THE GOLDEN VENTURE SHIPMENT: HUMANITARIAN AID OR UNLAWFUL INTERVENTION

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Introduction

This article deals with the legal problems that arise when one state attempts to provide humanitarian aid to people in rebel-controlled areas of another state without that state's consent. My analysis focuses on a specific incident: the clandestine shipment of Australian famine relief supplied to Eritrea aboard the MV Golden Venture in 1985.

After briefly outlining the factual background of the case study in Part I, I go on in Part II to consider the assertions made by the Ethiopian Government in the aftermath of the Golden Venture incident. I draw two tentative conclusions. First, the Ethiopian Government's seizure of the Golden Venture shipment can be legitimised by the application of the laws of blockade. Second, given the present scope of the principle of non-intervention in the domestic affairs of states, the Ethiopian Government has, on the face of it, a case for claiming that the Australian Government's actions represented an unacceptable challenge to the sovereign authority of Ethiopia over its territory.

In part III, I re-examine the conclusions reached in Part II in the light of certain principles of international human rights law which are opposed in spirit to the principles discussed in Part II.

In the first section of Part III, I spell out a prohibition against the use of starvation as a weapon of war from the texts of the

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Genocide Convention and Additional Protocol II of the Geneva Conventions 1949. Since the terms of the Genocide Convention have achieved the status of jus cogens, a competition between such a prohibition on the one hand and the principles in Part II on the other would probably be resolved in favour of the former.

Noting, however, that the Australian Government has never been prepared to accuse the Ethiopian Government of pursuing a policy of deliberate starvation of people in dissident regions, I go on in the second section to a consideration of principles of international human rights law that may be applicable to a less extreme set of facts. I briefly consider the applicability of common Article 3 of the Geneva Conventions 1949 but I conclude that clandestine aid to dissident regions is beyond its scope. Finally, I turn to the most promising avenue from Australia's point of view — the doctrine of humanitarian intervention. I conclude that a right of unilateral, non-violent humanitarian intervention exists in international law. I also conclude that, given the nature of the human rights being violated, the Australian Government could *in theory* have invoked the doctrine in defence of its attempted intervention in Eritrea. However, state practice in similar situations has been equivocal, and I suggest that a competition between the principle of non-intervention on the one hand and the doctrine of humanitarian intervention on the other is likely to be resolved in favour of the principle of non-intervention in the situation analysed but that the balance is fine. I suggest, moreover, that the Australian Government had a very real opportunity to shape customary International Law in this area by the simple expedient of stating strongly that the law *was* what it thought it *ought* to be. Upon examination of the Australian Government's statements in the aftermath of the Golden Venture incident I conclude that Australia wasted the chance to make the shipment live up to its name.

I: The factual background

On 2 December 1950, the United Nations General Assembly passed a resolution[1] which recommended that Eritrea, a former

1. United Nations General Assembly Resolution 390(V) (hereinafter cited as GA Res).

Italian colony, become federated with Ethiopia under the sovereignty of the Ethiopian crown. However, it was to be an autonomous unit with its own legislative, executive and judicial powers in the field of domestic affairs. In 1952 the Federation came into being.

Ethiopia, then ruled by Emperor Haile Selassie, soon began to undermine the federal arrangement.[2] In November 1962 the Eritrean Parliament voted for the annexation of Eritrea by Ethiopia. It is alleged that the "vote" was taken at gunpoint.[3]

Since 1962 liberation forces in Eritrea have been fighting the Ethiopians. For some time now the Eritrean Peoples Liberation Front (EPLF) has been in a position of "undisputed dominance"[4] among Eritrean liberation groups.

Ethiopia is a country ravaged by drought as well as civil war. The combination of these factors has caused an on-going famine which is most acute in the rebel-controlled areas of Eritrea and Tigray.

Since the start of the 1984-1985 drought, the Ethiopian Government has received substantial amounts of Western food aid. The Eritreans allege that the Ethiopian Government misuses this aid. The allegations include claims that Western food aid is being diverted by the Derg[5] to feed its army and to finance its arms bills and debts to the Soviet Union. In 1983 the Australian Parliament's Joint Committee on Foreign Affairs and Defence ("the Joint Committee") examined the evidence and came to the conclusion that

> although there may have been examples of some misuse of humanitarian relief aid in Ethiopia in the past, there is not significant evidence of misuse or misappropriation at present.[6]

There is no denying, however, that the Ethiopian Government displays an indifference to the plight of its own people. Enormous

2. J Firebrace and S Holland *Never Kneel Down Drought Development and Liberation in Eritrea* (Nottingham: Spokesman, 1984) 20.
3. Ibid 21, Commonwealth Joint Committee on Foreign Affairs & Defence *Report on Regional Conflict and Superpower Rivalry in the Horn of Africa* (April 1984) 38-39 ("*Horn of Africa Report 2*").
4. *Horn of Africa Report 2* ibid, 41.
5. The Derg is an army faction which deposed Emperor Haile Selassie in 1974. It is led by President Mengistu
6. Commonwealth Joint Committee on Foreign Affairs & Defence *Report on the Provisions of Development Assistance and Humanitarian Aid to the Horn of Africa* (December 1983) 91-92 ("*Horn of Africa Report 1*").

quantities of Western grain have rotted in Port Assab since the famine began because the grain cannot be transported to areas in need. The Ethiopian army has enough trucks for the task but they are all being used in the war against the rebels.[7]

Many Australian non-government relief organisations ("NGOs") regard the Eritrean Relief Association ("ERA") as a satisfactory vehicle for getting aid through to those in greatest need in Eritrea.[8] The ERA is an indigenous aid organisation which is closely linked with the EPLF.[9] The Eritrean Relief Committee ("ERC") in Australia is one of seventeen branches of the ERA worldwide which liaise with headquarters in Khartoum and supply food and other humanitarian assistance.[10]

The Joint Committee came to the following conclusion:

> In view of the difficulties the Ethiopian Government has in distributing aid to war zones such as Eritrea, the Committee is of the opinion that Australian aid channelled through the Sudan to the ERA is an effective way of ensuring that aid reaches those in pressing need in Eritrea. Such aid can be channelled through NGOs based in Australia which have a close association with the Australian ERC.[11]

In fact the Australian Development Assistance Bureau ("ADAB"), the aid arm of the then Department of Foreign Affairs, was already channelling aid through Australian NGOs to the ERA[12] and simply continued to do so. The Golden Venture shipment was one such aid effort.

The Australian Wheat Board, a Federal Government authority, chartered the Liberian freighter MV Golden Venture on behalf of ADAB. ADAB then offered space to two aid organisations: World Vision and the Australian Overseas Distress Response Organisation ("AODRO").[13] The vessel carried two cargoes. The World Vision consignment was destined for Port Assab. The other cargo consisted of famine relief supplied for the rebel-controlled areas of Eritrea and Tigray.[14]

7. Washington Post 2 June 1986; (1985) 56 Australian Foreign Affairs Record 874-875
8 *Horn of Africa Report 1* supra n 6, 94
9. Ibid, 95.
10. Ibid, 76.
11. Ibid, 96.
12. Ibid, 76.
13. "Wheat bungle sparks row in Canberra" Age (Melbourne) 17 January 1985, 3.
14 Ibid.

Three thousand tonnes of wheat for both Eritrea and Tigray came from ADAB's aid programme and was being channelled through Community Aid Abroad ("CAA"). The remaining cargo destined for the rebel-controlled areas was consigned through AODRO on behalf of other NGOs. Food, blankets, vehicles and clothing worth two hundred and fifty thousand dollars came from the Australian Freedom From Hunger Campaign and the Australian Catholic Relief Organisation. A water drilling rig came from the Melbourne Herald/Sun appeal and was being channelled through CAA.[15] CAA and the Australian Freedom From Hunger Campaign were to transport these supplies overland from Port Sudan to the Sudan-Eritrean border and were to filter the supplies across the border to the ERA and the Relief Society of Tigray for famine victims in the rebel-controlled areas.[16]

The Australian Wheat Board left the right to decide the route in the hands of the vessel's owners. The Golden Venture stopped first at Port Assab which is controlled by Ethiopia. The Ethiopian Government impounded the vessel and seized the supplies.[17]

II: An unacceptable challenge to the sovereign authority of Ethiopia over its territory

The Ethiopian Government described the supplies seized as "contraband".[18] In other words it took the view that it was justified in conducting a blockade against the Eritrean rebels.

The laws of international warfare have in the past recognised the legality of blockade as a means of war.[19] When neutral shipments of foodstuffs to a blockaded country were seized, for instance, the protests of the neutrals tended to focus on their rights to trade. Neutrals have rarely challenged the treatment of foodstuffs as war contraband on humanitarian grounds.[20] Samuels suggests that

15. Ibid.
16. ERC Newsletter January/March 1985.
17. Supra n 13.
18. "Aid workers flee Sudan war region" Guardian (Manchester) 17 January 1985.
19. G A Mudge "Starvation as a Means of Warfare" (1970) 4 International Lawyer 228, 246-247; J W Samuels "Humanitarian Relief in Man-Made Disasters. International Law, Government Policy and the Nigerian Experience" (1972) 10 Canadian Yearbook of International Law 3, 6.
20. Mudge supra n 19, 249.

since the legality of blockade is generally unquestioned in international conflicts, its legitimacy is even less to be questioned when the recognised authority in a state is conducting a blockade against a group it classes as rebels.[21]

The Ethiopian Government made other strong statements. It said that Australia was delivering "materials and equipment...to armed bandits in Ethiopia."[22] It argued that the action of the Australian Government constituted a

> flagrant violation of the most fundamental principles of International Law, namely non-interference in the internal affairs of states and respect for their territorial integrity [and represented] an unacceptable challenge to the sovereign authority of Ethiopia over its territory.[23]

The principle of non-intervention

Article 2(7) of the United Nations Charter provides that nothing in the Charter authorises the United Nations "to intervene in matters essentially within the domestic jurisdiction of any state...". Article 2(7) appears to be confined to the relationship between the United Nations organisation and its members. However, some writers take the view that the obligation not to intervene would, with stronger reason, apply to the member states of the United Nations.[24]

In any event, the principle of non-intervention has been endorsed in two United Nations General Assembly Resolutions. The Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty 1965 provides that:

> 1. No state has the right to intervene, directly or indirectly, in the internal or external affairs of any other state. Consequently, armed intervention *and all other forms of interference*...are condemned.
> 2. Also, no state shall organise, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another state, *or interfere in civil strife in another state*[25]. (emphasis added)

21. Samuels supra n 19, 7.
22. Ethiopian Ministry of Foreign Affairs Press Statement 16 January 1985 in [1985] Australian International Law News 119.
23. Ibid.
24. W D Verwey "Humanitarian Intervention Under International Law" (1985) 32 Netherlands International Law Review 357, 358.
25. G A Res 2131(XX) extracted in D J Harris *Cases and Materials on International Law* Third Edn (London: Sweet & Maxwell, 1983) 648.

This resolution was adopted by 109 votes to zero with one abstension. Paragraphs 1 and 2 of Resolution 2131 were incorporated into the Declaration on the Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations 1970.[26] This Declaration was adopted without dissent.

Although General Assembly Resolutions do not of themselves create binding legal obligations, Resolutions 2131 and 2625 may be regarded as reflecting customary international law. The voting patterns on the two resolutions and the form of the resolutions gives weight to this view. Furthermore, the International Court of Justice in the case of *Nicaragua v United States*[27] considered the principle of non-intervention to be "part and parcel of customary international law" and referred to Resolutions 2131 and 2625 in support of this assertion.[28]

Resolutions 2131 and 2625 define the concept of intervention in very vague terms. In the *Nicaragua* case the Court referred to the principle in the following way:

> A prohibited intervention must...be one bearing on matters in which each State is permitted by the principle of State sovereignty to decide freely. One of these is the free choice of a political, economic, social and cultural system and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones.[29]

It would seem to follow from the Court's statement of principle that a state's motivation for intervention in another state is all important. Material assistance to rebels in the form of equipment, training, intelligence, logistic support and so on would appear to be a clear breach of the principle of non-intervention.[30] Arguably, the provision of non-lethal forms of assistance would also be a breach of the principle if it were "a thinly veiled attempt to cloak what is simply partisan aid to political-military fronts, which might languish and disappear if it were not for foreign aid."[31] The reverse should

26. G A Res 2625 (XXV) extracted in Harris ibid, 783.
27. *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* [1986] ICJR 14
28. *Nicaragua* case, para 202.
29. *Nicaragua* case, para 205
30. *Nicaragua* case, para 242.
31. N F Scott "The Role of NGOs in Famine Relief and Prevention" in M H Glantz (ed) *Drought and Hunger in Africa Denying Famine a Future* (Cambridge: Cambridge University Press, 1987) 349, 358.

also be true. The Court said:

> there can be no doubt that the provision of strictly humanitarian aid to persons or forces in another country, whatever their political affiliations or objectives, cannot be regarded as unlawful intervention or as in any other way contrary to international law...
> [I]f the provision of humanitarian assistance is to escape condemnation as an intervention in the internal affairs of Nicaragua, not only must it be limited to the purpose hallowed in the practice of the Red Cross namely 'to prevent and alleviate human suffering' and 'to protect life and health and to ensure respect for human beings', it must also, and above all, be given without discrimination to all in Nicaragua, not only contras and their dependants.[32]

Australia's provision of humanitarian assistance to Eritrea would escape condemnation upon application of the Court's criteria. Firstly, the aid destined for Eritrea was strictly humanitarian. Secondly, on a GNP basis, Australia was the second highest contributor of emergency relief to Ethiopia in 1984-1985.[33] As well as providing official bilateral aid to the Ethiopian Government, Australia was contributing to some of the major multilateral organisations officially operating in Ethiopia such as the World Food Program (a joint United Nations and FAO effort), the United Nations High Commissioner for Refugees and UNICEF.[34] Furthermore, the Australian Government has resolutely refused to take a stand in relation to the conflict in Eritrea.

At various times calls have been made for Australia to raise the Eritrean issue in the United Nations and other forums.[35] However Mr Hayden, then Minister of Foreign Affairs, has stated the Australian Government's position as follows:

> ...the nations of Africa, which are better placed to respond to this African problem, have not publicly recognised Eritrea's claims to self-determination. Until such time as the issue is recognised by the Organisation of African Unity as an international matter, and not as an internal Ethiopian problem Australia should not...take a stand in relation to the dispute.[36]

Thus it can be argued that the Australian Government was providing aid without discrimination.

32. *Nicaragua* case, para 242-243.
33. W G Hayden Minister of Foreign Affairs Press Release 24 December 1984 in Department of Foreign Affairs, *Background No 461.*
34. *Horn of Africa Report 1*, supra n 6, 57
35. Eg 37th National Conference of the ALP (July 1956) Resolution in Support of Eritrea, full text cited in ERC Newsletter April 1987
36. Commonwealth Parliamentary Debates (House of Representatives) 5 September 1984, 599.

The Court's exposition of the principle of non-intervention diverges considerably from the expressed view of many states. The words "no state shall...interfere in civil strife in another state" in Resolutions 2131 and 2625 are regarded by them as extending to any action at all, including the provision of humanitarian assistance, taken by one state in relation to rebel-controlled areas of another state, without the consent of the recognised government of that other state. In so far as this view can be said to be evidence of the opinio juris it cannot be ignored when one is trying to ascertain the outer limits of a principle of customary international law.

The drafting history of article 18 of Additional Protocol II to the Geneva Convention 1949, which deals with non-international armed conflict, provides an illustration of the view in question. The International Committee of the Red Cross ("ICRC") included the following provision in its Draft Protocol.

> Article 33 — Relief Actions
> ...If the civilian population is inadequately supplied, in particular, with foodstuffs, clothing, medical and hospital stores and means of shelter, the parties to the conflict shall agree to facilitate to the fullest possible extent, those relief actions which are exclusively humanitarian in character and conducted without adverse distinction. *Relief actions fulfilling the above conditions shall not be regarded as interference in the armed conflict.*[37] (emphasis added)

The inclusion of the italicised sentence indicates in itself that the ICRC feared that the provision of humanitarian aid would otherwise be regarded as interference. This fear was confirmed by the deliberate emasculation of the provision by the states at the Drafting Conference. Article 18(2) of the final version of Protocol II provides:

> If the civilian population is suffering undue hardship owing to the lack of supplies essential for its survival such as foodstuffs and medical supplies, relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without adverse distinction shall be undertaken *subject to the consent of the High Contracting Party concerned.*[38] (emphasis added)

The outcome of the Conference was hardly surprising. Most of the literature dealing with international relief operations emphasises that "it remains a condition sine qua non that State consent is

37 CDDH/1 I Three 43 extracted in H S Levie (ed) *The Law of Non-International Armed Conflict Protocol II to the 1949 Geneva Conventions* (Dordrecht: Martinus Nijhoff, 1987) 565.
38. Ibid, 601.

necessary for relief actions."[39] One writer goes so far as to describe the provision of aid to rebel-controlled areas over the objections of the recognised government as "revolutionary humanitarianism".[40]

III: The competing body of international law

Assuming that the actions of the Australian Government were, on the face of it, a violation of the principle of non-intervention, it may still be possible to justify them by invoking various countervailing principles of international law.

Deliberate starvation

If the Ethiopian Government has been engaged in a policy of deliberate starvation of people in dissident regions, Australia could have invoked the Genocide Convention[41] as the basis of its actions. Article 1 states that genocide, whether committed in time of peace or in time of war, is a crime against international law and places state parties under an obligation to prevent the crime. Article 2(c) states that it is genocide to deliberately inflict on a national, ethnic, racial or religious group as such, conditions of life calculated to bring about its physical destruction in whole or in part. Starvation of a group identified in the Convention seems to fall squarely within article 2(c).[42] The Eritreans perceive themselves as a group with a distinct national identity separate from Ethiopia. Even if their claim to national identity is not generally recognised, a deliberate policy of starving this group of people would be genocide within the spirit of the Convention.

This interpretation of the Genocide Convention seems even more plausible in view of Additional Protocol II to the 1949 Geneva Conventions. Article 14 of Protocol II provides that:

39. J Patrnogic "Human Rights and Humanitarian Law Confluence or Conflict? Commentary" 9 Aust Yearbook of International Law 109, 111; P Macalister-Smith *International Humanitarian Assistance Disaster Relief Actions in International Law and Organisation* (Dordrecht. Martinus Nijhoff, 1985) 6
40 G A G Gottlieb "International Assistance to Civilian Populations in Armed Conflicts" (1971) 4 New York University Journal of International Law and Politics 403, 422.
41 Convention on the Prevention and Punishment of the Crime of Genocide 1948 UKTS 58 (1970) Cmnd 4421 extracted in Harris supra n 25, 561. The Convention has been ratified by both Australia and Ethiopia.
42 Mudge supra n 19, 265

> Starvation of civilians as a method of combat is prohibited. It is therefore prohibited to attack, destroy, remove, or render useless for that purpose, objects indispensable to the survival of the civilian population, such as foodstuffs and agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works.[43]

Ethiopia is not a signatory to Protocol II so it has no direct application to the Eritrean conflict. Nor can it be said that the provisions of Protocol II as a whole have been so universally accepted as to make them binding on non-parties as newly created customary international law. However, the drafting history of article 14 of Protocol II provides some evidence of the opinio juris that starvation of civilians is not a legitimate method of combat in internal wars. The delegates at the Drafting Conference adopted article 14 by consensus.[44] Moreover the representatives of the Holy See, the USSR, Sweden, France, Iraq, Canada, Ecuador, Algeria and Italy all made statements indicating that the provision expressed a principle that was beyond question.[45]

The status of the Genocide Convention is that of jus cogens[46] and it would prevail even against a principle as strong as that of non-intervention in domestic affairs. Thus the legality of Australia's conduct could be upheld and the legality of the seizure impugned if the Ethiopian Government were engaged in a deliberate policy of starvation. Unfortunately, the only conclusion that the Joint Committee was prepared to draw from the evidence before it was that the Ethiopian Government could not distribute aid effectively in the war zones of Eritrea and hence aid channelled through it would not reach those in greatest need.[47] I term this cautious conclusion unfortunate because the allegations that the Ethiopian Government is engaged in a policy of deliberate starvation appear to be well

43. Extracted in Levie supra n 37, 485.
44 Ibid, 484
45 Ibid, 484-485.
46. Jus cogens are overriding principles of international law. The concept of jus cogens is now generally accepted (see opinio juris cited in I Brownlie *Principles of Public International Law* Third Edn (Oxford: Clarendon Press 1979) 513 n 2) but its content is not settled. The law of genocide however is "one of the least controversial examples of the class", ibid. Brownlie cites the majority judgment in the *Barcelona Traction* case (Second Phase) [1970] ICJR 3, 32 as authority for this proposition
47. *Horn of Africa Report 1* supra n 6, 96.

founded.[48]

Failure to take appropriate measures to prevent starvation

If the Ethiopian Government is guilty only of indifference to the plight of the Eritreans, it may still be possible to vindicate the Australian Government's actions but the vindication must be based on different principles to those considered thus far.

Common article 3 of the 1949 Geneva Conventions applies in the case of armed conflict, not of an international character, occurring in the territory of one of the High Contracting Parties. At first glance this appears to provide a basis for upholding the Australian Government's actions and condemning those of the Ethiopian Government. The obligation of humane treatment of non-combatants expressed in article 3 appears broad enough to impose a legal obligation on High Contracting Parties to allow the free passage of humanitarian aid. However, it is unlikely that the drafters of article 3 intended to impose a greater obligation on parties to a civil war than article 23 of the Geneva Convention imposes in respect of international conflicts.[49] Article 23 provides that:

> Each High Contracting Party shall...permit the free passage of all consignments of essential foodstuffs, clothing, and tonics intended for *children under fifteen, expectant mothers and maternity cases.*
> The obligation of a High Contracting Party to allow the free passage...is subject to the condition that *this Party is satisfied* that there are no serious reasons for fearing
> (a) that the consignments may be diverted from their destination,
> (b) that the control may not be effective, or
> (c) that a definite advantage may accrue to the military efforts or economy of the enemy...
> ..the Power which permits their free passage shall have the *right to prescribe the technical arrangements under which the passage is allowed.*[50] (emphasis added)

Given the clandestine nature of the Golden Venture operation, it seems clear that it falls outside the terms of common article 3.

48. See, for instance, the evidence given to the United States House of Representatives on the subject in October 1985, Human Rights and Food Aid in Ethiopia: Hearings before the Subcommittee on Human Rights and International Organisations and the Subcommittee on Africa of the House Committee on Foreign Affairs, 99th Cong, 2nd Session (1985) cited in M J Bazyler "Reexamining the doctrine of Humanitarian Intervention in the light of the Atrocities in Kampuchea and Ethiopia" (1987) 23 Stanford Journal of International Law 547
49. Mudge supra n 19, 255.
50. Extracted in Mudge supra n 19, 251-252.

Thus we must turn to the less certain sphere of customary international law.

At customary international law there is arguably a doctrine of humanitarian intervention. It is based on the notion that sovereign jurisdiction is conditional upon compliance with minimum standards of human rights.[51] This doctrine has the support of several eminent jurists[52] and it is usually stated in the following terms: any state can intervene "to prevent serious and large scale violations of human rights...by another State regardless of the nationality of the victims."[53]

Leaving to one side interventions by a state to protect its own nationals abroad, three interventions of the post-United Nations era have been cited as state practice in support of the doctrine of humanitarian intervention. These are Tanzania's intervention in Uganda in 1979,[54] Vietnam's intervention in Kampuchea in 1978,[55] and India's intervention in East Pakistan (now Bangladesh) in 1971.[56] While none of the intervening states had single motives for their actions, they did point to large-scale abuse of human rights in the target state as part of their justification.

Despite the foregoing, there are many writers who simply deny the existence of a doctrine of humanitarian intervention. However, the basis of their denial is important. They have focused their attention exclusively on intervention involving the use of armed force and rejected the doctrine of humanitarian intervention on the basis

51. M Reisman and M S McDougal "Humanitarian Intervention to Protect the Ibos" in R B Lillich (ed) *Humanitarian Intervention and the United Nations* (Charlottesville: University Press of Virginia, 1973) 167, 170; H S Fairley "State Action, Humanitarian Intervention and International Law: Reopening Pandora's Box" (1980) Georgia Journal of International and Comparative Law 29, 35.
52. Eg Grotius *The Rights of War and Peace* 285-289; Vattel *Droit des Gens* 56; Guggenheim *Traite de Droit International Public* 289; Oppenheim, *International Law* 347; Lauterpacht *International Law and Human Rights* 120; all cited in Reisman and McDougal ibid.
53. Harris supra n 25, 470.
54. Bazyler supra n 48, 590
55. M J Levintin "The Law of Force and the Force of Law: Grenada, the Falklands and Humanitarian Intervention" (1986) 27 Harvard International Law Journal 621, 652.
56. T M Franck and N S Rodley, "After Bangladesh: The Law of Humanitarian Intervention by Military Force" (1973) 67 American Journal of International Law 275; N Ronzitti *Rescuing Nationals Abroad through Military Coercion and Intervention on the Grounds of Humanity* (Dordrecht: Martinus Nijhoff, 1985); Fonteyne "The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity Under the UN Charter" 4 California West International Law Journal 203; all cited in Bazyler supra n 48, 588.

that the United Nations Charter totally bans the unilateral use of force, except for the purpose of self-defence.[57] These arguments cannot, however, impugne the legality of humanitarian intervention which does not involve the use of force.

In fact it can be argued that the United Nations Charter has strengthened the doctrine of humanitarian intervention, in the absence of the use of force, by confirming the "homocentric character" of international law.[58] The preamble of the Charter expresses the determination of the peoples of the world "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person...". Moreover, article 1(3) states that one of the purposes of the United Nations is

> "to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and promoting and encouraging respect for human rights and for fundamental freedoms for all...".

Perhaps most importantly, article 55 provides that the United Nations shall promote "universal respect for and observance of human rights and fundamental freedoms for all..." and article 56 provides that:

> All Members pledge themselves to take *joint and separate action* in cooperation with the Organisation for the achievement of the purposes set forth in Article 55.[59] (emphasis added)

In view of the explicit provisions in the United Nations Charter, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights, it cannot be denied that there exists an ever-expanding international law of human rights. As Fairley suggests, the question then becomes

> whether the existence of this competing body of international law, and the concomitant moral point of view projected from fundamental principles of humanity, somehow authorises or at least justifies humanitarian intervention by one or more state actors in derogation of the long standing rule [of non-intervention].[60]

57. Eg I Brownlie "Humanitarian Intervention" in J N Moore (ed) *Law and Civil War in the Modern World* (Baltimore: John Hopkins University Press, 1974), Fairley supra n 51, 62. There is no reason in principle for this focus see eg Verwey supra n 24, 375.
58. Reisman and McDougal supra n 51, 171
59. Extracted in Harris supra n 25, 748.
60. Fairley supra n 51, 45

There is an argument put by many writers that in the post-United Nations era collective action within the framework of an international or regional organisation is always to be preferred and that unilateral action is always suspect.[61] However, if one is discussing the delivery of humanitarian aid to rebel-controlled areas against the wishes of the recognised government of a state, there are cogent reasons for preferring unilateral action by states.

United Nations specialised agencies are bound by the terms of their respective constitutions. UNICEF, for example, is permitted by its charter to operate in territories that are not "recognised" but many such agencies cannot legally operate in those territories.[62] Furthermore, if organisations such as the World Food Programme, UNICEF and the United Nations High Commissioner for Refugees are used as instruments of humanitarian intervention their long term role in international humanitarian assistance may well be undermined. The future of all United Nations agencies ultimately depends on their political acceptability.[63] The United Nations could create ad hoc bodies to deal with specific situations but such bodies may respond inadequately through lack of experience. It is better for individual governments to channel aid through NGOs based in their own countries. Such NGOs have the requisite expertise in the provision of humanitarian aid but are not constrained by having to avoid offending political sensibilities.

In the case under discussion, the Ethiopian Government was arguably violating the right to life and the right to food of the Eritrean people. Article 6 of the International Covenant on Civil and Political Rights[64] provides that every human being has the inherent right to life. Article 11 of the International Covenant on Economic, Social and Cultural Rights[65] provides that everyone has

61. Eg R B Lillich "Humanitarian Intervention: A Reply to Ian Brownlie and a Plea for Constructive Alternatives" in Moore (ed) supra n 57, 238; Reisman and McDougal supra n 51, 188, 192; Bazyler supra n 48, 602.
62. J Pilger, *Heroes* (London: Jonathon Cape, 1986) 397.
63. The UNHCR is especially vulnerable to political attack. No explicit enabling provisions for UNHCR's humanitarian assistance functions are to be found in the Statute of the Office of the UNHCR or in the 1951 Convention Relating to the Status of Refugees or in any subsequent convention. See Macalister-Smith, supra n 39, 38.
64. Extracted in Harris supra n 25, 542.
65. UKTS 6 (1977) Cmnd 6702 6 ILM 360 extracted in P Alston "International Law and the Human Right to Food" in P Alston and K Tomasevski (eds) *The Right to Food* (Dordrecht: Martinus Nijhoff, 1984) 9, 32.

the right to adequate food and the right to be free from hunger. The Universal Declaration of Human Rights has similar provisions.[66] Ethiopia is not a party to either of the Covenants. Thus its obligations under international law depend on the extent to which either or both of these rights are part of customary international law.

The right to life is established beyond question as forming part of customary international law. The real issue is how widely the right should be interpreted. Jurists have tended to interpret it narrowly as the right to be safeguarded against arbitrary killing.[67] It has been argued that the right cannot be invoked to "guarantee any person against death from famine".[68] However, the Human Rights Committee of the United Nations has taken a wider view. Its view implies that a state which fails to take appropriate measures to deal with serious hunger is in violation of its people's right to life.[69]

Some writers argue strongly in favour of the right to food as a customary legal norm.[70] Other writers just as strongly deny the legal, as opposed to the moral, content of the right.[71] It is worth noting in this context that the right to food is not acknowledged in most regional human rights instruments.[72] This is not surprising. Governments of developing nations are reluctant to affirm the right to food because it imposes upon them the onerous obligation of ensuring that food shortages do not occur within their own territories. Governments of developed nations are reluctant to affirm the right because it imposes upon them the obligation of transferring food surpluses to deficit countries or modifying their international trade arrangements. Since the right to food seems to have a tenuous status in international law I shall not attempt to use it as the basis for invoking the right of humanitarian intervention.

66. Articles 3 and 25 extracted in Harris supra n 25, 534, 537.
67. Alston supra n 65, 24.
68. N Robinson *The Universal Declaration of Human Rights Its Origin, Significance and Interpretation* (New York: Institute of Jewish Affairs, 1958) 106 cited in Alston supra n 65, 25.
69. Report of the Human Rights Committee, UN doc A/37/40 (1982) Annex V, para 5 cited in Alston supra n 65, 25.
70. Eg Shepherd "The Denial of the Right to Food· Development and Intervention in Africa" (1985) 15 California West International Law Journal 528.
71. R L Bard "The Right to Food" (1985) 70 Iowa Law Review 1279.
72. That is, not specifically recognised in the European Convention on Human Rights, the European Social Charter 1961, the American Convention on Human Rights 1969, or the Banjul (African) Charter of Human and Peoples' Rights 1981; see Alston supra n 65, 28.

One problem that remains to be addressed is the fact that despite the academic arguments in favour of intervention, in 1985 90 per cent of Western aid to Ethiopia went to the Ethiopian Government; only 5 per cent reached the Eritreans through the Sudan.[73] The Parliamentary Joint Committee attributed the meagreness of direct bilateral aid to Eritrea to an unwillingness on the part of the donor governments to deal directly with the EPLF or the ERA.[74] On the other hand those governments that have been willing to deal with the ERA have not met with international condemnation. This could be an acknowledgement that the right of humanitarian intervention exists in the circumstances even if most states find it inexpedient to exercise it themselves.

Since the right of humanitarian intervention is a right of customary international law, its applicability to the Eritrean situation is to be deduced ultimately from state practice and opinio juris in similar situations.

The Nigerian civil war was a close parallel to the Eritrean situation. In 1967 the Ibo tribe sought the creation of a separate state in the Biafran region of Nigeria.[75] Nigeria blockaded Biafra and millions of Biafrans faced starvation. The conflict was widely alleged to be a war of genocide. However the Nigerian Government does not appear to have been engaging in a deliberate policy of starvation. It had, for instance, suggested a land corridor for transporting relief supplies into Biafra.[76] At another stage it proposed to allow daytime relief flights into Biafra.[77] The problem was that the Nigerian Government wanted to impose the exact conditions under which the relief actions would take place. The Biafran authorities objected to these conditions and wanted to impose conditions of their own.

While the Nigerian Government did not *aim* to starve the Biafrans it was quite *willing* to let them starve rather than negotiate its political position. The situation probably did not justify intervention by armed force and, in fact, no armed intervention took place. The ques-

73. (1985) 7 *Eritrea Information* (No 5) 9.
74. *Horn of Africa Report 1* supra n 6, 94.
75. Reisman and McDougal supra n 51, 167
76. Mudge supra n 19, 257.
77. Ibid, 261.

tion important to the present enquiry is whether states considered that the situation justified non-armed humanitarian intervention.

Many NGOs started night-time relief flights into Biafra, with the sanction of the Biafran authorities but contrary to the wishes of the Nigerian Government. The United States Government supported United States NGOs which undertook these flights by donating $22.2 million worth of foodstuffs and $9.3 million for transport under the food for peace plan. In addition the United States Government sold four planes to Joint Church Aid International at the token price of $3760 each.[78] The official United States position on aid to Biafra was summed up in the following statement by President Nixon:

> Unfortunately, the humanitarian urge to feed the starving has become enmeshed with those issues that stand in danger of interpretation by the parties as a form of intervention but surely it is within the conscience and ability of man to give effect to his humanitarianism without involving himself in the politics of the dispute. It is in this spirit that United States policy will draw a sharp distinction between our moral obligations to respond effectively to humanitarian needs and involving ourselves in political disputes.[79]

The Canadian Government urged Canadians to support Canairelief which was also conducting night-time flights into Biafra. However, it thought that direct support of Canairelief would be intervention in the internal affairs of Nigeria. Nevertheless, it gave in to strong pressure and promised to give $1 million to Canairelief. The next day the Biafrans capitulated so the promise was never fulfilled.[80]

The British Government was under similar pressure to contribute to the relief efforts of Joint Church Aid International but it did not give in.[81] However, this resistance probably had more to do with the fact that Nigeria was a major supplier of British oil than any view of international law.[82]

The Australian Government made it clear that it did not "distinguish between suffering on one side of the line of conflict and that on the other side".[83] It contributed modestly to relief

78. Samuels supra n 19, 30-31.
79. 60 *Dept of State Bulletn* 222-3 (1969) quoted in Samuels supra n 19, 22.
80. Samuels supra n 19, 18.
81. Ibid, 20.
82. Pilger supra n 62, 317.
83. 39 *Australian Current Notes on International Affairs* 349.

operations conducted by UNICEF but its only contribution to an NGO operating in the conflict zone was a contribution of $67400 to the ICRC.[84] It appears to have stopped giving assistance to Red Cross operations when "uncertainties" arose regarding such operations.[85] These uncertainties may have been the consequence of the Nigerian Government's denunciation of the ICRC when that organisation attempted to extend its relief actions in Biafra in a manner objectionable to it.[86]

The state practice that emerges from the Nigerian Civil war gives some, though not unequivocal, support to the proposition that states have the right to intervene without the use of force to save the lives of people whose own government is indifferent to their fate. The support is equivocal because even the United States Government justified its actions in terms of moral obligation and not in terms of international law.

It appears, on the whole, that a jealous regard for the notion of state sovereignty, and hence the principle of non-intervention, has caused most states to take the position of denying the legality of humanitarian intervention but condoning it in practice if it meets certain criteria. Writers such as Brownlie support the concept of "second-order legality"[87] but if states operate outside the legal order in order to square their conscience, the legitimacy of operating outside the legal order, for whatever reason, may be established to the extent that the very existence of the international legal order is threatened. Instead of pleading moral obligation in mitigation of humanitarian actions states should make firm statements of opinio juris in support of such actions. Until such time as this occurs, however, the strict legality of providing humanitarian aid to civilians in rebel-controlled areas of other states, without the consent of the recognised government of that state, is open to question.

When the position of customary international law is uncertain, strong statements of opinio juris which are not actively repudiated by the rest of the international community can shape the future

84. 40 *Australian Current Notes on International Affairs* 176.
85. Commonwealth, Parliamentary Debates, (House of Representatives) 10 September 1969 (1969), .
86. Gottlieb supra n 40, 423-424.
87. Brownlie "Humanitarian Intervention" in Moore (ed) supra n 57, 223

direction of customary law. Unfortunately, the Australian Government's statements in the aftermath of the Golden Venture incident were probably not adequate for this purpose, although a strong protest was lodged with the Ethiopian Government over the seizure. The text of the message despatched on 16 January 1985 was as follows:

> The Australian Government has received representations from members of the Australian public, the Australian Wheat Board and non-governmental relief associations concerned about relief in Ethiopia about your Government's arbitrary confiscation of consignment aboard the ship MV Golden Venture, which was destined for Port Sudan. The Australian Government protests about the Ethiopian Government's action, which has caused great concern in Australia. The cargo consists only of humanitarian supplies which represent the response of the Australian people to the plight of drought victims throughout Ethiopia.
> Accordingly, the Australian Government appeals to the Ethiopian Government to release the confiscated cargo and allow it to proceed unimpeded.[88]

More promisingly, on 5 February 1985 Mr Hayden announced that a grant to NGOs for relief programs in Ethiopia included a compensatory element of $2.1 million for the food aid which had been seized by Ethiopia.[89]

On 20 February 1985, Mr Hayden announced that as a result of intensive diplomatic discussions with the Ethiopian Government 5500 tonnes of the seized wheat had been distributed in the famine areas of Gondor, Wollo and Tigray and the remaining commodities were being held in central grain stores awaiting distribution.[90]

In mid-March 1985 an Australian food aid shipment intended as a replacement of the Golden Venture shipment arrived safely at Port Sudan.[91] Thus the Golden Venture incident came to an end in a manner which indicated the Australian Government's determination to continue as before. Mr Hayden made the Australian position clear when he said:

> It is important that dispute over the seizure or its reasons does not deflect us from our over-riding aim of feeding people who are starving.[92]

Perhaps Australia's position at international law was sound. However its failure to meet Ethiopia's legal rhetoric with some very

88. [1985] *Australian International Law News* 118.
89. News Release in (1985) 56 *Australian Foreign Affairs Record* 131.
90. News Release in (1985) 56 *Australian Foreign Affairs Record* 153.
91 ERC Newsletter January/March 1985.
92. News Release, 22 January 1985 in [1985] *Australian International Law News* 116.

explicit legal rhetoric of its own is difficult to explain away and means that the Golden Venture incident did not bring us very much closer to a world in which human rights can be guaranteed to prevail over state rights in international law.