

**EXCEPTIONAL MEASURES CALL FOR
EXCEPTIONAL TIMES: THE
PERMISSIBILITY UNDER INTERNATIONAL
LAW OF HUMANITARIAN INTERVENTION
TO PROTECT A PEOPLE’S RIGHT TO
SELF-DETERMINATION**

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I. INTRODUCTION

On August 29, 2013, the British government announced that if the United Nations Security Council failed to take actions on the chemical attack carried out by the Syrian government against its people, “the UK would still be permitted under international law to take exceptional measures in order to alleviate the scale of the overwhelming humanitarian catastrophe in Syria.”¹ The British government said that “[s]uch a legal basis was available under the doctrine of humanitarian intervention.”² Although the British government advanced this proposal in response to the chemical attack, a proposal that was subsequently rejected by the British Parliament,³ and it now seems very likely that a military intervention in Syria has been averted,⁴ the movement by the British government rekindled the debate on whether there is a right under international law to intervene with military force in another country for humanitarian purposes.

Although Syria’s acquiescence to the dismantling of its chemical weapons arsenal⁵ is a welcomed development, the

1. Prime Minister’s Office, Chemical Weapon Use by Syrian Regime: UK Government Legal Position, ¶ 4 (2013), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/235098/Chemical-weapon-use-by-Syrian-regime-UK-government-legal-position.pdf.

2. *Id.*

3. Steven Erlanger & Stephen Castle, *Britain’s Rejection of Syrian Response Reflects Fear of Rushing to Act*, N.Y. TIMES, Aug. 29, 2013, at A8.

4. See, e.g., S.C. Res. 2118, para. 3, U.N. Doc. S/RES/2118 (Sept. 27, 2013) (endorsing the Organization for the Prohibition of Chemical Weapons’ decision to destroy Syria’s chemical weapons program); see also Org. for the Prohibition of Chem. Weapons [OPCW], Decision, *Destruction of Syrian Chemical Weapons*, EC-M-33/DEC.1, at 3 (Sept. 27, 2013) (“[T]he Syrian Arab Republic shall complete the elimination of all chemical weapons material and equipment in the first half of 2014”).

5. Albert Aji & Zeina Karam, *Assad: Syria Committed to Destroy Chemical*

conflict that has been ravaging the country for years seems to have no end in sight.⁶ In the meantime, casualties reach alarming numbers.⁷ World powers have taken sides, with Russia supporting the Assad regime and several Western countries backing the opposition forces.⁸ Furthermore, the United Kingdom, France, and the United States recognized the Syrian Opposition Council (“SOC”) as the sole legitimate representative of the Syrian people.⁹ This recognition has raised the question of whether the Syrian conflict is a struggle for self-determination.¹⁰

This Comment argues that humanitarian interventions are permissible under the U.N. Charter (“the Charter”) and customary international law for limited purposes that include the protection of peoples’ rights to self-determination under certain circumstances. Part II of this Comment will analyze the definition and evolution of the doctrine of humanitarian intervention and the right of peoples to self-determination. Part III will analyze the current status of the legality of humanitarian intervention under both the Charter and customary international law, concluding it is permissible under both types of law and two

Weapons, YAHOO! NEWS (Sept. 23, 2013), <http://news.yahoo.com/assad-syria-committed-destroy-chemical-weapons-194917936.html>.

6. See Max Fisher, *Political Science Says Syria’s Civil War Will Probably Last at Least Another Decade*, WASH. POST (Oct. 23, 2013), <http://www.washingtonpost.com/blogs/worldviews/wp/2013/10/23/political-science-says-syrias-civil-war-will-probably-last-at-least-another-decade> (estimating that the Syrian conflict “will most likely last through 2020 and perhaps well beyond”).

7. See Erika Solomon, *Syria’s Death Toll Now Exceeds 140,000: Activist Group*, REUTERS (Feb. 15, 2014), <http://www.reuters.com/article/2014/02/15/us-syria-crisis-toll-idUSBREA1E0HS20140215>.

8. Holly Yan, *Syria Allies: Why Russia, Iran and China are Standing by the Regime*, CNN (Aug. 29, 2013), <http://www.cnn.com/2013/08/29/world/meast/syria-iran-china-russia-supporters/index.html>; *Report: Syria Rebels to Get U.S. Armed Aid*, UNITED PRESS INT’L (Dec. 11, 2012), http://www.upi.com/Top_News/World-News/2012/12/11/Report-Syria-rebels-to-get-US-armed-aid/UPI-99581355212800.

9. Margaret Brennan, *U.S. Recognizes Syrian Opposition*, CBS NEWS (Dec. 11, 2012), http://www.cbsnews.com/8301-202_162-57558612/u.s-recognizes-syrian-opposition.

10. See, e.g., Dapo Akande, *Self-Determination and the Syrian Conflict—Recognition of Syrian Opposition as Sole Legitimate Representative of the Syrian People: What Does this Mean and What Implications Does it Have?*, EJIL: TALK! (Dec. 6, 2012), <http://www.ejiltalk.org/self-determination-and-the-syrian-conflict-recognition-of-syrian-opposition-as-sole-legitimate-representative-of-the-syrian-people-what-does-this-mean-and-what-implications-does-it-have>.

sets of criteria will be outlined. Part IV will then apply these sets of criteria to the self-determination scenario and conclude that humanitarian intervention is permissible both under the Charter and customary international law to protect peoples' rights to self-determination under very limited conditions.

II. HUMANITARIAN INTERVENTION AND SELF-DETERMINATION: DEFINITIONS, ORIGINS, AND EVOLUTION

Professor Jordan Paust has stated that a denial of self-determination can infringe upon human rights.¹¹ For that reason, some scholars have considered whether such a denial gives rise to a right to intervene for humanitarian reasons.¹²

A. *Humanitarian Intervention*

1. *Definition*

Several definitions of humanitarian intervention have been provided over the centuries. This Comment defines humanitarian intervention as the use of force by a state, group of states, or an international organization other than the United Nations, in another state in order to stop or prevent genocide or other gross, systematic, and widespread violations of basic human rights taking place within the territory of that state that affect its citizens.¹³

11. Jordan J. Paust, *International Law, Dignity, Democracy, and the Arab Spring*, 46 CORNELL INT'L L.J. 1, 5 (2013).

12. See, e.g., *id.* at 18 (noting that in 1984, the U.N. General Assembly affirmed the "permissibility of self-determination assistance" for the people of South Africa); W. Michael Reisman, *Coercion and Self-Determination: Construing Charter Article 2(4)*, 78 AM. J. INT'L L. 642, 643–44 (1984) (stating that Article 2(4) of the U.N. Charter enhances the "opportunities for ongoing self-determination," which is the fundamental principle of contemporary international law, and that interventions can "increase the probability" of people's free choice of "government and political structure"); see also Byron F. Burmester, *On Humanitarian Intervention: The New World Order and Wars to Preserve Human Rights*, 1994 UTAH L. REV. 269, 283 n.93 (1994) (citing scholars who affirm tyranny creates a moral obligation for state intervention).

13. Other recent formulations of the definition of humanitarian intervention have been offered. See Bartram S. Brown, *Humanitarian Intervention at a Crossroads*, 41 WM. & MARY L. REV. 1683, 1686–87 (2000); Barry M. Benjamin, Note, *Unilateral Humanitarian Intervention: Legalizing the Use of Force to Prevent Human Rights Atrocities*, 16 FORDHAM INT'L L.J. 120, 120 n.5 (1992); Malvina Halberstam, *The Legality*

This definition excludes interventions by outside powers to rescue their own nationals when they are being threatened abroad. Therefore, this Comment will not consider the cases of U.S. interventions in the Congo (1964), the Dominican Republic (1965), or Grenada (1983), and it will not consider Israel's raid in Entebbe, Uganda (1976). Such actions have been described as instances of self-help or self-defense.¹⁴

The analysis will also exclude instances of use of force that have been authorized by the Security Council, since these interventions are undertaken by virtue of the Council's enforcement powers under the Charter.¹⁵ This Comment is concerned instead with forcible actions taken in the absence of a Security Council resolution authorizing the use of force (or even a General Assembly resolution on the matter).

2. *Evolution*

The origins of the doctrine of humanitarian intervention can be traced to the Crusades.¹⁶ In the thirteenth century, St. Thomas Aquinas proposed that "one sovereign has the right to intervene in the internal affairs of another 'when the latter greatly mistreats its subjects.'"¹⁷ Hugo Grotius receives credit as the first international law scholar to articulate the standard for humanitarian intervention.¹⁸ He "recognized the propriety of a

of Humanitarian Intervention, 3 CARDOZO J. INT'L & COMP. L. 1, 1 (1995); Thomas M. Franck & Nigel S. Rodley, *After Bangladesh: The Law of Humanitarian Intervention by Military Force*, 67 AM. J. INT'L L. 275, 277 n.12 (1973); Daniel Wolf, *Humanitarian Intervention*, 9 MICH. Y.B. INT'L LEGAL STUD. 333, 334 n.3 (1988).

14. David J. Scheffer, *Toward a Modern Doctrine of Humanitarian Intervention*, 23 U. TOL. L. REV. 253, 255 n.4 (1992).

15. See U.N. Charter art. 42 ("[The Security Council] may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security."); see also S.C. Res. 816, para. 4, U.N. Doc. S/RES/816 (Mar. 31, 1993) (authorizing Member States to take all necessary measures to enforce the prohibition on flights over the Republic of Bosnia and Herzegovina "in the event of further violations to ensure compliance with the ban").

16. Michael J. Bazylar, *Reexamining the Doctrine of Humanitarian Intervention in Light of the Atrocities in Kampuchea and Ethiopia*, 23 STAN. J. INT'L L. 547, 571 n.103 (1987).

17. *Id.* at 571.

18. James W. Smith III, *Unilateral Humanitarian Intervention and the Just Cause Requirement: Should the Denial of Self-Determination to Indigenous People be a Valid*

‘war’ against a ruler who engages in a ‘manifest oppression’ of his or her people.”¹⁹ The doctrine was also advanced by Emerich de Vattel, who stated that if a prince, by violating the fundamental laws, gives his subjects a lawful cause for resisting him, any foreign power may rightfully assist an oppressed people who ask for its aid.²⁰

In the late nineteenth and early twentieth centuries, humanitarian intervention became widely accepted as “almost an absolute right of a state”.²¹ Most of those interventions were aimed at protecting religious or ethnic minorities in Europe.²² Outside the Old Continent, the U.S. intervention in Cuba in 1898 is considered to be another example of the use of force for humanitarian purposes.²³ It has been argued that “many of the policies of humanitarian intervention were institutionalized by the League [of Nations] in minority treaties and specific third-party procedures for the resolution of disputes.”²⁴

The year 1945 marked the beginning of a new era in international law. On October 24 of that year the U.N. Charter was entered into force.²⁵ In its very first article, the Charter identifies a purpose “to maintain international peace and security.”²⁶ Article 2(3) mandates that the organization’s Members must settle their international disputes in a peaceful manner.²⁷

Furthermore, Article 2(4) states that all Members “shall refrain in their international relations from the threat or use

Basis for Humanitarian Intervention? Yes, 31 AM. INDIAN L. REV. 699, 703 (2007).

19. JORDAN J. PAUST ET AL., INTERNATIONAL LAW AND LITIGATION IN THE U.S. 657 (3d ed. 2009).

20. Bazylar, *supra* note 16, at 571.

21. Benjamin, *supra* note 13, at 126.

22. Scheffer, *supra* note 14, at 254 n.4.

23. Bazylar, *supra* note 16, at 583. *But see* Franck & Rodley, *supra* note 13, at 285 (pointing out that some have perceived this intervention as motivated by “the powerful influence of endangered investments and trade”).

24. Thomas E. Behuniak, *The Law of Unilateral Humanitarian Intervention by Armed Force: A Legal Survey*, 79 MIL. L. REV. 157, 164 (1978).

25. *Introductory Note*, UNITED NATIONS, <http://www.un.org/en/documents/charter/intro.shtml> (last visited Oct. 29, 2014).

26. U.N. Charter art. 1, para. 1.

27. *Id.* art. 2, para. 3.

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.”²⁸ This provision is not absolute in its prohibition on the use of force, which is allowed in cases of self-defense under Article 51 and instances in which the United Nations engages in enforcement action under Articles 42 and 48.²⁹ Finally, Article 2(7) establishes the principle of non-intervention when it posits that “[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state”³⁰ This provision also creates an exception for enforcement measures taken by the United Nations.³¹

B. Political Self-Determination

1. Definition

The term self-determination means many different things to many different peoples.³² The Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations (“the Declaration on Principles of International Law”) provides that a people’s right to self-determination is their right to freely “determine, without external interference,

28. *Id.* art. 2, para. 4.

29. See Dapo Akande, *The Legality of Military Action in Syria: Humanitarian Intervention and Responsibility to Protect*, EJIL: TALK! (Aug. 28, 2013), <http://www.ejiltalk.org/humanitarian-intervention-responsibility-to-protect-and-the-legality-of-military-action-in-syria> (arguing that Security Council authorization and self-defense are the only legal bases to take military action against Syria); see also U.N. Charter arts. 42, 48, 51 (describing circumstances in which the Security Council is allowed to take action and when acts of self-defense are to be permitted). Enforcement action can also be undertaken by regional organizations under Article 52. *Id.* art. 52.

30. U.N. Charter art. 2, para. 7.

31. *Id.*; see also Müge Kinacıoğlu, *The Principle of Non-Intervention at the United Nations: The Charter Framework and the Legal Debate*, 10 PERCEPTIONS J. INT’L AFF. 15, 22–23 (noting that Article 2(7) establishes an exception to the rule of “nonintervention by the UN in the domestic affairs of a state”).

32. See, e.g., James A.R. Nafziger, *Self-Determination and Humanitarian Intervention in a Community of Power*, 20 DENV. J. INT’L L. & POL’Y 9, 19 (1991).

their political status and to pursue their economic, social and cultural development”³³

Moreover, this Declaration states that the right to self-determination can be implemented by the “establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people.”³⁴ “These modes of enjoyment are particularly relevant to a given people’s process of self-identification and their consensual participation in a relatively new and independent political process.”³⁵

2. *Evolution*

The origins to the self-determination doctrine have been traced to the American Declaration of Independence and to the French Revolution.³⁶ By the end of World War I, it was still yet to be recognized as an international legal principle and even the Covenant of the League of Nations did not openly endorse it.³⁷ One author notes, however, that “[t]he idea that peoples have a right to ‘self-determination’ came to international prominence at the end of the First World War.”³⁸

The adoption of the Charter marked a turning point in the recognition of self-determination when it made developing “friendly relations among nations based on respect for the principle of equal rights and self-determination” a central purpose of the newly-founded organization.³⁹ Furthermore,

33. Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), Annex, U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8028, at 123 (Oct. 24, 1970) [hereinafter Declaration on Principles of International Law].

34. *Id.* at 124.

35. Paust, *supra* note 11, at 7 (footnote omitted).

36. Rodney Pails, *Self-Determination, the Use of Force and International Law: An Analytical Framework*, 20 U. TAS. L. REV. 70, 70 (2001).

37. *Id.* at 71.

38. James J. Summers, *The Rhetoric and Practice of Self-Determination: A Right of All Peoples or Political Institutions?*, 73 NORDIC J. INT’L L. 325, 328 (2004).

39. U.N. Charter art. 1, para. 2; see Bradley R. Simpson, *Self-Determination, Human Rights, and the End of Empire in the 1970s*, 4 HUMANITY 239, 242–43 (2013) (noting that the Declaration of the Principles of International Law, which is in

Article 55(c) recognizes respect for the principle of peoples' self-determination as the basis for peaceful and friendly relations among nations.⁴⁰ Article 56 goes so far as to require all Members to "pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55."⁴¹

Other international documents support this right as well. Article 1 of the International Covenant on Civil and Political Rights ("ICCPR") states that "all peoples have the right of self-determination" and that "[b]y virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."⁴² Several General Assembly Resolutions also endorse self-determination as a right of peoples, including the Declaration on Principles of International Law⁴³ and the Declaration on the Granting of Independence to Colonial Countries and Peoples⁴⁴. Moreover, even though the Universal Declaration of Human Rights does not specifically refer to self-determination by that term, it does state that "[t]he will of the people shall be the basis of the authority of government".⁴⁵

The International Court of Justice (ICJ) recognized this principle as an essential one in contemporary international law.⁴⁶

accordance with the U.N. Charter, "marked a turning point in the evolution of self-determination").

40. U.N. Charter art. 55, para. c.

41. *Id.* art. 56.

42. International Covenant on Civil and Political Rights art. 1, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

43. See Declaration on Principles of International Law, *supra* note 33, at 123.

44. Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514 (XV), U.N. Doc. A/1514, at 67 (Dec. 14, 1960).

45. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), at 75 (Dec. 10, 1948).

46. See Legal Consequences for States of Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, 31–32, ¶¶ 52–53 (June 21) (noting that the principle of self-determination is applicable to all territories of the United Nations and a contemporary interpretation of the sacred trust, taking into account the current legal system, "leaves little doubt that the ultimate objective of the sacred trust was self-determination"); Western Sahara, Advisory Opinion, 1975 I.C.J. 12, 31–33, ¶¶ 54, 56 (Oct. 16) (asserting that the ICJ "must take into consideration the changes which have occurred in the supervening half-century," and the Court's interpretation of the principle

Furthermore, the Court declared in the *East Timor* case that the right of peoples to self-determination is an obligation *erga omnes*,⁴⁷ an obligation owing to and among all of humankind⁴⁸. This case addressed a dispute between Portugal and Australia over activities the latter carried out in East Timor, which was then a Portuguese possession.⁴⁹ This seems to indicate that, at least in the context of colonialism, the right of peoples to self-determination “must be respected by all members of the international community . . . [and] that all states have a legal interest in ensuring proper exercise of the right.”⁵⁰

Others interpret this ruling to also mean that the right to self-determination is a rule of *jus cogens* character.⁵¹ A *jus cogens* rule, or a peremptory norm, is a rule from which there is no derogation, unless it is modified by another peremptory norm.⁵² As commanding law, nations are not permitted to depart from *jus cogens* norms.⁵³

Therefore, international law seems to accord a great deal of recognition to the principle of self-determination, by granting this right to all of mankind and forbidding states from departing from it.

3. *A Right of Peoples*

The idea of self-determination as a right of peoples has its origins in “critiques of sovereignty by Grotius and Pufendorf and

of self-determination “cannot remain unaffected by the subsequent development of law, through the Charter”).

47. *East Timor (Port. v. Austl.)*, Judgment, 1995 I.C.J. 90, 102, ¶ 29 (June 30); PAUST ET AL., *supra* note 19, at 61.

48. *See* PAUST ET AL., *supra* note 19, at 59 (referring to human law as the customary law of nations).

49. *East Timor*, 1995 I.C.J. at 92, para. 1.

50. Pails, *supra* note 36, at 74.

51. Steven Wheatley, *The NATO Action Against the Federal Republic of Yugoslavia: Humanitarian Intervention in the Post-Cold War Era*, 50 N. IR. LEGAL Q. 478, 509 (1999).

52. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. k (1987).

53. Jon M. Van Dyke, *The Role of Customary International Law in Federal and State Court Litigation*, 26 U. HAW. L. REV. 361, 369 (2004) (stating that no nation is allowed to act contrary to *jus cogens* principles).

in the libertarian movements of the eighteenth century.”⁵⁴ Yet, despite the strong recognition this right has received since 1945, “the issue as to which group constitutes a ‘people’ . . . remain[s] highly contentious.”⁵⁵

Even if a definition remains elusive, some constituent characteristics can be delineated. A report issued by the United Nations Educational, Scientific, and Cultural Organization in 1990 proposed the following characteristics of a people:

- (1) a group of individual human beings who enjoy some or all of the following common features: (a) a common historical tradition; (b) racial or ethnic identity; (c) cultural homogeneity; (d) linguistic unity; (e) religious or ideological affinity; (f) territorial connection; (g) common economic life; (2) the group must be of certain number who need not be large (e.g. the people of micro-States) but must be more than a mere association of individuals within a State; (3) the group as a whole must have the will to be identified as a people or the consciousness of being a people—allowing that groups or some members of such groups, though sharing the foregoing characteristics, may not have the will or consciousness; and (4) possibly the group must have institutions or other means of expressing its common characteristics and will for identity.⁵⁶

III. ANALYZING THE PERMISSIBILITY OF HUMANITARIAN INTERVENTION UNDER INTERNATIONAL LAW

Although there seems to be a consensus that humanitarian interventions were permitted under customary international law prior to 1945, scholars are sharply divided on whether humanitarian interventions are currently allowed under the Charter. They also split on whether the doctrine has resuscitated as custom in recent decades. Of those scholars who support the current validity of humanitarian intervention, a minority has

54. Nafziger, *supra* note 32, at 12.

55. Wheatley, *supra* note 51, at 508 n.188 (citation omitted).

56. U.N. Educ., Scientific, and Cultural Org. [UNESCO], Nov. 27–30, 1989, *Int'l Meeting of Experts on Further Study of the Concept of the Rights of Peoples: Final Report and Recommendations*, ¶ 22(1)–(4), U.N. Doc. SHS-89/CONF.602/7 (Feb. 22, 1990) [hereinafter UNESCO].

advocated for its use to protect a people's right to self-determination.

A. *Current Status of Humanitarian Intervention Under the United Nations Charter*

1. *Opponents: Humanitarian Intervention Has Been Banned by the Charter*

Many authors insist that, regardless of whether there was a right to humanitarian interventions under customary international law, such right disappeared after the enactment of the Charter.⁵⁷ Scholars in general argue that Article 2(4) almost completely bans the use of force in international relations.⁵⁸ They also contend that Article 2(7) upholds the principle of non-intervention on the domestic affairs of any state.⁵⁹ This

57. See, e.g., Jost Delbrück, *A Fresh Look at Humanitarian Intervention Under the Authority of the United Nations*, 67 IND. L.J. 887, 889–90 (1992) (noting that under general international law, scholars disagree on whether states have a right to humanitarian intervention); Scheffer, *supra* note 14, at 259 n.9 (explaining that scholars such as Lillich, Frank, Rodley, and Fairley believe that “the use of force except in cases of self-defense or at the direction of the Security Council” was de-legitimized after the enactment of the Charter); Lee F. Berger, *State Practice Evidence of the Humanitarian Intervention Doctrine: The ECOWAS Intervention in Sierra Leone*, 11 IND. INT'L & COMP. L. REV. 605, 606 (2001) (“[F]or a humanitarian intervention not approved by the U.N. Security Council to be legal, customary international law allowing humanitarian interventions must have formed.”).

58. See, e.g., Smith, *supra* note 18, at 705 (noting that Article 2(4) bans the use of force “designed to impair the territorial integrity of a state, affect the political independence of a state, or violate the purposes of the United Nations”); Franck & Rodley, *supra* note 13, at 285 (noting that under the Charter, there are very few instances where force is used). *But see* Jordan Paust, *US Use of Limited Force in Syria Can be Lawful Under the UN Charter*, JURIST (Sept. 10, 2013, 11:00 AM), <http://jurist.org/forum/2013/09/jordan-paust-force-syria.php> (arguing that “a textually sound and policy-serving approach to interpretation of Article 2(4) would not automatically rule out every use of force in every social context”).

59. See Brown, *supra* note 13, at 1688 n.17 (referring to Article 2(7) as one of multiple provisions in the Charter that reinforces state sovereignty); see also Lori Fisler Damrosch, *Commentary on Collective Military Intervention to Enforce Human Rights*, in *LAW AND FORCE IN THE NEW INTERNATIONAL ORDER* 215, 219 (Lori Fisler Damrosch & David J. Scheffer eds., 1991) (stating that as long as a state's conduct is not directed against another state, no intervention can be authorized).

principle seemingly appears to limit interference with a state's internal affairs.⁶⁰

Non-intervention is said to “express a correlative duty to respect sovereignty.”⁶¹ Article 2(1) states that the “Organization is based on the principle of sovereign equality of all its Members.”⁶² Sovereignty can be defined as “the independence and freedom of states from any external dominance in the determination of their domestic and foreign policies and the equality of states under law.”⁶³ Therefore, sovereignty excludes, in principle, the “permissibility of interventions by third parties.”⁶⁴ Particularly, one scholar has argued that in the international society of independent states, an act of force against the state is an act of aggression and it must be punished with war.⁶⁵

2. *Proponents: Humanitarian Intervention Has Not Been Banned by the Charter*

Scholars who favor humanitarian intervention point to several provisions in the Charter to support their position. Many authors state that the prohibition on the use of force embodied in Article 2(4) only applies to cases where force, or the threat of it, is used against the territorial integrity or the political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.⁶⁶ Other authors

60. See Scheffer, *supra* note 14, at 261 (noting that the principle of nonintervention prohibits international inquiry into majority of activities that occur strictly within a nation's borders). *But see* Paust, *supra* note 11, at 8 (“It is well recognized that human rights violations and international crimes are of international concern.”).

61. JOHN JANZEKOVIC, *THE USE OF FORCE IN HUMANITARIAN INTERVENTION: MORALITY AND PRACTICALITIES* 140 (2006).

62. U.N. Charter art. 2, para. 1.

63. Delbrück, *supra* note 57, at 889.

64. *Id.*

65. See MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* 61–62 (1977) (noting that an act of force by one state against another constitutes aggression and justifies war). *But see* Smith, *supra* note 18, at 705 (noting that in response to concerns of member states regarding aggression, Article 2(4) of the Charter places limitations on the use of force). *But see* Paust, *supra* note 11, at 8 (“[T]he pretended cloak of state sovereignty ends where human rights begin.”).

66. See, e.g., FERNANDO R. TESÓN, *HUMANITARIAN INTERVENTION: AN INQUIRY INTO*

counter that such a construction of Article 2(4) would deprive it of its intended meaning.⁶⁷ But as one noted scholar observed: “If the drafters wanted to prohibit all military force, they would have done so, especially because it was relatively easy to do so.”⁶⁸

Supporters of humanitarian intervention also point to the inapplicability of Article 2(7) to situations that involve egregious violations of human rights. Article 2(7), they argue, only prohibits intervention *by* the United Nations⁶⁹ and, in any event, the prohibition only extends to matters that are “essentially within the domestic jurisdiction of any state.”⁷⁰ Human rights violations are no longer considered to be within a state’s jurisdiction; instead they are regarded as matters of international concern.⁷¹

Furthermore, supporters of humanitarian intervention claim that it does not violate the principle of sovereign equality of all Members contained in Article 2(1). Accordingly, a state impliedly waives its sovereignty when it violates international human

LAW AND MORALITY 192–93 (3d ed. 2005) (arguing that although Article 2(4) places restraints on a member’s use of force, it does not prohibit humanitarian intervention); Julie Mertus, *Reconsidering the Legality of Humanitarian Intervention: Lessons from Kosovo*, 41 WM. & MARY L. REV. 1743, 1763 (2000) (“By its very terms, the Charter does not prohibit all threats or uses of force.”); Paust, *supra* note 58 (stating that Article 2(4) does not prohibit every use of armed force and only covers three types of force).

67. See, e.g., Oscar Schachter, *The Lawful Resort to Unilateral Use of Force*, 10 YALE J. INT’L L. 291, 294 (1985); see Behuniak, *supra* note 24, at 184 (noting that allowing a State to intervene in the affairs of another state for purposes of humanitarian intervention will inevitably affect the target state’s political process, violating Article 2(4), which prohibits the use of force when directed towards the political independence of a state).

68. TESÓN, *supra* note 66, at 192.

69. See, e.g., Clinton W. Alexander, *NATO’s Intervention in Kosovo: The Legal Case for Violating Yugoslavia’s National Sovereignty in the Absence of Security Council Approval*, 22 HOUS. J. INT’L L. 403, 410 (2000) (stating that Article 2(7) “applies the idea of nonintervention to the United Nations as a whole”).

70. U.N. Charter art. 2, para. 7.

71. Laura Geissler, *The Law of Humanitarian Intervention and the Kosovo Crisis*, 23 HAMLINE L. REV. 323, 328 (2000); Mitchell A. Meyers, Comment, *A Defense of Unilateral or Multi-Lateral Intervention Where a Violation of International Human Rights Law by a State Constitutes an Implied Waiver of Sovereignty*, 3 ILSA J. INT’L & COMP. L. 895, 896 (1997).

rights law.⁷² Therefore, when a state intervenes to protect human rights, it does not infringe the sovereignty principle.⁷³

Moreover, supporters have argued that Articles 55(c) and 56 of the Charter endorse the practice.⁷⁴ Article 55(c) states that the United Nations “shall promote universal respect for, and observance of, human rights and fundamental freedoms for all.”⁷⁵ Article 56 requires all Members to take “action in cooperation with the Organization for the achievement of purposes set forth in Article 55.”⁷⁶ These two articles have been read as authorizing humanitarian intervention.⁷⁷

Supporters of humanitarian intervention also argue that the U.N.’s failure to stop gross human rights violations justifies the resort to unilateral intervention.⁷⁸ Rights created under human rights covenants cannot be presumed to lack an effective remedy and, therefore, the failure of the international community to collectively enforce them means that enforcement measures were meant to be left to states acting on their own.⁷⁹ Other scholars point out that states surrendered their right to intervene on the condition that the United Nations would be an

72. Meyers, *supra* note 71, at 907; see Paust, *supra* note 11, at 8 (“[T]he pretended cloak of state sovereignty ends where human rights begin.”).

73. Mertus, *supra* note 66, at 1764.

74. See e.g., Geissler, *supra* note 71, at 327 (asserting that together, the articles “arguably require humanitarian intervention on the part of member states”); Wolf, *supra* note 13, at 360–61 (holding that in conjunction, the articles support a “limited right of humanitarian intervention”).

75. U.N. Charter art. 55, para. c.

76. *Id.* art 56.

77. See Burmester, *supra* note 12, at 285 (noting that taken together, Articles 55 and 56 permit unilateral humanitarian intervention); see also Kevin Ryan, *Rights, Intervention, and Self-Determination*, 20 DENV. J. INT’L L. & POL’Y 55, 58 (1992) (stating that “Articles 1 and 55 of the Charter commit the United Nations to promotion of universal respect for human rights and . . . Article 56 creates a duty to act to promote respect for rights and freedom”).

78. See, e.g., Benjamin, *supra* note 13, at 122–23; Brown, *supra* note 13, at 1724 (purporting that the Security Council’s failure to act exhibits an obvious “need for some alternative legal basis” to respond to egregious violations of basic human rights); Mertus, *supra* note 66, at 1775 (detailing the specifics of how the U.N.’s failure to take action in Kosovo necessitated NATO’s unilateral intervention).

79. See Myres S. McDougal & W. Michael Reisman, *Response*, 3 INT’L LAW. 438, 442–44 (1969) (noting that the cumulative effect of the Charter gives members the right to act jointly or singly to protect human rights).

effective tool and therefore, given its inefficacy to stop human rights abuses, states can unilaterally intervene.⁸⁰

Finally, defenders of the legality of humanitarian intervention advocate the necessity of a new reading of the Charter based on state practice.⁸¹ They point to Article 31 of the Vienna Convention on the Law of Treaties, which “incorporated the international legal principle that when interpreting a treaty, one should take into account subsequent practice.”⁸² Accordingly, historical developments, unforeseen to the creators of the Charter, require a new interpretation of the same in order to maintain its viability.

Based on the foregoing arguments, a compelling case can be made that the Charter does not ban humanitarian interventions. Likewise, Articles 55(c) and 56 can be read as authorizing them.

B. Current Status of Humanitarian Intervention Under Customary International Law

1. Opponents: Humanitarian Intervention is No Longer Customary International Law

Custom is comprised of two elements: “(a) general patterns of practice or behavior” and (b) “general patterns of legal expectation or *opinio juris*.”⁸³ The authors who reject the existence of a right to intervene for humanitarian reasons under customary international law point to inconsistent state practice since 1945, a lack of supporting *opinio juris*, or both.

80. See, e.g., Benjamin, *supra* note 13, at 141 n.143 (citation omitted) (“It would seem that the only possible argument against the substitution of collective measures under the Security Council for individual measures by a single state would be the inability of the international organization to act with the speed requisite to preserve life.”); see also Bazylar, *supra* note 16, at 579 n.139 (citing authorities for the proposition that in case of failure to implement collective measures in the face of necessary use of force, the right to use such force reverts to the members).

81. See, e.g., Wolf, *supra* note 13, at 359 (supporting the adoption of a “rational and contemporary interpretation of the Charter,” which factors in modern day state practice).

82. Burmester, *supra* note 12, at 300; Vienna Convention on the Law of Treaties art. 31, para. 3(b), May 23, 1969, 1155 U.N.T.S. 331 (taking into account “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation”).

83. PAUST ET AL., *supra* note 19, at 93.

a. State Practice since 1945

Most of the literature has focused on three specific cases where one country intervened forcibly in another country while massive human rights violations were taking place there.⁸⁴

i. India's Intervention in East Pakistan (1971)

The origins of the Indian intervention in East Pakistan, now Bangladesh, can be traced “to the partition of India in 1947 which created the state of Pakistan”.⁸⁵ The new state was composed of two ethnically distinct parts, separated geographically by India.⁸⁶ Political and economic domination by West Pakistan over East Pakistan caused political unrest in the latter.⁸⁷ In December 1970, the east Pakistani Awami League party won a majority in the National Assembly, after running on a program of political and economic autonomy for East Pakistan.⁸⁸ After negotiations to draft a constitution broke down, mass demonstrations and serious acts of civil disobedience ensued.⁸⁹

On March 25, 1971, the Pakistani military began a campaign of terror throughout East Pakistan.⁹⁰ The Army engaged in “indiscriminate killing, mass murder, and destruction of

84. See, e.g., Wolf, *supra* note 13, at 346–51 (discussing the humanitarian interventions in Bangladesh, Uganda and Kampuchea); Michael J. Levitin, *The Law of Force and the Force of Law: Grenada, the Falklands, and Humanitarian Intervention*, 27 HARV. INT'L L.J. 621, 652 (1986) (discussing the humanitarian intervention cases in Uganda, Cambodia and “the last Pakistani government of what is now Bangladesh”); Bazylar, *supra* note 16, at 588–92 (discussing the humanitarian intervention cases in the Congo, Bangladesh and Uganda); Burmester, *supra* note 12, at 285–95 (utilizing Bangladesh, Uganda and Kampuchea as case studies illustrating unilateral humanitarian interventions); Ved P. Nanda, *Tragedies in Northern Iraq, Liberia, Yugoslavia, and Haiti—Revisiting the Validity of Humanitarian Intervention under International Law—Part I*, 20 DENV. J. INT'L L. & POL'Y 305, 315–23 (1992) (detailing India's intervention in Bangladesh, Tanzania's intervention in Uganda, Vietnam's intervention in Cambodia, and the United States' intervention in Grenada).

85. Nanda, *supra* note 84, at 315.

86. See Burmester, *supra* note 12, at 285–86 (identifying the “Urdu-speaking West” and the “Bengali-speaking East”).

87. Nanda, *supra* note 84, at 315.

88. *Id.*

89. *Id.*

90. Burmester, *supra* note 12, at 286.

homes.”⁹¹ The “wave of terror forced approximately 10 million people to flee to India.”⁹² On December 3, 1971, war erupted between India and Pakistan after Pakistan launched a preemptive air strike against Indian airfields.⁹³ Two weeks later, India had won the conflict, which resulted in the birth of Bangladesh as a new independent country.⁹⁴

Some scholars conclude that the Indian intervention does not constitute an example of humanitarian intervention.⁹⁵ They point out that India ultimately relied on self-defense as a justification for its actions.⁹⁶ Others argue that India did not act out of altruistic motives but on its own national interest.⁹⁷ The crisis, some posited, provided India “with a convenient opportunity to diminish the power and halve the territory of its fiercest political and military rival.”⁹⁸

91. Smith, *supra* note 18, at 706.

92. Nanda, *supra* note 84, at 316.

93. Burmester, *supra* note 12, at 286; *1971: Pakistan Intensifies Air Raids on India*, BBC NEWS, http://news.bbc.co.uk/onthisday/hi/dates/stories/december/3/newsid_2519000/2519133.stm (last visited Oct. 29, 2014).

94. Nanda, *supra* note 84, at 316–17.

95. See, e.g., Bazylar, *supra* note 16, at 589 n.187 (summarizing the view points of certain scholars who hold that India’s intervention was not an example of humanitarian intervention and instead, “ground[ed] the lawfulness of their actions on sounder arguments”).

96. See Benjamin, *supra* note 13, at 133–34 (explaining that “[b]ecause humanitarian intervention is illegal, states that do act with primarily humanitarian motives are forced to profess pretextual motivations”, such as self-defense).

97. See, e.g., Farooq Hassan, *Realpolitik in International Law: After Tanzanian-Ugandan Conflict “Humanitarian Intervention” Reexamined*, 17 WILLAMETTE L. REV. 859, 883 n.167 (1981) (pointing out that India never claimed to be invoking a humanitarian intervention doctrine); Wolfgang G. Friedmann, *Comment 4: Theories of Intervention and Self Defense*, in LAW AND CIVIL WAR IN THE MODERN WORLD 574, 577 (John Norton Moore ed., 1974) (“And the most ardent defender of the most recent instance of ‘humanitarian’ intervention, i.e., the armed intervention by India against East Pakistan . . . can hardly deny that this intervention also served India’s long-standing purpose of weakening Pakistan and creating a friendly, but necessarily beholden, country on its northeastern frontier.”).

98. Bazylar, *supra* note 16, at 589.

ii. Vietnam's Intervention in Cambodia (1978)

Cambodia plunged into a civil war in March 1970, from which the Khmer Rouge emerged victorious in 1975.⁹⁹ The communist regime then engaged in a massive campaign of executions in concentration camps.¹⁰⁰ In less than three years, the regime murdered “between two and three million people, or more than one third of the population.”¹⁰¹ The international community failed to stop the atrocities.¹⁰²

Finally, on December 25, 1978, the Vietnamese army, along with a group of Cambodian expatriates, invaded Cambodia.¹⁰³ On January 7, 1979, the capital was captured and a new government formed with expatriates.¹⁰⁴ Afterwards, the Vietnamese kept their troops for a decade in Cambodia and resettled 200,000 Vietnamese citizens there.¹⁰⁵

The Vietnamese intervention received widespread condemnation.¹⁰⁶ Vietnam was known for “harbor[ing] territorial ambitions” over Cambodia.¹⁰⁷ A commentator notes that Vietnam did not even claim humanitarian intervention as an excuse for its actions.¹⁰⁸ It claimed it exercised its right to self-defense.¹⁰⁹ Also, Vietnam argued that its presence in Cambodia was at the request of the local resistance.¹¹⁰

iii. Tanzania's Intervention in Uganda (1979)

During the eight-year rule of Idi Amin over Uganda, the government executed as many as 300,000 citizens.¹¹¹ On October

99. Burmester, *supra* note 12, at 292.

100. *Id.*

101. Wolf, *supra* note 13, at 350.

102. *Id.*

103. Burmester, *supra* note 12, at 293.

104. *Id.* at 293–94.

105. *Id.*

106. Wolf, *supra* note 13, at 350 (believing that the intervention was “a flagrant violation of international law”).

107. Nanda, *supra* note 84, at 322.

108. Burmester, *supra* note 12, at 293.

109. *Id.* (referring to Vietnam’s belief that Kampuchea assaulted Vietnam first).

110. Wolf, *supra* note 13, at 350–51.

111. Bazylar, *supra* note 16, at 590.

12, 1978, Uganda attacked Tanzania, claiming that the latter had previously attacked Uganda, a claim Tanzania denied.¹¹² Weeks later, Uganda claimed to annex a strip of Tanzanian territory.¹¹³ In early 1979, Tanzania, along with Ugandan exiles, “launched a full-scale invasion into Uganda.”¹¹⁴ By June 3, Amin’s forces had been defeated.¹¹⁵

Some commentators have noted that Tanzania acted mainly out of self-interest.¹¹⁶ Tanzania justified its intervention as a reaction to the Ugandan attack of October 1978.¹¹⁷ A scholar notes that Tanzania took advantage of the humanitarian intervention doctrine as a pretext for their real motive—getting rid of Amin.¹¹⁸

iv. Instances of Non-Intervention

Finally, scholars note that, since 1945, “there has been no disposition to intervene in most major genocides, nearly all genuine massacres, as well as many dramatic denials of self-determination.”¹¹⁹ Glaring examples of failure to intervene include: Indonesia, 1960s (150,000 to 400,000 citizens slaughtered, primarily of Chinese origin); Southern Sudan, 1960s–70s (government killed a large number of secessionists); Rwanda, early 1970s (government killed tens of thousands of Tutsis); Burundi, 1972 (government killed tens of thousands of Hutus);

112. Burmester, *supra* note 12, at 289 n.139; Hassan, *supra* note 97, at 869 n.43 (referring to a Tanzanian foreign minister’s denial of such an allegation).

113. Burmester, *supra* note 12, at 289.

114. Bazylar, *supra* note 16, at 590.

115. See Burmester, *supra* note 12, at 290 (following Tanzania’s occupation of Kampala, the Ugandan capital).

116. See, e.g., Nanda, *supra* note 84, at 320 (stating that Tanzania was partially motivated by humanitarian purposes, but primarily out of self-interest); see also Hassan, *supra* note 97, at 910–11 (noting that in the Ugandan-Tanzanian confrontation, Tanzania was able to “conceal its objective of overthrowing an enemy and establishing an ally under the pretext of assisting a brutally repressed people”).

117. Nanda, *supra* note 84, at 320.

118. See Hassan, *supra* note 97, at 910 (noting that Tanzania was able to “conceal its objective of overthrowing an enemy and establishing an ally under the pretext of assisting a brutally repressed people” by accepting the legality of humanitarian intervention).

119. E.g., Franck & Rodley, *supra* note 13, at 295.

East Timor, 1975 (Indonesian forces killed more than 100,000 East Timor citizens); Syria, 1982 (government massacred 20,000 citizens, ending an insurgency); Ethiopia, mid-1980s (government may have engaged in deliberate policy of starvation of about one million citizens); and Sudan, 1980s–90s (government appeared to engage in deliberate policy of starvation of hundreds of thousands).¹²⁰ More modern examples include repeat offenders such as Rwanda,¹²¹ Sudan,¹²² and Syria¹²³.

b. Opinio Juris

Opinio juris is the expectation “generally shared that something is legally required or appropriate”.¹²⁴ The Restatement (Third) of the Foreign Relations Law of the United States declared that “[w]hether a state may intervene with military force in the territory of another state without its consent . . . to prevent or terminate human rights violations, is not agreed”.¹²⁵ Many scholars advance the claim that the right of humanitarian intervention does not currently exist and/or should not exist.¹²⁶

120. Scheffer, *supra* note 14, at 253 n.1. *But see* Benjamin, *supra* note 13, at 152 (stating that “simply because humanitarian intervention was not exercised in many situations that warranted action in the past does not mean future interventions are not justifiable”).

121. *See, e.g.*, SIMON CHESTERMAN, JUST WAR OR JUST PEACE? HUMANITARIAN INTERVENTION AND INTERNATIONAL LAW 144 (2001) (describing briefly the 1994 conflict between Hutus and Tutsis).

122. *See, e.g.*, Alex Perry, *Sudan’s President Charged with War Crimes. Will He Be Tried?*, TIME (Mar. 4, 2009), <http://content.time.com/time/world/article/0,8599,1883048,00.html> (stating that 300,000 people died and 2.7 million became refugees as a result of the Darfur conflict).

123. *See* Solomon, *supra* note 7 (stating that as of February 15, 2014, the death toll in Syria’s civil war was 140,041).

124. PAUST ET AL., *supra* note 19, at 93.

125. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 703 cmt. e (1987).

126. *See, e.g.*, Schachter, *supra* note 67, at 293 (dismissing the existence of a right to humanitarian intervention by emphasizing the importance of rejecting the idea that force may be used unilaterally to achieve laudable ends such as freedom, self rule, and human rights); Delbrück, *supra* note 57, at 897 (dismissing the existence of a right to humanitarian intervention by pointing out that currently under general international law, there is no legal basis for military enforcement mechanisms “in cases of grave violations of human rights”); *see also* Ian Brownlie, *Humanitarian Intervention, in* LAW AND CIVIL WAR IN THE MODERN WORLD 217, 218 (John Norton Moore ed., 1974)

Moreover, a number of international documents seem to show disapproval of humanitarian interventions. The Declaration on Principles of International Law states that “[n]o state or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State.”¹²⁷ The U.N. Definition of Aggression declared that “[n]o consideration of whatever nature, whether political, economic, military or otherwise, may serve as justification for aggression.”¹²⁸ Finally, in the Declaration of the South Summit, members of the Group of 77 at the United Nations (G77) rejected the “so called ‘right’ of humanitarian intervention, which has no legal basis in the United Nations Charter or in the general principles of international law.”¹²⁹ The G77 is composed of over 130 member states.¹³⁰

Similarly, although the issue has not been addressed directly by the ICJ, the Court seemed to reject the doctrine in the *Nicaragua* case.¹³¹ The Court said that the use of force by the United States in Nicaragua could not be the appropriate method to ensure respect for human rights.¹³²

(expressing skepticism that a right of forcible humanitarian intervention exists and pointing out that “few writers familiar with the modern materials of state practice and legal opinion on the use of force would support such a view”).

127. Declaration on Principles of International Law, *supra* note 33. *But see* Geissler, *supra* note 71 (explaining that human rights violations are not state, but are rather international affairs).

128. Declaration on the Definition of Aggression, G.A. Res. 3314 (XXIX), U.N. GAOR, 29th Sess., Supp. No. 31, U.N. Doc. A/9631, at annex, art. 5 (Dec. 14, 1974) [hereinafter Definition of Aggression].

129. Declaration of the S. Summit, G.A. Res. 55/74, Annex I, U.N. Doc. A/RES/55/74, para. 54 (May 5, 2000).

130. *The Member States of the Group of 77*, GRP. 77, <http://www.g77.org/doc/members.html> (last visited Mar. 4, 2014).

131. *See* Dapo Akande, *Would It Be Lawful For European (or Other) States to Provide Arms to the Syrian Opposition?*, EJIL: TALK! (Jan. 17, 2013), <http://www.ejiltalk.org/would-it-be-lawful-for-european-or-other-states-to-provide-arms-to-the-syrian-opposition> (quoting the ICJ, which stated that the Court does not approve of intervention based upon a mere request by an opposition group in another State).

132. *See* *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Merits, Judgment, 1986 I.C.J. 14, 134, ¶ 268 (June 27). *But see* Statute of the International Court of Justice art. 59, June 26, 1945, 59 Stat. 1031 (stating that decisions of the Court have no binding force except between the parties and in respect of that particular case).

2. *Proponents: Humanitarian Intervention is Customary International Law*

a. *State Practice since 1945*

Supporters of humanitarian intervention claim that developments following the creation of the Charter have given rise to a renewed right to intervene under customary international law. In particular, they focus on the Indian and Tanzanian interventions. Moreover, they point to more recent events that show states' willingness to intervene unilaterally to stop massive human rights violations.

Regarding India's actions, a scholar has noted that the majority of jurists who have written on it regard it as justifiable under international law.¹³³ Furthermore, the International Commission of Jurists concluded that India's intervention was justified under the doctrine of humanitarian intervention.¹³⁴ Tanzania's intervention in Uganda received similar reactions from many scholars.¹³⁵ While Vietnam's invasion of Cambodia failed to gather the same level of endorsement,¹³⁶ one author notes that after the India and Tanzania invasions, "sufficient state practice had emerged to revive the customary international law doctrine of humanitarian intervention."¹³⁷ Even detractors of humanitarian intervention concede that the Indian case "has already entered into the nations' conscious expectations of future conduct."¹³⁸

Regarding newer developments that show state practice supporting humanitarian interventions, authors have focused mostly on two well-known examples: the Allies setting up a no-

133. Wolf, *supra* note 13, at 347 n.75 (providing examples of scholars, such as Franck, Rodley, and Behuniak, supporting and justifying the Indian actions taken to prevent the massacre of the population of East Bengal).

134. Alexander, *supra* note 69, at 418.

135. Bazylar, *supra* note 16, at 591; Levitin, *supra* note 84, at 652; TESÓN, *supra* note 66, at 234.

136. Bazylar, *supra* note 16, at 610–11; Nanda, *supra* note 84, at 322. *But see* Levitin, *supra* note 84, at 652 (concluding that Vietnam's intervention in Cambodia should be regarded as lawful).

137. Wolf, *supra* note 13, at 346.

138. Franck & Rodley, *supra* note 13, at 303.

fly zone in Iraq (1991–92) and the North Atlantic Treaty Organization (NATO) intervention in Kosovo (1999). France's intervention in Rwanda (1994) before receiving U.N. approval has also been considered an example of permissible unilateral intervention for humanitarian purposes.¹³⁹

After the Iraqi defeat in the Gulf War, rebel forces of Kurds and Shias rose against the Iraqi government.¹⁴⁰ The brutal repression by the government displaced over 1.5 million Kurd and 100,000 Shia refugees.¹⁴¹ In response, the Security Council passed Resolution 688, which condemned the repression, characterized it as a threat to international peace, demanded Iraq give humanitarian organizations access to those requiring aid, asked the Secretary-General to pursue humanitarian efforts, and requested member states and humanitarian agencies to contribute to the relief efforts.¹⁴²

What the Resolution did not do was to authorize the use of force.¹⁴³ Yet, in response to the tragedy, the United States, the U.K., and France used military force to protect the Iraqi civilian population.¹⁴⁴ These efforts ranged from providing assistance to the refugees to creating relief camps and no-fly zones north of the 36th parallel and south of the 33rd parallel.¹⁴⁵ The Iraqi government was warned that military force would be used to protect the no-fly zones in case of infringement.¹⁴⁶ These actions, without the Security Council's express approval, are regarded as another instance of humanitarian intervention.¹⁴⁷

139. Julie Jackson, *An Update On: Self-Determination and Humanitarian Intervention in a Community of Power* by James A.R. Nafziger, 26 DENV. J. INT'L L. & POL'Y 917, 931 (1998).

140. Geissler, *supra* note 71, at 331–32.

141. *Id.* at 332.

142. S.C. Res. 688, ¶¶ 1–4, 6, U.N. Doc. S/RES/0688 (Apr. 5, 1991).

143. Geissler, *supra* note 71, at 332; Wheatley, *supra* note 51, at 504; Scheffer, *supra* note 14, at 268.

144. Wheatley, *supra* note 51, at 502–03.

145. *Id.* at 503.

146. *Id.*; see Robin Wright, *U.S. Pilots Fire on Iraq Jets in 'No-Fly' Zone Confrontation*, L.A. TIMES (Jan. 6, 1999), <http://articles.latimes.com/1999/jan/06/news/mn-60701> (explaining that the U.S. "containment plus" policy created a no-fly zone in southern Iraq and was enforced by U.S. aircraft).

147. Daniel Bethlehem, *Stepping Back a Moment—The Legal Basis in Favour*

NATO's intervention in Kosovo is deemed to be "the first time in history that the United States or its European allies had intervened to head off a potential genocide."¹⁴⁸ The conflict in Kosovo erupted in March 1998 between Serbian forces and the Kosovo Liberation Army, when ethnic Albanian guerrillas attacked the Serbian police.¹⁴⁹ Serbian forces retaliated by carrying out summary executions and destruction of villages.¹⁵⁰ According to investigations, the Serbian actions involved ethnic cleansing, war crimes, crimes against humanity, and genocide.¹⁵¹

The Security Council passed a series of Resolutions condemning the attacks and calling for a cessation of hostilities, to no avail.¹⁵² These Resolutions, however, did not authorize NATO to intervene.¹⁵³ Nevertheless, because the situation on the ground was deteriorating and the Federal Republic of Yugoslavia refused to sign an agreement that would have provided a political settlement to the crisis, NATO began an air campaign in Kosovo.¹⁵⁴

Professor Jordan Paust has argued that NATO's actions were actually allowed by Chapter VIII of the Charter.¹⁵⁵ Article 52(1) states that:

Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of

of a Principle of Humanitarian Intervention, EJIL: TALK! (Sept. 12, 2013), <http://www.ejiltalk.org/stepping-back-a-moment-the-legal-basis-in-favour-of-a-principle-of-humanitarian-intervention>; see also Wheatley, *supra* note 51, at 504 (mentioning that the U.K. Foreign Office attempted to justify the intervention as humanitarian).

148. SAMANTHA POWER, *A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE* 448 (2002).

149. Alexander, *supra* note 69, at 431.

150. Geissler, *supra* note 71, at 336.

151. *Id.*

152. Alexander, *supra* note 69, at 431–34.

153. *Id.* at 434; see also Geissler, *supra* note 71, at 336 (explaining that U.N. resolutions 1160, 1199, and 1203 condemned the atrocities in Kosovo but did not authorize humanitarian intervention).

154. Wheatley, *supra* note 51, at 481.

155. Jordan J. Paust, *NATO's Use of Force in Yugoslavia*, in 33 UNITED NATIONS LAW REPORTS 114 (John Carey ed., 1999).

international peace and security as are appropriate for regional action provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.¹⁵⁶

According to Professor Paust, NATO is such a regional arrangement and its actions in Kosovo are consistent with U.N. Purposes and Principles, namely, peace, security, self-determination, and human rights.¹⁵⁷ Nevertheless, those who consider the NATO intervention an example of humanitarian intervention, deemed it so under customary international law and not the Charter precisely.¹⁵⁸

b. Opinio Juris

A significant number of U.N. Resolutions and other international documents are deemed to be supporting of the legalization of humanitarian intervention. The Universal Declaration of Human Rights states that “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,” and that “it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.”¹⁵⁹

Article I of the Convention on the Prevention and Punishment of the Crime of Genocide states that the Contracting Parties must undertake to prevent and punish the international crime of genocide.¹⁶⁰ Genocide is defined as:

any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial

156. U.N. Charter art. 52, para. 1.

157. Paust, *supra* note 155, at 115. *But see* Mertus, *supra* note 66, at 1763 (“Because the Security Council gave neither an express nor an implied *ex post* authorization for the action, the NATO action in Kosovo cannot be said to fall within . . . the Chapter VIII exception[.]”).

158. Smith, *supra* note 18, at 707–08; Alexander, *supra* note 69, at 441; Bethlehem, *supra* note 147.

159. Universal Declaration of Human Rights, *supra* note 45, at 71.

160. Convention on the Prevention and Punishment of the Crime of Genocide art. I, *adopted* Dec. 9, 1948, 78 U.N.T.S. 277.

or religious group, as such: a) Killing members of the group; b) Causing serious bodily or mental harm to members of the group; c) Deliberately inflicting on the group conditions of like calculated to bring about its physical destruction in whole or in part; d) Imposing measures intended to prevent births within the group; e) Forcibly transferring children of the group to another group.¹⁶¹

Article IV further states that any person committing genocide shall be punished.¹⁶² The prohibition of genocide is also another *jus cogens* norm, part of customary international law.¹⁶³

Moreover, although the Declaration on Principles of International Law seemingly proscribes interventions in the internal or external affairs of any state,¹⁶⁴ human rights violations are widely considered to be international affairs.¹⁶⁵ Furthermore, the Security Council has found some instances of human rights violations to be a threat to international peace.¹⁶⁶ The Declaration also asserts that every state has the duty to promote universal respect for human rights in accordance with the Charter.¹⁶⁷

The Resolution on the Definition of Aggression defined aggression as “the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the”¹⁶⁸ As explained above, an intervention for humanitarian purposes does not impair the territorial integrity or the political independence of the target state, nor is the latter’s sovereignty a shield to intervention, and it is in keeping with the Purposes of the Charter.¹⁶⁹

161. *Id.* art. II.

162. *Id.* art. IV.

163. Van Dyke, *supra* note 53, at 369.

164. Declaration on Principles of International Law, *supra* note 33, at 123.

165. James A.R. Nafziger, *Humanitarian Intervention in a Community of Power Part II*, 22 DENV. J. INT’L L. & POL’Y 219, 224 (1994); Brown, *supra* note 13, at 1688–89.

166. Halberstam, *supra* note 13, at 6; Nafziger, *supra* note 32, at 31.

167. Declaration on Principles of International Law, *supra* note 33, at 124.

168. Definition of Aggression, *supra* note 128, art. I.

169. See *supra* Part III.A.1.b (describing scholars who propose that humanitarian intervention has not been banned by the Charter); see also Paust, *supra* note 58 (arguing

Although it has been stated that the G77 rejected the existence of the right of humanitarian intervention,¹⁷⁰ it must be noted that relevant patterns of legal expectation need not be universal.¹⁷¹ It is very telling and somewhat ironic that states with a notorious record of human rights violations (e.g., the Democratic People's Republic of North Korea, the Democratic Republic of Congo, Ethiopia, Indonesia, Rwanda, Sudan, Syria, and Uganda) would reject the existence of such a right.¹⁷²

Statements made by world leaders can be evidence of *opinio juris*.¹⁷³ U.S. President Barack Obama announced in his Nobel Prize acceptance speech: "I believe that force can be justified on humanitarian grounds, as it was in the Balkans" ¹⁷⁴ Former Czech President Vaclav Havel called NATO's action in Kosovo "the first war that has not been waged in the name of 'national interests,' but rather the name of principle and values."¹⁷⁵ In April 1991, then-U.N. Secretary General Javier Pérez de Cuéllar declared: "We are clearly witnessing what is probably an irresistible shift in public attitudes towards the belief that the defense of the oppressed in the name of morality should prevail over frontiers and legal documents."¹⁷⁶ Later in that year, he expressed: "The fact that . . . the United Nations has not been able to prevent atrocities cannot be cited as an argument, legal or moral, against the necessary corrective action, especially where peace is also threatened."¹⁷⁷

that Article 2(4) only expressly bars certain actions from intervention).

170. *The Member States of the Group of 77*, *supra* note 130, ¶ 54.

171. PAUST ET AL., *supra* note 19, at 108.

172. *See supra* text accompanying notes 120–23 (presenting a nonexclusive list of countries with a record of massive human rights violations).

173. *See* Jordan J. Paust, *Customary International Law: Its Nature, Sources and Status as Law of the United States*, 12 MICH. J. INT'L L. 59, 61–62 (1990) (arguing that each person is a participant in the shaping of customary law and thus each viewpoint could be relevant).

174. Press Release, White House, Remarks by the President at the Acceptance of the Nobel Peace Prize (Dec. 10, 2009), <http://www.whitehouse.gov/the-press-office/remarks-president-acceptance-nobel-peace-prize>.

175. Mertus, *supra* note 66, at 1746 (citing Vaclav Havel, *Kosovo and the End of the Nation-State*, N.Y. REV. BOOKS, June 10, 1999, at 6, available in 1999 WL 9802362).

176. Scheffer, *supra* note 14, at 262 (citing *Secretary-General's Address at University of Bordeaux*, U.N. Press Release SG/SM/4560, at 6 (1991)).

177. *Id.*

Several scholars have also voiced their beliefs that humanitarian intervention is or should be legal.¹⁷⁸ The International Commission on Intervention and State Sovereignty (“ICISS”) issued a report in 2001 entitled “The Responsibility to Protect.”¹⁷⁹ In it, while noting the absence of a consensus accepting the validity of any intervention not authorized by the United Nations,¹⁸⁰ the ICISS observed that if the Security Council fails to discharge its responsibility to protect in conscience-shocking situations, concerned states may not rule out other means to meet the gravity of that situation.¹⁸¹ While this comment does not endorse the legality of non-U.N. sanctioned humanitarian intervention, it recognizes the “fundamental challenge posed by Security Council inaction.”¹⁸² Furthermore, “it is not a stretch of legal reasoning to say that the responsibility to protect admits of a narrowly tailored right of ad hoc action for a proper purpose.”¹⁸³

Also, developments in the field of international criminal law—e.g., the establishment of ad hoc international criminal tribunals to try cases of genocide, war crimes, and crimes against humanity, and the creation of the International Criminal Court—bolster the case of a limited right of humanitarian intervention.¹⁸⁴ As Daniel Bethlehem has explained,

it would raise a real issue of the credibility of the law for the international community to compel the post-hoc prosecution of those who are alleged to have committed the most heinous of atrocities but to deny a tightly constrained right of States to take action as a matter of

178. See, e.g., Levitin, *supra* note 84, at 632 n.43 (citing scholars who believe customary law permits humanitarian intervention to protect citizens or foreign nationals in a foreign country); see also Bazyley, *supra* note 16, at 581 (stating that “a strong body of international legal scholarship continues to recognize the doctrine” after World War II).

179. INT’L COMM’N ON INTERVENTION AND STATE SOVEREIGNTY, *THE RESPONSIBILITY TO PROTECT* (2001) [hereinafter ICISS REPORT].

180. See *id.* ¶¶ 6.36–37.

181. *Id.* ¶ 6.39.

182. See Bethlehem, *supra* note 147.

183. *Id.*

184. *Id.*

last resort to prevent the (further) commission of such crimes in the first place in the face of manifest evidence of such conduct.¹⁸⁵

Therefore, a strong case can be made that humanitarian interventions, even if deemed to have been proscribed in 1945, regained their legality as a custom over the decades. The interplay of state practice and legal expectations supports this conclusion.

C. Criteria for the Analysis of the Legality of Humanitarian Intervention

1. Under the Charter

The Charter neither bans nor explicitly authorizes humanitarian interventions. Yet, it can be interpreted in a way that allows for the use of said doctrine.¹⁸⁶ Workable criteria for the legality of humanitarian interventions can be found within the textual provisions of the Charter.

An analysis of the criteria must begin with the U.N.'s Purposes and Principles, as laid out in the Charter. Article 1(1) lists the following as the paramount purpose: "To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace."¹⁸⁷ The Charter goes on to mention developing "friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace" as another purpose.¹⁸⁸

To achieve these purposes, the United Nations must act on the basis of respect to the sovereign equality of its Members.¹⁸⁹ Members are also required to settle their international disputes peacefully and to refrain from the use of force against the

185. *Id.*

186. *See supra* Part III.A.1.b (discussing scholarly interpretations of the Charter that support the idea of humanitarian intervention).

187. U.N. Charter art. 1, para. 1.

188. *Id.* art. 1, para. 2.

189. *Id.* art. 2, para. 1.

territorial integrity and the political independence of any state.¹⁹⁰ A common theme runs through the Charter: the maintenance of international peace and security.

The Security Council has “primary responsibility for the maintenance of international peace and security.”¹⁹¹ It shall act “in accordance with the Purposes and Principles of the United Nations.”¹⁹² It also determines “the existence of any threat to the peace, breach of the peace, or act of aggression and . . . decide[s] what measures shall be taken . . . to maintain or restore international peace and security.”¹⁹³ It may take “such action . . . as may be necessary.”¹⁹⁴ Therefore, the Security Council is the main enforcement entity within the United Nations and it may take any action to maintain international peace and security if there has been a threat or a breach of the peace, or an act of aggression.

The Security Council is not the only entity with enforcement powers. Pursuant to the Uniting for Peace Resolution, if the Security Council fails to exercise its primary responsibility, the General Assembly can consider the matter and recommend the use of force if necessary to maintain or restore international peace and security.¹⁹⁵ Finally, regional agencies are allowed to deal “with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.”¹⁹⁶

Article 54 requires that the Security Council “be kept fully informed of activities undertaken or in contemplation under regional arrangements or by regional agencies for the maintenance of international peace and security.”¹⁹⁷ Although

190. *Id.* art. 2, paras. 3–4.

191. *Id.* art. 24, para. 1.

192. U.N. Charter art. 24, para. 2.

193. *Id.* art. 39.

194. *Id.* art. 42.

195. Uniting for Peace, G.A. Res. 377 (V), U.N. GAOR, 5th Sess., Supp. No. 20, U.N. Doc. A/1775, at 10 (Nov. 3, 1950).

196. U.N. Charter art. 52, para. 1.

197. *Id.* art. 54.

the Uniting for Peace Resolution does not specifically mention whether the General Assembly must report to the Security Council once the first acts, it does reaffirm the importance of the exercise by the Security Council of its primary responsibility.¹⁹⁸ Moreover, the Charter provides that the General Assembly must refer to the Security Council any question relating to the maintenance of international peace and security when action is necessary.¹⁹⁹ Therefore, the Uniting for Peace Resolution should be interpreted as requiring the General Assembly to inform the Security Council of any action taken by it to maintain international peace and security.

Clearly, international peace and security are the common threads connecting the possible enforcement mechanisms under the Charter. If the Security Council is required to find that there has been a threat or a breach of the peace, or an act of aggression, before it takes action, then it only seems logical to extend the same requirement to the General Assembly or a regional organization, or a state or group of states seeking to intervene militarily for humanitarian reason for that matter. To confine the application of this requirement to the Security Council exclusively would be like burdening the main organ entrusted with maintenance of international peace and security in a way that other organs, which do not have such function as their primary one, are not burdened, therefore impairing the Security Council's mission. Thus, there must be a finding of a threat or a breach of the peace, or an act of aggression, before any entity or state takes enforcement action.

The question, then, is: what constitutes a breach or a threat to the peace, or an act of aggression? The Resolution on the Definition of Aggression defined aggression as "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State."²⁰⁰ An act of aggression is defined then, for the most part, as involving a state attacking another state. Therefore, any response taken to correct this

198. See Uniting for Peace, *supra* note 195, at 10.

199. U.N. Charter art. 11, para. 2.

200. Definition of Aggression, *supra* note 128, annex at 143.

aggression is better analyzed under a self-defense scenario, not a humanitarian intervention one.²⁰¹

But the definition also states that the use of armed force by a state in a manner inconsistent with the Charter is aggression.²⁰² Article 1(3) mentions among the purposes of the U.N.: “[t]o achieve international cooperation in solving international problems of . . . humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all”²⁰³ Therefore, violations of human rights can be considered acts of aggression, regardless of whether the perpetrators and the victims come from different states. In other words, a state that violates its own population’s human rights can be considered to have committed an act of aggression.²⁰⁴

As for threats to/breaches of the peace, the Security Council has recognized that “non-military sources of instability in the economic, social, humanitarian, and ecological fields have become threats to peace and security.”²⁰⁵ This does seem like a broad definition of “threat to peace”. But in reality, “[t]he range of situations which the Council determined as giving rise to threats to the peace includes country-specific situations such as inter- or intra-State conflicts or internal conflicts with a regional or sub-regional dimension.”²⁰⁶ Therefore, there must be a conflict at least, and not just necessarily a crisis or instability of sorts.

201. See U.N. Charter art. 51 (stating that Members retain the right to exercise individual or collective self-defense in response to an armed attack); Matthew Gillett, *The Anatomy of an International Crime: Aggression at the International Criminal Court*, 13 INT’L CRIM. L. REV. 829, 847 (2013) (“[A]cts that are consistent with the Charter will, by definition, not qualify as aggression. This covers self-defence and acts authorized by the UNSC.”); Carin Kahgan, *Jus Cogens and the Inherent Right to Self Defense*, 3 ILSA J. INT’L & COMP. L. 767, 787 (1997) (stating that historically, the concept of self-defense referred to “a reaction against the use of force” and had a more restrictive and clear meaning than it currently does as its meaning expanded to include the principle of aggression, namely “armed attack[s] [and] the unlawful use of force”).

202. Definition of Aggression, *supra* note 128, annex at 143.

203. U.N. Charter art. 1, para. 3.

204. *But see infra* text accompanying notes 283–87 (explaining how Security Council Resolutions generally limit the definition of aggression to interstate conflicts).

205. U.N. SCOR, 47th Sess., 3046th mtg. at 143, U.N. Doc. S/PV.3046 (Jan. 31, 1992), *cited in* Mertus, *supra* note 66, at 1770 n.140.

206. Repertoire of the Practice of the Sec. Council, *Actions with Respect to Threats*

Thus, to be legal under the Charter, a humanitarian intervention must meet some requirements laid out therein. First, there must be an act of aggression or a threat to the peace or a breach of it. This means there must be at least a state act inconsistent with the Charter, such as a violation of human rights, or a conflict within a state that threatens international peace and security.²⁰⁷

Second, the Security Council, the General Assembly, and any available regional arrangement, must have failed to address the situation.²⁰⁸ Third, the enforcement action taken by the interveners must be consistent with the Purposes and Principles of the Charter to the extent possible. This means that the intervention must not impair the territorial integrity or the political independence of the target state, except when necessary to stop the aggression or the conflict giving rise to a threat or breach of the peace. The sovereignty of the target state must also be respected to the extent possible, and therefore, no claim of annexation must be had.

Fourth, the interveners must also disclose to the Security Council and cooperate with any Resolution taken by it. This requirement stems from the Security Council's role as the entity charged with "primary responsibility for the maintenance of international peace and security."²⁰⁹

2. *Under Customary International Law*

The vast majority of authors who believe that humanitarian interventions are/should be legal under customary international law have also proposed a set of criteria to narrow the scope of its application.²¹⁰ These criteria will avoid the inherent danger of

to the Peace, Breaches of the Peace, and Acts of Aggression (Ch. VII), UNITED NATIONS, <http://www.un.org/en/sc/repertoire/actions.shtml> (last visited Mar. 7, 2014).

207. See *supra* text accompanying notes 200–06 (discussing what constitutes aggression, threats to the peace, and breaches of the peace).

208. See *supra* text accompanying notes 191–96 (discussing enforcement mechanisms under the Charter).

209. U.N. Charter art. 24, para. 1; Brown, *supra* note 13, at 1723.

210. See Benjamin, *supra* note 13, at 152 (limiting intervention to situations of verifiable and extreme human rights abuses that "shock the conscience"); Mertus, *supra* note 66, at 1780 (listing criteria for intervention as threats of widespread loss of human

abuse.²¹¹ Yet scholars disagree on the type and number of requirements that must be met.²¹² However, some requirements are common to most, if not all, of these criteria and they include: necessity,²¹³ proportionality,²¹⁴ purpose,²¹⁵ and disclosure.²¹⁶

a. The Necessity Requirement

The necessity criterion, as applicable to self-defense under international law, was outlined in a series of letters U.S. Secretary of State Daniel Webster sent to the U.K. in the aftermath of the *Caroline* incident.²¹⁷ In 1837, insurgents opposed to the British government in Canada used a ship known as the *Caroline* to move men and supplies from the United States into British territory.²¹⁸ One night, the British attacked the ship as it was moored on the U.S. side of the Niagara River, injuring several American citizens and killing one.²¹⁹ The British claimed to have

life, averting disaster, ongoing nature of threats to peace and security, and a good faith attempt at peaceful settlement); Scheffer, *supra* note 14, at 290–91 (listing multiple criteria required to justify intervention such as Security Council deadlock without prohibition of intervention and exhaustion of alternative peaceful remedies); Bazylar, *supra* note 16, at 598–606 (requiring large-scale atrocities, overriding humanitarian motive, preference for joint action, limited intervention, and exhaustion of other remedies); Burmester, *supra* note 12, at 310 (requiring conscience-shocking offenses, egregious government offenses, and absence of joint action to justify separate action).

211. See Bazylar, *supra* note 16, at 598 (noting the importance of a clear guide for determining whether interventions are humanitarian); Brown, *supra* note 13, at 1728 (explaining that the balance between national interest and humanitarian interest necessitates safeguards against abuse).

212. Compare John Norton Moore, *Toward an Applied Theory for the Regulation of Intervention*, in *LAW AND CIVIL WAR IN THE MODERN WORLD* 3, 24–25 (John Norton Moore ed., 1974) (proposing up to eight criterions), with Burmester, *supra* note 12, at 301 (proposing two criteria: necessity and proportionality).

213. Brown, *supra* note 13, at 1726–27; see Burmester, *supra* note 12, at 310 (requiring conscience-shocking and government offenses that are so egregious that an objective observer would find the offenses intolerable to justify intervention).

214. Brown, *supra* note 13, at 1729; ICISS REPORT, *supra* note 179, at 37, cited in Smith, *supra* note 18, at 711.

215. Bazylar, *supra* note 16, at 601; Scheffer, *supra* note 14, at 290–91.

216. Moore, *supra* note 212, at 25; Nafziger, *supra* note 32, at 25.

217. Brown, *supra* note 13, at 1726.

218. *Id.* at 1711–12.

219. *Id.* at 1712.

acted in self-defense.²²⁰ In the course of their negotiations both parties agreed that for a right of self-defense to lie, the necessity must be “instant, overwhelming, leaving no choice of means, and no moment for deliberation.”²²¹

Although the *Caroline* standard of necessity cannot apply to humanitarian intervention without some adaptation, the need to prevent massive and grave violations of human rights may be deemed to create a similar necessity for action.²²² In fact, many scholars have incorporated this standard, or modified versions of it, into their criteria for analyzing the legality of humanitarian interventions.²²³

In order for the necessity to intervene to be instant and overwhelming, the nature of the human rights violations must be of such severity so as to outweigh any considerations of state sovereignty, political independence, and territorial integrity. The violations must amount to genocide or to other gross, widespread, and systematic violations of basic human rights.²²⁴ The right to life is the most basic right and, when it is violated on a widespread scale, either through a government’s misfeasance or “callous nonfeasance”, then exigent circumstances warranting intervention exist.²²⁵ At least one scholar has argued that the interveners need not wait for the massacre to take place if there is clear evidence of an impending killing.²²⁶

220. *Id.*

221. *Id.* at 1726.

222. Brown, *supra* note 13, at 1727.

223. See Nanda, *supra* note 84, at 330 (noting the importance of the severity of the rights violations in determining necessity); Burmester, *supra* note 12, at 306 (incorporating the standard in the inquiry into necessity and proportionality); Nafziger, *supra* note 165, at 226 (listing the factors that determine necessity as the severity of the rights violation, the nature of the intervention, the purpose of the intervention, the extent of multilateral participation, and the balance of alternatives and outcomes).

224. Nanda, *supra* note 84, at 330. Genocide need not be systematic or widespread; according to the International Criminal Tribunal for Rwanda, a person can be guilty of genocide for killing even as few as three people. See, e.g., Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶¶ 714, 734 (Sept. 2, 1998), <http://www.unictr.org/Portals/0/Case/English/Akayesu/judgement/akay001.pdf> (finding the accused guilty of genocide for ordering and participating in the deaths of three brothers).

225. Bazylar, *supra* note 16, at 598–99.

226. *Id.* at 600.

Moreover, the right to life need not be the only basic human right threatened. A state that engages in proscribed conduct, such as torture or rape, which impairs basic human rights to physical integrity and freedom, can also become the target of a humanitarian intervention if such conduct occurs on a systematic and widespread basis.²²⁷

Some authors have gone further and required that the crisis must pose a threat to international peace and security.²²⁸ But there is already widespread agreement that egregious violations of human rights constitute threats to the peace.²²⁹ The Security Council has stated that the danger of imminent death or grave injury to a large number of persons within a state also constitutes a threat to international peace.²³⁰ Therefore, once an act of genocide or some other gross, widespread, and systematic violation of basic human rights is shown, the latter requirement will also be satisfied.

Furthermore, for a true necessity to exist, all other alternatives must have been exhausted or at least explored in good faith.²³¹ Alternative means of conflict resolution can include economic sanctions, diplomatic appeals, or condemnation before pertinent regional organizations.²³² Interveners need not try each route and wait for it to fail before resorting to force; instead, the specific violation can trigger an armed response even if other possible solutions have not been explored yet.²³³

227. See, e.g., Levitin, *supra* note 84, at 652–53 (mentioning freedom from torture among the rights the denial of which justifies intervention); ICISS REPORT, *supra* note 179, at 32 (stating that intervention is justified in cases of ethnic cleansing carried out by rape).

228. Alexander, *supra* note 69, at 449; Mertus, *supra* note 66, at 1780.

229. Nafziger, *supra* note 32, at 31; Scheffer, *supra* note 14, at 287; Mertus, *supra* note 66, at 1770.

230. See, e.g., S.C. Res. 688, *supra* note 142, ¶ 1 (condemning the repression of the civilian population in Iraq, the consequences of which “threaten international peace and security in the region”); see also Mertus, *supra* note 66, at 1770 n.140 (“The U.N. Security Council has recognized that ‘nonmilitary sources of instability in the economic, social, humanitarian, and ecological fields have become threats to peace and security.’”).

231. Smith, *supra* note 18, at 711 n.60; Nafziger, *supra* note 32, at 25; Bazzyler, *supra* note 16, at 606.

232. Scheffer, *supra* note 14, at 291; Bazzyler, *supra* note 16, at 606.

233. ICISS REPORT, *supra* note 179, at 36; Bazzyler, *supra* note 16, at 606–07.

Otherwise, the toll in human lives could increase unduly while the parties involved play a game of diplomatic catch.

Many scholars require that the U.N. or at least a regional organization must have considered the situation and failed to act on it.²³⁴ If the U.N. and its Charter are to remain viable in the resolution of international conflicts, states considering intervening in another country for humanitarian purposes must appeal to the Security Council first, and then to the General Assembly or even a regional arrangement. If neither is willing to act, a necessity arises for a humanitarian intervention.

b. The Proportionality Requirement

This requirement is also strongly endorsed by scholars who support humanitarian intervention.²³⁵ According to the traditional principle of proportionality, “force must be proportional to the size of the wrong being addressed.”²³⁶ “The scale, duration, and intensity of the . . . intervention should be the minimum necessary to secure the humanitarian objective”²³⁷ Interventions that use excessive force, whether in terms of quantity, duration, or geographical extent, become unjustifiable.²³⁸ Vietnam’s intervention in Cambodia has been criticized for failing the proportionality requirement, because of the amount of force used and the duration of the intervention (the Vietnamese stayed for a decade).²³⁹ Thus, interveners must use the minimum amount of force necessary to stop the violation. Their actions should be limited in time and space.

c. The Purpose Requirement

In order to be legitimate, interventions must have a humanitarian purpose at its core. Yet authors disagree to the extent to which there can be other driving motives. An

234. Alexander, *supra* note 69, at 449; Scheffer, *supra* note 14, at 291; Benjamin, *supra* note 13, at 152.

235. Brown, *supra* note 13, at 1729; Smith, *supra* note 18, at 711–12; Nanda, *supra* note 84, at 330; Geissler, *supra* note 71, at 334.

236. Ryan, *supra* note 77, at 68.

237. ICISS REPORT, *supra* note 179, at 37.

238. Ryan, *supra* note 77, at 68.

239. Nanda, *supra* note 84, at 322; Burmester, *supra* note 12, at 294.

intervention could also take place out of pure self-interest or have mixed motives.²⁴⁰ Some insist on the disinterestedness of the intervener²⁴¹ and conclude that interventions with mixed motives are not justified.²⁴² Permitting mixed motives, the argument goes, is to “court the danger that the assertion of humanitarian concern will be merely a cover for other, quite different, actual interests.”²⁴³

Other authors are less categorical. They recognize that “[i]n practice, purity of motive is probably impossible” and states are likely to act out of self-interest.²⁴⁴ It was pointed out that India intervened in East Pakistan after West Pakistan attacked India first,²⁴⁵ and as a result of the intervention India reduced the size of its rival state.²⁴⁶ Therefore, only a relative disinterestedness is required as long as the humanitarian purpose is the overriding or paramount one.²⁴⁷

Additionally, some authors demand that the intervention’s effect on the target state’s authority structure or political system be kept minimal.²⁴⁸ This requirement seems to be designed to prevent humanitarian interventions from turning into regime change forays. But at least one scholar has pointed out that intervening states can use enough force to remove the despot responsible for the human rights violation.²⁴⁹ This latter position has the added advantage of allowing the responsible official to

240. Nanda, *supra* note 84, at 330.

241. Behuniak, *supra* note 24, at 167.

242. Ryan, *supra* note 77, at 67.

243. *Id.*

244. Bazylar, *supra* note 16, at 601; Brown, *supra* note 13, at 1728.

245. Burmester, *supra* note 12, at 286.

246. Nanda, *supra* note 84, at 319 (noting that India “must have welcomed the opportunity to split Pakistan into two countries and weaken it, thereby minimizing the perceived threat to India from a strong neighbor”).

247. Bazylar, *supra* note 16, at 602; Scheffer, *supra* note 14, at 291. *But see* Benjamin, *supra* note 13, at 153 (making relative disinterestedness a caveat and not an absolute prerequisite).

248. Nafziger, *supra* note 32, at 25; Scheffer, *supra* note 14, at 291; Geissler, *supra* note 71, at 334.

249. Bazylar, *supra* note 16, at 604.

be brought to justice, whether in the courts of the intervening state or in international courts.²⁵⁰

Therefore, an intervention must have as its main purpose the redress of a humanitarian crisis, although it may admit other self-interested motives. It should not significantly impair the territorial integrity or the political independence of the target state, except to the extent necessary to redress the wrong. Finally, the interveners should not engage in wholesale regime change but they are allowed to bring the responsible parties to justice if the wrong amounted to a crime against humanity or a war crime.

d. The Disclosure Requirement

At least two scholars demand that the intervening state fully and immediately report to the Security Council.²⁵¹ This prerequisite seems to arise out of the Security Council's role as the entity with primary responsibility for the maintenance of international peace and security.²⁵² It also seems to ensure the legitimacy of the intervention by allowing the international community to weigh in on the motives and the conduct of the intervention. Therefore, to prevent abuse of this doctrine and to preserve the U.N.'s purpose of maintaining international peace and security,²⁵³ interveners must keep the Security Council fully informed and comply with any Resolutions it adopts.

e. Other Requirements

There is less agreement as to whether other criteria apply. At least one scholar suggests a duty to reconstruct, politically and economically.²⁵⁴ This would be, arguably, consistent with "the general principle that any state invoking the right . . .

250. International law denies immunity for sitting or former heads of state or government. *See, e.g.*, Rome Statute of the International Criminal Court (ICC) art. 27, *opened for signature* July 17, 1998, 2187 U.N.T.S. 90 ("[O]fficial capacity as a Head of State or Government . . . shall in no case exempt a person from criminal responsibility under this Statute . . .").

251. Nafziger, *supra* note 32, at 25; Geissler, *supra* note 71, at 334.

252. U.N. Charter art. 24, para. 1.

253. *Id.* art. 1, para. 1.

254. Brown, *supra* note 13, at 1737–38.

accepts additional responsibilities as well as the obligations not to make things worse.”²⁵⁵ This requirement is also said to discourage abuse of the doctrine.²⁵⁶

Another scholar has demanded a good faith attempt to secure an invitation from the target state.²⁵⁷ But this prerequisite seems more like a formality. It would be hard to conceive a reason why a state that engages in flagrant and consistent violations of basic human rights would also consent to being invaded by another state in order to stop such conduct.

More support is found for the proposition that the intervention be carried out by several states instead of just one.²⁵⁸ However, authors disagree as to whether multilateralism should be mandated or simply a preference.²⁵⁹ The reason for this choice of joint action is because “the fact that more than one state has participated in the decision to intervene . . . lessens the chance that the doctrine will be invoked exclusively for reasons of self-interest.”²⁶⁰ While this is a preferable outcome, it should not be elevated to a full-blown prerequisite. The logistics and the politics of putting together a multistate coalition could delay redress.

IV. HUMANITARIAN INTERVENTION TO PROTECT A PEOPLES’ RIGHT OF SELF-DETERMINATION

Several scholars who endorse the legality of humanitarian intervention believe it can be used in cases of violations of a people’s right to self-determination.²⁶¹ They point out that the

255. *Id.* at 1738.

256. *Id.*

257. Nafziger, *supra* note 32, at 25.

258. Scheffer, *supra* note 14, at 291; Bazzyler, *supra* note 16, at 603; Benjamin, *supra* note 13, at 153.

259. Compare Benjamin, *supra* note 13, at 153 (making multilateralism a preferred caveat, but not an absolute prerequisite), with Scheffer, *supra* note 14, at 291 (stating that a unilateral intervention can only be justified if efforts to create a multinational force have failed).

260. Bazzyler, *supra* note 16, at 604 (citing Richard B. Lillich, *Forcible Self-Help by States to Protect Human Rights*, 53 IOWA L. REV. 325, 333 (1967) (quoting Quincy Wright, *The Legality of Intervention under the United Nations Charter*, 51 AM. SOC’Y INT’L L. PROC. 79, 86 (1957))).

261. Reisman, *supra* note 12, at 643–44; Nafziger, *supra* note 32, at 23; Mertus,

Declaration on Principles of International Law recognizes the Charter-based duty to refrain from any forcible action that deprives peoples of their right to self-determination.²⁶² Every state is said to have the duty to promote, through joint and separate action, the realization of the principle of self-determination of peoples.²⁶³

Moreover, the Declaration states that peoples in pursuit of the exercise of their right to self-determination are entitled to seek and receive support in accordance with the Purposes and Principles of the Charter.²⁶⁴ Furthermore, the Declaration states that nothing in it shall be construed as authorizing any action that impairs the territorial integrity or political unity of sovereign and independent states that conduct themselves *in compliance with the principle of equal rights and self-determination*.²⁶⁵ In other words, states that do not conduct themselves in such manner are not immune from actions that may impair their territorial integrity or political unity.²⁶⁶

Therefore, a seemingly strong case can be made for humanitarian interventions to protect a people's right to self-determination. But such an approach is problematic considering there is no single definition of self-determination, the rights it entails, how those rights can be violated, and who qualifies as the people entitled to those rights. Based on the criteria laid out above,²⁶⁷ an absolute right to intervene to protect a people's right to self-determination must be denied. Only when the violation of the rights to self-determination also amounts to genocide or to a systematic and widespread violation of the most basic human rights, then can the doctrine of humanitarian

supra note 66, at 1764; Paust, *supra* note 11, at 17.

262. Declaration on Principles of International Law, *supra* note 33, at 124; *see* U.N. Charter art. 1, paras. 2, 55.

263. Declaration on Principles of International Law, *supra* note 33, at 124.

264. *Id.*

265. *Id.*

266. For example, West Pakistan's actions in East Pakistan (now Bangladesh) led to India's intervention and the emergence of a new state. *See supra* text accompanying notes 85–94.

267. *See supra* Part III.B.1–2.

intervention be used to protect a people's rights to self-determination.

The content of self-determination remains "disappointingly vague."²⁶⁸ Scholars have pointed out that since there is no common definition of self-determination, the only plausible way to develop a norm regarding permissible intervention based on self-determination would be to admit any definition as equally valid, an approach that "would permit broad rights to intervene, essentially allowing 'self-determination' to be a pretext for nearly any intervention."²⁶⁹

A people's right to self-determination is said to be their right to freely "determine, without external interference, their political status and to pursue their economic, social and cultural development"²⁷⁰ But what exactly does this right to determine a political status entail? Does it entail the right to a representative government? The right to elections? Both the ICCPR and the Universal Declaration of Human Rights enshrine the peoples' rights to genuine and periodic elections by universal suffrage.²⁷¹ Yet authors frown on the use of humanitarian interventions when these rights are violated.²⁷²

The Declaration on Principles of International Law lists some modes of implementing the right to self-determination. They include establishing a sovereign and independent state, the free association or integration with an independent state, and "the emergence into any other political status freely determined by a people."²⁷³ These provisions can be interpreted in many ways, from demanding more autonomy, to overthrowing a colonial regime, to outright secession.²⁷⁴

268. Nafziger, *supra* note 32, at 10.

269. ANTHONY CLARK AREND & ROBERT J. BECK, *INTERNATIONAL LAW & THE USE OF FORCE* 86 (1993).

270. Declaration on Principles of International Law, *supra* note 33, at 123.

271. ICCPR, *supra* note 42, at 179; Universal Declaration of Human Rights, *supra* note 45, at 75.

272. See, e.g., Nafziger, *supra* note 165, at 226 (stating that it seems "that a threat to a right of participation or democracy would not alone justify humanitarian intervention"); see also Levitin, *supra* note 84, at 653 (stating "the denial of any particular form of government . . . does not justify intervention").

273. Declaration on Principles of International Law, *supra* note 33, at 124.

274. But see Payam Akhavan, *Lessons from Iraqi Kurdistan: Self-Determination*

Moreover, what does it mean to have the right to pursue “economic, social and cultural development?” Basically, any matter normally considered to be a domestic affair can fall under this category, from educational policies to economic spending. Is the Venezuelan government violating its people’s right to self-determination when it cracks down on those who oppose its policies?²⁷⁵ If so, does that entitle other countries to intervene militarily?

Furthermore, what constitutes a violation of any of these rights? A coup d’état? Rigged elections? An unrepresentative and undemocratic government? The Declaration on Principles of International Law itself mandates states to refrain from any *forcible* action that deprives people of their right to self-determination.²⁷⁶ It also allows peoples to seek and receive assistance to such *forcible* action.²⁷⁷ Therefore, there must be a use of force, at the very least. The question remains, however, of how to define the type or amount of force necessary for an action to be considered forcible. Is it the imposition of martial law to cancel elections? Is it the use of police units to repel protesters? Or must the force used mirror the actions carried out by the Saddam regime in 1991, or the Serbian government in the late 90’s?

Compounding the difficulties of extending the doctrine of humanitarian intervention to the protection of peoples’ right to self-determination is the lack of definition of “peoples.”²⁷⁸ Who exactly is the victim of the deprivation of a right? Is it the residents of a region who believe they are entitled to more autonomy, or even independence? Is it the followers of a political movement who believe their government’s fiscal policies will

and *Humanitarian Intervention Against Genocide*, 11 NETH. Q. HUM. RTS. 41, 55 (1993) (“[S]elf-determination should not be equated with secession”).

275. See, e.g., Girish Gupta, *Venezuela Government Faces Brutality Accusations over Unrest*, REUTERS (Feb. 26, 2014), <http://www.reuters.com/article/2014/02/26/us-venezuela-protests-allegations-idUSBREA1P1AF20140226> (detailing allegations of torture committed on protesters who opposed the government’s policies).

276. Declaration on Principles of International Law, *supra* note 33, at 124.

277. *Id.*

278. AREND & BECK, *supra* note 269, at 86.

bring financial doom and their protests are met with police force?

Although some guidelines have been offered to determine what is a “people,”²⁷⁹ this multivariate test leaves open the possibility that two separate groups of individuals can be considered a “people” and yet have completely opposite interests in a dispute.²⁸⁰ To wit, a group’s claim of more autonomy or even independence can run afoul of another group’s claim of preserving the territorial integrity and unity of the country. To extend the application of humanitarian intervention to such situations would be the equivalent of having the international community, or even a single state, sit as a judge of a state’s political system or domestic policies.

To argue that any violation of the right to self-determination justifies humanitarian intervention distorts the purpose of it and invites abuse of the doctrine.

A. Permissibility Under the United Nations Charter

A humanitarian intervention to protect a people’s right to self-determination can run contrary to some of the requirements under the Charter, as laid out above.

The requirement that there must be an act of aggression or threat or breach of the peace poses some difficulties. The Resolution on the Definition of Aggression defined aggression, *inter alia*, as the use of armed force by a State in a manner inconsistent with the Charter.²⁸¹ The Charter enshrines the right to self-determination.²⁸² Therefore, an armed attack aimed at impairing a people’s right to self-determination seems to fall under the definition of aggression. However, Security Council Resolutions finding specific instances of aggression show that the concept has been mostly applied to interstate conflicts.²⁸³

279. See *supra* text accompanying note 56 (summarizing the report on people characterization).

280. See UNESCO, *supra* note 56, ¶ 22 (noting criticisms that the definition of “peoples” is uncertain and may lead to “dangerous proliferation of claims, undermining settled borders, national sovereignty and international peace and security”).

281. Definition of Aggression, *supra* note 128, at 143.

282. U.N. Charter art. 1, paras. 2, 55.

283. See UNITED NATIONS, HISTORICAL REVIEW OF DEVELOPMENTS RELATING TO

Specifically, throughout the 1970's and 1980's, the Security Council consistently condemned Southern Rhodesia (now Zimbabwe) and South Africa for acts of aggression committed against their neighboring states.²⁸⁴ On two occasions the Council condemned attacks committed by Israel against Tunisia as acts of aggression.²⁸⁵ Iraq was likewise condemned as an aggressor for its invasion of Kuwait.²⁸⁶ The only case not involving interstate acts of aggression related to the attacks on Benin, which were carried out by mercenary forces in 1977.²⁸⁷ Nevertheless, the target of the act of aggression was a state, and not a people.²⁸⁸ Therefore, the Security Council tends to define acts of aggression as conflict between states or, at a minimum, a conflict in which a state is the target of the attack.

Moreover, there is no clear definition of what is a threat or breach of the peace, but it must involve at least a conflict.²⁸⁹ On top of that, the past has demonstrated that the Council is reluctant to find a threat to peace when a violation of political rights is involved.²⁹⁰ After a military coup overthrew the democratically elected President of Haiti, the Security Council, the General Assembly, and the Organization of American States agreed that free elections and installation of the democratically elected President were not issues of international peace and security.²⁹¹ Moreover, actions taken by the Allies in Iraq and NATO in Kosovo show that the violations at issue, in order to be a threat to the peace that justifies a humanitarian intervention consistent with the Charter's provisions, must involve conduct

AGGRESSION 225–37 (2003), available at <http://www.un.org/law/books/HistoricalReview-Aggression.pdf> (recounting the instances when the Security Council has issued resolutions for acts of aggression).

284. *Id.* at 225–34.

285. *Id.* at 235–36.

286. *Id.* at 236–37.

287. *Id.* at 234–35.

288. *See id.* at 234 n.456 (noting that “the State of Benin was subjected to aggression”).

289. *See supra* text accompanying notes 205–06.

290. *See, e.g.,* Nafziger, *supra* note 165, at 226 (“[I]t would seem that a threat to a right of participation or democracy would not alone justify humanitarian intervention.”).

291. *Id.*

more egregious than the state denying a people their rights to form their own state.²⁹²

Moreover, a humanitarian intervention to protect a people's right to self-determination can fall short of meeting the requirement that the enforcement action be consistent with the Purposes and Principles of the Charter to the extent possible. In particular, it may violate Article 2(4)'s prohibition on the use of force against the territorial integrity or the political independence of a state and Article 2(1)'s provision of sovereign equality.²⁹³ Granted, a military intervention involves a degree of impairment to the territorial integrity of the target state or its political independence.²⁹⁴ It may pose a challenge to its sovereignty. It may even result in the overthrow of the government (e.g., Tanzania's toppling of the Amin regime)²⁹⁵ or in the formation of a new state (e.g., the emergence of Bangladesh).²⁹⁶ But such outcomes are only justified when necessary to stop either genocide or gross, widespread, and systematic violations of human rights.

Unless the specific violation of a people's right to self-determination reaches a level similar to the atrocities committed by the Serbs in Kosovo, or the Iraqi government against the Kurds and Shias, for example, it would be extremely dangerous to allow a humanitarian intervention for any violation of a peoples' right to self-determination. To hold otherwise would be the equivalent of allowing the partition of countries where rebel groups, demanding independence or autonomy, are met with force by the central government, or allowing regime change in a country where a corrupt government manages to stay in power by rigging elections and cracking down on protesters.

Therefore, a humanitarian intervention, undertaken to uphold a people's right to self-determination, must meet the following requirements to be legal under the Charter. First, the violation of the right to self-determination must be of such

292. See, e.g., *supra* text accompanying notes 141, 150–51 (discussing the atrocities committed by the Iraqi government and the Serbians).

293. U.N. Charter art. 2, paras. 1, 4.

294. Behuniak, *supra* note 24, at 184.

295. See *supra* Part III.A.2.a.i.C.

296. See *supra* Part III.A.2.a.i.A.

severity as to amount to a threat or breach of the peace.²⁹⁷ A simple denial of political rights will not do. Second, the enforcement action, to the extent possible, must be consistent with the Purposes and Principles of the Charter.²⁹⁸ It must be aimed specifically at stopping and preventing continued violations of the right to self-determination.

Third, the intervenors must have sought a remedy through the United Nations and the provisions of the Charter.²⁹⁹ Fourth, a disclosure requirement applies to these types of humanitarian interventions.³⁰⁰ Finally, the intervention itself must not violate the very right it seeks to uphold.³⁰¹

B. Permissibility Under Customary International Law

A broad right to intervene to protect people's right to self-determination may fail the purpose requirement laid out above. Scholars have stressed that the denial of any particular form of government or economic system does not justify intervention.³⁰² Furthermore, supporters of humanitarian intervention have frowned on the use of such doctrine to alter the territorial integrity or political independence of the target state.³⁰³

297. See *supra* text accompanying notes 205–06 (listing requirements regarding threats or breaches of the peace).

298. See *supra* text accompanying notes 208–09.

299. See *supra* text accompanying notes 191–96 (stating that the provisions of the Charter give the Security Council and other entities the power to take action).

300. See *supra* text accompanying notes 197–99 (explaining that the Security Council must be kept fully informed).

301. See Ryan, *supra* note 77, at 66 (“The intervening party must be seeking only to destroy the barriers to the exercise of self-determination, not to install its own favored form of economic, political, or cultural order.”); see also Nafziger, *supra* note 32, at 25 (“Intervention may have the undesirable effect of inviting prolonged foreign hegemony . . .”).

302. Levitin, *supra* note 84, at 653; see also ICISS REPORT, *supra* note 179, at 35 (“Any use of military force . . . for the . . . advancement of a particular combatant group’s claim to self-determination, cannot be justified.”).

303. See, e.g., Scheffer, *supra* note 14, at 291 (stating that the political independence and territorial integrity of the target state should not be changed through humanitarian intervention); Geissler, *supra* note 71, at 334 (intervention should have “minimal effect on authority structures,” and “minimal interference with self-determination”).

Moreover, such broad application of the humanitarian intervention doctrine violates the necessity requirement.³⁰⁴ Almost unanimously, scholars require a violation of a basic human right.³⁰⁵ The violation must be gross, systematic, and widespread.³⁰⁶ The specific violation can also amount to genocide or some other crime against humanity.³⁰⁷ If the violation of the right to self-determination also amounts to genocide, or to a gross, widespread, and systematic violation of a basic human right—like enslaving a people, torturing and/or causing the disappearance of a significant amount of people—then humanitarian intervention would be warranted for that particular violation of the right to self-determination, provided all other requirements are met.

Therefore, for a humanitarian intervention—undertaken to protect a people’s right to self-determination—to be legitimate under customary international law, the intervention must be necessary. This means that the violation of a people’s right to self-determination must amount to either genocide or a gross, systematic, and widespread violation of basic human rights. All other remedies must have been exhausted, or at least there must have been a good faith effort to do so. Recourse must be had first with the Security Council, and then the General Assembly or a regional arrangement if the first one is unavailable.

Moreover, the amount of force used must be proportional. Additionally, humanitarian purposes must prevail over all

304. See *supra* Part III.B.2.a.

305. See, e.g., ICISS REPORT, *supra* note 179, at 32 (stating that military intervention is justified if its purpose is to avert large scale loss of life or ethnic cleansing); Levitin, *supra* note 84, at 653 (“The rights denied must be the minimum human rights of life and freedom from torture.”); see also Moore, *supra* note 212, at 25 (setting out the criteria for permissive humanitarian intervention).

306. See, e.g., Nanda, *supra* note 84, at 330 (requiring gross, persistent and systematic violations of basic human rights); Benjamin, *supra* note 13, at 152 (requiring extreme human rights abuses that shock the conscience); Moore, *supra* note 212, at 25 (requiring widespread arbitrary deprivation of human life).

307. See, e.g., Levitin, *supra* note 84, at 652 (citing genocide as the moral basis for humanitarian intervention); ICISS REPORT, *supra* note 179, at 32 (mentioning ethnic cleansing as justification for military intervention, whether it is carried out by killing, forced expulsion, acts of terror or rape).

others. This means that the intervention must not be aimed at changing a regime or partitioning a country unless it is indispensable to stop the violation of the people's right to self-determination. And finally there must be complete disclosure to the Security Council throughout the process.

V. CONCLUSION

Almost seven decades have passed since the world came together to save succeeding generations from the scourge of war and to reaffirm faith in fundamental human rights.³⁰⁸ Yet, the horrors mankind experienced in World War II have repeated themselves time and again.³⁰⁹ Genocide, ethnic cleansing, and other forms of gross violations of human rights have become all too common. In some instances, these violations accompanied peoples' struggles for self-determination. Meanwhile, except for a few noteworthy instances, the rest of the world sat by impotent or disinterested in stopping the carnage.

History has shown that the security system implemented by the Charter needs to be updated in order to confront these tragedies. While the Charter preserved its Members' right to self-defense, it based its enforcement mechanism mainly around the Security Council. This entity is composed of fifteen Member states, five of which are permanent ones with the right to veto decisions³¹⁰ and some of them went on, and continue to be, rivals. This arrangement left the implementation of security and peacemaking efforts to the whims of superpowers and Cold War politics. It also meant that oppressed peoples' plight would go unaddressed, since the right to self-defense belongs to Member states and not peoples.³¹¹

For many decades now, it has become clear that if the United Nations is to live up to its lofty goals, a new interpretation of the Charter is needed. Its provisions can be read in the light

308. U.N. Charter pmbl.

309. *See, e.g., supra* text accompanying notes 120–23 (presenting a nonexclusive list of gross human rights abuses).

310. U.N. Charter art. 23, para. 1.

311. *See id.* art. 51 (referring to “a Member of the United Nations” as the recipient of the Charter's protection).

of newer developments in a way that not only does it *not* prohibit humanitarian intervention, but also authorizes them.³¹² Like any other doctrine, humanitarian intervention can be prone to abuse. It is said that Hitler himself used it to justify the annexation of Czechoslovakia.³¹³ Fortunately the Charter provides criteria limiting the circumstances in which it can be used.³¹⁴

Furthermore, humanitarian intervention is also legal under customary international law. A consistent pattern of state practice has accumulated over the decades, in which states individually or in groups intervened militarily in another state to stop instances of genocide and other gross, systematic, and widespread abuses of human rights.³¹⁵ A strong body of *opinio juris* has also arisen espousing the expectation that such actions are or should be legal, albeit some significant dissent.³¹⁶ Customary international law also provides a set of criteria for the legality of humanitarian intervention.

The tragedy unfolding in Syria has renewed the debate on whether humanitarian interventions are permissible under international law. In light of the atrocities committed there some foreign governments have considered the possibility of using force.³¹⁷ Some scholars have even wondered whether an intervention in Syria would be warranted to protect the Syrian people's right to self-determination.³¹⁸

312. See *supra* Part III.A.1.b (stating that not only has humanitarian intervention not been banned by the Charter but several provisions may favor it).

313. Benjamin, *supra* note 13, at 135.

314. See *supra* Part III.B.1.

315. See *supra* Parts III.A.2.a.i.A, III.A.2.a.i.C, III.A.2.b.i (including general state practices and examples from India's intervention in East Pakistan and Tanzania's intervention in Uganda).

316. See *supra* Part III.A.2.b.ii (outlining a significant number of documents in support of legalization of humanitarian intervention). *But see supra* Part III.A.2.a.ii (presenting examples of *opinio juris* against humanitarian intervention).

317. See *supra* text accompanying notes 1–2 (noting the position of the British government that it could intervene to alleviate the catastrophe in Syria); *U.S. Considering Use of Military Force in Syria*, CBS NEWS (July 18, 2013), <http://www.cbsnews.com/news/us-considering-use-of-military-force-in-syria>.

318. Compare Akande, *supra* note 10 (answering in the negative), with Paust, *supra* note 11, at 17–18 (answering in the affirmative).

Considering the inherent lack of definition surrounding the doctrine of self-determination, a broad right to intervene to protect a peoples' right to self-determination must be denied. There is no single definition of self-determination, the rights it entails, and how those rights can be violated. Furthermore, the right to self-determination is said to belong to peoples; yet there is no single definition of "peoples". When all of these uncertainties are considered together, a risk exists that an intervention for such purposes may run afoul of another people's right. Moreover, an absolute right to intervene to uphold a people's right to self-determination can violate some of the requirements laid out above.

That does not mean the international community must sit idle while a tragedy like Syria's takes place. When a state commits acts of genocide against its people in their struggle to overthrow such regime, or carries out other acts in a systematic and widespread fashion that result in gross violations of basic human rights, that state is obviously violating those people's right to self-determination.³¹⁹ In that instance, other states would be entitled to intervene forcibly to stop such violations.

To hold otherwise would be akin to opening the door to abuse of the doctrine of humanitarian intervention: a single state could select which people it wants to protect from which deprivation of their right to self-determination. Regime-toppling forays and border-changing conflicts would ensue. If we are to leave succeeding generations with a world where peace, security, and human rights are valued, we must recognize that humanitarian interventions to stop violations of a people's right to self-determination must be carefully circumscribed to instances where a state engages in the most abject violations of human rights.

319. See generally Aryn Baker, 'Systematic Torture and Killing'—A New Report Points Fingers at Syria's Assad, TIME (Jan. 20, 2014), <http://world.time.com/2014/01/20/systematic-torture-and-killing-a-new-report-points-fingers-at-syrias-assad> (describing allegations of widespread torture and starvation carried out by the Syrian security agencies).