

**The Road to Hell Is Paved with Good Interventions:
A Pragmatic Examination of Humanitarian Intervention
with Special Reference to Kosovo**



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International Treaties, Conventions and Declarations

Treaty Providing for the Renunciation of War as an Instrument of National Policy, signed in Paris on 27 August 1928, entered into force 24 July 1929

Charter of the United Nations, signed at San Francisco on 26 June 1945, entered into force 24 October 1945

Statute of the International Court of Justice, signed at San Francisco on 26 June 1945, entered into force 24 October 1945

Universal Declaration of Human Rights, adopted and proclaimed by A/RES/217/A (III), 10 December 1948

Convention on the Prevention and Punishment of the Crime of Genocide, approved and proposed for signature and ratification or accession by A/RES/260/A (III), 9 December 1948, entered into force 12 January 1951

Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, adopted by A/RES/2625 (XXV), 24 October 1970

Definition of Aggression, adopted by A/RES/3314 (XXIX), 14 December 1974

Vienna Convention on the Law of Treaties, opened for signature on 23 May 1969, entry into force 27 January 1980

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African (Banjul) Charter on Human and Peoples' Rights, adopted by the eighteenth Assembly of Heads of State and Government, Organization of African Unity, on 27 June 1981, entered into force 21 October 1986

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1 Just War or Nothing But War?

Law is a peculiar phenomenon; *international law* even more so than municipal systems of jurisprudence. Characterizations of the discipline are myriad, and the fundamental basis of international law seems to elude definition. From the point of view of the international lawyer, this can often result in perplexing situations. When debate takes place within the system of international law—for example, in an international board of arbitration, in a political organ such as the United Nations or on the pages of legal journals—discussion can go forward and consensus can be reached even though there seems to be disagreement of the most fundamental kind with regard to what the underlying rules of international law are and to what extent those rules are malleable.

The boundaries of international law, international politics and “the international system” are indeterminate in character, and it is quite noteworthy indeed that issues on the international arena can be discussed and possibly resolved within such systems, even in the absence of consensus about their nature—or, as it appears, even in the absence of awareness about the lack of consensus among different parties. Evidently, one does not need to consciously subscribe to a particular view, theory or philosophy of international law to be able to participate in the debate, as on a practical level, there are numerous facets of the field whose importance participants in international legal discourse will undoubtedly agree upon, even though their content may be in dispute.

Notwithstanding the complex and apparently self-contradictory nature of such a system and the basic disagreements as to its nature described above, it is with a surprising degree of consistency that international lawyers appear to be able to agree on what the position of international law to a particular problem is. “Hard cases” seem to be relatively small in number; however, when such cases do present themselves, it often appears as if a wrench was thrown into the works of the international legal system. The age-old adage “hard cases make bad law” seems to be particularly appropriate in international law. Studying a contentious question of international law does not necessarily demand that a particular philosophy is explicitly espoused by the investigator as much as it requires that all relevant legal, practical and philosophical aspects of the problem are given due consideration and carefully assessed before a conclusion is reached.

The question of the acceptability of *humanitarian intervention*—that is, the use of military force for purportedly humanitarian ends, particularly when there is a

lack of explicit support for such an action from the Security Council of the United Nations—is a dilemma of international law that presents an interesting type of “hard case” to the international lawyer. Though humanitarian intervention has been invoked rarely, it is a controversial doctrine that has nonetheless been the subject of much debate. Indeed, there are few questions of international law that are as contentious as “the acceptability of military intervention for allegedly humanitarian purposes.”

The *goal* of the present study, in general terms, is to provide an answer to the general question of humanitarian intervention for the “occidental jurist” who is mindful of the dangers associated with loosening the bridles on the use of force but also recognizes the need to prevent violations of fundamental human rights. On a more specific level, the intervention in Kosovo by NATO in 1999 serves as an especially useful focal point for investigating the dilemmas involved in doctrines of humanitarian intervention. The main question to be answered can thus be stated as follows:

Taking into account the criticism that has been presented of human rights doctrines and their application, to what extent should humanitarian intervention be considered *acceptable* from the standpoint of international law, particularly in light of the controversial Kosovo intervention of 1999, and what significance as a *precedent* is it preferable to afford that case with regard to future interventions?

The approach employed in this study will be a pragmatic one—pragmatic here referring to the above-mentioned non-adherence to a given theoretical approach. This investigation will not delve into the depths of (international) legal theory or attempt to employ a particular fundamental method or a specific underlying philosophy that the different schools of thought in international law would supply in abundance. Instead, the approach is rooted in a more practical examination of existing literature and the viewpoints presented therein; furthermore, in light of what was noted above, the intention is to give adequate attention to those aspects of the issue, be they legal, moral or political, that are relevant to the question at hand.

However, the examination in the present study cannot be limited to a legal-pragmatic assessment of a particular case. Underlying the putative right—or, as some would allege, the duty—to intervene militarily in humanitarian crises is the

idea of there existing a set of universal rights common to all humanity. The issue of the purported universality of rights may not be immediately apparent in the problem of humanitarian intervention, as many of the relevant norms such as the prohibition of genocide can be said to enjoy universal support on the international arena. Nevertheless, arguments in favor of humanitarian intervention in the absence of Security Council authorization contain unspoken implications of “universal enforceability.” When it is argued that human rights norms have such a position in the present system of international law that they should override the prohibition on the use of force, at least in certain situations, the presupposition appears to be that they represent such universal values that they can take precedence over even the most fundamental rules of international law that have been agreed upon by the international community.

In other words, if rights are to be considered “universal” and therefore of the highest importance in international law, claims of universality must be explored in more detail if the justifiability of actions based on universal rights is to be assessed. Furthermore, the analysis of universality that shall be undertaken in the present study will serve to illustrate a number of critiques of human rights doctrines and provide a background for assessing that criticism, with particular reference to the connection that the criticism shares with the allegations that have been made of interventionism having been abused to serve “hegemonic” and “imperialist” ends.

Therefore, the first part of this study, Chapters Two and Three, will focus on the intrinsic character of human rights from the perspective of their putative universal nature. In these chapters, the universality of human rights and the effect that it has on the enforceability of rights shall be considered; moreover, this analysis will be linked to the practical-political criticisms that have been presented with regard to humanitarian intervention.

This examination will serve as background for Chapters Four and Five, wherein humanitarian intervention is examined from a perspective that is more legal in nature. It is here that the Kosovo problem is subjected to more detailed scrutiny. How “legal” or how “justified” was the Kosovo intervention—or, more precisely, what position should one adopt with regard to that intervention, keeping in mind the criticism and the problems assessed in the previous chapters? In Chapter Six, concluding observations will be made with respect to the main question described above.

2 Immoral Crimes Since Immemorial Times

The question of the *universality* of rights is more relevant to the problem of humanitarian intervention than would appear at first sight. It appears that the issue is raised relatively infrequently in debates regarding humanitarian intervention; however, one needs to acknowledge that the persuasive nature of modern human rights doctrines owes a lot to the way in which rights are portrayed as protecting the universal needs of humanity. The consensus permeating the international arena—at least as seen from a Western perspective—is such that statements that are critical of the purportedly empowering, liberating, impartial and *universal* nature of rights are easy to consider inappropriate or at least are tempting to look down upon or ignore.

What is relevant here is how this *Zeitgeist* may often contribute to creating a biased atmosphere where arguments based on the language of human rights may attain more credibility than they would otherwise have. The unspoken—but not uncriticized—assumption, it appears, is that actions justified by reference to human rights doctrines are by default preferable to other alternatives; i.e., that rights, through their universal nature, protect the “greater good” of the global community, and any detrimental effects that result from their implementation may only be considered an implementation-level problem. Furthermore, arguments for intervention are not invulnerable to criticisms of their connection to liberal Western thinking. Sidestepping relativist objections to human rights doctrines leads to a limited view of the issue wherein similar objections to intervention doctrines are ignored.¹ Therefore, when one chooses a starting point for examining humanitarian intervention, it is more than appropriate to elect to consider the root of the doctrines that are employed as justification and are thus inextricably intertwined with the main problem—namely, doctrines of the universality of rights.

The question, then, is whether human rights constitute a truly universal doctrine common to all mankind or whether they carry a culturally specific background and philosophy—and if there is such a cultural bias, to what extent it exists. This is a wide-ranging question which has been subject to intensive debate. Arguments in favor of the universality of human rights often make reference to the Univer-

¹Relativist objections to humanitarian intervention are considered in particular in *Tesón* 2003, p. 100–102. *Tesón* criticizes such arguments through what appears to be a *reductio ad absurdum*; furthermore, he points out that objections to intervention that are based on the Western origin of rights are unconvincing because the justifiability of an argument is not dependent upon its historical genesis.

sal Declaration of Human Rights that was drafted in the aftermath of the Second World War and which has been said to form the basis of the “ideology” of the United Nations,² if such a notion can be considered to exist. Representatives of different nations and cultures participated in the process of drafting the Declaration, and the argument has been that the Declaration would thus reflect an adequate consensus on the content of those rights.³ However, notable opposing views were presented to some provisions in the Declaration, such as the right to divorce which was opposed by Arab representatives. Nonetheless, those parts of the Declaration that are likely to serve as a basis for humanitarian intervention, and the provisions of subsequent documents that are relevant to the present study—in particular, the prohibition of genocide as defined in the Convention on the Prevention and Punishment of the Crime of Genocide—are relatively uncontested in the world at large. It could be argued that it was the recurrence of such atrocities that the United Nations was first and foremost created to prevent.⁴

Arguments of cultural relativism are not the only form of criticism that has been leveled against human rights treaties and norms. In fact, claims have been made that human rights are a doctrine that somehow seems to belong more appropriately to the sphere of morals and ethics than the sphere of law. Moreover, there has been criticism of the problems that codifying human rights into laws and treaties necessarily, it is alleged, seems to entail.⁵ Whether codification has been beneficial or not is evidently a matter of debate, as is the problem of whether that question should be assessed from the point of view of human rights ideology itself or from an external perspective. The problems of codification are also related to arguments and counter-arguments of cultural relativism: i.e., whether all cultural practices are equally justifiable or whether certain conceptions of morals and ethics are in some way preferable to others. Interesting questions have been raised, for example, with regard to the “Asian values” problem. It has been claimed that human rights as they are currently codified in treaties are actually manifestations of individualistic Western values and that they do not take into account the communitarian nature of Asian cultures where societal order is given precedence over

²For discussion of human rights as not only an ideology but as a “secular religion,” see Chapter 2.2 of the present study.

³*Ignatieff* 2001, p. 64. However, cf. *Douzinas* 2000, p. 122–124: “The *travaux préparatoires* he used to prepare his draft came, with only two exceptions, from Western English language sources with the American Law Institute submission a main influence. Only one of the seven principal drafters was not Christian [...]”

⁴Cf. the Preamble of the Charter of the United Nations; see p. 49 of the present study.

⁵See e.g. *Allott* 1999, p. 47: “The emergence of potentially universal values after 1945 [...] suffered a deformation [...] They were also systematically corrupted before they could acquire a more clearly universal substance, so that they became vulnerable to charges of cultural relativism and hegemonism.”

the well-being of individuals.⁶ Furthermore, there have been feminist arguments against human rights that point to the way in which rights doctrines—and interventions based on human rights ideology—fail to take into account the needs of women as a gender group.⁷ In this chapter, the implications of such arguments from the perspective of the applicability of human rights are examined so that the issues raised can be considered with regard to the main problem.

2.1 Uncommon Contempt for Common Content

The position that human rights are given in the system of international law depends on the writer. To name but a few examples, they can be considered simply a contractual obligation, a *jus cogens* norm in international law or one of the fundamental building blocks—or even the most fundamental building block—of international law. Allott examines the fundamentals of international society and considers the possibility of certain common values, possibly reflected in human rights norms, serving the *common interest* of international society. In his view, one of the main social functions of law is that “law inserts the common interest of society into the behaviour of society-members.”⁸ Furthermore, Allott considers law a “universalizing system, re-conceiving the infinite particularity of human willing and acting, in the light of the common interest of society.”⁹ Thus, from this perspective, the common interest of international society is, or should be, served by the system of international law, and the present writer contends that human rights, to the extent that they can be considered a defensible system of norms, should be seen as part of this endeavor.

One way of rephrasing such an approach in the form of a question would be to ask what values constitute the minimum for international society to *function successfully*. The ban on the use of force was specifically designed to avoid new major armed conflicts that would come with immense cost to international society and its members, and therefore the underlying purpose of the Charter system could be seen as the supporting of this goal.¹⁰ To this end, one can assess the idea of

⁶For discussion and debate on this viewpoint on a general level, see the *Introduction to The East Asian Challenge for Human Rights* by Bauer and Bell 1999, p. 3–23.

⁷See e.g. the discussion on Orford 2003 and Charlesworth & Chinkin in Chapters 3.1 and 3.2 of the present study, respectively.

⁸Allott 1999, p. 30 and p. 36–37.

⁹Allott 1999, p. 32.

¹⁰See Ch. 4 of the present study for a more detailed discussion on the prohibition on the use of force.

human rights as a doctrine that enables international society to function in an *effective* manner.¹¹

The creation of the United Nations and the instituting of the Charter system was followed by the national liberation movements of Africa, among others, and the process of decolonization.¹² From this point of view, those human rights provisions in the Charter and the Declaration that guarantee the equality of different ethnic groups are of paramount importance. Nations are built upon ideas of ethnicity and history,¹³ and in the modern world it would thus be hard to imagine an international order where one ethnic group could be held in a lower position than others or where such an approach could be effectively tolerated by members of the international society. For example, after the colonies in Africa gained independence, the repression of certain ethnic groups—particularly those that comprised the majority in the newly independent nations—became politically difficult and in the end impossible for any country in the world.¹⁴ As early as the 1960s, world public opinion and the international society took a critical position towards the lack of civil rights of people of African-American descent in the United States, a development that may have been unavoidable due to the fact that independent nations where the majority of the population was of similar ethnic heritage had come into existence.¹⁵

One can also contrast this situation with the provisions of the Charter intended to protect the equality of the sexes and the right to marry freely. There are no countries where the population is all-female or all-male¹⁶ and there exist no countries that would have been established on the idea or ideology of freedom of marriage. Therefore, protecting those human rights on the international arena will unavoidably prove more difficult than making successfully implementable provisions for

¹¹Cf. the conclusion of *Merón* 2000, p. 278, with regard to the discrepancy between humanitarian norms and reality and the need for a common system of values: “Public opinion and the social consensus that have proved so effective in the development of the law should be geared to transforming practice as well. For that, the creation of a culture of values is indispensable.”

¹²See e.g. Ignatieff 2001, p. 6.

¹³The United States may be one of the few countries *originally* founded on a *political idea* instead of ethnic or historical concepts. In any case, see e.g. *Douzinas* 2000, p. 131: “Nations owe their legitimacy to myths of origin, narratives of victory and defeat, borders and imagined or real historical continuities but not to humanity.”

¹⁴Furthermore, as both Cold War-era superpowers wanted to gain a foothold in the Third World, they wished to establish good relations with those states—something that required the adoption of new doctrines of equality.

¹⁵This is also demonstrated in the apparent fact that the fall of apartheid in South Africa may have been unavoidable in the long term—something that was understood within the leadership of the country as well. See e.g. *Mandela* 1994/1995, p. 660.

¹⁶With the notable exception of the Holy See (i.e., the Vatican), which wields considerable influence.

the equality of different human “races.”¹⁷ It is difficult to see how the international order could function efficiently or effectively if racism was permitted and openly accepted in the current framework of international law. African nations and other nations that have been afflicted by the idea that certain ethnic groups are inherently inferior to others would be extremely reluctant to participate in a system that denied the rights of the people they represent.¹⁸

On the other hand, it must be noted that the *efficiency* of a system does nothing to make it morally justifiable from the perspective of a given set of moral standards. To take an example from a state-internal level, Singapore is a highly efficient industrialized society with a low crime rate even though the policies of the Singaporean government do not correspond to a European view of human rights or democracy. Such examples illustrate the fact that concepts of “efficiency” are not necessarily universal. Nevertheless, the present writer is of the opinion that the goal of effectiveness—i.e., the ability to function in the first place—must be kept separate from the concept of efficiency, and it is *effectiveness* that is a necessary feature and reflects a kind of “common interest” in the system of international law.¹⁹

As the moral universality of human rights has been challenged on many grounds—e.g., on the basis of cultural relativism, feminist criticism and numerous or even innumerable others—considerations such as the ones expressed above might help define the applicability of the language of human rights more clearly. After all, as *Ignatieff* points out, the vocabulary of human rights led to the colonial and civil rights revolution.²⁰ Of course, it could be argued that it was not (only) the language and philosophy of human rights as stipulated in the Charter but the social and political realities of the postwar era that set in motion the process of decolonization and the civil rights revolution in the West. However, these two things cannot be detached from each other: human rights are an inseparable facet of the post-1945 international reality. In other words, the fact that rights language was codified and given a kind of an “official” position in the Charter and in other sources was something that did not happen in a vacuum; it was only a manifesta-

¹⁷Interestingly, “racism” is a meaningful concept in spite of—or possibly because of—the fact that races are nowadays usually understood to be a social construction.

¹⁸The former colonies gaining independence may be seen as an *empowering* chain of events from the point of view of the peoples those nations represent; furthermore, it can be argued that the Western civil rights revolution might not have taken place if the colonial revolution hadn’t transpired.

¹⁹When a distinction is made between *effectiveness* and *efficiency*, the first may be used as in “an effective normative system” as per *Kelsen*, the latter as in “economically efficient” as per *Pareto*.

²⁰Ignatieff 2001, p. 6.

tion of the outrage created by the atrocities of the Second World War. One could even put forward the thesis that this development might have been more or less inevitable—i.e., human rights *had* to come into existence due to the events that had transpired and due to the impending end of the colonial era.²¹

Nevertheless, claims that human rights are necessarily a Western—or Eurocentric—creation and an expression of individualistic Western values can only be said to have intensified in recent years.²² *Leino-Sandberg* has looked at the problem of the universality vs. particularity of human rights especially from a European point of view, which illustrates this criticism very visibly.²³ A precise definition of “Europe” is an impossible task and recent attempts at formulating a tangible description of “Europeanness” have been more cultural than geographical.²⁴ It appears that human rights language is portrayed as being at the core of being “European” while that same ideology is also presented as universal.²⁵ Different solutions have been suggested for this dilemma, and it is more or less overt that the most common solution is to convey an image of human rights being a European—or Western—responsibility,²⁶ i.e., a type of “white man’s burden.” This argument thus assumes that human rights are truly universal—that is, it is Europeans who simply happened to discover them first and it is Europeans or Westerners who are

²¹For example, Ignatieff notes that human rights as defined in the Universal Declaration of Human Rights were “not an expression of European imperial self-confidence but a war-weary generation’s reflection on European nihilism and its consequences.” Ignatieff 2001, p. 4. Thus, human rights could also be interpreted as a result of the Western *fatigue* with warfare. Note that the statement here that human rights “had” to come into existence is not meant to imply that a deterministic view of history needs to be adhered to: instead, the point is that such a development may have been more likely than some would assume.

²²A number of commentators have made reference to *Pollis—Schwab* 1979, considered by some to be a seminal example of this type of criticism. Unfortunately, the present writer has been unable to examine the original reference; thus, its influence and content shall not be discussed here in further detail.

²³*Leino-Sandberg* 2005.

²⁴Cf. *Leino-Sandberg* 2005, p. 40–41. Problems involved with defining “Europe” include the distinction between Western and Eastern Europe and the “Eastern border” of Europe—furthermore, with the enlargement of the EU, questions of the “Europeanness” of Turkey have come to the fore. *Leino-Sandberg* 2005, p. 41, notes that “[d]efining Europe with reference to *common values* [...] followed more closely political than geographical borders” (emphasis here).

²⁵*Leino-Sandberg* 2005, p. 45–47. According to *Leino-Sandberg*, p. 46, “the particular (the EU) invokes the universal language mainly in order to promote its own objectives.”

²⁶*Leino-Sandberg* 2005, p. 41, where it is pointed out that in 1986, the EC member states adopted a statement on human rights, emphasizing “their special responsibility as Europeans”—a view that has only intensified in recent years. According to *Leino-Sandberg*, these concepts are often used for political ends. Cf. *Douzinas* 2000, p. 125: “the official political purpose behind the “agenda” was to present a rosy European picture, to link aid and trade to Western human rights priorities and to give European representatives in international bodies something to say, as one delegate put it, when Europe was (justifiably allegedly) criticising others for human rights violations and was (unjustifiably) attacked in return for applying double standards.”

to carry on a proselytizing or enforcing mission in the rest of the world or at least within the Western sphere of influence.

However, it is surprisingly rarely that the question of the *empirical* vs. *moral* universality of rights is explicitly discussed. From the occasionally implied empirical viewpoint, human rights are to be defined as something that is “already” universal—that is, as rights the defining feature of which is that they are—and by implication, have been—applicable anywhere and at any time in all societies. Instead of “Are human rights universal?” the question to be posed would thus be “What rights can be considered universal?” This position carries the presupposition that human rights are not (only) seen as a goal that one should strive for but as a set of rules to be determined through an empirical endeavor.

The question of the empirical universality of rights is a perspective that highlights one of the major problems with the Declaration and human rights discourse in general: how can a declaration that prohibits certain actions and calls for equivalent rights for all people(s) purport to be “universal,” if the very reason for its drafting has been the fact that those rights have been (consistently or even *universally*) violated in the past? In other words, if the purpose of the Declaration was to prevent certain violations of certain putative rights from transpiring as had happened in the past, how can those rights be termed “universal?” To rephrase this once more, it seems that the massive violations of human rights in the past and the present—and most likely in the future as well—make apparent that the universal nature of these rights is not related to their empirical universality in the present—instead, it appears that the supporters of human rights would like to see them as *empirical* universals in the *future*, as they consider them *moral* universals in the *present*. Douzinas states that the “empirical universality of human rights is not a normative principle.”²⁷ One should keep in mind that it is this relationship between moral and empirical universality that is precisely the issue: to take a banal example, how can torture be called universally immoral and therefore something that should be banned, if it is a practice that has been taking place since time immemorial around the globe? Such statements appear to conform to an extreme version of *Hume’s Guillotine*:²⁸ not only is it considered inappropriate to deduce what *ought* from what *is*, but what *ought* is in fact decreed to be the diametrical opposite of what *is*.

²⁷Douzinas 2000, p. 117.

²⁸According to Hume’s Guillotine, one cannot directly deduce moral rules from empirical facts. The maxim was originally put forward by Hume in 1739 under the rubric “Moral Distinctions not Deriv’d from Reason.” See Hume 1739/1978.

The above-considered line of argumentation appears to serve as evidence of human rights being a doctrine that is more culturally specific than many would concede. Claiming that Europeans simply “came up” with these universal human rights “first”²⁹ is not a convincing argument. Were human rights akin to the physical laws of nature or the rules of mathematics, simply existing “somewhere out there” waiting to be discovered (if we suppose that these are things that are truly universal; some do not agree with this, but the present author is definitely not one of them),³⁰ then the argument of human rights being “discovered” by the West would be quite a valid one. However, the considerations above—and the historical background of the Universal Declaration of Human Rights—demonstrate that human rights language and doctrines should be seen as normative universals, i.e., something that somebody *wishes* to see as universal, not something that is universal from a more objective standpoint. Therefore, the argument of “white man’s burden,”³¹ which seems to be more prevalent in European thinking than would initially appear, at least in the background if not on the surface, is one that does not hold water. Even though this is a relatively straightforward counter-argument, the problematic assumption can still be seen “between the lines” in many positions that have been presented on the universality of human rights.

If one does opt to define human rights through what is truly “universal,” one cannot expect to end up with a list of rights that has more than a few select items. It is extremely unlikely, for example, that the equality of the sexes or the right to marry freely would be found on such a list of “true” empirical universals. What one *could* perhaps find on that list would be the prohibition of genocide. Even though it is true that genocide has been committed in the past with unfortunate frequency, it is quite difficult to imagine a cultural, ethnic or political group or a nation that would officially voice its support for genocidal policies or defend the idea of genocide on the international arena. Nazi Germany and the Soviet Union under Stalin did not publicly proclaim to be following policies of genocide, most likely because of the international outrage and universal condemnation that it would have caused.³² Similarly, the atrocities that have taken place in the former Yugoslavia in the 1990s—as in the Kosovo case—have often been denied by the alleged perpetrators and their supporters. Of course, the fact that genocide is

²⁹Cf. Leino-Sandberg 2005, p. 40–47.

³⁰Certain writers in the fields of philosophy and sociology of science appear to have denied the existence of an objective “reality” that is “waiting to be discovered”—an approach that seems to have seeped through to other fields as well and appears to be quite widespread today.

³¹Cf. e.g. Leino-Sandberg 2005, p. 43.

³²Evidence of the outrage caused by such atrocities can be seen in the eagerness to deny the historicity of the Holocaust in certain circles.

something that no nation, state or group wants to support officially may be attributable to the fact that it is a rule that can turn against that nation or group itself.³³ Nevertheless, it seems that the prohibition of genocide would be on the list of “universal universals,” if such a list were to be compiled.

Concluding observation. Human rights doctrines can be motivated through certain universal requirements—namely, the common interest of the world community and the ability of the international system to function effectively. Still, the *extent* and *content* of human rights is far from being universally agreed upon, let alone implemented, when examined in historical-empirical terms. This fact, however, does not lead to all rules being particularist: specifically, the universality of the prohibition of genocide is rather difficult to argue against. Nevertheless, arguments of universal human rights having been “discovered” by the West—which would give certain credence to the notion of the West being in the moral position of a championer or enforcer of those rights—can be considered untenable.

2.2 Human Rights: (A) Pretty Universal?

The question of whether human rights are universal is a problem that is connected to the question of the apparent *goals* of the proponents of rights doctrines and the *effects* of rights advocacy and humanitarian interventions. Are human rights promoted by the West so that the living conditions of people in developing nations and around the world could be improved, or are they a fiendish ploy to re-establish Western hegemony and imperialism in the Third World, or something in between? History has shown that hegemonic actors on the world arena often justify their actions either implicitly or explicitly in terms of universality, that is, purporting to represent a universal ‘pacifying’ force (cf. *pax romana*); the problem is, therefore, to what extent this problem is apparent in modern doctrines of human rights and humanitarian intervention.

According to *Charlesworth & Chinkin*, human rights are a product of the post-WWII international legal order and have developed mainly from the values of Western, Judeo-Christian morality—in other words, human rights doctrines appear to be a particularist enterprise as discussed in the previous section.³⁴ This is a criticism

³³In other words, if a nation contended that genocidal policies are acceptable, it would be difficult for it to put forward arguments condemning such policies if they were to be directed against that nation itself in the future. Cf. the peremptory norm of self-defense discussed below on p. 42 of this study.

³⁴Charlesworth—Chinkin 2000, p. 201–202.

that is often echoed elsewhere: the argument is that the Charter system was a tool central to legitimizing the post-war order, as is stated by Douzinas,³⁵ and that human rights, along with the use of force doctrines that emphasized sovereignty, were in that process designed to serve the agendas of the major powers. This argument does carry a certain degree of validity. However, this writer is of the view that these problems are an unavoidable drawback of current human rights doctrines. It would appear that the atrocities of WWII created a “window of opportunity” where the international political situation, with a great war just having ended and with two major powers capable of effecting profound change in international law, was ripe for a shift—the establishment of a new system where not only was waging war restricted but where the new language of “universal” rights could be employed in the fundamental documents of that system. The fact that the Soviet Union participated in the drafting of the Declaration and the fact that representatives of other cultures took part as mentioned previously should be evidence of this initial “breakthrough” of human rights in international law not being an entirely Western creation, even though human rights language may very well have been invoked numerous times in support of arguably dubious actions taken by Western powers—a fact that may be at the root of the motivations of the critical stance held by Charlesworth, Chinkin and other critics.³⁶

Further challenges to the Western bias that the Declaration has been criticized for appear to come from the Islamic values argument, particularly with reference to marital rights, and the Asian values position, which emphasizes the communitarian nature of Asian cultures in contrast to the ostensibly individualistic nature of Western cultures and Western rights.³⁷ In particular, countries such as the People’s Republic of China and Singapore have maintained that their cultures place more emphasis on the maintenance of societal order instead of individual rights. These arguments follow the logic of cultural relativism: all, or at least some, cultural values are seen as being on equal footing from a moral-ethical standpoint, and the claim that some values are superior or at least preferable—and thus univer-

³⁵Douzinas 2000, p. 118.

³⁶However, it is interesting how Marxist thinking is usually portrayed as an antithesis to the West, even though it was (at least initially) an European idea, conceived by a German living in England, in response to European developments—and later championed by the Soviet Union, the Czarist predecessor of which has historically been considered a major European power. For example, Douzinas 2000, p. 123, points out that “[t]he social democratic component of the Declaration consisted in a number of economic, social and cultural rights which, according to *Cassese*, “considerably reduced the impact of *Western* ideas by securing approval for some fundamental postulates of the *Marxist* ideology.”” (emphasis added)

³⁷The present writer cannot resist the temptation to point out that opponents of the Asian values argument could dub that position the “Oriental Fallacy” in honor of the Italian author *Oriana Fallaci*, who has recently re-entered the public spotlight as a controversial critic of Islam.

sally enforceable—to others is thereby rejected. Moreover, the Islamic argument also emphasizes the *failure* of Western human rights to protect women from prostitution, pornography and other ills that those rights were designed to provide protection from. Thus, cultural arguments against human rights ideologies are not only based on arguments of cultural *relativism* but also on the *efficiency* of Western human rights thinking or the lack thereof in certain cases.³⁸

However, it is only natural that arguments of cultural relativism—or cultural *exceptionalism*, i.e., arguments of certain cultures having moral standards that take precedence over “universal” human rights—can also work in the opposite direction. On the one hand, enforcing the rights of women in Afghanistan would seem to be in conflict with traditional Islamic morals, but on the other hand, the prohibition of torture may sometimes appear to be secondary to the protection of public security in certain Western nations. The gist of these arguments appears to be that human rights doctrines fail to take into account the special cultural, historical, social and other circumstances in some societies. *Franck* provides several arguments against such exceptionalism.³⁹ Of particular interest is his assertion that human rights have enjoyed widespread acceptance in non-Western societies. In other words, the exceptionalist argument seems to be far from being *universally* or even widely accepted around the world.⁴⁰

As for the criticism that human rights doctrines can be used to further “imperialist” and other seemingly nefarious ends, it also holds true that relativist exceptionalism provides opportunities for abuse as well. Examples of this include, for example, the oppression of minorities or women in certain countries as well as the aforementioned rejection of the prohibition of torture. What apparently is common to all these arguments is the fact that they are the proverbial two-edged sword. While human rights ideology can be abused, so can its counter-ideologies. Moreover, those who appeal to exceptionalism are not necessarily those whose well-being is allegedly being protected by exceptionalism (cf. *Franck*⁴¹); in fact, it would seem that exceptionalist arguments lend themselves to abuse more easily than human rights arguments do. On the other hand, the definition of “abuse” necessarily presupposes a certain conception of morality: one cannot argue that the Taliban’s repression of women was an “abuse” of the idea of taking into account

³⁸Cf. discussion on efficiency and effectiveness above, p. 8.

³⁹*Franck* 2001.

⁴⁰See e.g. the Asian pro-rights contributions in *The East Asian Challenge for Human Rights*.

⁴¹*Franck* 2001, p. 196–197.

cultural differences unless one clings onto a wider definition of “repression” that applies outside the local culture.⁴²

Franck also argues that human rights culture is a product of recent developments that are *global* in character.⁴³ The revolutionary changes that have taken place in the past century, particularly the industrial and communication revolutions (among others mentioned by Franck), have brought about new situations where old morals and philosophies may no longer be valid—or, at least, additional ones (or at the very least, refinement and reappraisal of the old ones) may be required. Wars have always taken place throughout history, but it was only in the 20th Century that they turned into genocide on an unprecedented scale and into rapid, organized mass slaughter of entire ethnic groups. The reasons for this may be hard to deduce, but the assessment may be made that industrialization and the communication revolution played a major role in such developments. Such global changes and the “one world” that has resulted may necessitate the creation of new, global moral doctrines; cultural exceptionalism would be a step away from that direction.

Moreover, as Franck points out, it was in the West that these developments initially took place, but they weren’t caused by Western culture.⁴⁴ However, it might be appropriate to refine this statement a bit—these developments weren’t caused by Western culture *per se*, but they were set in motion by a relatively rapid series of events that were precipitated by Western culture, i.e., the development of mercantilism, capitalism, the Enlightenment and the technological revolution that followed, *et cetera*. Nevertheless, it is relatively easy to concur with Franck’s view that these arguments are “unlikely to carry weight [. . .] with those whose claim of cultural exceptionalism is only a flimsy disguise for totalitarian tendencies.”⁴⁵ Indeed, those parties are unlikely to be convinced by *any* arguments; for example, if one considers the Islamic rulers of Iran, arguments of cultural exceptionalism on their part are more likely to be an argumentative strategy through which their

⁴²Nevertheless, it must be stated that extreme relativism is unlikely to be considered a particularly convincing argument by many. For example, see Tesón 2003, p. 102–108 and p. 129: “[E]ven a cursory look at history unmasks non-intervention as the one doctrine whose origin, design, and effect is to protect established political power and render persons defenseless against the worst forms of human evil.”

⁴³Franck 2001, p. 198–201.

⁴⁴*Ibid.* The reasons for the fact that European nations—instead of other regions of the world—advanced so rapidly have been widely debated; one recent argument is made in Diamond 1997, where it is asserted that *geographical* factors were ultimately the deciding factor in the “rise of the West.”

⁴⁵Franck 2001, p. 202.

actions are justified to others rather than something that they employ to convince themselves of the justifiability of their policies.

Douzinas makes the shrewd observation that cultural relativism is potentially even more murderous than extreme universalism.⁴⁶ His statement that respect for cultural differences has often “turned into a shield protecting appalling local practices” rings true in an unfortunately relevant and timely manner. One only needs to look at places such as Iran with the abysmal situation with women’s rights and certain African nations with the practice of female genital mutilation to see some examples of relativist positions being used to justify actions that the global community would not tolerate if strict human rights standards were to be applied to countries outside the Western sphere of influence. Nevertheless, the relativistic viewpoint is not illogical in itself—but only when it is considered separate from the realities of the international arena. For example, there is nothing in female genital mutilation that would make it a universally abhorrent practice as such; outrage and condemnation only stems from a specific set of moral rules and cultural assumptions, and no matter how widespread that condemnation might be, issues such as the ban on female genital mutilation and women’s suffrage cannot be put in the same group of “universal” moral principles to which the prohibition of genocide would belong.⁴⁷ To put it another way, moral conceptions and values are not either universal or non-universal, but could be placed along a continuum between entirely particular and possibly completely universal principles accepted by all mankind. It could be argued that female genital mutilation is a practice that is not placeable at the extreme end of universality where it could be said to be universally condemned, as that is not the case. Nevertheless, in light of the examples above and with reference to Douzinas’ statement, it seems safe to state that cultural relativism is an argument that is easier to misuse or abuse—whichever definition of “abuse” is adopted—than moral universalism.

Still, one must appreciate the fact that a certain idea of morality necessarily presupposes a certain system of ethics and morals. For example, intervening at any price to stop atrocities in Kosovo may be ethical from the point of view of Western states, but it may be impossible to draw a line between advancing purely national

⁴⁶Douzinas 2000, p. 137.

⁴⁷Of course, the ban on female genital mutilation is something that the present writer strongly agrees with, but it is not a norm that would protect the existence of international society and its ability to function in the same way as the ban on genocide does; furthermore, if the present system of international law had been based on the legal cultures of societies where that practice has historically been widespread, there would undoubtedly be little unanimity with respect to the need to ban it.

interests—which is what China and Russia, it has been argued,⁴⁸ were doing in preventing the Security Council from approving the Kosovo operation—and following one’s moral and ethical principles (possibly in the form of “patriotism”) which could place national interests above other considerations. For example, the 1968 intervention in Czechoslovakia is one dangerous example of the Pandora’s box that the easing of the restrictions on intervention might open, and it serves as a good example here as well: from the point of view of Communist ethics, the Warsaw Pact intervention in 1968 would have been justified because it helped preserve the Socialist bloc, the original underlying philosophy of which was at least supposed to be to advance the living conditions of the disadvantaged people of the world.⁴⁹

To continue to employ the Czechoslovakia case as an example, it can be argued that such arguments in favor of the Warsaw Pact action are not swayed even by the fact that the Warsaw Pact failed to live up to its own principles: one could justify the operation by saying that cementing Soviet power in Eastern Europe was the underlying goal, and that this “nationalist” or “imperialist” ethic—*in itself* no more or no less justifiable and acceptable than any other system of ethics—had to be dressed up in the language of Socialist principles so that it would appear more justifiable to the world community. These examples illustrate that resort to ethical principles is necessarily equivalent to treading down a slippery slope: when one slides down into the world of ethical arguments, it is difficult to avoid ending up with an “anything goes” approach. A general “turn to ethics” in international law among those writers who are unwilling to stick to the strict letter of Charter law is a trend that is according to *Koskenniemi* part of a more general trend since the end of the Cold War and carries “profoundly conservative” implications.⁵⁰ Whether or not one agrees with this assessment, the pragmatic observation should be made here that there are problems of the most fundamental kind with the justification of positions of international law by way of strong moral or ethical arguments.

Moreover, criticism of universal human rights as a “set of moral trump cards” or a “world-wide secular religion,” which has been discussed by Ignatieff among others,⁵¹ is quite valid indeed. In the opinion of the present author, the possibility of “religionness”⁵² is exactly the danger with trying to promote human rights as all-encompassing “super-arguments.” When human rights are removed from the

⁴⁸See the reference to Hannikainen on p. 54 of the present study.

⁴⁹See also p. 74 of the present study.

⁵⁰Koskenniemi 2002, p. 160.

⁵¹Ignatieff 2001, p. 21 and 75, *inter alia*.

⁵²That is, of being religion-like (cf. ‘religiousness’ or even ‘religiosity.’)

realm of politics⁵³ and become a religion of sorts that requires no justification and can by itself be used to justify more or less anything, they can become either a tool of apologism for the use of force by powerful nations or simply meaningless wordplay that is ignored by the world at large.

Additionally, the problem with treating human rights as “moral trump cards” or the ultimate overarching moral system that stands above everything else is that it exacerbates the general problem of using doctrines of morality and religion as arguments. In other words, the problem is the fact that certain values and ideas are abstracted away into unquestionable, axiomatic “*Ur-principles*” whose validity cannot even be discussed or called into question. The Abrahamic religions—Judaism, Christianity and Islam—which had their genesis in the Middle East serve as excellent examples of this problem: certain moral principles—relating to food, sexuality and other areas of life—were set down thousands of years ago for sound reasons, namely, to maintain a society that functions (effectively), but because they were elevated into the sphere of religion, even today there exist groups of considerable influence that refuse to acknowledge that some of these principles might be antiquated and in need of revision.

To take an even more stereotypical example, the American Revolution resulted in the right to bear arms being promoted to the position of an inalienable civil liberty that is guaranteed in the United States Constitution, considered by some to be a “sacred document” which cannot be altered. Now that society is faced with changed circumstances, it would arguably be a reasonable course of action to alter or possibly even revoke the right to bear arms, but it is highly unrealistic to expect such reforms to be implementable today.

Such issues with the very concept of unalterable “moral trump cards” not only result in obsolete norms harming society in the future but also cause the erosion of the credibility of other norms in the same system. This is the very problem that human rights also face if they become a “religion,” that is, a set of unquestionable moral principles that are supposed to be held as universal, eternal and unchangeable. Furthermore, as Ignatieff points out, viewing human rights as a kind of secular religion or an object of “idolatry” can raise doubts among religious non-Westerners.⁵⁴ This is particularly true when one considers the Western his-

⁵³Ignatieff 2001, p. 21.

⁵⁴Ignatieff 2001, p. 53.

tory, if not necessarily the alleged Western content, of human rights ideologies.⁵⁵ In light of what has been stated above, Ignatieff's thesis of human rights gaining more credence if they were more political, i.e., if they were "a discourse for adjudication of conflicts" instead of an untouchable object of idolatry is something that is worth considering.⁵⁶

At this point, one needs reconsider the implications of the argument that the universality of human rights could be denied by asserting that human rights doctrines are a representation of Western *individualism*. The allegations of "individualism" are a feature that seems to be central to many cultural relativist criticisms of human rights. Along with genocide, the prohibition of racism and the ban on the oppression of ethnic groups are the most important tenets of human rights doctrines today, as has been discussed previously with regard to the effectiveness of the current system of international law. It is difficult to imagine an international society where peoples with different ethnic backgrounds could effectively cooperate if the equality of persons between those ethnic groups was not guaranteed at least in principle in the basic rules that the international community has defined for itself. What is important here is that it would seem that the most convincing arguments against racism—if the necessity of the ban on racism in international society is not accepted as an unquestionable *a priori* principle, as should not be done in the opinion of this writer—are *individualistic* in nature. It is difficult to find academic arguments in favor of racism today, and the entire issue appears moot from a modern point of view, even though related controversies are ongoing in many nations around the globe. Nevertheless, it seems that the main argument for racism, as absurd as an "argument for racism" may seem in the modern world, is an *anti-individualistic* one while the main argument against it is *individualistic* in character.⁵⁷

To elaborate upon this problem, it appears to the present writer that racism, ethnic segregation and similar practices lead to situations that can be considered unjust

⁵⁵It is the personal opinion of the present writer that human rights doctrines may be in danger of becoming the major "religion" to have its genesis in the West, and humanitarian advocates would thus be well advised to avoid making theology out of international law.

⁵⁶Ignatieff 2001, p. 20–21. According to Ignatieff, "it is an illusion to suppose that the function of human rights is to define a higher realm of shared moral values that will assist contending parties to find common ground [. . .] The larger illusion I want to criticize is the that human rights is above politics [. . .]"

⁵⁷See e.g. *Pinker* 2002, p. 145: "[T]he case against bigotry is not a factual claim that humans are biologically indistinguishable. It is a moral stance that condemns judging an individual according to the average traits of certain groups."

mainly from the point of view of the individual.⁵⁸ Due to historical, cultural and other reasons, different ethnic and cultural groups often have divergent levels of participation and varying levels of success in different societies. As is well known, one ethnic group may have integrated itself into society very well and attained a high level of education—for example, the “model minorities” consisting of people of East Asian and Jewish descent in North America. On the other hand, there may be ethnic groups that have, due to cultural or other factors, failed to fulfil the “expectations” of the majority population or the definition of “success” defined by the majority. One example of such a group would be the Roma people in Europe—and the unfortunate fact is that there is no shortage of examples. Discrimination against such groups may be one of the most prevalent forms of racism in modern society. The unjustness that such discrimination creates can be considered to be at the core of anti-racist arguments. However, that unjustness is primarily manifested at the *individual* level: if one wanted to justify such discrimination, one could put forward the argument that members of these cultural and ethnic groups are simply being treated in accordance with the societal position of their group. In other words, arguments in favor of discrimination are valid in a *collectivist* sense, while arguments against discrimination are valid in an *individualist* sense.⁵⁹

In light of the above, the following argument may be put forward: firstly, if the prohibition of ethnic discrimination is so deeply at the center of the international legal system that racism cannot be justified in any way within that system; secondly, if the prohibition in question is one of the few tenets of human rights that has universal acceptance internationally; and thirdly, if the rationale for that prohibition is based on individualistic principles; then, it must follow that individualistic arguments are universally acceptable. Therefore, criticism of the *individualism* of human rights cannot in itself invalidate the global applicability of rights doctrines on the international arena; however, this fact in itself does not in turn invalidate the criticism that has been leveled against human rights in general and humanitarian intervention in particular by commentators who adhere to the non-individualist viewpoint.

⁵⁸From this point of view, it is interesting to ponder the fact that while it would obviously be in violation of human rights ideology to provide certain persons with special rights based on their membership in a group, such as an ethnic or a social group, there is still nothing wrong with the idea of conferring rights on a group of individuals on the basis of them belonging to a biological group—namely, that of humans. In other words, the basic idea of human rights seems to be internally contradictory due to the fact that it is individualist and collectivist at the same time. What implications this might have on the fundamental justifiability of human rights is a provocative avenue of argumentation that may be best left unexplored.

⁵⁹Further evidence of this may be that *non-individualistic* East Asian societies have often been alleged to suffer from serious problems with racism—the ban on which is *individualistic*.

Concluding observation. Arguments against the universal character of human rights have been posited that are particularly persuasive with regard to the problems they identify in the particularity inherent in rights discourse and the alleged failure of rights doctrines to effectively protect certain groups. Nonetheless, it can be stated that exceptionalist and relativist arguments lend themselves to abuse more easily than the vocabulary of universal human rights does. Recent societal changes are global in character and require a new moral code—however, such doctrines should not be elevated to the status of a secular religion. The individualism of modern rights doctrines does not in itself nullify the possibility of their universal applicability, but it also does not render them impervious to criticism.

3 From Common Sense to Obsolescence

While accusations of particularity in human rights doctrines may at least to a certain extent be rejected in light of the arguments presented in the previous section, critiques of humanitarian intervention that are connected to relativist arguments cannot be ignored. One of the underlying assumptions—or claims—that can be perceived in such criticisms is that a vocabulary of universal rights makes the job easier for the “hegemon,” as it were, by portraying a favorable image of the interveners, endowing the users of military force with an aura of benevolence, and providing them with a guise of “universal” credibility. The argument is, therefore, that doctrines of universal human rights are utilized—either wittingly or unwittingly—as a tool to legitimize imperialism both past and present.

The most commonly cited examples of dubious military interventions being supported by the ostensibly humanitarian vernacular of rights may be the invasions of Grenada and Panama by the United States in 1983 and 1989, respectively, but even a fleeting glance at history makes it obvious that there has been no monopoly on justifying the maleficent use of military force through altruistic arguments.⁶⁰ Even though many post-Cold War interventions have not been subjected to critical appraisals as intense as those directed against the aforementioned examples, the theory and practice of humanitarian intervention has nevertheless aroused strong criticism from this perspective. In the following discussion, an example of such an intervention critique, with particular emphasis on the discrepancy between the emancipatory potential of rights and their purported dystopian reality, shall be examined in detail. However, these approaches are not unproblematic in themselves, and questions raised by them will serve as background when we return to a wider assessment of the question of the universality of rights and its connection to the positive and negative potential of humanitarian intervention.

3.1 A Critical Reproach of a Critical Approach

A passionate case for the contention that the recent practice and development of human rights and particularly the concept of humanitarian intervention is conservative and imperialist is made by *Orford* in her monograph *Reading Humanitarian*

⁶⁰See e.g. *Chesterman* 2001, p. 99–106, for discussion. For a positive assessment of the Grenada intervention, see *Tesón* 1997, p. 216–219.

Intervention.⁶¹ According to her, the mainstream schools of thought with regard to humanitarian intervention all disregard the imperial history—and present—that international law allegedly has. This *critical approach* which she employs and which draws from postmodern philosophy and feminist writings portrays the system of international law as a (neo)colonial enterprise.⁶² In other words, the present system is not an impartial or objective system for the adjudication of conflicts, working in a world where imperialism and colonialism are a thing of the past. Instead, international law carries a specific bias that supports neoimperialist practices while simultaneously conveying an image of itself as a neutral machinery of arbitration, a just system of law.⁶³

In the opinion of Orford, the use of force by powerful states against mostly third world nations in support of “civilized” principles such as human rights and humanitarianism is something that shares eerie and unsettling similarities with the so-called civilizing missions of the colonial era. According to this view, the decolonization process that supposedly took place during the Cold War did not in fact end imperialism at all but instead transformed overt imperialism into a form of economic subjugation and colonialism where the former colonial states—and others—are unequal actors without the same freedom of action on the international arena as powerful states possess. In Orford’s opinion, humanitarian intervention only serves to bolster that type of imperialism and the unjust international system instead of counteracting it.⁶⁴

Using the tools of postmodern philosophy, postcolonial theory and literary analysis, Orford utilizes a “productive misreading” of texts that support humanitarian intervention with the goal of scrutinizing the unsaid ideologies and principles behind the idea of intervention. She describes the narratives and stories of intervention as actually justifying imperialism in the same way as texts of the 19th Century—often supported by the women of the time—justified the imperialist practices of that era. Furthermore, Orford not only claims that pro-interventionist texts serve the ends of neocolonialism, but she also points out her observation that such texts can garner support for intervention by helping one to rid oneself of the feelings of helplessness and powerlessness that atrocities described in the media and supplanted with graphic imagery of humanitarian suffering may produce in

⁶¹Orford 2003.

⁶²See, in particular, Chapter 2 in Orford 2003, “Misreading the texts of international law.”

⁶³Orford 2003, p. 45–54.

⁶⁴*Ibid.* The underlying philosophy behind her approach is quite apparent in the following phrase: “[T]his world of subject-constitution through civilising mission, of Europe and its Others, is the world of humanitarian intervention.” Orford 2003, p. 64.

the mind of Westerners. She describes her own experiences with regard to the humanitarian catastrophe of East Timor and her attempts to reconcile her feelings of helplessness and of the need to “do something” with her fear of supporting imperialism through supporting the idea of intervention or the threat of the use of force in East Timor.⁶⁵

Moreover, Orford places emphasis on the causes of conflicts and the way in which texts supporting humanitarian intervention attempt to portray the international community as having played no part in creating the crises, even though the actual state of affairs is in her view the exact opposite. In Orford’s analysis, the heroic “White Knight,” i.e., the intervening nation or the intervening group of nations—for example NATO in the case of Kosovo—is a masculine subject-character that either “punishes” or “saves” the feminine “object,” i.e., the target state of intervention, ruled by a stereotypical “rogue dictator.”⁶⁶ The blame for the event is thus placed on the target state, and the role that the international community has had in creating the humanitarian crisis is thus ignored. Examples given by Orford of the problems that the actions of the international community have created include the crises in the former Yugoslavia. According to the sources she cites, the policies of the IMF and the World Bank in the 1980s contributed to the collapse of societal order in Yugoslavia and thus to the creation of ethnic tensions.⁶⁷ These problems are in Orford’s opinion glossed over or completely ignored in most of the literature on the Kosovo crisis; instead, emphasis is placed on stereotypical and even racist views of pre-modern ethnic hatred and ruthless dictators.⁶⁸

In spite of her criticism, Orford holds a supportive stance on human rights doctrines as such, which she considers to constitute an emancipatory and revolutionary tool, not something that should be used to justify military operations and economic neocolonialism.⁶⁹ The problem she appears to see is one of the international order and the “mainstream,” abusing the *language* of human rights and molding it to suit their militarist narratives and goals, thereby effectively silencing voices of dissent. In her opinion, the “mainstreaming” of human rights ideology takes away the subversive and emancipatory potential of the said doctrines.⁷⁰ This is a

⁶⁵Orford 2003, p. 14.

⁶⁶Orford 2003, p. 165–178.

⁶⁷Orford 2000, p. 87–96.

⁶⁸Orford 2003, p. 164.

⁶⁹On the possibilities that human rights make available, see e.g. the conclusion to Orford’s work: “Human rights may provide one basis for articulating the terms on which [a] new internationalism might be imagined.” Orford 2003, p. 219.

⁷⁰See e.g. Orford 2003, p. 202: “This institutionalised commitment to a narrow range of civil and political rights as the end of military and monetary intervention has shut out other opportunities for dissenting from the established order or achieving emancipatory ends.”

concern that is echoed by others, including Allott. According to Allott, the postwar democratization, institutionalization and legalization of the emerging universal values reflected in human rights actually “systematically corrupted” them.⁷¹ While there is some value to these views, they raise the question of whether one can even go about implementing an ideology without “corrupting” it in some way—is it not true that the “purity” of an abstract ideology, its very “idealness,” is the hallmark of the “idea” of ideology?⁷²

On a more general level, it is the opinion of the present writer that Orford’s work suffers from two serious flaws. First, the view she portrays of the mistakes made by the international community may be considered exaggerated, even though there is more than a kernel of truth to the critique she presents. The other flaw—the more serious one—is that many of Orford’s methodological choices, especially the use of feminist and literary theory and even allusions to psychoanalysis, serve to obscure the core of her argument and ultimately undermine the credibility of her claims regarding the actual problems she identifies.

The arguments presented by Orford in support of her view that humanitarian intervention can be used and indeed has been used to further imperialistic ends rather than humanitarian ones certainly have value. Even if military intervention is justified by the need for humanitarian action, it still presents ample opportunity for exploitation. Furthermore, even if the use of military force or the threat thereof is actually motivated by true humanitarian needs, which was arguably true in the case of East Timor and in Kosovo, the end result may still prove less than beneficial for the people whose lives intervention was intended to improve.

However, the present author considers Orford’s views too extreme, especially when one reads Orford’s text “between the lines” in the same way she attempts to do with pro-intervention texts. It appears that Orford is eager to place the blame on the “established international order,” “the West,” the international capitalist system or a similar scapegoat—to employ a slightly inappropriate term—no matter what the circumstances of a particular case might be. For example, while attempting to analyze whether her above-mentioned claims of neoliberal monetary policies supported by the international community in the 1980s being a major factor

⁷¹Allott 1999, p. 47. See also the reference to Allott on p. 5 of the present study.

⁷²Cf. p. 35 of this study on the similar views presented by Charlesworth and Chinkin. Orford does state that “it does not make sense to talk about separating representation from reality, or intellectual games from real political action,” but the implications of her work nevertheless point in another direction. Orford 2003, p. 53.

in the ethnic violence in the former Yugoslavia are correct are beyond the scope of the present work, it is the view of this writer that those claims are quite unrealistic.

Moreover, it may not be appropriate to consider the Kosovo war an example of Western imperialism when the countries targeted in that intervention were European, or to talk of “racialised” narratives of humanitarian intervention if the targets of intervention were geographically located next to Italy and Greece. If NATO carries out a bombing campaign in Kosovo, to what extent does it make sense to discuss the “re-establish[ment of] racist cultural boundaries?”⁷³ *Sands* notes that while the notion of “unilateral” action is flexible, the contentiousness of “unilateral” acts is apparent in cases where one community could be seen as imposing its values on another community.⁷⁴ From the point of view of the Kosovo intervention, the question can thus be posed whether NATO was “imposing” modern European values on the communities of the Balkans. Obviously, the nations of the Balkans are undeniably quite “European” in any sense of the word. The most European of all wars, World War I, was triggered by events in the Balkans, and the area has originally been the European “us” to the Asian or Muslim “them”—or “the Other” to use the Beauvoirian term—on the opposite side of the Aegean Sea.⁷⁵ It is interesting that it was the opposition of China and Russia—two countries that can be argued to be outside the *European* system of values, at least today—that kept NATO from receiving Security Council approval. Thus, it would be illogical to consider the NATO action a unilateral one where cultural values—in this case, human rights—are imposed on another community in an “imperial” or “colonialist” manner.

In more general terms, the present writer would argue that Orford’s mode of thinking more or less forces her to view all ethnic violence and all humanitarian crises as something created by either the international régime of free trade or Western imperialism in general. Orford writes of her initial confusion regarding the East Timor crisis and describes the “strange” feeling it invoked.⁷⁶ In that conflict, violence was taking place between non-Western peoples and the West initially played little or no part in the crisis⁷⁷—and the situation was such that if there was to be a way to stop that violence, it would in all likelihood have to be through the use

⁷³Orford 2003, p. 190.

⁷⁴Sands 2000, p. 292–293: “Unilateralism in the international context is intrinsically linked to sovereignty, territory and jurisdiction.”

⁷⁵Cf. the cultural-political position of Turkey on p. 9 of the present study.

⁷⁶See the introduction to Orford 2003, e.g., p. 1–2.

⁷⁷However, it must be noted that the United States and Britain have been accused of involvement in training the Indonesian military, which committed atrocities in East Timor. See, for example, Douzinas 2000, p. 127.

or the threat of Western military force, which is what did transpire. The thought of Australian involvement in the Vietnam War decades earlier was so dominant in Orford's mind that it had become nigh impossible for her to think of Australian forces as anything but potential imperialist oppressors—a fact that is distinguishable from Orford's text in a relatively straightforward manner.⁷⁸

Thus, the problem in Orford's approach appears to be that the underlying *Weltanschauung* is so inextricably tied to the idea of the West always being the oppressor and the aggressor; in other words, the confusion Orford experienced may have stemmed from the fact that real-life events did not match that idealized and stereotyped view of the world. In Orford's previous writings, there is strong criticism of increasing militarism, particularly with regard to the military influence of the West around the globe.⁷⁹ What seems to have been the cause for surprise for Orford and made the case of East Timor feel “strange” to her was the fact that her methodological starting point and theoretical basis wasn't easy to reconcile with reality when world events seemed to make it obsolete—or, at the very least, it wasn't as all-encompassing as it might have appeared before the East Timor crisis.

It would seem that the credibility of the valid points Orford does make are negatively affected by her unwillingness to budge from the initial feminist-deconstructionist viewpoint. Though this may be a vulgar formulation, the assumption in Orford's commentary seems to be that most, if not all, of the evils of the world can be traced to Western imperialism and militarism, and events which fail to match that view are explained and reinterpreted so that the original assumptions still hold. Instead of the adjustment of their views to the facts, the tendency of the proponents of such approaches appears to be to adjust the facts to their views.

An example of Orford's arguably extreme positions is the surprising juxtaposition of IMF policies and genocide in East Timor.⁸⁰ While it is certainly true that intervention may also have less than desirable effects, Orford implies that the implementation of IMF and World Bank policies is somehow no more desirable than violence being committed against civilians by Indonesian troops, even though she does concede that her view was extreme and insinuates that she may no longer hold that view. Nevertheless, Orford calls both options “symptoms of global capitalism,” which in the view of the present writer demonstrates that the approach

⁷⁸Orford 2003, p. 8–16.

⁷⁹See e.g. Orford 1999.

⁸⁰Orford 2003, p. 87–96 and p. 134–140.

employed places undue emphasis on the reinterpretation of facts so that they are merely used to reinforce the political and methodological assumptions adopted.⁸¹

As stated above, it seems that the more or less extreme positions Orford propounds only undermine her factual arguments which are valid more often than not. For example, she quite accurately states that supporting intervention in East Timor, even for humanitarian purposes, could increase the legitimacy of militarism and increase the probability of humanitarianism being used to further imperialistic ends. However, Orford tends to take her approach too far, as the overriding logic throughout her contribution appears to be that all military action by the West must be condemned lest we provide support for imperialism and neocolonialism.

The theoretical basis of Orford's work is another matter that the present writer finds fault with, especially with regard to the concrete manifestations of the approach she employs. Orford's arguments regarding the actions of the international community and particularly the actions of the West appear circular or even solipsist, and these fundamental flaws of her theory are obscured beneath a façade of feminist theory and literary analysis. For example, Orford criticises international law for requiring new members of the international community such as East Timor to fulfil "what the spirit of international law requires" and for requiring them to mold themselves in accordance with the "idealised self-image of European sovereign peoples."⁸² However, if the present international order is built on a European idea of sovereign states, that is what East Timor necessarily has to conform to if it is to be independent within that order. It is a completely valid line of reasoning to assert that the international community should be different from what it currently is; however, the type of argument used by Orford appears to be applicable no matter what the international community is like.

A further drawback of Orford's feminist-postcolonial approach is that it is used to state self-evident facts or simple propositions about the world in language that makes those facts and propositions appear novel: for example, the old notion of "winners writing history" has been dressed up in the sesquipedalian vernacular of literary theory: now, "dominant" "narratives" and "stories" allegedly "constitute" the "self" of the international community to "facilitate empire" and justify colonialism. The facts behind these statements may very well be true and many of

⁸¹Orford 2003, p. 29.

⁸²Orford 2003, p. 27–28.

the points made may indeed be valid, but the methodological tools used do more harm than they do good for the cause that Orford is attempting to further.⁸³

It is the aforementioned tendency to reinterpret facts to fit the theory instead of readjusting theory to fit the facts that the present writer considers the most devastating to the credibility of Orford's valid observations. If human rights discourse is defined as something revolutionary and a tool of dissent, does it not follow that it is impossible for any nation—at least for any Western nation—to abide by the principles of human rights without being accused of distorting them to serve imperialistic ends? Such definitions of human rights appear to be designed solely to keep “powerful states” (namely, Western democracies) on the opposing side of the argument. Tactics such as these are closely related to the strategy through which certain commentators seek to explain any potentially benevolent actions that the West may embark upon as being motivated by selfish ends. If the “established order” is willing to support the cause of human rights, it is interpreted as a plot to recolonize the Third World through humanitarian intervention; if the West is critical of its own actions during the colonial period or actively participates in the creation of human rights treaties, it is seen as a selfish act of cleansing the conscience of the former colonial powers; *et cetera*.

Similarly, questioning the objectivity of the international legal order and highlighting any bias that may be built into the supposedly impartial system of international law is a perfectly acceptable point, but what is offered as an alternative? Is it a system that is truly objective or something that is even more “political?” This approach calls into question whether one can even write about international law without being political or subjective. Denying the objectivity of Enlightenment-influenced legal writing of the liberal tradition and attempting to replace it with something that is even *less* objective seems to be a defining feature of the critical “genre,” at least of its more extreme forms.⁸⁴ If certain approaches are subjective, it does not mean that all are equal, and Orford fails to provide justification for why her feminist reading of the texts of international law is superior to “main-

⁸³To employ similar language, a critic of Orford's might state that there is a “hidden subtext” of obfuscation in the “story” that Orford wants to tell. Furthermore, utilizing a relatively straightforward *linguistic* perspective with regard to her writings—an approach that is not unlike that employed by adherents of deconstructionist analysis themselves—shows that passages such as those describing the “ruthlessness of NATO member states” (Orford 2003, p. 169) may prompt the question of whether Orford's method may be accused of being disproportionately political and subjective.

⁸⁴With regard to the deconstructionist analysis of law, see e.g. *Amaya-Castro—El Menyawi* 2005, where its present status and future prospects are discussed (in fact, literally *discussed*.)

stream” views of law. Perhaps such justification exists—however, in the opinion of the present writer, it is not to be found in Orford’s work.

In general, it must be noted that analyzing the texts of international law—or any other texts—can help one glean information on the reality that those texts reflect. However, overemphasis on textual analysis can actually misfocus the discourse and drive attention away from more urgent issues. For example, what is one to make of the following statement by Orford:

Intervention texts can thus be read as a response to this threat, an attempt simultaneously to locate and thus distance the colonised from the coloniser.⁸⁵

Such deconstructionist “misreading” of the texts of international law seems quite unrealistic. To put it simply, the question is whether the above is an accurate description of how pro-intervention writers “parse” the world—whether they truly attempt to “locate and thus distance the colonised from the coloniser.” While law is based on language and text and thus lends itself more readily to textual analysis than many other fields of study, the route of such approaches is one that we should tread with caution. The present writer would find it quite surprising if interpretations such as the one quoted above were accurate reflections of the mental processes of pro-intervention writers instead of reflections of the mental processes of those who attempt to deconstruct their texts.

As stated, there are more than a few valuable points put forward by Orford, even though the appropriate criticism is obscured by an unflinching devotion to inappropriate methodological tools. To contrast recent events, the Iraq war of 2003 served as an example of the dangers of human rights doctrines being abused by powerful states in the position of a—or the—hegemon.⁸⁶ Even though the main rationale given for the invasion was the alleged threat of weapons of mass destruction, arguments about human rights and democracy were also used as justification. This lends some credibility to the argument put forward by Orford: she strongly implies that there did not necessarily exist a human rights era to begin with, as

⁸⁵Orford 2003, p. 125.

⁸⁶*Glennon* considers the implications of the possibility of a new system with “few hard and fast rules” coming into existence as a result of the Kosovo intervention. Glennon 1999, p. 2 and p. 4–6. Even though that arguably did not take place, Glennon’s commentary (with his description of the Kosovo interveners “effectively abandon[ing] the old U.N.”) viewed against recent events highlights the possibility that there might not have been that many hard and fast rules to begin with.

human rights haven't been on the agenda of the United Nations for a long time, if they ever were.⁸⁷ Even though this writer would not necessarily subscribe to such a point of view, it appears that arguments of the ever-increasing influence of human rights doctrines has been somewhat exaggerated—taking into consideration the political realities of the world arena and particularly the increasing influence and power of the People's Republic of China. In light of these facts and of a critical yet open-minded assessment of Orford's contribution, it may very well be that the *language* of rights is being used increasingly often, but the *practice* of human rights is something that may actually be regressing.

Concluding observation. A closer examination of a feminist-deconstructionist critique of humanitarian intervention and human rights discourse uncovers the flaws apparent in many such approaches: the philosophical, methodological and ideological underpinnings often gain the upper hand in the critique so that they obscure the valuable points made and may even render the contributions counterproductive. Nonetheless, Orford's analysis successfully highlights certain problematic aspects of humanitarian intervention which should not be ignored; in particular, the possible connection between the language of human rights and the perpetuation of that which Orford calls hegemony should not escape one's attention.

3.2 Universality: Purity of Essence or Peace on Earth?

Even though the methodological background of some analyses of the problems associated with humanitarian intervention can be subjected to a skeptical examination, the criticisms presented in them highlight the past failures and the future implications of the use of force that is in violation of the Charter but is carried out in the name of a humanitarian "just cause." Events such as the aforementioned Iraq war may once again call into question the future prospects of the present system of international law. It would be far-fetched to predict an end to the current Charter system or even a major change to how the United Nations functions,⁸⁸ but it seems that the exuberant hopes of the early 1990s of the U.N. gaining a stronger role in international affairs and a more just "New World Order" emerging in the wake of

⁸⁷Orford 2003, p. 187–203 and p. 201–202 in particular.

⁸⁸The difficulties involved with the efforts to reform the U.N. are well known (see p. 69 of the present study). The fact that major changes to the Charter system are not in sight may have to do with the fact that the post-WWII situation in 1945 was indeed a historical "window of opportunity" to reform the system of international affairs—one which had not been seen in the past and may not be seen in the near future, if ever. Cf. p. 13 of the present study.

the Decade of International Law do not seem realistic any more.⁸⁹ Even though human rights are being debated on the international arena with increasing intensity, it does not appear that the humanitarian situation is improving—particularly with the actions of certain parties that have showed a willingness to leverage their positions as global or regional hegemony through the United Nations system rather than to cooperate for a more “just” world (assuming that the definition of “just” does not encompass notions where hegemony is a necessary feature of justness.)

As *Falk* points out, the relevance or obsolescence of international law is now a matter of controversy.⁹⁰ In *Falk*’s opinion, the case of the war in Iraq highlighted the problems inherent in just war doctrines. In light of the views presented above, it does appear quite obvious that those doctrines do not necessarily lead to a more just world. The shift from justifying the Iraq intervention by the need to prevent the proliferation and use of weapons of mass destruction to doing so by way of arguments of “liberation” is something that in *Falk*’s opinion makes the limits of the just war approach evident. Still, *Falk* emphasizes the need to retain a way of dealing with humanitarian crises so that there remains a high threshold for the use of force—possibly by reforming the United Nations. In other words, he wants to keep open the option of waging war for humanitarian purposes as a *last resort*. This conclusion is quite unsurprising when one considers the political realities of the world today, but implementing any reforms will undoubtedly prove difficult.⁹¹ *Falk* recognizes this and states that the utopianism of such endeavors is still preferable to the dystopian world that a blank slate to use force would entail.⁹²

However, the dystopian world that we arguably live in already, a world where humanitarian crises cannot be adequately addressed, seems to be the most likely one for the near future. The recent crisis in Darfur has, as discussed by *Straus*, demonstrated the unwillingness or at least the ineffectiveness or inability of the international community to stop humanitarian catastrophes that are caused by state-sponsored policies of persecution, even if there are strong (although far from unanimous) calls to term such policies genocide—something that has been quite

⁸⁹Discussion of a “New World Order” with more emphasis on the rule of law instead of a “law of the jungle” was limited to the late 1980s and early 1990s. See e.g. *Bedjaoui* 1994, where the possibility of a more stringent legal control of the Security Council is considered in light of those developments—concerns that no longer appear to be particularly relevant.

⁹⁰*Falk* 2004.

⁹¹Analyzing the benefits and drawbacks of “the new U.N.” is destined to remain in the realm of the theoretical: for the foreseeable future, making even minor adjustments to the current system seems woefully difficult, and instituting any larger reforms is bound to be essentially impossible.

⁹²*Falk* 2004, p. 45.

exceptional in the past.⁹³ In the end, the effect that calling an ongoing catastrophe “genocide” has does appear relatively insignificant. *Douzinis* is among those who consider genocide to be the “greatest threat to peace” there is,⁹⁴ but it seems that such formulations are ultimately destined to have the same status as opposing views: that of a rhetorical device or strategy of argumentation. Regardless of whether the Darfur crisis can be considered genocide—in the opinion of Straus, it boils down to the definition of genocide⁹⁵—and regardless of whether genocide is considered the greatest threat to peace imaginable, the fact that the events taking place in Darfur constitute a large-scale man-made humanitarian catastrophe and the fact that the international community has failed to take adequate measures to put an end to them leads the present writer to conclude that genocide which does not transcend boundaries and takes place outside the immediate sphere of Western influence is not widely considered a “threat to the peace.”

If genocide *as such* did present the greatest threat to peace imaginable, the response from the international community to the Darfur crisis would surely have been one of different proportions. Above, it was argued that the ban on genocide is one of the truly universally accepted (international) moral and ethical norms. If flagrant violations of such a universal norm—or atrocities that at least *approach* that definition—do not spark widespread condemnation around the world, there seems to be little choice except to yield to the dystopian conclusion that morals and ethics play little or no part in international affairs today.

Here it may be interesting to consider some feminist critiques with regard to humanitarian intervention, mentioned in the discussion on Orford above. *Charlesworth* and *Chinkin* contend that women’s experiences and concerns have not been taken into account in international discourse, leading to an inadequate and narrow system of public international law.⁹⁶ In particular, human rights doctrines do not adequately reflect the needs of women. According to Charlesworth and Chinkin, the problems that plague rights discourse include: that the language of rights is individualistic and unable to echo the concerns of women; that human rights doctrines oversimplify complex power relations in (international) society;

⁹³Straus 2005, p. 131–133: “The genocide debate and the Darfur crisis [...] have made it clear that “genocide” is not a magic word that triggers intervention.”

⁹⁴Douzinis 2000, p. 139–140.

⁹⁵Straus 2005, p. 132: “[T]he violence in Darfur does appear to be genocide” if one uses standards under which the Srebrenica massacre can be considered genocide; however, Straus points out that “[f]or many observers, however, genocide is something else: a campaign designed to physically eliminate a group under a government’s control” and that “both [definitions] are defensible.”

⁹⁶Charlesworth—Chinkin 2000.

and that some rights can in fact be used to serve as justification for the oppression of women.⁹⁷

As with the views put forward by Orford, the critique presented by Charlesworth and Chinkin raises numerous valid points. However, such concerns are not limited to gender issues and the rights of women. In particular, the problems of the universality of rights and the abuse of human rights arguments for malevolent ends have been discussed previously. The nature of rights as a two-edged sword that can be used and abused to serve nefarious purposes is more or less pathological to rights discourse, as has been seen.⁹⁸ Similarly, the individualistic character of human rights language is to some degree unavoidable and something that is not necessarily an entirely negative aspect, due to the fact that (nearly) universal prohibitions such as the prohibition of racism can be argued to be based on individualistic principles, as argued earlier. Criticism of rights from a feminist perspective, exemplified particularly well in the writings of Orford, Charlesworth and Chinkin among others, can ultimately be traced to the aforementioned general criticisms and counter-criticisms.

However, there are certain aspects of feminist critique that warrant further commentary in addition to what was stated above in the discussion on Orford's writings. Charlesworth and Chinkin draw interesting juxtapositions between feminist critiques and cultural / relativist critiques of human rights law.⁹⁹ According to their view, those two strands of critique are parallel in nature. The different positions women have in different cultures, the fact that human rights law is based on the Western assumption of a free and independent woman and the fact that the idea of individual rights has "little resonance" in many cultures leads to practical problems. According to them, the idea of human rights may not necessarily be useful from this perspective and may even be detrimental from the point of view of empowering women and enhancing the quality of their life.

There are other parallels that the present author discerns between the approaches of Orford on the one hand and Charlesworth & Chinkin on the other. Charlesworth and Chinkin contend that one of the general problems of human rights doctrines from the point of view of women is the alleged fact that a specialized "women's" branch of human rights law has resulted in its marginalization.¹⁰⁰ One can actually

⁹⁷Charlesworth—Chinkin 2000; see in particular "Inadequacies of human rights law for women," p. 218 onwards.

⁹⁸See p. 14 of the present study; however, as was discussed above, human rights language may not be as vulnerable to "abuse" as, for example, arguments of cultural relativism can.

⁹⁹Charlesworth—Chinkin 2000, p. 223, and p. 221–222.

¹⁰⁰Charlesworth—Chinkin 2000, p. 218.

interpret this criticism of “mainstreaming” as criticism of the failure of the *implementation* of these ideologies, or, to take the point a bit further, of the failure of these feminist ideologies to garner support in the form that their adherents would like to see. In other words, the blame should not necessarily be placed on the “mainstreaming” of those human rights doctrines; instead, the alleged marginalization of (women’s) human rights law could be seen as a result of the flawed premises of feminist ideologies or at least the failed manifestations or implementations of that ideology—at the very least, these are possibilities that seem to have been overlooked. For example, Charlesworth and Chinkin¹⁰¹ as well as Orford¹⁰² contend that women are not taken into account in the views that have been presented in favor of humanitarian intervention. It can hardly be contested that military intervention for humanitarian purposes has in many cases resulted in more humanitarian suffering and that women are often the hardest hit in such situations. However, it is difficult to see to what extent such developments can actually be blamed on the “mainstreaming” of human rights law, the increasing use of human rights discourse in international affairs and the creation of specialized branches of human rights law such as women’s rights.

Again, the underlying question is whether human rights language has only served to exacerbate human suffering or whether it has in fact helped prevent situations that would be even more regrettable from a humanitarian point of view. Whatever the answer—if an “objective” answer even exists—it is the opinion of this writer that while problems exist with the current doctrines of human rights and humanitarian intervention and with their practical implementations, those problems do not stem from the fact that they have become “mainstream” as such. Mainstreaming is what “only” makes the inherent problems with those doctrines—or any doctrines—overt. This applies equally to mainstream human rights law as well as feminist conceptions of how women’s interests should be protected. As long as those doctrines are not implemented in reality, they remain in the perfect and utopian Platonic world of ideas—as idealized by their proponents and adherents. When those doctrines or parts of them gain support and are employed in practice, they necessarily lose at least some of their idealized perfect nature, and it may be that it is that fact that their supporters are ultimately unhappy with, not

¹⁰¹Charlesworth—Chinkin 2000, p. 268.

¹⁰²Orford 2003. See also e.g. Orford 1999, p. 709: “The hero possesses the attributes of that version of aggressive white masculinity produced in late twentieth-century US culture, a white masculinity obsessed with competitive militarism and the protection of universal (read imperial) values.”

“mainstreaming” *per se*.¹⁰³ A suitable comparison would be to draw parallels with the response of some Marxist writers to the fall of the Soviet Union: the claim is that Communism did not fail, since “real Communism” had not been implemented and that previous attempts had only been “state capitalist” style perversions of the true Marxist ideal of Communism.¹⁰⁴ However, from a pragmatic point of view, it seems that an ideology is only as good as its implementations.¹⁰⁵

To extend the parallel further, the same position could be taken with regard to other criticisms that have been leveled against humanitarian intervention from a practical point of view. For example, the fact that interventions are usually carried out when the action will be relatively inexpensive in terms of economic impact and potential casualties on the side of the interveners—and when the target state is a weak nation in terms of military and economic power—is an obvious practical problem identified by Chinkin, though the issue may be argued to have a moral-philosophical side to it as well.¹⁰⁶ A similar position is presented by *Walzer* who emphasizes that when the suitability of intervention is considered, taking into account all factors is morally necessary—so that “just purposes” and “just consequences” are not necessarily in conflict.¹⁰⁷ Furthermore, with particular reference to the Kosovo intervention, *Douzinis* criticizes the fact that NATO casualties were avoided more actively than Kosovar and Serbian casualties, for example in the decisions to prefer aerial bombardment to the use of ground troops.¹⁰⁸ While these are concerns of utmost validity, the question that remains is whether these problems are the inevitable fault of ideologies of (militarized) humanitarianism or only issues with their implementation—i.e., whether such ideologies are impossible to execute in practice without encountering similar problems. If humanitarian ideologies are considered to be twisted and perverted by the act of carrying them out in practice, it may be difficult to avoid the interpretation that such an approach turns the abstract idea of human rights into an object of *idolatry* as a perfect and idealized secular religion—an approach that entails dire practical and philosophical ramifications, as was discussed above.

¹⁰³Interestingly, it would at least initially appear that if a doctrine cannot be considered *mainstream*, one cannot make a claim as to it being concomitantly *universal*; however, this perspective is not particularly relevant to the present study.

¹⁰⁴For examples of this approach, see e.g. the decidedly hyperlexic contribution of *Chimni* 1993, who extols the virtues of the Soviet system, noting the “momentous achievements” of the Soviet Union, p. 168–169, while maintaining that “the hostility of the capitalist world had helped establish and sustain the Stalinist model which seriously distorted the idea of socialism.”

¹⁰⁵See above, p. 25 of the present study.

¹⁰⁶Chinkin 2000, p. 37.

¹⁰⁷Walzer 2004.

¹⁰⁸Douzinis 2000, p. 133–136: “A strict hierarchisation of the value of life was again evident during the conflict.”

At this point it may be appropriate to return to the question of universality for one more time. According to Ignatieff, the universality of rights is based on them defining “the universal interests of the powerless.”¹⁰⁹ In other words, it is the empowering nature of rights that makes them universal, not their purported ability to define in a universal, culture-neutral way what is acceptable behaviour and what is not—let alone any empirical notions of universality that might be attached to rights. However, it is interesting to compare this view with the arguments put forward by Orford, Chinkin, Charlesworth *et al*, according to which rights language can actually serve to *marginalize* the powerless even further. Thus, from this perspective it would appear that the universality of human rights could be an empirical question after all, but not in the sense of whether the mainstream of human rights represents a set of values that can be considered universally accepted or acceptable, but instead in the sense of whether human rights have actually succeeded or whether they have the potential to succeed as a tool of giving a voice to the powerless—i.e., whether and to what extent human rights are *effectively implementable* as an empowering instrument.

Still, from this perspective, one should make particular note of the criticism put forward by Douzinas and reflected in many of the arguments examined above: even though the 20th Century was a “human rights century,” it still saw more violent deaths than any other period in history.¹¹⁰ Of course, there is also the question of cause and effect,¹¹¹ but to the present writer, the central dilemma seems to be as follows: if human rights doctrines have been unable to stop widespread carnage even if that is what many *powerful* nations have arguably yearned to achieve, how could they succeed in giving a voice to the *powerless*? However, considering the history and purpose of the Charter,¹¹² it seems to be only relatively recently that the ideas originally put forward in the Universal Declaration of Human Rights have become a tool of empowerment and an instrument of “revolutionary potential” as Orford describes them.¹¹³ When one considers this possibility, the claims

¹⁰⁹Ignatieff 2001, p. 73. Similarly, Leino-Sandberg 2005, p. 47, asks, “Could it not be thought that the function of human rights is mainly in empowering individuals against their own governments?” She also contends that “[t]his universality seems more compatible with the wishes of the non-Western world.” However, this assumes that non-Western cultures share our appreciation of subversiveness, which may not be true. See also p. 8 of the present study on the empowering factor inherent in the newly-found independence gained by nations in the colonial revolution.

¹¹⁰Douzinas 2002, p. 437: “The 20th Century was the century of massacre, genocide, ethnic cleansing – the age of the Holocaust [...] no degree of progress allows one to ignore the fact that never before, in absolute figures, have so many men, women and children been subjugated, starved or exterminated.”

¹¹¹The question is to what extent the human rights revolution was an inevitable result of some of the atrocities of the 20th Century—see e.g. p. 9 above.

¹¹²Cf. the discussion on p. 5 and p. 48 of the present study.

¹¹³See above, p. 24.

that human rights have been robbed of their emancipatory power seem unjustified. Furthermore, as Ignatieff notes, “the very purpose of rights language is to protect and enhance individual agency,”¹¹⁴ raising the question of whether the possibility of human rights fulfilling that promise is greater than the danger of them ultimately serving “imperialistic” agendas. In fact, the increasing use of human rights language in debates on the international arena seems to suggest that a development of the opposite kind is in fact taking place: even if the apparent lack of improvement in the human condition may seem disheartening, it may be that human rights language has at least provided a vocabulary for a *universal* want: voicing concerns.

Concluding observation. The difficulty in instituting reforms in the current international system limits the gamut of implementable options: ongoing atrocities and crises will not necessarily prompt action from the international community insofar as measures other than mere condemnation are concerned—a fact that the Darfur catastrophe bears witness to. Still, international law may not be heading towards obsolescence as rapidly as some may fear. Certain criticisms of the “mainstreaming” of human rights and humanitarian intervention, flawed though they may be, manage to demonstrate the inescapable fact that implementation-level dilemmas of humanitarian doctrines—both on a legal level and in practice—are in the end greater than the philosophical problems involved. A reappraisal of the concept of universality can recast rights doctrines as a more emancipatory humanitarian tool, alleviating the misgivings that have been articulated with regard to the language of rights being distorted to further hegemonic agendas. These are lessons to be heeded when searching for “the least bad solution” to the problem of approaching humanitarian intervention; i.e., a solution which ensures that humanitarian concerns are not left unattended and the danger of the malevolent use of military action is kept to a minimum.

¹¹⁴Ignatieff 2001, p. 18.

4 The Relevant Law

The crux of the *legal* problem of humanitarian intervention can be concisely characterized as a conflict between the prohibition of the use of force in international relations and the arguably more recent—and undeniably more ambiguous—doctrines of the primacy of human rights in international law.¹¹⁵ The general prohibition on the use of force is one of the most central norms in international law today. As a general principle, it is practically universally accepted and uncontested. In this section, we will examine the international legal framework with regard to that norm, something that is particularly relevant if one wishes to formulate a position on the main problem that is both comprehensive and compelling.

4.1 The Prohibition of the Use of Force

Unlike in the past,¹¹⁶ today it can be said to be an unchallenged fact that a prohibition of the use of (military) force against another nation or of the threat to use force exists in the present system of international law. It is one of the most fundamental rules of modern international law or even the most fundamental cornerstone of that system.¹¹⁷ However, even though the existence of the norm in question is not in dispute *per se*, there are few areas of international law that have aroused as much controversy as the prohibition of the threat or use of force.¹¹⁸ The underlying reason for these disputes can be conjectured to be that the most fundamental problems of power, wealth and territory are inherently manifested within the field of the use of force. The use of *force* is a close kin of the use of

¹¹⁵See e.g. Harhoff 2001, p. 66, on Kosovo: “[The] controversy transpired as the conflict between the ban on the use or threat of force on the one hand, and the assumed duty to prevent violations of human rights and humanitarian law by all means – even by armed force if necessary – on the other.” However, compare Gowlland-Debbas 2000, p. 379: “The debate has been wrongly stated as a choice between protection of human rights on the one hand and state sovereignty on the other – it is really a debate over the means not the ends, for remedial action can encompass a number of reactions to human rights violations.” See also Chesterman 2001, p. 45.

¹¹⁶On the development of the prohibition of the use of force, see Brownlie 1963, in particular p. 235–237 on the Kellogg—Briand Pact of 1928 (Treaty Providing for the Renunciation of War as an Instrument of National Policy), which was an attempt at codifying such a prohibition. Although its immediate effect was arguably negligible, it was, according to Brownlie 2003, p. 698–699, “important as a background to the creation of customary law pre-Charter.”

¹¹⁷Charter of the United Nations, Art. 2(4); see below. See also the Judgment in *Military and Paramilitary Activities in and against Nicaragua (United States v. Nicaragua)*. ICJ Reports (1986), p. 94, para 176.

¹¹⁸Gray 2000, p. 3, describes it as “one of the most controversial areas of international law.”

power, and if international affairs can be called a system of “power play,”¹¹⁹ it is inevitable that the use of force will play a central part in it. Because of the undisputed nature of the prohibition itself, it is the definitions related to the prohibition and the exceptions to it that have been at the center of controversy.¹²⁰

The prohibition of the use of force has been codified in Article 2(4) of the United Nations Charter.¹²¹ The background to this codification can be found in the cataclysm of the Second World War after which the prevailing major powers wished to prevent the policies that had led to the war from ever being accepted again. The failure of the League of Nations also served as the background to this, and the United Nations was intended to avoid the same failure. However, the Charter system that was put in place was designed in a way that guaranteed the interests of the major powers and served to legitimize their actions before and after the war.¹²² It can nevertheless be argued that the manner in which the dominant position of the post-WWII superpowers was etched in the Charter system, particularly in the Security Council, was more or less unavoidable because the system had to have the backing of the major powers to maintain its credibility and to avoid the decline into irrelevancy that had befallen the League of Nations.

The fact that the prohibition on the threat or the use of force is a common source of controversy in international affairs raises the question of how *effective* international law truly is. Depending on the point of view one espouses, cases where the prohibition of the use of force is at the core of a dispute can be seen as an example of international law being ineffective in the sense that one of the most fundamental norms of the system cannot be adequately enforced or upheld. Gray, for example, notes that there exists “widespread scepticism as to the “effectiveness” of international law on the use of force.”¹²³ As a counterpoint, she mentions the position taken by the ICJ in the *Nicaragua* case (1986): a rule need not be universally complied with for it to be an existing customary rule of international law. The ICJ, furthermore, made the argument that if breaches to a rule are also *treated* by states as illegal breaches, they may actually serve to strengthen the rule instead of weakening it.¹²⁴ If this position was to be applied to the question of

¹¹⁹See e.g. *Brenfors—Petersen* 2000, p. 450–451, where the power-play aspect is employed as an argument in the Kosovo case. See also p. 60 of the present study.

¹²⁰Cf. Gray 2000, p. 3.

¹²¹The text of Art. 2(4) is as follows: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”

¹²²Douzinas 2000, p. 118. See also the previous discussion in the present study.

¹²³Gray 2000, p. 19.

¹²⁴See *Military and Paramilitary Activities in and against Nicaragua, United States v. Nicaragua*, ICJ Reports (1986).

the prohibition on the use of force being violated, the ‘effectiveness’ of the current Charter-based system of security would not necessarily be in question as long as the illegal nature of the violations was consistently upheld.¹²⁵

However, Gray does state that this position cannot be taken too far,¹²⁶ and it is quite easy to agree with her: it is difficult to see, for example, how a hypothetical rule that enjoys no practical support among nations and is universally breached could be considered a customary rule of international law. Of course, the prohibition on the use of force is far from being universally breached, but a simplistic manner of defining the problem would be to state that a line has to be drawn somewhere.¹²⁷ Nonetheless, what should be noted here is that if the current prohibition is to be maintained, it may be prudent to abstain from taking too lenient a stance on breaches to it.

In Gray’s opinion, the current rule(s) on the use of force also have a *declaratory* character.¹²⁸ Thus, not only are they a reflection of state practice but also “a goal to be aimed at,” and Gray considers this aspect of the norms in question to be reflected in certain resolutions of the General Assembly and in international documents and declarations, even though their significance is somewhat hampered by the reluctance of Western nations to give them credence.¹²⁹ These points illustrate that even though the prohibition on the use of force is one of the most basic norms of international law, its justification is ultimately based on its acceptance by states—which is difficult to define, the Charter and the Vienna Convention notwithstanding—and the significance of which is based on state practice, the importance of which is in turn based on itself. Any argument that attempts to delve into the very foundations of the prohibition on the use of force seems to be destined to become a circular one.¹³⁰ Furthermore, from the point of view of the efficiency and relevance of international law, it is worth noting that Gray points out that there are “rare instances” that “stand out” where states decline to even

¹²⁵See also Meron 2000, p. 275–278, under “Limitations to the Effectiveness of Laws.”

¹²⁶Gray 2000, p. 20: “[T]he insistence that breaches may be seen as strengthening rather than negating rules cannot be taken too far without losing plausibility.”

¹²⁷See, for example, Koskenniemi 1989, wherein it is argued that the process of legal argumentation cannot necessarily be used to arrive at objective or rational resolutions; instead, they provide the rules or grammar that can be employed to provide justification for a given answer between two extremes.

¹²⁸Gray 2000, p. 21.

¹²⁹*Ibid.* “[The] symbolic function [of the rules] is apparent in the *African Charter* and the 1984 General Assembly *Declaration on the Right of Peoples to Peace* [. . .] the Western states have been suspicious of such resolutions and their ritual reaffirmation of existing rules.” Gray 2000, p. 21–22.

¹³⁰The *practical* danger with the failure of international law to provide answers to questions of such a fundamental nature may be that in the eyes of some, the system may lose its validity and credibility when its character as an “argument-supporting” structure becomes apparent.

try to offer a legal explanation for their assumed violations of the rules on the use of force.¹³¹ Such cases highlight a noteworthy aspect of the debate on the use of force and humanitarian intervention: put quite simply, a strictly legal perspective may not necessarily be the preferable approach.

Concluding observation. In the present framework of international law, few rules are as universally agreed upon as the ban on the use of force in international relations and few are as commonly at the center of major disputes on the international arena. Resolving such conflicts in a satisfactory manner may be difficult, unless one is willing to explore the fundamental assumptions underlying the rules—or, from a more pragmatic point of view, it may prove beneficial to approach such “hard cases” in a manner that takes into account the practical-political considerations involved.

4.2 Acceptable Exceptions

As was already noted, the prohibition on the use of force is not a source of controversy in itself; rather, the problem lies in the problem of *interpreting* the *exceptions* to the rule. In particular, the most important exception not only has a *jus cogens* character but is also more or less clearly set out in the United Nations Charter. Even though there is little disagreement on the basic content of the main exceptions and even though their codification in the Charter aids one in discovering their fundamental content, it is how they should be interpreted that seems to be at the core of the legal issues in most conflicts where questions on the use of force are relevant.

Article 51 of the U.N. Charter is the main source where the right to *self-defense* is explicitly defined. Furthermore, that codification is carried out by referring to the “*inherent right*” (emphasis added) of nations to defend themselves against armed attacks.¹³² The natural right to self-defense is an uncontested fact of customary international law, and the practical-political *ratio* behind it appears self-evident: one would be hard-pressed to imagine a nation that would deny itself the right to

¹³¹Gray 2000, p. 22.

¹³²Art. 51 of the Charter: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”

engage in self-defense when it is attacked. Gray states that it is the interpretation and the extent of Art. 51 that are usually in dispute when questions of self-defense are assessed.¹³³ In themselves, the right to self-defense and the main content of Art. 51 are so widely agreed upon as justifications for the use of force that states will often attempt to justify their use of force by referring to Art. 51 even when such an argument would appear far-fetched.¹³⁴

Historically, statements by the Security Council on Art. 51 have been few and far between, the main reason being the *Cold War-era deadlock* in the Council. Due to the lack of consensus between the rival superpowers, there were few situations where the Security Council passed resolutions that would have had significance regarding the right to self-defense—at least from the point of view of humanitarian intervention. Instead of being labeled “humanitarian interventions” by their instigators, military actions of the Cold War were predominantly justified by reference to the right to self-defense. For example, the Tanzanian intervention in Uganda in 1979 and the Vietnamese intervention in Cambodia were justified through arguments of self-defense instead of arguments of humanitarian intervention.¹³⁵ Furthermore, as Gray points out, arguments based on a “doctrine” of humanitarian intervention were for the most part advanced by writers instead of states.¹³⁶ It would appear that Art. 51 was preferred as justification due to its *jus cogens* nature and the controversial nature of “separate” doctrines of humanitarian intervention: even though justifying the use of force through arguments of self-defense can often be controversial,¹³⁷ such arguments are still far less controversial than arguments of a right to “humanitarian intervention,” as states can be assumed to rely on those arguments that are the most likely to be considered acceptable by the international community.¹³⁸ Nevertheless, the prevailing opinion on Art. 51 and humanitarian intervention appears to be in line with *Simma’s* statement that

¹³³Gray 2000, p. 86.

¹³⁴Gray 2000, p. 87. See also the summary of cases in *Aro—Petman* 1999, p. 12–13.

¹³⁵See Chesterman 2001, p. 77–81. For example, on the Vietnamese intervention in Cambodia, Chesterman (p. 81) notes: “When one looks for *opinio juris* there is an immediate problem that neither the acting state nor any of the (few) states that supported the action articulated anything resembling a right of humanitarian intervention.” See also Gray 2000, p. 26.

¹³⁶Gray 2000, p. 27. See later, p. 47 of the present study.

¹³⁷For example, this applies to the interventions in Uganda and Cambodia mentioned above.

¹³⁸Of course, such an assumption contains the presupposition that states prefer to employ those arguments that are likely to be accepted by the international community even if there exist other (moral or legal) arguments that would be more in line with the actual motives of the state—something that would lend support to the view of international law being more of a “language game” than a legal system capable of providing objective answers. Cf. e.g. Koskenniemi 2004, p. 198: international law is described as a “process of articulating political preferences into legal claims that cannot be detached from the conditions of political contestation in which they are made.”

Article 51 is simply not available when a humanitarian crisis is confined to a single state.¹³⁹

The other major exception to the prohibition on the use of force is something that is not a peremptory norm of international law but a system which was established with the United Nations Charter. Under *Chapter VII* of the Charter, the Security Council has the power to *authorize the use of force* in response to a breach of the peace or to a threat thereof.¹⁴⁰ This possibility that was given to the Security Council in the Charter remained more or less unused due to the Cold War-era disagreement between the major powers in the Council.¹⁴¹ It was only in the early 1990s, in the build-up to the Gulf War, that the Council finally made use of its powers to authorize the use of force. Such authorizations, however, unavoidably bring with them new problems of interpretation and application.

As discussed by *Chesterman*, the wording of Article 39 in Chapter VII suggests that the Council should first determine that a threat to or a breach of the peace or an act of aggression exists and then decide on the measures to be taken—i.e., pass judgment on whether the use of force by member states should be authorized. It is the prerogative of the Security Council to decide whether a conflict has escalated or is about to escalate to a point where the use of force is justified.¹⁴² It goes without saying that it is this inherently political decision-making process by the Council that is often at the center of controversy. Even though consensus on the applicability of Chapter VII powers among the permanent members in the Council has proven elusive more often than not, a clear shift in the overall position of Security Council resolutions since the end of the Cold War—but before the Kosovo intervention—was undeniable. Not only did the Security Council impose sanctions on several occasions and authorize a large number of peacekeeping operations during the 1990s, but it also authorized the use of force under Chapter VII several times.¹⁴³

¹³⁹Simma 1999, p. 5.

¹⁴⁰The text of Article 39 is as follows: “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.” — Furthermore, Article 42 states: “Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.”

¹⁴¹Chesterman 2001, p. 114–7.

¹⁴²Chesterman 2001, p. 124–5.

¹⁴³Chesterman 2001, p. 121–124.

What is particularly notable is the willingness to intervene in internal armed conflicts, demonstrated particularly well in the resolutions regarding the protection of the Kurds in Iraq and the crisis in Somalia in 1992.¹⁴⁴ According to Chesterman, the actions of the Council in the early 1990s demonstrated a “gradual shift away from the transboundary implications of a situation.”¹⁴⁵ There was an increasing willingness to interpret *internal* humanitarian crises as threats to *international* peace and security—the domestic jurisdiction article (Art. 2(7)) notwithstanding—and as requiring measures ranging from economic blockades to military intervention. In the aftermath of the Gulf War, the Security Council’s ambiguously worded Resolution 688 on the Kurds—and its wide-ranging interpretation, used to justify the use of force against Iraq in the 1990s—had a particularly profound effect on the significance of Chapter VII. However, the controversy of the Kosovo case in 1999, discussed below, more or less put an end to the trend of the increasing use of Chapter VII powers.

One should also note that *Chapter VIII* of the Charter provides the possibility of employing *regional and multilateral security arrangements*.¹⁴⁶ However, this option never gained an essential role during the Cold War and its applicability today, particularly with regard to questions of humanitarian intervention, is relatively minor¹⁴⁷ and thus quite peripheral to the problem. For example, NATO is not considered a regional organization in the sense of Chapter VIII as it has refused to take on this role; besides, the general consensus is that it would be inapplicable to NATO in the first place.¹⁴⁸ Moreover, any arrangements under Chapter VIII are subsidiary to the main rules on the use of force, to the self-defense clause in Article 51 and to the primary responsibility of the United Nations Security Council in approving the use of military force.¹⁴⁹ Multilateral Chapter VIII arrangements cannot be seen as widening the acceptable range of the use of force. Thus, even though multilateral organizations theoretically could—and should—bear the responsibility in the settlement of disputes and in maintaining (regional) peace and stability, their importance from the perspective of the acceptability of humanitarian intervention is minuscule.

¹⁴⁴Iraq: S/RES/688 (1991). Somalia: S/RES/794 (1992). For a pro-interventionist discussion of S/RES/794, see Tesón 1997, p. 246–249.

¹⁴⁵Chesterman 2001, p. 151.

¹⁴⁶Charter of the United Nations, Ch. VIII, Arts. 52–54.

¹⁴⁷Cf. Aro—Petman 1999, p. 70.

¹⁴⁸See Simma 1999, p. 10; see also Simma 1999, p. 14–21, for a discussion on the position of NATO.

¹⁴⁹Art. 53 of the Charter contains a provision according to which “[...] no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council [...]”

Concluding observation. The self-defense clause of Art. 51 and the security system instituted in Ch. VII constitute the primary justifications for the use of force in the Charter system—and it is mainly the latter which is relevant from the point of view of humanitarian intervention. The 1990s saw the rapid expansion of the utilization of Ch. VII powers by the Security Council in state-internal (humanitarian) conflicts, a development that experienced an abrupt end with the Kosovo crisis.

4.3 The Gray Area

When one examines the problem of the acceptability of humanitarian intervention, the most important distinction to be made is the one between interventions that have a legal basis within the Charter system—mainly through the above-mentioned system of Security Council authorization under Chapter VII—and interventions where questions of *legitimacy* as opposed to *legality* are raised because adequate legal justification that has sufficient support within the international system cannot be found or because the legal justifications are in dispute in another way even though there is wide political support for forceful measures.¹⁵⁰ Here, we are concerned with the latter type of interventions, “unauthorized” humanitarian interventions, i.e., the problems that fall within the gray area of “justifiability” where extra-legal, ethical or moral arguments typically based on the vernacular of *human rights* may, according to some commentators, override the general ban on the use of force.

It seems to be the prevailing consensus in the international community that there exists no right to humanitarian intervention that would have its genesis in extra-legal arguments such as moral considerations that do not fulfil the requirements for “legal” use of force.¹⁵¹ In other words, these doctrines have not entered the

¹⁵⁰Harhoff 2001, p. 72, suggests the following *legal* definition for humanitarian intervention: “The use of armed force by one or more States against another State in which an internal conflict is taking place, with the humanitarian objective to prevent the commission of (1) genocide, (2) serious violations of the international humanitarian law applicable to internal armed conflicts, (3) widespread or systematic attacks against a civilian population, or (4) serious violations of recognized and fundamental international human rights standards, when these atrocities cannot be averted by peaceful means, and when the use of foreign armed force is neither discharged as a legitimate act of self-defence, nor carried out upon invitation of the conflict State.” Even though definitions such as this may be unavoidable in a discussion of humanitarian intervention, see section 5.2 of this study on the problematic issues associated with the drafting of definitions and criteria.

¹⁵¹For example, Rytter concludes that “under established customary international law there is no right of humanitarian intervention without the authorisation of the Security [Council],” at least not until 1999. Rytter 2001, p. 144. See the following chapter for a more detailed discussion of attempts at justifying interventions by legal or extra-legal arguments.

system of international law as rules of customary law at present time. As was already noted, arguments in favor of such doctrines have mainly been presented by writers, not states; notably, the writers that have voiced support for such a doctrine of humanitarian intervention have been predominantly American.¹⁵² From a political-pragmatic viewpoint, this fact does—due to American hegemony on the international arena and the aspirations towards maintaining such a position¹⁵³—raise questions about possible connections to specific foreign policy goals that may not be the same as the humanitarian considerations presented as justification. On the other hand, it is the view of this writer that even in a field of study such as international law, arguments should be considered in themselves and judged on their relative merits; thus, the emphasis should be less on the possible motivations behind an argument or on who has presented a specific argument, and more on the argument itself. Nevertheless, such considerations cannot be entirely overlooked in any inquiry that strives to be impartial, either.¹⁵⁴

One of the more obvious properties of the current system of international law and international affairs is the way in which many parts of it have formed during the post-WWII or Cold War era of international relations. It has been during that time that many structures and rules of international law that are nowadays taken for granted have been codified and have crystallized—particularly with respect to rules on the use of force. Indeed, it has been during that era that any possible doctrines of humanitarian intervention that may have existed in the past have been more or less unanimously cast aside.¹⁵⁵ Previously, it was noted that force-justifying arguments that relied on a right to humanitarian intervention were hardly employed at all from 1945 to 1990.¹⁵⁶ Furthermore, the arguments that were advanced by writers in support of such a right were generally agreed to be unconvincing.¹⁵⁷ The oft-quoted assessment of the state of international law with regard to this question, put forward by the British Foreign Ministry in 1986, is

¹⁵²Rytter 2001, p. 158. See also Aro—Petman 1999, p. 127.

¹⁵³The influence that the United States wields on the international arena hardly needs to be elaborated upon. From this perspective, one can consider the way in which international law has been described as an aspect of *hegemonic contestation*—see Koskeniemi 2004. On the use of force by the United States and its effect on international law, see Kohen 2003, in particular p. 219–220 on humanitarian intervention.

¹⁵⁴There are fields of study where it is entirely inappropriate to attempt to explicitly point out the putative motives of a participant in a debate; in particular, this includes the physical sciences where *ad hominem* arguments are strongly discouraged. To what extent they can be employed in international law either implicitly or explicitly may be a matter of debate.

¹⁵⁵See e.g. Chesterman 2001, p. 49–52. Note also the *Corfu Channel* case (1949).

¹⁵⁶See above, p. 43; see also Aro—Petman 1999, p. 128.

¹⁵⁷Gray 2000, p. 28.

lucid evidence in support of this position, even though it does acknowledge the option of considering some occurrences of humanitarian intervention legal:

“[T]he best case that can be made in support of humanitarian intervention is that it cannot be said to be unambiguously illegal. [. . .] But the overwhelming majority of contemporary legal opinion comes down against the existence of a right of humanitarian intervention [. . .]”¹⁵⁸

One relatively early article that explores the legality of unauthorized humanitarian intervention in the post-WWII system is the classic “Thoughts on Kind-Hearted Gunmen” by *Brownlie* (1973).¹⁵⁹ Brownlie’s arguments speak clearly against a right of humanitarian intervention that would fall outside the legal boundaries of the Charter system. According to Brownlie, doctrines of humanitarian intervention that may have existed before were invalidated by the changes in international law that the Charter system brought with it.¹⁶⁰ Indeed, it is noted in the article that writings in favor of a right of humanitarian intervention up to 1973 had been “characterized by an isolation which is remarkable.”¹⁶¹ This should serve as evidence of the fact that there was considerably wide-ranging agreement on the illegality of unauthorized humanitarian interventions during the Cold War era. As noted above, the arguments that were presented in favor of humanitarian intervention could have been tainted by unspoken foreign policy goals or could also stem from a lack of understanding of the Charter system and its genesis, goals and purpose. Whatever the reasons, opinions in support of unauthorized humanitarian interventions were undeniably in the minority from 1945 onwards.

The underlying arguments—legal as well as practical—for and against intervention were also weighed by Brownlie. In his view, a restrictive approach serves to “keep out of circulation disastrously vague and unworkable principles of self-limitation.”¹⁶² One of the central goals of the Charter system was to avoid further conflagrations of the type of the Second World War, caused by the pre-war reality where the League of Nations and the international community in general were unable to keep at bay those nations that simply chose to confer upon themselves the capacity to use force in situations where the nations themselves thought it

¹⁵⁸57 (1986) *British Yearbook of International Law*, p. 618–619.

¹⁵⁹Brownlie 1973. “Early” here refers to the fact that the 1990s were a turning point for doctrines of humanitarian intervention, as described above.

¹⁶⁰Brownlie 1973, p. 142–143.

¹⁶¹Brownlie 1973, p. 144.

¹⁶²Brownlie 1973, p. 145.

justified or necessary.¹⁶³ A system that allows for unauthorized humanitarian intervention would have flown in the face of such an approach; thus, it would have been completely antithetical to the Charter system, at least and particularly when one takes into account the international political realities of the polarized Cold War-era world—including but not limited to the obvious potential for abuse and the failure of proponents of intervention to come up with adequate definitions to facilitate a doctrine of unauthorized humanitarian intervention.

In his article, Brownlie also considered the argument that situations where a permanent member of the Security Council employs the *veto* and thus bars the Council from authorizing intervention could somehow be construed as situations where the United Nations is “ineffective.” His counterargument is threefold: firstly, efficacy can never fulfil “the normative goal it aspires to”; secondly, the veto is a procedure defined in the Charter; and thirdly, the concept of effectiveness is “superficial and defective.”¹⁶⁴ It is the opinion of the present writer that the second argument is the most important one—and closely related to the first one: the core of the problem can be succinctly summed up by pointing out the fact that when the veto is employed, it is serving the exact purpose it was given in the Charter, unless that purpose is defined as an abstract “effectiveness” in every case that can hardly be fulfilled in reality in any case. Oversimplifying somewhat, the question is whether the veto would ever be applicable if its meaning could be annulled by referring to the “ineffectiveness” it causes. Naturally, the argument can be made that the veto can be abused in violation of the “purpose” of the Charter.¹⁶⁵ However, in the view of the present author, one of the main functions of the Security Council procedures is to *formalize* decision-making between members of the Council; therefore, if unwritten exceptions are resorted to when a single country sees fit, this entire notion of formalizing such relations is threatened.¹⁶⁶

Not only did Brownlie contend that there is little evidence in support of the view that humanitarian intervention would be supported by *law*, but he also voiced his *practical-political-ethical* opinion that such doctrines are unlikely to function as “a genuine instrument for the benefit of mankind.” In his view, the very concept of

¹⁶³As is well-known, the Preamble of the Charter explicitly notes the determination to “save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind.”

¹⁶⁴Brownlie 1973, p. 145–146.

¹⁶⁵See later, p. 53.

¹⁶⁶In other words, disregarding the veto could be seen as eroding the *legal certainty* that the Charter system brought to international law, even though the Council is a political organ. Elements of legal certainty can be said to be central to any system that at least *purports* to be based on the Rule of Law.

humanitarian intervention is in conflict with “the needs of modern international life.”¹⁶⁷ His closing observations on the dangers of humanitarian intervention are still relevant and applicable to later events—particularly in light of cases such as the arguably dubious interventions in Panama and elsewhere.¹⁶⁸ Even though there have been major changes on the international arena since the end of the Cold War, Brownlie’s concerns remain surprisingly valid and are worth keeping in mind as the question of humanitarian intervention in the present system of international law is examined.

Concluding observation. During the Cold War era, “humanitarian intervention” in the absence of Council authorization was widely considered to be incompatible with the Charter system. Arguments in favor of a cautionary approach towards the problem have not lost their relevance today and may indeed be even more topical than before in the current single-superpower reality.

¹⁶⁷Brownlie 1973, p. 147.

¹⁶⁸The Panama intervention is an example of the use of force to (allegedly) maintain or re-establish *democracy*—a doctrine that enjoys little international support at present and is arguably deeply incompatible with the Charter system. See e.g. Chesterman 2001, p. 102–106, for discussion of the controversy surrounding the Panama case.

5 The Legality of Illegality

The case of the Kosovo intervention proved to be a conundrum that appeared insurmountable to many international lawyers.¹⁶⁹ This is apparent when one examines the debate that took place within international law circles during and after the Kosovo campaign. Hannikainen describes the Kosovo problem as a ‘tough nut to crack’ for international lawyers,¹⁷⁰ and it is ironic—or on closer inspection, quite telling—that the Decade of International Law would end with a crisis involving a collision between two fundamental doctrines of international law, namely, human rights and the ban on the use of force in international relations.

A closer examination of the Kosovo case and the debate surrounding its implications shall now be undertaken, with the goal of considering the possibility of a defensible solution to the main question of the acceptability of intervention. Thus, the issue is whether the Kosovo intervention was a harbinger of things to come or a mere aberration, and what the position is which would be judicious to support as regards the legal effects of that intervention—and on a more general level, of interventions described as “humanitarian.” The foregoing discussion on purportedly universal human rights doctrines and the benefits and on pitfalls of enforcing them through the use of military force will serve as the underlying background to the examination that follows.

5.1 Effectively Paralyzed?

If one attempts to look for justification for the Kosovo intervention—and for humanitarian intervention without Security Council authorization in general—more or less strictly in a *legalistic* manner within the confines of international law, i.e., without resort to ethical arguments, several options exist. On a general level, *Harhoff* identifies three different strains of *legal* positions on the Kosovo issue: the *affirmative* position which is favorable to the possibility of humanitarian intervention having a legal basis in international law; the *legalist* position which holds that legal justifications for humanitarian intervention cannot be found; and the

¹⁶⁹For example, *Hannikainen* points out that both he and *Simma* had major difficulties in analyzing the use of force by NATO from the point of view of international law. *Hannikainen* 1999, p. 82.

¹⁷⁰*Hannikainen* 1999, p. 76, translated here by the present author (the original formulation in Finnish, “Kosovon katastrofi on kansainvälisen oikeuden tutkijalle kova pala,” sums up the main dilemma quite adequately.)

reformist position where it is contended that a clear answer to the question cannot be provided by the current system of international law and that the system should therefore be reformed so that conditions for intervention could be identified.¹⁷¹ The approaches to the Kosovo problem taken by different commentators, described in the following sections, do not always fall neatly into these categories; furthermore, arguments regarding *extra-legal* exits from the problem of humanitarian intervention (in particular, “one-time” extra-legal escapes from the problem of Kosovo) seem to form a category of their own, possibly subsidiary to some of the positions identified by Harhoff.

If we now examine the affirmative positions more closely, *Gowlland-Debbas* divides these arguments into four groups: the implied authorization argument, the implied powers doctrine, *ex post facto* legitimization and the theory of emerging norms of humanitarian intervention.¹⁷² The *implied authorization* view argues that existing resolutions of the Security Council can be interpreted as providing legal justification for the Kosovo intervention. According to *Gowlland-Debbas*, this approach also implies an awareness of the need for Security Council approval for military intervention on the part of the states that invoke this argument. Previously, Security Council Resolutions 687 and 688 had been employed as “blanket” justifications for intervention in Northern Iraq—a strategy that had been met with little international outcry. Regardless of the lack of condemnation, Resolutions 687 and 688 have not been considered particularly convincing arguments in favor of intervention; thus, the same approach should be considered inapplicable in the case of Kosovo, especially when major actors on the international arena oppose it.¹⁷³ For authorization to exist, it would have to be given *explicitly* by the Security Council, not implicitly, particularly when the matter concerns a fundamental norm of international law such as the prohibition on the use of force.

The *implied powers* doctrine is based on an extended interpretation of Chapters VII and VIII of the United Nations Charter. It is quite clear in the Charter that regional organizations in the sense of Chapter VIII will always need authorization from the Security Council for the use of force—unless, of course, they can claim

¹⁷¹Harhoff 2001, p. 78–108.

¹⁷²Gowlland-Debbas 2000, p. 372–377.

¹⁷³In particular, Res. 688 was not adopted under Ch. VII. See *Gowlland-Debbas*, p. 372–373. *Gowlland-Debbas* notes: “[I]t has been seen that neither delegation of the Council’s powers nor authorization of acts normally unlawful under international law can lightly be made.” For discussion of the problems raised by the interpretation of Res. 688, see *Chesterman* 2001, p. 196–206. In particular, *Chesterman* notes (p. 201) that “[...] statements made in the Security Council confirm that [Res. 688] was not understood to authorize an enforcement action [...]”

justification through self-defense.¹⁷⁴ According to the implied powers interpretation as presented by Gowlland-Debbas, a “paralyzed” Security Council would give regional arrangements or *non*-Chapter VIII organizations such as NATO “residual responsibility” for the maintenance of peace and security in the same way that the General Assembly attempted to give itself similar responsibilities through the *Uniting for Peace* resolution.¹⁷⁵ However, as Gowlland-Debbas points out, that resolution only amounted to “a transfer of responsibility from one principal U.N. organ to another”—in other words, NATO is not the General Assembly.

As is apparent, the implied powers interpretation depends on the acceptance of the idea that the Security Council can be “inefficient” or “paralyzed.”¹⁷⁶ The implied powers doctrine and acceptance of the paralysis argument imply that the “absoluteness” of the power of Council resolutions (or of the lack of them) can be successfully challenged on extra-legal, that is, political or moral, grounds. However, it would seem that one problem with such an argument is that the Council’s decision-making is political in the first place. In other words, if we assumed that the sphere of politics encompasses or subsumes the sphere of “law” in the international system,¹⁷⁷ it would still not follow that a political decision by a group of (politically powerful) nations could override the opinion of the Security Council, as the Council happens to be a *political organ*. The implied powers argument appears illogical and contradictory from another—but nevertheless related—point of view as well: the veto is an integral part of the Security Council’s procedure, and claiming that a permanent member using the veto is tantamount to “paralysis” would nullify the significance of the veto, as discussed earlier.¹⁷⁸

Furthermore, as Gowlland-Debbas points out, the applicability of the implied powers doctrine in the case of Kosovo is limited by the fact that there was no attempt by NATO members to seek authorization from the Security Council due to the fact that it was apparent from the positions taken by China and Russia that no such

¹⁷⁴Note the non-Ch. VIII status of NATO, discussed on p. 45 of this study, and Art. 53 quoted *supra*.

¹⁷⁵As Chesterman points out, the legal status of the *Uniting for Peace* resolution is questionable. Chesterman 2001, p. 118. Cf. Simma 1999, p. 17.

¹⁷⁶Gowlland-Debbas 2000, p. 373–374. Cf. discussion on Brownlie above, p. 49.

¹⁷⁷The distinction here may be only a semantic one: for example, Koskeniemi (2004, p. 199) describes international law as appearing “as a way of dressing political claims in a specialised technical idiom in the conditions of *hegemonic contestation*.”

¹⁷⁸See the discussion on Brownlie above, p. 49. See also e.g. Watson 1999, p. 247, where it is stated with regard to the veto that “[t]he use of a legal power granted in a treaty can hardly be said to be an unforeseeable departure from the scheme of the treaty regime such as to invalidate other provisions in the treaty which were drafted and negotiated at the same time.”

authorization would be forthcoming.¹⁷⁹ Therefore, claiming that the Council was “paralyzed” in the Kosovo case is highly contestable, as no draft resolution was put to a vote.

It is interesting to look at the problem of seeking authorization vs. not seeking authorization from the Security Council as an unsolvable game-theoretical problem that seems to touch upon the fundamentals of international law and politics.¹⁸⁰ On the one hand, should a nation or a group of nations seek Security Council approval for intervention and fail to receive it due to a permanent member employing the veto, then the Council has not been “paralyzed” but has acted within its powers—i.e., through its normal voting procedures—to deny the right to use force on the basis of Ch. VII. Thus, there would be no room for the implied powers argument. On the other hand, should the interveners opt to refrain from seeking approval, then the implied powers doctrine is inapplicable due to the very lack of any purported “paralysis” described above, as the Security Council has not even rejected any request for the use of force. Therefore, it appears to be impossible to justify the use of force through the implied powers doctrine, regardless of whether or not one puts to the Security Council a draft resolution in support of intervention. Arguing that a view of this type leads to a system where there is no way to receive authorization for an action that is “required” or “necessary” isn’t a logical path of argumentation, as it is through the procedures of the Security Council that the “requiredness” of an action is defined. Of course, this would be a *legalistic* stance, and any counter-arguments based on morality or ethics would have the same benefits and drawbacks as any other moral-ethical arguments in international law. — One should also note Gowlland-Debbas’ observation that an “implied power” is difficult to argue for if the action that is justified through such an argument goes against an express prohibition in the United Nations Charter such as Art. 2(4) or Art. 51, as was the case with the Kosovo intervention.¹⁸¹

As for *ex post facto* legitimization of the Kosovo intervention, Gowlland-Debbas accurately notes that it is unclear whether Security Council resolutions do legitimize

¹⁷⁹Gowlland-Debbas 2000, p. 374. Hannikainen 1999, p. 82, contends that China as a permanent member of the Council mostly seems to be concerned about her national interests. It can perhaps be stated that similar criticisms could also apply to other permanent members as well.

¹⁸⁰In *game theory*—a field of study which has its roots in mathematics and economics but which has found applicability in the social sciences as well—outcomes of different strategic decisions are analyzed, often with the goal of discovering the optimal course of action. In this example, an “optimal” legal strategy may not exist.

¹⁸¹Gowlland-Debbas 2000, p. 374, and Simma 1999, p. 19. Compare *Hannikainen*, who argues that the *jus cogens* prohibition only applies to the use or threat of force whose purpose is *aggressive* and that the NATO action did not fulfil the definition of aggressive purpose. Hannikainen 1999, p. 82, wherein reference is made to Hannikainen 1988, p. 323–356.

actions that have been taken previously. As she mentions, there are numerous factors in the Kosovo case that support the contention that the Security Council did not approve of the operation *ex post facto*. The debate in the Council that took place was in many places critical of the Kosovo operation, which was readily apparent in the statements presented by China and Brazil, among others.¹⁸² Therefore, the Security Council resolution that followed that debate, Resolution 1244, cannot be seen as an “endorsement” of the Kosovo operation.¹⁸³

A draft resolution sponsored by Belarus, India and Russia which would have called for an end to the NATO action had been rejected previously,¹⁸⁴ but this rejection cannot be taken to mean that the Council would somehow have implicitly approved of the operation or would approve of it afterwards: it does not follow that a failure by the Security Council to arrive at a *consensus* in a particular matter would mean taking a stand for a given position. Furthermore, one must keep in mind the fact that the Security Council often deals with situations that are a result of actions illegal under international law.¹⁸⁵ When the Council handles such a matter, it would be illogical to claim that the absence of an explicit condemnation of past events could be interpreted as an implicit approval of those events. This is particularly true in the case of Kosovo.

When it comes to *emerging “norms of humanitarian intervention”* as justification, it has been argued that the rejection of the aforementioned draft resolution could have a contributing effect to the status of such norms.¹⁸⁶ It is the view of the present writer that the rejection carried little significance and was at best no more and no less than a slight indication of the opposition to humanitarian intervention, particularly when viewed against the background of the clear absence of humanitarian intervention norms in the post-1945 system in general.¹⁸⁷

¹⁸²Gowlland-Debbas 2000, p. 375.

¹⁸³*Ibid.* Gowlland-Debbas points out that China emphasized “the commitment of all member states to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia.” Cf. Franck’s statement that S/RES/1244 “on the one hand, seems to usher in an era of legally sanctioned intervention on behalf of globally recognized humanitarian and human rights law and, on the other hand, seems resigned to having such intervention conducted by states in disregard of the United Nations itself.” Franck 1999, p. 859.

¹⁸⁴Chesterman 2001, p. 213. Greenwood 1999, p. 151–152.

¹⁸⁵Simma 1999, p. 11: “[T]he fact is that the Security Council, as a political organ entrusted with the maintenance or restoration of peace and security rather than as an enforcer of international law, will in many instances have to accept or build upon facts or situations based on, or involving, illegalities.” See also Gowlland-Debbas 2000, p. 376, note 18, on the draft resolution.

¹⁸⁶See Gowlland-Debbas 2000, p. 376–377.

¹⁸⁷See p. 47 of this study. Cf. the aforementioned statement in 57 (1986) *BYIL*, p. 618–619.

In the view of Gowlland-Debbas, the role of the Security Council is not legislative and its position is therefore not an indication of “requisite state practice” for the creation of a new customary rule of humanitarian intervention. Of course, as she points out, the difficulty in assessing the significance of the practice of a political organ is apparent.¹⁸⁸ The weight that should be given to decisions of the Security Council from this point of view is somewhat unclear. Still, in this case, it seems safe to make a statement—as Gowlland-Debbas does—with regard to the impact that Security Council decisions might have had in the case of Kosovo: a *jus cogens* rule such as the norms on the use of force can hardly be said to be changeable in a situation where two permanent members of the Security Council opposed the action that would have led to a change in the rule.¹⁸⁹

One further possibility that has been raised as a legal justification for humanitarian intervention is the argument based on a *state of necessity* in extreme cases. As Rytter puts it, there is in customary international law the norm that in exceptional circumstances, acts incompatible with international law may be acceptable.¹⁹⁰ However, a strong indication of the limits of the doctrine of a state of necessity can be found by examining the ILC draft articles on the matter, referred to by Rytter: not just any “exceptional circumstances” will do, as the illegal action will have to be the “only means of safeguarding an essential interest of the state against a grave and imminent peril” for it to be acceptable. It is easy to agree with Rytter’s conclusion that humanitarian suffering does not fulfil these requirements and that intervention would instead impair an essential interest of the state that is the target of intervention—namely, territorial integrity.¹⁹¹ Of course, avoiding humanitarian suffering is only (*sic*) “an essential interest of the world,” as Rytter describes it, and “the world” or “the international community” cannot be said to be a “state” that could resort to a state of necessity; and even though it is individual states that would carry out an intervention, their essential interests are not as directly threatened as is the territorial integrity of the target state. However, it is the view of the present writer that even though the doctrine of a state of necessity cannot be used to *justify* humanitarian intervention, it doesn’t *preclude* its acceptability, either.¹⁹²

¹⁸⁸Gowlland-Debbas 2000, p. 377.

¹⁸⁹*Ibid.* Note, however, that “only very few states contended that the action on the part of NATO countries was contrary to the United Charter in that it violated Article 2(4),” as Cassese points out. Cassese 1999, p. 792.

¹⁹⁰Rytter 2001, p. 133.

¹⁹¹Rytter 2001, p. 134–135.

¹⁹²In other words, the sphere of applicability of the *state of necessity* doctrine doesn’t necessarily encompass all situations where “exceptional circumstances” can function as justification for illegal

The conclusion offered by Gowlland-Debbas—that central to the issue was the relationship of the international legal system and ethics and politics—seems appropriate. However, the complexities apparent in the “continuous adjustment”¹⁹³ that takes place within the system of international law highlights the uncertainty and ambiguity inherent in the international system as regards the foundations upon which this continuous adjustment should be based. Even though the different legal avenues, enumerated above, that have been used to attempt to legally justify the Kosovo intervention can be rejected after careful examination, it is the *ad hoc* nature of the system where the examination takes place that necessarily results in indeterminacy.¹⁹⁴ Every legal system¹⁹⁵ necessarily has gray areas of ambiguity, but the international lawyer who attempts to find a solution to a “hard case” should nevertheless remain wary of arguments that are based on an overly flexible interpretation of the rules of international law. This is a fact that is worth keeping in mind with respect to the interpretation of fundamental norms such as those on the use of force, due to the dangers such approaches necessarily entail.

Concluding observation. An overview of the spectrum of possible legal justifications for the Kosovo intervention—or, indeed, for any intervention unauthorized by the Council but described as “humanitarian” by its implementors—demonstrates the fact that attempts at legal vindication are either unconvincing or fail to avoid straying from the scope of legality into the murky field of ethics. This holds true particularly well for arguments that rely on the concept of “ineffectiveness” or “paralysis” of the Council.

actions; therefore, even if exceptional circumstances fail to fulfil the definition required by the necessity defense, they may still have relevance.

¹⁹³Gowlland-Debbas 2000, p. 381.

¹⁹⁴Whenever the present writer has been asked to define the meaning of “*ad hoc*,” the concise formulation “*ad hoc* is that what international law is” has proved most useful in informal contexts. However, such a primitive appraisal of the nature of international law is unlikely to prove helpful in the present work.

¹⁹⁵This may not be true for some theoretical legal systems that are based on formal logic; however, it is the opinion of the present writer that it holds true for any realistically implementable real-world system of law. Even if a legal system was completely self-consistent, its “interface” with reality would be a source of ambiguity. Cf. Koskenniemi 1989, p. 449: “The idea that law can provide objective resolutions to actual disputes is premised on the assumption that legal concepts have a meaning which is present in them in some intrinsic way, that at least their core meanings can be verified in an objective fashion. But modern linguistics has taught us that concepts do not have such natural meanings. In one way or other, meanings are determined by the conceptual scheme in which the concept appears.”

5.2 From Justifying Intervention to Mystifying Criteria

Apparent during the Kosovo crisis and in its aftermath was the ardor with which certain writers attempted to justify the intervention either through moral-ethical or legal means. The manner in which arguments in favor of the NATO operation were presented makes the critical reader wonder whether the unauthorized nature of the action in fact only boosted the enthusiasm of some supporters of humanitarian intervention. The fact that “military humanitarianism” so suddenly gained a real-life victory in the sense of the doctrine actually being executed, the fact that it happened with apparent disregard for the rules of international law on the use of force, and the fact that the situation in the Security Council initially appeared to block any possibility of military action, may have triggered a sense of vindication, if not triumphalism, in certain circles. Furthermore, the fact that proceedings in the International Court of Justice were instituted against NATO member countries by Yugoslavia¹⁹⁶ served as a compelling reason—with regard to both the proceedings and the political arena—to attempt to formulate more precise justifications within the debate that took place after the operation.

Reisman puts particular emphasis on the exceptional nature of the Kosovo case.¹⁹⁷ He is reluctant to abandon the current use of force régime or to bend the current system so that the intervention could be justified through legal means. Instead, he emphasizes the need for what he calls *procedural integrity*, as he recognizes that stepping outside the boundaries of law entails the risk of eroding the status of law and increases the potential for abusing it. Still, *Reisman* holds that there exist situations where decisions have to be taken without regard to the procedures of law—referring to *Holmes’* view of constitutions not being “suicide pacts.” Even in light of his willingness to support such measures, *Reisman* is still concerned of the possible consequences of the Kosovo operation in the future.¹⁹⁸

In *Reisman’s* view, the human rights violations in Kosovo were serious enough to warrant action, and from a practical perspective, all other policies to end the violence had failed. Even though he does encourage a *careful* approach with regard to making exceptions to the rules on the use of force, he maintains an overwhelmingly positive stance towards the Kosovo intervention while acknowledging the problems involved. The underlying philosophy of “military humanitarianism”

¹⁹⁶See *Legality of the Use of Force*.

¹⁹⁷*Reisman* 1999, p. 860–862: “Kosovo bears no likeness to previous examples of humanitarian intervention which were, to varying degrees, for all their high rhetoric, instruments of policy of particular states, whose commitment to human rights was not always consistent or credible.”

¹⁹⁸*Ibid.*

seems quite apparent in his statement regarding the possibility of Kosovo being a bad precedent for the future: “One may equally ask whether a better precedent would be that no one may do anything effective to stop the destruction or expulsion of the Kosovars of the future, if the Security Council proves unable to operate?”¹⁹⁹

In terms of the practical problems related to the Kosovo case, Reisman’s contention that the case bore little to no likeness to previous cases does have a certain level of validity: in particular, one aspect that should be considered further is the fact that it was the first post-Cold War situation where humanitarian needs and the legal régime on the use of force collided so spectacularly. In this sense, the Kosovo case may have demonstrated a major shift in the system of international law. However, to the present writer it would seem that Kosovo displayed a change in the *political realities* of the world than in international law itself—of course, this is a line that is hard to draw.²⁰⁰ The controversial nature of the Kosovo situation seems to stem from the fact that difficult cases were “swept under the rug” in the Cold War system of a deadlocked Security Council—i.e., they never came under strict scrutiny because of the political realities of the time. With the cataclysmic changes that took place in Europe and the world in the early 1990s, it became possible for human rights violations to be addressed by the Security Council—and, in fact, for major human rights violations to reoccur in Europe; nevertheless, whether such changes actually led to a *legal* change is a separate question.²⁰¹ Furthermore, *Simma* states that the question that arose was “how [. . .] even the purest humanitarian *motives* behind military intervention [could] overcome the formidable international legal obstacles” (emphasis added).²⁰²

The overall impression of Reisman’s argumentation that comes across from his commentary is the way in which there seems to be an underlying pro-interventionist position that guides his interpretation of the “facts on the ground”: to state Reisman’s opinion simplistically, he views the Kosovo case as “serious enough” for the law to be bypassed. However, from a more legal standpoint, such specific *in casu* assessments of whether a given situation fulfils a given requirement do not necessarily constitute a compelling argument. Of course, such ethical—and political—positions may be considered convincing, but legal argumentation must

¹⁹⁹Reisman 1999, p. 861.

²⁰⁰See above, e.g., p. 53.

²⁰¹See Simma 1999, p. 5: “The question which arises [. . .] is, of course, whether the state of the law [. . .] could have changed in recent years, possibly after the demise of the East–West conflict or under the shock of the genocide and crimes against humanity committed in the former Yugoslavia.”

²⁰²Simma 1999, p. 5–6.

be more refined than a naïve fallback to (more or less subjective) morality. A detailed, if ultimately unconvincing, attempt at providing such a legal justification is provided by *Brenfors* and *Petersen* in their article defending “unilateral humanitarian intervention.”²⁰³

The goal of *Brenfors* and *Petersen* is to formulate legal arguments in favor of humanitarian intervention without the authorization of the Security Council. One of the main positions they put forward is the notion that rules in international law should be interpreted *teleologically*, i.e., so that decisions satisfy the intent of the rules. Furthermore, according to their view, the international system should not be seen as a strictly legal enterprise; instead, one should also view it as a system of “power play.”²⁰⁴ In other words, ruling on the legality of humanitarian intervention should be done so that the “power play” aspect and the underlying intent of the rules are also taken into account.²⁰⁵ The fact that such an argument can be at least plausibly presented illustrates the exceptional nature of the debate. It is symptomatic to the issue that an article that purports to provide legal arguments—in fact, favoring a certain outcome in the case against NATO countries which was at the time of the publication of the article ongoing in the International Court of Justice²⁰⁶—appears to question the “legal” nature of the entire system, though in a slightly roundabout way.

Brenfors and *Petersen* refer to *Dworkin’s* theory on hard cases: the judge / lawyer should endeavor to find the underlying *raison d’être* of and the fundamental principles behind the rules that are to be interpreted.²⁰⁷ If one is to accept this view, as they suggest, making a decision on the lawfulness of the Kosovo intervention may be colored “by the fundamental goals of the international community.”²⁰⁸ However, if we assume that the basic legal problem with the NATO action was the conflict between sovereignty and human rights, the approach of *Brenfors* and *Petersen* does not solve this problem, as it just replaces it with a slightly different reformulation of the same issue. First, if we need to come to some sort of a conclusion regarding the interplay between sovereignty on the one hand and human

²⁰³*Brenfors—Petersen* 2000.

²⁰⁴*Brenfors—Petersen* 2000, p. 450–451.

²⁰⁵*Brenfors* and *Petersen* contend that the “issue is infiltrated by both the political realities and moral considerations,” thus: “A satisfactory solution to the problem of the legality of humanitarian intervention can [...] best be reached when accepting the interaction between disciplines.” *Brenfors—Petersen* 2000, p. 451–452.

²⁰⁶The case was subsequently dismissed on grounds of lack of jurisdiction by the Court. See *Legality of Use of Force*, Judgment of 15 December 2004.

²⁰⁷*Brenfors—Petersen* 2000, p. 455. They make reference to *Dworkin, Ronald* (1978): *Taking rights seriously*. (Cambridge, Massachusetts: Harvard University Press 1978)

²⁰⁸*Brenfors—Petersen* 2000, p. 456.

rights on the other, we find that there is little agreement on which one should be given precedence over the other. Then, to solve this problem, we are to turn to the teleological legal technique which directs us to look at the “fundamental goals of the international community.” The question thus becomes whether it is sovereignty or human rights that can be found at the “root” of the values of the international community. However, this is the original problem that we set out to solve; it thus appears that a satisfactory answer would remain elusive in spite of the approach suggested.

According to Brenfors and Petersen, the “classical” interpretation of the prohibition of the threat or use of force in Article 2(4) of the U.N. Charter is that it is a blanket prohibition, i.e., only those exceptions limit its range that have been explicitly stipulated in the Charter. Brenfors and Petersen examine in more detail the Article in question and Article 51 plus the human right provisions in the Charter and draw the conclusion that the “classical,” narrow interpretation of Article 2(4) may “at one time have been the acceptable view,” but such norms “must be taken as [. . .] constantly living.” Their main contention with regard to Articles 2(4) and 51 and the human rights provisions is that the changing situation on the international arena has resulted in a situation where the said sections of the Charter must be interpreted in a more flexible manner that takes the current state of affairs into account in an adequate way.²⁰⁹

To elaborate, one specific position of Brenfors and Petersen is that the Charter provisions on the use of force and self-defense had their genesis in the goal of avoiding a repetition of the policies that led to the Second World War as discussed previously in the present study. According to them, the original goal is “not responsive to the challenges to world peace of today, particularly the escalating violations of human rights.”²¹⁰ However, while there is a certain level of validity to be found in this argument, one must consider the fact that it was during the World War that some of the most massive human rights violations in the 20th Century—possibly in human history—took place. As a result of those violations, the Universal Declaration of Human Rights and the human rights provisions in the Articles of the U.N. Charter were drafted—clear evidence of the fact that human rights were not over-

²⁰⁹Brenfors—Petersen 2000, p. 473–476. Brenfors and Petersen assert that the *rebus sic stantibus* doctrine is applicable *mutatis mutandis* so that the Security Council can lose its relevance as the arbiter of Ch. VII enforcement if it is “ineffective.”

²¹⁰Brenfors—Petersen 2000, p. 167.

looked in the drafting of the Charter, even though they were “only” an emerging doctrine at the time.²¹¹

However, the question of humanitarian intervention was not explicitly addressed in the Charter. As has been discussed, even if there had been a pre-Charter norm of humanitarian intervention, it was no longer a valid doctrine in the wake of WWII.²¹² The framers of the Charter were undoubtedly aware of the dilemma of how to deal with (potentially beneficial) doctrines in the “just war” spirit but nevertheless did not address the question, even though the human rights violations of WWII were more extreme in magnitude than those taking place today. It was both threats to peace and violations of fundamental human rights that the world community wanted to avoid because of the experiences of the war; still, it was the issue of peace that was emphasized in the Charter, not human rights. Thus, it is illogical to claim that a right to humanitarian intervention, an exception to one of the most central rules of the international legal system, could be arrived at through such interpretations of the U.N. Charter as those attempted by Brenfors and Petersen.

On the other hand, one could argue that de-emphasizing human rights over sovereignty was a conscious choice because of the political realities of the time, and thus human rights were never afforded the status they should have gained; in other words, now that there is a possibility to give human rights the influential position they deserved in the Charter but failed to attain, that possibility should be seized. However, this counter-argument is not immune to criticism, either: the prohibition on the use of force was much less controversial than the idea of human rights, as is obvious from the history of the drafting of the Charter and the Universal Declaration of Human Rights.²¹³ From this point of view, the ban on the use of force has such weight that it would be exaggerated to claim that human rights provisions could provide an exception to it.

The same considerations also apply to further comparisons between the prohibition on the use of force and the human rights provisions codified in the Charter and the Universal Declaration of Human Rights. Brenfors and Petersen argue that the increasing importance of human rights on the world agenda—the “drastic turn to internationalisation of human rights” as they put it—must be taken into account

²¹¹See p. 40 of the present study. See also Ignatieff 2001, p. 5–12, on the genesis and emergence of human rights with regard to the Charter and the Universal Declaration of Human Rights.

²¹²See p. 47 of the present study.

²¹³See Ignatieff 2001, e.g., p. 5–6, where the results of the Universal Declaration are described as a “revolution”; cf. the relatively uncontroversial pre-Charter attempts to create an effective ban on the use of force (see p. 39 of the present study.)

when interpreting international law in a teleological manner.²¹⁴ In other words, one should assess the *purpose* of Article 2(4) and consider whether that is compatible with the “weighty human rights purposes of the international community.” Brenfors and Petersen draw the conclusion that humanitarian considerations must take precedence and sovereignty has to yield. In addition to introducing to the problem the unnecessary difficulties involved with defining the purposes and intentions of the international community, Brenfors and Petersen succumb to the fundamental flaw described above—the argument is a circular one.

As for the argument that declarations made subsequent to the United Nations Charter, such as the Friendly Relations Declaration and the Definition of Aggression, could be used to determine the extent of Article 2(4) and possibly limit the range of doctrines of humanitarian intervention, Brenfors and Petersen assert that those agreements are not relevant to the inquiry at hand, as they must be considered in light of the time and the political environment in which they were adopted—i.e., the Cold War.²¹⁵ However, these agreements are nevertheless valid sources of international law. It would not be a justifiable argument to employ a piecemeal approach whereby certain agreements are considered important and others are not; and if such an approach was not employed, what would bar one from claiming that the entire United Nations Charter is no longer applicable because it, too, is a product of the time and the political environment in which it was adopted? Of course, this does not mean that an “all-or-nothing” approach where all agreements are either honored or discarded regardless of the circumstances in which they were entered into would be the only acceptable one; nevertheless, it is illogical to simply pick those agreements and provisions that support one side of a dispute and dismiss the applicability of others on the grounds that the circumstances have changed since those agreements or declarations were made.

Moreover, Brenfors and Petersen argue that unilateral humanitarian intervention has been *verboden* in the Charter system not because of the ban on the use of force but because the Charter imposed a *collective* system where the Security Council takes precedence. In other words, intervention is prohibited not because it constitutes use of force but because it is unilateral. Therefore, they claim, humanitarian intervention is allowed (only) when the multilateral arrangement of the Security Council has become ineffective. However, this argument follows the same flawed logic that has been discussed previously with regard to the paralysis or ineffectiveness argument: if a group of powerful states is unsatisfied with the outcome

²¹⁴Brenfors—Petersen 2000, p. 470.

²¹⁵Brenfors—Petersen 2000, p. 472–473.

of a vote in the Security Council, can they subsequently make a unilateral decision regarding the Security Council's ineffectiveness to justify their actions?²¹⁶ It would be more logical to argue that the Council has used its position in an effective manner in accordance with the procedures defined in the United Nations Charter. According to Brenfors and Petersen, a right to unilateral enforcement of rights recognized by the international community is triggered when those rights cannot be enforced (multilaterally) through the international system.²¹⁷ Again, this argument presupposes that individual rights take precedence over sovereignty, which is equivalent to returning to the original question—and ignores the pragmatic problem of opening up a Pandora's box of abuse. Moreover, the delineation between “clear aggression in violation of the rules of the international community” versus “humanitarian intervention to enforce rights that cannot be protected by the international community” is one of considerable ambiguity.

As with most legal arguments in favor of humanitarian intervention, the view put forward by Brenfors and Petersen only appears to provide justification for that which it presupposes: human rights considerations override the ban on the use of force because human rights considerations override the ban on the use of force. It could be claimed, as has been done, that such arguments—i.e., that rights prevail over sovereignty—depend on an individualistic, Western, even Eurocentric, view of “rights.”²¹⁸ Similar criticism can also be leveled against those parts of the argument that concentrate on the “intentions of the founding fathers” of the United Nations.²¹⁹ Their intent will be hard to infer, and such an approach also brings with it a multitude of new issues, such as how one should deal with the Soviet Union under Stalin being one of those founding fathers of the Charter system whose intentions we are attempting to deduce. Such approaches either assume a certain conception of “rights” and / or bring with them difficult practical problems.

In the end, the legalistic approach to justifying humanitarian intervention by Brenfors and Petersen is well-argued and carefully constructed but ultimately flawed. If a doctrine of humanitarian intervention does not exist in customary international law and that fact is generally agreed upon within the international community,

²¹⁶Cf. the discussion on p. 49 and p. 53 of the present study. See also Simma 1999, p. 19: “[N]o unanimity of NATO member states can do away with the limits to which these states are subject under peremptory international law (*jus cogens*) outside the organization [. . .] NATO is allowed to do everything that is legally permissible, but no more.”

²¹⁷Brenfors—Petersen 2000, p. 475–476.

²¹⁸See, in particular, Chapter 2.1 of the present study for discussion on the individualistic characteristics of human rights doctrines.

²¹⁹Brenfors and Petersen employ the idea of the “founding fathers” of the United Nations (see e.g. Brenfors—Petersen 2000, p. 498)—a concept that harkens back to American constitutional discourse and perhaps also evokes unintended associations of American foreign policy in the reader.

such a norm cannot be conjured out of thin air through legal argumentation, no matter how elaborate those legal concoctions might be. It may be appropriate to agree with *Falk* here in that the problem cannot be solved by international law alone; according to him, “reliance on legalistic analysis is particularly unfortunate for the future of international law.”²²⁰

The foregoing discussion brings up the question of whether it is beneficial to attempt to define legal, political or moral criteria for judging the acceptability or justifiability of humanitarian interventions. *Wheeler* seems to concur with numerous other writers in that he sees the main problem with the Kosovo intervention in particular and unauthorized humanitarian intervention in general as having to do with the fact that “the legal principles of non-intervention and non-use of force would no longer be sacrosanct.”²²¹ He attempts to define a framework for judging the legitimacy of humanitarian intervention. Defining clear criteria for intervention could in his opinion allay the criticism that has been presented against “military humanitarianism.” These criteria could then, it is argued, be used to guide the debate in the *Security Council* if there is disagreement among the permanent members.

Wheeler’s criteria are divided into six principles that an intervention should fulfil for it to be considered “humanitarian” and thus justifiable. These criteria are as follows, and their content should be evident from their titles: A) just cause; B) last resort; C) good over harm; D) proportionality; E) right intention; F) reasonable prospect of success.²²² Similar suggestions have been made by others, for example by *Greenwood*, whose perspective is the acceptability of intervention *without* Security Council authorization but in accordance with customary international law. His criteria are: A) the most serious humanitarian emergency; B) necessity of intervention; C) inability of the Security Council to take action.²²³

The fact is, however, that a legal-political framework for judging the legitimacy of intervention or any other use of force already exists in the form of the general procedures of the Security Council, which is what makes *Wheeler’s* criteria problematic. Thus, the problems identified earlier also apply to the criteria suggested by *Wheeler*, *Greenwood et al.* Integrating these “more refined” or “more detailed” principles into the procedures of the Council is unlikely to make decision-making

²²⁰Falk 1999, p. 852–853.

²²¹Wheeler 2001, p. 552.

²²²Wheeler 2001, p. 554–560.

²²³Greenwood 1999, p. 170–171. See also Cassese 1999, p. 27, where a number of conditions are defined under which “resort to armed force may gradually become justified, even absent any authorization by the Security Council.”

more impartial. If, for example, a permanent member wanted to employ the veto to prevent military action from receiving authorization from the Security Council, for whatever purpose, it could simply point to a lack of a “reasonable prospect of success” or to an impending failure to meet the criterion of “good over harm.” If anything, defining more or less formal criteria for intervention could very well make it *easier* to “misuse” or “abuse” the veto, whatever the definition of misuse or abuse might be. If a set of detailed abstract criteria is defined in advance, the easier it becomes both politically and legally to argue that a particular requirement for approving intervention has not been met in a specific case.

Furthermore, a stricter and more legalistic definition of criteria would lend even more credence to any rejection of a “legitimate” intervention by the Security Council, thereby impeding the possibility of using an “extra-legal” exit based on ethical considerations as justification. In other words, if criteria for humanitarian intervention had been defined on an abstract level well before the Kosovo intervention, perhaps even officially integrated into the procedures of the Security Council, and if those criteria had then been considered by the Council and the intervention then rejected because of Chinese and Russian opposition, for example, that opposition would have made the unauthorized Kosovo intervention even more difficult ethically and politically than it was, as the Council would have explicitly rejected the notion that the specific conditions required for intervention had been fulfilled.

Thus, if one wants to indulge oneself in the formulation of criteria for humanitarian intervention, it would be more advisable to concentrate on drafting moral, ethical or political requirements for unauthorized interventions instead of working on suggestions for legal standards that could become “hard law” in the future—whatever that is taken to mean in international law²²⁴—but both pursuits are something that the present writer would advise against in light of the observations made above.

In any case, it must be emphasized that attempting to define criteria for intervention with the goal of somehow getting official approval for such rules within the United Nations system is an unrealistic venture at best. For example, it can be surmised that China and Russia were wary of supporting intervention even in a *singular case* for fear of creating a *precedent* with regard to human rights violations and intervention that could work against them in the future. It is quite obvi-

²²⁴Cf. Wheeler 2001, p. 564–566. As regards the question of whether international law is “hard law” or not, see e.g. *D’Amato* 1985, who contends that the system of international affairs does constitute a system where enforcement does take place in a “hard law” sense—in contrast to numerous views often presented to the contrary.

ous that *general* criteria would present even more of a risk from their perspective, and those countries as permanent members of the Council are unlikely to give up the power that is inherent in their position—an act that the approving of criteria for authorizing humanitarian intervention would necessarily amount to. Nevertheless, as Wheeler states, “there is little prospect of an immediate breakthrough in this area”—thus, arguments regarding the effects that such criteria would have are likely to remain theoretical.²²⁵

Thus, not only do attempts to formulate criteria for future interventions suffer from problems of a pragmatic nature, but they also run into the problems one experiences when trying to provide justification for illegal interventions through legal arguments. The lesson to be learned may be that conflicts where immutable rules of international law collide with moral and ethical issues are by definition not solvable through legal interpretation, and a similar lesson may concern the formulation of intervention criteria, as such norms will either fall into the category of suggestions for unimplementable legal reforms or the category of moral and ethical statements that are not necessarily helpful in legal argumentation in themselves.²²⁶ However, this is not to say that all commentary regarding the content for pre-defined criteria should be disposed of; instead, the unavoidable legal and pragmatic limitations that such approaches are characterized by should be recognized.

Concluding observation. Attempts at justifying the Kosovo intervention fall victim to the problems identified in the previous section—namely, the tendency to appeal to legal arguments that appear convincing only on an abstract level. The fact that it is possible to put forward numerous seemingly valid arguments of international law in support of the legality of the use of force in a case where the said use of force is widely agreed to have been illegal is something that testifies to the problems inherent in a strictly legalistic approach to the issue. This is further demonstrated by the dilemmas that are involved with the endeavor of attempting to formulate lists of criteria for future interventions.

²²⁵Wheeler 2001, p. 566.

²²⁶Cf. Koskeniemi 2002, p. 168: “The more precise the proposed criteria, the more automatic their application, the more arbitrary and exclusion or inclusion would appear. And this would be arbitrariness not just in regard to some contested policy but to the humanitarian point of the rule.”

5.3 A Precedent without Precedent

The central question of what status the Kosovo intervention should be afforded—i.e., whether it should be considered to be justifiable as an extra-legal exception or given another position altogether—is closely tied to the *effects* of the approach chosen. — In the slightly optimistic appraisal of *Greenwood*, certain events of the 1990s—e.g., the Pinochet case and the creation of international criminal tribunals—were evidence of a historical opportunity to move human rights and similar agendas from the realm of mere treaties to reality on the international arena.²²⁷ However, he recognizes that these changes also brought with them problems not encountered before, and that Kosovo presented “a more difficult case” than the relatively straightforward and uncontroversial East Timor crisis, for example.²²⁸

In *Greenwood*’s view, NATO was justified in resorting to force, even though the action taken was contrary to the basic principles of international law. His comments are a simple and illustrative description of the nature of the problem: the statement that the NATO military action was morally right but unlawful implies “a terrible criticism of international law”—if the law does not match morality, it logically follows the law should change.²²⁹ Nevertheless, considering the Kosovo operation “a violation of international law albeit morally legitimate” does seem to be the approach favored by many scholars of international law as well as many of the states that supported the Kosovo intervention or took part in it, as pointed out by *Rytter*.²³⁰

Of course, such an approach provokes numerous questions, one of the most central and least obvious ones being: what if the law cannot be changed—or, to rephrase, what if the United Nations cannot be reformed? The mismatch between *legality* on the one hand and *legitimacy* on the other is particularly problematic when political realities prevent it from being resolved. Law, especially international law, has never been very “logical” in the sense of being suited to analyses of formal logic,²³¹ for example, but if the discrepancy between law and morality becomes irreconcilable, the post-WWII system of international relations may be in danger of

²²⁷Greenwood 1999.

²²⁸Greenwood 1999, p. 142–143.

²²⁹Greenwood 1999, p. 144.

²³⁰Rytter 2001, p. 157.

²³¹This may be due to the widely agreed-upon inapplicability of formal logic to the analysis of language.

becoming obsolete, and a better system is not in sight.²³² In other words, if the law cannot be altered to match (a specific system of) morality, there are few good options available. However, it does not follow that the spectrum of options—possibly including a solution that is the “least bad” alternative—shouldn’t be explored.

Greenwood concentrates on one of the most important aspects of the dilemmas presented by the Kosovo intervention: since numerous writers have supported the view that the intervention was illegal but morally legitimate, there are also many who believe that the law should not be changed (for whatever reason) but instead contend that sometimes states will simply have to act outside the law. Greenwood is particularly critical of this view, as it not only does away with the task of formulating principles for intervention²³³ as “too difficult” but also serves to create a permanent gap between legitimacy and legality—something that is more than untenable when questions as important as the prevention of genocide and the use of force are concerned.²³⁴ However, it seems that with the heterogenous character of the system of international relations and the inability of the international community to arrive at a consensus in contentious cases such as Kosovo, the danger of ending up with a dichotomy of legality and morality will always remain a problem in international law.

Simma states that the U.N. Charter would have to be changed to overcome the international legal problems with humanitarian intervention, but such a change is not something that is expected in the foreseeable future.²³⁵ This is a fact that is obvious because of political realities, but the problem is somewhat exacerbated by the inherently ambiguous nature of the present international system. Of course, one could argue that such indefiniteness of a system actually makes it easier to alter the system—i.e., specific procedural requirements do not have to be fulfilled, only a “sufficient” level of consensus has to be reached, *et cetera*—but that doesn’t appear to be the case, at least not with the doctrines of humanitarian intervention. However, such a system does carry the advantage of arguably leaving open the

²³²See Hannikainen 1999, p. 80. According to Hannikainen, there existed the danger of the international community ending up in a “stalemate” (“pattitilanne” in original Finnish.) However, he makes the unrealistic suggestion of creating a new international organization to replace it; unfortunately, the fact may be that it is easier to make the United Nations fall apart than to reform it—which is in turn easier than replacing the United Nations with a new organization. Thus, if the possibility of reforming the United Nations is not in sight due to a “stalemate,” establishing a new system to replace the U.N. will be even more unrealistic.

²³³Cf. the discussion in the previous section on the problems involved with the drafting of criteria for intervention.

²³⁴Greenwood 1999, p. 144–145.

²³⁵Simma 1999, p. 6. Compelling evidence of the difficulty of reforming the United Nations was recently seen in the 60th Anniversary U.N. Summit where reforms of the Security Council were not even attempted.

possibility of using a *one-time* extra-legal solution when exceptional circumstances so dictate.

One must recognize that in the future, situations may come up where law and morality again collide in a manner that results in an unresolvable dilemma in the current international system. Thus, there is a definite need to appreciate extra-legal approaches which could function as a kind of “emergency vent” in cases where international law *stricto sensu* fails to offer a particularly good way out of a seemingly unsolvable problem. The main philosophy behind such approaches could perhaps be compared to the legal status of cannabis in the Netherlands: when none of the different legal solutions—legalization or prohibition—can be expected to yield acceptable results, a more “flexible” system has been instituted that is based on its very ambiguity: there exist things that are illegal but where the law is not enforced. These approaches share similarities with certain legislative approaches to euthanasia.²³⁶

A separate question is whether such solutions are feasible in the current international system and to what extent they can be employed without the rules on the use of force being eroded. Kosovo is as hard a “hard case” as one can expect to run into in international law,²³⁷ and the failure of international law to provide workable legal solutions to such cases may both threaten the future of international law and strengthen it at the same time. Implementing extra-legal “emergency vents” in international law can amount to treading down a “slippery slope,” but it has already been argued that the *limited* use of exceptional measures such as those utilized by NATO in Kosovo would bolster the position of international law if the illegality of those actions is maintained by their perpetrators and a conception of them as precedent is never allowed to overtake their character as exceptional extra-legal measures.²³⁸ The assessment to be made from that perspective is the extent to which the Kosovo intervention actually had a precedent-setting effect and the extent to which it should be afforded that status.

²³⁶On the euthanasia parallel, see Brownlie 1973, p. 146. Cf. also the mitigation aspect below. See also Chesterman 2001, p. 226. Another example of ambiguity being used as a legal-political strategy in international law is the Israeli policy of nuclear deterrence whereby Israel neither denies nor acknowledges its possession of nuclear weapons.

²³⁷However, an even “harder” example might have been presented in the Advisory Opinion of the ICJ regarding the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, where the Court was evenly split on the key issue of whether the use of nuclear weapons would be lawful in an “extreme circumstance of self-defence.” The matter itself is strange to consider in light of the fact that such events might very well lead to a world where international law as we know it would no longer exist. See also Kennedy 2004, p. 316–323. He writes: “[T]he judges decided the case seven to seven. Yet no one seemed to mind.” Kennedy 2004, p. 319.

²³⁸Cf. the considerations presented in the previous section and in Ch. 4.1, p. 41.

Thus, the problem is whether the Kosovo situation should be viewed as an *exceptional case* where extra-legal measures can be employed in the absence of better alternatives in circumstances that cannot be allowed to persist. In international law, it seems that the line between legal and extra-legal can be as ambiguous as the line between legal and illegal. The question to be considered, then, is the *legal* effect of these *extra-legal* “emergency vents”—apart from the strengthening / eroding effect on international law mentioned above—and how “extra-legal” such solutions should be.

The overall position taken by Simma is that the action by NATO in Kosovo was separated from legality only by “a thin red line.” It seems that hard cases such as this can be either beneficial or detrimental to international law: depending on their outcome and their effect on the international community, they can help develop international law in new directions, perhaps guided by ethical principles, or lead into its marginalization. Simma appears to be concerned of the dangers of the latter case: in his opinion, such cases should remain as isolated as possible, because they have the potential to “erode the rules of international law.”²³⁹ In Simma’s approach, considerable emphasis is put on the assertion that Kosovo should be an exceptional exception.²⁴⁰ He warns of the possibility of undermining the system of collective *security*, that is, not only the system of international law.²⁴¹ In other words, if carrying out the Kosovo intervention was justified as an extreme case, an example of a moral and ethical necessity to prevent grave breaches of humanitarian norms, it should nevertheless remain an exception that does not create new international law or a new policy or doctrine.²⁴² Rytter offers a similar caveat: even though norms of humanitarian intervention are intended to prevent human suffering, the use of force in international relations has also led to immense humanitarian catastrophes, and it has taken a lot of time and effort to establish a prohibition on the use of force—something that should not be jeopardized.²⁴³

Even though this is a point of view that may be relatively easy to subscribe to, it seems that Simma still underestimates the possibility of “exceptional exceptions” in fact strengthening international law. This strengthening could be twofold in its effect. Firstly, stressing the illegality of an operation while emphasizing its neces-

²³⁹Simma 1999, p. 22.

²⁴⁰Simma 1999, p. 14: “[T]he decisive point is that we should not change the rules simply to follow our humanitarian impulses; we should not set new standards only to do the right thing in a single case.”

²⁴¹Simma 1999, p. 1: “[S]hould such an approach become a regular part of [NATO’s] strategic programme for the future, it would undermine the universal system of collective security.”

²⁴²Simma 1999, p. 14.

²⁴³Rytter 2001, p. 158–159.

sity from a moral point of view would make the delineation between legality and illegality clearer and thus make the system less ambiguous.²⁴⁴ Secondly, it can be argued that the moral arguments in favor of an operation such as the one in Kosovo in fact serve the purpose and spirit, if not the letter, of the obligations that bind states under international law.²⁴⁵ In fact, it would seem that the danger with “hard cases” is that while they make bad law, they make good ethics—i.e., they can call into question the fundamentals of the system of international law, thereby undermining its credibility. Thus, the actual problem would not be the erosion of the present system in itself, but the fact that instituting a new system where these ethical and moral considerations could be taken into account more efficiently may be something that is impossible in the present political situation—resulting in a legal vacuum with moral problems of an even more serious nature if the present system were to be abandoned.

According to Rytter, the grounds on which violations of existing norms are justified—on legal or on purely moral or political grounds—is crucial from the point of view of the evolution of customary international law, as purely moral or extra-legal justifications cannot contribute to the modifying of norms. This point is connected to the strategy employed by NATO countries and the view put forward by Germany in particular, both of which are examined by Simma.²⁴⁶ NATO did not specifically refer to a *doctrine* of “humanitarian intervention” but still used lines of argumentation that bore strong resemblance to it. The organization put heavy emphasis on its willingness to follow the U.N. Charter and other sources of international law at least in spirit. It was the intention of NATO to convey an image of its actions that portrayed it as enforcing and maintaining the resolutions of the Security Council, particularly S/RES/1199.²⁴⁷ The intervening parties emphasized semi-legal arguments, i.e., they relied on the idea of carrying out the intent of the Security Council or enforcing the human rights obligations of the Charter, while not formulating their views in a strictly legal style—furthermore, as Cassese points out, the intervening states did not claim that the action taken was in accordance

²⁴⁴Cf. the arguments presented on p. 41 of the present study with regard to the possibility that breaches to a rule may actually strengthen the rule if certain conditions are met.

²⁴⁵See, for example, Franck 1999, p. 859: “Even an illegal action, if instrumental in bringing about results widely desired by a community, will not seriously undermine a resilient legal system, one with the elasticity to make allowances for mitigating circumstances.” On the mitigation aspect, cf. Kohen 2003, p. 220: “[J]ustifications could act as a mitigating circumstance, not to preclude wrongfulness, but with regard to the consequences arising from that act with regard to State responsibility.”

²⁴⁶Simma 1999, p. 12–14. See also Cassese 2000, p. 792–793.

²⁴⁷According to Simma, the aforementioned resolution was worded in such a way that it was an insufficient justification for military intervention. Simma 1999, p. 12.

with international law.²⁴⁸ The view embraced in German statements on the intervention was one in which the question of legality was de-emphasized more clearly and in which the notion that Kosovo should not become a precedent was more or less explicitly propounded.²⁴⁹

According to Simma, attempts at legal justification will ultimately remain unsatisfactory but the illegality of humanitarian intervention “cannot be the last word,” either. In other words, it appears that an *extra-legal* approach is indeed called for. Such an exit—one that stays close to the approach of Simma—is provided by the German view of Kosovo as an “exception,” and this is what Simma in the end prefers.²⁵⁰ As has been noted, such an approach could in fact strengthen the rules on the use of force instead of eroding them. However, this seems to be a solution that has to be used very sparingly: one cannot claim to be resorting to *exceptional* means available only in a singular case, if the same justification is invoked *again* later.²⁵¹

It appears that the decision on which “extra-legal” justification to employ—or whether to employ one at all (or whether declining to provide a carefully thought-out justification to an action such as the one carried out by NATO still amounts to providing an argument)²⁵² will ultimately rest on political and practical considerations. The concerns that underlie positions such as the one taken by Germany are well summed up at the end of Simma’s article: there is the risk of NATO “self-authorization,” a genie-in-the-bottle that must not be released.²⁵³ Cassese also voices certain caveats that echo the commentary of Simma: if a group of powerful nations utilizes human rights—or other arguments—to work around the limitations and procedures that curtail the use of force, a Pandora’s box may be opened that may be difficult to close. Even though NATO attempted to make its actions as “legal” as possible by referring to the previous Council resolutions and the spirit of the U.N. Charter, there nevertheless exists the danger of creating a precedent that

²⁴⁸Cassese 2000, p. 792.

²⁴⁹Simma 1999, p. 13, and Rytter 2001, p. 153–155.

²⁵⁰Simma 1999, p. 14: “[. . .] regard the Kosovo crisis as a singular case in which NATO decided to act without Security Council authorization out of overwhelming humanitarian necessity, but from which no general conclusion should be drawn.” Interestingly, emphasizing the *extra-legal* nature is done in this approach with the goal of preserving the status of *legal* norms.

²⁵¹Note Rytter’s emphasis on the assertion that an extra-legal “escape” must only be used very rarely. Rytter 2001, p. 151.

²⁵²Cf. the fact that declining to appear in the International Court of Justice is not without its effects: see e.g. *Elkind* 1984. However, this was not the strategy chosen by NATO countries in *Legality of Use of Force*. Cf. Gray 2000, p. 23: “Rather than not even attempt a legal justification, commonly states offer what may seem weak or unconvincing viewpoints.”

²⁵³Simma 1999, p. 20.

brings to mind the Warsaw Pact action that was carried out in Czechoslovakia in 1968, as *Laurenti*, quoted by Simma, points out.²⁵⁴

The main risk appears to be that if the Kosovo intervention and the arguments put forward in support of it created a more general norm of humanitarian intervention, it could become a norm of intervention without Security Council authorization for any reasons that a single state or a group of states deems sufficient. Such an insidious development would give rise to a situation where there would be no limit to the sphere of possible interventions but a rapid end to the present system where strict limits constrain the use of force in international relations.

Furthermore, Cassese argues that an *opinio necessitatis* may have formed instead of an *opinio iuris*: i.e., the consensus has come into existence that certain actions can be in breach of the law while still being necessary from a political, economical or moral standpoint.²⁵⁵ According to Cassese, *opinio necessitatis* was “strong and widespread” but did not amount to anything that could be said to support the notion that a general rule of humanitarian intervention had crystallized in international law. Thus, treating the Kosovo case as a singular exception with no precedent-creating effect appears to be quite possible: as Cassese points out, a new customary rule cannot be inferred on the basis of a single episode, regardless of its magnitude.²⁵⁶

It is interesting to consider in light of Cassese’s view about *opinio necessitatis* the possibility that the fundamental effects of the Kosovo intervention were not legal but political in character. The operation and the resulting reaction may not have created a new customary rule of international law, as elements generally agreed to be necessary requirements for the creation of such a new rule did not exist to the extent required, but a new “rule” may have become apparent in the political arena: Western states are willing to overstep the boundaries of the use of force regulation of the Charter system if human rights violations of sufficient severity are taking place in a country that shares a geographical, political or historical connection

²⁵⁴*Ibid.*

²⁵⁵Cassese 2000, p. 798. Similarly, Rytter states that “NATO’s bombing campaign has been widely stamped [...] as a violation of international law, albeit morally legitimate” and that “there are no signs of an emerging *opinio juris* among states in the aftermath of NATO’s war that unauthorised humanitarian intervention is under certain circumstances lawful.” Rytter 2001, p. 157.

²⁵⁶Cassese 2000, p. 797. Cassese notes that “the matter is too delicate and controversial to warrant the contention that the evolution of international law in this area may result from a single episode,” with particular reference to the special status that sovereignty has under the present system.

with the West, as was the case with Kosovo.²⁵⁷ The atrocities in Chechnya may not result in explicit condemnations from European states or major Western powers, while it could be estimated that similar human rights violations in the Ukraine or in Moldova, for example, would result in some type of action—in an extreme case, perhaps even military action or a threat to use military force—from the West. The effect that recent developments, such as the creation of the Rapid Reaction Force of the European Union, will ultimately impart on this state of semi-ambiguity is something that can only be assessed in the future.

When one sets out to formulate an opinion on the Kosovo situation, regardless of the legal (or extra-legal or ethical) position adopted, the ambiguities regarding the foundations of international law lead to problems, as hard cases such as Kosovo unavoidably touch upon those foundations. The lack of clear meta-rules appears to be one of the underlying factors that make the Kosovo case such a perplexing one. Commentators often have differing views of the rules and it sometimes appears as if fundamental rules were made up in an *ad hoc* manner. Even though the logical basis of the questions themselves seems—at least on occasion—frustratingly indeterminate, the basic legal nature of the dilemmas presented is more or less apparent: it is unavoidable that the prohibition on the use of force and the increasing importance of human rights doctrines are at odds when humanitarian intervention is examined, and the Kosovo intervention happened to be the case where that conflict became so obvious so suddenly.²⁵⁸

Even in the absence of clear common ground among commentators in terms of their fundamental approaches to the system of international law, it can be stated that the dilemma mentioned above is the basic problem that is being debated when the justifiability of humanitarian interventions is discussed. It is of no use to “discard” international law and the debate on law and morality, even if finding appropriate solutions to real-life problems seems impossible or exceedingly difficult within the present international system. In other words, there exists an ambiguous system of international law on which we must rely in the long run to reconcile the discrepancy between the legal ban on the use of force and the putative moral right or duty to uphold human rights obligations. A sound approach well suited to such a system is a position that remains relatively close to the one

²⁵⁷Cf. the assessment in Franck 1999, p. 859: “[E]gregious repression of minorities is not a risk-free venture [...]”

²⁵⁸Cf. Harhoff 2001, p. 66; see also p. 39 of the present study. However, cf. the view put forward by Gowlland-Debbas 2000, p. 378–379: *inter alia*, Art. 2(7) does not limit the powers of the Security Council under Ch. VII as such; in addition, there had previously been willingness on part of the Council to interpret violations of human rights as threatening international peace and security.

advocated by Simma—a solution wherein the Kosovo case is regarded as a singular exception, avoiding the promotion of a new doctrine of humanitarian intervention with its unavoidable pitfalls, while still leaving open the option of pursuing certain humanitarian measures should the need arise in the future. It is obvious that such an approach is not insusceptible to problems, and its main drawback may be that it bears the danger of leading to considerable ambiguity and instigating ominous legal conflicts if humanitarian dilemmas similar to that of Kosovo reoccur in the future. Nonetheless, in light of the viewpoints presented in this study, adhering to such a solution while expending maximum effort to prevent further incidents of humanitarian suffering from taking place is the optimal position to be advocated—regardless of whether the issue is examined from a legal, political or ethical perspective.

Concluding observation. There are convincing arguments for treating the Kosovo intervention as an *extra-legal* necessity whose precedent-setting *legal* effect is minimal, as it can be argued that such an approach minimizes the damage inflicted on the prohibition on the use of force while still taking humanitarian concerns into account. While it is an unavoidable drawback of this solution that it is not particularly well suited to reuse, it is the view of the present writer that it is the preferable “exit” out of the apparent legal dead end created by the Kosovo crisis. Traces of the position presented here can be discerned in the rhetorical strategy exhibited in statements made by the Kosovo interveners. Furthermore, it may be that while the NATO action indeed did not bring about a legal norm of humanitarian intervention, the political “rule” it may have created in Europe and its fringes cannot be overlooked.

6 Whither Intervention? Or: Wither, Intervention?

The issue that we set out to investigate was the problem of the general *acceptability* of humanitarian intervention and the extent to which the Kosovo case could—or should—be considered a *precedent* for future interventions. The viewpoints that have been examined in this study have demonstrated that the extremes of strict adherence to the prohibition on the use of force, on the one hand, and advocating the abandonment of the Charter system in favor of what has been called “military humanitarianism,” on the other, fail to provide the international lawyer with an optimal answer. Some may consider such a conclusion obvious, but finding a tenable solution to the dilemma requires that a diligent examination of the factors *pro* and *con* is conducted. In the present inquiry, an approach has been favored wherein an analysis of certain fundamental aspects of human rights doctrines—with particular reference to the purported *universality* of rights—was connected to an examination of the *criticism* that has been presented of the political and practical issues pertaining to intervention, which, in turn, served as background for a legal-pragmatic *assessment* of the Kosovo case and its implications for interventionism in general. At this point, certain closing observations may be in order in light of the foregoing.

An undeniable starting point in an investigation into the problem must be the concession that human rights fail to bear historical or empirical universality in a strict sense; nevertheless, it is the view of the present writer that the issues of the modern world necessitate the existence—be it manufactured or pre-existing—of a *common morality* that is global in scope but relatively limited in breadth. In this vein, it is reasonable to assert that genocide and atrocities of its ilk are in flagrant violation of the values that can be considered a reflection of the universal interests of the international community. While maintaining an effective and credible international public order based on the peaceful cooperation of nations can be argued to require the enforcement of norms which protect those universal interests, it must not escape notice that it would be ill-advised to elevate those values and interests to the position of a novel “secular religion” due to the misgivings that such a strategy would incite among many—and, in the position of this writer, due to the problems associated with the very notion of religious *dogmata*.

However, international law need not become subservient to doctrines professing to protect the common interest of the global community, a matter obvious to those who comprehend the historically-rooted genesis of current doctrines: attempts by

the West to gain a position as the “discoverer” and an “enforcing torchbearer” of universal rights can be expected to be met with skepticism, as those rights do not possess the property of universality in the sense of being “discoverable.” Thus, it is *practical dilemmas* that can appear insurmountable, as unenforced rights would lack relevance, as the dearth of credible contenders to the position of a more impartial enforcer cannot be denied and as the dubious actions taken in the name of civilization and humanitarianism in the past make it obvious why interventionism is often opposed with such vehemence.

The *law* on interventions is relatively unambiguous: even if motivated by morally laudable considerations and justified through arguments based on a teleological interpretation of the Charter, the use of force without an explicit authorization from the Security Council is an action in violation of international law. The fact that controversy which is as wide-ranging as that which stemmed from the intervention in Kosovo can arise in the face of such legal certainties is attributable to something that most international lawyers undoubtedly comprehend and consider self-evident but nevertheless rarely acknowledge in explicit terms—that is, the fact that the line between law and politics may be hard to draw in international relations.

The question that this situation prompts, then, is one of which *approach* it is that is advisable to adopt on the issue of contentious interventions, “approach” here referring to the position taken with regard to both legal and practical problems and taking into account considerations of both types. In light of the observations presented herein, the overarching conclusion to be drawn is that a conservative—in the sense of *cautionary*—stance is called for, due to certain issues whose importance and propensity to recur in analyses of the problem favors such an approach: the importance of maintaining the current limits on the use of force, the “fragility” of the rules of international law, the historical precedents of interventions that have served less than benevolent agendas, and *summa summarum*, the fact that (to formulate it bluntly) changing international law to include a right of humanitarian intervention without introducing to it elements prone to abuse or making the entire system lose its relevance altogether may be impossible for the foreseeable future.

It appears fairly obvious upon closer examination that attempts at providing legal justifications for the Kosovo intervention were quite contrived indeed—a conclusion that might have been reachable *a priori* due to the very illogicality of there existing a plausible legal excuse for actions that were generally agreed to be un-

pardonable in legal terms, something that even the present system of international law in its malleability declines to yield to. Thus, arguments presented in favor of *extra-legal* solutions wherein the intervention is conceived of as having an exceptional “one-time” character are persuasive in their ability to steer clear of the legal problems involved with approving of the intervention and the ethical problems involved with disapproving of it. Nonetheless, the nature of strategies of this type preclude them from being reapplied to subsequent interventions, as future actions would then either acquire precedent status or contribute to making the current rules on the use of force obsolescent.

Furthermore, the benefits associated with the widely agreed upon interpretation that the Kosovo case failed to establish a customary norm of humanitarian intervention leads the present writer to conclude that endeavoring to codify or even define in advance a set of *criteria* for intervention may be an enterprise that is destined to be futile or at least counterproductive—in particular, explicit conditions for “legal” or “acceptable” interventions can prove amenable to abuse and distortion more readily than a state of *ambiguity* would. In fact, the practical-political repercussions of the Kosovo intervention—the message or “precedent” that the case can plausibly be argued to have created or conveyed to the international community—may be interpreted as a manifestation of this approach: depending on the circumstances, a crisis on the geographical and cultural fringes of the West may result in humanitarian countermeasures of the military type even in the absence of Council authorization—a deterrent that may be effective due to its very ambiguity.

It would appear that the problems associated with the concept of humanitarian intervention are ultimately *pragmatic* in nature. The examination of certain critical approaches to the issue demonstrated that even methodologically suspect appraisals of the topic can prove valuable in contributing to identifying many of the practical drawbacks that interventionism entails; nevertheless, one needs to be mindful of the methodological and philosophical quagmires introduced by such approaches to avoid declining into absurdity.²⁵⁹

While it is undeniable that certain humanitarian crises may sometimes need to be counteracted with force, the road to Hell is indeed paved with good interventions,

²⁵⁹Allott puts forward the provocative question, “Who killed philosophy?” Allott 1999, p. 49. As the philosophical underpinnings and practical implications of certain approaches to humanitarian intervention and to international law in general call into question their very relevance—something that has been touched upon in this study—the present writer cannot but draw the conclusion that the death of philosophy may have been self-inflicted.

and the reasons lie on a practical level. The more conspicuous explanation can be summarized by stating that *good interventions go bad* more often than not—in other words, the humanitarian countermeasures may overtake the atrocities in their undesirable effects. The limits that have been imposed on the use of force will be in jeopardy if unauthorized interventions become the norm rather than the exception, giving rise to a risk of a less overt but more significant nature: overemphasizing the undeniable ethical dilemmas inherent in the present system may cast doubts upon its sustainability from a moral standpoint. Therefore, a future where it is superseded by a new order where the use of force is not bound by the shackles of a strict legal régime may become all too enticing. A cautious and critical but nonetheless non-nihilistic approach rooted in reality is the one that should be embraced with respect to humanitarian intervention. Giving the Kosovo intervention value as a legal precedent may be irreconcilable with such an approach, but a conservative stance on the matter does not preclude one from acknowledging the practical-political significance of the Kosovo case. In an ambiguous system such as that of international law, the best solution to a hard case may be one of ambiguity.

Quo vadis? While a sense of optimism will always linger in the minds of international lawyers and humanitarian activists, it can be challenging to avoid disillusionment with the possibilities of international law as a means of effecting profound and lasting change for the better. — “[T]o endow the world community with the capability to address humanitarian emergencies without weakening the bonds of restraint that restrict war-making by states” is what *Falk* recently identified as “the most pressing challenge.”²⁶⁰ The lamentable state of affairs on the international arena leads one to a conclusion that is as inescapable as it is unfortunate: it may very well be that the mission *Falk* calls “the most pressing challenge” turns out to be *a most depressing challenge*.

²⁶⁰Falk 2004, p. 45.