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REAPPRAISING POLICY OBJECTIONS TO
HUMANITARIAN INTERVENTION

Dino Kritsiotis*

I. INTRODUCTION

Constructed as a basic legal proposition, the right of humanitarian intervention—that is, the transnational application of force by states under the banner of humanitarian concern—challenges the fundamental doctrine upon which the contemporary system of international law operates: the doctrine of state sovereignty and the concomitant principle of non-intervention in the internal affairs of states.¹ In a world which has

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¹ For the purposes of this article, the legal definition of humanitarian intervention which is adopted is that provided by Professor Wil D. Verwey to the effect that humanitarian intervention is "the protection by a state or group of states of fundamental human rights, in particular the right to life, of nationals of, and residing in, the territory of other states, involving the use or threat of force, such protection taking place neither upon the authorization by the relevant organs of the [United Nations] nor upon invitation by the legitimate government of the target state." Wil D. Verwey, Humanitarian Intervention, in THE CURRENT LEGAL REGULATION OF THE USE OF FORCE 57, 59 (A. Cassese ed., 1986). Compare SEAN D. MURPHY, HUMANITARIAN INTERVENTION: THE UNITED NATIONS IN AN EVOLVING WORLD ORDER 11–12 (1996) (stating that humanitarian intervention is the threat or use of force by a state, group of states, or international organization in order to protect the target state's nationals from deprivation of internationally recognized human rights) and W. Michael Reisman, Hollow Victory: Humanitarian Intervention and Protection of Minorities, 91 PROC. AM. SOC'Y INT'L L. 431 (1997) (supporting a wider definitional scope for humanitarian intervention so that the term now "also
come to cherish the philosophical constructs of sovereignty and statehood as the legal identity of each of its politico-territorial communities, it comes as no surprise that “intervention” in the affairs of any of these communities has been depicted as a necessary evil forbidden by law.\(^2\)

Even when an intervention is recognized as permissible in principle—where, for example, a government in undisputed control of its territory has requested or given its consent to it—international law still brands the action as an *intervention* of sorts, albeit an *intervention by consent*. Furthermore, in cases of profound moral or humanitarian alarm, strict adherence to the principle of non-intervention in some circles continues to prioritize it above the compelling imperatives and considerations which appear to have provoked or precipitated these interventions in actual practice.\(^3\)

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\(^1\) Refers to interventions for humanitarian purposes by international organizations. Such organizational actions are significant, from a legal standpoint, only if the humanitarian impulse is the sole authoritative basis for the action in question). The preferred approach is to regard interventions authorized by the Security Council for humanitarian purposes as *casus foedris* which, as such, properly fall for consideration as precedents under Chapter VII of the United Nations Charter because that is where their legal basis is located. See J.P. Humphrey, *Foreword to HUMANITARIAN INTERVENTION AND THE UNITED NATIONS* at vii, viii (Richard B. Lillich ed., 1973); see also infra note 26. Although this article does draw upon the experiences of interventions which have received the sanction of the United Nations, it does so to illustrate the arguments it makes, without compromising the legal definition endorsed herein.

Finally, it should be noted that where states use force to protect their own nationals, this utilization is to be seen either as an element of the right of self-defense or as a separate conceptual head for intervention altogether. See Richard B. Lillich, *Forcible Self-Help by States to Protect Human Rights*, 53 IOWA L. REV. 325, 332 (1967); Michael Akehurst, *Humanitarian Intervention, in INTERVENTION IN WORLD POLITICS* 95, 99 (Hedley Bull ed., 1984). There is, however, an undoubted “overlap” in “functional terms” with humanitarian intervention. Ian Brownlie, *Non-Use of Force in Contemporary International Law, in THE NON-USE OF FORCE IN INTERNATIONAL LAW* 17, 25 (William E. Butler ed., 1989).


3. Although, it is important to note that in the Eichmann episode, on which, see supra note 2, where there was never any doubt of a violation of the international legal principle of non-intervention, “Argentina and other nations were, as anticipated, reluctant to appear to champion Eichmann or to interfere with his trial, even in order to vindicate the universally accepted principle of territorial integrity,” and that “the debates [in the Security Council] revealed
This article's purpose is not to search for particular conclusions as to the substantive merit or the present legal status of the right of humanitarian intervention as defined and in view of this seeming tension between recent practice and established principle. Its governing concern, rather, lies with: fundamental principles of analysis and method; the formal sources of public international law consulted in the examination of the validity of humanitarian intervention; how normative determinations are reached in the first place; and the techniques which are adopted in navigating our course to these ends.¹

To make its case, the article identifies three objections that have appeared in the legal literature and that have been used against the endorsement of the right of humanitarian intervention in international law: the prospect of the abuse of the right of humanitarian intervention, the propensity for its selective application, and finally, the nature of the motives of states who intervene in its name. These objections are of a policy, rather than of an empirical, orientation and yet, somehow, have come to eclipse more appropriate methods for deciding where humanitarian intervention stands as a matter of law. The article proceeds to emphasize the importance of a return to empirical-based methods of international law-determination at a time of prodigious—and relevant—state practice, but it is also used as an essential platform for questioning the cogency of these objections in view of the experiences and conduct of the interventions that have taken place since the end of the Cold War.

Offering its critique of these common policy objections, the article presents the argument that old and worn controversies as to the place of humanitarian intervention within the normative framework of the jus ad bellum still remain, notwithstanding the revival and re-working of international institutions and decision-making fora. These controversies persist because some states continue to apply armed force for humanitarian purposes without the formal authorization of these institutions, and yet have done so without their condemnation or censure—interventions which have also been greeted by the apparent approval and guarded applause of states. This possible acceptance of


4. For the configurations of constructing normative propositions in classic international law, see Philip Allott, Language, Method and the Nature of International Law, 1971 Brit. Y.B. Int'l L. 79, 80 (identifying: (1) the "autological" or deductive form which fashions legal argument on the basis of deduction, analysis or tautology and which emanates from "an underlying rule of internal logical consistency in international law"; (2) the empirical form, which relies on "the practice of states, the situation of fact, the history of the matter" and (3) the teleological or policy form, which argues for "rules determined on the basis of utilitarian reasoning or defined social and policy objectives").
such interventions has meant that we are still faced with real questions in need of real answers that cannot—and indeed should not—be postponed by ease of reference to policy objections which are themselves of doubtful validity and which could in fact constitute a denial of any genuine changes that may have taken place in the normative convictions of states.

In examining this practice, the article argues, we shall be able to ascertain whether states are permitted in law to exercise their so-called (individual or collective) right of humanitarian intervention, and this will, in turn, illuminate our understanding of the scope and nature of the principle of non-intervention in modern international law. Casting its final reflections on the possible place of humanitarian intervention in a world of multiple sovereigns, the article considers as its overarching theme the law-determination mechanisms within the United Nations and suggests that the international law scholar carries a significant share of the burden in venturing an account of the legal status of humanitarian intervention at any given moment in time, history or practice.

II. OF THE HISTORY, NATURE, AND SCOPE OF THE PRINCIPLE OF NON-INTERVENTION

That the principle of non-intervention commands such high prominence in international law cannot be doubted. The principle's positivist credentials derive from a vast multitude of legal texts and a monotonous succession of declarations and proclamations where it has been given repeated (if not rhetorical) mention. Its conventional existence is owed principally to a range of global and regional treaties, and its customary law status is verified in part by an on-going cavalcade of United Nations resolutions. The jurisprudence of the International Court of Justice and


generations of international legal scholarship have confirmed the principle's cardinal legal ranking.\(^7\) States jealously treasure the principle of non-intervention, and it is the chief envy of aspiring states because it is the legal insurance of their sovereign existence. In principle, therefore, the principle of non-intervention as it has been defined in international law reigns supreme.\(^8\)

When referring to the actual legal materials which preach and promote the principle of non-intervention in international affairs, we notice the absolute form that has been fastened upon its very being. General Assembly Resolution 2625 (XXV), for example, provides that "[n]o state or group of states has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other state."\(^9\) Armed intervention is singled out for particular mention as a "violation of international law,"\(^10\) but the principle of non-intervention as
constructed also outlaws "the use of economic, political or any other type of measures to coerce another state in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind." No scope for exceptional cases or conflicting considerations is entertained in the resolution. The kernel of the principle of non-intervention as defined thus embodies the essence of the first formulation of the principle by the General Assembly in Resolution 2131 (XX) of 1965. This was reiterated in Resolution 36/103 of 1981, despite the burgeoning catalogue of interventions which have occurred and continue to occur for various reasons in United Nations practice. The deepening chasm which separates practice from principle has drawn the normative scope of the principle into question, notwithstanding the relentless insistence on its continued status in international law by the General Assembly.

The International Court of Justice has followed a less didactic line in its jurisprudence on the nature and scope of the principle of non-intervention in international law. This approach is best exemplified by the Court in the Nicaragua Case in 1986. Charged with the responsibility of deciding the disputes which are brought before it in accordance with international law, the Court was, and remains, mindful of the formal sources of law which it must consult in the execution of this task. The Court reflected this approach in an important dictum of its ruling—a section of the judgment that appears to have been lost in the mire of recitations of the principle of non-intervention. After reviewing the prolific legal practice which has secured for the principle of non-intervention its pride of place in customary international law, the Court indicated that any "[r]eliance by a state on a novel right or an unprecedented exception to the principle might, if shared in principle by other states, tend toward a modification of customary international law." For this to occur, it was incumbent on the Court to determine "whether there

Res. 2625, supra note 6, at 123 (emphasis added). This principle is also firmly established in customary international law. See Nicaragua Case, 1986 I.C.J. ¶ 188, at 99; ARNOLD MCNAIR, THE LAW OF TREATIES 206-11, 215-18 (1961).

11. G.A. Res. 2625, supra note 6, at 123.


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might be indications of a practice illustrative of belief in a kind of general right for states to intervene, directly or indirectly, with or without armed force, in support of an internal opposition in another state, whose cause appeared particularly worthy by reason of the political and moral values with which it was identified.\textsuperscript{15}

With these words the Court demonstrated that it was prepared—at least in principle—to approach state practice on the non-intervention issue with a more open mind and with greater investigative rigor than the General Assembly, which could be said to have shown a general impotence to “cope with anything more than the shortest of intellectual agendas and the simplest of principles.”\textsuperscript{16} The Court, of course, labors under a more exacting obligation than does the General Assembly in that it is required to take heed of “general practice accepted as law” before it reaches conclusions that are defensible in law.\textsuperscript{17} This approach is

\textsuperscript{15} Id. \S 206, at 108.

\textsuperscript{16} Lowe, supra note 12, at 73. See also Tom J. Farer, An Inquiry into the Legitimacy of Humanitarian Intervention, in LAW AND FORCE IN THE NEW INTERNATIONAL ORDER 185, 197 (Lori Fisler Damrosch & David J. Scheffer eds., 1991) (contending that “opportunities [in the General Assembly] for expressing a clear position” on the legal status of humanitarian intervention “have been ignored”). In a similar vein, the International Court of Justice was faced with a “titanic tension between state practice and legal principle” in its Advisory Opinion, Legality of the Threat or Use of Nuclear Weapons, July 8, 1996, 35 I.L.M. 809, 836 (dissenting opinion of Judge Stephen M. Schwebel, concluding that the “chasm between practice and principle may be bridged—and is bridged by the Court’s Opinion”). I emphasize that this judicial sensitivity to state conduct manifested itself \textit{in principle}—that is to say that the Court identified a specific method of law determination, one that it may not itself have followed with rigor or sufficient precision in practice. Meron, for instance, has suggested that the Court in the Nicaragua Case “should be reproached for its near silence concerning the evidence and reasoning supporting [its] conclusion” that both Articles 1 and 3 of the 1949 Geneva Conventions are representative of international custom. THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 37 (1989). For a further critical appraisal of how the Court conducted its business on this matter in the same case, see Anthony D’Amato, Trashing Customary International Law, 81 AM. J. INT’L L. 101, 102 (1987); Nikolaos Tsagourias, The Theory and Praxis of Humanitarian Intervention 223 (1997) (unpublished Ph.D. dissertation, University of Nottingham (England)) (on file with author) (claiming that the approach adopted by the Court “concede[d] an unnecessary over-legitimization to governmental declarations and fails to apprehend the deeds”); GENNADII M. DANILENKO, LAW-MAKING IN THE INTERNATIONAL COMMUNITY 93 (1993). Criticisms of the Court’s application of its own stated method need to be set against theories which have sought to explain the Court’s approach by placing them in their wider normative context. See Fredric L. Kirgis, Jr., Custom on a Sliding Scale, 81 AM. J. INT’L L. 146 (1987).

\textsuperscript{17} See I.C.J. STATUTE art. 38, para. 1. This position was reiterated in clear terms by the Court in its judgment in \textit{Continental Shelf} (Libya v. Malta), 1985 I.C.J. 13, 29 (June 3), notwithstanding the questionable drafting of the concept of custom in Article 38 of the Statute, which refers to “international custom, as evidence of a general practice accepted as law.” Compare the view of ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 18 (1994), that “custom is the source to be applied, and ... it is practice which evidences custom.” See also R.R. CHURCHILL & A.V. LOWE, THE LAW OF THE SEA 5 (2d ed. 1988).
one that coincides more readily with the nature of customary law and the process of custom-formation in the international legal system. As the principal judicial arm of the United Nations, the Court is charged with the application of the law as it appears in practice and not as it appears in abstracto: the Court is responsible for recognizing normative changes in state behavior in its institutional role as the eye-witness and ultimate arbiter of international law in evolution.

In addition, the International Court of Justice showed itself more able to appreciate the nuances of state practice in the Nicaragua Case in 1986, where it confirmed Resolution 2131 (XX) to be "only a statement of political intention and not a formulation of law" and attested to the legal nature of the principle of non-intervention in the later Resolution 2625 (XXV) of October 1970. The Court, however, then went on to inquire into the "exact content" of the principle as well as the extent to which it was supported by state practice. This inquiry represented an honest endeavor by the Court to scrutinize dispassionately and with a distinct sense of professional objectivity and detachment the trends of state conduct in their wider historical context before determining their precise consequences for international law. This has meant that the nature of the Court's work is such that it is possible, if not probable, that different conclusions and outcomes are reached by the Court in relation to the self-same legal questions tackled and deliberated upon by the General Assembly.

Notwithstanding these evident disparities in method, one despairing consequence of this state of affairs is that the General Assembly, which is able at any time to deliberate upon accepted, uncertain or controversial legal principles, has refrained from dealing with the question of humanitarian intervention either by itself or through vicarious means, whereas the Court (with its preferred approach for determining lex lata) operates under rigorous procedural (principally jurisdictional) constraints that do not allow it unfettered opportunities to give its expert verdict on identical legal issues and questions, even when they are most

18. In the construction of treaties, it is an accepted canon of interpretation that "[t]here shall be taken into account, together with the context . . . . any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation." Vienna Convention on the Law of Treaties, May 23, 1969, art. 31 (3) (b), 1155 U.N.T.S. 331 (emphasis added). For further discussion, see Eduardo Jimenez de Aréchaga, International Law in the Past Third of a Century, I RECUEIL DES COURS (Academe De Droit International) 1, 21 (1978).
19. The Statute of the International Court of Justice does recognize that this approach "shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto." I.C.J. STATUTE art. 38, para. 2.
21. Id. ¶ 205, at 108.
needed. Even so, it should be recalled that, but for the International Court of Justice, there would be no institutionalized judicial appraisal within the United Nations system of whether the General Assembly, in professing to declare existing laws, had slipped through the all-too "porous fence" between the codification and development of international law. Added to this, of course, is the ability of the Court to evaluate deliberations of the General Assembly in the broader context of other (perhaps even conflicting) manifestations of state practice and to do so on legal questions which may not have been dealt with directly or in sufficient detail by the General Assembly.

The Court's verdict in the Nicaragua Case (1986) makes clear that the principle of non-intervention could admit to new exceptions in customary international law where states, through their legal actions, deem this appropriate. The Court in that case came to the conclusion that no "general right of intervention in support of an opposition within another state exists in contemporary international law," but it did so because "states [had] not justified their conduct by reference to a new right of intervention or a new exception to the principle of its prohibition," and not because this was not possible or arguable as a matter of law. In the Nicaragua judgment, the Court found itself unable to formulate new exceptions to or deviations from established principles or rules of international law because facts, legal arguments and empirical evidence were not adduced and therefore the veritable threshold was not met, and not because no such threshold existed. In essence, therefore, the International Court of Justice was prepared to explore the normative impact of state practice in its seeming mission to liberate international law from the General Assembly's perpetual "tyranny of phrases" on the principle of non-intervention.

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24. Id. ¶ 207, at 109.
25. The term is used in the same spirit as it appears in the following passage by Lassa Oppenheim:

As things are, there is scarcely a doctrine of the law of nations which is wholly free from the tyranny of phrases. The so-called fundamental rights are their arena, and the doctrines of state sovereignty and of equality of states are in large measure dominated by them. Anyone who is in touch with the application of international law in diplomatic practice hears from statesmen every day the complaint that books put forth fanciful doctrines instead of the actual rules of law.

LASSA OPPENHEIM, THE FUTURE OF INTERNATIONAL LAW 58, 59 (1921).
III. REAPPRAISING THE ROLE OF POLICY CONSIDERATIONS

Recent armed operations, some of which have assumed the integral characteristics of classic humanitarian interventions, have highlighted the crucial importance of and need for a thorough legal assessment of this practice in order to calculate its precise normative value. In the main, traditional critics of the doctrine have built their case—not without just cause or good reason—on the repeated abstinence by states from the invocation of the right of humanitarian intervention in the period of United Nations practice, especially in cases in which it would have been propitious to do so. This approach is tantamount to that which the Court adopted in the Nicaragua Case (1986) because it delves into the actual practice of states to ascertain whether they have “justified their conduct by reference to a new right of intervention or a new exception to the principle of its prohibition.” Practice, accompanied by requisite legal statements or stated convictions, confirms existing laws or edges us towards new normative frontiers, or at least that is the implication.

Within the literature, the case made against the acceptance of humanitarian intervention in international law is not, however, predicated solely on the patterns or vicissitudes of state practice. There, the line of attack also comprises a series of policy objections which have been used to argue against any formal endorsement of humanitarian intervention

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26. That is, they have involved the application of armed force for humanitarian protection without the authorization of the United Nations. Where the United Nations has authorized force, such as in Somalia (1992) and Rwanda (1994), the intervention may be classified as a precedent under the enforcement powers of the Security Council. They are not precedents under humanitarian intervention as it has traditionally been understood. See A.C. AREND & R.J. BECK, INTERNATIONAL LAW AND THE USE OF FORCE: BEYOND THE U.N. CHARTER PARADIGM 113 (1993); see also supra note 1 and accompanying text.

27. The trilogy of pre-1990 case-studies which validate this claim are: the 1971 Indian intervention in East Pakistan; Vietnam’s invasion of Kampuchea in 1978; and finally, the 1979 Tanzanian intervention in Uganda. In this regard, see generally International Commission of Jurists, The Events in East Pakistan, 1971, 8 INT’L COM. JURISTS REV. 59 (1972); GARY KLINTWORTH, VIETNAM’S INTERVENTION IN CAMBODIA IN INTERNATIONAL LAW (1989); S.K. Chatterjee, Some Legal Problems of Support Role in International Law: Tanzania and Uganda, 30 INT’L & COMP. L.Q. 755 (1981). The common denominator of these cases is that, “all three invaders had solid ground on which to rest a claim of legitimate humanitarian intervention. Yet they ignored the doctrine, choosing instead to claim self-defense from an armed attack, a claim not one of them could persuasively sustain. Their choice hardly suggests confidence in the exculpatory power of a humanitarian motive.” Farer, supra note 16, at 193 (emphasis added). See also Thomas M. Franck & Nigel S. Rodley, After Bangladesh: The Law of Humanitarian Intervention By Military Force, 67 AM. J. INT’L L. 275 (1973); Michael Akehurst, Humanitarian Intervention, in INTERVENTION IN WORLD POLITICS 95 (Hedley Bull ed., 1984); Ian Brownlie, Thoughts on Kind-Hearted Gunmen, in HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 139 (Richard B. Lillich ed., 1973).

as a matter of principle. The implication here, furnished by a ready and vociferous chorus of critics, is that even where states sympathize with humanitarian intervention in practice, the principle of non-intervention should be prioritized in deference to the principles and purposes which this law is designed to serve: the preservation of the sovereignty of states and the peace and order which exists between states. The argument is made that established laws of such standing should not be usurped by new considerations, notwithstanding the strength or appeal of these counter-claims and concerns, because the policy reasons for such laws continue to hold strong and should be applied in the long-term interest.  

The next section of this article investigates these policy-driven objections to humanitarian intervention. Before embarking upon this analysis, it should be restated that, in and of themselves, these objections should not be regarded as a substitute *modus operandi* for determining the status of humanitarian intervention in international law. Loyal to Article 38 (1) of the Statute of the International Court of Justice, our first port-of-call as scholars—acting as authorities and arbiters of the law or in our quasi-judicial capacities—must be to locate “evidence of a general practice accepted as law” *pace* the approach adopted in the *Nicaragua Case* (1986). This is not—and should not be read as—a denial of the valid, appropriate, and responsible role which such considerations have in the legal process, but this occurs within an intricate matrix of factors, comprising a plentitude of legal sources and authorities. Moderation, therefore, is what is called for when according significance to these policies: their application and impact require balanced judgement as well as a full appreciation of the normative context in which such considerations operate. Designed for application when state practice is not definitive on a given matter, policy considerations of the nature discussed in this article should not be 


30. See IAN BROWNLE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 323 (1963) (according to whom such objections to any departures from the principle of non-intervention become important where there is an “ambiguous state of the authorities”). Before the International Court of Justice in *Barcelona Traction, Light and Power Co.* (Belg. v. Spain), 1970 I.C.J. 3 (Feb. 5), policies were built into legal arguments in an area where there was “no clear authority [and] no express judicial decision.” Eli Lauterpacht, *The Place of Policy in International Law*, 2 GA. J. INT’L & COMP. L. 23, 25 (1972).
permitted to constitute a barrier to the examination of state practice, because it is imperative that we determine how much more or less conclusive in legal terms developments in state practice are with respect to the right of humanitarian intervention.

In any event, and as will become apparent, these policy objections as they have been advanced over the years are neither conclusive nor sustainable grounds of objection to humanitarian intervention when considered in a critical and contextual perspective: each of these objections have themselves become deserving targets for criticism. Somewhat like Newton’s third law of motion in physics, each objection (as presented here) to humanitarian intervention has generated an equal and opposite counter-objection and cannot be relied upon to provide a definitive answer to the taxing question of the status of humanitarian intervention in modern international law. Such objections also need to be set against policy considerations which construct the case for a right of humanitarian intervention as an interim remedial action for threatened or endangered peoples, populations or minorities. What results from this volley of policy considerations (as advanced in the legal literature) is a less than enthralling exchange where conflicting policies, and the arguments which they inspire, collide in their feeble endeavor to

31. By way of analogy, policy-based arguments in English law were considered and rejected by the House of Lords in *McLoughlin v O'Brian*, [1983] 1 App. Cas. 410 because they were not “of sufficient plausibility or merit.” RONALD DWORIN, LAW’S EMPIRE 28–29 (1986).

provide a breakthrough on where humanitarian intervention stands as a matter of law.

The significance and force of these considerations ultimately depends on the extent of normative authority of accumulated state practice and precedents at a particular point in time, on the individual merits of such considerations as well as the nature and strength of counter-considerations and, of course, on the stage of the legal process at which they appear:

When a legal adviser presents or defends a claim, there is no doubt about his role—it is to achieve the results sought by his client. When he acts as a counselor, he advises on ways of using law and on the risks involved in proposed or alternative courses of action. Obviously, in this role as well he must have in mind the goals of his client; and he must consider the causes and consequences of whatever decision is taken and the various factors involved in reaching a solution to the problem . . . . But a problem arises for the legal adviser when he assumes a somewhat different role (perhaps as part of his counseling) and when as an authority on the law, he is asked for a legal opinion, either to advise his client as to what is the rule of law and whether it applies to given circumstances or . . . . to give legal rulings with some degree of authority in, one might say, a quasi-judicial capacity. . . . [In this situation, the legal adviser] is not being asked to argue a case or to design a legal strategy to attain his client's ends; he is called upon for an opinion or ruling on the applicability of law, or, more precisely, on the existence of a legal obligation or right. It is moreover expected that he would provide an "objective" decision, that is, one that does not simply reflect his own likes or dislikes but is well founded in "law." He is in that respect in the same position as a judge or, for that matter, a disinterested and objective scholar. Would it not compromise the integrity of his function if he permitted "policy" to influence his decision as to the existence of a legal right?"
More fundamentally, scholars need to bear in mind that the right of humanitarian intervention is not (in practice) a litigious right. That is to say that its position in law is unlikely to be pleaded or challenged before a court of law. It is difficult, for instance, to envisage how humanitarian intervention will emerge as the brunt of legal proceedings in a contentious case before, for example, the International Court of Justice given the jurisdictional obstacles which exist as well as the multilateral nature of a good share of these kinds of military operations. The mechanics of inter-state relations on such matters does not therefore augur well for litigation on the specific issue of humanitarian intervention. This is particularly agonizing given the Court's declared preparedness to investigate the normative outcome of state practice in its 1986 Nicaragua ruling. In contrast and as has been emphasized, although the General Assembly does not operate under similar procedural constraints or inhibitions, it has deliberately chosen to abstain from a thorough assessment of state practice on this issue in favor of venerating and publicizing its own legal schema. Perhaps one possible solution would be for the General Assembly, in recognition of the limitations of its own

34. Although, one commentator has concluded that the Nicaragua Case unmistakably places the Court in the camp of those who claim that the doctrine of humanitarian intervention is without validity. Under that doctrine a state could rely on an alleged exception to the principle prohibiting unilateral resort to armed force by one state against another, where the purpose of its intervention was to protect persons (other than its own citizens) from serious and widespread violations of their human rights.

Nigel S. Rodley, Human Rights and Humanitarian Intervention: The Case Law of the World Court, 38 INT'L & COMP. L.Q. 321, 332 (1989); see also Christine Gray, After the Ceasefire: Iraq, The Security Council and the Use of Force, 1994 BRIT. Y.B. INT'L L. 135, 163. However, it is maintained here that, in the Nicaragua Case, the Court was not concerned with the right of humanitarian intervention: this was not pleaded before the Court, nor was the doctrine subjected to any test of advocacy, nor, arguably, was this the nature of military operations as they occurred in practice (i.e. intervention to protect human rights is a much broader conceptual configuration than humanitarian intervention and may more properly be equated with what is known as political—or ideological—intervention). The critical observation is made by Murphy that the actions "actually at issue"—which involved the mining of ports, the destruction of oil installations, and the training, arming, and equipping of the contras—in the Nicaragua Case were "hardly of the type normally associated with humanitarian intervention." MURPHY, supra note 1, at 129–30. Admittedly, had the Court considered the legal status of humanitarian intervention at that moment in time, "it would have been hard-pressed to find much evidence to substantiate [the proposition] that such a right existed within the realm of international law." Dino Kritsiotis, Review Essay: Developing Approaches towards Legitimizing Intervention on Humanitarian Grounds, 2 J. ARMED CONFLICT L. 91, 102 (1997). Indeed, it was even the view of the United States that its actions in Nicaragua were justified on the basis of the right of self-defense, not the right of humanitarian intervention—and these actions must therefore be judged on the basis of the justification advanced and not on some presumed or supposed alternative justification (per the judgment of the International Court of Justice in the Nicaragua Case, 1986 I.C.J. ¶ 266, at 134).
capacities, to request the International Court of Justice to consider the matter as part of its advisory jurisdiction and deliver an advisory opinion which takes account of the recent developments in state practice as well as contemporary legal analyses on the question of humanitarian intervention.35 Failing this approach, the duty is even more accentuated upon international law scholars to calculate the normative worth of recent developments on this particular question.

What should be borne in mind throughout is that the “real source of normative force of international relations” should not be eclipsed by statements of immutable principle or policy when a proper legal investigation of state practice is called for in order to “systemize the law [such] that rules are produced in a clear form.”36 This means that it is imperative that this controversial issue is addressed in an appropriate legal forum and re-assessed on a regular basis, a challenge to be met in chief by international legal researchers. It was exactly this clarion call that was sounded a generation ago by Franck and Rodley—significantly, critics of the right of humanitarian intervention—who urged:

International law is not static. . . . International law, as a branch of behavioral science, as well as of normative philosophy, may treat [an] event as the harbinger of a new law that will, henceforth, increasingly govern interstate relations. This places responsibility on international lawyers, particularly on those who counsel governments, educate publics, and interpret events in print. On the one hand, international lawyers must not be slow to accept changes which are actually occurring; neither should they faddishly accept as law any event merely because it has occurred. International law includes but it is also both more and less than the total of successful initiatives by states. The international lawyer must impose on events his historical sense of their meaning and their relationship to other events; he must also bring to bear a sense of policy perceived from the perspective of mankind.37

35. According to Article 65 of the Statute of the International Court of Justice, the Court may “give an Advisory Opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.” See U.N. CHARTER art. 96, para. 1 (providing the General Assembly as one such body authorized to request the Court to give an advisory opinion on “any legal question”).

36. Lowe, supra note 12, at 72.

37. Franck & Rodley, supra note 27, at 303. The interesting question is raised of how both of these scholars perceive the legal significance of the interventions that have taken place since 1990. Franck has noted that “Beijing did not object when 13,000 U.S., British, French, Dutch, Spanish, Italian and Australian troops, without U.N. authorization, entered northern Iraq to protect the Kurds.” Thomas M. Franck, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 236
For this very reason, Sir Robert Y. Jennings, onetime President and former Judge of the International Court of Justice, has compared the work, influence and importance of international legal scholars to the juriconsults of classical Roman law: "In fact it is safe to say that there is probably no other system of law in which individual workers and scholars enjoy such telling influence over the shaping and the content of the rules and even of the principles of law."38 That "shaping" of international law derives, in the first instance, from our regard of state practice accepted by states as law; the "sense of policy" of which Franck and Rodley wrote is a relevant consideration but must be carefully monitored lest it gains a stranglehold over the genuine normative convictions of states—especially where the quality and reasoning of such policy objections are themselves open to question.

IV. POLICY OBJECTIONS TO HUMANITARIAN INTERVENTION EXAMINED

A. The Abuse of the Right of Humanitarian Intervention

The most common criticism leveled at the right of humanitarian intervention is that its incorporation into the system of the law of nations would enhance the opportunities for the abusive use of force, the long-term effect of which would be to bring the international normative system into disrepute. Acceptance of humanitarian intervention, it is warned, would open the door to a situation in which its advocates would not be able to "devise a means that is both conceptually and instrumentally credible to separate the few sheep of legitimate humanitarian intervention from the herds of goats which can too easily slip through."39 States would, the argument is made, launch "heroic" missions to save and protect persecuted populations but would, in actual fact, only use the cover of altruism to use force to realize alternative and suspect

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ambitions, such as the change of government in the target state or even as part of an ignominious strategy of territorial self-aggrandizement.

Even human rights scholars have registered their concerns in this regard, warning against the dangers inherent in the formal acceptance of the right of humanitarian intervention. Henkin, for example, has said that humanitarian reasons are "easy to fabricate" and that every case of intervention has been "justified on some kind of humanitarian ground." The toll which such a "right" would exact on the international normative order would thus, it is alleged, be inestimable: "Violations of human rights are indeed all too common, and if it were permissible to remedy them by external use of force, there would be no law to forbid the use of force by almost any state against almost any other." Moreover, in an age in which all states are, at least in the formal sense, sovereign and equal, recognition of the legal right of humanitarian intervention would be a certain temptation for "big power intervention on the opposite sides of a wide range of domestic disputes." This power differential, it is said, would be teased out and exacerbated should humanitarian intervention be regarded as permissible in law.

History has shown that these concerns are legitimate and that they deserve full and serious consideration. The most notorious invocation of the right of humanitarian intervention in modern history occurred when Adolf Hitler claimed that German force was necessary to protect the ethnic Germans resident in Czechoslovakia who had been "subject[ed] to the 'brutal will [of] destruction [by] the Czechs' [and] whose behavior was 'madness' [that had] led to over 120,000 refugees being forced to flee the country .... while the 'security of more than [three million] human beings' was at stake." By no means is this an isolated

41. Henkin, supra note 29, at 96.
42. HENKIN, supra note 3, at 145.
43. Franck & Rodley, supra note 27, at 304. See also BROWNLE, supra note 30, at 340–41 (arguing that the institution of humanitarian intervention "did not conspicuously enhance state relations and was applied only against weak states. It belongs to an era of unequal relations"); Farooq Hassan, Realpolitik in International Law: After Tanzanian–Ugandan Conflict, 'Humanitarian Intervention' Reexamined, 17 WILLAMETTE L. REV. 859, 862 (1981) (discussing the right of humanitarian intervention as "simply a cloak of legality for the use of brute force by a powerful state against a weaker one"); D.J. HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW 890 (5th ed., 1998). Compare the position of Lillich who argues, in the context of the right to protect nationals abroad, "these rules generally operated in the interests of the smaller countries as well." Lillich, supra note 1, at 328.
44. Franck & Rodley, supra note 27, at 284 (citing the official justification given for the use of force in the letter from Reich Chancellor Hitler to Prime Minister Chamberlain in The Crisis in Czechoslovakia, April 24–October 31, 1938, 44 INT'L CONCILIATION 433 (1938)). Although, at that time, liberal opinion respected the need to discuss Germany's concern about
The prospect of the abusive application of humanitarian intervention is thus a very real and potent consideration but it is also one that requires a measured and reasoned response. Appealing to extreme solutions or responding in apocalyptic terms is undesirable. Professor Rosalyn Higgins (as she then was) has argued:

Many writers do argue against the lawfulness of humanitarian intervention today. They make much of the fact that in the past the right has been abused. It undoubtedly has. But then so have there been countless abusive claims to the right to self-defense. That does not lead us to say that there should be no right of self-defense today. We must face the reality that we live in a decentralized international legal order, where claims may be made either in good faith or abusively. We delude ourselves if we think that the role of norms is to remove the possibility of abusive claims ever being made.\(^4\)

The common sense of this approach has appealed from earlier times:

In advocating recognition of a limited right of unilateral humanitarian intervention, this author is not unaware of the serious dangers this approach entails, particularly the risk of abusive intervention. But, as an early proponent of humanitarian intervention pointed out almost a century ago: "It is a big mistake, in general, to stop short of recognition of an inherently just principle, [merely] because of the possibility of non-genuine intervention."\(^5\)

The particular concern identified here—that is, of the potential abuse of force—should not therefore be used to argue for the outright denial of humanitarian intervention. Rather, such an argument would call for the definition of indicia for the regulation and the conditions for the lawful exercise of the right of humanitarian intervention in prac-

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46. HIGGINS, supra note 17, at 247.

tice. For this to be the case, whether states regard some form of humanitarian intervention as permissible in principle within international law must first be determined. If so, then this right, like that of self-defense, will be subject to "regulation and evaluation by the law" on each and every occasion that it is invoked.

Thus, two separate but related matters for investigation have surfaced: whether humanitarian intervention is a permissible head of intervention under international law is a different inquiry from whether its invocation in a specific case is justified or lawful (assuming, of course, that the right of humanitarian intervention is regarded as permissible *prima facie* in the latter case). As with the right of self-defense, for a claim of humanitarian intervention to succeed, the case made for the use of force and the extent of the force actually applied will need to be judged in light of the prevailing circumstances. If, on the other hand, humanitarian intervention is not considered to be a permissible head of intervention in international law, then its invocation in a given instance is likely to be regarded as unlawful *per se*, unless, of course, there is significant support for a change in the legal position so as to allow it to become an acceptable head of intervention.

Therefore, the assertion that armed force has been used on the basis of humanitarian intervention does not entail its automatic or even ultimate acceptance in a given case. The more considered response to these

48. As W. Michael Reisman has suggested, "the challenge to contemporary lawyers is not to engage in automatic denunciations of unilateral resorts to coercion by states as violations of Article 2 (4) [of the United Nations Charter]. They must begin to develop a set of criteria for appraising the lawfulness of unilateral resorts to coercion." Reisman, *supra* note 32, at 643. However, Reisman also suggests that "[i]n the construction of Article 2 (4), attention must always be given to the spirit of the Charter and not simply to the letter of a particular provision," *id.* at 645, when what is envisioned here—because of the normative framework of the law on the use of force—is the right of humanitarian intervention as a customary law exception to the prohibition on the use of force contained in Article 2 (4) of the Charter. This, of course, is subject to the empirical evidence provided from state practice and, as such, places an important burden of proof on the intervening state(s) to demonstrate that such evidence exists. See Farer, *supra* note 16, at 192; Ian Brownlie, *The Use of Force in Self-Defense*, 1961 BRIT. Y.B. INT’L L. 183, 195 (asserting a "strong presumption of illegality whenever force is used as an instrument of national policy").


50. This is what Franck and Rodley have labeled "the harbinger of a new law that will, henceforth, increasingly govern interstate relations," *supra* note 27, at 303, and constitutes one of the classic dilemmas of the concept of custom in international law. See Roy Goode, *Usage and Reception in Transnational Commercial Law*, 46 INT’L & COMP. L.Q. 1, 9 (1997) ("The problem with the requirement of the observance of custom from a sense of legally binding obligation is that it is based either on circularity or on paradox, for it presupposes a belief in an existing legal duty which if correct would make the belief itself superfluous and if erroneous would convert non-law into law through error"). For a general discussion on the role of custom in international law, see *John Finnis, Natural Law and Natural Rights* 238–45 (1980).
concerns about the potential abusive invocation of the right of humanitarian intervention is to install various safeguards for observation by states—such as to recall helpful and informative precedents of the right in action (assuming the right exists) as well as to enunciate the relevant legal principles such as those of necessity, proportionality and the humanitarian rationale of the operation—which allows the lawfulness of the use of force in practice to be judged and the abusive application of force to be combatted. Such safeguards against abuse are essential because “[w]hether a claim invoking any given norm is made in good faith or abusively will always require contextual analysis by appropriate decision-makers—by the Security Council, by the International Court of Justice, by various international bodies.”

Of course, the inevitable claim will be made that the right of humanitarian intervention is open to much greater possibilities of abuse in practice than is the right of self-defense, particularly since the latter right is now regulated by Article 51 of the United Nations Charter. But abuses of this magnitude will in fact serve to facilitate determinations of unlawful action because there is minimal difficulty in exposing such egregious violations of the regulation of force for what they are. The inimitable, though modest, contribution of what Oscar Schachter once called “the invisible college of international lawyers” will help achieve this. Christopher Greenwood, for instance, has praised the coalition intervention to protect the imperiled Kurdish population in northern Iraq in 1991 on the basis that it was “a far cry from cases like Cambodia, in which the intervening state overthrew the government of its neighbor, or Bangladesh, in which India’s intervention led to the creation of a new

51. For example, the international law of peace and armed conflict both articulate the principle that the use of force can never be used to acquire title to territory, the purpose of which is to ensure that in the application of force by states for whatever reason(s), “not an atom of sovereignty [invests] in the authority of the occupant.” Lassa Oppenheim, The Legal Relations between an Occupying Power and the Inhabitants, 33 LAW Q. REV. 363, 364 (1917). See also G.A. Res. 2625, supra note 6, which provides an authoritative statement of customary international law: “[t]he territory of a State shall not be the object of acquisition by another state resulting from the threat or use of force” and that “[n]o territorial acquisition resulting from the threat or use of force shall be recognized as legal.” This statement is confirmed by laws regulating armed conflicts. See, e.g., Regulations of the Convention Concerning the Laws and Customs of War on Land, Oct. 18, 1907, art. 43, 100 B.F.S.P. 338 (discussing the temporary nature of any military control); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 47, 75 U.N.T.S. 287; First Protocol Additional to the Geneva Conventions of Aug. 12, 1949 and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 4, 1125 U.N.T.S. 3.

52. HIGGINS, supra note 16, at 247; see also Lowe, supra note 12, at 72.

Jurists and scholars are therefore committed as much to examine and determine the extent to which the law is complied with in practice as to define and determine what it is in a particular case.

Moreover, the multilateral application of armed force for humanitarian protection in Liberia in 1990 and then again in northern Iraq in 1991 demonstrates that the much vaunted danger of abuse may not be as great, pervasive, or as severe as once envisaged. The latter of these interventions is a choice determination that there are indeed prima facie cases where some form of humanitarian intervention is operable without the occurrence of abuse—such as the unseating of an incumbent government or the forcible dismemberment or permanent occupation of sovereign territory. President Saddam Hussein remained in office and in power after allied forces entered Iraqi territory in 1991 on their humanitarian mission, despite significant international condemnation of his leadership and foreign policy. Furthermore, the lesson of these interventions, which occurred in quick succession, suggests that where the actions of a regional association or an ex tempore coalition of states can be reduced to the common denominator of humanitarian need, the dynamic of such operations countenances against the abusive, or unlawful, use of force. States working together in this manner to facilitate the

54. Christopher Greenwood, New World Order or Old? The Invasion of Kuwait and the Rule of Law, 55 MOD. L. REV. 153, 177 (1992). This analysis is without prejudice to the status of the right of humanitarian intervention at that point in time and is used to demonstrate how (assuming the right were endorsed in international law) it is possible to make substantive distinctions between one "invocation" of the right in action and another.

55. Although, it should be noted, the creation of a no-fly zone in southern Iraq on August 26, 1992—with the authorization of the Security Council—met with a hostile response from Algeria, Jordan, Syria and Yemen. Serious reservations were also expressed by Egypt and Saudi Arabia. See 38 KEESSING'S REC. WORLD EVENTS 39068 (1992). Furthermore, in September 1996, the United States extended the southern no-fly zone by 110 kilometers to the thirty-third parallel. It is significant to note that the episode exposed greater differences in world opinion: France and Russia registered their concern about the nature of American policy. See Provocation and Response, ECONOMIST, Sept. 7–14, 1996, at 37; see also Nigel D. White, Commentary on the Protection of the Kurdish Safe-Haven: Operation Desert Strike, 1 J. ARMED CONFLICT L. 197 (1996) (providing a concise legal analysis of the issue); infra note 95.

56. Brownlie regards the multilateralization of the French intervention in Syria in 1860 as an assurance of the "disinterestedness" of the prime mover behind the operation. BROWNLIE, supra note 30, at 340. This multilateralization occurred in the form of an international convention, signed by Great Britain, France, Prussia, Russia and Turkey on August 3, 1860. But compare the positions of MURPHY, supra note 1, at 54, and Pogany, infra note 86, who believe that the international action was sanctioned by the Sublime Port and, as such, does not stand as a precedent of humanitarian intervention, even though the intervening powers asserted the right and regarded its exercise as inevitable. See Stephen Kloepfer, The Syrian Crisis, 1860–61: A Case Study in Classic Humanitarian Intervention, 1985 CAN. Y.B. INT'L L. 246, 255, 258.
humanitarian objectives of a shared armed operation is helpful, but this coordination should not be used to undermine the general case for unilateral humanitarian intervention. This is because other (political and economic) considerations—such as the human, material and financial costs involved—also act as constraining elements and argue against prolonged interventions and the deviation from any putative humanitarian mandate set forth in international law. The stakes are indeed higher where the unilateral application of force in the name of humanitarian intervention is contemplated: even so, the principle of humanitarian intervention (if accepted on its merits by states) must mean that the use of force is not only permitted in the name of a greater good but is also controlled and hopefully contained by it.

B. The Selective Application of Humanitarian Intervention

There is indeed much to be said for the old aphorism that like cases must be treated alike because it is one of the elementary characteristics which forges claims and perceptions of a fair and just legal system. One of the enduring strengths of the law is that it abides by the rule of law which prescribes, in Dicey's famous formulation, "equality before the law." This idea of comparable treatment in comparable cases is in essence the reasoning and argument behind the second principled objection to humanitarian intervention which argues that, if accepted in law, the right of humanitarian intervention would introduce endless opportunities for the selective use of force in cases of humanitarian need and this in turn would endanger the crucial kinship between international law and the rule of law: "[H]umanitarian intervention would be highly selective and nearly always dictated by political and strategic interest." Indeed, practice has shown that "widespread torture" occurs "in a large number of countries that appear blissfully unaware of their [apparent] vulnerability to legitimate intervention." Such are the in-
variable hazards that would allegedly accompany any legal recognition of the right of humanitarian intervention.

While this argument is correct to highlight the selective and partisan nature of the operation of humanitarian intervention in practice, this argument misconceives the theoretical composition and traditional understanding of humanitarian intervention in international law, which has been framed as a right of states and not as an obligation requiring state action. Inherent in the very conception of a right is an element of selectivity in the exercise of that right. This is in keeping with the right-holder's sovereign discretion to decide whether or not to exercise the right in question and commit its armed forces to foreign territories and explains why it is the right of—rather than the right to—humanitarian intervention that has taken hold in practice as well as legal scholarship. By and large, where states have exercised the right in the distant past, they have argued that they have done so because of some legal entitlement and not through some sense of legal duty. We may query how satisfactory this approach is, but the case remains that even in operations which arguably typify humanitarian intervention in recent times, the legal conviction of participating states has been expressed in terms of an entitlement and not in terms of a duty. The West African intervention in Liberia in 1990 was designed—in the words of the intervening states—to curtail "the massive destruction of property and the massacre by all

61. See, for example, WESLEY N. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING (1919), when he wrote of the "privilege" to do something. This privilege entailed a fundamental discretion as to whether or not to exercise a given right, such as the "privilege (or right) of self-defense" in the domestic order. Id. at 33; see also Arthur L. Corbin, Legal Analysis and Terminology, 29 YALE L.J. 163, 165 (1919). By way of analogy, the right of collective self-defense in Article 51 of the United Nations Charter allows states—it does not oblige them—to resort to forcible measures in collective self-defense of a threatened or injured state. Philip Allott, State Responsibility and the Unmaking of International Law, 29 HARV. INT'L L.J. 1, 22 (1988) (discussing the significance of the legal right of self-defense). For French political thinking and legal doctrine, see generally, MARIO BETATI, LE DROIT D'INGÉRENCE: MUTATION DE L'ORDRE INTERNATIONAL (1996); Bill Bowring, The 'Droit et Devoir D'Ingérence': A Timely New Remedy for Africa?, 7 AFR. J. INT'L & COMP. L. 493 (1995).

62. One should be aware of the emerging political rhetoric which seeks to identify a "new approach to intervention [that has] incrementally appeared in the past two decades," which awards the international community "the right, indeed the responsibility, to concern itself with human rights within states." Warren Zimmermann, Bad Blood, N.Y. REV. BOOKS, May 28, 1998, at 39. This development should be placed within the context of the actual wording and interpretations of established conventional regimes. See notes 115, 116 and accompanying text. Statements of legal principle need to be dissected from statements of political rhetoric, exemplified by the emotive words of President Roosevelt, which he wrote in 1904 in the context of the Spanish-American War of 1898: "Brutal wrong-doing, or impotence, which results in the general loosening of the ties of civilized society may finally require intervention by some civilized nation, and in the Western Hemisphere the United States cannot ignore this duty," quoted in JOHN BASSETT MOORE, THE PRINCIPLES OF AMERICAN DIPLOMACY 262 (1918).
the parties [to the conflict] of thousands of innocent civilians including foreign nationals, women and children." No statement was made in this case (or indeed in the leading precedents of the nineteenth century) to the effect that the humanitarian intervention occurred pursuant to some pressing legal obligation or requirement.

With this consideration in mind, the argument has been made that if humanitarian intervention is in principle deemed to be acceptable to the international community, humanitarian intervention can lawfully occur only where a mandate for the use of force is forthcoming from the Security Council. According to Chapter VII of the United Nations Charter, there are two permissible instances for the use of force: enforcement action of the Security Council under Article 42 and the right of individual and collective self-defense under Article 51. Chapter VIII, however, does recognize the role of regional organizations in the "maintenance of international peace and security as are appropriate for regional action" (Article 52) and for enforcement action under the authority of the Security Council (Article 53). No right of humanitarian intervention (as understood in its classic sense) was envisaged within this framework, and it is on record that states have not been receptive to incorporating de facto humanitarian interventions under the head of self-defense. So, according to the strict text and paradigmatic law of the United Nations Charter, Chapter VII (Article 42 in particular) provides the sole viable legal basis for such actions. This arrangement, it has been asserted, would formalize the legal justification for humanitarian intervention by

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64. See, e.g., R.W. Seton-Watson, Britain in Europe, 1789–1914, at 419–20 (1938) (discussing French intervention in Syria in 1860); David S. Bogen, The Law of Humanitarian Intervention: United States Policy in Cuba (1898) and in Dominican Republic (1965), 7 HARY. INT’L L. CLUB J. 296 (1966); Stowell, supra note 7, at 481; see also supra note 62 and accompanying text.


66. See supra note 27 and accompanying text.

67. In which case these actions are not, technically speaking, humanitarian interventions in the classic sense of the term. See supra notes 1, 26, and accompanying text.

68. See Murphy, supra note 1, at 381.
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subsuming it within the enforcement powers of the Security Council which would, at one and the same time, minimize the opportunities for the selective, *ad hoc* application of force by states in cases of humanitarian crisis.

Or so theory would have it. For the authorization of the use of force to occur under Article 42, the Security Council is required to determine that there exists a threat to the peace, a breach of the peace or an act of aggression. Article 39 of the United Nations Charter, which articulates this requirement, is worded in suitably mandatory language: that the Security Council "shall" make such findings and this may be taken to introduce the requisite degree of consistency of treatment of similar cases of humanitarian catastrophe. Experience, however, has shown that the Security Council considers that such determinations result from the exercise of its unfettered discretion and not necessarily in accordance with pre-determined, objective criteria. Even where the Security Council makes the requisite procedural finding under Article 39, the Security Council is not then in law *obliged* to authorize the use of force under Article 42: the Charter recognizes that this issue lies within the decision-making prerogative of the Security Council.

Proposing Security Council authorization as the preferable legal route for forcible humanitarian action therefore comes with its own share of problems and difficulties—and these are not inconsiderable. Questions of double standards which face the United Nations in the execution of its legal and institutional responsibilities are more serious than those leveled against states acting on the basis of some legal right or entitlement. The credibility and effectiveness of the United Nations as a global institution with universal appeal lie in the balance when it decides that Libya is a threat to the peace for failing to surrender suspected terrorists for trial but not Afghanistan, and when it chooses to author-

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69. See, for example, the resolution adopted by the Security Council against Libya, infra note 71.

70. See U.N. CHARTER art. 42 ("Should the Security Council consider that measures provided for in Article 41 would be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security").

ize the use of force against unconstitutional governments in Haiti but not in Nigeria or Sierra Leone. The problem is compounded because the United Nations Charter does not envisage the possibility of judicial scrutiny of Security Council action, and, of course, by the very nature of the political beast that is the Security Council.

failure by the Libyan government to demonstrate by concrete actions its renunciation of terrorism and in particular its continued failure to respond fully and effectively to the requests contained in Resolution 731 (1992), [in which the Security Council decided that Libya should meet the requests of the United States and the United Kingdom to surrender two Libyans suspected of participation in the bombing of Pan American Flight 103 on 22 December 1988] constitute[d] a threat to international peace and security and imposed extensive diplomatic and economic sanctions as a result. These sanctions have met with increasing opposition. See Ian Black, Britain Fends Off Calls to End Libyan Sanctions, GUARDIAN (London), Sept. 26, 1997, at 16.

72. See Ian Brownlie, International Law in the Changing World Order, in PERSPECTIVES ON INTERNATIONAL LAW 49–54 (Nandasiri Jasentuliyana ed., 1995). By unanimous decision, however, the Security Council imposed only oil, arms and travel sanctions on Sierra Leone after "the military junta ha[d] not taken steps to allow the restoration of the democratically-elected Government and a return to [the] constitutional order" that the junta usurped in May 1997. S.C. Res. 1132 U.N. SCOR, 3822d mtg. at 1, U.N. Doc. S/RES/1132 (1997). See Sanctions on Sierra Leone, INDEPENDENT (London), Oct. 9, 1997, at 14. This decision is a response that echoes part of its strategy in dealing with similar political situation in Haiti after the 1991 coup d'etat there, but differs from its handling of the constitutional crisis that has unfolded in Nigeria since June 1993.


In recent litigation, the International Court of Justice has found that it does have jurisdiction on the basis of Article 14 (1) of the Montreal Convention of September 23, 1971 to hear the disputes between Libya and the United Kingdom and the United States as to the interpretation or application of the provisions of that Convention notwithstanding the action of the Security Council. Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.K. & U.S.), 1998 I.C.J. ¶ 53, (Feb. 27) (Preliminary Objections).

74. In the context of the outbreak of violence in the Serbian province of Kosovo during the spring and summer of 1998, the claim has been made that it would be "absurdly legalistic to act on the Security Council's say-so" given the possible (Russian) veto of Security Council authorization for intervention. Intervene and Be Damned?, ECONOMIST, July 4–10, 1998, at 14. Contemplating this possibility, President Clinton was reported to have made the case for air strikes against Serbian targets without authorization from the Security Council. See Carla Anne Robbins, NATO Surveys Members on Kosovo Air Strikes: Objective Is to End Attacks by Serbs, WALL ST. J., Aug. 13, 1998, at A10. Igor S. Ivanov, the Russian Foreign Minister, advised the 53d session of the General Assembly against any acceptance of "attempts to undercut the Charter-stipulated powers of the Security Council to use coercive
The partisan or political invocation of the right of humanitarian intervention, on the other hand, while not ideal, can be attributed to the domestic forces of realpolitik but still governed by law and accommodated by the fact that humanitarian intervention has been regarded as a permissive rather than mandatory norm in legal doctrine and practice. Some will, however, regard this course with a great sense of unease and foreboding because this path could compromise the normative integrity of international law as well as its claim to offer procedural coherence. Yet, the decentralized structure of this system, together with the shortcomings of the system when centralized, both act as an effective counter-point to these concerns and allow us to appreciate why states may, on occasion, feel the need to factor the right of humanitarian intervention into the normative equation on the use of force. In addition, it is worth reminding ourselves that there is no immediate or compelling guarantee that armed force processed or authorized by an international institution for humanitarian purposes will *ipso facto* be less open to abusive behavior.  

So, if states do express the intention to permit such actions in principle, perhaps one way of reducing the resultant uncertainty would be to identify a *de minimis* threshold—drawn from recent and past experiences of state practice—for such operations, so as to set a basic trigger...
device in place for future reference and use. Of course, this threshold would be of limited value in rectifying discrepancies in comparable cases, but it is one important contribution—coupled with the rigorous application of the humanitarian mandate for the action—that could be made in regulating the right of humanitarian intervention in practice. For as long as humanitarian intervention is conceptualized as a right, as opposed to an obligation, of states, the problem of discretionary intervention will remain an intractable one, but this problem should then be set against the difficulties that could result from confining such matters to the province of the Security Council at this point in time. 

These difficulties extend to important practical limitations on how the Security Council may respond in a given crisis or conflict situation. Even accepting, arguendo, the principle that Security Council authorization is the sole legal basis for some form of humanitarian action, that this in itself would produce the desired results of affording humanitarian protection to imperiled populations is doubtful. Although the Security Council determined on April 5, 1991 that “the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish populated areas which led to a massive flow of refugees towards and across international frontiers and to cross border incursions” constituted a threat to regional peace and security, the Security Council stopped short of sanctioning the use of force. Conventional speculation at that point in time suggested that if any such resolution had been put to the vote in the Security Council, certain states would have made the resolution the victim of the veto. The same states, however, made it understood that they would not protest individual (or collective) state action to achieve the same result: their chief concern was not to establish an institutional precedent that could be used against them within that political setting at some future point in time.

Within the specified Charter framework on the use of force (contained in Chapter VII), concerned states were thus faced with either non-action or an exceptional invocation of the right of humanitarian in-
tervention. For this precise reason, humanitarian intervention remains a separate doctrinal categorization in international law: it encapsulates the notion from the classical period of international law, pre-dating the international law of human rights, of the individual or collective use of force on humanitarian grounds without the need to secure institutional authorization for "humanitarian intervention." As such, humanitarian intervention provides an essential working principle or conceptual framework for examining the extent to which state practice supports this form of the use of force in modern international law.

Although there was similar international approbation for forcible action in the case of Liberia in August 1990, the hands of the Security Council were tied—and even overloaded—by the consequences of the Iraqi invasion of neighboring Kuwait on August 2, 1990. The Council only managed to support the urgent August 1990 intervention by West African forces in Liberia some two years later, in November 1992. Controversial though they may seem, realistic considerations force us to

81. See FERNANDO R. TESÓN, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY 185 (2d ed. 1997). In striking contrast to the legal justifications offered by states for so-called "humanitarian interventions" during the period of the Cold War, on which see supra note 27, consider the justification for Operation Provide Comfort given by the British Foreign Secretary, Douglas Hurd: "[i]nternational law recognizes extreme humanitarian need." Parliamentary Papers 1992–93, 1992 BRIT. Y.B. INT'L L. 824. This was elaborated upon by Tony Aust, legal counsel in the Foreign and Commonwealth Office:

[Security Council] Resolution 688, which applies not only to northern Iraq but to the whole of Iraq, was not made under Chapter VII. Resolution 688 recognized that there was a severe human rights and humanitarian situation in Iraq and, in particular, northern Iraq; but the intervention in northern Iraq "Provide Comfort" was in fact, not specifically mandated by the United Nations, but the states taking action in northern Iraq did so in exercise of the customary international law principle of humanitarian intervention.

Id. Consider also Reisman’s view: "in these situations, it is not the human rights deprivations suffered by the victims that are perceived as the compulsion or justification for action. The justification for action is found in the threats the situations pose to the rest of us." Reisman, supra note 1, at 433.

82. See supra notes 1, 26 and accompanying text. At the height of the Cold War, the right of humanitarian intervention was mooted as a possible alternative to Security Council action or authorization because of "the failure of the United Nations to take effective steps to curb the genocidal conduct and alleviate [...] mass suffering." Richard B. Lillich, The International Protection of Rights by General International Law, 1972 REPORT OF THE INTERNATIONAL COMMITTEE ON HUMAN RIGHTS OF THE INTERNATIONAL LAW ASSOCIATION 38, 54. Even though the Security Council thrives on its current lease of life, and even though it is operating in a political environment of greater international co-operation, the Security Council may prove unable (as in Liberia (1990)) or unwilling (as in northern Iraq (1991) and southern Iraq (1992)) to authorize the use of force for humanitarian purposes, so the issue still remains a relevant one.

83. See S.C. Res. 788, U.N. SCOR, 3138th mtg., at 1, U.N. Doc. S/RES/788 (1992) ("welcoming the continued commitment of the Economic Community of the West African States (ECOWAS) to and the efforts towards a peaceful resolution of the Liberian conflict"); see also Nolte, supra note 63, at 608 (discussing the significance of the resolution and its timing).
recognize that even when the international political climate is marked by co-operation and not division, the omnicompetence of the Security Council in such matters, quite apart from whether this power is desirable or not, remains a remote and uncertain prospect. In international law, then, what residual discretion lies with states when faced with a humanitarian crisis on the scale of Liberia (1990) or northern (and even southern) Iraq (1991) to exercise the right to use force for humanitarian protection in lieu of authorization by the Security Council?

C. Purity of Motive

Reservations and residual fears as to the legal toleration of humanitarian intervention also emanate from an abiding skepticism that states are unlikely, if ever, to engage their forces in authentic altruistic interventions and that supposing otherwise is naïve, if not foolish. As corporate Hobbesian offspring, states are only prepared to act in their own self-interest, making the so-called right of humanitarian intervention appear as nothing more than a lingering, even self-contradictory, legal convenience. Michael Walzer, the moral philosopher, considers that the lives of foreigners “don’t weigh heavily in the scales of domestic decision-making” and resigns himself to the apparent inevitability of “mixed motives.”

Also, the historical record is one in which “the humanitarian motive [in such cases] is at least balanced, if not outweighed, by a desire to protect alien property or to re-enforce socio-political and economic instruments of the status quo.” In seeking to incorporate the right of humanitarian intervention into its ranks, international law thus


85. Franck & Rodley, supra note 27, at 279. The French intervention in Rwanda in June 1994 occurred amidst claims that the intervention was designed to assist the ailing Hutu government. These claims were fervently denied by the French Defense Minister François Léotard who said that the object of the operation was to “enforce a U.N. Resolution to stop atrocities.” French Prime Minister Balladur gave similar assurances that the French forces would not “get caught up in internal struggles.” Andrew Gumbel et al., U.N. Backs French Intervention in Rwanda in Spite of Doubts over “Humanitarian” Motives, GUARDIAN (London), June 23, 1994, at 28. Also, the French troops did not obstruct the advances made on Kigali, the Rwandan capital, and the second largest city of Butare by the Tutsi-dominated Rwandan Patriotic Front, which they captured on July 4, 1994. See Sam Kiley & Charles Bremner, Rwandan Rebels Seize Capital and Second City, TIMES (London), July 5, 1994, at 14. The French government did, however, later issue instructions to French forces to halt any further advances where these placed the lives of Hutu refugees at risk. See Barry James, Rebels Take Kigali, French Army Guards Fleeing Rwandans, INT’L HERALD TRIB. (London), July 5, 1994, at 1. For a suggestion that humanitarian protection was behind France’s creation of “safety zone” in southwestern Rwanda on July 2, 1994, see Barry R. Posen, Military Responses to Refugee Disasters, 21 INT’L SEC. 72, 97 (1996). For the domestic political considerations that accompanied the French intervention, see GÉRARD PRUNIER, THE RWANDA CRISIS: HISTORY OF A GENOCIDE 281–99 (1995).
adopts not only a dangerous stance but a hypocritical one: states never act for purely humanitarian reasons such that the right of humanitarian intervention can never serve as anything more than a smokescreen justification which the law should neither embrace nor be seen to embrace.\(^8\)

Though closely related to the first criticism made of humanitarian intervention—the prospect of abuse—the need for the purity of the motives behind such operations may be differentiated on the ground that it arguably applies even in cases of *prima facie* lawful intervention. That is to say that for any lawful humanitarian intervention to occur, not only must the use of armed force be kept in check and defined by humanitarian need, but the motives of participating governments should also be unassailable. Renewed doubt, for instance, has been cast on the 1860–61 French “humanitarian intervention” in Syria because whether “humanitarian considerations” were “decisive” is questionable. French motives were “probably ambiguous” enough to preclude the episode from being categorized as a reliable precedent of humanitarian intervention.\(^7\)

There is, however, something decidedly spurious about making legal determinations on the basis of ulterior motives or hidden agendas.\(^8\) For one thing, the voices of political sophisticates during the 1990–91 Gulf Conflict capitalized on this theme when they alleged that the response of the Western world to the Iraqi occupation of neighboring Kuwait was governed by the law of self-interest and not the law of self-defense because “if Kuwait had been famous for its carrots, the United States would not have lifted its proverbial finger.”\(^9\) Yet seldom, if at all, was this concern translated into legal argument; nor was this concern used to upset the prevailing opinion of the time that the actions of the coalition

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86. Istvan Pogany criticizes the French intervention in Syria in the nineteenth century on the basis *inter alia* that “it would be naive to view the object of French intervention as wholly humanitarian.” Istvan Pogany, *Humanitarian Intervention in International Law: The French Intervention in Syria Re-examined*, 35 INT’L & COMP. L.Q. 182, 188 (1986). In similar vein, Michael Bazyler argues that “Vietnam’s motives for invading Kampuchea [in December 1978] . . . . cast serious doubt on whether the Vietnamese invasion can be justified by the humanitarian intervention doctrine.” Bazyler, *supra* note 32, at 608. Bazyler does, however, concede that “purity of motive” is unrealistic and concludes that because of this “one should not condemn an intervention as nonhumanitarian merely because the intervening power also has political, economic, or social motives for intervening.” *Id.* at 602. What is advanced in this essay is the more pragmatic test of what the direct consequences (as a matter of fact) of an alleged humanitarian intervention are, so as to determine where it stands as a matter of law.


88. Leo Kuper questions whether “impurity of motive” is a valid objection to humanitarian intervention given the intrinsic nature of state behavior and the alternative strategy “to impose conditions to reduce, in some measure, the outright abuse of the doctrine.” Leo Kuper, *Theoretical Issues Relating to Genocide: Uses and Abuses*, in *GENOCIDE: CONCEPTUAL AND HISTORICAL DIMENSIONS* 31, 42 (George J. Andreopoulos ed., 1994).

89. The intriguing remark is attributable to the British Labor parliamentarian Tam Dalyell MP.
governments and their forces were founded on a firm legal footing. Professor Tesón has made the important observation that we should not confuse “psychological motivation” with “legal justification”—an approach that is sure to lose us in a quagmire of speculation, recurring claim and counter-claim.

Besides, what is the exact logic behind mapping the motives behind an action? If “motive” is considered to be the sine qua non for permissible interventions, why is the legal authority for this proposition so difficult to trace? Even if we were to accept these terms, would insistence on the “purity” of motive be logical? If not, why does “motive” then matter? If so, are motive-based arguments workable in practice? Are the real motives of states that simple to ascertain? Do states act on

90. Tesón, supra note 81, at 254. To similar effect, see the argument advanced by Lillich that the “economic interests of the great powers . . . does not necessarily impeach the viability of the rules that were established” to protect their nationals on alien territories. Lillich, supra note 1, at 328. Applying this distinction in practice, Rein Mullerson has, for example, made the persuasive argument that

accepting that the concern for Kuwaiti oil was the main (or even overwhelming) factor triggering Operation Desert Storm would not in any way delegitimize the world community’s response (led by the United States) to the Iraqi aggression. Saddam Hussein had also committed an original sin against the very essence of the interstate system—a direct across-the-border invasion. Even if it were possible to find out which had more influence in triggering the coalition’s response—a blatant armed attack by Iraq or Western oil interests—it would not delegitimize the response.

Rein Mullerson, Book Review, 92 AM. J. INT’L L. 583, 585 (1998) (reviewing Murphy, supra note 1). This approach takes into appropriate and necessary account the behavioral realities of states as well as the consideration specified by Murphy that, “to assert that states must be wholly ‘disinterested’ in participating in humanitarian intervention ignores rudimentary aspects of geopolitical behavior and may discourage any interventions from occurring at all.” Murphy, supra note 1, at 323.

91. See Philip Alston, The Security Council and Human Rights: Lessons to be Learned from The Iraq–Kuwait Crisis and Its Aftermath, 1992 Austl. Y.B. INT’L L. 107, 110–12 (comparing Andre Gunder Frank, Third World War: A Political Economy of the Gulf War and the New World Order, 13 THIRD WORLD Q. 267 (1992), who mapped out Western economic, geo-political and hegemonic interests that allegedly underpinned the reason for military involvement, with Peter M. Labonski and Kunal M. Parker, Human Rights As Rhetoric: The Persian Gulf War and United States Policy Toward Iraq, 4 HARV. HUM. RTS. J. 152, 155–56 (1990), arguing that President Bush “rallied the general public to a war not just for oil or money, but for humanity”). The emergence of humanitarian values within the international system, alien to the unadulterated stato-centric model of an “international community,” is one that is sure to attract a growing following: recalling the commitment of 500,000 military personnel in the 1990–91 Gulf Conflict, the Venezuelan Ambassador to the United Nations compared this with the relative inaction of states in the conflict in Bosnia-Herzegovina and proclaimed that the latter tragedy “has far more worrisome dimensions, as manifested in unspeakable crimes against humanity. There are essential values that should indeed be of strategic importance for the international community.” U.N. SCOR, 3227 mtg., at 25, U.N. Doc. S/PV. 3228 (1993).
the basis of single or multiple imperatives? Are these imperatives hierarchical? Do the motives of states engaged in humanitarian interventions remain constant? What of the factor of competing motives where there is multilateral action? Is asserting that states never act on the basis of humanitarian imperatives correct? What legal significance is to be given to such considerations? Indeed, should legal significance be given to such considerations?

What matters in such situations is not so much the nature of the motive—elusive as this may be to detect or determine—but the practical outcome of the intervention in question: did forcible humanitarian protection alone take place as a direct consequence of armed intervention? The use of objective, identifiable, *de minimis* legal criteria (proportionality is a classic principle in point) is to be preferred over

92. Operation Alba, for example, the Italian-led intervention in Albania in April 1997, was attributed to reasons of "geography, history and perhaps even idealism." See A Naughty New Bit of Nationalism, ECONOMIST, Apr. 17–25, 1997, at 30. On March 28, 1997, the Security Council "authorized the member states participating in the multinational protection force to conduct the operation in a neutral and impartial way" in order to "facilitate the safe and prompt delivery of humanitarian assistance, and to help create a secure environment for the missions of international organizations in Albania, including those providing humanitarian assistance." S.C. Res. 1101, U.N. SCOR 3758th mtg. at 2, U.N. Doc. S/RES/1101 (1997). The Resolution, which was adopted under Chapter VII of the United Nations Charter, further authorized member states "to ensure the security and freedom of movement of the personnel of the said multinational force." Id. This consideration coincides with the identity of the intervening state(s) which does not itself appear to be treated as a significant or material factor. See D.W. Bowett, *International Incidents: New Genre or New Delusion?*, 12 YALE J. INT'L L. 386, 388 (1987).


94. W. Michael Reisman, *Criteria for the Lawful Use of Force in International Law*, 10 YALE J. INT'L L. 279, 284 (1985); see also Tom J. Farer, *Panama: Beyond the Charter Paradigm*, 84 AM. J. INT'L L. 503, 505–06 (1990) (arguing that "rescue missions cannot be persuasively indicted as violations of international law, as long as they comply with the principles of proportionality and necessity . . . and are not tainted by ulterior motives").
determinations based upon evaluations of subjective intent—which may well prove nigh impossible to pin down. Even where the true motives behind an international action are discernible, using these motives to trump the lawfulness of an operation is unreasonable where the sole consequence of a given operation is the actual protection of human life, where this reason is given as the legal justification for action and is accepted as such by the world community. In analogous terms, it is not difficult to envisage the general acceptance that would greet the exercise of the right of (collective) self-defense against an aggressor even where this was animated by religious or economic considerations so long as the application of defensive force was confined to the return of territorial integrity and political independence to its lawful proprietor.

The foregoing is not to deny the possible relevance which ulterior motives or clandestine intentions could have. Considerations of this nature do become important where the quintessential humanitarian dimension of the intervention is superseded by sinister schemes of permanent political change or by some form of international control in which case the ulterior motives of the military operation exposes the unlawful—or impermissible—use of force. This is because in its doctrinal form and traditional application, the right of humanitarian intervention has only mandated the use of force insofar as it is necessary and proportionate for the purpose of humanitarian protection—its very raison d'être. Where ulterior motives do manifest themselves as a result of the use of force—such as in the provision of armed support for secessionist movements or the unseating of a government from its throne of power—this manifestation would be a clear breach and abuse of the legal mandate for the right of humanitarian intervention and, in all likelihood, would be contested on these grounds by the international community at large.

By way of illustration, it is worth recalling the swiftness and efficacy with which Operation Provide Comfort was executed in northern Iraq in 1991—an intervention which was commissioned to protect life

95. It is on this basis that Judge Koroma has criticized Rougier's definition of humanitarian intervention as "the right of one State to exercise international control by military means over the acts of another State with regard to its internal sovereignty when such acts had been exercised in a manner contrary to the laws of humanity." Abdul G. Koroma, Humanitarian Intervention and Contemporary International Law, 5 Revue Suisse de Droit International et de Droit Européen 409, 413 (1995). Concern, however, has been expressed as to whether the extended no-fly zone in southern Iraq remains necessary and the extent to which it has implications beyond its original humanitarian objectives. See supra note 55 and accompanying text; Roula Khalaf, Iraq to Defy No-Fly Zone, FIN. TIMES (London), Apr. 22, 1997, at 7; White House Warns Iraq Against Pilgrim Airlift, INT'L HERALD TRIB. (The Hague), Apr. 22, 1997, at 2.
by the states involved and did, in real terms, do so—at a time when the nature and authenticity of the expressed humanitarian ambitions of the project were made the subject of intense critical (and politicized) investigation. The precedent suggests that the law is more usefully engaged where it designates the conditions for the permissible use of force in cases of humanitarian crises as long as the international community is willing to endorse forcible humanitarian protection in principle.  

This has occurred where a state wishes to protect its own nationals whose lives are placed at risk on foreign soil: the controlled or proportionate use of force—"the epitome of a 'surgical' military sortie"—has warranted general legal acknowledgement by states on condition that this humanitarian intervention does not encompass the realization of improper or insupportable motives, that is motives which do not coincide with the imperative legal basis which has driven states to accept the principle of limited force to protect their own nationals.

So, the purity of motive factor needs to be properly and appropriately quantified when we engage in the rigors and the dynamics of legal analysis. In general terms, an inquiry by lawyers into the motives behind a particular action or use of force will, in all likelihood, lead us down a blind and unproductive alley, for it is "naïve to consider that states can be put on the psychiatrist's couch where their hidden motivations will be revealed." Of greater import are the principal consequences of any given military operation: even where a state's reasons for action are open to question or placed in grave doubt, if the international community is willing to summon and approve the transnational use of force to achieve a designated humanitarian objective, the use of force should be permitted insofar as—and only insofar as—the use of force is targeted towards attaining the permitted humanitarian reason for action. Once this lawful goal has been achieved, the legal mandate for the use of force (or the presence of foreign forces) expires and any continued force or presence will solicit international public censure and become vulnerable to charges of unlawful action.


97. Yoram Dinstein, War, Aggression and Self-Defense 229 (2d ed. 1994). For the legal distinction that has been made between the protection of a state's own nationals as opposed to humanitarian intervention, which is the use of force to protect the threatened nationals of the target state, see supra note 1.

V. HUMANITARIAN INTERVENTION VERSUS SOVEREIGNTY

Policy objections do not alone fuel the considerable juristic opposition toward the formal endorsement or acceptance of the right of humanitarian intervention in international law. Humanitarian intervention is also considered to be irreconcilable with the seminal doctrine of sovereignty and, as such, embodies the polar opposite of received legal wisdom. Humanitarian intervention, it is argued, does not only facilitate menacing state behavior, but also constitutes a radical departure from established legal ideas and traditions: any manifestation of humanitarian intervention in practice would be no more and no less than a full frontal assault on the sovereignty of the target state and this proposition is untenable in a system that worships the sovereignty of each of its constituent states.

Yet history testifies that actual restrictions were placed on a sovereign’s treatment of its own citizens even before the classical period of international law—and these were dutifully recognized and recorded in the work of Hugo Grotius (1583–1645)\(^9\) and, over a century later, by the Swiss writer Emmerich de Vattel (1714–1767).\(^{100}\) That sovereignty has traditionally admitted such formal limitations is partially explained by the fact that the world is composed of a proliferation of states: the world has become one of competing and co-existing sovereigns and not of a single state or a monopolistic sovereign. In the figurative sense, then, no state can be said to be an island: what a state does and what it chooses to do are observed by other states in the global neighborhood.\(^{101}\) Whatever


\(^{100}\) See Emmerich de Vattel, Le Droit des Gens ou Principes de la Loi Naturelle 210 (J.B.C. Mohr Tübingen ed., 1959) (1758). Humanitarian intervention is actually “pre-Grotian.” See Theodor Meron, Common Rights of Mankind in Gentili, Grotius and Suarez, 85 Am. J. Int’l L. 110 (1991). This proposition continued to find support in the first decade of this century:

There is general agreement that, by virtue of its personal and territorial supremacy, a state can treat its nationals according to discretion. But there is a substantial body of opinion and of practice in support of the view that there are limits to that discretion and that when a state renders itself guilty of cruelties against and persecution of its nationals in such a way as to deny their fundamental rights and to shock the conscience of mankind, intervention in the interest of humanity is legally permissible.


(emphasis added).

"outrage[s] upon humanity" or, in the words of John Stuart Mill, "severities repugnant to humanity"—occur in this neighborhood presuppose a common set of values that are (potentially at least) worth defending or protection. This is to be done in the first instance by converting international public opinion into diplomatic censure which could, in turn, ripen into "corrective action" because:

The case for not impinging on the sovereignty, territorial integrity and political independence of states... would only be weakened if it were to carry the implication that sovereignty, even in this day and age, includes the right of mass slaughter or of launching systematic campaigns of decimation or forced exodus of civilian populations in the name of controlling civil strife or insurrection.104

Article 2 (7) of the United Nations Charter gives this state of affairs legal recognition. Well-known for its articulation of the principle of non-intervention qua the United Nations "in matters which are essentially within the domestic jurisdiction of any state," this provision confirms that the principle of non-intervention within the United Nations system is not absolute and, in terms of its wider context and history, no longer impenetrable. Article 2 (7) stipulates that the principle of non-intervention shall not "prejudice" any enforcement measures taken in accordance with Chapter VII of the Charter. Here we have a clear prioritization of community will (as expressed in the determinations of the Security Council) over and above individual claims of "sovereignty" but only where the Security Council finds a "threat to the peace, breach of the peace, or act of aggression."105 States have therefore identified two values in one treaty provision—the principle of non-intervention and the notion of international peace and security—but they have, at one and the same time, also expressed preference for the latter value in casus extremis.


105. Article 39 of the United Nations Charter stipulates this as a condition precedent for lawful measures (not involving the use of force) to be taken under Article 41 or "such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security" under Article 42. U.N. CHARTER art. 42.
The principle of non-intervention, hailed as the constitutional safekeeper of the sovereignty of all states, therefore, admits to legal limitation qua the United Nations.\(^{106}\) This is the unambiguous, literal meaning of Article 2 (7). But our legal world is not populated with conventional laws alone. The International Court of Justice made the adroit and welcome observation in the *Nicaragua Case* (1986), often overlooked, that international law also comprises a series of customary prescriptions and norms: “it was never intended that the Charter should embody written confirmation of every essential principle of international law in force.”\(^ {107}\) One of these customary principles is that of non-intervention. Indeed, the very principle of non-intervention as it governs relations between states qua each other commands its authority from the firmament of customary international law; the principle is not “as such, spelt out in the United Nations Charter.”\(^ {108}\) The customary nature and legal force of this cardinal principle (alongside that on the prohibition on the use of force) means that our task as lawyers is to investigate whether international law places similar incursions or limitations on this principle in custom—that is state practice expressed as legal conviction. Our understanding of the state of custom at a particular point in time depends on our commitment to analysis, incident by incident, of what states have been or are in fact doing in order to determine the material field of application of the customary law principle of non-intervention: if the principle of non-intervention exists in customary international law, then it must be investigated whether this formal source of law admits any exceptions to or deviations from the principle of non-intervention.

The conflict between humanitarian intervention and sovereignty also manifests itself in the realm of *jus cogens* where states have rallied behind certain principles which are or have been depicted as “peremptory norms of general international law.”\(^ {109}\) The strength and

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106. *But see U.N. Charter* art. 2, para. 1 (affirming the principle of the sovereign equality of all states, be they large or small, strong or weak, wealthy or not, and it is from this that the principle of non-intervention derives).
duration of support for the principle of non-intervention in state practice must surely qualify the principle for this status, reinforced as it is by the proscription on the use of force (itself a main exemplar of *jus cogens*) contained in the United Nations Charter. The prohibition of genocide has also attained the force of *jus cogens*, such that states have sanctified an increasing range of premium norms which in the grand scheme of affairs are meant to co-exist with and even reinforce each other.

However, in accepting this growing series of ineluctable norms as "fundamental and superior values within the [international] system," it is at least arguable that by their behavior in recent practice, states have effectively pointed to the possibility that they have created a conflict of interests—that is, the individual versus the common interest. On the one hand, the principles of non-intervention and the non-use of force serve to protect the sovereignty of states; on the other hand, the right of humanitarian intervention could be seen as one conceivable means of providing meaningful and effective protection for potential victims of genocidal or para-genocidal killing. In the absence of authorization for action from the Security Council, humanitarian intervention could be seen as an alternative means of realizing the obligation to prevent genocide. However, such a far-reaching and radical construction of the terms of the 1948 United Nations Convention on the Prevention and Punishment of Genocide, which would envisage scope for some form of

110. CASSESE, supra note 8, at 147.

111. Both parties involved in the Nicaragua Case accepted this principle in their written submissions. This principle is of a general rather than an absolute nature since the United Nations Charter also accommodates the right to use force in self-defense. This means that the proposition that the principle prohibiting the use of force has attained the status of *jus cogens* (i.e. from which no derogation is permitted) is "not without its difficulties." Rosalyn Higgins, *Fundamentals of International Law*, in *PERSPECTIVES ON INTERNATIONAL LAW* 3, 16 (Nandasiri Jasentuliyana ed., 1995).


114. Natalino Ronzitti has expressed the alternative view that while it is quite sure that the obligation to refrain from the use of force is embodied in a peremptory norm of international law, it is not at all sure that the duty to promote human rights is set forth in the *jus cogens* rule. Consequently, it is difficult to agree that the value protected by the duty to safeguard human rights should prevail over the value protected by the rule which forbids the use of force.

115. Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277 (1951). The precise wording of the obligation of this Convention is instructive: according to Article I, the High Contracting Parties "confirm that genocide, whether committed in time of
armed remedial intervention to nip genocidal killing in the bud, was contemplated in the Sixth Committee during the ninth session of the General Assembly, but was opposed by Israel, Nationalist China, and Panama. The context of the realpolitik of the Cold War meant that states, eager to keep the legal opportunities for resort to force to their bare minimum in order to contain the risk of conflict, prioritized their own individual concerns above and beyond any competing (i.e. community) concerns and proved reluctant to disturb the Charter law on the use of force by appealing to or placating any so-called right of humanitarian intervention.

The watershed developments that have taken place after the Cold War have, at the very least, re-opened these macro-legal questions, to the point where our immediate past is littered with various and varied examples of humanitarian action, ranging from the provision of humanitarian assistance to full-scale intervention. These responses to humanitarian tragedies (of one form or another) could be interpreted as a series of freak impulses or reflexes with limited or no legal significance: these responses have occurred as a matter of fact, but it is questionable whether these responses can be said to have given rise to a new phenomenon as a matter of law. An alternative view would be to regard the world (meaning the states that compose it) as having experienced some sort of humanitarian awakening in the normative sense, so that there are now cases where the community concern (such as the
prevention of genocide) has expressed itself over and above individual claims of sovereignty and the principles prohibiting intervention and the use of force.

The growing bank of state practice which has accumulated in recent times must therefore force the question as to whether, in their increasing number, these responses are indeed the result of specific normative decisions made by states when faced with the conflicting priorities of jus cogens. Germany, for example, warned that the treatment of the Kurdish population in northern Iraq in 1991 "harbor[ed] the danger of genocide" as a result of "[t]he persecution of this ethnic group" and argued that "the armed repression against it must be stopped." At a time when there was no shortage of allegations of genocidal conduct during the ethnic conflict that ravaged the former Yugoslavia, Turkey (acting on behalf of the Organization of Islamic Conference) tabled a resolution in August 1992 which called for military intervention for the protection of Muslim populations in the Balkans. For her part, Russia has made her position with regard to the treatment of ethnic Russians in neighboring or proximate states crystal-clear, to the effect that "[i]n certain cases, the use of direct military force might be necessary to protect our compatriots abroad." Through humanitarian intervention, as defined at the outset of this article, we are therefore able to address the specific

119. Andrew Higgins, Kremlin Backs War to Protect Ethnic Russians, INDEPENDENT (London), Apr. 19, 1995, at 7. President Yeltsin threatened the use of force for the first time in Russian foreign policy in the Balkans when he said, in August 1995: "If peace efforts fail, as well as attempts to restrain the Serbs, then regrettably force will have to be used by the international community." Helen Womack, Yeltsin Hopes Milosevic and Tudjman Will Talk, INDEPENDENT (London), Aug. 8, 1995, at 7; see also Leonard Doyle, Russian President Invites Tudjman and Milosevic to Negotiations As Sidelined E.U. Mediator Hits Back, GUARDIAN (London), Aug. 8, 1995, at 7.
120. See supra notes 1, 26 and accompanying text. Adam Roberts has made the cogent argument that "action by one state or a group of states can be a valuable stopgap while the [United Nations] slowly cobbles together an international peacekeeping or other force." From San Francisco to Sarajevo; The U.N. and the Use of Force, 37 SURVIVAL 7, 31 (1995). This is a measure that would doubtless require the requisite normative foothold if it were to be regarded as permissible from the perspective of international law. Aside from this consideration, he also points out that for the United Nations, "there may be risks in too-direct involvement in the management of military forces when terrible mistakes occur, as they inevitably do in military operations, [because] they could reflect badly on the organization and could threaten its universal character." Id. The same may be said where the conditions for armed intervention, as perceived from a political vantage-point, countenance against formal United Nations approval, as in the Nigerian-engineered use of force to restored an elected government to power in Sierra Leone in 1997 (on which, see supra note 92), even though the United Nations may welcome such endeavors and their proposed outcome.
question of whether states are able at this point in time to resort to force in exceptional humanitarian circumstances where authorization for the use of force is not forthcoming from the United Nations or any other treaty-based authority or procedure for that matter.

The potential clash which may exist among the values protected by *jus cogens* raises fundamental questions of the priorities which states have created in the international legal order. In the event of a clash between such values and the norms that have been designed to protect them, what principles are to determine which of these essential values and norms prevail?\(^1\) Is preference to be given to the oldest peremptory norms, those rooted in historic and ancient practice? Or do subsequent values and norms carry a power of implied repeal? Are we to assume an anthropocentric or a statist bias? In reaching a decision on this matter, it is to be preferred if we stand back and take stock of international law's epic (r)evolution in preferences and its increasing protection afforded to human beings, either individually or in their multifarious associations—for it is human beings that are the “ultimate members” of the world community and its legal order.\(^2\) However, for any solid claim of this nature to be made in international law, evidence of legal authority is required, and this will be discerned, in the main, from the *normative convictions* which states themselves hold when confronted with conflicting values and *jus cogens* norms. This process exemplifies on a grand scale the intense friction between the global system's apologies and its utopias, the outcome of which will be decided by the changing meaning and understanding of sovereignty within the international law system.\(^3\)

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121. According to Professor Fernando R. Tesón, “[t]here is a growing trend in state practice and the literature in support of the proposition that the prohibition against massive human rights deprivations is indeed a rule of *jus cogens*.” *Tesón*, supra note 81, at 168–69. This proposition of law draws us closer to the notion of conflicting peremptory norms and forces us to address the issue of “why the preservation of peace (the value protected by the rule of non-use of force) prevails against, say, the prevention of serious and widespread human rights deprivations (the value protected by the exception of humanitarian intervention).” *Id.* Tesón also proposes that “[t]he only way to reach a conclusion is to focus the inquiry on the most appropriate moral-political theory of international law” and goes on to claim that the theory “must account for both state sovereignty and human rights.” *Id.*

122. JOHN WESTLAKE, COLLECTED PAPERS IN PUBLIC INTERNATIONAL LAW 78 (1914).

123. In response to repeated criticisms that the United Nations military action in Haiti in 1994 constituted a violation of that country’s sovereignty, Professor W. Michael Reisman has asked an array of thought-provoking questions:

Whose sovereignty? In modern international law, what counts is the sovereignty of the people and not a metaphysical abstraction called the state. If the *de jure* government, which was elected by the people, wants military assistance, how is its sovereignty violated? And if the purpose of the coercion is to reinstate a *de jure* government elected in a free and fair election after it was ousted by a renegade military, whose sovereignty is being violated? The military’s?
VI. FINALE

With its concentration on policy objections to humanitarian intervention, legal scholarship stands in possible danger of abandoning its preferred role—akin to that followed by the International Court of Justice in 1986—at a time when state practice appears to have yielded more readily to the notion of forcible humanitarian protection. The unprecedented trail of recent international interventions may well mean—as was said of the legal prohibition on armed reprisals in 1972—that the scope of the principle of non-intervention is, "because of its divorce from actual practice, rapidly degenerating to a stage where its normative character is in question." An alternative interpretation would be to regard the justifications offered for the use of force on such occasions as mere "statements of international policy, and not [as] an assertion of rules of existing international law." Quantifying the legal significance


126. This is how the International Court of Justice described the occasional claims made by United States officials, that "their grounds for intervening in the affairs of a foreign state [are] for reasons connected with, for example, the domestic policies of that country, its ideology, the level of its armaments, or the directions of its foreign policy." Nicaragua Case, 1986 I.C.J. 207, at 109. There is, of course, the explanation that these actions were considered to be outside the realm of the law. The following letter by Professor Arthur Leff of Yale Law School, which appeared in the New York Times on 4 October 1968, is illustrative of this kind of reasoning:

I don't know much about the relevant law. My colleagues here, who do, say that it's no insurmountable hindrance, but I don't care much about international law, Biafra or Nigeria. Babies are dying in Biafra. . . . We still have food for export. Let's get it to them any way we can . . . . Forget all the blather about international law, sovereignty and self-determination, all that abstract garbage: babies are starving to death . . .

Tom J. Farer, Humanitarian Intervention: The View from Charlottesville, in HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 149, 151 (Richard B. Lillich ed., 1973); see also R. George Wright, A Contemporary Theory of Humanitarian Intervention, 4 FLA. J. INT'L L. 435, 445–51 (1989). However, this approach is unsound given the fact that participating governments in Liberia (1990) and northern Iraq (1991) appealed to legal norms and legal standards; they did not see their actions as the result of moral choice and moral choice alone.
of these actions and attitudes should therefore be embarked upon as a
matter of priority and urgency in order that states are made aware of
what legal developments, if legal developments they so constitute, may
be distilled from the voluminous pulp of modern state practice. With
our finger on the pulse of this practice, we will be able to determine
whether the traditional conclusions reached on the legal status of hu-
manitarian intervention continue to command support or whether they
truly have been superseded by changes in the normative convictions of
states, especially after the sweeping transformations that have occurred
in international political actions and attitudes—backed by the use of
force—since the end of the Cold War.

In his seminal essay on the use of force published in 1984, Oscar
Schachter observed that “governments by and large (and most jurists)
would not assert a right to forcible intervention to protect the nationals
of another country from atrocities carried out in that country.” As an
exposition of the lex lata of the time, this standpoint was fashionably
correct—and remained so even for a time afterwards where states
proved reluctant to intervene on humanitarian grounds and, where they
did so, chose not to advance the self-same justification as the legal de-
fense for their actions. Should humanitarian intervention still be
regarded as an unlawful head of action for the use of force, the most
recent international interventions that have taken place for humanitarian
reasons but without the relevant institutional authorization at the time of

See, e.g., REGIONAL PEACE-KEEPING AND INTERNATIONAL ENFORCEMENT: THE LIBERIAN
CRISIS 75–76, 105–08 (Marc Weller ed., 1994); United Kingdom Materials in International
Law, 1992 BRIT. Y.B. INT’L L. 615, 824; but cf. Franck & Rodley, supra note 27, at 304
(“Like civil disobedience, however, this sense of superior ‘necessity’ [to launch a humani-
tarian intervention] belongs in the realm not of law but of moral choice, which nations, like
individuals, must sometimes make, weighing the costs and benefits of their cause, to the
social fabric and to themselves”).

127. See ANTHONY D’AMATO, INTERNATIONAL LAW: PROCESS AND PROSPECT 230–31
(1987) (“If Dr. Akehurst and the many who follow him have their way, their books will never be
out of date because they proclaim and set forth unchanging legal principles to which govern-
ments, regardless of what they actually do, pay lip service. . . . I would argue that customary law
grows and changes over time as a result of the interactions of states in the international arena
(the facts) and the rules we may infer from those interactions as the theory that best fits what the
states did (even if it was not, or was only partly, what they said they were doing). It is surely
more difficult to do this kind of international law research than to follow Dr. Akehurst and sim-
ply take governmental statements at face value”). Professor D’Amato omits reference in this
passage to the opinio juris sive necessitatis condition for customary norms to come into being: it
matters a great deal in legal terms whether states cite this head of justification to defend their
actions or risk the imaginative use of less controversial legal grounds for the use of force to
rationalize what they do in international law.

128. Oscar Schachter, The Right of States to Use Armed Force, 82 MICH. L. REV. 1620,
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action, would be without an appropriate legal basis. However, this interpretation would seem to be at odds with the stance of most governments who appeared to recognize the need for controlled action in such cases of humanitarian crisis.

Identified as the principal canon in the legal case made against the right of humanitarian intervention, state practice therefore needs to be re-evaluated at periodic intervals to ascertain what concrete normative corrections or changes have been made within the international system. This critical task cannot be abandoned by habitual or slavish reference to principle or suspect policies because this will introduce a legal system that is but a faint reflection of community attitudes and community conduct. To similar effect, the legal debate on humanitarian intervention cannot be won on some moral high ground or on the sole basis of some fundamental humanitarian presumption or ideal. "International law is about the real policies and commitments of governments, it is not about the incantations of secular or religious morality." And so it was that the Attorney-General of the United Kingdom, in his representations before the International Court of Justice on the issue of nuclear weapons in November 1995, made the claim that "[c]ustom is not something which can be conjured from the air, or even, in The Tempest, from the vasty deep . . . . It is not something which can be assumed, or deduced from appeals to general principles of humanity."

In the absence of substantiating state practice and opinio juris sive necessitatis, "[a] right or action [of humanitarian intervention], which can only be deduced by an elaborate legal sophistry, is nothing more than an artificial effort at realizing a moral fiction." Ultimately, we shall only be aware of—and be confident of—the outcome of legal thinking on humanitarian intervention if the right considerations have

129. See supra notes 63, 81 and 83.
been included in the legal analysis of state practice and are given considered and appropriate weighting.