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# SOVEREIGNTY VERSUS THE CHIMERA OF ARMED HUMANITARIAN INTERVENTION

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—ROBERT M. CASSIDY—

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It is now increasingly felt that the principle of noninterference with the essential domestic jurisdiction of States cannot be regarded as a protective barrier behind which human rights could be massively or systematically violated with impunity.<sup>1</sup> —*Javier Perez de Cuellar*

A plethora of pundits and publicists have embraced this statement and similar rhetoric to argue that sovereignty and domestic jurisdiction must yield to international humanitarian needs. The end of the Cold War and the concomitant vitality of the United Nations Security Council have encouraged a large amount of energy and literature advocating humanitarian intervention. Since the end of the Cold War, we have witnessed an upsurge in multilateral military interventions in intrastate affairs in the name of humanitarianism. David Scheffer has even proposed five exceptions to the principle of state sovereignty whereby he considers humanitarian intervention justified.<sup>2</sup> Ruth Gordon has labeled domestic jurisdiction a “malleable concept that is based on the current state of international relations.”<sup>3</sup> Moreover, genuinely moral motives are often invoked to legitimize intervention in domestic affairs.

Is the primacy of state sovereignty actually yielding to a morally underpinned right to intervene in intrastate affairs for humanitarian reasons? What does the experience in Somalia tell us about the moral and political motives behind humanitarian intervention? Is it possible to undertake humanitarian intervention without breaching positive law? The purpose of this essay is threefold: 1) to examine the evolution of state sovereignty and domestic jurisdiction under a positive law framework; 2) to analyze the moral, political and legal aspects of humanitarian intervention; and 3) to determine if it is genu-

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inely possible to carry out such intervention and still remain within the margins of positive law.

After examining a post-Cold War example of semi-permissive humanitarian intervention, this paper will show that political factors are as important as moral factors in impelling humanitarian intervention. Efforts to distort the provisions of the U.N. Charter notwithstanding, this analysis will also demonstrate that this notion of humanitarian intervention cannot be reconciled with positive law under the current Charter system. Finally, it will evaluate humanitarian intervention and the interaction of the moral, political and positive law spheres.

### Scope and Terms

This study focuses on the collective use of military force sanctioned by the international community to penetrate a state's boundaries for ostensibly humanitarian purposes. More specifically, it will examine those operations which conform to *Type Four* and *Type Five* in Marrack Goulding's typology of peacekeeping: "operations to protect the delivery of humanitarian relief supplies in conditions of continuing warfare; and operations deployed in a country where the institutions of state have collapsed."<sup>4</sup> The principal aim of this type of intervention is to stop a substantial loss of life and human suffering. For the purpose of clarity and standardization within this essay, these operations will be subsumed within the single term Armed Humanitarian Intervention (AHI). Unilateral intervention and intervention to stop transborder aggression lie beyond the scope of analysis. The United Nations action in Somalia is examined here because it provides an example of post-Cold War AHI wherein the Security Council unambiguously authorized the use of force to protect a large-scale humanitarian effort.

### International Law and AHI Before the World Wars

For over 300 years, sovereign states have been the most important political units in the international system. Moreover, states have claimed a monopoly on the legal use of force within their borders as well as freedom from interference by external forces. French political thinker Jean Bodin offered the first systematic approach to the theory of sovereignty in *De La Republique* in 1576. He defined sovereignty as the "State's supreme authority over citizen's and subjects." In 1625 in his seminal work *De Jure Belli ac Pacis Libris Tres*, Hugo Grotius maintained that the laws governing relations among nations must first safeguard the sovereignty of states themselves. Rules that prevented interference in another state's jurisdiction would help safeguard this sovereignty. According to the Grotian conception of law, other principles of international law would emerge as a consequence of the lasting arrangements that sovereign states make among themselves.<sup>5</sup>

Following the Thirty Years' War, the 1648 Peace of Westphalia attempted to codify an international system based on the coexistence of a plurality of

states exercising unimpeded sovereignty within their territories. Although it is possible to detect in the nineteenth-century Concert of Europe system the beginning of a deliberate effort to establish a higher realm of authority deriving from a community of states dominated by the Great Powers, untrammelled state sovereignty and freedom from outside interference remained the customary rules of the international arena. In the absence of any higher authority, restraints were mostly self-imposed, voluntarily observed, and enforced principally by the threat of retaliation. It is in this era—after Westphalia and before the world wars—wherein sovereign absolutist states operated without any superior authority or body, that the notion of humanitarian intervention first emerged.<sup>6</sup>

During this period, most legal scholars and governments espoused the proposition that international law did not obstruct the inherent right of each equal sovereign to treat its subjects as it deemed necessary. Such acts as torture and execution were considered legally significant internationally only when those acts were perpetrated against the citizens of another state. In these instances, international law did not consider the victims in the context of individual rights, but in the context of rights belonging to the governments of the victims. Moreover, attacks committed against the citizens of one state by the representatives of another state were considered attacks on the interests and dignity of the victims' state, thereby requiring compensation. Although most of the purported 'humanitarian interventions' during this period were essentially actions aimed at compelling compensation for assaults against one's own nationals, it is from this practice that standard arguments advocating humanitarian intervention derive.<sup>7</sup>

According to Donnelly, any arguments pointing to nineteenth-century Europe for the development of humanitarian intervention practice rely on accepting the intervenors' self-serving explanations at face value. The real question, Donnelly maintains, is "whether there is a clear pattern of state practice coupled with the belief that such practice is law." He explains that states regularly disregarded humanitarian atrocities that did not affect their own citizens. The extremely rare examples of genuine humanitarian intervention, coupled with transparent self-interest when humanitarian justification was asserted, both demonstrate that AHI was not common in practice.<sup>8</sup>

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### International Law and AHI after the World Wars

Before delving into the U.N. Charter and humanitarian intervention, it is necessary to examine briefly the relevant articles in the Covenant of the League of Nations. Although the League will always be most famous for its inefficacy in preventing World War II, the Covenant did further codify the principle of

nonintervention and the sanctity of domestic jurisdiction which would re-emerge in an even stronger form in the U.N. Charter. Article 10 of the Covenant stated:

The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of any threat or danger of such aggression, the Council shall advise upon the means by which this obligation shall be fulfilled.

Although the Covenant provided for potentially effective economic and military countermeasures against aggressors, it allowed for each member to determine whether aggression had been committed and if sanctions would be applied.

Nonetheless, in formulating the domestic jurisdiction clause of the Covenant, the drafters made it clear that the League should only possess such competence as was delegated to it; should any doubt emerge between the authority of the organization and the sovereignty of the state, the latter should receive the benefit.<sup>9</sup> As a result, Article 15.8 of the Covenant was constructed as follows:

If the dispute between the parties is claimed by one of them, and is found by the Council, to arise out of a matter which by international law is solely within the domestic jurisdiction of that party, the Council shall so report, and shall make no recommendation as to its settlement.

The insertion of this clause was aimed at assuaging the U.S. senators' anxieties about a world government that might encroach in American affairs. Subsequently, in devising a much wider functional scope for the League's successor—particularly relating to economic and social matters—the designers of the United Nations system would formulate a stronger domestic jurisdiction clause, with a broader range of application, in order to protect the domestic domain of states.<sup>10</sup>

The U.N. Charter, in further integrating and reflecting the values of the Westphalian state system, is a reaffirmation and confirmation of the principles of non-intervention in domestic affairs and non-use of force across international borders. Article 2.1 affirms that the United Nations itself "is based on the principle of the sovereign equality of all of its Members." Moreover, Article 2.4 requires U.N. members "to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state" that would not be consistent with the purposes of the organization. Article 2.7, however, conclusively confirms the paramountcy of state sovereignty within the framework of the Charter:

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.

The significant differences between Article 2.7 of the Charter and Article 15.8 of the Covenant were the substitution of "essentially" for "solely," the concept of United Nations intervention, and the absence of a reference to an international law standard. As evidenced by the exception for enforcement under Chapter VII, these changes were not intended to weaken the effectiveness of the organization in maintaining international peace and security. However, the revisions were aimed at strengthening the principle of domestic jurisdiction as a method of limiting the jurisdiction of the organization: Article 2.7 is concerned with the relations of the United Nations and its members, not with the intervention by one state in the domestic affairs of another. The United Nations cannot intervene in matters that in principle are not governed by international law. At the San Francisco Conference, propositions to substitute "solely" for "essentially" and to include a reference to international law were resisted.<sup>11</sup>

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Insofar as a reference to international law was excluded from Article 2.7, Inis L. Claude maintains that the drafters intentionally "refrained from indicating where the competence to decide on disputed jurisdictional issues should be lodged, and from citing international law as the relevant standard of judgment."<sup>12</sup> Moreover, in most of the cases in which this article has been invoked before the political organs, nothing specific has been proposed to address the issue of competence. Nor has a political organ of the United Nations requested the International Court of Justice to render an advisory opinion on the interpretation of Article 2.7. An issue which has inhered in interpretation and practice since the inception of the United Nations is whether other provisions of the Charter in effect internationalize some aspects of domestic jurisdiction or whether Article 2.7 effectively prevents such internationalization.<sup>13</sup>

While there is nothing in the Charter which addresses AHI, there are some who embrace the Charter's provisions on human rights and claim that such provisions and subsequent declarations attenuate the effect of Article 2.7, paving the way for a broader and more permissive U.N. approach to humanitarian problems. The Preamble of the Charter reaffirms "faith in fundamental human rights . . . in the equal rights of men and women and of nations large and small." Moreover, one of the purposes of the United Nations is to "achieve international cooperation in solving international problems of a humanitarian

character" and in "promoting and encouraging respect for human rights" (Article 1.3). Article 13 charges the General Assembly with initiating studies and making recommendations "for the purpose of . . . assisting in the realization of human rights." Articles 55 and 56 together pledge all members of the United Nations "to take joint and separate action in cooperation with the Organization for the achievement of . . . universal respect for, and observance of, human rights." Finally, Article 68 charges the Economic and Social Council with "setting up commissions . . . for the promotion of human rights."

Additionally, the 1948 Universal Declaration of Human Rights and the U.N. Convention on Genocide have been consistently cited as strengthening the human rights machinery of the United Nations, thereby making state boundaries more porous in the face of international human rights efforts. However,

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the Declaration only establishes the minimum conditions and standards of human rights toward which all states should aim: it is neither binding nor enforceable under international law. Although the Genocide Convention actually defines and codifies the crime of genocide, it does not aim to attenuate the principle of sovereignty. The second purpose of the Genocide Convention requires the parties to punish individuals who commit genocide "pursuant to their municipal laws." Article VI of the Genocide Convention stipulates that those accused of genocide "shall be tried by a competent tribunal

of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted this jurisdiction." Moreover, Article VI does not require any party to submit to the jurisdiction of such a tribunal.<sup>14</sup>

To be certain, the Charter provisions for human rights and the aforementioned documents did not emanate from a strong collective will to break through the barrier of state sovereignty wherever it shielded some form of oppression. The subordination of human rights in the hierarchy of the United Nations' purposes is manifested in the reality that the U. N. Charter excludes a provision for intervention on humanitarian grounds. The only way to lift the protective barrier afforded to states by Article 2.7 is to activate the one exception to the sanctity of domestic jurisdiction: Chapter VII enforcement measures.<sup>15</sup>

Thus, in the exception to Article 2.7, Articles 25 and 39 are inexorably linked to either Article 41 or 42. Article 25 binds members of the United Nations "to carry out the *decisions* of the Security Council in accordance with the present Charter." Moreover, Article 39 gives the Security Council the responsibility of determining that a threat to the peace exists and of deciding what enforcement measures to undertake according to Articles 41 and 42. In essence, activating Article 39 inactivates Article 2.7 for the target state:

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

Enforcement measures rest on the requirement that the Security Council will determine the existence of a threat to peace thereby opening the door to intervention under Chapter VII. An Article 39 judgement of the Security Council determining a threat to the peace which is based on a majority decision (at least nine of the 15 members) without a dissenting vote by a permanent member is also legally binding. Moreover, it has been contended that, circumstances notwithstanding, the Security Council should not make a determination under Article 39 unless its members are also prepared to apply the additional measures listed in Chapter VII.<sup>16</sup>

According to Article 41, the Security Council can decide which measures should be implemented in order to enforce its decisions ("these may include complete or partial interruption of economic relations and of rail, sea. . ."). The most significant limitation on Article 41 is the exclusion of the use of armed force: "measures not involving the use of armed force." Article 42, however, is more germane to armed intervention, since it is the only article which provides for the use of armed forces:

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

The Charter affords the Security Council latitude in deciding whether a given situation requires the use of military force. Article 42 does not require the Security Council to wait for proof that Article 41 measures are insufficient, nor does it require those measures to have been previously implemented. Instead, it is satisfactory if the Security Council elects to implement Article 42 measures immediately based on an assessment that Article 41 would be ineffective. Furthermore, in enabling the Security Council to make decisions that all members are obligated to carry out, the Charter's enforcement modalities surpass those which were established under the Covenant, whereby the League Council could only recommend military measures.<sup>17</sup> The quiescent Article 43 notwithstanding, after examining the Charter provisions which pertain to multilateral military intervention, the unambiguous absence of any humanitarian purpose is evident. To be justified legally within the scope of the Charter, the Security Council must determine a "threat to the peace, breach of the peace, or act of aggression" in order to apply collective military force "to maintain or restore international peace and security" (Article 39). Any

moral or humanitarian impetus must only be ancillary to the threat to the peace.

Before examining the practice of the United Nations and states in the context of AHI during the Cold War, it is useful to examine the sources of international law as specified in the Statute of the International Court of Justice (ICJ). The ICJ, whose function, according to Article 38 in the Statute of the ICJ, is to decide disputes in accordance with international law, likewise does not specifically mention moral or humane factors.<sup>18</sup> In hierarchical order, Article 38.1.a covers international treaties as "establishing rules expressly recognized by states;" Article 38.1.b addresses "international custom" manifested by state practice accepted as law; Article 38.1.c concerns the "general principles of law recognized by civilized nations;" and lastly, at the bottom of the hierarchy, Article 38.1.d includes "the decisions and teachings of the most highly qualified publicists," but only as a secondary source for determining international law.<sup>19</sup> With this hierarchy in mind, a succinct review of the developments which encouraged advocates of humanitarian intervention is in order.

### Post-Cold War Developments and AHI

The time of absolute and exclusive sovereignty, however, has passed; its theory was never matched by reality. It is the task of leaders of states today to understand this and find a balance between the needs of good internal governance and the requirements of an ever more interdependent world.<sup>20</sup> —Boutros Boutros-Ghali

The end of the Cold War heralded a new era of unprecedented cooperation in the Security Council and unparalleled collective action under the auspices of the United Nations. Even before the Cold War officially ended, the abatement of bipolar rivalry had allowed the international community to rally against Iraq's seizure of Kuwait and to address the plight of the Kurds and Shi'a within Iraq. Moreover, the new vitality of the Security Council coincided with an increase in tumult that erupted as states fragmented and collapsed in the vacuum created by the recession of superpower confrontation. In a January 1992 joint declaration by the Security Council, British Prime Minister John Major stated that "nonmilitary sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security."<sup>21</sup> What's more, Boutros-Ghali's above statement, which subsequently appeared in *An Agenda for Peace* in June 1992, implied to some that sovereignty was becoming more malleable; *An Agenda for Peace* itself proposed a framework for a more active U.N. role in maintaining the peace. Many humanitarians and promoters of human rights consequently embraced these developments as providing new opportunities for humanitarian intervention.<sup>22</sup>

Furthermore, during the years which had elapsed since the promulgation of the U.N. Charter system, additional treaties and resolutions were ratified or adopted: the two U.N. Human Rights Covenants of 1966, the Declaration

on Principles of International Law of 1970, and Resolution 46/182 of 1991 (to strengthen U.N. coordination of humanitarian assistance).<sup>23</sup> These documents are often cited to help legitimize and invigorate the new propensity for AHI, but this argument is specious for at least two reasons: 1) neither these instruments nor the joint statement by the Security Council nor the secretary-general's rhetoric bind states to use force for humanitarian purposes and; 2) the argument that the General Assembly practice of passing resolutions represents the acceptance of law as customary, and therefore valid international law, is misleading: it simply ignores the political motives for voting behavior.<sup>24</sup>

However, even General Assembly Resolution 46/182, adopted when optimism for U.N. collective action was at its zenith, stipulates that "sovereignty, territorial integrity, and national unity of states must be fully respected in accordance with the Charter of the United Nations."<sup>25</sup> Despite the evidently popular support for AHI in some circles, a post-Cold War peace conference to amend the Charter has not yet occurred, and it is therefore clear that the provisions of the Charter remain in force. In early 1992, the only recent practice or precedent for AHI was the humanitarian effort in Iraq.<sup>26</sup> Although several proponents of humanitarian intervention maintained that Operation Provide Comfort was a watershed for AHI, Resolution 688 did not authorize the use of force to effect humanitarian relief.<sup>27</sup> Resolution 688 did, however, demonstrate that many Security Council members were willing to recognize significant transborder refugee flows as a threat to international peace and security. Security Council members also highlighted their concern about setting a precedent that might jeopardize state sovereignty.<sup>28</sup> Nevertheless, by 1992 the Security Council possessed a new vitality and capacity for decisionmaking.

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### *Somalia: Crossing the Mogadishu Line*<sup>29</sup>

Ostensibly, the U.N. intervention in Somalia clearly conformed to the definition of AHI presented in the introduction: a massive humanitarian impetus; a multilateral action under a UN mandate; and an absence of geopolitical selfinterest. On closer examination, however, politics and positive law irregularities inhered in the Somalia operation. The collapse of Somalia accelerated in January 1991 when President Siad Barre was forced to abdicate in the midst of a general uprising. State failure ensued in a civil war that included no less than 13 rival factions vying for power. While a discussion of factional politics is beyond the scope of this study, it is important to note that Mohamed Farah Aideed's Somali National Alliance (SNA) and Ali Mahdi's Somali Salvation

Alliance (SSA) were central to the humanitarian problem because they controlled the Mogadishu area. Possessing a stronger force and convinced of his right to lead Somalia after defeating Siad Barre, Aideed initially opposed any U.N. political involvement. In a weaker military position, Al Mahdi welcomed a U.N. role.<sup>30</sup>

The active U.N. role in Somalia was impelled by a letter from interim Somali Prime Minister Omer Arteh Ghalib which was dated January 11, 1992. Ghalib's letter asked the Security Council to address the deteriorating situa-

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tion in Somalia and to "come up with a program of effective action to end the fighting."<sup>31</sup>

In early 1992, this deteriorating situation was best described as a lawless collapsed state in which factional fighting and looting blocked economic production and the distribution of food, causing an epidemic famine that was killing hundreds of thousands.<sup>32</sup>

January 1992 marked the beginning of a year-long series of Security Council resolutions addressing the situation in Somalia, which culminated in a large-scale U.S.-led AHI in December. Resolution 733 of January 20, 1992, ex-

pressed alarm at "the heavy loss of life" and concern "that the continuation constitutes . . . a threat to international peace and security." Moreover, this resolution made a decision under Chapter VII to implement a "complete embargo on all deliveries of weapons and military equipment," although it did not explicitly invoke Article 39 or 41. After noncompliance with a March 3 ceasefire continued to disrupt humanitarian efforts, the Security Council reaffirmed that "the magnitude of the human suffering . . . constitutes a threat to international peace and security" in Resolution 746.<sup>33</sup>

In adopting Resolution 751 on April 24, 1992, the Security Council decided to establish a U.N. Operation in Somalia (UNOSOM I) and to deploy 50 U.N. observers to monitor the ceasefire in Mogadishu. The Council also agreed in principle to establish a security force to protect humanitarian efforts. In July, Resolution 767 requested that the Secretary-General make use of "an urgent airlift operation" to facilitate the efforts of humanitarian organizations. The Security Council's increasing impatience with the warlords' disruption of the relief effort was manifest in this resolution: "The Council does not exclude other measures to deliver humanitarian assistance." Although the United States responded to Resolution 767 with an airlift effort, it became evident that even a sustained air effort would not effect a reversal in the deteriorating situation.<sup>34</sup>

In August, the two principal factions agreed to the deployment of a 500-strong security force as part of UNOSOM I. Moreover, on August 28, the Security Council approved Boutros-Ghali's request to increase the strength of UNOSOM I to 3,500 personnel (Resolution 775). The battalion of 500 lightly armed Pakistanis that comprised UNOSOM I arrived in Mogadishu in Sep-

tember 1992. The battalion's mission was to secure the port, secure food shipments to and from the airport, and escort food convoys in Mogadishu. However, constrained by stringent rules of neutrality and Aideed's control of the airport and port area, the Pakistanis contingent was essentially ineffective. Due to the scale of the disaster and the impediments presented by the factions' power struggles, UNOSOM I proved incapable of managing the catastrophe.<sup>35</sup>

By late November 1992, however, the magnitude of the catastrophe induced President Bush to offer U.S. troop support. As a result, on December 3, the Security Council "determined that the magnitude of the human tragedy caused by the conflict in Somalia, further exacerbated by the obstacles being created to the distribution of humanitarian assistance, constitutes a threat to international peace and security" (S/RES/794). Conspicuously absent in the resolution were any reference to refugee flows and any explanation of how intrastate starvation constituted such a threat. Resolution 794 also recognized the "unique character" of the situation; acting under Chapter VII, it authorized member states "to use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia." The deployment of the Unified Task Force (UNITAF) in December 1992 marked a significant escalation in the application of force—37,000 well-armed troops, including U.S. Marines.<sup>36</sup>

Although the coercive effect of UNITAF's presence compelled the Somali leaders to sign a general ceasefire agreement in Addis Ababa on January 8, 1993, UNITAF operations focused mostly on the removal of heavy weapons to establish a secure environment; light weapons were removed only in areas that directly threatened UNITAF facilities. Moreover, although UNITAF attempted to remain politically neutral while conducting humanitarian security missions, its forces were involved in a confrontation with pro-Aideed factions in February, causing Aideed to accuse UNITAF of undermining his political power. Thus, when the UNOSOM II transition began in March, some anti-U.N. sentiment among Aideed's allies already existed.<sup>37</sup>

Acting under Chapter VII of the Charter, Resolution 814 of March 26, 1993 authorized a UNOSOM II force consisting of 28,000 troops and expanded the mandate for the use of force. The resolution directed the force commander "to assume responsibility for the consolidation, expansion, and maintenance of a secure environment throughout Somalia." It also authorized UNOSOM II to "take appropriate action against any faction that violates or threatens to violate the cessation of hostilities" and "to seize the small arms of all unautho-

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rized armed elements."<sup>38</sup> Manned with a smaller force and supported by a more aggressive mandate, the UNOSOM II leadership soon alienated Aideed, contributing to a subsequent escalation in violence.<sup>39</sup>

When U.N. Special Representative Jonathan Howe renounced UNOSOM support for an Aideed-sponsored peace conference in May, Aideed suspected that his political power was being undermined. Moreover, when day and night patrolling was reduced in south Mogadishu because of a lack of personnel, Aideed seized on the apparent weakness of UNOSOM II. On June 5, 1993, Aideed's militia ambushed a Pakistani detachment, killing 24 soldiers, and prompting an emergency session of the Security Council. Resolution 837 of June 6, 1993, strongly condemned the attacks against UNOSOM II and reaffirmed the authorization "to take all measures necessary against all those responsible for the armed attacks." Supported by a broad mandate, UNOSOM II began to conduct combat operations against Aideed's faction, in essence taking sides in the conflict. On June 17, UNOSOM II forces conducted an attack against an Aideed stronghold, resulting in heavy U.N. casualties. In retaliation for the June 17 U.N. losses, Howe offered a \$25,000 reward for Aideed's capture. In the subsequent escalation in fighting, on July 12, U.N. forces conducted an attack helicopter raid against Aideed's command center, killing 54 Somalis.<sup>40</sup>

The broad Chapter VII mandate notwithstanding, the October 1993 raid in Mogadishu marked the culmination of U.N. combat against Aideed. In August, UNOSOM discharged commandos of the U.S. Special Operations Command with orders to capture Aideed. The ongoing war against Aideed ultimately came to a head on October 3, when an ill-fated commando raid against Aideed resulted in the death of 18 U.S. soldiers and approximately 500 Somalis. Moreover, as a result of the increased focus on defeating Aideed, the relief activities of this humanitarian operation were reduced by 50 percent in Mogadishu. As a result of the October debacle, the United States and most European countries withdrew their forces from UNOSOM II in early 1994. Although UNOSOM remained in Somalia until March 1995, most security and political objectives were abandoned during the summer of 1994 in the face of renewed factional infighting.<sup>41</sup>

In the context of humanitarian exigencies, Somalia clearly provided a very strong moral impetus for action. Vivid television scenes depicting starving women and children, coupled with statistics that indicated 3,000 daily deaths, all contributed to a sense of international moral indignation. The fact that greedy warlords were impeding humanitarian relief further outraged the public. Moreover, Somalia's post-Cold War strategic insignificance seemed to indicate that the motive was purely humanitarian. However, long ago, nineteenth-century international law expert E.C. Stowell observed, "humanitarian considerations will never be the sole motive." Before looking at the political motives behind the Somalia intervention, it is useful to note that one year of chaos and starvation had elapsed in Somalia before the United Nations passed its first resolution; almost two more years elapsed before the United States was willing to support the effort.<sup>42</sup>

The United States was very reluctant to commit forces in Somalia until it was impelled to do so by domestic political factors. Part of the motivation for the August airlift was a reaction to criticism leveled at President Bush for his inaction in Somalia and his unsteady support of the United Nations. Subsequently, strong congressional support for U.N. action and requests for protection by American nongovernmental organizations motivated the United States to change its policy and take the lead in Somalia. Another more subtle political factor that influenced the UN operation from the outset was the personal enmity that existed between Boutros-Ghali and Aideed. The most outspoken advocate of punitive action against Aideed, Boutros-Ghali had been a strong supporter of Siad Barre; Aideed also harbored great animosity towards Boutros-Ghali because of that support.<sup>43</sup>

On the other hand, the evolving mandate for the use of force was adopted in accordance with the Charter, more or less. Although the Security Council did not specifically invoke Article 39, it did determine that there was a threat to international peace and security. The Council also stated that it was acting under Chapter VII when it authorized the use of force. The major positive law irregularity inhered in the apparent absence of any threat to international peace and security. The Security Council determined that the "magnitude of human tragedy" constituted this threat (S/RES/794). Moreover, throughout the entirety of the Somalia resolutions, the term 'humanitarian' appeared 26 times while the term 'threat' appeared only 11 times. There were refugee flows resulting from the catastrophe, but nowhere in the Security Council documents were the refugees considered a threat. It is evident that the Security Council contrived the legal fiction that intrastate human suffering presented a threat to the international community in order to bypass Article 2.7 for moral and political reasons. Clearly overstepping the bounds of positive law, the Security Council also sought to avoid any precedential inference by recognizing the "unique character" of the problem.<sup>44</sup>

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**The Security Council contrived the legal fiction that intrastate human suffering presented a threat to the international community in order to bypass Article 2.7 for moral and political reasons.**

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### Conclusion

The concept of armed humanitarian intervention is not viable from a purely moral perspective. To be certain, the moral motives for all such endeavors are clear and compelling. The hundreds of thousands of deaths that resulted from the internecine warfare and self-interested power struggles of the Somali warlords was a clear and compelling moral impetus behind which the inter-

national community eventually rallied. The situation in Somalia seemed to provide sound moral reasons for doing something. However, after closer examination it is evident that the decision to launch the operation was influenced by political factors as well. It is impossible to divorce political reality from moral motives.

Although the situation in Somalia presented a genuinely compelling moral motive, morality did not prompt significant action for almost two years. Since Somalia remained outside the geopolitical interests of the West, the morally compelling situation there was ignored until domestic politics prompted President Bush to do something. What's more, after the United States offered to commit a large force, the Security Council provided authorization based on a disingenuous application of Article 39. The Security Council did authorize both UNITAF and UNOSOM II to apply force in accordance with Articles 39 and 42, but it conjured up the falsity that intrastate human suffering presented a threat to peace and security.

Moving beyond the Charter as a source of law (Article 38.1.a, ICJ Statute), many contemporary publicists have cited General Assembly resolutions and Operation Provide Comfort as evidence of state practice (Article 38.1.b) which supports the notion of AHI. However, relying on the politically motivated voting behavior of the General Assembly to infer accepted practice is equivocal.<sup>45</sup> Nonetheless, even one of the more recent General Assembly humanitarian resolutions (Resolution 46/182) reaffirmed the primacy of domestic jurisdiction.<sup>46</sup> What's more, Resolution 688 itself did not authorize the use of military force within Iraq's borders. Although the Security Council distorted the Charter to justify intervention in Somalia, its members tried to avoid any precedent-setting implications by qualifying their actions as "exceptional" and "unique."<sup>47</sup>

Since the principal sources of positive law do not currently authorize AHI, it seems that the publicists who promote humanitarian intervention are relying on a subsidiary means of international law—themselves (Article 38.1.d). However, appealing to morality, nonbinding resolutions, and politically expedient Security Council behavior to legally justify intervention is dangerous. Not only are the publicists failing to appreciate the paramountcy of domestic jurisdiction, but, advocating humanitarian intervention jeopardizes the already tenuous international legal order. The Charter system is based on the consent of sovereign states and it relies on those state actors to contribute to the system. States cooperate within the framework of the Charter to derive some benefit from its functions. States did not join the United Nations only to surrender their sovereignty to either a notion of humanitarian primacy or Security Council control over their internal operations that were never envisioned or codified.

Finally, there are pragmatic reasons for reconciling the legal with the moral and political spheres. An action conceived within the parameters of the Charter but lacks political staying power is not likely to succeed. UNITAF was given a mandate to use force, but it was constrained by a lack of United States will to stay the course. Cognizant of this weakness, Aideed's faction waited

until UNITAF's departure to resume his attacks. The bottom line is that law, politics and morality must all coalesce in order to create the conditions for the successful conduct of U.N. collective actions.

### Notes

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4. Marrack Goulding, "The Evolution of United Nations Peacekeeping," *International Affairs* Vol. 69, No. 3 (1993): 458-59.
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6. Leo Gross, *Essays on International Law and Organization* (Dobbs Ferry: Transnational Publishers, 1984), 3 and 12; and K. J. Holsti, *International Politics*, 5th ed. (Englewood Cliffs, N.J.: Prentice Hall, 1988), 363.
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8. Donnelly, 310.
9. Inis L. Claude, *Swords into Plowshares*, 4th ed. (New York: Random House, 1984), 181.
10. *Ibid.*, 182; and Leland M. Goodrich, Edvard Hambro, and Anne Patricia Simons, *Charter of the United Nations*, 3rd ed. (New York: Columbia University Press, 1969), 61-62.
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12. Inis L. Claude, 182-83.
13. Conforti, 477.
14. W. Andy Knight, "UN Charter-Based Human Rights Machinery," in *Article 2 (7) Revisited*, eds. Abiodun Williams and others (Worldwide Web: Academic Council on the United Nations System, 1993), 28; United Nations, General Assembly, A/RES/217, 8 December 1948; and *Report of the Committee on Foreign Relations United States Senate on The International Convention on the Prevention and Punishment of the Crime of Genocide, Executive O., 81st Congress, 1st Session*, by Richard G. Lugar, Chairman (Washington, D.C.: Government Printing Office, 1985), 10.
15. Farer, 228.
16. Jochen A. Frowein, "Article 39," in *The Charter of the United Nations*, ed. Bruno Simma (Oxford: Oxford University Press, 1994), 610; and Goodrich, Hambro, and Simons, 293.
17. Jochen A. Frowein, "Article 42," in *The Charter of the United Nations*, ed. Bruno Simma (Oxford: Oxford University Press, 1994), 631; and Goodrich, Hambro, and Simons, 315.
18. Alfred P. Rubin, "Jus Ad Bellum and Jus Cogens: Is Immorality Illegal," in *Humanitarian Law of Armed Conflict: Challenges Ahead, Essays in Honour of Frits Kalshoven*, ed. Astrid Delissen and Gerard J. Tanja (Boston: M. Nijhoff, 1991), 600.

19. Ibid.
20. Boutros Boutros-Ghali, *An Agenda for Peace: Preventive Diplomacy, Peacemaking, and Peacekeeping* (New York: United Nations Printing Office, 1992), par. 17.
21. For an account of the increased tempo of U.N. operations, see Christopher S. Wren, "U.N. is Cutting Back on Its Peacekeeping Ambitions," *New York Times*, November 12, 1995, 14; for John Major's statement, see United Nations, Security Council, SCOR, S/PV.3046, January 31, 1992, 143.
22. A significant number of authors maintain that domestic jurisdiction should yield in the face of humanitarian issues, they include Lori F. Damrosch, ed., *Enforcing Restraint: Collective Intervention in Internal Conflicts* (New York: Council on Foreign Relations Press, 1993); Lois E. Fielding, "Taking the Next Step in the Development of New Human Rights: The Emerging Right of Humanitarian Assistance to Restore Democracy," *Duke Journal of Comparative and International Law* Vol. 5, No. 2 (Spring 1995): 329-77; Ruth Gordon, "United Nations Intervention in Internal Conflicts: Iraq, Somalia, and Beyond," *The Michigan Journal of International Law* Vol. 15, No. 2 (Winter 1994): 519-88; Rajendra Ramlogan, "Towards a New Vision of World Security: The United Nations Security Council and the Lessons of Somalia," *Houston Journal of International Law* Vol. 16, No. 2 (Winter 1993): 213-259; and John Stremlau, "Antidote to Anarchy," *The Washington Quarterly* Vol. 18, No. 1 (Winter 1995): 27-42.
23. United Nations, General Assembly, GA/RES/2200, 16 December 1966; United Nations, General Assembly, GA/RES/2626, 24 October 1970; and United Nations, General Assembly, GA/RES/46/182, 19 December 1991.
24. J. S. Watson, "Autointerpretation, Competence, and the Continuing Validity of Article 2 (7) of the UN Charter," *The American Journal of International Law* Vol. 71, No. 1 (January 1977): 73.
25. GA/RES/46/182, par. I.3.
26. The 1960 U.N. operation in the Congo (ONUC) was also partly driven by humanitarian motives and it was in many respects an analog and precursor to Somalia. However, Secretary-General Hammarskjöld emphasized that ONUC operated there on a consensual basis under Article 40 of the UNC. See United Nations, Security Council, SCOR, S/PV.887, 21 August 1960, 17.
27. George A. Gellert, "Humanitarian Responses to Mass Violence Perpetrated Against Vulnerable Populations," *British Medical Journal* Vol. 311, No. 7011 (October 1995): 1003; Fielding: 376; and United Nations, Security Council, S/RES/683, 5 April 1991.
28. United Nations, SCOR, S/PV.2982, 5 April 1991, 7, 9, 27, and 31.
29. The notion of 'crossing the Mogadishu line' was borrowed from former UNPROFOR Commander Lieutenant General Sir Michael Rose as quoted in "Patience and Bloody Noses," *The Guardian*, September 30, 1994, 27.
30. Terrence Lyons and Ahmed I. Samatar, *Somalia: State Collapse, Multilateral Intervention, and Strategies for Political Reconstruction* (Washington, D.C.: The Brookings Institution, 1995), 30 and 77; and John L. Hirsch and Robert B. Oakley, *Somalia and Operation Restore Hope* (Washington, D.C.: United States Institute of Peace Press, 1995), 19.
31. United Nations, SCOR, S/23445, January 20, 1992, 2.
32. Lyons and Samatar, 7.
33. United Nations, Security Council, S/RES/733, January 20, 1992; and United Nations, Security Council, S/RES/746, March 17, 1992.
34. United Nations, Security Council, S/RES/751, April 24, 1992; United Nations, Security Council S/RES/767, July 24, 1992; and Hirsch and Oakley, 25.
35. United Nations, Security Council, S/RES/775, August 28, 1992; Hirsch and Oakley, 26, 27 and 41; Lyons and Samatar, 32-33.
36. Lyons and Samatar, 23; United Nations, Security Council, S/RES/794; Ramlogan: 251.
37. United Nations, SCOR, S/25168, January 26, 1993; Hirsch and Oakley, 77; and Lyons and Samatar, 41.

38. United Nations, Security Council, S/RES/814, 26 March 1993; and United Nations, SCOR, S/25354, March 3, 1993, par. 57.
39. Hirsch and Oakley, 115-116.
40. Ibid., 116-121; and United Nations, Security Council, S/RES/837, June 6, 1993.
41. Ibid.; Lyons and Samatar, 60; United Nations, Security Council, S/RES/954, November 4, 1994.
42. Kofi Annan, "UN Forces Withdraw from Somalia," *Foreign Policy Bulletin* Vol. 5, No. 6 (May/June 1995): 36; and E.C. Stowell, "Intervention in International Law," in *International Protection of Human Rights*, ed. Louis B. Sohn and Thomas Buergenthal (New York: The Bobbs-Merrill Company, Inc., 1973), 140.
43. Hirsch and Oakley, 36; Lyons and Samatar, 46; and United Nations, SCOR, S/25354, March 3, 1993, par. 57.
44. United Nations, SCOR, S/PV.3145, 3 December 1992, 17; S/RES/794; Hirsch and Oakley, 23. For a discussion of the legal fiction involved in determining humanitarian concerns to be threats to international security, see Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Clarendon Press, 1994), 257.
45. Watson: 73
46. GA/RES/46/182.
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