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Matthew C. Cooper

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Keywords

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A NOTE TO STATES DEFENDING HUMANITARIAN INTERVENTION: EXAMINING VIABLE ARGUMENTS BEFORE THE INTERNATIONAL COURT OF JUSTICE

MATTHEW C. COOPER*

INTRODUCTION

Humanitarian Intervention (HI) has been a central topic of controversy within international law scholarship for many years. This controversy is unsurprising because HI inevitably pits several of the most fundamental international norms as opposing forces: state sovereignty and the prohibition on the use of force *versus* the duty of states to prevent human rights atrocities and protect human life. HI takes many forms, but it is best defined as intervention into the sovereign territory of another state, without the host state's consent, for the purpose of halting atrocity crimes, such as genocide, ethnic cleansing, crimes against humanity, and war crimes.¹ It is conducted in one of two ways, *with* Security Council (SC) authorization or *without* such authorization.² In either case, HI categorically conflicts with notions of state sovereignty, and, in most instances, the prohibition on the use of force. Despite such conflict, HI through the SC has been universally accepted.³ "Unauthorized" HI, on the other hand, has been

* Matthew Cooper, JD '09, University of Denver Sturm of College of Law; LL.M., International Law and International Relations, University of Kent (Brussels School of International Studies). Cooper has served as clerk for the U.N. International Criminal Tribunal for Rwanda and as a trial attorney for the United States Department of Labor. He currently practices employment law in Colorado, with a particular focus on mining and workplace safety. He wishes to extend special gratitude to Professor Ved Nanda, to whom this book is dedicated, for his past and continued mentorship in the dynamic field of international law.

1. *E.g.*, Robert O. Keohane, *Introduction*, in HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS 1, 1 (J.L. Holzgrefe & Robert O. Keohane eds., 2003) [hereinafter HUMANITARIAN INTERVENTION]; J.L. Holzgrefe, *The Humanitarian Intervention Debate*, in HUMANITARIAN INTERVENTION, *supra*, at 15, 18; SIMON CHESTERMAN, JUST WAR OR JUST PEACE? HUMANITARIAN INTERVENTION AND INTERNATIONAL LAW 1 (2001).

2. *See, e.g.*, Michael Byers & Simon Chesterman, *Changing the Rules About Rules? Unilateral Humanitarian Intervention and the Future of International Law*, in HUMANITARIAN INTERVENTION, *supra* note 1, at 177, 181-82.

3. *See* Thomas M. Franck, Editorial Comment, *NATO's Kosovo Intervention: Lessons of Kosovo*, 93 AM. J. INT'L L. 857, 858 (1999).

more controversial. The primary question addressed herein is whether states would have a good faith means to justify HI if one day brought before the International Court of Justice (ICJ).

The central concentration with regard to this question is on the evolution of HI within customary international law. This subject is not new, and since the inception of the UN Charter (hereinafter the Charter) numerous authors have examined the component parts of custom (state practice and *opinio juris*) with regard to HI.⁴ This process has revealed many different approaches to this perplexing problem, as well as a myriad of conclusions. This study differs primarily in method, as it is written with a focus on the practical application of the HI doctrine and viable good-faith arguments for states before the ICJ. This study also differs by demonstrating the importance of evaluating *opinio juris* in a contemporaneous fashion. In other words, through historical analysis of several humanitarian interventions, this study illustrates that when investigating custom it is much more telling to assess the statements and actions (or inactions) of states at the time an intervention is taking place. Subsequent diplomatic statements cannot be ignored, but undue weight should not be given to statements most likely aimed at discouraging abuse of this potentially dangerous doctrine and not the doctrine itself. Doing so is the only viable means of truly understanding whether the international community believes an intervening state should be exonerated for undertaking a true humanitarian intervention. Through such an approach, it is possible to discern an acceptance by states that unauthorized HI is lawful (or at least *legally* justified) in extreme circumstances, when truly taken for humanitarian reasons and when conducted proportionately to that purpose.

Existing in conspicuous parallel with HI is the newly emerged "Responsibility to Protect" doctrine (R2P).⁵ While HI and R2P are intertwined, it is erroneous to refer to the doctrines interchangeably. HI deals with a "right" of states to intervene in the affairs of other states, whereas R2P deals with the "responsibility," and perhaps even a

4. See, e.g., Antonio Cassese, *A Follow-Up: Forcible Humanitarian Countermeasures and Opinio Necessitatis*, 10 EUR. J. INT'L L. 791 *passim* (1999); Ved P. Nanda, Thomas F. Muther, Jr. & Amy E. Eckert, *Tragedies in Somalia, Yugoslavia, Haiti, Rwanda and Liberia – Revisiting the Validity of Humanitarian Intervention Under International Law – Part II*, 26 DENV. J. INT'L L. & POL'Y 827, 827-28 (1998); A.P.V. Rogers, *Humanitarian Intervention and International Law*, 27 HARV. J.L. & PUB. POL'Y 725, 726 (2004).

5. S.C. Res. 1674, ¶ 4, U.N. Doc. S/RES/1674 (Apr. 28, 2006); 2005 World Summit Outcome, G.A. Res. 60/1, ¶ 139, U.N. Doc. A/RES/60/1 (Oct. 24, 2005) [hereinafter World Summit]; INT'L COMM'N ON INTERVENTION & STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT (2001) [hereinafter R2P]; Secretary-General's High-Level Panel on Threats, Challenges & Change, *A More Secure World: Our Shared Responsibility*, ¶ 203, U.N. Doc. A/59/565 (Dec. 2, 2004).

legal duty, to prevent “atrocities crimes.”⁶ Notably, R2P primarily places the onus of protection on the state in which atrocities are occurring,⁷ and only secondarily upon the international community.⁸ However, the 2005 World Summit Outcome clearly articulates that the international community, including each Member State of the United Nations (UN), also has some form of responsibility for crimes of mass atrocity, even when occurring outside their own state borders.⁹ While R2P’s contours are still evolving, its unanimous adoption by the General Assembly (GA) has solidified the doctrine somewhere in international law.¹⁰ While the predominant focus herein is on the legal “rights” of states to respond to atrocity crimes and not their “responsibility” to do so, this study will conclude by evaluating the potential interplay between the two doctrines in front of the ICJ.

THE UNITED NATIONS CHARTER ALLOWS FOR HUMANITARIAN INTERVENTION

The Charter is the necessary starting point when analyzing whether HI is lawful, and for that matter, whether it is even possible for such a doctrine to arise through customary law alongside the Charter. Although HI is admittedly nowhere to be found within the Charter, it is well accepted that customary law and the Charter *can* exist in parallel.¹¹ However, some authors have rightly pointed out that the Charter *could* preclude the possibility of a customary exception to the prohibition on the use of force, even for strictly humanitarian reasons, *if* the customary norm were inconsistent with the terms of the Charter.¹²

With regard to HI, the opponents’ syllogism goes like this: the Charter, in Article 2(4), specifically prohibits the threat or use of force “against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations”; this prohibition is comprehensive, except for the explicit exceptions articulated in the Charter, namely Security Council authorization and Article 51 self-defense; and, therefore, even if HI

6. See, e.g., World Summit, *supra* note 5, ¶¶ 138-39; David Scheffer, *Prevention: Atrocity Crimes Framing the Responsibility to Protect*, 40 CASE W. RES. J. INT’L L. 111, 111 (2008) (designating genocide, war crimes, ethnic cleansing, and crimes against humanity as “atrocities crimes” for the purpose of accuracy and simplicity in communication).

7. World Summit, *supra* note 5, ¶ 138.

8. *Id.* ¶ 139.

9. *Id.*

10. *Id.*

11. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶¶ 178-79 (June 27); see North Sea Continental Shelf (F.R.G./Den.; F.R.G./Neth.), 1969 I.C.J. 3, ¶¶ 71-73 (Feb. 20); Asylum (Colom./Peru). 1950 I.C.J. 266, 276 (Nov. 20).

12. *E.g.*, MICHAEL BYERS, WAR LAW 100 (2005).

arose through the component elements of custom (state practice and *opinio juris*), HI would still be a violation of international law because it would violate the superior and affirmative obligations under the Charter.¹³ In its essence, the argument is based on principles of *lex specialis*, and also grounded in the provisions of Article 103 of the Charter, which affirms that the Charter prevails over all *inconsistent* norms.¹⁴

This is an admittedly compelling argument. Indeed, if the prohibition on the use of force were absolute, apart from the Charter's explicit exceptions, then Article 103 would bar a customary norm from overriding its terms, unless of course it rose to the level of *jus cogens* (a status HI has clearly not achieved).¹⁵ This recognition is extremely important, but many proponents of HI have regrettably overlooked it. Nevertheless, there is an answer to this sound argument, and it rests in the fundamental principles of treaty interpretation, as articulated in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT),¹⁶ which are also considered to be custom.¹⁷

The reason states have recourse to these principles lies in the ambiguity of the terms of Article 2(4).¹⁸ Some argue the language "against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations" is not ambiguous, and that the provision is a comprehensive ban on force.¹⁹ However, the inability of both states and international jurists to come to agreement over the Article's full extent lends credible evidence to the contrary.²⁰ Consequently, recourse to principles of

13. See *id.* at 99-100.

14. U.N. Charter art. 103.

15. Vienna Convention on the Law of Treaties art. 64, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

16. *Id.* arts. 31-32.

17. Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), 2007 I.C.J. 43, ¶ 160 (Feb. 26); Legal Consequences of Construction of Wall in Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 94 (July 9); Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12, ¶ 83 (Mar. 31); LaGrand (Ger. v. U.S.), 2001 I.C.J. 466, ¶ 99 (June 27).

18. VCLT, *supra* note 15, art. 31.

19. E.g., Bruno Simma, *NATO, The U.N. and the Use of Force: Legal Aspects*, 10 EUR. J. INT'L L. 1, 2-3 (1999).

20. Compare, e.g., Nanda et al., *supra* note 4, at 864-65 (arguing that individual states should be allowed to intervene when international organizations cannot), and FERNANDO R. TESÓN, *HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY* 6 (3d ed. 2005) (arguing that states may intervene to prevent "severe tyranny or anarchy" in other states), with W. Michael Reisman, Editorial Comment: NATO's Kosovo Intervention, *Kosovo's Antinomies*, 93 AM. J. INT'L L. 860, 861-62 (1999) (arguing that the general prohibition on the use of force should be read narrowly), and Simma,

treaty interpretation is necessary to resolve the contours of Article 2(4) and to determine if HI is absolutely prohibited. Doing so provides insight into the modern meaning of the provision as well as the underlying purposes of the UN Charter.

VCLT Article 31 mandates three primary means of interpretation.²¹ The first requires “good faith” interpretation in accordance with the ordinary meaning of the terms “in their context and in the light of [the treaty’s] object and purpose.”²² The second calls for examination of the context surrounding the treaty, including the preamble and annexes, any agreement relating to the treaty’s conclusion, and any instrument made in connection with the conclusion of the treaty.²³ The third, which is of utmost importance here, entails examination of “any subsequent *practice* in the application of the treaty which establishes the agreement of the parties regarding its interpretation,” as well as any relevant *rules* of international law.²⁴ It bears explicit mention that all steps are required; none is mutually exclusive to the others.²⁵

With regard to the first step, there are good faith arguments on both sides. Opponents of HI can legitimately argue that the Charter was put in place in the wake of WWII to prevent states from abusing their power and invading the sovereignty of others — abuse that during WWII led to the most horrendous atrocities the world had ever seen. Specifically, it could be argued that the context of the Charter’s inception points to a full prohibition on the use of force, except when authorized by the Security Council, for the very purpose of preventing such abuse.²⁶ Likewise, the very first words of Article 1(1) are “[t]o maintain *international* peace and security,” thereby indicating the primary importance of respecting state sovereignty and refraining from using force against other states.²⁷ Going a step further, opponents could even argue, in good faith, that the principles regarding respect for human rights are subsidiary to this fundamental purpose.²⁸

On the other hand, proponents of HI can point to the second part of UN Charter Article 1(1), which envisions “*effective* collective measures”

supra note 19, at 2-3 (stating that Article 2(4) is meant to be “of a comprehensive nature”).

21. VCLT, *supra* note 15, art. 31.

22. *Id.* art. 31, para. 1.

23. *Id.* art. 31, para. 2.

24. *Id.* art. 31, para. 3 (emphasis added).

25. See, e.g., Petr Valek, Note, *Is Unilateral Humanitarian Intervention Compatible with the U.N. Charter?*, 26 MICH. J. INT’L L. 1223, 1240-41 (2005).

26. See, e.g., Simma, *supra* note 19, at 3.

27. U.N. Charter art. 1, para 1 (emphasis added).

28. Antonio Cassese, Ex Iniuria Ius Oritur: *Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?*, 10 EUR. J. INT’L L. 23, 24 (1999).

to respond to threats to the peace,²⁹ Article 1(3), which highlights the need "[t]o achieve international co-operation in solving international problems, and in promoting respect for human rights,"³⁰ as well as Article 55, which recognizes that conditions of stability, *which includes universal observance of human rights*, "are necessary for peaceful and friendly relations among nations."³¹ Moreover, proponents of HI can certainly argue, likewise in good faith, that the very same purpose that underlies the rationale for both non-use of force and HI are one in the same – *the protection of human life*. Therefore, though collective forceful measures through the SC may have been the ideal means envisioned for protecting human life at the time the Charter was formed, once the mechanism breaks down (i.e., because of a P5³² veto), the fundamental right to life *itself* is what is deserving of protection, not the *means* for protecting the right.

In either case, a teleological approach to Article 2(4) does not fully answer the question. To the contrary, it seems necessary to simply accept that the Charter's object and purpose is two-fold – to maintain international peace and security *and* to ensure protection for fundamental human rights – both of which embody the most fundamental of rights, the right to life.

Consequently, the next step is to turn to Article 31(3) of the VCLT, namely paragraph (b), which mandates examination of "subsequent practice."³³ Doing so allows examination of Member States' *present agreement* to the Charter, which has come to be accepted as dispositive with regard to a treaty's binding force (as opposed to the framers' original intent).³⁴ The ICJ has adopted this approach on multiple occasions. In *Namibia*, for example, when examining Article 22 of the Covenant of the League of Nations, the Court explicitly stated, "an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation."³⁵ Likewise, in *Nicaragua* the Court held that the Charter "by no means covers the whole area of the regulation of the use of force," specifically referring to the area of non-intervention as an example, and proceeding to examine custom to qualify the terms of the

29. U.N. Charter art. 1, para. 1 (emphasis added).

30. *Id.* art. 1, para. 3.

31. *Id.* art. 55 (emphasis added).

32. *See id.* art. 27.

33. VCLT, *supra* note 15, art. 31, para. 3 (emphasis added).

34. South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.), 1966 I.C.J. 6, 439 (July 18) (dissenting opinion of Judge Jessup); Competence of General Assembly for Admission of State into United Nations, Advisory Opinion, 1950 I.C.J. 4, 18 (Mar. 3) (dissenting opinion of Judge Alvarez).

35. Legal Consequences for States of Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, ¶ 53 (June 21).

Charter.³⁶ Judge Alvarez similarly addressed the issue of Charter interpretation in the *Admissions Case*, stating:

The text [of the Charter] must not be slavishly followed. If necessary, it must be vivified so as to harmonize it with the new conditions of international life. When the wording of a text seems clear, that is not sufficient reason for following it literally, without taking into account the consequences of its application.³⁷

As a result, to determine the true confines of Article 2(4), subsequent practice must be examined. Therefore, whether a customary norm has arisen, and whether Article 2(4) and the Charter allow for HI are in fact two parts of the same inquiry. Thus, the Charter does not absolutely prohibit a customary norm of HI.

Though unnecessary, the Court could also look to the preparatory work, or *travaux préparatoires*, of the San Francisco Conference to reach the conclusion that Article 2(4) is not absolute.³⁸ At the Conference, there was much discussion and debate as to what terms should be included within Article 2(4). Many proposals were made and rejected before settling on the current language.³⁹ Included among them was a proposal put forth by Norway, by which the Norwegian representative suggested including the language in Article 2(4) – “not approved by the Security Council as a means of implementing the purposes of the Organization” – to unambiguously affirm that *only* the Council could authorize force under Article 2(4).⁴⁰ However, after much consideration, including discussion that the inclusion of the language – “against the territorial integrity or political independence of any member state” – would leave ambiguity, the drafting committee chose to reject the specific language, instead adopting the existing open-ended terminology.⁴¹ This suggests that states were conscious of the evolving nature of international law, and that they allowed for this reality. Thus, as former ICJ President Rosalynn Higgins has averred, Article

36. *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 176 (June 27).

37. *Admission of State*, 1950 I.C.J. at 17.

38. VCLT, *supra* note 15, art. 32; *Application of Convention on Prevention and Punishment of Crime of Genocide* (Bosn. & Herz. v. Serb. & Montenegro), 2007 I.C.J. 43, ¶ 160 (Feb. 26).

39. BRIAN D. LEPARD, *RETHINKING HUMANITARIAN INTERVENTION: A FRESH LEGAL APPROACH BASED ON FUNDAMENTAL ETHICAL PRINCIPLES IN INTERNATIONAL LAW AND WORLD RELIGIONS* 345-47 (2002).

40. *Id.* at 346.

41. *Id.* at 346-47.

2(4) and the prohibition on the use of force should be treated as evolving norms.⁴² Doing so allows for customary HI.

SECURITY COUNCIL INTERVENTION HAS CHANGED THE CONTOURS OF STATE SOVEREIGNTY

Security Council-authorized HI perfectly exemplifies the evolution President Higgins referenced. Though now accepted as lawful, the legality of SC-authorized HI was also once controversial.⁴³ The reason for this stems from Article 2(7) of the Charter, notions of inviolable state sovereignty, as well as the explicit limits laid out in the Charter regarding the SC's ability to use force only in situations where "necessary to maintain or restore *international* peace and security."⁴⁴ While these concepts have not been outmoded, their parameters are in continual evolution and have undergone significant modification in the past 54 years. This is seen through the actions of the SC, the pronouncements of the ICJ, the international reaction to SC intervention, and most recently with the unanimous adoption of the 2005 World Summit Outcome document by the General Assembly.⁴⁵ Each is examined below.

State sovereignty has always taken center stage in international law, and was explicitly recognized in Article 2(7) of the Charter, which states: "[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state"⁴⁶ For a long time, so-called human rights affairs were considered to fall under this provision, and the SC refrained from acting, no matter how egregious states' human rights violations were.⁴⁷ However, beginning with the close of the Cold War, the SC found new life and began to act, under Article 42 of Chapter VII of the Charter, to intervene in situations of extreme human

42. ROSALYN HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* 167-222 (1963) *referenced in* JOSÉ E. ALVAREZ, *INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS* 185 (2005).

43. *See, e.g.,* Mohammed Ayoob, *Humanitarian Intervention and International Society*, 7 *GLOBAL GOVERNANCE* 225 (2001). Ayoob argues that human rights abuses and internal conflicts are domestic matters and that they therefore do not fall under Chapter VII and should not even be considered by the Security Council. It must be noted, however, that Ayoob is arguing that human rights abuses and internal conflicts *should* be considered "removed from the purview of Chapter VII," not that state practice has shown otherwise. *Id.* at 228.

44. U.N. Charter art. 42 (emphasis added).

45. World Summit, *supra* note 5, ¶¶ 138-39, 152.

46. U.N. Charter art. 2, para. 7.

47. *See generally* Jonathan I. Charney, Editorial Comment: NATO's Kosovo Intervention, *Anticipatory Humanitarian Intervention in Kosovo*, 93 *AM. J. INT'L L.* 834, 835, 838 (1999).

suffering, even when contained within one state's borders.⁴⁸ Such interventions include Somalia (1991), Haiti (1993-94), Rwanda (1994), East Timor (1999), and Bosnia-Herzegovina (1992), among others, and they represent a chapter in international law that gave hope to many that the UN system was beginning to work as originally envisioned — for security *and* the protection of human life.

To find proper authority for such SC authorized humanitarian interventions does not take much creativity. Clearly the SC has primary responsibility for international peace and security.⁴⁹ It also has the authority to authorize force in situations that threaten such peace and security.⁵⁰ In turning to both Article 55 of the Charter,⁵¹ as well as the direct effects of atrocity crimes, such as massive refugee flows, strained international relations, the potential for civil and regional war, the strain on international economic relations, and the mere fact that such crimes shock the conscience of mankind,⁵² it is well accepted that the SC has the prerogative to determine whether situations of genocide, ethnic cleansing, and crimes against humanity are indeed “threats to international peace and security” and thereby take action to abate the threat or breach if it indeed exists.⁵³ This led states to explicitly accept SC intervention for human rights purposes.

The primary importance of this development is the recognition that situations of mass atrocity are no longer solely domestic matters shielded behind the guise of territorial sovereignty.⁵⁴ Instead, as the

48. See Cassese, *supra* note 28, at 26.

49. U.N. Charter art. 24, para. 1; Uniting for Peace, G.A. Res. 377 (V), U.N. Doc. A/RES/377, at 10 (Nov. 3, 1950); Certain Expenses of United Nations: Article 17, Paragraph 2, of Charter, Advisory Opinion, 1962 I.C.J. 151, 165-68 (July 20).

50. U.N. Charter art. 42.

51. Article 55 recognizes that the preservation of human rights is a necessary condition for the maintenance of international peace and security. U.N. Charter art. 55.

52. See, e.g., R2P, *supra* note 5, ¶ 4.13, at 31 (recognizing there must be limitations to the non-intervention rule for exceptional circumstances).

53. See, e.g., World Summit, *supra* note 5, ¶ 139; MARY ELLEN O'CONNELL, THE POWER AND PURPOSE OF INTERNATIONAL LAW: INSIGHTS FROM THE THEORY AND PRACTICE OF ENFORCEMENT 223 (2008); Olivier Corten, *Human Rights and Collective Security: Is There an Emerging Right of Humanitarian Intervention?*, in HUMAN RIGHTS, INTERVENTION, AND THE USE OF FORCE 95 (Philip Alston & Euan MacDonald eds., 2008); Christopher C. Joyner & Anthony Clark Arend, *Anticipatory Humanitarian Intervention: An Emerging Legal Norm?*, 10 U.S. A.F. ACAD. J. LEGAL STUD. 27, 37 (1999-2000); Simma, *supra* note 19, at 5; Fernando R. Tesón, *Collective Humanitarian Intervention*, 17 MICH. J. INT'L L. 323, 337-38 (1996).

54. INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO, THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED 169 (2000), [hereinafter ICOK] (referencing the statements of former Secretaries General Javier Perez de Cuellar, Boutros Boutros-Ghali, and Kofi Annan); Amy Eckert, *The Non-Intervention Principle and Humanitarian Interventions*, 7 INT'L LEGAL THEORY 48, 52 (2001); Richard Falk, *Legality to Legitimacy: The Revival of the Just War Framework*, HARV. INT'L REV. (2006), available at <http://hir.harvard.edu/print/interventionism/legality-to-legitimacy>.

ICJ has now recognized on multiple occasions, atrocity crimes inhere a legal interest in their protection for all states.⁵⁵ In addition to SC action itself, this view is further demonstrated by the response of the international community, which has either openly praised the SC or refrained from condemning its actions. In the most pronounced showing of international support for such action, the General Assembly unanimously adopted the World Summit Outcome in 2005, which contained explicit provisions accepting the "Responsibility to Protect" beleaguered populations, and if necessary, the willingness to act forcefully through the SC under Chapter VII.⁵⁶ Such a showing of unanimous international solidarity is unusual in international relations, and it speaks loudly to states' concerns with preventing atrocity crimes. More importantly, it speaks to the position of the international community that two types of action are unequivocally lawful: (1) non-forceful measures aimed at the perpetrators of atrocity crimes, whether authorized or not; and (2) forceful measures taken through the SC. In sum, the SC has changed the debate regarding humanitarian intervention, and issues of sovereignty have been virtually removed from the discussion.⁵⁷

THE USE OF FORCE AND EVOLUTION OF "INDEPENDENT" HUMANITARIAN INTERVENTION

Conceptions of "sovereignty" no longer preclude humanitarian intervention.⁵⁸ However, because the Article 2(4) prohibition on the use of force still stands, the next question to be answered is what recourse does the international community have when non-forceful measures do not sufficiently counteract atrocity crimes and when the SC is either unwilling or unable to take action. In other words, is humanitarian intervention without SC authorization ever lawful? Or, in the alternative, is it ever justified by "necessity" so that the wrongfulness of a state's action would be precluded before a court of law such as the ICJ?

55. Legal Consequences of Construction of Wall in Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 155 (July 9); Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain), 1970 I.C.J. 3, ¶¶ 33-34 (Feb. 5); Reservations to Convention on Prevention and Punishment of Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15, 23 (May 28).

56. World Summit, *supra* note 5, ¶ 139.

57. See U.N. Charter art. 2, para 2 (supporting this outcome by mandating that all Member States fulfill their Charter obligations in good faith in order to be ensured the rights and benefits resulting from membership).

58. Eckert, *supra* note 54, at 50, 52 (pointing out that sovereignty is now viewed as entailing not only rights, but responsibilities, and when states fail those responsibilities, they forfeit a part of their sovereignty).

The question of HI's legality has been addressed many times, with varying conclusions.⁵⁹ Many scholars still maintain that HI is absolutely forbidden under international law, while others forcefully argue that a right to HI has emerged under customary international law. Most interestingly, a number of scholars posit that HI is not yet lawful, but perhaps "justified."⁶⁰ The latter is a seemingly sound position, but this approach has not fully addressed the true real-world consequences of such a determination. If justified, does that mean legal liability would still arise if a country were brought before the ICJ and found to have acted in accordance with the HI doctrine?⁶¹ Or does it suggest some form of estoppel or necessity doctrine, as adopted by the ICJ in the *Gabčíkovo-Nagymaros Project*,⁶² which would preclude state wrongfulness? The actions of states speak loudly to this query and evidence an acceptance by states that, *in certain extreme and limited circumstances*, intervening states should not be condemned or held legally liable for their humanitarian actions. This evidence is outlined below.

Note: For the purpose of this analysis, humanitarian intervention taken without SC authorization, but supported by the international community (or at least not widely condemned), will be termed "independent" humanitarian intervention. This designation intentionally avoids using the term "unilateral" intervention because unilateral intervention connotes intervention by a single state or small group of states with little international support. However, there is little evidence that HI without widespread international support would ever be justified. Thus, the two must be distinguished and it should be clear that the conclusions reached regarding arguments available to

59. See, e.g., SUSAN BREAU, HUMANITARIAN INTERVENTION: THE UNITED NATIONS & COLLECTIVE RESPONSIBILITY 26 (2005); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 710-12 (6th ed. 2003); Byers & Chesterman, *supra* note 2, at 177; CHESTERMAN, *supra* note 1, at 219; Thomas M. Franck, *Interpretation and Change in the Law of Humanitarian Intervention*, in HUMANITARIAN INTERVENTION, *supra* note 1, at 204-05; LEPARD, *supra* note 39, at 336; FERNANDO R. TESÓN, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY 3 (3d. ed. 2005); Christopher Greenwood, *International Law and NATO Intervention in Kosovo*, Memorandum Submitted to the Foreign Affairs Committee of the House of Commons, reprinted in 49 INT'L & COMP. L.Q. 926, 926 (2000).

60. E.g., Cassese, *supra* note 28, at 25 (stating that "from an *ethical* viewpoint resort to armed force was justified. Nevertheless, as legal scholar I cannot avoid observing in the same breath that this moral action is *contrary to current international law*."); Franck, *supra* note 59, at 226 (arguing "the unlawfulness of [humanitarian intervention] was mitigated, to the point of exoneration," because the circumstances were brutally calamitous).

61. For details of what elements must be fulfilled to fall within the doctrine, see *infra* Part 5.

62. *Gabčíkovo-Nagymaros Project* (Hung. v. Slov.), 1997 I.C.J. 7, ¶ 51 (Sept. 25).

intervening states are only with regard to "independent" humanitarian intervention.

The General Assembly and Uniting for Peace: The Often-Overlooked Origins of Independent Humanitarian Intervention

The international community collectively addressed the often underappreciated possibility of inaction on the part of the Security Council as early as 1950.⁶³ Faced with SC inaction in response to Russian Vetoes during the Korean War, the General Assembly passed resolution 377 (V), more commonly referred to as "Uniting for Peace."⁶⁴ The resolution states that should the SC, because of lack of unanimity of the permanent members, fail to exercise its primary responsibility to maintain international peace and security, then states, upon "recommendation" of the GA, may resort to "armed force when necessary, to maintain or restore international peace and security."⁶⁵ To ensure that the Resolution would have effect, the GA created the "emergency special session" (ESS) to ensure prompt action in the face of a SC stall.⁶⁶ Accordingly, an ESS can be called within 24 hours in one of two ways, either (1) at the request of the GA upon a two-thirds majority vote, or (2) on the basis of a procedural vote in the SC, which cannot be blocked by a P5 veto.⁶⁷

The Resolution can be viewed as the beginning of independent humanitarian intervention in the modern era for several reasons. First, the resolution was passed with a vote of 52 to 5, with two abstentions, which indicates wide international support.⁶⁸ Additionally, *Uniting for Peace* has been invoked ten times since its inception,⁶⁹ and in at least two instances, first in the Suez Canal and then in Namibia, the GA did in fact call upon states to render military assistance.⁷⁰ The response of the ICJ in both the *Wall Opinion* and *Certain Expenses* affirmed the legality of these "peacekeeping" operations under the authorization of the GA, and indirectly, of the underlying *Uniting for Peace* Resolution.⁷¹

63. See *Uniting for Peace*, *supra* note 49, at 10.

64. *Id.*

65. *Id.* ¶ 1.

66. *Emergency Special Sessions*, GEN. ASSEMBLY OF THE UNITED NATIONS, www.un.org/ga/sessions/emergency.shtml [hereinafter ESS] (last visited Sept. 18, 2011).

67. *Uniting for Peace*, *supra* note 49, Annex ¶ 1.

68. Christian Tomuschat, *Uniting for Peace: General Assembly Resolution 377(V), Procedural History*, UNITED NATIONS AUDIOVISUAL LIBRARY OF INTERNATIONAL LAW (2008), <http://untreaty.un.org/cod/avl/ha/ufp/ufp.html>.

69. ESS, *supra* note 66.

70. G.A. Res. ES-8/2, ¶ 6, U.N. Doc. A/RES/ES-8/2 (Sept. 11, 1981); GA. Res. 1000 (ES-I), ¶ 1, U.N. Doc. A/RES/1000 (Nov. 5, 1956).

71. Legal Consequences of Construction of Wall in Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 28 (July 9); *Certain Expenses of United Nations*:

Moreover, the ICJ has explicitly found that a series of GA resolutions such as those following *Uniting for Peace* “may show the gradual evolution of the *opinio juris* required for the establishment of a new rule,”⁷² and that *opinio juris* may be deduced by carefully examining the “attitude of States towards certain General Assembly resolutions”⁷³ Because *Uniting for Peace* allowed for force without going through the SC, manifest evidence indicates a shift away from a SC monopoly on the use of force as early as 1950.

All in all, the *Uniting for Peace* Resolution, its subsequent implementation, and the response of the international community illustrates widespread state support for the position that the SC is neither solely responsible for maintaining peace and security nor does it hold a monopoly on the use of force.⁷⁴ More importantly, it affirms that states will be justified, in limited circumstances, in acting without SC authorization. In short, *Uniting for Peace* provides an alternative to the SC when peace and security is threatened, and proclaims that *authorization is not always necessary for states to be justified in the use of force*.

INDEPENDENT HUMANITARIAN INTERVENTION: CASE STUDIES

Uniting for Peace confirms that the Security Council is not the only means to address atrocity situations. However, the Resolution could conceivably work against proponents of independent HI, as it is yet another mechanism available (arguably through the Charter) to those states willing to intervene in situations of mass atrocity. In other words, to have their actions legitimized, states should request a vote through the GA to act through *Uniting for Peace* before taking matters into their own hands. In fact, it could feasibly be argued that if a state could not attain the two-thirds required support of the GA, then it is not justified in taking independent action anyway. *Uniting for Peace* also seems to answer questions of urgency, as an ESS can be convened within 24 hours.⁷⁵ This scenario presents a compelling argument: because proponents point to the P5 veto as the predominant change in circumstance justifying HI, and because the international community has already addressed situations of veto deadlock by allowing *Uniting*

Article 17, Paragraph 2, of Charter, Advisory Opinion, 1962 I.C.J. 151, 165-68 (July 20); ALVAREZ, *supra* note 42, at 126.

72. Legality of Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶¶ 70-71 (July 8); *see also* Wall, 2004 I.C.J., ¶ 3 (separate opinion of Judge Al-Khasawneh) (“[R]esolutions . . . while not binding, nevertheless produce legal effects and indicate a constant record of the international community’s *opinio juris*.”).

73. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 188 (June 27).

74. *Certain Expenses*, 1962 I.C.J. at 165-68; *Uniting for Peace*, *supra* note 49.

75. ESS, *supra* note 66.

for *Peace* actions, states must attempt to go through the GA in order to claim independent HI is justifiable.

While utilizing *Uniting for Peace* might be desirable, this argument is not fully persuasive for two reasons. First, even if *Uniting for Peace* provides an alternative mechanism, the GA is not "authorizing" force *per se*, as only the SC has the power to do. Instead, it is merely recognizing an independent means for states to act – with international support. Therefore, there is no legal requirement that the GA "authorize" forceful HI. Second, state practice indicates that such a process is not necessary in the face of atrocity crimes. Proponents of independent HI point to a variety of interventions to support independent HI, none of which utilized *Uniting for Peace*, but which nonetheless lead these distinguished publicists to conclude that HI is lawful.⁷⁶ Some attention is given, for example, to interventions undertaken in the 1970s by India into East Pakistan, Vietnam into Cambodia, and Tanzania into Uganda.⁷⁷ Others also mention intervention by Belgium into the Congo in the 1960s,⁷⁸ Syria's Invasion of Lebanon in 1976,⁷⁹ France's invasion into the Central African Republic in 1979,⁸⁰ as well as India's invasion of Sri Lanka in 1987.⁸¹ Admittedly, it is difficult to maintain that these interventions in themselves led to a custom of HI, primarily due to the concomitant (and primary) reliance of the intervening states on claims of self-defense for legal justification.⁸² Nonetheless, they represent a development by which states began to recognize that intervention for humanitarian motives might deserve a place in modern international law. More importantly, states began to justify their actions based on HI in a way that resembled *opinio juris*, even if not yet explicitly doing so by claiming "legality" through HI.

Moving to the 1990s, however, a discernible trend became apparent: for the first time, states began to intervene solely upon humanitarian justifications, and they began to do so with the explicit

76. *E.g.*, TESÓN, *supra* note 59, at 418; Charney, *supra* note 47, at 838; Greenwood, *supra* note 59, at 931; Nanda et al., *supra* note 4, at 862; Reisman, *supra* note 20, at 860; Rogers, *supra* note 4, at 732.

77. BREAU, *supra* note 59, at 33-34; TESÓN, *supra* note 20, at 207-08; NICHOLAS J. WHEELER, SAVING STRANGERS: HUMANITARIAN INTERVENTION IN INTERNATIONAL SOCIETY 2 (2000); Jean-Pierre L. Fonteyne, *The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity Under the U.N. Charter*, 4 CAL. W. INT'L L.J. 203, 204 (1973-1974).

78. *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, [2001] 2 Y.B. Int'l L. Comm'n 84, ¶ 21, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part II) [hereinafter DASR].

79. BREAU, *supra* note 59, at 33.

80. *Id.*

81. *Id.*

82. *See, e.g.*, CHESTERMAN, *supra* note 1, at 1, 73, 79, 117.

support of regional organizations. Four such interventions dominate the discussion. First, in 1992, the U.S., U.K., and Coalition forces intervened in Iraq, without SC authorization, to maintain no-fly zones over parts of both northern and southern Iraq to protect the Kurdish and Shi'i populations, respectively. Second, the East African Community of West African States (ECOWAS) engaged in two humanitarian interventions, one into Liberia beginning in the early 1990s and then into Sierra Leone towards the end of the same decade. Again, in neither situation did the SC authorize intervention prior to ECOWAS's use of forceful measures. Finally, the most conspicuous and highly scrutinized HI is, of course, the unauthorized intervention by the North Atlantic Treaty Organization (NATO) forces into Kosovo and surrounding regions in 1999.

This brings this study to the heart of the matter – whether there exists sufficient evidence of the two component parts of customary international law to conclude that HI is acceptable under modern international law.⁸³ Necessarily, this analysis begins with the “individual” actions and statements of states, but is more fully analyzed by also examining the “collective” actions and statements of states through a diverse array of international organizations. The case studies below provide for such a process.

Iraq 1991-1992

In the wake of “Operation Desert Storm,” members of the international community again invaded Iraq, this time without explicit SC authorization, to establish no-fly zones aimed at protecting Kurdish groups in the north and Shi'i groups in the south.⁸⁴ Both groups had faced decades of persecution and gross human rights violations under the reign of Saddam Hussein.⁸⁵ In the late 1980s, for example, chemical weapons were used to target the Kurdish population, leading Human Rights Watch to conclude that the acts amounted to genocide.⁸⁶ Approximately 182,000 Kurds were murdered during this period, and some equated the action with the Nazi campaign against the Jews.⁸⁷ Despite the destruction of nearly 5,000 Kurdish villages and the

83. For further background on the interventions addressed herein, Professor Susan Breau presents a very comprehensive and well-written review on the factual background of each intervention. BREAU, *supra* note 59, at 33-147.

84. *Id.* at 87.

85. *Id.*

86. *Id.* at 88; HUMAN RIGHTS WATCH/MIDDLE EAST, IRAQ'S CRIME OF GENOCIDE: THE ANFAL CAMPAIGN AGAINST THE KURDS 17-19 (1995).

87. BREAU, *supra* note 59, at 89; SHERI LAIZER, MARTYRS, TRAITORS AND PATRIOTS: KURDISTAN AFTER THE GULF WAR 2 (1996); *see also, e.g.*, SAMANTHA POWER, A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE 172, 203 (2002).

displacement of countless individuals,⁸⁸ the remaining Kurds staged a meager rebellion in March 1991.⁸⁹ Hussein again went on the offensive, targeting Kurd civilians with napalm and brutal targeted bombing campaigns. By early May, over one million refugees had fled to Iran and nearly 500,000 to Turkey.⁹⁰ Simultaneously, the Shi'i Muslim population in the south of Iraq was also subjected to gross mistreatment. Though differing in extent, with no indications of genocidal intent, the Shi'i were denied basic rights, expelled to neighboring countries, and subjected to artillery attacks.⁹¹ By early 1991, both conflicts undoubtedly involved extensive atrocity crimes and the clear targeting of distinct ethnic groups.

In April 1991, several countries wrote letters to the SC asking for a SC meeting to designate the situation in Iraq "a threat to international peace and security."⁹² After extensive international pressure, the SC finally passed Resolution 688, which "*demand[ed]* that Iraq, as a contribution to removing the threat to international peace and security in the region, immediately end this repression"⁹³ In doing so, however, Resolution 688 was not passed under Chapter VII, nor did it set up safe havens or no-fly zones.⁹⁴ China and Russian veto threats prevented any UN-authorized forceful action.

The lack of SC authorization did not prevent forceful humanitarian intervention, however. On April 17, 1991, "Operation Provide Comfort" was implemented under the leadership of the United States, the United Kingdom, and France,⁹⁵ with substantial support from Germany, Italy,

88. AMNESTY INTERNATIONAL, ANNUAL REPORT 257-60 (1989), *reprinted in* IRAQ AND KUWAIT: THE HOSTILITIES AND THEIR AFTERMATH 650-51 (Marc Weller ed., 1993).

89. BREAU, *supra* note 59, at 89.

90. MICHAEL M. GUNTER, THE KURDS OF IRAQ: TRAGEDY AND HOPE 52-54 (1992); *see also* Special Rapporteur of the Comm'n on Human Rights, *Report on the Situation of Human Rights in Iraq*, Comm'n on Human Rights, U.N. Doc. E/CN.4/1992/31 (Feb. 18, 1992) (by Max Van der Stoep) (providing a full report on the situation).

91. Special Rapporteur of the Comm'n on Human Rights, Letter dated July 29, 1992 from the Special Rapporteur addressed to the Minister for Foreign Affairs of Iraq, *reprinted in* Charges D'Affaires A.I., Letter dated 3 Aug. 1992 from the Charge D'Affaires A.I. of the Permanent Mission of Belgium to the U.N. addressed to the President of the Security Council, 12-13, U.N. Doc. S/24386 (Aug. 5, 1992); *see also* BREAU, *supra* note 59, at 92.

92. Permanent Rep. of Turkey to the U.N., Letter dated Apr. 2, 1991 from the Permanent Rep. of Turkey addressed to the President of the Security Council, U.N. Doc. S/22435 (Apr. 3, 1991); Charge D'Affaires A.I. of the Permanent Mission of France, Letter dated Apr. 4, 1991 from the Charge D'Affaires A.I. of the Permanent Mission of France addressed to the President of the Security Council, U.N. Doc. S/22442 (Apr. 4, 1991); Permanent Rep. of the Islamic Republic of Iran to the U.N., Letter dated Apr. 4, 1991 from the Permanent Representative of the Islamic Republic of Iran to the United Nations addressed to the Secretary-General, U.N. Doc. S/22447 (Apr. 4, 1991).

93. S.C. Res. 688, ¶ 2, U.N. Doc. S/RES/688 (Apr. 5, 1991) (emphasis added).

94. *See id.*

95. BREAU, *supra* note 59, at 95.

and the Netherlands.⁹⁶ A large northern area of Iraq was officially declared a “no-fly” zone, and safe havens were provided for the beleaguered Kurdish populations.⁹⁷ Threats of forceful action kept Iraqi forces from entering the predominately Kurdish areas. The second phase of the intervention, which mirrored the first, began in southern Iraq in August 1992. Despite GA condemnation of Iraq’s human rights abuses, there was no SC authorization in either situation.⁹⁸ The no-fly zones in both regions continued until 2003.

The primary justification for the unauthorized intervention was humanitarian necessity.⁹⁹ Coalition forces explicitly proclaimed that they were “operat[ing] under international law . . . [which] recognizes extreme humanitarian need.”¹⁰⁰ The intervening states concurrently relied upon Resolution 688, claiming “a rubric exists within 688 to avoid need for a separate resolution”¹⁰¹ and that the action was “consistent with United Nations Security Council Resolution 688.”¹⁰² However, to clarify, the acting states did not claim that their action was authorized *per se*. Instead, they argued that the circumstances in Iraq, which amounted to a humanitarian disaster, justified their actions *despite* a lack of explicit SC authorization. Notably, the states made explicit claims that their actions were not only justified, but lawful. As a result, Operation Provide Comfort was carried out with an *opinio juris* placing independent humanitarian intervention within the realm of customary law.

In response to the humanitarian intervention, the world responded with tacit approval. The UN Secretary-General celebrated that the principle of non-intervention “cannot be regarded as a protective barrier behind which human rights could be massively or systematically violated with impunity”¹⁰³ Likewise, the SC did not even consider any resolution in opposition to the no-fly zones and safe havens;¹⁰⁴ and in a debate before the GA in 1992 to consider the human rights

96. KEESING’S RECORD OF WORLD EVENTS 38127 (Vol. 37, Apr. 1991).

97. *Id.*; BREAU, *supra* note 59, at 95.

98. See G.A. Res. 47/145, U.N. Doc. A/RES/47/145 (Dec. 18, 1992).

99. BREAU, *supra* note 59, at 97.

100. *Id.* at 98 (quoting Douglas Hurd’s response to a question on the “Today” Program regarding lack of a United Nations resolution authorizing action); see also Geoffrey Marston, *United Kingdom Materials on International Law 1992*, 63 BRIT. Y.B. INT’L L. 615, 826-27 (1992).

101. Statement by the UK Prime Minister: A Safe Haven for the Kurds, U.K. Foreign and Commonwealth Office Press Office (Apr. 8, 1991), noted in NEIL FENTON, UNDERSTANDING THE U.N. SECURITY COUNCIL: COERCION OR CONSENT? 47-48 (2004).

102. BREAU, *supra* note 59, at 98 (quoting President Bush speaking during a press conference on Apr. 16, 1991).

103. U.N. Secretary-General, *Report of the Secretary-General on the Work of the Organization*, at 5 (U.N. Doc. A/46/1 (Sept. 13, 1991)).

104. See U.N. SCOR, 47th Sess., 3105th mtg., U.N. Doc. S/PV.3105 (Aug. 11, 1992).

situation in Iraq, several states explicitly supported the intervention.¹⁰⁵ Admittedly, a number of states also argued that the intervention could not be justified based on either a right to unilateral intervention or on the basis of SC authorization.¹⁰⁶ Yet, when GA Resolution 47/145 was passed, the resolution failed to mention the intervention or condemn the actions of the Coalition Forces.¹⁰⁷ In the end, states did not act to condemn the actions of the intervening states, either legally or politically.

Liberia 1990-1997

Corresponding with intervention in Iraq, human rights atrocities were unfolding in West Africa that could no longer be ignored. After years of civil strife and several failed coups, in late 1989 Charles Taylor and his rebel troops (the NPFL) invaded across the Ivory Coast border to challenge Liberian President Samuel Doe's power.¹⁰⁸ A "campaign of savage violence" immediately ensued, in which civilians became the target of malicious reprisals by both sides.¹⁰⁹ The devastation was so great that it attracted widespread international attention, and both sides were accused of "ethnic purging."¹¹⁰ Massacres were frequent, sexual violence was rampant, and torture was common, prompting hundreds of thousands to flee in search of refuge in the neighboring countries of Guinea, Ivory Coast, and Sierra Leone.¹¹¹ Large-scale war crimes and crimes against humanity were unmistakable.

In response, the Economic Community of West African States (ECOWAS) created a transnational peacekeeping force (ECOMOG) to intervene and protect the civilian population from the ongoing atrocity crimes.¹¹² In similar fashion to the concurrent "no-fly zones" in Iraq, the intervention was conducted in parallel to the United Nations and the SC, but it was forcefully led by a regional organization without gaining prior SC authorization.¹¹³ From the beginning, ECOWAS took

105. BREAU, *supra* note 59, at 101-02.

106. *Id.*

107. *Id.*; see G.A. Res. 47/145, U.N. Doc. A/RES/47/145 (Dec. 18, 1992); United Nations, Econ. & Soc. Council, Comm. on Human Rights, at 12-13, U.N. Doc. E/CN.4/1992/71 (Feb. 18, 1992).

108. BREAU, *supra* note 59, at 75-76.

109. I.A. NASS, A STUDY IN INTERNAL CONFLICTS: THE LIBERIAN CRISIS & THE WEST AFRICAN PEACE INITIATIVE 60-61 (2000).

110. ICRC Report, *Liberia: Terrible Human Tragedy, 1990*, in REGIONAL PEACE-KEEPING AND INTERNATIONAL ENFORCEMENT: THE LIBERIAN CRISIS 123-24 (M. Weller ed., 1994); BREAU, *supra* note 59, at 76-77.

111. BREAU, *supra* note 59, at 76-77.

112. SEAN D. MURPHY, HUMANITARIAN INTERVENTION: THE UNITED NATIONS IN AN EVOLVING WORLD ORDER 150 (1996).

113. See BREAU, *supra* note 59, at 78-83

many steps to peacefully settle the conflict.¹¹⁴ However, after peaceful means failed, a “total peace plan was adopted.”¹¹⁵ Part of the plan was to provide ECOMOG with a mandate for armed intervention.¹¹⁶

Again, the primary justification for intervention into Liberia was humanitarian necessity, namely the need to protect human life and address the threat to international peace and security.¹¹⁷ The justification was made despite a marked absence of SC authorization to use force. And in similar fashion to coalition forces in Iraq, ECOWAS’s belief that its action was legal was readily apparent. In 1978 ECOWAS created a Protocol on Non-Aggression, which affirmed the members’ obligations to refrain from aggressive uses of force under Article 2(4) of the Charter.¹¹⁸ Nevertheless, ECOWAS explicitly chose to use force without SC authorization. Thus, ECOWAS’s forceful actions in Liberia and subsequent justifications provide evidence of not only a customary norm of independent humanitarian intervention, but also reveal the organization’s belief that the Charter does not prohibit such action. In other words, the members of ECOWAS concluded their humanitarian actions were non-aggressive, in line with Article 2(4), and lawful. Once more, the requisite *opinio juris* element to custom was manifest.

The tremendously positive international reaction buttressed ECOWAS’s position. The explicit support of the SC itself is most notable. In November 1992, the SC passed resolution 788,¹¹⁹ which primarily did three things: first, it imposed a complete embargo on all deliveries of weapons to Liberia; second, it declared the situation to be a “threat to international peace and security”; and, finally, it actually endorsed and commended the unauthorized ECOWAS intervention.¹²⁰ In the meetings to resolution 788, countries as diverse as the United States, Russia, and China all commended the ECOWAS intervention and its role in resolving the conflict.¹²¹ Likewise, in 1991, the President of the SC stated: “The members of the Security Council commend the efforts made by the ECOWAS Heads of State and Government to promote peace and normalcy in Liberia,”¹²² repeating these sentiments

114. MURPHY, *supra* note 112, at 149-50.

115. BREAU, *supra* note 59, at 79.

116. *Id.* at 79-80.

117. Comfort Ero, *ECOWAS and the Subregional Peacekeeping in Liberia*, J. HUMANITARIAN ASSISTANCE (Sept. 25, 1995), <http://sites.tufts.edu/jha/archives/66>.

118. BREAU, *supra* note 59, at 78-79 (citing ECOWAS Protocol on Non-Agression, Apr. 22, 1978).

119. S.C. Res. 788, U.N. Doc. S/RES/788 (Nov. 19, 1992).

120. *Id.*; see also S.C. Res. 813, U.N. Doc. S/RES/813 (Mar. 26, 1993).

121. U.N. SCOR, 47th Sess., 3138th mtg. at 66, 71, 74-75, U.N. Doc. S/PV.3138 (Nov. 19, 1992).

122. U.N. President of the S.C., Note by the President of the Security Council, U.N. Doc. S/22133 (Jan. 22, 1991); see also BREAU, *supra* note 59, at 84.

again in May 1992.¹²³ In the words of Professor Breau, "the international community as represented in the Security Council was *unanimous* in this approval notwithstanding that there had not been any type of enabling resolution by the United Nations."¹²⁴

Sierra Leone 1998

The crisis in Sierra Leone somewhat mirrored the disaster in neighboring Liberia, leading to the displacement of hundreds of thousands of Sierra Leoneans (about one tenth of the population).¹²⁵ Not only was the conflict in Sierra Leone similar to Liberia, but it also had a direct link, as Charles Taylor had sent troops across the border from Liberia in March 1991 in retaliation for Sierra Leone's provision of an ECOMOG base in 1990.¹²⁶ The Liberian NPFL joined forces with the Sierra Leonean Revolutionary Patriotic Front (RUF), and the groups set up a permanent headquarters in Sierra Leone.¹²⁷ This led to protracted conflict between the existing government and several rebel groups competing for power. Within 18 months of the conflict, at least 400,000 civilians had been displaced,¹²⁸ and in April the government was overthrown.¹²⁹ The war continued, however, and attacks upon the civilian population persisted. By late 1994, the RUF attacks had spread to nearly all parts of the country.¹³⁰

Throughout the conflict, numerous reports emerged documenting the grave extent of the atrocities. The International Committee of the Red Cross warned, for example, that something needed to be done to stop the disaster from turning into another Rwanda.¹³¹ The United

123. U.N. SCOR, 47th Sess., 3071st mtg. at 3, U.N. Doc. S/PV.3071 (May 7, 1992).

124. BREAU, *supra* note 59, at 85. Professor Breau notes that the Organization of African Unity also supported ECOWAS's humanitarian intervention, even going so far as to provide financial assistance, and that Western states, including the United States, Great Britain, and the European Union, also supported the action by contributing financial assistance. *Id.* at 84 (emphasis added).

125. *Id.* at 103. Throughout this time, there were several instances of ECOMOG and British involvement at the request of the existing government. The intervention that this study focuses on, however, is the ECOWAS intervention of February 1998, which again occurred independently of Security Council authorization, and was conducted without consent for the purpose of bringing the humanitarian disaster to an end.

126. *Id.*

127. STEPHEN ELLIS, *THE MASK OF ANARCHY: THE DESTRUCTION OF LIBERIA AND THE RELIGIOUS DIMENSION OF AN AFRICAN CIVIL WAR* 93 (1999).

128. EARL CONTEH-MORGAN & MAC DIXON-FYLE, *SIERRA LEONE AT THE END OF THE TWENTIETH CENTURY: HISTORY, POLITICS, AND SOCIETY* 128-29 (1999).

129. BREAU, *supra* note 59, at 103.

130. *Id.*

131. *Id.* at 104.

States issued similar reports of torture, rape, and sexual slavery,¹³² and Amnesty International reported that 250,000 Sierra Leonean refugees had fled to Guinea and Liberia.¹³³ Médecins Sans Frontières also released reports that armed groups in Sierra Leone were “implementing a policy of terror against civilians.”¹³⁴ Widespread atrocity crimes were unquestionable.

Heeding these warnings, ECOWAS again took action. And following a May 1997 coup, the organization convened and issued a final communiqué, urging: “that no State recognize the regime installed following the coup of May 25, 1997, and that every effort be made to restore the lawful government by a combination of three measures, i.e.: the use of dialogue; the application of sanctions, including an embargo; *and the use of force.*”¹³⁵ But despite continued pressure, by the end of 1997 it was apparent that the rebel groups were not disarming and the diplomatic peace efforts were not succeeding.¹³⁶ ECOWAS thus reconvened and issued the final communiqué, once again specifically referencing “the use of force.”¹³⁷ In early 1998, ECOMOG engaged in both bombing campaigns and ground operations.¹³⁸ The SC had not authorized the forceful actions.¹³⁹

The ECOWAS communiqués set forth the justifications for its actions. The organization referred to the “bloodshed and other loss of human life,” the increase of refugees in other neighboring countries, and the threat to peace and security in the region.¹⁴⁰ In similar fashion to intervention in Liberia, the actions were justified by humanitarian

132. U.S. DEPT OF STATE, SIERRA LEONE COUNTRY REPORT ON HUMAN RIGHTS PRACTICES FOR 1997 (1998), *available at* <http://www.sierra-leone.org/Other-Conflict/US-013098.html>.

133. BREAU, *supra* note 59, at 105.

134. *Id.*

135. ECOWAS Foreign Ministers Committee of Four, *Final Communiqué*, ¶ 9 (June 26, 1997), *available at* <http://www.sierra-leone.org/Other-Conflict/ECOWAS-062697.html>; *see also* Permanent Rep. of Nigeria to the U.N., Letter dated 27 June 1997 from the Permanent Rep. of Nigeria to the United Nations addressed to the President of the Security Council, U.N. Doc. S/1997/499 (June 27, 1997) (emphasis added).

136. Karsten Nowrot & Emily W. Schabacker, *The Use of Force to Restore Democracy: International Legal Implications of the ECOWAS Intervention in Sierra Leone*, 14 AM. U. INT'L L. REV. 321, 328-29 (1998).

137. ECOWAS Foreign Ministers Committee of Five, *Final Communiqué*, ¶ 6 (Feb. 5-6, 1998), *available at* <http://www.sierra-leone.org/Other-Conflict/ECOWAS-020698.html>.

138. BREAU, *supra* note 59, at 108.

139. *See* S.C. Res 1132, U.N. Doc. S/RES/1132 (Oct. 8, 1997) The Resolution did not authorize force, but stated the Council was “gravely concerned” at the . . . deteriorating humanitarian conditions’ in Sierra Leone, and reiterating that the SC had “determined” that the situation constituted a “threat to international peace and security in the region.” *Id.*

140. BREAU, *supra* note 59, at 111. Notably, ECOWAS also referred to restoring the democratically elected government of Kabbah, self-defense of the ECOMOG troops, and humanitarian disaster. *Id.*

necessity. And like the previously mentioned interventions, the international community responded with approval. In the debates surrounding SC Resolution 1132, the participating states praised ECOWAS's continued attempts to halt the conflict.¹⁴¹ The President of the SC similarly praised ECOWAS,¹⁴² and the UN Secretary-General applauded the diplomacy of ECOWAS and the contributions made by ECOMOG officers in removing the military junta.¹⁴³ The SC even took the extra step and passed multiple resolutions once again "commending" both ECOWAS and ECOMOG for their intervention into Sierra Leone.¹⁴⁴ For the third time in less than a decade, there was patent support for independent humanitarian intervention.

Kosovo 1999

Clearly the most important precedent for independent HI is NATO's intervention into Kosovo in 1999. Not only was the intervention followed by the clearest claims of humanitarian intervention as a legal right,¹⁴⁵ but it also received near universal reaction from states, as well as innumerable commentaries from international lawyers.¹⁴⁶ The foremost justification by NATO was that Former Republic of Yugoslavia (FRY) authorities were carrying out massacres, grave breaches of human rights, mass expulsions of a particular ethnic group (ethnic cleansing), and that the humanitarian catastrophe constituted a threat to peace and security.¹⁴⁷ It thus claimed that its intervention was "necessary" to prevent the humanitarian catastrophe. The situation prompted apt consideration of the question: "Should one remain silent and inactive only because the existing body of international law proves incapable of remedying such a situation? Or, rather, should respect for the Rule of Law be sacrificed on the altar of human compassion?"¹⁴⁸ Perhaps the two options are not so exclusive.

141. U.N. SCOR, 52d Sess., 3822d mtg. *passim*, U.N. Doc. S/PV.3822 (Oct. 8, 1997).

142. U.N. President of the S.C., Statement by the President of the Security Council, U.N. Doc. S/PRST/1998/5 (Feb. 26, 1998).

143. U.N. Secretary-General, *Fourth Report of the Secretary-General on the Situation in Sierra Leone*, ¶ 38, U.N. Doc. S/1998/249 (Mar. 18, 1998).

144. S.C. Res. 1289, ¶ 8, U.N. Doc. S/RES/1289 (Feb. 7, 2000); S.C. Res. 1270, ¶ 7, U.N. Doc. S/RES/1270 (Oct. 22, 1999); S.C. Res. 1162, ¶ 2, U.N. Doc. S/RES/1162 (Apr. 17, 1998).

145. See Legality of Use of Force (Serb. & Montenegro v. Belg.), 1999 I.C.J. Oral Pleadings II, at 6 (May 10, 1999), available at <http://www.icj-cij.org/docket/files/105/4515.pdf>.

146. See, e.g., Cassese, *supra* note 28, at 28-29.

147. *Id.* at 25; see U.N. SCOR, 54th Sess., 3988th mtg. *passim*, U.N. Doc. S/PV.3988 (Mar. 24, 1999).

148. Cassese, *supra* note 28, at 25.

The conflict in Kosovo stemmed from Slobodan Milosevic's refusal to recognize Kosovo as autonomous.¹⁴⁹ The refusal led to increased tensions in the region, and reports of violence against the civilian population began to surface as early as 1990.¹⁵⁰ For the next several years, hostilities continued to escalate, accompanied by numerous reports of discriminatory mistreatment, arbitrary detention, forced disappearances, and torture.¹⁵¹ In 1998, full scale armed conflict was underway.¹⁵² And on October 3, 1998, the UN Secretary-General issued a report to the SC describing the targeting and mass killing of civilians in Kosovo, comparing them to the atrocities seen earlier in Bosnia and Herzegovina, which included the Srebrenica genocide and other instances of massive ethnic cleansing.¹⁵³

On October 9, 1998, NATO Secretary-General Javier Solana proclaimed "the danger of a humanitarian catastrophe" in Kosovo "loomed large."¹⁵⁴ He contended that "a brutal campaign of forced deportation, torture and murder" plagued the region, and that the humanitarian catastrophe was evidence that the threat was spreading and intensifying.¹⁵⁵ This contention was supported by a myriad of other reports by international organizations operating in the area.¹⁵⁶ The SC, through Resolution 1199, even expressed grave concern at the fighting in Kosovo "and in particular the excessive indiscriminate use of force by Serbian security forces and the Yugoslav Army which have resulted in numerous civilian casualties and, according to the estimate of the [UN] Secretary-General, the displacement of over 230,000 persons from their homes."¹⁵⁷ The full extent of the situation finally caught the attention of the international community by early 1999, and the atrocities in Kosovo were deemed ethnic cleansing.¹⁵⁸

149. See BREAU, *supra* note 59, at 120; KEESING'S RECORD OF WORLD EVENTS 37725-26 (Vol. 36, Sept. 1990).

150. KEESING, *supra* note 149, at 37725-26.

151. See, e.g., U.N. Secretary-General, *Report of the Secretary-General Prepared Pursuant to Resolutions 1160 (1998), 1199 (1998) and 1203 (1998) of the Security Council*, ¶ 34, U.N. Doc. S/1998/1068 (Nov. 12, 1998).

152. TOM PERRIELLO & MARIEKE WIERDA, INT'L CTR. FOR TRANSITIONAL JUSTICE, LESSONS FROM THE DEPLOYMENT OF INTERNATIONAL JUDGES AND PROSECUTORS IN KOSOVO 5 (2006).

153. U.N. Secretary-General, *Report of the Secretary-General Prepared Pursuant to Resolutions 1160 (1998) and 1199 (1998) of the Security Council*, ¶ 9, U.N. Doc. S/1998/912 (Oct. 3, 1998).

154. Cassese, *supra* note 28, at 28; see also Simma, *supra* note 19, at 7.

155. Cassese, *supra* note 28, at 28.

156. *Id.*

157. S.C. Res. 1199, at 1, U.N. Doc. S/RES/1199 (Sept. 23, 1998); see also S.C. Res. 1203, at 2, U.N. Doc. S/RES/1203 (Oct. 24, 1998); S.C. Res. 1160, at 1, U.N. Doc. S/RES/1160 (Mar. 31, 1998).

158. BREAU, *supra* note 59, at 125.

By the time NATO intervened in March of 1999, peaceful means of settling the conflict had been exhausted.¹⁵⁹ Multiple meetings had been called,¹⁶⁰ the SC had imposed arms embargos,¹⁶¹ various international diplomats visited Belgrade,¹⁶² and multiple peace talks were held in the region.¹⁶³ A verification mission was also attempted under the authorization of the UN to allow NATO flights over the Kosovo region.¹⁶⁴ However, all efforts failed, and the cease-fire collapsed by early 1999. NATO made further efforts at negotiation at Rambouillet, but Milosevic failed to agree to international terms for protecting Kosovo civilians, stating "he would rather face air-strikes than a peacekeeping force."¹⁶⁵ In response, because the SC was unable to take decisive action, NATO commenced the most publicized independent humanitarian intervention to date, and bombing began on March 24, 1999.¹⁶⁶

At the time of the intervention, the international community responded with tacit approval. In the words of Antonio Cassese, no state or group of states took the action "that would have been obvious" in the presence of significant disapproval: to bring the matter before the General Assembly.¹⁶⁷ Regional organizations seemed content with the intervention, convening no official sessions, and, the SC likewise called no emergency meeting to order. In fact, when given the opportunity to unequivocally condemn NATO's intervention, the SC refused, defeating (by a vote of 12 to 3) a Draft Resolution put forth to denounce NATO for violating Articles 2(4), 24, and 53 of the UN Charter.¹⁶⁸ By voting against the resolution, the SC tacitly pronounced that the circumstances of NATO's intervention did *not* violate those provisions, effectively endorsing HI. A contrary conclusion would entail a finding that the SC itself acted contrary to its responsibilities under the

159. Cassese, *supra* note 28, at 28.

160. S.C. Res. 1160, at 1, U.N. Doc. S/RES/1160 (Mar. 31, 1998) (noting that the OSCE met on March 11, 1998, to condemn Serb actions); Permanent Rep. of Bulg. to the U.N., Letter dated 13 March 1998 from the Permanent Rep. of Bulg. to the United Nations addressed to the Secretary-General, U.N. Doc. S/1998/234 (Mar. 13, 1998) (issuing a joint declaration by the Ministers of Foreign Affairs of countries of south-eastern Europe for Serbian authorities to find a solution to the conflict).

161. S.C. Res. 1199, at 1, U.N. Doc. S/RES/1199 (Sept. 23, 1998); S.C. Res. 1160, ¶ 8, U.N. Doc. S/RES/1160 (Mar. 23, 1998).

162. BREAU, *supra* note 59, at 127.

163. *Id.*

164. S.C. Res. 1203, ¶ 3, U.N. Doc. S/RES/1203 (Oct. 24, 1998).

165. BREAU, *supra* note 59, at 131.

166. *Id.* at 132.

167. Cassese, *supra* note 28, at 29.

168. U.N. SCOR, 54th Sess., 3989th mtg. at 6, U.N. Doc. S/PV.3989 (Mar. 26, 1999); see also S.C. Draft Res. 328, U.N. Doc. S/1999/328 (Mar. 26, 1999).

Charter.¹⁶⁹ Going even further, SC Resolution 1244, which subsequently authorized force under UN auspices, contained no criticism whatsoever of NATO's use of force, not even implicitly.¹⁷⁰

Not only did states tacitly approve of NATO's intervention, but many actually took the extra step and openly supported the action. For example, while attending the emergency SC session, Albania and Bosnia-Herzegovina explicitly commended NATO's action.¹⁷¹ The European Union also sent a communication to the Secretary-General endorsing the NATO intervention.¹⁷² Both responses showed that Europe, the continent most affected by the tragedy, supported the intervention. Beyond Europe, states as diverse as the members of the Organization of Islamic States publically supported the action, expressing "regret" that the SC failed to uphold its primary responsibility under the Charter.¹⁷³ The only states explicitly speaking out against the intervention at the time included the FRY, Russia, China, Cuba, Belarus, Ukraine, Namibia, India, and, ambiguously, Mexico.¹⁷⁴

Equally, if not more, important to the discussion on custom are the justifications put forth by the acting states themselves. Subsequent to the intervention, NATO states invoked HI as their sole justification, referencing it both explicitly and implicitly as a legal doctrine. For example, both the United Kingdom and the Netherlands explicitly stated at the SC Emergency Session for Kosovo that NATO's action was legal.¹⁷⁵ Belgium also invoked "humanitarian intervention" before the ICJ in *Legality of the Use of Force*.¹⁷⁶ The United States, Germany, Canada, and France similarly responded, referring to NATO's action as "*justified and necessary* to stop the violence and prevent an even greater humanitarian disaster."¹⁷⁷ NATO's 19 members echoed this position

169. U.N. Charter art. 24, para. 2; Alain Pellet, *State Sovereignty and the Protection of Fundamental Human Rights: An International Law Perspective*, 1 PUGWASH OCCASIONAL PAPERS 37, 42 (2000); Ruth Wedgwood, Editorial Comment: NATO's Kosovo Intervention, *NATO's Campaign in Yugoslavia*, 93 AM. J. INT'L L. 828, 830 (1999).

170. S.C. Res. 1244, U.N. Doc. S/RES/1244 (June 10, 1999); Cassese, *supra* note 4, at 792.

171. U.N. SCOR, 54th Sess., 3988th mtg. at 18, U.N. Doc. S/PV.3988 (Mar. 24, 1999).

172. BREAU, *supra* note 59, at 143-44.

173. Permanent Rep. of the Islamic Rep. of Iran to the United Nations, Letter dated 31 Mar. 1999 from the Permanent Representative of the Islamic Republic of Iran to the United Nations addressed to the president of the Sec. Council, at 2, U.N. Doc. S/1999/363 (Mar. 31, 1999) [hereinafter OIS Letter].

174. Cassese, *supra* note 4, at 792.

175. U.N. SCOR, 54th Sess., 3988th mtg. at 8, 12, U.N. Doc. S/PV.3988 (Mar. 24, 1999).

176. *Legality of Use of Force (Yugoslavia v. Belg.)*, 1999 I.C.J. Pleadings 34 (May 10, 1999).

177. U.N. SCOR, 54th Sess., 3988th mtg. at 4, 5, 8, 16, U.N. Doc. S/PV.3988 (Mar. 24, 1999); BREAU, *supra* note 59, at 137 (quoting U.S. Secretary of State Madeline K.

through NATO's official justification of "avert[ing] a humanitarian catastrophe."¹⁷⁸ NATO had previously gone even further and codified HI in its Parliamentary Assembly.¹⁷⁹ In sum, the justifications of NATO states and the international community demonstrate a strong *opinio juris* in favor of this proposition: in situations of extreme necessity, where the SC fails to uphold its primary responsibility to maintain peace and security, states may be justified in undertaking "independent" humanitarian intervention.

EVALUATING *OPINIO JURIS*: CONTEMPORANEOUS STATE ACTION SPEAKS
LOUDER THAN SUBSEQUENT DIPLOMATIC DEFLECTION

In the wake of Kosovo's intervention, the international community engaged in substantial dialogue over the legitimacy of NATO's action, as well as the doctrine of humanitarian intervention itself. This dialogue has continued to date, pitting many states and many of international law's most highly qualified publicists on opposite sides of the fence: some claim that independent HI can be lawful in extreme circumstances¹⁸⁰ while others claim that independent HI is *always* manifestly *unlawful*.¹⁸¹ Others delicately scale the fence, arguing that HI is legitimate, but not yet lawful.¹⁸² No matter the conclusion, discerning *opinio juris* has always proved perplexing to international lawyers studying humanitarian intervention. This is the result of often conflicting state actions and official statements, incompatible acts and statements across time, ambiguous acts of diplomacy, and, in some instances, an inconclusive absence of action and/or comment altogether. This creates an extremely arduous process.

To illustrate: as shown above there is significant *opinio juris* favoring independent HI, especially on behalf of acting states. Nevertheless, numerous states have subsequently, and explicitly, rejected a "right" to HI. Most notably is the joint statement of the Group of 77 (G77), which proclaims to reject "the so-called 'right' to humanitarian intervention"¹⁸³ Assuming that this statement

Albright); PHILIP E. AUERSWALD, *THE KOSOVO CONFLICT: A DIPLOMATIC HISTORY THROUGH DOCUMENTS* 735-36 (2000).

178. Press Release, Javier Solana, Secretary General of NATO, Press Statement by Dr. Javier Solana (Mar. 23, 1999), *available at* <http://www.nato.int/docu/pr/1999/p99-040e.htm>.

179. See North Atlantic Treaty Organization [NATO], *Recasting Euro-Atlantic Security: NATO's Nineteen Nations-OSCE*, ¶ 28 (Nov. 1998), *available at* www.nato-pa.int/archivedpub/comrep/1998/ar290pcter-e.asp.

180. See, e.g., TESÓN, *supra* note 20, at 6; Nanda et al., *supra* note 4, at 866-67; Reisman, *supra* note 20, at 861; Rogers, *supra* note 4, at 735.

181. See, e.g., BYERS, *supra* note 12, at 100; Simma, *supra* note 19, at 2-3.

182. See, e.g., Franck, *supra* note 59, at 226; Cassese, *supra* note 28, at 25.

183. Group of 77, Declaration of the South Summit, ¶ 54 (Apr. 10-14, 2000), http://www.g77.org/summit/Declaration_G77Summit.htm.

represents the position of all G77 Member States, this evidences the stance of approximately 130 states.¹⁸⁴ Out of the approximate 200 states that make up the international community, this is at least a two-thirds majority. Thus, the natural reaction may be to conclude that even if the remaining states demonstrate the belief that HI is lawful, it would be insufficient to overcome this majority and form a customary norm. Note, however, that the ICJ has explicitly held that “the mere fact that States declare their recognition of certain rules is not sufficient for the Court to consider these as being part of customary international law, and as applicable as such to those states.”¹⁸⁵ In other words, one must look beyond these declarations and evaluate state action.

There is a marked difference between this pronouncement made at the 2000 South Summit and the *practice* of G77 members when actually faced with humanitarian atrocities. In fact, practice among these states, coupled with their legal statements *at the times* of intervention, seem rather to affirm some form of HI instead of rejecting it outright. For example, while sitting on the SC, six states from G77 endorsed the right of HI by voting against the Draft Resolution to halt NATO intervention – in effect, they voted in favor of NATO action (Argentina, Bahrain, Brazil, Gabon, Gambia, and Malaysia).¹⁸⁶ Similarly, the 15 members of ECOWAS,¹⁸⁷ all of which are members of the G77,¹⁸⁸ have each resorted to HI themselves, as shown above, justifying their actions on humanitarian grounds. Additionally, the African Union (AU), whose 53 members also all belong to the G77, has not only endorsed HI, but has codified independent HI in its Charter without any mention of need for SC authorization.¹⁸⁹ Furthermore, subsequent to NATO’s forceful intervention, the Organization of the Islamic Conference Contact Group on Kosovo issued a statement to the SC stating: “in view of the failure of all diplomatic efforts, due to the intransigence of the Belgrade authorities, a decisive international action was *necessary to prevent humanitarian catastrophe* and further violations of human rights in Kosovo.”¹⁹⁰ Presupposing that this statement reflected the views of the Organization of Islamic Conference at the time, which seems reasonable

184. *Member States*, GROUP OF 77, <http://www.g77.org/doc/members.html>.

185. *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 184 (June 27).

186. U.N. SCOR, 54th Sess., 3989th mtg. at 6, U.N. Doc. S/PV.3989 (Mar. 26, 1999).

187. *Member States*, ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS), <http://www.ecowas.int/> (Benin, Burkina Faso, Cape Verde, Cote d’Ivoire, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, Togo).

188. *Member States*, GROUP OF 77, <http://www.g77.org/doc/members.html>.

189. Constitutive Act of the African Union art. 4, para. h (entered into force July 11, 2000).

190. OIS Letter, *supra* note 173, at 2 (emphasis added).

based on the lack of objection to the letter, this represents another 29 states, not counting the 28 that are also members of the AU.¹⁹¹

Therefore, what "right" the G77 states are actually rejecting is unclear because at the time of these interventions, the large majority of these states responded with both active and passive acceptance.¹⁹² These responses speak much louder than subsequent diplomatic proclamations purporting to reject humanitarian intervention. If these states truly believed that humanitarian action was manifestly unlawful, they should have, and likely would have, spoken out against the action as it was occurring. To provide comparison, in other situations of aggression, such as when Iraq invaded Kuwait, states have been quick to complain and call on the SC and UN for action.¹⁹³ Moreover, the SC itself has been willing to condemn the inappropriate use of force swiftly and unambiguously, such as when Uganda invaded the Democratic Republic of Congo for reasons clearly not amounting to HI.¹⁹⁴ Finally, when given the opportunity to address the situation in its totality at the World Summit in 2005, the GA accepted the "Responsibility to Protect," and refused to unequivocally declare that independent HI outside of the SC was never allowed.¹⁹⁵ This would have been the ideal forum in which to make such a proclamation; and an absence of such a pronouncement speaks loudly to the impracticability of proclaiming that independent humanitarian intervention is never acceptable.

So how should these inconsistencies be evaluated? Ultimately, when adding the actions and statements of various individual states, as well as the NATO states and EU states, a total of at least 119 states have supported independent HI in some form or another.¹⁹⁶ And they

191. *Member States*, ORGANISATION OF ISLAMIC COOPERATION, http://www.oic-oci.org/member_states.asp.

192. See Declaration of the South Summit, *supra* note 183.

193. LORI DAMROSCH ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 1229 (5th ed. 2009) (noting the U.N. Security Council's passing of Resolution 660 to condemn the invasion, and Resolution 661 to place economic sanctions on Iraq); *Gulf War*, NEW WORLD ENCYCLOPEDIA (Apr. 2, 2008), http://www.newworldencyclopedia.org/entry/Gulf_War?oldid=680059 ("Kuwaiti and U.S. delegations requested a meeting of the U.N. Security Council, which passed Resolution 660, condemning the invasion and demanding a withdrawal of Iraqi troops. On 3 August the Arab League passed its own resolution. The resolution called for a solution to the conflict from within the League, and warned against outside intervention. On 6 August U.N. Resolution 661 placed economic sanctions on Iraq.").

194. *Armed Activities on Territory of Congo (Dem. Rep. Cong. v. Uganda)*, 2005 I.C.J. 116, ¶ 154 (Dec. 19); S.C. Res. 1304, ¶ 2, U.N. Doc. S/RES/1304 (June 16, 2000) (noting the "violation of the sovereignty and territorial integrity of the Democratic Republic of the Congo").

195. See World Summit, *supra* note 5, ¶¶ 138-39.

196. 28 NATO States, 53 African Union States, 28 OIS states (which are not also AU members), Venezuela, Russia (which has claimed R2P in Georgia), Bosnia-Herzegovina.

have done so while the situation was unfolding. Obviously, official diplomatic statements attempting to clarify states' positions on an issue cannot be ignored when determining whether a state is acting out of a sense of legal obligation (the requirement for *opinio juris*). However, to more clearly flush out the true motives of the acting states, state practice must be evaluated *concurrently* with *opinio juris*. Doing so more accurately evidences what states really believe is acceptable under international law. It is all too easy to support an action (or acquiesce to that action) while it is occurring, and later purport to reject a similar action likely for fear that any ensuing doctrine would be abused. However, the possibility of abuse does not mean that action is unlawful when done correctly. Rather, abusive situations are unlawful; non-abusive situations are lawful. Self-defense, for example, has been abused countless times. This has not caused states to claim the right no longer exists. The same can be said for true humanitarian intervention.

Even without distinguishing the true *actions* of "objecting" states to this extent before, numerous authors have concluded that a customary right to HI exists.¹⁹⁷ This analysis should serve to bolster their contentions. Consequently, if brought before the ICJ, states have a good faith argument that a "right" to independent humanitarian intervention exists.

THE DOCTRINE OF NECESSITY

While there is a good-faith argument that a "right" to independent humanitarian intervention exists akin to the "right" of self-defense, there is yet another viable argument available to states enacting true humanitarian interventions. In the wake of Kosovo, distinguished international jurists Antonio Cassese and Thomas Franck both came to the conclusion that HI is *not yet legal, but justified*.¹⁹⁸ The "justified" conclusion may seem paradoxical at first, raising the question: if HI is *justified*, then how would it serve international justice to find the particular *justified* intervention *unlawful* if a country were brought before the ICJ? In reality, such an outcome would not serve international justice. Nevertheless, without explicitly posing a possible remedy, the conclusion of these venerated jurists inadvertently hints at a viable defense: the state of necessity ("necessity").

Albania, and the 6 states supporting NATO action on the Security Council (Argentina, Bahrain, Brazil, Gabon, Gambia, and Malaysia).

197. See, e.g., FERNANDO TESÓN, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY 418 (3rd ed. 2005); Greenwood, *supra* note 59, at 931; Nanda, et al., *supra* note 4, at 862-65; Reisman, *supra* note 20, at 860; Rogers, *supra* note 4, at 732.

198. Cassese, *supra* note 28, at 24-25; Franck, *supra* note 3, at 859.

Necessity, which is only available in extremely rare situations, precludes the wrongfulness of state actions that are otherwise considered technically illegal.¹⁹⁹ The doctrine can be paralleled to domestic processes that excuse illegal behaviors, despite the lack of an established and defined defense like duress, self-defense, or insanity. For example, states almost always allow certain classes of persons to escape legal liability when acting for the greater good of society, such as a fire fighter who must destroy personal property to prevent a fire from spreading, or a police officer who is forced to trespass on private property to apprehend an armed criminal. Lay citizens can similarly be exonerated for their illegal acts if necessary to prevent a greater harm, such as a child stealing a bicycle to escape from a kidnapper, or a person running a stop sign to get a dying spouse to the hospital. Most times these defenses are not explicitly defined in statutes, but are rather applied by judicial bodies in the interests of upholding a clear means to justice. The notable commonality, as with HI, is the belief that the unlawful action is necessary to prevent greater harm.

Although “necessity” is not a rule of law strictly speaking, the doctrine has a long history of acceptance in international law.²⁰⁰ It has been implemented by numerous international tribunals, and also employed by the ICJ on several occasions,²⁰¹ with each coming to the conclusion that the doctrine holds a central place in international jurisprudence and can serve to justify otherwise unlawful actions. The Draft Articles on State Responsibility (DASR) describe the current customary version of necessity,²⁰² demonstrating that necessity does not invalidate the international obligation concerned; “rather [it] provide[s] a justification or excuse for non-performance while the circumstance in question subsists.”²⁰³

To escape wrongfulness of an otherwise illegal action, three criteria must be fulfilled. First, the act must be “the only way for the State to safeguard an essential interest against a grave and imminent peril.”²⁰⁴ With HI, it is fairly simple to conclude that in some circumstances the use of force will be the only way to stop genocide, ethnic cleansing, war crimes, and crimes against humanity — the prevention of which is

199. DASR, *supra* note 78, art. 25, at 80; Gabčíkovo-Nagymaros Project (Hung. v. Slov.), 1997 I.C.J. 7, ¶ 50 (Sept. 25).

200. *E.g.*, DASR, *supra* note 78, art. 25, at 80; Legal Consequences of Construction of Wall in Occupied Palestine Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 140 (July 9); *Gabčíkovo*, 1997 I.C.J. ¶ 51.

201. See Amin George Forji, *Drawing the Right Lessons from ICSID Jurisprudence on the Doctrine of Necessity*, 76 ARBITRATION 44, 49 (2010) (discussing doctrine of necessity's use in arbitration decisions presented to the International Centre for Settlement of Investment Disputes).

202. DASR, *supra* note 78, art. 25, at 80.

203. *Id.* ¶ 2, at 71.

204. *Id.* art. 25, at 80.

unquestionably an essential interest of the international community.²⁰⁵ Second, the state must not have contributed to the situation of necessity.²⁰⁶ This would have to be determined on a case-by-case basis, but it is clearly conceivable that this element will also usually be fulfilled in a true humanitarian intervention. Finally, the act must “not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.”²⁰⁷ The third element is the most problematic and thus deserves further analysis.

The two international interests most impacted by HI are state sovereignty and the prohibition on the use of force. Both are without question among the most “essential” interests of all states. However, as illustrated above, when states fail to protect their own populations from genocide and other atrocity crimes, they forfeit a part of their sovereignty and lose the protection of the principle of non-intervention. Thus, in the case of atrocity crimes, “sovereignty” does not preclude the necessity doctrine.

The interplay between the necessity doctrine and the use of force is a more complex situation. In the commentary to the DASR, the International Law Commission (ILC) contends, “the plea of necessity is not intended to cover conduct which is in principle regulated by the primary obligations,” using the rules relating to the use of force as a *possible* example.²⁰⁸ Therefore, at first glance necessity could appear inapplicable to HI. However, when the DASR was drafted, the authors also specifically addressed the possible applicability of necessity to HI and were unable to determine whether a state of necessity could be applicable or not.²⁰⁹ The conclusion at the time was that “the question of whether measures of forcible humanitarian intervention . . . may be lawful under modern international law is not covered by article 25.”²¹⁰ In other words, the authors of the DASR did not conclude either way whether the doctrine of necessity is applicable to HI.

The greatest obstacle to overcome for necessity to work with HI is the pronouncement of the ICJ that necessity may not be invoked “if the international obligation with which the act of the State is not in conformity arises out of a peremptory norm of general international

205. *Id.* ¶ 19, at 84; *see also* Convention on the Prevention and Punishment of the Crime of Genocide, U.N. Doc. A/760, Annex, art. 8 (Dec. 3, 1948) (adopted by G.A. Res. 260 (III), U.N. Doc. A/RES/260(III) (Dec. 9, 1948)). For a plea of necessity, the contribution must be to “sufficiently substantial and not merely incidental or peripheral.” DASR, *supra* note 78, ¶ 20 at 84; *see also* *Gabčíkovo*, 1997 I.C.J. ¶¶ 51–52.

206. DASR, *supra* note 78, art. 25, at 80.

207. *Id.*

208. *Id.* ¶ 21, at 84.

209. *Id.*

210. *Id.*

law.”²¹¹ This poses a problem because the prohibition on the use of force is commonly referred to as a peremptory or *jus cogens* norm. However, it is important to note that there is no consensus among international jurists (or states) as to the scope of the prohibition.²¹² In fact, distinguished publicists have concluded that even accepting the undefined proposition that the non-use-of-force is *jus cogens*, even characterization as *jus cogens* does not prohibit international evolution of the norm’s contours.²¹³ Thus, it is conceivable that exceptions to the non-use-of-force principle could evolve through custom.

Consequently, if any prohibition on the use of force has attained definable *jus cogens* status, it would be appropriately categorized as the prohibition on the “aggressive” use of force.²¹⁴ And as HI is no longer considered aggression, it is not precluded by *jus cogens*. A contrary finding would mean that when acting through *Uniting for Peace*, the international community — through the General Assembly — violated this very peremptory norm. Going further, HI is aimed at halting atrocity crimes, including genocide and crimes against humanity. These are also considered peremptory norms of international law, thus pitting two peremptory norms against each other. If a state is violating its *erga omnes* obligations by committing atrocity crimes, that state would logically be precluded (by the unclean hands doctrine, for example) from claiming that a state cannot use force against it to halt these atrocities.

In any case, despite the DASR’s avoidance of the doctrine’s applicability to HI, because the doctrine of necessity is also a customary norm,²¹⁵ its permissible uses as a norm of procedure can also evolve just as substantive customary norms. Put another way, if there is widespread belief on the part of states that HI is warranted by “necessity” in certain circumstances, the doctrine can evolve to cover this area of international law as well, notwithstanding its association with the use of force. Consequently, whereas there is sufficient evidence to find HI lawful (as demonstrated above), there is even greater evidence showing that HI is accepted as legitimate and “necessary” in certain extreme circumstances. In fact, HI is accepted to such a degree that states are willing to accept humanitarian

211. Gabčíkovo-Nagymaros Project (Hung. v. Slov.), 1997 I.C.J. 7, ¶ 50 (Sept. 25).

212. CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 29 (2d ed. 2004).

213. See, e.g., *Report of the International Law Commission on the work of its Fifteenth Session*, U.N. GAOR, 18th Sess., Supp. No. 9, art. 37, para. 4, U.N. Doc. A/5509 (1963), reprinted in [1963] 2 Y.B. Int'l L. Comm'n 187, 198-99, U.N. Doc. A/CN.4/163; IAN BROWNIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 488 (6th ed. 2003).

214. See, e.g., BREAU, *supra* note 59, at 256; see also M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 LAW & CONTEMP. PROBS. 63, 68 (1996).

215. Legal Consequences of Construction of Wall in Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 140 (July 9).

intervention without condemnation.²¹⁶ Therefore, it can reasonably be argued that in such circumstances the legal wrongfulness of HI should also be precluded, even if a court were to find that no “right” to independent HI exists.

A close examination of an extreme situation demonstrates why such an argument is desirable. In some situations, the only thing standing between preventing genocide and standing idly by while a Rwanda-type situation unfolds is the unwillingness of a P5 member to give its vote. Following the absolutist argument, then, it is conceivable that there could be a circumstance in which 191 members of the UN were in favor of intervention, but because China, for example, vetoed action, it would be automatically illegal. And upon this finding of illegality, the intervening states, even if made up of these 191 nations, could be held liable before the ICJ. This result is obviously absurd and would be contrary to the very idea of state-developed international law. Admittedly, such a clear-cut circumstance will never come to fruition. However, what occurred in the above interventions is not far off—Security Council action was blocked by virtue of the veto, or threat of the veto, and with substantial international support, states acted to uphold the responsibility that the SC failed to uphold. Necessarily then, there is a gray area that allows for the use of this justification, even if only on a case-by-case basis.

Thus, the true problem is discerning whether a *particular* intervention is legal or justified *under the circumstances*, not whether *all* interventions are *per se* lawful or unlawful.

WHEN IS INDEPENDENT HUMANITARIAN INTERVENTION EXCUSABLE?

In sum, there are essentially two arguments available to states that muster the political will to intervene for humanitarian purposes: a customary “right” to humanitarian intervention or the “necessity” to put a stop to atrocity crimes, which precludes the wrongfulness of the act. But are they really different? The distinction is somewhat trivial on a practical level. Clearly, the two methods vary legally: one accepts as lawful a certain action (an *exception*); and the other merely precludes the wrongfulness of an otherwise illegal action (a *justification*). However, with regard to their application to independent HI, they are essentially the same: (1) the outcome is the same (i.e., a state will or will not be held legally liable under the doctrine of state responsibility); (2) the process is the same (i.e., allowable use has emerged through custom.); and, more importantly, (3) the method of reaching the

216. See *supra* Section 4; see also, e.g., OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 126 (1991); Louis Henkin, *Kosovo and the Law of “Humanitarian Intervention,”* 93 AM. J. INT’L L. 824, 826 (1999); Franck, *supra* note 3, at 858-59; Byers & Chesterman, *supra* note 2, at 177.

outcome is also the same (i.e., the same universally-accepted elements for a true humanitarian intervention must be fulfilled, as discussed below).

Despite considerable controversy over whether humanitarian intervention is ever acceptable, there has been near universal agreement on the necessary elements for legitimate intervention if it were to take place.²¹⁷ They can be summed up in six categories. First, the purpose must be to prevent mass atrocities, including genocide, ethnic cleansing, crimes against humanity, and rampant war crimes, which the local government is either committing or unable to stop. Second, the SC must be unable to uphold its responsibility to maintain peace and security because of the use or threat of the veto by one of its permanent members. Third, intervention must be necessary (i.e., all reasonable peaceful means have been exhausted). Fourth, the action must be proportionate (the use of force must truly be for humanitarian purposes and limited in extent and scope stopping those atrocities). Fifth, the HI must not be opposed by a majority of states. Finally, the intervention must not pose a greater threat to international peace and security than the atrocities that it is meant to stop. There is little, if any, controversy over these elements.²¹⁸

The real issue is with timing. Whether it is appropriate to find an intervention legal or justified requires a case-by-case determination.²¹⁹ In particular, special attention must be given to whether intervention would cause (or has caused) greater tensions throughout the world, thereby threatening international peace and security. Remember, the underlying rationale for humanitarian intervention in the first place is the protection of human life. If intervention threatens even greater loss of life by creating a world war, for example, it would obviously not be desirable, lawful, or justified. Likewise, if an intervention is not proportionate and causes greater destruction than it was alleged to prevent, it will also not be justified. Additionally, the action must be both necessary and widely supported by the international community.

All of these elements must be sufficiently fulfilled to fall under *either* the exception of HI or the doctrine of necessity. However, it is not possible to fully assess these elements prior to intervention. Thus, in most cases it will be a necessary evil to fully judge the justifiability of humanitarian intervention only after the fact. This invariably poses a problematic risk for states considering independent humanitarian

217. R2P, *supra* note 5, at 32-37.

218. *See, e.g.*, Statement by the Rep. of the U.K., U.N. SCOR, 54th Sess., 3988th mtg. at 11-12, U.N. Doc. S/PV.3988 (Mar. 24, 1999); R2P, *supra* note 5, at 32-37; Cassese, *supra* note 28, at 27. This consensus has emerged through the valuable work of several independent commissions acting at the bequest of the General Assembly and other regional organizations. *See, e.g.*, R2P, *supra* note 5.

219. *E.g.*, World Summit, *supra* note 5, ¶ 139.

intervention, but such is the reality of one of the most difficult doctrines in international law. Nonetheless, difficulty does not proscribe legality. And when discussing legal liability, determining whether a state acted consistently with its international obligations is always an after-the-fact analysis anyway. The question analyzed herein is not whether states should intervene, but whether the ICJ could conceivably excuse a state if one day it did act to put an end to atrocity crimes. The answer is yes.

LOOKING FORWARD

If a state is brought before the ICJ and alleges HI as a defense, how the court rules is of no small consequence. In fact, the rationale relied upon could very well put the entire international community in the position of having to choose between (1) taking action and testing the scope of the non-use-of-force principle or (2) remaining inactive and risking violation of its responsibility to protect targeted civilian populations. The reason for this stems from prior ICJ jurisprudence.

In the 2007 *Genocide* opinion, the ICJ recognized that all states have a legal obligation to take action to prevent genocide.²²⁰ This obligation arises from Article 1 of the Genocide Convention²²¹ — a norm also widely recognized as custom.²²² In short, the Court held that the obligation of states to prevent genocide is both “normative and compelling,” extending beyond the responsibilities of the competent UN organs:

Even if and when these organs have been called upon, this does not mean that the States parties to the Convention are relieved of the obligation to take such action as they can to prevent genocide from occurring, while respecting the United Nations Charter and any decisions that may have been taken by its competent organs.²²³

Accordingly, states are instructed that they have an obligation to employ “all means reasonably available to them, so as to prevent genocide so far as possible.”²²⁴ When a state does not take “all measures . . . within its power,” then it incurs legal responsibility.²²⁵ The Court addresses several considerations when determining whether a state should be responsible for failure to prevent genocide — namely capacity to influence the situation, political links to those responsible

220. Application of Convention on Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb. & Montenegro*), 2007 I.C.J. 43, ¶ 427 (Feb. 26).

221. *See id.* ¶ 426.

222. Antonio Cassese, *International Criminal Law*, in *INTERNATIONAL LAW* 721, 744 (Malcolm D. Evans ed., 2003).

223. *Genocide*, 2007 I.C.J. ¶ 427.

224. *Id.* ¶ 430.

225. *Id.*

for genocide, and geographical proximity to the events. However, the Court also explicitly notes that the required action must be “*within the limits permitted by international law.*”²²⁶

This brings this discussion to the crux of the matter. In *Genocide*, the Court did not address whether outside states could (or should) use force to protect civilian populations. Indeed, in that case it would have been improper for the Court to do so. But if the Court were to someday rule that there is a “right” to humanitarian intervention, this pronouncement could instantly transform the R2P from an aspirational doctrine to one potentially requiring forceful actions (at least in regards to preventing genocide). In other words, because the prohibition on the use of force is the only norm preventing states from taking forceful action in the face of genocide, once a *right* to use force for HI is recognized, nothing proscribes states from using forceful measures. And if there is no legal proscription on the action, states could conceivably be held responsible for not taking “all measures within their power” to prevent genocide (and possibly other atrocity crimes),²²⁷ including force.

Creating such a legal requirement would admittedly be extremely confounding. Evaluating issues such as whether using force was actually within a state’s capacity,²²⁸ whether all states could be simultaneously held liable for the same failure, and whether states with greater military capacity or in closer proximity are more liable for the failure would be exceedingly arduous. Nevertheless, avoiding this legal predicament is something the ICJ will have to consider when in fact it is called upon to answer the controversial question of whether independent HI is ever acceptable in modern international law. In this vein, because the international community has demonstrated acceptance of independent HI in rare circumstances, perhaps relying on the necessity doctrine would be the Court’s more prescient option.

226. *Id.*

227. While the ICJ decision clearly only refers to and applies to genocide as such, the movement in the international community is towards equating atrocity crimes such as ethnic cleansing and other crimes against humanity with genocide — with all necessitating the same responsibility to protect. Therefore, depending on the change in custom with regard to these norms, the responsibility to prevent could also conceivably be applicable to these crimes as well.

228. It should be noted, however, that ability to succeed is not an allowable excuse — at least under the current rationale of the *Genocide* opinion. The Court held: “As indicated above, for a State to be held responsible for breaching its obligation of prevention, it does not need to be proven that the State concerned definitely had the power to prevent the genocide; it is sufficient that it had the means to do so and that it manifestly refrained from using them.” *Genocide*, 2007 I.C.J. ¶ 438.

CONCLUSION

In conclusion, the evolution of humanitarian intervention provides states with two viable defenses if brought before the International Court of Justice: (1) the right to humanitarian intervention and (2) the doctrine of necessity. Because of the marked incongruities in states' responses to HI, discerning the outcome of this evolution is not easy. Nevertheless, by giving due weight to the contemporaneous statements and actions (or inactions) of states at the time interventions have taken place, rather than being misled by subsequent diplomatic statements aimed at discouraging abuse of the independent HI doctrine, it is possible to recognize an *opinio juris* of states that HI is lawful (or at least *legally justified*) when truly taken for humanitarian reasons, when conducted proportionately to that purpose, and when international peace is not put in greater peril because of the intervention.

The tension between sovereignty, permissible uses of force, and the prevention of atrocity crimes is unavoidable. Even so, this evolution towards *independent* humanitarian intervention was somewhat inevitable considering the world's foremost priority of protecting human life. In fact, the evolution was prophesized at the time of the Charter's inception by the likes of former ICJ judge Philip C. Jessup. Judge Jessup concluded that if the SC were unable "to act with the speed requisite to preserve life," individual states would be justified to act in lieu of the ineffective "collective measures under the [SC]." ²²⁹ Indeed, prior to the inception of the UN Charter, the international community openly accepted independent HI. ²³⁰ However, upon establishment of the Charter, states resolved to refrain from the use of force, ²³¹ and to take collective action — through the UN — to maintain international peace and security. ²³² Notably, states never rejected the idea of HI *per se*. Instead, they agreed to the terms of the Charter, believing that the SC would guide the collective actions of Member States and act "on their behalf." ²³³ When this ideal failed to materialize, independent HI reemerged.

Whether states take the next logical step and realize the connection between this "right" and their "responsibility" to protect beleaguered populations from atrocity crimes is yet to be seen. As it has always been, the biggest obstacle to the prevention of mass atrocities is the not the existence of non-permissive legal doctrines — it is the lack of political will.

229. PHILIP C. JESSUP, A MODERN LAW OF NATIONS 170 (1948).

230. IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 338 (1963).

231. U.N. Charter art. 2, para. 4.

232. *Id.* art. 42.

233. *Id.* art. 24, para. 1.