

The Geneva Conventions in 21st Century Warfare: How the Conventions Should Treat Civilians' Direct Participation in Hostilities

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THE STARS ALIGNED: THE LEGALITY, LEGITIMACY, AND LEGACY OF 2011'S HUMANITARIAN INTERVENTION IN LIBYA

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Certainly it is undoubted that ever since civil societies were formed, the rulers of each claimed some especial right over his own subjects. . . . [But] [i]f a tyrant . . . practises [sic] atrocities towards his subjects, which no just man can approve, the right of human social conne[ct]ion is not cut off in such a case.¹

I. INTRODUCTION: LIBYAN INTERVENTION REINFORCES UNITED NATIONS PARADIGM AND RESPONSIBILITY TO PROTECT DOCTRINE

The United Nations Security Council's passage of the United Nations Security Council Resolution ("UNSCR") 1973 in March 2011, authorizing military force in Libya on humanitarian grounds, strengthened the United Nations Security Council's role as the legal and legitimate authorizer of the use of force for such protective purposes.² It will likely

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¹ WILLIAM WHEWELL, HUGONIS GROTII DE JURE BELLI ET PACIS LIBRI TRES 439-40 (translating the words of Hugo Grotius). Grotius believed that states have a discretionary right to intervene, by force if necessary, in another state to prevent grave human suffering but do not have an obligation to do so. *Id.* This Essay argues that the current trend among nations is moving toward acceptance of an actual obligation to do so. See J.L. Holzgrefe, *The Humanitarian Intervention Debate*, in HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS 15, 26-27 (J.L. Holzgrefe & Robert O. Keohane, eds., 2003) (articulating a tenet of natural law theory that views humanitarian intervention as a discretionary right versus moral obligation).

² S.C. Res. 1973, ¶¶ 4, 6-8, U.N. Doc. S/RES/1973 (Mar. 17, 2011) (authorizing the use of military force in Libya in light of the humanitarian rights abuses being committed). Resolution 1973, issued on March 17, 2011, supplements Resolution 1970, issued on February 26, 2011. *Id.* Resolution 1970 referred the situation in Libya to the Prosecutor of the International Criminal Court and called for an arms embargo and asset freeze against the Libyan Arab Jamahiriya for continuing human rights violations, as well as instituted a travel ban against certain persons connected to the Libyan government and considered

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also make future unilateral (i.e., without Security Council authorization) military action on such grounds more difficult to justify and perhaps even less likely to actually occur, if only due to UNSCR 1973's precedential value, and will make the normative status of such unilateral intervention less uncertain than it has been in the past. The passage of UNSCR 1973 reinforced the extant legal paradigm of non-intervention unless in self-defense or authorized by the Security Council, and buttressed the evolving international norm that grievous human rights abuses occurring solely within one state constitute a threat to international peace and security.³ Furthermore, it strengthened the concept of a collective international responsibility to act when a state fails to protect its population from grievous human rights abuses and reinforced a legal realist approach to such situations, though such collective responsibility has far to go before reaching peremptory norm status. Critically, the capability to intervene at relatively minimal cost, especially in terms of exposure of U.S. troops to danger, played a large role in the lack of U.S. domestic public opposition to the intervention; this allowed the Obama administration to support the United Nations ("UN") resolution and thus contribute to the above norm. While the tension between state sovereignty plus peaceful relations among states and the protection of human rights has certainly not been resolved, the recent Libyan military intervention underscores the willingness of the international community to pursue UN-sanctioned action on grounds of protecting civilian populations, but only when all the stars align via a UN-sanctioned constellation.

The UN Security Council's March 2011 resolution, which allowed for all necessary means to protect civilians, does, at least facially, implement and reinforce the so-called "[r]esponsibility to protect" doctrine

responsible for some of those violations. See S.C. Res. 1970, ¶¶ 4, 9-10, 15, 17, U.N. Doc. S/RES/1970 (Feb. 26, 2011). Resolution 1973 determined that the situation in Libya constituted a threat to international peace and security; demanded a cease-fire and end of violence against civilians; called for: a no-fly zone over Libya, stronger enforcement of the arms embargo, a travel ban on additional individuals, and a complete flight ban in and out of Libya. S.C. Res. 1973, *supra*, ¶¶ 4, 6, 8, 13, 17, 19. It also authorized "all necessary measures . . . to protect civilians and civilian populated areas under threat of attack." *Id.* ¶ 4.

³ See S.C. Res. 1973, *supra* note 2, ¶¶ 1, 7-8 (demonstrating the use of intervention in a non-international armed conflict by demanding a cease fire and establishing a no-fly zone in Libya, with the exception of humanitarian aid planes, and authorizing U.N. member states to enforce the no-fly zone); Alex J. Bellamy, *Responsibility to Protect or Trojan Horse? The Crisis in Darfur and Humanitarian Intervention After Iraq*, 19 ETHICS & INT'L AFF. 31, 33-34 (2005) (concluding that such an international norm—that human rights abuses within one state constitute a threat to international peace and security—already exists).

endorsed by the international community in 2005.⁴ This principle, articulated by the international community in non-binding documents, recognizes an international—versus solely sovereign state—responsibility to act in specific situations. It provides that, “[e]ach individual [s]tate has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity” and that the UN is “prepared to take collective action, in a timely and decisive manner, through the Security Council . . . on a case-by-case basis . . . should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.”⁵

However, Security Council Resolution 1973 may not be unanimously viewed as a ringing vindication of the responsibility to protect doctrine because it was not driven solely by humanitarian motives to prevent crimes against humanity (though the expenditure of resources for collective military action rarely has been justified purely on humanitarian grounds, given the costs and complex societal processes necessary to gain support for such action, especially in democracies). While the grave potential for greater civilian slaughter was surely a major impetus behind UNSCR 1973 (the resolution itself states that the Libyan government’s actions may amount to crimes against humanity), the geopolitical tides of the Arab Spring played an even larger role in its passage.⁶ The need for a “powerful demonstration effect” to help other beleaguered citizens across the Arab world throw off dictatorial shackles cannot be discounted as a primary driving force of UNSCR 1973, at least by major western powers.⁷ Furthermore, the lack of love the Libyan leader engendered in his fellow regional leaders—as well as around the globe—surely helped the UNSCR’s passage, and helped solidify the rare support of such intervention by the Arab street.⁸

Despite these non-humanitarian geopolitical dynamics, the 2011 UN-authorized military intervention in Libya underscores a growing international consensus that a domestic humanitarian crisis can

⁴ See 2005 World Summit Outcome, G.A. Res. 60/L.1 ¶ 138, U.N. Doc. A/RES/60/L.1 (Sept. 15, 2005) [hereinafter 2005 World Summit Outcome] (articulating the responsibility to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity).

⁵ *Id.* ¶¶ 138–39.

⁶ S.C. Res. 1973, *supra* note 2.

⁷ Shadi Hamid, *Lessons of the Libya Intervention*, THE ATLANTIC (Aug. 22, 2011), <http://www.theatlantic.com/international/archive/2011/08/lessons-of-the-libya-intervention/243922/>.

⁸ Stewart Patrick, *Libya and the Future of Humanitarian Intervention*, FOREIGN AFF. (Aug. 26, 2011), <http://www.foreignaffairs.com/articles/68233/stewart-patrick/libya-and-the-future-of-humanitarian-intervention>.

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constitute a threat to international peace and security. At the time of the resolution, fellow Arab states emphasized that “Libya was suffering heavily, with hundreds of victims dying and thousands displaced.”⁹ Prior to the Security Council’s vote, the Arab League called for the UN to authorize a “no-fly zone” over Libya to create “safe zones” as a “humanitarian measure to protect Libyan civilians.”¹⁰ Even non-major world powers outside the Arab street concurred with the need for action. Colombia’s UN ambassador stated that:

[H]is delegation was convinced that the purpose of the new resolution was essentially humanitarian and was conducive to bringing about conditions that would lead to the protection of civilians under attack from a regime that had lost all legitimacy. The Council had acted because the Government, through its actions, had shown that it was not up to protecting and promoting the rights of its people.¹¹

At the time, President Obama stressed that Libya faced “brutal repression and a looming humanitarian crisis,” while also acknowledging the confluence of factors, which made intervention appropriate, such as “an international mandate for action, a broad coalition prepared to join us, the support of Arab countries, and a plea for help from the Libyan people themselves. We also had the ability to stop Qaddafi’s forces in their tracks without putting American troops on the ground.”¹² These humanitarian justifications supported calls for action specifically under the Security Council’s authority to act to remedy or prevent breaches to international peace and security. World leaders also cited the geographical importance of Libya and the potential transnational strategic effects of a mass refugee exodus from Libya stemming from the humanitarian crisis—but their primary stated justification for military intervention focused squarely on the Libyan

⁹ U.N. Security Council, *Security Council Approves ‘No-Fly Zone’ Over Libya, Authorizing ‘All Necessary Measures’ to Protect Civilians, by Vote of 10 in Favour with 5 Absentions*, U.N. Doc. SC/10200 (Mar. 17, 2011) [hereinafter *Council Approves ‘No-Fly’ Zone*].

¹⁰ *Arab League Asks U.N. to Impose a No-fly Zone Over Libya to Protect Civilians from Air Attack*, N.Y. DAILY NEWS (Mar. 13, 2011), http://articles.nydailynews.com/2011-03-13/news/29139723_1_arab-league-zone-league-statement.

¹¹ *Council Approves ‘No-Fly’ Zone*, *supra* note 9.

¹² President Barack Obama, President of the United States of America, President Obama’s Speech on Libya (Mar. 28, 2011), available at <http://www.whitehouse.gov/photos-and-video/video/2011/03/28/president-obama-s-speech-libya#transcript> [hereinafter *Obama’s Speech on Libya*].

government's alleged past and potential future crimes against humanity within its sovereign borders.

These humanitarian justifications employed the concepts inherent in the responsibility to protect doctrine, as well as its language. In his speech to the American people a few weeks after the Security Council's vote, President Obama stated that "[t]o brush aside America's responsibility as a leader and—more profoundly—our responsibilities to our fellow human beings under such circumstances would have been a betrayal of who we are."¹³ This sentiment underscores the point made

¹³ *Id.*; see Dominic Evans, *Gaddafi Wins Little Arab Sympathy as West Strikes*, REUTERS (Mar. 19, 2011), <http://www.reuters.com/article/2011/03/19/us-libya-arabs-reaction-idUSTRE72142T20110319> (discussing Arab street's reaction to UNSCR 1973; highlighting Lebanon's Hezbollah leader Sayyed Hassan Nasrallah's comment). "Today, unfortunately, as a result of most Arab and Muslim leaders abandoning their responsibilities, the door has been opened to foreign intervention in Libya and we do not know where matters are heading." *Id.* (internal quotations omitted). Nasrallah's emphasis on the Arab world's "responsibilities" demonstrates the conceptual shift from "rights" to "responsibilities" by nations regarding events previously considered in the domestic realm. *Id.* Other world leaders echoed this sentiment. See Maria Golovina & Michael Georgy, *Western Warplanes, Missiles Hit Libyan Targets*, REUTERS (Mar. 19, 2011), <http://www.reuters.com/article/2011/03/19/us-libya-idUSTRE7270JP20110319> (quoting British Prime Minister David Cameron as saying "We cannot allow the slaughter of civilians to continue."); Nissa Rhee, *Nations Weigh Imposing No-fly Zone On Libya*, CHRISTIAN SCI. MONITOR (Mar. 3, 2011), <http://www.csmonitor.com/World/terrorism-security/2011/0303/Nations-weigh-imposing-no-fly-zone-on-Libya> (quoting Amr Moussa, the Arab League's Secretary-General as saying "The situation in Libya is sorrowful and it is not correct that we accept it or live with it, . . . The Arab League will not stand with its hands tied while the blood of the brotherly Libyan people is spilt." (internal quotation marks omitted)); *Arab League to Officially Request UN Impose No-fly Zone on Libya*, HAARETZ.COM (Mar. 3, 2011), <http://www.haaretz.com/news/international/arab-league-to-officially-request-un-impose-no-fly-zone-on-libya-1.348747> (quoting Amr Moussa, Secretary-General of the Arab League as saying "The Arab League decided on Saturday that the 'serious crimes and great violations' the Libyan government had committed against its people had stripped it of legitimacy."); *Arab States Seek Libya No-fly Zone*, AL JAZEERA (Mar. 12, 2011), <http://english.aljazeera.net/news/africa/2011/03/201131218852687848.html> (highlighting that despite opposition to the actual UNSCR authorizing intervention in Libya, the African Union still cited a need for outside intervention in Libya—just by other African states, and not via Western powers: "urgent African action" is needed to end the Libyan government's action against its population, stated Ramtane Lamamra, head of the African Union's Peace and Security Council). Not all world leaders shared this sentiment, however. See *Venezuela's Chavez Blasts Intervention in Libya*, LATIN AMERICANIST BLOG (Mar. 30, 2011), <http://ourlatinamerica.blogspot.com/2011/03/venezuelas-chavez-blasts-intervention.html> (quoting Venezuelan president Hugo Chavez as saying "We don't want outside strange elements in the region that come to alter the peace we need."); Vishnu Prakash, *Use of Force is Not Acceptable to India; Not in Libya, Not Anywhere Else*, DECCAN CHRONICLE (Mar. 31, 2011), <http://www.deccanchronicle.com/360-degree/%E2%80%98use-force-not-acceptable-india-not-libya-not-anywhere-else%E2%80%99-903> (discussing statements by India's spokesman of the Ministry of External Affairs, regarding why India did not support UNSCR 1973). "We have always gone by the premise that use of force is

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above: that the responsibility to protect doctrine, infused in the lexicon of national leaders, gained significant traction as an evolving norm in international law via the Libyan intervention, albeit not in a vacuum. The resolution was largely based on the desire to prevent further civilian casualties by the Libyan government, and such preventative action was taken by and through the UN Security Council, in step with the 2005 General Assembly's articulation of this doctrine. President Obama's choice of words are especially interesting when coupled with the pronouncements made at the same time by his senior policy staff, such as those by then-Secretary of Defense Robert Gates, that Libya did not involve vital U.S. interests.¹⁴ Hence, the U.S. support of the Libyan intervention, despite an alleged lack of vital national interests, seems in step with the responsibility to protect norm's emphasis on collective international action to protect human rights when they are gravely threatened, despite the lack of other national or international factors. Interestingly, only five months later, after the United States supported UNSCR 1973, President Obama unveiled his "Presidential Study Directive on Mass Atrocities," which "define[d] the prevention of mass atrocities as both 'a core national security interest and a core moral responsibility of the United States.'"¹⁵

This document signals a shift toward the acceptance, at least by the United States, of a duty or moral obligation to intervene in such situations, versus the previously-prevailing concept of a "right" to intervene without any such moral duty or legal compulsion to do so.¹⁶ Whether this potential acceptance is a step toward developing a legally binding international norm via shared *opinio juris* and state practice remains to be seen.¹⁷ What can be surmised today is that this automatic linkage, by one of the world's leading powers, of the prevention of mass atrocities to its core national interests propels such prevention up the ladder of required state and international community action, in better

unacceptable . . . [despite being] deeply concerned about the welfare of the people of Libya . . ." *Id.* (internal quotation marks omitted).

¹⁴ Jon Hilsenrath, *Gates Says Libya Not Vital US National Interest*, WALL ST. J., Mar. 27, 2011, <http://online.wsj.com/article/SB10001424052748704308904576226704261420430.html>.

¹⁵ Patrick, *supra* note 8.

¹⁶ See Holzgrefe, *supra* note 1, at 26–27 (articulating a tenet of natural law theory that views humanitarian intervention as a discretionary right versus moral obligation).

¹⁷ See Statute of the International Court of Justice, art. 38, June 26, 1945, available at <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0> (listing sources of international law); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 102, 103 (2011) (outlining constituent elements of customary international law).

alignment with the responsibility to protect doctrine.¹⁸ If prevention truly is a core national interest, and those interests are ones which a state, presumably, will use force to achieve if necessary, then most legal realists will agree that by equating the prevention of mass human suffering in another nation to one's own core national interests moves humanitarian intervention closer to being "required," at least pragmatically, if not morally.¹⁹

So what relevance does an Essay on the 2011 Libyan humanitarian intervention have to this special edition *Law Review*, itself focused on *jus in bello* issues associated with the treatment of civilians who are directly participating in hostilities? U.S. support of UNSCR 1973 actually highlights an interesting intersection of *jus ad bellum* and *jus in bello* that bears consideration—President Obama's March speech justifying the Libyan intervention is telling in this regard: "We also had the ability to stop Qaddafi's forces in their tracks without putting American troops on the ground."²⁰ What was the linchpin of this stand-off capability that allowed the United States to participate without risking ground troops? Drones. The United States' use of remotely-piloted vehicles such as Predators constituted "a resumption of a direct combat role for U.S. aircraft in Libya" when the manned North Atlantic Treaty Organization ("NATO") aircraft were having difficulty locating the small groups of Libyan government forces who were using small weapons, such as mortars to target civilians and rebels.²¹ The Predator's loiter ability—its ability to remain far above a specific location for hours at a time, with no risk to pilots, and collect vast amounts of extremely accurate intelligence—allows its operators to marry that real-time intelligence with the vehicle's firepower, that is, to employ its Hellfire missiles against those Libyan units, which only surface for a brief period of time to launch their mortar attacks.²² This emerging capability to use drones to achieve strategic objectives with greater precision than achieved in any previous "no-fly zone," without risking lives of pilots, may make

¹⁸ See Holzgrefe, *supra* note 1, at 30 (discussing how theorists such as Joseph S. Nye, Jr., who define national interests broadly, view certain humanitarian interventions as morally obligatory).

¹⁹ See Joseph S. Nye, Jr., *Why the Gulf War Served the National Interest*, ATLANTIC MONTHLY, July 1991, at 64 (discussing what constitutes national interests).

²⁰ Obama's Speech on Libya, *supra* note 12.

²¹ Dan Cloud, *U.S. Begins Using Predator Drones in Libya*, L.A. TIMES, Apr. 22, 2011, <http://articles.latimes.com/2011/apr/22/world/la-fg-gates-libya-20110422>.

²² See *U.S. Introduces Armed Predator Drones in Libya*, ENGLISH.NEWS.CN (Apr. 22, 2011), http://news.xinhuanet.com/english2010/world/2011-04/22/c_13840190.htm (describing the unique capabilities of the drones deployed in Libya, including their ability to provide better vision of the ground and fly much longer periods of time than manned conventional planes).

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policy makers increasingly inclined to intervene in such complex humanitarian interventions, since their nation's risks and costs are substantially lower than at any other time in history.

Imagine if President Clinton had had drones at his disposal when the UN sought U.S. support and assistance to prevent a looming genocide in Rwanda that fateful week in 1994. As this Essay later discusses, President Clinton (and the majority of western powers) was hamstrung from supporting a UN intervention in Rwanda by the 1992 debacle in Somalia during which a small number of U.S. service members died. But if General Dallaire had come to the United States with a list of a few individuals whose "targeted killing" would prevent the looming slaughter of civilians, the deaths of hundreds of thousands of innocent Rwandans may have been prevented via the use of remotely-piloted vehicles.²³ The successful use of remotely-piloted vehicles in the UN-authorized Libyan intervention may embolden policy makers to use them with greater frequency, thus involving the United States in more use of force situations, which previously had been deemed too difficult for involvement. The minimal exposure of U.S. service members to danger, made possible via use of weapon systems such as drones and Tomahawk missiles in the Libyan intervention, was a major component of the Obama administration's conclusion that U.S. participation (at least by mid-June 2011) did not constitute "hostilities" under domestic legislation regarding separation of powers issues; this allowed the administration to continue such "non-hostilities" without congressional authorization.²⁴

This "non-hostilities" rationale underscores the above point: that current capabilities may make interventions such as the one in Libya easier for policy makers to engage in, both technologically and politically (at least domestically regarding the latter). If such use of remotely-piloted vehicles emboldens policymakers to act in the name of the international community's responsibility to protect, then there needs to be greater clarity regarding the targeting process and how and when

²³ See generally *UN General's Rwandan Nightmares*, BBC NEWS (July 5, 2000), <http://news.bbc.co.uk/2/hi/africa/820827.stm> (discussing General Dallaire's role in the UN peacekeeping mission in Rwanda and his "inability to prevent the mass killings of more than 800,000 Rwandans").

²⁴ See Robert M. Chesney, *A Primer on the Libya/War Powers Resolution Compliance Debate*, BROOKINGS (June 17, 2011), http://www.brookings.edu/opinions/2011/0617_war_powers_chesney.aspx?p=1 (discussing the Obama administration's conclusion that U.S. participation in the Libyan no-fly zone no longer constituted hostilities as intended under the War Powers Resolution); see also Samantha Power, *Bystanders to Genocide*, ATLANTIC MONTHLY, Sept. 2001, at 86 (discussing the varied reasons the Clinton administration failed to intervene in Rwanda, including the "highly circumscribed understanding of what was 'possible' for the United States to do").

civilians become targets, especially if the United States does not believe these targeting actions amount to hostilities. If such actions do not constitute hostilities, then what governing body of law applies? Also, will these weapon systems likewise make future action, which is not approved by the Security Council, more likely? While other articles and essays in this law review implicate the first question, this Essay addresses the second, and concludes that humanitarian intervention outside of the UN regime is less likely following the Libyan intervention, regardless of relative technological ease, because of the evolving fortification of the UN Charter's ("the Charter") paradigm for use of force.

In summary, the following discussion clarifies how UNSCR 1973, which authorized the use of military force for the protection of Libyan citizens, is consistent with the Charter despite the absence of an explicit provision allowing for the use of force based on protecting human rights. Since the Charter allows the Security Council to approve the use of force to maintain or restore international peace and security, if the Security Council considers a situation as impacting international peace and authority, then it has the authority to act. This pigeon-holing of humanitarian intervention into an "international peace and security" rubric is not new, as later discussed in this Essay. Additionally, the Libyan intervention strengthens the expansion of this basis for Security Council action. This Essay also explores the historical context, which leads this Author to conclude that UNSCR 1973 weakened the legal status of humanitarian intervention without Security Council authorization, concomitantly strengthened the Security Council's role in approving such action, and reinforced the responsibility to protect doctrine.

II. LEGALITY OF UNSCR 1973

Because both a sanction regime and military action in Libya were authorized by the Security Council instead of unilaterally conducted by one or more nations, the Libyan intervention strengthened the UN's Westphalian system of collective security, which revolves around the sanctity of the state and constituent states' acknowledgment of the Charter's supremacy.²⁵ Furthermore, the UN's action in Libya restores some credibility to the United States and Great Britain whose credibility "as norm carriers" was weakened by the invasion of Iraq in 2003 and the

²⁵ *Contra* Allen Buchanan, *Reforming the International Law of Humanitarian Intervention*, in HUMANITARIAN INTERVENTION, *supra* note 1, at 130, 138-40 (discussing a different perspective regarding the UN system's legitimacy).

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subsequent protracted Iraq war.²⁶ Both were key actors in building consensus in support of UNSCR 1973; perhaps success in Libya will make it easier for these and other states to persuade others to act decisively in “humanitarian emergencies,” despite earlier forecasts to the contrary.²⁷

Finally, and most critically for this Essay’s purposes, UNSCR 1973 notably weakened the legal status of humanitarian intervention without Security Council authorization—a course of action many had argued was legally ambiguous, or even legally appropriate, following the NATO’s non-Security Council sanctioned intervention in Kosovo in 1999.²⁸ Great Britain argued at the time that use of force could be justified in Kosovo without explicit Security Council authorization “‘on the grounds of overwhelming humanitarian necessity.’”²⁹ Tony Blair, Britain’s Prime Minister at the time, expanded upon this theory in his 1999 speech in Chicago where he outlined five primary criteria to use when deciding whether intervention is warranted; he implied that Security Council authorization, while preferred, is not required.³⁰ Belgium went even further in arguing that NATO’s unilateral military intervention in Kosovo was lawful because it was necessary to protect a *jus cogens*, and was consistent with both earlier Security Council resolutions and with Article 2(4).³¹ These positions highlight the point that many legal theorists and policymakers understood the unilateral NATO use of force on humanitarian grounds in Kosovo in 1999 as having “established the norm of resort to force *without the authorisation* [sic] *of the UN Security Council.*”³² This Essay explores the historical context, which led to that

²⁶ Bellamy, *supra* note 3, at 32.

²⁷ *Id.* at 33.

²⁸ See Jane Stromseth, *Rethinking Humanitarian Intervention*, in HUMANITARIAN INTERVENTION, *supra* note 1, at 232, 239–40 (discussing the controversy behind the use of the Blair Doctrine in the Kosovo intervention).

²⁹ *Id.* at 236.

³⁰ Chris Abbott & John Sloboda, *The ‘Blair Doctrine’ and After: Five Years of Humanitarian Intervention*, OPEN DEMOCRACY (Apr. 21, 2004), <http://www.opendemocracy.net/print/1857>; see Chris Abbott, *Rights and Responsibilities: Resolving the Dilemma of Humanitarian Intervention*, J. HUMANITARIAN ASSISTANCE, Sept. 2005, at 1, 4, available at <http://sites.tufts.edu/jha/files/2011/04/a180.pdf> (elucidating Blair criteria and effects of Blair proposal) [hereinafter Abbott, *Rights and Responsibilities*]; see also Stromseth, *supra* note 28, at 240. Prime Minister Blair did not ignore the UN system altogether, however; he linked support of the NATO military intervention in Kosovo to earlier Security Council Resolutions, stressing the consistency of purpose between the two. *Id.*

³¹ Stromseth, *supra* note 28, at 239; see also Provisional Measures, Legality of Use of Force (Serb. & Montenegro v. Belgium), ¶ II (May 10, 1999), available at <http://www.icj-cij.org/docket/files/105/4515.pdf> (outlining Belgium’s arguments).

³² Abbott & Sloboda, *supra* note 30; see Bellamy, *supra* note 3, at 34 (discussing how the Kosovar intervention was viewed as “a watershed” regarding acceptance of non-UN

argument, and how the recent Libyan intervention once again shifted the dialogue and impacted the legality and legitimacy of such action.

A. Background: Humanitarian Intervention and the Charter

Humanitarian intervention refers to the non-consensual use or threat of use of military force against a state for the purpose of protecting people within that state—that is, to prevent or stop grave human rights abuses from being perpetrated within that state.³³ This is neither a new concept, nor a new guise for the use of force for other reasons.³⁴ The use of force for purely humanitarian reasons, and not simply as a cover for self-interested invasion, was promoted by the great naturalist Hugo Grotius, and some argue that humanitarian intervention constituted customary international law prior to passage of the Charter—there certainly was state practice to support such a stance.³⁵

However, the debatable customary law status of humanitarian intervention prior to the close of World War II was clarified by passage of the Charter in 1945, which established a new legal paradigm for the use of force.³⁶ The Charter closed the door on non-UN approved use of force except in cases of self-defense. In fact, when the Charter was being debated, the French advocated for an amendment that would have explicitly allowed humanitarian intervention without Security Council authorization.³⁷ It was defeated out of sovereignty fears, and the debate

authorized humanitarian intervention, and that it represented a general agreement that states have a “right” to intervene on such humanitarian grounds).

³³ See INT’L COMM’N ON INTERVENTION & STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT 8 (2001), available at <http://responsibilitytoprotect.org/ICISS%20Report.pdf> [hereinafter ICISS] (outlining generally accepted contours of what defines humanitarian intervention); see also Buchanan, *supra* note 25, at 130 (defining humanitarian intervention).

³⁴ See T. Modibo Ocran, *The Doctrine of Humanitarian Intervention in Light of Robust Peacekeeping*, 25 B.C. INT’L & COMP. L. REV. 1, 4–9 (2002) (discussing history of humanitarian intervention).

³⁵ *Id.* at 12.

³⁶ See generally U.N. Charter (establishing the creation of the UN); *infra* Part II.B (discussing the UN schema of international humanitarian law protections).

³⁷ See Stephen Carley, *Limping Toward Elysium: Impediments Created by the Myth of Westphalia on Humanitarian Intervention in the International Legal System*, 41 CONN. L. REV. 1741, 1770 (2009) (discussing the proposed 1945 amendment). “[T]he enforcement powers chapter to allow UN intervention in cases where ‘the clear violation of essential liberties and of human rights constitute[d] in itself a threat capable of compromising peace.’” *Id.* The French representative stated that the amendment “was in recognition of the historical experience of Nazism and the Holocaust, which had illustrated the desirability of international intervention for the purpose of protecting ‘certain unfortunate minorities.’” *Id.* The French amendment was supported by China, but several countries, including Australia (which proposed the initial counter-amendment that would become the “domestic jurisdiction clause” of Article 2(7)), the United States, and the United Kingdom, opposed the French provision that would essentially give the UN the power to involve

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surrounding it demonstrated the tension between what was then seen largely as a purely internal, domestic issue within the exclusive domain of the sovereign state, and an awareness that human rights should be respected and promoted by the international community. This Essay clarifies how UNSCR 1973, which authorized the use of military force for the protection of Libyan citizens, is consistent with the Charter despite the absence of an explicit provision allowing for the use of force based on protecting human rights. Since the Charter allows the Security Council to approve the use of force to maintain or restore international peace and security, if the Security Council considers a situation as impacting international peace and authority, then it has the authority to act.

B. *UN Schema*

The fundamental premise of the Charter is the prohibition of the use of force by its members except in self-defense or when authorized by the Security Council—and then only in cases to prevent aggression or restore/maintain international peace and security.³⁸ Article 2(4) of the Charter states that “[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the [UN].”³⁹ In Chapter VII, the Charter gives the Security Council alone the authority to determine threats to international peace and security, breaches of that peace, or acts of aggression, and provides that the Security Council should decide what measures to take to maintain or restore international peace and security.⁴⁰ Chapter VII, Article 42 stipulates that 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. Such action may include demonstrations, blockade[s], and other operations by air, sea, or land forces of Members of the [UN].”⁴¹ Chapter VII, Article 53 further specifies that regional organizations (for example, NATO) must first obtain Security Council authorization before engaging in “enforcement

themselves in purely domestic affairs of member states. *Id.* Even in 1945, Article 2(7) as it was adopted was considered “potentially the most substantial limitation that is to be found anywhere in the whole Charter upon the activity of the [UN].” *Id.* at 1772 (citations omitted).

³⁸ U.N. Charter art. 51 (“Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the [UN], until the Security Council has taken the measures necessary to maintain international peace and security.”).

³⁹ *Id.* at art. 2, ¶ 4.

⁴⁰ *Id.* at arts. 39, 41–42.

⁴¹ *Id.* at art. 42.

action" (that is, the use of force for maintaining or restoring international peace and security).⁴²

In other words, the Charter, whose primary purpose is to maintain international peace and security, gives the Security Council a monopoly on enforcement measures against aggression and breaches of international peace and security.⁴³ The Charter places a premium on

⁴² *Id.* at art 53, ¶ 1; see Richard N. Gardner, *A Life in International Law and Diplomacy*, 44 COLUM. J. TRANSNAT'L L. 1, 7 (2005) (discussing the 1962 United States naval quarantine of Cuba and the explanation of the United States before the UN for why the quarantine was not a blockade, and therefore an act of war); Suyash Paliwal, *The Primacy of Regional Organization in International Peacekeeping: The African Example*, 51 VA. J. INT'L L. 185, 193-94 (2010) (recognizing a contrast between "[t]he weight of scholarly opinion . . . that 'enforcement action' [under Article 2(4)] includes all . . . uses of force by regional organizations" including peacekeeping measures, but that "peacekeeping operations by regional organizations in accordance with a constitutive treaty framework against one of the organization's members do not constitute 'enforcement actions' within the meaning of Article 53" (citations omitted)). The United States cited Article 53 of the UN Charter and argued that although regional organizations cannot take enforcement action without Security Council approval, "because the quarantine had a very limited purpose and was authorized, not commanded, by the [Organization of American States]," it was not technically an enforcement action. *Id.*; see also Ugo Villani, *The Security Council's Authorization of Enforcement Action by Regional Organizations*, 6 MAX PLANCK U.N.Y.B. L. 535, 538-39 (2002) (discussing whether regional organization enforcement measures requiring Security Council approval "consist of enforcement measures of any type, or whether such authorization is only necessary for . . . cases involving the use of armed force (or . . . the threat of such force)" and concluding that "the enforcement measures which are subordinate to the Security Council's authorization are only those involving the use (or the threat) of armed force" because "enforcement measures . . . of a commercial, diplomatic or financial nature, are not forbidden by the Charter"). As the Charter only explicitly prohibits the use of armed force as a tool of international relations in Article 2(4), other enforcement measures used as tools of international relations do not require authorization. *Id.*

⁴³ *Contra* Paliwal, *supra* note 42, at 194 ("[A]pproval or commendation of a regional enforcement action after it has taken place satisfies the authorization requirement of Article 53(1), often pointing to the Security Council's treatment of [the Economic Community Of West African States'] 1990 intervention in Liberia." (citations omitted)). Although ECOWAS intervened in Liberia without first obtaining Security Council authorization under Article 53(1), the Security Council later "[c]ommend[ed] ECOWAS for its efforts to restore peace, security and stability to the conflict in Liberia" resulting in an interpretation that the Security Council's post hoc commendation constituted appropriate "authorization for a regional enforcement action." *Id.* at 195 (alteration in original) (citations omitted). Thus, there is some precedent for occurrences of enforcement actions constituting technical Article 53 violations being approved by the Security Council after the action has already occurred. See, e.g., S.C. Res. 788, ¶¶ 1-2, 4, U.N. Doc. S/RES/788 (Nov. 19, 1992) ("Commend[ing] ECOWAS for its efforts to restore peace, security and stability in Liberia; . . . call[ing] upon ECOWAS to continue its efforts to assist in the peaceful implementation of [the Yamoussoukro IV] Accord; . . . [and] [c]ondemn[ing] the continuing armed attacks against the peace-keeping forces of ECOWAS in Liberia by one of the parties to the conflict.").

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state sovereignty and peaceful relations among states.⁴⁴ It reinforces “an international state order dependent on the sovereignty of states and the inviolability of their territory.”⁴⁵ Article 2(4)’s prohibition against the use of force is complemented by Article 2(7)’s policy of non-intervention by the UN in states’ domestic affairs—except when authorized by the Security Council via its Chapter VII powers. Article 2(7) stipulates that:

Nothing contained in the present Charter shall authorize the UN to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.⁴⁶

While Article 2(7) has been used to oppose actions taken solely on humanitarian grounds—including those not sanctioned by the UN, exemplified by India’s protests against the NATO bombing of Kosovo in 1999—it is generally agreed that Article 2(7) only limits action by the UN, whereas Article 2(4) limits states.⁴⁷ Per its text, Article 2(7) does not apply to UN enforcement measures, which include all binding decisions made by the Security Council under Chapter VII.⁴⁸ But it nonetheless has been used generally to oppose both unilateral, non-UN approved intervention on humanitarian grounds, as well as to oppose Security Council authorization for the same.⁴⁹

The Charter’s collective security paradigm, an attempt to banish World War II and its ilk to the historical dustbin, includes a stated carve-out to the prohibition against force via the customary international law concept of self-defense.⁵⁰ It allows states to use force in self-defense if attacked, but not for any other reason (such as to stop a state from

⁴⁴ Buchanan, *supra* note 25, at 131.

⁴⁵ See ICISS, *supra* note 33, at VII (raising the issue of the policy conflict between preserving state sovereignty and the necessity of humanitarian intervention in the sovereign territory of a state).

⁴⁶ U.N. Charter art. 2, ¶ 7.

⁴⁷ Kawser Ahmed, *The Domestic Jurisdiction Clause in the United Nations Charter: A Historical View*, 10 SING. Y.B. INT’L L. 175, 184 (2006).

⁴⁸ *Id.* at 186.

⁴⁹ See *Council Approves ‘No-Fly’ Zone*, *supra* note 9. China, when explaining its vote of abstention regarding UNSCR 1973, made reference to the fact that the “Charter must be respected,” implying that perhaps Article 2(7) was being violated by the resolution in some manner. *Id.*

⁵⁰ PETER MALANCZUK, *AKEHURST’S MODERN INTRODUCTION TO INTERNATIONAL LAW* 27 (7th rev. ed. 1999).

perpetrating gross human rights violations within its own borders).⁵¹ In addition to the Charter's prohibition on the use of force, it also promotes and maintains state sovereignty through the Security Council itself: Only the Security Council can authorize, by an affirmative vote of nine members, the use of force against a member state by other member state(s), and the five permanent members of the Security Council hold veto power.⁵² In other words, of the fifteen Security Council members, all five permanent members (United States, United Kingdom, France, China, and Russia) must either authorize the proposed action or abstain from voting.⁵³ This voting procedure has historically posed a high hurdle for those seeking authorization to use force—especially true for the majority of the Security Council's existence, shadowed as it was for almost fifty years by the Cold War.⁵⁴ But it can also be viewed as an important check on the UN's power, thus ensuring that any collective action has the imprimatur of the five permanent members as well as most others.⁵⁵

Not only did the permanent party veto power stymie much Security Council action, it frequently neutered the entire UN collective security regime during much of the Cold War. The former Soviet Union exercised its veto power 114 times between 1945 and 1992, and the United States sixty-nine times during that same period.⁵⁶ Such

⁵¹ Compare U.N. Charter art. 51 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the [UN]."), with *id.* ¶ 7 ("Nothing contained in the present Charter shall authorize the [UN] to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter . . .").

⁵² U.N. Charter art. 27, ¶¶ 1-2.

⁵³ See *id.* (outlining the voting procedure for Security Council decisions).

⁵⁴ Eric A. Posner & John Yoo, *International Law and the Rise of China*, 7 CHI. J. INT'L L. 1, 6 (2006). The Cold War period was marked by decades of Security Council deadlock due to the permanent members exercising their veto power:

After the Korean War—when UN intervention was made possible only because the Soviet Union boycotted the Security Council vote in connection with another issue—the Security Council was never able to authorize the use of force to counter Cold War-era military aggression. If the aggression served Soviet interests, the USSR would veto any proposed resolution; if the aggression served American interests, the [United States] would veto any proposed resolution.

Id.

⁵⁵ See generally Niels Blokker, *Is the Authorization Authorized? Powers and Practice of the UN Security Council to Authorize the Use of Force by 'Coalitions of the Willing'*, 11 EUR. J. INT'L L. 541 (2000) (discussing various perspectives on the role of the Security Council).

⁵⁶ Global Policy Forum, *Changing Patterns in the Use of the Veto in the Security Council*, GLOBAL POLICY FORUM, http://www.globalpolicy.org/images/pdfs/Z/Tables_and_Charts/useofveto.pdf (last visited Apr. 8, 2012).

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impotency led to an evolving acknowledgment, within and among nations, that action taken without Security Council authorization, when approved by the majority of the General Assembly, could be legitimate.⁵⁷ The General Assembly passed the “Uniting for Peace” UNGA Resolution 377 in 1950 in an attempt to allow the General Assembly to act in situations that affected international peace and security but in which the Security Council was unable to act.⁵⁸ This resolution called on the General Assembly to immediately meet and issue non-binding recommendations, including those recommending the collective use of armed force, when the Security Council failed to maintain international peace and security.⁵⁹ It created “emergency special session[s]” of the General Assembly,⁶⁰ and was first utilized during the Suez Crisis in 1956, in which the United States and USSR teamed together to successfully call for the withdrawal of Israel, France, and Great Britain from Egypt.⁶¹ Emergency sessions have been used to call on South Africa to end its illegal occupation of Namibia and to deal with UN membership for Palestine.⁶²

While the Uniting for Peace resolution claimed for the General Assembly a “subsidiary responsibility with regard to international peace

⁵⁷ MALANCZUK, *supra* note 50, at 392.

⁵⁸ See generally Uniting for Peace Resolution, G.A. Res. 377 (V), U.N. Doc. A/RES/1775 (Nov. 3, 1950) (giving the General Assembly authority to act to maintain international peace and security when the Security Council is unable to act).

⁵⁹ MALANCZUK, *supra* note 50, at 393; see also Uniting for Peace Resolution, *supra* note 58, ¶ A(1) (declaring that the United Nations General Assembly can authorize the use of force for breaches of the peace or acts of aggression if the Security Council fails to act to address the situation and the failure to act is due to the negative vote of a permanent member.) The Uniting for Peace Resolution also includes collective measures where there is a “threat to the peace, breach of the peace, or act of aggression.” *Id.*

⁶⁰ Uniting for Peace Resolution, *supra* note 58, ¶ A(1). The Resolution allows for the General Assembly to bypass a Security Council stalemate in the event of Security Council deadlock paired with a necessity to act. *Id.* The General Assembly may thereafter call an emergency meeting on the issue in the following manner:

If not in session at the time, the General Assembly may meet in emergency special session within twenty-four hours of the request therefor. Such emergency special session shall be called if requested by the Security Council on the vote of any seven members, or by a majority of the Members of the [UN].

Id.

⁶¹ MALANCZUK, *supra* note 50, at 393.

⁶² See Christian Tomuschat, *Uniting for Peace General Assembly Resolution 377(V)*, AUDIOVISUAL LIBR. INT’L L., <http://untreaty.un.org/cod/avl/ha/ufp/ufp.html> (last visited Oct. 4, 2011). To date ten special sessions have been called under the Uniting for Peace Resolution. *Id.*; see also Emergency Special Sessions, U.N. GEN. ASSEMBLY, <http://www.un.org/en/ga/sessions/emergency.shtml> (last visited Apr. 8, 2012) (providing a list of instances where emergency special sessions have been called).

and security” based on Article 14 of the Charter,⁶³ this resolution continued to recognize the primacy of the Security Council in these matters.⁶⁴ Furthermore, it implicitly recognized that the UN was the means to authorize the use of armed force in the international arena—that is, it did not acknowledge that Security Council inaction could allow nations to use armed force without any type of UN authorization whatsoever. Instead, it simply moved the source of the authorization to the General Assembly when the Security Council failed to act.⁶⁵ While the need for such emergency sessions dramatically declined due both to the end of the Cold War and because the General Assembly began to meet more frequently outside of special sessions, the Uniting for Peace Resolution is noteworthy because it opened the door for many to question whether Security Council authorization is always required prior to the use of armed force.⁶⁶

III. EVOLUTION OF INTERNATIONAL HUMAN RIGHTS LAW

The Charter has always included the promotion and encouragement of respect for human rights, but the Security Council’s approval of UNSCR 1973 specifically to protect the Libyan civilian population must be placed in context of the tremendous growth of human rights on the international stage since the UN’s inception.⁶⁷ Since the passage of the

⁶³ Tomuschat, *supra* note 62.

⁶⁴ Uniting for Peace Resolution, *supra* note 58, at 10 (“Reaffirming the importance of the exercise by the Security Council of its primary responsibility for the maintenance of international peace and security . . .”).

⁶⁵ See generally *id.* (stating the General Assembly already had the power to issue non-binding resolutions, but the Uniting for Peace Resolution strengthened the Assembly’s role regarding the maintenance of international peace and security).

⁶⁶ See Tomuschat, *supra* note 62 (noting the shifting of responsibilities to the General Assembly and questioning the importance of Security Council authorization).

⁶⁷ U.N. Charter art. 1, ¶¶ 1–4. The first article in the Charter establishes the purposes of the UN as:

1. To maintain international peace and security
2. To develop 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
3. To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction . . . ; and
4. To be a center for harmonizing the actions of nations in the attainment of these common ends.

Id. Article 55 states that the UN shall promote the following economic and social concerns in order to pursue its goals of international peace, stability, and friendly cooperation:

- a. higher standards of living, full employment, and conditions of economic and social progress and development;

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Charter, there has been tremendous growth in treaty development and other international attempts to provide substantive protection of human rights—a movement toward the gradual erosion of the once-ironclad concept that the relationship between a state and its own nationals is purely an internal state matter. This development of human rights on the international level, in tension with the Westphalian international order of pure state sovereignty and its concept of internal domestic control, resulted in documents such as the 1948 Universal Declaration of Human Rights, the 1948 Genocide Convention, the 1984 Convention Against Torture, and the 1976 International Covenant on Civil and Political Rights.⁶⁸ The UN established the Commission on Human Rights in 1946 and the General Assembly created the post of High Commissioner for Human Rights in 1993.⁶⁹ During this same timeframe, regional organizations developed various human rights protocols such as the 1953 European Convention for the Protection of Human Rights and Fundamental Freedoms.⁷⁰ This convention is legally binding on its signatories, unlike the aspirational Universal Declaration, and establishes

b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and

c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

U.N. Charter art. 55.

⁶⁸ See generally Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 1987 (requiring states to both prevent torture within their borders and to consider whether other states engage in torture prior to transferring individuals to those states, thus mandating states review what had been previously considered an internal state matter); International Convention on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (highlighting the growing priority the international community is placing on human rights, including political and civil rights); Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 278 (codifying the peremptory norm against genocide); Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 8, 1948) (establishing specific human rights for global protection, transcending sovereign state borders).

⁶⁹ *What We Do*, U.N. HUMAN RIGHTS: OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS (Feb. 2009), <http://www.ohchr.org/EN/AboutUs/Pages/WhatWeDo.aspx>. The purpose of the Office of the High Commissioner for Human Rights is to “speak[] out objectively in the face of human rights violations worldwide, provide[] a forum for identifying, highlighting and developing responses to today’s human rights challenges, and act[] as the principal focal point of human rights research, education, public information, and advocacy activities in the [UN] system.” *Id.*

⁷⁰ See generally Convention for the Protection of Human Rights and Fundamental Freedoms, Mar. 20, 1952, 213 U.N.T.S. 221, available at <http://conventions.coe.int/Treaty/EN/Treaties/Html/005.htm> [hereinafter European Convention] (creating obligations to protect human rights).

the European Court of Human Rights to render binding decisions regarding complaints against state parties.⁷¹

A. *Enforcement of Human Rights: International Peace and Security*

This burgeoning international human rights superstructure did not bring with it separate global enforcement mechanisms outside of the Security Council's exclusive authority to both determine threats to international peace and security and to authorize military action to deal with said threats. The growing internationalization of the protection of human rights within the domestic jurisdiction of a sovereign state, along with the end of the Cold War Security Council dynamics, led to the greater use of humanitarian justifications for military interventions into sovereign states, when either the state itself was committing gross human rights abuses, failing to do anything to stop such abuses, or failing to alleviate mass human suffering. Even before the end of the Cold War, there were several instances of unilateral state intervention, undertaken at least partially on humanitarian grounds, which positively contributed to the notion that domestic mass human rights abuses were matters of concern to the international community.⁷² However, these instances also underscored that the international community wanted such interventions to occur with a UN imprimatur. Security Council approval (or at least General Assembly support garnered via a Uniting for Peace process) was desired to act as a check and balance against ulterior motives by intervening nations, and to allay weaker nations' fears that they would be unilaterally invaded on human rights grounds.

These Cold War instances include: Tanzania's armed intervention in Uganda in 1979 to overthrow Idi Amin; Vietnam's armed intervention in Cambodia in 1978 "against Pol Pot's genocidal regime[;]" and India's armed "response to Pakistan's . . . human rights violations" in East Pakistan in 1971.⁷³ These cases seemed to indicate a willingness by the world community to consider that mass human rights abuses occasionally justify the use of force by another nation—that is, that humanitarian crises can overcome Article 2(7)'s non-intervention norm and justify forcible violations of sovereignty. These interventions have even been cited as representing that the UN will "acquiesce in unilateral intervention under certain circumstances."⁷⁴ However, non-intervention

⁷¹ See *id.* at art. 1 ("The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.").

⁷² See Buchanan, *supra* note 25, at 130 (stating that several such interventions had moral justifications).

⁷³ See *id.* (discussing the primary motivation for these interventions).

⁷⁴ Robert O. Keohane, *Introduction to HUMANITARIAN INTERVENTION*, *supra* note 1, at 1, 6.

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in the domestic matters of another state, even for humanitarian purposes, remained the stated default for decades.⁷⁵ The sovereignty fears such unilateral actions prompted in states are seen in the 1970 United Nations Declaration on Friendly Relations and its emphasis that “[n]o [s]tate or group of [s]tates has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other [s]tate.”⁷⁶

While India defended its 1971 incursion into East Pakistan and eventual defeat of Pakistani forces on self-defense grounds (citing the impact of millions of refugees into its country), it also indicated that it needed to protect the victims of Pakistan’s policies within East Pakistan.⁷⁷ During Security Council deliberations on India’s offensive, the Indian representative said that “we have on this particular occasion absolutely nothing but the purest of motives and the purest of intentions: to rescue the people of East Bengal from what they are suffering.”⁷⁸ While a large majority of the UN nations condemned India’s action, despite the well-documented slaughter being perpetrated by Pakistan, the Security Council failed to pass a resolution calling for the withdrawal of Indian troops, and the resultant state of Bangladesh was only admitted to the UN three years later.⁷⁹ Thomas Franck and others have highlighted that most states at the time felt threatened by a powerful country unilaterally invading a weaker one, and “that one state could sit in judgment on another’s compliance with human rights and humanitarian law.”⁸⁰ But the “extreme necessity” of Pakistan’s crimes against humanity in East Pakistan seemed to mute formal condemnation of India’s action.⁸¹

⁷⁵ Michael Byers & Simon Chesterman, *Changing the Rules About Rules? Unilateral Humanitarian Intervention and the Future of International Law*, in HUMANITARIAN INTERVENTION, *supra* note 1, at 177, 183.

⁷⁶ *Id.* at 183 n.22 (internal quotation marks omitted).

⁷⁷ Thomas M. Franck, *Interpretation and Change in the Law of Humanitarian Intervention*, in HUMANITARIAN INTERVENTION, *supra* note 1, at 209, 216.

⁷⁸ U.N. SCOR, 26th Sess., 1606th mtg. at 18, U.N. Doc. S/PV.1606 (Dec. 4, 1971). The Indian representative continued, “this is the fourth time Pakistan has committed aggression against India. . . . We reserve our right to take . . . all appropriate and necessary measures to safeguard our security and defen[s]e against aggression from Pakistan.” *Id.* at 32; *see also* INT’L COMM’N ON INTERVENTION & STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT: RESEARCH, BIBLIOGRAPHY, BACKGROUND nn.54–75 and accompanying text (2001), available at <http://web.idrc.ca/openbooks/963-1/#rch4fn54> [hereinafter INT’L COMM’N] (discussing events leading up to India’s 1971 intervention in East Pakistan after reports of the persecution and offenses committed against the Hindu population in East Pakistan).

⁷⁹ Franck, *supra* note 77, at 217.

⁸⁰ *Id.*

⁸¹ *Id.*

There was similar precedential fear regarding Vietnam's invasion of Cambodia, which it justified both on self-defense and humanitarian grounds.⁸² Thirteen of the fifteen Security Council members supported a resolution calling for the immediate withdrawal of Vietnamese troops, and Portugal typified the response of both western and non-aligned powers:

Neither do we have any doubts about the appalling record of violation of the most basic and elementary human rights in Kampuchea . . . [Nonetheless], there are no nor can there be any socio-political considerations that would justify the invasion of the territory of a sovereign [s]tate by the forces of another [s]tate⁸³

But the very fact that Vietnam felt it useful to employ humanitarian grounds to justify its actions, and that other nations acknowledged such rationale, though without validating it, was a step towards recognizing its notional legitimacy.

Both India's and Vietnam's violations of Article 2(4) were seen by the world as motivated by the self-interest of the invading countries—invading nations with unclean hands who stood to greatly benefit by their incursions, irrespective of humanitarian concerns.⁸⁴ Their self-interested motives overshadowed the human rights violations that their interventions helped ameliorate. Therefore states chose the non-intervention norm despite any moral issues regarding human suffering at play.⁸⁵ However, Tanzania's action in Uganda demonstrated a violation of the non-intervention norm, which many states actually supported. The UN acquiesced in Tanzania's two-year occupation of Uganda; Tanzania was not seen as possessing "ulterior motives or strategic designs" comparable to Vietnam and India.⁸⁶ Instead, Tanzania's action was welcomed by the world community as ridding Uganda of Idi Amin's murderous reign.⁸⁷ While Tanzania did not formally claim humanitarian reasons for its invasion, instead relying on self-defense against minor border incursions, its occupation of Uganda was hugely disproportionate to this claim of self-defense, and the world

⁸² *Id.* at 218.

⁸³ INT'L COMM'N, *supra* note 78, at n.59 (quoting U.N. SCOR, 24th Sess., 2110th mtg. at 3, U.N. Doc. S/PV.2110 (Jan. 13, 1979)).

⁸⁴ Franck, *supra* note 77, at 217-18.

⁸⁵ *Id.* at 219.

⁸⁶ *Id.* at 218.

⁸⁷ *Id.* at 219.

accordingly viewed it as one appropriately executed on humanitarian grounds.⁸⁸

B. Post-Cold War and 1990s Developments

The end of the Cold War ushered in a new period of unprecedented Security Council activism, as well as a decrease in unilateral use of armed force by the United States.⁸⁹ Between 1990 and 1995, Chapter VII collective measures in the form of binding Article 41 sanctions were authorized by the Security Council in Iraq, Liberia, the former Yugoslavia, Somalia, Libya, Angola, Haiti, and Rwanda.⁹⁰ The Security Council authorized the use of force five times during this period: in Iraq, Somalia, the former Yugoslavia, Rwanda, and Haiti.⁹¹ This activism was accompanied by a growing realization among the international community that the protection of human rights was no longer an exclusive matter for each particular state. This realization was demonstrated by the Security Council's expansion of its interpretation of "international peace and security" in the 1990s.⁹² It authorized Chapter VII peace enforcement military interventions on humanitarian grounds in Bosnia in 1999 to protect civilians;⁹³ Somalia in 1992 to protect aid supplies and maintain law and order;⁹⁴ and in Haiti in 1994 to restore

⁸⁸ *Id.*; see also Buchanan, *supra* note 25, at 130 (stating that several such interventions had moral justifications).

⁸⁹ MALANCZUK, *supra* note 50, at 395.

⁹⁰ *Id.* at 396.

⁹¹ *Id.*

⁹² Bellamy, *supra* note 3, at 34.

⁹³ S.C. Res. 836, U.N. Doc. S/RES/836 (June 4, 1993).

⁹⁴ S.C. Res. 794, U.N. Doc. S/RES/794 (Dec. 3, 1992). In Resolution 794, the Security Council addressed the continuing international concerns on the state of Somalia following the coup against President Mohamed Siad Barre in 1992. *Id.* The Security Council met six times in 1992 regarding the situation in Somalia; in its December 3, 1992 meeting, the Security Council passed a resolution regarding Somalia containing the following provisions:

Dismayed by the continuation of conditions that impede the delivery of humanitarian supplies to destinations within Somalia, and in particular reports of looting of relief supplies destined for starving people, attacks on aircraft and ships bringing in humanitarian relief supplies

... [and]

Determined further to restore peace, stability and law and order with a view to facilitating the process of a political settlement under the auspices of the [UN], aimed at national reconciliation . . .

Id. at 2. The Security Council also

[s]trongly condemns all violations of international humanitarian law occurring in Somalia, including in particular the deliberate impeding of the delivery of food and medical supplies essential for the survival

democracy.⁹⁵ The Security Council resolutions authorizing these incursions demonstrated the evolving norm that the protection of human rights was part and parcel of international peace and security, and it was incumbent upon the Security Council to act per its Charter values.⁹⁶ In 1991, the UN Secretary-General Perez de Cuellar stated that, “the principle of non-interference with the essential domestic jurisdiction of [s]tates cannot be regarded as a protective barrier behind which human rights could be massively or systematically violated with impunity” — a much different message than contained in the 1970 United Nations Declaration on Friendly Relations.⁹⁷ Boutros Boutros-Ghali, in his 1992 Agenda for Peace address to the Security Council, stated:

The time of absolute and exclusive sovereignty, however, has passed; its theory was never matched by reality. It is the task of leaders of [s]tates today to understand this and to find a balance between the needs of good internal governance and the requirements of an ever more interdependent world.⁹⁸

But was this expansion of the meaning of international peace and security an *ultra vires* act by the Security Council? While “enforcement measures” under Chapter VII can only be taken to address threats to or breaches of international peace and security, or respond to acts of aggression, the Charter never defines what such threats or breaches include, nor does it define the concept of “international peace and security.” This definitional lacuna left the door open for the Security Council to include domestic human rights abuses as constituting such threats and/or breaches. In fact, the drafters of the Charter indicated that they wanted this phrase to be flexible.⁹⁹ An expanding notion of what constitutes a threat to international peace and security developed despite such intervention’s tension with Article 2(7)’s protection of

of the civilian population, and affirms that those who commit or order the commission of such acts will be held individually responsible in respect of such acts.

Id. at 3, ¶ 5.

⁹⁵ S.C. Res. 940, U.N. Doc. S/RES/940 (July 31, 1994).

⁹⁶ Bellamy, *supra* note 3, at 34.

⁹⁷ U.N. Secretary-General, *Report of the Secretary-General on the Work of the Organization*, at 5, U.N. Doc. A/46/1 (Sept. 13, 1991); *see also* Byers & Chesterman, *supra* note 75, at 183 (describing the non-intervention stance in the 1970 U.N. Declaration on Friendly Relations).

⁹⁸ U.N. Secretary-General, *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-Keeping: Rep. of the Secretary-General*, ¶ 17, U.N. Doc. A/47/277-S/24111 (June 17, 1992).

⁹⁹ *See* Holzgrefe, *supra* note 1, at 40.

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internal, domestic matters as outside the scope of the UN, a tension already lessened somewhat by the various human rights treaties and earlier interventions as described above.¹⁰⁰

In fact, according to theorists such as Alex Bellamy, it is now “widely accepted that the Security Council has a legal right to authorize humanitarian intervention under Chapter VII of the Charter.”¹⁰¹ However, despite this claimed international acceptance of the legitimacy of UN-sanctioned intervention on humanitarian grounds, the appropriateness of humanitarian intervention both with such a UN imprimatur and without remained the object of significant public debate following several such uses of force in the 1990s.¹⁰² The tripartite intervention into northern Iraq by Great Britain, the United States, and France in 1991, in order to shelter the Kurds from Saddam Hussein’s human rights abuses, was not explicitly authorized by the UN, yet never condemned by it either.¹⁰³ Several years later, NATO’s non-UNSCR authorized humanitarian intervention in Yugoslavia in the late 1990’s sharply focused global attention in both the academic and international political arenas on whether such non-UN-authorized action was legally defensible.¹⁰⁴

¹⁰⁰ U.N. Charter art. 2, ¶ 7. This section states:

Nothing contained in the present Charter shall authorize the [UN] to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

Id. Chapter VII enforcement measures include discretionary preliminary measures, interruption of economic relations, interruption of mediums of communication, severance of diplomatic relations, and military or non-military air, sea, or land operations “necessary to maintain or restore international peace and security.” U.N. Charter, art. 40–42.

¹⁰¹ Bellamy, *supra* note 3, at 33.

¹⁰² Franck, *supra* note 77, at 224–25.

¹⁰³ See Heval Hylan, *1991 Humanitarian Intervention in Kurdistan and Iraq’s Sovereignty*, 1, 56–57, available at <http://kcdme.com/Humanitarian20Intervention1.pdf> (last visited Oct. 5, 2011) (arguing that the intervention was legal).

¹⁰⁴ Won Kidane, *Managing Forced Displacement by Law in Africa: The Role of the New African Union IDPS Convention*, 44 VAND. J. TRANSNAT’L L. 1, 46–47 (2011) (discussing the Security Council’s failure to intervene in the Kosovo genocide). This “prompted NATO to act without . . . authorization . . . [which] was illegal on a technical level under the UN Charter” but such necessity could be legitimized in the future by amending “the UN Charter to facilitate collective intervention in circumstances of aggression or gross human rights violations.” *Id.* Kidane continues by arguing that:

Kosovo demonstrates yet again a compelling need to address the deficiencies in the law and practice of the UN Charter. The sometimes-compelling need for humanitarian intervention (as at Kosovo), like the compelling need for responding to interstate aggression (as against Iraq over Kuwait), brings home again the need for responsible reaction

However, it was the global community's failure to stop the Rwandan genocide in 1994, despite a new post-Cold War Security Council unfettered by US-USSR rivalries, which sharpened the focus on when, why, and how humanitarian intervention should occur. This was followed by NATO's illegal humanitarian intervention in Kosovo in 1999.¹⁰⁵ While NATO's action violated the Charter,¹⁰⁶ it, and the situation in Rwanda earlier, reflected larger issues: the world community's failure to prevent and stop such mass human rights violations in the first place, and the growing recognition that the protection of human rights fell no longer within the domestic province of states alone. World leaders, such as Great Britain's Tony Blair, argued that military intervention in third-world countries was necessary and legitimate in order to safeguard human rights, even without Security Council authorization.¹⁰⁷ That is, there existed an "unacceptable gap between what international law allows and what morality requires."¹⁰⁸

to gross violations of the Charter, or to massive violations of human rights, by responsible forces acting in the common interest.

Id. at n.301.

¹⁰⁵ See also Buchanan, *supra* note 25, at 130 (referring to the NATO action as illegal, assumedly because not authorized by the Security Council).

¹⁰⁶ *Id.* As did numerous other state actions taken on humanitarian grounds, such as Tanzania's overthrow of Idi Amin's regime in Uganda in 1979. *Id.*

¹⁰⁷ See Tony Blair, Prime Minister, U.K. of Gr. Brit. & N. Ir., Address to the Chicago Economic Club (Apr. 22, 1999), available at <http://www.globalpolicy.org/component/content/article/154/26026.html> [hereinafter Blair comments] (discussing criteria for evaluating when a state could justify intervening in the internal affairs of another state on humanitarian grounds). "The most pressing foreign policy problem we face is to identify the circumstances in which we should get actively involved in other people's conflicts." *Id.*; see also Byers & Chesterman, *supra* note 75, at 199 (discussing the U.S. Secretary of State's emphasis on the exceptional nature of Kosovo and implying that UN authorization was normally required whereas U.K. Prime Minister Tony Blair "suggested that such interventions might become more routine"); Stromseth, *supra* note 28, at 239 (highlighting that "the United States declined to embrace a doctrine of humanitarian intervention" following Kosovo, such as that outlined by Blair, that was unmoored from the UN Charter; also discussing that the United States, when agreeing to participate in a NATO intervention, emphasized previous UN resolutions which labeled the situation in Kosovo as a threat to international peace and security). The U.S. approach to Kosovo was mirrored in the justifications given by the U.S. government regarding the 2003 invasion of Iraq: it obsessively emphasized its actions as consistent with, and the implementation of, prior UN resolutions. *Id.*; see John B. Bellinger III, *Authority for Use of Force by the United States Against Iraq Under International Law*, COUNCIL ON FOREIGN REL. (Apr. 10, 2003), <http://www.cfr.org/world/authority-use-force-united-states-against-iraq-under-international-law/p5862> (discussing why previous UN Security Council authorizations provided sufficient legal authority under the UN Charter to allow for use of force against Iraq).

¹⁰⁸ Buchanan, *supra* note 25, at 131.

C. *Somalia Effect: Rwanda*

So if there was a growing recognition of the propriety of Security Council intervention in domestic matters when human rights were at issue, why did the Security Council fail to authorize armed intervention in Rwanda, when over 800,000 people were slaughtered in 100 days?¹⁰⁹ As pointed out by numerous scholars, it is telling that no state argued that the Security Council lacked authority to intervene in Rwanda's internal domestic crises during the Security Council's deliberations on the matter.¹¹⁰ Instead, the UN's then-recent failure in Somalia was cited as the primary dissuading factor.¹¹¹ Hence a closer look at Somalia is warranted, since its perceived failure directly weakened the growing support for intervention on humanitarian grounds.

In 1992, the Security Council determined that the internal violence in Somalia, which was causing widespread starvation, was a threat to international peace and security.¹¹² Pursuant to Chapter VII, it authorized an arms embargo and "all the necessary measures to ensure the safety of personnel sent to provide humanitarian assistance . . . and to ensure full respect for the rules and principles of international law regarding the protection of civilian populations."¹¹³ By the end of 1992, it had authorized "all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia" under its Chapter VII authorities.¹¹⁴

This initial Somalia UN operation, which concluded in spring of 1993, was largely deemed a success—but one soon undermined by the more ambitious Security Council Resolution, which authorized nation-

¹⁰⁹ See Chaim Kaufmann, *See No Evil: Why America Doesn't Stop Genocide*, FOREIGN AFF. (July/Aug. 2002), available at <http://www.foreignaffairs.com/articles/58061/chaim-kaufmann/see-no-evil-why-america-doesn-t-stop-genocide?page=2> (reviewing Samantha Power's book discussing the systemic political failures of the United States, which lead to reticence regarding humanitarian interventions—claiming that Somalia caused lack of intervention in Rwanda is overly simplistic—the Clinton Administration's domestic political calculus and conclusion their existed lack of public support was primary reason for U.S. government inaction); see also Power, *supra* note 24, at 84 (giving statistics about the number killed).

¹¹⁰ Bellamy, *supra* note 3, at 34.

¹¹¹ Kaufmann, *supra* note 109; see also Chester A. Crocker, *The Lessons of Somalia: Not Everything Went Wrong*, FOREIGN AFF. (May/June 1995), at 2, available at <http://www.pbs.org/wgbh/pages/frontline/shows/ambush/readings/lessons.html> ("Some see Somalia as an almost welcome inoculation against the temptation to intervene in places such as Rwanda . . .").

¹¹² S.C. Res. 733, U.N. Doc. S/RES/733 (Jan. 23, 1992).

¹¹³ *Id.* ¶ 8.

¹¹⁴ S.C. Res. 794, U.N. Doc. S/RES/794 (Dec. 3, 1992).

building on a grand scale.¹¹⁵ The hand-off between U.S. forces, who had been leading the creation of a secure environment for humanitarian relief operations per the earlier resolution, and the UN did not go well and created conditions ripe for the killing of eighteen U.S. servicemen in October 1993.¹¹⁶ These combat deaths shook Americans, and led to the withdrawal of U.S. forces from that mission and ultimately to the mission's overall collapse.¹¹⁷ While this failure was due more to strategic confusion than to the inappropriateness of humanitarian interventions themselves, it led the United States (and others) to seriously question armed action on humanitarian grounds for years, and greatly contributed to the lack of political will and consensus to become involved in stopping the Rwandan genocide.¹¹⁸

D. Kosovo Debate

As mentioned above, the Rwandan tragedy and the desire to prevent mass atrocities in Kosovo in the late 1990s led world leaders, such as Great Britain's former Prime Minister Tony Blair, to push the humanitarian pendulum back toward the pre-Somalia period of humanitarian activism. He declared in 1999 that there existed a right of humanitarian intervention when necessary to prevent or stop gross human rights abuses within a state, and that this moral right was legitimate even without Security Council authorization.¹¹⁹ Then-Prime Minister Blair, speaking in Chicago, articulated his theory that armed force can be used by a state in three situations: in self-defense; per a Security Council authorization; or in cases of "humanitarian intervention." He proposed five criteria for use when determining in what context such military action outside of the UN was appropriate, including whether all diplomatic options had been exhausted and whether national interests were at stake.¹²⁰

¹¹⁵ S.C. Res. 814, U.N. Doc. S/RES/814 (Mar. 26, 1993).

¹¹⁶ Crocker, *supra* note 111, at 5.

¹¹⁷ *Id.* at 5.

¹¹⁸ See Walter Clarke & Jeffrey Herbst, *Somalia and the Future of Humanitarian Intervention*, FOREIGN AFF. (Mar./Apr. 1996), at 82 (discussing the impact the UN mission in Somalia had on future humanitarian crises such as Rwanda, and clarifying Somalia operations).

¹¹⁹ Abbott & Sloboda, *supra* note 30; see Blair comments, *supra* note 107 ("[T]he principle of non-interference [in the actions of another sovereign state] must be qualified in important respects . . . [because] oppression produces massive flows of refugees which unsettle neighbouring countries, then [the underlying acts causing the flight of refugees] can properly be described as 'threats to international peace and security.'").

¹²⁰ Alex J. Bellamy, *The Responsibility to Protect and the Problem of Military Intervention*, 84 INT'L AFF. 615, 628 (2008). [hereinafter Bellamy, *Problem of Military Intervention*]; see Abbott & Sloboda, *supra* note 30 (describing the 'Blair doctrine'); see also Blair comments, *supra* note 107 (describing Blair's considerations). Blair's five criteria are as follows: (1) whether the

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When NATO unilaterally imposed a no-fly zone and militarily intervened in Kosovo in 1999 on humanitarian grounds, without host nation consent, it did so without approval of the UN Security Council because of Chinese and Russian opposition.¹²¹ Many at the time, and since, have argued that this action was legally ambiguous, or even legally appropriate, because of the humans-rights atrocities perpetrated by Yugoslav forces in Kosovo and condemned by the Security Council itself in specific resolutions.¹²² Great Britain stated that the use of force without Security Council authorization was legitimate “on the grounds of overwhelming humanitarian necessity.”¹²³ Germany likewise focused on the looming humanitarian disaster and believed that the intervention was in-step with the Security Council’s earlier resolutions.¹²⁴ Belgium went even further in arguing that NATO’s unilateral military intervention in Kosovo was “lawful” because it was necessary to protect a *jus cogens*, and was consistent with both earlier Security Council resolutions and with Article 2(4).¹²⁵

As mentioned in the introductory section of this Essay, many legal theorists and policy makers have since understood the unilateral NATO use of force on humanitarian grounds in Kosovo as having “established the norm of resort to force without the authorisation [sic] of the UN Security Council.”¹²⁶ This “norm” theory rested partially on the Security Council’s 1999 “retroactive endorsement” of NATO’s action via Resolution 1244, which approved the terms of the cease-fire that resulted from the NATO action plus authorized NATO troops in Kosovo based

intervenor are sure of the need to intervene (considering that “[w]ar is an imperfect instrument for righting humanitarian distress, but armed force is sometimes the only means of dealing with dictators”); (2) whether diplomatic options have been exhausted (as the international community “should always give peace every chance”); (3) whether military operations can be “sensibly and prudently” undertaken; (4) whether the intervenors are prepared for a long-term commitment in the state they are intervening in; and (5) do the intervenors have national interests involved in the intervention. *Id.*

¹²¹ Franck, *supra* note 77, at 224.

¹²² See S.C. Res. 1199, U.N. Doc. S/RES/1199 (Sept. 23, 1998) (denouncing the human rights violations committed by Yugoslav forces in Kosovo); S.C. Res. 1160, U.N. Doc. S/RES/1160 (Mar. 31, 1998) (“Condemning the use of excessive force by Serbian police forces against civilians and peaceful demonstrators in Kosovo . . .”).

¹²³ Stromseth, *supra* note 28, at 236 (internal quotation marks omitted).

¹²⁴ *Id.* at 235.

¹²⁵ *Id.* at 236; see Provisional Measures, *supra* note 31, ¶ II (outlining Belgium’s arguments).

¹²⁶ Abbott & Sloboda, *supra* note 30, at 5; see also Bellamy, *supra* note 3, at 34–35 (discussing the repercussions of unilateral NATO intervention in Kosovo). By using the term “norm” this Author is not referring to peremptory norms per se. See generally Rafael Nieto-Navia, *International Peremptory Norms (Jus Cogens) and International Humanitarian Law* (2001), <http://www.iccnw.org/documents/WritingColombiaEng.pdf> (describing *jus cogens* and norms.).

on its Chapter VII authorities.¹²⁷ Furthermore, a majority of twelve in the Security Council defeated Russia's resolution put forward during the intervention in Kosovo, which "demanded an immediate end to the intervention" and "condemned NATO's 'flagrant violation.'"¹²⁸

E. Responsibility to Protect

No such norm of non-consensual use of force on humanitarian grounds, outside the Security Council process, seemed to materialize after Kosovo as predicted (and certainly none was implemented to prevent the Darfur genocide), though the issue was debated for years. The terrorist attacks on the United States in September 2001, as well as the U.S. invasion of Iraq in 2003, diverted world attention, and the latter especially underscored fears that military action on humanitarian grounds, especially if without Security Council sanction, was simply coercive intervention under cover of the protection of human rights.¹²⁹ However, there was progress following Kosovo in establishing a better lexicon to describe intervention on humanitarian grounds, as well as semi-successful attempts at the UN to agree upon generalized criteria for such interventions.

This lexical progression was in response to a challenge issued in 1999 by Koffi Annan, then UN Secretary-General, to reconcile the tensions between the UN paradigm for authorizing force (specifically its prohibition against unilateral action on humanitarian grounds if Security Council approval wasn't given per Chapter VII), and the prevention of mass human rights violations within states:

The inability of the international community in the case of Kosovo to reconcile these two equally compelling interests—universal legitimacy and effectiveness in defence [sic] of human rights—can be viewed only as a tragedy. It has revealed the core challenge to the Security Council and to the [UN] as a whole in the next century: to forge unity behind the principle that massive

¹²⁷ Franck, *supra* note 77, at 225; see S.C. Res. 1244, U.N. Doc. S/RES/1244, ¶¶ 1–21 (June 10, 1999) (noting the necessary action that must take place in order to ensure the safety and security of people in Kosovo).

¹²⁸ Franck, *supra* note 77, at 224.

¹²⁹ Bellamy, *Problem of Military Intervention*, *supra* note 120, at 625–26.

and systematic violations of human rights—wherever they may take place—should not be allowed to stand.¹³⁰

The UN Secretary-General's challenge supercharged an on-going effort to outline definitive criteria as to when humanitarian intervention is appropriate. The Canadian government, via the International Commission on Intervention and State Sovereignty ("ICISS") published their response to this challenge in December 2001.¹³¹ The resultant "responsibility to protect" principle, promulgated shortly after the September 11, 2001 attacks, definitively embraced the UN Security Council as the appropriate body to "authorize military intervention for human protection purposes."¹³² It focused on the state as the repository of primary responsibility to prevent human suffering within its borders, but if the state failed to shoulder this responsibility, this responsibility shifted to the international community.¹³³

The responsibility to protect doctrine's "human protection purposes" focused on a population suffering "serious and irreparable harm" (or such harm was "imminently likely"), which involved "large scale loss of life . . . [due to] deliberate state action, or state neglect of inability to act, or a failed state situation; or large scale 'ethnic cleansing' . . . whether carried out by killing, forced expulsion, acts of terror or rape."¹³⁴ The ICISS document emphasized a requirement to seek Security Council authorization prior to any military intervention on humanitarian grounds, but also provided options when Security Council authorization is not forthcoming: The General Assembly should consider the matter under the "Uniting for Peace" procedure and action by regional organizations under Chapter VII of the Charter as long as they seek subsequent Security Council authorization.¹³⁵ The general principle of responsibility by the state for protection against suffering within its borders, and the principle that it is the international community's responsibility to act in cases in which the state fails to do so, were accepted by the international community during the UN World Summit in 2005, and unanimously reaffirmed a year later by the Security Council,

¹³⁰ U.N. Secretary-General, *Report of the Secretary-General on the Work of the Organization*, at 2, U.N. Doc. A/54/PV.4 (Sept. 20, 1999).

¹³¹ See generally ICISS, *supra* note 33 (establishing criteria for when humanitarian intervention is appropriate).

¹³² *Id.* at XII.

¹³³ *Id.* at XI.

¹³⁴ *Id.* at XII.

¹³⁵ See *id.* at 53 (outlining the procedure by which the General Assembly can take measures where the Security Council has failed).

though without any language referring to the propriety of use of force without Security Council authorization.¹³⁶

IV. CONCLUSION

Security Council Resolution 1973 has helped alter the post-Kosovo perception “that the requirement of Security Council authorization is an obstacle to the protection of basic human rights in internal conflicts.”¹³⁷ It may not be emulated soon, due to the presence of critical, case-by-case external dynamics (a hated dictator, strong support for intervention by regional organizations, etc.), which supported such intervention in Libya, but may be lacking in other situations. Regardless, its passage proves that the Security Council can act successfully to authorize military action within a sovereign member nation primarily to protect civilian populations from crimes against humanity in this post-9/11 era, thus implementing the responsibility to protect principles formally embraced by the UN in 2005.

While the Libyan intervention has been criticized, notably by other members of the Security Council, for overstepping the resolution’s mandate of protecting civilians, it has not been seriously criticized for its actual humanitarian intent, nor for stepping outside the bounds of the Charter.¹³⁸ While two veto-holding members of the Security Council, China and Russia, did abstain, they were careful to underscore that the humanitarian crisis was of “great concern” and both nations emphasized their opposition to continuing violence against civilians in Libya.¹³⁹ In fact, shortly after passage of the resolution, Russian President Medvedev stated that he did “not consider the resolution in question wrong” – it seems that commercial interests plus fear of instability in the Caucasus region prompted the Russian abstention.¹⁴⁰ Regarding China, this one resolution alone should not be viewed as China jettisoning its

¹³⁶ Bellamy, *Problem of Intervention*, *supra* note 120, at 615; see 2005 World Summit Outcome, *supra* note 4, ¶¶ 138–39 (recognizing the responsibility of the states and international community to “protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity”); S.C. Res. 1674, U.N. Doc. S/RES/1674, ¶ 4 (Apr. 28, 2006) (reaffirming the responsibility outlined in the 2005 World Summit Outcome).

¹³⁷ Buchanan, *supra* note 25, at 131.

¹³⁸ See Henry Meyer, *Russia to Resist Western-Led Regime Change After Syria Veto*, BLOOMBERG BUS. WK. (Oct. 5, 2011), <http://www.businessweek.com/news/2011-10-05/russia-to-resist-western-led-regime-change-after-syria-veto.html> (explaining the reasons Russia criticized the Libyan intervention).

¹³⁹ *Council Approves ‘No-Fly’ Zone*, *supra* note 9.

¹⁴⁰ Hannah VanHoose, *Understanding the Russian Response to the Intervention in Libya*, CENT. AM. PROGRESS (Apr. 12, 2011), http://www.americanprogress.org/issues/2011/04/russia_libya_response.html (internal quotations omitted).

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traditional non-intervention stance.¹⁴¹ But its opposition appeared based on the “blank check,” open-ended nature of the resolution’s ““all necessary measures”” language, versus an abstention based on pure sovereignty concerns or objections to the humanitarian intent of the UNSCR.¹⁴²

The criticism of the Libyan intervention mentioned above centered primarily on mission-creep from protection of the civilian population to regime change.¹⁴³ While key NATO leaders were careful to call for the Libyan leader to step down instead of claiming it was appropriate to use force to do so,¹⁴⁴ UN members such as Russia claimed that the intervention went beyond its mandate “to use military force to change the political system in the country and not just to protect civilians.”¹⁴⁵ This markedly differs from criticism of the resolution’s humanitarian objective and grounds, and highlights that UNSCR 1973 reinforced the principle that it is the responsibility of the international community to protect civilian populations from grave suffering, and that the Security Council is the only legal and legitimate means to do so.

By strengthening the collective international responsibility norm articulated in the responsibility to protect doctrine, as well as reinforcing the concept that the maintenance of international peace and security can include forcible interventions into a sovereign state, UNSCR 1973 pushed the humanitarian intervention pendulum back toward the acceptability of such action. If such action continues to find greater acceptance on the international stage because of an expansion of the international legal framework for the legal and legitimate use of force, and made easier to conduct via capabilities such as remotely-piloted vehicles, greater focus needs to be paid to the *jus in bello* concerns addressed elsewhere in this Essay.

¹⁴¹ Yun Sun, *China’s Acquiescence on UNSCR 1973 –No Big Deal*, INT’L REL. & SECURITY NETWORK (Apr. 4, 2011), <http://www.isn.ethz.ch/isn/Current-Affairs/ISN-Insights/Detail?lng=en&id=128200&contextid734=128200&contextid735=128197&tabid=128197>.

¹⁴² *Id.*

¹⁴³ *Does Nato Want Regime Change in Libya?*, CHANNEL 4 NEWS (Apr. 15, 2011), <http://www.channel4.com/news/does-nato-want-regime-change-in-libya>.

¹⁴⁴ *Id.*

¹⁴⁵ Meyer, *supra* note 138.