Humanitarian Intervention in Southeast Asia in the Post-Cold War World: Dilemmas in the Definition and Design of International Law

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HUMANITARIAN INTERVENTION IN SOUTHEAST ASIA IN THE POST-COLD WAR WORLD: DILEMMAS IN THE DEFINITION AND DESIGN OF INTERNATIONAL LAW

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Abstract: Human rights abuse is a significant problem in Southeast Asia. The end of the Cold War has led to trends toward greater use of international interventionary force for humanitarian objectives. This Comment proposes that rather than defining or re-interpreting international law to allow military intervention for humanitarian purposes, a Southeast Asian regional human rights regime should be formed, involving greater development and acceptance of non-military forms of intervention.

I. INTRODUCTION

The abuse of human rights is a serious international problem. Hundreds of thousands of people have lost their lives or suffered inhuman treatment in places like Rwanda, Bosnia, Somalia and Cambodia. The prevalence of such abuse has led to the development of a concept of "humanitarian intervention," which, in the past, served as a moral and legal justification for military intervention into one state by another state to prevent human rights abuse perpetrated by the target state. Historically, humanitarian intervention has been selectively used, often as pretext for intervention into the affairs of smaller states by militarily stronger states.

1 Although recent events in Rwanda, Bosnia and Somalia have significant implications for much of the analysis in this Comment, the scope was necessarily limited to discussion of the controversial issues surrounding humanitarian intervention as they apply to Southeast Asia.

2 Tom Farer, Humanitarian Intervention: The View from Charlottesville, in HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 150 (R. Lillich ed., 1973) ("It was generally conceded that during the nineteenth century and into the twentieth, the phrase 'humanitarian intervention' was used frequently to describe and to justify armed intervention by Western States in the rest of the world. Indeed, no one demurred to the proposition that, in this respect, humanitarian intervention may have enjoyed a priority of usage."). See also HUMANITARIAN INTERVENTION AND THE U.N. 10-11 (R. Lillich ed., 1973) (hereinafter HUMANITARIAN INTERVENTION AND THE U.N.) (quoting Professor William D. Rogers on humanitarian intervention as historically the most often used pretext for strong nations to intervene in the affairs of weaker nations, "We are talking about a concept which was international legal rationalization for the most important intrusions of great powers into the lives and social structures of small and weak powers in recent history."). Professor Richard A. Falk continues this point by noting that the issue of defining humanitarian intervention so as to safeguard against its misuse is only relevant for those nations with the military power to engage in the practice. Id. Falk notes the importance of explicitly recognizing the asymmetry between "political inequality and the pretense of juristic equality."
Nominally offered as a means to end human suffering, humanitarian intervention risks the possibility of heightened suffering through increased inter-state conflict. Humanitarian intervention risks inter-state conflict by allowing states to forcibly impose values regarding the proper limits to governmental powers onto other states. Thus, humanitarian intervention represents a continuing dilemma for international law between concerns for justice and concerns for peace.

This Comment analyzes this dilemma as it applies to the unique situation in Southeast Asian countries in the post-Cold War era. Southeast Asia is unique with respect to humanitarian intervention issues for several reasons. Unlike all the other regions of the world, neither Asia nor Southeast Asia has a regional human rights regime to define, adjudicate or encourage compliance with human rights norms. The lack of such a regime, combined with regional economic and demographic conditions, creates a high likelihood that human rights abuses will remain unidentified or unremedied until severe measures like humanitarian intervention seem necessary. In addition, Southeast Asian nations, along with China, have been in the forefront of those states mounting philosophical challenges to international efforts to broaden the scope of universal human rights. Finally, considering the strategic importance of Southeast Asia to China and China's power as a permanent member of the UN Security Council, it seems unlikely that the Security Council will authorize humanitarian intervention in Southeast Asia.

In the post-Cold War era there is an emerging trend whereby the UN Security Council is using its enforcement powers under Chapter VII of the UN Charter to engage in humanitarian intervention. According to many international law scholars, in the past, the legality of humanitarian intervention under customary law was overruled by the overriding concern for peace and the emergence of the fundamental norms of non-intervention and non-use of force in the United Nations Charter. During the Cold War, however,
the United Nations proved to be ineffective in halting appalling human rights abuses, such as those committed by the Khmer Rouge in Cambodia. In the post-Cold War era, the past ineffectiveness of the United Nations has led to a trend toward more frequent and more militarily aggressive peacekeeping operations by the Security Council. Under an implied authority derived from its Chapter VII enforcement powers to remedy "threats to the peace," the Security Council is broadening the legal basis for humanitarian intervention by the United Nations.6

This trend poses dilemmas of definition and design of international law, which are particularly apparent in the case of Southeast Asia.7 In order to halt significant abuses of human rights in Southeast Asia in the post-Cold War period, should humanitarian military intervention by the UN Security Council be encouraged, even though historically there is a demonstrated risk that it may be misused by the more powerful states? What strategies offer the best path out of the dilemma between abuse and misuse?8

Many legal scholars argue that misuse of humanitarian intervention can be controlled by adopting a clearly defined doctrine of humanitarian intervention, primarily through an expanded interpretation of the UN Charter.9 This Comment argues that such hope is misplaced, because the

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7 In this Comment, "mechanisms of legal design" refers to the processes of constitutive law. This type of law designs structures and processes regarding who has legal authority for what kinds of actions or decisions. It emphasizes the distribution of power to various entities in the government or society, such as the "checks and balances" found in the separation of powers designed into the United States Constitution. See generally BLACK'S LAW DICTIONARY 214 (Abr. 6th ed. 1991). The definition of doctrine primarily involves issues of defining and interpreting substantive normative law.

8 In order to maintain clarity, the term "abuse" is used in this Comment in reference to human rights abuse. The term "misuse" is used in reference to use, by states, of the doctrine of humanitarian intervention to justify intervention in other states for other than humanitarian purposes, while claiming humanitarian intent.

9 See HUMANITARIAN INTERVENTION AND THE U.N., supra note 2, at 48-49 (quoting Professor John N. Moore describing the criteria for allowable humanitarian intervention which he, and other scholars he mentions, advocate). See also Wil D. Verwey, Humanitarian Intervention, in THE CURRENT LEGAL REGULATION OF THE USE OF FORCE 57, 74-5 (A. Cassese ed., 1986) (advocating a "number of conditions . . . which relevant U.N. organs could apply as an informal quasi-legality standard"); David Scheffer, The Persian Gulf Crisis, 22 GA. J. INT'L & COMP. L. 60, 63, 69 ("[T]he era of being intimidated by the provision [sic] of the U.N. Charter is over. The charter is a flexible document and can be interpreted as such,"); and "we have reached the stage where . . . the use of force . . . is a legitimate tool for the enforcement of international law."). See generally, W. Michael Reisman, Sovereignty and Human Rights in Contemporary
concept of humanitarian intervention is inherently vulnerable to subjective interpretation, and is therefore ripe for misuse. To maximize the recognition of and compliance with human rights norms in Southeast Asia, international law should instead emphasize changes in international structures and processes (what this Comment terms issues of "design"). The dilemmas of humanitarian intervention in Southeast Asia are better resolved by emphasizing such mechanisms of legal design rather than renewing debate over the definition of doctrine. Specifically, Southeast Asian governments should form a regional human rights regime similar to those found in Africa, Europe and the Americas. At the same time, human rights activists should encourage the development and acceptance of non-military forms of intervention.

This Comment is organized into five parts to analyze these issues. Following this introduction, Part II illustrates the problem of human rights abuse in Southeast Asia. Section A examines selected countries in Southeast Asia with problematic human rights records, with a particular focus on Cambodia. Section B analyzes the unique situation in Southeast Asia regarding humanitarian intervention. Part III provides a brief history of the development of humanitarian intervention, identifies current trends toward an expanded doctrine of humanitarian intervention in the post-Cold War period and considers its application in Southeast Asia. Part IV explains how the basic concepts inherent in a definition of humanitarian intervention are subject to varying interpretations and do not deter misuse in its application. These interpretive difficulties are analyzed under the elements of a model definition of humanitarian intervention and as they apply to Southeast Asia in particular. Part V proposes functional approaches to legal design involving international legal structures and processes as alternatives to definitional strategies. The potential and effectiveness of several approaches are explored, including: restructuring the United Nations Security Council; negotiating a regional Southeast Asian framework convention on human rights; and increasing the development of non-military strategies and technologies in humanitarian intervention.

*International Law, 84 Am. J. Int'l. L. 866, 875* (arguing that "new criteria for unilateral human rights actions must be established," most particularly with intervention to support democratic governance).

10 See supra note 7.
II. HUMAN RIGHTS ABUSE IN SOUTHEAST ASIA AND THE TREND TOWARD INTERVENTION

A. Southeast Asia: The Problem of Human Rights Abuse

Many Southeast Asian countries experience human rights abuses, which are often due to domestic conflicts, such as civil wars or insurrections. The United Nations has recently engaged in humanitarian intervention in other parts of the world to remedy instances of substantial human rights abuse. However, Southeast Asia may expect to be treated differently, due to the geopolitical alignment of China and its permanent seat on the Security Council. The recent history of Cambodia in particular demonstrates the gravity of the problem and the contrast between current and past approaches of the international community. The human rights situations in Papua New Guinea, Myanmar (formerly Burma) and Indonesia are also briefly surveyed at the end of Part II.A.

The Communist Party of Kampuchea (Khmer Rouge) militarily defeated Cambodia’s authoritarian ruler Lon Nol in April of 1975. Fanatical policies were implemented in an attempt to completely restructure Cambodian society and wipe out all foreign influence. In the process, the Khmer Rouge killed between one and two million Cambodians out of a total population of 7.3 million within less than four years. A special rapporteur for the United Nations concluded in his report that “this was the worst case of human rights violations since the Nazi era.”

The international response was minimal and ineffective. Cambodia was largely sealed off from the outside world. In addition, the United States public was tired of hearing about Southeast Asia after the Vietnam War. Only two newspaper staff reporters from the U.S. were left to cover a region

12 In this Comment, ‘Cambodia’ is used rather than ‘Kampuchea’. ‘Kampuchea’ is based on local usage, whereas ‘Cambodia’ is more widely accepted for international usage.
14 See BECKER, supra note 13, at 20; see also Jackson, supra note 13, at 3.
that had been blanketed by American press for years. After several states finally brought the reports of the atrocities to the attention of the UN Human Rights Commission's Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1978, the Commission requested a formal response to the allegations from Democratic Kampuchea (Khmer Rouge). The Cambodian authorities rejected the request "with chilling invective."

In contrast, international reaction to the invasion of Cambodia by Vietnam was more significant. Vietnam invaded Cambodia in late 1978 and established the People's Republic of Kampuchea (PRK), which controlled most of Cambodia throughout the 1980s. In reaction, the UN General Assembly called for withdrawal of all "foreign forces" and accepted the credentials of the Democratic Kampuchean (Khmer Rouge) delegation at the UN rather than seating the Vietnam-supported People's Republic of Kampuchea (PRK). Vietnam justified its invasion as self-defense to Cambodian raids stemming from a border dispute with Cambodia. The failure of the international community to mount a multilateral response to the atrocities of the Khmer Rouge lent greater credibility to the argument that Vietnam's invasion was a necessary act of humanitarian intervention.

The road to peace in Cambodia was long and hard. In protest of the Vietnamese aggression, the United Nations continued to recognize the Khmer Rouge, who were supported by China, and reject the legitimacy of the PRK. The UN General Assembly demanded the withdrawal of

17 See BECKER, supra note 13, at 372-75.
19 Ratner, supra note 16, at 3.
21 Ratner, supra note 16, at 3.
22 See, e.g., GARY KLIINTWORTH, VIETNAM'S INTERVENTION IN CAMBODIA IN INTERNATIONAL LAW 41-84 (1989) (justifying the 1978 invasion as humanitarian intervention).
Vietnam from Cambodia as a pre-condition of peace in Cambodia.\textsuperscript{24} It was not until December of 1987, that Prince Sihanouk,\textsuperscript{25} representing a coalition of Khmer Rouge and other Cambodian factions, began direct negotiations with Hun Sen, the Vietnamese-supported PRK Prime Minister. The Association of South East Asian Nations (ASEAN) sponsored further meetings, known as JIM I (July 1988) and JIM II (February 1989),\textsuperscript{26} which outlined key components of an agreement to be endorsed later at an international conference.\textsuperscript{27} When, in April of 1989, Vietnam announced its decision to withdraw its troops by September of that year, the stage was set for earnest peace negotiations at the Paris Conference on Cambodia.

The involvement of the five permanent members of the Security Council (the Permanent Five) was critical to the eventual peace settlement. After the first session of the Paris Conference failed to produce an agreement on power-sharing among the four disputing factions, the Permanent Five held meetings from January to August of 1990, in which they defined the fundamental components of a settlement in a “Framework Document.”\textsuperscript{28} It was only a few days later that the four disputing factions accepted this document as the basis for settlement.\textsuperscript{29} The final settlement documents were signed on October 23, 1991.\textsuperscript{30}

The final settlement, based on the Framework Document, included new precedents for international law. First, Cambodia became the first United Nations member-state to be formally administered by a UN body (the United Nations Transitional Authority in Cambodia, or UNTAC).\textsuperscript{31} Second, this unique surrender of state sovereignty was arranged by the

\textsuperscript{24} See Ratner, \textit{supra} note 16, at 4.
\textsuperscript{25} Cambodia's hereditary king.
\textsuperscript{26} Jakarta Informal Meeting, convened by the government of Indonesia and including all four Cambodian disputant factions, Cambodia's two Indochinese neighbors, and the six states of the Association of Southeast Asian Nations (ASEAN). ASEAN is composed of Brunei, Indonesia, Malaysia, the Philippines, Singapore and Thailand (with Papua New Guinea having formal observer status). See \textit{Ratner, supra} note 16, at 4-5.
\textsuperscript{27} See \textit{id.}, at 5.
\textsuperscript{28} See \textit{generally id.}, at 5-7.
\textsuperscript{30} See \textit{Ratner, supra} note 16, at 8.
\textsuperscript{31} The word 'administered' is politically important in this context. The Cambodian factions could not agree to any arrangement of coalition government. A U.N. 'government', i.e. a U.N. trusteeship of a member state, is not permissible under Article 78 of the U.N. Charter. The political compromise established a coalition governing body, the Supreme National Council, which immediately granted all governmental authority to the U.N. until free elections were held. See \textit{Ratner, supra} note 16, at 9.
Security Council in lieu of approving an enforcement action under Chapter VII, which would have required a very large troop commitment.\textsuperscript{32} Since there was no single recognized government to grant consent to the United Nations to administer elections, a proxy organization, the Supreme National Council (SNC), was created out of the four disputing factions.\textsuperscript{33} The SNC was not considered the government of Cambodia during the transition. It only existed (through its recognition by the Security Council)\textsuperscript{34} as a vehicle for granting state consent to delegate governing powers to UNTAC.\textsuperscript{35}

Even though the Security Council did not resort to a Chapter VII enforcement action, and the corresponding commitment of troops that would have been required, UNTAC was one of the largest and most expensive peacekeeping operations in United Nations history.\textsuperscript{36} By the time it completed its mission in September of 1993, it had cost $1.7 billion and had included 22,000 civilian and military personnel. Even with this massive influx of resources (in a country whose per capita GNP is only $200/year)\textsuperscript{37} the mission did not restore peace. Khmer Rouge threats and PRK intimidation marred the presidential election which followed the UNTAC mission.\textsuperscript{38} Ultimately, the courage of the Cambodian people was the most critical factor determining the success of the mission.\textsuperscript{39}

The impotence of the international community’s response to the Cambodian holocaust illustrates the extent to which the Cold War balance of power on the Security Council prevented collective action by the United Nations. The inaction of the United Nations caused many international scholars and politicians to argue that the United Nations should have more forcible interventionary power to prevent similar atrocities from happening in the post-Cold War era. Even though the post-Cold War Security Council now appears capable of collective action to prevent human rights abuse, the risk of misuse of humanitarian intervention remains.

\textsuperscript{32} Id. at 9-10.
\textsuperscript{33} Id. at 10-11.
\textsuperscript{34} Id. at 7, 11 (citing SC Res. 668, U.N. SCOR, 45th Sess., Res. & Dec. at 28, U.N. Doc. S/INF/46 (1990)).
\textsuperscript{35} Ratner, supra note 16, at 11.
\textsuperscript{37} POPULATION REFERENCE BUREAU, INC., 1993 WORLD POPULATION DATA SHEET (1993) [hereinafter POPULATION REFERENCE].
\textsuperscript{38} Branigin, supra note 36, at A8.
\textsuperscript{39} Id. (quoting Yasushi Akashi, head of the UNTAC operation in Cambodia, on the courage of the Cambodian people being critical for saving the elections).
The events leading to the Cambodian settlement illustrate how increasing the power of the post-Cold War Security Council may not increase the security, nor protect the human rights, of the people of Southeast Asia.

Cambodia was a victim of the power politics of the Cold War era. The United States-supported government (Lon Nol/Khmer Republic) was replaced by the Chinese-supported government (Pol Pot/Khmer Rouge) which was replaced by the Soviet Union-supported government (Hun Sen/Vietnamese-installed PRK). Finally, the breakup of the Soviet Union and its withdrawal of political and financial support for Vietnam coincided with the Vietnamese willingness to withdraw from Cambodia in April of 1989.40

This shift in the international and regional balance of power contributed to a breakthrough in the negotiations. When the Permanent Five united behind the Framework Document, they were able to get concessions from the disputing parties. The most important concession from the disputing Cambodian factions was the establishment of the “strawperson government” of the Supreme National Council in order to “grant” Cambodia’s consent to a virtual United Nations transitional government.

What this exercise in power politics portends for Asia is significantly different than for the rest of the world due to the geopolitical alignment of China. The balance of power on the Security Council shifted significantly with the demise of the Soviet Union. Russia has since taken the Soviet Union’s seat on the Security Council. Russia is unlikely to block Western initiatives on the Security Council as the Soviet Union did in the past. However, China still may, insofar as its views on human rights have differed markedly from Western beliefs.41 China is most likely to exert its influence in the Asian theater, where its security interests are greatest.42 Due to the greater likelihood of a Chinese veto, the Security Council is politically less likely to use an expanding doctrine of humanitarian interven-

40 See Ratner, supra note 16, at 5.
41 See Aryeh Neier, Watching Rights, 257 NATION 345 (1993) (noting that China has asserted that Western beliefs in political and civil rights are not compatible with economic growth). See also Yojana Sharma, Asia: China MFN Issue a Setback for Human Rights Movement, Inter Press Service, May 20, 1994, available in LEXIS, News Library, Allwild File (stating, “At the Vienna World Conference on Human Rights in July last year, Asian countries led by China and Malaysia set great store by the notion that states had the sovereignty to develop their own concept of human rights and the right not to be interfered with by other nations.”).
42 See, e.g., David Pugliese, The Rebels Who Won’t Give Up: A Young Ragtag Army Challenges a Brutal Dictatorship, VANCOUVER SUN, Dec. 24, 1993, at B5 (noting that China has continued to supply arms to Myanmar in the face of a nearly universally observed arms embargo intended to pressure Myanmar’s existing government to cease massive human rights abuses).
tion to address gross violations of human rights in Southeast Asia. The political stalemate which prevented United Nations action during the 1975-78 holocaust in Cambodia could happen again, even if the United Nations were granted greater powers to militarily intervene for humanitarian causes. Thus, a balance-of-power paralysis similar to that which occurred in the Cold War era may still prevent United Nations humanitarian intervention in Southeast Asia.

In addition to the threat of another genocidal episode like that in Cambodia, other lesser-known atrocities exist which might warrant humanitarian intervention. On the tiny island of Bougainville in Papua New Guinea, over one-fourth of the population has been forced into temporary shelters by a domestic conflict. Abuses by both sides in the conflict include extra-judicial executions, torture, and rape. In Myanmar, the government was overthrown in a military coup in 1988. The new military government then refused to accede to an elected government in 1990. The military, in the process of waging a decades-old war against insurgents, has been reported to be:


44 Amnesty International issued a scathing report accusing both the government and rebel troops of abuses. It cited incidents where government troops tied suspected opponents to a truck and dragged them along the road before shooting them. Earlier reports by an Australian barrister accused Australia of attempting to stop independent investigations that allegedly "could reveal its complicity in large-scale human rights violations," with detailed evidence that "at least 120 innocent civilians had been murdered without provocation." *Australia Accused of Trying to Cover up Massacres*, Agence France Presse, July 8, 1992, available in LEXIS, News Library, Allwld File.

The causes of the conflict are primarily financial and ethnic. The copper-rich island supplied Papua New Guinea with nearly half its export earnings until critical copper mine installations were blown up by rebels to protest the fact that local people saw little of the huge profits made by the Australian mine owners. The people of Bougainville share a common heritage with the nearby Solomon Islands, a mere row boat ride away. In contrast, Port Moresby, the capital of Papua New Guinea, is 560 miles away. Bougainvillians resent the artificial colonial boundary which has placed them under PNG control since Australia granted independence to Papua New Guinea in 1975. International response to the plight of civilians in Bougainville has been slight. Resolutions passed by the U.N. Commission on Human Rights, which recommended a fact-finding mission be sent to Bougainville, were not implemented as planned. See *Pacific Waves*, ECONOMIST, Mar. 27, 1993, at 42.

‘purifying’ the country by destroying the ethnic groups or forcing them to flee to neighboring nations . . . and has destroyed villages, conducted a systematic campaign of rape and torture and used women and children for slave labor. Thousands have died. Another 300,000 have been forced to flee to Bangladesh and Thailand. 46

In Indonesia, 47 approximately one-third of the population of East Timor (about 200,000 people) have been killed by the Indonesian army in a prolonged attempt to forcibly assimilate the island. 48 In addition, Amnesty International estimates that 2,000 civilians, including children and the elderly, have been killed by the Indonesian army in Aceh, a heavily Muslim part of the Indonesian island of Sumatra. Some of these deaths have been arranged as public executions. 49

B. Southeast Asia is Unique with Respect to Humanitarian Intervention

Southeast Asia’s unique political, economic, cultural and legal situation highlights the dilemmas presented by humanitarian intervention. The region runs a high risk of further human rights abuse in the future. There are several reasons for this. First, Southeast Asia is one of the poorest regions of the world. It has an average per capita income of only $980, only
23.4 percent of the world average.\(^5\) Some fear that massive poverty alongside the rapidly increasing wealth in Southeast Asian countries will lead to increased conflict and further human rights abuses.\(^5\) Furthermore, the growing importance of the Asian economies in the context of the global economy may give government elites of this region increased influence in global affairs and increase their ability to resist outside pressures to improve human rights performance.\(^5\) The tension between economic concerns and human rights has already led to controversy over the priority of economic development over democratic values.\(^5\)

Second, there is potential for increased ethnic conflict in Southeast Asia which could give rise to significant human rights abuse. One of the defining characteristics of the post-Cold War era is the increase in ethnic conflict among formerly peaceful neighbors.\(^5\) The region is heavily populated, but often in largely isolated and distinct pockets. Dense population and geographic barriers have produced a vast array of linguistically and ethnically distinct peoples throughout the region.\(^5\)

Third, Southeast Asia is extremely diverse culturally and religiously. Although many Southeast Asian nations are primarily Buddhist, Indonesia has the largest Muslim population in the world, while the Philippines are 97 percent Christian (mostly Catholic).\(^5\)

Human rights abuses are less likely to be corrected, or even identified, at the regional level in Southeast Asia. In contrast to every other major

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\(^{50}\) POPULATION REFERENCE, supra note 37.

\(^{51}\) See Peter Wallensteen, Global Patterns of Conflict and the Role of Third Parties, 67 NOTRE DAME L. REV. 1409, 1417 (1992).

\(^{52}\) See Bilahari Kausikan, Asia's Different Standard (Human Rights), FOREIGN POL'Y, Fall 1993, at 24. See also Sharma, supra note 41 ("[T]he determination of Asian governments not to succumb to U.S. 'bully-boy' tactics, has led to a chorus of warnings to Washington not to impose its values on China and the rest of Asia, whatever these values may be. The whole episode [Washington's threat to withhold Most Favored Nation status from China] has given a new credibility to the unholy alliance in Asia of governments who reject human rights as a 'Western concept', say activists, adding that there has been a serious setback to the universality of rights.").

\(^{53}\) See Max L. Stackhouse, The Future of Human Rights (World Conference on Human Rights), 110 CHRISTIAN CENTURY 661 (1993) (noting that Singapore and Malaysia framed the issue as development vs. democracy at the World Conference on Human Rights held in Vienna in June of 1993). See also Neier, supra note 41, at 345 (noting that authoritarian East Asian nations, such as Singapore, Indonesia, Malaysia and China, have asserted that Western beliefs in political and civil rights are not compatible with economic growth). See also R.K.L. Panjabi, Asian Perspectives on Human Rights, 86 AM. J. INT'L L. 199 (1992) (book review).

\(^{54}\) See generally The New Tribalism, supra note 11.

\(^{55}\) See Panjabi, supra note 53, at 200.

region, neither Southeast Asia nor Asia as a whole has a regional human rights system.57 Southeast Asia does not have an intergovernmental organization with mandated responsibility to define, interpret, monitor or enforce human rights norms.58 Other continents are at least partially covered by Regional Arrangements established under the authority of Chapter VIII of the UN Charter or by regional human rights regimes.59 Thus, humanitarian intervention is more likely to be considered by the United Nations as a necessary response to human rights abuse in Southeast Asia than in other areas of the world.

Southeast Asia has neither its own normative standards nor has the region acceded to the most widely accepted global human rights norms. The lack of a regional agreement on human rights would not be so grievous if Southeast Asian nations were already parties to other international rights treaties. Only the Philippines and Vietnam are signatories to the two major binding human rights conventions.60

Since very few Southeast Asian states are bound by the international human rights treaties, the absence of a Southeast Asian human rights regime leaves the region with no adjudicative or enforcement mechanism to determine and sanction human rights violations. Violations are thus more likely to be severe before remedial action is deemed to be appropriate. In such cases, severe sanctions are more likely to be seen as necessary. Further, without a regional system, violations must be remedied by either unilateral state action (such as occurred in the Vietnamese invasion of Cambodia) or action under the United Nations. Both of these options have disadvantages (which are explored below in Part IV.A.).

Finally, it is unlikely that the Security Council will militarily impose human rights norms onto Southeast Asian countries without engendering philosophical, as well as political, resistance from China. As the only one of the Permanent Five members of the Security Council which is not European or Euro-centric, China does not share the philosophical foundations of many international human rights norms which have emerged from

57 Panjabi, supra note 53, at 200; see also Leary, supra, note 56, at 321.
58 Leary, supra note 56, at 321. ASEAN, the Association of Southeast Asian Nations, is an economic organization founded in 1967 to support Southeast Asian economic and cultural cooperation. EDMUND J. OSMANCZYK, ENCYCLOPEDIA OF THE UNITED NATIONS AND INTERNATIONAL AGREEMENTS 54 (1985).
59 See generally Leary, supra note 56, at 320.
60 The International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights. See Leary, supra note 56, at 327 n.7. See also Kausikan, supra note 52, at 24.
European traditions. Thus, China may be expected to play a critical role vis-à-vis humanitarian intervention by the UN in Southeast Asia.

III. Development of Humanitarian Intervention as a Response to the Problem of Human Rights Abuse

Given that Southeast Asia lacks effective regional remedies for an existing, and possibly increasing, problem of human rights abuse, should humanitarian intervention by UN forces be an allowable remedy under international law? Historically, states have often sought to justify forcible humanitarian intervention on unilateral legal or moral grounds. However, unilateral humanitarian intervention has been widely considered illegal under the UN Charter. This Section first examines the historical evolution of humanitarian intervention up to the end of the Cold War and then identifies the trends that have emerged in the post-Cold War period.

A. Historical Background

Historical analysis of humanitarian intervention can be divided into three periods prior to the end of the Cold War:

1. Customary Law (prior to the Kellogg-Briand Pact);
2. Pre-UN Charter (between the Kellogg-Briand Pact of 1929 and the signing of the UN Charter in 1945); and
3. UN Charter (after the founding of the United Nations).

I. Customary Law

Although some scholars suggest that the concept of humanitarian intervention predates Grotius, most scholars focus on the development of

61 See Scheffer, supra note 6, at 254 n.4 (for a historical listing of international interventions justified or criticized on humanitarian grounds since the early 1800s; organized by category).
63 Hugo Grotius is an important and early theoretical architect of modern international law who developed a basic theory of law and order for inter-state relations in 1625. See MARK W. JANIS, AN
the doctrine during and since the nineteenth century.64 During the 19th century there were many instances of unilateral military intervention by powerful nations against weaker nations.65 Before the Kellogg-Briand Pact66 there was no formal, universal international law proscribing the use of military force.67 During this period, international law was defined primarily by customary law, which is especially susceptible to subjective and differing interpretations.68 The malleability of the doctrine allowed it to be defined either to legitimate or proscribe intervention.69 Thus, humanitarian intervention was defined and used according to the needs of the powerful nations.70

2. Pre-UN Charter

The Kellogg-Briand Pact is viewed as a turning point in international law because it established a general prohibition on the use of war, including interventionary wars. Formally known as the Treaty Providing for the Renunciation of War as an Instrument of Foreign Policy,71 the Pact’s general prohibition on war proved ineffective, in as much as it lacked any mechanisms for interpretation or enforcement. Subsequent debate over its interpretation has focused on which exceptions to the general prohibition on war, if any, would be allowed.72 Before the United Nations was formed many legal scholars continued to assert that the doctrine of humanitarian

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INTRODUCTION TO INTERNATIONAL LAW 180-81 (2d ed. 1993). See also HUMANITARIAN INTERVENTION AND THE U.N., supra note 2, at 23-24 (quoting Professor W. Michael Reisman).

64 See HUMANITARIAN INTERVENTION AND THE U.N., supra note 2, at 23 (quoting a statement by Professor Frey-Wouters).

65 See Scheffer, supra note 6, at 254-56.


68 See I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 3-12 (3d. ed. 1979); see also JANIS, supra note 63, at 53 (Noting the particular weaknesses of customary law, that “[c]ustomary international law is ordinarily found by a more or less subjective weighing of the evidence, and subjective scales tilt differently in different hands.”).

69 See, e.g., HUMANITARIAN INTERVENTION AND THE U.N., supra note 2, at 15.

70 Id.

71 See Treaty Providing for the Renunciation of War as an Instrument of Foreign Policy, supra note 66.

intervention survived the Kellogg-Briand Pact as an allowable exception based in customary law.\textsuperscript{73}

3. **UN Charter**

In contrast, the adoption of the UN Charter in 1945 has been understood to eradicate the customary law doctrine of humanitarian intervention. Article 2(4)\textsuperscript{74} prohibits any threat or use of force between States, except for self-defense from armed attack which is allowed under Article 51.\textsuperscript{75} The United Nations can only use interventionary force in enforcement actions under Chapter VII. In addition, Article 2(7), which prohibits the United Nations from intervening in matters essentially within the domestic jurisdiction of any State, has been seen as equally applicable to relations between States.\textsuperscript{76} Thus, with the adoption of the U.N. Charter, there was wide agreement that the prohibitions on force and intervention would combine with international law principles of sovereign equality and political independence to preclude forcible humanitarian intervention.\textsuperscript{77}


\textsuperscript{74} Article 2(4) reads, "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." \textit{U.N. CHARTER} art. 2, \textsuperscript{4}.

\textsuperscript{75} Article 51 states, in part:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.

\textit{U.N. CHARTER} art. 51.

\textsuperscript{76} Article 2 states, in part:

> Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.


\textsuperscript{77} See Fonteyne in \textit{HUMANITARIAN INTERVENTION AND THE U.N.,} supra note 62, at 200; see also Sohail H. Hashmi, \textit{Is There an Islamic Ethic of Humanitarian Intervention, 7 ETHICS \\& INT'L AFF.} 55, 56-57 (quoting Michael Akehurst "that the U.N.'s 1979 condemnation of Vietnam's unilateral incursion into Pol Pot's Cambodia reflected 'a consensus among states in favor of treating humanitarian intervention as illegal'").
It was only a few years after the Charter was created, however, that these strict interpretations began to be tested. With the escalation of the Cold War came the miscarriage of the collective security mechanism upon which the United Nations was premised. The failure of the United Nations to live up to its founders' original vision became a controversial justification for reviving a "right" of unilateral humanitarian intervention either as a form of customary law outside the Charter, or within a broader interpretation of the Charter.80

The failure of Article 43 necessitated the advent of United Nations peacekeeping forces.81 Peacekeeping was not mentioned in the UN Charter; rather, it evolved as an ad-hoc concept.82 Essentially, it may be defined as United Nations military action in a sovereign state for the purpose of maintaining or restoring peace.83 Peacekeeping developed primarily as a

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78 The advent of the Cold War led to both superpowers using the veto power to prevent effective use of the United Nations enforcement machinery in all but a few cases. See Joseph Murphy, supra note 62, at 21.

79 Compare Richard B. Lillich, Forcible Self-Help by States to Protect Human Rights, 53 Iowa L. Rev. 325 (1967) and Richard B. Lillich, Intervention to Protect Human Rights, 15 McGill L.J. 205 (1969) (arguing that unilateral forcible humanitarian intervention to protect human rights is legal) with Ian Brownlie, Humanitarian Intervention, in Law and Civil War in the Modern World 217 (John N. Moore ed., 1974) (arguing that the Charter precludes, and/or has become, the relevant customary norm; that it clearly prohibits forcible humanitarian intervention; and that the customary norm immediately preceding adoption of the Charter, if it were deemed to survive as an adjunct to the Charter, would also prohibit humanitarian intervention). See also Richard B. Lillich, Humanitarian Intervention: A Reply to Ian Brownlie and a Plea for Constructive Alternatives, in Law and Civil War in the Modern World 229 (John N. Moore ed., 1974) [hereinafter Reply to Brownlie] (arguing that humanitarian intervention is not prohibited by the Charter, is allowed under customary law and is necessary due to the abject inability of the United Nations to take effective action to terminate the genocidal conduct and alleviate the mass suffering in Bangladesh [requiring] a fundamental reassessment ... of the role of self-help, and especially of humanitarian intervention, in international affairs today).

80 See Fonteyne in HUMANITARIAN INTERVENTION AND THE U.N., supra note 62, at 200; R. George Wright, A Contemporary Theory of Humanitarian Intervention 4 Fla. Int'l L.J. 435, 439 n.28 (citing scholars who use a type of "frustration of purpose" argument to allow exceptions to Article 2(4) and 2(7)); see also Reply to Brownlie, supra note 79, at 236 (arguing that 2(4) only prohibits use of force which affects the "territorial integrity" or "political independence" of the target state, or is inconsistent with the Purposes of the United Nations, none of which, according to these authors, apply to humanitarian intervention).


83 See 1 Rosalyn Higgins, United Nations Peacekeeping 1946-1967: Documents and Commentary at ix (1969) [hereinafter Peacekeeping]. Higgins examines several definitions from "the entire role of the United Nations in maintaining, or restoring, international peace" to "United Nations forces ... which are operational on a territory with the consent of its government." Higgins uses a generic definition: "operations in which personnel owing allegiance to the United Nations are engaged in military
mechanism for the United Nations to maintain truces already established by
diplomacy, not as a form of intervention to enforce human rights norms.84

The definitional distinctions between maintaining peace and preserving
fundamental norms of human rights on the one hand, and between
Chapter VII enforcement actions and peacekeeping on the other, proved
problematic from the very beginning. For example, the Korean War, one of
the first Chapter VII actions undertaken by the United Nations, is also re-
ferred to as a peacekeeping operation.85 North Korea’s refusal to allow re-
unification and elections was followed by its invasion of South Korea.86
Thus, an “act of aggression” triggering Chapter VII also involved the fun-
damental human rights issue of self-determination.87

While distinguishing between United Nations “enforcement” and
peacekeeping has been difficult,88 maintaining the distinction between
United Nations military intervention authorized under Chapter VII to
maintain peace and United Nations intervention to promote human rights
has been more substantive and controversial.89 These distinctions have
proven to be increasingly unworkable in the post-Cold War period.

84 See MURPHY, supra note 62, at 21-22, 79-93.
85 In the Korean War the U.N. Security Council authorized the multilateral military effort (led by the
U.S.) only because the Soviet Union’s delegate was absent from the Council when the North Koreans
invaded South Korea. The critical authorization resolution was S.C. Res. 83. Subsequent vetoes by the
Soviet Union led to the “Uniting for Peace” Resolution of the General Assembly, which provided the de
facto legitimacy for continued United Nations action. See MURPHY, supra note 62, at 29-37. See also
ARTHUR M. COX, PROSPECTS FOR PEACEKEEPING 6 (1967); Paul Lewis, Painting Nations Blue, N.Y.
TIMES, Dec. 9, 1992, at A17.
86 See MURPHY, supra note 62, at 29.
87 See generally James A.R. Nafziger, Self-Determination and Humanitarian Intervention in a
Community of Power, 20 DENV. J. INT’L L. & POL’Y 9, 16 (citing Article 55 of the U.N. Charter, Article
21(3) of the Universal Declaration of Human Rights and other instruments for the internationally recog-
nized right of peoples to self-determination).
88 See Ciobanu, supra note 82, at 15-29.
89 Perhaps this is most especially true with self-determination issues. See generally, Nafziger, supra
note 87, at 9. See also Russell Watson, Perils of Peacekeeping, NEWSWEEK, Feb. 15, 1993, at 34; Paul
[hereinafter War Room] (“As peacekeeping grows, its nature is changing, with United Nations operations
becoming increasingly complex and intrusive and moving toward what Mr. Goulding [Marrack Goulding,
Under Secretary General in charge of United Nations Peacekeeping] called ‘the gray area between classic
peacekeeping and enforcement’.”).
B. Trends of the Post-Cold War Period

There have been significant changes in the nature of humanitarian intervention in the post-Cold War era. As the Cold War has thawed, the United Nations has dramatically increased its peacekeeping missions. Since 1988, the United Nations has initiated fourteen new peacekeeping operations, more than in the previous forty years. Thirteen of these operations were still under way in early 1993, with over 50,000 United Nations troops wearing the "blue helmets" at a cost of roughly $3 billion a year. In addition, there have been three significant qualitative developments in humanitarian intervention since the end of the Cold War which together constitute a trend toward allowing forcible humanitarian intervention. These developments have been with respect to: 1) the legal bases for humanitarian interventions; 2) who is or should be intervening; and 3) how the interventions are being conducted.

1. Legal Bases for Humanitarian Intervention

"Threat to the peace" and "consent," the two legal bases which allow forcible intervention by the United Nations, have been greatly expanded in recent years. Under the UN Charter the Security Council has been precluded by Article 2(7) from militarily intervening to address domestic human rights violations. Internal conflicts have been seen as "matters essentially [in] the domestic jurisdiction" of each nation state unless they pose a "threat to the peace" under Article 39, thereby allowing Chapter VII intervention. This narrow interpretation of a right of humanitarian intervention by the United Nations has been debated, and has tended to be sup-

90 See War Room, supra note 89, at A12.
91 U.N. CHARTER art. 2, ¶ 7.
93 See Fonteyne in HUMANITARIAN INTERVENTION AND THE U.N., supra note 62, at 203-209 (identifying the various strands of debate on the issues of self-determination and humanitarian intervention by the United Nations or unilaterally by single nations as possible exceptions to the Article 2(7) prohibition on intervention. Fonteyne notes that most representatives held States to the same strict restraint as the United Nations, thereby precluding any intervention in matters which were essentially within the domestic jurisdiction of any State. A "large" number precluded unilateral intervention for any reason, while an
ported by militarily weaker countries afraid of being the victims of misuse through a broader interpretation.\(^{94}\) The only other way that foreign states or the United Nations have been able to legally intervene has been with the consent of the target state.\(^{95}\) Thus, United Nations interpretations of both "consent" and "threat to the peace" have undergone dramatic changes towards allowing humanitarian intervention in the post-Cold War period.

\(\text{a. "Threat to the Peace"}\)

Recently, the United Nations has explicitly and effectively expanded its interpretation of "threat to the peace" to include humanitarian concerns. The first meeting of the Security Council ever to be held at the level of Heads of State and Government adopted the Summit Declaration of January 31, 1992:

The absence of war and military conflicts amongst States does not in itself ensure international peace and security. The non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security.\(^{96}\)

United Nations practice has so far matched its rhetoric. With Resolution 688 the Security Council authorized humanitarian assistance \textit{and military protection} for the Kurds within Iraqi borders.\(^{97}\) This military ac-


\(^{95}\) See \textit{JANIS}, supra note 63, at 180-81 (noting that the mechanism of "consent" was used by the superpowers during the Cold War to both intervene on behalf of governments and insurgents they favored under different versions of a consent theory of legitimation). See also Lloyd N. Cutler, \textit{The Right to Intervene}, 64 FOREIGN AFF. 96, 108 (1985) and Oscar Schachter, \textit{The Legality of Pro-Democratic Invasion}, 78 AM. J. INT'L L. 645 (1984). There also exist troublesome justifications for intervention under a state's right of self-defense, currently articulated in Article 51 of the United Nations Charter. However, this does not apply to the United Nations because it is not a "state."


\(^{97}\) See generally Philip Alston, \textit{The Security Council and Human Rights: Lessons to be Learned from the Iraq-Kuwait Crisis and its Aftermath}, AUSTL. Y.B. INT'L L. 108; Jost Delbruck, \textit{A Fresh Look at}
tion to protect a persecuted minority within the territorial boundaries of a nation-state was unprecedented.98 Thus, an expanded interpretation of what constitutes a "threat to the peace"99 appears to be enlarging the legal basis for humanitarian intervention by the post-Cold War United Nations.100

b. "Consent"

In the last few years, consent of the host state has been eroding as a limitation on decisions by the United Nations to intervene with peacekeeping forces. During the Cold War, UN policy was to secure the consent of a target state (and usually all warring parties) before placing United Nations peacekeeping troops in the midst of a hot conflict.101 For example, the United Nations peacekeeping action in the Congo in 1964 was initiated with the consent of the Congolese government. In Cambodia and Somalia, the post-Cold War United Nations devised creative means to manufacture or bypass this consent requirement. In Cambodia, a fictitious government was created to grant consent. As discussed above in Section II.A, several warring factions all claimed to be the legitimate government of Cambodia. The Permanent Five member states of the Security Council obtained the agreement of these four factions to establish a "strawperson" government, the Supreme National Council (SNC).102 The sole purpose of the SNC was to grant consent to the United Nations to establish the massive peacekeeping

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98 Some analysts argue that it should not be viewed as a precedent for forcible humanitarian intervention, but as merely an extension of the authority granted U.N. sponsored forces for the Gulf War or in response to the mass exodus of refugees. Contra Alston, supra note 97, at 158.

99 Previously the United Nations has interpreted human rights violations to be "threats" twice. First, with economic sanctions against the Ian Smith regime in Southern Rhodesia (Zimbabwe). Second, with sanctions directed at the apartheid regime of South Africa. These actions raised significant controversy over the interpretation of Article 39. See Murphy, supra note 62, at 139-146; S.C. Res. 217 (1965) and S.C. Res. 352 (1968).

100 This is precisely the interpretive strategy advocated by nearly all who want a broader power of humanitarian intervention. See, e.g., Delbruck, supra note 97, at 899-901 ("This view deserves support."); Scheffer, supra note 6, at 286-288 (arguing for even broader authority than might be allowed under a broader interpretation of "threat to the peace"). But cf. O'Connell supra note 92, at 911 (arguing against an expansive interpretation of "threat to the peace" as regards United Nations intervention in civil wars).


102 Ratner, supra note 16, at 6-7.
force of UNTAC (the United Nations Transitional Authority in Cambodia).103

The United Nations bypassed consent of the host state or the parties in conflict for the first time in Somalia.104 The Security Council justified this action by claiming that there was no government in Somalia, because the country was in a civil war between several warlord factions.105 But the United Nations has received consent before placing peacekeepers in other countries ravaged by internal strife and civil war.106 This occurred as recently as 1992 in the conflict in the former Yugoslavia.107 In Somalia, with the justification that the civil war canceled any presumption of a prevailing government, the United Nations created a precedent for similar initiatives with similar circumstances of alleged ambiguity of authority.

2. Who Should Intervene

The international reaction to the Iraqi invasion of Kuwait signaled the dramatic end of the Cold War period and a shift from unilateral to multilateral interventions.108 The Chapter VII enforcement provisions and collective security architecture of the United Nations were freed from the stagnation and inaction created by the balance of power and deep mistrust between the veto-wielding United States and Soviet Union.109 The Gulf War signaled that the United Nations had finally acquired the political capability to enforce international norms related to peace and security.110 Subsequent UN military actions inside Iraq to protect the Kurds also

103 Id. at 9-11.
105 Id.
106 Ciobanu, supra note 82, at 38-39 ("[T]he consent of the parties concerned is the conditio sine qua non for the stationing, deployment and movement of the United Nations forces carrying out peacekeeping operations in the territory under their sovereignty or control." Ciobanu later distinguishes Chapter VII actions as exempted from this fundamental consent requirement.).
107 See, e.g., John F. Burns, Serbian Leader in Croatia Agrees to Cooperate With U.N. Troops, N.Y TIMES, Feb. 24, 1992, at A3 (reporting that a major obstacle to United Nations troop placement in Croatia was removed with the consent of a critical Serbian leader).
108 See generally Scheffer, supra note 6, at 263.
109 See Nafziger, supra note 87, at 26-27. For discussion of alternative views see generally COLLECTIVE SECURITY (Marina S. Finkelstein & Lawrence S. Finkelstein eds., 1966).
110 The issue of unilateral intervention is not dead, however. Differing values and politics forced newly elected President Clinton to address the option of unilateral intervention in the Bosnian war. See The Guns Talk Too, TIME, Feb. 22, 1993, at 46.
highlighted the willingness of the United Nations to use military force to address violations of international human rights within a sovereign state.\footnote{See Delbruck, supra note 97, at 899. Contra Alston, supra note 97, at 158.}

Although multilateral intervention by the UN seems to better insure against the misuse of humanitarian intervention, UN decisions on where and when to intervene are significantly limited by the military inequality of its member states. The United States has emerged as the dominant force within the United Nations, particularly on the Security Council.\footnote{See Craig R. Whitney, More Than Ever, U.N. Policing is an American Show, N.Y. TIMES, Jan. 17, 1993, at E3 ("In those instances where the United Nations was able to act, from Korea to the Persian Gulf, it always did so with the strong political backing and the military muscle of the United States. Where the United States did not provide the wherewithal, the United Nations has seldom been effective.").} This shift in the power dynamics of the Security Council has provided the United States with a greater opportunity to set the agenda of the United Nations, particularly as regards Chapter VII enforcement actions.\footnote{See generally Paul Lewis, U.N. Weighs Terms by U.S. for Sending Somalia Force, N.Y. TIMES, Nov. 28, 1992, §1, at 6 [hereinafter U.N. Weighs Terms] (noting the great influence the U.S. has in dictating terms to the United Nations on whether and how to intervene under United Nations auspices).} For those countries which do not share the policies of the United States, this is a matter of some concern. Many countries now view United States leadership and influence over the United Nations with apprehension.\footnote{See Paul Lewis, U.N. Votes to Send Force to Yugoslavia, N.Y. TIMES, Feb. 21, 1992, §1, at 3 [hereinafter U.N. Votes to Send Force] ("Third World countries are fighting any move that enlarges the powers of the Security Council, which they increasingly see as an instrument of American foreign policy.").}

3. \textit{How Interventions are Conducted}

Humanitarian intervention through the United Nations is also becoming more militarized. For example, United Nations responses to the civil war in the former Yugoslavia have merged traditional peacekeeping with the more militarily aggressive forms of humanitarian intervention and Chapter VII enforcement actions. For the first time, the United Nations authorized its peacekeeping troops to use military force to get relief supplies to their intended recipients.\footnote{War Room, supra note 89, at A12.} This merger has created a new hybrid that has been dubbed "humanitarian enforcement" by the media.\footnote{Id.} \textit{The New York Times} reported that the United States insisted in late November of 1993, that U.S forces joining the UN forces in Somalia be allowed to use "all necessary means" including "more aggressive tactics than the force in
Bosnia and Herzegovina had used so far in its efforts to speed the delivery of food and medicine.\textsuperscript{117}

In addition, the numbers of troops in United Nations peacekeeping operations have been increasing. The Somalia operation was the largest to date, with more than 30,000 United Nations troops at its peak.\textsuperscript{118} The UN forces authorized to go to Cambodia (20,000) and Croatia (14,000) were the second and third largest ever deployed.\textsuperscript{119}

In the post-Cold War era, a trend has been developing. This trend is toward humanitarian interventions executed through the United Nations rather than unilaterally by individual states. The size, number and military aggressiveness of UN peacekeeping has increased dramatically. In addition, the Security Council has been broadening its interpretations of key terms such as "consent" and "threat to the peace" to provide a legal basis for aggressive peacekeeping and Chapter VII enforcement actions for humanitarian ends.

IV. DILEMMAS OF DEFINITION

Although humanitarian intervention has a long history as a concept its definition continues to evolve.\textsuperscript{120} Recent writers have suggested new definitions to aid in both clarifying the doctrine and shaping it to further their particular political ends.\textsuperscript{121} Analysis demonstrates that creating new or refined definitions of allowable humanitarian intervention is not the most effective way to resolve the dilemmas of humanitarian intervention. There are two significant disadvantages to the "definitional strategy" of refining the doctrine of allowable humanitarian intervention to control its misuse. The first is conceptual and the second is practical.

\textsuperscript{117} Michael R. Gordon, Somali Aid Plan is Called Most Ambitious Option, N.Y. TIMES, Nov. 28, 1992, at L6; see also U.N. Weighs Terms, supra note 113.


\textsuperscript{119} Paul Lewis, U.N. Council Favors Peace Force for Yugoslavia, N.Y. TIMES, Feb. 13, 1992, at A1 ("The senior official in charge of peacekeeping ... favors a total force of 13,000, the second-largest ever deployed."); U.N. Votes to Send Force, supra note 114 ("The United Nations Security Council voted unanimously tonight to start dispatching a 14,000 member peacekeeping force to Yugoslavia ... [T]he operation in Yugoslavia, which is already one of the biggest the United Nations has ever organized, will be followed by an even bigger and more complex one next week when the Council is expected to send military and civilian contingents to oversee the end of Cambodia's long civil war.").

\textsuperscript{120} See generally HUMANITARIAN INTERVENTION AND THE U.N., supra note 2.

\textsuperscript{121} See Scheffer, supra note 6, at 258 nn.6-7 (regarding scholars who advocate narrow and broad interpretations of allowable humanitarian intervention); Wright, supra note 80, at 436-37.
A. The Inherently Subjective Nature of Humanitarian Intervention

Due to the subjectivity inherent in the concept of humanitarian intervention, a refined definition of allowable humanitarian intervention can still function only as a standard like "reasonableness" or "good faith," rather than as a bright line rule. Thus, even if an exception to the prohibitions on force and intervention could be defined, its application would be determined by those interpreting or enforcing that definition.\textsuperscript{122} Thus, the definition does not, in itself, provide an adequate safeguard against misuse.

Analysis of key elements of the definition of humanitarian intervention illustrates that they are each inherently vulnerable to subjective interpretation.

Figure 1: Model Definition of Humanitarian Intervention\textsuperscript{123}

\begin{center}
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\hline
Humanitarian intervention is: \\
\hline
1) intervention \\
2) by a state or international governmental body \\
3) in the territory or internal affairs of a sovereign state \\
4) to prevent human rights abuses or human suffering \\
5) caused or unalleviated by that sovereign state. \\
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1. Model Definition: "Intervention"

"Intervention" may be defined as "various forms of interference by one or several states into affairs which are within the jurisdiction of another state in pursuance of their own interest."\textsuperscript{124} Usually, though not exclusively, interference is executed with military force.\textsuperscript{125} A norm of non-

\textsuperscript{122} In contrast to domestic legal systems, international law lacks fully developed institutions of compulsory adjudication and enforcement.

\textsuperscript{123} This model definition is drawn from a synthesis of many sources, each of which had a different definition of humanitarian intervention. See AREND & BECK, supra note 72, at 113; Brownlie, supra note 5, at 217; Scheffer, supra note 6, at 264; Wright, supra note 80, at 436.

\textsuperscript{124} OSMANCZYK, supra note 58, at 418.

\textsuperscript{125} See generally Fonteyne in HUMANITARIAN INTERVENTION AND THE U.N., supra note 62, at 205 (noting that most comments of United Nations representatives interpreted the Article 2(7) prohibition to apply equally to forcible or non-forcible intervention by either the United Nations or individual states). For an interesting analysis of whether customary norms exist which also prohibit non forcible forms of
intervention thus becomes problematic in an interdependent world. It is clear that military invasions like that of Vietnam into Cambodia are inter-
ventions into the "territorial integrity" of a target state. But are non-military forms of inter-state actions, such as economic sanctions, trade wars or diplomatic statements also intervention? When the UN General Assembly passed a resolution which criticized Myanmar for violations of basic human rights, Myanmar Foreign Minister Ohn Gyaw told reporters that the UN resolution was "interference."126

Perhaps what is really at issue is less the form of influence exerted than the desired end. The cry of "intervention" may be a way of attempting to delegitimize an influential act by coloring it with a taboo term. Intervention may best be defined as an illegitimate form of influence or interaction; and whether an act is illegitimate is a subjective, political judgment.

2. Model Definition: "In the Territory or Internal Affairs"

Two concepts are significant in analyzing "Territory" and "Internal Affairs." These concepts are expressed in Article 2(4) (prohibiting use of force against the "territorial integrity" of any state) and Article 2(7) (prohibiting United Nations intervention in "matters which are essentially the domestic jurisdiction of any state").

a. Model definition: "Internal Affairs"

The process of defining what sorts of matters are "essentially [within] the domestic jurisdiction" of a state invokes a paradigm of categorical "spheres." Determining what activities are "domestic" and what are "international" is essentially the same question Chief Justice Marshall tried to answer in Gibbons v. Ogden, except, in that case, the issue was between "state" and "federal" spheres.127 The evolution of the Commerce Clause doctrine in U.S. constitutional law may be viewed as a prophetic analog to this categorical distinction in international law.

126 See Leopold, supra note 45; see also Meaningful Ties, supra note 45, at 12.
In *Gibbons*, Marshall found the federal sphere to be supreme as regards commerce, encompassing any economic activity which affects more than one state.\(^{128}\) While the Court used a different test during the formalist years from 1887-1937,\(^{129}\) the politics, economics and jurisprudence of the 1930s finally led to the ultimate absorption of the state sphere into the federal sphere in *Wickard v. Filburn*.\(^{130}\) In this case, the activity of one farmer growing his own wheat for consumption at home was found to affect interstate commerce by what has come to be termed the "cumulative effect principle."\(^{131}\)

A similar line of reasoning has been advanced in the international arena by proponents of a broader definition of humanitarian intervention.\(^{132}\) Their logic is that because abuse of human rights within the geographical boundaries of one state has an "effect" on other countries (e.g., increasing the influx of refugees, exciting passions, or threatening regional conflict), these abuses threaten international peace. By this argument as threats to international peace, abuses of human rights are de facto within the scope of Chapter VII and thus extend beyond the "sphere" of "domestic jurisdiction."

The Security Council has, like the court in *Wickard*, begun to pursue this logic to extreme lengths through a broadened definition of "threat to the peace," giving itself authority to control very local events due to their ultimate "cumulative effect" on the international scene.\(^{133}\) Senator Daniel Patrick Moynihan commented on this development, noting, "[W]e are at the point of claiming that the larger community has more rights of intervention. I don't want a proposition that has the UN General Assembly deciding how we are handling our affairs in Elmira, N.Y."\(^{134}\)

129 Id. at 307-08.
131 TRIBE, *supra* note 127, at 310.
132 See, e.g., Nafziger, *supra* note 87, at 31; see also Scheffer, *supra* note 6, at 287.
133 See Nafziger, *supra* note 87, at 27 (finding that S.C. Res. 688 authorizing military intervention into Iraq to aid the Kurds was a precedent. "The misery of a suppressed population is no longer deemed 'essentially within the domestic jurisdiction' of a national government. Large scale deprivations of human rights unquestionably threaten international peace and security; hence, they engage the Security Council's powers under Chapter VII . . . . Resolution 688 presaged a larger role for humanitarian intervention under international authority."). But cf Alston, *supra* note 97, at 108, 158 ("It is apparent from the foregoing analysis that the Security Council has not in fact succeeded in establishing the key precedent that some observers have suggested is already in place as a result of the humanitarian action taken in relation to the Kurds in northern Iraq.").
Moynihan thus points out the dilemma of emphasizing ultimate interconnectedness to justify ultimate centralized authority, even for the sake of such worthy causes as peace and justice. Thus, the issue of interconnectedness versus definitional “spheres” is itself interconnected to structural issues of representation and power distribution. To the extent the UN Security Council is given authority to intervene in the internal affairs of states, it becomes increasingly important that the Security Council be truly representative and have structural limitations placed on its increased concentration of power.

b. Model definition: “Territory”

A second concept at issue within the model definition of humanitarian intervention is that of “territorial integrity.” One might think that a physical boundary would constitute a sufficient definition. However, many boundaries are still contested. Boundary lines are often indeterminate and have constantly shifted throughout history. Thus, the integrity of a territory is sometimes not as unequivocal as its boundary lines on a current map may appear.

Many recent conflicts have involved territorial issues. For example, Vietnam’s invasion of Cambodia in late 1978 was triggered by military clashes resulting from a long-standing border dispute between the two countries. Many current trouble spots across the globe are legacies of arbitrary line-drawing and nation-creating by colonial powers in the last two centuries.

3. Model Definition: “Human Rights Abuses”.

Defining “human rights” and their violation is a highly subjective and value-laden exercise. During the first thirty years of the United Nations, nearly all of its human rights work was devoted to developing universal human rights standards such as the Universal Declaration of Human Rights. A later resolution of the General Assembly added the 16 International Covenants.

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135 See Ratner, supra note 16, at 3.
136 See MURPHY, supra note 62, at 25-29 (recounting how one of the earliest United Nations peacekeeping/Chapter VII enforcement actions was over the Palestine/Israel issue, clearly an example of a border dispute with a colonial legacy that led to an extremely turbulent conflict); see also id. at 148 (telling of the United Nations operation in the Congo, where Belgian colonial rule left political boundaries which were unacceptable to the people of Katanga, who revolted in civil war soon after the Congolese achieved formal independence from the Belgians).
Rights. Originally considered to be a sufficient deterrent to human rights abuse, "universal" definitions of human rights found in human rights declarations and treaties have proven to be ineffective as governments were not bound by common interpretations. Compliance has been less than optimal, without some means of adjudication and enforcement. The prospect of internationally compelled enforcement by military intervention highlights the philosophical issues of moral and cultural relativism which underlie the debates over the definition and interpretation of universal human rights.

An analysis of the concept of "human rights" illustrates its indeterminacy. One source of confusion is that two meanings of "right" are intermingled in the expression "human right." A noted human rights scholar, Jack Donnelly, distinguishes between use of the term "right" to connote what is "right" (a value judgment) and to describe a "right" which one "holds." A "right" which one "holds" is actually a legally created power which may be enforced upon others by means of legal sanctions. Thus, a legal "right" is a form of power legitimized by the prevailing ethics embodied in current law. Claims of human rights are thus claims for power which ultimately aim to achieve the legitimation of legal sanction. In simple terms, a "human right" is a legally sanctioned and normatively approved form of power.

From the foregoing exploration of the Model Definition of Humanitarian Intervention, one can see that defining "human rights" must ultimately, face the challenge of moral relativism. Who has authority, and on what basis, to claim that one ethic or another is to be enforced by threat or use of force? Some scholars implicitly respond with proposals to limit humanitarian intervention only to "extreme" or "serious human rights violations." At best this only shifts the argument to defining "extreme" or "serious." Other scholars point to Treaties, or international declarations like the Declaration of Universal Human Rights, as expressions of a universal norm. Yet in the Southeast Asian context, resorting to treaty definitions is
problematic insofar as most Southeast Asian states have not acceded to the primary international human rights conventions.\textsuperscript{142} Further, even within treaties, there is room for different interpretations of key phrases, such as "genocide," "cruel and inhuman," "torture" or "equal."

B. Practical Disadvantages to Defining Allowable Humanitarian Intervention

There are practical reasons why attempting to establish specific definitional criteria for distinguishing justified from unjustified humanitarian intervention is problematic. Treaty elements drafted with what might be sufficient specificity are likely to be problematic politically. General criteria are usually more politically viable because they can be interpreted in many ways. But flexible interpretation allows misuse, thereby supporting those who argue for an unequivocal prohibition.\textsuperscript{143} In addition, the diverse types of situations that would need to be covered would be difficult to address with specific criteria. Although many scholars advocate re-defining the basis for, and definition of, legitimate humanitarian intervention, the analysis above suggests that definitional approaches alone are insufficient to prevent misuse of doctrines of humanitarian intervention.

V. Dilemmas of Design

Strategies involving the design of new international institutional structures and processes may be more effective than refined definitions of doctrine in controlling the worst and augmenting the best of humanitarian intervention. There are two aspects of institutional design in international law which hold greater promise in this regard.\textsuperscript{144} The first pertains to the question of who should be authorized to make the ultimately subjective, political judgment to intervene for humanitarian purposes in Southeast Asia. The second aspect relates to developing means by which the international


\textsuperscript{143} See, e.g., Alston, supra note 97, at 170-71.

\textsuperscript{144} Institution is used here in its broader societal sense.
community might intervene in or influence the affairs of Southeast Asian states without resort to military force. These approaches to legal design assume that some form of intervention for humanitarian ends is not only allowable, but inevitable in an interdependent world.

A. Who Should Have Authorization to Engage in Humanitarian Intervention in Southeast Asia?

If decisions regarding which circumstances justify humanitarian intervention are inherently subjective and political, then decisions regarding who determines, interprets and enforces human rights norms become paramount. The determination of who makes these ultimately political decisions is a matter of the structural design of international law. Although customary law emphasizes independent freedom of action by sovereign states within their own territory, there is growing recognition of the limits of this tradition in the post-Cold War era. Thus, a fresh examination of a few alternative designs is historically opportune, especially with respect to Southeast Asia and its unique situation (discussed above at Part II.A). Should decisions to intervene for allegedly humanitarian reasons be made unilaterally, globally or regionally?

Unilateral humanitarian intervention is highly susceptible to misuse for political purposes. Every treaty is subject to various interpretations, and this is especially true when dealing with fluid concepts such as human rights and intervention. Thus, allowing unilateral interpretation and enforcement of human rights treaties fosters international conflict. For this reason unilateral humanitarian intervention has enjoyed less support than operations under the United Nations or regional arrangements. Unilateral "enforcement" of a human rights norm by one state against another state has neither neutrality nor international or regional consensuality to give it the legitimacy to counter suspicions of self-interested action by individual states.

There are two collective action alternatives to unilateral action: 1) global multilateral action through the United Nations, with specific authorization of the Security Council; and 2) regional multilateral action through

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145 See generally JANIS, supra note 63, at 153-55.
146 See Elaine Sciolino, Reluctant Heroes: Getting In is the Easy Part of the Mission, N.Y. TIMES, Dec. 6, 1992, §4, at 1 (quoting U.N. Secretary-General Boutros Boutros-Ghali as stating in his Agenda for Peace that "the time of absolute and exclusive sovereignty [has passed]. It's theory was never matched by reality.").
regional constitutive human rights regimes. Although action by the Security Council would appear more plausible in the post-Cold War era, the Security Council favors the interests of the most powerful nations. In contrast, the development of regional human rights norms and enforcement mechanisms in Southeast Asia would provide greater promise for resolving the dilemmas of humanitarian intervention for the region.

1. Collective Human Rights Enforcement Through the United Nations

In the post-Cold War era, great hopes have been raised that the United Nations may provide relief for victims of human rights abuse around the globe. Not only is the United Nations incapable of meeting such a daunting need, it is doubtful that it can impartially select which situations to address. Under the UN Charter the Security Council is given "primary responsibility" for both interpretation and enforcement decisions regarding international peace and security (and thus for humanitarian intervention, under the current trend of a broader interpretation of "threat to the peace"). But the Security Council is not representative nor is it neutral. The Security Council approach has the fundamental flaw of legitimizing a "Might Makes Right" paradigm. As long as this structure remains, each permanent member has extraordinary power to block humanitarian intervention by the United Nations. This reduces the political, if not the moral or legal, legitimacy of humanitarian intervention by the United Nations.

Proposals have been made to restructure the United Nations and the Security Council in the post-Cold War era. Germany has requested a permanent seat on the Security Council. Secretary General Boutros-Ghali

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147 See generally War Room, supra note 89, at A12.
148 See MURPHY, supra note 62, at 79.
149 Of the 15 member states sitting on the Security Council, ten are rotated and five are permanent. Each of the five permanent members have power to veto any decision. The "Permanent Five", as they are called, are the United States, Great Britain, France, Russia and China. The United Nations General Assembly also has a limited claim to representational legitimacy due to the gross disproportionality of its representational structure. China's 1.18 billion people are entitled to a single representative; so too are dozens of smaller countries with 100-200,000 citizens. Thus, when the General Assembly passes a resolution by majority vote, it may or may not reflect the opinions or values of a popular majority of the world's people. See generally JANIS, supra note 63, at 197-98.
150 See, e.g., Murray Kempton, China's Missing on U.N. Blacklist, NEWSDAY, Nov. 28, 1993, at 37 (noting that the General Assembly's longest ever listing of states who have violated human rights has omitted China, "a significant omission, and its absence affirms a United Nations tradition of seldom reproving a despotism powerful enough to avenge the affront with its Security Council veto").
151 See generally Craig R. Whitney, U.N. Chief Asks Bonn for Troops, Underlining Constitutional Issue, N.Y. TIMES, Jan. 12, 1993, at A11 (quoting a German official as stating that Germany will not press
has indicated that there may be a permanent position for Japan on the Security Council. Secretary of State Warren Christopher has also suggested restructuring the permanent membership of the Security Council. But such developments alone would only continue the tradition of giving greater power to those states already having the greatest power. As the graph below illustrates, the permanent membership of the Security Council already disproportionately represents much wealthier nations. Adding Germany and Japan would only exacerbate this problem.

Figure 2: Comparative Wealth of the Current and Proposed Permanent Membership of the Security Council with the Nations of Southeast Asia

![Graph showing comparative wealth of current and proposed permanent membership of the Security Council with nations of Southeast Asia.](image)

its claim for a permanent seat on the Security Council; while Boutros-Ghali courted their help by stating, "After all, you are the third most important country in the world. We need the full participation of Germany in peace-keeping, peace-making, peace-enforcing... if we want a strong United Nations.")

152 *See* T.R. Reid, *U.N. Secretary General Calls for 'More Participation' in Peace-keeping Missions*, WASH. POST, Feb. 18, 1993, at A28 (stating that "Boutros-Ghali was fairly encouraging in discussing Japan's chances of achieving its goal of a permanent seat on the Security Council. As the world's second-richest country... Japan contends that it has as much right to a permanent seat as the five current members, which each received its seat four decades ago.").

153 *See* Watson, *supra* note 89, at 34 ("[T]he United Nations probably needs to be reinvented, or at least overhauled -- a task that is already being contemplated by the Clinton administration."); *see also* Hugo Young, *Europe to Clinton: A Wary Welcome*, NEWSWEEK, Feb. 22, 1993, at 36 ("Warren Christopher, in his first address to State Department staff, casually remarked that it made sense to review the permanent membership of the United Nations Security Council....").

154 The average per capita GNP for all five countries on the Security Council is $12,518.74. (China's is only $370). If one were to add Japan ($26,920) and Germany ($23,650) to the Security Council, the average would then be $16,166. Compare this to the median per capita GNP of $980 of the 10 Southeast Asian countries (not including Papua New Guinea, which has a per capita GNP of $820), and one can better appreciate the gravity of the economic disparity. *See* POPULATION REFERENCE, *supra* note 37.

155 *See* POPULATION REFERENCE, *supra* note 37 (data depicted is deduced by the author from data provided).
The concept of a world order in which the United Nations represents a “community of power” remains unrealized in the face of this “concentration of power.” Other proposals supported by Southeast Asian nations include limiting the veto power of the Permanent Five and adding more southern hemisphere or non-aligned nations to the Security Council membership. However, efforts to limit the power of the Permanent Five must be approved by the Permanent Five, thus making significant changes less likely. Before collective humanitarian intervention by the Security Council would truly represent a global decision, the Security Council must become more representative. Until then, Southeast Asian states have reason to be suspicious of decisions by the Security Council to intervene in their affairs for allegedly humanitarian reasons.

2. Collective Human Rights Enforcement Through a Regional Organization or Convention

Development of a regional human rights regime would provide a more effective alternative for Southeast Asia than current proposals for restructuring global institutions. Southeast Asia faces a unique set of circumstances and thus requires a distinct approach to resolving the dilemmas of humanitarian intervention in the region. With China holding a veto power on the Security Council, the United Nations is unlikely to intervene in Southeast Asia to remedy human rights abuses. Although a regional regime could not authorize humanitarian intervention under the UN Charter without authorization from the Security Council, it could help prevent human rights abuses from becoming egregious in the first place. In addi-

156 See Nafziger, supra note 87, at 9-11.
159 See generally Alston, supra note 97, at 174.
160 See, e.g., Kissinger Backs Suharto, supra note 157 (reporting that even former U.S. Secretary of State Henry Kissinger “acknowledged that to smaller countries the Security Council might look more and more like an instrument of the major powers...” in supporting Indonesian President Suharto’s call to add developing nations).
161 See Leary, supra note 56, at 323 (arguing that despite tremendous efforts by the United Nations and its agencies, the “most effective human rights implementation systems are regional systems”).
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tion, to the extent that the regime contains adjudicative or reporting functions it could make determinations that certain acts were, by Southeast Asian standards, judged to be gross violations of human rights. These determinations would, in turn, provide a focus point for international attention and, ultimately, enforcement sanctions.

A regional human rights regime would allow Southeast Asian nations the forum to define human rights norms that, in the words of Zahir Ismail, the president of the ASEAN Inter-Parliamentary Organisation, "emulate universal human rights principles but [are] tailored to the needs and requirements of our society."¹⁶³ Many Southeast Asian governments are challenging the application of what they perceive to be a Western concept of universal human rights to Southeast Asia.¹⁶⁴ At the Vienna World Conference on Human Rights last year, China was joined by Southeast Asian nations in resisting universal human rights norms by claiming the authority to develop their own concept of human rights.¹⁶⁵ However, other Southeast Asian leaders concur with the Western emphasis on a broader conception of universal human rights.¹⁶⁶ Development of a human rights regime would necessitate the reconciliation of these views in defining human rights norms which reflect Southeast Asian values. However, declaring human rights norms will still be insufficient to ensure compliance with those norms. The problems of subjective interpretation and lack of enforcement authority will remain. Thus, Southeast Asia should move beyond declarations and toward designing a Southeast Asian regime to promote and protect human rights.

Southeast Asia should develop a constitutive convention with adjudicative and enforcement mechanisms similar to the European, American and African human rights conventions/regimes. These conventions establish permanent bodies with powers to perform many important functions, including investigating complaints, facilitating resolution of disputes, and

¹⁶⁴ See Clayton Jones, Asia Carves Out Own Ideas on Political Values, CHRISTIAN SCIENCE MONITOR, Dec. 15, 1993, at 11 (quoting Sec. of State Warren Christopher's paraphrase of some Asian criticism of United States efforts during a talk to the Association of Southeast Asian Nations (ASEAN)).
¹⁶⁵ See Sharma, supra note 41; see also Amyn Sajoo, A New Profile for Human Rights on ASEAN's Agenda?, BUS. TIMES, Oct. 19, 1993, at 28.
¹⁶⁶ See Kunda Dixit, Human Rights: Asia-Pacific States Set Strong Agenda, Inter Press Serv., April 2, 1993, available in LEXIS, News Library, Allwld File (noting that India, the Philippines, Japan, South Korea and Nepal spoke out for pluralism and civil liberties at the Bangkok conference in July; also quoting a Japanese spokesperson as saying, "Human rights are universal . . . these are values common to all mankind and they are a matter of legitimate international concern.")
promoting increased understanding of, and compliance with, the human rights norms contained in the convention. These functions also include, to differing degrees, reporting or publicizing violations, and adjudicating and enforcing certain sanctions to compel compliance.167

This model was rejected by many state representatives in Southeast Asia, while being championed by non-governmental organizations in the region.168 Such a proposal was considered by the Economic and Social Council of the United Nations (ECOSOC) in the early 1980s, but was not accepted at the time.169 Resistance to the idea ranged from disagreement over whether any human rights norms were appropriate for Southeast Asia to fear that a regional regime would be dominated by authoritarian governments unsupportive to the goals of human rights advocates. Subsequently, the non-governmental Asian Human Rights Commission was established in 1983 out of frustration at the failure to create a regional inter-governmental human rights commission.170 To the extent that a non-governmental body develops and maintains a reputation for neutrality and integrity, it should enjoy some success in fulfilling some of the functions of the regional conventions described above. For example, non-governmental organizations like Amnesty International have succeeded in generating significant pressure on governments to comply with stated norms by engaging in neutral investigation and reporting. But a non-governmental body lacks the authority and legitimacy of an inter-governmental body. Thus, an inter-governmental regional human rights commission has greater potential than the non-governmental Asian Human Rights Commission for effectively deter ring and exposing human rights abuse in Southeast Asia.

Establishing a regional human rights regime would not be without its problems. To be most effective, the convention should constitute bodies with authority to interpret and, to some extent, report and enforce the human rights norms established. Yet, to the extent that a regional body is given broader and clearer authority to interpret and enforce human rights norms, it is politically less likely to be created. However, since the UN General Assembly voted to create the new post of a UN Human Rights

168 These include the Human Rights Standing Committee of LAWASIA, which has set a long-term goal of establishing an inter-governmental human rights commissions. See Leary, supra note 56, at 327-28.
170 See Leary, supra note 56, at 330.
Commissioner at the close of 1993,\textsuperscript{171} Southeast Asia may face greater attention from the increasingly powerful international human rights apparatus of the United Nations. This could be a further incentive to establish a regional regime. In the final analysis, it is the development of the political will of the people of the region which will be critical to the success of any regional regime enforcing human rights in Southeast Asia.

There have been recent developments in Southeast Asia toward defining binding regional human rights norms and building the institutions to enforce them.\textsuperscript{172} In 1982, the non-governmental Regional Council on Human Rights in Asia published the non-binding Declaration of Basic Duties of ASEAN Peoples and Governments.\textsuperscript{173} More recently, and more significantly, there was a first-ever inter-governmental gathering of Asia-Pacific states in Bangkok which drafted a non-binding, “Bangkok Declaration” on human rights in Asia in preparation for the UN World Conference on Human Rights held in Vienna in June of 1993.\textsuperscript{174} In Bangkok, and again in Vienna, Southeast Asian nations were vocal in challenging the scope of the Western belief in universal human rights. Southeast Asian states were put on the defensive in Vienna “for uniquely lacking regional machinery that would promote and protect human rights.”\textsuperscript{175} Months later, in October of 1993, ASEAN’s Inter-Parliamentary Organization (AIPO) adopted the ASEAN Declaration on Human Rights to “show the world that we also practise human rights.”\textsuperscript{176} There are indications that ASEAN nations intend to move beyond rhetorical declarations towards establishing “some sort of a regional mechanism to handle human rights issues.”\textsuperscript{177} For example, Indonesia and the Philippines have already established national human rights commissions.\textsuperscript{178}

Establishment of a neutral regional body to promote compliance with regionally defined human rights norms, beginning with investigation and reporting of violations, would be a first step. Southeast Asia would benefit


\textsuperscript{172} See Leary, supra note 56 (for additional analysis of the steps taken to date in developing a regional human rights system in Asia).

\textsuperscript{173} See Leary, supra note 56, at 329.

\textsuperscript{174} Dixit, supra note 166.

\textsuperscript{175} Sajoo, supra note 165, at 28.

\textsuperscript{176} \textit{ASEAN to Draft its First Human Rights Charter}, Agence France Presse, Sept. 20, 1993, available in LEXIS, News Library, Allwld File (quoting Zahir Ismail, the president the ASEAN Inter-Parliamentary Organization).

\textsuperscript{177} Pereira, supra note 171, at 8.

\textsuperscript{178} Sajoo, supra note 165, at 28.
from a convention like the Banjul Charter of Africa, which includes a provision for educating people about the human rights norms contained in the Charter as one of the tasks of its Commission. As a Special **Rapporteur** for Asia from the United Nations stated, "what is lacking in the field of human rights in Asia, is that moral conscience which prompts individuals to resist repression and arbitrary disciplinary action taken by the government...."\(^\text{179}\)

Although such "preventive" human rights work is less dramatic than military operations, without essential preparatory work at the grass-roots level, humanitarian interventions in Southeast Asia risk long-term destabilization of international peace while providing an ultimately ineffective quick-fix.

**B. How Should Humanitarian Intervention Be Practiced in Southeast Asia**

The development of new means of humanitarian intervention holds more promise than refining the definition of humanitarian intervention. Military forms of humanitarian intervention should continue to be prohibited.\(^\text{180}\) In contrast, non-military forms of intervention should not only be allowed, but further developed.\(^\text{181}\) This would reduce the pressure to use military forms of humanitarian intervention.

Much of the opposition to humanitarian intervention is based on the presumption that interventions will involve military force in violation of Article 2(4).\(^\text{182}\) The use of military force is controversial because the means are antithetical to the end which is sought.\(^\text{183}\) Killing people to prevent them from killing people is usually acceptable only if it is deemed "necessary."\(^\text{184}\) The meaning of necessity involves two important concepts: 1) that no other acceptable means are available which will accomplish the desired end; and 2) that the desired end of humanitarian intervention, in its


\(^{180}\) Cf AREND & BECK, _supra_ note 72, at 179-85 (admitting that only one other legal scholar believes Art. 2(4) no longer prohibits the use of force, this author argues that state practice has destroyed legal viability of Art. 2(4)).

\(^{181}\) See generally Damrosch, _supra_ note 125, at 5-13.

\(^{182}\) See, e.g., AREND & BECK, _supra_ note 72, at 112-13, 134-35; see also Scheffer, _supra_ note 6, at 258 n.6, 264 (listing scholars who advocate narrow views of allowable military humanitarian intervention).

\(^{183}\) See Farer, _supra_ note 2, at 150 (noting that, "[T]he instrument of intervention that we were judging- force- is also the instrument of those whose acts are the occasions for our concern.").

\(^{184}\) See Delbruck, _supra_ note 97, at 901 (arguing that humanitarian "enforcement measures could only be resorted to as an _ultima ratio_...lawfully undertaken if enforcement measures short of the use of military force have proven to be ineffective and if the military enforcement measures are applied proportionately.").
most basic form, is maximizing human rights compliance, particularly through a net savings of human life.\textsuperscript{185} These two concepts highlight the controversy over whether military forms of humanitarian intervention should be allowed.

Strategies for opposing military forms of intervention can be categorized according to their response to these two concepts. The first strategy emphasizes the inefficiency of military methods to achieve the humanitarian end. The argument is that military intervention does not result in a net savings of life. The second strategy emphasizes the need to fully develop and then exhaust effective alternative means before resorting to military force.

1. \textit{Inefficiency of Military Intervention}

The argument that military intervention is sometimes necessary to achieve humanitarian goals rests on certain implicit assumptions. Those who believe that military sanctions are effective for maximizing human rights compliance and saving lives may be implicitly emphasizing short-term versus long-term calculations concerning the loss of life associated with using military forms of intervention. On the other hand, advocates of a strict prohibition of the use of military intervention believe that the long-term costs of allowing the use of military force for humanitarian ends, and its concomitant risk of misuse, outweigh its short-term benefits in saving lives.\textsuperscript{186} For example, the strict prohibitionist might concede that a military intervention in which 20,000 were killed, but 50,000 were saved, would result in an immediate net savings of life. But the strict prohibitionist would contend that this calculation is too short-sighted, and would speculate that allowing military forms of humanitarian intervention would lead to misuse of the exception as a pretext for ulterior political objectives. Such politically opportune uses of humanitarian intervention would, in the long run, lead to the loss of many more lives than would be saved.\textsuperscript{187} Thus, the

\textsuperscript{185} See, e.g., \textsc{Black's Law Dictionary} 715 (Abr. 6th ed. 1991) (regarding what it means to be necessary); \textit{see also} AREND \& BECK, supra note 72, at 113; \textit{see also} TESON, \textit{supra} note 140, at 95-109 (providing a much more sophisticated analysis of utilitarian arguments for and against humanitarian intervention, including discussion of relative weighting given to the lives of innocents versus combatants or violators).

\textsuperscript{186} \textit{See} TESON, \textit{supra} note 140, at 95-96.

strict prohibitionist adds the lives lost (from a predicted long-term increase in pretextual military interventions) to the initial short-term calculation made by the military intervention advocate.\textsuperscript{188}

The primary strategy for preventing the use of force has been to ban the use of military force in international affairs, allowing only certain exceptions.\textsuperscript{189} The Kellogg-Briand Pact presumed that international agreement to a mutual prohibition and renunciation of war would be a sufficient deterrent.\textsuperscript{190} World War II demonstrated the limits of this presumption. In response, the UN Charter incorporated a broader prohibition against force or the threat of force and coupled it with an institutional mechanism for interpretation and enforcement through the “collective security” architecture of the Security Council.\textsuperscript{191} But the many conflicts and interventions of both the Cold War and post-Cold War eras have led many to question the efficacy of this strategy.\textsuperscript{192}

2. Developing the Alternatives to Military Intervention

Activists who support humanitarian intervention should encourage the development and acceptance of non-military forms of intervention. The time is ripe for a new approach. The end of the Cold War represents a historic opportunity to dramatically reassess how to control the use of force in international law.\textsuperscript{193} The final years of the Cold War witnessed dramatic and effective use of nonviolent methods to topple or shake many of the most formidable governments of the world.\textsuperscript{194} Anti-militarists and defense

\textsuperscript{188} One advocate of humanitarian intervention argues for a utilitarian calculation which deducts from the risk of misuse the risk of other doctrines being used as substitute pretexts if humanitarian intervention were completely prohibited. It is an interesting argument, but neglects to add into the equation the additional interventions which would be initiated if there were exceptions for humanitarian intervention. See Wright, \textit{supra }note 80, at 443. \textit{Cf.} TESON, \textit{supra }note 140, at 96-107 (discussing various utilitarian arguments for and against humanitarian intervention and arguing that “Humanitarian intervention can be just even if the intervenor infringes the rights of innocents, and even if, in rare cases, more infringements will occur than the intervention will prevent”) (emphasis added).

\textsuperscript{189} See AREND \& BECK, \textit{supra }note 72, at 31-33. \textit{See, e.g.,} The International Court of Justice, in Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27), interpreted the exception for self-defense in case of “armed attack” very narrowly.

\textsuperscript{190} See, \textit{e.g.,} JANIS, \textit{supra }note 63, at 166-67.

\textsuperscript{191} See AREND \& BECK, \textit{supra }note 72, at 177.

\textsuperscript{192} Id. at 178.

\textsuperscript{193} See JANIS, \textit{supra }note 63, at 168.

\textsuperscript{194} See generally Tom Mathews, \textit{Decade of Democracy}, NEWSWEEK, Dec. 30, 1991, at 32 (chronicling the primarily nonviolent revolutions and protests occurring around the globe from the Soviet Union and Eastern Europe, to the Philippines and China’s Tiananmen Square).
analysts have begun researching non-military forms of intervention and dispute settlement in the international arena. Further research and development of these techniques provides hope for a solution to some of the dilemmas of humanitarian intervention.

International law should allow and encourage the development of alternative methods of non-military intervention for humanitarian purposes. The development of effective non-military enforcement and dispute resolution mechanisms is a relatively new endeavor in international relations. Its potential remains underdeveloped. Just as new advances in technology have led to changes in how we solve technical problems. So too advances in non-military strategies may lead to changes in how we solve social problems. For example, many new manufacturing technologies have compelled nations and the law to adapt to changed economic, ecologic and social conditions. Similarly, the behavioral changes that many hope the law will effect may best be achieved by more aggressive development of non-military dispute settlement mechanisms rather than relying on normative prohibitions of military force. Further international and national resources should be diverted from military technologies and strategies designed for the conflicts of the Cold War to non-military initiatives and strategies designed to resolve post-Cold War disputes.

There have been some interesting developments in this regard at both the inter-governmental and non-governmental levels which should be

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199 See Sharp, supra note 195, at 5; see also Binder, supra note 134 (noting encouraging signals in this direction from the Clinton administration, "[Secretary of State] Christopher called for ‘preventive diplomacy’ to keep the conflicts from spreading. He also endorsed ‘new dispute resolution techniques,’ including some form of international arbitration . . . ’").

200 See COHEN, supra note 92, at 1 (creating emergency machinery for the United Nations Commission on Human Rights to respond to human rights emergencies; stationing of human rights monitors; and development of preventive strategies); see also Alston, supra note 97, at 172-174 (arguing that
supported. For example, the 5,000 member United Nations Volunteers, administered by the UN Development Programme since 1970, may expand its mission to include some form of non-violent presence in troubled countries. In addition, UN Secretary General Boutros Boutros-Ghali has proposed establishing regional training centers for the development of non-military peacekeeping and peacemaking forces. In addition, many non-governmental organizations have begun to develop skilled volunteer forces prepared to intervene non-violently to prevent human rights abuses and help resolve conflicts, utilizing techniques developed by Mahatma Gandhi, Martin Luther King and a core of defense specialists researching possible applications of these techniques in global affairs.

Short-term interests have often prevailed over long-term interests in international affairs. Thus, it would be difficult to gain support for a prohibition on military force through the implementation of structures which address long-term cost. However, the world is showing greater signs of sophistication in making longer-range cost/benefit policy choices, at least in cases where future projections are plausible and serious. For example, in the Montreal Protocol the international community severely curtailed the economically lucrative (short-term), but ecologically catastrophic (long-term), production of CFC’s to protect the earth’s ozone layer. Similarly, claims of the long-term social costs of continued acceptance of the use of military force could become more credible if empirical data corroborates the long-term costs predicted by anti-militarists.

Absent such evidence, a prudent investment in the future of Southeast Asia would be to explore the potential of nonviolent methods as an effective
alternative to military might. Events in Eastern Europe, the Philippines, China and elsewhere have shown that non-military methods can be successful in re-shaping governments which abuse human rights. Herein lies a bright hope for resolving the dilemmas of humanitarian intervention.

VI. CONCLUSION

The end of the Cold War has revived the issue of military intervention for humanitarian objectives. Dramatic abuses of human rights in Southeast Asia tempt Western impulses to project global power to enforce human rights norms. Some Southeast Asian states resist intervention by claiming that they are not bound by Western interpretations of human rights norms and should enjoy refuge, as sovereign powers, from the subjective judgments of militarily stronger states. But as Bilahari Kausikan, Director of Singapore's East Asia and Pacific Bureau, notes:

The traditional notion of sovereignty is being eroded by the influence of television, environmental concerns, and the United Nations. This tension is the defining characteristic of our time. There's a false debate on whether human rights is relative to a country's conditions or whether they are absolute. Of course, there are universal values, but the core of the values is smaller than the West believes. The debate is over the way that international norms are set, and that depends on the global distribution of power.206

Legal scholars continue to debate broadened definitions of a doctrine of humanitarian intervention in hopes of controlling its potential misuse and increasing its usefulness in halting substantial human rights abuse. However, definitional improvements will likely be less effective than political and methodological changes in the determination and practice of humanitarian intervention. This is particularly true in Southeast Asia where: 1) "universal" norms are not widely accepted; 2) no regional interpretive or enforcement machinery is in place; and 3) the region is

205 See NONVIOLENT SANCTIONS, supra note 195, at 6-14, 16-17; see also, Mathews, supra note 194 at 32.
206 Jones, supra note 164, at 11.
highly susceptible to political manipulation by the current members of the Security Council (notably China and the United States).

Two strategies offer greater promise for Southeast Asia. First, development of a regional human rights regime like those in other regions of the world would be more likely to control human rights abuse in the area. Second, while military humanitarian intervention should continue to be prohibited, non-military methods of intervention should be more aggressively developed and granted greater legal legitimacy. Emphasizing these two developments in the design of international law provides the best strategic choices for the promotion of human rights, while simultaneously controlling the potential misuse of humanitarian intervention in Southeast Asia. By adhering to standards of democracy and non-violence in international law as it applies to Southeast Asia, we may not “rid the world of scoundrels. But it will make it easier to tell them from us.”

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