

# Consent-Based Humanitarian Intervention: Giving Sovereign Responsibility Back to the Sovereign

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The repeated failure of the United Nations Charter regime to respond to humanitarian crises—and to prevent interventions outside the regime—has laid bare a conflict that lies at the heart of modern international law. This failure has revealed that the twin commitments on which the post-World War II international legal system has been built—sovereign rights and sovereign responsibilities—are often deeply at odds. The response of scholars to this tension has often been to choose sides in the fight. Scholars who place greater value on human rights than state sovereignty have sought to craft exceptions to the prohibition on the use or threat of force. Those who place greater value on sovereignty (and, they would argue, democratic rule of law), have rejected any humanitarian intervention not authorized by the Security Council as illegal and on occasion have portrayed the human rights movement as “anti-sovereignist” and even “anti-democratic.” In this Article, we offer another way forward—one that aims to respect sovereign rights while helping states meet their sovereign responsibilities and thereby alleviate the tension between the twin commitments of the modern international legal system. Rather than seek to craft an exception to state sovereignty to meet humanitarian aims, we argue for empowering states to meet their sovereign responsibility through what we call “consent-based intervention.”

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## Introduction

On November 30, 2012, United Nations Secretary-General Ban Ki-moon stood before the United Nations General Assembly and addressed the conflict in Syria that had stretched on for twenty violent months.<sup>1</sup> He decried the “new and appalling heights of brutality and violence” in the

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1. Ban Ki-moon, Sec'y-Gen., United Nations, Remarks to the General Assembly on the Situation in Syria (Nov. 30, 2012), <http://www.un.org/sg/statements/index.asp?nid=6474>.

country.<sup>2</sup> Forty thousand people were said to have been killed, thousands of them civilians caught in the Syrian government's indiscriminate air strikes against areas held by rebel forces.<sup>3</sup> There were "seemingly daily massacres of civilians." Meanwhile the "humanitarian crisis" was "becoming more acute."<sup>4</sup> Refugees numbered close to a half million, with their numbers expected to swell to 700,000 within months.<sup>5</sup> By winter, as many as four million people would be in need.<sup>6</sup>

What the Secretary-General did not mention was that the United Nations had proven unable to stop the bloodshed. The United Nations Security Council, the only body capable of authorizing military action, had been blocked from addressing the crisis by two of its permanent members.<sup>7</sup> China and Russia had from the outset made clear their intent to veto any move to intervene in the unfolding crisis.<sup>8</sup> Indeed, on the surface the Secretary-General's speech had an almost comically modest purpose: he was appearing to announce the appointment of Joint Special Representative Lakhdar Brahimi, who was charged with leading an effort to stop the violence.<sup>9</sup> Without the forceful backing of the Security Council, it appeared unlikely these efforts at diplomacy would succeed where personal efforts by Ban's predecessor, Kofi Annan, had failed.<sup>10</sup>

This was not the first time the United Nations had found itself hamstrung in the face of an unfolding humanitarian disaster. The United Nations Security Council famously refused to authorize intervention in Sudan, Kosovo, and Rwanda even as genocides unfolded in those countries.<sup>11</sup> In the face of this intransigence, states have engaged in what they claimed were humanitarian interventions without Security Council authorization (what we call "unauthorized interventions"). Indeed, they have done so at least eight times since the United Nations came into being.<sup>12</sup>

The repeated failure of the United Nations Charter regime to respond to humanitarian crises—and to prevent interventions outside the regime—has laid bare a conflict that lies at the heart of modern international law. This failure has revealed that the twin commitments on which the post-World War II international legal system has been built—sovereign rights and sovereign responsibilities—are often deeply at odds. The human rights

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2. *Id.*

3. *See id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. Rick Gladstone, *Friction at the U.N. as Russia and China Veto Another Resolution on Syria Sanctions*, N.Y. TIMES, July 19, 2012, <http://www.nytimes.com/2012/07/20/world/middleeast/russia-and-china-veto-un-sanctions-against-syria.html>.

8. *Id.*

9. Ban Ki-moon, Remarks to the General Assembly, *supra* note 1.

10. Gladstone, *supra* note 7.

11. *See generally* MATTHEW C. WAXMAN, COUNCIL ON FOREIGN RELATIONS, INTERVENTION TO STOP GENOCIDE AND MASS ATROCITIES: INTERNATIONAL NORMS AND U.S. POLICY (2009); *see also* SAMANTHA POWER, A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE (2007).

12. *See infra* pp. 509-518.

revolution that emerged after World War II established that state sovereignty carries with it *responsibilities*. Most fundamentally, every state must protect its populations from humanitarian violations including genocide, war crimes, ethnic cleansing, and crimes against humanity. The 1948 Universal Declaration of Human Rights, for example, declared that the member states pledged themselves to “the promotion of universal respect for and observance of human rights and fundamental freedoms.”<sup>13</sup> Yet, at the same time, the international institutions created at the close of the war provided extraordinary protections for sovereign *rights*.<sup>14</sup> Most importantly, the U.N. Charter protects states from the threat or use of force, allowing exceptions only in cases of self-defense against armed attack, target state consent, or Security Council authorization.<sup>15</sup> That protection against intervention holds *even when a state is engaged in an open and notorious violation of human rights law*.<sup>16</sup>

Nothing has exposed the tension—sometimes outright contradiction—between these twin commitments more than the debate over humanitarian intervention. On the one hand, the U.N. system prohibits intervention into a state without its consent or Security Council authorization even for humanitarian purposes.<sup>17</sup> On the other, international law places non-derogable limits on what states may do even within their own borders.<sup>18</sup> When a humanitarian crisis breaks out but the Security Council refuses to authorize intervention, these commitments appear irreconcilable.

The response of scholars to this tension has often been to choose sides in the fight. Scholars who place greater value on human rights than state sovereignty seek to craft exceptions to the prohibition on the use or threat of force.<sup>19</sup> Those who place greater value on sovereignty (and, they would argue, democratic rule of law), reject any humanitarian intervention not authorized by the Security Council as illegal and on occasion portray the human rights movement as “anti-sovereigntist” and even “anti-

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13. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), <https://www.un.org/en/documents/udhr/> (“[E]very individual and every organ of society . . . shall strive . . . to promote respect for these rights and freedoms . . . both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.”).

14. See, e.g., U.N. Charter art. 2, para. 4, art. 51.

15. *Id.*

16. See Oona A. Hathaway & Scott Shapiro, *The Law of the World* (Apr. 23, 2013) (unpublished manuscript) (on file with authors).

17. U.N. Charter art. 2, para. 4, art. 51.

18. See, e.g., Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. Doc. A/RES/39/46 (Dec. 10, 1984); Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260 (III) A, U.N. Doc. A/RES/260 (III) (Dec. 9, 1948).

19. See, e.g., W. Michael Reisman, *Criteria for the Lawful Use of Force in International Law*, 10 YALE J. INT’L L. 279, 285 (1985) (arguing that “an important part of the control on impermissible coercion will be a clear conception of the licit community objectives for which coercion may be used: the basic and enduring values of contemporary world public order and human dignity”).

democratic.”<sup>20</sup>

In this Article, we offer another way forward—one that aims to respect sovereign rights while helping states meet their sovereign responsibilities and thereby alleviate the tension between the twin commitments of the modern international legal system. Rather than seek to craft an exception to state sovereignty to meet humanitarian aims, we argue for *empowering* states to meet their sovereign responsibility through what we call “consent-based intervention.”

Consent-based intervention is carried out, as the phrase clearly indicates, with the consent of the state.<sup>21</sup> Consent-based intervention thus places the power to prevent humanitarian crises back in the hands of states. It offers states a way to meet their state responsibility—either through seeking help when the crisis emerges or in advance, through advance cooperation with regional partners to safeguard each of their populations from future breakdowns. Hence, consent-based intervention is grounded in the respect for sovereign state rights that is essential to the modern international law system while at the same time allowing states to meet the responsibility that is inherent in sovereignty as well.

This Article proceeds in four parts. Part I examines the scope and limits of the United Nations Charter regime. It outlines the Charter’s prohibition on the use of force and the related principle of non-intervention, which together prohibit states from intervening to prevent humanitarian crises in the absence of Security Council authorization. It then describes the significant limits on the United Nations’ capacity to address humanitarian crises and the efforts by states to circumvent the Charter’s limits. We describe eight frequently cited instances of humanitarian intervention outside of the U.N. Charter regime.<sup>22</sup>

Part II turns to the scholarly literature on humanitarian intervention and the efforts the literature has made to understand the unauthorized humanitarian interventions described in Part I. Existing scholarship offers two central approaches to explaining unauthorized humanitarian intervention. The first argues that there is an emerging customary international law norm that gives states the legal right to engage in unauthorized humanitarian intervention in rare circumstances. The second maintains that states have a “responsibility to protect” their populations, and when they fail to meet that responsibility, the international community should intervene (though scholars increasingly argue that this intervention must be

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20. See, e.g., Ian Brownlie, *Thoughts on Kind-Hearted Gunmen*, in HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 139, 147–48 (Richard B. Lillich ed., 1973) (“Whatever special cases one can point to, a rule allowing humanitarian intervention, as opposed to a discretion in the United Nations to act through the appropriate organs, is a general license to vigilantes and opportunists to resort to hegemonial intervention.”).

21. Consent-based intervention as described in this article builds on the concept of “host-state consent.” See, e.g., David Wippman, *Military Intervention, Regional Organizations, and Host-State Consent*, 7 DUKE J. COMP. & INT’L L. 209 (1996).

22. Julia Brower, Ryan Liss, Tina Thomas & Jacob Victor, *Historical Examples of Unauthorized Humanitarian Intervention* (2013), [http://www.law.yale.edu/documents/pdf/cgic/GLC\\_historicalExamples.pdf](http://www.law.yale.edu/documents/pdf/cgic/GLC_historicalExamples.pdf). [hereinafter Historical Examples Appendix].

done through the U.N. Charter regime, not outside it). We argue that both of these approaches suffer from significant weaknesses: they are not supported by the state practice highlighted in Part I; they fail to take account of recent developments in international law; and they do not adequately foreclose the risk of abuse.

Part III describes an alternate approach to humanitarian intervention—consent-based intervention. Consent-based intervention works to empower states to live up to their sovereign responsibilities. It aims to do so without contravening the U.N. Charter system's prohibition on the threat or use of force and the protections the Charter offers for sovereign rights. Consent-based intervention may take place in two ways. First, consent-based intervention could be based on an invitation to intervene. This, in turn, raises the question of who may issue such an invitation. In many cases the answer is simple: the legally recognized government of the state. Yet in some cases the answer is less obvious. If a country is in turmoil, there may be dispute as to who represents the state and therefore who may consent on the state's behalf to intervention to prevent or halt an unfolding humanitarian crisis. We offer three criteria for resolving this question: effective control, willingness to accept sovereign responsibility, and multi-lateralism. Second, consent to intervention may be granted proactively, in advance of a humanitarian crisis, through a regional organization-based treaty of guarantee by which a state agrees to allow future intervention by an outside state (or group of states) in certain specified circumstances. Such treaties of guarantee allow states to decide in advance how to address a possible future humanitarian crisis if they later find themselves incapable of preventing an unfolding crisis.

The Article concludes by recognizing that consent-based intervention is not a panacea—it will not solve all of the problems presented by humanitarian crises. But, consent-based intervention offers an important step forward, by recognizing that states may consent to intervention by others when they cannot meet their responsibilities alone. In doing so, it aims to at least partially reconcile the conflict between the extraordinary protections international law offers sovereign states against forceful intervention and the non-derogable protections international law provides for human rights. Instead of pitting sovereign rights and sovereign responsibility against one another, the concept of consent-based intervention aims to provide states with tools so they can use their sovereign rights to meet their sovereign responsibilities.

## I. The Scope and Limits of the U.N. Charter Regime

The U.N. Charter prohibits any member state from threatening to use or using force without U.N. Security Council approval.<sup>23</sup> This prohibition has been remarkably successful in preventing wars of conquest, which

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23. U.N. Charter art. 2, para. 4, art. 51.

were common up until the early twentieth century.<sup>24</sup> Yet this same prohibition also serves to constrain responses to humanitarian emergencies by prohibiting unilateral humanitarian interventions—that is, the use of force, without Security Council approval, by a state or group of states in the territory of another state to prevent a humanitarian crisis or respond to an ongoing one. The Security Council may authorize interventions to stop or prevent such humanitarian emergencies, but it is usually slow to act, and it often fails to act altogether. Indeed, the conflicting political interests of Security Council members have sometimes led the Council to refuse to authorize intervention even in the face of clear and significant humanitarian crises. This Part explores, first, the U.N. Charter’s prohibition on the use of force and the principle of non-intervention; second, the limits on the United Nations’ capacity to address humanitarian crises; and, third, examples of efforts by states to circumvent these limits.

### A. The U.N. Charter Regime

At the core of the U.N. Charter is a blanket prohibition on the use of force. Article 2(4) states that “[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”<sup>25</sup> The only exceptions to this prohibition are the use of force in self-defense or collective self-defense under Article 51<sup>26</sup> and the use of force as part of a collective security action authorized by the Security Council under Chapter VII.<sup>27</sup> In addition, although not explicitly stated in the Charter, a state may consent to the use of force in its territory.<sup>28</sup> The prohibition on the unilateral use of force in Article 2(4) places clear limits on the capacity of individual states to intervene to prevent or respond to a humanitarian crisis in another state without first obtaining Security Council authorization.<sup>29</sup>

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24. Hathaway & Shapiro, *supra* note 16. The prohibition has almost entirely eliminated the destruction of states through violence. See TANISHA M. FAZAL, *STATE DEATH: THE POLITICS AND GEOGRAPHY OF CONQUEST, OCCUPATION, AND ANNEXATION* 28 (2007); see also GARY GOERTZ & PAUL F. DIEHL, *TERRITORIAL CHANGES AND INTERNATIONAL CONFLICT* (1992).

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

26. *Id.* art. 51.

27. *Id.* ch. 7.

28. See, e.g., *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 246 (June 27) (stating that, under customary international law, “intervention . . . [is] allowable at the request of the government of a State”); IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 317 (1963) (“States may lawfully confer by treaty a right to intervene by the use of armed force within the territorial or other legally permitted limits of their jurisdiction. They may also give *ad hoc* consent to the entry of foreign forces on their territory . . . [or] to operations by foreign forces on their territory . . . .”); Louis Henkin, *Use of Force: Law and U.S. Policy*, in *RIGHT v. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE* 37, 63 (Louis Henkin et al. eds., 1989).

29. Some scholars have argued that a contextual reading of Article 2(4) supports the legality of unauthorized humanitarian interventions. They commonly make this argument one of two ways. First, humanitarian intervention involves “neither a territorial change nor a challenge to the political independence of the State involved” and is thus

Some have questioned whether even the Security Council may authorize humanitarian intervention where the crisis occurs within a single state. Arguably, a strict reading of the text of the Charter could be said to prohibit such interventions.<sup>30</sup> Under Chapter VII, the Security Council has the power to authorize the use of force in order “to maintain or restore international peace and security.”<sup>31</sup> Humanitarian intervention aimed at stopping a crisis confined to a single state might be thought to fall outside this framework. Indeed, Article 2(7) of the Charter provides that “[n]othing contained in the . . . Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdic-

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not prohibited by Article 2(4). See, e.g., W. Michael Reisman & Myres S. McDougal, *Humanitarian Intervention to Protect the Ibos*, in HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 167, 177 (Richard B. Lillich ed., 1973); JULIUS STONE, AGGRESSION AND WORLD ORDER 95 (1958); FERNANDO R. TESÓN, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY 150-57 (2d ed. 1997). Second, humanitarian intervention’s aim is to protect human rights—a value promoted by the Charter—therefore humanitarian intervention would not constitute force “inconsistent with the Purposes of the United Nations” prohibited by article 2(4). See, e.g., TESÓN, *supra*, at 152-53 (observing, *inter alia*, that when force is used to protect human rights it could be said to be consistent with the purpose of the Charter); W. Michael Reisman, *Coercion and Self-Determination: Construing Charter Article 2(4)*, 78 AM. J. INT’L L. 642 (1984) (arguing that the Charter’s prohibition on force should be viewed as contingent on the Charter’s collective security mechanisms working effectively, and that when it does not function, the unilateral use of force for purposes consistent with the Charter should be permitted); W. Michael Reisman, *Criteria for the Lawful Use of Force in International Law*, 10 YALE J. INT’L L. 279, 279-81 (1985). The majority of scholars, however, maintain that these interpretations are inconsistent with the Charter’s drafting history and its “primary purpose” to reduce incidents of war. Saira Mohamed, *Restructuring the Debate on Unauthorized Humanitarian Intervention*, 88 N.C. L. Rev. 1275, 1285-87 (2010). The drafters explicitly rejected the proposition that a use of force outside those expressly permitted in the Charter could be consistent with the Charter’s “purposes.” *Id.* at 1286. Rather, Article 2(4) was intended to prohibit unauthorized, non-defensive uses of force “absolutely.” *Id.* at 1287; see Ian Brownlie, *Humanitarian Intervention, in LAW AND CIVIL WAR IN THE MODERN WORLD* 217, 222-23 (John Norton Moore ed., 2009); Roger S. Clark, *Humanitarian Intervention: Help to Your Friends and State Practice*, 13 GA. J. INT’L & COMP. L. 211, 211 (1983) (finding that the preparatory work of the Charter indicates that the “words [in the last phrase of Article 2(4)] were not meant to leave a loophole of that nature”); Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EUR. J. INT’L L. 1, 3 (1999) (“[T]he phrase ‘. . . or in any other manner inconsistent . . .’ is not designed to allow room for any exceptions from the ban, but rather to make the prohibition watertight.”).

30. The principle of non-intervention is also found in customary international law. The International Court of Justice concluded in the *Corfu Channel* case that “[b]etween independent States, respect for territorial sovereignty is an essential foundation of international relations.” *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4, 35 (Apr. 9). The Court later concluded that customary international law prohibited the use of force against another state: “acts . . . directly or indirectly involv[ing] the use of force constitute a breach of the principle of non-use of force in international relations.” *Nicaragua*, *supra* note 28, ¶ 209; see also Marcelo Kohon, *The Principle of Non-Intervention 25 Years After the Nicaragua Judgment*, 25 LEIDEN J. INT’L L. 157, 161 (2012) (“[T]he Court [in *Nicaragua*] clearly stated that military coercion is just one form of unlawful intervention, making this conduct illegal on two bases: as a breach of the prohibition of the use of force and as a breach of the principle of non-intervention.”).

31. U.N. Charter ch. VII, art. 42.



tion of any state.”<sup>32</sup> Yet this same provision also provides that Article 2(7) “shall not prejudice the application of enforcement measures under Chapter VII.”<sup>33</sup> In addition, Article 39 of Chapter VII stipulates that the Security Council can authorize non-defensive uses of force (under Article 42) when it determines that a “threat to the peace” exists.<sup>34</sup>

Today, there is wide agreement that “the Security Council has the authority, under Chapter VII of the U.N. Charter, to conduct or authorize humanitarian intervention,” even when responding to human rights abuses wholly within a single state’s borders.<sup>35</sup> And, indeed, the Security Council has authorized intervention in response to humanitarian emergencies contained entirely within the borders of a state on multiple occasions.<sup>36</sup> None-

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32. *Id.* art. 2, para 7.

33. *Id.*

34. *Id.* arts. 39, 42.

35. Mark S. Stein, *Unauthorized Humanitarian Intervention*, 21 *SOC. PHILOSOPHY & POL’Y* 14, 17 (2004) (focusing on the fact that, under article 39, “[t]he Security Council shall determine the existence of a threat to the peace,” which places the authority for determining what constitutes a threat to peace in the hands of the Council). See generally INT’L COMM’N ON INTERVENTION & STATE SOVEREIGNTY, *THE RESPONSIBILITY TO PROTECT* ¶ 4.23 (2001) [hereinafter ICISS Report] (stating that they have “confidence that, in extreme conscience-shocking cases of the kind with which we are concerned, the element of threat to international peace and security, required under Chapter VII of the Charter as a precondition for Security Council authorization of military intervention, will be usually found to exist”); J. L. Holzgrefe, *The Humanitarian Intervention Debate*, in *HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS* 15, 41 (J. L. Holzgrefe & Robert O. Keohane eds., 2003) (“[T]he records of both the Dumbarton Oaks and San Francisco Conferences plainly show the drafters of the UN Charter wanted the Security Council to have wide discretion in determining the existence of any threat to the peace.”); Eve Massingham, *Military Intervention for Humanitarian Purposes: Does the Responsibility to Protect Doctrine Advance the Legality of the Use of Force for Humanitarian Ends?*, 91 *INT’L REV. RED CROSS* 803, 814 (2009) (observing that, if even state practice did not necessarily evidence “support” for the UNSC authorizations for humanitarian intervention in the 1990s, it did evidence “at least ‘toleration[ ] for United Nations authorized actions with an ‘expressly humanitarian purpose’”). But see Lori Fisler Damrosch, *Commentary on Collective Military Intervention to Enforce Human Rights*, in *LAW AND FORCE IN THE NEW INTERNATIONAL ORDER* 215, 219 (Lori Fisler Damrosch & David J. Scheffer eds., 1991).

36. S.C. Res. 770, ¶ 2, U.N. Doc. S/RES/770 (Aug. 13, 1992) (recognizing the situation as a threat to international peace and security and calling on states to take “all measures necessary” to facilitate humanitarian assistance in Bosnia and Herzegovina); S.C. Res. 776, ¶ 2, U.N. Doc. S/RES/776 (Sept. 14, 1992) (expanding the size and mandate of the existing United Nations Protection Force in the region into Bosnia to respond to the crises); S.C. Res. 794, pmb. & ¶ 10, U.N. Doc. S/RES/794 (Dec. 3, 1992) (recognizing the humanitarian crisis as a threat to international peace and security and authorizing the use of force in Somalia for humanitarian purposes); S.C. Res. 872, ¶¶ 2–3, U.N. Doc. S/RES 872 (Oct. 5, 1993) (establishing a peace-keeping force in Rwanda); S.C. Res. 929, ¶ 3, U.N. Doc. S/RES/929 (June 22, 1994) (recognizing the humanitarian crisis as a threat to peace and security and authorizing states to use “all necessary means” to achieve certain humanitarian objectives in Rwanda); S.C. Res. 940, ¶ 4, U.N. Doc. S/RES/940 (July 31, 1994) (authorizing the use of force by a multinational force in Haiti); S.C. Res. 1264, ¶ 3, S/RES/1264 (Sept. 15, 1999) (establishing a multinational force authorized to “take all necessary measures” to restore peace and security in East Timor); S.C. Res. 1973, ¶ 4, U.N. Doc. S/RES/1973 (Mar. 17, 2011) (authorizing the use of force “to protect civilians and civilian populated areas” in Libya, but prohibiting the use of foreign ground troops on Libyan territory); see Thomas M.

theless, the political realities of the Council pose challenges for securing authorization. As a result, the United Nations has declined to authorize interventions on multiple occasions, even in the face of significant humanitarian crises.<sup>37</sup> We turn next, therefore, to examining the limits of the U.N. Charter regime.

## B. Limits of the U.N. Charter Regime

At its core, the Security Council is a political body. The Council's decisions do not turn simply on a legal assessment of a given situation, but also on the interplay of states' political interests.<sup>38</sup> This reality is amplified by the existence and use of the veto, held by the permanent five members of the Council. As a result, for decades Cold War politics overrode the assessment of whether or not a humanitarian crisis warranted U.N. intervention. Indeed, the increased likelihood of humanitarian crises at times of heightened international political tension has led to "a major paradox: when impartial intervention is most necessary it seems that it is least likely to take place."<sup>39</sup>

Commentators often point to the failure of the United Nations to intervene in Kosovo as the paradigmatic example of the Council's intransigence. The Council concluded in Resolution 1199, which was adopted in September 1998, that the situation in Kosovo constituted a threat to peace and security.<sup>40</sup> The Security Council, however, "could not achieve consensus to authorize collective military measures due to opposition from Russia and China."<sup>41</sup> Many states expressed their frustration with the failure of the Council to act. For example, in the subsequent Security Council debates, Slovenia stated that the members of the Security Council had failed to live up to their "special responsibility;"<sup>42</sup> Malaysia emphasized

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Franck, *Interpretation and Change in the Law of Humanitarian Intervention*, in HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS, *supra* note 35, at 204, 216 ("[I]n practice, UN-authorized forces increasingly have been deployed—for example, in Haiti, Somalia, and Bosnia—to redress catastrophic humanitarian deprivations even when, occurring domestically, they have had little or no international consequences."); J. L. Holzgrefe, *supra* note 35, at 41-43 (discussing the interventions in Haiti, Somalia, and Rwanda); Jonathan E. Davis, *From Ideology to Pragmatism: China's Position on Humanitarian Intervention in the Post-Cold War Era*, 44 VAND. J. TRANSNAT'L L. 217, 251-54 (2011) (examining the U.N.-authorized intervention into East Timor). Bosnia and Rwanda both involved some cross border concern: the conflict in Bosnia was closely related to the crises in Serbia and Croatia, and the conflict in Rwanda was connected to the cross border flow of refugees. See Historical Examples Appendix, *supra* note 22.

37. See NORRIE MACQUEEN, HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 37 (2011).

38. See, e.g., *id.* ("[T]he United Nations . . . can do precisely what its members—usually meaning its most powerful members—permit it to do. U.N. intervention has always taken place within this 'permissible zone.'").

39. *Id.*

40. S.C. Res. 1199, pmb., U.N. Doc. S/RES/1199 (Sept. 23, 1998).

41. Franck, *supra* note 36, at 224; INDEP. INT'L COMM'N ON KOSOVO, THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED 163 (2000).

42. U.N. SCOR, 54th Sess., 3988th mtg. at 6-7, U.N. Doc. S/PV.3988 (Mar. 24, 1999).

the need for “a greater sense of unity and common purpose” among the members of the Council, “particularly the permanent members;”<sup>43</sup> and Bosnia and Herzegovina spoke of the problems that arose when the Council was “blocked” from responding to humanitarian crises.<sup>44</sup> Even Secretary-General Kofi Annan was critical of the Council’s inaction. After expressing “regret” that NATO proceeded without Security Council authorization, Annan observed that while it was important to maintain the Security Council’s position as the arbiter of the legality of intervention, “equally important[ ]” was the fact that “unless the Security Council can unite around the aim of confronting massive human rights violations and crimes against humanity on the scale of Kosovo, then we will betray the very ideals that inspired the founding of the United Nations.”<sup>45</sup> He concluded that “[t]his is the core challenge of the Security Council and the United Nations as a whole in the next century: to unite behind the principle that massive and systematic violations of human rights conducted against an entire people cannot be allowed to stand.”<sup>46</sup>

Of course, the inability to achieve Security Council consensus has not been the only cause of the U.N.’s refusal to intervene in humanitarian crises. Even when the Security Council authorizes intervention, states may be reluctant to supply troops, mission mandates may be limited or ineffective, and other factors may undermine either the international will to intervene or the success of intervention. Yet the fundamental impediment to intervention remains the veto: “The UN system’s ability to do what it should to alleviate what it had identified as a threat to the peace [has been] blocked not by the will of the members but by threat of a veto.”<sup>47</sup> The veto has, in turn, led the Security Council to fail to authorize interventions even when nearly all observers agree it ought to.

In part as a result of the Security Council’s failure to act to prevent humanitarian disasters, states have pushed back against the Charter regime by intervening in other states for humanitarian reasons without first gaining approval from the Security Council or consent from the target state. As the next Section explains, these interventions pose a significant challenge to the U.N. regime.

### C. Circumventing the Limits: Humanitarian Interventions Outside the U.N. Regime

Contemporary scholars frequently point to eight instances of humani-

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43. U.N. SCOR, 54th Sess., 4011th mtg. at 15, U.N. Doc. S/PV.4011 (June 10, 1999); see also U.N. Doc. S/PV.3988, *supra* note 36, at 10.

44. U.N. SCOR, 54th Sess., 3989th mtg. at 14-15, U.N. Doc. S/PV.3989 (Mar. 26, 1999).

45. Press Release, Secretary General, Sec’y Gen. Says Renewal of Effectiveness and Relevance of Sec. Council Must be Cornerstone of Efforts to Promote Int’l Peace in Next Century, U.N. Press Release SG/SM/6997 (May 18, 1999).

46. *Id.*

47. Franck, *supra* note 36, at 226.

tarian intervention outside the U.N. Charter regime:<sup>48</sup> India's 1971 intervention in East Pakistan; Vietnam's 1978 intervention in Cambodia; Tanzania's 1978-79 intervention in Uganda; France's 1979 intervention into the Central African Republic; the Economic Community of West African States' (ECOWAS) 1990 intervention in Liberia; the United States, the United Kingdom, the Netherlands, France, and nine other countries' 1991 intervention in Northern Iraq; ECOWAS's 1997-99 interventions in Sierra Leone; and NATO's 1999 intervention in the Kosovo province of the Federal Republic of Yugoslavia (FRY).<sup>49</sup> These instances are all characterized by two criteria: (1) The intervening state asserted humanitarian purposes (often in conjunction with other justifications such as self-defense, regional security, or the consent of an opposition group within the state),<sup>50</sup>

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48. These examples were identified based on a comprehensive review of the literature on humanitarian intervention, including SUSAN BREAU, *HUMANITARIAN INTERVENTION: THE UNITED NATIONS & COLLECTIVE RESPONSIBILITY* (2005); SIMON CHESTERMAN, *JUST WAR OR JUST PEACE?* 231-32 (2002); THOMAS M. FRANCK, *RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS* (2002); ICISS REPORT, *supra* note 35; Antonio Casese, *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, 29 (1999); John Currie, *NATO's Humanitarian Intervention in Kosovo: Making or Breaking International Law?*, 36 *CAN. Y.B. INT'L L.* 303 (1998); Franck, *supra* note 36; Monica Hakimi, *To Condone or Condemn? Regional Enforcement Actions in the Absence of Security Council Authorization*, 40 *VAND. J. TRANSNAT'L L.* 643 (2007); Simma, *supra* note 29; Jane Stromseth, *Rethinking Humanitarian Intervention: The Case for Incremental Change*, in *HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS*, *supra* note 35, at 232.

49. There are additional interventions in the Cold War period that some have characterized as humanitarian that are not included here because most modern scholars do not regard them as true humanitarian interventions. These include Belgium's intervention in the Congo (1960), Belgium and the United States' intervention in the Congo (1964), the United States' intervention in the Dominican Republic (1965), Israel's intervention in Uganda (1976), Syria's intervention in Lebanon (1976), Belgium and France's intervention in Zaire (1978), the United States' intervention in Grenada (1983), and the United States' intervention in Panama (1989-90). *See, e.g.*, CHESTERMAN, *supra* note 48, at 63-85 (surveying scholars who have cited these interventions and arguing that "writers who claim that state practice [based on these examples] provides evidence of a customary international law right of humanitarian intervention grossly overstate their case" because states did not justify these interventions primarily by reference to humanitarian motives, let alone frame these interventions as legal because of the humanitarian motive, as required for evidence of *opinio juris*); SEAN D. MURPHY, *HUMANITARIAN INTERVENTION: THE UNITED NATIONS IN AN EVOLVING WORLD ORDER* 143 (1996) (arguing that these interventions are not strong evidence of an emerging customary international law norm permitting unauthorized humanitarian interventions because "[i]n virtually all instances, the intervening states characterized the intervention as justifiable on a basis other than a doctrine of humanitarian intervention" and because "the international community was highly critical of most of these interventions"); ERIC A. HEINZE, *WAGING HUMANITARIAN WAR: THE ETHICS, LAW, AND POLITICS OF HUMANITARIAN INTERVENTION* 75 (2009) ("[M]ost observers agree that the humanitarian elements in the United States interventions in the Dominican Republic, Grenada, and Panama are highly questionable. . . . [T]he only remaining of these [Cold War] interventions that are not widely contested as genuine humanitarian interventions are those in East Pakistan, Uganda, and Cambodia . . .").

50. The humanitarian justifications become more prominent over time. In East Pakistan and Cambodia, the intervening states did not rely as explicitly on overt humanitarian arguments. In NATO's intervention in the FRY, however, there was more regular

and (2) the Security Council either refused to authorize the intervention under Chapter VII or was simply not consulted.

Table 1 summarizes the justifications offered by states for the eight interventions and the reactions of the international community to those interventions. Based on this record, we made three observations. First, although most of the intervening states mentioned an ongoing humanitarian crisis, very rarely was the crisis used as an explicit justification for the intervention. Second, states mentioned humanitarian crises *alongside* other justifications intended to portray the intervention as legal under the U.N. Charter regime; these justifications included self-defense and consent of the receiving state. Indeed, none of the interventions were justified solely on humanitarian grounds. Finally, the reactions of the international community to these interventions were far from uniformly supportive. The U.N. never explicitly endorsed the legality of any of these interventions through adopted resolutions, and debates among Member States revealed varying opinions on the interventions. This is true even of NATO's intervention in FRY (Kosovo Province).

This Section now turns to a brief outline of each humanitarian intervention.<sup>51</sup> Examining these historical instances of humanitarian intervention outside the U.N. regime serves two purposes. First, it offers support for our claim that the U.N. regime has not been entirely effective and that, in fact, interventions have taken place outside of the U.N.-authorized process. Second, it provides background for Part II, which examines two prominent theories offered for humanitarian intervention—each of which looks to these historical examples for support.

### 1. *India's Intervention in East Pakistan (1971)*

The Indo-Pakistani conflict was sparked by the Bangladesh Liberation War, a conflict between the East Pakistanis, who were mainly Bengali in ethnicity, and the West Pakistanis.<sup>52</sup> In the 1970 Pakistani national elections, the East Pakistani Awami League secured a majority in the Parliament of Pakistan.<sup>53</sup> The West Pakistani leadership, however, stalled in relinquishing power.<sup>54</sup> The Awami League declared the independence of East Pakistan as Bangladesh on April 10, 1971.<sup>55</sup> West Pakistani forces engaged in violent attempts to end the insurrection, committing widespread atrocities against the Bengali population of East Pakistan.<sup>56</sup> An esti-

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and explicit appeal to a "right to humanitarian intervention." See Historical Examples Appendix, *supra* note 22.

51. A more detailed discussion of each intervention is provided in the Historical Examples Appendix, *supra* note 22.

52. John H. Gill, *An Atlas of the 1971 India-Pakistan War: The Creation of Bangladesh*, NEAR E. S. ASIA CTR. FOR STRATEGIC STUDIES 10-12 (2004), available at <http://www.ndu.edu/nesa/docs/Gill%20atlas%20final%20version.pdf> (last visited Oct. 29, 2012).

53. *Id.* at 10.

54. *Id.* at 10-11.

55. ANTONIO TANCA, *FOREIGN ARMED INTERVENTION IN INTERNAL CONFLICT* 163 (1993).

56. FRANCK, *supra* note 48, at 139-40.

Table 1: Unauthorized Humanitarian Interventions

Date	Intervening State(s) and Regional Organization	Receiving State	Justifications for Intervention by Intervening State(s) and Regional Organization	Reactions of the International Community
1971	India	East Pakistan	<ul style="list-style-type: none"> <li>• Self-defense</li> <li>• Consent of Bangladesh, which India unilaterally recognized shortly after intervening</li> <li>• Mentioned the humanitarian crisis, but not the explicit justification</li> </ul>	<ul style="list-style-type: none"> <li>• UNSC resolutions calling for immediate halt to hostilities vetoed by the Soviet Union</li> <li>• UNGA resolution calling for an immediate ceasefire</li> <li>• Positive statements only from the Soviet Union and Poland</li> </ul>
1978	Vietnam	Cambodia	<ul style="list-style-type: none"> <li>• Self-defense</li> <li>• Assisting the Cambodian people in their alleged uprising against the Pol Pot regime (and referencing a humanitarian crisis as the reason for that uprising)</li> </ul>	<ul style="list-style-type: none"> <li>• UNSC resolution indirectly condemning the intervention vetoed by the Soviet Union</li> <li>• Almost universally negative statements in U.N. debates</li> </ul>
1978-1979	Tanzania	Uganda	<ul style="list-style-type: none"> <li>• Self-defense</li> <li>• Mentioned humanitarian crisis, but not as the explicit justification</li> </ul>	<ul style="list-style-type: none"> <li>• No UNSC resolution mentioning intervention</li> <li>• No U.N. debate</li> </ul>
1979	France	Central African Republic	<ul style="list-style-type: none"> <li>• Consent of the Dacko government</li> </ul>	<ul style="list-style-type: none"> <li>• No UNSC resolution mentioning intervention</li> <li>• No U.N. debate</li> <li>• Libya, Chad, and Benin condemn</li> </ul>
1990	ECOWAS	Liberia	<ul style="list-style-type: none"> <li>• Consent of the deposed Doe government</li> <li>• Legal under the ECOWAS Mutual Assistance on Defense Protocol</li> <li>• Mentioned humanitarian crisis in the context of the need to restore regional security</li> </ul>	<ul style="list-style-type: none"> <li>• UNSC resolution "commending" ECOWAS for its efforts to promote peace and normalcy without explicitly mentioning the intervention or its legality</li> <li>• No U.N. debate</li> </ul>
1991-1992	U.S., U.K., the Netherlands, France & nine other countries	Iraq	<ul style="list-style-type: none"> <li>• Legal under prior UNSC resolution</li> <li>• Morally necessary to respond to a humanitarian crisis</li> <li>• Legal right to humanitarian intervention (Britain only)</li> </ul>	<ul style="list-style-type: none"> <li>• No UNSC resolution mentioning intervention</li> <li>• Few statements by states mentioning intervention at all in UN debates, with only Iraq and Sudan explicitly condemning</li> </ul>
1997-1999	ECOWAS	Sierra Leone	<ul style="list-style-type: none"> <li>• Self-defense</li> <li>• Legal under prior UNSC resolution</li> <li>• Consent of the deposed Kabbah government</li> </ul>	<ul style="list-style-type: none"> <li>• UNSC resolutions "commending" ECOWAS without explicitly mentioning the legality of the intervention</li> <li>• No U.N. debate</li> </ul>
1999	NATO	Federal Republic of Yugoslavia (Kosovo)	<ul style="list-style-type: none"> <li>• Legal under prior UNSC resolutions</li> <li>• Morally necessary to respond to humanitarian crisis</li> <li>• Legal right to humanitarian intervention (Britain, Belgium and the Netherlands explicitly, though U.S. and Canadian statements could be taken to support a legal right as well)</li> </ul>	<ul style="list-style-type: none"> <li>• UNSC declined to pass resolution condemning intervention (12 to 3)</li> <li>• Negative, positive, and neutral statements in U.N. debates, with the negative including Russia, China, and India</li> </ul>

mated eight million refugees fled to India.<sup>57</sup> In December 1971, fighting broke out between India and Pakistan when India sent armed troops into East Pakistan.<sup>58</sup> Debates in the U.N. over the conflict took on a distinctly Cold War tone, stalling any action on the part of the U.N.<sup>59</sup> The conflict between India and Pakistan lasted only thirteen days before West Pakistani forces in East Pakistan surrendered.<sup>60</sup>

## 2. *Vietnam's Intervention in Cambodia (1978)*

After coming to power in Cambodia in 1975, the Khmer Rouge began engaging in border clashes with Vietnam.<sup>61</sup> Initially, Vietnam resisted the Khmer Rouge by assisting opposition forces in Cambodia in their attempt to overthrow the regime.<sup>62</sup> After the failure of these efforts,<sup>63</sup> Vietnamese forces invaded Cambodia on December 25, 1978.<sup>64</sup> Vietnam did not attempt to procure Security Council approval beforehand. In January 1979, Pol Pot fled the capitol,<sup>65</sup> and Vietnamese forces installed a new government, which called itself the People's Republic of Kampuchea (PRK).<sup>66</sup> The exiled Khmer Rouge government continued fighting the new government until the warring parties signed an international accord in 1991,<sup>67</sup> two years after Vietnam had withdrawn its forces.<sup>68</sup>

Vietnam's intervention is credited with ending the massive atrocities committed by Pol Pot's regime, which included over 200,000 political killings between 1975-1977 and a further 100,000 in 1978.<sup>69</sup> The total number of deaths during the Khmer Rouge period, through starvation,

57. *Id.* at 140.

58. TANCA, *supra* note 55, at 163.

59. The U.N. Security Council assembled on December 4, 1971 to discuss the hostilities. FRANCK, *supra* note 48, at 140. The United States proposed a resolution that called for an "immediate cessation of hostilities" and "immediate withdrawal of armed personnel." The USSR vetoed the resolution. *Id.* at 141. A Chinese draft resolution from December 5 called on states to support the Pakistan people, meanwhile condemning the Indian Government's acts of "subverting, dismembering and committing aggression against Pakistan." China: draft resolution, U.N. Doc. S/10421 (Dec. 5, 1971).

60. TANCA, *supra* note 48, at 163.

61. NICHOLAS J. WHEELER, *SAVING STRANGERS: HUMANITARIAN INTERVENTION IN INTERNATIONAL SOCIETY* 79 (2000); see FRANCK, *supra* note 48, at 145-46.

62. WHEELER, *supra* note 61, at 81-82.

63. *Id.* at 82 (citing GRANT EVANS & KELVIN ROWLEY, *RED BROTHERHOOD AT WAR: VIETNAM, CAMBODIA AND LAOS SINCE 1975* 108 (1990)).

64. FRANCK, *supra* note 48, at 146.

65. WHEELER, *supra* note 61, at 84.

66. *Id.*

67. Alan Riding, *4 Parties in Cambodian War Sign U.N.-Backed Peace Pact; Khmer Rouge Shares Rule*, N.Y. TIMES (Oct. 24, 1991), <http://www.nytimes.com/1991/10/24/world/4-parties-in-cambodian-war-sign-un-backed-peace-pact-khmer-rouge-shares-rule.html?pagewanted=all&src=pm>.

68. Uli Schmetzer, *Vietnamese Troops Leave a Weary, Wary Cambodia*, CHI. TRIB., Sept. 22, 1989, [http://articles.chicagotribune.com/1989-09-22/news/8901150240\\_1\\_cambodian-vietnamese-angkor-wat](http://articles.chicagotribune.com/1989-09-22/news/8901150240_1_cambodian-vietnamese-angkor-wat).

69. WHEELER, *supra* note 61, at 78; Amnesty Int'l, *Kampuchea: Political Imprisonment and Torture*, 16-17, AI Index ASA/23/05/87 (June 1987) (cited in WHEELER, *supra* note 61, at 78).

executions, and forced labor, is estimated at approximately 1.7 million.<sup>70</sup>

### 3. Tanzania's Intervention in Uganda (1978-1979)

Idi Amin, known for his "barbaric regime" which perpetrated massive human rights abuses over the course of nearly a decade, came to power in Uganda by military coup in 1971.<sup>71</sup> In October 1978, the Ugandan army crossed the Tanzanian border and occupied 1,000 km<sup>2</sup> of Tanzanian territory, killing Tanzanians and pillaging towns in the process.<sup>72</sup> In response, Tanzanian forces, along with exiled Ugandan forces and rebels (known as the Ugandan National Liberation Front), moved into Ugandan territory in January 1979, progressively occupying more of the country.<sup>73</sup> The Security Council never discussed the intervention; Amin's initial request in February for a meeting of the Security Council on the issue was dismissed on the basis that it was not properly worded.<sup>74</sup> He appealed again for a meeting in March,<sup>75</sup> but retracted that appeal a few days later on the request of African states.<sup>76</sup> By April, the Amin regime fell to the intervening soldiers<sup>77</sup> and a new government was established, comprised of formerly exiled leaders.<sup>78</sup>

### 4. France's Intervention in Central African Republic (1979)

France intervened in the Central African Republic in 1979, leading to the fall of Jean-Bedel Bokassa, who had been the head of state.<sup>79</sup> Bokassa's fourteen years in power were marked by human rights atrocities, which became especially acute when resistance to his power began in 1979.<sup>80</sup> For example, in April 1979, 250 young people suspected of opposing Bokassa were taken from the street, beaten up, and thrown into prison where dozens of them died.<sup>81</sup> On the night of September 20, 1979, while Bokassa was on a state visit in Libya, the French launched Operation

70. *Cambodian Genocide Program*, YALE UNIV., <http://www.yale.edu/cgp/> (last visited Nov. 12, 2012); WHEELER, *supra* note 61, at 78.

71. WHEELER, *supra* note 61, at 111; Farooq Hassan, *Realpolitik in International Law: After Tanzania-Ugandan Conflict "Humanitarian Intervention" Reexamined*, 17 WILLAMETTE L. REV. 859, 867 (1981); MURPHY *supra* note 49, at 105.

72. Hassan, *supra* note 71, at 865, 871-72; WHEELER, *supra* note 61, at 113.

73. MURPHY, *supra* note 49, at 105.

74. WHEELER, *supra* note 61, at 122-23.

75. Deputy Permanent Rep. of Uganda to the U.N., Letter dated Mar. 28, 1979 from the Deputy Permanent Rep. of Uganda to the United Nations addressed to the President of the Security Council, U.N. Doc. S/13204 (Mar. 28, 1979).

76. Deputy Permanent Rep. of Uganda to the U.N., Letter dated Apr. 5, 1979 from the Deputy Permanent Rep. of Uganda to the United Nations addressed to the President of the Security Council, U.N. Doc. S/13228 (Apr. 6, 1979); WHEELER, *supra* note 61, at 123; Hassan, *supra* note 71, at 866 n.19.

77. WHEELER, *supra* note 61, at 120.

78. *Id.* at 131; Hassan, *supra* note 71, at 876-77 (discussing the "election" process completed in exile).

79. CHESTERMAN, *supra* note 48, at 81.

80. *Id.*

81. INTERNATIONAL CRISIS GROUP, CENTRAL AFRICAN REPUBLIC ANATOMY OF A PHANTOM STATE: AFRICA REPORT NO. 136 6 (2007) available at <http://www.crisisgroup.org/-/media/Files/africa/central-africa/central-african-republic/Central%20African%20>



Baraccuda.<sup>82</sup> French military secured the airport and other locations in the capital.<sup>83</sup> The military then flew former president, David Dacko, to retake power, which occurred in a bloodless coup.<sup>84</sup>

### 5. *ECOWAS's Intervention in Liberia (1990)*

The First Liberian Civil War lasted from 1989–1996, pitting the government of Samuel Doe and his Armed Forces of Liberia against the rebel National Patriotic Front of Liberia (NFL), led by Charles Taylor.<sup>85</sup> In 1990, the Economic Community of West African States (ECOWAS), a West African regional organization,<sup>86</sup> created a special ECOWAS Cease-Fire Monitoring Group (ECOMOG), consisting of the armed forces of several member-states, and dispatched it to intervene in Liberia, an ECOWAS member-state. ECOWAS did not seek Security Council approval before creating and dispatching ECOMOG.<sup>87</sup> During its early years, ECOMOG suffered from operational difficulties and competing interests among member states. Despite these challenges, ECOMOG remained active in Liberia for several years, helping broker various temporary cease-fires, and ultimately helping implement a final cease-fire and supervise elections that formally brought Taylor to power in 1997.<sup>88</sup>

### 6. *The United States, the United Kingdom, the Netherlands, France, and Nine Other Countries' Intervention in Iraq (1991)*

Iraq's Kurdish and Shiite populations rebelled against Saddam Hus-

Republic%20Anatomy%20of%20a%20Phantom%20State. ashx. See also MURPHY, *supra* note 49, at 107 (observing that "Bokassa's forces . . . beat at least 100 to death").

82. Christopher William Griffin, *French Grand Strategy in African in the Fifth Republic 225* (May 2009) (unpublished Ph.D. dissertation, University of Southern California) available at <http://digitallibrary.usc.edu/cdm/ref/collection/p15799coll127/id/218417>.

83. *Id.*

84. CHESTERMAN, *supra* note 48, at 82.

85. ERIC G. BERMAN & KATIE E. SAMS, *PEACEKEEPING IN AFRICA: CAPABILITIES AND CULPABILITIES* 84 (2000).

86. ECOWAS was originally designed to help integrate the economies of member states, with the ultimate goal of establishing an economic and monetary union. In 1993, ECOWAS revised its founding treaty and took more steps towards political, as well as economic, integration. See Treaty Establishing the Economic Community of West African States, July 24, 1993, 35 I.L.M. 660 [hereinafter ECOWAS Treaty] (replacing the 1975 Treaty of Lagos), available at <http://www.comm.ecowas.int/sec/index.php?id=treaty&lang=en>. This eventually included the establishment of a regional Parliament, a court of justice, and formal mechanisms for settling conflicts between and within member-states. See ECONOMIC COMMUNITY OF WEST AFRICAN STATES, Profile: ECONOMIC COMMUNITY OF WEST AFRICAN STATES [hereinafter ECOWAS Profile], available at <http://www.africa-union.org/root/au/recs/ECOWASProfile.pdf> (last visited Oct. 29, 2013).

87. Some claim this was due to opposition from the Cote d'Ivoire, as well as Ethiopia and Zaire—members of the Security Council at the time—to Security Council involvement. David Wippman, *Enforcing the Peace: ECOWAS and the Liberian Civil War*, in *ENFORCING RESTRAINT: COLLECTIVE INTERVENTION IN INTERNAL CONFLICTS* 157, 165 (Lori Fisler Damrosch ed., 1993).

88. BERMAN & SAMS, *supra* note 85, at 109.

sein's government in March 1991.<sup>89</sup> The Hussein regime responded with brutal force, committing atrocities against the rebels.<sup>90</sup> By April 6, the United Nations High Commissioner for Refugees estimated that roughly 750,000 Kurds had fled to Iran, 280,000 to Turkey, and that 300,000 more were gathered at the Turkish border.<sup>91</sup> Many of the internally displaced persons soon began dying in large numbers from cold and hunger.<sup>92</sup> The Security Council adopted Resolution 688 on April 5, condemning the repression of the Iraqi civilian population,<sup>93</sup> but it did not authorize international intervention under Chapter VII. Instead, without U.N. approval, the United States, the United Kingdom, France, and the Netherlands dispatched about 8,000 troops to Northern Iraq to provide assistance to Kurdish refugees under "Operation Provide Comfort."<sup>94</sup> At the peak of the intervention, there were 20,000 troops from thirteen countries in Northern Iraq.<sup>95</sup> On April 18, Iraq agreed to a Memorandum of Understanding with the United Nations that provided for the establishment of 100 U.N.-administered humanitarian centers throughout Iraq.<sup>96</sup> The last coalition forces left Iraq on July 15, 1991,<sup>97</sup> but in response to escalating harassment of the Shiite population, coalition forces imposed a no-fly zone in the south on August 26, 1992.<sup>98</sup> Coalition forces continued to patrol northern and southern no-fly zones until 1999.<sup>99</sup>

#### 7. ECOWAS's Interventions in Sierra Leone (1997-1999)

In May 1997, the Revolutionary United Front (RUF) overthrew the democratically elected government of President Tejan Kabbah in Sierra Leone.<sup>100</sup> Nigeria sent in troops under the command of ECOWAS's Economic Community of West African States Monitoring Group (ECOMOG)<sup>101</sup> and began fighting the rebels.<sup>102</sup> On May 27, the President of the Security Council issued a statement strongly deploring the attempt

89. Lawrence Freedman & David Boren, *'Safe Havens' for Kurds in Post-War Iraq*, in *TO LOOSE THE BANDS OF WICKEDNESS: INTERNATIONAL INTERVENTION IN DEFENCE OF HUMAN RIGHTS* 43, 45 (Nigel S. Rodley ed., 1992).

90. See HUMAN RIGHTS WATCH, *ENDLESS TORMENT: THE 1991 UPRISING IN IRAQ AND ITS AFTERMATH* (1992), available at <http://www.hrw.org/legacy/reports/1992/Iraq926.htm>.

91. *Chronology for Kurds in Iraq*, MINORITIES AT RISK PROJECT, <http://www.cidcm.umd.edu/mar/chronology.asp?groupId=64504> (last updated July 16, 2010).

92. WHEELER, *supra* note 61, at 141; Freedman & Boren, *supra* note 89, at 48.

93. S.C. Res. 688, ¶ 1, U.N. Doc. S/RES/688 (Apr. 5, 1991).

94. Freedman & Boren, *supra* note 89, at 56.

95. MURPHY, *supra* note 49, at 174.

96. Memorandum of Understanding, in letter dated May 30, 1991 from the Secretary-General addressed to the President of the Security Council, U.N. Doc. S/22663 (May 31, 1991); WHEELER, *supra* note 61, at 155; Freedman & Boren, *supra* note 89, at 60.

97. CHESTERMAN, *supra* note 48, at 199.

98. WHEELER, *supra* note 61, at 162.

99. CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 30 (2000).

100. See U.N. Secretary-General, Letter dated Oct. 7, 1997 from the Secretary-General addressed to the President of the Security Council, at 1, U.N. Doc. S/1997/776 (Oct. 7, 1997).

101. James Rupert, *Nigeria Weighs Risks, Benefits of Involvement in Sierra Leone*, WASH. POST, Feb. 18, 1998, at A12.

to overthrow the government, but did not mention ECOMOG's intervention.<sup>103</sup> Nigeria withdrew its troops on June 3, 1997, when its military efforts failed,<sup>104</sup> but it engaged in intermittent skirmishes with the RUF until October.<sup>105</sup> In October 1997, Amnesty International published a report accusing the RUF coup government of "committ[ing] serious human rights violations," including torture and extrajudicial killings of those opposed to the new government.<sup>106</sup>

On October 8, 1997, the Security Council imposed sanctions on Sierra Leone<sup>107</sup> and authorized ECOWAS to ensure the implementation of the embargo,<sup>108</sup> but not to use force or to overthrow the junta. ECOMOG, however, continued to intermittently fight the RUF.<sup>109</sup> In February 1998, Nigeria, "operat[ing] nominally under the auspices of ECOMOG," again intervened in Sierra Leone<sup>110</sup> and forcibly removed the military government.<sup>111</sup> The United Nations created and deployed the U.N. Observer Mission (UNOMSIL) to supplement ECOMOG forces and to monitor the situation.<sup>112</sup> In January 1999, as tensions escalated, UNOMSIL evacuated immediately prior to a RUF-led advance into Freetown.<sup>113</sup> In response, ECOMOG sent in more troops.<sup>114</sup> On July 7, 1999, the government and the RUF signed the Lomé Peace Agreement, which provided a new mandate for ECOMOG with the goal of turning it into a neutral peacekeeping force.<sup>115</sup> On October 22, 1999, the UNSC passed Resolution 1270, which created the U.N. Mission in Sierra Leone (UNAMSIL), replacing UNOMSIL, to disarm combatants and monitor the cease-fire.<sup>116</sup> The resolution

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102. 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, 327 (1998).

103. Statement by the President of the Security Council, U.N. Doc. S/PRST/1997/29 (May 27, 1997).

104. Antony Goldman, *Humiliated Nigerian Army Retires Hurt: Botched Intervention in Sierra Leone Has Left the Military Regime Morally Exposed*, FIN. TIMES (London), June 4, 1997.

105. *Sierra Leone: Elusive Peace*, OXFORD ANALYTICA DAILY BRIEF SERV., Dec. 3, 1997, <http://www.oxan.com/display.aspx?ItemID=DB8732>.

106. Amnesty Int'l, *Sierra Leone: A Disastrous Set-Back for Human Rights*, AI Index AFR 51/05/97 (Oct. 20, 1997), available at <http://www.amnesty.org/en/library/asset/AFR51/005/1997/en/1387dc4e-e9a1-11dd-b3a1-f9ff1fdb4a5/afr510051997en.pdf>.

107. S.C. Res. 1132, ¶ 6, U.N. Doc. S/RES/1132 (Oct. 8, 1997).

108. *Id.* ¶ 8.

109. See Permanent Rep. of Nigeria to the U.N., Letter dated Oct. 28, 1997 from the Permanent Rep. of Nigeria to the United Nations addressed to the President of the Security Council, Annex II, ¶¶ 1, 2, U.N. Doc. S/1997/824 (Oct. 28, 1997).

110. Nowrot & Schabacker, *supra* note 102, at 330.

111. U.N. Secretary-General, *Fourth Rep. of the Secretary-General on the Situation in Sierra Leone*, ¶ 6, U.N. Doc. S/1998/249 (Mar. 18, 1998).

112. S.C. Res. 1181, ¶ 6, U.N. Doc. S/RES/1181 (July 13, 1998).

113. U.N. Secretary-General, *Fifth Rep. of the Secretary-General on the United Nations Observer Mission in Sierra Leone*, ¶ 6, U.N. Doc. S/1999/237 (Mar. 4, 1999).

114. *Id.* ¶ 5.

115. U.N. Secretary-General, *Seventh Rep. of the Secretary-General on the United Nations Observer Mission in Sierra Leone*, ¶¶ 2, 11-12, U.N. Doc. S/1999/836 (July 30, 1999).

116. S.C. Res. 1270, ¶¶ 8, 10, U.N. Doc. S/RES/1270 (Oct. 22, 1999).

also approved ECOMOG's mandate in the Lomé Peace Agreement.<sup>117</sup> On February 7, 2000, the Security Council passed Resolution 1289 authorizing UNAMSIL to deploy troops to Sierra Leone in place of ECOMOG.<sup>118</sup>

8. *NATO's Intervention in the Federal Republic of Yugoslavia (Kosovo Province) (1999)*

In 1989, President Slobodan Milošević of the Federal Republic of Yugoslavia (FRY) revoked Kosovo's autonomous status as a province.<sup>119</sup> Under Milošević's rule, the FRY discriminated against ethnic Albanians, leading to increasing separatist sentiment and, ultimately, a turn to violence by the Kosovo Liberation Army (KLA).<sup>120</sup> By 1998, Milošević was targeting the KLA with attacks on urban centers using heavy weapons and air strikes.<sup>121</sup> During 1998, the fighting between FRY forces and the KLA "resulted in the deaths of over 1,500 Kosovar Albanians and forced 400,000 people from their homes."<sup>122</sup> Despite a Security Council resolution that condemned the use of force and imposed an arms embargo on the FRY under Chapter VII<sup>123</sup> and an agreement between NATO, the Organization for Security and Cooperation in Europe (OSCE), and the FRY,<sup>124</sup> the FRY initiated a "new campaign in Kosovo of ethnic cleansing" in March 1999.<sup>125</sup> In response, NATO initiated air strikes on March 23.<sup>126</sup> The strikes targeted military facilities and fielded forces in Kosovo, as well as "strategic" targets across FRY.<sup>127</sup> A peace settlement was eventually reached, and NATO air strikes were suspended on June 10.<sup>128</sup>

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117. *Id.* ¶ 11.

118. S.C. Res. 1289, ¶ 10, U.N. Doc. S/RES/1289 (Feb. 7, 2000).

119. ROBERT F. GORMAN, GREAT DEBATES AT THE UNITED NATIONS: AN ENCYCLOPEDIA OF FIFTY KEY ISSUES, 1945-2000 365 (2001).

120. WHEELER, *supra* note 61, at 257-58.

121. *Id.* at 258.

122. *NATO's Role in Relation to the Conflict in Kosovo*, NATO (July 15, 1999), <http://www.nato.int/Kosovo/history.htm>.

123. S.C. Res. 1160, U.N. Doc. S/RES/1160 (Mar. 31, 1998).

124. *NATO-FRY, Agreement Providing for the Establishment of an Air Verification Mission over Kosovo, Belgrade, 15 October 1998*, in *THE KOSOVO CONFLICT AND INTERNATIONAL LAW: AN ANALYTICAL DOCUMENTATION 1974-1999*, 291, 291-92 (Heike Krieger ed., 2001); *Agreement on the Kosovo Verification Mission of the Organization for Security and Cooperation in Europe*, in letter dated Oct. 19, 1998 from the Permanent Representative of Poland to the United Nations addressed to the Secretary-General, U.N. Doc. S/1998/978 (Oct. 20, 1998).

125. WHEELER, *supra* note 61, at 265.

126. Press Release, Secretary General, NATO (Mar. 23, 1999) [hereinafter NATO Press Release], available at <http://www.nato.int/docu/pr/1999/p99-040e.htm>; see also WHEELER, *supra* note 61, at 265.

127. W.J. Fenrick, *Targeting and Proportionality During the NATO Bombing Campaign Against Yugoslavia*, 12 *EUR. J. INT'L. L.* 489, 490 (2001); see also INDEP. INT'L COMM'N ON KOSOVO, *supra* note 41, at 179.

128. *NATO, Statement by the Secretary General on Suspension of Air Operations, Brussels, 10 June 1999*, in *THE KOSOVO CONFLICT AND INTERNATIONAL LAW*, *supra* note 124, at 309.

We turn now to examining the ways in which scholars previously have sought to explain these eight instances of unauthorized humanitarian interventions.

## II. Theorizing Humanitarian Intervention Outside the Formal U.N. Regime

Over the last two decades, several theories have emerged to explain these unauthorized humanitarian interventions. Many scholars have struggled to explain that even though the eight interventions described above were not authorized by the Security Council, they were nonetheless legal. There are two common lines of argument in this vein: The first asserts that these eight interventions are evidence of a new customary international law norm that gives states the legal right to engage in unauthorized humanitarian intervention in certain limited circumstances. The second, and closely related, approach also rests on the claim that there is an emerging customary norm, but it focuses on states' responsibility to protect their populations rather than on states' rights to intervene. This has come to be known as the Responsibility to Protect doctrine. Here, we outline the two approaches and assess their claims. We conclude that neither one is supported either by state practice or *opinio juris* and that, moreover, they both present a significant risk of abuse.

In addition to these approaches, which assert the emergence of a new *legal* norm, there is an alternative approach to unauthorized intervention, sometimes referred to as "illegal-but-legitimate,"<sup>129</sup> which is prominent in the literature on humanitarian intervention. As its label implies, this approach examines the normative, rather than legal, basis for humanitarian intervention. It maintains that humanitarian interventions not authorized by the U.N. Security Council remain illegal, but can nonetheless be deemed legitimate in certain circumstances. Thomas Franck, a key proponent of this approach, points out that the international community's reactions to unauthorized interventions demonstrate that the "jury of states has not rescinded Charter Article 2(4) or replaced it with an understanding that, now, 'anything goes.'"<sup>130</sup> But, when unauthorized interventions avert genuine humanitarian crises, Franck claims, the international community does not sanction the intervening states as harshly as it would a normal breach of Article 2(4).<sup>131</sup> In this way, the theory functions much like the domestic law concept of necessity or mitigating circumstances in situations in which strict enforcement of the law "conduces to a result which opens an excessive chasm between law and the common moral sense."<sup>132</sup> Franck explains that the "jurors" of the international community—the Security Council, the General Assembly, the International Court of Justice,

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129. Thomas Franck has articulated the "illegal but legitimate" approach in more detail than any other scholar. See, e.g., FRANCK, *supra* note 48; Franck, *supra* note 36; see also INDEP. INT'L COMM'N ON KOSOVO, *supra* note 41, at 4.

130. Franck, *supra* note 36, at 230.

131. *Id.*

132. *Id.* at 213–14.

and “the court of public opinion”<sup>133</sup>—calibrate the degree to which they sanction<sup>134</sup> the intervening states depending on how *morally* justified they judge the intervention to be in light of its particular circumstances. The international community lets those interventions deemed most clearly legitimate “pass with tacit approval,” those in the middle pass “without comment,” and those on the edge of legitimacy pass “with only minimal rebuke.”<sup>135</sup>

Franck and other proponents of the illegal-but-legitimate approach argue that it is better than creating an explicit legal exception to Article 2(4) for humanitarian intervention (as the two approaches assessed below do).<sup>136</sup> It is less open to abuse by those who would insincerely invoke a humanitarian justification,<sup>137</sup> they argue, because it imposes a high burden of proof on the intervener. If the intervention is illegal, “the bar [for proof] will be set very high, forcing states to show that a particular humanitarian crisis justifies departing from the law.”<sup>138</sup> On the other hand, “if unilateral humanitarian intervention is recognised as an exception, then the bar will be lower because states will need to show only that their actions come within the exception.”<sup>139</sup> Proponents of the illegal-but-legitimate approach also contend that, from an ethical perspective, the approach is better than never permitting unauthorized humanitarian intervention.<sup>140</sup> The political reality is that the Security Council will still often fail to authorize intervention in cases where the majority of the international community may agree that not averting or stopping a genuine humanitarian disaster would be worse than violating Article 2(4). Failing to accommodate this impulse can undermine the law’s legitimacy. As Franck explains, “the law’s legitimacy is surely . . . undermined if, by its slavish implementation, it produces terrible consequences.”<sup>141</sup>

We focus our analysis here on the first two approaches—putting aside the illegal-but-legitimate approach—for two reasons. First, the illegal-but-legitimate approach addresses a different question from the one on which we are focused. This approach does not attempt to establish any *legal*

133. *Id.* at 228.

134. Franck defines sanctions broadly as “the imposition of negative consequences ranging from resolutions deploring a transgressor’s conduct, through diplomatic and economic embargoes, all the way to authorizing a remedial military response to the transgression.” *Id.*, at 227 n.80.

135. FRANCK, *supra* note 48, at 184, 186.

136. *See, e.g., id.* at 183–84 (noting that “formal adjustment of the law” is unnecessary and undesirable); Simma, *supra* note 29, at 22 (“To resort to illegality as an explicit *ultima ratio* for reasons as convincing as those put forward in the Kosovo case is one thing. To turn such an exception into a general policy is quite another.”).

137. *See, e.g.,* FRANCK, *supra* note 48, at 171–72 (arguing that recognizing such an exception “could launch the international system down the slippery slope into an abyss of anarchy.”).

138. Anthea Roberts, *Legality Verses. Legitimacy: Can Uses of Force be Illegal but Justified?*, in HUMAN RIGHTS, INTERVENTION, AND THE USE OF FORCE, 179, 201 (Philip Alston & Euan MacDonald eds., 2008).

139. *Id.*

140. *See, e.g., id.* at 188.

141. FRANCK, *supra* note 48, at 175.

exception to the prohibition on unauthorized humanitarian intervention. It begins from the presumption that unauthorized humanitarian intervention is *illegal* and asks instead whether it is nonetheless legitimate. It thus seeks to provide a coherent *normative*, rather than legal, foundation for humanitarian intervention. We, on the other hand, are seeking to determine whether there is a *legal* exception to the prohibition and, if so, what its scope and bounds might be. Second, the illegal-but-legitimate approach, while intuitively appealing, fails to grapple with the difficulties of divorcing the normative and legal in international law. Customary international law is, after all, established in part by state practice and *opinio juris*. As a consequence, illegal but legitimate interventions can, over time, become engrained in the law. If states tacitly accept ostensibly illegal interventions without sanctioning the intervening states (or at the very least reaffirming that the interventions were illegal), their silence could be interpreted as evidence of the emergence of a customary *legal norm*,<sup>142</sup> or as evidence that states have reconceived of the legal weight of the Charter's prohibition on the use of force.<sup>143</sup> It is simply not as easy in international law as it is in domestic law to cabin the precedential effects of breaches of the law. Put simply, in international law, accepted violations of the law can *change* the law. Indeed, this capacity for evolution in the law is the very insight on which the approaches discussed in more depth here are grounded.

In the remainder of this Part, we describe the two leading legal approaches to humanitarian intervention and demonstrate that both fail to establish that there is an emerging customary international law norm permitting unauthorized humanitarian interventions. Unauthorized humanitarian interventions remain prohibited under Article 2(4). The variant that focuses on emerging customary international law does not accurately describe state practice surrounding the eight unauthorized humanitarian interventions described in Part I. Nor can its proponents point to—or even acknowledge the necessity of—the kind of universal and consistent state practice that would be necessary to either displace the Charter or modify its original interpretation. The limited state practice thus far, even if described accurately by these theorists, is nowhere close to what would be necessary. The more recent doctrine of responsibility to protect (R2P) also fails to take into account developments in state practice and *opinio juris* since Kosovo, namely, that whenever the international community has considered the concept of R2P, it has consistently insisted that the Security

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142. Roberts, *supra* note 138, at 196 (“Characterizing humanitarian intervention as an ‘exception to the rule’ or as a ‘mitigating circumstance’ . . . are difficult to sustain in international law for the simple reason that state practice helps to create international law.”).

143. Mohamed, *supra* note 29, at 1311 (“[V]iolations of international law contribute to the law’s shaping over time. This is not to suggest that the mere practice of unauthorized intervention can, without more, become customary international law; only *opinio juris* may transform a set of practices into a part of customary international law. But if states were to frequently undertake unauthorized interventions . . . this could lead to some disintegration in the sense that the rule that states must not use force is a legal obligation.”).

Council must authorize any intervention launched under the R2P banner. We conclude by arguing that, in addition to their lack of support in state practice, these theories present a fundamental risk of abuse and therefore pose a danger to the general prohibition on the use of force.

#### A. Emerging Customary International Law

One group of scholars looks at the eight examples of unauthorized humanitarian interventions surveyed in Part I and sees in at least those since 1990 the potential emergence of a customary international law (CIL) norm giving states the right to intervene unilaterally to address humanitarian crises in extreme circumstances. John Currie, for example, concludes that it is possible to view “NATO’s intervention as but another—albeit enormous—step in the gradual normative shift, now underway for some time, from a rigid to a conditional conception of the principle of non-intervention,” building off the invasion of Northern Iraq in 1991 and ECOWAS’s invasion of Liberia.<sup>144</sup> NATO’s intervention, he continues, “appear[s] to provide remarkable evidence of the state practice and *opinio juris* that would be required to crystallize an emergent norm of customary international law that would allow for unilateral forcible intervention on humanitarian grounds.”<sup>145</sup> While he does not proclaim for certain that such a norm has already emerged, he contends that this conclusion would only be undercut by “some future inconsistent practice by a significant number of the same states involved in the NATO intervention.”<sup>146</sup>

Others are more cautious than Currie about proclaiming the emergence of a new customary norm. Antonio Cassese, for example, argues that the NATO intervention “*may* gradually lead to the crystallization of a general rule of international law authorizing armed countermeasures for the exclusive purpose of putting an end to large-scale atrocities amounting to crimes against humanity and constituting a threat to the peace.”<sup>147</sup> Jane Stromseth similarly concludes that at least the interventions during the 1990s could be the beginning of “a positive legal norm . . . emerging under which humanitarian intervention, under [certain] conditions, unambiguously can be deemed lawful.”<sup>148</sup> *Could* is the operative word. Writing in 2003, she explicitly cautions that “[i]t is too early to say with confidence” that this process is occurring.<sup>149</sup> She characterizes the situation at that

144. Currie, *supra* note 48, at 311-14, 316, 328.

145. *Id.* at 372.

146. *Id.* at 330.

147. Cassese, *supra* note 48, at 29 (emphasis added); see also BREAU, *supra* note 48, at 271-74 (arguing that “unilateral humanitarian intervention has arrived at the critical juncture of emerging as a rule of customary international law,” because, on the one hand, “difficulties in the definition of custom and the problem of the serious and sustained objections to the conflict in Kosovo[ ] [mean] it cannot be said unambiguously that [unilateral] humanitarian intervention . . . is lawful,” but on the other hand, “[t]oo many nations have been involved in [such interventions] and have accepted their legality,” so that “at some point this practice may well crystallize into a doctrine of customary international law.”).

148. Stromseth, *supra* note 48, at 252.

149. *Id.*



time as somewhere between an “excusable breach” of international law and the early stages of an emerging CIL norm.<sup>150</sup>

These scholars contend that states have actively employed legal arguments (rather than purely normative arguments) in explaining their decisions to undertake unauthorized humanitarian interventions. As Stromseth elaborates:

NATO states did not argue “we are breaking the law but should be excused for doing so.” Instead, NATO states, in sometimes differing ways, explained why they viewed their military action as “lawful”—as having a legal basis within the normative framework of international law.<sup>151</sup>

NATO states, she claims, pointed to “fundamental human rights norms as well as Security Council resolutions . . . that characterized the situation [in Kosovo] as a threat to peace and security” as actually rendering their intervention lawful under the circumstances.<sup>152</sup> The coalition that invaded Northern Iraq argued their intervention was consistent with a Security Council resolution that “insisted that Iraq allow access to its territory for humanitarian relief.”<sup>153</sup> Stromseth is careful to acknowledge that states (including most members of the NATO coalition) did not explicitly justify their intervention on a “right” to engage in humanitarian intervention.<sup>154</sup> She simply contends that the intervening states have justified their actions in legalistic terms, not purely moral ones and have, in the process, made it more likely that a customary norm will emerge.

Advocates of an emerging customary norm in favor of humanitarian intervention also point out that the Security Council has frequently failed to condemn violations of the Charter regime. They suggest that this inaction is indicative of an emerging legal norm.<sup>155</sup> Currie, for example, cites the Security Council’s failure to pass Russia’s resolution condemning NATO’s invasion as “noteworthy” in indicating the emergence of legal right to unilateral humanitarian intervention.<sup>156</sup> Belgium apparently construed this same event as evidence that the intervention was legal.<sup>157</sup>

The central shortcoming of the emerging customary norm approach is that there is insufficient evidence of both state practice and *opinio juris* in support of such an emerging norm—which are, after all, the essential components of an emerging customary norm! In the last several decades, when

150. See *id.* at 247.

151. Stromseth, *supra* note 48, at 244; see also Currie, *supra* note 48, at 326 (“NATO members maintained that they were legally entitled to use force on humanitarian grounds alone.”).

152. Stromseth, *supra* note 48, at 251.

153. *Id.*

154. *Id.* at 235, 245.

155. *Id.* at 247 (“Still others emphasize the Security Council’s refusal to condemn NATO’s action after the fact as essential to the action’s legality.”).

156. Currie, *supra* note 48, at 329 n.125.

157. See, e.g., GRAY, *supra* note 99, at 37. Stromseth has gone farther than most in trying to identify the circumstances that might warrant unilateral intervention if a norm does emerge based on past practice. She has identified a series of following factors through a careful comparison of NATO’s intervention and the 1991 intervention in Northern Iraq. See Stromseth, *supra* note 48, at 248–251.

an intervening state cited humanitarian motives, the focus was often on morality rather than law. For example, when it joined the U.S.-led intervention in Iraq in 1992, Britain characterized its intervention as an “exercise of the customary international law principle of humanitarian intervention.”<sup>158</sup> Yet when announcing that the coalition was going to intervene in northern Iraq to establish safe havens, the United States only spoke of humanitarian concerns as providing a *moral* imperative to act. President Bush explained, “[S]ome might argue that this is an intervention into the internal affairs of Iraq. But I think the humanitarian concern, the refugee concern is so overwhelming that there will be a lot of understanding about this.”<sup>159</sup> Similarly, the early NATO press releases on its intervention in Kosovo referenced a “moral duty” to undertake the strikes to “bring an end to the humanitarian catastrophe now unfolding in Kosovo”<sup>160</sup> but did not refer to a legal basis for the military action.<sup>161</sup> Only the U.K., Belgium, and the Netherlands specifically identified a right of humanitarian intervention as a legal basis for their action.<sup>162</sup>

In practice, as noted by Stromseth, when states provided a legal justification for such interventions, they tended to rely on non-humanitarian

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158. WHEELER, *supra* note 61, at 167 (quoting the statement of a legal counselor to Britain’s Foreign and Commonwealth Office).

159. George H.W. Bush, *Remarks on Assistance for Iraqi Refugees and a News Conference*, Apr. 16, 1991, AM. PRESIDENCY PROJECT (Apr. 16, 1991), <http://www.presidency.ucsb.edu/ws/index.php?pid=19479>.

160. NATO Press Release, *supra* note 126; see also NATO, *Press Statement by the Secretary General Following the Commencement of Air Operations*, Press Release (1999)041, 24 March 1999, in KOSOVO CONFLICT AND INTERNATIONAL LAW, *supra* note 124, at 304 [hereinafter Commencement of Air Operations]; NATO Letter dated Mar. 27, 1999 from the Secretary General of NATO to the Secretary-General of the U.N., in letter dated Mar. 30, 1999 from the Secretary-General of the U.N. to the President of the Security Council, U.N. Doc. S/1999/360 (Mar. 30, 1999).

161. See, e.g., NATO Press Release, *supra* note 126; Commencement of Air Operations, *supra* note 160. Germany also did not mention a legal basis for military action. U.N. Doc. S/PV.3988, *supra* note 42, at 17. The United States and Germany expressly cautioned against viewing Kosovo as a precedent to justify future similar actions, which undercuts the new CIL norm theory. See Press Conference, U.S. Sec’y of State Madeleine K. Albright and Russian Minister of Foreign Affairs Igor Ivanov (July 26, 1999), <http://secretary.state.gov/www/statements/1999/990726b.html> (quoting Secretary of State Madeleine Albright as asserting that Kosovo was “a unique situation *sui generis* in the region of the Balkans” and that it was important “not to overdraw the lessons that come out of it”); see also Simma, *supra* note 29, at 13 (quoting the German Foreign Minister as stating in October 1998 that “[t]he decision of NATO [on air strikes against the FRY] must not become a precedent”).

162. U.N. Doc. S/PV.3988, *supra* note 42, at 12 (statement of the U.K.); *id.* at 8 (statement of the Netherlands). The Dutch representative observed, “[D]iplomacy has failed, but there are times when the use of force may be legitimate in the pursuit of peace. The Netherlands feels that this is such a time.” *Id.* Belgium argued in the ICJ proceedings on the legality of NATO’s intervention that “the Kingdom of Belgium takes the view that this is an armed humanitarian intervention, compatible with Article 2, paragraph 4, of the Charter, which covers only intervention against the territorial integrity or political independence of a State.” Oral Pleadings of Belgium, Legality of Use of Force (Yugo. v. Belg.), 1999 I.C.J. Pleadings 12 (May 10, 1999, 3:00 p.m. hearing). Belgium grounded its legal justification in an interpretation of Article 2(4), see Mohamed, *supra* note 29, at 1289, that has been dismissed by the majority of scholars, as noted in *supra* note 29.

grounds and rarely cited humanitarian motives as an independent basis for intervening.<sup>163</sup> In the eight instances surveyed above, states justified their interventions as an exercise of self-defense (India,<sup>164</sup> Vietnam,<sup>165</sup> Tanzania,<sup>166</sup> ECOWAS in Sierra Leone<sup>167</sup>), as in response to an invitation

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163. India did reference the humanitarian crisis in East Pakistan in explaining its intervention to the U.N., but “its humanitarian justifications were bound up with its advocacy of self-determination for the people of East Bengal.” WHEELER, *supra* note 61, at 62. India also cited the refugee burden it experienced as a result of the crisis. See, e.g., U.N. Secretary-General, *Report of the Secretary General*, at 7, U.N. Doc. S/10410 (Dec. 3, 1971) (quoting Letter from the Prime Minister of India to the U.N. Secretary General (Nov. 16, 1971), in which the Prime Minister stated, “I am sure you will appreciate our anxiety as the military authorities in Pakistan continue to pursue a deliberate policy of suppressing the fundamental freedom and human rights of the people in East Bengal and driving out millions of their citizens into India, thus placing intolerable political, social and economic burdens on us”). Vietnam spoke of the abuses of Pol Pot’s regime, which it characterized as making Cambodia a “living hell,” U.N. SCOR, 34th Sess., 2108th mtg., ¶ 131, U.N. Doc. S/PV.2108 (Jan. 11, 1979), but only in order to lend greater credibility to its claim that the fall of the Pol Pot regime had been caused by a “mass uprising” that it had only assisted. *Id.* ¶ 132; see also WHEELER, *supra* note 61, at 88–89 (claiming Vietnam appealed to “‘humanitarian norms’ . . . to lend credibility to the two-wars justification”). Tanzania did not articulate a humanitarian rationale for its intervention at the 1979 OAU Summit. It was only the new President of Uganda who came to power after the intervention who mentioned the abuses of the previous regime, and characterized Tanzania’s actions as consistent with the OAU Charter’s aims of “enhanc[ing] the freedom and dignity of the sons and daughters of Africa.” WHEELER, *supra* note 61, at 129 (quoting President of Uganda Godfrey Bianaia). ECOWAS did emphasize the humanitarian catastrophe engulfing Liberia in its official statements, but mainly in order to emphasize that it was just a peacekeeping force (despite the fact that hostilities were ongoing) responding to the massive number of refugees and “spilling of hostilities into neighboring countries” the abuses caused. Wippman, *supra* note 87, at 176 (quoting Final Communiqué of the First Joint Summit Meeting of the ECOWAS Standing Mediation Committee and the Committee of Five, paras. 6–9). ECOWAS did not mention humanitarian abuses of the RUF at all in justifying its intervention in Sierra Leone, instead focusing on the fact that a democratic government had been displaced by a coup. See, e.g., Goldman, *supra* note 104 (“While no official explanation has been given for the intervention, Mr. Tom Ikimi, Nigeria’s foreign minister, said at the weekend that his country had been prepared to work with its neighbours in taking ‘appropriate measures’ to help restore Mr. Kabbah’s elected government.”).

164. See, e.g., Report of the Secretary General, *supra* note 163 (quoting a letter from the Prime Minister of India to the UNSC, stating: “[W]e have no desire to provoke an armed conflict with Pakistan. Such measures as we have taken are entirely defensive. We have been constrained to take them because of the movement and positioning for offensive combat of the Pakistani military machine.”); see also WHEELER, *supra* note 61, at 61–62 (describing India’s assertion of self-defense in response to what it called Pakistan’s “refugee aggression”).

165. See, e.g., U.N. SCOR, 2108th mtg., *supra* note 163, ¶ 127 (statement of Vietnam) (claiming that Vietnam’s use of force had been restricted to the exercise of the “sacred right of self-defence of peoples in the face of aggression”).

166. At a 1979 OAU Summit on the intervention, Tanzanian President Nyerere did not rely on the justification of humanitarian intervention; instead, he circulated a statement referred to as the “Blue Book” relying on a justification grounded in self-defense. WHEELER, *supra* note 61, at 126–27 (quoting from the Blue Book as stating that “[t]he war between Tanzania and Idi Amin’s regime in Uganda was caused by the Ugandan army’s aggression against Tanzania and Idi Amin’s claim to have annexed part of Tanzanian territory” and that “[t]here was no other cause for it” (italics removed)).

167. See, e.g., Permanent Rep. of Nigeria to the U.N., Letter dated Feb. 13, 1998 from the Permanent Rep. of Nigeria to the United Nations addressed to the President of the

to intervene (India,<sup>168</sup> ECOWAS in Liberia<sup>169</sup> and in Sierra Leone<sup>170</sup>), or as consistent with previous Security Council Resolutions (ECOWAS in Sierra Leone,<sup>171</sup> Iraq,<sup>172</sup> Kosovo<sup>173</sup>).

The reactions of the international community to humanitarian interventions also offer little support for the existence of an emerging norm.<sup>174</sup> To begin with, scholars arguing in favor of an emerging customary norm

Security Council, at 2, U.N. Doc. S/1998/123 (Feb. 13, 1998) (“The present engagement of ECOMOG forces with the junta in Sierra Leone was the direct result of these unprovoked attacks, launched by elements of the illegal regime against the ECOMOG peacekeeping forces.”); *see also* Permanent Rep. of Nigeria to the U.N., Letter dated Feb. 27, 1999 from the Permanent Rep. of Nigeria to the United Nations addressed to the President of the Security Council, ¶ 7, U.N. Doc. S/1998/170 (Feb. 27, 1998) (claiming that ECOMOG had “to defend itself” against “unprovoked attacks”).

168. After it recognized the new state of Bangladesh, India claimed that its government consented to the presence of Indian troops in its territory. U.N. Secretary-General, *Report of the Secretary-General on the Work of the Organization*, 73, U.N. Doc. A/8701 (June 15, 1972) (stating that the Indian Foreign Minister had explained that “India’s recognition of Bangladesh was necessary to provide a proper basis for the presence of Indian armed forces and to make clear that the entry of those forces into Bangladesh was not motivated by any intention of territorial aggrandizement”).

169. The besieged incumbent President Doe apparently wrote a letter to the Standing Mediation Committee, after its creation, stating that “it would seem most expedient at this time to introduce an ECOWAS Peace-keeping Force into Liberia to forestall increasing terror and tension and to assure a peaceful transitional environment.” Letter Addressed by President Samuel K. Doe to the Chairman and Members of the Ministerial Meeting of the ECOWAS Standing Mediation Committee (July 14, 1990), in *REGIONAL PEACE-KEEPING AND INTERNATIONAL ENFORCEMENT: THE LIBERIAN CRISIS* 60, 61 (Marc Weller ed., 1994). The legal authority of Doe to do so, however, is contested. *See* Wippman, *supra* note 21, at 225-27.

170. On the day of the coup, the exiled President Kabbah reportedly invited Nigeria to take military action to restore his rule. *See* Goldman, *supra* note 104 (“Speaking from exile in the Guinean capital, Conakry, Mr. Ahmad Tejan Kabbah, Sierra Leone’s deposed president told the BBC’s African Service that he had invited Nigeria to take military action to overturn an army coup 10 days ago.”).

171. After the initial intervention, ECOWAS frequently claimed its uses of force were consistent with UNSC Resolution 1132 (imposing an arms and oil embargo on Sierra Leone), under which it was given an enforcement role. *See, e.g.*, U.N. Secretary-General, Letter dated Nov. 14, 1997 from the Secretary-General addressed to the President of the Security Council, ¶ 40, U.N. Doc. S/1997/895 (Nov. 17, 1997) (“ECOMOG operations are tailored towards enforcing the blockade of supplies of petroleum products and military hard and soft ware to the junta.”).

172. At the same press conference in which President Bush first announced the intervention in northern Iraq, he repeatedly emphasized that the coalition’s actions were consistent with UNSC Resolution 688 (condemning the repression of Iraqi civilians). *See* Bush, *supra* note 159.

173. In the lead-in to the Kosovo intervention, France relied on U.N. debates on UNSC Resolutions 1160, 1199, and 1203, which all expressed concern with the violence in Kosovo, and claimed that intervention was justified because the FRY government had not respected its obligations under these resolutions. *See* U.N. Doc. S/PV.3989, *supra* note 44, at 7. The Netherlands also stated that the authorization for the NATO strikes flowed from the breach of a UNSC Resolution: “The NATO action . . . follows directly from resolution 1203 (1998), in conjunction with the flagrant non-compliance on the part of the [FRY].” *Id.* at 4.

174. The ICISS report on R2P does not analyze the reactions of the international community to these interventions. This reflects the fact that much of the report is prescriptive, not descriptive.

place too much emphasis on the response of the Security Council as the best barometer for gauging the international community's reaction. The Security Council does not always condemn interventions widely regarded by the broader international community as illegal. For example, scholars that argue that there is emerging customary international law permitting intervention point to the Security Council's failure to pass a resolution condemning NATO's intervention as evidence that the international community accepted the intervention. Yet powerful states condemned the intervention, including Russia,<sup>175</sup> China,<sup>176</sup> and India,<sup>177</sup> and the Group of 77, an organization of developing countries in the U.N., rejected the right of humanitarian intervention as having "no basis in the [U.N.] Charter or in international law" in December 1999.<sup>178</sup> The Non-Aligned Movement (NAM) made the exact same declaration in April 2000 and also "reiterate[d] [its] firm condemnation of all unilateral military actions including those made without proper authorisation from the United Nations Security Council."<sup>179</sup> The NAM's additional statement condemning all unilateral interventions could suggest that it also considers such interventions to be illegitimate, regardless of the circumstances. In addition, as discussed in the section on R2P below, state practice in the intervening decade since Kosovo has affirmed the international community's rejection of any potential emerging customary international law norm.

The emerging customary norm approach also does not acknowledge the difficulty of construing the international community's reaction when it is not expressly supportive or condemnatory (as was the case for the interventions in Uganda and Iraq). Silence does not necessarily indicate tacit acceptance of an intervention's legality or legitimacy. Further factual analysis or effort to rule out alternative explanations is required to reach such a conclusion.<sup>180</sup> When Tanzania unilaterally intervened in Uganda, Uganda and Libya unsuccessfully tried to get the Security Council to even consider the intervention.<sup>181</sup> This silence, however, may not have actually reflected a conclusion that the intervention was legal,<sup>182</sup> but simply reflected politi-

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175. U.N. Doc. S/PV.3988, *supra* note 42, at 2-3.

176. *Id.* at 12-13.

177. *Id.* at 15-16.

178. Group of 77, *23rd Annual Meeting of the Ministers for Foreign Affairs*, Sept. 24, 1999, Ministerial Declaration, <http://www.g77.org/doc/Decl1999.html> (last visited Nov. 11, 2012).

179. Non-Aligned Movement, XIII Ministerial Conference, Apr. 8-9, 2000, Cartagena, Colom., Final Document, para. 11, 263 <http://www.nam.gov.za/xiiiinconf/minconf.pdf>.

180. See, e.g., Sean D. Murphy, *Criminalizing Humanitarian Intervention*, 41 *CASE W. RES. J. INT'L L.* 341, 353 (2009) (arguing that it is not clear why silence or "failure of an organ to act should be construed as tacit approval of an intervention").

181. Franck, *supra* note 36, at 219.

182. Franck describes this episode as demonstrating that the international community "expressed its assent in silence." FRANCK, *supra* note 48, at 145. Franck also characterizes the international community's failure to respond to the 1991 intervention in Iraq as "benevolent silence." *Id.* at 154; see also Stromseth, *supra* note 48, at 248-49 (noting that in neither the Iraq nor Kosovo example "did the Security Council criticize or con-

cal calculations by individual states and regional organizations.<sup>183</sup> By concluding that silence in all cases indicates approval, proponents of this theory at times oversimplify state practice in order to bolster their claim. In sum, the evidence of state practice and *opinio juris* on humanitarian interventions is much more ambiguous than those advocating the emergence of a customary international law norm often acknowledge.

Advocates of an emerging norm approach also rarely confront the implications of a conflict between an emerging norm and the U.N. Charter's clear prohibitions on the use of force. The drafters of the U.N. Charter intended for it to provide the exclusive authority for *jus ad bellum*—the law that governs when states may exercise force against other states.<sup>184</sup> The emergence of a *jus cogens* or peremptory norm in customary international law could supersede a treaty like the U.N. Charter.<sup>185</sup> Yet the limited state practice of humanitarian intervention has not met the high standard required to establish the emergence of such a norm.<sup>186</sup> Thus, advocates of the emerging norm approach would have to argue that the emergence of a non-*jus cogens* customary international norm is sufficient to override an obligation established in the UN Charter. Critics of the emerging norm account, such as Byers and Chesterman, rightly reject such a possibility,

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demn the action undertaken" as one factor supporting her claim that a CIL norm may be emerging).

183. WHEELER, *supra* note 61, at 136 (quoting EVANS & ROWLEY, *supra* note 63, at 192).

184. See, e.g., BROWNLIE, *supra* note 28, at 113 ("By reason of the universality of the Organization [the United Nations] it is probable that the principles of Article 2 constitute general international law."); MURPHY, *supra* note 49, at 70-75 ("The broad term 'use of force'—as opposed to the term 'war'. . . reflected a desire to prohibit armed conflicts generally, not just conflicts arising from a formal state of war. As such, an initial reading of Article 2(4) suggests that the various doctrines of forcible self-help, reprisal, protection of nationals and humanitarian intervention that had developed in the pre-Charter era were now unlawful."); Hans Kelsen, *Collective Security and Collective Self-Defense under the Charter of the United Nations*, 42 AM. J. INT'L L. 783, 785, 787 (1948) (noting that, unlike the Covenant of the League of Nations, "[t]he Charter forbids not only the use of force by one state against the other, but also any kind of threat of force."). Nor can it be convincingly argued that the problem of humanitarian crises was unforeseen at the time of the Charter's drafting. The drafters considered unauthorized humanitarian intervention, but chose not to include it as an exception to Article 2(4). FRANCK, *supra* note 48, at 136.

185. Vienna Convention on the Law of Treaties art. 64, May 23, 1969, 1155 U.N.T.S. 331.

186. Michael Byers & Simon Chesterman, *Changing the Rules About Rules? Unilateral Humanitarian Intervention and the Future of International Law*, in HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS, *supra* note 35, at 177, 180 (arguing that peremptory norms "require the support of most, if not all, states, as expressed through their active or passive support, coupled with a sense of legal obligation. Given the public policy and peremptory character of these rules, the threshold for their development is necessarily very high: higher than that for other customary rules."). Indeed, if a *jus cogens* norm allowing humanitarian intervention were to emerge, it would arguably abrogate the entire UN Charter, not simply Article 2(4). See Vienna Convention on the Law of Treaties, *supra* note 185, art. 64. Furthermore, any interaction between a potential *jus cogens* norm of humanitarian intervention and the Charter would be complicated by the fact that some scholars argue that the inviolability of state sovereignty reflected in Article 2(4) is itself a peremptory norm. See *infra* note 333 and accompanying text.

pointing out that “clear treaty provisions prevail over customary international law,” and therefore “an ordinary customary rule allowing intervention would not . . . be] sufficient to override Article 2(4).”<sup>187</sup>

Another variation on this argument—that subsequent state practice could arguably support the binding nature of a re-interpretation of Article 2(4) to permit unauthorized humanitarian interventions—is similarly unconvincing. The premise of this argument is that even if the original intent behind Article 2(4) was not to permit such interventions, the provision is open to an interpretation<sup>188</sup> to this effect. Moreover, subsequent practice in the application of a treaty is recognized as a means by which to determine which interpretation of a treaty’s provisions is binding.<sup>189</sup> Admittedly, the degree of state practice required to support legalization of unilateral humanitarian intervention under this framework may be less than that required to establish a customary international law norm. As Julian Arato has observed, however, a high threshold must still be met to support a reinterpretation according to “subsequent practice.”<sup>190</sup> In particular, the subsequent practice must be widespread, intentional, consistent, and directly related to the application of the treaty.<sup>191</sup> The limited state practice thus far is nowhere close to meeting that standard.

## B. Responsibility to Protect

Advocates of the “responsibility to protect” doctrine aim to reorient the conversation about humanitarian intervention around human security and human rights. Like those who adopt the customary international law approach outlined above, those who believe R2P provides a *legal* basis for intervention argue that it represents an emerging customary international law norm. Yet unlike the customary international law approach, which tends to focus on the *right of states* to intervene, R2P is grounded in the *responsibility of states* to protect their populations from human rights abuses. Indeed, some have argued that the doctrine of R2P, with its emphasis on state responsibility, should displace the doctrine of humanitarian intervention altogether.<sup>192</sup> During the 2009 U.N. debates on R2P, for

187. Byers & Chesterman, *supra* note 186, at 182; see Michael Akehurst, *The Hierarchy of the Sources of International Law, 1974-1975* BRIT. Y.B. INT’L L. 273, 277-79 (arguing that a (non-*ius cogens*) customary norm cannot displace treaty obligations). Some dispute the claim that any hierarchy of sources exists in international law. NGUYEN QUOC DINH, PATRICK DAILLIER & ALAIN PELLET, *DROIT INTERNATIONAL PUBLIC* 106 (3d ed.1987) (stating that “pour les sources, il n’existe pas de hiérarchie en droit international” (emphasis omitted)); MARK E. VILLIGER, *CUSTOMARY INTERNATIONAL LAW AND TREATIES* ¶ 85 (2d ed. 1997) (noting that “an *a priori* hierarchy of sources is an alien concept [to international law].”).

188. On this point see *supra* note 29 and accompanying text.

189. Vienna Convention on the Law of Treaties, *supra* note 185, art. 31(2)(b).

190. Julian Arato, *Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation over Time and Their Diverse Consequences*, 9 L. & PRAC. INT’L CTS. & TRIBUNALS 443, 459 (2010).

191. *Id.*

192. See, e.g., Evans, *infra* note 229, at 704; Kohen, *supra* note 30, at 163. ICISS itself sought to provide R2P as an option that would make humanitarian intervention (and its concomitant debate and controversy) a thing of the past, with the research director of the

example, various participants argued that R2P had taken the place of humanitarian intervention, which some characterized as “discredited.”<sup>193</sup>

At its core, R2P provides that a sovereign state has a duty to protect its own population, and when it is either unable or unwilling to do so, that responsibility falls on the broader international community.<sup>194</sup> The concept gained international prominence in a report issued by the International Commission on Intervention and State Sovereignty (ICISS) in 2001, which asserted that the same state practice discussed above had given rise to an “emerging principle” allowing or possibly requiring intervention by the international community in extreme cases where a state fails to protect its own people.<sup>195</sup> ICISS was founded by the Canadian government in response to U.N. Secretary-General Kofi Annan’s challenge to the international community in the wake of Kosovo to determine an approach to the next humanitarian crisis. As Annan stated, “if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica—to gross and systematic violations of human rights that offend every precept of our common humanity?”<sup>196</sup> The goal of ICISS was to “promote a comprehensive debate on the issues [of humanitarian intervention].”<sup>197</sup>

The crux of the ICISS report is its conclusion that there exists an “emerging principle . . . that intervention for human protection purposes,

Commission stating that they hoped to “drive a stake through the heart of the term ‘humanitarian intervention.’” Thomas G. Weiss, *To Intervene or Not to Intervene? A Contemporary Snap-Shot*, 9 CAN. FOREIGN POL’Y 141, 145 (2002).

193. U.N. GAOR, 63rd Sess., 97th plen. mtg. at 20, U.N. Doc. A/63/PV.97 (July 23, 2009) (statement of Australia) (“This is not a debate about the now-discredited notion of humanitarian intervention. Rather, it is a discussion about protection—the protection of all our peoples against mass-atrocity crimes.”); *id.* at 3 (statement of the President of the General Assembly) (“[T]he earlier concept of humanitarian intervention was discredited and, indeed—as described by Mr. Gareth Evans this morning—buried.”); U.N. GAOR, 63rd Sess., 99th plen. mtg. at 18, U.N. Doc. A/63/PV.99 (July 24, 2009) (statement of Mexico) (“Unlike other concepts with which it is associated, such as humanitarian intervention, the concept of the responsibility to protect has a much sounder basis in international law, since it was adopted by the General Assembly at the highest possible level and endorsed by the Security Council.”); *id.* at 25 (statement of India) (“In this context, the responsibility to protect should in no way provide a pretext for humanitarian intervention or unilateral action. That would not only give the responsibility to protect a bad name but would also defeat its very purpose.”); U.N. GAOR, 63rd Sess., 101st plen. mtg. at 13, U.N. Doc. A/63/PV.101 (July 28, 2009) (statement of Serbia) (“We must not forget the recent past, when the now-discredited, hastily composed concept of humanitarian intervention was a highly prized concept championed by some political leaders exerting great influence over the state of world affairs at that time and even today.”).

194. ICISS Report, *supra* note 35, ¶¶ 2.30–31.

195. *See id.* ¶ 2.25.

196. *Id.* ¶ 1.6.

197. Peter Stockburger, *The Responsibility to Protect Doctrine: Customary International Law, an Emerging Legal Norm, or Just Wishful Thinking?*, 5 INTERCULTURAL HUM. RTS. L. REV. 365, 374 (2010) (alteration in original). “The ICISS was asked to ‘wrestle with the whole range of questions—legal, moral, operational and political—rolled up in th[e] debate [of humanitarian intervention], to consult with the widest possible range of opinion around the world, and to bring back a report that would help the Secretary-General and everyone else find some new common ground.’” *Id.*



including military intervention in extreme cases, is supportable when major harm to civilians is occurring or imminently apprehended, and the state in question is unable or unwilling to end the harm, or is itself the perpetrator.”<sup>198</sup> ICISS uses the phrase R2P to express the idea underpinning this emerging principle.<sup>199</sup> The report is unclear as to whether this “principle” and the proposed model built upon it concern the legality or legitimacy of intervention.<sup>200</sup> ICISS observes that “there is not yet a sufficiently strong basis to claim the emergence of a new principle of customary international law.”<sup>201</sup> Nevertheless, ICISS argues that state, regional organization, and Security Council practice—specifically, the Security Council’s authorization of intervention in Somalia, ECOWAS’s interventions in both Liberia and Sierra Leone, and NATO’s intervention in Kosovo—support the existence of R2P as an “emerging guiding principle,” and it argues that the R2P principle was the basis on which the interventions were “essentially justified.”<sup>202</sup> Indeed, to the extent that the report provides a *legal* basis for intervention, it simply provides an alternative foundation for the emerging customary norm: the responsibility of states to protect, rather than the right of states to intervene.<sup>203</sup>

In this initial formulation of what we call “strong R2P,” the ICISS report argues that states could intervene when necessary without obtaining prior Security Council authorization.<sup>204</sup> The ICISS report

198. ICISS Report, *supra* note 35, ¶ 2.25.

199. *See id.* ¶¶ 2.30–31.

200. The tendency to blur the line between legality and legitimacy is evident at various points in the report. For instance, ICISS argues that “the Charter’s strong bias against military intervention is not to be regarded as absolute,” but is not clear as to whether this is a legal or policy statement. *Id.* ¶ 2.27. Likewise, under its description of the Uniting for Peace alternative, ICISS acknowledges that a General Assembly resolution “lacks the power to direct that action be taken,” but emphasizes that such a resolution “would provide a high degree of legitimacy for an intervention which subsequently took place.” *Id.* ¶ 6.30. And in its discussion of regional organizations, ICISS notes that “the letter of the Charter” requires prior Security Council authorization of any actions taken by such organizations, yet suggests that the support for the ECOWAS interventions even without prior authorization demonstrates that “there may be certain leeway for future action in this regard.” *Id.* ¶ 6.35.

201. *Id.* ¶ 2.24.

202. *Id.* ¶¶ 2.24–25; *see also id.* ¶¶ 2.25–26 (discussing other sources of this “emerging guiding principle in favour of military intervention for human protection purposes.”).

203. ICISS’s ambiguity as to the precise character of its proposals suggests that, arguably, its report simply provides a new discourse under which to consider the status of humanitarian intervention. Admittedly, this is a discourse that could be adopted by either the proponents of an emerging customary international law or supporters of the normative arguments in favor of intervention, such as the illegal-but-legitimate framework. Ultimately, however, in noting at the outset that “there is *not yet* a sufficiently strong basis to claim the emergence of a new principle of customary international law,” it seems that underpinning the ICISS report is the recognition of the potential emergence of such a norm and an effort to propose the ideal terms under which this would occur. *Id.* ¶ 2.24 (emphasis added). *See also id.* ¶ 2.27.

204. As noted above, it is not immediately clear whether ICISS’s proposals on this front supported the legality of such interventions or simply the legitimacy: *see supra* note 200. In this section we take ICISS’s proposal on its strongest possible terms—that is, as providing a legal basis for unilateral intervention—to demonstrate that, even if such a

makes clear that “the Security Council should be the first port of call on any matter relating to military intervention for human protection purposes.”<sup>205</sup> The report also advocates measures short of intervention and suggests that intervention is appropriate in only the most extreme cases.<sup>206</sup> If the Security Council cannot act because of a threatened veto however, ICISS proposes that states may intervene under two circumstances. First, countries can “seek support for military action from the General Assembly meeting in an Emergency Special Session under the established ‘Uniting for Peace’ procedures.”<sup>207</sup> Action by the General Assembly in this form, however, is non-binding and is therefore only a recommendation to the Security Council to act.<sup>208</sup> Second, it is possible for “collective intervention to be pursued by a regional or sub-regional organization acting within its defining boundaries.”<sup>209</sup>

The central shortcoming of “strong R2P”—that is of the claim that R2P offers a basis for humanitarian intervention independent of Security Council authorization—is that it is not supported by significant developments in international law over the past decade. The international community has endorsed a new iteration of R2P that provides only a potential legal justification for intervention, not a legal obligation to intervene, is confined in scope to only certain enumerated forms of atrocity, and, most importantly, requires Security Council authorization of any intervention. We call this the “limited R2P” doctrine. Notably, in endorsing only this limited form of R2P, the international community has also reinforced the prohibition on unilateral intervention more generally.

In addition to the responsibility of the state to protect its own citizens, some claim there are two norms concerning outside intervention embodied in the R2P framework: (1) a prescriptive norm, *requiring* the international community to intervene in certain situations; and (2) a permissive norm, *allowing* the international community to justify its intervention into the territory of another state due to the failure of that state to protect its population.<sup>210</sup> As discussed below in Part III, the claim that R2P requires

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position was initially advocated by supporters of R2P, it has subsequently been overwhelmingly rejected.

205. *Id.* ¶ 6.28.

206. The ICISS report identifies the most extreme cases as those where there is “just cause” due to, *inter alia*, “large scale loss of life, actual or apprehended, with genocidal intent or not” or “large scale ‘ethnic cleansing,’ actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape.” *Id.* ¶ 4.19; *see also id.* ¶¶ 4.10–.43 (discussing other criteria including the right authority, the right intention, that intervention is the last resort, that it is taken by proportional means, and that there exists a reasonable prospect of success).

207. *Id.* ¶ 6.29; *see also* G.A. Res. 377 A(V), ¶ 1, U.N. GAOR, 5th Sess., U.N. Doc. A/RES/377(V) (Nov. 3, 1950).

208. *See* ICISS Report, *supra* note 35, ¶ 6.30.

209. *Id.* ¶ 6.31. The report focused mainly on interventions by a regional organization occurring within the territory of a member state; the report acknowledged that intervention by a regional organization in non-member states (such as NATO’s action in Kosovo) is “much more controversial.” *Id.* ¶ 6.34.

210. *See* Alex J. Bellamy, *Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit*, 20 ETHICS & INT’L AFF. 143, 145 (2006) (making the

states to protect their own citizens enjoys significant support, but the assertion that R2P either requires or allows *outside* intervention has received a much cooler reception.

On the prescriptive norm, most scholars believe that the obligation of the international community to intervene if a state fails to protect its citizens is at most an “emerging norm.”<sup>211</sup> Saira Mohamed, for instance, argues that the General Assembly’s Outcome Document and the Security Council’s Resolution 1674 reference to “prepared[ness]” instead of “responsibility” both “signaled a retreat from . . . duty.”<sup>212</sup> As Catherine Powell notes, even in the case of the Libyan intervention—where the Security Council self-consciously based the authorization on R2P language—neither resolution on the matter “explicitly or implicitly indicated a legal obligation compelling the international community to protect civilians—which reflects the limits of RtoP’s collective-responsibility prongs despite its obvious, widespread normative appeal.”<sup>213</sup>

More relevant for the present article is the status of the permissive element—the “permission” to intervene.<sup>214</sup> On this front, it is relevant that, when the international community has considered the concept of R2P since its initial formulation by ICISS, it has insisted that any intervention launched under the R2P banner must be authorized by the Security Council.<sup>215</sup>

In December 2004, *limited* R2P was officially endorsed by the Secre-

distinction between R2P’s prescriptive and permissive elements); *see also* Jonah Eaton, Note, *An Emerging Norm? Determining the Meaning and Legal Status of the Responsibility to Protect*, 32 MICH. J. INT’L L. 765, 769–70 (2011) (making a similar observation as to the ways in which R2P’s proscriptions on intervention could be interpreted).

211. Eaton, *supra* note 210, at 766. Other commentators are skeptical that this responsibility could even amount to a legal norm at all. *See* Mehrdad Payandeh, Note, *With Great Power Comes Great Responsibility? The Concept of the Responsibility to Protect Within the Process of International Lawmaking*, 35 YALE J. INT’L L. 469, 501 (2010) (discussing the negative reaction of the Security Council and General Assembly to a suggestion of mandatory action under R2P).

212. Saira Mohamed, *Taking Stock of the Responsibility to Protect*, 48 STAN. J. INT’L L. 319, 327 (2012). Apparently, earlier drafts of the Outcome Document used “responsibility” but were later scaled back, in part because of opposition from the United States. *See* Payandeh, *supra* note 211, at 501, 507–08.

213. Catherine Powell, *Libya: A Multilateral Constitutional Moment?*, 106 AM. J. INT’L L. 298, 313 (2012).

214. The trajectory of R2P since 2001 should be taken into account in attempting to characterize the current status of unilateral humanitarian intervention. R2P grew out of a deliberate attempt to reexamine the debate over humanitarian intervention. R2P shifted the perspective away from the interests of States seeking to intervene to “the perspective of the needs of those who seek or need support (e.g. communities in need of protection from genocide, mass killings, ethnic cleansing, rape or mass starvation).” Steve Martin, *Sovereignty and the Responsibility to Protect: Mutually Exclusive or Codependent?*, 20 GRIFFITH L. REV. 153, 164 (2011) (citing Carsten Stahn, *Responsibility to Protect: Political Rhetoric or Emerging Legal Norm*, 101 AM. J. INT’L L. 99, 164 (2007)). R2P also adds an emphasis on the responsibility of states to protect their own populations. *See* ICISS Report, *supra* note 35, ¶¶ 2.30–31.

215. Martin, *supra* note 214, at 165–66.

tary-General's High-Level Panel on Threats, Challenges and Change.<sup>216</sup> The report specifically provided that Security Council authorization would be required for military intervention in the name of R2P. It explained: "We endorse the emerging norm that there is a collective international responsibility to protect, *exercisable by the Security Council authorizing military intervention as a last resort*."<sup>217</sup> At the 2005 World Summit, member states included an endorsement of R2P in the Outcome Document. It, too, made clear that Security Council authorization was required for any intervention: "[W]e are prepared to take collective action . . . through the Security Council . . . on a case-by-case basis . . . should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity."<sup>218</sup> Finally, in his 2009 report on implementing R2P, the Secretary-General noted that the Outcome Document required that any use of force be taken in accordance with the Charter and that "the responsibility to protect does not alter, indeed it reinforces, the legal obligations of Member States to refrain from the use of force *except in conformity with the Charter*."<sup>219</sup> Similarly, in the course of U.N. debates on R2P, a number of states emphasized that Security Council authorization was necessary for any use of force under the auspices of R2P.<sup>220</sup>

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216. High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, U.N. Doc. A/59/565 (Dec. 2, 2004) [hereinafter *A More Secure World*]. Commentators have noted the significance of the fact that this document endorsing R2P emerged from the U.N. system itself. See, e.g., Eaton, *supra* note 210, at 776.

217. *A More Secure World*, *supra* note 216, ¶ 203 (emphasis added).

218. 2005 World Summit Outcome Document, G.A. Res. 60/1, ¶ 139, U.N. Doc. A/RES/60/1 (Oct. 24, 2005) (emphasis added). The Outcome Document was adopted at the 60th Session of the General Assembly; the United States did not voice any concerns on R2P. Addresses on the Occasion of the High-level Plenary Meeting, U.N. GAOR, 60th Sess., 8th plen. mtg. at 46-47, U.N. Doc. A/60/PV.8 (Sept. 16, 2005). Some have described the restriction of the document to enumerated atrocities as constituting a "breakthrough" in the negotiations around the document. See Eaton, *supra* note 210, at 779-780 (reviewing the GA debate and comments of scholars on this point). In April 2006, the UNSC reaffirmed the Outcome Document's statement in Resolution 1674 on the protection of civilians in armed conflict. S.C. Res. 1674, ¶ 4, U.N. Doc. S/RES/1674 (Apr. 28, 2006).

219. U.N. Secretary-General, *Implementing the Responsibility to Protect: Rep. of the Secretary-General*, ¶ 3, U.N. Doc. A/63/677 (Jan. 12, 2009) (emphasis added) [hereinafter Secretary-General's Report].

220. See, e.g., U.N. Doc. A/63/PV.97, *supra* note 193, at 15 (statement of Guatemala) ("Although the document does not state so explicitly, it is clear that the use of force must be considered as a recourse of last resort, and only on the basis of a Security Council resolution."); *id.* at 19 (statement of Republic of Korea) (emphasizing that the very root of the distinction between R2P and humanitarian intervention is that "R2P . . . is based on collective action in accordance with the United Nations Charter, not on unilateral action"); *id.* at 22 (statement of Liechtenstein) (emphasizing that any use of force must be authorized by the Security Council, and that "[t]his third pillar [intervention by the international community] therefore clearly excludes from the application of R2P any form of unilateral action taken in contravention of the Charter"); *id.* at 24 (statement of Costa Rica) ("With regard to the use of force, far from authorizing unilateral interventions, the responsibility to protect seeks to expand the multilateral options and to improve the Security Council's performance."); U.N. Doc. A/63/PV.99, *supra* note

Together, the debates over R2P and humanitarian intervention have reaffirmed the necessity of Security Council authorization for intervention: “[t]he debates over responsibility to protect have generated considerable evidence of *opinio juris* on the issue of unilateral intervention,” generally, and “almost all . . . points to a lack of legal right on the part of individual states.”<sup>221</sup> Strong R2P—the assertion that states may intervene without prior Security Council authorization—has been clearly, indeed resoundingly, rejected by the international community.<sup>222</sup>

### C. The Risk in Carving out Exceptions

Most of this Part has focused on the analytic problems posed by the major approaches to humanitarian intervention, especially that they are inconsistent with state practice and with subsequent developments in international law. But there is an additional problem inherent in both of the leading approaches of humanitarian intervention and, indeed, in most theoretical attempts to carve out an explicit humanitarian exception to Article 2(4): the rise of abuse. Both approaches described above try to resolve the fundamental clash between human rights commitments and state sovereignty presented by humanitarian intervention by carving out exceptions to the basic rule of non-intervention. But by carving out exceptions to the prohibition on the use of force without Security Council authorization, both present the risk that the exceptions will grow to swallow the rule.

Several scholars have pointed out that legalization of unauthorized humanitarian intervention would provide an easy pretext for waging war for self-interested reasons.<sup>223</sup> Dino Kritsiotis, especially, has elaborated on this position:

States would, the argument is made, launch “heroic” missions to save and protect persecuted populations but would, in actual fact, only use the cover of altruism to use force to realize alternative and suspect ambitions, such as the change of government in the target state or even as part of an ignominious strategy of territorial self-aggrandizement.<sup>224</sup>

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193, at 25 (statement of India) (stating that to safeguard against misuse of R2P it “should in no way provide a pretext for humanitarian intervention or unilateral action,” since “[t]hat would not only give the responsibility to protect a bad name but would also defeat its very purpose”).

221. Eaton, *supra* note 210, at 800; *see also* Secretary-General’s Report, *supra* note 219, ¶ 3.

222. *See, e.g.*, Martin *supra* note 214, at 165–66.

223. *See, e.g.*, Jonathan I. Charney, *Anticipatory Humanitarian Intervention in Kosovo*, 93 AM. J. INT’L L. 834, 837 (1999) (“[H]umanitarian intervention presents grave risks of abuse, as illustrated by virtually all of the past actions put forward in its support. Once established, such a right would be difficult to check, thwarting containment of those unacceptable risks.”); Ryan Goodman, *Humanitarian Intervention and Pretexts for War*, 100 AM. J. INT’L L. 107, 107 (2006) (“The concern that states would exploit a humanitarian exception to justify military aggression has long dominated academic and government debates.”).

224. Dino Kritsiotis, *Reappraising Policy Objectives to Humanitarian Intervention*, 19 MICH. J. INT’L L. 1005, 1020–21 (1998).

Powerful states in particular, scholars warn, would use (or have used) humanitarian intervention as a “cloak of legality for the use of brute force” against weaker states to force them to accept their values or to support their policies.<sup>225</sup> Many scholars who have advanced this argument survey historical examples of military interventions that might be characterized as humanitarian and invariably conclude that most “consisted . . . of the invocation of humanitarian motives in cases where states were actually pursuing highly particular national interests.”<sup>226</sup>

Two recent unauthorized interventions highlight this risk. The first is the United States and Britain’s unauthorized intervention in Iraq in 2003, which many in the international community condemned as illegal.<sup>227</sup> When their primary justifications for war were discredited, the United States and the U.K. fell back on what had originally been only a subsidiary justification—that the intervention was necessary to save the Iraqi people from the abuses of Saddam Hussein’s regime.<sup>228</sup> But many have questioned the sincerity of that motivation, or at least question whether the

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225. BROWNLIE, *supra* note 28, at 340–41 (finding that most historical invocations of humanitarian intervention humanitarian intervention were “applied only against weak states. It belongs to an era of unequal relations”); Hassan, *supra* note 71, at 890 (arguing that legalizing humanitarian intervention would undermine the U.N. Charter regime).

226. Tom J. Farer, *Humanitarian Intervention Before and After 9/11: Legality and Legitimacy*, in HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS 53, 77 (J. L. Holzgrefe & Robert O. Keohane eds., 2003); see also Thomas M. Franck & Nigel S. Rodley, *After Bangladesh: The Law of Humanitarian Intervention by Military Force*, 67 AM. J. INT’L L. 275, 290 (1973) (“A critical, if not exhaustive, examination of principal cases in which the right to carry out humanitarian purposes through the use of military force has been asserted does not provide clear answers. [But i]n very few, if any, instances has the right been asserted under circumstances that appear more humanitarian than self-interested and power-seeking.”); Edward M. Kennedy et al., *Biafra, Bengal, and Beyond: International Responsibility and Genocidal Conflict*, 66 AM. J. INT’L L. 89, 96 (1972) (remarks of Louis Henkin) (arguing that humanitarian justifications are “easy to fabricate” and every case of unilateral military intervention has been “justified on some kind of humanitarian grounds”).

227. See, e.g., David Cortright, *The World Says No: The Global Movement against War in Iraq*, in THE IRAQ CRISIS AND WORLD ORDER 75 (Thakur Ramesh & Waheguru Pal Singh Sidhu eds., 2006) (discussing the global antiwar movements against the intervention); Sean D. Murphy, *Assessing the Legality of Invading Iraq*, 92 GEO. L.J. 173, 133 (2004). (“[O]perating on the fringes of authorization as contemplated by the UN Charter, with a strong expression of disapproval by the Security Council members (though obviously no Security Council resolution prohibiting the action), and in a manner designed to overthrow an existing government, the United States ultimately generated a widespread public perception that the action was illegitimate.”); *Iraq War Illegal, Says Annan*, BBC NEWS (Sept. 16, 2004), <http://news.bbc.co.uk/2/hi/3661134.stm> (quoting then-U.N. Secretary-General Kofi Annan as saying, “I have indicated it was not in conformity with the UN charter from our point of view, from the charter point of view, it was illegal”); see generally Cortright, *supra* (examining the Iraq War as a challenge to the traditional Westphalia order, where the rule of law can be disregarded by “one preeminent” power).

228. See, e.g., HEINZE, *supra* note 49, at 28 (“Once the original justification for the invasion turned out to be largely overstated and based on faulty intelligence, the George W. Bush administration continued to insist that the invasion was still justified on humanitarian grounds because it liberated Iraq from the yoke of tyranny.”); Nicholas J. Wheeler & Justin Morris, *Justifying the Iraq War as a Humanitarian Intervention: The Cure is Worse than the Disease*, in THE IRAQ CRISIS AND WORLD ORDER, *supra* note 227, at

intervention is properly considered a legitimate humanitarian intervention.<sup>229</sup> The second is Russia's unilateral intervention in Georgia in 2008. Although its primary justification for the invasion was self-defense of its peacekeepers and citizens in the disputed territories,<sup>230</sup> Russia also cited humanitarian concerns<sup>231</sup> and invoked the language of R2P to justify its intervention.<sup>232</sup> Much of the international community, however, condemned the intervention and disputed the sincerity of Russia's humanitarian motives.<sup>233</sup>

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444, 448-49. For a discussion of the other justifications the United States put forward to justify its intervention, see Murphy, *supra* note 228, at 173-77.

229. See, e.g., Gareth Evans, *From Humanitarian Intervention to the Responsibility to Protect*, 24 WIS. INT'L L.J. 703, 717 (2006) ("The biggest inhibitor of all to the ready acceptance of R2P as an operating principle has been the misuse of that principle in the context of the war on Iraq."); Ken Roth, *War in Iraq: Not a Humanitarian Intervention*, HUMAN RIGHTS WATCH (Jan. 26, 2004), <http://www.hrw.org/news/2004/01/25/war-iraq-not-humanitarian-intervention> ("We conclude that, despite the horrors of Saddam Hussein's rule, the invasion of Iraq cannot be justified as a humanitarian intervention."); Wheeler & Morris, *supra* note 228, at 444, 452, 459 (arguing that Iraq is not a clear example of a state "deliberately manipul[at]ing humanitarian claims for ulterior purposes," since "both Bush and, especially, Blair strongly believed in the moral case for removing Saddam," but concluding that the intervention "fails as a justifiable humanitarian intervention" because of the "nature and magnitude of the human suffering that resulted from the war.").

230. Permanent Rep. of the Russian Federation to the U.N., Letter dated 11 August 2008 from the Permanent Representative of the Russian Federation to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2008/545 (Aug. 11, 2008).

231. Chris Borgen, *Frozen Conflict Becomes Hot War: Russia Invades Georgia*, OPINIO JURIS (Aug. 8, 2008, 1:36 PM), <http://opiniojuris.org/2008/08/08/frozen-conflict-becomes-hot-war-russia-invades-georgia/>; see also Press Conference, Dmitry Medvedev, President of Russia, Statement and Answers to Journalists' Questions After the 22nd Russia-EU Summit (Nov. 14, 2008), available at [http://www.sras.org/22nd\\_russia\\_eu\\_summit](http://www.sras.org/22nd_russia_eu_summit) (stating that Russia "had to intervene to protect people, to defend their right to exist simply as ethnic groups, and to prevent a humanitarian catastrophe.").

232. See, e.g., INT'L CRISIS GROUP, *RUSSIA VS GEORGIA: THE FALLOUT* 28 (Aug. 22, 2008), available at [http://www.crisisgroup.org/-/media/Files/europe/195\\_russia\\_vs\\_georgia\\_the\\_fallout.pdf](http://www.crisisgroup.org/-/media/Files/europe/195_russia_vs_georgia_the_fallout.pdf) (quoting Russian Minister of Foreign Affairs Sergey Lavrov as stating during an August 9, 2008 interview with the BBC: "According to our Constitution there is also a responsibility to protect—the term which is widely used in the U.N. when people see some trouble in Africa or in any remote part of other regions. . . . This is the area, where Russian citizens live. So the Constitution of the Russian Federation, the laws of the Russian Federation make it absolutely unavoidable to us to exercise responsibility to protect.").

233. The United States generally criticized Russia for not respecting Georgia's territorial integrity, but did not overtly characterize the intervention as an illegal use of force. See Press Release, U.S. Dep't of State, Statement by Secretary Condoleezza Rice, Russia Moves into Georgia (Aug. 8, 2008) (quoting Secretary of State Condoleezza Rice as follows: "[The United States] underscores the international community's support for Georgia's sovereignty and territorial integrity within its internationally recognized borders."). The U.K. Foreign Secretary criticized the intervention for being a disproportionate response to the threat to Russian peacekeepers, and critiqued the notion that the intervention was similar to NATO's Kosovo intervention. Gregory Hafkin, Note, *The Russo-Georgian War of 2008: Developing the Law of Unauthorized Humanitarian Intervention After Kosovo*, 28 B.U. INT'L L.J. 219, 226-27 (2010) (quoting David Miliband, British Foreign Sec'y, Protecting Democratic Principles (Aug. 27, 2008)). Although a 2009 independent E.U. report concluded that Russia had a limited right to intervene to protect its

Finally, the emerging customary international law norm and the R2P approaches are open to abuse because of the fundamental difficulty of defining a legal humanitarian intervention. Historically, one country's humanitarian intervention is another's illegal power grab. Thus, to the extent that the two approaches outlined above permit unauthorized humanitarian intervention, they risk opening the floodgates to allowing states to mask expansionist or other strategic aims. Indeed, both pose the danger of allowing uses of force that would progressively erode the norms that restrict intervention to extreme circumstances. Some claim that this could in turn actually increase the number of interventions undertaken by states since states might factor the easy availability of humanitarian justifications into their decision-making processes.<sup>234</sup>

We turn next to our own approach to humanitarian intervention: consent-based intervention. Unlike the existing theories discussed in this Part, consent-based intervention does not carve out exceptions to state sovereignty but instead aims to resolve the clash between human rights and state sovereignty by empowering states to live up to their sovereign responsibilities.

### III. Sovereign Responsibility and Consent-Based Intervention

During the past decade, the idea of “sovereignty as responsibility” has been a subject of intense debate in the international community. The concept has proven controversial in part because it has often been understood as an argument for permitting the international community to violate state sovereignty and the U.N. Charter regime where a state has failed to meet its responsibility. Here, we argue instead for seeing the concept as a case for empowering states—giving them the tools they need to live up to their sovereign responsibility. In what follows, we explore various options for consent-based intervention informed by the principles of sovereign responsibility—interventions that do not usurp sovereign authority but instead give states new tools to protect their populations from massive humanitarian crises.

#### A. Sovereign Responsibility and Consent-Based Intervention in Theory

At its root, sovereignty as responsibility views sovereignty not simply as a grant of control over territory and people, but as an obligation to protect one's citizens from harm. Consent-based intervention offers states a tool for meeting this obligation even when they find themselves in crisis. It

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peacekeepers in South Ossetia, the report also found that Russia's response was hugely disproportionate and its humanitarian justification was invalid. INDEP. INT'L FACT-FINDING MISSION ON THE CONFLICT IN GEOR. ¶¶ 21-22 (2009), available at <http://www.ceiig.ch/Report.html>.

234. See, e.g., Farer, *supra* note 226, at 78 (“[T]he availability of humanitarian intervention as a recognized exception to the Charter prohibition of force might at least occasionally swing the balance of national decision processes in favor of an illegal intervention.”); Goodman, *supra* note 223, at 113-14 (laying out this argument, which he calls the “model of pretext wars”).



thus offers states a way to use their sovereign authority to meet their sovereign responsibility.

Even as the claim that R2P allows humanitarian intervention without Security Council authorization has met with significant resistance, the normative underpinning of R2P—sovereignty as responsibility—has encountered a much warmer reception.<sup>235</sup> It entered the discourse of the United Nations and the international community when affirmed by Secretary-General Kofi Annan in the late 1990s.<sup>236</sup> And in 2005, the Outcome Document of the World Summit, approved by the heads of state and governments of all U.N. member states and endorsed by the General Assembly, emphasized the importance of sovereign responsibility. The document provided, in relevant part: “Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. . . . We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility . . . .”<sup>237</sup>

The international community has repeatedly endorsed the idea of sovereign responsibility over the course of the past decade. The High Level Panel, convened by the Secretary-General, stated that, “[i]n signing the Charter of the United Nations, States not only benefit from the privileges of sovereignty but also accept its responsibilities. . . . [T]oday [sovereignty] clearly carries with it the obligation of a State to protect the welfare of its own peoples and meet its obligations to the wider international community.”<sup>238</sup> The Secretary-General’s Report on Implementing R2P noted that by 2009, sovereignty as responsibility had been broadly endorsed by the international community. Significantly, the report observes that the notion of sovereignty as responsibility is derived not from the doctrine of R2P, but from pre-existing obligations held by all states. The report explains: “The responsibility derives both from the nature of State sovereignty and from the pre-existing and continuing legal obligations of States.”<sup>239</sup> Finally, the Security Council has repeatedly affirmed its sup-

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235. See Mohamed, *supra* note 212, at 330 (“[T]he responsibility to protect now enjoys an ‘overwhelming consensus, at least on basic principles.’”).

236. See, e.g., KOFI ANNAN, *THE QUESTION OF INTERVENTION: STATEMENTS BY THE SECRETARY GENERAL* 37 (1999); Luke Glanville, *The Antecedents of ‘Sovereignty as Responsibility’* 17 *EUR. J. INT’L REL.* 233, 233 (2011). The concept is often traced to Francis Deng, but Deng did not purport to be creating a new concept; rather, he viewed “sovereignty as responsibility” as a concept which, though not universally accepted, “[was] becoming increasingly recognized as the centerpiece of sovereignty.” FRANCIS M. DENG ET AL., *SOVEREIGNTY AS RESPONSIBILITY: CONFLICT MANAGEMENT IN AFRICA* xviii (1996); see Glanville, *supra*, at 237–40 (2011) (arguing that the notion that sovereigns have some responsibility to their citizens has been around since at least the 16th century).

237. 2005 World Summit Outcome, G.A. Res. 60/1, ¶ 138, U.N. Doc. A/RES/60/1 (Oct. 24, 2005); Addresses on the occasion of the High-level Plenary Meeting, 60th Sess., 8th Mtg., U.N. Doc. A/60/PV.8 (Sept. 16, 2005).

238. *A More Secure World*, *supra* note 216, at 21–22, ¶ 29 (discussing “sovereignty as responsibility”).

239. U.N. Secretary-General, *Implementing the Responsibility To Protect: Rep. of the Secretary-General*, ¶ 11(a), U.N. Doc. A/63/677 (Jan. 12, 2009).

port for the concept of sovereignty as responsibility.<sup>240</sup>

Therefore, state sovereignty clearly places responsibility on states. Less clear is how states may meet this responsibility. Yes, states may meet their responsibility to provide protection for basic human rights by creating governance institutions that prevent human rights violations—effective police, courts, and other governmental bodies that can protect the rights of persons within their territory. But what are states to do if there is a breakdown in this system? What if the state's own police or military are unable to ensure the security of the public? What tools do states have to protect against humanitarian violations in times of crisis? What measures can a government take to protect against the possibility that a future government would disregard the rights of the population?

We argue that an answer can be found in consent-based intervention: states may consent to intervention by others when they cannot meet their responsibilities alone. Indeed, one could view the Chapter VII authority of the Security Council as grounded in state consent. After all, 193 states have consented to the U.N. Charter and, with it, to the authority of the Council to intervene in cases where there is a threat to international peace and security.<sup>241</sup> The theory of consent-based intervention builds upon this institution, offering a more robust set of tools for consent-based intervention to meet states' sovereign responsibility.

Consent-based intervention offers an alternative to the common view that the only available options for addressing a humanitarian crisis are Council-authorized intervention, unilateral intervention, and inaction. This common view has placed those seeking to locate a response to humanitarian crises within international law in a catch-22: *either* Council-authorized intervention is the only option (thus allowing human rights violations to proceed unchecked in the face of a P5 veto), *or* states may unilaterally intervene (thus placing the Charter's prohibition on the use of force in jeopardy). Consent-based intervention offers a way out of the catch-22 by recognizing a third option. Under this view, all states have the responsibility to protect their citizens, and they can meet this responsibility by consenting to intervention when a humanitarian crisis emerges that they cannot resolve on their own.<sup>242</sup>

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240. See S.C. Res. 1970, pmb., U.N. Doc. S/RES/1970 (Feb. 26, 2011); S.C. Res. 1962, pmb., U.N. Doc. S/RES/1962 (Dec. 20, 2010); S.C. Res. 1674, ¶ 4, U.N. Doc. S/RES/1674 (Apr. 28, 2006); see also Powell, *supra* note 213 (describing the international community's response to the 2011 crisis in Libya as a "multilateral constitutional moment" that confirmed the transition from sovereignty as control to sovereignty as responsibility).

241. See *Growth in United Nations Membership, 1945-Present*, UNITED NATIONS: MEMBER STATES, <http://www.un.org/en/members/growth.shtml#text> (last visited June 23, 2013).

242. Proposals to implement R2P have included consent-based elements that are consistent with the proposal here. See Secretary-General's Report, *supra* note 219, ¶¶ 11(b), 28-48 (discussing "Pillar 2" of R2P and the "commitment of the international community to assist States in meeting [their] obligations [under R2P]"); see also *id.* ¶ 40 (discussing intervention with the host state's consent).

There is broad consensus that a state may request intervention by outside powers and that such consent eliminates the need for Security Council approval.<sup>243</sup> In the *Nicaragua* decision, the ICJ affirmed the legality of consent-based intervention *in dicta*, stating that “intervention . . . [is] allowable at the request of the government of a State.”<sup>244</sup> The Security Council has also endorsed the principle of consent-based intervention.<sup>245</sup> More generally, the International Law Commission’s Draft Articles on State Responsibility provide that consent by one state to the actions of another state “precludes” the former state from later asserting the “wrongfulness” of the act of latter state, if the act “remains within the limits of that consent.”<sup>246</sup>

The ability to consent to intervention strengthens rather than weakens state sovereignty. States may use the tool of consent to leverage resources of other states to protect against future humanitarian violations. Ultimately, consent-based intervention provides states a mechanism by which to meet their responsibility to protect their citizens, even when the institutions of the state itself are no longer able to meet this responsibility. As the next Section demonstrates, a request for assistance is itself an act of sovereignty: an invocation of a power that only the state itself possesses.

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243. BROWNLIE, *supra* note 28, at 327; LOUIS HENKIN, *The Use of Force: Law and U.S. Policy*, in *RIGHT V. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE* 37, 63 (1989); Wippman, *supra* note 21, at 209 (“That consent may validate an otherwise wrongful military intervention into the territory of the consenting state is a generally accepted principle. When a government is both widely recognized and in effective control of most of the state, this principle affords a clear alternative to Security Council authorization as a basis for justifying external intervention. . . .”). There are no narrow limits on the form through which consent may be expressed, as long as it is clearly and unequivocally expressed. If the agreement constitutes a “treaty” as defined by Article 2 of the Vienna Convention on the Law of Treaties, its enforcement and validity will be governed by the terms of that Convention. The enforcement and validity of agreements not qualifying formally as treaties (through which consent can also be granted) will be governed by customary international law. In either case intervention must take place strictly within the limits of the consent granted; any agreement that was coerced or due to the threat or use of force is void. Vienna Convention on the Law of Treaties, *supra* note 185, at arts. 26, 51–52; Eliav Lieblich, *Intervention and Consent: Consensual Forcible Interventions in Internal Armed Conflicts as International Agreements*, 29 *B.U. INT’L L.J.* 338, 361, 363 (2011) (citing *Draft Articles on Responsibility for Internationally Wrongful Acts, with Commentaries*, [2001] 2 *Y.B. Int’l L. Comm’n* 31, art. 20, U.N. Doc. A/56/10; Josef L. Kunz, *The Meaning and the Range of the Norm Pacta Sunt Servanda* 39 *AM. J. INT’L L.* 180–81 (1945)).

244. *Nicaragua*, *supra* note 28, ¶ 246.

245. S.C. Res. 387, pmb., U.N. Doc. S/RES/387 (Mar. 31, 1976) (discussing “the inherent and lawful right of every State, in the exercise of its sovereignty, to request assistance from any other State or group of States”).

246. *Draft Articles*, *supra* note 243; see also *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J. 168, ¶¶ 52–54, 111, 149 (Dec. 19, 2005) [hereinafter *Armed Activities Case*] (observing that legality of intervention undertaken pursuant to the granting of consent is restricted to the intervening state’s adherence to “the parameters of that consent”).

## B. Sovereign Responsibility and Consent-Based Intervention in Practice

We turn now to an examination of consent-based intervention in practice. We outline two contexts in which states might engage in consent-based interventions to address humanitarian emergencies. Both operate within the constraints of the U.N. Charter regime and the strong protections it offers for state sovereignty, yet both offer a mechanism for intervention without prior Security Council authorization. Moreover, both propose consent-based intervention as a means to enhance or strengthen sovereignty. First, we examine “recognition and invitation,” which allows intervention based on the consent of emerging governments in the context of internal strife. Second, we explore options for “contracting around” the U.N. Charter through “treaties of guarantee,” which allow states to consent to humanitarian intervention in advance, usually by ratifying the constitutive acts or charters of regional organizations that expressly provide for such intervention.

### 1. *Recognition and Invitation.*

In the case of consent-based intervention, much turns on who has the authority to speak on behalf of the state. In what follows, we delineate a framework for government recognition, which attempts to discern between competing claims of legitimacy. We suggest that the ordinary indicators of effective control and multilateral recognition play an important role. At the same time, an additional factor flows from the acceptance of sovereign responsibility: in cases where there are competing claims of governance and where effective control is disputed, consideration should be given to whether those claiming to represent the state accept the international law responsibilities that such recognition carries, including the responsibility to protect fundamental human rights and prevent mass atrocities. In this way, the international community can help states make a long-term commitment to meeting their sovereign responsibility.<sup>247</sup>

Article 2(4) of the U.N. Charter prohibits states from intervening in other states without the authorization of the Security Council. If a state consents to an intervention by another state however, international law holds that the intervention is no longer a violation of Article 2(4).<sup>248</sup> Only

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247. This Article focuses only on the recognition of governments, not on the recognition of states. The Article delves into situations of internal conflict where there are competing claims to governmental authority in an existing state (e.g., the 2011 conflict in Libya), without reflecting on situations where there is doubt as to the very existence of the state (e.g., the debates over Palestinian statehood). State and government recognition are distinct processes and one must be careful not to conflate the two; distinct criteria govern state and government recognition and the legal significance that flows from such external recognition differs. See, e.g., THOMAS GRANT, *THE RECOGNITION OF STATES: LAW AND PRACTICE IN DEBATE AND EVOLUTION* (1999); STEFAN TALMON, *RECOGNITION OF GOVERNMENTS IN INTERNATIONAL LAW: WITH PARTICULAR REFERENCE TO GOVERNMENTS IN EXILE* (1998).

248. See Special Rapporteur on State Responsibility, Eighth Report on State Responsibility, U.N. Doc. A/CN.4/318 and Add.1-4, ¶ 66 (Jan. 24, Feb. 5, and June 15, 1979) (by Roberto Ago) (“[T]here is a consensus in international practice and in the decisions of international judicial bodies to the effect that consent of the subject in which is vested

actors who can speak on behalf of the state can issue valid invitations to another state to intervene in its territory.<sup>249</sup> The question thus becomes: “[W]ho is entitled to express the will of the state concerning intervention?”<sup>250</sup>

In many cases, the answer to this question is simple and uncontested: Under international law, the legally recognized government of a state can certainly speak on behalf of the state and therefore request intervention.<sup>251</sup> In the *Nicaragua* decision, the ICJ stated that “intervention . . . [is] allowable at the request of the government of a State.”<sup>252</sup> Yet the ICJ decision also noted that intervention was not permitted at the request of opposition forces within the state.<sup>253</sup> Indeed, scholars have taken the *Nicaragua* decision as evidence that only a legally recognized government may invite an intervention.<sup>254</sup> Yet in cases of conflict—particularly in civil wars, where human rights abuses are often widespread—there are frequently several entities vying for status as the legally recognized government. In such cases, it is necessary to decide which is the legitimate government—and therefore who may consent—before there may be a consent-based intervention.

Nothing in the U.N. Charter, multilateral treaties, or ICJ decisions specifies on what basis a state must recognize a government of another state. Indeed, several scholars have aptly observed that “[i]nternational law is surprisingly ambiguous about the circumstances under which new governments should be recognized.”<sup>255</sup> The analysis is also complicated by the fact that there is no international law rule obligating states to perform the act of recognition.<sup>256</sup> Thus, non-recognition of an entity does not

the subjective right that suffers injury precludes the wrongfulness of an act of a State which, in the absence of such consent, would constitute a breach of an international obligation.”).

249. *Id.* ¶ 70 (“[C]onsent . . . must be *internationally attributable to the State*; in other words, it must issue from a person whose will is considered, at the international level, to be the will of the State and, in addition, the person in question must be competent to manifest that will in the particular case involved.”).

250. Wippman, *supra* note 21, at 211.

251. *See id.* at 214; Louise Doswald-Beck, *The Legal Validity of Military Intervention by Invitation of the Government*, 56 BRIT. Y.B. INT’L L. 189, 190 (1985) (“The basic principle of State representation in international law is that the government speaks for the State and acts on its behalf.”).

252. *Nicaragua*, *supra* note 28, ¶ 246.

253. *Id.*

254. *See, e.g.*, Christopher J. Le Mon, *Unilateral Intervention by Invitation in Civil Wars: The Effective Control Test Tested*, 35 N.Y.U. J. INT’L L. & POL. 741, 750 (2003) (arguing that the Court’s decision in *Nicaragua* “not to discuss the standards of belligerency indicated that this system of gradations had likely been abandoned by the time of the adoption of the United Nations Charter”). It should be emphasized that an entity recognized in a form lesser than the government, such as “representative of the people,” cannot validly invite intervention. *See* Stefan Talmon, *Recognition of the Libyan National Transitional Council*, 15 ASIL INSIGHTS, no. 16 (June 16, 2011).

255. Mary Beth West & Sean D. Murphy, *The Impact on U.S. Litigation of Non-Recognition of Foreign Governments*, 26 STAN. J. INT’L L. 435, 439 (1990).

256. Hans Kelsen, *Recognition in International Law: Theoretical Observations*, 35 AM. J. INT’L L. 605, 610 (1941); Robert D. Sloane, *The Changing Face of Recognition in International Law: A Case Study of Tibet*, 16 EMORY INT’L L. REV. 107, 120–21 (2002).

necessarily reflect any conclusion about its legal status.<sup>257</sup>

We aim to fill the gap in the existing legal order by outlining three factors to which states may turn in answering who may consent to intervention: effective control, willingness to accept sovereign responsibility, and multilateralism. None of these factors is decisive alone. Yet together they offer states criteria for deciding between conflicting claims to legitimate authority.

#### a. Effective Control

The traditional (and still the most widely accepted) criterion for recognition of a government is “effective control” over the territory of the state it seeks to govern.<sup>258</sup> In the late nineteenth and early twentieth centuries, “*de facto* control over the nation was the principal criterion in assessing the existence of a government.”<sup>259</sup> Indeed, in situations of internal conflict, pre-Charter customary international law provided that an insurgent group could invite intervention as long as it exercised a certain degree of control over territory.<sup>260</sup> In that era, if an opposing group “continued to acquire territory, so that its degree of control matched or exceeded that of the previously-recognized government,” states would be required to recognize the group as “a belligerent[ ],” which status would confer legitimacy upon any invitation the group might issue.<sup>261</sup> Under traditional international law, therefore, the opposition group did not have to gain recognition as the *government* of a State in order to invite intervention. Although the ICJ in *Nicaragua* rejected the idea that non-state actors could invite intervention, it did not undermine the principle of effective control as a criterion for recognition. Indeed, “effective control” is the criterion for government recognition that enjoys the greatest acceptance.<sup>262</sup>

Many scholars argue that effective control is not only the most established legal criterion but that it is also normatively a good criterion. First, since it “turn[s] on a single fact that is relatively easy to verify, [it] serves the important policy of inhibiting intervention”<sup>263</sup> in a system where legiti-

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257. The non-recognitions of the Tinoco government in Costa Rica and the Popular Movement for the Liberation of Angola in Angola are often cited as being based on political reasons alone. See STEFAN TALMEN, *RECOGNITION OF GOVERNMENTS IN INTERNATIONAL LAW: WITH PARTICULAR REFERENCE TO GOVERNMENTS IN EXILE* 34-39 (1998).

258. See, e.g., Le Mon, *supra* note 254, at 745 (“The traditional determination of a government’s legality as representative for its state asks whether the government exerts *de facto* control over the state’s territory. The effective control test involves no legal inquiry into how the putative government gained control; if it can fulfill the functions of the state, it will be considered the legal government.”); Wippman, *supra* note 21, at 211 (stating that international law recognizes a government that can express the will of the state as one that “exercises effective control over the territory and people of the state.”).

259. Doswald-Beck, *supra* note 251, at 193.

260. See Le Mon, *supra* note 254, at 747.

261. *Id.*

262. See Talmon, *supra* note 254 (“The main criterion in international law for the recognition of a rebel group as the government of a State is its exercise of effective control over the State’s territory.”)

263. Tom J. Farer, *Panama: Beyond the Charter Paradigm*, 84 AM. J. INT’L L. 503, 511 (1990).

mately recognized governments can invite intervention by foreign states. Second, “effective control serves as a rough proxy for the existence of some degree of congruity between the government and the larger political community of the state, which supports the government’s claim to represent the state as a whole.”<sup>264</sup> Finally, “effective control” is “a means of reconciling two fundamental principles of the international order’s relationship to domestic political authority: popular sovereignty and ideological pluralism.”<sup>265</sup>

Establishing effective control as a factor for recognition also has the salutary effect of connecting the conditions of recognition to the conditions of sovereign responsibility, particularly human rights obligations. Foreign and international courts have begun crafting a doctrine concerning the responsibilities that flow from a state’s possession of “effective control.” This emerging doctrine holds that states are responsible for ensuring observance of international human rights obligations both inside their own geographic boundaries and when they exercise “effective control” over territory or persons.<sup>266</sup> The doctrine suggests that with sovereign power comes sovereign responsibility. Where states are able to exercise “effective control”—essentially, where they exercise authority to govern persons or territory—they must abide by the limits that international human rights law places on the exercise of that authority.

Yet effective control is not the only relevant factor for determining who in the country may consent to intervention. Indeed, despite the consensus in scholarly literature on the necessity of “effective control,” there are significant exceptions in state practice.<sup>267</sup> First, “[p]ractice shows that although *de facto* control is generally required of a new regime, recognition will rarely be withdrawn from an established regime, even once it has lost control, if there is no new single regime in control to take its place.”<sup>268</sup> Second, states have often continued to treat a government overthrown by an unconstitutional process (most often a coup) as the recognized government of a state, even though it cannot be said to exercise “effective control” of the state and even if the new government is in “effective control.”<sup>269</sup>

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264. Wippman, *supra* note 21, at 212.

265. Brad R. Roth, *Secessions, Coups and the International Rule of Law: Assessing the Decline of the Effective Control Doctrine*, 11 MELB. J. INT’L L. 393, 395 (2010).

266. See Oona A. Hathaway et al., *Human Rights Abroad: When Do Human Rights Treaty Obligations Apply Extraterritorially?*, 43 ARIZ. ST. L.J. 389, 395–411 (2011) (reviewing the recent jurisprudence of foreign and international courts that apply the effective control test).

267. See Doswald-Beck, *supra* note 251, at 198–99.

268. *Id.* at 199; see also Wippman, *supra* note 21, at 220 (“[M]ost states continue to accord substantial deference to the will of a recognized, incumbent government, even after it arguably lost control of a substantial portion of the state, so long as the government retains control over the capital city and does not appear to be in imminent danger of collapse.”).

269. See, e.g., Jean d’Aspremont, *Legitimacy of Governments in the Age of Democracy*, 38 N.Y.U. J. INT’L L. & POL. 877, 901–02 (2006) (claiming that states refused to recognize the governments that came to power via coups in Sierra Leone, Haiti, Burundi, Niger, the Ivory Coast, Guinea Bissau, and Togo); Eki Yemisi Omorogbe, *A Club of Incumbents? The African Union and Coups d’Etat*, 44 VAND. J. TRANSNAT’L L. 123, 138

Although this has not been a uniformly consistent practice,<sup>270</sup> many states that have decided to continue to recognize the ousted government have also been willing to take significant action to help restore it to power. In the case of the 1991 coup of the democratically elected Aristide government in Haiti, for example, the Security Council authorized intervention to restore the ousted government.<sup>271</sup> The African Union has actively tried to restore (including by using coercive measures short of intervention) governments deposed via coups in Togo, Mauritania, Guinea, Madagascar, and Niger.<sup>272</sup> Finally, some scholars have suggested that states can recognize a government-in-exile using criteria other than “effective control.”<sup>273</sup>

It is clear, therefore, that effective control is an important, but not the only, factor for determining who may consent to humanitarian intervention. We turn next, therefore, to two additional factors: willingness to accept sovereign responsibility and multilateralism.

#### b. Accepting Sovereign Responsibility

In addition to effective control, an entity seeking to invite humanitarian intervention must be willing to accept the responsibilities that come with sovereignty. This includes the willingness to fulfill international obligations, including, prominently, human rights obligations.

To determine whether a government is willing to accept the responsibility that comes with sovereignty, other states may look to indicia such as democratic commitments of the government seeking recognition and the process by which it has come to power—in particular, whether it has popular support, adherence to the state’s own domestic constitutional processes, independence from foreign military support, respect for the rights of other countries, the absence of extreme violence in seizing power, and demonstrated respect for human rights and humanitarian norms.<sup>274</sup>

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(2011) (noting that the African Union refused to recognize governments that came to power via coups in Togo (February 2005), Mauritania (August 2005 and August 2008), Guinea (December 2008), Madagascar (March 2009), and Niger (February 2010)); Roth, *supra* note 265, at 427–30, 435–39 (discussing the international repudiation of the governments that came to power via coups in Haiti in 1991, Sierra Leone in 1997 and Honduras in 2009).

270. See Roth, *supra* note 265, at 430.

271. See *id.* at 429.

272. Omorogbe, *supra* note 269, at 138–53.

273. René Cassin, for example, has suggested that States can recognize a government-in-exile “if they regard it as being representative of the national will.” Stefan Talmon, *Who Is a Legitimate Government in Exile? Towards Normative Criteria for Governmental Legitimacy in International Law*, in *THE REALITY OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF IAN BROWNIE* 499 (Guy S. Goodwin-Gill & Stefan Talmon eds., 1999). Giuseppe Sperduti has stated that “the recognition of a government in exile requires that it shows a sufficient quality by which it seems an emanation of the community for which it intends to act.” *Id.* at 510.

274. See Le Mon, *supra* note 254, at 745 n.12; Robert D. Sloane, *The Changing Face of Recognition in International Law: A Case Study of Tibet*, 16 *EMORY INT’L L. REV.* 107, 124–26 (2002). Such a determination will need to be made on a case-by-case basis, on the basis of both stated commitments and actions taken to ensure that human rights and humanitarian norms will be followed.



This criterion that the state seeking recognition must accept sovereign responsibility finds some recent support in state practice. During the 2011 conflict in Libya, states did not rely exclusively on the “effective control” test in determining whether the National Transitional Council (NTC) constituted a government.<sup>275</sup> Indeed, at the time of its recognition, the NTC’s effective control was arguably far from complete. The NTC captured the capital on August 21, 2011, though many countries made recognition statements before that date.<sup>276</sup> In recognizing the NTC as the new government of Libya, states emphasized the Qaddafi government’s failure to uphold certain responsibilities towards its people, in particular the responsibility to respect human rights.<sup>277</sup> States evoked Colonel Muammar Qaddafi’s failure to uphold Libya’s responsibility to its people while pointing to the NTC’s stated commitments to abide by human rights law.<sup>278</sup> In this way, states effectively used the principle of sovereign responsibility as a supplement to the traditional test of “effective control.”

The conduct of France, the first country to engage with recognition in Libya, provides one illustrative example. On March 8, 2011, France announced, “Qaddafi is no longer a discussion partner.”<sup>279</sup> Subsequently, France began recognizing the NTC in various forms, first “as the legitimate representative of the Libyan people”<sup>280</sup> and then as “a legitimate political discussion partner.”<sup>281</sup> On June 7, France recognized the NTC as the government of Libya, thus substituting it for the Qaddafi government.<sup>282</sup> In this process of de-recognizing Qaddafi, France emphasized the role of human rights violations by the Qaddafi government: “Having committed the most serious crimes against the Libyan people, in violation of interna-

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275. Catherine Powell extensively details the Libyan intervention arguing that “[t]he Libya intervention of 2011 marked the first time that the UN Security Council invoked the ‘responsibility to protect’ principle (RtoP) to authorize use of force by UN member states.” Powell, *supra* note 213, at 298. Indeed, her Comment focuses on the centrality of R2P to the *intervention* in Libya, not to the *recognition* of the NTC (which receives only brief mention). *Id.* at 300–01 n.17.

276. See, e.g., *US recognizes Libya rebels in blow to Qaddafi*, CBS News (July 15, 2011), [http://www.cbsnews.com/2100-202\\_162-20079750.html](http://www.cbsnews.com/2100-202_162-20079750.html).

277. See, e.g., Press Release, Maldives Ministry of Foreign Affairs Maldives Recognizes Libyan National Council as sole representative of the Libyan people, (Apr. 3, 2011), [hereinafter Press Release, Maldives], available at <http://www.foreign.gov.mv/new/tpl/news/article/65/>; Colombia reconoce como interlocutor al Consejo de Transición libio, EL TIEMPO.COM (Aug. 22, 2011), [http://www.eltiempo.com/politica/colombia-reconoce-legitimidad-de-rebeldes-en-libia\\_10206384-4](http://www.eltiempo.com/politica/colombia-reconoce-legitimidad-de-rebeldes-en-libia_10206384-4).

278. Press Release, Maldives, *supra* note 277.

279. *Statements made by the Ministry of Foreign and European Spokesperson*, FR. IN THE U.S. (Mar. 8, 2011), <http://www.ambafrance-us.org/IMG/html/briefing/2011/us110308.htm>.

280. *Statements made by the Ministry of Foreign and European Spokesperson*, FR. IN THE U.S. (Mar. 10, 2011), <http://lists.ambafrance-us.org/pipermail/daily-briefing/2011-March.txt>.

281. *Statements made by the Ministry of Foreign and European Spokesperson*, FR. IN THE U.S. (Mar. 21, 2011), <http://www.ambafrance-us.org/IMG/html/briefing/2011/us110321.htm>.

282. *Statements made by the Ministry of Foreign and European Spokesperson*, FR. IN THE U.S. (June 7, 2011), <http://www.ambafrance-us.org/IMG/html/briefing/2011/us110607.htm>.

tional law, the authorities under Colonel Qaddafi cannot claim any role in representing the Libyan State.”<sup>283</sup> France’s emphasis on Qaddafi’s failures to respect human rights was far from exceptional; many other countries followed suit.<sup>284</sup>

Second, countries used the commitments that the NTC had assumed to justify their recognition of the NTC. When the United States recognized the NTC as the “legitimate governing authority of Libya” on July 15, 2011, for example, it emphasized “the commitment to their obligations, the commitment to an inclusive democratic reform process as laid out in their roadmap, the commitment to disburse funds in a transparent manner for the benefit of the Libyan people, and the commitment to ensure inclusivity both geographically and politically.”<sup>285</sup> The United States also emphasized that the recognition of the NTC would “send a very clear signal to Qadhafi . . . that we are looking past Qadhafi to a future without him . . . and then, ultimately, a new democratic government that *reflects and responds to the aspirations of the Libyan people* . . .”<sup>286</sup> For its part, the United Kingdom referenced both effective control and the willingness of the NTC to accept sovereign responsibilities: “This decision reflects the [N]ational [T]ransitional [C]ouncil’s increasing legitimacy, competence and success in reaching out to Libyans across the country. . . . Our decision also reflects the responsibilities the NTC has taken on in the areas under its control.”<sup>287</sup> Similarly, in seating the NTC, the General Assembly looked not only to effective control but also to the willingness to assume sovereign

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283. *Id.*

284. The United Kingdom, for example, asserted that Qaddafi’s “brutality against the Libyan people has stripped him of all legitimacy.” Nicholas Watt, *Britain recognises Libyan rebels and expels Gaddafi’s London embassy staff*, THE GUARDIAN (July 27, 2011), <http://www.guardian.co.uk/world/2011/jul/27/libya-transitional-council-london-embassy-hague>. The Secretary-General of the Gulf Cooperation Council (GCC) remarked that the decision by Qatar to recognize the NTC as the government was “in line with the decisions of the GCC.” Regan E. Doherty, *Qatar recognises Libyan rebel body as legitimate*, REUTERS (Mar. 29, 2011), <http://www.reuters.com/article/2011/03/28/us-libya-qatar-idUSTRE72R1J820110328>. The Maldives, in recognizing the NTC as the sole legitimate representative body of the Libyan people, held that “through its actions including gross and systemic human rights violations, which appear to amount to war crimes and crimes against humanity, the government of Muammar Gaddafi has lost its legitimacy and its right to govern.” Press Release, Maldives, *supra* note 277. Italy, in recognizing the NTC as Libya’s only legitimate interlocutor on bilateral relations, stated that “the proposals” of Muammar Gaddafi “to end the crisis” are “not credible.” Press Release, Farnesina: Ministry of Foreign Affairs Focus-Libya: Frattini, the NTC is Italy’s only interlocutor (Apr. 4, 2011), *available at* [http://www.esteri.it/MAE/EN/Sala\\_Stampa/ArchivioNotizie/Appfondimenti/2011/04/20110404\\_FocusLibia\\_frattini\\_Cnt.htm](http://www.esteri.it/MAE/EN/Sala_Stampa/ArchivioNotizie/Appfondimenti/2011/04/20110404_FocusLibia_frattini_Cnt.htm).

285. U.S. DEP’T OF STATE, SPECIAL BRIEFING: BACKGROUND BRIEFING BY SENIOR STATE DEPARTMENT OFFICIALS ON LIBYA CONTACT GROUP MEETING (July 15, 2011), *available at* <http://www.state.gov/r/pa/prs/ps/2011/07/168662.htm>.

286. *Id.* (emphasis added).

287. Press Release, Foreign & Commonwealth Office, Libyan Charge d’Affaires to be Expelled from UK (July 27, 2011), <https://www.gov.uk/government/news/libyan-charge-d-affaires-to-be-expelled-from-uk>.

responsibility.<sup>288</sup>

The Libyan example demonstrates how the multi-factor approach can work in practice, taking into account not only effective control, but also the ability and willingness of an entity to fulfill international obligations. Yet the Libyan example does not provide evidence that effective control and willingness to accept sovereign responsibility are alone sufficient to permit an entity to invite humanitarian intervention. Before states intervened, after all, the Security Council authorized action. Indeed, Security Council authorization predated the emergence of the NTC as a viable alternative regime to the Gaddafi regime. For an entity to be able to invite intervention *without* prior Security Council authorization, it is important to look to a third factor: multilateralism. It is to this final factor that we now turn.

### c. Multilateralism

Scholars have been rightly concerned that any criteria suggested for the recognition of governments could be manipulated to justify self-interested interventions by other states.<sup>289</sup> To address this danger, it is important to look to a third factor: multilateral endorsement of a consenting government's legitimacy prior to any intervention. The requirement of multilateralism in the recognition process is not new. Traditionally, in situations in which there are several entities claiming or seeking to be the government of a state, state practice indicates that in addition to having effective control, a government must also have international external legitimacy in order to legitimately invite intervention.<sup>290</sup> Put differently, there must be sufficient multilateral consensus that the government requesting intervention speaks for the state.

In the past, external legitimization has taken several forms: the use of the General Assembly's "Uniting for Peace" resolution in the case of the Lebanese Civil War,<sup>291</sup> requesting the Secretary-General to opine on the recognition of a government in the civil war in the Dominican Republic,<sup>292</sup> and using the General Assembly credentialing process to legitimate a gov-

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288. See *Press Release: After Much Wrangling, General Assembly Seats National &c.*, UNITED NATIONS GEN. ASSEMBLY (Sept. 16, 2011), <http://www.un.org/News/Press/docs/2011/ga11137.doc.htm>.

289. See, e.g., David Wippman, *Change and Continuity in Legal Justifications for Military Intervention in Internal Conflict*, 27 COLUM. HUM. RTS. L. REV. 435, 442-44 (1996) (noting competing views on the criteria for recognition and the possibility for abuse that flows from relying on flexible criteria).

290. See, e.g., Doswald-Beck, *supra* note 251, at 213 ("The justifications given by the intervening or supported governments as well as State reaction to such interventions tend consistently to indicate the need to show significant outside support for the rebels so that the intervention is characterized as a collective defence action rather than an involvement in internal strife."); Le Mon, *supra* note 254, at 754 ("While traditional international law regarding foreign intervention in civil wars restricted the introduction of foreign interveners once the rebellion had achieved some degree of success, modern international law regarding intervention by invitation in a civil war views as critical the inviting party's *international* external legitimacy." (emphasis added)).

291. See Le Mon, *supra* note 254, at 758-59.

292. See *id.* at 764.

ernment after the Republic of Congo was admitted into the U.N.<sup>293</sup> There is no consensus in state practice or in the literature, however, on what method best actualizes this requirement for sufficient international external legitimacy.

In the following Subsections, we explore several methods that could serve this multilateralism function, including the use of the Credentials Committee of the General Assembly, a majority vote in the plenary session of the General Assembly, or a critical mass of individual state recognitions. We consider the advantages and limitations of each of these methods in turn. Although we insist on using multilateralism in recognition to check against possible abuse, we leave the process by which to effectuate such multilateralism to the community of states.

Admittedly, the United Nations has disavowed any formal role in recognition; it insists that no organ of the organization can, as a legal matter, recognize a government.<sup>294</sup> As detailed in this Subsection, however, U.N. processes for deciding questions of credentials and representation often function as de facto recognition because the approval of credentials and representatives of one self-proclaimed government over the competing credentials and representatives of another arguably legitimizes one government over the other. Even accepting the U.N.'s claim that it will not formally recognize governments, however, the credentials and representation processes still arguably serve as sufficient multilateral affirmation of other states' recognition pronouncements.

#### i. The U.N. Credentialing Committee

We begin by considering the use of the General Assembly's Credentials Committee to fulfill the criterion of multilateralism. The credentialing process is the mechanism by which the U.N. confirms whether the docu-

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293. See Farrokh Jhabvala, *The Credentials Approach to Representation Questions in the U.N. General Assembly*, 7 CAL. W. INT'L L.J. 615, 622 (1977).

294. See *Becoming a Member of the United Nations*, UNITED NATIONS NEWS CENTRE, [http://www.un.org/News/dh/infocus/UN\\_membership.shtml](http://www.un.org/News/dh/infocus/UN_membership.shtml) (last visited Dec. 1, 2012) ("The United Nations is neither a State nor a Government, and therefore does not possess any authority to recognize either a State or a Government. As an organization of independent States, it may admit a new State to its membership or accept the credentials of the representatives of a new Government."); see also G.A. Res. 396 (V) (1950), ¶ 4, U.N. Doc. A/RES/396(V) (1950) (noting that the General Assembly's attitude regarding recognition disputes "shall not of itself affect the direct relations of individual Member States with the State concerned"); *Scope of Credentials in Rule 27 of the Rules of Procedure of the General Assembly*, 1970 U.N. JURID. Y.B. 170, U.N. Doc. A/8160. [hereinafter *Scope of Credentials*] ("Unlike the acceptance of credentials in bilateral relations, the question of recognition of a Government of a Member State is not involved [in credentialing], and substantive issues concerning the status of Governments do not arise . . . ."); U.N. Secretary-General, Letter dated 8 March 1950 from the Secretary General to the President of the Security Council Transmitting a Memorandum on the Legal Aspects of the Problem of Representation in the United Nations, U.N. Doc. S/1466 (Mar. 9, 1950) (asserting that that recognition is a "political" decision made by individual states, whereas admission and credentialing are collective acts by the General Assembly, and it is "legally inadmissible to condition the latter acts [of admission or credentialing in the United Nations] by a requirement that they be preceded by individual recognition").

ments submitted by individuals representing a given country within the organs of the United Nations are acceptable.<sup>295</sup> Members of the Credentials Committee are appointed by the General Assembly at the beginning of each session of the General Assembly.<sup>296</sup> Member States submit credentials to the Secretary-General, and subsequently the nine-member Credentials Committee “examine[s] the credentials of representatives and report[s] without delay.”<sup>297</sup> The General Assembly votes by majority vote to adopt or reject the recommendations of the Committee.<sup>298</sup> If the General Assembly rejects the credentials of a representative that the Committee has accepted, it may leave the seat empty or it may vote to accredit the delegation of its choice.<sup>299</sup>

Scholars have asserted that the question of credentialing is distinct from the question of who may represent a state at the U.N., the former being a procedural question and the latter involving a decision as to what authority will be treated as the legitimate agent of the state.<sup>300</sup> A General Assembly resolution held that “whenever more than one authority claims to be the government entitled to represent a Member State in the United Nations and this question becomes the subject of controversy in the United Nations . . . it should be considered by the General Assembly.”<sup>301</sup>

Although the representation question can be considered by the General Assembly under a separate agenda item,<sup>302</sup> many representation issues are, in practice, decided by the Credentials Committee. For example, in 1960, the General Assembly admitted the Republic of Congo to United Nations membership, but faced with a domestic power struggle, the General Assembly referred the question of representation to the Creden-

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295. See Jhabvala, *supra* note 293, at 617-624. The Legal Counsel to the UN has defined credentials generally as “the document attesting that the person or persons named are entitled to represent their State at the seat of or at meetings of the Organization,” and credentials specifically for the General Assembly as “a document issued by the Head of State or Government or by the Ministry of Foreign Affairs of a Member State of the United Nations, submitted to the Secretary-General designating the persons entitled to represent that Member at a given session of the General Assembly.” *Scope of Credentials*, *supra* note 294 ¶¶ 1 & n.3, 3. Notably, this process should be distinguished from the process by which new members are admitted to the United Nations under Article 4(1) of the UN Charter.

296. Rules of Procedure of the General Assembly, U.N. Doc. A/520/Rev.17, r. 28 (2007).

297. *Id.*

298. *Id.* r. 85.

299. Matthew Griffin, *Accrediting Democracies: Does the Credentials Committee of the United Nations Promote Democracy Through Its Accreditation Process, and Should It?*, 32 N.Y.U. J. INT'L L. & POL. 725, 730 (2000). During this process, if objections are made to the credentialing of certain representatives, the representatives may be seated provisionally until the Credentials Committee has reported and the General Assembly has voted. Rules of Procedure, *supra* note 296, r. 29.

300. See, e.g., Jhabvala, *supra* note 293, at 617-624.

301. G.A. Res. 396 (V), *supra* note 294, ¶¶ 1-2.

302. See Orna Ben-Naftali & Antigoni Axenidou, “Accredito” Ergo Sum: Reflections on the Question of Representation in the Wake of the Cambodian Representation Problem in the Fifty-Second Session of the General Assembly, 27 DENV. J. INT'L L. & POL'Y 151, 163 n.45 (1998).

tials Committee, which decided to accept the credentials of the Kasavubu delegation.<sup>303</sup> There are several advantages to having the credentialing process play this role. First, the U.N. has failed to establish separate criteria by which to assess representation questions.<sup>304</sup> Therefore, the rules pertaining to credentialing become, de facto, the only available rules codified in the U.N. system for representation determinations.<sup>305</sup> The Credentials Committee also has the advantage of being a “ready-made forum” in which to assess these matters.<sup>306</sup>

There are, to be sure, significant drawbacks to using the credentialing process in this way. When the representatives of two different purported governments for the same state submit competing credentials, the General Assembly must determine which set of credentials to authorize. First, however, the decision comes before the nine-member Credentials Committee, leaving the decision to a small number of states. Moreover, the Committee commonly includes the United States, China, and Russia.<sup>307</sup> The Committee may therefore be encumbered by the same political and diplomatic roadblocks that affect the Security Council. Finally, in some instances in which rival claimants to governmental authority have submitted competing credentials, the Committee has refrained from making a decision and instead deferred the assessment to the following year.<sup>308</sup> The Committee is

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303. See Jhabvala, *supra* note 293, at 622.

304. Resolution 396 (V) only states that representation questions “should be considered in light of the Purposes and Principles of the Charter and the circumstances of each case.” G.A. Res. 396 (V), *supra* note 294, ¶ 1.

305. See Jhabvala, *supra* note 293, at 622 (“It is clear then, that when questions concerning representation arise in the General Assembly, the lack of specific representation rules has been dealt with by using the rules pertaining to credentials.”).

306. *Id.*

307. Ben-Naftali & Axenidou, *supra* note 302, at 166 n.64 (“However, for more than twenty years, the Committee has traditionally consisted of representatives from China, the Russian Federation/USSR, the United States, two Member States each from Africa and Latin America, and one Member State each from Asia and from Western Europe.”); see also Griffin, *supra* note 299, at 731 (“China, the United States, and Russia (previously the Soviet Union) traditionally always sit on the Credentials Committee despite the fact that no printed rule promises membership to any state and despite the practice of UN organs of rotating membership on a regional basis.”).

308. The cases of Cambodia and Afghanistan demonstrate this practice. In 1997 the Committee received two sets of credentials from delegations seeking to represent Cambodia during the 52nd session. Rep. of the Credentials Comm., 52nd Sess., ¶ 4, U.N. Doc. A/52/719 (Dec. 11, 1997). The Committee considered these credentials on September 19, but decided it would defer a decision on the understanding that no one would occupy the seat of that country at the 52nd session. See *id.* ¶ 5; Ben-Naftali & Axenidou, *supra* note 302, at 194-95. At the 51st session in 1996, the UN received a note from the Ministry of Foreign Affairs of Afghanistan, challenging the delegation whose credentials were issued by President Burhan-u-ddin Rabbani. First Rep. of the Credentials Comm., 51st Sess., U.N. Doc. A/51/548 (Oct. 23, 1996). The note did not provide a list of new representatives for Afghanistan. *Id.* The Committee decided to defer any decision on the credentials of the representatives until a subsequent meeting. *Id.* ¶ 14. At the 52nd session, the Committee received two sets of credentials from Afghanistan. *Id.* ¶ 7). The Committee concluded that, “[h]aving considered the question of the credentials of Afghanistan, [it would] defer a decision on the credentials of representatives of Afghanistan . . .” Rep. of the Credentials Comm., 52nd Sess., *supra*, ¶ 10. At the 53rd session, when faced again with competing claims regarding the creden-

therefore not suited to situations in which there is a pressing humanitarian crisis.

ii. The General Assembly

Credentialing can also be brought directly to the General Assembly, subject to a majority vote.<sup>309</sup> Any Member State can propose that a credentialing decision be discussed under an agenda item.<sup>310</sup> This process was used in the case of China, for example. The Credentials Committee deferred the question of Chinese representation for ten years, leaving the Chinese Nationalist Government seated.<sup>311</sup> When support for such deferral weakened, the General Assembly took up the issue. In 1971, the General Assembly adopted Resolution 2758, which declared the representatives of the Government of the People's Republic of China the "only lawful representatives of China to the United Nations."<sup>312</sup>

The advantages of going directly to the General Assembly for a credentialing determination are threefold. First, the credentialing decision can be made without the procedural delays detailed above that often encumber the Committee. Given the more public nature of the General Assembly, it is less likely to defer decisions on contentious issues. This is particularly important when international recognition of an emerging government is needed quickly in the face of a humanitarian crisis. Second, the General Assembly is substantially more representative than the Credentials Committee, as every Member State has a seat in the Assembly. A decision by the General Assembly to credential a government is therefore more likely to be regarded as legitimate.<sup>313</sup> Third, discussion over the legitimacy of the government in question is likely to be more transparent if the matter is brought directly to the General Assembly. Under the current process, the

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tials of Afghanistan, the Committee again deferred the decision. First Rep. of the Credentials Comm., 53rd Sess., ¶¶ 7-8, U.N. Doc. A/53/556 (Oct. 29, 1998). The same thing took place during the 54th and 55th Sessions. First Rep. of the Credentials Comm., 55th Sess., ¶¶ 6, 8, U.N. Doc. A/55/537 (Nov. 1, 2000); Rep. of the Credentials Comm., 54th Sess., ¶¶ 6, 9, U.N. Doc. A/54/475 (Oct. 18, 1999). At the 56th Session in 2001, the controversy was resolved by the war in Afghanistan and the establishment of the Interim Authority, which the Committee noted was set to take office on December 22, 2001, after which point credentials of that government's representative would be submitted. See Rep. of the Credentials Comm., 56th Sess., ¶ 4, U.N. Doc. A/56/724 (Dec. 20, 2001).

309. See Griffin, *supra* note 299, at 730. At present, the General Assembly subjects recommendations of the Credentials Committee to a majority vote. It seems appropriate, therefore, to maintain this same threshold. At least one scholar, however, has argued that questions of representation brought directly to the General Assembly should be decided by a two-thirds majority, because it is properly considered an "important question" under Article 18(3) of the Charter. See Ben-Naftali & Axenidou, *supra* note 302, at 202.

310. See Jhabvala, *supra* note 293, at 622.

311. See Griffin, *supra* note 299, at 730 n.17.

312. See *id.* (citing G.A. Res. 2758, U.N. GAOR, 26th Sess., Supp. No. 29, U.N. Doc. A/8429 at 2 (1971)).

313. See *id.* at 771-72 ([T]he only legitimate way to use the credentials process to promote democracy would be for the decision to be made directly by the General Assembly.').

Credentials Committee consults extensively with Member States.<sup>314</sup> As a result, it rarely votes out a recommendation the General Assembly is unwilling to accept.<sup>315</sup> Yet the informal consultation process is hidden from sight. As a result, the international community gains little insight as to what criteria are used in their credentialing and representation determinations. Bringing these discussions directly to the General Assembly might bring about more open debate and greater transparency. It would also allow states to be held accountable for their role in the process, rather than allowing them to hide their influence from view.

Of course, bringing the decision to the General Assembly would not be without challenges of its own. A decision in the Credentials Committee regarding a government's credentials is generally considered procedural in nature. By contrast, a challenge raised directly in the General Assembly is more likely to be regarded as political.<sup>316</sup> In the context we are considering, however, that would likely be unavoidable. Where more than one entity claims to be the legitimate representative of a Member State and where that state is experiencing a humanitarian crisis, the credentialing decision will be unavoidably political. Bringing a credentialing decision directly to the General Assembly is unlikely to change that.

### iii. A Critical Mass of Individual Recognitions

International law does not require that the United Nations be the forum that determines whether an emerging government has achieved widespread multilateral recognition. Indeed, as mentioned above, the United Nations has resisted this role. Multilateral recognition could be determined simply through a critical mass of individual state recognitions. This would have the significant advantage of avoiding the procedural delays associated with the Credentials Committee and the General Assembly. That may prove important in the context of an unfolding humanitarian crisis.

Once again, however, this approach has significant drawbacks of its own. Most notably, the United Nations is the only international body that has a formalized process for determining which entity has the proper credentials and is the proper representative of a state. For all its attendant delays and procedural difficulties, the process has a track record and is generally regarded as legitimate. Relying upon a system unmoored from any international organization would raise a series of difficult questions to which there are no clear answers. What threshold would apply? How many states must recognize a government for it to legally invite a humani-

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314. See *id.* at 731.

315. See *id.* at 731 & n.19.

316. Questions of representation decided in the General Assembly are not subject to the Rules of Procedure, but rather to Resolution 396 (V), which states that representation questions "should be considered in light of the Purposes and Principles of the Charter and the circumstances of each case." G.A. Res. 396 (V), *supra* note 294, ¶ 1. For more on the different criteria used in the United Nations for deciding credentialing and representation matters, see Ben-Naftali & Axenidou, *supra* note 302, at 163-64.



tarian intervention? What process must they follow? Must they grant full diplomatic relations? Not only are there no clear answers to these questions, it is not clear where authoritative answers would come from, if not from an international treaty, the negotiation of which would take years at best. Any state claiming to intervene on the invitation of a government that has received the recognition of a critical mass of states but has not been credentialed by the U.N., thus risks being regarded as an illegal aggressor and any such intervention will likely erode the prohibition on the use of force that is core to the modern international legal system. Thus, reliance on a critical mass of individual state recognitions trades legitimacy for efficiency.

## 2. *Proactive Consent: Regional Organization-Based Treaties of Guarantee*

States may not only consent to humanitarian intervention after a humanitarian crisis has emerged; they may also consent *in advance*. States can do so by agreeing to a humanitarian crisis-preventing regional organization-based “treaty of guarantee”—a treaty-based mechanism in which a state agrees to allow future intervention by an outside power (or group of powers) in specific circumstances. A treaty of guarantee gives states a tool they can use to meet their sovereign responsibility to protect their citizens. It has the virtue of permitting states to decide in advance how to address a crisis if one occurs (therefore perhaps even preventing a future crisis). Moreover, it places the power back in the hands of the states themselves, allowing states to bind themselves in advance rather than wait until a crisis has emerged. A treaty of guarantee thus offers states a mechanism for meeting their sovereign responsibility through advance planning and by marshalling the resources of regional partners to help safeguard the human rights of their populations.

In the discussion that follows, we first elaborate on the potential benefits of humanitarian crisis-preventing treaties of guarantee, explaining how such treaties can be understood as sovereignty-enhancing. We also explore the specific advantages of grounding these treaties in regional organizations. Second, we consider the legality of treaties of guarantee, showing that they are consistent with the U.N. Charter regime and international law. Third, we address the specific questions that arise when a state seeks to withdraw from a treaty of guarantee. Finally, recognizing that such treaties might be abused by states seeking to further their strategic interests, we present a set of best practices that might guide future regional-organization-based treaties of guarantee designed to prevent humanitarian crises.

### a. *Treaties of Guarantee and Sovereign Responsibility*

Historically, states have frequently entered into treaty-based arrangements that allow other states to intervene in their territory in specific situations. Such arrangements were usually designed to maintain a precarious

political status quo or to protect a state's neutrality.<sup>317</sup> States, of their own accord, generally began eschewing such arrangements by the mid-twentieth century, primarily because of accusations that such treaties were used to further coercive, colonialist aims.<sup>318</sup>

Although treaties of guarantee were historically formed by small, unstable states seeking to ensure domestic stability or the protection of a governing group,<sup>319</sup> such arrangements are today more typically formed in the context of regional organizations. They often serve the specific goal of preventing humanitarian disasters within the region governed by the treaty. At least two regional organizations maintain treaties that allow the organization to intervene in member states during humanitarian crises. The Charter of the African Union (AU) provides the institution with the authority to “intervene in a Member State pursuant to a decision of the [AU’s governing] Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity.”<sup>320</sup> Similarly, in 1999, the Economic Community of West African States (ECOWAS)<sup>321</sup> created a protocol providing a “mechanism” for intervention, *inter alia*, in cases of “internal conflict . . . that threaten[ ] to trigger a humanitarian disaster” or “[i]n event of serious and massive violation of human rights and the rule of law.”<sup>322</sup>

Regional-organization-based treaties of guarantee designed to prevent humanitarian catastrophes—like the ECOWAS and AU treaties—represent a promising framework through which to further the principle of sovereign responsibility. Sovereign responsibility rests on the assumption that sovereignty entails an obligation to protect the population from harm.<sup>323</sup> When a government takes steps to prevent a humanitarian crisis, it demonstrates its commitment to meeting this obligation;<sup>324</sup> consenting *ex ante* via treaty to intervention in the event of a humanitarian crisis allows a state to prevent against a future inability to meet its sovereign responsibility. In signing a treaty of guarantee aimed at protecting human rights, a state has essentially tied itself to the mast, committing itself to protect its population

317. See David Wippman, *Treaty-Based Intervention: Who Can Say No?*, 62 U. CHI. L. REV. 607, 613 (1995); see also Peter E. Harrell, Note, *Modern-Day “Guarantee Clauses” and the Legal Authority of Multinational Organizations to Authorize the Use of Military Force*, 33 YALE J. INT’L L. 417, 426 (2008) (giving examples of such treaties).

318. Wippman, *supra* note 317, at 614–15.

319. For example, the 1903 Treaty of Havana between Cuba and the United States allowed the United States to intervene in Cuba to protect “life, property and liberty.” See Harrell, *supra* note 317, at 426 (quoting the text of the treaty and noting that President Theodore Roosevelt invoked it to justify military intervention in Cuba in 1906).

320. *Constitutive Act of the African Union*, AFRICAN UNION art. 4(h) (July 11, 2000), [http://www.africa-union.org/about\\_au/constitutive\\_act.htm](http://www.africa-union.org/about_au/constitutive_act.htm) [hereinafter AU Charter].

321. For a discussion of ECOWAS, see *supra* note 86.

322. Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security art. 25, ECOWAS Doc. A/P10/12/99 (Dec. 10, 1999) [hereinafter ECOWAS Protocol]. The protocol is explicit that this mechanism may be used with or without approval from the Security Council. *Id.* art. 26.

323. See BROWNIE, *supra* note 28, § III.A.

324. See *id.*; see also ICISS Report, *supra* note 35, ¶¶ 3.1–3.2 (noting the importance of a nation-state’s “responsibility to prevent”).

in the event of a breakdown of political order and the emergence of a humanitarian crisis. Such a treaty is not a surrender of sovereignty. To the contrary, it is sovereignty-enhancing, allowing a state to use its sovereign capacity to consent in order to meet its sovereign responsibility to protect its population.<sup>325</sup>

Although not a legal requirement, grounding these treaties in regional organizations has significant advantages.<sup>326</sup> Regional organizations are often more aware of local politics and custom, making them better suited to take steps to mitigate a humanitarian crisis without causing unnecessary political or social upheaval.<sup>327</sup> This view is arguably reflected in the U.N. Charter itself. Article 52 encourages member states to “achieve pacific settlement of local disputes through . . . regional arrangements or by . . . regional agencies before referring them to the Security Council.”<sup>328</sup> States in the same region are often close trading partners and their populations are more likely to share ethnic, linguistic, racial, cultural, and socio-economic characteristics. Moreover, bordering states may be concerned with refugee flows or impediments to trade routes caused by a significant humanitarian crisis and therefore might be motivated to act quickly to address emerging problems before they escalate.

Of course there are also potential drawbacks to relying on regional organizations. First, regional organizations are not immune from internal division merely because they are more sensitive to local politics and customs. Indeed, in some instances, division may be more, not less, pronounced due to historical enmity and long-term competition over resources. Second, placing power in the hands of regional organizations can magnify the influence of regional powers. The African Union’s Peace and Security Council’s failure to respond to Ethiopia’s 2006 intervention in Somalia demonstrates that a regional power may wield its influence to hinder a regional organization’s response to a crisis that implicates its inter-

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325. Andrew Moravcsik has highlighted how developing democracies sometimes seek the creation of human rights-enforcing institutions in order to help them prevent backsliding. See Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 INT’L ORG. 217 (2000).

326. A humanitarian-crisis-preventing treaty of guarantee could certainly be created bilaterally, or multilaterally outside the auspices of a regional organization. Regional organizations, such as ECOWAS and the AU, however, have generally proven most willing to adopt such treaties, and we anticipate this trend will continue. Furthermore, as we explain above, there are sound political and normative reasons for preferring that these treaties be established under the auspices of regional organization.

327. In the context of R2P, the ICISS report emphasizes that regional organizations can prove crucial in preventing atrocities. ICISS Report, *supra* note 35, ¶ 3.17. Moreover, such organizations are often better equipped to intervene where necessary, since “countries within the region are more sensitive to the issues and context behind the conflict headlines, more familiar with the actors and personalities involved in the conflict, and have a greater stake in overseeing a return to peace and prosperity.” *Id.* ¶¶ 6.31–32. Although intervention based on regional treaties of guarantee is grounded in consent and not on the framework for intervention proposed by ICISS, the report’s observations on this point nevertheless provide helpful insight by analogy.

328. U.N. Charter art. 52, para. 2.

ests.<sup>329</sup> Third, regional organizations may lack the infrastructure and military capacity to carry out humanitarian interventions without external assistance. These are reasons to expect that regional treaties of guarantee are unlikely to be a panacea — or to replace U.N.-authorized action. Nonetheless, such treaties offer an additional tool for addressing humanitarian crises that can supplement existing mechanisms.

#### b. Treaties of Guarantee and the U.N. Charter

Some have argued that the adoption of the U.N. Charter called into question the legality of treaties of guarantee which, as noted above, had been relatively common in the pre-Charter era. Article 2(4)'s proscription against "the threat or use of force against the territorial integrity or political independence of any state"<sup>330</sup> clearly prohibits armed interventions. And Article 103's stipulation that the U.N. Charter supersedes all other international agreements<sup>331</sup> would seem to prohibit attempts to "contract around" this provision via treaty.<sup>332</sup> Some have also framed the inviolability of state sovereignty embodied in Article 2(4) as a *jus cogens* (peremptory) norm in international law,<sup>333</sup> pointing out that international law explicitly provides that states may not agree to a *jus cogens* violation via treaty.<sup>334</sup>

Yet treaties of guarantee can be reconciled with the U.N. Charter, as well as with the claim that the inviolability of state sovereignty is a *jus cogens* norm. As discussed above, international law does not treat intervention undertaken with state consent as a violation of the sovereignty of a state.<sup>335</sup> A treaty of guarantee simply represents a kind of prospective con-

329. Paul D. Williams, *The Peace and Security Council of the African Union: Evaluating an Embryonic International Institution*, 47 J. MOD. AFR. STUD. 603, 620 (2009).

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

331. *Id.* art. 103 ("In the event of a conflict between the obligations . . . under the . . . Charter and . . . obligations under any other international agreement . . . obligations under the . . . Charter shall prevail.")

332. Although the U.N. Charter encourages the use of regional organizations to ensure stable relationships between states, U.N. Charter, art. 52, paras. 1-2, it is explicit that "no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council," *Id.* art. 53, para. 1.

333. Scholars have generally made this argument in the context of critiquing specific claims of a right to intervene under a treaty. For example, Louis Henkin criticized the U.S. government's arguments that intervention in Panama was justified by a treaty of guarantee in the Panama Canal Treaty, claiming that "[e]ven if Panama and the United States had concluded such a treaty, it would be void: such a treaty would violate . . . the principles of Article 2(4) of the Charter which are *jus cogens*." Louis Henkin, *The Invasion of Panama Under International Law: A Gross Violation*, 29 COLUM. J. TRANSNAT'L L. 293, 309 (1991). Similarly Michael Reisman criticized the idea that the Soviet Union could intervene in post-Revolution Iran under the 1921 Treaty of Friendship, since the right to sovereignty had become a *jus cogens* norm during the decades since the treaty was signed. W. Michael Reisman, *Termination of the USSR's Treaty Right of Intervention in Iran*, 74 AM. J. INT'L L. 144 (1980).

334. Vienna Convention on the Law of Treaties, *supra* note 185, art. 53 ("[A] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.")

335. See *supra* notes 243-246 and accompanying text.

sent.<sup>336</sup> In this respect, by signing a treaty of guarantee, a state agrees that any future intervention undertaken under the treaty's auspices would not violate its sovereignty, and would therefore fall outside the scope of Article 2(4)'s prohibition.<sup>337</sup>

The practice of embedding a treaty of guarantee in a regional organization's charter or protocols also raises particular legal concerns. The role of the regional organizations in the international legal system is specifically addressed in Chapter VIII of the U.N. Charter. While the U.N. Charter encourages the use of the regional organizations in ensuring stable relationships between states,<sup>338</sup> it explicitly provides that "no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council."<sup>339</sup> But as Peter Harrell has argued, this restriction on "enforcement action" would seem to refer only to the use of force where approval of the Security Council would otherwise be required; namely, use of force that, but for Council authorization, would contravene Article 2(4).<sup>340</sup> Article 2(4) is not applicable because the use of force undertaken against a state under a treaty of guarantee would fall under the law of consent.<sup>341</sup> Thus, "use of force consistent with a regional organization's [treaty of] guarantee . . . does not trigger Article 53 concerns because it simply never rises to the level of a possible violation of Article 2(4)."<sup>342</sup>

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336. BROWNLIE, *supra* note 28, at 317 ("States may lawfully confer by treaty a right to intervene by the use of armed force within the territorial or other legally permitted limits of their jurisdiction."); MURPHY, HUMANITARIAN INTERVENTION: THE UNITED NATIONS IN AN EVOLVING WORLD ORDER 342-43; Tom J. Farer, *A Paradigm of Legitimate Intervention*, in ENFORCING RESTRAINT: COLLECTIVE INTERVENTION IN INTERNAL CONFLICTS 316, 332 (Lori Fisler Damrosch ed., 1993); Harrell, *supra* note 317, at 427 ("[T]he plain language of Article 2(4)'s prohibition on the use of force applies to force used 'against the territorial integrity or political independence of any state . . . .' But force used with the consent of a legitimate government violates neither the territory nor the political independence of a state." (footnote omitted)).

337. In considering a hypothetical humanitarian intervention undertaken by a regional organization under the authority of a treaty of guarantee, a separate question emerges: could a regional organization invite an outside, non-member state to assist in the intervention? We recommend that, as a matter of best practice, regional organizations include explicit language in the treaty specifying, one way or the other, whether a non-member state may be invited to participate in a humanitarian intervention taken under the auspices of the treaty. Just as states may consent *ex ante* via treaty to intervention through a treaty of guarantee, *see* sources cited *supra* note 333, they may similarly consent *ex ante* via treaty to giving a regional organization the authority to request outside assistance during an intervention. If a treaty is completely silent on the subject, however, this issue becomes more complicated. While there may be situations in which a regional organization could request assistance from a non-member during an intervention, even without a specific treaty provision allowing such, a full discussion of this question remains outside the scope of this project.

338. U.N. Charter art. 52, paras. 1-3.

339. *Id.* art 53, para. 1.

340. Harrell, *supra* note 317, at 429.

341. *See supra* text accompanying note 333.

342. Harrell, *supra* note 317, at 429.

### c. Withdrawal

Whether a state may invalidate a treaty of guarantee at a time when states are preparing for an intervention under its auspices is a difficult question that deserves special attention. Although recognizing that an absolute right to revoke consent to intervention would render such treaties impotent, scholars are generally divided on the ramifications of revocation of consent previously given through treaty under international law. Under the Vienna Convention on the Law of Treaties, widely considered to reflect customary international law,<sup>343</sup> withdrawal from a treaty is generally only allowed on the basis of criteria identified in the treaty or by the consent of all parties to the treaty.<sup>344</sup> If the agreement does not include specific language, the Vienna Convention provides that states shall follow the assumed intent of the contracting parties regarding withdrawal.<sup>345</sup> But some scholars claim that official withdrawal of consent necessarily invalidates a treaty of guarantee. According to Yoram Dinstein, consent to intervention, formalized *ex ante* in a treaty, may be withdrawn at any point, even if doing so contravenes the text of the treaty.<sup>346</sup> Eliav Lieblich agrees, grounding the claim in the *jus cogens* status of the inviolability of state sovereignty that he argues is enshrined in Article 2(4). Even if a state formalizes consent via a treaty of guarantee, the argument goes, “[o]nce consent is withdrawn, a violation of [A]rticle 2(4) occurs, notwithstanding any treaty, since, treaty provisions cannot contravene *jus cogens*.”<sup>347</sup> Thus, according to Lieblich, revocation of consent automatically abrogates a treaty of guarantee, regardless of the rules that generally govern withdrawal from treaties.<sup>348</sup>

The notion that state sovereignty requires the power to instantly revoke consent to a treaty of guarantee fundamentally misunderstands the nature of state sovereignty. Treaties of guarantee—by allowing states to bind themselves in advance to humanitarian intervention in the event of a humanitarian crisis—are sovereignty enhancing, not sovereignty restricting.<sup>349</sup> The delegation of authority that takes place when a state consents to a treaty of guarantee is itself an act of sovereignty. Such agreements allow a state to pursue its long-term ends of protecting its citizenry and meeting its sovereign responsibility, even when its own state institutions

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343. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, 47 (June 21); Lea Brilmayer & Isaias Yemane Tesfalidet, *Treaty Denunciation and “Withdrawal” from Customary International Law: An Erroneous Analogy with Dangerous Consequences*, 120 YALE L.J. ONLINE 217, 218–19 (2011), available at <http://yalelawjournal.org/2011/1/5/brilmayer-tesfalidet.html>.

344. Vienna Convention on the Law of Treaties, *supra* note 185, art. 54.

345. *Id.* art. 56.

346. YORAM DINSTEIN, *WAR, AGGRESSION, AND SELF-DEFENCE* 121–23 (5th ed. 2005).

347. Lieblich, *supra* note 243, at 366.

348. *Id.* at 366, 371 (“Considering the fact that the right of withdrawal trumps any treaty provisions to begin with, it is only logical that it also trumps the ‘formalities’ stipulated by such a treaty.”).

349. See discussion *supra* Subsection III.B.2.a.

are incapable of doing so.<sup>350</sup>

The claim that treaties of guarantee must immediately be annulled upon revocation of consent is also inconsistent with treaty law. Even assuming that the inviolability of state sovereignty is a *jus cogens* norm,<sup>351</sup> there is no reason to believe that the withdrawal of consent to a treaty of guarantee would immediately abrogate the treaty as a matter of law.<sup>352</sup> Consider the U.N. Charter: ratifying the U.N. Charter involves a kind of delegation of authority not dissimilar from a treaty of guarantee. States that have committed themselves to the Charter have agreed to allow the Security Council to authorize an intervention on their territory when warranted under Chapter VII. A state may not prevent an intervention under Chapter VII by revoking consent to the U.N. Charter on the eve of the planned intervention.<sup>353</sup> It would be difficult to argue that the U.N. Charter would be invalidated under such circumstances on the basis that a Chapter VII intervention without state consent violates *jus cogens*. Although a regional-organization-based treaty of guarantee is certainly not equivalent to the U.N. Charter, the principle is the same: a state's commitment to a treaty cannot be separated from that state's commitment to abide by the withdrawal mechanisms provided in that treaty.

The explicit withdrawal provisions of a treaty generally govern how and when states may exit a treaty.<sup>354</sup> But the Vienna Convention on the Law of Treaties provides that a treaty is void under other circumstances as well, including if a state is coerced or defrauded into signing it, or if circumstances have changed to the point that a state is completely unable to

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350. See Oona A. Hathaway, *International Delegation and State Sovereignty*, 71 LAW & CONTEMP. PROBS. 115, 141–42 (2008) (discussing the possibility that limitations on future actions by international agreements can “enhance, rather than restrict, freedom”). Ulrich Beck argues that under a contemporary conception of sovereignty, there is a distinction between autonomy and sovereignty. Where, in Beck's view, sovereignty now entails “having an impact on the world stage, and of furthering the security and well-being of [a state's] people” then interdependence among states, while leading to a decrease in autonomy “can lead to an increase in sovereignty.” Thus, he argues, “sharing sovereignty does not reduce it; on the contrary, sharing actually enhances it.” Ulrich Beck, *The Terrorist Threat: World Risk Society Revisited*, THEORY, CULTURE & SOC'Y, Aug. 2002, at 39, 48–49 (2002); see also Hathaway, *International Delegation*, *supra*, at 143 (discussing Beck's statement).

351. Not all scholars accept this proposition. See, e.g., James A. Green, *Questioning the Peremptory Status of the Prohibition of the Use of Force*, 32 MICH. J. INT'L L. 215 (2011).

352. This conclusion is implicit in the ICJ's decision in the *Armed Activities Case*, *supra* note 246. The Court noted that, while the D.R.C. had consented in advance to the presence of Ugandan military personnel in its territory, this consent had not been established by treaty. On this basis, the Court concluded that “this prior authorization or consent could thus be withdrawn at any time by the Government of the DRC, without further formalities being necessary.” *Id.* ¶ 47. While the Court was not explicit on this point, the implication seems to follow that, if the consent *had* been granted by treaty, its withdrawal would be subject to the “formalities” contained therein.

353. Indeed, there is wide (though admittedly not universal) agreement that a state may *never* revoke its commitment to the Charter because the Charter lacks an explicit mechanism of withdrawal. See Hathaway, *supra* note 350, at 131 (discussing the general, though not universal, agreement that the Charter is irrevocable).

354. See *supra* text accompanying notes 352–353.

fulfill its responsibilities under the treaty.<sup>355</sup> Yet even when a state seeks to invalidate a treaty on one of the grounds listed in the Convention (such as a change of circumstances or a conflict with a *jus cogens* norm), the state must still follow the procedures identified in the Convention before the treaty is considered void.<sup>356</sup> These procedures include a requirement that the state notify other parties to the treaty of its desire to invalidate the treaty and wait for a “period which, except in cases of special urgency, shall not be less than three months” for other parties to object, before taking steps to invalidate the treaty.<sup>357</sup>

An attempt to *immediately* void a treaty of guarantee by withdrawing consent to intervention would be invalid as a matter of the customary international law that governs exit from treaties. But it is also worth considering the sort of political context within a state that would likely lead a government to attempt to immediately withdraw its consent to a *human rights-protecting* treaty of guarantee just as an intervention under the auspices of that treaty was about to take place. Only a government recognized as the legitimate representative of a state can cause that state to withdraw from its existing treaty commitments.<sup>358</sup> This leads to the question of whether a government that is violating its citizens’ rights can be said to have the authority to speak for the state and withdraw consent.<sup>359</sup>

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355. See Vienna Convention on the Law of Treaties, *supra* note 185, arts. 49, 51–52, 62.

356. *Id.* art 42.

357. *Id.* art. 65(1)-(2). It could be argued that impeding intervention based on a treaty of guarantee constitutes a situation of “special urgency” discussed in the provision; as the language of the provision makes clear, however, a situation of special urgency would, at most, reduce the amount of time the state seeking to invalidate the treaty would have to wait for other states to object. It would not remove the obligation to adhere to the invalidation procedure more generally, including notification of all other state parties and providing *some* opportunity for them to object to the invalidation.

358. The Organization of American States’ (OAS) actions in the wake of the 2009 coup removing the Zelaya government in Honduras demonstrate this requirement. In response to the coup, the OAS sought to suspend Honduras’s membership. ALISON DUXBURY, *THE PARTICIPATION OF STATES IN INTERNATIONAL ORGANISATIONS: THE ROLE OF HUMAN RIGHTS AND DEMOCRACY* 181 (2011). The regime in power in Honduras endeavored to preempt the suspension by withdrawing from the organization. *Id.* at 181–82. However, the OAS rejected the attempted withdrawal, with the Assistant Secretary-General asserting that “[o]nly legitimate governments can withdraw from an entity such as the OAS.” *Id.* at 182 (citing *OAS Honduras’ Interim Government Can’t Withdraw*, REUTERS (July 4, 2009), <http://www.reuters.com/article/2009/07/04/us-honduras-oas-sb-idUSTRE56320Z20090704>); see also *Suspension of the Right of Honduras to Participate in the Organization of American States*, OAS AG/RES. 2 (XXXVII-E/09) (July 4, 2009) (suspending Honduras’s participation in the OAS). It is worth noting that the assessment of the government’s illegitimacy was based on the OAS requirements for democratic governance. See *Resolution on the Political Crisis in Honduras*, AG/RES. 1 (XXXVII-E/09) rev. 1 (July 2, 2009). But the principle that an illegitimate government cannot withdraw from a treaty arrangement remains a relevant one.

359. Even Lieblich, while maintaining that withdrawal of consent by nature voids a treaty of guarantee arrangement as a procedural matter, has acknowledged the view that only a “government capable of withdrawing its consent” may exercise its right to abrogate a treaty of guarantee, Lieblich, *supra* note 243, at 365–66, and that an assessment of substantive consent might complicate this picture by calling into question whether the government truly has the legitimacy to withdraw from a treaty of guarantee arrange-



Although we do not believe that complicity in human rights violations inherently voids a government's ability to offer or withdraw consent,<sup>360</sup> direction can be taken from the previous Section's discussion of recognition and invitation. In this regard, the procedures and standards described above for recognizing governments in contentious cases could likewise guide the determination of who constitutes the legitimate government with the authority to withdraw consent from an existing treaty of guarantee.<sup>361</sup>

#### d. Preventing Abuse

Treaties of guarantee are both normatively valuable and consistent with international law, but like nearly any legal tool, they can potentially be abused. The recognition of this concern is not novel. Several regional organizations, most notably the AU and ECOWAS, have already adopted humanitarian-crisis-preventing treaties of guarantee. These treaties provide useful examples of practicable steps that can be taken when structuring a treaty of guarantee<sup>362</sup>—and serve as cautionary guides as well.<sup>363</sup> Thus, based in part on our examination of these regimes, we identify three best

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ment. *Id.* at 372–73 (“The nexus between the question of procedural consent and RtoP may have legal effects over the capacity to withdraw consent from forward-looking intervention treaties within the framework of regional organizations. The RtoP doctrine binds sovereignty with responsibility, and thus, it could be argued, that a state may lose its right to withdraw consent to an intervention when it breaches its RtoP obligations. It seems one can draw the logical conclusion that a government that fails to fulfill its responsibility to protect will also lose the capacity to withdraw its past consent given to a forward-looking intervention treaty.” This notion, worthy of further exploration, is beyond the scope of this article.); *see also* Wippman, *supra* note 317, at 631, 680 (“If the government at the moment of intervention represents the state as a whole, its decision may be deemed an adequate expression of the will of the states.”).

360. Whether or not a government can consent or withdraw consent turns on its legitimacy as the representative of the state, we believe, as we discuss above, we believe various criteria must be considered in making this assessment. *See supra* Subsection III.B.1.

361. For the purposes of this paper, we again confine our assessment of legitimacy based on our proposed model to instances where there are two competing claims of governmental authority.

362. ECOWAS Protocol, *supra* note 322, at art. 25 (allowing for intervention in cases when an internal conflict “threatens to trigger a humanitarian disaster” or “[i]n event of serious and massive violation of human rights and the rule of law”).

363. Although we believe the ECOWAS model is commendable, we are skeptical of the fact that it provides for intervention in an overly expansive array of circumstances: cases of

aggression or conflict in any Member State or threat thereof; . . . conflict between two or several Member States; . . . internal conflict . . . that poses a serious threat to peace and security in the sub-region; . . . an overthrow or attempted overthrow of a democratically elected government [of a member state]; [or] [a]ny other situation as may be decided by the [ECOWAS] Mediation and Security Council.

*Id.* This wording strikes us as dangerously broad. The AU's treaty is much narrower, but it has been criticized for failing to develop an institutional framework or the necessary political will to allow it to exercise effectively its authority to intervene in humanitarian crises; indeed, the AU has been unwilling or unable to intervene in several major humanitarian crises. *See* Kwame Akonor, *Assessing the African Union's Right of Humanitarian Intervention*, 29 *CRIM. JUST. ETHICS* 157, 158 (2010).

practices: procedural checks on the organization's decision-making; reporting requirements; and a lagged withdrawal period for member states seeking to exit the treaty. These three proposals are unlikely to address all potential abuses of the treaty of guarantee mechanism. Such detailed analysis is outside the scope of this predominantly theoretical discussion. We hope that they provide a useful guide however—one that is grounded in emerging state practice and hence feasible for existing regional organizations to implement.

### *Best Practice 1: Procedural Checks*

A central danger that an expanded use of treaties of guarantee in regional organizations poses is that a dominant state or a group of dominant states might use them to intervene in cases where intervention is not necessary. To avoid this problem, regional organizations should mandate certain procedural checks before triggering a treaty of guarantee. These checks should include majoritarian decision-making and transparent deliberation at a minimum.<sup>364</sup> Providing such procedures would reduce the likelihood that an intervention will be the result of a member seeking to improperly interfere in the affairs of a rival state.<sup>365</sup>

The ECOWAS Protocol provides an example of such procedures. The Protocol establishes that the Authority Council of ECOWAS, comprising the heads of state of all members,<sup>366</sup> has the highest authority to authorize an intervention when one of the conditions of the Protocol has been triggered.<sup>367</sup> But this power is also delegated to the smaller ECOWAS Mediation and Security Council.<sup>368</sup> The Mediation and Security Council consists of “nine . . . Member States of which seven . . . shall be elected by the Authority. The other two . . . members shall be the current chairman and the immediate past chairman of the Authority.”<sup>369</sup> Convening a meeting of the Mediation and Security Council requires a quorum of two-thirds of the Council members, and any decision to intervene requires a two-

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364. Peter Harrell has also argued in favor of such checks. Harrell, *supra* note 317, at 431-32 (stating that, while regional organizations may be dominated by “one or a few” regional powers “individual powers are less likely to be able to impose their will” within regional organizations because “smaller states can bargain collectively to ensure that their interests are represented. Furthermore, regional organizations typically have a deliberative decision-making process and voting procedures may require a supermajority vote to authorize action, both of which provide checks on abuse that would not be present when a state or an ad hoc coalition decides to use force unilaterally.”).

365. Such a requirement is closely related to the principle that multilateralism can provide a check on potential abuse, which is advocated in the recognition and invitation section above. See *supra* Subsection IV.B.1.

366. ECOWAS Protocol, *supra* note 322, art. 5.

367. *Id.* arts. 6, 26(a).

368. *Id.* arts. 7, 10(c), 26(b). Groups that may request or initiate interventions include the government of member state in question, the Executive Secretariat of ECOWAS, the Organization of African Unity, or the Security Council. *Id.* arts. 26(c)-26(e).

369. *Id.* art. 8. Members serve two-year periods, which are renewable. *Id.*

thirds decision by members present.<sup>370</sup>

This grant of authority has been criticized both for the small size of the Mediation and Security Council and for the lax standards that govern when the Council can authorize an intervention.<sup>371</sup> Under the two-thirds quorum and two-thirds majority vote requirements, as few as four states may authorize an intervention into another ECOWAS member state. This provides a cautionary example. A more robust majoritarian procedure would more successfully prevent states from abusing the mechanism. In this respect, the AU's Charter provides a more promising example. According to Article 4(h) of the Charter, only the AU Assembly may authorize a humanitarian intervention into a member state.<sup>372</sup> The Assembly, which consists of the leaders of all member states,<sup>373</sup> meets in ordinary session once a year and can be called into an extraordinary session only with a quorum of two-thirds of member states.<sup>374</sup> Decisions by the assembly require approval of at least two-thirds of members present at the Assembly meeting.<sup>375</sup> This more representative process provides substantial procedural checks against potential abuse of the AU Charter's treaty of guarantee. As such, it provides a more promising guide for other regions considering how to structure their treaties of guarantee.

### *Best Practice 2: Reporting Requirements*

A humanitarian-crisis-preventing treaty of guarantee allows a regional organization to engage in limited humanitarian intervention without awaiting action by the U.N. Security Council. Nonetheless, the Security Council can play a role in ensuring that interventions taken under the auspices of a treaty of guarantee are truly consistent with the letter and spirit of the treaty. We propose that any regional organization that undertakes an intervention pursuant to a treaty of guarantee should be required to report the intervention to the Security Council and explain its justifications.

The U.N. Charter provides that states that use force in self-defense must report their actions to the Security Council.<sup>376</sup> If the Security Council deems the intervention illegitimate, it may respond in various ways, including invoking its Chapter VII authority. The same process should be put in place for any intervention under a treaty of guarantee. A reporting requirement would help ensure that a regional organization was using the treaty of guarantee in an open and transparent manner to achieve the goals of the treaty. A reporting requirement would also ensure that any intervention undertaken by a regional organization be fully consistent with U.N. Charter Article 54's requirement that "[t]he Security Council shall at all

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370. *Id.* art. 9.

371. See, e.g., Ademola Abass, *The New Collective Security Mechanism of ECOWAS: Innovations and Problems*, 5 J. CONFLICT & SECURITY. L. 211, 216 (2000).

372. AU Charter, *supra* note 320, art. 4(h).

373. *Id.* art. 6, para. 1.

374. *Id.* art. 6, para. 3, art. 7, para. 2.

375. *Id.* art. 7. Procedural matters, however, are decided by a simple majority.

376. U.N. Charter art. 51.

times be kept fully informed of activities undertaken or in contemplation under regional arrangements or by regional agencies for the maintenance of international peace and security.”<sup>377</sup>

The ECOWAS Protocol offers an example of how such a reporting requirement might look in practice. Article 53 of the Protocol states: “In accordance with Chapters VII and VIII of the United Nations Charter, ECOWAS shall inform the United Nations of any military intervention undertaken in pursuit of the objectives of this Mechanism.”<sup>378</sup> To this end, Article 27 instructs the ECOWAS Mediation and Security Council to “submit a report on the situation to the Organisation of African Unity and the United Nations” after an intervention has been authorized.<sup>379</sup> This offers an instructive guide to other regional organizations that adopt a treaty of guarantee.

### *Best Practice 3: Lagged Withdrawal*

As a matter of treaty law, states that commit to a treaty of guarantee must also abide by its formal procedures for withdrawal. If a state has consented *ex ante* to a sovereignty-enhancing treaty, such as a human-rights-protecting treaty of guarantee, it cannot immediately abrogate the treaty by revoking consent; it must follow the exit procedures defined by the treaty.<sup>380</sup> Although a treaty need not include any specific provision for withdrawal,<sup>381</sup> we think that as a matter of best practice, humanitarian-crisis-preventing treaties of guarantee should include a mechanism for withdrawal. But, in order to prevent a human-rights-violating state from attempting to withdraw from the treaty just as a regional organization is contemplating intervention under the treaty’s auspices, we propose that a state be required to wait a period of one year after announcing its intention to withdraw before the withdrawal comes into effect.

A year-long lagged withdrawal period mirrors the default rule in the Vienna Convention on the Law of Treaties, which stipulates that a state must provide “not less than twelve months’ notice of its intention to denounce or withdraw from a treaty,” in a situation where a withdrawal procedure is not specified in a treaty.<sup>382</sup> Both the ECOWAS Protocol and the AU Charter include such a year-long lagged withdrawal provision. According to Article 56 of the ECOWAS Protocol, “[a]ny Member State wishing to withdraw from this Protocol shall give a one-year written notice to the Executive Secretary who shall inform Member States thereof. At the end of this period of one year, if such notice is not withdrawn, such a State shall cease to be a party to the Protocol.”<sup>383</sup> In order to prevent parties from attempting to withdraw just as intervention becomes warranted

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377. U.N. Charter art. 54.

378. ECOWAS Protocol, *supra* note 322, art. 52.

379. *Id.* art. 27.

380. *See supra* Subsection III.B.2.c.

381. *See* Vienna Convention on the Law of Treaties, *supra* note 185, art. 56.

382. *Id.* art. 56, para. 2.

383. ECOWAS Protocol, *supra* note 322, art. 56.

under the treaty, the Protocol requires members to continue abiding by the protocol during this year-long waiting period.<sup>384</sup> The AU Charter contains similar provisions: a state that seeks to withdraw must wait one year for the withdrawal to be approved,<sup>385</sup> and “any Member State wishing to withdraw from the Union shall comply with the provisions of this Act and shall be bound to discharge its obligations under this Act up to the date of its withdrawal.”<sup>386</sup> In both cases, the lagged withdrawal requirement has proven an effective compromise between allowing states the flexibility to adjust their treaty obligations and the need to make the guarantee effective.

## Conclusion

This Article has aimed to address a conflict that lies at the heart of current debates over humanitarian intervention—a conflict between the protection from forceful intervention that modern international law grants to sovereign states and the responsibilities that state sovereignty carries with it. Most prior efforts to address humanitarian intervention have either insisted on the inviolability of state sovereignty and therefore rejected humanitarian intervention of any kind, or sought to craft exceptions to state sovereignty to allow for intervention—exceptions that threaten to swallow the rule. This Article has offered an alternative way forward, suggesting that more robust use of consent-based intervention could allow states to use their sovereign rights to meet their sovereign responsibilities. Instead of placing sovereign rights and sovereign responsibilities at odds, consent-based intervention allows them to work in tandem.

Of course, consent-based intervention is not a panacea. As outlined here, it is carefully tailored to allow intervention in cases where states consent either at the time of the crisis or in advance. Yet there will no doubt be cases of humanitarian crisis where consent-based intervention is not an option because, for example, a regime that exercises uncontested effective control and enjoys multilateral recognition has neither agreed in advance to intervention nor is willing to permit external intervention after a crisis has erupted. In those cases, the United Nations Security Council remains the sole unquestionably legal option available. And in those cases, we will likely find ourselves back in debates over whether illegal interventions can nonetheless be legitimate and whether customary international law has emerged that permits states to intervene even in the face of a decision by the United Nations Security Council to remain on the sidelines—with the attendant dangers and drawbacks that this Article has highlighted.

Yet, even recognizing these limits, consent-based intervention casts new light on a debate whose battle-lines have hardened over the last decade. Rather than regarding states that are in crisis as mere obstacles to be overcome by the international community, consent-based intervention encourages us to see those states as *potential partners*. Rather than seeing

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384. *Id.*

385. AU Charter, *supra* note 320, art. 31, para. 1.

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

a humanitarian crisis as a problem that is to be addressed after it becomes too dire to ignore, consent-based intervention encourages us to see a humanitarian crisis as a problem to be prepared for and addressed *in advance*, through cooperative planning by states, regional organizations, and the multilateral community. And rather than seeing sovereign states as either protected from unauthorized forceful intervention or responsible for protecting their populations, consent-based intervention encourages us to see them as both.