

January 1994

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Recommended Citation

James A. R. Nafziger, Humanitarian Intervention in a Community of Power Part II, 22 Denv. J. Int'l L. & Pol'y 219 (1994).

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Humanitarian Intervention in a Community of Power Part II

Keywords

Human Rights Law, National Defense, Self-Determination

Humanitarian Intervention in a Community of Power Part II

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Civilization is hooped together, brought
Under a rule, under the semblance of peace
By manifold illusion, but man's life is thought . . .¹

Collective security in the post-Cold War era is less than a reality but more than an illusion. Wars rage on, but a new community of power is gradually taking shape. Even the terrible flames of Bosnia and Somalia cannot obscure this development. Indeed, the tragic implosion of Yugoslavia and the savagery of war lords on the loose in Somalia sparked a new agenda for peace that calls for collective intervention.² Public opinion generally favors this new activism,³ as do both stable and wobbly governments that face the threat of armed bands outside their control.⁴ Having witnessed a Hobbesian nightmare of political chaos in failed states, responsible leaders welcome a new day of multilateral supervision, trusteeship, community building, and state building.⁵ Whether the United Nations should become the

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1. William Butler Yeats, *Meru*, in *SELECTED POEMS AND TWO PLAYS OF WILLIAM BUTLER YEATS* 157 (Macha Louis Rosenthal ed., 1962). The poem was written in 1934.

2. See BOUTROS BOUTROS-GHALI, *AN AGENDA FOR PEACE: PREVENTIVE DIPLOMACY, PEACEMAKING AND PEACE-KEEPING* (1992). The United Nations Secretary-General prepared this report on the invitation of the Security Council at its first Summit Meeting of Heads of States (January 31, 1992). The Agenda seeks to strengthen and make more efficient four types of collective activity under United Nations leadership: preventive diplomacy (including preventive deployment of troops and use of demilitarized zones); peacemaking (including peace-enforcement and other collective use of military force); peacekeeping; and post-conflict peace-building. Other topics on the Agenda include cooperation between the United Nations and regional organizations, safety of personnel, and financing.

3. See Roper Organization, *Public Opinion on Collective Security* (March 1992), reported in UNA-USA, *PARTNERS FOR PEACE: STRENGTHENING COLLECTIVE SECURITY FOR THE 21ST CENTURY* 28 (1992)[hereinafter *PARTNERS FOR PEACE*].

4. See Paul Lewis, *U.N. Is Developing Control Center to Coordinate Growing Peacekeeping Role*, N.Y. TIMES, Mar. 28, 1993, at 10.

5. Paul Johnson, *Colonialism's Back — and Not a Moment Too Soon*, N.Y. TIMES, April 18, 1993 (Magazine), at 22.

world's policeman is, however, a troubling issue.

I. THE TREND TOWARD MULTILATERAL INTERVENTION FOR HUMANITARIAN REASONS

A consolidated framework for collective humanitarian intervention is high on the agenda for peace in the international legal community.⁶ At the crossroads of nonintervention and humanitarian intervention, the United Nations is proceeding cautiously down the humanitarian intervention road. The trend toward multilateral intervention is reflected in statements by the Conference on Security and Cooperation in Europe⁷ and decisions by the United Nations Security Council.⁸

Until recently, endless debates about two issues stymied humanitarian intervention. One issue was the legitimacy of unilateral intervention despite the rule against the use of force⁹ and the principle of nonintervention. The other issue involved the legitimacy of multilateral intervention despite the rule against United Nations intervention in the domestic jurisdiction of states.¹⁰ Today, however, the World Court has endorsed humanitarian relief measures,¹¹ and an expansive mul-

6. For background as of 1991, see Nafziger, *supra* note *. Accord, Jane E. Stromseth, *Self-Determination, Secession and Humanitarian Intervention by the United Nations*, 1992 Am. Soc. Int'l. L. Proc. 370; Jost Delbrück, *A Fresh Look at Humanitarian Intervention Under the Authority of the United Nations*, 67 IND. L.J. 887 (1992); David J. Scheffer, *Toward a Modern Doctrine of Humanitarian Intervention*, 23 U. TOL. L. REV. 253 (1992). But see Mary Ellen O'Connell, *Continuing Limits on UN Intervention in Civil War*, 67 IND. L.J. 903 (1992) (Threats to international peace and security that would justify Security Council action are limited to those by one state against another. Therefore, the United Nations should not intervene in civil wars, even for humanitarian reasons).

7. *Conference on Security and Co-Operation in Europe: Document of the Moscow Meeting on the Human Dimension, Emphasizing Respect for Human Rights, Pluralistic Democracy, The Rule of Law, and Procedures for Fact-Finding*, reprinted in 30 I.L.M. 1670 (1991). The Moscow Concluding Document confirms the CSCE's power to conduct investigations of human rights abuses in member states without their consent. See also Nafziger, *supra* note * at 33; Malvina Halberstam, *The Copenhagen Document: Intervention in Support of Democracy*, 34 HARV. INT'L L.J. 163 (1993).

8. See *infra* notes 16-21 and accompanying text.

9.

All members shall refrain in their international relations from 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.

U.N. CHARTER art. 2(4).

10.

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

U.N. CHARTER art. 2(7)(emphasis added).

11. *Case Concerning Military and Paramilitary Activities In and Against Nica-*

tilateral competence has largely displaced unauthorized unilateral measures, in fact and in law. Redefining the term "humanitarian intervention" according to the emerging practice is therefore essential.¹²

Security Council Resolution 688,¹³ which provided for relief and protection of displaced Kurds in the brutal aftermath of the Gulf War, was particularly significant. First, it confirmed the ability of the Permanent Members to develop a common plan of humanitarian action, albeit under unusual circumstances and by a mixed vote.¹⁴ Second, Resolution 688 established that civil war and a massive deprivation of human rights might constitute a threat to international peace and security. The term "international" therefore is to be interpreted broadly and functionally, rather than being limited to strictly inter-state relationships. After all, people come first: The United Nations Charter begins with the words, "We, the peoples," not "We, the States" or "We, the High Contracting Parties" as in the League of Nations Covenant. Third, it follows from the United Nations Charter¹⁵ that in providing humanitarian assistance, the Security Council may exercise its enforcement powers or authorize the use of force by member states. Although Resolution 688 neither provided for United Nations enforcement measures nor authorized unilateral intervention, it nevertheless

ragua, 1986 I.C.J. 14, 124 (June 27) states that "[t]here can be no doubt that the provision of strictly humanitarian aid to persons or forces in another country, whatever their political affiliations or objectives, cannot be regarded as unlawful intervention, or as in any other way contrary to international law."

12. Standard definitions of intervention fail to take account of the new multilateralism. According to one definition, for example, intervention is "interference by a State in the domestic or foreign affairs of others in opposition to its will and serving by its design or implication to impair its political independence." CHARLES C. HYDE, *INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES* 246 (1945). According to an even more questionable definition, "[i]ntervention is dictatorial interference by a state in the affairs of another state . . ." 1 LASSA OPPENHEIM, *INTERNATIONAL LAW* 305 (8th ed. 1955). These definitions are quoted and discussed in Ved P. Nanda, *Tragedies in Northern Iraq, Liberia, Yugoslavia, and Haiti — Revisiting the Validity of Humanitarian Intervention Under International Law — Part I*, 20 DENV. J. INT'L L. & POL'Y 305, 307 (1992).

13. U.N. SCOR, 46th Sess., 2982d mtg., U.N. DOC. S/RES/688 (1991), reprinted in 30 I.L.M. 858 (1991).

14. Cuba, Yemen, and Zimbabwe voted against the Resolution. China and India abstained. *Id.*

15. Article 1 of the United Nations Charter provides the following means by which the United Nations is to maintain international peace and security:

. . . to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts or aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;

U.N. CHARTER art. 1(1).

Under Chapter VII of the United Nations Charter, the Security Council may act "to maintain or restore international peace and security." U.N. CHARTER art. 39.

granted the Security Council substantial powers of humanitarian assistance and relied for its implementation on Big Power occupation of Iraqi territory. Fourth, in implementing Resolution 688, the Security Council minimized the customary gesture of obtaining a target state's consent. Iraq did consent but was more or less compelled to do so.

Since then, the balance of community power has tilted further away from the principle of nonintervention and toward multilateral humanitarian assistance. With a little help from the broadcast media and public opinion, collective measures have become more intrusive. The first response by the Security Council to the civil wars in Somalia and Bosnia are illustrative. Resolution 794¹⁶ authorized the use of force in Somalia, and Resolution 813¹⁷ authorized deployment of United Nations troops there (UNOSOM II), with the power to use necessary force to ensure the distribution of humanitarian assistance. Resolution 743¹⁸ established a United Nations Protection Force (UNPROFOR) in the thick of the battle for Croatia, and Resolution 770¹⁹ authorized member states to take all measures necessary to protect relief missions in Bosnia. Resolution 816²⁰ similarly provided for all measures necessary to enforce a "no flight zone" in Bosnia, and Resolution 836²¹ authorized "necessary measures, including use of force" against forces that had been besieging safe areas designated by the Security Council in Bosnia.

Flush with the new *esprit de corps*, the French Foreign Minister even claimed a legal *duty* to intervene for humanitarian reasons.²² Although the French enthusiasm for a *nouveau régime* may be a bit extravagant, the steady flow of action-packed Security Council Resolutions is certainly significant. After all, in its first forty-seven years, the Security Council specifically authorized the use of force on only three occasions: against North Korea in 1950; against a tanker bound for Portuguese Mozambique with oil for the embargoed Rhodesia in 1966; and against Iraq in 1990.²³

16. U.N. SCOR, 47th Sess., 3145th mtg., U.N. DOC. S/RES/794 (1992); Paul Lewis, *U.N. Will Increase Troops in Somalia*, N.Y. TIMES, Mar. 27, 1993, at 3.

17. U.N. SCOR, 48th Sess., 3187th mtg., U.N. DOC. S/RES/813 (1993).

18. U.N. SCOR, 47th Sess., 3055th mtg., U.N. DOC. S/RES/743 (1992), *reprinted in* 31 I.L.M. 1447 (1992).

19. U.N. SCOR, 47th Sess., 3106th mtg., U.N. DOC. S/RES/770 (1992), *reprinted in* 31 I.L.M. 1468 (1992).

20. U.N. SCOR, 48th Sess., 3191st mtg., U.N. DOC. S/RES/816 (1993); Paul Lewis, *U.N. Approves Plan to Enforce Bosnia Flight Ban*, N.Y. TIMES, April 1, 1993, at A12; Julia Preston, *U.N. Council Votes to Use Force Against Military Flights in Bosnia*, WASH. POST, April 1, 1993, at A37.

21. U.N. SCOR, 48th Sess., 3228th mtg., U.N. DOC. S/RES/836 (1993).

22. See PARTNERS FOR PEACE, *supra* note 3, at 44.

23. On a number of other occasions the Security Council seemed to call for forceful action. For example, during the Rhodesian crisis the Council called upon the United Kingdom "to quell this rebellion of the racist minority" and "... to take all

A noteworthy development has been the acquiescence by States in the understanding that collective measures generally preempt unilateral intervention. Repeated decisions of the Security Council in response to the imbroglios in Somalia, Croatia, and Bosnia²⁴ have been particularly instrumental in converting a controversial, unilateral doctrine of humanitarian intervention into a more accepted, collective process. The results of the new activism may be disappointing and the future of multilateral capacity uncertain. There is little doubt, however, that the international community is prepared to undertake humanitarian measures as a substitute for unilateral intervention. The latter is now seen as "a Pandora's box that should be opened with only the greatest care."²⁵

II. The Issues

Despite the trend toward collective security, critical questions remain. What is the scope of collective intervention? What are, or should be, the limitations on Security Council decisions? A collective process cannot altogether replace substantive rules. There must be limits on the Security Council's authority, even when it merely authorizes action by Member States rather than organizing and controlling the action itself. But *what* limits precisely? When should the United Nations and its members be allowed to brandish their swords on behalf of human rights and humanitarian relief?

A. *The Principle of Nonintervention*

The first problem is to reconcile humanitarian intervention with the noninterventionist principle reflected in such provisions as Article 2(7) of the United Nations Charter²⁶ and Article 18 of the OAS Charter.²⁷ Under Article 2(7) the Security Council may take action under Chapter VII, but its options may be limited to the last resort of enforcement measures. The Chapter VII exception is not, however, the

other appropriate measures which would prove effective in eliminating the authority of the usurpers and in bringing the minority regime in Southern Rhodesia to an immediate end" S/RES/216 (1965), *reprinted in* 5 I.L.M. 167, 168 (1966). The Council also called upon the United Kingdom to "enforce" both its own measures and those prescribed by the Council. S/RES/217 (1965), *reprinted in* 5 I.L.M. 167, 168 (1966).

24. See *Documents Regarding the Conflict in Yugoslavia* [September 25, 1991 - November 16, 1992], in 31 I.L.M. 1421 (1992).

25. PARTNERS FOR PEACE, *supra* note 3, at 47.

26. U.N. Charter art. 2(7).

27.

No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State.

Charter of the Organization of American States, *done* April 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 3.

last word. Rather, a functional interpretation of the basic rule against intervention in the domestic jurisdiction of states has established that the protection of human rights is simply no longer confined to domestic jurisdiction.²⁸ The Security Council therefore has a broad range of coercive and noncoercive options available to respond to humanitarian crises.

B. *The Legitimate Scope of Intervention*

This leaves open the question of *what* options? For instance, could the Security Council decide to impose U.N. supervision of Mexican elections, or could it have provided for military intervention to accelerate the complete elimination of *apartheid* in South Africa? On the other hand, should intervention be confined to the protection of relief missions and civilian victims in time of emergency? When a U.N. mission is attacked, may the Blue Helmets retaliate by going on the attack against the responsible government? May humanitarian intervention be employed in order to compel a ceasefire and a peaceful settlement of a dispute under Article 33 of the Charter?

As Judge Shahabuddeen asked in the *Libya Case*:

Are there any limits to the Council's powers of appreciation? In the equilibrium of forces underpinning the structure of the United Nations within the evolving international order, is there any conceivable point beyond which a legal issue may properly arise as to the competence of the Security Council to produce such overriding results? If there are any limits, what are those limits and what body, if other than the Security Council, is competent to say what those limits are?²⁹

28.

[A] majority of UN member states now agrees that compliance with basic human rights standards, including protection of the rights of minorities, can no longer be regarded as a matter of domestic jurisdiction. Stromseth, *supra* note 6, at 372.

29. Case concerning questions of interpretation and application of the 1971 Montreal Convention arising from the aerial incident at Lockerbie (*Libya v. U.S.*) (Order with regard to Request for the indication of provisional measures of Apr. 14.) (Separate opinion of Judge Shahabuddeen), 1992 I.C.J. 114 [hereinafter *Libya Case*]. Judge Weeramantry described the expansive scope, if not unbridled discretion, of the Security Council, as follows:

However, once we enter the sphere of Chapter VII, the matter takes on a different complexion, for the determination under Article 39 of the existence of any threat to the peace, breach of the peace or act of aggression, is one entirely within the discretion of the Council. It would appear that the Council and no other is the judge of the existence of the state of affairs which brings Chapter VII into operation. That decision is taken by the Security Council in its own judgment and in the exercise of the full discretion given to it by Article 39. Once taken, the door is opened to the various decisions the council may make under that Chapter.

Unfortunately, neither Judge Shahabuddeen nor anyone else has provided very complete answers to these important questions. Nor does the muddled doctrine of unilateral humanitarian intervention or state practice offer much guidance.

All United Nations intervention must conform to the Purposes and Principles of the organization³⁰ under Article 24(2) of its Charter, but the parameters of this text are inexact. The usual justifications of humanitarian intervention are to relieve human misery and to rescue the intervening state's nationals from serious threats to their persons and their liberty. A human rights premise for such intervention is generally understood, but what is its breadth? Treaty law offers partial guidance. For example, the Genocide Convention³¹ encourages states to call upon the United Nations to take "appropriate"³² action, presumably to include collective intervention in order to prevent or suppress that crime. "Ethnic cleansing,"³³ as in the former Yugoslavia, may be a form of genocide.³⁴

Id. at 176 (dissenting opinion of Judge Weeramantry). For cogent discussions of the issue of Security Council competence, see W. Michael Reisman, *The Constitutional Crisis in the United Nations*, 87 AM. J. INT'L. L. 83, 92 (1993); Thomas M. Franck, *The "Powers of Appreciation": Who is the Ultimate Guardian of UN Legality?*, 86 AM. J. INT'L. L. 519, 521 (1992).

30. Article 1 of the Charter defines the purposes of the U.N. as follows: "[t]o maintain international peace and security . . . [t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples . . . to take other appropriate measures to strengthen universal peace . . . [t]o achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms . . ." and "[t]o be a centre for harmonizing the actions of nations in the attainment of these common ends." U.N. CHARTER art. 1.

31. Convention on the Prevention and Punishment of the Crime of Genocide, done Dec. 9, 1948, KAV2303, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

32. *Id.* art. VIII.

33.

At the most general level . . . ethnic cleansing can be understood as the expulsion of an "undesirable" population from a given territory due to religious or ethnic discrimination, political, strategic or ideological considerations, or a combination of these.

Andrew Bell-Fialkoff, *A Brief History of Ethnic Cleansing*, 72 FOREIGN AFF., Summer 1993, at 110.

34. Article II of the Convention defines "genocide" to include any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
- (a) Killing members of the group;
 - (b) Causing serious bodily or mental harm to members of the group;
 - (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
 - (d) Imposing measures intended to prevent births within the group;
 - (e) Forcibly transferring children of the group to another group.

Genocide Convention, *supra* note 31.

Short of genocide, however, what level of human rights deprivations would justify collective intervention? A famous dictum in the *Barcelona Traction Case*³⁵ explains that fundamental human rights are enforceable *erga omne*, but it does not tell us *which* rights and by *what* means of enforcement. Ultimately, the cases will make the law. So far, for example, it would seem that a threat to a right of participation or democracy would not alone justify humanitarian intervention. In the depressing case of Haiti, the Security Council, the General Assembly, and the Organization of American States (OAS) agreed at first that free elections and installation of the democratically elected President were *not* issues of *international* peace and security.

A very useful checklist to evaluate the permissibility of humanitarian intervention proposes five criteria: the severity of the rights violation (the necessity criterion); the nature of the intervention (the proportionality criterion); the purpose of the intervention; the extent of multilateral participation in the intervention; and the balance of alternatives and outcomes.³⁶ This checklist might well serve as a basis for defining the legitimate scope of humanitarian intervention.

C. Definition of "All Measures Necessary"

A third, related issue is whether the Security Council can authorize the use of force regardless of the type or level of humanitarian assistance.³⁷ Former Under Secretary-General Brian Urquhart has

35. *Barcelona Traction (Belgium v. Spain)*, 1970 I.C.J. 4, 32 (Judgment of Feb. 5).

36. More specifically, the checklist includes the following factors:

1. The Severity of the Rights Violations—The Necessity Criterion
 - a. Genocide
 - b. Gross, Persistent and Systematic Violations of Basic Human Rights
2. The Nature of the Intervention—The Proportionality Criterion
 - a. Duration
 - b. Was the force proper/excessive?
3. The Purpose of the Intervention
 - a. Humanitarian Concern?
 - b. Self-interest?
 - c. Mixed?
4. Was the action:
 - a. Collective?
 - b. Unilateral?
5. Balancing Alternatives and Outcomes
 - a. Does the intervention maximize the best outcomes?

Nanda, *supra* note 12, at 330.

37. One writer, distinguishing "forcible" from "non-forcible" forms of humanitarian intervention, would allow the Security Council greater power to "intervene" non-forcibly by, for example, providing assistance after natural disasters without state consent. Scheffer, *supra* note 6, at 266, 288. If, however, a target state should resist such assistance forcibly, "a threat to international peace and security would clearly arise" and "the Security Council should consider applying economic sanctions and, if

described the types of military operations in the Agenda for Peace as a "Sears catalogue of international peace and security."³⁸ Can the Security Council authorize the deployment of troops and give them attack orders regardless of the operation? The establishment of safe havens or areas to protect persons in the killing fields of fratricidal conflict raises important questions of military security. Experiences in Kurdish and Bosnian areas validate the efficacy of this kind of humanitarian measure³⁹ but raise serious questions about expanding the use of force beyond the normal bounds of humanitarian missions.

Until recently, peacekeeping missions were authorized to fire only in self-defense. Even in the Korean and Gulf Wars, the Security Council authorized the use of force, under Chapter VII, only to counter aggression by one state across established international boundaries. In the Congo, the Council's authorization was even more limited. Now, however, the Security Council has repeatedly authorized U.N. forces in Somalia and Bosnia to take all measures necessary to accomplish their missions. Precisely when should "all necessary measures" of humanitarian relief include the use of force, especially its initiation? The answer is unclear.

D. Institutional Coordination

A fourth issue relates to the role of other organs within the United Nations framework. The Security Council was not intended to go it alone. Ever since the U.N. General Assembly adopted the Uniting for Peace Resolution,⁴⁰ it has indicated its readiness to respond to a threat to international peace and security in the absence of Security Council action. Its recent pronouncements on humanitarian assistance⁴¹ provide important guidance, particularly on the sensitive issues of state consent. On the other hand, the General Assembly's condemnation of Serbian aggression in Bosnia and recommendation to lift the arms embargo there may have exceeded the jurisdictional boundaries imposed by Article 12(1)⁴² of the Charter. The Secretary

these prove ineffective, authorizing a military intervention." *Id.* at 289. Ultimately, then, a non-forcible intervention carries with it the threat of forcible intervention if non-forcible intervention is resisted by the target state.

38. Brian Urquhart, *Remarks*, 1993 AM. SOC. INT'L L. PROC. 284, 286.

39. See, e.g., Geraldine Brooks, *For Kurds, at Least, 'Safe Area' Designation Provides Protection*, WALL ST. J., May 19, 1993, at 1.

40. *Uniting for Peace Resolution*, G.A. Res. 337A(V), U.N. GAOR, 5th Sess., Supp. No. 20 at 10, U.N. Doc. A/1775 (1951).

41. See, e.g., G.A. Res. A/RES/46/182 (1991).

42.

While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.

U.N. CHARTER, art. 12(1).

General also has important responsibilities to call problems to the attention of the Security Council and to work with it in resolving those problems. Regional organizations must assume greater responsibility, however spotty their past efforts may have been. The World Court seems to have confirmed its powers to review actions taken by other organs of the United Nations. That would seem to be the implication of its preliminary decision in the *Libya* case,⁴³ which may be the *Marbury v. Madison*⁴⁴ of the United Nations. Also, the World Court may serve as a source of advisory opinions on issues of intervention.

E. Multilateral Preemption of Unilateral Intervention

A fifth question is whether, as a matter of law, collective intervention should *completely* displace unilateral prerogatives. The answer is probably a qualified yes—or yes except in exceptional cases.⁴⁵ Certainly, it is no longer possible to justify unilateral intervention on the *posse comitatus* theory of the Cold War that a state may use force, despite the injunction against it in Article 2(4) of the Charter, in the absence of a collective sheriff.⁴⁶ Such an application of *rebus sic stantibus* in Cold War circumstances is invalid today because it turns out that there was no permanent change of systemic circumstances. The Security Council can be effective, after all.

Moral bases of unilateral intervention are persuasive⁴⁷ but can-

43. *Supra* note 29.

44. 5 U.S. (1 Cranch) 137 (1803). See Franck, *supra* note 29.

45. One writer has listed seven conjunctive requirements for such interventions:

- (1) The Security Council is deadlocked indefinitely on the issue and has not explicitly prohibited intervention to meet the humanitarian crisis
- (2) Alternative peaceful remedies, including economic sanctions, have been exhausted within the period of time during which the humanitarian need has not reached crisis dimensions.
- (3) The severity of the human rights violations is apparent.
- (4) Every effort is made to diversify the intervening forces among many nations. A unilateral intervention can only be justified if efforts to create a multinational force have failed.
- (5) The humanitarian purpose and objective of the intervention is paramount.
- (6) The intervention will have a convincingly positive effect on human rights in the target country. In other words, more good than harm will come of the intervention.
- (7) The long-term political independence and territorial integrity of the target state will not be imperiled by the intervention.

Scheffer, *supra* note 6 at 290-91. Noting the difficulty of separating humanitarian principles from political objectives, the author suggests that the circumstances justifying unilateral or unprescribed multilateral interventions should encompass "a very narrow range." *Id.* at 293.

46. Reisman, *supra* note 29, at 98; See also W. Michael Reisman, *Coercion and Self-Determination: Construing Article 2(4)*, 78 AM. J. INT'L L. 642 (1984).

47. See FERNANDO R. TESÓN, HUMANITARIAN INTERVENTION: AN INQUIRY INTO

not override the Charter's preference for collective action when feasible. To resolve any ambiguity the extent to which, and the process by which, Security Council action preempts unilateral intervention for humanitarian reasons must be clarified. What kind of collective measures may preempt such actions? When would a crisis warrant intervention? Although a convention defining permissible circumstances for unilateral intervention does not seem feasible at the present time, the General Assembly and Security Council might jointly adopt a standard operating procedure for humanitarian intervention.⁴⁸ An ad hoc approach invites cynicism.⁴⁹

F. *Consent of the Target State*

A sixth issue is whether humanitarian intervention requires the consent of a target state, as the General Assembly's Resolution on humanitarian assistance⁵⁰ seems to suggest. In practice, the General

LAW AND MORALITY (1988).

48. In part I of this study, I proposed that

the General Assembly and the Security Council might jointly adopt a resolution on humanitarian intervention. It should preempt unilateral actions. Accordingly, member states would be authorized, *only* under the resolution, to undertake measures in other states that are deemed necessary to vindicate fundamental human rights. Such measures might include the use of force, *unless* the target state agreed within a reasonable period of time to submit immediately to fact-finding and conciliation procedures, and in good faith to carry out any resulting recommendations or decisions. Under Articles 98 and 99 of the U.N. Charter, the Secretary-General might continue to play a central role. Rescue missions requiring an immediate response would be an exception; these would be governed primarily by customary rules of law, such as immediacy, proportionality, and necessity. Thus, humanitarian intervention by one state would be permissible only under two circumstances: first, if a target state had declined to submit a dispute to impartial review within a reasonable period or time; second, if after agreeing to do so, the target state failed to comply in good faith with resulting recommendations or decisions. Humanitarian intervention would be subsumed within a process of community decision, and would be authorized only as a last resort when Article 33 procedures have failed. Effective community deliberations and collective initiatives, rather than unilateral argument and doctrinal justification of intervention, would become the hallmark of a new process of multilateral dispute resolution.

Nafziger, *supra* note *, at 38-39; accord, Scheffer, *supra* note 6, at 291 ("a unilateral intervention can only be justified if efforts to create a multilateral force have failed").

49. A summary of the ambiguities that beset decision making by the United States in the absence of a clear restatement of broader community expectations may be found in Gaddis Smith, *What Role for America?*, 92 CURRENT HISTORY 150, 152-53 (1993).

50. The pertinent part of the Resolution provides as follows:

The sovereignty, territorial integrity and national unity of States must be fully respected in accordance with the Charter of the United Nations. In this context, humanitarian assistance *should* be provided with the

Assembly has turned a blind eye to the Secretary-General's dispatch of assistance to Africa without first gaining the consent of the states involved. Although the Security Council has paid lip service to the gesture of consent, it has demonstrated a capacity to arrange or compel consent whenever the Permanent Members are willing and able to supply the force.⁵¹ In any event, the Security Council's powers under Chapter VII would trump anything to the contrary in the General Assembly Resolution. Consent is thus more of a political than a legal issue.⁵²

G. Hegemony by Permanent Members of the Security Council

A seventh question involves the purported skepticism of weaker states towards the new "Superpower" of the Security Council.⁵³ The spectre of a modern Holy Alliance of the Great Powers is said to alarm these states. Indeed, they are said to feel more threatened by conspiracy among the Permanent Members than by the former Cold War rivalry.⁵⁴ Many of those states argue that the General Assembly should be

consent of the affected country and in principle on the basis of an appeal by the affected country.

G.A. Res. A/RES/46/182(1991)(emphasis added). Presumably the words "should be" establishes a requirement, rather than merely suggesting an option.

51. See, e.g., Resolution 771, U.N. SCOR, 46th Sess., 3106th mtg., U.N. Doc. S/RES/771 (1992), reprinted in 31 I.L.M. 1470 (1992). This Resolution first:

Further demands that relevant international humanitarian organizations . . . be granted immediate, unimpeded and continued access to camps, prisons and detention centres within the territory of the former Yugoslavia and calls upon all parties to do all in their power to facilitate such access.

Id. at 1471. Then, the Security Council

Decides, acting under Chapter VII of the Charter of the United Nations, that all parties and others concerned in the former Yugoslavia, and all military forces in Bosnia and Herzegovina, *shall comply with the provisions of the present resolution, failing which the Council will need to take further measures under the Charter*;

Id. (emphasis added).

52.

Contemplating UN action to protect a repressed people such as the Kurds, one realizes that the issue is not so much the authority of the United Nations to act, but rather whether there will be sufficient political consensus on the Security Council in favor of action, and whether agreement can be reached on the goals of such an action. These goals will be either negotiated among the parties consensually or determined by the members of the Security Council acting under Chapter VII. Either way it will be difficult.

Stromseth, *supra* note 6, at 373.

53. See Franck, *supra* note 29, at 523.

54.

The East-West rapprochement and the invigoration of the Security Council have left many developing countries deeply concerned about their vulnerability to international intervention in the post-cold war era. There is now no counterbalancing political bloc to discourage Western

more involved in making decisions about humanitarian intervention lest the United Nations be simply the pawn of the big powers.⁵⁶ On the other hand, smaller states involved in making decisions show no reluctance to lead crusades for intervention.⁵⁸

H. *Financial and Operational Issues*

Finally, we should note that the competence of the Security Council and the cooperation of states are not the only issues. Capacity, cost, control, command, and credibility may ultimately determine the success of multilateral intervention.

Most of these factors have been severely tested in the course of United Nations actions in Somalia and the former Yugoslavia. It has been argued that the United Nations lost its military credibility in responding to the crisis in the former Yugoslavia and even that U.N. humanitarian measures made matters worse.⁵⁷ Although such an assessment is questionable over the long haul, it is hard to gainsay that the global community faces serious financial and operational issues in conducting intervention.

In confronting these issues, a new community of power has revived the stillborn effort to install an effective global system of collective security. This will require the United Nations to enter into Article 43 agreements with states to provide standby forces. Related issues include the precise obligations of member states,⁵⁸ the status of the Military Staff Committee,⁵⁹ and specific provisions for the composition

countries from using economic pressure to force a developing-country government to make the sort of internal changes they believe desirable; and the big powers have now demonstrated the potential for forceful intervention under the aegis of the Security Council. Governments of weak and poor states, acutely aware of the limited nature of their "sovereignty" in confronting the global tides of economic, social, environmental, and communication changes, have drawn the line to assert at least their political sovereignty. They have blocked efforts by Western powers to add to the Security Council agenda such issues as environment, drugs, and democratization — issues that, they fear, might be used to justify international intervention in their affairs — insisting that such matters are the province of the General Assembly, whose one-state/one-vote rule of decision-making embodies the Charter principle of the "sovereign equality of states."

UNA-USA, *THE COMMON DEFENSE; PEACE AND SECURITY IN A CHANGING WORLD* 34 (1992).

55. *Id.* at 39.

56. For example, Cape Verde, a member of the Security Council in 1993, argued that "[t]he U.N. has to go beyond peacekeeping It needs an interventionist role. To circumscribe it to traditional peacekeeping is to relegate the U.N. to failure." Quoted in Trevor Rowe, *Is the U.N. Failing?*, 19 *The Interdependent* (UNA-USA), Spring 1993, at 6.

57. William Pfaff, *Invitation to War*, 72 *FOREIGN AFF.*, Summer 1993, at 97,99.

58. See U.N. CHARTER arts. 44, 45, 48, 49.

59. *Id.* arts. 45, 46, 47. It is uncertain, however, whether the big powers favor a

and marshalling of United Nations forces.⁶⁰

An Article 43 agreement between the United States and the United Nations would seem to require not only the advice and consent of the Senate but implementing legislation enacted by both houses of Congress as well.⁶¹ Under the U.N. Participation Act of 1945,⁶² such legislation might provide advance approval of United Nations mandated or authorized use of force, presumably under a combination of presidential and United Nations command. Advance approval would obviate the problem that loomed on the eve of the Gulf War⁶³ when Congress, exercising its declaratory powers, reviewed the competence of the Commander-in-Chief to deploy troops to the Persian Gulf under Security Council Resolution 678.⁶⁴ Advance approval would also help resolve the issue whether the War Powers Resolution⁶⁵ governs the duration of all military deployments by the President and whether United States troops may serve under foreign command.⁶⁶ Implementing legislation under an Article 43 agreement should clarify the respective spheres of U.N. and presidential authority to command standby or ready troops.

III. CONCLUSION

An emerging community of power, under United Nations leadership, has brought at least a semblance of peace and more coherent rules of law. We are being "hooped together" by more than some kind of manifest illusion. Collective security, expressed today in more user-friendly terms, may be moving toward a third phase in which it relies more heavily on the protection of human rights.⁶⁷ A comprehensive

stronger Military Staff Committee.

60. See Andrew S. Miller, *Universal Soldiers: U.N. Standing Armies and the Legal Alternatives*, 81 GEO. L.J. 773 (1993).

61. See Michael J. Glennon, *The Constitution and Chapter VII of The United Nations Charter*, 85 AM. J. INT'L. L. 74 (1991).

62. United Nations Participation Act of 1945, ch. 583, 59 Stat. 619 (1945).

63. See Comment, *Collective Security v. Constitutional Sovereignty: Can the President Commit U.S. Troops Under the Sanction of the United Nations Security Council Without Congressional Approval?*, 17 U. DAYTON L. REV. 1055, 1084 (1992).

64. UN SCOR, 45th Sess., 2963rd mtg., U.N. DOC. S/RES/678 (1990) reprinted in 30 I.L.M. 1565 (1990). Resolution 678 demanded that Iraq comply with previous resolutions by January 15, 1991, authorized the use of "all necessary means to uphold and implement" the resolutions after that date, and requested all states to support the measures taken under the provision. The Resolution also authorized the necessary means to "restore international peace and security in the area."

65. War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973)(codified at 50 U.S.C. §§ 1541-1548 (1988)). For a good summary of the War Powers Resolution and literature about it, see Comment, *supra* note 63, at 1058, n. 13.

66. Lewis, *supra* note 16. For the first time in U.S. history, UNOSOM II placed U.S. troops under foreign field command (initially, a Turkish general).

67. For an outline of this approach, see James A.R. Nafziger, *The Security of Human Rights: A Third Phase in The Global System*, 20 CAL. W. INT'L L.J. 173

definition of international peace and security must consider the threats of poverty and environmental degradation as well. Collective intervention for humanitarian reasons has become feasible because of this reinterpretation of "international peace and security" under the United Nations Charter and a far more assertive Security Council in the post-Cold War era. As a result, the global community has rescued the doctrine of humanitarian intervention from the quicksand of unilateralism.

Several key questions remain, however: What is the scope of the Security Council's powers to prescribe, organize, or authorize intervention? Is unilateral intervention any longer permissible? If so, must an intervening state first exhaust international or regional remedies? When should the United Nations condition intervention on a state's consent? May the Security Council authorize the Blue Helmets to take "all necessary measures," including the use of force, regardless of the purpose or type of operation? Is the new Superpower of the Security Council simply a bully in multilateral disguise? We, the peoples, must find answers to all of these questions, for the authority, legitimacy, and effectiveness of a new community of power are at stake.

