ABHANDLUNGEN

Humanitarian Intervention through the United Nations: Towards the Development of Criteria©

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At the beginning of this year, New York Times' columnist William Safire set out his annual list of prognostications for the coming twelve months. Leading off the list, he gave his readers three choices for the "most unexpected good news" of 1993: (a) Charles and Diana reconcile; (b) President Clinton delivers a suitably short inaugural address; and (c) the "right to intervene" to stop anarchy or genocide becomes international law[2]. Writing just a month after the UN Security Council had authorized the use of force "to restore peace, stability and law and order" to Somalia[3], his own personal pick was the latter.

Nearly a year later, after the international community's dismal failure to sanction forceful actions to halt rump Yugoslavia's savage slaughter, mass rapes, "ethnic cleansing" and undoubted genocide in Bosnia and other parts of the former Yugoslavia[4], the right of humanitarian intervention – even (perhaps especially) by the United Nations – seems more of a will-o'-the-wisp than a legal reality. Indeed, in view of the international community's reluctance to address satisfactorily the gross and persistent human rights violations well-known to be occurring in numerous other countries – Angola, Haiti and Liberia come easily to mind – it seems almost quixotic at present to devote time and effort to an attempt to develop legal criteria for UN humanitarian intervention.

 An earlier version of this Article, entitled "The Development of Criteria for Humanitarian Intervention", was presented to a Wilton Park Special Conference on "Legal Aspects of Humanitarian Assistance and Intervention" held at Wiston House, Steyning, U.K., on July 2-4, 1993.

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[2] Safire, If at First You Goof, Try, Try Again, Int'l Herald-Tribune, Jan. 4, 1993, at 6, cols. 3–5.

[3] S.C. Res. 794, U.N. Doc. S/RES/794 (1992).

[4] Editorial, A Diary of Disgrace, Int'l Herald-Tribune, Dec. 21, 1992, at 4, cols. 1–2.

Nevertheless, since the end of the Cold War has freed up the Security Council and permitted it to authorize various degrees of forceful action in Iraq, the former Yugoslavia and Somalia, precedent for UN-sanctioned humanitarian intervention has been established and, it is to be hoped, may be invoked again in future cases. Thus the identification and elaboration of suggested criteria that might prove useful in deciding whether to undertake a given intervention and in monitoring its legality thereafter is not an entirely academic enterprise. Indeed, because until recently little if any attention has been paid to developing criteria for UN, as opposed to unilateral or collective, humanitarian intervention, such an exercise may have the salutary effect of underscoring that the UN now has not only a right, but perhaps "in extreme cases even a duty, to intervene when States severely infringe human rights"[5]. The academic community and non-governmental organizations especially should take the lead in proposing such criteria, as most States hardly can be expected to press energetically for the construction and clarification of a doctrine that carries with it obvious limitations on their once-absolute freedom of action with respect to the treatment of individuals within their borders[6].

This Article, therefore, will begin with a brief review of previous efforts to clarify the status of and define criteria for unilateral and collective humanitarian intervention; next proceed to an equally brief summary of the constitutional underpinnings of UN humanitarian intervention; then in summary fashion posit a half-dozen tentative criteria for such interventions; and finally conclude with a plea that the UN recognize humanitarian interventions, or at least the threat thereof, as the potent weapon they can be in its continuing effort to protect the basic human rights of individuals in crisis situations.

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[5] Schermers, The Obligation to Intervene in the Domestic Affairs of States, in: Delissen/Tanja (eds.), Humanitarian Law of Armed Conflict: Challenges Ahead. Essays in Honour of Frits Kalshoven 583, 592 (1991). See also Beigbeder, The Role and Status of International Volunteers and Organizations: The Right and Duty to Humanitarian Assistance (1991). Rodley even suggests that "[a] growing number of influential governments take the view that there is a threshold beyond which inaction is impermissible", Rodley, Collective Intervention to Protect Human Rights and Civilian Populations: The Legal Framework, in: Rodley (ed.), To Loose the Bonds of Wickedness: International Intervention in Defence of Human Rights 14, 35 (1992). One wonders what governments he had in mind.

[6] Schermers, *supra* note 5, at 591.

I. Previous Efforts to Clarify the Status of and Define Criteria for Humanitarian Intervention

Traditional international law, in the pre-Charter period, recognized one principal doctrine under which a State or group of States could intervene in another State to put an end to human rights violations that had reached intolerable proportions. That doctrine – humanitarian intervention – permitted such interventions when a State mistreated its own nationals in a way so far below international minimum standards as "to shock the conscience of mankind ..."[7]. Although many international lawyers, like Brownlie, question the doctrine's legal pedigree[8], a substantial number, like Falk, believe that State practice before 1945 "exhibits many instances in which intervention was prompted by humanitarian considerations that one can condemn only by waving too vigorously the banners of sovereignty"[9].

The effect of the UN Charter – particularly Arts. 2(4) and 2(7) – on the humanitarian intervention doctrine received little attention in the literature on the organization and its human rights responsibilities for over two decades. The drafters of the Charter, as a thorough study of the San Francisco conference has demonstrated, paid no attention to whether the doctrine was to survive the Charter, and its signatories, while obligating themselves to promote the protection of human rights, surely recognized that the Charter contained no explicit provisions permitting either the organization itself or its Member States, individually or collectively, to take forceful action even in extreme situations to compel a recalcitrant State to comply with its human rights obligations[10]. Thus, in the words of D'Amato, "[w]ith the establishment of the United Nations in 1945, substantial doubt was cast upon the older precedents supporting the legal-

[7] 1 Oppenheim, International Law 312 (8th ed. Lauterpacht 1955).

[8] Brownlie, International Law and the Use of Force by States 338–342 (1963). Compare Brownlie, Humanitarian Intervention, in: Moore (ed.), Law and Civil War in the Modern World 217 (1974) with Lillich, Humanitarian Intervention: A Reply to Ian Brownlie and a Plea for Constructive Alternatives, in id. at 229.

[9] Falk, Legal Order in a Violent World 161 (1968). "The treatment of the Jews by Hitler provides a recent vivid illustration of a situation in which respect for the internal autonomy seems to be less compelling than the impulses that prompt and, in the opinion expressed here, vindicate intervention".

[10] Huston, Human Rights Enforcement Issues of the United Nations Conference on International Organization, 53 Iowa L. Rev. 272 (1967).

ity of the use of force short of war"[11]. Farer is even more categoric: "The nub of the matter, then, is that if one deems the original intention of the founding states to be controlling with respect to the legitimate occasions for the use of force, then humanitarian intervention is illegal"[12].

In any event, it soon became apparent that there was tension between the two major purposes of the UN Charter: the maintenance of peace and the protection of human rights. Art. 2(4), the Charter provision relevant to both purposes, prohibits "the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations". Only two exceptions are explicitly provided for by the Charter, namely, individual or collective self-defence under Art. 51, and UN enforcement action for the maintenance of peace and security under Chapter VII. The latter, of course, is specifically excepted from Art. 2(7)'s prohibition against UN intervention in "matters which are essentially within the domestic jurisdiction of any state ...".

Soon after the establishment of the United Nations, this tension was noted by the late Judge Jessup, who examined the impact of the above provisions and concluded that the forcible protection of nationals abroad, a doctrine related to and often confused with humanitarian intervention, was no longer permitted because the Charter had preempted all unilateral or collective State actions previously permitted by customary international law[13]. However, he carefully entered the caveat that if the Security Council, which with its Military Staff Committee and pledged national contingents in a state of readiness, was not able to act under Chapter VII with the speed requisite to preserve life, then unilateral or collective measures by a State or group of States might be substituted for UN measures[14]. Nearly two decades later, with a notional Military Staff Committee and no Art. 43 agreements providing national contingents for a UN force having been concluded, the present writer advanced the view

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[11] D'Amato, International Law: Process and Prospect 53 (1987). D'Amato attributes the failure to authorize forceful action to protect human rights to the fact that a majority of the delegates who signed the Charter probably regarded the preservation of peace as far more important than the promotion of justice. Id. at 54. Accord, Farer, An Inquiry into the Legitimacy of Humanitarian Intervention, in: Damrosch/Scheffer (eds.), Law and Force in the New International Order 185, 190 (1992): an objective observer "cannot help concluding that the promotion of human rights ranked far below the protection of national sovereignty and the maintenance of the peace as organizational goals".

[12] Id. at 191 (emphasis deleted). Accord, Brownlie, International Law, *supra* note 8.

[13] Jessup, A Modern Law of Nations 169–170 (1948).

[14] Id. at 170–171.

that, in the absence of effective UN humanitarian intervention, unilateral or collective humanitarian intervention was not precluded in serious human rights deprivation cases[15]. Shortly thereafter McDougal and Reisman, in their famous memorandum entitled "Humanitarian Intervention to Protect the Ibos"[16], strongly urged UN humanitarian intervention in Nigeria, either authorized by the Security Council under Chapter VII or by the General Assembly under the Uniting-for-Peace Resolution[17], but also contended that in its absence unilateral or collective humanitarian intervention by States would be lawful given the facts at hand. Their memorandum concluded with the interesting and provocative suggestion that the United Nations institutionalize a system of humanitarian intervention, including a Protocol of Procedure for Humanitarian Intervention to be drafted by the International Law Commission.

The International Law Association picked up this suggestion in 1970 and, in a series of four reports, attempted to draft such a Protocol[18]. Unfortunately, despite an emerging consensus on the importance of UN humanitarian intervention, the effort foundered in 1976 on the question of whether, if a veto prevented the Security Council from acting under Chapter VII, as would have been the case had forcible UN action in Namibia been proposed, unilateral or collective humanitarian intervention by States would have been lawful. A similar research project by the Procedural Aspects of International Law Institute about the same time on "Humanitarian Intervention Through the United Nations" soon reached the conclusion, in Weston's words, that "if we are to limit humanitarian intervention to global organization intervention or its equivalent, then we are not talking about a real world. I don't think that we can

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[15] Lillich, Forcible Self-Help by States to Protect Human Rights, 53 Iowa L. Rev. 325, 344–351 (1967). See also Lillich, Intervention to Protect Human Rights, 15 McGill L.J. 205 (1969).

[16] Reisman/McDougal, Humanitarian Intervention to Protect the Ibos, in: Lillich (ed.), Humanitarian Intervention and the United Nations 167 (1973) [hereinafter cited Humanitarian Intervention].

[17] G.A. Res. 377(V), 5 U.N. GAOR Supp. No. 20, at 10, U.N. Doc. A/1775 (1950).

[18] Interim Report of the Sub-Committee on the International Protection of Human Rights by General International Law, I.L.A. Report of the Fifty-Fourth Conference 633 (The Hague 1970); Second Interim Report of the Sub-Committee on the International Protection of Human Rights by General International Law, I.L.A. Report of the Fifty-Fifth Conference 608 (New York 1972); Third Interim Report of the Sub-Committee on the International Protection of Human Rights by General International Law, I.L.A. Report of the Fifty-Sixth Conference 217 (New Delhi 1974); and Final Report of the Sub-Committee on the International Protection of Human Rights by General International Law, I.L.A. Report of the Fifty-Seventh Conference 519 (Madrid 1976).

expect the United Nations to intervene actively through the use of force except in the most limited circumstances"[19]. The PAIL project, however, did produce a seminal and still-useful volume, Humanitarian Intervention and the United Nations[20], as well as an interesting if generally overlooked student Note entitled "A Proposed Resolution Providing for the Authorization of Intervention by the United Nations, A Regional Organization, or A Group of States In A State Committing Gross Violations of Human Rights"[21]. The vast outpouring of legal literature on the subject during the past two decades, however, has focused almost exclusively upon unilateral or collective humanitarian intervention, and with rare exceptions has added little new to the debate[22].

The one legacy left by the ILA reports and the PAIL research project that remains relevant for present purposes is the attempt to clarify criteria by which the legality of non-UN humanitarian interventions might be judged. Building upon earlier lists compiled principally by U.S. academic lawyers[23], the ILA's Third Interim Report offered the following 12 criteria:

1. There must be an imminent or ongoing gross human rights violation.

2. All non-intervention remedies available must be exhausted before a humanitarian intervention can be commenced. (See also criteria 9.)

3. A potential intervenor before the commencement of any such intervention must submit to the Security Council, if time permits, its views as to the specific limited purpose the proposed intervention would achieve.

4. The intervenor's primary goal must be to remedy a gross human rights violation and not to achieve some other goal pertaining to the intervenor's own self-interest.

5. The intent of the intervenor must be to have as limited an effect of [*sic*] the authority structure of the concerned State as possible, while at the same time achieving its specific limited purpose.

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[19] Weston, in Humanitarian Intervention, *supra* note 16, at 85.

[20] See *supra* note 16.

[21] 13 Va. J. Int'l L. 340 (1973).

[22] For this literature up to the end of 1990, see Lillich, International Human Rights: Problems of Law, Policy, and Practice, 604–606 (1991). Prominent among the exceptions is Teson, Humanitarian Intervention: An Inquiry Into Law and Morality (1988), who, like his counterparts, essentially ignores the possibility of UN humanitarian intervention.

[23] See, e.g., Nanda, The United States' Action in the 1965 Dominican Crisis: Impact on World Order – Part I, 43 Denver L.J. 439, 475–479 (1966); Lillich, Forcible Self-Help, *supra* note 15, at 347–351; and Moore, The Control of Foreign Intervention in Internal Conflict, 9 Va. J. Int'l L. 205, 264 (1969).

6. The intent of the intervenor must be to intervene for as short a time as possible, with the intervenor disengaging as soon as the specific limited purpose is accomplished.

7. The intent of the intervenor must be to use the least amount of coercive measures necessary to achieve its specific limited purpose.

8. Where at all possible the intervenor must try to obtain an invitation to intervene from the recognized government and thereafter co-operate with the recognized government.

9. The intervenor, before its intended intervention, must request a meeting of the Security Council in order to inform it that the humanitarian intervention will take place only if the Security Council does not act first. (See also criteria 2 & 3.)

10. An intervention by the United Nations is preferred to one by a regional organization, and an intervention by a regional organization is preferred to one by a group of States or an individual State.

11. Before intervening, the intervenor must deliver a clear ultimatum or "peremptory demand" to the concerned State insisting that positive actions be taken to terminate or ameliorate the gross human rights violations.

12. Any intervenor who does not follow the above criteria shall be deemed to have breached the peace, thus invoking Chapter VII of the Charter of the United Nations[24].

The above twelve criteria, it is submitted, are a useful starting point in any effort to establish legal norms to govern possible UN humanitarian interventions in the future, but they are no more than a first step. For, in assessing what criteria should apply to UN-authorized interventions, one should recall Bowett's admonition that "an intervention authorized by a competent organ of the United Nations, whilst undoubtedly subject to a test of legality, is not subject to the same test as unilateral action by states"[25].

II. Constitutional Underpinnings of UN Humanitarian Intervention

UN humanitarian interventions, to be justified on legal grounds, presumably must be authorized by the Security Council under Art. 42 after a finding, pursuant to Art. 39, that there exists a "threat to the peace,

[24] Third Interim Report, *supra* note 18, at 219–220.

[25] Bowett, The Interrelation of Theories of Intervention and Self-Defense, in: Moore, *supra* note 8, at 38, 45 (emphasis in original).

breach of the peace, or act of aggression ...". Absent such authorization, some observers have postulated that the General Assembly might be seised with the power to intervene pursuant to its Uniting-for-Peace Resolution[26] or, *de lege ferenda*, proposed Uniting-Against-Genocide or Uniting-Against-Crimes-Against-Humanity resolutions[27]. While the possible future role of the General Assembly in this regard is worthy of far more consideration than it has received to date, until now attention has been focused almost exclusively upon the Security Council. For this reason, it is the focus adopted for the balance of this Article.

One must begin a parsing of the authority granted the Council by Art. 39 by acknowledging the fact that, just as the Charter's drafters did not expressly address the doctrine of unilateral humanitarian intervention, so too "[n]othing in the *travaux* suggests that the parties envisioned a government's treatment of its own nationals as likely to catalyze a threat or breach" triggering potential Security Council action under Chapter VII[28]. Subsequent Council practice, however, has put a gloss on the phrase "threat to the peace" and, especially during the past three years, has changed the attitudes and expectations of UN Member States with respect to the legitimacy, if not the likelihood, of UN humanitarian interventions. While these changes, following the end of the Cold War and the break-up of the former Soviet Union, may have come as a surprise, the Security Council's *de facto* amendment of the Charter to permit humanitarian intervention by the organization, regional organizations and Member States is in keeping with the constitutional law of the Charter. For, to paraphrase Chief Justice Hughes' remarks about the U.S. Constitution and the Supreme Court, the international community is bound by the UN Charter, but the Charter is what (in this case) the Security Council says it is[29].

The Security Council first interpreted a State's human rights violations to constitute a "threat to the peace" in 1968 when it adopted comprehen-

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[26] See *supra* note 17.

[27] Such resolutions have been proposed by at least one U.S. scholar. See Newman, in Humanitarian Intervention, *supra* note 16, at 123–124.

[28] Farer, *supra* note 11, at 190. "Taken together with the so-called 'veto' power and Art. 2(7)'s explicit denial of U.N. jurisdiction with respect to matters of a primarily domestic character, these structural elements and normative arrangements imply that the ultimate shared value of the member states remained what it had been for the two previous centuries, namely national sovereignty", id. at 190–191.

[29] "We are under a Constitution, but the Constitution is what the judges say it is ...", Bartlett's Familiar Quotations 700 (15th ed. 1980).

sive mandatory economic sanctions in the case of Southern Rhodesia[30]. Nine years later it used the same rationale when it imposed a mandatory arms embargo upon South Africa[31]. These resolutions, while precedent-setting, nevertheless were so entwined with the issues of self-determination and apartheid that their value in situations involving other internal human rights deprivations is somewhat problematic[32].

The same cannot be said with respect to a Gulf War follow-up resolution designed to protect Iraqi nationals, primarily Kurds, from further repression by their Government. Security Council Resolution 688, adopted on 5 April 1991, noted the Council's responsibilities for the maintenance of international peace and security – an implied reference to Chapter VII – and expressed its concern that Iraq's actions had "led to a massive flow of refugees towards and across international frontiers and to cross border incursions, which threaten international peace and security"[33]. The resolution, which demanded that Iraq immediately end its repression and allow immediate access by international humanitarian organizations to all persons in need of assistance, contained no express reference to Chapter VII, however, nor did it specifically authorize the allied military intervention to create "safe havens" that subsequently took place.

Pease and Forsythe maintain that by adopting Resolution 688 "[t]he Security Council for the first time in its history stated a clear and explicit linkage between human rights violations materially within a state (although there were indeed international repercussions) and a threat to international security"[34]. They conclude, therefore, that "the Council clearly has the legal authority to authorize [*in futuro*] armed action, or lesser coercive measures, to correct human rights

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[30] S.C. Res. 253, 23 U.N. SCOR, Res. and Dec. at 5 (1968). On the legality of Rhodesian sanctions and the arguments pro and con their adoption, compare McDougal & Reisman, Rhodesia and the United Nations: The Lawfulness of International Concern, 62 Am. J. Int'l L. 1 (1968) with Acheson, The Arrogance of International Lawyers, 2 Int'l Law. 591 (1968). For a comprehensive study of these sanctions, see Gowland-Debbas, Collective Responses to Illegal Acts in International Law: United Nations Action in the Question of Southern Rhodesia (1990).

[31] S.C. Res. 418, 32 U.N. SCOR, Res. and Dec. at 5 (1977).

[32] Malanczuk, Humanitarian Intervention and the Legitimacy of the Use of Force 16 (Inaugural Lecture, Univ. of Amsterdam, Jan. 22, 1993).

[33] S.C. Res. 688, U.N. Doc S/RES/688 (1991).

[34] Pease & Forsythe, Human Rights, Humanitarian Intervention, and World Politics, 15 Hum. Rts. Q. 290, 303 (1993) (emphasis added).

violations materially within a territorial state"[35]. Malanczuk, on the other hand, believes that "the resolution cannot be cited as precedent for the proposition that the Security Council views massive, but purely internal human rights violations as such, without transboundary effects, as a direct threat to international peace and security"[36]. Nor does he regard the resolution as precedent "for the authorization of the use of force by the Security Council to protect human rights in such circumstances"[37]. His more guarded conclusions seem persuasive. Nevertheless, the resolution remains a pathbreaking one insofar as it characterizes internal human rights deprivations having external effects as constituting a threat to international peace and security.

The most recent and striking "normative landmark of genuine Security Council practice of humanitarian intervention"[38], however, is Resolution 794, adopted on 3 December 1992, concerning Somalia[39]. After first determining 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", the Council further determined "to restore peace, stability and law and order with a view to facilitating the process of a political settlement under the auspices of the United Nations, aimed at national reconciliation in Somalia ...". To achieve these objectives the Council, invoking Chapter VII, authorized the Secretary-General and cooperating Member States "to use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia ...".

It is noteworthy that this resolution, while invoking Chapter VII, makes no mention whatsoever of the effects, real or notional, of the Somalia crisis on neighboring States, specifically the flow of refugees. Likewise, in the debate leading up to Resolution 794, the principal focus was on the violence and vandalism occurring within Somalia, not on the actual or possible flow of refugees to neighboring States. Although the participants in the debate clearly recognized that the situation in Somalia had external repercussions, the sense of the Security Council was that the

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[35] Id. at 304. Somewhat more cautiously, Rodley suggests that Resolution 688 "represents what could be a first step towards a possible doctrine of collective military intervention to protest human rights", Rodley, *supra* note 5, at 33.

[36] Malanczuk, *supra* note 32, at 17–18.

[37] Id. at 18 (emphasis deleted).

[38] Id. at 24.

[39] *Supra* note 3.

internal situation, in and of itself, warranted action and would anywhere that it might be replicated.

While the Somalian situation was very different from that which had presented itself in Iraq, the Security Council clearly saw common ground between Resolutions 688 and 794, namely, that internal disorders of such magnitude were a proper concern of the Council wherever they may occur. Thus, in voting for the resolution, the U.S. representative noted that, while the Council's immediate objective was to resolve the Somalia crisis, "the international community is also taking an important step in developing a strategy for dealing with the potential disorder and conflicts of the post-Cold War world"[40]. He added that "in the case of Somalia, and in other cases we are sure to face in the future, it is important that we send this unambiguous message: the international community has the intent and will to act decisively regarding peace-keeping problems that threaten international stability"[41].

Heartening as it is to see the Security Council, freed from its Cold War shackles, move towards the recognition and clarification of a doctrine of UN-sanctioned humanitarian intervention, it should not be overlooked that the Council, the key player in this area, is not necessarily reflective of the views of many UN Member States. As Reisman reminds us, "[t]he United Nations system was essentially designed to enable the Permanent Five, if all agree, to use Charter obligations and the symbolic authority of the organization as they think appropriate to maintain or restore international peace, as they define it"[42]. A decision by the Security Council that a threat to the peace sufficient to warrant UN humanitarian intervention exists, according to Reisman,

> expands the Charter's contingencies for action under Art. 39 and engages the full authority of the United Nations, yet it need not be financed through the general budget and, hence, is not subject to control by the General Assembly. As such, [it] may aggravate certain latent tensions between the Permanent Five and the rest of the United Nations[43].

These tensions have surfaced recently in several contexts. In the *Lockerbie* case[44], for instance, where Libya challenged as *ultra vires* a Se

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[40] U.N. Doc. S/PV.3145, at 36 (Dec. 3, 1992).

[41] Id. at 38.

[42] Reisman, Peacemaking, 18 Yale J. Int'l L. 415, 418 (1993) (emphasis added).

[43] Id. at 421.

[44] Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (*Libya* v. *U.K.*; *Libya* v. *U.S.*), Provisional Measures, 1992 ICJ Rep. 3, 114 (Orders of Apr. 14).

curity Council resolution – based upon a threat to the peace rationale – ordering it to surrender two of its nationals accused of bombing Pan Am 103, the International Court of Justice held that the resolution, taken under Chapter VII, preempted its jurisdiction under the Montreal Convention. Franck, likening the case to *Marbury* v. *Madison*[45], believes that "the Court has carefully, and quietly, marked its role as the ultimate arbiter of institutional legitimacy"[46]. "As in *Marbury*", he argues,

> the Court superficially appears to accede to the broad discretionary power of the system's political "branch". But, as in *Marbury*, it accedes not by refusing to decide, but by exercising its power of decision. The Security Council's action in imposing sanctions is adjudged *intra vires* precisely because the majority of judges seems to agree that, for purposes of interim measures, Art. 103 of the Charter "trumps" any rights Libya might have under the Montreal Convention, and thus frees the Security Council to apply sanctions as a suitable remedy in exercise of its powers under Chapter VII[47].

One need not share Franck's enthusiasm for this reading of *Lockerbie*[48] to agree that the case raises the fundamental question of whether the Court, under the UN Charter, possesses the competence to review decisions of the Security Council taken under Chapter VII. Certainly, as Reisman has recently pointed out, "several judges in *Lockerbie* indicated, some more tentatively than others, that, under certain circumstances, a decision by the Security Council might be viewed as invalid by the Court"[49]. However, he finds it difficult to locate limitations in the Charter on the Security Council's actions taken when it is operating under Chapter VII, noting particularly that the term "threat to the peace" "has proved to be quite elastic in the hands of the Council"[50]. The very absence of limiting standards, he concludes, "in a context where so much power is assigned to the Council, is telling. A judicial review function, viewed in the formal Charter regime, seems somewhat difficult"[51]. The real significance of *Lockerbie*, therefore, may be less in the case itself than

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[45] 5 U.S. (1 Cranch) 137 (1803).

[46] Franck, The "Powers of Appreciation": Who Is the Ultimate Guardian of UN Legality?, 86 Am. J. Int'l L. 519, 523 (1992).

[47] Id. at 521.

[48] *Lockerbie* is not the first time that the author has compared a Judgment of the Court to *Marbury* v. *Madison*. See Franck, Word Made Law: The Decision of the ICJ in the Nuclear Test Cases, 69 Am. J. Int'l L. 612 (1975).

[49] Reisman, The Constitutional Crisis in the United Nations, 87 Am. J. Int'l L. 83, 92 (1993).

[50] Id. at 93.

[51] Id. at 94.

in the fact that it is the judicial manifestation of "an international constitutional struggle on many fronts, as the governments of the majority of small states seek some checks and balances on unrestrained Security Council action, just as they sought to impose them, without significant success, in San Francisco in the spring of 1945"[52].

The political counterpart to the legal debate in and over *Lockerbie* is reflected throughout various UN fora. At the Security Council summit meeting in January 1992, Zimbabwe's Foreign Minister Shamuyarira, focusing upon UN humanitarian intervention, posed the issue with especial cogency and caution:

> In the era we are entering, the Council will be called upon to deal more and more with conflicts and humanitarian situations of a domestic nature that could pose threats to international peace and stability. However, great care has to be taken to see that these domestic conflicts are not used as a pretext for the intervention of big Powers in the legitimate domestic affairs of small States, or that human rights issues are not used for totally different purposes of destabilizing other Governments. There is, therefore, the need to strike a delicate balance between the rights of States, as enshrined in the Charter, and the rights of individuals, as enshrined in the Universal Declaration of Human Rights.
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> Zimbabwe supports very strongly both the Universal Declaration of Human Rights and the Charter on these issues. Zimbabwe is a firm subscriber to the principles in the United Nations Declaration on Human Rights. However, we cannot but express our apprehension about who will decide when to get the Security Council involved in an internal matter and in what manner. In other words, who will judge when a threshold is passed that calls for international action? Who will decide what should be done, how it will be done and by whom? This clearly calls for a careful drawing up and drafting of general principles and guidelines that would guide decisions on when a domestic situation warrants international action, by the Security Council or by regional organizations[53].

Shamuyarira's two rhetorical questions pose no particular problem and call for the same answer: the Security Council. His final point, the major purpose of this Article, is addressed in the next Section.

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[52] Id. at 96.

[53] U.N. Doc. S/PV.3046, at 131 (Jan. 31, 1992).

III. Suggested Criteria for UN Humanitarian Intervention

Conventional wisdom calls for the elaboration of criteria by which the legitimacy of UN humanitarian intervention may be judged[54]. Since, as pointed out in the Introduction, most States can be expected to show little interest in such an exercise (pace the Zimbabwean Foreign Minister), the academic community and NGOs must take the initiative. As the former Secretary General of Amnesty International remarked in a recent lecture, "[t]he human rights movement has the principles and the impartiality to contribute to the definition of criteria for legitimate intervention, and it must work to develop the effectiveness of the UN and regional organizations in mounting and fully controlling such interventions"[55]. Until such criteria have been agreed upon, he observed, the movement "must remain inhibited in calling for armed intervention, even though only armed intervention can prevent the continued perpetration of mass violations"[56].

Nevertheless, a cautionary word may be in order. Given the lack of prior precedent, criteria necessarily must be fashioned primarily from earlier ones developed to govern unilateral or collective humanitarian intervention[57], or otherwise derived from principles of general international law[58]. In either case, what is their juridical status: potential legal norms or merely policy recommendations? Since they obviously are not to be found in the text of the UN Charter, what is the impact of proposed criteria upon the Security Council's decision-making process under Chapter VII? Furthermore, is it even desirable to establish criteria during a time of rapid change, or is it not preferable to handle each situation, as Malanczuk has suggested, on a case-by-case basis[59]? Schachter, a

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[54] See, e.g., Scheffer, Toward a Modern Doctrine of Humanitarian Intervention, 23 U. Tol. L. Rev. 253, 286–293 (1992) ("Criteria for a Modern Doctrine of Humanitarian Intervention").

[55] Martin, The New World Order: Opportunity or Threat for Human Rights?, at 23 (Lecture at the Harvard Law School, Apr. 14, 1993).

[56] Id. at 21. Compare text *supra* note 5.

[57] See text *supra* note 24.

[58] See, e.g., Gardam, Proportionality and Force in International Law, 87 Am. J. Int'l L. 391, 391 n. 3 (1993): "It appears clear that proportionality is also a component of the exercise of force by way of collective security action under chapter VII of the Charter".

[59] "I see no need de lege ferenda to formulate such criteria for unilateral humanitarian intervention. Nor do I see a clear reason ... to ask the General Assembly to adopt criteria in a resolution to guide collective humanitarian enforcement measures. The development should be better left to practice on a case by case basis", Malanczuk, *supra* note 32, at 31.

seasoned UN veteran, has warned against "a tendency on the part of those seeking to improve the United Nations to prescribe sets of rules for future cases, usually over-generalizing from past cases. Each crisis has its own configuration. Governments will always take account of their particular interests and the unique features of the case. While they can learn from the past, it is idle – and often counterproductive – to expect them to follow 'codified' rules for new cases"[60].

Nevertheless, the greatly increased activity of the United Nations in the humanitarian intervention and assistance areas warrants fresh study and constructive criticism to ensure that the organization – primarily the Security Council – is not proceeding down a path that may damage its future capabilities and credibility. Categorizing actual or even likely massive human rights deprivations as threats to international peace and security has a compelling moral quality to it. Yet, unless the Security Council shows itself ready, willing and able to act effectively to address such situations without in fact contributing to their exacerbation, the new opportunities that the Council certainly will face could have adverse consequences not only for its capabilities to cope with massive human rights deprivation cases, but also to resolve other, more traditional threats to the peace.

At present, the Security Council's credibility as a protector and enforcer of human rights surely is at stake. The use of limited military force in Iraq and, more recently, in Somalia, has given credibility to the Council's decisions because it has demonstrated a resolve to enforce them effectively; earlier UN actions in Somalia and, lamentably to this day, its decisions with respect to the former Yugoslavia, were not backstopped by a credible authorization or even a reasonable threat to use force if Council demands were not met. Another aspect of the credibility problem concerns the Council's willingness to act consistently in the face of widespread human rights deprivations. While it has focused its attention on Iraq, the former Yugoslavia and Somalia, equally severe deprivations have occurred in numerous other countries – Angola, Haiti and Liberia have been mentioned above – without provoking significant Council action.

To ensure even-handed treatment of roughly similar human rights situations and to guarantee wider acceptance of the legitimacy of future UN humanitarian interventions, it is recommended that the Security Council consider the following criteria in determining whether and how to intervene in a Member State for human rights purposes. This tentative list is

[60] Schachter, Remarks, 86 Am. Soc'y Int'l L. Proc. 320 (1992).

not necessarily complete, and it is not closed: it is offered in the hope that it will provoke debate and, in the meantime, perhaps provide some useful guidance to decisionmakers in Government and at the United Nations. Presumably it will be generally acceptable to most such persons, since the list is derived not only from a revision and modification of the criteria developed to govern unilateral and collective humanitarian interventions, but also from statements made by the intervening States in the cases of Iraq and Somalia.

1. UN humanitarian intervention must be based on the actual existence or impending likelihood of gross and persistent human rights violations that shock the world's conscience. (Such violations occur, *inter alia*, from systematic and indiscriminate attacks on civilians by a central government, or a system breakdown in law and order producing the dislocation and starvation of the civilian population.)

2. The intervention should be authorized, except in rare cases, only after all reasonable diplomatic efforts on the international and regional level have been exhausted and have failed to bring about the cessation of such human rights violations.

3. The intervention must be strictly limited in scope to actions necessary and proportionate to bring about the cessation of such human rights violations.

4. The intervening forces must begin their withdrawal as soon as reasonably possible, and in any event complete such withdrawal within a reasonable period after the cessation of such human rights violations. (If a lengthy presence is necessary, the intervening forces, if possible, should be under the direct command and control of the United Nations.)

5. The intervention should preserve the territorial integrity of the target State, by which is meant that the State's boundaries, except in rare cases, should not be redrawn.

6. The intervention should not interfere with the authority structure of the target State, except where the cessation of human rights violations clearly is dependent upon the removal of the central government. (In the case of "failed States", e.g., Somalia, the intervening authorities should seek through UN auspices a national reconciliation based on the will of the people.)

The likelihood of prompt and impartial application of these criteria to situations involving actual or impending gross and persistent human rights violations obviously would be enhanced if the UN Security Council had its own capabilities to act and was no longer dependent upon the *ad hoc* initiatives of member States. In both Iraq and Somalia, the ini-

tiatives were taken and the military assets provided by major Western powers. The possibility of more, prompt and effective UN-authorized humanitarian interventions exists if the United Nations itself is provided greater capabilities to organize and command on short notice sufficient forces to carry out at least small or perhaps even mid-scale interventions. In such a case, charges that UN humanitarian interventions were Western-driven would lose much, if not all, of their validity.

Negotiation and conclusion of Art. 43 agreements between the United Nations and Member States for the provision of military forces, assistance and facilities to the organization on its call would expedite its ability to deploy "UN" forces promptly in humanitarian situations. The Secretary-General actually considered the option of a country-wide enforcement operation in Somalia to be carried out under UN command and control. However, he concluded that the Secretariat did not "at present have the capability to command and control an enforcement operation of the size and urgency required by the present crisis in Somalia"[61]. Concluding Art. 43 agreements would allow for coordination and training of a truly multinational force in advance of a humanitarian crisis, along with resolving in advance any humanitarian intervention command and control issues and questions as to rules of engagement. While such agreements have not been thought achievable in the past, in today's post-Cold War climate States may find them more politically acceptable, especially if limited to humanitarian interventions rather than traditional actions to repel aggression or maintain the peace[62].

IV. A Plea for Taking UN Humanitarian Intervention Seriously

During this century unilateral or collective humanitarian interventions have been few, far between and, especially after the adoption of the UN Charter, regarded in most quarters as a violation of international law.

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[61] Letter dated 29 Nov. 1992 from the Secretary General to the President of the Security Council, U.N. Doc. S/24868, at 5 (Nov. 30, 1992).

[62] In addition to Art. 43 agreements, the suggestion has been made that the United Nations establish a small international volunteer force under the exclusive authority of the Security Council and the day-to-day direction of the Secretary-General. See Urquhart, For a UN Volunteer Military Force, 40 N.Y. Rev. Books No. 11, at 3 (June 10, 1993). Commentary on this proposal, generally favorable, may be found in A UN Volunteer Force – Four Views, 40 id. No. 12, at 58 (June 24, 1993); A UN Volunteer Force, 40 id. No. 13, at 52 (July 15, 1993). The likelihood of such a force being established by the United Nations in the near future seems remote.

Times have changed, and in this post-Cold War period one perceives a willingness among many members of the international community to authorize Chapter VII-based humanitarian interventions under UN auspices. Even in situations where there is no threat to the peace in the traditional sense, the Minister for Foreign Affairs of Australia, Evans, informed the General Assembly in September 1992, "there is an emerging willingness ... to accommodate [UN] collective intervention in extreme, conscience-shocking cases, and it may well be that a body of customary precedent will emerge over time and will constitute its own source of authority for such intervention in the future"[63].

Effective UN humanitarian interventions, however, will not be cost free. As Reisman graphically points out, they often may require

> the demonstrated capacity and willingness to engage in what amounts to internationally directed war. We are not talking about 500 men from Fiji and 1500 from Canada, who have been issued blue helmets and side-arms, to police a demilitarized zone or to oversee some blue, red, or green line. We are talking of large-scale efforts against large-scale resistance. We are talking of actions that require the direct participation of the great industrial democracies[64].

He then warns, however, that "[t]he citizens of the great industrial democracies appear loathe to engage in costly military actions unless they are persuaded by their leaders that the expenditure of their blood and treasure is in the urgent national interest"[65].

Alas, their leaders have made no such effort. In May 1993 U.S. Secretary of State Christopher, backing away from Bosnia, called it "a humanitarian crisis a long way from home, in the middle of another continent ..."[66]. Shades of British Prime Minister Chamberlain talking about Czechoslovakia in September 1938: "How horrible, fantastic, incredible, it is that we should be digging trenches and trying on gas masks here because of a quarrel in a far-away country between people of whom we know nothing"[67]!

Recently Buergenthal, former President of the Inter-American Court of Human Rights and survivor of Auschwitz, addressed the U.S. Helsinki Commission: "I am outraged – all humanity should be outraged

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[63] U.N. Doc. A/47/PV.15, at 15 (Oct. 7, 1992).

[64] Reisman, *supra* note 42, at 419.

[65] Id.

[66] Wash. Post, May 27, 1993, at A45.

[67] Quoted from Churchill, The Second World War: The Gathering Storm 315 (1948).

– by the inaction of the same governments which in the 1930's tried to appease Hitler and which for many months now have done the same with the murderers and rapists in the former Yugoslavia", he remarked with passion. "Not only have they done nothing, they have repeated over and over again that they would not use force. Have we learned nothing from the Holocaust"[68]?

If, indeed, we have learned anything, it should be that in Bosnia and many other states today people cry out for forcible humanitarian intervention, UN-authorized or not, to bring an end to their sufferings, whether caused by political oppression or persecution or famine or other natural or man-made disasters. Perfecting criteria for such interventions may be a useful exercise in prospective international law-making and contribute eventually to the recognition of a duty to intervene to terminate or prevent massive human rights violations[69], but it will count for little or nothing now or in the near future as long as the "statesmen" of today lack the moral courage and political will even to threaten the use of force in a situation which, in President Clinton's words, "offends the world's conscience and our standards of behavior"[70].

[68] 16 "The Helsinki Commission" Digest 3 (May 1993).

[69] See *supra* note 5.

[70] Clinton, Remarks By Bill Clinton to the ExiBank Conference, Washington, D.C. (White House Briefing, May 6, 1993).