

I. INTRODUCTION

The doctrine of unilateral humanitarian intervention has been contemplated, discussed, and debated for over 600 years.¹ Although the world has recently focused its attention on collective humanitarian measures such as those taken in Iraq, Bosnia, and Somalia, society must not forget that only a short while ago, the prospect of collective action was remote as the Security Council usually deadlocked. Unknown events in the near future may throw the world back into those days when Security Council action was infrequently authorized.

In fact, several events may have already thrown the world back into the times of infrequent use of collective action. The world's unwillingness to attempt to stop the mass slaughter in Bosnia via the use of force demonstrates nations' increasing egocentrism and an unwillingness to act collectively. The battle in Somalia that led to eighteen U.S. soldiers' deaths has led many in the U.S. to question the ability of the United Nations (U.N.) to take effective, collective action and has led Congress to introduce legislation preventing U.S. troops from operating under U.N. control.² Since this author finds the question of unilateral intervention more doctrinally interesting and recognizes this area is likely to reemerge as a possibility of much future debate, this comment will focus on the legality of unilateral humanitarian interventions.³

Even today, the contemporary legality of this doctrine remains one of the most controversial in the international regime.⁴ Many governments and commentators firmly believe the U.N. Charter prohibits all uses of unilateral intervention, including humanitarian interventions. Despite the general acceptance of that position today, others find powerful justifications for unilateral interventions for humanitarian purposes because of or in spite of

1. Jean-Pierre L. Fonteyne, *The Customary International Law Doctrine of Humanitarian Intervention*, 4 CAL. W. INT'L L.J. 203, 214 (1974); see also Michael J. Bazylar, *Reexamining the Doctrine of Humanitarian Intervention in Light of the Atrocities in Kampuchea and Ethiopia*, 23 STAN. J. INT'L L. 547, 571 (1987).

2. Terry Atlas, CHICAGO TRIBUNE, Oct. 19, 1993, at N1.

3. The question regarding the collective use force for humanitarian intervention is also a viable one. Chapter VII of the United Nation's Charter grants the Security Council the powers to authorize a collective intervention. Chapter VIII of the Charter provides for regional arrangements to deal "with matters relating to the maintenance of international peace and security." U.N. Charter, art. 52, ¶ 1. The interplay between Chapters VII and VIII is not spelled out very clearly in the Charter, and a situation may arise where a regional organization, believing it has the power to act collectively, acts collectively, but the Security Council is either silent or disapproves of the action. Although interesting, such questions are outside the scope of this present comment.

4. Farooq Hassan, *Realpolitik in International Law: After Tanzanian-Ugandan Conflict "Humanitarian Intervention" Reexamined*, 17 WILLIAMETTE L. REV. 859, 859 (1981).

the Charter. A reexamination of this doctrine will reveal a limited right to intervene unilaterally for humanitarian purposes does exist and, more fundamentally, should exist.

In our contemporary setting, perhaps more than any other time in history, the world is both pleading for necessary and vital assistance in the human rights arena⁵ and capable of alleviating a tremendous amount of unnecessary human suffering. Although the international community had been inactive in securing all human beings their human rights prior to the World Wars, since World War II, reports indicate the international community is beginning to pressure states into recognizing fundamental human rights.⁶ Unfortunately, the world's human rights record is atrocious. The U.N. recently released a study concluding over half the world's population is currently being denied fundamental human rights.⁷ In light of this background, this comment will trace the doctrine of unilateral humanitarian intervention from its origins throughout the centuries, examine its fundamental pillars and their movements through history, and argue that a right of unilateral humanitarian intervention exists.

The purpose of this comment is to demonstrate that a qualified right to intervene unilaterally for humanitarian purposes exists and should exist in the modern world. In order to reach that conclusion, the first step in discussing unilateral humanitarian intervention is to define this term. Part II of this comment will examine several different definitions which will shed light on many relevant pillars contained in international law which will later be analyzed. Part III will trace the doctrine of unilateral humanitarian intervention from the thirteenth century until the end of World War II and demonstrate that a customary right to unilaterally intervene for humanitarian purposes existed at least until the early part of this century but that the existence of this right began to be questioned by the 1920's. Part IV will analyze the terms of the U.N. Charter including sovereignty, human rights, and non-intervention to provide a background for important international law concepts involved in solving the dilemma over whether unilateral humanitarian intervention is legal or illegal. Part V will attempt to resolve the Charter's implicit tensions by looking at the language of the Charter, the intent of the founders, and other policy rationales to determine whether the Charter itself prohibits or allows unilateral humanitarian intervention. This analysis will reveal a tremendous confrontation between two diametrically opposed schools of thought and end by concluding that those who believe the Charter permits humanitarian intervention have the more persuasive arguments. Part VI will analyze nations' actions after the implementation of the Charter to determine whether nations believe the unilateral right to intervene exists. This analysis

5. In today's world, there are more countries who regularly violate their citizens' fundamental rights than countries who recognize and protect the human rights of their citizens. A.H. ROBERTSON & J.G. MERRILLS, *HUMAN RIGHTS IN THE WORLD 2* (1989).

6. *Id.* at 1.

7. *UN: Rights Denied Half World's People*, *BOSTON GLOBE*, Apr. 19, 1993, at A53.

will discuss examples of nations unilaterally intervening for humanitarian purposes without condemnation by the U.N.—suggesting this right does exist. Part VII will discuss necessary limitations on this unilateral right. Part VIII will conclude by arguing that even in today's world, the right to intervene unilaterally for humanitarian purposes exists and with limitations preventing abuse, classicists should not be alarmed.

II. DEFINING HUMANITARIAN INTERVENTION

The first step in discussing any doctrine is to formulate a definition. One of the problems in discussing the doctrine of humanitarian intervention is that difficulties abound in the first step of attempting to formulate a precise definition. One commentator even despaired, "there is little use in defining the doctrine of humanitarian intervention" because of the number and breadth of definitions.⁸ Others have noted that a usable definition of humanitarian intervention would be extremely difficult to formulate and apply rigorously.⁹ Even the U.N. has neither agreed upon nor promulgated a definition despite several attempts.¹⁰

Several commentators have, however, attempted to define this elusive term. In a leading work on international law, humanitarian intervention was defined as the "justifiable use of force for the purpose of protecting the inhabitants of another state from treatment so arbitrary and persistently abusive as to exceed the limits within which the sovereign is presumed to act with reason and justice."¹¹ In a frequently used definition, humanitarian intervention was believed to be "the theory of intervention on the ground of humanity . . . that recognizes the right of one state to exercise an international control by military force over the acts of another in regard to its internal sovereignty when contrary to the law of humanity."¹² A contemporary Argentinean scholar defines humanitarian intervention as "the proportionate transboundary 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."¹³ Finally, another scholar claims humanitarian intervention is a "short-term use of armed force by a government in what would otherwise be a violation of the sovereignty of the foreign state, for the

8. Bazylar, *supra* note 1, at 547 n.1.

9. 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).

10. Hassan, *supra* note 4, at 859 n.1.

11. E. Stowell, *International Law* 349 (1931), *quoted in* Hassan, *supra* note 4, at 859 n.1.

12. Rougier, *La Theorie de l'Intervention d'Humanite* 17 *Revue Generale de Droit International Publique* (Rev. Gen. Dr. Int'l Publ.) 468 (1919), *quoted in* Hassan, *supra* note 4, at 859 n.1.

13. FERNANDO R. TESON, *HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY* 5 (1988).

protection from death or grave injury of nationals of the acting state by their removal from the territory of the foreign state."¹⁴

Although the definitions are not similar, they do overlap in important areas and provide a basic understanding of what scholars mean by the term "humanitarian intervention." For the purposes of this comment, the definition of humanitarian intervention will encompass all of the previous definitions. Primarily, these differing definitions shed light on several important areas that must be understood in order to fully understand the issues associated with the doctrine of humanitarian intervention. First, the use of armed force is a common denominator in all four definitions above.¹⁵ Second, the concept of human rights must be examined in any discussion of humanitarian intervention. Third, the concept of sovereignty, a major pillar of international law, must be examined. Finally, customary international law and the U.N. Charter must also be examined in any analysis of humanitarian intervention.

Perhaps the best method to illustrate what this author means by the term humanitarian intervention is to provide concrete examples of situations involving humanitarian interventions. First, humanitarian intervention is a term that can be used when one nation attempts to rescue or protect, with military force, its own nationals being held against their will in another nation.¹⁶ For example, in 1867 a powerful British expeditionary force was dispatched from India to rescue two British emissaries imprisoned by

14. HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 53 (Richard B. Lillich ed. 1973) Many scholars have disagreed with Baxter and classified this situation as a rescue operation falling within the self-defense category rather than humanitarian intervention. See Farrokh Jhabvala, *Unilateral Humanitarian Intervention and International Law*, 21 INDIAN J. INT'L L. 208, 210-212 (1981). David Scheffer, on the other hand, argues that humanitarian interventions cannot be characterized as self-defense because that is an artificial distinction. David Scheffer, *Toward a Modern Doctrine of Humanitarian Intervention*, 23 TOLEDO L. REV. 253, 258 (1992). Scheffer believes if rescue missions are characterized as self-defense, then international law becomes a means of discriminating between the lives of the intervening state and the lives of the target state's population. *Id.* For the purposes of this comment, humanitarian intervention will be defined broadly enough to cover this rescue mission. See *infra* text accompanying notes 16-21.

15. In some situations, humanitarian intervention may not rise to the level of armed intervention. The U.S. led food drop over the Balkans is an example of humanitarian intervention not rising to the level of an armed intervention. The airdrop may, however, violate the sovereignty over the airspace. ANTHONY D'AMATO, *INTERNATIONAL LAW: PROCESS AND PROSPECT* 92 (1986). Unilateral humanitarian intervention not rising to the level of force is also an open question outside the scope of this comment. Some unilateral humanitarian interventions, those based upon economic sanctions or diplomatic pressure, raise an easier question than the question of unilateral humanitarian intervention rising to the level of force. The U.N. Charter itself seems to validate the economic and diplomatic, non-forceful, unilateral humanitarian intervention. The Charter prohibits the threat or use of force by member nations. U.N. Charter art. 2, ¶ 4. The Charter includes economic and diplomatic relations as "not involving the use of armed force." U.N. CHARTER art. 41. Therefore, the Charter appears to verify the lawfulness of unilateral humanitarian intervention not rising to the level of force. A contrary conclusion would seem absurd since it would dictate that a nation, once economic and diplomatic ties were created with another, could not legally sever those ties because such action would violate the prohibition on the use of force in article 2(4).

16. Edward Gordon, *Article 2(4) in Historical Context*, 10 YALE J. INT'L L. 270, 277 (1985).

Ethiopian Emperor Theodore.¹⁷ Britain deployed 250 ships for this journey and used over forty elephants to transport the heavy ammunition to the main base of the emperor.¹⁸ The British force decimated the emperor's forces, released the prisoners, and marched the 400 miles back to port destroying everything in their path.¹⁹ Notwithstanding the excessive use of force, this mission describes a unilateral humanitarian intervention.

Second, a nation can use force to prevent a foreign government from initiating or perpetuating a massive and gross violation of human rights against its own or a third state's nationals.²⁰ For instance, if a nation chose to intervene by unilaterally using force in response to the South African government's imposition of apartheid, this intervention would be characterized as a humanitarian intervention.²¹

III. DEVELOPMENT OF THE HUMANITARIAN INTERVENTION DOCTRINE

The international law concept of customary international law may be helpful in resolving the dispute over whether unilateral humanitarian interventions are legal or illegal. If unilateral humanitarian intervention rose to the level of customary international law, then the contemporary legality of this doctrine is easier to defend. Conversely, if this doctrine was never integrated into customary international law, then its prohibition in the modern day world is easier to support. An action becomes an international custom when there is "evidence of a general practice accepted as law."²²

A. Beginnings of the Doctrine of Humanitarian Intervention

The doctrine of humanitarian intervention is not a creature of the Technological Age, Cold War, or the New World Order, but was a doctrine based upon natural law created centuries ago.²³ Historical references to this doctrine are extremely important as society must not simply declare what should be done now, but must consider the evolution of humanitarian

17. Tom J. Farer, *Agora: U.S. Forces in Panama, Defenders, Aggressors, or Human Rights Activists? Panama: Beyond the Charter Paradigm*, 84 AM J. INT'L L. 503, 503 (1990).

18. *Id.*

19. *Id.* This example merely illustrates the concept of rescue. The legality of this rescue mission would not stand under today's requirements for a lawful rescue mission. See *infra* text accompanying notes 183-196.

20. Gordon, *supra* note 16, at 277.

21. The non-existence of the South African blacks' human rights has prompted the U.N. Security Council to characterize South Africa's system of apartheid as a threat to international peace and to impose sanctions under Chapter VII. Jost Delbruck, *Commentary on International Law: A Fresh Look at Humanitarian Intervention Under the Authority of the United Nations*, IND. L.J. 887, 894 (1992). Yet, not a single nation has attempted to intervene with force to liberate South African blacks from their own government. *Id.* at 890.

22. Statute of the International Court of Justice, Art. 38, ¶ (1)(b).

23. Bazylar, *supra* note 1, at 572.

intervention.²⁴ As early as the thirteenth century, St. Thomas Aquinas made references to the right of one sovereign to intervene in the internal affairs of another if subjects were being greatly mistreated.²⁵ In the seventeenth century, Grotius wrote, “if a tyrant . . . practices atrocities towards his subjects, which no just man can approve, the right of human social connexion [sic] is not cut off in such case.”²⁶ Both of these quotes provide a strong basis for concluding a unilateral right to intervene for humanitarian purposes did exist at one time.

In the nineteenth century, the doctrine of humanitarian intervention received its greatest support.²⁷ In one instance, the U.S. unilaterally intervened into Cuba in 1898 to “put an end to barbarities, bloodshed, starvation, and horrible miseries. . . .”²⁸ This century further emphasized the right that nations possessed to intervene unilaterally for humanitarian reasons.

B. The Early Twentieth Century

As this century began, the majority of writers continued to recognize the existence of the doctrine of humanitarian intervention.²⁹ In 1904, Borchard, a British legal scholar, noted “where a state under exceptional circumstances disregards certain rights of its own citizens, over whom presumably it has absolute sovereignty, the other states of the family of nations are authorized by international law to intervene on the grounds of humanity.”³⁰ Another early twentieth century scholar declared:

should a state venture to treat its own subjects or a part thereof with such cruelty as would stagger humanity, public opinion of the rest of the world would call upon the Powers to exercise intervention for the purpose of compelling such a State to establish a legal order of things within its boundaries sufficient to guarantee to its citizens an existence more adequate to the ideas of modern civilization.³¹

24. Lillich, *supra* note 14, at 28-29.

25. Fonteyne, *supra* note 1, at 214.

26. H. GROTIUS, *DE JURE BELLI ESTI PACIS* 438 (Whewell trans., 1853), *quoted in* Fonteyne, *supra* note 1, at 214.

27. Hassan, *supra* note 4, at 859-60. Hassan noted the 1929 intervention into Greece against the Turks; the 1860 intervention into Lebanon; the 1866 intervention into Crete; the 1876 intervention into Bosnia, Herzegovina; and the 1876 intervention into Bulgaria. *Id.* at 860-61. *Id.*

28. Franck & Rodley, *supra* note 9, at 285 (quoting FITZGIBBON, *CUBA AND THE UNITED STATES, 1900-1935*, 22 (1935)).

29. Bazzyler, *supra* note 1, at 572.

30. E. BORCHARD, *THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD* 14 (1916), *reprinted in* Bazzyler, *supra* note 1, at 571.

31. L. OPPENHEIM, *INTERNATIONAL LAW* 347 (1st ed. 1905).

The arguments demonstrating an acceptance of the unilateral right to intervene on humanitarian grounds through the beginning of the twentieth century are well supported.

In sum, the doctrine of unilateral humanitarian intervention was accepted for at least six hundred years,³² was embodied into customary international law,³³ and provided that a state could intervene either to protect the lives or human rights of individuals, generally their nationals, but occasionally nationals of the target states, who were threatened while living in other states.³⁴ The doctrines changed substantially following World War II.

C. Changes in the Doctrine Between the World Wars

After World War I, nations became horrified about the possibility of another world war, and as nations began to distrust one another, the permissibility of the use of force began to dwindle. From the time period of the First World War to the end of the second, the policy and core of the language by which the community sought to deprive nations of the unlimited use of self-help were arguably put in place.³⁵ In the Atlantic Charter, both the U.S. and U.K. declared, “[We] believe that all nations of the world, for realistic as well as spiritual reasons must come to the abandonment of the use of force.”³⁶

Conventional international law of the period following the formation of the League of Nations slowly began to tilt towards prohibiting the unilateral use of force by states.³⁷ The Kellogg-Briand pact of 1928 was an attempt to prohibit the use of force. It “condemned recourse to war”³⁸ and declared that all settlements “shall never be sought except by pacific means.”³⁹ Some commentators interpreted this pact as prohibiting the use of force by states against other states, including humanitarian intervention.⁴⁰ Others chastised it as a “brief afterglow of Wilsonian optimism” and an “ironic preface to the supervening decades of blood and steel, the 1930’s and 1940’s.”⁴¹ Hence, the commentators, as usual, did not agree on the effect of the treaties in the early twentieth century.

32. Bazyler, *supra* note 1, at 573.

33. Scheffer, *supra* note 14, at 258-59.

34. RICHARD B. LILICH, PREFACE TO HUMANITARIAN INTERVENTION AND THE UNITED NATIONS xii, xii (Richard B. Lillich ed. 1973).

35. Gordon, *supra* note 16, at 274.

36. Atlantic Charter, Aug. 14, 1941, U.S.-U.K., 55 Stat. 1603, E.A.S. No. 236.

37. Hassan lists 1921 as the year in which the pendulum swung in favor of the previous minority view. Hassan, *supra* note 4, at 863.

38. Kellogg-Briand Pact, Aug. 27, 1928, Art. 1, 46 Stat. 2343, T.S. No. 796, 94 L.N.T.S. 57.

39. *Id.* at art. 2.

40. Hassan, *supra* note 4, at 884.

41. Arnold Toynbee, 2 *Major Peace Treaties of Modern History: 1648-1967* 1232 (Israel ed. 1967) quoted in BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW 1229 (1991).

Other commentators, however, disputed that conclusion. The minority view in the pre-World War II era rejected the legality of humanitarian intervention because “[t]he acts of inhumanity, however condemnable they may be, as long as they do not affect nor threaten the rights of other States, do not provide the latter [an intervening state] with a basis for lawful intervention. . . .”⁴² In addition, some commentators concluded a unilateral right did not exist because cases used to support such claims were not really humanitarian at all but facades for self-interested intervention.⁴³ Such a conclusion does not follow from the evidence because the existence of self-interested interventions does not mandate a prohibition on humanitarian interventions but merely indicates a lack of information to determine whether humanitarian interventions were legal. As discussed above, ample evidence suggesting a right to unilateral humanitarian intervention existed prior to World War II.⁴⁴

At this juncture in history, the status of customary law on the unilateral use of force for humanitarian interventions was murky. Six hundred years of legal humanitarian interventions had recently encountered roughly twenty-five years of mild opposition. The U.N. Charter aimed at providing the guiding light for international behavior. The creation of the U.N. Charter, however, continued the trend of the early part of the twentieth century by failing to clearly express the state of the law regarding humanitarian intervention.

IV. CREATION OF THE U.N. AND IMPLICIT TENSIONS OF THE CHARTER

The creation of the United Nations in 1945 brought with it a multilateral treaty. Nations have not questioned the *pacta sunt servanda* of the U.N. charter.⁴⁵ The problem, however, is determining the precise meaning of the Charter and balancing some of the Charter’s provisions against others.

The U.N. Charter’s purposes include both “maintain[ing] international peace and security, and . . . tak[ing] effective collective measures . . . for the suppression of acts of aggression . . . ”⁴⁶ and “promoting and encouraging respect for human rights and for fundamental freedoms for all. . . .”⁴⁷ The Charter’s provisions have created implicit tensions between international law concepts of sovereignty, non-intervention, and human rights.

In fact, the U.N. system creates a paradox. If one nation allows a second nation to violate the human rights of a second nation’s citizens, the first nation has violated article 55 by failing to promote human rights whereas if

42. P. PRADIER-FODÉRÉ, *TRAITÉ DE DROIT INTERNATIONAL EUROPÉEN ET AMÉRICAIN* 663 (1885), *quoted in* Bazylar, *supra* note 1, at 573 n.119.

43. Frank & Rodley, *supra* note 9, at 283-85.

44. *See* text accompanying notes 24-30.

45. *Vienna Convention on the Law of Treaties, opened for signature, May 23, 1969, (entered into force January 27, 1980) 1155 U.N.T.S. 331, reprinted in 8 I.L.M. 679 (1969) [hereinafter Vienna Convention].*

46. U.N. CHARTER art. 1, ¶ 1.

47. *Id.* at ¶ 3.

the first nation intervenes, she has violated article 2(4) by using force and possibly article 2(7) by interfering in another nation's internal affairs. This raises the question of how this predicament can be resolved. Before this debate can be resolved, however, the concepts of sovereignty, non-intervention, and human rights must be understood in order to determine whether the unilateral intervention for humanitarian purposes is permitted or prohibited under the U.N. Charter.

A. Respecting Sovereignty

The notion that a sovereign shall be able to govern her own land without interference from outside nations is a well known and long-standing concept within customary international law.⁴⁸ In 1849, the Supreme Court of France insisted, "the reciprocal independence of states is one of the most universally respected principles of international law."⁴⁹ The British courts were of the same opinion as the French, ". . . the absolute independence of every sovereign authority, and of the international comity . . . induces every sovereign state to respect the independence and dignity of every other sovereign state. . . ."⁵⁰ By the beginning of the twentieth century this right became somewhat more limited, but the public acts of one sovereign were still not to be questioned by other nations.⁵¹

It appears clear the creators of the U.N. wanted to assure all nations of this customary right to independence, the undisturbed enjoyment of autonomy within their own territory, and their right to be left alone.⁵² This independence of nations to decide for themselves how to govern was incorporated into the U.N. Charter: "[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. . . ."⁵³ Thus, the Charter makes quite clear its aim to prohibit intervention in domestic matters of a nation when the consequences fall solely within the borders of the decision-making state.⁵⁴

48. Carter & Trimble, *supra* note 41, at 549.

49. *Id.* at 550 (quoting Spanish Government v. Lambige et Pejol, D.P.I. 5, 9 (1849).

50. *Id.* (quoting *In the Patlement Bdge.*, 5 P.D. 197, 217 (1880)).

51. This was expressed in the U.S. by the Tate Letter, *in* Carter & Trimble, *supra* note 41, at 555. Others nations had previously narrowed the range of sovereign immunity. *Id.* at 553, 556-57.

52. LOUIS HENKIN, *THE USE OF FORCE: LAW AND U.S. POLICY in RIGHT V. MIGHT* 39 (L. Henin et al. eds. 1991).

53. U.N. CHARTER art. 2, ¶ 7.

54. Although on its face, this provision appears clear, determining what is and what is not a domestic issue is not easy to define. In the proposed U.N. Charter, full employment was proposed as a human right, but the U.S. strongly opposed and was able to defeat that classification by arguing that the inclusion of employment as a human right would be an intrusion into the domestic affairs of nations. A. GLENN MOWER, JR., *THE UNITED STATES, THE UNITED NATIONS, AND HUMAN RIGHTS* 7 (1979).

B. The Non-Intervention Principle

At the inception of the U.N., its creators had just witnessed the atrocities of the second of two world wars in a span of under thirty years. They decided one paramount value of the new world was to be peace.⁵⁵ Universal agreement existed at the end of World War II demanding that the status quo of territorial boundaries prevailing at that time must not be changed by any use of force.⁵⁶ Many parts of the U.N. Charter reflect this desire for a prohibition on the use of force.

Three provisions are devoted to emphasizing the desire for eliminating the use of force. First, article 2(3) states, “[a]ll Members shall settle their international disputes by peaceful means. . . .”⁵⁷ Second, article 2(4) states “[a]ll members shall refrain . . . 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.”⁵⁸ In addition, article 2(7)⁵⁹ states all nations are to respect all others’ decisions that affect solely their internal affairs. All three parts of the Charter’s second paragraph clearly emphasize the desire for peace over war.

In addition, in order to prevent hasty decisions by a single state that might jeopardize the peace, the Charter emphasizes the need for collective over unilateral action. The Charter stresses “effective collective measures” be taken to ensure the peace.⁶⁰ In order to enhance the possibility of collective action, the Charter created the Security Council which consists of five permanent members and ten members serving two year terms.⁶¹ The creators of the U.N. conferred on the Security Council, “primary responsibility for the maintenance of international peace and security. . . .”⁶² One major responsibility involves determining when breaches of the peace may transcend article 2(7)’s domestic affairs provision and hence become matters of international concern. In case of breaches of the peace, “[i]f the Security Council deems that the continuance of the dispute is in fact likely to endanger the maintenance of international peace and security, it shall decide whether to take action. . . .”⁶³ Further, “[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

55. Henkin *supra* note 52, at 38.

56. *Id.*

57. U.N. CHARTER art. 2, ¶ 3.

58. U.N. CHARTER art. 2, ¶ 4.

59. The concept of sovereignty is embodied in the nonintervention principle. *See supra* text accompanying notes 48-54.

60. U.N. CHARTER art. 1, ¶ 1.

61. U.N. CHARTER art. 23, paras. 1 and 2.

62. U.N. CHARTER art. 24, para 1.

63. U.N. CHARTER art. 37, ¶ 2.

taken. . . ."⁶⁴ In short, the U.N. Charter's goals of peace and collective action were clearly included in the final version of the Charter.

C. Emphasis on Human Rights

The protection of human rights through international legislation was a revolutionary idea at the time of the Charter because traditional international law had no place for it at all.⁶⁵ Yet, after World War II, the world, through the Nuremberg Trials, realized the heinousness of the atrocities committed against human beings⁶⁶ and vowed never to let those crimes happen again.

The U.N. Charter emphasizes the tremendous importance in recognizing and promoting human rights world-wide. Article 55 of the Charter is devoted solely to human rights, "the United Nations shall promote . . . universal respect for . . . and observance of, human rights. . . ."⁶⁷ Article 56 provides "all members pledge themselves to take joint and separate action in co-operation with the Organi[z]ation for the achievement of the purposes set forth in Article 55." Several other provisions are also related to the protection of human rights.⁶⁸

One of the problems in promoting human rights is determining what the international society means by this term. Differences between eastern and western cultures and capitalistic and socialistic regimes make the possibility of a conclusive and exhaustive list of human rights virtually impossible. In the West, we tend to think of individual human rights as life, liberty, and the pursuit of happiness.⁶⁹ These rights also encompass the right to speak freely, choose a political party, choose a religion and practice freely, and to be free from slavery, torture, and genocide. Other countries differ in their views of human rights.

In the East, nations believe economic, social and cultural rights should be protected.⁷⁰ In light of that feeling, nations attempted to include full employment in the Charter as a human right, but the U.S. argued inclusion

64. U.N. CHARTER art. 39.

65. Robertson & Merrills, *supra* note 5, at 2.

66. Teson, *supra* note 13, at 135-36.

67. U.N. CHARTER art. 55.

68. Article 13 authorizes the General Assembly to make studies and recommendations about human rights. Article 62 authorizes the Economic and Social Council to make recommendations to promote human rights. Article 68 requires the Economic and Social Council to set up commissions to promote human rights. Article 76 makes the promotion of human rights one of the basic objectives of the trusteeship system.

69. THE DECLARATION OF INDEPENDENCE ¶ 2 (U.S. 1776).

70. International Conference on Human Rights in Teheran in 1968 stated, "the problems of economic, social and cultural rights should receive due and increasing attention in view of the increasing importance of realizing these rights in the modern world." Robertson & Merrills, *supra* note 5, at 12.

would violate the principle of not intervening in a nation's domestic affairs and won the debate.⁷¹

In many African nations, people tend to see a correlation between the enjoyment of western human rights and economic rights.⁷² Expert Keba M'Baye, former President of the U.N. Commission on Human Rights, acknowledges African nations are trying to combat famine, illness, and ignorance, and in light of those atrocities, they tend to overlook the liberties of the Western world.⁷³

In addition, Koreans have an entirely different view of human rights. Korea possesses a Shamanistic world view which emphasizes a Confucian tradition and deep human emotional involvement.⁷⁴ As a result, the Western notion of the individual never developed in Shamanistic Korea.⁷⁵

Socialist nations also offer a vastly different emphasis on human rights than Western countries. The major difference is the socialist state owns the production and distribution mechanisms, and the state is in charge of organizing and running the national economy.⁷⁶ In socialist nations, the state, by definition, represents the interests of the people; therefore, the individual owes the state her absolute obedience.⁷⁷ The citizens cannot have rights against the state.⁷⁸ Conflicts cannot exist between the individual and the state since the state assures the economic well-being and cultural development of all individuals.

Despite these differences, the U.N. was able to promulgate the respect for and observance of human rights as a general concept in addition to solutions for economic, social and health problems.⁷⁹ Moving from a system that failed to protect human rights to a system in which the promotion of fundamental rights of human beings is of tantamount importance was undoubtedly a major step forward.⁸⁰

V. ATTEMPTED RESOLUTION OF IMPLICIT TENSIONS

These tensions in the Charter, between the promotion of human rights on one side and non-intervention and sovereignty on the other side, must be resolved. There are two vigorous and vocal sides to the argument whether

71. Mower, *supra* note 54, at 7.

72. Robertson & Merrills, *supra* note 5, at 13.

73. *Id.*

74. M. Lee, *North Korea and the Western Notion of Human Rights*, in HUMAN RIGHTS IN EAST ASIA: A CULTURAL PERSPECTIVE 129, 131-137 (J. Hsiung ed. 1985) noted in Carter & Trimble, *supra* note 44, at 883.

75. *Id.*

76. Robertson & Merrills, *supra* note 5, at 9.

77. *Id.*

78. This principle is strongly refuted by many scholars including Teson and Scheffer. See also *infra* text accompanying notes 171-176.

79. U.N. CHARTER art. 55, ¶ b.

80. Robertson & Merrills, *supra* note 5, at 2.

the U.N. Charter permits or prohibits the unilateral use of force for humanitarian purposes. On one hand are those who argue the U.N. Charter prohibits the use of force for all reasons except self-defense or collective action authorized by the Security Council. On the other hand are those who argue the U.N. Charter makes an exception for unilateral humanitarian intervention, albeit sometimes in limited circumstances. The difference between the two schools of thought has been characterized as the classicist-realist schism.⁸¹ In order to further their beliefs, both sides have developed arguments from the text of the Charter, from the intent of the framers of the U.N., and from other sources. These arguments will be examined at great length, and despite a general acceptance of the classicist position, this author believes the realists are more persuasive.

A. Textual Arguments

Since the U.N. Charter is a treaty, it must be interpreted in "good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."⁸²

1. The Classicist's Good Faith View

Classicists cannot find any persuasive grounds for claiming unilateral humanitarian intervention is legitimate under circumstances other than self-defense or Security Council authorized action.⁸³ Charter provisions 2(4) and 2(7) combined with General Assembly Resolution 2131⁸⁴ provide a clear, textual basis for the classicist's conclusion that the Charter prohibits the use of force for humanitarian purposes.⁸⁵

Further, the classicists note the creators of the Charter included two explicit exceptions to the general prohibition on the use of force. One exception permits the use of force as a self-defense mechanism in response to an armed attack.⁸⁶ The second permits an action by the Security Council as an enforcement measure.⁸⁷ If the founders of the Charter wanted to authorize humanitarian intervention as a third exception to the prohibition on the use of force, they would have done so expressly; however, the term

81. Tom J. Farer, *Human Rights in Law's Empire: The Jurisprudence War*, 85 AM. J. INT'L L. 117, 118 (1991). The classicists support the prohibition on the use of force whereas the realists support a liberal interpretation permitting the use of force for humanitarian reasons. *Id.*

82. Vienna Convention, *supra* note 45, at art. 31, ¶ 1.

83. Michael Akehurst, *Humanitarian Intervention*, in INTERVENTION IN WORLD POLITICS 95 (Hedley Bull ed., 1984).

84. G.A. Res. 2131, 20 U.N. GAOR, 20th Sess., Supp. No. 14, at 11, U.N. Doc A/6014 (1965).

85. Lillich, *supra* note 14, at 44.

86. U.N. CHARTER art. 51.

87. Oscar Schacter, *International Law: The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1620 (1984).

“humanitarian intervention” is noticeably absent from the text of the Charter giving clear indication that nations do not have the right to intervene for humanitarian purposes.⁸⁸

Another argument forbidding the use of force stems from two General Assembly resolutions. First, in 1970, the General Assembly passed a resolution proclaiming “[n]o state . . . has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of another state.”⁸⁹ This resolution strongly condemns the use of force. Second, the General Assembly has defined aggression as “the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State. . . .”⁹⁰ This definition includes as an act of aggression the “invasion or attack by the armed forces of a state of the territory of another state, or any military occupation . . . of another state. . . .”⁹¹ This resolution also forbids exceptions, “[n]o consideration of whatever nature, whether political, economic, military or otherwise may serve as a justification for aggression.”⁹² Hence, armed intervention is synonymous with aggression and aggressions violate the U.N. Charter without exception.⁹³

Third, classicists believe the U.N. Charter unquestionably forbids any unilateral use of force. The founders were so fearful of unilateral action, they even limited the unilateral right to self-defense. First, if an action is taken in self-defense, the state must notify the Security Council immediately.⁹⁴ Second, this right of self-defense becomes extinguished once the Security Council takes measures in response.⁹⁵ The only instrument leaving unilateral force a possibility is the Proclamation of Teheran.⁹⁶ Since apartheid is the only evil which can legally be eradicated unilaterally, all other rationales, including humanitarian intervention, must be illegal if done unilaterally.

2. Realist's Good Faith View

The underlying rationale for humanitarian intervention is the natural human urge to help those in need. As Professor Reisman says, “When human beings are killed in another part of the world, it upsets me very much

88. Gordon, *supra* note 16, at 277.

89. G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1970).

90. *Definition of Aggression Resolution*, G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, at 142, art. 1, U.N. Doc A/9631 (1974).

91. *Id.* at art. 3(a).

92. *Id.* at art. 5.

93. Frank & Rodley, *supra* note 9, at 301.

94. U.N. CHARTER art. 51.

95. *Id.*

96. Frank & Rodley, *supra* note 9, at 300. This Proclamation addresses apartheid and it is therefore imperative for the international community to use every possible means to eradicate the evil of apartheid.

and I want to do something about it.”⁹⁷ Professor Arthur Leff of Yale, echoed those same desires.⁹⁸ In addition to this strong emotional attachment to their conclusion, these realists have also compiled many textual arguments showing why humanitarian intervention is still justified in light of the classicist view of the U.N. Charter.

Many scholars argue there is a continuing right of states to intervene unilaterally on humanitarian grounds.⁹⁹

The advent of the U.N. neither terminated nor weakened the customary institution of humanitarian intervention. In terms of its substantive marrow, *the charter strengthened and extended humanitarian intervention*, in that it confirmed the homocentric character of international law and set in motion a continuous authoritative process of articulating international human rights, reporting and deciding infractions, assessing the degree of aggregate realization of human rights and appraising their work.¹⁰⁰

In furtherance of that idea, one strong argument focuses on the qualifying phrases of article 2(4) to legitimate the unilateral use of force for humanitarian purposes.¹⁰¹ If the founding nations wanted to prohibit the use of force entirely, article 2(4) would consist of only fifteen words: “[a]ll members shall refrain in their international relations from the threat or use of force[.]”¹⁰² Article 2, however, did not end with the fifteenth word, it added three qualifying clauses and an additional twenty-three words. According to article 2, the use of force is only prohibited when it is against the territorial integrity of the nation, the political independence of a nation, or in any manner inconsistent with the purposes of the charter.¹⁰³ If these qualifying clauses are not redundant, they must somehow limit the prohibition against the use of force.¹⁰⁴ In other words, there must be some uses of force that are permissible because they are not against the territorial integrity of a nation, the political independence of a state, or otherwise inconsistent with the aims of the Charter.

97. Lillich, *supra* note 14, at 17.

98. Professor Leff uttered, “I don’t know much about the relevant law. My colleagues here, who do, say that it’s no insurmountable hindrance, but I don’t care much about international law, Biafra or Nigeria. Babies are dying in Biafra . . . We still have food to export. Let’s get it to them any way we can, dropping it from the skies, unloading it from armed ships, blasting it with cannons if that will work. I can’t believe there is much political cost in feeding babies, but if there is let’s pay it; if we are going to be hated, that’s the loveliest of grounds. Forget all the blather about international law, sovereignty and self-determination, all that abstract garbage: babies are starving to death.” N.Y. TIMES, Oct. 4, 1986, at 46 quoted in Farer, *Humanitarian Intervention: The View from Charlottesville*, in HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 151 (R. Lillich ed., 1973).

99. Michael Reisman & Myres S. McDougal, *Humanitarian Intervention to Protect the Ibos*, in Lillich, *supra* note 14, at 167; see generally Teson, *supra* note 13.

100. Reisman & McDougal, *supra* note 99, at 171 (emphasis added).

101. Gordon, *supra* note 16, at 275.

102. U.N. CHARTER art. 2, ¶ 4.

103. *Id.*

104. Schacter, *supra* note 89, at 1625.

Whether unilateral humanitarian intervention fits into the qualifying clauses depends on the meaning of those clauses. Territorial integrity means "preventing the permanent loss of a portion of one's territory."¹⁰⁵ True humanitarian interventions will not even cause a temporary loss of a nation's territory. Further, the notion of political independence means a state's independence must not be abrogated.¹⁰⁶ Unilateral humanitarian interventions will not abrogate a nation's independence, and therefore will not violate a nation's political independence. Lastly, if all uses of force were inconsistent with the Charter, all three qualifying clauses become redundant. In order to give this third qualifying phrase meaning, one must look to other purposes of the Charter. Humanitarian intervention, realists contend, is not inconsistent with the Charter because the preamble to the Charter lists the advancement of human rights as one purpose.¹⁰⁷ In sum, humanitarian intervention must fit into the category of uses of force not violating the Charter.¹⁰⁸

Despite the apparent persuasiveness of the realist position, a classicist would not be persuaded. She would contend even if some uses of force were to fit into these qualifying clauses, unilateral humanitarian intervention is not one of those that fits. This realist argument, to the classicists, is simply a fallacious argument for several reasons. First, by its very nature, an invasion or bombing *does* violate the territorial integrity of a nation simply because the physical boundaries have been crossed by enemy troops. Second, classicists would argue violating the political independence of a nation means upsetting the balance of power. One cannot know *a priori* whether a unilateral humanitarian intervention will upset the political independence of the nation. In a non-rescue situation, the human rights violations must be eliminated at their source. In order to remove the problem, policies and the political integrity of the nation will necessarily be altered which will violate a nation's political independence.¹⁰⁹ Finally, any unilateral use of force is inconsistent with a Charter that emphasizes peace and security.

3. Summary of the Textual Arguments

Although the classicist position is generally accepted, an examination of the Charter does not reveal any clear-cut, predetermined answer to the question whether unilateral humanitarian intervention is permitted or forbidden. Both sides present credible arguments, but any determination based on the Charter cannot, absent explicit mention, emanate from the

105. D'Amato, *supra* note 15, at 59. D'Amato gleaned this definition from examining nineteenth century treaties. *Id.*

106. *Id.* at 71.

107. Tom J. Farer, *An Inquiry into the Legitimacy of Humanitarian Intervention*, in *LAW AND FORCE IN THE NEW INTERNATIONAL ORDER* 185, 190 (Lori F. Damrosch & David J. Scheffer eds. 1991).

108. Gordon, *supra* note 16, at 275.

109. Lillich, *supra* note 14, at 153.

Charter itself as it is dedicated to both peace and the promotion of human rights. An answer to the question might come from one's interpretation of the U.N. Charter.

B. Intent Arguments

If the good faith method of treaty interpretation leaves the meaning of the treaty ambiguous or obscure as in this case, one may look to the preparatory work and the circumstances leading up to the formation of the treaty.¹¹⁰ Both classicists and realists have attempted to bolster their arguments by examining the intent of the founders of the U.N.

1. Classicist View of Intent

First, the rationale for the paramount value of non-intervention was the desire for world-wide peace.¹¹¹ This over-arching goal of peace makes the prohibition on the use of force in international disputes one of the U.N.'s fundamental goals.¹¹² Under the Charter, force is not legitimized just because it is in the interest of justice. Force is allowed only in the interest of maintaining peace and for defense against aggression. The Charter, in this respect, clearly chooses peace over justice. It also forbids states to use arms to enforce treaties or rules of law.¹¹³

Second, the intent of the founders, classicists argue, was to create a system whereby acts of aggression and warfare would be minimized if not eliminated. In furthering that goal, the founders created a system under which any act of aggression must be undertaken on a collective basis. One of the prime evils of the recent past had been unilateral acts of violence. The founders intended to eradicate all these evil acts by prohibiting all unilateral acts of aggression.

Third, classicists examine some of the language debated in formulating the Charter. One proposal called for the "protection of human rights," instead of the final version's "promotion of human rights."¹¹⁴ Undoubtedly, the use of the word "protect" would allow for a more forceful defense of human rights than the meekness embodied by the word "promote." The proposal to use "protect" was rejected because "it would raise hopes going beyond what the United Nations could successfully accomplish."¹¹⁵ In other words, such language would entice nations into believing the U.N. Charter would allow nations to do more than other nations were willing to allow. By

110. Vienna Convention, *supra* note 45, at art. 60.

111. Henkin, *supra* note 52, at 38.

112. Gordon, *supra* note 16, at 275.

113. Oscar Schacter, *Just War and Human Rights*, 1 PACE Y.B. INT'L L. 1, 4 (1989).

114. SIR H. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 145-146 (1968 ed.).

115. *Id.*

limiting this right to “promote,” the founders expressed a right, according to classicists, that cannot be interpreted to rise to the level of force. Even many ratifying nations recognized the weakness of the ratified Charter and hoped to pass a Bill of Rights to bolster the protection for human rights.¹¹⁶

2. Realist View of Intent

This subsection examines three different aspects of the founders’ intent. First, it discusses whether the founders felt strongly about human rights. Second, it discusses whether the founders intended human rights to fall within or outside of article 2(7)’s domestic jurisdiction provision. Finally, it analyzes the founders’ intent with respect to human rights and article 2(4).

a. Intention of the Human Rights Provision

The realists correctly assert the human rights provisions in the Charter are not present whimsically or carelessly but because nations strongly felt the desire to promote human rights for all human beings. Sir H. Lauterpacht has written the leading work on the human rights provisions of the Charter.¹¹⁷ He maintains the inclusion of human rights was hardly an afterthought or error of drafting but adopted after prolonged discussion. As such, it was every nation’s legal duty to respect and observe fundamental human rights.¹¹⁸

Lauterpacht recognized the Charter used the word “promote” instead of a stronger word such as “respect.” He emphatically stated such an omission was of little importance:

it would be out of keeping with the spirit of the Charter and, probably with the accepted canons of interpretation of treaties, to attach decisive importance to that omission [of the word “respect”]. It would have been otiose to the point of pedantry for the draftsmen of the Charter to incorporate an explicit provision of this nature in a document in which the principle of respect for and observance of human rights . . . is one of the main pillars of the structure of the Organization. . . .¹¹⁹

Adding credibility to the view that human rights provisions were to be taken seriously is the fact that the U.N. Charter almost protected human rights only in passing. The original proposal for the U.N., prepared in 1944 by the four great powers, contained merely one general provision regarding

116. Robertson & Merrills, *supra* note 5, at 24. This Bill of Rights became the Universal Declaration of Human Rights which was adopted by General Assembly Resolution 217 (III) on December 10, 1948.

117. Robertson & Merrills, *supra* note 5, at 70 n.1.

118. LAUTERPACHT, *supra* note 114, at 147.

119. *Id.* at 151.

human rights. The smaller countries and representatives of non-governmental organizations, however, were determined and responsible for the inclusion of the ratified version's human rights provisions.¹²⁰ If nations were not concerned about human rights, the original proposal would have sufficed. By placing added emphasis on human rights, the founders demonstrated their high regard for human rights.

b. Human Rights and Article 2(7)

Although some may argue human rights are within the domestic jurisdiction of a nation and that a state is prevented by article 2(7) from acting to eliminate human rights violations in a third nation, the framers intended otherwise. At the time the Charter was formulated, concepts that were governed by international law were recognized to be *ipso facto* and by definition outside of the realm of domestic jurisdiction.¹²¹ Since nearly all nations are now subject to some international law and obligation regarding at least some human rights of their inhabitants, their actions with regard to human rights cannot be considered within their domestic jurisdiction. Efforts to bring about compliance with the human rights obligations are, therefore, not improper interference in domestic affairs.¹²²

Further, one of the reasons for the comprehensive formulation of article 2(7) was the desire to exclude the possibility that the Economic and Social Council would make specific recommendations in matters which were primarily within a state's domestic jurisdiction.¹²³ The Charter created this distinction between the Security Council and the Economic and Social Council because all coercive powers were expressly reserved for the Security Council and not to be exercised by the Economic and Social Council.¹²⁴ Since this was the rationale for the formulation of 2(7), declaring human rights to be international problems comports with the intent of the framers.

Moreover, the first case to come before the U.N. demonstrated the U.N.'s narrow interpretation of what was considered within a nation's domestic jurisdiction. In early 1946, Poland requested that the Security Council denounce Spain and the Franco regime for events leading to international friction.¹²⁵ As a remedy, Poland asked the Council to compel all U.N. members to sever diplomatic ties with Spain for problems caused by the Franco regime, which, on their face, fell within Spain's domestic jurisdiction. Essentially the Security Council and General Assembly found the disturbance created by and within Spain created disturbances outside of

120. Robertson & Merrills, *supra* note 5, at 24.

121. Louis Henkin, *Human rights and "Domestic Jurisdiction,"* in HUMAN RIGHTS, INTERNATIONAL LAW AND THE HELSINKI ACCORDS 22 (Thomas Buergenthal ed., 1977).

122. *Id.* at 25.

123. LAUTERPACHT, *supra* note 114, at 170.

124. *Id.* at 171.

125. *Id.* at 188.

Spain's domestic jurisdiction.¹²⁶ In short, this early case demonstrated matters appearing to fall within one's domestic jurisdiction must actually be considered international provided they caused international repercussions.¹²⁷ Other, later sources continued to comply with the Security Council's decision in 1946. For instance, the Final Act of the Helsinki Accord assumes that human rights are not exclusively within the domestic jurisdiction of states.¹²⁸

Finally, the conclusion human rights violations are not solely matters of domestic concern is the only logical conclusion.¹²⁹ Concluding human rights violations fall solely within a nation's domestic jurisdiction would invalidate many international agreements by rendering them *ultra vires*. With such an interpretation, every government would be guilty of meddling.¹³⁰ Finally, even nations¹³¹ and scholars¹³² have supported the view that a consistent pattern of gross violations of human rights is a violation of international law.

c. Human Rights and Article 2(4)

The question remaining unanswered is whether the founders intended to authorize force as a possible remedy for human rights violations. Lauterpacht, for one, assures scholars and governmental officials it is erroneous to conclude that the Charter's provisions on human rights are "a mere declaration of principle devoid of any element of legal obligation."¹³³ The U.N. Charter is not to be wielded as a shield for the protection of repressive governments and dictatorships.¹³⁴

From the language of the some of the founders, it appears they designed the qualifying phrases of article 2(4) to prevent the change of any international borders or the elimination of a state's independence through the use of or

126. *Id.* at 188-192.

127. *Id.* at 188-89.

128. Henkin, *supra* note 121, at 23.

129. The Security Council has, in fact, declared human rights violations to be international and not within the domestic jurisdiction on the state. *See, e.g.*, U.N. Security Council Resolution No. 216, U.N. SCOR, 20th Sess., 1258th mtg., at 1, U.N. Doc. A/RES/216 (1965); U.N. Security Council Resolution No. 217, U.N. SCOR, 20th Sess., 1265th mtg., at 1, U.N. Doc. A/RES/217 (1965); U.N. Security Council Resolution No. 232, U.N. SCOR, 21st Sess., 1340th mtg., at 1, U.N. Doc. A/RES/232 (1966); U.N. Security Council Resolution No. 253, U.N. SCOR, 23rd Sess., 1428th mtg., at 1, U.N. Doc. A/RES/253 (1968); U.N. Security Council Resolution No. 282, U.N. SCOR, 25th Sess., 1549th mtg., at 1, U.N. Doc. A/RES/282 (1970).

130. Henkin, *supra* note 121, at 23.

131. *Id.* at 27.

132. W. Michael Reisman, *Sovereignty and Human Rights*, 84 AM. J. INT'L. L. 866, 869 (1990).

133. LAUTERPACHT, *supra* note 114, at 147.

134. Jeane J. Kirkpatrick & Allan Gerson, *The Reagan Doctrine, Human Rights, and International Law*, in RIGHT V. MIGHT, *supra* note 52, at 25-26.

threat of force.¹³⁵ For instance, the Deputy Prime Minister of Australia stated: “[t]he application of this principle [article 2(4)] should insure that no question relating to a change of frontiers or an abrogation of a state’s independence could be decided other than by peaceful negotiations.”¹³⁶ Since a unilateral humanitarian intervention neither affects a nation’s borders nor its independence, the founders must not have intended article 2(4) to prohibit such a use of force.

In addition, the framers debated omitting the qualifying phrases of 2(4), but this proposal was rejected, indicating an intention to allow an intervention not otherwise inconsistent with other provisions in the Charter—arguably validating humanitarian interventions.¹³⁷ Further, had the founders thought about humanitarian intervention, in light of the fresh memories from the Holocaust, they would have allowed such intervention.¹³⁸

3. Summary of Intent Arguments

One problem of determining the intent of the framers is that with a large group of people formulating the Charter, finding all members possessed a single, identical intention is unlikely.¹³⁹ It is abundantly clear that the founders intended to halt both aggression and violations of human rights. Whether or not the founders were willing to sacrifice human rights for aggression or sacrifice aggression for human rights is not explicit in the Charter nor explicit from intent. What is certain is that a prohibition on unilateral interventions for human rights amounts to a declaration that human rights do not exist. In other words, denying force to rectify human rights violations, when all other methods have been attempted, means that human rights are devoid of a remedy, but a right without a remedy implies the right does not exist.¹⁴⁰ “Human rights guarantees which cannot be protected by some action . . . are not worth the ink with which they are written.”¹⁴¹

135. New Zealand argued for permitting the status quo of nations to change, but not via the threat of force. Australia’s representative also felt that the qualifying phrase was intended to prevent borders from changing because of the use of force, but not by peaceful methods. 1 U.N.C.I.O. Docs. 174 *quoted in* D’Amato, *supra* note 15, at 70 (quoting New Zealand Department of External Affairs, *New Zealand and the San Francisco Conference* 45 (Wellington, 1945)).

136. *Id.*

137. Teson, *supra* note 13, at 134. Of course, unilateral humanitarian interventions would need to escape the qualifying clauses. *See supra* text accompanying notes 105-06.

138. Teson, *supra* note 13, at 135.

139. *See* D’Amato, *supra* note 15, at 72-73.

140. Frank & Rodley, *supra* note 9, at 299.

141. Jochen Abr. Frowein, *The Interrelationship between the Helsinki Final Act, the International Covenants on Human Rights, and the European Convention on Human Rights*, in Buergenthal, *supra* note 121, at 71.

C. Other Arguments

Since the Charter is unclear, both sides to this seemingly never ending debate turn to policy rationales to support their respective positions. The classicists point mainly to abuses that would occur if a unilateral humanitarian intervention exception existed. In contrast, the realists demonstrate how the failure of the U.N. to live up to expectations allows states to retain a residual right to intervene unilaterally for humanitarian reasons. Further, realists assert international law concepts have changed dramatically so that an oppressive regime does not possess any international rights and a unilateral humanitarian intervention must, therefore, be legal.

1. Classicist Argument of Abuse and Realist Responses

In 1949, the International Court of Justice asserted that an "alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and as such cannot . . . find a place in international law. . . ." ¹⁴² Since abuses will inevitably occur, classicists argue for a steadfast rule that prohibits all unilateral humanitarian interventions and all other uses of force.

According to classicists, in international society it is too dangerous to permit a readily presumed right to coerce the citizens of another country. ¹⁴³ Most nations act in their own self-interest. Humanitarian motives, even when genuine, appear too often to have been subordinated to the attacking state's motive of enhancing its own relative power position. ¹⁴⁴

Invariably intervening states have had their own agendas, imposed conditions not freely chosen, obtained special advantages and exacerbated internal conflicts. ¹⁴⁵ Intervention can deny people their right to self-determination and is inherently inhumane. ¹⁴⁶ The stark reality, classicists contend, is that humanitarian intervention is nothing more than enabling the strong to intervene in weaker states. This doctrine gave the European powers of the earlier centuries the dignity of legal sanction. ¹⁴⁷ Any formulation of law that allows unilateral action by any state invites stronger countries to violate smaller ones at suitable times. It is unrealistic to imagine that the would-be intervenor can disregard economic, political, and social implications and invade solely for humanitarian reasons. ¹⁴⁸

142. *Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 4 (Judgment of Apr. 9), *quoted in Bazylar, supra* note 1, at 575.

143. *See generally* Gordon, *supra* note 16.

144. Gordon, *supra* note 16, at 277.

145. Schacter, *supra* note 113, at 16.

146. Mary Ellen O'Connell, *Commentary on International Law: Continuing Limits on U.N. Intervention in Civil War*, 67 *IND. L.J.* 903, 904 (1992).

147. Hassan, *supra* note 4, at 862.

148. *Id.* at 881.

The unresolved problem of abuse, classicists continue, is not resolved by those who argue for the right of states to unilaterally or collectively use force for human rights because they cannot devise means to separate the legitimate humanitarian interventions from the illegitimate ones like Hitler's assertion he was invading Czechoslovakia in 1938 to prevent oppression of German nationals.¹⁴⁹ In sum, any rule permitting the unilateral use of force is an invitation to powerful nations to act in whatever manner they please.

There are two powerful responses to this argument. First, the U.N. must attack the underlying problem and not eradicate the solution. For example, crime is rampant in the U.S., and police officers have abused their powers from time to time while attempting to prevent crime. An argument paralleling the classicist position is that the U.S. government must eliminate the police because they have abused their powers. Obviously, what is needed is a system that effectively targets the underlying problem of crime or human rights violations and not one that eliminates the solution, police officers or humanitarian intervention, without implementing another solution.¹⁵⁰

Second, the reliance on abuse doctrine to enforce a prohibition on unilateral humanitarian intervention posits a utilitarian calculation declaring that the consequences of prohibiting all interventions will provide better or safer consequences than the opposite rule.¹⁵¹ The problem with this absolute rule is there might be a situation in which it has the calculation backwards, and an intervention will increase overall utility. If one is a rule utilitarian and truly concerned with the outcome, such a person must allow for intervention in cases where unilateral humanitarian intervention does more good than harm, but this means one can no longer be a rule-utilitarian.¹⁵² Thus, the problem becomes not one of interpreting the Charter, but in knowing when a true humanitarian intervention will save lives and increase overall utility.¹⁵³

149. Frank & Rodley, *supra* note 9, at 284.

150. See Robertson & Merrills, *supra* note 5, at 1.

151. Teson, *supra* note 13, at 103.

152. *Id.* at 104. Some scholars, notably Lori Damrosch, argue that humanitarian interventions must be prohibited because they are not effective solutions to the deeper social and political problems in a suffering nation. Lori Damrosch, *Commentary on Collective Military Intervention to Enforce Human Rights*, in *LAW AND FORCE IN THE NEW INTERNATIONAL ORDER* 215, 220 (Damrosch & Scheffer, eds., 1991). This is also a utilitarian argument in favor of prohibiting force for humanitarian purposes. As with other utilitarian arguments, this must also be rejected because of those cases in which it will be beneficial to intervene. Once again, the problem will be determining which cases can be dealt with effectively and for the proper reasons.

153. This will be discussed in part VIII, *infra*.

2. Realist Arguments and Classicists Responses

a. Failure of the U.N.

Realists argue even if society erroneously accepts the position that the U.N. system was designed to prohibit the unilateral use of force for humanitarian interventions, states retain this right because of the frequent failure of the U.N. system to act collectively when human rights are being severely violated. "It would seem that the only possible 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."¹⁵⁴

Realists acknowledge a properly functioning U.N. scheme would have obviated the need for the continuation of the right to use force unilaterally but that nations retain this right due to the failure of the system:¹⁵⁵

the establishment of machinery for collective security and enforcement was so basic a condition for the members of the U.N. in surrendering their right under customary international law to use force for a variety of reasons, that *failure by the Organization to create this machinery would partially relieve* the Member States of their obligation of restraint under the Charter.¹⁵⁶

The security system failed because it rested on a fragile consensus between the five permanent members, which unfortunately was very short-lived.¹⁵⁷ The Soviet Union, shortly after the U.N. was created, announced that it did not accept 2(4).¹⁵⁸ In fact, the Security Council has rarely functioned in accordance with Chapter VII.¹⁵⁹

There are numerous post-U.N. examples of situations in which massive human rights violations took place without any U.N. intervention. A partial list of these failures includes: the Indonesian government's killing of between 150,000 and 400,000 political nonconformists in the mid-1960's, the Southern Sudanese government's massacre of secessionist blacks for nearly a decade, the decimation of tens of thousands of Tutsis in Rwanda, the slaughter of tens of thousands of Hutus in Burundi, the massacre of perhaps one million Ibos at the hands of the Nigerian government, and the brutal

154. P. JESSUP, A MODERN LAW OF NATIONS 170-71 (1948).

155. W. Michael Reisman, *Criteria for the Lawful Use of Force in International Law*, 10 YALE J. INT'L L. 279, 279 (1985).

156. Fonteyne, *supra* note 1, at 257 n.231, *quoted in* Bazylar, *supra* note 1, at 579 (emphasis added).

157. Reisman, *supra* note 155, at 280.

158. *Id.*

159. Delbruck, *supra* note 21, at 887.

genocide of between one and three million Cambodians by the Khmer Rouge in the 1970's.¹⁶⁰

These examples evidence a discernable lack of commitment on the part of many governments either to protect human rights in their own countries or to act for their protection at the international level. Many governments have accepted such international commitments but have failed to take measures for their implementation at the national level.¹⁶¹ Governments are more often mindful of self-interest and of protecting allies or harassing adversaries than extending provisions of international agreements regarding human rights to their citizens.¹⁶² The four bodies in the U.N. responsible for promoting human rights¹⁶³ are all primarily comprised of the same government representatives who are motivated by self-interest or protection of their allies.¹⁶⁴ Other problems include a severe lack of resources at the U.N. for promoting human rights.¹⁶⁵

Employees of U.N. organizations designed to eliminate human rights abuses realize their organization's shortcomings. Mr. Theo C. van Boven, former Director of the Division of Human Rights, stated

we are frequently faced in the United Nations with serious and urgent problems of violations of human rights which arise in different parts of the world, but apart from statements of the Secretary General issued in a humanitarian spirit . . . , the Organization is mostly unable to take action. . . . In my view this is a major deficiency in the arrangements of the United Nations for dealing with situations of gross violations. . . .¹⁶⁶

At the thirty-seventh session of the Commission on Human Rights, Mr. van Boven pled for help, "our methods for tackling violations of human rights are still in their infancy and are often inadequate to deal with the problems faced."¹⁶⁷

Since the U.N. has failed to provide assistance when it was urgently needed, realists argue that society requires retaining the possibility of a unilateral use of force. The unilateral use of force may actually help those in need. It seems only logical that if the international community fails to act when it should, unilateral intervention must be available as a last resort to relieve individuals from unnecessary suffering.

160. Bazylar, *supra* note 1, at 595-96.

161. B.G. RAMCHARAN, *THE CONCEPT AND PRESENT STATUS OF THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS* 268 (1989).

162. *Id.*

163. These bodies include the Security Council, the General Assembly, the Economic and Social Council, and the Commission on Human Rights. *Id.* at 269.

164. *Id.*

165. *Id.* at 273.

166. *Id.* at 243 (quoting United Nations press release, H.R. 1928, p. 6).

167. *Id.* at 244 (quoting United Nations press release, H.R. 1992).

b. Sovereignty of the People

Realists argue governments are not per se legitimate but that the international legitimacy of a government depends on respect for the rights of the individual and on the consent of the governed.¹⁶⁸ At one time, sovereignty of a nation was absolute. With the passage of time, the international world responds to changes. Updating is not unknown to international law as even the International Court of Justice recognized the absurdity of mechanically applying an old norm without reference to fundamental constitutive changes.¹⁶⁹ As the often quoted Oliver Wendel Holmes once proclaimed, "a word is not a crystal, transparent and unchanged, it is the skin of living thought and may vary greatly in color and content according to circumstances and the time used."¹⁷⁰

One concept that has changed dramatically in some parts of the world since the Middle-Ages is the notion of sovereignty. The idea of sovereignty coming from the people is not really a recent Western idea. John Locke's political theory held that sovereignty pertains to the people and not to the monarch. As Locke wrote, "Government is not their [the governed's] master; it is created by the people voluntarily and maintained by them to secure their own good."¹⁷¹ International law still protects sovereignty, but now, argue the realists, international law must protect the people's sovereignty.¹⁷² The elusive national premise of sovereignty of the king must no longer prevail.¹⁷³

Classicists counter the realists idea of sovereignty by arguing even if a nation attempted to support the sovereignty of the people, doing so via military intervention will not promote a democratic form of government with democratic values.¹⁷⁴ Classicists argue that if democratic will is apparent in the people, democracy will likely prevail without any foreign intervention—as in Eastern Europe.¹⁷⁵ If democratic forces have not developed from within, then the foreign force will impose its own will, not the will of the people. As such, intervention interferes with the genuine development of a legitimate government.¹⁷⁶

168. Kirkpatrick & Gerson, *supra* note 134, at 21; see also *Universal Declaration of Human Rights*, G.A. Res. 217, U.N. Doc. A/810, at art. 21(3) (1948). "The will of the people shall be the basis of authority of government; this will shall be expressed in periodic and genuine elections." *Id.*

169. Reisman, *supra* note 132, at 873.

170. *Id.* at 872-73.

171. Robertson & Merrills, *supra* note 5, at 5.

172. Reisman, *supra* note 132, at 869.

173. Scheffer, *supra* note 14, at 254.

174. Ved P. Nanda, *Agora: U.S. Forces in Panama: Defenders, Aggressors or Human Rights Activists?* 84 AM. J. INT'L L. 494, 499 (1990).

175. *Id.*

176. *Id.*

3. Summary of the Two Sides

This author believes these policy rationales point decisively in favor of the realist position. The classicist argument that a complete prohibition is necessary to prevent abuse of the doctrine is mistaken. Limitations on the unilateral use of force for humanitarian purposes should allay all classicist fears on providing stronger nations open invitations to intervene. Further, maintaining the position that all unilateral humanitarian interventions are illegal prevents a nation from acting on behalf of others in a clear case of humanitarian intervention such as one nation intervening in a situation similar to Somalia.

On the other hand, the realist arguments are quite solid. If everyone agrees upon a system, but that system fails, as the world has witnessed time and time again, all parties must retain rights they originally surrendered.¹⁷⁷ In addition, the notion whoever is in power has complete control over the population and should be recognized internationally is artificial and outdated. This U.N. system completely legitimizes all uses of force prior to the formation of the U.N. For instance, Iraq's recent attack and attempted annexation of Kuwait was a violation of international law. A tyrant, however, who took control over a population prior to 1945 and does not represent their will, likewise should not be recognized in international law, but international law clearly recognizes these tyrants as well as those leaders rising to power via brutal means from the inside as legitimate sovereigns. In essence, international law devised an artificial system that recognizes anyone who assumed control by any method prior to 1945 and any internal method after 1945 but would not recognize an outside force taking control over territory and its population after 1945. The distinction between taking additional territory by force and therefore controlling the population is in actuality no different than a dictator or tyrant taking control of the population from the inside via force, and the international system must recognize the similarity of these two uses of force and recognize that the controlling principle ought to be the people's sovereignty.

VI. ACTIONS TAKEN BY STATES SINCE 1945

The actions taken by states since the implementation of the Charter are an important indication of whether or not states believe they still possess the customary right to unilaterally intervene for humanitarian purposes. These actions states have taken must be examined when trying to determine whether the U.N. Charter regards unilateral humanitarian intervention as lawful or

177. When the notion of the social contract breaks down, even in the domestic sphere, individuals believe they retain the rights they gave up in "agreeing" to the social contract. After the first verdict in the Rodney King trials, the citizens of Los Angeles and many other communities across the U.S. believed that the system had failed them, and they therefore retained rights previously relinquished.

unlawful.¹⁷⁸ Judging from actual state intervention and scholarly interpretation of those state actions, there are two subdivisions of humanitarian intervention—rescue missions and non-rescue missions.¹⁷⁹ After the implementation of the Charter, nations have continued to intervene unilaterally for humanitarian purposes and claimed they have the right to do so. The U.N. continues to condemn most of these humanitarian interventions. A close analysis of several examples, this author believes, lends support to the theory that nations do possess the right to intervene unilaterally for humanitarian purposes in both rescue and non-rescue cases so long as the intervention is done properly.

A. Rescue Missions

The easiest unilateral humanitarian interventions to justify are those that are classified as “true” rescue missions. A “true” rescue mission occurs when a third nation has captured nationals of other nations and at least one other nation takes swift, immediate action to recapture the hostages and return the former hostages and all forces back to their homeland as quickly as possible while doing as little damage and spilling as little blood as possible. The general rule for the protection of nationals is there must be an imminent threat of injury to one’s nationals, a failure on the part of the targeted state to protect the nationals, and the intervention must be narrowly construed to limit injury and death.¹⁸⁰ Proportionality is often also considered an important element in validating a rescue mission.¹⁸¹

Two important ideas must be mentioned before discussing two examples of rescue mission humanitarian interventions. First, the belief of commentators regarding the protection of a nation’s own national’s on foreign soil has changed. At the time of the U.N.’s creation, commentators felt the U.N. had sole responsibility for providing the necessary protection, but that position is no longer accepted and has not been accepted for some time.¹⁸² Second, the classicist-realist debate does not end with the language of the Charter, the founders intent, or policy reasons. Each side tends to characterize the facts giving rise to the intervention, the intervention itself, and the outcome of the intervention somewhat differently. Rescue missions are the exception to that rule as both sides generally agree that humanitarian rescue

178. Vienna Convention, *supra* note 45, at Art. 31, ¶ 3(b).

179. For a complete list of all humanitarian type interventions, *see* Scheffer, *supra* note 15, at 254 n.4.

180. WILLIAM C. GILMORE, *THE GRENADA INTERVENTION: ANALYSIS AND DOCUMENTATION* 59 (1984).

181. *Id.* at 63.

182. Jessup, *supra* note 154, at 169-72.

missions remain a nation's right and will not be condemned unless the mission is undertaken in an improper manner.¹⁸³

1. Israel in Entebbe

The most classic rescue mission occurred in 1976 when many Israeli citizens aboard an Air France airplane were hijacked by Palestinian terrorists who forced the plane to land at the Entebbe Airport in Uganda.¹⁸⁴ Israeli commandoes stormed the airport, rescued those hijacked, including non-Israelis, and immediately returned to Israel.¹⁸⁵ The essential features of this intervention were that it was a limited armed intervention, both narrowly construed to only saving the hostages and proportional to the threat, with only one aim—rescuing nationals being held as hostages in a foreign country whose lives were at substantial risk of death or serious harm while the government of the target country refused to intervene on their behalf.¹⁸⁶ In this type of rescue situation, “the legal community has widely accepted that the Charter does not prohibit humanitarian intervention by use of force strictly limited to what is necessary to save lives.”¹⁸⁷

2. U.S. in Grenada

Even though the legal community has accepted the legality of unilateral rescue missions as humanitarian interventions, some “rescue” missions have failed to meet the basic requirements of a rescue mission and have been condemned by the world community because of the failure to limit the mission. One classic example of such a case occurred in 1983, when the U.S. sent over 8,000 troops to the island of Grenada partly to protect 1,000 Americans living on the island.¹⁸⁸ The international reaction condemning the invasion was relatively swift. A Security Council resolution strongly condemning the armed intervention failed only because the U.S. exercised

183. Although both sides reach the same conclusion with rescue missions, the paths they take to reach this conclusion are quite different. *See supra* note 14. Realists believe that humanitarian interventions are lawful and as a result, rescue missions, one form of humanitarian intervention, must also be legal. Classicists tend to characterize rescue missions as falling within article 51 of the U.N. Charter for self-defense. Classicists believe that the principles of a proper rescue mission stem in part from the *Caroline* case and U.S. Secretary of State Webster's response which delineated the principles for a proper self-defense. Brownlie, *International Law and The Use of Force by States*, in CARTER & TRIMBLE, *supra* note 41, at 1219.

184. Scheffer, *supra* note 14, at 271.

185. *Id.* at 257.

186. *Id.*

187. Henkin, *supra* note 52, at 41.

188. Teson, *supra* note 13, at 188-89. The U.S. State Department claimed the U.S. “did not assert a broad doctrine of ‘humanitarian intervention’ [but] instead relied on the narrower well-established ground of protection of United States nationals.” Scheffer, *supra* note 14, at 257 n.4. Other, non-generally accepted, defenses for the invasion were also given by the U.S. These included a request by the Governor General of Grenada and as a lawful act under regional peace-keeping treaties. Teson, *supra* note 13, at 189.

its veto power.¹⁸⁹ A nearly identical resolution passed the General Assembly with 108 votes in favor, 9 against, and 27 abstentions.¹⁹⁰

The most basic reason why the world community condemned the invasion is because this "rescue" mission clearly fell outside the bounds of the requirements for a proper rescue mission. First, the U.S. troops remained in Grenada for several months after the invasion and the evacuation, demonstrating they did not narrow this rescue mission to saving the lives of American nationals.¹⁹¹ This mission was so broadly construed that the U.S. troops remained on the island until after the establishment of a new government.¹⁹² Second, the armed intervention did not appear to be necessary to save lives of the American citizens.¹⁹³ In short, the Grenada intervention did not meet the standards for a legitimate rescue mission and was appropriately sanctioned by the U.N. General Assembly.

B. Non-Rescue Unilateral Humanitarian Interventions

Interventions that do not qualify as rescue missions are more difficult to validate either under the U.N. Charter or through state action since the implementation of the Charter. This is partly due to the classicist-realist schism. Classicists maintain although nations sometimes have argued for a humanitarian intervention exception, even this benign exception to 2(4) has never been accepted.¹⁹⁴ Virtually every use of force in years since the Charter has been clearly condemned by virtually all states and all justifications except for self-defense have been rejected, classicists contend.¹⁹⁵ According to these classicists, neither the claiming behavior of the intervenor nor the international community's response to claims and facts lends any support to the view that unilateral humanitarian intervention now enjoys any tolerance.¹⁹⁶ Classicists point to modern day cases, especially India in East Pakistan and Tanzania in Uganda, in which humanitarian intervention seemed to have been the best method to justify the intervention. Both intervenors had solid grounds to assert a humanitarian justification for their actions,¹⁹⁷ but their failure to even assert a humanitarian intervention defense, classicists claim, demonstrates that such a defense must not exist.¹⁹⁸

Realists counter this argument by demonstrating a clear-cut case of humanitarian intervention that was not condemned by the U.N. Second,

189. J.S. DAVIDSON, GRENADA 145 (1987).

190. *Id.* at 146.

191. Scheffer, *supra* note 14, at 257 n.4.

192. *Id.*

193. Davidson, *supra* note 189, at 147.

194. Henkin, *supra* note 52, at 41.

195. *Id.* at 40.

196. Farer, *supra* note 107, at 193.

197. *Id.*

198. *Id.*

realists insist that both India and Tanzania did in fact assert humanitarian intervention as a justification for their action. Third, realists examine how nations actually respond to these cases of humanitarian intervention by their actions and do not judge merely by a nation's rhetoric because although states sometimes announce that an aggressor must be condemned, the covert message conveyed to the aggressor is that the international community approves of the measures taken by the intervenor. As a result, the intervenor need not worry about sanctions against herself because after initially condemning the aggression, other measures against the acting nation will not be taken. In essence, this is actually a backhanded method for approving the action and not a condemnation as the classicists argue. In determining whether international law permits or forbids unilateral humanitarian intervention, realists argue scholars must deemphasize what governments say in favor of what they do.¹⁹⁹ Further, this author believes one reason why the U.N. condemns most non-rescue humanitarian interventions is because the smaller nations that violate the human rights of their citizens, fearing for their own safety and fearing that their nation may be the next nation to receive international attention, attempt to hide behind the U.N. Charter and influence the interpretation of the U.N. Charter so all types of intervention are forbidden.

1. French in the Central African Republic

At least one unilateral humanitarian intervention was never condemned and stands for the proposition that the right to unilaterally intervene for humanitarian purposes does exist if done properly. Jean-Bedel Bokassa was the emperor of the Central African Republic ("C.A.R."), and the atrocities his regime committed were well known.²⁰⁰ In 1979, Bokassa ordered the torture and execution of several schoolchildren.²⁰¹ In response, 1,800 French troops combined with a group of C.A.R. citizens overthrew Bokassa in a bloodless coup.²⁰² Only three nations voiced their objection to the intervention.²⁰³ Even classicists acknowledge this intervention "could be accepted as humanitarian in intent and effect. . . ." ²⁰⁴

This intervention can only be justified as a unilateral humanitarian intervention permitted by international law as self-defense and rescue cannot in any way pertain to this particular example.²⁰⁵ This intervention provides a paradigm of how an intervening nation must act in order to legally

199. *Id.* at 188.

200. Teson, *supra* note 13, at 175.

201. *Id.*

202. *Id.*

203. *Id.* at 177. Benin, Chad, and Libya condemned the invasion. *Id.*

204. Schacter, *supra* note 113, at 16.

205. Teson, *supra* note 13, at 178.

intervene unilaterally for humanitarian reasons. The lessons to be learned from this intervention provide that a nation must be driven by humanitarian motives to intervene for humanitarian purposes. Second, the targeted nation must be grossly violating its citizens' human rights. Third, the mission must be narrowly targeted to the human rights violations with as little blood as possible spilled in the process of liberating people from those human rights abuses. Fourth, the territory of the former nation must not be conquered or annexed by the intervening nation. Fifth, the intervening army must pull out as quickly as possible after the purposes of the mission have been completed. According to this invasion and the response of the international community, if all these conditions are met, then the unilateral humanitarian intervention is lawful.

2. India and East Pakistan

Not all unilateral interventions for humanitarian purposes are clearly as lawful or as accepted as the French invasion of C.A.R. In 1971, in response to a massacre of East Bengalis by the Pakistani government, the Indian government unleashed a large-scale military force in East Bengal to stop the perpetuation of the massive human rights violations occurring in East Bengal.²⁰⁶ Commentators' reaction to this intervention painted two completely different pictures of the intervention and the result.

Classicists argued India failed to claim that the intervention was for humanitarian purposes.²⁰⁷ Others concluded that the Indian government did justify their military actions via a humanitarian intervention argument.²⁰⁸

One side vigorously challenged the lawfulness of India's intervention for human rights. Some commentators vigorously challenged the legality of the intervention by relying mainly on the danger of abuse arguments.²⁰⁹ Other commentators, by noting the 104-11-10 vote in the General Assembly, believed the world strongly condemned India for their actions in Pakistan.²¹⁰ Classicists believe the world condemned this intervention and believe this intervention cannot possibly stand for the proposition that unilateral humanitarian intervention measures are lawful.

Others argued the majority of states, rather than condemning India for violating article 2(4) actually implicitly acknowledged an exception to article

206. Frank & Rodley, *supra* note 9, at 275.

207. See Akehurst, *supra* note 83, at 96; see also Farer, *supra* note 107, at 193; see also Schacter, *supra* note 113, at 191.

208. See Teson, *supra* note 13, at 186. The Indian representative was quoted as saying, "The 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. . . ." *Id.*

209. Frank & Rodley, *supra* note 9, at 275-76.

210. Thomas M. Franck, *Of Gnats and Camels: Is There a Double Standard at the United Nations?* 78 AM. J. INT'L L. 811, 816-17 (1984).

2(4) in this particular unilateral humanitarian intervention example.²¹¹ The Security Council failed to adopt any resolutions regarding this violation of human rights and intervention.²¹² The General Assembly's resolution, contrary to classicist interpretation, called for Pakistan to stop the human rights atrocities occurring within Pakistan and for both sides to cease all hostilities.²¹³ In this view, the General Assembly refused to take sides in this matter and actually balanced human rights violations and the need for peace not by outwardly condemning either of the parties but by calling for a restoration of the peace which included the cessation of human rights abuses in Pakistan.²¹⁴ In short, the U.N. complied with the Charter by calling for an end to both the human rights violations and the armed conflict between India and Pakistan.

Analyzing this intervention in terms of the C.A.R. lawful humanitarian intervention reveals that this is a borderline case of a lawful intervention. First, India certainly had humanitarian motives for their invasion. Although the Pakistani atrocities forced many to flee Pakistan and enter India giving rise to economic reasons for intervening, India's primary motivation was humanitarian.²¹⁵ There can be no dispute that Pakistan was grossly violating the human rights of its citizens. This intervention could plausibly be challenged on the ground that the Indian government did not narrowly tailor its intervention to the human rights abuses or possibly did not pull out fast enough. Further, even though the Indian government itself did not capture any territory from this intervention, the nation of Bangladesh was formed as a result of this armed conflict.²¹⁶ Despite these possible flaws in claiming a lawful intervention, this author believes the General Assembly's response was an indication that the world community agreed in principle with India's actions.

3. Tanzania and Uganda

Another example of a questionably lawful humanitarian intervention occurred between Tanzania and Uganda. In 1978, President Amin's troops from Uganda invaded its neighbor Tanzania, captured and annexed over 700 square miles of formerly Tanzanian territory before retreating back to Uganda within the month.²¹⁷ After a precarious two-and-one-half month negotiation session, Tanzania took the offensive and attacked Amin's troops

211. Teson, *supra* note 13, at 188.

212. *Id.* at 187 n.194.

213. *Id.* at 187.

214. *Id.*

215. *Id.* at 182.

216. *Id.* at 179.

217. Hassan, *supra* note 4, at 865.

and continued to attack well after Amin offered peace settlements.²¹⁸ Amin's government, over the eight years he ruled Uganda, was clearly responsible for a brutal and repressive regime that killed an estimated 300,000 Ugandans.²¹⁹ Neither the Security Council nor the General Assembly condemned Tanzania's use of force.²²⁰ Similarly, the leaders of the African nations were silently thankful that Amin was overthrown.²²¹

The question still remains whether this intervention was a lawful exercise of humanitarian intervention. Some commentators have declared Tanzania's invasion illegal because of the methods they used.²²² This author believes using illegal methods in a humanitarian intervention is not an argument for eliminating the right but, rather an argument for creating a list of criteria that must be followed for a humanitarian intervention to be considered lawful. Others have strongly declared that a system that protects genocidal leaders is totally unacceptable.²²³ Analyzing this intervention from the standpoint of the C.A.R. invasion does not lend itself to a clear answer as some of the more important elements required were met while some of the others were not.

In this type of case, when the leader of a country is overthrown, classicists can always point to the "political independence" clause of article 2(4) to denounce the otherwise lawful humanitarian invasion. The U.N. community's refusal to denounce this invasion shows that if the atrocities of a government are so overwhelmingly heinous, then even if a humanitarian intervenor oversteps some bounds, the international community will not condemn the invasion.

C. Summary of State Action

This author believes these examples demonstrate nations believe the right of unilateral humanitarian intervention is available to nations as an option stemming either from the Charter or customary international law. Some argue in continuing this right, the world must realize states will not lightly risk their international relations on behalf of the human rights of a third nation's citizens. Such interventions, they contend, undoubtedly would be undertaken with great prudence and infrequency, at most when there is a serious breach on a widespread scale and a consistent pattern of serious violations.²²⁴ Although perhaps comforting, this author also believes if this right could be exercised on an absolute basis, then, as the classicists

218. Teson, *supra* note 13, at 159-60.

219. *Id.* at 163.

220. Frank, *supra* note 210, at 816.

221. Hassan, *supra* note 4, at 866.

222. *Id.* at 912.

223. Teson, *supra* note 13, at 165.

224. Henkin, *supra* note 121, at 33.

painstakingly argue, humanitarian intervention could act as an open invitation for the stronger nations to use humanitarian intervention as a facade to intervene militarily into weaker nations at any time. In order to prevent those types of abuses and to promote the Charter's goal of peace, the U.N. ought to delineate some requirements or limitations on this right before a nation may justify a unilateral intervention via the defense of humanitarian intervention.

VII. LIMITATIONS ON THE UNILATERAL RIGHT

The following is a list of requirements, borrowed from many international law scholars, that a nation ought to be required to take before intervening unilaterally for humanitarian purposes. First, before undertaking any unilateral action, unless completely futile, the Security Council must be consulted and fail to authorize collective action. Since one basis for unilateral intervention is the failure of the collective system, the Security Council must actually have knowledge of a situation and fail to act before the system can be declared a failure and unilateral action can be authorized.

Second, time permitting, all measures to remedy the situation short of the use of force must be attempted unless it can be known that such efforts will be futile.²²⁵ Before acting unilaterally, a nation must adhere to the principles of the Charter. Since one of the pillars of the Charter is a desire for peace, other measures, such as diplomatic and economic measures, must be attempted before allowing a nation to intervene by using force.

Third, a claim of humanitarian intervention must be examined in light of the record of human rights of the intervening country.²²⁶ This will limit the number of countries permitted to intervene for humanitarian purposes, but it will also prevent the absurd situation of abusive nations taking the position that they are more concerned about the condition of nationals in other countries than they are of nationals in their own country. Nations can rely on U.N. human rights records to determine if they are eligible to intervene unilaterally to prevent gross violations of human rights.

Fourth, intervention must be done in proportion to the violation so as to prevent wide-scale abuse by the intervening nation from occurring.²²⁷ In order for an intervention to adhere to the proportionality principle, the number of nationals being abused must be significant.²²⁸ This will ensure that a nation refrains from deploying thousands of troops to stop single abuses as the U.S. did in Panama.

225. Bazylar, *supra* note 1, at 604.

226. Hassan, *supra* note 4, at 890.

227. Bazylar, *supra* note 1, at 604.

228. Hassan, *supra* note 4, at 890-95.

Fifth, the intervention must be done for overriding humanitarian motives.²²⁹ In most circumstances, with ample scrutiny in our highly integrated world community, some self-interest can inevitably be found; however, if objectively a nation intervenes for humanitarian motives, the fact that some self-interest may arise should not prevent the nation from promoting human rights.

To ensure overriding humanitarian motives, nations must be required to focus their intervention narrowly on the abuses in the second nation which will probably be found with that nation's government.²³⁰ This requirement will be a tricky one because of the possibility of tinkering with a nation's "political independence." A nation must not be able to use this right to implement a more friendly government but only to eliminate the gross human rights violations in other nations.

Sixth, the U.N. delegate from Singapore²³¹ and the former Secretary-General of the U.N.²³² have both suggested that "like cases [of human rights violations] must be treated alike." In principle, this is a great idea because it prevents discrimination from playing a role in humanitarian interventions. Unfortunately, with half the world suffering from human rights abuses, such a rule would be a death knell for all humanitarian interventions. Adoption of such a provision would be tantamount to prevention of intervention on the basis of humanitarian intervention and, at this time, must be rejected.

Finally, the length of the intervention must be no longer than is necessary to eradicate the human rights violations.²³³ These conditions will enable nations to promote human rights while limiting the abuse of the doctrine. This requirement will help insure that a nation remains politically independent. After the intervention has eradicated the human rights violations, it is conceivable that the U.N. would agree to oversee governmental elections.

In sum, all of these limitations are designed to prevent a nation from using unilateral humanitarian intervention as a facade for aggression aimed against the intervene nation. As all situations will be different factually, these requirements must be read in light of their purpose which is the elimination of human rights abuses while simultaneously not allowing nations to overstep their bounds by controlling smaller, weaker nations. In light of this, the intervention in Uganda, since the Amin government was extremely repressive, was correctly not condemned by the U.N. even though the Tanzanian troops continued to liberate Ugandan nationals after Amin acquiesced to holding additional peace talks.

229. Bazylar, *supra* note 1, at 601-02.

230. Teson, *supra* note 13, at 116.

231. Ramcharan, *supra* note 161, at 245.

232. JAVIER PEREZ DE CUELLAR, REPORT OF THE SECRETARY-GENERAL ON THE WORK OF THE ORGANIZATION 19 (1991).

233. Hassan, *supra* note 4, at 898.

VIII. CONCLUSION

In light of the protection of human rights becoming one of the keystones in the arch of peace²³⁴ and in light of the failure of collective measures, states must retain the right to intervene unilaterally for humanitarian purposes. Since the founders of the U.N. failed to consider the possibility of unilateral humanitarian intervention, attempts to determine whether the Charter permits or forbids this type of military action is futile. The action of states since the implementation of the Charter should be the controlling factor, and their actions indicate states believe the Charter has not limited them from exercising the unilateral right to intervene for humanitarian purposes. As the classicists accurately demonstrate, an unlimited right may create more problems than it would solve. It is necessary, therefore, to spell out limitations on this right with which all nations must comply before intervening unilaterally for humanitarian purposes.

Steve G. Simon

234. PEREZ DE CUELLAR, *supra* note 232, at 12.

