

Between a Rock and a Hard Place: Unauthorised Humanitarian Intervention and the Preservation of International Law

Jeffrey M. Bernstein
Carleton University, Ottawa ON

The present recurrence of mass atrocity crimes, though shocking, is nothing new. With conflict raging in the Democratic Republic of Congo, Myanmar, Sudan, and elsewhere, why have actors or coalitions outside the authority of the United Nations not emerged to exercise a credible deterrent and halt the bloodshed? Much of the answer lies within the framework of international law. This article seeks to understand whether the law serves as constrainer or enabler of unauthorised humanitarian interventions. I argue that the integrity of international law is best preserved by maintaining the illegality of unauthorised, militarily-coercive interventions. Simultaneously I posit that states should take the coercive actions necessary to end large-scale killing and that their actions should be considered and authorised, ex post facto, by the Security Council based on contextual "exceptionality."

Jeffrey M. Bernstein is a Master's Candidate in Conflict Analysis and Resolution at the Norman Paterson School of International Affairs (NPSIA), Carleton University. He is an avid global traveler, has previously interned in the Future of Peace Operations Program at The Henry L. Stimson Center in Washington, DC, and works on the genocide prevention file of Senator Roméo Dallaire. Jeffrey holds an Honours Bachelor's degree in Political Science and History from the University of Toronto. Questions or comments regarding his paper can be directed to jeffreymbernstein@gmail.com

All notions of sovereignty with respect to Rwanda should be completely forgotten and we should just go in and stop the killing.

—Nobel Laureate Wole Soyinka, May 1994

The genocide in Rwanda showed us how terrible the consequences of inaction can be in the face of mass murder. But the conflict in Kosovo raised equally important questions about the consequences of action without international consensus and clear legal authority. On the one hand, is it legitimate for a regional organization to use force without a UN mandate? On the other, is it permissible to let gross and systematic violations of human rights, with grave humanitarian consequences, continue unchecked?

—United Nations Secretary-General Kofi Annan, September 1999²

INTRODUCTION

Difficult as it is to comprehend in the 21st century, “gross and systematic violations of human rights” continue unabated. Indeed, despite the proliferation of human rights conventions since the mid-20th century—of which most states are signatories—that legally oblige states to respect the human rights of their citizens,¹ violations of the gravest nature persist. In the United Nations (UN) Charter of 1945, the non-defensive use of force by states (Article 51) to combat, among others, such human rights violations, was proscribed except by the Security Council.² Nonetheless the ability to confer legal authority on a coercive military intervention is not the same thing as taking such a decision in a particular case.

The purpose of this analysis—embodied in the statements above by Soyinka and Annan—is to address this persistent challenge to the international community: Should international law permit states to intervene militarily to stop a “conscious-shocking” atrocity crime without Security Council authorisation? I present the following arguments in order to answer the preceding question: international law is best served by maintaining the illegality of unauthorised, militarily-coercive interventions; states should take necessary actions to stop gross violations of human

¹ Among these include: *Convention on the Prevention and Punishment of the Crime of Genocide* (1948); *International Covenant on Economic, Social and Cultural Rights* (1966); *International Covenant on Civil and Political Rights* (1966).

² These are military measures authorised by the Security Council in response to “any threat to the peace, breach of the peace, or act of aggression” (under Chapter VII, Article 42). *Charter of the United Nations*, 26 June 1945, Can. T.S. (entered into force 24 October 1945).

rights; the international community, through the adjudicating body of the Security Council, should hear openly and fairly the intervening states' petitions (ideally, on both moral and legal grounds) in seeking *ex post facto* authorisation; and efforts to codify an international norm of humanitarian intervention are, at least at present, unhelpful and, perhaps, detrimental to securing the protection of those most vulnerable to systematic atrocities.

There are several assumptions that necessarily follow in tackling such an emotionally-charged issue. First, while a rich debate has taken place for years over the measures that should be considered as part of the "intervention umbrella," I am specifically addressing the issue of coercive military action as an option of "last resort."³ Moreover by posing the above question, it is assumed that "if the Security Council fails to discharge its responsibility in a conscience-shocking situation crying out for action, a concerned individual state or ad hoc coalition will step" into the vacuum created by Council inaction (Evans, 2008: 146, emphasis added).⁴ A further assumption is that the proposed coercive action is taken to address situations deemed legitimate to warrant such action; legitimacy, here, implying that the decision to apply military action is "made on solid evidentiary grounds, for the right reasons, morally as well as legally" (Evans, 2008: 139). Although the "right reasons" are, themselves, debatable, I refer here to the work of the International Commission on Intervention and State Sovereignty (ICISS) in determining the threshold criteria of "just cause." Positing that "exceptions to the principle of non-intervention should be limited," the Commission established two broad sets of circumstances that warrant forcible intervention for human protection purposes, in order to halt or avert

1. large scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation; or
2. large scale "ethnic cleansing," actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape.⁸

³ As follows from this, all measures that fall short of the coercive threshold should be undertaken as soon as a potential problem is identified, thereby (hopefully) mitigating the need and urgency for employing military action. Sanctions are often cited as an important part of the "preventive toolbox." These include: arms embargoes; restrictions on access to petroleum products; aviation bans; restrictions on diplomatic representation; restrictions on travel; suspension of membership or expulsion from international or regional bodies; etc. (ICISS, 2001: 30-31).

⁴ Historical (and recent) experience has shown too often that, tragically, states lack the political will to assume this mantle of responsibility when the Security Council has not or cannot. Although I discuss briefly the risks faced by law-abiding states who feel constrained from acting illegally to intervene in defence of human rights, an in-depth analysis of the absence of political will is not possible herein.

Manifestly clear is the Commission's view that the action in question needs to be "large scale" in order to justify military intervention. And, though no attempt is made to quantify 'large scale'—is there really any quantitative or qualitative difference between 999 and 1000?—the Commission does make clear, importantly, "that military action can be legitimate as an anticipatory measure in response to clear evidence of likely large scale killing" (ICISS, 2001: 33).

In that vein, while this article is intended primarily as a legal treatment of the issues surrounding unauthorised, militarily-coercive interventions, it is nearly impossible to divorce the legal issues from the myriad moral and political implications. Though I will touch on these other aspects, I am interested specifically in what international law has to say regarding such interventions. Lastly, this article addresses unauthorised (absent Security Council consent) humanitarian intervention (hereafter, UHI). Strong objections have been raised regarding the term "humanitarian": assistance and relief organisations have taken exception to the exploitation of an inherently approving word to actions that are anathema to the non-violent work they carry out (by associating this work with violent means) (ICISS, 2001: 9). Nonetheless the corpus of literature regarding the subject continues, predominantly, to refer to humanitarian interventions. Furthermore, in previously referring to the legitimacy of such actions, I believe that the ends of protecting or assisting people at risk epitomise the essence of what is meant by "humanitarian"—despite the coercive means applied to achieve such ends.

This article is organised into several sections. I begin, first, by defining UHI. Next, I identify the principles of conventional (treaty) and customary international law relevant to an examination of the legal norms addressed herein: sovereignty, intervention, and the use of force. Following this I analyse the legal arguments proffered by prominent academics, establishing their collective strengths and weaknesses. Lastly, I consider the legal facts and arguments in order to determine the present state of international law regarding UHI, and the prospects for a possible, future norm of intervention.⁵

⁵ I have purposely excluded the concept of "responsibility to protect" (R2P) from this discussion. R2P was an attempt at re-conceptualising humanitarian intervention to shift the emphasis from a "right to intervene" to states' "sovereign responsibility" to protect citizens. Indeed, the drafters of R2P firmly held that coercive military action must *only* be authorised by the Security Council: "For the UN to function effectively as a law-enforcing collective security organization, states must renounce the unilateral use of force...." (ICISS, 2001: 49). And, despite the Commission's recognition of a possible role for the General Assembly absent Security Council endorsement (48), the very concept of R2P obviates a discussion of unauthorised humanitarian intervention—my main interest and concern herein.

(UNAUTHORISED) HUMANITARIAN INTERVENTION: WHAT IS IT?

Jeff Holzgrefe (2003: 18) has defined humanitarian intervention as the threat or use of force across state borders by a state (or group of states) aimed at preventing or ending widespread and grave violations of the fundamental human rights of individuals other than its own citizens, without the permission of the state within whose territory force is applied.

Robert Keohane (2003: 1) clarifies further that a humanitarian intervention is unauthorised if it has not received authorisation from the Security Council under Chapter VII of the Charter; a prominent example was the North Atlantic Treaty Organization's (NATO) military actions in Kosovo.⁶ Michael Byers and Simon Chesterman (2003: 4) offer a similar definition, while explicitly highlighting that UHI is "justified on the basis of humanitarian need." As Holzgrefe (2003: 18) points out, his definition deliberately excludes two types of actions occasionally associated with the concept: non-forcible interventions and forcible interventions with the objective of protecting or rescuing the intervening state's own nationals. He defends his definitional construction by emphasising that "the question of whether states may use force to protect the human rights of individuals other than their own citizens [without Security Council authorisation] is more urgent and controversial" (Holzgrefe, 2003: 18).

JUDGE AND JURY: WHAT DOES THE LAW SAY?

Rudimentary though it may seem, before delving into specific rules we must first establish what law is. As Article 38(1) of the Statute of the International Court of Justice (ICJ) stipulates, international norms are legally binding if incorporated in "a. international conventions, whether general or particular, establishing rules expressly recognised by the contesting states; b. international custom, as evidence of a general practice accepted as law...."⁷ While technically only binding on the ICJ, this Statute is widely regarded as the authoritative statement of the sources of international law. (Holzgrefe, 2003: 95).

⁶ Admittedly, however, although the Security Council did not endorse NATO's intervention in advance, NATO argued that its actions were "implicitly" authorised through the Security Council's rejection of a resolution condemning NATO's actions and its engagement in a form of "retroactive validation" through resolutions at the end of the conflict. (Franck, 2003: 224-25).

⁷ *Statute of the International Court of Justice*, 26 June 1945, Can. T.S. 1945 No. 7 (entered into force 24 October 1945), Article 38.

TREATY LAW

Taking the first source identified by the ICJ, convention or treaty law, the cardinal international convention governing the exercise of armed force is the UN Charter. Article 2 contains several important provisions relating to how intervention may be interpreted legally. For instance, Article 2(1) establishes “the sovereign equality” of all UN member states. The fundamental statement prohibiting the use of force is found in Article 2(4), which holds that all member states “shall refrain in their international relations from the threat or use of force against the territorial integrity and political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”⁸ However, as John Currie (2008: 458) has explained, Article 2(4) “tells only part of the story;” to appreciate its significance, one needs to read it in conjunction with Chapter VII of the Charter. Indeed, Article 2(7) establishes the oft-cited principle of non-intervention, while foreshadowing the Security Council’s authority:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state... but this principle shall not prejudice the application of enforcement measures under Chapter VII.

As was demonstrated earlier, the exception to the prohibition on the non-defensive use of force are military measures authorised by the Security Council in response to threats to international peace and security. Article 39, Chapter VII, reads accordingly::

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 [non-forcible measures] and 42 [forcible measures by air, sea, or land forces], to maintain or restore international peace and security.

Thus, the Charter’s peace and security provisions seek to regulate and centralise the use of force through the Security Council, rather than eliminate altogether coercive military action.

⁸ The “Purposes” of the UN can be summarised as follows: the maintenance of international peace and security; the development of friendly relations among nations; and the achievement of international cooperation in solving international problems. It strives “[t]o be a centre for harmonizing the actions of nations in the attainment of these common ends,” (Charter, Article 1)..

On its face, the principles elucidated above suggest that the non-defensive use of force employed by states acting without the authorisation of the Security Council is contrary to international law.⁹ Nevertheless, some legal scholars dispute this outright prohibition, insisting, for example, that because “[a] genuine humanitarian intervention does not result in territorial conquest or political subjugation,” it is, therefore, “a distortion to argue that [UHI] is prohibited” by Article 2(4) (Tesón, 1997: 151). Yet most international lawyers and opponents of humanitarian intervention counter that Article 2(4)’s somewhat ambiguous construction yields to further restrictions on force, not fewer. Like many international legal debates, the differences of opinion rest on how the text of relevant international conventions are interpreted. So advocates of the “classicist view,” as described by Tom J. Farer, believe that parties to a treaty “had an original intention” which can be ascertained through textual analysis and holds until the agreement has been overturned or expires (Farer cited in Holzgrefe, 2003: 38). By contrast, champions of “legal realism” see the original intention of the drafters as useful only in the context of evolving behaviour and current state practice (Holzgrefe, 2003: 38). Therefore, if one subscribes to the classicist view, “the illegality of [UHI] is patent,” while, if one adopts the legal realist view, UHI’s “legal status depends in large measure on the attitude of the contemporary international community towards it” (Holzgrefe, 2003: 39).¹⁰ Before turning to customary international law, it is appropriate to state that the Charter’s drafting history and recent Security Council practice clearly indicate that authorised humanitarian interventions are “lawful exceptions” to the Charter’s general prohibition against forcible self-help in international relations, whereas the legality of UHI remains questionable (Holzgrefe, 2003: 43).¹¹

CUSTOMARY INTERNATIONAL LAW

Are there any significant differences between the treaty law characterised above and customary international law concerning the unauthorised use of force for humanitarian interventions? As suggested by ICJ Statute Article 38(1)(b), above, any proposed customary “right” of UHI would have to meet the two, generally-recognised attributes of a binding international norm: i.e., general observance through state practice and widespread belief that such behaviour is lawful (*opinio juris sive necessitatis*) (Currie, 2008: 187-99). Establishing such a right faces

⁹ It is important to note here that treaty provisions generally prevail over customary international law. More importantly, Charter principles take priority over obligations enunciated in other agreements: “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail,” (*Charter*, Article 103).

¹⁰ See 37-43 for a full account of the contentions between UHI’s proponents and opponents.

¹¹ Recent Security Council practice refers to its authorisations of coercive military interventions to end massive human rights abuses in Somalia (1992), Rwanda (1994), and Haiti (1994).

several difficulties. Perhaps most challenging (and troubling) is the inconsistency and selectivity with which UHI has been exercised.¹² More significantly, though, even those states that have intervened to end gross human rights abuses in the Charter era—the United States (U.S.) in the Dominican Republic (1965); India in East Pakistan (1971); Vietnam in Kampuchea (1978); Tanzania in Uganda (1979); ECOWAS in Liberia (1990) and Sierra Leone (1997); Britain, France and the U.S. in Iraq (1991); and NATO in Kosovo (1999)—have been “loathe to invoke a customary right of [UHI] to defend their actions” (Holzgrefe, 2003: 46-48).¹³ Indeed, justifications were offered on just about every ground other than one of “humanitarian” concern.¹⁴ Holzgrefe (2003: 49) is adamant regarding the legal consequences of such alternative justifications:

It is irrelevant that these justifications are specious if not false. What is noteworthy is the fact that the states concerned felt they could not appeal to a right of [UHI] to legitimate their actions. If there is presently a right of [UHI], it is a right that dares not speak its name.

Though the equivocal nature of these arguments is not helpful in establishing *opinio juris*, it may be understandable in view of the numerous UN General Assembly resolutions expressly rejecting a specific right to UHI: for example, “[a]rmed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law.”¹⁵ The *opinio juris* of states, then, seems to suggest that the prohibition against force by UHI transcends the Charter regime and exists in customary international law, too. Furthermore the ICJ in *Nicaragua v. United States* concluded, to the same effect, that custom does not permit UHI, and even reinforced this view by accepting that General Assembly resolutions, including the aforementioned, played a role in the development of customary rules prohibiting

¹² Holzgrefe (2003: 47) catalogues a half-page of situations that likely warranted intervention, yet received no action. Some, for example: the massacre, by Indonesia, of several hundred thousand ethnic Chinese (mid-1960s); the slaughter and forced starvation of more than one million black Christians by the Sudanese government (since late 1960s); the slaying, again by Indonesia, of 100,000 East Timorese (1975-99); the forced starvation of approximately one million Ethiopians by their government (mid-1980s); the murder of 100,000 Kurds in Iraq (1988-89).

¹³ Belgium, however, did invoke a customary right of humanitarian intervention to defend its participation in NATO’s Operation Allied Force for Kosovo. Though citing the safeguarding of *jus cogens* values, such as the “right to life, physical integrity, [and] the prohibition of torture”—values that were undoubtedly being trampled by Serbia—as the obligation for intervention, Belgium was the only NATO member to claim such a defence. “Public sitting held on Monday 10 May 1999, at the Peace Palace, Vice-President Weeramantry, Acting President, presiding in the case concerning *Legality of Use of Force (Yugoslavia v. Belgium)*” (Holzgrefe, 2003: 49).

¹⁴ For example: self-defence; by invitation; in response to aggression or annexation; etc.

¹⁵ *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations*, GA Res. 2625 (XXV), UN GAOR, 25th Session, Supp. No. 28, UN Doc. A/8028 (1971).

intervention and aggression.¹⁶ Thus Chesterman (2001) remarks that UHI “will remain at most in a legal penumbra—sometimes given legitimacy by the Security Council, sometimes merely tolerated by states” (Chesterman, 2001: 87). It is to the concept of legitimacy that I now turn.

EXPERT OPINION: LEGITIMACY VS. LEGALITY

As outlined above, the bulk of international law appears stacked against interventionists; nevertheless, this does not close the book on UHI. In addition to the myriad moral and political justifications advanced for a right of UHI, several legal arguments have been advocated that create a space for UHI within the framework of international law—with the presumed intention of both upholding the law and accepting the inevitability that a UHI will be undertaken in conscious-shocking situations. Separated, admittedly, by degrees of nuance, the following approaches maintain a great deal in common and offer models for legitimately pursuing UHI.

“EXCEPTIONAL ILLEGALITY”

Positing that a right of UHI does not yet exist and is unlikely to develop, Byers and Chesterman (2003: 198) offer an approach that reflects both the positions of states and maintains fundamental principles of international law. Hence exceptional illegality: “If, instead of advancing potentially destabilizing legal claims, states were to admit—explicitly or implicitly—that they were violating international law, the effect would be to strengthen, rather than weaken, the rules governing intervention.” To bolster their position, Byers and Chesterman (2003: 199) point to the statements by NATO members that their military actions in Kosovo were not intended as setting a precedent for UHI. Indeed this is supported by the foregoing comment that intervening states, generally—and especially so in the case of NATO states acting in Kosovo—have been “reluctant to suggest that they acted on the basis of clear legal principles.”

An admitted difficulty with this approach is the possibility that maintaining the illegality of UHIs will actually bar state action, rather than encourage it under

¹⁶ *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. United States of America), [1986] ICJ Rep. 14, para. 268 (27 June): “[W]hile the United States might form its own appraisal of the situation as to respect for human rights in Nicaragua, the use of force could not be the appropriate method to monitor or ensure such respect.... The Court concludes that the argument derived from the preservation of human rights in Nicaragua cannot afford a legal justification for the conduct of the United States....” (Goodman, 2006: 111, note 23). See, also, *Nicaragua*, ICJ Report 14, pp. 97-100, at paras. 183-90, (Byers and Chesterman, 2003: 189).

“exceptional” circumstances. Surely states would be taking a potentially serious risk by acting without Security Council authorisation and then hoping for a favourable weighing. For instance, Yugoslavia did bring legal action against ten NATO member states before the ICJ; the Court did not pronounce on the legality of NATO’s use of force—not for the case’s lack of merit, but because it lacked *prima facie* jurisdiction to decide the case (Gray, 2008: 44-47). Moreover if the remedial burden of intervention was prohibitive enough, “one would have to question the motives” of the intervening state, thus creating a strong barometer for judging states’ humanitarian concern (Byers and Chesterman, 2003: 201). Nevertheless states, through the political organs of the UN, have often demonstrated responsibility in determining the exceptionality of non-defensive uses of force to safeguard against mass atrocity crimes and judging, in the words of Thomas Franck whether UHI was “the lesser wrong” (Franck, 2003: 230). In the context of the international legal system, penalising states for infractions against the strict prohibition on the use of force elucidated in Article 2(4) has been waived in notable instances,

in reliance on the credibility of the evidence adduced in support of extenuating facts, on the perceived “clean” motives of those resorting to force, on the immediacy and gravity of the challenge to world peace and common humanitarian values that an intervention sought to avert, and on the proportionality and appropriateness of the measures taken (Franck, 2003: 227).

By adopting this approach of exceptional illegality, “the focus of inquiry would shift to the consequences of the delict,” where arguments of legitimacy may find acceptance in the mitigation of ensuing penalties (Byers and Chesterman, 2003: 200). The 1949 Corfu Channel case is a clear example of mitigating circumstances being taken into account: the ICJ held that an admission of illegality by the United Kingdom (the intervening state) was a sufficient remedy for its naval intervention in Albanian territorial waters (Byers and Chesterman, 2003: 200). Such an approach would necessarily weigh the human rights violations being addressed by the UHI in any determination regarding the necessity of compensation for violating the prohibition concerning the use of force. To be sure, the interveners “might fare quite well” in an *ex post facto* balancing of relative violations (the human rights violations that prompted the UHI), owing to “the fundamental character of the rights violated when mass atrocities occur, and the *erga omnes* character of the concomitant obligations [acted upon by the intervening states]” (Byers and Chesterman, 2003: 200-01).

"NECESSITY:" THE MOTHER OF INTERVENTION

Similar to the argument advanced by Byers and Chesterman (2003), though falling somewhere more ambiguously between legality and illegality, Franck (2003: 213) suggests an approach where necessity is advanced to mitigate the consequences of acting illegally, "although neither, on the one hand, fully exculpating the actors, nor, on the other, rendering the law nugatory." NATO's intervention in Kosovo was not taken in self-defence, as no UN or NATO member state was attacked (Kosovo was not a state but, rather, an autonomous region within Serbia), and the Security Council did not authorise the use of force. Yet it was entirely reasonable that the recent record of Serbian atrocities in Bosnia elicited strong concern that similar crimes would be committed against Kosovar Albanians. Thus, facing the threat that Security Council-authorized action under Charter Chapter VII would be vetoed by Russia, "NATO decided to use force and, in so doing, violated strict Charter legality" (Franck, 2003: 215).

One may support UHI to halt mass atrocities in a specific instance, though be concerned about the consequences of supporting a legal right to UHI. Writing in 1991, Oscar Schachter identified this concern: "Even in the absence of such prior approval [by the Security Council], a State or group of States using force to put an end to atrocities when the necessity is evident and the humanitarian intention is clear is likely to have its action pardoned."¹⁷ Surely an argument can be made that ECOWAS' UHIs against Liberia (1990) and Sierra Leone (1997), and the Security Council's responses thereof, appear to substantiate the likelihood of ex post facto recognition in that, a) UHI "may be tolerated where the emergency is palpable..." and that, b) UHI "may later be retroactively validated by the Council," through explicit approval, "or implicitly through a 'commendation' followed by the Council authorizing a UN presence to cooperate with the intervening force" (Franck, 2003: 223). Whether or not this same argumentation can be extended to NATO's UHI in Kosovo, the point is well-taken that the strict letter of the Charter text is not the only determinant of states' verdict in exculpating or mitigating a breach. While state practice and opinio juris do not imply "that any unilateral, unauthorized use of force for an allegedly 'humanitarian' purpose is per se acceptable," this should not preclude flexibility and contextual sensitivity in cases of extreme necessity (Franck, 2003: 230).

¹⁷ Schachter continues: "But, I believe it is highly undesirable to have a new rule allowing humanitarian intervention, for that could provide a pretext for abusive intervention. It would be better to acquiesce in a violation that is considered necessary and desirable in the particular circumstances than to adopt a principle that would open a wide gap in the barrier against unilateral use of force." (Schachter, 1991: 126, cited in Goodman, 2006:112, note 34, emphasis added).

CONTINUUM: "EXCUSABLE BREACH" TO "INCREMENTAL CHANGE"

In a notable departure from the previously-detailed approaches, Jane Stromseth (2003:233) argues that the ambiguous legal status of UHI "is a good thing," since the uncertainty places "a very high burden of justification" on potential interveners, and presents a clear risk of ex post facto condemnation by the Security Council. She elaborates: "Yet this very ambiguity is also fertile ground for the gradual emergence of normative consensus [regarding UHI], over time, based on [state] practice and case-by-case decision-making." Stromseth (2003) clarifies her position further by distinguishing the incremental approach from doctrinaire efforts to codify legal criteria for a right of UHI, which she describes as "counterproductive." Before fleshing out the incremental development of normative consensus, she describes the "excusable breach" approach—strikingly similar to Byers and Chesterman's (2003) "exceptional illegality" concept. In essence, UHI as an excusable breach "is a violation of the Charter for which states are unlikely to be condemned or punished" (Stromseth, 2003: 243). Advocates of this approach have been loathe to counter the legal restrictions on UHI on the grounds that "necessity knows no law."¹⁸ But this approach has evident drawbacks—most fundamental being the potentially recurring tension between legality and legitimacy; moreover "[a]n extended period of 'excusable breaches'" may even "precede the development of a new legal norm" (Stromseth, 2003: 248). Hence, argues Stromseth (2003: 247), the normative status of UHI is "arguably in a state of evolution," somewhere between the excusable breach and incremental change approaches.¹⁹

One benefit of incrementalism is its serious regard for the legal justifications offered by states and the international community's subsequent receptiveness towards these explanations. For example, in explaining their decision to use military force in Kosovo, NATO states "did not argue 'we are breaking the law but should be excused for doing so'." While their individual justifications differed, there was a broad consensus (misconstrued or not) that their actions were lawful and should be understood as such in view of the "extraordinary factual circumstances at hand" (Stromseth, 2003: 244, 251). So operating within the constructs of a normative framework of international law, "states committed to following the rule of law will—and should—identify and articulate legal bases for their actions as part of the

¹⁸ See, for instance, (Chesterman, 2001: 230): "The impetus to develop some sort of normative regime is understandable but misplaced: the circumstances in which the law may be violated are not themselves susceptible to legal regulation."

¹⁹ Nonetheless the weight of legal opinion seems to be against the idea that a norm of UHI has crystallised in customary international law.

process of accountability” (Stromseth, 2003: 246). In effect, Stromseth (2003) might argue, norm-emergence begets the legal compliance obviated by the excusable breach approach, while maintaining the flexibility to permit UHI in compelling and urgent circumstances in which the Security Council is unable or unwilling to rise to the challenge.

WILLING AND ABLE? UHI AND THE WAY FORWARD

As Thomas Franck argues, law “does not thrive when its implementation produces *reductio ad absurdum*: when it grossly offends most persons’ common moral sense of what is right” (Franck, 2003: 178). Upholding principles of international law—especially principles that appear, sometimes, to be in direct conflict with one another—can be compared to a high-wire act: balance is the essential challenge. However, for the scrupulous preserver of the letter of international law, acting in conscious-shocking situations that demand the unauthorised use of force to halt atrocities should pose the greatest challenge. This is because the

typical situation where we consider intervening is not one where we are contemplating violating international law as opposed to not violating international law. These are cases where whatever we do we will end up tolerating a violation of some fundamental rule of international law. Either we intervene and put an end to massacres, in which case we apparently violate the general prohibition [against force], or we abstain from intervening, in which case we tolerate the violation by other states of the general prohibition of gross human rights abuses (Tesón, 1997: 110).

Nevertheless there are, admittedly, some very palpable risks associated with proliferative invocations of UHI. One major consequence is the generation of skepticism regarding allegations of mass atrocity, thereby inhibiting the political will of states that, otherwise, would view UHI as a necessary action (Farer, 2003: 78). Surely states “are not champing at the bit” to forcibly intervene to halt human rights abuses around the globe, “prevented only by an intransigent Security Council and the absence of clear criteria to intervene without its authority” (Byers and Chesterman, 2003: 202). Rather the problem is the absence of political will to act at all. Also, importantly, mendacious invocation of UHI could result in “more generalized cynicism” regarding legal restraints on the use of force, “thereby weaken[ing] the normative status of peace” (Farer, 2003: 78). An oft-ignored factor, too, is the creation of expectations that victims of mass atrocities inevitably will be rescued,

and that each case will “merit” UHI.²⁰ As a matter of strict, political expediency, such expectations are—tragically—impossible to meet each time they may be warranted.

Though I argued earlier in favour of the “exceptional illegality” approach, one might reasonably disagree that intervening states should be held to a higher standard of legality than a target state. After all, violators of the most sacred human rights—to add insult to injury—may often flaunt, very publicly, their flagrant disregard for international law. Nonetheless intervening states “act at their own risk in full awareness that they are violating the rules for a higher purpose;” this is a burden that law-respecting nations must carry (Stromseth, 2003: 244, emphasis added). It is also what distinguishes the “humanitarian” use of force to save lives (interveners) from the abuse of force to take life (genocidaires). To be sure, the general prohibition on the use of force exists for good reason; most states—regardless of ideological stripe—would not countenance even mere discussion of its repeal.

And for whom the nuance between Byers and Chesterman’s (2003) “exceptional illegality” and Jane Stromseth’s (2003) “incrementalism” legitimately may be difficult to appreciate, the less-obvious consequences of any push for the emergence of normative consensus require mentioning. For while the insistence on offering realistic and relevant legal justifications for states’ behaviour is surely laudable, the development of a new normative regime would likely lead to at least one of the following: at best, limiting and cementing the potential for future actions presently unforeseeable (tactically, technologically, etc.) yet unpredictably necessary; at worst, undermining the general prohibition on the use of force through the ostensibly-benevolent condoning of “acceptable,” forcible behaviour. This seemingly-innocuous process would engender the very doctrinaire criteria-making that Stromseth criticises as counterproductive.

In the event that some mass atrocity is about to occur or, worse, is already occurring—be it genocide, ethnic cleansing, or even refusing emergency relief for victims of natural disasters—and the Security Council is unwilling or unable to assert its authority under Article 39, Chapter VII, the international lawyer has a duty to communicate the letter of the law to governments considering unilateral action.

²⁰ Such expectations are legitimate; however, they may possibly lead to a “moral hazard” situation. In this context, “the expectation of benefiting from intervention” may embolden “rebels to fight, which provokes state-sponsored retaliation against their perceived civilian supporters, thereby exacerbating and prolonging the humanitarian emergency.” (Kuperman, 2009: 281–303)..

However, she should also advise that “the law will not hold a government hard to account for doing what is palpably necessary to stop the commission of an imminent and greater wrong” (Franck, 2003: 191, emphasis added). Surely, as former UN Secretary-General Kofi Annan (2000: 48) pleaded, just because “we cannot protect people everywhere is no reason for doing nothing when we can.”

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