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Elisabeth J. Brennen  
*University of Michigan Law School*

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# REJECTING CUSTOMARY REGRESSION: UNILATERAL HUMANITARIAN INTERVENTION & THE EVOLUTION OF CUSTOMARY INTERNATIONAL LAW

*Elisabeth J. Brennen\**

## I. INTRODUCTION

Humanitarian intervention is perhaps one of the most important topics in international affairs. It raises questions of morality and militarism, becoming a platform for sharp debate in international law. This note discusses both the moral and legal questions presented by unilateral humanitarian intervention (“UHI”). It argues that UHI is antithetical to the progression of customary international law due to customary international law’s evolutive nature and the ongoing importance of decolonization. UHI is not only normatively undesirable, but the particular normative criticisms of the doctrine – that it is regressively imperialist and neo-colonial – render it fundamentally incompatible with customary international law.

“Humanitarian intervention” generally refers to the use of force across state borders in pursuit of protecting civilian lives, without the consent of the targeted state.<sup>1</sup> It is important to distinguish between “collective” and “unilateral” interventions. “Collective” refers not to the number of states participating in each intervention, but rather to the presence of a mandate or authorization from the United Nations (“U.N.”) Security Council.<sup>2</sup> Conversely, “unilateral” humanitarian intervention refers not to a state acting alone, but rather to a state or group of states acting without Security Council authorization.<sup>3</sup>

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1. It can also refer to the threat of the use of force or the use of economic, diplomatic, and other sanctions, as well as rescuing the intervening state’s own citizens. These kinds of interventions are outside of the scope of this note, which focuses exclusively on cross-border uses of force as a means of addressing humanitarian crises, such as mass atrocities. HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS 18 (J. L. Holzgrefe & Robert O. Keohane eds., 2003); Šárka Moravcová, *The Controversy over Humanitarian Intervention and Responsibility to Protect*, 22 PERSPS. 65, 65 (2014).

2. Anders Henriksen & Marc Schack, *The Crisis in Syria and Humanitarian Intervention*, 1 J. ON USE FORCE & INT’L L. 122, 123 (2014).

3. See *id.* at 123; Daphne Richmond, *Normativity in International Case of Unilateral Humanitarian Intervention*, 6 YALE HUM. RTS. & DEV. L.J. 45, 47 (2003).

There is no real debate on the legality of collective humanitarian interventions; with Security Council authorization, such an intervention falls squarely within the U.N. Charter's exceptions to the general prohibition on the use of force.<sup>4</sup> However, scholars, practitioners, and governments remain split on the legality of unilateral humanitarian interventions. Some frame UHI as a legally permitted action, while others critique it as a Charter violation not yet grounded in customary international law.<sup>5</sup> There is also heated debate about UHI's practical and normative desirability, ranging from those who frame UHI as a positive moral obligation to those who critique it as counterproductive and colonial in nature.

Part II of this note frames UHI as a continuation of colonial impulses, mirroring the civilizing missions and colonial impositions of the past. This Part engages with Third World Approaches to International Law ("TWAAIL") to draw parallels between past colonial practice and contemporary unilateral humanitarian interventions.

Part III discusses the current legal status of unilateral humanitarian intervention. It concludes that the right to unilateral humanitarian intervention has not yet been established in international law. However, each new UHI reinvigorates the legal debate, particularly with respect to its status under customary international law. As the practice of UHI develops, it is important to continually position it within the legal framework of customary international law. It is also important to consider whether the practice is compatible with customary international law.

Finally, Part IV takes up the question of UHI's status under customary international law and considers its compatibility with one of the central purposes of customary international law itself: moving the law forward. This Part argues that such an evolutive purpose is incompatible with practices that advance neo-colonialism. As customary international law is evolutive in nature, this note argues that it should not allow for neo-colonial regression but must instead continue the decolonial project. The note ultimately concludes that state practice of UHI should not be understood as

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4. See U.N. Charter art. 2(4), 51.

5. See, e.g., Kevin Jon Heller, *Why Unilateral Humanitarian Intervention is Illegal and Potentially Criminal*, OPINIO JURIS (Apr. 17, 2020), <http://opiniojuris.org/2017/04/20/against-unilateral-humanitarian-intervention-and-why-it-can-be-criminal/>; Jennifer Trahan, *In Defense of Humanitarian Intervention*, OPINIO JURIS (Apr. 19, 2017), <https://opiniojuris.org/2017/04/19/in-defense-of-humanitarian-intervention/>; Harold Honju Koh, *Not Illegal: But Now The Hard Part Begins*, JUST SECURITY (Apr. 7, 2017), <https://www.justsecurity.org/39695/illegal-hard-part-begins/>; Jens David Ohlin, *Two Visions of the UN Charter*, OPINIO JURIS (Apr. 13, 2017), <https://opiniojuris.org/2017/04/13/two-visions-of-the-un-charter/> (all responding to the 2017 U.S. airstrikes against Syria and to each other's posts); see also Steve G. Simon, *The Contemporary Legality of Unilateral Humanitarian Intervention*, 24 CAL. WESTERN INT'L L.J. 117 (1993); Petr Valek, *Is Unilateral Humanitarian Intervention Compatible with the U.N. Charter?*, 26 MICH. J. INT'L L. 1223 (2005).

contributing to state practice in a way that develops customary international law but should instead be rejected as incompatible with it.

## II. UNILATERAL HUMANITARIAN INTERVENTION AS CUSTOMARY REGRESSION

Unilateral humanitarian intervention is often framed as a new and developing space in the law.<sup>6</sup> On the one hand, proponents of UHI embrace this development as a method of providing “immediate and urgent relief” in humanitarian crises.<sup>7</sup> They often view unilateral action as necessary when the Security Council does not consider or does not approve collective intervention in humanitarian crises.<sup>8</sup> On the other hand, critics of UHI are skeptical of its legal development, viewing it as a continuation of colonial interventionist policy and as doing more harm than good.<sup>9</sup>

Some of the strongest critiques of UHI come from Third World Approaches to International Law (“TWAIL”) scholarship. These theorists frame unilateral humanitarian intervention as part of imperialism’s “state of becoming,” a process of regenerating and rebranding itself to maintain global power imbalances.<sup>10</sup> Thus, to TWAIL scholars, unilateral humanitarian intervention is not a new practice. Rather, it builds on colonial interventionist history, couching old practices in the new rhetoric of humanitarianism.<sup>11</sup>

TWAIL theorists and post-colonial states are right to be skeptical of unilateral humanitarian intervention and its proponents. In many ways, the rhetoric and practice of unilateral humanitarian intervention mirrors the “civilizing missions” of the past in worrying ways.<sup>12</sup>

In the nineteenth century, one of the key ideological touchpoints of civilizing missions was the “simplification of diverse peoples and historical experiences into conceptual boxes.”<sup>13</sup> This same over-simplification is reflected in interventionist discourse today when interventionist policymakers and commentators similarly place humanitarian crises into

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6. See, e.g., Koh, *supra* note 5.

7. Trahan, *supra* note 5.

8. *Id.*

9. See, e.g., FIDELE INGIYIMBERE, DOMESTICATING HUMAN RIGHTS: A REAPPRAISAL OF THEIR CULTURAL-POLITICAL CRITIQUES AND THEIR IMPERIALISTIC USE 57–114 (Rasmussen & Ferrara eds., 2017) (tracing humanitarian intervention theory and practice from the imperial era to the modern day).

10. See ANN LAURA STOLER & CAROLE MCGRAHANAN, IMPERIAL FORMATIONS 8 (Ann Laura Stoler & Peter C. Perdue eds., 2007).

11. See, e.g., INGIYIMBERE, *supra* note 9, at 57–114

12. *Id.* at 50–53 (discussing the evolution of human rights theory from one of the historical justifications for imperialism to modern civilizing rhetoric).

13. Harry Liebersohn, *Introduction: The Civilizing Mission*, 27 J. WORLD HISTORY 383, 383 (2016).

“conceptual boxes.” Individual context is not always considered when determining the legal status of unilateral humanitarian intervention. Rather, the actions and reactions of states considering intervention are overemphasized in the debate, while the vehement opposition from a diverse coalition of states tends to be disregarded.<sup>14</sup>

The interventionist often cares less about the factual differences at the heart of a conflict than they do about the universal principles being violated across conflicts.<sup>15</sup> But factual differences matter in the law. When considering a step as drastic as unilateral intervention, the varied circumstances in which conflicts and crises arise are relevant. For instance, Kosovo, Rwanda, Libya, and Syria are some of the paradigmatic examples of unilateral humanitarian intervention’s success or failure.<sup>16</sup> They are discussed as precedent and anti-precedent for each other and for other interventions, yet their conflicts have very little in common other than Western handwringing over the prospect of intervention.<sup>17</sup> Rather than

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14. See, e.g., Trahan, *supra* note 5 (centering the Kosovo intervention in discussing the legality of the Syrian intervention; dismissing opposition to the practice due to the continued invocation of unilateral humanitarian intervention).

15. See, e.g., NICHOLAS J. WHEELER, UNILATERAL HUMANITARIAN INTERVENTION AND INTERNATIONAL LAW 210 (summarizing the UK’s legal arguments regarding NATO’s 1998 unilateral humanitarian intervention in the FRY, invoking the precedent of the 1992 intervention in northern Iraq. The arguments centered on the “humanitarian necessity,” arguing that “force may be used in extreme circumstances to avert a humanitarian catastrophe.” The intervention in Iraq was understood as a form of precedent because of humanitarian need and former intervention; no arguments as to the similarities or differences between the Iraqi and FRY conflicts was presented publicly); Moravcová, *supra* note 1, at 65 (“The on-going civil war in Syria, the escalating armed conflicts in Iraq and the Gaza Strip, the extensive use of force by the security forces in Sudan, and the systematic attacks on civilians in the Central African Republic, the Democratic Republic of Congo and other places reflect the continuous presence of large-scale violence in contemporary world affairs. Although the particular circumstances of these crisis situations are very different, they raise the very same fundamental question . . . whether to intervene forcefully in cases of a serious intra-state crisis, and if so, under what conditions.”).

16. See, e.g., Alan J. Kuperman, *A Model Humanitarian Intervention?*, INT’L SEC., Summer 2013, at 105, 105 (discussing the success of the intervention in Libya in light of the history of intervention in Kosovo, Rwanda and then-potential intervention in Syria, among other past interventions); Walden Bello, *The Crisis of Humanitarian Intervention*, RELIEF WEB (AUG. 9. 2011) [https://reliefweb.int/sites/reliefweb.int/files/resources/Full\\_Report\\_2215.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/Full_Report_2215.pdf) (discussing the interventions in Syria and Libya in a historical context, referencing the Kosovo and Rwanda situations as catalysts in the UHI debate); Rosa Brooks, *Lessons for International Law from the Arab Spring*, 28 AM. U. INT’L L. REV. 713–32 (2013) (discussing the legality of UHI and Responsibility to Protect in light of the Kosovo, Rwanda, Syria, and Libya cases).

17. See, e.g., *Syrian Civil War*, ENCYC. BRITANNICA, <https://www.britannica.com/event/Syrian-Civil-War> (last visited Oct. 5, 2021) (identifying the catalysts of the Syrian Civil War as including anti-authoritarianism, anti-corruption sentiment, economic frustrations over capitalist-cronyism, and environmental crisis); Jeremy Maron, *What Led to the Genocide against the Tutsi in Rwanda?*, CAN. MUSEUM HUM. RTS., <https://humanrights.ca/story/what-led-to-the-genocide-against-the-tutsi-in-rwanda> (last visited Oct. 5, 2021) (identifying the

investigating the unique contexts of each humanitarian crisis, interventionists conceptually anchor the conflicts to intervention alone.<sup>18</sup>

As a result of the interventionists' tendency to gloss over the specifics of each conflict, existing scholarship does not recognize that the factual nuances of a humanitarian crisis could be relevant to a UHI's legality. There is a missed opportunity for robust debate about whether the individual facts of crises might be relevant to potential unilateral humanitarian intervention. That Rwanda's ethnic genocide might be distinguishable from Libya's political civil war in the context of justifying UHI has not been adequately discussed.<sup>19</sup> Instead, the diverse conflicts, states, and populations targeted for unilateral humanitarian intervention are pushed into the same conceptual boxes. They are framed as passive recipients of intervention, and their varied political and social realities are ignored. The debate centers outside intervenors' understanding of what is morally and legally relevant, without due regard for local nuance.<sup>20</sup>

Unilateral humanitarian intervention further mirrors the colonial civilizing mission's narrative by simplifying complex conflicts into familiar narratives and "establish[ing] Western powers as legitimate monitors of how [conflicts] should unfold..."<sup>21</sup> Contrasted with the above simplification process, which groups distinct conflicts together into an "intervention" category, this process oversimplifies each individual conflict into a digestible narrative of democracy, human rights, and/or related universal norms.<sup>22</sup> Thus, the process frames Western intervenors, as the principal architects of these international legal norms, as inherently understanding of the broad goals and potential outcomes of humanitarian crises.<sup>23</sup> This exacerbates the problematic nature of the former simplification: as the West *already knows* what target states want in conflict, there is no need to concern themselves with the factual situation. Rather than learning the unique contours of each international conflict, the modern civilizing narrative invokes the universality of humanitarian ideals to claim that intervenors know the desires and motivations of people on the

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catalysts of the Rwandan civil war & genocide as post-colonial inter-ethnic tension and political turmoil).

18. See, e.g., Samantha Power, *Stopping Genocide and Securing "Justice": Learning by Doing*, 69 SOC. RSCH. 1093 (2002).

19. See WHEELER, *supra* note 15; Moravcová, *supra* note 1.

20. See Mojtaba Mahdavi, *A Postcolonial Critique of Responsibility to Protect in the Middle East*, 20 PERCEPTIONS 7, 23 (2014).

21. Stefan Borg, *The Arab Uprisings, the Liberal Civilizing Narrative and the Problem of Orientalism*, 25 MIDDLE E. CRITIQUE 211, 212 (2014).

22. *Id.* at 212 ("Human rights in this narrative play a crucial role since their universality guarantees that the West *knows* what the Arab world wants.").

23. *Id.*

ground.<sup>24</sup> This narrative positions the West as the arbiter of and authority on those “universal” values<sup>25</sup> – claiming to have experience implementing the relevant norms in ways that target states do not. The intervening states are thus understood as being in a “privileged position to assist and monitor” the attainment of these ideals.<sup>26</sup>

The intervenors’ vision of themselves as the authority on universalist goals and of their “ethical obligation” to “guide” conflicts also relates to the idea of colonial responsibility.<sup>27</sup> In the colonial era, “Western states assumed the moral responsibility for others to progress.”<sup>28</sup> Here, the new civilizing narrative of UHI matches the colonial line of thought: developed, typically Western states, have both the moral authority and moral obligation to help target states progress.<sup>29</sup> The emphasis on universality thus overrides the competing political demands in crisis.<sup>30</sup> Again, interventionist framing ignores local nuance, even though this context is crucial to understanding any crisis’ potential outcomes.

Postcolonial critiques of UHI challenge the vision of universality, objectivity, and neutrality that UHI purports to actualize. These critiques suggest that “liberal and neoliberal institutionalist discourses often appear as rationalization of hegemony disguised as universal humanism.”<sup>31</sup> Former UN Assistant Secretary-General Ramesh Thakur, himself one of the principal architects of the Responsibility to Protect doctrine,<sup>32</sup> writes:

“They” (the European colonizers) came to liberate “us” (the colonized natives) from our local tyrants and stayed to rule as benevolent despots . . . Should they be surprised that their fine talk

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24. *Id.* (discussing the liberal civilizing narrative of universal rights in the context of the Arab Spring, based on analysis of the collected speeches of President Barack Obama, Secretary of State Hillary Clinton, and two major EU statements on the Arab uprisings).

25. The actual universality of these values, their desirability, and the extent to which they are accepted versus imposed on non-Western states are topics taken up elsewhere in Third World Approaches to International Law (“TWAAIL”) scholarship. *See, e.g.* Borg, *supra* note 21, at 212–13.

26. *Id.* at 219.

27. *Id.* at 221.

28. *Id.*

29. *See* B.S. Chimni, *Capitalism, Imperialism, and International Law in the Twenty-First Century*, 14 OR. REV. INT’L L. 17, 31–32 (2012) (citing INGIYIMBERE, *supra* note 9, at 50–53.).

30. Borg, *supra* note 21, at 221.

31. Mahdavi, *supra* note 20, at 8–9

32. *See Ramesh Thakur*, AUSTL. NAT’L U. <https://crawford.anu.edu.au/people/visitors/ramesh-thakur>, (last visited Oct. 3, 2021).

of humanitarian intervention translates in our consciousness into efforts to resurrect and perpetuate rule by foreigners?<sup>33</sup>

Discourse surrounding UHI in the Middle East and North Africa in particular echoes Orientalist and colonialist views largely rejected by the international community.<sup>34</sup> Many formerly colonized countries maintain their hostility toward the doctrine for exactly this reason: it is tied to the “historical baggage of rapacious exploitation and cynical hypocrisy” of colonial powers.<sup>35</sup>

Orientalist tropes seep into interventionist discourse when painting Middle Eastern states as particularly and even cartoonishly despotic.<sup>36</sup> Former State Department legal adviser Harold Koh engaged in this framing, dramatically declaring that it was Assad’s intent to kill a million Syrian children overnight as an example of why unilateral humanitarian intervention might be justified.<sup>37</sup> The justification for the Libyan intervention was grounded at once in the need to protect the United States’ regional Arab “allies and partners” from catastrophe in the form of refugee flows, while noting that those same countries were on the brink of “the darkest form of dictatorship, as repressive leaders concluded that violence is the best strategy to cling to power.”<sup>38</sup>

Neo-orientalist thought concludes that Middle Eastern states are somehow particularly prone to despotism and in need of humanitarian intervention.<sup>39</sup> These conclusions are tinged with the paternalistic idea that conflict in these countries cannot be solved absent intervention.<sup>40</sup> They also reflect a sense of entitlement to foreign intervention in the region. This right is not grounded in law.<sup>41</sup>

Unilateral humanitarian intervention is also classically colonialist in its violation of sovereignty and self-determination. The UN Charter’s article 51 permits only three exceptions to the otherwise-blanket prohibition on interstate uses of force: self-defense, invitation by a host government, and

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33. Madhavi, *supra* note 20, at 11 (quoting RAMESH THAKUR, *THE UNITED NATIONS, PEACE AND SECURITY: FROM COLLECTIVE SECURITY TO THE RESPONSIBILITY TO PROTECT* 267 (2006)).

34. Madhavi, *supra* note 20, at 9, 25, 27.

35. RAMESH THAKUR, *REVIEWING THE RESPONSIBILITY TO PROTECT: ORIGINS, IMPLEMENTATION AND CONTROVERSIES* 19 (Alex J. Bellamy et al. eds., 2019).

36. Mahdavi, *supra* note 20, at 9.

37. Harold Hongju Koh, *The War Powers and Humanitarian Intervention*, 53 *HOUS. L. REV.* 971, 1005 (2016).

38. President Barack Obama, Remarks by the President in Address to the Nation on Libya (Mar. 28, 2011).

39. Mahdavi, *supra* note 20, at 9; Mohammad Samiei, *Neo-Orientalism? The Relationship Between the West and Islam in Our Globalised World*, 31 *THIRD WORLD Q.* 1145, 1148 (2010).

40. Mahdavi, *supra* note 20, at 25.

41. U.N. Charter arts. 2(4), 51.

Security Council authorization.<sup>42</sup> Inter-state uses of force that do not fall into one of article 51's exceptions are unjustified violations of state sovereignty. Colonial powers essentially did not recognize the sovereignty of colonized nations, interventionists frame states as losing their right to sovereignty.<sup>43</sup> Further, unilateral humanitarian intervention also "wrest[s] self-determination from the national community," not just the state.<sup>44</sup> It fundamentally undermines even the groups that it aims to benefit, doubting the agency of local and regional actors to make their own history.<sup>45</sup>

Finally, the intervenors' reactions to their failure also reflect colonial thought processes. Interventionists point in particular to the Rwandan genocide as evidence of the horrors that can occur absent unilateral humanitarian intervention.<sup>46</sup> Yet recent unilateral humanitarian interventions have hurt their intended beneficiaries and neighbors more than they have helped. Libya and Syria have been in states of protracted civil war for over ten years, exacerbated and prolonged by external intervention.<sup>47</sup> Entire generations have grown up in conflict. In Libya particularly, "there is no functioning state to speak of," and the Maghreb has become more dangerous.<sup>48</sup>

In observing these failed interventions, interventionists never doubt that "outsiders [can] remake societies wholesale."<sup>49</sup> They have a "tendency to rationalize, rather than reassess basic assumptions"<sup>50</sup> – not just the assumptions about their theory of intervention as a noble goal, but also their assumptions about the ease with which outsiders can assess complex, protracted national conflicts. States that are subject to intervention are but case studies in the interventionist project. Interventionists "move on to the

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42. UN Charter art. 51.

43. See Carrie Booth Walling, *Human Rights Norms, State Sovereignty, and Humanitarian Intervention*, 37 HUM. RTS. Q. 383, 387 (2015); Jens David Ohlin, *Two Visions of the UN Charter*, OPINIO JURIS (Apr. 13, 2017), <https://opiniojuris.org/2017/04/13/two-visions-of-the-un-charter/> ("Protecting the sovereignty of each state has instrumental value because it allows states to flourish. But if sovereignty is simply preserving injustice, we need to consider that there are other values at stake, other values that are prompted by international law.").

44. RAJAN MENON, *THE CONCEIT OF HUMANITARIAN INTERVENTION* 49 (2016).

45. See Migda Shihade, *On the Difficulty in Predicting and Understanding the Arab Spring: Orientalism, Euro-centrism, and Modernity*, 17(2) INT'L J. PEACE STUD. 57, 59 (2012).

46. See, e.g., Samantha Power, *Bystanders to Genocide*, ATLANTIC MONTHLY, SEPT. 2001.

47. Alan J. Kuperman, *Obama's Libya Debacle*, FOREIGN AFFS. (March/April 2015), <https://www.foreignaffairs.com/articles/libya/2019-02-18/obamas-libya-debacle> ("All told, the intervention extended Libya's civil war from less than six weeks to more than eight months.").

48. MENON, *supra* note 44, at 14.

49. *Id.* at 31.

50. *Id.*

next experiment,”<sup>51</sup> assured that prior failure was due to the problems of policymaking or implementation.

It is worth pointing out that the debate about unilateral humanitarian intervention’s legality also reflects imperial power imbalances. Only one country’s legal position is that unilateral humanitarian intervention is an acceptable justification for using force outside of the Charter: the United Kingdom. The United States, Denmark, and other NATO allies advance related positions or occasionally engage in unilateral humanitarian intervention.<sup>52</sup> In total, approximately thirty states position themselves as pro-UHI.

On the anti-interventionist side, nearly 150 countries consistently and vehemently oppose UHI.<sup>53</sup> That latter group includes most post-colonial states, who have explicitly argued that unilateral humanitarian intervention is a mere reframing of colonialism.<sup>54</sup> Their perspectives on the practice should be prioritized; they are the states most well-positioned to understand what colonial imposition looks and feels like, having experienced it themselves. That UHI is framed in terms of universal human rights, morality, and law is no shield to these criticisms. Colonialism was often similarly framed in terms of benevolence.<sup>55</sup>

The debate in law and scholarship surrounding UHI prioritizes the voices of a small group of powerful states, presenting them as equal to a much larger coalition that distinctly rejects the practice. Implicit is the devaluation of the legal positions of developing and post-colonial countries. The debate itself thus reflects imperial preferences.

One response to the above arguments might be that unilateral humanitarian intervention is not a colonial continuation because it is not based on overtly racist superiority constructs or resource theft. While the literature is replete with examples to the contrary,<sup>56</sup> for purposes of this note, I take interventionists at their word that their primary concern is human rights in target countries. Nonetheless, the fact that their concern is tinged with the familiar colonial rhetoric of saving and civilizing remains problematic.<sup>57</sup>

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51. *Id.*

52. Henriksen & Schack, *supra* note 2, at 126.

53. Heller, *supra* note 5.

54. *Id.*; *Declaration Adopted on the Occasion of the Twenty-third Annual Ministerial Meeting of the Group of 77*, G-77 (Nov. 24, 1999), <https://www.g77.org/doc/Decl1999.html>

55. INGIYIMBERE, *supra* note 9, at 22 (discussing the emergence of a moral justification for imperialism that framed the practice as benevolent).

56. See, e.g., Sedef Arat-Koç, *Dance of Orientalisms and Waves of Catastrophes: Culturalism and Pragmatism in Imperial Approaches to Islam and the Middle East*, 35 *THIRD WORLD Q.* 1656 (2014); see also Nguirane Cheikh, *Stories Behind the Western-Led Humanitarian Intervention in Libya: A Critical Analysis*, 7 *AFR. J. POL. SCI. & INT’L REL.* 154 (2013); Mahdavi, *supra* note 20.

57. INGIYIMBERE, *supra* note 9, at 39, 92, 104–114.

If interventionists want to demonstrate their concern for and commitment to human rights by engaging in unilateral humanitarian interventions, they should be able to demonstrate that such a practice actually meets their stated humanitarian goal. They cannot. Their persistence and continued confidence that UHI can help control the outcome of conflict and implement human rights is the ultimate “expression of imperial arrogance” in the face of failure.<sup>58</sup> The ease with which they move on from their failures, while target states and regions must handle the fallout, reflects colonial disregard for the immediate harm and long-term consequences of their actions.

It is not necessarily the case that *all* humanitarian intervention reflects solely colonial impulses or are repugnant to the purposes of customary international law, either. There are real harms to human life, security, and dignity that interventionists seek to prevent via unilateral action.<sup>59</sup> Rather, it is that the decision to intervene cannot be left to individual states acting unilaterally. Within the current legal framework, the decision whether to intervene lawfully with military force appropriately rests with the Security Council and such decisive power should not be expanded via customary international law.<sup>60</sup> This is particularly the case when such expansion would legitimize colonial thought processes regarding unilateral humanitarian intervention and re-incorporate them into the international legal system.

Unilateral humanitarian intervention may appear new, but it is merely a re-articulation of old colonial traditions that the international community has rejected. Interventionists seek to incorporate unilateral humanitarian intervention into the body of customary international law, but a practice that repeats outdated and since-rejected norms is incompatible with that body. Customary international law represents the capacity of the international legal system to evolve and progress by incorporating new norms into the law. Practices that repackage colonial constructs are the antithesis of evolutive and progressive. They are instead distinctly regressive.

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58. Arat-Koç, *supra* note 56, at 1662.

59. See, e.g., Moravcová, *supra* note 1 (introducing her article by reciting the many crises occurring contemporaneously to her piece: “The on-going civil war in Syria, the escalating armed conflicts in Iraq and the Gaza Strip, the extensive use of force by the security forces in Sudan, and the systematic attacks on civilians in the Central African Republic, the Democratic Republic of Congo and other places reflect the continuous presence of large-scale violence in contemporary world affairs.”).

60. There are many arguments put forward by states and scholars that call for the Security Council to be expanded or otherwise reformed to better reflect the post-colonial era. These arguments are not taken up here. I argue that intervention decisions are better left in the hands of a collective rather than with individual states, particularly when those seeking to intervene and circumvent the collective are usually members of the deciding collective themselves (e.g. U.S., U.K.).

### III. THE LEGAL STATUS OF UNILATERAL HUMANITARIAN INTERVENTION

#### A. *Unilateral Humanitarian Intervention in the Text of the Charter*

The primary goal of the United Nations is the maintenance of “international peace and security.”<sup>61</sup> The prevention of global conflict is an essential measure of this goal’s achievement.<sup>62</sup> As such, analysis of unilateral humanitarian intervention should begin with the U.N. Charter.<sup>63</sup>

One of the central means by which the Charter aims to maintain peace and security is the general prohibition of the use of force across borders.<sup>64</sup> Article 51 provides only three exceptions to this prohibition: self-defense, invitation by a host government, and Security Council authorization.<sup>65</sup> There is no textual basis in the Charter for treating humanitarian intervention any differently than other justifications for the use of force.<sup>66</sup> Humanitarian intervention is only explicitly authorized under the Charter if it falls within one of article 51’s exceptions.<sup>67</sup>

This conclusion causes many to bristle. That the Charter system’s rigid prohibition on the use of force might allow a state to engage in genocide because of a Security Council veto, for instance, is morally and politically unacceptable for advocates of humanitarian intervention.<sup>68</sup>

Observing this rigidity, some have argued against such a literal, four-corners approach to interpreting the Charter. More expansive interpretations emphasize that maintenance of international peace and security is central to the Charter system and argue that this goal should be prioritized when articles 2(4) and 51’s constraints on the use of force would result in humanitarian crises going unchecked.<sup>69</sup> In *Legality of Use of Force*, for instance, Belgium defended their intervention in Yugoslavia by arguing that article 2(4)’s prohibition on the use of force covers only “intervention against the territorial integrity or political independence of a State,” and armed humanitarian intervention that questions neither the political independence nor territorial integrity of the target state is not a violation of

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61. U.N. Charter art. 1(1).

62. *Id.*

63. *Use of Force*, INT’L COMM. RED CROSS, <https://casebook.icrc.org/glossary/use-force> (last visited Oct. 18, 2021) (“General public international law and the law of the United Nations Charter govern the legality of the resort to the use of force between States.”).

64. U.N. Charter art. 2(4).

65. U.N. Charter arts. 2(4), 51.

66. See Henriksen & Schack, *supra* note 2, at 146.

67. U.N. Charter arts. 2(4), 51.

68. Stephen J. Stedman, *The New Interventionists*, FOREIGN AFFS., 1992/1993, at 1, 2.

69. See, e.g., HEDLEY BULL, INTERVENTION IN WORLD POLITICS 193 (1984) (suggesting that if Unilateral Humanitarian Intervention (“UHI”) expresses the “collective will” of states, it may not necessarily pose a threat to international order).

the Charter.<sup>70</sup> Ultimately, Belgium stood alone – the twenty-six other NATO states involved in the intervention Belgium was defending did not invoke UHI as the basis for their action.<sup>71</sup>

A prominent commentator who pushes against the textual interpretation is Harold Koh, former State Department legal adviser. Koh opposes the “conventional” textual perspective on international law.<sup>72</sup> Instead, Koh agrees with British Legal Adviser Sir Daniel Bethlehem that an analysis of humanitarian intervention relying on the prohibitions of article 2(4), as well as the related concepts of non-intervention and sovereignty, is “overly simplistic.”<sup>73</sup> But these arguments describe the world of law outside the purely textual realm, drawing on theories of customary international law and law-making, addressed *infra*.

Critics of the textual position are not entirely wrong; there *is* a tension between maintaining international peace and security and allowing intra-state crises to go unaddressed in the face of Security Council inaction. In terms of treaty language, however, the Charter itself recognizes this tension. The general prohibition on the use of force contained in article 2(4) and the exceptions in article 51 implicitly recognize that there will be intra-state crises that are not addressed via inter-state military action. Article 24 states that U.N. member states confer to the Security Council the “primary responsibility for the maintenance of international peace and security.”<sup>74</sup> The U.N. system for regulating the use of interstate force absent a self-defense or invitation justification is thus clear-cut: in the interest of maintaining international peace and security, states must seek Security Council authorization.

Many critics argue that consistent use of a veto by a Security Council member in the face of a humanitarian crisis reflects dysfunction in the Charter system.<sup>75</sup> These critics do not complain of a complete Security Council deadlock, such as that which characterized the Cold War,<sup>76</sup> but instead argue that issue-specific persistent vetoes are reflective of such dysfunction when the issue in question is a particular humanitarian crisis,

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70. Legality of Use of Force (Serb. & Montenegro v Belg.), Verbatim Record, 34 (May 10, 1999), <https://www.icj-cij.org/public/files/case-related/108/108-19990510-ORA-01-00-BI.pdf>.

71. Heller, *supra* note 5.

72. Koh, *supra* note 37, at 1004 (discussing his own views and those of U.K. Legal Advisor Sir Daniel Bethlehem).

73. *Id.* at 1005.

74. U.N. Charter art. 24(7).

75. Koh, *supra* note 37, at 1005.

76. See Philippa Webb, *Deadlock or Restraint? The Security Council Veto and the Use of Force in Syria*, 19 J. CONFLICT & SECURITY L. 471, 474 (2014).

such as in Syria.<sup>77</sup> In these situations, interventionists argue, the Security Council is acting contrary to their mandate of maintaining international peace and security.<sup>78</sup>

However, to extrapolate that a persistent veto is indicative of systemic dysfunction is to ignore the other important tools at the United Nations' and Member States' disposal that can influence how humanitarian crises unfold. The United Nations has many organs devoted to human rights; the Security Council regularly adopts resolutions related to human rights; the General Assembly similarly routinely passes resolutions and statements on human rights and humanitarian crises. These tools are not always ineffective, either. Indeed, the United Nations' diplomatic and advocacy-based efforts in reaction to South Africa's apartheid are emblematic of the international community's ability to influence humanitarian crises without unilateral intervention.<sup>79</sup> These institutional practices do not reflect systemic dysfunction with respect to issues of humanitarian concern.<sup>80</sup>

Persistent veto usage is not an indication of systemic dysfunction. The Charter system was explicitly designed to discourage the international use of force and thus makes it difficult to do so legally.<sup>81</sup> Persistent vetoes, even in situations of humanitarian crisis, could, in fact, further the project of international peace and security by confining a crisis to its state of origin. Security Council vetoes are not symptomatic of dysfunction nor are they inherently contrary to the purpose of the enterprise as contained in articles 1 and 24.<sup>82</sup> Rather, it is the system functioning as planned.<sup>83</sup>

Despite these critiques, the simple fact remains that the text of the U.N. Charter does not authorize unilateral humanitarian intervention. The Charter contains a blanket prohibition on international uses of force in article 2(4)

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77. See e.g., Trahan, *supra* note 5 (“[T]here are times that UN Security Council dysfunctionality in voting serves to shield the commission of atrocity crimes . . . Russia has been shielding the Assad regime.”).

78. See *id.* (explaining that states can seek an ICJ opinion as to whether some vetoes may be “null and void” when read in the context of the U.N. Charter as a whole, implying, in part, that the obligation to maintain international peace and security may nullify the validity of a veto.).

79. *Other United Nations Bodies*, U.N. HUM. RTS. OFF. HIGH COMM’R, <https://www.ohchr.org/en/hrbodies/pages/otherunitednationsbodies.aspx>

(listing 23 other United Nations agencies and offices as either explicitly devoted to human rights issues or regularly engaging with them); *Resolutions Adopted by the Security Council in 2021*, U.N. SEC. COUNCIL, <https://www.un.org/securitycouncil/content/resolutions-adopted-security-council-2021> (detailing how twenty-one of the twenty-eight resolutions adopted by the Security Council in 2021 engaged with human rights concerns to some degree).

80. Enuga S. Reddy, *The Struggle Against Apartheid: Lessons for Today’s World*, U.N. CHRON., <https://www.un.org/en/chronicle/article/struggle-against-apartheid-lessons-todays-world>.

81. See *id.* arts. 1, 2, 51.

82. *Id.* arts. 1, 24.

83. U.N. Charter art. 27.

and provides for specific exceptions in article 51. Criticisms of the text and system's rigidity notwithstanding, the legality of unilateral humanitarian intervention is not based on the U.N. Charter.

### B. *Unilateral Humanitarian Intervention in Customary International Law*

As the lawfulness of unilateral humanitarian interventions is not contained in the text of the U.N. Charter, we must turn instead to customary international law. Traditionally, customary international law has been understood as “unwritten law deriving from practice accepted as law.”<sup>84</sup> Put differently, customary international law is derived from general and consistent state practices and acquiescence to said practices as legal (*opinio juris*).<sup>85</sup> Customary international law is an important source of public international law that operates concurrently to treaty law, particularly for the law on the use of force.<sup>86</sup> Interventionists seek to fill the textual gap by finding that customary international law licenses unilateral humanitarian intervention.<sup>87</sup> That is, customary international law could create a new exception to the Charter's prohibition on the use of force.<sup>88</sup>

### C. *State Practice*

An action or norm that would amount to customary international law must be practiced generally and consistently, as well as extensively and representatively.<sup>89</sup> It is not necessary that *all* states engage in the practice, but those that do should represent a variety of the “interests at stake and/or the various geographical regions.”<sup>90</sup>

Humanitarian intervention has not become a general practice. States do not regularly intervene in humanitarian crises. In fact, humanitarian intervention has often been “more noteworthy in its breach” than in its practice.<sup>91</sup> There are several contemporary humanitarian crises – including some of the most striking acts of genocide, war crimes, ethnic cleansing,

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84. U.N. Int'l L. Comm'n, *Rep. of the International Law Commission on the Work of the Seventieth Session*, U.N. Doc. A/73/10, at 122 (2018).

85. Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INTL. L. 757, 758 (2001).

86. Monica Hakimi, *Making Sense of Customary International Law*, 118 MICH. L. REV. 1487, 1487 (2020).

87. E.g., Harold Hongju Koh, *Syria and the Law of Humanitarian Intervention (Part II: International Law and the Way Forward)*, EJIL:TALK! (Oct. 4, 2013) <https://www.ejiltalk.org/syria-and-the-law-of-humanitarian-intervention-part-ii-international-law-and-the-way-forward/>.

88. *Id.*

89. See U.N. Int'l L. Comm'n, *supra* note 84, at 135.

90. *Id.* at 136.

91. MADELEINE K. ALBRIGHT & RICHARD S. WILLIAMSON, *THE UNITED STATES AND R2P: FROM WORDS TO ACTION 7* (Brookings Inst. 2006).

and crimes against humanity – in which states have not intervened with the unilateral use of force.<sup>92</sup> In addition, a geographically and interest-based representative practice has not occurred. Rather, humanitarian interventions have been sporadic and geographically limited.<sup>93</sup>

#### D. *Opinio Juris*

To become customary international law, actions must not simply form a practice but must also be done due to a sense of legality, *opinio juris*, on the part of states.<sup>94</sup> Outside of treaty law, “states’ expressions of the perceived extent and content of their international legal obligations are key constitutive elements” of customary international law.<sup>95</sup>

Modern practice and *opinio juris* can also be derived from general statements of rules rather than specific instances of practice.<sup>96</sup> That is, treaties, declarations, and statements made in international fora crystallize custom by reflecting *opinio juris*, and the act of making those statements is a practice in itself.<sup>97</sup>

This is where UHI might find its footing in customary international law. The United States, the United Kingdom, and Denmark have all adopted legal positions indicating their belief that unilateral humanitarian intervention may be compatible with international law absent Security Council authorization.<sup>98</sup> The United Kingdom has been the most vocal on

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92. See, e.g., Yukiko Nishikawa, *Saving the Stateless? Myanmar, the Rohingya, and R2P*, OXFORD RSCH. GRP. (Mar. 21, 2019) (discussing the lack of intervention in Myanmar and the problems of applying the “responsibility to protect” to the Rohingya genocide); R2P MONITOR, GLOB. CTR. FOR RESP. TO PROTECT, (Sept. 15, 2020), [https://www.globalr2p.org/wp-content/uploads/2020/10/R2P\\_Monitor\\_SEPT2020\\_Final.pdf](https://www.globalr2p.org/wp-content/uploads/2020/10/R2P_Monitor_SEPT2020_Final.pdf), (discussing what the center considers actionable crises. Of the eight countries identified as in need of urgent action, half have not had any military intervention at all.).

93. See Kevin Jon Heller, *The Illegality of ‘Genuine’ Unilateral Humanitarian Intervention*, 32 EUR. J. INT’L L. 1, 26–27 (listing unilateral humanitarian interventions between 1991–2003. Six of the nine interventions were American- and/or European-led; of the American-/European-led interventions, four were in countries outside of the West); *id.* at 9–13 (listing only thirteen times UHI was wholly or in part a rationale for intervention, over half of which were American- and/or European-led. The contemporary interventions in Syria and Libya were also American- and European-led.).

94. *Customary International Law*, LEGAL INFORMATION INSTITUTE, [https://www.law.cornell.edu/wex/customary\\_international\\_law](https://www.law.cornell.edu/wex/customary_international_law); see U.N. Int’l L. Comm’n, *supra* note 84, at 119 (“To determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice that is accepted as law (*opinio juris*).”).

95. Michael N. Schmitt & Sean Watts, *State Opinio Juris and International Humanitarian Law Pluralism*, 91 INT’L L. STUD. 171, 177 (2015).

96. Roberts, *supra* note 85, at 758.

97. *Id.*

98. Henriksen & Schack, *supra* note 2, at 126.

this point.<sup>99</sup> In a 2013 legal memorandum, the U.K. stated its position that “it is permitted under international law to take exceptional measures in order to avert a humanitarian catastrophe,” referring to the possibility of unilateral humanitarian intervention in Syria.<sup>100</sup>

Yet despite the legal positions and related statements made by states who advocate for the right to UHI, there is a strong contingent of states whose position is that it is decidedly illegal.<sup>101</sup> The G77, a coalition of 134 developing countries, has rejected “the so-called right to unilateral humanitarian intervention” since 1999, citing a lack of basis in the Charter.<sup>102</sup> The Non-Aligned Movement, which numbers approximately half of the Member States of the U.N., has “unequivocally condemned” the use of force in unilateral humanitarian intervention.<sup>103</sup> This broad coalition includes major world powers—such as China, India, and South Africa.<sup>104</sup> Repeated declarations and statements from these groups also form part of the practice and *opinio juris* of customary international law, indicating that unilateral humanitarian intervention’s legality has not been established in terms of state practice or *opinio juris*.

Individual states have also rejected the legal positions of the United Kingdom and other states, suspecting that the efforts to legitimize UHI camouflage more insidious goals.<sup>105</sup> This sentiment is especially strong in post-colonial, non-European states.<sup>106</sup> For example, the statements of Bolivia’s delegate at the 7919<sup>th</sup> Meeting of the Security Council – a meeting reactive to the unilateral action taken in Syria in 2017 – reflect such a suspicion. The delegate described unilateral humanitarian intervention as violating the Charter.<sup>107</sup> He further quoted former U.N. Secretary-General Ban Ki-moon’s statement that “everything should be handled within the framework of the United Nations Charter.”<sup>108</sup> The delegate characterized

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99. Ryan Goodman, *UK Government Issues Major Statement on Legality of Humanitarian Intervention*, JUST SEC. (Jan. 30, 2014), <https://www.justsecurity.org/6583/uk-government-issues-major-statement-legality-humanitarian-intervention/>.

100. *Id.*

101. Heller, *supra* note 5.

102. *Declaration Adopted on the Occasion of the Twenty-third Annual Ministerial Meeting of the Group of 77*, G-77 (Nov. 24, 1999), <https://www.g77.org/doc/Decl1999.html>.

103. Heller, *supra* note 5 (quoting the Non-Aligned Movement’s (“NAM”) legal position and noting that there is membership overlap between the G77 and NAM).

104. *Id.*

105. *See, e.g.*, U.N. SCOR, 71st Sess., 7919th Mtg., UN Doc. S/PV.7919 (Apr. 7, 2017) (with representatives of Bolivia, Russia, Syria criticizing the American UHI in Syria. This posture was to be expected of the latter two countries, but all three explicitly or implicitly identified competing motives for the intervention); *see also* Heller, *supra* note 93 (discussing parallel motives).

106. MENON, *supra* note 44, at 10.

107. U.N. SCOR, *supra* note 105, at 3.

108. *Id.* at 4.

such unilateral interventions as “imperialistic” and “a serious threat to international peace and security.”<sup>109</sup>

In sum, established practice does not indicate that UHI meets the first prong of customary international law. The actual practice is relatively rare.<sup>110</sup> Diplomatic statements concerning unilateral humanitarian intervention do not reflect a cohesive practice among states. Rather, a minority of states advance their interventionist position while many more strongly oppose it. The aforementioned diplomatic statements and state declarations indicate the distinct lack of *opinio juris* on UHI’s legality. The United Kingdom is still the only nation to clearly indicate that they believe that unilateral humanitarian intervention has firm legal ground, while the United States and Denmark seem to support the practice on an *ad hoc* basis.<sup>111</sup> Thus, unilateral humanitarian intervention meets neither the practice nor *opinio juris* prongs of customary international law.

Finding that unilateral humanitarian intervention is legal under customary international law would require weighing the practices and legal opinion of a small handful of states against the vehement and vocal disagreement of nearly 200 states. Such a conclusion is untenable under modern customary international law.

#### E. “Law-Making Moment”

Despite the strong opposition, the legal status of unilateral humanitarian intervention does appear to be shifting in the long- and short-term. The governments that now most strongly support UHI’s legality initially condemned it as illegal and destabilizing.<sup>112</sup> Even the U.K.’s strong position is relatively new in its history. In 1999, the House of Commons Foreign Affairs Committee concluded that the doctrine of unilateral humanitarian intervention had, at best, a “tenuous” basis in customary international law.<sup>113</sup>

As recently as fifteen years ago, the leading opinion on unilateral intervention was that it found “no support in international law.”<sup>114</sup> However, subsequent military and diplomatic actions have shaken up formerly firm ground. States have undertaken actions resembling unilateral humanitarian interventions without presenting them as such. The modern era has seen humanitarian intervention come to be regarded in the West as both

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109. *Id.* at 3–4.

110. *See* Heller, *supra* note 93, at 9–12 (listing thirteen interventions justified in whole or part on UHI between 1971 and 2018).

111. Henriksen & Schack, *supra* note 2, at 126.

112. MENON, *supra* note 44, at 23 (discussing these governments’ legal and political positions in the 1970s).

113. Henriksen & Schack, *supra* note 2, at 140.

114. Petr Valek, *Is Unilateral Humanitarian Intervention Compatible with the U.N. Charter?*, 26 MICH. J. INT’L L. 1223, 1228 (2005).

“desirable and permissible, powered by a commitment to universal human rights.”<sup>115</sup>

It is thus not outside the realm of possibility that other states will similarly change their opinions and practices in this area. While it cannot be said that unilateral humanitarian intervention is now legal, we may be in a “lawmaking moment”<sup>116</sup> as state practice continues to shift.

Given that UHI’s legal status is in flux, we must shift our analysis. The central question of UHI is not whether it is legal. The more important question is whether it *should* be and, importantly, whether it even *can* be in light of the normative foundations of customary international law.

#### IV. THE PURPOSES OF CUSTOMARY INTERNATIONAL LAW & UNILATERAL HUMANITARIAN INTERVENTION

The importance of customary international law should not be understated. It is a fundamental underpinning of international law’s relevance that it adapts to new developments, moral stances, and challenges.<sup>117</sup> Customary international law is one of the primary means through which international law evolves.<sup>118</sup> Treaty negotiation can be lengthy and difficult, but customary international law allows the international community to address timely challenges and recognize new practical developments.<sup>119</sup>

Customary international law “fill[s] critical gaps in the international legal system.”<sup>120</sup> It “defines most of the content of international law; it is the main mode of international regulation.”<sup>121</sup> It has an especially important role in developing specialized areas of law, expanding the rules of international law beyond treaty ratification, and regulating state conduct.<sup>122</sup> Customary

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115. MENON, *supra* note 44, at 23–24.

116. Koh, *supra* note 37, at 1016.

117. Bill Campbell, *The Dynamic Evolution of International Law - The Case for the More Purposeful Development of Customary International Law*, 49 VICTORIA U. WELLINGTON L. REV. 561, 561 (2018).

118. U.N. Charter art. 38(1) (identifying Customary International Law (“CIL”) as one of the three primary sources of public international law); John Dugard, *The Application of Customary International Law Affecting Human Rights by National Tribunals*, 76 PROCS. ANN. MEETING (AM. SOC. INT’L L.) 245, 245–251 (1982) (noting that while treaty-based law is relatively static, customary international law evolves dynamically because it is derived from practice).

119. Campbell, *supra* note 117, at 561.

120. B.S. Chimni, *Customary International Law: A Third World Perspective*, 112 AM. J. INT’L L. 1, 8 (2018).

121. Hakimi, *supra* note 86, at 1488.

122. Chimni, *supra* note 120, at 8.

international law's purpose is thus evolutive and expansive.<sup>123</sup> It reflects the continued conceptual growth of the law as the international community addresses new questions. When considering unilateral humanitarian intervention's legal status, we should consider whether integrating this practice into the law would similarly advance evolutive legal goals.

Proponents of unilateral humanitarian intervention argue that it would. The humanitarian interventionist's ideology is rooted in a progressing view of history similar to customary international law's view of the law.<sup>124</sup> Moral and ethical norms can advance with the law, if not advance the law itself, and interventionists thus conclude that UHI matches well with the purpose of customary international law.<sup>125</sup> These understandings rest on the assumption that UHI is a new kind of practice, morally distinct from former intervening practices.

Most countries would agree that new international law should not allow for a re-colonial cycle.<sup>126</sup> The United Nations has declared each of the last four decades to be International Decades for the Eradication of Colonialism (1990-2030).<sup>127</sup> It has passed numerous resolutions on the topic of decolonization and the right to self-determination, affirming the "right of peoples under colonial rule to exercise their right to self-determination and the right of every nation . . . to choose freely and without any external influence its political, social, and economic system."<sup>128</sup> Decolonial thought, at least on paper, has carried the day.

Neo-colonialism, however, has followed in colonialism's footsteps despite decolonial efforts. It is characterized by the continuing exploitation of newly independent countries in the post-colonial period.<sup>129</sup> Distinct from

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123. U.N. Charter art. 38(1) (identifying CIL as one of the three sources of international law, complementing treaty law and court decisions); U.N. Int'l L. Comm'n, *supra* note 84, at 119 (noting the development of CIL over time).

124. MENON, *supra* note 44, at 23.

125. See, e.g., Jens David Ohlin, *Two Visions of the UN Charter*, OPINIO JURIS (Apr. 4, 2017), <https://opiniojuris.org/2017/04/13/two-visions-of-the-un-charter/> (arguing that the changed nature of most armed conflict since the establishment of the Charter, our vision of the Charter must change, either by emphasizing different provisions or integrating CIL); see also Harold Koh, *Not Illegal: But Now The Hard Part Begins*, JUST SEC. (Apr. 7, 2017), <https://www.justsecurity.org/39695/illegal-hard-part-begins/> (suggesting a new test for judging the lawfulness of UHI).

126. The original Declaration on the Granting of Independence to Colonial Countries and Peoples was supported by all eighty-nine voting member states, with nine abstentions. G.A. Res. 1514 (XV) (Dec. 14, 1960). The most recent resolution naming the Fourth International Decade for the Eradication of Colonialism was supported by 148 voting member states, with three votes against and twenty-three abstentions. G.A. Res. 75/123 (Dec. 10, 2020).

127. U.N. Documentation: *Decolonization, Key Documents Related to Decolonization*, U.N. DAG HAMMARSKÖLD LIBRARY, <https://research.un.org/en/docs/decolonization/keydocs> (last visited Oct. 18, 2020).

128. G.A. Res. 2160 (XXI), at 1 (Nov. 30, 1966).

129. Chimni, *supra* note 29, at 27.

the overt physical and economic exploitation and domination that defined the colonial period, neo-colonial and imperialist practices frame hegemony in terms of universal moral truths and “global values.”<sup>130</sup>

While the international community has in theory rejected colonialism, neo-colonial practices and theories of law do not necessarily conflict with customary international law or treaty law. There is nothing in the law that prohibits neo-colonialism: practices that reinforce power imbalances may proliferate so long as they do not violate an existing rule.<sup>131</sup> Normatively, however, customary international law cannot align with neo-colonial or imperial practices because they are antithetical to the evolutionary and progressive purpose of customary international law.

The idea that certain practices are inapposite to customary international law – and thus cannot be incorporated into it – is not novel. For example, states’ continued violations of human rights are not understood as contributing to a practice that could result in a new rule of customary international law unraveling human rights treaty law.<sup>132</sup> Human rights violations are only understood to violate existing treaty and customary international law, not as contributing to the general practice prong of customary international law.<sup>133</sup> We should approach neo-colonial practices in much the same way – as inherently incompatible with the evolutive goals of customary international law and the international community’s goal of decolonization.

For this reason, unilateral humanitarian intervention should not be incorporated into customary international law. The reactions to unilateral humanitarian intervention from developing states and TWAIL scholarship should be centered and prioritized. These scholars and states view UHI as a continuation of colonialism’s power imbalances.<sup>134</sup> As a practice rooted in colonial tradition and thought processes, unilateral humanitarian intervention is incompatible with customary international law’s emphasis on progression.

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130. *Id.* at 31.

131. That is, the terms “neo-colonial” and “imperialist” are characterized by continuing exploitation in the postcolonial period, described by TWAIL scholars as part-and-parcel of the international legal and economic order. While some practices that are neo-colonial/imperialist might be found illegal because of the practice violating an existing rule, simply *being* neo-colonial or imperialist in nature is not illegal. Not only can these practices run rampant, TWAIL scholars argue that they do. *Id.*

132. Jan Wouters & Cedric Ryngaert, *Impact on the Process of the Formation of Customary International Law*, in *THE IMPACT OF HUMAN RIGHTS LAW ON GENERAL INTERNATIONAL LAW* 111 (Menno T. Kamminga ed., 2009).

133. *Id.*

134. *See* Part II, *supra*.

## V. CONCLUSION

The legal justifications for unilateral humanitarian intervention attempt to circumvent established treaty law by building a pathway to intervention via customary international law. This has not been universally accepted, but it is concerning to see it proliferate in the language of diplomats and humanitarian advocates.

Much of the discourse around humanitarian intervention reflects familiar colonialist, imperialist, and Orientalist sentiments. Interventionists simplify individual international conflicts and then re-simplify them in groups that they claim are conceptually linked, framing these conflicts only in terms of what is relevant to outside intervenors. They further rely on Orientalist tropes of governments and leaders as cartoonishly cruel. In the face of failure, interventionists do not question their goals, only the means with which intervention was implemented in a target state. The target states are left to deal with the consequences of said failed interventions. Interventionists move on to their next “case study” without reflecting on whether the overarching project is worth pursuing. The debate itself requires the elevation of powerful states’ opinions, weighing them equally or even greater than a much larger group of states that reject the practice as patently illegal. All of this reflects colonialist and imperialist tradition.

Practices that so reflect the rejected institutions of the past conflict with the purposes of customary international law – to grow and progress, to encourage the proliferation of law in new areas. Unilateral humanitarian intervention is rejected by post-colonial states and TWAIL scholars for a reason: it is a repackaging of colonial thought and practice. Colonial imposition is not a new practice. As such, unilateral humanitarian intervention should be understood as antithetical to customary international law’s central purpose and be rejected as incompatible with the development of the law.

