Justifying Humanitarian Intervention

by

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ABSTRACT

The time is ripe for a re-examination of the doctrine of humanitarian intervention, and in particular, of its legal basis in international law. This thesis attempts to draw attention to the significance of the decision to justify humanitarian intervention in a certain way, and to some of the implications of that decision.

The thesis compares the two justificatory options which seem to be most appropriate to the multilateralism of the post-Cold War era: collective humanitarian intervention under Chapter VII of the UN Charter and mulitilateral humanitarian intervention under customary international law. It reviews recent state practice, arguing that a mulitilateral right to intervene for the protection of human rights is emerging at custom.

After critically analysing humanitarian intervention's justification under the Charter, the thesis concludes that the better way to justify the doctrine, both in principle and in practice, is under customary law.

SOMMAIRE

Il serait opportun de réexaminer la doctrine de l'intervention humanitaire, et en particulier le fondement juridique de celle-ci dans le droit international. La présente thèse essaiera d'attirer l'attention sur l'importance de la décision de justifier d'une manière quelconque l'intervention humanitaire, ainsi que sur certaines conséquences de cette décision.

La thèse compare les deux options justificatrices qui semblent le mieux convenir au multilatéralisme de la période postérieure à la Guerre Froide: l'intervention humanitaire collective aux termes du Chapitre VII de la Charte des Nations Unies, et l'intervention humanitaire multilatérale selon le droit international coutumier. Elle passe en revue la pratique contemporaire des états, soutenant qu'un droit multilatéral d'intervention est en train de s'établir comme coutume pour la protection des droits de l'homme.

Après avoir fait l'analyse critique la justification de l'intervention humanitaire en vertu de la Charte, la thèse conclut que le meilleur moyen de justifier la doctrine, tant en principe que dans la pratique, est de s'appuyer sur le droit international coutumier.

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Chapter 1

Introduction

Humanitarian Intervention is a subject which addresses issues lying at the heart of contemporary international law. It cannot be studied without directly confronting the tension which exists between the principles of state sovereignty, non-intervention and the prohibition of armed force on the one hand, and respect for human rights on the other.

Use of the term 'humanitarian intervention' will here be confined to action involving the use or threat of armed force by a state or an international organization, with the purpose of protecting human rights. Its non-consensual character will be assumed, since if an invitation or consent to intervention has been provided by a *de jure* and *de facto* government, then the resulting action would be lawful on any view. The cases of Liberia and Somalia will be considered however, because in spite of there being some form of consent in both instances, the respective governments had for all practical purposes ceased to exist, and the possibility of armed resistance was high.

While reference will be made to the case of intervention by a regional inter-governmental organization in my discussion of Liberia, no comprehensive examination of the legality of such actions will be made, other than in situations where the United Nations may authorise or otherwise legitimize such intervention. Similarly, I do not intend to deal with the issue of a state intervening to protect its nationals abroad, nor with the provision of humanitarian assistance by states, inter-governmental or non-governmental organizations.

It is submitted that contemporary international law provides (at least) three possible ways in which humanitarian intervention as it is defined here could be justified. These are:

(i) by a unilateral right under customary law

(ii) by a multilateral right under customary law

(iii) under Chapter VII of the Charter of the United Nations.

From the outset, it is important to establish that there are two quite fundamental differences between these potential justifications. First, the *source* of the legal right to intervene varies according to whether options (i) or (ii) are chosen on the one hand, or option (iii) on the other. While the former two can only be derived from customary international law, the latter is based on a

multilateral treaty, namely the UN Charter.[1] Secondly, the very *existence* of both customary options is controversial, whereas there is no doubt about the existence and *prima facie* legality of Chapter VII of the UN Charter. Of course, this in itself does not prove that the Chapter is capable of justifying a right of humanitarian intervention. That issue will be the subject of the first substantive chapter of this thesis.

For decades the subject of humanitarian intervention has been controversial. But virtually all of the discussion and controversy to date has focused exclusively on option (i). This traditional 'humanitarian intervention' debate on whether the Charter can be reconciled with a customary doctrine of 'pure' unilateral humanitarian intervention has never been settled conclusively. Undeniably, those who believe that existing law does allow unilateral recourse to force for the protection of human rights have marshalled impressive legal and moral arguments in support of their thesis.[2] But the counter-position - which regards forcible intervention as irreconcilable with Article 2(4) of the Charter - is also persuasive and still commands significant

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[1] Custom and treaties are independent sources of international law, as confirmed by Article 38(1) of the Statute of the ICJ.

[2] See especially F.R. Teson, *Humanitarian Intervention: An Inquiry into Law and Morality* (Dobbs Ferry, N.Y.: Transnational Publishers, 1988) [hereinafter Teson]. See also A. D'Amato, *International Law: Process and Prospect* (Dobbs Ferry, N.Y.: Transnational Publishers, 1987) at 223-232.

support.[3]

The most obvious reason for this concentration on unilateral actions is because unilateral interventions have, until recently, constituted the vast bulk of relevant precedent. The case most frequently relied upon is India's intervention in Pakistan in 1971 in support of the Bangladeshis. More recent examples include the Tanzanian intervention in Uganda which ultimately led to the downfall of Idi Amin, and the intervention of the United States in Grenada in 1983.[4] With the exception of Bangladesh however, the intervening states have always justified their actions primarily by reference to self-defense, making these instances of 'humanitarian intervention' at least debateable. Although it has been argued that philosophically, the justification for humanitarian intervention is the same as that for self-defense,[5] I am inclined to agree with the view that there is "no accepted *legal* identification between the two types of forceful

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[3] See *e.g.* N. Ronzitti, *Rescuing Nationals Abroad and Intervention on Grounds of Humanity* (Dordrecht: Martinus Nijhoff, 1985). See also L.F. Damrosch, "Commentary on Collective Military Intervention to Enforce Human Rights" in L.F. Damrosch & D.J. Scheffer, eds., *Law and Force in the New International Order* (Boulder: Westview Press, 1991) 215.

[4] For a detailed analysis of these instances of state practice see Teson, *supra* note 2 at chapter 8.

[5] F.R. Teson, Remarks (1990) 84 Proc.Am.Soc.Int'l L. 195.

action." [6]

A further explanation for the conventional debate's neglect of multilateral and collective actions is provided by the Cold War. Until the end of East-West bipolarity, consideration of superpower co-operation on intervention was a matter of academic interest rather than one of practical importance. Whatever its legal status, unilateral action was usually the only moral alternative to passive tolerance of human rights atrocities.[7] It is only in the post-Cold War era that alternatives to unilateral intervention have become useful and relevant. As one commentator puts it:

> "...[F]avouring multilateral responses to national crises of international significance is nothing new. What is new is the heightened capacity of multilateral institutions to do so." [8]

Although reference to the traditional debate will be made wherever relevant, I do not intend to rehearse or to attempt to resolve it here. Instead, this article will concentrate on multilateral and collective justifications for humanitarian crises (*e.g.* options (ii) and (iii) above), because, as we will see below, these justifications have become the pertinent options for humanitarian

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[6] J.R. Nafziger, "Self-Determination and Humanitarian Intervention in a Community of Power" (1991) 20 Den. J. Int'l L. & Pol'y 9 at 24.

[7] *Ibid.* at 26

[8] *Ibid.* at 11.

intervention today.[9]

Moreover, because customary international law is not "a mere static body of rules" but "a process of continuous interaction, of continuous demand and response,"[10] the argument presented in this article in support of a multilateral right to humanitarian intervention at customary law does not depend on the traditional debate having been resolved in favour of such a right. In other words, the legality of option (ii) does not rest entirely upon the legality of option (i). It is as possible that the right to intervene multilaterally is emerging as custom for the first time, as it is that it is developing as an

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[9] Assuming that such multilateral and collective justifications remain available to states contemplating the use of force, it seems highly unlikely that unilateral intervention will be undertaken. Non-unilateral approaches are far preferable to states because they are cheaper, help to neutralize domestic political opposition, offer opportunities to acquire useful political allies, reassure the international community that operations have limited and legitimate goals and reduce the risk of large-scale force being used by rival powers. See A. Roberts, "The United Nations and International Security" (1993) 35(2) Survival 3 at 6.

[10] M.S. McDougal, "The Hydrogen Bomb Tests and the International Law of the Sea" (1955) 49 A.J.I.L. 356 at 356- 57. This description of the creation of customary international law was provided by Professor Myres McDougal in the context of discussing the law of the sea, but it is equally applicable in other contexts. While I welcome the insights into the process of law formation and non-positive sources of law provided by the so-called New Haven school of international law, there are difficulties with accepting this approach in its entirety. In particular, the New Haven writers fail to incorporate many institutional values into their model of law as a process of authoritative decision, and their work is suspiciously political. For a full discussion of these difficulties see S.J. Toope, "Confronting Indeterminacy: Challenges to International Legal Theory" (Paper presented to the Canadian Council on International Law Annual Conference, 19 October, 1990). Similar objections can be found in Teson, *supra* note 2 at 17-20.

adjunct of a pre-existing right to intervene unilaterally.

Having said that, it is important to recognise that the two customary options are not completely unrelated in terms of their justificatory potential. In order for my argument for a multilateral right of humanitarian intervention at customary international law to succeed, one must have accepted that it is at least *theoretically possible* for a unilateral right of intervention to be reconciled with the Charter (especially Articles 2(4) and 2 (7)), irrespective of whether such a right actually exists or has ever existed.[11] So while denying the existence of option (i) on grounds of inter-temporal construction of subsequent state practice does not affect option (ii)'s potential legality, denying it on grounds of the exclusivity of treaty mechanisms, such as those of Article 2(4) or Chapter VII, does.

For present purposes it is helpful to distinguish collective from multilateral intervention. Whereas multilateral intervention is determined solely by the group of two or more states involved rather than by any institutional 'authority,' collective intervention involves action by a non-discriminatory, regionally or internationally representative organization with a

[11] The reader will find my reasons for accepting this possibility at Chapter 3, below.

virtually universal membership within its defining boundaries.[12] In so far as non-unilateral humanitarian intervention has been considered at all, the assumption has always been that this would be a collective operation conducted under the authority of the United Nations.[13] This assumption, which places a great deal of naive faith in the Security Council, probably originated in the high aspirations for the United Nations and the resulting conviction that the world's "common interest" could only be served through UN channels. Although the Cold War and the resulting failure of the UN to function as had been envisaged helped to lessen these expectations, the lack of any moral distinction between unilateral and multilateral actions - as opposed to collective action - has persisted. Consequently, little or no attention has been paid to the possibility of an independent customary right of multilateral intervention and to the ways in which this differs both from unilateral and from collective intervention.[14] For this reason I will postpone discussion

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[12] See R. Thakur, "Non-intervention in International Relations" (1990) 42 Political Science 27 at 42-43.

[13] See generally the collection of essays in N.S. Rodley, ed., *To Loose the Bands of Wickedness - International Intervention in Defence of Human Rights* (London: Brassey's, 1992). See also D.B.S. Thapa, *Humanitarian Intervention: A Study of the Problems and Practices of Collective Intervention* (LL.M. Thesis, Montreal: McGill University, 1968); and Nafziger, *supra* note 6.

[14] But see the excellent recent article by Adam Roberts, in which the author points out some advantages of enforcement taking the form of multilateral action by a group of states rather than coming under the collective auspices of the United Nations. Roberts, *supra* note 9, at

of multilateral custom and turn first to examine Chapter VII's potential for justifying a doctrine of humanitarian intervention.

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15-19.

Chapter 2

Enforcement Action under Chapter VII

The extent to which the UN Charter authorises humanitarian intervention by the United Nations is not obvious. Article 2(7) articulates the principle of non-intervention in the internal affairs of states, providing that:

> "Nothing in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state..."

Whether this provision has implications for humanitarian intervention obviously depends upon whether humanitarian crises are deemed to fall "essentially within the domestic jurisdiction" of a state. Elsewhere in the Charter it is made clear that the issue of human rights as such is regarded as a matter of international concern,[15] but it is less clear whether the human rights situation in a particular state is a legitimate reason for international action.[16] The early practice of the United Nations tended

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[15] See Articles 1(3), 55 and 56, U.N. CHARTER.

[16] N.S. Rodley, "Collective Intervention to Protect Human Rights and Civilian Populations: the Legal Framework" in N.S. Rodley, ed., *supra* note 13, 14 at 18.

towards a wide interpretation of 'domestic jurisdiction,' suggesting that any international inquiry about activities occurring within national borders was strictly taboo. In the words of a former British ambassador to the UN:

> "Little emphasis was laid in the early years on the contradiction apparent to the non-legal mind between article 2(7) and articles 55 and 56. Under these two articles, members and the organisation itself are pledged to promote *inter alia* observance of human rights and fundamental freedoms. Yet it was taken for granted that the United Nations was debarred by article 2(7) from action against a member state which broke the pledge in article 56 by violating the human rights of its citizens. Human rights were regarded as falling within the 'domestic jurisdiction'. Promotion rather than correction was the purpose."[17]

Increasingly however, this bulwark against international action has been eroding. Since 1945 there has been growing recognition that individuals, as well as states, are subjects of international law, at least for limited purposes.[18] This development has provoked the further claim that serious violations of human rights are

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[17] A. Parsons, "Conclusions and Recommendations" in N.S. Rodley, ed., *ibid.* 213 at 214.

[18] This idea was first made popular by Sir Hersch Lauterpacht:

> "[A]s a result of the Charter of the United Nations - as well as of other changes in international law - the individual has acquired a status and a stature which have transformed him from an object of international compassion into a subject of international right."

H. Lauterpacht, *International Law and Human Rights* (London: Stevens, 1950) 4. Sir Hersch's challenge to the statist conception of international law is generally accepted today. Professor Brownlie, for example, accepts that the individual is a subject of international law "in particular contexts," although he points out that the extent and permanence of the progress made by legal obligations and institutions are determined by political conditions. See I. Brownlie, *Principles of Public International Law* 4th ed. (Oxford: Clarendon Press, 1990) at 601.

not a domestic matter, but that they fall within international jurisdiction, since they involve breaches of obligations existing under international law. So as nations have committed to an ever-expanding regime of international treaties and as customary law has grown, the concept of domestic jurisdiction has simultaneously shrunk.[19] Thus, it has become arguable that Article 2(7) is no bar to international intervention for the protection of human rights.[20] With growing frequency the internal human rights practices of states are appearing on the United Nations' agenda, and the recent practice of the organization certainly appears to endorse a restrictive interpretation of Article 2(7), as will be shown below.[21] According to the organization's former Secretary-General, the aforementioned tug of war between respect for state sovereignty and humanitarian concerns is moving in favour of the latter:

> "We are witnessing what is probably an irreversible shift in public attitudes towards the belief that the defence of the oppressed in the name of morality

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[19] D. Scheffer, "Toward a Modern Doctrine of Humanitarian Intervention" (1992) 23 U. of Tol. L.R. 253 at 262.

[20] In Reisman's words:
"[I]nternational human rights puts current and erstwhile tyrants on notice that monarchical and elitist conceptions of national sovereignty cannot be invoked to immunize them from the writ of international law..."
W.M. Reisman, "Sovereignty and Human Rights in Contemporary International Law" (1990) 84 A.J.I.L. 866 at 874.

[21] See especially *infra* note 98 and accompanying text.

should prevail over frontiers and legal documents."[22]

In any case, from the outset Article 2(7) expressly provided that it does not prejudice the application of Security Council enforcement measures adopted under Chapter VII of the Charter. According to Article 24, the Security Council has "primary responsibility for the maintenance of international peace and security." Chapter VII, titled "Actions with respect to threats to the peace, breaches of the peace, and acts of aggression," is particularly relevant to humanitarian intervention because Council decisions made under that Chapter are binding on all members of the United Nations,[23] and because the Chapter empowers the Council to use armed force in appropriate cases.[24]

Enforcement action by the Council under Chapter VII is an explicit exception to Article 2(4) of the Charter, as well as to Article 2(7). The exception falls under a provision in the Charter's preamble asserting that one of the purposes of the organization is to prevent the use of armed force except where it is in the "common interest."[25]

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[22] J. Perez de Cuellar, 22 *Diplomatic World Bulletin* (May 1991), cited in C. Greenwood, "Is there a Right of Humanitarian Intervention?" (1993) 49(2) The World Today 34 at 35.

[23] Article 25, U.N. CHARTER.

[24] Article 42, U.N. CHARTER.

[25] K. Ryan, "Rights, Intervention, and Self-Determination" (1991) 20 Den. J. Int'l L. & Pol'y 55 at 56, note 5.

It follows that if a humanitarian emergency within a state could be said to fall within the Council's mandate over international peace and security, the UN would have the legal right to forcibly intervene, notwithstanding Articles 2(7) and 2(4).[26] In this situation the real obstacle to Security Council intervention would not be those provisions which protect the principles of sovereignty and the non-use of force respectively. Instead, it would be the condition precedent to Chapter VII enforcement action, Article 39, which requires that there be a "threat to the peace, a breach of the peace, or an act of aggression."

In some respects the entire legal framework of Chapter VII appears to be informed by the concept of 'collective security,' although this expression is not used in the Charter. In theory, the concept of collective security assumes that all states share an interest in keeping the peace. In order for the theory to work, peace must be viewed as indivisible, and threats to the peace anywhere should be the concern of all members of the international community, who must be prepared to react collectively in response to such threats.[27] According to the Charter, one

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[26] "As an abstract proposition, if a human rights situation can amount to a threat to international peace and security, thus permitting the Council to take enforcement action to remedy the situation, there is nothing in Article 2(7) restricting the enforcement action to measures short of the use of force." Rodley, *supra* note 16 at 28.

[27] See A.L. Bennett, *International Organizations Principles and Issues* 5th ed. (New Jersey: Prentice Hall, 1991) at 131.

of the purposes of the United Nations is "to take effective collective measures...for the suppression of acts of aggression or other breaches of the peace..."[28] This provision, coupled with Chapter VII's delegation of authority to the Security Council to determine the existence of threats to the peace and to authorise sanctions and then military action, clearly evinces elements of collective security theory.

On the other hand, the United Nations system is by no means a paradigm of collective security, and not only because of the inevitable gap which exists between theory and practice.[29] The Charter contains some significant departures from the theory of collective security, the most notable being the existence of the veto and the position of the five permanent members of the Security Council. These elements reflect a deliberate decision not even to attempt to establish a system of collective security applicable to the 'Big Five,' whose decision-blocking competence is wholly incompatible with the theory that aggressors should be faced with the certain opposition of the collectivity, irrespective of the identity of aggressor or victim.[30] A

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[28] Article 1(1), U.N. CHARTER.

[29] As one commentator has pointed out, if the world situation were conducive to absolute success of collective security, we would be ready for world government. See I.L. Claude, *Swords Into Plowshares*, 4th ed. (New York: Random House, 1971) at 256.

[30] *Ibid.* at 265.

further departure from the ideal institutional system for the realization of collective security lies in the absence of any definite commitment in the Charter that military contingents for UN enforcement actions will be provided by member states.[31]

Traditionally, UN collective enforcement action was reserved for cases of international aggression, and required the Security Council to take sides in inter-state disputes. The type of force involved in such interventions is quite different from the force relevant to humanitarian intervention, which is used to protect people in crises, and is not necessarily limited to inter-state situations.[32] It has been suggested that the Council's powers under Chapter VII were styled with only the former case in mind:

> "Collective security... is intended only to forestall the arbitrary and aggressive use of force, not to provide enforcement mechanisms for the entire body of international law; it assumes that, as far as the problem of world order is concerned, the heart of the matter is the restraint of military action rather than the guarantee of respect for all legal

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[31] In fact the Charter postpones arrangements for the provision of armed forces to the future - see Article 43(3), U.N. CHARTER. These 'special agreements' have still not been negotiated. Instead, *ad hoc* agreements for the provision of armed forces have been struck, both for peacekeeping and, more recently, for peacemaking.

[32] Admittedly, humanitarian intervention *could* be confined to international conflicts if we so chose to restrict the doctrine, but the idea seems to extend to using force for the protection of victims in intra-state conflicts such as civil wars. As will be shown at pps. 20-23, below, recent practice suggests that the doctrine has in fact been extended to intra-state crises.

obligations."[33]

This opinion about the original intention behind Chapter VII is shared by Professor Farer. His study of the Charter's *travaux preparatoires* found nothing to suggest that the parties imagined that a state's abuse of its own nationals would ever constitute a 'threat to the peace,' thereby triggering Chapter VII.[34] But why did Chapter VII fail to contemplate any notion of humanitarian intervention? An interesting article by Andrew Hurrell suggests that the answer could lie in the changing nature of international conflict.[35] In 1945 the Charter's drafters naturally relied upon past experience to shape their model of collective security. Unlike events *since* 1945, typical conflict in the pre-war period did involve clear breaches of the peace and invading armies, rather than large-scale civil disorder.[36] Humanitarian intervention was therefore simply less of a priority at the time, since violence within sovereign borders was as rare then as Iraq's invasion of Kuwait was by today's standards.[37]

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[33] Claude, *supra* note 29, at 249.

[34] T. Farer, "An Inquiry into the Legitimacy of Humanitarian Intervention" in L.F. Damrosch & D.J. Scheffer eds., *supra* note 3, 185 at 190.

[35] A. Hurrell, "Collective Security and International Order Revisited" 11 International Relations (1992) 37 at 42.

[36] *Ibid.*

[37] This comparison accords with a study which found that roughly 80% of violent conflict between 1900-45 occurred between the armies of two or more states, whilst, since 1945, roughly 80% of conflict has

During the Cold War's neutering of the UN enforcement system some academics did speculate about collective UN intervention for humanitarian reasons, providing some valuable discussion for present purposes. Writing twenty years ago, John Humphrey foresaw that *if* the Security Council were to invoke Chapter VII by adopting an expansive definition of 'threat to the peace,' the provision of forcible humanitarian assistance might be possible.[38] However, he concluded that the Council would be unlikely ever to characterize human rights abuses as a threat to the peace, "except perhaps in the most extraordinary circumstances."[39]

Extraordinary perhaps, but not unimaginable. Even at the time Humphrey was writing, there had already been one case in which the Security Council had invoked Chapter VII in response to what was essentially an internal human rights problem - to impose mandatory sanctions against Southern Rhodesia in 1966.[40] Until 1991 the only other

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taken place on the territory of a single state. See B. Most & H. Starr, "Patterns of Conflict: Quantitative Analysis and the Comparative Lessons of Third World Wars" in R. Harkavy & S. Neuman eds., *The Lessons of Recent Wars in the Third World* (Lexington, Mass: Lexington Books, 1985), cited in Hurrell, *ibid.* at 43 note 8.

[38] J.P. Humphrey, "Foreword" in R.B. Lillich, ed., *Humanitarian Intervention and the United Nations* (Charlottesville: University Press of Virginia, 1973) vii at viii.

[39] *Ibid.*

[40] S.C. Res. 221, U.N. Doc. S/RES/221 (1966); S.C. Res. 232, U.N. Doc. S/RES/232 (1966).

situation in which human rights violations were brought within Chapter VII was in 1977, when an arms embargo was imposed against South Africa.[41]

The events of the past two years however, suggest that what was formerly the "extraordinary" exception might edge towards replacing the rule. Since 1991 there have been four instances - in Iraq, Liberia, Somalia, and the former Yugoslavia - in which the Security Council has proved willing to characterize the internal human rights situations of member states as threats to international peace and security.[42] In all but the first of these determinations the Council expressly invoked Chapter VII of the Charter. This practice has been justified by the claim that humanitarian considerations constitute an important element in the maintenance of international peace and security - a claim which marks a significant widening of the concept of peace and security. Clearly, this development takes us well beyond the traditional view of Chapter VII, which assumed that nothing other than aggression or threats to territorial integrity could constitute a threat to international peace.

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[41] S.C. Res. 418, U.N. Doc. S/RES/418 (1977). The exceptional nature of this action deserves emphasis. According to one commentator, it marked a "breach in...conventional interpretation." P. Calvocoressi, "A Problem and its Dimensions" in N.S. Rodley, ed., *supra* note 13, 1 at 9. See also Rodley, *supra* note 16 at 27.

[42] *Infra* notes 46, 49, 50, 51 and accompanying text.

There is not yet any real consensus, however, about the point at which human rights concerns become threats to or breaches of the peace, thereby justifying measures under Chapter VII. All that can be safely said is that in order for the Security Council to consider intervening the human rights situation has to fall within its mandate, constituting some sort of threat to international peace and security. Intervention is thereby made dependent upon the discovery of an at least notional link between domestic misdeeds and their impact on world peace or security.

Thus far, the Security Council's involvement in humanitarian emergencies has not been hampered by this limitation in its mandate. This is hardly surprising - if the political will to intervene exists, it is relatively easy for the Council to conclude that almost any civil conflict or man-made disaster arising out of human rights violations has a transnational dimension and should be tackled internationally.[43] Hence the aforementioned Resolutions on Rhodesia and South Africa were both passed successfully, despite the fact that whatever transnational dimensions were involved were quite peripheral to the Council's central purpose of bringing about changes in these countries' internal racist regimes.[44] The links to

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[43] Parsons, *supra* note 17, at 221.

[44] See P. Fifoot, "Functions, and Powers, and Inventions: UN Action in Respect of Human Rights and Humanitarian Intervention" in N.S. Rodley, ed., *supra* note 13, 133 at 149-153.

international peace and security which were made in these cases have been described as no more than "legal fictions," connived in by the majority of the UN members.[45]

The more recent civil wars in Iraq, Liberia, the former Yugoslavia and Somalia could all arguably be said to possess a transnational dimension, although this is far more apparent in the former two cases than in the latter two. In Iraq, hundreds of thousands of Kurdish and Shiite refugees fled to Turkey and Iran, allowing the Council to condemn the repression of the civilian population and find that its consequences threatened international peace and security.[46] A similar threat to the stability of neighbouring states existed in Liberia, with up to half a million refugees flooding into Guinea and the Ivory Coast.[47] In addition, Liberian rebels were making ad hoc raids against the government of Sierra Leone.[48] Once again, the Security Council recognised that the civil war constituted a threat to international peace and security.

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[45] *Ibid.* at 151 and 153.

[46] S.C. Res. 688, (1991) 30 I.L.M. 858.

[47] S.P. Riley, "Intervention in Liberia: Too little, Too partisan" (1993) 49(3) The World Today 42.

[48] Although the protection of nationals abroad does not constitute humanitarian intervention as it is defined here, it is interesting to note that the Liberian situation had further transboundary implications in view of the fact that several states had nationals trapped in Monrovia. See R. Cooper & M. Berdal, "Outside Intervention in Ethnic Conflicts" (1993) 35 Survival 119 at 132.

"particularly in West Africa as a whole."[49]

Chapter VII arms embargoes have also been imposed in response to the 'threats to international peace and security' posed by the crises in the former Yugoslavia[50] in September 1991, and in Somalia in January 1992.[51] Initially, the Yugoslavian conflict was regarded as a civil war (although it soon became 'internationalised' by the widespread international recognition led by the EEC which was accorded to Bosnia-Hercegovina, Croatia and Slovenia). An outflow of refugees again provided a transnational dimension, although in this case that dimension appears to have been more token than real. According to one commentator, the civil war in Yugoslavia at this stage had "very limited direct transborder effects."[52]

Unlike the Resolutions on Iraq, Liberia, and Yugoslavia which all acknowledged the link between humanitarian problems and international security (i.e. outflow of refugees exacerbates border tensions), the Resolution on Somalia makes no mention of this link. Furthermore, the preamble to a later Resolution on Somalia

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[49] S.C. Res. 788, U.N. Doc. S/RES/788 (1992).

[50] S.C. Res. 713, U.N. Doc. S/RES/713 (1991).

[51] S.C. Res. 733, U.N. Doc. S/RES/733 (1992).

[52] Rodley, supra note 16 at 25. Thousands of Yugoslav refugees did flee to Hungary of course, but not until later, in 1992.

expressly recognises the humanitarian tragedy to be the reason for intervening, stating that this in itself constitutes a threat to international peace and security.[53] Of the Security Council's involvements so far, the case of Somalia certainly comes closest to intervention in the internal affairs of an established state.[54] Yet even the Somalian crisis had some impact, albeit a limited one, on neighbouring states, caused once again by a migration of refugees.

These examples show that so far, gross abuses of human rights have created (discoverable) threats to international peace and security. And there is no doubt that the Charter provides the Security Council with clear legal authority to forcibly intervene in situations where international peace or security is threatened. Hence, it is submitted that Chapter VII has at least the *potential* to provide a legal basis for the provision of humanitarian intervention. Moreover, despite the fact that most humanitarian conflicts in the contemporary world are different in character from those conflicts, essentially interstate, that the United

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[53] '[T]he 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.' Preamble to S.C. Res. 794, U.N. Doc. S/RES/794 (1992).

[54] But see the discussion of Somalia in chapter 4, below, where it is argued that intervention in Somalia only occurred as it did because Somalia was not in fact an 'established state' (due to the collapse of the *de jure* government).

Nations was established to tackle,[55] the Council's recent interpretations of what constitutes a threat to international peace and security suggest that it has recognised this potential. Whether the same potential has actually been realized will be considered in the survey of recent state practice on humanitarian intervention at Chapter 4 below.

Considering the contrasting controversy surrounding the existence of a right to humanitarian intervention at customary law, not to mention the added complication of finding supportive state practice, it is tempting to jump to the conclusion that Chapter VII provides an ideal legal justification for forcible intervention to protect human rights. However, for reasons to be elaborated in chapter 5, it is this writer's opinion that the use of Chapter VII as a means of authorising collective military intervention, even though it is legally available, is not the best way to attempt to end serious human rights abuses in cases in which force is required. Nor, as was suggested above, is it the only option. In the following chapter I will therefore explore the feasibility of justifying multilateral uses of force against those who violate human rights under customary international law.

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[55] Roberts, supra note 9 at 5.

Chapter 3

Multilateral Intervention under Customary Law

State practice is indisputably the key element in determining whether a right exists under customary international law. But before moving to survey recent state practice, it is important to establish whether or not it is even theoretically possible for a multilateral right of humanitarian intervention to exist at custom. There are two main grounds for denying such a possibility, both of which will be considered - and rejected - in this section. The first denies the possibility of customary intervention altogether, on the basis that Article 2(4) imposes a virtually all-embracing ban on uses of force. The second, on the other hand, accepts the possibility of a customary right to intervene, but only in highly circumscribed circumstances. More specifically, it makes the customary right conditional upon the absence of workable collective mechanisms for intervention.

(i) The Exclusivity of Treaty Materials on the Use of Force

It will be recalled that Chapter VII of the UN Charter is an exception to Article 2(4), which prohibits the use of force.[56] The only other exception to that prohibition which is explicitly recognized by the Charter is self-defense, individual or collective.[57] Some opponents of the right of humanitarian intervention under customary law[58] have argued that such a right is irreconcilable with Article 2(4) because these two exceptions are exhaustive and because the prohibition is otherwise all-embracing. Although these arguments were made in the context of the traditional debate on unilateral intervention, it is essential to mention them here since they apply by analogy to deny the possibility of *any* right of humanitarian intervention existing under customary law.

While the Charter contains no provision *authorising* unilateral or multilateral humanitarian intervention by states, neither does it specifically abolish or disallow a

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[56] Article 2(4) provides:
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.

[57] See Article 51, U.N. CHARTER.

[58] The principal opponents of humanitarian intervention under customary law are listed in Teson, *supra* note 2 at 129, note 5.

customary doctrine.[59] The proper scope of Article 2(4) is therefore not self-evident. It has been the subject of a long-standing academic debate which will not be fully related here as it is amply documented elsewhere[60] and seems to be incapable of yielding a conclusive answer to the question whether humanitarian intervention is or could be another exception to the general prohibition of Article 2(4).[61] For present purposes, suffice it say that the survival or emergence of a customary doctrine of humanitarian intervention alongside the UN Charter has been accepted by a number of scholars.[62] They claim that humanitarian intervention is reconcilable with Article 2(4) because a 'pure' intervention does not constitute an assault on a state's territorial integrity or political independence. In Reisman's words:

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[59] I. Brownlie, *International Law and the Use of Force by States* (Oxford: Clarendon Press, 1963) at 342 [hereinafter I. Brownlie].

[60] Perhaps the most prominent supporter of the view that Article 2(4) cannot be interpreted as allowing for humanitarian intervention under customary law is Professor Ian Brownlie. See I. Brownlie, *ibid.* On the other side of the debate, Derek Bowett has argued that customary international law remains unless expressly cut down by the Charter. See D.W. Bowett, *Self-Defence in International Law* (New York, N.Y.: Praeger, 1958). For a list of other general works on the scope of Article 2(4) see Teson, *supra* note 2 at 127, note 1.

[61] Writes Teson:

> "One cannot but agree with the late Professor Stone that, as a matter of exegesis, both the extreme and narrow views of article 2(4) are possible."

Teson, *ibid.* at 134. The same writer also points out that the *travaux preparatiores* of the San Francisco Conference are inconclusive on this question. *Ibid.* at 130, 134, 136.

[62] Those who would defend the possibility of a customary doctrine of humanitarian intervention are listed in Teson, *ibid.* at 129, note 7, and include Teson himself. The present author falls into this group.

> "Since a humanitarian intervention seeks neither a territorial change nor a challenge to the political independence of the state involved and is not only not inconsistent with the Purposes of the United Nations but is rather in conformity with the most fundamental peremptory norms of the Charter, it is a distortion to argue that it is precluded by Article 2(4)."[63]

It is submitted that this claim carries considerable force. Far from being "discredited,"[64] the view that the final clause of Article 2(4) qualifies the prohibition is endorsed by many distinguished academics.[65]

In addition, a study of intervention carried out by the Planning Staff of the United Kingdom's Foreign and Commonwealth Office in 1984 concluded that humanitarian intervention under customary law was not "unambiguously illegal."[66] This conclusion implies that the Foreign Office does not subscribe to the view that automatically rules out the possibility of a customary doctrine of intervention on the grounds of Article 2(4). Moreover, even the World Court appears to have accepted the possibility of a right of humanitarian intervention at custom co-existing with the

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[63] W.M. Reisman, "Humanitarian Intervention to Protect the Ibos" in R.B. Lillich, ed., *supra* note 38, 167 at 177 [hereinafter "Humanitarian Intervention"].

[64] I. Brownlie, "Humanitarian Intervention" in J.N. Moore, ed., *Law and Civil War in the Modern World* (Baltimore: John Hopkins University Press, 1974) 217 at 222 [hereinafter Brownlie].

[65] Supporters of this view include Reisman, Lillich, McDougal, Teson, Stone, Lauterpacht, Nanda and Thapa. See R.B. Lillich, "Humanitarian Intervention: A Reply to Ian Brownlie and a Plea for Constructive Alternatives" in J.N. Moore, ed., *ibid.* 229 at 241 [hereinafter Lillich].

[66] UK Foreign Office Policy Document No. 148: "Is Intervention Ever Justified?" reprinted in (1986) 57 B.Y.I.L. 614 at 619.

law of the Charter. In the *Nicaragua* case,[67] the Court expressed the view that customary law on the use of force exists independently of Article 2(4). The United States' claim that customary law on the use of force had been subsumed by treaty law was specifically rejected by the Court, which purported to apply only the former to the facts of the case.[68]

As stated above, the aim here is not to attempt to resolve the debate on Article 2(4), nor to prove that humanitarian intervention is an exception thereto. Rather, my purpose is simply to show why it is at least arguable - and indeed quite probable - that the treaty materials on the use of force are not dispositive. If this view is correct, it is perfectly possible for a customary doctrine of humanitarian intervention to exist, providing that it is supported by adequate state practice which is accepted as law by the international community.[69] But before turning to

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[67] See *Military and Paramilitary Activities in and Against Nicaragua (Merits) (Nicaragua v. U.S.)*, [1986] I.C.J. Rep. 14 [hereinafter *Nicaragua*].

[68] The opinion of the Court states:
"In a legal dispute affecting two States, one of them may argue that the applicability of a treaty rule to its own conduct depends on the other State's conduct in the application of other rules...also included in the same treaty...But if the two rules in question also exist as rules of customary international law, the failure of the one State to apply the one rule does not justify the other State to decline to apply the other rule."
Ibid. at 97.

[69] For a discussion of this subjective element of customary international law, known as *opinio juris*, see *infra* notes 80 and 128, and accompanying text.

an examination of state practice, one other ground for denying customary intervention must be considered.

(ii) The Effectiveness of Collective Security

The second objection to even the abstract possibility of a customary right of humanitarian intervention also originated in the debate on unilateral intervention, but it is equally applicable in the multilateral context. Rather ironically, the objection emanates from several of those who argued *in favour* of a customary doctrine of humanitarian intervention. Their argument relates back to our discussion of the UN's system of enforcement mechanisms, often denominated 'collective security.' It will be recalled that this system, embodied in Chapter VII of the Charter, has the potential to provide legal justification for humanitarian intervention. However, as we saw, this potential displayed few signs of being realized during the Cold War's paralysing effect on the Security Council.

Some of the advocates of a customary right of humanitarian intervention not only supported the idea of responding collectively to humanitarian emergencies; they went a step further and conditioned their support for customary intervention upon the absence of such collective

mechanisms. As a result, intervention under customary law was permitted - but *only because* of the undeniable failure of the UN's system of collective security. The adoption of Article 2(4) is therefore argued to have presupposed effective institutions. In Reisman's words:

> "The problem can be approached from the standpoint of the contemporary meaning of Charter Article 2(4), an apparently blanket proscription on the unilateral use of force, which had relevance, at least within the paper world of the Charter, when read in conjunction with the implementative programs of Chapter VII of that instrument. Unfortunately, the programs of Chapter VII were never realized...
> A more realistic policy formulation would recognise the present inability of the world community to move to implementation of Chapter VII and would therefore accept the partial suspension of the full thrust of Article 2(4)."[70]

This conditional approach is also endorsed by Professor Lillich, who expressly states that he prefers it to an unconditional right of intervention at custom because "it clearly contemplates the gradual phasing out of the doctrine as the United Nations develops the capacity and the will to act in such situations."[71]

It is important to emphasise that the argument presented here for a multilateral right of humanitarian intervention under customary law is not similarly conditional. There are several reasons for rejecting the

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[70] W.M. Reisman, "Sanctions and Enforcement" in III C. Black & R. Falk, eds., *The Future of the International Legal Order* (Princeton, N.J.: Princeton University Press, 1971) 273 at 332-33.

[71] Lillich, *supra* note 65 at 240.

conditional approach. To begin with, such an approach is inconsistent with the view of the relationship between custom and treaty law which I supported above and which was endorsed in the *Nicaragua* case. As Fernando Teson explains:

> "The question of whether or not the customary principle prohibiting the use of force recognizes the exception of humanitarian intervention is independent from the argument based on the effectiveness of the United Nations. Suppose that customary law does recognise a right of humanitarian intervention. If a state is bound by customary law but not by the Charter, that state is not legally preempted from intervening for humanitarian purposes by the mechanisms of Chapter VII, *even if such mechanisms are functioning effectively*."[72]

Second, it is revealing to speculate about why these commentators linked Article 2(4) to the effectiveness of Chapter VII in the first place. As we have seen, the focus of controversy in the traditional debate was whether a customary right of humanitarian intervention could co-exist with Article 2(4). The conditional approach to custom helps to bolster the arguments in favour of such a right because it accommodates the claim that the customary right to intervention, *even if* initially lost under the Charter, has reverted to states. This claim is based on the principle of *rebus sic stantibus*[73] - the fundamental change of circumstances being the failure of collective mechanisms to

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[72] Teson, *supra* note 2 at 140 [emphasis in original].

[73] See *Vienna Convention on the Law of Treaties*, 23 May 1969, U.N. Doc. A/CONF. 39/27 (1969), 8 I.L.M. 679, art. 62 (entered into force 27 January, 1980).

remedy serious human rights violations.[74] Hence, it is respectfully submitted that much of the appeal of the conditional approach to custom lay purely in its instrumental value *vis-a-vis* the prevailing controversy of the day. It seems unlikely that the prospect of actually having to forfeit the right to intervention received much attention at the time, since collective mechanisms were undeniably ineffective and showed few signs of becoming operative.

Finally, there is an important practical reason for not linking customary intervention to collective security. It will be recalled that if this link is made, and if collective security becomes effective, Chapter VII becomes the sole legal basis for humanitarian intervention as any customary basis is "phased out."[75] Theoretically, this does not seem problematic. Since the Security Council would authorize collective intervention against regimes which perpetrate human rights atrocities, there would be no need to conserve the possibility of justifying intervention under customary international law. In reality, the situation is not so simple. The advocates of the conditional approach display an extremely naive understanding of collective mechanisms in their discussion about whether the system is 'effective' or not. In practice

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[74] See Teson, *supra* note 2 at 138.

[75] *Supra* note 71.

the effectiveness of collective mechanisms is not self-evident. Who is to say whether collective security is working or not? Is one collective response enough - or two? What happens if collective security, after a period of effectiveness, fails to function in a particular humanitarian crisis? Does the customary right to intervention automatically revert to states in such a case, or does 'ineffectiveness' have to be more extensive and systemic?

The advocates of the conditional approach to custom fail to provide answers to any of these critical questions. And in this post-Cold War era such questions are of much more than academic interest. The prospect of being able to utilise collective intervention is no longer the remote aspiration which it once was. The Security Council's current inclination to invoke Chapter VII explicitly in humanitarian crises - as revealed by its responses to Liberia, Somalia and the former Yugoslavia - suggests that collective security could indeed be developing as the pre-eminent basis for humanitarian intervention. All of these sanctions resolutions reinforce the fact that the Council is closer to realizing its potential for humanitarian intervention than ever before.[76]

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[76] But see pps. 54-55, below, where it is suggested that the sanctions resolutions could be deceptive and should be treated with caution.

Furthermore, it is quite arguable that collective mechanisms are already operational, in view of the United Nations's response to Iraq's invasion of Kuwait.[77] Alternatively, one might contend that the ability to act collectively against what was an illegal aggression in the Iraq case has little bearing on the ability of the international community to reach the requisite consensus on human rights in order to undertake collective humanitarian intervention.[78] It is impossible to guess how the supporters of the conditional approach would assess the current situation - they do not even appear to appreciate that the functioning of collective mechanisms in a particular type of case does not guarantee the success of collective security across the board.

Fortunately, it is not necessary to provide answers to these hard questions now since it will be recalled that the thesis presented here admits a customary right of intervention even if collective mechanisms *are* functioning effectively.[79] Hence, it is submitted that neither of the theoretical objections to a customary right of intervention described in this chapter are fatal. Customary law, like

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[77] But see chapter 6, below, where the present writer will attempt to refute this argument.

[78] See *e.g.* Professor Roberts' suggestion that in cases in which aggression is not so blatant, it might be harder to secure an international military response. Roberts, *supra* note 9 at 24.

[79] See *supra* note 72.

Chapter VII of the UN Charter, has the potential to provide legal justification for a doctrine of humanitarian intervention. Let us therefore turn to examine some of the recent practice of states on humanitarian intervention.

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Chapter 4

Recent Practice: The Need For Reappraisal

The discussion so far has merely suggested that it is theoretically possible for humanitarian intervention to develop as an independent doctrine of customary law as well as as an adjunct to Chapter VII of the UN Charter. But state practice is the key element for actually establishing a rule of customary international law.[80] In this chapter therefore, an examination of three recent instances in which military force has been used for humanitarian

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[80] Although it is often claimed that in order to constitute customary international law, state practice has to be accompanied by separate evidence of *opinio juris* (a subjective belief that the given practice is required by law), it is the present writer's opinion that *opinio juris* can be presumed from the general practice of states, and need not be strictly proved. In the majority of cases it cannot be strictly proved because the practice is not accompanied by an express statement of intention, nor by an explicit acceptance of a state's claim by others. Rather, *opinio juris* is measured from the state practice itself. It is shown by states' ability to convince others that a given practice is custom, and by others' tolerance of that state's conduct. This view is supported by the decision of the ICJ in the *North Sea Continental Shelf Cases:* notwithstanding what the majority of the Court said about the need for *opinio juris* to be strictly proved, the judges in fact decided that case simply by weighing the available state practice. See *North Sea Continental Shelf Cases (Federal Republic of Germany* v. *Denmark and* v. *Netherlands)*, [1969] I.C.J. Rep. 3. This understanding of *opinio juris* was suggested to me by S.J. Toope, Lectures in Public International Law (Presented to the Faculty of Law, McGill University, Fall 1992)[unpublished]. For further comments on the concept of *opinio juris*, see *infra* note 128.

purposes will be made. The purpose of surveying these cases will be to discern any patterns for humanitarian intervention in the practice of states. By my examination of the first two cases - Liberia and Iraq - I aim to show that a multilateral right to humanitarian intervention under customary law is emerging. Moreover, when considered in conjunction with the third case of Somalia, these precedents suggest that notwithstanding its potential, Chapter VII is unlikely to be used to justify humanitarian intervention, save in exceptional circumstances.

(i) Liberia

Civil war in the small West African state of Liberia broke out in 1990, allegedly because of Libyan subversion. It is estimated that 60,000 people died when Charles Taylor, leader of the National Patriotic Front, began an armed revolt against the government of President Doe.[81] By summer the country was reduced to a state of virtual anarchy. There is little doubt that the terrible human suffering caused by the civil war makes Liberia's case qualify as a humanitarian emergency. In the words of one commentator, the crisis "cried out for someone to come in

[81] Riley, *supra* note 47, at 42.

and stop the carnage."[82]

Initially, involvement in the conflict was regional, with a peace-keeping force called ECOMOG being deployed in August 1990 under the auspices of the Economic Community of West African States (ECOWAS). According to a declaration issued by the ECOWAS Heads of State and Government on 9 August 1990, the force's objective was "first and foremost to stop the senseless killing of innocent civilian nationals and foreigners, and to help the Liberian people to restore their democratic institutions. ECOWAS intervention is designed in no way to save one part or punish another."[83] The stated aims of the mission were to supervise a ceasefire and to establish an interim government to hold elections. Although Taylor's rebels certainly opposed this deployment, it is not clear whether Doe's government furnished its consent. If it did, the operation should be regarded as one of traditional, consensual peace-keeping by a regional organization rather than as an example of humanitarian intervention.[84] However, the likelihood that the Liberian government consented to the intervention does not provide a sustainable legal basis for ECOMOG's involvement in light of the fact that the

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[82] B. Rivlin, "Regional Arrangements and the UN System for Collective Security and Conflict Resolution: A New Road Ahead?" (1992) 11(2) International Relations 95 at 102.

[83] UN Doc. S/21485, cited in Greenwood, *supra* note 22 at 37.

[84] *Ibid.* at 37.

government ceased to exist when President Doe was killed by rebels in September 1990. A new interim regime was created by ECOWAS, led by Dr Amos Sawyer.

It is impossible to base ECOMOG's intervention on powers conferred by the UN Charter. The mandate of regional agencies, like that of the Security Council, is defined in terms of maintaining international peace and security.[85] But according to Article 53, "no enforcement action shall be taken...by regional agencies without the authorization of the Security Council." Since the Council gave no such approval to ECOWAS in the summer of 1990, this cannot be characterised as a case of collective humanitarian intervention authorised by the UN. That being so, it is submitted that the intervening states' actions are best interpreted as asserting a multilateral right of humanitarian intervention under customary law.

Generally, the international community has expressed support for ECOMOG's efforts in Liberia, regarding Taylor as the aggressor. The only dissenters have been a few members of ECOWAS, who object to what they allege to be a violation of Article 2(7). In January 1991 and May 1992 the Security Council released statements encouraging ECOWAS' attempts "to promote peace and normalcy in Liberia."[86] The

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[85] See Article 52, UN CHARTER.

[86] UN Docs. S/22133 and S/23886.

Council became more directly involved last year, when ECOWAS, with the consent of the Sawyer government, requested its assistance. The result was Resolution 788,[87] adopted on 19 November 1992, with unanimous approval. This was the Chapter VII resolution mentioned above, which formally acknowledged that the Liberian situation constituted a threat to international peace and security and imposed a mandatory arms embargo on the warring factions.

Resolution 788, while significant in the sense that it reinforces the Security Council's acquiescence in the ECOWAS intervention, has no real implications for collective humanitarian intervention under Chapter VII: first, because the Sawyer government had consented to the Council's actions; and more importantly, because the Council did not authorise forcible measures.

(ii) Iraq

The Security Council's intervention in Iraq in the aftermath of the war in the Persian Gulf is of a very different nature from its involvements in Liberia and Somalia. In the case of Iraq, the need to protect the citizens of the state arose not because a state of anarchy

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[87] See *supra* note 49.

had arisen, but because of the actions of the *de jure* and *de facto* government itself. Following the coalition's victory in the Gulf War, both the Kurds in the north and the Shiite Muslims in the south of Iraq rebelled against the Baghdad government. Saddam Hussein responded brutally, using combat helicopters against the insurgents, and breaching numerous international obligations and human rights agreements to which Iraq was a party.[88] Once the government had re-established control of the rebel regions, hundreds of thousands of Kurdish and Shiite refugees fled to Turkey and Iran.

The United Nations did not rush to the Kurds' assistance. Officially, 'Operation Desert Storm' - the aim of which had been to repel aggression by freeing Kuwait - had been completed on 27 February 1991, and Western leaders initially seemed reluctant to interfere directly with the Iraqi regime. In April however, the Security Council abandoned its 'hands off' approach to the humanitarian crisis with the adoption of Resolution 688. This condemned the repression of the civilian population, and found that its consequences threatened international peace and

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[88] For example, the *Geneva Conventions*, 1949, 75 U.N.T.S. 31, common art. 3 (entered into force 21 October 1950), which governs armed conflict within a state; and the *International Covenant on Civil and Political Rights*, 19 December 1966, Can. T.S. 1976 No. 47, 999 U.N.T.S. 171, 6 I.L.M. 368 (entered into force 23 March 1976). See Greenwood, *supra* note 22 at 35.

security.[89] The Council insisted that Iraq allow immediate access to all those in need of assistance, demanded its cooperation with the Secretary-General, and appealed to member states for contribution for the relief efforts.[90] Since aid agencies usually only operate with the consent of the host government, the Resolution broke new ground by not deferring to the government's resistance to this relief operation.[91] For this reason, some members of the Council were opposed to the resolution: Cuba, Yemen and Zimbabwe voted against it, while China and India abstained.

Resolution 688 did not however, go so far as to authorise forcible intervention in the face of the Iraqi government's opposition. No formal determination was made under Article 39, the resolution was *not* adopted under Chapter VII, and it contained no provision for enforcement either by the UN or by individual states. Instead, the UN appeared to direct its efforts at securing the government's cooperation with relief workers and their protective security guards in some parts of the country.[92] According to one UN official who was involved in the operation, this was the correct approach, for trying to mount a relief programme without any degree of governmental cooperation

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[89] See *supra* note 46.

[90] *Ibid.*

[91] Scheffer, *supra* note 19 at 267.

[92] See *Memorandum of Understanding*, U.N. Doc. S/22513 (1991).

would have been of scarce practical benefit to the Kurds, and would have rendered assistance to the Shiites impossible.[93]

This consensual strategy was not strictly adhered to however. Notwithstanding the Iraqi government's opposition, the United States and the United Kingdom began deploying troops to northern Iraq. By spring of 1991 this deployment was substantial enough to be regarded as a "precedent of forcible humanitarian intervention."[94] Apparently oblivious to Resolution 688's limitations, the US-led allies claimed that it justified their military intervention, 'Operation Provide Comfort,' the object of which was the establishment of 'safe havens' for the Kurds. Admittedly, the operation did share Resolution 688's objective: according to the United Kingdom's Foreign Secretary, Douglas Hurd, the allies only aimed to help bring the refugees off the mountains.[95] He assured that Iraq's territorial integrity would be respected, and that there were no plans for a permanent UN presence nor for an independent Kurdish state.[96] Nevertheless, the operation did prevent Iraq from using military aircraft in the area, and forced the

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[93] Michael Stopford, cited in *The Economist*, (26 Dec. 1992 - 8 Jan. 1993) at 60.

[94] Scheffer, *supra* note 19 at 268.

[95] See HC Debs. Vol. 189, Col. 21; 15 April 1991.

[96] *Ibid.*

withdrawal of its ground forces from Kurdish areas.[97]

Although this intervention was claimed to be consistent with Resolution 688, it has been shown that the resolution does not provide a legal basis for non-consensual, forcible intervention. The problem is not that the allies were interfering in Iraq's internal affairs, since Resolution 688 had specifically recalled Article 2(7), and had thereby internationalized the situation.[98] Rather, the hurdle is Article 2(4) - particularly in view of Iraq's repeated objections to the infringement of its sovereignty.[99] The Security Council appears to have acquiesced in what amounts to a blatant distortion of its authorization of non-forcible intervention (Resolution 688) by the allies, and allowed a multilateral right of military intervention to be attached to it.[100] As one commentator points out, this action implies that humanitarian intervention "might legitimately be pursued without invoking Chapter VII, at least explicitly, without posing a threat to international peace or security, and without

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[97] Greenwood, *supra* note 22 at 36.

[98] The fact that the resolution specifically "recall[s]" Article 2(7) illustrates that the United Nations now endorses a restrictive view of that provision, as was suggested at pp. 12, above. The suffering of the Kurds is clearly not deemed to be "essentially within the domestic jurisdiction" of the Iraqi government.

[99] Greenwood, *supra* note 22 at 36.

[100] Scheffer, *supra* note 19 at 268.

transgressing article 2(7)."[101]

The Council's acquiescence, particularly when considered in the light of certain subsequent events, suggests that the allied operation is best regarded as an assertion of a multilateral right to humanitarian intervention under customary law, even though this claim was not expressly invoked in justification. When the United States, the United Kingdom and France established a no-fly zone in southern Iraq in August 1992 in the face of Iraqi protests and without specific authorization from the Security Council, Foreign Secretary Hurd offered some interesting observations about its legality. He claimed that allied actions did not all require authorization from the UN in order to be lawful, because "international law recognises extreme humanitarian need" and was being complied with.[102] The fact that this measure had been undertaken in response to the van der Stoel report on human rights abuses helps to support the allegation that the object was humanitarian.

Questions about the legal basis for the intervention in Iraq were raised again when the allies carried out an air raid on Iraqi anti-aircraft missiles on 13 January

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[101] Calvocoressi, *supra* note 41 at 12.

[102] Interview with BBC Radio 4 'Today' programme, 19 August 1991, cited in Greenwood, *supra* note 22 at 36.

1993. Statements from the British government continued to assert the legality of humanitarian intervention under customary law, conceding that the United Nations had not authorised these enforcement actions. The UN's Secretary-General, on the other hand, alleged that the legal basis was supplied by Chapter VII. He claimed that Iraq's violation of the cease-fire (Resolution 687) could justify the use of force because that resolution's application under Chapter VII could persist for a prolonged period. Least plausibly, the US government invoked Resolution 688 itself as grounds for its intervention. Unfortunately, this could make the international community reluctant to authorise UN involvement in future cases where there is a consensus that such involvement should be limited to non-forcible measures (since there is no guarantee that the Security Council will not go beyond the authorization and accept the use of armed force, as it did in Iraq).

Such confusion underlines the urgent need for a current reappraisal of the justificatory options for humanitarian intervention. As David Scheffer remarks:

> "Law here matters...The need for...intervention was critical under the circumstances. But the reasons invoked to use military force overseas are important, for they establish precedents, affect the way other governments and the UN react, and deeply influence the duration and magnitude of a nation's commitment."[103]

The confusion also makes it extremely difficult to evaluate

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[103] Scheffer, *supra* note 19 at 268.

the implications of events in Iraq for the doctrine of humanitarian intervention. All that may safely be said is that if the allies *were* in fact asserting some right of humanitarian intervention in Iraq, this was not an example of collective intervention by the Security Council. The case would then be similar to that of Liberia, discussed above, in that the widespread acquiescence of the world community might signify the emergence of a multilateral right of humanitarian intervention under customary law. Before proceeding to my conclusions on these cases' implications - both for customary intervention and for collective intervention under Chapter VII - there is one other important instance of recent practice to consider.

(iii) Somalia

When the overthrow of President Siad Barre's government in 1991 was followed by a severe famine in Somalia, the warring factions disrupted efforts to distribute humanitarian aid to the starving Somaili people in violation of international humanitarian law. It is estimated that 300,000 people have died since November 1991, and that of the total population of 6 million, 1.5 million lives are immediately at risk because of famine, while another 4.5 million Somalis are threatened by severe

malnutrition.[104] Roughly 700,000 refugees have fled the country, which is controlled by various clan-based warlords, to seek shelter in neighbouring states.

The Security Council's response to this humanitarian crisis was unanimously to adopt Resolution 733 in January 1992. This Resolution imposed an arms embargo under Chapter VII of the Charter. As has been shown, this was the same action as that taken both in the cases of Yugoslavia and Liberia.[105] Another parallel between the three cases is the fact that initially all Council involvement was consensual, in the sense that formal declarations of governmental consent were obtained. Although Resolution 733 directed Secretary-General Boutros-Ghali to take the "necessary action" to deliver increased humanitarian assistance to Somalia, and also called for full cooperation from member states, the measures taken under Chapter VII again stopped short of military intervention.

In April 1992, the Council authorised the deployment of UNOSOM: a classic peace-keeping force which was only authorised to use force in self-defence.[106] By November,

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[104] See "Operation Restore Hope - UN-Mandated Force Seeks to Halt Tragedy" (1993) 30(1) UN Chronicle, 13 at 14 [hereinafter "Restore Hope"].

[105] See *supra* note 51.

[106] See the Report of the Secretary-General, *Agenda for Peace* (June 1992), UN Doc. S/24111, 6 and 14-16.

however, the Secretary-General advised the Council that the situation demanded "more forceful measures" to secure the humanitarian operations.[107] Boutros-Ghali explained that the absence of any government in Somalia meant that it would not be possible to secure consent to forcible intervention. The Council's only option would therefore be to make a determination under Article 39, and to authorise the necessary enforcement action as referred to in Chapter VII to restore international peace and security, stating that the non-forcible measures would prove inadequate to meet this crisis.[108]

The Security Council responded with Resolution 794, which was passed unanimously on 3 December 1992.[109] If this Resolution had followed the Secretary-General's suggestion, it would have provided the first ever instance of forcible, non-consensual humanitarian intervention occurring under Chapter VII. The Resolution did invoke Chapter VII explicitly, and authorised a sizable military intervention to police the provision of humanitarian aid, but it was *not* the UN-led operation which the Secretary-General had envisaged.[110] Rather, the Council lent its support to the United States' offer of 29 November to establish a secure

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[107] UN Doc. S/24868.

[108] See Greenwood, *supra* note 22 at 37.

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

[110] See pp. 92, below, for a discussion of this point.

environment for humanitarian relief operations in Somalia as soon as possible. Troops from the US and other countries - known as the Unified Task Force, or UNITAF - would act under American unified command and would remain independent from the UNOSOM forces. The resolution authorised these forces to use "all necessary means" to secure the delivery of humanitarian aid to the starving.[111]

In contrast to all the resolutions discussed above, Resolution 794 does qualify as an authorization of humanitarian intervention by our definition: it allows for enforcement, expressly recognises the alleviation of human suffering to be the purpose of intervening,[112] and is non-consensual. This last feature should however, be interpreted with caution. While the intervention was, strictly speaking, non-consensual, in the course of the Council debate on Resolution 794, several states emphasised that the case was exceptional and attached considerable significance to the fact that Somalia was in the unusual position of being a state without a government.[113] In his assessment the Secretary-General had also stressed the "unique character" of the tragedy, and described it as being of a "deteriorating, complex and extraordinary

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[111] *Supra* note 109, at paragraph 10.

[112] See *supra* note 53.

[113] See Press Release SC/5516, cited in Greenwood, *supra* note 22 at 38.

nature, requiring an immediate and exceptional response."[114]

More generally, the recent practice of states still tends to suggest that intervention by the UN should be consensual, as confirmed by a resolution which the UN General Assembly adopted in December 1991. The resolution stated that one of the guiding principles in the provision of humanitarian assistance[115] should be that:

> "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 consent of the affected country and in principle on the basis of an appeal by the affected country."[116]

One commentator has pointed out that the Resolution's wording - consent "should be provided" rather than "must be provided" - leaves open the possibility that non-consensual intervention might occur, and infers that the UN has not prohibited itself from such intervention altogether.[117]

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[114] See "Restore Hope", *supra* note 104 at 13.

[115] As Christopher Greenwood points out, although not primarily concerned with military intervention, the supporters of this resolution would presumably regard the consent of the host state as doubly important in such a case. Greenwood, *supra* note 22 at 39.

[116] G.A. Res. A/RES/46/182 (1991). The resolution aims to maximise coordination of international humanitarian assistance and to pressure non-consenting governments to allow aid to be distributed to the needy victims of civil war and internal conflicts. This latter objective is to be achieved by an emergency relief coordinator, who has been empowered to approach the relevant government directly in an attempt to encourage its consent to humanitarian intervention. See *ibid.*

[117] Scheffer, *supra* note 19 at 281.

This is especially significant for cases where for all practical purposes the government has ceased to exist, and means that the UN's action in Somalia is not necessarily inconsistent with the General Assembly's position on humanitarian assistance.

More recent developments in Somalia have transformed that situation into what appears to be the first precedent of genuinely collective intervention under Chapter VII. In May of 1993 the United States turned 'Operation Restore Hope' over to the UN as had been originally planned. For the first time ever, the UN Secretary-General took command and control of an enforcement action under Chapter VII.[118]

(iv) Analysis

What then, are the implications of these three cases for collective humanitarian intervention? As intimated above, it is the present writer's opinion that the Security Council's authorization of forcible intervention under Chapter VII in the case of Somalia is highly exceptional, and was only made possible because a state of virtual anarchy existed. As David Scheffer comments (in the context of United Nations intervention), "there has not yet been any ringing endorsement of non-consensual humanitarian

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[118] Roberts, *supra* note 9 at 18.

intervention."[119] This view is buttressed by the fact that the Council stopped short of authorising military intervention in the cases of Liberia and Iraq, even though it has been shown that potentially, in both of those situations Chapter VII could have been extended to authorize collective intervention. Yet 'Operation Restore Hope' was not copied in Liberia. And in Iraq, notwithstanding that there were already military forces taking measures on multilateral initiatives, and notwithstanding the passage of Resolution 688 in the wake of numerous chapter VII resolutions, the United Nations still felt itself unable to intervene without the agreement of the Iraqi authorities.[120]

Juridically perhaps, the fact that these actions were not armed actions is beside the point[121] - the Security Council *could* have gone further. Pragmatically however, it is precisely the point. The fact is that military enforcement is a great deal more extreme than non-forcible measures, and requires a commitment on the part of states that is both massive and rare. The Charter itself recognises the distinction by separating Chapter VII's options into the two independent Articles 41 and 42.[122] The

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[119] Scheffer, *supra* note 19 at 281.

[120] Fifoot, *supra* note 44 at 161.

[121] Rodley, *supra* note 16 at 28.

[122] Calvocoressi, *supra* note 41 at 11.

Council's recent ability to reach agreement on the invocation of Chapter VII for the imposition of sanctions is therefore rather deceptive if it encourages the expectation that it will be similarly able to reach consensus on military enforcement.[123] As Rosalyn Higgins remarks, "resolutions are passed not simply for what is in them, but for what consequences it is thought they will entail."[124]

As far as implications for customary intervention go, it is not possible to draw definitive conclusions from the extensive acceptance of the interventions in Liberia and in Iraq. The legal basis for multilateral intervention by *ad hoc* groups of states is probably not yet any more firmly established than that for unilateral intervention.[125] Nevertheless, it is my tentative submission that these precedents can and should be regarded as assertions of a right to multilateral humanitarian intervention at customary international law. It will be recalled that neither the intervention in Liberia nor that in Iraq can be based on Chapter VII (unless one subscribes to the Secretary-General's view that the latter intervention

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[123] A good example of consensus breaking down over the transition from economic sanctions to military enforcement can be found in the debates on this matter in the 1990-91 Gulf Crisis. Roberts, *supra* note 9 at 20.

[124] R. Higgins, "Internal War and International Law" in III C. Black and R. Falk eds., *supra* note 70, 81 at 116-117.

[125] Damrosch, *supra* note 3 at 221.

should be justified by Resolution 687).[126] Consequently, if these multilateral actions are not justified under customary law, they must be deemed illegal, as must all future interventions which do not qualify as Chapter VII enforcement actions (unless a customary right emerges over time). And we have seen that in practice, Chapter VII seems likely to remain confined to non-forcible measures, except perhaps in cases such as Somalia where the fabric of government has totally collapsed. My point is that although humanitarian intervention as practised by states is bound to be exceptional,[127] the invocation of Chapter VII as justification seems likely to be even more exceptional. Hence, denying a customary right of humanitarian intervention could create a 'credibility gap' between exclusive reliance on Chapter VII for justification and the practice of states.

Of course, not all state conduct should be considered 'practice' for the purpose of establishing custom.[128] It is

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[126] See pp. 46, above.

[127] Evidence of the doctrine's exceptional nature is provided by the fact that humanitarian intervention has *not* occurred in so many contemporary humanitarian emergencies, as for example in Angola and the Sudan. This is due to a host of considerations, including the prohibitive cost of intervention (financially and morally); the difficulty of securing sufficient political will to act; the fact that forcible action should only be taken as a last resort; and the infrequency of there being any reasonable prospect of success in non-consensual situations.

[128] Brownlie, *supra* note 64 at 221. The fictional requirement of *opinio juris*, discussed at *supra* note 80, does have a useful cautionary role to play here, in that it helps to distinguish state conduct which

necessary to look to the reaction the claim provokes, and to assess the weight of any counterclaims. In these terms both cases fare well - not only were the interventions not condemned, but the Security Council expressly encouraged ECOWAS' actions in Liberia, and also acquiesced in the mounting of 'Operation Provide Comfort' in Iraq. As mentioned above, there are two ways to deal with these facts. Either we can accord frank recognition to the legality of these interventions under customary law, or we can consider them illegal *de jure*, yet condonable *de facto*. The preferability of the former lies in its honesty. The latter, by contrast, is a perfect example of the aforementioned 'credibility gap,' and does not augur well for the integrity of international law. As Ronning wondered thirty years ago, in a somewhat different context:

> "whether refusal to compromise on the principle of absolute non-intervention will not threaten the very principle itself. It can of course be honoured in countless declarations and protests, but if it does not square with the hard facts of international politics, that will be the extent of its honour."[129]

It is submitted that the same question is relevant *vis-a-vis* exclusive reliance upon Chapter VII.

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should be considered 'practice' for the purpose of establishing custom from rules of international comity. Because it is based on rhetoric - in the sense that it depends upon states' ability to convince others that practice constitutes customary law - *opinio juris* helps to ensure that 'practice' is serious, not frivolous.

[129] C. Ronning, *Law and Politics in Inter-American Diplomacy*, cited in Lillich, *supra* note 65 at 247.

In sum, these case studies demonstrate that the need for justification of humanitarian intervention under customary law has survived the Security Council's recent willingness to include human rights considerations as an element in its maintenance of international peace and security. It may be objected that there is simply not sufficient evidence to support the claim that state practice evinces a right of humanitarian intervention under customary law. After all, two precedents hardly constitute a consistent and uniform practice. However, as Fernando Teson suggests, the exceptional nature of humanitarian intervention makes it better suited to a claim-oriented approach[130] than to the traditional inductive method of determining custom in international law.[131]

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[130] This approach follows the recommendations of Professor Anthony D'Amato, who explains that,

"[i]f we attempt to study international law as it is viewed by participants in the international arena, we will be inclined to replace absolutinistic theories with the more accurate description of a *process* by which the better of two conflicting claims prevails. In other words, two competing claimants may each have a case that falls short of fulfilling the requirements for a given absolutinistic theory, yet the fact that one claimant has prevailed or will prevail over the other necessitates an abandonment of that "theory" and its replacement by one which takes account of the *relative* superiority of persuasiveness."

See A. D'Amato, *The Concept of Custom in International Law* (Ithaca, N.Y.: Cornell University Press, 1971) at 18.

[131] "The traditional approach to custom...is well-suited to the relatively noncontroversial, everyday exchanges among governments, such as diplomatic or maritime relations. Interventions are exceptional events. Therefore, the decision as to whether 'custom' exists in this regard should take that exceptionality into account and adopt a flexible standard for the analysis of state practice."

Teson, *supra* note 2 at 156.

It is important to stress that the claim presented here for justification of humanitarian intervention under customary law is by no means based solely on the assertion that custom provides the best interpretation of two instances of state practice. I willingly concede that the interpretation of (admittedly scant) state practice which I have suggested demonstrates emerging customary law is not purely inductive nor objective. My characterization of the precedents in question as creating law, rather than as violating law, has been determined by a deliberate value choice.[132] In my opinion, there are several strong policy reasons for regarding customary intervention as legal. These reasons - or values - need to be articulated and will be the subject of the next chapter. Moreover, the same reasons suggest that *even if* Chapter VII could provide justification for all relevant instances of humanitarian intervention (i.e. even if there was no credibility gap), there is still cause to favour intervention under customary law over collective intervention under the UN Charter in all cases where forcible action is deemed necessary to put an end to serious human rights abuses.

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[132] Teson, *supra* note 2 at 245.

Chapter 5

Stretching Chapter VII:

Desirability & Consequences

> "The United Nations is not a merely declaratory body. It is a political body which has by its very nature a role beyond codification and declaration. It has powers of intervention and enforcement specified in its Charter. But there is confusion over the exercise of these powers in certain situations: in particular, situations which have become, contrary to expectation, the most urgent instances of illegal behaviour by states and their officers - a development which has made human rights law as crucial, and the enforcement of human rights law as imperative, as the definition and application of the laws of war."
>
> Peter Calvocoressi.[133]

In chapter 2 I suggested that collective action by the UN Security Council does not provide an ideal justification of humanitarian intervention. In fact, much of my reason for advocating a right of intervention under customary law stems from the fact that custom offers an alternative to Chapter VII - and one which avoids some of the undesirable consequences attached thereto. In this chapter I intend to examine four specific disadvantages which result from justifying intervention under Chapter VII, and to show how a customary doctrine of humanitarian intervention suffers from none of these drawbacks.

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[133] Calvocoressi, *supra* note 41 at 12.

(i) *The "Open-textured"[134] Quality of Chapter VII and Its Lack of Substantive Standards*

Probably the most obvious consequence of pulling human rights inside the Security Council's mandate of maintaining international peace and security is the fact that this approach obliterates the need for any independent doctrine of humanitarian intervention. In a sense, collective humanitarian intervention gets in 'through the back door,' by simply becoming a subset of the Council's wide powers of intervention under Chapter VII. John Humphrey makes this point during his discussion of the hypothetical "extraordinary" case[135] (in which the Council characterises human rights abuses as a threat to the peace), arguing that any such precedent "would hardly establish a right of humanitarian intervention, because the justification for the intervention would be the purported threat to the peace."[136]

The problem with this all-embracing justification is that it provides very little guidance as to when the Security Council ought to intervene in humanitarian emergencies. In the words of one commentator, "although all

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[134] H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon, 1961) 120, cited in W.M. Reisman, "The Constitutional Crisis in the United Nations" (1993) 87 Am.J.Int'l.L. 83 at 93 [hereinafter "Constitutional Crisis"].

[135] See *supra* note 39.

[136] Humphrey, *supra* note 38 at viii.

nations seem to agree on the broad principle that this (Article 39) is an exception to the nonintervention doctrine, there is an interpretive cacophony when it comes to application of the principle to particular cases."[137] For one thing, the Council's mandate - primary responsibility for the maintenance of peace and security - is not defined anywhere in the Charter. The Council is supposed to determine what constitutes a threat to the peace, breach of the peace, or act of aggression in accordance with Article 39. It is not clear whether such a determination is purely procedural or whether it assumes some substantive standard.[138] The provision could be interpreted as merely requiring a formal declaration by the Council that there is a threat to the peace etc, in order for it to proceed legitimately to Articles 40-42. The problem with this interpretation is that a member of the Council, when called upon to decide if a particular act falls within Article 39's ambit, might be motivated by its own political interests and ideology in its interpretation of the key phrases. Moreover, if the determination were only intended to be a formality, it is difficult to see why it is required at all. Hence the preferable view is that any determination under Article 39 has to be made by the

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[137] Ryan, *supra* note 25 at 56, note 5.

[138] Even if there is some substantive standard inherent in Article 39, there does not appear to be any mechanism in the Charter for checking or enforcing this standard - see part (iii), below.

Council in good faith.[139]

As we saw in chapter 2, the sole condition precedent for collective intervention - that there be a threat to international peace and security - has not been any barrier to Security Council action so far. Nevertheless, there is still good reason to feel uneasy about Chapter VII's insistence that humanitarian emergencies affect international affairs in order for intervention to occur. Although the cases of Yugoslavia and Somalia suggest that this is proving to be little more than a formality in practice, it is difficult *in principle* to see why severe human rights abuses that are confined in their impact to the territory of a single state should be immune from intervention. Considering that states are under an obligation to comply with minimum international human rights standards, is not a nation's abuse of its people a legitimate matter of inquiry, and, if necessary, intervention?[140] Furthermore, as Nigel Rodley points out:

"It would be artificial, if not unconscionable, for

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[139] This view is shared by J.F. O'Connor, whose comprehensive study of the nature, scope and function of the principle of good faith in international law can be found in J.F. O'Connor, *Good Faith in International Law* (Aldershot: Dartmouth Publishing Company, 1991). O'Connor defines the principle as "a fundamental principle from which the rule *pacta sunt servanda* and other legal rules distinctively and directly related to honesty, fairness and reasonableness are derived, and the application of these rules is determined at any particular time by the compelling standards of honesty, fairness and reasonableness prevailing in the international communitty at that time." *Ibid.* at 124.

[140] Scheffer, *supra* note 19 at 288.

> the happenstance of geography to determine the international reaction to the fate of a particular population. Yet this would be the case if...transborder effects (are) a condition for action: an island state could probably avoid generating a major refugee flow to other countries. In any event, it would merely put a premium on a military strategy by the state in question aimed at preventing refugees from crossing adjacent frontiers, thus potentially increasing the suffering of the victim population."[141]

It may be countered the Security Council has found its own solution for dealing with Chapter VII's condition. Instead of resorting to "legal fictions"[142] in order to provide the requisite link to international peace and security as it did in the past, it has simply stopped defining international peace and security as a transboundary phenomenon, and has included cases of gross human rights violations without any cross-border effect within its collective security/Chapter VII system. The aforementioned resolution on Somalia - SCR 794 - demonstrates this most clearly.[143]

The Council's redefinition of international peace and security coincides with a more general expansion of the concept of security that has been developing recently. The new, multidimensional 'co-operative security' as it is called is far more wide-ranging than the concept of

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[141] Rodley, *supra* note 16 at 35.

[142] See *supra* note 45.

[143] See *supra* note 53 and accompanying text.

'confrontational security' traditionally relied on by the Council.[144] Detailed discussion of this development lies beyond the scope of this paper. For present purposes it suffices to recall that Chapter VII, as originally conceived in 1945, was to be limited in application to cases of inter-state war. This limitation became increasingly frustrating for the Security Council and its system of collective security (as shown by the resort to legal fictions) in view of the fact that many contemporary international conflicts occur within sovereign borders, rather than across them. The attraction of 'co-operative security' is that it allows the Council to attempt to deal with these modern problems of civil disorder by characterising them as threats to the peace and using its Chapter VII powers. Such characterisation is possible because 'security' is defined to cover the *causes* of insecurity and violent conflict which lie within the internal structures of states.

Despite the fact that it avoids the strict requirement of transboundary effects (to which I am opposed), I nevertheless find the Council's adoption of this expansive

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[144] Co-operative security has been described as covering not only military matters and non-offensive defense, but economy, science and technology, environmental protection, free movement of information and persons, family reunification and cross-border cultural co-operation. See A. Eide, "Democratization and the New International Order: Unfinished Business" in UNESCO Studies on Peace and Conflict. ed., *Peace and Conflict Studies After the Cold War* (New York, 1992) 11 at 16.

view of security to be problematic, at least in the context of humanitarian intervention. To begin with, there is a practical problem of one word having two meanings. The Council's 'security' assumes that the link between respect for human rights and the maintenance of peace is not only usual, but necessary. It is no doubt justifiably difficult for most laymen to accept that *every* human rights problem is describable as a threat to peace and security. Indeed, even certain members of the Security Council initially demonstrated some difficulty with such descriptions. During the debate on the Yugoslavian arms embargo resolution in September 1991, some Council members evinced their reluctance to invoke Chapter VII in what was at that stage essentially a civil war. Although the resolution was eventually passed, China, India, the USSR/Russia and Zimbabwe made it clear that their support was only given because Yugoslavia itself had requested help and consented to the embargo. This is slightly curious in view of Chapter VII's non-consensual nature, but it probably reflects a feeling that there is something "conceptually dubious"[145] about characterising these sorts of circumstances (i.e.civil war plus outflow of refugees) as threats to international peace and security. Such conceptual confusion seems inevitable when the Council's new definition of security is completely different from traditional definitions. 'Co-operative security' is very much a term of

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[145] Rodley, *supra* note 16 at 34.

art: it is so far removed from conventional notions of security that unless and until it is universally adopted (which is unlikely) or two distinct terms evolve, such confusion is likely to continue.

Nevertheless, the Security Council now seems to be supporting the new concept wholeheartedly. At their summit meeting in New York on January 31, 1992, the heads of government of the current Council confirmed the Council's endorsement of the concept of co-operative security . Their declaration stated:

> "The absence of war and military conflicts amongst states does not in itself insure international peace and security. The non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security... The members of the Council reaffirm their commitment to the collective security system of the Charter to deal with threats to peace and to reverse acts of aggression."[146]

For our purposes, there is still a fundamental difficulty with the Council's expansive view of its mandate. According to Chapter VII, as long as Article 39's threshold is met, coercive action can be taken. But if the Council is prepared to characterise virtually every issue as one of security, the 'threat to the peace' threshold is arbitrary[147] and we are left with absolutely no objective

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[146] Security Council Summit Declaration, cited in Scheffer, *supra* note 19 at 282.

[147] The concept of aggression is similarly subjective. In an attempt to overcome the difficulty of deciding whether a particular use of force constitutes aggression, the General Assembly in 1974 adopted

criteria for when intervention will or should occur. This forces us to approach collective intervention *procedurally*, by granting an automatic legitimation function to the Security Council.[148] Such an approach is undesirable because although Chapter VII provides a *legal* basis for Security Council intervention, this does not necessarily mean that all instances of intervention by the Council will be legitimate. In Professor Lori Damrosch's words, multilateral approval "does not automatically provide the touchstone of legitimacy."[149] The legitimacy of a particular intervention depends upon who does what, and why.

In my opinion, Chapter VII's 'easy legalisation' of humanitarian intervention should not be encouraged, for it suppresses the real debate. Like Rosalyn Higgins, I do not believe that it is beyond our capabilities to develop substantive conditions for humanitarian intervention, to be acted upon after a contextual appraisal by the appropriate

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Resolution 3314 on the Definition of Aggression. But this Definition is of very limited assistance, because its eight Articles really represent a compromise between those states of the South which favoured an enumerative approach, and those of the North which favoured a general definition. See U.N.G.A. Res. 3314 (XXIX), December14, 1974, 29 U.N. GAOR, Supp. (No. 31) 142; U.N. Doc. A/9631 (1974); reprinted in 13 I.L.M. 710. Furthermore, the definition as drafted only serves as a guide to the Security Council - it does not purport to fetter the ultimate discretion of the Council in determining whether an act of aggression has been committed in a particular instance. See H.M. Kindred *et al*, eds., *International Law Chiefly as Interpreted and Applied in Canada*, 4th ed.(Emond Montgomery Publications Limited, 1987) at 33.

[148] Higgins, *supra* note 124 at 117.

[149] Damrosch, *supra* note 3 at 216.

decision-maker.[150] A doctrine of intervention under customary law would incorporate such conditions. Admittedly, these would always be open to interpretation, but at least they would provide some degree of guidance, preventing *any* violation of human rights from sufficing to justify intervention. Detailed discussion of these conditions lies beyond the scope of this paper, although it is probably safe to say that the pattern and scale of the violations would have to be massive and systematic to justify intervention. The more difficult issue would be deciding exactly which rights, if any, would justify intervention when breached.[151] Other important aspects of the debate - arguments based on the rights of states, utilitarian calculations and motives for intervention (to mention but a few) - also deserve to be considered, yet are ignored when humanitarian intervention is justified under the Charter.

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[150] Higgins, *supra* note 124 at 117.

[151] This issue received close attention at the recent conference held at Ditchley Park in England. A majority of the participants reached a consensus that a "hard core" of rights were universal and that their violation did justify international action, but disappointingly, no attempt was made to develop a full list of such rights. It was suggested that the violation of certain non-derogable rights such as the right to life or freedom from torture should be regarded as falling into a differrent category from violations, even of a gross and systematic character, of rights like gender equality, and accordingly were more likely to justify intervention. The problem with this suggestion's ranking of rights in a hierarchy lies in the practical difficulty of obtaining any kind of international consensus regarding the criteria by which this might be done. See C. Greenwood, "Ditchley Conference Report No. D93/8" (An essay on a Ditchley Foundations conference held at Ditchley Park, Oxfordshire, England, 11-13 June 1993)[unpublished][hereinafter "Ditchley Report"].

In addition to incorporating conditions for permissable intervention, an independent customary doctrine of humanitarian intervention would also include the traditional international legal principles of necessity and proportionality to govern the actual intervention. The former dictates that nothing short of armed force should suffice to stop the particular human rights violations, while the latter requires the level of force used to be commensurate with the harm it is aimed at redressing.[152] It has been said that these principles are "primordially apposite to the assessment of the legitimacy of any humanitarian intervention."[153] This being so, they ought to apply to all instances of humanitarian intervention, irrespective of the legal justification for the resort to force. But although it is possible that these priciples are built-in to intervention under the Charter,[154] it will be

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[152] These principles of necessity and proportionality originate from the *Caroline Case* of 1837 as the relevant criteria for legitimate self-defense under customary law, and apply by analogy to other uses of armed force under customary law such as humanitarian intervention.

[153] Rodley, *supra* note 16 at 37.

[154] Although the law of self-defense under the Charter (Article 51) makes no mention of these principles, the Court in the *Nicaragua* case accepted that necessity and proportionality were fundamental to *any* exercise of the right of self-defence. Reasoning by analogy once again, this suggests that the principles might also be applicable to force employed under Article 42 of Chapter VII (i.e. collective humantarian intervention), notwithstanding the Charter's silence. The former Secretary-General of the UN, Javier Perez de Cuellar, certainly seemed to assume that proportionality was a component of the use of force under Chapter VII, when, in the context of the Gulf conflict, he stressed the need to have necessary mechanisms for the "Security Council to satisfy itself that the rule of proportionality in the employment of armed force is observed." UN Department of Public Information, Report of the Secretary-General on the Work of the

shown below that the extent to which they are respected in a case of collective intervention relies wholly on the United Nations' discretion.[155] By contrast, if an intervention is to be justified under customary law, we can insist that these criteria be met.

(ii) *Rejecting State-Centrism*

There is a second, more theoretical reason for favouring an independent, customary doctrine of multilateral humanitarian intervention over collective intervention under Chapter VII: only the former entails a solid commitment to human rights. Although contemporary international law purports to recognise individuals as well as states as its subjects, and places states under an obligation to comply with international human rights standards, this has not always been the case. In fact, the Security Council's mandate - to maintain international peace and security - is a classic reflection of the state-centric belief that the *raison d'etre* of international law is to preserve the stability of the political order.

Organization, UN Doc. DPI/1168-40923 (1991), cited in J.G. Gardam, "Proportionality and Force in International Law" (1993) 87 A.J.I.L. 391 at note 3.

[155] See part (iii),below, for discussion of this problem of accountability.

The inclusion of humanitarian intervention within Chapter VII only serves to reinforce this view and to undermine the individual's independent status. As Fernando Teson warns, the enhancement of human dignity becomes "just an accessory to the supreme value of preserving international stability."[156] By contrast, an independent doctrine of intervention under customary law recognises the "intrinsic value"[157] of human rights. Its priority is not security but humanity,[158] as the following passage explains:

> "The validity of humanitarian intervention is not based upon the nation-state-oriented theories of international law...it is based upon...a long tradition of natural law and secular values: the kinship and minimum reciprocal responsibilities of all humanity, the inability of geographical boundaries to stem categorical moral imperatives, and ultimately, the confirmation of the sanctity of human life, without reference to place or transient circumstances."[159]

(iii) *Absence of Checks*

A third difficulty with the Security Council

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[156] Teson, *supra* note 2 at 133.

[157] *Ibid.*

[158] For a discussion of the relative importance of these priorities in the context of the arms race, see I.A. Vlasic, "Raison d'Etat v. Raison de l'Humanite - The United Nations SSOD II and Beyond" (1983) 28 McGill L.J. 456.

[159] "Humanitarian Intervention," *supra* note 63 at 168.

justifying humanitarian intervention under its Chapter VII mandate stems from the fact that the Council appears to be a law unto itself - it is unlikely that there are any effective limits to its authority, at least as far as Chapter VII is concerned. Although there *must* be implicit limits to the Council's powers, since these are delegated by member states, the Charter makes no reference to the policing of such limits.[160] The United Nations' principal judicial organ, the International Court of Justice (ICJ), has no power of initiative.

In a case last year, the ICJ was called upon to consider as a preliminary issue whether or not it had jurisdiction to rule on the legality of a Security Council action.[161] It was not clear whether the ICJ had the right to review Council decisions: at the San Francisco Conference it had been decided that each organ of the United Nations should determine its own competence.[162]

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[160] See *e.g.* Professor Reisman's comment: "Hard substantive and procedural standards for review of chapter VII actions are difficult to pinpoint in the Charter. Their very absence, in a context where so much power is assigned to the Council, is telling." 'Constitutional Crisis,' *supra* note 134 at 93-94.

[161] Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.S.), Request for the Indication of Provisional Measures, General List No. 89 (Order of Apr. 14)[hereinafter *Lockerbie*].

[162] R. Higgins, *The Development of International Law Through the Political Organs of the United Nations* (London: Oxford University Press, 1963) 66 & n.27, cited in T.M. Franck, "The 'Powers of Appreciation': Who is the Ultimate Guardian of UN Legality?" 86 Am. J. Int'l L. 519 at 520.

Nevertheless, Libya requested such a review, alleging that the Council's imposition of mandatory sanctions had been an *ultra vires* act which violated Libyan rights under the Montreal Convention of 1971.[163]

For present purposes, the interesting aspect of the *Lockerbie* case was Libya's assertion that the Council is *not* free to characterize any conflict as a 'threat to the peace.' In effect, Libya was challenging the Council's rather innovative finding that Libya's alleged export of state terrorism fell within Chapter VII. A majority of the ICJ denied Libya's request for interim relief, on the ground that its obligations under the Council's Chapter VII decision prevailed over any other inconsistent treaty-based rights which it might have (in this case rights under the Montreal Convention). On the facts, this was probably the correct conclusion.[164]

What is less satisfactory about the *Lockerbie* case is the Court's formalistic reasoning, most of which revolves around the existence of a Security Council decision *under Chapter VII*.[165] This formalism becomes apparent if one compares the Court's treatment of the original source of

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[163] Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Sept. 23, 1971, 24 UST 564, 974 UNTS 177 [hereinafter Montreal Convention].

[164] "Constitutional Crisis," *supra* note 134 at 87.

[165] *Ibid.* at 90.

this litigation, Resolution 731,[166] with its treatment of Resolution 748,[167] which was passed after Court proceedings had begun. Whereas the former was cast in recommendatory language and was definitely not an explicit Chapter VII decision,[168] the latter invoked Chapter VII expressly. It was the later Resolution which proved to be decisive. The Court ruled that Article 103 meant that obligations under Chapter VII of the Charter (i.e. Resolution 748) 'trumped' Libya's claim to treaty-based Court jurisdiction. According to Professor Michael Reisman, the Court's exclusive reliance on the Chapter VII Resolution suggests that the judges did not believe that Resolution 731, by itself, was capable of prevailing over the Montreal Convention.[169] Professor Reisman actually goes so far as to suggest that the United States and the United Kingdom might have sensed this judicial inclination during the oral argument, and accordingly pressed the Council to issue a second Resolution, expressly under Chapter VII.[170]

It is important to stress that *Lockerbie* did not

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[166] SC Res. 731 (Jan.21, 1992), *reprinted in* 31 ILM (1992) 732.

[167] SC Res. 748 (Mar.31, 1992), *reprinted in* 31 ILM (1992) 750.

[168] As Professor Reisman points out, it is not clear from the terms of Resolution 731 whether it was adopted under Chapter VI, or as a nonbinding recommendation under Article 39 of Chapter VII. "Constitutional Crisis," *supra* note 134 at 87.

[169] *Ibid.* at 87 and 88.

[170] *Ibid.*

decide that the ICJ could *never* order relief if this required finding that any Council decision had been *ultra vires*. In other words, the Court did not shy away from arrogating to itself the right of judicial review - in fact, it implicitly assumed that it had such a right. It follows (assuming Professor Reisman's interpretation is correct), that the Court might have exercised this jurisdiction over the Security Council in order to protect the rights Libya claimed under the Montreal Convention if Resolution 731 had stood alone. However, *Lockerbie* suggests that the ICJ is not prepared to similarly review the Council's Chapter VII actions, at least not if these are explicit. In Reisman's words, the Court's approach "precludes, in blanket fashion, the exercise of judicial jurisdiction *whenever* and *simply because* the Council is in a Chapter VII decision mode."[171]

Lockerbie's implications for our consideration of the consequences of stretching Chapter VII to accommodate humanitarian intervention are significant. The case suggests that if the Council opts to provide forcible humanitarian assistance *by invoking Chapter VII of the*

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[171] *Ibid.* at 90 [emphasis in original]. But see Franck, *supra* note 162, for the view that *Lockerbie* does not imply that decisions under Chapter VII will always prevail over rights arising from other agreements. In view of Professor Reisman's convincing analysis of the case, I find it difficult to agree with Professor Franck's optimistic conclusion that in *Lockerbie* the Court marked its role as "the ultimate arbiter of institutional legitimacy." *Ibid.* at 523.

Charter, its decision to do so will automatically be insulated from review by the ICJ. Although decisions of the ICJ are not, strictly speaking, precedential,[172] it seems probable that *Lockerbie* will be followed. The ICJ is unlikely suddenly to become confident about acting as a supreme organ of judicial review in the future, which would entail assuming a role comparable to that of the Supreme Court of Canada or of the United States. The Court is no doubt aware that at San Francisco the proposal to confer on it the power to determine each organ's competence was rejected. Constitutionally, this makes the appropriateness of judicial review somewhat ambiguous to say the least. In *Lockerbie* the Court was obviously reluctant to confront the Council over a Chapter VII decision. Such reluctance is unlikely to disappear in the future if the Council continues to be by far the more powerful of the two organs.[173]

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[172] Article 59 of the Statute of the ICJ provides that:
'The decision of the Court has no binding force except between the parties and in respect of that particular case.'

[173] Rather conveniently, the ICJ (and Reisman's interpretation) will soon be put to the test. On March 20, 1993 Bosnia filed a case at the World Court seeking provisional measures and challenging the validity of the actions taken by the Security Council to enforce its chapter VII arms embargo against the former Yugoslavia. One of the Bosnian allegations is that SCR 713 should not have been construed as directed against Bosnia because this interfered with Bosnia's right to request and receive arms under Article 51 and in customary international law. Bosnia's case is particularly compelling in view of the widespread public sympathy for its plight. If the ICJ is prepared to act as a check on the Council, it is likely that the confrontation will occur on these facts.

My third reason for opposing the use of Chapter VII in humanitarian cases is therefore that there appears to be no check on the Security Council's allegedly humanitarian enforcement actions. This makes the consequences of abuse in the case of collective humanitarian intervention by the Council under Chapter VII much more serious than in the case of multilateral intervention. If and when *states* fail to respect the constraints of humanitarian intervention, they are guilty of aggression in the same way as are states which do not respect the constraints of self-defense.[174] Hence, abusers can at least be held accountable to the international community after the fact.

By contrast, if the Security Council, acting under Chapter VII, ignores the limits of the doctrine of humanitarian intervention - proportionality, for example - it appears no legal consequences can flow from that failure to comply with international law, for the decisions of the Council under Chapter VII appear to be insulated from review. It should be added that ultimately, any Security Council failures to comply with international law could be sanctioned informally through a loss of prestige and an evaporation of the much-vaunted consensus so recently achieved. Even from the perspective of those who support Security Council action under Chapter VII therefore, the absence of appropriate constitutional checks should cause

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[174] Teson, *supra* note 2 at 102, n.21.

concern.

Of course, the absence of any check on Security Council decisions under Chapter VII only presents a problem in practice if there is reason to be afraid of abuse by the Council. There seems to be a surprising lack of concern - at least among many Western academics - about the Council's unchecked authority when acting under Chapter VII. A view expressed recently asserted that the Security Council "does not act arbitrarily."[175] Notwithstanding the absence of external checks, Council members were said to act within "internal restraints," dictated by practicalities and by international law.[176] Similar faith in the Council is reflected by the fact that many of those who are opposed to humanitarian intervention under customary law find collectively authorised uses of force quite acceptable. Professor Brownlie for example, a leading advocate of the view that Article 2(4) of the Charter prohibits unilateral intervention for the protection of human rights absolutely, has accepted that humanitarian intervention is lawful when there is a threat to the peace.[177] As he points out, the Charter itself clearly displays its faith in collective action (Chapters VII and VIII), in sharp contrast to its

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[175] "Report of Group B." presented to The Ditchley Foundations Conference on Human Rights and External Intervention, 11-13 June, 1993 [unpublished].

[176] *Ibid.*

[177] Brownlie, *supra* note 64 at 226.

suspicion of unilateral action (Articles 2(4) and 2(7)).[178]

Professor Scheffer, on the other hand, eschews such faith, sharing the present writer's opinion that it is both naive and dangerous to assume that Council decisions will never require review by the ICJ. As he remarks:

> "A collective authorization alone should not necessarily override a nation's sovereignty and right to non-interference...Though principles of sovereignty and non-interference in internal affairs have proven unreasonable and unjustifiable with respect to a growing number of internal transgressions, that fact alone does not guarantee that the Security Council may not reach a terribly mistaken judgement about what action to take. Thus, international lawyers need to remain vigilant in their examination of the legitimacy of interventions authorized by collective decision-making bodies, *particularly the Security Council*"[179]

In large part this awareness of the need for scrutiny of Security Council decisions has only arisen since the war in the Persian Gulf. The reasons why that episode cast serious doubts upon the conventional faith in 'collective actions,' will be considered in chapter 6 below.

When assessing the prudence of empowering the Security Council by justifying humanitarian intervention under the Charter, it is crucial to remember that for all its rhetoric of state equality, the UN Charter endorses a "highly differentiated" international society,[180] reflected

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[178] *Ibid.* at 219.

[179] Scheffer, *supra* note 19 at 290 [emphasis added].

[180] "Constitutional Crisis," *supra* note 134 at 83.

by the very existence of the Council, its permanent members, and their vetoes. The Council may be able to act as a universal policeman, but it is not a universal institution with an equitable system of membership and representation. It is simply not true that Council approval ensures full consideration of "all relevant community policies" and would ensure that humanitarian intervention was only undertaken "in cases where the entire world community" condemns the human rights violations, as Professor Damrosch has suggested.[181] If that really was the case, the absence of any check on Chapter VII decisions might be more tolerable. As things stand however, the Security Council's structure is a valid cause for concern, and one which will be dealt with briefly in the next section.

(iv) The Possibility of Veto and the Wider Problem of Legitimacy

> "There is no real peace and security ... if these are achieved only at the sacrifice of justice."[182]

The final consequence of justifying humanitarian

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[181] Damrosch, *supra* note 3 at 216.

[182] L.M. Goodrich & E. Hambro, eds., *Charter of the United Nations*, cited in K.L. Sellen, "The United Nations Security Council Veto in the New World Order" (1992) 138 Military L.R. 187 at 219.

intervention under the Charter which I wish to mention is the fact that intervention under Chapter VII is capable of being frustrated by any one of the five veto-wielding powers, namely the United States, Great Britain, France, Russia and China.[183] Indisputably, the existence and indeed the exercise of the veto are lawful. But the veto's current status needs to be considered in the context of the wider debate about the Security Council's legitimacy.[184] It is probably fair to say that this debate has become *the* central controversy of contemporary international law,[185] with increasing demands being made from North and South alike for reform of the Council's permanent membership and its decision-making procedures as well as for the elimination of the veto.[186] In essence, these critics object to the fact that the shape of the 'New World Order'

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[183] Article 27(3) of the U.N. CHARTER states:
"Decisions of the Security Council on all other matters (meaning nonprocedural issues) shall be made by an affirmative vote of nine members including the concurring votes of all the permanent members."

[184] The following definition of "legitimacy" as it applies to the rules applicable among states has been offered by Thomas Franck:
"Legitimacy is a property of a rule or rule-making institution which itself exerts a pull toward compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process."
T.M. Franck, *The Power of Legitimacy Among Nations*, cited in B.H. Weston, "Security Council Resolution 678 and Persian Gulf Decision Making: Precarious Legitimacy" (1991) 85 A.J.I.L. 516.

[185] For a wealth of recent views and doubts about the Council's legitimacy see (1993) 87 Proc. Am. Soc. Int'l. L.

[186] See especially Sellen, *supra* note 182.

still reflects the balance of world power as it was in 1945, at a time when the majority in the UN was Western, no one was forecasting decolonization, and the Council dealt solely with cases of international aggression.

For present purposes it is not necessary to establish that the Council's structure and the veto do *in fact* affect the legitimacy of Council decisions. That is a very complex question which lies beyond the scope of this thesis. Whatever one's view, it is virtually impossible to deny that the structure of the Council has become an extremely sensitive and problematic issue in the face of descriptions of the five permanent members as a "threatening directorate",[187] and "a club of ex-imperialists",[188] who are accused of possessing vetoes which constitute "an outright bully-power anachronism from another age."[189] It is fairly ironic that at a time when the Council should arguably be concentrating on ways to enhance its image, it is instead stretching its Chapter VII mandate by embracing a wide concept of security. In my opinion, widening the potential ambit of the veto power to cover humanitarian situations is unwise - at least until the Council's legitimacy becomes a

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[187] M.A. Kessler & T.G. Weiss, "The United Nations and Third World Security in the 1990s" in M.A. Kessler & T.G. Weiss, eds., *Third World Security in the Post-Cold War Era* (Boulder: Lynne Rienner Publishers, 1991) 105 at 111.

[188] "Mr Human Rights", *The Economist*, *supra* note 93 at 60.

[189] E.B. Childers, "Gulf Crisis Lessons for the United Nations" (1992) 23(2) Bulletin of Peace Proposals 129 at 134.

less sensitive issue (through structural reform or otherwise). It would only increase controversy and resentment between the 'Big Five' and the rest of the United Nations membership.

However strong the case for eliminating the veto may be, it unfortunately requires the support of all five permanent members to succeed.[190] Because self-interest persists, there is no guarantee that the 'Big Five' will be persuaded to give up or even to share their outmoded and inequitable positions of privilege in the near future. Although the veto has not been used since 1990,[191] it was only because of an abstention rather than a veto by China that Resolution 688 succeeded in its passage. And notwithstanding recent cooperation between the permanent members, "[t]here is no reason to suppose that the present period of global harmony will continue indefinitely; when the harmony ceases, the political machinery, unchanged, will prove to be just as inadequate as during the Cold War."[192] Hence, a possible consequence of opting to justify humanitarian intervention under the Charter is that victims of future humanitarian emergencies will be denied outside

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[190] Article 108, U.N. CHARTER.

[191] The United States was the last of the 'Big Five' to use its veto, which it did on 31 May 1990 in order to defeat a Resolution on the Israeli-occupied territories.

[192] T.M. Franck, "United Nations Based Prospects for a New Global Order" 22 Int'l. L.& Pol. 601, cited in Sellen, *supra* note 182 at 190.

intervention (because of a veto), in situations where intervention under customary law would have gone ahead.

It may be countered that although no official vetoes would be attached to a doctrine of humanitarian intervention under customary law, in practice multilateral groups of states would be highly unlikely to intervene in those states which currently possess the veto. No doubt there is some truth in this assertion. Nevertheless, it does not follow that on principle, and as a matter of law, we should support a justificatory option which precludes all possibility of humanitarian intervention in any of the 'Big Five.' It is submitted therefore that a final reason for favouring a customary right of intervention lies in its potentially universal applicability.

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Chapter 6

Conclusions

Events of the post-Cold War era call for a re-examination of the legal basis of humanitarian intervention. This thesis has attempted to draw attention to the significance of the decision to justify humanitarian intervention under treaty or customary international law, and to some of the implications of that decision. As earlier chapters indicate, the contemporary propensity for non-unilateral intervention suggests that the most appropriate justificatory options are Chapter VII of the UN Charter and customary international law, both of which appear to be legally available.

These two options are by no means interchangeable. In practice, Chapter VII seems unlikely to be used to authorise forcible measures, save in the most exceptional circumstances. Admittedly, non-consensual armed intervention is not a common occurrence, and rightly so, since in many cases such action would be useless, if not harmful. Nevertheless, rarity is no excuse for ignoring the fact that "a modern doctrine of humanitarian intervention is emerging from the transforming events of the immediate

post-Cold War era."[193] Today's increased concern about human rights, coupled with growing awareness of cases of gross and systematic abuse, almost guarantee that in certain humanitarian crises of the future, public pressure will generate the requisite political will to act.[194] In such cases, it is to be hoped that serious consideration will be given to the possibility of justifying multilateral humanitarian intervention under customary international law.

As discussed above, there are two recent instances of mulitilateral humanitarian intervention (Liberia and Iraq) which cannot possibly be justified under the Charter, and which underline the need for recognition of a customary right of intervention. Such recognition is desirable, not only to make sense of state practice, but also for the important policy reasons outlined in chapter 5. It is submitted that these reasons cast doubt on the wisdom of expanding Chapter VII of the Charter so as to encompass humanitarian problems. They suggest that legality, while essential, should not necessarily be a suffucient condition for justifiable intervention, since the issue of justification seems to go beyond questions of law to embrace perceptions of moral and political legitimacy as

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[193] Scheffer, *supra* note 19 at 259.

[194] In Scheffer's words, the post-Cold War world has introduced "a new standard of intolerance for human misery and human atrocities." Scheffer, *ibid.*

well.[195] In terms of legitimacy, advantages of a customary law justification over Chapter VII include its articulation of substantive conditions for intervention, its commitment to human rights, its facility to check abuses and its potentially universal applicability (not being subject to veto by any single state).

In addition, there are several practical grounds for preferring the justification of humanitarian intervention at custom to its justification in treaty law. To begin with, it is arguably in the Security Council's *own* interests, and consequently in the interests of the entire United Nations, to reserve forcible action under Chapter VII for classic inter-state conflicts. As we have seen, the Council's endorsement of co-operative security has begun to look like "a recipe for infinite obligation,"[196] extending its mandate to characterise virtually every issue as one of security. This fosters the expectation that the Council is responsible for all these issues, and that it ought to be able to deal with them effectively. Failure to do so is likely to lead to frustration and disillusion, which could result in massive popular disaffection and widespread enforcement difficulties for the UN. One way of reducing these unreasonable expectations is to restrict collective

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[195] This point was widely accepted at the Ditchley Foundation's conference on humanitarian intervention. See "Ditchley Report", *supra* note 151 at 3.

[196] Roberts, *supra* note 9, at 6.

enforcement to cases of confrontational security, thereby limiting the range of disputes in which the Council is expected to intervene with force.

Whereas blatant examples of inter-state aggression (such as Iraq's invasion of Kuwait) are rare and relatively easy to identify, intra-state human rights abuses are not so uncommon and are far more controversial. Bearing in mind the high cost of humanitarian intervention - financially, politically and morally - we must beware of treating what has been done by the Council in one case as a precedent for what might be done in a later case, because willingness to act in a particular situation does not indicate willingness to act in a similar one.[197] It is simply unrealistic to imagine that the Council can afford to employ force "consistently" against the many regimes which are possible candidates for intervention. In fact, the application of collective security to such regimes is bound to be "selective and uneven;"[198] "a form of action that is mobilized occasionally - and imperfectly."[199] This could be extremely damaging for the UN, given the fact that

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[197] Fifoot, *supra* note 44, at 134.

[198] O. Schachter, "United Nations Law in the Gulf Conflict" (1991) 85 A.J.I.L. 452 at 472. This view is shared by Sir Anthony Parsons, who predicts that the plight of people in countries which are remote from great power interests such as the Sudan and Burma will be less likely to provoke collective enforcement than their counterparts in more sensitive locations such as the Middle East and the Caribbean. See Parsons, *supra* note 17, at 223.

[199] Roberts, *supra* note 9, at 27.

consistency and coherence are central to the effectiveness of a collective security system and to the maintenance of broad public support for such a system.[200] By contrast, if intervention is justified under customary law rather than under the Charter, the inevitably patchy nature of humanitarian intervention is less likely to come in for criticism, leaving the United Nations' credibility intact.

It is important to emphasise that this proposal does not amount to advocacy of complete abdication of responsibility concerning human rights by the Council. Rather, it is an attempt to be realistic about the Security Council's ability to deal with these inherently difficult issues and its capacity to manage armed enforcement operations. In recent years, there has been growing enthusiasm for more Security Council involvement in human rights-related disputes.[201] The Council's attraction no doubt stems from the fact that, compared with other international human rights organisations, it possesses unmatched clout in terms of political weight, prompt decision-making and potential operational force. A fact which many enthusiasts do not appreciate fully however, is

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[200] See Hurrell, *supra* note 35 at 43.

[201] See *e.g.* T. van Boven, "The Security Council: The New Frontier" (1992) 48 Int'l Commission of Jurists Rev. 12, and B.G. Ramcharan, "The Security Council: Maturing of International Protection of Human Rights" (1992) 48 Int'l Commission of Jurists Rev. 24.

that UN resources are already overstretched.[202] If this chronic lack of financial support continues, it will become increasingly difficult for the Council even to attempt to undertake collective humanitarian intervention.[203] As Kessler and Weiss warn:

> "By hastily taking on commitments without adjusting internally to the post-Cold War world, the UN runs the risk of being overextended and underprepared. Unless reform is undertaken within the next decade, the UN is likely to find itself overburdened, underfinanced, and ill-equipped to fulfil its mandate."[204]

It is submitted that justifying humanitarian intervention under customary law is a useful means of alleviating the Security Council's problem of overload. As mentioned above, this is not to suggest that the Council should be excluded from all involvement in humanitarian crises. On the contrary, the Council is an indispensible organ for authoritative ascertainment of facts and community opinion. The vital part which the Council played in the interventions in Liberia and Iraq - which arguably

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[202] See Roberts, *supra* note 9 at 6-8.

[203] Prohibitive costs have already prevented the UN from undertaking collective enforcement. The initial phases of 'Operation Restore Hope' in Somalia were only placed under US control because the UN could not afford to act independently, as the following letter, written by Boutros-Ghali, explains:

> "The Secretariat, already overstretched in managing greatly enlarged peace-keeping commitments, does not at present have the capacity to command and control an enforcement action of the size and urgency required by the present crisis in Somalia."

Letter from the Secretary-General, UN Doc. S/24868, 30 November 1992, cited in Roberts, *ibid.* at 6.

[204] Kessler & Weiss, *supra* note 187 at 114.

represent the emergence of a multilateral right to intervention under customary law - deserves recognition. Its support and acquiescence in those cases provide valuable evidence of state practice; bolstering both the claim and the response to the existence of a customary right of intervention. It is imperative that the Council maintain this role, for its condemnation or support of states' decisions to intervene is likely to be a decisive factor in the determination of whether an intervention creates or violates international law.

As well as being in the Council's own interests, a customary doctrine of multilateral humanitarian intervention corresponds with military realities. Every major enforcement action which has been authorised by the UN under Chapter VII, has been under United States, not United Nations, command: in Korea in 1950-53, Iraq in 1990-91 and Somalia in 1992-93.[205] Hence, *even when* Chapter VII has been the legal basis for military action, no truly collective operations have ever resulted (with the exception of the last phase of 'Operation Restore Hope' in Somalia, which was only transferred to the UN when the most forceful aspects of the military exercise were thought to have been completed).[206] Instead, these uses of force have

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[205] Roberts, *supra* note 9, at 15.

[206] See p. 53, below.

been 'contracted out'[207] by the UN, amounting in fact to multilateral operations by *ad hoc* groups of states, with the added feature of Security Council authorization.

The UN's actions in Iraq illustrate this point best, since they were recent but are not ongoing. Although it was not a case of humanitarian intervention, the Gulf War provides a rare example of Chapter VII being used to authorise forcible collective action, in the same way as it could be used to authorise humanitarian intervention. Does it provide a solid example of a collective use of force by the Security Council in the "common interest?" Or does it "set a dubious precedent, both for the United Nations as it stands today and the New World Order that is claimed for tomorrow?"[208]

In its attempt to settle the conflict in the Gulf, the Security Council invoked Chapter VII first to impose mandatory economic sanctions on Iraq, and then to authorise the use of force for the first time since its action in Korea in 1950. Its resolutions were given unprecedented support, enjoying near unanimity. There was a great deal of talk about collective security having worked at last, and there has been a surge of interest in the Council and its potential ever since. It is undeniable that the Council

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[207] "Ditchley Report," *supra* note 151, at 4.

[208] Weston, *supra* note 184 at 517.

acted effectively to suppress Saddam Hussein's aggression. However, its decision-making processes suggest that the Gulf War was by no means a paradigm of collective action dedicated to the restoration of international peace and security.

The enforcement action was not carried out in the way envisaged by Chapter VII of the Charter. To begin with, the campaign to liberate Kuwait was not executed in accordance with Articles 43-47, which call for UN forces to be put at the Council's disposal for direction by its Military Staff Committee. These forces and the Committee are non-existent, and have been since 1945. The Charter does not furnish the Council with the legal right to call up member states' armies. The national forces which undertook operation 'Desert Storm' were voluntarily deployed under Article 48, which allows such action to be taken even though only certain states are participating. Since military enforcement by the UN requires a UN decision to be made, it would seem logical that the UN should organise and supervise the operation. But under the command of General Schwartzkopf, it was the United States which led the military coalition in the Gulf, which did not include any Soviet/Russian contingent. Furthermore, the United Nations did not even play a token part in decision-making. Once the resolution authorising the use of force had been passed,[209]

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[209] S.C. Res. 678, Nov. 29, 1990 (1990) 29 I.L.M. 1565.

the Security Council was actually barred from making any further decisions on the conflict until the deadline for forcible action.

In retrospect then, it appears that it was more the United States than the United Nations which was making the decisions about the operation in the Gulf.[210] This raises a crucial question: to what extent is effective collective enforcement a function of the willingness of a single major state to deploy its military power?[211] The truth is that without the US's support, the Security Council could never have mounted an operation like 'Desert Storm,' and the Security Council knows this. This highlights the fact that Chapter VII does not overcome what has been referred to as 'the dilemma of preponderance.'[212] Far from effectively harnessing preponderant power in the interests of the collectivity, the dominant force is given scope potentially to abuse its power and to use the UN authority as a cloak

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[210] This sad fact is buttressed by the debate on whether the intervention really was an example of Security Council enforcement under Chapter VII rather than an exercise of collective self-defense. The United States has been described as being in a "no-lose" legal position: if the Council had refused to authorise forcible intervention the US and its allies would have gone ahead nevertheless, and invoked their inherent right to collective self-defense. The Council would have been powerless in such a situation because to prohibit self-defense requires support of all five permanent members. See D.J. Scheffer, "Commentary on Collective Security" in L.F. Damrosch & D.J. Scheffer, eds., *supra* note 3, 101 at 102.

[211] Hurrell, *supra* note 35 at 45.

[212] *Ibid.*

for its own interests.[213]

There is therefore a very real danger that if and when the US considers unilateral military intervention in a state in the future, (as it did in Grenada (1983) and in Panama (1989)), it might manage to act under UN auspices in another 'collective' Chapter VII enforcement. This danger underlines the need for Security Council accountability, highlighting how unsatisfactory the current absence of checks on its Chapter VII decisions is. Given that our world is increasingly unipolar (militarily at least), the chances of the US successfully 'hijacking'[214] the UN are far from remote. Having said that, it is only fair to point out that the more recent authorization of force in Somalia did in fact strictly limit the level of force which the US was entitled to use, and left the Security Council with a far greater degree of political control than it possessed during the Kuwaiti conflict.[215]

The truth is that the method of organising collective enforcement actions envisaged by the Charter does not work in practice. Activation of these mechanisms is easier said than done, in view of states' understandable reluctance to relinqush control of their troops to an international body

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[213] *Ibid.*

[214] Childers, *supra* note 189 at 132.

[215] Greenwood, *supra* note 22, at 38.

which could risk their lives in remote operations which might be controversial and mismanaged.[216] Although the UN Secretary-General, in his 1992 *Agenda for Peace* report,[217] called on member states to make armed forces permanently available to the Security Council as specified in Article 43 of the Charter, lack of financial and political support makes the creation of such a standing UN force appear improbable. And at a time when many bigger states are seeking to make substantial cuts in their defence budgets, even the more practical idea of earmarking certain national forces for stand-by use by the UN is not guaranteed to be successful.[218]

Whatever happens, it seems likely that 'collective' enforcement actions will continue to be undertaken multilaterally, by national forces authorized by the UN.[219]

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[216] See Roberts, *supra* note 9, at 16.

[217] See *supra* note 106.

[218] "Ditchley Report", *supra* note 151, at 4.

[219] Contrary to the conventional wisdom which tends to assume that the 'ideal' enforcement action would be organized precisely in accord with the UN Charter, Professor Adam Roberts believes that there are important advantages to the type of multilateral arrangement which reflects current UN practice:

> "First, it reflects the reality that not all states feel equally involved in every enforcement action. Moreover, military actions require extremely close coordination between intelligence-gathering and operations, a smoothly functioning decision-making machine and forces with some experience of wrking together to perform dangerous and complex tasks. These things are far more likely to be acieved thorugh existing national armed forces, alliances and military relationships, than they are within the structure of a UN command. As habits of cooperation between armed forces develop, and as the United Nations itself grows, the scope

This being so, it is submitted that the customary right of multilateral intervention advanced in this thesis provides an ideal legal basis for such collective actions, in cases where the object of the intervention is to protect human rights. The upshot of all this is that humanitarian intervention, whether multilateral or collective, *does not need to be justified under the Charter at all*, once a customary doctrine of intervention is accepted. Justifying collective as well as mulitilateral intervention under customary law would not only avoid all of the undesirable consequences attached to justification under the Charter; it would also allow Chapter VII's system of collective security to be reserved for cases of inter-state aggression, as suggested above.

These practical considerations can only reinforce the assertion that customary international law provides the best justification of humanitarian intervention in the contemporary world. In my opinion, the time is ripe for international lawyers to quit the endless debate on whether a customary right of intervention actually exists, to accord recognition to the multilateral right which has emerged, and to shift their valuable attention and resources to more fruitful discussions on how this evolving right should be developed, refined and controlled.

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for action under direct UN command may increase, but this will inevitably be a slow process."
Roberts, *supra* note 9, at 15-16.

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