

# HUMANITARIAN INTERVENTION, ITS MISUSE, AND A PROPOSED SOLUTION THROUGH THE INTERNATIONAL COURT OF JUSTICE

Michael Pappas\*

*Humanitarian interventions are a military tool for the purpose of stopping an ongoing genocide or crime against humanity, and they present a (shaky) legal alternative to the traditional United Nations Security Council resolution for the use of force. Although their legal authority is not formally cemented in international law, there is a growing acceptance of humanitarian interventions among both the international community and scholars for their ability to stop the worst crimes against humanity. However, that growing legitimacy is a double-edged sword because those shaky legal foundations can—and have—been misused by insincere actors, with Russia being the clearest example. This Note assumes a normative perspective that humanitarian interventions, at their best, are good and should be protected from the misuse of states trying to justify their otherwise illegal use of force.*

*In the Introduction, I give an overview of the context of humanitarian interventions. In Part I, I summarize the legal foundations for the traditional use of force and for humanitarian interventions. In Part II, I give three case examples of the use of humanitarian justifications for the use of force including: India's intervention in Bangladesh, NATO's intervention in Yugoslavia, and Russia's intervention in Ukraine. Finally, in Part III, I present a proposed solution to this problem of misuse. The proposed solution will include (1) allowing the International Court of Justice ("ICJ") to adjudicate the legality of a humanitarian intervention, and (2) giving it a three-factor test to establish a framework that the ICJ may use in its adjudication. The three factors of the test include: (1) whether there exists a breach of the Genocide Convention; (2) whether the intervening state made a formal notification for its intervention; and (3) whether the intervention, from a reasonable observer, would result in*

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\* Juris Doctor Candidate 2024, William S. Boyd School of Law, University of Nevada, Las Vegas. M.A. Political Science, University of Nevada, Reno 2017. Future law clerk for Chief Judge Michael Gibbons of the Nevada Court of Appeals. For this Note, I would like to thank Professor White for helping me develop a chaotic grouping of thoughts into a coherent legal argument. I would further like to thank Jeffrey Griffin and the UNR political science department more generally for inspiring in me a passion for human security and human rights. I appreciate the editors of the Nevada Law Journal for taking a chance on international law when they need not have to. And lastly, I would like to thank Jory Hoffman and my entire Jessup Moot Court team for keeping my passion for international law alive.

*a net-positive number of lives saved and not increase regional instability. For this test, if any of the three factors are not met, then the humanitarian justification is invalid.*

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## INTRODUCTION

Russia invaded Ukraine in the spring of 2022.<sup>1</sup> Their casus belli was to “de-nazify” the Ukrainian government and to stop the humiliation and genocide of the ethnic Russians living in the eastern provinces of Ukraine.<sup>2</sup> It said it wanted to restore the pre-2014 government and remove the neo-Nazi, Kyiv Regime.<sup>3</sup> Despite its claims, the current Ukrainian government is not fascist, nor has there been any evidence of systematic crimes against

<sup>1</sup> Rachel Treisman, *Putin's Claim of Fighting Against Ukraine 'Neo-Nazis' Distorts History, Scholars Say*, NAT'L PUB. RADIO, <https://www.npr.org/2022/03/01/1083677765/putin-d-enazify-ukraine-russia-history> [https://perma.cc/H5VD-4A5E] (Mar. 1, 2022, 3:02 PM).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

humanity in the region.<sup>4</sup> Conversely, the Russian military has mass-executed civilians, mass-raped Ukrainian women, and kidnapped Ukrainian children and put them up for adoption as “Russians” in a potential act of ethnic cleansing.<sup>5</sup>

After America left Vietnam and Cambodia shattered in 1973, Pol Pot and his regime took power in Cambodia and implemented one of the worst genocides ever recorded in human history—killing between one and a half and three million people.<sup>6</sup> The Vietnamese intervened in the country and toppled Pol Pot’s regime.<sup>7</sup> Despite the numerous international reports on the atrocities in Cambodia, Vietnam never used a humanitarian justification for their use of force.<sup>8</sup> Instead, it justified its intervention as an act of self-defense against the Cambodian regime and to protect its own security and the security of the region.<sup>9</sup> The international community uniformly denounced the action.<sup>10</sup>

In Bangladesh (what was then East Pakistan), the Pakistani government began Operation Searchlight and cracked down on ethnic Bengalis.<sup>11</sup> Between one million and three million people were killed, and between 200,000 and 400,000 women were raped by the Pakistani military and other Islamist militias.<sup>12</sup> The Indian government intervened with military force, and stated, among other reasons, that it did so to stop the ongoing and developing genocide.<sup>13</sup> It was denounced by the international community for that intervention.<sup>14</sup>

<sup>4</sup> *Id.*

<sup>5</sup> Sarah El Deeb et al., *How Moscow Grabs Ukrainian Kids and Makes Them Russians*, AP NEWS (Mar. 17, 2023, 1:45 PM), <https://apnews.com/article/ukrainian-children-russia-7493cb22c9086c6293c1ac7986d85ef6> [<https://perma.cc/EAA2-5ZX8>]; Yousur Al-Hlou et al., *New Evidence Shows How Russian Soldiers Executed Men in Bucha*, N.Y. TIMES, <https://www.nytimes.com/2022/05/19/world/europe/russia-bucha-ukraine-executions.html> [<https://perma.cc/AN6C-U3AR>] (May 21, 2022); Philip Wang et al., *Russia Using Rape as ‘Military Strategy’ in Ukraine: UN Envoy*, CNN, <https://www.cnn.com/2022/10/15/europe/russia-ukraine-rape-sexual-violence-military-intl-hnk> [<https://perma.cc/QUW3-ZM3D>] (Oct. 15, 2022, 2:35 AM).

<sup>6</sup> JAMES H. WILLBANKS, *ABANDONING VIETNAM: HOW AMERICA LEFT AND SOUTH VIETNAM LOST ITS WAR* 3 (2004); *Center for Holocaust and Genocide Studies, Cambodia*, UNIV. MINN., <https://cla.umn.edu/chgs/holocaust-genocide-education/resource-guides/cambodia> [<https://perma.cc/5FGY-JEZ8>].

<sup>7</sup> See NICHOLAS J. WHEELER, *SAVING STRANGERS: HUMANITARIAN INTERVENTION IN INTERNATIONAL SOCIETY* 78 (2000).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 78–79.

<sup>10</sup> SIMON CHESTERMAN, *JUST WAR OR JUST PEACE? HUMANITARIAN INTERVENTION AND INTERNATIONAL LAW* 79–80 (2001).

<sup>11</sup> PHILIP SPENCER, *GENOCIDE SINCE 1945* 61–63 (2012).

<sup>12</sup> *Id.* at 63–64.

<sup>13</sup> CHESTERMAN, *supra* note 10, at 73.

<sup>14</sup> *Id.*

Starting in 1993, the United Nations (“UN”) Security Council gave *de facto* authority to the North Atlantic Treaty Organization (“NATO”) to establish peace during the conflict in Bosnia and Herzegovina.<sup>15</sup> NATO led Operation Deliberate Force, a bombing campaign, to stop Serbia and Croatia from their ongoing genocide in Bosnia and Herzegovina.<sup>16</sup> The airstrikes stopped a massacre, and brought a temporary end to the humanitarian crimes in the region.<sup>17</sup> Likewise, between March and June of 1999, America, Great Britain, and NATO’s combined forces lead a bombing campaign in Kosovo to stop the genocide and ethnic cleansing of the Muslim populations living in Serbia while also guaranteeing the regional security of the Balkans.<sup>18</sup> After a set of airstrikes, the Serbians stopped their ethnic cleansing.<sup>19</sup> The UN established the International Criminal Tribunal for the Former Yugoslavia to investigate and punish the crimes perpetrated within the decade.<sup>20</sup>

During the eight weeks of the Rwandan genocide, between five-hundred thousand and one million people were systematically executed.<sup>21</sup> Despite a total understanding of what was occurring, no Western military power was willing to intervene to stop the genocide—despite there being ongoing “acts of genocide.”<sup>22</sup> Likewise in Guatemala, when the white, Hispanic population murdered 200,000 ethnically indigenous persons, the international community failed to raise a call.<sup>23</sup> In Sudan, when the northern Muslim tribes were ejecting the southern, Christian farmers in an act of genocide and ethnic cleansing, George W. Bush invoked the term genocide,

<sup>15</sup> TREVOR FINDLAY, *THE USE OF FORCE IN UN PEACE OPERATIONS* 219 (2002).

<sup>16</sup> Vojin Dimitrijevic & Marko Milanovic, *The Strange Story of the Bosnian Genocide Case*, 21 LEIDEN J. INT’L L. 65, 71 (2008).

<sup>17</sup> *Id.*

<sup>18</sup> Nicholas J. Wheeler, *Reflections on the Legality and Legitimacy of NATO’s Intervention in Kosovo*, 4 INT’L J. HUM. RTS. 144, 145 (2000); *Operation Allied Force: 23 March – 10 June 1999*, NATO, <https://www.nato.int/kosovo/all-frce.htm#pb> [<https://perma.cc/4WZW-XE6D>] (May 26, 2006).

<sup>19</sup> Benjamin S. Lambeth, *Operation Allied Force, Lessons for the Future*, RAND CORP. (2001), [https://www.rand.org/pubs/research\\_briefs/RB75.html](https://www.rand.org/pubs/research_briefs/RB75.html) [<https://perma.cc/LK9C-DAY3>].

<sup>20</sup> S.C. Res. 808, ¶ 1 (Feb. 22, 1993).

<sup>21</sup> Jens Meierhenrich, *How Many Victims Were There in the Rwandan Genocide? A Statistical Debate*, 22 J. GENOCIDE RSCH. 72, 73 (2020); Andre Guichaoua, *Counting the Rwandan Victims of War and Genocide: Concluding Reflections*, 22 J. GENOCIDE RSCH. 125, 125–26 (2020).

<sup>22</sup> Samantha Power, *Bystanders to Genocide*, ATLANTIC (Sept. 2001), <https://www.theatlantic.com/magazine/archive/2001/09/bystanders-to-genocide/304571/> [<https://perma.cc/2H9J-BP3P>]. See generally GÉRARD PRUNIER, *THE RWANDA CRISIS: HISTORY OF A GENOCIDE* (1995).

<sup>23</sup> See Victoria Sanford, *From Genocide to Femicide: Impunity and Human Rights in Twenty-First Century Guatemala*, 7 J. HUM. RTS. 104, 106 (2008).

yet the international community refused to respond.<sup>24</sup> Right now, there are multiple UN opinions recognizing the ongoing ethnic cleansing in Xinjiang province of the People's Republic of China.<sup>25</sup> Not a single state has considered any form of military action to intervene and stop the genocide.<sup>26</sup>

Humanitarian intervention has a muddled history. After the Holocaust, the international community has accepted tacit responsibility for the various states to intervene and stop genocides when they occur.<sup>27</sup> The cases above illustrate a snapshot of the few times military force was used to stop genocides or other crimes against humanity. Sometimes, the justification was explicit; sometimes, the justification was comingled with realpolitik reasons; and in almost every case, the justifications were muddy. In some of the cases, the intervention worked. In other cases, the interventions were ineffective. In the case of Ukraine, Russia's justification for its intervention had no legitimate basis in reality, and Russia has further perpetrated the very crimes in the region it is claiming to prevent.<sup>28</sup>

Part of that muddled history comes from the murky legality of humanitarian interventions. Although not formally legal like a UN Security Council resolution, there is a growing consensus among scholars and the international community in general that a military intervention for the limited purposes of stopping crimes against humanity is not only legal but morally obligatory—even in the absence of a UN Security Council resolution.<sup>29</sup> But there is no institution that guarantees the sincerity or legality of the justification, and countries have abused that justification to shield their interventions from international criticism.<sup>30</sup> That then comes at the cost of the legitimacy of a tool that is morally important to protect. Acts of genocide and

<sup>24</sup> Nsongurua J. Udombana, *When Neutrality Is a Sin: The Darfur Crisis and the Crisis of Humanitarian Intervention in Sudan*, 27 HUM. RTS. Q. 1149, 1149–50 (2005); Scott Straus, *Darfur and the Genocide Debate*, 84 FOREIGN AFFS. 123, 123 (2005); see also Alex de Waal, *Reflections on the Difficulties of Defining Darfur's Crisis as Genocide*, 20 HARV. HUM. RTS. J. 25, 32 (2007).

<sup>25</sup> OFF. OF THE U.N. HIGH COMM'R FOR HUM. RTS., OHCHR ASSESSMENT OF HUMAN RIGHTS CONCERNS IN THE XINJIANG UYGHUR AUTONOMOUS REGION, PEOPLE'S REPUBLIC OF CHINA 43, 44, 45 (Aug. 31, 2022), <https://www.ohchr.org/sites/default/files/documents/countries/2022-08-31/22-08-31-final-assessment.pdf> [<https://perma.cc/7BPB-R6TD>].

<sup>26</sup> See Lindsay Maizland, *China's Repression of Uyghurs in Xinjiang*, COUNCIL ON FOREIGN RELS., <https://www.cfr.org/background/china-xinjiang-uyghurs-muslims-repression-genocide-human-rights> [<https://perma.cc/8Y9S-W3VX>] (Sept. 22, 2022, 11:30 AM).

<sup>27</sup> G.A. Res. 260 A (III), art. I Convention on the Prevention and Punishment of the Crime of Genocide (Jan. 12, 1951) [hereinafter *Genocide Convention*] (with an explicit provision that calls for preventative action if there is an ongoing genocide).

<sup>28</sup> *Supra* note 5 and accompanying text.

<sup>29</sup> See ALEX J. BELLAMY, RESPONSIBILITY TO PROTECT: THE GLOBAL EFFORT TO END MASS ATROCITIES 2 (2009). See generally Amitai Etzioni, *Sovereignty as Responsibility*, 50 ORBIS 71 (2006).

<sup>30</sup> Russia, for example, has used humanitarian justifications for their invasion of Ukraine. See Treisman, *supra* note 1.

ethnic cleansing must be stopped, and humanitarian interventions are one of the only tools that has been successful in stopping crimes against humanity where they occur.<sup>31</sup>

This Note takes the normative stance that humanitarian intervention, as a limited action to stop a genocide or ethnic cleansing, is morally good and should be protected. It further proposes an international, legal mechanism that states must use to legitimize their humanitarian justifications for the use of force. That mechanism requires the International Court of Justice (“ICJ”) to adjudicate the legitimacy of a humanitarian-intervention justification using a three-pronged test. The three-pronged test requires: (1) a breach of the Genocide Convention; (2) a formal notification from the intervening state declaring its intention to perform a humanitarian intervention and what the end conditions will be for that intervention; and (3) a reasonable analysis to ensure that the intervention will result in a net-positive number of lives saved and will not increase regional instability. The International Court of Justice has filled the first role already—in the Bosnian Genocide Case—and it will do so again soon in the most recent Russia-Ukraine case.<sup>32</sup>

As a matter of organization, this Note will first discuss the legality of the use of force, both using the traditional legal means of the Security Council and through humanitarian intervention. Then it will present multiple case studies of humanitarian-intervention justifications and explore, practically, how countries have used those justifications. Further, it will explore how various legal institutions, and the world community, have responded to either the justifications or interventions. Those cases will include India’s intervention into Bangladesh in 1971, NATO’s intervention into the Balkans from 1993–1999, and Russia’s use of force into Ukraine in 2022. All three cases failed to have formal security council resolutions authorizing the use of force, and all three cases have had progressively greater involvement with the international legal institutions declaring (or failing to declare) the presence of a humanitarian justification. Lastly, this Note will propose the formal legal solution and mechanism to ratify the humanitarian justification.

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<sup>31</sup> TAYLOR B. SEYBOLT, HUMANITARIAN MILITARY INTERVENTION: THE CONDITIONS FOR SUCCESS AND FAILURE 93–95 (2007).

<sup>32</sup> See *Allegations of Genocide Under Convention on Prevention and Punishment of Crime of Genocide (Ukr. v. Russ.)*, Order, 2022 I.C.J. 211, ¶¶ 17–23 (Mar. 16); see also *Application of Convention on Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro)*, Judgment, 2007 I.C.J. 43, ¶¶ 377–415 (Feb. 26).

## I. THE LEGALITY OF THE USE OF MILITARY FORCE IN INTERNATIONAL LAW

There are two broad sources of international law: Treaties and Custom.<sup>33</sup> Treaties are formal agreements between various states, and customs are actions and behaviors that are so ubiquitous as to form international law.<sup>34</sup> A unique subset of international law is the theory of *jus cogens*.<sup>35</sup> *Jus cogens* are inviolable principles that hold a special place in international law and represent fundamental, universal rights stemming from Natural Rights Theory.<sup>36</sup> The Vienna Convention on the Law of Treaties—a foundational international treaty detailing how other treaties should be interpreted and understood—includes a special carveout provisions that prohibits any state from acting on a treaty that violates *jus cogens*.<sup>37</sup> Thus, *jus cogens* rights are non-derogable, and they generally protect against genocide, slavery, torture, and other gross violations of human rights.<sup>38</sup>

The use of force and the protection of human rights draw their legality from either formal treaties or customary international law (or both).<sup>39</sup> The right of self-defense and the use of force through a security council resolution are explicit treaty obligations established in the UN Charter.<sup>40</sup> The protection of human rights from crimes against humanity—the foundation which humanitarian intervention draws its legal justification from—is enshrined in both international treaties and customary international law, and it is covered under the rules of *jus cogens*.<sup>41</sup>

A. *The UN Security Council and the Right of Self-Defense*

The Charter of the UN establishes only two formal legal justifications for the use of force in the current international regime: (1) a UN Security Council resolution, or (2) a legitimate act of self-defense.<sup>42</sup> The UN Charter holds that the Security Council is in charge of maintaining peace and security within the international system.<sup>43</sup> It is authorized to vote on any matter

<sup>33</sup> Statute of the International Court of Justice art. 38; HUMANITARIAN INTERVENTION VOL. II 28 (James Pattison ed., 2014); *see also* PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 2, 35 (7th ed. 1997).

<sup>34</sup> MALANCZUK, *supra* note 33, at 36, 39.

<sup>35</sup> Mark W. Janis, *The Nature of Jus Cogens*, 3 CONN. J. INT'L L. 359, 359 (1988).

<sup>36</sup> *Id.* at 359–62.

<sup>37</sup> *See, e.g.*, Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331.

<sup>38</sup> MALANCZUK, *supra* note 33, at 58.

<sup>39</sup> *See e.g.*, U.N. Charter arts. 24, 51. *See generally* Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135.

<sup>40</sup> U.N. Charter art. 24–26, chs. VI–VII.

<sup>41</sup> Jean Allain, *The Jus Cogens Nature of Non-Refoulement*, 13 INT'L J. REFUGEE L. 533, 534–38 (2001).

<sup>42</sup> U.N. Charter arts. 2(4), 25–26, 40–42, 51.

<sup>43</sup> *Id.* arts. 12, 24.

to protect the international community including the use of force.<sup>44</sup> The Security Council holds fifteen members with five of those members being permanent: the United States, Great Britain, France, Russia (formally the Soviet Union), and China.<sup>45</sup> All five permanent members can unilaterally veto any resolution without any explanation.<sup>46</sup> These five permanent members were the great powers that were victorious after World War II, and the function of their veto was to prevent another world war.<sup>47</sup> Thus, the offensive use of force was justifiable only with the explicit permission of all the Great Powers.

Regardless of the reason why, the UN Security Council almost never authorizes the use of force.<sup>48</sup> The UN Security Council, with the permanent member veto, has refused to authorize nearly every military intervention since its creation.<sup>49</sup> The first (and one of the last) major military uses of force authorized by the body was the Allied Occupation of Korea—only doing so because the Soviet Union boycotted the body.<sup>50</sup> The Council also authorized limited uses of force in Bosnia and Kosovo in the 1990s to maintain regional security after the breakup of Yugoslavia.<sup>51</sup> Beyond those examples, the Security Council usually passes symbolic measures of support, but those measures do not endorse or condone any action.<sup>52</sup> As in Balkans in 1999, the UN Security Council did not authorize NATO to conduct airstrikes into Serbia—NATO did that on its own initiative.<sup>53</sup> It merely stated that the ongoing conduct was a threat to international security and called on the parties to cease their hostilities and conform to the treaties signed in the years prior.<sup>54</sup>

Absent a formal UN Security Council resolution, the UN allows a state to defend itself against armed attack.<sup>55</sup> Article 51 of the UN Charter enshrined the intuitive right that a state may defend itself if it is attacked. But, Article 51 is explicit that the attack must be an “armed attack,” the defend-

<sup>44</sup> *Id.* arts. 24–27, ch. VII.

<sup>45</sup> *Id.* art. 23.

<sup>46</sup> *Id.* art. 27(3).

<sup>47</sup> Thomas Schindlmayr, *Obstructing the Security Council: The Use of the Veto in the Twentieth Century*, 3 J. HIST. INT'L L. 218, 218 (2001).

<sup>48</sup> *Id.* at 226–30; Erik Voeten, *The Political Origins of the UN Security Council's Ability to Legitimize the Use of Force*, 59 INT'L. ORG., 527, 527–29 (2005).

<sup>49</sup> Schindlmayr, *supra* note 47, at 225–28.

<sup>50</sup> Louis Fisher, *The Korean War: On What Legal Basis Did Truman Act?*, 89 AM. J. INT'L L. 21, 21 (1995); S.C. Res. 82 (June 25, 1950); S.C. Res. 83 (June 27, 1950).

<sup>51</sup> FINDLAY, *supra* note 15, at 256.

<sup>52</sup> See S.C. Res. 1160 (Mar. 31, 1998) (Security Council resolution that called for the end of violence in Kosovo but provided no authorization for the use of force); see also WHEELER, *supra* note 7, at 259.

<sup>53</sup> WHEELER, *supra* note 7, at 259.

<sup>54</sup> *Id.* at 260.

<sup>55</sup> U.N. Charter art. 51.



ing state must immediately report their self-defense to the UN, and the legal justification for the self-defense lasts only as long as there is an absence of a UN Security Council resolution.<sup>56</sup> Because of the inability of the Security Council to pass any meaningful resolutions that authorize the use of force, various states have attempted to interpret Article 51 broadly, and those interpretations usually involve “prevent[ative]” actions of self-defense.<sup>57</sup> The UN and the ICJ have been critical of these interpretations,<sup>58</sup> and they usually restrict “prevent[ative]” acts of self-defense to truly imminent attacks.<sup>59</sup>

The UN Charter then prevents all other forms of the use of force in international relations under Article 2(4).<sup>60</sup> Because nearly every state is a member of the UN, any other violation of a state’s sovereignty is illegal unless there is an alternative legal justification that can be employed.<sup>61</sup> This non-intervention principle even extends beyond traditional uses of force.<sup>62</sup> For example, the ICJ, in the *Nicaragua* case, extended this principle to indirect uses of force when it held that America violated international law when it funded the Contras in Nicaragua even though it never formally used force itself.<sup>63</sup> The court further held, in their *Uganda-Democratic Republic of Congo* decision, that indirect uses of force, and even non-uses of force, can violate the non-intervention principle.<sup>64</sup>

The court’s decision and Article 2(4) represent the international community’s investment in the principle of sovereignty, which is both the right of non-interference from outside entities and the right of a state to govern its own affairs without any foreign and coercive influence.<sup>65</sup> Sovereignty is the necessary definitional condition for the existence of a state,<sup>66</sup> and it is both the basis of the international system and the foundation for the entire system of public international law.<sup>67</sup> Sovereignty is not an “end-all-be-all” principle that prevents every military intervention, and there are legal avenues that allow for the violation of a state’s sovereignty (mainly a Security

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<sup>56</sup> *Id.*

<sup>57</sup> *E.g.*, *Oil Platforms (Iran v. U.S.)*, Judgment, 2003 I.C.J. 161, ¶¶ 25, 49 (Nov. 6).

<sup>58</sup> *See id.* at ¶ 78 (holding that the United States launching a missile preemptively at Iran was not self-defense).

<sup>59</sup> *See id.*

<sup>60</sup> U.N. Charter art. 2(4).

<sup>61</sup> *See Member States*, UNITED NATIONS, <https://www.un.org/en/about-us/member-states> [<https://perma.cc/L6MP-G446>].

<sup>62</sup> *Military and Paramilitary Activities in and Against Nicaragua (Nicar. V. U.S.)*, Judgment, 1986 I.C.J. 14, ¶ 206 (June 27).

<sup>63</sup> *Id.* at ¶ 292.

<sup>64</sup> *Armed Activities on Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2005 I.C.J. 168, 280 (Dec. 19).

<sup>65</sup> NIKOLAOS K. TSAGOURIAS, *JURISPRUDENCE OF INTERNATIONAL LAW: THE HUMANITARIAN DIMENSION* 64 (2000).

<sup>66</sup> *Id.*; U.N. Charter art. 2(4).

<sup>67</sup> TSAGOURIAS, *supra* note 65, at 65.

Council resolution).<sup>68</sup> But the principle is the cornerstone of international law and any attempted military or nonmilitary intervention must contend with sovereignty and find some other legal justification to override the receiving state's sovereignty.<sup>69</sup>

### B. Human Rights

Human rights are enshrined in international law both through customary international law and then through the subsequent codification of multiple international treaties.<sup>70</sup> The Geneva Convention represents the one of the first conventions endorsed by the international community that enumerated certain human rights.<sup>71</sup> In the post-World War II era, the Universal Declaration of Human Rights was the global endorsement of human rights that would subsequently inspire more than seventy human rights treaties.<sup>72</sup> It included protections against slavery,<sup>73</sup> torture,<sup>74</sup> and lawful discrimination,<sup>75</sup> among other things. It further provided that all individuals have a right to life, liberty, and the security of their person.<sup>76</sup>

Although the Universal Declaration of Human Rights was only a non-binding statement that did not directly affect international law, it, through its near universal endorsement, enshrined that these rights existed in the custom of the various states.<sup>77</sup> It further provided the framework for important and wide-reaching treaties including the International Covenant on Civil and Political Rights ("ICCPR") and the International Covenant on Economic, Social, and Cultural Rights ("ICESCR").<sup>78</sup> Both of these covenants are formal treaties that have been ratified by nearly the entire global community.<sup>79</sup> Further, the newly passed UN Charter provided certain nominal

<sup>68</sup> Mohammed Ayoob, *Humanitarian Intervention and State Sovereignty*, 6 INT'L J. HUM. RTS. 81, 82 (2002).

<sup>69</sup> *Id.*

<sup>70</sup> See, e.g., G.A. Res. 2200 (XXI) A, International Covenant on Civil and Political Rights (Dec. 16, 1966) [hereinafter ICCPR]; G.A. Res. 2200 (XXI) A, International Covenant on Economic, Social and Cultural Rights (Dec. 16, 1966) [hereinafter ICESCR].

<sup>71</sup> See generally Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 39, at art. 3.

<sup>72</sup> G.A. Res. 217 (III) A, at Preamble, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter UDHR].

<sup>73</sup> *Id.* art. 4.

<sup>74</sup> *Id.* art. 5.

<sup>75</sup> *Id.* art. 7.

<sup>76</sup> *Id.* arts. 1, 3.

<sup>77</sup> Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287, 289 (1995). See generally UDHR, *supra* note 72.

<sup>78</sup> ICCPR, *supra* note 70; ICESCR, *supra* note 70.

<sup>79</sup> ICCPR, *supra* note 70; ICESCR, *supra* note 70; see also UN Treaty Body Database: ICCPR, UNITED NATIONS, [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/T](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/T)

protections for human rights in Article 1, 13, 55, and 62.<sup>80</sup> Each article establishes that the UN or the international community has nominal responsibilities to ensure that the human rights of all persons are respected.<sup>81</sup> Those rights include protections against persecution based on race, sex, language, and religion,<sup>82</sup> and they further include rights that promote economic, social, cultural, and educational opportunities.<sup>83</sup>

Although the protections they provide are generally broad, ill-defined, and difficult to apply in both internal and external legal settings, these treaties still provide formal sources of international law that can be the bedrock to challenge states not conforming with the basic fundamentals of human rights.<sup>84</sup> They further encourage, as aspirational objectives, the furtherance of human rights in both domestic and international legal systems.

Humanitarian law, which is distinct from human rights law, was established by the First Geneva Convention in 1864—and all the subsequent Geneva Conventions—and it provides protections to all persons (both soldiers and civilians) during times of armed conflict.<sup>85</sup> Humanitarian law is generally intermingled with customary international law and various, near-universally adopted treaties, and “[n]early every State” must follow humanitarian law during times of armed conflict.<sup>86</sup> Although not definitive, this further provides the foundation and support for humanitarian intervention.

### C. *Humanitarian Intervention*

Humanitarian interventions are defined as a limited use of force, employed by an outside state, to stop or prevent an act of genocide, ethnic cleansing, or some other crime against humanity.<sup>87</sup> There are no treaties that formally endorse humanitarian intervention as a justification for a use of force.<sup>88</sup> If a justification for a military intervention to stop crimes against

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reaty.aspx?Treaty=CCPR&Lang=en [https://perma.cc/74XS-76BL]; *UN Treaty Body Database: ICESCR*, UNITED NATIONS, [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CCPR&Lang=en](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CCPR&Lang=en) [https://perma.cc/R7Y3-43LD].

<sup>80</sup> U.N. Charter arts. 1, 13, 55(a), 55(c), 62.

<sup>81</sup> *Id.* Preamble.

<sup>82</sup> *Id.* art. 13(1)(b)(2).

<sup>83</sup> *Id.* art 55(b).

<sup>84</sup> *See* Legal Consequences of Construction of a Wall in Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 ¶ 111 (July 9).

<sup>85</sup> Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 39, art. 3; *see also*, *Convention for the Amelioration of the Condition of the Wounded in Armies in the Field. Geneva, 22 August 1864*, INT’L COMM. RED CROSS: INT’L HUMANITARIAN L. DATABASES, <https://ihl-databases.icrc.org/en/ihl-treaties/gc-1864> [https://perma.cc/5UPW-GXZV].

<sup>86</sup> *What is International Humanitarian Law?*, INT’L. COMM. OF THE RED CROSS (July 2004), [https://icrc.org/en/doc/assets/files/other/what\\_is\\_ihl.pdf](https://icrc.org/en/doc/assets/files/other/what_is_ihl.pdf) [https://perma.cc/BT6E-JVCU].

<sup>87</sup> WHEELER, *supra* note 7, at 2 n.3.

<sup>88</sup> *Id.* at 3.

humanity exists in international law outside of a formal Security Council resolution, then it stems from the more mushy moral responsibilities that requires states to respect human rights and humanitarian law.<sup>89</sup> The justification for a humanitarian intervention stems from a structuralist and policy argument about the purposes of the various treaties that protect against genocide and other crimes against humanity—their existence necessitates some form of enforcement (so the argument goes).<sup>90</sup> Before we discuss those, we must look at the history of humanitarian interventions.

Humanitarian interventions are an odd duck in international law, and they come with a troubled history. Humanitarian interventions stem from European colonial history and the paternalistic attitudes that permeated Europe during their colonial and imperial expansions.<sup>91</sup> Although Europeans agreed that the use of force violated sovereignty, the Westphalian System only applied to European states.<sup>92</sup> Colonizing states would intervene in non-European states to protect industry and ensure that their national businesses, and all of those business's property, were safe.<sup>93</sup> If those states claimed justifications for their interventions, it would fall on a spectrum from paternalism (the infamous “white man’s burden”) to realpolitik or profit motives.<sup>94</sup> This baggage has encumbered the reputation of humanitarian intervention, and many small and middle-size states in the east and global south understandably view humanitarian interventions as a new justification for the old practice of colonialism.<sup>95</sup>

World War II and the Holocaust changed how the international community viewed humanitarian intervention.<sup>96</sup> After the creation of the UN, the body passed the Universal Declaration of Human rights, which expanded the notion of humanity and solidified (albeit in a nonbinding manner) that all humans had certain fundamental rights that even their own states could not infringe.<sup>97</sup> The Nuremberg trials were established to punish the remaining, high-ranking German officials who held some responsibility for

<sup>89</sup> See *id.* at 1–3; see also TSAGOURIAS, *supra* note 65, at 59.

<sup>90</sup> See WHEELER, *supra* note 7, at 3–4; see also CHESTERMAN, *supra* note 10, at 45–47.

<sup>91</sup> See CHESTERMAN, *supra* note 10, at 26–27; MARTHA FINNEMORE, THE PURPOSE OF INTERVENTION: CHANGING BELIEFS ABOUT THE USE OF FORCE 27–28 (Robert J. Art et al. eds., 2003).

<sup>92</sup> See FINNEMORE, *supra* note 91, at 28–29.

<sup>93</sup> *Id.* at 27–28.

<sup>94</sup> See CHESTERMAN, *supra* note 10, at 26–28; see also Martha Finnemore, *Constructing Norms of Humanitarian Intervention*, in THE CULTURE OF NATIONAL SECURITY: NORMS AND IDENTITY IN WORLD POLITICS 153, 163 (Peter J. Katzenstein ed., 1996) [hereinafter Finnemore, *Constructing Norms*].

<sup>95</sup> Finnemore, *Constructing Norms*, *supra* note 94, at 164, 166.

<sup>96</sup> Daniel Levy & Natan Sznaider, *The Institutionalization of Cosmopolitan Morality: The Holocaust and Human Rights*, 3 J. HUM. RTS., 143, 143 (2004).

<sup>97</sup> See *id.*

the genocide.<sup>98</sup> Critically, the Nuremberg trials changed the historical pattern and found that “following orders” was not a sufficient excuse to escape liability for acts of genocide.<sup>99</sup> Along with the wave of other human rights protections, there was a cultural consensus that the Holocaust was a crime that should never happen again, and that the global community had a responsibility to prevent any similar acts in the future.<sup>100</sup>

Thus, the UN passed the Convention on the Prevention and Punishment of the Crime of Genocide in December 1948.<sup>101</sup> The convention defined the act of genocide, and provided an obligation among its signatories to stop an ongoing genocide.<sup>102</sup> The convention demands “[a]ny [c]ontracting [p]arty” to “call upon the competent organs of the United Nations to take such action under the Charter . . . as they consider appropriate for the prevention and suppression of acts of genocide.”<sup>103</sup> Implicit in the language is that states must work through the UN Security Council to satisfy the treaty, and that provides a hang-up for use of military force outside of the Security Council’s approval.<sup>104</sup> However, the emergence of the norm of humanitarian intervention still arose because of this convention in spite of the necessity of the Security Council for a use of force.<sup>105</sup>

Despite the hang-up of needing a Security Council resolution, the Convention on Genocide provided an additional justification for the use of military force for humanitarian purposes outside of the Security Council’s traditional purpose of providing for the “peace and security” of the international community.<sup>106</sup> So long as there existed a Security Council resolution, the Genocide Convention provided a formal, codified justification and established a legal responsibility for states to justify their use of force to prevent crimes against humanity.<sup>107</sup> Although there are problems with the conven-

<sup>98</sup> *Nuremberg Trials*, U.S. HOLOCAUST MEM’L MUSEUM <https://encyclopedia.ushmm.org/content/en/article/the-nuremberg-trials> [<https://perma.cc/2V2T-C34X>] (Jan. 5, 2018).

<sup>99</sup> George A. Finch, *The Nuremberg Trial and International Law*, 41 AM. J. INT’L L. 20, 21 (1947). After the French Revolution when there were trials about the civilian massacre in the Vendée, military officers escaped liability by claiming they were following orders. See David A. Bell, *The French Revolution, the Vendée, and Genocide*, 22 J. GENOCIDE RSCH. 19, 21–22 (2020). See generally DAVID A. BELL, *THE FIRST TOTAL WAR: NAPOLEON’S EUROPE AND THE BIRTH OF WARFARE AS WE KNOW IT* 215–16, 219–20, 227–28, 231–32, 239–40, 243–48 (2007).

<sup>100</sup> *Ratification of the Genocide Convention: Background*, UNITED NATIONS OFF. GENOCIDE PREVENTION & RESP. TO PROTECT, <https://www.un.org/en/genocideprevention/genocide-convention.shtml> [<https://perma.cc/WBK5-BSHL>].

<sup>101</sup> *Genocide Convention*, *supra* note 27.

<sup>102</sup> *Id.* arts. I, II.

<sup>103</sup> *Id.* art. VIII.

<sup>104</sup> See *id.*

<sup>105</sup> Finnemore, *Constructing Norms*, *supra* note 94, at 168.

<sup>106</sup> Gareth Evans, *From Humanitarian Intervention to the Responsibility to Protect*, 24 WIS. INT’L L.J. 703, 704 (2006).

<sup>107</sup> *Id.* at 715; *Genocide Convention*, *supra* note 27.

tion,<sup>108</sup> it presented the first legal formulation for what would become the doctrine of humanitarian intervention.<sup>109</sup>

In 2005, in the World Summit of New York, the international community adopted the provisions on the Responsibility to Protect (“R2P”).<sup>110</sup> This convention was drawn from a proposal created by the International Commission on Intervention and State Sovereignty which sought to deal with the protection of persons in nonconventional warzones.<sup>111</sup> Conventional warfare became less common after World War II, and most conflicts in the subsequent half-century did not fit neatly into the conventional war paradigm of the nineteenth and twentieth centuries.<sup>112</sup> War became more internal, more fractured, and involved more non-state actors than the nation-state-defined, total-wars of Europe.<sup>113</sup> In these new conflicts, civilians were more likely to be targeted for the purpose of terror rather than for traditional military purposes.<sup>114</sup> In total war, civilians are considered acceptable targets because they contribute to the war goals of the nation state.<sup>115</sup> Targeting civilians was a means to an end, and it was not acceptable if it did not contribute to the war-goals of the competing nation state.<sup>116</sup> But in these new conflicts, targeting civilians was the end.<sup>117</sup>

R2P was created to address that problem, and it reinterprets the concept of sovereignty to better protect persons suffering from the persecution of

<sup>108</sup> Multiple scholars have noted that the definition for genocide is under-inclusive. Although it includes national, ethnic, racial, and religious groups, it failed to include political identification—the most common victims of acts of genocide. Lawrence J. LeBlanc, *The United Nations Genocide Convention and Political Groups: Should the United States Propose an Amendment?*, 13 YALE J. INT’L L. 268, 268 (1988). Further, although the UN General Assembly adopted the provisions, not all states in the international community ratified the treaty. America was the most notable exception, and it did not ratify the convention until 1986. Robin Toner, *After 37 Years, Senate Endorses a Genocide Ban*, N.Y. TIMES (Feb. 20, 1986), <https://www.nytimes.com/1986/02/20/us/after-37-years-senate-endorses-a-genocide-ban.html> [<https://perma.cc/GT6P-TYDN>].

<sup>109</sup> See Evans, *supra* note 106, at 705.

<sup>110</sup> Lloyd Axworthy, *RtoP and the Evolution of State Sovereignty*, in THE RESPONSIBILITY TO PROTECT: THE PROMISE OF STOPPING MASS ATROCITIES IN OUR TIME 3, 3 (Jared Genser & Irwin Cotler eds., 2012).

<sup>111</sup> *Id.* at 3–4.

<sup>112</sup> See Frank G. Hoffman, CONFLICT IN THE 21ST CENTURY: THE RISE OF HYBRID WARS 7–9 (2007); see also MARY KALDOR, NEW AND OLD WARS: ORGANIZED VIOLENCE IN A GLOBAL ERA 1–3, 104 (1999).

<sup>113</sup> KALDOR, *supra* note 112, at 1–3.

<sup>114</sup> *Id.*

<sup>115</sup> See CONRAD C. CRANE, BOMBS, CITIES, AND CIVILIANS: AMERICAN AIRPOWER STRATEGY IN WORLD WAR II 13 (1993) (Noting that American strategy in World War II involved targeting “chemical plants [which] would cut artillery shell output, and bombing aircraft engine plants [which] would limit airplane production.” These strategies existed to “cut off the necessary supplies without which the armies in the field cannot exist.”).

<sup>116</sup> See KALDOR, *supra* note 112, at 27.

<sup>117</sup> See *id.* at 102–07.

their home state.<sup>118</sup> It was passed after genocides in the Balkans and Rwanda, and it established that “[e]ach individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing, and crimes against humanity.”<sup>119</sup> Further, the provision states that “[t]he international community should . . . encourage and help States to exercise this responsibility,” and that it has “the responsibility to use appropriate diplomatic, humanitarian and other peaceful means . . . to help protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity.”<sup>120</sup> Implicit in the convention is that sovereignty is no longer the “end-all-be-all” of public international law, and states would not have legal impunity to commit crimes against humanity (not just genocide) against their own, internal populations.<sup>121</sup>

This represents a growing trend in the academic literature of human security.<sup>122</sup> Human rights are a necessary condition to sovereignty, and crimes against humanity would strip a state of their sovereign right against intervention.<sup>123</sup> Sovereignty then, would stop being the final say on the legality of military intervention.<sup>124</sup> Sovereignty still protects against outside intervention, but sovereignty is no longer an axiomatic right of the state.<sup>125</sup> A state may lose its sovereignty, and thus its protection from outside interference, if it perpetuates a genocide.<sup>126</sup>

Further, the R2P contributed toward the improvement of the flawed definition of genocide that is provided by the Genocide Convention. The Convention failed to define political identity as a class susceptible to genocide, and multiple important stakeholders (most notably the United States)

<sup>118</sup> William W. Burke-White, *Adoption of the Responsibility to Protect*, in *THE RESPONSIBILITY TO PROTECT: THE PROMISE OF STOPPING MASS ATROCITIES IN OUR TIME* 18 (Jared Genser & Irwin Cotler eds., 2011).

<sup>119</sup> *Responsibility to Protect: About*, UNITED NATIONS, <https://www.un.org/en/genocideprevention/about-responsibility-to-protect.shtml> [<https://perma.cc/CA3N-G75L>] (quoting G.A. Res. 60/1, 2005 World Summit Outcome, ¶ 138–39 (Sept. 16, 2005)).

<sup>120</sup> *Responsibility to Protect: About*, *supra* note 119 (quoting G.A. Res. 60/1, 2005 World Summit Outcome, ¶ 138–39 (Sept. 16, 2005)).

<sup>121</sup> *See id.*; *see also* G.A. Res. 60/1, 2005 World Summit Outcome, ¶ 138–39 (Sept. 16, 2005). *See generally* FRANCIS M. DENG ET AL., *SOVEREIGNTY AS RESPONSIBILITY: CONFLICT MANAGEMENT IN AFRICA* (1996).

<sup>122</sup> Roland Paris, *Human Security: Paradigm Shift or Hot Air?*, 26 INT’L SEC. 87, 87 (2001). *See generally* BARBARA VON TIGERSTROM, *HUMAN SECURITY AND INTERNATIONAL LAW: PROSPECTS AND PROBLEMS* 2 (2007).

<sup>123</sup> Etzioni, *supra* note 29, at 72; *see also* Fernando R. Teson, *The Liberal Case for Humanitarian Intervention* 1–5 (Fla. State Univ. Coll. of L. Working Paper No. 39, 2001), [https://www.humanrights.ch/cms/upload/pdf/150824\\_Fernando\\_Teson.pdf](https://www.humanrights.ch/cms/upload/pdf/150824_Fernando_Teson.pdf) [<https://perma.cc/HZP2-V8FX>].

<sup>124</sup> Etzioni, *supra* note 29, at 72.

<sup>125</sup> *Id.*

<sup>126</sup> *See* THERESA REINOLD, *SOVEREIGNTY AND THE RESPONSIBILITY TO PROTECT: THE POWER OF NORMS AND THE NORMS OF THE POWERFUL* 55 (2013).

did not originally ratify the convention.<sup>127</sup> The formal point is critical because most genocides and ethnic cleansings after the Holocaust targeted internal political populations.<sup>128</sup> The United States eventually ratified the Genocide Convention,<sup>129</sup> but the R2P addressed the definitional deficiencies of the Convention.<sup>130</sup> States have a general responsibility to protect all humans from the various crimes against humanity including genocide, ethnic cleansing, and other war crimes.<sup>131</sup> Those responsibilities include their own populations and the populations of other states, and they are obligated to intervene if another state targets their internal populations.<sup>132</sup>

The R2P is not without its problems, however. Sovereignty is the foundation of the public international law system, and a system as messy as R2P, which would allow the violation of sovereignty, is not viewed as a universal positive.<sup>133</sup> Further, it was easy for states to support the measure in principle, but when situations that call for action arise, those same states either shirk their responsibility or bring up the old sovereignty claim.<sup>134</sup> Then, there are other states that understandably continue to claim that R2P is another avenue for rich, western, and European powers to excuse their neo-colonial, neo-imperial interventions into poorer states.<sup>135</sup>

However, even if the explicit provisions of the R2P are not adopted as formal law within the international community—and there are justifiable reasons to believe it is—the values and principles of the protection against genocide has achieved the status of *jus cogens*.<sup>136</sup> The UN General Assembly has consistently adopted resolutions confirming the rights of all individuals, and it has reaffirmed those resolutions time and time again.<sup>137</sup> The R2P was

<sup>127</sup> Thomas W. Simon, *Defining Genocide*, 15 WIS. INT'L L.J. 243, 244–45 (1996).

<sup>128</sup> Barbara Harff & Ted Robert Gurr, *Toward Empirical Theory of Genocides and Politicides: Identification and Measurement of Cases Since 1945*, 32 INT'L STUD. Q. 359, 364–65 (1988).

<sup>129</sup> LAWRENCE J. LEBLANC, *THE UNITED STATES AND THE GENOCIDE CONVENTION* 2 (1991).

<sup>130</sup> Evans, *supra* note 106, at 704.

<sup>131</sup> G.A. Res. 60/1, ¶¶ 138–39, 2005 World Summit Outcome, (Sept. 16, 2005).

<sup>132</sup> *Id.*

<sup>133</sup> See Alicia L. Bannon, Comment, *The Responsibility to Protect: The U.N. World Summit and the Question of Unilateralism*, 115 YALE L.J. 1157, 1158–60 (2006).

<sup>134</sup> The UN Has declared China's acts toward the Uighur populations in Xinjiang as constituting crimes against humanity, but other countries, like Saudi Arabia, have invoked China's sovereign right to police their borders. Samuel Osborne, *Saudi Crown Prince Suggests China has 'Right' to Detain Uighur Muslims*, INDEPENDENT (Feb. 24, 2019, 1:36 AM), <https://www.independent.co.uk/news/world/asia/uighur-muslims-china-saudi-arabia-prince-mohammed-bin-salman-a8793916.html> [<https://perma.cc/U7L9-868E>].

<sup>135</sup> Finnemore, *Constructing Norms*, *supra* note 94, at 176. See generally Fidele Ingiyim-bere, *Humanitarian Intervention as Neocolonialism*, in DOMESTICATING HUMAN RIGHTS 57, 57 (2017).

<sup>136</sup> *Jus cogens* is a principle in international law that some things are so fundamental that they hold the force of law even if there exist no formal treaty or convention that establishes them. Janis, *supra* note 35.

<sup>137</sup> See, e.g., G.A. Res. 217 (III) A, *supra* note 72.



invoked in multiple conflicts by parties such as America, NATO, and the Arab League (when they justified intervening in Libya after the Arab spring movements<sup>138</sup>), and Russia—which has used the R2P and the genocide convention to justify its use of force in the Ukraine.<sup>139</sup>

## II. CASE STUDIES

I have selected three case studies to illustrate humanitarian justifications by a state for the use of force against another state: India's intervention into Bangladesh (formally East Pakistan), NATO's intervention into Bosnia and Serbia, and Russia's invasion into Ukraine. I excluded other interventions that had humanitarian outcomes, but which had no formal humanitarian justifications (e.g., Vietnam's invasion in Cambodia). The purpose of these is to view the use, legitimacy, and acceptance of the humanitarian-intervention justification, and to see the causal effect that international legal institutions had on the action's subsequent acceptance.

### A. *India's Intervention into East Pakistan*

Bangladesh was formally East Pakistan after British left the continent in 1947.<sup>140</sup> Although the area was 1500 kilometers away from Pakistan and the population was majority Hindu and the majority spoke Bengali, it was governed by Pakistan as a majority Islamic territory.<sup>141</sup> Most Bengalis wanted closer ties with India, their cultural neighbors, but Pakistan rejected that call, and instead, promoted closer ties with the international Islamic Block.<sup>142</sup> In 1969, Pakistan agreed to hold elections after the General Yahya Khan replaced Ayub Khan.<sup>143</sup> The Awami League, a pro-Bengali, anti-Pakistani political party, gained the overwhelming majority of seats in the East Pakistan Assembly.<sup>144</sup> Negotiations started, but the Pakistani Government feared that the Awami League was harboring separatist sentiment and sought to repress the political party.<sup>145</sup> After stalls in the negotiations, the Pakistani garrisons "struck with devastating force" against the Awami League's leadership and supporters.<sup>146</sup> The attack devolved into mass acts of

<sup>138</sup> Ivo H. Daalder & James G. Stavridis, *NATO's Victory in Libya*, FOREIGN AFFS. (Mar. 2012), <https://www.foreignaffairs.com/articles/libya/2012-02-02/natos-victory-libya> [http://perma.cc/ZAR9-SG8A].

<sup>139</sup> Treisman, *supra* note 1.

<sup>140</sup> WHEELER, *supra* note 7, at 55–56.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 56.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 57 (citing LEO KUPER, *THE PREVENTION OF GENOCIDE* 47 (1985)).

torture, rape, and exterminations.<sup>147</sup> The Bengali's started to form armed resistance against the Pakistani military, but the military responded even harsher and indiscriminately, and it systematically targeted civilian villages.<sup>148</sup>

India's government immediately adopted a resolution declaring Pakistan's actions as "amounting to genocide" because they were unable to share power through a legitimate democratic election.<sup>149</sup> The rest of the international community took the opposite stance and declared that Pakistan had the sovereign right to continue its actions, and that the rest of the international community should practice nonintervention.<sup>150</sup> The Soviet Union gave a tepid statement asking Pakistan to stop but also reemphasized nonintervention.<sup>151</sup> During the conflict, between nine and ten million Bengalis escaped across the border into India and more than a million Bengalis were murdered.<sup>152</sup>

Even though there was an understanding that millions of refugees could cause territorial instability, the international community failed to propose any solution and actively prevented any UN resolution to address the issue.<sup>153</sup> The Security Council only offered international aid and refused to consider any other issue—the UN Secretary General labeled Security Council's response as: "extraordinary apathy."<sup>154</sup> India began to communicate to western leaders that it was beginning to consider intervention as a means to stop the stream of refugees.<sup>155</sup> They trained Bengali refugees as guerilla fighters, and Pakistan retaliated by shelling villages on the border of India.<sup>156</sup> The Security Council held a meeting the next day, and the international community and organs of the UN held that India had an Article 51 right to self-defense for the shelling.<sup>157</sup> But India never explicitly referenced Article 51 in the justifications for their intervention.<sup>158</sup> Instead, it argued that Pakistan was implementing a "refugee aggression" by warring with itself.<sup>159</sup> India subsequently conducted an immediate intervention and over-

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<sup>147</sup> WHEELER, *supra* note 7, at 57.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 58.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 59.

<sup>154</sup> *Id.* (citing U. THANT, VIEW FROM THE UN 424 (1978)).

<sup>155</sup> WHEELER, *supra* note 7, at 61–62.

<sup>156</sup> *Id.* at 59.

<sup>157</sup> *Id.* at 59–60, 60 n.25.

<sup>158</sup> *Id.* at 61.

<sup>159</sup> *Id.* (citing Security Council Resolution, 1606 Meeting, 17 (Dec. 4, 1971)).

whelmed the Pakistani military in Bangladesh.<sup>160</sup> The Pakistani military promptly surrendered, and the genocide was stopped.<sup>161</sup>

Although India never formally invoked humanitarian justifications for its use of force, its justification, and the decision-making that went into its justification, involved a uniquely humanitarian slant.<sup>162</sup> It labeled the conflict as a genocide; it listed the refugee crisis as one of its justifications; and it explicitly chose not to invoke its Article 51 right to self-defense, even when the rest of the international community supported that justification for its use of force.<sup>163</sup> The humanitarian nature differed significantly from prior post-World War II justifications for the use-of-force. American and Soviet military interventions stemmed from strategic or ideological motivations—including America’s justification of the Korea invasion due to its fear of communist expansion or the Soviet intervention into Hungary to stop the anticommunist revolution.<sup>164</sup> Additionally, beyond India’s justifications, the state stopped the ongoing genocide and allowed Bangladesh to assert its independence.<sup>165</sup>

There are justifiable criticisms of India’s response. Observers claim that Prime Minister Gandhi was unpopular and losing electoral support (in part because of the refugee crisis), and that attacking Pakistan provided a dovetailed benefit of solving the refugee crisis while also attacking India’s historic enemy.<sup>166</sup> Likewise, those observers claimed that the result of this military invasion would establish a more friendly neighbor compared to a hostile enemy power, something that would help her domestically.<sup>167</sup> All those issues may be true especially looking at the situation after-the-fact, yet they do not take away from the stated justification and the subsequent action that took place. The global community saw India declare the conflict a genocide, blame Pakistan’s “war on itself” for the refugees, and then swiftly invade and stop the genocide once it was attacked by Pakistan.<sup>168</sup> Further, observers can always find an after-the-fact, realpolitik justification for every example

<sup>160</sup> See Onkar Marwah, *India’s Military Intervention in East Pakistan 1971–1972*, 13 MOD. ASIAN STUD., 549, 564–70 (1979).

<sup>161</sup> *Id.* at 550–51.

<sup>162</sup> WHEELER, *supra* note 7, at 62.

<sup>163</sup> *Id.*

<sup>164</sup> *US Enters the Korean Conflict*, NAT’L ARCHIVES, <https://www.archives.gov/education/lessons/korean-conflict> [<https://perma.cc/9BUK-S9QB>] (May 19, 2021); *Hungary, 1956*, U.S. DEP’T OF STATE ARCHIVE, <https://2001-2009.state.gov/r/pa/ho/time/lw/107186.htm> [<https://perma.cc/AT2V-TAWY>].

<sup>165</sup> *1971 Liberation War, Birth of Bangladesh and Comparison with Present Day Pakistan*, EUR. FOUND. FOR S. ASIAN STUD. (Apr. 2017), <https://www.efsas.org/publications/research-dossiers/1971-liberation-war,-birth-of-bangladesh-and-comparison-with-present-day-pakistan/> [<https://perma.cc/78YR-3HA3>].

<sup>166</sup> WHEELER, *supra* note 7, at 61–62.

<sup>167</sup> *Id.* at 62.

<sup>168</sup> *Id.* at 65–67.

of humanitarian intervention. But the issue with this Note involves the interpretation of the humanitarian justification by observers in the global community at the time the justification took place.

*B. NATO's Intervention into the Former Republic of Yugoslavia*

Between 1993 and 1995, the Security Council authorized the use of force in Bosnia to keep the peace.<sup>169</sup> The authorization formally established a UN taskforce working together with NATO to protect civilians from the ongoing massacres committed by the Serbian forces.<sup>170</sup> The campaigns were ultimately successful, if not flawed and overly costly.<sup>171</sup> The Dayton agreement was signed, and various states achieved their independence.<sup>172</sup>

Conflict flared again in 1998 and 1999, when Albanians in Kosovo sought independence from the Federal Republic of Yugoslavia ("FRY").<sup>173</sup> The international community, perplexed at having to come back to the Balkans to solve another humanitarian crisis, followed the lead of the Clinton administration, which tried to negotiate with the two parties in Paris.<sup>174</sup> Milosevic, the President of the FRY, rejected the negotiation's ultimatum because he thought it heavily favored Kosovo.<sup>175</sup>

The conflict escalated as Milosevic began a new offensive which caused 100,000 refugees to flee to surrounding areas.<sup>176</sup> Unlike the conflict in the first half of the 1990s, here, the Security Council never specifically authorized any entity to use force in the region.<sup>177</sup> The United States and Great Britain wanted a formal Security Council resolution, but both China and Russia had signaled that they would veto any resolution that would authorize a use of force.<sup>178</sup> They, however, did declare that the ongoing activity in the region was a threat to the peace and security of the region under Article VII of the UN Charter—Russia did so begrudgingly and China abstained.<sup>179</sup> And so, without Security Council Authorization, the United States and NATO responded with another air campaign.<sup>180</sup> Operation Allied Force was initiated on March 24, 1999, and NATO forces slowly increased the intensity of the bombing until a ceasefire was called on June 9th.<sup>181</sup>

<sup>169</sup> FINDLAY, *supra* note 15, at 219.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 271–72.

<sup>172</sup> SEYBOLT, *supra* note 31, at 79, 203.

<sup>173</sup> *Id.* at 79–81.

<sup>174</sup> *Id.* at 80–81.

<sup>175</sup> *Id.* at 81.

<sup>176</sup> WHEELER, *supra* note 7, at 259.

<sup>177</sup> SEYBOLT, *supra* note 31, at 81; WHEELER, *supra* note 7, at 260.

<sup>178</sup> WHEELER, *supra* note 7, at 261.

<sup>179</sup> *Id.* at 259–61.

<sup>180</sup> SEYBOLT, *supra* note 31, at 81.

<sup>181</sup> *Id.* at 82.

The military intervention into the FRY and Kosovo highlights a new phase on the topic of humanitarian intervention. It was the first time that humanitarian justifications were given as the main reason used to justify a use of force, and that those justifications, unlike India's justifications during the Bangladesh conflict, stayed front-and-center during the entire conflict.<sup>182</sup> The Clinton Administration argued that it had a "moral responsibility" to stop the ongoing ethnic cleansing.<sup>183</sup> Other justifications employed were couched in terms of regional stability, but those justifications would often call back to a moral responsibility; they were not *realpolitik* attempts to attain strategic benefit in the international arena, but calls to justice to stop an ongoing atrocity.

The international community responded much more positively to the humanitarian interventions than prior interventions (like India's intervention in Bangladesh). Most states supported the intervention—albeit in a very limited context—and even those that did not, quibbled about the method of justification rather than the supporting reasons for intervention.<sup>184</sup> Costa Rica announced that the goals of the intervention were "ethically and morally unquestionable," but they objected to the absence of a Security Council resolution.<sup>185</sup> The German government gave the green light for military intervention "under [the] unusual circumstances of the current crisis situation in Kosovo."<sup>186</sup> But the German government was careful to specify that this was a one-off circumstance, and its endorsement would not give a green light to any future military interventions without a Security Council authorization.<sup>187</sup> Further, the Independent Internal Commission on Kosovo judged the intervention to be technically illegal, but "legitimate because it was unavoidable."<sup>188</sup> The issue would eventually be taken to the International Court of Justice to arbitrate whether Genocide Convention was violated.<sup>189</sup>

The International Court of Justice also declared that the massacres in Bosnia, including the Srebrenica massacre, amounted to a genocide.<sup>190</sup> It held that the massacre was meant to destroy, in whole or in part, the Bosnian Muslims in Srebrenica.<sup>191</sup> The Court held that Serbia did not commit the genocide, but they did hold that it breached the Genocide Conventions be-

<sup>182</sup> WHEELER, *supra* note 7, at 266–67.

<sup>183</sup> *Id.* at 266.

<sup>184</sup> *Id.* at 261, 265.

<sup>185</sup> *Id.* at 264.

<sup>186</sup> *Id.* at 262.

<sup>187</sup> *Id.*

<sup>188</sup> INDEP. INT'L COMM'N ON KOS., THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED 289 (2000).

<sup>189</sup> See generally Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43, 159–92 (Feb. 26).

<sup>190</sup> *Id.* ¶¶ 370, 374(a).

<sup>191</sup> *Id.* ¶ 370.

cause Serbia refused to prevent the Srebrenica massacre.<sup>192</sup> Further, the court did not make an explicit ruling on the NATO intervention, and they refused to hear the case brought by Yugoslavia against the various NATO members.<sup>193</sup>

### C. *Russia's Invasion of Ukraine*

Russia started its invasion of Ukraine on February 24, 2022.<sup>194</sup> The conflict originated in 2014, after President Yanukovych was expelled by popular protest and fled to Russia.<sup>195</sup> Russia's military then occupied and annexed Crimea and conducted a covert military operation to support Russian separatists in the Donetsk and Luhansk regions.<sup>196</sup> There was low-intensity conflict for the next eight years, as Russian separatists, supported by Russia, fought off Ukrainian armed forces.<sup>197</sup> In the latter half of 2021, Russia began deploying a majority of its armed forces on the border of Ukraine and the Belarus-Ukrainian border.<sup>198</sup> Then, in a prerecorded announcement, President Putin proclaimed that Ukraine's government was controlled by Nazis, and that it had perpetrated a genocide against its Russian minorities in the Eastern Donetsk and Luhansk regions.<sup>199</sup> Putin's stated goal was to stop the ongoing genocide, topple the "Nazi" government, and reimplement the government that was ousted in 2014.<sup>200</sup>

The Ukrainian Government immediately presented the case to the ICJ, and it contends, against Russia's assertions, that no genocide, ethnic cleans-

<sup>192</sup> *Id.* ¶ 438.

<sup>193</sup> *See* Legality of Use of Force (Yugoslavia v. U.S.), Summary, 1999 I.C.J. 916, 916–17 (June 2). *See generally* Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43, 159–92 (Feb. 26).

<sup>194</sup> Yuras Karmanau et al., *Russia Presses Invasion to Outskirts of Ukrainian Capital*, ASSOCIATED PRESS (Feb. 24, 2022, 8:47 PM), <https://apnews.com/article/russia-ukraine-putin-attack-a05e7c4563ac94b963134bba83187d46> [https://perma.cc/NZN3-ZH6X]; *see also* Treisman, *supra* note 1.

<sup>195</sup> Roy Allison, *Russian 'Deniable' Intervention in Ukraine: How and Why Russia Broke the Rules*, 90 INT'L AFFS. 1255, 1257–58, 1260–61 (2014).

<sup>196</sup> *Id.* at 1265–66.

<sup>197</sup> *Id.* at 1260.

<sup>198</sup> Becky Sullivan, *Why Belarus is So Involved in Russia's Invasion of Ukraine*, NAT'L PUB. RADIO (Mar. 11, 2022, 5:01 AM), <https://www.npr.org/2022/03/11/1085548867/belarus-ukraine-russia-invasion-lukashenko-putin> [https://perma.cc/YBR6-VUGV]; Dmitry Gorenburg & Michael Kofman, *Here's What We Know About Russia's Military Buildup Near Ukraine*, WASH. POST (Jan. 15, 2022, 7:00 AM), <https://www.washingtonpost.com/politics/2022/01/15/heres-what-we-know-about-russias-military-buildup-near-ukraine/> [https://perma.cc/6MA5-23KS].

<sup>199</sup> 'No Other Option': Excerpts of Putin's Speech Declaring War, AL JAZEERA (Feb. 24, 2022), <https://www.aljazeera.com/news/2022/2/24/putins-speech-declaring-war-on-ukraine-translated-excerpts> [https://perma.cc/SBB9-F52G].

<sup>200</sup> Treisman, *supra* note 1.

ing, or other crime against humanity had taken place in Ukraine.<sup>201</sup> Russia responded to the claim—but not in the ICJ case—by asserting that it was protecting the rights of ethnic Russians in Eastern Ukraine from genocidal acts.<sup>202</sup> Instead, most military and political observers believe that Putin does not believe in his humanitarian justification, but instead, he was trying to provide a legitimate *casus belli* to justify the realpolitik goal of toppling of the pro-western Ukrainian government.<sup>203</sup>

Russia's humanitarian justification is absurd, and Ukraine has performed no legitimate crime against humanity that would justify a humanitarian intervention. However, Russia's use of the humanitarian justification begs the question of why it would bother to assert it as a *casus belli* in the first place. On one hand, the Russian government could just believe the claim, and that would stop the analysis. Oppositely, it may not believe the claim in good faith but is asserting it because it could provide value to Russia either on the international stage or to a domestic audience. Generally, it is hard for outside observers to assume the intent of states because they are not unified entities with unitary goals, and different stakeholders and factions within the state will have different beliefs and goals when acting. But I will assume that both the sincere and cynical goals are true with more persons believing the latter. The latter assumption is more interesting (and important), and it leads to two critical conclusions about the use of humanitarian justifications to legally justify the use-of-force.

First, it indirectly reinforces the notion that humanitarian justification *is good law*. If Putin was merely looking for a legal justification for his invasion, an Article 51 claim of self-defense could have also been used. That justification is formally adopted in the UN Charter, and there was enough evidence—but an insufficient amount for a true justification of legitimate self-defense—for Putin to fake a legal claim to invade Ukraine. Instead, he used a humanitarian justification, and that shows that, even to its critics, humanitarian intervention can be a legitimate and legal justification for a use of force.

Second, the use, oppositely, delegitimizes the act. Humanitarian intervention is a limited tool for the limited purpose of stopping the crimes of genocide and ethnic cleansing. There are understandable criticisms of the tool, and the legitimacy of the tool is founded on its reputation. Every legitimate, successful use increases its legitimacy in the international arena. Every illegitimate use reduces its reputation in the international arena and prohibits, as a matter of international culture, the willingness to use it to stop

<sup>201</sup> Allegations of Genocide Under Convention on Prevention and Punishment of Crime of Genocide (Ukr. v. Russ.), Order, 2022 I.C.J. 211, ¶ 42 (Mar. 16).

<sup>202</sup> *Id.* ¶¶ 32–34, 40.

<sup>203</sup> Timothy Snyder, “Genocide” and Genocide. How Putin’s Atrocity Talk Leads to Atrocities, INST. HUM. SCIS.: BLOG, <https://iwm.at/blog/genocide> [<https://perma.cc/S3H6-A6WF>].

real incidents of genocide and ethnic cleansing. So, Russia's humanitarian justification both illustrates the legitimacy of the use of force while also delegitimizing it for the future.

### III. SOLUTION

Law requires legitimacy.<sup>204</sup> The three cases illustrated present an evolving need for states to justify their use of force outside the traditional requirements of a Security Council resolution or an act of self-defense under Article 51. India attempted to justify its attacks under its own territorial sovereignty. NATO, through a nonbinding Security Council resolution, justified its intervention, in part, on a fear of regional instability. Ironically enough, Russia has made the clearest assertion of humanitarian intervention citing a nonexistent genocide being a reason for its intervention into Ukraine. Humanitarian intervention has received a higher amount of acceptance within the international community, but to protect that growing legitimacy of the act from insincere states trying to justify an illegal use of force, there must be some procedure required by a state before they can claim a humanitarian intervention. That procedure should require a state to bring a case to the International Court of Justice.

The ICJ is not the only possible solution to grant legitimacy to justify a humanitarian intervention, nor is it necessarily the most effective solution or the most popular among the international community. However, as a solution, it comes with benefits that make it more appealing, including an established infrastructure, institutional momentum, and a pool of its own—albeit imperfect—legitimacy to draw from. Further, I will propose a legal framework that the ICJ may implement when adjudicating whether to grant legal justification for a humanitarian intervention within international law. That framework is a three-part test the court must employ that requires them to progressively conclude if: (1) there is a violation of the Genocide Convention; (2) whether the state gives proper notice for its humanitarian goals; and (3) whether the intervention would promote, or inhibit, regional stability. A state justifying its intervention would have to satisfy all three factors in front of the ICJ for its humanitarian intervention to conform with international law. Lastly, for the legal solution, I will address certain criticisms of laying this critical power onto the ICJ.

<sup>204</sup> See generally JEAN-MARC COICAUD, LEGITIMACY AND POLITICS: A CONTRIBUTION TO THE STUDY OF POLITICAL RIGHT AND POLITICAL RESPONSIBILITY 10 (David Ames Curtis ed. & trans., 2002); Jonathan Jackson et al., *Why Do People Comply with the Law? Legitimacy and the Influence of Legal Institutions*, 52 BRIT. J. CRIMINOLOGY 1051, 1051 (2012).



### A. *The International Court of Justice*

The ICJ is the judicial apparatus of the UN, and the statute governing its structure grants it the power to hear disputes between states.<sup>205</sup> The court contains fifteen members who are elected by the UN General Assembly,<sup>206</sup> and the statute further defines the sources of international law,<sup>207</sup> the jurisdiction that the court holds,<sup>208</sup> and the powers that it can use to enforce its orders.<sup>209</sup> The court can give advisory opinions,<sup>210</sup> make judgements on judicial matters,<sup>211</sup> engage in fact finding,<sup>212</sup> and declare the rights and responsibilities of the various parties.<sup>213</sup>

The court has historically made findings on state responsibility. For example, in *Nicaragua v. United States*, the court held, among other things, that America had violated the non-intervention principle derived from Article 2(4) of the UN Charter when it funded the Contras against the Sandinista government.<sup>214</sup> In *Democratic Republic of Congo v. Uganda*, the court held that Uganda violated the noninterference principle when it sent its military force into the DRC to prevent invading rebel groups.<sup>215</sup> In the *Corfu Channel* case, the court held that Albania had violated the United Kingdom's rights when it fired on its ship.<sup>216</sup> In *South China Sea Arbitration*, the Permanent Court of Arbitration (a court similar to the ICJ) held that China had violated the rights of the Philippines, and that China did not create sovereign territorial rights in the sea by making artificial islands.<sup>217</sup>

In the first three decisions, the court made a holding on the legality on the use of force in broad and limited contexts. It held which states performed lawful actions, and those interpretations then had legal ramifications for how the international community understood both uses of force and the definition of sovereign right of territorial integrity found in Article 2(4) of the UN Charter. Thus, the court has the power to make holdings on the legality of a state's actions in the context of international law.

<sup>205</sup> Statute of the International Court of Justice, art. 1.

<sup>206</sup> *Id.* arts. 3–4.

<sup>207</sup> *Id.* art. 38(1).

<sup>208</sup> *Id.* arts. 34–36.

<sup>209</sup> *Id.* art. 59.

<sup>210</sup> *Id.* art. 65. *See generally* Legality of Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8).

<sup>211</sup> Statute of the International Court of Justice, art. 54.

<sup>212</sup> *Id.* art. 53.

<sup>213</sup> *Id.* arts. 54(1), 55(1).

<sup>214</sup> Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 15 (June 27).

<sup>215</sup> Armed Activities on Territory of Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, ¶¶ 164–65 (Dec. 19).

<sup>216</sup> *See* Corfu Channel (U.K. v. Alb.), Judgment, 1949 I.C.J. 4, 31–32 (Apr. 9).

<sup>217</sup> *See generally* South China Sea Arbitration (Phil. v. China), Award, 2016 Permanent Court of Arbitration (July 12).

*B. ICJ as the Formal Decision Maker*

The ICJ should have the sole authority to hold whether a humanitarian intervention conforms with international law absent a formal UN Security Council resolution. It has made prior decisions on the legality of the use of force, and it should continue that jurisprudence by determining the legality of humanitarian interventions. And, although the court only has voluntary authority, its jurisdiction can be changed by the UN to include the ability to perform this action. This Note argues that its jurisdiction should be mandatory when questions of humanitarian intervention arise absent a formal Security Council resolution.

Further, to prevent this solution from transferring a complex and difficult problem for the ICJ to solve, I will also propose a framework that will both make the determination easier and serve the goals of maintaining the legitimacy of humanitarian interventions. The framework will consist of a three-factor test. This test is a progressive factor test in which the first factor must be satisfied before the court can move to the second factor and so on for the third. The court must find all three factors have been met to hold that a humanitarian intervention is justified under international law. The first factor asks the ICJ if there is an ongoing act of genocide, similar in spirit to their Bosnian Genocide case.<sup>218</sup> The second factor asks the state seeking the humanitarian intervention to formally notify the receiving state and the international community of its humanitarian intentions (either before or immediately after the intervention), and to provide a verifiable plan giving concrete goals and end conditions for the intervention. For the third factor, the ICJ must make a good-faith determination that the intervention would promote, rather than deteriorate, regional stability and be a net-positive gain in human lives.

Making each factor dispositive establishes a high bar that most suggested interventions will not reach. This will help promote the legitimacy of the intervention in two ways. First, those interventions that meet the high bar will have a claim of legitimacy and be able to shed, in part, the baggage that traditionally encumbers humanitarian interventions. Having to meet the high bar provides a shield to otherwise justifiable criticisms that the intervention is a face for colonial and imperial ambitions. Second, it will sift through insincere cases and protect the already fragile reputation of humanitarian intervention.

*1. Declaration of Genocide or Ethnic Cleansing*

The first part of the three-part test requires the ICJ to find that a violation of the Convention on the Prevention and Punishment of the Crime of

<sup>218</sup> Application of the Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43, ¶ 370 (Feb. 26).

Genocide. The court has already partially fulfilled this role in a *de facto* fashion when it made findings on the occurrence and responsibility of a genocide in the *Allegations of Genocide* case between Ukraine and Russia and the *Crime of Genocide* case between Bosnia and Serbia.<sup>219</sup> The ICJ has already established that it has the explicit power to arbitrate the existence of a genocide or crime against humanity.<sup>220</sup>

To do so, the court must engage in an intensive, fact-finding process that presents a high burden for the applicant country and would require the ICJ to hold that a violation of the Genocide Convention is ongoing. For example, in the *Bosnian Genocide Case*, the ICJ held that Serbia violated the Genocide Convention in part.<sup>221</sup> It discussed how it should determine the factual holding and the burden of proof that the party must bring.<sup>222</sup> And they held that the accusing party has the burden of proof, and that there must be “conclusive” proof for claims of “exceptional gravity.”<sup>223</sup>

Further, in both cases, the court established they had the authority to make a conclusive determination on whether a state had violated the Genocide Convention. In the Serbia case, although the court held that Serbia had not perpetrated an act of genocide, it did hold that Serbia failed in its responsibility under the Convention to prevent an ongoing, private act of genocide and ethnic cleansing.<sup>224</sup> Likewise, in the Russia-Ukraine case, the court held that they had the authority to rule whether there was an ongoing genocide in the Eastern provinces of Ukraine,<sup>225</sup> although they have not made a conclusive decision at the time of this Note.

My solution would merely formalize what the court has already held within these two cases and create a necessary factor for a legal assertion of the humanitarian justification for a use of force. Without the court’s holding, every subsequent humanitarian justification would be unlawful. The ICJ, as an institution, already has the expertise and established power to provide that role to the international community. Humanitarian interven-

<sup>219</sup> See *Allegations of Genocide Under Convention on Prevention and Punishment of Crime of Genocide* (Ukr. v. Russ.), Order, 2022 I.C.J. 211, ¶¶ 17–23 (Mar. 16); see also *Bosnian Genocide Case*, (Bosn. & Herz. v. Serb. & Montenegro), 2007 I.C.J. at ¶ 377.

<sup>220</sup> See *Bosnian Genocide Case*, (Bosn. & Herz. v. Serb. & Montenegro), 2007 I.C.J. at ¶ 140; see also *Allegations of Genocide*, (Ukr. v. Russ.), 2022 I.C.J. at ¶¶ 48–49.

<sup>221</sup> *Bosnian Genocide Case*, (Bosn. & Herz. v. Serb. & Montenegro), 2007 I.C.J. at ¶¶ 417–18.

<sup>222</sup> See *id.* at ¶¶ 202–24.

<sup>223</sup> *Id.* at ¶ 209.

<sup>224</sup> *Id.* at ¶ 450. The difference between the two, for the purposes of this test, is a distinction without a difference. The violation of the Genocide Convention is the critical factor. And to stress the point, this factor is satisfied when a state violates the Genocide Convention, not when a state actor is engaging in an ongoing genocide. If a state fails to stop a non-state actor from perpetuating a genocide within its own borders, that will satisfy the first factor of this test because it would violate the Genocide Convention as Serbia did in the Serbia-Bosnia case.

<sup>225</sup> *Allegations of Genocide*, (Ukr. v. Russ.), 2022 I.C.J. at ¶¶ 24–31.

tions are an extension of public international law, and the ICJ judges are the foremost experts on international law within our current international system.

## 2. *Notification Requirement*

The second factor of the three-part test requires a state to formally announce that they are performing a humanitarian intervention. This notification must be directed to the receiving state and the international community. Within that notification, the state must include explicit goals of the intervention and concrete situations that would cease the intervention. This requirement serves the dual purpose of providing a safe harbor for the state employing the intervention while also working to dispel the baggage that humanitarian interventions historically carry. The notification would communicate the intent of the use of military force, and formally establish the purpose for the use of force within the international community and within the legal mechanisms of the ICJ's framework. It would further provide a defined standard for the court, and the rest of the international community, to judge whether the state implementing the humanitarian intervention conformed with their own stated goals, and thus, international law.

Notification requirements are ubiquitous within international law. For example, they are required if a state seeks to implement a countermeasure,<sup>226</sup> if it seeks to suspend a treaty under the Vienna Convention,<sup>227</sup> or if it seeks to assert an Article 51 right of self-defense under the UN Charter.<sup>228</sup> In all these notification requirements, a formal representative of the government must communicate to the receiving state the justification for its decision and the action it will be taking. Similarly, to satisfy the two-part test for the court, the state performing the humanitarian intervention must have a formal member of the government announce: (1) the state is implementing a humanitarian intervention, (2) what its formal goals are (i.e., how it is going to stop the ongoing genocide), and (3) at what concrete point it is willing to withdraw its forces and declare the end of the intervention. All three are required to satisfy the second factor of the test.

The court can consider the timing of the notification under this factor. As a matter of military necessity—and similar to both countermeasures and acts of self-defense—a state need not necessarily give notification before it initiates the intervention.<sup>229</sup> Notification before the use of force could be

<sup>226</sup> Draft Articles on Responsibility of States for Internationally Wrongful Acts, art. 52(1)(b).

<sup>227</sup> Vienna Convention on the Law of Treaties art. 58(2), May 23, 1969, 1155 U.N.T.S. 331.

<sup>228</sup> U.N. Charter art. 51.

<sup>229</sup> Although if a state wishes to, it can satisfy the second factor by issuing its notification before the use of force. All the other requirements within this test would still apply.

dangerous and interfere with factor three, which requires a net-positive number of lives saved as a result of the intervention. That begs the question of when a state would have to announce its goals, but I propose a possible solution: the state must notify the international community and the receiving state immediately after the intervention but before the case is brought to the ICJ by either party.

### 3. *Regional Stability*

The last factor is a two-pronged requirement. The intervention must produce a net-positive number of lives saved and it must promote regional stability. The court should primarily view the intervention from the perspective of an objective observer during the initiation of the invasion. Although the court may consider the effects after the intervention, it should not make that its primary consideration for factor three. Looking at the actual effects of the invasion *ex post facto* would diminish any possibility of a state employing an intervention. If there is an ongoing genocide that a state wants to stop, and the state performs the proper notification, the court should look at the objective situation at that point. If it seemed reasonable that an intervention would stop the genocide and save more lives than it would cost, then the state should not be punished if an unpredictable externality causes more regional instability or a net-loss of lives.

Further, saving lives is a necessary, but not sufficient, condition for a lawful humanitarian intervention. The court must move beyond the pure calculation of lives lost in the discrete calculation for a lawful intervention. There must be a long-term calculation of the impact on regional stability if the intervention is employed. In the worst-case scenario, a military intervention causing regional instability is a failure because it will cause more total harm, for the persons whom the international community has a responsibility to protect, than the absence of the intervention.

Of the examples discussed previously, the interventions caused both regional stability and instability. NATO's intervention into the Balkans was for the explicit purpose of promoting regional stability. India's purpose was to promote regional stability. Conversely, Russia's intervention into Ukraine is increasing regional instability. And as a worst-case example, when America invaded Iraq,<sup>230</sup> it caused a level of regional instability for the next two decades that caused hundreds of thousands of civilian deaths and contributed to the destabilization of multiple states in the Middle East.<sup>231</sup> For both the

<sup>230</sup> Although America could have had the opportunity to justify their invasion, in part, to protect the Kurdish populations in Northern Iraq from the bombings of Saddam Hussein, they never made that the main goal of their intervention, and so I did not consider it as a true humanitarian intervention.

<sup>231</sup> WATSON INST. INT'L & PUB. AFFS., *Costs of War: Iraqi Civilians*, BROWN U., <https://wats>

Ukraine invasion and the Iraq invasion, the cost of regional stability would have invalidated the humanitarian justification under this test. And, although I propose that the court should calculate the objective cost to regional stability when the decision was made rather than the eventual outcome, if the outcomes are as bad as Iraq, then the court may use those in the adjudication of factor three.

Thus, when the ICJ is looking at a case, either pre- or post-intervention, there must be an analysis of whether the intervention has, or is likely to cause, regional stability or instability. This standard is a high bar because most interventions will disrupt a state, or an entire region, even if they would otherwise stop a genocide. However, looking to the India and NATO examples, it is not impossible for an intervention to promote regional stability. Thus, knowing that it is possible supports the argument that it should be included as the last factor in the test. The purpose of this three-part test is, in part, to promote the legitimacy of humanitarian interventions. Making this last factor a high bar to reach would restrict the flagrant use of humanitarian interventions where they would be inappropriate while still allowing for the possibility of a humanitarian intervention where it would be appropriate.

#### 4. Criticisms

This test could receive possible criticisms for the high bar it sets for the states and the implications derived from that difficulty. The first criticism levied against it could be that the court would be hesitant to be the gatekeeper for a violation of sovereignty, especially when it has been so steadfast in maintaining the principles of nonintervention and sovereignty.<sup>232</sup> But the court has also maintained that under *jus cogens* principles (like the prevention of genocide),<sup>233</sup> all states within the international community have a responsibility to stop and prevent acts of genocide.<sup>234</sup> That is inherently in

on.brown.edu/costsofwar/costs/human/civilians/iraqi [https://perma.cc/FQC8-KLLV] (Mar. 2023); see also Waleed Hazbun, *A History of Insecurity: From the Arab Uprisings to ISIS*, 22 MIDDLE E. POL'Y. 55, 62 (2015).

<sup>232</sup> See, e.g., *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 202 (June 27) (Holding that “[t]he principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference.”).

<sup>233</sup> *Jus cogen* principles are generally considered under the auspices of international criminal law. See M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 L. & CONTEMP. PROBS. 63, 63–67 (1996). The court has refused to consider the responsibility of *erga omnes* as applying to state acts of genocide, but the fact that they considered it means there is a possibility it could be applied to the various states. Application of Convention on the Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43 ¶ 185 (Feb. 26).

<sup>234</sup> *Concerning Barcelona Traction, Light and Power Company, Limited* (Belg. v. Spain), Judgment, 1970 I.C.J. 3, ¶ 33 (Feb. 5) (*Erga omnes* is a principle of international law that

tension with the right of sovereignty, and it is possible that the court could make new case law emphasizing the need of the international community to save the lives of those suffering from genocide.

The second criticism could be that the test could make humanitarian intervention too difficult and recreate a Rwanda-like situation. The failure to intervene during the Rwandan Genocide is a mark of shame on the international community.<sup>235</sup> If the international community makes it harder for a state to employ a humanitarian intervention, it could mean the loss of more lives; when genocidal acts occur, states that could stop the genocide will refrain from doing so because of the burden this test will place on it. However, I would argue that this test, although more difficult, will not prohibit humanitarian interventions because it will provide certainty to the community. All the previous interventions that occurred happened in a context of uncertainty.<sup>236</sup> States intervened while being unsure of the legality of their actions. Although the high bar of this test may present an obstacle to the use of humanitarian interventions, it will make up the difference in the certainty provided to the state that employs them.

### 5. *Three-Part Test Conclusion*

The three-factor test I propose will be difficult for a state pursuing a humanitarian intervention to satisfy—and rightfully so. The purpose of the test is to preclude a state, like Russia, from misusing humanitarian intervention for an otherwise illegal intervention. Oppositely, the test is not impossible to satisfy. Of the three case examples given, the India intervention and the NATO intervention could have, with some tweaks, satisfied all three factors.<sup>237</sup> There are other historical examples that could have satisfied the three-factor test,<sup>238</sup> and it would be possible, especially with foreknowledge of the test, for a state to satisfy all three factors to attain a legal humanitarian intervention. Although there could be possible criticisms that arise because of the test, they need not be prohibitive, and the test can still provide value for the ICJ thrust with the responsibility to solve an infinitely complex problem.

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states that “all States can be held to have a legal interest in their protection” in “view of the importance of the rights involved.”).

<sup>235</sup> See generally ALAN J. KUPERMAN, *THE LIMITS OF HUMANITARIAN INTERVENTION: GENOCIDE IN RWANDA* (2001).

<sup>236</sup> See *supra* Part I and accompanying text.

<sup>237</sup> This would be true even in the absence of the UN Security Council’s tacit endorsement of NATO’s actions in the Balkans.

<sup>238</sup> Vietnam’s intervention in Cambodia could also be a possible example. See generally WHEELER, *supra* note 7, at 78–111.

### C. ICJ Problems

The ICJ, like the United Nations, has no central enforcement power. There is no formal authority that can, in John Austin's description of the nature of law,<sup>239</sup> use force to back the rule that the court makes. Their authority largely relies on the legitimacy of the court as seen by the various states.<sup>240</sup> Those states, who perceive the court to be legitimate, may then work to enforce the judgments of the court. That requirement becomes problematic when states—and especially powerful states—choose not to enforce or respect the judgment. This is highlighted in the *South China Sea Arbitration* case.<sup>241</sup> The arbitral body ruled against China and in favor of the Philippines, but China has refused to recognize the decision—at least in practice.<sup>242</sup> The Philippines functionally has a consolation prize for the guarantee of its rights, but there is no entity that can enforce that decision against China.

But that does not mean that the ICJ's rulings are useless. As the international system currently stands, countries still use the ICJ as a medium to solve their disputes, which gives *de facto* legitimacy to the institution. The use of the court is an inherent endorsement of its legitimacy because states, as rational actors, would ignore a tool that provides them no benefits—this is true even in the most realpolitik justifications.<sup>243</sup> Further, the power of the courts moves beyond the legal ability to punish a state for breaches of international law. The court, much like international laws in general, shapes norms and customs with its rulings.<sup>244</sup> It creates the normative understanding of what the law should be which then shapes the narrative that states try to follow or define themselves against.<sup>245</sup>

Another criticism involves the idea of institutional capture. The more powerful an institution becomes, the more likely rational actors will try to

<sup>239</sup> See generally JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (Wilfrid E. Rumble ed., 1832).

<sup>240</sup> For a discussion of the perceived legitimacy of various legal institutions see, e.g. Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1819–20 (2005).

<sup>241</sup> See generally *South China Sea Arbitration* (Phil. v. China), Award, 2016 Permanent Court of Arbitration, ¶ 11 (July 12).

<sup>242</sup> *Id.*; Michael Birnbaum, *By Ignoring the South China Sea Ruling, China Follows a Long Line of Big Powers*, WASH. POST (July 12, 2016, 12:32 PM), <https://www.washingtonpost.com/news/worldviews/wp/2016/07/12/by-ignoring-the-south-china-sea-ruling-china-follows-a-long-line-of-great-powers/> [<https://perma.cc/8DZB-A9PC>].

<sup>243</sup> Inis L. Claude, Jr., *Collective Legitimization as a Political Function of the United Nations*, 20 INT'L ORG. 367, 367 (1966).

<sup>244</sup> See Jutta Brunnée & Stephen J. Toope, *Interactional International Law: An Introduction*, 3 INT'L THEORY 307, 307–10 (2011).

<sup>245</sup> *Id.* at 309–10.



instill actors to capture that institution.<sup>246</sup> Instilling the court with more power may leave it more vulnerable to institutional capture by insincere actors. But that issue is a nonstarter for structural and practical reasons. Structurally, the ICJ has fifteen members, and no two members may share the same nationality.<sup>247</sup> Practically, there are bigger prizes within the United Nations as a matter of gaining power—like the Security Council—and if a state is going to flout international laws by committing genocide, it probably would not spend energy trying to place a single citizen on the court for a nine-year term to have a slightly higher chance of that justice voting against a humanitarian intervention justification. In other words, the path to “capture” the ICJ is difficult, and the results would probably be unsatisfactory. Thus, using the capture as a justification to not implement some form of procedural legitimacy employed by the courts would be the equivalent of throwing the baby out with the bathwater.

#### CONCLUSION

Humanitarian interventions are a controversial legal justification in international law, and they are used to make military uses of force legal despite the protections of Article 2(4) of the UN Charter. They have grown more legitimate in the decades after World War II, and because of that growing cultural acceptance within the international community, states have increasingly used it to try and legally justify their otherwise illegal use-of-force.

That is problematic from a normative perspective. Humanitarian interventions, as problematic as they may be, are the most successful tool to stop an ongoing genocide and they should be protected. They will remain controversial even if there exists a proper legal procedure for states to justify their use-of-force; but without that foundation, states will continue to hesitate to use them when they are necessary. Thus, as a solution, there should be some way to both limit the insincere uses of humanitarian interventions while also allowing legitimate uses of the tool for ongoing acts of genocide.

In this Note, I propose that the International Court of Justice should adjudicate the legality of humanitarian intervention. I propose that the court should apply a three-factor test to make that legal determination. The three factors include: (1) whether there exists a violation of the Convention on the Prevention and Punishment of Genocide; (2) whether or not the state gave sufficient notice of its intent to employ a humanitarian intervention;

<sup>246</sup> Although institutional capture (or regulatory capture) is most commonly explored in the context of American government and the industries it regulates, the concept of certain actors capturing an institution for personal gain can be applied to this context as well. For more on institutional capture *see generally* PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT (Daniel Carpenter & David A. Moss eds., 2013).

<sup>247</sup> Statute of the International Court of Justice art. 3(1).

and (3) whether that intervention, from a reasonable observer, would lead to a net-positive amount of lives saved while not destroying regional stability. This three-factor test would provide a framework that would prevent insincere uses of humanitarian interventions—through the high bar that each factor requires—while also allowing states to employ humanitarian interventions during actual cases of genocide—and giving them the legal certainty to do so. Although this proposal comes with justifiable criticisms related to both the ICJ and the process of the test, it is still better than the current status-quo of international law.