

## Legitimacy and Legality of Collective Unilateral Humanitarian Interventions

*La legitimidad y legalidad de las intervenciones  
humanitarias unilaterales colectivas*

*Légitimité et légalité des interventions  
humanitaires collectives unilatérales*

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SUMMARY: I. *Introduction*. II. *Definitions*. III. *Legality*. IV. *Legitimacy*.  
V. *Interplay*. VI. *Conclusion*. VII. *Bibliography*.

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**RESUMEN:** El estatus jurídico de las intervenciones humanitarias unilaterales (UHIs) sigue sin resolverse a pesar del desarrollo de la doctrina sobre la responsabilidad de proteger. Además, el Consejo de Seguridad continúa siendo inconsistente en la prevención de catástrofes humanitarias, como lo demuestra el caso reciente de Siria. Mientras tanto, la acción colectiva entre los Estados ha ganado legitimidad jurídico-racional a través de organizaciones regionales, cooperación y solidaridad en derecho internacional. ¿Pero se extiende tal legitimidad para mitigar o justificar la ilegalidad de las UHIs en la conducción de UHIs colectivas? Este artículo explora la relación entre la legitimidad de la acción colectiva y la legalidad de UHIs colectivas, particularmente cómo la legitimidad de la acción colectiva ha influido en la percepción y la situación jurídica de las UHIs.

**Palabras clave:** intervención humanitaria unilateral, organizaciones regionales, acción colectiva, cooperación, solidaridad.

**ABSTRACT:** The legal status of unilateral humanitarian interventions (“UHIs”) remains unresolved despite responsibility to protect. Security Council also remains inconsistent in preventing potential humanitarian catastrophes, as evident in the recent case of Syria. Meanwhile, collective action among states has gained rational-legal legitimacy through military alliances or regional organisations, cooperation, and solidarity under international law. But does such legitimacy extend to mitigate or further justify the illegality of UHIs in the conduct of collective UHIs? This paper explores the relationship between the legitimacy of collective action and the legality of collective UHIs. In particular, it retrospectively examines how the legitimacy of collective action in some previous UHIs has influenced the perception and the legal reality of UHIs.

**Key words:** unilateral humanitarian interventions, regional organisations, collective action, cooperation, solidarity.

**RÉSUMÉ:** Le statut juridique des interventions humanitaires unilatérales (UHIs) n’est pas encore résolu malgré la responsabilité de protéger. Le Conseil de Sécurité reste aussi incohérent dans la prévention des catastrophes humanitaires possibles, comme en témoigne la récente affaire de la Syrie. Pendant ce temps, une action concertée entre les États a acquis une légitimité rationnelle-légale grâce à les organisations régionales, la coopération et la solidarité en droit international. Mais cette légitimité s’étend-elle pour atténuer ou encore justifier l’illégalité des UHIs dans la conduite de UHIs collectives? Cet article explore la relation entre la légitimité de l’action collective et la légalité des UHIs collectives, en particulier comment la légitimité de l’action collective dans les précédents a influencé la perception et la réalité juridique de UHIs.

**Mots-clés:** interventions humanitaires unilatérales, organisations régionales, actions collectives, coopération, solidarité.

## I. INTRODUCTION

Some of the express purposes of the UN are to maintain international peace and security by taking effective collective measures to prevent threats and suppress acts in breach of peace<sup>1</sup> and to foster international cooperation in solving humanitarian problems and promoting human rights.<sup>2</sup> However, there is still no consensus as to whether states could lawfully intervene for humanitarian purposes. Despite the end of the Cold War, the Security Council (“SC”) still often finds itself hindered by veto in preventing atrocities such as in Rwanda and Srebrenica.<sup>3</sup> Nevertheless, states would risk incurring international responsibility if they proceed to intervene amidst this inaction. While much of academic literature has dealt with how humanitarian interventions could be justified by the thousands of civilian lives at stake and the growing legitimacy of Responsibility to Protect (“R2P”), little has been said about the collective aspect of these interventions, which remains as the preferred format.

Collective humanitarian interventions with SC authorisation under Chapter VII or Chapter VIII of the Charter could be deemed as lawful and legitimate because they enjoy the legitimacy of the UN<sup>4</sup> and are rooted in international solidarity<sup>5</sup> and cooperation<sup>6</sup> in promoting human rights and upholding peremptory norms under international law. Nevertheless, it seems less clear whether collective unilateral humanitarian interventions would be equally lawful and legitimate. The SC may have authorised collective UHIs such as through Resolution 788 concerning the ECOWAS intervention in Liberia. However, the retrospective effect and ambiguity of this kind of resolutions continue to render collective UHIs in legal con-

<sup>1</sup> Article 1(1) Charter of the United Nations.

<sup>2</sup> Article 1(3) Charter of the United Nations.

<sup>3</sup> Murphy, Sean D., *Humanitarian Interventions: The United Nations in an Evolving World Order*, University of Pennsylvania Press, 1996, pp. 355-357.

<sup>4</sup> Teson, Fernando, “Collective Humanitarian Interventions”, *Michigan Journal of International Law*, 1996, p. 323.

<sup>5</sup> Wolfrum, Rudiger, “Solidarity”, in Shelton, Dinah (ed.), *Oxford Handbook of International Law*, Oxford University Press, 2013.

<sup>6</sup> Dupuy, Pierre-Marie, “The Place & Role of Unilateralism in Contemporary International Law”, *European Journal of International Law*, vol. 11, 2000, p. 19.

troverson as UHIs *prima facie* violate principles on the use of force and non-intervention in international law.<sup>7</sup> At the same time, there is legitimacy in the collective action, and this collective legitimacy appears to have some influence in the discourse on the legal status of UHIs.

Therefore, this paper seeks to examine how much collective legitimacy play a part in the question of the lawfulness of UHIs, if at all. To achieve this, it will first define the notion of collective unilateral intervention. Then it will briefly trace the development of the unilateral right to humanitarian intervention and R2P in order to establish the present legal status of UHIs. Subsequently, this paper will discern some sources of collective legitimacy under international law and how they would fair in justifying collective UHIs. Next, this paper will consider the impact collective legitimacy has had on the discourse concerning the legality of (arguable) UHIs in the Dominican Republic (1965), northern Iraq (1991), Liberia (1991), Sierra Leone (1997), and Kosovo (1999). Finally, it will highlight some concerns if collective legitimacy is left to obscure the current legal truth that is the *prima facie* illegality of UHIs. These points will be discussed specifically in the context of military or forcible UHIs, *i.e.*, UHIs that involve direct and deliberate participation and/or provision of military assistance to change the *statu quo* of a conflict and not merely peacekeeping actions.<sup>8</sup>

## II. DEFINITIONS

### 1. *Collective Action*

“Collective” literally means “an action done by individuals or entities as a group”.<sup>9</sup> “Collective” would describe the mode of the action taken, not the fact that it involves more than one acting party. The difference could be illustrated through the application of state responsibility laws in the collective action of a group of states. Although collective action would naturally im-

<sup>7</sup> Gowland-Debbas, Vera, “The Limits of Unilateral Enforcement of Community Objectives in the Framework of UN Peace Maintenance”, *European Journal of International Law*, vol. 11, 2000, p. 361.

<sup>8</sup> Lumsden, Eleanor, “An Uneasy Peace: Multilateral Military Interventions in Civil Wars”, *New York Journal of International Law & Policy*, vol. 35, 2002, pp. 798-799.

<sup>9</sup> *Oxford Dictionary*, available at: <http://www.oxforddictionaries.com/definition/english/collective>.

ply that it involves more than one state, the responsibility of each state involved would differ, depending on whether the states acted in concert,<sup>10</sup> in complicity<sup>11</sup> or independently<sup>12</sup> in executing the action.<sup>13</sup> In other words, “collectiveness” describe the means of the states’ action while “plurality” and “multilateral” its participants. In turn, the difference between the two would determine the consequences of the action for each of the state participant. In the same way, a collective security action may imply that it is borne of the collective security system under the Charter. However, collective UHIs discussed in this paper cannot be considered as collection security action in this sense because they are a departure from the collective security system, as will be demonstrated in due course.

## 2. *Collective Intervention*

On the other hand, collective intervention may be multilateral in the sense that it involves two or more states acting in concert or by loose association,<sup>14</sup> or in the sense that it is an action borne of multilateral bodies or treaties such as the UN through the Charter.<sup>15</sup> In this regard, Thomas & Thomas defines collective intervention as: “a collective enforcement action to protect the rights of states as a reaction against a violation of international law which can be taken by all members of the international community; a group of states under the obligation of a multilateral treaty; or a single state acting on the authority of general international law”.<sup>16</sup> This definition implies more than multi-state involvement. It also reflects the intervention’s objective of addressing gross human rights violations, be it under auspices of the UN (e.g., in Somalia, Haiti and Bosnia), through

<sup>10</sup> *i.e.*, where all states involved contributed equally to the action.

<sup>11</sup> *i.e.*, where one or some of the states involved acted in assistance to other(s) in the group.

<sup>12</sup> *i.e.*, each state involved contributed differently to the same action.

<sup>13</sup> Crawford, James, *State Responsibility: The General Part*, Cambridge University Press, 2013, p. 340.

<sup>14</sup> Lumsden, Eleanor, *op. cit.*, p. 797.

<sup>15</sup> Newman, Edward, “Responsibility to Protect, Multilateralism & International Legitimacy”, in Thakur, Ramesh and Maley, William (eds.), *Theorising the Responsibility to Protect*, Cambridge University Press, 2015, pp. 125-127.

<sup>16</sup> Thomas, Ann van Wynen and Thomas, A. J., *Non-Intervention: The Law & its Import in the Americas*, Southern Methodist University Press, 1956, pp. 99-100.

regional or sub-regional organisations (e.g., ECOWAS in Sierra Leone)<sup>17</sup> or other international institutions and arrangements outside the UN framework (e.g., NATO in Libya by virtue of SC Resolution 1973).<sup>18</sup> This is why this definition is considered most relevant to this paper.

### 3. *Collective Unilateral Interventions*

Dupuy suggests that unilateral legal actions can be taken by a group of subjects acting together in a collective body.<sup>19</sup> From this perspective, interventions can be both “collective” and “unilateral”, *i.e.*, taken by a group of states acting together but without the authority of international law. Such an intervention may be done with institutional support (e.g., NATO in Kosovo) or without (e.g., the US-led coalitional airstrikes in Iraq and Syria). “Unilateral” in this instance should not be confused with unilateral in the sense that the intervening state acted individually or in isolation (e.g., Tanzania in Uganda; India in Bangladesh). Individual state humanitarian interventions in the latter category are outside the scope of this paper.

### 4. *Unlawful Interventions*

Taking Thomas & Thomas’ definition of collective intervention and Dupuy’s notion of collective unilateral interventions together, one would surmise that collective UHIs are unlawful since an unlawful measure (*i.e.*, an intervention) is used to respond to an unlawful act (*i.e.*, a grave human rights violation). However, the answer may not be as clear-cut. The ICJ in the *Nicaragua Case* defined an unlawful intervention as one that is calculated to change, through coercive means, matters in which all states, by reason of their sovereignty, shall have freedom of choice under international law.<sup>20</sup> On this authority, Teson is of the further view that a forcible intervention would be

<sup>17</sup> *i.e.*, with SC authorisation under Article 53 of the Charter.

<sup>18</sup> UNSC Res. 1973, 7 March 2011, UN Doc. S/RES/1973. Under this resolution, the SC did not authorise NATO specifically but authorised “Member States acting nationally or through regional organisations or arrangements”.

<sup>19</sup> Dupuy, Pierre-Marie, *op. cit.*, p. 20.

<sup>20</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* [1986], ICJ Rep. 14, para. 205.

unlawful if: (i) it involves indirect or direct use of force, and (ii) it is aimed to influence or thwart matters falling under the exclusive domestic jurisdiction of a state.<sup>21</sup> It follows that the determination of whether an intervention is lawful and whether a forcible intervention would violate the principle of use of force and non-intervention would thus hinge upon whether the subject matter that the intervention seeks to turn falls within the domestic jurisdiction of a state.<sup>22</sup> In this connection, this paper will demonstrate that forcible collective UHIs are better deemed as unlawful based on its intended and realised effects on the sovereignty of the intervened state.

### III. LEGALITY

#### 1. *Right of Humanitarian Intervention*

In the first instance, UHIs violate clearly established principles of international law. Article 2(4) prohibits states from using force or threatening to use force to interfere with territorial integrity and political independence of other states,<sup>23</sup> except in self-defence under Article 51 or with SC authorisation under Chapter VII of the Charter.<sup>24</sup> Incidentally, Article 2(7) prohibits the UN from interfering in the domestic affairs of states except in application of Chapter VII measures.<sup>25</sup> In the *Nicaragua Case*, the ICJ held that the principle of non-intervention is a principle under customary international law and the US' act of training and arming the *contra* rebels in El Salvador to overthrow the Nicaraguan government was in violation of this principle.<sup>26</sup> In particular, the US' actions amounted to a threat or use of force against the sovereignty of Nicaragua within the meaning of the principle under the Friendly Relations Declaration.<sup>27</sup> Incidentally, the

<sup>21</sup> Teson, Fernando, *op. cit.*, pp. 326-327.

<sup>22</sup> *Idem.*

<sup>23</sup> Article 2(4) Charter of the United Nations.

<sup>24</sup> Article 42 Charter of the United Nations.

<sup>25</sup> Article 2(7) Charter of the United Nations.

<sup>26</sup> *Nicaragua Case, cit.*, para. 228.

<sup>27</sup> *Declaration on Principles of International Law concerning the Friendly Relations and Cooperation among States according to the Charter of the United Nations*, UNGA Res. 2625, 24 October 1970, UN Doc. A/RES/25/2625(XXV). See also *Nicaragua Case, cit.*

Declaration on Inadmissibility of Intervention also provides that no state has the right to intervene in the affairs of other states for any reason,<sup>28</sup> while the Aggression Definition Resolution provides that no circumstances or grounds whatsoever shall be considered to justify aggression.<sup>29</sup> After noting the fundamental nature of these principles under international law in *Nicaragua*<sup>30</sup> and the *Armed Activities Case*,<sup>31</sup> this principle was finally recognised as *jus cogens* by the World Court in the *Armed Activities New Application 2002*.<sup>32</sup>

At the same time, serious violations of human rights is also a legitimate international concern.<sup>33</sup> UN member states have pledged to cooperate with the UN to promote universal respect and compliance with human rights under Articles 55 and 56 (c) of the Charter. In the *Reservations Advisory Opinion*, the ICJ held that the Genocide Convention is based on universally binding principles, the universal condemnation of genocide, and the recognition for cooperation between states in eliminating genocide.<sup>34</sup> As such, states would be fulfilling their obligations under this Convention in the interest of the international community and universal respect for human rights rather their own.<sup>35</sup> In other words, the cooperation pledge not only requires a joint effort to enforce human rights protection, but also to eliminate human rights violations.

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<sup>28</sup> *Declaration on Inadmissibility of Intervention in the Domestic Affairs of State*, UNGA Res. 2131, 21 December 1965, UN Doc. A/RES/20/2131, para. 1.

<sup>29</sup> Articles 1 & 5, *Resolution on the Definition of Aggression*, UNGA Res. 3314, 14 December 1974, UN Doc. A/RES/29/3314(XXIX).

<sup>30</sup> *Nicaragua Case*, *cit.*, para. 190. In his Separate Opinion at para. 153, Judge (President) Nagendra Singh expressly acknowledged that the ICJ treats the principle as “within the realm of *jus cogens*”.

<sup>31</sup> *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)* [2005], ICJ Rep. 168, para. 148.

<sup>32</sup> *Armed Activities on the Territory of the Congo (New Application 2002) (Democratic Republic of Congo v. Rwanda)* [2006], ICJ Rep. 6, Separate Opinion of Judge *ad hoc* Dugard, paras. 4-8.

<sup>33</sup> Rodley, Nigel S., “Collective Intervention to Protect Human Rights & Civilian Populations: The Legal Framework”, in Rodley, Nigel S. (ed.), *To Loose the Band of Wickedness: International Interventions in Defence of Human Rights*, Brassey UK, 1992, pp. 17-18.

<sup>34</sup> *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)* [1951], ICJ Rep. 15, p. 23.

<sup>35</sup> *Idem*.

Chief among the major protection mechanisms in force following this pledge is the mechanism to protect the right to life,<sup>36</sup> which includes the recognition of gross violations of the right such as genocide and crimes against humanity as *jus cogens*. In the *Nuclear Weapons Advisory Opinion*, the ICJ categorised rules of international humanitarian law concerning the protection of the civilian population in armed conflicts as “intransgressible principles of international customary law” since they are “so fundamental to the respect of the human person and the elementary considerations of humanity”.<sup>37</sup> These rules, such as those embodied under Common Article 3 of the Geneva Conventions, are applicable in both international and non-international armed conflicts,<sup>38</sup> while failure to observe them would constitute war crimes.<sup>39</sup> In addition, upholding the right to life also entails *erga omnes* obligations, *i.e.*, collective rights and duties enforceable by and on all states.<sup>40</sup> This goes to show to some extent how extensive and severe the legal regime has become in ensuring strict observance of norms relating to the right to life under international law.

In the same spirit, the SC has also deemed some intrastate conflicts which caused or could potentially cause extreme loss of human lives as a “threat to international peace and security”<sup>41</sup> and intervened under Chapter VII (e.g., through Resolution 794 concerning Somalia<sup>42</sup> and Resolution 940 concerning Haiti).<sup>43</sup> However, the SC has not been able to do so consistently as it is still subject to the politics of its permanent members.

<sup>36</sup> Article 3 Universal Declaration of Human Rights; Article 6 International Covenant on Civil & Political Rights.

<sup>37</sup> *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996], ICJ Rep. 226, paras. 79-82.

<sup>38</sup> International Committee of the Red Cross, “Commentary of 2016 on Common Article 3: Conflicts of Not An International Character”, 3 August 2016, available at: <https://ihldata.bases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=59F6C DFA490736C1C1257F7D004BA0EC>.

<sup>39</sup> Also under Article 8(2)(e) Rome Statute of the ICC.

<sup>40</sup> *Barcelona Traction, Light and Power Co. Case (Belgium v. Spain)* (Second Phase) [1970], ICJ Rep. 3, paras. 32-33.

<sup>41</sup> Article 39 Charter of the United Nations.

<sup>42</sup> UNSC Res. 794, 3 December 1992, UN Doc. S/RES/794.

<sup>43</sup> UNSC Res. 940, 31 July 1994, UN Doc. S/RES/940. See also Teson, Fernando, *op. cit.*, pp. 348-362. However, question remain as to whether some aspects of the decision-making process or the enforcement of the SC authorisation in these resolutions are to valid.

Although the SC may have unlimited powers under the law,<sup>44</sup> it often could not exercise them despite the dire humanitarian situation at hand. The Russian and Chinese veto in the draft resolutions to intervene in Syria<sup>45</sup> before Resolution 2118 in 2013 is one recent example of SC's limitations.

Therefore, the issue becomes whether states could unilaterally intervene when the SC fails to act. To date, neither Article 2(4) nor Article 2(7) has been amended to include this unilateral right as an exception<sup>46</sup> or to modify the principles to the same effect under Article 53 Vienna Convention on the Law of Treaties.<sup>47</sup> State practice indicating emergence of the right evidenced by positive action or acquiescence<sup>48</sup> has also been too inconsistent to change the related customary international law. In *Legality of the Use of Force in Kosovo*, Yugoslavia argued that as there is no right of unilateral intervention under international law, Belgium's direct involvement in the NATO bombing of Kosovo was illegal. Meanwhile, Belgium argued that the right exists based on SC practice in Sierra Leone and Liberia.<sup>49</sup> This issue remains unresolved as the case was subsequently dismissed for want of jurisdiction.<sup>50</sup>

Previously, states such as France and Belgium in Zaire (1978) and the US in the Dominican Republic (1963) justified their intervention under the pretext of rescuing their nationals and self-defence. However, this has

<sup>44</sup> Articles 25 & 103 Charter of the United Nations; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)* (Provisional Measures Order of 14 April 1992) [1992], ICJ Rep. 114, para. 49; *Prosecutor v. Tadic* IT-94-1-AR72, Appeal on Jurisdiction, 2 October 1995, [1996] 35 ILM 32.

<sup>45</sup> UNSC 6627<sup>th</sup> Meeting, 4 October 2011, UN Doc. S/PV.6627; UNSC 6711<sup>th</sup> Meeting, 4 February 2012, UN Doc. S/PV.6711; UNSC 6810<sup>th</sup> Meeting, 19 July 2012, UN Doc. S/PV.6810.

<sup>46</sup> Gray, Christine, "The Use of Force for Humanitarian Purposes", in White, Nigel and Henderson, Christine (eds.), *Research Handbook on International Conflict and Security Law: Jus ad Bellum, Jus in Bello and Jus Post Bellum*, Edward Elgar Publishing Ltd, 2013, p. 230.

<sup>47</sup> Article 53 Vienna Convention on the Law of Treaties (1969) 1155 UNTS 331.

<sup>48</sup> *Nicaragua Case, cit.*, paras. 206-209; *North Sea Continental Shelf Cases (Germany v. Denmark; Germany v. Netherlands)* [1969], ICJ Rep. 3, p. 44, and Dissenting Opinion of Judge Lachs, pp. 230-231.

<sup>49</sup> *Legality of the Use of Force (Yugoslavia v. Belgium)* (Provisional Measures, Order of 2 June 1999) [1999], ICJ 124, para. 4.

<sup>50</sup> FRY made separate claims against all 10 NATO member states involved in the intervention before the ICJ. The ICJ dismissed all these claims at the preliminary stage for lack of jurisdiction.

proven controversial as it is arguably a defence against “armed attack”<sup>51</sup> and have often involved the rescue of other nationals or other motives like regime change.<sup>52</sup> Supporters of this doctrine have argued that humanitarian intervention could not violate Article 2(4) since it has no direct effect on the territory or political independence of the intervened state. But, as the ICJ held in the *Corfu Channel Case*, a forcible intervention in such circumstances would remain a “manifestation of a policy of force” always subject to abuse and thus legally indefensible “whatever be the present defects in the Organisation”.<sup>53</sup> On the other hand, those in favour argue that humanitarian interventions are consistent with the objectives of the UN in human rights protection<sup>54</sup> and with the developments in protection of right to life under international human rights law.<sup>55</sup> However, as the ICJ also held in the *Nicaragua Case*, the objectives of human rights protection under the Charter are incompatible with the conduct of forcible intervention.<sup>56</sup> Incidentally, both the Declaration on the Inadmissibility of Intervention and Definition of Aggression Resolution make no room for any justification to intervene<sup>57</sup> and provide that the practice of intervention of any kind would violate both the letter and spirit of the Charter.<sup>58</sup> States such as Belgium in Congo (1960) have also tried to rely on necessity<sup>59</sup> as a defence to intervene.<sup>60</sup> However, the ILC made clear that necessity as a circumstance to preclude wrongfulness was never intended to address the issue of legality of humanitarian interventions,<sup>61</sup> while Article 26 of the ILC Articles clearly provides that none of the circumstances to preclude wrongfulness under the ILC Articles shall be invoked in respect of breach *jus cogens* obligations.<sup>62</sup> The debate continues to this day. In any event, though one could conclude that as the uni-

<sup>51</sup> Article 51 Charter of the United Nations.

<sup>52</sup> Lumsden, Eleanor, *op. cit.*, pp. 804-807.

<sup>53</sup> *Corfu Channel Case (United Kingdom v. Albania)* [1949], ICJ Rep. 4, p. 35.

<sup>54</sup> Article 1(3) Charter of the United Nations.

<sup>55</sup> Greenwood, Christopher, “International Law and NATO Intervention in Kosovo”, *International Comparative Law Quarterly*, vol. 49, 2000, pp. 926-927.

<sup>56</sup> *Nicaragua Case*, *cit.*, para. 202.

<sup>57</sup> GA Res. 2131, *cit.*; GA Res. 3114, *cit.*

<sup>58</sup> *Ibidem*, Preamble & para. 4.

<sup>59</sup> Article 25 ILC Articles on State Responsibility.

<sup>60</sup> Article 26, para. 4, Commentary to ILC Articles on State Responsibility.

<sup>61</sup> Article 25, para. 21, Commentary to ILC Articles on State Responsibility.

<sup>62</sup> Article 26, paras. 3-7, Commentary to ILC Articles on State Responsibility.

lateral right to humanitarian intervention has yet to be clearly established, UHIs would remain *prima facie* illegal.<sup>63</sup>

## 2. Responsibility to Protect

R2P came about in response to the consecutive humanitarian catastrophes in Somalia, Bosnia, Rwanda, Kosovo and Darfur; the unresolved issue of the right to UHI;<sup>64</sup> and the growing rejection of sovereignty as a defence for states' deliberate failure to protect their people from avoidable catastrophes such as mass murder.<sup>65</sup> Within seven years, the concept evolved from entailing sovereignty with responsibility to protect internally displaced persons in 1998 to the versions advanced in the eponymous ICISS report in 2001; the High-Level Panel on Threats, Challenges and Change report titled "A More Secure World" in December 2004; the UN Secretary-General's report "In Larger Freedom" in March 2005; and as finally approved by the World Summit in October 2005.<sup>66</sup> The final World Summit version imposes on every sovereign state the responsibility to protect its civilians from irreparable harm and large-scale loss of human life as a result of genocide, war crimes, crimes against humanity and ethnic cleansing, failing which would trigger the responsibility of the international community to step in through permissible means under the Charter.<sup>67</sup> The SC first adopted the concept in Resolution 1674 on the protection of civilians in armed conflict.<sup>68</sup> Since then, R2P is cited in Chapter VII resolutions (among others) on Darfur,<sup>69</sup> Libya<sup>70</sup> and Cote D'Ivoire.<sup>71</sup>

<sup>63</sup> Murphy, Sean D., *op. cit.*, pp. 362-366.

<sup>64</sup> Report of the High-Level Panel on Threats Challenges & Change, *A More Secure World: Our Shared Responsibility*, 2 December 2004, UN Doc. A/59/565, para. 201.

<sup>65</sup> *Idem.*

<sup>66</sup> Bellamy, Alex J., "Responsibility to Protect & the Problem of Military Intervention", *International Affairs*, vol. 84, 2008, pp. 618-624.

<sup>67</sup> UNGA Res. 60/1, 24 October 2005, UN Doc. A/RES/60/L.1, paras. 138-139.

<sup>68</sup> UNSC Res. 1674, 28 April 2006, UN Doc. S/RES/1674.

<sup>69</sup> UNSC Res. 1706, 31 August 2006, UN Doc. S/RES/1706; UNSC Res. 1755, 30 April 2007, UN Doc. S/RES/1755; UNSC Res. 1784, 31 October 2007, UN Doc. S/RES/1784.

<sup>70</sup> SC Res. 1973, *cit.*

<sup>71</sup> UNSC Res. 1975, 30 March 2011, UN Doc. S/RES/1975.

R2P was thought to be the end of the humanitarian intervention dilemma.<sup>72</sup> It changed the narrative from a regime of right to that of responsibility<sup>73</sup> using pre-existing legal principles<sup>74</sup> within a limited set of circumstances.<sup>75</sup> It initially showed promise to deal with the situations in Darfur and Libya,<sup>76</sup> but eventually lost some lustre after many states led by Russia and China believed NATO had exceeded its mandate in Libya.<sup>77</sup> As a result, the SC was reluctant to invoke R2P in Syria and did not intervene until evidence of the Assad regime's chemical weapons turned up in 2013.<sup>78</sup>

R2P is also questionable as a legal norm. First, its documentation in General Assembly and Security Council resolutions may be evidence of soft law at best.<sup>79</sup> Second, the versions of R2P throughout its development have been inconsistent to constitute international custom. For example, unlike the ICISS report version,<sup>80</sup> the SC has the discretion to authorise Chapter VII action only when it deems necessary in the World Summit Outcome version.<sup>81</sup> This means that, when the SC is deadlocked or otherwise unable to authorise a Chapter VII intervention,<sup>82</sup> states could still proceed to exercise collective self-defence or UHI. In this respect, R2P would have no effect.

<sup>72</sup> Alvarez, José, "The Schizophrenias of R2P", in Alston, Philip and MacDonald, Euan (eds.), *Human Rights, Intervention and the Use of Force*, Oxford University Press, 2008, p. 275.

<sup>73</sup> Strauss, Ekkehard, "A Bird in Hand is Worth Two in the Bush: On the Assumed Legal Nature of Responsibility to Protect", in Bellamy, Alex J. et al. (eds.), *Responsibility to Protect & International Law*, Martinus Nijhoff Publishers, 2011, pp. 51-52.

<sup>74</sup> Stahn, Carsten, "Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?", *American Journal of International Law*, vol. 101, 2007, pp. 111-115.

<sup>75</sup> Bannon, Alicia, "The Responsibility to Protect: The UN World Summit and the Question of Unilateralism", *Yale Law Journal*, vol. 115, 2006, pp. 1161-1163.

<sup>76</sup> Gray, Christine, *op. cit.*, p. 247; Berti, Benedetta, "Forcible Intervention in Libya: Re-vamping the «Politics of Human Protection»?", *Global Change, Peace & Security*, vol. 26, 2014, pp. 24-25.

<sup>77</sup> Ulfstein, Geir and Christiansen, Hege F., "Legality of the NATO Bombing in Libya", *International Comparative Law Quarterly*, vol. 62, 2013, pp. 166-169.

<sup>78</sup> Sterio, Milena, "Humanitarian Intervention Post-Syria: Legitimate & Legal?", *Brooklyn Journal of International Law*, 2014, p. 141.

<sup>79</sup> Stahn, Carsten, *op. cit.*, p. 101.

<sup>80</sup> International Commission on Intervention & Sovereignty of States, "The Responsibility to Protect", December 2001, available at: <http://responsibilitytoprotect.org/ICISS%20Report.pdf>.

<sup>81</sup> UNGA Res. 60/1, *cit.* It is also unclear in this document whether the five conditions to trigger SC authorisation in the ICISS Report continue to apply.

<sup>82</sup> Stahn, Carsten, *op. cit.*, pp. 106-110.

Third, what triggers R2P of the international community or who should undertake this responsibility when the SC is no longer viable also remains unclear.<sup>83</sup> In all the SC resolutions referencing R2P so far, only the violating state authorities' primary R2P is cited, not the international community's residual R2P.<sup>84</sup> Accordingly, R2P cannot be said to have legalised UHIs nor established a criteria to legalise UHIs. If anything, the *prima facie* illegality of UHIs is only compounded by the doubtful legal status of R2P.

#### IV. LEGITIMACY

##### 1. *Multilateralism*

Collective and regional unilateral intervention is believed as having greater deference than individual state intervention.<sup>85</sup> A decision to intervene made through the established framework of an international organisation is commonly believed as better than that by a single state because the procedure and participation of many states would imply a series of checks and balances.<sup>86</sup> Multilateral actions allude to legitimacy since they express consensus, due process and popular will.<sup>87</sup> This is why they are believed to be a proven safeguard against abuse, particularly by powerful states.<sup>88</sup> On the flipside, the involvement of more than one state in a forcible action weakens the appearance and possibility of hegemony, especially in terms of military might and influence.<sup>89</sup> As a result, the approval of other states

<sup>83</sup> Bellamy, Alex J., *op. cit.*, pp. 623-624.

<sup>84</sup> Global Centre for the Responsibility to Protect, "R2P References in United Nations Security Council Resolutions and Presidential Statements", 27 June 2016, available at: <http://www.globalr2p.org/resources/335>.

<sup>85</sup> Wedgwood, Ruth, "NATO's Campaign in Yugoslavia", *American Journal of International Law*, vol. 93, 1999, p. 833.

<sup>86</sup> Pellet, Alan, "Brief Remarks on Unilateral Use of Force", *European Journal of International Law*, vol. 11, 2000, p. 387.

<sup>87</sup> Newman, Edward, *op. cit.*

<sup>88</sup> Farer, Tom, "Humanitarian Intervention Before and After 9/11: Legality & Legitimacy", in Holzgrefe, Jeff L. and Keohane, Robert O. (eds.), *Humanitarian Intervention: Ethical, Legal & Political Dilemmas*, Cambridge University Press, 2003, pp. 74-76.

<sup>89</sup> Lumsden, Eleanor, *op. cit.*, p. 834.

would be more forthcoming in collective interventions since it could be justified as necessary or taken in the interest of the international community.<sup>90</sup> In this regard, Damrosch's study in 1993 found that the majority of states endorsed collective interventions between 1945 and 1990 because they were taken in situations such as genocide, which are among common interests of the international community.<sup>91</sup>

More precisely, multilateral institutions derive their legitimacy from the right to rule given by its members. When states recognise an institution to have this right,<sup>92</sup> the institution shall not be interfered with in its process and issues.<sup>93</sup> The rules that such institution issues shall also be complied with.<sup>94</sup> This is why in the case of the UN, for example, member states find it necessary to exhaust efforts to obtain SC authorisation before undertaking any forcible enforcement action in line with the Charter.<sup>95</sup> The legitimacy of the UN is hardly ever under challenge.<sup>96</sup>

However, problems are bound to arise when the institution could not function effectively or fully exercise its legitimate powers due to its own structural flaws. In the case of the UN, this would particularly occur when the SC is deadlocked in the face of a humanitarian crisis. On one hand, although Article 52(1) of the Charter recognises the significant role of regional organisations in maintaining international peace and security<sup>97</sup> and regional organisations have proven effective in that role,<sup>98</sup> their actions are still limited to the Charter.<sup>99</sup> In this regard, Gowland-Debbas argues that regional institutions attain residual and implied powers to intervene if the

<sup>90</sup> Garrett, Stephen A., *Doing Good & Doing Well: An Examination of Humanitarian Intervention*, Praeger Publishers, 1999, p. 151.

<sup>91</sup> Damrosch, Lori Fischer (ed.), *Enforcing Restraint: Collective Intervention in Internal Conflicts*, Council on Foreign Relations, 1993, pp. 12-13.

<sup>92</sup> Buchanan, Alan and Keohane, Robert O., "Pre-Commitment Regimes For Intervention: Supplanting the Security Council", *Ethics & International Affairs*, vol. 25, 2011, pp. 43-44.

<sup>93</sup> *Idem*.

<sup>94</sup> *Idem*.

<sup>95</sup> *Ibidem*, pp. 47-49.

<sup>96</sup> Newman, Edward, *op. cit.*, p. 128.

<sup>97</sup> E.g., under UNSC Res. 1197, 18 September 1998, UN Doc. S/RES/1197, which called for more support by the UN and states to the OAU and sub-regional organisations in peacekeeping operations in Africa.

<sup>98</sup> Lumsden, Eleanor, *op. cit.*, pp. 831-832; Garrett, Stephen A., *op. cit.*, p. 157.

<sup>99</sup> *Nicaragua Case, cit.*, paras. 210-211; Farer, Tom, *op. cit.*, p. 69.

SC is paralysed<sup>100</sup> since the SC has primary<sup>101</sup> but not exclusive responsibility in maintaining international peace and security.<sup>102</sup> Nevertheless, this residual power must be exercised only after all efforts to obtain prior SC authorisation are exhausted, and not in a manner that would usurp powers of the SC or otherwise violate express provisions of the Charter.<sup>103</sup> Therefore, humanitarian interventions conducted through regional organisations and independent of the SC could arguably be deemed as unilateral, while raising the question whether *ex post facto* legitimisation for interventions such as in Sierra Leone and Liberia are lawful. This further raises the question whether falling back on regional organisations when the SC cannot act despite an urgent humanitarian crisis should be made lawful, as former UN Secretary-General Kofi Annan once did.<sup>104</sup>

## 2. Duty of Cooperation

Alternatively, collective UHIs may be deemed legitimate as an exercise of the duty of cooperation under international law. The duty of cooperation can be generally gleaned from the collective and cooperative objectives of the UN under Articles 1(1) and 1(3) of the Charter, in addition to the principle of sovereign equality under Article 2(1) of the Charter and customary international law.<sup>105</sup> Article 41(2) of the ILC Articles in more specific terms provides for the duty of all states, including UN non-members, to cooperate in ending serious violations of peremptory norms by using all lawful means.<sup>106</sup> In the *Wall Advisory Opinion*, the ICJ held that pursuant to Article 41(2), states are under a duty: (i) not to acknowledge the illegal situation arising from Israel's construction of the wall which violated the Palestinians' right of self-determination; (ii) not to render aid or assistance

<sup>100</sup> Gowland-Debbas, Vera, *op. cit.*, p. 374.

<sup>101</sup> Article 24 Charter of the United Nations.

<sup>102</sup> *Certain Expenses of the United Nations (Article 17 paragraph 2 of the Charter)* (Advisory Opinion) [1962], ICJ Rep. 151, p. 163.

<sup>103</sup> Gowland-Debbas, Vera, *op. cit.*

<sup>104</sup> Report of the Secretary-General on the Work of the Organisation, UN Doc. A/54/PV.4, 1999.

<sup>105</sup> Dupuy, Pierre-Marie, *op. cit.*, pp. 22-23.

<sup>106</sup> Article 41 Commentary to the ILC Draft Articles on State Responsibility.

in maintaining the illegal situation; (iii) to ensure the removal of any impediment to ending the illegal situation;<sup>107</sup> and (iv) as members of the UN, to consider further measures to end the illegal situation.<sup>108</sup> The ICJ in the *Namibia Advisory Opinion* nonetheless held that this duty of cooperation concerning peremptory norms would not extend to acts that would otherwise be detrimental to its subjects.<sup>109</sup> In addition, the ILC clarifies that while this duty requires states to participate in good faith, it does not require states to find or to agree to any solution proposed in the collaborative effort.<sup>110</sup>

Accordingly, one could argue that resorting to UHIs would be in furtherance of states' duty of cooperation to end violations of *jus cogens* such as genocide or ethnic cleansing<sup>111</sup> and/or the international community's (residual) R2P. However, one should be mindful that first, exercise of this duty under Article 41(2) of the ILC Articles is contingent upon the use of lawful means. To this end, neither R2P nor UHI are conclusively recognised as within the law. Second, R2P under the World Summit document is vague on veto restrictions in humanitarian-related SC resolutions and viable options in the event of such veto. This is unlike the ICISS report, which did not discount the possibility of international cooperative humanitarian effort outside the UN<sup>112</sup> and even provided for a recourse to the General Assembly under the Uniting for Peace Resolution<sup>113</sup> procedure in the event of SC inaction.<sup>114</sup> Therefore, it would still be unclear as to exactly when the duty of cooperation actually arise or when states' collective R2P is triggered. In light of these ambiguities, UHIs thus cannot be justified, let alone be legalised, by the fact that they were conducted through the cooperation and collection action of states.

<sup>107</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004], ICJ Rep. 136, paras. 159-160.

<sup>108</sup> Identified as *jus cogens* by the ICJ in *East Timor (Portugal v. Australia)* [1995], ICJ Rep. 90, para. 29.

<sup>109</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971], ICJ Rep. 16, para. 125.

<sup>110</sup> Article 41, para. 2, Commentary to ILC Draft Articles on State Responsibility.

<sup>111</sup> Dupuy, Pierre-Marie, *op. cit.*, pp. 23-24.

<sup>112</sup> Newman, Edward, *op. cit.*, pp. 128-129.

<sup>113</sup> UNGA Res. 377, 3 November 1950, UN Doc. A/RES/377(V).

<sup>114</sup> ICISS Report, *cit.*, p. 55.

### 3. Principle of Solidarity

Further, collective UHIs may also be a legitimate expression of international solidarity. Solidarity under international law is defined by MacDonald as “a principle of cooperation which identifies as the goal of joint and separate state action an outcome that benefits all states or at least does not gravely interfere with the interests of other states”.<sup>115</sup> In the meantime, Boisson de Charzounes defines solidarity as “assistance by some international actors to others to achieve a goal or to recover from a critical situation which takes place within a shared value system at the international community level based on a moral obligation owed between members of the international community”.<sup>116</sup> In other words, solidarity is the principle that enables the achievement of common interests through a common effort at the international level<sup>117</sup> but without any interference with the sovereignty of states involved.<sup>118</sup>

There is still no consensus as to whether solidarity creates legally binding obligations on states,<sup>119</sup> but it is gaining recognition as the underlying principle in major areas of international law, including economic development, environment, peace and security, and human rights protection.<sup>120</sup> R2P would be deemed a manifestation of this principle.<sup>121</sup> In this regard, Judge Koroma believes that the collective responsibility of the international community to intervene when a state fails to discharge its R2P *vis-à-vis* its civilian population arises from the international community’s solidarity with the population.<sup>122</sup>

<sup>115</sup> MacDonald, Ronald St. John, “Solidarity in the Practice and Discourse of Public International Law”, *Pace International Law Review*, vol. 8, 1996, pp. 259-260.

<sup>116</sup> Boisson de Charzounes, Laurence, “Responsibility to Protect: Reflecting Solidarity?”, in Wolfrum, Rudiger and Kojima, Chie (eds.), *Solidarity: A Structural Principle of International Law*, Springer, 2010, pp. 94-95.

<sup>117</sup> Wolfrum, Rudiger, *op. cit.*, p. 403.

<sup>118</sup> *Ibidem*, p. 416.

<sup>119</sup> MacDonald, Ronald St. John, *op. cit.*, p. 262.

<sup>120</sup> Wolfrum, Rudiger, *op. cit.*, pp. 401-417.

<sup>121</sup> *Idem*.

<sup>122</sup> Koroma, Abdul G., “Solidarity: Evidence of an Emerging Principle International Legal Principle”, in Hestermeyer, Holger P. *et al.* (eds.), *Coexistence, Cooperation and Solidarity: Liber Amicorum Rudiger Wolfrum*, Martinus Nijhoff, 2012, pp. 122-123.

However, at least two counter-arguments could be made against a proposition that collective UHIs are pursuant to the principle of solidarity. First, the principle of solidarity so far has only been established between states and, even so, without any compromise to sovereignty.<sup>123</sup> Solidarity between the international community and a population within the territory sovereignty of a state in the context of R2P has yet to be established. Second, similar to the duty of cooperation, application of the solidarity principle is always subject to conduct by lawful means. In these circumstances, collective UHIs would be inversely correlated the solidarity principle because their legal status remain doubtful in law while in fact they infringe the sovereignty of the host state.

## V. INTERPLAY

### 1. *Consequences of Collective Legitimacy on Questions of Legality*

Thomas & Thomas posit that collective intervention undertaken through a multilateral organisation framework would be legal only if the organisation's constituent treaty expressly grants its members the right to intervene and the intervention fulfils the conditions of exercising such right.<sup>124</sup> Neither the fact that the intervention was a joint action nor the force of a group of states conducting the intervention in itself would render the intervention automatically legal.<sup>125</sup> In other words, the permissibility of collective interventions taken under the auspices or by the extended powers of an international or regional organisation would depend on whether its treaty expressly provides for the right to intervene in the first place. Therefore, based on this premise, collective interventions under the Charter would only be lawful with prior SC authorisation since there is no express right to intervene under the Charter except under Chapter VII or VIII. It follows that UHIs, collective or individual, presently would not be lawful.

In contrast, African Union member states by the same premise may lawfully intervene as Article 4(h) of the African Union Constitutive Act grants

<sup>123</sup> Wolfrum, Rudiger, *op. cit.*, p. 416.

<sup>124</sup> Thomas, Anna van Wynen and Thomas, A. J., *op. cit.*, pp. 98-99.

<sup>125</sup> *Idem.*

them the right to do so through a decision of the African Union Assembly and in the grave circumstances of genocide, war crimes and crimes against humanity.<sup>126</sup> However, Article 4(h) is silent on whether the right extends to forcible interventions. As the principles on the use of force and non-intervention should always prevail given these principles' *jus cogens* status and under Article 103 of the Charter, it seems unlikely that Article 4(h) would authorise the use of force. In any event, Article 4(h) has not been invoked in reality so far. Even when it had the opportunity, the African Union only sent its peacekeeping forces to Darfur with the consent of the Sudanese government<sup>127</sup> and had rejected any form of military intervention in Libya before the SC authorised *Operation Odyssey Dawn* through Resolution 1973.<sup>128</sup> In this respect, Thomas & Thomas' proposition on how collective interventions can be deemed as lawful is flawed.

Further, although regional and sub-regional institutions may appear to have multilateral legitimacy, their mandates could still be so outdated that it would not otherwise be lawful for them to take enforcement actions.<sup>129</sup> Most constituent treaties of these institutions were intended to address a different set of issues in a different time, which may not include human rights protection.<sup>130</sup> Yet, these institutions have often been forced to deal with humanitarian situations in their backyard, particularly when the SC could not.<sup>131</sup> For example, in the ECOWAS military intervention in Liberia, ECOWAS' Protocol on Non-Aggression and Protocol Relating to Mutual Resolution on Defence governing the West African region's collective security mechanism did not provide any authority for the ECOMOG to intervene<sup>132</sup> and consent of the parties in the conflict to the intervention was not obtained.<sup>133</sup> These issues would have put the legality of the inter-

<sup>126</sup> Kioko, Ben, "The Right of Intervention under the African Union's Constitutive Act: From Non-Interference to Non-Intervention", *International Review of the Red Cross*, vol. 85, 2003, pp. 815-817 and 819-820.

<sup>127</sup> Gray, Christine, *op. cit.*, p. 237.

<sup>128</sup> African Union Peace & Security Council, 265<sup>th</sup> Meeting, 10 March 2011, AU Doc. PSC/PR/COMM.2(CCLXV).

<sup>129</sup> Lumsden, Eleanor, *op. cit.*, pp. 815-817 and 831.

<sup>130</sup> Damrosch, Lori Fischer (ed.), *op. cit.*, pp. 12-15.

<sup>131</sup> Murphy, Sean D., *op. cit.*, p. 364.

<sup>132</sup> *Ibidem*, pp. 148-149 and 160-161.

<sup>133</sup> Chesterman, Simon, *Just War or Just Peace: Humanitarian Intervention & International Law*, Oxford University Press, 2001, pp. 136-137.

vention<sup>134</sup> and its status as a UHI precedent under serious question,<sup>135</sup> but ECOMOG's collective action and the support it received from the US and other African states such as Zimbabwe, Botswana, Egypt and Zambia in Liberia was apparently enough to avoid that.<sup>136</sup> What's more, these issues were hardly raised in the UN<sup>137</sup> before SC Resolution 788,<sup>138</sup> which retroactively approved the ECOMOG military action, was passed a year later.<sup>139</sup>

The legitimacy of numbers also made a legal impact on the US' intervention of the Dominican Republic (1965). The US' was initially condemned in the General Assembly<sup>140</sup> for sending its troops to deal with the pro-Bosch rebels in Santo Domingo with the apparent intent of preventing a communist takeover.<sup>141</sup> In defence, the US contended that the action was necessary to rescue its nationals in the Republic.<sup>142</sup> However, the OAS' resolution to establish the Inter-American Peace Force comprising of troops from six Latin American states and the US a month after the intervention turned the intervention into a collective one.<sup>143</sup> Although nothing in the resolution could imply an endorsement of the US' initial military action, the subsequent involvement of the OAS in the intervention was apparently enough for Russia's proposed SC resolution condemning the same to be rejected.<sup>144</sup>

Similarly, the ECOMOG intervention in Sierra Leone (1997-1999) was deemed lawful as no ECOWAS member questioned its legality<sup>145</sup> and as it obtained retroactive approval of the SC under Resolution 1132.<sup>146</sup> Although the predominantly Nigerian-ECOMOG forces, which aeri ally raided and fought the rebels in Freetown to restore the Kabbah government, raised

<sup>134</sup> Gray, Christine, *op. cit.*

<sup>135</sup> Murphy, Sean D., *op. cit.*, p. 364.

<sup>136</sup> Lumsden, Eleanor, *op. cit.*, p. 819.

<sup>137</sup> Gray, Christine, *International Law and the Use of Force*, Oxford University Press, 2000, p. 212.

<sup>138</sup> UNSC Res. 788, 19 November 1992, UN Doc. S/RES/788.

<sup>139</sup> Chesterman, Simon, *op. cit.*, p. 136.

<sup>140</sup> UNGA 1335<sup>th</sup> Meeting, 24 September 1965, UN Doc. A/PV.1335, paras. 57-60; UNGA 1340<sup>th</sup> Meeting, 28 September 1965, UN Doc. A/PV.1340, paras. 29 and 36-37.

<sup>141</sup> Lumsden, Eleanor, *op. cit.*, pp. 809-811.

<sup>142</sup> *Idem.*

<sup>143</sup> Chesterman, Simon, *op. cit.*, pp. 70-71.

<sup>144</sup> UNGA, "Questions Relating to the Americas", *UN Yearbook*, 1965, pp. 142-147.

<sup>145</sup> Lumsden, Eleanor, *op. cit.*, p. 827.

<sup>146</sup> UNSC Res. 1132, 8 October 1997, UN Doc. S/RES/1132.

some concerns as to Nigeria's motives, Nigeria enjoyed the support of the OAU and the Commonwealth in the intervention.<sup>147</sup> The legitimacy of ECOWAS, OAU and the Commonwealth in this case seems to have lent to the perception that this collective UHI was lawful even though it was conducted without prior SC authorisation.

On the other hand, NATO member states' reliance on their collective legitimacy through the OSCE framework<sup>148</sup> and the justification of intervening in the interest of the international community<sup>149</sup> have been ineffective. The controversy surrounding the lawfulness of the Kosovo intervention remained because firstly, the decisions and actions of a regional military alliance of 19 democratic states without SC authorisation cannot be said as representing the international community.<sup>150</sup> Moreover, NATO's mandate in Kosovo as a non-Article 5 mission under the North Atlantic Treaty, particularly in light of Articles 2(4), 51 and 53 the Charter, is in itself questionable.<sup>151</sup> Although some have argued that SC Resolution 1244 offered some retrospective validation,<sup>152</sup> nothing in the resolution or its *travaux préparatoires* could imply that the intervention had been authorised.<sup>153</sup> Unlike SC's express but *ex post facto* legal reassurances in Resolution 788 on Liberia,<sup>154</sup> Resolution 1244 only referred to NATO in the context of establishing an international security presence in post-conflict Kosovo to provide a safe environment for all civilians and means for safe return of refugees.<sup>155</sup> In this connection, the ICJ in the *Kosovo Advisory Opinion* interpreted Resolution 1244 as having only two main purposes: (i) to call parties to end the armed conflict in Kosovo; and (ii) to establish an international civil and security presence under UN auspices for a political solution to the

<sup>147</sup> Lumsden, Eleanor, *op. cit.*, pp. 825-826.

<sup>148</sup> Cassese, Antonio, "A Follow-up: Forcible Humanitarian Countermeasures & *Opinio Necessitatis*", *European Journal of International Law*, vol. 10, 1999, p. 794.

<sup>149</sup> White, N. D., "Legality of Bombing in the Name of Humanity", *Journal of Conflict and Security Law*, vol. 5, 2000, pp. 33-37.

<sup>150</sup> *Idem.*

<sup>151</sup> Simma, Bruno, "NATO, the UN and the Use of Force: Legal Aspects", *European Journal of International Law*, vol. 10, 1999, pp. 14-21.

<sup>152</sup> Pellet, Alan, *op. cit.*, pp. 387 and 389; Wedgwood, Ruth, *op. cit.*

<sup>153</sup> UNSC Res. 1244, 10 June 1999, UN Doc. S/RES/1244; Gowland-Debbas, Vera, *op. cit.*, pp. 374-376.

<sup>154</sup> UNSC Res. 788, *cit.*, Preamble & paras. 1, 2, 4 and 10.

<sup>155</sup> UNSC Res. 1244, *cit.*, annex 2, para. 4.

conflict and interim administration of Kosovo.<sup>156</sup> Further, Russia's draft SC resolution condemning the intervention as a serious breach of international law<sup>157</sup> only gained the support of China and Namibia.<sup>158</sup> The US in voting against the resolution contended that the Charter did not prevent the international community from not acting in the face of atrocities.<sup>159</sup> Meanwhile, the UK, who also voted against, was of the view that there is an established exceptional right to intervene on humanitarian grounds which it had in fact exercised to protect the Kurds in northern Iraq in 1991.<sup>160</sup> In this regard, most scholars agree that the illegality arising from the NATO threats and airstrikes was justified,<sup>161</sup> though some remain wary of the dangers of justifying illegality.<sup>162</sup>

At first glance, the intervention to protect the Kurdish population in northern Iraq (1991) by a coalition of 13 states led by the US and the UK had the prerequisite authorisation by way of SC Resolution 688.<sup>163</sup> Thus, it was arguably neither a UHI nor unlawful. Resolution 688 expressly condemned Saddam Hussein's campaign to exterminate the Iraqi Kurds by chemical weapons and identified the situation as a threat to international peace and security. However, Resolution 688 was not adopted under Chapter VII and did not authorise use of force.<sup>164</sup> As a result, the legality of the subsequent military establishment of no-fly zones and safe havens for the Kurds within the Iraq border could be seriously questioned. Nevertheless, one cannot deny that the intervention to some extent enjoyed the legitimacy of

<sup>156</sup> *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo* (Advisory Opinion) [2010], ICJ Rep. 403, paras. 58-59.

<sup>157</sup> *Idem*.

<sup>158</sup> SC 3988<sup>th</sup> Meeting, 24 March 1999, UN Doc. S/PV.3988; SC 4011<sup>th</sup> Meeting, 10 June 1999, UN Doc. S/PV.4011.

<sup>159</sup> Gray, Christine, *op. cit.*, pp. 234-235.

<sup>160</sup> Greenwood, Christopher, *op. cit.*, pp. 929-930.

<sup>161</sup> Simma, Bruno, *op. cit.*, pp. 1-11; Cassese, Antonio, "Ex iniuria ius oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?", *European Journal of International Law*, vol. 10, 1999, pp. 23-29; Franck, Thomas, *Recourse to Force: State Action against Armed Attacks & Threats*, Cambridge University Press, 2002, pp. 178-189.

<sup>162</sup> Roberts, Anthea, "Legality versus Legitimacy: Can Uses of Force Be Illegal but Justified", in Alston, Philip and MacDonald, Euan (eds.), *Human Rights, Intervention and the Use of Force*, Oxford University Press, 2008, p. 179.

<sup>163</sup> UNSC Res. 688, 5 April 1991, UN Doc. S/RES/688.

<sup>164</sup> Lumsden, Eleanor, *op. cit.*, pp. 819-823.

the coalition and, through Resolution 688, the UN. Therefore, in comparison to the other previous instances of humanitarian interventions earlier discussed in this paper, the effect of collective legitimacy on legality in the case of Northern Iraq could be best described as an anomaly.

## 2. Concerns

The previous section demonstrates to some extent how collective legitimacy distorts the actual legal status of UHIs. This is a dangerous trend to continue. Collective unilateralism is still unilateralism. In reality, there is no legal difference between individual and collective unilateral acts.<sup>165</sup> In any event, an action of a group of states is often subject to a single strong actor<sup>166</sup> who is either powerful enough to bear the high political, legal and tangible cost and risks involved or influential enough to steer others to play to its interest.<sup>167</sup> The reality is, multilateralism cannot truly exist so long as states and international actors are not equal in strength and capacity.<sup>168</sup> For example, the NATO intervention in Kosovo might not have been necessary in the first place had Russia not expressed its intent to veto any resolution against Serbia. Therefore, whether a UHI is lawful should be considered by its substance and not by its collective format. To this end, as established earlier in Part 2 of this paper, UHIs remain illegal.

Further, recognising the legitimisation of UHIs by multilateral arrangements outside the UN framework would elevate the status of these arrangements and relegate the UN in the Charter-based collective security system.<sup>169</sup> Although some argue that this may be necessary in view of the intermittent failings of the SC,<sup>170</sup> the law on the use of force and non-in-

<sup>165</sup> Chinkin, Christine, "The State that Acts Alone: Bully, Good Samaritan, or Iconoclast?", *European Journal of International Law*, vol. 11, 2000, pp. 37-38.

<sup>166</sup> *Idem*.

<sup>167</sup> Cronogue, Graham, "Responsibility to Protect: Syria The Law, Politics and Future of Humanitarian Intervention Post-Libya", *Journal of International Humanitarian Legal Studies*, vol. 3, 2012, p. 127; Garrett, Stephen A., *op. cit.*, p. 152.

<sup>168</sup> Krauthammer, Charles, "The Unipolar Moment", *Foreign Affairs*, vol. 70, 1991, p. 25.

<sup>169</sup> Roberts, Anthea, *op. cit.*, pp. 203-204.

<sup>170</sup> E.g., Buchanan, Alan and Keohane, Robert O., *op. cit.*, pp. 49-61; Reisman, Michael, "Unilateral Action and the Transformation of the World Constitutive Process", *European Journal of International Law*, vol. 11, 2000, p. 3.

tervention remains unchanged. Until it does, the UN and its organs should remain above regional institutions and looser coalition of states outside the UN. The latter cannot mutually reinforce the UN, even when the SC cannot act.<sup>171</sup>

Condoning UHIs before the right of humanitarian intervention and R2P fully crystallise into international law could also see a return to pre-1945 self-help and open the floodgates to abuse<sup>172</sup> as the possibility of grounds to justify UHIs is endless.<sup>173</sup> In the long run, this would undermine the collective security system and return global security governance to one that is alliance-based and no longer Charter-based.<sup>174</sup> This would make humanitarian action more selective than it already is as alliances would go crisis shopping according to their interests. In this regard, geostrategic and national interests may prove to weigh heavier than humanitarian concerns and compliance with the law when states consider acts of international solidarity, as seen recently in Syria.<sup>175</sup> Before 2013, SC members led by Russia and China were reluctant to implement R2P in Syria on the back of Libya<sup>176</sup> even though the situation had already been described as “the worst humanitarian crisis since the end of the Cold War”.<sup>177</sup> However, when the situation in the Levant became complicated by ISIL, states were quick to join forces outside the UN to intervene.<sup>178</sup> From September 2015 to February 2016, Russia at the Assad government’s request and with the support of Iran, Serbia and Armenia conducted airstrikes in north-western Syria to defeat opposition militant groups.<sup>179</sup> Since September 2014, the US and France have

<sup>171</sup> Simma, Bruno, *op. cit.*, p. 18.

<sup>172</sup> *Corfu Channel Case*, *cit.*; White, N. D., *op. cit.*, p. 29.

<sup>173</sup> Roberts, Anthea, *op. cit.*, pp. 205-208.

<sup>174</sup> Dupuy, Pierre-Marie, *op. cit.*, p. 29.

<sup>175</sup> Coicaud, Jean-Marc, “International Law, Responsibility to Protect & International Crises”, in Thakur, Ramesh and Maley, William (eds.), *Theorising the Responsibility to Protect*, Cambridge University Press, 2015, p. 172.

<sup>176</sup> Ulfstein, Geir and Christiansen, Hege F., *op. cit.*, pp. 169-171.

<sup>177</sup> Chulov, Martin, “Half of Syrian Population «Will Need Aid by the End of the Year». UN High Commissioner for Refugees Says Crisis May Be the Worst it has Dealt with”, *The Guardian*, 19 April 2013, available at: <http://www.theguardian.com/world/2013/apr/19/half-syrian-population-aid-year>.

<sup>178</sup> Coicaud, Jean-Marc, *op. cit.*, pp. 169-171.

<sup>179</sup> “Russia Carries Out First Airstrikes in Syria”, *Al Jazeera*, 30 September 2015, available at: <http://www.aljazeera.com/news/2015/09/russian-carries-air-strikes-syria-150930133155190.html>.

also been leading separate coalitional airstrikes targeting anti-government forces and ISIL in Syria.<sup>180</sup> The US, no longer recognising legitimacy of the Assad government, conducted the airstrikes without Syria's consent. The closest to SC authorisation for the US airstrikes were Resolutions 2170 and 2249. But Resolution 2249 was not adopted under Chapter VII<sup>181</sup> while Resolution 2170,<sup>182</sup> which was in fact adopted under Chapter VII, did not authorise use of force.<sup>183</sup> In this respect, the US-led airstrikes could be reasonable deemed illegal for want of valid SC authorisation.<sup>184</sup>

## VI. CONCLUSION

Although outwardly justified and commonly perceived as the better form of intervention, collective UHIs should be considered for what it essentially is a UHI. In Part 3 of this paper, we have seen how, despite the development from humanitarian intervention to R2P, UHIs remain *prima facie* in violation of the non-intervention principle. While the advent of R2P may have changed the discourse on how and why UHIs should be made legal, its rapid and unconventional start as a norm (if it really was intended as one) seem to have only made the legalisation of UHIs more complex. Part 4 then offered three ways in which collective action could further justify UHIs and perhaps the underlying reason why states prefer to join forces when intervening: multilateral legitimacy, the duty of cooperation and the principle of solidarity. However, as later demonstrated in the same Part, these justifications

<sup>180</sup> Farrell, Theo, "Are the US-Led Airstrikes in Syria Legal – and What Does it Mean if They Are Not?", *The Telegraph*, 23 September 2014, available at: <http://www.telegraph.co.uk/news/worldnews/middleeast/syria/11116792/Are-the-US-led-air-strikes-in-Syria-legal-and-what-does-it-mean-if-they-are-not.html>.

<sup>181</sup> UNSC Res. 2249, 20 November 2015, UN Doc. S/RES/2249.

<sup>182</sup> UNSC Res. 2170, 15 August 2014, UN Doc. S/RES/2170.

<sup>183</sup> Farrell, Theo, *op. cit.*

<sup>184</sup> Narwani, Sharmin, "Breaking International Law in Syria: US-NATO's Humanitarian Airstrikes", 29 November 2015, available at: <http://www.globalresearch.ca/breaking-international-law-in-syria-us-natos-humanitarian-air-strikes/5492208>; Moynihan, Harriet, "Assessing the Legal Basis of UK Military Action in Syria", 26 November 2015, available at: <https://www.chathamhouse.org/expert/comment/assessing-legal-basis-uk-military-action-syria>.

have their own legal complications. Therefore, collective action may not be as good a validation for the already illegal UHIs as it seems.

Nevertheless, as the following Part showed based on previous interventions in Dominican Republic, Liberia, Sierra Leone, Kosovo, and northern Iraq, the legitimacy of collective action has to some extent influenced how some of these interventions is perceived legally. In Liberia, the apparent legitimacy of ECOWAS seem to have led the SC to retrospectively endorse the ECOMOG military action, even though ECOMOG in reality may not have sufficient mandate to do so under ECOWAS laws. In the Dominican Republic, OAS' involvement later in the intervention arguably turned the initial condemnation of the US' unilateral action into a rejection of the same condemnation at the SC. In Sierra Leone, the unanimous legitimacy of ECOWAS and the wide support its ECOMOG forces received made the forcible intervention mostly viewed as lawful, notwithstanding the fact that the SC did not approve the action (and even so impliedly) until Resolutions 1132 and 1152 a year later. In Kosovo, collective legitimacy of the NATO action was asserted by the NATO members involved, but it seems to have had little impact in the ensuing vigorous discourse on the legality of the intervention. The intervention in northern Iraq was relatively peculiar in that the Allies did obtain prior SC authorisation via Resolution 688. However, similar to the case in Libya (2011), it was the Allies' subsequent creation of safe havens and no-fly zones for the Iraqi Kurds during conduct of the authorised action that created legal controversy because the scope of authorisation under Resolution 688 did not seem to extend that far.

The role of collective legitimacy observed in the discourse on the legality of these interventions may not have been deliberate since this paper's observation is only made now in retrospect. However, collective legitimacy is still found as sufficient to misrepresent the present legal truth of UHIs. If collective legitimacy continues to be considered in this light, the fear is abuse and that it would further complicate the discourse on legalisation of humanitarian interventions. The preceding and penultimate section of this paper explained these concerns in detail using the foreign interventions in the ongoing conflict in Syria as a foreboding illustration.

It is unfortunate that just as the intentions may be noble, the collective form in which UHIs are usually executed —otherwise a picture of states united for humanitarian causes— neither bears legal significance nor contributes to the longstanding quest of solving the humanitarian intervention

conundrum. But the significance of the values underlying collective action in the international plane should nonetheless continue in paving inroads to that solution.

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