BEYOND R2P: A PROPOSED TEST FOR LEGALIZING UNILATERAL ARMED HUMANITARIAN INTERVENTION

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Abstract

The current state of the law with regard to humanitarian interventions is that the only legal interventions are those approved by the United Nations Security Council. This framework has produced substandard results. The International Commission on Intervention and State Sovereignty (ICISS) in 2001 sought a way to obtain better results. In a report entitled "The Responsibility to Protect" (R2P), the ICISS set out a new framework for legal armed humanitarian interventions. The ICISS maintained the status quo with regard to authority to intervene by expressing a preference for a paradigm of multilateralism, requiring Security Council approval for interventions. The ICISS articulated the belief that it would be "impossible to find consensus . . . around any set of proposals for military intervention which acknowledged the validity of any intervention not authorized by the Security Council or General Assembly." The Secretary-General's Report on Implementing R2P reaffirmed the principle of multilateral action and ruled out Unilateral Armed Humanitarian Intervention (UAHI) as a legal use of force. The UN thus currently holds the view that unilateral interventions—no matter the extent of human suffering—are viewed disfavorably by the majority of the international community. This view ensures, in some cases, that action will not be taken in time to alleviate suffering.

As a result, R2P's significant failing is that it did not create a framework for UAHI when the Security Council fails to act. Instead, the ICISS asked—but but did not answer—the question, "where lies the most harm: in the damage to international order if the Security Council is bypassed or in the damage to that order if human beings are slaughtered while the Security Council stands by[?]" This thesis argues that the answer to the question is the latter—the most harm lies in the damage to the international order if human beings are slaughtered or allowed to suffer while the Security Council stands by. The thesis thus proposes a four-part test to legalize UAHIs when the Security Council fails to act. The test rests on three foundations: just war theory, sovereignty and non-intervention as presumptions, and the necessity that any intervention be both legal and legitimate. These same principles form the foundations for R2P. But, this test goes beyond R2P by establishing a framework under which individual states may intervene when the Security Council fails to act.

The elements of the proposed test are:

1. The United Nations Security Council fails to act under Chapter VII of the UN Charter.
2. The intervening state must show clear and convincing evidence of extreme human suffering—or imminent extreme human suffering—to rebut the presumptions of sovereignty and non-intervention.
3. The intervening state must have a defined mission.
4. The intervening state must intend to carry out—and actually carry out—jus post bellum obligations.

The international community must accept the concept of legal and legitimate UAHIs when this test is met. If the international community does not accept this concept, international law will be powerless and thus irrelevant in the face of extreme human suffering when the Security Council fails to act and R2P does not apply.

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I. Introduction

Between April and July 1994, approximately 800,000 Rwandan children, women, and men were slaughtered because of their ethnic ties.[1] Their suffering was extreme and their enemies were persistent: "Families were murdered in their homes, people hunted down as they fled by soldiers and militia, through farmland and woods as if they were animals."[2] While the suffering continued, the United Nations (UN) Security Council argued about whether the violence in Rwanda actually was genocide.[3] A decade later, many of the same acts were repeated—widespread and systematic rape, murder, and destruction of villages[4]—this time in the Darfur region of Sudan.[5] The UN engaged in the same arguments over the scope of the violence, and whether it was genocide.[6] In Rwanda and Sudan, the Security Council failed to approve adequate armed interventions in time to alleviate the suffering. This framework, in which the only legal armed humanitarian interventions are those approved by the Security Council,[7] has produced substandard results.[8]

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[1] JOSHUA JAMES KASSNER, RWANDA AND THE MORAL OBLIGATION OF HUMANITARIAN INTERVENTION 1 (2013).

[2] President William Jefferson Clinton, Address to Genocide Survivors at the Airport in Kigali, Rwanda (Mar. 25, 1998), *available at* http://www.cbsnews.com/news/text-of-clintons-rwanda-speech/.

[3] KASSNER, *supra* note 1, at 3.

[4] Rep. of the Int'l Comm'n of Inquiry on Darfur to the United Nations Secretary General, Oct. 25, 2004–Jan. 25 , 2005, (Jan. 25, 2005) ¶¶301-305, 320–321 [hereinafter Darfur Inquiry]. *See also* Samuel Vincent Jones, *Darfur, The Authority of Law, and Unilateral Humanitarian Intervention*, 39 U. TOL. L. REV. 97 (Fall 2007).

[5] *See* Darfur Inquiry, *supra* note 4, ¶ II.

[6] *Id.* The report found crimes against humanity, but not genocide, in Sudan. *Id.*

[7] U.N. Charter art. 39.

[8] U.N. Secretary-General, *A More Secure World: Our Shared Responsibility, Rep. of the High-Level Panel on Threats, Challenges, and Change*, ¶ 202, U.N. Doc. A/59/565 (2004) [hereinafter High-level Panel Report], *available at* https://www.un.org/en/peacebuilding/pdf/historical/hlp_more_secure_world.pdf.

The International Commission on Intervention and State Sovereignty (ICISS) in 2001 sought a way to obtain better results. In a report[9] entitled "The Responsibility to Protect" (R2P),[10] the ICISS set out a framework for legal armed humanitarian interventions. The ICISS maintained the status quo with regard to authority to intervene by expressing a preference for a paradigm of multilateralism, requiring Security Council approval for interventions.[11] The ICISS articulated the belief that it would be "impossible to find consensus . . . around any set of proposals for military intervention which acknowledged the validity of any intervention not authorized by the Security Council or General Assembly."[12] The Secretary-General's Report on Implementing R2P reaffirmed the principle of multilateral action and ruled out Unilateral Armed Humanitarian Intervention (UAHI) as a legal use of force.[13] The UN thus currently holds the view that unilateral interventions—no matter the extent of human suffering—are viewed disfavorably by the majority of the international community. This view ensures, in some cases, that action will not be taken in time to alleviate suffering.[14]

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[9] Rep. of the Int'l Comm'n on Intervention and State Sovereignty (ICISS), The Responsibility to Protect, Sept. 14, 2000–Dec. 2001, (2001) [hereinafter Responsibility to Protect], *available at* http://responsibilitytoprotect.org/ICISS%20Report.pdf.

[10] Responsibility to Protect (R2P) is a relatively new formulation for humanitarian intervention proposed in the Report of the ICISS in 2001. The Report is based on the meetings of a commission, appointed by the Government of Canada and a group of major foundations in response to Secretary-General Kofi Annan's pleas to find a consensus on humanitarian intervention.

[11] Responsibility to Protect, *supra* note 9, para. 6.28.

[12] *Id.* para. 6.37.

[13] *See* U.N. Secretary-General, *Implementing the Responsibility to Protect: Rep. of the Secretary-General*, ¶ 3, U.N. Doc. A/63/677 (Jan. 12, 2009) [hereinafter Implementing R2P], *available at* http://www.un.org/en/ga/search/view_doc.asp?symbol=A/63/677 ("[T]he responsibility to protect . . . reinforces the legal obligations of Member States to refrain from the use of force except in conformity with the Charter.").

[14] Responsibility to Protect, *supra* note 9, para, 6.37.

As a result, R2P's significant failing is that it did not create a framework for UAHI when the Security Council fails to act. Instead, the ICISS asked—but but did not answer—the question, "where lies the most harm: in the damage to international order if the Security Council is bypassed or in the damage to that order if human beings are slaughtered while the Security Council stands by[?]"[15]

Arthur Leff,[16] a professor at Yale Law School, expressed the idea that if human beings are suffering somewhere in the world, the international community should act to end it, no matter the political or international law restraints. The need to help suffering people, Leff argues, trumps any legal objections that may arise. In 1968, he wrote to the *New York Times* regarding children suffering in Biafra:[17]

> I don't know much about the relevant law [of humanitarian interventions] . . . I don't care much about international law, Biafra or Nigeria. Babies are dying in Biafra. . . . We still have food for export. Let's get it to them any way we can, dropping it from the skies, unloading it from armed ships, blasting it in 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 . . . .[18]

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[15] *Id.*

[16] Professor Leff was a professor at Yale Law School from 1969–1981 and a Washington University Law professor before that. YALE LAW SCHOOL, http://www.law.yale.edu/cbl/modernera.htm (last visited Mar. 25, 2014).

[17] Biafra was a secessionist western African state that declared its independence from Nigeria in 1967. Nigerian government forces defeated Biafran forces in 1968. Biafra lost its seaports and became landlocked. Supplies could only be brought in by air. Starvation and disease followed, and estimates of mortality ranged from 500,000 to several million. BIAFRA, http://www.britannica.com/EBchecked/topic/64289/Biafra (last visited Mar. 1, 2014).

[18] Tom J. Farer, *Humanitarian Intervention: The View from Charlottesville, in* HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 151 (Richard B. Lillich, ed., 1973) (referencing Professor Leff's letter to the Editor of the *N.Y. Times*, Oct. 4, 1968).

Professor Leff's argument is compelling, but it is not the law. Instead, the law is and has been that UAHI is prohibited by the UN Charter. [19]

This thesis argues that the answer to the question ICISS left unanswered is that the most harm lies in the damage to the international order if human beings are slaughtered or left to suffer while the Security Council stands by. The thesis thus proposes a four-part test to legalize UAHIs when the Security Council fails to act. The test rests on three foundations: just war theory, sovereignty and non-intervention as presumptions, and the necessity that any intervention be both legal and legitimate. These same principles form the foundations for R2P.[20] But, this test goes beyond R2P by establishing a framework under which individual states may intervene when the Security Council fails to act.

The elements of the proposed test are:

> 1. The United Nations Security Council fails to act under Chapter VII of the UN Charter. [21]
>
> 2. The intervening state must show[22] clear and convincing evidence of extreme human suffering—or imminent extreme human suffering—to rebut the presumptions of sovereignty and non-intervention.
>
> 3. The intervening state must have a defined mission.

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[19] U.N. Charter art. 2, para. 4.

[20] Responsibility to Protect, *supra* note 9, at XII, chap. V (discussing post-intervention obligations).

[21] Rep. of the Ind. Int'l Comm'n on Kosovo, Sept. 21, 1999–Aug. 28, 2000 (2000) at 193 [hereinafter "Kosovo Report"], *available at* http://reliefweb.int/sites/reliefweb.int/files/resources/6D26FF88119644CFC1256989005CD392-thekosovoreport.pdf. The first element of this thesis's proposed test is also part of the Danish Institute for International Affairs' criteria for legitimate humanitarian intervention which is referenced in the Kosovo Report. In the proposed test, this does not give the Security Council a "right of first refusal." The element is met if the Security Council is unable to act due to a veto or veto threat, or fails to act for some other reason.

[22] "Show" in this case does not mean the intervening state must formally present its case to the UN or to any other formal panel. Rather, the test proposes the state must have evidence that it deems clear enough to convince the international community that the intervention is necessary to stop extreme human suffering or to avoid imminent extreme human suffering.

4. The intervening state must intend to carry out—and actually carry out—jus post bellum obligations.

The international community must accept the concept of legal and legitimate UAHIs when this test is met. If the international community does not accept this concept, international law will be powerless and thus irrelevant in the face of extreme human suffering when the Security Council fails to act and R2P does not apply.

This thesis explores the foundational principles of international law and the legal bases for the use of force, examining R2P and its failure to address the need for UAHI when the Security Council fails to act. This thesis further defines and sets out the current state of UAHI and discusses issues that make its application problematic. Lastly, this thesis sets out the elements of a proposed test for UAHI and explains how such actions can be both legal and legitimate.

II. The Foundational Principles of International Law and Legal Bases for the Use of Force

The concept of UAHI is not new, and arguments for its legality have been around for some time. Even so, it remains a much-debated concept—primarily because of the foundational principles of the international order—sovereignty and non-intervention. The UN Charter has codified these concepts and prohibited the use of force against the territorial integrity and political independence of any state, except in self-defense.[23] It is necessary, therefore, to first review these legal foundations and the UN Charter's legal bases for the use of force in the context of the UN's purposes.

A. Sovereignty

[23] U.N. Charter art. 2, para. 4, art. 2, para. 7.

The Peace of Westphalia of 1648, which concluded the Thirty Years' War, established an international community based on a system of sovereign states in which all states are inherently equal, without regard to size, political stature, or wealth.[24] In this system, each sovereign state has the authority within its own territorial boundaries to enact and enforce laws and to exclude other states from acting within its boundaries.[25] This authority has long been viewed as absolute.[26] Recently, however, sovereignty has been reformulated as a mix of rights and responsibilities. The R2P formulation of sovereignty ensures that a state retains authority within its borders, provided it meets the accompanying responsibility to respect and protect the human rights of its citizens.[27]

Sovereignty is not simply a concept internal to a state; rather, it implies a dual purpose: "Internally, it connotes the exercise of supreme authority by states within their individual territorial boundaries. Externally, it connotes equality of status between states comprising the society of states."[28] This second part of the sovereignty formulation thus touches on its companion legal foundation, non-intervention. The two concepts are closely interrelated;

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[24] IAN BROWNLIE, PRINCIPLES OF INTERNATIONAL LAW 289 (5th ed. 1998). *See also* Responsibility to Protect, *supra* note 9, para. 2.7; MICHAEL ROSS FOWLER & JULIE MARIE BUNCK, LAW, POWER, AND THE SOVEREIGN STATE 65 (1995).

[25] Dan E. Stigall, *Ungoverned Spaces, Transnational Crime, and the Prohibition on Extraterritorial Enforcement Jurisdiction in International Law,* NOTRE DAME J. INT'L & COMP. L. 6, 9 (2013).

[26] *Id. See also* FOWLER & BUNCK, *supra* note 24, at 65.

[27] FOWLER & BUNCK, *supra* note 24, at 12. *See also* Responsibility to Protect, *supra* note 9, para. 2.15.

[28] FRANCIS KOFI ABIEW, THE EVOLUTION OF THE DOCTRINE AND PRACTICE OF HUMANITARIAN INTERVENTION 24–25 (1999).

whereas sovereignty deals with national freedoms and self-determination, the principle of non-intervention means that states will respect each other's sovereignty.[29]

B. Non-Intervention

While sovereignty means the state is empowered with exclusive domestic jurisdiction over matters within its borders,[30] non-intervention means states have the duty not to intervene in the affairs of another state. In other words, states have a duty not to violate another's sovereignty. If this duty is violated, as for example when a state suffers an armed attack, the victim state has the right to defend its territorial integrity and political independence.[31]

Sovereignty and non-intervention have formed the basis for international legal order since the rise of the nation-state.[32] More recently, the UN Charter codified the concepts as the cornerstones for relations between states following World War II.

C. The UN Charter and the Legal Bases for the Use of Force

The UN Charter codifies the principles of sovereignty and non-intervention in Articles 2(1) and 2(7), respectively, of the UN Charter.[33] Article 2(1) delineates that the UN is "based on the principle of sovereign equality of all its Members."[34]

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[29] INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH. , LAW OF ARMED CONFLICT DESKBOOK 30 (2013) [hereinafter DESKBOOK].

[30] Responsibility to Protect, *supra* note 9, para. 2.8. *See also* Stigall, *supra* note 25, at 9.

[31] U.N. Charter art. 51.

[32] Stanley A. McChrystal, *Memorandum from the Joint Chiefs of Staff, in* HUMANITARIAN INTERVENTION: CRAFTING A WORKABLE DOCTRINE 65 (Alton Frye ed., 2000).

[33] U.N. Charter art. 2, paras. 1, 4, 7.

[34] U.N. Charter art. 2, para. 1.

The norm of non-intervention is found in Article 2(7) of the UN Charter, which sets out that every state—and the UN—has the responsibility not to intervene in another state's affairs:

> Nothing contained in the present charter shall authorize the UN to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.[35]

"This formulation," argues Professor Thomas Mertens, "seems to indicate that the Charter makes a clear choice in favor of bilateral unconditional respect between states, except for the provisions of Chapter VII."[36]

The UN Charter generally reflects modern jus ad bellum, or the law governing when a state may use force,[37] under Article 2(4): "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations."[38] The Charter authorizes two exceptions to Article 2(4)'s prohibition against the use of force. The first exception is actions authorized by the Security Council under Chapter VII of the UN Charter, while the second exception is actions that constitute a legitimate act of individual or collective self-defense pursuant to Article 51 of the UN Charter or customary international law.[39]

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[35] U.N. Charter art. 2, para. 7.

[36] Thomas Mertens, *Humanitarian Intervention: Legal and Moral Arguments, in* ETHICS OF HUMANITARIAN INTERVENTIONS 217 (Georg Meggle ed., 2004).

[37] DESKBOOK, *supra* note 29, at 35.

[38] U.N. Charter art. 2, para. 4.

[39] U.N. Charter art. 51.

Chapter VII provides the analytical framework for dealing with threats to the peace, a breach of the peace, or an act of aggression.[40] The analysis starts with Article 39, requiring the Security Council to first determine whether there has been a threat to the peace, a breach of the peace, or an act of aggression.[41] If the Security Council determines these requirements are not met, then it will not take action. If, on the other hand, there is a threat to the peace, a breach of the peace, or an act of aggression, the next step under Chapter VII's framework is normally sanctions of the sort authorized by Article 41,[42] which lists several non-military enforcement measures designed to restore international peace and security. These include "complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations."[43] Then, if sanctions are not successful—and the Security Council can agree on a course of action—it is authorized under Article 42 to mandate military action by forces made available to it under "special agreements" with UN member states, as contemplated by Article 43.[44] However, because no Article 43 special agreement has ever been made, military measures taken pursuant to Chapter VII are permissive.[45] That is, Chapter VII

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[40] U.N. Charter art. 39.

[41] *Id.*

[42] This step is not necessary if the circumstances warrant the use of force before sanctions. However, sanctions are generally imposed prior to the Security Council approving actions under Art. 42. *See* U.N. Charter art. 42 ("Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.").

[43] U.N. Charter art. 41.

[44] U.N. Charter art. 43 ("All members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining peace and security.").

[45] DESKBOOK, *supra* note 29, at 33.

authorizations permit individual member states or coalitions of member states to act rather than mandate them to take action.[46]

The second exception to the Article 2(4) prohibition is actions in individual or collective self-defense under Article 51 or customary international law.[47] In order to act under Article 51, the action must meet two criteria: (1) it must be necessary—the force must be viewed as a last resort; and (2) it must be proportionate—actions by states must limit any use of force to the level of force reasonably necessary to counter a threat or attack.[48]

Some states argue a more expansive view of self-defense and believe that the customary international law principle of anticipatory self-defense justifies using force in anticipation of an "imminent" armed attack.[49] Anticipatory self-defense finds its foundation, historically, in the 1837 Caroline Case.[50] During diplomatic exchanges in which the states set out their legal positions, U.S. Secretary of State Daniel Webster posited that a state need not suffer an actual armed attack before taking defensive action, but may engage in anticipatory self-defense if the circumstances leading to the use of force are "instantaneous, overwhelming, and leaving

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[46] *Id.*

[47] U.N. Charter, art. 51. *See also* DESKBOOK, *supra* note 29, at 31 (discussing customary international law).

[48] *See* DESKBOOK, *supra* note 29, at 35. *See also* YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 230–33 (5th ed.) Dinstein would include a third criterion called immediacy meaning that the response must not be delayed or the delay will attenuate the immediacy of the threat and the need to use force.

[49] *See* DESKBOOK, *supra* note 29, at 37. *See also* Ashley Deeks, *"Unwilling or Unable": Toward a Normative Framework for Extra-Territorial Self-Defense*, 52 VA. J .INT'L L. 483, 492 (2012) ("Most states and scholars recognize that an imminent threat of armed attack would also trigger a state's right to self-defense, though there is a debate about what constitutes an 'imminent' threat.") (citations omitted).

[50] *See* Deeks, *supra* note 49, at 502 (describing the Caroline case as an international matter where "Canadian rebels were using U.S. territory as a staging ground from which to attack British forces in Canada. The rebels used a steamer called the Caroline to transport themselves from the U.S. side of the Niagara River to the Canadian side. British troops set fire to and destroyed the Caroline, prompting a strong objection from the United States and a series of diplomatic exchanges setting forth each state's position.").

no choice of means and no moment for deliberation."[51] Anticipatory self-defense is a controversial use of force because the international community remains concerned that it could be used as a pretext for self-defense actions before a threat has coalesced.[52]

Preemptive self-defense is even more controversial than anticipatory self-defense.[53] The "Bush Doctrine" used an anticipatory self-defense basis for action in Iraq and for actions against rogue states and terrorists. [54] The Bush Administration articulated a different understanding of "imminence" in the 2006 U.S. National Security Strategy (NSS), which came to be recognized by some as preemptive use of force. The NSS stated, "We must adapt the concept of imminent threat . . . even if uncertainty remains as to the time and place of the enemy's attack."[55] United States' policy is that preemptive self-defense is a legitimate use of force.[56]

Anticipatory self-defense and preemptive self-defense remain highly controversial in international legal circles. On one side, states have relied on anticipatory self-defense a number of times, including the U.S. bombing of Libya in 1986 dubbed "Operation El Dorado Canyon."[57] The day following the operation, U.S. President Ronald Reagan argued the use of force was legal under Article 51 as a "necessary and appropriate action [that] was a

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[51] DESKBOOK, *supra* note 29, at 37.

[52] *Id.* at 38. *See also* DINSTEIN, *supra* note 48, at 195.

[53] *See* DINSTEIN, *supra* note 48, at 194–200.

[54] *Id.* at 195 ("[The] Bush Doctrine (after President G.W. Bush) was intended to 'adapt the concept of imminent threat' by allowing 'anticipatory action' to 'forestall or prevent 'hostile acts.'") (citation omitted). *But Cf. Id.* ("[C]ontrary to what many commentators believe, [the Bush Doctrine] was not applied in Iraq in 2003.").

[55] The White House, *The National Security Strategy of the United States of America,* (2006).

[56] *Id.* at 22. The Obama Administration has backed off of preemptive use of force some, but not completely. The United States continues to maintain that it may act unilaterally to the defend itself.

[57] GEOFFREY S. CORN ET AL., THE LAW OF ARMED CONFLICT: AN OPERATIONAL APPROACH 22 (2012).

preemptive strike."[58] On the other side, Yoram Dinstein argues the position held by many: any interpretation of Article 51 that expands its authorization for the use of force in response to an "armed attack" to anticipatory and preemptive self-defense is "counter-textual, counter-factual, and counter-logical."[59] He argues the Charter drafters never intended for Article 51 to be interpreted expansively. Further, he argues there must be an armed attack before a state can act in self-defense, and then only until the UN can act.[60]

Defense against non-state actors is a related issue under the self-defense basis for use of force. In this context, examples of non-state actors have included groups such as Al-Qaeda, Chechen rebels in Georgia, and the Palestine Liberation Organization.[61] Commentators believe that victim states may respond to attacks by non-state actors if the host nation (for example, Afghanistan under the Taliban) is "unwilling or unable" to address non-state actors who are planning and launching attacks from within the sovereign territory of the host nation.[62] Some scholars argue that the victim state (the state that has been attacked) must meet a higher burden of proof than is typically required for self-defense actions in order to establish the legality of the victim state's use of force in self-defense against the host nation.[63] At the far end of the self-defense spectrum—beyond anticipatory and preemptive

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[58] *Id.* at 20.

[59] DINSTEIN, *supra* note 48, at 196. *But see id.* (discussing Judge Schwebel's dissenting opinion in Nicaragua v. United States, in which "Judge Schwebel rejected a reading of the text which would imply that the right of self-defense exists 'if, and only if, an armed attack occurs'") (citation omitted).

[60] *Id.* at 196–97.

[61] Deeks, *supra* note 49, at 487.

[62] *Id.* at 485. *See also* DINSTEIN, *supra* note 48, at 244–46.

[63] Michael Schmitt, *Responding to Transnational Terrorism Under the Jus Ad Bellum: A Normative Framework*, 56 NAVAL L. REV. 1, 40 (2009).

self-defense—is a concept called preventive self-defense, meant to be used against non-imminent threats, and which is illegal under international law.[64]

Consent is a well-established legal basis for the use of force, but is not an exception to Article 2(4)'s prohibition against the use of force, because if the state consents, there is no threat or use of force against a state's territorial integrity or political independence.[65] Consent must be voluntary, reasonable, and granted by a recognized government, a standard that is difficult to meet if there is no recognized government, such as Afghanistan under the Taliban,[66] or no government at all, such as Somalia in 1991.[67]

The legal bases for the use of force are interpreted in the context of the purposes of the UN, set out in Article 1 of the Charter.[68] The UN Charter envisions dual purposes for the international body. The first is to seek international cooperation to solve problems peacefully, without resort to war, and the second purpose is to promote and encourage respect for human rights. The Preamble of the Charter states in part, "Peoples of the United Nations . . . reaffirm faith in fundamental human rights, in the dignity and worth of the

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[64] DESKBOOK, *supra* note 29, at 39. *But see* CORN ET AL., *supra* note 57, at 23–24 (arguing that "[s]ome have discussed [preventive self-defense] as applying to the last point at which a State can successfully intervene").

[65] DESKBOOK, *supra* note 29, at 31. *See also* CORN ET AL., *supra* note 57, at 17 ("If a nation requests the aid of a fellow nation or ally, that fellow nation or ally is free to use force within the boundaries of the requesting nation.").

[66] Annyssa Bellal, Gilles Giacca, & Stuart Casey-Maslen, *International Law and Armed Non-state Actors in Afghanistan*, INT'L REV. OF THE RED CROSS 49 Vol. 93, No. 881, Mar. 2011 (discussing Pakistan, Saudi Arabia, and the United Arab Emirates as the only three states that recognized the Taliban as the legitimate government in Afghanistan when they were in power until their military defeat by the U.S.-led coalition in 2001).

[67] NICHOLAS J. WHEELER, SAVING STRANGERS 186 (2000).

[68] U.N. Charter art. 2, para. 4.

human person, in the equal rights of men and women and of nations large and small."[69] Moreover, Article I, paragraph 3 affirms the commitment to human rights:

> The Purposes of the United Nations are . . . [t]o achieve international cooperation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion . . . .[70]

The current framework for the use of force under the UN Charter therefore does not recognize the right of a state to unilaterally and militarily intervene in another state for humanitarian purposes. This is true despite the UN's clear purpose to protect human rights. After the North Atlantic Treaty Organization's (NATO) intervention in Kosovo in 1999, however, UN Secretary-General Kofi Annan challenged the international community to find a "new consensus on how to approach [humanitarian intervention]."[71] The result was a report entitled "Responsibility to Protect."

III. The Responsibility to Protect

In 2000, the Canadian Government took up the Secretary-General's challenge and appointed the ICISS to study the concepts of intervention and sovereignty and to determine "when, if ever, it is appropriate for states to take coercive—and in particular military—action, against another state for the purpose of protecting people at risk in that other state."[72] The ICISS report, "The Responsibility to Protect," set out core principles of a state's responsibility to protect its own citizens, and the international community's role in protecting

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[69] U.N. Charter pmbl.

[70] U.N. Charter art. 1, para. 3.

[71] Responsibility to Protect, *supra* note 9, at VII.

[72] *Id.*

the people of a state, should the sovereign fail to do so.[73] It also set out a framework for multilateral military intervention based on the just war principles of just cause, right intention, last resort, proportionality, probability of success, proper authority, and jus post bellum.[74]

A. The Pillars of R2P

United Nations Member states included R2P in the 2005 World Summit Outcome Document, paragraphs 138 and 139, setting out the three pillars of R2P:

1. The State carries the primary responsibility for protecting populations from genocide, war crimes, crimes against humanity and ethnic cleansing, and their incitement;
2. The international community has a responsibility to encourage and assist States in fulfilling this responsibility;
3. The international community has a responsibility to use appropriate diplomatic, humanitarian and other means to protect populations from these crimes. If a State is manifestly failing to protect its populations, the international community must be prepared to take collective action to protect populations, in accordance with the Charter of the United Nations.[75]

These three pillars represent the starkly different view R2P took of sovereignty and non-intervention from the traditional formulation. Here, not only does a state incur a responsibility to protect its people, but if it fails in that responsibility, the international community assumes the responsibility in its place. The international community is then authorized to use "appropriate diplomatic, humanitarian *and other means"* to protect the

[73] *Id.* at XI.

[74] *Id.* at XI–XIII.

[75] 2005 World Summit Outcome, G.A. Res. 60/1, ¶¶ 138–139, U.N. Doc. A/Res/60/1 (Sept. 16, 2005) [hereinafter World Summit Outcome Document], *available at* http://www.un.org/en/preventgenocide/adviser/pdf/World%20Summit%20Outcome%20Document.pdf#page=30.

people of the state, in accordance with the Charter (emphasis added). Presumably, "other means" indicates use of military force, if necessary. According to R2P, the traditional formulation of sovereignty and non-intervention—where a state has absolute authority within its own borders and is free from outside interference no matter the extent of suffering within its borders—is a relic of the past.[76] United Nations Security Council Resolution 1674 in 2006 reaffirmed the pillars of R2P and expressly stated UN support regarding "the responsibility to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity."[77]

Secretary-General Ban Ki-moon issued a report in January 2009 entitled "Implementing the Responsibility to Protect,"[78] again affirming the UN's support for R2P and laying out a strategy for operationalizing it.[79] In his report, which was based on the three Pillars of R2P, the Secretary-General urged the General Assembly to consider his report and the specific proposals therein.[80] The General Assembly considered the report and held five "dialogues" on it, but has yet to act on implementing the proposals.[81] Nevertheless, R2P is considered to be "an emerging norm" of international law which encompasses the international

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[76] Responsibility to Protect, *supra* note 9, para. 1.33. *See generally* W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866 (1990) (arguing the modern view of sovereignty is founded in human rights).

[77] S.C. Res. 1674, para. 4, U.N. Doc. S/Res/1674 (Apr. 28, 2006), *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/331/99/PDF/N0633199.pdf?OpenElement.

[78] Implementing R2P, *supra* note 13.

[79] *Id.* ¶ 66.

[80] *Id.* ¶ 71.

[81] *See* INTERNATIONAL COALITION FOR THE RESPONSIBILITY TO PROTECT, http://www.responsibilitytoprotect.org/index.php/about-rtop/the-un-and-rtop#dialogues (last visited Mar.7, 2014).

community's "right to intervene" collectively and the "responsibility to protect" collectively in circumstances of extreme human suffering.[82]

B. Responsibility to Protect and Multilateral Action

Responsibility to Protect confirms the current framework in which individual states must refrain from acting unilaterally unless such action is approved by the Security Council.[83] In his report on implementing R2P, the Secretary-General reinforced the UN position that the Security Council is the only proper authority to approve humanitarian interventions.[84] Responsibility to Protect, in short, is not an alternative to Security Council action, but a way to make the current system of requiring Security Council approval for humanitarian intervention "work better."[85] This limits the efficacy of R2P's mandate.

If the Security Council fails to act, the ICISS warns, states "may not rule out other means to meet the gravity and urgency" [86] of different situations. It lists two alternative avenues, should the Security Council fail to act: "submitting the matter to the General Assembly for consideration under the 'Uniting for Peace' procedure;[87] or action by regional or sub-regional

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[82] High-level Panel Report, *supra* note 8, ¶¶ 201–202. *But see*, Carsten Stahn, *Responsibility to Protect: Political Rhetoric or Emerging Legal Norm*, AM. J. INT'L L. 99, 120 (2007) (arguing R2P is too uncertain to be considered a legal norm).

[83] Responsibility to Protect, *supra* note 9, para. 6.28. *See also* Implementing R2P, *supra* note 13, ¶ 3.

[84] *See* Implementing R2P, *supra* note 13, ¶ 3. *See also* High-Level Panel Report, *supra* note 8, ¶ 203; U.N. Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All, Rep. of the Secretary-General*, ¶ 135, U.N. Doc. A/59/2005, (Mar. 21, 2005) [hereinafter In Larger Freedom], *available at* http://www.un.org/en/ga/search/view_doc.asp?symbol=A/59/2005.

[85] *See* In Larger Freedom, *supra* note 84, ¶ 126.

[86] Responsibility to Protect, *supra* note 9, para. 6.39.

[87] Uniting for Peace, G.A. Res. 377 (V), U.N. GAOR, 5th Sess. (Nov. 3, 1950) [hereinafter Uniting for Peace], *available at* http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/377(V). Uniting for Peace provides if the Security Council fails to act in a situation where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly "shall consider the matter immediately" and make recommendations to the members about what can be done collectively. *Id.*

organizations under Chapter VIII of the UN Charter, subject to seeking subsequent authorization from the Security Council." [88] General Assembly actions—including under the Uniting for Peace procedure—are not binding, and are simply recommendations to the members for action.[89] Additionally, the Security Council is the sole body responsible for determining a threat to the peace, breach of the peace, or act of aggression under Article 39.[90] The General Assembly is not authorized to make that determination, but may make recommendations for the maintenance of peace and security under Article 11.[91] Even with General Assembly approval, an action would likely not be recognized as legal because the General Assembly is not a recognized proper authority.[92] Actions by regional or sub-regional organizations—even with subsequent Security Council approval—would not legalize a unilateral action. The Security Council may find the action legitimate, but not legal.[93]

Given the ICCIS's expressed preference for—and the Secretary-General's confirmation of—multilateral action to address extreme human suffering, UAHI is still not accepted as a legal basis for the use of force. The questions then are: what is UAHI?, and, is there a possibility that it could become a legal basis for the use of force? A clear understanding of

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[88] Responsibility to Protect, *supra* note 9, para. 6.21 (recommending Security Council members agree not to apply their veto power in matters where their vital state interests are not involved, such as purely humanitarian situations).

[89] Uniting for Peace, *supra* note 87, ¶ 1.

[90] U.N. Charter art. 39.

[91] U.N. Charter art. 11.

[92] Responsibility to Protect, *supra* note 9, para. 6.37. *But see id.*, para. 6.7 (explaining that the Uniting for Peace Procedure has been used "as a basis for operations in Korea [in 1950] and subsequently in Egypt in 1956 and the Congo in 1960." The ICISS stops short of saying that such an action is legal, and instead argues that such an action would have "powerful moral and political support").

[93] Kosovo Report, *supra* note 21, at 4.

what UAHI is and how it is defined will help the reader navigate through this difficult area and answer those questions.

IV. UAHI Named and Defined

Humanitarian intervention seems easy to name and define; however, there is little agreement in the international legal and relations communities.[94] Arnold Kanter, a former U.S. Under Secretary of State and staff member at the National Security Council, labels it "armed humanitarian intervention";[95] Professor Seamus Miller[96] calls it "humanitarian armed intervention";[97] and still others, like Professor of Philosophy Rüdiger Bittner,[98] simply call it "wrong."[99] The difficulty in agreeing on one label was most clearly articulated by Professor Stephen A. Garrett.[100] "The terms 'humanitarian' and 'intervention' are typically imbued

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[94] Rüdiger Bittner, *Humanitarian Interventions are Wrong, in* ETHICS OF HUMANITARIAN INTERVENTION 212 (Georg Meggle, ed. 2004). *See also* Tom J. Farer, *Humanitarian Intervention Before and After 9/11: Legality and Legitimacy, in* HUMANITARIAN INTERVENTION: ETHICAL LEGAL AND POLITICAL DILEMMAS 55 (J.L. Holzgrefe & Robert O. Keohane eds., 2003).

[95] Arnold Kanter, *Policy on Armed Humanitarian Intervention, in* HUMANITARIAN INTERVENTION: CRAFTING A WORKABLE DOCTRINE 1 (Alton Frye, ed., 2000). Mr. Kanter served in the State Department from 1977–1985 and on the staff of the National Security Council from 1989-1991. In addition to his public service, Mr. Kanter was a Principal and founding member of the Scowcroft Group, an international business consulting firm. He was also a Senior Fellow at the Forum for International Policy and the Rand Corporation. In 1997, he participated in a project for the Council on Foreign Relations which resulted in *Humanitarian Intervention, Crafting a Workable Doctrine*. This project sought views from scholars and practitioners in the international law and relations community and had them draft memos as if they were members of the administration. Mr. Kanter's role in the project was to advise as if he were the National Security Advisor.

[96] Professor Miller is a professor of Ethical Issues in Political Violence and State Sovereignty at Charles Sturt University in Australia. CENTRE FOR APPLIED PHILOSOPHY AND PUBLIC ETHICS, http://www.cappe.edu.au/staff/seumas-miller.htm (last visited Mar. 17, 2014).

[97] Seamus Miller, *Collective Responsibility and Humanitarian Armed Intervention, in* ETHICS OF HUMANITARIAN INTERVENTIONS 37 (Georg Meggle ed., 2004).

[98] Professor Bittner is a professor at Institut für Philosophie, University of Bielefeld, Germany. UNIVERSITAT BIELEFELD, https://www.uni-bielefeld.de/philosophie/personen/bittner/ (last visited Mar. 17, 2014).

[99] Bittner, *supra* note 94, at 212.

[100] STEPHEN GARRETT, DOING GOOD AND DOING WELL: AN EXAMINATION OF HUMANITARIAN INTERVENTION (1999).

with such a variety of nuances and differing interpretations," Garrett argues, "that to join them together into a single concept almost inevitably produces ambiguity and perhaps even tension, especially since both words inherently carry a lot of emotional baggage."[101]

With this difficulty in mind, it is still necessary to identify a label to ensure that the term is understood in the right context for this thesis. The most widely used term is simply "humanitarian intervention," but that misses the mark. By adding the term "armed," the phrase more accurately describes what happens when one state intervenes in another.[102] Even though the missions discussed in this thesis are humanitarian, they are also armed interventions meant to impose the will of one state on the other to alleviate human suffering.

The difficulty encountered in trying to label UAHI increases exponentially when trying to define it. It seems as though every commentator or scholar who writes on UAHI has to provide his own definition of what it means.[103] These definitions describe essentially the same action, but are varied enough to cause some consternation with regard to exactly what is meant when arguing for UAHI. In this thesis, "unilateral armed humanitarian intervention" is defined as "the [unilateral] use of foreign military force within the sovereign territory of a state against that state's will in an attempt to protect the fundamental interests of

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[101] KASSNER, *supra* note 1, at 6.

[102] Miller, *supra* note 97, at 37. *See also* Kanter, *supra* note 95, at 15 (characterizing sovereignty as a "substantial presumption against intervening that must be surmounted by the compelling nature of the particular circumstances").

[103] *See* ABIEW, *supra* note 28, at 31. Professor Abiew sets out a number of definitions of humanitarian intervention, including "the reliance upon force for the justifiable purposes of protecting the inhabitants of another state from treatment which is so arbitrary and persistently abusive as to exceed the limits of that authority within which the sovereign is presumed to act with reason and justice." Also, "proportionate trans-boundary help, including forcible help, provided by governments to individuals in another state who are being denied basic human rights and who themselves would be rationally willing to revolt against their oppressive government." The classical concept of humanitarian intervention, Abiew says, "covered any use of force by a state against another state for the purpose of protecting the life and liberty of the nationals of the latter state unable or unwilling to do so itself." *Id.*

(a section of) the population of that state,[104] with the goal of effectively alleviating human suffering."[105] "Against a state's will" means that the intervention is undertaken without the consent of the state. If the legitimate government of the state consented, of course, there would be no issue as to legality under the UN Charter.[106]

This definition is informed by the four main components of UAHI.[107] First, the armed humanitarian intervention discussed in this paper is unilateral, as opposed to multilateral. This distinction removes UAHI from the R2P framework.[108] Unilateral means that the intervention is carried out by one state or an ad hoc collection of states without Security Council approval; while multilateral would mean that the intervention is carried out by a collection of states, usually under a formal international organization.[109] Generally, unilateral actions are those not approved by the Security Council; while multilateral actions

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[104] Mertens, *supra* note 36, at 217. *See also* ERIC A. HEINZE, WAGING HUMANITARIAN WAR 3 (1999). The second part of the definition "with the goal of effectively alleviating human suffering" comes from Heinze's book, *Waging Humanitarian War*. Heinze argues that the goal of all humanitarian interventions should be to "effectively alleviate human suffering." *Id. See also* Guglielmo Verdirame, *The Law and Strategy of Humanitarian Intervention*, EJIL: TALK!, (Aug. 30, 2013), http://www.ejiltalk.org/the-law-and-strategy-of-humanitarian-intervention/ (arguing "[t]he doctrine of humanitarian intervention gives states a right to use force in order to alleviate the humanitarian crisis").

[105] *See* HEINZE, *supra* note 104, at 3. "Fundamental interests" in this case mean the essential human rights of life and freedom.

[106] DESKBOOK, *supra* note 29, at 31 (explaining "[c]onsent is not a separate exception to Article 2(4) [of the UN Charter]. If a State is using force with the consent of a host state, then there is no violation of the host state's territorial integrity or political independence; thus, there is no need for an exception to the rule as it is not being violated"). *See also* Byron F. Burmester, *On Humanitarian Intervention: The New World Order and Wars to Preserve Human Rights*, UTAH L. REV. 269, 277 (1994) (arguing the only way a state can unilaterally intervene is when the targeted state requests intervention).

[107] Kanter, *supra* note 95, at 3.

[108] Responsibility to Protect, *supra* note 9, para. 6.37.

[109] HEINZE, *supra* note 104, at 117. Regional organizations include the North Atlantic Treaty Organization (NATO), the Organization of American States (OAS), the European Union (EU), the African Union (AU), the Organization for Security and Co-operation in Europe (OSCE), the Association of South-East Asian Nations (ASEAN), the Economic Community of West African States (ECOWAS), etc. *Id.*

are presumed approved by the Security Council.[110] "In international legal discourse" argues Professor Eric Heinze, "unilateral humanitarian intervention is synonymous with an unauthorized or illegal intervention, whereas multilateralism refers to the collective decision-making process used by the UN to deem the act of humanitarian intervention permissible (and legal) in a particular situation, regardless of how many states actually take part in carrying it out."[111] Past interventions, such as the United States' intervention in Haiti, were unilateral actions, even though approved by the Security Council.[112] In the case of Haiti, the intervention was viewed as legitimate and legal, based on Security Council approval.[113]

Second, it is armed, meaning that the military is utilized and there is a threat that the military of the intervening state may lose soldiers' lives. It is important to include the term "armed" because interventions are tantamount to war [114] and even "no fly zones," without accompanying ground troops, are acts of war, as they interfere in another's sovereign airspace.[115] These characteristics distinguish armed humanitarian intervention from other humanitarian missions such as providing relief to victims of Typhoon Haiyan in the Philippines[116] or providing water purification in Africa.[117]

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[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] *Id.* at 15.

[115] H.D.S. Greenway, *No-Fly Zone? No*, N.Y. TIMES, Mar. 8, 2011, *available at* http://www.nytimes.com/2011/03/09/opinion/09iht-edgreenway09.html?_r=0 (quoting Secretary of Defense Robert Gates that a no fly zone is an "act of war").

[116] *Cf.* David J. Scheffer, *Toward a Modern Doctrine of Humanitarian Intervention*, 23 U. TOL. L. REV. 253, 270 (1992) (describing humanitarian intervention as including non-forcible assistance to the targeted state, "[h]umanitarian intervention should be understood to encompass responses to natural calamities like earthquakes, floods, famine, volcanic eruptions, and man-made disasters—like nuclear power plant accidents—

Third, it is humanitarian, thus aimed at alleviating human suffering. It is also humanitarian—vice strategic—"because it entails the threat or use of . . . force in situations that do not pose direct, immediate threats to . . . [a state's] strategic 'interests.'"[118] In other words, the main justification for action is a humanitarian one—to alleviate human suffering.[119] A humanitarian action is distinct from a government's intervention to protect its own nationals.[120] The latter has gained greater acceptance in the international community because it is less likely to have a significant impact on the territorial integrity of the target state.[121] An action to protect one's own nationals is generally seen as a rescue action that should last for only so long as it takes to ensure the safety of the nationals.[122] A humanitarian intervention to protect citizens of the target state would likely last significantly longer.

Fourth, it is an intervention. It entails sending military forces into another sovereign's territory—including airspace—without consent.[123] Even with the good intentions that may

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when the casualties and the displacement of thousands of people demand an effective international response, with or without the consent of the national government").

[117] *Id*.

[118] Kanter, *supra* note 95, at 4.

[119] *See* Burmester, *supra* note 106, at 277 (summarizing and comparing the arguments of "conditionalists" and "realists" who agree that humanitarian intervention must be the predominant motivation for intervention, but need not be the only motivation).

[120] SEAN D. MURPHY, HUMANITARIAN INTERVENTION: THE UNITED NATIONS IN AN EVOLVING WORLD ORDER 16 (1996).

[121] *Id*.

[122] *Id*.

[123] Kanter, *supra* note 95, at 4.

justify an armed humanitarian intervention, it is still "an extreme case of interference in the internal affairs of another state."[124]

V. The Current State of UAHI

Because the ICISS left open the question of whether UAHI is a legal use of force,[125] arguments over legality of UAHI continue outside the R2P framework. The current state of UAHI is exemplified by the textualists,[126] who advance an argument as simple as the issue is complex. They argue the Charter forbids military action without Security Council approval. Their position is based on a strict reading of the Charter, and is supported by the underlying principles of sovereignty and non-intervention. They further bolster their argument with the position that UAHIs must be barred because of the threat of "pretextual wars."[127]

Unilateral armed humanitarian intervention is per se illegal under the Charter without Security Council approval, even in the face of extreme human suffering, and the textualists argue that this prohibition is absolute. Russian President Vladimir Putin advanced a textualist argument and took the position that the prohibition is absolute in an op-ed in the *New York Times* during debate about intervention in Syria:

> The law is still the law, and we must follow it whether we like it or not. Under current international law, force is permitted only in self-defense or by

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[124] *Id.*

[125] Stahn, *supra* note 82, at 104.

[126] The term "textualists" is used here to identify provide context for the view that the text of the UN Charter clearly forbids unilateral humanitarian intervention. The term was borrowed from U.S. Supreme Court Justice Antonin Scalia, who describes himself as a "textualist" for his plain reading of the U.S. Constitution. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 23 (1997). *See also* Burmester, *supra* note 106, at 276 (describing the group making this same argument as "Conflict Minimalists").

[127] *See* Burmester, *supra* note 106, at 278 (explaining that "conflict minimalists," like the textualists described herein, argue that the threat of pretext is always present in UAHI because it is unlikely any nation acts for purely humanitarian reasons).

> the decision of the Security Council. Anything else is unacceptable under the United Nations Charter and would constitute an act of aggression.[128]

The textualists support their view that UAHI is forbidden under international law with the argument that states may use humanitarian justifications as pretext to intervene in another state's affairs for advancement of their own interests. They argue states could use humanitarian justifications as a subterfuge to achieve political goals without international repercussions.[129] History reveals prominent examples of states using justifications for intervention that were widely viewed as pretext. One, in particular, stands out as a cautionary tale: "[Our people and those of other nations] have been maltreated in the unworthiest manner, tortured . . . [and denied] the right of nations to self-determination," and "[i]n a few weeks the number of refugees who have been driven out has risen to over 120,000," and "the security of more than 3,000,000 human beings" is in jeopardy.[130] These are not the words of Kosovars, or Rwandans, or Somalis seeking approval for intervention in their homelands. These words were written by German leader Adolf Hitler in a letter to British Prime Minister Chamberlain to justify Germany's military activities in the Sudetenland in 1939.[131] Hitler further justified the occupation of Bohemia and Moravia in 1939 by referring to "assaults on the life and liberties of minorities, and the purpose of disarming Czech troops and terrorist bands threatening the lives of minorities."[132] Hitler's use of the humanitarian justification for intervention in Czechoslovakia in 1939 starkly

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[128] Vladimir V. Putin, *A Plea for Caution from Russia*, N.Y. TIMES, Sept. 11, 2013, *available at* http://www.nytimes.com/2013/09/12/opinion/putin-plea-for-caution-from-russia-on-syria.html?_r=0.

[129] Ryan Goodman, *Humanitarian Intervention and Pretexts for War*, 100 AM. J. INT'L L. 107 (2006).

[130] *Id.* at 113.

[131] *Id.*

[132] ABIEW, *supra* note 28, at 57.

represents the pretext problem.[133] It also lends historical perspective to why pretext is "the most compelling"[134] and certainly the "most common"[135] objection to legalization of UAHI.

More recently, the 2003 U.S.-led intervention in Iraq under the Bush Doctrine[136] led many in the international community to be wary of justifications for wars not approved by the Security Council.[137] The invasion of Iraq, which UN Secretary-General Kofi Annan believed was illegal, "heightened the concern over the possible illicit use of the responsibility to protect [justification for UAHI] because members of the coalition employed rhetoric (often post hoc) echoing the language of the responsibility to protect to justify their choice to invade Iraq."[138]

The issue, in terms of just war theory and under the R2P formulation, is that an intervening state must have "right intention" to avoid allegations of pretextual war. [139] That is, the "[p]rimary purpose of the intervention must be to halt or avert human suffering."[140]

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[133] Michael L. Burton, *Legalizing the Sublegal: A Proposal for Codifying a Doctrine of Humanitarian Intervention*, 85 GEO. L.J. 417, 421–22 (1996).

[134] Goodman, *supra* note 129, at 113.

[135] *Id.*

[136] *See supra* note 54 (explaining Bush Doctrine).

[137] In part, the United States based its justification for war in Iraq on Security Council Resolutions 660 and 678 related to the first Persian Gulf War and the ceasefire, and on Security Council Resolution 1441 related to inspections of Iraqi weapons programs. The United States argued that Iraq had violated these Resolutions and thus the war was legally authorized even without further UN action. *But see* Ewan McCaskill & Julian Borger, *Iraq War Was Illegal and Breached UN Charter, Says Annan*, THE GUARDIAN (Sept. 15, 2004, 9:28 PM), *available at* http://www.theguardian.com/world/2004/sep/16/iraq.iraq (showing the disagreement that existed among the international community on the legal basis for the Iraq War).

[138] KASSNER, *supra* note 1, at 147. *See also* Michael Ignatief, *Why Are We in Iraq?; (And Liberia? And Afghanistan)*, N.Y. TIMES MAG., *available at* http://www.nytimes.com/2003/09/07/magazine/why-are-we-in-iraq-and-liberia-and-afghanistan.html (arguing that former Under Secretary of Defense Paul Wolfowitz "all but admitted" that "the 'bureaucratic' reason for going to war in Iraq—weapons of mass destruction—was not the main one," instead the United States wanted to assert influence in the Middle East post 9-11).

[139] Responsibility to Protect, *supra* note 9, para. 4.33.

[140] *Id.*

Alteration of borders and overthrow of regimes would not be "right intentions," although disabling a regime from inflicting suffering on its people would be considered right intentions under the R2P formulation.[141] Pretext has "figured importantly in the analyses of leading public international law scholars . . . who have argued against legalizing [UAHI]."[142] These international law scholars have generally fallen into one of two schools of thought on the pretext problem: one holding that pretext is a prominent issue that can only be overcome by multilateral approval and action,[143] the other insisting that the pretext problem is overstated and not particularly solved by multilateral action.[144]

Some scholars insist that multilateral actions include procedural safeguards to ensure states are not acting in their own self-interests. Professor Tom Farer[145] argues that multilateral actions serve the interests of the UN Charter:

> In the cases where the UN has authorized humanitarian interventions, the humanitarian case has been strong. Where it has condemned interventions, the case has been weak if not altogether meretricious. Thus for reasons grounded in theory and practice,[146] one needs to conclude that imputing authorizing power to large coalitions of states in a condition of voluntary association offers a very important guarantee that intervention is not designed

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[141] *Id.*

[142] Goodman, *supra* note 129, at 108–109 nn.8–14 (citations omitted) (discussing scholars who argue why pretext is an important objection to UAHI, including Richard Bilder, Ian Brownlie, Thomas Franck, Louis Henkin, Oscar Schachter, Bruno Simma, and Jane Stromseth).

[143] Farer, *supra* note 94, at 75.

[144] MICHAEL WALZER, JUST AND UNJUST WARS 107 (1977).

[145] Professor Farer is a University Professor and Former Dean of the Joseph Korbel School of International Studies at the University of Denver. Professor Farer received his law degree from Harvard Law School and is an expert in international law, international politics, U.S. foreign policy, Africa, and Latin America. UNIVERSITY OF DENVER, JOSEF KORBEL SCHOOL OF INTERNATIONAL STUDIES, http://www.du.edu/korbel/faculty/farer.html (last visited Mar. 18, 2014).

[146] Farer, *supra* note 94, at 75 (citing NATO's intervention in Kosovo with approval because it was multilateral in that "sixteen member states approved the intervention through a process of democratic deliberation").

> to serve interests incompatible with the principles and purposes of the Charter.[147]

Farer may overstate the point with the word "guarantee." There can be no "guarantee" that an intervening state or group of states are acting on a purely humanitarian impetus. Regional organizations of states are dominated by more powerful states.[148] If a more powerful state wants to intervene for whatever purpose, that state will likely be able to use its political influence to obtain approval to do so by its regional partners.[149] Multilateral action does not mean there are no political agendas being advanced in addition to the humanitarian interests.[150]

On the other side of the argument, Professor Michael Walzer, citing India's 1971 unilateral invasion of East Pakistan, which was "formally carried to the United Nations but no action followed," argues that multilateral action does not represent a stronger safeguard against pretext than unilateral action: "Nor is it clear to me that action undertaken by the UN, or by a coalition of powers, would necessarily have had a moral quality superior to that of the Indian attack . . . [s]tates don't lose their particularist character merely by acting

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[147] *Id.*

[148] HEINZE, *supra* note 104, at 117 (arguing "the United States undeniably plays a preponderant role in NATO—both institutionally and militarily." The preponderant role mainly has to do with the military and financial resources of the larger countries. During the Cold War, the United States provided most of the financial and military resources to NATO (and it does to this day), while the Soviet Union did the same for the Warsaw Pact. The same is true today in the UN. The United States provides a large share of the financial resources, and thus has great influence on what the world body can and cannot do, as can any other member of the Security Council).

[149] *See* Kosovo Report, *supra* note 21, at 92 (describing the United States as the moving force behind NATO's intervention in Kosovo: "The United States flew over 60% of all sorties, and over 80% of all strike sorties. It played an even more dominant role in carrying out high-tech aspects of the campaign").

[150] WALZER, *supra* note 144, at 107. *See also* Responsibility to Protect, *supra* note 9, para. 3.17 (discussing shortcomings of regional organizations taking action "not the least of which is that they are often not disinterested in the outcomes of deadly conflicts").

together."[151] He suggests that governments who have reasons, other than humanitarian impulses, to intervene will have those same reasons whether acting unilaterally or multilaterally. In other words, multilateral action does not provide any more protection from pretext than unilateral action.

Nevertheless, through practice and the recent R2P formulation, the international community has determined that multilateral action offers safeguards against pretext and is therefore preferable to unilateral action.[152] This thesis proposes that multilateral action is not the only way to address pretext. Unilateral armed humanitarian intervention under the proposed test is another way to address it—by providing more certainty as to when a state may intervene and ensuring the reasons for intervening are predominately humanitarian. Not all proposals for the legality of UAHI adequately address this issue, and that is one reason why they fail to gain international acceptance.

VI. Proposals for the Legality and Legitimacy of UAHI

As the discussion below demonstrates, commentators have posited various approaches and views regarding the legality of UAHI. Despite the UN Charter's prohibition on unilateral action, the debate over UAHI legality continues to stir emotions and legal thought because of the extreme amount of human suffering that continues to happen throughout the world. The difference between the various proposals to legalize UAHI—referred to here as

[151] *See* WALZER, *supra* note 144, at 107.

[152] Responsibility to Protect, *supra* note 9, para. 6.28. *See also* Implementing R2P, *supra* note 13, ¶ 3; World Outcome Document, *supra* note 75, ¶¶ 138–39.

the textualists,[153] the legalists, and the evolutionaries—is in how the prohibition is interpreted.

A. The Legalist View of UAHI

The legalists acknowledge the textualists' argument that the UN Charter prohibits UAHI, but argue that there is an exception to the rule when UAHI is not against the territorial integrity or political independence of the state. [154] They do not go as far as the evolutionaries in finding evidence outside of the Charter to support their argument for legalizing UAHI. Rather, the legalists rely on a technical reading of the Charter to advance their argument.

The legalists believe the language in Article 2(4), which generally prohibits the use of force "against the territorial integrity or political independence of any state"[155] sufficiently limits the prohibition against unilateral intervention, thus allowing for interventions that are humanitarian and not against the state itself.[156] That is, Article 2(4) does not forbid all unilateral uses of force, just those against the territorial integrity or political independence of the state.[157]

This interpretation of the UN Charter "has been largely refuted and the prevailing legal opinion is that the language in Article 2(4) was not meant to create loopholes to the general prohibition of the use of force."[158] Furthermore, interventions are, in fact, against a state's territorial integrity and political independence. As Professor Heinze points out, "the reality

[153] *See* discussion *supra* Part V.

[154] HEINZE, *supra* note 104, at 62.

[155] U.N. Charter art. 2, para. 4.

[156] Burmester, *supra* note 106, at 285.

[157] HEINZE, *supra* note 104, at 62 n.12 (citations omitted).

[158] *Id.* at 62.

of most humanitarian interventions is that they rarely achieve their purposes without the removal or at least disablement of an incumbent regime."[159] Interventions aim to stop human suffering within a state's borders and are aimed at a failed government that did not protect its people, either by perpetrating human rights violations on them directly, or by allowing others to do so. As a result, UAHI is clearly directed at the political independence of a state and the legalists' theory fails as a means to legalize it.[160]

B. The Evolutionary View of UAHI

The evolutionaries, like the legalists, acknowledge the textualists' basic argument that the UN Charter prohibits UAHI. But, the evolutionaries believe that the law has evolved since the inception of the Charter. They cite evidence outside of the Charter to show that the international law has changed, and the context in which it is viewed has changed, thus allowing for an interpretation of the Charter that supports legal UAHI.[161]

The evolutionaries advance their theory in two ways. First, its proponents argue that it has gained legal acceptance in the international community because recent interventions bear circumstantial proof of legality.[162] Second, proponents rely on a related theory—that UAHI is customary international law.

1. Circumstantial Proof of Legality

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[159] *Id.*

[160] *Id.*

[161] Sir Daniel Bethlehem, *Stepping Back a Moment: The Legal Basis in Favour of a Principle of Humanitarian Intervention*, EJIL: TALK! BLOG OF THE EUROPEAN JOURNAL OF INTERNATIONAL LAW (Sept. 12, 2013) http://www.ejiltalk.org/stepping-back-a-moment-the-legal-basis-in-favour-of-a-principle-of-humanitarian-intervention/.

[162] *Id.*

In 1991, UN Secretary-General Perez de Cuellar observed, "We are clearly witnessing what is an irresistible shift in public attitudes towards the belief that the defense of the oppressed in the name of morality should prevail over frontiers and legal documents."[163] The evolution theory is advanced in a number of forums,[164] but is most succinctly expressed by Sir Daniel Bethlehem, the former legal advisor to the British Foreign Office and now on faculty at Columbia University,[165] in his article "*Stepping Back a Moment—The Legal Basis in Favour of a Principle of Humanitarian Intervention*." Bethlehem believes recent interventions present sufficient circumstantial evidence of legality to overcome the legal hurdles.[166] He maintains the traditional analysis[167] fails to consider all of the factors involved in questions of humanitarian intervention:

> Legality . . . often falls ultimately to be assessed by reference to a circumstantial appreciation of a range of factors rather than resting simply on some apparently trumping proposition of law. In the case of the law on humanitarian intervention, an analysis that simply relies on the prohibition of the threat or use of force in Article 2(4) of the UN Charter, and its related principles of non-intervention and sovereignty, is overly simplistic.[168]

Bethlehem argues, in the context of the debate on possible intervention in Syria, that there is a "strand" of legal argument that "pull[s] together threads of practice that in isolation

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[163] Press Release, Secretary-General's Address at University of Bordeaux, U.N. Press Release SG/SM/4560 (1991).

[164] *See generally* Abiew, *supra* note 28. *See also* Burton, *supra* note 133, at 420 (discussing the "precedential approach" to UAHI). *Cf.* Responsibility to Protect, *supra* note 9, para. 2.24 (discussing the "emerging practice" of intervention based on "state and regional organization practice").

[165] COLUMBIA LAW SCHOOL, VISITING FACULTY AND SCHOLARS IN RESIDENCE, http://www.law.columbia.edu/fac/Sir%20Daniel_Bethlehem,%20KCMG%20QC (last visited Mar. 17, 2014).

[166] Bethlehem, *supra* note 161.

[167] *See* discussion *supra* Part V (discussing the textualist approach to the legality of UAHI. "Traditional analysis" in this case is the equivalent of the textualist approach).

[168] Bethlehem, *supra* note 161.

may appear fragile and unreliable but which, when knitted together, are more robust and compelling."[169] The "threads" that make up the "strand" are expressed in the United Kingdom's 1998 Kosovo principles and the R2P formulation.[170] More importantly, eight elements compose the "tapestry of [the] argument."[171] These elements include the humanitarian objectives of the UN, the development of R2P, and the development of international criminal law including the establishment of ad hoc international, and similar, tribunals to try offenses committed in internal conflicts.[172] Sir Bethlehem also relies upon the no-fly zones in Iraq, circa 1991, and the NATO intervention in Kosovo as examples of armed humanitarian interventions undertaken without Security Council approval that set the precedent for future actions.[173]

These arguments are convincing, but not accepted by the international community as a legal basis for UAHI.[174] This is true for a couple of reasons. First, taken individually, these elements are not sufficient to provide a legal justification for UAHI.[175] Also, with regard to Kosovo, one of the interventions Bethlehem cites as precedent, the legal justification for the intervention was weak. In that case, the Security Council could not act because Russia

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[169] *Id.*

[170] *Id.*

[171] *Id.*

[172] E.g., The International Criminal Tribunal for the Former Yugoslavia (ICTY–TPIY), International Criminal Tribunal for Rwanda, The Special Court for Sierra Leone.

[173] Bethlehem, *supra* note 161.

[174] *Id.*

[175] *Id.*

agreed with Serbia that Kosovo should be treated as an internal matter.[176] Even though there was agreement that there was extreme human suffering,[177] the overwhelming international opinion is that the Kosovo intervention was illegal, albeit legitimate.[178] James P. Rubin, an Assistant Secretary of State for Public Affairs during U.S. President Clinton's Administration and currently a Scholar in Residence at Oxford University,[179] wrote in an op-ed in the *New York Times* that Kosovo is a poor precedent for future UAHI, including in Syria:

> As a matter of international law, Kosovo is no precedent either. As spokesman for the State Department in 1999, I was asked for a legal justification for the use of force. Frustrated by vague appeals to "the principles of international law," we eventually prepared a statement reciting Serbia's numerous violations of United Nations resolutions, the extreme danger to civilians, the risks to NATO countries of a wider war and the unity of Europe, and then declared that as a result we believed there was "a substantial and legitimate grounds for action internationally." In a court of international law, the case for Kosovo was weak. But in the court of international opinion, it was strong. History's verdict on Kosovo has been that it was legitimate but not strictly legal.[180]

The Kosovo intervention's strongest supporters still believe it was an illegal use of force. The United Kingdom was one of only a few states which came out publicly to explain the legal basis of their action in Kosovo. [181] Also, even though the ICISS "acknowledges the

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[176] Kosovo Report, *supra* note 21, at 143. Russia is a permanent member of the Security Council and holds a veto. *See* discussion *infra* Part VIII.A (discussing the permanent members of the Security Council and use of the veto).

[177] *Id.* at 2. In a three-month period from March to June 1999, the Kosovo Commission found evidence of ethnic cleansing including the killing of 10,000 mostly Kosovar-Albanians, 863,000 civilians seeking refuge outside Kosovo and another 590,000 displaced persons. They also found evidence of widespread rape and torture, looting, pillaging, and extortion. The Kosovo Commission found evidence of logistical arrangements made for deportations and attacks by the Yugoslav army, para-military groups, and the police. As a result, they found the huge expulsion of Kosovar-Albanians was systematic and deliberately organized. *Id.*

[178] *Id.* at 4.

[179] James P. Rubin, *Syria is Not Kosovo*, N.Y. TIMES, Sept. 4, 2013, *available at* http://www.nytimes.com/2013/09/05/opinion/syria-is-not-kosovo.html.

[180] *Id.*

[181] *Id.*

fundamental challenge posed by Security Council inaction,"[182] it still "does not endorse the legality of non-UNSC authorized ad hoc humanitarian intervention."[183]

Finally, the evolutionaries' theory falls short because their evidence still is not enough to sufficiently address sovereignty, non-intervention, and the pretext problem. These shortfalls were most starkly presented in the argument over intervention in Syria. Despite evidence in June 2013 that nearly 100,000 Syrians—a third civilians—had been killed by the Assad regime during the fighting,[184] many in the international community still held the view that it was a civil war.[185] Thus, the matter was viewed as an internal conflict, which Syria could address free from outside interference. Russia cited pretext as an issue as well, arguing Syria could become another Iraq.[186]

Former Assistant Secretary of State Rubin pointed out in his op-ed in the *New York Times* that America's case for striking Syria had even less indicia of legality than the Kosovo

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[182] Bethlehem, *supra* note 161.

[183] *Id.*

[184] David Jolly, *Death Toll in Syrian Civil War Near 93,000 U.N. Says*, N.Y. TIMES, June 13, 2013 *available at* http://www.nytimes.com/2013/06/14/world/middleeast/un-syria-death-toll.html (reporting that the UN estimated 92,901 deaths as a result of the Syrian conflict through the end of April 2013, with civilians making up one-third of those killed). *See also* Alan Cowell, *War Deaths in Syria Said to Top 100,000*, N.Y. TIMES, June 26, 2013 *available at* http://www.nytimes.com/2013/06/27/world/middleeast/syria.html?_r=0 (reporting that the Syrian Observatory for Human Rights estimated over 100,000 deaths, with over one-third civilians in June 2013 and indicating that both the UN and Syrian Observatory suggested the numbers may, in fact, be much higher). *Cf.* Steve Almasy, *More than 11,000 Children Killed in Syrian Civil War, Report Says*, CNN (Nov. 24, 2013, 11:16 AM), http://www.cnn.com/2013/11/24/world/meast/syria-children-deaths/.

[185] *Id.* Each of the news reports cited above refer to the conflict in Syria as a "civil war." *See also* Interview with Secretary of State John F. Kerry, U.S. Department of State (Sept. 10, 2013), *available at* http://www.state.gov/secretary/remarks/2013/09/214049.htm (referring to Syria as a "civil war").

[186] Kirit Radia, *Russia Compares Syria War Drums to Iraq Invasion, Warns of Consequences of Intervention*, ABC NEWS BLOG (Aug. 25, 2013, 6:04 PM), http://abcnews.go.com/blogs/headlines/2013/08/russia-compares-syria-war-drums-to-iraq-invasion-warns-of-consequences-of-intervention/ (discussing Russia's concerns about pretext. Russia's Foreign Ministry Spokesman, Alexander Lukashevich was quoted as saying the Syrian situation "brings to mind the events of 10 years ago, when, on the pretext of false information about the Iraqi possession of weapons of mass destruction, the United States, outside the UN, went on an adventure, the consequences of which are well known").

intervention because there was no Security Council Resolution, the United States would be acting alone (NATO was not going to get involved), and China and Russia both opposed the intervention. Moreover, the United States' most consistent ally—the British—voted to stay out of Syria.[187]

As a result, the proposed action in Syria—even though it appeared to be a good test case for the evolutionaries' theory—bore even fewer indicators of a legal intervention than did Kosovo, making the use of UAHI in Syria a difficult, if not impossible, case. The threat of unilateral force was enough to move the Syrian regime to the negotiating table. In the end, though, it was not humanitarian reasons that persuaded the international community to act in Syria. The issue that actually moved the needle in Syria was President Bashir al-Assad's use of chemical weapons in violation of the 1925 Protocol banning the use of poison gas, to which Syria is a party.[188] Ultimately, even though Syria seemed to be an excellent test case for the evolutionaries' theory, the international community was not ready to accept it.

2. UAHI Is Not Customary International Law

The evolutionaries also posit that UAHI is customary international law. This position is related to the evolutionaries' argument because for a course of action or international norm to become customary international law, it first must have evolved over time through a persistent pattern of behavior by states.[189] Second, there must be a belief on the part of state actors that the behavior in question is legally required or legally permissible (this is otherwise known as

[187] Rubin, *supra* note 179. Mr. Rubin identifies two of the issues that are addressed by the proposed test: the Security Council failing to act and unilateral v. multilateral actions (which implicates the pretext issue).

[188] *Id.* (referring to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and Their Destruction (1925)).

[189] Allen Buchanan, *Reforming the Law of Humanitarian Intervention, in* HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS 134 (J.L. Holzgrefe & Robert O. Keohane, eds., 2003).

the *opinio juris* requirement).[190] The general opinion is that armed humanitarian intervention does not meet those requirements.

In *Nicaragua v. United States*, the International Court of Justice found that UAHI is not customary international law.[191] More recently, the ICISS conceded that UAHI is not customary international law, but that states and the Security Council have been "giving credence to . . . the emerging guiding principle of the 'responsibility to protect,' a principle grounded in a miscellany of legal foundations."[192] The ICISS argues that these actions, in places like Somalia and Kosovo, and most recently in Libya, "may eventually [lead to] a new rule of customary international law," but that it "would be quite premature to make any claim about the existence of such a rule."[193]

The second reason UAHI is not customary international law is there has never been a persistent pattern of behavior by states.[194] In fact, the only constant is that there has been no consistency in the way states act with regard to UAHI. This makes sense because interventions are influenced by a number of factors including facts on the ground, politics, international relations, and national self-interests, among other factors.[195] Moreover, there exists no belief on the part of state actors that the behavior (UAHI) in question is legally

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[190] *Id.*

[191] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 181 (June 27), *available at* http://www.icj-cij.org/docket/index.php?sum=367&p1=3&p2=3&case=70&p3=5 ("With regard more specifically to alleged violations of human rights relied on by the United States, the Court considers that the use of force by the United States could not be the appropriate method to monitor or ensure respect for such rights, normally provided for in the applicable conventions.").

[192] Responsibility to Protect, *supra* note 9, para. 6.17.

[193] *Id.*

[194] *Id.* para. 2.24.

[195] Kanter, *supra* note 95, at 16–19 (discussing the points the President of the United States should consider when deciding whether or not to intervene militarily on a humanitarian basis).

required or legally permissible. On the contrary, the overwhelming majority believe that UAHI is illegal except for those approved by the Security Council.[196]

The legalist and evolutionary theories of UAHI legality have failed to gain the general support of the international community because they fail to address the just war principles of proper authority and jus post bellum obligations, or because they fail to adequately address sovereignty, non-intervention, or the pretext problem. What is needed, therefore, is a test—based in just war principles—that adequately addresses the issues of sovereignty, non-intervention, and pretext, and allows for UAHI to be both legal and legitimate.

VII. Three Foundations for the Proposed Test

Given the legal insufficiency of the tests articulated above, R2P's failure to construct a framework for UAHI, and the pressing need to address persistent extreme human suffering, this thesis proposes a test that, if met, will allow the international community to find a UAHI both legal and legitimate. The proposed test stands on three foundational principles. The first is Just War Theory, which gives the test a historical basis and maintains consistency with R2P, itself based on just war principles.[197] The second foundation is the concept of sovereignty and non-intervention as rebuttable presumptions. This approach allows the possibility that states may be able to intervene unilaterally by rebutting the presumptions of sovereignty and non-intervention with clear and convincing evidence of extreme human suffering or imminent extreme human suffering. The third foundation of the proposed test is the need for UAHI to meet the standards of legality and legitimacy.

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[196] U.N. Charter art. 39.

[197] Responsibility to Protect, *supra* note 9, at XII.

A. Just War Theory

Like any other war, armed humanitarian interventions can be analyzed under just war tradition to determine if they are moral. Professor Gary J. Bass[198] points out that just war tradition is focused on two main points: jus ad bellum (justness of war) and jus in bello (justness of the way that war is fought).[199] These two points have historically determined if a war is moral. In his seminal work on just war, *Just and Unjust Wars*, Professor Michael Walzer writes, "War is always judged twice, first with reference to the reasons states have for fighting, secondly with reference to the means they adopt."[200] Professor Bass, though, includes jus post bellum (justness after war) as part of the analysis, even though this prong of Just War Theory has largely been neglected.[201] He argues that whether a state meets jus post bellum obligations is on par with jus ad bellum and jus in bello in the determination of the morality of a war,[202] and that this is especially true with regard to genocidal states.[203]

Just War Theory was a product of the Just War Period, ranging from 335 B.C. to 1800 A.D.[204] The theory was developed initially as a means to refute Christian pacifists and provide for certain, defined grounds under which a resort to warfare was both morally and

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[198] Bass is Professor in the Politics and International Affairs Department at the Woodrow Wilson School of Public and International Affairs at Princeton University. PRINCETON UNIVERSITY, https://www.princeton.edu/~gjbass/ (last visited Mar. 25, 2014).

[199] Gary J. Bass, *Jus Post Bellum*, 32 PHIL. & PUB. AFF. 384 (2004).

[200] WALZER, *supra* note 144, at 21.

[201] Richard P. DiMeglio, *The Evolution of the Just War Tradition: Defining Jus Post Bellum*, 186 MIL. L. REV. 116, 117 (2005).

[202] Bass, *supra* note 199, at 384.

[203] *Id.* at 399.

[204] DESKBOOK, *supra* note 29, at 11.

religiously permissible.[205] Six jus ad bellum principles—Proper Authority, Last Resort, Just Cause, Right Intention, Probability of Success, and Macro Proportionality—were developed from these historical underpinnings,[206] as were principles for jus in bello and jus post bellum.

Responsibility to Protect lists jus ad bellum principles as required elements before multilateral military intervention can be authorized under its "responsibility to react" concept and it also addresses post-intervention obligations.[207] Likewise, the elements of the proposed test address each jus ad bellum principle and jus post bellum obligations. These actions stand in contrast to typical UAHIs, which fail to meet the jus ad bellum principle of proper authority because the international community recognizes just two proper authorities that can make the decision to wage war.[208] The first proper authority is those who rule, i.e., the sovereign.[209] The second is the Security Council.[210] There are no other proper legal authorities recognized by international law. However, this thesis posits that a state, acting unilaterally, can become a proper authority if it meets each element of the proposed test.

A sovereign state is a proper authority to approve a decision to wage war under both Just War Theory and the UN Charter. Under Just War Theory, a state could wage war in self-defense and in defense of rights.[211] Professor Walzer notes that "the defense of rights is a reason for fighting . . . it is the only reason . . . [p]reventive wars, commercial wars, wars of

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[205] *Id.*

[206] *Id.* at 12.

[207] Responsibility to Protect, *supra* note 9, para. 6.1. *See also Id.* at Chap. V.

[208] DESKBOOK, *supra* note 29, at 12.

[209] *Id.*

[210] U.N. Charter chap. VII.

[211] WALZER, *supra* note 144, at 72.

expansion and conquest, religious crusades, revolutionary wars, military interventions—all these are barred and barred absolutely."[212] A sovereign state may also make the decision to go to war in accordance with Article 51 of the UN Charter in response to an armed attack or based on customary international law.[213] The sovereign state may also approve interventions in its own territory under the UN Charter by consent.[214]

The Security Council is a proper authority because it has been granted the legitimacy to act by the consent of the parties to the UN Charter and because of past practice.[215] This is partly because it is a multilateral body, but actions by other multilateral bodies do not automatically confer legality on a humanitarian intervention, as Security Council approval does.[216] The reason the Security Council is a "proper authority" is because it is the only organization of its kind—multilateral, international, and subject to the check of the veto power.

Provided a proposed intervention meets all of the elements of the proposed test, it too meets all jus ad bellum and jus post bellum principles, thereby making it a legitimate action, even under the R2P formulation.[217] It will have also adequately addressed sovereignty, non-

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[212] *Id.* Walzer describes the general rule with regard to the legal basis for the use of force. He goes on to argue that some interventions are justified. *Id.*

[213] U.N. Charter art. 51.

[214] DESKBOOK, *supra* note 29, at 31. *See also* CORN ET AL., *supra* note 57, at 17 ("If a nation requests the aid of a fellow nation or ally, that fellow nation or ally is free to use force within the boundaries of the requesting nation.").

[215] Responsibility to Protect, *supra* note 9, para. 6.17 (indicating that past practice alone does not mean that a course of conduct has become customary international law).

[216] Even a multilateral organization, like NATO, does not confer legality on a humanitarian intervention. *See* Kosovo Report, *supra* note 21, at 4 (finding NATO's intervention in Kosovo "illegal, but legitimate").

[217] Responsibility to Protect, *supra* note 9, paras. 4.18, 4.32–.48 (indicating that if the requirements are met of right intention, last resort, proportional means, reasonable prospects, and just cause—all of the jus ad bellum principles except for proper authority—then an intervention is "justified"). *Id.* at 4.32. *See also* High-Level

intervention, and pretext through the elements of the proposed test. The intervention would bear the same—if not more—indicators of legitimacy and legality than either General Assembly approval or regional organization approval. The intervening state would thus inherit "proper authority" or moral authority to intervene under just war theory, and therefore would have "legitimate authority sanctioned by the society they profess to represent."[218] In that case, this thesis argues, the international community should accept the intervening state as a proper authority because its proposed intervention bears all the indicators of a legitimate and legal action aside from Security Council approval. If this is accepted, then the intervening state would meet all of the just war requirements and can assume the mantle of proper authority to act under international law.

B. Sovereignty and Non-intervention as Presumptions

The second foundation for the proposed test is that sovereignty and non-intervention are not absolutes, and instead, are rebuttable presumptions. The most vigorous adherents to the concepts of sovereignty and non-intervention are weaker states, mostly third world states, apprehensive of severe limitation on their sovereign rights by more powerful states.[219] Conversely, these concepts have been employed by the more powerful states (permanent members of the Security Council) as a means to frustrate intervention when it might save lives.[220] The most telling example is Rwanda in 1994. At the time of the genocide within its

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Panel, *supra* note 8, ¶ 207 (identifying five criteria for legitimacy for intervention based on R2P—"seriousness of threat, proper purpose, last resort, proportional means, and balance of consequences").

[218] Jimmy Carter, *Just War—or Just a War?*, N.Y. TIMES, Mar. 9, 2003, *available at* http://www.nytimes.com/2003/03/09/opinion/just-war-or-a-just-war.html.

[219] ABIEW, *supra* note 28, at 66.

[220] KASSNER, *supra* note 1, at 3.

borders, Rwanda held one of the rotating seats on the Security Council.[221] The Hutu-led government employed the sovereignty doctrine to shield itself from intervention while Tutsis and Tutsi sympathizers were being slaughtered.[222] Permanent members of the Security Council were hesitant to support new peacekeeping operations after Somalia,[223] which led to a weak mandate for the United Nation's Assistance Mission for Rwanda (UNAMIR) and severely limited UNAMIR's ability to alleviate the suffering.[224]

Because sovereignty and non-intervention are prominent parts of any decision to approve or disapprove an armed humanitarian intervention, any discussion regarding the use of foreign military force in another state must begin with these two concepts. If these concepts were inviolable, this thesis and further inquiry into the idea of intervention would end here. Recent history has shown they are not inviolable.[225] The dual principles of sovereignty and non-intervention remain the cornerstones of the international legal order.[226] But as the two concepts have developed, both have come to be understood in a more modern context—that they are not inviolable principles and do not absolutely bar intervention.[227] Sovereignty has

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[221] *Id.*

[222] *Id.*

[223] *See* COLIN POWELL & JOSEPH E. PERSICO, MY AMERICAN JOURNEY 588 (stating that eighteen U.S. Soldiers were killed and dragged through the streets in Mogadishu, Somalia, in 1993).

[224] Rep. of Ind. Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda, Jun. 17, 1999 –Dec. 15, 1999 (1999) at 32.

[225] The interventions in Somalia and Kosovo, to name two, suggested that sovereignty was less than absolute. Recent interventions in Libya and Mali have continued that trend.

[226] BROWNLIE, *supra* note 24, at 289.

[227] Responsibility to Protect, *supra* note 9, para. 2.14. *See also* Reisman, *supra* note 76, at 871 (arguing that interventions should not be seen as violations of sovereignty if the intervention was to replace a "usurper" with "the people who were freely elected").

come to be understood as a bundle of rights and responsibilities[228] to the people of the state and the minimum content of good international citizenship.[229] According to R2P, the bundle of rights is partially made up of a dual responsibility to respect the rights of other states and the rights of the people: "externally—to respect the sovereignty of other states, and internally, to respect the dignity and basic rights of all the people within the state."[230]

Some scholars go even further. Professor W. Michael Reisman[231] argues that sovereignty rests with the people (a concept he calls "popular sovereignty") and the "old" concept of sovereignty resting with the government is anachronistic:

> International law is still concerned with the protection of sovereignty, but, in its modern sense, the object of protection is not the power base of the tyrant who rules directly by naked power or through the apparatus of a totalitarian political order, but the continuing capacity of a population freely to express and effect choices about the identities and policies of its governors.[232]

Professor Reisman argues that UAHI may be justified in part by suppression of popular sovereignty, "[n]ot a justification per se but a *conditio sine qua non*."[233] He also suggests that sovereignty may be forfeited if the state is suppressing popular sovereignty.[234] This

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[228] *See* Responsibility to Protect, *supra* note 9, para. 1.35 (explaining that "sovereignty implies a dual responsibility: externally—to respect the sovereignty of other states, and internally, to respect the dignity and basic rights of all the people within the state"). *See also* Reisman, *supra* note 76, at 867 (explaining that "the sovereignty of the sovereign became the sovereignty of the people: popular sovereignty," meaning the state derives its legitimacy from the people and that the rights of the people must be respected for that state to protect its sovereignty).

[229] *See* Responsibility to Protect, *supra* note 9, para. 1.35. *See also* Farer, *supra* note 94, at 55 (arguing "[l]ike private property owners in Anglo-American common law, they [sovereign states] enjoyed bundles of rights in relation to their space and obligations to other sovereigns").

[230] *See* Responsibility to Protect, *supra* note 9, para. 1.35. *See also* ABIEW, *supra* note 28, at 25.

[231] Reisman is the Myres S. McDougal Professor of International Law at Yale Law School. YALE LAW SCHOOL, http://www.law.yale.edu/news/WReisman.htm (last visited Mar. 25, 2014).

[232] Reisman, *supra* note 76, at 872.

[233] *Id.* "*Conditio sine qua non*" means an indispensible condition.

[234] *Id.* at 867.

modern view of sovereignty has found high-profile supporters within the UN power structure. Former UN Secretaries-General Javier Perez de Cuellar and Boutros Boutros-Ghali have both acknowledged that absolute state sovereignty is increasingly a legal fiction, while popular sovereignty's role within the international legal system is on the rise.[235] Even so, Mr. de Cuellar believes that sovereignty and the norm of non-intervention remain "indubitably strong" and "would only be weakened if it were to carry the implication that sovereignty . . . includes the right of mass slaughter or of launching systematic campaigns of decimation or forced exodus of civilian populations in the name of controlling civil strife or insurrection."[236] That is, a state will remain sovereign and free to carry out actions within its own borders without international interference—provided they do not cause, or allow to happen, extreme suffering within those borders.

Professor Walzer presents a similar, more nuanced, view of sovereignty. He argues that sovereignty allows people to live their lives without foreign interference except in certain circumstances, such as when the government is directly involved in widespread massacre or enslavement of its people.[237] Otherwise, intervention violates a state's rights because it is violating the right of the people to live undisturbed by foreigners in a political community of their own.[238] Walzer's presumption is that the existence of a political community (even one the international community finds repugnant) within a state means there is a fit between that community and its government.[239] In other words, people of a state have a right to have the

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[235] Burton, *supra* note 133, at 435.

[236] *Id.* at 434 n.110 (citations omitted).

[237] WALZER, *supra* note 144, at 90.

[238] HEINZE, *supra* note 104, at 20.

[239] *Id.* at 21.

government they want and the government then has the right to treat its subjects the way it wants.[240] These rights are not inviolable, according to Walzer, and in that way he presents a more modern view of sovereignty.[241]

Some scholars are willing to carry the modern formulation of sovereignty even further under the "moral forfeiture theory."[242] The moral forfeiture theory holds that a state may lose sovereignty and be rendered an international non-entity if it fails to sustain some minimum standard for treatment of its citizens.[243] Professor Fernando Tesón,[244] the primary proponent of the theory, argues:

> [B]ecause the ultimate justification of the existence of states is the protection and enforcement of the natural rights of the citizens, a government that engages in substantial violations of human rights betrays the very purpose for which it exists and so forfeits not only its domestic legitimacy, but its international legitimacy as well.[245]

Under Professor Tesón's formulation, such forfeiture is complete. It renders the offending state a non-entity and the government illegitimate.[246] Without legitimacy, the state loses international standing to challenge an intervention. As the state forfeits its sovereignty, the international community assumes the responsibility to protect the people of the state.[247]

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[240] *Id.*

[241] WALZER, *supra* note 144, at 89.

[242] Burton, *supra* note 133, at 435.

[243] *Id.*

[244] Professor Tesón is the Tobias Simon Eminent Scholar at The Florida State University College of Law and is "[k]nown for his scholarship relating political philosophy to international law (particularly his defense of humanitarian intervention)." FLORIDA STATE UNIVERSITY COLLEGE OF LAW, http://www.law.fsu.edu/faculty/fteson.html (last visited Mar. 17, 2014).

[245] Burton, *supra* note 133, at 435 (citations omitted).

[246] *Id.*

[247] Responsibility to Protect, *supra* note 9, para. 2.31 ("While the state whose people are directly affected has the default responsibility to protect, a residual responsibility also lies with the broader

This view was adopted, in part, by ICISS in the R2P report, but it did not go quite as far as Professor Tesón in arguing complete moral and political forfeiture. The ICISS does support a framework where a state may lose the presumption of sovereignty based on its acts or omissions relative to the human rights of its citizens.[248] Although the formulation of the moral forfeiture theory is a relatively new construct, the idea that a state may forfeit its sovereignty because it is not protecting the rights of its citizens is not new. In *Just and Unjust Wars*, Professor Walzer wrote of the relationship between sovereignty and intervention in 1977.[249] He argued that sovereignty is not absolute and is subject to "unilateral suspension" in certain instances, including "when the violation of human rights within a set of boundaries is so terrible that it makes talk of community or self-determination or 'arduous struggle' seem cynical and irrelevant, that is, in cases of enslavement or massacre."[250]

This view that sovereignty and non-intervention are rebuttable presumptions is not accepted universally for two main reasons. First, small states fear that more powerful states will use this modern view of sovereignty to invade and take over.[251] The small states "are particularly apprehensive about any emerging right of humanitarian intervention for fear that they will be targets of an invasion intended to serve the geopolitical interests of the

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community of states. This fallback responsibility is activated when a particular state is clearly either unwilling or unable to fulfill its responsibility to protect or is itself the actual perpetrator of the crimes or atrocities . . . .").

[248] *Id.*

[249] WALZER, *supra* note 144, at 90. Walzer characterizes sovereignty and non-intervention as a "ban on border crossings."

[250] *Id.*

[251] ABIEW, *supra* note 28, at 66.

intervener, though under the pretext of humanitarianism."[252] Some large states also resist the evolution of sovereignty as a check against the United States or any other superpower that may emerge.[253] These defenses of state sovereignty, however, do not include the claim of the unlimited power of the state to do what it wants with its people.[254] Even the strongest supporters of sovereignty acknowledge that it implies a dual responsibility to respect the sovereignty of other states and the dignity and basic rights of all the people within the state.[255] This modern formulation of sovereignty means that if a state fails in either of its dual responsibilities—it fails to respect the sovereignty of other states or to respect the dignity and basic rights of its own people—the international community has an obligation to intervene.[256] In other words, sovereignty has evolved from an inviolable principle to a presumption that can be overcome by evidence that the state has failed in an extreme way to meet its human rights obligations to its people.

Likewise, non-intervention has developed from an inviolable principle to a presumption. Professor David J. Scheffer[257] wrote in his piece *Toward a Modern Doctrine Humanitarian Intervention*, "the norm of non-intervention would appear to shield nation-states from international inquiry and action about almost all activities occurring strictly within national

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[252] HEINZE, *supra* note 104, at 118.

[253] This is especially true after Afghanistan and Iraq. *Cf.* FOWLER & BUNCK, *supra* note 24, at 144 (describing the "Sovereign Equality Defense" in which all states are viewed as having the same sovereign power, "no matter how powerful or weak, rich or poor, large or small").

[254] Responsibility to Protect, *supra* note 9, para.1.35.

[255] *Id. See also* ABIEW, *supra* note 28, at 25.

[256] *See* Responsibility to Protect, *supra* note 9, para. 4.37.

[257] Professor Scheffer is the Mayer Brown/Robert A. Helman Professor of Law and Director of the Center for International Human Rights at Northwestern. a professor at Northwestern Law School and former U.S. Ambassador at Large for War Crimes Issues. NORTHWESTERN LAW, https://www.law.northwestern.edu:443/faculty/profiles/DavidScheffer/ (last visited Mar. 17, 2014).

borders."[258] The articulation of non-intervention in Article 2(7) of the UN Charter confirms this understanding. But, this rule has been qualified as nations commit to treaties and other international laws and principles that encroach on sovereignty. According to Professor Scheffer, "the principle of non-interference with the essential domestic jurisdiction of States cannot be regarded as a protective barrier behind which human rights could be massively or systematically violated with impunity."[259] Further, non-intervention has been qualified by the actions of individual states in signing on to a "larger and more intrusive regime of international treaties and conventions"[260] and by "growing regional organization and state practice."[261] That is, as states allow more intrusion into their affairs by international governmental and non-governmental organizations, non-intervention's use as a shield is weakened. In sum, both sovereignty and non-intervention are considered to be presumptions—rather than absolutes—and can be rebutted by evidence of extreme human suffering.

C. Legality and Legitimacy of UAHI

The third foundation for the proposed test is made up of the related, but distinct, concepts of legality and legitimacy.[262] Legality of UAHI, in its current construct, refers to interventions approved by the Security Council in conformity with the UN Charter—meaning that the Security Council has first determined "the existence of [a] threat to the

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[258] Scheffer, *supra* note 116, at 261.

[259] *Id.* at 262.

[260] *Id.*

[261] Responsibility to Protect, *supra* note 9, para. 2.24.

[262] JANE STROMSETH, DAVID WIPPMAN & ROSA BROOKS, CAN MIGHT MAKE RIGHTS? 19 (2006).

peace, breach of the peace, or act of aggression"[263]—or the target state has consented to the intervention.[264]

Under R2P, a legitimate intervention is a just war without meeting the jus ad bellum requirement of proper authority. The ICISS identified five criteria for legitimate interventions that are meant to apply to the Security Council and to member states under R2P: just cause, right intention, last resort, proportionality of means, and a reasonable prospect of success.[265] Thus, a legitimate intervention meets each of the jus ad bellum requirements except for proper authority.[266] As a result, some interventions are viewed as legitimate, even though they are not approved by the Security Council. Kosovo is the most prominent example. The intervention was not approved by the Security Council; thus, it lacked approval by a "proper authority."[267] The Kosovo Report described how an intervention could be "legitimate" while at the same time be "illegal"[268] and the ICISS adopted the same formulation for R2P. [269]

Legality and legitimacy are distinguishable in other ways as well. For example, success can have a direct effect on the legitimacy of an action, but has only an indirect effect on the

[263] U.N. Charter art. 39.

[264] DESKBOOK, *supra* note 29, at 31.

[265] Responsibility to Protect, *supra* note 9, paras. 4.18, 4.32–.48.

[266] DESKBOOK, *supra* note 29, at 13. *See also* High-Level Panel, *supra* note 8, ¶ 207 (identifying five criteria for legitimacy for intervention based on R2P—"seriousness of threat, proper purpose, last resort, proportional means, and balance of consequences").

[267] *See* Kosovo Report, *supra* note 21, at 4.

[268] *Id.*

[269] Responsibility to Protect, *supra* note 9, paras. 6.28–.40.

legality of an action.[270] Interventions, like the one in Kosovo, are viewed as legitimate in retrospect because they are generally viewed as successful, implicating the jus ad bellum requirement of probability of success.[271] There are two main problems with basing a finding of legitimacy on "success" of a UAHI alone. First, success or failure can only be judged after the intervention, and second, success is a term that escapes precise definition. For example, some commentators label the NATO intervention in Kosovo a "success."[272] The Kosovo Report, authored by a commission of experts in international law and relations from around the world, found it to be "neither a success nor a failure; it was in fact, both."[273] Kosovo is but one example of how difficult it is to define success. The United States' intervention in Iraq provides a good example of how difficult it is to define "success" in any type of armed intervention.[274] Success, like beauty, is in the eye of the beholder and is a poor way to judge legitimacy, and has no effect on legality of an intervention.[275]

Both legality and legitimacy can be judged pre-intervention. Legality is judged by whether the intervention is approved by a proper authority and whether that proper authority (the Security Council) has determined the existence of a threat to the peace, a breach of the

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[270] STROMSETH ET AL., *supra* note 262, at 19. Probability of success may have an effect on whether a Security Council member approves or disapproves (or vetoes or withholds a veto on) an intervention. For example, success was more probable in Libya and the intervention was approved with Russia and China abstaining. Success is a less likely outcome in Syria and a vote on intervention has yet to occur. *Id.* It appears there is an indirect effect on legalizing an intervention through a Security Council vote.

[271] *Id. But Cf.* KASSNER, *supra* note 1, at 148 (discussing the U.S.-led invasion of Iraq). *But see* Kosovo Report, *supra* note 21, at 5 (concluding "the NATO War [in Kosovo] was neither a success nor a failure; it was in fact both").

[272] *See* STROMSETH ET AL., *supra* note 262, at 19.

[273] Kosovo Report, *supra* note 21, at 5.

[274] *See* Ignatief, *supra* note 138 (arguing "[i]nterventions don't end when the last big battle is won . . . containing rather than defeating the enemy is the most you can hope for").

[275] Probability of success may, however, have an effect on the willingness of the international community to intervene. If an intervention is likely to be successful, it is more likely to have proponents.

peace, or an act of aggression.[276] Legitimacy, on the other hand, is judged by reference to just war principles. If a UAHI meets jus ad bellum principles, then it can be judged legitimate, even if it has not been approved by a "proper authority." In this way, legitimacy of UAHI would reside on a continuum just to the left of legality. Legality is judged at the outset of an intervention, while intervening states will likely face questions about legitimacy throughout the intervention, but most prominently in the post-intervention phase. Professor Jane Stromseth[277] asserts "whatever factors trigger states to intervene in the first place, they increasingly face international pressure to help build governance structures and institutions that advance self-determination and protect the basic international human rights of the local population."[278] Therefore, for an intervention to be approved and supported by the international community, there must be legitimacy throughout the intervention, from basing the action on jus ad bellum principles, to following jus in bello principles during the conflict, and finally meeting jus post bellum obligations (building governance structures and institutions).[279]

It is essential for UAHIs to be both legal and legitimate. Legality and legitimacy are the tools the international community may use to support the intervention before and after it happens. They have a direct bearing on both participation by the international community

[276] U.N. Charter art. 39.

[277] Professor Stromseth teaches and writes in the fields of constitutional law, human rights, international security, and post-conflict resolution. GEORGETOWN LAW, https://www.law.georgetown.edu/faculty/stromseth-jane-e.cfm (last visited Mar. 17, 2014).

[278] STROMSETH ET AL., *supra* note 262, at 19.

[279] DESKBOOK, *supra* note 29, at 9–10. Jus ad bellum is the law dealing with conflict management, and how states initiate armed conflict (i.e., under what circumstances the use of military power is legally and morally justified). Jus in bello is the law governing the actions of states once conflict has started (i.e. what legal and moral restraints apply to the conduct of waging war). Jus post bellum focuses on the issues regulating the end of warfare and the return from war to peace (i.e., what a just peace should look like).

and its willingness to view the intervention in a favorable light.[280] "Without question, the presence of clear legal authority to intervene will also be highly significant in convincing other states that military action is legitimate."[281] If an intervention is viewed as legitimate, it is more likely states will contribute to the intervention and support it.[282] Not only is the international community more likely to support the intervention in theory when it is viewed as legal and legitimate, individual states are more likely to support the intervention in reality through financial and political means.[283] This thesis holds that a state can gain legality and legitimacy for its action by meeting the elements of the proposed test based on these three foundational principles.

VIII. The Proposed Test

A. The UN Security Council Fails to Act

The first element presupposes that the targeted state is complicit in the crimes against its citizens or, at least, is unable to stop those who are committing the crimes.[284] Under the Pillars of R2P, the international community, acting through the Security Council, thus assumes the responsibility to act.[285] If the Security Council then fails to act under these circumstances, an intervening state would meet this element of the test and would also meet the just war requirement that military intervention be a last resort.

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[280] STROMSETH ET AL., *supra* note 262, at 18.

[281] *Id.*

[282] *Id.*

[283] *Id.*

[284] *Cf.* Deeks, *supra* note 49, at 485 (explaining the "unwilling or unable" standard with regard to a state's inability to deal with non-state actors).

[285] World Outcome Document, *supra* note 75, ¶¶ 138–139.

The Security Council has essentially unlimited authority to determine a threat to international peace and security and to approve interventions for humanitarian purposes based on its obligation "to ensure prompt and effective action by the United Nations" and its "responsibility for the maintenance of international peace and security."[286] Even so, the Security Council's power to act is not unlimited. It may be unable to act due to a veto or threat of veto or states may disagree about the scope of the approval, thereby calling into question the legality and legitimacy of its action.

The veto or threat of veto may be exercised by one of the permanent members of the Security Council.[287] The Security Council is made up of five permanent members and ten temporary members elected by the General Assembly.[288] Non-permanent members are elected for a term of two years.[289] Each member of the Security Council has one vote.[290] Decisions of the Security Council on all non-procedural matters "shall be made by an affirmative vote of nine members including the concurring votes of the permanent members."[291] If one permanent member does not concur, then the action cannot be approved. Historically, the underlying basis for a veto is either international politics or domestic politics.[292] The vetoes are typically not based on whether the intervention meets

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[286] U.N. Charter art. 24. *See also* Responsibility to Protect, *supra* note 9, para. 6.3.

[287] U.N. Charter art. 27, para. 3 (requiring concurring votes of the permanent members on all non-procedural matters). *See also* U.N. Charter art. 23, para. 1 (naming the United States, China, France, Russia, and the United Kingdom as the permanent members of the Security Council).

[288] U.N. Charter art. 23, para. 1.

[289] U.N. Charter art. 23, para. 2.

[290] U.N. Charter art. 27, para. 1.

[291] *Id.* para. 3.

[292] *See, e.g.* WHEELER, *supra* note 67, at 179 (describing the George H.W. Bush Administration's decision to act in Somalia: "The Democratic challenger in the election campaign, Bill Clinton, was criticizing Bush for his

legal requirements.[293] The ICISS posits that in cases where action should be taken to avert a humanitarian crisis, the domestic politics of Security Council members must be deemed less important than the extreme human suffering of the citizens of the targeted state.[294] To that end, the ICISS recommends permanent members refrain from using their veto with respect to actions that need to be taken "to stop or avert a significant humanitarian crisis" in matters where their "vital national interests were not claimed to be involved" and the veto would "obstruct the passage of what would otherwise be a majority resolution." [295] This recommendation is unlikely to be implemented. Due to the interconnectedness of the world today, it would be difficult to find a situation where a state's national interests would not in some way be implicated. Also, states will continue to act in their own interests, even when vital national interests are not at stake.

Even when the Security Council does act, states understand the actions differently.[296] This is because, as the ICISS points out, "multilateral decision-making bodies require consensus to succeed, and vagueness and incrementalism, rather than specificity, are inevitable outcomes of multilateral deliberations."[297] Recently, China and Russia abstained

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alleged foreign-policy failures over both Bosnia and Somalia, and this coupled with Bush's personal reactions to the stories of suffering Somalis galvanized the President to act decisively on the Somali issue"). *See also* Max Fisher, *The Four Reasons Russia Won't Give up Syria, No Matter What Obama Does*, WASH. POST WORLD VIEWS BLOG (Sept. 5, 2013, 11:28 AM), http://www.washingtonpost.com/blogs/worldviews/wp/2013/09/05/the-four-reasons-russia-wont-give-up-syria-no-matter-what-obama-does/ (describing Russia's national interests in backing Syria).

[293] In the humanitarian intervention context, the veto has been used to protect the interests of particular states or their allies. *See* discussion *supra* Part VII.B.

[294] Responsibility to Protect, *supra* note 9, para. 6.21.

[295] *Id.*

[296] *Id.* para. 7.13.

[297] *Id.*

from voting on the intervention in Libya and issued a double-veto of a resolution condemning the violence in Syria.[298] In the case of Libya, the abstentions allowed the intervention to be approved.[299] In some cases such as Libya, there is a great amount of debate about the scope of the approved actions even after approval and after they have been executed, leading to questions about whether the "armed" part of the intervention was actually legal under Chapter VII if there was no agreement on the scope of the intervention.

For example, the scope of UN Security Council Resolution (UNSCR) 1973 authorizing intervention in Libya has been interpreted to mean one thing in the United States and quite another in Russia.[300] National security scholars, such as Professor Robert Chesney,[301] saw UNSCR 1973 as "surprisingly broad" including provisions authorizing a "no fly zone"[302] and the use of force to protect civilians and civilian-populated areas.[303] The United States and its coalition partners acted under a similar view of UNSCR 1973—that it allowed for military operations to include airstrikes against air-defense systems and military airfields in preparation for imposing a no-fly zone.[304] On the contrary, Russia expressed its belief that NATO exceeded the scope of the resolution by conducting a military operation when the

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[298] Mick B. Krever, *Why won't the U.N. Security Council Intervene in Syria?*, CNN, (Jan. 13, 2012, 7:14 PM) http://www.cnn.com/2012/01/13/world/meast/un-security-council-syria/index.html.

[299] *Id.*

[300] Robert Chesney, *The Surprisingly Broad Scope of UN Security Council Resolution 1973: Not Just a No Fly Zone, at Least So Long as Gaddafi is on Offense*, THE LAWFARE BLOG, (Mar. 17, 2011, 11:01PM), http://www.lawfareblog.com/2011/03/the-surprisingly-broad-scope-of-un-security-council-1973-not-just-a-no-fly-zone-at-least-so-long-as-gaddafi-is-on-offense/.

[301] Professor Chesney is a professor at the University of Texas School of Law and a founding editor of the Lawfare National Security Blog.

[302] Greenway, *supra* note 115 (quoting former Secretary of Defense Robert M. Gates that a no-fly zone is considered both an act of war and an intervention into sovereign airspace).

[303] Chesney, *supra* note 300.

[304] Authority to Use Military Force in Libya, 35 Op. O.L.C. 1, 4 (2011).

resolution did not contemplate military action.[305] As such, even instances where states are vested with Security Council approval, there are still objections to the way the intervention is carried out and debate about the scope of the approved intervention.

In the end, the Security Council approval does not directly confer legality on all actions.[306] Also, when a state has used or threatened to use the veto, the Security Council is paralyzed and fails to act; or when it does act, it is not definitive. In these cases, the Security Council has failed to act for the purposes of the test.

UAHI Is a Last Resort

The Security Council's inaction would mean that a UAHI would be a "last resort" as required by just war theory.[307] In an op-ed in the *New York Times* before the Iraq War, former U.S. President Jimmy Carter wrote about the just war requirement of last resort, "war can only be waged as a last resort, with all non-violent options exhausted." The Kosovo report found that the intervention there was legitimate, in part, "because all diplomatic avenues had been exhausted."[308] In cases where there is extreme human suffering or imminent extreme human suffering, the failure of the Security Council to act would mean that all diplomatic avenues have been exhausted. In that case, an individual state would meet

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[305] FRANCE24.COM, http://iphone.france24.com/en/20110415-russia-says-nato-libya-strikes-exceed-un-mandate (last visited Feb. 26, 2014) (describing Russia's opinion that NATO strikes on Libya exceeded the Security Council mandate because the resolution did not authorize military action).

[306] Scheffer, *supra* note 116, at 273.

[307] Verdirame, *supra* note 104 (citing the United Kingdom's published legal advice on Syria and the view that Security Council failure to act means that UAHI is a last resort: "Previous attempts by the UK and its international partners to secure a resolution of this conflict, end its associated humanitarian suffering and prevent the use of chemical weapons through meaningful action by the Security Council have been blocked over the last two years. If action in the Security Council is blocked again, no practicable alternative would remain to the use of force to deter and degrade the capacity for the further use of chemical weapons by the Syrian regime").

[308] Kosovo Report, *supra* note 21, at 4.

the last resort requirement. Thus, if the Security Council fails to act, the first element of the proposed test is met.

B. The Intervening State Must Show Clear and Convincing Evidence of Extreme Human Suffering or Imminent Extreme Human Suffering to Rebut the Presumptions of Sovereignty and Non-intervention

To meet this element of the test, the intervening state must (1) show clear and convincing evidence (2) of extreme human suffering or imminent extreme human suffering (3) to rebut the presumptions of sovereignty and non-intervention. This evidence will show that the intervention is a "just cause" and "based upon . . . a need to right an actual wrong."[309] It would also show that the intervening state has a "right intention." In other words, the state intends to fight the war for the sake of the just cause and not for other purposes.[310] This section concludes that the rebuttable presumption test adequately addresses sovereignty and non-intervention and allows the intervening state to take the next step toward UAHI legality.

1. Clear and Convincing Evidence

The clear and convincing evidence standard is borrowed from American jurisprudence and is "[a] medium level of burden of proof which is a more rigorous standard to meet than the preponderance of the evidence standard, but a less rigorous standard to meet than proving evidence beyond a reasonable doubt. In order to meet the standard and prove something by clear and convincing evidence, a party must prove that it is substantially more likely than not

[309] DiMeglio, *supra* note 201, at 128.

[310] *Id.*

that it is true." [311] Clear and convincing evidence is more probative of an issue than "preponderance of the evidence," but less probative than beyond a "reasonable doubt," the required evidentiary standard for a guilty finding in a U.S. criminal case.[312]

Intervening in another state's affairs against the international law norms of sovereignty and non-intervention should require a heightened standard of evidence.[313] The clear and convincing standard meets this requirement.[314] Beyond a reasonable doubt would be an impossible standard to meet, even with today's technology. There would always be a question or concern about the validity of some piece of evidence—which could produce reasonable doubt. On the other hand, the preponderance of the evidence standard is too low. Sovereignty and non-intervention are the foundations of international law and relations. There must be a high evidentiary standard to overcome the presumptions that the state still retains its sovereignty and right of non-intervention. As a result, this thesis uses the clear and convincing standard.

2. Of Extreme Human Suffering

There is near agreement in the international community with regard to the type of events which qualify as "extreme human suffering," for the purpose of determining if a UAHI is just. In short, "extreme human suffering" in this context refers to genocide or other large

[311] CORNELL UNIVERSITY LAW SCHOOL, LEGAL INFORMATION INSTITUTE, http://www.law.cornell.edu/wex/clear_and_convincing_evidence (last visited Feb. 26, 2014).

[312] Schmitt, *supra* note 63, at 40.

[313] *See* Kanter, *supra* note 95, at 15 (characterizing sovereignty as a "substantial presumption against intervening that must be surmounted by the compelling nature of the particular circumstances").

[314] *Cf.* Schmitt, *supra* note 63, at 40 (discussing the clear and convincing standard with regard to use of force in self-defense).

scale loss of life,[315] war crimes, ethnic cleansing, or other crimes against humanity.[316] These types of events are generally considered *jus cogens*, or peremptory norms, from which no derogation is ever permitted.[317] No derogation means that a state may not itself do something which conflicts with a rule of *jus cogens* or make an agreement to allow another state to do something which conflicts with a rule of *jus cogens*.[318]

Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such:

(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group.[319]

Under the 1948 Genocide Convention, signatories have the obligation to prevent and punish the crime of genocide.[320] No derogation from these obligations is permitted.[321] However, the issue with the Genocide Convention is that it requires signatories to call upon "the competent organs of the United Nations to take such actions as they consider

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[315] Responsibility to Protect, *supra* note 9, para. 4.19.

[316] HEINZE, *supra* note 104, at 96. *See also* Responsibility to Protect, *supra* note 9, para. 4.19; Implementing R2P, *supra* note 13, ¶ 13; World Summit Outcome Document, *supra* note 75, ¶¶ 138–39.

[317] BROWNLIE, *supra* note 24, at 517 (positing that genocide is jus cogens).

[318] *Id.* at 516.

[319] Convention on the Prevention and Punishment of the Crime of Genocide, art. 2, Dec. 9, 1948, 78 U.N.T.S. 277, S. Exec. Doc.O, 81-1 (1949).

[320] *Id.*

[321] *Id.*

appropriate."[322] This means, of course, that genocide does not, in and of itself, create legal UAHI.

The Rome Statute[323] lists the following as crimes against humanity when "part of a widespread or systematic attack against any civilian population, with knowledge of the attack": murder, extermination, enslavement, forcible deportation of a population, unlawful imprisonment, torture, rape and other sexual violence, racial or ethnic persecution, enforced disappearance, apartheid, and other inhumane acts causing great human suffering.[324]

These extreme acts stand in contrast to other, less extreme forms of denying important human rights, guaranteed by customary international law or treaty. For example, the International Covenant on Civil and Political Rights (ICCPR),[325] to which the United States is a party, guarantees a broad set of rights, all of which may constitute "human suffering" but only some of which would meet the "extreme human suffering" standard. The ICCPR enumerates a number of rights, including: freedom of thought, conscience, and religion; freedom of opinion and expression; freedom of association; the right of peaceful assembly; the right to vote; equal protection of the law; the right to liberty and security of the person; the right to a fair trial, including the presumption of innocence; the right of privacy; freedom of movement, residence, and immigration; freedom from slavery and forced labor; protection from torture or cruel, inhumane, or degrading treatment or punishment; and the right to life.[326] While a violation of any of these would arguably cause human suffering, a violation of some might not amount to

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[322] *Id.*

[323] The Rome Statute of the International Criminal Court, art. 6, U.N. Doc. A/CONF.183/9 (1998).

[324] *Id. See also* HEINZE, *supra* note 104, at 96.

[325] International Covenant on Civil and Political Rights (ICCPR), *adopted* Dec. 16, 1966, 999 U.N.T.S. 171.

[326] *Id. See also* Stigall, *supra* note 25, at 28 (citation omitted).

extreme human suffering. For example, denying voting rights would be a human rights violation, but would not be extreme enough to meet the definition here of extreme human suffering.

This formulation of what is and is not extreme human suffering generally follows Professor Walzer's "chasm" approach.[327] Walzer explains that on one side of the chasm are "common brutalities of authoritarian politics, the daily oppressiveness of traditional social practices," which do not necessitate an intervention.[328] These issues are better handled internally by the people who understand the social and political fabric of that country. Outsiders may misinterpret situations and cause more harm than good by intervening in these situations. On the far side of the chasm are the acts which necessitate intervention: genocide, war crimes, crimes against humanity, and ethnic cleansing. [329] These acts do not call for interpretation by the local populace—they are banned absolutely and must be addressed. The general consensus in the international community is that the acts Walzer identifies on the far side of the chasm constitute extreme human suffering. Any of those acts would constitute extreme human suffering for the purposes of the proposed test.

3. Imminence

The determination of whether there is imminent extreme human suffering will be based on all the facts and circumstances known to the intervening state at the time of the proposed

[327] Michael Walzer, *The Argument About Humanitarian Intervention, in* ETHICS OF HUMANITARIAN INTERVENTIONS 22 (Georg Meggle ed., 2004).

[328] *Id.*

[329] *Id.*

intervention.[330] The standard for imminence is the one articulated by then-U.S. Secretary of State Daniel Webster in the Caroline case: a state need not wait for the people of the targeted state to suffer actual extreme human suffering before taking action, but may intervene if the circumstances leading to the use of force are "instantaneous, overwhelming, and leaving no choice of means and no moment for deliberation."[331] By this high standard of what constitutes extreme human suffering or imminent extreme human suffering, the proposed test limits interventions to the most extreme cases. It thus limits the instances to those where there will likely be international consensus on the need to act.

4. To Rebut the Presumptions of Sovereignty and Non-intervention

Sovereignty is not an absolute bar to intervention. The best formulation is that sovereignty is a rebuttable presumption that can be overcome by clear and convincing evidence that the government of a state is suppressing the people's sovereignty but is more specifically violating the human rights of its citizens by taking their lives and freedom through genocide, war crimes, crimes against humanity, or ethnic cleansing. This view was expressed by Arnold Kanter with regard to U.S. policy on humanitarian intervention: "By itself, the principle of national sovereignty may not be an absolute bar to armed humanitarian interventions, but it should constitute a substantial presumption against intervening that must be surmounted by the compelling nature of the particular circumstances."[332]

5. The "Inherent Dilemma" of This Element

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[330] INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH. , OPERATIONAL LAW HANDBOOK 78 (2013).

[331] DESKBOOK, *supra* note 29, at 37. *See also* Deeks, *supra* note 49, at 502 (describing the Caroline case).

[332] Kanter, *supra* note 95, at 15.

There is an "inherent dilemma"[333] that the second element of the proposed test presents in the decision to intervene. On the one side, the bar for intervention is high and requires evidence of extreme human suffering or imminent extreme human suffering.[334] On the other side, interventions may be required to save lives before the decision-makers have all of the information.[335] It is both a difficult hurdle to overcome and a necessary one to protect the rights of the citizens of the target state.[336] It is also part of the proposed test to ensure that sovereignty and non-intervention are addressed.

There is also an issue of the evidence relied upon to establish extreme human suffering or imminent extreme human suffering. "Obtaining fair and accurate information is difficult but essential," argues the ICISS.[337] The experience in Iraq and the evidence relied upon regarding Saddam Hussein's alleged weapons of mass destruction have made the international community cautious about intelligence and information.[338] In that regard, if time permits, the ICISS recommends a report on the "gravity of the situation."[339] The difficulty with this approach is that in cases of genocide, war crimes, crimes against humanity, or ethnic cleansing, there typically will not be time to complete a comprehensive report before intervention is necessary. As a result, the international community may be

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[333] *Id.* at 8.

[334] *Id.*

[335] *Id.*

[336] *Cf.* Walzer, *supra* note 327, at 22.

[337] Responsibility to Protect, *supra* note 9, para. 4.28.

[338] *See* Verdirame, *supra* note 104 ("There is no better evidence of the long shadow that the Iraq war continues to cast that, while in 2003 the British Parliament supported intervention against the mere possibility that weapons of mass destruction might be used, ten years later the British Parliament voted against it after they had actually been used.").

[339] Responsibility to Protect, *supra* note 9, para. 4.29.

acting on incomplete information, or possibly misleading information. This is an issue that must be taken into account by the intervening state—and the international community—when determining whether there really is *clear and convincing* evidence of extreme human suffering or imminent extreme human suffering.

C. The Intervening State Must Have a Defined Mission

This element has both an internal and external component for the intervening state. Internally, the intervening state must maintain domestic political and popular support for its action. Externally, the intervening state must maintain international political and popular support for its action. Having a properly defined mission that is acceptable internally and externally will help a state maintain legitimacy of an action from the time of the intervention through the post-intervention phase. It is especially important to maintain legitimacy in the post-intervention phase for the state to maintain, and possibly even increase, the support it receives from international partners.[340]

A state can define its mission and maintain internal and external support for its action in two ways. First, the purpose of the intervention must be predominantly humanitarian, thus showing the intervening state's "right intention."[341] Second, it must establish that the defined mission has a strong probability of success.[342]

1. Right Intentions

[340] STROMSETH ET AL., *supra* note 262, at 19.

[341] Responsibility to Protect, *supra* note 9, para. 4.33.

[342] DiMeglio, *supra* note 201, at 128 ("A state may not resort to war if it can reasonably foresee that doing so will have no measurable impact on the situation.").

The first requirement is succinctly stated in the ICISS's R2P report, and is adopted in this thesis—"[t]he primary purpose of the intervention must be to halt or avert human suffering."[343] Other motives for intervening, such as alteration of borders or overthrow of a regime, are not considered right intentions.[344] This does not mean that a state must not have any self-interest involved in its decision to intervene. It is inevitable that there needs to be some self-interest to meet the internal pressures of domestic political and popular opinion. Due to the cost of interventions, both in terms of lives of military personnel and budgets, it is also not unlikely that an intervening state may in some way benefit from the intervention.[345] These factors should not preclude intervention if the predominant motivation is humanitarian.

2. Probability of Success

Second, it is critical for approval that an intervention be viewed as having a strong probability of success. Probability of success is even more important in humanitarian interventions in part because they are controversial uses of force to begin with. Interventions must have a defined goal to provide metrics by which to measure its success or failure. Without a defined goal pre-intervention, there is no way to determine if the intervening state achieved its goals post-intervention.

The intervention in Somalia is an excellent case study as to why a defined mission and probability of success are important components in gaining and maintaining international support for a humanitarian intervention. When the Security Council approved Resolution

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[343] Responsibility to Protect, *supra* note 9, para. 4.33.

[344] *Id.* (explaining that regime change is not always bad: "disabling that regimes' capacity to harm its own people may essential to discharging the mandate of protection").

[345] *Id.* para. 4.35.

794 under its Chapter VII authority in December 1992,[346] and the United States took the lead in providing military power to the intervention in Somalia, it was seen as a harbinger for the future of humanitarian intervention.[347] The initial stages of the intervention to "establish as soon as possible a secure environment for humanitarian relief operations in Somalia"[348] went well.[349] The end of the intervention in Somalia, however, was not favorable after the mission had changed—from ending civil disorder and providing humanitarian relief to nation-building.[350] The mission was no longer well-defined and there was no good way to measure its success or failure. The failure of some aspects of the intervention in Somalia has led to a humanitarian intervention decision-making process where "the desire to help collides with cold calculus of national interest."[351] In most cases, the national interest prevails.

To meet this element, an intervening state must show that the predominant reason for the intervention is humanitarian and that the intervention will probably be successful in meeting the goals the state set out. In the context of a UAHI under the proposed test, success is stopping the extreme human suffering or imminent extreme human suffering and putting governing structures and political systems in place to ensure that the extreme human

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[346] S.C. Res. 794, para. 10, U.N. SCOR, 47th Year, U.N. Doc. S/RES/794, at 3 (Dec. 3, 1992) (empowering the Unified Task Force (UNITAF) headed by the United States to "use all necessary means" to ensure security for the delivery of humanitarian aid).

[347] Burmester, *supra* note 106, at 269.

[348] *See supra* note 346 (describing S.C. Res. 794).

[349] WHEELER, *supra* note 67, at 188. *But see id.* (describing the contrary opinion of Alex De Waal who argued that the intervention in Somalia was not as successful as the UN said. De Waal argued that the intervention was flawed from the outset because it aimed to deliver food to starving people, even though the famine had passed by the time the intervention occurred in 1992. De Waal believes the intervention would have been better had it focused on vaccinations against malaria and measles).

[350] POWELL, *supra* note 223, at 580.

[351] *Id.* at 605.

suffering does not recur. If a state can show how they intend to accomplish these two things, then the element of defined mission is met and the inquiry moves to the final, and probably most controversial, of the four elements—the requirement to intend to meet and actually carry out jus post bellum obligations.

D. The Intervening State Must Intend to and Actually Meet Jus Post Bellum Obligations

The final element of the proposed test requires that the intervening state intend to meet—and actually meet—jus post bellum (post-intervention) obligations to the targeted state. In addition to jus post bellum, this element corresponds to the jus ad bellum principle of macro proportionality, which requires a state, before initiating a war, to weigh the expected universal good to accrue from prosecuting the war against the expected universal evils that will result.[352] That is, only if the benefits of the UAHI seem reasonably proportional to the costs should the UAHI proceed.[353] It follows that, in the context of UAHI against genocidal regimes (or regimes committing or allowing crimes against humanity, war crimes, or ethnic cleansing),[354] many of the universal evils that may result could be avoided by robust criteria for post-intervention obligations to ensure that a governmental system is in place that is free from the genocidal regime and stable enough to ensure it does not return. This element is also a check to ensure right intentions by the intervening state. The requirement to commit to post-intervention obligations exposes whether the intention is predominately for the right reason—to alleviate extreme human suffering. There may be no fool-proof way to ensure

[352] DiMeglio, *supra* note 201, at 128.

[353] Macro proportionality is a jus ad bellum principle meaning the justness of the action can be judged before the intervention. The intervention should also be evaluated after the intervention to ensure that the intervening state actually met their obligations.

[354] For ease of reference, the thesis uses Professor Bass's term "genocidal regimes" to describe regimes that engaged in "extreme human suffering"—genocide, war crimes, crimes against humanity, or ethnic cleansing.

purely humanitarian intentions, but requiring states to meet post-intervention obligations is a check pre- and post-intervention.

This section addresses the development of jus post bellum principles from the historical standard of "status quo ante,"[355] where supporters argue for states to intervene for the shortest time possible,[356] to a new standard of "clear improvement."[357] It reviews the obligations an intervening state incurs and identifies general principles for post-intervention obligations. Finally, it explains why jus post bellum obligations are an integral part of just UAHIs.

Jus post bellum is "a third, largely historically neglected prong of the just war tradition . . . which focuses on the issues regulating the end of war and the return from war to peace."[358] It adds a prong to the just war model for judging UAHIs—first, the justness of going to war (jus ad bellum); second, the justness of actions during the war (jus in bello); and third, the justness of the actions an intervening state takes post-conflict to help the targeted state establish a government, and economic and social systems free from the human rights violations that led to the intervention (jus post bellum).[359] The overriding jus post bellum obligation should be to remove, to the greatest extent possible, the root causes of the original conflict and restore good governance and economic stability to the targeted state.[360]

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[355] Bass, *supra* note 199, at 385 n.4.

[356] Jones, *supra* note 4, at 115.

[357] Carter, *supra* note 218.

[358] DiMeglio, *supra* note 201, at 117.

[359] *See* Bass, *supra* note 199, at 399 ("Some form of authority must be constituted instead, free (as much as possible) from the taint of the previous genocidal regime.").

[360] Responsibility to Protect, *supra* note 9, para. 5.25.

1. Jus Post Bellum: Historical View vs. Modern View

There are two views of jus post bellum obligations, referred to in this thesis as the historical view and the modern view. The historical view mandated a return to the status quo ante.[361] But returning a state to the status quo that existed before the intervention is no longer an acceptable way to end wars, especially those fought as humanitarian wars against genocidal or criminal regimes. The modern view requires that "[t]he peace it [an intervention] establishes must be a clear improvement over what exists,"[362] and that the "object in war is a better state of peace."[363] This means states need to demonstrate not only that their reasons for going to war are just, but that their post-intervention actions will also be just. Professor Bass argues postwar conduct must be consistent with just war: "helping to make the region more stable and secure, and leaving the affected population less subject to violence and oppression."[364]

For years, scholars have argued that armed humanitarian interventions should be limited to the time necessary to stop the atrocity.[365] Many do not address post-intervention obligations.[366] Northwestern Law professor David Scheffer argues, "U.N.-authorized forcible intervention should be limited by the humanitarian objectives," and "should not be aimed at forcing governmental change."[367] He maintains that the government is only a

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[361] Bass, *supra* note 199, at 385 n.4.

[362] Carter, *supra* note 218.

[363] WALZER, *supra* note 144, at 121.

[364] Bass, *supra* note 199, at 385.

[365] Burmester, *supra* note 106, at 269 n.80 (citations omitted).

[366] Bass, *supra* note 199, at 384 n.2 (citations omitted).

[367] Scheffer, *supra* note 116, at 289.

legitimate target if the humanitarian crisis in its borders imposes a "threat to international peace and security" beyond its borders.[368] Professor Scheffer is not alone in this view. Professor Samuel Vincent Jones, a law professor and former reserve judge advocate,[369] argues that a UAHI should be deemed appropriate after General Assembly approval if it meets certain requirements,[370] including "the intent of the [intervening state] must be to intervene for as short as [sic] time possible, with the [intervening state] disengaging as soon as the specific limited purpose is accomplished."[371] He added that "it appears appropriate" to add the additional requirement that a UN Commission indicates "the targeted state's government is complicit in the actions that constitute massive human rights atrocities against its own citizens."[372]

The combination of these requirements—to intervene for as short a time as possible and the circumstance that the targeted state's government is complicit in human rights atrocities—appear incompatible with Just War Theory. If the targeted state is complicit in massive human rights atrocities, then the intervening state should remain as long as necessary to ensure there is a clear improvement over what existed before. This may include replacing

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[368] *Id.*

[369] Samuel Vincent Jones served as a United States Army Reserve Judge Advocate (MAJ, USAR (Ret.)) and is a Professor of Law at The John Marshall Law School in Chicago. JOHN MARSHALL LAW SCHOOL, http://www.jmls.edu/directory/profiles/jones-samuel/ (last visited Mar. 17, 2014).

[370] Jones, *supra* note 4, at 115. All of the criteria Professor Jones proposes are: (1) The intent of the [intervening state] must be to intervene for as short as time possible, with the [intervening state] disengaging as soon as the specific limited purpose is accomplished; (2) Where at all possible, the [intervening state] must try and obtain an invitation to intervene from the recognized government and thereafter, to cooperate with the recognized government; (3) The [intervening state], before its intended intervention, must request a meeting [with the UNSC] in order to inform it that the humanitarian intervention will take place only if the [UNSC] does not act first; and (4) Before intervening, the [intervening] state must deliver a clear ultimatum or peremptory demand to the concerned state insisting that positive actions [must] be taken to terminate or ameliorate the gross human rights violations.

[371] *Id.*

[372] *Id.*

the complicit government and helping to ensure freedom for the people of the targeted state.[373] These obligations are even more distinct when the intervention is based upon humanitarian reasons and against genocidal regimes, according to Professor Bass.[374] He argues that "[b]ecause these regimes have sought to exterminate their citizens, they have no international standing. Some form of authority must be constituted instead, free (as much as possible) from the taint of the previous genocidal regime."[375] This notion would require the intervening state to act even more strongly to ensure the genocide does not return:

> If a state wages war to remove a genocidal regime, but then leaves the conquered country awash with weapons and grievances, and without a security apparatus, then it may relinquish by its postwar actions the justice it might otherwise have claimed in waging the war.[376]

Failing to change regimes may return the targeted state to the *status quo ante* which could bring the original justification for the intervention into question. [377] Regime change, therefore, is not only a possibility, but may be a requirement when facing a genocidal regime. The question then becomes whether regime change is a good or bad idea.

2. Regime Change in Genocidal States

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[373] Bass, *supra* note 199, at 386. *See also Id*. at 396 (discussing political reconstruction in a genocidal state). *Cf.* DiMeglio, *supra* note 201, at 146.

[374] *See* Bass, *supra* note 199, at 399.

[375] *Id.*

[376] *Id.* at 386. *See also* Verdirame, *supra* note 104 ("There may be extreme instances (e.g., a genocidal regime like the interim Rwandan government in 1994) where regime change may be by itself an acceptable humanitarian objective but, in all other situations, the cheap Marxist whiff around the idea of regime change – let us do the revolution now and what will follow will surely be better—should not suffice.").

[377] DiMeglio, *supra* note 201, at 150.

Regime change, as Professor Michael Reisman persuasively argues, "is (almost always) a bad idea." However, Professor Reisman explains that the "almost always" is a caveat and means there are some situations where regime change is a good idea:

> There will be times . . . when an individual state must undertake to forcefully change a regime in another state because that regime is both hideous and dangerous, pathological and pathogenic, and because the formal decision structures of the international legal system prove inoperable.[378]

Reisman proposes guidelines for successful regime changes in theses extreme cases.[379] These guidelines are stringent by design. Regime change should not be entered into lightly and should be done with great care. It must be a last resort.

Interestingly, a number of regime changes—even those not approved by the Security Council—are met with approval by the international community, or at the very least, not disapproval. Professor Reisman points out that there were four regime changes in 1979

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[378] W. Michael Reisman, *Manley O. Hudson Medal Lecture: Why Regime Change is (Almost Always) a Bad Idea*, 98 AM. SOC'Y INT'L L. PROC. 290, 298 (2004).

[379] *Id.* The ten factors are:

1) There should be as much support from international organizations as possible;
2) If a regime change is not formally authorized by the UN, there should be significant foreign support (especially in the states contributing forces) for the regime change.
3) There should be significant domestic and internal support for the regime change in both the would-be changer and the targeted state.
4) The elite that is the target of regime change should not have an effective internal base of support.
5) There should be an acceptable and readily available alternative government that promises to be effective, so that, ideally, all that is involved is regime change, not regime reconstruction or nation-building.
6) The occupation by an outside force should be short.
7) The costs to the outside force should be minimal.
8) The force accomplishing the regime change should not be believed, by those within the country or outside of it, to have a parochial interest in securing the regime change.
9) Where nation building is an inevitable part of the regime change, the United Nations should be responsible or prominently involved . . . the UN commitment should be secured before the regime change.
10) Do not forget Murphy's Law. As in all elective uses of force, the Powell Doctrine (overwhelming force) should apply.

Id.

alone[380] and just one—the Soviet invasion of Afghanistan—was met with disapproval from the international community.[381] The other three regime changes shared something in common: the replaced regimes had caused extreme human suffering.[382]

More recently, the international community has taken part in regime changes in Afghanistan, Iraq, Egypt, and Libya, with mixed results. The regime change in Iraq is the one most will remember and it may be viewed in a negative light. But, each of the states mentioned are arguably better off than they were under the previous regime.[383]

Genocidal states are in a different category when it comes to post-intervention requirements.[384] This is because, through its actions, a genocidal state "has lost the moral personality that normal states have; it has lost its claim to be recognized and respected as a state."[385] This thesis proposes more robust jus post bellum obligations in UAHI because of

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[380] *Id.* at 292 ("Tanzania invaded Uganda and replaced the Idi Amin dictatorship with a government led by a former elected president. France invaded what was then known as the Central African Empire, imprisoned the self-styled emperor, Jean Bedel Bokassa, and put in power a former president, David Dacko, who had conveniently been residing in Paris. Vietnam invaded Cambodia, expelled the Khmer Rouge government from Phnom Penh, and put Hun Sen in power. The Soviet Union invaded Afghanistan, made Babrak Karmal president and later replaced him with another puppet.").

[381] *Id.*

[382] Idi Amin, the Khmer Rouge, and their crimes are well known. Jean Bedel Bokossa, former President of the Central African Republic personally participated with his imperial guard in the massacre of 100 schoolchildren and other crimes for which he was tried (he was acquitted of cannibalism). ENCYCLOPAEDIA BRITANNICA, JEAN-BEDEL BOKASSA, http://www.britannica.com/EBchecked/topic/71915/Jean-Bedel-Bokassa (last visited Mar. 17, 2014).

[383] It is beyond the scope of this thesis to discuss the leaders of these countries and the crimes each committed against its own citizens. However, the list of the leaders of these states reads like a "rogues gallery" of the most notorious human rights abusers in recent times. Afghanistan had the Taliban before the intervention and it was the most repressive regime in the world in addition to its' giving safe haven to terrorists; Iraq had Saddam Hussein who used chemical weapons against his own people; Egypt had Hosni Mubarak who has been on trial for murdering protestors and embezzlement of government funds; and Libya had Muammar Gadaffi, who was a sponsor of terror, and the UN Security Council referred his crackdown on protestors to a war crimes tribunal. These states all face uncertain futures, but their pasts were difficult indeed.

[384] Bass, *supra* note 199, at 396. *Cf.* Walzer, *supra* note 144, at 113 (citing Nazi Germany as the only state considered a "genocidal regime").

[385] WALZER, *supra* note 144, at 106.

the special circumstance in which the UAHI is undertaken: after the Security Council's failure to act in the face of extreme human suffering or imminent extreme human suffering.

3. Four Principles for Jus Post Bellum Obligations

This thesis proposes four general principles of jus post bellum obligations: restraint, restoration of national sovereignty, perfect is the enemy of good enough, and multilateralism. The two overarching principles for post-intervention obligations should be "restraint" by respecting the sovereignty of the targeted state and "restoration of national sovereignty."[386] Sovereignty, in this view, is derived "from the consent of [a state's] individual citizens."[387] Therefore, the intervening state must respect the rights of the individual citizens post-intervention to maintain legitimacy. The intervention may well be found to be illegitimate and illegal without compliance to the principles of restraint and restoration of sovereignty post-intervention. The principle of restraint also corresponds with the view that "just wars are limited wars" and "conservative in character."[388] The paradigmatic just war is the one fought in self-defense, which typically would not require disablement of the regime of the attacking country.[389] Wars against genocidal regimes would not fit the paradigm, but still would require that the intervening state's post-intervention actions be restrained to be successful.

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[386] Bass, *supra* note 199, at 395.

[387] *Id.* at 387.

[388] WALZER, *supra* note 144, at 121–22.

[389] But see the examples of Afghanistan after the 9/11 attacks and Germany in World War II. In Afghanistan, regime change was required because the state was supporting the terrorist acts. In Germany, the Nazi regime had to be changed because it was a genocidal state.

The third principle in post-intervention obligations is that "perfect is the enemy of good enough."[390] In other words, jus post bellum does not require that the newly established government and state be a model, liberal, Jeffersonian democracy, but the state should not be left in chaos.[391] Additionally, the state need not be at perfect peace, but the state should be stable enough to ensure that the underlying causes of the genocide do not recur. Also, there should be a focus on returning the state to the people so that they can exercise their right of self-determination.[392] Professor Bass explains this idea by way of the Serbian example after the Kosovo intervention, where, "[t]he job of remaking the genocidal Serbian state has therefore been left in the hands of the people of Serbia."[393] The Serbs revolted against Slobodan Milosevic and toppled his regime in October 2000.[394] Mr. Milosevic was then tried for war crimes in The Hague.[395]

The final principle is that the post-intervention period should be as multilateral as possible. That is, "reconstruction should include the participation of a broad array of

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[390] This phrase is attributed most often to Voltaire, who wrote in his poem La Begueule,

> *Dans ses ecrtis, un sage Italien*
> *Dit que le mieux est l'ennemi du bien.*
>
> In his writings, a wise Italian
> Says that the best is the enemy of the good.

THE OXFORD DICTIONARY OF QUOTATIONS 797 (Elizabeth Knowles, ed., 5th ed. 1999).

[391] Bass, *supra* note 199, at 402.

[392] *Id.* at 395.

[393] *Id.* at 402.

[394] Marlise Simons & Alison Smale, *Obituary: Slobodan Milosevic, 64, Former Yugoslav Leader Accused of War Crimes Dies*, N.Y. TIMES, Mar. 12, 2006, *available at* http://www.nytimes.com/2006/03/12/international/europe/12milosevic.html?pagewanted=all&_r=0.

[395] *Id.*

governments."[396] A coalition of states would help to defray the reconstruction costs, but would also show the people of the targeted state that the intervention was with right intention. The intervening state must respect the rights of the citizens of the targeted state throughout the process to maintain legitimacy, argues Professor Stromseth, and the best way to do that is through a coalition of states post-intervention. "[T]he ability of intervening states to act in a manner consistent with fundamental principles of international law—including human rights and international humanitarian law—will influence not only international support for but also local acceptance of the intervention's legitimacy."[397]

Post-war situations are difficult in the best of circumstances, and interventions against genocidal states are the worst of circumstances. It will be difficult to carry out jus post bellum obligations, while at the same time maintain legitimacy throughout the process. However, meeting the jus post bellum principles laid out above—restoration of national sovereignty, restraint, the perfect being the enemy of good enough, and multilateralism—is critical to the completion of a legal and legitimate intervention.

4. Judging UAHI Pre- and Post-Intervention

The jus post bellum element of the test should be evaluated twice: before the intervention (jus ad bellum), based on what the intervening state presents to the international community as its post-intervention intentions, and then post-intervention to determine what the intervening state has actually done to establish a more stable governing structure free from the former genocidal regime. The pre-intervention evaluation allows the international community to assess the true intentions of the intervening state as it lays out what its post-

[396] Bass, *supra* note 199, at 403.

[397] STROMSETH ET AL., *supra* note 262, at 20.

intervention plans are; and second, it provides the international community with a roadmap of goals it can use to evaluate post-intervention. The evidence presented would serve to confirm the justness of the intervention ahead of and after action. This shift—or return—to the just war paradigm carries with it responsibilities and legal obligations for the intervening state to end an armed humanitarian intervention justly. These requirements may be staggering to some and may discourage states from intervening. But they are critical to conducting a just war and achieving a just peace.

E. UAHI as a Solution to the Pretext Problem

The following discussion demonstrates that the elements of the proposed test ensure that any UAHI carried out under its framework are primarily humanitarian and are not based on pretext. The international community currently holds that multilateral action is the best solution to the pretext problem.[398] However, multilateral action is not the only solution. The elements of the proposed test offer a framework for solving the pretext problem by providing more certainty as to when a state may intervene and ensuring the reasons for intervening are predominately humanitarian. The proposed test does this by ensuring that the intervening state has right intentions through requiring clear and convincing evidence of extreme human suffering or imminent extreme human suffering, a defined mission, and implementation of jus post bellum obligations.

A properly crafted unilateral justification for armed humanitarian intervention could "discourage wars with ulterior motives [pretext]."[399] In other words, by meeting just war principles as justification for a UAHI, states intervening unilaterally could produce less risk

[398] Responsibility to Protect, *supra* note 9, para. 6.28. *See also* Implementing R2P, *supra* note 13, ¶ 3; World Outcome Document, *supra* note 75, ¶¶ 138–139.

[399] Goodman, *supra* note 129, at 107.

of pretext, rather than more. Professor Ryan Goodman of Harvard Law School argues in *Humanitarian Intervention and Pretexts for War* that the pretext problem is based on questionable assumptions about the ways states behave.[400] These assumptions are that "international law affects how states—particularly duplicitous, aggressive states—orient themselves to the international order."[401] The international community generally believes that legalizing UAHI would affect how and when states use force because states would use whatever justification is most politically palatable at home and abroad to allow them to continue their intervention.[402] Hitler's invasion of Czechoslovakia, mentioned earlier, is an example of this way of thinking. Goodman argues this is in error. He believes that the "justifications that leaders contrive in order to build political support for war can meaningfully constrain subsequent governmental action."[403] That is, a domestic political audience may support an intervention for humanitarian purposes, if that is what has been sold to them, but would not allow one for other purposes. But Goodman does not stop there:

> An appeal to humanitarian interest as the justification for war can produce two types of pacifying effects. First, it can frame (or reframe) an interstate dispute in a manner that is ultimately less escalatory. That is, non-humanitarian frameworks are, in general and on average, less controllable and more incendiary than humanitarian ones. . . . Second, the addition of humanitarian issues to an existing framework can facilitate negotiations to avoid war—in particular, by providing opportunities for issue linkage and face-saving settlements.[404]

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[400] *Id.* at 111.

[401] *Id*.

[402] *Id.* at 113 ("[T]he argument proceeds from the premise that legalizing [unilateral humanitarian intervention] will affect, if only on the margins, the use of force by such states.").

[403] *Id.* at 116.

[404] *Id.*

Thus, the UAHI framework of the proposed test can solve the problem of pretext because it provides more certainty for when a state may act unilaterally for humanitarian purposes and do so legally and legitimately.

The test requires specific findings with regard to extreme human suffering or imminent extreme human suffering in the targeted state and the evidence must be clear and convincing to rebut the presumptions of sovereignty and non-intervention. Additionally, the test requires a defined mission and demands that the intervening state meet jus post bellum obligations. These elements ensure—as much as possible—that the intervening state is not acting on pretext. Similarly, the test helps to ensure the primary motivation for intervention is humanitarian. The ICISS recognizes that states may have mixed motives for intervening—even under R2P's multilateral action paradigm, but that the motives should not be disqualifying—

> Complete disinterestedness—the absence of any narrow self-interest at all—may be an ideal, but it is not likely always to be a reality: mixed motives, in international relations as everywhere else, are a fact of life. Moreover, the budgetary cost and risk to personnel involved in any military action may in fact make it politically imperative for the intervening state to be able to claim some degree of self-interest in the intervention, however altruistic its primary motive might actually be.[405]

Knowing that states act in their own self-interest and their motives are not purely humanitarian in most interventions—even multilateral ones—the proposed test follows the R2P example by taking a pragmatic stance. It rejects the idea that an intervening state's motives must be entirely humanitarian,[406] and the test elements are in place to verify that the

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[405] Responsibility to Protect, *supra* note 9, para. 4.35.

[406] Burmester, *supra* note 106, at 269 (discussing that Conditionalists feel the predominant motivation for intervening must be humanitarian, and not to achieve political, economic, or social gain. Realists believe essentially the same, except that the intervening state need only demonstrate its altruistic motive by deed and not by word).

intervening state's interests are primarily humanitarian. The proposed test offers significant safeguards against pretext and ensures, to the greatest extent possible, that the intervening state's reasons for acting are primarily humanitarian and not based on pretext.

F. Summary of the Proposed Test

The following diagram summarizes the proposed test by setting out the elements, which just war principles are implicated by each element, and whether the element addresses sovereignty, non-intervention, or pretext.[407] This chart serves as a graphic representation of the argument for UAHI—that the proposed test meets all just war principles and addresses sovereignty, non-intervention, and pretext. An intervention that meets the elements of the proposed test should be determined to be legal and legitimate.

Element of the Proposed Test	**Just War Principles Implicated**	**Does the element address sovereignty, non-intervention, or pretext?**
The Security Council fails to act under Chapter VII of the UN Charter.	Proper Authority – a decision to wage war can be reached only by a legitimate authority.[408] Last Resort – must have exhausted all plausible, peaceful alternatives to resolving the conflict in question.[409]	Yes, sovereignty and non-intervention
The intervening state must show clear and convincing evidence of extreme human suffering—or imminent extreme human suffering—to rebut the presumptions of sovereignty and non-intervention.	Just Cause – a decision to resort to war must be based upon either a need to right an actual wrong, be in self-defense, or be to recover wrongfully seized property.[410] Right Intention – the state must intend to fight the war only for the sake of the Just Cause. It cannot employ the cloak	Yes, sovereignty, non-intervention, and pretext

[407] The chart does not address jus in bello (justness in war) principles, but those are operative as well during any action. Because this is a test to judge the UAHI before and after action, jus in bello principles are not implicated here.

[408] DESKBOOK, *supra* note 29, at 12. *See also* DiMeglio, *supra* note 201, at 128.

[409] *See* DiMeglio, *supra* note 201, at 128.

[410] *Id.*

	of a Just Cause to advance other intentions.[411]	
The intervening state must have a defined mission.	Right Intention[412] Probability of Success – reasonable expectation of victory.[413]	Yes, pretext
The intervening state must intend to carry out—and actually carry out—just post bellum obligations.	Macro-Proportionality – prior to initiating war, weigh the expected universal good to accrue against the expected universal evils to result. Only if the benefits seem reasonably proportional to the costs may the war action proceed.[414] Right Intention[415] Jus Post Bellum[416]	Yes, pretext

IX. Objections and Limitations

This test has been carefully crafted to meet all just war requirements, including "proper authority" and jus post bellum obligations. It is designed to overcome the presumptions of sovereignty and non-intervention with a high legal standard (clear and convincing evidence) that is both difficult and realistic to achieve. This is not a perfect test. It will be difficult for any state wishing to intervene to meet the standards. Only a few states would be able to carry out such an intervention unilaterally. This is by design; it should not be easy to intervene in the affairs of another state. There should be a "substantial presumption against intervening that must be surmounted by the compelling nature of the particular

[411] *Id.*

[412] *Id.*

[413] *Id.*

[414] *Id.*

[415] *Id.*

[416] *See generally* Bass, *supra* note 199. The first three elements address jus ad bellum requirements, while this last element implicates both jus ad bellum (macro-proportionality) and jus post bellum obligations.

circumstances."[417] It should, however, be possible to intervene in the face of extreme human suffering or imminent extreme human suffering when the Security Council fails to act.

The proposed test will face objections and does, admittedly, have limitations. Many, including the ICISS in the R2P report, argue that the UN should continue to play a vital role in these matters—despite a history of failing to approve interventions in a timely manner and of disagreements over the scope of interventions when they have been approved.[418] The test does not preclude UN involvement; rather, it encourages it. It serves as an additional and complementary test to R2P, not as a replacement. The formulation of the proposed test allows the Security Council the discretion to approve or not approve an intervention. If the Security Council definitively approves an armed intervention, then the test will not apply. The test is designed for situations where the Security Council fails to act or fails to act definitively. In that way, the UN will continue to play a vital role in armed humanitarian interventions, just not unilateral ones. The test also intends for members of the UN, and other agencies of the UN, to play a vital role in the post-intervention phase. One of the goals is to ensure that, even if the intervention itself had to be taken on unilaterally, the work of building governing structures and a society free of the underlying causes that led to the extreme human suffering will be multilateral.

Another objection to UAHI, and by relation the proposed test, is that an armed intervention may authorize another state to respond to the armed attack under the theory of

[417] Kanter, *supra* note 95, at 15.

[418] Responsibility to Protect, *supra* note 9, para. 6.28. *See also* High-Level Panel Report, *supra* note 8, ¶ 202; Putin, *supra* note 128.

collective self-defense.[419] For example, in Syria, had the United States elected to act militarily without Security Council approval, an ally of Syria may have been justified in responding to that attack militarily.[420] This objection highlights the need for a test to authorize legal and legitimate UAHIs. An intervention that is not legal and legitimate would be an armed attack under Article 51 and could justify a response by the attacked state or its allies.[421] On the other hand, an intervention that is legal and legitimate would not be an armed attack, in the same way that an intervention approved by the Security Council would not be an armed attack.

Russian President Vladimir Putin makes a related argument as an objection to UAHI. In an op-ed in the *New York Times* during the debate over Syria, he argued that if the world cannot depend on consistent application of international law on use of force, the world could react by acquiring weapons of mass destruction.[422] President Putin is suggesting that if UAHI is allowed indiscriminately, the world will react with a new arms race to protect itself from states bent on intervening to advance their own interests—whether those interests are humanitarian or not. The proposed test addresses President Putin's objection by both allowing for UAHI and providing consistency if the Security Council fails to act. The test contains stringent requirements that must be met before the UAHI is considered legal and legitimate.

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[419] Major Bill Johnson, "Russia Legally Justified in Attacking United States if Obama Launches Missiles into Syria," Sep. 1, 2013 (on file with author) (arguing Syria would have the right to self-defense under Article 51 of the UN Charter if it was attacked).

[420] *Id.* The most prominent ally of Syria is Russia, which had rendered the Security Council ineffective by threatening to veto a resolution for action in Syria. *Id.*

[421] U.N. Charter art. 51.

[422] Putin, *supra* note 128.

The test is also limited in ways stemming from the domestic political situation of the intervening states or the international political interests of those states. With regard to domestic politics, states are generally unwilling to place the lives of their people in danger to save strangers. States do not want to use ground troops in armed humanitarian interventions, and would prefer that other forms of military force be used (if at all), such as no-fly zones and aerial bombardment. In considering an intervention, a state weighs whether it is willing to risk the lives of its troops to save the lives of people in another country. Recent interventions, including those in Bosnia and Libya, have been conducted almost exclusively from the air, with very few "boots on the ground" from the intervening state or states. The debate in the United States leading up to a possible intervention in Syria was focused solely on an air campaign, starting with a "no-fly zone." U.S. Secretary of State John Kerry confirmed in testimony before the U.S. Congress that ground troops would not be used.[423] States are not eager to send ground troops for humanitarian interventions, even though that may be exactly what is required to address the underlying causes of the human suffering and meet jus post bellum obligations.

This is not a small issue. From a military standpoint, ground troops are critical to carrying out any mission that includes providing humanitarian assistance, protecting the civilian population, or ensuring security so that a new governing structure can be established free from the old genocidal regime. Ground troops are also necessary to provide legitimacy for the action. Air power is limited because it can increase the risk of civilian casualties.[424]

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[423] N.Y. TIMES VIDEO, http://www.nytimes.com/video/us/100000002419637/no-ground-troops-in-syria-kerry-insists.html (last visited Mar. 17, 2014) (showing American Secretary of State John F. Kerry emphasizing that no American ground troops would go to Syria).

[424] Kosovo Report, *supra* note 21, at 5.

This increased risk of civilian casualties has a chilling effect on the international community's view of the intervention's legitimacy.[425] A state must be willing to send troops, and possibly risk the lives of those troops, if the UAHI is to be successful. But once lives of the intervening state's troops are at risk, the people of that state will be more likely to demand to know what the vital interests are in intervening in the targeted state. [426] This is a delicate balance for politicians and a serious limitation for any proposed test for legalizing and legitimizing UAHI.[427]

X. Conclusion

The ICISS's R2P report sets out the international community's current position that armed humanitarian intervention must be approved by the Security Council to be legal. It did not answer the question of what happens when the Security Council fails to act. As a result, the international community needs a well-thought out test to allow for UAHI in time to stop extreme human suffering or in time to ensure that it never occurs. Despite limitations, the test proposed in this thesis represents the best formulation for determining when a state may

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[425] *Cf.* Kosovo Report, *supra* note 21, at 297.

[426] See POWELL, *supra* note 223, at 605 ("We [the United States] proudly and readily allow our young sons and daughters in uniform to participate in humanitarian enterprises far from home . . . but when the fighting starts, as it did in Somalia, and American lives are at risk, our people rightly demand to know what vital interests that sacrifice serves."). *Cf.* Amar Khoday, *Prime-Time Saviors: The West Wing and the Cultivation of a Unilateral American Responsibility to Protect*, 19 S. CAL. INTERDISC. L.J. 1, 33 (2009) (describing The NBC Show "The West Wing" in which a fictional President Josiah "Jed" Bartlet wrestles with the issue of sending American troops to unilaterally intervene in another state. In "Inaugural, Part I" in season 4, the Bartlet administration is faced with the outbreak of genocide in Equatorial Kundu, a fictional country in Africa. While contemplating whether to send U.S. forces in a UAHI, President Bartlet asks one of his staff members why a Kundanese life is worth less to him than an American life. The staff member responds, "I don't know, but it does." This exchange identifies why it is so difficult for states to risk the lives of their troops to save the lives of others. Without some direct benefit to the U.S., either financially or politically, it is difficult to gain and maintain popular support for a UAHI.).

[427] *Cf.* Ignatief, *supra* note 138 (writing in context of Iraq, Liberia, and Afghanistan, but citing the history of American interventions throughout the world, Mr. Ignatieff argued, "If we take stock and ask what will curb the American appetite for intervention, the answer is, not much. Interventions are popular, and they remain popular even if American soldiers die").

undertake UAHI because it meets all just war principles and addresses sovereignty, non-intervention, and the pretext problem. It formulates a way for an individual state to become a proper authority and requires an intervening state to meet jus post bellum obligations. Other tests have failed to address each of these elements and have therefore failed to gain acceptance as legal bases for the use of force.

This thesis has shown why the test is necessary, how the test was developed through its three foundations, and the specifics of the test. More importantly, it has shown why the international community must accept the concept of legal and legitimate UAHIs in situations where this test is met. International law must expand to allow interventions to protect the citizens of a state that is not meeting its responsibilities, and when the Security Council fails to take action under Chapter VII of the Charter. If not, international law will become powerless and thus irrelevant in the face of extreme human suffering. Humanitarian interventions have made things better in places like Somalia, Rwanda, Haiti, and Kosovo.[428] There are risks with having a test for legalizing and legitimizing UAHI, but the benefit is that a state may be able to legally and legitimately act to end extreme human suffering or even act before extreme human suffering occurs when the Security Council fails to do so.

This thesis began with a short explanation of the extreme human suffering in Rwanda during the genocide of 1994. It now ends with reference to the same event. Former Secretary-General Kofi Annan, speaking in the context of NATO's unauthorized intervention in Kosovo, starkly presented the challenge to the international community in weighing the benefits and drawbacks of UAHI:

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[428] Fernando Tesón, *The Liberal Case for Humanitarian Intervention, in* HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS 113 (J.L. Holzgrefe & Robert O. Keohane eds., 2003).

> To those for whom the greatest threat to the future of international order is the use of force in the absence of a Security Council mandate, one might ask—not in the context of Kosovo—but in the context of Rwanda: If, in those dark days and hours leading up to the genocide, a coalition of States had been prepared to act in defence of the Tutsi population, but did not receive prompt [Security] Council authorization, should such a coalition have stood aside and allowed the horror to unfold?[429]

It seems unthinkable that a coalition would stand aside again if the Security Council failed to act in a similar situation. It seems unthinkable that even an individual state would stand aside in the face of such extreme human suffering. Under the proposed test, an individual state would not need to stand aside. It could, instead, legally and legitimately stand up for the suffering people.

[429] Press Release, Secretary-General, Secretary-General Presents His Annual Report to General Assembly, U.N. Press Release SG/SM/7136 GA/9596 (Sept. 20, 1999).