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Is Unilateral Humanitarian Intervention Compatible with the U.N. Charter?

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STUDENT NOTE

IS UNILATERAL HUMANITARIAN INTERVENTION COMPATIBLE WITH THE U.N. CHARTER?

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I. INTRODUCTION

Though it is a rule established by the laws of nature and of social order, and a rule confirmed by all the records of history, that every sovereign is supreme judge in his own kingdom and over his own subjects, in whose disputes no foreign power can justly interfere. Yet where a Busiris, a Phalaris or a Thracian Diomede provoke their people to despair and resistance by unheard of cruelties, having themselves abandoned all the laws of nature,

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> *they lose the rights of independent sovereigns, and can no longer claim the privilege of the law of nations.*[1]
>
> —Hugo Grotius, De Jure Belli ac Pacis, 1625.

Hugo Grotius, often called the father of modern international law, left a great legacy of ideas to the contemporary generation of international lawyers, which can be divided into two spheres. The first part of his legacy we tend to prize and treat with respect, the other one we consider obsolete, or sometimes even dangerous.

To the former belongs, for example, the above cited idea of humanitarian intervention. The translation of Grotius into modern language might be that any ruler or government loses the protection of international law when he starts to commit serious crimes against his own people. With regard to current international human rights law, there are not many lawyers who would oppose this idea.

The latter and more controversial part of his legacy constitutes the theory of "just war." Under this doctrine, "a war was lawful when fought for a just purpose by just means."[2] The problem with this doctrine was that "it was impossible to determine in any particular case whose case was just and whose not. As a result, the rule of *bellum justum*, which at the outset was understood as a legal restraint on war, turned into the opposite."[3] Therefore, "by the nineteenth century, the international legal literature abandoned the 'just war doctrine'"[4] and Western civilization moved towards the "severance of morality from law."[5] Both domestic and international law was built on the basis of legal positivism that "leaves little room for moral absolutes."[6]

However, "many theologians, ethicists, political scientists and occasionally even international lawyers would like to revive the just war doctrine in present-day international law."[7] These thinkers want to establish humanitarian intervention as a modern "just cause" for war. Some writers rightfully observe that "in many ways we have moved back to the earlier Grotian conception insofar as we accept a universal moral order involving human rights; gross violations of these in other countries pro-

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1. HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE INCLUDING THE LAW OF NATURE AND OF NATIONS 288 (A. C. Campbell trans. 1901).

2. Michael Bothe, *Terrorism and the Legality of Pre-emptive Force*, 14 EUR. J. INT'L L. 227, 237 (2003).

3. *Id.* at 238.

4. Yoram Dinstein, *Comments on War*, 27 HARV. J.L. & PUB. POL'Y 877, 878 (2004).

5. Thomas M. Franck, *Interpretation and Change in the Law of Humanitarian Intervention*, *in* HUMANITARIAN INTERVENTION: ETHNIC, LEGAL AND POLITICAL DILEMMAS 208 (J.L. Holzgrefe & Robert O. Keohane eds., 2003) [hereinafter Holzgrefe & Keohane].

6. *Id.*

7. Dinstein, *supra* note 4, at 877.

vide at least prima facie a 'just cause' for action."[8] Professor Tesón, a proponent of this conception, noted:

> Wars should be avoided, even sometimes at considerable cost. But some wars are just. The United Nations itself is the child of a victory in a just war. Just wars are those that are waged in defense of the only currency we all have: our basic rights and the individual autonomy from which they derive.[9]

As the brutality goes on in Darfur,[10] the question of the legality of humanitarian intervention pops up again, when the legal debates following the Kosovo intervention are almost forgotten, partly as a result of the crisis in Iraq. The controversy over the legality of humanitarian intervention, in particular unilateral intervention, has returned.

Before I arrive at my central argument, I would like briefly to recapitulate the legal history of humanitarian intervention, explain its concept, and distinguish between humanitarian intervention with and without UN mandate. Subsequently, I will discuss the legal theories surrounding unilateral humanitarian intervention.

The main topic of my Note, however, is the compatibility of unilateral humanitarian intervention with Article 2(4) of the U.N. Charter (the Charter). Through its interpretation, I will attempt to discover whether the Grotian idea of unilateral humanitarian intervention can survive in the environment of contemporary international law without its "just war appendix." I will separate this idea from its "just war justification" and approach the question of the compatibility of such intervention with the Charter as a legal positivist. In my interpretation of Article 2(4) of the Charter, I will try to avoid moral principles. Instead, I will rely on the methods described by the Vienna Convention on the Law of Treaties (Vienna Convention),[11] i.e., the textual, systematic, and teleological interpretations, subsequent agreements, subsequent practice, international law, and finally, the *travaux préparatoires*. At the same time, I will not leave out the current trends in international law.

In the part concerning the policy issues, I will depart from the positivist approach and discuss the reasons for and against the legalization of unilateral humanitarian intervention.

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8. Nigel Dower, *Violent Humanitarianism—An Oxymoron?*, *in* HUMAN RIGHTS AND MILITARY INTERVENTION 73, 82 (Alexander Moseley & Richard Norman eds., 2002).

9. FERNANDO R. TESÓN, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY 317 (1997).

10. *See* news about Darfur, http://hrw.org/doc?t=africa&c=darfur; http://news.amnesty.org/pages/sudan; http://news.bbc.co.uk/1/hi/world/africa/3496731.stm; http://www.state.gov/g/drl/rls/36028.htm.

11. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

II. THE CONCEPT OF HUMANITARIAN INTERVENTION

Humanitarian intervention was not unknown in the pre-Charter period. The most cited examples are the joint intervention of Great Britain, France, and Russia in aid of Greek insurgents in 1827[12] and the French intervention in Syria to protect the Christians living there in 1860–1861.[13] Nevertheless, "it is debatable, whether humanitarian intervention, although then supported by a majority of writers, was clearly established under the customary international law at that time."[14]

After the Second World War, humanitarian intervention was not included in the Charter. The preparatory works will be described in detail below. Because of this, the doctrine of humanitarian intervention was developed primarily by scholars. The International Law Commission (ILC), in its commentaries to the Draft Articles on Responsibility for Internationally Wrongful Acts, [15] did not deal directly with the issue of humanitarian intervention, simply stating that the "legal regime of serious breaches [of peremptory norms] is itself in a state of development."[16]

The concept of humanitarian intervention is dependent on the existence of the obligations *erga omnes partes*, i.e., the obligations of a state towards the international community as a whole. The International Court of Justice (ICJ) held that "such obligations derive . . . from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination."[17] "In the event of material breaches of such obligations, every other state may lawfully consider itself legally injured and is thus entitled to resort to countermeasures against the perpetrator."[18] In the context of article 59 of the ILC Principles of Responsibility of States for Internationally Wrongful Acts, however, such countermeasures must comply with the Charter.[19]

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12. SIMON CHESTERMAN, JUST WAR OR JUST PEACE? HUMANITARIAN INTERVENTION AND INTERNATIONAL LAW 28 (2001).

13. *Id.* at 32.

14. Ulrich Beyerlin, *Humanitarian Intervention*, *in* ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, 927 (R. Bernhardt ed., 1992).

15. Responsibility of States for Internationally Wrongful Acts, G.A. Res. 83, U.N. GAOR, 56th Sess., U.N. Doc. A/RES/56/83 (Dec. 12, 2001).

16. Int'l L. Comm'n, *Commentaries to the Draft Articles on Responsibility of States for Intentionally Wrongful Acts*, 53d Sess., art. 19 (2001), *reprinted in Report of the International Law Commission on the Work of its Fifty-third Session*, U.N. GAOR Supp. (No. 10) at 292, U.N. Doc. A/56/10 (2001).

17. Barcelona Traction, Light and Power Co., (Belg. v. Spain), 1970 I.C.J. 33, ¶¶ 33–34 (Feb. 5).

18. Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EUR. J. INT'L L. 1, 2 (1999).

19. *See* Responsibility of States, *supra* note 15, at 13, art. 59 ("These articles are without prejudice to the Charter of the United Nations.").

Concerning the crime of genocide, the Genocide Convention contains even a duty "to prevent and punish."[20] The ICJ held in the *Genocide* case that "the rights and obligations enshrined by the Convention are rights and obligations *erga omnes*."[21] Unfortunately, article 8 of the Genocide Convention says only that "[a]ny Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate."[22] Therefore, the Genocide Convention itself neither establishes an enforcement mechanism, nor provides for humanitarian intervention.

Turning to the definition of humanitarian intervention, the widely accepted view is that "humanitarian intervention is a short-term initiative, aimed only at stopping massive and ongoing human rights violations. Once the violations cease, it is no longer justified."[23] This view does not embrace any regime change. My understanding of the concept of humanitarian intervention is broader. Although regime change is not and must not be an objective of humanitarian intervention, I can imagine a scenario where the removal of a Saddam Hussein-type dictator from power is necessary in order to stop atrocities. It would make no sense to invade a state which is committing serious crimes against its people, only to pull out and leave the oppressive government "to finish the job." At the same time, however, humanitarian intervention must be clearly distinguished from intervention in the name of democracy, sometimes called "pro-democratic intervention."[24]

With legal basis as a criterion for distinction, there are two basic types of humanitarian intervention. The first is humanitarian intervention authorized by the Security Council under Chapter VII of the Charter. To provide a mandate for such interventions, the Security Council has previously classified humanitarian catastrophes as a "threat to the peace," pursuant to Article 39 of the Charter. Examples of interventions

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20. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, art. 1 (*entry into force* Jan. 12, 1951) [hereinafter Genocide Convention] ("Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III.").

21. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo.), 1996 I.C.J. 25, ¶ 31 (July 11).

22. *See* Genocide Convention, *supra* note 20, art. 8 ("Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in art. III.").

23. W. Michael Reisman, *Why Regime Change Is (Almost Always) a Bad Idea*, 98 AM. J. INT'L L. 516, 517 (2004).

24. Dino Kritsiotis, *Arguments of Mass Confusion*, 15 EUR. J. INT'L L. 233 (2004).

authorized under this scheme are those in Somalia,[25] Haiti,[26] and Bosnia and Herzegovina.[27] The legality of this type of humanitarian intervention is accepted by the majority of international lawyers,[28] even if some still oppose it.[29]

In my Note, I will deal only with the second and more controversial category of humanitarian intervention, that without Security Council authorization. Such intervention is often called unilateral humanitarian intervention and also covers situations in which more than one state is involved in the use of force. The most recent examples of this type of intervention are the Economic Community of West African States' (ECOWAS) intervention in Liberia in 1990–91, the operations in Iraq since 1991 to protect the Kurdish and Shia populations,[30] the 1998 intervention in Sierra Leone, again by the ECOWAS,[31] and, of course, the 1999 Kosovo intervention.

III. UNILATERAL HUMANITARIAN INTERVENTION IN LEGAL THEORY

The leading opinion on the legality of the unilateral humanitarian intervention is that it finds no support in current international law.[32] According to this view, the prohibition on the use of force in Article 2(4) of the Charter must be interpreted restrictively as allowing no exceptions except the right of self-defense according to Article 51 of the Charter, together with Security Council actions under Chapter VII.[33] No authority for unilateral humanitarian intervention is found in customary international law either, because Article 2(4) of the Charter replaced all existing

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25. S.C. Res. 794, U.N. SCOR, 47th Sess., 3145th mtg., U.N. Doc. S/RES/794 (1992).

26. S.C. Res. 940, U.N. SCOR, 48th Sess., 3413th mtg., U.N. Doc. S/RES/940 (1994).

27. S.C. Res. 1031, U.N. SCOR, 50th Sess., 3607th mtg., U.N. Doc. S/RES/1031 (1995).

28. *See, e.g.*, Jost Delbruck, *Commentary on International Law: A Fresh Look at Humanitarian Intervention Under the Authority of the United Nations*, 67 IND. L.J. 887 (1992); Michael J. Matheson, *Conference: Just War and Humanitarian Intervention: Comment on the Grotius Lecture by Prof. J. B. Elshtain*, 17 AM. U. INT'L L. REV. 27 (2001); Simma, *supra* note 18, at 5.

29. HANS KÖCHLER, GLOBAL JUSTICE OR GLOBAL REVENGE? INTERNATIONAL CRIMINAL JUSTICE AT THE CROSSROADS 309 (2003).

30. A.P.V. Rogers, *Humanitarian Intervention and International Law*, 27 HARV. J.L. & PUB. POL'Y 725, 729 (2004).

31. Leo F. Berger, *State Practice Evidence of the Humanitarian Intervention Doctrine: The ECOWAS Intervention in Sierra Leone*, 11 IND. INT'L & COMP. L. REV. 605 (2001).

32. *E.g.*, CHESTERMAN, *supra* note 12; Delbruck, *supra* note 28; Louis Henkin, *NATO's Kosovo Intervention: Kosovo and the Law of "Humanitarian Intervention,"* 93 AM. J. INT'L L. 824 (1999); Dino Kritsiotis, *Reappraising Policy Objections to Humanitarian Intervention*, 19 MICH. J. INT'L L. 1005 (1998).

33. *See* CHESTERMAN, *supra* note 12, at 47–53.

customary international rules regulating the use of force and has not been modified by any new customary international rule.[34]

Furthermore, as I explain below, this restrictive opinion finds solid support in the *travaux préparatoires* of the Charter, subsequent practice of states, and several General Assembly declarations, such as the Declaration on Friendly Relations of 1970.[35] In addition, the ICJ did not allow any exceptions to the principle of non-intervention in the *Corfu Channel*[36] and *Nicaragua*[37] cases.

The second legal approach to unilateral humanitarian intervention is that such an intervention is illegal but legitimate, given the unique circumstances of a particular humanitarian catastrophe. It admits that there are situations in which the international community must act outside positive law in ways that are nevertheless legitimate because of the demands of morality and justice.[38] The "excusable breach" view[39] was also expressed, for example, by U.S. Secretary of State Madeleine Albright,[40] German Foreign Minister Klaus Kinkel,[41] and by Secretary-General Kofi Annan, who said that "there are times when the use of force may be legitimate in the pursuit of peace."[42] This statement in particular shows the pattern of the Grotian just war logic. This justification, however, does

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34. *Id.* at 53–60.

35. Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, U.N. GAOR, 25th Sess., U.N. Doc. A/RES/2625 (October 24, 1970), [hereinafter Declaration on Friendly Relations].

36. Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 35 (Apr. 9) ("The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law. Intervention is perhaps still less admissible in the particular form it would take here; for, from the nature of things, it would be reserved for the most powerful States, and might easily lead to preventing the administration of international justice itself.").

37. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 106, ¶ 202 (June 27) [hereinafter Nicaragua] ("The principle of non-intervention involves the right of every sovereign state to conduct its affairs without outside interference; though examples of trespass against this principle are not infrequent, the Court considers that it is part and parcel of customary international law."); *id.* at 108, ¶ 205 ("The principle forbids all States or groups of States to intervene directly or indirectly in internal or external affairs of other States.").

38. ANNE ORFORD, READING HUMANITARIAN INTERVENTION, HUMAN RIGHTS AND THE USE OF FORCE IN INTERNATIONAL LAW 44 (2003).

39. *See* Dinstein, *supra* note 4, at 881.

40. *See* CHESTERMAN, *supra* note 12, at 216.

41. *See* Simma, *supra* note 18, at 13.

42. U.N. Press Release, Secretary General's Statement on NATO Military Action Against Yugoslavia, U.N. Doc. SG/SM/6938 (March 25, 1999), *reprinted in* JEFFREY L. DUNOFF ET AL., INTERNATIONAL LAW: NORMS, ACTORS, PROCESS: A PROBLEM ORIENTED APPROACH 893, *available at* http://www.globalpolicy.org/security/issues/kosovo2.htm.

not imply "that the system as a whole, or even the particular rule that is violated, is in need of improvement."[43]

The "illegal, but legitimate" approach, which rests on arguments of justice, morality, or necessity, comes more from the world of political science or philosophy than from international law. If we start to create exceptions, will we really be able to talk about something like the international rule of law? Nevertheless, it is one of the possible ways to resolve the legal dilemma between human rights protection and the Charter rules on the use of force.

The third approach attempts to assert the legality of unilateral humanitarian intervention, on the presumption that customary international rules allowing self-help survived the Charter and exist in parallel with it.[44] Although the ICJ held in *Nicaragua* that the Charter "by no means covers the whole area of regulation of the use of force in international relations,"[45] and that treaty-law and customary international law "retain a separate existence,"[46] this theory does not seem to be very convincing. All customary international law regulating the use of force in contradiction with Article 2(4) and other Charter provisions ceased to exist after the Charter had been adopted.[47] In this context, Article 2(4) can be viewed as the *lex posterior*. Otherwise, the Charter would have very limited legal significance. Moreover, it cannot be said for sure that unilateral humanitarian intervention was clearly part of pre-Charter customary international law.[48]

The fourth opinion also uses customary international law to defend the legality of unilateral humanitarian intervention. This time, however, the legal basis is not an old rule of customary international law, but rather a new emerging rule. In theory, the Charter could be changed by a new rule of customary international law, which conforms to the general maxim of *lex posterior derodat priori*.[49] Such a rule "derives its law hallmark through the possession of two elements: (i) a material and (ii) a psychological element,"[50] i.e., state practice and *opinio juris*. Therefore, a new rule of the right or even obligation of unilateral humanitarian inter-

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43. Allen Buchanan, *From Nuremberg to Kosovo: The Morality of Illegal International Reform*, *in* HUMANITARIAN INTERVENTION, MORAL AND POLITICAL ISSUES 123, 124 (Alexander Jokic ed., 2003).

44. *See* CHESTERMAN, *supra* note 12, at 53.

45. *See* Nicaragua, *supra* note 37, at 94, ¶ 176.

46. *Id.* at 95, ¶ 178.

47. Carsten Stahn, *International Law at a Crossroads? The Impact of September 11*, 62(1–2) HEIDELBERG J. OF INT'L L., 183, 229 (2002).

48. *See* Beyerlin, *supra* note 14.

49. *See* PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 56 (1997).

50. REBECCA M. WALLACE, INTERNATIONAL LAW 9 (4th ed. 2002).

vention could exist, but only if those two elements are clearly established.

In the history of the twentieth century, it is very hard to find any undisputed case of unilateral intervention with purely humanitarian objectives. After the 1999 Kosovo intervention, the record becomes complicated. The cases where other objectives played a key role include Indian intervention in East Pakistan in 1971, Tanzanian intervention in Uganda in 1978–9, and Vietnamese intervention in Cambodia in 1978–79.[51] The 2003 invasion of Iraq was not justified as humanitarian and certainly does not fulfill the requirement of consistent state practice.

Opinio juris is even harder to prove. As I have already stated above in the case of Kosovo, some leading NATO members made clear that they considered this intervention to be an exception that should not be repeated in the future.[52] Only Belgium even mentioned humanitarian intervention, and then merely as a possible legal justification.[53]

It is obvious that such state practice and *opinio juris* fulfill neither the criteria specified by the ICJ in the *Nicaragua*[54] and *North Sea Continental Shelf*[55] cases nor the definitions provided by legal theory.[56] In addition, if any new customary international law should modify the Charter in the future, it would need to be crystal clear and undisputed, as the Charter is a treaty of constitutional importance.

The last legal opinion on unilateral humanitarian intervention, claiming that this type of intervention is compatible with Article 2(4) of the Charter,[57] is the main subject of this Note. This controversial approach is sometimes criticized as the "Orwellian school of interpretation."[58]

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51. Nicholas J. Wheeler, *Humanitarian Intervention after September 11, 2001, in* JUST INTERVENTION 192, 195 (Anthony F. Lang ed., 2003).

52. *See* CHESTERMAN, *supra* note 12; Simma, *supra* note 18.

53. Jonathan I. Charney, *Anticipatory Humanitarian Intervention in Kosovo*, 32 VAND. J. TRANSNAT'L L. 1231, 1239 (1999).

54. *See* Nicaragua, *supra* note 37, at 97–100, ¶¶ 183–190.

55. North Sea Continental Shelf (F.R.G. v. Den., F.R.G. v. Neth.), 1969 I.C.J. 4, ¶¶ 75–81 (Feb. 20).

56. 1 LASSA OPPENHEIM, INTERNATIONAL LAW 22, para. 17 (1st ed. 1905) ("Jurists speak of a custom, when a clear and continuous habit of doing certain actions has grown up under the aegis of the convictions that these actions are legally necessary or legally right.").

57. Anthony D'Amato, *U.S. Force In Panama: Defenders, Aggressors or Human Rights Activists?: The Invasion of Panama Was a Lawful Response to Tyranny*, 84 AM. J. INT'L L. 516 (1990).

58. *See* CHESTERMAN, *supra* note 12, at 53.

IV. UNILATERAL HUMANITARIAN INTERVENTION AND ARTICLE 2(4) OF THE CHARTER

A. *Subject and Method of Interpretation*

It was suggested above that unilateral humanitarian intervention is compatible with Article 2(4)[59] of the Charter. Under this theory, such intervention violates neither the territorial integrity nor the political independence of any State, as its objective is to stop the atrocities and not to annex part of the State's territory or create a dependent colonial government. Furthermore, unilateral humanitarian intervention is not "inconsistent with the purposes of the United Nations," as stated in the preamble of the Charter. Is such a conclusion supported by careful interpretation of the Charter?

The Charter is sometimes called the "constitution" of the international community. This conclusion is usually made for three reasons. First, the Charter "is a constituent instrument defining the structure of the Organization . . . and the rights and duties of its members. Second, it was intended to endure not just for present, or for foreseeable future, but for 'succeeding generations.'"[60] Third and finally, pursuant to Article 103, it provides for its own primacy over other treaties.[61]

In spite of its importance, the Charter is technically a multilateral treaty subject to regular treaty interpretation according to customary international law. The Vienna Convention cannot be applied retroactively pursuant to its article 4,[62] but articles 31 and 32 can be taken to reflect customary international law; such view was affirmed by the ICJ.[63] In addition, article 5 of the Vienna Convention states that it applies to "any

59. U.N. Charter art. 2, para. 4 ("The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles: . . . 4. 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.").

60. Blaine Sloan, *The United Nations Charter as a Constitution*, 1 PACE Y.B. INT'L L. 61, 116 (1989).

61. U.N. Charter art. 103 ("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.").

62. Vienna Convention, *supra* note 11, art. 4 ("Without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention, the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States.").

63. MALCOLM N. SHAW, INTERNATIONAL LAW 839 (2003).

treaty which is the constituent instrument of an international organization."[64]

Therefore, in the following interpretation of the Charter, I will rely on article 31 of the Vienna Convention,[65] providing for the textual, systematic, and teleological interpretation, and additional tests, and on article 32 of the Vienna Convention,[66] providing for supplementary methods. Although it is possible to use the guidance of the Vienna Convention, it is still true that "treaty interpretation is not an exact science but an art."[67] Sir Fitzmaurice called it a "subject of acute debate and controversy,"[68] which is exactly the case in the interpretation of Article 2(4) of the Charter.

B. *Textual Interpretation*

The key words of Article 2(4) of the Charter are the terms "territorial integrity" and "political independence." Pursuant to article 31(1) of the Vienna Convention, a treaty shall be interpreted "in accordance with the ordinary meaning to be given to the terms of the treaty."[69] And "[t]he usual method of ascertaining this "ordinary meaning" is by recourse to dictionaries."[70]

The Oxford English Dictionary defines "integrity" as "[t]he condition of having no part or element taken away or wanting; undivided or unbroken state."[71] These words imply that the term of integrity has to be read as inviolability.[72] It is difficult to imagine a military action, such as an aerial bombing, that would not violate territorial integrity. After a major military operation, a state hardly remains "unbroken." Therefore, the expansive view of territorial integrity seems to be closer to the "ordinary meaning" than the restrictive one, which claims that when force is used against a state in the form of a humanitarian intervention, such state does not lose any part of its territory.[73]

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64. Vienna Convention, *supra* note 11, art. 5 ("The present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization.").

65. Vienna Convention, *supra* note 11, art. 31.

66. *Id.* art. 32.

67. T. O. ELIAS, THE MODERN LAW OF TREATIES 72 (1974).

68. Sloan, *supra* note 60, at 95–96.

69. Vienna Convention, *supra* note 11, art. 31, para. 1.

70. Bothe, *supra* note 2, at 229.

71. OXFORD ENGLISH DICTIONARY 1066 (J. A. Simpson & E. S. C. Weiner eds., 1989).

72. *See* Albrecht Randelzhofer, *Article 2(4)*, *in* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 106, 117 (Bruno Simma ed., 1994).

73. Albrecht Randelzhofer, *Use of Force*, *in* 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1246, 1251 (R. Bernhardt ed., 1992) ("Incursion into the territory of another State by armed force, for example, remains an offence against Article 2(4), even if there is no

"Independence," pursuant to The Oxford English Dictionary definition, means "[t]he condition or quality of being independent; the fact of not depending on another; exemption from external control or support; freedom from subjection, or from the influence of others; individual liberty of thought or action."[74] Black's Law Dictionary states that "independence" is "a country's freedom to manage all its affairs, whether external or internal, without control by other countries."[75]

As I pointed out earlier, in order to conduct an effective humanitarian intervention, regime change might be necessary. In such a situation, before the legitimate government is created, there would surely be at least a short period of time when the country in question would have to be ruled by some kind of provisional administration, à la the Coalition Provisional Authority in Iraq.[76] As a result of this, the country would not be exempted "from external control or support" or "from the influence of others." Therefore, the "ordinary meaning" of the terms of territorial integrity and political independence do not endorse the unilateral humanitarian intervention.

This expansive approach to Article 2(4) of the Charter was also taken by the ICJ in the *Corfu Channel* case:

> The United Kingdom argued that a minesweeping operation "threatened neither the territorial integrity nor the political independence of Albania. Albania suffered thereby neither territorial loss nor any part of its political independence." Though the argument was not specifically addressed in the judgment, the Court's finding that the operation violated Albanian sovereignty impliedly rejects it.[77]

The second question is how to interpret the second, ambiguous part of Article 2(4) of the Charter. The words "or in any other manner incon-

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intent to deprive the other State of a part of its territory, and the aim of the incursion is a temporary and restricted one, with the prompt withdrawal of troops.").

74. "Independence," *in* OXFORD ENGLISH DICTIONARY, *supra* note 71, at 847.

75. "Independence," *in* BLACK'S LAW DICTIONARY 785 (8th ed., 2004).

76. *See* updates to JEFFREY L. DUNOFF, STEVEN R. RATNER & DAVID WIPPMAN, INTERNATIONAL LAW: NORMS, ACTORS, PROCESS (2002), http://teaching.law.cornell.edu/faculty/drwcasebook/updates13.htm ("The United States and its coalition partners established an interim government, called the Coalition Provisional Authority ('CPA'), to run Iraq in the aftermath of the war. According to the United States and the United Kingdom, the goal of the CPA is 'to provide security, to allow the delivery of humanitarian aid, and to eliminate weapons of mass destruction.' On May 6, 2003, President Bush named L. Paul Bremer III, former ambassador and State Department counterterrorism director, as U.S. civil administrator of postwar Iraq. Bremer arrived in Baghdad on May 12, 2003."); more information available at http://www.iraqcoalition.org/.

77. CHESTERMAN, *supra* note 12, at 50 (quoting Corfu Channel, 3 ICJ Pleadings (1948)).

sistent with the Purposes of the United Nations" might have an inclusive meaning, that any other use of force is also illegal,[78] or an exclusive one, that the use of force consistent with the purposes of the UN is legal. Under a purely textual interpretation, both conclusions are possible. This ambiguity was addressed by the delegate of Brazil at the San Francisco Conference,[79] as will be discussed below. The latter interpretation could open the door of legality to unilateral humanitarian intervention.

C. *Systematic Interpretation*

Systematic interpretation is based on the "context" of other treaty provisions. Together with Article 2(4), other Charter articles must be analyzed. Unilateral humanitarian intervention must be matched with the obligation to settle disputes by peaceful means pursuant to Article 2(3), with the notion of domestic jurisdiction pursuant to Article 2(7), with General Assembly declarations, and also with the powers of the Security Council pursuant to Article 24(1). The relations of unilateral humanitarian intervention with the purposes of the UN according to Articles 1(3) and 55 and the preamble of the Charter will be examined in the section on teleological interpretation.

Article 2(3) of the Charter imposes on UN members the duty to settle their disputes by peaceful means, "in such a manner that international peace and security, and justice, are not endangered." [80] Nevertheless, sometimes a state, through genocide or other crimes under international law, endangers "international peace and security, and justice," and refuses to settle the problem "by peaceful means." Since Article 2(3) deals with "international peace and security, and justice," it would make no sense to interpret this provision as a shield for those who commit these crimes and endanger "peace, security, and justice." In a situation where all diplomatic means have been exhausted, ius cogens rules concerning the basic rights of human beings must take precedence over Article 2(3), according to the general principle of *lex superior derogat inferiori*.

Article 2(7) of the Charter prohibits the UN from intervention "within the domestic jurisdiction of any state."[81] This provision, related

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78. *See, e.g., id.* at 52; Simma, *supra* note 18, at 2.

79. BRIAN D. LEPARD, RETHINKING HUMANITARIAN INTERVENTION: A FRESH LEGAL APPROACH BASED ON FUNDAMENTAL ETHICAL PRINCIPLES IN INTERNATIONAL LAW AND WORLD RELIGIONS 346 (2002).

80. U.N. Charter art. 2, para. 3 ("All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.").

81. *Id.* art. 2(7) ("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 or shall require the Members to submit such matters to settlement under the present

to the doctrine of state sovereignty, deals only with the relationship between the UN and the States. Therefore, Article 2(7) itself is not a legal impediment to unilateral humanitarian intervention, which is by definition conducted by one or more States against another State without UN participation.

Nonetheless, unilateral humanitarian intervention is in conflict with the international customary law principle of non-intervention, the General Assembly's 1970 Declaration on Friendly Relations,[82] and the 1981 Declaration on the Inadmissibility of Intervention.[83] These resolutions cover relations among States.

The often-cited Declaration on Friendly Relations contains "the principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter."[84] The language of the Declaration seems to be analogous to Article 2(7) of the Charter, but in fact, "it clearly goes beyond the various Charter provisions of Article 2."[85] In particular, the Resolution defines more broadly the scope of domestic jurisdiction.[86] Under the Resolution, unilateral humanitarian intervention is *prima facie* illegal. But is this Resolution consistent with current customary international law?

"The concept of domestic jurisdiction signifies an area of internal State authority that is beyond the reach of international law."[87] There is no doubt that the "area of internal State authority . . . beyond the reach of international law" is much smaller today than it was in 1945. Surprisingly, it is hard today to find an internal affair of a State that would be completely beyond the reach of international law. There are certainly matters that still fall under the category of domestic jurisdiction, and matters that are in a "grey zone," and matters that are no longer considered a domestic-jurisdiction issue at all, such as genocide.[88] In this

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Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.").

82. *See* Declaration on Friendly Relations, *supra* note 35.

83. Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States, G.A. Res. 103, U.N. GAOR, 36th Sess., U.N. Doc. A/RES/36/103 (Dec. 9, 1981).

84. *See* Declaration on Friendly Relations, *supra* note 35 (third of seven principles proclaimed).

85. Anthony D'Amato, *Domestic Jurisdiction*, *in* 1 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1090, 1093 (R. Bernhardt ed., 1992).

86. *See* Declaration on Friendly Relations, *supra* note 35 ("No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed 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.").

87. D'AMATO, *supra* note 85, at 1090.

88. *Id.*

extreme situation, however, the defense of domestic jurisdiction or state sovereignty does not work.

Perhaps the most important part of the Charter that must be read together with Article 2(4) is Article 24(1), as well as all of Chapter VII. Article 24(1) of the Charter provides for the Security Council's "primary responsibility for the maintenance of international peace and security."[89] A unilateral action within the multilateral system of the Charter is highly controversial under current circumstances. Speaking *de lege lata*, the power to authorize humanitarian interventions belongs to the Security Council and not to a group of states. Therefore, Article 24(1) makes unilateral humanitarian intervention incompatible with the Charter. Nevertheless, speaking *de lege ferenda*, customary international law or interpretation through practice may enable bypassing of the Security Council in the future. There are some international legal trends that cannot be ignored.

When the ICJ dealt with Article 24 of the Charter in the *Nicaragua* case, it held that "the Charter accordingly does not confer exclusive responsibility upon the Security Council for the purpose."[90] The ICJ meant responsibility within the UN constitutional system in this case, but in an extreme situation, when the Security Council is unwilling or unable to protect the victims of genocide, Article 2(4) may allow transfer of part of this responsibility back to states that are willing and able to act. The subject of transfer would not be the broad "responsibility for the maintenance of international peace and security,"[91] but rather a new "responsibility to protect" the people from serious human rights violations, which was endorsed by the High-level Panel on Threats, Challenges and Change as the "emerging norm."[92]

The concept of the "responsibility to protect" was first recognized by the International Commission on Intervention and State Sovereignty (ICISS) and embraces three specific responsibilities: "to prevent," "to react," and "to rebuild."[93]

The ICISS was an independent body, intended to support the UN, funded by the governments of Canada, the United Kingdom, and

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89. U.N. Charter art. 24, para. 1 ("In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.").

90. Nicaragua, *supra* note 37, ¶ 95 (emphasis omitted).

91. U.N. Charter art. 24, para. 1.

92. *Report of the High-level Panel on Threats, Challenges and Change*, 57, para. 203, U.N. Doc. A/59/565 (2004), *available at* http://www.un.org/secureworld/report.pdf.

93. *Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty*, at XI (Dec. 2001) [hereinafter ICISS Report], *at* http://www.iciss.ca/pdf/Commission-Report.pdf.

Switzerland, and various foundations. Its mandate was to promote a comprehensive global debate on the relationship between intervention and state sovereignty. The ICISS reported back to the UN Secretary-General and the international community on this issue in December 2001.[94] The ICISS report relies on two principles:

A. State sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the state itself.

B. Where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect.[95]

According to its report, the ICISS "is in absolutely no doubt that there is no better or more appropriate body than the Security Council to deal with military intervention issues for human protection purposes. It is the Security Council which should be making the hard decisions in the hard cases about overriding state sovereignty."[96] At the same time, the ICISS admits, however, that if the Security Council "fails to discharge its responsibility to protect in conscience-shocking situations crying out for action, concerned states may not rule out other means to meet the gravity and urgency of that situation—and that the stature and credibility of the United Nations may suffer thereby."[97]

The transfer of the "responsibility to protect" would function as an emergency measure of the UN framework. Such customary international rules or interpretation through practice, however, have not yet developed.

D. *Teleological Interpretation*

Article 31 of the Vienna Convention also provides for teleological interpretation, i.e., interpretation of a treaty "in the light of its object and purpose." Article 2 of the Charter refers twice to "Purposes," first in the initial sentence and then in paragraph 4 itself. One of the purposes of the UN is, pursuant to Article 1(3) of the Charter, as follows:

To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian char-

94. *See* International Commission on Intervention and State Sovereignty website, http://www.iciss.ca/mandate-en.asp.

95. ICISS Report, *supra* note 93, at XI.

96. *Id* at 49.

97. *Id.* at XIII.

> acter, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion . . .[98]

Furthermore, pursuant to Article 55 of the Charter, "the United Nations shall promote universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."[99]

On one hand, "the Charter does not mention protection, but only promotion of human rights, and none of the UN's principal organs have actually been established to deal exclusively with this issue."[100] On the other hand, if we define the purpose of humanitarian intervention as protection of people from the gravest violations of human rights, then humanitarian intervention must be compatible with the above-cited purpose. In addition, the UN itself has moved, since 1945, from promotion to human rights protection, international enforcement, and finally, to the prevention of human rights violations.[101]

The 1993 Vienna Declaration identified protection of human rights not only as a legitimate concern of the international community, but as a "priority objective of the UN."[102] Some writers even mention the promotion of human rights as a "main purpose of the UN" and argue that "there is a necessary link between the maintenance of peace and the respect for human rights."[103]

Nevertheless, according to some international lawyers, the "overriding purpose"[104] or the "paramount goal"[105] of the UN is "to maintain international peace and security" pursuant to Article 1(1) of the Charter. Therefore, they create an artificial hierarchy among particular purposes listed in Article 1 of the Charter.[106] The text and structure of the Charter, however, do not provide any basis for this hierarchy, except that the maintenance of international peace and security is mentioned first.

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98. U.N. Charter art. 1, para. 3.

99. U.N. Charter art. 55 ("With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.").

100. MANFRED NOWAK, INTRODUCTION TO THE INTERNATIONAL HUMAN RIGHTS REGIME 73 (2003).

101. *Id.* at 75.

102. *Id.* at 27.

103. *See* TESÓN, *supra* note 9, at 151–52.

104. *See* MALANCZUK, *supra* note 49, at 310.

105. *See* Randelzhofer, *supra* note 73.

106. *See* CHESTERMAN, *supra* note 12, at 52.

Pursuant to article 31(2) of the Vienna Convention, the context shall also comprise a treaty's preamble.[107] The preamble of the Charter clearly refers to human rights as well:

> We the Peoples of the United Nations Determined . . . to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small . . .[108]

Since respect for human rights is one of the *leitmotifs* of the Charter, the maintenance of international peace and security cannot be understood as the exclusive purpose of the UN. "The use of force to remedy serious human rights deprivations, far from being 'against the purposes' of the UN Charter, serves one of its main purposes."[109] Furthermore, by saving lives, it "may actually further one of the UN's major objectives."[110]

E. *Subsequent Agreements, Subsequent Practice and International Law*

1. Introductory Note

After using the textual, systematic and teleological interpretations of Article 2(4), the treaty analysis is not yet done, since "[t]here is no hierarchy between the various elements of article 31 of the Vienna Convention; rather, they reflect a logical progression."[111] Therefore, pursuant to article 31(3) of the Vienna Convention, three more tests need to be "taken into account, together with context."[112] In addition, the ILC Commentary points out that the three elements in this paragraph (subsequent agreements, subsequent practice, and international law) "are all of

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107. *See* Vienna Convention, *supra* note 11, art. 31, para. 2 ("The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes . . .").

108. U.N. Charter Preamble.

109. TESÓN, *supra* note 9, at 151.

110. James P. Terry, *Rethinking Humanitarian Intervention after Kosovo: Legal Reality and Political Pragmatism*, ARMY LAW 36, 38 (Aug. 2004).

111. Malgosia Fitzmaurice, *The Practical Working of the Law of Treaties, in* INTERNATIONAL LAW 186 (Malcolm D. Evans ed., 2003).

112. Vienna Convention, *supra* note 11, art. 31, para. 3 ("There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.").

an obligatory character and by their very nature could not be considered to be norms of interpretation in any way inferior to those which precede them."[113]

2. Subsequent Agreements

Article 31(3) of the Vienna Convention first mentions "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions."[114] No such formal agreement with respect to Article 2(4) of the Charter has ever been made among UN members. Theoretically, such a subsequent agreement could be constituted by General Assembly resolutions, but these resolutions have a different legal quality than the Charter, so this option is not very convincing.

3. Subsequent Practice

In accordance with article 31(3)(b) of the Vienna Convention, "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" shall be taken into account as well. "The use of subsequent practice in the interpretation of treaties was well established in international law prior to the work of the ILC,"[115] and it was also one of the six interpretation principles "distilled by Sir Fitzmaurice from the jurisprudence of the International Court of Justice."[116]

Subsequent practice used to serve as evidence of original intent.[117] This legal fiction was rejected by the ILC, and under the Vienna Convention, "it is present agreement, not original intent, indicated by practice that is significant."[118] This conclusion is important for the interpretation of Article 2(4), since opponents of unilateral humanitarian intervention often argue based on the original intent of the framers.[119]

The next question is whose practice is relevant? The ILC wanted to avoid during drafting "any possible misconception that every party must individually have engaged in the practice."[120] In addition, "some writers

113. Sloan, *supra* note 60, at 107 (quoting International Law Commission Report).
114. Vienna Convention, *supra* note 11, art. 31, para. 3(a).
115. Sloan, *supra* note 60, at 107.
116. *Id.* at 108.
117. *Id.*
118. *Id.* at 109.
119. *See, e.g.*, MICHAEL GLENNON, LIMITS OF LAW, PREROGATIVES OF POWER: INTERVENTIONISM AFTER KOSOVO 22 (2001).
120. Sloan, *supra* note 60, at 110.

have suggested that in the case of multilateral conventions a 'great majority,' rather than all, of the parties is required."[121]

"Interpretation through practice is a procedure allowing flexibility and organic growth. It is particularly appropriate for documents like the Charter, whether we call it a constitution, a constitutional instrument or a special treaty *sui generis*."[122] "Like subsequent agreements, parties' post-ratification practice may reflect an implicit agreement to revise the original treaty document."[123] "Numerous examples of multilateral treaties being modified by subsequent practice may be found in the Law of the Sea,"[124] but there are also some important examples of the interpretation through practice of the Charter as well.

The first example concerns the voluntary abstention of the permanent members of the Security Council.[125] "[P]eace keeping operations, developed by the General Assembly and subsequently followed by the Security Council, are another example of interpretation or informal amendment through practice."[126] The third example relates to the resolutions of the General Assembly. Although it can only make recommendations under the Charter, it often approves declaratory resolutions.[127] The fourth example is the authorization of coalitions instead of proceeding according to Article 43 of the Charter.[128]

"It is unclear whether this 'general practice' amounted to an authoritative interpretation of the Charter, or to a modification of its provisions by subsequent practice or by the emergence of a new rule of customary international law."[129] Even if it is sometimes difficult to distinguish "the interpretation through practice" from customary international law *in*

121. *Id.*

122. *Id.* at 120.

123. Evan Criddle, *The Vienna Convention on the Law of Treaties in U.S. Treaty Interpretation*, 44 VA. J. INT'L L. 431, 439 (2004).

124. CHESTERMAN, *supra* note 12, at 58.

125. *See* Sloan, *supra* note 60, at 120–21 ("Article 27(3) requires the affirmative vote of nine members including "the concurring votes of the permanent members" for decisions on all matters other than procedure. Practice quickly established that abstentions would not be considered vetoes. While not to be considered affirmative votes, they are in effect counted as 'concurring votes' allowing a resolution to be adopted. This firmly established practice is variously considered either a broad interpretation or an informal amendment by subsequent practice.").

126. *Id.* at 121 ("Peace keeping falls somewhere between peaceful settlement in Chapter VI and Enforcement Action in Chapter VII, but finds no precise authorization in the Charter.").

127. *Id.* at 121–22 ("Nothing in the Charter authorized [the adoption of such resolutions], but from its very first session the General Assembly exercised a right to adopt declarations and has continued to exercise this right without objection. This declaratory function of the Assembly, if not inherent, has been established through interpretative practice or amendment and is long beyond any reasonable challenge.").

128. Thomas M. Franck, *When, If Ever, May States Deploy Military Force Without Prior Security Council Authorization?*, 5 WASH. U.J.L. & POL'Y 51, 54 (2001).

129. CHESTERMAN, *supra* note 12, at 59.

statu nascendi, "[i]t is sufficient to note, for present purposes, that it may be possible to amend the Charter in such a way, though the threshold of requisite practice would be high."[130]

"NATO's attacks on Serbia to stop ethnic cleansing in Kosovo are only the most recent notable example of intervention on humanitarian grounds."[131] Moreover, most states involved in Kosovo did not invoke the "interpretation through practice." Perhaps the only exception is the statement of the Belgian representative made in oral pleadings in the *Legality of Use of Force* case that an armed humanitarian intervention was compatible with Article 2(4).[132]

Other examples include India's 1971 intervention in Bangladesh, Tanzania's 1978 ouster of Idi Amin in Uganda, France's 1979 intervention in the Central African Empire, the use of force in Iraq to protect the Kurds in 1991, and intervention by African states in Liberia and Sierra Leone in the 1990s.[133]

In order to sustain the argument that there is such implicit revision, "one must show that genuine cases of humanitarian intervention are not to be treated as violations of international law, or at least that they are not to be thrown in the same category as other clear-cut, non-humanitarian, uses of force."[134] I agree with Dinstein, who is "apprehensive of any 'creative interpretation' of the Charter, unless it is supported by consistent and uniform practice."[135] Although some writers would disagree,[136] there is no 'consistent and uniform practice' that would confirm expansive interpretation of Article 2(4) of the Charter. Although some of the above-mentioned interventions well might not have occurred but for the presence of independent humanitarian goals, there is no doubt that some of them also involved strategic or security concerns.[137] In addition, this is not reliable state practice of a "great majority" of UN members.

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130. *Id.* at 60.

131. John Yoo, *Using Force*, 71 U. CHI. L. REV. 729, 743 (2004).

132. Legality of Use of Force (Yugo. v. Belg., Yugo. v. Can., Yugo. v. Fr., Yugo. v. F.R.G., Yugo. v. Italy, Yugo. v. Neth., Yugo. v. Port., Yugo. v. Spain, Yugo. v. U.K., Yugo. v. U.S.), Public Sitting, May 12, 1999, Speech of Professor Brownlie, *at* http://www.icj-cij.org/icjwww/idocket/iypo/iypoframe.htm.

133. *See* Yoo, *supra* note 131, at 743. For a detailed description of state practice with regard the humanitarian intervention, see also FRANCK, *supra* note 5, at 216–26.

134. TESÓN, *supra* note 9, at 162.

135. Dinstein, *supra* note 4, at 879.

136. *See* TESÓN, *supra* note 9, at 175–225.

137. *See* NOWAK, *supra* note 100, at 309 ("The Tanzanian government, despite gross and systematic human rights violations committed by Uganda under Idi Amin in the 1970s, did not want the massive military invasion and subsequent overthrow of the regime to be considered a 'humanitarian intervention' (the same is true for other frequently mentioned cases, i.e. humanitarian intervention in Bangladesh or Cambodia)."); Yoo, *supra* note 131, at 743.

4. Relevant Rules of International Law

Article 31(3)(c) of the Vienna Conventions refers to "any relevant rules of international law applicable in the relations between the parties," and includes "any customary law underlying the conventional rule."[138] At the Vienna Conference, the representative of Czechoslovakia commented on the adoption of this subparagraph:

> [I]t was in the interest of the international community to take into account the rules of international law in force at the time of application of the treaty. Principles and institutions of law underwent changes in the course of time . . . . A static interpretation of the law could lead to misinterpretation.[139]

This "principle has occasionally been referred to in the case-law of tribunals, for instance the *Namibia Advisory Opinion*, where the Court stated, in regard to the concepts embodied in Article 22 of the Covenant of the League of Nations,"[140] that:

> The Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law. Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation.[141]

This principle is often called dynamic treaty interpretation.[142] "It is independent of the relevance of subsequent practice and calls for a solution even if there is no practice available that could advocate such a change in the meaning of the word."[143]

The ICJ used the same method for the interpretation of a bilateral treaty in the *Gabčíkovo-Nagymaros Project* case. In this case, the ICJ

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138. MARK EUGEN VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES: A STUDY OF THEIR INTERACTIONS AND INTERRELATIONS, WITH SPECIAL CONSIDERATION OF THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 265 (1985).

139. Sloan, *supra* note 60, at 107.

140. VILLIGER, *supra* note 138, at 264.

141. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 31, ¶ 53 (June 21).

142. Simma, Public Sitting held on November 13, in the LaGrand Case (F.R.G. v. U.S.), ¶¶ 8–11, *at* http://www.icj-cij.org/icjwww/idocket/igus/iguscr/igus_icr2000-26.html.

143. Georg Ress, *Interpretation*, *in* Simma ed., *supra* note 72, at 35.

took into account the latest developments in international environmental law.[144]

If the principle of dynamic treaty interpretation was used to recognize the illegality of South Africa's presence in Namibia and to interpret a treaty in the context of contemporary international environmental law, why could Article 2(4) of the Charter not be read in connection with current human rights law? "In the case of treaties that also operate as the constitutional documents of an international organization, a more flexible method of interpretation would seem to be justified, since one is dealing with an instrument that is being used in order to accomplish the stated aims of that organization."[145] Hambro also took this evolutionist approach. He declared: "The Charter like every written Constitution, will be a living instrument."[146] In addition, "an evolutionary interpretation was already envisaged during the San Francisco Conference."[147]

Since 1945, when the Charter came into force, a lot of things have happened outside its framework. At that time, state sovereignty was still considered to be one of the pillars of the international legal system and there were no international institutions dealing with human rights protection (except perhaps the Nuremberg and Tokyo tribunals). Nowadays, the picture of international law is much more colorful.

First, many human rights documents with different legal force were adopted after the Second World War, including the Universal Declaration of Human Rights[148] and the Genocide Convention.[149] Subsequently, regional systems of human rights protection were developed in Europe, the Americas, and Africa. In particular, under the European Convention on Human Rights, as amended by Protocol 11, an individual can bring a suit directly against his or her own government.[150] The European Court of Human Rights has even decided cases against states involving breaches

144. *See* Gabcíkovo-Nagymaros Project (Hung. v. Slovk.), 1997 I.C.J. 78, ¶ 140 (Sept. 25) ("Owing to new scientific insights and to a growing awareness of the risks for mankind—for present and future generations—of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.").

145. *See* SHAW, *supra* note 63, at 842–43.

146. *See* Sloan, *supra* note 60, at 118.

147. Ress, *supra* note 143, at 36.

148. Universal Declaration of Human Rights, G.A. Res. 217 A (III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (Dec. 10, 1948).

149. *See* Genocide Convention, *supra* note 20.

150. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953).

of human rights related to national security and torture.[151] Similarly progressive is the Inter-American Court of Human Rights,[152] and there are also the human rights protection mechanisms within the UN framework based on the International Covenant on Economic, Social and Cultural Rights[153] and the International Covenant on Civil and Political Rights.[154]

Second, humanitarian law, sometimes referred to as "parallel to the human rights law,"[155] expanded into the sphere of non-international armed conflict, since article 3, common to all four Geneva Conventions,[156] applies to any armed conflict, international or non-international. The next significant step forward was the adoption of the 1977 Additional Protocol II, which applies in all armed conflicts.[157]

Third, even the ICJ has started to deal with legal issues closely related to human rights. This trend began with the *Barcelona Traction* case, where the court recognized obligations *erga omnes*.[158] In the *Legality of the Threat or Use of Nuclear Weapons Advisory Opinion*,[159] the ICJ expressed its opinion on many human rights and humanitarian law problems, although its conclusion was ambiguous. In the *LaGrand*[160] and *Avena*[161] judgments, the ICJ confirmed that the Vienna Convention on Consular Relations creates separate individual rights, even if not human rights. Unfortunately, the human rights record of the ICJ was partly spoiled by the *Arrest Warrant* judgment, where the ICJ found the Belgian arrest warrant against an alleged humanitarian law violator unlawful because of his diplomatic immunity.[162]

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151. *See, e.g.*, McCann v. United Kingdom, 12 EUR. CT. H.R. 97 (1996); Ireland v. United Kingdom, 2 EUR. CT. H.R. 25 (1978).

152. *See, e.g.*, Simma *supra* note 142, para. 14.

153. International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (21st Sess.), 21 U.N. GAOR, Supp. No. 16 at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).

154. International Covenant on Civil and Political Rights, G.A. Res. 2200A (21st Sess.), 21 U.N. GAOR Supp. No. 16 at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

155. JENNIFER M. WELSCH, HUMANITARIAN INTERVENTION AND INTERNATIONAL RELATIONS 74 (2004).

156. In this context, the most important is the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

157. Anne-Marie Slaughter & William Burke-White, *An International Constitutional Moment*, 43 HARV. INT'L L.J. 1, 6 (2002).

158. *See* Barcelona Traction, *supra* note 17.

159. *See* Legality of the Threat or Use of Nuclear Weapons Advisory Opinion, 1996 I.C.J. 254–60, at ¶¶ 68–87 (July 8).

160. *See* LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 494, ¶ 77 (June 27).

161. *See* Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 49, ¶ 124 (Mar. 31).

162. *See* Case Concerning the Arrest Warrant of 11 April 2000 (D.R. Congo v. Belg.), 2002 I.C.J. 18–21, ¶¶ 51–58 (Feb. 14).

Finally, international criminal justice has been booming during the last decade. The Nuremberg and Tokyo Military Tribunals did not have any followers for almost half a century. Then, in the 1990s, the International Criminal Tribunals for Yugoslavia and Rwanda (ICTY and ICTR) were created by Security Council resolutions under Chapter VII.[163] After this, the so called mixed or hybrid courts, like the Special Court for Sierra Leone and the Special Tribunal for Cambodia, were negotiated. Into this process fits also the establishment of the Iraqi Special Tribunal, even if it is a domestic, not international court. [164] The most promising achievement in the field of international criminal justice, however, is the establishment of the permanent International Criminal Court (ICC), although it has limited personal and territorial jurisdiction.[165]

The international community has made remarkable progress in bringing the perpetrators of gravest international law violations to justice. The Security Council itself created the *ad hoc* international criminal tribunals. If the Security Council hypothetically refuses to stop genocide, however, why should a majority of the international community be prevented from doing so?

A group of almost one hundred states became parties to the ICC Statute, which created a permanent court that will prosecute perpetrators of genocide, war crimes, and crimes against humanity. Why can this group not have the right to stop these perpetrators, when the Security Council does not act, at least on the territory of states party? Does the international community really have to wait until the genocide is over?

This development of international law after the Second World War is the broader context of the Charter; therefore, Article 2(4) must be read together with this *corpus* of international human rights and humanitarian law.

F. *Historical Interpretation*

Pursuant to article 32 of the Vienna Convention, supplementary means of interpretation may be used when article 31 "leaves the meaning

163. *See* S.C. Res. 808, U.N. SCOR, 47th Sess., 3175th mtg., U.N. Doc. S/RES/808 (Feb. 22, 1993); S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955 (Nov. 8, 1994).

164. Statute of the Iraqi Special Tribunal, *at* http://www.cpa-iraq.org/human_rights/Statute.htm.

165. Rome Statute of the International Criminal Court, art. 12, U.N. Doc. A/Conf. 183/9 (1998), *available at* http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf.

ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable."[166]

The *travaux préparatoires* seem more to support the restrictive interpretation of Article 2(4) of the Charter, but there is some ambiguity as well. At the Dumbarton Oaks Conference, the Four Powers agreed on the provision, which simply read: "All members of the Organization shall refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the Organization."[167] At the San Francisco Conference,

> Norway proposed to amend the provision to require member states to refrain from the threat of force or any use of force "not approved by the Security Council as a means of implementing the purposes of the Organization"—thus explicitly affirming that only Council authorized threats or uses of force were exempt from the prohibition.[168]

The Norwegian amendment was rejected, which is used as an argument by the proponents of unilateral humanitarian intervention.[169] Subsequently, Australia suggested that the words "against the territorial integrity or political independence of any member state" be added to the text.[170]

> The Australian amendment "provoked considerable discussion." One issue that provoked such discussion was the potentially open-ended character of the language of Article 2(4). The delegate of Brazil said that the change, made in the text to incorporate the Australian amendment had not removed the element of ambiguity . . . and he suggested that . . . the text as it stood at present might well be interpreted as authorizing the use of force unilaterally by a state, claiming that such action was in accordance with the purposes of the Organization.[171]

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166. Vienna Convention, *supra* note 11, art. 32 ("Supplementary means of interpretation: "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

a. Leaves the meaning ambiguous or obscure; or
b. Leads to a result which is manifestly absurd or unreasonable.").

167. LEPARD, *supra* note 79, at 345.
168. *Id.* at 346.
169. *See* TESÓN, *supra* note 9, at 154.
170. LEPARD, *supra* note 79, at 346.
171. *Id.* at 346–47.

The Australian amendment was adopted, and the drafting committee in its final report explained that "the unilateral use of force or similar coercive measures is not authorized or admitted."[172] This conclusion also confirms one of the first commentaries of the Charter, published just one year after the Conference in San Francisco:

> First of all it is stated, although this is the last part of the paragraph, that it is only force in a way inconsistent with the Purposes of the Charter, which is forbidden. This means that the threat or use of force is permitted in connection with the application of measures of collective security.[173]

Surprisingly, a later addition of this commentary speaks in the same place about "a wide range of possible interpretations."[174]

According to Professor Tesón, "one can even argue that the fresh memories from the Holocaust would have led the framers to allow for humanitarian intervention, had they thought about it,"[175] since Nuremberg's human rights message should not be underestimated.[176] Nevertheless, it seems that the framers of the Charter discussed this issue, at least in general terms. At the San Francisco Conference, France had proposed an amendment to the draft Charter that would have authorized states to intervene in another state, "even without authorization of the Security Council, when "the clear violation of essential liberties and human rights constitutes a threat capable of compromising peace."[177] This was rejected, however, in spite of relatively fresh memories of the horrors of the Second World War.

Although the *travaux préparatoires* indicate a broad meaning for the prohibition of the use of force in Article 2(4) of the Charter, in the section dealing with state practice, I mentioned a few developments that were also not envisioned during the preparatory works of the Charter and today, the legality of these "legal innovations" is not questioned. One day, this might be the case for unilateral humanitarian intervention as well.

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172. *Id.*

173. LELAND M. GOODRICH & EDVARD HAMBRO, CHARTER OF THE UNITED NATIONS, COMMENTARY AND DOCUMENTS 67–68 (1946).

174. LELAND M. GOODRICH, EDVARD HAMBRO & ANNE P. SIMONS, CHARTER OF THE UNITED NATIONS, COMMENTARY AND DOCUMENTS 51–52 (1969).

175. TESÓN, *supra* note 9, at 155.

176. *Id.*

177. FRANCK, *supra* note 5, at 207.

V. POLICY REMARKS: OPENING PANDORA'S BOX?

For an international lawyer who believes that a government cannot do to its own people whatever it wants to, the legalization of unilateral humanitarian intervention is a tough dilemma.

The opponents of this type of intervention equate its legalization to the "opening of a Pandora's box."[178] They cite the ICJ's half-century-old dicta from the *Corfu Channel* case,[179] stating that intervention would be reserved for the most powerful states. They further warn against the danger of abuse of the right of unilateral humanitarian intervention, giving examples from the history of the twentieth century to support this argument.[180] They are skeptical about any use of force invoking humanitarian reasons, as stated by Carl Schmitt: "The concept of humanity is an especially useful ideological instrument of imperialist expansion, and in its ethical-humanitarian form it is a specific vehicle of economic imperialism. Here one is reminded of a somewhat modified expression of Proudhon's: whoever invokes humanity wants to cheat."[181]

It is true that the right of unilateral humanitarian intervention could be abused. Nevertheless, any right can be abused. A very good example is the right of self-defense, which was often abused by states in the last century.[182] Is the possibility of abuse a reason for abolishing this right? No state has ever raised this question.

In addition, the opponents stress in a Kantian way[183] the importance of preservation of the international legal order established by the Charter:

> Whatever may be the idealistic rhetoric by which military actions are justified, the system of norms ensuring the peaceful coexistence among nations—what has been known essentially as the "international rule of law"—will not only be gradually undermined but will finally collapse if an equivalent to the old *jus ad bellum* is introduced into international relations. This fact

178. *See* KÖCHLER, *supra* note 29, at 305.

179. *See* Corfu Channel, *supra* note 36.

180. Dino Kritsiotis, *Reappraising Policy Objections to Humanitarian Intervention*, 19 MICH. J. INT'L L. 1005, 1021 (1998) ("The most notorious invocation of the right of humanitarian intervention in modern history occurred when Adolf Hitler claimed that German force was necessary to protect the ethnic Germans resident in Czechoslovakia . . .").

181. CARL SCHMITT, THE CONCEPT OF THE POLITICAL 54 (George Schwab trans., 1996).

182. *E.g.*, the 1931 Japanese invasion of Manchuria; the 1935 Italian invasion of Ethiopia; ANTHONY D'AMATO, INTERNATIONAL LAW: PROCESS AND PROSPECT 31, 37 (1995) (discussing the 1961 Indian invasion of Goa); PIERRE-MARIE DUPUY, DROIT INTERNATIONAL PUBLIC 439 (1995) (addressing the 1979 Soviet invasion of Afghanistan).

183. *See* IMMANUEL KANT, KANT'S PERPETUAL PEACE: A PHILOSOPHICAL PROPOSAL 30–32 (Helen O'Brien trans., 1927).

> cannot be denied, whether the principle is introduced under the pretext of "crisis response operations". . . or of outright "humanitarian intervention."[184]

Therefore, according to the opponents of humanitarian intervention, without Security Council authorization, the only result of its legalization would be the weakening of the restraints on the recourse to force and "fragmentation and regionalization of the international security system."[185] Unfortunately, those who oppose unilateral humanitarian intervention suggest only vague alternative solutions, or more often, no solutions at all.[186]

The UN has been relatively successful in some areas, such as post-conflict reconstruction and nation-building.[187] On one hand, the events in Rwanda and Bosnia-Herzegovina showed that the UN's coordinated effort can be inefficient under circumstances where immediate executive action is needed. On the other hand, NATO's air attacks on Bosnian Serb forces in 1995 produced proposals for the Dayton peace talks.[188] Similarly, the Kosovo campaign proved to be successful in ending incidents of mass atrocities against the civilian population.[189]

Although unilateral use of force might be a solution to the problems of the world, with the U.S. as the only superpower, in the future, there might be a different superpower or the U.S. might abandon the ideals for which it stood in the last century. Therefore, priority should be given to the procedures under Chapter VII of the Charter and its possible reforms. The High-level Panel Report may be a start.[190]

The ICISS made the following proposal: "The Permanent Five members of the Security Council should agree not to apply their veto power, in matters where their vital state interests are not involved, to obstruct the passage of resolutions authorizing military intervention for human protection purposes for which there is otherwise majority support."[191] It is hard to imagine such an agreement under the current situation, but the international community may find some other way around this dilemma.

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184. KÖCHLER, *supra* note 29, at 301.

185. *See* CHESTERMAN, *supra* note 12, at 236.

186. *See, e.g.*, CHESTERMAN, *supra* note 12; KÖCHLER, *supra* note 29.

187. *See, e.g.*, Michael J. Matheson, *United Nations Governance of Postconflict Societies*, 95 AM. J. INT'L L. 76 (2001).

188. Joseph C. Sweeney, *The Just War Ethic in International Law*, 27 FORDHAM INT'L L.J. 1865, 1887 (2004).

189. Eyal Benvenisti, *The US and the Use of Force: Double-edged Hegemony and the Management of Global Emergencies*, 15 EUR. J. INT'L L. 677 (2004).

190. *See* High-level Panel Report, *supra* note 92.

191. *See* ICISS Report, *supra* note 93, at XIII.

The system of collective security, however, makes sense only if it works. It is likely that during the twenty-first century, the Security Council will again be unable to solve Darfur-type crises, since in the contemporary global world, it is very hard to find a place on the Earth where none of the permanent members of the Security Council has interests.

The best example is the position of the superpowers towards the current events in the Sudan. U.S. Secretary of State Collin Powell declared that genocide is being committed in Darfur.[192] "Never before has a sovereign nation invoked the Genocide Convention to characterize another conflict. This was partially due to fears that the Convention required action to 'prevent' genocide from all its signatories."[193]

But would China, for example, authorize humanitarian intervention against the Sudanese government? Probably not, given the oil concessions granted to Chinese companies by that very government in Southern Darfur.[194] Such sensitive questions sometimes do not even reach the Security Council because the result is known beforehand. Nonetheless, "genocide is an on-going process that can be stopped."[195]

If the international community fails to reform the UN, it may legalize unilateral humanitarian intervention either by developing customary international law or by re-interpretation of the Charter through practice. One of the possible changes is to abolish the veto of the permanent members for cases of genocide.

Unilateral humanitarian intervention would not necessarily cause the destruction of the UN system, even if it could further decrease the role of Security Council. The Security Council might be forced to deal with more issues than it deals with now. It would be aware that if it does not act, others would. Thus, the right of unilateral humanitarian intervention might paradoxically revive the Security Council.

Should the legality of unilateral humanitarian intervention be established, the exercise of this right would have to be subject to strict limitations that could be prepared by the ILC and then passed at least as a General Assembly resolution, like the Draft Articles on Responsibility

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192. Secretary Colin L. Powell, Testimony Before the Senate Foreign Relations Committee, Washington, D.C. (Sept. 9, 2004), *at* http://www.state.gov/secretary/former/powell/remarks/36042.htm ("When we reviewed the evidence compiled by our team, and then put it beside other information available to the State Department and widely known throughout the international community, widely reported upon by the media and by others, we concluded, I concluded, that genocide has been committed in Darfur and that the Government of Sudan and the Jingaweit bear responsibility—and that genocide may still be occurring.").

193. Jamal Jafari, *"Never Again," Again: Darfur, the Genocide Convention, and the Duty to Prevent Genocide*, 12(1) HUM. RTS. BRIEF 10 (2004).

194. Oil Concessions in Central & Southern Sudan, http://www.rightsmaps.com/html/sudmap2.html.

195. Jafari, *supra* note 193, at 8.

for Internationally Wrongful Acts. The ILC could use as a basis the report of the International Commission on Intervention and State Sovereignty.[196] The following general limitations would have to be imposed on unilateral humanitarian intervention:

First, a declaration of an independent international institution that serious breaches of humanitarian law have been committed, such as genocide and crimes against humanity, should be required. "G. Robertson has suggested that a declaration by judges of the ICC formally confirming its prosecutor's indictment of the head of the offending government might provide the trigger."[197] Nevertheless, it is questionable whether such declaration would also operate against non-party states and whether it would not be too late. The determination could also be made by the ICTY or ICTR, or even by the International Committee of the Red Cross (ICRC).

Second, all available remedies would have to be exhausted, such as diplomatic negotiations and economic or other sanctions. This is called, in the ICISS report, the "last resort principle."[198] The issue of humanitarian intervention could then be brought to the Security Council, unless there were a clear previous statement from a permanent member that such a resolution will be vetoed. In case of a veto, the military operation would be launched as a unilateral humanitarian intervention. The use of military force would have to follow all principles of the law of armed conflict, such as the requirements of necessity and proportionality.

Third, if it is necessary to overthrow the government in order to stop serious breaches of international law, democratic elections and the withdrawal of the intervention forces should be accomplished as soon as possible and with broad UN involvement, since "[m]ilitary force is more likely to be effective in stopping atrocities and restoring basic security than in addressing the underlying factors that lead to atrocities."[199]

VI. CONCLUSION

Dealing with the different types of humanitarian intervention, I drew a distinction between humanitarian interventions authorized by the Security Council and those without UN mandate. While the legality of the former is now widely accepted, the legality of the latter is being discussed. In my note, I concentrated primarily on the question of whether

196. ICISS Report, *supra* note 93, at XII.

197. CHESTERMAN, *supra* note 12, at 229.

198. *See* ICISS Report, *supra* note 93, at XII.

199. Jane Stromseth, *Rethinking Humanitarian Intervention*, *in* Holzgree & Keohane, *supra* note 5, at 269.

unilateral humanitarian intervention is compatible with Article 2(4) of the Charter.

In the introduction, I stated that the Grotian idea of unilateral humanitarian intervention comes from the "just war doctrine," which is based on both legal and moral grounds. As a result of its origin, this intervention wrestles with the positivist system of international law and the Charter, its constitution. I attempted to separate the idea of unilateral humanitarian intervention from its just war "life jacket," to see whether it can survive alone on the "seas" of Article 2(4). The outcome of my inquiry is that it cannot.

As a basis for the analysis of Article 2(4), I used the Vienna Convention. First, I started with the textual interpretation and I found that the ordinary meaning of the terms "territorial integrity" and "political independence" is incompatible with unilateral humanitarian intervention. Nevertheless, the last part of Article 2(4), referring to the use of force "in any other manner inconsistent with the purposes of the UN," can be understood either as allowing or prohibiting unilateral humanitarian intervention.

Second, within the systematic interpretation, I concentrated on the relation of unilateral humanitarian intervention to Articles 2(3), 2(7), and 24(1) of the Charter, and also on General Assembly resolutions. Article 24(1) in particular, which provides for the Security Council's "primary responsibility for the maintenance of international peace and security," makes unilateral humanitarian intervention incompatible with the Charter.

Third, I focused on the purposes of the Charter and concluded that there is no hierarchy among them. The maintenance of international peace and security cannot be understood as the exclusive purpose of the UN in the twenty-first century.

Then I moved to the specific tests under article 31(3) of the Vienna Convention. First, I have not found "any subsequent agreement" among the UN members on the interpretation of Article 2(4).

Second, I turned to "subsequent practice." In modern treaty interpretation, the practice of states and international organizations plays an important role.[200] Furthermore, in cases of the constitutional documents of an international organization, the concept and nature of subsequent practice possesses an added relevance.[201] I did not find, however, the consistent and uniform practice that would serve as a basis for the legalization of unilateral humanitarian intervention.

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200. *See* Bernhardt, *supra* note 14, at 1421.
201. *See* SHAW, *supra* note 63, at 843.

As a third test, I reviewed "any relevant rules of international law," in particular the development of international human rights law in the last fifty years, which could serve as an argument for the legalization of unilateral humanitarian intervention.

In addition, the historical interpretation also contradicts the compatibility of unilateral humanitarian intervention with Article 2(4) of the Charter.

Speaking *de lege ferenda*, unilateral humanitarian intervention may be legalized in the future by customary international law, interpretation through practice, or by the formal procedure under Articles 108 and 109 of the Charter.

Speaking *de lege lata*, however, the international lawyers supporting the idea of unilateral humanitarian intervention will have to rely on the "illegal, but legitimate" approach. As Franck stated, "legal systems worldwide accept the need for some such way out of the *conundrum* in which good law, strictly enforced, conduces to a result which opens an excessive chasm between law and the common moral sense."[202]

This doctrine absorbs into international law the principles of morality and necessity. In the sphere of these principles, the idea of unilateral humanitarian intervention can survive. In fact, this idea is inseparable from these principles, as I ascertained in this Note. The ICISS, which considers "large-scale loss of life" or "large-scale ethnic cleansing" to be a "just cause" for humanitarian intervention, probably came to the same conclusion.[203]

Since the monopoly of the legal positivists has been challenged since the end of the Second World War,[204] and a certain skepticism has begun to gnaw at its roots,[205] the "illegal, but legitimate doctrine" might be the right answer in extreme situations.

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202. FRANCK, *supra* note 5, at 214.

203. *See* ICISS Report, *supra* note 93, at XII.

204. *See* Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 649 (1958).

205. *See* FRANCK, *supra* note 5, at 210.