USE OF FORCE AND THE 'HUMANITARIAN' FACE OF INTERVENTION IN THE 21ST CENTURY

ROHINI SEN*

ABSTRACT

Every now and then, there comes an event or a point that questions the long-standing legal doctrines. Unilateral humanitarian intervention is one such concept. Traditionally, humanitarian intervention finds very few takers, as it is deemed to be incompatible with existing norms of state sovereignty. It is argued that if the concept of unilateral humanitarian intervention is legalized, would "open a Pandora's box of military interventions that would disrupt the nation-state system and permit the forcible pursuit of political, economic, and security objectives far removed from alleged humanitarian concerns."[1] Having stated that, there is an urgent need to expand the scope of international law and reevaluate the concept, owing to the changing face of contemporary conflicts.

Since 1990, there has been an increased need and number of unilateral humanitarian interventions, such as Iraq, East Timor, Bosnia, Somalia, et al.[2] Despite its strategic success, however, and the fact that the international community has engaged in more than fifteen such instances in the last two decades, the legal basis and position for humanitarian intervention is still not well settled. While UN-sanctioned *collective intervention* and the emergent *responsibility to protect* find more academic and legislative support, the international community has largely criticized unilateral action by States. The primary reason for this dichotomy lies in inadequate pre- and post-intervention impact assessment. The former lacks an effective mechanism to discern political motivation or

---

* Rohini Sen is currently working as an Assistant Professor and Assistant Dean at the Jindal Global Law School where she teaches courses on International Law, Humanitarian Law , Global Governance, and has worked on conflict-related research and projects. Ms. Sen obtained an LL.M. in International Law from the University of Leeds (UK) in 2012 and an undergraduate degree in Law from Gujarat National Law University, India (batch of 2006-2011). Her areas of interest include public international law, humanitarian law and human rights, WTO law, disability rights, and women's rights.

1 David J. Scheffer, *Towards A Modern Doctrine Of Humanitarian Intervention*, 23 U. TOL. L. REV. 253, 258 (1992).

2 THE POLITICS OF INTERNATIONAL LAW 96, 263 (Christian Reus-Smit, ed. 2004).

geo-political strategies from humanitarian benefit and intent (justifiable *jus ad bellum*), and the latter lacks a framework to hold states accountable for incidental violations and damages once the intervention is completed. Given the lukewarm success of the collective security approach, it is important to go beyond the existing international legal framework and adopt a redesigned system as an effective tool of peace to address armed conflicts and use of force problems.

This paper analyzes the legality and legitimacy of unilateral humanitarian intervention as exercised by states against *failed states*, state-sponsored terrorists or militia, and acts of humanitarian aggression acquiesced to or implicitly tolerated by states. It attempts to address the existing problems in the model through a series of suggested steps. A key element is the layout for establishment of an independent, pre- and post-intervention analysis body. The purpose of this entity is to monitor human rights and adherence to laws of war, in collaboration with existing independent organs, followed by a liability regime and status update. Part I evaluates the laws governing use of force and scope of unilateral humanitarian intervention through the Kosovo framework. Part II deals with the scope of codification of laws of intervention and the need for their normative ambiguity. Part III looks at the existing and projected legal framework and touches upon the emergent norm of the responsibility to protect. Part IV aims to integrate human rights and humanitarian legal framework as a possible long-term strategic solution to remedy the intervention model.

I. KOSOVO AND THE INTERPRETATION OF USE OF FORCE

In March 1999, the North Atlantic Treaty Organization (NATO) unilaterally launched a bombing campaign against the Federal Republic of Yugoslavia (FRY) to rescue the Kosovar Albanians from the Serbian

onslaught.[3] Following his dramatic rise to power in 1989, Slobodan Milosevic had engineered several changes in the Serbian Constitution that severely curtailed the autonomies enjoyed by the province of Kosovo since 1974.[4] Having introduced measures that imposed cultural constraints and put thousands of Kosovar Albanians out of work, Milosevic accelerated the fragmentation of the Federal Republic of Yugoslavia, which further mutated into the Bosnian war.[5] Despite repeated threats of use of force by the United States through 1998, systematic "ethnic cleansing" persisted in the Bosnian region.[6]

Finally, in 1999, following the failure of diplomatic talks and the escalation of abuses against the Albanians, NATO responded preemptively to an imminent Serbian incursion by deploying missiles towards Central Belgrade.[7] Thereafter, NATO launched a full-scale humanitarian operation as seemingly the last resort.[8] In the absence of an express Security Council authorization, this move, termed Operation Allied Force, invigorated the notion of unilateralism and posed several uncomfortable questions to the international community.[9] For the first time since the establishment of the United Nations' collective security system, a group of states expressly defended a breach of state sovereignty through unilateral use of force, predominantly on humanitarian grounds.[10] International law was left to ponder if there was any legitimacy and legality in the use of such force and if unilateral humanitarian intervention finds any valida-

---

[3] NICHOLAS J. WHEELER, SAVING STRANGERS: HUMANITARIAN INTERVENTION IN INTERNATIONAL SOCIETY 16 (2000).

[4] SABRINA P. RAMET, THE THREE YUGOSLAVIAS: STATE-BUILDING AND LEGITIMATION, 1918-2005 340-43 (2006); LOUIS SELL, SLOBODAN MILOSEVIC AND THE DESTRUCTION OF YUGOSLAVIA 39-51, 141-52 (2002).

[5] SELL, *supra* note 4, at 65-71, 263-66. In 1974 Kosovo became an "Autonomous Province": enjoying almost all of the features of a Republic. However, it did not have the formal right to secede and had very few representatives in the state presidency. Prior to this, Kosovo's status was that of an "Autonomous Region" within Serbia.

[6] Jon Western, *U.S. Policy and Human Rights in Bosnia: The Transformation of Strategic Interests*, in IMPLEMENTING U.S. HUMAN RIGHTS POLICY 245 (Debra Liang-Fenton, ed. 2004). *See also* Sean Murphy, *Contemporary Practice of the United States Relating to International Law*, 95 AM. J. INT'L L. 626, 628-67. The United States condemned the violence and was in support of unilateral or multilateral sanctions in hopes of curbing it.

[7] Western, *supra* note 6. Prior to the actual airstrikes NATO had threatened to do so with relative success in containing the atrocities.

[8] *Id.*, *see also* Noam Chomsky, *A Review of NATO's War over Kosovo*, Z MAGAZINE, Apr.-May 2001, *available at* http://www.chomsky.info/articles/200005—.htm.

[9] Nicholas J. Wheeler, *Unilateral Humanitarian Intervention and International Law*, Naçào e Defesa (Braz.), Summer 2003, at 199, 209.

[10] *See* WHEELER *supra* note 3, for a detailed discourse of cases of humanitarian intervention.

tion under the existing international legal system.[11] The parties to the operation justified this restrictive interpretation of the concept of state sovereignty through the lens of humanitarian requirement.[12] The existing humanitarian crisis in Kosovo, in addition to the fact that impending vetoes from Russia and China were permanent obstacles to any explicit authorization of use of force by the United Nations rendered the NATO strikes necessary and legitimate.[13]

Post Kosovo, the unilateral use of force outside the ambit of self-defense[14] has been in a state of operative limbo. International law has not warmed up to the independent use of force by states, except as provided under Article 51 of the UN Charter. However, humanitarian requirements,[15] human rights abuses by states,[16] and invisible enemies[17] have forced states to be creative in their interpretation of the self-defense doctrine under the UN Charter and develop a practice that resembles humanitarian intervention with each passing day.[18] Additionally, the increase in humanitarian interventions post 1990 has revived the need to reconsider the legalization of this practice. The armed intervention in Libya in response to the civil war,[19] the Syrian crisis and use of prohibited weapons,[20] and the recent Russian infiltration of Crimea[21] are clear examples

---

[11] WHEELER, supra note 3, at 1-2.

[12] Wheeler, supra note 9, at 201.

[13] *Id.*

[14] U.N. Charter art. 51.

[15] Wheeler, supra note 9, at 201.

[16] *World Report of 2013*, HUMAN RIGHTS WATCH, *available at* https://www.hrw.org/sites/default/files/wr2013_web.pdf (last visited Apr. 28, 2014) (documenting the violation practices and severe human rights abuses of several states across the world).

[17] The war on terror and emergent asymmetrical conflicts have, often been defined as use of force against invisible enemies (non-state actors) who strike stealthily and against conventional practices of warfare. ALFRED W. MCCOY, TORTURE AND IMPUNITY: THE U.S. DOCTRINE OF COERCIVE INTERROGATION 84-86 (2012).

[18] Robert J. Delahunty & John Yoo, *The "Bush Doctrine": Can Preventive War Be Justified?*, 32 HARV. J.L. & PUB. POL'Y 843 (2009).

[19] In 2011, a multi-state armed intervention was launched into Libya following the Security Council Resolution 1973. This was a measure taken in response to the Libyan civil war. NATO started Operation Unified Protector and took over the arms embargo until the war ended with Gaddafi's death. In October 2011, the Security Council passed a resolution to end NATO's control over the region. *See Nato chief Rasmussen 'proud' as Libya mission ends*, BBC NEWS, Oct. 31, 2011, http://www.bbc.co.uk/news/world-africa-15516795.

[20] The Syrian civil war has been under the international radar for a while and each party to the conflict has been supported logistically and diplomatically by a number of foreign states. There have been talks of unilateral intervention by the United States (as allies to the Arab Spring and the rebels) in Syria in the face of stiff opposition from the Russian camp (consisting of China and all those supporting the current regime.). *See* Jack Goldsmith, *The Kosovo Precedent for Syria Isn't*

of why the international community needs to revisit this debate. The need to legalize humanitarian intervention finds support in the recent Russian invasion of Ukraine. The United States and European Union have imposed innumerable sanctions against Russia, in keeping with the collective international outrage about its actions.[22] Furthermore, the UN passed a resolution declaring the Russian referendum to annex Crimea illegal.[23] Despite the "verdict," Russia has continued to use force and justified the intervention on grounds of lack of express prohibition under international law as well as 'humanitarian' requirements in the face of alleged human rights violations of the ethnic Russians in Crimea[24]—a situation that could, perhaps, be easily avoided if codification of intervention practices took place. Before ascertaining the scope of codification, however, it is important to evaluate the existing legal position of use of force under the UN Charter and other instruments through the Kosovo reference frame.

For more than six decades, the UN Charter has governed the regulation of use of force between member states.[25] As previously discussed, the Charter permits two kinds of use of force—a) the more liberal, collective use of force by the UN Security Council[26] and b) the restricted unilateral use of force by states.[27] The rationale behind this approach is rooted in the ravages of the Second World War, which prompted the creation of the United Nations and extinction of the unilateral rights of states to use force except u/a 51 of the Charter for the purpose of self-defense.[28] The shift in approach to collective security reflected an implicit assertion that the Security Council was better suited to determine the legality of use of force on behalf of the international community of states.[29] This assumption seemingly rests on the notion that Se-

---

Much of Precedent, LAWFARE (Aug. 24, 2013, 8:02 AM), http://www.lawfareblog.com/2013/08/the-kosovo-precedent-for-syria-isnt-much-of-a-precedent/.

[21] Marie-Louise Gumuchian, Ben Wedeman & Ian Lee, *Ukraine mobilizes troops after Russia's 'declaration of war'*, CNN (Mar. 3, 2014, 1:26 PM), http://edition.cnn.com/2014/03/02/world/europe/ukraine-politics/.

[22] *Id.*

[23] G.A. Res. 68/262.

[24] Gumuchian et al, *supra* note 211; Tom Miles & Robert Evans, *U.N. monitors warn on human rights in east Ukraine, Crimea,* REUTERS (May 16, 2014), *available at* http://www.reuters.com/article/2014/05/16/us-ukraine-crisis-un-idUSBREA4F05Y20140516

[25] U.N. Charter art. 2, para.4.

[26] *Id.* arts. 39, 41, 42.

[27] *Id.* art. 51.

[28] L. J. ART & K. WALTZ, THE USE OF FORCE: MILITARY POWER AND INTERNATIONAL POLITICS (Lanham, MD: Rowman and Littlefield Publishers, 7th ed. 2008)

[29] *Id.*

curity Council resolutions follow a democratic process and are free from political motivations. However, the hegemony of the permanent five is more than a clear indicator of the political constraints within which the Security Council operates.[30] Syria is a classic example of how the collective decision-making process falls prey to political alignments and allied interests.[31] Also, historically, the UN collective security system has been known to respond only after a conflict has started and has rarely been able to preempt or intercept.[32] Therefore, to dismiss the right to unilateral use of force for the purpose of humanitarian intervention on grounds of far-reaching political interests seems hypocritical in light of the somewhat obscured practices of the international security system.

Moving away from the narrative of flawed collective security, it is also possible to derive some legality from the teleological interpretation of the Charter itself. In addition to restricting the use of force, with the exception of self-defense,[33] the Charter has laid down the framework for protection and promotion of international peace and security as well.[34] The Charter does not define these terms and has left it up to the Security Council to interpret them in light of contemporary application of legal principles.[35] Within the broader mandate of protection and promotion of international peace, the Charter recognizes certain objectives and purposes.[36] The observation and protection of human rights is listed as one of the purposes the Charter aims to fulfill.[37] It is interesting to note that the rapid development of the body of rules protecting human rights at the international level has led many scholars to argue that a new norm of customary law has emerged where the obligation to protect human rights

---

[30] DAVID L. BOSCO, FIVE TO RULE THEM ALL: THE U.N. SECURITY COUNCIL AND THE MAKING OF THE MODERN WORLD 5-8 (2009).

[31] The Syrian civil war has been under the international radar for a while and each party to the conflict has been supported logistically and diplomatically by a number of foreign States. There have been talks of unilateral intervention by the United States (as allies to the Arab Spring and the rebels) in Syria in face of stiff opposition from the Russian camp (consisting of China and all those supporting the current regime.). *See* Jack Goldsmith, *The Kosovo Precedent for Syria Isn't Much of a Precedent*, LAWFARE, (Aug. 24, 2013), *available at* http://www.lawfareblog.com/2013/08/the-kosovo-precedent-for-syria-isnt-much-of-a-precedent/.

[32] THE USE OF FORCE, *supra* note 28, at 16-20.

[33] U.N. Charter art. 51.

[34] *Id.* pmbl., art. 1.

[35] BBC, *supra* note 19; U.N. Charter chs. VI, VII; the powers conferred to the Security Council under Ch. VI are very wide and allows it to take all relevant action for the protection and promotion of international peace and security.

[36] U.N. Charter Chapters VI and VII.

[37] *Id.* arts. 55, 56.

may override that of state sovereignty, especially in instances where the state has acquiesced or been responsible for violations itself.[38] Thus, trapped in its own text, the Charter seems to have created a system of competing interests between the sacrosanct, but gradually diluting, principle of state sovereignty and the emergent customary law norm of protection of human rights within a state.[39] It is the latter that creates the scope of legal recognition for a right of unilateral humanitarian interventions, such as the ones in Kosovo (or former East Pakistan)[40] as a response to human rights abuses and humanitarian violations in the state. This argument stems from what is understood to be the "special nature" of human rights. This "special nature" allows human rights violations to not only be enforceable against a state, but it also dilutes a state's sovereign rights to govern its subjects in certain instances. The latter often leads to intervention by the international community, particularly when the State in question engages in or tolerates practices of human rights violation and fails to protect the basic rights of its citizens.[41] Therefore, even in the absence of an escalated armed conflict, the protection of basic human rights and state-sponsored armed aggression should allow for legitimate and legal humanitarian intervention by the international community unilaterally or by affected states.

In light of the debated principles, it may be useful to take stock of the possible interpretations of use of force as prescribed by Article 2(4).[42] This article of the UN Charter provides that, "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."[43] A perusal of the provision has led many a scholar to propose that the phrase "against the territorial integrity or political independence of any state" is indicative of a certain threshold to be reached by threats or the use of force itself.[44] Therefore, any threat or use of force that is not

---

[38] SIMON CHESTERMAN, JUST WAR OR JUST PEACE, 45 (2001).

[39] *Id.* at 47.

[40] Formerly East Pakistan, it is now known as Bangladesh following the war of liberation in 1971. *See Collaborators and War Criminals*, BANGLADESH GENOCIDE ARCHIVE, http://www.genocidebangladesh.org/?page_id=14 (last accessed April 16, 2014).

[41] Leif Wenar, *The Nature of Human Rights*, *in* REAL WORLD JUSTICE (A. FØLLESDAL & T. POGGE eds., 2005).

[42] U.N. Charter art. 2, para. 4.

[43] *Id.*

[44] SEAN D. MURPHY, HUMANITARIAN INTERVENTIONS: THE UNITED NATIONS IN AN EVOLVING WORLD ORDER 71 (1996).

against a state's territorial integrity or political independence[45] is understood not to be prohibited by Article 2(4). If one is to structure this through the Kosovo lens, the intervention was justified on humanitarian grounds with the intention of protecting Kosovar Albanians from ethnic cleansing, and restoring peace and stability in the region.[46] Therefore, one may argue that since the act of humanitarian intervention was not specifically aimed at depriving states of their sovereignty or territorial integrity, it fell outside the threshold of the proscribed prohibition.[47] Furthermore, the words "or in any other manner inconsistent with the Purposes of the United Nations" seem to be indicative of the fact that the scope of paragraph four is restrictive and only those uses of force that are inconsistent with the purpose of the Charter will be deemed to be unlawful.[48] Again, given that the unilateral humanitarian intervention in Kosovo was in accordance with the purpose of the Charter (i.e. the protection of international security and promotion of human rights),[49] it is possible to interpret that any use of force that is consistent with the purpose of the Charter is lawful and falls outside the prohibition laid down in article 2(4).[50]

The Charter's express provision for unilateral use of force under article 51 can also be interpreted to contain permissive semantics. Article 51 of the Charter States that:

> nothing in the present Charter shall impair the *inherent* right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.[51]

---

[45] Further supplemented by the role of the State in observation of humanitarian practices within its territory.

[46] WHEELER, *supra* note 3, at 16.

[47] FERNANDO TESON, HUMANITARIAN INTERVENTION: AN INQUIRY INTO PEACE LAW AND MORALITY 150-51 (2d ed. 1997).

[48] *Id.*

[49] WHEELER, *supra* note 3, at 1–2.

[50] TESON, *supra* note 47, at 150.

[51] U.N. Charter art. 51 (emphasis added).

The supporters of humanitarian intervention have often interpreted this provision to be codified customary law that is inclusive of humanitarian practices predating the UN Charter.[52] The inclusion of the word "inherent" indicates that states have a right to engage in defensive use of force even in the absence of the Charter provisions and the use of this right is perhaps not limited to use against states. The intervention camp also interprets the words "if an armed attack occurs" to be one of many possible instances, and argues that other grounds, such as serious violations of human rights or state-sponsored aggression, may also invoke the use of this article.[53] This approach has been questioned by the likes of Simma,[54] as well as in the Nicaragua case.[55] Both contend that the right to use of force under this article does not arise in the absence of an armed attack and the rights of self-defense cannot be that far-reaching.[56] However, recent developments in the use of Article 51 indicate that the doctrine of preventive self-defense has long transgressed this strict requirement.[57] While NATO's intervention against Serbia cannot be categorized as a response to a traditional *armed attack*, it may be called a variant of preventive responses that go beyond the armed attack requirement.

Incidentally, if the threshold of collective security is extended by analogy to the unilateral use of force then, even in the absence of a Security Council authorization, Operation Allied Force was legal and legitimate under the strict interpretation of this article. The threshold of use of force through the Chapter VII mandates of the Security Council comes into effect when the international community faces a "threat to the peace, breach of the peace, or act of aggression."[58] As stated earlier, no definition as to what constitutes a "threat to the peace, breach of the peace, or act of aggression" is provided in the Charter, and the Security Council is free to interpret the terms as it deems fit.[59] The Council's interpretative practices have indicated that it recognizes internal conflicts or humanitar-

---

[52] WHEELER, *supra* note 3, at 1–2.

[53] MURPHY, *supra* note 444, at 74–75.

[54] Bruno Simma, *NATO, the U.N. and the Use of Force: Legal Aspects*, 10 EUR. J. INT'L L. no. 1, 1999 at 3.

[55] Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.) 1986 I.C.J. 100, ¶ 211 (June 27).

[56] *Id.*

[57] Delahunty & Yoo, *supra* note 19; USE OF FORCE: MILITARY POWER AND INTERNATIONAL POLITICS (Robert J. Art & Kenneth N. Waltz, eds. 1993); U.N. Charter arts. 39, 41, 42.

[58] *Id.* art. 39.

[59] MURPHY, *supra* note 44, at 76.

ian crises to fall within the definition of "threat to peace and security."[60] NATO member states contended that the intervention in Kosovo was authorized by Security Council Resolutions 1160 and 1199, which were adopted under Chapter VII in 1998.[61] Resolution 1199 categorically stated that, the deterioration of the situation in Kosovo constitutes a threat to peace and security in the region,[62] thereby enabling the use of force under Chapter VII. Additionally, the resolution urged the FRY to implement concrete measures for attainment of peace and security, failing which the Council would consider further action and additional measures to bring about the same.[63]

The two declarations and the Security Council resolutions are indicative of a pattern here vis-à-vis the applied threshold in Security Council practices. There seems to be implicit authorization of the Member States by the Security Council to take necessary actions in the event of failure of FRY to implement the measures in question. But, it has often been contended that the debate preceding the adoption of Resolution 1199 clearly indicated that China and Russia were opposed to any use of force in the Kosovo situation and would veto all resolutions that involve the use of force.[64] The eventual adoption of the resolution, coupled with the fact that the Security Council can resort to non-forcible methods to deal with threats of security as well, tips the scale in favor of the argument that Resolution 1199 did not authorize the use of force by NATO member States. However, if the latter is adopted to be the accurate legal position, then it vitiates the purpose of having a collective security system in place—a system incapable of giving meaning to its object and purpose. Therefore, if an implicit permission to use force is absent in these resolutions, they have a created a greater need to codify when and how unilateral force may be used.

Even if one is to reject the notion that the Resolutions and declarations implicitly permitted the use of force, it is worthwhile to remember that a final Resolution 1244,[65] following the peace agreement between the NATO and FRY was passed. This Resolution is often touted to be retroactively validating the unilateral humanitarian intervention and giving it legality under the UN. However, critics of humanitarian inter-

---

[60] *Id.* at 287; *see also* S.C. Res. 1973 U.N. Doc. S/RES/1973 (Mar. 17, 2011) (regarding Libya).

[61] S.C. Res. 1160 (1998) U.N. Doc S/RES/1960 (Dec. 16, 2010).

[62] *See* S.C. Res. 1199, pmbl., para. 1–2, U.N. Doc. S/RES/1199 (Sept. 23, 1998).

[63] *Id.* para. 4.

[64] Wheeler, *supra* note 9, at 212-215.

[65] S.C. Res. 1244, U.N. Doc. S/RES/1244 (June 10, 1999).

vention have once again pointed to the language of the resolution and the pre-resolution debates to indicate that in the absence of an express recognition of legality, it is not possible to attribute legitimacy to this use of force, even under resolution 1244. This puts international law on the use of force at an interesting crossroads. Given the ambiguity of practices and language, evolving customs, and the scope of interpretations, should the Charter be read in a manner that is consistent with the inclusion of unilateral interpretation? Or is there a need to amend the Charter and separately codify the practice normatively? State practice has indicated that while states have often resorted to humanitarian intervention, until 1991, their justification of such of use of force revolved around the frame of self-defense.[66] It is only after the Cold War that states have made express references to liberal interventionism, thereby widening the scope of legalization.[67]

It is important to note that even in the absence of comprehensive recognition, states continue to launch unilateral military interventions on humanitarian grounds in order to prevent human rights abuses.[68] Further, as one can discern from NATO's intervention in Kosovo, in the face of international inaction, diplomatic failure, and the absence of alternate means to contain the problem, such measures have often served to put an end to human rights violations under a dysfunctional regime and strengthen subsequent practices in failed states.[69] Therefore, it is important to evaluate such use of force and give each of them some tangible legal form instead of deriving controversial validity from negative interpretations and euphemisms. This proposition finds support in former Secretary General Kofi Annan's questions to the General Assembly in 1999, "if, in those dark days and hours leading up to the genocide [in Rwanda], a coalition of States had been prepared to act in defence of the Tutsi population, but did not receive prompt Council authorization, should such a coalition have stood aside and allowed the horror to unfold?"[70] In light of the aforementioned deliberations, the nature, shape, and form of this principle will be discussed in the next segment.

---

[66] MURPHY, *supra* note 44, at 97–100.

[67] *Id.* at 106–07.

[68] WHEELER, *supra* note 4; TESON, *supra* note 47; *see* S.C. Res. 1199, *supra* note 62, pmbl., para. 1-2.

[69] WHEELER, *supra* note 3, at 16.

[70] Press Release, Secretary General, Secretary General Presents His Annual Report to the General, U.N. Press Release SG/SM7136 GA/9596 (Sept. 20, 1999).

II. ETYMOLOGY, CODIFICATION AND NORMATIVE AMBIGUITY

It is difficult to ascribe a definition to the term, but classic *humanitarian intervention* can be defined in two ways. The first one applies to those instances in which "a nation unilaterally uses military force to intervene in the territory of another state for the purpose of protecting a sizable group of people from life-threatening or otherwise unconscionable infractions of their human rights that the national government inflicts or in which it acquiesces."[71] Alternately, a more comprehensive and compact definition defines the practice as, "a military intervention undertaken by a State (or a group of States) outside the umbrella of the United Nations in order to secure human rights in another country."[72] Both these definitions emphasize the role and transgression of the recipient state, making the act of intervention a legitimate necessity in order to ensure a set of legal rights guaranteed to individuals in every state. The focus of legality needs to incorporate the recipient state's failure to observe its duties and responsibilities and not limit itself to the intervening state's adherence to the rather handicapped prescribed system of the UN.

The history of humanitarian intervention is not very different from the protective approach it advocates. Initially, it was an extension of the passive personality doctrine where states claimed to engage in intervention in order to protect their own citizens on foreign soil, or endangered citizens of inviting states.[73] By the end of Cold War, however, state practice broadened the scope of humanitarian intervention and states started using the doctrine to protect citizens of third party or victim states as well.[74] Some appropriate examples of such instances would be the Indian intervention in East Pakistan in 1971 and the Tanzanian intervention in Uganda in 1979.[75] The persistent genocide in East Pakistan was a clear indicator of state failure and India's armed intervention to protect the population can be said to fit well within the two definitions.[76] Although

---

[71] David J. Scheffer, *Toward A Modern Doctrine of Humanitarian Intervention*, 23 U. TOL. L. REV. 253, 264 (1992).

[72] Daphné Richemond, Normativity in International Law: The Case of Unilateral Humanitarian Intervention, 6 YALE HUM. RTS. & DEV. L.J. 44, 47.

[73] Interventions were deemed to be justified if "invited" by the target state (e.g.: French intervention in Zaire in 1978; protection of nationals abroad, Israeli intervention in Entebbe in 1976, et al.).

[74] CHESTERMAN, *supra* note 38, at 115-17.

[75] Barry M. Benjamin, Unilateral Humanitarian Intervention: Legalizing the Use of Force to Prevent Human Rights Atrocities, 16 FORDHAM INT'L L.J. 120, 131-35 (1992).

[76] Handbook of International Humanitarian Law in South Asia 117-18 (V.S. Mani ed. 2007).

India has justified its use of force as coming under Article 51, it was very clear to the international community that humanitarian intervention was far better suited to define such operations as opposed to the crippling parameters of self-defense.[77] Despite criticism by the United Nations and a section of international scholars, these are largely accepted as justified interventions by the international community.[78] As under the existing legal regime, only a very narrow and extreme set of circumstances triggers legal humanitarian intervention.[79] However, the legitimacy of these acts exists even in the absence of concrete legal trappings. State practice throughout northern and southern Iraq, East Timor, Bosnia, Somalia, and Kosovo in and after the 1990s indicates an elevation in use of force in this realm.[80] Also, in some of these instances use of force through humanitarian intervention has proven to be an effective solution to the failed state narrative. For instance, a detailed study of the effectiveness of international threats in Kosovo proved that "use of force, through humanitarian intervention, was the only way to force Serbia to halt its military campaign in Kosovo."[81]

Despite its strategic success and the fact that the international community has engaged in more than fifteen such instances in the last two decades, the legal basis and position for humanitarian intervention is clearly not well settled.[82] The primary legal criticism is that the practice violates the principles of sovereignty and territorial integrity, which are sacrosanct in international law.[83] Predictably, the resistance stems from a state-centric and increasingly redundant Westphalian system. Nonetheless, owing to its utility as a method of last recourse in instances of grave violations, several scholars uphold the practice as a lawful extension of

---

[77] Benjamin, *supra* note 75, at 131-134.

[78] Tom J. Farer, Human Rights in Law's Empire: The Jurisprudence War, 85 AM. J. INT'L. L. 117, 122.

[79] *Id.* at 122.

[80] Taylor B. Seybolt, Humanitarian Military Intervention: The Conditions for Success and Failure 230 (2007).

[81] Paul R. Williams & Meghan E. Stewart, *Humanitarian Intervention: The New Missing Link in the Fight to Prevent Crimes Against Humanity and Genocide?,* 40 CASE W. RES. J. INT'L L. 97, 101 (2008); MURPHY, *supra* note 444; PAUL R. WILLIAMS & MICHAEL P. SCHARF, PEACE WITH JUSTICE?: WAR CRIMES AND ACCOUNTABILITY IN THE FORMER YUGOSLAVIA 28 (2002).

[82] Paul Williams & Michael Scharf, *NATO Intervention On Trial: The Legal Case That Was Never Made,* 1 HUM. RTS. REV. 103 (2000).

[83] *Id.*; Sean D. Murphy, Humanitarian Intervention: The United Nations in the Evolving World Order (1996).

the purposes of the UN Charter.[84] To understand this dichotomy, it is necessary to look beyond the legal scope of the concept to the etymological significance of each word involved.

> **Unilateral:** The world "unilateral," in this context, is an indication of the absence of UN authorization or supervision and not of the number of parties involved in the act.[85] A classic example would be NATO's intervention in Kosovo because it took place without the authorization of the UN Security Council.
>
> **Humanitarian:** The inclusion of this term does not mean that the intervention may not be based on grounds additional to humanitarian interests.[86] A truly humanitarian intervention need not be devoid of other motives, as long as its primary purpose is to deter human rights violations and subsequently strengthen the system.[87]
>
> **Intervention:** In the words of Falk, while attempting to define intervention with precision, "it is impossible to be too rigorous in abstract legal terms about the doctrinal contours of intervention practice."[88]

Looking at the ambiguity generated by the terms and attempts to define them, it is imperative to ask if the codification of the norm should reflect some of this ambiguity as well. Ideally, unilateral humanitarian intervention should be etched out with a clear legal framework[89] in order to generate consistent state practice and to avoid gross exploitation of the concept. However, international society currently is fraught with inequalities, power disparity, economic and social imbalances, undefined polarity, and hegemony of the permanent members of the Security Council, and these factors subsume the notions of democracy, equality, and human rights.[90] Therefore, a strict normative approach would be futile and incongruous with the realities of modern day. Given the difficulty to define the components of the term itself, normative ambiguity, as opposed to strict normativity, would allow for greater flexibility and *ad hoc* di-

---

[84] Steve Simon, The Contemporary Legality of Unilateral Humanitarian Intervention, 24 CAL. W. INT'L L. J. 117, 144 (1993).

[85] Richemond, *supra* note 72, at 47.

[86] Christine Gray, From Unity to Polarization: International Law and the Use of Force Against Iraq, 13 EUR. J. INT'L L. 1, 16 (2002).

[87] *Id.*

[88] Richemond, *supra* note 72, at 45; Richard Falk, *The Complexities of Humanitarian Intervention: A New World Order Challenge*, 17 MICH. J. ITN'L L. 491, 502 (1996).

[89] Kevin Boyle, Lecture at the Yale Law School's Human Rights Workshop, New Haven, CT, USA (Dec. 13, 2000).

[90] *See generally* Richemond, *supra* note 722, at 46.

plomacy by states.[91] However, it is necessary to be mindful of the cons of excessive ambiguity in order to avoid the risk of maintaining the status quo and grant recognition to the concept itself.

Reverting to the failed state narrative, the standards of state failure, acquiescence, and tolerance should be codified in order to effectively spot "a thinly disguised imperial intrusion designed to assure the perpetuation of an ideologically congenial political and social structure," and to prevent unilateral humanitarian intervention from becoming "a mask for garden-variety of aggression."[92] If the international community has learned anything from Iraq and Abu Ghraib,[93] it should be redirected to create a legal a threshold for when to intervene unilaterally, as opposed to repeatedly criticizing the act itself. The presence of a permissive law will also foster deterrence and help avoid another act akin to the Russian invasion and subsequent annexation of Crimea in the twenty-first century, under the guise of 'assistance.' Despite the fact that Crimea and Sevastopol are recognized as federal subjects of the Russian Federation by five UN member states, including Russia itself, one cannot get past the unilateral interventionist nature of this annexation that incurred high and incidental civilian casualties. As was clearly witnessed in this unprecedented invasion, without any prior statement or resolution by the United Nations,[94] it is possible for states to invoke "humanitarian" grounds in the absence of any legal system positively codifying the same. A clear mandate defining—a) when a state qualifies as a failed state for the purpose of intervention, b) what a proportionate use of force is, and c) what the duties and responsibilities of an intervening state are—should serve as a starting point for the crystallization of unilateral state practices. This pre-intervention evaluation will help address the subjective application of international law and subsequent abuse of the concept,[95] thereby making a stronger case for its effectiveness in deterring human rights violators, both individuals and states.[96]

---

[91] *Id.* at 47

[92] Tom J. Farer, *Humanitarian Intervention: The View from Charlottesville, in* HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 149, 156 (Richard B. Lillich ed., 1973).

[93] *See* Thomas Cushman, *Introduction: The Liberal-Humanitarian Case for War in Iraq, in* A MATTER OF PRINCIPLE: HUMANITARIAN ARGUMENTS FOR WAR IN IRAQ 1, 18 (Thomas Cushman ed., 2005).

[94] *'Russian Invasion' of Ukraine Prompts UN Emergency Meeting*, ABC NEWS (Aug. 28, 2014), *available at* http://abcnews.go.com/International/russian-invasion-ukraine-prompts-emergency-meeting/story?id=25156827; G.A. Res. 68/262, U.N. Doc. A/RES/68/262 (Mar. 27, 2014).

[95] *See* Farer, *supra* note 922, at 156–57.

[96] *Id.*

In addition to prescribing legal standards, it is necessary to develop morally appealing policies of some consistence.[97] This is imperative in order to take the spotlight away from additional strategic or political interests that states may possess over and above their humanitarian reasons. This system can be built through objective analysis of intervention claims by a body independent of the Security Council. Repeated vetoes in the Council and manifestations of political agendas through them[98] have rendered the collective responsibility structure weak and redundant. It makes little sense to vest objective responsibility on the Security Council given how politicized its decision-making can be vis-à-vis use of force. Borrowing from the human rights model, this responsibility can be taken up proactively by civil society organs. Establishment of an objective standard would "facilitate the assessment of an intervention's legitimacy, and the detection of unfounded claims of human rights violations."[99] Furthermore, codification will require that states comply with the new norm, creating behavioral patterns which are affected by legal standards to a large extent.[100] This will subsequently help in the creation of decisive state practice and *opinio juris*, thus facilitating the development of customary law in this realm.

While the enabling provision demands clarity, it is wise to maintain linguistic, as well as normative ambiguity for codification of the means and methods that states may employ to engage in unilateral humanitarian intervention. Arguments in favor of normative ambiguity derive value from the fact that the traditional concept of sovereignty has undergone substantive changes since the inception of the United Nations[101] Although sovereignty is the fulcrum of international law, with the advent of non-state actors, this exclusive national premise no longer prevails in its original state.[102] In the words of Scheffer, "as nations commit to a larger and more intrusive regime of international treaties and conventions and as customary international law expands its reach, the concept of 'domestic jurisdiction shrinks."[103] Additionally, according to

---

[97] *See id.* at 154.

[98] Wheeler, *supra* note 9.

[99] Richemond, *supra* note 72, at 52.

[100] Byron F. Burmester, *On Humanitarian Intervention: The New World Order And Wars To Preserve Human Rights*, 1994 UTAH L. REV. 269, 304.

[101] *Id.* at 317.

[102] Ian Brownlie, Principles of Public International Law 290 (4th ed. 1990).

[103] David J. Scheffer, *Toward a Modern Doctrine of* Humanitarian *Intervention*, 23 U. TOL. L. REV. 253, 262 (1991-1992).

some scholars, the development of human rights has led to "significant erosion of state sovereignty,"[104] and this erosion will eventually result in "abandonment of traditional concepts of sovereignty for the sake of human values."[105] As traditional understanding of state sovereignty gradually yields before considerations of morality,[106] a semblance of normative ambiguity will allow states to preserve local, indigenous, and regional practices. Thus, it is pragmatic to allow the States to choose their intervention strategies; subject to all other existing international legal principles in order to smooth the transition from severe state-centricity to modern day needs and practices. In the words of Kofi Annan, "the traditional concept of sovereignty is being changed by the developments in the world today,"[107] and one such development is the humanitarian face of intervention in the twenty-first century.

In addition to changing sovereignty, normative ambiguity is also recommended for pragmatic reasons. Despite good intentions, it will be difficult for states to agree on the specific content of this doctrine, namely with respect to its form and development.[108] With the possibility of each state providing a unique concept of what is acceptable in the realm of intervention, it will be useful simply to provide a basic legal framework and recognition of the concept without exhaustively defining the modes of usage. There is some consensus about the fact that this application should contain provisions to determine and verify the violations alleged,[109] ensure that all peaceful means have been exhausted,[110] the provision of an independent body to evaluate these claims in the likelihood or anticipation of a veto in the Security Council,[111] adherence to principles of necessity and proportionality, and observation of *jus in bello* in the target state.[112] In addition to comprehensive compliance with internation-

---

[104] Louis Henkin, That "S" Word: Sovereignty, and Globalization, and Human Rights, Et Cetera, 60 FORDHAM L. REV. 1, 4 (1999).

[105] Richemond, *supra* note 72, at 60; *see also* Henkin *supra* note 1044, at 11.

[106] Henkin *supra* note 1044, at 61.

[107] *PBS Newshour Interview by Gwen Ifill with Kofi Annan, U.N. Secretary General* (PBS television broadcast Oct. 18, 1999) (transcript on file with Wisconsin International Law Journal).

[108] Richemond, *supra* note 72, at 62–64.

[109] *Id.* at 64.

[110] *See* MURPHY, *supra* note 4, at 70.

[111] CHESTERMAN, *supra* note 38, at 189.

[112] THE INDEP. INT'L COMM'N ON KOS., THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED 193 (2000), *available at* http://reliefweb.int/sites/reliefweb.int/files/resources/6D26FF88119644CFC1256989005CD392-thekosovoreport.pdf.

al law,[113] the intervening State has to be made responsible for consequences and effects of use of force on the target State.[114] An enforcement framework needs to be created in order to ensure commitment to observe *jus post bellum* on part of the intervening State and to help in post conflict reconstruction of the affected region.[115] For those questioning the value of ambiguity, the application of this principle in international humanitarian law (e.g., definitions of armed conflict, as laid down in the *Tadic* judgment),[116] have allowed us to successfully expand their scope to hitherto unseen and evolving forms of conflict, and, subsequently, not leaving unprepared to deal with rapid change of circumstances such as escalated asymmetric and new age warfare.

III. INTERVENTION AND THE RESPONSIBILITY TO PROTECT

Theoretically, there are two possible routes to give effect to intervention. It can either be undertaken collectively by the United Nations or spearheaded unilaterally by interested or affected states. Although the UN Charter strictly prohibits the use of force to violate the sovereignty of any state or otherwise in article 2(7), this ban does not prejudice the application of enforcement measures under Chapter VI and VII.[117] Chapter VII predominantly deals with authorized use of force by the United Nations in specific cases, and, as previously discussed, UN precedent indicates that a massive violation of human rights is one of them.[118] Given the change in the post-Cold War set-up, many scholars have advocated further codification of UN executed humanitarian interventions as an alternative to unilateral practices.[119] This academic position has been premised on the notion that, being an instrument to secure international peace and security, multilateral intervention under the aegis of the United Nations does not pose the same threats as exhibited in unilateral actions by a State.[120] This line of thinking suggests that to give multilateralism more

---

[113] *See* S.C. Res. 1244, *supra* note 65, para. 5.

[114] *See* U.N. Charter arts. 39, 41, 42.

[115] JUS POST BELLUM: MAPPING THE NORMATIVE FOUNDATIONS,(Carsten Stahn et al., eds. 2014) (supporting a framework of jus post bellum); *see also* Murphy, *supra* note, 83; Williams & Scharf, *supra* note 82.

[116] Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment, para. 84 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999).

[117] U.N. Charter art. 2, para. 7.

[118] *Id.* arts. 39, 41, 42.

[119] *See generally* Burmester, *supra* note 1000.

[120] Scheffer, *supra* note 103, at 264.

teeth and to curb parallel unilateral practices, an enhanced collective system should be in place.[121] One must remember that UN intervention is primarily conducted without the consent of the target government,[122] and, in a standard UN intervention, "consent from the target state usually precludes a particular action from being characterized as an intervention."[123] The only distinction between this and unilateral intervention seems to be faith in the collective decision making process since the Charter recognizes the Security Council's ability to "intervene in a State for humanitarian purposes pursuant to the relevant collective decision-making process."[124] The necessary rule to be observed is that such collective authorization does not completely override the two fundamental principles of a nation's sovereignty and its right to non-interference in its internal affairs.[125]

In addition to observing sovereignty and non-intervention, humanitarian intervention is limited to "terminating the human rights abuses that made intervention necessary."[126] Therefore, any act of intervention undertaken by the United Nations is required to use force only to address a humanitarian or human rights crisis in a state.[127] The situation may or may not threaten trans-border peace and security, depending on how the Security Council classifies an incident. The United Nations has demonstrated this extraordinary liberty and faith in the collective decision-making process by resorting to military interventions on grounds of both a possible external threat to neighboring nations and the regulation of internal conflicts in a state.[128] Iraq is a relevant example of the former, where human rights violations posed a "threat to international peace," per the United Nations.[129] As opposed to Iraq, Somalia's issues were deemed to be contained within the State. Although regional instability and threat to security[130] were cited as preliminary grounds for interven-

---

[121] *Id.*

[122] Anthony Clark Arend & Robert J. Beck, International Law and the Use of Force 113 (1993).

[123] Ruth E. Gordon, Intervention By The United Nations: Iraq, Somalia, and Haiti, 31 TEX. L.J. 43, 45 (1994).

[124] Scheffer, *supra* note 103, at 290.

[125] *Id.*

[126] Gordon, *supra* note 1233, at 45.

[127] *Id.*

[128] INT'L COMM'N ON INTERVENTION & STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT (2001).

[129] ERIKA DE WET, THE CHAPTER VII POWERS OF THE UNITED NATIONS SECURITY COUNCIL 150-57 (2004), S.C Res. 688 (May 5, 1991).

[130] S.C Res. 688 (May 5, 1991).

tion, the rationale behind the Resolution and the use of force focused only on Somalia's internal human rights crisis and the impediments it caused to humanitarian assistance efforts within the State.[131] While this may be viewed as an apparent UN success, both these interventions came at a time when the violence was escalated and both the States had sustained unnecessary damage – consequences that question this resounding echo in favor of the collective security system as the only legalized way to military intervention. However, despite the criticisms of unilateral use of force, if the strong support for legality of collective humanitarian intervention is anything to go by, use of force is only going to increase in the coming decades in favor of possible legitimization of unilateral humanitarian intervention in the twenty-first century.

While UN-guided humanitarian intervention is a method that has some formal legal acceptance, its unilateral counterpart garners tremendous international criticism.[132] Despite that, the few instances of unilateral action undertaken to stop genocide and gross violations of human rights have found legitimacy in global acceptance.[133] One can say that the intervention in Kosovo set a temporal benchmark for this concept. In the words of Nesiah, "for [the] international law and policy community it legitimized the use of military force for humanitarian purposes and increased states' humanitarian confidence in the ability to use military power for good."[134] Drawing from the Russian referendum and stitching it with past practices, one of the primary arguments advanced as a justification for unilateral humanitarian intervention has been that under the corpus of public international law, there exists no explicit prohibition to engage in such use of force when the mechanisms provided through the United Nations fail.[135] Under the *Lotus* theory, as advanced by the Permanent Court of International Justice, in the *absence* of prohibitive rules—"every state remains free to adopt the principles which it regards as best and most suitable."[136] This interpretation of the *Lotus* case can be used to establish that the UN Charter does not expressly prohibit unilateral humanitarian intervention. Additionally, in the absence of a prohibitive rule, the arguments in Part I of this paper can be construed to favor a

---

[131] *Id.*

[132] Farer, *supra* note 78; Williams & Stewart, *supra* note 81.

[133] *See* Richemond, *supra* note 72, at 79.

[134] Vasuki Nesiah, *From Beling to Bonn to Baghdad: A Space for Infinite Justice*, 17 HARV. HUM. RTS. J. 75, 77 (2004).

[135] IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES, 338-42 (1981).

[136] S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, ¶ 46 (Sept. 7).

permissive rule, which would permit states to intervene unilaterally for humanitarian purposes, as long as they do not violate established international legal principles.[137] Therefore, one may argue that public international law has long since created room to legally recognize unilateral intervention through the selective practices and patterns of states in this realm.

Momentarily assuming that unilateral intervention is legal, let us revisit the codification requirements of normative ambiguity as dealt with in the previous section. In addition to the already prescribed framework, the following parameters should also be factored into this potential legal instrument:

> The intervening state's human rights records and practices:[138] An independent body should be set up, along the lines of civil society, in order to evaluate the intervening state's pattern of respecting, protecting, and promoting human rights through reports and jurisprudence. A positive evaluation could be valuable political currency and earn it support for a decision to intervene, despite pending approval, or even a lack of approval, from the Security Council.[139]
>
> The determination of the process through which the decision to intervene has been arrived at in the intervening state[140]: This is under the assumption that involvement of democratic institutions in this decision making, adoption of democratic processes to determine use of unilateral force, comprehensive public debate over the issue, and inputs from all segments of the society will lend some legitimacy to the decision making process.[141]
>
> The state's competence to conduct intervention without escalating damage: In order to determine this, it is important to look at the state's economic and military resources subsequent to evaluating the scope of its claim.[142] A state that does not have the resources to con-

---

[137] Richemond, *supra* note 72, at 70.

[138] Richemond, *supra* note 72, at 66.

[139] *Id.*

[140] *Id.*

[141] *Id.*

[142] THE INDEP. INT'L COMM'N ON KOSOVO, THE KOSOVO REPORT 195, *available at* http://reliefweb.int/sites/reliefweb.int/files/resources/6D26FF881 19644CFC1256989005CD392-thekosovoreport.pdf ("After the use of force has achieved its objectives, there should be energetic implementation of the humanitarian mission by a sufficient commitment of resources to sustain the population in the target society and to ensure speedy and human reconstruction of that society in order for the whole population to return to normality."), *available at* http://reliefweb.int/sites/reliefweb.int/files/resources/6D26FF881 19644CFC1256989005CD392-thekosovoreport.pdf

> duct an armed intervention should not be allowed to proceed without monetary assistance or collated resources.
>
> Open debate: The idea of this debate rests in the notion that if unilateral intervention expresses "the collective will of the society of States,"[143] it will not pose a threat to the international legal system. To build upon this insight, it is necessary to consider what constitutes such an expression of "collective will" of the states, and whether such an expression of will exists independent of the United Nations.[144] If international law is to be derived from the Kosovo intervention, we may look to NATO's proposition, which suggests that in order to avert a humanitarian catastrophe, unilateral action may be taken by states acting on behalf of the society of states.[145]

In the previous part, it was suggested that the threshold of State failure, acquiescence, or tolerance should be codified. In this part, it is further supplemented that the scope of this threshold to determine when a state is unable to contain violations within its borders is best determined through the following levels of implementation: a) when the human rights abuses are extreme and b) when the international governing bodies cannot prevent them.[146] A state should be permitted to use unilateral military force only when human rights abuses are verifiable,[147] extreme,[148] and "shock the conscience."[149] In other words, "when confirmation of human rights atrocities is available to a greater extent, the legality of humanitarian intervention should be reconsidered and reapplied to meet the changing environment."[150] More importantly, unilateral use of force should be allowed when it appears that international organizations will fail to fully address and prevent human rights abuses.[151] The second level is not absolute and only provides guidelines for states.[152] Given what is at

---

[143] Hedley Bull, *Conclusion, in* INTERVENTION IN WORLD POLITICS 195 (Hedley Bull ed., 1984).

[144] *See* Nicholas J. Wheeler, *Humanitarian Vigilantes or Legal Entrepreneurs: Enforcing Human Rights in International Society*, CRITICAL REV. INT'L SOC. & POL. PHIL., Spring 2000, at 139.

[145] Vera Gowland-Debbas, *The Limits of Unilateral Enforcement of Community Objectives in the Framework of UN Peace Maintenance*, 11 EUR. J. INT'L L. 361, 361–83 (2000).

[146] Benjamin, *supra* note 75, at 144.

[147] See John Norton Moore, The Control of Foreign Intervention in Internal Conflict, 9 VA. J. INT'L L. 209, 264 (1969).

[148] Richard B. Lillich, *Humanitarian Intervention: A Reply to Ian Brownlie and a Plea for Constructive Alternatives, in* LAW AND CIVIL WAR IN THE MODERN WORLD, 229, 248 (John Norton Moore ed., 1974).

[149] L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 312 (H. Lauterpacht ed., 8th ed. 1955).

[150] Benjamin, *supra* note 75, at 154.

[151] Jean-Pierre L. Fonteyne, The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity Under the U.N. Charter, 4 CAL. W. INT'L L.J. 203, 264–65 (1974).

[152] Benjamin, *supra* note 75, at 154–55.

stake, the legitimization of unilateral humanitarian intervention should not require a state to exhaust every available peaceful means to prevent the abuse, especially if time is of the essence. An application of the principle of complementarity,[153] as understood by the International Criminal Court and Rome Statute can also be appended to this requirement (i.e., use of unilateral intervention when a state is unable or unwilling to address the ongoing crisis).

While implementation of such standards is usually hindered by the differential interpretations of states, the evolution of the doctrine of *responsibility to protect* has mitigated a lot of these challenges.[154] This doctrine relies on the paradigm shift in perspective—instead of debating the right of states to intervene in a crisis, the states should recognize it under their responsibility to protect the peace and security of the international system.[155] Furthermore, this right to humanitarian intervention under the responsibility to protect will only be invoked when a state has failed in its responsibility to protect its own citizens.[156] This norm has made it clear that the responsibility to protect is much more than intervention,[157] and has allowed humanitarian intervention as a last resort to gain greater currency in the international legal system. However, this article focuses only on the aspect of unilateral intervention as part of the responsibility framework and will not engage in discussion of the current legal status of responsibility to protect under the collective framework.

While it is easier to ascertain the applicability of unilateral humanitarian intervention to visible state failure and acquiescence, there are several *hidden conflicts* and instances of state-sponsored human rights abuses which remain undocumented and unacknowledged by the perpetrator state. For conflicts such as these, where the scope of verification and measurement of the prescribed thresholds are diluted by the state itself, there are no remedies available before international organs, unless

---

[153] The International Criminal Court is considered complementary to national criminal jurisdictions and steps in when national judicial systems fail. *See* Rome Statute of the International Criminal Court, pmbl., July 17, 1998, 2187 U.N.T.S. 3. It exercises jurisdiction when it can be demonstrated that the state concerned is either unwilling or unable to bring the perpetrators to justice. *See id.* art. 17. This is implemented by the court through articles 17 and 53 of the Rome Statute and is assessed on a case-by-case basis. *See id.* arts. 17, 53.

[154] INT'L COMM'N ON INTERVENTION & STATE SOVEREIGNTY, at 1, 64–67.

[155] Gareth Evans, President of Int'l Crisis Group & Co-Chair of the Int'l Comm'n on Intervention & State Sovereignty 2001, From Humanitarian Intervention to the Responsibility to Protect, Keynote Address to University of Wisconsin, Madison, Symposium on Humanitarian Intervention, (Mar. 31, 2006), *available at* http://www.gevans.org/speeches/speech211.html

[156] *Id.*

[157] Burmester, *supra* note 100, at 272.

the state concedes the existence of such conflicts or violations in the first place. Thus, borrowing from the progressive jurisprudence of the ECHR,[158] in the absence of evidence, productive results from national legislation, and large-scale international inaction, humanitarian intervention may be an effective way to minimize the damage in such cases.

A study of the Indian Naxalite movement has revealed it to be a classic hidden conflict. Described as the "biggest internal threat to Indian security," the movement has elicited a military response from the State.[159] Originally a socio-political movement, it has now taken the form of full-fledged armed violence.[160] India has repeatedly denied its existence before the international community, but the Naxal movement remains India's most persistent internal armed conflict.[161] Efforts to eradicate it have failed and the protracted violence has had far-reaching effects.[162] With generous aid from their Nepali counterparts, the Naxals in India have given rise to a conflict with a unique and dangerous international dimension, including frequent whispers of Chinese monetary involvement.[163] Leaders of the movement have also been alleged to have hideouts in China, thus escalating cross-border tensions.[164] Already rife with blatant violations of international legal standards, the Naxal conflict has also been associated with rumors of state-sponsored militia and child soldier employment.[165] As corroborated by reports of various Human Rights Committees, "initially an uprising of local indigenous people in Chhattisgarh, the Salwa Judum later received bi-partisan support from both the opposition and ruling parties' and moved on to be a powerful insurgency movement.[166] While the Indian State continues to deny its ex-

---

[158] *See* Velásquez Rodríguez Case, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, (July 29, 1988).

[159] *Senior Maoist 'Arrested' in India*, BBC NEWS (Dec. 19, 2007, 10:42:42 GMT), http://news.bbc.co.uk/go/pr/fr/-/2/hi/south_asia/7151552.stm.

[160] Judith Vidal-Hall, *Long Walk in a Deep Forest*, 35 INDEX ON CENSORSHIP, no. 4, 2006, at 73.

[161] *Id.*

[162] *Id.* at 74–75.

[163] *See id.* at 75.

[164] Dwaipayan Ghosh & Neeraj Chauran, *Cops nail China link with Naxals*, TIMES INDIA (Oct. 8, 2011, 3:33 AM IST), http://timesofindia.indiatimes.com/city/delhi/Cops-nail-China-link-with-Naxals/articleshow/10273433.cms?prtpage=1.

[165] Vivek Deshpande, *Left in the lurch*, INDIAN EXPRESS (July 10, 2011, 3:06 AM), *available at* archive.indianexpress.com/story-print/815252/.

[166] *Centre gives its tacit approval to Salwa Judum*, TIMES INDIA (Jan. 8, 2009, 3:54 AM IST), http://timesofindia.indiatimes.com/india/Centre-gives-its-tacit-approval-to-Salwa-Judum/articleshow/3948503.cms?; Randeep Ramesh, *Inside India's hidden war*, GUARDIAN, (May 9, 2006, 19:11 EDT) http://www.theguardian.com/world/2006/may/09/india.randeepramesh.

istence, the Naxal movement has maintained its consistent pace of violence over the central Indian terrain.[167] It would be interesting to test the practice of unilateral humanitarian intervention, stemming from collective responsibility to protect as a possible way to contain and address this problem on the Indian subcontinent.

IV. *JUS POST BELLUM* AND POST CONFLICT *NON LIQUET*

Once the intervention has commenced, there is greater potential for amalgamation of humanitarian and human rights abuses. Though conducted with the intention of containing human rights abuses or atrocities in the target state, humanitarian intervention has often failed to yield results, with the primary flaw being the attempt to apply human rights law to a situation of armed conflict.[168] While human rights laws are technically applicable to a conflict regime, these laws were designed to govern peacetime interactions.[169] Thus, while they act as a general protection against human rights violations, they lack basic rules to regulate the means and methods of warfare.[170] Additionally, during serious internal hostilities or ongoing conflicts, governments bound by human rights treaties can lawfully suspend most of these rights, including the substantive and procedural guarantees of a fair trial and the prohibition against arbitrary arrest.[171] This poses a persistent problem. In the event of an intervention, these violations usually go unregulated and worsen the existing atrocities in the State.

Furthermore, since human rights laws are generally designed to restrain the abusive practices only of the party recognized by the relevant instruments (i.e., the government and its agents), it creates a legal vacuum in terms of accountability of the non-state actors present in the state.[172] The human rights regime has no concept of non-state actors, and since only states are parties to these treaties, they alone are capable of committing and being internationally liable for violating he treaty provi-

---

[167] *See* Nandini Sundar v. Chattisgarh, (2011) 7 S.C.C. 547 (India).

[168] *Internal Disturbances and Tensions: A New Humanitarian Approach?* 262 INT'L REV. RED CROSS 3, 4 (1988) [hereinafter *Internal Disturbances and Tensions*]; Lillich, *supra* note 148.

[169] *Internal Disturbances and Tensions*, supra note 168.

[170] *See id.*

[171] *See* American Convention on Human Rights art. 27, Nov. 22, 1969, 1144 U.N.T.S. 123.

[172] W. Michael Reisman, *Unilateral Action and the Transformation of the World Constitutive Process: The Special Problem of Humanitarian Intervention,* 11 EUR. J. INT'L L. 3, 17 (2000); Bull, *supra* note 143.

sions.[173] This is a great handicap for the intervening state and the state on whose territory violations are taking place. Rampant abuses of the same instruments committed by non-state actors, rebels, or insurgent groups do not constitute human rights violations and incur no international legal obligation.[174] Instead, penalties for such abuses fall under the limited domestic laws of an already failed state and go largely unpunished due to lack of motivation, infrastructure, or resources.[175] As a result of these issues, there is a serious possibility of an aggregate increase of violations during the intervention phase, which may increase the chance of failure and delegitimize the intervention itself.

Therefore, a dual system of human rights and international humanitarian law needs to be implemented simultaneously in order to address and absolve this *non liquet*. The human rights system will apply to any human rights violations incidental to the conflict or which take place before, during, or after the period of intervention while international humanitarian law is to find a "methodological basis for dealing with the problematic issue of civilian casualties and to judge objectively the conduct of military operations by the respective parties" to the conflict;[176] it will particularly extend its applicability to the intervening state. Even though human rights and humanitarian law share "a common nucleus of non-derogable rights and a common purpose of protecting human life and dignity,"[177] the detailed provisions of humanitarian law are necessary to fill in the gaps or *non liquet* in the human rights framework. In the event of an armed intervention, humanitarian law provides victims of the conflict with far greater legal recourse.[178] This also ensures that effects of the intervention are contained and do not lead to subsequent occupation or annexation of the victim State.

Finally, one arrives at *jus post bellum*. *Jus post bellum* is the name given by contemporary scholars to an emergent category of international laws, which are applicable to the *post-conflict phase*.[179] The term "post-conflict phase" is understood to indicate the "period from when a

---

[173] Reisman, *supra* note 172.

[174] *Internal Disturbances and Tensions*, *supra* note 168.

[175] *Id.*

[176] Robert Kogod Goldman, *Internal Humanitarian Law: America's Watch Experience in Monitoring Internal Armed Conflicts*, 9 AM. U. INT'L L. REV. 49, 51 (1993).

[177] Coard et al v. United States, Case 10.951, Inter-Am. Comm'n H.R., Report No. 109/99, OEA/Ser.L./V/II.106, doc. 3 rev. ¶ 39 (1999).

[178] Reisman, *supra* note 172; Williams & Stewart, *supra* note 81.

[179] Alex J. Bellamy, *The responsibilities of victory:* Jus Post Bellum *and the Just War*, 34 REV. INT'L STUD., 601, 615 (2008).

state signs a peace agreement after conflict until the moment the state has reached a situation of durable peace, either by returning to its pre-war situation or by achieving an improved version thereof."[180] Once the period of intervention is over, it is imperative to evaluate the post conflict laws and statistics, not only for restoration of peace and security, but also because increasing "attempts are made to justify intervention on multiple grounds, which takes into account the effects of the intervention on the post-conflict phase."[181] According to contemporary legal literature, the success, legality, and acceptability of an intervention is often measured by its effects and implications after the use of armed force, in addition to fulfilling its purpose and intent.[182] Creation and adherence to a *jus post bellum* framework can help states stay within the prescribed limits of unilateral humanitarian intervention by providing them with clear rules on conduct to be observed during the post-conflict phase. The rules of *jus post bellum* "can thereby allow for a more nuanced assessment of the legality or legitimacy to use force,"[183] in addition to those employed prior to and during the intervention phase. Conditioning the legality of these interventions retroactively in respect for the rules of *jus post bellum* can effectively help in post-conflict reconstruction and ensure that the intervening state does not exploit the intervention process.[184]

V. CONCLUSION

In light of the prevalent uses of force and increased asymmetric warfare, it is becoming increasingly necessary to codify the unilateral intervention practices outside the scope of self-defense. While normative ambiguity has allowed it to nourish under the shadow of collective security, repeated vetoes and a politicized Security Council demands that we look at alternatives outside the United Nations. Having discussed its emergence, development, and dimensions, it is clear that the legitimization of unilateral intervention can happen only when a strict enforcement framework is in place.

---

[180] Inger Österdahl & Esther van Zadel, *What Will* Jus Post Bellum *Mean? Of New Wine and Old Bottles*, 14 J. CONFLICT & SEC. L. 175, 176 (2009).

[181] Carsten Stahn, 'Jus ad bellum', 'jus in bello'. . . 'jus post bellum'*?—Rethinking the Conception of the Law of Armed Force*, 17 EUR. J. INT'L L. 921, 930 (2006). (supporting a framework of *jus post bellum*).

[182] *Id.* at 931–33.

[183] *Id.* at 942.

[184] *See id.* at 931.

By employing the three-tier system as discussed in the preceding sections—establishing legality before, during, and after an intervention—states will not be able to validate a unilateral act of humanitarian intervention until and unless they comply with the framework of *jus post bellum* rules as soon as the intervention ends. Prior to intervention, a state's democratic decision-making, military practices, and human rights record should be looked into in order to objectively evaluate their claim. In course of intervention, strict adherence to IHL must be observed and monitored by independent bodies and incidentally affected states. But, this two-pronged approach is inadequate to ensure comprehensive compliance of international law during unilateral intervention by states. Many a state considers the intervention complete once the conflict/violations/use of force is curbed within the target state/region. As was witnessed in Iraq, however, incomplete post conflict reconstruction can lead to further violence and escalation of human rights abuses. Therefore, *jus post bellum* is an important component in this tripartite legitimization process. Not only will this ensure overall adherence to IHL practices, but it will also limit unilateral intervention to those states that are able and willing to address post conflict responsibilities and ravages. Violations of or non-compliance with the rules of *jus post bellum* should also render an entire intervention illegal, regardless of adherence to other principles and requirements prior to the *jus post bellum* stage—thus, raising the stakes. Enforcement of all these stages of legitimization should be monitored and assessed through the creation of an independent monitoring system. Just what this system looks like is something that must be discussed in subsequent state debates. The independent body evaluating the pre-intervention claims or a separate entity that consists of competent human rights bodies and ad hoc judicial organs may take up this role. It is hoped that through a stringent process of legal compliance, definitive thresholds, and independent monitoring at the three crucial stages, unilateral humanitarian intervention becomes a legislative reality in the near future.