THE NEVER-ENDING DILEMMA: IS THE UNILATERAL USE OF FORCE BY STATES LEGAL IN THE CONTEXT OF HUMANITARIAN INTERVENTION?*

EL DILEMA INTERMINABLE: ¿ES LA UTILIZACIÓN UNILATERAL DE LA FUERZA POR LOS ESTADOS LEGAL EN EL CONTEXTO DE LAS INTERVENCIONES HUMANITARIAS?

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Resumen: En este artículo se sostiene la tesis de que las intervenciones humanitarias unilaterales son ilegales. Esta conclusión es alcanzada después de un cuidadoso análisis y refutación de los argumentos que son comúnmente utilizados por algunos académicos para defender este tipo de acciones, es decir: que dichas intervenciones no contravienen la Carta de la ONU, que existe una regla de costumbre internacional emergente y que se trata de intervenciones legítimas, toda vez que los derechos que se buscan proteger a través de ellas vencen cualquier barrera jurídica.
Palabras clave: intervenciones humanitarias unilaterales, intervenciones humanitarias colectivas, uso de la fuerza, Carta de la ONU, legalidad, legitimidad, interpretación, derecho internacional consuetudinario, Consejo de Seguridad.

Abstract: This article upholds the thesis that unilateral humanitarian interventions are illegal. This conclusion is reached after a careful analysis and rebuttal of the arguments that are usually put forward by some scholars to defend this type of actions, namely: that such interventions do not contravene the UN Charter, that there is an emerging rule of customary law that allows them, and that they are legitimate interventions because of the rights they seek to protect hence trumping any legal barriers.
***Descriptors**: unilateral humanitarian intervention, collective humanitarian intervention, use of force, UN Charter, legality, legitimacy, interpretation, customary international law, Security Council.*

Résumé: Dans cet article se soutient la thèse de ce que les interventions humanitaires unilatérales sont illégales. Cette conclusion est atteinte après une analyse soigneuse et la réfutation des arguments qui sont communément utilisés par quelques académiciens pour défendre ce type d'actions, signifier: que les dites interventions ne contreviennent pas la Lettre de l'ONU, qu'existe une règle de coutume internationale émergente et qu'il s'agit des interventions légitimes étant donné que les droits qui cherchent à se protéger à travers de celles-ci vainquent n'importe quelle barrière juridique.

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SUMMARY: I. *Introduction*. II. *The Interpretation of Article 2(4) on the UN Charter in the Context of Humanitarian Intervention*. III. *Unilateral Humanitarian Intervention as an Emerging Rule of Customary International Law*. IV. *The Dilemma of 'Legitimacy vs. Legality' in the Context of Unilateral Humanitarian Interventions*. V. *The Responsability to Protect Doctrine*. VI. *Conclusion*.

I. INTRODUCTION

Article 2(4) of the United Nations Charter establishes the principle on the prohibition of the use of force, which, according to the International Court of Justice, codifies customary international law.[1] The system of collective security created with the UN Charter defines the existence of two exceptions to said principle: first, when a State acts in self-defence (Article 51), and second, when the Security Council authorizes the use of force in response to a threat to or breach of the peace or act of aggression (Article 42).[2] Hence, it does not allow for a unilateral use of force with the sole exception of the right to individual self-defence, and even in that case, such right can only be invoked 'until the Security Council has taken measures necessary to maintain international peace and security'.[3]

Yet, the commission of atrocities and gross human rights violations throughout the world has lead to a debate about the well-functioning and pertinence of this UN Charter-based system of one rule and two exceptions concerning the use of force.

It is true that international relations and, in consequence international law, are construed based on the premise that all States are equal: *par in parem non habet imperium.* The United Nations Charter codifies this

[1] *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, 14, p. 100, para. 190.

[2] Byers, M., *War Law,* London, 2005, p. 85; This has also been described by Thomas Franck as a 'two-tiered system' in which, on the upper tier, if there is an act of aggression the international community would respond collectively through the Security Council, and on the lower tier, the right to self-defence would be activated whenever the international community is unable to respond collectively and until it is able to do so. Franck, T., *Recourse to Force*, Cambridge, 2002, p. 3.

[3] UN Charter, article 51.

principle of 'sovereign equality' among Member States in its Article 2(1). Accordingly, no State can intervene 'in matters which are essentially within the domestic jurisdiction of any state';[4] sovereignty protects the internal affairs of a State. Closely linked to the principles of sovereign equality and non-intervention is the prohibition of the use of force; if no State is above any other, then there can be no legal justification for a unilateral use of force against another State.

The tension that exists on the current legal order is based on the argument that, in certain circumstances, the limits set up by the system of collective security to unilateral action and the lack of an efficient response by the international community has led to humanitarian catastrophes. Moreover, it has been said that gross human rights violations no longer belong to the realm of 'internal affairs', and therefore a State cannot commit them going unpunished relying on the principles of sovereign equality and non-intervention. This has been the position of Fernando Tesón, among others, who has said that 'the proposition that human rights are no longer a matter of exclusive domestic jurisdiction is indisputable, independently of the legal grounds for the obligation of states to respect human rights'.[5]

Thomas Franck gives form to this dilemma asking the following question: 'When a government turns viciously against its own people, what may or should other governments do?'[6] Nevertheless, it is one thing to say that the protection of human rights within States has become an issue relevant for the international community as a whole and another completely different thing is to say that, based on this premise, States have a right to unilaterally intervene in a State. Ewan MacDonald and Philip Alston, for example, consider that a human rights exception to the prohibition of the use of force in the context of humanitarian interventions is controversial.[7]

Under this factual and legal scenario, the question that arises, and that constitutes the core issue of the present work, is whether if humanitarian

[4] *Ibidem*, article 2(7).

[5] Tesón, F., 'Collective Humanitarian Intervention' (1995-1996), 17 *Mich. J. Int'l. L.* 323, p. 330.

[6] Franck, n. 2 above, p. 135.

[7] MacDonald, E. and Alston, P., "Sovereignty, Human Rights, Security: Armed Intervention and the Foundational Problems of International Law", in Alston and MacDonald (eds.), *Human Rights, Intervention and the Use of Force*, New York, 2008, p. 7.

military intervention can constitute a third exception to the prohibition of the use of force. In other words, *whether the unilateral use of force by States in the context of humanitarian interventions may ever be legally permissible under international law as it currently stands*. In that sense, the purpose of the present work is a limited one: to prove that there is no right for *unilateral* use of force by States under the humanitarian intervention doctrine.

The difficulty of this debate is that it tends to combine two different questions: first, what is the law and, second, what should the law be. Nevertheless, we will focus on the former; The latter question concerning what should the law be will be briefly addressed as part of the conclusions, but it will not be responded within the body of this work given the fact that the main question is whether there is or there is not a right for unilateral use of force by States rather than whether there *should* be or not such right.

The way in which we will structure our analysis is the following: there are three main arguments used to justify the existence of a unilateral right of use of force in the context of humanitarian interventions: 1) a narrow interpretation of Article 2(4) of the UN Charter does not prohibit such intervention; 2) in the alternative, there is an emerging right of customary international law allowing for such intervention; 3) in the further alternative, in case that the law as it stands prohibits the unilateral use of force in humanitarian interventions, these are legitimate interventions because of the rights they protect and legitimacy therefore trumps legality. Each and every one of these arguments will be addressed separately explaining how they are construed and which authority supports them, and then the legal arguments that tackle them proving them wrong will be elaborated.

Finally, and before moving to the conclusions, the issue of the Responsibility to Protect Doctrine will be addressed. Responsibility to Protect is not the same as humanitarian military intervention but they are two concepts which are very closely related, especially when it comes to unilateral actions of States. Even when said doctrine is not an argument *per se* to justify a unilateral right for the use of force, it is sometime espoused as such by commentators. That is why we will briefly elaborate on this doctrine just to prove that it does not endorse the claim that States have a unilateral right to military intervene on humanitarian grounds.

Before going into the analysis of this legal debate, it is important to make two methodological clarifications: First, for the purposes of the

present work, we adopt the following definition of 'humanitarian intervention' given by J. L. Holzgrefe:

> [Humanitarian intervention is] the threat or use of force across state borders by a state (or group of states) aimed at preventing or ending widespread and grave violations of the fundamental human rights of individuals other than its own citizens, without the permission of the state within whose territory force is applied.[8]

Second, 'unilateral use of force' is herby understood as the use of force or intervention by a State or group of States in another without the approval of the Security Council,[9] while 'collective use of force' is understood as the use of force or intervention by a State or group of States with the authorization of the Security Council.[10] The main difference is that the Security Council, by virtue of Article 24(1) of the UN Charter, acts on behalf of the whole Organization (namely, on behalf of the international community) in issues related to international peace and security. Hence, its decisions are collective. On the other hand, decisions to use force bypassing the Security Council are therefore unilateral for they lack the approval of the organ established by the international community to address said issues.

II. The Interpretation of Article 2(4) of the UN Charter in the Context of Humanitarian Intervention

As it is explained by Christian Tams, before the establishment of the United Nations, 'the concept of humanitarian intervention, while not uncontroversial, indeed enjoyed considerable support'.[11] Nevertheless, the UN Charter set out a clear-cut regime on the prohibition of the use of force between States contained in Article 2(4). Therefore nowadays, as Simon Chesterman says:

[8] Holzgrefe, J. L., *Humanitarian Intervention*, Cambridge, 2003, p. 18.

[9] Byers, n. 2 above, p. 92.

[10] Roberts, A., "Legality Verses Legitimacy: Can Uses of Force be Illegal but Justified?", in Alston P. and Macdonald, E. (eds.), *Human Rights, Intervention, and the Use of Force*, New York, 2008, p. 180.

[11] Tams, C., *Enforcing Obligations* Erga Omnes *in International Law*, Cambridge, 2005, p. 92.

> In order to establish a right of humanitarian intervention in international law, it is necessary to demonstrate either that such a right is not incompatible with the clear provisions of Article 2(4), or that Article 2(4) does not preclude unilateral action as a form of self-help justified in customary international law when the collective security regime envisaged in the Charter fails to address a crisis.[12]

The second hypothesis regarding customary international law will be addressed in the next section. Here, the discussion is limited to the analysis of whether unilateral action would be compatible with Article 2(4). The first step is then to look at said provision which reads as follows:

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Principles of the United Nations.[13]

The reading of this Article seem to suggest that the use of force will *not* be illegal if it is not directed against the territorial integrity or political independence of a State, or if it is consistent with the Principles of the UN. The question that should be asked has been articulated with great clarity by Christine Gray:

> Should the words 'against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations' be construed as a strict prohibition on all use of force against another state, or did they allow the use of force provided that the aim was not to overthrow the government or seize the territory of the state provided that the action was consistent with the purposes of the UN?[14]

Anthony D'Amato, who supports the idea that Article 2(4) indeed limits the prohibition contained therein to cases in which the political independence or the territorial integrity of a State are at stake, says that 'the language [of Article 2(4)] seems to be all-encompassing, but appearances can be deceptive.'[15] Likewise, it has been argued by some commentators

12 Chesterman, S., *Just War or Just Peace?*, New York, 2001, p. 47.

13 UN Charter, Article 2(4).

14 Gray, C. *International Law and the Use of Force*, New York, 2008, p. 31.

15 D'Amato, A., *International Law: Process and Prospect*, New York, 1987, p. 58.

that humanitarian intervention does not seek to affect neither the territory nor the political independence of States and that moreover such intervention is carried out precisely to give effect to the principles of the United Nations. This has been the position of Michael Reisman and Myers McDougal:

> The prohibition on the use of force is found in Charter Article 2(4). A close reading of it will indicate that the prohibition is not against the use of coercion per se, but rather the use of force for specified unlawful purposes. [...] Since a humanitarian intervention seeks neither a territorial change nor a challenge to the political independence of the State involved and is not only not inconsistent with the purposes of the United Nations but is rather in conformity with the most fundamental peremptory norms of the Charter, it is distortion to argue that it is precluded by Article 2(4).[16]

Tesón also has said that 'genuine humanitarian intervention does not result in territorial conquest or political subjugation'.[17] As explained by Christopher Greenwood, the argument is that humanitarian intervention was designed to protect human rights, which is one of the principles of the Organization.[18] Here is how Tesón, after saying that humanitarian intervention does not affect the political independence or territorial integrity of a State, elaborates on this same argument offered by Greenwood:

> The remaining task is to determine whether humanitarian intervention can survive the "purpose" test. [...] It need hardly be emphasized that the promotion of human rights is a main purpose of the United Nations. Writers who support a right of humanitarian intervention have forcefully contested the invariable priority of the purpose of maintaining international peace in the system created by the charter. It is urged along these lines that a purposive reading of Article 2(4), a reading that is mandated by its very own wording, indicates that the use of force to overthrow despotic regimes cannot be included in the blanket prohibition. The promotion of human rights is as important a purpose in the Charter as is the con-

[16] Reisman, W. M. and McDougal, M. S., "Humanitarian Intervention to Protect the Ibos", in Lillich, R. (ed.) *Humanitarian Intervention and the United Nations*, USA, 1973, p. 177.

[17] Tesón, F., *Humanitarian Intervention,* New York, 1997, p. 151.

[18] Greenwood, C., 'Is There a Right of Humanitarian Intervention?' (1993), 49 *The World Today* 34, p. 34.

> trol of international conflict. Therefore, the use of force to remedy serious human rights depravations, far from being "against the purposes" of the UN Charter, serves one of its main purposes. Humanitarian intervention is in accordance with one of the fundamental purposes of the UN Charter. Consequently, it is a distortion to argue that humanitarian intervention is prohibited by Article 2(4).[19]

Interestingly enough, two pages before the previous paragraph he acknowledges the fact that the practically absolute prohibition of the use of force set out in Article 2(4) has also been supported in General Assembly Resolutions such as GA Res 2625 (XXV) and GA Res 3314 (XXIX).[20]

In line with Tesón's and Greenwood's arguments, Anthony Arend and Robert Beck have said that humanitarian interventions are not in breach of Article 2(4) because they 'would *not* involve: a prolonged military presence by the intervening state in the target state; a loss of territory by the target state; a regime change there; or any actions "inconsistent with the purposes of the United Nations".'[21]

In contrast with these arguments is the point of view of Dame Rosalyn Higgins, who opines that there cannot be an action by a State involving the use of force that *is not* against the territorial integrity or political independence of the targeted State for, in her own words, 'most uses of force, no matter how brief, limited, or transitory, do violate a state's territorial integrity.'[22] She goes on to conclude that 'even minor military incursions are unlawful uses of force'.[23] We agree with her on this point.

Moreover, and in this same line of argument we can add the position of Franck in order to conclude that Article 2(4) does not allow for unilateral humanitarian interventions:

> It is clear from the negotiating record that the Charter's Articles 2(4) and 51 were intended to circumscribe, and perhaps even abrogate, unilateral recourse to force except in response to an armed attack by one state to another. This makes it hard to construe those texts as anything but a pro-

[19] Tesón, n.17 above, p. 151.

[20] *Ibidem,* pp. 147 and 148.

[21] Arend, A. C. and Beck, R. J., *International Law and the Use of Force*, New York, 1993, p. 134.

[22] Higgins, R., *Problems & Process*, New York, 1994, p. 240.

[23] *Ibidem*, p. 245.

> hibition of any humanitarian intervention that involves the use of military force, since even egregious violations by a government of the fundamental human rights of its own citizens does not evidently cross the original "armed attack" threshold. [...] The Charter's Article 2(4), strictly construed, prohibits states' unilateral recourse to force. The text makes no exception for instances of massive violation of human rights or humanitarian law when these occur in the absence of an international aggression against another state.[24]

Concerning the *travaux préparatoires* of Article 2(4) of the UN Charter, there are two things to be mentioned: first, the draft text presented in the Dumbarton Oaks Proposals, on 7 October 1944, read: 'All members of the Organization shall refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the Organization'.[25] This means that the original proposal was broader and indeed did not intend to limit the prohibition of the use of force to cases affecting the territorial integrity or the political independence of a State. Second, despite the amendments made to this original proposal, the conclusion adopted in the Report of Rapporteur of Committee 1 to Commission I of the UN Conference on International Organization, presented on 9 June 1945, clearly established that 'the unilateral use of force or similar coercive measure is not authorized or admitted.'[26]

Ian Brownlie has already elaborated a clear explanation on how the original phrase presented at Dumbarton Oaks was modified throughout the conference by proposals submitted by Australia, Brazil, Ecuador and Norway, in order to adopt its present text.[27] His conclusion is that 'there is no indication in the records that the phrase was intended to have a restrictive effect.'[28]

In any event, the position of Higgins on this point is very clear and conclusive:

[24] Franck, n. 2 above, pp. 136 and 137.

[25] Dumbarton Oaks Proposals for the establishment of a General International Organization, available at *http://www.info.dfat.gov.au/info/historical/HistDocs.nsf/vVolume/2AAAD0953A3FC06FCA256B7E002C07BA*.

[26] Documents of the United Nations Conference on International Organization, 6 *Doc. U.N. Conf. on Int'l. Org.* (1945), Doc. 885 I/1/34 (June 9, 1945) 387, p. 400.

[27] Brownlie, I., *International Law and the Use of Force by States*, New York, 1963, pp. 265-268.

[28] *Ibidem*, p. 267.

> No matter how much one may wish it otherwise, no matter how policy-directed one might wish choice between alternative meanings to be, there is simply no getting away from the fact that the Charter *could* have allowed for sanctions for gross human-rights violations, but deliberately did not do so. The only way in which economic or military sanctions for human-rights purposes could lawfully be mounted under the Charter is by the legal fiction that human-rights violations are causing a threat to international peace.[29]

This interpretation is in complete harmony with the analysis made of Article 2(4) of the UN Charter by Albrecht Randelzhofer where, with respect to the proposition that unilateral humanitarian intervention does not breach said provision, has said that 'such an interpretation of Art. 2(4) disregards the *travaux préparatoires* and the purpose of the provision and is, therefore, not tenable.'[30]

In conclusion, the prohibition of the unilateral use of force by States is contained in Article 2(4) of the UN Charter and this prohibition should not be read in a restrictive way. As Tams says, 'given the clear wording of Article 2, para. 4, those arguing that States, even under the Charter, could use force to protect human rights therefore deliberately relied on pre-Charter law.'[31]

It is time then to move on and respond the second part of the question of Chesterman above, namely, is there a right of customary international law that allows States to unilaterally intervene for humanitarian reasons in another State?

III. Unilateral Humanitarian Intervention as an Emerging Rule of Customary International Law

An alternative argument to the one explained before, could allegedly be that a new rule of customary international law has emerged granting States the right for a unilateral humanitarian intervention. The International Court of Justice in the *North Sea Continental Shelf* cases reiterated the necessary elements for the existence of a rule of custom in interna-

[29] Higgins, n. 22 above, p. 255.

[30] Randelzhofer, A., 'Article 2(4)', in Simma, B. (ed.), *The Charter of the United Nations: A Commentary*, volume 1, New York, 2002, p. 130.

[31] Tams, n. 11 above, p. 93.

tional law: state practise and *opinio juris*. In particular, the Court said that even when custom can be created within a short period of time, State practise has to be widespread and representative, and it should include the practise of specially affected States, it has to be very extensive and virtually uniform.[32] With respect to the *opinio juris* it said:

> Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need of such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or the habitual character of the acts is not in itself enough.[33]

Therefore, any attempt to prove the existence of an emerging rule of customary international law allowing States to unilaterally use force and intervene whenever there is a humanitarian crisis must fulfil these elements. The possibility of a rule of custom modifying the principle of non-intervention was also mentioned by the ICJ in its *Nicaragua* judgment, where it said that:

> The significance for the Court of cases of State conduct prima facie inconsistent with the principle of non-intervention lies in the nature of the ground offered as justification. Reliance by a State on a novel right or an unprecedented exception to the principle might, if shared in principle by other States, tend towards a modification of customary international law.[34]

Nevertheless, in that case the ICJ did not have to go into the analysis of that hypothesis given the fact that the United States did not argue that it had intervened in Nicaragua based on a new rule of customary international law or in a new exception to the rule of the prohibition of the use of force.[35]

[32] *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands),* Judgment, ICJ Reports 1969, 3, pp. 42 y 43 párrs. 73 y 74.

[33] *Ibidem*, p. 45, para. 77.

[34] *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, n.1 above, p. 109, para. 207.

[35] *Idem.*

Given the limited extension of this paper we cannot elaborate in detail the circumstances and arguments that were given by States and scholars in each and every one of those situations which allegedly prove the existence of an emerging rule of customary international concerning humanitarian interventions. Nevertheless, there is in legal literature an extensive analysis of them. We will rely on the various studies that several authors have already elaborated.

On the one hand, Tesón cites as State practise the cases of the Tanzania intervention in Uganda (1979), the French Intervention in Central Africa (1979), the intervention of India in Pakistan (1971) and the intervention of the United States in Grenada (1983) to prove the existence of a rule of custom regarding unilateral humanitarian interventions.[36] Similarly, Greenwood cites the cases of Iraq (1991), Liberia (1990), Somalia (1992) and Yugoslavia (1991-2), for this matter.[37]

On the other hand, Chesterman has made a very thorough analysis of the following situations that could allegedly fall under the umbrella of humanitarian intervention: Belgian intervention in the Congo (1960), Belgian and US intervention in the Congo (1964), US intervention in the Dominican Republic (1965), Indian intervention in East Pakistan/Bangladesh (1971), Israeli intervention in Uganda (1976), Belgian and French intervention in Zaïre (1978), Tanzanian intervention in Uganda (1978-9), Vietnamese intervention in Kampuchea (Cambodia) (1978-9), French intervention in the Central African Empire/Republic (1979), US intervention in Grenada (1983), US intervention in Panama (1989-90), as well as the "collective" humanitarian interventions from 1990 to 1999, namely, the intervention of the Economic Community of West African States (ECOWAS) in Liberia (1990), the US, UK and French intervention in Iraq (no-fly zones) (1991), the ECOWAS intervention in Sierra Leone (1997-8), and the North Atlantic Treaty Organization (NATO) intervention in the Former Republic of Yugoslavia (Kosovo) (1999).[38]

Even with this number of interventions it is hard to find the existence of an emerging rule of customary international law regarding humanitarian interventions that would fulfil the criteria set by the International Court of Justice mentioned above for this matter. Not only the State practise is

[36] Tesón, n. 17 above, pp. 179-223.

[37] Greenwood, n. 18 above, pp. 35-39.

[38] Chesterman, n. 12 above, pp. 63-87.

scarce and not virtually uniform, but there is an almost absolute lack of *opinio juris*. In support of this view are, first, Chesterman's conclusions:

> It seems clear that writers who claim that state practice provides evidence of a customary international law right of humanitarian intervention grossly overstate their case... The humanitarian elements of the three US interventions in the Western hemisphere –Dominican Republic (1965), Grenada (1983), and Panama (1989-80) –must be considered highly dubious... The United States specifically *disclaimed* any right of humanitarian intervention in relation to its action in Grenada. All three interventions in the Congo/Zaïre (1960, 1964, 1978) were, at best, interventions to protect nationals abroad; at worst they were post-colonial adventures to secure access to mineral resources in the newly independent state. Similarly, France's intervention in the Central African Republic (1979) cannot be understood without reference to its colonial history in the region.
>
> Of the four remaining examples, the Entebbe operation (1976) can be set aside as being an example of protection of nationals abroad, explicitly relied upon as a species of self-defence. This leaves three examples of interventions that are, at least, regarded favourably in retrospect by the international community: East Pakistan (1971), Uganda (1978-9) and Kampuchea (1978-9)... However, in none of these cases was [sic] humanitarian concerns invoked as a justification for the use of military force.[39]

These conclusions are supported also by Gray, who explains that the actions of India, Tanzania and Vietnam in Bangladesh, Uganda and Cambodia, respectively, were *not* justified on the basis of humanitarian action but mainly on self-defence.[40] Byers is of a similar opinion:

> Advocates of such a right [of customary international law] cite a handful of possible precedents, including India's intervention in East Pakistan (1971), Vietnam's intervention in Uganda (1979) and the intervention of Northern Iraq (1991) by Britain, France, Italy, the Netherlands and the United States. A brief examination of these four instances reveals that none of the intervening countries, apart from Britain in 1991, advanced an argument of humanitarian intervention. Even then, Britain quickly abandoned its claim in favour of arguing that it had implied authorization of the UN Security Council... Overall, this near absence of *opinio juris* deprived the state

[39] *Ibidem*, p. 84.

[40] Gray, n. 14 above, p. 33.

> practice of any capacity to change international law to allow a right of unilateral humanitarian intervention.[41]

Finally, the analysis made by Olivier Corten leads to the same result; regarding the interventions in Somalia, Rwanda and Bosnia-Herzegovina he reiterates that 'no state has on those occasions claimed that unilateral military action to alleviate human suffering was authorized by a right of intervention.'[42] He also reiterates that the legal justification of the intervention in Liberia and Iraq were self-defence and implied authorization of the Security Council, respectively.[43] He concludes with the following words:

> Ultimately, all the precedents raised lead to the same single conclusion. It is indisputably difficult to interpret them as testifying to the emergence of a right of humanitarian intervention that would overthrow traditional principles of sovereignty of states and non-interference in their domestic affairs. Neither the intervening states nor other states, individually or in the UN, clearly issued *opinio juris* that would point in this direction.[44]

Tesón, on the other hand, argues against this lack of *opinio juris* saying that, when it comes to humanitarian interventions, what really matters is what governments *do* rather than what governments *say*.[45] Using the intervention of Tanzania in Uganda as an example, he says 'that the fact that Tanzania did not say, or did not emphasize enough, that it was in fact liberating the Ugandan people from a bloody tyrant means that it was not really doing that.'[46]

Chesterman, in our view correctly, responds to this argument saying that it is flawed because of two reasons:

> First, it suggests that analyses of state practice... rely exclusively on the "sanctimonious language" of government leaders. Relatedly [sic], and

[41] Byers, n. 2 above, p. 92.

[42] O. Corten, 'Human Rights and Collective Security: Is there an Emerging Right of Humanitarian Intervention?, in Alston P. and Macdonald, E. (eds.), *Human Rights, Intervention, and the Use of Force*, New York, 2008, p. 94.

[43] *Ibidem*, p. 102.

[44] *Ibidem,* p. 107.

[45] Tesón, n. 17 above, p. 192.

[46] *Idem.*

> more importantly, it appears to do away with the notion of *opinio juris*, leaving in its place the "logic of the situation".... Aside from the fact that such a conception of customary law is incompatible with the vast majority of writing on the subject, it would be completely unworkable as a legal system.[47]

Susan Breau, who is in favour of unilateral humanitarian interventions, recognizes that the emergence of a right of a customary nature in this respect is difficult (if not impossible) to prove given the elements required to form a rule of custom. Therefore, she conveniently reformulates the question that has to be responded in order to prove the existence of such a rule, equating custom to general practise. Here are her words:

> A significant problem emerges in analysing the doctrine of humanitarian intervention... First of all, the practice is clearly not constant. States do not intervene in every case of extreme violations of human rights. An excellent example would be the situation in Chechnya. Although many nations spoke out against the human rights violations, there was never any suggestion of intervention. The Russian government would not tolerate any type of interference and a serious global conflict would result. Therefore, it would be an error to examine every case of human rights abuse and argue that humanitarian intervention is not part of customary international law as it is discretionary. The more apt question would be: when the states intervene in situations of extreme violations of human rights do they argue humanitarian intervention as their justification on each occasion resulting in uniformity? Do they engage in the practice also believing that their interventions are in conformity with international law –the *opinio juris* aspect? Finally, is there an expectation that similar conduct and similar legal justification might take place in the future?[48]

Her arguments can be responded saying, first, that the rules establishing the formation of customary international law are clear enough and that a tailor-made definition of custom for humanitarian interventions seems a distortion of the law to accommodate arguments in its favour. Second, even if we were to accept the 'more apt' question that she suggests, still the answer would be no: as it has been shown before, States

[47] Chesterman, n. 12 above, p. 85.

[48] Breau, S., *Humanitarian Intervention: The United Nations & Collective Responsibility*, London, 2005, p. 259.

have not argued a right of humanitarian intervention as a justification to their interventions, even in cases where extreme violations of human rights were being committed. Therefore, the uniformity required is still lacking.

Furthermore, in her conclusions of this analysis she argues that there is evidence of an emerging doctrine of humanitarian intervention of a customary character,[49] implicitly acknowledging that such rule does not exist today.

Chesterman adds one more conclusive element to this debate:

> Implicit in many of the arguments for a right of humanitarian intervention is the suggestion that the present normative order is preventing interventions that should take place. That is simply not true. Interventions do not take place because states do not want them to take place.[50]

The result of this analysis is very well put, in our opinion, by Randelzhofer:

> There is no practice or *opinio iuris* that would have led to an amendment of the UN Charter, by means of customary international law, in the sense of recognizing humanitarian intervention as an exception to the prohibition laid down in Art. 2(4).[51]

In conclusion, because of all the reasons given above, today there is not enough State practise or *opinio juris* to uphold the argument that a new rule of custom giving States the right for unilateral humanitarian interventions has emerged in international law.

Furthermore, it has to be said that the prohibition of the use of force is not only a rule of customary international law, but a rule of *jus cogens*. This has been confirmed by the ICJ in the *Nicaragua* case,[52] as well as by several judges in separate opinions.[53] Therefore, as it was said by Al-

[49] *Ibidem*, p. 271.

[50] Chesterman, n. 12 above, p. 231.

[51] A. Randelzhofer, n. 30 above, pp. 130 y 131.

[52] *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, n. 1 above, pp. 100 y 101, para. 190.

[53] *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, n.1 above, Separate Opinion of President Nagendra Singh, p. 153; *ibidem*. Separate Opinion of Judge Sette-Camara, p. 199; *Oil Platforms (Islamic Republic of Iran v. United*

exander Orakhelashvili, 'if the very prohibition of the use of force is peremptory, then every principle specifying the limits on the entitlement of States to use force is also peremptory.'[54]

According to Article 53 of the Vienna Convention on the Law of Treaties:

> A peremptory norm of general international law is a norm 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.[55]

This means that in order to modify the current legal regime concerning the use of force by States an emerging rule of customary character is not enough, for the rule prohibiting the use of force is a peremptory one and, as such, can only be modified by another *jus cogens* rule. Therefore, even if there was (which it has been shown that there is *not*) such an alleged rule of customary international law allowing for the unilateral use of force by States in cases of humanitarian interventions, such 'rule' would still be in breach of the peremptory norm prohibiting the use of force.

The response to this argument could be that the protection of human rights is also a peremptory norm of international law and, therefore, there might be a conflict of opposing *jus cogens* rules: the prohibition of the use of force v. the prohibition of human rights violations. This premise has been suggested, for example, by Judge Tanaka who wrote:

> If we can introduce in the international field a category of law, namely *jus cogens*, recently examined by the International Law Commission, a kind of imperative law which constitutes the contrast to the *jus dispositivum*, capable of being changed by way of agreement between States, surely the

States of America), Judgment, ICJ Reports 2003, 161, Separate Opinion of Judge Simma, p. 330, para. 9; *ibidem.* Separate Opinion of Judge Koojmans, p. 260, para. 46; *ibidem.* Dissenting Opinion of Judge Elaraby, p. 291, para. 1.1; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136, Separate Opinion of Judge Elaraby, p. 254, para. 3.1.

[54] Orakhelashvili, A., *Peremptory Norms in International Law*, New York, 2006, p. 51.

[55] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art. 53.

> law concerning the protection of human rights may be considered to belong to the *jus cogens*.[56]

It should be said that, as it has been very clearly explained by Orakhelashvili, indeed *some* international human rights (such as the prohibition of torture, genocide, slavery, summary executions, disappearances or arbitrary detentions among others) have acquired the status of *jus cogens* rules, but not all of them belong to this category.[57]

In any event, it is our position that such a dilemma of two peremptory norms which allegedly appear to be in conflict with each other is a false one. This is because of the following reasons: even when there is an obligation imposed on States not to breach human rights norms and when such an obligation, regarding specific human rights, can be of peremptory character, that does *not* give third States the right to unilaterally intervene when such violations occur. This assumption is based on the misconception of the extent of the *jus cogens* obligations. A similar argument has been used to say that immunities do not apply in international law as a bar to prosecution when individuals commit international crimes such as genocide, for the prohibition of such crimes is of peremptory character. Nevertheless, 'the *ius cognes* argument depends on a false conflict –*ius cogens* concerns the prohibition on committing the act, not the manner or timing of prosecution'.[58] This false conflict has also been analysed by the House of Lords in the context of the prohibition of torture in the *Jones v. the Kingdom of Saudi Arabia and Others* case.[59]

Likewise, in our discussion, the fact that the prohibition to breach some human rights is *jus cogens* does not tantamount to a *jus cogens* right or obligation to unilaterally intervene through the use force for humanitarian purposes. This is also supported with Article 41 of the Articles on *Responsibility of the States for internationally wrongful acts* adopted by the International Law Commission in 2001; said article refers to the

[56] *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)* Second Phase, Judgment, ICJ Reports, 1966, p. 6, Dissenting Opinion of Judge Tanaka, p. 298.

[57] Orakhelashvili, n. 54 above, pp. 53-60.

[58] Cryer, R. *et al.*, *An Introduction to International Criminal Law and Procedure*, Cambridge, 2007, pp. 427 and 428.

[59] *Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) and others*, [2006] UKHL 26, in particular, Lord Bingham of Cornhill paras. 24-28 and Lord Hoffmann paras. 43-64.

obligations of States whenever there has been a breach of a peremptory norm by another State and it establishes in its first paragraph that:

> States shall cooperate to bring to an end *through lawful means* any serious breach within the meaning of Article 40 [which refers to serious breaches by a State of an obligation arising under a peremptory norm of general international law].[60] (emphasis added)

Since unilateral humanitarian intervention is still illegal under the current legal order, it simply cannot be used as a mean by States to put an end to gross human rights violations which could tantamount to breaches of peremptory norms.

Yet, this false dilemma of opposing *jus cogens* rules gives rise to another debate in the discussion of unilateral humanitarian intervention: 'legality' and 'legitimacy'. This is what we will analyze in the following section.

IV. The Dilemma of 'Legitimacy vs. Legality' in the Context of Unilateral Humanitarian Interventions

The legal constrains to the unilateral use of force that have been explained above have led scholars to explore any possible options to by-pass the current legal system in order to allow for unilateral humanitarian interventions. Their strategy has been based on the recourse to the concepts of 'morality' and 'legitimacy', facing them with the concept of 'legality' as if a real difference, a real gap, existed between them. This confrontation is normally stated through moral dilemmas. Nicholas Wheeler elaborates this argument asking first the following question: 'What moral value attaches to the rules of sovereignty and non-intervention if they provide a licence for governments to violate global humanitarian standards?'[61] Similarly, David Cortright formulates the following questions:

> When the victims of tyranny and abuse cry out for help, at times urging military intervention to overthrow a tormenting dictatorship or stop genocide, how should peace advocates respond? Is it morally defensible to

[60] International Law Commission 'Responsibility of States for internationally wrongful acts' in 'Report of the International Law Commission on the Work of its 53rd Session' (23 April-1 June an 2 July-10 August 2001) UN Doc A/56/10 at 59, art. 41, p. 286.

[61] N. Wheeler, *Saving Strangers* (New York, 2000), p. 27.

> stand aside when innocent populations are murdered wantonly and a minimum application of force could stop the killing?[62]

In this same line, Franck analyses the possibility of uses of force which are illegal but justifiable asking the following questions:

> What can the law gain by requiring strict adherence to a rule producing so awful an outcome? While consistency of application is an element in law's legitimacy, what benefit can a legal order derive from becoming an accomplice to moral depravity?[63]

According to Wheeler the argument goes like this:

> The moral argument is that humanitarian intervention is one of those hard cases where ethical concerns should trump legality, and that, while we should always try and obtain Security Council authorization, this legal requirement can be overridden in cases of supreme humanitarian emergency.[64]

The situation that put this discussion right in the spotlight was NATO's intervention in Kosovo over ten years ago now, on 24 March 1999, which was considered by many international lawyers as illegal but justified.[65] In the statement given by Dr. Javier Solana, Secretary General of NATO, on 23 March 1999 he announced the order for a military intervention in Serbia. The arguments were the following:

> We are taking action following the Federal Republic of Yugoslavia Government's refusal of the International Community's demands... As we warned on the 30 January, failure to meet these demands would lead NATO to take whatever measures were necessary to avert a humanitarian catastrophe... This military action is intended to support the political aims of the international community. Our objective is to prevent more human suffering and more repression and more violence against the civilian population of

62 D. Cortright, *Peace* (New York, 2008), p. 280.

63 Franck, n. 2 above, p. 182.

64 Wheeler, n. 61 above, p. 41.

65 Roberts, n. 10 above, p. 179.

> Kosovo... We must halt the violence and bring an end to the humanitarian catastrophe now unfolding in Kosovo... We have a moral duty to do so.[66]

Shortly after the beginning of the air strike campaign, Belarus, the Russian Federation and India sponsored a Security Council resolution condemning NATO's military intervention in Kosovo, but that resolution did not pass with a voting of three in favour (China, Namibia, and Russian Federation) and twelve against (US, UK, France, Canada, The Netherlands, Argentina, Bahrain, Brazil, Gabon, Gambia, Malaysia and Slovenia, being the first five States NATO members).[67] Faced with this result, the Russian Federation declared that 'attempts to justify the military action under the pretext of preventing a humanitarian catastrophe bordered on blackmail, and those who would vote against the text would place themselves in a situation of lawlessness.'[68] On the other hand, the US delegate declared that the 'allegation contained in the draft resolution that NATO was acting in violation of the United Nations Charter had turned the truth on its head'.[69]

This, evidently, did not put an end to the discussion. On 24 September 1999, the Ministers of Foreign Affairs of the Group of 77, in their 23rd Annual Meeting 'rejected the so-called right of humanitarian intervention, which had no basis in the UN Charter or in international law.'[70]

Afterwards, the UN participated in the arrangements between NATO and Serbia in order to end the use of force by the former, which was considered by some as an *ex-post facto* authorization on NATO's action.[71]

66 Press Statement by Dr. Javier Solana, Secretary General of NATO, 23 March 1999. NATO Press Release (1999) 040. Available at: *http://ls.kuleuven.be/cgi-bin/wa?A2=ind9903&L=natopres&P=2504*

67 *Security Council Rejects Demand for Cessation of Use of Force Against Federal Republic of Yugoslavia*, Press Release SC/6659, 26 March 1999. Available at: *http://www.un.org/News/Press/docs/1999/19990326.sc6659.html*

68 *Ibidem.*

69 *Ibidem.*

70 *Letter dated 29 September 1999 from the Permanent Representative of Guyana to the United Nations addressed to the Secretary General, Annex I: Ministerial Declaration on the South Summit, adopted at the twenty-third annual meeting of Ministers of Foreign Affairs of the Group of 77, held at the United Nations Headquarters on 24 September 1999*, A/54/423 General Distribution 6 October 1999, p. 18, para. 69.

71 M. Sapiro, "The Politics of international Law and the Law of International Politics: an American Perspective" (2005), 23 *Wis. Int'l L. J.* 49, pp. 57 y 58.

The result of the Organization's involvement was the establishment of a UN administration in Kosovo through Security Council resolution 1244.[72] The question of the legality of the use of force by NATO was brought before the International Court of Justice by Serbia (then Serbia and Montenegro), who instituted proceedings against the US, the UK, Spain, Portugal, The Netherlands, Italy, Germany, France, Canada and Belgium (namely NATO). As it is very succinctly explained by Chesterman, the respondent States were not so clear in explaining to the Court their reasons to intervene: Belgium relied in Security Council resolutions, a doctrine of humanitarian intervention and necessity; the US also relied on Security Council resolutions and, together with Germany, the Netherlands, Spain and the UK, made reference to the existence of a humanitarian catastrophe; finally, Canada, France, Italy and Portugal did not offer the ICJ a clear argument for their actions.[73]

Nevertheless, the ICJ did not address the issue of the legality of NATO's intervention for it dismissed all these cases determining that the Court did not possessed jurisdiction to solve the disputes.[74] In the opinion of Roberts, such lack of a declaration on the legality of NATO's action by the ICJ is relevant because:

[72] *Security Council Resolution 1244 (1999) on the situation relating to Kosovo*. S/Res/1244, 10 June 1999.

[73] Chesterman, n. 12 above, p. 213.

[74] *Legality of Use of Force (Yugoslavia v. United States of America)*, Provisional Measures, Order of 2 June 1999, ICJ Rep 1999, p. 916; *Legality of Use of Force (Serbia and Montenegro v. United Kingdom)*, Preliminary Objections, Judgment, ICJ Rep 2004, p. 1307; *Legality of Use of Force (Yugoslavia v. Spain)*, Provisional Measures, Order of 2 June 1999, ICJ Rep 1999, p. 761; *Legality of Use of Force (Serbia and Montenegro v. Portugal)*, Preliminary Objections, Judgment, ICJ Rep 2004, p. 1160; *Legality of Use of Force (Serbia and Montenegro v. Netherlands)*, Preliminary Objections, Judgment, ICJ Rep 2004, p. 1011; *Legality of Use of Force (Serbia and Montenegro v. Italy)*, Preliminary Objections, Judgment, ICJ Rep 2004, p. 865; *Legality of Use of Force (Serbia and Montenegro v. Germany)*, Preliminary Objections, Judgment, ICJ Rep 2004, p. 720; *Legality of Use of Force (Serbia and Montenegro v. France)*, Preliminary Objections, Judgment, ICJ Rep 2004, p. 575; *Legality of Use of Force (Serbia and Montenegro v. Canada)*, Preliminary Objections, Judgment, ICJ Rep 2004, p. 429; *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, Preliminary Objections, Judgment, ICJ Rep 2004, p. 279.

> If there is no clear statement that unilateral humanitarian intervention is illegal, that opens the door to claims that there should be a legal exception to the prohibition on the use of force in extreme humanitarian crisis.[75]

We agree with this position. When it comes to the legality of the unilateral use of force by States, ambiguity is dangerous. After NATO's unilateral intervention in Kosovo, Göran Perssons, then Prime Minister of Sweden, suggested the creation of an independent commission 'to assess the moral and legal implications' of said intervention.[76]

The International Independent Commission on Kosovo in 'The Kosovo Report' reached the following conclusion:

> This complex of circumstances raises a central question: are the constraints imposed by international law on the non-defensive use of force adequate for the maintenance of peace and security in the contemporary world? The question is particularly relevant where force is used for the protection of a vulnerable people threatened with catastrophe. If international law no longer provides acceptable guidelines in such a situation, what are the alternatives? In responding to these challenges, the Commission considers the international law controversy provoked by the NATO campaign. It also puts forward an interpretation of the emerging doctrine of humanitarian intervention. This interpretation is situated in a gray zone of ambiguity between an extension of international law and a proposal for an international moral consensus. In essence, this gray zone goes beyond strict ideas of legality to incorporate more flexible views of legitimacy.[77]

The opinion of the then Secretary General of the United Nations, Kofi Annan, expressed in a speech given to the General Assembly was the following:

> In the case of Kosovo, the inability of that community to reconcile the question of the legitimacy of an action taken by a regional organization without a United Nations mandate, on the one side, and the universally accepted imperative of effectively halting gross and systematic violations of human rights, on the other, could only be viewed as a tragedy.[78]

[75] Roberts, n. 10 above, p. 190.

[76] Cortright, n. 62 above, p. 291.

[77] Independent International Commission on Kosovo, 'The Kosovo Report', available at: *http://www.reliefweb.int/library/documents/thekosovoreport.htm*.

[78] "Implications of International Response to Events in Rwanda, Kosovo Examined by Secretary-General, in Address to General Assembly" Press Release GA/9595, 20 Sep-

Bruno Simma seems to agree with this idea of illegal but legitimate actions, though only in exceptional circumstances and not as an emerging rule of custom:

> Unfortunately there do occur 'hard cases' in which terrible dilemmas must be faced and imperative political and moral considerations may appear to leave no choice but to act outside the law… To resort to illegality as an explicit *ultima ratio* for reasons as convincing as those put forward in the Kosovo case is one thing. To turn such an exception into a general policy is quite another.[79]

Aside from these positions, opinions and points of view, a juridical analysis of this 'legality *vs*. legitimacy' debate implies asking more general questions: why do scholars or States use this argument? What is legitimacy, what does it imply in international law? Is this indeed a valid argument in international law? These issues have been thoroughly studied and robustly supported by Roberts. She begins by explaining why this argument is used:

> The 'illegal but justified' approach appears to be motivated by a desire to have the best of both worlds: to maintain the prohibition on unilateral uses of force while allowing worthy interventions to occur without rebuke.[80]

She then moves on to explain some of the motivations behind the movement of legitimacy:

> First, legitimacy may be resorted to as an escape from law altogether… Second, legitimacy may be used to supplement strict notions of legality in an attempt to maintain the integrity of the law while at the same time responding to the need for justice in individual cases… Third, legitimacy may be resorted to with a view to critiquing the law and progressively developing it.[81]

tember, 1999, available at: *http://www.un.org/News/Press/docs/1999/19990920.ga9595.html.*

[79] Simma, B., 'NATO, the UN and the Use of Force: Legal Aspects', (1999) 10 *EJIL* 1, 22.

[80] Roberts, n. 10 above, p. 184.

[81] *Ibidem,* pp. 208 y 209.

She also highlights the fact that 'the term 'legitimacy' is both overused and under-defined in international law.'[82] Here are her arguments on why legitimacy cannot be used to bypass the law:

> Polarizing legality and legitimacy in this way places limits on the way in which we construct and evaluate the debate over unilateral humanitarian intervention. First, the legality versus legitimacy debate leads one to formulate the choices presented by unilateral humanitarian intervention in dichotomous terms that exclude other potential avenues from consideration… Second, juxtaposing legality and legitimacy unfairly represents the choice as being between legal formalism and substantive morality. This approach fails to recognize that current notions of legality incorporate strong elements of substantive and procedural legitimacy. Finally, attempting to strictly separate legality from legitimacy is problematic because one of the functions of the law is to help delimit legitimate actions from illegitimate actions and thus help guide behavior… Separating legality from legitimacy may undermine the relevance of the law, as the law might require illegitimate actions and prohibited legitimate ones.[83]

As a consequence of this legal analysis, she reaches the following conclusion:

> The 'illegal but justified' approach does not maintain the integrity of the general prohibition on the use of force. It is also not clear that it achieves the policy of allowing intervention in extreme cases while minimizing abusive claims.[84]

We agree with her arguments, her reasoning and her conclusion. In our view, the rules in international law that regulate and limit the use of force by States are in themselves not only legal but legitimate. This means that in order for a State to legitimately recourse to force, its action have to be legal. There simply cannot be a legitimate use of force if it is illegal. As it has been analyzed before, the current legal order concerning the prohibition of the use of force is very clear and does not allow for an exception to a unilateral humanitarian intervention.

[82] *Ibidem,* p. 205.
[83] *Ibidem,* pp. 207 y 208.
[84] *Ibidem,* p. 184.

The fact that States do not possess a right to unilateral humanitarian intervention does not mean that the international community does not have an obligation to prevent humanitarian catastrophes and to respond to them if prevention was impossible. It has to be remembered that it is only the *unilateral* humanitarian intervention the one that is prohibited under international law, but nothing prevents from collective humanitarian intervention by the international community when the Security Council has determined that a specific humanitarian crisis constitutes a threat or breach to the international peace and security. This leads us to the discussion of the so called 'Responsibility to Protect Doctrine', which we will address in the following part of this paper.

Before we move on, let it be said again that the United Nations has a main role to play in this debate. This idea (the relevance of the UN) was also expressed by Franck in his analysis of the lessons learned from Kosovo:

> A final lesson of Kosovo is that, in the end, the United Nations —albeit disdained and circumvented— again became an essential facilitator in ending the conflict. It is not the only forum for the exercise of creative, sustained multilateral diplomacy, but it remains a resilient and irreplaceable one. That, in the end, may be the clearest lesson.[85]

We agree with Franck's conclusion, and we therefore also agree with the position expressed by Morton Abramowitz and Thomas Pickering: 'reinvigorating the UN —which is still perceived by most countries as the preeminent institution providing international legitimacy— will be essential'.[86]

Finally, all consequences deriving from the use of force to stop grave human rights breaches have to be taken into consideration. Regarding the situation in Kosovo, the words of Michael Ignatieff are more than pertinent: 'The larger dilemma that Kosovo illustrates is that once you use imperial power to right human rights abuses you are inevitably set upon a course of altering sovereignty and even altering borders.'[87]

[85] Franck, T., 'Lessons of Kosovo', (1999) 93 *AJIL* 857, 860.

[86] Abramowitz, M. and Pickering, T., 'Making Intervention Work; Improving the UN's Ability to Act', (2008) 5 *Foreign Affairs* 100, p. 103.

[87] Ignatieff, M., *Empire Lite*, Great Britain, 2003, p. 70.

V. The Responsibility to Protect Doctrine

As it was said before, the 'responsibility to protect' doctrine *per se* is not an argument in favour of unilateral humanitarian intervention. Actually, 'responsibility to protect' and 'humanitarian intervention' are not synonymous. As clearly explained by Gareth Evans, who was Chairman of the International Commission on Intervention and State Sovereignty, they are very different concepts:

> The very core of the traditional meaning of "humanitarian intervention" is coercive military intervention for humanitarian purposes –nothing more or less. But "responsibility to protect" is about much more than that. Above all, R2P [responsibility to protect] is about taking effective *preventive* action, and at the earliest possible stage.[88]

Nevertheless, the development of said doctrine has led some scholars to suggest that unilateral intervention can and does fall within its umbrella.[89] As José Alvarez has said, responsibility to protect 'means too many things for too many different people'.[90] Before going into this debate, it is important to begin by explaining what should be understood by 'responsibility to protect'.

In the words of António Guterres, UN High Commissioner for Refugees:

> The R2P doctrine maintains that a state's sovereignty is inseparable from its responsibility to protect the people living in its territory and cannot be merely a form of control, and that the international community has a duty to take appropriate action when this responsibility is neglected or violated. This is not an open invitation to military intervention, which must always be an option of last resort, exercised only in exceptional circumstances. Rather, it is an urgent call to states to assume their rightful role in recognizing, respecting, and protecting the rights of their people.[91]

[88] Evans, G., *The Responsibility to Protect* (Washington D. C., 2008), p. 56.

[89] See, for example, Breau, n. 48 above, p. 310.

[90] J. Alvarez, 'The Schizophrenias of R2P', in Alston and Macdonald (eds.), *Human Rights, Intervention, and the Use of Force*, New York, 2008, p. 277.

[91] Guterres, A., 'Millions Uprooted; Saving Refugees and the Displaced', (2008) 5 *Foreign Affairs* 90, pp. 102 and 103.

It could be said that the responsibility to protect doctrine, formally speaking, was the result of the report elaborated by the *International Commission on Intervention and State Sovereignty* (ICISS) established by the Canadian Government after the crises of Yugoslavia and Rwanda. These are the words with which the ICISS begins its approach on the responsibility to protect:

> Millions of human beings remain at the mercy of civil wars, insurgencies, state repression and state collapse. This is a stark and undeniable reality, and it is at the heart of all the issues with which this Commission has been wrestling. What is at stake here is not making the world safe for big powers, or trampling over the sovereign rights of small ones, but delivering practical protection for ordinary people, at risk of their lives, because their states are unwilling or unable to protect them.[92]

According to ICISS, there are four main objectives that a 'new approach' on humanitarian intervention should have:

> To establish clear rules, procedures and criteria for determining whether, when and how to intervene; to establish the legitimacy of military intervention when necessary and after all other approaches have failed; to ensure that military intervention, when it occurs, is carried out only for the purposes proposed, is effective, and is undertaken with proper concern to minimize the human costs and institutional damage that will result; and to help eliminate, where possible, the causes of conflict while enhancing the prospects for durable and sustainable peace.[93]

Despite the fact that the language used in the previous paragraph seems to endorse a responsibility to act by States that could include unilateral military intervention, there is an interesting paragraph included by the ICISS at the conclusions reached in its report that seems to suggest otherwise:

> As to *process*, the main concern was to ensure that when protective action is taken, and in particular when there is military intervention for human protection purposes, it is undertaken in a way that reinforces the collective responsibility of the international community to address such issues, rather

[92] ICISS, *The Responsibility to Protect* (Ottawa, 2001), p. 11, para. 2.1.

[93] *Ibidem*, para. 2.3.

> than allowing opportunities and excuses for unilateral action. The Commission has sought to address these concerns by focusing, above all, on the central role and responsibility of the United Nations Security Council to take whatever action is needed. We have made some suggestions as to what should happen if the Security Council will not act but the task, as we have seen it, has been not to find alternatives to the Security Council as a source of authority, but to make it work much better than it has.[94]

This is directly linked with the 'six criteria for military intervention' that the Commission identified, which are: 'right authority, just cause, right intention, last resort, proportional means and reasonable prospects'.[95] If a *right authority* is necessary as an essential criterion for intervention, then the authority of the Security Council authorizing such *collective* intervention is needed. This same conclusion was reached three years after the publication of the ICISS report by the *Secretary-General's High-level Panel on Threats, Challenges and Change* in its report called 'A more secure world: Our shared responsibility'. Said Panel concluded the following:

> There is a growing recognition that the issue is not the "right to intervene" of any State, but the "responsibility to protect" of *every* State when it comes to people suffering from avoidable catastrophe –mass murder and rape, ethnic cleansing by forcible expulsion and terror, and deliberate starvation and exposure to disease. And there is a growing acceptance that while sovereign Governments have the primary responsibility to protect their own citizens from such catastrophes, when they are unable or unwilling to do so that responsibility should be taken up by the wider international community –with it spanning a continuum involving prevention, response to violence, if necessary, and rebuilding shattered societies. The primary focus should be on assisting the cessation of violence through mediation and other tools and the protection of people through such measures as the dispatch of humanitarian, human rights and police missions. Force, if it needs to be used, should be developed as a last resort.
>
> The Security Council so far has been neither very consistent nor very effective in dealing with these cases, very often acting too late, too hesitantly or not at all. But step by step, the Council and the wider international community have come to accept that, under Chapter VII and in pursuit of the emerging norm of a collective international responsibility to protect, it can

[94] *Ibidem*, p. 69, para. 8.4.

[95] *Ibidem*, p. 32, para. 4.16.

> always authorize military action to redress catastrophic internal wrongs if it is prepared to declare that the situation is a "threat to international peace and security", not especially difficult when breaches of international law are involved.
>
> We endorse the emerging norm that there is a collective international responsibility to protect, *exercisable by the Security Council authorizing military intervention as a last resort* [emphasis added], in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to protect.[96]

It also established that the Security Council has to take into consideration five criteria in order for its authorization of force to be legitimate: seriousness of threat, proper purpose, last resort, proportional means and balance of consequences.[97] The element of 'right authority' is not included for obvious reasons: it is already incorporated in the fact that it is the Security Council the one who is taking action.

The responsibility to protect doctrine was also endorsed by the United Nations General Assembly under the premise that military action, if any, should be authorized by the Security Council. This was clearly established in the 2005 World Summit Outcome document:

> Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity... The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.[98]

[96] Secretary-General's High-level Panel on Threats, Challenges and Change, *A more secure world: Our shared responsibility* (New York, 2004), pp. 65 and 66, paras. 201-203.

[97] Ibidem, p. 67, para. 207.

[98] '2005 World Summit Outcome' General Assembly Resolution A/Res/60/1, adopted 16 September 2005, p. 30, paras. 138 and 139.

In Gray's opinion, all these documents and reports that we have made reference to above 'leave open the crucial question as to whether there is a right of unilateral humanitarian intervention in the absence of Security Council authority.'[99] Some authors, like Pablo César Revilla Montoya, have suggested that if the Security Council fails to do so, the General Assembly or Regional Organizations should act, requesting *a posteriori* Security Council authorization.[100] He also suggests that if the Security Council is paralyzed due to the use of veto by its permanent members, there is a possibility for States or other international organizations to self-attribute the right to use or authorize force, and that this would generate a grave crisis in the international legal system.[101]

It is pertinent to mention at this point that regional organizations also need the approval of the Security Council in order to use force. This is so according to Article 53, paragraph 1, of the UN Charter, where it is clearly established that 'no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council.'[102]

In conclusion, unilateral humanitarian intervention and responsibility to protect are not the same; nevertheless, as a last resort, military intervention can be authorized within the scope of the responsibility to protect doctrine whenever there is a humanitarian catastrophe. But, as has been evidenced in all the documents referenced above, this use of force has to be authorized by the Security Council to be legal *and* legitimate. This also closes the door then for an alleged *unilateral* right of humanitarian intervention in the understanding that intervention under R2P is foreseen as *collective.*

It is for these reasons that the emphasis is put on the Security Council as the organ responsible to act in order to prevent or stop humanitarian crises. In this regard, it has also been severely criticized. Cortright has written that:

[99] Gary, n. 14 above, p. 52.

[100] Revilla, P., "Hacia la responsabilidad de proteger. Bases jurídicas para una respuesta colectiva ante crisis humanitarias", (2007) 7 *Anuario Mexicano de Derecho Internacional* 643, p. 673.

[101] Revilla, P., "Necesidad de Intervenir Militarmente en Sudán-Darfur para Salvaguardar los Derechos Humanos de sus Pobladores", (2009) 9 *Anuario Mexicano de Derecho Internacional* 245, p. 267.

[102] UN Charter, article 53(1).

> Until the Security Council is reformed and its composition broadened to more accurately represent the world community, its credibility and authority on controversial matters of humanitarian intervention will be constrained.[103]

It may be so, and indeed there must be a thorough analysis of the role, capacity, efficiency and effectiveness of the Security Council in preventing, reacting and responding to humanitarian catastrophes. Nevertheless, such an analysis escapes the scope of the present paper though; as it has been reiterated, it is limited only to the analysis of the prohibition on the use of force as it stands today in order to determine whether unilateral humanitarian intervention is legal or not.

It must always be taken into consideration that the responsibility to protect is much broader than the use of force in cases of humanitarian catastrophes. In fact, its main role in order to maintain international peace and order would be focused on prevention rather than in enforcement action though the use of force by States. Indeed, as Byers says, 'proponents of the responsibility to protect who focus on military intervention are participating in a terrible charade'.[104]

VI. Conclusion

As it has been shown throughout this paper, *under the current international legal order there is no right for unilateral humanitarian intervention*; a correct interpretation of the UN Charter prohibits it and there is no rule of customary international law allowing for such unilateral intervention. Also, the so-called debate of legitimacy v. legality is a false one for these two concepts are not contrary to one another, and because a legitimate action includes a legal authorization of the use of force, which can only be collective. In the words of Chesterman:

> *Unilateral enforcement is not a substitute for but the opposite of collective action*: as unilateral assertions of humanitarianism come to displace multilateral institutional legality, so the normative restrains on the recourse to force weaken.[105]

[103] Cortright, n. 62 above, p. 294.

[104] Byers, n. 2 above, p. 111.

[105] Chesterman, n. 12 above, p. 236.

Regarding the responsibility to protect doctrine, it does not allow unilateral humanitarian interventions; indeed States have acknowledged their obligation to prevent and respond to humanitarian crises, but such responses have to be carried out collectively through the authorization of the UN Security Council.

Finally, addressing the issue of what the law *should* be, there is indeed still much work to be done domestically and within the UN in order to have strong international institutions that, through the use of efficient and effective diplomacy, can tackle gross human rights violations and the commission of international crimes throughout the world. Nevertheless, the fact that more clear rules are needed in order to enable the efficient action of the collective security system to protect individuals *does not* mean that the legal regime on the use of force has to change. This is the opinion of Dame Higgins:

> I generally believe that, in our decentralized legal order, facts must be looked at, and legal views applied, in context. But I also believe such policy choices are appropriate when the legal norms leave open alternative possibilities. I believe that to be the case, for example, on the question of humanitarian intervention. But I do not believe the question of the use of force to be comparable. It seems clear to me that such force is prohibited by the relevant legal instruments, and that the common good is best served by terming the indirect use of force unlawful, regardless of the objectives in a particular case.[106]

Diplomacy as a tool for action has been severely criticized,[107] and that criticism has been used by authors to try to uphold a right for unilateral humanitarian intervention. Yet, in our view it is possible to have strong diplomatic avenues to address humanitarian issues. In this sense, there are many proposals to be explored an analysed: the Federal Ministry for European and International Affairs of the Austrian Government, in conjunction with the Institute for International Law and Justice of the New York University School of Law, elaborated a report called *The UN Security Council and the Rule of Law; The Role of the Security Council in Strengthening a Rule-based International System*. Its final report (2008) included 17 recommendations for the Security Council; in particular Reco-

[106] Higgins, n. 22 above, p. 253.

[107] See, for example, Wheeler, n. 61 above, p. 35.

mmendation 6 reiterates that, according to the 2005 World Summit Outcome document, 'the Council should be prepared to act for the international community in the exercising the Responsibility to Protect.'[108]

Other proposals include the establishment of a standing UN force that would respond in grave crises: 'a well-designed UN response force would act as a complement to relief agencies on the ground, collaborating and coordinating with them.'[109]

As rightly pointed out by MacDonald and Alston:

> International lawyers are thus compelled (or condemned) to pursue an analysis of the irreducible dilemmas posed by the foundational challenges of sovereignty, human rights, and security, not merely in terms of the formal doctrine of their discipline, but also of the manner in which they can be configured in order to achieve (more or less) persuasive legitimacy as to both its methods and results.[110]

Probably the most important lesson that should permeate from scholars, international lawyers, and diplomats into the Security Council is the premise that was spelled, not in a law book, but in the writings of Dr. Seuss:

> A person's a person, no matter how small...
> From sun in the summer. From rain when it's fall-ish,
> I'm going to protect them. No matter how small-ish![111]

[108] Federal Ministry for European and International Affairs and IILJ, *The UN Security Council and the Rule of Law; The Role of the Security Council in Strengthening a Rules-bases International System* (Vienna, 2008), p. 8, para. 22.

[109] Abramowitz and Pickering, n. 86 above, p. 106.

[110] Alston and MacDonald, n. 7 above, p. 31.

[111] Dr. Seuss, *Horton Hears a Who!*, New York, 1954.