The Complexities of Humanitarian Intervention: A New World Order Challenge

Richard Falk
Princeton University

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THE COMPLEXITIES OF HUMANITARIAN INTERVENTION: A NEW WORLD ORDER CHALLENGE

Richard Falk*

I. FRAMING AN INQUIRY

The interplay between juridical support for norms of non-intervention and the actualities of interventionary diplomacy is an integral feature of a world of sovereign, yet unequal, states pursuing diverse goals. Pointing in one direction is the juridical stress on sovereignty, reinforced by spatial notions of territorial supremacy within fixed boundaries, which provides the doctrinal underpinnings of non-interventionism. Pointing in the other direction is the effort to project power and influence beyond territorial sovereignty, virtually a definition of what distinguishes a great power from an ordinary state, which creates the geopolitical pressures that result in intervention in the internal and external affairs of weaker sovereign states. This essay assesses the nature of change in interventionary diplomacy since the end of the Cold War against this conceptual background.

Part of the complexity traditionally associated with interventionary diplomacy is its confounding and varying admixtures of politics, morality, and law. These admixtures exist irrespective of whether the particular intervention is characterized as "humanitarian" — although by so describing an intervention, the moral/legal justification is given additional importance.

The political dimension is preoccupied with the decisive issues of effectiveness and acceptability: managing the means/end relationship between commitment and outcome, and assessing the acceptability of the interventionary claim in various arenas of decisionmaking and evaluation. This dimension is also crucial in determining whether the overall interest of the intervening state — including its reputation for effective and legitimate action — is promoted through the effort to influence behavior by coercive means in a foreign country and whether

* Albert G. Milbank Professor of International Law and Practice, Princeton University. J.S.D., Harvard University (1962); LL.B., Yale Law School (1955); B.S., University of Pennsylvania (1952).
sufficient resources can and should be brought to bear to achieve the interventionary goals within a reasonable amount of time given the level of prevailing domestic support.

The moral dimension of interventionary diplomacy focuses on vindicating the claim that the use of force is essential and proportionate: that it benefits the peoples of the target society, serves the values (and interests) of the intervening state, and contributes to the global common good.¹

The legal dimension is concerned with invoking and establishing precedents and making legal arguments about rules and standards in support of, or in opposition to, a particular interventionary undertaking.²

The subject-matter of intervention evolved as an incident of the Westphalian world order. States were the only legitimate actors enjoying the rights of territorial supremacy and there existed no external legal constraints on government decisions to use force as an instrument of statecraft. While it is still true that only states possess the military capabilities and political disposition needed to fashion the sort of policy that is likely to be identified as “interventionary,” recent practice over the last half-century in interventionary diplomacy has exhibited the impact of several new elements.³

The most significant new element impinging on interventionary diplomacy, is the role played by the United Nations and regional entities, especially in Europe. Nevertheless, the character of the United Nations’ role is ambiguous both overall and from case to case. Particularly confusing is the uncertainty regarding whether a Security Council decision involves a genuinely collective and community interventionary

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¹. These perspectives may not point in the same direction. For instance, the 1986 United States air strike against Libya in alleged retaliation for Libya's complicity in terrorist actions against U.S. targets was and remains inconclusive from these viewpoints. It was not certain that Libya was involved in the specific terrorist incident that served as the factual basis for the interventionary claim. Neither was it clear that the targets chosen were appropriate or that the means used were proportionate. Yet the attack did not arouse any strong adverse reaction, partly because Libya had previously and blatantly acted in a provocative manner with respect to international terrorism and partly because the United States' use of limited force was widely, but not uniformly, accepted as a reasonable way to compel Libya to change its behavior (which seems to have happened in the period subsequent to the attack). For a series of skeptical assessments of the American claim, see MAD DOGS: THE U.S. RAIDS ON LIBYA (Mary Kaldor & Paul Anderson eds., 1986).

². See MYRES S. MCDougAL & FLORENTINO P. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER (1961) (on the process by which claims to use force are validated in international law).

³. Russia, although no longer the global presence of the Soviet Union at the height of the Cold War, remains, since 1989, an uncontested interventionary actor in the “near abroad,” the region comprised of those formally independent states that had previously been republics in the Soviet imperial system.
judgment guided predominantly by considerations of public good. Uncertainty clouds the degree to which such a decision is little more than a legitimating rationale for use of force that would otherwise be more widely viewed as "illegal" if undertaken by a state on its own or in coalition with other states. Another relatively new element is the emergence and magnitude of an array of transnational civil initiatives that seek to mitigate the suffering of people living in the target societies and participating in any warfare that results. The International Committee of the Red Cross, established in reaction to the horrific battlefield conditions of the Crimean War in the mid-nineteenth century, is suggestive of this non-governmental role that has been expanding in interventionary contexts, especially those expressly characterized as humanitarian. Also relatively novel are legal constraints on the use of force as an instrument of statecraft and formal prohibitions on all forms of coercion that possess an interventionary character. A final development is the emergence of a highly articulated international law of human rights, reinforced psychologically by ideas about government and individual accountability for their gross violation. Cumulatively, heightened expectations about conformity to minimal human rights standards generate interventionary pressures, especially given the capacity of television and other innovative media to create real-time awareness of many types of inhumane behavior on a global basis.

Evaluating the effect of these normative innovations in the status of force remains controversial: are we dealing mainly with a change in discursive reality — such that what has really changed is language, not behavior — with major states still retaining, on a behavioral level, a discretionary option to use force? A middle position contends that the discursive change alters behavior by legitimating challenges directed at uses of force that did not previously exist. Gradually, there are moves away from reliance on force, thereby affecting in subtle ways the balance of considerations entering into the national security calculus of governments.

The increased complexity of the phenomenon of intervention has had a number of contradictory effects. It has become more difficult to identify who is responsible for what. While the state continues to dominate interventionary diplomacy, it often operates indirectly, by reliance on the authorizing mandate of one or more layer of institutional authority at the regional and global levels. Such indirectness of mandate dilutes and disguises the role of the state to some extent, undercuts somewhat certain anti-interventionary criticism, and shifts part of the responsibility for failure to achieve interventionary goals to the wider institutional frameworks, especially that of the United Nations. Further, norms of non-intervention in addition to prohibitions on the use of force are somewhat at odds with the contemporary view that the occasion of human rights abuse provides legal and moral grounds for disregarding the sovereign rights of states.

Given this complexity, it is hardly surprising that the subject-matter of interventionary diplomacy has consistently given rise to controversy and inconclusive results. This effect has been more pervasive in constitutional democracies that claim a moral advantage and legal validation for their foreign policy initiatives, at least partly, because of the domestic accountability of their political leaders through free and periodic elections and legislative checks. Discussing the reluctance of the Bush Administration to get involved on the ground during the early stages of the war in Bosnia, then-Secretary of State James Baker recalled a few years later that "the American people would not have stood for such a commitment for even three days!" Such a perception of citizen skepticism about an interventionary policy operates as a definite check on a proposed intervention that is not clearly based on widely acknowledged strategic interests or national security considerations. When such lines of justification are powerfully present, then the passions of the electorate can act, on occasion, as a spur to intervene.

5. This reliance has caused rather meaningless debates as to whether the United Nations has "failed" because of the dismal outcomes in several recent peacekeeping tasks or whether the United Nations has been made a scapegoat by leading member states. See David Rieff, Slaughterhouse: Bosnia and the Failure of the West 13-23 (1995).


7. This is not to say that the moral/legal status of an intervention is the primary ingredient of its acceptability; generally, far more relevant is the sense of interests at stake in relation to prospects for success at acceptable costs. As suggested by the experience in the Gulf War, the level of domestic support rose dramatically when a quick and easy victory resulted. Conversely, the early popularity of the Korean and Vietnam Wars dropped as the costs rose, the war dragged on, and the prospects for victory diminished.

8. Observation made during an informal meeting with the faculty of the Woodrow Wilson School, Princeton University, April 1994.
The United States seems especially susceptible to such swings of interventionary mood that can be played upon by opportunistic politicians. Such a possibility is reinforced by the American political myth of acting benevolently, rather than selfishly, on international issues, and of being a country whose actions are allegedly driven by values rather than interests. This special American need for a moral justification stems, no doubt, in part, from its own anti-colonial heritage, its recent championship of international human rights including the right of self-determination, and its tendency to disguise its selfish motivations for overseas actions. This complex orientation of the United States toward intervention, inhibited by the Vietnam syndrome and encouraged by a missionary mentality, is of great world order significance at the present time because of the leadership role it has played as the sole remaining superpower.

Accompanying the changes in interventionary diplomacy has been a further stage-setting factor: the demise of the credibility of geopolitical pressures to intervene since the end of the Cold War. This development reinforces the normative impact of the collapse of colonialism and the participation in global politics of leaders of ex-colonies who remain generally suspicious of any interventionary claim. To circumvent such resistance within the setting of the United Nations, interventionary arguments have been formulated in a manner that effectively obscures great power aspects. The rise of "humanitarian" rationalizations is an effort to reconcile the proactive impulse to intervene with the normative inhibitions on the use of force for geopolitical purposes given the present historical setting.

There is a further general observation. To the extent that intervention (aside from countries intervening in the affairs of their neighbors) is the exclusive work of great powers, its feasibility as a policy option is often shaped by the nature of the governing structure within the intervening state. If the state is authoritarian, it needs generally less public

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9. Two contradictory lines of interpretation are significant. One regards the United States as a self-maximizing intervening power with little sense of moral scruple. For a powerful articulation of this view, see Gabriel Kolko, Century of War 412-51 (1994). The other sees the United States as unwilling to act coercively in foreign policy until it is first convinced of the moral correctness of its position. An influential formulation of this view is to be found in Henry Kissinger, Diplomacy (1994).

10. Geopolitical factors remain relevant in some settings. Islamic challenges in key Middle East countries may still create a new geopolitical climate favorable to intervention should the pro-Western orientation of the governments in Saudi Arabia, Turkey, and Egypt be seriously threatened. It is not difficult to imagine a number of scenarios involving a resurgent and assertive Russia, possibly aligned with China, that would raise further the geopolitical stakes in the outcome of various internal struggles for power.
support at home and is consequently less interested in mounting an elaborate justification, beyond deflecting international reactions and positing its security concerns. Such a state can also reverse its course more readily since it has not mobilized its citizenry in such a way as to be entrapped by their expectations. If the state is democratic, however, it must persuade its citizenry of the merits of an interventionary policy, especially if resistance is expected in the target society, casualties are anticipated as a distinct possibility, and there is no assurance of a rapid end to hostilities. Once persuaded, however, the termination of an intervention may be politically problematic as it could involve an acknowledgment of failure that has cost the lives of citizens. The United States has assumed much of the interventionary leadership both during the Cold War and since its conclusion, and has a particular need to rest its policy on a firm platform of public acceptance — a position that was greatly solidified during the definitive interventionary experience of this era, namely the Vietnam War.

Historical memory is also of crucial relevance, as is its most authoritative construction. It is common knowledge how governmental attitudes toward national security policy and resultant international behavior in the West were shaped after 1945 by “the lessons of Munich,” and associated fears about “appeasement” and lack of military preparedness. Leaders and populations were educated about the importance of confronting early expressions of aggressive behavior, even in marginal settings, to avoid later having to deal with a more focused challenge to the established world order. Such a process of social learning was reinforced by America’s lost innocence at Pearl Harbor. This realization of vulnerability to surprise attack by distant enemies was further reinforced by revolutionary technological developments associated with the means of waging war, above all by nuclear weaponry, but also by missiles, guidance and reconnaissance systems, as well as the advent of sophisticated submarines and long-range bomber aircraft.

Twenty-five years later, the Vietnam syndrome imparted a quite different message. Syllabi for social learning were updated to recognize that it is not worth the effort to address challenges in marginal arenas when the consequence is military frustration, serious division and demoralization in the core country and its allies, as well as magnified suffering and devastation in the target society. Since the Vietnam War, literally every American political leader, regardless of party or ideological orientation, has attempted to rally public support for recourse to military action in a manner that would erase the Vietnam syndrome from public consciousness once and for all, thereby removing one source of reluctance to use force in pursuit of national interests. In
contrast, those opposed to interventionary diplomacy, especially those who felt harmed or betrayed by the Vietnam War have continued to regard the Vietnam syndrome as a useful cautionary inhibition upon interventionary impulses.

Such a preliminary assessment of interventionary diplomacy is lacking in historical specificity. Although interventionism has been a pervasive feature of international relations, its specific forms have varied with the times, and need to be so understood by reference to the global setting.

Interventionary diplomacy during the Cold War reflected the bipolar character of geopolitics and induced patterns of intervention that were based primarily on maintaining or disrupting ideological affiliations, especially in countries where geopolitical affinities were ambiguous and contested, and the risks of escalation seemed manageable. It is revealing that the most globally dangerous instances of intervention occurred in relation to countries divided along ideological lines (Vietnam, Korea, China, and Germany) or in countries situated geographically close to one or the other superpower (Afghanistan and Cuba). Since 1989, however, the geopolitical pressures to intervene have weakened in most settings, while humanitarian pressures to intervene have strengthened.

Fundamentally, geopolitical and humanitarian pressures to intervene are of a radically different character. Both types of intervention have proved problematic given current realities about the military, economic, and political capabilities needed for an effective intervention and the extent and character of support and political will required to sustain an interventionary effort until its goals are reached. The failure of geopolitical intervention is associated mainly with its inability to overcome indigenous nationalist forces of resistance, particularly when reinforced diplomatically and militarily by counter-interventionary capabilities. The failure of humanitarian intervention, however, arises mainly because of the relatively shallow commitment on the intervening side, thereby simplifying the tactics of resistance even in the absence of counter-interventionary support.

11. In essence, interventionary rivalry between the superpowers was encouraged on the periphery while avoided at the core; serious confrontations occurred in Vietnam, Korea, and Afghanistan, but not in Eastern Europe or Central America. The tense moments occurred in circumstances of uncertainty as in the Cuban Missile Crisis or with respect to access to Berlin. Governing elites in Moscow and Washington learned that testing the will of their adversary in such settings was dangerous and should be avoided.

12. To the extent that the intervention is genuinely humanitarian, in its essence, it tends to be “shallow.” Shallow here means that it arises from an assessment that the mission can be completed successfully on the basis of a modest commitment of resources and without incurring serious risks of substantial loss of lives on the part of the intervening side. In
Closely related to this shift in the justifying discourse, is an apparent change in political backing. The geopolitically oriented interventions represent the outgrowth of an assessment of strategic interests by government leaders who then mobilize public support for an interventionary policy. In contradistinction, humanitarian interventions result from societal pressures, recently enhanced by a more globalized media, that finally compel a reluctant political leadership to act against its sense of the national interest, but to limit its commitments to the extent possible politically. Recent trends toward transferring formal responsibility to the United Nations can be seen as a mechanism to defuse societal pressures to act while avoiding an open-ended interventionary commitment.

Because interventionary diplomacy, especially if lacking strong geopolitical motives and sufficient capabilities, is likely to fail, the reputation of the United Nations in the field of peace and security has declined, temporarily at least. Much of this decline has been related to the perceived failures of the United Nations to respond to humanitarian emergencies in such countries as Somalia, Rwanda, Burundi, and most of all, Bosnia. This failure has been reinforced by the transfer of primary responsibility from the United Nations to NATO. This transfer is itself a complex, multi-faceted process, and can be viewed as one aspect of an approach adopted to induce the parties to agree finally, if precariously, upon a peace plan. The contrast between NATO's willingness to engage Serb resistance militarily, and the United Nations' reluctance to contrast, an intervention that proceeds from a geopolitical rationale, even if it includes humanitarian aspects, tends to be much more open-ended with respect to the depth and breadth of the commitment. Geopolitical commitments that were characteristic of the Cold War era, exemplified by the wars in Vietnam and Afghanistan, involved massive interventions, but engendered intense nationalist forms of indigenous resistance reinforced by strong counter-interventionary responses by the superpower opposed to the success of intervention.

Another learning experience from the Cold War was that it was more hazardous to attempt a political restructuring of the target country than merely to pursue some particular objective involving a change of policy. The Gulf War is illustrative of a geopolitical intervention with humanitarian aspects. The United Nations provided the backing for the main interventionary claim, there was no prospect of significant counter-intervention, and the intervening side did not attempt the more ambitious task of political restructuring, and indeed, left Saddam Hussein as head of state despite demonizing him as the most abusive political leader since Hitler. What is relevant here is that the humanitarian aspect of the intervention was easily abandoned (that is, liberating the Iraqi people from an abusive leader and protecting the vulnerable Kurdish minority in northern Iraq and the Shi'a population in southern Iraq), especially as geopolitical calculations shifted once Iraq was removed from Kuwait and destroyed as a regional military threat. It was perceived that the main geopolitical priority was to keep Iraq united in order to contain Iran regarded as the other threat to Western interests in the region and to avoid an independent Kurdish state from further destabilizing Turkey. And, in fact, the aftermath of the Gulf War has had mainly perverse humanitarian effects as the maintenance of economic sanctions for several years has resulted in continuing casualties and hardships for the civilian population without seeming to weaken Saddam Hussein's hold over Iraq.
do so, has confirmed for many a view of United Nations ineffectiveness. Furthermore, in a crucial sense, even NATO's role was overshadowed in the peace process by the essentially unilateral character of United States diplomacy, epitomized by virtually locking up the leaders of Bosnia, Croatia, and the rump Yugoslavia in a military base in Dayton, Ohio until they finally reached an agreement. In effect, there exists now a répertoire of diplomatic tools and modalities for addressing humanitarian challenges, but none among them offers any strong promise of consistent success; indeed, the peace in Bosnia continues to hang precariously in the balance.

Finally, because states continue to be guided by a rather narrow conception of self-interest that does not extend to the well-being of foreign societies and their peoples, their unwillingness to intervene effectively in circumstances of great human urgency increasingly encourages independent grassroots initiatives to undertake humanitarian missions. An outstanding example of this expanding role is Médecins sans Frontières. More relevantly, the agents of humanitarian intervention are now often actors other than governments, especially transnational citizens associations, operating on a political logic that is shaped almost exclusively by moral considerations — largely an ethos of responsibility and solidarity — that is very different from the statist outlook that guides most governments when they are engaged in humanitarian missions. Of course, such generalizations need careful qualification. For instance, there are a series of governments of middle size, most notably those of the Scandinavian countries, Canada, and the Netherlands, that act in a more genuine humanitarian spirit, and subordinate their statist character to an identity shaped by the humanitarian imperative. At the same time, the capabilities and outlook of these transnational forces should not be romanticized. Some of these transnational actors are funded and otherwise dependent on one or more governments, and thus lack real independence. Also, if conflicts cross the threshold of large-scale violence, non-governmental actors generally lack the financial, diplomatic, and logistical means to address directly the core of the conflict or even to gain access to the participants.

The foregoing discussion supports the conclusion that the present status of interventionary initiatives is shaped by several realities:

- intervention in almost any foreign society is likely to entail important risks of failure for the intervening side;
geopolitical factors may persuade leaders to take such risks, but humanitarian concerns are unlikely to do so even if backed up by strong political pressures;¹³

defusing political pressures to alleviate human suffering without adopting a major interventionary commitment has encouraged reliance upon the United Nations;

disillusionment with this pattern is likely to produce, at least temporarily, a reduced role for the United Nations, and greater reliance on regional actors, dominant states, and instances of an outright refusal to act;

humanitarian concerns have also been stimulating significant transnational initiatives of a non-governmental character;

the combination of media attention and the evolution of a human rights culture provide a coherent rationale for "humanitarian intervention" (that is, serious expectations that severe abuses of human rights, including acute economic and cultural deprivations, are matters of international concern that justify interventionary action and overcome otherwise restraining considerations associated with non-intervention commitments and attitudes); and

this combination of developments in the last several years, especially in light of the human ordeal that has accompanied the dissolution of former Yugoslavia, has caused profound disillusionment with the capacity of the collective will in international society to protect vulnerable peoples against severe forms of abuse and suffering arising either from governmental aggression (Bosnia, Chechnya, East Timor, Tibet), acute ethnic strife (Bosnia, Rwanda, Burundi), or from governmental collapse (Somalia).

The questions raised by these realities are wide ranging. What should we learn from this dismal experience? How shall the interplay between interventionary diplomacy and international law be interpreted in light of both doctrinal formulations and the practice of states, international organizations, and transnational citizens associations? What is the legal standing of various claims of humanitarian intervention by different types of actors? How can the role of international law be strengthened without raising expectations too high? How can the constraining

¹³. The Gulf War discloses the relative priority of these two classes of concerns, providing an illustration of a massive geopolitical response and a minimal humanitarian response. See supra note 12 and accompanying text.
impact of geopolitics be acknowledged without undermining the relevance of international law?

II. Conceptual Ambiguities

Intervention is notoriously ambiguous as a legal term of art. It is used journalistically to describe all forms of influence projected primarily by governments of states (but more recently by other political actors, as well) in their interaction with one another. In general coinage, the term intervention has been reserved for situations in which a powerful state uses forcible means, characteristically including the use of military capabilities, to alter the policies or governing structures of weaker states. In geopolitical terms, intervention has been used to maintain traditional spheres of influence within the region of a powerful state, and more widely during the Cold War when the entire Third World became an arena for competitive interventionary diplomacy between the two superpowers.\(^\text{14}\) The United States has frequently “intervened” over the course of many decades in the Caribbean and Central America to uphold its traditional control within this neighboring region — an interventionary pattern early formulated as a precept of foreign policy (The Monroe Doctrine). Nevertheless, the United States’ interventionary character was somewhat disguised in each particular instance by lofty claims of protecting democracy and rescuing the people of a target society from an abusive government, and by invoking rather flimsy contentions of regional authorization. In the last several years, interventions in Grenada, Nicaragua, Panama, and Haiti have all been justified in such humanitarian terms with varying degrees of credibility.

But are each of these instances properly regarded as interventions from the perspective of international law? When a government gives its clear and uncoerced consent to the initiative of another country it removes a large part of the interventionary taint. Of course, ambiguities surround the authority to invite intervention and the genuineness of the invitation. Most recently, it is contended that when the people of the target country seek protection from their own government, their approval of interventionary action is equivalent to consent, and has the effect of removing, or at least qualifying, the interventionary taint.\(^\text{15}\) Also, as

\(^{14}\) Regional politics is quite distinct, in many instances, from global geopolitics. Egypt’s intervention in Yemen, Iran’s intervention in Dhofar, and India’s intervention in Bhutan and Sikkim were connected mainly with hegemonic ambitions of regional scope.

\(^{15}\) For influential formulations along these lines see Anthony D’Amato, The Invasion of Panama Was a Lawful Response to Tyranny, 84 AM. J. INT’L L. 516 (1990); W. Michael Reisman, Coercion and Self-Determination: Construing Article 2(4), 78 AM. J. INT’L L. 642
in Haiti, the essentially unilateral move made by the United States to restore the elected government to power was undertaken with the blessing and collaboration of the United Nations Security Council after sustained brutality by a military regime that had usurped power from the elected civilian leadership. Given the opinion of the International Court of Justice in the Lockerbie case that there is no review of Security Council action taken within the formal scope of its authority, it would seem that any initiatives endorsed by the Security Council are effectively immunized from interventional accusations of a legal character, at least as mounted within the United Nations.

Even the manifestly unilateral intervention by the United States in Grenada in 1983 was allegedly regionalized by reliance on the mandate of a previously unknown political actor, the Organization of Eastern Caribbean States. In a sense, such reliance on multilateral authorization is both an acknowledgment of respect for prohibitions on unilateral intervention and a dubious manipulation of this prohibition through the use of a multilateralizing figleaf. When the Soviet Union relied on similar tactics to mask its unilateralism in Eastern Europe during the Cold War, the interventionary pretexts of "invitation" or Warsaw Pact authorization were dismissed in the West as crude deceptions unworthy of rebuttal.

What, then, should be deemed to be intervention from the perspective of international law? Consent can be coerced or manufactured; public approval can be claimed, or highly contingent and unreliable. It is impossible to be too rigorous in abstract legal terms about the doctrinal contours of interventionary practice. Whenever an external agency acts coercively to alter the governing structure or orientation of a sovereign state, an interference with sovereign rights occurs, such that a challenge


18. Obviously, it is still possible to challenge the legality of United Nations sponsored initiatives by reference to the constraining principle of "domestic jurisdiction" embodied in Article 2(7) of the U.N. Charter, but what seems unlikely is that such challenges can be successfully mounted before the International Court of Justice, given its current reluctance to review judicially the acts of the Security Council. The Court is not bound by its own precedents, and so would technically be capable of taking a different approach to contested Security Council action in the future. See STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 59.
of some sort is directed at unconditional non-intervention norms. But if
the governing process has collapsed or is widely perceived as engaged
in massive and gross violations of human rights amounting to "crimes
against humanity," especially if there is a genocidal element present,
then the moral and legal requirements for intervention are surely satis-
fied. This is clear especially if humanitarian concerns are not intertwined
with economic and strategic interests as would be the case if the target
country was an important oil supplier, site of foreign investment or
military base, or located in a geographically strategic place. A well-
founded humanitarian claim to act can be explained either as an exception
to the prohibition on non-intervention or a suspension of such a
prohibition in light of the illegitimacy of the territorial government or,
alternatively, the existence of anarchic conditions of brutality and chaos.

Let us consider, then, situations in which there is widespread accept-
tance among governments and the public that the proclaimed goal of
coercive action is to alleviate suffering of the people in the target soci-
ety that arises from either the breakdown of government (the so-called
"failed state" problem) or by policies being pursued by governments that
violate fundamental human rights of part or all of the society. In such
settings, we speak generally and appropriately about "humanitarian
intervention." Actually, because of the interventionary taint, especially in
the ex-colonial regions, other less evocative terms of art are generally
relied upon by the supporters of coercive initiatives, such as "humanitar-
ian assistance," "humanitarian operation," and "humanitarian diploma-
cy." Problems of this sort cannot be dealt with properly by semantic
evasion. The essence of these projects still is crossing international bor-
ders and acting within a country, allegedly to help people in a condition
of acute distress. It is interventionary in this fundamental sense, and for
this reason, the terminology of humanitarian intervention remains with
us. Of course, underpinning the political language relied upon by partici-
pants in the discussion of policy responses to humanitarian emergencies
of various sorts exist controversies that arise from different factual
assessments and different perceptions regarding the mix of motives
attributed to the intervening actors. As already mentioned, the range of
actors participating in such an undertaking includes humanitarian non-
governmental organizations, international institutions, as well as states.
The range of possible motives is at least as diverse.

III. THE JURISPRUDENTIAL PREDICAMENT

Most of the international literature on intervention ignores
geopolitical pressures and constraints. This failure has several serious
consequences for our capacity to understand and act in specific situa-
tions. Part of the neglect of geopolitics is a matter of apologetics and part is a matter of wishful thinking.¹⁹

The apologetic part overlooks the extent to which interventionary claims are exclusively mounted by powerful states that have often in the past put forward self-serving rationalizations for their questionable uses of force to coerce weaker countries with what appear to be anti-humanitarian net effects. A recent controversial instance would be the economic coercion maintained by the United States against Cuba for several decades in the form of sanctions. It is rather strange that those international law specialists who think of themselves as realists when describing the predominance of power in international society tend still to talk as if the most powerful states in the world can be taken at face value when they purport to act as altruistic agents of change with respect to the assertion and implementation of humanitarian claims.²⁰ Neither international relations nor practice lends much support to such a benevolent role for great powers, nor, it should be added, does the evidence support the opposite view that geopolitically motivated action will never confer humanitarian benefits. Conclusions either way are persuasive only to the extent that their assessment is particularized by reference to the characteristics and effects of particular interventionary claims. Humanitarian factors are rarely, if ever, decisive in shaping an interventionary decision of any magnitude, although governments will often rely in public on an essentially humanitarian rationale for intervention. Such reliance is especially characteristic of intervention under the auspices of the United Nations in the years since 1989. It is partly an empirical, partly an interpretative, and partly an archival matter to assess the genuineness of such humanitarian claims, but it does not resolve the further concern as to whether intervention is legally permissible if humanitarian.

When Vietnam invaded Cambodia in 1975, presumably for security reasons, but effectively removed a genocidal regime from power, it was widely condemned. Vietnam was called upon to withdraw by the United Nations despite the danger, that by so doing, it would revive the influence of the Khmer Rouge. In fact, the successor Cambodian government, installed as a result of the Vietnamese intervention, was precluded

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¹⁹. This distinction owes a great deal to Martti Koskenniemi, From Apology to Utopia: The Structure of International Legal Argument (1989).

from representing Cambodia in the United Nations. The anti-Vietnam posture was based on geopolitical calculations in the face of the extremity of humanitarian considerations: it was deemed more important, in effect, to avoid the extension of Vietnamese influence and to placate China (then hostile to Vietnam) than to relieve the people of Cambodia from the grotesque burden imposed on their lives by the Khmer Rouge regime. Such priorities may seem extreme, but they are not anomalous when it comes to disclosing the relative impact of geopolitical and humanitarian claims on the behavior of leading states, and through their influence, of international institutions under their control.

There is another kind of geopolitical pressure operative in the years since the end of the Cold War: the avoidance of intervention even in the face of extreme humanitarian emergencies. The United States has been in the critical role of decisive leader with respect to the clarification of geopolitical concerns. Since its experience of encountering violent resistance in Somalia, followed by a domestic firestorm of criticism, there has existed a Mogadishu syndrome suggesting that humanitarian interventions that take the form of ground forces risk serious military confrontations. In reaction, the United States has scaled back drastically its willingness to act, directly or indirectly, to restore peace and normalcy to afflicted societies except by way of applying diplomatic muscle to hasten negotiations among adversaries as in Bosnia, the Middle East, and even Northern Ireland. This reluctance by the United States has also expressed itself in terms of rigid limits on the duration of its commitment even to the implementation of the Dayton Agreement that it brokered, on an unwillingness to make open-ended financial commitments in such settings, and by a particularly notable resistance to desperate requests for even low-level United Nations operations to prevent the renewal of genocidal violence in Rwanda and its further outbreak in Burundi. Thus, in some important sense, the geopolitics of humanitarian intervention has recently worked mainly to discourage action at the regional or global levels premised on responses that are reflective of attitudes of collective responsibility and compassion. It is almost paradoxical that it is this anti-interventionary geopolitical mood that has been subject to as much critical commentary as the interventionism associated with geopolitics in general, and American foreign policy, in particular.

21. It also lends support to preventive efforts as in Macedonia where a symbolic military presence under United Nations auspices has so far successfully sought to avoid any spillover of the warfare that could spread the conflicts in Bosnia and Croatia.

22. See Richard J. Barnet, Intervention and Revolution: The United States Role in the Third World (1968); see also Kolko, supra note 9.
There is also the utopian side of the ledger in these settings, with moralists and legalists naively urging governments to do what is right without any feeling for the political constraints that surround such demands. One result is frustration and bitterness that comes with the inevitable discovery that governments will not, in general, act in a substantive manner against their material interests. This has been the unhappy fate of East Timor and Tibet, forcibly and brutally annexed against the clearly expressed will of their peoples. At the same time, agitation by transnational civil groups on such issues prevents the legitimation of oppressive arrangements that cannot be reconciled with minimal conceptions of self-determination and human rights. The basic compromise in these settings is avoidance of substantive opposition, but engagement in some sort of symbolic action that to varying degrees withholds complete legitimation. Another result of utopian thinking is terrible disappointment with the role of international law: finding it impotent to overcome the torments of peoples, and entire nations trapped in humanitarian emergencies. Both effects tend to divert attention from the constructive, if modest, roles of international law, as well as from the contributions that can be made on other avenues seeking to exert political influence.

In essence, the only way to induce action in support of such humanitarian claims is to generate enough countervailing power to overcome geopolitical inhibitions. Domestic protest in the key countries of the United Kingdom and the United States, succeeded in doing this with respect to instituting a sanctions campaign to weaken apartheid during the early 1980s, thereby providing the political context for an effective transnational campaign that drew upon humanitarian arguments but did not rely upon them to achieve change. In this regard, mobilized domestic and transnational pressures responsive to humanitarian emergencies can alter the geopolitical calculus to a considerable extent, especially as most political leaders are preoccupied with maintaining domestic power. A famous instance, the interpretation of which is itself a matter of continuing controversy, involved the level of United States support for the early period of Israeli statehood — prior to 1967 after which Israel became more of a strategic partner — despite the risk of weakening crucial ties with oil-rich Arab countries in the Middle East. Obviously, the impact on geopolitical calculations is greatest in a democratic country where a well-financed, deeply committed constituency imaginatively mobilizes its resources for a sharply focused campaign. The impact is particularly heightened where the same constituency has enough of a perceived connection to domestic political balances to exert pressure that will confine foreign policy within rigid parameters that make little
geopolitical sense if considered purely by reference to international goals. The Cuban exile community has been remarkably effective in its efforts to maintain United States pressures on Castro's Cuba despite the undermining, since 1989, of geopolitical pretexts for a hostile relationship.

If international law, following the broad outlines of the New Haven approach associated with the work of Myres McDougal, Harold Lasswell, and more recently, Michael Reisman, is to be associated with some kind of conjointness between the authority to act and the capacity to implement, then the application of international law to the theory and practice of humanitarian intervention is highly problematic in the current global setting. Recent experience in Somalia, Rwanda, Liberia, Burundi, Chechnya, and most of all, Bosnia and Croatia, is suggestive of both the growth of authoritative claims to act on behalf of the international community and of the absence of the capabilities to translate those claims with any consistency into outcomes that vindicate the undertaking. There is, thus, a serious gap between claim and performance with a tendency to deform the implementing policy and its agents of enactment.

Important questions ensue. Does this suggest the wisdom of a higher threshold of non-intervention despite the presence of humanitarian wrongs that need to be corrected? Does it also underscore the importance of differentiating actions by states and inter-state actors such as the United Nations and NATO from transnational civic initiatives that are carried out by independent associations of citizens?

At issue, also, is the fundamental Westphalian question of representation. It has been useful and generally reliable to treat the constituted government as the authoritative representative of the people — the "subject" of international law. Furthermore, with reason, the manipulation of counter-elites to obtain invitations and mandates to intervene, which was standard Soviet practice (as in Czechoslovakia in 1968 and Afghanistan in 1979), reinforced the view that only the legitimate, internationally recognized government has the authority to grant consent for the entry of an outside force with an interventionary mission. But this neat Westphalian view has been eroding in a variety of respects as a result of recent practice. For one thing, if the oppressed people of a country can validate interventionary force by welcoming their own

23. See Hedley Bull's important argument that international society lacks sufficient solidarity at this time to support collective ventures for the public good on a global level such as humanitarian intervention or criminal accountability of government officials. Hedley Bull, The Grotian Conception of International Society, in DIPLOMATIC INVESTIGATIONS 51 (Herbert Butterfield & Martin Wight eds., 1966).
liberation, then the voice of formal governmental authority can be cast aside rather abruptly; such is the implication of an alleged emerging right of democracy or the state-shattering practice of self-determination accompanying the break-up of the Soviet Union and former Yugoslavia.24 Also, if there has been a collapse of government, there is no authority to grant or withhold consent, and forcible entry can be claimed, as it has been, by reference to the objective conditions of complex humanitarian emergency. But what if those empowered to represent are also the perpetrators of crimes against humanity? These leaders are simultaneously treated as negotiating partners and potential war criminals. This is the puzzle created by the 1995 Dayton Peace Agreement. It suggests that diplomacy should be less confined to its traditional governmental parameters. Instead of treating only figures such as Karadzic and Milošević as negotiating partners, there should have been discussions with “representatives” of these peoples who did not endorse or participate in crimes of state or seek to establish states along ethnically pure lines. The feasibility of such an alternative course of action is uncertain at best. Government leaders, even if associated with criminal practices, may alone possess representational capacity by having sufficient control over the sentiments and capabilities of the peoples, and it would be meaningless to deny their representational authority. Such an acknowledgment of realities has led to the acceptance of both the PLO and the IRA as necessary participants in their respective peace processes, but without the Bosnian overlay of potential indictment for previous anti-humanitarian activity.

Once that overlay exists, as is the case in relation to Bosnia, it poses a fearful dilemma: the intention to prosecute those responsible for war crimes seemingly can neither be dispensed with, nor implemented. And this indeterminacy imperils the move from war to peace, and makes the process appear vindictive to some, hypocritical to others. It is notable that even with the resumption of IRA terrorism in February 1996, there are no suggestions from responsible negotiating actors that perpetrators be treated as “war criminals” because in this instance the British government has sought to protect the population by a substantive commitment rather than abandon protection and offer those exposed to violence the symbolic solace of a future war crimes tribunal.25

24. This recent self-determination practice means that in situations other than decolonization peoples previously entrapped within a state have been acknowledged by the international community as entitled to engage in struggle to establish by an act of secession their own independent state. These developments are difficult to assess as they have also been the occasion for establishing “ethnic states” that are violently and cruelly “cleansed.”

25. Such an observation is not to be confused with an overall endorsement of the British role; indeed, Prime Minister Major’s tilt toward Unionist sentiments in Ulster for domestic
This issue of reconciling Westphalian notions of representation and legitimacy with post-Westphalian ideas of personal criminal accountability of agents of state power is at the very center of the difficulties surrounding the contemporary compromise between geopolitics and morality in the setting of "humanitarian intervention." The move to institute war crimes proceedings in this instance of Bosnia (and more casually, Rwanda) reflected the relative unwillingness of the great powers to use their capabilities directly, by way of the United Nations or NATO, to prevent ethnic cleansing in former Yugoslavia or genocide in Rwanda and Bosnia between 1991 and 1994. Being unwilling to act substantively when it counted most, the political pressures to act in some manner acknowledging the humanitarian challenge produced a variety of symbolic gestures, including the establishment of a war crimes tribunal at The Hague, an arms embargo, sanctions against Serbia, safe havens in Bosnia. These gestures had a range of effects, but overall, an ambiguous, if not a perverse, impact on the underlying wrongdoing. They shared the common feature of responding for the sake of humanitarian goals but not being committed to devoting major resources to increase prospects that the response would be effective.

The standoff between the authority to intervene and the lack of capabilities to do so effectively raises serious questions about support for the purported legality (and even morality) of given instances of humanitarian intervention. Indirectly, as well, it suggests that at this stage of international society, the doctrine of non-intervention provides a generally more constructive foundation for exerting the influence of international law than does an emphasis of the sort contained in Secretary-General Boutros Ghali's oft-quoted passage in An Agenda for Peace to the effect that sovereignty in the sense of territorial supremacy is eroding as a principle of world order. This softening of deference to the sovereignty of the territorial state is not a mere jurisprudential quibble. The policy concerns here are at least four-fold, and are not altogether internally consistent:

- upholding the sovereign rights of weak states, by stripping further the pretensions of legality away from interventionary diplomacy of an essentially geopolitical character, as was the case with the Panama intervention of 1989, that is, protecting
states against dubious interventionary claims even if backed by some humanitarian considerations;

• avoiding punishing the victims and weakening tendencies toward reconciliation, by acknowledging the inability and unwillingness of leading states and international institutions (as now constituted) of an inter-governmental character to intervene effectively for predominantly humanitarian purposes in most circumstances of acute distress;

• challenging the artificial line of sovereign deference that is now drawn to give Russian intervention in Chechnya or Iraqi intervention against the Kurdish regions of northern Iraq, a different, more internal legal and geopolitical status than Russian intervention in Georgia, or formerly, in the countries of Eastern Europe; and

• accepting the view that despite the unevenness of international practice, it remains beneficial to maintain maximum and flexible support for the alleviation of suffering and the establishment of peace, and thus abiding a highly selective, and inconsistent, doctrine of humanitarian intervention.

This line of analysis suggests a reconvergence of authority and effectiveness in relation to humanitarian claims as evaluated in context, thereby reinforcing not only sovereign rights and norms of non-intervention, but also endorsing a limited option of humanitarian intervention. Such an approach opens the way for humanitarian assistance in many, but not all, circumstances, and recognizes that the actors in the current phase of the Westphalian structure must often make tragic choices between diplomacies of interventionism and reconciliation. In the absence of strong strategic interests on the part of major states, or the existence of a mobilized domestic constituency that is pushing humanitarian concerns onto the foreign policy agenda in a manner that overcomes a purely geopolitical assessment of interests, only a diplomacy of reconciliation remains viable.

27. Humanitarian interventions might become more feasible in a wider class of instances if the United Nations or a regional actor were given the financial and peacekeeping resources to act with far greater independence of geopolitical priorities. Reconceiving geopolitics to incorporate acute humanitarian emergencies for the sake of overall global stability and investor confidence could be viewed as another modus operandi. The essence of this point is grasped by comparing the mobilization of resources to address the Iraqi challenge in the Gulf crisis with that occurring in response to the Serb challenge in Bosnia.
28. As argued, such pressures can work for or against intervention, and in normative terms, are a "wild card" played in specific circumstances.
In advocating such a position, it is obvious that major, and likely unfortunate, uncertainties exist in relation to the adoption of a more permissive approach to interventionary options. No one can answer the "what if" questions about various recommended interventionary initiatives alleged to support humanitarian goals. Would an early NATO action of bombing the gun emplacements around Sarajevo have lifted the siege sooner and led to a quicker, less devastating "peace"? Or would such action have led to a bloody Serbian retaliation against vulnerable United Nations forces prompting their removal or to a spread of the violence to new arenas in the Balkans? Did the creation of the safe havens negligently contribute to ethnic cleansing and the containment of refugees or was it a genuine good faith effort to provide sanctuary and protection for a portion of the entrapped Muslim population of Bosnia? Clearly the inability to defend adequately several of the six safe havens contributed to the impression of United Nations impotence and responsibility, and probably suggested that had the level of Serb aggressiveness been anticipated, support for the safe haven concept would not have been forthcoming. These fundamental issues are what postmodernists (in the deconstructionist mode) are fond of calling "undecidables." The vigorous debates generated by them reveal little about the probabilities and much about the sensibilities of participants in the debate.

IV. MAKING HUMANITARIAN INTERVENTION HUMANITARIAN

My argument has been that with the end of the Cold War there has been a notable shift in interventionary diplomacy away from purely geopolitical interventionism in the direction of support for humanitarian claims to alleviate human suffering. This shift has been expressed especially strongly in United States foreign policy, both as directly

29. The retrospective claims made in light of NATO bombs bringing the Serbs to Dayton need to be tempered by the realization that their impact occurred after Milosevic had abandoned maximalist Serb goals in the war and after the military buildup of Croatia and Bosnia changed the realities on the ground. Without a far more detailed analysis of causal responses at various stages of the conflict it is exceedingly difficult to draw any firm conclusions about what would have happened had bombing occurred sooner. What is clear is that the United States and other actors undertaking such earlier bombing would have had to be bureaucratically prepared in advance to cope effectively with the political fallout arising from possible failure of bombing to achieve its intended results and with possible Serb retaliatory actions.

30. To some extent the deontologically minded are drawn to positions that seem intrinsically right, acting to oppose ethnic cleansing; while the consequentially minded are drawn to positions that seem contextually sound, given likely effects of proposed actions. Some combination of perspectives is probably most likely to produce results that are both responsible and responsive; the appropriate combination is impossible to codify in any useful way.
enacted, and as channelled through the United Nations, and to some extent, NATO.

From a purely normative perspective of law and morality, this shift in interventionary practice is a welcome development. But it has foun-
dered in key instances because it was based on a shallow commitment of resources and will, underestimating the burdens associated with carrying humanitarian diplomacy successfully to term. Earlier geopolitical interventions had also frequently failed because they engen-
dered a combination of indigenous, nationalist resistance and counter-
intervention organized by opposed geopolitical actors. Thus, interventionary success cannot be equated talismantically with money, weapons, or even ground forces.

Interventionary experience suggests a number of conclusions with respect to humanitarian emergencies. First, the best opportunity, given available levels of capability, to avoid acute suffering is normally for states to become seriously engaged in a preventive role. Such a role can include providing a symbolic presence, substantial economic relief, and making constructive diplomatic intermediary services available to the troubled states. Second, external encouragement of nationalist tendencies toward self-determination needs to be balanced effectively by adequate protection of human rights. Third, once battlefield results have pro-
duced a stalemate or antagonists have reached a point of disillusionment with armed struggle, outside diplomatic moves and military forces can play a valuable catalytic role in encouraging and implementing a peace process. Fourth, during the phases of most intense humanitarian emer-
gency, in the absence of a suitable interventionary response by states and international institutions, a maximal effort should be made to support transnational and grassroots initiatives — especially those with a non-violent, reconciling orientation — without compromising their inde-
pendence. Fifth, a critical geopolitics is needed to convince those who dominate decisions over the allocation of resources, that investments in conflict-prevention, human rights (including economic, social, and cultural, as well as civil and political), and conflict-resolution are condu-
cive to global stability and prosperity; whether such a critical geopolitics is presented as "a new realism" or as an abandonment of realism is not

31. The German recognition of Croatia and Slovenia in 1991 was in this sense anti-
humanitarian even if it did support strong majoritarian claims of self-determination. Ethnically or religiously mobilized majorities pose severe human rights challenges to dissident minori-
ties, especially as in Croatia and Bosnia, where varying interpretations of recent historical experience engendered plausible fears and established political space for opportunistic politicians to play their own minority nationalist card as Milošević did to such devastating effect in both Croatia and Bosnia.
of great importance vis-à-vis altering the makeup of decisions and understanding what counts for individual and collective well-being at this stage of international political life.

It is the contention of this paper that these five directions of policy have been insufficiently emphasized in the years since 1989. The consequence has been an unhealthy move from an initial unfounded enthusiasm for "humanitarian intervention" to a more recent unwarranted disillusionment. As a result, even allowing for some specific successes and mixed outcomes, the net impact of humanitarian diplomacy has been perceived to be, and in several instances has been, anti-humanitarian. The challenge now is to rededicate our energies to increase the prospect of humanitarian interventions serving humanitarian goals. Until this can be done, the failure of humanitarian intervention since 1989 will be generally interpreted as far outweighing the successes, and seem likely to continue for the foreseeable future to produce a renewal of support for the ethos of non-interventionism.