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The Lonely Pragmatist: Humanitarian Intervention in an Imperfect World

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The Lonely Pragmatist: Humanitarian Intervention in an Imperfect World

*David Vesel**

TABLE OF CONTENTS

I. Introduction

A. Overview	3
B. Theoretical Foundations of Humanitarian Intervention	5
C. Balancing Order and Justice	7

II. Legality and Legitimacy of Humanitarian Intervention

A. International Law and the Charter of the United Nations	9
B. Nothing to Declare? Customary International Law Regarding Humanitarian Intervention	13
C. Ir-Responsibility to Protect? State Sovereignty and Human Rights	15

III. Humanitarian Intervention in Practice

A. Overview	19
B. Somalia	20
C. Sierra Leone	26
D. East Timor	31
E. Northern Iraq	36
F. Kosovo: Solidarism in Excess?	41

IV. Recap and Outlook

A. Case Study Summary	50
B. Improvements	52
C. Failing States and Global Security	53

<i>APPENDIX A: IRAQ IN 2003</i>	56
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I. INTRODUCTION

“Humanitarian intervention saves lives and costs lives. It upholds international law and sometimes breaks international law. It prevents human rights violations, and it perpetrates them.”¹ The doctrine of humanitarian intervention attempts to reconcile these contradictions, while some actual interventions may perpetuate them. Humanitarian interventions have at times been of questionable legality, and undertaken by half-hearted interveners amid international controversy or with ulterior motives. Other missions have encouraged international consensus, stopped human rights abuses, averted humanitarian catastrophes, and preserved a humanitarian character, even when doing so contradicted more traditional conceptions of strategic interests. These discrepancies give rise to many questions on issues of legality and legitimacy, which combine to provide the basis for the doctrine of humanitarian intervention. They also give rise to questions about the on-the-ground nature of humanitarian interventions, or how closely the actual mission resembles a mission conducted to preserve basic human rights. In looking at how such questions were answered in a number of cases and covering a range of circumstances, this paper aims to shed light on the evolution of both the doctrine and practice of humanitarian intervention.

The words “evolved” and “humanitarian intervention” may need some clarification. Evolution, in this context, will cover humanitarian interventions during the period 1991-2002, a twelve-year period that has seen unprecedented international and United Nations (U.N.) action to combat massive human rights violations. Admittedly, it would be fruitless to claim a distinctly linear evolutionary relationship exists between time and a more clearly defined and legitimated form of humanitarian intervention. Setbacks, mistakes, and various political agendas have slowed and at times derailed such a progression. Nonetheless, evolution helps describe the reinterpretation of lessons learned from earlier actions. Successful reinterpretation relies upon the German adage, *Ubung macht den Meister* (practice makes the master) or, in this case, “hindsight hones the vision” of past interventions. Humanitarian intervention as a term is classically defined as “the justifiable use of force for the purpose of protecting the inhabitants of

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1. *Human Rights in Times of Conflict: Humanitarian Intervention*, HUMAN RIGHTS DIALOGUE, Winter 2001 at 1.

another state from treatment so arbitrary and persistently abusive as to exceed the limits within which the sovereign is presumed to act with reason and justice.”²

A. Overview

Previous interventions and debates over their legitimacy form the backdrop for future humanitarian interventions, as well as the basis of arguments for and against intervening. Lucid reinterpretations of earlier humanitarian interventions and their rationale will lead to a more productive debate surrounding humanitarian intervention. With that goal in mind, this article will first focus on the framework of the doctrine of humanitarian intervention, as manifested in issues of legality and legitimacy. The two issues are interrelated yet distinct. The first section will highlight areas of legal dispute outline developments in international law regarding intervention, with particular attention on customary international law. The legal discussion will include a commentary on legitimacy issues, which will serve to underscore the supra-legal elements of humanitarian intervention.

The second section will delineate how the questions raised by the doctrine of humanitarian intervention have been answered in practice. For the purposes of this article, only armed interventions will be considered. That is not to suggest military intervention is the only possible resolution in cases of extreme humanitarian emergencies, but rather that international armed action likely represents the most difficult, controversial, and potentially divisive response. The analysis will focus on five specific cases of armed intervention with stated humanitarian justifications: Somalia, Sierra Leone, East Timor, northern Iraq,³ and Kosovo. These examples represent a cross-section of circumstances and levels of international involvement. Though these conflicts range over three continents and thirteen years, the interveners in each case claimed some sort of U.N. authorization for their actions. The validity of these claims will be analyzed, along with efforts to achieve the purported humanitarian goals.

None of these five cases, or any other similar intervention for that matter, occurred without some form of dissent before, during, and after action. Many forms of controversy have surrounded the doctrine and execution of humanitarian intervention, though the levels of protest have varied widely from case to case. Disagreements have arisen over such

2. ELLERY STOWELL, INTERNATIONAL LAW: A RESTATEMENT OF PRINCIPLES IN CONFORMITY WITH ACTUAL PRACTICE 349 (1931).

3. This case looks primarily at the establishment of safe havens in Iraq in 1991.

issues as whether foreign troops may use force in any case not involving self-defense and how conflicting concerns for international order and justice can be reconciled and prioritized. This article attempts to keep as pragmatic of a perspective as possible when addressing these disagreements.

One particular variable, the functioning capacity of the state in question, has not received enough attention in these doctrinal debates, but it will be of illustrative importance here. Most pro-intervention analysis makes no distinction between cases where states are unwilling and those where states are unable to stop humanitarian emergencies.⁴ However, a closer look at the developing doctrine of humanitarian intervention, the rights and protections of state sovereignty, and humanitarian intervention in practice will show that the international community and international law do not treat all instances of humanitarian intervention similarly. A differentiation can and will be drawn between states that are unwilling to stop crises and states incapable of stopping them. The case studies will show that states unwilling to stop such emergencies are likely to be involved in the perpetuation of the crises, despite the fact that the government maintains predominant control over the state. Even so, the legal protections of state sovereignty still apply to states engaging in what may be morally reprehensible acts. The cases will also show that the international community at-large has been more hesitant to accept and authorize intervention in functioning yet repressive states, than in instances of states that no longer have any central governing authority. States that demonstrate inability to put an end to crises often reflect states that have ceased to function—failing states. It remains my contention that these are two very distinct situations; there exist fundamental differences in the challenges posed and lessons offered by states *unwilling* to stop abuses and those *unable* to do so. In support of this claim, analysis of intervention practice will show the usefulness of a division between failing states and functioning but repressive ones. Then the article will tackle the more difficult question of what implications this differentiation could yield for the doctrine of humanitarian intervention.

Following the discussion of previous interventions, the focus will shift to the current climate regarding interventions. The main question here will be how the focusing of international attention on counter-terrorism has affected the evolution of humanitarian intervention. The cries, particularly from the United States, that “everything changed” with

4. See, e.g., *infra* note 15 (None of those works make a clear delineation between interventions in functioning states versus failing states).

regard to foreign policies, threat perceptions, and international actions in September 2001 have slowly begun to subside. The full effects of this political refocusing on humanitarian intervention remain murky, though a few points of light will emerge.

B. Theoretical Foundations of Humanitarian Intervention

This part of the article will explore some of the theoretical underpinnings of humanitarian intervention. In one of the best and most thorough recent works on this subject, Nicholas Wheeler's *Saving Strangers* notes the dispute between what he calls "restrictionists" and "counter-restrictionists" on humanitarian intervention.⁵ He also breaks down the arguments for and against intervention along the lines of realist, pluralist, and solidarist theories of international society.⁶ Using this breakdown as a guide, I will briefly sketch out these theories that guide much of the current thought on humanitarian intervention.

Under the realist theory, there can be no such thing as a humanitarian intervention. States are always in pursuit of their own strategic interests and goals, not altruistic ones. According to this school of thought, humanitarian justifications can only serve to mask underlying vital or strategic interests.⁷ Thus, anything resembling a humanitarian intervention occurs only on occasions when human rights concerns and political power objectives coincide.⁸

The pluralist theory of international relations, which Wheeler and others ascribe primarily to English School theorists including Hedley Bull, Martin Wight and R. J. Vincent, supports a view that a society of states exists. This society can both constrain and compel state actions.⁹ According to this theory, states adopt certain obligations and responsibilities to become members of this international society.¹⁰ In contrast with the realists, pluralists assert that while states may well act in pursuit of their own strategic interests, they must pursue such interests only within the framework of accepted rules in the society of states.¹¹

5. NICHOLAS J. WHEELER, *SAVING STRANGERS: HUMANITARIAN INTERVENTION IN INTERNATIONAL SOCIETY* 41-42 (2000).

6. *Id.* at 21-52.

7. See generally Thomas M. Franck & Nigel S. Rodley, *After Bangladesh: The Law of Humanitarian Intervention by Military Force*, 67 AM. J. INT'L L. 275 (1973).

8. See WHEELER, *supra* note 5, at 30.

9. *Id.* at 6.

10. R. J. Vincent & Peter Wilson, *Beyond Non-Intervention*, in *POLITICAL THEORY, INTERNATIONAL RELATIONS AND THE ETHICS OF INTERVENTION* 127 (Ian Forbes & Mark Hoffman eds., 1993); HEDLEY BULL, *THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS* 12 (2d ed., 1995).

11. BULL, *supra* note 10, at 12-13.

Hedley Bull maintains that these rules are not steadfast, but states that break them must provide acceptable justifications for their transgressions.¹² With regard to humanitarian intervention, pluralism holds that states may intervene on humanitarian grounds only as an exception to the accepted principles of state sovereignty and non-intervention. As such, these interventions must provide acceptable international justification. The explanations appeal to the notion that human rights and humanitarian considerations can, at least in some cases, supersede the existing principles that would prohibit such interventions. Nonetheless, under pluralism state sovereignty and non-intervention remain building blocks of international society. Yet, the complications that arise from questions over humanitarian justifications for intervention make them stumbling blocks as well.

In terms of humanitarian intervention, solidarist theory represents an alternative to both the realist and pluralist views. In contrast to both the realists and the pluralists, solidarists try to expand and codify a right to humanitarian actions, including armed intervention.¹³ Wheeler's book attempts to clarify this solidarist viewpoint by forming it into a practical theory. The solidarist conception is rooted in the belief that there is a moral, political, and legal compulsion for the international community to respond to humanitarian emergencies.¹⁴ This idea elevates certain human rights, particularly the right to be free of systematic violence, above the post-Westphalian rights of the sovereign state to commit such acts with impunity.

Proponents of this more humanitarian-based, solidarist approach to international society are still trying to answer the questions of when and where interventions should occur. The search for an acceptable set of criteria or tests to be used as a guide for answering those questions has proven both attractive and elusive. That is to say, many scholars and politicians have created laundry lists of factors that should be met before armed humanitarian intervention becomes policy; as of yet, none have had any lasting influence on state practice.¹⁵

12. *Id.* at 62-71.

13. See WHEELER, *supra* note 5, at 33-51.

14. *Id.*

15. For various scholar-created lists, see, e.g., *id.*; Ved P. Nanda et al., *Tragedies in Somalia, Yugoslavia, Haiti, Rwanda and Liberia: Revisiting the Validity of Humanitarian Intervention Under International Law—Part II*, 26 DENV. J. INT'L L. & POL'Y 827, 827 (1998); OLIVER RAMSBOTHAM & TOM WOODHOUSE, *HUMANITARIAN INTERVENTION IN CONTEMPORARY CONFLICT* (1996); FERNANDO R. TESÓN, *HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY* (1988). For politico-government created lists, see, e.g., INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, *THE RESPONSIBILITY TO PROTECT: REPORT OF THE INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY* (2001) [hereinafter ICISS, REPORT]; DANISH INSTITUTE OF INTERNATIONAL AFFAIRS, *HUMANITARIAN INTERVENTION:*

The highest level political effort yet to apply such an approach has come from Tony Blair. The British prime minister set out five conditions that need to be affirmatively answered to pave the path to intervention: (1) "Are we sure of our case?" (2) "Have we exhausted all diplomatic options?" (3) "Are there military options we can sensibly and prudently undertake?" (4) "Are we prepared for the long term?" and (5) "Do we have national interests involved?"¹⁶ While controversial, Blair's declaration broadened the scope of missions that would need to be pursued under such an expansive doctrine of humanitarian intervention. As of yet, verifiable changes regarding humanitarian intervention have been slow to make their way into state practice. Similar criteria will help in the later analysis of specific cases of intervention.

C. Balancing Order and Justice

In a heavy-handed comparison, it can be said that the realist, pluralist, and solidarist theories respectively contend that "might makes right," "majority makes right," and "morality makes right." These three theoretical approaches assist in this article's first task of describing the existing debate over humanitarian intervention. Another useful way to break down arguments for and against intervention is to look at the competition and prioritization of claims for the preservation of order, versus those promoting a greater sense of justice in international society.¹⁷

Pro-interventionists believe that from justice flows order. Therefore, by allowing humanitarian tragedies to continue unfettered, the international community tacitly creates a threat to global order. In this view, the threat to international order posed by preserving the protections provided by the principles of state sovereignty and non-intervention supercedes the risks associated with a broader right to intervene in crisis situations. Accordingly, the goal of a peaceful and more secure world cannot be achieved in a world that permits, nearly to the point of sanctioning, the creation and perpetuation of humanitarian emergencies.

Non-interventionists, on the other hand, believe that from order flows justice. This side of the argument maintains that preserving peace is the utmost goal of the international community. Any form of armed

LEGAL AND POLITICAL ASPECTS (1999); DUTCH ADVISORY COMMITTEE ON ISSUES IN PUBLIC INTERNATIONAL LAW 2000; ADVISORY COUNCIL ON INTERNATIONAL AFFAIRS, ADVISORY REPORT ON HUMANITARIAN INTERVENTION (2000).

16. Tony Blair, *The Blair Doctrine of the International Community*, Speech given at Chicago Economic Club (Apr. 23, 1999) at http://www.pbs.org/newshour/bb/international/jan-june99/blair_doctrine4-23.html.

17. See BULL, *supra* note 10, at 74-94.

conflict presents a threat to the post-World War II security balance, and such actions are to be undertaken in as few situations as possible. In particular, a right to and practice of armed intervention on humanitarian grounds threatens to destabilize any existing security balance. Such a right would run a high risk for abuse by powerful states, which would then have the potential to take up arms in many areas of the world as long as they could provide some sort of pro-humanitarian justification. Intra-state conflict is of secondary importance at best. The underlying rationale of this anti-intervention approach would be that international violence begets further international violence, whereas domestic violence does not. Therefore it is better for the pursuit of global stability to deny states the right to intervene, even on humanitarian grounds, than to run the risks associated with expanding justifications for international conflict. Even if that means the international community may have to accept certain humanitarian abuses and human rights violations.

The order versus justice arguments show differences of ideas and eras. The pro-intervention stance addresses the world as one where conflicts have shifted from the inter-state paradigm, predominant until the end of World War II, to the intra-state fighting that has grown more and more prevalent since widespread decolonization in the second half of the twentieth century.¹⁸ Conversely, the anti-intervention, order-first camp focuses its attention on avoiding inter-state conflict, taking the focus off the trend towards intra-state violence. In a decision of quality over quantity, the order-first view asserts that eliminating the conflicts with the most potentially dire consequences—inter-state conflict—should remain the central focus of global security efforts. Even though the bulk of violent situations may stem from various domestic situations, those situations' long-term and ultimate consequences for global stability and security pale in comparison to those of international military conflict. The result is a complex relationship between order and justice where justice in some ways is a precondition for order, while order in other respects is a precondition for justice.¹⁹ Balancing these two conceptions of international order continues to play an important role in the debate over humanitarian intervention and, as Section III will show, has had an influence on the U.N. Security Council's responses to humanitarian emergencies.

18. Michael J. Glennon, *The New Interventionism: The Search for a Just International Law*, 78 FOREIGN AFF. 2 (1999).

19. See DANISH INSTITUTE OF INTERNATIONAL AFFAIRS, *supra* note 15, at 15.

II. LEGALITY AND LEGITIMACY OF HUMANITARIAN INTERVENTION

A. International Law and the Charter of the United Nations

The legal status of humanitarian intervention has changed markedly over the past three hundred years. Hugo Grotius, a seventeenth-century scholar and one of the earliest proponents of international law, was one of the first to comment on the legal aspects of interventions. It was his contention that a sovereign committing atrocities against his own subjects could provide justification for others taking up arms against that sovereign in defense of all humankind.²⁰ While not widely accepted during his time, Grotius' viewpoint was reflected in state practice throughout the nineteenth and early twentieth centuries. In fact, prior to the U.N. Charter a right of humanitarian intervention was accepted as a customary international law.²¹

With the advent of the League of Nations and ultimately the United Nations, a new standard of international order was introduced. The principles of state sovereignty and non-intervention were to be given utmost priority, as avoiding inter-state conflict was seen as the key element in maintaining the international order that had been so decimated by World Wars I and II. This section will highlight some of the legal issues regarding intervention that have arisen since the adoption of the Charter of the United Nations in 1945, with particular attention on the requirements for changing international law and the contradictions in existing legal standards regarding intervention.

In the combination of treaty law and customary law that constitute international law, the Charter of the United Nations provides the starting point for further discussion of international legal issues. The most relevant sections to intervention in the Charter are Articles 2(4), 2(7) and Chapter VII, specifically Articles 39 and 42. Article 2(4) codifies the principle of non-intervention from foreign powers and grants upon all members of the United Nations the privilege of state sovereignty associated with freedom from threats of outside force: "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."²² Article 2(7) further strengthens the protections of state sovereignty when it states, "[n]othing contained in the present Charter

20. HUGO GROTIUS AND INTERNATIONAL RELATIONS 247 (Hedley Bull et al. eds., 1995).

21. Jean-Pierre Fonteyne, *The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity under the U.N. Charter*, 4 CAL. W. INT'L L.J. 203, 235 (1974).

22. U.N. CHARTER, art. 2, para. 4.

shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state . . . but this principle shall not prejudice the application of enforcement measures under Chapter VII.”²³ In laying out these principles of the United Nations, Article 2 is intended to provide some of the most basic and fundamental rights and responsibilities of Charter signatories.

Articles 39 and 42 discuss threats to international peace and possible remedies. Article 39 asserts: “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”²⁴ Article 42 authorizes the use of force to restore international peace and security under specific circumstances.²⁵ In conjunction, Articles 39 and 42 provide the opportunity for the Security Council to determine a situation—be it contained within the borders of one state or not—to be a threat to international peace and security, and in doing so, the Security Council may justify an armed intervention.

Based on these Articles of the U.N. Charter, the legality of humanitarian intervention, with and without Security Council authorization, has been called into question. One argument in support of legal intervention is that Article 2(4) does not prohibit humanitarian intervention. This line of thinking contends that, as humanitarian interventions, in principle, are neither directed against “territorial integrity or political independence” of a state, Article 2(4) does not prohibit them.²⁶ Philip Jessup, former judge at the International Court of Justice, states this position clearly: “If force can be used in a manner which does not threaten the territorial integrity nor political independence of a state, it escapes the restriction of the first clause.”²⁷ Furthermore, such interventions would not be “inconsistent with the Purposes of the United Nations,” but instead they would further the stated goals of the United Nations even when the organization itself is

23. U.N. CHARTER, art. 2, para. 7.

24. U.N. CHARTER, art. 39.

25. U.N. CHARTER, art. 42 states: “Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such actions by air, sea or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea or land forces of Members of the United Nations.”

26. See Michael Reisman & Myres S. MacDougal, *Humanitarian Intervention to Protect the Ibos*, in HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 171 (Richard B. Lillich ed., 1973).

27. PHILIP C. JESSUP, A MODERN LAW OF NATIONS 162 (1950).

unable to take action.²⁸ Additional support for the argument that humanitarian interventions are consistent with Article 2(4) asserts: “[A]n altruistic humanitarian intervention does not result in the territorial conquest or political subjugation against which the Charter was designed to protect. The territorial boundaries of the target state remain unchanged and the intervener departs from the oppressed state once the crisis passes.”²⁹

On the surface, this argument is compelling; upon deeper inspection, the assumptions contained within such a claim become tougher to support. To follow this line of reasoning and accept that Article 2(4) does not prohibit interventions, one must first reject the aforementioned realist view of humanitarian intervention and agree that “altruistic humanitarian intervention” is a practical possibility. The second and much higher logical hurdle is the contention that armed international intervention would not disrupt the domestic political situation. Otherwise, the provision of Article 2(4) prohibiting interference in domestic political independence may be breached. An armed intervention necessarily interferes in domestic politics.

Yet others argue that humanitarian intervention constitutes an acceptable form of interference, as the violation of rights protected by the U.N. Charter does not fall within the domestic jurisdiction of any state.³⁰ Therefore, this argument contends that human rights violations can take precedence over the non-intervention principle and assumes that states can accurately judge when the non-intervention principle needs to be respected or not—a concession that few small states are willing to make. Perhaps these difficulties explain why this view is supported by only a minority of legal scholars and why it goes against the majority of state practice since the adoption of the U.N. Charter.³¹

The more prevalent argument is that armed intervention on humanitarian grounds is illegal; the only possible exception being under direct authorization from the United Nations under Charter Articles 39 and 42. The International Court of Justice (I.C.J.) has ruled in support of

28. TESÓN, *supra* note 15, at 131.

29. Barry Benjamin, Note, *Unilateral Humanitarian Intervention: Legalizing the Use of Force to Prevent Human Rights Atrocities*, 16 FORDHAM INT’L L. J. 120, 150 (1992).

30. See generally Reisman & MacDougal, *supra* note 26.

31. For support of at least a limited right to humanitarian intervention, see generally Michael J. Bazylar, *Reexamining the Doctrine of Humanitarian Intervention in Light of the Atrocities in Kampuchea and Ethiopia*, 23 STAN. J. INT’L L. 547 (1987); Michael Levitin, *The Law of Force and the Force of Law: Grenada, the Falklands, and Humanitarian Intervention*, 27 HARV. INT’L L.J. 621 (1986); HUMANITARIAN INTERVENTION AND THE UNITED NATIONS (Richard B. Lillich ed., 1973); W. Michael Reisman, Editorial Comments, *Coercion and Self-Determination: Construing Charter Article 2(4)*, 78 AM. J. INT’L L. 642 (1984); TESÓN, *supra* note 15.

this view in *Nicaragua v. United States* in 1986.³² The court ruled that the principle of non-use of force had attained the status of both a treaty and custom-based international law. Such a principle could not be violated via the use of force for the humanitarian considerations the United States cited to justify their intervention in Nicaragua.³³ The court held that “while the United States might form its own appraisal of the situation as to respect for human rights in Nicaragua, the use of force could not be the appropriate method to monitor or ensure such respect.”³⁴ This ruling can be interpreted as showing that the I.C.J. did not support the use of force predicated upon humanitarian grounds. Certainly, the decision strengthened the authority behind the principle of non-intervention and behind a prohibitive interpretation of Article 2(4). Nonetheless, the conflict between defense of human rights and state sovereignty remains unresolved and will be revisited in the next section.

A restrictive interpretation of Article 2(4) contends that the purpose of the Article is to eliminate any recourse to take up arms. Admittedly, even the most stringent analysis of Article 2(4) allows exceptions to this principle of the non-use of force. Aside from the exception for territorial self-defense allowed under Article 51, only the U.N. Security Council can legitimize the use of force in another state. Scholars who support this view conclude that the purpose of Article 2(4) is to forbid the use of force in as many situations as possible, with the onus of proof falling on would-be interveners to convince the Security Council that an intervention is justified.³⁵ On the restrictions of Article 2(4), Oscar Schachter, professor emeritus in international law at Columbia, writes:

No state today would deny the basic principle that the people of a nation have the right, under international law, to decide for themselves what kind of government they want, and that this includes the right to revolt and to carry on armed conflict between competing groups. For a foreign state [or regional actor] to support, with “force,” one side or the other in an internal conflict, is to deprive the people in some measure of their right to decide the issue by themselves. It is, in terms of article 2(4), a use of force against the political independence of the state engaged in civil war.³⁶

32. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

33. *Id.* at § 242.

34. *Id.* at § 268.

35. For authors who support a restrictive interpretation of Article 2(4), see generally Ian Brownlie, *Humanitarian Intervention*, in *LAW AND CIVIL WAR IN THE MODERN WORLD* (John Norton Moore, ed., 1974); W.D. Verwey, *Humanitarian Intervention Under International Law*, 32 NETH. INT'L L. REV. 357 (1985); Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620 (1984).

36. Schachter, *supra* note 35, at 1641.

In contrast with the pro-intervention interpretation of Article 2(4) mentioned above, a broader definition of domestic jurisdiction and political independence interprets 2(4) as identifying specific areas that are to remain within domestic jurisdiction while a significant number of others, including human rights violations, fall under international domain.

B. Nothing to Declare? Customary International Law Regarding Humanitarian Intervention

One pro-interventionist response to these restrictionist arguments that interventions are illegal, is that a customary international law supporting a right to intervene on humanitarian grounds either has emerged or is emerging. The issue here is unilateral intervention, which for the purposes of this article is defined as any intervention outside of a specific U.N. Security Council resolution, as authorized under Article 42 of the U.N. Charter. Interventions under U.N. authorization are *de jure* legal under international law. However, such actions do not necessarily authorize states or groups of states to act when and where the Security Council does not. To assess this pro-interventionist response, one must first look at what constitutes a customary international law.

Historically, there have been two sources of customary international laws: state practice and *opinio juris*. State practice requires a “general and consistent” manner of state actions.³⁷ *Opinio juris* is defined as “a subjective feeling of legal obligation regarding the practice in question,”³⁸ or a “sense of legal obligation under which a state acts.”³⁹ Thus, through state practice or *opinio juris* an international law may be established without reference to a court decision, international agreement, or treaty. Furthermore, *opinio juris* typically functions as a check on powerful state behavior, so that the most influential and active states cannot abuse the state practice caveat to establish customary international laws by their actions alone.⁴⁰ It follows that state conduct is not, by itself, a sufficient condition for a concept to achieve the status of a customary international law; a state must also believe that its behavior was already required by existing international law to meet the *opinio juris* requirement.

37. RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) cmt. b (1987).

38. Michael Byers, *Power, Obligation, and Customary International Law*, 11 DUKE J. COMP. & INT’L L. 81, 83 (2001).

39. Daniel Joyner, *A Normative Model for the Integration of Customary International Law into United States Law*, 11 DUKE J. COMP. & INT’L L. 133, 134 (2001).

40. See Byers, *supra* note 38, at 86-87.

It is important to assess whether such a customary international law has developed in support of humanitarian intervention. The armed actions that individual states, regional organizations, and ad hoc coalitions have taken in the name of preserving human security comprise the body of state practices at issue. Were such a customary international law in existence as of 1999, the legal debates that preceded the North Atlantic Treaty Organization (NATO) intervention in Kosovo would have been unnecessary and easily resolved – they were not.

The general consensus among legal scholars is that such a norm did not exist prior to Kosovo, nor does one exist today. This consensus is evidenced by the fact that many legal scholars who support humanitarian intervention argue that the right to unilateral humanitarian intervention should be both legalized and codified, thereby admitting that unilateral interventions do not have the status of a customary international law.⁴¹

Though the right to unilateral intervention appears to fall short of meeting the requirements of being a customary international law, such a right may be emerging. The increased occurrence of interventions with stated humanitarian goals over the past twelve years gives fodder to the argument supporting an emerging norm that may, in time, become law. These actions include missions undertaken both with and without authorization from the U.N. Security Council. Though both states and commentators generally concur that the Security Council maintains primary responsibility for the preservation of international peace and security as well as the determination of threats to that stability, no such agreement has been found on who holds secondary or subsidiary power in these areas. As such, even though Security Council decisions to intervene for the prevention or limitation of a humanitarian crisis are accepted as legal, similarly intended actions taken by regional organizations or ad hoc coalitions without a U.N. mandate face much more legal scrutiny. To help evaluate the emergence of a right to intervene another issue should be addressed: when the Security Council does not take action in the face of a humanitarian catastrophe, does any other organization or state hold the capacity and legal authority to act?

The difficult question to answer is whether the U.N. Security Council's power to evaluate threats to international peace and security is a power granted primarily to the Security Council or exclusively to it. One side of the debate holds that the practice of humanitarian intervention takes precedence over the process to authorize the

41. See generally Benjamin, *supra* note 29; Michael Burton, *Legalizing the Sublegal: A Proposal for Codifying a Doctrine of Unilateral Humanitarian Intervention*, 85 GEO. L.J. 417 (1996); W. Michael Reisman, *Kosovo's Antinomies*, 93 AM. J. INT'L L. 860 (1999).

interventions at the Security Council level.⁴² As such, action to combat supreme humanitarian crises should be taken by whichever actor is most capable. Although the United Nations would be the actor of choice, regional organizations or other coalitions should not be prohibited from undertaking a humanitarian mission because the Security Council is preoccupied or at an impasse.⁴³ Furthermore, the humanitarian interventions either taken or authorized by the United Nations could be used to claim that the *opinio juris* requirement for a right to unilateral intervention has been met. As described above, states must believe that their actions, in this case humanitarian interventions outside of a U.N. mandate, are required by existing international law to begin the process of establishing a new customary international law.

On the other side of the debate, the preservation of international order through the principles of non-use of force and non-intervention necessitates that neither individual states nor regional organizations are permitted to resort to force in defense of humanitarianism. According to this view, the Security Council's design, which includes giving its five permanent members veto power, attempts to ensure that the world's great powers agree on any use of force. If the Security Council does not come to agreement or sanction such action, then the intervention should not occur. According to Louis Henkin, professor emeritus at Columbia Law School, the threats to international stability from either a division between the great powers or abuse of power by potential interveners take priority over the humanitarian issue in question, so unilateral interventions should remain illegal.⁴⁴

Questions surrounding the legality of interventions persist. These will reappear in this article as they pertain to the particular interventions discussed in Section III. For now, we can conclude that a customary international law supporting unilateral humanitarian interventions does not exist, but that it is likely that one is beginning to emerge. This likely emergence is due in no small part to the increased prominence and legal force given to international humanitarian and human rights law, even as they challenge traditional notions of state sovereignty.

C. Ir-responsibility to Protect?: State Sovereignty and Human Rights

While the Articles of the U.N. Charter are of seminal importance to the legal questions, other potentially competing sources of international

42. See Burton, *supra* note 41, at 430-32; Benjamin, *supra* note 29, at 155.

43. Nanda, *supra* note 15, at 865-866.

44. Louis Henkin, Editorial Comments: NATO's Kosovo Intervention, *Kosovo and the Law of "Humanitarian Intervention"*, 93 AM. J. INT'L L. 824, 824-27 (1999).

law must also be considered, such as international human rights and humanitarian law. Beyond the references to respect for and protection of human rights of the U.N. Charter itself, other U.N. documents have furthered the legal status of fundamental human rights.⁴⁵ To mention a few, the Universal Declaration of Human Rights, the Convention for the Prevention and Punishment of the Crime of Genocide, and the four Geneva Conventions clarify rights of individuals to be free from grave threats wherever they live.⁴⁶ The rights detailed in such documents further cloud the debate over humanitarian intervention. Solidarists can assert that these human rights provisions provide a legal basis for the claim that the right to humanitarian intervention exists either unilaterally or under U.N. auspices. However, the question of how to prioritize conflicting principles of human rights, non-intervention, and state sovereignty cannot be answered so quickly.

A recent eloquent study by the International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect*, addresses the contentious issue of balancing the rights and responsibilities inherent to a state with those of a state's citizens.⁴⁷ The Commission asserts that one of the most important steps towards resolving the apparently incompatible notions of traditional state sovereignty provisions and humanitarian intervention would be a clarified redefinition of state sovereignty.⁴⁸ The current, prevailing definition stems from the seventeenth-century Treaty of Westphalia and the Charter of the United Nations, and assures certain rights and protections based on the concept of state equality.⁴⁹ In their evaluation of state sovereignty, the ICISS helps create a working definition for the term:

State sovereignty denotes the competence, independence, and legal equality of states. The concept is normally used to encompass all matters in which each state is permitted by international law to decide and act without intrusions from other sovereign states. These matters

45. For references to human rights, see U.N. CHARTER art. 1, 55, 56.

46. See *Universal Declaration of Human Rights*, G.A. Res. 217, U.N. GAOR, 3rd Sess., U.N. Doc. A/810 at 71 (1948); *Convention on the Prevention and Punishment of the Crime of Genocide* at http://www.unhcr.ch/html/menu3/b/p_genoci.htm; Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949, Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Geneva, 12 August 1949, Geneva Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949, Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949 at <http://www.icrc.org/ihl.nsf/WebCONVFULL?OpenView>.

47. ICISS, REPORT, *supra* note 15.

48. *Id.* at 11-12.

49. *Id.* at 12.

include the choice of political, economic, social, and cultural systems and the formulation of foreign policy. The scope of the freedom of choice of states in these matters is not unlimited; it depends on developments in international law (including agreements made voluntarily) and international relations.⁵⁰

The ICISS provides a basis for the prevailing ideas of state sovereignty. After starting with this general definition, the ICISS goes on to delineate a number of limits on and challenges to sovereignty.⁵¹ The Commission contends that these limitations have yielded a new definition of sovereignty—one that is more consistent with the preservation of human rights than the potential for sovereign authority to mask humanitarian emergencies and human rights violations.

The ICISS-proposed definition would alter the conception of sovereignty from an idea based on the privileges bestowed upon the state to one predicated upon the responsibilities that states must assume for their citizens. The contention put forth stresses that states are under a responsibility to protect their citizens, and if a state fails to protect its citizens, then the international community can and must take the responsibility for human security. This conception elevates “the people’s sovereignty, rather than the sovereign’s sovereignty.”⁵² Sovereignty, in this case, should be viewed as a bottom-up practice insofar as it represents a power that ascends from the level of the citizens upwards to their governments. This is in contrast to traditional conceptions of sovereignty as a top-down process in which the greater international society, often through organizations such as the United Nations, extends the rights, privileges, and responsibilities of sovereignty down to a state.

A redefined concept of sovereignty remains a necessary precondition for increased legalization and legitimization of humanitarian interventions. For if a notion of sovereignty consistent with the ICISS findings gains widespread acceptance among the society of states, the principle of non-intervention will be weakened. The current statist-based definitions of sovereignty may skew the balance between human rights considerations and state sovereignty in international law: “By prohibiting even the most well-intentioned interventions, the current per se illegality of unilateral humanitarian intervention perpetuates this imbalance and calls into question the desirability of a body of law that protects human

50. INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, ARTICLE, THE RESPONSIBILITY TO PROTECT: RESEARCH, BIBLIOGRAPHY, BACKGROUND 6 (2001).

51. *Id.* at 6-12.

52. W. Michael Reisman, Comment, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT’L L. 866, 869 (1990).

rights abusers more than the abused.”⁵³ According to this view, the need to rebalance the provisions of human rights and state sovereignty warrants a redefinition of sovereignty even if the principle of non-intervention gets impaired in the process.

Proponents of humanitarian intervention accurately identify redefining the traditional Westphalian-based concept of state sovereignty as a potential pathway to wider acceptance of unilateral humanitarian intervention. However, identifying a problem and proposing a feasible solution are two drastically different steps. Implementing such a redefinition of state sovereignty, as proposed by the ICISS, would require both broad and specific state support. Approval for this redefinition would erode the protections of non-intervention. It would also amount to the vast majority of U.N. members repudiating what Algerian President Abdelaziz Boueteflika, addressing the U.N. General Assembly in 1999 in his capacity as head of the Organization for African Unity, called: “our final defense against the rules of an unjust world.”⁵⁴

There would seem to be very little practicality in suggesting that such a measure could garner significant world-wide support—member-states who are potential sites of intervention far outnumber those who have the power to intervene. Nor would there be any significant checks on a right to unilateral humanitarian intervention beyond the loose requirement that a mission have a stated humanitarian goal. Many states, especially those in the developing world, tend to view a right to unilateral humanitarian intervention “as the thin end of a neo-imperialist wedge.”⁵⁵ A right that is inherent to an ICISS-type redefinition of state sovereignty. This is not to suggest that human rights concerns are not shared by nearly all U.N. members, but rather that a redefinition of state sovereignty that focuses on the rights of individuals and supports unilateral humanitarian intervention, while potentially weakening the protections of “territorial integrity or political independence” provided by traditional conceptions of state sovereignty, may never be acceptable, legitimate, or incorporated into state practice by most U.N. members.

In addition to the legitimacy problems presented in the ICISS report’s recommendations, pro-intervention works such as *The Responsibility to Protect* and Wheeler’s *Saving Strangers* take a selective view of humanitarian intervention under international law. Though conceding that no customary international law legalizes unilateral

53. Burton, *supra* note 41, at 431.

54. Shashi Tharoor & Sam Daws, *Humanitarian Intervention: Getting Past the Reefs*, 18 WORLD POL’Y J. 21, 25 (2001). President Bouteflika was addressing the U.N. General Assembly in 1999 in his capacity as head of the Organization for African Unity.

55. *Id.* at 24.

humanitarian intervention,⁵⁶ their pro-intervention analysis is based on the presumption that such a law does exist. In fact, in the paragraph immediately following the non-existence of customary international law admission, the report continues: "That intervention for human protection purposes, including military intervention in extreme cases, is supportable when major harm to civilians is occurring or imminently apprehended, and the state in question is unable or unwilling to end the harm, or is itself the perpetrator."⁵⁷

Setting aside that this is but another example of analysis that lumps states that are unable to prevent humanitarian disasters with those that are unwilling to do so, references to any role for the U.N. Security Council are conspicuous only by their absence. Previous Security Council actions and resolutions serve only to as a legitimating factor for future interventions, regardless of whether they occur unilaterally or through the United Nations, as long as they have humanitarian objectives.

Allowing international policy to acknowledge and commend knowingly illegal behavior, such as unauthorized humanitarian interventions, threatens to destabilize international security through an erosion of law at an international level. This threat exists regardless of the moral and humanitarian underpinning of any specific international law violations. While international concern for human rights swells, and the body of human rights law grows, proposed policy changes must still be mindful of at least two pitfalls: outpacing the international political will for change and establishing rights easily susceptible to abuse.

III. HUMANITARIAN INTERVENTION IN PRACTICE

A. Overview

Over the past twelve years, a number of interventions under humanitarian auspices have occurred. In analyzing interventions in Somalia, Sierra Leone, northern Iraq, Kosovo, and East Timor, this section will highlight the role of the Security Council and Security Council resolutions in the development and debate of a doctrine of humanitarian intervention. The purpose of a more in-depth treatment of these specific cases of intervention is threefold. First: to identify when the international community has been willing to take up arms for humanitarian considerations. Such an identification is necessary, because no steadfast and objectively measurable threshold requirement has been

56. ICISS, REPORT, *supra* note 15, at 15.

57. *Id.* at 16.

agreed upon to dictate either when, where or under what circumstances to intervene. Second: to isolate the particular legal issues surrounding each intervention and to explore how the subsequent legal questions were or were not addressed in each case. Third: to heighten understanding of previous interventions and to clarify the applicability of past lessons learned for present and future actions. These interventions will be viewed through the lenses of current international political and security concerns. The focus here will be on what practical lessons for the doctrine of humanitarian intervention can be seen from today that may have been obscured in the immediate aftermath of interventions ten, five, or even three years ago.

To emphasize the difference in cases involving failing states as opposed to repressive ones, the article will present the cases along these lines rather than chronologically. The first two cases will discuss the failed or failing state interventions in Somalia and Sierra Leone. Then the hybrid case of Indonesia and East Timor will segue into two examples of humanitarian interventions in functioning yet abusive states in the form of northern Iraq and Yugoslavia (Kosovo). Each case will begin by briefly addressing the political circumstances and humanitarian crisis at issue. Then the attention will shift to examining how the United Nations responded to each situation, and each case will finish with a look at the actual intervention, its forces, and its outcomes. The most important factor in each case will be the way each contributes to the debate over the legality and legitimacy of humanitarian intervention.

B. Somalia

1. Situation

The political history of Somalia has not been characterized by strong democratic traditions. It has rarely even put on democratic window dressing. After taking control of Somalia in a military coup d'état in 1969, Muhamed Siad Barre's government was in power until it was overthrown in 1991.⁵⁸ In the aftermath of Siad Barre's fall, widespread clan battles culminated in a bloody power struggle between factions led by Mohamed Farah Aidid and Ali Mahdi Mohamed, who had previously worked together as part of the United Somali Congress to oust Siad Barre.⁵⁹ The central government had ceased to function, and after "Siad Barre's retreat from Mogadishu in January 1991, power and leadership

58. UNITED NATIONS DEPARTMENT OF PUBLIC INFORMATION, THE UNITED NATIONS AND SOMALIA: 1992-1996, 9, 11 (1996).

59. *See id.* at 11-13.

naturally drifted to local communities and subclan-level leadership.”⁶⁰ During 1991, the remaining foreign embassies in Mogadishu were closed.⁶¹ These acts isolated Somalia from the outside world, and turned possible diplomatic inroads into dead-ends. As former Secretary-General of the United Nations Boutros Boutros-Ghali wrote, “A State that loses its Government—a failed State—loses its place as a member of the international community.”⁶² On the issue of state failure, “[t]he Somalia case reveals that when the *de jure* government of a state dissolves and nothing takes its place (except wide spread civil war or anarchy), what exists is a ‘collapsed state.’”⁶³ Consequently, as a member of the international society of states, Somalia ceased to function.

The effects of the civil war were magnified by the poor living, economic, and agricultural conditions in Somalia, resulting in a widespread humanitarian emergency. The possibility of armed humanitarian intervention arose when famine began to threaten millions of Somalis in the early-1990s. The famine was caused by a ruthless civil war, in which destruction of food stocks was a weapon of choice, creating a disaster that was augmented by drought.⁶⁴ In the period from 1989-1991, warring clans tried to prevent each other from accessing food and clean water. They systematically destroyed much of the richest farmland in Somalia, polluted water supplies, killed livestock, and stockpiled much of the remaining grain.⁶⁵ When a severe drought affected the area in 1991-1992, concurring with the height of the civil war, the consequences were astonishing. An estimated 300,000 to 500,000 died and up to three million Somalis suffered from the famine.⁶⁶

2. *United Nations*

Although much of the international community was preoccupied in 1991 with the break-up of the Soviet Union, turmoil in Yugoslavia, and war in the Persian Gulf, the Somali civil war and famine attracted

60. LEARNING FROM SOMALIA: THE LESSONS OF ARMED HUMANITARIAN INTERVENTION 5 (Walter Clarke & Jeffrey Herbst, eds., 1997).

61. UNITED NATIONS, *supra* note 58, at 16.

62. *Id.* at 87.

63. Jeremy Levitt, *Humanitarian Intervention by Regional Actors in Internal Conflicts: The Cases of ECOWAS in Liberia and Sierra Leone*, 13 TEMP. INT’L & COMP. L.J. 333, 354 (1998) (citing Francis Mading Deng, *State Collapse: The Humanitarian Challenge to the United Nations*, in COLLAPSED STATES: THE DISINTEGRATION AND RESTORATION OF LEGITIMATE AUTHORITY 207 (I. William Zartman, ed., 1995)).

64. UNITED NATIONS, *supra* note 58, at 14.

65. *Id.*

66. Ismail Ahmed, *Understanding Conflict in Somalia and Somaliland*, in COMPREHENDING AND MASTERING AFRICAN CONFLICTS: THE SEARCH FOR SUSTAINABLE PEACE AND GOOD GOVERNANCE 246 (Adebayo Adedeji ed., 1999).

increasing international attention throughout 1992. In January 1992, the U.N. Security Council passed a resolution that both condemned the fighting in Somalia and implemented an arms embargo.⁶⁷ Continued attention from the United Nations and the Security Council resulted in four more resolutions over the next ten months, though these only amounted to sending a fifty member cease-fire monitoring mission to Somalia (the U.N. Operation in Somalia or UNOSOM).⁶⁸ The U.N. Secretary-General concluded that the United Nations had not taken overly successful measures in achieving the humanitarian goals of U.N. involvement in Somalia, and stronger measures were needed.⁶⁹

The result was U.N. Security Council Resolution 794.⁷⁰ In passing Resolution 794 in December 1992, the Security Council broke new ground in several ways. An offer by the United States to make combat troops available and lead a mission of coalition forces to Somalia prompted the resolution.⁷¹ The resolution begins by addressing “the *unique* character of the present situation in Somalia, [being] mindful of its deteriorating, complex and *extraordinary* nature, requiring an immediate and *exceptional* response,” by the Security Council.⁷² Such wording strongly suggests that the Security Council did not want any action it chose to take in Somalia to be used as precedent in future situations.

A further clause stating that, “the magnitude of human tragedy caused by the conflict in Somalia . . . constitutes a threat to international peace and security,”⁷³ was a concession granted to gain compliance on the resolution from a circumspect India and China.⁷⁴ The Security Council’s acknowledgement that humanitarian crises contained entirely within a single state can, in certain extraordinary situations, constitute a threat to international peace and security under Article 39 of the U.N. Charter, implies that the Security Council was well aware that it was entering uncharted waters.

The third and most important part of the resolution was the Security Council’s agreement to sanction the use of force in Somalia. The

67. Sec. Council Res. 733, U.N. SCOR, 47th Sess., 55th mtg., U.N. Doc. S/RES/733 (1992).

68. UNITED NATIONS, *supra* note 58, at 18-29. (More troops were promised, but these forces never arrived under UNOSOM).

69. *Id.* at 30-1.

70. *Id.* at 31-2.

71. James Woods, *U.S. Government Decisionmaking Processes During Humanitarian Operations in Somalia*, in *LEARNING FROM SOMALIA: THE LESSONS OF ARMED HUMANITARIAN INTERVENTION* 157-8 (Walter Clarke & Jeffrey Herbst, eds., 1997).

72. Sec. Council Res. 794, U.N. SCOR, 47th Sess., 3145th mtg. At 1, U.N. Doc. S/RES/794 (1992) (emphasis added).

73. *Id.*

74. See WHEELER, *supra* note 5, at 186.

resolution supported the U.S. offer to lead the mission and authorized the creation of what would become the Unified Task Force (UNITAF). The cooperative force was given the authority “to use *all necessary means* to establish as soon as possible a secure environment for humanitarian relief operations in Somalia.”⁷⁵ For the first time in its history, the Security Council invoked the powers granted by Chapter VII, Article 42 under humanitarian justifications.⁷⁶

In Security Council negotiations, the competence, or lack thereof, of the Somali central government played an important role. As previously mentioned, Security Council members China and India were wary of the United Nations either supporting or taking any action that would impinge upon the domestic jurisdiction and sovereignty of any state.⁷⁷ However, the two did agree that governmental authority in Somalia had collapsed. Consequently, if there was no functioning state whose sovereign authority would be challenged by intervention, then U.N. action could proceed without threatening the principles of state sovereignty. Such action further challenges the assertions about a new definition of sovereignty discussed in Section II.

3. *Intervention*

The humanitarian goals of the UNOSOM and UNITAF missions have rarely been questioned. Somalia was of little to no strategic interest to any of the intervening forces. Although this fact may eventually have contributed to the ultimately unsuccessful outcome of intervention, it serves a useful purpose for improving the legitimacy of humanitarian interventions. By only taking action in accordance with specific and detailed Security Council resolutions, the intervening forces obtained a legal foundation and a high degree of international legitimacy. However, even if the intervention was legal and legitimate, it may not have been helpful or resulted in a humanitarian outcome. The prevailing opinion regarding the humanitarian outcomes contends that UNITAF, while coming after the worst of the famine had been endured, improved food distribution and helped prevent further starvation.⁷⁸

Although meeting some of the immediate humanitarian goals, by early 1993 UNITAF had achieved little success in limiting the conflict in Somalia. The United States wanted to pull back its commitment in

75. Sec. Council Res. 794, *supra* note 72, §10, at 3 (emphasis added).

76. See Nanda et al., *supra* note 15, at 835.

77. See WHEELER, *supra* note 5, at 187.

78. See, e.g., RAMSBOTHAM & WOODHOUSE, *supra* note 15, at 208; TERRENCE LYONS & AHMED I. SAMATAR, SOMALIA: STATE COLLAPSE, MULTILATERAL INTERVENTION, AND STRATEGIES FOR POLITICAL RECONSTRUCTION 39 (1996).

Somalia and pass control of the mission to the United Nations. The Security Council agreed with the United States and passed Resolution 814, in which U.N. forces were authorized to use force in their efforts to end fighting between rival clan factions and to rebuild judicial, political and economic institutions under UNOSOM II.⁷⁹ Whereas Resolution 794 had focused on purely humanitarian goals, the more robust scope of Resolution 814 saw the focus of international involvement shift towards rebuilding the state capacities of Somalia. In response to attacks on Pakistani U.N. troops, U.N. action included armed pursuit of Aidid, his headquarters, and his supporters.⁸⁰

On October 3, 1993, many of the remaining U.S. Rangers attempted a raid of a house in central Mogadishu where some of Aidid's top aides were supposed to be meeting.⁸¹ The raid ended in disaster as Aidid's forces, and numerous other locals who were not part of any clan-based militia, fought against the American troops. In the firefight that followed, over 500 Somalis and 18 U.S. soldiers died with many more injured.⁸² The consequences of this debacle included the removal of U.S. troops from Somalia in March 1994, damage to the humanitarian character and goal of the intervention, and a decrease in political will on the part of the international community to get involved in conflict situations for exclusively humanitarian reasons.⁸³ Other UNOSOM II participant-states decided to remove their troops from Somalia as well. A lack of strong political will and distaste for any military losses combined to leave the U.N. mission in Somalia unable to achieve the goals of Resolution 814. Unable to elicit cooperation from key Somali parties and mindful of the dangers to U.N. personnel, the Security Council terminated UNOSOM's mandate in March 1995.⁸⁴

4. Implications for humanitarian intervention

Though the Security Council took steps to ensure that the Somali case be seen as an exception to accepted state and international practice, Security Council decisions regarding Somalia are rightly regarded as a watershed for the doctrine of humanitarian intervention. Even if Resolution 794 does not legalize or address the issue of unilateral

79. Sec. Council Res. 814, U.N. SCOR, 48th Sess., 3188th mtg., U.N. Doc. S/Res/814 (1993).

80. Nanda et al., *supra* note 15, at 836.

81. See MARK BOWDEN, BLACK HAWK DOWN (1999). Bowden gives a detailed description of the seemingly haphazard nature of mission selection in Somalia.

82. WHEELER, *supra* note 5, at 198.

83. See *id.* at 199, 205.

84. UNITED NATIONS, *supra* note 58, at 76-7.

humanitarian intervention, the Security Council expanded the scope of Articles 39 and 42 of the U.N. Charter with its course of action in Somalia. The threat of widespread human suffering, within the borders of one state and of exceptional proportions, could legally be considered a threat to international peace and security.

It remains extremely difficult to divorce the disintegration of state capacity in Somalia from the ensuing famine and humanitarian emergency. The existence of such a collapsed or failed state in Somalia allowed the Security Council to agree on stronger intervention measures than would otherwise have been acceptable to the Council. The ability to broker consensus among the international community, particularly the permanent members of the Security Council, to support U.N. sponsored missions in Somalia shows a convergence in world opinion. Humanitarian concerns could warrant international intervention, but a humanitarian intervention that was not deemed to threaten the rights of privileges of traditionally associated with state sovereignty.

Other factors in the intervention in Somalia that have contributed to the humanitarian intervention debate include the Somali people's will, the interveners' fatigue, and the mission's humanitarian character. The will of the Somali people was difficult to judge; Gallup had no polling office in Mogadishu. According to the United Nations, the Somali people were desperate for international intervention.⁸⁵ The actual intervening forces encountered a different situation, as they were often jeered and attacked when in public.⁸⁶ If many of the very people for whom they were supposed to be fighting were fighting against them, the U.N. and U.N. member forces had to question whether their mission was warranted and justified. Disputes between U.N. forces and locals, such as the bloody events of October 3, 1993, also undermined the humanitarian nature of the mission. The lack of clarity regarding the expressed will of the Somali people created problems. Intervening states tired of sending unwanted forces, soldiers questioned why they were sent to Somalia, and the mission compromised its humanitarian character. The first rule of humanitarian intervention, as for doctors, should be "do no harm." Yet, for the intervening forces in Somalia, this rule proved exceedingly difficult to follow.

85. *See id.*

86. WHEELER, *supra* note 5, at 194-96.

*C. Sierra Leone**1. Situation*

Sierra Leone has been a country long-riddled with political instability, organized violence, and economic strife. The brightest time for Sierra Leone was immediately following independence from Britain in 1961. The economy grew slowly but steadily during the 1960s.⁸⁷ At the same time, enrollment in schools doubled and life expectancies increased by ten years.⁸⁸ However, the All People's Congress (APC) governments of President Siaka Stevens (1968-1985) and his chosen successor, Joseph Momoh (1985-1992), pursued policies that accelerated the decline of the state.⁸⁹ The kleptocratic Stevens and Momoh governments were seen as illegitimate by large sections of the disenchanted Sierra Leonean population.⁹⁰ The declining legitimacy of the governing authority compounded by a lack of public services, high unemployment rates, and rampant drug use yielded thousands of desperate young men⁹¹ and helped to set the stage for the armed conflict that would consume the state throughout the 1990s.⁹²

As a result, the Revolutionary United Front (RUF) emerged. The RUF reflected "the state's failure to provide education, vocational training and economic opportunity to a whole generation of youths who grew up seeing no future for themselves."⁹³ In 1991, the RUF mounted an invasion of Sierra Leone, and shortly thereafter the military staged a coup that ousted the Momoh government in 1992.⁹⁴ The junta took up the battle against the RUF. The RUF invasion was led by former Sierra Leonean army corporal Foday Sankoh, supported by external forces including then-warlord and former president of Liberia, Charles Taylor, and consisted of groups of desperate young men. The RUF ruthlessly sought power and had little to no regard for human rights or humanitarian considerations. Sankoh and his forces used drugs, torture,

87. Michael Chege, *Sierra Leone: The State that Came Back from the Dead*, 25 WASH. Q. 147, 151 (2002).

88. *Id.*

89. *Id.* at 151-54.

90. *Id.* at 153.

91. See Ibrahim Abdullah, *Bush Path to Destruction: the Origin and Character of the Revolutionary United Front/Sierra Leone*, 36 J. MOD. AFR. STUD. 203 (1998).

92. See John Bobor Laggah et al., *Sierra Leone*, in COMPREHENDING AND MASTERING AFRICAN CONFLICTS: THE SEARCH FOR SUSTAINABLE PEACE AND GOOD GOVERNANCE 180-84 (Adebayo Adedeji ed., 1999).

93. John L. Hirsch, *War in Sierra Leone*, 43 SURVIVAL 145, 150 (2001).

94. Laggah, *supra* note 92, at 183-84.

plunder, and rape as battle tactics.⁹⁵ The nature of RUF force was shocking. Typical RUF actions included asking civilians if they wanted long or short sleeves before amputating their arms at the wrist or elbow, imposing conscription on young boys, and forcing women into sexual slavery.⁹⁶

The conflict in Sierra Leone has gone through many periods of change. The military government led the country from April 1992 until Ahmed Kabbah was elected president in 1996. Kabbah's government was subsequently overthrown in 1997. His ousting led to further RUF rampages and cries for international involvement. As of 1999, when the dust of the conflict was still far from settled, the humanitarian crisis was evident. More than half of the population had either been displaced or became refugees, with modest casualty estimates of 70,000 and hundreds of thousands of amputees.⁹⁷ In a strange self-financed intervention, Sierra Leone twice hired outside security forces to help engage and defend against the RUF. The South African group Executive Outcomes was hired in 1995 and stayed until four months before the 1997 coup.⁹⁸ A second private security group, Sandlines International from Britain, was brought in to help restore Kabbah's government.⁹⁹

2. *United Nations and ECOWAS*

The United Nations played a different role in Sierra Leone than in Somalia. In Sierra Leone, unlike Somalia, the United Nations was not the only organization attempting to organize an armed international intervention. The Economic Community of West African States (ECOWAS) provided key intervening forces from 1997-2000.¹⁰⁰ Therefore, the relationship between the United Nations and ECOWAS is an important factor to consider when looking at Security Council resolutions on Sierra Leone.

In May 1997, Johnny Paul Koromah, who was mayor of Freetown in addition to being head of the RUF and a major in the army, instigated another military revolt to oust the popularly-elected Kabbah government. The Security Council responded with its most interesting resolution regarding Sierra Leone—Resolution 1132.¹⁰¹ The resolution, which was

95. Chege, *supra* note 87, at 149.

96. See WILLIAM SHAWCROSS, *DELIVER US FROM EVIL: WARLORDS & PEACEKEEPERS IN A WORLD OF ENDLESS CONFLICT* 169-82 (2000).

97. Chege, *supra* note 87, at 150.

98. *Id.* at 154-55.

99. *Id.* at 155.

100. Hirsch, *supra* note 93, at 146, 151-52.

101. Sec. Council Res. 1132, U.N. SCOR, 52d Sess., 3822d mtg., U.N. Doc. S/Res/1132 (1997)

passed in October 1997, included the language that the Security Council was “[g]ravelly concerned at the continued violence and loss of life in Sierra Leone following the military coup of May 25, 1997, the deteriorating humanitarian conditions in that country, and the consequences for neighbouring countries.”¹⁰² The Security Council then determined the situation in Sierra Leone to be a threat to international peace and security.¹⁰³ The humanitarian considerations were prevalent in designating the strife in Sierra Leone to be a threat to international peace and security. In Resolution 1132, the Security Council also imposed an oil and arms embargo on Sierra Leone.¹⁰⁴ The resolution welcomed ECOWAS involvement and authorized it to ensure “strict implementation” of the embargo.¹⁰⁵ ECOWAS, however, was already intervening in Sierra Leone prior to U.N. authorization, and Resolution 1132 fell short of granting ECOWAS full enforcement powers.

Kabbah was restored to power in February 1998, but the RUF did not disappear. The rebels continued fighting and the Security Council remained riveted on the issue. Security Council Resolution 1270, passed in October 1999, stepped up the U.N. commitment in Sierra Leone. Resolution 1270 created the U.N. Mission in Sierra Leone (UNAMSIL), which was an effort to monitor and enforce the latest negotiated ceasefire between the government and the RUF.¹⁰⁶ The resolution called for an initial allocation of 6,000 military personnel, though in time the force was expanded to nearly 20,000 troops.¹⁰⁷ The UNAMSIL forces were granted power to “take the necessary action . . . to afford protection to civilians under imminent threat of physical violence”¹⁰⁸

3. *Intervention*

The interventions in Sierra Leone came in two stages, but both cited humanitarian considerations as one of their justifications. The first intervention, by ECOWAS in 1997-1998, had a second goal of restoring the elected government to power. ECOWAS forces, predominantly from Nigeria, operated under the Military Observation Group of ECOWAS (ECOMOG).¹⁰⁹ The ECOMOG actions were at least moderately

102. *Id.* at 2.

103. *Id.*

104. *Id.*

105. *Id.* at 3.

106. Sec. Council Res. 1270, U.N. SCOR, 54th Sess., 4054th mtg. at 2, U.N. Doc. S/Res/1270 (1999).

107. *Id.* at 3.

108. *Id.*

109. Hirsch, *supra* note 93, at 146.

successful in both political and humanitarian terms. After a brief but intense campaign in February 1998, ECOMOG forces took control of Freetown, captured many of the military junta's leaders, and reinstated the previous government.¹¹⁰ Though the rebel forces were not fully contained and rural areas still suffered from their brutal tactics, the intervention provided at least temporary relief for the population.

The second intervention came with the establishment of UNAMSIL in 1999-2000. UNAMSIL added a much-needed influx of political will and military force to the efforts of ECOMOG; there was finally sufficient force to both keep the government in power and protect the citizens. Especially strong support from the British helped to put an end to the devastating war and its accompanying humanitarian crisis. The British sent 700 combat troops to Freetown in 2000 to restore order after an RUF uprising, and they have been instrumental in training new police and military officers in Sierra Leone.¹¹¹ In January 2002, Daniel Opande, commander of UNAMSIL, declared the war in Sierra Leone was over when 45,000 rebel forces surrendered.¹¹² By finally getting the sobels (an amalgamated nickname for former Sierra Leonean soldiers turned rebels)¹¹³ and others militias to give up their arms, the people of Sierra Leone have been able to return home and no longer face the perpetuation of humanitarian atrocities that so ravaged the state throughout the 1990s.

4. *Implications for humanitarian intervention*

The Sierra Leone intervention was acceptable to the international community for a variety of factors. This contrasts with the assertion that international support for ECOWAS in Sierra Leone was based solely on humanitarian concerns and signified the full acceptance of unilateral humanitarian intervention under international law.¹¹⁴ A single-variable conclusion appears too simple and overlooks that other factors, notably the existence of a failing state in Sierra Leone, influenced international acceptance of the intervention.

In reference to the broader doctrine of humanitarian intervention, the Sierra Leone intervention has two important and related variables to consider. The first refers to the politico-legal ramifications of the ECOWAS decision to intervene without prior approval from the Security Council. The second refers to the functioning capacity of the state. Based

110. James Rupert, *Nigerians Drive Junta from Sierra Leone*, WASH. POST, Feb. 14, 1998, at A23.

111. See Hirsch, *supra* note 93, at 153.

112. Chege, *supra* note 87, at 150.

113. SHAWCROSS, *supra* note 96, at 172.

114. Levitt, *supra* note 63, at 373-75.

on the protections of Article 2(4) of the U.N. Charter, ECOWAS intervention in Sierra Leone without Security Council authorization was *prima facie* illegal. However, the Nigerian-led ECOMOG attempted to justify their actions through separate appeals to humanitarian concerns, regional stability, and the request of the legitimate government of Sierra Leone.¹¹⁵ The international community, for its part, did not condemn the intervention as a violation of international law, but instead gave it *post facto* sanctioning in Resolution 1132 and virtual unanimous assent in the General Assembly.¹¹⁶

The control of Sierra Leone was also a key legal issue for assessing the claim that President Kabbah's request for military assistance from Nigeria and ECOWAS legitimized and legalized the intervention. Some scholars conclude that Kabbah's government remained the legal ruling authority of Sierra Leone and was, therefore, entitled to ask for outside assistance.¹¹⁷ This contention contrasts with Louise Doswald-Beck's earlier finding

that a regime may only be legally entitled to invite outside military help if it is a "government" within the meaning of the international law, and must therefore be in *de facto* control. If, on the other hand, it needs to request assistance to quell an insurrection, i.e. a rebellion of some magnitude, it is by definition not in *de facto* control and thus cannot speak for the State.¹¹⁸

It would follow that Kabbah's request for assistance was illegal, as Koromah's forces comprised a rebellion that had taken *de facto* control over most of Sierra Leone in 1997. Thus, the argument that ECOWAS intervened as a democracy-defending measure seems to rest on a questionable legal foundation and the practical improbability that a state with a tradition of military rule (Nigeria) would intervene to defend the principles of democracy.

The question of why the ECOWAS intervention was met with widespread acceptance as opposed to criticism for an unsanctioned use of force may be answered by looking at the government capacity in Sierra Leone. The path of Sierra Leone's state failure began well before the outbreak of war in 1991. Former Sierra Leonean President Siaka Stevens, who was president from 1968-1985, "decapitated the Sierra Leonean

115. See Karsten Nowrot & Emily W. Schabacker, *The Use of Force to Restore Democracy: International Legal Implications of the ECOWAS Intervention in Sierra Leone*, 14 AM. U. INT'L L. REV. 321 (1998).

116. Levitt, *supra* note 63, at 366, 372-73.

117. Nowrot and Schabacker, *supra* note 115, at 401-402.

118. Louise Doswald-Beck, *The Legal Validity of Military Intervention by Invitation of the Government*, 56 BRIT. Y.B. INT'L L. 189, 195-96 (1985).

state Sierra Leone has not yet recovered from Stevens's depredations."¹¹⁹ However, a kleptocratic government is not, by itself, a sufficient condition for state failure. A comprehensive definition of a failed state includes the criteria that a failed state cannot deliver public goods or provide security for its people, possesses weak and flawed institutions, offers no control of its borders, preys on its own citizens, and languishes in civil conflict.¹²⁰ Sierra Leone, already weakened by the Stevens and Momoh governments, met the criteria for state failure on the eve of the ECOWAS intervention. In a failed state such as Sierra Leone, there is no functioning and credible central government to give or refuse consent for intervention.

As was the case with Somalia, international support for intervention is influenced by the perceived effects on the provisions of state sovereignty. The failed-state status of Sierra Leone allowed states to support the ECOWAS intervention without fear that the traditional definition of sovereignty was being eroded. Furthermore, the ECOWAS intervention would set a dangerous example if it is viewed as legitimizing regional organizations to intervene without recourse to the Security Council. This idea will be further explored when looking at the more controversial NATO intervention in Kosovo.

D. East Timor

1. Situation

The humanitarian and political crisis in East Timor, like those in Somalia and Sierra Leone, did not become a trouble spot overnight. Most of the problems that culminated in an Australian-led, U.N.-supported intervention force in East Timor began when Indonesia invaded the island in 1975.¹²¹ There was no clear or widely accepted justification for Indonesia's actions; instead, they relied on appeals to a shared cultural heritage and fears of the potential for unchecked East Timorese radicals to disrupt Indonesian domestic affairs as grounds for their bloody preemptive action.¹²² Around a quarter of the East Timorese population died

119. Robert I. Rotberg, *The New Nature of Nation-State Failure*, 25 WASH. Q. 85, 94 (2002) [hereinafter Rotberg, *The New Nature*].

120. *Id.* at 85-90.

121. James Cotton, *Against the Grain: The East Timor Intervention*, 43 SURVIVAL 127, 132-33 (2001) [hereinafter Cotton, *Against the Grain*].

122. See EAST TIMOR AND THE INTERNATIONAL COMMUNITY: BASIC DOCUMENTS 60-63 (Heike Krieger, ed., Cambridge Int'l Documents Series, vol. 10, 1997).

as a result of violence following the invasion.¹²³ Yet, Indonesia's size and relative stability along with the precarious Cold War security balance resulted in most individual states in the international community—including Australia though notably not the U.N. Security Council—tacitly accepting Indonesian rule in East Timor.¹²⁴

By the late 1990s the international political situation had changed markedly from 1975. The Asian financial crisis and the fall of Suharto's regime contributed to political instability in Indonesia. B.J. Habibie, the Indonesian president, held at best a tenuous control of the world's fourth most populous country. Control of East Timor remained a hot-button issue in multi-ethnic Indonesia, as numerous other secessionist groups (including those in Ambon, Irian Jaya, and Aceh) looked to see how Indonesia and the international community would settle the most visible conflict. Changes in Indonesia's internal economic and political situation helped enable the international community to make greater efforts to protect against human rights abuses and to promote self-determination of peoples.¹²⁵ Particularly in Australia, policy on East Timor was shifting. This shift was due in no small part to increased public support for East Timor's bid for self-determination from post-Suharto Indonesia.¹²⁶ Thus, there were increasing internal and external pressures for a resolution of East Timor's status.

2. *United Nations*

Under international pressure to allow more autonomy for East Timor, President Habibie agreed to allow a referendum for East Timor to determine its future status. The election was to be administered in August 1999 by the U.N. Mission in East Timor (UNAMET). UNAMET entered a hostile environment where pro-integration militias aggressively sought to disrupt the voting process and intimidate the voting public.¹²⁷ In a stance that would prove costly in human terms, Habibie insisted that no outside election monitors were needed to accompany UNAMET. The Indonesian president asserted that his own army and local police would keep the peace.

123. James Cotton, *'Peacekeeping' in East Timor: An Australian Policy Departure*, 53 *AUSTL. J. INT'L AFF.* 237 (1999) [hereinafter Cotton, *Peacekeeping*].

124. See Nicholas J. Wheeler & Tim Dunne, *East Timor and the New Humanitarian Intervention*, 77 *INT'L AFF.* 805, 805-08 (2001).

125. Cotton, *Against the Grain*, *supra* note 121, at 133.

126. AUSTRALIA DEPARTMENT OF FOREIGN AFFAIRS AND TRADE, *EAST TIMOR IN TRANSITION, 1998-2000: AN AUSTRALIAN POLICY CHALLENGE*, 29-30 (2001).

127. SHAWCROSS, *supra* note 96, at 355.

After the militants succeeded in delaying the vote twice, the East Timorese voted resoundingly in favor of independence on August 30, 1999.¹²⁸ Chaos followed the announcement of the election results. According to Jarat Chopra, former head of the U.N. Transitional Authority in East Timor (UNTAET), local militias supported by Indonesian armed forces undertook *Operation Clean Sweep*, a campaign to eliminate any and all supporters of an independent East Timor.¹²⁹ Over three-quarters of the population were displaced in response to militia action following orders to kill “those 15 years and older, including both males and females, without exception.”¹³⁰ In East Timor, “[t]he military and the militias were clearly determined to destroy the territory that had had the temerity to vote for independence.”¹³¹

The Security Council responded quickly to the crisis and passed Resolution 1264 on September 15, 1999. The Security Council was “[a]ppalled by the worsening humanitarian situation in East Timor, particularly as it affects women, children and other vulnerable groups”¹³² and noted that “widespread and flagrant violations of international humanitarian and human rights law have been committed in East Timor”¹³³ The Security Council also invoked its Chapter VII right in declaring the situation a threat to international peace and security.¹³⁴ The Security Council further noted the creation of refugees and protection of UNAMET workers as reasons for designating the situation to be an international threat. The resolution then agreed to the establishment of a coalition force, to be led by Australia, with a mandate “to restore peace and security in East Timor . . . and authorize[d] the States participating in the multinational force to take all necessary measures to fulfill this mandate.”¹³⁵

3. Intervention

The Australians played an instrumental role in resolving of the East Timor crisis. Not only did the Australians apply political pressure to convince Habibie to agree to the ballot initiative, they also led the International Force for East Timor (INTERFET) envisioned in

128. Wheeler & Dunne, *supra* note 124, at 815, 816.

129. Jarat Chopra, *The UN's Kingdom of East Timor*, 42 SURVIVAL 27, 27 (2000).

130. *Id.* (quoting the orders given by Joao da Silva Tavares, Commander-in-Chief of pro-integration forces on East Timor).

131. SHAWCROSS, *supra* note 96, at 358.

132. Sec. Council Res. 1264, U.N. SCOR, 54th Sess., 4045th mtg. at 1, U.N. Doc. S/Res/1264 (1999).

133. *Id.* at 2.

134. *Id.*

135. *Id.*

Resolution 1264.¹³⁶ Neither Australia nor the United Nations were willing to send an intervention force without at least a nominal invitation from the Indonesian government.¹³⁷ However, an invitation for outside intervention from Habibie would be an admission that either the Indonesian military was incapable of controlling the militia activity in East Timor or that Habibie was incapable of controlling the military. Neither one was an attractive option for Habibie, who did not want to allow foreign troops on what was still Indonesian soil. A Security Council mission brought the head of the Indonesian army, General Wiranto, to witness the mayhem that East Timor had become and the role of local military forces in supporting the violence.¹³⁸ His shock over the severity of the situation and embarrassment at the demonstrable lack of control Jakarta had over Indonesian military in East Timor helped influence Habibie to accept an intervention force.¹³⁹

INTERFET entered Dili, East Timor on September 21, 1999.¹⁴⁰ The 8,000-member force entered the situation unsure if the Indonesian military forces in East Timor would cooperate. Jakarta's assurances held little weight, as many of the same forces the Indonesian government sent to ensure both the safety of the election and the island actively contributed to the pro-integrationist violence. Australian intelligence also demonstrated there was high-level support from the Indonesian military for the militia-led violence.¹⁴¹ When INTERFET landed on the island, they feared an extremely hostile environment, but they found opposition to be less than expected. The predominantly-Australian force occupied the whole of East Timor in less than two months, reaching the last enclaves of pro-integration forces on November 16. In the course of the intervention, INTERFET sustained no casualties and inflicted only a handful.¹⁴²

4. Implications for Humanitarian Intervention

INTERFET remains the closest instance of a true humanitarian intervention in goal, scope, and results. Like Somalia and Sierra Leone, the intervening forces had no ulterior realist motives for taking up arms in defense of the East Timorese. In fact, "[t]he case of INTERFET is particularly significant . . . because Australia's 'vital interests' were

136. Cotton, *Against the Grain*, *supra* note 121, at 131.

137. See Wheeler & Dunne, *supra* note 124, at 817.

138. SHAWCROSS, *supra* note 96, at 360.

139. *Id.*

140. Cotton, *Against the Grain*, *supra* note 121, at 137.

141. *Id.* at 131.

142. *Id.* at 137.

clearly *not* being served by its armed rescue of the East Timorese.”¹⁴³ The Jakarta-first policy that Australia had pursued regarding East Timor from 1976-1999 bears witness to the fact that both Australian and regional security were best preserved through a pacific relationship with Indonesia.¹⁴⁴ Control of East Timor and the fate of the East Timorese were, even after the outbreak of post-ballot violence in September 1999, not causes worth risking the relative peace and security balance of the region. Hence, the Australians needed an invitation for intervention from the Indonesian government.

Besides humanitarian motivations, the intervention’s low casualty totals underscore a mission that preserved its humanitarian character. That is to say, the means employed by the intervention force were consistent with the intended goals. INTERFET also achieved a humanitarian outcome by stopping the persecution of the East Timorese and allowing refugees to begin returning home.

The East Timor intervention provides another angle for analyzing the relationship between the principles of state sovereignty and a right to humanitarian intervention as well as adding another case to trace possible developments in international law. With respect to Indonesian sovereignty, neither the United Nations nor any individual state was willing to intervene without some show of support from Habibie.¹⁴⁵ This need to gain permission supports traditional definitions of sovereignty and the principle of non-intervention over the emergence of a customary international law in favor of unilateral humanitarian intervention. Regional views of the intervention also show one should be hesitant before citing East Timor as a case supporting a legalized right of intervention. One scholar of the region contends that there is almost no chance that Indonesia’s fellow Association of Southeast Asian Nations (ASEAN) members would have supported intervention in any of its member states, regardless of size, without consent of the concerned state.¹⁴⁶ Only the unique history of East Timor and Indonesia’s agreement to invite the intervention allowed for ASEAN members to support INTERFET.¹⁴⁷

The issue of state capacity also warrants consideration here. Indonesia, as a whole, was not a failing state to the extent of either Somalia or Sierra Leone. In Indonesia, “[d]espite dangerous economic

143. Wheeler & Dunne, *supra* note 124, at 825.

144. See Cotton, *Peacekeeping*, *supra* note 123.

145. See Wheeler & Dunne, *supra* note 124, at 824.

146. Kusuma Snitwongse, *Thirty Years of ASEAN: Achievements through Political Cooperation*, 11 PAC. REV. 184 (1998).

147. See Cotton, *Against the Grain*, *supra* note 121.

and other vicissitudes in the post-Suharto era, the state provides most of the other necessary political goods and remains legitimate. Indonesia need not be classified as anything other than a weak state"¹⁴⁸

While Indonesia cannot be properly identified as a failing state, the situation for East Timor was slightly different. East Timor prior to INTERFET's landing was "not so much a failed state as a territory from which the attributes of the state had been removed."¹⁴⁹ In response to East Timor's desperation, Habibie's government had been *unable* to control the situation or provide security for the East Timorese. With regard to the situation in East Timor, "Habibie seemed to be operating in a universe of his own and was certainly not in charge."¹⁵⁰ Habibie lost international credibility when he was unable to fulfill Indonesia's commitment to the United Nations to provide security for UNAMET and the referendum. Had he been in better control of his military, Habibie would likely have been able to stop the pro-integration violence. Calling for international assistance was an option of last resort that provides further evidence that the government was unable to stop the humanitarian disaster not unwilling.

*E. Northern Iraq*¹⁵¹

1. Situation

Saddam Hussein's Iraq repeatedly violated international humanitarian and human rights law with respect to the Kurdish population in northern Iraq.¹⁵² Kurdish uprisings against Iraqi rule followed the military successes of the U.S.-led coalition forces in the 1991 Gulf War. The rebellions, while briefly successful, were brutally put down by Hussein's Iraq and followed by a "campaign of repression against the Kurds."¹⁵³ In March 1991, fearing the worst, hundreds of thousands of Kurds sought refuge in the mountainous Iraqi border regions with Turkey and Iran.¹⁵⁴ Though up to a thousand refugees were

148. Rotberg, *The New Nature*, *supra* note 119, at 92.

149. Cotton, *Against the Grain*, *supra* note 121, at 138.

150. SHAWCROSS, *supra* note 96, at 359.

151. This section only looks at the humanitarian intervention in Iraq following the first Gulf War. The recent intervention in Iraq cannot accurately be called a humanitarian intervention. Nonetheless, Appendix A of this article provides more detail on the recent armed intervention in Iraq and that intervention's applicability to the conclusions of this article.

152. See Jane Stromseth, *Iraq's Repression of Its Civilian Population: Collective Responses and Continuing Challenges*, in ENFORCING RESTRAINT: COLLECTIVE INTERVENTION IN INTERNAL CONFLICTS 77 (Lori Fisler Damrosch, ed., 1993).

153. DANISH INSTITUTE OF INTERNATIONAL AFFAIRS, *supra* note 15, at 65.

154. See WHEELER, *supra* note 5, at 141.

dying daily from terrible health conditions and lack of food, the refugees still preferred these conditions to facing the distraught and vengeful Iraqi forces—Iraqi forces that had already unleashed chemical weapons against the Kurds in 1988.¹⁵⁵ The intense human suffering looked to become even worse as the refugee Kurds were cut-off from access to basic survival necessities.

2. *United Nations*

The question for the United Nations and the coalition forces still in the region was whether and in what way they would respond to the Kurds' plight. The United Nations responded with the Security Council's Resolution 688 on April 5, 1991.¹⁵⁶ In Resolution 688, the Security Council condemned "the repression of Iraqi civilian population . . . including, most recently in Kurdish-populated areas" and demanded "that Iraq . . . immediately end this repression, and . . . express[ed] the hope that an open dialogue will take place to ensure the human and political rights" of all Iraqis.¹⁵⁷ Outside of the appeals for Iraq to take measures on its own, the Security Council insisted that "Iraq allow immediate access by international humanitarian organizations to all those in need of assistance in all parts of Iraq" as well as appealing to "all Member States and to all humanitarian organizations to contribute to these humanitarian relief efforts."¹⁵⁸

This resolution was the least supported of all Security Council resolutions passed in the wake of the Iraqi invasion of Kuwait with three votes against (Cuba, Yemen, and Zimbabwe) and two abstentions (China and India).¹⁵⁹ In the divided Security Council, France was the most outspoken member in favor of a robust resolution embracing the Council's "duty of intervention."¹⁶⁰ Sir David Hannay, then the British Permanent Representative on the Security Council, noted in a recent interview:

We were all worried by that [the French proposal for a "duty of intervention"] because that elevated the whole thing to an issue of principle If you asked about one hundred and eighty-five members

155. See Stromseth, *supra* note 152.

156. Sec. Council Res. 688, U.N. SCOR, 46th Sess., 2982th mtg. at 32, U.N. Doc. S/Res/688 (1991).

157. *Id.*

158. *Id.*

159. Nigel S. Rodley, *Collective Intervention to Protect Human Rights and Civilian Populations: the Legal Framework*, in *TO LOOSE THE BANDS OF WICKEDNESS: INTERNATIONAL INTERVENTION IN DEFENCE OF HUMAN RIGHTS* 14 (Nigel S. Rodley, ed., 1992).

160. Robert Cottrell, *Crisis in the Gulf: Paris Calls for New UN Laws to Help Kurds*, THE INDEP. (London), April 5, 1991, at 10.

of the UN whether they agreed that there was a duty to intervene, one hundred and eighty-four would have said no.¹⁶¹

Hannay's comment reveals the extent to which U.N. members did not want any action taken under humanitarian justifications in Iraq to be used as a precedent for future actions. Recalling the first requirement of a customary international law, broad acceptance in state practice, the uniqueness of the French position shows that a right or duty of humanitarian intervention was nowhere near meeting that criteria. Thus, Resolution 688 reflects that the solidarist French position was overshadowed by pluralist support for principles of state sovereignty and non-intervention and realist fears of becoming the next site of intervention. Contrary to some scholars who assert that Resolution 688 invoked Chapter VII,¹⁶² the resolution never specifically took the step of declaring the situation in northern Iraq to be a threat to international peace and security. The resolution stated that only the "consequences [of the repression] threaten international peace and security," not the repression itself.¹⁶³

3. *Intervention*

Assurances from U.S. President George Bush that "we're not going to get sucked into this [Kurdish situation] by sending precious American lives into battle,"¹⁶⁴ and British foreign secretary Douglas Hurd that there was no legal justification for intervention inside Iraqi borders,¹⁶⁵ were apparently whisked away by Resolution 688, which made no reference to the use or authorization of military force in Iraq. Within two weeks of Resolution 688, a coalition of military forces, largely consisting of American, British, and French troops, began to establish so-called safe havens in northern Iraq for Kurdish refugees without Iraqi consent. Though the coalition claimed that such measures were legitimate and legal under paragraph six of Resolution 688 that appealed for member states to contribute to the humanitarian effort,¹⁶⁶ the most common explanation for this policy shift towards solidarism was that it reflected an increase in media exposure of the Kurdish plight in the West.¹⁶⁷

161. David Hannay as quoted in WHEELER, *supra* note 5, at 142 n.8.

162. Nowrot & Schabacker, *supra* note 115.

163. Sec. Council Res. 688, *supra* note 156.

164. Rone Tempest, *Iran Asks Help to Cope with Fleeing Kurds*, L.A. TIMES, April 5, 1991, at A1.

165. Patrick Wintour, *Government Resists Calls to Help Kurds*, THE GUARDIAN (London), April 2, 1991.

166. See Levitt, *supra* note 63, at 352.

167. See WHEELER, *supra* note 5, at 165.

The initial result of the safe havens mission was success in getting needed humanitarian relief supplies to the refugees, but creating a secure environment for Kurdish refugees to return home proved to be a more difficult and longer-term operation.¹⁶⁸ In addition to sending ground troops, the coalition brought significant air support force and established a no-fly zone for Iraqi aircraft north of the 36th parallel on April 11, 1991. The United States was anxious to pull back its ground troop commitment to the Kurds and the temporary benefit of establishing safe havens was tempered by the resultant creation of conditions that led to further interventions. One example of this was a series of aggressive Turkish interventions throughout the rest of the 1990s against the Kurdish Workers Party in northern Iraq.¹⁶⁹

4. Implications for humanitarian intervention

How is the coalition intervention in northern Iraq to be regarded in the context of the development of a legal and legitimate right to humanitarian intervention? For the Kurdish intervention to be either considered legal or as contributing to the development of customary international law, the decision to intervene should be widely accepted, clearly legitimized, legally sound, and broadly applicable. The Kurdish case is weak in all four areas.

The issues of acceptance and legitimacy are related and can be viewed in the context of Security Council negotiations regarding the situation in northern Iraq. During the debates over Resolution 688, there was specifically no mention of the use or threat of force against Iraq for humanitarian defense because “it would have been killed by a Soviet veto.”¹⁷⁰ The imminent threat of losing a vote or getting a veto means that the coalition would have been unable to get Security Council authorization for their intervention. India and China refrained from voting against 688, because it stopped short of labeling the situation a direct threat to international peace and security and thus did not violate Iraq’s domestic jurisdiction protections of U.N. Charter Article 2(7).¹⁷¹ A stronger Security Council resolution, one that would have explicitly authorized coalition efforts, was out of the question thereby damaging

168. Lawrence Freedman & David Boren, ‘*Safe Havens for Kurds in Post-war Iraq*, in *TO LOOSE THE BANDS OF WICKEDNESS: INTERNATIONAL INTERVENTION IN DEFENCE OF HUMAN RIGHTS* 43, 75-76 (Nigel Rodley, ed., 1992).

169. Adam Roberts, *HUMANITARIAN INTERVENTION IN WAR: AID, PROTECTION AND IMPARTIALITY IN A POLICY VACUUM*, 305 *ADELPHI PAPERS* 19, 27-28 (1996) [hereinafter *ROBERTS, INTERVENTION*].

170. WHEELER, *supra* note 5, at 154.

171. U.N. SCOR, 46th Sess., 2982d mtg., U.N. Doc S/PV.2982 (1991).

the legitimacy of the intervention. Proponents of the intervention claim that because neither the United Nations nor the broader international community officially condemned the United States, Britain, or France for the intervention, the intervention was legitimate and even legal.¹⁷² However, the lack of condemnation seems to have come as much from the belief that the intervention would be short-term and therefore not as grave a violation of Iraqi sovereignty and the principle of non-intervention.

As to the legal basis for intervention, “[e]ven the most cursory glance at Resolution 688 reveals that intervention by the U.S. and allied forces was not endorsed by the United Nations.”¹⁷³ As was noted in Section II, customary international law does not definitively support unilateral humanitarian intervention. Without recourse to U.N. resolutions or customary international law supporting humanitarian intervention, Oxford international law professor Adam Roberts, put forth a different explanation, that “[t]he military operation within northern Iraq . . . must be seen partly in the special context of post-war actions by victors in the territory of defeated adversaries.”¹⁷⁴ This justification, though never proffered by the coalition, maintains that Iraqi sovereignty was temporarily punctured by virtue of the invasion of Kuwait. As such, traditional Iraqi sovereignty provisions were violable, not because Iraq was a failing state or because its government had engaged in human rights violations, but because of the customary international law that permits war victors to bear some responsibility for the defeated territory and its inhabitants.¹⁷⁵ This argument further limits the applicability of this case to an evolving customary international law in favor of humanitarian intervention.

Finally, as far as the Kurdish case providing for or contributing to the development of the doctrine of humanitarian intervention and a more solidarist international society, there are at least two problems. First, Roberts’s argument cross-applies here to show that a unique case from which general precedents should not be drawn. Second, the international community, the coalition members in particular, did not follow the model created in response to the Kurds. A comparison of the plight of the Kurds in northern Iraq and the Shiites in the south shows that like cases were not treated alike. The humanitarian justifications for intervention in

172. See WHEELER, *supra* note 5, at 167.

173. Levitt, *supra* note 63, at 352.

174. Roberts, INTERVENTION, *supra* note 169, at 22.

175. See generally Adam Roberts, *Humanitarian War: Military Intervention and Human Rights*, 69 INT’L AFF. 429 (1993).

southern Iraq paralleled those for northern intervention.¹⁷⁶ All the same arguments put forth by the coalition to justify armed intervention for the Kurds applied to the situation for the Shiites, yet no ground forces were sent to defend the Shiites. Only a no-fly zone was established, which did little to stop the Iraqi artillery that was shelling Shiites.¹⁷⁷

While the coalition forces did intervene for predominantly humanitarian reasons in northern Iraq and saved at least some lives in the process,¹⁷⁸ the suspect legal justifications and legitimacy claims make this intervention a poor case to be used as a precedent for an expanding and accepted legal right to humanitarian intervention.

F. Kosovo: Solidarity in Excess?

1. Situation

Though not meant to be an historical analysis of the causes of unrest in the former Yugoslavia, some background to the conflict is necessary to contextualize the international response. The history of ethnic conflict and violence in Kosovo dates back over six hundred years to 1389 when the Serbians, under the leadership of Prince Lazar lost a battle with the Ottomans in the Field of Blackbirds.¹⁷⁹ Ethnic problems in Yugoslavia had been suppressed under the communist regime, led by Tito, which held power since 1945. However, after Tito's death in 1980, Yugoslavia lacked a clear, strong successor.¹⁸⁰ Following governments did not possess Tito's forcefulness, and the political leadership remained in question.¹⁸¹ In 1987, the opportunistic and ambitious Slobodan Milošević took advantage of the ever-simmering ethnic tensions by telling a crowd of Kosovo Serbs that, "No one should dare to beat you."¹⁸² Milošević's resurgent ethno-nationalist tactics propelled him into power and saw the previously simmering ethnic tensions boil over into wars in Slovenia, Croatia, and Bosnia in the early 1990s. He first waged war in an effort to keep the Yugoslav federation together, but the rhetoric quickly changed

176. WHEELER, *supra* note 5, at 160.

177. *Id.* at 163.

178. *Id.* at 170.

179. For more on the history of Kosovo and the Balkans, see MISHA GLENNY, *THE BALKANS 1804-1999: NATIONALISM, WAR AND THE GREAT POWERS* (1999); NOEL MALCOLM, *KOSOVO: A SHORT HISTORY* (1998); NOEL MALCOLM, *BOSNIA: A SHORT HISTORY* (1994); TIM JUDAH, *THE SERBS: HISTORY MYTH AND THE DESTRUCTION OF YUGOSLAVIA* (1997).

180. TIM JUDAH, *KOSOVO: WAR AND REVENGE* 38-9 (2000) [hereinafter JUDAH, *REVENGE*].

181. On Milošević's rise to power, see *id.* at 52-60.

182. LAURA SILBER AND ALLAN LITTLE, *THE DEATH OF YUGOSLAVIA* 37 (1996).

to support the idea of Greater Serbia, which would bring all Serbs together under one state.¹⁸³

Kosovo wanted independence from Yugoslavia too. However, as Kosovo was a province of Serbia, not its own republic in the Yugoslav federation like Slovenia, Croatia, and Bosnia were, it had less political leverage. The ethnic makeup of Kosovo has been predominantly Albanian, with Serbs as the second largest ethnic group. In fact, Kosovar Albanians outnumbered Serbs by 8-1 by the 1990s.¹⁸⁴ The political leader of Kosovo Ibrahim Rugova, and his party the Democratic League of Kosovo (LDK), supported non-violent measures to try to achieve their independence.¹⁸⁵ Yet, when the Dayton Peace Accords were signed in 1995 to end the war between Croats, Serbs and Bosnian Muslims in Bosnia, there was no political windfall for Rugova and Kosovo's support of non-violent means. Some in Kosovo believed they had been betrayed by the international community at Dayton. An armed guerrilla movement had started within the province. The Kosovo Liberation Army (KLA) was insignificant militarily until the collapse of Albania in 1997 allowed them to smuggle in mass quantities of light arms.¹⁸⁶

The long-standing conflict between Serbs and Kosovars (ethnic Albanians) over Kosovo came to a head in the late-1990s when war broke out between Serb forces and the KLA in February 1998.

By the summer of 1998, the Serbs responded oppressively in Kosovo. Villages were burned and thousands of Kosovars were driven from their homes to avoid Serb attacks. The Independent International Commission on Kosovo estimated that 200,000-300,000 people were driven from their homes by the Serbs.¹⁸⁷ The conflict continued to escalate and quickly spun out of control. The Serbs appeared set to continue their plan of driving Albanians out of Kosovo, thus creating a humanitarian disaster in and of itself and threatening destabilization in Macedonia and Albania, where most of the refugees fled.¹⁸⁸ By mid-1998, the conflict was more than a blip on the international media radar and pressure was mounting in Europe and the United States to respond to these events.

183. See JUDAH, REVENGE, *supra* note 180, at 52-60.

184. Yugoslav census data as reported in *id.* at 313.

185. WHEELER, *supra* note 5, at 257-58.

186. Tim Judah, *Kosovo's Road to War*, 41 SURVIVAL 5, 13 (1999) [hereinafter Judah, *Road to War*].

187. INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO: THE KOSOVO REPORT, at <http://www.reliefweb.int/library.documents/thekosovoreport.htm> (2000).

188. See JUDAH, REVENGE, *supra* note 180, at 240-41.

2. *United Nations, NATO, and OSCE*

The United Nations was not involved in most of the key decisions regarding an international intervention on behalf of the Kosovars. The U.N. Security Council did manage to pass three resolutions between the outbreak of Serb-KLA hostilities and the onset of intervention. Resolution 1160, passed on March 31, 1998, condemned both sides for their participation in the conflict and imposed an arms embargo on the Federal Republic of Yugoslavia (FRY), including both Serbia and Kosovo.¹⁸⁹

Six months later, and with the fighting and its humanitarian consequences increasing, Security Council Resolution 1199 readdressed Kosovo.¹⁹⁰ In 1199, the Security Council was less ambivalent as to the perpetrators and victims in Kosovo, citing “the excessive and indiscriminate use of force by Serbian security forces and the Yugoslav army which have resulted in numerous civilian casualties. . . .”¹⁹¹ Resolution 1199, like 1160, stopped short of invoking the Security Council’s Article 39 power when declaring the situation in Kosovo to be a threat to “regional” peace and security, but refrained from using the word “international.” At the conclusion of Resolution 1199, the Security Council agreed that if the violence did not stop and the humanitarian situation for the Kosovars did not improve, it would “consider further action and additional measures to maintain or restore peace in the region.”¹⁹² Russia and China both declared that they intended to veto any Security Council resolution to support military intervention.¹⁹³ Both countries made “legally valid declaratory statements spelling out that the resolutions [1160 & 1199] should not be interpreted as authorizing the use of force.”¹⁹⁴

Noteworthy in both of these resolutions are the repeated references to outside other groups such as the Contact Group (consisting of France, Germany, Italy, Russia, the United Kingdom, and the United States) and the Organization for Security and Cooperation in Europe (OSCE). These references indicate the subsidiary role the United Nations played in resolving the conflict. In fact, the third Security Council resolution on

189. Sec. Council Res. 1160, U.N. SCOR, 53d Sess., 3868th mtg., U.N. Doc. S/Res/1160 (1998).

190. Sec. Council Res. 1199, U.N. SCOR, 53d Sess., 3930th mtg., U.N. Doc. S/Res/1199 (1998).

191. *Id.* at 1.

192. *Id.* at 5.

193. DANISH INSTITUTE OF INTERNATIONAL AFFAIRS, *supra* note 15, at 92.

194. Catherine Guicherd, *International Law and the War in Kosovo*, 41 SURVIVAL 19, 26 (1999).

Kosovo did little more than rubber stamp a deal struck between U.S. negotiator Richard Holbrooke and Yugoslav President Slobodan Milošević.¹⁹⁵ The October 1998 deal was struck without the involvement of the United Nations. It followed conditions set out by the Contact Group, provided for a Kosovo ground verification mission monitored by the OSCE, and included an air verification mission over Kosovo conducted by NATO. The FRY agreed to the October deal under the threat of air strikes by NATO.¹⁹⁶ This form of coercive diplomacy—threatening the use of force—was never authorized by the United Nations, and in doing so, NATO was *prima facie* in violation of Article 2(4) of the U.N. Charter.

Regardless of this violation of international law, NATO members would continue to act outside the framework of the United Nations. In January 1999, the OSCE verification mission reported a Serb massacre of at least forty-five Kosovars near the town of Račak.¹⁹⁷ In response, the United States decided that “a new policy was needed, one that stressed decisive action”¹⁹⁸ This “consensus in favor of some type of firmer action soon turned into an agreement to launch one last-ditch diplomatic effort to find a solution”¹⁹⁹

The last ditch effort came at the Rambouillet conference in France. The talks at Rambouillet proved fruitless and seemed to be geared towards providing justification for the still-looming NATO air strikes against Milošević and Serbia rather than finding a diplomatic solution. The Contact Group introduced a set of non-negotiable and, to the FRY, unacceptable military terms at the eleventh hour of the negotiations, including that: “NATO personnel shall enjoy, together with their vehicles, vessels, aircraft, and equipment, free and unrestricted passage and unimpeded access throughout the FRY.”²⁰⁰ These provisions appear designed to ensure that no agreement would be reached in Rambouillet:

If the main priority of NATO negotiators was a remission of the plight of the Kosovo Albanians, how could these demands have been other than counterproductive? It is difficult to imagine any sovereign state

195. See Sec. Council Res. 1203, U.N. SCOR, 53d Sess., 3937th mtg., U.N. Doc. S/Res/1203 (1998).

196. Judah, *Road to War*, *supra* note 186, at 13.

197. JUDAH, REVENGE, *supra* note 180, at 193-94.

198. IVO H. DAALDER & MICHAEL E. O'HANLON, WINNING UGLY: NATO'S WAR TO SAVE KOSOVO 64 (2000).

199. *Id.* at 65.

200. Interim Agreement for Peace and Self-Government in Kosovo, (Feb. 23, 1999) at <http://jurist.law.pitt.edu/ramb.htm>.

not facing wholesale defeat in war or some form of collapse agreeing to what amounts to surrender of the control of its territory.²⁰¹

In a somewhat surprising result, the Serbs were not the only group to leave Rambouillet without signing the accord. The Kosovar delegation did not initially agree to the terms of Rambouillet. However, they signed by mid-March, and NATO had all the authority it deemed necessary to begin the intervention.²⁰²

3. Intervention

NATO air strikes, known as *Operation Allied Force*, against the FRY began on March 24, 1999.²⁰³ The intervention was based on the premise “that there are some crimes so extreme that a state responsible for them, despite the principle of sovereignty, may properly be the subject of military intervention.”²⁰⁴ U.S. warplanes conducted the vast majority of sorties and within days had to expand beyond their initial set of military targets.²⁰⁵ NATO, and particularly U.S., military planners made a critical error in assuming that Milošević would agree to the terms of Rambouillet within the first three days of aerial attacks.²⁰⁶ This was based on the flawed assumption that a short series of NATO air strikes in 1995 were the central factor in compelling Milošević to agree to a negotiated settlement over Bosnia.²⁰⁷

With no recourse to calling in ground troops, a move that was considered too politically unattractive among NATO member’s, NATO stepped up its show of force by expanding its target list to include infrastructure within the FRY. These new targets included civilian-use facilities such as bridges, factories, electricity grids, and water treatment plants. To achieve the intervention’s humanitarian goals, which Bill Clinton stated as to “deter an even bloodier offensive against innocent civilians in Kosovo, and, if necessary, to seriously damage the Serb military’s capacity to harm the people of Kosovo,”²⁰⁸ NATO’s generals determined that “[j]ust focussing [sic] on fielded forces is not

201. Jim Whitman, *After Kosovo: The Risks and Deficiencies of Unsanctioned Humanitarian Intervention*, J. HUMANITARIAN ASSISTANCE (Sept. 28, 2000), at <http://www.jha.ac/articles/a062.htm> (2000).

202. See DAALDER & O’HANLON, *supra* note 199.

203. JUDAH, REVENGE, *supra* note 180, at 237.

204. Adam Roberts, *NATO’s ‘Humanitarian War’ over Kosovo*, 41 SURVIVAL 102, 103 (1999).

205. JUDAH, REVENGE, *supra* note 180, at 256.

206. DAALDER & O’HANLON, *supra* note 199, at 91.

207. See WHEELER, *supra* note 5, at 268.

208. DAALDER & O’HANLON, *supra* note 199, at 101.

enough The people have to get to the point that their lights are turned off, their bridges are blocked so they can't get to work."²⁰⁹

The lack of ground troops and expanded targeting created two legal problems for the NATO intervention. First, U.S. bombers flying 15,000 feet above the ground could not protect Kosovars. If the intervention was predicated, as it was by NATO, upon overwhelming humanitarian necessity,²¹⁰ one must wonder how an intervention constructed solely of dropping bombs could quickly improve the plight of the Kosovars. The evidence seems to support a view that humanitarian intervention by air is a contradiction in terms. U.S. military planners were aware of this as Chairman of the U.S. Joint Chiefs of Staff, Harry Shelton, was reported as saying "bombing was likely to provoke a Serbian killing spree."²¹¹ Serb actions against Kosovars intensified once bombing began and with no intervening ground troops, there was little NATO could do to stop the Serbs.²¹² It is estimated that four times as many people were killed during NATO's eleven-week intervention than had died in the previous years of fighting between the Serbs and the KLA, and six times as many refugees were created.²¹³

In addition to this problem with the mission's humanitarian character, the second issue addressed the targeting of civilian resources throughout the FRY. It seems difficult to justify these attacks in a mission that had, in the words of then-NATO Secretary-General Javier Solana, "no quarrel with the people of Yugoslavia Our actions are directed against the repressive policy of Yugoslav leadership."²¹⁴ Targeting such non-military assets, combined with the supporting statements by NATO commanders brings into question whether NATO action violated the *jus in bello*, the rules in war, as mandated by the 1977 Protocol of the Geneva Convention that states:

Attacks shall be limited to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.²¹⁵

209. Robert Hayden, *Humanitarian Hypocrisy*, at <http://jurist.law.pitt.edu/hayden.htm> (1999).

210. WHEELER, *supra* note 5, at 275.

211. WHEELER, *supra* note 5, at 269.

212. Michael Mandelbaum, *A Perfect Failure: NATO's War Against Yugoslavia*, 78 FOREIGN AFF. 2 (1999).

213. *Id.* at 3.

214. JUDAH, REVENGE, *supra* note 180, at 234.

215. 1977 Protocol I: Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 52.2.

Article 54.2 of the same document prohibits attacks on “objects indispensable for the survival of the civilian population.”²¹⁶ The military advantage for an air campaign to bombing bridges in Belgrade seems minimal at best, and clean water is typically regarded as an essential element for civilian populations. Collateral damage and civilian casualties also increased when NATO exhausted its military targets in the FRY. Regardless of these concerns, NATO did induce Milošević to capitulate after seventy-eight days of bombing. Hundreds of thousands of refugees were able to return home, and Milošević’s military forces left Kosovo.

4. *Implications for Humanitarian Intervention*

The NATO intervention in the FRY was more controversial than any of the previously discussed interventions. Many supporters of the intervention heralded the action as a new precedent for humanitarian interventions and a new day for more humanitarian and solidarist policies among NATO members.²¹⁷ While the humanitarian motivations were indeed evident on the part of the intervening forces, problems with the intervention’s authorization, character, and consequences persist.

NATO intervened in Kosovo on behalf of its values rather than its strategic interests. A noble aim, to be sure, but the specifics of the intervention reveal that it may have been detrimental to most of the involved parties. It remains impossible to calculate the human costs and benefits of the intervention. No one can know definitively whether Serb military action against Kosovars would have ever reached the levels it did during the intervention, had the intervention not taken place. As for the questionable nature of NATO’s decision to use force, “[a] child saved from ethnic cleansing in Kosovo by NATO’s intervention is no less alive because the intervention was impromptu”²¹⁸

Still, there are many questions and few answers raised by NATO’s air strikes. First, NATO subverted the Security Council’s Article 39 power to “determine threats to international peace and security” by invoking the phrase to describe the situation in Kosovo.²¹⁹ None of the Security Council resolutions used that language because doing so is the first step towards authorizing the use of force, an authorization that never

216. 1977 Protocol I: Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 54.2.

217. See *NATO’s Kosovo Intervention: Editorial Comments*, 93 AM. J. INT’L L. 824, 824-27, 834-62 (1999).

218. Glennon, *supra* note 18, at 5.

219. See DAALDER & O’HANLON, *supra* note 199 at 218-19.

would have come.²²⁰ The closest the United Nations came to authorizing NATO's actions was in voting down a measure to officially condemn the intervention, and in hearing U.N. Secretary-General Kofi Annan's comments at the beginning of the intervention that "there are times when the use of force may be legitimate in the pursuit of peace." but the Security Council "should be involved in any decision to resort to the use of force."²²¹

NATO usurped the Security Council's power because its members believed that they needed to take action, and rightly asserted that the Security Council would veto a resolution to use force in the FRY. In other words, they bypassed vetoes by two of the five permanent members. The original purpose of granting veto rights was to ensure that force would be a last resort and only when the Great Powers agreed to its use. In this respect, NATO's action, if considered legal and legitimate, seems to call into question the continued relevance of the Security Council as the primary guardian of international peace and security. Such a question will grow louder as NATO and its member states continue to practice what former-U.S. Deputy Secretary of State Strobe Talbott preaches: "We [NATO] will try to act in concert with other organizations, and with respect for their principles and purposes. But the Alliance must reserve the right and the freedom to act when its members, by consensus, deem it necessary."²²² One response to this and other similar remarks by NATO members maintains:

The declaration that NATO must not be subordinated to any other international body is a defiance of international law and an invitation to other states and organizations to regard themselves similarly and act accordingly. Does anyone suppose that a legal and ethical foundation for relations between states and peoples will be better served in a world so constituted?²²³

According to such assertions as Talbott's, NATO has authorized itself to bypass the United Nations whenever it deems fit and has found a way to make veto power on the Security Council irrelevant—a frightening concept for any state that is not a member of NATO. Furthermore, the risks associated with regional organizations, *ad hoc* coalitions, or individual states usurping the Security Council's power and authorizing

220. See Sec Council Res. 1160, *supra* note 190; Sec Council Res. 1199, *supra* note 191; Sec. Council Res. 1203, *supra* note 196.

221. Secretary General's Statement on NATO Military Action Against Yugoslavia UN Press Release SG/SM/6938 (March 24, 1999) at <http://globalpolicy.org/security/issues/kosovo2.htm>.

222. Bruno Simma, *NATO's Future 'Strategic Concept': From 'Out of Area' to 'Out of Treaty'?* 10 EUR. J. INT'L L. 1 (1999) available at <http://www.ejil.org/journal/Vol10/no1/abl-3.html>.

223. Whitman, *supra* note 203.

themselves to take military action when and where they deem necessary are already increasing. The U.S.-led coalition that moved into Iraq during 2003 appeared to tread on the path forged by NATO's actions regarding Kosovo by acting without specific Security Council authorization.²²⁴

In addition to the dubious authority under which the Kosovo intervention took place and the questionable humanitarian character of the operation, NATO action represented a great challenge to the traditional notions of sovereignty as discussed in Section II. Milošević's FRY was a functioning state. As repressive and distasteful as Milošević's regime may have been, it was still the governing authority of a sovereign state. Government control and the capacity of the state in the FRY far superseded that of Somalia, Sierra Leone, or East Timor on the eves of their respective interventions. In Security Council negotiations over Resolutions 1199, 1203, and a potential resolution to condemn the NATO bombing, Russia and China, among other U.N. members, criticized NATO for threatening and using force in violation of Yugoslav sovereignty.²²⁵ In the eyes of two permanent Security Council members and a number of other states, the rights of non-intervention and non-use of force, inherent in all states, still protected the FRY.

Furthermore, neither customary international law requirement—*opinio juris* or state practice—is supported by the Kosovo case. The United States and France argued in the Security Council that their intervention was called for in Resolutions 1199 and 1203,²²⁶ undermining a claim to *opinio juris*. To support *opinio juris* and the development of a new customary international law, they needed to claim and support a right to their actions outside of U.N. authority and specific resolution. In addition, the lack of broad international consensus concerning the Kosovo intervention shows that Kosovo did not meet the state practice requirement, and weakens any claims that the Kosovo situation be used as precedent for legalizing future interventions.

The NATO intervention in Kosovo was important in signaling that some of the most powerful states are willing to go to war in defense of human rights. The problem with the intervention comes in its conduct and justification. If NATO's actions are accepted as the new form of humanitarian intervention, there could be severe international

224. Colin Powell, Interview on This Week with George Stephanopoulos, October, 20, 2002, at <http://usinfo.state.gov/regional/nea/sasia/text/1020pwlabc.htm>. Powell said: "The President has authority [to use military force in Iraq], as do other like-minded nations, just as we did in Kosovo." Also see Appendix A for more on the 2003 U.S.-led coalition and their justification for action in Iraq.

225. See WHEELER, *supra* note 5 at 275-76.

226. *Id.* at 278; French Ministry of Foreign Affairs, *Base Juridique de l'action Enterprise par l'OTAN* (March 25, 1999) at <http://www.diplomatie.fr/actual/dossiers/kosovo/kosovo13.html>.

consequences for the rule of law, the protections of state sovereignty, and the maintenance of international peace and security. However, had NATO conducted its operations differently, with a credible threat of ground troops and further limiting attacks on civilian-use targets, the intervention could have maintained its humanitarian posture much more effectively and achieved far more humane results for both Serb and Albanian civilians. It did not. If after following the first step of proper conduct, NATO had justified its actions to the Security Council as an invitation to aide in the self-defense of Kosovo's neighboring states of Macedonia or Albania, which were overwhelmed with refugees, their case would have had much more credibility. It did not. The reliance on Resolutions 1160, 1199 and 1203 as legal justification made a mockery of international law and the United Nations. Admittedly, there would still be questions over violating the FRY's sovereignty, but if NATO had taken a few different steps, those violations would have been less severe and Kosovo would be closer to a true humanitarian intervention.

IV. RECAP AND OUTLOOK

This section of the article attempts to draw some conclusions from the various aspects of humanitarian intervention discussed thus far. This section will be broken down into three parts. First will be a summary of the case studies with an aim to highlight key points. The second will address the debate surrounding humanitarian intervention and identify potential areas of improvement that have come to light. These first two parts will focus on the period covered by the cases in Section III—1991-1999. The final part will look at the current prospects for humanitarian intervention in law and practice, with particular attention on intervention in failing states.

A. Case Study Summary

In these five cases, there are a broad range of circumstances that influence the legality and legitimacy of each armed intervention. They also provide different lessons for when and how humanitarian interventions should proceed. As far as when interventions occur, there should be some mention not only of these five cases when intervention did occur, but also of the cases when the international community, nor any of its composite members, faced a grievous humanitarian emergency and did not intervene.

Many analysts are concerned that a right to intervene could be abused by powerful states taking action too often, which could result in greater occurrences of violence and suffering than without such a right. Contrasting with these views are persistent worries that inaction, through

selectivity in choosing missions, may also undermine humanitarian goals. In short, why does the international community choose to get involved in certain cases but not in others? In certain potential sites of intervention, such as Chechnya or Tibet, the immediate and likely catastrophic consequences on global stability necessitate tolerance of some human rights abuses with few calls to intervene. However, the lack of international response in the 1990s to massive death tolls in Angola or the humanitarian catastrophe in Sudan is more difficult to explain.²²⁷ Such selectivity may suggest that states have learned from the UNITAF and UNISOM missions to Somalia that even a fully internationally sanctioned humanitarian intervention, if undertaken with little political will and no stomach for intervener casualties is unlikely to produce the desired humanitarian results.

While Somalia showed the limits of half-hearted intervention, Sierra Leone showed the possibility for successful humanitarian intervention through perseverance. The British intervention was particularly telling in this regard. Dire situations, such as the one that existed in Sierra Leone even after concerted ECOWAS intervention, can be turned towards a positive humanitarian outcome with a robust, determined, and legal intervention force. Sierra Leone also provided an excellent example of the international community and the United Nations accepting humanitarian intervention in a failing state as both legal and legitimate.

East Timor further showed that states support humanitarian intervention when governments are unable to control human rights violations on their territory. INTERFET also reinforced a lesson from Somalia—that for humanitarian intervention to be successful the intervening forces must be willing to place themselves in hazardous situations—though this time from the perspective of a successful mission.

Meanwhile, the Iraqi and Yugoslav interventions illustrate the continued controversy surrounding humanitarian intervention and the relationship between human rights and state sovereignty. Both Iraq and the FRY were of greater strategic significance to their respective intervening forces than in any of the other examples. In and of itself, this fact has no bearing on the evolution of the doctrine or practice of humanitarian intervention. However, when combined with other factors such as the disputed violation of state sovereignty, non-existent U.N. authorization, weak legal foundations, and the problematic humanitarian character of these two interventions, fears of states abusing a potential right to unilateral humanitarian intervention seem more understandable.

227. See ROBERTS, INTERVENTION, *supra* note 169, at 25.

B. Improvements

As of the end of 1999—after the Kosovo and East Timor interventions—a number of areas of improvement had emerged for the debate over humanitarian intervention. First, those who saw Kosovo as opening the door to a “new regime”²²⁸ or “doctrine of the international community”²²⁹ may have been a bit premature in their assessments. At the same time, the opposite argument that humanitarian emergencies never warrant intervention over the principles of non-intervention and state sovereignty deny the promulgation of support for humanitarian intervention in specific cases. The reality, of course, is in between. Humanitarian interventions will neither be so frequently occurring that it will immediately halt any significant human rights violations nor will it be subject to a full prohibition. Efforts would be better spent detailing and defining this middle ground than on all-or-nothing approaches to humanitarian intervention.

The second area with a relatively unexplored middle ground lies in the perceived and actual interests behind humanitarian interventions. Both the anti-intervention realists and pro-intervention solidarists tend to overstate their claims. On one side, realists and Russia tend to agree—along with India and China—that humanitarian claims by the West always mask selfish, ulterior motives.²³⁰ Such a view gains support when noting interventions that lacked strong international support and clear legal foundations, or interventions that employed force in a manner not consistent with a humanitarian intervention. Yet, the realist view—that all interventions support the intervening forces’ power objectives—undervalues the bold and anti-realist actions of beginning intervention in Somalia, or continuing it in Sierra Leone. For example, realism cannot explain the Australian about-face on its Indonesia and East Timor policy.

Meanwhile, the solidarists tend to overestimate the extent to which the protection of human rights has become internationally accepted as being privileged over other order-enhancing measures, e.g., principles of non-intervention and state sovereignty. A tendency can be seen, as previously mentioned in reference to the ICISS report on *The Responsibility to Protect*, for solidarists to make modest claims but then draw extreme conclusions. Harvard human rights professor Michael Ignatieff contends that “there is a widening range of internationally agreed norms for the conduct of both international and domestic

228. See Glennon, *supra* note 18, at 4.

229. Blair, *supra* note 16.

230. See WHEELER, *supra* note 5, at 305.

policy,”²³¹ but then he proceeds to use this claim as a justification for bombing Serbia and for circumventing the U.N. Security Council’s authority.²³² Ignatieff’s claim implies some form of increasing restraints on state behavior—a claim that could be extended to say that the legal rights of individuals are coming closer to those of states. Nonetheless, the conclusion he draws about Serbia is unwarranted. Bypassing the Security Council is certainly not such an “internationally agreed norm,” and to presume so would be folly. This flaw in many solidarist arguments can be summarized as follows: “most proponents of unilateral humanitarian intervention neglect the value of institutions; they conclude a unilateral legal right directly from the moral argument.”²³³

In practice, humanitarian intervention has been, and will continue to be, a mix of both strategic, state interests and altruistic, humanitarian ones. The arguments that present interventions as purely in pursuit of strategic aims or purely in pursuit of humanitarian goals fail to acknowledge that actual interventions happen when these aspirations intersect.

The third area in which the debate could be improved would be to accept the *ad hoc* nature of humanitarian intervention. As was shown in the case studies, each site of intervention, or even potential intervention, arises from a complex and unique set of historical, political, and economic factors. For example, the Somalia and Sierra Leone interventions were possible within the context of failing domestic political situations. Indonesia’s and Iraq’s aggressive use of military force for territorial conquest influenced the decision to intervene in East Timor and northern Iraq. International engagement in resolution of the Bosnia conflict contributed to intervention in Kosovo. Codifying a right of humanitarian intervention receives undue attention²³⁴ as it appears an unnecessary step. The belief that codification would change the decision-making process and yield more humanitarian interventions is impractical. Interventions will still be undertaken and accepted because of the particular set of circumstances surrounding in each case.

C. Failing States and Global Security

The protections of state sovereignty do not give governments the right to act with impunity. However, interventions that violate

231. Robert Skidelsky and Michael Ignatieff, *Is Military Intervention over Kosovo Justified? Skidelsky versus Ignatieff*, PROSPECT 16, 19 (1999).

232. *Id.* at 19-20.

233. Nico Krisch, *Review Essay: Legality, Morality, and the Dilemma of Humanitarian Intervention after Kosovo*, 13 EUR. J. INT’L L. 323, 323 (2002).

234. See Benjamin, *supra* note 29; Burton, *supra* note 41.

traditionally-defined sovereignty need to be acceptable to the broader international community. The U.N. Security Council represents the most accepted body to sanction any breach of sovereignty while limiting risks to international peace. In the case of failing states, the protections of sovereignty are diminished. Humanitarian intervention in failing states has been internationally accepted time and again, yet interventions in functioning, repressive states have been met with much more dissent. Intervention in failing states does not represent the same potential threat to international peace and the principles of sovereignty as intervention in functioning states. According to the guidelines for establishing a customary international law, a right to humanitarian intervention in failing states is emerging much more strongly than one in support of unilateral humanitarian intervention.

While a customary international law supporting failing state intervention emerges, failing states themselves have come under increased scrutiny. In the aftermath of the September 11, 2001 terrorist attacks in the United States, a tangible connection formed between lawless, anarchical states and global security. Powerful countries learned that they run a great risk in ignoring failing states.²³⁵ Failing states are of heightened concern for global security after September 11, as terrorists and terrorist organizations thrive in the chaotic environments characteristic of failing states. To put it succinctly, state failure “has become much more relevant and worrying than ever before.”²³⁶

Failing states present non-traditional threats to international peace and security. A failing state does not represent a military-based threat of invasion to its neighbors, but rather it can threaten to destabilize a region by creating masses of refugees, harboring warlords, or becoming key exporters of terror and drugs. The humanitarian risks to citizens in failing states are extremely high. Violations of human rights can continue unchecked in the ungoverned environment of a failed state. The deeper into failure a state descends, the more likely a government, in whatever limited capacity it may still exist, is to prey on its citizens. Humanitarian intervention in failing states becomes a strategic and humanitarian imperative.

Since September 11, 2001, the future of humanitarian intervention has changed in two key ways. First, pure humanitarian interventions are less likely to occur. Second, interventions will not be undertaken half-heartedly. On the first point, a pure humanitarian intervention describes a mission in which the intervening forces are acting with primarily

235. See Lawrence Freedman, *The Coming War on Terrorism*, in *SUPERTERRORISM: POLICY RESPONSES* (Lawrence Freedman, ed., 2002).

236. Robert Rotberg, *Failed States in a World of Terror*, 25 WASH. Q. 127, 127 (2002).

humanitarian motives and possibly even against other strategic interests—such as Australia in East Timor. The increased strategic value means that intervening states will have stronger ulterior motives for their interventions. Instead of humanitarian interventions, missions may become interventions with a humanitarian character. Although intentions may be shifting, the on-the-ground character should remain consistent with a humanitarian intervention. The practice of a humanitarian intervention remains the most effective method for combating the problems of a failing state. Stronger measures, such as full-scale invasion, run much greater risks of exacerbating any threat to international peace posed by failing states.

The second change, regarding more dedicated interventions, builds from the first. The increased strategic significance of failing states indicates that interventions will not be prematurely ended. The United States was able to pull its troops out of Somalia in the early-1990s with little fear of dire consequences for U.S. domestic security. A similar move of removing troops from a state in anarchy, would be much less tenable today. The decision to undertake intervention then becomes a more binding choice and will be taken more seriously. This should result in fewer, but more comprehensive interventions.

In addition to these two changes for the future humanitarian intervention, three main conclusions have emerged throughout this article. First, the debate over humanitarian intervention can be improved by taking a more practical and balanced approach to the somewhat incompatible ideas of state sovereignty and human rights. Second, intervention in failing states can be legitimized and legalized without destroying the principles of sovereignty or international consensus. Third, the legal status of unilateral humanitarian intervention remains unclear, but a customary international law is emerging in support of humanitarian intervention in failing states.

Appendix A: Iraq in 2003

Given the nature of some political statements regarding the U.S.-led coalition's ouster of Saddam Hussein in Iraq,²³⁷ one might be tempted to hold this action up as a case of humanitarian intervention. From the official labelling of the mission as "Operation Iraqi Freedom"²³⁸ to repeated references from key U.S. government sources that the Iraqi people are now free of tyranny and dictatorship,²³⁹ the United States has sought to put forth the impression that the operation focused on the Iraqi people and was humanitarian in justification, nature, and scope. The reality of U.N. actions and the debate regarding the possibility of intervention in Iraq tell a slightly different story.

Recent Security Council action regarding Hussein's Iraq notably includes Resolution 1441.²⁴⁰ Resolution 1441 is overwhelmingly concerned with Iraq's possible possession of weapons of mass destruction, and the task of reinstating a weapons inspection regime in Iraq.²⁴¹ As humanitarian interventions can, by definition, only occur in response to existing or imminent humanitarian crises, the existence (or not) of such a crisis in Iraq is central to the question of whether the latest Iraqi case can be categorized as a humanitarian intervention. In order to qualify, it would be necessary to see evidence of humanitarian concerns, particularly as they relate to the Security Council's action on Iraq. Nowhere in Resolution 1441 is there a reference to a current, growing, or imminent humanitarian emergency within Iraq.²⁴² This omission does not demonstrate the absence of a humanitarian emergency in Iraq, but it does show that the Security Council, as a whole, did not consider the situation in Iraq to be a threat to international peace and security for humanitarian reasons.

237. See George W. Bush, *President Bush Outlines Progress in Operation Iraqi Freedom* (April 16, 2003) at <http://www.whitehouse.gov/news/releases/2003/04/20030416-9.html>.

238. See Tommy Franks, *CENTCOM Briefing on Military Operations in Iraq* (March 22, 2003) at <http://www.centcom.mil/CENTCOMNews/Transcripts/20030322.htm>.

239. The White House makes regularly statements of "Liberation Updates" on Iraq. These are references to "news accounts [that] are painting vivid pictures of the joy and relief of free Iraqis, who are living without fear of Saddam's brutality and beginning to enjoy freedoms unknown for decades." See e.g., *Operation Iraqi Freedom: Liberation Update* (October 28, 2003) at <http://www.whitehouse.gov/news/releases/2003/10/20031028-2.html>; *Operation Iraqi Freedom: Liberation Update* (October 22, 2003) at <http://www.whitehouse.gov/news/releases/2003/10/20031022-9.html>.

240. Sec. Council Res. 1441, U.N. SCOR, 57th Sess., 4644th mtg., U.N. Doc. S/RES/1441 (2002).

241. *Id.*

242. See *id.*

The official legal justification for “Operation Iraqi Freedom” cannot be found in a single U.N. resolution, though a combination of resolutions appeared to satisfy coalition legal concerns, and was certainly not humanitarian. Although Resolution 1441 did not provide an explicit authorization for use of military force in Iraq, it did warn of “serious consequences” if Iraq did not comply with the weapons inspections.²⁴³ Even if the resolution’s language can be construed as authorizing the full-scale military action that inevitably ensued, the resolution was focused on mitigating the potential threat of Iraqi weapons of mass destruction.²⁴⁴ In pursuit of a resolution that would have directly authorized the use of force, the United States sent Secretary of State Colin Powell to the United Nations to make a detailed appeal to the Security Council and to solicit support for the impending military action.²⁴⁵ Powell’s speech to the Security Council detailed intelligence information on Iraqi weapons programs—not human rights violations within Iraq and certainly not an impending humanitarian catastrophe.²⁴⁶ Nonetheless, the Security Council appeared unmoved by Powell’s appeal and, due to objections of France, Russia, and China and the imminent threat of a veto of any resolution that authorized the use of force in Iraq,²⁴⁷ no further Security Council resolutions were passed prior to the start of the intervention.

The perceived need to seek a Security Council resolution vanished, and in the run-up to intervention, U.S. Ambassador to the United Nations, John Negroponte, positively stated that authorization for the coalition action came primarily from two twelve-year-old Security Council resolutions on Iraq, 678 and 687.²⁴⁸ President Bush added Resolution 1441 to the list of resolutions that contributed to the intervention’s authorization.²⁴⁹ Between the Powell, Negroponte, and Bush justifications, the Iraqi intervention was not a humanitarian one,

243. *Id.* §13, at 5.

244. *See id.*

245. Colin L. Powell, *Remarks to the United Nations Security Council* (February 5, 2003) at <http://www.state.gov/secretary/rm/2003/17300.htm>.

246. *Id.*

247. Adam Roberts *Law and the Use of Force After Iraq*, 45 SURVIVAL 31, 41, 52 (2003).

248. *Id.* at 40 (Citing a letter dated March 20, 2003 from the Permanent Representative of the U.S. to the U.N. addressed to the President of the Security Council).

249. George W. Bush, *Address to the Nation* (March 17, 2003) at <http://www.whitehouse.gov/news/releases/2003/03/20030317-7.html>. This part of the article does not aim to address the legality of the U.S.-led coalition action in Iraq, but rather to identify the applicability of this case to the debate over humanitarian intervention.

rather the intervention intended to preserve a right to enforce U.N. resolutions and to establish a right to pre-emptive self-defence.²⁵⁰

For the developing doctrine of humanitarian intervention, the case of Iraq is not directly applicable. However, as this article has put forth the contention that a customary international law supporting humanitarian intervention in failing states is emerging, the Iraqi case does provide some evidence in support of this claim. As noted throughout the article, the international community has been unwilling to sanction the use of force for stated humanitarian purposes in states with functioning governments. The French, Russian, and Chinese dissent in Security Council debates over a specific resolution authorizing force in Iraq bears further witness to this contention. While the functioning capacity of the Iraqi government may not have been the sole reason behind the reluctance to sanction intervention in Iraq, respect for the preservation of international order through the pursuit of all possible peaceful measures before resorting to war, with its inherent violation of state sovereignty, certainly influenced dissenting states.²⁵¹

Not even the most vocal critics of Iraq under Hussein, the United States and the United Kingdom, claimed that Iraq was a failing state prior to intervention, thus to authorize the use of force in the Security Council would be an authorization to violate the principles of non-intervention and Iraqi sovereignty. Such a violation was not acceptable to the majority of the permanent members of the Security Council and, in fact, the majority of United Nations members.²⁵²

250. See Michael J. Glennon, *Why the Security Council Failed* 82 FOREIGN AFF. (May/June 2002) available at <http://www.foreignaffairs.org/20030501faessay11217-p10/michael-j-glennon/why-the-security-council-failed.html>.

251. See *France, Germany Unite Against Military Action in Iraq*, PBS ONLINE NEWS HOUR (Jan. 22, 2003) at http://www.pbs.org/newshour/updates/iraq_01-22-03.html; John Lichfield & Anne Penketh, *Iraq Crisis: There is an Alternative to War, We are Sure, Say France, Germany and Russia*, THE INDEP. (London), Feb. 11, 2003, at 5.

252. Glennon, *supra* note 251.