Yale Human Rights and Development Law Journal
2003

Article

*45 NORMATIVITY IN INTERNATIONAL LAW: THE CASE OF UNILATERAL HUMANITARIAN INTERVENTION

Daphné **Richemond** [FNd1]

This Article argues that the ambiguous normative regime currently governing unilateral humanitarian intervention provides an adequate legal framework for such intervention. The Article reviews the arguments typically made in support of a codified, strict normative regime, finding that strict normativity is unlikely to deter human rights violators more effectively than the current framework. In addition, the Article points out that any effort to codify a norm of unilateral humanitarian intervention faces formidable obstacles. Such an effort must overcome the conflict between the traditional doctrine of state sovereignty and emerging principles of human rights, as well as practical difficulties in reaching international consensus on the content of a codified norm. A permissive legal regime, while imperfect, provides adequate safeguards against abuse, acknowledges the exceptional nature of unilateral intervention, benefits both intervening and target states, and protects human rights. Although the Article argues that normative ambiguity is the only viable legal regime at this time, it recognizes strict normativity as an ideal towards which the international community should strive.

*46 I. Introduction

The lawfulness of unilateral humanitarian intervention has long been a subject of academic discussion, fueling a debate over whether or not a new norm of customary international law has emerged. A critical observation dominates this debate: Unilateral humanitarian intervention is frequently considered unpredictable, its legal regime ambiguous, and its recourse too selective. Many scholars have expressed the view that these problems could be solved if there were more normativity in this area of international law. Yet, all too often, the proponents of codification have neglected to consider the negative aspects of a clear norm of unilateral humanitarian intervention, or, alternatively, what the advantages of the current "flawed" regime might be. In large part due to human rights concerns, they have taken for granted the notion--deeply rooted in legalistic minds--that norms are best expressed in codified laws. [FN1]

Today's regime of unilateral humanitarian intervention is that of a chiaroscuro, somewhere between dawn and sundown. Is this chiaroscuro satisfactory or would legal clarity benefit the international system? This Article looks critically at the regret expressed by many internationalists that no adequate regime of unilateral humanitarian intervention currently exists and challenges the prevailing notion that a clearly defined norm of unilateral humanitarian intervention would a priori be more desirable than not having one. Many analyses overlook the question of whether it is more desirable to have a rule of unilateral humanitarian intervention capable of dealing with complex humanitarian crises, or whether the absence of a clearly defined rule suffices for the purposes of international law and the protection of human rights. [FN2] This Article argues that, given the present state of the international system, the codification of a precise norm may not be

preferable to the ambiguous regime currently in place.

Ideally, unilateral humanitarian intervention should be circumscribed within a clear legal framework, [FN3] which would promise consistency and predictability. However, in an international society where inequalities and imbalances prevail over democracy and respect for human rights, the conditions simply do not exist for the realization of the strict normative approach. Until the time becomes ripe for the adoption of a stricter normative approach, the international community should make the most of ***47** the current ambiguous regime.

The debate over codification reflects a broader query of legal theory. Legal jurisprudence has long hesitated between rules and standards, between specificity and "ambiguity." [FN4] In the context of unilateral humanitarian intervention, this hesitation may be characterized as one between two legal perspectives: "Strict normativity" and "normative ambiguity." Strict normativity would entail the adoption of a "strict" or clear legal framework for the doctrine of unilateral humanitarian intervention. Such a framework would set out the limited instances in which unilateral humanitarian intervention can be conducted lawfully (ad bello) and determine which rules govern its conduct (in bello). Normative ambiguity, in contrast, would maintain the flexible and ambiguous status quo that enables states to have recourse to ad hoc diplomacy. [FN5] Before discussing these two perspectives, it is instructive to review briefly the development of unilateral humanitarian intervention and clarify terminology.

Unilateral humanitarian intervention is a military intervention undertaken by a state (or a group of states) outside the umbrella of the United Nations in order to secure human rights in another country. [FN6] Initially, intervention (before being called unilateral humanitarian intervention) was intended as a means to protect one's own nationals abroad. During the Cold War, states' interventions on foreign territory were justified under the right to self-defense [FN7] or a combination of other ***48** motives, not under a general right to intervene on humanitarian grounds. [FN8] With the end of the Cold War, however, states began approaching humanitarian intervention as a way to protect other states' nationals and have increasingly relied on Chapter VII of the U.N. Charter, significantly broadening the scope of the doctrine of humanitarian intervention. [FN9]

From the outset, the practice was criticized as legitimizing interference in another state's internal affairs, contrary to well-entrenched principles of international law. [FN10] When expanded to the mistreatment of any human being in any country, what increasingly appeared as a doctrine of intervention seemed all the more threatening to certain states, and dubious to many scholars. After losing its initial justification--namely, the guarantees attached to a person's nationality--individuals began questioning the lawfulness and legitimacy of unilateral humanitarian intervention.

While some states have rejected the idea of a right to intervene, [FN11] the academic world remains divided on the legality of unilateral humanitarian intervention. While a number of scholars recognize the lawfulness of the practice, [FN12] others maintain that it violates Article 2(4) of the U.N. Charter [FN13] ***49** (prohibition on the use of force) and the sacredness of the principle of state sovereignty. [FN14] Today, in part because of these uncertainties, the legal regime of unilateral humanitarian intervention is unclear. A review of each of the words comprising the concept highlights how difficult it is to define.

• Unilateral. [FN15] Regardless of the number of states participating in a humanitarian intervention, the intervention remains unilateral so long as the operation is not supervised by the United Nations. Humanitarian interventions authorized by the U.N. are therefore excluded from the scope of this Article. Similarly, it is beyond this Article's scope to determine when a given operation ceases to be unilateral and becomes collective. For example, some argue that the intervention in Kosovo, undertaken by a regional organization (NATO), was collective in nature. [FN16] Nevertheless, NATO's intervention in Kosovo is regarded here as

falling within the meaning of “unilateral,” simply because it took place without the U.N. Security Council's authorization. [FN17]

• Humanitarian. Even though many interventions have been justified as humanitarian, one can doubt whether the motives of the intervening state were truly humanitarian. In fact, intervening states seldom portray their intervention as solely humanitarian, and often refer to additional justifications for their action. [FN18] The wide range of justifications invoked in support of a given intervention tends to undermine the humanitarian nature of such intervention. [FN19] For this reason, some have asked whether military ***50** intervention for humanitarian purposes exists at all. [FN20] This Article will accept the possibility of a truly humanitarian intervention.

• Intervention. Finally, the task of defining with precision what intervention means is complicated by the fact that the nature and modalities of the military operation itself do not answer to a given, immutable pattern. Because the conduct varies from one intervention to another, “it is impossible to be too rigorous in abstract legal terms about the doctrinal contours of interventionary practice.” [FN21]

For the purposes of this Article, it is assumed that unilateral humanitarian intervention--lawful or not--has become a reality of international law. As Secretary General of the United Nations Kofi Annan said, “we need to adapt our international system better to a world with new actors, new responsibilities, and new possibilities for peace and progress.” [FN22] Hence, this Article will focus on whether there should be rules to govern unilateral humanitarian intervention, rather than on the lawfulness of the practice itself.

As the attempt to define it shows, unilateral humanitarian intervention is a malleable concept, which makes its justifications, practice, and prospects difficult to grasp. [FN23] Would a stricter normative framework ease the task at all? Section II, immediately following this introduction, argues that codification would not necessarily help “pin down” unilateral humanitarian intervention.

Section III takes a fresh and more controversial look at intervention. It suggests that a permissive regime already governs this area of international law. It also acknowledges the exceptional character of the remedy of unilateral humanitarian intervention and the advantages of keeping it unofficial and limiting its use. Finally, the section shows that--despite the advantages normative ambiguity holds in the short term for the intervening state, the target state, and human rights--normative ambiguity may not be a viable option in the long term.

The concluding picture--a triptych--illustrates the normative evolution of the doctrine of unilateral humanitarian intervention: The first panel of the triptych corresponds to the present state of this development (what the law is, or normative ambiguity), the second symbolizes the phase of the doctrine's normative development to which the international community can realistically aspire (what the law can be), and the third ***51** panel represents the “messianic” phase of this development, i.e., strict normativity (what the law ought to be).

II. Strict Normativity

This section examines the desirability of advocating a formal doctrine of unilateral humanitarian intervention. The strict normativity approach entails the formulation of a clear norm of unilateral humanitarian intervention, thereby reinforcing the normative regime currently in place. This section dissects the most commonly acknowledged virtues of strict normativity (deterrence, the anticipation of states' behavior, and the legitimacy of international law), and concludes that, upon closer inspection, some of these virtues are questionable.

A. The Benefits of Strict Normativity

1. Deterrence: A True Virtue?

Norms, and, to a certain extent, international norms, are expected to achieve dissuasion and compliance. [FN24] In order to regulate states' behavior effectively, international norms should dissuade states from acting in violation of negative norms (such as the prohibition on the use of force), as well as encourage states to comply with positive obligations (such as diplomatic immunity).

The proponents of codification support the view that formulating a formal doctrine would increase the level of deterrence, while promoting fairness [FN25] and norm-internalization. [FN26] This section looks at certain types of deterrence to determine the validity of this claim.

• A true virtue: Deterrence of abusive interventions. If the doctrine were enunciated as a formal norm, states would be less tempted to engage in unjustified or abusive interventions, and to respond disproportionately to other states' interventions. [FN27] The underlying concern is that interventions undertaken in the name of human rights should not be used as a disguise for more abuse. Such abuse cannot be prevented in the absence of a standard that assesses and distinguishes specific interventions. A strict ***52** norm would provide a solid frame of reference by clarifying what is to be condemned and why, thus defining what constitutes abusive intervention. [FN28]

Ideally, codification would enable the international community to spot and condemn “a thinly disguised imperial intrusion designed to assure the perpetuation of an ideologically congenial political and social structure,” and prevent unilateral humanitarian intervention from becoming “a mask for garden-variety of aggression.” [FN29] An objective standard would thus facilitate the assessment of an intervention's legitimacy, and the detection of unfounded claims of human rights violations. [FN30] In turn, unequivocal condemnations of abusive interventions would gain in meaning and effectiveness. By limiting abusive interventions, a clear international law norm may increase deterrence.

• Another true virtue: Strict normativity contributes to conflict prevention. This argument suggests that the mere threat of intervention--and the existence of clear norms governing such intervention--would create incentives to contain internal conflicts. [FN31] Through the codification of unilateral humanitarian intervention, the international community would declare that whenever a conflict arises on a state's territory and gross violations of human rights arise, the international community has the right, under certain conditions, to enter that state's territory and defend the population that has been deprived of its rights. [FN32] Such a declaration, ***53** coupled with a stricter legal framework, might deter conflicts from arising ab initio: Acting as a deterrent, strict normativity would slow the emergence of internal conflicts (or, if not the conflict itself, its deterioration into a humanitarian disaster) where hatred often takes precedence over humanity. [FN33]

• A false virtue: Strict normativity would not better deter human rights violators. The hope has been expressed that a clearer legal framework of unilateral humanitarian intervention would more effectively deter human rights violators. Under the current regime of unilateral humanitarian intervention, a lack of evaluating criteria and the a posteriori assessment of the legality of unilateral intervention open the door to subjectivity and selectivity in the application of international law. [FN34] As a result, unilateral humanitarian intervention projects an image of weakness and fails to deter human rights violators. To palliate such “cynicism,” [FN35] Tom Farer advocates a “clear, consistent, and morally appealing policy,” [FN36] or, in other words, more normativity. Yet, it is arguable whether strict normativity would achieve such goals.

Alternative, or complementary, ways to deter human rights violators have been suggested. Emphasizing the importance of complementary deterrents, U.N. Secretary General Kofi Annan suggests that de-

terrence includes both military intervention and the establishment of tribunals. [FN37] In Annan's view, clarification of the doctrine as well as criminal prosecution are needed. [FN38] Another way to achieve deterrence would be to increase accountability. Often less costly than military intervention--at least politically, if not financially--holding individuals responsible under international law may also be a deterrent, especially if accountability is coupled with the establishment of international tribunals.

To the extent that deterrence of human rights violators can be achieved through better accountability rather than military intervention, there is no urge to codify unilateral humanitarian intervention, especially given the ***54** costs and the complexities of such codification. [FN39] In sum, if its sole purpose were to deter human rights violators, codification would not be necessary.

After deterrence, we now turn to the second major argument expressed in favor of strict normativity: The anticipation of states' behavior in the conduct of unilateral humanitarian intervention.

2. Predictability

Today, the absence of an effective deterrent and the vagueness of the legal regime governing unilateral humanitarian intervention preclude the anticipation of states' in situations likely to trigger foreign intervention. Not only is it exceedingly difficult to anticipate whether a state (or group of states) will intervene in a given situation, it is nearly impossible to predict how a state might conduct such an intervention. Even more unpredictable are the reactions of the target state and the international community. To compensate for the disadvantages arising from this unpredictability, the option of strict normativity offers advantages. A clearly formulated rule would facilitate anticipation of states' behavior, contributing to an increased level of world security.

The argument that an increased degree of normativity would bolster predictability recurs. As Vaughan Lowe observes, “the persuasiveness of the. . .goals of certainty and predictability within the legal system are advanced if there is a consistent principle that motivates the individual instances of resolutions of conflicts between the principles.” [FN40] The need for clarity for purposes of predictability also has recently been expressed by the British House of Commons' Committee on Foreign Affairs, which stressed the need for a non-ambiguous legal framework with respect to military interventions: “When the law is clear, there can be consensus; when there is ambiguity, international stability and the mechanisms of collective security set up through the United Nations are threatened.” [FN41]

It is hoped that, with the codification of unilateral humanitarian intervention, states would modify their behavior to comply with the new norm, creating a predictable pattern of behavior over time. This argument rests on the observations that states generally try to justify their action through legal standards, suggesting that legal standards do affect state behavior, at least to some extent. [FN42] Accordingly, state behavior may be modified via legal norms. Contrarily, in the absence of clear norms, any bearing on state behavior is lost and no sort of predictability can be ***55** achieved: “[A] subjective evaluation of each case would not modify [states'] behavior because there is no standard by which a state might evaluate its future actions.” [FN43] Yet, even in the presence of norms, including a norm of unilateral humanitarian intervention, the rule of power may deceive an international lawyer's expectations.

Rule of Power and Rule of Law. Indeed, the question remains whether an international norm would succeed in regulating--or at least homogenizing-- states' behavior to allow for more predictability. It is the function of international law to normalize interactions between states and hold states accountable to a set of laws. Yet, states are by their very nature loci of control: sovereign states do not act as much according to the rule of law as they do to the rule of power. This tension, frequently noted in the realm of international law, strikes again with respect to unilateral humanitarian intervention.

That unilateral humanitarian intervention is a highly politicized area of international law should not prevent a clear legal framework from being adopted. [FN44] To craft a pragmatic legal regime without compromising significant normative ideals, the right balance between law and power should be struck. As Richard Falk asked: “How can the role of international law be strengthened without raising expectations too high? How can the constraining impact of geopolitics be acknowledged without undermining the relevance of international law?” [FN45] Many different proposals have attempted to reconcile the rule of power and the rule of law. The best approach would incorporate the various parameters that influence state behavior into the newly enunciated norm, allowing the decision-maker to “work around” the norm depending on the political stakes. Such an approach would place unilateral humanitarian intervention squarely within the realm of the law, while allowing for limited considerations of power. A few other proposals--of varying interest--are briefly outlined below.

Insisting on the “legal” character of humanitarian intervention, Tom Farer argues that, were norms applied objectively and consistently, a “legal” conception of human rights would prevail over a “political” one: “Human rights are not ‘political’; they are legal, recognized norms of behavior binding on all governments and international institutions. As long as they are applied objectively and consistently, the complaint of ***56** political intervention has no standing.” [FN46] Unfortunately, Farer's perspective bets too much on consistency to constrain political contingencies.

Rationalist scholars suggest a distinction between what they call “low politics” and “high politics.” Whereas “low politics” would be subject to international legal norms, “high politics” would not. An example of “high politics,” where the interests at stake were too important for legal norms to prevail, is the U.S. intervention in Grenada in 1984. Under this distinction, two standards of legality would co-exist in international law and legal norms would only be relevant in minor issues. The distinction between low and high politics does not satisfactorily explain how a codified norm of unilateral humanitarian intervention would successfully operate. To the contrary, it considerably undermines the weight and importance of international norms, which become mere tools in the pursuit of a state's political aspirations. Furthermore, it is unclear whether unilateral intervention would belong in high or low politics.

In the effort to resolve the tension between law and politics in the context of humanitarian intervention, some authors have argued in favor of reinforcing the United Nations' role in the conduct of humanitarian intervention. [FN47] The U.N. mandate would be expanded to provide for mandatory intervention whenever certain conditions are met. If the U.N. had a duty to intervene, all humanitarian interventions would be collective, and unilateral intervention would become an empty shell. By eliminating unilateral intervention altogether, this proposal only indirectly solves the question of the rule of power. [FN48]

Interestingly, others argue in favor of a duty for states to act (as opposed to a duty for the U.N. to act), which would minimize selectivity by compelling states to intervene in some cases and prohibiting them from intervening in other cases. Bernard Kouchner first raised the idea of a duty to act for humanitarian purposes (devoir d'ingérence). [FN49] This idea, widely criticized, cannot at this time provide a solution to the predominance of the rule of power in the conduct of unilateral humanitarian intervention. [FN50]

***57** According to Kofi Annan, the “common interest” should determine when the international community intervenes, thus allowing humanitarian intervention to distance itself from the ups and downs of politics. [FN51] Yet Annan acknowledges that until a common understanding of what the “common interest” means is reached in the Security Council, the doctrine of humanitarian intervention will remain unclear and inconsistent. At least for the time being, recourse to the “common interest” does not adequately address the issue of power and how to constrain political interests.

Another alternative would be to measure the necessity of humanitarian intervention according to its con-

sequences, rather than its causes: Will human rights be worse off as a result of the intervention? Even if a result-oriented approach cannot provide an answer to all situations, it does ensure that political interests guiding unilateral humanitarian intervention do not override the imperative to protect human rights. It also provides a pragmatic, easy-to-implement solution to humanitarian intervention. [FN52]

To maximize the weight of norms in the context of unilateral humanitarian intervention, the new doctrine should be formulated to echo the realities of the international system. A rule-oriented approach can reduce manipulative capacities, but "if definite standards become too non-policy-responsive for the full range of varied contexts in which they are to be applied, they will simply be disregarded." [FN53] In other words, if the rule is ***58** too unbending, there will be no compliance. The doctrine should therefore accommodate the factors influencing state behavior--including, to a certain extent, political stakes--while also allowing for a "pinch" of selectivity. [FN54]

To conclude, the recurrent argument that a codified norm of unilateral humanitarian intervention would bolster predictability stands only so long as such a norm is internalized by states as one of the primary factors influencing their decision-making processes. The most efficient way to achieve such internalization would be to incorporate the factors that influence states' behavior into the norm, thereby making the outcome of the norm responsive to these factors. Only then would strict normativity allow for more predictability of states' behavior in the conduct of unilateral humanitarian intervention.

3. Legitimacy

The third major argument in favor of strict normativity holds that codification would enhance the legitimacy of international law. [FN55] It has been suggested that leaving such an important part of international interaction outside the reach of international law is highly problematic. [FN56] The regime of unilateral humanitarian intervention currently strikes by its selectivity and the number of ad hoc responses, triggering the traditional criticisms that international law is not really a system of law because it neither regulates states' behaviors effectively nor succeeds in providing reliable guidelines for states' actions. [FN57]

The supporters of strict normativity argue that a clearly formulated rule of unilateral humanitarian intervention would enhance international law's legitimacy by allowing for greater coherence and fewer arbitrary decisions. [FN58] In the words of the International Independent Commission on Kosovo, "[the current regime of humanitarian intervention] reinforces an impression of double standards." [FN59] Similarly, Burton insists that a codified ***59** right of unilateral humanitarian intervention, as opposed to a "de facto approach," would enhance international law's legitimacy "by bringing doctrine in line with practice." [FN60]

International law's credibility would certainly benefit from a stress on the importance of its norms. Yet, a doctrine of unilateral humanitarian intervention could be rendered meaningless if it were subject to conflicting interpretations and invoked to justify a wide range of military interventions. Addressing the issue of legitimacy--albeit in relation to the concept of self-defense--Sir Arthur Watts commented: "[T]o stretch the concept [of self-defense] to such an extent that it departs from the ordinary meaning of the term, as refined by judicial pronouncements, serves not only to undermine this particular branch of the law, but also to bring the law in general into disrepute." [FN61] Sir Arthur's argument holds equally with respect to unilateral humanitarian intervention. The evolution of the concept of self-defense has shown that the existence of a norm does not suffice to create legitimacy or to avoid conflicting and far-fetched interpretations. Thus, legitimacy may be enhanced, but only if both conditions are fulfilled: Codification of the norm and application and interpretation consistent with-- and limited to--its original purpose.

In summary, the chief assets of strict normativity are deterrence of abusive interventions, the prevention of conflicts, the anticipation of states' behavior and--to a limited extent--legitimacy.

B. Strict Normativity: What the Law *Ought* To Be

This Article shows that a number of conditions, including flexibility of the norm and norm internalization, must be fulfilled for strict normativity to fulfill its promise. Because these conditions will not easily be met and because strict normativity poses additional problems, as outlined infra, strict normativity is unlikely to be achieved in the near future. Strict normativity is desirable, as its virtues attest, yet unattainable at the moment: It represents what the law ought to be.

The first major problem with strict normativity stems from the belief that the principle of state sovereignty still dominates international law. The second problem arises from the magnitude of the challenge of getting states to agree on a possible rule of unilateral humanitarian intervention. Even though the international community is moving towards the recognition of a more human-rights-oriented meaning of sovereignty, finding the appropriate instrument to embody a new norm of unilateral humanitarian intervention remains an obstacle to the codification of the doctrine.

1. State Sovereignty and Human Rights ***60** How can the international community avert crimes against humanity while at the same time respecting the rule of international law and the sovereignty of nation states? [FN62]

The principle of non-interference in the affairs of another state is a corollary of the principle of state sovereignty. All-powerful within its territory, the state is sovereign when dealing with internal matters and no authority exists outside its own. By permitting one state to tell another state how it should treat its citizens internally, humanitarian intervention is at odds with the principle of sovereignty. [FN63]

Although a consensus has emerged, the concept of sovereignty has undergone substantive changes since the adoption of the U.N. Charter in 1945; still, a few scholars remain attached to the traditional, absolute idea of state sovereignty. [FN64] Louis Henkin, in his famous piece on sovereignty, admits that the traditional concept of sovereignty has evolved: “[S]omething happened to that ‘S' word in the twentieth century,” namely, a change in the notion of national sovereignty took place under the pressures of twentieth century views of sovereignty and human rights. [FN65] In Henkin's view, attention to human rights has led to a “significant erosion of state sovereignty.” [FN66] This erosion, Henkin argues, will lead to the abandonment of traditional concepts of sovereignty for the sake of “human values,” announcing the victory of human rights over stricto sensu state sovereignty. [FN67]

Acknowledging these changes, Richard Falk does not view sovereignty as an obstacle to the recognition of a right of unilateral humanitarian intervention. [FN68] Although unilateral intervention distances itself from the ***61** traditional deference international law accorded to state sovereignty, it echoes a modern, moral, and philosophical approach to international law. [FN69] The emerging belief maintains that the traditional understanding of state sovereignty should yield before considerations of human dignity and morality.

The transformation of the concept of state sovereignty is also noted by U.N. Secretary General Kofi Annan. [FN70] When asked how to balance a nation's desire for its own sovereignty with protection against international intervention for human rights abuses, Annan replied that, although he understands a state's concern for its sovereignty, “the traditional concept of sovereignty is being changed by the developments in the world today.” [FN71] Human rights, like many other attributes of the state--such as external factors that affect the economy, the movement of currency, and environmental issues-- are no longer under the state's control. As W. Michael Reisman puts it, under the “modern concept” of sovereignty, “[i]nternational law still protects sovereignty, but--not surprisingly--it is the people's sovereignty rather than the sovereign's sovereignty.” [FN72]

If this “modern” view--which regards the individual, and not the state, as the pillar of the international

system--were embraced, what kind of safeguards would protect the sovereignty of the target state when intervention is carried on outside the U.N.? And who would determine whether an intervention was in fact about the promotion of human rights and not simply an infringement on the target state's sovereignty?

Under the current ambiguous regime, which relies mostly on the traditional interpretation of state sovereignty, there are no specific guarantees for the preservation of the target state's integrity when unilateral humanitarian intervention is taking place. A codified norm, however, would ensure that there were no unnecessary or unjust curtailments of the target state's sovereignty in the course of the intervention. Guidelines would set forth when and how intervention may be conducted. By providing safeguards against unjust curtailments of the target state's sovereignty, a codified norm would ironically better protect state sovereignty than the current regime, which is based on the traditional meaning of sovereignty. [FN73] At the same time, the modern interpretation of ***62** sovereignty grants additional protection to individuals by allowing intervention, even in the event of a U.N. deadlock. Thus, codification would enhance human rights without hurting sovereignty.

Many proposals have been put forward that consecrate, in one way or another, this modern conception of sovereignty, but the ultimate subordination of state sovereignty to human rights is not yet widely accepted. [FN74] Under the more moderate "exceptional approach," which accepts the supremacy of the individual's rights in extraordinary circumstances, human rights would not prevail over state's sovereignty in all circumstances, but only where urgency so requires. [FN75]

Whichever way is preferable, a consensus among those disturbed by the traditional concept of state sovereignty seems to have emerged on how to balance sovereignty against human rights. [FN76] Under a codified norm of unilateral humanitarian intervention, human rights would constitute the paramount principle, while sovereignty would be subordinate in status, at least where the urgency and the gravity of the situation demand.

2. Consent: What Happens at the Rule-Making Stage

Another reason for skepticism towards strict normativity (and its ability to represent what the law can be) stems from the difficulty--if not impossibility--of getting states to agree on the formulation of a norm itself. In other words, it is feared that even if states were to agree on the necessity to codify the doctrine, they simply might not reach consensus on the content of such a doctrine. More specifically, codification of the doctrine generates two main uncertainties: The first relates to the form that the doctrine should take, while the second relates to the actual contours of a new doctrine of unilateral humanitarian intervention.

• Form. The first uncertainty regards the type of international instrument in which the new doctrine would be enunciated. To make codification a realistic enterprise, it has been suggested that a strict rule of unilateral humanitarian intervention be embodied in a General Assembly ***63** Resolution. [FN77] By showing a general awareness of unilateral humanitarian intervention, a General Assembly Resolution would be a first step towards the adoption of an enforceable norm of international law. Such a normative change, without being radical, would announce a new era in the law of unilateral humanitarian intervention. At the same time, the infringement of state sovereignty would be minimal, since a General Assembly Resolution does not theoretically create binding obligations under international law. [FN78] A new doctrine of unilateral humanitarian intervention embodied in a U.N. General Assembly Resolution would balance state sovereignty and the desire for an adequate instrument to protect human rights in cases of internal conflicts. If the United Nations is, indeed, an appropriate forum for the enunciation of the norm--as it commands the greatest legitimacy and authority--the question then arises whether the U.N. is willing and able to formulate a norm that is applicable to military interventions taking place without its authorization.

The Independent International Commission on Kosovo recommends the adoption of a set of principles by the U.N. General Assembly in the form of a Declaration on the Rights and Responsibility of Humanitarian Intervention and U.N. Security Council interpretations of the U.N. Charter "that reconcile such practice with the balance between respect for sovereign rights, implementation of human rights, and the prevention of humanitarian catastrophe." [FN79] The Commission went so far as to suggest that the Charter eventually be amended to incorporate those changes. Others advocated the development of an informal practice to suspend the use of the veto in cases of humanitarian catastrophes. [FN80]

There are other instruments in which a doctrine of unilateral humanitarian intervention could be embodied. An international tribunal, such as the International Court of Justice, might delineate the contours of the right to intervene in a judicial pronouncement, such as an advisory opinion. A more utopian ideal might be a treaty. Yet another possibility is for individual states to formulate declarations about the circumstances that would warrant military intervention outside the United Nations. Because the latter option follows the pattern of customary international law, it would be more practical than other alternatives.

Still, the instrument in which a newly formulated doctrine of unilateral ***64** humanitarian intervention would be embodied remains uncertain.

• Substance. Many have expressed a desire to turn collective intervention into the general principle and unilateral humanitarian intervention into a limited but recognized exception. [FN81] Britain's recommendations include, inter alia, that the use of force be "carried out in accordance with international law" and that "only in exceptional circumstances should it be undertaken without the express authority of the Security Council." [FN82] France has taken a similar stance. [FN83] But when is the international community faced with "exceptional circumstances" and who has the authority to make such a pronouncement?

Even if states were to agree on the elaboration of a principled doctrine of unilateral humanitarian intervention on its form, they would still have to agree on its content. Each state may have a unique conception of where to draw the line between acceptable and unacceptable intervention. A few proposals have been put forward about what a doctrine of unilateral humanitarian intervention should look like.

Fundamental agreement on the basic features of a strict norm--at least among academics and supporters of human rights--appears to be within our grasp. All authorities agree to some extent on the importance of the violations alleged, [FN84] the necessity for exhaustion of peaceful or less coercive ***65** means of resolution, [FN85] the likelihood of a veto (or anticipation of a veto) in the Security Council, [FN86] the principles of necessity and proportionality (including prompt disengagement from the target state), [FN87] and compliance with international law. [FN88] But three criteria, less commonly agreed upon, are of critical importance: (a) the avoidance of seriously aggravating consequences on, or injury to, the civilian population; [FN89] (b) the avoidance of consequences on the target and intervening states' authoritative structures; [FN90] and (c) the commitment to rebuild the target state's civil society after the intervention. [FN91]

The greatest disagreements arise over whether intervening states need to obtain the authorization of the target state prior to intervention [FN92] or a ***66** showing of the consent of the local population [FN93] and whether the intervening state needs to be disinterested in the affairs of the target state. [FN94] Conditioning unilateral intervention upon the invitation of the target state, as in Sierra Leone, simply changes the nature of the operation to one that would no longer qualify as a unilateral humanitarian intervention. More generally, it considerably reduces the instances in which the international community could intervene to secure human rights against the will of the target state. The disinterestedness of the intervening state--because it is extremely difficult to measure--appears unhelpful and superfluous. Therefore, both the invitation of the target state and the disinterestedness of the intervening state should be rejected as criteria for unilateral humanitarian intervention. [FN95]

Two additional criteria are worth exploring in shaping the contours of an acceptable right to intervene unilaterally. The first is the nature of the intervening state's human rights record. An intervening state's pattern of respecting and promoting human rights could be considered a guarantee of fairness, authority, and legitimacy, which could earn it support for the intervening state's decision, even where it does not get the approval of the Security Council. [FN96]

The second element is the process through which the decision to intervene was or would be made within the intervening state. The belief is that democratic and collegial decision-making processes generally lead to fair and balanced decisions. If (a) democratic institutions have been involved throughout the decision-making process, (b) the decision to intervene has been the subject of a national and public debate for some time, and (c) intellectuals, politicians, and academics alike have had the opportunity to comment on the prospects of the military intervention, could this be sufficient to "legalize" the decision to intervene unilaterally? Here again, it is unclear who has the authority to declare that the democratic process has "legalized" the unilateral intervention.

To conclude this review of strict normativity, some aspects of the approach-- such as certain types of deterrence, predictability, and legitimacy--hold long-term promises for both this specific area of international law and the international legal system as a whole. Nevertheless, many conditions must be fulfilled for strict normativity to become a viable option, including both (a) finding a balance between state sovereignty and human rights, and (b) forging a consensus on a formulation of the norm, especially among those who have remained opposed to the right per se. Indeed, most of the substantive criteria outlined above have been proffered by those who believe in the existence of a right to unilateral humanitarian intervention. One of the many challenges is to ***67** rally consensus among those who contest the existence or even the desirability of such a right.

The following section sheds light on the alternative: namely, the hidden benefits of not having a rule of humanitarian unilateral intervention. As one shall see, this approach is at times a more valuable--or at least a more realistic--option.

III. Normative Ambiguity

Unilateral humanitarian intervention is less frequently looked at through a blurrier lens of normativity, called here "normative ambiguity," which holds that unilateral humanitarian intervention should not be governed by too clear a norm. [FN97] The rationale behind this unconventional approach is that, even if ideally strict normativity is preferable (i.e., what the law ought to be), a flexible rule of unilateral humanitarian intervention (what the law is) holds advantages for the international community given the present state of international society. As Richard Falk writes, "it remains beneficial to maintain maximum and flexible support for the alleviation of suffering and the establishment of peace, and thus abiding a highly selective, and inconsistent, doctrine of humanitarian intervention." [FN98]

The normative ambiguity approach does not imply the absence of a normative framework for unilateral humanitarian intervention. It simply argues for a different kind--a different degree--of normativity that is deliberately ambiguous, unclear, and imprecise. Normative ambiguity comprises a variety of perspectives, each of which dismisses the value of elaborating a rigid rule of unilateral humanitarian intervention. Among the proponents of normative ambiguity are those who advocate the promulgation of standards--as opposed to rules--to regulate intervention. Others argue that customary international law, with its inherent flexibility, should continue to govern. A more extreme strain claims that, in fact, no right of unilateral humanitarian intervention can be said to have emerged and should not emerge in the future. [FN99] These approaches share a common view that having a strict norm is undesirable or unnecessary. They are discussed here collectively

under “normative ambiguity.”

Although the advantages of normative ambiguity should not be underestimated-- as they too often are--the ultimate goal should remain ***68** the elaboration of a clearer normative regime of unilateral humanitarian intervention, i.e., what the law ought to be. This is not about crossing strict normativity off international lawyers' agendas or attempting to encourage normative ambiguity. Instead, it is about acknowledging the advantages of the current regime, at least in the short term, and challenging the one-sided view that more normativity is necessarily better than less normativity.

It is important to note the discrepancy between the claims in favor of strict normativity, which have been extensively published, and pleas for ambiguity, which are sparse. As a matter of common practice, one does not write a pamphlet to support the current state of affairs. One is more likely to express his opinion when one objects to the current state of affairs or advocates change. A law review article often fulfils the same purpose as a pamphlet: It is an act of rebellion, an act of engagement. For this reason, literature supporting the normative ambiguity approach--and thus the present regime of unilateral humanitarian intervention--is thin. Yet this lack of representation does not affect the validity of the normative ambiguity claim itself.

Three main arguments in favor of normative ambiguity, rarely mentioned in recent writings, merit consideration. The first one suggests that a “permissive” regime of unilateral humanitarian intervention, which embodies a number of safeguards against abuses, already exists. The second argument insists on the exceptional nature of unilateral humanitarian intervention. Finally, going one step further, the third argument shows the value of not having a rule of unilateral humanitarian intervention. Each is considered in turn.

A. A Solution Only Viable in the Short Term

The three scenarios described infra suggest that having an ambiguous regime of unilateral humanitarian intervention, while acceptable and beneficial in the short term, might not be desirable in the long term.

First, the nature of international society shows how normative ambiguity often is a second-best solution, taking over when strict normativity can no longer perform. If the international community opposes codification, per se, so that strict normativity cannot be achieved at this time, normative ambiguity inevitably flourishes as a default solution. Second, even if a consensus could be reached on the need to codify, any incapacity to agree on the type of instrument or the actual wording of the norm would render all efforts in vain: There would be no other possible regime but one of normative ambiguity. [FN100] Finally, a third scenario imagines that a new doctrine is accepted and then adopted by all states, but the norm is simply ignored or disregarded by states. It does not act as a deterrent, fails to constrain states' behavior, and creates no sense of obligation. In this case, the norm is meaningless because it has not been internalized by states. Because the codified norm of unilateral ***69** humanitarian intervention failed to achieve its objectives, normative ambiguity becomes de facto the only workable alternative.

Normative ambiguity appears as a default solution in all three scenarios. Such a conclusion raises important questions as to the fundamental worth of the approach. Despite its advantages in the short term, the fact that normative ambiguity only is a valuable option when no other realistic option exists casts doubts on its viability in the long-term. While it is therefore important to acknowledge the merits of not having a norm of unilateral humanitarian intervention in the short-term--and to take advantage of what the law is--the ambiguous framework may not represent what the law ought to be.

B. An Adequate Normative Framework Already Exists

Even though unilateral humanitarian intervention is not presently enunciated in a specific international norm, a permissive regime of unilateral humanitarian intervention exists: one that succeeds in providing adequate safeguards against abuses. This argument rests on two assumptions: first, there is no explicit prohibition against recourse to unilateral humanitarian intervention when the mechanisms provided by the U.N. fail, i.e., when collective intervention cannot be carried out; [FN101] and second, the intervening state must not act in violation of existing norms of international law.

Under the Lotus theory proffered by the Permanent Court of International Justice (P.C.I.J.), states cannot be deemed to have renounced a right unless they have done so explicitly. In the Lotus case, the P.C.I.J. held that (a) restrictions upon the independence of states cannot be presumed, and (b) a state's margin of discretion can only be limited by prohibitive rules, declaring that--in the absence of prohibitive rules--"every state remains free to adopt the principles which it regards as best and most suitable." [FN102] Thus, when no rule of international law exists to regulate a particular behavior, states are free to act the way they want.

According to Prosper Weil, the approach taken by the Court in the Lotus case assumes that, because they enjoy sovereignty, "states are obliged to act only in so far as there exists a prescriptive rule, and they are obliged not to act only if there exists a prohibitive rule." [FN103] In other words, ***70** "without any prescriptive rule or prohibitive rule, states may act the way they want, unfettered by law," and "whatever is not explicitly prohibited by international law is permitted." [FN104] This approach, Weil argues, rejects the idea that there are lacunae in international law and insists on the completeness of the international legal system. [FN105] Moreover, since a prohibitive rule can be deemed to exist only when expressly formulated, a permissive rule always exists with respect to states' actions.

Weil's interpretation of the Lotus case has several implications for unilateral humanitarian intervention. Assuming traditional international law, including the U.N. Charter, does not explicitly prohibit unilateral humanitarian intervention, it is per se permissible. In the absence of a prohibitive rule, there is indeed a rule of unilateral humanitarian intervention, permitting states to intervene unilaterally for humanitarian purposes if or when they think fit, so long as they do not violate established norms of behavior.

What seems to emerge from the Lotus case is that whenever international law fails to provide a clear answer, a permissive rule fills the gap. In the context of unilateral humanitarian intervention, the result is that a normative framework--sometimes inconsistent, but nevertheless recognizable--has emerged to guide how and when intervention may be conducted.

A closer look at the relationship between states' behavior and ***71** normativity, as touched on by the Lotus case and the Advisory Opinion on the Threat and Use of Nuclear Weapons, shows why it is not an absolute necessity to codify unilateral humanitarian intervention. Generally, the ambiguity surrounding an area of international law can be interpreted in two different ways. On the one hand, the uncertainty of a legal regime can be attributed to a disagreement about the content of the norm governing the particular area of international law. Although there is a norm, its contours are ill-defined and its regime ambiguous and uncertain. On the other hand, the uncertainty of a legal regime can be interpreted as resulting from the absence of a norm, from a lacuna in international law. In the event of a lacuna--as in the Advisory Opinion with respect to the use of nuclear weapons--the legal regime is simply undefined. As a result, states can continue to behave the way they want--unconstrained by international law--thus creating a legal regime that is inevitably ambiguous, uncertain, or at least unclear.

What are the implications for unilateral humanitarian intervention of each interpretation of the relationship between states' behavior and the (non-) existence of a norm? Where the uncertainty of the regime is attributable to disagreement about the content of the norm, codification is simply barred due to strong disagreement among states. Where the uncertainty of the regime results from the absence of a norm, codifica-

tion is unnecessary because a rule of customary international law either will or will not emerge on the basis of state practice. In short, the permissive regime set forth in the Lotus case makes it unnecessary to determine whether the current ambiguous legal regime of unilateral humanitarian intervention is attributable to a disagreement about the content of a norm or to the mere absence of such a norm. Since codification is impossible in the first case and superfluous in the second, normative ambiguity is the only possible regime.

To summarize, the absence of a clear prohibition on unilateral humanitarian intervention has resulted in a permissive framework that diminishes the need for strict normativity.

Not only does a permissive normative framework exist, but it also provides adequate safeguards and succeeds in sporadically constraining states' behavior. W. Michael Reisman describes these safeguards as embodied in “the international constitutive process,” [FN106] i.e., “the force that now invokes, compels and appraises the lawfulness of unilateral acts purporting to be based on humanitarian concerns.” [FN107] Reisman's main argument is that as a result of the contemporary constitutive process, “the fears of gross kinds of abuses, associated with humanitarian interventions. . .are considerably reduced.” In other words, the situation is now better than it was in the past, when models of constitutive process did ***72** not provide for such safeguards against abuses. [FN108] Reisman sees this as a positive development in international law: “The fact that this international legal process is more able than constitutive structures of the past to compel the provision of remedies for some grave human rights violations is a cause for satisfaction.” [FN109] Although Reisman acknowledges that human rights are better off when unilateral humanitarian intervention takes place within this new constitutive process, he notes that it is still imperfect. [FN110]

Even without referring to Reioman's “constitutive legal process,” one can understand why the normative ambiguity regime is without safeguards. As noted earlier, normative ambiguity does not mean that there is no normative framework. It is the degree of normativity that distinguishes it from strict normativity. The permissive framework rests upon existing norms of international law that have over time developed guarantees aimed at securing their effectiveness. [FN111] This constellation of norms includes laws on the use of force, laws of war, humanitarian law, decisions of international tribunals such as Nicaragua v. United States, [FN112] doctrinal and academic writings, condemnation in international forums like the U.N., [FN113] condemnations by individual states, and even criticism by the media. [FN114] All of these sources create constraints within which unilateral humanitarian interventions must take place. Even though these safeguards function sporadically, they operate as limiting factors that raise the cost of abusive interventions. If a state were to intervene today in complete disregard of international law, the international community would condemn its violation of established norms of international law, even though such a state is not violating a specific norm of unilateral humanitarian intervention.

Therefore, by its mere existence, international law both constrains and protects states' conduct of unilateral humanitarian intervention, independently of any clearly formulated rule circumscribing the doctrine. Thanks to the existence of a nexus of international norms, most of the ***73** objectives of strict normativity are met today by normative ambiguity.

C.

An Exceptional Remedy, Better Kept Uncodified

The second argument in favor of ambiguity holds that because unilateral humanitarian intervention is by nature an exceptional remedy, its codification would do more harm than good to the international system. [FN115] Even if, as stated above, unilateral humanitarian intervention is understood as being permissible under the international system, it remains a remedy of an exceptional nature to which states have recourse in extraordinary circumstances. [FN116] In fact, the number of unilateral humanitarian interventions that have

ever been conducted is quite small, so the permissive regime should be interpreted restrictively: namely, that unilateral humanitarian intervention can only be conducted in exceptional circumstances. The antagonism of the remedy with generally accepted norms of international law, i.e., the prohibition of the use of force, the principle of state sovereignty, and the non-interference in another state's internal affairs, explains why unilateral humanitarian intervention is an exception rather than a principle. These well-entrenched principles of international law intrinsically limit the use of unilateral humanitarian intervention, making it difficult to "elevate" it to the normative level of principle.

The exceptional nature of unilateral humanitarian intervention has been emphasized by Ian Brownlie, who has implicitly embraced recourse to unilateral humanitarian intervention in extreme circumstances by drawing an analogy with euthanasia. [FN117] More specifically, Brownlie compares the legal frameworks applicable to euthanasia and unilateral intervention:

> [T]here is a moral and legislative problem of the type raised by euthanasia, itself a form of "humanitarian intervention." Even though euthanasia is unlawful, doctors occasionally commit technical breaches of the law, for example, by administering massive drug dosages that accelerate coma and death. It is very generally assumed that legalizing euthanasia would alter the moral climate and produce harmful abuse. [FN118]

In this particular case, marginalizing the exceptional remedy from the realm of law would benefit the overall system more than "legalizing" unilateral humanitarian intervention through strict normativity.

***74** Brownlie's analogy has drawn mixed responses. Richard Falk points to the dangers resulting from a lack of protection and asks: "Would you want your doctor to have the power to kill in the name of euthanasia? Or, more aptly, would you want your worst enemy's doctor to have such discretion?" [FN119] Richard Lillich, in a similar vein, interprets Brownlie's analogy as suggesting that some interventions, "while technically breaches of Article 2(4), might be condoned, if not actually approved by the world community." [FN120] Lillich writes that the analogy with euthanasia "creates an open space for doing what is accepted by the world community as right in exceptional circumstances without explicitly ripping the lid off the Pandora's box." [FN121] In short, leaving the door open only to a few countries that have the logistical and practical capabilities of conducting an intervention--and thereby consecrating it as an exceptional remedy rather than a principle--would better prevent abuses.

Similar arguments apply to euthanasia and unilateral humanitarian intervention in showing that expressly recognizing the exception would hurt the system more than it would improve it. The general argument is that, just like euthanasia, unilateral intervention should not be codified; instead, it should remain a tacitly accepted exception to other principles of international law with which it inherently conflicts. Just as the potential beneficiaries of euthanasia may not be better off under a strict rule delimiting the conditions under which this exceptional remedy could be administered, human rights might not actually benefit from the express formulation of a rule of unilateral humanitarian intervention. In the same way, the adoption of a law on euthanasia may create the potential for abuses that are currently being prevented by the system itself; codification of a doctrine of unilateral humanitarian intervention may thus "provide a pretext for abusive interventions." [FN122] In sum, drawing from the analogy with euthanasia, the normative ambiguity approach better limits abuses and creates safeguards against undesirable generalization of unilateral humanitarian intervention.

D. Advantages for the Intervening State, the Target State, and Human Rights

The question remains about whether the international legal system, in the present stage of international relations, would benefit from the adoption of a strict rule of unilateral humanitarian intervention. This sec-

tion highlights the advantages of not having a strict norm, rarely acknowledged by those who have advocated a clearer regime of unilateral humanitarian intervention.

***75** Normative ambiguity has distinct advantages for each of the three primary actors in an intervention--namely, (a) the intervening state, (b) the target state, and (c) the individuals whose rights are being violated by the target state. In order to assess fully the value of not having a strict rule of unilateral humanitarian intervention, it is important to look at unilateral humanitarian intervention from the perspective of all three. Each perspective suggests that there are distinct advantages to having a flexible, rather than rigid, norm of unilateral humanitarian intervention.

• The target state. From the perspective of the target state, one of the major obstacles to the recognition of an unambiguous right to unilateral intervention is the principle of state sovereignty and its corollary, the principle of territorial integrity. Under traditional international law, each state is the sole judge of what happens on its territory, and no other state can impose its views on another, especially not by force. [FN123] Unilateral humanitarian intervention--where one state intervenes in the territory of another state without its consent--conflicts with these principles.

The solutions proposed to solve the tension between sovereignty and human rights allow for the realization of the strict normativity paradigm. Many scholars, whose ideas and suggestions have been outlined above, do not see the existence of a doctrine of unilateral humanitarian intervention as a threat to state sovereignty. [FN124] In spite of the emergence of a consensus on the modern meaning of sovereignty, there seems to be persistent resistance to the idea that state sovereignty be overruled so simply.

After a thorough examination of the doctrine, the Goldstone Commission [FN125] concluded that it is unlikely that any of its recommendations in favor of a strict normativity approach will be implemented in the near future. [FN126] The Commission reached this conclusion precisely because of the tension between sovereignty, human rights, and the challenge of forging a consensus on the formulation of the norm. In addition, there may be very strong opposition on the part of certain countries--such as Russia and China--who have been and remain flatly opposed to a right to intervene for humanitarian purposes. Notwithstanding the virtues of strict normativity, therefore, it is too early to say that all would agree to the curtailment of state sovereignty, as implied by a codification of unilateral humanitarian intervention.

The obstacles to the elaboration of a clearly formulated doctrine might make normative ambiguity the only framework realistically acceptable by ***76** states, at least for the time being. Despite the merits of a strict rule of unilateral humanitarian intervention, it may simply not be realizable in the near future. Since strict normativity is unlikely in the short term, the most positive take on unilateral humanitarian intervention is to acknowledge the hidden benefits of the current system, i.e., what the law is, while continuing to move towards a clearer legal framework, i.e., what the law can be.

• The intervening state. From the perspective of the intervening state, normative ambiguity also presents advantages, mainly because it does not open the door of intervention to all states on an equal basis. In fact, only a few states have the privilege of engaging in humanitarian intervention today, and the reason for this is twofold. First, only a few states have the financial and military capabilities to undertake interventions; and second, there is an assumption that these states generally intervene in good faith and with good intentions. Not having a norm would secure the privilege of these select nations to engage in unilateral humanitarian intervention. At the same time, “rogue states”--which tend to show little respect for human rights--would not be able to interpret or use a strict norm of unilateral humanitarian intervention in a counter-productive manner. So long as states are likely to misuse a right to conduct unilateral humanitarian intervention, this potentially dangerous tool should remain in the hands of a few well-intentioned and law-abiding states.

That unilateral action should remain the privilege of a few states goes against state equality. [FN127] In the conflict between state equality and human rights, human rights should be preferred over the traditional idea that one of international law's goals is to achieve state equality. Although the adoption of a rule applicable to all could eliminate this inequality, normative ambiguity nevertheless appears more desirable in the current state of international relations.

From the perspective of the intervening state, therefore, allowing each and every state to carry unilateral humanitarian intervention on the basis of a newly codified doctrine would not necessarily be a positive development. Having a norm of unilateral humanitarian intervention could achieve counter-productive results, significantly curtailing the norm's main raison d'etre.

From the perspective of the intervening state, an additional element in favor of normative ambiguity is the fear that a tighter legal framework would considerably limit states' inherent right to ad hoc diplomacy by implicitly creating a duty to intervene in certain circumstances. [FN128] Under strict normativity, like situations should be treated alike, or at least follow a consistent pattern, preventing states from enjoying flexibility in their actions--and thus from selectively deciding whether to intervene. [FN129] That ***77** states only intervene when political will and some kind of national interest are present tips the balance on the side of normative ambiguity. [FN130]

Insisting on flexibility rules out any general commitment to unilateral humanitarian intervention. If the doctrine of unilateral humanitarian intervention were to be codified under the proposals set forward in the previous section, states' margin of discretion and the right to ad hoc diplomacy--perceived as inherent privileges of the state--would be impaired.

There are therefore serious doubts as to whether a norm of unilateral humanitarian intervention is valuable from the perspective of the intervening state--because of both the persistent belief that it curtails state sovereignty and territorial integrity and the limitations it inevitably sets against ad hoc diplomacy.

• Individuals whose human rights are violated. Finally, the value of having less normativity must be analyzed from the perspective of human rights. Is the normative ambiguity framework more desirable for the protection of human rights? As Tom Farer said, “[t]he dispute, then, was simply over whether efforts to marshal support for an openly articulated and broadly applicable justification for initiatives were more likely than not to promote realization of the full range of humanitarian values.” [FN131] A strict norm may reduce the incentive of states to intervene, thus preventing the protection of the nationals of the target state via unilateral humanitarian intervention.

A reason for this phenomenon is accountability. If states worry that they may be held (or accused of acting) in violation of the rule, they might refrain from intervening. In a situation where (a) human rights are violated in a region of the world, and (b) states would intervene if no norm existed (but do not because they fear being held accountable for their actions later), the existence of the norm impairs the protection of human rights through unilateral humanitarian intervention. The accountability argument is all the more relevant as the Goldstone Commission writes: “[T]he pattern of the recent past suggests that states are eager to find excuses not to intervene.” [FN132] If that trend is already noticeable in states' behavior, the elaboration of a rule may only further deter states from intervening. Conversely, giving states more latitude in how and when they intervene could help to re-create incentives for states to intervene, or at least avoid any further reluctance to do so.

The second impact of the normative ambiguity approach on human rights has already been pointed out above: [FN133] While it has been argued that a strict norm of intervention would better deter human rights violators, ***78** normative ambiguity is, in fact, likely to achieve better results. The reason is that, under a

strict normativity regime, dictators and other human rights violators might make genocidal calculations so as not to fall within the scope of the norm. For instance, violators might only kill a certain number of people to avoid reaching the threshold established by the norm, or kill people only in a certain way to escape any relevant provisions of the rule. To put it differently, a people's destruction could be planned ahead in order to render the rule inapplicable, thus indefinitely barring the option of unilateral humanitarian intervention. Of course, intervention through the United Nations would still be a possibility. But in the event of a deadlock, no humanitarian intervention could take place. Were strict normativity to achieve such results, it would fail to protect human rights. In contrast, normative ambiguity creates incentives to intervene by limiting accountability, and better deters human rights violators from committing atrocities.

The value of not having a norm of unilateral humanitarian intervention is thus much greater than commonly thought, at least in the short term. Not only does an adequate framework exist, but it also embodies a number of safeguards inherent in the international system that sporadically succeed in constraining state behavior with respect to unilateral humanitarian intervention. In addition, there is a compelling argument for not codifying an exceptional remedy, which is by definition limited in scope. Finally, opting for normative ambiguity presents an array of advantages for all the main actors involved. The value of having a norm of unilateral humanitarian intervention is thus not absolute, contrary to what recent academic writings on this topic suggest.

IV. Conclusion

As a concluding picture, the law governing unilateral humanitarian intervention may be represented by what in art is called a triptych, a three-panel painting, portraying the three development stages of the unilateral humanitarian intervention regime.

The first panel of the triptych represents today's legal framework of unilateral humanitarian intervention (i.e., what the law is). It embodies the accumulation of instances of intervention, each a unique blend of national interests and humanitarian concerns. [FN134] Even though it is neither structured nor framed in a coherent manner, today's normative ambiguity still functions in a relatively satisfactory way, while providing a number of safeguards.

The second part of the triptych, or the middle panel, depicts the image of unilateral humanitarian intervention to which the international community can realistically aspire given the present state of international ***79** relations and the obstacles it sets against the elaboration of a new doctrine, i.e., what the law can be. Superior to the first panel, but inferior to the third panel, the middle panel is a necessary step towards an era of strict normativity. As those who cherish this vision know--or should know--codification is likely to remain a dream in the near future. However, they hope that--eventually--the world will be ready for the final panel of the triptych. As the widespread acceptance of genocide as a crime against humanity shows, what the world may not be willing to accept at one point in time may later become reality.

Finally, the third and last part of the triptych is the image of a glamorous norm of unilateral humanitarian intervention, as ideally framed by scholars who believe in the merits of codification, accepted by those who believe in the necessity of protecting human rights, and agreed upon by all states. As such, the final panel, or strict normativity, perfectly responds to the needs of the jurist for whom clarity and preciseness of the law are guarantees of fairness. When looking at the third panel of the triptych, the viewer sees the ultimate, perfect--perhaps even utopian--image of unilateral humanitarian intervention. In a way, the third panel pictures the messianic era of unilateral humanitarian intervention, or what the law ought to be.

The transition from the middle to the third panel, i.e., from the intermediate period where a norm of unilateral humanitarian intervention is being worked on to the messianic era where it would finally be adopted,

may take a long time. [FN135] Yet, this transition may have already begun through a movement towards regionalism, where preexisting coalitions of democracies act de concert to uphold human rights. [FN136] Whether or not the answer lies within "regionalization," it is the role of international jurists in the continuously moving middle panel to raise their voices whenever they think that the system would benefit from change and to prepare mentalities for the next move.

Until the final panel becomes realizable, however, the advantages existing under the first and middle panel should not be overlooked. In this respect, those revering codification and regretting the absence of a clearer legal framework of unilateral humanitarian intervention should better acknowledge the value of the current system. Indeed, for the target state, for the intervening state, and for human rights, there are numerous advantages to not having a strict rule of unilateral humanitarian intervention.

The conclusion is that it is unnecessary to worry excessively about what today's normative ambiguity brings about. Internationalists should not be alarmed and should wait until the time becomes ripe for the ***80** realization of the third panel. If this were never to happen, they should be reassured that--at least in some respects--an untidy regime of unilateral humanitarian intervention is not as bad as commonly thought.

[FNd1]. Associate, Cleary, Gottlieb, Steen & Hamilton, New York. Maîtrise in Law, Université Panthéon-Assas, Paris, France; Diploma in Legal Studies, University of Oxford; LL.M., Yale Law School. An earlier draft of this paper was presented at the Yale Journal of International Law Young Scholars Conference on March 24, 2001. I would like to give special thanks to Professor Michael Reisman for his guidance and advice during the early stages of this paper. I owe him a debt of gratitude for the time he generously spent with me discussing the topic. I would also like to thank Professor Harold Koh for his comments on earlier drafts and his encouragement at all stages of the process. Of course, positions taken in this article and any mistakes or mischaracterizations are mine alone.

[FN1]. Jean-François Deniau posits that Montesquieu and other French humanists thought that the best guarantee against arbitrary exercise of power and in favor of human rights was the law itself. Deniau believes that, unfortunately, law can no longer be the sole basis for defending human rights, since even the worst dictatorial regimes rely on law. He argues, therefore, that the desirability of the law now depends on whether its consequences are respectable. See Mario Bettati & Bernard Kouchner, Le Devoir d'Ingerence 104 (1987).

[FN2]. This article will not look at the question of the legality of unilateral humanitarian intervention.

[FN3]. This idea of a clear legal framework was presented as a necessity by Kevin Boyle: "It is important for the next 'humanitarian war' that we have a clear framework of legal accountability." Kevin Boyle, Lecture at the Yale Law School's Human Rights Workshop, New Haven, CT, USA (Dec. 13, 2000).

[FN4]. Friedrich Kratochwil, How Do Norms Matter?, in The Role of Law in International Politics: Essays in International Law and International Relations, 35, 43 (Michael Byers ed., 2000). Kratochwil associates this question with the first two levels of the legal order: "The first level involves choices between specific rules and more general, and therefore vague, standards. The utilization of strict rules safeguards procedural uniformity; the invocation of discretionary standards results in more situation-sensitive decisions, but does so on an ad hoc basis. Ambiguity also enters at a second level of doctrines designed to resolve first-level disputes. Doctrines, contrary to the hopes one might place in them, are only able to provide us with a list of counterpoised functional arguments for the applicability of rules and standards without, however, being able to provide a solution to the new dilemma." Id. at 43.

[FN5]. The status quo is described by Michael Glennon as "a realm in which expectations have been con-

fused, predictability has been lessened, and the contours of law have been rendered uncertain." Michael Glennon, Limits of Law, Prerogatives of Power 85 (2001). Simon Chesterman calls the current legal regime of humanitarian intervention a "normative vacuum." Simon Chesterman, Just War or Just Peace? Humanitarian Intervention and International Law 227 (2001).

[FN6]. Fernando R. Tesón gives the following definition of unilateral humanitarian intervention: "The proportionate transboundary help, including forcible help, provided by governments to individuals in another state who are being denied basic human rights and who themselves would be rationally willing to revolt against their oppressive government." Fernando R. Tesón, Humanitarian Intervention: An Inquiry Into Law and Morality 5 (2d ed. 1987).

[FN7]. Article 51 of the U.N. Charter provides:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security. U.N. Charter, art. 51.

India's invasion of Bangladesh in 1971 and Tanzania's invasion of Uganda in 1979 were justified under Article 51 of the U.N. Charter. See Tesón, supra note 6, at 179, 200.

[FN8]. Some interventions were justified by the "invitation" of the target state (such as the French intervention in Zaire in 1978), but most relied on a variety of motives, including the protection of nationals abroad. The most characteristic of this period was the Israeli intervention in Entebbe in 1976.

[FN9]. During the Cold War, the Security Council authorized military intervention as enforcement actions under Chapter VII of the U.N. Charter only in Korea in 1950 (Resolution 84) and in Southern Rhodesia in 1966 (Resolution 221). Chesterman, supra note 5, at 115-17; see also id., at 123 (listing a number of situations in which the Security Council has expressly or retroactively authorized the use of force under Chapter VII since 1990).

[FN10]. See D.J. Harris, Cases and Materials on International Law 624 (5th ed. 1998) (noting that, traditionally, the treatment of nationals was regarded as being within the domestic jurisdiction of sovereign states).

[FN11]. China and Russia are two key examples, in part because of the situations in Tibet and Chechnya, respectively.

[FN12]. Steve Simon, The Contemporary Legality of Unilateral Humanitarian Intervention, 24 Cal. W. Int'l L. J. 117, 144 ("[N]ations do possess the right to intervene unilaterally for humanitarian purposes in both rescue and non-rescue cases so long as the intervention is done properly."); Julie Mertus, Reconsidering the Legality of Humanitarian Intervention: Lessons from Kosovo, 41 Wm. & Mary L. Rev. 1743, 1748 (2000) (suggesting that the U.N. Charter implicitly permits and even mandates humanitarian interventions such as NATO's intervention in Kosovo); W. Michael Reisman & Myres McDougal, Humanitarian Intervention to Protect the Ibos, in Humanitarian Intervention and the United Nations 167 (Richard B. Lillich ed., 1973); Jeremy Levitt, Humanitarian Intervention by Regional Actors in Internal Conflicts: The Cases of ECOWAS in Liberia and Sierra Lione, 12 Temp. Int'l & Comp. L. J. 333, 375 ("[T]here has been a shift in the law de lege ferenda, permitting unilateral humanitarian intervention by groups of states and regional actors in internal conflicts."); Foreign Affairs Committee, Fourth Report, 2000, Cm. 28-I, para. 132, www.publications.parliament.uk/pa/cm1999900/cmselect/cmfaff/28/2813.htm (on file with author).

[FN13]. Article 2(4) of the U.N. Charter reads:

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.

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

[FN14]. See, e.g., Tesón, supra note 6, at 222 (calling Ian Brownlie a "Charter literalist"); Yogesh Tyagi, The Concept of Humanitarian Intervention Revisited, 16 Mich. J. Int'l L. 883, 890 (refuting the idea that unilateral humanitarian intervention has become customary international law); Chesterman, supra note 5, at 226 (rejecting the existence of a "right" of humanitarian intervention per se).

[FN15]. Collective intervention remains unchanged by this analysis, which focuses on unilateral action. All interventions authorized by the U.N. Security Council are excluded from the scope of this article.

[FN16]. See, e.g., Alain Pellet, Brief Remarks on the Use of Force, 11 Eur. J. Int'l L. 385 (2000); Kofi Annan, Two Concepts of Sovereignty, The Economist, Sept. 18, 1999, at 49, 49 [hereinafter Annan, Two Concepts] (expressing the belief that the intervention in Kosovo was of regional, thus collegial nature); Glennon, supra note 5, at 198 (writing that "the Kosovo intervention was multilateral").

[FN17]. The same criterion is used by Peter Hilpold. Peter Hilpold, Humanitarian Intervention: Is There a Need for a Legal Reappraisal? 12 Eur. J. Int'l L. 437, 448 (2001) ("The distinction between collective and unilateral measures refers to the question whether the initiative has been authorized by the Security Council or not.").

[FN18]. Other justifications may include a claim that there is a "threat to the stability of the entire region." For example, Secretary General of NATO Dr. Javier Solana justified the bombing of Serbia by NATO on March 23, 1999 in such terms. Press Statement by Dr. Javier Solana, Secretary General of NATO (March 23, 1999) http://www.nato.int/docu/pr/1999/p99-040e.htm (on file with author); see also Christine Gray, From Unity to Polarization: International Law and the Use of Force Against Iraq, 13 Eur. J. Int'l L. 1, 16 (2002) ("The combination of a series of weak arguments in the hope that cumulatively they will be persuasive is typical legal reasoning and common in the area of the use of force.").

[FN19]. One example is the argument that intervention would prevent the destabilization of the rest of the region. See Press Statement by Dr. Javier Solana, supra note 18.

[FN20]. Samuel Berger, A Foreign Policy for the Global Age, Foreign Affairs, Nov.-Dec. 2000, at 22, 30 (describing the U.S. intervention in Somalia as "the only instance in which America has used force purely for humanitarian reasons").

[FN21]. Richard Falk, The Complexities of Humanitarian Intervention: A New World Order Challenge, 17 Mich. J. Int'l L. 491, 502 (1996).

[FN22]. Annan, Two Concepts, supra note 16, at 49, 49; see also Michael Byers, Introduction, in The Role of International Law in International Politics: Essays in International Law 1, 16 (Michael Byers ed., 2000) (stating that international law's "importance is a function of its effectiveness and its ability to respond to change").

[FN23]. Farer, Humanitarian Intervention: The View from Charlottesville, in Humanitarian Intervention and the United Nations 149, 151 (Richard B. Lillich ed., 1973) (identifying the following definitional parameters: the object of the intervention, its motive, its duration and its effects) [hereinafter Farer, View from

Charlottesville].

[FN24]. Glennon, supra note 5, at 98.

[FN25]. One example would be creating a reasonable expectation of the sanction. Note also that, In Glennon's view, the “legalist model” (or what I have called “strict normativity”) “still holds more promise for reconciling justice with peace.” Glennon, supra note 5, at 7.

[FN26]. On norm-internalization, see Harold Hongju Koh, How is International Human Rights Law Enforced? 74 Ind. L. J. 1397 (1999); Harold Hongju Koh, Transnational Legal Process, 75 Neb. L. Rev. 181 (1996).

[FN27]. One of the four policy concerns described by Richard Falk is that of “upholding the sovereign rights of the weak states...that is protecting states against dubious interventionary claims even if backed up by some humanitarian considerations.” Falk, Humanitarian Intervention, supra note 21, at 508; see also Michael Burton, Legalizing the Sublegal: A Proposal for Codifying a Doctrine of Unilateral Humanitarian Intervention, 85 Geo. L. J. 417, 421 (1996) (“[A] lack of condemnation does not make it clear exactly what the international community is condoning and why.”).

[FN28]. “Policy must be consistent. The government we seek to influence must have a fairly accurate idea of the circumstances in which the United States will applaud or censure their behavior...This means that like countries must be treated alike.” Tom Farer, Toward a Humanitarian Diplomacy: A Primer for Policy, in Toward a Humanitarian Diplomacy: A Primer for Policy 1, 7 (Tom Farer ed., 1980) [hereinafter Farer, Humanitarian Diplomacy]; see also Thomas Franck, Legitimacy in the International System, 82 Am. J. Int'l L. 705, 738 (1988) (“Problems arise, however, when the standards are not applied coherently; that is, when they are applied to some but not to others equally entitled, or when the standards cease to be connected to principles of general applicability.”); Glennon, supra note 5, at 197.

[FN29]. Farer, View from Charlottesville, supra note 23, at 156-57. Tom Farer has suggested a requirement “that the threatened group be nationals of the target state,” which would imply a radical change from the original justification of unilateral humanitarian intervention, namely the protection of one's own nationals. Id.at 152, 157.

[FN30]. Michael Burton suggests that codification and the existence of a better frame of reference would make it “more difficult for an intervening state to characterize its action as a lawful humanitarian intervention.” Michael Burton, supra note 27, at 422; see also Farer, View from Charlottesville, supra note 23, at 156.

[FN31]. Robin Cook, Foreign Secretary of the United Kingdom, expressed this idea in a recent speech: “There should be a clear framework for intervention, defined and qualified by formal criteria and principles. Humanitarian intervention could in itself serve as a deterrent for future conflicts.” Robin Cook, Guiding Humanitarian Intervention, Address at the American Bar Association of London, London, U.K. (July 19, 2000), http:// www.fco.gov.uk/news/speechtext.asp?3989 (on file with author).

[FN32]. The so-called Clinton Doctrine failed to achieve this objective because it lacked a legal framework governing humanitarian intervention. In a speech given to Kosovo Force (KFOR) troops in Macedonia in June 1999, U.S. President Bill Clinton formulated the doctrine as follows: “[I]f we can say to the people of the world, whether you live in Africa, or Central Europe, or any other place, if somebody comes after innocent civilians and tries to kill them en masse because of their race, their ethnic background or their religion, and it's within our power to stop it, we will stop it.” U.S. President Bill Clinton, Speech to KFOR troops (June 22, 1999), at http:// clinton4.nara.gov/WH/New/Europe-9906/html/Speeches/990622d.html (last vis-

ited Dec. 12, 2002).

[FN33]. No matter how promising, this argument remains mostly intuitive and does not rest on empirical evidence.

[FN34]. An example is the U.N. Security Council's a posteriori acquiescence to NATO's intervention in Kosovo. SCOR Res. 1244, U.N. SCOR, 54th Sess., 4011th mtg. at 32-38 (1999).

[FN35]. Farer, View from Charlottesville, supra note 23, at 155-57.

[FN36]. Tom Farer elaborates: “Deterrence, in other words, does seem to presuppose a far more coherent and vigorous reaction to human rights deprivations than the present predominance of parochial identifications is likely to allow.” Id. at 154.

[FN37]. Interview by Gwen Ifill with Kofi Annan, U.N. Secretary General (Oct. 18, 1999), at http://pbs.org/newshour/bb/international/july-dec99/annan_ 10-18.html (last visited Apr. 22, 2003) [hereinafter Annan Interview].

[FN38]. Kofi Annan believes that the establishment of the two tribunals for Rwanda and the former Yugoslavia, as well as the creation of the International Criminal Court, are sending a deterrent message to people who commit these crimes that they will have no place to hide. “But I think that what is important in today's world, when we have the kinds of abuses that we are talking about [situations where there are gross and systematic violations of human rights] we need to take measures to deter them. It does not necessarily mean military intervention. In fact the establishment of the two tribunals for Rwanda and the former Yugoslavia is a deterrent.” Id.

[FN39]. See discussion in Section II, supra.

[FN40]. Vaughan Lowe, The Politics of Law-Making: Are the Method and Character of Norm Creation Changing?, in The Role of Law in International Politics: Essays in International Law 207, 215 (Michael Byers ed., 2000).

[FN41]. Foreign Affairs Committee, supra note 12, at para. 125.

[FN42]. Byron F. Burmester, On Humanitarian Intervention: The New World Order And Wars To Preserve Human Rights, 1994 Utah L. Rev. 269, 272 (“[A] state that employs force against another state will attempt to define its acts as being justified under the Charter, through regional arrangements or custom, or by some combination of the three.”); see also Glennon, supra note 5, at 192.

[FN43]. Burmester, supra note 42, at 302.

[FN44]. Carl Tham, Co-Chairman of the Independent International Commission on Kosovo, acknowledges that humanitarian intervention involves political, rather than legal, stakes. Even if “it is unrealistic to expect humanitarian intervention to evolve according to the rule of law such that equal cases are treated equally,” the Commission nonetheless finds it important to adopt a legal framework. Report of the Independent International Commission on Kosovo 187, http://www.kosovocommission.org/reports/6.pdf (on file with author) [hereinafter Commission on Kosovo]. More generally, the goal of the Commission is to provide a framework for humanitarian intervention as “a pre-legal proposal for initiatives by governments and international institutions to move in the direction of establishing a legal doctrine of humanitarian intervention that balances the claims to protect peoples against the importance of restricting discretion to use force in international relations” Id.at 198.

[FN45]. Falk, Humanitarian Intervention, supra note 21, at 499.

[FN46]. Farer, Humanitarian Diplomacy, supra note 28, at 35.

[FN47]. See, e.g., Sean Murphy, Humanitarian Intervention 297 (1996) ("A more compelling argument might be made that the international community has a moral duty to intervene and that the soundest means of fulfilling it is through the use of the United Nations."). According to Murphy, the likelihood that the U.N. will intervene increases in the following circumstances: Immediate or imminent danger of life, the rescuer is aware of the danger and danger is located in the vicinity, one is able to act effectively and at minimal risk. In particular, Murphy acknowledges the difficulty of satisfying the vicinity requirement, especially when military forces are deployed all over the world. Id.at 295.

[FN48]. This Article does not elaborate further on the role of the U.N., since it only matters here as a means to limit the influence of politics and power on humanitarian intervention.

[FN49]. See Bettati & Kouchner, supra note 1 passim.

[FN50]. The British House of Commons Committee on Foreign Affairs declared that "the international community will not be obliged to intervene for humanitarian reasons even if it were legally possible to do so." Foreign Affairs Committee, supra note 12, at para. 144. Commenting on such "devoir d'ingérence" as set forth by Mario Bettati and Bernard Kouchner, Alain Pellet admits that at the time the idea was put forward, he was "at least skeptical." Pellet, supra note 16, at 386 n.3. Equally skeptical, the general rapporteur to NATO's Civilian Affairs Committee writes:

> [T]he result of all this [international practice of humanitarian intervention] is a measure of ambiguity or...a certain 'hypocrisy' in international law insofar as a right of states to provide assistance by all means, including military force, does not flow from the rights of the victims to that assistance. Still less can it be said that there is a duty of humanitarian intervention.

Draft Special Report of the General Rapporteur: "Kosovo as a Precedent: Towards a Reform of the Security Council?" International Law and Humanitarian Intervention, para. 38, NATO Civilian Affairs Committee (Sept. 16, 1999), available at http://www.naa.be/publications/comrep/1999/as244cc-e.html (last visited Jan. 26, 2001) [hereinafter Kosovo as a Precedent].

[FN51]. Annan Interview, supra note 37 (suggesting that the "common interest," or as he says, "some understanding of when we intervene and when we do not," be the criteria for intervention). Annan does not advocate a broad doctrine of humanitarian intervention, but says "there are gross violations and systematic violations of human rights, we cannot stand back and do nothing." Id.

[FN52]. Glennon criticizes this type of cost-benefit approach because "[i]t cannot provide an obligatory dimension to the decision [to intervene]." Glennon, supra note 5, at 202-04. Nevertheless, he expresses the hope that such a cost-benefit analysis may lay "the groundwork for the ultimate emergence of a legalist order." Id.at 204; see also Bartram Brown, Humanitarian Intervention at Crossroads, 41 Wm. & Mary L. Rev. 1683, 1735-37 (2000) (suggesting that the common-law principle of active bystander be applied to humanitarian intervention). Bartarm Brown argues:

> The latter rule roughly corresponds to the situation of a state electing, on its own authorization, to undertake forcible humanitarian intervention on the territory of another state. Such a state is not under a duty to intervene, but once it has affirmatively acted to do so, it must accept added legal responsibilities.

Id.at 1737. He calls this obligation "the duty not to make the humanitarian situation worse than it otherwise would have been." Id. at 1735.

[FN53]. John N. Moore, Comment 3: On Professor Farer's Need for a Thesis: A Reply, in Law and Civil War in the Modern World 565, 567 (John N. Moore ed., 1974). "International law will always be controlling. Adherence to law will be better served, however, if international lawyers articulate for national de-

cision-makers the multitude of long- and short-run considerations which strongly militate for adherence to law rather than trumpeting righteous but philosophically unsound dogma." Id.at 572.

[FN54]. Otherwise, consent to the rule would be problematic. In addition, the rule should not be so malleable as to allow for invocation in too broad a range of situations, as is the case with the right to self-defense under Article 51 of the U.N. Charter. See Section I.A.3, supra, for a further discussion of legitimacy.

[FN55]. The topic of legitimacy is developed broadly in Franck, supra note 28 passim.

[FN56]. Michael Burton designates the matter as a "sublegal" area of international law. Burton, supra note 27 passim. This article shows that this statement is inaccurate, as evident through the analysis of international law as a nexus of norms, interacting in concert to constrain states' behavior.

[FN57]. Thomas Franck insists that coherence is the key to achieving legitimacy: "[A] pedigree only confers actual rights and duties when the standards for pedigreeing are applied coherently. When, on the contrary, symbols, ritual and pedigree are dispensed capriciously, the desired effect of legitimization may not accrue." Franck, supra note 28, at 736; see also Andrea Bianchi, Ad-hocism and the Rule of Law, 13 Eur. J. Int'l L. 263, 270 (2000) ("Unfortunately, ad-hocism may over time become an almost invincible enemy, as it prevents the development and subsequent enforcement of consistent patterns of normative standards and policies."); Mertus, supra note 12, at 1748.

[FN58]. Chesterman, supra note 5, at 161-62.

[FN59]. Commission on Kosovo, supra note 44, at 189.

[FN60]. Burton, supra note 27, at 426, 430.

[FN61]. Arthur Watts, The Importance of International Law, in The Role of Law in International Politics 5, 11 (Michael Byers ed., 2000).

[FN62]. Cook, supra note 31.

[FN63]. Accepting a human-rights-oriented concept of sovereignty goes against the principle that, under traditional international law, the individual does not have enforceable rights against the state. Yet, in the context of unilateral humanitarian intervention, it is precisely the violation of the individual's rights that triggers the intervention. Lea Brilmayer calls this situation a vertical relationship, i.e., between a state and the nationals of another state, as opposed to a horizontal relationship, i.e., a relationship among states. In other words, "It is not the intervening state's vertical relationship with the violator that gives it a right to intervene on humanitarian grounds but its vertical relationship with the victim." Lea Brilmayer, Justifying International Acts 153 (1989).

[FN64]. NATO's General Rapporteur, Mr. Arthur Paecht, writes in his conclusion: "The panoply of practices and legal texts is now powerful enough to call for a readjustment between the principles of sovereignty and protection of human rights. Is it not time, therefore, for an official fresh interpretation, more in accordance with the present international context?" Kosovo as a Precedent, supra note 50, at para. 51.

[FN65]. Louis Henkin, That "S" Word: Sovereignty, and Globalization, and Human Rights, Et Cetera, 68 Fordham L. Rev. 1, 3 (1999).

[FN66]. Id.at 4.

[FN67]. Henkin declares: "If sovereignty has imploded sufficiently, so that the human community feels re-

sponsible for what goes on inside territories, we have to find ways of addressing problems occurring in other states, ways that are legally, morally and politically acceptable." Id. at 11. Note, however, that despite his acknowledgment of a change in the meaning of sovereignty, Henkin remains opposed to unilateral humanitarian intervention.

[FN68]. "[N]orms of non-intervention in addition to prohibitions on the use of force are somewhat at odds with the contemporary view that the occasion of human rights abuse provides legal and moral grounds for disregarding the sovereign rights of states." Falk, Humanitarian Intervention, supra note 21, at 494.

[FN69]. This moral and ethical trait of international law has recently been emphasized in the writings of authors like Sean Murphy and Fernando Tesón, as well as in international instruments such as the International Covenant for Civil and Political Rights and the European Convention on Human Rights. See Murphy, supra note 47 passim; Tesón, supra note 6 passim.

[FN70]. "State sovereignty, in its most basic sense, is being redefined ... States are now widely understood to be instruments at the service of their peoples, and not vice-versa. At the same time, individual sovereignty...has been enhanced by a renewed and spreading consciousness of individual rights." Annan, Two Concepts, supra note 16, at 49, 49.

[FN71]. Annan Interview, supra note 37.

[FN72]. W. Michael Reisman, Sovereignty and Human Rights in Contemporary International Law, 84 Am. J. Int'l L. 866 (1990).

[FN73]. "The meaning of 'sovereignty' is confused and its uses are various, some of them unworthy, some even destructive of human values." Henkin, supra note 65, at 1.

[FN74]. The Independent International Commission on Kosovo suggests that a declaration be adopted by the General Assembly of the United Nations. The Commission goes as far as to recommend that the U.N. Charter be amended accordingly. More generally, the Commission puts forward "a pre-legal proposal for initiatives by governments and international institutions to move in the direction of establishing a legal doctrine of Humanitarian Intervention that balances the claims to protect people against the importance of restricting discretion to use force in international relations." Commission on Kosovo, supra note 44, at 198. Alternatively, the Commission suggested that the Security Council interpret the Charter explicitly in this very direction on a case-by-case basis. In any case, the Commission does not see any of these as likely developments in the near future. Id.at 197-98.

[FN75]. "The power of the state...must yield to a 'principle of extreme urgency'--the need for a minimum protection of human rights." Olivier Corten, Humanitarian Intervention, A Controversial Right, The Unesco Courier, July-August 1999, available at www.unesco.org/courier/1999_08/uk/ethique/txt1.htm (last visited Dec. 15, 2002).

[FN76]. However, some remain opposed to any kind of compromise on the principle of state sovereignty as Section I.B.1. shows.

[FN77]. Michael Burton suggests that new principles governing interventions be embodied either in a Security Council or General Assembly Resolution (which he considers to be the "most feasible approach") or in a statement by the President of the Security Council or Secretary General. Burton, supra note 27, at 446. For a discussion of the legal force of General Assembly Resolutions, see Harris, supra note 10, at 58-64.

[FN78]. See Judge Richard Goldstone, Chairman of the Independent International Commission on Kosovo,

Press Briefing on Kosovo Commission (Oct. 23, 2000), available at www.fas.org/man/dod-101/ops/2000/kosovo-001023zub.htm (last visited Dec. 14, 2002).

[FN79]. Commission on Kosovo, supra note 44, at 187.

[FN80]. Id. at 3. Richard Falk suggested this idea to Judge Goldstone: "To a question on how the international community could engage in intervention in a legal, not just legitimate manner and get past the veto, Professor Falk said one way to achieve this would be through the informal development of a practice among the permanent members, in which they would suspend the use of the veto in cases of humanitarian catastrophes." Id. at 3.

[FN81]. See Rosalyn Higgins, Problems & Process: International Law and How We Use It 248 ("There are a variety of important decision-makers, other than courts, who can pronounce on the validity of claims advanced; and claims which may in very restricted circumstances be regarded as lawful should not a priori be disallowed because on occasion they may be unjustly invoked.") (emphasis added).

[FN82]. In reference to the concept of "exceptional circumstance," Tony Blair declared: "Chechnya, where military intervention is neither feasible, nor desirable, illustrates the obvious limits." Tony Blair, Shaping a Pivotal Role for Britain in the World, Speech in London (November 22, 1999) at http:// www.britainusa.com/government/xq/asp/SarticleType.1/Article_ID.569/qx/articles_ show.htm (last visited Apr. 22, 2003).

[FN83]. Jacques Chirac declared: "J'ajoute que, et je le répète, la situation humanitaire constitue une raison qui peut justifier une exception à une règle si forte et si ferme soit-elle." (I would add and repeat that the humanitarian situation constitutes a ground that can justify an exception to a rule, no matter how strong and firm the rule is.) Jacques Chirac, Remarks at Press Conference, Florence, Italy (Oct. 6, 1998), quoted in Patrice Despretz, Le Droit International et Les Menaces d'Intervention De L'OTAN au Kosovo, Actualité et Droit International, Oct. 18 1998, available at http:// ridi.org/adi/199811a4.html (last visited Dec. 15, 2002) (trans. by author); see also Klinton W. Alexander, NATO's Intervention in Kosovo: The Legal Case for Violating Yugoslavia's National Sovereignty in the Absence of Security Council Approval, 22 Hous. J. Int'l L. 403, 407, 420 (2000).

[FN84]. The Independent International Commission on Kosovo enumerated the following threshold principles to guide the conduct of unilateral humanitarian intervention: There should be severe violations of human rights on a sustained basis, subjection of the civilian society to great suffering, and risk due to the failure of the target state to protect the victimized population. Commission on Kosovo, supra note 44, at 193-94. Similarly, The International Law Association's Subcommittee on Human Rights, restating John Norton Moore's five criteria, mentions the necessity of having an immediate and extensive threat to fundamental rights. Report of the Committee on Human Rights, International Law Association, The Hague Conference (1970), at 5, quoted in Ian Brownlie, Humanitarian Intervention, in Law and Civil War in the Modern World 217, 225 (John N. Moore ed., 1974). In the same line of thinking, Michael Reisman and Myres McDougal have referred to the requirement of an "overriding necessity." Reisman & McDougal, supra note 12, at 193 ("A humanitarian intervention taken without prior delegation from the United Nations or a relevant regional organization would require a showing, among other things, of overriding necessity, lack of time to seize an international organization of the matter, and subsequent seizing as soon as possible.").

[FN85]. The International Commission on Kosovo also pointed out the necessity of trying to find peaceful solutions to the conflict and the exhaustion of less coercive actions. Commission on Kosovo, supra note 44, at 166. Sean Murphy insists on having serious diplomatic efforts prior to intervention. Murphy, supra note 47, at 19-20.

[FN86]. Burton, supra note 27, at 450 (stressing that "[u]nilateral humanitarian intervention should be conditioned upon Security Council deadlock"). Although it emphasized the need to find peaceful resolutions to humanitarian crises through the U.N., the Independent International Commission on Kosovo recognized that, in some instances, a country might not consult the Security Council either because a permanent member of the Council had exercised its veto power or it reasonably anticipated that a permanent member would exercise its veto power. Commission on Kosovo, supra note 44, at 194; see also Reisman & McDougal, supra note 12, at 193 (limiting the requirement to the lack of time to seize an authorized international organization on the matter, and subsequent seisin as soon as possible, i.e., any organization, not just the U.N.).

[FN87]. Proportionality of the action is typically considered to be a basic component of a right to unilateral humanitarian intervention. As the Independent International Commission on Kosovo stated: "[T]he method of the intervention must be reasonably calculated to end the humanitarian catastrophe as rapidly as possible." Commission on Kosovo, supra note 44, at 194. Moreover, "there should be a credible willingness on the part of intervening states to withdraw military forces and to end economic coercive measures at the earliest point in time consistent with the humanitarian objectives." Id.at 195.

[FN88]. Reisman & McDougal, supra note 12, at 193 (insisting upon compliance with international law on the use of force and submission to the supervision and appraisal of the appropriate inclusive international organization); see also Commission on Kosovo, supra note 44, at 168-69 (suggesting that higher legal standards than applicable to ordinary military interventions be applied).

[FN89]. According to Tom Farer, one factor to be taken into account when intervening is that "where the good Samaritan must fight for the right to perform, he may end up causing more injury that he averts." Farer, View from Charlottesville, supra note 23, at 152; see also Brown, supra note 52, at 1735.

[FN90]. Hilpold, supra note 17, at 455.

[FN91]. Commission on Kosovo, supra note 44, at 195 ("After the use of force has achieved its objectives, there should be energetic implementation of the humanitarian mission by a sufficient commitment of resources to sustain the population in the target society and to ensure speedy and human reconstruction of that society in order for the whole population to return to normality."). An obligation to rebuild would limit the risk of abusive intervention (since, if it walks away after worsening the human rights situation in the target state, the intervener can be held in breach of its international obligation) and thus ensure that interventions are conducted for the right reasons, by states truly committed to the future of the target state.

[FN92]. Ved Nanda and Richard Lillich have suggested this criterion. See Brownlie, Humanitarian Intervention, supra note 84, at 225.

[FN93]. See Tesón, supra note 6, at 3.

[FN94]. Ved Nanda and Richard Lillich have suggested this criterion. See Brownlie, Humanitarian Intervention, supra note 84, at 225; see also Glennon, supra note 5, at 200.

[FN95]. See Murphy, supra note 47, at 385.

[FN96]. See Glennon, supra note 5, at 199 ("If the objective is furtherance of human rights, that goal is more likely to be achieved to the extent that the interveners themselves uphold human rights.").

[FN97]. "It is important to note that these criteria [which stipulate when unilateral humanitarian intervention is permitted, namely, when human rights abuses violate jus cogens, i.e., when the target state is anarchical or the government has been dislodged against the will of the population,] should be seen as specific guidelines

rather than rigid rules and, as the cases in Sierra Leone and the Central African Republic demonstrate, current trends in international law and U.N. practice would seem to allow for some flexibility." Levitt, supra note 12, at 337-38.

[FN98]. Falk, Humanitarian Intervention, supra note 21, at 510.

[FN99]. Brownlie, Humanitarian Intervention, supra note 84, at 219 ("If a new view is to be put forward, either it should be based on a much more substantial exposition of the practice, doctrine, and general development of the law relating to the use of force by states or the view should be offered tout court as a proposal to change the existing law."); see also, Chesterman, supra note 5 passim.

[FN100]. This idea was alluded to in Section I.

[FN101]. Some would argue that unilateral humanitarian intervention is prohibited altogether by Article 2(4) of the U.N. Charter: "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." U.N. Charter art. 2, para. 4. See Ian Brownlie, International Law and The Use of Force by States 338-42 (1981); Louis Henkin, How Nations Behave 145 (1979); Hilpold, supra note 17, at 443.

[FN102]. S.S. Lotus (Fr. v. Turk) 1927 P.C.I.J. (ser. A) No. 10, at 18-19 (Sept. 7) (holding that "restrictions upon the independence of states cannot... be presumed," leaving states a "wide measure of discretion which is only limited in certain cases by prohibitive rules'). The Lotus case affirms the consensual approach to international law, namely that international law is based ultimately on the free will of states.

[FN103]. Prosper Weil, "The Court Cannot Conclude Definitively...": Non liquet Revisited, 36 Colum. J. Transnat'l L. 109, 112 (1997).

[FN104]. Id.at 112.

[FN105]. Fifty years later, the International Court of Justice in the Advisory Opinion on the Threat or Use of Nuclear Weapons declared:

> [I]n the view of the current state of international law, and the elements at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defense, in which the very survival of a State would be at stake.

Legality of the Threat or Use of Nuclear Weapons, (Adv. Op.) 1996 I.C.J. 35, 105 (Jul. 8). The position take by the Court in the Advisory Opinion is called a "non liquet," i.e., "[a] tribunal's nondecision resulting from the unclarity of the law applicable to the dispute at hand." Black's Law Dictionary 1078 (7th ed. 1999); see also Glennon, supra note 5, at 63 ("Non liquet means 'it is not clear.' The doctrine of non liquet refers, today, to an insufficiency in the law, to the conclusion that the law does not permit deciding a case one way or the other."). In other words, "non liquet" means that there is a lacuna in international law. This approach contrasts with that of the Lotus case where the completeness of the international legal regime was celebrated. But Weil distinguishes "non liquet" in contentious proceedings from "non liquet" in advisory opinions. Weil, supra note 103, at 115-16. Although Professor Weil argues, "non liquet" is not acceptable in contentious proceedings, it is understandable in advisory opinions. In contentious proceedings, the mission of the Court is circumscribed by the principle of consensual jurisdiction. In an advisory opinion, the Court, wandering outside the limits of consensual jurisdiction, is not constrained by the will of the parties to see their dispute resolved one way or another by the Court. In advisory opinions, the Court is free not to answer the question presented to it, thereby suggesting the incompleteness of the international legal system. Regardless of Weil's interpretation, it seems that the theoretical debate about completeness and lacunae in international law is still vivid today--and the question unresolved. In our view, the rule set forth by the P.C.I.J. in

the Lotus case, namely that the absence of a prohibitive rule implies permissibility, remains applicable, if not all the time, at least in contentious proceedings. This explains why unilateral humanitarian intervention is analyzed here in light of this decision.

[FN106]. W. Michael Reisman, Unilateral Action and the Transformations of the World Constitutive Process: The Special Problem of Humanitarian Intervention, 11 Eur. J. Int'l L. 3, 17 (2000).

[FN107]. Id.at 17.

[FN108]. More specifically, Reisman argues, "[i]n the contemporary constitutive process, the potential for abuse in humanitarian interventions is considerably reduced because the species of unilateral action for humanitarian purposes that has emerged in the contemporary constitutive process is different, both in stimulation and application, from its traditional counterpart." Id.at 16.

[FN109]. Id.at 18.

[FN110]. Id.at 18 ("The safeguards that are part of an organized and institutionalized decision process are not available in the constitutive constellation that currently obtains.").

[FN111]. Kratochwil, supra note 4, at 53 ("I accept the usual notion that regimes enable the participants to realize certain goals...and that the rules and norms of regimes are defenses against unilateral action and opportunism.").

[FN112]. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 135 (June 27).

[FN113]. See, e.g, G.A. Res. 38/7 (1983) adopted 108-9-27, U.N. GAOR (condemning the Grenada intervention), and GA Res. 44/240 (1989) adopted 75-20-40 (condemning the intervention in Panama).

[FN114]. For reports in the media of condemnation by individual countries, see Nicole Winfield, Call for Humanitarian Intervention Degenerates into Sovereignty Debate, Associated Press, Nov. 21, 1999 ("Russia laid out a strong criticism of US and Allied policies in Iraq and Kosovo, saying unilateral action in both places had no legal basis...China joined Russia in the sovereignty call.").

[FN115]. Reisman and McDougal, supra note 12, at 169.

[FN116]. Reisman and McDougal, supra note 12, at 168 ("Humanitarian intervention is an extraordinary remedy, an exception to the postulates of State sovereignty and territorial inviolability that are traditional to the fundamental theory if not the actual practice of international law.").

[FN117]. Brownlie, Humanitarian Intervention, supra note 84, at 223. Note that Brownlie combines the two main arguments in favor of "normative ambiguity." There is indeed a permissive regime of unilateral humanitarian intervention, but it is of an exceptional nature.

[FN118]. Ian Brownlie, Humanitarian Intervention, supra note 84, at 223.

[FN119]. Richard Falk, Comment 1, in Law and Civil War in the Modern World 539, 541 (John N. Moore ed., 1974).

[FN120]. Richard B. Lillich, Humanitarian Intervention: A Reply to Ian Brownlie and a Plea for Constructive Alternatives, in Law and Civil War in the Modern World 227, 230 (John N. Moore ed., 1974).

[FN121]. Falk, Comment, supra note 119, at 545.

[FN122]. Oscar Schachter, International Law in Theory and Practice 126 (1991).

[FN123]. Article 2(4) of the U.N. Charter prohibits the use of force by states. U.N. Charter, art. 2, para. 4.

[FN124]. See Section I.B.1, supra, for a detailed discussion of state sovereignty under inter-national law.

[FN125]. Commission on Kosovo, supra note 44, at 191 (“It might be unrealistic, however to expect such an outcome [principled framework for humanitarian intervention] in the near future”).

[FN126]. Brownlie, Humanitarian Intervention, supra note 84, at 223 (“It is surprising to expect a worth-while doctrine of intervention to protect human rights at the time when the most modest proposals not for implementing but for merely setting of standards were struck down as threats to domestic jurisdiction”).

[FN127]. On the importance and the meaning of equality in international law, see Glennon, supra note 5, at 147-51.

[FN128]. Commission on Kosovo, supra note 44, at 189, 191.

[FN129]. Falk, Humanitarian Intervention, supra note 21, at 542 (supporting the ideas put forward by John Norton Moore: “[t]he only way to make the equality principle function in a complex series of instances is to evolve discernible standards allowing that reasonably unlike cases should be treated dissimilarly.” (emphasis in original)). According to Falk, the problem with the strict normativity approach is that it generalizes di-verse situations by subjecting them to the same formula, thus neglecting the different policy choices that arise from each of those situations. Id.at 542-43.

[FN130]. See Section I.A.2, supra, on the rule of law and the rule of power.

[FN131]. Farer, View from Charlottesville, supra note 23, at 164.

[FN132]. Commission on Kosovo, supra note 44, at 195.

[FN133]. See Section I.A.1., supra, on deterrence of human rights violators.

[FN134]. Some authors argue that this accumulation of instances has achieved the level of normativity of customary international law. The majority of academics, however, agree that, in Michael Glennon's words: “[T]he law governing intervention is at best hopelessly confused and at worst illusory.” Glennon, supra note 5, at 11.

[FN135]. Bettati & Kouchner, supra note 1, at 267 (“Le droit est toujours en retard sur l'éthique ... Anticiper sur la norme c'est déjà préparer son avènement.”).

[FN136]. Michael Glennon views “[a]n interim solution of regionalization” as an “inexact and non-legalistic approach that can lay the groundwork for the eventual establishment of a true legalist system to govern the use of force.” Glennon, supra note 5, at 209. This trend is also identified by Simon Chesterman as one of “three important factors in the emerging international order.” Chesterman, supra note 5, at 218.

END OF DOCUMENT