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HUMANITARIAN ASSISTANCE BY INTERNATIONAL ORGANISATIONS: A QUESTION OF COMPULSORY ACCESS TO VICTIMS

The article examines a question that frequently arises when a State faces a disaster which threatens the lives of its nationals. Is the State in such a situation under an obligation to allow international humanitarian organisations into its territory to assist those in need of help? The issue pits the notion of State sovereignty against the sanctity of human life.

ON 5 April 1991, the United Nations Security Council passed Resolution 688 and, thereby, gave international law a prod in the right direction. By ordering Iraq to "allow immediate access by international humanitarian organisations to all those in need of assistance in all parts of Iraq", the Security Council made a crucial contribution to the individual human being's struggle for protection in international law.[1]

The resolution had in mind the plight of the Kurdish population in Iraq. Problems for Kurds there began in earnest in the aftermath of the Gulf War in February 1991. Kurdish rebels started an uprising, unsuccessful to date, to establish an autonomous Kurdistan mini-state in north-eastern Iraq. This prompted a violent response from the Saddam Hussein regime which left over a hundred thousand Kurdish civilians displaced without adequate food, shelter and medical supplies. The circumstances facing the Kurds raise a recurrent issue. Is a State which is either unable or unwilling to render relief to its civilian population in a disaster situation obliged in general international law to allow international humanitarian organisations access to victims of such disaster? This issue encompasses but is not on all fours with the question whether a State has an obligation to accept aid. A mere obligation to accept aid does not ensure that the State will dispense the aid it receives fairly or effectively to the victims. It may be that the grant of access to humanitarian organisations is a form of acceptance of aid. Nonetheless, it is more useful to address the question of access rather than the acceptance of aid *simpliciter*.

This is especially important where the State is reluctant to help the stricken population, as in the case of the Kurds in Iraq. Another example we may draw from current events is the medical assistance brought to the besieged Croatian town of Vukovar by an European Community convoy.[2] The federal Yugoslavian government may be disinclined to

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1 S/RES/688 (1991), 5 April 1991; reprinted in (1991) 30 I.L.M. 858.

2 See *The Asian Wall Street Journal*, 21 October 1991, Vol. XVI No. 36, p. 1.

worry about the conditions of life in that territory. It may also be inappropriate to badger the federal government to accept aid on behalf of the Croatians. Nonetheless, there is the possibility that the government will not interfere with non-military assistance being rendered to Croatian civilians. Sometimes, it is not so much inability as indisposition on the part of the State that creates the threat to life. Therefore, the thrust of this article is the issue of direct access to victims of disaster by those who are qualified to render humanitarian aid. It will be argued that if there is an obligation to grant access, it should be granted to legitimate humanitarian organisations.

The article does not seek to elucidate the various treaties and conventions regulating the conduct of warfare. A number of States are under treaty obligations to grant access to persons in need of assistance in their territory. Reference will be made where these treaties are relevant to the discussion at hand. The focus is on the possibility of an obligation found in general international law, as opposed to treaty law, with regard to disaster victims.

The obvious obstacle to the existence of such an obligation is the principle of State sovereignty, which involves the corollary prohibition against interference in the internal affairs of a State. Only less than two decades ago, the Final Report on the Reappraisal of the Red Cross contained the following remark: "Current international law, which is largely based on traditional practice, does not obligate a State in any way to accept emergency aid even when its population is in extremely grave danger."[3]

This article will argue that the above caveat on emergency aid, generous to the State even at the time it was made, may be out of place in today's world. Inroads, of which Resolution 688 was one, have been made which force us to re-examine the sacrosanct notion of State sovereignty.

Humanitarian assistance as an issue in international law is merely one facet of the perennial tension between the sovereignty of the State and the well-being of the individual.[4] A review of how the interests of the individual have gained a foothold against the omnipotent State is therefore a useful starting point of discussion.

I. STATE SOVEREIGNTY

The present world order has as its basic tenet the idea that all States are sovereign and equal. International law developed through the will of States, which were also traditionally its only subjects, to regulate affairs

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[3] Tansley, *Final Report: An Agenda for the Red Cross* (1975), p. 80.

[4] In this article the focus is on the emergency aid given by non-governmental international relief organisations to victims of disasters, whether caused by the forces of nature or man-made. The right of States to have access and render aid to nationals of another State in times of disaster is a separate issue. The latter may be justified on other grounds, *e.g.* humanitarian intervention or self-help in the event of breach by the victim State of an international obligation, and is not discussed here.

between them. Until the latter half of the twentieth century, the prevailing view was that international law was concerned only with relations between States. What happened within a State's territorial domain was a matter exclusively within that State's jurisdiction. The manner in which a State treats its own nationals was not a matter with which international law concerned itself.[5]

The exclusion of individuals from the international law domain led to a severance of the individual's welfare from the duties of States in international law. While rights and obligations were formed and discharged at State level, the individual who was the ultimate recipient of the consequences of inter-State dealings was almost a nonentity in the eyes of the law. Thus, when an individual was injured by acts contrary to international law committed by another State, his only avenue of complaint was through his State. His State, and not the individual, was then regarded as the aggrieved party.[6]

This neglect of the individual was identified by Jessup as one of the main defects of the international legal system. The fundamental tenet that international law was a law only between States, and not between individuals or individuals and States, had removed the individual one stage away from the application of the law. Thus, in legal jargon, he was not a "subject" of the law but only an "object".[7]

II. WINDS OF CHANGE

Although States remain the principal actors in the international legal arena, it can no longer be maintained that only inter-State matters have consequences in international law. Certainly, since the *Reparations* case,[8] international organisations have broken the stranglehold that States had of international rights and remedies. International society no longer possesses solely inter-State characteristics. An impersonal international legal system that served the parochial interests of governments has metamorphosed into one that diffuses the power of States and allows participation by functional groups espousing pluralistic concerns. The increase of participation in the global process means that values previously ignored as inconsequential have been brought to the fore by participants less hindered by the shackles of political expediencies.[9] Among the chief concerns of the newly-composed world order are social justice and human rights.

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5 H. Lauterpacht(ed.), *Oppenheim's International Law: A Treatise,* Vol. I(8thed., 1955), § 292, p. 641.

6 *Mavrommatis Palestine Concessions Case (Jurisdiction)* P.C.I.J., *ser.* A, No. 2, p. 12 (1924).

7 Jessup, *A Modern Law of Nations* (1948), p. 8.

8 I.CJ. Rep. 1949, p. 174 (Advisory Opinion).

9 See generally McDougal and Reisman, "International Law in Policy-Oriented Perspective" in MacDonald *et. a/,* (eds.), *The International Law and Policy of Human Welfare* (1978), p. 103.

The individual person, previously a ghost in the machinery of the world order, has gained prominence as the rightful beneficiary of an enlightened system of law. This is not to say that the individual is now cloaked with all the trappings of legal personality as a subject of international law. What it means is that the law of nations has now shifted emphasis "to give effect, through appropriate limitation and international supervision of the internal sovereignty of States, to the principle that the protection of human personality and of its fundamental rights is the ultimate purpose of all law, national and international."[10]

A constant theme in developments since the Second World War, no doubt in response to the horrifying excesses committed during that period, has been that there must be respect for the well-being and rights of the person. This concern was expressed in a number of internationally-negotiated documents. To avoid a discourse on history, suffice it to say that the idea of human rights is now firmly embedded in international consciousness by documents like the U.N. Charter,[11] the Universal Declaration of Human Rights 1948[12] and the two covenants adopted by the General Assembly in 1966. These two documents are the International Covenant on Civil and Political Rights (hereinafter referred to as "Civil Rights Covenant") and the International Covenant on Economic, Social and Cultural Rights (hereinafter referred to as "Economic Rights Covenant").[13]

There is scant agreement on the status of specific rights pronounced by various instruments on human rights. Nonetheless, there are some "core rights" which enjoy almost universal recognition.[14] While the content of the rules which command observance is still unsettled, it is undeniable that human rights as a concept has taken root in international law.[15]

III. BASES FOR HUMANITARIAN ASSISTANCE

It may be difficult to find examples in practice where a State has been compelled, against its will, to grant access to its stricken population. The more common problem is the lack of humanitarian assistance from outside, not the reluctance of the State to permit it. Recent examples of inadequate foreign help in the face of national catastrophies are found in Bangladesh (cyclone), China (flood) and the Philippines (volcanic eruption).

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[10] E. Lauterpacht (ed.) *International Law: Collected Papers ofH. Lauterpacht(l915),* Vol. II, Part 1, p. 47.

[11] The relevant expressions are found in the Preamble, Article 1, para. 3, Article 55, para. (c), and Article 56.

[12] G.A. Res. 217A (III), 3 (pt. 1) GAOR, Resolutions (A/810), p. 71. The voting was 48 for and none against. Eight States abstained.

[13] Adopted by G.A. Res. 2200 (XXI) of 16 Dec 1966, 21 GAOR, Suppl. No. 16 (A/6316), p. 49 (Economic Rights Covenant), p. 52 (Civil Rights Covenant). Both texts are reprinted in (1967) 61 Am. J. Int'l L. 870.

[14] For a discussion on the idea of a hierarchy of human rights, see generally Meron, "On a Hierarchy of International Human Rights" (1986) 80 Am. J. Int'l L. 1, p. 11.

[15] For a brief outline of "precedent, United Nations practice, regional practice, state practice, scholarly writing and world opinion" on this, see Teson, "Le Peuple, C'est Moi! The World Court and Human Rights" (1987) 81 Am. J. Int'l L. 173, p. 175.

On the other hand, it can hardly be said that there are many instances in recent history where reputable international relief organisations have been denied access to victims of major disasters. If there was interference with relief work, it seldom came in the form of a flat denial of access. For example, in Ethiopia, the ousted regime of President Mengistu which was widely perceived to be hindering aid shipments to rebel-held areas, nevertheless, officially permitted the ICRC (International Committee of the Red Cross) to mount large-scale aid programmes during the famine of 1984-85.[16] Governments could easily agree to access in principle, knowing that there would be a host of practical difficulties which could hamper relief activities during the actual field operations.[17] By itself, this general practice of assent is not conclusive that an obligation to permit access is established in law. Nonetheless, it does show a reluctance on the part of States to appear to be directly challenging humanitarian principles.

A. *Human Rights Basis*

It has been seen above that in principle, human rights now form a branch of international law, although the status of various "rights" is an open question. We can, fortunately, by-pass much of the uncertainty about the contents of human rights. If there is any right which is universally recognised as a human right, it must be the right to life.[18]

This right is expressed in most international instruments on human rights. Among the notable documents propounding the principle that everyone has a right to life are:

(i) The Universal Declaration of Human Rights, Article 3: "Everyone has the right to life, liberty and security of person."[19]

(ii) Civil Rights Covenant, Article 6: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."[20]

(iii) The European Convention on Human Rights, Article 2, para.l: "Everyone's life shall be protected by law. No one shall be arbitrarily deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law."[21]

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[16] See ICRC, *AnnualReport 1985,* (1986),pp. 22-24. The Ethiopian People's Revolutionary Democratic Front, which set up an interim government after overthrowing President Mengistu, had at least promised aid agencies that relief operations would be a priority. As reported in *The Times,* 1 June 1991, pp. 1, 24.

[17] See ICRC, *ibid.,* at p. 23; see also *The Economist,* 8-14 June 1991, p. 44.

[18] Meron identifies the right to life as one of four rights forming an "irreducible core" of fundamental norms. See Meron, *supra,* note 14, p. 11.

[19] *Supra,* note 12.

[20] *Supra,* note 13.

[21] E.T.S. No. 5; U.K.T.S. 70 (1950), Cmd. 8969.

(iv) The American Convention on Human Rights, 1969, Article 4, para. 1: "Every person has the right to have his life respected. This right shall be protected by law, and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life."[22]

The content of the right to life is not limited to the specific provisions laid down in covenants. Whether as a general principle of law, as supported by its enshrinement in municipal law, or as a rule of custom, as evidenced by its frequent, unopposed exposition in international fora, this right has emerged as a prominent norm in itself. The scope of the right, therefore, transcends the limitations of the written documents which purport to expound it.[23] Thus, while discussions centred around the provisions of a covenant may illuminate the general nature of the right, its application to any given circumstance does not depend on specific treaty coverage of that situation.

The prohibition against arbitrary killing is a settled component of the right to life. For our purpose, what is in question is whether this right includes a right to the basic necessities of life, for example, food, shelter and medicine. If a person is denied access to those basic needs in a situation where life cannot otherwise be sustained, would the right to life be violated?

One view is that the right to life is really a right to be safeguarded against arbitrary killing. This would include homicide by purposeful starvation or exposure to extreme temperature. However, it cannot be invoked to "guarantee any person against death from famine or cold or lack of medical attention."[24] This view requires that the "right to life" be construed in a strict sense. In this sense, it is not concerned with the necessities of survival which are more appropriately covered under the right to an adequate standard of living and health under the Economic Rights Covenant.[25]

The above view suffers from a number of weaknesses. First, it confuses the sustainment of life with providing an adequate standard of living. The minimum needs for sustaining life and the requirements for a proper standard of living are not the same. The former refer to those very elementary needs necessary to keep life going while the latter lies on a less urgent plane of requirements. It is only when life is sustained that we can talk about the quality of life and standard of living. In disaster

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[22] Text reprinted in (1970) 9 I.L.M. 673.

[23] Ramcharan, "The Concept and Dimensions of the Right to Life," in Ramcharan (ed.), *The Right to Life in International Law*, (1985), p. 3.

[2] Robinson, *The Universal Declaration of Human Rights: Its Origins, Significance and Interpretation* (2nd. ed., 1958), p. 59; see also Dinstein, "The Right to Life, Physical Integrity and Liberty" in Henkin (ed.), *The International Bill of Human Rights* (1981), pp. 114-115; Przetacznik, "The Right to Life as a Basic Human Right" (1976) 9 Hum. Rts. J. 585, pp. 586, 603.

[25] Articles 11 and 12, *supra*, note 13.

situations, when denial of emergency provisions can result in deaths, we are not talking about a denial of "an adequate standard of living." Such denial virtually amounts to a deprivation of life.[26]

Secondly, the strict view presumes that the rights enunciated in the Civil Rights Covenant are devoid of social and economic content. This is a fallacy. The rights in the two covenants of 1966 are inter-related. The fact that there are two separate covenants does not mean that there is an invisible wall requiring that one group of rights operate in isolation from the other.[27] It can even be said that in some instances, civil rights and social and economic rights merge so that there is no clear demarcation between the two categories. In a judgment delivered in 1979, the European Court of Human Rights held that the Civil Rights Covenant may be interpreted so that its scope extends into the sphere of social and economic rights. The two fields are not sealed off in mutually exclusive compartments.[28]

Thirdly, there have been authoritative statements against a restrictive meaning of the right to life. Admittedly, a proposal to encompass the right to subsistence was not accepted by the Commission on Human Rights when the Universal Declaration was drafted.[29] As developments since then have demonstrated, too much importance should not be attached to this rejection. In its gerieral comments on Article 6 of the Civil Rights Covenant, the Human Rights Committee said that:

> [T]he right to life has been too often too narrowly interpreted. The expression inherent right to life cannot properly be understood in a restrictive manner, and the protection of this right requires that states adopt positive measures. In this connexion, the Committee considers that it would be desirable for State Parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.[30]

The European Commission on Human Rights has also stated that "the concept that everyone's life shall be protected by law' enjoins the State not only to refrain from taking life 'intentionally' but, further, to take appropriate steps to safeguard life."[31] Likewise, the Inter-American Commission is of the view that the right to life has negative as well as

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[26] Menghistu, "The Satisfaction of Survival Requirements" in Ramcharan, *supra*, note 23, p. 67.

[27] Capotorti, "Human Rights: The Hard Road Towards Universality" in MacDonald, *supra*, note 9, pp. 987-990.

[28] *Airey case* (1979) Y.B. Eur. Conv. on Hum. Rts. 420.

[29] U.N. Doc. E/CN. 4/21 (1947), p. 59; cited in Alston, "International Law and the Human Right to Food" in Alston and Tomasevski (eds.), *The Right to Food* (1985), p. 25.

[30] *Report of the Human Rights Committee*, UN doc. A/37/40 (1982) Annex V, para. 5.

[31] *Decision on Admissibility*, Application 7154/75; cited in Ramcharan, *The Concept and Present Status of the International Protection of Human Rights* (1989), p. 10.

positive dimensions. The latter would require that priority be assigned to "rights to survival" and "basic needs".[32]

Apart from the consequences flowing from the right of life to life itself, the obligation to take positive action is expressly stated in a number of documents. Article 2 of the Civil Rights Covenant reinforces the rights recognised in the covenant by stipulating that States have a duty "to respect and ensure to all individuals within its territory and subject to its jurisdiction" those rights. The Human Rights Committee has clarified that the implementation of Article 2 does not depend solely on the enactment of laws protecting those rights, but requires specific activities to be undertaken by the State to enable individuals to enjoy their rights.[33] Therefore, it is not sufficient for the State to refrain from positive action which violates those rights. The State must take affirmative action to see that everything is done to enable individuals to exercise their rights.[34]

Similar undertakings are reflected in other instruments. Like the Civil Rights Covenant, Article 1 of the American Convention on Human Rights uses the words "respect" and "ensure". Article 1 of the European Convention on Human Rights reads: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention." In less direct fashion, a duty to act positively, and not merely to refrain from violations, with regard to human rights, can be found in both the Universal Declaration and the U.N. Charter. The preamble of the Declaration requires "every individual and every organ of society... to secure their universal and effective recognition and observance." In Article 56 of the Charter, all Members of the United Nations have pledged themselves "to take joint and separate action in co-operation with the Organization," to promote, *inter alia*, universal respect for, and observance of, human rights. Admittedly, the implications of the undertaking in Article 56 are subject to controversy. Its precise import has not been authoritatively determined. This does not mean that it has no normative value. At the very least, deliberate, gross violations of human rights would appear to be a violation of the pledge.[35] It is also fair to say that "[a]n undertaking to co-operate in the promotion of human rights does not leave a state free to suppress or even remain indifferent to those rights."[36]

Finally, it violates commonsense to hold that denial of access to food to a prisoner is a denial of the right to life, but not the refusal to permit access to food and other basic survival requirements to thousands of

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32 Inter-American Commission on Human Rights, *Ten Years of Activities*, 1971-1981 (1982), p. 322.

33 U.N. Doc. A/37/40, p. 109.

34 See Kabaalioglu, "The Obligation to 'Respect' and to 'Ensure' the Right to Life" in Ramcharan, *supra*, note 23, p. 165.

35 Henkins, "Human Rights" in Bernhardt (ed.), *Encyclopedia of Public International Law*, Instalment 8 (1981), p. 268.

36 Schwelb, "The International Court of Justice and the Human Rights Clauses of the Charter" (1972) 66 Am. J. Int'l L. 337, p. 340.

innocent people resulting in their deaths. In the case of a prisoner, his access to food is barred by the cage around him. In a calamity, the idea of sovereignty acts as a cage around the people making foreign aid unavailable. In both cases, the State must act to preserve life. Where a State forbids or hinders the arrival of help to disaster victims, it is no longer merely failing to act, but positively contributing to the threat to life. One writer made the pointed remark that:

> If deprivation of the lives of millions of people through lack of access to survival requirements is not a right to life issue, we can only say that the whole concept and notion of the right to life in its restricted and narrow sense does not apply to more than a million people around the globe.[37]

Thus, the denial of aid to victims of disasters would be a violation of the right to life. If a State refuses to use its own resources to help its stricken population, this in itself would be a breach. If a State does not have the resources, then it is likely that it is not in breach, although there seems to be some ground for saying that a State must work towards having an adequate early warning and relief system. In any event, unless a State is able *and* willing to adequately deal with the situation, it is not too much of a jump in reasoning to say that it must allow external help into its territory to do what it cannot or would not do, *i.e.* to ensure the survival of its people.

This brings to the fore again the tension between the right to life and State sovereignty. It boils down to the question: does State sovereignty override the right to life so as to prevent external help from saving the lives of civilians in danger? Unfortunately, tempting though it is to categorically say "no", the law does not allow a firm answer either way. The subject of humanitarian intervention is still hotly disputed. However, if we look at the rationale behind the protests, we will find that they are actually based on a fear of breach of national security and interference in the government of the country. Humanitarian assistance by neutral relief organisations can steer clear of this paranoia. It is certainly a more acceptable solution than forcible humanitarian intervention by States. After all, humanitarian assistance should not be seen as intervention at all, but rather as "international efforts to alleviate human suffering."[38] Once the risk of a breach of national security is avoided, the scales balancing State sovereignty and the right to life should tip in favour of life. It is not justifiable to brandish the concept of State sovereignty on bare nationalistic grounds to deprive people of their lives when there is no fear of a violation of the tangible interests of the State. From a functional point of view, it may be said that State sovereignty and its sister concept, the equality of States, are merely tools of expe-

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[37] Menghistu, *supra*, note 26, p. 65.
[38] Macalister-Smith, *International Humanitarian Assistance* (1985), p. 72.

diency in the chosen machinery of a decentralised world order. The worship of sovereignty as an inviolable commandment has never been encouraged. In modern times, it is seen by some as a persistent obstruction to "international goodwill, cooperation and agreement."[39]

B. *A General Principle of Law*

Is it right for a State to ignore the plight of hundreds, maybe thousands, of its people who would die from starvation, exposure or disease if the State does not either initiate or allow help for them?

For most of us, the impulsive response must be that it does not seem right. Once the issue is stripped of all political considerations, the basic requirement of the situation is obvious. Morality dictates that something needs to be done. The same moral rationale probably underlies the law of criminal omissions found in many legal systems in the world.

This brings us to the next possible basis for an international law obligation to permit humanitarian aid. If an obligation to save life is commonly found in various jurisdictions, there would be justification for such an obligation in international law as well. The source for this obligation can then be said to be found in the "general principles of law recognised by civilised nations."[40]

1. *Laws on criminal omissions*

One concept which is fundamental to many legal systems is that there is a duty to come to the rescue of people in danger in one's presence. A comparative study published in 1966 revealed that this concept is neither new, nor peculiar to western philosophy. Laws punishing those who fail to aid others in danger hark back to ancient Egypt and India. Roman law did not address the issue but specific examples of criminal omissions could be found. Homicide by wilful starvation was one such offence.[41] This concept appeared in a more modern setting in the nineteenth century in various European countries, among them Russia, the Netherlands and Italy. The concept finally took root after the Second World War and found its way into almost every criminal code enacted therafter.[42]

Municipal law would of course contain detailed provisions which are not pertinent to the international context. The focus on one individual's duty to help another also means that certain criteria cannot be applied to the State's duty in times of calamity. For example, almost every code on the subject excuses a person from acting if doing so will endanger his own life or health. In addition, a person must be in physical proximity

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[39] Johnston, "The Foundations of Justice in International Law" in Macdonald, *supra*, note 9, p. 123.

[40] Article 38, para. 1, sub-para, (c) of the Statute of the International Court of Justice.

[41] Kirchheimer, "Criminal Omissions" (1942) 55 Harv. L. Rev. 615.

[42] Feldbrugge, "Good and Bad Samaritans" (1966) 14 Am. J. Comp. L. 630.

to the danger to be seized of a duty. Article *422bis* (1961) of Belgium's Criminal Code of 1867, for example, requires that "the offender could have helped without exposing himself or others to serious danger." He is also excused if, in the circumstances, he could believe that there was no danger to the victim. Similar provisions can be traced eastward across the European continent to Yugoslavia, where Article 147 of the Criminal Code of 1951 reads: "Whoever fails to extend assistance to a person finding himself in direct danger to life whereas he could have done so without danger to himself or another, shall be punished with imprisonment of up to one year."[43]

These criteria will of course be irrelevant where the obligation of the State is in issue. The State can hardly excuse itself on such grounds.

The duty to rescue also presupposes serious danger to a person, and the possibility of effective intervention. Transposed to a full-scale disaster setting involving the State as would-be rescuer, the requirements are clearly met. Of course, the penal sanction is not duplicated to make a breach of this duty an international crime. Nevertheless, the existence of the duty has firm grounds to stand on.

A word must be said about the Anglo-American position. In England, and in the United States, it is fairly accurate to say that there is no criminal liability where death results from a failure to aid a person in peril. Even so, courts uncomfortable with egregious displays of indifference to an endangered life have found sufficient exceptions to the rule in order to penalise such apathy. The moral force of the laws found in other jurisdictions has not infrequently influenced Anglo-American decisions.[44] Debate has continued to this day on whether English law should join the mainstream approach to this subject.[45]

The Anglo-American status quo should not obstruct the elevation of the commonly-found duty to assist to the international plane. First, global unanimity is not a precondition of "a general principle of law."[46] There is sufficient support for the principle as it is.

Secondly, opponents of the doctrine do so on grounds which are inapplicable to the State. Some of these arguments may be briefly identified. From a practical point of view, there are the difficulties in determining the sphere of liability and administering the rule. These would include questions of who among a group of potential rescuers has the duty and what sort of help will discharge the duty. There is also the question of

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[43] These are among the translated provisions from twenty-three jurisdictions listed in Feldbrugge's article. *Ibid.*, pp. 655-656. Note must be taken that the list was made in 1966. These provisions may have been amended since then.

[44] For a list of examples, see Note, "The Failure to Rescue: A Comparative Study" (1952) 52 Colum. L. Rev. 631, p. 635n.

[45] See for example, Ashworth, "The Scope of Criminal Liability for Omissions" (1989) 105 L.Q.R. 424, and the reply by Glanville Williams in "Criminal Omissions" (1991) 107 L.Q.R. 86.

[46] Waldock, "General Course on Public International Law" (1962-11) 106 *Hague Recueil* 54; part reproduced in Harris, *Cases and Materials on International Law* (3rd. ed., 1983), p. 41.

the state of mind required for liablity; the *mens rea* of the offence. Williams brings up the further point that it is unfair to label guilty non-doers under the same offence as doers because public attitudes towards wrongful action and wrongful inaction differ. He also mentions the prevailing gear of law enforcement agencies towards offenders by active conduct.[47] From the sociol-philosophical angle, there is the argument for individual autonomy and liberty.[48] The rule could also lead to individuals interfering unnecessarily in each other's affairs out of fear of legal prosecution.[49] It is apparent that none of these objections survive their journey into the realm of State-citizen interplay.

Thirdly, even Anglo-American law recognises a duty to act where there is some sort of a relationship between the parties. Treatment of these exceptions has not been consistent enough to permit clear rules to emerge. Without embarking on a lengthy exposition, there is a view that a contractual duty *per se* is a sufficient basis for criminal liability.[50] Objection to this proposition is particularly strong where there is no co-relation between the contractual duty and the harm to the victim. Otherwise, it has a fair degree of support.[51] As mentioned earlier, the morality of the situation does bear upon court decisions. This explains why implied contracts can be found in situations which one would not consider commercial in ordinary circumstances. Kirhheimer suggests that a more satisfactory explanation is that a legal duty may be inferred where the relationship between the persons is strong and manifest enough. This can be proven where there is mutual reliance giving rise to "the expectation that in an emergency a limited faith or trust will be honored."[52]

2. *A State and its subjects*

This brings us to the relationship between the State and its subject. There is a danger of being lost in a quagmire of political theories of State here. I shall attempt to state a few points which should not generate too much controversy.

A State is not, either in form or in substance, a permanent creature born of divine origins. It is an entity of pragmatism; established to satisfy the needs of people in a particular environment. This truism has a pedigree dating back to the time of Plato. An excerpt from *The Republic* reads:

> A State ... arises out of the needs of mankind; no one is self-sufficing, but all of us have many wants ... as we have many wants, and many persons are needed to supply them, one takes a helper

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47 Williams, *op. dr.,* note 45, p. 88.
48 See the discussion in Ashworth, *op. cit.,* pp. 427-430.
49 *Supra,* note 44, p. 642.
50 See *e.g., Instan's case* [1983] 1 Q.B. 450; *Pittwnod's case* (1902) 19 T.L.R. 37.
51 See the discussions in Ashworth, *op. cit.,* pp. 443-447; and Kirhheimer, *supra,* note 41, pp. 630-635.
52 *Ibid.,* p. 625.

> for one purpose and another for another; and when these partners and helpers are gathered together in one habitation the body of inhabitants is termed a State.[53]

It follows that the State is an association of people assembled together to secure for themselves their needs and necessities. The State has a function, and it is to serve the people. The question of how it can fulfill that function is altogether a different matter. For our purpose, it is sufficient to keep in mind that this is the purpose of the State.

To carry out its function, certain powers are conferred on the State. There is nothing inherent or abstract about the powers of the State. The sovereignty of the State, over which so much fuss has been made, is merely a conferred competence to issue orders without a need to refer to a higher authority. This sovereignty is exercised only through the human agents of the State. Viewed in this manner, it is not self-generating but a method of conferring power upon men to whom certain functions have been entrusted.[54] Through these men, who form the "government", the State acts to satisfy the wants of the people on a large scale and the power thus conferred is exercised towards that end, and that end only. Power is not possessed for its sake alone; and a right of sovereignty likewise exists only for the ends it is supposed to serve.[55]

A theory widely-subscribed to is that the legitimacy of the State and of its power to issue orders arises from a contract between the State and its subjects. Under this contract, "the state agrees to provide certain services, both in creating the conditions for a secure life and in the more direct promotion of well-being, in return for which the subjects agree to obey and sustain the state."[56]

It is obvious that the case for a duty on the State to act in relation to its subjects is much more cogent than that between a would-be rescuer who comes upon his endangered fellow man. If we adopt the Anglo-American contractual requirement, it is precisely the well-being of its subjects which the State was given its powers to upkeep. In no other circumstances would the need to fulfill this social contract be as pressing as when their lives are being threatened. If we follow Kirhheimer's analysis, it is again inevitable that we find such a strong relationship of mutual reliance that it must give rise to a duty to act.

When a State denies humanitarian organisations access to its subjects, not only would it have failed to act in fulfilment of the ends for which it was established, it would be an active violator of those purposes.

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[53] As quoted in Scott, *Law, The State, And the International Community* (1939), Vol. II, p. 190.

[54] Laski, *Studies in Law and Politics* (1932), pp. 237, 240.

[55] *Ibid.*, pp. 245, 261.

[56] Barker, "Obedience, Legitimacy, and the State" in Harlow (ed.), *Public Law and Politics* (1986), p. 5. The idea of a "social contract", while differing in content from writer to writer, is deeply rooted in many works which have influenced modern philosophy. Its proponents include Hobbes, Locke and Rousseau.

Comparisons can even be made between the hindrance of relief work by the State and the obstruction of rescue attempts to save life in municipal law. The latter is so firmly established as a punishable wrong that no elaboration on the point is needed.

C. *Maintenance of International Peace and Security*

The above grounds for humanitarian assistance, even if well-founded in logic, will almost certainly be challenged out of fear that they will amount to a *carte blanche* for meddling with a State's internal affairs. Sovereignty is still a concept close to the heart of many States.[57]

Perhaps, in the light of today's political climate, the least controversial relief operation would be one having the mandate of the Security Council of the United Nations behind it. There is little doubt that the Security Council can act to maintain international peace and security. The basis for this is found in Chapter VII of the U.N. Charter, particularly Article 39 which reads as follows:

> The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

Resolution 660, the first of many Security Council resolutions on the Iraq-Kuwait conflict, was prompted by what the council perceived as a breach of international peace and security.[58] The overriding concern to restore peace in the area was reflected in subsequent resolutions.[59]

Those resolutions were, however, a response to the traditional form of a breach of international peace, *i.e.* an armed attack on a neighbouring State. The power under Article 39 had never been exercised to initiate humanitarian assistance for the repressed nationals of a State.

In this regard, Resolution 688 was a watershed. It recognized that domestic turmoil can threaten international peace and set a precedent for the compulsory facilitation of international humanitarian action. This threat to international peace the Security Council found in the repression of the Iraqi civilian population, "which led to a massive flow of refugees towards and across international frontiers and to cross-border incursions."[60]

While acting under the banner of maintaining international peace, the Security Council was also able to give bite to human rights law. The resolution demanded that Iraq end the repression of its civilian popula-

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[57] This is especially true of third world States which wield it as a shield against first world interference. See Johnston, *supra*, note 39, p. 123.

[58] S/RES/660 (1990), 2 August 1990; reprinted in (1990) 29 I.L.M. 1323.

[59] See *e.g.*, S/RES/674 (1990), 29 October 1990; reprinted in (1990) 29 I.L.M. 1560; and *SI* RES/678 (1990), 29 November 1990; reprinted in (1990) 25 U.N.L.R. No. 4, addenda ii.

[60] Preamble; see also Article 1. For text, see *supra*, note 1.

tion, including the Kurdish population. In less mandatory language, it expressed the hope that "an open dialogue will take place to ensure that the human and political rights of all Iraqi citizens are respected."[61]

Resolution 688 was not expressly stated to be made under Article 39, or Chapter VII. Nonetheless, it was made for the maintenance of international peace and security. Arguably, the full effect of Chapter VII could eventually be brought to bear on the situation if Iraq chose to ignore the resolution. Under Article 42 of the Charter, the Security Council could resort to force to remedy the breach of peace if "measures not involving the use of armed force" under Article 41 were inadequate. Having found that Iraq's treatment of its own nationals created a threat to peace and security, it would have been legitimate for the Security Council to follow up with more rigorous measures if they felt it appropriate to do so. This meant that humanitarian assistance could have been effected by force, if necessary.

Of course, events since the resolution have shown that the resolution has not been of much comfort to the Kurds. Yet it cannot be said that it was a total futility. Where the Kurds are concerned, the resolution may have helped in tempering the violence being employed against them. If we look further, the resolution could also be an important springboard for future enforcement of humanitarian needs.

As a subsidiary point, action under the Charter may be considered to be enforcement of a treaty insofar as the Charter is itself a treaty between members of the United Nations. However, since the reach of the Charter is nearly universal, it may conveniently be considered to be as general in application as custom or a general principle of law.

IV. NATURAL AND MAN-MADE DISASTERS

A particularly thorny problem faced by would-be relief workers is the paranoia of the State concerned when the emergency is brought about by an ongoing insurgency or civil war. When the government of the day is faced with the prospect of being forcibly ousted, it can be very sensitive about perceived outside interference. Naturally, the incumbent government would not be happy at all if relief in any form were to reach the insurgents. It is presumably this fear that prompted suggestions that a line be drawn between natural and non-natural disasters.[62]

This attempt to set apart emergencies created by strife is not entirely unjustified. Traditionally, situations of armed conflict have been governed by a distinct legal regime. This regime, which has the paradoxical

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[61] Article 2.

[62] During the General Assembly meeting on Resolution 36/225, U.N. Doc. A/36/737/Add. 1 (1981), a number of States, mostly from Eastern Europe, wanted to limit the scope of the resolution to natural disasters. They were in the minority, however, and subsequently voted against the resolution which was passed notwithstanding the dissent. See the report headed "Disasters, Emergency Relief and Economic Assistance" (1981) 35 Y.B.U.N. 471, p. 476.

function of maintaining humanitarian standards in an anarchical situation, is known as humanitarian law.

It will be shown that the case for humanitarian assistance of civilians, based on the principles discussed, is unaffected by the traditional regime of humanitarian law. This is based on two grounds. First, there is no clear-cut demarcation of boundary between the areas in which human rights and humanitarian law apply. Certain human rights are non-derogable and still stand in the midst of heated battle. Secondly, the bases for humanitarian assistance, as set out above, are in no way dependent on the sources of humanitarian law. The implementation of humanitarian law is often hindered by vexed questions about the status of the conflict, the combatants and whether the conflict is international in character. This article does not invoke the laws of war in protection of the civilians, and the principles it espouses are unaffected by nice definitions.

A. *Humanitarian Law and Human Rights*

To avoid confusion, it is important to bear in mind that humanitarian law and human rights developed as separate branches of law. The origin and content of human rights law have been briefly set out above. Unlike human rights, which "originate in the intra-State tension between the government and the governed," humanitarian law sprang from a need to regulate the conduct of armed conflicts between States and has historically developed with the protection of victims of international violence in mind.[63] The latter has a longer pedigree and was established even before human rights were given legal recognition. The origin of humanitarian law could be traced back to the Red Cross conventions of the nineteenth century and was already accepted as an independent branch of law during the Second World War.[64] Basically, humanitarian law is concerned with the protection of certain categories of human beings during times of armed conflict. It consists of rules on the treatment of the sick, the wounded, prisoners of war and civilians.[65] Human rights law, on the other hand, is applicable to all human beings at all times.

In recent years, however, there has been a growing convergence of the two subjects. This is perhaps unavoidable since both subjects share the common objective of protecting the individual from the overwhelming power of the State. Both seek to restrain the forces unleashed by the State

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[63] Meron, *Human Rights in Internal Strife: Their International Protection* (1987), p. 26.

[64] Robertson, "Humanitarian Law and Human Rights" in Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in honour of Jean Pictet* (1984), pp. 793, 797.

[65] The four 1949 Geneva Conventions form the backbone of the law on the conduct of warfare. These are: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 U.N.T.S. 31; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 U.N.T.S. 85; Convention (III) Relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135; Convention (IV) Relative to the Protection of Civilian Persons in time of War, 75 U.N.T.S. 287.

lest they cross the line of necessary action into abuse and oppression. Humanitarian law has extended its scope to protect victims of non-international armed conflict. Human rights law has also claimed a legitimate place in situations of international and internal violence to ensure that basic rights are not violated even in such testing times.[66]

Meron points out, but at the same time cautions, the view that some human rights may even constitute *jus cogens* or a peremptory norm, so that no derogation is permitted, not even in a state of emergency.[67] If such norms do exist, it seems that the right to life would occupy a cosy niche among them. The Human Rights Committee of the United Nations had once referred to the right to life in Article 6 of the Civil Rights Covenant as "the supreme right from which no derogation is permitted even in time of public emergency."[68]

The argument that situations of armed conflict are subject to a distinct and exclusive body of law is thus becoming increasingly tenuous.

B. *Distinctions in the Laws of Warfare Inapplicable*

Certain important distinctions are drawn in the regime of humanitarian law. Traditionally, only conflicts of an international character were regulated so that in internal conflicts, insurgents and civilians were vulnerable to the unabated cruelties of war. The legal exception of "recognised belligerency" was seldom applied in practice. This position was modified somewhat by common Article 3 to the Geneva Conventions.[69] Subsequently, further improvements were introduced by Protocol II to the Conventions.[70] However, these amendments only permit the protection expressed therein to apply if there is a non-international *armed conflict.* This means that, as stipulated in Protocol II, "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature" are not regulated. Thus, varying degrees of disturbances are subjected to varying degrees of regulation, or even none at all. Understandably, governments faced with internal disturbances have refused to admit that those disturbances are serious enough to be considered an "armed conflict". This allows them to deal with their citizens as they see fit, without the constraints of humanitarian rules.[71]

It is obvious that if humanitarian assistance were to be exercisable only under the umbrella of the law of warfare, or humanitarian law, there

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66 Robertson, *op. cit.,* p. 797.

67 See the discussion in Meron, *supra,* note 14, pp. 215-222.

68 Quoted in Ramcharan, *supra,* note 23, p. 5.

69 For a discussion of Article 3, see Wilson, *International Law and the Use of Force by National Liberation Movements* (1988), pp. 42-48.

70 There are two Additional Protocols to the Geneva Conventions. Protocol I relates to the protection of conflict victims of international armed conflicts and Protocol II applies to non-international conflicts. Both protocols are reprinted in (1977) 16 I.L.M. 1391 (Protocol I), 1442 (Protocol II). For the history of Protocol II, see ICRC, *Commentary on the Additional Protocols to the Geneva Conventions* (1987), pp. 1325-1343.

71 For examples of State practice on Article 3, see Wilson, *op. cit.,* p. 47.

would be very limited scope for its implementation. Fortunately, the right of civilians to assistance transcends the narrow confines of the instruments just discussed.

In 1969, the XXIst International Conference of the Red Cross adopted its resolution entitled "Declaration of Principles for International Humanitarian Relief of the Civilian Populations in Disaster Situations." It called for relief of civilians both in peace and in armed conflict situations. Furthermore, no distinction was made between international and non-international armed conflicts. The resolution called upon States "to facilitate the transit, admission and distribution of relief supplies provided by impartial international organizations for the benefit of civilian populations in disaster areas."[72] This approach is reinforced in Principle 8 of Resolution 2675 (XXV) of the United Nations General Assembly which reads:

> The provision of international relief to civilian populations is in conformity with the humanitarian principles of the Charter of the United Nations, the Universal Declaration of Human Rights and other international instruments in the field of human rights. The Declaration of Principles for International Humanitarian Relief to the Civilian Population in Disaster situations, as laid down in Resolution XXVI adopted by the twenty-first International Conference of the Red Cross, shall apply in situations of armed conflict, and all parties to a conflict should make every effort to facilitate this application.[73]

1. *Starvation as warfare*

The nature of the work involved in the rescue of threatened civilians is the same whether or not there is a battle raging. In either case, relief operations are concerned with providing food, shelter and medical attention. They do not affect the balance, or imbalance, of power.[74]

A government besieging a rebel stronghold is understandably concerned that aid should not reach the rebels. Starvation is an ancient, and perhaps still legitimate, form of warfare. In earlier times, the view had even been expressed that a civilian living in a besieged locality "may legally be starved or bombed. If he lives in a country which does not grow enough food to support its population, a blockade can legally starve him to death."[75] That may or may not be true half a century ago. As we have seen above, concern for the welfare of non-combatants has since then led to numerous efforts toward their protection. For exam-

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[72] Resolution XXVI, sub-para. (5), XXIst Conference, Istanbul, 1969; cited in ICRC, *op. cit.*, p. 1476.

[73] U.N. Doc. A/8178 (1971); quoted in ICRC, *ibid.*, p. 1476n.

[74] Macalister-Smith, *supra*, note 38, p. 34. According to Dr. Macalister-Smith, "[p]ost-impact problems of relief management such as evacuation, emergency feeding, temporary shelter and disease control exist in a similar manner in both armed conflict and other disaster situations."

[75] Nurrick, "The Distinction between Combatant and Non-combatant in the Law of War" (1945) 39 Am. J. Int'l L. 696.

pie, Article 54, para. 1 of Protocol I to the 1949 Geneva Conventions reads: "Starvation of civilians as a method of warfare is prohibited." The effect of this explicit provision is not necessarily limited to the confines of the treaty. Though relatively recent, it is a reflection of the general principle of protection of civilians.[76] The content of the law of blockades may not be clear, but as the ICRC has emphasised, "the object of a blockade is to deprive the adversary of supplies needed to conduct hostilities, and not to starve civilians." Where a blockade deprives the civilian population of adequate "food and medical supplies, clothing, bedding, means of shelter and other supplies essential to its survival," relief actions should be taken.[77] The ICRC drew attention to a historical example in the Second World War when, "from 1942 to 1944 the population of Greece enjoyed considerable aid requiring the intervention of a whole fleet."[78] Even before that, in what was probably the first large-scale international operation of humanitarian assistance, the civilian populations of occupied Belgium and Northern France were saved from famine by an *ad hoc* relief committee.[79] Still fresh in our minds is the global blockade against Iraq which, nevertheless, permitted food and medical supplies through. Resolution 661 of the Security Council dated 6 August 1990 which imposed a blockade against Iraq made an exception for "supplies intended strictly for medical purposes, and, in humanitarian circumstances, foodstuffs."[80]

2. *No collective guilt*

It is true that in an internal armed conflict, civilians sometimes shelter certain combatants. The status of individuals making up the population may not be easy to ascertain, so that the question of who among them is a "civilian" can be a vexing one.[81] Yet, we cannot permit the mere presence of some non-civilians to strip the whole group of civilians of the protection they would otherwise enjoy.[82] There can be no short cuts when innocent lives are at stake. In the case of the Kurds, it would not be open to Iraq to prevent aid to the Kurdish population on the ground

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[76] ICRC, *supra,* note 70, pp. 652-653.

[77] *Ibid.,* p. 654.

[78] *Ibid.,* p. 654n.

[79] Macalister-Smith, *supra,* note 38, pp. 10-11.

[80] S/RES/661 (1990), 6 August 1990, para. 3, sub-para, (c); see also para. 4; reprinted in [1990] 25 U.N.L.R. No. 1, addenda ii. For a more detailed study of the legitimacy of starving civilians during an armed conflict, see Allen, "Civilian Starvation and Relief during Armed Conflict: The Modern Humanitarian Law" (1989) 19 Ga. J. Int'l & Comp. L. 1.

[81] The definition of a civilian is not of particular legal intricacy. The definitions found in international instruments do not differ very much from the general dictionary meaning. For a suggested definition, see Umozurike, "Protection of the Victims of Armed Conflicts" in Henry Dunant Institute (ed.), *International Dimensions of Humanitarian Law (*1988), p. 188. See also ICRC, *op. cit.,* pp. 609-613.

[82] See ICRC, *ibid.,* p. 1452.

that all the Kurdish people wanted the overthrow of the Saddam Hussein regime and were therefore collectively guilty of rebellion. Any attempt to eliminate a people as a whole, including inducing a condition in which life cannot be sustained, is outlawed as genocide.[83]

3. *Distinction between man-made and natural disaster undesirable*

From a practical point of view too, the distinction between man-made and natural disasters can be artificial. In reality, emergencies can arise from a combination of causes. Disasters can be partly natural and partly man-made. Human contribution can be present in cases where the suffering is first triggered by the forces of nature, *e.g.* earthquake or cyclone. Human neglect can gravely aggravate what would otherwise be a minor hiccup into a major turbulence. If nothing is done in the face of an oncoming tidal wave, it does not rest easy on the idle government to say the deaths thereby caused are manifestations of the force of nature or the will of God. Macalister-Smith made the point that "a disaster caused by purely natural phenomena is no longer simply a 'natural' disaster when the authorities of the stricken country decline to acknowledge the problem or when the international community fails to respond with the relief that is required."[84] He argued that "natural" disasters are mis-named as they are really a reflection of "mankind's relationship with the environment." Therefore, the multiple causes contributing to an emergency situation render the distinction between "natural" and "man-made" disasters meaningless.

One may also question the propriety of bickering over which regime applies to an emergency while death hovers over the region. The notorious difficulty in classifying conflicts according to recognised categories has already proven a bane to the implementation of humanitarian law. There is, furthermore, the risk of a lacuna created in the protection of victims should the State deny that a situation of armed conflict exists at all. In such an event, the line drawn between natural disasters and non-natural disasters will keep both relief workers and humanitarian law at bay. International organisations will not have access to the victims because it will arguably not be a "natural" disaster and humanitarian law will not apply because the State will deny that there is anything more than, say, breaches of the peace by "criminals".[85]

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[83] Article II, para, (c) of the Convention on the Prevention and Punishment of the Crime of Genocide, 1948,78 U.N.T.S. 277 stipulates that genocide includes the act of "[d]eliberately inflicting on (a national, ethnical, racial or religious) group conditions of life calculated to bring about its physical destruction in whole or in part." Unfortunately, it still is a crime too often committed. See *e.g.* Kuper, "Genocide and Mass Killings: Illusions and Reality" in Ramcharan, *supra,* note 23, p. 114.

[84] Macalister-Smith, *supra,* note 38, p. 3.

[85] The Tansley Report revealed that, in practice, parties in the middle of a struggle for power "frequently refuse to accept that the law of armed conflict applies. There is frequent disagreement over which law applies and to what extent. Great humanitarian need exists in situations not falling under the law of armed conflict." Tansley, *supra,* note 3, p. 72.

The current regime on refugees would not help much either. It is primarily concerned with questions of asylum for people uprooted from their home States. For persons displaced by violent political disturbances, the law on refugees offers no protection if they are within the boundaries of their own country. For example, Article 1, para. 2 of the Convention Relating to the Status of Refugees, 1951, provides that a "refugee" must be a person who "is outside the country of his nationality" or "outside the country of his formal habitual residence."[86] Excessive categorisation, so often the blight of good intentions in other areas, should not take root in the notion of humanitarian assistance to civilians. Problems of classification can be avoided as the welfare of the innocent population is a common thread running through all categories of emergencies.[87]

V. WHEN ACCESS is OBLIGATORY

Any obligation must have a triggering mechanism. In the present context, the trigger must be a disaster situation threatening the lives of a sufficiently large number of people through starvation, exposure or lack of health or sanitation facilities. The reason behind the criterion of scale is to avoid having domestic welfare and police roles usurped by over-zealous foreign Samaritans. Poverty and general accidents are not within the scope of this subject.[88]

The requirement is for a "disaster". This term by itself is rather vague. Various alternatives have been used which do not add precision to the matter. Para. 10 of General Assembly Resolution 36/225 used the words "complex disasters and emergencies of exceptional magnitude."[89] The XXIst International Conference of the Red Cross chose the words "when disaster situations imperil the life and welfare of [civilian] populations."[90]

Perhaps an analogy drawn from State humanitarian intervention may help define the perimeters of legitimate assistance. Writing in 1969, Moore suggested several criteria for legitimate intervention by States.[91] Borrowing from these points where they are relevant and applying them *mutatis mutandis* to humanitarian *assistance,* the criteria would be:

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[86] 189 U.N.T.S. 137; U.K.T.S. 39 (1954), Cmd. 9171. See generally, Jahn, "Refugees" in Bernhardt, *supra,* note 35, p. 452. The plight of the Kurds is an example of this.

[87] For a contrary opinion, see Samuels, "Organized Responses to Natural Disasters" in MacDonald, *supra,* note 9, p. 686.

[88] There is a developing duty in respect of poverty, based on the socio-economic right to an adequate standard of living. This is an altogether different topic.

[89] *Supra,* note 62. This concept is not defined and some countries question its efficacy. *Ibid.,* p. 477.

[90] *Supra,* note 72. This description again does not pinpoint the scale of the disaster,

[91] Moore, "The Control of Foreign Intervention in Internal Conflict" (1969) 9 Va. J. Int'lL. 205, p. 264; see also White, "The Control of Intervention after the Nicaragua Case" in White and Smythe (eds.), *Current Issues in European and International Law* (1990), p. 149.

(a) the existence of a serious threat to human life;

(b) conducting the relief action only for the purpose of saving life;

(c) the action should have minimal effect on any internal struggle; and

(d) the action must be ended at the earliest opportunity and the workforce withdrawn.

Of particular relevance to our purpose is Moore's observation that "[a] threat of widespread loss of human life would seem to be the clearest justification" for intervention.[92]

While the word "disaster" in itself may have different shades of meaning, the idea of when help is needed is deducible from years of humanitarian action experience. Most phrases employed to indicate the type of situation covered convey the message that it is one of such scale and urgency that resources beyond those available domestically are needed.

VI. WHO HAVE ACCESS?

A. *Suggested Criteria*

Organisations invoking the obligation of the State to allow them access to the stricken population must naturally fulfill certain criteria. Some of these criteria can be gleaned from previous practice in this field. First, they must be non-governmental and neutral. This is important if nationalistic sentiments are not to be aroused against perceived interference by another State. Organisations representing particular political ideologies will almost certainly be unacceptable. It is especially crucial in times of internal struggles when partiality towards one side can jeopardise both the safety and the credibility of rescue missions. In this regard, non-governmental organisations may be more acceptable than organisations consisting of member countries. There are many inter-governmental organisations which have undertaken humanitarian relief work. Among these are the European Economic Community, the North Atlantic Treaty Organization, the Organization for African Unity and the Association of South East Asian Nations.[93] These organisation were not primarily set up for the purposes of welfare work. More importantly it is doubtful that non-member States are obliged to allow such organisation to operate in their territories.

Secondly, the organisation must be effective. It must have the resources and the expertise to be of help. If States are to be persuaded that the inviolability of their territory should be compromised for humani-

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[92] Moore, *loc. cit.*
[93] Macalister-Smith, *supra*, note 38, pp. 111-116.

tarian concerns, they must be convinced that the organisation which steps into their territory is well worth the price. A proven track record in international relief work may be required. Fairly new organisations can first establish themselves in State-sanctioned operations.

B. *United Nations Organisations*

The foremost international organisation is the United Nations. It inevitably plays a coordinating role in large-scale relief operations. It was with this function in mind that the Office of the United Nations Disaster Relief Co-ordinator was established in 1971.[94] The involvement of the specialised agencies of the United Nations in emergency relief is almost taken for granted. If criticism is made, it is seldom on the right of these agencies to carry out humanitarian assistance but their failure to do enough.[95] The World Food Programmme, for example, has been touted as "the world's biggest deliverer of emergency food."[96] Other organisations within the United Nations system like the United Nations Children's Fund, the Food and Agricultural Organisation of the United Nations, the World Health Organisation and the Office of the United Nations High Commissioner for Refugees are also recognised actors in the field. These were among the organisations urged to respond effectively to disaster situations in General Assembly Resolution 36/225 of 17 December 1981.[97] If there is a duty to permit access to certain organisations, the specialised agencies should have no difficulty qualifying for access.

C. The International Committee of the Red Cross

The ICRC fulfills every criteria suggested for the privilege of compulsory access. This is as much a result of the circumstances in which it was created as a culmination of its impeccable record in humanitarian activities. It is different from the other organs of the Red Cross which are of a private nature and whose activities are conducted under the banner of national legislation.[98] The ICRC has only Swiss nationals among its members and is based on Swiss legislation. Logically, this would have deprived it of much international scope. But history has proven otherwise. The nature of ICRC membership was determined to enable it to operate in times of war. It was thought that the permanent neutrality of Switzerland would make feasible an International Committee, consisting solely of Swiss nationals, formed to work in the most adverse political

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94 G.A. Res. 2816 (XXVI), para. 10, U.N. Doc. A/8430/Add. 1 (1971). On the work of the General Assembly and the Economic and Social Council in this area, see Macalister-Smith, *op. cit.*, pp. 96-99.

95 See, for example, *The Economist,* 8-14 June, 1991, p. 44.

96 *Ibid.*

97 Para. 7, *supra,* note 62. A summary of the work of some of these organisations can be found in Macalister-Smith, *op. cit.*, pp. 99-107.

98 A detailed coverage of the movement is found in Macalister-Smith, *ibid.,* pp. 75-92.

conditions. This forecast was proven correct in the battlefields of the Second World War."

The reputation of the ICRC as a neutral organ has been further reinforced by a faithful adherence to the principles of the Red Cross. Among the Fundamental Principles of the Red Cross, proclaimed at the 20th International Conference in Vienna in 1965, is the principle of impartiality. In accordance with this principle, the Red Cross "makes no discrimination as to nationality, race, religious beliefs, class or political opinions. It endeavours only to relieve suffering, giving priority to the most urgent cases of distress."[100] Article 4, para. 1, sub-para, (d) of the Statutes of the ICRC recognises the role of the ICRC as an intermediary in "humanitarian matters" between opposing parties in cases of "war, civil war or internal strife." Article 4, para. 2 confers authority on the ICRC to "take any humanitarian initiative which comes within its role as a specifically neutral and independent institution."[101]

Various resolutions of the International Conferences of the Red Cross also mention the role of the Red Cross in times of internal strife.[102] No doubt, it cannot be argued that these resolutions and statutes have even the legal significance of resolutions of the General Assembly of the United Nations. Nevertheless, they have been adopted by "practically the entire international community of states."[103] Meron commented that this fact "signifies that the international community does not consider the ICRC's offers of humanitarian assistance as an encroachment upon the domestic jurisdiction of states. Although these texts do not create legal rights and obligations, they may, nevertheless, establish that the international community does not consider certain matters as belonging to the reserved domain of domestic jurisdiction."[104] If States find the ICRC's presence acceptable in times of political turmoil, there should be even less ground for objection to its presence in times of peace.

A point of clarification must be made with regard to humanitarian initiative under the statutes and resolutions mentioned above. The argument is not made here that those instruments have formed the basis for a *right* of access. Meron concluded that "the right of initiative does not impose any legal duty on the State concerned to accept an offer of humanitarian services." Apparently, this limitation is acknowledged by the ICRC itself.[105] For our purposes, the instruments merely illustrate the suitability of the ICRC to perform any relief work which a State may

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[99] Broms, "Subjects: Entitlement in the International Legal System" in Macdonald, *supra*, note 9, pp. 403-404.

[100] See the *International Red Cross Handbook* (11 th. ed., 1971), p. 3. In addition to impartiality, the Red Cross also recognises that neutrality is required in order to gain the confidence of all governments. *Ibid.*

[101] Statutes of the International Red Cross, International Committee of the Red Cross, League of Red Cross Societies, *International Red Cross Handbook* (1983), p. 421.

[102] A survey of these resolutions is found in Meron, *supra*, note 63, pp. 106-109.

[103] *Ibid.*, p. 111.

[104] *Ibid.*, p. 110.

[105] *(bid.,* pp. 111-112.

already be under an obligation to allow on its territory based on the grounds discussed earlier. By comparison, when Iraq was required to comply with a duty in international law (possibly the laws of war) to repatriate its prisoners at the end of the conflict, the ICRC's role in the implementation of this programme was specifically recognised. Thus, Resolution 687 of the Security Council ordered Iraq to "extend all necessary cooperation to the International Committee of the Red Cross" to facilitate the repatriation of all Kuwaiti and third country nationals.[106]

The ICRC enjoys a tremendous amount of recognition as a viable response to disasters of catastrophic proportions. Besides frequent mention in resolutions of the United Nations, it was granted observer status at the United Nations on 16 October 1990. Before that, it had only consultative status which meant that it was dependent on invitations to attend meetings of the main United Nations bodies. It had no right to speak on its own initiative in either the Economic and Social Council or the other major bodies. The observer status now grants it permanent representation at, and access to, nearly all United Nations fora without undergoing the lengthy process required of organisations with only consultative status. This status is not easily available to other non-governmental organisations and is a tribute to the work of the ICRC.[107]

D. *Possibility for Other Organisations*

As seen above, the ICRC emerges as a prime candidate for the privilege of compulsory access. Little has been said of other non-governmental organisations which have been making vital contributions in this field. This should not be seen as a denial of their status. The ICRC itself has drawn attention to the fact that the "Red Cross Movement, while playing a role of prime importance, does not have a monopoly on humanitarian activities, and there are other organizations capable of providing effective assistance."[108] Whether or not these other organisations can demand entry to the stricken State's territory to perform their functions will depend on their respective composition and track record.[109]

VII. SOME POINTS ON ENFORCEMENT

A brief word may be mentioned on how those organisations which have legitimate claims can enforce the State's obligation to permit them entry and facilitate their access. In all cases, except perhaps, where the Security Council has authorised access, organisations should not act with-

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[106] S/RES/687 (1991), 3 April 1991, para. 30.

[107] For a more comprehensive treatment on the implications of this new status of the ICRC, see Koenig, "Observer Status for the International Committee of the Red Cross at the United Nations" (Jan-Feb 1991) 280 Int'l Rev. Red Cross 37.

[108] ICRC, *supra*, note 70, p. 1477.

[109] For a general discussion on the work of non-governmental organisations in this area, see Macalister-Smith, *supra*, note 38, pp. 117-124.

out prior permission of the State. Whether or not the State is obliged to grant them permission, they would be treading on dangerous ground if they act without such concession of access.

Of course, if they are subjects of international law, they may have a direct line of action in pursuing the State's consent. There is some tendency to describe the ICRC as having this status. Broms feels that the tasks facing the ICRC give it grounds for claiming such a position.[110] Koenig refers to its "functional international personality".[111] While it is an open question whether the ICRC has standing as a subject and therefore, a right in international law which it can enforce, other organisations may face difficulties if that is crucial to their participation in humanitarian assistance. The requirements of personality in international law are not easily met.[112]

The problem may be approached from another angle. It is not necessary to cloak the organisations with legal personality at all. There is no need to establish a *right* owed to it by the stricken State in international law. The previous sections argued for the existence of a duty on the part of the State to permit access to certain organisations. This duty of the State does not have to import a corresponding right to the organisations. The right is the right of the individual to receive help. It is a question really of how this right of the individual may be preserved."[3] International law may recognise that the ICRC, for example, is one legitimate organisation which is capable of performing this function. It would probably remain open to the affected State to challenge admission of other organisations, not because they are not subjects of international law, but on grounds of their competence or suitability. A balance must be struck between the urgency of aid to the victims and the sovereignty of the State. Naturally, the State should not be obliged to permit just any organisation access through its territory. On the other hand, the competence of any organisation to carry out a neutral, effective scheme is within the purview of international law. Even if it is conceded that the grant of access is a unilateral act of the affected State, that decision must be exercised within the confines of the law."[4]

When it comes to enforcement, it is not necessary that the organisation be possessed of an international legal personality either. Where human rights are concerned, it is in the interest of every State to enforce them. As Meron puts it:

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[110] Broms, *supra,* note 99, p. 404.

[111] Koenig, *op. cit.,* p. 39.

[112] See the *Reparations* case, *supra,* at note 8; see also Broms, *op. cit.,* pp. 409-410.

[113] It may also be said that the obligation is owed to the world community of States. This will be considered below.

[114] By analogy, although "the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law": *Anglo-Norwegian Fisheries* case, I.C.J. Rep. 1951, p. 116. This reasoning has been extended to the State's act of derogation from certain of its obligations under Article 4 of the Civil Rights Covenant. See Bossuyt, "The United Nations and Civil and Political Rights in Chile" (1978) 27 I.C.L.Q. 462, p. 469.

> Complaints for human rights violations, whether based on multilateral human right treaties or customary law, are based on the notion that violations of human rights violate the international legal order. As such, they injure the 'legal' interest of each and every party to a human rights treaty and, with respect to customary human rights, of all states.[115]

Human rights give rise to an obligation *erga omnes,* and other States need not even show damage to themselves to act against a recalcitrant State.[116] International law has always recognised a right to sue for non-material or moral damage. This means that a State's standing to sue is not dependent on any material damage inflicted upon it by another State's breach of an international obligation. Examples of this are "offences to representatives, the flag, and the dignity, sovereignty, and territorial integrity of the State."[117] For instance, the European Commission of Human Rights has ruled that in bringing an action claiming a violation of the European Convention, a State is not enforcing its own rights, or the rights of its nationals, but vindicating the "public order of Europe".[118]

Difficulties in enforcement will be alleviated when the Security Council is involved. In such a case, the options would be determined by the Council under the provisions of the U.N. Charter, in particular under Articles 41 and 42. Where the Security Council has authorised access, it is legitimate for persons or organisations so authorised to enter the recalcitrant State without its permission. The question remains whether such organisations would want to risk their personnel and equipment in a confrontation.

VIII. CONCLUSION

Some may feel that many of the above grounds for assistance, if carried to their logical conclusion, will justify intrusion by a third State. This is so only if we employ monocular vision to look at a field that normally requires stereoscopic lenses. International law is very much a blend of diametrically opposing ideas and interests. One rule can extend only so far before it comes against the force-field generated by an incompatible principle heading in the opposite direction. International law is a melting pot of philosophies. To a higher degree than the rigid prescriptions of domestic authorities, it accomodates the demands of an extremely pluralistic society. Each of the units of this society has different priorities and pursues its own ideology. A commonly accepted system is the only one that will work and compromises are the best ingredients of such a system. The rules of this system of law are derived from pragmatism as much as reason.

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[115] Meron, *Human Rights and Humanitarian Norms as Customary Law* (1989), p. 148.
[116] See the *Barcelona Traction* case, I.C.J. Rep. 1970, p. 32.
[117] Meron, *op. cit.,* p. 201.
[118] *Austria v. Italy,* Application No. 788/60 (1961) Y.B. Eur. Conv. on Hum. Rts. 116.

This perspective explains why it is unsafe to presume that an analysis focused on international organisations can be applied lock, stock and barrel to Samaritan States. States have their own grounds of intervention. These could be, say, humanitarian intervention or reprisal for breach of an *erga omnes* obligation. These are problematic areas in themselves. What should be noted is that a State persuaded, on the grounds discussed, to accept into its territory neutral humanitarian organisations may balk at another State's demand for entry. It also explains why assistance in situations falling short of a disaster requires its own analysis.

In summary, the fertile soil of human rights and general principles of law offers a foundation upon which can be found an obligation on the State not to ignore, much less contribute to, the plight of its disaster-stricken citizens. That obligation is not fulfilled merely by pleading insufficient resources. Insufficient domestic resources are easily remedied by incoming aid. The State, upon which the well-being of its people depends, must accept that aid, and in situations where it cannot or will not distribute the relief to the people, must allow legitimate, qualified, organisations to do so.

Unfortunately, it can be expected that many States will instinctively resort to dogmatic pronouncements of sovereignty. The intricacies of State psychodynamics will often make assessment of acceptance of the principles discussed above difficult. The most concrete ground for action is still to be found in Chapter VII of the U.N. Charter. This can be invoked only if the Security Council feels that the disaster is on a dimension which threatens international peace and security.

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