

RESTRUCTURING THE DEBATE ON UNAUTHORIZED HUMANITARIAN INTERVENTION*

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Scholars and practitioners addressing the problem of unauthorized humanitarian intervention often characterize the central difficulty of the issue as arising out of the fact that when the U.N. Security Council fails to authorize states to use military force to stop mass atrocities, the law requires a result—doing nothing—that is illegitimate and morally abhorrent. One scholarly solution to this predicament has been to subordinate considerations of legality to those of legitimacy or morality by arguing that in certain cases in which the Security Council does not authorize an intervention that should take place, the international community should tolerate the unlawful intervention as “excused” or “justified.”

This Article responds to this recent willingness to look beyond the law by illuminating the unaccounted costs of unauthorized humanitarian intervention and by proposing a more rigorous framework for assessing these uses of force. Specifically, this Article advocates a new emphasis on the systemic consequences of unauthorized intervention, focusing on the impact of unauthorized humanitarian intervention on two elements of the international system that preserve the primacy of law over power: first, the principle of sovereign equality of states, and second, the principle that military force should be used only in the common interest. This Article urges that the impact of unauthorized uses of nondefensive force on these principles, and therefore on the vitality of law in the international system, should be an essential consideration in any evaluation of unauthorized humanitarian intervention. By considering the deeper implications of looking the other way when states resort to war to protect human rights, this Article challenges

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the conventional account of unauthorized humanitarian intervention as raising a choice between protecting human rights and protecting sovereignty, and it contends that the roots and benefits of the prohibition against unauthorized military force should compel policy makers to consider alternatives to military force when responding to grave human rights abuses.

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INTRODUCTION

The regulation of violence constitutes a complex and significant undertaking in any society. Rules that determine legitimate uses of violence not only structure behavior in a particular way, but also reflect and construct attitudes about the role that violence should play in the shared life of the community. In international society, laws on the use of force serve both to limit the incidence of war and to define its proper function; these laws, enshrined in the Charter of the United Nations and in customary international law, are crucial to the preservation of the international community.

Despite this vital role, recent years have seen a turn away from the law in debates over one of the most hotly contested questions concerning violence in the international sphere: humanitarian intervention, or the use of armed force by a state or states, without authorization by the U.N. Security Council, for the purpose of protecting nationals of the target state from large-scale human rights abuses. In the run-up to the 2008 U.S. presidential election, for example, the question of what to do about Darfur provoked impassioned pronouncements that inertia on the part of the international community should not stop the United States from undertaking a vigorous campaign of military action—along with diplomacy, of course—to prevent attacks against peacekeepers, break down barriers to humanitarian aid, and stop the killing, rape, and displacement of civilians that have devastated the area for years.¹ The

1. See, e.g., John McCain & Bob Dole, *Rescue Darfur Now*, WASH. POST, Sept. 10, 2006, at B7; Barack Obama & Sam Brownback, *Policy Adrift on Darfur*, WASH. POST, Dec. 27, 2005, at A25; Tom Curry, *Exit Iraq, Enter Darfur?*, MSNBC.COM, Feb. 8, 2007, <http://www.msnbc.msn.com/id/17034034/> (quoting statements of Hillary Clinton supporting U.S. military action in Darfur); see also Paul Richter & Noam N. Leavy, *On Foreign Policy, He's Willing to Go His Own Way*, L.A. TIMES, Aug. 24, 2008, at 1 (noting support of vice-presidential nominee Joe Biden for NATO ground troops in Sudan to end violence in Darfur); David E. Sanger, *Rivals Split on U.S. Power, but Ideas Defy Easy Labels*, N.Y. TIMES, Oct. 23, 2008, at A1 (noting that Obama had expressed support for setting up a no-fly zone but when pressed, was hesitant to commit to U.S. ground troops in Sudan); Charlie Savage, *Susan E. Rice*, N.Y. TIMES, Nov. 7, 2008, at A22 (quoting a 2007 statement of an Obama foreign-policy adviser before the Senate Foreign Relations

candidates, so divided on their approaches to other foreign policy issues, were uniquely united on this matter,² not only in their consistent belief that the suffering in Sudan had to end, but also in their apparent lack of concern for what international law would say about the United States taking on Darfur without the United Nations.

The turn away from the law is not surprising. To many commentators, the central problem of humanitarian intervention is that when the Security Council fails to authorize states to use military force to stop mass atrocities, the law requires a result—to do nothing at all³—that is illegitimate and morally abhorrent. One solution to this predicament has been to subordinate considerations of legality to those of legitimacy or morality. Some scholars have turned to the criminal law categories of excuse and justification as a basis for arguing that in certain cases in which the Security Council will not authorize an intervention that *should* take place, states should tolerate the unlawful intervention as “excused” or “justified.”⁴ This proposal—which I refer to as the “criminal law approach”—has been welcomed in the scholarly literature about humanitarian intervention, and its sense that the rules of international law must be tempered by considerations of morality has been advocated in practice as well. Most prominently, the Independent International Commission on Kosovo (also known as the Goldstone Commission) declared NATO’s bombing campaign in Kosovo “illegal but legitimate.”⁵

Committee supporting U.S. military action against Sudan to end genocide in Darfur and arguing that U.S. intervention without U.N. authorization would not be illegal).

2. See Joint Statement, Hillary Rodham Clinton, John McCain & Barack Obama, We Stand United on Sudan, (May 28, 2008), http://www.savedarfur.org/page/content/Candidates_Statement/ (“We stand united and demand that the genocide and violence in Darfur be brought to an end.”).

3. See *infra* note 107 (discussing the view that humanitarian intervention raises a choice between military action and doing nothing at all).

4. See, e.g., THOMAS M. FRANCK, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS 139 (2002) [hereinafter FRANCK, RECOURSE TO FORCE] (articulating theory of intervention); Thomas M. Franck, *Interpretation and Change in the Law of Humanitarian Intervention*, in HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS 204, 212–16, 227–31 (J.L. Holzgrefe & Robert O. Keohane eds., 2003) [hereinafter Franck, *Interpretation and Change*] (articulating theory of intervention). The scholars who advocate these types of approaches vary in their use of these terms, and they show little loyalty to the nuances of the criminal law doctrines. See *infra* Part II.A.2.

5. INDEP. INT’L COMM’N ON KOSOVO, THE KOSOVO REPORT 4 (2000) [hereinafter KOSOVO REPORT]. Just before the U.S. invasion of Iraq in 2003, Anne-Marie Slaughter proposed that the Bush administration’s decision to use force without Security Council authorization could also be described as “illegal but legitimate.” Anne-Marie Slaughter, Op-Ed., *Good Reasons for Going Around the U.N.*, N.Y. TIMES, Mar. 18, 2003, at A33.

Using the criminal law approach as a starting point from which to orient its analysis, this Article proposes a more rigorous framework for evaluating unauthorized humanitarian intervention and calls for placing greater focus on the systemic impact of unlawful uses of force to protect human rights. Most accounts of the problem of unauthorized intervention focus narrowly on the particular circumstances of the humanitarian crisis at hand, such as the scale of the human suffering, the prospects for military success, or the motives of the intervener. These accounts fit well with the predominant characterization of the problem as raising a choice between protecting human rights or protecting state sovereignty.⁶ With the question posed in this way, the relevant considerations in determining the propriety of unauthorized intervention are limited to confirming that the violence to be addressed is of a sufficient magnitude to justify an intrusion on state sovereignty, that military force appears a promising way to end the violence, and that the intervener is not using a pretext of humanitarianism to get around otherwise intact barriers against armed intervention in the affairs of another sovereign state.

This traditional approach, however, fails to consider the significant impact of unauthorized humanitarian intervention on the international system's regulation of state power. This Article argues that the question of unauthorized intervention implicates two crucial principles of the international system that serve to define international society as one in which law, not power, is the proper basis for state behavior and interaction. Specifically, unauthorized humanitarian intervention jeopardizes (1) the rule of sovereign equality, which demands that all states are equally obliged to follow the law and (2) the concentration of control over nondefensive military force in the United Nations. The observance of these principles is necessary for a system that is governed by law, rather than power, and observance of these principles is necessarily endangered by accommodation and acceptance of unauthorized humanitarian intervention. Accordingly, any debate concerning unauthorized humanitarian intervention should account for the implications of intervention for sovereign equality and international control of military force.

This Article proceeds in three Parts. Part I examines the legal status of unauthorized humanitarian intervention. Discussing arguments that the U.N. Charter allows states to use armed force

6. See *infra* Part I.C.

without Security Council authorization, as well as claims that recent state practice has created a customary international law right of unauthorized humanitarian intervention, this Part concludes that despite changes in traditional conceptions of state sovereignty and the accompanying development of a rigorous human rights regime, humanitarian intervention undertaken without Security Council authorization remains a violation of international law. It then considers the criminal law approach to unauthorized humanitarian intervention, under which scholars have advocated importing the criminal law defenses of excuse and justification into the international sphere in order to situate within the law cases in which the law prohibits what morality or legitimacy demands.

Part II argues that the criminal law approach is an unsuitable framework for evaluating unauthorized humanitarian intervention. Beginning with an analysis of how the approach seeks to use the criminal law to characterize state behavior in the context of humanitarian intervention, it then turns to a critique of the criminal law approach. First, this Article contends that the approach fails to offer a convincing explanatory model for past interventions. Second, it posits that even if state behavior and institutional action were to adapt to better fit the model, the criminal law approach still is a troubling framework for evaluating unauthorized humanitarian intervention because of its limited focus on the immediate causes and consequences of intervention. This Part highlights two features of the international system that complicate the transposition of the criminal law categories of excuse and justification to international law: the frequent absence of explicit determinations of illegality and the impact of noncompliance with a law on transformation of that law.

Part III argues that any evaluation of unauthorized humanitarian intervention must consider the systemic consequences of such an action. In particular, greater attention should be paid to the impact of an unauthorized use of force on the Charter's fundamental principles that (1) all states are equal before the law and (2) control over nondefensive military force should reside in the international community (by way of the Security Council), not in individual states. Both serve to limit the exercise of power in the international system, and both are preconditions to the survival of international law as a governing mechanism of international society. Thus, evaluating unauthorized intervention without considering these two principles poses a danger to the integrity of international law overall. This Part concludes by defending the assumptions made in this Article about the functions of international law in the international system.

This Article contributes to the literature on humanitarian intervention by investigating the consequences of the criminal law approach, the contours of which are increasingly advanced but scarcely elaborated. Further, it challenges the predominant account of unauthorized humanitarian intervention, which characterizes the issue as a battle between human rights and state sovereignty, and reconceptualizes the problem of unauthorized humanitarian intervention by considering the effects of tolerating unauthorized intervention on the capacity of international law to shape state behavior.

I. DEBATING THE LAW OF UNAUTHORIZED HUMANITARIAN INTERVENTION

This Part examines the law of unauthorized humanitarian intervention under the U.N. Charter.⁷ Reviewing the status of unauthorized intervention, both from a positivist approach to international law and from the perspective of a policy-oriented approach, this Part concludes that international law prohibits unauthorized humanitarian intervention. This Part then turns to the work of some international legal scholars to explain how theorists have approached the question of how the law should respond to situations in which an unauthorized intervention should take place, despite its illegality. This discussion connects the popularity of this approach to its alignment with the predominant account of unauthorized intervention as raising a conflict between state sovereignty and human rights.

7. Consistent with prevailing interpretations of international law, this Article excludes from its definition of humanitarian intervention actions undertaken with the consent of the target government, as well as those undertaken to protect the nationals of the intervening state. Moreover, this Article takes the position that an intervention is authorized only if the Security Council has explicitly approved a use of force; a determination that a situation is a threat to international peace and security does not constitute an authorization for the use of force. *Contra* Adam Roberts, *NATO's "Humanitarian War" over Kosovo*, SURVIVAL, Autumn 1999, at 102, 105–08 (claiming that Security Council resolutions calling on Yugoslavia to cease attacks on civilians and contemplating further action “provided some legal basis for military action” by NATO). For a discussion of six incidents in which states have argued that their military interventions were justified by implicit Security Council authorization, see Jules Lobel & Michael Ratner, *Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease Fires and the Iraqi Inspection Regime*, 93 AM. J. INT’L L. 124, 131–33 (1999).

A. *The Law of Unauthorized Humanitarian Intervention*

The first steps toward the establishment of the United Nations took place amid the unleashing of aggressive war and the commission of human rights violations of unprecedented horror and scale.⁸ Accordingly, although the promotion of human rights constituted a significant focus of the United Nations, the aim of the creators of the new organization was, above all, the suppression of armed conflict.⁹ A right of humanitarian intervention, therefore, did not figure into the U.N. Charter.

The drafters agreed from the outset to recognize that the intention of the participating governments in forming the organization was “to save succeeding generations from the scourge of war.”¹⁰ Accordingly, the first purpose outlined in the Charter is “[t]o maintain international peace and security.”¹¹ To achieve this purpose, the U.N. system is built around a central rule, set forth in Article 2(4) of the Charter, that prohibits the use of force in international relations: “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

8. *See generally* STEPHEN C. SCHLESINGER, *ACT OF CREATION: THE FOUNDING OF THE UNITED NATIONS* (2003) (describing the formation of the United Nations).

9. In the 1943 Declaration of Four Nations on General Security, the United States, Great Britain, the Soviet Union, and China announced their intention to establish an international organization “for the maintenance of international peace and security.” Declaration of Four Nations on General Security, Nov. 1, 1943, *in* 1 *FOREIGN RELATIONS OF THE UNITED STATES: DIPLOMATIC PAPERS* 755, 756 (1943) [hereinafter Declaration of Four Nations]. The powers met at Dumbarton Oaks in 1944 to draft proposals for the establishment of the organization; these proposals, which came to form the basis for the U.N. Charter, did not include the protection of human rights among the purposes of the new organization. *See* Proposals for the Establishment of a General International Organization, Oct. 7, 1944, *in* 1 *FOREIGN RELATIONS OF THE UNITED STATES: DIPLOMATIC PAPERS* 890, 890 (1944) (including among purposes the achievement of “international cooperation” in the solution of “humanitarian problems,” but not expressly including human rights promotion or protection).

10. U.N. Charter pmbl.; *see also* Rüdiger Wolfrum, *Preamble*, *in* *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 33, 34–35 (Bruno Simma ed., 2002) (explaining that the reference to the “scourge of war” was meant to indicate both that the United Nations was formed in response to the two world wars and that the Organization’s member states intended to prevent the recurrence of armed conflicts in the future).

11. U.N. Charter art. 1, para. 1. Whether the purposes of the United Nations contained in Article 1 are binding is a matter of some controversy. *See* Rüdiger Wolfrum, *Article I*, *in* *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY*, *supra* note 10, at 39, 40 (noting that the placement of the purposes in the Charter suggests that they are legally binding but that the wording of Article 1 suggests that the provision sets out political objectives rather than legal obligations).

inconsistent with the Purposes of the United Nations.”¹² As a peremptory norm of international law, this prohibition is binding not only on U.N. members but also on all states.¹³ Like the League of Nations Covenant and the Kellogg-Briand Pact of the interwar period,¹⁴ the U.N. Charter established a system in which peace is the default state in international relations and war is an exceptional occurrence that requires justification. The drafters sought to institute a system far more rigorous than that of the League era, however, and the Charter accordingly provides for only two exceptions to the prohibition on armed force. First, in the event of an “armed attack,” Article 51 provides states a right of self-defense without Council authorization for the use of force.¹⁵ Second, the Security Council, as part of its responsibility for the maintenance of international peace and security, may authorize the use of force by member states.¹⁶

12. U.N. Charter art. 2, para. 4. The drafters chose to use the term “use of force” rather than “war” as a result of the failings of the League of Nations era. The Covenant of the League of Nations regulated only the resort to “war” and did not address uses of force not amounting to war; the 1928 Kellogg-Briand Pact similarly condemned “recourse to war” but made no mention of uses of force short of war. *See* League of Nations Covenant arts. 12, 13, 15; General Treaty for the Renunciation of War art. I, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57 [hereinafter Kellogg-Briand Pact]; *see also* ANTHONY CLARK AREND & ROBERT J. BECK, *INTERNATIONAL LAW AND THE USE OF FORCE* 21–24 (1993) (discussing failures of the League of Nations and the Kellogg-Briand Pact).

13. *See* YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 99–102 (4th ed. 2005) (discussing judicial and other opinions on status of use of force prohibition as a peremptory norm and consequences thereof).

14. *See* League of Nations Covenant pmb. (announcing acceptance of members “of obligations not to resort to war”); Kellogg-Briand Pact, *supra* note 12, art. I (renouncing war as an instrument of international relations).

15. Article 51 provides: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.” U.N. Charter art. 51.

16. *See* U.N. Charter arts. 42, 53. During the Cold War period, there were only two instances in which the Security Council is believed to have authorized the use of force: in 1950, after the invasion by North Korea of South Korea—though the Council at that time only “[r]ecommend[ed]” that U.N. Members assist South Korea in repelling the attack, S.C. Res. 83, U.N. Doc. S/RES/83 (June 27, 1950)—and in 1966, to prevent, “by use of force if necessary,” the arrival in Mozambique of tankers believed to be carrying oil for Southern Rhodesia, S.C. Res. 221, ¶ 5, U.N. Doc. S/RES/221 (Apr. 9, 1966). For further discussion of the details of these authorizations, *see* MICHAEL BYERS, *WAR LAW: UNDERSTANDING INTERNATIONAL LAW AND ARMED CONFLICT* 16–18 (2005). Since the end of the Cold War, the Council has used its powers to authorize force more frequently, including authorizing member states to “use all necessary means” to restore international peace and security in Kuwait after Iraq’s 1990 invasion, *see* S.C. Res. 678, ¶ 2, U.N. Doc. S/RES/678 (Nov. 23, 1990); to “take the necessary measures” to facilitate the delivery of humanitarian assistance in Bosnia in 1992, *see* S.C. Res. 770, ¶ 6, U.N. Doc. S/RES/770 (Aug. 13, 1990); to “take all measures necessary” to establish a secure environment for humanitarian assistance in Somalia in 1992, *see* S.C. Res. 794, ¶ 3, U.N. Doc. S/RES/794

To many international lawyers, the bright-line rule prohibiting the use of force by individual states, except in cases of self-defense or Council authorization, indicates indisputably the unlawfulness of unauthorized humanitarian interventions.¹⁷ Although the Charter includes in the purposes of the United Nations the “achieve[ment of] international co-operation in . . . promoting and encouraging respect for human rights,”¹⁸ the absence of any provision affirmatively permitting the use of force to protect human rights, coupled with the

(Dec. 3, 1992); and to “form a multinational force under unified command” to restore the Aristide government in Haiti in 1994, *see* S.C. Res. 940, ¶ 4, U.N. Doc. S/RES/940 (July 31, 1994). *See also* MICHAEL J. MATHESON, COUNCIL UNBOUND: THE GROWTH OF UN DECISION MAKING ON CONFLICT AND POSTCONFLICT ISSUES AFTER THE COLD WAR 145–58 (2006) (discussing each authorization). In 2008 the Council authorized states to use “all necessary means” to combat piracy in Somalia’s territorial waters and land territory. *See* S.C. Res. 1851, ¶ 6, U.N. Doc. S/RES/1851 (Dec. 18, 2008); S.C. Res. 1838, ¶ 3, U.N. Doc. S/RES/1838 (Oct. 7, 2008); S.C. Res. 1816, ¶ 7, U.N. Doc. S/RES/1816 (June 2, 2008).

17. *See, e.g.*, IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 342 (1963) (“[I]t is extremely doubtful if [humanitarian] intervention has survived in the express condemnations of intervention which have occurred in recent times or the general prohibition of resort to force to be found in the United Nations Charter.”); BYERS, *supra* note 16, at 92–103 (reviewing cases of humanitarian intervention and concluding that there is no right of unauthorized humanitarian intervention under international law); OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 128 (Martinus Nijhoff 1991) (1982) (“Neither human rights, democracy or self-determination are acceptable legal grounds for waging war, nor for that matter, are traditional just war causes or righting of wrongs.”); Mary Ellen O’Connell, *The UN, NATO, and International Law After Kosovo*, 22 HUM. RTS. Q. 57, 70 (2000) (stating that there is no right under customary international law or any treaty permitting a state to undertake a humanitarian intervention without Security Council authorization); *see also* Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EUR. J. INT’L L. 1, 6 (1999) (concluding after analysis of the Charter that unauthorized humanitarian interventions constitute violations of international law, but cautioning that any instance of intervention requires consideration of not only the law but also the circumstances of the particular case). The weight of opinion among states appears to fall against the notion of a right to unauthorized humanitarian intervention. That most NATO member states did not justify their intervention in Kosovo by reference to a general humanitarian exception to Article 2(4), *see* W. Michael Reisman, *Acting Before Victims Become Victims: Preventing and Arresting Mass Murder*, 40 CASE W. RES. J. INT’L L. 57, 79 (2008) (“[N]o major participating government relied exclusively or primarily on some sort of theory of humanitarian intervention, or on an international responsibility to act to arrest mass killing.”)—despite conditions that arguably would favor such an exception, such as the growing humanitarian crisis in the region, a certain veto in the Security Council, and the involvement of a regional organization rather than action by a single state—further demonstrates the resistance of states to a rule allowing unauthorized interventions under international law.

18. U.N. Charter art. 1, para. 3. The Charter also provides that the General Assembly “shall initiate studies and make recommendations for the purpose of . . . assisting in the realization of human rights,” *id.* art. 13, para. 1, and Chapter IX requires the United Nations to “promote . . . universal respect for, and observance of, human rights.” *Id.* art. 55.

express prohibition on the use by states of nondefensive force,¹⁹ indicates that the drafters of the Charter did not intend to allow individual states, absent U.N. authorization, a right of humanitarian intervention.

Proponents of a right of unauthorized humanitarian intervention generally advance three arguments in opposition to the textually focused classical view of international law.²⁰ First, some scholars contend that because Article 2(4) prohibits the use of force only against the “territorial integrity or political independence” of a state, unauthorized humanitarian intervention—which seeks neither territorial nor political conquest of the target state—does not violate the Charter.²¹ This claim, however, is inconsistent not only with the primary purpose of the Charter to limit the incidence of interstate war, but also with the negotiating history of the instrument.²² During their discussions on what would become Article 2(4), the drafters sought to formulate language that would make clear that armed force should not be used in the absence of U.N. authorization; smaller states especially were concerned about strengthening the language in

19. This reading of international law relies on a narrow interpretation of Article 51. For an alternative reading of Article 51 that holds that under a doctrine of “legitimate defense,” third-party nations have a right to defend national groups that are attacked, see GEORGE P. FLETCHER & JENS DAVID OHLIN, *DEFENDING HUMANITY: WHEN FORCE IS JUSTIFIED AND WHY* 129–54 (2008).

20. See Tom J. Farer, *An Inquiry into the Legitimacy of Humanitarian Intervention*, in *LAW AND FORCE IN THE NEW INTERNATIONAL ORDER* 185, 186 (Lori Fisler Damrosch & David J. Scheffer eds., 1991).

21. See, e.g., JULIUS STONE, *AGGRESSION AND WORLD ORDER* 95 (1958); FERNANDO R. TESÓN, *HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY* 150–57 (1997); W. Michael Reisman & Myres S. McDougal, *Humanitarian Intervention to Protect the Ibos*, in *HUMANITARIAN INTERVENTION AND THE UNITED NATIONS* 167, 177 (Richard B. Lillich ed., 1973). The United Kingdom used this line of argument before the International Court of Justice (“ICJ”) in the *Corfu Channel* case, in which the Royal Navy undertook a sweep of Albanian waters in 1946 in response to an incident in which two British vessels struck stray mines in the North Corfu Strait, resulting in significant damage to both vessels and the deaths of forty-four men. See *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4, 10 (Apr. 9). The court determined that the United Kingdom had violated Albanian sovereignty, but it also recognized “extenuating circumstances,” including Albania’s failure to investigate the mines after the Royal Navy vessels were hit, and did not order any penalty against the United Kingdom. See *id.* at 35; see also FRANCK, *RECOURSE TO FORCE*, *supra* note 4, at 184–85 (examining *Corfu Channel* as one example of how a “penumbra of reasonableness” has developed to let “technically illegal but morally justified” uses of force pass without rebuke).

22. See Vienna Convention on the Law of Treaties arts. 31–32, May 23, 1969, 1155 U.N.T.S. 331 (providing that (1) a treaty should be interpreted “in accordance with the ordinary meaning” of the language in context and in light of the treaty’s “object and purpose” and (2) recourse to the preparatory work of the treaty is permissible when interpretation based on the text, object, and purpose leaves the text ambiguous or results in a “manifestly absurd or unreasonable” result).

order to express an absolute prohibition. The delegates explicitly considered the prospect that some formulations of the provision might be vulnerable to an interpretation that would allow the use of force by a member state “in some manner consistent with the purposes of the Organization” but without U.N. authorization.²³ The drafters believed that the reference to territorial integrity or political independence protected against this possibility, and they further expected that this additional language itself could not be used to undercut the requirement of Security Council authorization.²⁴ The drafters of the Charter thus included the specification to strengthen the prohibition on the use of force, not to restrict its application.²⁵ Even if an intervening state does not seek to appropriate any territory of the target state or change its political or government structure, its use of force still constitutes a violation of Article 2(4).

Second, some scholars argue that when the Security Council fails to realize one of its principal purposes, such as the protection of human rights, the unauthorized use of force by member states is not inconsistent with Article 2(4).²⁶ This policy-oriented approach looks

23. U.N. Conference on Int'l Org., Comm'n I: Gen. Provisions, S.F., Cal., Apr. 25–June 25, 1945, *Summary Report of Seventh Meeting of Committee I/1*, in 6 DOCUMENTS OF THE UNITED NATIONS CONFERENCE ON INT'L ORG. [U.N.C.I.O.] 303, 304, Doc. 382 (May 17, 1945).

24. U.N. Conference on Int'l Org., Comm'n I: Gen. Provisions, S.F., Cal., Apr. 25–June 25, 1945, *Summary Report of Eleventh Meeting of Committee I/1*, in 6 U.N.C.I.O. 331, 334–35, Doc. 784 (June 5, 1945) [hereinafter U.N.C.I.O. Document 784]; see also U.N. Conference on Int'l Org., Comm'n I: Gen. Provisions, S.F., Cal., Apr. 25–June 25, 1945, *Summary Report of Twelfth Meeting of Committee I/1*, in 6 U.N.C.I.O. 342, 342, Doc. 810 (June 6, 1945) (adopting provision unanimously).

25. BROWNLIE, *supra* note 17, at 266–68 (outlining discussion among drafters indicating that “territorial integrity or political independence” was not intended to restrict application of Article 2(4)); see also RUTH B. RUSSELL, *A HISTORY OF THE UNITED NATIONS CHARTER: THE ROLE OF THE UNITED STATES 1940–1945*, at 456–57 (1958) (describing the drafters' interest in crafting an obligation that would be stronger than a mere promise of states not to resort to military force to settle disputes); Oscar Schachter, *The Legality of Pro-Democratic Invasion*, 78 AM. J. INT'L L. 645, 648–49 (1984) (opining that interpreting military action to protect human rights to be action not taken “against the ‘territorial integrity or political independence’ ” of a state is “problematic”).

26. See, e.g., W. Michael Reisman, *Criteria for the Lawful Use of Force in International Law*, 10 YALE J. INT'L L. 279, 279–81 (1985); W. Michael Reisman, *Coercion and Self-Determination: Construing Charter Article 2(4)*, 78 AM. J. INT'L L. 642, 642 (1984) (noting that if the United Nations operated according to the terms of its Charter, unilateral recourse to force would be unnecessary). Michael Reisman argues that the security system of the United Nations was created on the basis of a consensus between the permanent members of the Security Council. Once that consensus broke down in the early days of the organization, member states no longer had the opportunity that had been envisioned to find recourse in the Council. As a result, unauthorized force by member states, which would have been unnecessary in a properly functioning system, again became relevant and

to the provisions of the U.N. Charter on human rights as well as the quickly developing human rights law regime as evidence that use of force for the protection of human rights is not prohibited in general. If the Security Council fails to act, then members retain a responsibility to protect human rights and may intervene even in the absence of U.N. action.²⁷ This interpretation, however, also fails to reflect both the context of the use of force provision and the negotiating history of the Charter. As a general matter, it disregards the “presumption against self-help” that lies at the heart of the Charter system as a whole.²⁸ Further, like the reference in Article 2(4) to “territorial integrity or political independence,” the delegates who were negotiating the text intended the phrase “or in any other manner inconsistent with the purposes of the United Nations” as a reinforcement, not a limit, to the prohibition against the use of force.²⁹ With these two phrases, the drafters believed they had made clear that unauthorized use of nondefensive force by a member state was prohibited absolutely. Indeed, they rejected a proposal to include separate language to that effect on the grounds that Article 2(4) already made clear that force was permissible only in self-defense or as authorized by the Council.³⁰

Third, citing prior interventions such as NATO’s Kosovo campaign, the Indian invasion of East Pakistan, the Vietnamese invasion of Cambodia, and the Tanzanian invasion of Uganda, some argue that customary international law provides a right of unauthorized humanitarian intervention.³¹ Neither sufficient state

lawful. See Reisman, *Criteria for the Lawful Use of Force in International Law*, *supra*; Reisman, *Coercion and Self-Determination: Construing Charter Article 2(4)*, *supra*.

27. See Reisman, *Criteria for the Lawful Use of Force in International Law*, *supra* note 26, at 279–80.

28. BROWNIE, *supra* note 17, at 275.

29. See U.N.C.I.O. Document 784, *supra* note 24, at 334–35; see also Simma, *supra* note 17, at 2–3 (“[O]r in any other manner inconsistent . . .’ is not designed to allow room for any exceptions from the ban, but rather to make the prohibition watertight.”).

30. See U.N. Conference on Int’l Org., Comm’n I: Gen. Provisions, S.F., Cal., Apr. 25–June 25, 1945, *Report of Rapporteur of Committee 1 to Commission I*, in 6 U.N.C.I.O. 387, 400, Doc. 885 (June 9, 1945).

31. See Richard B. Lillich, *Humanitarian Intervention: A Reply to Ian Brownlie and a Plea for Constructive Alternatives*, in *LAW AND CIVIL WAR IN THE MODERN WORLD* 229, 244–51 (John Norton Moore ed., 1974); Ruth Wedgwood, *NATO’s Campaign in Yugoslavia*, 93 AM. J. INT’L L. 828, 833 (1999); see also Wedgwood, *supra*, at 828 (arguing that the Kosovo intervention may signal “the emergence of a limited and conditional right of humanitarian intervention”). Some also contend that a right of humanitarian intervention that existed before the Charter has been revived. According to this argument, the extent to which Article 2(4) displaces customary law is dependent on the United Nations responding properly to international crisis. If it fails to exercise its responsibility for protecting human rights and maintaining international peace, states recover their

practice nor *opinio juris*, however, exists to support this view. The International Court of Justice (“ICJ”) explained in *Nicaragua v. United States*³² that “[r]eliance by a State on a novel right or an unprecedented exception to the principle might, if shared in principle by other States, tend towards a modification of customary international law.”³³ Nonetheless, as in *Nicaragua*, states undertaking humanitarian interventions “have not justified their conduct by reference to a new right of intervention or a new exception to the principle of its prohibition.”³⁴ Aside from the Kosovo campaign, the intervening states in the cases listed above explained their actions not as exercises of a right or principle of humanitarian intervention, but rather as acts of self-defense; they chose to justify their uses of force from within the framework of the Charter rather than to challenge its application.³⁵ NATO also did not attempt to ground its intervention in any right of humanitarian intervention; most member states avoided asserting any legal justification at all, turning instead to morality to defend the action³⁶ and emphasizing repeatedly that the intervention should not serve as a precedent for future action.³⁷ Those states that did cite a legal justification proposed that NATO’s action

customary right of intervention and may resort to force even in the absence of Security Council authorization. *See, e.g.*, Reisman & McDougal, *supra* note 21, at 170–71 (discussing customary right of intervention and arguing that the creation of the United Nations “neither terminated nor weakened the customary institution of humanitarian intervention”).

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

33. *Id.* at 109.

34. *Id.*

35. For a description of the Indian explanation of its resort to force, see NATALINO RONZITTI, RESCUING NATIONALS ABROAD THROUGH MILITARY COERCION AND INTERVENTION ON GROUNDS OF HUMANITY 96–98 (1985). For a discussion of the Vietnamese justification for war, see GARY KLINTWORTH, VIETNAM’S INTERVENTION IN CAMBODIA IN INTERNATIONAL LAW 15–33 (1989); SEAN D. MURPHY, HUMANITARIAN INTERVENTION: THE UNITED NATIONS IN AN EVOLVING WORLD ORDER 103–04 (1996). On the Tanzanian intervention in Uganda, see RONZITTI, *supra*, at 102–06.

36. *See* U.N. SCOR, 54th Sess., 3988th mtg. at 17, U.N. Doc. S/PV.3988 (Mar. 24, 1999) [hereinafter Security Council 3988th Meeting]. The day the air strikes began, Germany, holding at that time the Presidency of the European Union (“EU”), stated in the Security Council that EU members had a “moral obligation” to respond to the humanitarian crisis. *See id.*

37. *See* 328 PARL. DEB., H.C. (6th ser.) (1999) 617 (statement of U.K. Defense Secretary George Robertson) [hereinafter Robertson Statement], available at http://www.publications.parliament.uk/pa/cm199899/cmhansrd/vo990325/debtext/90325-33.htm#90325-33_spnew3 (describing the NATO intervention as “exceptional”); *see also* Jacob Katz Cogan, *Noncompliance and the International Rule of Law*, 31 YALE J. INT’L L. 189, 203 n.78 (2006) (noting that, at times, states violating international law “have no interest in diminishing the long-term value of the rule” they are violating).

was an enforcement of prior Security Council resolutions.³⁸ When NATO states had to account for the intervention in the ICJ after Yugoslavia initiated an action challenging the bombing campaign, only Belgium articulated a legal right of intervention,³⁹ and even then it later expressed its “hope that resorting to force without the Council’s approval will not constitute a precedent.”⁴⁰ These cases indicate that not only is “constant and uniform”⁴¹ state practice lacking, but so is any sense that states undertaking humanitarian interventions believe their conduct is in accordance with the law, as is required to establish *opinio juris*.⁴² States that might have been acting for humanitarian purposes appeared to judge that they could not base their actions on a purported right of unauthorized humanitarian intervention and did not seek to assert a new right so as to change the law through practice. As a result, they instead turned to the reliable rules of self-defense or neglected the law altogether. That the majority of state opinion appears to weigh against a right of intervention further weakens the argument.⁴³ These examples not only undermine the theory that international legal rules prohibiting the unauthorized use of force absent self-defense are “wither[ing] away through long, total neglect,” but also “reinforce [states’] commitment to those rules as binding.”⁴⁴

38. See Robertson Statement, *supra* note 37 (justifying intervention as a “measure in support of purposes laid down by the UN Security Council”); Press Release, Security Council, Security Council Rejects Demand for Cessation of Use of Force Against Federal Republic of Yugoslavia, at 4, 7, U.N. Doc. SC/6659 (Mar. 26, 1999) (statements of France and Netherlands citing prior Security Council resolutions).

39. See Oral Pleadings of Belgium, Legality of Use of Force (Yugo. v. Belg.), 1999 I.C.J. Pleadings 15 (May 10, 1999), available at <http://www.icj-cij.org/docket/files/105/4515.pdf> (uncorrected translation).

40. See U.N. GAOR, 54th Sess., 14th mtg. at 17, U.N. Doc. A/54/PV.14 (Sept. 25, 1999) (statement of Vice-Prime Minister and Minister of Foreign Affairs for Belgium Louis Michel).

41. Asylum Case (Colom. v. Peru), 1950 I.C.J. 266, 276–77 (Nov. 20).

42. See Jonathan I. Charney, *Anticipatory Humanitarian Intervention in Kosovo*, 93 AM. J. INT’L L. 834, 836 (1999) (finding few cases of states justifying actions based on a right of humanitarian intervention); see also North Sea Continental Shelf (F.R.G. v. Neth.; F.R.G. v. Den.), 1969 I.C.J. 3, 44 (Feb. 20) (explaining that establishment of a rule as part of customary international law requires settled state practice and “evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it”).

43. See *infra* note 84 (describing discussions in the United Nations on unauthorized humanitarian intervention).

44. Mary Ellen O’Connell, *Re-leashing the Dogs of War*, 97 AM. J. INT’L L. 446, 448 (2003) (reviewing CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE (2000)).

B. *Looking Beyond the Law of Unauthorized Humanitarian Intervention*

The case under international law for a right of unauthorized humanitarian intervention is quite weak; few scholars and few states support the view that international law at this time allows states to use force to protect human rights in the absence of Security Council authorization. Faced with an apparently solid prohibition on the unauthorized use of force for humanitarian reasons, policy makers and scholars have struggled with how to address situations in which humanitarian intervention appears appropriate and a state or group of states are willing to use force to protect human rights, but the Security Council will not authorize their use of force.⁴⁵ To answer this question, some have turned away from the prescriptions of the law. The salient issue, they argue, is not simply what international law says about the unauthorized use of force, but rather whether following the law might be politically or morally unacceptable.⁴⁶ This inquiry leads to further discussion of whether unauthorized humanitarian interventions should happen despite their illegality—and to what consequences for the intervening state.

Taking this alternative perspective, a number of commentators have asserted that in some cases, a state should undertake an unauthorized humanitarian intervention even though Article 2(4) prohibits such action. They have argued that the prohibition on the unauthorized use of nondefensive force should remain in place, but that in cases in which morality demands action, a violation of the law against unauthorized intervention should be tolerated—or even welcomed.⁴⁷ The resulting scholarship has looked to the criminal law

45. See, e.g., SIMON CHESTERMAN, JUST WAR OR JUST PEACE? HUMANITARIAN INTERVENTION AND INTERNATIONAL LAW 221–22 (2001); FRANCK, RECOURSE TO FORCE, *supra* note 4, at 188–89.

46. See Franck, *Interpretation and Change*, *supra* note 4, at 210–11 (exploring the impact of “dissonance” between positive law and public perception of the law’s fairness).

47. See FRANCK, RECOURSE TO FORCE, *supra* note 4, at 139 (taking the position that unauthorized recourse to force must remain illegal, but “in ascertainable circumstances,” the consequences of illegal action should be mitigated because the unlawful intervention has “demonstrably prevented the occurrence of some greater wrong”); see also SCHACHTER, *supra* note 17, at 126 (“[I]n the absence of [Security Council] prior approval, a State or group of States using force to put an end to atrocities when the necessity is evident and the humanitarian intention is clear is likely to have its action pardoned.”). Domestic criminal law has also been invoked in another theory of unauthorized humanitarian intervention, this time relying on civil disobedience. The philosopher Allen Buchanan has explored the opportunities for states to transform the law of humanitarian intervention by undertaking illegal acts—that is, by undertaking unauthorized humanitarian interventions. See Allen Buchanan, *Reforming the International Law of*

categories of excuse and justification to frame unauthorized humanitarian intervention.⁴⁸ While maintaining that international law generally prohibits unauthorized humanitarian intervention and should continue to do so, this approach—which I term the “criminal law approach”—argues that in exceptional cases in which intervention should take place but the Security Council refuses to act, states should impose no (or only nominal) penalties on a state or group of states that decides to use military force without U.N. authorization.

The primary architect of the criminal law approach is Thomas Franck, who drew on the writings of Oscar Schachter in developing his work.⁴⁹ Professor Franck argues that the hard cases—situations in which a government is committing massive human rights abuses against its people, diplomatic efforts have failed to stop the violence, and a veto in the Security Council prevents the possibility of a Council-authorized use of force⁵⁰—should be situated within the law rather than viewed strictly as violations.⁵¹ For “technically illegal but

Humanitarian Intervention, in HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS, *supra* note 4, at 130, 132–33. Buchanan’s proposal, however, hinges on the assumption that states undertaking interventions indeed seek to reform the law, *see id.* at 133, but this has not been the case in practice, *see supra* note 37 and accompanying text. Moreover, in the paradigm case of civil disobedience, the law-breaker violates the law and accepts punishment for her act. *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 295 (5th ed. 2009). The punishment is key: “We must pay a certain price to convince others that our actions have . . . a sufficient moral basis in the political convictions of the community,” according to John Rawls. *See id.* (quoting JOHN RAWLS, A THEORY OF JUSTICE 367 (1971)). In the international system, however, it is unlikely that the law-breaker will be subject to any punishment, given that interventions are likely to be undertaken by powerful states, and powerful states are less likely to suffer sanctions for their misdeeds. *See* Allen Buchanan, *From Nuremberg to Kosovo: The Morality of Illegal International Legal Reform*, in HUMANITARIAN INTERVENTION: MORAL AND PHILOSOPHICAL ISSUES 123, 126 (Aleksandar Jokic ed., 2003).

48. *See, e.g.*, Franck, *Interpretation and Change*, *supra* note 4, at 213; Richard V. Meyer & Mark David “Max” Maxwell, *The Natural Right to Intervene: The Evolution of the Concepts of Justification and Excuse for Both State and Individual*, 7 J. INT’L CRIM. JUST. 555, 570–72 (2009).

49. *See* FRANCK, RECOURSE TO FORCE, *supra* note 4, at 181 (crediting Schachter for the basis of the idea). For the position of other scholars in support of the criminal law approach, *see* JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE 258 (2003) (describing Kosovo intervention as “the lesser of two evils” and “tolerable, perhaps even excusable”); Simma, *supra* note 17, at 22; Jane Stromseth, *Rethinking Humanitarian Intervention: The Case for Incremental Change*, in HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS, *supra* note 4, at 232, 243.

50. *See* Simma, *supra* note 17, at 22 (“[T]here do occur ‘hard cases’ in which terrible dilemmas must be faced and imperative political and moral considerations may appear to leave no choice but to act outside the law.”).

51. *See* Franck, *Interpretation and Change*, *supra* note 4, at 214.

morally justified actions,”⁵² the international community—acting as a sort of jury through the mechanisms of the Security Council or General Assembly⁵³—acknowledges the act as illegal, and because the act remains illegal, the rule prohibiting the illegal act remains intact.⁵⁴ But because of the unique circumstances that compelled the intervening state(s) to undertake this illegal act, its illegality is set aside, and no punitive action is taken in response to the breach.⁵⁵

The primary benefits of the criminal law approach, according to its proponents, are twofold. First, it preserves the integrity of the prohibition against the use of nondefensive force; even though particular breaches are not penalized, the law remains intact.⁵⁶ Second, it preserves the legitimacy of the law. This approach takes the position that strict application of the law—which would yield no military interventions in the absence of Security Council authorization—produces an unacceptable result, and when the law produces an unacceptable result, it risks losing its legitimacy. The criminal law approach accordingly tempers the strict application of the law with “considerations of moral legitimacy.”⁵⁷

Professor Franck sees this approach not only as normatively desirable, but also as accurate in describing the practice of states in

52. FRANCK, RECOURSE TO FORCE, *supra* note 4, at 184.

53. See Thomas M. Franck, *Legality and Legitimacy in Humanitarian Intervention*, in HUMANITARIAN INTERVENTION 143, 148, 151 (Terry Nardin & Melissa S. Williams eds., 2006) (discussing “jurying” role of states in the U.N. system); Franck, *Interpretation and Change*, *supra* note 4, at 212–31 (explaining the approach).

54. See FRANCK, RECOURSE TO FORCE, *supra* note 4, at 183–84 (noting that “formal adjustment of the law” is not necessary because international law may accommodate instances of noncompliance without changing the underlying rule); SCHACHTER, *supra* note 17, at 126 (“[I]t is highly undesirable to have a new rule allowing humanitarian intervention It would be better to acquiesce in a violation that is considered necessary and desirable in the particular circumstances than to adopt a principle that would open a wide gap in the barrier against unilateral use of force.”); see also Charney, *supra* note 42, at 837 (arguing that there is no international consensus in support of a right of unauthorized humanitarian intervention); O’Connell, *supra* note 17, at 81 (noting that supporters of the criminal law approach do not advocate a universal doctrine of unauthorized humanitarian intervention or an abandonment of the Charter use of force regime).

55. Writers in the criminal law approach use a range of terminology, alternating between describing interventions as excused, justified, mitigated, or necessary. For discussion of the distinctions in the criminal law between these concepts and the neglect of these distinctions in the criminal law approach to unauthorized humanitarian intervention, see *infra* Part II.A.1–2.

56. See Stromseth, *supra* note 49, at 243 (identifying preservation of the legal rules governing the use of force as one benefit of the excusable breach approach).

57. FRANCK, RECOURSE TO FORCE, *supra* note 4, at 185.

past interventions.⁵⁸ The international response to NATO's bombing campaign in Kosovo is a favored example of the criminal law approach.⁵⁹ Expecting that Russia and China would veto any authorization of forceful intervention by the Security Council, NATO states did not seek Security Council authorization for the use of force, which they justified as a legitimate action in support of prior Security Council resolutions and a moral imperative—but not an exercise of a right of unauthorized humanitarian intervention.⁶⁰ In an emergency session of the Security Council the day the bombing commenced, Russia, China, Belarus, and India called the NATO intervention a violation of the Charter,⁶¹ and Russia introduced a resolution condemning the campaign and demanding an end to the air strikes.⁶² The Council rejected the draft by twelve votes to three, with only Russia, China, and Namibia voting to support it.⁶³ Franck characterizes the Security Council's refusal to condemn the NATO intervention, despite its clear contravention of Article 2(4), as a demonstration of states setting aside NATO's violation of the law.⁶⁴ Although the NATO intervention was clearly illegal, it was morally justifiable: a massive humanitarian crisis was causing widespread civilian suffering; the responsible parties refused to negotiate a political settlement; and the Security Council failed to fulfill its responsibility to act in the face of a clear threat to international peace and security. Because of these unique circumstances, the international community judged NATO's violation of the law to be excused or justified.⁶⁵

The 1990 intervention of the Economic Community of West African States ("ECOWAS") in Liberia also is cited as an example of

58. See Franck, *Interpretation and Change*, *supra* note 4, at 215–26 (describing the operation of excuse and justification in past interventions).

59. See, e.g., *id.* at 224–26.

60. See *supra* notes 36–40 and accompanying text.

61. See Security Council 3988th Meeting, *supra* note 36, at 12–13 (statement of China); *id.* at 13 (statement of Russia); *id.* at 15 (statement of Belarus); *id.* at 15–16 (statement of India).

62. See S.C. Draft Res., U.N. Doc. S/1999/328 (Mar. 21, 1999) (introduced by Belarus, India, and Russian Federation); see also U.N. SCOR, 54th Sess., 3989th mtg., U.N. Doc. S/PV.3989 (Mar. 26, 1999) [hereinafter Security Council 3989th Meeting] (discussing the draft resolution).

63. See Security Council 3989th Meeting, *supra* note 62, at 6; see also Press Release, Security Council, *supra* note 38, at 1 (“Acting on a draft resolution submitted by Belarus, Russian Federation and India, the Council failed to adopt it by a vote of 3 in favour (China, Namibia, Russian Federation) to 12 against.”).

64. Franck, *Interpretation and Change*, *supra* note 4, at 224–25.

65. See *id.*

excuse or justification in action.⁶⁶ After a failed coup attempt in late 1989 disintegrated into months of indiscriminate, pervasive violence throughout the country, the sixteen-member organization decided to take action—without the authorization of the Security Council.⁶⁷ In August 1990 it established a ceasefire monitoring force, the Economic Community of West African States Monitoring Group (“ECOMOG”),⁶⁸ which deployed to Liberia later that month.⁶⁹ The deployment of ECOMOG was undoubtedly a use of force; although it was technically organized as a traditional peacekeeping body,⁷⁰ ECOMOG aggressively used armed force in response to attacks, conducted aerial bombing, and relied on heavy artillery and tanks.⁷¹ The Liberian factions agreed to a ceasefire in November 1990, and fighting largely calmed for nearly two years.⁷² The Security Council, meanwhile, stayed on the sidelines and inserted itself into the matter only to applaud the work of ECOWAS.⁷³ When it first considered the question of Liberia, in January 1991, the President of the Council “commend[ed] the efforts made by the ECOWAS Heads of State and Government to promote peace and normalcy in Liberia.”⁷⁴ The

66. See, e.g., *id.* at 221–23.

67. See U.N. SCOR, 47th Sess., 3138th mtg. at 76, U.N. Doc. S/PV.3138 (Nov. 19, 1992) [hereinafter Security Council 3138th Meeting] (statement of U.S. representative) (“[T]he dispatch of peace-keeping forces to Liberia was a decision taken by the ECOWAS Governments on their own initiative . . .”). By 1993, the fighting had resulted in some 150,000 casualties and the displacement of an estimated 600,000 to 700,000 Liberian refugees to neighboring countries. See The Secretary-General, *Report of the Secretary-General on the Question of Liberia*, ¶ 8, delivered to the Security Council, U.N. Doc. S/25402 (Mar. 12, 1993) [hereinafter *Secretary-General Report on Liberia*].

68. See Econ. Cmty. of W. Afr. States [ECOWAS], Standing Mediation Comm., Final Communiqué of the First Session, ¶¶ 10–14 (Aug. 7, 1990), reprinted in REGIONAL PEACE-KEEPING AND INTERNATIONAL ENFORCEMENT: THE LIBERIAN CRISIS 72, 73 (M. Weller ed., 1994); ECOWAS, Standing Mediation Comm., On the Cease-fire and Establishment of an ECOWAS Cease-fire Monitoring Group for Liberia, art. 2, Decision A/DEC/1/8/90 (Aug. 7, 1990), reprinted in REGIONAL PEACE-KEEPING AND INTERNATIONAL ENFORCEMENT: THE LIBERIAN CRISIS, *supra*, at 67, 67–68. The Economic Community of West African States Monitoring Group (“ECOMOG”) did not have permission to intervene from the Liberian government in place at the time. For further discussion rejecting possible theories of authorization, see MURPHY, *supra* note 35, at 160–62.

69. David Wippman, *Enforcing the Peace: ECOWAS and the Liberian Civil War*, in ENFORCING RESTRAINT: COLLECTIVE INTERVENTION IN INTERNAL CONFLICTS 157, 168 (Lori Fisler Damrosch ed., 1993).

70. *Id.* at 167.

71. MURPHY, *supra* note 35, at 152.

72. See *id.* at 152–53.

73. See AREND & BECK, *supra* note 12, at 65 (describing the inaction of the Security Council).

74. Note by the President of the Security Council, U.N. Doc. S/22133 (Jan. 22, 1991).

Council did not express concern that ECOWAS member states had resorted to force without U.N. authorization and instead broadly supported the organization's initiative.⁷⁵ Indeed, there was no discussion of any breach of Article 2(4).⁷⁶ To proponents of the criminal law approach, the Security Council's reaction shows that states allowed the violation of the law because of their sense that there was a gap between what was required by the law and what was required by "the common sense of moral justice."⁷⁷ Because the consequences of the ECOMOG deployment (a short-term ceasefire and, with U.N. participation, an eventual peace) were preferable to the presumed consequences of inaction by the international community (continuing death and displacement with no foreseeable end)⁷⁸ the Security Council determined that the unauthorized use of force should not be condemned or punished, despite its illegality.⁷⁹

C. *Mapping Legality and Legitimacy in the Unauthorized Humanitarian Intervention Debate: Sovereignty and Human Rights*

The criminal law approach, and its driving rationale that strict application of the law must yield to considerations of morality, have been well received not only in the academic literature, but also in practice. Most significantly, the Goldstone Commission concluded that the NATO air campaign in Kosovo was "illegal but legitimate";⁸⁰ like the work of Professor Franck, the Commission lamented the "gap between legality and legitimacy" that had developed in the area of

75. See, e.g., Security Council 3138th Meeting, *supra* note 67, at 66 (statement of Russian representative) (noting the position that the Liberian crisis should be resolved on a regional basis); *id.* at 76 (statement of U.S. representative) (expressing support for ECOWAS intervention even though it was undertaken without Security Council authorization). The United Nations became more involved in the Liberian conflict only after the ceasefire broke down in August 1992, as distrust by Charles Taylor toward ECOMOG necessitated more active participation by the organization. See *Secretary-General Report on Liberia*, *supra* note 67, ¶ 28 (noting Taylor's concern that ECOMOG was no longer a neutral force). It was only in November 1992 that the Council declared the situation in Liberia a threat to international peace and security; at that time, however, it again "commend[ed]" the efforts of ECOWAS in Liberia, and it did not authorize any action. S.C. Res. 788, ¶¶ 1, 7–8, U.N. Doc. S/RES/788 (Nov. 19, 1992).

76. See CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 306 (2d ed. 2004).

77. FRANCK, *RECOURSE TO FORCE*, *supra* note 4, at 183–84.

78. See *id.* at 188 ("To consider a plea in mitigation of an otherwise unlawful act, it is necessary to compare potential outcomes of action and inaction in precise circumstances.").

79. See Franck, *Interpretation and Change*, *supra* note 4, at 221.

80. KOSOVO REPORT, *supra* note 5, at 4.

unauthorized intervention.⁸¹ This is not surprising; the criminal law approach carries some obvious appeal. As a preliminary matter, using criminal law concepts to characterize unauthorized interventions, despite the notable distinctions between international and domestic models explained below,⁸² expresses that violations of the prohibition against nondefensive force are public abuses that concern the international community as a whole, not private matters that lie solely between the intervener and the target state.⁸³ An absence of effective law-enforcement mechanisms or avenues for punishment may weaken the sense that violations of the Charter and customary international law are affronts to the international community, but the representation of such violations as having impact beyond the particular states that are directly involved reinforces the central tenet of the international system that all states have an interest in peace.⁸⁴ Further, there is a readily apparent connection between the rules of domestic law, in which members of society accept near-complete restrictions on their right to use violence, with the paradigmatic exception of violence used in self-defense, and those of international law, in which states accept near-complete restrictions on their right to use force, with the exception of force used in self-defense until the Security Council intervenes.⁸⁵

81. *Id.* at 10; *see also* FRANCK, *RECOURSE TO FORCE*, *supra* note 4, at 182 (explaining that the Commission took a first step toward “bridging the gap . . . between legality and legitimacy, between strict legal positivism and a common sense of moral justice”). In contrast to Professor Franck’s approach, however, the Goldstone Commission urged that this gap be closed by some process of amending the law to allow for lawful interventions outside of the United Nations. *See* KOSOVO REPORT, *supra* note 5, at 291.

82. *See infra* Part II.A.3–II.B.

83. *See* Beth Stephens, *Translating Filártiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 *YALE J. INT’L L.* 1, 12 (2002) (noting that addressing egregious violations of human rights through private civil suits may suggest that only money and financial compensation are at issue and reduces the matter to a private concern rather than one of the larger public).

84. Moreover, the criminal law approach is faithful to the state of international law in that it acknowledges that unauthorized humanitarian intervention remains prohibited and does not call for an amendment to the Charter that appears highly unlikely in light of the opposition of the majority of states to a right of humanitarian intervention. *See supra* note 54. The debates in the General Assembly at the time of the Kosovo intervention show that governments supported Council-authorized interventions in situations of humanitarian crisis, but many states spoke out to oppose the notion that states could intervene without Council authorization. *See* Press Release, General Assembly, General Debate Surveyed Pros and Cons of Humanitarian Intervention, Globalization, Poverty, UN Reform, Observes Assembly President, U.N. Doc. GA/SM/105 (Oct. 2, 1999).

85. For a discussion of the connection between self-defense in domestic criminal law and in international law, *see* FLETCHER & OHLIN, *supra* note 19, at 129–54.

The appeal of the criminal law approach, however, extends beyond these two factors. The discourse of legality versus legitimacy or legality versus morality that lies at the heart of the criminal law approach reflects the predominant characterization of the debate over unauthorized humanitarian intervention as a battle between state sovereignty, which is characterized as an amoral ordering mechanism, and the protection of human rights, the consummate expression of morality in international life.⁸⁶ Discussions of the legal status of unauthorized intervention frequently begin with an acknowledgment of the “disturbing tension” between these “two core values of the international legal system,”⁸⁷ and the question of unauthorized intervention is seen as bringing the conflict between these two values into stark relief.⁸⁸ Advocates of a right of intervention cast their arguments in terms of human rights versus sovereignty, with the conclusion that human rights wins out.⁸⁹ Under an ethical theory of international law, Fernando Tesón, for example, reaches the conclusion that because the promotion of human rights has primacy over the principle of respect for state sovereignty, the prohibition against the use of force in Article 2(4) is necessarily qualified by the purpose of the United Nations of promoting and

86. See Nico Krisch, *Legality, Morality and the Dilemma of Humanitarian Intervention After Kosovo*, 13 EUR. J. INT'L L. 323, 327, 329 (2002) (describing the predominant account that the question of unauthorized humanitarian intervention centers on the tension between sovereignty and human rights and that sovereignty has no moral basis, while human rights is based on moral concerns). There are some exceptions to this type of characterization. Terry Nardin, for example, advocates evaluating humanitarian intervention by reference to the much older traditions of protecting the innocent and punishing wrongs. See Terry Nardin, *The Moral Basis for Humanitarian Intervention*, in JUST INTERVENTION 11, 11–28 (Anthony F. Lang Jr. ed., 2003). Anne Orford argues that the predominant narrative of humanitarian intervention as a story of human rights enforcement triumphing over the protections of sovereignty has been created to mask the reality that the international community is complicit in the humanitarian crises to which it responds. See ANNE ORFORD, *READING HUMANITARIAN INTERVENTION: HUMAN RIGHTS AND THE USE OF FORCE IN INTERNATIONAL LAW* 85 (2003).

87. Buchanan, *supra* note 47, at 131.

88. See, e.g., Bartram S. Brown, *Humanitarian Intervention at a Crossroads*, 41 WM. & MARY L. REV. 1683, 1689 (2000) (“When the Security Council fails to act to stop a continuing humanitarian crisis, these two basic pillars of the post-World War II legal order come into dramatic conflict.”); see also ANTONIO CASSESE, *INTERNATIONAL LAW* 104 (2001) (opining that the principle of respect for human rights “is, in fact, competing—if not at loggerheads” with principles of sovereign equality and nonintervention in the domestic affairs of other states); Mirko Bagaric & John R. Morss, *Transforming Humanitarian Intervention from an Expedient Accident to a Categorical Imperative*, 30 BROOK. J. INT'L L. 421, 427–31 (2005) (discussing the conflict between human rights and state sovereignty).

89. See TESÓN, *supra* note 21, at 173–74.

protecting human rights.⁹⁰ Unauthorized humanitarian intervention is, therefore, consistent with the Charter.⁹¹ Opponents of a right of intervention are seen to use the same inputs to come to a different result, supporting their textual analysis with a heavy reliance on the principle of nonintervention, a corollary of state sovereignty.⁹² The conclusion is that although human rights protection is important, it cannot withstand the prohibitions imposed by state sovereignty and the accompanying nonintervention norm.⁹³

When debates about humanitarian intervention are cast in these terms, as a choice between saving states or saving lives, discussions of what factors may justify an unauthorized intervention take the form of inquiries about what degree of suffering may justify an intrusion or conditioning of sovereignty, or whether military force will accomplish its stated goal of ending the human rights abuse.⁹⁴ These questions are undoubtedly important, but they fail to account for another dimension of unauthorized intervention—its impact on restraints of power and the operation of law. The following two Parts turn to those questions.

II. A CHALLENGE TO THE CRIMINAL LAW APPROACH TO UNAUTHORIZED HUMANITARIAN INTERVENTION

The criminal law approach to unauthorized humanitarian intervention provides a seemingly elegant model. For those who take the position that international law prohibits unauthorized uses of nondefensive force and believe that the law should continue to do so despite the existence of cases in which it produces unacceptable results, the criminal law approach allows a state both to disregard the law and to escape sanction for its breach. At the same time, this approach preserves the operation and integrity of the prohibition against unauthorized force. This Part investigates the application of the criminal law approach, and it argues that upon deeper inspection, the criminal law approach is neither an apt descriptive model for past

90. *Id.*

91. *Id.*; see also Ulrich K. Preuss, *The Force, Frailty, and Future of Human Rights Under Globalization*, 1 THEORETICAL INQUIRIES L. 283, 284 (2000) (opining that state sovereignty has prevented the enforcement of human rights norms); Nicholas Tsagourias, *Humanitarian Intervention and Legal Principles*, 7 INT'L LEGAL THEORY 83, 83 (2001) (explaining the debate over humanitarian intervention as a disagreement regarding whether state sovereignty or human rights is the guiding principle of legal reasoning).

92. AREND & BECK, *supra* note 12, at 131–32.

93. See, e.g., *id.* (“In order to buttress their argument that humanitarian intervention is not legal, restrictionist scholars invoke the principle of ‘non-intervention.’ ”).

94. See *id.* at 128–29.

interventions nor an appropriate normative framework to guide evaluation of future interventions.

A. *The Descriptive Failures of the Criminal Law Approach*

This sub-Part contends that the criminal law approach is untenable as a description of the international community's past practice in unauthorized humanitarian intervention. In order to explain why this is the case, it is necessary to examine briefly the criminal law defenses of excuse and justification and the application of these defenses by the criminal law approach in the context of unauthorized humanitarian intervention. This sub-Part then turns to an exploration of why the criminal law approach fails to accurately theorize past cases of unauthorized humanitarian intervention.

1. A Brief Overview of Excuse and Justification

Although many courts and legislators have failed to acknowledge that justification and excuse are two distinct concepts,⁹⁵ both have benefited from deep scholarly investigation, and the differences between the two are now well settled.⁹⁶ A justification defense applies to conduct that otherwise would be unlawful, but that under the circumstances is "socially acceptable" and therefore not unlawful.⁹⁷ Justified conduct is consistent with the rules that the law seeks to guide behavior and thus is "to be encouraged (or at least tolerated) in the future."⁹⁸ An application of the justification defense to the case of

95. See Joshua Dressler, *New Thoughts About the Concept of Justification in the Criminal Law: A Critique of Fletcher's Thinking and Rethinking*, 32 UCLA L. REV. 61, 65–66 (1984) (discussing conflation of the terms "excuse" and "justification" and other misuses thereof).

96. The literature on excuse and justification is vast; Professors George Fletcher and Paul Robinson especially have illuminated the dark corners of the two defenses. See George P. Fletcher, *The Right Deed for the Wrong Reason: A Reply to Mr. Robinson*, 23 UCLA L. REV. 293 *passim* (1975); Paul H. Robinson, *A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability*, 23 UCLA L. REV. 266 *passim* (1975). Given the relatively simple analogy drawn by the criminal law approach, a detailed examination of these defenses is both unnecessary to and beyond the scope of this Article. Accordingly, this sub-Part provides only a brief discussion so as to allow for further discussion of the applicability of the criminal law approach to unauthorized humanitarian intervention.

97. Peter D.W. Heberling, Note, *Justification: The Impact of the Model Penal Code on Statutory Reform*, 75 COLUM. L. REV. 914, 916 (1975).

98. PAUL H. ROBINSON, *STRUCTURE AND FUNCTION IN CRIMINAL LAW* 82 (1997); see also DRESSLER, *supra* note 47, at 208 ("A justified act is one that 'the law does not condemn, or even welcomes.'" (quoting H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW* 13 (1968))). The U.N. Charter's law of self-defense can be thought of as a codification of a justification. Using force in response to the occurrence of an armed attack is justified and thus not unlawful.

Kosovo would say: although NATO's military campaign would otherwise be unlawful because it violated Article 2(4) of the Charter, under the circumstances—the growing humanitarian crisis in Kosovo, the urgent need for action, and the certainty that the Security Council would not act—the intervention was “socially acceptable” and therefore not unlawful.

Whereas justification focuses on the nature of the act, an excuse, in contrast, looks to the circumstances faced by the actor and serves as a defense in cases in which the actor cannot be held to be morally culpable for the wrongful conduct committed.⁹⁹ An excuse defense does not deny that the actor has committed the act in question or that the conduct has harmed society; the defense lies in the absence of moral blameworthiness in the defendant for undertaking that conduct and causing the harm. A defendant may have committed a criminal act, but because she is insane, or undertook the act involuntarily, for example, the defendant is not criminally responsible for the act; excuses are “variations of the theme ‘I couldn’t help myself’ or ‘I didn’t mean to do it.’”¹⁰⁰ Professor Fletcher keenly describes three categories of excuses: (1) necessity as a result of natural conditions (for example, a starving man who steals a loaf of bread); (2) coercion or duress as a result of intimidation exerted by another person (an actor who steals because a gunman threatens to kill him if he does not); or (3) distortion in the actor’s conduct as a result of her own psychological or physical make-up (an actor who cannot control her movements because of an epileptic seizure).¹⁰¹ Of course, none of these three categories fits the type of explanation that would suit a case of unauthorized humanitarian intervention, but putting that aside for further discussion below,¹⁰² an application of the excuse defense to the Kosovo intervention would say: although NATO member states committed a wrongful act by violating Article 2(4) of the Charter, the intervening states are not morally culpable for their wrongful conduct because they could not help but act.

Although exploring the distinctions between excuse and justification might appear to be quibbling over minor details, there are significant differences between the two defenses. First, because justified conduct is lawful conduct and excused conduct remains

99. See DRESSLER, *supra* note 47, at 205 (explaining excuse defenses).

100. George P. Fletcher, *The Individualization of Excusing Conditions*, 47 S. CAL. L. REV. 1269, 1269 (1974).

101. *Id.* at 1269–70.

102. See *infra* Part II.A.2 (discussing applicability of criminal law definitions of excuse, justification, and necessity to unauthorized humanitarian intervention).

unlawful despite its failure to result in criminal liability, and because the law seeks to encourage (or at least tolerate) lawful conduct and deter unlawful conduct, whether conduct is excused or justified impacts how the law guides the conduct of other actors. If the Kosovo campaign was justified, then another actor in the same position as one of the intervening states in the future would be legally entitled to make the same decision to intervene. If NATO was excused for conducting the Kosovo campaign, in contrast, then another actor in the same position as one of the NATO states in the future would not legally be entitled to undertake the same conduct. The distinction also impacts the message the law sends about the conduct. Does the conduct align with what is normatively expected or acceptable, or does it deviate from those norms? Was the actor reasonable in undertaking the conduct, or was it attributable to some disability or impairment?¹⁰³ Accordingly, how the criminal law approach navigates these murky waters is especially important.

2. Excuse and Justification in the Criminal Law Approach

Instead of describing unauthorized humanitarian intervention as either justified or excused, the criminal law approach alternates between these two categories; unauthorized humanitarian interventions are in some writings portrayed as “illegal but justified” and in others “illegal but excused.”¹⁰⁴ Indeed, the approach appears to combine elements of the two categories. On the one hand, the criminal law approach regards as significant that an excused or justified unauthorized intervention remains illegal. This aspect looks like excuse: while justified conduct is legal conduct, excused conduct is illegal, but because of the circumstances faced by the actor, no criminal liability attaches.¹⁰⁵ On the other hand, the factors that, to

103. These questions have been explored in fascinating scholarship on battered women. See, e.g., David A.J. Richards, *Self-Defense and Relations of Domination: Moral and Legal Perspectives on Battered Women Who Kill*, 57 U. PITT. L. REV. 461 *passim* (1996); Robert F. Schopp et al., *Battered Woman Syndrome, Expert Testimony, and the Distinction Between Justification and Excuse*, 1994 U. ILL. L. REV. 45 *passim*.

104. See, e.g., Franck, *Interpretation and Change*, *supra* note 4, at 213 (alternating between discussions of justification, excuse, and mitigation).

105. See Kent Greenawalt, *Distinguishing Justifications from Excuses*, LAW & CONTEMP. PROBS., Summer 1986, at 89, 91 (explaining that “warranted action” is the “central feature of justification,” while “nonresponsibility” is the “central feature of excuse”); Donald L. Horowitz, *Justification and Excuse in the Program of the Criminal Law*, LAW & CONTEMP. PROBS., Summer 1986, at 109, 119 (“To recognize a justification defense is effectively to change the law For if a person in a given situation is justified in doing an act that would otherwise be denominated criminal, then all others similarly situated are likely privileged to do the same act.”).

proponents of the criminal law approach, make the unlawful conduct unworthy of sanction suggest that justification is at work. These factors concern the nature of the act, not the vulnerable circumstances of the actor: NATO was justified in intervening in Kosovo, for example, because of the degree of suffering that the United Nations was failing to stop—not because it could not help but initiate a bombing campaign.

Despite the vast differences between justification and excuse, ultimately the precise category of defense appears less important to the proponents of the criminal law approach than the concept of necessity, a “choice of evils” defense.¹⁰⁶ At first glance, this defense appears consistent with the predominant narrative of the problem of unauthorized intervention: a state is forced to choose between taking action to prevent or stop massive violations of human rights and violating international law in doing so, or continuing to abide by the law and allowing the atrocities to continue or even increase.¹⁰⁷ Other conditions of the necessity defense also appear to be met by a case of unauthorized intervention that the criminal law approach would consider appropriate for tolerance: the intervening state or group of states must reasonably expect that intervention will avert the harm being suffered in the target state, and there are no available legal alternatives because the Security Council will not act.¹⁰⁸

The crucial factor that makes necessity inapplicable to unauthorized intervention, however, is foreseeability. Circumstances

106. See Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for its Proper Limits*, 62 S. CAL. L. REV. 1331, 1348–49 (1989) (discussing distinction between necessity, properly understood as a justification defense, and duress, properly understood as an excuse).

107. As Anne Orford notes, discourse about humanitarian intervention “always [focuses] on the moment when military intervention is the only remaining credible foreign policy option,” resulting in a false sense that the “choice facing the international community in security or humanitarian crises is one of action”—and specifically the use of armed force—“or inaction.” ORFORD, *supra* note 86, at 14–18. Her observation of the action/inaction dichotomy applies not only to scholarly debates about humanitarian intervention but also to the discourse of statesmen: during the Kosovo campaign, Tony Blair repeatedly represented inaction as the only alternative to military intervention. See Tony Blair, *A New Generation Draws the Line*, NEWSWEEK, Apr. 19, 1999, at 40 (“Others argue we should not have acted at all. Of them I ask, what was the alternative? To do nothing would have been to acquiesce in Milosevic’s brutality.”); see also Tony Blair, *There Is No Compromise . . . We Will Win*, SUNDAY MIRROR (London), Apr. 11, 1999, at 4 (voicing concern over the damage that would have resulted if NATO “had done nothing”).

108. See MATTHEW LIPPMAN, CONTEMPORARY CRIMINAL LAW: CONCEPTS, CASES, AND CONTROVERSIES 267 (2006) (explaining the requirements for a necessity defense under criminal law).

that are apt for a necessity defense require that “lawmakers must not have previously ‘anticipated the choice of evils and determined the balance to be struck between the competing values’ in a manner in conflict with the defendant’s choice.”¹⁰⁹ But the problem of intervention without Security Council authorization was foreseeable. Indeed, the drafters of the U.N. Charter considered whether to allow states a right to intervene without Security Council authorization in order to protect human rights, and they determined that force should be allowed without Security Council authorization only in the case of self-defense.¹¹⁰ The primary rules governing the use of force thus already take into account considerations of necessity; the drafters of the Charter codified a justification of self-defense in Article 51 and chose to exclude other reasons that states might use force.¹¹¹ The structure of the criminal law doctrine of necessity therefore would not characterize unauthorized intervention as a proper case of necessity.

The concept of necessity under existing international law also fails to shed much light on the operation of the criminal law approach.¹¹² According to the International Law Commission (“ILC”) Articles on State Responsibility, necessity “preclud[es] the wrongfulness of an act.”¹¹³ The ILC also alternates between using language of justification and excuse to describe necessity.¹¹⁴ During the drafting process, ILC members discussed the distinction between a defense that precludes the wrongfulness of an act, and one that mitigates responsibility, and they settled on the former, which suggests that necessity under international law constitutes a

109. DRESSLER, *supra* note 47, at 292–93 (quoting *State v. Tate*, 505 A.2d 941, 946 (N.J. 1986) and citing *Commonwealth v. Leno*, 616 N.E.2d 453, 455 (Mass. 1993)).

110. The drafters not only decided not to include an exception for humanitarian intervention in Article 2(4), but also debated whether to allow regional organizations a right to intervene without Security Council authorization and decided against it. See FRANCK, *RECOURSE TO FORCE*, *supra* note 4, at 157–58.

111. See U.N. Charter art. 51.

112. See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 131, paras. 140–42 (July 9) (recognizing the existence of a doctrine of necessity in international law); *Gabcikovo-Nagymaros Project* (Hung. v. Slov.), 1997 I.C.J. 92, paras. 49–59 (Sept. 25) (same).

113. U.N. Int’l Law Comm’n, Draft Articles on Responsibility of States for Internationally Wrongful Acts, art. 25, *Report of the International Law Commission on the Work of Its Fifty-third Session*, U.N. GAOR, 56th Sess., Supp. No. 10 at 49, U.N. Doc. A/56/10 (2001) [hereinafter *ILC 2001 Report*], available at <http://www.un.org/documents/ga/docs/56/a5610.pdf>. The International Law Commission adopted the Draft Articles as final in 2001, and the General Assembly approved them that same year. See G.A. Res. 56/83, at 1–2, U.N. Doc. A/RES/56/83 (Dec. 12, 2001).

114. See JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES* 160–62 (2002).

justification.¹¹⁵ At the same time, James Crawford, the Special Rapporteur on State Responsibility, concluded that it is not clear whether the ILC considered the enumeration of circumstances precluding wrongfulness to be a justification or an excuse, but he suggested that the Commission meant to preclude responsibility rather than wrongfulness, which looks more like excuse.¹¹⁶

Whether necessity as a matter of international law may be applied to unauthorized humanitarian intervention is an equally murky question. Although the ILC Articles provide that necessity may only be invoked where an unlawful action is “the only way for the State to safeguard an essential interest against a grave and imminent peril,” the ILC notably did not specify that the “essential interest” being protected must be that of the intervening state.¹¹⁷ The commentary to Article 25 notes that “necessity consists not in the danger to the lives of individuals in the charge of a State official but in a grave danger either to the essential interests of the State or of the international community as a whole.”¹¹⁸ At the same time, the ILC determined that necessity may not be invoked where the unlawful conduct “seriously impair[s] an essential interest of the State or States towards which the obligation exists, or of the international community as a whole,”¹¹⁹ raising the question of whether a military intervention can be reasonably characterized as conduct that does not impair the essential interest of the target state, and, further, whether that unlawful conduct impairs the interests of the international community in light of the absence of Security Council authorization. Further complicating the question of the applicability of necessity under international law is the provision that necessity may not be used to preclude the wrongfulness of conduct that violates a peremptory norm of international law,¹²⁰ which suggests that necessity may not be applicable to unauthorized humanitarian intervention.¹²¹ Moreover, the ILC noted in its 2001 commentary that “considerations

115. *Id.* at 209.

116. See James Crawford, *Revising the Draft Articles on State Responsibility*, 10 EUR. J. INT'L L. 435, 443–44 (1999).

117. *ILC 2001 Report*, *supra* note 113, at 49.

118. *Id.* at 195; see also *Report of the International Law Commission on the Work of Its Thirty-second Session*, Commentary, 35 U.N. GAOR Supp. (No. 10) art. 33, para. 23, U.N. Doc. A/35/10 (1980), reprinted in [1980] 2 (Part Two) Y.B. Int'l L. Comm'n 34, 44, U.N. Doc. A/CN.4/SER.A/1980/Add.1 (observing that necessity has applied in cases of “grave and imminent danger to the State, to some of its nationals or simply to human beings”).

119. *ILC 2001 Report*, *supra* note 113, at 49.

120. See *id.* at 53.

121. See *supra* note 13 and accompanying text.

akin to those underlying Article 25 may have a role” in evaluating cases of unauthorized humanitarian intervention but that primary rules on use of force already take those considerations into account.¹²² On balance, it appears that as a matter of international law, necessity is not available as a defense for a breach of Article 2(4) undertaken to protect human rights.

3. The Practice of Excuse and Justification in International Affairs

The success of the criminal law approach need not depend exclusively on its ability to fit the practice of humanitarian intervention neatly into the categories of either the criminal law or international law. But the criminal law approach also fails to fit the reality of past practices of humanitarian intervention, contrary to its proponents’ claims. The criminal law approach offers an unsatisfying description of the international community’s approach to unauthorized humanitarian intervention on account of the fundamental differences between the institutions and practices at work in the international system and those operating in the domestic criminal justice system. In order to assess that an unauthorized intervention is viewed as excused or justified in accordance with the criminal law approach, there must be some clarity that the law has been broken—even if that breach is deemed not to merit condemnation or sanction. This clarity could originate in a judgment by the ICJ or, conceding that non-judicial international bodies could act as judges or juries,¹²³ a declaration by the Security Council or the General Assembly. But such determinations of illegality are rare. Because of severe restraints on its jurisdiction, the ICJ only infrequently becomes involved in adjudicating a state’s use of force.¹²⁴

122. CRAWFORD, *supra* note 114, at 186.

123. *See supra* note 53 and accompanying text (discussing Franck’s writing on the jurying function of the Security Council and General Assembly).

124. The Kosovo intervention provides a unique case in which the ICJ did have a role, but even then, because of jurisdictional barriers, the court did not make a final judgment on the legality of NATO’s use of force and noted only that it was “profoundly concerned with the use of force in Yugoslavia” and that “under the present circumstances, such use raises very serious issues of international law.” *Legality of Use of Force (Yugo. v. Belg.)*, 1998 I.C.J. 124, 132 (June 2). The orders issued in the other nine cases are identical *mutatis mutandis*. In recent years, the ICJ has taken up cases on uses of force in non-humanitarian contexts. *See, e.g.*, *Armed Activities in the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J. 116 (Dec. 19) (holding that military operations by Uganda in the Democratic Republic of Congo violated Article 2(4) of the Charter, as well as international human rights and humanitarian law, and ordering the government of Uganda to pay reparations); *Oil Platforms (Iran v. U.S.)*, 2003 I.C.J. 160 (Nov. 6) (holding that U.S. Navy attacks against Iranian oil platforms in 1987 and 1988 constituted an unlawful use of force but did not violate a 1955 commerce treaty between the two countries).

The prospect of jurisdiction in the International Criminal Court over the crime of aggression could provide another opportunity for judicial evaluation of unauthorized humanitarian intervention, but this is contingent both on the Assembly of States Parties reaching a decision on the definition of the crime and the conditions for the exercise of jurisdiction and on the considerable political hurdles likely to arise in the face of a potential action against an intervening state.¹²⁵ As for the political bodies, the Security Council and General Assembly often choose not to address questions of the legality of a member state's actions,¹²⁶ and when they do discuss such matters during debate, those assessments are often mixed with political judgments.¹²⁷

These same factors result in the second failure of the criminal law approach: the absence of any articulation of the factors that may justify or excuse the illegal conduct. Without a court judgment or any consensus on the part of the international community, the international system lacks a mechanism for pronouncing why particular violations of the law are released from sanction. In the case of Kosovo, for example, which Professor Franck cites as an example of the criminal law approach in action, it is clear that the international community chose to tolerate the intervention rather than subject NATO member states to any type of sanction. But it is not clear that states regarded the intervention as justified because of the circumstances that Franck cites—“[e]xtreme necessity” in the form of severe humanitarian crisis; “immediacy of the need for action” because violence was increasing; the “clean hands” of the NATO states; and the U.N. system's inability to act.¹²⁸ For example, some scholars and observers believed that the Muslim states that supported

125. Although aggression is included in the list of crimes over which the court has jurisdiction, *see* Rome Statute of the International Criminal Court art. 5, *adopted* July 17, 1998, 2187 U.N.T.S. 90, the exercise of jurisdiction is conditioned on agreement by the Assembly of States Parties on a definition of the crime and on the conditions for the exercise of jurisdiction. *See* Anja Seibert-Fohr, *The Crime of Aggression: Adding a Definition to the Rome Statute of the ICC*, 12 AM. SOC'Y INT'L L. INSIGHTS (Nov. 18, 2008), <http://www.asil.org/insights081118.cfm>. The Assembly of States Parties will hold its first Review Conference in 2010. *See id.*

126. *See, e.g., infra* text accompanying notes 135–40 (discussing the Council's failure to discuss violation of Article 2(4) in the context of the regional intervention in Liberia).

127. During the Kosovo debate, delegates from Russia, China, Belarus, and India each declared that the intervention was a violation of the Charter, *see supra* note 61 and accompanying text, and some states voiced their unease about the use of force absent Security Council authorization, *see* U.N. SCOR, 54th Sess., 4011th mtg. at 17, U.N. Doc S/PV.4011 (June 10, 1999) (statement of Brazil); U.N. SCOR, 54th Sess., 4011th mtg. Resumption 1 at 4, U.N. Doc. S/PV.4011 (June 10, 1999) (statement of Costa Rica), but most states did not take a position one way or the other.

128. Franck, *Interpretation and Change*, *supra* note 4, at 226.

the NATO campaign in Kosovo did so not because they saw the intervention as legally defensible as a result of the factors cited above, but rather because this particular use of force was being directed to protect fellow Muslims.¹²⁹ Slovenia, too, was similarly focused on concerns other than the standard defenses for intervention. In rejecting the draft Russian resolution, which is regarded under the criminal law approach as a representation of the international community accepting that the violation of the law was excused or justified, Slovenia focused on the fact that the resolution lacked sufficient mention of the abuses of the Yugoslav government.¹³⁰ More generally, Nicholas Wheeler points to what he terms the “shaming power of humanitarian norms” as an explanation for states’ support of operations such as the Kosovo campaign.¹³¹ States suffer political costs as a result of opposing powerful “global humanitarian values” that shape their reactions to humanitarian interventions; as a result, these reactions are likely to be unaffected by states’ assessments of the legality of those interventions.¹³² Thus, because political judgments can be mixed with legal ones, or at times overtake them entirely, a state’s acquiescence in an illegal act does not necessarily point to an assessment that the illegal act was justified under the circumstances.¹³³

129. See Roland Dannreuther, *Perceptions in the Middle East, in KOSOVO: PERCEPTIONS OF WAR AND ITS AFTERMATH* 206, 206–08 (Mary Buckley & Sally N. Cummings eds., 2001) (describing rationale for positions of Turkey, Saudi Arabia, and United Arab Emirates). Malaysia was expected to abstain in the vote on the Russian resolution condemning the intervention, but it voted against it. See Security Council 3989th Meeting, *supra* note 62, at 8–9. In the explanation of vote, the Malaysian representative expressed his “wish[] that the crisis in Kosovo could have been dealt with directly and in an effective manner by the Security Council,” but declared that in light of the growing humanitarian crisis in Kosovo, he “had no other option but to vote against the draft resolution.” *Id.*

130. See Security Council 3989th Meeting, *supra* note 62, at 3; see also N.D. White, *The Legality of Bombing in the Name of Humanity*, 5 J. CONFLICT & SECURITY L. 27, 33 (2000) (“[A] major concern for many states voting against the resolution was its lack of balance in that it failed also to condemn the brutality of the repressive measures taken by the [Former Republic of Yugoslavia].”).

131. See NICHOLAS J. WHEELER, *SAVING STRANGERS: HUMANITARIAN INTERVENTION IN INTERNATIONAL SOCIETY* 290–91 (2000).

132. Nicholas J. Wheeler, *The Humanitarian Responsibilities of Sovereignty: Explaining the Development of a New Norm of Military Intervention for Humanitarian Purposes in International Society*, in *HUMANITARIAN INTERVENTION AND INTERNATIONAL RELATIONS* 29, 39 (Jennifer M. Welsh ed., 2004).

133. That the NATO member states did not concede that their own actions were unlawful further complicates the attempt to interpret other states’ reactions to the intervention. As Jane Stromseth explains, NATO states argued that the intervention had “a legal basis within the normative framework of international law.” Stromseth, *supra* note 49, at 244. As discussed above, the Netherlands, for example, defended its participation in

The same problems arise upon a closer examination of the Liberia intervention, which Franck also sees as an example of the international community tolerating a violation of the law because of exceptional conditions—widespread violence that demands action, Security Council inaction, and clean hands on the part of the intervening states.¹³⁴ The Council indeed (1) failed to condemn ECOWAS's violation of Article 2(4) and (2) "commend[ed]" ECOWAS's intervention, including the military efforts of ECOMOG.¹³⁵ But it is a different matter to assert that the Council acknowledged a breach of Article 2(4) and determined that under the circumstances, the breach should be condoned. The Security Council debates at the time, as well as those of the General Assembly, show support of the ECOWAS intervention, but they do not reveal member states' positions on Article 2(4) and Security Council authorization.¹³⁶

It is not clear why this intervention was condoned. It is possible that states in the Council chose to tolerate the intervention, and even validate it, because they recognized the existence of particular conditions that they deemed a valid defense for a violation of the Charter, an explanation supported by Professor Franck.¹³⁷ Another possible answer, as noted by Sean Murphy, is that at the time that ECOWAS established and deployed a peacekeeping force to Liberia, the international community was focused on Iraq's invasion of

the bombing and its vote against the Russian resolution on the grounds that the intervention "follows directly from [R]esolution 1203," Security Council 3989th Meeting, *supra* note 62, at 4, in which the Security Council, acting under Chapter VII, affirmed that the situation in Kosovo constituted a threat to international peace and security and demanded that the Government of the Federal Republic of Yugoslavia take certain steps to resolve the crisis there. *See* S.C. Res. 1203, U.N. Doc. S/RES/1203 (Oct. 24, 1998). The same problems have arisen in past interventions. India, Tanzania, and Vietnam, for example, characterized their interventions in neighboring countries not as humanitarian actions, but as self-defense. *See* AREND & BECK, *supra* note 12, at 119 (describing India's "reali[zation] that humanitarian intervention was an insufficient justification for the use of force" (quoting Michael Akehurst, *The Use of Force to Protect Nationals Abroad*, 5 INT'L REL. 3, 12 (1977))). As a result, it is impossible to assess whether the international community's responses in those cases represent examples of its reaction to humanitarian interventions, to stretched interpretations of self-defense, or to those interveners' self-interested motives cloaked in the language of self-defense. *See id.* at 121–22 (describing Vietnam's characterization of its intervention in Cambodia as self-defense); *id.* at 125 (discussing Tanzania's justification of its intervention in Uganda on self-defense grounds).

134. *See* Franck, *Interpretation and Change*, *supra* note 4, at 221–23.

135. *See supra* notes 74–76 and accompanying text (describing Security Council reaction to ECOMOG intervention).

136. *See* MURPHY, *supra* note 35, at 163.

137. *See* Franck, *Interpretation and Change*, *supra* note 4, at 223 (stating that the "reality" of the Liberia intervention is "simpler" than some scholars would have it).

Kuwait, which had taken place earlier in the same month.¹³⁸ Even if U.N. member states were troubled by the unauthorized use of force in Liberia, they were willing to let it pass not because they believed the unique circumstances of the violence in Liberia warranted it, but simply because the world was otherwise occupied. Another possibility is that the international community did not think the intervention was illegal, perhaps because the use of force was undertaken through a sub-regional organization.¹³⁹ The accuracy of any one of these possible explanations, however, is not apparent from proceedings taking place within the United Nations or from other statements in response to the intervention. To describe this as a case of the international community excusing or justifying a violation of the law because it determined that violation to be moral or legitimate is, at best, a guess.¹⁴⁰ The only clear conclusion from the ECOWAS intervention is that the international community was willing not only to condone, but also to commend, the intervention of a regional organization in an internal violent conflict without authorization of the Security Council.

B. The Significance of the Descriptive Failures

The success of an analogy to domestic law also need not rely on a precise replication of domestic law mechanisms in the international system, of course.¹⁴¹ Accordingly, it is important to explore whether it is significant that in the international system there generally is no acknowledgment of a violation of the underlying rule or of the circumstances that merit tolerance of a violation. In the criminal law system, such an acknowledgment is crucial to the purpose of justification or excuse. When a defendant who has committed a homicide is acquitted because she acted in self-defense, the trial

138. See MURPHY, *supra* note 35, at 163 (noting a connection between the international community's "almost universally favorable" reaction to the ECOMOG intervention and the Kuwait invasion); see also STEPHEN ELLIS, *THE MASK OF ANARCHY: THE DESTRUCTION OF LIBERIA AND THE RELIGIOUS DIMENSION OF AN AFRICAN CIVIL WAR* 86 (1999) (noting that the possibility of U.S. intervention in Liberia was foreclosed by Iraq's invasion of Kuwait).

139. See MURPHY, *supra* note 35, at 163.

140. Franck, in contrast, asserts that "[t]he political organs have demonstrated their ability and readiness, when faced with states' recourse to force, to calibrate their responses by sophisticated judgment, taking into account the full panoply of specific circumstances." FRANCK, *RECOURSE TO FORCE*, *supra* note 4, at 186.

141. Indeed, the operation of the domestic law mechanisms is at times muddled as well. See *supra* note 95 and accompanying text; see also Thomas Morawetz, *Reconstructing the Criminal Defenses: The Significance of Justification*, 77 J. CRIM. L. & CRIMINOLOGY 277, 282-90 (1986) (proposing a third category of "justified wrong[s]").

court's presentation of facts relating to that defense, the jury instructions provided on self-defense, and an appellate court's review and determination of whether the facts of the case support a self-defense justification all serve the function of preserving the root prohibition against homicide and providing for a public accounting of what the law prohibits and what it allows. Without an articulation of the circumstances that support acquittal, the integrity of the prohibition would suffer, but because the particular conditions that justify the conduct or excuse the actor for undertaking that conduct are explored and elaborated, it is clear that it is not homicide that is being tolerated by the law, but only homicide under those particular conditions.¹⁴²

In the international law system, too, an articulation of illegality and of the circumstances that are significant to merit a defense are also crucial if the criminal law approach is to succeed in its goals to (1) preserve the integrity of the prohibition, and at the same time (2) preserve the integrity of the law overall. The criminal law approach seeks to accomplish these aims by offering a legal framework under which unlawful conduct is tolerated because of certain circumstances, but the conduct remains unlawful, as opposed to a framework in which the law is amended to affirmatively permit that conduct under those circumstances. Vaughan Lowe helpfully characterizes the distinction as follows:

[O]ne might impose a strict speed limit but give the authorities the discretion not to prosecute, say, a driver who breaks the speed limit in order to take an emergency patient to [the] hospital. Alternatively, one might prescribe a speed limit but make the obligation to obey the limit subject to a qualification allowing drivers to break the speed limit in cases of necessity. Both save the emergency driver from conviction for breaking the law; but it is entirely possible that the second approach leads in practice to much wider disregard of the speed limit than does the first.¹⁴³

Lowe is correct to point out that this is an empirical question, and the specific question of whether affirmatively allowing states a right of humanitarian intervention would lead to abuse of that right

142. General verdicts may raise a similar problem. See Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 COLUM. L. REV. 1897, 1913 (1984) ("Whether [excuse and justification] are overlapping or alternative, a general verdict will fail to reveal the basis for the jury's judgment if it has considered both defenses.").

143. Vaughan Lowe, *Precluding Wrongfulness or Responsibility: A Plea for Excuses*, 10 EUR. J. INT'L L. 405, 409-10 (1999).

has been deeply explored in the literature.¹⁴⁴ The more significant point for this Article is that to reap the benefits that may result from using a system of prosecutorial discretion (or in the case of unauthorized humanitarian intervention, political expressions of tolerance) rather than one that builds exceptions into the obligation itself, there must be some way for the system to recognize both that the conduct is *prima facie* unlawful and that the unlawful conduct is tolerated because of unique circumstances. If unauthorized humanitarian interventions take place without any acknowledgment of their illegality, the prohibition against the unauthorized use of nondefensive force will weaken. This is not only because cases of states breaching the Charter with no consequence may impact other governments' sense that they must comply with the rules of international law,¹⁴⁵ but also because violations of international law contribute to the law's shaping over time. This is not to suggest that the mere practice of unauthorized intervention can, without more, become customary international law; only *opinio juris* may transform a set of practices into a part of customary international law.¹⁴⁶ But if states were to frequently undertake unauthorized interventions (and characterize them as humanitarian interventions, not as self-defense or as lawful enforcement of Security Council decisions¹⁴⁷), this could lead to some disintegration in the sense that the rule that states must not use force is a legal obligation. Because states are both subjects of international law and creators of international law, an act of noncompliance functions both as a breach of the rule and as a

144. See, e.g., LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 144–45 (2d ed. 1979) (“[H]umanitarian intervention’ can too readily be used as the occasion or pretext for aggression.”); Ian Brownlie, *Thoughts on Kind-Hearted Gunmen*, in *HUMANITARIAN INTERVENTION AND THE UNITED NATIONS*, *supra* note 21, at 139, 147–48 (“Whatever special cases one can point to, a rule allowing humanitarian intervention, as opposed to a discretion in the United Nations to act through the appropriate organs, is a general license to vigilantes and opportunists to resort to hegemonial intervention.”); Thomas M. Franck & Nigel S. Rodley, *After Bangladesh: The Law of Humanitarian Intervention by Military Force*, 67 *AM. J. INT’L L.* 275, 304 (1973) (“[A] law derived from the Bangladesh precedent is an unlimited fiat for larger states to oppress their smaller neighbors.”). *But see* Ryan Goodman, *Humanitarian Intervention and Pretexts for War*, 100 *AM. J. INT’L L.* 107, 107 (2006) (questioning the assumption that states will use a right of humanitarian intervention as a pretext for self-interested war).

145. See Cogan, *supra* note 37, at 194 (discussing “inadequacies in how the international community creates, internalizes, and manages the rules” and their role in noncompliance).

146. See *North Sea Continental Shelf (F.R.G. v. Neth.; F.R.G. v. Den.)*, 1969 *I.C.J.* 3, 44 (Feb. 20).

147. See *supra* note 133 (discussing states’ justification of their unauthorized humanitarian interventions as self-defense).

potential basis for a new rule. Thus, the first goal of the criminal law approach—to preserve the prohibition on the use of force—is not well served by the application of the approach in practice.

In addition to possibly weakening the prohibition against the use of nondefensive force, the criminal law approach to unauthorized intervention—in the form in which it usually operates in practice, that is, without any clear statement on either the illegality of the act or the circumstances that render the act unworthy of penalty—also may impact the integrity of international law. Discussing the costs of noncompliance with international law, Jacob Katz Cogan explains that a breach of international law undermines the international rule of law in two ways. First, noncompliance “impinges on the principle that power must be exercised in accordance with the law.”¹⁴⁸ Second, noncompliance weakens international actors’ habit of complying with the law, and thereby unsettles the assumption that states must comply with the law.¹⁴⁹ If the breaches at issue were recognized as illegal and absolved from penalty or condemnation as a result of specific, exceptional circumstances, the same result might not obtain. But because of the infrequency of deliberation and judgment on these matters in authoritative institutions such as courts, the criminal law approach fails in its goal to preserve the legitimacy of the law by bridging a gap between what is legal and what is right. Instead, the criminal law approach sets up a system in which what is law is irrelevant, and the determinants of what is right are unclear at best.

C. *Questioning the Criminal Law Model for Unauthorized Intervention*

The previous two sub-Parts discussed the operation of the criminal law approach to humanitarian intervention in practice and concluded that it fails to accurately characterize previous instances of humanitarian intervention and offers little hope of achieving its stated goals of situating exceptional cases of breach into the law so that the underlying prohibition against unauthorized intervention remains intact and preserving the legitimacy of the law. The weaknesses of the criminal law approach, however, are not limited to its failure to accurately characterize past instances of humanitarian intervention or to its awkward attempt to map domestic law structures onto a quite different international system. Even if the international arena evolved to encompass a court system that evaluated every purported case of

148. Cogan, *supra* note 37, at 203.

149. *See id.* at 203–04.

unauthorized force, and even if states used opportunities in institutions like the United Nations to assess the legality of uses of force and the existence of excusing or justifying conditions, the criminal law approach still advocates a troubling framework for thinking about unauthorized humanitarian intervention. The deeper problem of the criminal law approach lies in its failure to account for the systemic considerations that are crucial to international law and that are jeopardized by unauthorized humanitarian intervention.

The excuse and justification defenses focus exclusively on considerations that are unique to the particular situation that is being judged by the criminal law. Justification looks to the nature of the act and questions whether particular circumstances operated to transform the act from one that is wrongful into one that is tolerable.¹⁵⁰ Excuse looks to the situation of the actor and questions whether particular circumstances operated to transform the actor from a person who is blameworthy for her act into one who is not.¹⁵¹ By answering the question of whether the international community should condone an illegal humanitarian intervention by reference to considerations such as the scale of the humanitarian crisis and the failure of the United Nations to act, the criminal law approach adopts the basic inquiries of criminal law defenses that emphasize the nature of the act and the character of the actor. But judging an unauthorized humanitarian intervention by reference to the situation of the particular act and the particular actor necessarily ignores the impact on the structure of international society that results when a state chooses to contravene Article 2(4) and pursue an unauthorized use of force against another state. Justification defenses do look to consequences of an act, but this examination is limited to direct results; longer-term, deeper impact on society and the law does not figure as readily into determining criminal culpability and punishment.

The criminal law approach seeks to find a “way out of the conundrum” in which only noncompliance with the law leads to a result that is “just and moral.”¹⁵² In defining what is “just and moral,” however, this approach imports the relevant considerations of the criminal law, which fit well the predominant characterization of unauthorized intervention as a matter of the conflict between human rights and sovereignty, while distracting the debate from other aspects

150. See *supra* notes 97–98 and accompanying text.

151. See *supra* notes 99–102 and accompanying text.

152. Franck, *Interpretation and Change*, *supra* note 4, at 214.

of the international system that are implicated when the international community condones an unauthorized use of force. The following Part argues that any discussion of unauthorized intervention must pay greater attention to the systemic aspects of intervention, and particularly to those elements of the U.N. system that serve to constrain states' exercise of power under a system of law.

III. EXAMINING THE SYSTEMIC CONSEQUENCES OF UNAUTHORIZED HUMANITARIAN INTERVENTION

This Part argues that discussions of unauthorized humanitarian intervention have been unduly limited to inquiries regarding the particular intervention at hand and would benefit from greater focus on the systemic impact of the international community's tolerance of unauthorized uses of force. First, this Part examines two principles of the U.N. system—the sovereign equality of states and the concentration of force in the Security Council—that are jeopardized by unauthorized humanitarian intervention. Next, this Part discusses why this impact on these two structures is significant. This Part then turns to explaining how the approach presented in this Article comports with constructivist theories of international law that examine how norms shape state behavior.

A. *Neglected Principles of the U.N. System: Sovereign Equality and Security Council Control over Armed Force*

1. The Concept and Consequences of Sovereign Equality

The principle of sovereign equality of states finds expression in the U.N. Charter as the first among a set of principles on the basis of which the United Nations and its members must act.¹⁵³ Although they did not define the principle in the Charter, the drafters understood the concept to mean (1) that states are “juridically equal”; (2) that every state “enjoys the right inherent in full sovereignty”; (3) that the

153. See U.N. Charter art. 2, para. 1 (“The Organization is based on the principle of the sovereign equality of all its Members.”); see also Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), at 124, U.N. GAOR, 25th Sess., 1883rd plen. mtg., U.N. Doc. A/8018 (Oct. 24, 1970) (“All States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature.”). For a discussion of the roots of the concept of sovereign equality and its operation in the international system, see generally ROBERT A. KLEIN, SOVEREIGN EQUALITY AMONG STATES: THE HISTORY OF AN IDEA (1974).

personality, territorial integrity, and political independence of each state is respected; and (4) that every state must “faithfully” fulfill its international obligations.¹⁵⁴ Commentators frequently criticize the emptiness of the concept of sovereign equality, pointing to obvious imbalances in political power or economic might to illustrate the pervasiveness and depth of inequality in the international system.¹⁵⁵ That the veto power in the Security Council is allocated to only five states is cited as one of the most glaring examples of the absence of equality in the U.N. system;¹⁵⁶ sovereign equality appears to be merely a “utopian description of a world-to-be in which all states are equal in power and well-being.”¹⁵⁷

The principle of sovereign equality, however, is distinct from political equality. Sovereign equality refers to equal status before the law, not to equal political power. In fact, in advocating for acceptance of the principle in the eighteenth century,¹⁵⁸ Emmerich de Vattel sought to consolidate in the legal framework of interstate relations a concept that would protect republican states that had less political power than the monarchies that might make claim to them.¹⁵⁹ A

154. U.N. Conference on Int'l Org., Comm'n I: Gen. Provisions, S.F., Cal., Apr. 25–June 25, 1945, *Report of Rapporteur of Committee I to Commission I*, in 6 U.N.C.I.O. 446, 456–57, Doc. 944 (June 13, 1945).

155. See, e.g., Dino Kritsiotis, *The Power of International Law as Language*, 34 CAL. W. L. REV. 397, 400 (1998) (“[W]e do indeed live in an Orwellian world in which all states are equal, but in which some states are more equal than others.”); Thomas H. Lee, *International Law, International Relations Theory, and Preemptive War: The Vitality of Sovereign Equality Today*, LAW & CONTEMP. PROBS., Autumn 2004, at 147, 147 (“Whatever the general merits of the norm, its retention seems fairly open to question when one sovereign state appears supremely unequal among 191 sovereign states . . .”).

156. See, e.g., Bardo Fassbender, *Pressure for Security Council Reform*, in THE UN SECURITY COUNCIL: FROM THE COLD WAR TO THE 21ST CENTURY 341, 351 (David M. Malone ed., 2004) (noting that many governments oppose the veto as a “violation of the principle of sovereign equality among states”).

157. Andreas Paulus, *The War Against Iraq and the Future of International Law: Hegemony or Pluralism?*, 25 MICH. J. INT'L L. 691, 725 (2004).

158. See M. D. VATTEL, THE LAW OF NATIONS OR PRINCIPLES OF THE LAW OF NATURE APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS, §§ 18–19, at 52–53 (Northampton, Mass., Simeon Butler 1820) (1758), *quoted in* Lee, *supra* note 155, at 150 (“A dwarf is as much a man as a giant; a small republic is as much a sovereign state as the most powerful kingdom. From a necessary consequence of this equality, what is permitted to one nation is permitted to all and what is not permitted to one is not permitted to any other.”).

159. See Lee, *supra* note 155, at 150–54 (explaining the normative agenda of theorists who advocated the principle of sovereign equality). Although sovereign equality typically is presented as a corollary of the principle of state sovereignty that has formed a defining feature of the international system since Westphalia, the rough equality of states around the time of Westphalia was a de facto characteristic of the European powers rather than a legal principle. See GERRY SIMPSON, GREAT POWERS AND OUTLAW STATES: UNEQUAL SOVEREIGNS IN THE INTERNATIONAL LEGAL ORDER 11–12, 30 (2004) (explaining the

principle of sovereign equality surely would not balance the power of republican states with that of monarchies, but it would provide those more vulnerable states with protection from intervention.¹⁶⁰

Sovereign equality also is distinct from equality of the law.¹⁶¹ The principle does not require that all states possess equal rights and duties under international law, but rather holds that all states, regardless of their economic or military power, enjoy equal capacity to possess rights and duties under international law, even if ultimately the rights and duties allocated under international law vary from state to state.¹⁶² This is why, as Hans Kelsen explained in his 1944 study of sovereign equality, published shortly after the United States, United Kingdom, China, and Russia had declared their joint intention to establish a “general international organization, based on the principle of the sovereign equality of all peace-loving states,”¹⁶³ customary international law imposes distinct obligations on certain categories of states that do not apply to others.¹⁶⁴ Treaty law, moreover, is international law, and different states have different rights and obligations under treaty law.¹⁶⁵

In addition to dictating that states have equal capacity to attain rights and duties under the law, sovereign equality further provides that all sovereign states are equal *before* the law in that they are equally bound to follow the law.¹⁶⁶ It is this aspect of sovereign equality that is most pertinent to the question of unauthorized

common conception that Westphalia effected a transformation of the international system from hierarchy to equality).

160. See Lee, *supra* note 155, at 152 (“State autonomy, or the norm of domestic non-intervention, was an important corollary to Vattel’s conception of sovereign equality in the service of republican preservation.” (footnote omitted)).

161. See Ulrich K. Preuß, *Equality of States—Its Meaning in a Globalized Legal Order*, 9 CHI. J. INT’L L. 17, 24 (2008).

162. See Michel Cosnard, *Sovereign Equality—“The Wimbledon Sails On,”* in UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW 117, 121 (Michael Byers & Georg Nolte eds., 2003) (noting that sovereign equality “is an equality before the rule, not within the rule”).

163. Declaration of Four Nations, *supra* note 9, at 756.

164. See Hans Kelsen, *The Principle of Sovereign Equality of States as a Basis for International Organization*, 53 YALE L.J. 207, 209 (1944) (“But even according to general customary international law, all the States have not the same duties and rights. A littoral State, for example, has other duties and rights than an inland State.”).

165. See *id.* at 208–09 (noting that treaty law results in a “great diversity” in states’ rights and duties).

166. See Hidemi Suganami, *Grotius and International Equality*, in HUGO GROTIUS AND INTERNATIONAL RELATIONS 221, 222–25 (Hedley Bull et al. eds., 1992) (explaining that “most fundamentally,” sovereign equality means that states have an equal obligation to obey international law); see also U.N. Charter art. 25 (declaring that all U.N. members are equally bound by decisions of the Security Council).

humanitarian intervention. The equal-duties sense of sovereignty is “absolutely essential to a stable society of nations.”¹⁶⁷ If states are not equal before the law, they are not equally required to comply with international law. Without equal application of the law, international law would be reduced to an exercise of power.¹⁶⁸

Discussions of sovereign equality often focus on the principle’s impact on smaller states; without a principle that guarantees that all states are juridically equal, small or weak states would not survive.¹⁶⁹ The relation of the sovereign equality principle to powerful states, however, has been subject to far less exploration. Because of its significance that all states are equally obligated to follow international law, sovereign equality operates to exert a restraining force over powerful states or those otherwise inclined to violate international law. Accordingly, when a state violates the law, it is declaring itself not bound to follow the law to the same degree as other states, and, especially if there is no acknowledgment of or consequence for the breach, the principle of sovereign equality is necessarily eroded. Unauthorized humanitarian intervention is a practice by states of exempting themselves from international law. Accommodation of this practice recognizes the validity of a state’s choice to consider itself unbound by the restraints of the U.N. Charter’s rules on the use of force and accepts a system of inequality of states within the international system. Moreover, validation of this practice by attempting to situate it within the legal categories of excuse or justification puts a label of legal legitimacy on an exercise of power.

2. Military Force as an Instrument of the Community

As discussed in detail above, the U.N. Charter empowers the Security Council with control over the use of armed force by states, except for uses of force in self-defense.¹⁷⁰ The Charter’s rules on the

167. EDWIN DEWITT DICKINSON, *THE EQUALITY OF STATES IN INTERNATIONAL LAW* 335 (1920).

168. See DAVID CHANDLER, *FROM KOSOVO TO KABUL: HUMAN RIGHTS AND INTERNATIONAL INTERVENTION* 137 (2002) (“If states were not treated as equals, . . . [r]ights of weaker states could be infringed on the basis that the law does not fully apply in their cases, or more powerful states would claim immunities from prosecution due to their ‘special case’ situation.”).

169. See REIN MÜLLERSON, *ORDERING ANARCHY: INTERNATIONAL LAW IN INTERNATIONAL SOCIETY* 121 (2000) (describing sovereign equality as “instrumental for the emergence and survival of healthy but not physically . . . strong states”).

170. Even then, the Charter protects a state’s right of self-defense in the event of an armed attack only “until the Security Council has taken measures necessary to maintain international peace and security.” U.N. Charter art. 51.

use of force are often presented in the literature as being connected, above all, to the principle of sovereign equality: because states are juridically equal to one another, one state may not use force against another.¹⁷¹ This characterization, however, only reflects how the Charter's use of force regime (as well as the sovereign equality principle) serves to promote the intention of the creators of the United Nations to limit the incidence of interstate war.¹⁷² It also reflects a decision about the proper normative basis for using military force.

The decision of the drafters to vest in the Security Council control over the nondefensive use of force signifies a determination to change the character of military force by preventing states from resorting to arms to pursue national interests. By entrusting the collective with the use of nondefensive force, the drafters of the Charter sought to ensure that war would be undertaken only for the common good; a use of force that did not further the community interest would presumably not be authorized by the Council.¹⁷³ In accepting the Charter framework, the international community expressed its support for the idea that a state may not wage war to "defend its own parochial understanding of justice"; instead, "states must persuade others of their just cause."¹⁷⁴ The prohibition against the use of nondefensive force is therefore not simply an ordering rule, but instead reflects a normative goal of the drafters of the Charter: to

171. See MÜLLERSON, *supra* note 169, at 289 ("The Charter norms on the use of force are premised on the principle of sovereign equality of states."); Bardo Fassbender, *The United Nations Charter as Constitution of the International Community*, 36 COLUM. J. TRANSNAT'L L. 575, 583 (1998) (noting that the prohibition against the use of force protects sovereign equality).

172. See U.N. Charter pmb. (setting forth the aim of U.N. member states to "save succeeding generations from the scourge of war, which . . . has brought untold sorrow to mankind").

173. See *id.* (including among purposes of creation of the United Nations "to ensure . . . that armed force shall not be used, save in the common interest"); STEPHEN C. NEFF, *WAR AND THE LAW OF NATIONS* 281 (2005) ("Police actions by the Security Council would be just wars of the purest kind, for the countering of aggression and the upholding of community values.").

174. ALEX J. BELLAMY, *JUST WARS: FROM CICERO TO IRAQ* 230 (2006); see WILLIAM D. COPLIN, *THE FUNCTIONS OF INTERNATIONAL LAW: AN INTRODUCTION TO THE ROLE OF INTERNATIONAL LAW IN THE CONTEMPORARY WORLD* 91 (1966) ("[T]he attempt to establish a collective security system . . . indicates that men realize that the use of force for nondefensive purposes can no longer be a typical tool of statecraft. It expresses a growing attitude that the nondefensive use of force is incompatible with the general aim of world peace. In representing the aspirations of leaders and in providing a veneer of symbols and procedures to which leaders feel compelled to pay at least lip-service, the United Nations is itself a symbol of the universally held inhibitions against the nondefensive use of force.").

change military force from an instrument of national will to one of international will.

This conception of the proper basis for using force was not new to the United Nations. The Western just war tradition¹⁷⁵ includes among its inquiries whether a war is undertaken by a “right authority.”¹⁷⁶ In early just war thinking, authority to resort to war was granted by God and rested in the sovereign.¹⁷⁷ That belief gradually evolved from a theological matter to a legal and political one.¹⁷⁸ By the end of the Middle Ages, sovereignty continued to rest in the sovereign prince, but his authority derived from the community, rather than from God.¹⁷⁹ The idea that only a legitimate authority can wage war originated not only in an interest in limiting the recourse to war by disapproving of force used by private actors for the purpose of preserving order in society,¹⁸⁰ but also in a moral interest in ensuring

175. The Western just war tradition typically focuses on six considerations—just cause, right intention, reasonable prospects for success, last resort, proportionality, and right authority—but there are many other formulations of this list. See BRIAN OREND, *WAR AND INTERNATIONAL JUSTICE: A KANTIAN PERSPECTIVE* 48–50 (2000). For an overview of Western just war thinking, see generally MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* (1977) and PAUL RAMSEY, *THE JUST WAR: FORCE AND POLITICAL RESPONSIBILITY* (1968). For discussions of the application of just war theory to humanitarian intervention, see Mona Fixdal & Dan Smith, *Humanitarian Intervention and Just War*, 42 *MERSHON INT’L STUD. REV.* 283 (1998). For non-Western perspectives on just war, see, for example, TORSEL BREKKE, *THE ETHICS OF WAR IN ASIAN CIVILIZATIONS* (2006) (studying ethics of war in six Asian religions) and PAUL ROBINSON, *JUST WAR IN COMPARATIVE PERSPECTIVE* (2003) (examining a range of religious and secular just war traditions).

176. See OREND, *supra* note 175, at 49 (“A state may go to war only if the decision has been made by the appropriate authorities, according to the proper process, and made public, notably to its own citizens and to the enemy state(s).”). Right authority is traditionally understood as a component only of *jus ad bellum* (law governing the resort to war), but there are strong arguments for including this principle in discussions of *jus in bello* (law governing the conduct of warfare) as well. If part of the rationale for limiting just war to a rightful authority is to reduce the incidence of war because of its destructiveness, then rightful authority for the conduct of war may have an equally significant role to play in just war thinking’s *jus in bello* analysis.

177. See JOHN MARK MATTOX, *SAINT AUGUSTINE AND THE THEORY OF JUST WAR* 32 (2006).

178. See A.J. COATES, *THE ETHICS OF WAR* 125 (1997) (explaining the transformation in the concept of right authority).

179. See JAMES TURNER JOHNSON, *IDEOLOGY, REASON, AND THE LIMITATION OF WAR: SECULAR AND RELIGIOUS CONCEPTS* 242–43 (1975).

180. See COATES, *supra* note 178, at 125 (explaining that the just war tradition sought to “curb the easy resort to violence” by “upholding the ‘public’ character of war and by outlawing ‘private’ warfare”); John F. Coverdale, *An Introduction to the Just War Tradition*, 16 *PACE INT’L L. REV.* 221, 248 (2004); see also BELLAMY, *supra* note 174, at 48 (“Although private wars continued well into the eighteenth century, they diminished significantly from the fourteenth century onwards.”).

that any act of war have a “public character.”¹⁸¹ Accordingly, the sovereign declaring war had rightful authority only if the war represented the common good of the people. Power alone, without this moral component, would fail to rally the support of the people—which is necessary in order to successfully prosecute the war—but beyond that, according to Saint Augustine, an early writer on just war, it would fail to reflect “the natural order” in which citizens of a state must perceive their leader as devoted to their care.¹⁸²

The moral conception of right authority faded from view beginning in the seventeenth century, as the formal concept of sovereignty became the automatic answer to the substantive inquiry of whether a state had proper authority to use force.¹⁸³ Because war-making was understood as an inherent accompaniment of sovereignty, just war thinkers began to give only cursory treatment to the question of right authority, assuming a linkage between state sovereignty and authority that neglects the question of rightness.¹⁸⁴ The U.N. Charter, of course, put an end to the system in which

181. COATES, *supra* note 178, at 127–28.

182. Hartley S. Spatt, *Faith, Force, or Fellowship: The Future of Right Authority*, in *RETHINKING THE JUST WAR TRADITION* 205, 206 (Michael W. Brough et al. eds., 2007) (quoting 35 ST. THOMAS AQUINAS, *SUMMA THEOLOGIAE* 83 (Thomas R. Heath trans., Blackfriars ed., 1972)). Augustine argued that soldiers did not sin when they carried out an order to use violence because they were acting to “promot[e] the common good.” BELLAMY, *supra* note 174, at 28.

183. See Coverdale, *supra* note 180, at 249 (discussing the decline of a moral conception of legitimate authority). Indeed, the general concept of justice in war was relegated to the background as state sovereignty became the primary organizing principle of society. To the extent that just war theory played a role in uses of force, it was as a result of its incorporation into international law. See Michael Walzer, *The Triumph of Just War Theory (and the Dangers of Success)*, 69 *SOC. RES.* 925, 927 (2002) (“The princes of the world continued to defend their wars, using the language of international law, which was also, at least in part, the language of just war.”).

184. See Spatt, *supra* note 182, at 206 (“The rise of the nation-state . . . led to an unfortunate decoupling of authority, which became linked to *de jure* state sovereignty, from rightness, which became marginalized as an affair of the Church or of philosophers, not necessarily of the state.”). One exception to this general paucity of discussion on right authority is writing on the subject of nonstate actors and terrorism. Alex Bellamy puts forward three requirements for a nonstate actor to demonstrate that it is a rightful authority under just war theory:

First, non-state actors must demonstrate that they enjoy high levels of support within a readily identifiable political community. Second, they must demonstrate that their constituents share their political aspirations and endorse the strategy of violence. Finally, they must pass an instrumental test by showing that they are capable of controlling their members and making and upholding agreements with others.

BELLAMY, *supra* note 174, at 138 (internal citations omitted).

sovereignty carried an unimpeded right to use force, as it required member states to limit their lawful use of unauthorized force—that is, force without the authorization of the international community, attained through the Security Council—to self-defense.¹⁸⁵ Scholars and practitioners considering an application of just war thinking to contemporary problems concerning the use of force now conclude that right authority requires action by the Security Council rather than individual states.¹⁸⁶

The Charter, however, did not simply transfer the legal entitlement to use force from individual states to the United Nations. It also revived the just war notion that force should be used only in the common interest. It is this function of the Charter that is jeopardized by unauthorized humanitarian intervention. Armed intervention that takes place outside the authority of the Security Council cannot be presumed to be in the common interest, as an intervention that is authorized by the Council can. Conceding that the Security Council suffers from significant failures in representation that demand reform,¹⁸⁷ it still provides a mechanism, even if only a rough one, for distinguishing actions that are consistent with community interests from those being undertaken to pursue national policy. Taking force outside the hands of the Security Council, as unauthorized humanitarian intervention does, allows for the re-introduction of a system in which unilateral interests may suffice to justify war, and in which power dominates legal order.

B. Considering Systemic Factors in Unauthorized Humanitarian Intervention

1. The Gaps in the Criminal Law Approach

The central problem of unauthorized humanitarian intervention is how to confront cases in which the law demands one result, no military force without Security Council authorization, but justice or morality requires another, doing something instead of doing nothing. The paradigm case is one in which a permanent member of the

185. See U.N. Charter art. 2, para. 4; *id.* art. 51.

186. See, e.g., INT'L COMM'N ON INTERVENTION & STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT, at XII (2001) [hereinafter RESPONSIBILITY TO PROTECT] (discussing right authority by reference to Security Council authorization for force).

187. See BARDO FASSBENDER, UN SECURITY COUNCIL REFORM AND THE RIGHT OF VETO: A CONSTITUTIONAL PERSPECTIVE 197–207 (1998) (analyzing the representativeness of Security Council membership in terms of population, territorial size, economic strength, and contributions to the United Nations).

United Nations threatens a veto not because of principled reasons relating to the use of force, such as a belief that diplomatic options have not yet been fully explored or that military force will not succeed in stopping the atrocities that are being addressed, but instead because of factors unrelated to the merits of the intervention, such as the permanent member's economic interests in the target state.¹⁸⁸ In such a case, the criminal law approach supports framing a state's unauthorized use of force as tolerated by the law.

The above discussion of the systemic factors that are impacted by cases of unauthorized humanitarian intervention shows the narrowness of the criminal law approach. Because it is based on a system for determining the criminal liability of a defendant for a particular act, and thus examines a single instance of conduct rather than considering the systemic consequences of that conduct, evaluations of what justifies or excuses an intervention despite its illegality are limited to inquiries into the immediate roots and consequences of the proposed intervention—the inaction in the Security Council, the scale of the humanitarian crisis, and the likelihood that intervention can stop the crisis—and the larger impact of the proposed intervention is ignored. This larger impact, however, should be considered. If unauthorized humanitarian interventions are presented by scholars and policy makers as tolerated by the law, the values of sovereign equality and force as a community instrument are relegated to subordinate status within the international system. Condoning a decision of a state to exempt itself from the law and to use military force as an expression of unilateral interests shifts the normative basis for international society from legal order to power. To evaluate humanitarian intervention without attention to this impact would result in reversion to a system of power politics.

2. The Gaps in Other Frameworks for Intervention

Admittedly, the purpose of the criminal law approach is to develop a legal framework for conceptualizing illegal acts that are nonetheless “legitimate” or “moral”; it does not aim to theorize the factors that render an unauthorized intervention legitimate or moral, beyond listing them and looking to criminal law analogies for

188. It is widely expected that because of the billions of dollars that Beijing has invested in Sudan's oil industry, any prospects for aggressive U.N. military intervention in Darfur are rendered impossible by a certain Chinese veto. See, e.g., Mark Lange, *The Only Way to Alter China's Hand in Darfur*, CHRISTIAN SCI. MONITOR, Apr. 30, 2008, at 9 (“Since China wields veto power on the United Nations Security Council, no serious multilateral sanctions, arms embargo, or effective military intervention can happen.”).

guidance. This task, however, has been taken up by others. A wide range of actors, from governments to scholars to nongovernmental organizations, have enumerated parameters that should be used to guide determinations of whether a state's unauthorized humanitarian intervention should be tolerated by the international community. Major efforts to craft criteria that could justify an unauthorized intervention in recent years include the work of the International Commission on Intervention and State Sovereignty,¹⁸⁹ the Danish Institute of International Affairs,¹⁹⁰ and the Goldstone Commission.¹⁹¹ Each project focuses on the particular circumstances of the humanitarian crisis and the anticipated intervention. Jane Stromseth describes the typical components of these lists:

a threshold or triggering set of circumstances (such as severe human rights abuses leading to loss of life on a large scale, and an unwillingness or inability of the state in question to halt the abuses); a requirement that the Security Council be unable or unwilling to take action; a requirement that force be necessary to halt the abuses; that the force used be proportionate to the end of halting the atrocities; and that the law of armed conflict be complied with. To guard against abuse, additional criteria sometimes (though not always) are articulated, including that the intervention be multilateral, perhaps by a regional organization; and that the motivation (or at least the goals and the effects) be primarily humanitarian in nature.¹⁹²

189. The International Commission on Intervention and State Sovereignty requires: (1) just cause for intervention, in the form of large-scale ethnic cleansing or loss of life; (2) a primary purpose of the intervening state(s) to stop or prevent the ethnic cleansing or loss of life; (3) use of the minimum scale, duration, and intensity of force necessary to stop or prevent the crisis; (4) exhaustion of all non-military options for prevention or resolution of the crisis; (5) a reasonable prospect that military intervention will succeed in stopping or preventing the crisis; and (6) consideration of the matter by the General Assembly or action by a regional organization. *See* RESPONSIBILITY TO PROTECT, *supra* note 186, at 32–37, 53–55.

190. The Danish Institute proposes that “legitimate humanitarian intervention” requires: (1) serious violations of human rights or international humanitarian law; (2) failure by the Security Council to act; (3) multilateral action; (4) the use of necessary and proportionate force; and (5) “disinterestedness” of the intervening states. *See* KOSOVO REPORT, *supra* note 5, at 192–93.

191. The Goldstone Commission argues that “legitimate humanitarian intervention” requires (1) “serious violations of human rights or international humanitarian law,” or civilian suffering (or risk thereof) as a result of state failure; (2) force directed only to the protection of the suffering population; (3) “necessary and proportionate force”; (4) exhaustion of non-military measures; and (5) multilateral action. *See id.* at 192–95.

192. Stromseth, *supra* note 49, at 258. The United Kingdom proposed that humanitarian intervention should be guided by the following principles: intervention should occur only in the case of an “overwhelming humanitarian catastrophe”; armed

Like the criminal law approach, these inquiries fail to illuminate the impact of unauthorized uses of force on the international system's efforts to restrain exercises of power by states. The requirement of multilateral action approaches a consideration of whether force is being used for unilateral purposes or in support of the interests of the international community, but multilateralism is at best a rough proxy for wider support. Regional organizations may well consist of states that pursue the same political goals and have the same economic or political orientations and motives. That the Kosovo intervention, for example, was multilateral did not save it from widespread accusations that it was undertaken for self-interested reasons.¹⁹³

3. Assessing an Intervention's Impact on Sovereign Equality and the Use of Force in the Common Interest

The next time the international community struggles with the question of whether a state or group of states should undertake a military campaign to protect human rights, how can it give due consideration to the systemic factors this Article highlights? In order to properly weigh the impact of an unauthorized humanitarian intervention on sovereign equality and community control of force, this Article proposes that parties who seek to judge an unauthorized

intervention must be a last resort, and it must be "objectively clear" that there is no alternative to the use of force to save lives; any use of force must be proportionate to achieving the humanitarian purpose and carried out in accordance with international law; and interventions should be carried out with Security Council authority, and if not possible, should be undertaken by a coalition of states rather than by individual states. See Robin Cook, U.K. Foreign Sec'y, Guiding Humanitarian Intervention, Speech to the American Bar Association (July 19, 2000) (transcript available at <http://www.fco.gov.uk/en/newsroom/latest-news/?view=Speech&id=2148757>). Jules Lobel proposes that the inquiry could be limited to four simple factors: (1) whether the situation has been condemned by the Security Council as "a threat to peace" under Chapter VII; (2) whether the Council is paralyzed by a veto and the action is being taken by a regional organization that says it is "intervening to protect human rights"; (3) the Security Council is subsequently silent or refuses to condemn the intervention; and (4) peaceful options have been exhausted. See Jules Lobel, *Benign Hegemony? Kosovo and Article 2(4) of the U.N. Charter*, 1 CHI. J. INT'L L. 19, 29 (2000). Lobel also points out the weakness of this framework, including its failure to answer who decides whether a situation is so dire as to necessitate military force. See *id.*

193. See, e.g., ANDREW J. BACEVICH, *THE LIMITS OF POWER: THE END OF AMERICAN EXCEPTIONALISM* 149 (2008) (arguing that NATO commander General Wesley Clark saw the Kosovo intervention as an "opportunity to demonstrate NATO's continuing relevance in a post-Cold War world"); Richard Falk, *Humanitarian Intervention After Kosovo*, in *LESSONS OF KOSOVO: THE DANGERS OF HUMANITARIAN INTERVENTION* 31, 35 (Aleksandar Jokic ed., 2003) (noting the role of "strong independent pressures to endow NATO with renewed credibility and meaningful security roles" in NATO's decision to intervene in Kosovo).

intervention—whether states, scholars, or policy makers—should approach the question of intervention in three new ways.

First, consideration should be given to why the Security Council has not authorized the intervention at issue. This inquiry may reveal whether the use of military force is directed to the self-interest of the intervening state(s) or to the protection of the community that is vulnerable to or the victim of mass atrocity. NATO, for example, undertook the Kosovo intervention not only without Security Council authorization, but without seeking Council authorization because it anticipated a Russian veto.¹⁹⁴ Had the United States or United Kingdom decided instead to bring to a vote a resolution authorizing intervention, the states supporting intervention would have had the opportunity to explain their position that intervention in Kosovo did not merely serve their interests or those of NATO as a collective security or political organization, but instead would benefit and protect the interests of the international community. Moreover, it could have forced Russia to exercise, explain, and defend its veto, allowing the international community a greater opportunity to evaluate whether the Security Council was deadlocked because of substantive disputes over the content of the nonintervention principle, disagreements as to the likely consequences of an intervention, debates about whether all other options for resolution of the conflict had been exhausted, or simply power politics. A greater understanding of the source of disagreement within the Council would help to illuminate the rationale for NATO choosing to undertake the intervention despite the lack of Council authorization.

Second, there should be greater investigation of whether there are other expressions by the international community that suggest that the unauthorized intervention may represent the common interests of the community. Although the system of Security Council authorization for the use of force was intended to ensure that armed force would be undertaken by states only in the common interest, a lack of Security Council authorization is not necessarily evidence that a use of force is not in the common interest. A majority vote in the Council in favor of intervention, even if the approval is ultimately blocked by a veto, might indicate the degree to which states believed the use of force was in the interests of the international community. The General Assembly also can be crucial in this regard.¹⁹⁵ After a

194. See Steven Haines, *The Influence of Operation Allied Force on the Development of the Jus ad Bellum*, 85 INT'L AFF. 477, 477 (2009).

195. Although the Charter grants the Security Council "primary responsibility for the maintenance of international peace and security," U.N. Charter art. 24, the General

state or group of states fails in an attempt to seek Council authorization for a use of force, it could turn to the General Assembly for approval under the 1950 “Uniting for Peace” resolution.¹⁹⁶ Although the Assembly does not have the power to authorize a state to use force,¹⁹⁷ the support of two-thirds of the General Assembly for a resolution backing an unauthorized intervention would serve as an indicator of a wide sense that the intervention serves the interests of the international community.¹⁹⁸

Third, all actors should use the opportunities available to them to identify an unauthorized intervention as a violation of the Charter. As discussed in Part II, declarations of illegality are rarely forthcoming in the international system, but this is not because of an absence of forums for evaluation. The Security Council and General Assembly are indeed political bodies, but states may still recognize

Assembly may address questions relating to international peace and security, *see id.* art. 11, as long as the Security Council is not seized of the matter at the time, *see id.* art. 12. The General Assembly, however, may only make recommendations, with binding decisions reserved to the Council. *Compare id.* art. 11 (granting the General Assembly recommendatory power), *with id.* art. 39 (granting the Council power both to make recommendations and to decide what measures will be taken to restore international peace and security).

196. The General Assembly adopted the Uniting for Peace Resolution in 1950 in the midst of a Security Council deadlock over the question of collective action against North Korea. The General Assembly decided that

if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security.

G.A. Res. 377 (V), ¶ 1, U.N. GAOR, 5th Sess., Supp. No. 20, U.N. Doc. A/1775 (Nov. 3, 1950).

197. *See* Marc Weller, *Forcible Humanitarian Action: The Case of Kosovo*, in *REDEFINING SOVEREIGNTY: THE USE OF FORCE AFTER THE COLD WAR* 277, 326 (Michael Bothe et al. eds., 2005) (explaining that based on the text of the U.N. Charter and previous practice, the General Assembly has only powers of recommendation and cannot authorize states to use force).

198. NATO states apparently opposed the idea of taking the question of intervention in Kosovo to the General Assembly, reportedly due to their fear that they would not have been able to get the votes of two-thirds of the member states. *See* U.K. HOUSE OF COMMONS, FOREIGN AFFAIRS COMMITTEE, *KOSOVO, MINUTES OF EVIDENCE*, 1999–2000, H.C. 28-II, at 98 (statement of Adam Roberts recalling that the Foreign Office said his suggestion of using the Uniting for Peace procedure for Kosovo “was not very helpful” and proposing that the Foreign Office opposed the idea because of its belief that the requisite votes were unlikely and because of procedural inflexibility in the Assembly).

the legal status of the actions of their fellow members. Advocates and scholars, too, have wide opportunities to pronounce that unauthorized humanitarian interventions—regardless of their merits—are violations of the Charter and customary international law. Recognizing the illegality of those actions reinforces the fact that international law does apply to all states. Although the criminal law approach reveals some of the difficulties of drawing guidance for interstate relations from criminal law, one principle worth borrowing is that the integrity of the criminal law is not necessarily weakened by violations because those violations are addressed. Similarly, if violations of international law are confronted, even if only through a declaration of illegality without any accompanying sanction, the participants in the international system affirm the continuing relevance of international law as a primary gauge for the acceptability of a use of force. Instead of amorphous considerations of legitimacy or morality dominating the debate, questions of legality take on a central focus.

Incorporating concerns about sovereign equality and the requirement of a “common interest” for the use of military force into decisions about humanitarian intervention may impact the practice of unauthorized intervention in two ways. First, if states and other observers emphasize the question of the legality of an unauthorized intervention, would-be interveners may be more likely to justify their decision to intervene not in terms of those amorphous considerations of legitimacy or morality, but rather by reference to the institutions on the basis of which they are being evaluated. Assessment of interventions in terms of Security Council authorization and adherence to Article 2(4) will encourage justifications that will more likely take the form of explaining why the absence of Security Council authorization is not indicative of an absence of community will, for example. If a state or group of states contemplates intervention because of an arbitrary veto in the Council based on the economic interests of a permanent member, and the General Assembly overwhelmingly supports the unauthorized intervention, then the impact on the Charter’s use of force regime and sovereign equality principle is distinct from that in a situation in which a state undertakes an unauthorized intervention without bringing the matter before the Council and against the wishes of the majority of the member states of the United Nations. In that case, no matter how dire the suffering in the target state, the unauthorized intervention signals the resurgence of power politics as the basis for force and the breakdown of a system in which sovereign states are equally bound

by the law and in which force is concentrated in the hands of the international community rather than entrusted to individual states. This type of world order is necessarily incompatible with the operation of international law.

Second, changing decision making and assessment to include these concerns may put to rest the characterization of unauthorized intervention as raising a conflict between what is law and what is right. Greater acknowledgment of the merits of the prohibition against the use of force—of its foundation not simply as a rule of order or a rule to protect the state, but rather as a mechanism to limit the exercise of national power in the international system¹⁹⁹—may allow for a more nuanced assessment of what is at stake in the debate over unauthorized intervention, replacing the accepted approach to the question as law versus morality, or sovereignty versus human rights. By changing these stakes, instead of addressing the question as a choice between saving hundreds or thousands of lives through military action and doing nothing, policy makers may be more willing to consider actions other than military intervention, such as early attempts at preventive diplomacy or non-military sanctions.

C. Defending a Focus on the Systemic Factors in Unauthorized Humanitarian Intervention

Ultimately, the framework this Article proposes is a plea to protect the relevance of international law in evaluations of unauthorized humanitarian intervention. The validity of this plea is based on an assumption that international law plays an important role in the operation of international society—a role that unshared standards of morality, legitimacy, or ethics cannot. This sub-Part discusses those functions of international law.

International legal rules on the use of force may be accused of failing to shape state behavior, and in some cases, those restraints clearly have failed to prevent a state from acting in contravention of the Charter.²⁰⁰ But international law still operates to change states' decisions and behavior. An examination of use of force cases in which the prohibition against the use of force did not prevent a state from using force demonstrates the functions that international law plays apart from compliance. In the case of Kosovo, for example, NATO member states indeed chose to act without Security Council

199. See *supra* Part III.A.

200. See *supra* notes 60–76 and accompanying text (describing the Kosovo and Liberia cases, in which states breached Article 2(4)).

intervention, but they framed their actions in the language of the law. Justifying the bombing campaign, the U.S. Permanent Representative told the Council that the “Charter does not sanction armed assaults upon ethnic groups, or imply that the international community should turn a blind eye to a growing humanitarian disaster.”²⁰¹ Opponents also used the language of international law to frame their arguments. Russia characterized the NATO intervention as an “[a]ttempt[] to apply a different standard to international law and to disregard its basic norms and principles”²⁰² The actions of India nearly thirty years earlier also demonstrate the power of international law. Although the mass flight of East Pakistanis to escape violence at the hands of a repressive government provided a powerful political justification for military intervention in East Pakistan, India chose instead to frame its action as self-defense, knowing that its most promising chance for tolerance was in the law.²⁰³

International law not only establishes rules that states, as members of an international society, seek to guide behavior, but it also provides a common language in which states can deliberate competing claims about their rights and interests.²⁰⁴ Justifications for unauthorized humanitarian interventions are framed in terms of human rights law or enforcement of U.N. action, while challenges to such interventions take up the language of nonintervention and Security Council authorization. States speak in the language of international law because it is more determinate than morals or ethics. Although recent debates over the use of force reveal the wide room for variance in interpretations of international law,²⁰⁵ the rules of the Charter and of customary international law supply at least a common framework from which those interpretations will be discussed and debated. Contested norms of morality or ethics, on the other hand, fail to provide states with a common framework for debate.²⁰⁶ Further, when states structure their arguments in the

201. Security Council 3989th Meeting, *supra* note 62, at 5.

202. Security Council 3988th Meeting, *supra* note 36, at 3.

203. See MARTHA FINNEMORE, *THE PURPOSE OF INTERVENTION* 76 (2003) (describing the Indian characterization of intervention); MURPHY, *supra* note 35, at 99 (same).

204. See FRIEDRICH V. KRATOCHWIL, *RULES, NORMS, AND DECISIONS: ON THE CONDITIONS OF PRACTICAL AND LEGAL REASONING IN INTERNATIONAL RELATIONS AND DOMESTIC AFFAIRS* 35, 181 (1991).

205. For a range of views published in the aftermath of the 2003 Iraq invasion, see *Agora: Future Implications of the Iraq Conflict*, 97 *AM. J. INT'L L.* 553–642 (2003).

206. See JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 182–84 (2006).

language of international law, they affirm their belief that state interests must be characterized by reference to the common framework.²⁰⁷ The same is true of the decision of states to use international institutions as the forum for justification; the decision to debate and defend state actions within the United Nations reflects an intention to justify state behavior from within the structures created by international law.

The impact of this process is not limited to transforming the justificatory language for interventions; instead, it transforms the justifications themselves. Instead of relying on “brute power” to justify actions, “[e]ven the great powers seek approval from their peers and domestic publics,”²⁰⁸ whether the aim in seeking approval is to preserve their reputations of good standing in the international sphere, to secure the cooperation of other governments in order to pursue the particular matter at hand, or to garner public support.²⁰⁹ This process of seeking approval takes place as a social act of interaction and discussion among states and other actors. If the targets of the justifications change the terms of the discourse, states attempting to justify their actions will be forced to consider their actions in a new light. Accordingly, if states—as well as other participants in the international system—reframe the debate over humanitarian intervention by making inquiries into the extent to which a use of force may subvert the power-restraining structures of the international system, as I propose, then intervening states will in turn be forced to look to those same values in determining whether they will be able to justify their actions to the community. In this sense, international law does more than merely impact a state’s choice of the words it uses to justify its interests; international law also shapes those interests. Focusing on sovereign equality and the community control of force would serve not only to illuminate whether a proposed intervention does damage to the ability of the international system to restrain a state’s exercise of power, but also to change the terms of the debate from questions of legitimacy, morality,

207. See COPLIN, *supra* note 174, at 193.

208. Wheeler, *supra* note 132, at 32; see OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE: GENERAL COURSE IN PUBLIC INTERNATIONAL LAW 59 (offprint from the *Collected Courses* 1985) (1982) (“True, in some cases [governments] depend on power to be persuasive. But even in these cases, governments . . . generally base their legal case on grounds that are logically independent of their own interests and wishes.” (emphasis omitted)).

209. See THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 38 (1990); Oscar Schachter, *Self-Defence and the Rule of Law*, 83 AM. J. INT’L L. 259, 264 (1989).

or what is right to questions about the operation of the international system and the extent to which the circumstances underlying a state's interest in using unauthorized force is rooted in the failure of the international system to operate as intended by the law.

CONCLUSION

This Article has aimed to challenge the predominant accounts of unauthorized humanitarian intervention and offer an alternative framework that considers the crucial, and neglected, systemic aspects of the question. Discussions of unauthorized humanitarian intervention often assume that existing international law fails to accomplish the goals of the international community. This reaction, however, mistakes the existence of competing normative claims for an absence of a framework altogether. The problem is not that existing international law fails to serve the goals of the community; it is that there are several goals to fulfill. Although the idea of criminal law defenses appears to be an intuitively attractive “way out” of the problem of competing normative goals, upon deeper inspection it is clear that the criminal law approach ignores one side of the normative framework—the need for the international system to restrain the exercise of power by states—rather than finding a way to reconcile it with the need to protect human rights.

This problem is not limited to the context of unauthorized humanitarian intervention. Both in anticipation of the 2003 invasion of Iraq by the United States and in the post-mortem, commentators pronounced the war illegal but legitimate,²¹⁰ again raising concerns both about the difficulties of using criminal law concepts to characterize interstate relations and about the considerations that are guiding determinations of the legitimacy of an unlawful use of force. This Article has attempted not only to demonstrate the immediate importance of considering the principles of sovereign equality and community control of force in the Charter, but also to explain how focus on those considerations can consolidate the function of international law, rather than amorphous standards of morality or ethics, as the primary locus for debate on unauthorized humanitarian intervention. This lesson is one that should also guide discussions of preemptive or preventive self-defense, perhaps the next frontier in which international law faces great risk of marginalization.

210. See, e.g., RAMESH THAKUR, *THE UNITED NATIONS, PEACE, AND SECURITY* 223 n.3 (2006) (describing characterizations of the invasion); Slaughter, *supra* note 5 (proposing that bypassing the United Nations could be “ ‘illegal but legitimate’ ”).

