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The Humanitarian and Human Rights Duties of the United Nations Security Council

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GEORGE WEBER

The Humanitarian and Human Right Duties of the United Nations Security Council

ABSTRACT.

International intervention has increased in recent history for the abuses of humanitarian law and human rights. This article reflects on the history of human rights and humanitarian law reasoned interventions authorized by the United Nations Security Council and examines whether a duty now exists in international law for future action. The question of whether a duty exists, and the legal repercussions of failing to exercise that duty, is of paramount importance to international law. Whether the duty currently exists or is currently developing, the analysis that follows will show why the Security Council should have the duty of intervention and how the duty is emerging from both practice and necessity.

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Introduction

It was generally agreed that the situation in Libya, where government forces targeted civilians, authorized unlawful killings, committed sexual violence, and recruited children for armed conflict, was a violation of human rights and international humanitarian law.¹ Due to the circumstances of armed violence in Libya, the United Nations Security Council passed Resolution 1973 (2011) to authorize intervention in order to stop violations of human rights law, international humanitarian law, and crimes against humanity.² The Security Council authorized intervention, as it has done in the past, to protect people from internal abuse by state governmental authority.

This article examines whether the Security Council has developed a duty to authorize intervention when gross human rights and humanitarian law violations occur. Although past cases have seen the Security Council authorize intervention in situations where human rights and humanitarian law are violated, little thought is given as to whether there is a *duty* to authorize such intervention.³

In analyzing the question in support of a duty, I will examine the international importance placed on human rights and humanitarian law by treaty and custom; how the

¹ See. S.C. Res. 1973, U.N. Doc. S/RES/1973 (March 17, 2011). Resolution 1973 describes the official reasons for authorizing intervention and gives the Security Council's views regarding the situation in Libya as a definite violation of human rights and international humanitarian law. *Id.*

² *Id.*

³ See *infra* notes 85-120.

United Nations Charter framework, in its present form, ensures that human rights and humanitarian law are adhered to only on a selective basis; why the ultimate responsibility to ensure adherence falls to the Security Council; and how that responsibility has been exercised in the past by the Security Council.

This question is particularly relevant considering the “Arab Spring” taking place in northern Africa and the Middle East.⁴ In Syria, for example, there is extensive evidence that governmental forces have committed human rights violations against their own citizenry.⁵ In the case of Syria, however, the Security Council has been slow to reply compared to the overwhelming response to the Libyan situation. Although the Security Council had at one point responded by requiring a cease-fire and sending unarmed observers, there is little evidence of that limited measure’s success considering the history of the protracted conflict

⁴ The Arab Spring is “a succession of civilian uprisings” in the Middle East and Northern Africa targeted at oppressive regimes. Jonathan Masters, *Issue Guide: One Year of ‘Arab Spring’ Upheavals*, COUNCIL ON FOREIGN RELATIONS, (Dec. 12, 2011), <http://www.cfr.org/middle-east/issue-guide-one-year-arab-spring-upheavals/p26764>.

⁵ See S.C. Res. 2043, U.N. Doc. S/RES/2043 (Apr. 21, 2012); S.C. Res 2042, U.N. Doc. S/RES/2042 (Apr. 14, 2012); Michael Haggerson, *UN investigators: human rights violations in Syria increasing*, JURIST (Sept. 17, 2012), <http://jurist.org/paperchase/2012/09/un-investigators-human-rights-violations-in-syria-increasing.php>; *Human Rights in Syria*, HUMAN RIGHTS WATCH, <http://www.hrw.org/node/106266> (last visited Apr. 14, 2013); *Independent UN panel urges action amid ongoing human rights abuses in Syria conflict*, UN NEWS CENTRE (Feb 18, 2013), <http://www.un.org/apps/news/story.asp?NewsID=44163&Cr=syria&Cr1=human%20rights#.UVO0jL9i5hg>; *UN Report: Syrian forces commit ‘gross violations’ of human rights*, CNN (Nov. 29, 2011), <http://www.cnn.com/2011/11/28/world/meast/syria-un-report>.

and evidence of defiance on the part of the parties involved.⁶

When violations of human rights, international humanitarian law, and crimes against humanity occur, what entity other than the Security Council has the authority under international law to authorize intervention? Are states able to intervene lawfully without the Security Council's authority? The answer to the latter question is probably not.⁷

The question of whether a duty exists and the legal repercussions of failing to exercise that duty are of paramount importance to international law. Regardless of whether there is an existing duty, this paper attempts to answer why the Security Council should have a duty to authorize intervention in the face of gross human rights violations while still respecting the fundamental precepts to the principle of non-intervention. Although there may not be enough agreement to state with certainty that such a duty currently exists, there is certainly evidence of an emerging duty on the part of the Security Council to intervene in cases of gross human rights violations. Moreover,

⁶ S.C. Res 2043, U.N. Doc. S/RES/2043 (April 21, 2012); S.C. Res. 2042, U.N. Doc. S/RES/2042 (April 14, 2012); *Independent UN panel urges action amid ongoing human rights abuses in Syria conflict*, UN NEWS CENTER (Feb 18, 2013), <http://www.un.org/apps/news/story.asp?NewsID=44163&Cr=syria&Cr1=human%20rights#.UVO0jL9i5hg>; CNN Wire Staff, *U.N. authorizes 300 unarmed Syria monitors*, CNN (Apr. 21, 2012), http://www.cnn.com/2012/04/21/world/meast/syria-unrest/index.html?hpt=hp_t1.

⁷ U.N. Charter art. 2, para. 4. The United Nations Charter specifically decries in Article 2(4) that states cannot violate the sovereign territorial integrity of another state. The exceptions to this rule are outlined in Chapter VII where the Security Council can authorize intervention. *See* U.N. Charter arts. 39-51.

international legal values suggest that such a duty should exist.

My analysis will show why the Security Council should have a duty to authorize intervention in the face of gross human rights violations, and how a duty is emerging from Security Council practice and from necessity.

I. Security Council: A Merely Permissive Legal Framework

The United Nations Charter sets up a framework where intervention into the territory of another state is only permissible when authorized by the Security Council or where self-defense is employed.⁸ The Security Council must even, under Article 39, determine the existence of a threat to international peace and security before the legal framework of the Charter will permit intervention.⁹ A possible exception to Security Council authorization and self-defense is the *Uniting for Peace Resolution*, which is discussed below.¹⁰ However, without any of the

⁸ U.N. Charter art. 2, para. 4; U.N. Charter arts. 39-43, 51.

⁹ U.N. Charter art. 39.

¹⁰ *Uniting for Peace*, G.A. Res. 377(V) A, U.N. Doc. A/Res/377(V) (Nov. 3 1950); “[T]he Assembly’s power in maintaining international peace and security is only recommendatory, not mandatory. It may only ‘make recommendation to the members of the United Nations or to the Security Council or to both’, ‘discuss any question relating to international peace and security’, call the attention of the Security Council to situations which are likely to endanger international peace and security’, and ‘recommend measures for the peaceful adjustment of any situation’. However where ‘*Uniting for Peace*’ resolutions are concerned, the General Assembly, not having mandatory power conferred upon it by the Charter, can adopt resolution that are binding in the sense that they are based on the principles of international law. The Assembly’s function in this regard is the focal point for state’ views on international law, not one that can be said to create a mandatory power and certainly not one that grants the

aforementioned justifications, intervention premised on any basis that affects the sovereign territory of another state is not permissible under the charter regime.

The legal basis for all intervention in the United Nations Charter is Chapter VII. Chapter VII allows the Security Council to determine a breach of the peace and to take actions with respect to that breach.¹¹ However, this mechanism is completely voluntary—the determination of whether there is a breach is solely within the hands of the Security Council. Failure to determine “the existence of any threat to the peace, breach of the peace, or act of aggression”¹² makes it impossible for intervention to occur; by not recognizing a situation requisite for a legal intervention, the world can do nothing. This entire process is within the hands of the Security Council to determine. In the human rights context, this means that intervention is only legally valid if the Security Council declares a breach of international peace and security with regard to human rights violations is occurring, and authorizes intervention.

Under the Charter, as it stands now, a determination that human rights violations are occurring, other than by the Security Council under Article 39, would not constitute the set of circumstances necessary to allow for intervention.¹³ Even widespread international belief in the existence of a humanitarian crisis, human rights violations, or crimes against humanity would not be enough to allow the international community to intervene in such a way that is

Assembly a coercive power to order economic or military enforcement measures.” Kamrul Hossain, *Complementary Rule of the United Nations General Assembly in Peace Management*, *Uluslararası Hukuk ve Politika [UHP] [REV. INT’L L & POL]* 77,79 (2008) (Turk.).

¹¹ U.N. Charter arts. 39-42.

¹² U.N. Charter art. 39.

¹³ U.N. Charter arts. 2, 39-42.

precluded under the Charter unless authorized by the Security Council. The reality of this problem is contradictory to the philosophy behind the establishment of the Security Council. Moreover, the only solution may be to circumvent the Security Council entirely.

It has been suggested that the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) may be a legal vehicle to circumvent the Security Council.¹⁴ It is true that Article I of the Genocide Convention calls on signatories to prevent and punish genocide¹⁵ but Article VII requires the signatories to go through the “competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide.”¹⁶

The *Uniting for Peace Resolution* is a possible solution to circumvent the Security Council’s necessary determination of a threat to international peace and security under Article 39, but it is imperfect – lacking the sturdy and forceful effect of Security Council action.

The *Uniting for Peace Resolution* is compelling because it shows the Charter regime is open to evolving interpretation; however, it is no substitute for the Security Council.¹⁷ The Resolution resolves that when the Security

¹⁴ See Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951); Eyal Mayroz, *The Legal Duty to ‘Prevent’: After the Onset of ‘Genocide’*, J. OF GENOCIDE RES. 79 (2012), available at http://www.genocidewatch.org/images/About_Genocide__12_3_2_Legal_Duty_to_Prevent.pdf.

¹⁵ Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 14.

¹⁶ *Id.*

¹⁷ G.A. Res. 337(V) A, *supra* note 10, at 4.

Council cannot exercise its responsibility to maintain peace and security, the General Assembly can act in its stead, making recommendations for collective actions, including armed force, to maintain international peace and security.¹⁸ The General Assembly has used this framework to recommend several actions with respect to the use of force when the Security Council was deadlocked.¹⁹ The International Court of Justice has advised that *Uniting for Peace* is legitimate under the Charter, including the General Assembly's approval of use of force, but limits such authorization to the consent of the states concerned.²⁰ Although *Uniting for Peace* gives options to the General Assembly when the Security Council refuses to act, there is still some question as to how effective the General Assembly can be when utilizing the resolution.²¹ In particular, requiring the consent of the states concerned can be a huge obstacle especially in the human rights context, when permission is required from an offending state.

The question of intervention would not be difficult to answer but for the United Nations Charter principle of non-intervention²² which prevents states from interfering in the internal affairs of other states. This is not to say, however, that the adoption of Article 2(4) was in any way a bad idea – preventing war and promoting peace is the most noble of ideas. But the presence of Article 2(4) in the United Nations Charter creates an obstacle and prevents intervention in cases of human rights violations. There is a

¹⁸ *Id.*

¹⁹ BARRY E. CARTER ET AL., INTERNATIONAL LAW 1002-4 (6th ed. 2011).

²⁰ *Id.* at 1004; Kamrul Hossain, *The Complementary Role of the United Nations General Assembly in Peace Management*, 4 Rev. Int'l L. & Pol. 77, 83 (2008).

²¹ Carter, *supra* note 19, at 1004; See Hossain, *supra* note 20, at 83.

²² U.N. Charter art. 2, para. 4.

need to remedy the obstacle of obstinacy on the part of the Security Council when it neglects to authorize intervention in situations where the humanitarian situation is dire. The current Charter framework does not textually specify any positive duty of the Security Council in the intervention context. Considering the fact that the Council itself is the only entity able to determine the “legal” existence of any threat to international peace and security, based solely on its own collective judgment and the ability of any one permanent member to veto measures designed to consider intervention, begs the question of whether a positive duty exists or whether one should be imposed.²³ Clearly, there is need for a change; but is there a duty?

II. Importance of Human Rights, Humanitarian Law, and *The Responsibility to Protect*

Human rights law and humanitarian law are of paramount importance in international law as a whole. Although both concepts are not the same, strictly speaking, they are interrelated. Both branches of law are directly tied to the United Nations as well as to individual states.

The International Court of Justice has described portions of international humanitarian law and human rights law as part of international custom so fundamental that they cannot be violated.²⁴ Relatedly, human rights law is now looked upon and recognized as not within the sole

²³ See U.N. Charter arts. 2, 24, 25, 39–42; Judith A. Miller, *NATO's Use of Force in the Balkans*, 45 N.Y.L. SCH. L. REV. 91, 91-92 (2000-2001).

²⁴ See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226 (July 8).

province of individual states but as an international law principle transcending borders.²⁵

In fact, *The Responsibility to Protect* report, adopted by the International Commission on Intervention and State Sovereignty, declares human rights to be a mainstream part of international law—a “central subject and responsibility of international relations.”²⁶ Although the International Commission on Intervention and State Sovereignty is a commission set up by the government of Canada, the report was recognized by the World Summit Outcome Document in 2005²⁷, and its principles were subsequently adopted by the United Nations General Assembly²⁸ and the United Nations Security Council.²⁹ The report itself declares that states have a duty to protect the human rights of their citizens—that it is first the responsibility of state governments to protect citizenry

²⁵ Malcolm N. Shaw, *INTERNATIONAL LAW*, 278 (6th ed. 2008).

²⁶ Rep. of the Int'l Comm'n on Intervention & State Sovereignty, *The Responsibility To Protect*, 6 (2001), available at <http://responsibilitytoprotect.org/ICISS%20Report.pdf>. *The Responsibility to Protect* references, as support, the Universal Declaration of Human Rights, the four Geneva Conventions and two Additional Protocols on international humanitarian law in armed conflict, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, the two 1966 Covenants relating to civil, political, social, economic and cultural rights, and the adoption in 1998 of the statute for the establishment of an International Criminal Court. *Id.*

²⁷ 2005 World Summit Outcome, G.A. Res. 60/1, U.N. Doc. A/RES/60/1 (Oct. 24, 2005); *The Responsibility to Protect*, *supra* note 26, at 2.

²⁸ G.A. Res. 63/308, U.N. Doc. A/RES/63/308 (Oct. 7, 2009); Mahrdad Payandeh, *With Great Power Comes Great Responsibility? The Concept of the Responsibility to Protect Within the Process of International Lawmaking*, 35 *YALE J. INT'L L.* 469, 479 (2010).

²⁹ S.C. Res. 1674, ¶ 4, U.N. Doc. S/RES/1674 (Apr. 28, 2006); *see also* S.C. Res. 1894, U.N. Doc. S/RES/1894 (Nov. 11, 2009); S.C. Res. 1706, U.N. Doc. S/RES/1706 (Aug. 31, 2006); Payandeh, *supra* note 28 at 478.

from human rights abuses, humanitarian crises, and other international crimes such as genocide.³⁰ But, if states fail to meet their responsibility, the international community assumes the responsibility to respond through the United Nations—particularly the Security Council.³¹ Human rights are thought to be universal—meaning state borders will not provide immunity from transgressions committed in the name of sovereignty.³²

Human rights protections are a reflection of values that are important and fundamental to the operation and fair treatment of other human beings. Apart from being a legal issue of intervention, human rights violations are moral wrongs committed directly against the value of human existence. Internal state laws against killing and harming others reflect this.³³ As a human society, we have come to the point where humane treatment is a staple right of all persons. The evidence is present in the flood international covenants, treaties, and resolutions by the United Nations General Assembly and Security Council declaring genocide, torture, rape, unlawful killing, and violence as the antithesis of what is right for humanity.³⁴

In short, international human rights and international humanitarian law are of the utmost importance to the values of humanity. However, when a

³⁰ *The Responsibility to Protect*, *supra* note 26 at XI; THOMAS BUERGENTHAL ET AL., *INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL*, 119 (4th ed. 2009).

³¹ *The Responsibility to Protect*, *supra* note 26, at XII.

³² Kok-Chor Tan, *The Duty to Protect*, in *HUMANITARIAN INTERVENTION* 84, 90 (Terry Nardin & Melissa S. Williams eds., 2006).

³³ See John Mikhail, *Is the Prohibition of Homicide Universal? Evidence from Comparative Criminal Law*, 75 *BROOK. L. REV.* 497, 515 (2009-10).

³⁴ See *The Responsibility to Protect*, *supra* note 26.

sovereign state violates or allows human rights violations to occur, there is no effective enforcement remedy under international law because there is no compulsory or consistent remedy offered or mandated by international law. The only mechanism for authorizing intervention is the United Nations through the Security Council³⁵, an entity that can at best be described as selective.

International human rights are so important to the world order that the United Nations Charter included them as a paramount principle—Article 55 of the Charter states that the United Nations shall promote “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”³⁶

Although the United Nations Charter is vague about how respect and observance of human rights is to be achieved, subsequent documents have defined the importance and standing of human rights as reaching the status of customary international law.³⁷ The Universal Declaration of Human Rights, passed by the United Nations General Assembly, was interpreted, early on, as being “an authoritative interpretation of the United Nations Charter of the highest order” which has obtained the status of customary international law.³⁸ In addition to the Universal Declaration of Human Rights, two treaties, the International Covenant on Social, Economic and Cultural

³⁵ U.N. Charter, arts. 39-51.

³⁶ U.N. Charter art. 55, para. c.

³⁷ See Universal Declaration of Human Rights, G.A. Res. 217(III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948); Abdullahi Na-na'im, *The Rights of Women and International Law in the Muslim Context*, WHITTIER L. REV. 491 (1987); Shannon Oliver, *The International Fight for Human Rights: Women Lately Discovered*, 2 HOWARD SCROLL: THE SOCIAL JUST. REV. 77, 85-86;

³⁸ Na-na'im, *supra* note 37 at 502.

Rights³⁹ (ICESCR) and the International Covenant on Civil and Political Rights⁴⁰ (ICCPR), were ratified by many states—showing the widespread acceptance by the world community.⁴¹ In fact, some academics and theorists believe that certain human rights have achieved the status of *jus cogens*⁴² when it comes to crimes of physical violence including torture, extra-judicial executions, genocide, war crimes, disappearances, crimes against humanity, and massive human suffering.⁴³ They are regarded as the highest category of international law, and of such consequence that violation of human rights amounts to a crime of the highest severity. K. Lee Boyd writes that *jus cogens* crimes entail individual as well as state responsibility to safeguard against the commission of such crimes and equating a violation thereof to be a disruption of the domestic and international order.⁴⁴ Andrea Bianchi

³⁹ International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6136 at 490 (1966); *opened for signature* Dec. 16, 1966, U.N.T.S. 2, *available at* [http://www.un.org/ga/search/view_doc.asp?symbol=A?RES/2200\(XXI\)](http://www.un.org/ga/search/view_doc.asp?symbol=A?RES/2200(XXI))).

⁴⁰ International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171.

⁴¹ Oliver, *supra* note 37 at 96.

⁴² See M. Cherif Bassiouni, *International Recognition of Victims' Rights*, 6 HUMAN RIGHTS L. REV. 203, 203-79 (2006); K. Lee Boyd, *Universal Jurisdiction and Structural Reasonableness*, 40 TEX. INT'L L.J. 1, 36 (2004). A *jus cogens* norm is a "peremptory norm of general international law . . . accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention on the Law of Treaties art. 53, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331.

⁴³ Bassiouni, *supra* note 42; Boyd, *supra* note 42; M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 LAW & CONTEMP. PROBS. 63, 68 (1996).

⁴⁴ Boyd, *supra* note 42; Bassiouni, *supra* note 42.

describes human rights, in general, as being synonymous with jus cogens—that they developed together.⁴⁵

The United Nations Charter memorializes human rights as a paramount concern of the international community. Although human rights can be said to have originated before the Charter, it is the United Nations Charter framework, the Universal Declaration of Human Rights, and all subsequent treaties, conventions, resolutions, and the like that have raised human rights to the level of customary international law and defined their importance as worldwide human values. In short, human rights are deserving of the highest protections, from the individual level all the way to the international level because when states fail to protect their citizens, or worse commit human rights violations against them directly, only a remedy with teeth will protect the prized rights of our fellow men and women—intervention by the international community.

III. Intervention Beyond the United Nations Framework

Examining history is a good place to start when discussing why the United Nations Charter Article 2 framework is so preventive.

Professor Mortimer Sellers, in his article *The Legitimacy of Humanitarian Intervention Under International Law* declares “humanitarian intervention has always played an important part in international relations.”⁴⁶ He asserts that even the strongest proponents

⁴⁵ Andrea Bianchi, *Human Rights and the Magic of Jus Cogens*, 19 EUR. J. INT’L LAW 491, 491-92 (2008).

⁴⁶ Mortimer Sellers, *The Legitimacy of Humanitarian Intervention Under International Law*, 7 INT’L LEGAL THEORY 67 (2001).

of the principle of sovereignty have made exceptions for intervention on “public welfare” grounds.⁴⁷ Further, there are examples of states, prior to the creation of the United Nations, acting consistent with this theory.

In the 17th century, legal scholars believed that intervention was appropriate when the mistreatment of state nationals was occurring in another state that was so bad as to shock the conscience of the international community.⁴⁸ It was said that this doctrine co-existed with the concept of sovereignty⁴⁹—that sovereignty was not absolute and there could exist circumstances that would supersede the sovereign authority of the state.⁵⁰ This concept, as stated above, originated with the premise that protection of the state’s nationals abroad was an interest that superseded the offending state’s authority—that this doctrine of protecting rights fundamental for human existence, over time, equated to universal rights that are so essential that a state cannot violate them.⁵¹ This led to the legal doctrine allowing intervention by other states when the denial of human rights occurred.⁵² In fact, Professor Sellers mentions that “under ordinary international law, as it has existed for centuries, states are entitled to take diplomatic, economic and other ‘measures’, individually and collectively, against states that have violated their international obligations.”⁵³ The reference to “other measures” is a reference to the use of force.

⁴⁷ *Id.* at 67.

⁴⁸ BUERGENTHAL, *supra* note 30, at 3.

⁴⁹ FRANCIS KOFI ABIEW, THE EVOLUTION OF THE DOCTRINE AND PRACTICE OF HUMANITARIAN INTERVENTION 22 (1999).

⁵⁰ *Id.* at 30.

⁵¹ *Id.*

⁵² *Id.*

⁵³ Sellers, *supra* note 46, at 72.

By the end of the 19th century a majority of international legal scholars believed that the right of intervention on humanitarian grounds existed.⁵⁴ This intervention had rules that governed when interference was allowed—an international legal restraint perhaps. Intervention would occur based on the grounds of “tyranny, extreme atrocities, and violations of specific fundamental rights” by the offending state.⁵⁵ Additionally, there was a preference that there be collective action by several states, as opposed to unilateral intervention, and the intervention only be instituted if undertaken for humanitarian motives.⁵⁶ The preference for collective intervention was later memorialized in the United Nations Charter and can be seen in several articles.⁵⁷

Several instances during the 1800s highlight the exercise of this principle. From the intervention of France, Britain, and Russia in Greece from 1827–1830 to stop massacres committed by Turks;⁵⁸ to the intervention of France, after authorized by Britain, Austria, Prussia, Russia, and Turkey, in 1860 in Syria to restore order;⁵⁹ to the intervention of Russia in the Balkans in 1877 due to harsh treatment by the Ottoman Empire;⁶⁰ and finally by the United States in Cuba following the Cuban revolt against the Spanish for humanitarian reasons.⁶¹

Despite the limiting principles in this legal doctrine, it was often misused as a pretext for war.⁶² The largest

⁵⁴ Abiew, *supra* note 49, at 40.

⁵⁵ *Id.* at 43.

⁵⁶ *Id.* at 42-43.

⁵⁷ See U.N. Charter, arts. 43–49.

⁵⁸ ABIEW, *supra* note 49, at 48.

⁵⁹ *Id.* at 50.

⁶⁰ *Id.* at 51.

⁶¹ *Id.* at 54.

⁶² BUERGENTHAL, *supra* note 30, at 3.

example of using humanitarian intervention as an excuse for war was Hitler's argument that "Aryan" minorities were being oppressed in other states as a reason to incorporate Austria into Germany and to justify the invasion of Poland and Czechoslovakia.⁶³ Consequently, Germany's actions and the failure of the League of Nations to prevent another world conflict, drove the victors of World War II to create the United Nations—hence the current Charter framework for giving authority to intervene solely to the Security Council.⁶⁴

The old humanitarian principles that predate the United Nations show a right of states to intervene for humanitarian purposes.⁶⁵

Kok-Chor Tan argues that, today, there is a general duty, on the part of the international community, to intervene—that when intervention is permissible, it is also obligatory.⁶⁶ He stresses that *The Responsibility to Protect* report supports the theory that there is an "international responsibility to protect" when human rights violations occur that "shock the conscience of mankind."⁶⁷ Professor Sellers agrees when he states, "some level of interference by governments or individuals to prevent the human rights abuses of others must be tolerated."⁶⁸

Both the General Assembly and Security Council have adopted the *Responsibility to Protect* doctrine in

⁶³ ABIEW, *supra* note 49, at 56-57.

⁶⁴ *Id.*

⁶⁵ Eve Massingham, *Military Intervention for Humanitarian Purposes: Does the Responsibility to Protect Doctrine Advance the Legality of the Use of Force for Humanitarian Ends?*, 91 INT'L REV. OF THE RED CROSS 803, 880-11 (2009).

⁶⁶ TAN, *supra* note 32, at 90.

⁶⁷ *Id.* at 88-89.

⁶⁸ Sellers, *supra* note 46, at 67.

resolutions declaring its protection principles to be paramount.⁶⁹ Although it is probably not held as a customary international law norm, its presence in United Nations resolutions and international discourse on intervention at the very least shows the impact of *The Responsibility to Protect* and its influence on intervention considerations.⁷⁰

The main point of *The Responsibility to Protect* doctrine is that sovereignty is not absolute—that sovereignty contains the responsibility of states to protect their subjects and citizens.⁷¹ Under *The Responsibility to Protect*, failure of states to meet their responsibility to safeguard, or in cases of willful commission of harm against people, will result in the abrogation of sovereignty and the international community will assume the responsibility to remedy the situation.⁷²

Six principles contained in *The Responsibility to Protect* establish criteria for international intervention that gives the international community guidelines as to when intervention is appropriate and permissible.⁷³ These principles are (1) Just Cause, allowing the international community to intervene only when there is an extraordinary amount of suffering occurring; (2) Right Intention, where

⁶⁹ See *supra* notes 27-29.

⁷⁰ See Payandeh, *supra* note 29, at 514-15.

⁷¹ INTERNATIONAL COMMISSION ON INTERVENTION & STATE SOVEREIGNTY, *supra* note 26, at 13; Rebecca J. Hamilton, The *Responsibility to Protect*, *supra* note 26; Rebecca J. Hamilton, *The Responsibility to Protect: From Document to Doctrine – But What of Implementation?*, 19 HARV. RTS. J. 289, 289-90 (2006).

⁷² INTERNATIONAL COMMISSION ON INTERVENTION & STATE SOVEREIGNTY, *supra* note 26, at 13; Hamilton, *supra* note 71.

⁷³ INTERNATIONAL COMMISSION ON INTERVENTION & STATE SOVEREIGNTY, *supra* note 26, at 29, 32; Hamilton, *supra* note 71, at 290.

the international community can only intervene if it is for the purpose of stopping human suffering; (3) Proportional Means, which requires the international community to use the most minimal means to stop human suffering; (4) Last Resort, which requires all non-military options to be exhausted before force is used; (5) Reasonable Prospects, where military intervention will not take place unless there is a reasonable likelihood that it will be successful; and (6) Right Authority, where Security Council authorization should be sought before intervention occurs.⁷⁴

Support for *The Responsibility to Protect* doctrine is growing. According to Rebecca Hamilton in *The Responsibility to Protect: From Document to Doctrine* civil society organizations, state governments, and international bodies, including the United Nations, are endorsing the principles of *The Responsibility to Protect*.⁷⁵ Growing support of *The Responsibility to Protect* doctrine necessitates a mechanism in international law that supports the principle of intervention in response to gross violations of international law. The Security Council, under the United Nations Charter, has the authority to act as the international community's voice in these matters.⁷⁶

The Security Council's practice, as detailed below, shows that the precedent has already been established to authorize intervention in situations where human rights have been violated. Essentially, *The Responsibility to Protect* doctrine has already been utilized, albeit not always explicitly by reference, in situations where the Security Council has authorized intervention to remedy human

⁷⁴ INTERNATIONAL COMMISSION ON INTERVENTION & STATE SOVEREIGNTY, *supra* note 26, at 32; Hamilton, *supra* note 71, at 290-91.

⁷⁵ Hamilton, *supra* note 71 at 294-95, 297 n.43.

⁷⁶ U.N. Charter arts. 2, 24, 25, 39-42.

rights violations. But with an emerging responsibility of the international community to intervene, evidenced by increasing support of *The Responsibility to Protect*, the current Security Council framework is not sufficient to support the responsibility of the international community. Is a Security Council duty to authorize intervention necessary? Probably so. To say otherwise would ignore the responsibility of the international community and, at the same time, the United Nations Charter.

IV. Past and Present Practice of the Security Council

There is evidence of an emerging duty on the part of the Security Council to authorize intervention in gross human rights violations. The past practice of the Security Council has shown that by authorizing intervention with respect to human rights and humanitarian law violations, it compels authorization to intervene in certain situations in the future. Such practice, at a minimum, can be evidence of the Security Council's ability to make international law at least with respect to the United Nations Charter framework.⁷⁷ The Security Council's past actions on human rights and humanitarian issues is compelling evidence that a self-created duty to intervene is emerging.

The Security Council has stated in past resolutions that "widespread violations of international humanitarian law" constitute threats to peace under the United Nations Charter.⁷⁸ In fact, Malcolm Shaw believes that the Security Council's practice in the area of "civil war and internal

⁷⁷ Inger Osterdahl, *The Exception as the Rule: Lawmaking on Force and Human Rights by the UN Security Council*, 10 J. CONFLICT & SEC. L. 1 (2005).

⁷⁸ Shaw, *supra* note 25, at 1238.

strife” has allowed Article 39 to apply in cases of internal armed conflict.⁷⁹

In the past, the Security Council has authorized intervention for the purpose of securing adherence to international human rights. The United Nations has an interest in authorizing intervention in areas where human rights violations have taken place because of the importance that human rights and humanitarian law play in international law in general. This interest has come, not from the argument for a legal duty for intervention to occur, but rather because of the international pressures and obligations surrounding past conflict. In these situations, the Security Council used the current United Nations Charter framework to intervene.

The authors of *International Human Rights in a Nutshell*, consider the decisions by the Security Council to include hints that the old customary international law doctrine of collective intervention, present before the creation of the Security Council, may be becoming more prevalent.⁸⁰ The Security Council has not referred to any pre-UN doctrine specifically—although, as mentioned previously, there has been reference to the newer *Responsibility to Protect*. However, the Security Council’s decisions show that there is at least a belief in the international community that intervention should be authorized in response to large-scale violations of human rights.⁸¹

The belief that the Security Council should intervene in gross violations of human rights started after the end of the Cold War when an increase in action,

⁷⁹ *Id.* at 1240.

⁸⁰ BUERGENTHAL, *supra* note 30, at 5.

⁸¹ *Id.* at 4.

pursuant to humanitarian crisis and human rights violations, started to take place under the auspice of Chapter VII of the Charter.⁸² Chapter VII, which applies to “threats of the peace, breaches of the peace, and acts of aggression,”⁸³ would now apply to human rights cases as well.⁸⁴

The Security Council’s main focus is to maintain international peace and security.⁸⁵ Is not the violation of human rights and international humanitarian law a breach of international peace and security? The Security Council has determined that it does in many cases, as described below. In many situations, beginning in the 1990s, the Security Council had declared threats to international peace and security for human rights and humanitarian reasons. In the following examples, the motives of the Security Council included the position that human rights are of the highest importance and must be protected. Pursuant to Article 39, they determined a threat to international peace and security, and acted to authorize intervention.

In 1992, under Resolution 770, the Council determined that the situation in Bosnia-Herzegovina warranted use of force to protect humanitarian interests.⁸⁶ The Security Council described the situation in Bosnia-Herzegovina as constituting “a threat to international peace and security” reasoning that humanitarian violations, including abuses committed against civilians, were a major

⁸² *Id.*

⁸³ U.N. Charter art 39.

⁸⁴ BUERGENTHAL, *supra* note 30, at 4-5.

⁸⁵ U.N. Charter art. 24, para. 1.

⁸⁶ S.C. Res. 770, U.N. Doc. S/RES/770 (August 13, 1992); Osterdahl, *supra* note 77, at 3.

consideration in authorizing intervention through the use of force.⁸⁷

Later in 1992, the Security Council authorized another intervention with “military enforcement measures”⁸⁸—this time in Somalia. Under Security Council Resolution 794 the Council described the “magnitude of the human tragedy caused by the conflict” combined with “the obstacles created to the distribution of humanitarian assistance” created a threat to international peace and security.⁸⁹ The resolution further expressed alarm “of widespread violations of international humanitarian law occurring” which included reports of “violence and threats of violence” against those engaged in humanitarian efforts, “deliberate attacks on non-combatants, relief consignments and vehicles, and medical and relief facilities,” and in stopping help from arriving to those in need.⁹⁰

A few years later, in 1994, the Security Council authorized military intervention in Rwanda. Under Security Council Resolution 929, the Council described the “magnitude of the humanitarian crisis in Rwanda” as constituting “a threat to peace and security in the region.”⁹¹ The Security Council referenced the killing of civilians by the parties to the conflict and the displacement that those killings caused as being part of the decision to authorize intervention.⁹²

Later in 1994, the continued situation in Haiti, which originated from the ousting of the elected president,

⁸⁷ S.C. Res. 770, ¶ 5, U.N. Doc. S/RES/770 (August 13, 1992).

⁸⁸ Osterdahl, *supra* note 77, at 3.

⁸⁹ S.C. Res. 794, ¶ 3, U.N. Doc. S/RES/794 (December 3, 1992).

⁹⁰ *Id.* at 2.

⁹¹ S.C. Res 929, ¶ 10, U.N. Doc. S/RES/929 (June 22, 1994).

⁹² *Id.* at 1.

turned into a humanitarian crisis moving the Security Council to act by passing Resolution 940.⁹³ The resolution was passed because of, among other reasons, “the significant further deterioration of the humanitarian situation in Haiti, in particular the continuing escalation by the illegal de facto regime of systematic violations of civil liberties” and the “plight of Haitian refugees.”⁹⁴ Under Chapter VII, the resolution granted intervention authorizing “member states to form a multinational force under unified command and control and, in this framework, to use all necessary means” to end military leadership, return the ousted president and restore legitimate authorities, and to “establish and maintain a secure and stable environment” under the Governors Island Accord.⁹⁵

In 1996, the Security Council authorized humanitarian intervention in Zaire.⁹⁶ The resolution authorizing intervention stated that the “situation in eastern Zaire constitutes a threat to international peace and security in the region.”⁹⁷

In 1997, the Security Council again authorized intervention for humanitarian reasons in Albania under the auspice of the crisis being a “threat to international peace and security in the region.”⁹⁸ Resolution 1101 called for an end to the acts of violence occurring in Albania and authorized “a temporary and limited multinational

⁹³ S.C. Res 940, ¶ 4, U.N. Doc. S/RES/940 (June 31, 1994).

⁹⁴ *Id.* at 4.

⁹⁵ *Id.* at 2.

⁹⁶ S.C. Res. 1080, U.N. Doc. S/RES/1080 (Nov. 15, 1996) (The United Nations Security Council, concerned about the deteriorating condition in Zaire, adopted Resolution 1080 which authorized the offering Member States to intervene in Zaire by means of humanitarian organizations).

⁹⁷ *Id.* at 2.

⁹⁸ S.C. Res. 1101, ¶ 9, U.N. Doc. S/RES/1101 (June 19, 1997).

protection force to facilitate the safe and prompt delivery of humanitarian assistance, and to help create a secure environment for the missions of international organizations in Albania, including those providing humanitarian assistance.”⁹⁹

In 1999, the Security Council, under Resolution 1244 authorized an international civil and security presence in Kosovo in order “to resolve the grave humanitarian situation” and “to provide for the safe and free return of all refugees and displaced persons to their homes.”¹⁰⁰ The resolution describes the situation in Kosovo to be one of “humanitarian tragedy.”¹⁰¹ The resolution also states that one of the key purposes of the international security force was to protect and promote human rights.¹⁰²

Later in 1999, the Security Council determined that a threat to international peace and security continued to exist in East Timor—authorizing a United Nations Transitional Administration in East Timor (UNTAET) “empowered to exercise all legislative and executive authority, including the administration of justice.”¹⁰³ The threat existed because of “the grave humanitarian situation resulting from violence in East Timor and the large-scale displacement and relocation of East Timorese civilians, including large numbers of women and children”¹⁰⁴ and because of “reports indicating that systematic, widespread

⁹⁹ *Id.* at 2.

¹⁰⁰ S.C. Res. 1244, ¶ 4, Doc. S/RES/1244 (June 10, 1999).

¹⁰¹ *Id.* at 1.

¹⁰² *Id.* at 4.

¹⁰³ S.C. Res. 1272, U.N. Doc. S/RES/1272 (October 25, 1999).

¹⁰⁴ *Id.*

and flagrant violations of international humanitarian and human rights law have been committed in East Timor.”¹⁰⁵

In 2003, the Security Council authorized an Interim Multinational Force in the Congo to, among other things, “contribute to the improvement of the humanitarian situation.”¹⁰⁶ The resolution authorizing intervention refers to “fighting and atrocities” with regard to the humanitarian situation.¹⁰⁷

Later in 2003, the Security Council authorized the United Nations Mission in Liberia (UNMIL), a stabilization force created for humanitarian intervention reasons.¹⁰⁸ The resolution declared: “the situation in Liberia continues to constitute a threat to international peace and security in the region, to stability in the West Africa sub region, and to the peace process for Liberia.”¹⁰⁹ The threat to international peace and security was declared to be because of, among other reasons, the “violation of human rights, particularly atrocities against civilian populations, including widespread sexual violence against women and children.”¹¹⁰

In 2004, the situation in Haiti again was determined to constitute a threat to international peace and security by the Security Council.¹¹¹ The adopted resolution cited evidence of a threat existing due to the continuing violence and deterioration of the humanitarian situation.¹¹² The resolution authorized the deployment of a Multinational

¹⁰⁵ *Id.*

¹⁰⁶ S.C. Res. 1484, U.N. Doc. S/RES/1484 (May 30, 2003); Osterdahl, *supra* note 77, at 4-5.

¹⁰⁷ S.C. Res. 1484, U.N. Doc. S/RES/1484 (May 30, 2003).

¹⁰⁸ S.C. Res. 1509, U.N. Doc. S/RES/1509 (September 19, 2003).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ S.C. Res. 1529, U.N. Doc. S/RES/1529 (February 29, 2004).

¹¹² *Id.*

Interim Force to “maintain public safety and law and to promote and protect human rights.”¹¹³

Later in 2004, the Security Council authorized African Union observers in Darfur because of the “ongoing humanitarian crisis and widespread human rights violations, including continued attacks on civilians that are placing the lives of hundreds of thousands at risk.”¹¹⁴ The Security Council determined the situation constituted a threat to international peace and security.¹¹⁵ In 2006, the Security Council reiterated that the situation was a threat to international peace and security and began the process of incorporating a United Nations operation.¹¹⁶ In 2007, a co-United Nations-African Union force was implemented by the decision of the Security Council.¹¹⁷ In that decision, the Security Council stated that it regarded the situation occurring in Darfur to be a violation of human rights and international humanitarian law and that the situation was still a threat to international peace and security.¹¹⁸

Most recently in 2011, the Security Council authorized intervention in Libya.¹¹⁹ The resolution, while precluding an occupations force, gave member states the ability to use “all necessary measures” to protect civilians and populated areas under attack by Libyan governmental forces.¹²⁰ Use of force allowed the Libyan opposition to fend off attack, prevent killings by governmental forces, and eventually topple the Qadhafi regime that committed

¹¹³ *Id.*

¹¹⁴ S.C. Res. 1556, U.N. Doc. S/RES/1556 (July 30, 2004).

¹¹⁵ *Id.*

¹¹⁶ S.C. Res. 1679, U.N. Doc. S/RES/1679 (May 16, 2006).

¹¹⁷ S.C. Res. 1769, U.N. Doc. S/RES/1769 (July 31, 2007).

¹¹⁸ *Id.*

¹¹⁹ S.C. Res. 1973, U.N. Doc. S/RES/1973 (March 17, 2011).

¹²⁰ *Id.*

human rights and humanitarian violations against civilians.¹²¹

The above situations determine for certain that the Security Council is not limited to the strict interpretation of the Charter. The Council has shown that its power to determine “threats to international peace and security” can apply in other contexts,¹²² in particular, within the realm of humanitarian and human rights contexts through Article 39, which makes decisions binding. The above situations show that the Council has determined humanitarian and human rights violations to constitute threats to international peace and security.

The previously illustrated situations, if not creating a state practice standard important to create customary international law binding on states, almost certainly place an international law custom standard important for international law interpretation binding on the United Nations Charter.¹²³ Inger Osterdahl states, “The way the Security Council interprets and applies the UN Charter has an effect on the import of the Charter because Security Council is an authoritative and important body within the Charter system and, moreover, holds the rare power to take legally binding decisions.”¹²⁴ He goes on to suggest that,

¹²¹ David Clark, *Libyan Intervention was a Success, Despite the Aftermath's Atrocities*, THE GUARDIAN, (Oct. 28, 2011), <http://www.guardian.co.uk/commentisfree/2011/oct/28/intervention-libya-success>.

¹²² Shaw, *supra* note 25, at 1240.

¹²³ Osterdahl, *supra* note 77, at 2. Customary international law is traditionally created by “*opinio juris*” and state practice. *See* Jo Lynn Slama, *Opinio Juris in Customary International Law*, 15 OKLA. CITY U.L. REV. 603, 617-18 (1990). *See also* The Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055, T.S. 933, 3 Bevens 1179.

¹²⁴ Osterdahl, *supra* note 77, at 19.

through practice, the Security Council makes Charter law and that the only way the Security Council could cease this practice is to stop adopting resolutions.¹²⁵ Adding to Osterdahl's premise, Articles 25 and 49 require member states to carry out decisions of the Security Council, giving decisions of the Council a binding effect—perhaps an elevated legal effect.¹²⁶

Though traditional standards of creating law through performance, i.e. state practice, apply to states in creating general customary international law, it makes sense to allow Security Council practice to play a role in interpreting the United Nations Charter. Further, Security Council practice could create a traditional customary international law norm in existence outside the Charter law. As such, the practice of the Security Council in authorizing intervention in the human rights and humanitarian situations described above, over time, is creating an emerging duty on the Security Council to intervene if the above examples are to be given weight under the “practice” portion of creating customary international law.

If the Security Council can make Charter law, the Security Council, through its past actions, is declaring to the world that human rights and humanitarian law ultimately deserve forceful intervention when all other measures fail.¹²⁷ In so declaring, the Security Council establishes a duty upon itself because it is the only entity that can authorize such action.

In the alternative, assuming *arguendo* that the Security Council cannot use its own actions to interpret the

¹²⁵ *Id.* at 19.

¹²⁶ U.N. Charter, arts. 25, 49.

¹²⁷ *See* Osterdahl, *supra* note 77, at 19; *see also* Slama, *supra* note 123, at 647.

Charter framework, do not the actions of the states taking part to enforce the Security Council's decisions in cases of humanitarian and human rights violations show that state practice and *opinio juris* exist to support the duty? Should the act of states "merely" carrying out the authorization of the Security Council, through continued practice of intervening on behalf of these principles establish such a duty on the Security Council by traditional customary international law methods? I think that it does. States take part in drafting the resolutions (through membership), take part in the decisions of the Security Council (as members), and carry out binding decisions (by direction).¹²⁸ Such a process, if applied to situations of one doctrine—human rights and humanitarian law—surely satisfies the customary international law prerequisites of state practice and *opinio juris*. Essentially, it can be argued that states intervening pursuant to Security Council resolutions are establishing state practice and the Security Council and participating states are establishing *opinio juris*.

The counterargument to the proposition that Security Council interventions are creating an emerging duty to intervene is that there are times when the Security Council may have decided not to authorize intervention. Of course, non-intervention is difficult to address because traditional methods of creating international law refer to practice, not the lack thereof, to be the constitutive element of customary international law. In fact, looking at lack of practice in this area would serve little purpose. Law develops over time. As such, a linear observation must be taken into account. As illustrated above, the Security Council has been increasingly willing to intervene in situations on the more recent part of history's timeline.¹²⁹

¹²⁸ BARRY E. CARTER, PHILLIP R. TRIMBLE & CURTIS A. BRADLEY, *INTERNATIONAL LAW* 468-72 (4th ed. 2003); U.N. Charter arts. 39-51.

¹²⁹ *See supra* notes 86–121

This should be taken into account because, as times change, so does the law (as it should). Law is not stagnant; it is molded with the experience and actions of our world. The Security Council's practice shows that its influence on the Charter reflects progressive and modern ways of looking at and valuing the human condition.¹³⁰

Inger Osterdahl, commenting on inconsistent Security Council practice states, "even though it acts in an inconsistent or ad-hocish way, whatever action the Security Council takes has a normative impact."¹³¹ The combined notion of accepting practice (as opposed to non-practice), the restrictive circumstances upon which Security Council action affects only Charter interpretation, and the increased nature of interventions show that non-intervention should not be considered when interpreting the Charter framework.

V. Duty to Authorize Intervention – A Proposed Logical Legal Framework

Although I have already posited an emerging duty on the part of the Security Council based on its own practice, a logical, normative argument can also be made in favor of imposing a duty on the Security Council.

Premise: The Security Council has a duty to intervene when human rights violations have occurred. Is there an alternative? The Security Council, and no other entity, has the power to authorize intervention under the United Nations Charter framework.¹³² Because of the refusal of the Security Council to get involved in some areas where clear human rights and humanitarian law

¹³⁰ *Id.*

¹³¹ Osterdahl, *supra* note 77, at 19.

¹³² U.N. Charter arts. 2, para. 4, 39-43, 51.

violations are occurring, there is a disconnect. A refusal to accept a situation exists to preclude states from acting, just as refusing to act in the face of a recognized humanitarian crisis. Before the United Nations came into existence, there was a clear right of states to intervene—a right present before the proliferation of human rights and humanitarian law in the international context.¹³³

Today, there is an international standard for human rights and humanitarian law, as well as a voluntary remedy through the Security Council for violations of that law. But this is not enough. For the following reasons, the current UN charter framework and the current state of international humanitarian law and human rights demands that the Security Council be required to authorize intervention in cases of humanitarian and human rights gross violations.

International law makes humanitarian and human rights violations unlawful.¹³⁴ The duty, first and foremost, falls to the individual state to ensure adherence to the law.¹³⁵ This is as it should be. States should take care that subjects and citizens are guaranteed their human rights, and should refrain from committing any sort of violation against them. However, sometimes states do not comply with this principle.¹³⁶ In such a case, the state has failed to exercise its duty.

¹³³ See *supra* notes 48-64.

¹³⁴ See, e.g. Universal Declaration of Human Rights, G.A. Res. 217(III)A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948); Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, (July 8); *The Responsibility to Protect*, *supra* note 26. See also, DAVID LUBAN ET AL., INTERNATIONAL AND TRANSNATIONAL CRIMINAL LAW 1039, 1043 (2010).

¹³⁵ *The Responsibility to Protect*, *supra* note 26.

¹³⁶ See *supra* notes 86-121.

When the state fails in its duty to ensure humanitarian and human rights, it becomes an international issue and concern, as humanitarian and human rights law is of international concern. The humane treatment of people is an interest that the human condition demands. Thus, as an international issue, the United Nations, being the forum and entity that has emerged as the central international body on Earth, assumes the issue on behalf of the international community. Again, individual states, or coalitions of states, cannot interfere at this point in any other way than through diplomacy and other actions short of intervention, as the United Nations Charter will not allow it¹³⁷ unless and until the Security Council permits it.¹³⁸ By signing onto the United Nations Charter, individual member states gave up the portion of their authority to make unilateral decisions with regard to use of force without “world” consent (i.e., without the Security Council’s approval).

The legal dilemma comes to a head when the permissive framework meets the passive or non-interested state parties.

Assume there is a universally understood situation of gross humanitarian and human rights violations occurring in the world—a situation that is generally agreed upon by the majority of United Nations member states as constituting a situation in dire need of intervention, but the Security Council is deadlocked. Because states cannot interfere without the authorization of the Security Council by virtue of the United Nations Charter, there is a deadlock in international law. People are harmed without any

¹³⁷ U.N. Charter art. 2, para. 4.

¹³⁸ U.N. Charter arts. 39-43.

remedy to alleviate their suffering or make the situation right, except by taking up arms.¹³⁹

The question that I posed earlier is still relevant. Can the duty fall to any other entity under the current state of international humanitarian and human rights law in light of the current United Nations Charter framework? No. By sheer necessity, the Security Council holds the duty to authorize intervention, as a last resort, in cases of gross violations of humanitarian and human rights. Based upon the importance that the international community has placed on humanitarian and human rights, it is evident that it is of utmost concern to ensure that those rights are adhered to. Thus, a logical conclusion is that a duty has arisen. By virtue of the international legal framework existing in the form of the United Nations Charter, that duty falls to the Security Council in humanitarian and human rights cases.¹⁴⁰ Similar to the reasons Professor Sellers gave for interference sometimes being necessary because it cannot be totally avoided in any legal system, the duty of the Security Council is necessary here because it is the only entity that can act, it has acted before, and it is necessary that it do so in certain future situations.¹⁴¹

¹³⁹ See generally Andrew Baskin, *Human Rights Organizations Seek to Refer Syria to the International Criminal Court*, 27 NO. 12 INT'L ENFORCEMENT L. REP. 1010 (2011). See also *Syria: The Story of the Conflict*, BBC, March 15, 2013 available at <http://www.bbc.co.uk/news/world-middle-east-19331551>. The current conflict in Syria is an example. The Security Council will not authorize intervention. Therefore the people have taken up arms against the regime for violation of human rights and humanitarian law.

¹⁴⁰ U.N. Charter arts. 2, para. 4, 39-43.

¹⁴¹ *Id.*; Sellers, *supra* note 46, at 67.

Conclusion

The Security Council should have a duty to authorize intervention in circumstances of gross violation of human rights, humanitarian law, or crimes against humanity. It is likely that the duty, as understood under customary international law, is not currently present. However, what appears to be an emerging duty out of the Security Council's practice is promising for the future of human rights and humanitarian law enforcement. Normative arguments are also promising as they give an alternative to the "practice" assertion.

Before the formation of the United Nations, intervention was a collective right of states.¹⁴² During the pre-United Nations period, however, the prevalence of human rights and humanitarian law was not as paramount and defined as it is today. The establishment of the United Nations and the proliferation of humanitarian law and human rights, including the new category of crimes against humanity, establish that the treatment of humanity is a paramount concern of the world community. That paramount concern is expressed through the United Nations. Expression of this vital concern is manifested and remedied by the Security Council in its actions to cure situations where humanitarian violations exist. As the Security Council is the mechanism set up to maintain world order and ensure the peace and prosperity of the world, it makes sense that it have a duty to espouse the values of humanity by enforcing international human rights and humanitarian law. That a duty will arise on the part of the Security Council seems inevitable, if not already present, as described by normative arguments.

¹⁴² See *Supra* notes 48-64.

Failure of a state to protect its citizens or affirmative actions taken to harm civilians necessitates authorization for intervention. The Security Council was established up to maintain international peace and security but its purpose evolved to enforcing human rights and humanitarian law. There is no other entity that can authorize intervention. When all diplomatic options fail, the world turns to the Security Council for authorization to intervene. Its duty should always be to authorize intervention when great suffering occurs, when people are massacred, where torture is present, and where the state cannot or will not protect the people—essentially in situations of gross human rights violations. In the face of the protracted situation in Syria, and other instances of humanitarian and human rights atrocities occurring around the world, the need for recognizing a Security Council duty to authorize intervention is paramount and necessary.