ARTICLES

Moving Into UNchartered Waters: An Emerging Right of Unilateral Humanitarian Intervention?

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Keywords: human rights; intervention; use of force; Security Council.

Abstract: With the black letter law of the UN Charter denying states to unilaterally intervene in third states on humanitarian grounds, this article tries to project a picture of the moral controversy of humanitarian intervention as a balance for order and justice. The author argues that some post-cold war armed interventions may be taken as evidence of an emerging rule of international law outside the UN Charter system allowing the use of unilateral humanitarian intervention to keep a third state from committing large-scale human rights violations on its own territory. However, in the absence of prior authorization from the relevant UN organs, it is necessary to address concerns of possible abuse and manipulations of such an emerging rule. The article includes recommendations to this end.

> To go to war for an idea, if the war is aggressive, not defensive, is as criminal as to go to war for territory or revenue; for it is as little justifiable to force our ideas on other people, as to compel them to submit to our will in any other respect. But there assuredly are cases in which it is allowable to go to war, without having been ourselves attacked, or threatened with attack; and it is very important that nations should make up their minds in time, as to what these cases are.
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> John Stuart Mill,
> A Few Words on Non-Intervention (1859)

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12 Leiden Journal of International Law 759-786 (1999)

1. INTRODUCTION

In early 1991, a carefully built coalition of nations, operating under the formal authorization of the United Nations, successfully checked and repelled Iraqi aggression in Kuwait.[1] The international legal issues at stake in this classical interstate war were easily manageable. In the aftermath of that war, however, the government of Iraq undertook ruthless and indiscriminate attacks against Iraqi Kurds in northern Iraq and against Iraqi Shiites in the South in an effort to quell rebel elements that challenged the Sunni-dominated regime of President Saddam Hussein. Here the international legal issues became more difficult, for the international community had to decide whether it should deploy forces into Iraq to assist Iraqi nationals in defending themselves against their own government.

Shortly thereafter, other largely internal conflicts also cried out for intervention by the international community. With the thawing of the bipolar cold war world have come new threats among peoples of long-suppressed ethnic, religious, and cultural differences. As Yugoslavia disintegrated during the early 1990s and Serbs, Croats, and Muslims took to slaughtering each other, numerous civil wars raged in various African countries, such as Sierra Leone, Somalia, Sudan, Liberia, and Angola. The apocalyptic apotheosis came in April 1994, when Hutu militia in Rwanda systematically slaughtered at least half a million Rwandan Tutsis.

In a 1995 supplement to his *Agenda for Peace*, United Nations Secretary-General Boutros Boutros-Ghali observed:

> [S]o many of today's conflicts are within states rather than between states. The end of the cold war removed constraints that had inhibited conflict in the former Soviet Union and elsewhere. As a result there has been a rash of wars within newly independent states, often of a religious or ethnic character and often involving unusual violence and cruelty. The end of the cold war seems also to have contributed to an outbreak of such wars in Africa. In addition, many of the proxy wars fuelled by the cold war within states remain unresolved. Inter-state wars, by contrast, have become infrequent.[2]

Most striking about these post-cold war crises has been the wanton disregard for basic human rights – the casual slaughter of innocents, the use of rape as an instrument of warfare, and the indiscriminate shelling of civilians.

The United Nations Charter and the practice of states under the Charter recognise the right of a state to use military force in self-defence and, also, the right of the United Nations to use military force to address threats to and breaches of international peace and security, and acts of aggression. The Charter, however,

1. S.D. Murphy, Humanitarian Intervention – The United Nations in an Evolving World Order 1, 165-198 (1996).
2. Supplement to an Agenda for Peace: Position Paper of the Secretary-General on the Fiftieth Anniversary of the United Nations, UN GAOR, 50th Sess., UN Doc. A/50/60 (1995).

does not expressly recognise the right to use military force to protect the people of a state against their own governing authorities or from an overall breakdown in governmental authority, even when they face genocide, widespread violence, starvation, or disease. In the context of projecting military force, the Charter is oriented to the preservation of order, not the protection of human rights. Yet, when cases of widespread human rights violations occur, this Charter orientation raises a fundamental and serious question: can any order be durable if it is not just? With the emergence of international human rights law since the enactment of the Charter, the international community is increasingly interested in promoting justice in international relations and international law.[3]

The collapse of the bipolar confrontation not only unleashed internal conflicts that heretofore were suppressed or at least controlled by that confrontation, but also sparked off the collective security apparatus of the United Nations. Suddenly, in various situations, the members of the Security Council authorised the deployment of military forces under United Nations command, or more often under national command with United Nations backing, in an attempt to resolve forcibly what were largely internal, not international conflicts.[4]

In recognition of the re-emergence of the UN Security Council as a potential option for assisting in the management of conflict, the primary focus of this study should perhaps have been on the role of the Security Council, using or authorizing the use of force on its own and in relation to regional organizations to prevent widespread and severe breaches of human rights. Yet, these deployments encountered tremendous difficulties, raising doubts about the true willingness of member states to provide the necessary military and financial support to the United Nations and about the ability of the United Nations to serve this function.[5]

Notwithstanding the reawakening of the Security Council, at times it has failed to act, and states have been inclined to forcibly intervene in the affairs of another state whose citizens were subject to widespread human rights violations. Such actions are commonly referred to as 'humanitarian interventions.' Yet, a humanitarian intervention by a state or by a group of states without authorization of the United Nations or a regional organization – unilateral humanitarian intervention – remains a significant issue for international law.

A central challenge rests in reconciling existing constraints on the use of armed force with the increasing desire to protect civilians and combatants from widespread and severe infringements of human rights that arise from internal conflicts due to civil war or to the persecution of groups by autocratic governments. Should states be allowed to intervene in the affairs of other states to pre-

3. Murphy, *supra* note 1, at 2.
4. *Id.*, at xiii-xiv.
5. *Id.*

vent violations of human rights? And, if so, under what conditions should such intervention occur?

The post-cold war world is undergoing a process of change, the object of which should be to reconcile the traditional norms disfavouring international projections of force with emerging norms favouring human rights and respect for the dignity of persons.[6] The purpose of this article is to assess the controversy about humanitarian intervention as a dialectic of international law, a competition between the values of order and justice. Paragraph 2 focuses on what is meant by 'humanitarian intervention', a term fraught with ambiguity and subject to endless debate. Paragraph 3 discusses the structure and content of the UN Charter. The central juxtaposition of the existing limits on the use of armed force on the one hand, and the growing necessity to protect innocent civilians against mass and gross violations of their human rights by their governments on the other, seems to pose limits to the intervention with military means in the internal affairs of a third state.[7] However, international law on the use of force consists of more than an objective application of the rules codified in the UN Charter. It covers processes for authoritative decision-making that exist within wider contexts of morality and politics. Paragraph 4 looks at these broader principles and purposes to apply the Charter rules in given situations. The role of the UN Security Council is examined in paragraph 5, as the (in)action of this organ appears to play a crucial role in the argument of legal theorists in determining the possible legality of unilateral humanitarian intervention in the post-cold war era. Paragraph 6 addresses unilateral action by a state or a group of states, in other words, action outside the auspices of the United Nations, or a regional security organization, in the post-cold war period. It considers the legality and prudence of unilateral humanitarian intervention under a rules-oriented approach that emphasizes the language of the UN Charter and state practice. It is clear, however, that the repercussions of armed humanitarian intervention on the "dogma of state sovereignty"[8] should be limited. It is argued that an absence of rules is more worrisome than the acceptance of situations of humanitarian intervention as deplorable breaches of the UN Charter rules. Therefore, efforts will be made in paragraph 7 to develop acceptable criteria for when states should be able to act unilaterally.

6. *Id.*, at 2.
7. A. D'Amato, *Domestic Jurisdiction*, *in* R. Bernhardt (Ed.), Encyclopedia of Public International Law, Vol. I, at 1090-1096 (1992).
8. B. Röling, *Volkenrechtelijke aspecten van hulp aan bevrijdingsbewegingen*, 27 Internationale Spectator at 717 (1973).

2. COMING TO TERMS WITH 'HUMANITARIAN INTERVENTION'

There is much confusion about the meaning of such notions as self-determination, (non-)use of force and (non-)intervention. The notion of humanitarian intervention is equally unclear and is interpreted by each state individually when a conflict arises. A variety of operations has been categorized under this heading. The three recurring situations are the following:

1. Humanitarian emergency help which is provided in cases of (environmental) disasters without the approval of the state where the disaster takes place;
2. Enforcement actions for humanitarian purposes which occurs when multilateral interventions take place mandated by the UN Security Council under Chapter VII of the Charter to protect the populace in general, or a minority in particular, from gross violations of human rights; and
3. Interventions by one or more states on the territory of a third state by using or threatening with the use of armed force, in reaction to massive and gross violations of human rights and fundamental freedoms, without a Security Council mandate.[9]

The approach taken is to recognize that the concept of intervention encompasses a continuum of potential political, economic, and military actions by one state against another. At the same time, however, a working definition of 'humanitarian intervention' is best limited to the threat or use of force by a state, group of states, or (an) international organization(s) primarily for the purpose of protecting the nationals of the target state from widespread infringements of internationally recognized human rights, without authorization by the target state or by the relevant UN organs. The latter characteristic is often emphasized by adding the qualifying term 'unilateral' to the notion of humanitarian intervention.[10]

The notion of 'humanitarian intervention', understood in the classical sense and as it will be used here, only covers the third type of the situations mentioned above. It is defined by Verwey as

> [t]he threat or use of force by a state or states abroad, for the sole purpose of preventing or putting a halt to a serious violation of fundamental human rights, in particular the right to life of persons, regardless of their nationality, such protection taking place

9. U. Beyerlin, *Humanitarian Intervention*, *in* R. Bernhardt (Ed.), Encyclopedia of Public International Law Vol. III, at 212 (1982). *See also* E. Suzuki, *Self-determination and World Public Order: Community Response to Territorial Separation*, 16 Virginia Journal of International Law 808-810 (1976): "Such deprivations may be the result of active persecution by the native government or the passive failure of national authorities to protect a minority from harassment."
10. *See* Murphy, *supra* note 1, at 3-4.

> neither upon authorization by relevant organs of the United Nations nor with the permissibility by the legitimate government of the target state.[11]

As such, rescue operations in third states to save nationals – e.g. the Israeli operation on the airport of Entebbe in 1976 – are not included within the scope of 'humanitarian intervention'. General agreement exists that these are situations of self-help.[12] Neither to be regarded as humanitarian interventions are transboundary actions by non-governmental organizations and military actions undertaken on the request of the government of the third state – e.g. the Belgo-American operation in Stanleyville in 1964, leaving aside the discussion on the legitimacy of the Tshombe government.

Examples of humanitarian interventions *pur sang* which have been undertaken during the cold war period are scarce. The interventions by India in East-Pakistan in 1971, by Tanzania in Idi Amin's Uganda in 1979, and by Vietnam in the Cambodia of Pol Pot (Kampuchea) in 1978 are often cited as stereotype examples.[13]

3. THE UN CHARTER SYSTEM

3.1. The UN Collective Security System

In providing a collective security system, the legal framework of the Charter is as simple as far-reaching. Essentially, it embodies a prohibition with two exceptions. Article 2(4) lays down the prohibition:

> All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

Article 2(4) is the fundamental provision of an organization established "to save succeeding generations from the scourge of war."[14] Much has been written about this cornerstone of the UN collective security system, and it is agreed that "any present-day discussion on the right of states to use force must start from this point."[15]

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11. W. Verwey, *Legality of Humanitarian Intervention After the Cold War*, *in* E. Ferris (ed.), The Challenge to Intervene: A New Role for the United Nations?, at 114 (1992).
12. B-O. Bryde, *Self-help*, *in* R. Bernhardt (Ed.), Encyclopedia of Public International Law Vol. IV, at 215-217 (1982): "Reactions in the form of the unilateral protection and enforcement against the violations of a state's rights that do not occur in the form of an armed attack."
13. Examples of humanitarian interventions after the collapse of the bipolar world order will be given in paragraph 6.
14. UN Charter, Preamble.
15. N. Blokker, *Iraq, the UN Security Council and the Use of Force*, Panel Debate at the Hague Appeal for Peace Conference, 11 May 1999, The Hague, on file with the author.

If the reading of Article 2(4) creates the impression that the Charter rules outlaw the use of force once and for all, then good-believing pacifists will be disappointed when reading the two exceptions to Article 2(4) which the drafters at San Francisco have included in the document. A first exception is laid down in Article 51: the inherent right of individual or collective self-defence if an armed attack occurs against a UN member. The last part of Article 51 emphasizes the Charter hierarchy between the two exceptions, in which self-defence must yield to "necessary measures" taken by the Security Council:

> [m]easures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

The second exception is the use of force by, or authorized by the Security Council, laid down in Article 42. If measures *not* involving the use of armed force (Article 41)

> would be inadequate or have proved to be inadequate, [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.[16]

Article 43, envisaging the provision of troops by member states to the Security Council on an as-needed basis, has never been implemented. In addition, the Charter in Article 53(1) also provides for the use of force when authorized by the Security Council and carried out by regional arrangements or agencies. Article 52(1) of the UN Charter recognizes the permissibility of actions by regional arrangements for

> the maintenance of international peace and security as are appropriate for regional action, provided that such (...) activities are consistent with the Purposes and Principles of the United Nations.

The UN collective security system conceived for the maintenance of international peace and security has its fundament in the principle of non-intervention,[17] as laid down in Article 2(7) of the UN Charter:

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16. One of the most striking constitutional developments in the Charter era concerns the adoption of the so-called "Uniting for Peace Resolution" (GA Res. 377, UN GAOR, 5th Sess., UN Doc. A/1775 (1950)), in which the General Assembly asserted that it could take actions in matters relating to international peace and security in the event that the Security Council was unable to discharge its primary responsibility in that area because of lack of unanimity.
17. L. Damrosch, *Politics Across Borders: Nonintervention and Nonforcible Influence over Domestic Affairs*, 83 AJIL 1-50 (1989); M. Schröder, *Non-Intervention, in* R. Bernhardt (Ed.), Encyclopedia of Public International Law Vol. III, at 358-360 (1984).

> [n]othing contained in the present Charter shall authorize the United Nations to intervene in matters that are essentially within the domestic jurisdiction of any State [...]; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

The duty not to intervene hinges on two concepts. First, intervention by a third state, especially physically, violates the principle of fixed borders because the territorial integrity of a third state is trampled upon. Second, interventions violate the sovereignty of a state. On a defined territory, the government of a state is the sovereign power. Intervention of a third state against the will of that power means a violation of that power and its political independence, because it cannot effectuate its own will. The principle of non-intervention is based on the right of states to deal with their internal and external affairs on a domestic level without interference from outside the state.

Initially, only the organs of the United Nations were thought to be bound by Article 2(7) because it addresses only the organization and not the member states. In a series of authoritative resolutions with a clear law-making purpose, the General Assembly has concreticized the implicit character of the principle of non-intervention contained in the Charter.[18] While paragraph 7 of the *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty* declared non-intervention also applicable to states,[19] Resolution 2625 (1970) was clearly meant to endow non-intervention with a legal character:

> [n]o State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law.[20]

Armed intervention had already explicitly been deemed contrary to international law by the ICJ in its *Corfu Channel* case.[21] By referring to the element of duty in

18. UN Doc. A/RES/2131 (1965) – Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty; UN Doc. A/RES/2225 (1966); UN Doc. A/RES/2625 (XXV) (1970) – Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance With the Charter of the United Nations; and as far as the economic forms of intervention are concerned, UN Doc. A/RES/3281 (1974) – Charter of Economic Rights and Duties of States; and UN Doc. A/RES/3201 (1974) – Declaration on the Establishment of a New International Economic Order.
19. UN Doc. A/RES/2131 (1965), para. 7.
20. UN Doc. A/RES/2625 (XXV) (1970), part 3, para. 1.
21. Corfu Channel case (United Kingdom *v.* Albania), Merits, Judgment of 9 April 1949, 1949 ICJ Rep. 90, at 35. Already in 1949, the ICJ stated that "the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and as cannot, *whatever be the present defects in international organization*, find a place in international law". (Emphasis added).

paragraph 2 of the definition of intervention, and the prohibition of armed intervention in paragraph 1, the General Assembly in Resolution 2625 (1970) linked the principle of non-intervention to the prohibition of the use of force in Article 2(4) of the Charter.

There is no question about the common understanding between states that armed intervention in the domestic affairs of a third state is prohibited.[22] The problem lies in the fact that the road towards recognition of a consistent state practice is covered by potholes caused by violations of that right.[23] However, the fact that a certain discrepancy exists between state practice and *opinio iuris* does not mean that the legal character of this norm of customary international law is uncertain. In the *Nicaragua* case, the ICJ plainly said that an "established and substantial practice" exists on the issue of non-intervention. Recent instances violating the principle of non-intervention could not affect the legal character of the principle, according to the Court.[24] Hence, one can safely conclude that both criteria have been fulfilled for the existence of an international customary rule on non-intervention.

Corresponding with this customary right to be free from outside interference, is the duty which rests on third states to refrain from interfering in the domestic affairs of other states, thereby adversely affecting the exercise of this right.[25] This duty can be deduced from the two UN human rights covenants of 1966,[26] which each state in Article 1 that the promotion of the right to self-determination has to be in compliance with other provisions of international law, and from Resolution 2625 (1970), where the word "duty" is explicitly used in this context.

3.2. The Internationalization of Human Rights

In reaction to the atrocities of World War II, the preamble of the UN Charter declares the determination of the peoples of the world, *inter alia*, "reaffirm[ing] faith in fundamental human rights, in the dignity and worth of the human person, in equal rights of men and women." One of the basic purposes of the Char-

22. Schröder, *supra* note 17, at 358-359: "The principle that states should refrain from intervening in matters which international law recognizes as being solely within domestic jurisdiction has gained general acceptance and belongs to the so-called fundamental rights and duties of states."
23. For an overview of (military) interventions between 1815 and 1975, *see* J. Leurdijk, Intervention in International Politics (1986).
24. Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States), Merits, Judgment of 27 June 1986, 1986 ICJ Rep. 14, at 106-109 and at 123-127. In a separate opinion, Judge Sette-Camara even suggests that the norm should enjoy the status of *ius cogens*; *id*, at 199-200.
25. P. Thornberry, *Self-determination, Minorities, Human Rights: A Review of International Instruments*, 38 International and Comparative Law Quarterly 879 (1989).
26. The International Covenant on Civil and Political Rights, which was adopted by General Assembly Resolution 2200 A (XXI) of 16 December 1966 and which entered into force on 23 March 1976; and the International Covenant on Economic, Social and Cultural Rights, which was adopted by the same General Assembly Resolution of 16 December 1966, which entered into force on 3 January 1976. *See* 6 ILM 368 (1967).

ter, as stated in Article 1(3), is "promoting and encouraging respect for human rights." Similarly, in Article 55(c) the member states reaffirm that the UN shall promote "universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." Finally, under Article 56, the member states "pledge themselves to take joint action and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55."

Although human rights are propounded and referenced in the UN Charter, the nature and scope of those rights, and their relationship to the maintenance of international peace, are not addressed, thereby leaving them something of a poor second cousin. The Universal Declaration of Human Rights which was adopted by the General Assembly on 10 December 1948 elaborates and supplements the Charter provisions on human rights.[27] It contains a whole series of civil and political, and economic, social, and cultural rights pertinent to human existence. The human rights covenants of 1966 define and set out in much greater detail than the Universal Declaration a variety of rights and freedoms, some of which had not been listed under the Declaration.[28] Apart from these instruments, there are also numerous declarations, conventions, and instruments adopted by the General Assembly elucidating specific obligations pertaining to particular human rights. They address a broad range of concerns that include, among others: the prevention and punishment of the crime of genocide; the humane treatment of military and civilian personnel in time of war; the status of refugees; the protection and reduction of statelessness; prevention of discrimination and the protection of minorities; the promotion of the political rights of women; the elimination of all forms of discrimination of women; the rights of children; the rights of indigenous peoples; and the promotion of equality of opportunity and treatment of migrant workers.

A number of institutional arrangements have been established to deal with the promotion and protection of human rights. The UN's efforts in this regard have been through the use of committees, commissions, sub-commissions, specialized agencies, and working groups. The main techniques employed in their enforcement measures have been communications, inquiries, investigations, periodic reports, advisory services, recommendations, global conferences, and global studies of specific rights or groups of rights.

Despite these efforts aimed at the universal promotion and protection of human rights, there are still widespread violations. The main problems encountered relate to, *inter alia,* governmental commitment, problems of perspectives and

27. UN Doc. A/RES/217A (III) (1948).
28. *Supra* note 26.

priorities, and the fact that the UN by and large only plays a supervisory role in implementation and enforcement action.[29]

Apart from the UN Human Rights machinery, it is also worthwhile noting that most of the world's regional organizations have enacted treaties bolstering the protection of human rights. Examples of these treaties are the European Convention for the Protection of Human Rights and Fundamental Freedoms, the American Convention on Human Rights, and the African Charter on Human and Peoples' Rights.[30]

Since the inception of the UN human rights regime, human rights issues have become important, and their internationalization has been increasingly recognized. The accumulation of both universal and regional instruments has helped in crystallizing legal norms in favour of human rights, and they have had a significant effect on the status of individuals in international law, and in their position in relation to states. The latter is important, because it indicates a gradual shift in thinking about absolute notions of state sovereignty and its corollary principle of non-intervention, as laid down in Article 2(7) of the Charter.[31] As states make commitments to a larger and more intrusive regime of international treaties and conventions, and as customary law expands its reach, the concept of domestic jurisdiction shrinks. It is increasingly accepted that human rights violations within states will not preclude the taking of international action to redress those situations of abuse. Gross systematic violations of human rights have become a concern of the whole international community and are not just a matter exclusively within the domestic purview of states, constituting infringement on their sovereign rights.[32]

3.3. The Clash of Charter Concepts

Although the UN Charter does not explicitly mention unilateral humanitarian intervention by states, it does not specifically prohibit it either.[33]

Article 2(2) of the Charter obliges states to fulfil in good faith all obligations assumed by them in accordance with the Charter. This means that states willing to intervene in another state on purely humanitarian grounds are confronted with a dilemma. According to Article 56, any action undertaken by member states

29. K. Pease & D. Forsythe, *Human Rights, Humanitarian Intervention and World Politics*, 15 Human Rights Quarterly, at 290-293 (1993).
30. UN Doc. ST/HR/1/Rev. 5 (Vol. II) (1997): European Convention for the Protection of Human Rights and Fundamental Freedoms, at 73-127; American Convention on Human Rights, at 14-48; African Charter on Human and Peoples' Rights, at 330-346.
31. M. Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 American Journal of International Law, at 866-876 (1990).
32. J. Perez de Cuellar, Report of the Secretary-General on the Work of the Organization: 1991, at 11-13 (1991).
33. R. Lillich, *Humanitarian Intervention: A Reply to Ian Brownlie and a Plea for Constructive Alternatives*, *in* J. Moore (Ed.), Law and Civil War in the Modern World, 229, at 236 (1974).

jointly or separately should be "in cooperation with the Organization." Under a strict reading of the Charter's text, states intervening in another state in order to protect human rights – by acting in compliance with Articles 56 and 55(c) – cannot but infringe Article 2(7) – principle of non-intervention, and Article 2(4) – non-use of force – when using military means to achieve their ends. Humanitarian intervention, as commonly understood and as defined for the purposes of this study, would violate these provisions *per definition* had there not been any room for exceptions.

However, Article 2(7) in present reality does not affect the principle of humanitarian intervention. Fundamental human rights must take precedence over any norm of non-intervention in the internal affairs of states. For, if the most basic human rights are not protected, governments will engage in gross violations of such rights without fear of punishment. Hence the critical proviso at the end of Article 2(7): "this principle shall not prejudice the application of enforcement measures under Chapter VII."

While arguments may be made that Article 2(4) of the Charter does not prohibit humanitarian intervention,[34] the counter-arguments are stronger that Article 2(4) is meant to be comprehensive in scope:

> [i]nternational law does not, and should not, legitimize the use of force across national lines except for self-defence (including collective self-defence) and enforcement measures ordered by the Security Council. Neither human rights, democracy or self-determination are acceptable legal grounds for waging war, nor for that matter, are traditional just war causes or rightings of wrongs. This conclusion is not only in accord with the UN Charter as it was originally understood; it is also in keeping with the interpretation adopted by the great majority of states at the present time. When governments have resorted to force, they have almost invariably relied on self-defence as their legal justification.[35]

In line with this reasoning, it has to be concluded that Article 51 – in the context of this study the only Charter exception worth exploring when the relevant UN organs fail to take action in the face of humanitarian catastrophes – forecloses the possibility to include a right by states to resort to unilateral humanitarian intervention, since it preserves an *inherent* right of *self-defence* if an *armed attack* occurs against a *member of the United Nations*. Humanitarian intervention, per definition, is not a defensive use of force by one state in response to another state, let alone an "armed attack" by another state. To the extent that there is an attack, that attack is occurring by a state against its own nationals, who themselves are not a "member of the United Nations."

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34. M. Reisman & M. McDougal, *Humanitarian Intervention to Protect the Ibos, in* R. Lillich (Ed.), Humanitarian Intervention and the United Nations, at 177 (1973).
35. O. Schachter, International Law in Theory and Practice 128 (1991); an examination of the *travaux préparatoires* that led to drafting Article 2(4) warrants a broad interpretation of the provision.

The UN Charter, however, is not a static document. Codification does not immobilize international law, since later practice can influence or modify a written treaty. International law as such may be conceived as a system of rules emanating primarily from textual agreement among states and the customary practice of states accompanied by their conviction that such practice is required by international law – *opinio iuris*. Under this approach, rule-oriented norms on the permissibility of unilateral humanitarian intervention derive primarily from the UN Charter, which should be interpreted in the light of the intent of states in crafting the Charter and their subsequent interpretation of the Charter if incidents of intervention arise.[36] While in theory the prohibition of the use of armed force with its two exceptions is a closed system, it was clear from the outset that it would be an open-ended one in practice due to its almost inevitable broad wording. Great ambiguity exists as to where the proper balance between the limits of the self-defence and the scope of the authority of the Security Council is to be found.

Highly restrictive interpretations of Articles 2(4) and 51 have not withstood the test of time. Many of the incidents since 1945 involved a state arguing, among other things, that it was entitled to intervene unilaterally in another state to protect its own nationals. Many states and some scholars have come to the view that such interventions constitute a "defence of nationals" that is, in effect, a "defence of the state" itself.[37] As explained in paragraph 2, the protection by a state of its own nationals is qualitatively different from the protection of the nationals of the target state. Yet, while accepting that there is a great difference between the protection of one's own nationals and the protection of another state's nationals, it must be asked in what sense that difference is dictated by the Charter. Why is it that states regard the deployment of forces to another state for the protection of their nationals as consistent with the notion of "self-defence if an armed attack occurs against a member state?" A way of explaining this development is a fundamental unwillingness of state A to stand by idly when state B commits or permits the infliction of violence against persons whose well-being state A regards as important to its national interests. If this is what drives a more expanded interpretation of Article 51, it must be asked whether such reasoning is that far from a position that can encompass unilateral humanitarian intervention as well. One can imagine other categories of persons that might also be important to the interests of the intervening state. For instance, one of the arguments made by President Clinton in justifying US military intervention in Haiti was that there were a large number of US nationals who were of Haitian

36. Murphy, *supra* note 1, at 358.
37. R. Lillich, *Forcible Protection of Nationals Abroad: The Liberian "Incident" of 1990*, 35 German Yearbook of International Law 205, at 217, n.86 (1992). *See also* D. Bowett, *The Use of Force for the Protection of Nationals Abroad*, in A. Cassese (Ed.), The Current Legal Regulation of the Use of Force, at 39 (1986).

origin, and who presumably had family ties with Haitian nationals. The basis in the UN Charter for justifying the rescue of nationals of a third state is perhaps less problematic if one regards the rescue of nationals as a permissible exception to Article 2(4). One adherent of that view, Louis Henkin, acknowledges a right of a state to protect its own nationals as well as the nationals of another state (perhaps including the nationals of the target state); both constitute an exception to Article 2(4) and, as such, there is no need to consider the juridical relationship of the recuee to the rescuing state.[38]

Yet if one is willing to accept within the scope of Article 2(4) or Article 51 an ability to protect one's own nationals and the nationals of others abroad, it would appear that the lines being drawn are dictated less by the language of the Charter than by the manner in which states perceive their fundamental national interests. As such, the rules of the UN Charter on the use of force appear more ambiguous than might otherwise be thought. As states move down the road of an expanded interpretation of the Charter's key provisions restraining the use of force, there may be no principled basis within the language of the Charter itself for regarding unilateral humanitarian intervention as impermissible.[39]

4. General Principles of International Law

As said before, international law on the use of force consists of more than just an objective application of the rules codified in the UN Charter. It consists of processes for authoritative decision-making that exist within wider contexts of morality and politics. While specific rules applicable to the use of force are lacking in detailed development, one must look to broad principles and purposes to apply those rules in given situations. Yet these broad principles and purposes are themselves often opposing in character, not because the law is defective but because there are complex social realities underlying such principles and purposes.[40] With respect to unilateral humanitarian intervention, general principles favouring political independence and territorial integrity are in conflict with other principles favouring justice, human dignity, and self-determination. Whether an intervention in a given situation is permissible under international law will then turn on whether the intervention is found to be in conformity with international community values and expectations.[41]

A major objection is that, under this approach, the legality of an intervention seems to depend upon whether it is based on notions of human dignity or justice as interpreted by Western moral and political traditions. If, however, unilateral

38. L. Henkin, How Nations Behave: Law and Foreign Policy, at 153-154 (1979).
39. *See* Murphy, *supra* note 1, at 361-362.
40. O. Schachter, International Law in Theory and Practice 21 (1991).
41. *See* Murphy, *supra* note 1, at 366-367.

humanitarian intervention is restricted to situations where a state is engaged in the widespread transgression of human rights – atrocities that shock the conscience of humankind – the argument is stronger that there exists global condemnation of such actions which are contrary to community notions of justice and human dignity. The development of human rights law since the inception of the Charter indicates that there are certain core human rights values (such as the prohibition of genocide) that states of all traditions agree upon. In this respect, international lawyers make reference to *ius cogens*, by which is meant fundamental norms of law from which no state may derogate, and make further reference to obligations that are *erga omnes*, by which is meant obligations of a state that are so offensive that they are owed to all other states.[42]

Even so, the issue is not simply whether states agree that they share an adherence to these core human rights values but whether they share a belief in the enforcement of those values by means of unilateral humanitarian intervention. Indeed, one of the least controversial examples of *ius cogens* is the prohibition of the use of force.[43] At this stage, the less powerful states of the world are deeply distrustful of the prospect of enforcing human rights by means of forcible intervention.[44]

A second objection to the use of such community values as human dignity and justice for the application of international law to humanitarian intervention lies in the difficulty in applying the concepts to actual incidents of intervention. While in theory intervention to prevent human rights atrocities would seem to advance values of human dignity and justice, in practice it is not at all clear that such intervention, and the manner and form in which it is conducted, does advance such values. The promotion of those values as a guide for decision-makers in determining the legality of any given intervention then appears questionable.

As an alternative to the promotion of values of human dignity and justice, one might posit that, in a decentralized international legal order, the ambiguities present in characterizing an action as unlawful coercion or lawful self-defence require promotion of values associated with systemic stability.[45] It may be possible for states to adopt a common norm that permits intervention to prevent the most flagrant of human rights violations and to provide security for citizens of a third state in situations where not to act will lead to regional instability – threatening international peace and security. This norm would recognize that there is a diversity of views among states of the world, but that in an interdependent world it is not possible to permit all forms of intolerance that may exist within any

42. I. Brownlie, Principles of Public International Law 511-519 (1998).
43. *Id.*, at 515.
44. This tension is readily apparent in the outcome of the 1993 UN Conference on Human Rights; *see* Vienna Declaration and Programme of Action, Report of the World Conference on Human Rights, chapter I, para. 1, UN Doc. A/CONF.157/24 (Part I) (1993), *reprinted in* 32 ILM 1661 (1993).
45. *See* Murphy, *supra* note 1, at 373.

given state. The problem with this approach is that it simply cannot be said that the international community as a whole regards unilateral humanitarian intervention as a necessary step in maintaining systemic stability. Less powerful states and even certain powerful nations, such as China and Russia, think that intervention for the purpose of advancing human rights values itself is a threat to systemic stability.

5. SECURITY COUNCIL (IN)ACTION

The past two years have brought butchery in Kosovo, belligerency in Afghanistan, open nuclear rivalry in India and Pakistan, a new outbreak of anti-American terrorism, the apparent determination of North Korea to implode, and the descent into warfare of a number of African countries from the Atlantic to the Indian Ocean. Meanwhile old fires still burn brightly in Algeria, Sierra Leone, Sudan, Sri Lanka, and corners of the Caucasus – and smoulder dangerously in Bosnia, the Middle East, Angola, Colombia, and Cambodia. It seems that, now that Russia and China are again asserting themselves, the UN Security Council is, on many issues, deadlocked and back in the position in which it was during the cold war.

For about 45 years (1945-1989) – in other words, during most of its existence – the UN Security Council was crippled by the Soviet-American antagonisms of the cold war. Arguably, it was effective in 1950, when the Soviet Union was boycotting the Security Council. On the basis of a Security Council authorization, military force was employed in Korea,[46] and in the 1960's, by the UN peacekeeping force ONUC in the Congo,[47] and in Southern Rhodesia.[48] Apart from these exceptions, the Security Council could impossibly perform its Charter functions due to the general absence of agreement among the five permanent members. Almost the opposite is true for the last decade – after Soviet communism collapsed – in which it generally proved possible to achieve consensus on major issues discussed in the Security Council. Only the most recent practice provides indications that a reverse trend – the return to deadlock – is developing.

Directly connected to this distinction in periods is the difference in the ways in which violations of Article 2(4) have been justified. In the cold war period, Article 51 was almost routinely invoked as the legal basis for the use of armed force by states in a large number of post war situations. The application of (collective) self-defence over the hierarchical superior exception – the use of force

46. UN Doc. S/RES/82 (1950).
47. UN Doc. S/RES/143 (1960).
48. UN Doc. S/RES/217 (1965).

(authorized) by the Security Council – thus showed "the bankruptcy of that political and legal system for which the United Nations was created."[49]

The measures taken by the Security Council following the Iraqi invasion of Kuwait in 1990, marked the *renaissance* of the Security Council. The collapse of Soviet communism led to consensus among the permanent members in a large number of cases. This is reflected, *inter alia*, in the fivefold increase of the number of resolutions adopted each year, a widening interpretation of the notion 'threat to the peace', and the evolution of UN peacekeeping.[50] Moreover, in a considerable number of cases the Security Council authorized the use of military force, usually on the basis of Chapter VII. Exceptionally, armed interventions have also been justified on the basis of Chapter VIII of the Charter.[51] What is particularly remarkable in this period is the development of the concept of states seeking UN approval before forcibly intervening in a third state.

It seems that, with the renewed deadlock of the Security Council over the humanitarian crisis in Kosovo, states acting under the umbrella of NATO have moved into unchartered waters. Not only did the alliance not try to justify its campaign against Yugoslavia as an action of (collective) self-defence, it did not even try to obtain authorization for its action from the Security Council.

Deadlock of the fire brigade should not be considered the desirable norm, nor should the alternative be automatic deference to the Western world powers. Ideally, the aim must be to reach reasonable consensus among the five permanent members. In a world that is now less ideologically divided than it was, there are plenty of issues on which the Security Council should be able to reach agreement and take impartial action. Africa's wars – the genocide in Rwanda – provide examples. Many of these conflicts are not post-modern wars, but old-fashioned wars between states, which the Security Council has every right to try to stop – Eritrea *v.* Ethiopia. In time, too, the Security Council should become more representative, though its current weakness owes less to its composition than to the reluctance of its leading members to get engaged. Of course, consensus will never be possible on everything. There will inevitably be some issues on

49. H. Kelsen, *Collective Security and Collective Self-defense Under the Charter of the United Nations*, 42 AJIL 796 (1948). In the cold war period, claims under Article 51 to further exceptions have been made on the basis of customary international law to include anticipatory self-defence (by Israel against its Arab neighbours in June 1967), intervention at the invitation of a sovereign (Soviet Union in Hungary, Czechoslovakia, and Afghanistan; US in Vietnam), and intervention to save lives of citizens (US and Belgium in the Congo). At times, interpretations were given of Article 51 which made it difficult to distinguish an act of self-defence from an outright armed attack; e.g. the US air strikes on Tripoli and Benghazi on 15 April 1986. *See* Blokker, *supra* note 15.

50. *See* Blokker, *supra* note 15.

51. The role for regional organizations in the maintenance of international peace and security, however, has for the most part been underutilized. Certain incidents both during the cold war era and in recent years indicate that regional organizations can perform significant functions in fostering or conducting humanitarian intervention. Greater use of these organizations for humanitarian intervention could yield significant benefits not achieved through the use of the United Nations alone.

which the world's major powers will disagree, and that will sometimes lead to paralysis. The danger exists, however, that this paralysis, in turn, will lead to action – more often than not on less morally justifiable grounds than the protection of human rights – by member states, unsanctioned by the UN and far from qualifiable as (collective) self-defence.

In the post cold war period there have been a number of cases of humanitarian interventions which were performed outside the scope of the UN collective security system, and which, although they were not authorized by the relevant UN organs, were eventually tacitly condoned by the international community. It is argued that these instances are a first step toward the development of a right to humanitarian intervention which survives the UN Charter and the ICJ's *dictum* in the *Corfu Channel* case.[52]

6. UNILATERAL HUMANITARIAN INTERVENTION

6.1. Practice

For the most part, the post-cold war interventions – in Liberia, Iraq, Bosnia-Herzegovina, Somalia, Rwanda, and Haiti – are not persuasive in demonstrating a unilateral right of humanitarian intervention under international law. In each of these instances, the intervention related in some fashion or the other to the authority of the Security Council or a regional organization, which best explains the overall acceptance by the international community of these interventions. Moreover, one of the most striking features of these post-cold war situations was the pursuit by France of Security Council authorization prior to intervening in Rwanda in 1994.[53] Similarly, the United States pursued authorization by the Security Council prior to the intervention of the US-led Multinational Force in Haiti, also in 1994.[54] Seeking Security Council authorization is politically a prudent course of action, particularly if a state wishes to extract itself from the target state and replace its forces with UN forces. The concept of seeking UN approval before intervening is a remarkable development and cannot be easily discounted. It evidences a lack of confidence in the ability of a state to proceed on its own initiative in conducting such intervention and a belief that the expectations of the global community in a post-cold war environment require approval by the Security Council.[55]

52. Corfu Channel case, *supra* note 21, at 35.
53. UN SCOR, 49th Sess., 3392nd meeting, UN Doc. S/PV.3392 (1994). 'Opération turquoise', which had its legal basis in Resolution 929 (1994) (UN Doc. S/RES/929 (1994)), was to serve a purely humanitarian purpose, and was intended to rescue endangered civilians and to put an end to the massacres.
54. UN SCOR, 49th Sess., 3413th meeting, UN Doc. S/PV.3413 (1994). This intervention found its legal basis in Resolution 940 (1994) (UN Doc. S/RES/940 (1994)).
55. *See* Murphy, *supra* note 1, at 364-365.

When looking at the multilateral intervention in northern Iraq in 1991, proponents of a right of unilateral humanitarian intervention will focus on the lack of explicit authorization in Resolution 688 (1991) for states to intervene in Iraq,[56] and on the explanations of France and Great Britain which gave a very strong sense that these two countries believed intervention was justified solely on humanitarian grounds even without UN approval.[57] Moreover, the intervention in southern Iraq occurred sixteen months after the 'threat' was identified in Resolution 688, at a time when the flows of Iraqi refugees out of Iraq had long stopped. Consequently, it will be argued, the interventions in northern and southern Iraq cannot be regarded as based on Security Council authorization but, instead, on a unilateral right to intervene to hinder widespread human rights abuses. Seen in this light, Resolution 688 has significant precedential value, now that the Security Council, by deciding upon the applicability of Article 39 in the situation of the Kurdish population in northern Iraq, for the first time recognized the indirect relationship between repression – mass and gross violations of human rights – and the maintenance of international peace and security.[58]

Also not authorized by the United Nations, was the ECOWAS interventionary force, known as the ECOWAS Monitoring Group (ECOMOG), in Liberia in 1990. The initial international response to ECOMOG's intervention in Liberia was one of cautious approval. Before Resolution 788 (1992)[59] was passed, the UN, OAU, EC, and several states adopted a 'wait and see' attitude.[60] Nonetheless they applauded this unprecedented African determination to take the lead in regional conflict resolution and encouraged ECOWAS to find a settlement to the Liberian conflict. Thus, rather than condemning the intervention as contrary to the provisions of the Charter, the Security Council in essence condoned the intervention by a subregional organization because it was based on the need to end

56. UN Doc. S/RES/688 (1991). The resolution merely appealed to member states of the UN and to humanitarian organizations "to contribute to [...] humanitarian relief efforts."
57. UN SCOR, 46th Sess., 2982nd meeting, UN Doc. S/PV.2982 (1991). 'Operation Provide Comfort' in the North and 'Operation Southern Watch' in southern Iraq, were undertaken by troops from the United States, Britain, France, and armed forces from The Netherlands and other countries and declared "no-fly zones".
58. The Security Council stated in Resolution 688, *supra* note 56, that is: "1. Condemns the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish populated areas, the consequences of which threaten international peace and security in the region; 2. Demands that Iraq, as a contribution to removing the threat to international peace and security in the region, immediately end this repression and expresses the hope in the same context that an open dialogue will take place to ensure that the human and political rights of all Iraqi citizens are respected."
59. UN Doc. S/RES/788 (1992), which determined that the deterioration of the situation in Liberia constituted a threat to international peace and security, particularly in the West African region, and which commended efforts by ECOWAS to find a peaceful solution to the conflict.
60. UN SCOR, 47th Sess., 3138 meeting, UN Doc. S/PV.3138 (1992). Apart from Burkina Faso, which had earlier condemned the action as an unlawful intervention in the internal affairs of a sovereign country. *See* D. Wippman, *Enforcing the Peace: ECOWAS and the Liberian Civil War*, *in* L. Damrosch (Ed.), Enforcing Restraint: Collective Intervention in Internal Conflicts 175 (1993).

the atrocities and the mass killings of civilians in Liberia.[61] This intervention too is of great precedential value, because it shows that many African states are becoming used to the idea that gross and mass violations of human rights have been removed from the domestic sphere and have become matters of international concern.

Opponents of a right of unilateral humanitarian intervention will dissect each incident and show why it cannot stand as a pure example of unilateral humanitarian intervention. In the case of Liberia, they will argue that the intervention was conducted not by states operating in their individual capacities but by a subregional organization, acting with the knowledge and eventually support of the Security Council. ECOWAS may have acted inconsistently with the provisions of Chapter VIII of the Charter and arguably even with its own constituent instruments, but it still was a collective action within a framework of a regional organization and therefore cannot stand as a precedent for unilateral humanitarian intervention.[62] Further, opponents of a right of unilateral humanitarian intervention will emphasize the difference between situations where there has been a complete breakdown of governmental authority (Liberia) and other situations where this is not the case, noting that in the former case there is no government capable of providing consent to an intervention. As such, interventions in those countries are not precedents for unilateral humanitarian intervention in situations where a government is in full control of its country and is conducting human rights atrocities. In the case of Iraq, explicit UN authorization may not have existed, but authorization implicitly existed either in Resolution 688 or in the overall intrusion of the United Nations in Iraqi internal affairs in a post-war environment.[63]

On the basis of this analysis, one conclusion is inevitable: while the rules embedded in the UN Charter do not allow for a right of unilateral humanitarian intervention, the practice of states in a number of post-cold war instances does not evidence a belief that such interventions are generally permissible under the Charter. It, however, does show an *opinio iuris* among states, international organizations, and scholars that the rules of the Charter are not to be strictly applied in situations of genocidal violence. This belief may provide a start for rules on the use of force to accommodate unilateral humanitarian intervention outside the Charter framework.

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61. Wippman, *supra* note 60, at 158.
62. K.O. Kufuor, *The Legality of the Intervention in the Liberian Civil War by the Economic Community of West African States,* 5 African Journal of International and Comparative Law 523, 539-547 (1993). *See also* A.C. Ofodile, *The Legality of ECOWAS Intervention in Liberia*, 32 Columbia Journal of Transnational Law 381, at 383 and 406-409 (1994).
63. *See* Murphy, *supra* note 1, at 364.

6.2. The UN Charter and the Test of Time

The UN Charter is not a static document. Under any theory of international law, state practice is pivotal in assessing international law as it exists or as it is developing. Cassese deems it is the task of

> [i]nternational lawyers to pinpoint the evolving trends as they emerge in the world community, while at the same time keeping a watchful eye on the actual behaviour of states. Standards of conduct designed to channel the action of states are necessary in the world community as in any human society. And it is not an exceptional occurrence that new standards emerge as a result of a breach of *lex lata* [– *ex iniuria ius oritur* –].[64]

As seen in the preceding paragraph, examples of true humanitarian interventions are still sporadic. Especially since, in most instances, the stated objective of the intervening state does not appear consistent with a candid assessment of the circumstances. A case in point is the military action of NATO countries against the Federal Republic of Yugoslavia (FRY) over the Kosovo crisis in 1999.[65] Similar to the post-cold war instances of armed intervention which have already been mentioned, NATO's action can be seen as an example of an unauthorized intervention which was impossible to justify as collective self-defence pursuant to Article 51 of the Charter. To conclude that this action must not set a precedent and should remain a dramatic exception of (blatant) disregard for the rules embedded in the UN Charter,[66] is not compatible with the concept of an international lawyer actively trying to further the cause of international law through teleological argumentation. The danger exists that

> [o]nce a group of powerful states has realized that it can freely escape the strictures of the UN Charter and resort to force without any censure, [...] a Pandora's box may be opened. What will restrain those states or other groups of states from behaving likewise when faced with a similar situation or, at any event with a situation that in their opinion warrants resort to armed violence?[67]

To justify this new intervention, it is time to dare to conclude that recourse to force has taken place *outside*, and indeed *against*, the Charter framework.

From an ethical viewpoint, the dogma that the UN Charter – as complemented by the international human rights standards which have emerged in the last 50 years – does not allow international peace and security to be put in jeopardy, is untenable. Given the inaction of the Security Council due to the refusal

64. A. Cassese, *Ex iniuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?* 10 EJIL 23-30, at 30 (1999).
65. J. Duursma, *Justifying NATO's Use of Force in Kosovo?*, 12 LJIL 287-295 (1999).
66. B. Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EJIL 1-22, at 22 (1999): "only a thin red line separates NATO's action on Kosovo from international legality."
67. Cassese, *supra* note 64, at 25.

of one or more permanent members to stop massacres and expulsions, one should not sit idly by and watch thousands of persons being executed or persecuted. It is a shame that one has to conclude that such moral action is contrary to current international law. When 'urgency breaks law' too often – like it has done since the end of the cold war in northern Iraq, Liberia, and Kosovo – the resort to armed force ought to be explicitly justified when appropriately used to address extreme situations of widespread human rights violations. In other words, "'positive peace', i.e. the realization of justice, should prevail over 'negative peace', i.e. the absence of armed conflict."[68]

Practice in the present international community indicates that states accept an emerging right of humanitarian intervention, as defined for the purpose of this article, based on the following widespread convictions:

1. peaceful measures for settling disputes or solving conflicts must always take precedence over the resort to armed force, with a view to safeguarding the goal of peace;
2. basic human rights and fundamental freedoms are no longer of exclusive concern to the particular state where they are infringed, but have become the main concern of the world community as a whole. These rights and freedoms cannot and should not be trampled upon with impunity in any part of the world;
3. obligations to respect these core human rights and freedoms are *erga omnes*, which implies that any state, individually or collectively, has the right to take steps (admittedly, short of force) to attain such respect;[69] and
4. large-scale and systematic atrocities may give rise to an aggravated form of state responsibility, to which other states or international organizations may be entitled to respond by resorting to countermeasures other than those contemplated for delictual responsibility.[70]

Having argued that the right of humanitarian intervention survives the Charter and that it has relevance in the contemporary world as a means of protecting oppressed peoples and minorities, other matters should be addressed. Because abuse of the principle is possible, it is imperative that justification for intervention be limited. In a majority of instances, states with varying interests would intervene to settle the outcome of the dispute. Recent history is replete of instances of intervention that were justified on lofty idealistic grounds, but which were, in reality, embarked upon in pursuit of national interests.[71] In these cir-

68. *Id.*, at 27.
69. *See* Brownlie, *supra* note 42.
70. Cassese, *supra* note 64, at 26.
71. R. Barnet, *Patterns of Intervention*, *in* R. Falk (Ed.), The Vietnam War and International Law 1164 (1969).

cumstances, the need for rules is clear. An absence of rules may mean that the norm of non-use of force will be eroded by expansive use of the exceptions to the norm. Fortunately, the existing doctrine of humanitarian intervention has safeguards against abuse.

7. TOWARD CRITERIA FOR THE CONDUCT OF UNILATERAL HUMANITARIAN INTERVENTION

Many – both states and scholars – resist to recognize a right of unilateral humanitarian intervention due to a fear of abuse by unscrupulous states. States might forcibly intervene in the domestic affairs of another state claiming that the target state is engaged in violations of human rights when in fact the intervening states are simply seeking to advance their own interests by altering the political or economic structure of the target state. Fear of abuse does not reside solely in smaller states that are likely targets of intervention. Larger states, such as the United States, are also concerned about opening a floodgate of interventions that could create world-wide conditions of instability. One way of addressing this concern is to seek acceptance on authoritative methods of allowing unilateral humanitarian intervention to proceed. The question, however, is whether the value of permitting unilateral humanitarian intervention exceeds the costs of not having it. If it is true that a far greater number of lives is lost through widespread infringements of human rights than through armed intervention, then the value of permitting humanitarian intervention – notwithstanding the possibility of abuse – would appear to be high.

Whether the failure of the Security Council to act in a manner intended by the drafters of the UN Charter vitiates the use of force norms embedded in the Charter is far from accepted and, indeed, is rejected by a number of scholars.[72] They question the efficacy of developing criteria to justify the resort to armed force in the absence of Security Council authorization. First, because states are likely to resist the development of, and adherence to, criteria that purport to control such intervention. Second, because developing criteria might serve less to restrain unilateral humanitarian intervention and more to provide a pretext for abusive intervention. That is, by establishing a list of factors that if checked off justify an intervention, states otherwise inclined not to intervene because it is generally disfavoured, may seek to exploit vague criteria as a cover for intervention. These scholars would prefer to regard unilateral humanitarian intervention as a violation of international law, which the international community can

72. L. Henkin, How Nations Behave: Law and Foreign Policy 146 (1979). *See also* O. Schachter, *The Right of States to Use Armed Force*, 82 Michigan Law Review 1620 (1984).

choose to ignore in situations where the intervention is truly humanitarian and morally justified.[73] Oscar Schachter believes

> it is highly undesirable to have a new rule allowing humanitarian intervention, for that could provide a pretext for abusive intervention. It would be better to acquiesce in a violation that is considered necessary and desirable in the particular circumstances than to adopt a principle that would open a wide gap in the barrier against unilateral use of force.[74]

Finally, these scholars argue that the criteria that have been suggested by others, when measured against recent incidents of intervention, can be seen as lacking. For instance, most criteria that have been proposed include in some fashion a requirement that the intervening state be 'disinterested', by which is meant that the intervening states obtain no benefit or gain. Yet, as seems apparent from recent incidents of intervention, if the objective in allowing the action is to promote human rights values, requiring that a state seeking to intervene be 'disinterested' may not be desirable. In an imperfect world, self-interest alone induces conduct that may be regarded as morally obligatory. That is made evident by the fact that atrocities as grave as those perpetrated in Algeria have not attracted an intervention by armed force. Many interventions, such as the ones in Somalia, Liberia, Rwanda, and Haiti can be characterized as 'far too little, far too late.' If such interventions are to occur in a timely, effective fashion, it may be that the intervening state needs more than just altruistic reasons for its actions. On policy grounds, the existence of self-interest should therefore not affect the legality of humanitarian intervention:

> [i]f Tanzania was courageous enough to do what several other states would have wished to do and if it was acting as the 'international conscience' in replacing a regime which most governments believed to be abhorrent and whose domestic policies violated all the international legal standards relating to human rights and fundamental freedoms, then its actions should be supported explicitly by that international community and by its law.[75]

Given the possible return of the ideological differences that have paralyzed the Security Council during the cold war, the arguments in favour of conditionally allowing unilateral humanitarian intervention to stop massacres and expulsions will be stronger. For reasons already mentioned, and in view of the nascent trends in the international community in the post cold war period, it is right to

73. B. Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EJIL 22 (1999).
74. O. Schachter, International Law in Theory and Practice 126 (1991). *See also* P. Malanczuk, Humanitarian Intervention and the Legitimacy of the Use of Force 30-31 (1993).
75. N. Burrows, *Tanzania's Intervention in Uganda: Some Aspects*, 35 World Today 306 (1979). The end of the rule of Emperor Bokassa of the Central African Republic passed without condemnation for similar reasons.

develop conditions or criteria that might serve as a guide in assessing such intervention.

Allowing states themselves to determine whether situations calling for humanitarian intervention exist should be predicated on their first requesting action by the Security Council. If the Security Council fails to act, either due to the exercise of a veto power or otherwise, states might then be expected to pursue alternative methods for authoritative decision-making, based on the theory that collective action is less susceptible to abuse.[76] States may do this by requesting action by the General Assembly[77] or by a regional organization,[78] although neither entity may be capable of authorizing enforcement action. Without a United Nations or regional organization's determination of a threat to or breach of the peace from widespread violations of human rights, a state may be inclined to intervene on its own authority.

Based on criteria developed by various scholars,[79] this article sets forth ten conditions for assessing the legality of unilateral humanitarian intervention:

1. the Security Council is deadlocked indefinitely on the issue because of disagreement among the five permanent members or because one or more of them exercises its veto power; consequently, the Security Council either refrains from any coercive action or only confines itself to deploring or condemning the massacres;
2. the Security Council has not explicitly prohibited intervention to meet the humanitarian crisis;
3. all alternative peaceful remedies which may be explored consistent with the urgency of the situation to achieve a solution based on negotiation, discussion, and any other means short of force have failed, and no solution can be agreed upon by the parties to the conflict;

76. R. Lillich, *Humanitarian Intervention: A Reply to Ian Brownlie and a Plea for Constructive Alternatives, in* J. Moore (Ed.), Law and Civil War in the Modern World 229, 247 (1974). *See also* P. Jessup, A Modern Law of Nations 170-171 (1968).
77. Pursuant to GA Res. 377 A(V) of 3 November 1950, UN Doc. A/RES/377 A (V) (1950).
78. Pursuant to Articles 11(2) and 53(1) UN Charter.
79. *See* R. Lillich, *Forcible Self-Help by States to Protect Human Rights*, 53 Iowa Law Review 325, at 347-351 (1967); J. Moore, Law and the Indo-China War 186 (1972); M. Sornarajah, *Internal Colonialism and Humanitarian Intervention*, 11 Georgia Journal of International and Comparative Law 75 (1981); H.G. Schermers, *The Obligation to Intervene in the Domestic Affairs of States, in* A. Delissen & G. Tanja (Eds.), Humanitarian Law of Armed Conflict – Challenges Ahead 589-590 (1990); V. Nanda, *Tragedies in Northern Iraq, Liberia, Yugoslavia, and Haiti – Revisiting the Validity of Humanitarian Intervention Under International Law – Part I*, 20 Denver Journal of International Law and Policy 305, 330 (1992); D. Scheffer, *Toward a Modern Doctrine of Humanitarian Intervention*, 23 University of Toledo Law Review 290-291 (1992). In Dutch, *see* Adviescommissie Mensenrechten Buitenlands Beleid en Commissie van Advies Inzake Volkenrechtelijke Vraagstukken, Het Gebruik van Geweld voor Humanitaire Doeleinden: Dwangmaatregelen voor Humanitaire Doeleinden en Humanitaire Interventie (1992).

4. an immediate and extensive threat to or gross and egregious breaches of fundamental human rights, involving a widespread loss of life, and amounting to crimes against humanity, take place on the territory of a sovereign state which is unable or unwilling to protect its citizens. If the crimes against humanity result from anarchy in a sovereign state, proof is necessary that the central authorities are unable to put an end to those crimes, while at the same time refusing to call upon or to allow other states or international organizations to enter the territory to assist in terminating the crimes. If, on the contrary, such crimes are the work of the central authorities, it must be shown that those authorities have consistently withheld their cooperation from the United Nations or other international organizations, or have systematically refused to comply with appeals, recommendations, or decisions of such organizations;
5. a diversified group of states (not a single hegemonic power, however strong its military, political, and economic authority, nor such a power with the support of a client state or an ally) decides to try to halt the atrocities, with the support or at least the non-opposition of the majority of member states of the UN;
6. the humanitarian purpose and objective of the intervention is paramount;
7. the intervention must have a convincingly positive effect on the protection of human rights in the target country;
8. the use of armed force must be proportional: it is exclusively used for the limited purpose of stopping the atrocities and restoring respect for human rights, not for any goal going beyond this limited purpose. Consequently, the use of force must be discontinued as soon as this purpose is attained;
9. the intervention will have a minimal effect on authority structures; the long-term political independence and territorial integrity of the target state will not be imperiled by the intervention; and
10. immediate full reporting to the Security Council and appropriate regional organizations.

Although there is still a considerable amount of resistance to the legality of unilateral humanitarian intervention and to the variance in the conditions under which such interventions occur, this list of criteria is a useful exercise in attempting to clarify factors that must be weighed when assessing humanitarian intervention, and might lead to a gradual legitimation of forcible humanitarian countermeasures by a state or a group of states outside any authorization by the Security Council. In the wake of a series of large-scale humanitarian crises in the post-cold war era, the international community organized in the UN General Assembly should seize momentum to overcome the existing obstacles, to agree upon a set of criteria, to codify them in a Declaration, and to assess whether they are complied with in specific situations of humanitarian intervention. Also, the Security Council should be able to condemn unjustified intervention. It may be

necessary to provide for a special voting majority for this kind of decisions. The International Court of Justice, for its part, should decide whether or not a particular intervention is an infringement of international law. Approval of these three institutions should provide sufficient protection against unjustified intervention by a state or a group of states.

In the absence of such (timely) approval, the conditions listed above, general principles such as those with respect to UN humanitarian intervention, or, more generally, the "principles of humanity, neutrality, and impartiality" identified by the General Assembly in considering the provision of humanitarian assistance by states,[80] should guide states when conducting and assessing humanitarian interventions. The latter principles may be vague, but they seem to be present in the conduct of UN-authorized interventions and are probably the most that can be said about how unilateral humanitarian intervention should be conducted pending future developments.[81]

8. CONCLUSION

Unilateral humanitarian intervention finds little support in the international legal framework. Any unmandated resort to armed force not constituting self-defence in the sense of Article 51, remains contrary to the UN Charter. Over time, as states have interpreted the Charter rules, an exception has developed for forcible action in the protection by a state of its own nationals. Trends of this type may provide an opening for a general acceptance by the international community of humanitarian intervention in the future. Values of human dignity and justice suggest that such a development may be warranted. State practice in the post-Charter era *vis-à-vis* particular instances of breaches of international law may gradually lead to the crystallization of a general rule of international law authorizing forcible action for the sole purpose of putting an end to large-scale atrocities amounting to crimes against humanity. Values of systemic stability may provide additional support for such a rule if the destruction of human rights values is seen as a threat to or breach of international peace and security. However, countervailing arguments could be made that there is an inherent difficulty in applying such values as human dignity, justice and systemic stability as justification of humanitarian intervention. A comparable – and perhaps even greater – threat to the international order may be the result of allowing humanitarian intervention. Theorists who in a cold war environment have justified humanitarian intervention on the basis of a defective Security Council apparatus, seem to have regained the core element of their argument in the last two years of the

80. GA Res. 46/182, UN GAOR, 46th Sess., Supp. No. 49, at 49, Annex, para. 2, UN Doc. A/46/49 (1992).
81. *See* Murphy, *supra* note 1, at 387.

first post-cold war decade. The renewed blockage of the Security Council as an authoritative decision-maker creates a significant hurdle for those who would continue to advance arguments against the legality of humanitarian intervention. The emergence of an international customary rule laying down a restricted right of humanitarian intervention, would constitute an exception to the collective security system based on the mandate of the relevant UN organs. More precisely, it would amount to an exception similar to that of self-defence as laid down in Article 51 of the Charter, but placed outside the Charter system. While humanitarian interventions may occur, the crafting of criteria for use in assessing and conducting such interventions therefore appears to be inescapable to root out possible abuse and manipulations of this emerging rule of international law.