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Unilateral Humanitarian Intervention: Legalizing the Use of Force to Prevent Human Rights Atrocities

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Abstract

This Note argues that the international community should relax prohibitions against unilateral humanitarian action until the international collective security measures of the U.N. Charter designed to prevent egregious human rights abuses are effective. Because modern technology has significantly increased the ability to discern pretextual actions from altruistic actions, the potential abuse of unilateral humanitarian intervention is minimized. While the meaning of the word “intervention” in itself is subject to debate, this Note will consider only military intervention. Part I of this Note discusses the historical background of humanitarian intervention. Part II first analyzes the arguments against legalization of humanitarian intervention, based on the U.N. Charter and state practice. Part II then analyzes the arguments for legalization and explains how the U.N. Charter and state practice can be read to mandate legality. Part III argues that the legalization of unilateral humanitarian intervention, within limits, would not create incentives for the doctrine’s massive abuse as was once feared. This Note concludes that the legalization of limited unilateral humanitarian intervention would effectively balance human rights and legitimate state sovereignty, while maintaining international stability.

NOTE

UNILATERAL HUMANITARIAN INTERVENTION: LEGALIZING THE USE OF FORCE TO PREVENT HUMAN RIGHTS ATROCITIES

INTRODUCTION

One of the foremost principles in international law is the inviolability of the territorial sovereignty of individual states.¹ Territorial sovereignty derives from the theory of the state, whereby the existing government is supreme within its territory, and no external force may interfere with that supremacy.² The state can exert its influence in any manner over all persons and property within its boundaries.³ Under international law, other states must respect this territorial sovereignty.⁴ When a state perpetrates human rights abuses against its citizens, however, another state may violate the state's territorial sovereignty and protect the abused citizens under the doctrine of humanitarian intervention.⁵

Since the inception of the U.N. Charter (the "Charter"),

1. MALCOLM N. SHAW, *INTERNATIONAL LAW* 276 (3d ed. 1991). State governments are traditionally free to act without restraint within their borders. *Id.* "International law is based on the concept of the state. The state in its turn lies upon the foundation of sovereignty, which expresses internally the supremacy of the governmental institutions and externally the supremacy of the state as a legal person." *Id.*

2. *Id.* at 276-77.

3. J.G. STARKE, *INTRODUCTION TO INTERNATIONAL LAW* 152 (9th ed. 1984).

4. BELATCHEW ASRAT, *PROHIBITION OF FORCE UNDER THE U.N. CHARTER* 148-49 (1991) (stating that "[o]ther States have the correlative duty of respecting this base of State authority, which is one of the important elements constituting statehood"). The United Nations codified this principle in article 2(7) of the U.N. Charter, which states that "[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state." U.N. CHARTER art. 2, ¶ 7.

5. L. OPPENHEIM, *INTERNATIONAL LAW* 312 (H. Lauterpacht ed., 8th ed. 1955). Humanitarian intervention is traditionally defined as an action to prevent a foreign state from denying fundamental rights and persecuting its own citizens in a way which "shock[s] the conscience of mankind." *Id.* Authors generally accept this basic definition although some find that "the doctrine [of humanitarian intervention] [i]s inherently vague." IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 338 (1963) [hereinafter BROWNLIE, *INTERNATIONAL LAW*]; see Thomas M. Franck & Nigel S. Rodley, *After Bangladesh: The Law of Humanitarian Intervention by Military Force*, 67 AM. J. INT'L L. 275, 305 (1973) (concluding that "a usable general

humanitarian intervention has been considered illegal,⁶ although the Charter does not explicitly ban it.⁷ Despite this

definition of 'humanitarian intervention' would be extremely difficult to formulate and virtually impossible to apply rigorously").

Humanitarian intervention has also been defined as "the proportionate trans-boundary help, including forcible help, provided by governments to individuals in another state who are being denied basic human rights and who themselves would be rationally willing to revolt against their oppressive government." FERNANDO TESÓN, *HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY* 5 (1988) (emphasis omitted).

The protection of a state's own nationals abroad has also come under the rubric of humanitarian intervention. See, e.g., Jean-Pierre L. Fonteyne, *Forcible Self-Help by States to Protect Human Rights: Recent Views from the United Nations*, in *HUMANITARIAN INTERVENTION AND THE UNITED NATIONS* 197, 198-99 (Richard B. Lillich, ed. 1973). The U.S. interventions in the Dominican Republic in 1965 and in Grenada in 1983, and the Israeli raid on Entebbe in 1976, are examples of such interventions. See Thomas E. Behuniak, *The Law of Unilateral Humanitarian Intervention by Armed Force: A Legal Survey*, 79 *MIL. L. REV.* 157, 172-74 (1978) (for Dominican Republic and Entebbe incidences); Michael J. Bazylar, *Reexamining the Doctrine of Humanitarian Intervention in Light of the Atrocities in Kampuchea and Ethiopia*, 23 *STAN. J. INT'L L.* 547, 586 (1987) (for Grenada incident). This Note, however, will discuss only the protection of citizens facing abuses at the hands of their own government. For a review of the protection of one's own nationals abroad, see NATALINO RONZITTI, *RESCUING NATIONALS ABROAD THROUGH MILITARY COERCION AND INTERVENTION ON GROUNDS OF HUMANITY* (1985).

6. See, e.g., Paul Lewis, *The Right to Intervene for a Humanitarian Cause*, *N.Y. TIMES*, July 12, 1992, § 4 (Week in Review), at 22. The doctrine of humanitarian intervention presently is receiving widespread attention due to the end of the cold war and the hope that the United Nations might finally act in the fashion it was designed. *Id.* Before the collapse of the Soviet Union as a rival superpower to the United States, "[c]old war tensions virtually assured paralysis, with the rival superpowers fearing that humanitarian intervention would be directed against their interests But with the cold war over, Western governments and humanitarian organizations began pressing for new action to defend vulnerable people." *Id.* Since 1987, some U.N. organizations have tried to establish humanitarian intervention as a right under international law. *Id.* There is evidence, however, that the United Nations is overburdened by the present crises occurring around the globe and cannot possibly contain every crisis. See, e.g., *Too Much Stress at the U.N.*, *N.Y. TIMES*, July 25, 1992, at A20. "The crisis switchboard at the United Nations is overloaded. Once paralyzed by cold war rivalries, the world organization is nowadays asked to do too much: enforce peace in Sarajevo, face down a truculent Saddam Hussein and clean up messes in Cambodia, Central America, Afghanistan and South America." *Id.*

7. U.N. CHARTER art. 2, ¶ 4; see Ian Brownlie, *Humanitarian Intervention*, in *LAW AND CIVIL WAR IN THE MODERN WORLD* 217 (John N. Moore ed., 1974) [hereinafter Brownlie, *Humanitarian Intervention*]. Those authors who argue that humanitarian intervention should be illegal include Ian Brownlie, *Humanitarian Intervention*, *supra*; Vladimir Kartashkin, *Human Rights and Humanitarian Intervention*, in *LAW AND FORCE IN THE NEW INTERNATIONAL ORDER* 202 (Lori F. Damrosch & David J. Scheffer eds., 1991); RONZITTI, *supra* note 5; Franck & Rodley, *supra* note 5; Farrokh Jhabvala, *Unilateral Humanitarian Intervention and International Law*, 21 *INDIAN J. INT'L L.* 208 (1981); Oscar Schachter, *The Right of States to Use Armed Force*, 82 *MICH. L. REV.* 1620 (1984);

putative illegality, however, the debate concerning whether humanitarian intervention is illegal or legal has continued with many supporters on both sides. The commentators who support the ban on humanitarian intervention argue that if humanitarian intervention were legal, the cost of the potential abuse of pretextual interventions would outweigh any benefit derived from altruistic interventions.⁸ A pretextual intervention is a nation's use of military force in a different state for the nation's own gain, not for the protection of human rights.⁹ An altruistic intervention, however, occurs when a nation's motives for military intervention are grounded predominantly in the protection of human rights.¹⁰ Furthermore, these commentators stress that the Charter provides for collective security measures that sufficiently protect human rights.¹¹

Many commentators, however, advocate the legalization of humanitarian intervention.¹² These commentators argue that the past¹³ and present¹⁴ failures of the Charter's collective

W.D. Verwey, *Humanitarian Intervention Under International Law*, 32 *NETHERLANDS INT'L L. REV.* 357 (1985). *But see infra* note 12 (listing authors who believe humanitarian intervention should be legal).

8. *See, e.g.*, BROWNLIE, *INTERNATIONAL LAW*, *supra* note 5.

9. *See, e.g.*, Schachter, *supra* note 7, at 1629.

10. *Id.*

11. U.N. CHARTER ch. VII. Article 39, which begins chapter VII, states that "[t]he Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." U.N. CHARTER art. 39.

12. Richard B. Lillich, *Humanitarian Intervention: A Reply to Ian Brownlie and a Plea for Constructive Alternatives*, in *LAW AND CIVIL WAR IN THE MODERN WORLD* 229 (John N. Moore ed., 1974) [hereinafter Lillich, *A Reply*]. The authors who support the legality of humanitarian intervention include TESÓN, *supra* note 5; Michael J. Bazylar, *Reexamining the Doctrine of Humanitarian Intervention in Light of the Atrocities in Kampuchea and Ethiopia*, 23 *STAN. J. INT'L L.* 547 (1987); Jean-Pierre L. Fonteyne, *The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity Under the U.N. Charter*, 4 *CAL. W. INT'L L.J.* 203 (1973); Michael J. Levitin, *The Law of Force and the Force of Law: Grenada, the Falklands, and Humanitarian Intervention*, 27 *HARV. INT'L L.J.* 621 (1986); Richard B. Lillich, *Forcible Self-Help By States To Protect Human Rights*, 53 *IOWA L. REV.* 325 (1967) [hereinafter Lillich, *Self-Help*]; W. Michael Reisman, *Coercion and Self-Determination: Construing Charter Article 2(4)*, 78 *AM. J. INT'L L.* 642 (1984); R. George Wright, *A Contemporary Theory of Humanitarian Intervention*, 4 *FLA. INT'L L.J.* 435 (1989). *But see supra* note 7 (listing some authors who argue that humanitarian intervention should be illegal).

13. *See* Fonteyne, *supra* note 12, at 237. It is clear that the collective security measures of the Charter have often failed to prevent serious abuses. *See id.* Sadly, it is often

security provisions to prevent egregious human rights abuses clearly mandate the legalization of humanitarian intervention.¹⁵ For example, in current ethnic fighting in the former Yugoslavia, Serbians are engaging in an "ethnic cleansing" campaign to drive out all Muslims and Croats from various areas in Bosnia and Herzegovina.¹⁶ Moreover, reports from the area describe Serbians moving Croatian and Muslim refugees into concentration camps, evoking images of the Nazis' camps in World War II, where people are killed, beaten, and starved.¹⁷ In Somalia, during nationwide drought and famine, warring factions engaged in a civil war have pushed farmers off their land so that the farmers are unable to plant their crops. It is estimated that one-third of Somalia's population may die without humanitarian relief,¹⁸ and more than 100,000 people have already died.¹⁹ In the Sudan, a push by the government to spread Islam throughout the country has led to rebellion and civil war.²⁰ The war has already taken the lives of over 500,000 Sudanese, from both famine and warfare.²¹ In Iraq, Kurds have discovered mass graves, torture chambers, and elaborate prison systems that document the egregious human

those extreme cases where the most fundamental human rights are massively threatened, that the United Nations and the regional organizations, paralyzed by Major Power disagreements and the reluctance of the New States to accept any infringement upon the sacrosanct principles of sovereign independence and nonintervention in a setting lacking colonial and para-colonial aspects, have been unable or unwilling to take any significant measures Biafra, Indonesia, Sudan, Burundi, Bangladesh, and more recently, Uganda are but the most recent bloody examples of the unfortunate passivity and ineffectiveness of the international organizations.

Id. (citations omitted).

14. See, e.g., Patrick E. Tyler, *U.N. Chief's Dispute With Council Boils Over*, N.Y. TIMES, Aug. 3, 1992, at A1.

15. See, e.g., Lillich, *A Reply*, *supra* note 12.

16. See John F. Burns, *Serbs' Campaign for Ethnic Purity Divides Up a Busload of Orphans*, N.Y. TIMES, Aug. 3, 1992, at A1.

17. See Stephen Engelberg, *Bosnians Provide Accounts Of Abuse in Serbian Camps*, N.Y. TIMES, Aug. 4, 1992, at A1.

18. See Jane Perlez, *Deaths in Somalia Outpace Delivery of Food*, N.Y. TIMES, July 19, 1992, at A1.

19. See Jeffrey Bartholet, *The Road to Hell*, NEWSWEEK, Sept. 21, 1992, at 52. The United Nations belatedly has begun to send in troops to protect the relief supplies reaching Somalia. *Id.* at 53. Looting, by armed gunmen, of previous supplies destined for those in need prevented proper distribution. *Id.*

20. See Chris Hedges, *Sudan's Strife Promises to Outlive Rebellion*, N.Y. TIMES, July 19, 1992, § 4 (Week in Review), at 3.

21. *Id.*

rights violations perpetrated by Iraqi President Saddam Hussein's government.²²

Commentators support their arguments for or against the legality of humanitarian intervention through interpretation of the U.N. Charter and state practice.²³ When interpreting the U.N. Charter, scholars incorporate the many resolutions that the United Nations has passed since 1945 both supporting²⁴ and not supporting²⁵ the legalization of humanitarian intervention. Commentators both for and against the legalization of humanitarian intervention find support for their arguments in the "state practice" doctrine,²⁶ whereby nations' actions le-

22. Chris Hedges, *Kurds Unearthing New Evidence of Iraqi Killings*, N.Y. TIMES, Dec. 7, 1991, at A1.

23. See, e.g., TESÓN, *supra* note 5, at 129.

24. *Id.* at 128-29; see, e.g., *Convention on the Elimination of All Forms of Discrimination Against Women*, G.A. Res. 34/180, U.N. GAOR 3d Comm., 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/34/830 (1979) (declaring equality of women and men); *International Convention on the Elimination of All Forms of Racial Discrimination*, Mar. 12, 1969, 660 U.N.T.S. 195 (seeking to end government sponsored practice of racial discrimination); *International Conference on Human Rights* (the "Proclamation of Teheran"), 1968 U.N.Y.B. 538, 539 (declaring that economic development cannot come about without protection of human rights); *International Covenant on Economic, Social and Cultural Rights*, G.A. Res. 2200, U.N. GAOR 3d Comm., 21st Sess., 1496th plen. mtg. at 49, U.N. Doc. A/6316 (1966) (recognizing the right to self-determination as a fundamental right); *Convention on the Prevention and Punishment of the Crime of Genocide*, Jan. 12, 1951, 78 U.N.T.S. 277 (outlawing all practices which intend to destroy a specific national, ethnic, racial or religious group); *Universal Declaration on Human Rights*, G.A. Res. 217A, 3(1), U.N. GAOR Res. 71, U.N. Doc. A/810 (1948) (calling on all states to recognize and affirm general human rights for all peoples without limitation). For an overview of the U.N. responses to the protection of human rights, see LOUIS B. SOHN & THOMAS B. BUERGENTHAL, *INTERNATIONAL PROTECTION OF HUMAN RIGHTS* (1973).

25. See, e.g., *The Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1970), reprinted in 65 AM. J. INT'L L. 243 (1971). This document states that "[n]o state or group of states has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other state." 65 AM. J. INT'L L. at 248; *The 1974 U.N. Definition of Aggression*, G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, at 142, U.N. Doc. A/9631 (1974), reprinted in 69 AM. J. INT'L L. 480 (1975). This document defines "aggression" as "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State," *id.* art. 1, 69 AM. J. INT'L L. at 481, and then goes on to state that "[n]o consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression." *Id.* art. 5(1), 69 AM. J. INT'L L. at 482.

26. See *infra* notes 113-27 and accompanying text (discussing authors' views on how "state practice" does not support the legality of humanitarian intervention); see

gitimize similar actions taken in the future by other nations.²⁷ The International Court of Justice has not directly addressed the issue of humanitarian intervention.²⁸

This Note argues that the international community should relax prohibitions against unilateral humanitarian action until the international collective security measures of the U.N. Charter designed to prevent egregious human rights abuses are effective. Because modern technology has significantly increased the ability to discern pretextual actions from altruistic actions, the potential abuse of unilateral humanitarian intervention is minimized.²⁹ While the meaning of the word "intervention" in itself is subject to debate, this Note will consider only military intervention.³⁰ Part I of this Note discusses the historical background of humanitarian intervention. Part II first analyzes the arguments against legalization of humanitarian intervention, based on the U.N. Charter and state practice. Part II then analyzes the arguments for legalization and explains how the U.N. Charter and state practice can be read to mandate legality. Part III argues that the legalization of unilateral humanitarian intervention, within limits, would not create

infra notes 153-61 and accompanying text (discussing authors' views on how "state practice" supports the legality of humanitarian intervention).

27. See *infra* notes 65-95 and accompanying text (discussing definition and example of "state practice").

28. Although the International Court of Justice has not directly addressed the issue of humanitarian intervention, certain decisions do reflect, to some degree, on the value of human rights and humanitarian intervention. These decisions are inconclusive as to the legality of the doctrine. See *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, Merits, 1986 I.C.J. 4 (June 27); *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1980 I.C.J. 3 (May 24); *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, 1971 I.C.J. 16 (June 21); *Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain)*, 1970 I.C.J. 3 (Feb. 5) (second phase); *South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.)*, 1966 I.C.J. 6 (July 18) (second phase); *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, 1951 I.C.J. 15 (May 28). For a review of the above cases, see Nigel S. Rodley, *Human Rights and Humanitarian Intervention: The Case Law of the World Court*, 38 INT'L & COMP. L.Q. 321 (1989).

29. See *infra* notes 165-76 (discussing how technology can overcome inability to discern true events in other states).

30. Verwey, *supra* note 7, at 364 (quoting J.L. BRIERLY, *THE LAW OF NATIONS* 402 (1963)). Intervention can refer to "almost any acts of interference by one State in the affairs of another." *Id.* For a discussion of the definitions of "intervention" and "humanitarian intervention" see Verwey, *supra* note 7.

incentives for the doctrine's massive abuse as was once feared. This Note concludes that the legalization of limited unilateral humanitarian intervention would effectively balance human rights and legitimate state sovereignty, while maintaining international stability.

I. *THE HISTORY OF HUMANITARIAN INTERVENTION: LEGAL UNTIL THE U.N. CHARTER*

Humanitarian intervention is difficult to define with precision.³¹ Most authors, though, adhere to a traditional definition, defining humanitarian intervention as an action to prevent a state's denial of fundamental rights to, and persecution of, its own citizens in a way that "shock[s] the conscience of mankind."³² The theory of humanitarian intervention has undergone various stages of development. In the 17th century, Hugo Grotius first expounded a theory of humanitarian intervention.³³ He believed that while rulers ordinarily could deal with their citizenry unimpeded, when the ruler terribly abused the citizens, others have a right to try to prevent the mistreatment.³⁴ In the latter half of the 19th and early 20th centuries, humanitarian intervention became widely accepted as almost an absolute right of a state.³⁵ The U.N. Charter, though, outlawed all resort to military force, including humanitarian intervention.³⁶ Identification of the factors which legitimize state practice subsequent to the ratification of the Charter is difficult because interpretations of the same events vary considerably and arguments have been made supporting both the illegality and the legality of humanitarian intervention.

31. See BROWNLIE, *INTERNATIONAL LAW*, *supra* note 5 and accompanying text; Franck & Rodley, *supra* note 5 and accompanying text.

32. OPPENHEIM, *supra* note 5, at 312; *see supra* note 5 (discussing various definitions of humanitarian intervention).

33. HUGO GROTIUS, *DE JURE BELLI ESTI PACIS* 288 (Whewell trans., 1853).

34. *Id.*

35. Fonteyne, *supra* note 12, at 235.

36. U.N. CHARTER art. 2, ¶ 4. Article 2(4) of the Charter provides that "all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." *See generally* BROWNLIE, *INTERNATIONAL LAW*, *supra* note 5.

A. *Grotius: The Origin of Humanitarian Intervention*

Early recognition of the doctrine of humanitarian intervention is widely attributed to the works of the 17th century Dutch author Hugo Grotius,³⁷ who is often called the "father of international law."³⁸ Grotius propounded a theory that when tyrants mistreat their subjects, and the subjects cannot defend themselves, others outside the state may take action to defend those oppressed subjects.³⁹ The theory flowed from a presumption that while citizens had no legal right to take up arms against their government,⁴⁰ nothing prevented others from using force against the oppressive government for the benefit of those citizens.⁴¹

Grotius employed a theory analogous to modern agency theory, whereby an action is illegal because the individual lacks standing to assert a legal right.⁴² An example of such an agency theory is illustrated in the guardian/minor relationship: the minor cannot legally contract or sue, but the minor's guardian can contract or sue on the minor's behalf.⁴³ Therefore, although the oppressed citizens (the minor) could not attack the government, a different sovereign (the guardian) could do so for the oppressed citizens. Thus, Grotius believed that in certain instances, humanitarian intervention was per-

37. OPPENHEIM, *supra* note 5, at 312. "Humanitarian intervention derives from the teachings of Grotius." J.D. van der Vyver, *Statehood in International Law*, 5 EMORY INT'L L. REV. 9, 76 n.323 (1991).

38. RICHARD FALK ET AL., *INTERNATIONAL LAW: A CONTEMPORARY PERSPECTIVE* 7 (1985).

39. GROTIUS, *supra* note 33, at 288. "If a tyrant . . . practises atrocities towards his subjects, which no just man can approve, the right of human social connexion is not cut off in such a case . . . [I]t would not follow that others may not take up arms for them." *Id.*

40. *Id.* Originally it was believed that despite any governmental action, citizens had no authority to seek to overthrow the existing government. *Id.* Grotius doubted this theory. *Id.*

41. *Id.* "[I]f we should grant that subjects cannot rightly take up arms even in extreme necessity, (which, we have seen, has been doubted even by those whose purpose was to defend the royal power,) it would not follow that others may not take up arms for them." *Id.*

42. *Id.* "For when the impediment which exists to an action is in the person, not in the thing itself; in such cases, what is not lawful to one person may be lawful to another for him, if it be a case in which one can help another." *Id.*

43. *Id.* "Thus for a ward or minor, who is not capable of legal acts, the guardian or trustee sustains the suit; and for an absent person, an agent even without a special commission." *Id.*

missible.⁴⁴

Grotius did recognize that possible abuses could occur if humanitarian intervention were legal.⁴⁵ He argued, though, that states could invoke any doctrine to use force as a mere pretext for that use of force.⁴⁶ Thus, he concluded that the possible abuses do not necessitate the illegality of humanitarian intervention.⁴⁷

B. *The Pre-Charter Era: Humanitarian Intervention Was Legal*

The doctrine of humanitarian intervention following Grotius was largely a theoretical argument.⁴⁸ Specific invocation of the doctrine of humanitarian intervention by an intervening state arose mostly in the latter half of the 19th century.⁴⁹ However, the first example of state practice when the doctrine of humanitarian intervention was used to justify military force occurred in 1829, when France, Britain, and Russia militarily enforced the 1827 Treaty of London in order to prevent massive bloodshed in Greece, then under Ottoman occupation.⁵⁰ France intervened militarily in Syria in 1860 to protect the Christian population from slaughter at the hands of the Ottoman empire.⁵¹ The French intervention is considered a valid precedent for legalizing humanitarian intervention even by those opposed to it.⁵²

44. *Id.*

45. *Id.* "[T]he desire to appropriate another's possessions often uses such a pretext as this: but that which is used by bad men does not necessarily therefore cease to be right. Pirates use navigation, but navigation is not therefore unlawful. Robbers use weapons, but weapons are not therefore unlawful." *Id.*

46. *Id.*

47. *Id.*

48. See, e.g., Fonteyne, *supra* note 12, at 214; Bazylar, *supra* note 12, at 571-72.

49. Fonteyne, *supra* note 12, at 206. "[I]t seems that the institution of humanitarian intervention is in fact largely a creation of the latter part of the 19th century. This is certainly true so far as State practice *explicitly* referring to this justification is concerned." *Id.*

50. Thomas E. Behuniak, *The Law of Unilateral Humanitarian Intervention by Armed Force: A Legal Survey*, 79 MIL. L. REV. 157, 160 (1978) (citing M. GANJI, PROTECTION OF HUMAN RIGHTS (1962)). "[I]n the 1827 Treaty of London the Major Powers themselves indicated that their action was dictated 'no less by sentiments of humanity, than by interests for the tranquility of Europe;' thus invoking, for the first time in history, humanitarian concern as a justification for intervention." Fonteyne, *supra* note 12, at 208 n.15 (citing GANJI, *supra*).

51. See generally RONZITTI, *supra* note 5, at 90 n.19.

52. See, e.g., BROWNLIE, INTERNATIONAL LAW, *supra* note 5, at 339-40.

Another relevant example of state practice during this era occurred in 1912, when Greece, Bulgaria, and Serbia intervened in Macedonia to end mistreatment of Christians, also by the Ottoman empire.⁵³ These and other state practices⁵⁴ led some authors to conclude that prior to the drafting of the U.N. Charter, customary international law, through state practice and in the opinion of leading scholars, unquestionably recognized the legality of humanitarian intervention.⁵⁵

C. *The U.N. Charter's Effect on Humanitarian Intervention*

The U.N. Charter fundamentally changed international law by outlawing almost all unilateral resort to the use of

53. See generally RONZITTI, *supra* note 5, at 91.

54. See generally Behuniak, *supra* note 50, at 161-62. The other examples of humanitarian intervention during this period include the intervention in the island of Crete (1866-68) and the intervention in Bosnia, Herzegovina, and Bulgaria (1876-78). *Id.* Some authors proffer that these are valid precedents for the legality of humanitarian intervention while others believe that these examples are of doubtful significance, for a variety of reasons, to support its legality. Compare Fonteyne, *supra* note 12 with BROWNIE, *INTERNATIONAL LAW*, *supra* note 5, at 339-41 and RONZITTI, *supra* note 5, at 90-91.

55. Fonteyne, *supra* note 12, at 235. Professor Fonteyne's in-depth analysis of the pre-World War II writings and state practices of humanitarian intervention led him to conclude that humanitarian intervention was legal before the U.N. Charter. *Id.*

[W]hile divergences certainly existed as to the *circumstances* in which resort could be had to the institution of humanitarian intervention, as well as to the *manner* in which such operations were to be conducted, the *principle* itself was widely, if not unanimously, accepted as an integral part of customary international law.

Id. He further noted that the examples of humanitarian intervention are admittedly few, but that there is no absolute number at which an action is accepted as legalized by state practice. *Id.* at 232-33. Also, due to the lack of structure in international law, leading scholars' and authors' opinions should be given significant weight. *Id.*

It is conceded that the precedents are not particularly numerous, but the extent of State practice necessary to create a rule of customary international law is a debatable question. That they are actually so scarce should not come as a surprise In addition, . . . [t]he opinions of the leading scholars, especially in an essentially non-institutionalized structure such as that of international law, have a significant impact upon the development of the legal norms of the system

Id. See Behuniak, *supra* note 50, at 166 (citing Mandelstam, *The Protection of Minorities*, I. RECUEIL DES COURS 367, 391 (1923)) ("By the turn of the 20th Century, the principle of unilateral armed humanitarian intervention had won wide acceptance over the rigid doctrine of nonintervention."); Richard B. Lillich, *Intervention to Protect Human Rights*, 15 MCGILL L.J. 205, 210 (1969) (stating that doctrine was "so clearly established under customary international law that only its limits and not its existence is subject to debate").

force.⁵⁶ Unilateral humanitarian intervention became illegal under the Charter because Article 2(4)⁵⁷ banned all uses of military force, except actions taken in self-defense⁵⁸ and actions authorized by the Security Council.⁵⁹ The United Nations recognizes state sovereignty, and the Security Council preserves peace, security, and human rights through collective security.⁶⁰

The legislative history of the Charter shows an intent by the drafters to render illegal all excuses for resorting to military force, except those explicitly stated in the Charter.⁶¹ This legislative intent is generally understood to forbid self-help and military reprisals.⁶² Article 2(4)'s ban on all force thus covers unilateral humanitarian intervention.⁶³ The provisions outlawing all resort to military force except when approved by the Security Council are considered the most important provisions of the Charter and have been unanimously reaffirmed numerous times.⁶⁴ Therefore, the prevailing view finds that the underlying purposes, as well as the express provisions of the Charter, render unilateral humanitarian intervention illegal.

56. Fonteyne, *supra* note 12, at 243-44. The Charter is "completely divorced from the pre-existing body of rules under customary international law." *Id.*

57. U.N. CHARTER art. 2, ¶ 4. Article 2(4) of the Charter provides 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 United Nations." *Id.*

58. U.N. CHARTER art. 51. Article 51 of the Charter provides that "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations." *Id.*

59. U.N. CHARTER ch. VII. Chapter VII of the Charter, *see supra* note 11, reserves to the Security Council the right to use military force against an aggressor. *See, e.g.*, Schachter, *supra* note 7.

60. Schachter, *supra* note 7, at 1620; BROWNIE, INTERNATIONAL LAW, *supra* note 5, at 333-34. "Chapter VII [of the Charter] conferred on the Security Council a broad competence to act on behalf of the international community with respect to varying characterizations of unlawful unilateral resorts to force: threats to the peace, breaches of the peace and acts of aggression." Reisman, *supra* note 12, at 642.

61. *See, e.g.*, BROWNIE, INTERNATIONAL LAW, *supra* note 5, at 264-72.

62. *Id.* at 265.

63. Verwey, *supra* note 7, at 377. The Charter bans the "use of force for any particular purpose, including a humanitarian one." *Id.*

64. Schachter, *supra* note 7, at 1620.

D. *State Practice*

Before international rule-making bodies such as the United Nations developed, international law consisted mainly of customary rules.⁶⁵ These customary rules derive from actions by states, called "state practice."⁶⁶ Over time, "state practice" becomes the norm and thus, legitimate.⁶⁷ When interpreting a chain of state practices, however, it is sometimes difficult to discern the true motives behind the state's action. Discerning these underlying motives is important because they determine the legitimacy of state practice, and thus legal action in the international community.⁶⁸

The Indian intervention in East Pakistan in 1971 ("the India case") is a classic example of the problems associated with interpreting state practice and ascertaining whether such practice supports the legitimacy of humanitarian intervention.⁶⁹ The birth of Pakistan came about after the separation of India in 1947.⁷⁰ Pakistan emerged out of two distinct land masses, separated not only by hundreds of miles, but also by ethnic, linguistic, and cultural differences.⁷¹ Only Islam and the hatred of India bound the country together.⁷²

In December 1970, an East Pakistani secessionist group, the Awami League, won a majority of seats in the Pakistan Assembly.⁷³ The President of Pakistan, part of the controlling West Pakistan regime, proposed to hold a meeting at which the

65. STARKE, *supra* note 3, at 34.

66. SHAW, *supra* note 1, at 70. "It is how states behave in practice that forms the basis of customary law . . ." *Id.*

67. *Id.* at 60. "[The rules] are not . . . written down or codified, [but] survive ultimately because of what can be called an aura of historical legitimacy." *Id.*

68. *Id.* at 61. "The existence of customary rules can be deduced from the practice and behaviour of states and this is where the problems begin. How can one tell when a particular line of action adopted by a state reflects a legal rule or is merely prompted by, for example, courtesy?" *Id.*

69. Compare TESÓN, *supra* note 5, at 185 ("The case . . . is an almost perfect example of humanitarian intervention.") with Franck & Rodley, *supra* note 5, at 276 ("[T]he Bangladesh case . . . does not constitute the basis for a definable, workable, or desirable new rule of law which, in the future, would make certain kinds of unilateral military interventions permissible.").

70. See, e.g., James A. Michener, *A Lament for Pakistan*, N.Y. TIMES, Jan. 9, 1972, § 6 (Magazine) at 11, 39.

71. *Id.* at 39, 43-46.

72. *Id.*

73. Behuniak, *supra* note 50, at 175.

Assembly would draft a new Pakistani constitution.⁷⁴ The President reneged on this promise and indefinitely postponed the meeting.⁷⁵ The resulting backlash in East Pakistan materialized in the form of protests, riots, and demonstrations by Bengalis, who were the inhabitants of the area and supporters of the Awami League.⁷⁶

Soon after Awami League supporters gained control of East Pakistan,⁷⁷ the Pakistani Army attacked Dacca, the capital of East Pakistan, without warning.⁷⁸ The Pakistani army gained control of the capital, used military force against many unarmed civilians,⁷⁹ outlawed the Awami League, and arrested many of the Awami League leaders.⁸⁰ Following the deaths of approximately 10,000 Bengalis, approximately nine to ten million Bengali refugees flowed across the border into India.⁸¹ With this massive influx of refugees came disease and scarcities of food and housing, causing severe hardship on India's economic and political security.⁸² Simultaneously, Pakistan was violating minimal standards of human rights by killing massive numbers of Bengali civilians, destroying villages, committing rape, torture and murder, and executing individuals without trials.⁸³

Following a Pakistani attack on an Indian air base located miles within the Indian border, India militarily intervened in

74. *Id.*

75. *Pakistan Postpones Assembly in Conflict of Major Parties*, N.Y. TIMES, Mar. 2, 1971, at A1.

76. *Dacca Disorders Bring a Curfew*, N.Y. TIMES, Mar. 3, 1971, at A7.

77. *Tillman Durdin, Army's Rule Cut in East Pakistan*, N.Y. TIMES, Mar. 10, 1971, at A1.

78. Ved P. Nanda, *A Critique of the United Nations Inaction in the Bangladesh Crisis*, 49 DENVER L.J. 53, 55 (1972).

79. *Both Sides Claim Gains in Pakistan; All News Banned*, N.Y. TIMES, Mar. 29, 1971, at A1; *Leader of Rebels in East Pakistan Reported Seized*, N.Y. TIMES, Mar. 27, 1971, at A1; *Pakistan Reports Opposition in East Has Been Crushed*, N.Y. TIMES, Mar. 30, 1971, at A1; Sydney H. Schanberg, *Heavy Fighting, Raids Reported in East Pakistan*, N.Y. TIMES, Mar. 28, 1971, at A1.

80. See generally Behuniak, *supra* note 50, at 175.

81. See generally *id.*; RONZITTI, *supra* note 5, at 95.

82. *Bengali Cholera Grows; India Asks World Aid*, N.Y. TIMES, June 1, 1971, at A14; Sydney H. Schanberg, *Refugee Children in India: 'Thousands' Die*, N.Y. TIMES, Sept. 30, 1971, at A10; Benjamin Welles, *Plan To Woo Back Bengalis Weighed*, N.Y. TIMES, Nov. 21, 1971, at A7.

83. *East Pakistan Staff Study*, in 8 REVIEW 23, 31 (1972).

East Pakistan.⁸⁴ Within a few days, the Pakistani army surrendered, political prisoners were released, and the extreme human rights violations stopped.⁸⁵ Also, the new country of Bangladesh emerged out of East Pakistan.

Before India intervened, however, the Indian government appealed to foreign governments and to the United Nations to remedy the situation.⁸⁶ Foreign governments and the United Nations failed to respond to India's appeals for aid. India's use of military force followed months of inaction by the international community.⁸⁷ The United Nations failed to prevent or even address the human rights abuses taking place in East Pakistan.⁸⁸

Because humanitarian intervention is illegal, states that do act with predominantly humanitarian motives are forced to profess pretextual motivations to the international community.⁸⁹ The defenses India proffered in justifying its actions before the United Nations changed over time. The Indian government initially maintained that humanitarian motives justified the use of force.⁹⁰ Ultimately, however, India did not rely

84. See generally Behuniak, *supra* note 50, at 176.

85. *Id.*

86. Verwey, *supra* note 7, at 401 n.210.

87. Behuniak, *supra* note 50, at 176.

88. TESÓN, *supra* note 5, at 185. The U.N. response to the crises was resoundingly lambasted. See *id.* ("Writers have unanimously criticized the total inability of the United Nations to even address, let alone stop, the massacres, and to prevent the Indo-Pakistani war."); Behuniak, *supra* note 50, at 176 ("During the crisis, the U.N. and its peacekeeping machinery floundered badly, unable to take any effective action to bring to an end the gross violations of human rights in East Pakistan."); Nanda, *supra* note 78, at 65 ("The United Nations failed to prevent the crisis. It failed to deter the Pakistani regime from using excessive [sic] force in East Pakistan. It failed to stop the war. Above all, it failed even to attempt to persuade or coerce the parties to arrive at a political settlement.").

89. See RONZITTI, *supra* note 5, at 108-09.

90. See, e.g., Franck & Rodley, *supra* note 5, at 276 (citing U.N. Doc. S/PV. 1606, at 86 (1971)). "[W]e have . . . absolutely nothing but the purest of motives and the purest of intentions: to rescue the people of East Bengal from what they are suffering." *Id.* Furthermore, the Indian representative in the General Assembly also declared

[T]he reaction of the people of India to the massive killing of unarmed people by military force has been intense and sustained There is intense sorrow and shock and horror at the reign of terror that has been let loose. The common bonds of race, religion, culture, history and geography of the people of East Pakistan with the neighbouring Indian state of West Bengal contribute powerfully to the feelings of the Indian people.

on humanitarian intervention.⁹¹ Rather, India proffered self-defense under Article 51 of the Charter to justify its use of military force.⁹² This type of legal gamesmanship, where a state professes to conform its actions with established precedent despite the state's true motives has, in part, led to the current debate over whether humanitarian intervention should be legalized. In addition to India, both Tanzania⁹³ and Vietnam⁹⁴ failed to invoke humanitarian intervention when there were obvious egregious human rights violations occurring in the states against which they used military force.⁹⁵

II. THE CURRENT DISPUTE OVER HUMANITARIAN INTERVENTION

Although unilateral humanitarian intervention is currently considered illegal in international law because the accepted interpretation of the U.N. Charter requires such illegality,⁹⁶ a growing number of authors would have humanitarian intervention legalized.⁹⁷ These commentators believe that a revised interpretation of the Charter would establish the legality of humanitarian intervention. Such an interpretation focuses on an understanding of the conditions under which the U.N. Charter was drafted and evaluates the subsequent history of the United

TESÓN, *supra* note 5, at 186, n.187 (citing 26 U.N. GAOR, 2002d Sess., at 14, U.N. Doc. A/PV 2002 (1971)).

91. Behuniak, *supra* note 50, at 176-77; Detlev F. Vagts, *International Law Under Time Pressure: Grading the Grenada Take-Home Examination*, 78 AM. J. INT'L L. 169, 170 (1984) ("It is significant that India did not justify its operations in Bangladesh . . . as a humanitarian intervention but as a response to aggression.").

92. *See, e.g.*, U.N. SCOR, 26th Sess., 1606th mtg., at 15, *cited in* Michael Akehurst, *Humanitarian Intervention*, in *INTERVENTION IN WORLD POLITICS* 95, 96 n.12 (H. Bull ed., 1984).

93. *See infra* notes 121-27 and accompanying text (outlining use of force by Tanzania in Uganda against Idi Amin's regime).

94. *See, e.g.*, RONZITTI, *supra* note 5, at 98-101. Soon after the Khmer Rouge took power in Kampuchea in 1975, it started to systematically torture and murder massive numbers of citizens. *Id.* at 98. Over 2,000,000 people died within three years. *Id.* In 1978, Vietnam invaded Kampuchea and the Khmer Rouge government was ousted. *Id.* at 98-99. The government of Vietnam declared that their reason for intervening was self-defense, in response to various border clashes between the two states. *Id.* at 99.

95. *See* RONZITTI, *supra* note 5, at 109.

96. *See supra* note 7 (listing authors who argue that humanitarian intervention should remain illegal).

97. *See supra* note 12 (listing authors who argue that humanitarian intervention should be legal).

Nations.⁹⁸ Interpretations of state practice, including the India case above, may support both the illegality and the legality of humanitarian intervention.

A. Humanitarian Intervention Is Currently Illegal

The overriding concern of those commentators who prefer that humanitarian intervention remain illegal is the fear of potential abuse by stronger states seeking political gain to the detriment of weaker states.⁹⁹ These commentators argue that states which desire to engage in war could too easily invoke the doctrine as a pretext for unlawful, selfish, or political goals.¹⁰⁰ Arguably, the most blatant abuse of the doctrine of humanitarian intervention was perpetrated by Hitler, who invoked the doctrine to justify using military force in Czechoslovakia in 1938, disguising his motive as a protest against the extreme mistreatment of ethnic Germans in that country.¹⁰¹ Also, many weaker states would be unable to employ humanitarian intervention due to their inability to prevent the human rights abuses.¹⁰² Thus, commentators who support the illegality of humanitarian intervention state that a sense of fairness supports its illegality.¹⁰³ Because only stronger states could em-

98. See *supra* note 24 (discussing U.N. resolutions passed since 1945 supporting legality of humanitarian intervention).

99. See, e.g., Jost Delbrück, *A Fresh Look at Humanitarian Intervention Under the Authority of the United Nations*, 67 *IND. L.J.* 887, 891 (1992) (“[T]he door to purely arbitrary intervention, that is, acts of aggression in disguise, would be wide open.”); see also Schachter, *supra* note 7, at 1629 (“The reluctance of governments to legitimize foreign invasion in the interest of humanitarianism is understandable in the light of past abuses by powerful states.”).

100. Franck & Rodley, *supra* note 5, at 284.

101. See *id.* Professors Franck and Rodley concluded that “[some past invocations of humanitarian intervention] are so clearly bogus as to be worth examining only to indicate the abuse to which the asserted right is so commonly subject.” *Id.*

102. ASRAT, *supra* note 4, at 186. Professor Asrat argues that because strong states would probably not suffer intervention, the doctrine would not be uniformly enforced, and thus humanitarian intervention should remain illegal. *Id.* “[S]uch intervention would normally be the *de facto* prerogative of States possessing adequate human and material resources; its exercise would necessarily be discretionary, and most probably would not be undertaken against powerful States. These factors would make it discriminatory and hence unsatisfactory as a legally sanctioned remedy.” *Id.* (citations omitted). Professor Asrat admits that “[d]espite these defects, however, were a forcible humanitarian intervention to be undertaken in the proper instances, the breach of the target State’s territorial integrity would probably be considered to deserve extenuation.” *Id.*

103. *Id.*

ploy humanitarian intervention, many commentators argue that it should remain illegal.¹⁰⁴

1. The Traditional Interpretation of the Charter Renders Humanitarian Intervention Illegal

When the U.N. Charter was enacted, Article 2(4)¹⁰⁵ banned the use of force for any reason, except in self-defense¹⁰⁶ and when authorized by the Security Council.¹⁰⁷ Authors traditionally interpret this section as prohibiting humanitarian intervention.¹⁰⁸ The Charter's ban on the use of force was enacted to preserve territorial integrity and political independence.¹⁰⁹ The Charter's collective security measures were to ensure peace.¹¹⁰ Although humanitarian intervention was not expressly forbidden, the Charter effectively forbids its use through its general provisions regarding the use of force.¹¹¹ U.N. resolutions passed after the ratification of the Charter support the illegality of humanitarian intervention.¹¹²

2. Many Authors Argue That State Practice Does Not Legalize Humanitarian Intervention

Commentators advocating the illegality of humanitarian intervention argue that the military actions of the recent past, i.e. state practices, do not support the legalization of unilateral humanitarian intervention.¹¹³ These commentators argue that

104. See, e.g., BROWNLIE, *INTERNATIONAL LAW*, *supra* note 5, at 338-42; ASRAT, *supra* note 4, at 186.

105. U.N. CHARTER art. 2, ¶ 4. For the text of article 2(4), see *supra* note 57.

106. U.N. CHARTER art. 51. For the text of article 51, see *supra* note 58.

107. U.N. CHARTER ch. VII; see *supra* note 11 (stating that only Security Council can legally authorize force).

108. BROWNLIE, *INTERNATIONAL LAW*, *supra* note 5, at 342. "[I]t is extremely doubtful if [humanitarian] intervention has survived the . . . general prohibition of resort to force to be found in the United Nations Charter." *Id.* (citations omitted).

109. U.N. CHARTER art. 2, ¶ 4.

110. RONZITTI, *supra* note 5, at 92.

111. BROWNLIE, *INTERNATIONAL LAW*, *supra* note 5, at 342.

112. See *supra* note 25 (discussing the U.N. resolutions which support the illegality of humanitarian intervention). "[T]he . . . individual use of force has been superseded by the United Nations Charter and its emphasis upon collective state action through the Security Council." Bazylar, *supra* note 12, at 575.

113. Verwey, *supra* note 7. These actions include the 1975 Indonesian intervention in East Timor, the 1975 South African intervention in Angola, the 1978 Belgian intervention in Zaire, and the 1983 U.S. intervention in Grenada. For a review of the above, see *id.*

states that intervened in the past usually did so for their own political gain, not out of humanitarian motives.¹¹⁴ They also argue that there are no precedents for the validation of humanitarian intervention.¹¹⁵ In the past, when a state could have argued justifiably that it intervened for humanitarian reasons, it proffered more well-accepted doctrines, like self-defense.¹¹⁶

In evaluating state practice, commentators opposed to the legality of humanitarian intervention argue that the India case supports their viewpoint.¹¹⁷ They state that while humanitarian interests were involved, India clearly had ulterior, non-humanitarian motives.¹¹⁸ These ulterior motives included responding to the bombing of an Indian airport, relieving the economic strain on India caused by the millions of Bengali refugees, and dealing a political blow to its neighbor and rival, Pakistan.¹¹⁹ Thus, commentators argue that India acted more for political gain and self-interest than out of humanitarian concerns.¹²⁰

The Tanzania case is another example of how a state failed to invoke humanitarian intervention for its use of military force when it arguably could have.¹²¹ President Idi Amin's rule of Uganda from 1971 to 1979 was widely known as extremely brutal and repressive, and was compared with Hitler's rule of

114. See, e.g., Schachter, *supra* note 7, at 1629 ("States strong enough to intervene and sufficiently interested in doing so tend to have political motives.")

115. Franck & Rodley, *supra* note 5, at 290. Professors Franck and Rodley discussed numerous situations in which humanitarian intervention could have been invoked but was not. *Id.* These situations included when military force was employed but the intervening state proffered a different reason, and situations when intervention on humanitarian grounds was warranted, yet no state intervened militarily. *Id.* They concluded that "[a] 'right' so little exercised in circumstances where morality, if not law, most craves its application is rightly suspect." *Id.*

116. RONZITTI, *supra* note 5, at 108. When discussing examples of when states reasonably could have invoked humanitarian intervention to justify their use of military force, Mr. Ronzitti refers to, *inter alia*, India in 1971 and Tanzania in 1979 (the intervention in Uganda at the end of Idi Amin's regime). *Id.* He states that "these States took good care not to invoke the doctrine of humanitarian intervention and preferred to ground the lawfulness of their actions on sounder arguments." *Id.*

117. See, e.g., *id.*

118. Verwey, *supra* note 7, at 402. "[It is] clear that non-humanitarian motives also played a decisive role in the Indian action." *Id.*

119. *Id.*

120. *Id.*

121. See generally RONZITTI, *supra* note 5, at 102-06.

Germany and Stalin's rule of Russia as far as human rights were concerned.¹²² Neither the United Nations nor the Organization of African Unity took action to stop, prevent, or hinder Amin's repression.¹²³ In 1979, Tanzania invaded Uganda and overthrew Amin.¹²⁴ After the intervention, Tanzania did not seek to annex any Ugandan territory, install a puppet government, or seek to exert political influence over Uganda after the intervention.¹²⁵ Thus, it is argued that this use of military force is also a valid precedent of state practice to support the legality of humanitarian intervention.¹²⁶ However, Tanzania proffered that its use of force was in response to border clashes with Uganda, so that it took action in self-defense, not for humanitarian reasons.¹²⁷

*B. Many Commentators Argue That Limited Unilateral
Humanitarian Intervention Should Be Legal*

For a variety of reasons and in various ways, a contingent of authors argue that humanitarian intervention should be legal.¹²⁸ These authors argue that when a government commits egregious human rights abuses against its citizens, and when international organizations fail to prevent these abuses, a state should have a right of unilateral humanitarian intervention, within certain limits, to prevent those abuses.¹²⁹ Legal, moral, and practical justifications are offered in support of the legality of humanitarian intervention.¹³⁰ It is argued that the Charter and subsequent resolutions also support humanitarian intervention.¹³¹ Furthermore, commentators claim that the state practice that has developed since the inception of the Charter sufficiently supports the legalization of humanitarian intervention.¹³²

122. See Bazylar, *supra* note 12, at 590.

123. *Id.* at 591.

124. *Id.* at 590.

125. *Id.* at 591-92.

126. See generally *id.*

127. RONZITTI, *supra* note 5, at 103.

128. See *supra* note 12 (listing authors who advocate the legalization of the doctrine of humanitarian intervention).

129. See, e.g., Lillich, *Self-Help*, *supra* note 12.

130. See *infra* notes 133-43 and accompanying text.

131. See *infra* notes 144-52 and accompanying text.

132. See *infra* notes 153-61 and accompanying text.

1. Legal, Moral, and Practical Justifications for Legalizing Humanitarian Intervention

Some commentators argue that legal arguments support the legality of humanitarian intervention. It has been proffered that states that commit such egregious human rights violations lose their legitimacy under international law.¹³³ States' rights to exist derive not from any supposed international order, but rather from the duty of the government to protect the rights of the individual citizens.¹³⁴ A state forfeits its legitimacy when it commits human rights violations, and another state can legally intervene on behalf of the oppressed citizens.¹³⁵

These commentators are also concerned with the preservation of humanity, and value human life over adherence to legal principles.¹³⁶ According to these authors, basic humani-

133. TESÓN, *supra* note 5, at 15.

[B]ecause the ultimate justification of the existence of states is the protection and enforcement of the natural rights of the citizens, a government that engages in substantial violations of human rights betrays the very purpose for which it exists and so forfeits not only its domestic legitimacy, but its international legitimacy as well.

Id.; see Levitin, *supra* note 12, at 652 (arguing that governments which commit massive human rights abuses forfeit their legitimacy). The United Nations expelled the Serbian delegation from the seat previously held by Yugoslavia. See Paul Lewis, *U.N. Assembly Expels Belgrade Over Its Role in Bosnia Fighting*, N.Y. TIMES, Sept. 23, 1992, at A1. The decision was based in part on Serbia's refusal to make peace in the region and its policy of "ethnic cleansing." *Id.*

134. TESÓN, *supra* note 5, at 112. Mr. Tesón developed a theory based upon the social contract. *Id.* "States and governments exist because individuals have consented, or would ideally consent, to transfer some of their rights in order to make social cooperation possible." *Id.* Thus, there is no distinction between the rights of citizens of one state and the rights of foreigners; all people deserve protection where human rights are concerned, and therefore humanitarian intervention should be legal. *Id.* at 113-14.

135. See, e.g., *id.* at 15. In examining the United Nations' record on the protection of human rights, one author concluded that egregious or severe violations "are no longer essentially within the domestic jurisdiction of States, and therefore the principle of nonintervention is not applicable." Felix Ermacora, *Human Rights and Domestic Jurisdiction (Article 2, § 7 of the Charter)*, 124 RECUEIL DES COURS bk. II, 371, 436 (1968); see B. De Schutter, *Humanitarian Intervention: A United Nations Task*, 3 CAL. W. INT'L L.J. 26 (1972) ("Abuse of a generally recognized right can lead to its suppression and the removal of a state's immunity."); Levitin, *supra* note 12, at 652 (arguing that governments which commit massive human rights abuses forfeit their legitimacy).

136. Lillich, *Self-Help*, *supra* note 12, at 344. The doctrine of humanitarian intervention appeals to the average person's sense of morality and justice. *Id.* The doctrine "is the expression of a profound and innate sense of justice corresponding to

tarian sentiments support the view that no person can remain idle in the midst of government-sponsored slaughter.¹³⁷ Also, defensive wars to protect human rights are considered the only morally justifiable wars.¹³⁸

In addition, these authors recognize that in practice, the U.N. collective security measures usually fail to prevent the most egregious cases of human rights violations.¹³⁹ Numerous instances exist of the obvious failures of the U.N. collective security measures to provide the international security for which they were designed.¹⁴⁰ The most recent examples include the former Yugoslavia, Somalia, Sudan, and Iraq.¹⁴¹ Furthermore, not responding to extreme human rights violations causes dictators to believe that they can commit massive human rights

the natural feelings and reactions of the average person." *East Pakistan Staff Study*, *supra* note 83, at 60; see Lillich, *Self-Help*, *supra* note 12, at 344 ("Surely to require a state to sit back and watch the slaughter of innocent people in order to avoid violating blanket prohibitions against the use of force is to stress blackletter [law] at the expense of far more fundamental values.").

137. Arthur A. Leff, *Food for Biafrans*, N.Y. TIMES, Oct. 4, 1968, at A46. Professor Leff of Yale Law School has succinctly and eloquently summarized the position of many people who support the legalization of humanitarian intervention: "I don't much care about international law, Biafra or Nigeria. Babies are dying in Biafra . . . Forget all the blather about international law, sovereignty and self-determination, all that abstract garbage: babies are starving to death." *Id.*

138. TESÓN, *supra* note 5, at 247.

139. Fonteyne, *supra* note 12, at 237.

It is in those extreme cases where the most fundamental human rights are massively threatened, that the United Nations and the regional organizations, paralyzed by Major Power disagreements and the reluctance of the New States to accept any infringement upon the sacrosanct principles of sovereign independence and nonintervention in a setting lacking colonial and para-colonial aspects, have been unable or unwilling to take any significant measures.

Id. (citations omitted).

140. *Id.* at 237. "Biafra, Indonesia, Sudan, Burundi, Bangladesh, and more recently, Uganda are but the most recent bloody examples of the unfortunate passivity and ineffectiveness of the international organizations." *Id.* (citations omitted).

141. See *supra* notes 16-22 and accompanying text; see also Aryeh Neier, *Watching Rights*, NATION, Sept. 28, 1992, at 317 ("[T]he U.N. record . . . in Bosnia and Somalia . . . is disastrous. The U.N.'s priorities have been wrong and, especially in Somalia, its performance in the field has been execrable."); Shirley Hazzard, *System Failure: The Trouble With the U.N.*, NEW REPUBLIC, Sept. 21, 1992, at 16 (stating that, in reference to the lack of effective U.N. response to the current international crises, "the U.N. administration has shown itself, for all its greater funds and advantages, less prompt and enterprising than the Red Cross or the smallest voluntary agencies. The confused state of the numerous U.N. relief agencies has been the subject of scandal and concern for many years").

abuses with impunity.¹⁴² It was recognized very early in the U.N. era that the collective security measures of the Security Council might not be able to prevent serious tragedy, and that an individual state might retain the right to unilateral action.¹⁴³

2. Some Authors Argue That Charter Interpretation Legalizes Humanitarian Intervention

Authors interpret the Charter in various ways to support the argument that unilateral humanitarian intervention should be legal. One thesis is that unilateral humanitarian intervention supports the purposes of the U.N. Charter because the preservation of human rights is one of the Charter's primary goals.¹⁴⁴ Another thesis is that humanitarian intervention does not violate Article 2(4) of the Charter because an altruistic humanitarian intervention impairs neither the territorial integrity nor the political independence of the target state.¹⁴⁵ This is because an altruistic humanitarian intervention maintains the territorial boundaries of the target state.¹⁴⁶ If the government of the target state is overthrown, the political independence of the state is not impaired because the government forfeited its legitimacy.¹⁴⁷

Some authors state that in cases where U.N. approval of the use of military force is extremely difficult to obtain, humanitarian intervention should be legal.¹⁴⁸ This conditional approach would render humanitarian intervention illegal once

142. Bazylar, *supra* note 12, at 618-619.

143. P. JESSUP, *A MODERN LAW OF NATIONS* 170 (4th ed. 1952). Shortly after the ratification of the U.N. Charter, Professor Philip C. Jessup asserted that "[i]t would seem that the only possible argument against the substitution of collective measures under the Security Council for individual measures by a single state would be the inability of the international organization to act with the speed requisite to preserve life." *Id.*

144. TESÓN, *supra* note 5, at 131. "[T]he promotion of human rights is a main purpose of the United Nations. . . . [T]he use of force to remedy serious human rights deprivations, far from being 'against the purposes' of the U.N. Charter, serves one of its main purposes." *Id.*

145. *See id.*

146. *See id.*

147. *See id.*

148. *See, e.g.*, John Mackinlay & Jarat Chopra, *Second Generation Multinational Operations*, 15 WASH. Q. 113 (1992). Before the fall of the Soviet Union, the Security Council was bogged down in super power in-fighting. *Id.* The end of the cold war might change this, many critics say. *Id.* "The end of the Cold War marks the rebirth of the United Nations (UN) and the start of its second generation as an institution.

U.N. security measures function as they were intended.¹⁴⁹ In addition, another theory evaluates the legislative history of the U.N. Charter and concludes that because the drafters could have explicitly banned humanitarian intervention but did not do so, it remains legal.¹⁵⁰ Because law evolves over time, commentators argue that Article 2(4) should not be read without reference to the present political and technological situation.¹⁵¹ Lastly, it is proffered that the international community should affirmatively recognize an exception to Article 2(4) to allow for humanitarian intervention.¹⁵²

3. Some Authors Argue That State Practice Legalizes Humanitarian Intervention

It is argued that recent state practice supports the legalization of humanitarian intervention. Precedents do exist to support such a theory, these commentators argue.¹⁵³ These com-

Incapacitated for its first 40 years by a deeply divided Security Council, the UN is rediscovering its original mandate as it faces the demands of a new era." *Id.*

149. Lillich, *A Reply*, *supra* note 12, at 240. Preferring collective action to unilateral action, as most would agree is proper, Professor Lillich states that "[this approach] is preferable in that it clearly contemplates the gradual phasing out of the doctrine as the United Nations develops the capacity and the will to act in such situations." *Id.*

150. See Fonteyne, *supra* note 12, at 243-58.

151. Reisman, *supra* note 12, at 644. Recognizing that the framework for the politics of the international community changes over time, Professor Reisman argues that

[o]ne should not seek point-for-point conformity to a rule without constant regard for the policy or principle that animated its prescription, and with appropriate regard for the factual constellation in the minds of the drafters Article 2(4) . . . is premised on a political context and a technological environment that have been changing inexorably since the end of the 19th century.

Id.

152. Levitin, *supra* note 12, at 652. Professor Levitin assumes the position that the Charter does outlaw humanitarian intervention, but proffers that an exception for the doctrine should be drafted. *Id.* "International law ought [to] recognize an exception to article 2(4) and allow intervention for the specific and limited purpose of altering the conditions within a territory when the government of that territory is committing extensive violations of its peoples' minimum human rights." *Id.*

153. See, e.g., TESÓN, *supra* note 5, at 5-6. France recently took action which arguably satisfies the requirements of a minimal altruistic humanitarian intervention by sending French military troops into the Sarajevo airport in support of United Nations humanitarian relief efforts. William Pfaff, *Nations Must Lead When Collective Security Stalls*, *INT'L HERALD TRIB.*, July 11, 1992. The U.N. Security Council did not explicitly authorize the French use of military force, but France acted anyway. *Id.*

mentators cite, inter alia, the Congo case of 1964,¹⁵⁴ the India case of 1971,¹⁵⁵ and the Tanzania case of 1979.¹⁵⁶ In each of these cases, massive human rights atrocities were occurring and states intervened militarily, to prevent further abuses.

In the India case, the situation warranted humanitarian intervention, and India provided it.¹⁵⁷ The Pakistani military assaulted unarmed civilians and massive human rights violations continued unabated.¹⁵⁸ The U.N. collective security measures designed to prevent such events failed miserably.¹⁵⁹ Finally, India intervened and stopped the abuses, which would surely have continued without India's action.¹⁶⁰ Thus, India's intervention has been called "an almost perfect example of humanitarian intervention."¹⁶¹

III. LIMITED UNILATERAL HUMANITARIAN INTERVENTION SHOULD BE LEGAL

Humanitarian intervention should be legal but with limitations designed to protect against disingenuous invocations of the doctrine.¹⁶² Today's world should not tolerate massive

France had little immediate concrete gain, except perhaps increasing its stature in the world community. *Id.*

154. *See, e.g.*, Bazylar, *supra* note 12, at 587. In 1964, a rebel army in the Congo took foreigners from 18 nations hostage to aid their cause. *Id.* When compliance by the Congo government was not forthcoming, the rebels threatened to kill the hostages. *Id.* Belgian, U.S., and British forces combined in a military venture to rescue hostages, and did so in four days. *Id.* The Congo government approved this use of force, and the military forces departed immediately after the crisis was over. *Id.* Thus, it is argued that this use of military force is a valid precedent of state practice to support the legality of humanitarian intervention. *See generally id.*

155. *See supra* notes 69-92 and accompanying text (explaining the India case); *see also infra* notes 160 and 161 (explaining reasons how India case supports legality of humanitarian intervention).

156. *See supra* notes 121-27 and accompanying text (explaining the Tanzania case).

157. *See supra* notes 77-83 and accompanying text (describing human rights abuses taking place in East Pakistan).

158. *See id.*

159. *See supra* note 88 and accompanying text (describing the lack of effective U.N. response).

160. *See TESÓN, supra* note 5, at 185.

161. *Id.*

162. *See supra* note 12 (listing authors who argue that humanitarian intervention should be legal). Authors who support the legality of humanitarian intervention recognize that there must be limitations on this right. *See, e.g.*, Bazylar, *supra* note 12, at 597; Fonteyne, *supra* note 12, at 258; Lillich, *Self-Help, supra* note 12, at 345-46; John N. Moore, *The Control of Foreign Intervention in Internal Conflict*, 9 VA. J. INT'L L. 209, 264

human rights atrocities when, in contrast to previous eras, modern technology has enhanced the possibility of detecting, and therefore, preventing pretextual interventions.¹⁶³ When a state possesses the determination and the will to prevent egregious abuses from occurring, the doctrine of humanitarian intervention should permit such a state to intervene.¹⁶⁴ A world community purportedly committed to peaceful co-existence should not remain idle while a state murders and tortures its citizens.

Humanitarian intervention should be circumscribed to reduce incentives for the use of military force for self-interested, political gain, and thus protect against the potential abuse of the doctrine. Two levels of limitations best implement this goal. The first level consists of absolute prerequisites wherein humanitarian intervention should be legal only when the human rights abuses are extreme and the international governing bodies are paralyzed and cannot prevent them. The second level consists of caveats which are not absolute requirements, but provide rough guidelines by which states should abide when invoking the doctrine of unilateral humanitarian intervention. These caveats should distinguish between a disingenuous and an altruistic intervention.

A. Modern Technology Makes the Reasoning for Humanitarian Intervention's Illegality Obsolete

Due to the advances in information systems technology, an absolute ban on humanitarian intervention is no longer necessary.¹⁶⁵ The ban is a remnant of the days when cold war tensions were divisive, and suspicions about pretextual uses of force were preeminent.¹⁶⁶ Thus, the theory of state sover-

(1969). Even Professor Wright, who argues that there are significant problems with most traditional limitations proffered by the cited authors, recognizes that there should be a standard, and hence a limitation, for humanitarian intervention. Wright, *supra* note 12, at 462. That limitation is that a state's human rights violation must "shock the conscience" before another state can legally employ military force. *Id.*

163. See *infra* notes 165-76 and accompanying text (discussing how modern technology allows the true events taking place in another state to be known).

164. See, e.g., Lillich, *Self-Help*, *supra* note 12.

165. See *infra* notes 168-72 (discussing how human rights atrocities can be documented with new technologies).

166. See Lewis, *supra* note 5.

eighty prevailed to protect against pretextual invocations.¹⁶⁷ Information, observation and communication systems have greatly enhanced the ability to confirm the existence of massive human rights atrocities.¹⁶⁸ Furthermore, the speed with which information can be gathered and processed will only increase in the future. The technology of satellites,¹⁶⁹ facsimile machines, video recorders, telecommunications systems, and future as yet unknown devices advances almost daily.¹⁷⁰ Developing countries, where large-scale human rights abuses most often occur, will soon benefit from these technological advances so that knowledge of human rights abuses will be available to the world community.¹⁷¹ Because of this advanced technology, the international community can document human rights atrocities and confirm the actual events occurring within state borders.¹⁷² A pretextual humanitarian intervention can

167. See *supra* note 6 and accompanying text (discussing cold war tensions and suspicions about pretextual uses of military force).

168. See, e.g., Steven V. Roberts et al., *New Diplomacy By Fax Americana*, U.S. NEWS & WORLD REP., June 19, 1989, at 32. "Direct dial telephones and satellite uplinks carry information into countries like China, and they also carry it out. Those images and ideas appear instantly on American television, engaging voters and altering the environment of formal diplomacy." *Id.*

169. See Todd Halvorson, *U.S. Spy Satellites Monitor Developments in Soviet Union*, GANNETT NEWS SERVICE, Aug. 20, 1991, at 20. The United States currently has a network of sophisticated spy satellites capable of photographing objects as small as a license plate, seeing through darkness, and intercepting walkie-talkie communications on earth. *Id.* It was recently used to monitor Soviet activities during the 1991 attempted coup d'etat, which sought to oust Mikhail Gorbachev. *Id.*

170. See, e.g., *id.*; Roberts et al., *supra* note 168.

171. Roberts et al., *supra* note 168. Trade with China has increased dramatically in recent years, including such goods as airplanes and computers. See *id.* In addition to the facsimile machines changing the political climate for governments, there is still the classic "ham" radio operator. John F. Burns, *In Sarajevo, a Ham Operator Captures the Horrors of War*, N.Y. TIMES, July 20, 1992, at A1. In Bosnia and Herzegovina, reports were coming out through "ham" radio operators that one of the many truces signed during the conflict was not upheld. *Id.* As Serbian mortar fire still pounded cities, the ham radio operator stated that "[the Serbians] have constantly lied in the past, and anybody who believes that they are going to stop their killing now should know that they are still lying." *Id.*

172. See Roberts et al., *supra* note 168. The number of facsimile transmissions into and out of China during the Tienanmen Square massacre is well documented. See John Hughes, *China Turns Back the Clock*, CHRISTIAN SCI. MONITOR, June 14, 1989, at 18 ("[The Chinese people] are getting clippings from newspapers around the world, sent into China by facsimile machine from student communities and sympathizers in various countries."). Technology such as this in the hands of citizens will eventually prevent governments from covering up human rights abuses. Governments can no longer control all satellite transmissions into and out of its borders. *Id.*

be discovered more easily and the state subjected to sanctions. Meanwhile, altruistic humanitarian interventions will contribute to world peace and end human suffering.

Although faulty interpretation of information, manipulation of information by human rights abusers, and devices to defeat such technology may exist, the advances and improvements of technology will advance significantly to overcome these problems.¹⁷³ Currently, states that wish to conceal their activities have numerous methods at their disposal to achieve this result.¹⁷⁴ Thus, massive human rights violations are hidden.¹⁷⁵ These methods of hiding human rights abuses, however, become obsolete at a rate commensurate with advances in the technology created to defeat them.¹⁷⁶ Due to this fact, if humanitarian intervention were legal, the possibility of a disingenuous invocation of the doctrine would be significantly minimized because such disingenuousness is recognizable.

If humanitarian intervention becomes legal, however, a need will arise to control this technology to insure that human rights violations are documented. International organizations

The Chinese student protestors fashioned a small statue of liberty, seen on American television, during the standoff before the Tienanmen Square massacre designed, at least in part, to capture the American public's conscience. *See id.*

In addition, states which commit human rights violations sometimes document their activities with photographs and videotapes, and the documentation can fall into enemy hands. *See, e.g., Kurds Claim Proof of Iraqi Massacres*, ATLANTA J. & CONST., Dec. 8, 1991, at H10. Recently, Kurds in Iraq obtained letters, photographs, and videotapes documenting egregious Iraqi violations including executions. *Id.* This evidence might be used against Saddam Hussein in a trial charging him with violating the 1948 U.N. Convention on Genocide. Patrick E. Tyler, *U.S. to Help Retrieve Data on Iraqi Torture of Kurds*, N.Y. TIMES, May 17, 1992, § 1, at 3.

173. *See, e.g., infra* note 176 (discussing the progress of making satellites that can see through clouds and darkness).

174. *See, e.g.,* Jeffrey T. Richelson, *Although Impressive, Reconnaissance Can't Get Answers Overnight*, ATLANTA J. & CONST., Feb. 17, 1991, at H4. Currently, most U.S. satellites cannot see through darkness or clouds. *Id.* No U.S. satellites can see inside buildings or shelters. *Id.*

175. *See, e.g., id.* During the U.S.-led war against Iraq, Iraq kept its missiles hidden in shelters, caves, or underground structures during the day. William J. Broad, *War In the Gulf: The Damage; Assessing Damage Can Be Fettered by the Weather and Pilot Hyperbole*, N.Y. TIMES, Jan. 24, 1991, at A12. These tactics were effective in hindering the U.S. reconnaissance effort. *Id.* Other tactics possibly included rolling out paper painted to look like bomb craters. *Id.* The Iraqis were extremely effective at deceiving the U.S. intelligence network. *Id.*

176. *See, e.g.,* Richelson, *supra* note 174. Currently only one type of U.S. imaging satellite can see through clouds. *Id.* The U.S. will obviously launch more in the future. *Id.*

should coordinate efforts to monitor events in all states.¹⁷⁷ Many individual states should also have the ability and the equipment to observe the events in other states to combat the possibility that centralized control of the devices will itself lead to abuse. Such checks and balances will work towards minimizing manipulation of these systems by any one particular political state or organization.¹⁷⁸

Any doctrine that allows a state to act unilaterally is subject to potential abuse, but the possibility of abuse should not render humanitarian intervention illegal.¹⁷⁹ Because an intervenor must decide for itself whether conditions in the target state warrant military action, the legalization of humanitarian intervention may create the potential for abuse.¹⁸⁰ This potential abuse should not cause an outright ban on humanitarian intervention. States act at their own peril, subject to review, and possible reprisal, by the international community.¹⁸¹

Any individual state action which is permitted, such as self-defense, may result in potential abuse, but this potential abuse applies to almost every legal rule.¹⁸² Obviously, not all states that invoke the doctrine of self-defense, a legal right, to justify their use of force, do so truthfully. The benefits of self-defense, however, legitimize the doctrine despite the potential abuse of its invocation.¹⁸³ The same should be said for hu-

177. Leonard Doyle, *Washington Opposes Spy Role for U.N.*, INDEPENDENT, Apr. 20, 1992, at 9. Recently, various nations have proposed that the United Nations expand into intelligence-gathering and analysis services. *Id.* These states include Russia, the Nordic countries, Australia, Canada, and New Zealand. *Id.* This proposal is fiercely opposed by the United States. *Id.* The Russian proposal mentions using this spy network to protect oppressed citizens from dictatorial governments. *Id.*

178. The question then arises whether this type of observation is legal. The answer is that this observation should be a condition of acceptance into the international community. Furthermore, espionage and counter-espionage is a fact of life for the international community. It has gone on in the past, it goes on presently, and it will continue in the future.

179. MYRES MCDUGAL & FLORENTINO FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 416 (1961). "A policy of permitting individual initiative is, of course, again like the policy of allowing self-defense, susceptible to perverting abuse; but this susceptibility is an attribute common to all legal policy, doctrine, or rule." *Id.*

180. *See supra* note 99 and accompanying text (describing commentators' fear that stronger states would abuse humanitarian intervention).

181. MCDUGAL & FELICIANO, *supra* note 179, at 416.

182. *Id.*

183. *See, e.g.*, Schachter, *supra* note 7. The right to use force in self-defense is legalized in article 51 of the U.N. Charter. *See supra* note 58 for the text of article 51.

manitarian intervention.

As humanitarian intervention is currently illegal, potential intervenors with the will and the desire to prevent human rights abuses are deterred from intervening because they face the political cost of international condemnation even when they engage in justifiable military intervention.¹⁸⁴ This unfair result would not occur if humanitarian intervention were legal. The legality of humanitarian intervention would increase the pool of potential intervenors, and after the doctrine is employed, human rights violations would decrease due to the fear of potential intervention.¹⁸⁵

The legality of humanitarian intervention does not generate any incentive to use force pretextually because detection of a pretextual invocation is highly likely. Thus, the state faces the same international condemnation for the use of force as it would if humanitarian intervention were illegal.¹⁸⁶ Furthermore, the current illegality of humanitarian intervention does not deter a state with selfish political motives from acting because the state may invoke other doctrines for military action.¹⁸⁷ Simply invoking the doctrine as a pretext cannot validate a state's actions. Therefore, legalizing humanitarian intervention imposes limited costs to international stability, while increasing benefits to international peace by removing

184. Wright, *supra* note 12, at 453. "[T]he force of international condemnation of intervention remains, whether such condemnation is justified or not." *Id.*

185. *Id.* Professor Wright argues that a legal right of humanitarian intervention would decrease the number of human rights violations because the fear of intervention would deter states from committing such abuses. *Id.* "A broader theory of justified humanitarian intervention, to the extent that it tends to enhance either the probability or the severity of sanctions imposed on inhumane governments, may well reduce the incidence of human rights violations through a classic deterrence effect." *Id.* (citations omitted).

186. *Id.* Professor Wright has called the condemnation that a state receives when its military actions are not approved by the international community as the "sheer magnitude of the international diplomatic pillorying undergone by the intervenor." *Id.*

187. *Id.* at 450. Using the Soviet Union as an example, Professor Wright explicates that numerous methods exist to pretextually justify the use of military force.

It seems fair to suggest, however, that even a substantial liberalization of the doctrine of humanitarian intervention would not lead to a significant increase in Soviet abuse. [Numerous other] . . . purported justifications for external adventures [exist], such as the Brezhnev doctrine, wars of national liberation, mutual defense obligations, and the presumed categorical superiority of the socialist system.

Id. at 450-51 (citations omitted).

potential drawbacks for states with altruistic motives.¹⁸⁸

B. *Charter Interpretation and State Practice Can Legalize Humanitarian Intervention*

The Charter permits humanitarian intervention as evidenced by its preamble,¹⁸⁹ the Charter itself,¹⁹⁰ and the number of derivative resolutions passed since its inception that seek to protect human rights.¹⁹¹ These resolutions have equalized the importance of the protection of human rights with the preservation of state sovereignty.¹⁹² Under the rubric of state practice, it must be understood that it is practically impossible for a state to intervene with purely altruistic motives.¹⁹³ But, when humanitarian motives predominate over political goals, the intervening state should not face international condemnation for its actions. Viewed in this way, state practice supports the legality of humanitarian intervention.

1. Reinterpreting the U.N. Charter

Reinterpreting the Charter to permit humanitarian intervention would not undermine the ban on the use of force provided by Article 2(4). The U.N. Charter dictates that the use of force is banned when such force operates against the territorial

188. *Id.* at 454. Legalizing the doctrine of humanitarian intervention would lead to a strengthening of all international laws because it promotes respect for basic moral values. *Id.* “[H]umanitarian intervention may . . . contribute to the sense of the basic equitableness of the system of laws in such a way as to strengthen the system of laws on balance.” *Id.* at 455.

189. U.N. CHARTER pmbl. The preamble states that the United Nations is determined to “reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women.” *Id.*

190. U.N. CHARTER art. 1, ¶ 3. Article 1(3) states that one of the main purposes of the United Nations is “to achieve international co-operation in solving international problems of a[] . . . humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.” *Id.*

191. *See supra* note 24 and accompanying text (discussing resolutions passed subsequent to ratification of Charter supporting protection of human rights).

192. Louis B. Sohn, *The Universal Declaration of Human Rights*, 8 J. INT’L COMMISSION JUR. 17, 23 (1967). “[The Universal Declaration of Human Rights] was adopted unanimously, without a dissenting vote, [so] it can be considered as an authoritative interpretation of the Charter of the highest order.” *Id.*

193. *See infra* note 220 and accompanying text (discussing impossibility of precluding every other motivation for intervention before allowing intervention on humanitarian grounds).

integrity and political independence of other states, and inconsistently with the purposes of the United Nations.¹⁹⁴ The Charter itself speaks of the preservation of human rights as one of its main purposes.¹⁹⁵ When collective security breaks down, individual states should act to uphold the purposes of the international community.¹⁹⁶ Also, the numerous documents and resolutions supporting human rights further raise the level of respect members of the international community should afford to the protection of human rights.¹⁹⁷ Furthermore, an altruistic humanitarian intervention does not result in the territorial conquest or political subjugation against which the Charter was designed to protect. The territorial boundaries of the target state remain unchanged and the intervenor departs from the oppressed state once the crisis passes.¹⁹⁸

Humanitarian intervention's legality should be conditioned upon inaction by international organizations that are designed to ensure peace and human rights.¹⁹⁹ The ability to use unilateral military force should be phased out when those organizations become effective vehicles of prevention.²⁰⁰ A legalized doctrine of humanitarian intervention within these parameters strikes a well-balanced order for the interests of the world community.²⁰¹

The United Nations is currently moving towards legalizing military humanitarian intervention, albeit only military action through the Security Council, in support of humanitarian aid and relief supplies.²⁰² Resolutions recently passed dictate that

194. U.N. CHARTER art. 2, ¶ 4. For the text of article 2(4), see *supra* note 57.

195. U.N. CHARTER art. 1, ¶ 3. For the text of article 1(3), see *supra* note 190.

196. TESÓN, *supra* note 5, at 131.

197. See *supra* note 24 and accompanying text.

198. See TESÓN, *supra* note 5, at 131. The author of this Note recognizes that the India case previously mentioned resulted in the formation of a new state, but the Bengalis' right to self-determination was generally recognized as legitimate. *Id.* Thus, although the general principle of humanitarian intervention was not followed perfectly in the India case, the situation warranted humanitarian intervention, and thus India's intervention was justified. See *supra* notes 69-92 (explaining the India case); see generally TESÓN, *supra* note 5, at 184; LEO KUPER, *THE PREVENTION OF GENOCIDE* (1985) (discussing the legitimacy of Bangladesh as an independent state).

199. W. MICHAEL REISMAN, *NULLITY AND REVISION* 848-49 (1971).

200. *Id.*

201. *Id.*

202. See generally Lewis, *supra* note 5 (describing recent actions within United Nations to recognize that humanitarian aid should be sent to citizens within states even when those states' governments do not consent to receiving aid).

even without the consent of the target state, the United Nations is not prohibited from intervening to provide humanitarian relief.²⁰³ The United Nations will no doubt continue to pass such resolutions in the future.

2. Interpreting State Practice

Realism dictates that a state will always have more than one motivation for taking action in any situation. When human rights protection is the predominant motive, humanitarian intervention should be legal. Viewed in this light, the legality of humanitarian intervention is supported by state practice when considering the Congo case,²⁰⁴ the India case,²⁰⁵ the Tanzania case,²⁰⁶ and most recently, the French intervention in the former Yugoslavia supporting U.N. relief workers and supplies.²⁰⁷

Realities of modern warfare also dictate that potential intervenors can conduct an intervention with significantly reduced cost to both parties.²⁰⁸ "Surgical air strikes" and modern laser guided missiles,²⁰⁹ for example, dramatically reduce

203. See generally *id.*; see S.C. Res. 688, reprinted in 30 I.L.M. 858 (1991) (resolution of Apr. 5, 1991).

204. See *supra* note 154 (describing human rights abuses which transpired in the Congo and military intervention which followed).

205. See *supra* notes 69-92 and accompanying text (explaining background of India case); see also *supra* notes 160-61 and accompanying text (discussing proffered reasons of how India case supports legality of humanitarian intervention).

206. See *supra* notes 121-27 and accompanying text (describing human rights abuses which transpired in Uganda and Tanzanian military intervention which followed).

207. See *supra* note 153 (discussing French use of military force in former Yugoslavia to support U.N. humanitarian relief efforts).

208. See, e.g., William J. Perry, *Desert Storm and Deterrence*, 70 FOREIGN AFF. 66 (1991). While there are limitations to new technological systems, they are effective in reducing casualties to both sides.

Laser-guided bombs, laser-guided missiles and infrared-guided missiles were dramatically more effective and cause far fewer civilian casualties than the area bombing that characterized previous wars [T]hese [technological] systems made a vital contribution to shortening the war, to dramatically reducing coalition casualties and to reducing Iraqi civilian casualties.

Id. at 76. However, a former Naval pilot observed, on the effectiveness of surgical air-strikes, that "surgical strikes exist only in think-tanks and mental institutions." R.W. Apple, Jr., *Confrontation in the Gulf: As Forces in Gulf Build, U.S. Weighs Its Options*, N.Y. TIMES, Sept. 7, 1990, at A9.

209. See, e.g., T.A. Heppenheimer, *The Pentagon's 50th . . . and the Future For America's Defense*, FORBES, July 6, 1992, (Special Report), at 1 (outlining array of weapons used in the U.S.-led war against Iraq: the Stealth fighter, laser-guided bombs,

the cost in human life to the intervening state and the target state, so that the risk of massive casualties can be minimized.²¹⁰ In the past, these weapons were unavailable and the risk of massive casualties to the intervening state deterred it from acting. Thus, simply because humanitarian intervention was not exercised in many situations that warranted action in the past does not mean future interventions are not justifiable.²¹¹

C. *Criteria for Intervening States to Follow*

In legalizing humanitarian intervention, the international community should follow certain criteria in a two-part inquiry. The first level consists of two absolute prerequisites. First, a state should use military force unilaterally only when verifiable²¹² and extreme²¹³ human rights abuses exist that "shock the conscience."²¹⁴ Only when human rights abuses are extreme is humanitarian intervention completely justifiable and beyond moral debate.²¹⁵ Second, this use of force should only occur when the international organizations fail to fully address and prevent the extreme abuses.²¹⁶ Collective action by the international community is inherently legitimate and always

and the Tomahawk Cruise missile). The Tomahawk "carried electronic maps within its on-board computer, permitting it to navigate through Baghdad's streets like a tourist." *Id.*

210. See *supra* note 208 and accompanying text.

211. Franck & Rodley, *supra* note 5, at 275.

212. Moore, *supra* note 162, at 264. Professor Moore proffers that the immediate full reporting to the Security Council is one criterion for humanitarian intervention. Presumably, this reporting must include the reasons for the intervention, i.e. the human rights violations, and thus, the human rights violations must have been verifiable.

213. Lillich, *Self-Help*, *supra* note 12, at 348. "Forcible self-help . . . is permissible only when a substantial deprivation of human rights values has occurred or is threatened." *Id.*; Fonteyne, *supra* note 12, at 259-60.

214. OPPENHEIM, *supra* note 5, at 312.

215. Cf. Wright, *supra* note 12, at 462. Professor Wright finds possible justification for intervening on behalf of even one individual. *Id.* The justification derives from the analogy that the modern day equivalent of Mahatma Gandhi might be threatened with execution on a transparently false charge and that a "surgical" air strike could prevent the execution. *Id.* This approach is somewhat akin to the scheme proffered herein, but seems to ignore the current reality that absolute verification and the possibility of prevention on behalf of one person is extremely difficult. However, the scheme proffered herein provides for such an intervention on behalf of a small number of people, if the human rights violation is completely verifiable and the military intervention is limited to the task of preventing the violation.

216. Fonteyne, *supra* note 12, at 264.

preferable to individual action.²¹⁷

The second level consists of supplemental caveats which do not have to be followed completely, but lend credibility to an intervention's legitimacy. These caveats are probative of the altruistic nature of the intervention. These caveats include a preference for multilateralism,²¹⁸ a minimum use of force commensurate with preventing abuses,²¹⁹ a relative disinterestedness by the intervenor in the affairs of the target state,²²⁰ and an exhaustion of peaceful measures to prevent the abuses.²²¹ Because it is impossible to apply these caveats to every scenario, these caveats should not become absolute prerequisites.²²²

1. The First Level: Absolute Prerequisites

The two first-level prerequisites must be followed. As verification of human rights abuses is the key to preventing disingenuous interventions, an intervening state may intervene only when the abuse is extreme.²²³ The more widespread the abuse, the easier it is to document and confirm its existence.²²⁴

217. *See id.*

218. *See id.* at 264-65; Bazylar, *supra* note 12, at 602-04.

219. *See* Lillich, *Self-Help*, *supra* note 12, at 349; Fonteyne, *supra* note 12, at 262-64; Bazylar, *supra* note 12, at 604-06.

220. *See* Lillich, *Self-Help*, *supra* note 12, at 350-51; Fonteyne, *supra* note 12, at 261; Bazylar, *supra* note 12, at 601-02; *see also* Farooq Hassan, *Realpolitik in International Law: After Tanzanian-Ugandan Conflict "Humanitarian Intervention" Reexamined*, 17 WILLAMETTE L. REV. 859, 897 (1981). Professor Hassan agrees with those who have stated that the necessity for complete indifference before allowing humanitarian intervention is naive and absurd, and concludes that "if the predominant motive for the aggression is humanitarian, a limited degree of national interest should not conclusively preclude its validity." *Id.*

221. *See* Fonteyne, *supra* note 12, at 264; Bazylar, *supra* note 12, at 606-07. *But see* Wright, *supra* note 12, at 455-56 (arguing that exhaustion requirement could lead to morally unjustifiable delay).

222. Wright, *supra* note 12, at 462. In discussing whether a limitation forcing a state to attempt to exhaust all other remedies outside of military force before humanitarian intervention is legitimate, Professor Wright concludes that this might lead to a morally unjustifiable delay. *Id.* at 456. States would be slowed by their attempts to create a diplomatic record of their actions taken before intervening simply to comply with the rule, and this might cost many lives. *Id.*

223. *See supra* notes 213-15 (discussing ability to verify human rights abuses and moral dilemma when human rights violation is only toward few individuals).

224. Moore, *supra* note 162, at 264. Professor Moore argues that past state practice dictates that humanitarian interventions have occurred when the human rights abuses were widespread. *Id.* Thus, only when human rights violations are ex-

The lives or well-being of a large number of people must be threatened before a state can justifiably use unilateral military force.²²⁵ No absolute limit or number can designate a line of demarcation at which the use of force is justifiable, but the limit should be proportionate to the nature and extent of the human rights abuses.²²⁶ Although the definition of "extreme" is admittedly fluid, attempting to define each and every example of human rights violation and the appropriate response to each is practically impossible.²²⁷ When confirmation of human rights atrocities is available to a greater extent, the legality of humanitarian intervention should be reconsidered and reapplied to meet the changing environment.

In addition, only where the human rights abuses are not morally debatable should humanitarian intervention be employed.²²⁸ For example, a state that opposes the death penalty should not be permitted to use force against the United States, where the death penalty is legal in some jurisdictions, before a state-sponsored execution takes place. A state which opposes abortion should not be permitted to use force against a state which permits abortion. Such morally debatable issues should be excluded from the bases upon which a state may use humanitarian intervention to justify recourse to military force.

2. The Second Level: Useful Caveats

The second level consists of supplementary caveats which lend credibility to the legitimacy of an intervention, but need not be followed completely. Rather, they should be loose guidelines for action by a potential intervenor. These caveats include a preference for multilateralism,²²⁹ a minimum use of

treme can they be documented, and in such cases humanitarian intervention is legitimate. *Id.*

225. Lillich, *Self-Help*, *supra* note 12, at 348.

226. *Id.* at 348-49.

227. *See id.* at 349. Speaking of the inability to set forth steadfast rules regarding the proper response to human rights violations and the preference for a general standard, Professor Lillich stated that "[v]ague as this approach may sound, it is far preferable to an a priori attempt to catalogue those rights to be protected and those rights to be left unprotected by the sanction of self-help." *Id.*

228. *See supra* note 215 and accompanying text (setting forth Professor Wright's discussion of morally justifiable intervention).

229. *See infra* notes 234-237 and accompanying text (discussing multilateralism requirement).

force commensurate with preventing abuses,²³⁰ a relative disinterestedness of the intervenor in the affairs of the target state,²³¹ and an exhaustion of peaceful measures to prevent the abuses.²³² The caveats are important because they are probative of the altruistic nature of the intervention. These caveats should not be prerequisites, though, as they are often difficult to apply to discrete situations. The cost of not acting or of reacting too slowly in order to comply with rules which may not fit the present crisis is too high.²³³

A preference for multilateralism is encouraged.²³⁴ While collective action does not legitimize the action,²³⁵ seeking the cooperation of other states in the face of inaction by the United Nations or other regional organizations lends credibility to a claim of intervention based largely on altruistic motives.²³⁶ When other states apart from the intervenor agree with the use of force, such collective action is probative of the action's genuine character.²³⁷ Because the preference for multilateralism could lead allies to join together against a common enemy, such an action is probative of a political maneuver, and would be recognized as disingenuous. Multilateralism, although not dispositive of justifiable action, is persuasive.

The intervenor should be required to use the minimum force necessary to achieve its goal,²³⁸ and to use force proportionate to the seriousness of the abuses. However, this caveat should not be absolute. Using hindsight to gauge the possible alternatives to various decisions concerning the use of force is too divorced from the conditions under which the decisions

230. See *infra* notes 238-241 and accompanying text (discussing minimum use of force requirement).

231. See *supra* note 220 and *infra* notes 241-245 and accompanying text (discussing relative disinterest requirement).

232. See *infra* notes 246-250 and accompanying text (discussing exhaustion of peaceful measures requirement).

233. See *supra* note 215 and accompanying text (discussing why delay before intervening is morally unjustifiable).

234. See Fonteyne, *supra* note 12, at 264-65; Bazylar, *supra* note 12, at 602-04.

235. Quincy Wright, *The Legality of Intervention Under the United Nations Charter*, 51 AM. SOC'Y INT'L L. PROCEEDINGS 79, 85 (1957). "Intervention does not gain in legality under customary international law by being collective rather than individual." *Id.*

236. See Lillich, *Self-Help*, *supra* note 12, at 333.

237. Bazylar, *supra* note 12, at 602-04.

238. See Fonteyne, *supra* note 12, at 262-64; Levitin, *supra* note 12, at 652-53; Moore, *supra* note 162, at 264.

were made.²³⁹ An altruistic intervenor obviously would desire to use the least amount of force necessary to achieve its objective. Furthermore, if the intervening state uses patently excessive force to prevent the human rights abuses, its motives are questionable.²⁴⁰ Likewise, motives are also questionable when the intervenor maintains a presence in the target state longer than necessary to fulfill its humanitarian goal.²⁴¹

Humanitarian motives that predominate over other motives are probative of an altruistic humanitarian intervention.²⁴² An absolute disinterestedness requirement, by which a state must have no political, economic, or strategic motive for the intervention, is impractical.²⁴³ A state will inevitably have motives apart from humanitarian motives for intervening.²⁴⁴ The real question is whether the humanitarian motives predominate over other self-interested, political motives. When the humanitarian motives predominate, they outweigh other motives due to the importance of preventing large scale human rights atrocities.²⁴⁵

Legalization of humanitarian intervention should not require the intervenor to exhaust all peaceful means to prevent abuse before acting,²⁴⁶ but the steps an intervening state does employ before using force is probative of the legality of the intervention. A true humanitarian intervention, under the scheme proffered herein, would occur only after all peaceful means are exhausted.²⁴⁷ The high cost of military force and its

239. Cf. Fonteyne, *supra* note 12, at 262-64.

240. Bazylar, *supra* note 12, at 604. The use of too much force leading to the conclusion that the intervention is pretextual takes two forms: when the number of troops or armaments used to complete the objective is too high, or the troops remain in the target state after completing the humanitarian mission. *See id.*

241. *Id.*

242. Lillich, *Self-Help*, *supra* note 12, at 350 ("The presence of [other] such motives does not invalidate the resort to forcible self-help if the overriding motive is the protection of human rights."); Wright, *supra* note 12, at 460 ("To insist on purity of motive is, realistically, to essentially abolish the legal doctrine of humanitarian intervention.").

243. *See supra* note 220.

244. Bazylar, *supra* note 12, at 601-02. "In practice, purity of motive is probably impossible; states rarely will intervene unless they have other interests in addition to the humanitarian interest." *Id.*

245. Lillich, *Self-Help*, *supra* note 12, at 237.

246. *See supra* note 222 (setting forth Professor Wright's discussion of morally unjustifiable delay before intervening).

247. Wright, *supra* note 12, at 456.

unexpected consequences may cause a potential intervenor with humanitarian motives to exhaust peaceful means before using force.²⁴⁸ These peaceful means include, for example, petitioning the U.N. Security Council for action, attempting to enlist the support of other states, and attempting to meet directly with the abusing state.²⁴⁹ Furthermore, if a country fails to employ other peaceful alternatives before engaging in the use of force, the action may be a disingenuous invocation of humanitarian intervention. A state with altruistic motives, however, would be exonerated if it acted hastily in the face of impending danger. Thus, because this condition is not an absolute prerequisite, but rather simply probative of the altruistic character of the use of force, a state would not delay its use of force to satisfy this condition.²⁵⁰ If a state needed to act quickly, it could do so under the scheme proffered herein.

CONCLUSION

The costs in human suffering throughout the world outweigh the benefits of the illegality of humanitarian intervention. The previous legality of humanitarian intervention should be revisited. Collective security mechanisms that were supposed to render humanitarian intervention obsolete have never functioned, and may never function, properly. These mechanisms therefore fail to prevent the occurrence of egregious human rights violations. The fear of potential abuse of the doctrine, while at one time legitimate, should no longer be the overriding concern in international law because modern technology enables states to detect pretextual invocations of the doctrine. The legality of humanitarian intervention under this scheme will not create incentives for the use of military force by governments which were previously deterred from using force by humanitarian intervention's illegality. Legalizing humanitarian intervention within certain limits strikes an effec-

248. *Id.*

249. *Id.* at 455.

250. *Id.*

tive balance between legitimate state sovereignty and the protection of human rights.

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