Humanitarian Intervention at the Margins: An Examination of Recent Incidents

Peter Tzeng

Follow this and additional works at: https://scholarship.law.vanderbilt.edu/vjtl

Part of the International Law Commons

Recommended Citation
Peter Tzeng, Humanitarian Intervention at the Margins: An Examination of Recent Incidents, 50 Vanderbilt Law Review 415 (2021)
Available at: https://scholarship.law.vanderbilt.edu/vjtl/vol50/iss2/4

This Article is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Journal of Transnational Law by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.
Humanitarian Intervention at the Margins: An Examination of Recent Incidents

Peter Tzeng

ABSTRACT

Scholarship on humanitarian intervention is plentiful, but actual examples of state practice and opinio juris are sparse. Thus, critics conclude, the doctrine of humanitarian intervention has no legal basis in international law. This Article challenges this viewpoint. It does so by departing from the traditional framework of international law and adopting an alternative framework of analysis: the study of incidents. Through an examination of seven incidents over the past decade, this Article reveals that the doctrine of humanitarian intervention, though not yet an established norm of international law, functions to widen traditional exceptions to the prohibition on the use of force.

TABLE OF CONTENTS

I. INTRODUCTION ................................................................. 416
II. BACKGROUND .............................................................. 419
   A. The Prohibition on the Use of Force ......................... 419
   B. The Responsibility to Protect .......................... 422
III. HUMANITARIAN INTERVENTION ................................. 425
   A. Humanitarian Intervention as a Customary Exception .......... 427
   B. The History of Humanitarian Intervention ..... 428
   C. Kosovo, Libya, and Syria .............................. 431
   D. The Study of Incidents .............................. 433
IV. RECENT INCIDENTS OF HUMANITARIAN INTERVENTION 435
   B. The NATO Intervention in Libya (2011) .......... 439
   C. The UNOCI/French Intervention in Côte d'Ivoire (2011) ................. 442
   D. The French Intervention in Mali (2013) .......... 444
   F. The U.S. Intervention at Mount Sinjar in Iraq (2014) .......... 450

415
I. INTRODUCTION

For over five years, the Islamic State of Iraq and the Levant (ISIL) has been committing gross violations of human rights on Syrian territory.¹ As of August 2016, eleven states have submitted letters to the United Nations justifying military action against ISIL in Syria.²


All eleven letters invoke the right of self-defense under Article 51 of the Charter of the United Nations. Four of the letters additionally stress how the Syrian government is “unwilling or unable” to prevent attacks originating from the concerned territory. And two of the letters note that the Syrian government no longer exercises “effective control” over the territory in question. One justification, however, is notably missing from all eleven letters: the doctrine of humanitarian intervention.

This story should sound strikingly familiar. In 1999, the North Atlantic Treaty Organization (NATO) proceeded, without express Security Council authorization, to bomb the Federal Republic of Yugoslavia for the purpose of ending widespread human rights violations in Kosovo. Although undoubtedly motivated by humanitarian concerns, the NATO states subsequently justified their actions before the International Court of Justice (ICJ) and the Security Council by making reference to Security Council resolutions.


3. U.N. Charter art. 51; see generally supra note 2.
4. Australian Article 51 Letter, supra note 2; Turkish Article 51 Letter, supra note 2; Canadian Article 51 Letter, supra note 2; U.S. Article 51 Letter, supra note 2.
5. Belgian Article 51 Letter, supra note 2; German Article 51 Letter, supra note 2.
6. For a definition of the term “humanitarian intervention” as used in this Article, see text accompanying infra note 59.
words "humanitarian intervention" did not even appear in most of the states' pleadings before the ICJ.⁸

What does this mean for the status of the doctrine of humanitarian intervention in international law? According to critics, if intervening states consistently refuse to invoke the doctrine when it would seemingly apply, the doctrine must not exist.⁹ Although a vibrant topic in academic scholarship, the doctrine does not have the requisite state practice and opinio juris to support its existence in international law.¹⁰ In order for such a doctrine to exist, these critics argue, states need to expressly rely on it as a legal justification for a military intervention.¹¹

This Article challenges this viewpoint. It does so by departing from the traditional framework of customary international law based on state practice and opinio juris. Instead, this Article adopts a modern framework of analysis: the study of incidents. By examining seven recent incidents, this Article concludes that the doctrine of humanitarian intervention, though not yet an established norm of international law, has been actively developing at the margins over the past decade. In particular, these incidents reveal that the doctrine of humanitarian intervention functions to widen traditional exceptions to the prohibition on the use of force.

This Article is organized as follows. Part II provides background on the prohibition on the use of force and the Responsibility to Protect. Part III discusses the doctrine of humanitarian intervention, examines its history, and explains the reasons why a study of incidents is appropriate for its analysis. Part IV then examines seven incidents of humanitarian intervention over the past decade. Part V explains how

---


¹⁰. State practice and opinio juris are the two components of customary international law. See infra notes 67–72 and accompanying text.

¹¹. See, e.g., Lowe & Tzanakopoulos, supra note 7, ¶ 34 ("The fact that intervening States have been so reluctant to rely explicitly on a right of humanitarian intervention means that there is great difficulty in finding any opinio iuris that can properly be counted towards the establishment of a right of humanitarian intervention."); Charney, supra note 9, at 1238 ("[F]ew, if any, interventions can be found in which the intervening states have expressly based their actions on the right of humanitarian intervention. In the absence of such a linkage by the intervening states, the actions can hardly serve as opinio iuris in support of such a right."); Sarvarian, supra note 9, at 30 ("[T]he absence of publicly articulated legal positions by states that humanitarian intervention is lawful defeats [the] ultimate argument of legality.").
these incidents reflect the development of the doctrine of humanitarian intervention at the margins. Finally, Part VI draws conclusions regarding humanitarian intervention in light of this study.

II. BACKGROUND

There is a growing tension between two fundamental notions of international law: state sovereignty and human rights. Although both concepts are enshrined in the U.N. Charter, for several decades after 1945, the former took precedence over the latter. This phenomenon resulted, at least in part, from the relative clarity of the prohibition on the use of force enshrined in Article 2(4) of the U.N. Charter, and the relative lack of clarity of the normative force of fundamental human rights.

A. The Prohibition on the Use of Force

Article 2(4) establishes the prohibition on the use of force in international relations. Not only has the prohibition been deemed a “cornerstone” of the U.N. Charter, but it is widely considered a jus cogens norm. There are only three widely accepted exceptions to the prohibition.


17. Oliver Dör, Use of Force, Prohibition of, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 1 (June 2011); e.g., Iran v. U.S., 2003 I.C.J. ¶ 1.1 (“The principle of the prohibition of the use of force in international relations... reflects a rule of jus cogens from which no derogation is permitted.”). Jus cogens norms, also called peremptory norms, are rules of international law from which no derogation is permitted.

First, under Article 42 of the U.N. Charter, a state may use force if authorized by the Security Council under Chapter VII of the U.N. Charter in response to a threat to the peace, breach of the peace, or an act of aggression. Although Article 42 vests the authorization power solely in the Security Council, the General Assembly's Uniting for Peace resolution and the ICJ's Certain Expenses and Wall advisory opinions recognize that the General Assembly may exercise Chapter VII powers if the Security Council proves to be paralyzed.

Second, under Article 51 of the U.N. Charter, a state may use force in individual or collective self-defense in response to an armed attack. As the ICJ clarified in Military and Paramilitary Activities and later confirmed in Oil Platforms, only "the most grave forms of the use of force" constitute an "armed attack." The Court in those cases also emphasized that the use of force in response to an armed attack must comply with the principles of necessity and proportionality.

Third, a state may use force if the host state consents. Although this exception is not enshrined in the U.N. Charter, the ICJ, in Military and Paramilitary Activities, expressly accepted consent as an exception to the prohibition, and, more recently, in Armed Activities, appeared to apply this principle in its analysis of the merits of the

---

21. The Court in Certain Expenses held that Article 24 of the U.N. Charter grants the Security Council primary but not exclusive responsibility for the maintenance of international peace and security. Certain Expenses of the United Nations, Advisory Opinion, 1962 I.C.J. 151, 163 (July 20). However, the Court also held that Article 11(2) of the U.N. Charter reserves the taking of enforcement action to the Security Council. Id. at 164–65.
22. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 26 (July 9) (affirming that the Security Council has primary but not exclusive responsibility for the maintenance of international peace and security, and that the General Assembly also has "the power, inter alia, under Article 14 of the Charter, to recommend measures for the peaceful adjustment of various situations").
23. See Lowe & Tzanakopoulos, supra note 7, ¶ 36; Reisman, Present Problems of the Use of Force in International Law; supra note 12, at 242–43.
Moreover, the International Law Commission's Articles on State Responsibility recognize consent as a means of precluding the wrongfulness of an otherwise wrongful act.30

Aside from these three traditional exceptions to the prohibition on the use of force, some scholars have asserted an exception of "protective intervention," which has not gained universal support.31 Under this theory, a state has the right to intervene militarily in the territory of another state for the purpose of protecting its civilians.32 Some argue that this exception is best assimilated into the exception of self-defense under Article 51,33 whereas others posit that it does not constitute an exception to the prohibition on the use of force at all.34

Humanitarian intervention is another proposed exception to the prohibition on the use of force. As a matter of lex lata, most scholars agree that humanitarian intervention does not have a legal basis in international law.35 Indeed, whenever the ICJ has broached the prohibition on the use force, it has not left any room for an exception based on humanitarian grounds. In Corfu Channel, the Court affirmed the mandatory nature of the prohibition, specifying that the inabilities of an international organization could not be invoked to justify

29. Dem. Rep. Congo v. Uganda, 2005 I.C.J. ¶¶ 92–105 (analyzing the situation as if consent were a valid exception to the prohibition on the use of force).
33. E.g., id. at 617–18.
34. Morozov’s Dissent, supra note 31, at ¶ 8; Tarazi’s Dissent, supra note 31.
noncompliance. In *Military and Paramilitary Activities*, the Court expressly held that humanitarian objectives cannot justify the use of force under international law. In *Nuclear Weapons*, the Court seemed to confirm the exclusive nature of the aforementioned exceptions. In *Oil Platforms*, the Court affirmed the narrowness of the exception of self-defense to the prohibition. And, most recently, in *Armed Activities*, the Court held that even Security Council resolutions requiring states to bring peace and stability to a region could not justify the use of force. In short, the ICJ’s jurisprudence over the past seven decades has reaffirmed the importance and nearly absolute nature of the prohibition on the use of force.

**B. The Responsibility to Protect**

This is not to say, however, that concern for human rights has completely disappeared. In fact, there is no question that, over the past two decades, international human rights norms have gained considerable traction. This development can most easily be seen in the emergence of the Responsibility to Protect (R2P).

The history of R2P dates back to two tragic events in the mid-1990s. In 1994, the United Nations and the rest of the international community watched from the sidelines as the Hutu majority in Rwanda slaughtered approximately eight hundred thousand Rwandans over the course of a mere one hundred days. Then in 1995, the international community once again stood idly by as the Bosnian Serb Army of Republika Srpska massacred eight thousand Muslim Bosniaks in Srebrenica within a mere ten days. In a 2000 report, U.N. Secretary-General Kofi Annan asked, “if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica—to gross and
systematic violations of human rights that offend every precept of our common humanity?"\(^{43}\)

Five months later, the Canadian government established the International Commission on Intervention and State Sovereignty (ICISS) in response to Secretary-General Annan’s question. The following year, ICISS released its report, entitled *The Responsibility to Protect*, which, in a revolutionary fashion, argued that state sovereignty implies not only certain rights but also the responsibility of the state to protect its people.\(^{44}\) Where a state fails to meet this responsibility, the ICISS report argued, military intervention for humanitarian purposes could be undertaken as "an exceptional and extraordinary measure."\(^{45}\) The report, however, made it clear that such intervention would require (1) Security Council authorization, (2) General Assembly authorization under the *Uniting for Peace* procedure, or (3) *post hoc* Security Council authorization for intervention by a regional organization.\(^{46}\)

Although subsequent U.N. reports endorsed the notion of R2P, they took a more restrictive approach with regard to its application. For example, in 2004, the Secretary-General’s High-Level Panel released the report *A More Secure World*, which restricted the application of R2P to gross violations of human rights, and specified that only the Security Council has the power to authorize military intervention:

> We endorse the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent.\(^{47}\)

The Panel, however, accepted the possibility of *post hoc* Security Council authorization in cases of intervention by a regional organization:

> Authorization from the Security Council should in all cases be sought for regional peace operations, recognizing that in some urgent situations that authorization may be sought after such operations have commenced.\(^{48}\)

A few months later, the African Union, in a consensus document, agreed with the Panel on this latter point:

---

44. INT’L COMM’N ON INTERVENTION AND STATE SOVEREIGNTY, RESPONSIBILITY TO PROTECT XI (Dec. 2001).
45. Id. at XII.
46. Id. at XII–XIII.
48. Id. ¶ 272(a) (emphasis added).
The African Union agrees with the Panel that the intervention of Regional Organisations should be with the approval of the Security Council; although in certain situations, such approval could be granted "after the fact" in circumstances requiring urgent action.49

Nevertheless, subsequent reports did not address this question. In Secretary-General Annan's 2005 report, entitled In Larger Freedom, he stated:

[If] national authorities are unable or unwilling to protect their citizens, then the responsibility shifts to the international community to use diplomatic, humanitarian and other methods to help protect the human rights and well-being of civilian populations. When such methods appear insufficient, the Security Council may out of necessity decide to take action under the Charter of the United Nations, including enforcement action, if so required.50

This understanding that any humanitarian intervention would require Security Council authorization remained intact in the groundbreaking World Summit Outcome Document of 2005, which the General Assembly unanimously adopted. The document provided:

In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.51

Since 2009, Secretary-General Ban Ki-moon has published annual reports on the Responsibility to Protect. For the most part, they have reaffirmed the conclusions in the World Summit Outcome Document. For example, in his 2009 report Implementing the Responsibility to Protect, he stated:

The process of determining the best course of action, as well as of implementing it, must fully respect the provisions, principles and purposes of the Charter. In accordance with the Charter, measures under Chapter VII must be authorized by the Security Council. The General Assembly may exercise a range of related functions under Articles 10 to 14, as well as under the "Uniting for peace" process set out in its resolution 377 (V).52

51. G.A. Res. 60/1, ¶ 139, 2005 World Summit Outcome (Sept. 16, 2005) (emphasis added). The Security Council has on two occasions reaffirmed the conclusions reached in this paragraph. See S.C. Res. 1674 (Apr. 28, 2006); S.C. Res. 1894 (Nov. 11, 2009).
Nevertheless, in that very report, Secretary-General Ban Ki-moon recognized that the General Assembly could potentially authorize a Chapter VII enforcement action under the Uniting for Peace procedure:

[Collective enforcement measures, including through sanctions or coercive military action in extreme cases . . . could be authorized by the Security Council under Articles 41 or 42 of the Charter, by the General Assembly under the "Uniting for peace" procedure . . . or by regional or subregional arrangements under Article 53, with the prior authorization of the Security Council.]

Since then, however, little emphasis has been placed on Uniting for Peace. In his 2012 report on R2P, Secretary-General Ban Ki-moon made it clear that “[o]nly the Security Council can authorize the use of force, under Chapter VII, Article 42, of the Charter.” And, in his most recent report, released in July 2015, he once again suggested that only the Security Council may authorize a forceful intervention.

On the whole, the position of the U.N. Secretary-Generals on R2P—although not entirely consistent over time—contains three departures from the ICISS report. First, R2P applies only to gross violations of human rights. Second, only the Security Council can authorize military intervention. And third, Security Council authorization must be given before the military intervention takes place, even for interventions by regional organizations. Indeed, Secretary-General Ban Ki-moon’s 2009 report expressly rejected the possibility of post hoc authorization.

III. HUMANITARIAN INTERVENTION

Although R2P and humanitarian intervention share the same goal, they differ in one key respect: R2P requires the authorization of the Security Council, or, at the very least, the General Assembly under the Uniting for Peace procedure. Humanitarian intervention, on the other hand, does not.

Generally speaking, a humanitarian intervention is any intervention by a state, a group of states, or an international organization into the territory of another state for the purpose of ending human rights violations. This Article, however, employs the

53. Id. ¶ 56 (emphasis added).
56. The principal exception is Secretary-General Ban Ki-moon’s 2009 report. See supra note 53 and accompanying text.
57. The principal exception is the High-Level Panel’s 2004 report. See supra note 47 and accompanying text.
58. See supra note 52 and accompanying text.
term humanitarian intervention—as many other scholars do—to refer to the subset of humanitarian interventions that (1) involve the use of force, (2) aim to end gross violations of human rights, and (3) do not fall under any of the traditional exceptions to the prohibition on the use of force (i.e., Security Council authorization, self-defense, or consent of the host state). In other words, humanitarian intervention is the use of force by a state, a group of states, or an international organization in the territory of another state for the purpose of ending gross violations of human rights in the absence of a Security Council authorization, a claim of self-defense, or the consent of the host state.

As it is generally accepted that humanitarian intervention is unlawful as a matter of lex lata, commentators have proposed two ways by which humanitarian intervention could become lawful conduct under international law. The first is through a reinterpretation of Article 2(4) of the U.N. Charter in light of state practice. Under Article 31(3)(b) of the Vienna Convention on the Law of Treaties, “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation” shall be taken into account in the interpretation of a treaty. Therefore, if there is sufficient state practice showing that Article 2(4) should be interpreted to allow for humanitarian intervention, then that interpretation could hold.

The problem with this approach, however, is that there is a very high standard for what qualifies as “subsequent practice . . . which establishes the agreement of the parties.” According to the Appellate Body of the World Trade Organization, the subsequent practice would have to be a “concordant, common and consistent sequence of acts or

59. E.g., Aoife O'Donoghue, Humanitarian Intervention Revisited, 1 HANSE L. REV. 165 (2005); J. L. Holzgrefe, The Humanitarian Intervention Debate, in HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS 15, 18 (J. L. Holzgrefe & Robert O. Keohane eds., 2003); Daniel Wolf, Humanitarian Intervention, 9 MICH. Y.B. INT'L LEGAL STUD. 333, 334 n.3 (1988); Reisman, Present Problems of the Use of Force in International Law, supra note 12, at 241–42; Lowe & Tzanakopoulos, supra note 7, ¶ 3; GRAY, supra note 7, at 33–39. There are, of course, slight differences between the definition used in this Article and the definitions used by these scholars. In particular, some scholars use the term “humanitarian intervention” to include military interventions authorized by the Security Council, and therefore distinguish between “authorized” and “unauthorized” humanitarian interventions. This Article uses the term “humanitarian intervention” to refer only to unauthorized humanitarian interventions.

60. See Rodley, supra note 35.


pronouncements,” which most certainly does not describe the infrequent “practice” of humanitarian intervention.

Moreover, even if Article 31(3)(b) could be invoked to reinterpret the treaty prohibition on the use of force, it could not facilitate the re-interpretation of the customary prohibition on the use of force, which the ICJ made clear in Military and Paramilitary Activities “retain[s] a separate existence” from the treaty norm. Therefore, the possibility of a reinterpretation of Article 2(4) to allow for the doctrine of humanitarian intervention is implausible.

The second way for humanitarian intervention to become lawful conduct is through a new, supervening customary exception to the prohibition on the use of force. It is to this possibility that this Article now turns.

A. Humanitarian Intervention as a Customary Exception

As set forth in Article 38 of the ICJ Statute, and as the Court has repeatedly recognized in its jurisprudence, a norm reflects customary international law if there is sufficient state practice accompanied by the requisite opinio juris—the belief that “this practice is rendered obligatory by the existence of a rule of law requiring it.”

There is no steadfast rule concerning the amount of state practice necessary to establish a rule of customary international law, but the Court has noted that the practice must be “extensive” and “generally accepted.” Needless to say, the doctrine of humanitarian intervention does not meet this standard.

It must be recognized, however, that this formulation of customary international law makes proving the customary nature of certain rules much more difficult than others. In particular, it is extremely difficult under this formulation to prove the customary

---

64. See infra Sections III.B and III.C.
69. Ger./Neth.; Ger./Den., 1969 I.C.J. ¶ 77.
73. See infra Sections III.B and III.C.
nature of an emerging exception to a customary prohibition, such as the doctrine of humanitarian intervention. The reason is twofold.

First, states are strongly disincentivized from acting in accordance with an emerging exception to a customary prohibition. The reason is that every instance of such state practice—until the exception definitively matures into a customary norm—would be a violation of international law. Consequently, even if a state believed that the exception should be law, it would still be discouraged from acting under the exception out of fear of the consequences of breaching the overarching norm. This phenomenon thus makes state practice of an emerging customary exception rarer than it would be for other emerging customary norms.

Second, even if a state acted in accordance with the exception, it would be strongly disincentivized from framing its act as falling under the exception, for the very same reason: the act would be considered a violation of international law. As a result, the state would be inclined to invoke other exceptions to the customary prohibition to justify its actions. This phenomenon makes identifying state practice very difficult.

Humanitarian intervention falls victim to both of these phenomena. It is a proposed exception to the customary, and arguably jus cogens\textsuperscript{74} prohibition on the use of force. As a result, until a sufficient portion of the international community agrees that humanitarian intervention constitutes a customary norm, any act of humanitarian intervention will be a violation of the prohibition on the use of force. Consequently, states are strongly disincentivized to engage in humanitarian intervention.\textsuperscript{75} And, in the rare cases that they do, they are strongly incentivized to disguise it as falling under one of the three traditional exceptions to the prohibition on the use of force: Security Council authorization, self-defense, or consent of the host state.

**B. The History of Humanitarian Intervention**

This dilemma is borne out by the history of humanitarian intervention. The pre-Charter\textsuperscript{76} cases of humanitarian intervention

---

74. See supra note 17 and accompanying text.

75. See ERIC A. HEINZE, WAGING HUMANITARIAN WAR: THE ETHICS, LAW, AND POLITICS OF HUMANITARIAN INTERVENTION 74 (2009) ("Initial efforts to create new customary international law... are necessarily illegal at the time that they occur, which in the case of humanitarian intervention is to violate the prohibition on the use of force... "); Rodley, supra note 35, at 794 ("We are left with the conundrum that a rule of jus cogens, a rule so important that it cannot be varied by treaty, has to be breached to pave the way for an alternative rule. Such a paradigmatic paroxysm should not be lightly presumed.").

76. Being pre-Charter cases, the relevant norm of international law was not the prohibition on the use of force, but rather the principles of non-intervention and state sovereignty.
most commonly cited by commentators include the U.K., French, and Russian intervention in Ottoman Greece in 1827; the French intervention in Ottoman Syria from 1860 to 1861; and the U.S. intervention in Cuba in 1898. Nevertheless, in each case, the intervening state or group of states never actually invoked humanitarian intervention as its legal basis for intervention, but rather relied on consent (Ottoman Greece\(^7\) and Ottoman Syria\(^7\)), self-defense (Cuba\(^8\)), or other non-humanitarian grounds.\(^8\)

Similarly, the post-Charter cases of humanitarian intervention most commonly cited by commentators are the Indian intervention in East Pakistan (Bangladesh) in 1971; the Tanzanian intervention in Uganda in 1978; the Vietnamese intervention in Democratic Kampuchea (Cambodia) in 1978; the French intervention in the Central African Empire (Central African Republic) in 1979; the U.S. intervention in Grenada in 1983; the U.S. intervention in Panama in 1989; the Economic Community of West African States’ (ECOWAS) intervention in Liberia in 1997; and the NATO intervention in Kosovo in 1999.\(^8\)

Yet, once again, in each case, rather than invoking solely humanitarian intervention as its justification, the intervening state, group of states, or international organization invoked, or at least could have invoked, one or more of the three traditional exceptions to the use of force: Security Council authorization (Iraq and Kosovo),\(^8\) self-defense (East

---

78. Id. at 29–32 (acknowledging that legal justification was not humanitarian intervention, but that historians have purported numerous motives to the action including “fear of unilateral intervention by Russia” and public opinion forcing government action).
79. Id. at 30.
80. Id. at 34.
81. Brownlie, supra note 77, at 339–40 (1963); see Chesterman, supra note 77, at 28–34; Lowe & Tzanakopoulos, supra note 7, ¶ 5.
83. Legality of Use of Force, Verbatim Record, CR 99/15, at 15 (May 10, 1999) (“[L]e Royaume de Belgique est d’avis que l’intervention armée trouve un fondement sans conteste dans les résolutions du Conseil de sécurité que je viens de citer.”) (Kosovo); Lowe & Tzanakopoulos, supra note 7, ¶ 30 (Iraq); ¶ 32 (Kosovo); Gray, supra note 7, at 36 (Iraq); 42–43, 45–47 (Kosovo); Stromseth, supra note 7, at 235 (Kosovo); Johnstone, supra note 7, at 238–39 (Iraq), 239–43 (Kosovo). It should be noted that states have invoked humanitarian intervention to justify a military intervention on three occasions, but always alongside other justifications. First, in the Iraq case, the United Kingdom argued that its action was justified by a doctrine of humanitarian intervention. Gray, supra note 7, at 37. However, the United Kingdom had first tried to bring its action under the implied authorization of a Security Council resolution, id. at 36, and later also invoked self-defense with respect to particular confrontations, id. at 37–38. Second, in the Kosovo case, the U.K. Permanent Representative to the United Nations put forth an
Pakistan, Uganda, Democratic Kampuchea, and Iraq,\textsuperscript{84} and consent of the host state (Grenada, Panama, Liberia, and Sierra Leone).\textsuperscript{85}

The fact that the intervening states almost never actually invoked the doctrine of humanitarian intervention to justify their military interventions is critical. As the ICJ held in \textit{Military and Paramilitary Activities,}\textsuperscript{86}

\begin{quote}
[i]f a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State’s conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.\textsuperscript{86}
\end{quote}

And, as the Court later held in the same judgment,

\begin{quote}
[i]the significance for the Court of cases of State conduct prima facie inconsistent with the principle of non-intervention \textit{lies in the nature of the ground offered as justification}. Reliance 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. In fact however the Court finds that
\end{quote}

\begin{flushright}
84. GRAY, supra note 7, at 33, 38 (East Pakistan, Uganda, Democratic Kampuchea, Iraq); Lowe & Tzanakopoulos, supra note 7, ¶¶ 29–30.
85. GRAY, supra note 7, at 49–50 (Liberia, Sierra Leone); Lowe & Tzanakopoulos, supra note 7, ¶ 31 (Grenada, Panama); Simon M. Meisenberg, \textit{Sierra Leone}, in \textbf{MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW} ¶ 9 (2013) (Sierra Leone); Nolte, supra note 30, ¶¶ 4, 8 (Grenada, Panama, Liberia, Sierra Leone). Liberia and Sierra Leone have also been characterized by commentators as falling under a Security Council authorization, Lowe & Tzanakopoulos, supra note 7, ¶ 29, in particular a \textit{post hoc} Security Council authorization, David Wippman, \textit{Pro-Democratic Intervention, in THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW, supra note 7, at 803–05 (Liberia, Sierra Leone); Rodley, supra note 35, at 775–76 (Liberia); Verena Wiesner, \textit{Liberia, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW} ¶¶ 29–30 (2009) (Liberia); Meisenberg, supra note 85, ¶ 9 (Sierra Leone).
\end{flushright}
States have not justified their conduct by reference to a new right of intervention or a new exception to the principle of its prohibition.87

Commentators have thus argued that, in light of the fact that the intervening states almost never actually invoked the doctrine of humanitarian intervention to justify their military interventions, the numerous “examples” of humanitarian intervention mentioned above cannot be used to support the existence of a customary norm of humanitarian intervention.88 True examples of humanitarian intervention, these commentators argue, would be ones where the intervening state, group of states, or international organization actually invokes humanitarian intervention as its legal justification for intervening. With this understanding, the requisite state practice and opinio juris of humanitarian intervention would be sparse, if not completely absent.89

C. Kosovo, Libya, and Syria

This traditional understanding of international law and humanitarian intervention, however, has not stopped the academy from publishing a plethora of articles on humanitarian intervention. Indeed, after NATO’s bombing of Kosovo, there was a massive outpouring of law review articles evaluating the merits of the doctrine.90 Some scholars have even reached the conclusion that Kosovo represents the only modern example of humanitarian

87. Id. ¶ 207 (emphasis added).
88. See, e.g., Lowe & Tzanakopoulos, supra note 7, ¶ 34; Sarvarian, supra note 9, at 30; Charney, supra note 9, at 1238–39; Tyagi, supra note 9, at 893; Hoffmann, supra note 9, at 381.
89. See generally supra note 83.
intervention,

91 despite the concerns critics raise regarding the lack of express invocations of the doctrine.

After Kosovo, however, the conversation on humanitarian intervention slowed down. Excitement about the prospects of this new purported doctrine of international law was tempered by pronouncements from Germany and the United States that the NATO bombing of Kosovo “must not become a precedent.”

And states did not invoke the doctrine of humanitarian intervention to justify subsequent engagements in military action.

Then came the Arab Spring, sparking instability and violence in Libya and Syria, among other states. All of a sudden, the question of humanitarian intervention came to the fore once again. In Libya, the Muammar Qaddafi government began engaging in indiscriminate massacres of civilians. Many commentators thus saw Libya as a promising case for humanitarian intervention. Nevertheless, the intervening states sought and ultimately received authorization from the Security Council, thereby making Libya yet another case where a military intervention fell under a traditional exception to the prohibition on the use of force. The intervening states had no need to invoke the doctrine of humanitarian intervention.

A similar story could be told about Syria. At first, scholars clamored over how the doctrine of humanitarian intervention could be invoked to stop the Syrian government from committing atrocities against its own population. Then, as ISIL gained influence in the region, commentators began supporting military action against the terrorist organization. However, as described in Part I, all eleven

91. E.g., Gray, supra note 7, at 48–50; Heinze, supra note 75, at 76–77; Heinze, supra note 35, at 452.
92. See supra note 83.
94. See infra Section IV.B.
96. See infra Section IV.B.
98. See, e.g., Sourgens, supra note 1, at 404; Milena Sterio, The Applicability of the Humanitarian Intervention Exception to the Middle Eastern Refugee Crisis: Why the International Community Should Intervene Against ISIS, 38 SUFFOLK TRANSNAT’L L.
states that have submitted letters to the United Nations justifying military action against ISIL in Syria have invoked the right of self-defense rather than the doctrine of humanitarian intervention. Therefore, once again, the use of force falls under a traditional exception to the prohibition on the use of force. Proponents of humanitarian intervention are thus at a loss for true state practice and opinio juris to support humanitarian intervention.

Yet even critics would admit that it would be a grave mistake to disregard Kosovo, Libya, and Syria in a discussion on humanitarian intervention. It is true that the intervening states ultimately relied on a traditional exception to the use of force. But there is no question that humanitarian motives were present in all three cases. And it would be rational to surmise that humanitarian factors were a critical consideration when the intervening states made the decision to engage in forceful action. Indeed, in all three cases, commentators argued for military action based on the doctrine of humanitarian intervention. Therefore, although it would be inaccurate to cite these three cases as actual examples of state practice and opinio juris supporting the doctrine of humanitarian intervention, they are nonetheless incidents that contribute to our understanding of international law. This is why today it is not uncommon for commentators writing on humanitarian intervention to focus on Kosovo, Libya, and Syria.

D. The Study of Incidents

Once it is acknowledged that the scope of analysis is broadened beyond examples where intervening states expressly invoked humanitarian intervention, further analysis is required. Over the past decade, the international community has witnessed many incidents where a state, a group of states, or an international organization undertook or planned to undertake military intervention for humanitarian purposes. Like Kosovo, Libya, and Syria, none of these cases were clear examples of state practice and opinio juris supporting the doctrine of humanitarian intervention. But, as with Kosovo, Libya, and Syria, it would be unwise to completely ignore these incidents. Only through an examination of these incidents can one fully reflect on the current status of humanitarian intervention under international law.

99. See supra note 2.
Indeed, relying solely on state practice and _opinio juris_ is an overly formalistic way of understanding international law. The two disincentives discussed above in Section II.A—the disincentive to engage in humanitarian intervention and the disincentive to frame acts as humanitarian interventions—must be taken into consideration. When a state engages in a military intervention for humanitarian purposes but invokes a traditional exception to the prohibition on the use of force (especially an exception that does not fit very well with the facts), it is still possible that the state was compelled to act by the emerging norm of humanitarian intervention. If the system makes state practice unlawful, how can one expect law-abiding states to engage in the requisite state practice to make it lawful?

This Article aims to break through the formalism that has impeded the acceptance of humanitarian intervention as a norm of customary international law. Rather than trying to accumulate examples of state practice and _opinio juris_ to argue for the existence of the customary norm, this Article undertakes an examination of incidents.

First proposed by Professor W. Michael Reisman in 1984, the study of incidents is an alternative approach to understanding international law. Traditionally, international lawyers examine primary and subsidiary sources of international law (treaties, custom, general principles, judicial decisions, and scholarly writings) to identify the norms of international law and to determine whether a given act violates some preexisting norm. In the study of incidents, however, the lawyer focuses his or her attention on specific incidents—"overt conflict[s] between two or more actors in the international system"—and, more importantly, on the responses of key actors of the international community to those incidents. It is incidents, rather than the primary and subsidiary sources, that indicate and generate the norms of international law. The question is therefore not whether an act has violated some preexisting norm, but rather whether an act is considered permissible by key actors of the international community.

The benefits of examining incidents are manifold. First, the lawyer is no longer confined to the strict limits of the sources of international law. Just because a certain norm has not achieved the requisite state practice and _opinio juris_, or has not yet come before an international court or tribunal, does not mean that it is completely irrelevant. State conduct in conformity with the norm could still be considered permissible by key actors in the system, giving the norm

---

102. ICJ Statute, _supra_ note 67, art. 38(1).
103. Reisman, _supra_ note 101, at 12.
104. _Id._ at 4.
some legal value. Second, the study of incidents is, in many ways, more attuned to reality. Traditional conceptions of customary international law and its formation obfuscate the dynamics of power, but an examination of the reactions of key actors in the system to specific incidents reveals these dynamics. Third, the study of incidents, in particular the study of recent incidents, can reveal rapid changes in international law that a study of the traditional sources of international law is unable to capture. And fourth, most importantly, the study of incidents allows for the expansion of the scope of research beyond mere instances of state practice and opinio juris to any action and/or reaction by states in international relations. This expansion allows scholars to consider incidents like Kosovo, Libya, and Syria, even if they are not, strictly speaking, cases of humanitarian intervention.

Once the unit of inquiry becomes incidents rather than state practice, the story of humanitarian intervention over the past decade changes significantly. Not only do Kosovo, Libya, and Syria become subjects of analysis, but many other incidents become critical for a more comprehensive understanding of humanitarian intervention.

IV. RECENT INCIDENTS OF HUMANITARIAN INTERVENTION

Over the past decade, there have been seven notable incidents of humanitarian intervention. This Part examines these seven incidents in turn. The purpose of this examination, unlike an examination of state practice and opinio juris, is not to identify an emerging customary norm of humanitarian intervention. Rather, the purpose is to use these incidents as a prism to observe the reactions of key actors in the international legal order, in order to ultimately determine what is permissible under modern international legal practice. Consequently, this Article makes no assertion that these incidents are representative of military interventions today, nor does it need to. It merely asserts that they provide a useful lens into how the international community perceives the emerging norm of humanitarian intervention.

For each incident, the Article proceeds as follows. It first provides the relevant background necessary to understanding the context of the intervention. It then narrates the intervention, explains the asserted legal justification for the intervention, and points out the problems with the justification. Finally, and perhaps most importantly, it focuses on the reactions of key actors in the international community to the intervention. After examining all seven incidents, Part V of the Article discusses the implications of the incidents for the doctrine of humanitarian intervention.

After the collapse of the Siad Barre regime in 1991, Somalia entered into what one U.S. government official called “the worst humanitarian crisis in the world.”105 Within a mere two years, brutal warfare between sixteen rival warlords and their factions106 caused an estimated three hundred thousand deaths, seven hundred thousand refugees, and severe malnutrition among 4.5 million Somalis.107 In December 1992, the U.N. Security Council authorized the Unified Task Force (UNITAF) to “use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia.”108 A series of early failures, however, led to the withdrawal of UNITAF in May 1993.109

It was not until 2004 that significant progress was made towards restoring stability to the war-torn nation. Under the auspices of the then seven-nation Intergovernmental Authority on Development (IGAD), Somali leaders meeting in Nairobi established a Transitional Federal Parliament,110 which elected Abdullahi Yusuf as President in October 2004.111 President Yusuf’s new Transitional Federal Government (TFG) had the support of the United Nations,112 but the TFG’s status as the legitimate Somali government was questionable because, at the time of President Yusuf’s election, the TFG was still


109. See Lewis & Mayall, supra note 107, at 124–27.


based in Nairobi and non-state armed groups continued to roam Somali territory. Just eleven days after his inauguration, President Yusuf requested that the African Union (AU) Peace and Security Council (PSC) provide a Peace Support Mission (PSM) of fifteen to twenty thousand troops to help him reinstall the TFG in Somalia. As the AU worked to develop this PSM (later called AMISOM), the IGAD developed a plan to deploy its own PSM (later called IGASOM) to help the TFG relocate to Somalia. Plans for IGASOM moved much more quickly than those for AMISOM, so that, by May 2005, the AU PSC had authorized the deployment of Phase I of IGASOM with the mandate of, inter alia, protecting the TFG and facilitating its relocation to Somalia. At the same time, the AU PSC expressly requested that the Security Council lift the arms embargo on Somalia in order to allow the deployment of IGASOM forces.

The lawfulness of IGASOM, however, was questionable. First, IGASOM did not have the unequivocal consent of the host state. Many Somali leaders—even some affiliated with the TFG—opposed the presence of foreign troops, especially troops from bordering states, on the territory of Somalia. Moreover, it would have been difficult to

114. See Report of the Secretary-General on the Situation in Somalia, supra note 111, ¶ 17.
115. Id. ¶ 16.
118. Id. ¶ 8.
assert that the TFG was the legitimate representative of the Somali people, as the TFG at the time was still located in Nairobi.\textsuperscript{120} Indeed, commentators generally agree that consent by one faction in a civil war, especially if that faction does not control all of the territory, is insufficient to justify foreign military intervention.\textsuperscript{121}

Second, neither the IGAD nor the AU ever sought Chapter VII authorization for the IGASOM intervention. That is not to say that they disregarded the United Nations entirely. When requesting the mandate for IGASOM from the AU, the IGAD had “expressed [its] hope that ultimately the mandate will be endorsed by the United Nations.”\textsuperscript{122} And when authorizing IGASOM, the AU PSC had called upon the United Nations to “provide support” for IGASOM.\textsuperscript{123} Moreover, as mentioned above, when authorizing Phase I of IGASOM in May, the AU PSC had requested the U.N. Security Council to exempt IGASOM from the Somali arms embargo.\textsuperscript{124} But neither the IGAD nor the AU ever expressly requested that the U.N. Security Council authorize the use of force by the IGAD under Chapter VII.

The reaction of the international community to IGASOM was, on the whole, not very positive. Although the AU and the IGAD had endorsed the deployment of IGASOM forces, Secretary-General Kofi Annan warned that, if IGASOM went “beyond peacekeeping and involve[d] peace enforcement, a Security Council approval must be sought.”\textsuperscript{125} And although the European Union appeared to accept the deployment of IGASOM subject to certain conditions,\textsuperscript{126} the United


States suggested that it would veto any Security Council Resolution authorizing IGASOM, stating that, "[w]hile we appreciate IGAD's intentions of stabilising Somalia, we do not understand the rationale behind the IGAD deployment plan . . ."127 The final verdict, however, came out in July 2005, when the Security Council rejected the AU PSC’s request to lift the arms embargo.128 Although the Security Council had on paper "commend[ed]" the IGAD and "welcom[ed]" its planned deployment of IGASOM in Somalia,129 its refusal to lift the embargo effectively prevented the deployment of IGASOM.

Over a year and a half later, in December 2006, the Security Council did finally exempt IGASOM from the embargo and authorize the mission under Chapter VII.130 However, IGASOM never actually deployed because of internal Somali opposition, the lack of troops, and funding problems.131

B. The NATO Intervention in Libya (2011)

In February 2011, inspired by anti-government protests sweeping across the Middle East and North Africa, Libyans began organizing protests against the Muammar Qaddafi government.132 Qaddafi forces responded brutally with enforced disappearances and indiscriminate killings of civilians,133 leading the U.N. Human Rights Council to conclude that the Qaddafi government had been committing “gross and systematic human rights violations” against its own civilians.134

---

129. Id.
130. S.C. Res. 1725, ¶ 3 (Dec. 6, 2006).
131. HULL & SVENSSON, supra note 119, at 24–25.
By mid-March, the Arab League, the Gulf Cooperation Council, the Secretary-General of the Organisation of Islamic Cooperation, and various states had called on the U.N. Security Council to impose a no-fly zone over Libya. After the humanitarian situation significantly worsened in the first half of March, the U.N. Security Council—with China, Russia, Brazil, Germany, and India abstaining—adopted Resolution 1973. Resolution 1973 authorized U.N. Member States to take “all necessary measures . . . to protect civilians and civilian populated areas” and “all necessary measures to enforce compliance with” a no-fly zone established to “help protect civilians.”

Two days later, the United States, the United Kingdom, and France commenced military operations in Libya, which NATO took over soon after. The NATO forces destroyed the Libyan air defense and air force within days, and carried out multiple attacks on Qaddafi’s control centers in Tripoli over the next couple of months. By August 2011, the NATO forces had helped the Libyan rebels gain
control over Tripoli. The legality of these actions, however, was questionable: commentators largely agree that NATO overstepped its mandate by pushing for regime change rather than simply civilian protection.

The reaction of the international community, aside from those who participated in the intervention, was also largely negative. Just days after the intervention began, the BRICS states (Brazil, Russia, India, China, and South Africa), the Arab League, the AU and other Latin American states began criticizing the Western powers for exceeding the Security Council mandate. In response, NATO Secretary General Anders Rasmussen, U.N. Secretary-General Ban Ki-moon, and others argued that NATO operations had remained


infra legem the Resolution because the only way of "protecting civilians" was to topple the Qaddafi government.\footnote{154} Indeed, as early as April 2011, President Obama, President Sarkozy, and Prime Minister Cameron wrote a joint editorial recognizing the limits of Resolution 1973 but nonetheless stating that "it is impossible to imagine a future for Libya with Qaddafi in power" and that it is "unthinkable that someone who has tried to massacre his own people can play a part in their future government."\footnote{155}

Nevertheless, most commentators agree that NATO had gone beyond the mandate.\footnote{156} And it could be argued that the Libya intervention had a negative impact on the development of R2P. In a concept note sent to the U.N. Security Council in November 2011, Brazil stated that "there is a growing perception that the concept of the responsibility to protect might be misused for purposes other than protecting civilians, such as regime change."\footnote{157}

C. The UNOCI/French Intervention in Côte d’Ivoire (2011)

Another case where an intervening state allegedly overstepped a Chapter VII mandate can be seen in Côte d’Ivoire in 2011. A dispute over the results of presidential elections in November 2010 had led to a humanitarian crisis: supporters of the incumbent, Laurent Gbagbo, and supporters of the opposition candidate, Alassane Ouattara, engaged in violent clashes and committed widespread human rights abuses.\footnote{158} By March 2011, amidst the humanitarian crisis, forces loyal to Mr. Ouattara had taken over most of the country, but Mr. Gbagbo maintained control of the capital Abidjan.

On March 30, 2011 the U.N. Security Council unanimously adopted Resolution 1975. The Resolution reiterated the Security Council’s authorization for the U.N. Operation in Côte d’Ivoire (UNOCI) to "use all necessary means . . . to protect civilians under imminent threat of physical violence."\footnote{159} Although the Resolution, as well as key sectors of the international community, had recognized Mr.
Ouattara as the victor of the elections, 160 the Resolution did not authorize the use of military force to ensure his accession to power.161 Heavy fighting broke out in Abidjan the following day and Mr. Gbagbo's forces began shelling civilians in pro-Ouattara areas of Abidjan, as well as U.N. forces, which UNOCI later considered as a "possible crime against humanity." 162 A few days later, U.N. and French helicopters arrived, and began firing at pro-Gbagbo military installations.163 On April 11, as forces loyal to Mr. Ouattara closed in on Mr. Gbagbo's bunker in the presidential residence, UNOCI and French attack helicopters targeted the heavy weapons used by his forces.164 That afternoon, Mr. Ouattara's forces managed to enter the residence and arrest Mr. Gbagbo.

Once again, one can question the lawfulness of this final offensive operation. As in Libya, the Security Council Resolution only authorized the use of "all necessary means" to "protect civilians." As a result, the participation of UNOCI and France in the offensive attacks and final siege on Mr. Gbagbo's forces arguably went beyond the mandate.165 And, as in Somalia, although Mr. Ouattara impliedly consented to UNOCI and French support, it is not clear whether Mr. Ouattara had the authority to authorize the intervention, given the divided state of the country at the time.

Nevertheless, the reaction of the international community was largely positive. At the meeting of the Security Council two days later, the Special Representative of the Secretary-General and head of UNOCI called the incident "a success story," and praised France for "its most helpful cooperation." 166 The Secretary-General in his subsequent report later argued, as NATO argued in Libya, that

---

160. The United Nations, the African Union, the Economic Community of West African States (ECOWAS), the European Union, the United States, France, and other states recognized Mr. Ouattara as the victor. See NICOLAS COOK, CONG. RESEARCH SERV., RS21989, CÔTE D'IVOIRE POST-GBAGBO: CRISIS RECOVERY 1 (2011); Twenty-seventh Progress Report of the Secretary-General, supra note 158, ¶¶ 22–24.

161. The Resolution did, however, "[u]rg[e] all ... parties ... to respect ... the election of Alassane Dramane Ouattara as President." S.C. Res. 1975, ¶ 1 (Mar. 30, 2011).


164. Schori, supra note 162, at 169.


attacking Mr. Gbagbo’s forces was necessary to protect civilians.\textsuperscript{167} And the Chef de Cabinet of the Secretary-General pointed out: “[t]he impartiality of the United Nations does not mean neutrality. Its peacekeepers had a responsibility to act in the face of possible grave violations of human rights and international humanitarian law.”\textsuperscript{168}

Support was not unanimous, however. The Russian Minister of Foreign Affairs\textsuperscript{169} and the Chairman of the AU\textsuperscript{170} argued that France had exceeded its mandate. As a BBC U.N. correspondent stated, “[w]hat is clear is that if the UN continues to sanction military interventions in national conflicts, there will be continuing questions about whether it is acting to protect civilians, or using humanitarian justifications as a smokescreen to force political change.”\textsuperscript{171}

**D. The French Intervention in Mali (2013)**

In January 2012, armed with an influx of weapons from Libya, Tuareg rebels in northern Mali began a military campaign against the Malian government.\textsuperscript{172} After a military coup in March 2012, the Tuareg rebels proclaimed the independence of Azawad,\textsuperscript{173} a northern territory that comprises approximately sixty percent of Mali’s total land area. The resultant political instability facilitated the rapid growth of armed Islamist groups in the region.\textsuperscript{174} By July 2012, the Islamists had pushed out the Tuareg rebels and had taken over northern Mali.\textsuperscript{175}

Under Islamist control, the humanitarian situation in the region underwent a “drastic deterioration.”\textsuperscript{176} Several armed Islamist groups began imposing sharia law on the local population, punishing violators


\textsuperscript{168.} Schori, supra note 162, at 175.

\textsuperscript{169.} \textit{Id.} at 169.

\textsuperscript{170.} \textit{Id.} at 170.


\textsuperscript{176.} \textit{WORLD REPORT 2013}, supra note 174, at 134.
through public beatings, floggings, and summary executions. On July 17th, the Human Rights Council adopted a resolution condemning the human rights violations and acts of violence committed in northern Mali, in particular by the rebels, terrorist groups and other organized transnational crime networks, including the violence perpetrated against women and children, the killings, hostage-takings, pillaging, theft and destruction of religious and cultural sites, as well as the recruitment of child soldiers, and calls for the perpetrators of these acts to be brought to justice.

In response, in November 2012, ECOWAS adopted a Concept of Operations for the deployment of an African-led International Support Mission in Mali (later called AFISMA), requested that the AU PSC endorse it, and “urge[d] the Security Council to examine the Concept with a view to authorizing the deployment of the international military force in Mali.” In endorsing the Concept, the AU PSC likewise “urge[d] the UN Security Council...to authorize...the planned deployment of AFISMA.” Pursuant to these requests, in December 2012, the U.N. Security Council unanimously adopted Resolution 2085, which authorized AFISMA to take “all necessary measures,” inter alia, to recover the northern territories of Mali from the rebels. The Resolution also “[u]rge[d] Member States...to provide coordinated support...and any necessary assistance [to AFISMA] in efforts to reduce the threats posed by terrorist organizations.”

For logistical and financial reasons, however, AFISMA could not be deployed immediately. This proved problematic, as, within a few weeks of the Resolution, Islamist rebels made significant advances against government forces. After the rebels captured the strategic town of Konna on January 10th, the Transitional Government formally requested that France come to its assistance. That same day, the U.N. Security Council issued a press statement “reiterating their call to Member States to...provide assistance to the Malian Defence and..."
Security Forces in order to reduce the threat posed by terrorist organizations and associated groups.”  

The next day, France launched Operation Serval, a military operation aimed at ousting the Islamic militants. At a press conference, the French Minister of Foreign Affairs justified the legality of the intervention by invoking Security Council authorization, the consent of the Malian authorities, and Article 51 self-defense. With regards to the self-defense justification, France’s Minister of Defense explained the following day that France was compelled to act because it could not allow “a terrorist state at the doorstep of France and Europe.”

Nevertheless, one can again question the validity of these justifications. First, although Resolution 2085 authorized military intervention, it expressly authorized only AFISMA, not France, to take “all necessary measures” to achieve the stated objectives. Second, although the Transitional Government had consented to the French intervention, it is unclear whether the Transitional Government had the authority to do so, as the Transitional Government exercised authority over less than half of the country’s territory at the time. And third, it is not clear that a fear of future terrorist attacks justifies a preemptive military strike in “self-defense” under Article 51 of the U.N. Charter.

Despite these ambiguities, the reaction of the international community to Operation Serval was overwhelmingly positive. The day after the French operations, the ECOWAS Commission “welcome[d]” the Security Council press statement “authorising immediate intervention in Mali to stabilise the situation.” A few days later, according to the French delegation, the Security Council in a closed-door session unanimously supported the French intervention. France also received the support of Secretary-General Ban Ki-moon.

---

as well as a large number of states of the international community. Nevertheless, not everyone was on board. President Morsi of Egypt, for example, expressed his disapproval of the French intervention.


In the context of the Arab Spring, nationwide protests in Syria against President Bashar Al-Assad erupted in March 2011. In April, the Syrian Army started launching a series of deadly military attacks on civilian populations. Not long after, the country descended into civil war, leading to "widespread, systematic and gross violations of human rights" committed by government officials.

At first, there was very little support for foreign military intervention. In August 2012, however, President Obama stated at a news conference that "a red line for us is [when] we start seeing a whole bunch of [chemical or biological] weapons moving around or being utilized." Unconfirmed reports of the use of chemical weapons had surfaced as early as October 2012, and states started seriously


The statement clarified that such a legal basis is available, under the doctrine of humanitarian intervention, provided three conditions are met:

(i) there is convincing evidence, generally accepted by the international community as a whole, of extreme humanitarian distress on a large scale, requiring immediate and urgent relief;

(ii) it must be objectively clear that there is no practicable alternative to the use of force if lives are to be saved; and

(iii) the proposed use of force must be necessary and proportionate to the aim of relief of humanitarian need and must be strictly limited in time and scope to this aim (i.e. the minimum necessary to achieve that end and for no other purpose).

All three conditions would clearly be met in this case \ldots \footnote{Id. ¶ 4.}

On the very day the statement was published, however, the U.K. parliament voted against any British involvement in a military
intervention in Syria, thereby politically preventing the United Kingdom from acting.

Two days later, President Obama decided that “the United States should take military action against Syrian regime targets” even “without the approval of [the] United Nations Security Council,” but he planned to first seek authorization from Congress. Unlike Downing Street, the White House never explained the international legal basis for the intervention. One week later, a White House attorney acknowledged that military intervention “may not fit under a traditionally recognized legal basis under international law,” but she maintained that it would be “justified and legitimate under international law.”

The reaction of the international community was divided. At the time, the United States asserted that nine other states had “publicly and explicitly expressed support for U.S. military action.” France, for example, agreed that “if the Security Council is blocked from acting, a coalition will form” to take military action. China, Russia, and Iran, however, all expressed opposition to foreign military intervention. In addition, the Joint Special Representative of the United Nations and the League of Arab States for Syria Lakhdar Brahimi insisted that Security Council authorization was absolutely necessary. Moreover, Secretary-General Ban Ki-moon also opposed military intervention without Security Council authorization.


In any case, the agitation for military intervention—at least as a response to the use of chemical weapons—abated after the United States and Russia concluded the Framework for Elimination of Syrian Chemical Weapons in September 2013.

F. The U.S. Intervention at Mount Sinjar in Iraq (2014)

In 2006, a number of Sunni insurgent groups in Iraq united to form the Islamic State of Iraq (ISI). By 2013, the ISI had expanded into Syria and renamed itself the Islamic State of Iraq and the Levant (ISIL). The following year, it rose to international prominence after a series of successful military operations in Iraq. The goal of ISIL has been to establish a "unitary and worldwide Islamic state or caliphate" under sharia law.

Its governance, however, has involved indiscriminate killings of civilians, mass executions, religious persecution, ethnic cleansing, sexual violence, arbitrary detention, and other gross violations of human rights. In August 2014, the Security Council in Resolution 2170 "condemned..." ISIL and its violent extremist ideology, and its continued gross, systematic and widespread abuses of human rights and violations of international humanitarian law...

One particular incident is notable for the purposes of humanitarian intervention: on August 3, 2014, ISIL attacked and captured Sinjar, a town in northern Iraq inhabited primarily by Yazidis. As the Yazidi people do not practice Sunni Islam, ISIL had...

---


213. See BLANCHARD ET AL., supra note 212, at 1.


called for their systematic destruction. Of the approximately two hundred thousand civilians who fled the town, about forty thousand fled to Mount Sinjar, where they lacked water, food, and shelter, and were effectively surrounded by armed ISIL forces. A humanitarian disaster was imminent.

On August 7, 2014 the Security Council issued a press statement "calling on the international community to support the Government and people of Iraq and to do all it can to help alleviate the suffering of the population affected by the current conflict in Iraq." That day, President Obama authorized U.S. airstrikes "to break the siege of Mount Sinjar." As Obama noted, "when many thousands of innocent civilians are faced with the danger of being wiped out, and we have the capacity to do something about it, we will take action."

The following day, when asked what the legal justification was for the airstrikes, a senior administration official invoked the consent of the host state, stating that "we believe that any actions we would take, to include airstrikes, would be consistent with international law, as we have a request from the Government of Iraq." Nevertheless, as in Somalia, Côte d'Ivoire, and Mali, one might question the capacity of the host government to give consent, as the Iraqi government was...
arguably in the middle of a Civil War with ISIL, which had taken control over a large portion of Iraqi territory.

The reactions of other states to the U.S. airstrikes to save the Yazidis is not well documented in publicly available information, perhaps partly because the Iraqi Kurdish peshmerga ended up playing a large role in rescuing the Yazidis. Nevertheless, no strong objections were voiced against the U.S. airstrikes, and, significantly, the European Union and other states joined the United States in providing humanitarian relief to the Yazidis.


Although the United States had, for the most part, refrained from intervening in Syria for the first three years of the conflict, on September 10, 2014, President Obama announced that the United States and its allies would aim to “degrade and ultimately destroy” ISIL not only in Iraq, but also in Syria. At least one of the principal purposes for doing so was humanitarian in nature. In his speech, President Obama noted:

In a region that has known so much bloodshed, these terrorists are unique in their brutality. They execute captured prisoners. They kill children. They enslave, rape, and force women into marriage. They threatened a religious


minority with genocide. And in acts of barbarism, they took the lives of two American journalists -- Jim Foley and Steven Sotloff.231

On September 22, the United States, along with Bahrain, Jordan, Qatar, Saudi Arabia, and the United Arab Emirates, commenced airstrikes in Syria.232 The following day, U.S. Ambassador to the United Nations Samantha Power sent a letter to Secretary-General Ban Ki-moon justifying the intervention. Rather than calling the operation a humanitarian intervention, however, she expressly invoked the "inherent right of individual and collective self-defence" under Article 51 of the U.N. Charter.233 Ambassador Power noted that Iraq was subject to "continuing attacks from ISIL coming out of safe havens in Syria . . . against Iraq's people,"234 and referenced a letter from the Minister of Foreign Affairs of Iraq to the President of the Security Council, received three days earlier, expressly "request[ing] the United States of America to lead international efforts to strike ISIL sites' outside of Iraq's borders."235 In light of the fact that Syria was "unwilling or unable to prevent the use of its territory for such attacks," she argued, the United States had taken "necessary and proportionate military actions in Syria in order to eliminate the ongoing ISIL threat to Iraq."236

Two months later, the United Kingdom sent a similar letter to the Secretary-General and the President of the Security Council, invoking collective self-defense on behalf of Iraq under Article 51, but without the "unwilling or unable" language.237 As of August 2016, nine other

231. Id.
234. Id.
states—Canada, Turkey, Australia, France, Germany, Denmark, the Netherlands, Norway, and Belgium—have sent similar letters to the United Nations, invoking individual and/or collective self-defense under Article 51. Canada, Turkey, and Australia employed the “unwilling or unable” formulation in their letters, whereas Germany and Belgium, in a similar fashion, noted that the Syrian government does not exercise “effective control” over the territory from which ISIL operates.

The self-defense justifications offered by these eleven states raise the question, as France’s intervention in Mali did, of whether a foreign terrorist threat can justify a preemptive attack. Aside from a few exceptions, the international community on the whole appears to approve of these military interventions against ISIL in Syria. To begin with, many states have at some point in time participated in the airstrikes. And the day after the United States and its Arab allies commenced the airstrikes, Secretary-General Ban Ki-moon issued the following statement:

http://opiniojuris.org/2015/09/25/a-broad-consensus-of-between-two-and-four-states/ (calling Deeks's observation regarding the United Kingdom "correct").

238. Australian Article 51 Letter, supra note 2; Belgian Article 51 Letter, supra note 2; Canadian Article 51 Letter, supra note 2; Danish Article 51 Letter, supra note 2; Dutch Article 51 Letter, supra note 2; French Article 51 Letter, supra note 2; German Article 51 Letter, supra note 2; Norwegian Article 51 Letter, supra note 2; Turkish Article 51 Letter, supra note 2.

239. Australian Article 51 Letter, supra note 2; Canadian Article 51 Letter, supra note 2; Turkish Article 51 Letter, supra note 2; see Kevin Jon Heller, France Fails to Adopt “Unwilling or Unable” in Syria, OPINIO JURIS (Oct. 11, 2015), http://opiniojuris.org/2015/10/11/france-fails-to-adopt-unwilling-or-unable-in-syria/ (calling Deeks’s observation “correct”).

240. Belgian Article 51 Letter, supra note 2; German Article 51 Letter, supra note 2; see Marko Milanovic, Belgium’s Article 51 Letter to the Security Council [UPDATED], EJIL: TALK! (June 17, 2016), http://www.ejiltalk.org/belgiums-article-51-letter-to-the-security-council/ (calling Deeks’s observation “correct”). Secretary-General Ban Ki-moon has also employed the “effective control” language. See infra note 242 and accompanying text. On the question of the relationship between the “unwilling or unable” standard and the “effective control” standard, Brian Egan, Legal Adviser to the U.S. Department of State, noted, “With respect to the ‘unable’ prong of the standard, inability perhaps can be demonstrated most plainly, for example, where a State has lost or abandoned effective control over the portion of its territory from which the non-State actor is operating.” Brian Egan, Keynote Address at the 2016 Annual Meeting of the American Society of International Law (Apr. 1, 2016); see Douglas Cantwell, “Unwilling or Unable” in the Legal Adviser’s ASIL Speech, LAWFARE (Apr. 12, 2016), https://www.lawfareblog.com/unwilling-or-unable-legal-adviser-asil-speech (calling Deeks’s observation “correct”).

I am aware that today’s strikes were not carried out at the direct request of the Syrian Government, but I note that the Government was informed beforehand. I also note that the strikes took place in areas no longer under the effective control of that Government. I think it is undeniable — and the subject of broad international consensus — that these extremist groups pose an immediate threat to international peace and security.242

Nevertheless, not everyone was on board. Russia243 and Iran,244 for example, opposed the military intervention without the consent of the Syrian government or a Security Council authorization.

V. HUMANITARIAN INTERVENTION AT THE MARGINS

As discussed in Section III.B above, many commentators argue, in line with ICJ jurisprudence, that the classification of a case as a humanitarian intervention requires that the intervening power actually invoke humanitarian intervention as its legal justification.245 Under this definition, there has not been a single case of humanitarian intervention over the past decade. Even the U.K.-proposed intervention in Syria after the chemical weapon attacks in Ghouta would not count, as that incident did not result in an actual intervention. So, if one were to accept the point of view of these commentators, it would be disingenuous to argue that humanitarian intervention is an emerging norm.

Nevertheless, in light of the examination of these seven incidents, it would be equally disingenuous to argue that agitation for the norm of humanitarian intervention is entirely absent. Arguably, it has now become common for an intervening power to invoke a traditional exception to the prohibition on the use of force to justify a humanitarian intervention, even when the facts do not completely fit within the scope of the exception. And the international community has, on many occasions, though not on all occasions, approved of the intervention, thereby raising the possibility that the doctrine of


245. See supra notes 86–89 and accompanying text.
humanitarian intervention, though not yet an established norm of international law, has some force at the margins.

This is not a new phenomenon. In the aftermath of ECOWAS's interventions in Liberia and Sierra Leone in the 1990s, commentators started asserting that the interventions were justified because of an emerging norm of post hoc Security Council authorization. And in subsequent publications, ICISS, the U.N. Secretary-General, and the AU all accepted the possibility that regional organizations could obtain post hoc authorization from the Security Council for humanitarian interventions. Although not expressly accepted by Secretary-General Ban Ki-moon's report of 2009, this development reflected humanitarian intervention at the margins: humanitarian intervention alone may not have been sufficient to justify a military intervention, but it allowed the intervening power to broaden the scope of traditional exceptions to the prohibition on the use of force.

Over the past decade, as evidenced in the seven incidents examined in this Article, three new paradigms of humanitarian intervention at the margins have emerged: (1) mission creep, (2) antiterrorism, and (3) partisan support.

A. Mission Creep

In the mission creep paradigm, the intervening power invokes a Security Council resolution as the legal justification for its humanitarian intervention, even though the intervention arguably falls outside the mandate of the resolution. When this is the case, the norm of humanitarian intervention may allow the intervening power to widen the mission authorized by the Security Council, a theory that some commentators have referred to as "implied authorization." The implementation of no-fly zones in Iraq after the First Gulf War, as well as NATO's intervention in the Kosovo war, could be seen as examples of mission creep. And, over the past decade, this trend has continued in Libya, Côte d'Ivoire, and Mali. In each case, the intervening power arguably exceeded its mandate. In Libya, NATO allegedly pursued "regime change" rather than "the protection of civilians" authorized under Resolution 1973. In Côte d'Ivoire, UNOCI and France similarly sought to depose Mr. Gbagbo, arguably going beyond their mandate to "protect civilians" under Resolution 1975. And in Mali, France launched Operation Serval against the Islamist militants, even though Resolution 2085 expressly authorized France only to "provide coordinated assistance . . . to the Malian Defence and Security Forces . . . in order to . . . reduce the threat posed by terrorist

246. See supra note 85.
247. See supra notes 46, 48–49 and accompanying text.
248. See supra note 53 and accompanying text.
249. See Johnstone, supra note 7, at 238–43.
organizations and associated groups . . . .”250 To be clear, this Article
does not assert that these operations exceeded their Security Council
mandates; rather, it simply notes that other states and commentators
have made such assertions, and that such assertions are not without
merit.

In two of the cases—Côte d’Ivoire and Mali—the international
community appeared to have welcomed the intervention. Part of the
reason, no doubt, was that the interventions had humanitarian
objectives. The Gbagbo regime had been indiscriminately shelling
civilian populations,251 and the Islamist militants in Mali had been
committing gross violations of human rights against innocent
civilians.252 Libya was another story: key members of the international
community condemned NATO’s intervention in Libya. Nevertheless, it
should not be overlooked that there were still a significant number of
states—primarily Western, developed states—that supported the
intervention.

One cannot draw sweeping conclusions from these three incidents
of mission creep. But it would be fair to say that humanitarian
intervention was at least operating at the margins.

B. Antiterrorism

In the antiterrorism paradigm, the intervening power invokes
self-defense under Article 51 of the U.N. Charter as the legal
justification for its humanitarian intervention, but its argument
hinges on the acceptance of antiterrorism activities against a non-state
actor as preemptive self-defense.253 The fact that the host state is
“unwilling or unable” to suppress the threat itself may carry some
weight in justifying this exercise of the right of self-defense, at least
according to four states.254 And, according to two states, whether the
host state exercises “effective control” over the territory in question
may also strengthen this justification.255 Commentators have taken
various viewpoints on the preemptive self-defense justification,256 and

251. See supra note 162 and accompanying text.
252. See supra notes 176–178 and accompanying text.
253. Scholars also use the terms “anticipatory self-defense” and “preventive self-
defense” alongside the term “preemptive self-defense.” For an attempt to distinguish and
define these three terms, see Ashley S. Deeks, Taming the Doctrine of Pre-emption, in
THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW, supra note 7, at
662–63.
254. See supra note 239.
255. See supra note 240.
256. See generally Deeks, supra note 253, at 661 (presenting various viewpoints
on the question of anticipatory, preemptive, and preventive self-defense); GRAY, supra
note 7, at 114 (“The law on self-defence is the subject of the most fundamental
disagreement between states and between writers.”); Kevin Jon Heller, France Fails to
Adopt “Unwilling or Unable” in Syria, OPINIO JURIS (Oct. 11, 2015),
it suffices to say that many still question the legality of such “antiterrorism” interventions.

Nevertheless, when there is a humanitarian crisis in the host state, military intervention under this theory appears to be more acceptable. Drawing examples from the past decade, the French intervention in Mali and the U.S.-led intervention against ISIS in Syria stand for this hypothesis. In Mali, France argued, inter alia, that its attack on the Islamist militant groups was partly justified out of self-defense, and states generally welcomed the French intervention. Similarly, in Syria, the United States was able to build a coalition of eleven states to launch airstrikes in Syria, and, although a few states have objected, most states that have voiced their opinions appear to support the intervention.

Once again, two incidents are insufficient for drawing any definitive conclusions. But it appears that a humanitarian motive may help widen the self-defense exception to accommodate antiterrorism operations.

C. Partisan Support

In the partisan support paradigm, the intervening power invokes the consent of the host state to justify its military intervention, but the host state is embroiled in a civil war and the intervening power only obtains the consent of one faction—often the faction with stronger international support. The problem here, as most commentators agree, is that intervention based on consent is prohibited in the context of a civil war, especially where control over state territory is divided.257 Indeed, at least one prominent commentator has criticized Russia’s airstrikes in Syria as unlawful because “a very large number of states have determined that the Assad government can no longer fully claim to represent the people of Syria.”258

Four of the seven incidents examined above reflect this paradigm: Somalia, Côte d’Ivoire, Mali, and Iraq. The TFG in Somalia consented to IGAD’s intervention, Mr. Ouattara’s forces impliedly invited UNOCI and France to help assault Mr. Gbagbo’s last stronghold, the Transitional Government in Mali formally invited France to come to its assistance, and Iraq invited the United States to strike the ISIL forces besieging Mount Sinjar. The common thread in all four cases is


257. GRAY, supra note 7, at 81; U.K. FOREIGN & COMMONWEALTH OFFICE, supra note 31, at 614; Nolte, supra note 30, ¶ 18.

that the inviting power—the alleged representative of the host state—did not have full authority over the state and was arguably in a state of civil war. As such, under traditional international law doctrine, it is questionable whether the inviting powers actually had the authority to consent to a military intervention.

Nevertheless, the international community's reactions to these interventions, aside from the IGAD's proposed intervention in Somalia, were largely positive. Consequently, one may suspect that a humanitarian cause may ease the restriction on the ability of one faction to consent to foreign military intervention in times of internal conflict.

***

**Table 1** below summarizes which paradigms the seven incidents fall under, and whether the international community's reaction to the intervention or proposed intervention was largely positive or negative.

**Table 1: Recent Incidents of Humanitarian Intervention**

<table>
<thead>
<tr>
<th>Mission</th>
<th>Antiterrorism</th>
<th>Partisan Support</th>
<th>International Reaction</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Proposed IGAD Intervention in Somalia (2005-2006)</td>
<td>X</td>
<td></td>
<td>negative</td>
</tr>
<tr>
<td>The NATO Intervention in Libya (2011)</td>
<td>X</td>
<td></td>
<td>negative</td>
</tr>
<tr>
<td>The UNOCI/French Intervention in Côte d'Ivoire (2011)</td>
<td>X</td>
<td>X</td>
<td>positive</td>
</tr>
<tr>
<td>The French Intervention in Mali (2013)</td>
<td>X</td>
<td>X</td>
<td>positive</td>
</tr>
<tr>
<td>The U.S. Intervention at Mount Sinjar in Iraq (2014)</td>
<td></td>
<td>X</td>
<td>positive</td>
</tr>
<tr>
<td>The U.S.-Led Intervention in Syria (2014-2016)</td>
<td>X</td>
<td></td>
<td>positive</td>
</tr>
</tbody>
</table>
VI. Conclusion

One must be careful when drawing conclusions from a study of incidents. In selecting these seven incidents, no specific effort was made to choose a sample that is representative of the entire population of military interventions. There was also no attempt to isolate the independent variables that ultimately influenced how key actors in the international community reacted to the interventions. Indeed, in many cases, it is possible that international approval for the military intervention in question may have been the product of international politics rather than a reflection of attitudes towards humanitarian intervention. Each incident arises from its own unique political, legal, and factual context. Consequently, it would be inappropriate to generalize from these incidents.

Nevertheless, one cannot turn a blind eye to this agitation for humanitarian intervention at the margins. At least some, if not all of the seven incidents can only with difficulty be assimilated into one of the three traditional exceptions to the prohibition on the use of force. As a result, there must be an underlying element that not only compels the intervening power to intervene but also drives the international community to accept that intervention. This element is humanitarian intervention, and these incidents reveal that humanitarian intervention has developed considerably at the margins over the past decade.

It is true that genuine state practice and opinio juris of humanitarian intervention are still lacking. As a result, it would be erroneous to argue that a customary exception to the prohibition on the use of force based on humanitarian intervention exists as a matter of lex lata. There is no free ticket for a state to militarily intervene in another state for the purpose of ending gross violations of human rights. Nevertheless, the incidents discussed here reveal that the norm of humanitarian intervention is developing, and key actors in the international system are responding to this developing norm.

At the moment, it appears that the norm of humanitarian intervention, at the very least, serves as a tool for widening the traditional exceptions to the prohibition on the use of force. Although military intervention based on a Security Council resolution normally must stay within the limits of the resolution, there appears to be greater leeway when it comes to a humanitarian intervention. Although ambiguity remains in the legitimacy of preemptive self-defense, this exception to the prohibition on the use of force appears to widen when the intervention has humanitarian and antiterrorism purposes. And, although intervention based on the consent of the host state normally requires approval from a clear sovereign authority, if the intervention has humanitarian objectives, it appears that consent may also be given by a government that does not have control over all of its territory.
These are not firm rules that establish whether a state, intervening on humanitarian grounds, is in violation of international law. Rather, these are observations of the reactions of key actors in the international community to certain incidents of humanitarian intervention over the past decade.
***