

TAKING THE NEXT STEP IN THE DEVELOPMENT OF NEW HUMAN RIGHTS: THE EMERGING RIGHT OF HUMANITARIAN ASSISTANCE TO RESTORE DEMOCRACY†

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I. INTRODUCTION

In the 1991 Report of the Secretary-General, Javier Pérez de Cuéllar, speaking in regard to humanitarian intervention, stated, "what is involved is not the right of intervention but the collective obligation of States to bring relief and redress in human rights emergencies."¹ New developments in international law support acknowledgment of an emerging right of humanitarian assistance to restore democracy. In this contemporary context, the United Nations is the appropriate body to assert this right. A recent example of the development in this area is the case of Haiti. On September 19, 1994, a U.S.-led multinational force was introduced into Haiti. U.N. Security Council Resolution 940 authorized this force in order to eject the military dictatorship from power, return Jean-Bertrande Aristide to power,² and maintain a stable and secure environment.

This Article argues that the overthrow of a democratic government can constitute a threat to peace and security under Article 39 of the U.N. Charter,³ and that evidence of an emerging right of humanitarian assistance to restore democracy is supported by recent pronouncements in documents, declarations and resolutions of the U.N. and of regional organizations, statements of government officials

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1. Javier Pérez de Cuéllar, *Report of the Secretary-General on the Work of the Organization*, 45 U.N.Y.B. 3, 8 (1991), U.N. Doc. A/46/404.

2. For details of Aristide's election and the coup that displaced him, see discussion *infra* part V.C.1.

3. U.N. CHARTER art. 39.

and international law theorists, and statements in national policy documents.⁴ Humanitarian assistance to restore democracy consists largely of the support of democracy by measures not involving use of force such as condemnation, withdrawal of aid, and suspension of diplomatic relations or perhaps, if the exigency of the circumstances demand, harsher measures such as economic sanctions. Use of force as a form of humanitarian assistance to restore democracy is advocated only when circumstances constitute a humanitarian crisis involving human rights atrocities.⁵

In the series of resolutions regarding Haiti, the Security Council extended humanitarian intervention to include measures against the usurpation of the sovereign prerogative of a population to be governed by those it has democratically elected. This placed the international community at a crossroads in the development of a right of humanitarian assistance. The right of humanitarian assistance to restore democracy is supported by and, in turn, supports the emerging concepts of an emerging right to democratic government,⁶ the right of a population to be free from internal as well as external aggression,⁷ and the right of victims of human rights violations to receive assistance.⁸ Since these rights support a concept of humanitarian assistance which is more expansive than a right to assist democratic restoration, it can be argued that a right to assist democratic restoration is only the core of a much broader right of humanitarian assistance.⁹

4. In this Article, the terms "humanitarian assistance" and "humanitarian intervention" include measures undertaken without the consent of those in effective control of the state to halt unacceptable killing, suffering or usurpation of rights of a population and refer to a span of measures not involving force, such as economic sanctions, as well as, in the last resort and under circumstances of egregious human rights violations, measures involving force. The term "humanitarian assistance" is preferable in that it indicates that the purpose of measures is to assist the population experiencing a humanitarian crisis.

5. For example, the overthrow and suppression of democracy by violent means could present appropriate circumstances for the use of force. This is consistent with the requirement of proportionality discussed *infra* note 231 and accompanying text.

6. See Thomas Franck, *Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992).

7. See W. Michael Reisman, *Comment: Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866 (1990); Anthony D'Amato, *The Invasion of Panama Was a Lawful Response to Tyranny*, 84 AM. J. INT'L L. 516 (1990).

8. See *Summing Up*, in *THE DEVELOPMENT OF THE ROLE OF THE SECURITY COUNCIL: PEACE KEEPING AND PEACE BUILDING* 327, 330 (René-Jean Dupuy ed., 1993) (comment of H. Thierry) [hereinafter *Summing Up*].

9. This possibility is discussed by Thomas Franck and Michael Reisman. Franck, *supra* note 6; Reisman, *supra* note 7, at 866; see also D'Amato, *supra* note 7; Notes from Professor

Determining the limits of the right of humanitarian assistance depends largely on the political will and desires of the international community. For example, on September 26, 1994, President Clinton addressed the General Assembly of the United Nations on efforts to restore democracy:

In my nation, as in all of your nations, there are many people who are understandably reluctant to undertake these efforts because often the distances are great or the cultures are different. There are good reasons for the caution that people feel. Often the chances of success, or the costs, are unclear. And, of course, in every common endeavor there is always the potential for failure, and often the risk of loss of life.¹⁰

Several arguments support the right of humanitarian assistance in regard to Haiti. First, there is emerging a right to assist the restoration of democracy when there is violent overthrow or obstruction of a legitimate democratic government.¹¹ Second, the violent overthrow or obstruction of legitimate democracy constitutes a sufficient legal basis for the finding of a threat to the peace necessary for the Security Council to adopt enforcement measures under Chapter VII of the U.N. Charter. Third, the crisis in Haiti presents a clear cut case of the violent overthrow and obstruction of legitimate democracy. Finally, the new concept of the right of humanitarian assistance to restore democracy supports a unilateral right of humanitarian intervention under limited circumstances where the United Nations recognizes a legitimate need for action but is prevented from or is unable to address the crisis.

Joseph Rees, VDM, Visiting Professor, International Law Day Conference (Oct. 29-30, 1994).

10. Wolf Blitzer, *Clinton Will Announce Lifting of Haiti Sanctions*, Cable News Network, Sept. 26, 1994, Text of President Clinton's United Nations Address, available in LEXIS, News Library, CNN File.

11. Varying degrees of democracy can characterize the governmental process. In this Article, "legitimate democracy" refers to a democratic government which is brought to power by the democratic elements consistently set forth in human rights treaties, which elements have been verified whether by U.N. monitoring, by an established tradition of participatory democracy or other acceptable method. Regarding a "free and fair" election as a democratic element, examine the criteria of Gregory H. Fox, *The Right to Political Participation in International Law*, 86 AM. S. INT'L L. 249, 251 (1992) [hereinafter Fox, *Political Participation*, American Society]. Note free and fair elections are not the equivalent of democracy, but a significant component. *Id.* at 249; see also Douglas Lee Donoho, *The Role of Human Rights In Global Security Issues: A Normative and Institutional Critique*, 14 MICH. J. INT'L L. 827, 841 (1993).

II. THE EMERGING RIGHT TO DEMOCRACY

Commentators note the right to democracy developing within international agreements. Thomas Franck finds that democracy, "while not yet fully word made law, is rapidly becoming in our time, a normative rule of the international system."¹² Gregory Fox asserts that "parties to the major human rights conventions have created an international law of participatory rights."¹³ The principle of democracy and the rights which together constitute the democratic prerogative are "guaranteed in all comprehensive human rights instruments."¹⁴ Among these instruments are the Universal Declaration of Human Rights, the International Covenant on Economic, Social, and Cultural Rights, and the International Covenant on Civil and Political Rights. The Universal Declaration states: "The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures."¹⁵ The International Covenant on Economic, Social, and Cultural Rights and the International Covenant on Civil and Political Rights provide that: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development."¹⁶

Thomas Franck argues that these documents together with regional instruments constitute "a net of participatory entitlements."¹⁷ In addition, the Charter of the Organization of American States (OAS) declares that "representative democracy is an indispensable condition for the stability, peace and development of the region" and that promoting democracy is "an essential purpose of the OAS."¹⁸

12. Franck, *supra* note 6, at 46.

13. Gregory H. Fox, *The Right To Political Participation in International Law*, 17 YALE J. INT'L L. 539, 607 (1992) [hereinafter Fox, *Political Participation*, Yale].

14. Fox, *Political Participation*, American Society, *supra* note 11, at 249. See also Franck, *supra* note 6, at 46; Fox, *Political Participation*, Yale, *supra* note 13, at 539.

15. Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. GAOR, 3d. Sess., at 71, U.N. Doc. A/810 (1984).

16. International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, art. 1, 993 U.N.T.S. 3; International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 1, 999 U.N.T.S. 171.

17. Franck, *supra* note 6, at 79.

18. Organization of American States: Integrated Text of the Charter As Amended By the Protocols of Buenos Aires and Cartagena De Indias; The Protocol of Amendment of

The rights set forth in the American Declaration of the Rights and Duties of Man (American Declaration) approximate those of the Universal Declaration of Human Rights.¹⁹ The American Declaration sets forth rights and duties which are viewed by the General Assembly of the OAS as international commitments²⁰ and as specifying the fundamental human rights addressed in the Charter of the OAS.²¹ The American Declaration states in article XX: "Every person having legal capacity is entitled to participate in the government of his country, directly or through his representatives, and to take part in popular elections, which shall be by secret ballot, and shall be honest, periodic and free."²²

The American Convention on Human Rights, adopted on November 22, 1969, states that "every citizen shall enjoy the . . . [right] . . . [t]o vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voter"²³ Regional instruments of the Conference on Security and Cooperation in Europe (CSCE) constitute, in Frank's words, "an unprecedented North Atlantic and Europe-wide initiative to endorse and define a popular right of electoral democracy."²⁴

Importantly, in addition to guaranteeing democratic freedoms to the individual, recent instruments view democracy as both a keystone of human rights and a necessary condition for international peace and security. Reflecting the proliferation of democracies throughout the 1980s and 1990s, the Document of Copenhagen commits participating states to the individual freedoms of democracy, including free elections, representative government, government compliance with

Washington, and the Protocol of Amendment of Managua, Preamble and art. 20 [Done at Bogota, in 1948, as amended in 1967 and 1985; Dec. 14, 1992; June 10, 1993] *reprinted in* 33 I.L.M. 981, 989 [hereinafter OAS Charter]. The OAS Charter, adopted in 1948 and entered into force on December 13, 1951, has been ratified by 32 states. Heidi V. Jimenez, *Introductory Note*, OAS Charter, 33 I.L.M. 981 (1994).

19. FREDERIC L. KIRGIS, JR., *INTERNATIONAL ORGANIZATIONS IN THEIR LEGAL SETTING* 978 (2nd ed. 1993).

20. *Id.* at 979.

21. *Id.* at 980.

22. The American Declaration of the Rights and Duties of Man, May 2, 1948, art. 27, O.A.S. Off. Rec. OEA/Ser.L/V/II.23/Doc. 21/Rev. 6, at 18 (1988).

23. American Convention on Human Rights, Nov. 22, 1969, art. 23, 1144 U.N.T.S. 144, 151; Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/SER. L. VII 71, Doc. 6 Rev. 1, at 25 (1988), Part I, art.23.

24. Thomas Buergenthal, *The Copenhagen CSCE Meeting: A New Public Order for Europe*, 11 HUM. RTS. L.J. 217, 221-222 (1990); *see also* Franck, *supra* note 6, at 67.

law, and separation between the State and political parties.²⁵ It holds: "The participating states reaffirm that democracy is an inherent element of the rule of law."²⁶ The thirty-five participating states "recognize that pluralistic democracy and the rule of law are essential for ensuring respect for all human rights and fundamental freedoms, the development of human contacts and the resolution of other issues of a related humanitarian character."²⁷ Further,

participating States express their conviction that full respect for human rights and fundamental freedoms and the development of societies based on pluralistic democracy and the rule of law are prerequisites for progress in setting up the lasting order of peace, security, justice and co-operation that they seek to establish in Europe.²⁸

The CSCE's Charter of Paris pledges to "undertake to build, consolidate, and strengthen democracy as the only system of government of our nations."²⁹ In addition to guaranteeing democratic freedoms to every individual, the thirty-four participating states proclaimed: "Democracy is the best safeguard of freedom of expression, tolerance of all groups of society, and equality of

25. See Franck, *supra* note 6, at 67.

26. Conference on Security and Cooperation in Europe: Document of the Copenhagen Meeting of the Conference on the Human Dimension, 29 I.L.M. 1305 (1990) [hereinafter Copenhagen Document].

The Copenhagen meeting convened in Copenhagen from June 25 to June 29, 1990, and was attended by representatives of one observer nation, Albania and the following 35 participating states of the CSCE: Austria, Belgium, Bulgaria, Canada, Cyprus, Czechoslovakia, Denmark, Finland, France, the German Democratic Republic, the Federal Republic of Germany, Greece, the Holy See, Hungary, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, Monaco, the Netherlands, Norway, Poland, Portugal, Romania, San Marino, Spain, Sweden, Switzerland, Turkey, the Union of Soviet Socialist Republics, the United Kingdom, the United States of America and Yugoslavia. *Id.* at 1306.

The Document of Copenhagen includes among essential elements of justice: (1) "free elections," (2) "accountable . . . representative" government, (3) a government, administration, and judiciary regulated by law, (4) "independence of judges and the impartial operation of the public judicial service," (5) military forces and police which are "under the control of, and accountable to, the civil authorities," and (6) "legislation and regulations which are published." *Id.* at 1308.

27. *Id.* at 1307.

28. *Id.*

29. Conference on Security and Co-operation in Europe: Charter of Paris for a New Europe and Supplementary Document to Give Effect to Certain Provisions of the Charter (Done at Paris, Nov. 21, 1990), 30 I.L.M. 190 (1991)[hereinafter Charter of Paris]. Leaders of thirty-four participating states of the CSCE convened in Paris and adopted the Charter of Paris on Nov. 21, 1990 to initiate "a new era of democracy, peace and unity." *Id.* at 190.

opportunity for each person.”³⁰ Participating states “are convinced that in order to strengthen peace and security among our States, the advancement of democracy, and respect for and effective exercise of human rights, are indispensable.”³¹

In the Moscow meeting of the CSCE, participating states asserted that “full respect for human rights and fundamental freedoms and the development of societies based on pluralistic democracy and the rule of law are prerequisites for a lasting order of peace, security, justice and co-operation in Europe.”³² Participating states found that “issues relating to human rights, fundamental freedoms, democracy and the rule of law are of international concern, as respect for these rights and freedoms constitutes one of the foundations of the international order.”³³

Recent international conferences have mirrored the CSCE’s concerns. For instance, the Vienna Declaration of the U.N. World Conference on Human Rights “considers the denial of the right of self-determination as a violation of human rights and underlines the importance of the effective realization of this right.”³⁴ The participating states expressly defined self-determination to include a democratic entitlement, noting that it is through self-determination

30. *Id.* at 194.

31. *Id.* at 196.

32. Conference on Security and Cooperation in Europe: *Document of the Moscow Meeting on the Human Dimension, Emphasizing Respect For Human Rights, Pluralistic Democracy, The Rule of Law, and Procedures for Fact-Finding* (Done at Moscow, Oct. 3, 1991), 30 I.L.M. 1670, 1672 (1991) [hereinafter *Moscow Document*]. The Moscow Meeting convened in Moscow from September 10 to October 4, 1991 and was attended by representatives of the following participating states of the CSCE: Albania, Austria, Belgium, Bulgaria, Canada, Cyprus, the Czech and Slovak Federal Republic, Denmark, Estonia, Finland, France, Germany, Greece, the Holy See, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Monaco, the Netherlands, Norway, Poland, Portugal, Romania, San Marino, Spain, Sweden, Switzerland, Turkey, the USSR, the United Kingdom, the United States of America and Yugoslavia. *Id.* at 1671.

33. *Id.* at 1672.

34. United Nations World Conference on Human Rights: Vienna Declaration and Program of Action, 32 I.L.M. 1661, 1665 (1993) [hereinafter *Vienna Declaration*]. The World Conference on Human Rights was assembled in Vienna by the United Nations on June 14-25, 1993. Representatives of 171 States attended. The Vienna Declaration was adopted by acclamation on June 25, 1993. *Id.* at 1661. The Vienna Declaration states that the focus of “[c]ooperation, development and strengthening of human rights” should be on “strengthening and building of institutions relating to human rights, strengthening of a pluralistic civil society and the protection of groups which have been rendered vulnerable.” To this end, assistance is necessary for “the conduct of free and fair elections, . . . the strengthening of the rule of law, the promotion of freedom of expression and the administration of justice, and . . . the real and effective participation of the people in the decision-making processes.” *Id.* at 1683.

that peoples "freely determine their political status, and freely pursue their economic, social and cultural development."³⁵ The Vienna Declaration further affirmed that the "World Conference on Human Rights considers the denial of the right of self-determination as a violation of human rights and underlines the importance of the effective realization of this right."³⁶ The participating states asserted that "[d]emocracy, development and respect for human rights, and fundamental freedoms are interdependent and mutually reinforcing." Finally, the participating states agreed that "[d]emocracy is based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives."³⁷

These documents together with the U.N. monitoring of elections have clarified the substantive meaning of the emerging right to democracy.³⁸ Gregory Fox lists criteria gathered from human rights instruments and U.N. practice in monitoring elections that "defin[e] a free and fair election."³⁹

35. *Id.* at 1665.

36. *Id.*

37. *Id.* at 1666.

38. Fox, *Political Participation*, American Society, *supra* note 11 at 250-253. See generally Franck, *supra* note 6. U.N. monitoring of the elections can involve, as in the case of the U.N. Observer Group for the Verification of the Elections in Haiti (ONUVEH), verification of the use of secret ballots, public polling places, and voter registration. See *Haiti Holds Free, Democratic Elections with UN Help*, U.N. CHRON., March, 1991, at 62. ONUVEH claimed that "[i]n a country that had been traumatized by the experience of the election on 29 November 1987, the first task of ONUVEH was to help create a psychological climate conducive to the holding of democratic elections." *Id.* at 64.

39. These include:

1. periodic elections at reasonable intervals;
2. a secret ballot;
3. honesty in vote tabulation;
4. universal suffrage, with minor exceptions permitted for minors, prisoners, the mentally ill, and the like;
5. an absence of discrimination against voters and candidates;
6. freedom to organize and join political parties, which must be given equal access to the ballot, and an equal opportunity to campaign;
7. to the extent the government controls the media, the right of all parties to present their views through the major media outlets;
8. supervision of the election by an independent council or commission not tied to any party, faction, or individual, whose impartiality is insured in both law and practice.

Fox, *Political Participation*, American Society, *supra* note 11, at 251.

Recent policy trends of actors in the world community have further encouraged democracy as a right.⁴⁰ The United Nations has monitored over thirty elections, including those in Namibia, Nicaragua, and Haiti.⁴¹ Several Western European nations have attempted to withhold aid from those nations that are not democracies. On a regional level, the European Community and the United States have imposed on countries, such as the former Yugoslavia and the Balkan States, "conditions on recognition" that include a commitment to democratic governance.⁴²

The idea of democracy is supported by fundamental instruments of multilateralism, specifically the U.N. Charter. Under Chapter I, article 1(2), "[t]he Purposes of the United Nations are . . . [t]o develop friendly relations among nations based on respect for the principle of equal rights and *self-determination of peoples*"⁴³ Thomas Franck finds that the right of self-determination at present "entitles peoples in all states to free, fair, and open participation in the democratic process of governments freely chosen by each state."⁴⁴ He argues that interaction on the international level is increasingly based on respect for democracy.⁴⁵ In defining the right of self-determination, Frederic L. Kirgis, Jr. ties the legitimacy of self-determination claims to "the degree of representative government in the state."⁴⁶ Hurst Hannum finds that "the present content of

40. *Id.* at 250-52; Bartram Brown, *The Protection of Human Rights In Disintegrating States: A New Challenge*, 68 CHI-KENT L. REV. 203, 206 (1992); Marc Weller, *The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia*, 86 AM. J. INT'L L. 569, 574-577 (1992); Thomas Franck, *Intervention Against Illegitimate Regimes*, in LAW AND FORCE IN THE NEW INTERNATIONAL WORLD ORDER 177 (Lori Fisler Damrosch et al. eds., 1992).

41. Fox, *Political Participation*, Yale, *supra* note 13, at 541.

42. Fox, *Political Participation*, American Society, *supra* note 11, at 250.

43. U.N. CHARTER art. 1, ¶ 2. (emphasis added).

44. Franck, *supra* note 6, at 59.

The Vienna Declaration states: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status, and freely pursue their economic, social and cultural development." Vienna Declaration, *supra* note 34, at 1665. A people may even chose to reject democratic government as long as that choice is made freely and fairly. As Thomas Carothers explains, "[i]f our stated principle is to respect the consent and will of the people, we will find ourselves in the difficult situation of having to accept the fact that nondemocratic governments are at times the choice of the people." Thomas Carothers, *Empirical Perspectives on the Emerging Norm Of Democracy in International Law*, 86 AM. SOC'Y INT'L L. PROC. 261, 265 (1992).

45. See generally, Franck, *supra* note 6.

46. Frederic L. Kirgis, Jr., *Comment: The Degrees of Self-Determination in the United Nations Era*, 88 AM. J. INT'L L. 304, 308 (1994). However, Kirgis includes the right to democracy in the group of elements which make up self-determination which cannot be

international human rights law does include the great majority of what Woodrow Wilson and others viewed as the internal content of self-determination — democracy.⁴⁷

Support of democracy has become increasingly identified with the maintenance of peace and security.⁴⁸ Resolution 917 declared that the obstruction of the restoration of democracy in Haiti constituted a threat to peace.⁴⁹ By imposing sanctions and authorizing military intervention in order to restore democratic rule in Haiti, the Security Council further recognized democracy as an entitlement. The Security Council corroborated the claim of a population's right to be governed by those whom they had elected freely, fairly and openly.

III. THE CONCEPT OF POPULAR SOVEREIGNTY

The concept of popular sovereignty is at the heart of the emerging right to restore democracy. Michael Reisman notes that "sovereignty can be violated as effectively and ruthlessly by an indigenous as by an outside force, in much the same way that the wealth and natural resources of a country can be spoliated as thoroughly and efficiently by a native as by a foreigner."⁵⁰

Seen in this manner, the sovereignty of Haiti was violated when the will of the people, ascertained in open, free and fair elections, was thwarted by violent means. Reisman also argues that the right of self-determination signals "a radical decision that henceforth the internal authority of governments would be appraised internationally."⁵¹ Further, the appearance of "criteria for appraising the conformity of internal governance with international standards of democracy" is evidence of the rise of popular sovereignty.⁵²

"categorically" considered an established rule of international law. *Id.*

47. Hurst Hannum, *Rethinking Self-Determination*, 34 VA. J. INT'L L. 1, 59 (1993). Hannum states: "Both the right of a people organized as a state to freedom from external domination and the right of the people of a state to a government that reflects their wishes are essential components of the right of self-determination." *Id.* at 33.

48. Nancy D. Arnison, *International Law and Non-Intervention: When Do Humanitarian Concerns Supersede Sovereignty?* 17 FLETCHER F. WORLD AFF. 199 (1993).

49. S.C. Res. 917, U.N. SCOR, 49th Sess., 3376th mtg., U.N. Doc. S/RES/917 (1994); see also Arnison, *supra* note 48; Goodrich, Hambro and Simons assert that the priorities accorded the purposes of the Charter are determinative of the types of problems addressed by the United Nations currently and the remedies adopted to solve them. GOODRICH, ET AL., *THE CHARTER OF THE UNITED NATIONS* 25 (3rd ed., 1969).

50. Reisman, *supra* note 7, at 872.

51. *Id.* at 867.

52. *Id.* at 868.

The emerging right of humanitarian assistance to restore democracy is affiliated with the right of self-determination. On the adoption of Resolution 940, U.S. Representative to the United Nations Madeleine K. Albright stated that the resolution's objective was "not to impinge upon the sovereignty of Haiti, but to restore the power to exercise that sovereignty to those who rightfully possessed it and to enable Haiti, in the words of the United Nations Charter, to pursue 'social progress and better standards of life in larger freedom.'"⁵³

Restoration of democracy and the right of self-determination has figured prominently in the lawfulness of recent military action in the southern hemisphere. On October 27, 1993, the governor-general of Grenada, Sir Paul Scoon, requested assistance from the United Kingdom, the United States, Jamaica and the Organization of Eastern Caribbean States. In addition, a written request addressed to Prime Minister John Adams stated: "It is my desire that a peace-keeping force should be established in Grenada to facilitate a rapid return to peace and tranquility and also a return to democratic rule."⁵⁴ Professor John Norton Moore describes the Grenada mission as "regional peacekeeping assistance for the purpose of both restoring self-determination on Grenada and ending the chaos and vacuum of authority threatening human rights and bloodshed".⁵⁵

Former President Bush, in setting forth the objectives of the mission in Panama in 1990, stated: "On Wednesday, December 20th, I ordered U.S. troops to Panama with four objectives: to safeguard the lives of American citizens; to *help restore democracy*; to protect the integrity of the Panama Canal treaties; and to bring General Manuel Noriega to justice."⁵⁶ Professor Anthony D'Amato grounds the lawfulness of the military action in Panama under the device of a right to popular sovereignty. D'Amato argues that "human rights

53. Statement of Madeleine K. Albright, U.S. Ambassador to the U.N., Addressing the U.N. Security Council (July 30, 1994), in *Security Council Authorizes Multinational Force 'To Use All Necessary Means' To Facilitate Departure of Military From Haiti, Return of President Aristide*, Federal News Service (Aug. 1, 1994), available in LEXIS, NEWS Library, FEDNEW File [hereinafter *Security Council Authorizes Multinational Force*].

54. Letter from Governor-General Scoon, of Grenada, to Prime Minister John Adams, of Barbados (October 24, 1983), quoted in John Norton Moore, *Grenada and the International Double Standard*, 78 AM. J. INT'L L. 145, 148 (1984).

55. *Id.* at 148.

56. President George Bush, Announcement on Noriega's Arrest (Jan. 3, 1990), in The Reuter Library Report (Jan. 3, 1990) (emphasis added).

law demands intervention against tyranny."⁵⁷ Although D'Amato does not argue for restoration of democracy as a form of government, he does "regard 'tyranny' as occurring when those who have monopolistic control of the weapons and instruments of suppression in a country turn those weapons and instruments against their own people" and finds "that intervention from outside is not only legally justified but morally required."⁵⁸

IV. THE RIGHT OF THE VICTIM TO RECEIVE ASSISTANCE

The expression, "humanitarian assistance," is a more descriptive term than "humanitarian intervention."⁵⁹ It is on the right of a victim to receive assistance that the right to give assistance is based.⁶⁰ Jurisprudentially, the case of *Nicaragua v. United States* laid the groundwork for this right of assistance. The International Court of Justice made clear that giving humanitarian aid is not an unlawful intervention when it stated categorically, "[t]here can be no doubt that the provision of strictly humanitarian aid to persons or forces in another country, whatever their political affiliations or objectives, cannot be regarded as unlawful intervention, or as in any other way contrary to international law."⁶¹

57. D'Amato, *supra* note 7, at 519.

58. *Id.*

59. A. Truyol Y. Serra states, "the right we are discussing here should be called the *right of humanitarian assistance* rather than the right of interference or intervention, which are not neutral expressions." *Summing Up, supra* note 8, at 327 (comment of A. Truyol Y. Serra). J.P. Puissechet states, "it is true that the expression *right or duty of interference* — which was the subject of a workshop in France in 1987 — should be abandoned in favor of the right of humanitarian assistance, which is a more appropriate concept." *Id.* at 327 (comment of J.-P. Puissechet). However, Thierry states that he prefers the expression, "duty to interfere — because it stresses that the rights of the victims prevail over the preservation of state sovereignty." *Id.* at 330 (comment of H. Thierry).

60. *Id.* (comment of M. Torrelli discussing the comments of H. Thierry). Torrelli agrees with Thierry and states, "there is a right of assistance based to a certain extent on every victim's right to assistance." *Id.* Legally speaking, however, the right of assistance prevails over the right to assistance. As Mr. Salcedo states, "[v]ictims do indeed have a right to assistance, in the same way as a State has the duty to guarantee its citizens fundamental rights and liberties." *Id.* (comment of J. A. Carillo Salcedo); see David J. Scheffer, *Toward a Modern Doctrine of Humanitarian Intervention* 23 U. TOL. L. REV. 253 (1992).

61. Military and Paramilitary Activities (*Nicar. v. U.S.*), 1986 I.C.J. 14, ¶ 242 (June 27), quoted in Mary Ellen O'Connell, *Continuing Limits on U.N. Intervention in Civil War* 67 IND. L. J. 903, 906 (1992). O'Connell interprets the Nicaragua case as allowing "[d]istribution of humanitarian aid, even against the wishes of a government in effective control . . ." *Id.*

Security Council resolutions addressing human rights violations in Iraq, Bosnia-Herzegovina, Somalia and Rwanda confirm a right to assist victims of human rights abuses. Resolution 688 condemned "the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish-populated areas . . ." and appealed "to all Member States and to all humanitarian organizations to contribute to . . . humanitarian relief efforts."⁶² The resolutions addressing the crisis in Bosnia-Herzegovina have been humanitarian in purpose in providing food, water, and shelter to victims, and condemning genocide and other atrocities.⁶³ In Resolution 794, the Security Council found that the "magnitude of the human tragedy caused by the conflict in Somalia" constituted a threat to peace and accepted the United States' offer to deploy its military under U.S. control to protect the distribution of humanitarian aid.⁶⁴ In Resolution 918 regarding Rwanda, the Security Council sought to "secure humanitarian areas," and to protect "distribution of relief supplies and humanitarian relief operations."⁶⁵

The right to give assistance includes a continuum of action of varying degrees of intrusion with military intervention at one extreme and mere condemnation at the other. If humanitarian assistance takes the form of military intervention, the use of force is required to be

62. S.C. Res. 688, U.N. SCOR, 46th Sess., 2982nd mtg., U.N. Doc. S/RES/688 (1991).

63. See generally S.C. Res. 770, U.N. SCOR, 47th Sess., 3106th mtg., U.N. Doc. S/RES/770 (1992) (calling upon States to take "all measures necessary to facilitate . . . delivery of humanitarian assistance to Sarajevo and wherever needed in Bosnia and Herzegovina"); S.C. Res. 743, U.N. SCOR, 47th Sess., 3055th mtg., U.N. Doc. S/RES/743 (1992) (establishing UNPROFOR, a U.N. Protective Force); S.C. Res. 761, U.N. SCOR, 47th Sess., 3078th mtg., U.N. Doc. S/RES/761 (1992) (authorizing UNPROFOR to secure the Sarajevo airport to secure delivery of humanitarian aid); S.C. Res. 776, U.N. SCOR, 47th Sess., 3114th mtg., U.N. Doc. S/RES/776 (1992) (enlarging UNPROFOR's mandate to further protect the delivery of aid); S.C. Res. 781, U.N. SCOR, 47th Sess., 3122nd mtg., U.N. Doc. S/RES/781 (1992) (establishing a ban on military flights in the airspace of Bosnia-Herzegovina); S.C. Res. 819, U.N. SCOR, 48th Sess., 3199th mtg., U.N. Doc. S/RES/819 (1993) (demanding the "unimpeded delivery of humanitarian assistance to all parts of Bosnia and Herzegovina"); S.C. Res. 824, U.N. SCOR, 48th Sess., 3208th mtg., U.N. Doc. S/RES/824 (1993) (establishing Sarajevo, Tuzla, Zepa, Gorazde, Bihac, and Srebrenica as safe areas).

64. S.C. Res. 794, U.N. SCOR, 47th Sess., 3145th mtg., U.N. Doc. S/RES/794 (1992).

65. S.C. Res. 918, U.N. SCOR, 49th Sess., 3377th mtg., U.N. Doc. S/RES/918 (1994).

necessary and proportional.⁶⁶ Possible abuses of the right to give humanitarian assistance remain a concern.⁶⁷

The "right of assistance" acknowledges a moral imperative to come to the aid of the suffering that, arguably, can raise the *right* of assistance to a *duty* of assistance. J. A. Carrillo Salcedo asserts that "if there is a clear and far-reaching violation of fundamental human rights, the international community has the *duty* to interfere, via the United Nations Security Council or General Assembly"⁶⁸ Former Secretary-General Pérez de Cuéllar notes a duty or obligation of assistance rather than a right as well when he finds a "*collective obligation of States* to bring relief and redress in human rights emergencies."⁶⁹

The often-voiced requirement that aid be given indiscriminately supports an obligation of assistance.⁷⁰ For instance, Secretary-General Pérez de Cuéllar sets forth the first caveat to the principle of protection of human rights, which can be referred to as the principle of impartiality: that protection "cannot be invoked in a particular situation and disregarded in a similar one. To apply it selectively is to debase it."⁷¹ Under General Assembly Resolution 47/120, the

66. See Pérez de Cuéllar, *supra* note 1, at 8 (explaining that proportionality is required to be maintained during an intervention). "Proportionality is a fundamental component of the law on the use of force and the law of armed conflict—the *jus ad bellum* and the *jus ad bello* The legitimate resort to force under the United Nations system is regarded by most commentators as restricted to the use of force in self-defense under Article 51 and collective security action under Chapter VII of the U.N. Charter." Judith Gail Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT'L. L. 391, 391 (1993). "In the *jus ad bello* sense, proportionality has 'to do with calculations of force necessary to subdue the enemy'" *id.* (quoting JAMES TURNER JOHNSON, JUST WAR TRADITION AND THE RESTRAINT OF WAR 202 (1991)).

67. B. Godet notes that "the right of humanitarian assistance can be exercised only in favour of or against 'small States,' there being no possibility of action against the great Powers." *Summing Up*, *supra* note 8, at 328 (comment of B. Godet). F. Orrego Vicuna states that "the difficulty, or indeed the danger, lies in the fact that some people wanted to extend the possibility of intervention to other situations that are different from that of the Kurds: for example, intervention for ecological purposes." *Id.* at 329 (comment of F. Orrego Vicuna).

68. *Id.* at 331 (comment of J. A. Carrillo Salcedo).

69. Pérez de Cuéllar, *supra* note 1, at 8 (emphasis added); see also Scheffer, *supra* note 60, at 263.

70. See *Summing Up*, *supra* note 8, at 327-34.

71. Pérez de Cuéllar, *supra* note 1, at 8. As B. Godet states, "[p]olitical and humanitarian matters do not make good bedfellows. Indeed, humanitarian matters are becoming more and more political" *Summing Up*, *supra* note 8, at 328; see also David J. Scheffer, *The Expanding U.N. Role In Humanitarian Relief Operations*, 86 A.S.I.L. PROCEEDINGS 313, 317 (1992) (discussing the rapid evolvement of the legal norms underpinning international humanitarian relief operations).

secretary-general is encouraged "to continue to address the question of coordination, when necessary, between humanitarian assistance programmes and peace-keeping or related operations, *preserving the non-political, neutral, and impartial character of humanitarian action*"⁷²

Further, the principle of impartiality argues for a recognition of a right to assist the restoration of democracy, just as a right exists to assist the victims of violations of other recognized freedoms.⁷³ After all, "[r]espect for human rights and for fundamental freedoms without distinction of any kind is a fundamental rule of international human rights law."⁷⁴ Arguably, former Secretary-General Pérez de Cuéllar includes aggression against the sovereign will of the people when he speaks of "human rights emergencies" which trigger an obligation to assist.⁷⁵ Tyranny is an injury different in kind from deprivation of food, water, and shelter, yet the right to be free from domination is vital.

V. DEVELOPMENT OF THE RIGHT TO ASSIST TO RESTORE DEMOCRACY

A. Evidence of the Emerging Right of Humanitarian Assistance to Restore Democracy

The emerging right to assist to restore democracy appears to be a step taken in the development of humanitarian assistance and is a part of the overall development of humanitarian assistance. A discussion of the recent evidence of developments in the right to assist

72. *An Agenda for Peace: preventive diplomacy and related matters*, G.A. Res. 47/120, at 41 (1992), reprinted in 46 U.N.Y.B. 38, U.N. Sales No. E.93.I.1. (emphasis added). The claim of a right or duty of assistance was central to the U.N. undertaking in Bosnia-Herzegovina. In Resolution 770, the Security Council expressly acted under Chapter VII and found "that the situation in Bosnia and Herzegovina constitutes a threat to international peace and security and that the provision of humanitarian assistance in Bosnia and Herzegovina is an important element in the Council's effort to restore international peace and security in the area" (emphasis added). S.C. Res. 770, *supra* note 63.

73. Secretary-General Boutros Boutros-Ghali insists that "the principles of the Charter must be applied consistently, not selectively." *An Agenda for Peace: preventive diplomacy, peacemaking, and peace-keeping: Report of the Secretary-General*, U.N. GAOR, 47th Sess., at 975, U.N. Doc. A/47/277 (1992), reprinted in 46 U.N.Y.B. 35, U.N. Sales No. E.93.I.1. Other recognized freedoms include the right of self-determination, and "freedom from torture, disappearance, . . . prolonged arbitrary detention, [and] . . . systematic racial discrimination." Hannum, *supra* note 47, at 36; Hans A. Linde, Book Review, 85 AM. J. INT'L L. 414 (1991).

74. Vienna Declaration, *supra* note 34, ¶ 15, at 1667.

75. Pérez de Cuéllar, *supra* note 1, at 7, 8.

to protect human rights is consistent with and supports a right of humanitarian assistance to restore democracy.

1. *General Assembly Resolutions.* Recent General Assembly resolutions support a right of the international community to assist victims in humanitarian crises. The General Assembly Resolution on the High Commissioner for the Promotion and Protection of All Human Rights "recogni[z]es that . . . the promotion and protection of all human rights is a legitimate concern of the international community" and that "it is the duty of States . . . to promote and protect all human rights and fundamental freedoms" ⁷⁶

The Resolution on Strengthening the Coordination of Humanitarian Emergency Assistance of the United Nations also supports a right of humanitarian assistance.⁷⁷ This resolution provides that "humanitarian assistance should be provided with the consent of the affected country and in principle on the basis of an appeal by the affected country."⁷⁸ While such consent is preferable, when it is not given, humanitarian intervention, including that involving the use of force, can be provided without the consent of the affected country.⁷⁹

2. *The Vienna Declaration.* The concept of the right of humanitarian assistance to restore democracy, supported by Security Council Resolution 940, is not new. It is consistent with the declarations in, as well as the tenor of, numerous recent international and regional instruments. The Vienna Declaration, adopted at the World Conference on Human Rights, states that the right of humanitarian assistance is justified on the grounds that: (1) "[t]he promotion and protection of human rights is a matter of priority for the international community;"⁸⁰ (2) "[h]uman rights and fundamental freedoms are the birthright of all human beings; their protection and promotion is the first responsibility of Governments;"⁸¹ and (3) "the international

76. *The General Assembly Resolution on the High Commissioner for the Promotion and Protection of All Human Rights*, G.A. Res. 48/141, U.N. GAOR, 48th Sess., 85th mtg., U.N. Doc. A/RES/48/141 (1993), reprinted in 33 I.L.M. 303, 305 (1994); see also Vienna Declaration, *supra* note 34, at 1665.

77. See discussion of norm of intervention in KIRGIS, *supra* note 19, at 866-67.

78. Resolution on Strengthening the Coordination of Humanitarian Emergency Assistance of the United Nations, G.A. Res.46/182, U.N. GAOR, 46th Sess., Supp. No. 49, Annex ¶ 3, at 50, U.N. Doc. A/46/49 (1991), reprinted in KIRGIS, *supra* note 19, at 862-866 [hereinafter Assistance Resolution].

79. *Id.*; Scheffer, *supra* note 71, at 314; KIRGIS, *supra* note 19, at 866-867.

80. Vienna Declaration, *supra* note 34, at 1665.

81. *Id.*

community should devise ways and means to remove the current obstacles and meet challenges to the full realization of all human rights and to prevent the continuation of human rights violations resulting thereof throughout the world.”⁸²

The Vienna Declaration is also supportive of the emerging right to assist to restore democracy. It bases this emerging right on the grounds that: (1) by the right of self-determination, all peoples “freely determine their political status, and freely pursue their economic, social and cultural development;”⁸³ and (2) “[t]he denial of the right of self-determination [is] a violation of human rights and underlines the importance of the effective realization of this right.”⁸⁴ The Vienna Declaration further states that:

[T]his shall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind.⁸⁵

Establishing the importance of the “effective realization” of the right to self-determination, exhorting the international community to prevent the continuation of human rights violations, and ruling out action against representative governments would allow a right of humanitarian assistance. This right could conceivably include military intervention in states with non-representative governments which violate fundamental human rights, including the right of self-determination.⁸⁶ The World Conference on Human Rights (World Conference) acted on a right of humanitarian assistance when it called “on all States to take immediate measures, individually and collectively, to combat the practice of ethnic cleansing to bring it quickly to an

82. *Id.* at 1664. In preparation for the U.N. World Conference on Human Rights in Vienna, the Center for Human Rights submitted a draft which reportedly would have allowed “flexible, prompt, corrective and preventive measures” to correct human rights abuses and further would permit committees to present human rights abuses directly to the Security Council. Third World nations voiced objections to these provisions. *Human Rights: Third World Unhappy in Lead With*, Inter Press Service, Apr. 20, 1993.

83. Vienna Declaration, *supra* note 34, at 1665.

84. *Id.*

85. *Id.*

86. *Id.*

end.”⁸⁷ The World Conference found not only a right of states to assist to end genocide but also a right of victims to receive assistance. It stated, “[v]ictims of the abhorrent practice of ethnic cleansing are entitled to appropriate and effective remedies.”⁸⁸

3. *CSCE Documents.* The Copenhagen Document, the Charter of Paris, and the Moscow Document, provide support for the victims of violations of rights and fundamental freedoms to receive assistance and the right of participating states to assist such victims. These instruments which carried forward the Helsinki process⁸⁹ have been described by some as “political” and “nonbinding.”⁹⁰ However, Professor Kirgis recognizes that significant human rights instruments “reflect an *opinio juris*” and states further that “[i]n the human rights field, a strong showing of *opinio juris* may overcome a weak demonstration of state practice to establish a customary rule.”⁹¹

In the Copenhagen Document, each participating state makes a commitment not only to defend and protect the democratic order established within its own borders but also a commitment to defend and protect the democratic order of the other participating states against violent attack. According to the Copenhagen Document, the participating states

recognize their responsibility to defend and protect, in accordance with their laws, their international human rights obligations and

87. *Id.* at 1676.

88. *Id.* at 1677.

89. The “Helsinki process” is described as a systematic process by which nations develop, encourage, build and maintain the law of “the legal structures for the enforcement of human rights,” i.e., economic, social and cultural rights. Lori Fisler Damrosch, *Constitutional Control of Military Actions: A Comparative Dimension*, 85 AM. J. INT’L L. 92, 95 (1991). In 1972, thirty-five nations, including the United States and the Soviet Union inaugurated this process by meeting to discuss fundamental freedoms at the Conference of Security and Cooperation in Europe (CSCE). James F. Smith, *NAFTA and Human Rights: A Necessary Linkage*, 27 U.C. DAVIS L. REV. 793, 819 & n.96 (1994).

90. See Lori Fishler Damrosch, *International Human Rights Law in Soviet and American Courts*, 100 YALE L.J. 2315, 2319 (1991); Jost Delbruck, *A More Effective International Law or a New “World Law”?- Some Aspects of the Development of International Law in a Changing International System*, 68 IND. L.J. 705, 715 & n.39 (1993).

91. Kirgis, *supra* note 46, at 306. Kirgis makes this comment in discussing the Vienna Declaration and General Assembly resolutions. *Id.* According to Hurst Hannum, the 1975 Final Act of the Conference on Security and Co-operation in Europe (to which the Charter of Paris, the Copenhagen Document and the Moscow Document are “follow-up” documents) represents “a significant understanding between the Western and Soviet blocs on a variety of issues.” Hannum, *supra* note 47, at 28; *but see* Damrosch, *supra* note 90. Damrosch asserts that the CSCE documents “are generally considered ‘political’ rather than ‘legal.’” *Id.* at 2319.

their international commitments, the democratic order freely established through the will of the people against the activities of persons, groups or organizations that engage in or refuse to renounce terrorism or violence aimed at the overthrow of that order or of that of another participating State.⁹²

Note that a reasonable interpretation of the language "defend and protect" could include forcible intervention. The right of the individual victim to both seek and give assistance in circumstances where fundamental freedoms are violated is clearly set forth.⁹³ This right of assistance would reasonably include transboundary assistance. Note that assistance is not limited to nonforcible methods.

In the Charter of Paris, participating states indicate that the protection of human rights and fundamental freedoms is undertaken as a step necessary to strengthen democracy.⁹⁴ Participating states make a commitment to protect democratic government, asserting that "[o]ur States will co-operate and support each other with the aim of making democratic gains irreversible."⁹⁵ In support of the right of democracy, the right of the victim to receive assistance from the international community is set forth as follows:

92. Copenhagen Document, *supra* note 26, at 1309 (emphasis added).

93. The pertinent provisions state,

(11) The participating States further affirm that, where violations of human rights and fundamental freedoms are alleged to have occurred, the effective remedies available include

- (11.1) -the right of the individual to seek and receive adequate legal assistance;
- (11.2) -the right of the individual to seek and receive assistance from others in defending human rights and fundamental freedoms, and to assist others in defending human rights and fundamental freedoms;
- (11.3) -the right of individuals or groups acting on their behalf to communicate with international bodies with competence to receive and consider information concerning allegations of human rights abuses.

Copenhagen Document, *supra* note 26, at 1312; *see also* Scheffer, *supra* note 60, at 276-77.

94.

We undertake to build, consolidate and strengthen democracy as the only system of government of our nations. In this endeavor, we will abide by the following:

Human rights and fundamental freedoms are the birthright of all human beings, are inalienable and are guaranteed by law. Their protection and promotion is the first responsibility of government.

Charter of Paris, *supra* note 29, at 193.

95. *Id.* at 195.

We will ensure that everyone will enjoy recourse to effective remedies, national or international, against any violation of his rights.

Full respect for these precepts is the bedrock on which we will seek to construct the new Europe.⁹⁶

In the Moscow Document, participating states make a commitment to support restoration of legitimate democracy as follows:

(17) The participating States

- (17.1) - condemn unreservedly forces which seek to take power from a representative government of a participating State against the will of the people as expressed in free and fair elections and contrary to the justly established constitutional order;
- (17.2) - *will support vigorously, in accordance with the Charter of the United Nations, in case of overthrow or attempted overthrow of a legitimately elected government of a participating State by undemocratic means, the legitimate organs of that State upholding human rights, democracy and the rule of law, recognizing their common commitment to countering any attempt to curb these basic values;*
- (17.3) - recognize the need to make further peaceful efforts concerning human rights, democracy and the rule of law within the context of security and cooperation in Europe, individually and collectively, to make democratic advances irreversible and prevent any falling below the standards laid down in the principles and provisions of the Final Act, the Vienna Concluding Document, the Document of the Copenhagen Meeting, the Charter of Paris for a New Europe and the present document.⁹⁷

4. *Organization of American States Charter and Resolutions.*

The Organization of American States (OAS) supports a right of humanitarian assistance to restore democracy. The preamble of the Charter of the Organization of American States declares that member states are "convinced that representative democracy is an indispens-

96. *Id.*

97. *Moscow Document*, *supra* note 32, at 1677 (emphasis added); see Scheffer, *supra* note 60, at 278.

able condition for the stability, peace and development of the region."⁹⁸ Article 2 of the OAS Charter sets forth as an "essential purpose" the promotion and consolidation of "representative democracy, with due respect for the principle of nonintervention."⁹⁹ Despite its acknowledgement of the principle of nonintervention, the OAS has undertaken an activist role in support of democracy under article 2.

The Santiago Resolution, adopted on June 5, 1991, asserts that regional solidarity requires "the political organization of those [American] States to be based on effective exercise of representative democracy."¹⁰⁰ The Santiago Resolution instructs

"the Secretary General to call for the immediate convocation of a meeting of the Permanent Council in the case of any event giving rise to the sudden or irregular interruption of the democratic political institutional process of the legitimate exercise of power by the democratically elected government in any of the Organization's member states."¹⁰¹

The Permanent Council shall "look into the events [and] . . . adopt any measures deemed appropriate."¹⁰² In fact, as U.S. Senator Graham indicated, "[m]uch of the original impetus for international action in Haiti was as a result of the OAS's Santiago Resolution, which committed the hemisphere to the protection of democracies."¹⁰³

The first convocation of the OAS Permanent Council under the Santiago Resolution was the September 30, 1991, meeting of the Permanent Council in response to the overthrow of President Aristide. Permanent Council Resolution 567 adopted on September 30, 1991, condemned the "abrupt, violent, and irregular interruption of the legitimate exercise of power by the democratic government of that country" and demanded "adherence to the Constitution and respect for the government, which was legitimately established

98. OAS Charter, *supra* note 18, at 989.

99. *Id.*

100. O.A.S. G.A. Res. 1080, pmb1. (June 5, 1991), *reprinted in* 2 U.S. DEPT. OF STATE DISPATCH 750, 750 (Sept.-Dec. 1991).

101. *Id.* ¶ 1.

102. *Id.* ¶ 2.

103. *Hearing of the Senate Armed Services Committee, Subcommittee on Coalition Defense and Reinforcing Forces*, Fed. News Service, May 12, 1994 (statement of Sen. Graham).

through the free expression of the will of that country's people."¹⁰⁴ Consistent with the concept of popular sovereignty, the Permanent Council demanded that "parties put an end to the violation of the Haitian people's rights, respect the life and physical safety of President Jean-Bertrand Aristide, and restore the President's exercise of his constitutional authority."¹⁰⁵

OAS Resolution MRE/RES 1/91, which called for the diplomatic, economic and commercial isolation of Haiti, condemned "the grave events taking place in Haiti, which deny the right of its people to self-determination, and [demands] full restoration of the rule of law and of constitutional order and the immediate reinstatement of President Jean-Bertrand Aristide in the exercise of his legitimate authority."¹⁰⁶ OAS Resolution MRE/RES 2/91, which imposed a trade embargo on Haiti, denounced the replacement of the legitimate president of Haiti.¹⁰⁷

The OAS has called for the restoration or strengthening of democracy in Peru and Venezuela as well. Under the Santiago Resolution, the Permanent Council convened and adopted a resolution on April 6, 1992, which called for an ad hoc meeting of the Ministers of Foreign Affairs regarding the denial of representative democracy in Peru. By Resolution MRE/RES 2/92, the Ministers of Foreign Affairs noted the commitment made by President Fujimori to the people of Peru to "call immediate elections for a Constitutional Congress, in an electoral process fully guaranteeing free expression of the will of the people, in such a way as to restore representative democracy in his country"¹⁰⁸ and urged Peruvian authorities to restore representative democracy as early as possible.¹⁰⁹ In addressing the attempted overthrow of the democratic government in Venezuela, the General Assembly passed a resolution on May 22, 1992, confirming their support for the democratic government of

104. OAS Resolution MRE/RES. 567, ¶ 1 (Sept. 30, 1991), *reprinted in* 2 U.S. DEPT. OF STATE DISPATCH 750, 750 (Sept.-Dec., 1991).

105. *Id.* ¶ 3.

106. OAS Resolution MRE/RES. 1/91, ¶ 1 (Oct. 3, 1991), *reprinted in* 2 U.S. DEPT. OF STATE DISPATCH 760, 760 (Sept.-Dec., 1991).

107. OAS Resolution MRE/RES. 2/91 (Oct. 8, 1991), *reprinted in* 2 U.S. DEPT. OF STATE DISPATCH 761, 761 (Sept.-Dec., 1991).

108. OAS Resolution MRE/RES. 2/92, ¶ 1 (May 18, 1992), *reprinted in* 3 U.S. DEPT. OF STATE DISPATCH 526, 526 (1992).

109. *Id.* ¶ 2.

Venezuela and reaffirming "confidence in democracy, as the political system of American nations" ¹¹⁰

5. *European Union Declaration.* In condemning the installation of Emile Jonassaint as president of Haiti and reaffirming its support for sanctions, the European Union demonstrated its commitment to the restoration of democracy in Haiti.¹¹¹ The European Union noted that the installation of Jonassaint was an affront to the international community and stressed its support for measures adopted by the Security Council and the OAS.¹¹²

6. *Clinton Administration Guidelines.* In May, 1994, President Clinton signed a presidential decision directive (PDD) after a review of the United States' "peacekeeping policies and programs in order to develop a comprehensive policy framework, suited to the realities of the post-cold war period."¹¹³ The crisis in Haiti was one of the first to be considered under the new policy.¹¹⁴ The summary of the PDD lists factors for the administration to contemplate "when deciding whether to vote for a proposed new U.N. peace operation (Chapter VI or Chapter VII) or to support a regionally-sponsored peace operation"¹¹⁵ in an effort to avoid missions which are broad, indefinite, and open-ended or which do not advance U.S. interests.¹¹⁶ The summary also seems to indicate support from the Clinton administration for a right of humanitarian assistance in finding a threat to the peace in "the sudden interruption of established democracy or gross violation of human rights coupled with violence or threat of violence."¹¹⁷

110. OAS General Assembly Resolution AG/doc. 2906/92, ¶ 2 (May 22, 1992), reprinted in 3 DEPT. OF STATE DISPATCH 527, 527 (1992).

111. *Press Communique by the Presidency on Behalf of the European Union on Haiti*, Reuter European Community Report, May 30, 1994.

112. *Id.*

113. United States: Administration Policy on Reforming Multilateral Peace Operations, May 1994, 33 I.L.M. 795, 798 [hereinafter PDD].

114. Madeleine Albright, U.S. Ambassador to the United Nations, indicated the U.S. deployment in Rwanda was the "first test of the application of PDD-25." Farhan Haq, *U.S.-Peacekeeping: Washington Puts U.N. Missions On Hit List*, Inter Press Service, May 18, 1994, available in LEXIS, NEWS Library, WIRES File.

115. PDD, *supra* note 113, at 803.

116. Haq, *supra* note 114.

117. See PDD, *supra* note 114, at 802-03.

B. Security Council's Claim of Secondary Rights in the Emergence of the Right of Humanitarian Assistance to Restore Democracy

The right of humanitarian assistance certainly includes the right to deliver food, water, and shelter,¹¹⁸ and this right, in turn, gives rise to additional rights necessary to fulfill such an obligation.¹¹⁹ In the case of the right to give humanitarian assistance in the form of food, water, and shelter, the secondary rights have come to include a

118. O'Connell, *supra* note 61, at 906.

119. See Scheffer, *supra* note 71 at 316-17; see also KIRGIS, *supra* note 19, at 867, 875 (noting U.N. demands that conditions allowing for the delivery of humanitarian assistance be created).

right of delivery or access,¹²⁰ a right to protect victims,¹²¹ and a right to protect U.N. personnel.¹²²

120. See Scheffer, *supra* note 74, at 317; see also KIRGIS, *supra* note 19, at 875-76. In the context of Bosnia-Herzegovina, this concern was addressed by the Security Council in Resolution 770, which stated that the provision of humanitarian assistance in Bosnia-Herzegovina is "an important element in the Council's effort to restore international peace and security in the area . . ." S.C. Res. 770, *supra* note 63, and in Resolution 819, which stated the Council's position that "impediments to the delivery of humanitarian assistance constitute a serious violation of international humanitarian law . . ." S.C. Res. 819, *supra* note 63.

In the Somali context, Resolution 794 "authorize[d] the Secretary-General and Member States . . . to use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia." S.C. Res. 794, *supra* note 64.

Comments made during the Security Council debate of December 3, 1992, support a secondary right of delivery or access. Ambassador Merimee of France stated that "[t]he commitment is part of the principle of establishing access to victims and of the right to emergency humanitarian assistance . . ." Comment of Amb. Merimee of France, U.N. SCOR, 47th Sess., 3145th mtg. at 29, U.N. Doc. S/PV.3145 (1992) (emphasis added).

Addressing the Rwandan crisis, Security Council Resolution 918 expanded the United Nations Assistance Mission for Rwanda's (UNAMIR's) mandate to include protection of the "distribution of relief supplies" and acknowledged that UNAMIR "may be required to take action in self defense against persons or groups who threaten . . . the means of delivery and distribution of humanitarian relief." S.C. Res. 918, *supra* note 65.

121. In Resolution 743, the Security Council established under its authority, a U.N. Protection Force (UNPROFOR). S.C. Res. 743, *supra* note 63. Secretary-General Boutros-Ghali in a report to the Security Council described the UNPROFOR concept:

United Nations troops and police monitors would be deployed in certain areas in Croatia, designated as "United Nations Protected Areas." These areas would be demilitarized; all armed forces in them would be either be withdrawn or disbanded. The role of the United Nations troops would be to ensure that the areas remained demilitarized and that *all persons residing in them were protected from fear of armed attack*

Report of the Secretary-General, U.N. Doc. S/23280, at 16 (1991) (emphasis added).

To underscore the significance of humanitarian assistance in the protection of the victims themselves and the securing of the delivery of humanitarian assistance (i.e., meaning food, water and medicines) to those in need, the Security Council introduced the concept of safe havens in Resolutions 819 and 824. Resolution 819 specified that a safe area "should be free from any armed attacks or any other hostile acts." S.C. Res. 819, *supra* note 63. Resolution 824 extended this safe area designation to additional areas of Bosnia and Herzegovina and demanded cooperation with UNPROFOR by all parties involved in respecting these safe areas. S.C. Res. 824, *supra* note 63. Ultimately, in response to a request from Secretary-General Boutros-Ghali, NATO authorized air strikes to ensure the protection of these safe areas in Bosnia-Herzegovina. Report of the Secretary-General Pursuant to Resolution 913 (1994), U.N. Doc. S/1994/600 (1994). Thus, the right to protect victims and to deliver humanitarian aid was aggressively defended with use of force.

Resolution 918 expanded UNAMIR's role in Rwanda to include the protection "of displaced persons, refugees, and civilians at risk." S.C. Res. 918, *supra* note 65.

122. By Security Council Resolution 868,

The Security Council . . . 3. Urges States and parties to a conflict to cooperate closely with the United Nations to ensure the security and safety of United Nations forces and

The Security Council's claim of authority to establish the conditions necessary for democracy first appeared in resolutions regarding Somalia.¹²³ Resolution 865 called "national reconciliation in a free, democratic, and sovereign Somalia" one of the three objectives of the U.N. Operation in Somalia II (UNOSOM II).¹²⁴ Resolution 814 cited a need for "steps leading to the establishment of representative democratic institutions . . ." ¹²⁵ and pledged "to assist" Somalians "on a local, regional or national level, to participate in free and fair elections . . ." ¹²⁶ Under Resolution 897, additional transitional steps to democracy included "representative district and regional councils, . . . a transitional council, . . ." and the "re-establish[ment] [of a] police force and . . . judicial system."¹²⁷

The emergence of secondary rights necessary for the effective restoration of democracy are evident throughout the Security Council resolutions regarding Haiti. They include: (1) the right to establish "a proper and secure environment"¹²⁸ for new legislative action; (2) the right to establish and train a modern armed force under civilian command; (3) the right to establish and train a new civilian police force under civilian command; (4) the right to make preparations for free and fair legislative elections;¹²⁹ (5) the right of safety of U.N. personnel; and (6) freedom of movement and communication.¹³⁰

The Security Council asserted secondary rights in Resolution 867 by imposing obligations on the state, claiming the rights "necessary for the performance of its task" and called upon Haiti to "ensure" those rights.¹³¹ Specifically, the Security Council called upon the

personnel; 4. *Confirms* that attacks and use of force against persons engaged in a United Nations operation authorized by the Security Council will be considered interference with the exercise of the responsibilities of the Council and may require the Council to consider measures it deems appropriate; 5. *Confirms also* that if, in the Council's view, the host country is unable or unwilling to meet its obligations with regard to the safety and security of a United Nations operation and personnel engaged in the operation, the Council will consider what steps should be taken appropriate to the situation

S.C. Res. 868, U.N. SCOR, 48th Sess., 3228th mtg., U.N. Doc. S/RES/868 (1993).

123. *See generally* Franck, *supra* note 6 (discussing the concept of "texture of right").

124. S.C. Res. 865, U.N. SCOR., 48th Sess., 3280th mtg., U.N. Doc. S/RES/865 (1993).

125. S.C. Res. 814, U.N. SCOR, 48th sess., 3188th mtg., U.N. Doc. S/Res/814 (1993).

126. *Id.*

127. S.C. Res. 897, U.N. SCOR, 49th Sess., 3334th mtg., U.N. Doc. S/RES/897 (1994).

128. S.C. Res. 917, *supra* note 17.

129. *Id.*

130. S.C. Res. 867, U.N. SCOR, 48th Sess., 3282nd mtg., U.N. Doc. S/RES/867 (1993).

131. *Id.*; *see* KIRGIS, *supra* note 19, at 854-857.

Haitian Government to ensure the safety of U.N. personnel and the "freedom of movement and communication" necessary "for the successful implementation of the Mission."¹³²

VI. USE OF FORCE TO RESTORE DEMOCRACY ONLY IN HUMANITARIAN CRISIS INVOLVING HUMAN RIGHTS ATROCITIES

A. The Emerging Right of Humanitarian Assistance to Restore Democracy is Independent of Chapter VII Obligations

The right of humanitarian assistance as discussed by Secretary-General Boutros-Ghali is not necessarily based on a Security Council finding of a threat to peace.¹³³ The strength of the obligation to assist is based on the strength of the solidarity of humanity.¹³⁴ Instead of acting under Chapter VII, the Security Council could act to provide humanitarian assistance under article 24. The first paragraph of this article states that "Members confer on the Security Council primary responsibility for the maintenance of international peace and security" for the purpose of "ensur[ing] prompt and effective action by the United Nations."¹³⁵ The Namibia Advisory Opinion delivered by the International Court of Justice (ICJ) in 1971 states that "[t]he reference in paragraph 2 of this Article [24] to specific powers of the Security Council under certain chapters of the Charter does not exclude the existence of general powers to discharge the responsibilities conferred in paragraph 1."¹³⁶ Despite article 24's

132. S.C. Res. 867, *supra* note 130. Resolution 867 is consistent with the previous resolutions in which the Security Council set forth the obligations of the state regarding the delivery of humanitarian assistance. In Resolution 794 the Security Council affirmatively demands that "all parties, movements, and factions in Somalia . . .": (1) "[I]mmediately cease hostilities, maintain a cease-fire . . . and cooperate . . . to promote the process of relief distribution, reconciliation and political settlement . . ."; (2) "[T]ake all measures necessary to facilitate the efforts . . . to provide urgent humanitarian assistance . . ."; (3) "[T]ake all measures necessary to ensure the safety of United Nations and all other personnel engaged in the delivery of humanitarian assistance . . ."; and (4) "[I]mmediately cease and desist from all breaches of international humanitarian law . . ." S.C. Res. 794, *supra* note 64.

133. For a discussion of U.N. action under Chapter VII, requiring a finding of threat to the peace, see *infra* part VI.C.3.

134. See Pérez de Cuéllar, *supra* note 1.

135. U.N. CHARTER art. 24, ¶ 1. Frederic L. Kirgis, Jr. poses the possibility of adopting humanitarian assistance resolutions, in particular Resolution 688, under article 24 rather than Chapter VII. KIRGIS, *supra* note 19, at 854.

136. Legal Consequences for States of The Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16, 52

basis for humanitarian assistance, the acknowledgement of such a right and the growth of secondary rights necessary for the right to be effective have taken place under the authority of Chapter VII. Since the Security Council has chosen to address violations of human rights and freedoms under Chapter VII, it has been necessary for the Security Council to find a threat to the peace in order to meet a duty to assist and protect human rights.

B. Promotion of Democracy as a Condition Necessary for Peace and Security is a Valid Objective of Chapter VII Measures

In Resolution 47/60A, the General Assembly emphasized that certain closely related factors "provide the basis for an enduring and stable universal peace and security."¹³⁷ These factors include "respect for the right to self-determination and national independence, economic and social development, the eradication of *all forms of domination* and respect for basic human rights and fundamental freedoms, as well as the need for preserving the environment."¹³⁸ As illustrated in Security Council resolutions regarding Somalia, the United Nations has recently redefined its role as one of actively promoting conditions for peace, particularly democracy. The significance of this development for Haiti is that it provides a precedent for Security Council authority under Chapter VII to call for the restoration of democratic government and to help create the legislative, judicial, and administrative bodies necessary therefore.

An early precedent for democratic restoration exists in the U.N. Operation in the Congo (ONUC) mandate.¹³⁹ In August, 1960, then Secretary-General Dag Hammarskjold requested the Security Council to clarify the mandate of ONUC in August 1960, stating,

[The Security Council] should also find its way to formulate principles for the United Nations presence, which, in accordance with the Purposes and Principles of the Charter, would safeguard democratic rights and protect the spokesman of all different political views within the large entity of the Congo so as to make it possible for

(June 21).

137. *Review of the Implementation of the Declaration on the Strengthening of International Security*, G.A. Res. 47/60A, U.N. GAOR, 47th Sess., Supp. No. 49, at 80, U.N. Doc. A/47/49 (1992).

138. *Id.* (emphasis added).

139. Thomas M. Franck, *The Security Council and "Threats to the Peace": Some Remarks On Remarkable Recent Developments*, in *THE DEVELOPMENT OF THE ROLE OF THE SECURITY COUNCIL: PEACE-KEEPING AND PEACE-BUILDING* 83, 92-95 (Rene-Jean Dupuy ed., 1993).

them to make their voice heard in democratic forms; this is not an easy matter, because it will require a sensitive development of the United Nations activities, but I am sure it can be done, and *I feel strongly that the United Nations would have failed in its mission if it maintained order while permitting democratic principles to be violated.*¹⁴⁰

More recently, Secretary-General Boutros-Ghali advocated this role for the United Nations when he stated that “[t]he United Nations must foster, through its peace-building measures, the process of democratization in situations characterized by long-standing conflicts, both within and among nations.”¹⁴¹ This enlarged mandate, directed at promoting democracy as a condition of peace, will shape the degree of involvement and the variety of tasks undertaken in peace enforcement. As Scheffer states, “[m]ore recently, the growth of democracy as a legal principle among nations will influence the manner in which certain humanitarian interventions will be carried out.”¹⁴²

The Security Council claims the authority under Chapter VII, while conducting a peace-keeping operation, to attempt to establish the elements giving rise to democracy. The Security Council made this claim in the Somalian context in Resolution 775.¹⁴³ This resolution increased the size and mandate of UNOSOM to establish a secure environment in Somalia.¹⁴⁴ In so doing, the Security Council called for “broad-based consultations and deliberations to achieve reconciliation, agreement on the setting up of transitional government institutions and consensus on basic principles and *steps leading to the establishment of representative democratic institutions*”¹⁴⁵

Later, the Security Council reaffirmed the position taken in Resolution 775, and expressed “its readiness to assist the people of

140. 15 SCOR, 884th meeting (S/PV. 884), at 5 (1960), *quoted in* KIRGIS, *supra* note 19, at 753 (emphasis added).

141. Boutros Boutros-Ghali, *Report of the Secretary-General on the Work of the Organization*, 46 U.N.Y.B. 3, 24, U.N. Doc. A/47/407.

142. Scheffer, *supra* note 60, at 291-92. Within the Document of Copenhagen is a “conviction that full respect for human rights and fundamental freedoms and the development of societies based on pluralistic democracy and the rule of law are prerequisites for progress in setting up the lasting order of peace, security, justice and co-operation that [the participating states] seek to establish in Europe.” Copenhagen Document, *supra* note 26, at 1307; *see also* Scheffer, *supra* note 60, at 276.

143. S.C. Res. 775, U.N. SCOR, 47th Sess., 3110th mtg., U.N. Doc. S/RES/775 (1992).

144. *Id.* For a discussion of Resolution 775, see KIRGIS, *supra* note 19, at 875-876.

145. S.C. Res. 814, *supra* note 125 (emphasis added).

Somalia, as appropriate, on a local, regional or national level, to participate in free and fair elections, with a view towards achieving and implementing a political settlement"¹⁴⁶ The bold and revolutionary nature of this peace enforcement operation is found again in Resolution 865, emphasizing UNOSOM II's "objectives of facilitation of humanitarian assistance and the restoration of law and order, and of national reconciliation in a free, democratic and sovereign Somalia"¹⁴⁷

The Security Council is not a world government and thus does not, in the exercise of its new mandate, impose forms of government or institutions on a population. In discussing the U.N. purpose in Somalia, the Security Council "recogniz[ed] that the people of Somalia bear the ultimate responsibility for setting up viable national political institutions and for reconstructing their country"¹⁴⁸ While the United Nations can establish the environment necessary for a functioning democracy, and even hold an election, ultimately democracy would have to be the form of government desired by the people of the state.

C. Use of Chapter VII Powers to Restore Democracy in the Haiti Crisis

1. *Facts of the crisis in Haiti.* The overthrow of the democratically elected President Jean-Bertrand Aristide, the obstruction by the military of his return to office, and the frustration of democracy prevent realization of the Haitian people's attempt through free and fair elections to choose their form of government. Aristide came to power in elections organized and observed by the U.N. Observer Group for the Verification of the Elections in Haiti (ONUVEH), a U.N. mission which was dispatched by the Secretary-General pursuant to General Assembly Resolution 45/2.¹⁴⁹ Sixty-four ONUVEH security observers developed and executed an "electoral security plan."¹⁵⁰ By ONUVEH's count, "between 62.5 per cent and 71.4 per cent of the 3,227,155 registered voters had cast their ballots,"¹⁵¹

146. *Id.*

147. S.C. Res. 865, *supra* note 124.

148. S.C. Res. 897, *supra* note 127.

149. *Haiti Holds Free, Democratic Elections with U.N. Help*, *supra* note 38, at 64; GA Res. 45/2, U.N. GAOR, 45th Sess., Supp. No. 2, U.N. Doc. A/RES/45/2 (1990).

150. *Haiti holds free, democratic elections with U.N. help*, *supra* note 38, at 64.

151. *Id.* at 63.

with Aristide winning 67.5% of the vote.¹⁵² Thus, the United Nations can verify that the election was democratic, with the votes cast "freely and fairly."¹⁵³ Furthermore, from its direct involvement in Haiti's democratic election, the United Nations can claim to have a special interest in democracy in Haiti.¹⁵⁴

Throughout most of the crisis in Haiti, the Organization of American States (OAS) was the leading advocate of the restoration of democracy and the return of President Aristide to office. The activist role of the OAS regarding Haiti was engendered by the June 1991 adoption of the Santiago Resolution. The Haitian crisis constituted the first overthrow of democracy following the adoption of the Santiago Resolution. Convening under the Santiago Resolution, the Permanent Council of the OAS called for "an end to the violation of Haitian people's rights" and the restoration of the "President's exercise of his constitutional authority."¹⁵⁵ The OAS called for the reinstatement of President Aristide and urged all states to isolate Haiti diplomatically and commercially,¹⁵⁶ and further asked the Secretary-General to urge the Security Council to adopt a similar measure.¹⁵⁷ While the Security Council choose not to do so,¹⁵⁸ the General Assembly requested "the Secretary-General of the United Nations, in accordance with his functions, to consider providing support sought by the Secretary-General of the Organization of American States in implementing the mandates arising from resolutions MRE/RES. 1/91 and MRE/RES. 2/91"¹⁵⁹

On September 10, 1992, the U.N. Secretary-General announced to the Security Council that he would cooperate with the OAS, then

152. *Id.*; Deputy Secretary Talbott, *Pursuing the Restoration of Democracy in Haiti*, 5 U.S. DEP'T ST. DISPATCH 331, 331 (1994) (noting that Aristide won nearly 70% of the vote) [hereinafter *Talbott Statement*].

153. *Talbott Statement*, *supra* note 152.

154. *Id.* Ambassador Adolfo Raul Taylhardat of Venezuela noted that the Security Council had been involved with and encouraged the steps that brought about democracy and the election of the present legitimate government of Haiti. He noted further that the international community's commitment to Haitians has borne no fruit because of the actions of the military in Haiti. Statement of Ambassador Adolfo Raul Taylhardat of Venezuela, U.N. Press Release SC/5718 (1993).

155. OAS Resolution MRE/RES. 567, *supra* note 104, ¶ 4.

156. OAS Res. MRE/RES 1/91, *supra* note 106, ¶ 6; *see also* KIRGIS, *supra* note 19, at 711.

157. OAS Res. MRE/RES 2/91, *supra* note 107, § III, ¶ 4.

158. KIRGIS, *supra* note 19, at 711.

159. G.A. Res. 46/7, ¶ 3, U.N. Doc. A/RES/46/7 (1991).

contemplating an observer mission to Haiti.¹⁶⁰ The Secretary-General dispatched, together with the OAS, a civilian mission to observe and investigate human rights violations.¹⁶¹ In Resolution 47/20, the General Assembly condemned the replacement of President Aristide and urged member states "to renew their support, within the framework of the Charter of the United Nations and international law, by adopting measures in accordance with [OAS resolutions] especially as they relate to the strengthening of representative democracy, the constitutional order and to the embargo on trade with Haiti"¹⁶² Finally, by Resolution 841 of June 16, 1993, the Security Council took note of OAS resolutions and affirmed "that the solution of the crisis in Haiti should take into account" the OAS resolutions prior to imposing an oil embargo on Haiti, freezing the nation's funds, and establishing a committee of the Security Council to monitor the embargo.¹⁶³

On July 3, 1992, President Aristide and junta leader Lieutenant-General Raoul Cedras signed the Governors Island Agreement, a pact that required Cedras to resign and should have returned Aristide to Haiti on October 30, 1993. Aristide would then appoint a new commander-in-chief of the armed forces and nominate a prime minister, with the latter selection to be ratified subsequently by the Parliament.¹⁶⁴ By Resolution 861 of August 27, 1993, the Security Council suspended sanctions after having received notice that the Prime Minister was confirmed and had assumed office in Haiti.¹⁶⁵

160. General Assembly Resolution 47/20, adopted by the General Assembly on November 24, 1992, requested "the Secretary-General of the United Nations to take the necessary measures in order to assist, in cooperation with the Organization of American States, in the solution of the Haitian crisis" G.A. Res 47/20, ¶ 5, U.N. Doc. A/RES/47/20 (Nov. 24, 1992).

161. *A Step Towards Democracy*, U.N. CHRON., June, 1993 at 29.

162. G.A. Res. 47/20, *supra* note 160, ¶ 6.

163. S.C. Res. 841, U.N. SCOR, 48th Sess., 3238th mtg., U.N. Doc. S/RES/841 (1993). Acting under Chapter VII, the Security Council "[d]etermin[ed] that, in these unique and exceptional circumstances, the continuation of this situation threatens international peace and security in the region" *Id.* The Security Council found "a unique and exceptional situation" in the request by the "legitimate" government of Haiti together with coordinated action taken by the OAS and by the General Assembly of the U.N. *Id.*

The preamble to Resolution 841 indicates that the coordinated action includes the report of the Secretary-General regarding Haiti, OAS resolutions regarding Haiti, General Assembly resolutions supporting OAS action, combined leadership of the Secretary-General of the United Nations and the Secretary-General of the OAS, together with the "efforts of the international community to reach a political solution to the crisis in Haiti," efforts undertaken by Mr. Dante Caputo, the Special Envoy for Haiti of the U.N. and OAS Secretaries-General. *Id.*

164. *Transition Agreement Signed on Governors Island*, U.N. CHRON., Sept., 1993, at 8, 8.

165. S.C. Res. 861, U.N. SCOR, 48th Sess., 3271st mtg., U.N. Doc. S/RES/861 (1993).

By Resolution 862 of August 31, 1993, the Security Council sent an "advance team" of approximately thirty personnel to prepare for the arrival of the civilian police and military assistance elements of the U.N. mission bound for Haiti.¹⁶⁶ Noting that there was an urgent need to ensure conditions for the full implementation of the Governors Island Agreement and a subsequent agreement, the New York Pact,¹⁶⁷ the Security Council authorized the dispatch of the U.N. Mission in Haiti (UNMIH) in Resolution 867.¹⁶⁸

After the deployment of the UNMIH was prevented by supporters of the military regime, sanctions under Resolutions 841 and 873¹⁶⁹ were reimposed by Resolution 875.¹⁷⁰ In a series of resolutions adopted subsequently, the Security Council sought to restore a Haitian democracy and reinstate President Aristide, in the framework of the Governors Island Agreement.¹⁷¹

In Resolution 917, the Security Council acted expressly under Chapter VII to impose sanctions upon and isolate Haiti.¹⁷² The Security Council cited the junta's intransigence and subsequent failure to implement an agreed solution as constituting a threat to peace.¹⁷³

166. S.C. Res. 862, U.N. SCOR, 48th Sess., 3272 mtg., U.N. Doc. S/RES/862 (1993).

167. In fulfilling a term of the Governors Island Agreement, Haiti's political leaders agreed to permit that country's parliament to ratify Aristide's nomination of a prime minister. Richard Bernstein, *Haitians Achieve "Political Truce"*, N.Y. TIMES, July 18, 1993, § 1, at 7.

168. S.C. Res. 867, *supra* note 130.

169. S.C. Res. 873, U.N. SCOR, 48th Sess., 3291st mtg., U.N. Doc. S/RES/873 (1993); S.C. Res. 841, *supra* note 163.

170. S.C. Res. 875, U.N. SCOR, 48th Sess., 3293rd mtg., U.N. Doc. S/RES/875 (1993).

171. In discussing the adoption of Resolution 875, Ambassador Li Zhaoxing of China noted that China's support arose in part from the formal request by Aristide, the support by Latin American countries and the OAS. Statement of Ambassador Li Zhaoxing of China, U.N. Press Release SC/5718 (1993).

172. Specifically, the Security Council acted to: (1) impose an embargo on all commercial goods; (2) freeze funds of officers of the military, major participants in the coup, and employees of the military; (3) suspend all flights to and from Haiti, except for humanitarian purposes; and (4) impose a maritime interception to enforce the embargo. The Council condemned "numerous instances of extra-judicial killings, arbitrary arrests, illegal detentions, abductions, rape and enforced disappearances, the continued denial of freedom of expression, and the impunity with which armed civilians have been able to operate and continue operating . . ." S.C. Res. 917, *supra* note 49.

173. Deputy Secretary Talbott notes the existence of external effects which are not direct or immediate, stating:

If the international and hemispheric community allows thugs . . . to rob and terrorize the people of Haiti, that country is likely to become a haven and a breeding ground for the forces of instability and criminality in the region The regime is presiding over a steadily worsening humanitarian catastrophe, raising the specter of a refugee crisis that impinges on the vital interests of all countries in the region, especially Haiti's neighbors.

On June 7, 1994, the OAS took the additional step of prohibiting all commercial flights entering or leaving Haiti, froze assets of Haiti and proscribed financial dealings with Haiti.¹⁷⁴ On July 31, 1994, the Security Council, acting under Chapter VII, authorized a multinational force to intervene militarily in Haiti to restore the democratically elected government.¹⁷⁵

The sensitivities of OAS member states to intervention in the Southern Hemisphere prevented the OAS from endorsing the use of force to oust the military junta.¹⁷⁶ During a meeting at the OAS in Washington on May 13, 1994, Brazil, Peru, Ecuador, and Uruguay rejected the use of force under any circumstances.¹⁷⁷ Mexico and Cuba also rejected use of force.¹⁷⁸ During the Security Council meeting of July 31, 1994, Mexico, Cuba, Uruguay and Venezuela spoke before the Security Council in opposition to use of force to restore democracy in Haiti, arguing that Haiti did not constitute a threat to international peace and security.¹⁷⁹ To the extent that

Talbot Statement, supra note 152, at 331. In the context of the "unique and exceptional circumstances," the Security Council definitively states that "the situation created by the failure of the military authorities in Haiti to fulfill their obligations under the Governors Island Agreement and to comply with relevant Security Council resolutions constitutes a threat to peace and security in the region . . ." S.C. Res. 917, *supra* note 49.

174. *OAS Tightens Sanctions on Haiti Government*, THE RECORD, June 8, 1994, at 18.

175. S.C. Res. 940, U.N. SCOR, 49th Sess., 3413 mtg., U.N. Doc. S/RES/940 (1994). Under the resolution, member states were authorized "to form a multinational force under unified command . . . and to use all necessary means" to implement its stated goals: the "departure" of the "military leadership," the return of Aristide, and the establishment of "a secure and stable environment" that would permit implementation of the Governors Island Agreement. *Id.* The Security Council found "that the situation in Haiti continues to constitute a threat to peace and security in the region . . ." Without specifying what the "situation" includes, the Security Council emphasized: (1) support for action under Chapter VII from the Secretary-General, Aristide, and the permanent representative of Haiti to the United Nations; (2) the terms of the Agreement and the Pact of New York and the violations of these agreements by the military; and (3) the "deterioration of the humanitarian situation" in Haiti, in particular the "continuing escalation by the illegal de facto regime of systematic violations of civil liberties, the desperate plight of Haitian refugees and the recent expulsion of the staff of the International Civilian Mission (MICIVH)." The Preamble expresses a broader purpose in reaffirming the "commitment" of the international community to "assist and support" the development of Haiti. *Id.*

Resolution 940 was adopted by twelve affirmative votes, no negative votes and two abstentions on the part of Brazil and China. See *Security Council Authorizes Multinational Force, supra* note 53.

176. Howard W. French, *Latin Americans Reject Use of Force to Unseat Haiti Military*, INT'L HERALD TRIBUNE, May 14, 1994, available in LEXIS, NEWS Library, NON-US File.

177. *Id.* The United States, Argentina, and Antigua had attempted to include support for use of force in Haiti in an OAS resolution, but were unsuccessful. *Id.*

178. *Id.*

179. *Security Council Authorizes Multinational Force, supra* note 53.

these nations appear to reject democratic intervention out of a fear that it will be used to correct human rights abuses at home, their disapproval loses its credibility.¹⁸⁰

Conversely, the new Secretary-General of the OAS, Cesar Gaviria, immediately endorsed the U.S. initiative and pledged to President Clinton the support of the OAS for U.S. action in Haiti.¹⁸¹ Ultimately, ten Caribbean nations and Argentina agreed to contribute to the multinational force needed to restore democracy in Haiti.¹⁸² Even though the U.S. troops landed in Haiti under an agreement obtained from the military junta under much duress, on September 24, 1994, the OAS communicated to President Clinton, "its satisfaction with the progress being made in reaching a peaceful resolution of the Haitian crisis."¹⁸³

On September 18, 1994, pressured by the specter of an American-led invasion, Lieut. Gen. Raoul Cedras and Brig. Gen. Philippe Biamby, the military Chief of Staff, agreed to step down by October 15 and allow President Aristide to resume power in Haiti.¹⁸⁴ On September 19, 1994, three thousand U.S. troops commenced phase I of "Operation Restore Democracy" by entering Haiti and securing all airports and ports.¹⁸⁵

2. *HAITI as a good model for intervention.* The overthrow of democracy has recently been seen as a serious threat to peace. In Resolution 794, the Security Council did not require an external effect, or direct effect outside the borders of Somalia, in finding that

180. Anthony D'Amato makes this argument in regards to the lack of support of the OAS for the 1991 invasion of Panama. D'Amato, *supra* note 7, at 516.

181. *OAS Chief Meets With Clinton On Haiti*, UPI, Sept. 20, 1994, available in LEXIS, NEWS Library, UPI File.

182. Wolf Blitzer, *Rhetoric Increases in Possible Haiti Invasion*, (CNN television broadcast, Sept. 8, 1994), available in LEXIS, NEWS Library, CNN File; Anthony Boadle, *U.S. Forces Run Into Potentially Volatile Situation in Haiti*, Reuters World Service, Sept. 21, 1994, available in LEXIS, NEWS Library, REVWLD File. More than twenty-four nations contributed to the multinational force. Secretary of State Warren Christopher, Remarks at the Meeting of the Coalition of Nations Contributing Troops to the Defense of Democracy in Haiti, (Sept. 16, 1994) (transcript available in LEXIS, NEWS Library, FEDNEW File).

183. Martin Walker, *Clinton Gets OAS Go-Ahead But His Allies Stay Offshore*, THE GUARDIAN, Sept. 24, 1994 at 16, 16.

184. This agreement followed negotiations with Clinton envoys, former President Jimmy Carter, Senator Sam Nunn of Georgia and Gen. Colin L. Powell, and included a promise of amnesty for those stepping down. Douglas Jehl, *Haiti's Military Leaders Agree to Resign; Clinton Halts Assault, Recalls 61 Planes: Troops in Today*, N.Y. TIMES, Sept. 19, 1994, at 1.

185. Larry Rohter, *3000 U.S. Troops Land Without Opposition and Take Over Ports and Airfields in Haiti*, N.Y. TIMES, Sept. 20, 1994, at 1.

“the magnitude of the human tragedy caused by the conflict in Somalia” constituted a threat to peace.¹⁸⁶ It appears to be the first time that the Security Council found that an internal breach of human rights, regardless of the presence or absence of external effects, could rise to the level of a threat to peace. Arguably, the determinant seems to be whether the Security Council finds the violation to be *unacceptable*.

Certainly, the overthrow of democracy in the circumstances of the Haitian crisis can be found to be “unacceptable.” According to Professor Harold Koh, Haiti presents a “textbook” case.¹⁸⁷ First, ONUVEH, the U.N. electoral monitoring mission established by the Secretary-General, supervised and observed the December 16, 1991, elections. After a successful voter registration campaign, secret ballot elections took place at public polling places “in a climate of freedom and security, free from all pressures.”¹⁸⁸ Second, the large voter turnout¹⁸⁹ can be interpreted as an indication of strong feelings about the candidate as well as an indication of a significant trust in, and enthusiasm for, democracy. Third, Aristide was the clear winner, receiving 67.5% of the votes cast.

Haiti presents a case where the electorate made a definite choice. The sovereign will of the population did not prevail because of the assertion of power and violence by a regime lacking democratic legitimacy. The imposition of a military regime by Cedras is a form of aggression and domination violative of the right of a population to determine its form of government and those officials who comprise such a government. Under Reisman’s theory of popular sovereignty, the military coup in Haiti is clearly a violation of popular sovereignty “by an indigenous . . . force.”¹⁹⁰ It is the aggression against and domination of a people that gives rise to a self-defense justification of humanitarian assistance to restore the democratic government which had been elected openly, freely and fairly.

Indisputably, the toppling of democracy can have an external effect. The message to potential usurpers of power would be that fragile democracies are up for grabs. Deterrence is a major end

186. S.C. Res. 794, *supra* note 64.

187. Harold Ju Koh, Professor of International Law at Yale University, Director of the Center for International Human Rights, Testimony Before the Senate Foreign Relations Committee on the Haitian Refugee Fairness Act (Mar. 8, 1990).

188. *Haiti Holds Free, Democratic Elections with UN Help*, *supra* note 38, at 64.

189. See note 150 and accompanying text.

190. Reisman, *supra* note 7, at 872.

product of enforcement under Chapter VII of the right to democratic restoration. Democracy has become linked to peace as have few other human rights. In fact, democracy is now considered necessary for peace.¹⁹¹

3. *Violent overthrow or obstruction of legitimate democracy is sufficient grounds for a finding of a threat to peace under article 39.* Under article 39 of Chapter VII of the U.N. Charter, the Security Council must find a threat to the peace, breach of the peace, or act of aggression prior to adopting measures under articles 41 and 42 "to maintain or restore international peace and security."¹⁹² The Security Council previously has acted under Chapter VII in two well known instances to protect the rights of peoples to participate freely in the civil and political affairs of their nation: Rhodesian independence and South African Apartheid.

The declaration of independence of Rhodesia from the United Kingdom in 1965 prompted the Security Council to condemn the illegal and racist regime which took power and to impose on Rhodesia an embargo on goods and investments.¹⁹³ Similarly, in Security Council Resolution 418, the Security Council imposed an arms embargo against South Africa and "call[ed] upon [South Africa] urgently to end violence against the African people and to take urgent steps to eliminate *apartheid* and racial discrimination."¹⁹⁴ These provide sound precedents for Security Council action under Chapter VII to address a government's treatment of its own citizens in the absence of civil war.¹⁹⁵

191. *Secretary-General's Annual Report on the Work of the Organization Says Organization Is "Humanity's Best Hope" For Peace*, U.N. Press Release SG/2003 (1993).

192. U.N. CHARTER art. 39. "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." *Id.*

193. S.C. Res. 216, U.N. SCOR, 20th Sess., U.N. Doc. S/RES/216 (1965) (calling upon "all States not to recognize" the racist minority regime in Rhodesia); S.C. Res. 253 U.N. SCOR, 23d Sess., 1428th mtg., U.N. Doc. S/RES/253 (1968) (calling for an embargo on goods and investments in Rhodesia).

194. S.C. Res. 418, U.N. SCOR, 32nd Sess., 2046th mtg., U.N. Doc. S/RES/418 (1977). Security Council Resolution 418 also referred to attacks by South Africa against neighboring states and found that "having regard to the policies and acts of the South African Government, that the acquisition by South Africa of arms and related *matériel* constitutes a threat to the maintenance of international peace and security." *Id.*

195. Franck, *supra* note 139, at 95-97.

More recently, the Security Council has found an internal violation of human rights to constitute a threat to the peace. On April 5, 1991, the Security Council adopted Resolution 688, which "condemn[ed] the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish-populated areas, the consequences of which threaten international peace and security."¹⁹⁶ This constitutes a precedent for finding a threat to peace in violations of human rights which take place wholly within the territory of a state.

On December 3, 1992, the Security Council determined "that the magnitude of the human tragedy caused by the conflict in Somalia, further exacerbated by the obstacles being created to the distribution of humanitarian assistance, constitutes a threat to international peace and security."¹⁹⁷ For the first time, the Security Council made clear that the human tragedy in itself, rather than the consequences of the situation in Somalia for neighboring countries or the region, constituted a threat to international peace and security. Internal violations of human rights with no external effects may constitute a threat to peace.

The Security Council resolutions regarding Haiti indicate that the Security Council may consider the following conditions in finding a government or governmental process to constitute a threat to peace and security in a region:

1. any government that is not a democracy;
2. any government that is not a democracy and is violently repressive;
3. any government that is not a democracy and came to power by the violent overthrow of a legitimate democracy;
4. any government that is not a democracy and stubbornly resists the U.N.;
5. any government that is not a democracy and violates its legal obligations under a settlement agreement;
6. any government that is not a democracy, came to power by overthrowing a legitimate democracy, and is actively opposed on that basis by nations and organizations in the region; or
7. any government that is not a democracy and threatens the security of other nations, whether by direct or indirect external effects such as massive refugee flow.

196. S.C. Res. 688, *supra* note 62.

197. S.C. Res. 794, *supra* note 64.

All factors listed above characterize the crisis in Haiti. A conclusion might be drawn that it is on the basis of all factors listed above that the Security Council acted.¹⁹⁸

In Resolution 917, the Security Council, acting under Chapter VII, "reaffirm[ed] its determination that, in these unique and exceptional circumstances, the situation created by the failure of the military authorities in Haiti to fulfill their obligations under the Governors Island Agreement and to comply with relevant Security Council resolutions constitutes a threat to peace and security in the region."¹⁹⁹ In calling Haiti's circumstances "unique and exceptional," perhaps the Security Council is warning against generalizations regarding the finding of the threat to peace in the overthrow or obstruction of democracy.²⁰⁰

The support of the world community, the obstruction of the restoration of democracy by the military, and major human rights violations are all set forth as factors in Resolutions 917 and 940.²⁰¹ In addition, Resolution 940 emphasizes the support of the Secretary-General, the "unique, . . . deteriorating, complex and extraordinary nature" of the crisis, and the breach by the military of the Governors Island Agreement and Security Council resolutions.²⁰²

Both the Haitian military's refusal to cooperate in implementing the Governors Island Agreement and its disregard of Security Council resolutions aimed at restoring democracy help form the basis of the findings of a threat to peace.²⁰³ The language of Resolution 917

198. However, arguably, the principal elements which characterize the Haitian crisis are the following:

1. the violent overthrow of a democracy that had been legitimized by U.N. monitoring and, therefore, the disruption of a process of democratization in which the U.N. had been a partner;
2. the installment of a dictatorship by the military in the place of the democracy and a continuing refusal to reinstate the ousted democratic government; and
3. the regular violation of fundamental human rights.

199. S.C. Res. 917, *supra* note 49.

200. *Id.*

201. S.C. Res 940, *supra* note 175. Resolution 940 finds "that the situation in Haiti continues to constitute a threat to peace and security in the region" *Id.*

202. *Id.*

203. The Security Council emphasizes the obstruction of the restoration of democracy in Resolution 940 by stating that "the illegal de facto regime in Haiti has failed to comply with the Governors Island Agreement and is in breach of its obligations and relevant resolutions" *Id.*

Kooijmans finds that "it is an abuse of sovereignty if a Government refuses to co-operate with the Organization, with the possible consequence that the Organization will be forced to

offers significant support for the idea that intransigence in restoring democracy alone can rise to the level of a threat to peace.²⁰⁴ When the failure to cooperate results in violent, continuing and regular transgressions of the sovereign rights of a population by obstructing the popular will of the electorate, the Security Council gains Chapter VII jurisdiction. Implementing the will of the people expressed in the free and fair election of Aristide is the non-negotiable remedy enforced by the Security Council under Chapter VII in the face of a usurpation of power by Cedras in violation of the popular sovereignty of Haiti.

National and regional instruments may also consider a threat to the peace resulting from the usurpation of a population's democratic rights. The Executive Summary of the PDD lists as a factor to be considered in the support of a peace operation the presence of a threat to or breach of international peace and security.²⁰⁵ Clinton administration policy is to consider the "sudden interruption of established democracy coupled with violence or threat of violence" as a threat to or breach of international peace and security.²⁰⁶ The Moscow Document supports this criteria in stating that "the participating States . . . will support vigorously, in accordance with the Charter of the United Nations, in case of overthrow or attempted

intervene, at a later stage, and at much higher cost for the Organization as well as for the population, if the crisis becomes really explosive." Peter H. Kooijmans, *The Enlargement of the Concept "Threat to the Peace,"* in PEACE-KEEPING AND PEACE-BUILDING, THE DEVELOPMENT OF THE ROLE OF THE SECURITY COUNCIL 120 (Rene-Jean Dupuy ed., 1993). Franck also notes this possibility in the context of Resolution 687 stating "[t]hat a Member State's 'uncooperative behaviour' can rise to the level of a threat to the peace and implicate the use of collective measures to compel co-operation with international normative standards beyond those specified as binding obligations of the Charter" Franck, *supra* note 139, at 99.

204. S.C. Res. 917, *supra* note 49.

205. A threat to or breach of international peace and security is defined under the PDD as one or a combination of the following: international aggression, urgent humanitarian disaster coupled with violence, or sudden interruption of established democracy or gross violation of human rights coupled with violence or threat of violence. PDD, *supra* note 113, at 802-03.

206. Reisman, in discussing a scenario analogous to that in Haiti, notes that "in circumstances in which free elections are internationally supervised and the results are internationally endorsed as free and fair and the people's choice is clear, the world community does not need to speculate on what constitutes popular sovereignty in that country." Reisman, *supra* note 7, at 871. Again, "sovereignty can be violated as effectively and ruthlessly by an indigenous as by an outside force, in much the same way that the wealth and natural resources of a country can be spoliated as thoroughly and efficiently by a native as by a foreigner." *Id.* at 872. Gross violations of fundamental human rights in addition to the violation of the right of a population to be governed by those officials it chose in free and fair elections should not be required under international law for intervention. A usurper who perpetrates violations of additional human rights only strengthens the case under Chapter VII.

overthrow of a legitimately elected government of a participating State by undemocratic means, the legitimate organs of that State upholding human rights, democracy and the rule of law"²⁰⁷ In addition, the Moscow Document "recognize[d] the need . . . to make democratic advances irreversible"²⁰⁸ It appears that the Moscow Document requires the overthrow of the democratic government "by undemocratic means" as a prerequisite to intervention in accordance with the U.N. Charter.²⁰⁹ Viewed in this context, the rationale of intervention in Haiti appears consistent with the determination that the world will not be allowed to slip back in its advances toward democracy.²¹⁰ Thus, intervention in Haiti can be seen as a warning to other usurpers that they will be resisted. Hence, intervention becomes a matter of deterrence.

4. *Concern for protection of sovereignty is prominent throughout the resolutions regarding Haiti.* The protection of human rights must be accompanied by respect for sovereignty as redefined. Former Secretary-General Javier Pérez de Cuéllar stated in his 1991 report:

It seems to be beyond question that violations of human rights imperil peace, while disregard of the sovereignty of States would spell chaos. The maximum caution needs to be exercised lest the defense of human rights becomes a platform for encroaching on the essential domestic jurisdiction of States and eroding their sovereignty. Nothing would be a surer prescription for anarchy than an abuse of this principle.²¹¹

The Secretary-General manifested a sensitivity to issues of sovereignty. In setting forth three caveats of humanitarian assistance, he required that the protection of human rights be unbiased and all states be treated equally. In addition, Pérez de Cuéllar called for the protection of human rights to be in accordance with the U.N. Charter. Lastly, the former Secretary-General held that measures taken to redress deprivations of human rights be proportional to the violation of those rights.²¹² Further, the General Assembly Resolution on

207. *Moscow Document*, *supra* note 32, at 1677.

208. *Id.*

209. *Id.*

210. Comment of Anne-Marie Burley, *National Sovereignty Revisited: Perspectives On the Emerging Norm of Democracy In International Law*, 86 AM. SOC'Y INT'L L. PROC. 267 (1992); *see also* Fox, *Political Participation*, American Society, *supra* note 11, at 249.

211. Pérez de Cuéllar, *supra* note 1, at 8.

212. *Id.*

Strengthening the Coordination of Humanitarian Emergency Assistance of the United Nations stated that “[t]he sovereignty, territorial integrity and national unity of States must be fully respected in accordance with the Charter of the United Nations” when assistance is given.²¹³ Protection of sovereignty as described by Michael Reisman would involve safeguarding “the continuing capacity of a population freely to express and affect choices about the identities and policies of its governors.”²¹⁴

Reflecting a concern about sovereignty, sensitivity to the positions taken by nations in the region of conflict is apparent in the emphasis of the Security Council on the supporting parallel measures undertaken by the OAS regarding Haiti. Resolution 841 states that OAS efforts regarding Haiti call for “extraordinary measures” to be taken by the Security Council.²¹⁵ The request of the “legitimate government” of Haiti for Chapter VII enforcement measures was significant in the Security Council’s decision to act in Resolutions 862 and 940,²¹⁶ and the request from the Permanent Representative of Haiti is stated to be significant in Resolution 841.²¹⁷ The General Assembly Resolution on Strengthening the Coordination of Humanitarian Emergency Assistance of the United Nations places responsibility for humanitarian assistance primarily on the state.²¹⁸ The affected state “has the responsibility first and foremost” to provide for victims and “has the primary role in the initiation, organization, coordination, and implementation of humanitarian assistance within its territory.”²¹⁹ Each state is asked to “facilitate the work of these organizations in implementing humanitarian assistance, in particular the supply of food, medicines, shelter and health care, for which access to victims is essential.”²²⁰

213. Assistance Resolution, *supra* note 78, at 49.

214. Reisman, *supra* note 7, at 872.

215. S.C. Res. 841, *supra* note 163.

216. Under Reisman’s theory of popular sovereignty, Aristide’s government, chosen by the people of Haiti in democratic elections, was the legitimate government of that country, and, as such, its request or consent would indicate that the sovereignty of Haiti was not being violated by the Security Council’s action. See Reisman, *supra* note 7, at 871.

217. S.C. Res. 841, *supra* note 163.

218. Assistance Resolution, *supra* note 78, at 49.

219. *Id.* at Annex, ¶ 4.

220. *Id.* at Annex, ¶ 6. This designation of responsibility is consistent with the responsibility placed on Haiti under Resolution 867 to: (1) “ensure the safety of the United Nations personnel;” (2) “ensure the freedom of movement and communication of the Mission;” (3) ensure “other rights necessary for the performance of its task;” and (4) “renounce violence as a means of political expression.” S.C. Res. 867, *supra* note 130.

In Resolutions 873, 875 and 917, the Security Council places responsibility for the increased sanctions directly on Haiti's military authorities.²²¹ The program was very clearly communicated to Cedras and the military. If intransigence increased, the sanctions increased as per the warning of Resolution 873.²²² On the other hand, under Resolution 917, if the military cooperates, sanctions will be reduced or lifted.²²³ The Security Council was very clear that it was not imposing a solution on the parties. It was, however, enforcing an agreement reached between the disputants.²²⁴ Ambassador Albright, in voting to terminate suspension of sanctions, stated: "[T]he military leaders . . . violated a solemn agreement. That agreement sought to resolve peacefully the governmental crisis in their country."²²⁵ This view was reflected by Latin American countries as well, as Ambassador Taylhardat of Venezuela said, "[t]he Haitian authorities had not only not carried out their commitment, they had put obstacles in the way of implementing the Agreement."²²⁶

Ambassador Albright described efforts towards democracy in Haiti as "steps" taken by the "people of Haiti"²²⁷ and "the results of the struggle of the Haitian people."²²⁸ As Ambassador Edward S. Marker of the United States observed during the Security Council debates on Resolution 867, "[c]ivic institutions must be refashioned as the building blocks of a democratic society. Those institutions must have legitimacy in the eyes of the Haitian people, be accountable to the Haitian people, operate on behalf of the Haitian people, and reflect the unique character and courage of those people."²²⁹

221. S.C. Res. 873, *supra* note 169; S.C. Res. 875, *supra* note 170; S.C. Res. 917, *supra* note 49.

222. S.C. Res. 873, *supra* note 169.

223. S.C. Res. 917, *supra* note 49.

224. Because of "fears that the Council could impose a political settlement upon the parties," Chapters VI and VII of the U.N. Charter were crafted so that Security Council recommendations are not binding. GOODRICH ET AL., *supra* note 49, at 300.

225. Statement of Madeleine K. Albright, U.N. Press Release SC/5716 (1993).

226. Statement of Ambassador Adolfo Raul Taylhardat of Venezuela, U.N. Press Release SC/5716 (1993).

227. Statement of Amb. Madeleine K. Albright of the United States, U.N. Press Release SC/5692 (1993).

228. Statement of Amb. Fritz Longchamps of Haiti, U.N. Press Release SC/5692 (1993).

229. Statement of Amb. Edward S. Marker of the United States, U.N. Press Release SC/5705 (1993).

VII. USE OF FORCE IN HUMANITARIAN ASSISTANCE TO RESTORE DEMOCRACY

Upon finding a threat to the peace, the Security Council can claim Chapter VII authority to act under article 42, involving measures using force, as well as under article 41, involving non-forcible measures. Franck asserts regarding intervention, "[i]n theory, if Chapter VII of the Charter is applicable for purposes of economic measures, it is also possible to defend collective recourse to military measures."²³⁰ There is some difference of opinion regarding whether measures involving use of force may be enacted without first trying article 41 measures or whether a delay is required to make certain article 41 measures will not have further effect. There is no such requirement specifically expressed in the Charter. There is, however, a requirement that measures enacted be proportional to the threat posed; former Secretary-General Pérez de Cuéllar and others hold that "proportionality is of utmost importance" in humanitarian intervention.²³¹ Certainly, it is logical that enforcement measures less severe than article 42 be adopted first, if circumstances permit and if it is reasonable to presume that article 41 measures would be effective. Refusal of violators to cooperate would be reason to move to harsher measures and, ultimately, assuming the suffering and deprivation of the population warrants, intervention using force, as Resolutions 917 and 940 illustrate.²³²

The policy of the Clinton administration expressly contemplates the use of force in a Chapter VII peace operation or even a "regionally sponsored peace operation," in the event of the "sudden interruption of established democracy . . . coupled with violence, or threat of violence . . ." ²³³ Specifically, the policy requires that "[f]or peace enforcement (Chapter VII) operations, the threat to international peace and security [be] considered significant."²³⁴ The Clinton administration applies harsher standards if the assessment being made is whether to involve U.S. personnel in a peace operation; it would

230. Franck, *supra* note 40, at 170.

231. Pérez de Cuéllar, *supra* note 1, at 8.

232. S.C. Res. 917, *supra* note 49; S.C. Res. 940, *supra* note 175.

233. PDD *supra* note 113, at 802, 803. The participating States of the Moscow Document "support vigorously, in accordance with the Charter of the United Nations, in case of overthrow or attempted overthrow" of a democracy "the legitimate organs of that State . . ." *Moscow Document*, *supra* note 32, at 1677.

234. PDD, *supra* note 113, at 803.

apply "even more rigorous factors . . . when there is the possibility of significant U.S. participation in Chapter VII operations that are likely to involve combat . . ." ²³⁵

Resolution 940 established the precedent in the Haitian context of a Chapter VII enforcement action involving use of force, if necessary, to restore democracy. The Security Council

authorizes Member States to form a multinational force under unified command and control and, in this framework, *to use all necessary means* to facilitate the departure from Haiti of the military leadership, consistent with the Governors Island Agreement, the prompt return of the legitimately elected President and the restoration of the legitimate authorities of the Government of Haiti, and to establish and maintain a secure and stable environment that will permit implementation of the Governors Island Agreement . . . ²³⁶

This is the imposition of the harsher measure which, as noted by the Security Council in the preamble of Resolution 940, Resolution 873 warned about. Under Resolution 873, the Council confirmed its "readiness to consider . . . the imposition of additional measures . . ." if the military authorities continued to impede the activities of the U.N. Mission in Haiti or failed to comply in full with its relevant resolutions and the provisions of the Governors Island Agreement. ²³⁷

The escalation of Security Council measures, prompted by the continued obstruction of a resolution by the military junta, and the authorization of use of force as a last resort imply that Resolution 940 is consistent with the principles of necessity and proportionality. In fact, there was little force used by U.S. troops in Haiti throughout the operation. ²³⁸ Thus, the actual use of force to date has been necessary and proportional.

235. *Id.* at 804.

236. S.C. Res. 940, *supra* note 175.

237. S.C. Res. 873, *supra* note 169.

238. The major occurrence has been a confrontation between U.S. Marines and the Haitian military police resulting in the death of ten Haitian police. *Military Leaders Bury Their Dead Troops*, HOUSTON CHRONICLE, Oct. 6, 1994, at 20.

VIII. CONCLUSION

It is preferable that the Security Council be the international body to assist for humanitarian purposes because of the potential for abuse by individual states seeking political and territorial gain in the guise of assistance. Alternatively, action by a regional organization or group of states would be preferable to unilateral state action. In the event that the Security Council cannot act, international law does not require the rest of the world community to stand idly by as atrocities and human rights abuses unfold. The legal right of the international community to reach within a state to protect a population from massive human rights violations begins with Reisman's concept of "popular sovereignty," described as "people's sovereignty rather than the sovereign's sovereignty."²³⁹ Since sovereignty is derived from the will of the people and does not belong to the ruler who holds power over the state, the ruler is included among those who can violate the sovereignty of the state.²⁴⁰ Reisman, arriving at the same conclusion as did Pérez de Cuéllar, asserts that sovereignty is no barrier to intervention to protect the population from human rights abuses.²⁴¹

The new concept of the right of humanitarian assistance supports a right of *unilateral* humanitarian assistance to halt egregious human rights violations, at least when multilateral humanitarian assistance is not forthcoming. The right of humanitarian assistance is based on the right of victims to receive aid from those who are capable of delivering it. This right belongs to member states of the world community as well as the Security Council and exists independently of Chapter VII obligations. Inspired by events in Bosnia, the World Conference acknowledged a unilateral right of humanitarian assistance when it called upon all countries to take measures, "individually and collectively," against the practice of ethnic cleansing.²⁴² The request demands, in effect, that the measures be prompt, appropriate, and effective and include the use of force if necessary.²⁴³ Under the present circumstances of the conflict in Bosnia-Herzegovina, the measures would have to include the use of force or the threat of force

239. Reisman, *supra* note 7, at 869.

240. *Id.* at 867-70. See Universal Declaration of Human Rights, *supra* note 15, at 71.

241. Reisman, *supra* note 7, at 872-873.

242. Vienna Declaration, *supra* note 34, at 1676.

243. See Vienna Declaration, *supra* note 34, at 1677.

to be effective.²⁴⁴ The World Conference based the right of states to take unilateral as well as collective action on the rights of the victims, stating that the victims "are entitled to appropriate and effective remedies."²⁴⁵

By acting under Chapter VII to address gross human rights violations, the Security Council acknowledges that traditional concepts of sovereignty, "matters essentially within the domestic jurisdiction,"²⁴⁶ and non-intervention have changed, and that new concepts govern intervention. Recent Security Council Chapter VII measures confirm that "the principle of non-interference with the essential domestic jurisdiction of States cannot be regarded as a protective barrier behind which human rights could be massively or systematically violated with impunity."²⁴⁷ Security Council resolutions are binding²⁴⁸ and, therefore, help establish the new concepts of the right of humanitarian assistance and popular sovereignty as international law principles.

Arguably, if the Security Council denominates a threat to peace under Chapter VII, but then refrains from acting for lack of political will or resources, some of the dangers of abuse of a subsequent unilateral intervention are arguably diminished. In such a case, an avowedly neutral, unbiased decision-maker would have made a judgment that internal abuse and violations of human rights and freedoms existed. Even though a diminished possibility of abuse would remain, at least a bona fide purpose for assistance would have been proven to exist.

Instances exist where a nation, which insists it will not act without Security Council authority, nevertheless finds itself pushed by humanitarian imperatives to act. This may be claimed in the actions of the French in Rwanda in July, 1994. The French pushed the Security Council for authorization to allow French troops to set up a safe haven in southwestern Rwanda to protect civilians from military

244. Some of the problems faced by U.N. peacekeepers in Bosnia include "the pattern of hostilities by Bosnian Serb paramilitary units against towns and villages in eastern Bosnia . . . the deliberate interdiction by Bosnian Serb paramilitary units of humanitarian assistance convoys . . ." and the Bosnian Serb paramilitary's "refusal to guarantee the safety and freedom of movement of UNPROFOR personnel . . ." S.C. Res. 819, *supra* note 63.

245. Vienna Declaration, *supra* note 34, at 1676-77.

246. U.N. CHARTER, art. 2, ¶ 7.

247. Pérez de Cuéllar, *supra* note 1, at 7.

248. W. Michael Reisman, *The Constitutional Crisis in the United Nations*, 87 AM. J. INT'L L. 83, 86 (1993).

attack.²⁴⁹ Ultimately, French troops were sent into southwestern Rwanda prior to, though in contemplation of, U.N. authorization and, arguably, at least initially, as a unilateral act.²⁵⁰

Recent state practice supports a unilateral right of humanitarian assistance. For example, over Iraq's protest alleging an "unfounded attack on the sovereignty and territorial integrity of Iraq," the United States, on April 16, 1991 gave notice that it would build, protect and maintain refugee centers in the Zakho area for the Kurds in the north in an enterprise involving ten thousand U.S. soldiers.²⁵¹ Theorists argue that the United States and its coalition partners, France and Great Britain, were not authorized by Resolution 688²⁵² to intervene to protect the Kurds in Iraq.²⁵³ Without clear authority from the Security Council, refugee "centers" or safety areas were established on Iraq's territory without Iraq's consent by the United States, France, and Great Britain. Furthermore, U.S. troops were initially stationed on Iraqi soil without Iraq's consent to protect these centers and the Zakho area of northern Iraq.²⁵⁴ To support the protected area, the United States, Great Britain, and France established a ban on all Iraqi military and civilian flights below the 32nd parallel, which was enforced by surveillance missions preventing the Iraqi government from terrorizing the Shiites in southern Iraq.²⁵⁵ It is important to note that these acts were justified by their humanitarian purpose and that they were accomplished without Iraq's approval and, indeed, were conducted over Iraq's objections.²⁵⁶ These acts mark the recognition of a unilateral right or obligation to assist by delivering

249. Raymond Bonner, *French Establish a Base in Rwanda to Block Rebels*, N.Y. TIMES, July 5, 1994, at 1.

250. *Id.*

251. *The Gulf: 5 million and counting*, U.N. CHRON., Sept., 1991, at 47, 50. On April 18, 1991, Iraq signed a Memorandum of Understanding, by which Iraq agreed to: (1) "facilitate the safe passage of emergency relief commodities throughout the country;" and (2) allow U.N. humanitarian operations wherever through the establishment of U.N. sub-office Humanitarian Centers. *Id.*

252. S.C. Res 688, *supra* note 62.

253. See KIRGIS, *supra* note 19, at 854-57.

254. 45 U.N.Y.B. 206, U.N. Sales No. E.92.I.1; KIRGIS, *supra* note 19, at 854-57.

255. William Clinton, *Statement on Establishment of No-Fly Zone in Iraq*, Aug. 26, 1992, reprinted in *President-Elect Clinton's Foreign Policy Statements December 12, 1991-November 4, 1992*, FOREIGN POL'Y BULL., Nov./Dec., 1992, at 2, 18; *Iraqi oil revenues to be transferred to pay for consequences of Kuwait invasion*, U.N. CHRON., Dec., 1992, at 26, 30.

256. Ultimately, under an agreement with Iraq, U.S. troops were replaced by five hundred lightly armed U.N. Guards. The purpose of the guards was to protect the humanitarian operation in all aspects: supplies, distribution centers, supply routes, and repatriation conveyes. 45 U.N.Y.B. 206, U.N. Sales No. E.92.I.1; KIRGIS, *supra* note 18, at 856-57.

humanitarian aid in the form of protection of victims and the basics of food, water, and shelter.

This emphasizes the point that sometimes circumstances require unilateral action. One suspects that no matter where international law stands, various nations will continue to come to the rescue of those facing death, destruction, or deprivation, prompted by the humanitarian impulse that is the essence of mankind and should be the essence of mankind's institutions.

