastly circumstances. And the intervention must also demonstrate the likelihood of long-term improvements, such as improved governance and better distributive mechanisms for social and economic goods.

How might this last threshold test operate? The United States' unilateral invasion of Iraq fails the Good Samaritan test because not only were weapons of mass destructions not found, but the invasion came at a huge cost of lives for the Iraqi people, with some 25,000 Iraqi civilians killed in the first two years. Given the relative size of the two countries, this number of civilian deaths would be the equivalent of roughly 300,000 American deaths. The application of an international Good Samaritan doctrine would seek to limit the harm within Iraq. An acceptable alternative might have been to deploy troops on the border to put pressure on the Iraqi regime to comply with the 1991 Security Council resolutions. The potential task of those troops would not have been invasion and regime change, but the protection of in the event that the government decided to crush an uprising, as happened, for example, in 1991. Under the equitable doctrine of the Good Samaritan, the US invasion could be seen as misfeasance – the sin of commission.

5. CONCLUSION

A couple of decades ago, neither the UNSC nor the governments of individual nations relied so heavily on issues like human rights, genocide, oppression, and torture when justifying intervention in civil conflicts. This is changing. There is today an unprecedented awareness of the plight of people in other nations. Globalization has accelerated this debate through its focus on the role of governments in responding to international pressures for expanded human rights. This awareness has altered the expectations of sovereignty: the international community places an affirmative duty upon national governments not only to keep the peace, but to

distribute minimal material goods sufficient to prevent starvation. Military humanitarian interventions of the last decades are invoking a moral language of international interest in the competence of domestic governments. International humanitarian intervention has become one way of expressing compassion for citizens who are too silenced, too sick, too hungry, or simply too neglected, to demand more of their government.

While death by government violence or civil war may seem a more shocking failure of a government's duty of care to its peoples, in fact, widespread death through malnutrition or disease may render a negligent government equally culpable. The rationale for international intervention ought to apply to both active infliction of violence and passive ignoring of death and disease. In both cases, the sovereign government has failed in its role to protect its people. A murderous, corrupt, or neglectful government's failure to prevent the death or injury of its citizens amounts to a fracturing of sovereignty. This creates an opportunity – a moral permission rather than a legal obligation – for other nations to act as Good Samaritans. In these circumstances, the international community may provide a remedy to beleaguered citizens – a remedy that exists as a matter of equity rather than as a matter of law, and which may be the impetus for a Chapter VII intervention.

The test should be extreme and widespread harm, whether this comes from deadly civil mayhem or malnutrition and diseases. An equitable international right to intervene in the intentional harm inflicted by a government or its negligent failure to distribute public goods should come into play when national sovereignty has been overtaken by a government's action or inaction towards its people. It needs to be an overwhelmingly welcome intervention, with good *ex ante* evidence of internal support. And it must be an intervention that improves the lives of citizens, and certainly does not make their life harder. For, even when intervention is supported by a large majority of a population, history shows that some resistance and insurgency will likely cause further bloodshed and harm. For intervention to be justified, there must have been such extreme and widespread hardship in that country that the bloodshed of a forced international presence seems minor in comparison. Finally, humanitarian intervention is only justified if there is a long-term commitment to building something better in the place of what is destroyed.

NOTES

1. And yet another way of creating moral grounds for intervention arises when the UN is already participating in the settlement of a civil war or is somehow involved in the

region. Multilateral humanitarian action by a coalition of states without UNSC sanction in these conditions seems more plausible. There have been multilateral military interventions outside the UN Charter when, for example, the 1995 Serbian massacre of some 7,000 Muslim males in the supposed UN "safe haven" of Srebrenica gave rise to NATO's role in Bosnia. This led to Washington's coercive diplomacy that hammered out the Dayton agreement.

2. Annan warned that if Jakarta refused to accept the international community's assistance, it could not "escape the responsibility of what could amount . . . to crimes against humanity." See *Transcript of Press Conference of Secretary-General Kofi Annan, at Headquarters, 10 September,* United Nations Information Service UNIS/SG/2360, at: http://www.unis.unvienna.org/unis/pressrels/1999/sg2360.html?print. Or, in the words of the Geneva Conventions, Indonesian leaders would be left open to international prosecution because they had not taken "all feasible measures" to stop the violence. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, art. 68, 6 UST 3516, TIAS No. 3365, 75 UNTS 287.
3. UN Secretary-General Kofi Annan, Speech to open the General Assembly on September 20, 1999.
4. This conception of sovereignty extended to both internal and external relations: a state exercises extensive control over its people within its territory, but at the same time it must respect the authority of other states within their territorial borders. This is a "thin" conception, as it concentrates on the state's right to govern its citizens, not on the state's responsibilities towards its citizens. For more on this see Jonathan H. Marks, "Mending the Web: Universal Jurisdiction, Humanitarian Intervention and the Abrogation of Immunity by the Security Council," 42 *Columbia Journal of Transnational Law* 445, 477 (2003).
5. An example for such occurrence can be found in the case of East Timor. East Timor declared its independence from Portuguese colonization on November 28, 1975. Nine days later it was invaded and occupied by Indonesian forces, killing 60,000 Timorese in the initial assault. At the time, the international community did not initiate any actions targeted at the protection of the Timorese people. More than 20 years later, on August 30, 1999, in a UN-supervised popular referendum, an overwhelming majority of the people of East Timor (78.5%) voted for independence from Indonesia. By this time, the region's aspirations for independence were the focus of the UNs, which agreed to send a multinational peacekeeping force to the region in the pre-referendum phase, at the request of Indonesia. Soon after the referendum, antiindependence Timorese militias – organized and supported by the Indonesian military – commenced a large-scale, scorched-earth campaign of retribution against the East Timorese. On September 20, 1999 the Australian-led peacekeeping troops of the International Force for East Timor (INTERFET) deployed to the country and brought the violence to an end. On May 20, 2002, East Timor was internationally recognized as an independent state.
6. See .SC Res. 1244, UN SCOR, 4011th mtg., UN Doc. S/RES/1244 (1999).
7. Emily Wax, "Sudanese getting little help U.N. estimates death toll has nearly doubled to 70,000 since Sept. 9," *The Washington Post*, November 17, 2004, A10.
8. The UN Secretary-General, Kofi Annan, established the High-Level Panel on Threats, Challenges and Change in November, 2003 in order to examine new dangers to international security and to recommend ways of strengthening institutions of collective security. See http://www.un-globalsecurity.org/panel.asp.

9. Thomas O. Main, “Traditional Equity and Contemporary Procedure,” 78 *Washington Law Review* 429, at pp. 476–478.
10. Jack Moser, “The Secularization of Equity: Ancient Religious Origins, Feudal Christian Influences, and Medieval Authoritarian Impacts On the Evolution of Legal Equitable Remedies,” 26 *Capitol University Law Review* 483 (1997), p. 484.
11. See General Information about ICJ: http://www.icj-cij.org/icjwww/igeneral information/ibbook/Bbookchapter7.HTM.
12. See ICJ website, http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm.
13. The requirement of an extreme and widespread humanitarian crisis, as a just condition for humanitarian intervention, has also appeared in the works of others. See Michael Walzer, *Just and Unjust Wars* (New York: Basic Books, 1977) and Fernando Teson, *Humanitarian Intervention: An Inquiry into Law and Morality* (Ardsley, NY: Transnational Publishers, 1997).
14. This threshold test would rule out humanitarian intervention in Iraq because human rights abuses there, though extreme in some cases, were not as widespread as either mass starvation or large-scale ethnic cleansing.
15. Here, I am utilizing the distinction between civil and political rights as they are expressed in the “International Covenant on Civil and Political Rights,” and social and economic rights as they are expressed in the “International Covenant on Social, Economic and Cultural Rights.”
16. See Kristin M. Lomond, 31 *University of Louisville Journal of Family Law* 665, 670 (1993).