American Bar Association

National Security Law Report

Volume 14, Number 12 STANDING COMMITTEE ON LAW AND NATIONAL SECURITY December 1992

Conference Remarks

Humanitarian Intervention: The Case for Somalia

by Richard Schifter

The following is a condensed version of remarks delivered to the Second Annual Morry Leibman Conference Reviewing the Field of National Security Law in Washington, D.C., on October 30, 1992.

In the course of the year 1991 it became increasingly clear to anyone following developments in Africa that Somalia was heading for a major humanitarian crisis. The Government of Siad Barre had been overthrown in January. No single authority was in control as armed bands fought pitched battles in Mogadishu, the country's capital, and terrorized the countryside. We were not even dealing with an ethnic or religious dispute. Somalis are of the same ethnic stock, speak the same language, and are Sunni Moslems. And yet, after twenty years of dictatorial rule by Siad Barre, the country could not get its act together to install a successor government which would be generally recognized.

Roaming bands of armed thugs totally disrupted the production and distribution of food throughout southern and central Somalia. By the end of 1991 we could see the danger of mass starvation in Somalia in the foreseeable future.

There were those in the U.S. Government who saw the problem coming and urged the organization of a substantial relief effort. We had to recognize, however, that the armed bands which were crisscrossing Somalia made the delivery of food to the hungry people hazardous. To assure that those in need would be reached it was necessary to provide an armed guard. The logical place to which to turn was the United Nations Security Council. But that proved quite difficult. How many matters could be taken to the Council? There were those who spoke of triage, suggesting that there was no room for Somalia on the short list of critical items which would have to be put on the Security Council agenda.

Continued on page 2

Inside

Holbrooke Urges New Organization of White House At Breakfast Meeting

by Jackson R. Sharman III

Attendees at the Standing Committee's breakfast on December 9, 1992 heard Richard C. Holbrooke outline a new machinery for the executive branch that has the potential to accomplish some of the successes on the domestic and economic fronts that the National Security Council system has accomplished over the last forty-five years. Mr. Holbrooke, managing director of Lehman Brothers and former Assistant Secretary of State for East Asian and Pacific Affairs, was chair of the Bipartisan Commission on Government Renewal sponsored by the Carnegie Endowment for International Peace and the Institute for International Economics. Mr. Holbrooke emphasized that the Commission's *Memorandum to the President-Elect* was written well before the election, although the election of a new President, in Mr. Holbrooke's view, allows greater room for influence.

Mr. Holbrooke said the Commission recommends that the President adopt a council system for domestic and economic affairs much like the current executive branch national security system. Mr. Holbrooke pointed out that under President Nixon, the Secretary of the Treasury was the *de facto* coordinator of the economic machinery of government, whereas under President Ford there was an Assistant to the

Continued on page 5

Humanitarian Intervention. . .

Continued from page 1

The case of Somalia presents the case of humanitarian intervention in its purest form: a starving population, the total absence of an organized national government, armed bands preventing food delivery. There is no government in Somalia which is in a position to extend an invitation to outside parties for a relief effort. But the absence of a recognized government also means that humanitarian intervention by outsiders is not likely to be opposed by UN members whose principal concern is not to create a precedent which might ultimately be used against them.

The case of Somalia is thus an ideal case for establishing the principle of humanitarian intervention by the United Nations. Article 1, Paragraph 3 of the Charter lists as a purpose of the United Nations the achievement "of international co-operation in solving international problems of an economic, social, cultural, or humanitarian character." Which problem of a humanitarian character can be deemed more serious than mass starvation? Is it not obvious that the only solution to this problem is to provide food? And if armed marauders interfere with the delivery of food, and the result of such interference is that the affected population starves to death, is this less of a "breach of the peace" than would be an air raid? Is there, therefore, not a basis for the Security Council to take jurisdiction over the matter under Article 39 of the Charter?

I believe that the answer to these questions is "yes." The Security Council has, to date, without serious opposition and probably without careful legal analysis, arranged for military detachments to be sent to Somalia in the context of the relief effort. For many victims this action came too late. Even today it is for many others too late. The forces which have been dispatched so far are too small to be able to tell the local war lords to stand back and allow the distribution of food to go forward.

Troops which would be sent to Somalia and deployed without the consent of the local warlords would be at risk. It would be costly to send an expeditionary force to Somalia large enough to give full and effective protection to the relief effort. But given the circumstances posed by the situation in Somalia, the risks are fewer and the costs are lower than they might be in other settings. There is no holy war in which the opposing forces in Somalia would be engaged, nor are we dealing with a political struggle. If the term "police action" fits any international use of force, this most surely is a case for it *par excellence*.

If the "New World Order" is to be more than an empty phrase, the challenge of Somalia must be met. The questions to be answered are: (1) whether the world community is willing to make sufficient military forces available to assure that food destined for the starving people of Somalia actually gets through, and (2) whether it is prepared to foot the bill for both the needed food and the cost of providing the required military protection. If the answer to either or both of these questions is "no" in the case of Somalia, we might as well shelve the idea of both humanitarian intervention and a new world order; for if we can't get the job done under present conditions in Somalia, we can't get it done anywhere, anytime.

The purely legal considerations for intervention which apply in Somalia will have equal applicability in Sudan. The political hurdles, on the other hand, are far more formidable in Sudan. The Government of a member of the United Nations would be told to change its policy and instruct its military forces to stop interfering with the delivery of food to a population group which the government wants to see starved. Will the Security Council muster the necessary votes? In particular, will China refrain from casting a veto?

Sudan will argue that the fate of its own citizens within its country is its own affair and that the United Nations is foreclosed from interfering in the internal affairs of any country. The simple answer is that Article 2, Section 7 of the Charter, which does guard against UN intervention "in matters which are essentially within the domestic jurisdiction of any state," also provides that "this principle shall not prejudice the application of enforcement measures under Chapter VII." Article 39, to which I referred earlier, is a part of Chapter VII. It follows that the Security Council has the legal authority to proceed in a situation such as that posed by Sudan.

As we focus on the idea of humanitarian intervention under United Nations auspices, let us keep in

Continued on page 5

The *National Security Law Report*, which is published monthly, contains articles concerning the law relating to the security of the Nation, and associated topics. The *National Security Law Report* is sponsored by the Standing Committee on Law and National Security. The views expressed in this publication are not necessarily those of the Standing Committee or the American Bar Association. Comments, or original articles, should be directed to Robert F. Turner, Center for National Security Law, School of Law, University of Virginia, Charlottesville, VA 22903, Tel. 804 924-4080, Fax 804 924-7362.

Point of View

Cities and States Refuse to Move Away From Anti-South Africa Action

by Peter J. Spiro

Almost a year and a half after the repeal of federal sanctions restricting U.S. corporate ties to South Africa, there is little sign of easing among the more than 150 state and local governments that have adopted their own anti-South Africa measures over the last decade. Indeed, even as the transition to majority rule in South Africa has become a near-term inevitability, some non-federal authorities have actually moved towards more stringent constraints on dealings with companies doing business in South Africa.

The end-game of the sanctions movement has only served to highlight the dangers of non-federal interference in the foreign policy-making process. Cities and states in effect continue to dictate the terms of commercial engagement in South Africa, as they have for most of the past decade. Such parochial interference has been undertaken without the benefit of the expertise and resources available only to federal decision makers, and without regard to the national and international repercussions of continued sanctions. Whatever the substantive merits of sanctions policies, action at the state and local level has plainly deprived Washington of the flexibility, authority, and unity necessary for an effective foreign policy.

State and local action, which saw its advent in the wake of the Soweto uprising of 1976 and reached a critical mass in the mid 1980s, has most prominently taken the form of divestment (under which pension funds have not been invested in companies doing business in South Africa) and selective contracting measures (under which local governmental procurement from such firms is prohibited). According to a recent comprehensive study by the Investor Responsibility Research Center, *A Guide to State and Local Laws on South Africa*, a total of 27 states, 105 cities (including all of the nation's eight most populous), and 32 countries and regional authorities now maintain some form of South Africa related restrictions. Hartford, Baltimore, and Kansas City have added new restrictions during 1992.

These measures have been devastatingly effective. Faced with the choice between huge state and municipal contracts on the one hand, and relatively small South Africa operations on the other, most corporations opted for withdrawal. Almost none have reversed course, despite the lifting of sanctions under the federal Comprehensive Anti-Apartheid Act of July, 1991; only two major U.S. corporations (Lotus and WordPerfect) have since opened offices in South Africa. At a time when foreign investment could alleviate economic distress contributing to continuing instability in South Africa, and as firms from other nations reestablish what will no doubt emerge as profitable bridgeheads to the new South Africa, American companies are left with their hands tied by an unmanageable variety of non-federal governments that show no sign of retreat from entrenched positions adopted under circumstances since overtaken by events on the ground in South Africa.

Policy arguments aside, local anti-South Africa measures are also of doubtful constitutional validity as against the foreign commerce clause and the federal government's exclusive powers in the sphere of foreign affairs. As John Marshall concluded in *Holmes* v. *Jennison* (39 U.S. 540 [1840]), which invalidated an early nineteenth century extradition arrangement between Canada and Vermont, "It was one of the main objects of the Constitution to make us, so far as regarded our foreign relations, one people, and one nation." More recently, in the 1968 decision in *Zschernig* v. *Miller* (289 U.S. 429), the Court found constitutionally intolerable any state or local actions having more than "some incidental or indirect effect" on foreign relations.

Continued on page 4

Articles and Reviews Solicited

The *National Security Law Report* welcomes contributions in the form of original short articles, case summaries, book reviews, and the like from members of the national security law community. Articles and reviews should not normally exceed 750-words in length and should address topics of relevance to the field of national security law. Shorter contributions for inclusion in the *National Security Agenda* or *For Your Information* columns, such as information about important congressional hearings, newly enacted laws, or upcoming conferences, are also solicited. The newsletter is now printed directly from computer disk (desktop publishing), so contributions accompanied by a disk are especially appreciated.

Individuals considering submitting an article or review are invited to explore their ideas with the editor (Bob Turner, 804 924-4080) or associate editor (Jack Sharman, 202 662-5192) in advance. Acceptance for publication will be subject to space limitations and perceived interest to the readership.

— The Editors

Special Counsel's Report

"October Surprise" Charge Found Unsupported by Senate

On November 23, the Senate Special Counsel investigating the so-called "October Surprise"—the charge that William Casey and/or other members of the 1980 Reagan Campaign negotiated a secret agreement with Iran to delay release of U.S. hostages until after the election—issued a 156-page report. Excerpts from his conclusions follow. A more detailed investigation by the House of Representatives is expected to result in a report by early 1993.

Conclusions

. . . .

a. Was There a Secret Agreement Between the Reagan Campaign and Representatives of the Ayatollah Khomeini to delay the Release of the American Hostages Until After the November 1980 Election?

There is not sufficient credible evidence to support this allegation. The primary sources for this allegation—Brenneke, Ben-Menashe, and Lavi—have proven wholly unreliable. Their claims regarding alleged secret meetings are riddled with inconsistencies, and have been contradicted by irrefutable documentary evidence as well as by the testimony of vastly more credible witnesses. Not one aspect of Ben-Menashe's story, which alleges a series of meetings in Madrid, Amsterdam, Paris and Washington in furtherance of an "October Surprise" conspiracy promoted by Israel, was ever corroborated. There is now reliable evidence (from passports, calendars, credit card receipts, FBI surveillance tapes, etc.) that the men Ben-Menashe claims attended these meetings—including Casey, Bush, Brian, Cyrus Hashemi, and Allen—were definitely not present. Even Jamshid Hashemi, who has testified under oath that Reagan campaign director William Casey met with Karrubi in Madrid, also stated that Casey's intent was not to delay, but rather to expedite, the release of the hostages. . . .

The great weight of the evidence is that there was no such deal. Numerous individuals involved with the Reagan campaign have denied the allegation and provided credible accounts to the contrary. Carter Administration officials intimately involved in almost every aspect of the crisis, including negotiations with the Algerian intermediaries who dealt directly with the Iranians, had no reason to believe there was any such involvement by the Republicans. All objective events during the crisis, including the timing of the release of the hostages on January 20, 1981, and the transshipment of American arms to Iran by Israel can be fully and reasonably explained without resorting to the theory of a Republican/Iranian deal.

In sum, the Special Counsel found that by any standard, the credible evidence now known falls far short of supporting the allegation of an agreement between the Reagan campaign and Iran to delay the release of the hostages.

Cities and States . . .

Continued from page 3

Implausibly, in the single significant decision addressing the legality of anti-South African laws, the Maryland Court of Appeals found that such action has had "a minimal, if indeed any, effect on South Africa itself." This conclusion was only possible in the absence of some representation to the contrary from the federal government itself, which, after much interagency wrangling, the Bush Administration failed to provide. Indeed, despite the clear institutional threat—and likely unconstitutionality—of local activities in the area, neither the Reagan nor the Bush administrations could muster the political fortitude to take any decisive action towards their constraint.

President Clinton would be well advised to move against state and local anti-South Africa measures, perhaps when the African National Congress (which has continued to support sanctions) gives its final green light to full restoration of economic ties. Legal obstacles to reengagement, even as supported by consensus, may otherwise prove slow to fall. (More than two years after Namibia gained its full independence from South Africa, several non-federal jurisdictions still maintained sanctions against those doing business there.) But more importantly such strong federal action would mitigate the precedential damage of the South Africa experience for future foreign policy controversies in which the stakes may be greater and the need for institutional coherence all the more imperative.

The author, a Washington lawyer, is a term member of the Council on Foreign Relations and former State Department official.

Holbrooke Breakfast . . .

Continued from page 1

President for Economic Affairs, who was a White House official but one assigned to the Department of Treasury. Mr. Holbrooke said that the Commission had concluded that it is extremely difficult to coordinate interagency action from one agency, if for no other reason than the volume of work is simply too much for one agency or department head to handle. Rather, Mr. Holbrooke continued, interagency policy coordination is best done at the White House, although he was quick to point out that the Commission was not advocating total centralization of economic and domestic policy in the White House but was rather proposing a model whereby the White House coordinates and agency heads implement.

The result was the Commission's proposal of a three-council system. In addition to the current National Security Council, the Commission proposed the establishment of an Economic Council and a Domestic Council. Both councils would be headed by an Assistant to the President.

Mr. Holbrooke also said that the Commission had made several studies of the role of a Chief of Staff in the White House. Noting the recent Democratic reluctance to have a White House Chief of Staff, Mr. Holbrooke said that the Commission recommended that the White House would be best served by a Chief of Staff, but one who was a "coordinator," rather than a "dictator" or even a "prime minister."

In light of recent events in Somalia and Bosnia-Hercegovina, Mr. Holbrooke said that the Commission recommended that peacekeeping authorizations be moved to the Pentagon and that peacekeeping should not be considered an emergency funding issue. He cited the potential for a peacekeeping force in Mozambique as an example of the continuing, quasi-permanent demand for such a force.

Mr. Holbrooke concluded by pointing out that the executive machinery created in 1947 worked well for the issues that it was created to face, but that we should not fight tomorrow's battle with yesterday's machinery.

Humanitarian Intervention. . .

Continued from page 2

mind that progress at the United Nations takes place only on issues in which the United States takes, at least, an active interest. Progress can, in fact, be best assured when the United States takes the lead. It is thus ultimately up to the United States to see to it that humanitarian intervention becomes established as a United Nations activity; and that means, necessarily, that we must be prepared to do our share in funding this effort and to join with others in providing the required military forces and logistic support.

Ambassador Schifter has represented the United States at the United Nations and until earlier this year served as Assistant Secretary of State for Human Rights and Humanitarian Affairs. A former member of the Standing Committee, since August he has served on the Advisory Committee.

Calendar of Events

Please mark your calendar for the following dates. Details will be announced later.

January 28 — Breakfast (tentative)

February 18 — Breakfast

March 18 — Breakfast

April 15— Breakfast

For Your Information . . . .

• **NSIC Invites Seminar Applications**—The National Strategy Information Center will hold its second annual "Faculty Seminar on Teaching Security Studies" at Bowdoin College in Brunswick, Maine, from July 24 to August 1, 1993. The program is being organized by NSIC in cooperation with the Fletcher School of Law and Diplomacy's International Security Studies Program and Columbia University's International Security Policy Program, and will examine the proper content of security studies in the post-Cold War era. Faculty members of all ranks who either already teach in the field or intend to do so are invited to apply by February 1, 1993, for the approximately 25 positions. Those selected will receive round trip travel along with room and board at the seminar. For further information, contact: Dr. Roy Godson, National Strategy Information Center, 1730 Rhode Island Avenue, N.W., Washington, D.C. 20036, (202) 429-0129.

• **Military and Defense Encyclopedia Forthcoming**—Brassey's/Macmillan has recently announced the publication in late December of a six-volume, 3,600-page *International Military and Defense Encyclopedia*. Edited by Col. Trevor N. Dupuy and featurning an editorial board which includes former U.S. Navy Judge Advocate General William C. Mott (who also chaired the Standing Committee and for a decade edited this *Report*), the advanced literature and table of contents suggest this will be a valuable addition to any library. Authors of the 785 entries are drawn from 38 countries, and include some of the foremost authorities in the world. Several of the contributors have been active in the work of the Standing Committee: Admiral William L. Schachte, Jr., writes about "Law of the Sea and Piracy," Professor Howard S. Levie contributes on "Prisoners of War" and "War Crimes," Roy Godson examines "Disinformation," Robert H. Kupperman writes about "Terrorism," and Col. James P. Terry addresses "Legal Aspects of Terrorism." Other contributors include Colin S. Gray, Dov S. Zakheim, Robert L. Pfaltzgraff, James L. George, and the legendary Lt. Gen. William P. Yarborough (on "Special Operations" and "Unconventional Warfare"). Based upon its scope and the caliber of the contributors, this massive new undertaking is likely to become a landmark reference of value to national security lawyers and a wide range of other specialists as well. For further information, contact Brassey's/Macmillan at (800) 257-5755.

• **CNSL Report Available**—The Center for National Security Law at the University of Virginia School of Law has recently published a report of its first decade of activity. The sixty-four page report includes information about a broad range of programs, including several conferences sponsored jointly by the Center and the Standing Committee. For further information, contact: Center for National Security Law, University of Virginia School of Law, Charlottesville, VA 22903 (804) 924-4080.