

## **Law, Force, and Human Rights: The Search for a Sufficiently Principled Legal Basis for Humanitarian Intervention**

by  
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### **INTRODUCTION**

Finding sufficient international legal grounding for the use of force to protect human rights has been one of the foremost difficulties for proponents of humanitarian intervention. On the one hand, proponents see the need to take action in response to gross human rights violations that is both decisive and morally principled.<sup>1</sup> On the other hand, they recognize the need to find relevant legal grounding for such actions, lest undermining the rule of law and its ability to provide a stable framework of expectations within which individuals and states may coordinate their activities and behavior.<sup>2</sup> Indeed, activities as politically sensitive as humanitarian intervention rely heavily upon law to provide standards of moral conduct, including certainty as to the existence of rules, predictability as to the consequences of conduct, and above all, a framework that strives to be devoid of arbitrary power.<sup>3</sup> The problem, however — particularly salient in the aftermath of the Kosovo intervention — is that there seems to be a widening gap between what international law allows and what morality requires.<sup>4</sup> In fact, the major finding of the Independent International Commission on Kosovo was that NATO's intervention there was illegal though still morally legitimate.<sup>5</sup> The International Commission on Intervention and State Sovereignty has reached a similar conclusion.<sup>6</sup> Thus, law serves us poorly when it proscribes behavior that aims to protect and promote human rights and is otherwise morally consistent.

This article focuses on the potential legal grounding of humanitarian intervention, defined as the targeted use of military force by a state or group of states in the territory of another state, without that state's consent, for the explicit purpose of halting or averting human rights violations.<sup>7</sup> Humanitarian intervention, thus understood, maintains an unquestionable tension with certain rules of international law — most notably, provisions of the United Nations (UN) Charter relevant to the use of force. Furthermore, beyond the question of the mere legality of humanitarian intervention, it remains questionable as to whether the UN

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Charter framework, including related treaties and customary law, is a sufficiently principled legal framework that provides clear standards for the resort to military force. While it would be a dramatic development for international law to explicitly provide for a “legal right” to humanitarian intervention, it nevertheless remains contested that such a rule as an outgrowth of the Charter’s legal paradigm would necessarily maintain the requisite specificity to make an overall moral improvement in the international legal system.<sup>8</sup> As such, the purpose of this article is to inquire into the extent to which Charter-based law, related treaty law, and potential customary law relevant to humanitarian intervention provide a sufficiently principled legal basis for humanitarian intervention. In addition to asking is humanitarian intervention legal under international law?, this inquiry asks is the law currently used to justify humanitarian intervention a sufficiently morally principled legal grounding?

The article begins with a brief moral treatment of what law regulating humanitarian intervention should resemble. In other words, it describes what moral considerations a “law of humanitarian intervention” must take into account for it to be sufficiently principled. Using the reasoning of the legal theorist Lon Fuller,<sup>9</sup> it argues that any law governing humanitarian intervention must consider the moral reality that intervention is only permissible under certain (severe) human rights conditions, which must be taken into account by maintaining clear principles that explicate such conditions. The subsequent legal analysis proceeds in three steps: first, it examines the ordinary meaning of Charter principles relevant to humanitarian intervention, using the prevailing approaches to treaty interpretation.<sup>10</sup> Next, it approaches the Charter as an organic document and judges its value to the present inquiry in light of subsequent human rights law. Finally, it examines the possible emergence of a customary rule that authorizes intervention, the practical bases of such a rule, and the extent to which a customary legal grounding is a sufficiently principled law of intervention. Ultimately, the article argues that as one moves from a textual reading of the Charter toward a broad construction that includes supporting treaty and customary law, arguments for the legality of humanitarian intervention remain weak. Incorporating supporting treaty and customary law does, however, allow for some improvement regarding the legal specificity that is morally required of a law of intervention.

## **The Requirements of a Sufficiently Principled “Law of Intervention”**

### ***The Moral Requirements of Law***

While law and morality often occupy different positions with respect to the permissibility of humanitarian intervention, the need to reconcile the two is crucially important. Citing the legal theorist, H.L.A. Hart, Fernando Tesón eloquently argued in his seminal dissertation on humanitarian intervention that legal principles are far from technical, morally neutral precepts, but rather “speak to

some of our most basic moral principles, convictions and institutions.”<sup>11</sup> In this sense, law can be understood as a purposive human activity that necessarily maintains a moral significance that is subject to moral duty, while also giving rise to moral responsibility.<sup>12</sup> Insofar as law is an enterprise that aims to subject human conduct to the governance of rules, the codification of moral precepts into law is thus intended to be prescriptive with respect to how actors coordinate their behavior; which in the context of international law refers to the guidelines that states follow in achieving their international policy goals.<sup>13</sup> At a jurisprudential level, then, the role of international law is to fix a policy response to an international societal need. Insofar as the debate on humanitarian intervention maintains a substantive moral dimension, the relevant societal need is morally defined, but must be recognized as a legal construct if states and international actors are to behave with a reasonable amount of predictability when contemplating the use of force for humanitarian purposes.<sup>14</sup>

For legal theorist, Lon Fuller, whether or not a body of law is “moral” depends not only on its substantive content, but also its “procedural” aspects.<sup>15</sup> The word “procedural,” however, is not to be confused with its common usage in legal discourse, but rather as a contrast to the substantive dimension of legal rules. For the purposes of this article, to judge whether a body of law is “sufficiently principled” is to necessarily be concerned with the way in which a system of rules that governs human conduct should be constructed and administered if it is to be efficacious with respect to the activity that it purports to govern.<sup>16</sup> Fuller proposes a set of “procedural” requirements that a hypothetical body of law must meet, several of which are relevant to the existing law that purportedly governs humanitarian intervention. Collectively, Fuller’s framework applied to the current law relating to humanitarian intervention requires that this body of law maintain clear, non-retroactive, substantive rules that are not contradictory.<sup>17</sup> At a very minimum, therefore, a sufficiently principled legal basis for humanitarian intervention requires, 1) the existence of an actual set of non-contradictory rules, such that 2) every situation does not have to be decided on an *ad hoc* basis, and 3) that the course of action in a given circumstance is clearly prescribed by such rules based on the realities of the situation. So, for a law of humanitarian intervention to be moral according to Fuller’s analysis, it must be clear *which* human rights violations are legally permissible grounds for the use of force. This article shall proceed based on this insight.

### **The Need for Moral Substance**

With respect to the moral substance of these legal principles, we recall that the moral debate over intervention hinges on the ostensible paradox of using an instrument of violence as a means to avert violence.<sup>18</sup> This moral tension is, generally speaking, between the “moral imperative” argument in favor of intervention, and the notion that the moral reality of war is one that itself kills, maims,

and destroys human life.<sup>19</sup> The crucial reconciliation of these competing moral claims is therefore empirically reduced to a moral appraisal of whether existing human suffering is such that waging a war as a means to halt or avert it will result in an outcome that is to the overall benefit of human well-being.<sup>20</sup> In the just war tradition, this substantive moral requirement is known as proportionality.<sup>21</sup> In the context of humanitarian intervention, the moral requirement of proportionality essentially establishes a threshold of human suffering that, when crossed, the use of force is a morally justified response. Thus, a minimal moral requirement for judging the permissibility of humanitarian intervention is the existence of explicit principles pertaining to the types of human rights violations that justify the resort to force. To interject this substantive moral reasoning into Fuller's "procedural" analysis, therefore, is to require that the jurisprudence of any potential law governing intervention be *clear* and *consistent* about the types and extent of human rights violations that must be present before the use of force is permissible. Only then can such law adequately deal with the moral substance of the humanitarian intervention debate.

We know it is not necessarily in the overall interests of human welfare to unleash a war against a state that demonstrates something less than the ideal complement of human rights – even if such rights are internationally recognized, legally protected, and violated on a large scale.<sup>22</sup> In fact, it is a sad but true reality that non-democratic states that regularly violate human rights are so broadly distributed throughout the world that intervening to oppose them all would create, in Michael Walzer's terminology, "endless war in the society of states."<sup>23</sup> Thus, to extrapolate on Fuller's reasoning, what is morally required of a law of intervention is the prioritization of certain human rights violations as fundamentally worse or egregious than others, such that when violated *en masse*, intervention is a lawful response.

### **Toward Prioritization**

The philosophic literature on human rights suggests a reasonable moral priority of "fundamental" or "basic" human rights, though not necessarily as triggering conditions for humanitarian intervention.<sup>24</sup> Most famously, Henry Shue has cogently argued for what he refers to as "basic rights," which are a set of rights that are not necessarily more valuable or intrinsically more satisfying to enjoy than other rights, but rather are fundamental to the enjoyment of all other rights.<sup>25</sup> Shue's list includes life, physical security, subsistence, and even political liberty.<sup>26</sup> The most basic, of course, is the right to life, which is embodied by both security and subsistence rights, violations of which often result in death. Since it is true that some innocent people's basic rights are likely to be violated as a result of the humanitarian intervention, the aggregate enjoyment of human rights understood in the utilitarian language of proportionality is not enhanced by the use of force unless more rather than fewer people are able to enjoy their basic

human rights as a result of the intervention.<sup>27</sup> Some have even argued that the intent of the violator and the manner in which the right was violated is also a relevant consideration.<sup>28</sup> Whatever the substance of a potential law of intervention might be – that is, wherever this threshold of human suffering is to be set – proponents of humanitarian intervention agree that it is morally preferable that some avenue for the use of force be permissible in response to widespread and severe violations of these rights, especially the rights to life and physical security.<sup>29</sup>

Such a substantive moral calculus is not necessarily required of a law of humanitarian intervention at a jurisprudential level. Nevertheless, as Fuller would argue, it is integral that such jurisprudence speaks to these moral concerns or its resultant substantive law will be incapable of articulating humanitarian exceptions to international law's general presumption against the use of force. In other words, just as the Charter's jurisprudence on the use of force speaks to the moral reality of war as being to the inherent detriment of human well-being, any exceptions to this rule must endeavor to achieve the same end of human well-being.<sup>30</sup> This can only be achieved if the principles that create the legal avenue for humanitarian intervention are reasonably explicit and consistent regarding the objective conditions of human welfare under which it may be invoked. Short of such *legal clarity*, permissive legal rules lend themselves to an expansive interpretation that requires less justification for departure from the norm of the non-use of force. Absent *consistency*, the law fails in its *raison d'être* to provide a stable framework of expectations. Both deficiencies have detrimental consequences for the moral efficacy of international law. We now turn to the extent to which the existing legal rules relevant to humanitarian intervention both render its practice legal and meet these jurisprudential requirements.

## **UN Charter Law Relevant to Humanitarian Intervention**

### ***The Non-Use of Force and Human Rights Provisions***

The prohibitive principle in the UN Charter most relevant to humanitarian intervention is Article 2(4), which regulates the use of force.<sup>31</sup> Article 2(4) of the UN Charter reflects the well-founded presumption that the use of force by states poses an unacceptable danger to global security, and thus must be regulated by law. It reads:

All 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>32</sup>

With respect to humanitarian intervention, which is the explicit, non-self-defensive use of force, the (largely textual) debate has centered on whether the language italicized above was intended to restrict or to reinforce the general prohibition of the use of force. The argument for the former is that Article 2(4) does

not forbid all uses of force, just that which is directed against the territorial integrity and political independence of states, and that which is inconsistent with the purposes of the UN Charter.<sup>33</sup> In other words, humanitarian intervention is the use of force that is neither directed against the territorial integrity nor the political sovereignty of a state, nor is inconsistent with the purposes of the Charter.<sup>34</sup> As such, this debate hinges on three issues: treaty interpretation, the usages of the terms “territorial integrity” and “political independence,” and what, exactly, are the purposes of the UN Charter.

Based on the prevailing rules of treaty interpretation found in the Vienna Convention on the Law of Treaties, treaties are to be interpreted with respect to their “context” and “in light of their object and purpose.”<sup>35</sup> Thus, the fact that subsequent restrictions or exceptions to Article 2(4) are explicitly mentioned in Article 51 (the self-defense exception), and Articles 39, 42, and 43 (the Security Council’s Chapter VII enforcement exception) is evidence that statements in 2(4) are not intended to be implicit exceptions. Furthermore, pursuant to the Vienna Convention’s allowance for recourse to the “preparatory work of the treaty and circumstances of its conclusion”<sup>36</sup> in instances of ambiguity, reference to the *travaux préparatoires* makes it clear that the language in Article 2(4) was not intended to be restrictive. In fact, the terms “territorial integrity” and “political independence” were not part of the Dumbarton Oaks Proposals at all, but were subsequently inserted at the San Francisco Conference as a result of arguments by several smaller states (e.g. Australia, New Zealand, Belgium, Bolivia) that protection of territorial integrity and political independence should be specifically emphasized.<sup>37</sup> Simon Chesterman has even pointed out that the United States delegation defended the inclusion of these terms in especially strong terms, suggesting that such language should be inserted to convey an “all-inclusive prohibition [of the use of force] . . . designed to insure that there should be no loopholes.”<sup>38</sup> This – as illustrated by the writings of Ian Brownlie<sup>39</sup> and Hersch Lauterpacht,<sup>40</sup> as well as in contemporary debates<sup>41</sup> – is now the dominant view with respect to Article 2(4).

Even if these terms were intended to be exceptions to the general rule in Article 2(4), it does not follow that humanitarian intervention fails to have an effect on a state’s territorial integrity and political independence. Nevertheless, observers, such as Anthony D’Amato, have argued, based on exhaustive research into the historical legal usage of the term, that “territorial integrity” means that no part of a state’s territory may be forcibly separated and given over to another state.<sup>42</sup> What D’Amato overlooks, however, is that this usage employed in tandem with the term “political independence” necessarily refers to the ability of a governmental authority within a state to pursue policy under its sovereign prerogative. The realities of most humanitarian interventions have been such that they rarely achieve their purposes without the removal or at least disablement of an incumbent regime.<sup>43</sup> Thus, insofar as humanitarian intervention takes place within a state’s territory and is aimed at preventing a state’s governing apparatus

from carrying out a policy (human rights violations), it is unlawful under a textual reading of Article 2(4). In the words of Oscar Schachter, to conceive humanitarian intervention as *not* involving violations of territorial integrity or political independence “demands an Orwellian construction of those terms.”<sup>44</sup>

Concerning humanitarian intervention being legal since it is potentially “not inconsistent” with the purposes of the UN, a textual analysis suggests that the phrase “*or in any other manner inconsistent . . .*” is intended to have inclusive meaning. That is, the intent of the drafters was to convey that the use of force that is *not* directed against the territorial integrity or political independence of a state, but is inconsistent with the purposes of the Charter (explicated in Article 1), is *also* illegal.<sup>45</sup> Since the “purposes” of the UN Charter include to “promote and encourage respect for human rights,” as suggested by Article 1(3), and also to “maintain international peace and security” as stated in the very first sentence in Article 1(1), the debate is arguably one of emphasis. As such, some have argued that order indicates emphasis, and that the drafters did not regard human rights on equal footing with peace.<sup>46</sup> This argument, however, is not entirely persuasive in light of subsequent developments in human rights law, which will be addressed below.

Furthermore, it has been suggested that Articles 55 and 56 further indicate that human rights are among the fundamental purposes of the Charter.<sup>47</sup> These Articles respectively read:

The United Nations shall *promote . . . universal respect for, and observance of, human rights and fundamental freedoms,*<sup>48</sup>

and:

. . . all members pledge themselves to *take joint and separate action* in cooperation with the Organization for the achievement of the purposes set forth in Article 55.<sup>49</sup>

Nevertheless, the “Purposes and Principles” of the Charter are explicitly expounded in Chapter I, while these paragraphs are contained in Chapter IX, which deals with “International Economic and Social Cooperation.”<sup>50</sup> To interpret the meaning of these provisions as contributing to an exception to Article 2(4) is to exaggerate even an “Orwellian” approach to interpretation. Furthermore, “promoting” and “taking action” cannot be reasonably understood using any interpretive method as calling for the use of military force. At best, these human rights provisions in the Charter suggest that human rights are not under the exclusive jurisdiction of states, which is merely to address the non-intervention principle in Article 2(7). To suggest that “intervention in matters that are essentially within the domestic jurisdiction of a state” does not include human rights issues is quite different from saying that military force may be used to rectify human rights violations. Therefore, a textual interpretation of the Charter’s provisions on the use of force in light of its object, context, and pur-

pose can be read as nothing other than a purposive effort to prohibit the unilateral use of force by vesting sole authority for the non-defensive use of force in the Security Council.<sup>51</sup>

### ***Charter Law as “Sufficiently Principled”***

Based on the discussion thus far, one can see that there are at worst, no legal avenues in the text of the Charter that allow for unilateral humanitarian intervention, while at best what we have are contradictory, unclear, and imprecise rules. Neither scenario is favorable for a potential legal grounding for humanitarian intervention. Applying the criteria for a sufficiently principled basis to this body of law as it pertains to humanitarian intervention, we find that the Charter principles dealt with thus far are insufficient for the following reasons. First, although this debate is largely settled, the duty to promote human rights as one of the chief purposes of the UN is ostensibly inconsistent with Article 2(7), which is unclear regarding which activities are under the sole jurisdiction of the state. Second, since it is highly doubtful that humanitarian intervention is permissible under Article 2(4), authorization for intervention must come from the Security Council’s Chapter VII enforcement powers.<sup>52</sup> Finally, even if we were to assume that the human rights provisions in the Charter provide a loophole to the prohibition on the use of force, the Charter’s rules give us no clear prescription on the human rights violations under which the use of force is permissible. Given the scarcity of substantive human rights provisions in the Charter, this latter problem is obvious if we circumscribe the analysis to the Charter itself. Thus, this third issue is dealt with in the next section where I incorporate supporting human rights treaty law.

The initial problem with the Charter is that its rules relevant to humanitarian intervention are apparently contradictory. According to Fuller, this denotes a failure of a body of law to effectively govern certain activity.<sup>53</sup> In their defense, it is likely that the Charter’s drafters were not writing the text with humanitarian intervention in mind. Thus, the Charter is being employed to regulate an activity that it was not designed to manage. If one reads the relevant Charter rules prescriptively as saying “promote and protect human rights, but do not use force,” we must either assume that the framers did not intend the unilateral use of force to be lawful in response to human rights violations,<sup>54</sup> or accept the inherent “repugnancy”<sup>55</sup> of this statement and conclude that the Charter is insufficient to properly govern unilateral humanitarian intervention.

If the Charter is to effectively govern humanitarian intervention at all, recourse must be had to the Chapter VII enforcement powers of the Security Council.<sup>56</sup> Indeed, in the 1990s the Security Council found it expedient to characterize human rights violations as “threats to the peace” under its Article 39 powers, and then authorize enforcement under its general Chapter VII authority.<sup>57</sup> By granting the Council this authority, the drafters of the Charter were



replacing the notion of state self-help with the idea of collective security. This explicit exception to Article 2(4) was to be subject to the rule of law in the form of the Council's legal monopolization of the use of force.<sup>58</sup> Thus, the framers assumed that the decision on what constituted a "threat to or breach of the peace" could be safely left to case-by-case interpretations by the Council. The San Francisco Conference, therefore, did not consider the issue of whether the Security Council would be required to treat "like cases alike."<sup>59</sup> If the Council had worked as intended, it would have obviated the need for the unauthorized, unilateral use of force, and the debate on the textual meaning of Article 2(4) would be unnecessary.<sup>60</sup> But as we know, the Council has never worked as it was envisioned by the framers.

Counterfactual reasoning is illuminating. What if the Cold War had not descended and the Security Council had not been paralyzed for 50 years? What if the Council was able to take swift and decisive action against human rights abusers? Unfortunately, we live with reality and not counterfactuals, and the reality is that Security Council decisions under Chapter VII lack principled coherence.<sup>61</sup> As the only body legally authorized to sanction the non-self-defensive use of force, any such use of force without the Security Council's sanction is illegal, *despite* the fact that the political realities of the Council are such that it is unable to assume its role as enforcer in a principled way.<sup>62</sup> Even if it could, there exists no set of guidelines (formal or informal) that the Council would follow in determining threats to the peace – and by proxy, it follows no principled legal or moral criteria in determining when humanitarian intervention is permissible. If it possessed and followed such guidelines, humanitarian intervention would have been authorized in Rwanda and Kosovo just as it was in Bosnia and Haiti. Consequently, the Charter framework is devoid of any principled criteria for determining the human rights conditions under which humanitarian intervention is permissible; there are only the *ad hoc* determinations of the Council, which is dominated by powerful states. This, according to Fuller's analysis, is another reason why the Charter's framework would be insufficient as a body of law.<sup>63</sup> The Council operates giving us no stable framework of expectations, no legal certainty, and the moral authority of its decisions is tainted by the arbitrary and selective exercise of power.<sup>64</sup> At a very minimum, Fuller would argue, the Council must provide some level of predictability for when it will authorize force.<sup>65</sup> The only legal rules in the Charter governing the use of force are Articles 2(4) and 51, neither of which prescribe a clear legal avenue for humanitarian intervention. Thus, relying on the Security Council to provide legal authority for humanitarian intervention is not a sufficiently principled legal basis.

## The Charter as an Organic Document: Supporting Human Rights Law *The Universal Declaration and the Search for Standards for Intervention*

The UN Charter enshrines the promotion of human rights as one of its purposes, yet says virtually nothing about substantive human rights beyond “human rights and fundamental freedoms.”<sup>66</sup> While the Charter requires its members to promote and respect human rights standards, the document itself does not specify what these standards are.<sup>67</sup> However, numerous human rights instruments created subsequent to the Charter provide detailed descriptions of the human rights that are purported to be authoritative statements of the Charter’s human rights standards, particularly the 1948 Universal Declaration of Human Rights (UDHR).<sup>68</sup> The UDHR is not a binding treaty, however, but a General Assembly Declaration, which has no legal effect since the Charter does not give the Assembly the power to make authoritative legal interpretations of Articles 1(3), 55, and 56.<sup>69</sup> To the extent that this hortatory statement can be read as codifying the human rights principles of the Charter, and thereby potentially explicating human rights standards subject to “protection and promotion,” the UDHR can at best only offer evidence of state attitudes, and given consistent state practice, perhaps customary law.<sup>70</sup> However, neither governments nor courts have accepted the UDHR as anything other than what *ought* to become principles of law to be acted upon by states over time.<sup>71</sup>

Given its non-legally-binding nature, it is unlikely that the UDHR could be utilized as a legal standard that specifies *which* human rights must be “protected and promoted” in the form of humanitarian intervention as an exception to Article 2(4). In fact, the General Assembly has passed several resolutions in support of Articles 2(4) and 2(7) – which also offer evidence of state attitudes – that are in tension with these human rights principles to the extent that they set standards for intervention. The Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty was adopted by the General Assembly in 1965 and emphatically affirms that the norms of sovereignty and nonintervention preclude intervention on any grounds.<sup>72</sup> Annex II of The Declaration of the Inadmissibility of Intervention and Interference in the Internal Affairs of States adopted in 1981 even urges states to refrain from distorting human rights issues as a means of interference.<sup>73</sup> Thus, even states’ attitudes indicated by these General Assembly declarations as bases for determining customary law (the *opinio juris* requirement) are contradictory.

### ***Legally Binding Documents***

Legally binding human rights treaties, however, place more explicit obligations upon states. According to Michael Reisman, the normatively uncertain place accorded to human rights in the UDHR has been elevated to an imperative level of international law supported by widespread demands for enforcement, as

evidenced by the passage of various legally-binding human rights instruments.<sup>74</sup> Given the existence of a significant number of legally-binding multilateral human rights treaties, one can reasonably conclude that the human rights codified in these treaties are no longer within the “essential domestic jurisdiction of states” as a matter of law relating to the Charter’s Article 2(7).<sup>75</sup> The Genocide Convention, the Convention on the Elimination of Racial Discrimination, the two principal human rights Covenants, the Convention on the Elimination of Discrimination Against Women, the Convention Against Torture, the Convention on Rights of the Child, and the Convention on Rights of Migrant Workers are a few of these important legal developments. In fact, many of these instruments maintain accompanying implementing organs that are essentially authorized to inquire into the extent to which signatory states are complying with the terms of the treaty.<sup>76</sup>

There are two potential problems in using the rights enunciated in these instruments as a principled legal basis for humanitarian intervention. First, it is debatable at best whether these instruments maintain clear language calling for the use of force to enforce the provisions therein. Thus, while we can comfortably say that human rights treaties have collectively had a profound effect on what matters are to be held within a state’s domestic jurisdiction for the purposes of Article 2(7), the same cannot be said with respect to Article 2(4). Second is the issue of whether any of these treaties adequately address the fundamental concern of *which* human rights in these treaties may potentially be subject to humanitarian intervention. In other words, to ground humanitarian intervention in human rights treaty law, the relevant treaties must consider, at least implicitly, the fundamental moral substance of the humanitarian intervention problem: that only certain (severe) human rights violations are to be met with force. In other words, these treaties must express a prioritization of human rights, such that those rights of a higher priority maintain a unique legal status and are thus deserving of special protection. I identify two multilateral human rights treaties that potentially create avenues relevant to a sufficiently principled legal framework for humanitarian intervention: the Genocide Convention and the Civil and Political Covenant.

### ***The Genocide Convention***

The Genocide Convention speaks most directly to humanitarian intervention because, of all the aforementioned multilateral treaties, it alone contains language that could potentially be construed as authorizing the use of force to achieve its purposes, in that it creates an obligation that requires states to “prevent and punish” the crime of genocide.<sup>77</sup> Such language suggests that if a government permits or itself commits genocide, then other signatories would be obligated to take steps to prevent, suppress, and punish the crime.<sup>78</sup> This explicit language calling for action to be taken by states against other states who commit

such a crime is unparalleled in human rights treaty law, as even such instruments as the Convention Against Torture do not imply such trans-boundary action,<sup>79</sup> while the human rights provisions in the UN Charter only require that states “take action to promote” human rights.<sup>80</sup> As a result of the vague and ostensibly permissive language in the Genocide Convention, it has been argued that it could be read to permit humanitarian intervention to halt or avert the crime of genocide,<sup>81</sup> though neither the Convention itself nor its drafters explicitly discussed the unilateral use of force as a remedy.<sup>82</sup>

Pursuant to the Vienna Convention’s rules on treaty interpretation, recourse to the *travaux préparatoires* of the Convention suggests that the obligation in Article I of the Convention to “prevent and to punish” the crime of genocide refers only to legislative and judicial activity. In considering the Draft Convention on Genocide, the Sixth Committee of the General Assembly addressed the issue of *punishment* of genocide by discussing the establishment of an international tribunal to punish the crime.<sup>83</sup> This debate came to the fore when the French representative argued that, since it is governments who commit genocide, punishment in domestic legislation would be insufficient; thus the need for an international tribunal.<sup>84</sup> Even this was feared by many members as a potential infringement of the national sovereignty of states.<sup>85</sup> The subsequent debate centered on whether states alone should take responsibility for preventing or punishing genocide, or whether an international tribunal should be established; but the preventative (contrast punitive) mechanism was *always* penal legislation, and neither punishment nor prevention was discussed in the context of military force.<sup>86</sup> Only once was the concept of military force ever uttered in the negotiations, and it was done so by the British representative in the context of arguing against the establishment of an international tribunal, saying pejoratively that “genocide committed by states was punishable only by war.”<sup>87</sup> In general, however, the consensus among the negotiators was that their objective on this matter was to debate whether and the extent to which “states [should] provide for the prevention and punishment [of genocide] in their national legislatures.”<sup>88</sup>

With respect to the *prevention* of the crime, the use of force was again never discussed. The contemplation of preventative measures was again debated in the context of national legislatures drafting legislation that would prohibit activities *in preparation for* genocide, such as “incitement and propaganda for racial or religious hatred . . . or racial superiority.”<sup>89</sup> Remarks by the representative of the USSR reflect this sentiment when he declared that the prevention and suppression of genocide should be “provided for in the legislation of all democratic states . . . and must apply to all propaganda which stirred (sic) up the hatred leading to genocide.”<sup>90</sup> The representative of Yugoslavia even suggested that a state would fail in its duty under the Convention to “prevent and punish” only if it failed to proscribe genocide in its domestic legislation.<sup>91</sup>

It is thus highly unlikely that the drafters of the Convention intended the

unilateral use of force to be a preventative or punitive measure for the crime of genocide, or that the crime of genocide was intended to act as a loophole to Article 2(4). Even if such a notion was on the minds of the drafters, it is worth mentioning that one representative, Mr. Chaumont of France, made reference to genocide such that it could be construed as a threat to “international peace and security.” In such instances, he argues, the matter “should be brought before the Security Council.”<sup>92</sup> Thus, even if the use of force entered the thought processes of the Convention’s drafters, it is likely that they intended the use of force to remain a matter to be dealt with at the discretion of the Security Council. As has been argued, however, the *ad hoc* nature of the Council’s approach is not a sufficiently principled legal grounding for humanitarian intervention because it fails to give us legal certainty as to which activities are subject to the use of force. To categorically say that the crime of genocide is subject to the use of force *does* take into account the moral content of the humanitarian intervention debate by addressing a specific human rights violation. However, the Convention’s drafters’ apparent deference to the Security Council on the matter of using force precludes a principled approach to the problem, for under this framework genocide might at times trigger the use of force and other times it might not.

### ***The International Covenant on Civil and Political Rights***

The principal purpose of drafting both the Covenant on Civil and Political Rights (ICCPR) and the Covenant on Economic, Social, and Cultural Rights (ICESCR) was to develop in more detail the rights enumerated in the UDHR in the form of a legally binding treaty.<sup>93</sup> Because of existing political realities, however, this effort resulted in two separate treaties, each containing different categories of rights. Nevertheless, if it is accepted that the rights in the UDHR are an expression of what *ought* to become the human rights principles of the UN Charter principles, then the development and codification of these rights in subsequent legally-binding form can be reasonably pronounced to be the human rights principles of the UN Charter as a matter of law.<sup>94</sup> As such, when the Charter requires that states “promote . . . universal respect for, and observance of, human rights,”<sup>95</sup> one can conclude that this is in reference to the human rights provisions embodied in the two Covenants, which, like the UN Charter, aspire to universal membership. Likewise, when Article 1(3) of the Charter pronounces the vague notion of “respect for human rights” as one of the purposes of the UN, again it is in the two Covenants where one can find what “human rights” are for the purposes of UN Charter law. It is important to note, however, that the Covenants only bind those UN member-states that are parties to the Covenants. While the Covenants aspire to universal membership, as a technical legal matter, any standards gleaned from these instruments would only apply to UN members who have ratified the relevant Covenant; just as the duty to “prevent and punish” genocide only obligates parties to the Genocide Convention.

This proposed understanding of the relationship between the two Covenants and the UN Charter has important implications for interpreting Article 2(4) of the Charter pertaining to humanitarian intervention. As I suggested above, it is possible that since promoting and encouraging respect for human rights is one of the purposes of the UN Charter, the use of force that is not “inconsistent with the purposes of the UN Charter” could include using force without Security Council approval to protect human rights, if only the Charter specified what it meant by “human rights.” Given the potential status of the Covenants as authoritative interpretations of the human rights provisions of the Charter – again, technically applying only to parties to the Covenants – can one say that the use of force is permissible to protect those human rights enumerated in the two Covenants, since the purpose of the UN is to protect and promote these rights, and the use of force is only prohibited if it is against the purpose of the UN? This is a very plausible reading of the Charter as an organic document,<sup>96</sup> but proponents of a legal right of humanitarian intervention have refrained from making this argument, and for very good reasons that are related to the moral reality of humanitarian intervention.

The main problem with this approach is that it would undermine another important purpose of the UN Charter – the maintenance of international peace and security<sup>97</sup> – by permitting the use of force in response to violations of “everyday” human rights ranging from freedom of expression and the right to marriage, to the right to form trade unions and the right to scientific research and creative activity.<sup>98</sup> While these are important rights, creating a legal avenue for the use of force as a means to ensure the enjoyment of such rights fails to consider fully the moral content of the humanitarian intervention debate. Grounding humanitarian intervention in this legal framework can be understood as principled in the sense that there exist clear, non-arbitrary rules that appeal to precise human rights standards. Nevertheless, this body of law operates devoid of the moral consideration that permitting war as a matter of law in response to *all* human rights violations will itself undermine human rights. In other words, using this law to ground humanitarian intervention is to ignore the moral requirement that a law of humanitarian intervention must maintain some limitations, such that the use of force itself does not eclipse the human rights that it is said to be protecting. Using the two Covenants *en bloc* as the human rights standard for the use of force is to fail in this requirement unless the Covenants can be shown to prioritize certain human rights violations as fundamentally worse or more egregious than others.<sup>99</sup>

It is possible to interpret the ICCPR as doing just this. While there is no clear standard for how human rights ought to be prioritized legally,<sup>100</sup> Article 4(2) of the ICCPR provides a list of human rights therein that are to be considered “non-derogable.”<sup>101</sup> These non-derogable rights are the right to life, freedom from torture, freedom from slavery and servitude, freedom from imprisonment for failure to fulfill a contract, freedom from *ex post facto* laws, equality

before the law, and freedom of thought, conscience, and religion.<sup>102</sup> For the purposes of Article 4, these rights are to be specifically safeguarded and intended to retain their full strength and validity, in particular during times of public emergency.<sup>103</sup> However, reference to the *travaux préparatoires* of the ICCPR reveals no intent on the part of the drafters to suggest that these non-derogable rights are deserving of any differential enforcement mechanism or punitive measure in response to their violation, much less are subject to the use of force.<sup>104</sup> These rights may simply not be suspended under any circumstances.

Using the UN Charter in tandem with the human rights provisions in the two Covenants and the non-derogation clause in the ICCPR comes very close to providing a sufficiently principled legal basis for humanitarian intervention that considers the moral content of humanitarian intervention. However, this legal avenue must be regarded as tentative because the language in this clause pertains to categorically prohibiting the suspension of these rights, and does not suggest that they are deserving of any special punitive or preventative activity, which is the case regarding the Genocide Convention. Such evidence in the ICCPR is also – as a technical legal matter – insufficient to make a substantive leap from the idea of non-derogation, to enforcement, or prevention by military action. Furthermore, a single paragraph in one human rights treaty is likely not sufficient evidence of an accepted system by which “privileged” rights can be acknowledged and their content determined, particularly since membership to this treaty is not yet universal. It would also be prudent to question the substance of the non-derogable rights in Article 4 as standards for humanitarian intervention. It is not clear by any stretch of the imagination that each of the rights enumerated in Article 4(2) of the ICCPR, when violated *en masse*, are equally subject to the waging of war as a means of enforcement. Pursuant to the moral concern of proportionality that aims to minimize human suffering, which any potential law that governs humanitarian intervention must take into account, we must seriously consider whether, for example, freedom of expression is morally on par with the right to life. In other words, the moral reality of humanitarian intervention is not fully addressed even if it is reserved for violations of these non-derogable rights only.

### **A Customary Law Exception for Humanitarian Intervention**

The existence of a customary rule that permits humanitarian intervention is probably one of the more common arguments in favor of its legality. To have a customary rule permitting humanitarian intervention would require a persistent pattern of consistent state practice of humanitarian intervention accompanied by a sense of *opinio juris* – the belief on the part of the state actors that the behavior in question is lawful (though in fact, it is *not* lawful when the norm is forming).<sup>105</sup> While a comprehensive analysis of state practice is beyond the scope of the present inquiry, and has in fact been undertaken by many authors,<sup>106</sup> several

observations can be made pertaining to the relevance and usefulness of a potential customary rule permitting humanitarian intervention.

### *Illegal State Practice and Customary Rules*

The conventional approach to customary rule formation is that the behavior at issue must form a persistent pattern of consistent state activity.<sup>107</sup> The emergence of a customary rule from state practice can thus potentially change existing treaty law, which has in fact happened numerous times. Most notably, the concepts of the 12-mile territorial sea and the 200-mile economic zone both arose as a form of custom that effectively modified the Law of the Sea Convention.<sup>108</sup> The question, then, is whether there exists sufficient state practice of humanitarian intervention to constitute a modification of the Charter's rules on the use of force in the form of an exception for humanitarian intervention.

Initial efforts to create new customary law are a risky venture, especially when the behavior in question consists of the non-self-defensive use of force. Furthermore, these initial efforts are necessarily illegal at the time that they occur, which in the case of humanitarian intervention is to violate the prohibition on the use of force – a norm that has arguably achieved *jus cogens* status as a peremptory norm of international law.<sup>109</sup> As Allen Buchanan has argued, “[t]he first acts a state performs hoping to initiate the process of creating the new norm will be illegal [because] they will violate the existing norms concerning the scope of sovereignty.”<sup>110</sup> Thus, state behavior cannot modify existing rules unless the existing rules are broken.<sup>111</sup> As a methodological matter then, much of the state practice of humanitarian intervention that has potentially contributed to the formation of a new permissive customary rule may not be considered a part of accumulated state practice of *unilateral* humanitarian intervention because it was authorized by the Security Council, and was thus perfectly legal under Charter law. Such instances include humanitarian interventions in Northern Iraq (1991), the former Yugoslavia (1992-95), Somalia (1992), Haiti (1994), Sierra Leone (1997), and East Timor (1999). This is largely why numerous authors have pointed to Kosovo as state practice supportive of a new customary rule – because it was widely considered illegal and is therefore suggestive of an emerging rule permitting military force *absent* Security Council authorization.<sup>112</sup>

Before addressing Kosovo, it is important to review the various contemporary incidents commonly suggested as humanitarian interventions that have potentially contributed to a customary rule. Simon Chesterman has identified 11 instances deserving of consideration for this matter: Belgium in the Congo (1960), Belgium and the US in the Congo (1964), the US in the Dominican Republic (1965), India in East Pakistan (1971), Israel in Uganda (1976), Belgium and France in Zaire (1978), Tanzania in Uganda (1978), Vietnam in Cambodia (1978), France in the Central African Republic (1979), the US in Grenada



(1983), and the US in Panama (1989).<sup>113</sup> Of these interventions, most observers agree that the humanitarian elements in the US's interventions in the Dominican Republic, Grenada, and Panama are highly questionable. The intervention in Grenada was largely conducted under the auspices of an evacuation of US and other nationals,<sup>114</sup> the intervention in Grenada was explicitly cited by US officials as *not* being justified under a right of humanitarian intervention,<sup>115</sup> and the intervention in Panama was undertaken, in the words of President Bush, "to combat drug trafficking and to protect the integrity of the Panama Canal Treaty."<sup>116</sup> The same goal of rescuing nationals is also commonly associated with all three interventions in the Congo/Zaire.<sup>117</sup> In fact, the only remaining interventions that are *not* widely contested as examples of the protection of nationals abroad were those in East Pakistan, Uganda, and Cambodia,<sup>118</sup> which are held by many to be the only contemporary instances of genuine humanitarian intervention before 1990.<sup>119</sup>

Even in these three cases it is uncertain whether it can be accurately contended that they constituted genuine humanitarian interventions. If one takes as a requirement that the intervening parties must overtly invoke humanitarian concerns as justification for their action,<sup>120</sup> the intervention in East Pakistan might qualify, while those in Uganda and Cambodia clearly do not qualify as humanitarian interventions. A persuasive case can be made that each of these interventions achieved a positive humanitarian outcome.<sup>121</sup> However, only in India's intervention in East Pakistan were humanitarian justifications invoked, and were so in tandem with self-defense justifications.<sup>122</sup> In neither Tanzania's nor Vietnam's interventions were humanitarian considerations invoked as the justification for the use of force.<sup>123</sup> Thus, to say that these interventions constitute state practice supportive of a customary rule permitting humanitarian intervention depends on how one defines the concept. As the ICISS defines humanitarian intervention, and as it is defined here, only India's intervention could potentially contribute to a customary rule that would permit humanitarian intervention.

### ***Kosovo as a Turning Point***

The most recent instance of the illegal use of force for humanitarian purposes was, of course, NATO's intervention in Kosovo. Kosovo is widely touted as an almost perfect example of humanitarian intervention, where the intervening actor(s) had few if any intentions beyond rescuing innocent civilians from a brutal dictator.<sup>124</sup> Even UN Secretary-General Kofi Annan believed that this intervention was defensible on moral grounds and was a supporter of NATO's effort.<sup>125</sup> Importantly, the action was justified almost exclusively on humanitarian grounds, as evidenced by US President Clinton's statement that "[w]e act to protect thousands of innocent people in Kosovo from a mounting military offensive [and] to prevent a wider war . . ."<sup>126</sup> However, it is widely acknowledged that as a legal matter, NATO's action was a violation of the UN Charter,<sup>127</sup>

though arguments for its legality have been put forth based on customary law and even innovative readings of relevant Security Councils resolutions.<sup>128</sup> What is at issue here, however, is the extent to which the Kosovo intervention – insofar as it was illegal under the UN Charter – contributes to the emergence of a customary rule permitting humanitarian intervention absent Security Council approval. Many of those legal experts who recognize Kosovo’s illegality under existing law also argue that it is an initial instance of state practice that will eventually make humanitarian intervention lawful.<sup>129</sup> However, many of the details of Kosovo’s intervention make even this conclusion uncertain.

The main problem for the Kosovo intervention is that the intervening agents did not demonstrate a sense of *opinio juris*. In fact, statements by US officials suggest a desire to avoid setting a legal precedent at all. Secretary of State Madeline Albright stressed in a press conference shortly after the campaign that “it is important not to overdraw the lessons that come out of it.”<sup>130</sup> In other words, the action in Kosovo was a response to a unique situation in the Balkans and is not to be applied elsewhere. Probably even more mindful of precedent, US government lawyers have justified Kosovo using “fact-based factors,” so as to preclude the emergence of any universal rule that could be used by other governments to justify similar military interventions.<sup>131</sup> For his part, British Prime Minister Tony Blair also repeatedly emphasized the exceptional nature of the intervention.<sup>132</sup> Furthermore, according to the ruling in the *Nicaragua* case, activity aimed at challenging an existing rule of law (therefore initiating the creation of new law) must be predicated upon an alternative rule of law.<sup>133</sup> Throughout the campaign, however, the NATO states never argued that their humanitarian intervention was legal on a basis of law that existed apart from the Charter.<sup>134</sup> It was only in the recent suits against many of the intervening European NATO states filed by Yugoslavia in the International Court of Justice that the respondents began to provide legal justifications; and even then, only Belgium has used humanitarian intervention as a possible legal defense.<sup>135</sup>

### ***Customary Law as Sufficiently Principled***

Even if it is conceded that Kosovo does contribute to an emerging customary rule, we are faced with the reality that there have been at most, four instances of illegal humanitarian intervention contributing to such a rule, and in all likelihood, only two (East Pakistan and Kosovo). Whether or not this is sufficient state practice is thus a matter for lawyers to further debate. Assuming that these two or four instances of humanitarian intervention do effectively create a permissive rule for humanitarian intervention, one must still judge the desirability of having such a permissive rule in light of the need for a sufficiently principled legal standard. Drawing from these instances of purported humanitarian intervention, one can make a few observations regarding the content of this hypothetical customary rule.

With respect to whether a customary rule permitting humanitarian intervention is consistent with other international rules, we have a different framework of analysis than with UN Charter law. Pursuant to Fuller's reasoning, law governing a certain action (humanitarian intervention) must not be contradictory<sup>136</sup> – a particularly difficult criterion to apply to non-codified customary norms. However, since customary law is created by essentially breaking the law – therefore creating what is in essence a narrow exception to the general rule – customary law is, by definition, not contradictory to the general rule from which it departs. In other words, the strong non-intervention/non-use of force presumption at the core of the Charter is affirmed, but a narrow exception to this rule is also affirmed by state practice that occurs under certain circumstances that most states find persuasive.<sup>137</sup> So the question of the consistency of a customary exception with Charter rules is largely irrelevant. What is relevant for Fuller's requirement of consistency is whether there exists other customary law that is contradictory to that which permits humanitarian intervention. However, having "contradictory customary law" is a misnomer, since what we really have is a preponderance of evidence either in favor or against a customary law exception for humanitarian intervention. The fact that when human rights violations on the scale of what occurred in the Balkans and in East Pakistan are hardly ever met with force, accompanied by the numerous General Assembly resolutions that explicitly condemn intervention,<sup>138</sup> is state practice and *opinio juris* that stands against *permitting* intervention as a matter of law. However, if Kosovo were allowed to count toward the formation of customary law, since it took place subsequent to much of this activity and with widespread acceptance by the international community,<sup>139</sup> it might be indicative that customary practice is quite possibly taking a step in the direction toward permitting humanitarian intervention.<sup>140</sup> Still, the absence of *opinio juris* in the case of Kosovo makes it a poor candidate for contribution to customary international law.

Assuming that at least the interventions in Kosovo and East Pakistan could contribute to a customary rule, one can see that the conditions for humanitarian intervention would be addressed as a matter of law by the empirical conditions that were present during these interventions. Indeed, the moral reality of humanitarian intervention *would* be addressed by customary law in that the human rights conditions under which the interventions took place would be those that were intended to be halted or averted. In this sense, a customary law of humanitarian intervention *would* explicitly deal with the types and extent of human rights violations that must be present before the use of force is permissible. The existence of a customary rule would by default suggest that states agree that the human rights violations at issue in a given circumstance are those that may be opposed with military force as a matter of law. In East Pakistan, there was indiscriminate killing of Bengali civilians, attempted extermination of Hindus, arbitrary arrest and torture, and widespread looting and rape perpetrated by the Pakistani Army.<sup>141</sup> Similar atrocities took place in Kosovo, including rape, tor-

ture, and indiscriminate killing of Albanian civilians at the hands of Serbian paramilitary and the Yugoslav National Army.<sup>142</sup> Incorporating the interventions in Uganda and Cambodia we find documented evidence of comparable atrocities.<sup>143</sup> The question is whether these conditions are similar enough to say that the state practice of humanitarian intervention is consistent; and the answer is most likely affirmative.

If it is agreed that these interventions can be employed as evidence of a customary rule for humanitarian intervention, then the resultant law is reasonably clear and consistent about the types and severity of human rights violations that are sufficient to justify the use of force. However, as argued above, it is highly unlikely that interventions in Uganda and Cambodia constitute genuine humanitarian interventions, while NATO lacked the *opinio juris* requirement in Kosovo. Thus, it is hard to argue for the existence of a persistent pattern of state practice when only one or two instances of humanitarian intervention can be counted as evidence of customary international law. While a potential customary law basis for humanitarian intervention could possibly be a sufficiently principled body of law that considers the moral reality of humanitarian intervention, based on the accepted methodology for determining customary international law, it is unlikely that this body of law currently exists.

## CONCLUSION

This article has argued that humanitarian intervention is illegal under international law as it stands today. It also suggested that the law which purportedly governs humanitarian intervention – UN Charter rules on the use of force, supporting human rights treaty law, and customary international law – may not be a sufficiently principled body of law on which to ground humanitarian intervention. To be sufficiently principled, I maintained that any law governing humanitarian intervention must articulate clear rules that are not in contradiction with other rules, that these rules must be formal and not *ad hoc*, and that they must prescribe action that considers the moral reality of humanitarian intervention – which is that it is only permissible under certain human rights conditions. With respect to a textual reading of the UN Charter, it is clear that humanitarian intervention is both illegal, as well as insufficiently principled. The legality question under Article 2(4) is largely settled in legal circles.<sup>144</sup> The latter problem is because of the lack of specific human rights provisions and inconsistency among rules, but mostly because the legality question itself necessarily relies on *ad hoc* determinations of the Security Council.

The incorporation of human rights treaty law leads to a slightly different conclusion. While human rights treaties, most notably the two principal Covenants, may reasonably be construed as authoritative statements of the Charter's human rights provisions, and thus have had a profound effect on what matters are to be held within a state's domestic jurisdiction, the same cannot be

said with respect to what matters are lawfully subject to military force. Furthermore, the drafters of the Covenants did not intend for them to set standards for differential punitive or preventative measures for certain human rights violations – as Genocide Convention does – beyond obliging states to enact domestic legislation. The ICCPR does speak (albeit minimally) to the moral reality of intervention by suggesting that certain human rights are potentially “superior” to others, though this prioritization does not create duties aimed at the prevention or punishment of violations of these rights. While considering human rights law leads to a more principled grounding for humanitarian intervention because it specifies human rights standards, and even prioritizes human rights, this approach still falls short of being sufficiently principled. The use of force under the Genocide Convention would still require Security Council authorization, while the legal significance of the ICCPR’s non-derogable rights is unclear and its content is morally questionable as a human rights standard for the resort to military force.

Customary international law fares little better as an avenue for a sufficiently principled legal basis for humanitarian intervention. A customary rule would not be inconsistent with Charter law, since it is by definition an exception to it. It would furthermore be reasonably explicit about the human rights conditions under which the use of force is permissible, simply because the mere existence of a customary rule is indicative that states have accepted certain conditions as constituting a customary exception. Unfortunately, the creation of customary law is fraught with methodological problems, largely having to do with the logic and role of the Security Council, as well as the problem of establishing *opinio juris* in promising instances of state practice such as Kosovo. Thus, while a customary rule permitting intervention might be sufficiently principled, we simply lack the appropriate historical empirical realities for the existence of a customary rule at this time.

Taken as a whole the normative framework of the international law relevant to humanitarian intervention leads us to two very general conclusions. First, there remains at the very core of contemporary international law a strong presumption against the trans-boundary use of force, the exceptions to which are explicitly spelled out in the UN Charter, and do not include humanitarian intervention apart from Security Council authorization. Having said that, it is also true that contemporary international law has a very strong presumption in favor of protecting human rights, even at the expense of state sovereignty, traditionally understood. As such, if one reads international law as Professor J.L. Brierly does – that it exists to achieve certain ends, which themselves are differently formulated in different times and places<sup>145</sup> – then the normative value of international law is that it aims to mitigate human suffering. How this end is achieved, Brierly would argue, depends on the circumstances. Most of the time human suffering is minimized by refraining from the inherent destructiveness of the use of force, while in rare cases this end is achieved by actually using force to alleviate

the most severe forms of human suffering. Making this judgment necessarily depends on the moral and empirical realities of human suffering. To perceive international law in this way, however, is to require that it maintain criteria for when the empirical realities (human rights violations) are such that the use of force may be permitted. This is the basic moral reality of humanitarian intervention that has been the foundation of this article and that international law must encompass if it is to provide standards for when intervention is permissible. Unfortunately, the different areas of law reviewed here either have no such standards, or contain vague, all-inclusive standards; while the customary law that could potentially maintain such standards does not yet exist. To move beyond this legal gridlock inherent in humanitarian intervention requires either a change in the law, or a change in the way the Security Council decides when the use of force is to be authorized. The adoption of a comprehensive convention on humanitarian intervention is currently an unlikely solution to the problem, given the extreme difficulty of creating a global consensus on the myriad contested aspects of this issue. Thus, at least until such a consensus can be reached, the best way to address the legality question is for the Security Council to incorporate explicit principled guidelines into its decision-making. Specifically, these principles would provide a set of criteria for determining when a situation of gross human rights violations is considered a threat to international peace and security for the purposes of Article 39. Once the Council makes these guidelines explicit, then states whose activities constitute such threats can reasonably expect that their activity will be met with force if it is not discontinued. The problem, however, is maintaining a credible threat of force in maintaining these guidelines, such that the influence of geopolitics, self-interest, and even racism do not dwarf the Council-members' commitment to taking principled and decisive action to halt or avert egregious human rights violations. This would require the Permanent Five to agree not to veto resolutions authorizing military force that come to a vote based on these agreed-upon guidelines for determining when human rights violations constitute a breach of international peace and security.<sup>146</sup> In other words, it is crucial that such guidelines be agreed upon *beforehand* so as to ensure that the "humanitarian" component of humanitarian intervention does not fall victim to the ad hoc geopolitical and strategic impulses that underlie most states' decision to use military force. While this might only be a short-term solution to finding a sufficiently principled legal basis for humanitarian intervention, it is nevertheless a viable one; but only if the Council steps up to the responsibilities it has been given by the international community.

ENDNOTES

1. See, for example, T. Pogge, "Preempting Humanitarian Interventions," in A. Jokic and B. Wilkins, eds., *Humanitarian Intervention: Moral and Philosophical Issues* (Toronto: Broadview, 2003), pp. 93-108.
2. A. Buchanan, "Reforming the Law of Humanitarian Intervention," in J.L. Holzgrefe and R.O. Keohane, eds., *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (Cambridge: Cambridge University Press, 2003), pp. 123-58.
3. A. Watts, "The Importance of International Law," in M. Byers, ed., *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford: Oxford University Press, 2000), p. 7.
4. Buchanan, "Reforming the Law," p. 131.
5. Independent International Commission on Kosovo (Kosovo Commission), *The Kosovo Report* (Oxford: Oxford University Press, 2000), p. 4. See also Simon Chesterman, "Legality versus Legitimacy: Humanitarian Intervention, the Security Council, and the Rule of Law," *Security Dialogue* 33 (2002), pp. 293-307.
6. International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect* (Ottawa: International Development Research Centre, 2001), pp. 53-54.
7. It is crucial here to note the distinction between humanitarian intervention and peacekeeping. The latter maintains defensive rules of engagement and political neutrality, whereby the intervener comes between disputing parties much as a mediator would. The former requires partiality, at least at the point of initial engagement, and uses or threatens military force to compel an actor to take a course of action (or abstain from some action), establish socio-political conditions, or adopt policies that it otherwise would not. See J. Mayall, "The Concept of Humanitarian Intervention Revisited," in A. Schnabel and R. Thakur, eds., *Kosovo and the Challenge of Humanitarian Intervention: Selective Indignation, Collective Action, and International Citizenship* (New York: United Nations University Press, 2000), p. 324.
8. See A. Buchanan, "From Nuremberg to Kosovo: The Morality of Illegal International Legal Reform," in Jokic and Wilkins, eds., *Humanitarian Intervention*, p. 155.
9. L. Fuller, *The Morality of Law* (New Haven, CT: Yale University Press, 1964).
10. I rely on the accepted method of treaty interpretation as laid out in the Vienna Convention on the Law of Treaties (Vienna Convention), 23 May 1969, 1155 UNTS 331, Articles 31 and 32. See also T. J. Farer, "An Inquiry into the Legitimacy of Humanitarian Intervention," in L. Fislser Damrosch and D. J. Scheffer, eds., *Law and Force in the New International Order* (Boulder, CO: Westview, 1991), pp. 185-86.
11. F. Tesón, *Humanitarian Intervention: An Inquiry into Law and Morality* (Dobbs Ferry, NY: Transnational, 1988), p. 12.
12. P. Allott, "The Concept of International Law," in Byers, ed., *Role of Law*, p. 71.
13. Fuller, *Morality of Law*, p. 106.
14. Watts, "Importance," p. 7.
15. Fuller, *Morality of Law*, p. 96.
16. *Ibid.*, p. 97.
17. *Ibid.*, p. 39.
18. Bertil Dunér, "Violence for Human Rights," *International Journal of Human Rights* 5 (2001), pp. 46-71. See also P. Hassner, "From War and Peace to Violence and Intervention: Permanent Moral Dilemmas under Changing Political and Technological Conditions," in J. Moore, ed., *Hard Choices: Moral Dilemmas in Humanitarian Intervention* (New York: Rowman and Littlefield, 1999), p. 18.

19. See especially J. F. Childress, *Moral Responsibility in Conflicts: Essays on Nonviolence, War, and Conscience* (Baton Rouge, LA: Louisiana State University Press, 1982).
20. David Luban, "Just War and Human Rights," *Philosophy and Public Affairs* 9 (1980), pp. 172-76.
21. M. Fixdal and D. Smith, "Humanitarian Intervention and Just War," *Mershon International Studies Review* 42 (1998), p. 286.
22. Mark Evans makes this point in the context of the Universal Declaration of Human Rights, which recognizes rights as disparate as the right to life (Article 3) and the right to paid holidays (Article 24). M. Evans, "Selectivity, Imperfect Obligations and the Character of Humanitarian Morality," in A. Moseley and R. Norman, eds., *Human Rights and Military Intervention* (Aldershot: Ashgate, 2002), pp. 132-33.
23. Michael Walzer, "The Moral Standing of States: A Response to Four Critics," *Philosophy and Public Affairs* 9 (1980), p. 209. See also J. B. Hehir, "Military Intervention and National Sovereignty: Recasting the Relationship," in Moore, ed., *Hard Choices*, p. 44.
24. See especially H. Shue, *Basic Rights: Subsistence, Affluence, and US Foreign Policy*, 2nd ed. (Princeton, NJ: Princeton University Press, 1996). See also T. van Boven, "Distinguishing Criteria of Human Rights," in K. Vasak and P. Alston, eds., *The International Dimensions of Human Rights* (Westport, CT: Greenwood, 1982); Theodore Meron, "On a Hierarchy of International Human Rights," *American Journal of International Law* 80 (1986); C. Medina Quiroga, *The Battle of Human Rights: Gross, Systematic Violations and the Inter-American System* (Boston, MA and London: Martinus Nijhoff, 1988).
25. Shue, *Basic Rights*, pp. 18-20.
26. *Ibid.*, p. 21.
27. See generally Luban, "Just War."
28. Daniel F. Montaldi, "Toward a Human Rights-Based Account of the Just War," *Social Theory and Practice* 11 (1985), p. 123. See also Tesón, *Humanitarian Intervention*, p. 97.
29. B.D. Lepard, *Rethinking Humanitarian Intervention: A Fresh Legal Approach Based on Fundamental Ethical Principles in International Law and World Religions* (University Park, PA: Pennsylvania State University Press, 2002), p. 89.
30. See generally ICISS, *Responsibility*, p. 31.
31. Charter of the United Nations (UN Charter), 26 June 1945, Stat. 1031, Article 2(4).
32. *Ibid.*, emphasis added.
33. J. Stone, *Aggression and World Order: A Critique of the United Nations' Theories of Aggression* (London: Stevens, 1958). See also Tesón, *Humanitarian Intervention*, p. 151.
34. Laura Geissler, "The Law of Humanitarian Intervention and the Kosovo Crisis," *Hamline Law Review* 23 (2000), p. 323; Leslie A. Burton, "Kosovo: To Bomb or Not to Bomb? The Legality is the Question," *Annual Survey of International and Comparative Law* 7 (2001), p. 60.
35. Vienna Convention, Article 31(1).
36. *Ibid.*, Article 32.
37. United Nations Information Organization (UNIO), *Documents of the United Nations Conference on International Organization*, 22 vols. (New York, United Nations, 1945), vol. 1, p. 174; vol. 3, p. 3, 578-79; vol. 6, pp. 304, 334-35; Ian Brownlie, *International Law and the Use of Force by States* (Oxford: Clarendon, 1963), p. 267-68.
38. Quoted in Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law* (Oxford: Oxford University Press, 2001), p. 49.
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49. *Ibid.*, Article 56.
50. *Ibid.*, Chapters I and IX.
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54. Louis Henkin, "Kosovo and the 'Law of Humanitarian Intervention'" *American Journal of International Law* 93 (1999), p. 824.
55. This term is used by Fuller to denote a certain level of contradiction or inconsistency. See Fuller, *Morality of Law*, p. 69.
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85. *Ibid.*, p. 28.
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106. See for example Murphy, *Humanitarian Intervention; Tesón, Humanitarian Intervention*, pp. 155-200; N. J. Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (Oxford: Oxford University Press, 2000); Arend and Beck, *International Law*, pp. 114-31.
107. Buchanan, "Reforming the Law," p. 134. While others such as Michael Reisman have argued that customary law is formed each time an international incident occurs based on the way the international community reacts to it, it is generally accepted that the behavior be repeated in subsequent state practice before a new norm is "crystallized" as law. See W. M. Reisman, "International Incidents," in W. M. Reisman and A. R. Willard, eds., *International Incidents: The Law That Counts in World Politics* (Princeton, NJ: Princeton University Press, 1988).
108. For other examples, see Chesterman, *Just War or Just Peace?*, pp. 58-60.
109. See, for example, *Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. United States of America) (Merits), Judgment of 27 June 1986, ICJ Rep. 14, 100 para 190.
110. Buchanan, "From Nuremberg to Kosovo," p. 129. See also Buchanan, "Reforming the Law," p. 135.
111. See also Jonathan I. Charney, "Anticipatory Humanitarian Intervention in Kosovo," *American Journal of International Law* 93 (2001), p. 834, 836.
112. See Kosovo Commission, Kosovo Report, p. 4.
113. Chesterman, *Just War or Just Peace?*, pp. 65-83.
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117. Natalino Ronzitti, *Rescuing Nationals Abroad through Military Coercion and Intervention on the Grounds of Humanity* (Dordrecht: Martinus Nijhoff, 1985); Chesterman, *Just War or Just Peace?*, pp. 65-67, 76 notes, 141, 154, 155, 225.
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120. This is the requirement endorsed by the International Commission on Intervention and State Sovereignty. See ICISS, *Responsibility*, p. 8, 11.
121. See Tesón, *Humanitarian Intervention*, pp. 159-74, 179-87; Wheeler, *Saving Strangers*, pp. 55-138.
122. Chesterman, *Just War or Just Peace?*, p. 73; Tesón, *Humanitarian Intervention*, p. 207; Wheeler, *Saving Strangers*, pp. 60-65.

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139. As evidence, for example, a Security Council resolution that would have condemned the use of force by Kosovo was defeated by a vote of 12 votes to three. See A.J.R. Groom and P. Taylor, "The United Nations System and the Kosovo Crisis," in Schnabel and Thakur, ed., *Kosovo*, p. 296.
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142. See generally T. Judah, *Kosovo: War and Revenge* (New Haven, CT: Yale University Press, 2000).
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