The New World Order: Humanitarian Interventions From Kosovo to Libya and Perhaps Syrian?

Ilan Fuchs, *University of Michigan - Ann Arbor*  
Harry Borowski, *Tulane University of Louisiana*
1. Introduction

The Involvement of NATO forces in the toppling of Libyan longtime dictator Muammar Kaddafi was received with standing ovation in world media. The Libyan dictator was involved in terrorism and in crimes not only against his own people but against citizens of many other countries as well. One question seems to have been overlooked: under what grounds did NATO join an armed non-international conflict? What was the basis for recognizing the rebel *ad hoc* government as the legal representative of Libya and not the Kaddafi government that had ruled it for almost half a century; a government that chaired the UN committee for human rights ridiculous as this reality might have been?

This article will reevaluate the few sources that discuss the issue and offer a model that will help define the ambiguous scenario of humanitarian intervention.

The first point that needs to be made is that there is no disagreement that only a government can seek assistance from another government against rebels. The rebels do not have this option;\(^1\) in the Nicaragua case a rationale was given to this prohibition.\(^2\) At the core is the assumption that there is a distinct differentiation between the government and the rebel forces. When that differentiation is lost, there are many scholars who assert that neither of the sides has the right to ask for military assistance from a foreign government.\(^3\) However the literature shows an ambiguous approach to this stage in which the government loses is status as the sovereign. This unclear situation has been exacerbated in the ‘Arab Spring’ where there was intervention in Libya

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but not so in Bahrain or in Syria. In the latter case, it should be noted there are also militias composed of rebels that defected from the Syrian army and regime in a very similar fashion to the developments in Libya.

We wish to suggest a model that will define the move from an armed conflict of government against rebels toward a civil war and large-scale atrocities that justify international action that would otherwise be deemed as infringement of sovereignty under article 51 of the U.N charter. Finally we wish to put forth the notion that a more elaborate set of criteria should be presented for future interventions.

We will compare this case to the intervention of NATO forces in Kosovo. The conflict that arose between NATO and the Federal Republic of Yugoslavia concerning Kosovo in 1999 was seen as the first humanitarian intervention where a military alliance actively participated in an intra-state conflict. Although the initial conflict in Kosovo between Serbs and Albanian had been ongoing for several decades, the claims that massive human rights violations orchestrated by the Yugoslav forces were occurring, led NATO to use force in order to prevent further violations and help Albanian refugees to return to Kosovo.

2. The U.N Security Council resolutions’- A Comparison

A natural question that arises while contemplating NATO’s intervention regards the legitimacy of its use of force against Yugoslavia. The United Nations Security Council adopted Resolution 1160 which condemned the use of force by the Serbian police and Albanian terrorism and called for the enforcement of an arms embargo against Yugoslavia. The Council later adopted Resolution 1199, which further condemned reports of violence and population displacements acting under Chapter VII of the UN Charter. What is more interesting is that no specific Security Council Resolution explicitly authorized the use of force as is usually the case (e.g. the Gulf War) against either of the parties to that purely intra-state conflict. Furthermore, the Federal Republic of Yugoslavia had not attacked a fellow UN member state, nor had it attacked a NATO member since Kosovo was a region of Serbia.

While the Kosovo conflict appears to have silently legitimized humanitarian military interventions within the context of domestic conflicts, the recent case regarding Libya seems to have gone further. Security Council Resolution 1970 declared in this case a no-fly zone and also:
“Authorizes Member States that have notified the Secretary-General, acting nationally or through regional organizations or arrangements, and acting in cooperation with the Secretary-General, to take all necessary measures, notwithstanding paragraph 9 of resolution 1970 (2011), to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory...”

This resolution authorized the use of force against the Libyan government, directly aiding the rebels by attacking the Libyan air force, which was one of Kaddafi’s main advantages on the rebels. The humanitarian ground for intervention was in this case based on a much shorter amount of time in contrast to Kosovo and more importantly, far less information and proof of crimes performed by the regime had been brought forth. These decisions of the Security Council change dramatically the legal situation of internal conflicts and make much of the existing doctrine obsolete opening a new avenue for intervention legitimised by humanitarian law. The basic question arises from the words of the most important player in the Libyan case, President Barak Obama. In a speech after the NATO involvement he claimed:

For generations, the United States of America has played a unique role as an anchor of global security and as an advocate for human freedom. Mindful of the risks and costs of military action, we are naturally reluctant to use force to solve the world’s many challenges. But when our interests and values are at stake, we have a responsibility to act. That’s what happened in Libya over the course of these last six weeks 4

The approach of this document is clear. Only once did the president mention terrorist attacks orchestrated by Libya against Americans and that was clearly not the main reason for NATO involvement rather:

Confronted by this brutal repression and a looming humanitarian crisis, I ordered warships into the Mediterranean. European allies declared their willingness to commit

resources to stop the killing. The Libyan opposition and the Arab League appealed to the world to save lives in Libya. And so at my direction, America led an effort with our allies at the United Nations Security Council to pass a historic resolution that authorized a no-fly zone to stop the regime’s attacks from the air, and further authorized all necessary measures to protect the Libyan people.\(^5\)

This begs the question what are the criteria for involvement in protection of people in civil wars? In the same speech the president pointed out that: “It’s true that America cannot use our military wherever repression occurs. And given the costs and risks of intervention, we must always measure our interests against the need for action. But that cannot be an argument for never acting on behalf of what’s right”.\(^6\) Another emphasis was that the intervention was that of a coalition of International forces. With this lack of criterion what should be the attitude towards Syria? Or for that matter may we assume that the Security Council can authorize the invasion of the U.S for civil rights violations?

3. Intervention in Civil Wars in Scholarship prior to the Libyan Case

After defining the reason for the Libyan campaign as humanitarian, we find that there are several approaches in scholarship concerning the use of force for humanitarian reasons. The Libyan case involved several issues that need to be addressed independently.

3.1 Aiding Rebels involved in a civil war

In section 2(4) of the U.N charter it is stated that:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.\(^7\)

The prohibition against actions “against the territorial integrity or political independence of any state” aims to protect the domestic jurisdiction and sovereignty of the member states stands (or perhaps stood) at the center of the international system and can be explained by a basic utilitarian

\(^5\) Ibid.
\(^6\) Ibid.
approach. If we choose to see the international arena as a Hobbesian state of nature than every actor has liberty, which is defined as “the absence of external impediments”\(^8\). The emergence of International law in a gradual process of treaties and customary law led in turn to a partial agreement of the actors abandoning some of their right, in absence of an international leviathan there is no total “social contract” that will lead to a more comprehensive relinquishment of rights.\(^9\) This line of reasoning was adopted in many international documents.\(^10\)

The debate over intervention in other states internal political affairs can be aptly used when discussing the U.S invasion to Grenada in 1983. In that case a military *coups d'état* led to an American expedition force to invade the small island state with a small number of soldiers from other Caribbean Island states. At no point was there danger to American territory or for that matter any other of the Caribbean states.\(^11\) In the Grenada case there was no invitation from the government, only from the governor general who had no authority according to the local constitution. With no formal invitation from the former government the American invasion was deemed by some scholars as illegal (at least from the aspect of re-instituting law, order and democracy).\(^12\) In the case of *The Republic of Nicaragua v. The United States of America*,\(^13\) the ICJ ruled that the U.S by training, arming, financing the anti-government paramilitary group in Nicaragua, has breached its obligation under customary international law not to intervene in the affairs of another State.\(^14\) In the Libyan case there was also no danger to any of the NATO members from the Kaddafi regime and the support of NATO seems to contradict the ICJ decision concerning Nicaragua.\(^15\) However another angle makes the NATO involvement more problematic, the scope

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\(^9\) Ibid, 104.

\(^10\) See for example article 2 (7) of the U.N charter or the general assembly: “no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State” Res. 2131 (XX), 21 December 1965, UNYb 1965, 94.

\(^11\) Joyner, supra note 1, 131, 143.


\(^14\) Ibid, paragraphs 202-209.

\(^15\) There is a side issue of the scope of the involvement of NATO forces alongside the rebels in Libya, according to Nicaragua v. U.S there needs to be ‘effective control’, meaning the intervening party needs to have ‘directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State’ (ibid, para. 115) that question is relevant to NATO possible accountability to alleged war crimes perpetrated by the rebels. A different guideline was introduced in ICTY, Appeals Chamber, Tadić, 15 July 1999 (Case no. IT-94-1-A). for an overview see: Antonio Cassese, “The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia,” 18 (4) Eur. J. Int. l’ (2007) 649-668.
of the rebel forces seems to have been designated as a civil war and by that, according to some scholars outside assistance to any side should have been forbidden.

3.2 Intervention is Civil war\textsuperscript{16}

Prima facie there seems to be a reason to claim that the existing government in a civil war “until it is definitely overthrown, remains competent to invite foreign troops into the state’s territory and to seek other forms of foreign help, whatever the effect which that help may have on the political future of the state”.\textsuperscript{17} But it is very easy to abuse such a reality, for example a third party that wishes to intervene can recognize the rebels as the de jure government as was done by Nazi Germany in the Spanish civil war or when different government officials claim to have authority according to the constitution.\textsuperscript{18} More to the point, Peter Malanczuk suggested that in the case of a civil war the actual holder of the sovereign power is in question and therefore no party has the legitimacy to invite intervention of a foreign power.\textsuperscript{19}

3.3 Assisting national liberation movements and intervening for humanitarian reasons - Why it's a bad idea

In the margins of international law scholarship we find at this point some of the more radical ideas concerning the intervention in other states and boundaries of article 51. The U.N general assembly in several cases supported aid to national liberation organization using force.\textsuperscript{20}

\textsuperscript{16} The difference between a civil war and a rebellion discussed in the previous section can be determined by the debate in humanitarian international law on non-international conflict as they pertain to common article 3 of the Geneva conventions I-IV. In the Tadic case the definition is: “the intensity of the conflict and the organization of the parties to the conflict. In an armed conflict of an internal or mixed character, these closely related criteria are used solely for the purpose, as a minimum, of distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law”. Prosecutor v. Tadic ICTY IT-94-1-T 7 May 1997 paragraph 562 http://www.icty.org/x/cases/tadic/tjug/en/tad-tsj70507JT2-e.pdf 11/6/2011. On the issue on humanitarian law in non-international conflicts see: Alex G Peterson, “Order Out of Chaos: Domestic Enforcement of the Law of Internal Armed Conflict” 171 Mil. L. Rev. (2002) 1-91; HORS DE LOGIQUE: CONTEMPORARY ISSUES IN INTERNATIONAL HUMANITARIAN LAW AS APPLIED TO INTERNAL ARMED CONFLICT ARTURO CARRILLO-SUÁREZ

\textsuperscript{17} Peter Malanczuk, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW. (London: Routledge, 1997).322.
\textsuperscript{18} Ibid, 323.
\textsuperscript{19} Ibid, 324.
\textsuperscript{20} GA Res. 3236 (XXIX), UN Chronicle, 1974 no. 11, 36– 44; GA Res. 31/61, ibid., 1976 no. 11, 38– 45, at 79; GA Res. 33/24, ibid., 1978 no. 11, 52– 3, at 81; GA Res. 34/44 and 34/93 A-R, ibid., 1980 no. 1, 24, 79.
Malanczuk aptly pointed out the apparent contradiction to the literature concerning civil war and the lack of internal logic of such a position:

“It is difficult to reconcile these resolutions with the general rule against giving help to insurgents in civil wars. It is true that violation of the right of self-determination is a violation of international law. But breaches by a state of other rules of international law (for example, the rules protecting human rights) are not treated as justifying help given to insurgents against that state, and there is no logical reason for treating violations of the right of self-determination differently from other breaches of international law”.

More challenging and definitely more relevant to the Libyan case is the suggestion that a foreign power may intervene in order to stop gross violations of human rights or according to some scholars intervention is legitimate in order to further the development of democratic regimes. During the Panama invasion by the U.S, the American government explained its operation based on humanitarian grounds and the restoration of democracy. The doctrine of Humanitarian grounds justifying the use of force in an international conflict according to article 51 has never been resolved. According to some scholars it lacks any basis in International law, the escalation of hostilities is counterproductive and does not serve as a logical justification to the use of force nor has it been suggested as a legitimate reason in international documents. The rational for such a position also maintains that the centrality of non-intervention to International law is crucial to its success and humanitarian intervention does not serve a good exception to this rule for several reason: first freedom is the result of internal struggles; second, violence breeds more violence and finally humanitarian interference only serves the strong when they wish to admonish the week not

21 Malanczuk, supra note 17, 237-238. He also negates an interpretation that sees such a situation as an international conflict: “Alternatively, if wars of national liberation are classified as international wars and not as civil wars, the General Assembly resolutions which urged states to help national liberation movements in colonial territories, in Palestine and South Africa, are hard to reconcile with the rules of international law concerning international wars. The use of force in international relations is normally prohibited by international law; there are some exceptions to this rule, but the only one which has any possible relevance to wars of national liberation is collective self-defence against armed attack”. Ibid, ibid.


vice versa. According to this approach the NATO operation in Kosovo was justly not approved by the U.N Security Council and caused more harm than good since a peaceful result could have been achieved.

3.4 Assisting national liberation movements and intervening for humanitarian reasons - Why it’s a good idea

A different response was suggested that focuses on the idea that the development of human rights regime demands that states who do not respect human rights will be penalized and need be forced to adopt such a regime by the U.N or any other willing state. Humanitarian intervention is defined as: “The use of force by one state in the territory of another to protect persons who are in imminent danger of death or grave injury when the state in whose territory they are is unwilling or unable to protect them”.

It is suggested that as long as the use of force is not actually meant to violate the territorial integrity of the invaded state but to protect human rights it does not violate article 2 (4). This approach sees the horizon of International law in the protection of Universal Human rights at the expense of sovereignty putting the genocide of the Second World War as an archetype that calls for involvement of any actor that cares for freedom and justice. One scholar went as far as to suggest that overthrowing a despot is a legitimate reason for the use of force according to article 2 (4). This issue came to the spotlight again in the aftermath of the NATO operation in Kosovo where NATO justified its attacks on Serbia in the attempt to protect ethnic Albanians from Serbian war crimes. The fact that the NATO operation was carried out without the U.N Security Council approval cast a shadow of ambiguity on the legitimacy of the entire endeavor. Several authors

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suggested that the source of legitimacy for humanitarian intervention is customary law. David vessel claimed that there is an opinion juris sufficient to see such an intervention as customary International law. Some jurists saw no basis for the definition of humanitarian intervention as a customary law and proclaimed the Security Council as lacking the means and the will to be the policeman of the world.

Several ideas were presented to endorse such actions:

1. Ongoing or imminent gross violations of human rights.
2. All “non-intervention” remedies were exhausted.
4. The intervention aims to remedy the human rights violations rather than any other goal. The intervention should be as short as possible and use the most minimal amount of force needed to achieve its goals.
5. If the state is a weak state proof is needed for the government’s infectiveness.
6. If the government is instigating the human rights violations then proof is needed that it refuses to cooperate with international organizations.

These guidelines are problematic. They are unclear and can be misused because of their ambiguity. Expressions like: “Only the grossest abuses of human rights by a government against its own citizens would overcome the burden against external interference”, Are simply too broad.

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34 Ibid, 455;
36 Hilpold, supra note 34, 455.
37 D’amato, supra note 26.
38 Cassese, supra note 31, 27.
39 Hilpold, supra note 34, 457-458.
to be useful. Hilpold pointed out that opinions among scholars concerning the application of the Kosovo scenario to such guidelines were diametrically opposed.\footnote{Hilpold, supra note 34, 458 footnote 57.}

But after all is said and done the result of the U.N Security Council resolution in the Libyan case moved the discussion to the next level. It clearly stated that humanitarian intervention is an acceptable justification for the use of force and that the guidelines suggested to deal with cases of civil war are not relevant when dealing with large-scale atrocities.

We are however left with several questions that were presented by scholars in the past three decades: when can such an intervention take place? What regime loses its legitimacy to role?

4. *Philosophical Justification for Intervention and the Emergence of Right to Protect*

Several justifications were offered to the idea of humanitarian intervention on the expense of sovereignty. Scholars such as Michael Waltzer suggested that the gross violation of human rights topple the concept of sovereignty.\footnote{Micheal Waltzer, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATION (2nd ed., New York: 1992)} Robert Philips added that not violating sovereignty erodes peace therefore from a pragmatic point of view the choice must be made in favor of intervention.\footnote{Robert Philips, “the ethics of humanitarian intervention,” in Robert Philips et al (eds.) HUMANITARIAN INTERVENTION (LANHAM MD: 1996)} Eric Heinze suggested that the doctrine of universal jurisdiction is ground to humanitarian intervention.\footnote{Eric Heinze, WAGING HUMANITARIAN WAR: THE ETHICS, LAW AND POLITICS OF HUMANITARIAN INTERVENTION (NY: SUNY press 2009) 85-110.} Michael Keren put things quite bluntly when he described the dichotomy of sovereignty and humanitarian intervention as a case of choosing good v. evil.\footnote{Michael Keren, “Intellectuals without borders,” in Micheal Keren et al (eds.) INTERNATIONAL INTERVENTION: SOVEREIGNITY VERSUS RESPONSIBILTY (London 2002): 27-40.} The discussion comes down to the limited nature of sovereignty. That limited character is explained in many different ways e.g. the universal character of human rights at least as they reflect the rejection of genocide.\footnote{Henry Shue, “Limiting Sovereignty,” in Jennifer Welsh (ed.) HUMANITARIAN INTERVENTION AND INTERNATIONAL RELATIONS (Oxford UK: 2004): 16-17, 25.} Michael Waltzer describes it as: “A government, an army, a police force, tyrannically controlled, attacks its own people or some subset of its own people, a vulnerable minority, say
territorially based or dispersed throughout the country”. Other philosophers pointed to a collective moral responsibility to intervene in cases were basic human rights are violated and the domestic government in unwilling or unable to intervene. But in light of the Libyan case the question of should there be intervention became when should there be intervention and who should intervene. Philosophers debated whether the duty to intervene is only on the UN or also on individual states.

The concept that developed in international relations discourse was of the doctrine of “The Responsibility to protect”. The concept developed initially after the Canadian government established the International Commission on Intervention and State Sovereignty (ICISS) in September 2000. In February 2001 they published their report where they coined the concept of responsibility to protect. The U.N Security Council adopted this concept in 2005.

Under the title of “Responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity” the general assembly adopted the following statement:

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

51 For a bibliography and summary see Thomas Weiss, Don Hubert, THE RESPONSIBILITY TO PROTECT: RESEARCH, BIBLIOGRAPHY, BACKGROUND (2001)
with relevant regional organizations as appropriate, should peaceful means be
Inadequate and national authorities manifestly fail to protect their populations
from genocide, war crimes, ethnic cleansing and crimes against humanity. We
stress the need for the General Assembly to continue consideration of the
responsibility to protect populations from genocide, war crimes, ethnic
cleansing and crimes against humanity and its implications, bearing in mind
the principles of the Charter and international law. We also intend to commit
ourselves, as necessary and appropriate, to helping States build capacity to
protect their populations from genocide, war crimes, ethnic cleansing and
crimes against humanity and to assisting those, which are under stress before
crises and conflicts break out.52

This statement clearly gives the authority to the implementation of the responsibility to protect to
the U.N security council: “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…”. Obviously
that did not happen in Yugoslavia or in Libya but that fact that NATO took action in these cases
suggests a healthy equilibrium between the check and balances system that such a group of states
have when collectively intervening and on the other hand a quick and efficient ability to intervene,
characteristics that are rarely found in the U.N. general assembly or the Security Council.

4.1 The limited scope of sovereignty vis-à-vis grousse violations of human rights

Now that we established that there is justification for humanitarian intervention comes a basic question: when do violations of human rights create the possibility for such intervention? Many jurists suggest the example of genocide as a justification for intervention, but usually without specifying the difference it and other violation of human rights.

J.S. Mill dealt with the issue in his known article from 1859 “A Few words on Non-Intervention”. The article was criticized as justifying imperialism and euro centrism but not withstanding his position on these issues that deserves an independent discussion he also offered some thoughts on the matter at hand:

> whether one country is justified in helping the people of another in a struggle against their government for free institutions, the answer will be different, according as the yoke which the people are attempting to throw off is that of a purely native government, or of foreigners; considering as one of foreigners, every government which maintains itself by foreign support. When the contest is only with native rulers, and with such native strength as those rulers can enlist in their defense, the answer I should give to the question of the legitimacy of intervention is, as a general rule, No. The reason is, that there can seldom be anything approaching to assurance that intervention, even if successful, would be for the good of the people themselves. The only test possessing any real value, of a people’s having become fit for popular institutions, is that they, or a sufficient portion of them to prevail in the contest, are willing to brave labor and danger for their liberation.

Mill’s justification is clear. For liberty and freedom so survive it must be the result of an internal process that cannot be created artificially by outside intervention. Mill suggested that there is an exception when the rebels were able to take charge and then they are able to ask for the assistance of other countries in their fight against tyrannical forces from the outside. It is also justified to help

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one side in a civil war if the other side is assisted by a foreign power contrary to the doctrine of non-intervention.\textsuperscript{54}

However there seems to be an exception to this rule and that is the case of a barbarian nation:

\begin{quote}
There is a great difference (for example) between the case in which the nations concerned are of the same, or something like the same, degree of civilization, and that in which one of the parties to the situation is of a high, and the other of a very low, grade of social improvement. To suppose that the same international customs, and the same rules of international morality, can obtain between one civilized nation and another, and between civilized nations and barbarians, is a grave error, and one which no statesman can fall into ... In the first place, the rules of ordinary international morality imply reciprocity. But barbarians will not reciprocate. They cannot be depended on for observing any rules. ... Independence and nationality, so essential to the due growth and development of a people further advanced in improvement, are generally impediments to theirs. The sacred duties which civilized nations owe to the independence and nationality of each other, are not binding towards those to whom nationality and independence are either a certain evil, or at best a questionable good.\textsuperscript{55}
\end{quote}

This is a famous quote of Mill and was criticized as condoning imperialism but it can also be interpreted as stating that sovereignty is not a magic bullet. It is an outcome of international law and as such there are situations were actions would revoke the protections of sovereignty:

\begin{quote}
But barbarians have no rights as a nation, except a right to such treatment as may, at the earliest possible period, fit them for becoming one. The only moral laws for the relation between a civilized and a barbarous government are the universal rules of morality between man and man.\textsuperscript{56}
\end{quote}

\textsuperscript{54} Ibid.
\textsuperscript{55} Ibid.
\textsuperscript{56} Ibid.
Michel Walzer in his criticism of this Text by Mill agreed that acts that are repugnant to humanity must not be protected by the basic position on non-intervention. In a case of atrocities when no other options are viable and a peaceful solution was rejected all that is left is an action aimed at defending the victims if indeed an intervention will not cause more damage.\textsuperscript{57}

This approach in our opinion is stating that sovereignty as a political construct is by definition limited within the boundaries of the most basic human norms. International law does not demand liberalism or democracy however it did identify since the Westphalia treaty a basic common denominator that is the foundation for international discourse. If we were to use the Hobbesian and Lockean term state of nature and apply it to the International arena than even Hobbes that was willing to entertain rebellion only when life itself was at danger would see genocide as a legitimate reason to override the protections of sovereignty.

This text can be seen as a form of standard of Civilization. In the 19\textsuperscript{th} century this term was used by jurists as a basic condition for recognition, and was usually interpreted minimum demand not only of effective control over a country but also conformed to the customs and norms accepted in Western societies.\textsuperscript{58} This term was abandoned due to its colonial legacy but some scholars noted that: “In the post-Cold War world, the triumph of liberalism within Western civilization has spawned a new Standard of Civilization… The resulting convergence of the new standard of civilization and international law creates the vision of a liberal, globalized civilization, which is a more radical and far-reaching concept than Westphalian civilization”.\textsuperscript{59}

At the center of this new Standard of Civilization is the human rights regime and the concepts recognition as not merely a Hobbesian understanding of sovereignty dependent on the effective ability to govern but also of a Lockean and perhaps communitarian ethos. Michael Sandel's concept of natural duties ties in with what Mill states as “sacred duties”.\textsuperscript{60} According to Sandel, “natural duties are those moral claims that apply to persons irrespective of their consent, such as the duties to help others in distress, not to be cruel, to do justice, and so on”.\textsuperscript{61} Those duties are inherent to


\textsuperscript{58} Gerrit V. Gong, \textit{The Standard of Civilization' and International Society} 14-15 (Chrendon 1984).


\textsuperscript{60} Mill, supra note 53, 259.

the individual and are inseparable from the self; the liberal ethos he claims cannot be understood with these natural commitments.

This philosophical structure could be translated to a basic common denominator that lies in the foundation of any political structure. It is even more basic than sovereignty, and infringement of these natural duties, a new standard of civilization, justifies infringement of sovereignty.

5. International Law Standard of Use of Force and Proof For Intervention

5.1 The standard: Necessity, Proportionality, Exhaustion of peaceful means

The next phase of the discussion deals with the practical implementation of humanitarian intervention. What is the proof needed to justify use of force? International law has long set requirements for the legality of the recourse to force by states against other states but these discussions dealt with self-defense, as defined in Article 51 of the United Nations Charter (UNC). Since humanitarian interventions are by definition armed operations which purported to using force against a state in order to stop the commission of egregious humanitarian rights violations by that state, it would be only natural for the general principles developed in customary international law for example defined in the Caroline case to be used here. Principles of necessity and proportionality are a good doctrinal basis for the developing discourse of humanitarian intervention.

Necessity for the purpose of self-defense was defined by U.S. Secretary of State Daniel Webster in his correspondence with the British Minister to Washington, Mr. Henry Fox (and then to Lord Ashburton). In his correspondence, Secretary Webster highlighted that force was to be

\[62\] Article 51 of the United Nations Charter, available at: http://www.un.org/en/documents/charter/chapter7.shtml: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”


\[64\] “A necessity of self-defense, instant, overwhelming, leaving no choice of means and no moment for deliberation. It will be for it to show, also, that the local authorities of Canada, even supposing the necessity of the moment authorized
used as a means of last resort. This directly implies that all other avenues to prevent the use of force had been exhausted as he states: “leaving no choice of means”. The necessity criterion set forth in the Caroline case has transcended the ages and remains until today one of the two major pillars of the legality of the use of force against other states in self-defense. Modern lawyers, have associated the necessity requirement to the obligation on the part of the defending country to take any and every step in order to avoid having to resort to force. This consists of what is known as the “exhaustion of peaceful means”. Instances of resolving conflicts through peaceful means

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66 “The general academic position on the Caroline incident during the UN era may be summarized by the following: The Caroline doctrine asserts that use of force by one nation against another is permissible as a self-defense action only if force is both necessary and proportionate ... [the correspondence relating to the incident] effectively defined the limits of self-defense, and in so doing enabled later statesmen and scholars to distinguish that concept, with its constraints, from the largely limitless notion of self-preservation.” James A. Green, “Docking The Caroline: Understanding The Relevance Of The Formula In Contemporary Customary International Law Concerning Self-Defense”, 14 CARDOZO J. INT’L & COMP. L. 429, 437 (2006). See generally Martin A. Rogoff & Edward Collins Jr, “The Caroline Incident and the Development of International Law”, 16 BROOK. J. INT’L L. 493, 498 (1990).

67 Renaissance philosophers and jurists like Hugo Grotius also emphasized the need to attempt to resolve disputes between states peacefully before resorting to armed force. HUGO GROTIIUS, DE JURE BELLII AC PACIS, (A.C. Campbell trans., London, 1814) (1646), Bk. II, Ch. XXIV, section IX.

68 “Today, the necessity criterion requires that the responding state show that it exhausted non-forcible measures or that the extremity of the situation meant that it would have been wholly unreasonable to expect the responding state to attempt non-forcible measures of resolution. In other words, a forcible response must be a last resort with no practical or reasonable alternative.” Ibid 4 at p. 300-301.
could involve the use of diplomacy, dialogue, arbitration and so forth. The obligation to exhaust peaceful avenues to resolving differences was reiterated after the 1981 Israeli strike on Iraq when Israel was condemned for having the Osirak nuclear reactor. The United States, which supported sanctioning Israel specifically because it had failed to attempt to resolve the issue in a peaceful manner.

The other pillar upon which rests the legality of a use of force by a state against another is proportionality. Differing opinions exist as to what constitutes a proportional response to an armed attack or to an impending one. Some argue that a proportional response has to coincide exactly to the magnitude of the incoming of suffered armed attack. Practically speaking, this would mean that if a state attacks another and launches twenty rockets at another state, the latter

69 Olivera Medenica, “Protocol I and Operation Allied Force: Did NATO Abide by Principles of Proportionality?”, 23 LOY. L.A. INT’L & COMP. L. REV. 329, 347 (2001): “Commentators have advocated the legitimacy of forceful intervention without Security Council authorization for humanitarian reasons under enumerated circumstances. These circumstances are discussed in greater detail infra, but mainly include: (1) the existence of gross human rights violations; (2) paralysis of the Security Council; (3) exhaustion of diplomatic means; and (4) proportionality in the use of force.”


72 David A. Sadoff, A Question of Determinacy: The Legal Status of Anticipatory Self-Defense, 40 GEO. J. INT’L L. 523, 570 (2009): “The international community’s divided opinion on the legality of anticipatory self-defense was reflected in its debate on Israel’s actions. Some States, such as Iraq, Mexico, Egypt, Syria, Guyana, Pakistan, Spain, and Yugoslavia, challenged the concept’s legitimacy in principle. Others, such as Sierra Leone, Malaysia, Uganda, Niger, and the United Kingdom, were prepared to accept anticipatory self-defense in concept-citing to the Caroline standard-but found the conditions, mainly an instant and overwhelming need for self-defense, absent in the case at hand. Other States expressed concern about the underlying fact that the IAEA had found no evidence Iraq was planning to develop nuclear weapons at the subject facility. The United States, for its part, pointed out Israel’s failure to exhaust peaceful means of resolution before undertaking its attack, but did not take a position on the self-defense doctrine itself.”

73 International courts have repeatedly upheld that any use of force in self-defense needs to comply with the requirements of necessity and proportionality of the action. “Whether the response to the [armed] attack is lawful depends on observance of the criteria of the necessity and the proportionality of the measures taken in self-defense [...] The submission of the exercise of the right of self-defense to the conditions of necessity and proportionality is a rule of customary international law.” Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161, 196, 198 available at: http://www.icj-cij.org/docket/files/90/9715.pdf. See also CASE CONCERNING MILITARY AND PARAMILITARY AND PARAMILITARY ACTIVITIES IN AND AGAINST NICARAGUA (1986) I.C.J. Reports 1986, p. 94, para. 176 where the court stated: “whereby self – defense would warrant only measures which are proportional to the armed attack and necessary to respond to it as a rule well established in customary international law.”

state would only be allowed to respond and defend itself by launching twenty rockets against its aggressor. In that sense, the proportionality criterion plays a limiting role when it comes to the scope and intensity of the military response.\textsuperscript{75}

This tit-for-tat approach to the notion of proportionality can leave us perplexed. First of all, it imposes on the victim of the attack limits to its means to defend itself without taking into consideration the nature of its opponent. For instance, if a large and powerful state were to launch a defined number of missiles or strikes on a vastly smaller state, the damage made on the smaller and weaker state would be of a greater extent to that done by a similar amount of strikes performed by the smaller state on the larger one.

Recent instances of disproportionate behavior were witnessed during the 2008 Georgia conflict where Georgia came close to being totally invaded by Russia\textsuperscript{76}, after it had launched artillery barrages on Tskhinvali and killed a few Russian soldiers. Russia’s full-scale war was deemed by some at the time as having been disproportionate.\textsuperscript{77}

Since the quantitative approach to proportionality has drawbacks, some states have argued that proportionality should also serve as a deterrent against future acts of aggression. While the first kind of proportionality could be considered as quantitative (a tit-for-tat approach), the latter variation takes a more qualitative one in that it seeks to address the reason why the attack occurred in the first place. Such a “qualitative” approach to proportionality was claimed by Israel during its


\textsuperscript{77} Ed. By John R. Crook, “Contemporary Practice of The United States Relating to International Law: General International and U.S. Foreign Relations Law: U.S. Statements Responding to Russia’s Intervention into Georgia and Recognition of South Ossetia and Abkhazia”, 103 Am. J. Int’l L. 138, 139 (2009): “A Department of State statement issued the same day again stressed Georgia’s sovereignty and territorial integrity, and emphasized the threat to civilians from Russia’s use of missiles and strategic bombers. Deputy Secretary of State John D. Negroponte summoned Russian Charge d’Affaires Darchiyev today to press Moscow to cease military operations in Georgia. The Deputy Secretary said that we deplore today’s Russian attacks by strategic bombers and missiles, which are threatening civilian lives. These attacks mark a dangerous and disproportionate escalation of tension, as they occur across Georgia in regions far from the zone of conflict in South Ossetia.” See generally U.S. Dep’t of State Press Statement No. 2008/627, Russian Actions in Georgia (August 8, 2008), available at http://www.state.gov/r/pa/prs/ps/2008/108097.htm.
2006 campaign against Hezbollah.\textsuperscript{78} “Quantitative” and “qualitative” proportionality are not exclusive of one another since goals that could be accomplished under a “qualitative” proportional response could also be undertaken within the limits set forth by “quantitative” proportionality. International jurisdictions such as the ICJ however have been weary to accept the “qualitative” approach to proportionality\textsuperscript{79}, possibly due to the apparent absence of clear limitations, which could consequently invite abuse.

Proportionality also invites the notion of discrimination, which is also known as distinction. Discrimination or distinction, place additional limitations on proportionality in that it forces military planners to undertake an additional balancing test when armed force is used during a conflict. This test weighs on the one hand necessity of achieving a military objective against the risk of inflicting harm to the civilian population.

This test has been one of the staples of the Protocol I of the Geneva Conventions, which purported to the protection of the civilian population during an armed conflict.\textsuperscript{80} Article 51 of the Protocol sets forth this obligation belonging to the warring parties to not only avoid targeting

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\item \textsuperscript{78}“One important principle established by international law...is that the proportionality of a response to an attack is to be measured not in regard to the specific attack suffered by a state but in regard to what is necessary to remove the overall threat.” Israel Ministry of Foreign Affairs, Responding to Hezbollah Attacks from Lebanon: Issues of Proportionality, July 25,2006, as reproduced in James A. Green, “Docking The Caroline: Understanding The Relevance Of The Formula In Contemporary Customary International Law Concerning Self-Defense”, 14 CARDozo J. INT’L & COMP. L. 429, 460 (2006).

\item \textsuperscript{79}The International Court of Justice held in the Oil Platforms case that some of the United States’ actions against the Iranian oil platforms were disproportionate because the platforms were destroyed pursuant to a larger military operation, emphasizing that the United States could not destroy the platforms and other vessels in response to the mining of a single American ship. \textit{Oil Platforms} (Iran v. U.S.), 2003 I.C.J. 161, 198-199 available at: http://www.icj-cij.org/docket/files/90/9715.pdf : “As to the requirement of proportionality, the attack of 19 October 1987 might, had the Court found that it was necessary in response to the Sea Isle City incident as an armed attack committed by Iran, have been considered proportionate. In the case of the attacks of 18 April 1988, however, they were conceived and executed as part of a more extensive operation entitled “Operation Praying Mantis” (see paragraph 68 above). The question of the lawfulness of other aspects of that operation is not before the Court, since it is solely the action against the Salman and Nasr complexes that is presented as a breach of the 1955 Treaty; but the Court cannot assess in isolation the proportionality of that action to the attack to which it was said to be a response; it cannot close its eyes to the scale of the whole operation, which involved, inter alia, the destruction of two Iranian frigates and a number of other naval vessels and aircraft. As a response to the mining, by an unidentified agency, of a single United States warship, which was severely damaged but not sunk, and without loss of life, neither “Operation Praying Mantis” as a whole, nor even that part of it that destroyed the Salman and Nasr platforms, can be regarded, in the circumstances of this case, as a proportionate use of force in self-defense.”

\item \textsuperscript{80}Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, available at: http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/f6ec8b9fee14a77fde125641e0052b079.
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civilians during hostilities, but it places a positive obligation on these parties not to undertake attacks which might cause harm to civilians. To a certain extent, one could here argue that the Protocol’s position relative to proportionality might coincide with the “qualitative” approach previously mentioned, since it will require military commanders to use force with great precision and effectively banning large-scale military operations where precise strikes cannot be used.

Due to the fact that humanitarian interventions are armed interventions, it is all but normal that the international law principles of necessity and proportionality apply to such scenarios. The last criteria spelled out in the Caroline case along with necessity and proportionality was imminence. One could ponder whether this criterion is relevant in cases of humanitarian interventions.

While customary international law likely authorizes the use of preemptive self-defense, that is to say the use of force by the defender in anticipation of an imminent attack from an attacker, one could question whether the same standard should be applied to humanitarian interventions. During humanitarian interventions, the intervening party is not being abused (or about to be

81Ibid. “Art 51. - Protection of the civilian population 1. The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. To give effect to this protection, the following rules, which are additional to other applicable rules of international law, shall be observed in all circumstances. 2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited. 3. Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities. 4. Indiscriminate attacks are prohibited. Indiscriminate attacks are: (a) those which are not directed at a specific military objective; (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction. 5. Among others, the following types of attacks are to be considered as indiscriminate: (a) an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and (b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”

82Preemptive force should not be mistaken with “preventive” force as the latter concept addresses cases where the imminence of a threat is not necessarily present but likely foreseeable. “Preventive” force remains regarded by legal jurists as unlawful: “The consensus view among most international legal scholars is that the recent American interventions in Kosovo and Iraq, and the Bush administration’s announced plans to use force preemptively against rogue nations and international terrorist organizations, violate core principles of international law. Nations generally do not have a right to use force against the political independence or territorial integrity of other nations. Under the UN Charter, it is the prerogative of each government to control the use of force. Without government sanction, force can be used only in self-defense. While most international law scholars admit that the law includes the right to use force in anticipation of a coming attack, they argue that this justification is available only if an attack is imminent.” John Yoo, “Using Force”, 71 U. Chi. L. Rev. 729, 735 (2004).
abused), but a third party. Third parties could very well be a single state or an international organization grouping different states such as the United Nations\textsuperscript{83} or NATO.\textsuperscript{84} This article advocates that humanitarian interventions should abide by general principles of international law when it comes to the use of force. Consequently, the principles of necessity, proportionality and immediacy (when applicable) are to be abided by if any intervention is to be deemed legal. When cases of “preemptive humanitarian interventions”\textsuperscript{85} arise, as it was purportedly the case during the NATO campaign in Kosovo against Milosevic’s Yugoslavia, the intervening third party should ensure that its use of force is in response of a gross and impending humanitarian rights violation.\textsuperscript{86} A broader interpretation of immediacy would on the other hand open the doors to possible willing or unwilling abuses on the part of the intervening state, and would in any case be likely deemed unlawful because preventive force has not been recognized as a legitimate recourse with respect to international humanitarian law. Bringing about limitations to the use of force also included the

\textsuperscript{83} John Alan Cohan, “The Bush Doctrine and The Emerging Norm of Anticipatory Self-Defense in Customary International Law”, 15 PACE INT’L L. REV. 283, 346 (2003): “Formerly, it was widely acknowledged that the U.N. Charter regards unilateral humanitarian intervention as a violation of state sovereignty and a violation of the use of force prohibited by Article 2(4). 321 On the other hand, some argue that humanitarian intervention does not violate Article 2(4) because it is not a use of force against the territorial integrity or political independence of any state. 322 Since the interventions in Somalia, Rwanda and Kosovo, the majority of the international community has recognized the tragedy of ignoring widespread, acute human suffering, and the legitimacy of coercive humanitarian intervention, particularly when the U.N. Security Council fails to act.”

\textsuperscript{84}See Christopher Clarke Posteraro, “Intervention in Iraq: Towards a Doctrine of Anticipatory Counter-Terrorism, Counter-Proliferation Intervention”, 15 FLA. J. INT’L L. 151, 195 (2002): “In a display of remarkable forthrightness for Western political leaders, NATO never sought to claim its intervention in Kosovo as legal under the U.N. Charter. Rather, it emphasized the legitimacy (not legality) of the action under both the spirit of the U.N. Charter and basic notions of state responsibility to prevent human atrocities. The authoritativeness of their action was bolstered by the paucity of condemnation offered by other U.N. member states. Furthermore, Secretary-General Kofi Annan gave his implicit blessing to the NATO air campaign, citing it as an example of force that was necessary for the restoration of peace.”

\textsuperscript{85}Ibid. See also
\textsuperscript{86} “Preemptive Humanitarian Interventions” have appeared with the Kosovo campaign when NATO bombed Serbia to forestall an impending and purported ethnic cleansing by Yugoslavs against Albanians in Kosovo. Christopher C. Joyner and Anthony Clark Arend, “Anticipatory Humanitarian Intervention: An Emerging Legal Norm?” 10 U.S.A.F.A. J. LEGAL S. 27, 33 (1999/2000): “The term ‘anticipatory’ is not commonly linked to humanitarian intervention in scholarly debates. In the classic cases often cited--the Congo, the Dominican Republic, East Pakistan, Angola, Kampuchea, Uganda, and Grenada -an intervention occurred following allegations that massive human rights abuses had already taken place. In the Kosovo intervention, however, the massive violations were only beginning. President Clinton spoke of acting ‘to protect thousands of innocent people in Kosovo from a mounting military offensive. While certain atrocities were alleged to have taken place, Clinton explained that one of NATO’s goals was ‘to deter an even bloodier offensive against innocent civilians in Kosovo, and, if necessary, to seriously damage the Serbian military’s capacity to harm the people of Kosovo.’ As a consequence, to develop arguments supporting the notion of anticipatory humanitarian intervention, it is necessary first to explore the arguments relating to anticipatory action.”
requirement that the intervening party show beforehand that they are right in their action. The intervening parties would thus have to bear the burden of proof in most cases. However, the international community has at times decided to reverse that burden of proof after having witnessed gross human rights violations or acts of rapacity emanating from an international actor.

5.2 Burden of Proof

Bearing the burden of proof commonly refers to the obligation that belongs to a claimant to show the validity of his or her allegation. This rule has long been recognized as a fundamental principle of international law, as well as most private law systems around the world.87 This principle, according to which the claimant bore the burden of proof, was reiterated many times by the International Court of Justice (ICJ) in the Corfu case,88 or more recently in the Oil Platforms case.89

Whereas the general rule consists of the fact that the claimant has to bear the burden of proof, there have been some rare exceptions to this rule. One of the most notable exceptions was the case of Iraq in the run-up to the 2003 Iraq War. Iraq invaded Kuwait on August 2, 1990. This

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87 “The burden of proof is clearly on the State (State A) purporting to rely on the customary international law doctrine of anticipatory self-defense to justify the unilateral use of force against another State, (State B). Such a burden of proof is consistent with the general onus of proof in criminal cases in domestic legal systems. For instance, if State A is accusing State B of an impending attack that would breach international law, then the onus is on State A to prove this allegation. Furthermore, it is also consistent with the general principle in international law that ‘the burden of proving the legality of the resort to force rests on the State asserting the necessity of self-defense’.” Lucy Martinez, “September 11th, Iraq and the Doctrine of Anticipatory Self-Defense”, 72 UMKC L. REV. 123, 166 (2003).

88 “It cannot be concluded from the mere fact of the control exercised by a State over its territory and waters that that State necessarily knew, or ought to have known, of any unlawful act perpetrated therein, nor yet that it necessarily knew, or should have known, the authors. This fact, by itself and apart from other circumstances, neither involves prima facie responsibility nor shifts the burden of proof.” Corfu Channel, I.C.J. REPORTS 1949, p. 18

89 “For present purposes, the Court has simply to determine whether the United States has demonstrated that it was the victim of an "armed attack" by Iran such as to justify it using armed force in self-defense; and the burden of proof of the facts showing the existence of such an attack rests on the United States. The Court does not have to attribute responsibility for firing the missile that struck the Sea Isle City, on the basis of a balance of evidence, either to Iran or to Iraq; if at the end of the day the evidence available is insufficient to establish that the missile was fired by Iran, then the necessary burden of proof has not been discharged by the United States.” Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161, 189 available at: http://www.icj-cij.org/docket/files/90/9715.pdf.
invasion was widely recognized as an act of aggression\textsuperscript{90} and condemned by the international community in multiple United Nations Security resolutions.\textsuperscript{91} The Security Council eventually adopted Resolution 678 under Chapter VII of the U.N. Charter, which authorized the use of force against Iraq, \textsuperscript{92} considering that Iraq’s aggression consisted of a threat to peace and international security.\textsuperscript{93} Pursuant to Resolution 678, a coalition of states launched a military campaign against Iraq to force it to withdraw from Kuwaiti territory. An aerial campaign against Iraq to enforce Resolution 678 started on January 17, 1991. The aerial campaign was then followed by a ground troop deployment on January 23, 1991, which caused a swift defeat and led to a retreat of the Iraqi forces when a cease-fire was declared on February 28, 1991.

The United Nations Security Council adopted under Chapter VII Resolution 687 on April 3, 1991 which provided the conditions for the cease-fire. Resolution 687 provided that Iraq had to destroy its Weapons of Mass Destruction arsenal, which consisted mainly of chemical weapons and delivery systems.\textsuperscript{94} In doing so, the Security Council effectively reversed the burden of proof

\textsuperscript{90} Christopher Clarke Posteraro, “Intervention in Iraq: Towards a Doctrine of Anticipatory Counter-Terrorism, Counter-Proliferation Intervention”, 15 FlA. J. INT’L L. 151 at p. 161 (2002):“On August 2, 1990, over 100,000 Iraqi troops and 300 tanks invaded Kuwait. Kuwait had been a peaceful neighbor of Iraq with a modest military force of only 20,000 soldiers.”

\textsuperscript{91} Ibid at p. 161-162: “Former U.S. President George H.W. Bush described this invasion as an act of naked aggression. The United Nations concurred with President Bush and expressed that sentiment in several U.N. Security Council resolutions.”

\textsuperscript{92} “Acting under Chapter VII of the Charter, 1. Demands that Iraq comply fully with resolution 660 (1990) and all subsequent relevant resolutions, and decides, while maintaining all its decisions, to allow Iraq one final opportunity, as a pause of goodwill, to do so; 2. Authorizes Member States co-operating with the Government of Kuwait, unless Iraq on or before 15 January 1991 fully implements, as set forth in paragraph 1 above, the above-mentioned resolutions, to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore International peace and security in the area”. S.C. Res. 678, U.N. Doc. S/RES/678 (November 29, 1990).

\textsuperscript{93}“The Security Council, Alarmed by the invasion of Kuwait on 2 August 1990 by the military forces of Iraq, Determining that there exists a breach of international peace and security as regards the Iraqi invasion of Kuwait, Acting under Articles 39 and 40 of the Charter of the United Nations, 1. Condemns the Iraqi invasion of Kuwait; 2. Demands that Iraq withdraw immediately and unconditionally all its forces to the positions in which they were located on 1 August 1990; 3. Calls upon Iraq and Kuwait to begin immediately intensive negotiations for the resolution of their differences and supports all efforts in this regard, and especially those of the League of Arab States; 4. Decides to meet again as necessary to consider further steps to ensure compliance with the present resolution.” S.C. Res. 660, U.N. Doc. S/RES/660 (August 2, 1990).

\textsuperscript{94} “7. Invites Iraq to reaffirm unconditionally its obligations under the Protocol for the prohibition of the Use in War of asphyxiating, poisonous or other gases, and of bacteriological methods of warfare, signed at Geneva on 17 June 1925, and to ratify the convention on the prohibition of the development, production and stockpiling of bacteriological (biological) and toxin weapons and on their destruction, of 10 April 1972; 8. Decides that Iraq shall unconditionally
and placed it on Iraq. The coalition of states that went to war against Iraq was not anymore the party, which had to show that Iraq possessed WMDs. That burden was now incumbent upon Iraq according to the wording of Resolution 687\(^95\) due to the fact that it had waged a war of aggression against Kuwait and that it had previously used chemical weapons.\(^96\) The example of Iraq provides us with a prime example where the international community reversed the burden of proof on a state. In that instance, the international community imposed such a drastic measure probably due to the fact that Iraq had become a pariah state following the aggression it had committed against

\(^{95}\) Security Council Resolution 687 first of all states that Iraq is the only international actor responsible for the invasion of Kuwait. Security Council Resolution 687 then points out to prior instance’s of gross and egregious behavior on Iraq’s part which included the use of missiles, the attempted development of a nuclear weapons program and its support for acts of terror (“Aware of the use by Iraq of ballistic missiles in unprovoked attacks and therefore of the need to take specific measures in regard to such missiles located in Iraq, Concerned by the reports in the hands of Member States that Iraq has attempted to acquire materials for a nuclear-weapon's program contrary to its obligations under the Treaty on the Non-Proliferation of Nuclear Weapons of 1 July 1968, […] Deploring threats made by Iraq during the recent conflict to make use of terrorism against targets outside Iraq and the taking of hostages by Iraq …”). The Resolution then seeks to apply sanctions on Iraq which purport to obtain the total destruction of its WMDs and missiles which can reach further than 150 kilometers (“Decides that Iraq shall unconditionally accept the destruction, removal, or rendering harmless, under international supervision, of: (a) All chemical and biological weapons and all stocks of agents and all related subsystems and components and all research, development, support and manufacturing facilities related thereto; (b) All ballistic missiles with a range greater than 150 kilometers and related major parts, and repair and production facilities.”). Point 9 places on Iraq the burden of stating how many missiles it possesses, as well as the WMD sites to the U.N. the Secretary-General. Resolution 687 also calls for Iraq to be subjected to multiple inspections so as to ensure that it complies with the 1968 Treaty on the Non-Proliferation of Nuclear Weapons. Furthermore, paragraph 14 highlights the fact that these undertakings constitute “actions to be taken by Iraq” and that they constitute a burden solely on Iraq.

its neighbors, namely Iran where it used chemical weapons and later Kuwait where it used ballistic missiles. Saddam Hussein’s reputation for cruelty towards his own population also possibly reinforced the international community’s perception that he had a propensity to commit acts of violence with any kind of weapon, heightening the danger he represented to international peace and security.

While establishing which party bears the burden of proof is an important component in demonstrating whether a crime has been committed or not or whether an obligation has been breached, a just as important component regards the threshold of evidence required to prove whether such an act was committed. Jurists usually refer this “threshold” as the standard of proof. Domestic US evidence law can provide us with a prime example of what the standard of proof is. In the United States everyone is more or less familiar with the “beyond a reasonable doubt” standard. This means that the accusing party, who bears the burden of proof, has to demonstrate that the defendant has committed the charged infraction “beyond a reasonable doubt”. In this case, “beyond a reasonable doubt” does not mean that a criminal infraction needs to be proven by the prosecution beyond any doubt. The general understanding of “beyond the reasonable doubt” is that no other reasonable explanation exists that would justify as to why such an event or infraction happened in such a way.

In the international realm, the International Court of Justice (I.C.J.) demands that evidence produced before it be “fully conclusive”. This standard has been interpreted by the Court as

97 One could for instance cite the case of the March 1988 gassing with chemical weapons of Al-Halabja ordered by Saddam Hussein against Kurds. This chemical weapons attack resulted in the death of 5,000 civilians. JOSEPH CIRINCIONE, DEADLY ARSENALS: TRACKING WEAPONS OF MASS DESTRUCTION, (Brookings Institution Press, 2002) at p. 164-5.

98 “The statements attributed by the witness Kovacic to third parties, of which the Court has received no personal and direct confirmation, can be regarded only as allegations falling short of conclusive evidence. A charge of such exceptional gravity against a State would require a degree of certainty that has not been reached here. […] The Court considers that, even in so far as these facts are established, they lead to no firm conclusion. It has not been legally established that Yugoslavia possessed any GY mines, and the origin of the mines laid in Albanian territorial waters remains a matter for conjecture. It is clear that the existence of a treaty, such as that of July 9th, 1946, however close may be the bonds uniting its signatories, in no way leads to the conclusion that they participated in a criminal act. On its side, the Yugoslav Government, although not a party to the proceedings, authorized the Albanian Government to produce certain Yugoslav documents, for the purpose of refuting the United Kingdom contention that the mines had been laid by two ships of the Yugoslav Navy. As the Court was anxious for full light to be thrown on the facts alleged, it did not refuse to receive these documents. But Yugoslavia’s absence from the proceedings meant that these documents could only be admitted as evidence subject to reserves, and the Court finds it unnecessary to express an opinion upon their probative value. The Court need not dwell on the assertion of one of the Counsel for the Albanian Government that the minefield might have been laid by the Greek Government. It is enough to say that this was a mere
meaning that it be “fully convinced that allegations made in the proceedings, that the crime of genocide of the other acts enumerated in Article III have been committed, have been clearly established.” 99 The standard adopted by the I.C.J. is clearly of a heightened nature. It resembles more the domestic criminal common law standard of “beyond a reasonable doubt” than any other standard.

5.3 The Elements of Proof

We suggest that the existence of evidence to mass atrocities should transfer the burden of proof to the actor involved in genocide. The basic elements of proof needed in our opinion are based on three categories:

1. Past offenses (humanitarian and others)

2. Call for Humanitarian rights violations (call for genocide)

3. Will and Means.

Past offences create a foundation to the claim of abuse of the rights and privileges of sovereignty. It is a position that looks at the track record of the accused regime and looks for a pattern that might lead to mass atrocities. Historical scholarship showed that genocides to not develop over night but are actually a result of a complex process that erupts in a given time after a long period

99 “The Court has long recognized that claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive (cf. Corfu Channel (United Kingdom v. Albania), Judgment, I.C.J. Reports 1949, p. 17.). The Court requires that it be fully convinced that allegations made in the proceedings, that the crime of genocide or the other acts enumerated in Article III have been committed, have been clearly established. The same standard applies to the proof of attribution for such acts. In respect of the Applicant’s claim that the Respondent has breached its undertakings to prevent genocide and to punish and extradite persons charged with genocide, the Court requires proof at a high level of certainty appropriate to the seriousness of the allegation [...] The Court must itself make its own determination of the facts which are relevant to the law which the Applicant claims the Respondent has breached. This case does however have an unusual feature. Many of the allegations before this Court have already been the subject of the processes and decisions of the ICTY. The Court considers their significance later in this section of the Judgment.” Case Concerning Application of the Convention of the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro). Judgment, I.C.J. Reports 2007, p. 190-191.
of gestation. Be it the holocaust or the case of the Rwanda genocide there was a track record of a long period of human rights violations in a massive scale.100

In the case of the holocaust the extermination of European Jewry was preceded with an eight-year period of systematic and extreme discrimination that aimed to exclude Jews from German society.101 The Nuremberg laws were a point in a process that resulted in the removal of Jews from all societal function and only after that goal was achieved continued to the physical extermination of Jews.102 A similar process took place in Rwanda where the Tutsi minority was excluded from all political power and on occasion subjected to physical danger during the “Republican era” of Rwanda and only later on, after two decades in par with the decline of the Hutu hegemony developed to a full blown Genocide.103

The second element we are suggesting to examine is Call for Humanitarian rights violations. This element played an important part in the political discourse that lead to the NATO operation in Libya. Kaddafi made public threats threatening to destroy the city of Benghazi that was a rebel center.104 These lead NATO to act fearing that he will act on these threats and destroy the heavily populated city.105 When looking at the Rwanda example it seems that there were ample warning signs for the mass atrocities. These were specifically centered on the Radio Télévision des Milles Collines (RTLM) that incited the murder.106 The ICTR pointed to several foundations that create an incitement to genocide. In a case dubbed the “media trial”,107 the court

107 Prosecutor V. Nahimana, Barayagwiza, & Ngeze. Case No. ICTR 99-52-A
noted that a call for active annihilation of a group,\textsuperscript{108} is determined by analyzing the intent of the publisher, which is determined by the context of the statements.\textsuperscript{109} There is no need to show causation,\textsuperscript{110} the chamber made it clear that freedom of speech should not be interpreted widely in a case where the majority opinion that holds political power attacks a minority group on an ethnic basis:

“The Chamber notes that international standards restricting hate speech and the protection of freedom of expression have evolved largely in the context of national initiatives to control the danger and harm represented by various forms of prejudiced communication. The protection of free expression of political views has historically been balanced in the jurisprudence against the interest in national security. … The special protections for this kind of speech should accordingly be adapted, in the Chamber’s view, so that ethnically specific expression would be more rather than less carefully scrutinized to ensure that minorities without equal means of defense are not endangered”\textsuperscript{111}

The last element would be the question of will and means. The existence of both the will and the means to carry out mass atrocities should be determined in relation to the level of incitement and prior bad acts of the regime. The more aggressive and threatening the regime language and the more human rights track record the lower the threshold should be concerning the will and means.

\textbf{6. Before whom must the action be taken to?}

One of the major challenges has to do with the question of assessment, who should reviewe by the evidence and determine a cause for humanitarian intervention? Clearly it has to be a legitimate international body of states. The first such body that comes to mind is the United Nations Security Council. The UN Charter affords the UN Security Council the power to “\textit{investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance}}
of international peace and security.” 112 The United Nations, and more specifically the UN Security Council has been responsible for international peace and security since the end of the Second World War. The Security Council has authorized the use of force by states or groups of states, and it has withheld its authorization in other cases, or has outright condemned states for having used force in other cases. According to the doctrine of right to protect the security-council is the designated organ to make such decisions.113 But there are several factors that pose a serious questions mark on the validity of these arguments.

The permanent members, which have a right to veto which they use to advance their respective interests and that of their allies they wish to defend. The Security Council is clearly not an institution that is “conflict of interest” free, this being a serious issue to be contemplated while considering preventive force. This topic, just as the topic of the representativeness of the UN Security Council, is vast and goes beyond the scope of this research. Nonetheless, the issue of conflicts of interest within the UN Security Council remains maybe one of its major structural flaws that need to be addressed in the context of humanitarian intervention as we can see most recently in the veto power used by Russia and China to block a referral of Syria to International Criminal Court.114

We believe that NATO can be seen as an organization with the legitimacy to take such actions. This is based on several foundations discussed in a recent Brookings institute memorandum:

“[t]he United States favors leaving the decision on whether or not to use force up to the organization that would be responsible for undertaking such action—in this case to NATO. The

Clinton Administration has argued that if nineteen democracies deem the threat or use of force necessary to right a specific wrong, then that fact in and of itself provides sufficient justification and legitimacy for the contemplated action. No country would accept constraints on its freedom to act on behalf of its own interests in the manner and at a time it judges best. It argues that the same should be true for any organization of democratic states that acts on the basis of consensus.”.¹¹⁵ Such claims are part of International law discourse,¹¹⁶ in light of the lesson learnt from the failure of the league of nations to stop the escalations of the 1930s it seems that responsible multi-national organizations committed to the principles of human rights have the responsibility to take actions in the face of mass atrocities.

7. Case Scenarios - South Sudan and Syria

After discussing cases from the recent past of humanitarian interventions: Rwanda, Kosovo, Libya. We should utilize the principles addressed in this article on two case scenarios where mass atrocities took place in the recent years: Darfur in South Sudan and Syria.

Darfur is an area in South Sudan populated by several ethnic and tribal groups that knew in the 16th and 17th century many clashes. Darfur had a period of sovereignty in the 18th century and during the colonial period it became part of Sudan. The British colonial administration found allies in the region and the colonial era resulted in the creation of a ruling elite, specifically the Arab Muslim communities. This hegemony excluded the African communities that were not Arabic.

¹¹⁶ Simma, supra note 35, more on justifications for NATO involvement see: Schüssler, supra note 50.
speaking and sometimes Christian.\textsuperscript{117} These tensions were accompanied by a traditional disinterest and disregard by the central government in Khartoum and occasional famines in the area. Violence was a natural result of this harsh reality, mainly in the face of the Islamization of Sudan in the first Islamic revolution in Africa.\textsuperscript{118} The understanding that a genocide was taking place in Sudan was not easy,\textsuperscript{119} The conflict in Darfur was described initially as a civil war with no ethnic elements.\textsuperscript{120} The research on the Darfur conflict makes it clear that the attacks on the south were actually initiated on a racial basis and were explained by the north as a war against African’s by the Arabs.\textsuperscript{121} This ambiguity is the result of the form of warfare used in Darfur and the limited coverage of international media. The numbers of the perished remains unclear, anywhere from 200,000 to 400,000 died either directly by attacks of the Khartoum-backed militias (Janjaweeds) or by starvation. 1.8 million displaced persons in Darfur and 200,000 inside Chad were a direct result of the conflict and the attacks included killing of civilians, rape,\textsuperscript{122} and destruction of villages and of farland and cattle herds.\textsuperscript{123}

Was there a genocide in Rwanda? That question remains open. International law scholars have been rethinking the definition of genocide and are broadening the definition beyond the formalistic


\textsuperscript{119} Joyce Apsel, editor. DARFUR: GENOCIDE BEFORE OUR EYES (2005).


\textsuperscript{121} Samuel Totten, Eric Markusen, editors. GENOCIDE IN DARFUR: INVESTIGATING THE ATROCITIES IN THE SUDAN (2006).

\textsuperscript{122} On the use of rape as a part of the conflict see: Tara Gingerich, Jennifer Leaning. The Use of Rape as a Weapon of War in the Conflict in Darfur, Sudan (2004).

interpretation of the genocide prevention treaty. But as one genocide studies scholar pointed out the question has a limited scope:

What emerges from all this is a pattern of violence aimed at the forced removal of specific ethnic communities, a phenomenon much closer to ethnic cleansing than to genocide. This does not mean that the abominations committed against Africans by Arabs, or by other African rebel groups, are less objectionable than those described as genocidal killings, or that ethnic cleansing or “massive violations of human rights,” to use Kofi Annan’s expression, deserve less moral attention. Scale makes little difference when human lives are at stake. What it does mean is that analysts owe it to themselves to be self-conscious in their use of language when it comes to making sense of mass violence.

As we noted before, the development of genocide took several forms in the past century. Mass atrocities that include the targeting of a specific group on ethnic basis can easily develop to genocide and humanitarian intervention can and should take place before an event would develop to a full-blown genocide. The difficulty with Darfur was the question of evidence, it was far from the public eye of the western world and as such it was proved challenging to ascertain the facts on the ground. That being said, when the reality of an ethnic clash backed by the central government was made clear it resulted in an arrest warrant against the president of Sudan and a Security Council resolution. It seems quite clearly that in retrospect the Security Council verifies that mass atrocities took place in Darfur, which according to the model suggested in this article allows for humanitarian intervention.

The most pressing case at this time would be Syria. In January 2011 the “Arab Spring” came to Syria. The civil war started in mid-March 2011 between the Bashar al-Assad regime and different opposing groups. As of September 2013, there have reportedly been 100,000 people that have died in Syria according to the United Nations since the start of the civil war, most of them civilians.
The Syrian government has also been accused by Western powers of having used Sarin gas on August 21, 2013 that caused the death of 1400 people in the suburbs of Damascus.\textsuperscript{128} The reaction from certain international players has been to condemn the atrocities and loss of life in Syria. However, no UN Security resolution was passed that condemned Syria as Russia and China have vetoed such attempts.\textsuperscript{129} The paralysis of the Security Council lead some Western powers,\textsuperscript{130} mainly the U.S, to take some actions in lieu of the inaction of the Security Council and the continued mass violations of human rights in Syria. At some point the discourse included an attempt to organize a strike even tough there was no Security Council resolution authorizing the use of force.\textsuperscript{131}

The use of chemical weapons and the extent of civilians casualties as a result of the actions of the regime and some of the rebel groups were not seen by many as a reason to allow the use of force in Syria.\textsuperscript{132} But the inaction of the Security Council did not stop Congress from allowing a military action. That and the support of Western forces gives to the rebels clearly shows that the regime in Syria lost it position as a sovereign nation in the eyes of the West and is seen as nothing more the

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Michael R. Gordon and Jackie Calmes, “Kerry Casts Obama’s Syria Decision as ‘Courageous’”, THE NEW YORK TIMES, September 1, 2013, available at: http://www.nytimes.com/2013/09/02/world/middleeast/syria.html: “The lobbying blitz stretched from Capitol Hill, where the administration held its first classified briefing on Syria open to all lawmakers, to Cairo, where Secretary of State John Kerry reached Arab diplomats by phone in an attempt to rally international support for a firm response to the Aug. 21 chemical weapons attack in the suburbs of Damascus. Mr. Kerry appeared on five morning talk shows, announcing new evidence — that the neurotoxin sarin had been used in the attack that killed more than 1,400 people — and expressing confidence that Congress would ultimately back the president’s plan for military action.”\textsuperscript{129}

Russia and China Vet Syria Sanctions Threat, AP, October 5, 2011, available at: http://www.independent.co.uk/news/world/politics/russia-and-china-veto-syria-sanctions-threat-2365794.html: “Russia and China vetoed a European-backed UN Security Council resolution that threatened sanctions against Syria if it did not halt its military crackdown against civilians [...] Russia’s UN Ambassador Vitaly Churkin told the council after the vote that his country did not support the Assad regime or the violence but opposed the resolution because it was ‘based on a philosophy of confrontation,’ contained ‘an ultimatum of sanctions’ and was against a peaceful settlement of a crisis. He also complained that the resolution did not call for the Syrian to dissociate itself from ‘extremists’ and enter into dialogue.” An analysis of the Russian position can be found in: Eric Engle, HUMANITARIAN INTERVENTION AND SYRIA, 18 Barry L. Rev. (2012) 129.\textsuperscript{130}


Jillian Blake, Aqsa Mahmud, “A Legal 'Red Line'?: Syria and the Use of Chemical Weapons in Civil Conflict,” 61 UCLA L. Rev. Disc. (2013) 244.\textsuperscript{132}

\end{quote}
a gang of thugs ruling a large territory. It seems that in the Syrian case, according to the model suggested in this article, there is ample reasons to intervene on humanitarian grounds without the approval of the Security Council. There is no doubt that mass violations of human rights are taking place and the regime has shown its will to use chemical weapons and any other action needed to crush the rebellion with no respect to any international law norms. With conclusive proof for past gross violations of human rights and the will and means for future such violations, the regime has lost all its claims for the protections of sovereignty.

8. Summary

The questions we posed at the beginning of this article: when can humanitarian intervention that includes the use of force take place touches the core of international law as a paradigm. The concept of sovereignty frames the worldview of modern jurisprudence and politics and shaped international law in many ways. That being said, there are evolving interpretations of sovereignty. The existence of weak states invites situations in which the difference between the government and the rebel forces are mere semantics rather than substantive. As such international intervention according to the traditional understanding of article 51 if the UN charter proves challenging. The supremacy of sovereignty is not absolute and examining the origins of the term shows this conclusively. Hobbes, Lock and philosophical traditions that created modern political thought linked sovereignty to individual autonomy and at a point where a regime is involved in mass violations of human rights such as genocide lose the protections of the sovereign status.133

The decision of NATO to intervene in Kosovo and later in Libya forged a new path to international law. The decision to act in the face of massive atrocities without the authorization of the Security Council went against the majority opinion of International law scholars and did not abide by the measures outlined in the right to protect doctrine. That being said this new reality in international law seems to usher in a new age in international law. The veto power in the Security Council is a reality and the paralysis of the Security Council lead to the actions taken by NATO in Kosovo and Libya. International law can either acknowledge that shift or stay silent and return to deal with the

minutia of treaty jurisprudence. That being said it is also true that the responsibility to protect discourse does not mean duty to protect. It is true that NATO members do not have the political and economic ability to intervene in all cases but they do have in some. The decision making process of when to intervene in cases of humanitarian catastrophes is, in our opinion, an important part of future scholarship in international law.

We suggest that humanitarian intervention should be based on a similar model of any use of force in the international arena: necessity, proportionality and immediacy (when applicable). As we noted gross violations of human rights do not take place overnight and the historical research of genocide shows that a long period of time is needed to bring a population to try and annihilate a minority. Therefore when cases of “preemptive humanitarian interventions” arise, as it was purportedly the case during the NATO campaign in Kosovo against Milosevic’s Yugoslavia, the intervening third party should ensure that its use of force is in response to a gross and impending humanitarian rights violation. To reach this determination we suggest an approach to the question of evidence. NATO should examine evidence of mass violations of human rights such as genocide and if there are initial reports that suggest mass atrocities are taking place then the burden of proof should be passed to the party accused of committing such crimes. The evidence should be examined in light of three criteria: 1. Past offenses (humanitarian and others) 2. Call for Humanitarian rights violations (call for genocide) 3. Will and Means.

The developments of the past two decades and the lessons learnt from the failure of the League of Nations seems to point us to this new direction.