
The Illegality of ‘Genuine’ Unilateral Humanitarian Intervention

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It is also contrary to the natural Equality of Mankind, for a Man to force himself upon the World for a Judge, and Decider of Controversies. Not to say what dangerous Abuses this Liberty might be perverted to, and that any Man might make War upon any Man upon such a Pretence.

— Pufendorf, *Law of Nature and Nations*¹

Abstract

The activation of the crime of aggression at the International Criminal Court has renewed interest in one of the oldest and most fraught questions of the jus ad bellum: whether a state is entitled to unilaterally use force on the territory of another state for humanitarian purposes. Scholars who support unilateral humanitarian intervention (UHI) generally make two interrelated claims. The first is positivist: that unilateral intervention is lawful if it genuinely intended to end mass atrocity. The second is normative: that genuinely humanitarian unilateral intervention should be lawful because, in the right circumstances, it can serve as an effective mechanism for protecting civilians from harm. In this article, I criticize both claims. I begin by arguing that, from a positivist perspective, even genuinely humanitarian unilateral intervention violates the prohibition of the use of force and qualifies as a criminal act of aggression. I then argue that the historical record undermines the normative attractiveness of UHI because it is extremely difficult to find an actual example of a unilateral intervention motivated primarily by humanitarian concerns, especially one that improved the humanitarian situation in the territorial state. Finally, I conclude by arguing that the basic effect of insisting on the legality of UHI is to weaken one of the few clear prohibitions in international law for no discernible benefit, making the desire to decriminalize such intervention a well-meaning equivalent to the notorious ticking time-bomb scenario.

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¹ S. Pufendorf, *The Law of Nature and Nations*, trans. Basil Kennet (5th edn, 1749), bk 8, at 847.

1 Introduction

The activation of the crime of aggression at the International Criminal Court (ICC) has renewed interest in one of the oldest and most fraught questions of the *jus ad bellum*: whether a state is entitled to unilaterally use force on the territory of another state for humanitarian purposes. Scholars who support unilateral humanitarian intervention (UHI) generally make two interrelated claims. The first is positivist: that unilateral intervention is lawful if it is genuinely intended to end mass atrocity. The second is normative: that genuinely humanitarian unilateral intervention *should* be lawful because in the right circumstances it can serve as an effective mechanism for protecting civilians from harm.

In this article, I criticize both claims. I begin by arguing that, from a positivist perspective, even genuinely humanitarian unilateral intervention violates the prohibition of the use of force and qualifies as a criminal act of aggression. I then argue that the historical record undermines the normative attractiveness of UHI because it is difficult to find an example of a unilateral intervention motivated primarily by humanitarian concerns, especially one that actually improved the humanitarian situation in the territorial state. Finally, I conclude by arguing that the basic effect of insisting on the legality of UHI is to weaken one of the few clear prohibitions in international law for no discernible benefit, making the desire to decriminalize such intervention a well-meaning equivalent of the notorious ticking time-bomb scenario.

2 Does UHI Qualify as a Criminal Act of Aggression?

Adapting the seminal definition, I will define UHI as a state or group of states using armed force without the authorization of the United Nations Security Council primarily, if not exclusively, to end mass atrocities in a foreign state.² From a positivist perspective, whether UHI qualifies as a criminal act of aggression depends on two issues: whether it involves a use of force that violates Article 2(4) of the UN Charter and whether it constitutes a manifest violation of the UN Charter for purposes of Article 8bis of the Rome Statute.³

A *Prohibited Use of Force*

Article 2(4) of the UN Charter provides that '[a]ll 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'. There is no question that even a genuinely humanitarian unilateral intervention is a use of force for the purposes of Article 2(4), because it necessarily involves State A using force on the territory of State B. As Tom Ruys says,

² Dorr and Randelzhofer, 'Purposes and Principles, Article 2(4)', in B. Simma *et al.* (eds), *The Charter of the United Nations: A Commentary* (3rd edn, 2012), vol. 1, 200, at 222.

³ Rome Statute of the International Criminal Court 1998, 2187 UNTS 90.

Article 2(4) is triggered by 'any deliberate projection of (potentially) lethal force onto the territory of another state'.⁴

It is worth noting that scholars have occasionally suggested that Article 2(4) does not prohibit UHI because genuine humanitarian intervention, to quote Michael Reisman and Myres McDougal, 'seeks neither a territorial change nor a challenge to the political independence of the State involved and is not only not inconsistent with the purposes of the United Nations but is rather in conformity with the most fundamental peremptory norms of the [C]harter' – namely, the protection of human rights.⁵ That position, however, is not *lex lata*. The drafting history of Article 2(4) indicates that the prohibition of the use of force is all-inclusive, admitting of no exceptions other than those contained in the UN Charter itself.⁶ Indeed, Oscar Schachter famously dismissed the idea that humanitarian intervention does not violate Article 2(4) as requiring 'an Orwellian construction' of the prohibition of the use of force.⁷

Since it involves a use of force, UHI is prohibited by Article 2(4) unless it falls within a recognized exception. It does not. By definition, UHI is not authorized by the Security Council or conducted with the consent of the territorial state.⁸ Moreover, a state engaging in UHI cannot invoke the right of self-defence, because Article 51 requires an armed attack on the state using defensive force.⁹ In terms of the latter, therefore, UHI must be distinguished from the use of force to protect nationals abroad, which many states believe qualifies as self-defence.¹⁰ That position is itself not without controversy,¹¹ but harm to nationals at least arguably involves an armed attack against

⁴ Ruys, 'The Meaning of "Force" and the Boundaries of the *Jus Ad Bellum*: Are "Minimal" Uses of Force Excluded from UN Charter Article 2(4)?', 108 *American Journal of International Law (AJIL)* (2014) 159, at 197.

⁵ Reisman and McDougal, 'Humanitarian Intervention to Protect the Ibos', in R. Lillich (ed.), *Humanitarian Intervention and the United Nations* (1973) 167, at 177; see also E.R. Tesón, *Humanitarian Intervention: An Inquiry into Law and Morality* (3rd edn, 2005), at 151 (arguing that 'it is a distortion to argue that humanitarian intervention is prohibited by article 2(4)'); Brenfors and Petersen, 'The Legality of Unilateral Humanitarian Intervention: A Defence', (2001) 69 *Nordic Journal of International Law (NJIL)* 449, at 497.

⁶ See, e.g., I. Brownlie, *International Law and the Use of Force by States* (1963), at 267; Kammerhofer, 'The Resilience of the Restrictive Rules on Self-Defence', in Marc Weller (ed.), *The Oxford Handbook of the Use of Force in International Law* (2015) 627, at 642.

⁷ Schachter, 'The Legality of Pro-Democratic Invasion', 78 *AJIL* (1984) 645, at 649; see also Ruys, 'Criminalizing Aggression: How the Future of the Law on the Use of Force Rests in the Hands of the ICC', 29 *European Journal of International Law (EJIL)* (2018) 887, at 895 (noting that 'the application of a traditional positivist methodology leads to the almost inescapable conclusion that the drafters of the UN Charter intended Article 2(4) to be construed broadly in a manner leaving no room for unilateral interventions').

⁸ A non-Charter-based exception to the prohibition of the use of force established through supervening custom. See T. Ruys, *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice* (2013), at 36.

⁹ See, e.g., V. Lowe and A. Tzanakopoulos, 'Humanitarian Intervention', in *Max Planck Encyclopedia of Public International Law* (2011), at 473.

¹⁰ See C. Gray, *International Law and the Use of Force* (3rd edn, 2008), at 88–92. Israel's raid at Entebbe is an example. See note 4 above.

¹¹ Ruys, 'The Protection of Nationals' Doctrine Revisited', 13 *Journal of Conflict and Security Law (JCSL)* (2008) 233, at 233.

the intervening state.¹² No such armed attack takes place when a state unilaterally intervenes to protect another state's nationals.¹³

To be sure, scholars have occasionally tried to bring UHI within the ambit of self-defence. Jens David Ohlin claims, for example, that the defence of others – with UHI, the defence of foreign nationals being victimized by their own government – is part of the 'inherent' right of self-defence in Article 51:

[I]f a national group located within a sovereign State is attacked, and that attack threatens their natural law right to exist, the national group has a right, sounding in natural law, to resist that unjustified attack. By extension, other nations have the right to come to the assistance of that national group through the exercise of the defense of others that is implicit in the doctrine of legitimate defense. And it is precisely this broader natural law right that is carved out of the prohibition against the use of force by Article 51.¹⁴

Ohlin is careful to insist that he is making a positivist argument based on Article 51, not a naturalist one.¹⁵ The idea that the inherent right of self-defence includes the collective defence of a civilian population, however, is impossible to reconcile with the drafting history of Article 51. The inclusion of 'inherent' – which was accompanied by no substantive debate over the word's meaning¹⁶ – was not intended to recognize self-defence beyond what is specifically permitted by the UN Charter.¹⁷ On the contrary, as Hans Kelsen noted nearly 70 years ago, '[t]he effect of Article 51 would not change if the term "inherent" was dropped'.¹⁸ That is fatal to Ohlin's argument because the text of Article 51 makes clear that a state can engage in collective self-defence only in defence of another state.¹⁹ Put more simply, civilian populations have no individual right of self-defence against an armed attack,²⁰ so UHI cannot qualify as collective self-defence under Article 51.²¹

¹² *Ibid.*, at 237.

¹³ See, e.g., Simma, 'NATO, the UN and the Use of Force: Legal Aspects', 10 *EJIL* (1999) 1, at 5 ('as long as humanitarian crises do no transcend borders ... and lead to armed attacks against other states, recourse to Article 51 [self-defence] is not available').

¹⁴ Ohlin, 'The Doctrine of Legitimate Defense', 91 *International Law Studies* (2015) 119, at 141–142.

¹⁵ *Ibid.*, at 146 ('the doctrine of legitimate defense works within the Charter by recognizing the absolute centrality of Article 51 for governance of use-of-force questions. It accomplishes this task by offering a subtle reading of Article 51, carefully attuned to the natural law origins of defensive force and the positive law incorporation and preservation of that right into the text of Article 51').

¹⁶ Ruys, *supra* note 8, at 65.

¹⁷ See, e.g., Nolte and Randelzhofer, 'Art. 51', in Simma *et al.*, *supra* note 2, 1397, at 1403 (noting that, with regard to the 'inherent' right, '[t]he prevailing view considers Art. 51 to exclude any self-defence other than that in response to an armed attack').

¹⁸ H. Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems* (1950), at 791–792.

¹⁹ UN Charter, Art. 51 ('[n]othing 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'); see also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Merits, 27 June 1986, ICJ Reports (1986) 14, para. 185 ('[i]n the case of individual self-defence, the exercise of this right is subject to the State concerned having been the victim of an armed attack. Reliance on collective self-defence of course does not remove the need for this').

²⁰ See, e.g., Kress, 'Major Post-Westphalian Shifts and Some Important Neo-Westphalian Hesitations in the State Practice on the International Law on the Use of Force', 1 *Journal on the Use of Force and International Law (JUFIL)* (2014) 11, at 15; Lowe and Tzanakopoulos, *supra* note 9, at 473.

²¹ Kress, *supra* note 20, at 15 ('[f]or the same reason the text of Article 51 of the UN Charter does not offer anything in support of a right of collective self-defence of a foreign state to the benefit of a civilian population under attack by its own government').

Unlike Ohlin, Ruth Wedgwood relies primarily on Security Council practice to argue that the right of self-defence can justify UHI. In her view, '[t]he Council's willingness to expand the reach of Chapter VII to look at both internal and international conflicts may justify a broader interpretation of Article 51 as well, for surely the self-defence of a population warrants as much consideration as defense of a political structure'.²² It is not clear why the Security Council's increasingly aggressive use of Chapter VII with regard to internal conflicts supports interpreting Article 51 to no longer require an armed attack against a state. Regardless, there is no state practice or *opinio juris* supporting such an interpretation. On the contrary, no state has ever claimed that UHI was justified as an act of self-defence of a civilian population.²³

Other scholars have suggested that, even if UHI is a prohibited use of force, it could still be justified on the basis of necessity,²⁴ one of the 'circumstances precluding wrongfulness' in the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA).²⁵ Belgium made precisely that argument in the context of the North Atlantic Treaty Organization's (NATO) intervention in Kosovo.²⁶ Numerous other states, however, have specifically rejected the idea that necessity can justify an otherwise-prohibited use of force,²⁷ and their position is the stronger one. Most importantly, Article 2(4) is widely recognized as a *jus cogens* norm²⁸ – a 'conspicuous' one,

²² Wedgwood, 'NATO's Campaign in Yugoslavia', 93 *AJIL* (1989) 828, at 833.

²³ Lowe and Tzanakopoulos, *supra* note 9, at 473. Interestingly, the North Atlantic Assembly once suggested that self-defence should apply to 'defence of common interests and values, including when the latter are threatened by humanitarian catastrophes, crimes against humanity, and war crimes'. *Ibid.* The Arab League also issued a statement regarding Syria in 2013 that can be read to endorse Ohlin's view, but the better reading of the statement, as discussed below, is that it reflects the Arab League's decision to give Syria's membership in the League to the rebel coalition.

²⁴ See, e.g., G.K. Walker, *Principles for Collective Humanitarian Intervention to Succor Other Countries' Imperiled Indigenous Nationals* (2002), at 160 ('collective humanitarian intervention under state of necessity, based on ILC State Responsibility principles that restate customary and general principles norms, demonstrate that NATO acted within the bounds of international law in conducting Allied Force'); Spiermann, 'Humanitarian Intervention as a Necessity and the Threat or Use of Jus Cogens', 71 *NJIL* (2002) 523, at 543 ('[a]t present necessity is the one way that humanitarian intervention not sanctioned pursuant to the Charter may find space in international law, however limited').

²⁵ International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), UN Doc. A/56/83, 3 August 2001, at 43, Art. 25.

²⁶ See Johnstone, 'The Plea of "Necessity" in International Legal Discourse: Humanitarian Intervention and Counter-Terrorism', 43 *Columbia Journal of Transnational Law (CJTL)* (2004) 337, at 362–363 (quoting a Belgian pleading at the International Court of Justice [ICJ]). The United Kingdom (UK) came close to taking the same position, but, unlike Belgium, it seemingly did not tie its 'humanitarian necessity' argument to ARSIWA (at 363).

²⁷ Corten, 'L'état de nécessité peut-il justifier un recours à la force non constitutif d'agression?', 1 *Global Community Yearbook of International Law and Jurisprudence* (2004) 11, at 27–31.

²⁸ See, e.g., Rodley, 'Humanitarian Intervention', in Weller, *supra* note 6, at 794 ('[t]he prohibition of the use of force is the most secure *jus cogens* norm'). James Green says this view is endorsed by 'an overwhelming majority of scholars'. Green, 'Questioning the Peremptory Status of the Prohibition of the Use of Force', 32 *Michigan Journal of International Law* (2011) 215, at 216. Green himself is more sceptical, though he does not deny the possibility (at 217).

according to the International Law Commission.²⁹ Article 26 of the ARSIWA specifically provides that no circumstance can ‘preclude[] the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law’. A state thus cannot plead necessity with regard to a prohibited use of force.

Even if Article 2(4) was not *jus cogens*, Article 25 of the ARSIWA would still preclude a state from arguing that necessity permits UHI. Article 25(1) provides that a state cannot invoke necessity ‘as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State’ unless the act ‘is the only way for the State to safeguard an essential interest against a grave and imminent peril’ and ‘does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole’. By definition, atrocities against foreign nationals do not pose a ‘grave and imminent peril’ to an ‘essential interest’ of the intervening state. And even if abstract considerations of humanity could qualify as such an essential interest, it is clear that UHI ‘seriously impair[s]’ the territorial state’s essential interest in maintaining its sovereignty and territorial integrity.³⁰

The idea that UHI can be justified on the basis of necessity also runs afoul of Article 25(2) of the ARSIWA, which provides that, ‘[i]n any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if ... the international obligation in question excludes the possibility of invoking necessity’. Article 2(4) involves precisely such an obligation because the UN Charter’s ‘closed system’ of rules prohibits a state from claiming a non-Charter-based rationale for the use of force.³¹ Article 25(2) thus precludes a state from invoking the necessity of UHI to justify a violation of Article 2(4).³²

B A New Exception?

To be sure, even if genuine UHI is a prohibited use of force that cannot be considered self-defence and cannot be justified on the basis of necessity, it is not necessarily unlawful. On the contrary, at least in theory, the legality of UHI could be established in two different ways. First, pursuant to Article 31(3)(b) of the Vienna Convention on the Law of Treaties (VCLT), the subsequent practice of UN member states could have resulted in a new interpretation of Article 2(4) (deeming UHI not a use of force)

²⁹ ‘Draft Articles on the Law of Treaties with Commentaries’, 2 *ILC Yearbook* (1966) 187, at 247 (‘[t]he Commission pointed out that the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*’). The ICJ favourably quoted that position in the *Nicaragua* case. *Nicaragua*, *supra* note 19, para. 190.

³⁰ Danish Institute of International Affairs, *Humanitarian Intervention: Legal and Political Aspects* (1999), at 82; O’Meara, ‘Should International Law Recognize a Right of Humanitarian Intervention?’, 66 *International Comparative Law Quarterly* (2017) 441, at 463.

³¹ Ruys, *supra* note 4, at 162.

³² See, e.g., ‘Draft Articles on the Law of Treaties with Commentaries’, *supra* note 29, at 247 (‘[a]s embodied in article 25, the plea of necessity is not intended to cover conduct which is in principle regulated by the primary obligations. This has a particular importance in relation to the rules relating to the use of force in international relations’).

or Article 51 (including UHI within the ambit of self-defence).³³ Second, a new customary rule permitting UHI could have emerged that supervenes Article 2(4)'s prohibition of the use of force.³⁴ Fernando Tesón is perhaps the leading proponent of the subsequent-practice argument.³⁵ This argument is not persuasive, however, because Article 31(3)(b) requires all states to have either engaged in the practice or at least accepted it via acquiescence.³⁶ That is not the case with UHI, given that no state has ever claimed either that such intervention does not violate Article 2(4) or that it constitutes a legitimate act of self-defence under Article 51.

Because the subsequent-practice argument is so weak, nearly all scholars who defend the legality of UHI claim that it is now permitted by customary international law. Suggestions to that effect date back at least to the mid-1960s,³⁷ but the argument first gained significant scholarly traction after Kosovo – as exemplified by the influential memo that Christopher Greenwood submitted to the United Kingdom's (UK) House of Commons Foreign Affairs Committee defending NATO's intervention there.³⁸ More recently, the customary legality of UHI has been championed by two scholars who previously held high-ranking positions in their governments: Daniel Bethlehem, the principal legal adviser of the UK Foreign and Commonwealth Office under Prime Minister Tony Blair,³⁹ and Harold Koh, who served as legal advisor to the US State Department during President Barack Obama's administration.⁴⁰

³³ Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331, Art. 31(3)(b) ('[t]here shall be taken into account, together with the context ... any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'). This process has resulted in the acceptance of the Security Council's right under Chapter VII of the UN Charter to deem purely internal humanitarian crises 'threats to the peace'. See D. Akande, 'The Diversity of Rules on the Use of Force: Implications for the Evolution of the Law', *EJIL: Talk!* (2019), available at www.ejiltalk.org/the-diversity-of-rules-on-the-use-of-force-implications-for-the-evolution-of-the-law/.

³⁴ Lowe and Tzanakopoulos, *supra* note 9, at 473.

³⁵ See Tesón, *supra* note 5, at 161 (arguing that 'the best reading of the Charter and subsequent practice is that the prohibition of the use of force contains an exception allowing states to use force to stop serious human rights abuses').

³⁶ See Report of the International Law Commission on the Work of the Second Part of Its Seventh Session, UN Doc. A/6309/Rev. 1 (January 1966), at 221; see also M.E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2008), at 431.

³⁷ See, e.g. Lillich, 'Forcible Self-Help by States to Protect Human Rights', 53 *Iowa Law Review* (1967) 325, at 334.

³⁸ UK Parliamentary Select Committee on Foreign Affairs, Fourth Report (2000), para. 129 ('modern customary international law does not exclude all possibility of military intervention on humanitarian grounds by States, or by an organization like NATO').

³⁹ See D. Bethlehem, 'Stepping Back a Moment: The Legal Basis in Favour of a Principle of Humanitarian Intervention', *EJIL: Talk!* (2013), available at www.ejiltalk.org/stepping-back-a-moment-the-legal-basis-in-favour-of-a-principle-of-humanitarian-intervention/ (arguing that 'there is a case to be made in favour of the emergence of a tightly constrained principle of humanitarian intervention that is consistent with traditional conceptions of customary international law').

⁴⁰ Koh, 'Remarks by Harold Hongju Koh', 111 *American Society of International Law Proceedings (ASILP)* (2017) 114, at 115 (arguing that an absolutist rejection of the legality of unilateral humanitarian intervention (UHI) cannot be 'squared with state practice'). For additional examples of scholars who argue that customary international law permits UHI, see Tesón, *supra* note 5, at 179 (arguing that, under custom, 'a right of humanitarian intervention has been established since 1945'); Brenfors and Petersen,

From a positivist perspective, however, the case for the legality of UHI via supervening custom is not much stronger than the case for subsequent practice. Most importantly, it is not enough for state practice and *opinio juris* to establish an ordinary customary rule. Because the prohibition of the use of force is a peremptory norm, as discussed above, Article 53 of the VCLT makes clear that the prohibition can be modified only by the emergence of another peremptory norm.⁴¹ No scholar has argued that there is sufficient practice to establish the peremptory status of the right of UHI. In fact, there is not even enough state practice and *opinio juris* to establish an ordinary customary exception to Article 2(4).⁴² We can obviously dispense with the oft-cited collective interventions in Somalia in 1992, Haiti in 1994, Rwanda in 1994, Bosnia in 1995, East Timor in 1999 and Libya in 2011. Whatever humanitarian motives or effects those interventions might have had, they were authorized by the Security Council and thus cannot help establish the legality of UHI.⁴³ Indeed with regard to Libya, NATO itself emphasized the need for the Security Council to authorize any action⁴⁴ – a marked contrast from its intervention in Kosovo, discussed below.

Moreover, not all unilateral interventions necessarily help establish UHI's customary legality. Even if an intervention has positive humanitarian effects, the intervening state must still invoke UHI as the legal rationale for its actions.⁴⁵ This requirement means that three types of unilateral interventions do not count towards a customary exception. The first is where the intervening state invokes a more traditional legal rationale, such as self-defence or the consent of the territorial state, instead of UHI. For the reasons articulated by the International Court of Justice (ICJ) in the *Nicaragua* case, such interventions strengthen, not weaken, the rule that unilateral intervention is unlawful unless it falls within an already-existing exception to Article 2(4):

supra note 5, at 499 (claiming 'the examples chosen established the presence of a customary rule giving right to unilateral humanitarian intervention'); Root, 'Interpreting the Crime of Aggression to Exclude Humanitarian Intervention', 2 *University of Baltimore Journal of International Law* (2013) 62, at 72 ('[t]here is ample support for the position that a customary rule of international law allowing for just uses of force under Article 2(4) has emerged').

⁴¹ VCLT, *supra* note 33, Art. 53 ('a peremptory norm of general international law ... can be modified only by a subsequent norm of general international law having the same character'); see also Franchini and Tzanakopoulos, 'The Kosovo Crisis: 1999', in T. Ruys, O. Corten and A. Hofer (eds), *The Use of Force in International Law: A Case-Based Approach* (2018) 594, at 614 ('[t]his task is made particularly difficult by the fact that the prohibition on the use of force, at least with regard to its core, is widely regarded as a norm of *jus cogens* and thus the new exception would also have to achieve this status').

⁴² See, e.g., Schrijver, 'The Ban on the Use of Force in the UN Charter', in Weller, *supra* note 5, 465, at 476 ('humanitarian intervention without the authorization of the Security Council cannot be regarded as a customary international law exception to the prohibition of the use of force'); Rodley, *supra* note 27, at 793–794 (concluding that UHI cannot be considered lawful).

⁴³ See Lowe and Tzanakopoulos, *supra* note 9, at 745; Currie, 'NATO's Humanitarian Intervention in Kosovo: Making or Breaking International Law', 36 *Canadian Yearbook of International Law* (1998) 303, at 314.

⁴⁴ Lowe and Tzanakopoulos, *supra* note 9, at 476.

⁴⁵ See, e.g., *Nicaragua*, *supra* note 19, para. 207 ('for a new customary rule to be formed, not only must the acts concerned "amount to a settled practice," but they must be accompanied by the *opinio juris sive necessitatis*').

If a State acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.⁴⁶

The second situation is where the intervening state does not offer any formal legal rationale for its actions. Such an intervention cannot help establish the *opinio juris* necessary for a customary exception for UHI, even if it has positive humanitarian effects, because we have no way of knowing why the state intervened. Perhaps the state did, in fact, use force because it believed UHI was legal. It is also possible that the state knew UHI was illegal but simply did not care. It is even possible that the state intervened for self-interested reasons that unintentionally improved the humanitarian situation on the ground. Without a clear statement by the intervening state, it is impossible to determine which explanation is correct – which is precisely why the ICJ insisted in *Nicaragua* that we cannot 'ascribe to States legal views which they do not themselves advance' when determining whether inconsistent practice helps establish an exception to a customary rule.⁴⁷

The third situation is the corollary of the second: where the intervening state cites UHI as a rationale for its intervention along with one or more traditional exceptions to Article 2(4), such as consent or self-defence. Here the problem with viewing the intervention as providing support for the customary legality of UHI is two-fold. The less significant problem is that the presence of multiple rationales makes it difficult to determine with any confidence that the intervening state is, in fact, trying to create a new customary exception for UHI. This problem can perhaps be solved by assuming the intervening state is offering the rationales in the alternative, claiming that each rationale – including UHI – is independently sufficient to establish the legality of the intervention. But that assumption does not solve the more significant problem: determining whether the failure of third states to condemn an intervention indicates support for UHI. The ICJ made clear in *Nicaragua* that '[r]eliance by a State on a novel right or an unprecedented exception to the principle might, if shared in principle by other States, tend towards a modification of customary international law'.⁴⁸ If a state justifies an intervention solely on the basis of UHI, it might be possible to construe the failure to condemn the intervention as expressing third states' belief that UHI is legal.⁴⁹ But that is not the case if the intervening state offers multiple legal rationales for its actions. In such a situation, even if the silence of third states indicates legal approval, it is impossible to determine which of the intervening state's rationales the third states intended to endorse.

⁴⁶ *Ibid.*, para. 186.

⁴⁷ *Ibid.*, para. 207. Even proponents of UHI accept that a unilateral intervention that is not clearly justified on humanitarian grounds cannot contribute to the creation of a customary exception. See, e.g., Currie, *supra* note 43, at 310 (describing such situations as 'signalling a lack of conviction (or *opinio juris*) as to the sufficiency of the humanitarian intervention defence').

⁴⁸ *Nicaragua*, *supra* note 19, para. 207.

⁴⁹ See, e.g., *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v. Singapore)*, Judgment, 23 May 2008, ICJ Reports (2008) 51, para. 121 ('silence may also speak, but

With these interpretive principles in mind, we can examine the unilateral interventions that various scholars have invoked in defence of the legality of UHI.⁵⁰ As the discussion below indicates, the necessary *opinio juris* for a customary exception to Article 2(4) is almost entirely non-existent. In nearly every case, the intervening state(s) either avoided relying on a right of UHI entirely or invoked humanitarian concerns as only one of multiple legal rationales for intervening, making it impossible to view the silence of other states in the face of the intervention as acquiescence to the legality of UHI.

1 *India's Invasion of East Pakistan (1971)*

India's invasion of East Pakistan in 1971 was aimed at ending the repression of Bengalis. India primarily justified its actions by reference to self-defence against two forms of aggression: 'military aggression' in the form of armed attacks by the Pakistani military, and 'refugee aggression' in the form of millions of Bengalis fleeing East Pakistan's repression into Indian territory.⁵¹ In response to the invasion – an 'almost perfect example' of UHI, according to Tesón⁵² – the UN General Assembly voted 104, to 11, to 10 to demand that India withdraw its forces.⁵³ Nigel Rodley thus suggests that '[f]ar from suggesting a world *opinio juris* in favour of humanitarian intervention, this reaction is more forceful evidence of the opposite'.⁵⁴

2 *Israel's Intervention at Entebbe in Uganda (1976)*

Israel's intervention at Entebbe in Uganda in 1976 rescued Israelis who had been hijacked by members of the 'Popular Front of Palestine'. Israel invoked self-defence – in particular, the supposed 'right of a state to take military action to protect its nationals in mortal danger ... whom the local government is unable or unwilling to protect'.⁵⁵ It did not claim any right of UHI to protect nationals of another state.

3 *Tanzania's Intervention in Uganda (1978)*

Tanzania's intervention in Uganda in 1978 led to the overthrow of Idi Amin. Tanzania specifically claimed to be acting in self-defence – a response to Uganda's occupation and purported annexation of Tanzanian territory.⁵⁶ It began to mention humanitarian concerns only after the Organization of African Unity condemned the intervention as

only if the conduct of the other state calls for a response'); see also M.N. Shaw, *International Law* (7th edn, 2014), at 64 (noting that only 'where a state or states take action which they declare to be legal, the silence of other states can be used as an expression of *opinio juris* or concurrence in the new legal rule').

⁵⁰ Not all scholars invoke all of these examples. The list includes all of the uses of force scholars have cited in defence of the customary legality of UHI.

⁵¹ Kritsiotis, 'The Indian Intervention into (East) Pakistan – 1971', in Ruys, Corten and Hofer, *supra* note 41, 169, at 177.

⁵² Tesón, *supra* note 5, at 207.

⁵³ GA Res. 2793 (XXXVI), 7 December 1971.

⁵⁴ Rodley, *supra* note 28, at 781.

⁵⁵ Quoted in UN Doc. S/PV.1939, 9 July 1976, paras. 106–107.

⁵⁶ S. Chesterman, *Just War or Just Peace?* (2001), at 77.

a violation of Uganda's sovereignty.⁵⁷ Even then, however, Tanzania did not invoke UHI as a legal justification for its use of force.⁵⁸

4 Vietnam's Invasion of Democratic Kampuchea (1978)

Vietnam's invasion of Democratic Kampuchea in 1978 led to the overthrow of Pol Pot: '[I]n explaining the intervention, Vietnam eschewed a humanitarian justification and never argued explicitly that it entered Cambodia to end Khmer Rouge abuses'.⁵⁹ Instead, Vietnam claimed to be acting in self-defence⁶⁰ and at the request of the legitimate government, the United Front for the Salvation of Kampuchea.⁶¹ In response, the General Assembly denounced Vietnam's invasion and demanded the withdrawal of its forces by a vote of 91- 22 -29,⁶² with the UK – in marked contrast to its current fulsome support for UHI – insisting that '[w]hatever may be said about human rights in Kampuchea, it cannot excuse Viet Nam ... for violating the territorial integrity of Democratic Kampuchea'.⁶³

5 USA's Invasion of Grenada (1983)

The USA justified the invasion of Grenada in 1983 on the ground that it was protecting American nationals, while its Caribbean allies invoked the consent of the governor-general and collective-security provisions in the Organization of Eastern Caribbean States Treaty.⁶⁴ In fact, the USA specifically disclaimed that it was relying on a right of humanitarian intervention.⁶⁵ Even so, the General Assembly overwhelmingly rejected the invasion's legality, describing it as a 'flagrant violation of international law and of independence, sovereignty and territorial integrity' of Grenada.⁶⁶

6 USA's Intervention of Panama (1989)

The USA argued that its intervention in Panama in 1989 was legally justified in order to protect American nationals and because it had been conducted at the invitation of Panama's legitimate government.⁶⁷ It did not invoke humanitarian concerns, much less a right of UHI.

⁵⁷ Rodley, *supra* note 28, at 782.

⁵⁸ See Roberts, 'The Uganda–Tanzania War, the Fall of Idi Amin, and the Failure of African Diplomacy, 1978–1979', 8 *Journal of Eastern African Studies* (2014) 692, at 704.

⁵⁹ Fox, 'The Vietnamese Intervention in Cambodia – 1978', in Ruys, Corten and Hofer, *supra* note 41, 242, at 244.

⁶⁰ Rodley, *supra* note 28, at 782.

⁶¹ *Ibid.*

⁶² GA Res. 34/22, 14 November 1979, para. 7.

⁶³ Quoted in Chesterman, *supra* note 56, at 89, n. 249.

⁶⁴ Hajjami, 'The Intervention of the United States and Other Eastern Caribbean States in Grenada – 1983', in Ruys, Corten and Hofer, *supra* note 41, 385, at 389. Treaty Establishing the Organization of Eastern Caribbean States, concluded at Basseterre on 18 June 1981, Article 8.4, UNTS (1983) n° 22435.

⁶⁵ Robinson, 'Letter from the Legal Adviser, United States Department of State', 18 *International Lawyer* (1984) 381, at 386 ('[w]e did not assert a broad doctrine of "humanitarian intervention." We relied instead on the narrower, well-established ground of protection of United States nationals').

⁶⁶ GA Res. 38/7, 2 November 1983, paras 1–4. The vote was 108-9-27.

⁶⁷ Tsagourias, 'The US Intervention in Panama – 1989', in Ruys, Corten and Hofer, *supra* note 41, 426, at 433.

7 *Economic Community of West African States' Intervention in Liberia (1990)*

The Economic Community of West African States (ECOWAS) never formally invoked UHI to defend the legality of its intervention in Liberia in 1990. Instead, it cited – however unpersuasively – President Samuel Doe's formal request for intervention⁶⁸ and Liberia's (constructive) consent as a signatory to the 1981 Protocol Relating to Mutual Assistance on Defence, which permitted ECOWAS to intervene militarily in an internal armed conflict sustained from outside the territorial state.⁶⁹ Moreover, although ECOWAS cited humanitarian concerns in defence of its intervention, it also emphasized that the conflict threatened the safety of foreign nationals and was likely to cause significant refugee problems for neighbouring states – two very different legal rationales.⁷⁰

8 *Collective Creation of No-Fly Zones in Northern Iraq (1991)*

The collective creation of no-fly zones in northern Iraq in 1991 aimed to protect Kurds and Shias from the Iraqi government. Overall, the members of the coalition 'were unable not only to agree on a common legal position, but they were unable to consistently maintain their own legal argument throughout the period'.⁷¹ The USA relied exclusively on implicit authorization by the UN Security Council, most often citing Resolution 688, which condemned Iraq's treatment of its civilian population, and sometimes citing the combination of Resolution 688 and Resolution 687, which established the terms of the ceasefire in Iraq.⁷² France never clearly articulated a legal position, though it hinted at implicit Security Council authorization through the combination of Resolutions 687 and 688.⁷³ And although the UK eventually explicitly asserted the legality of UHI, it did so only after first citing Resolution 688,⁷⁴ and it later invoked self-defence in the context of specific attacks on Iraqi planes and missile sites.⁷⁵

9 *ECOWAS's Intervention in Sierra Leone (1997)*

Although it is not entirely clear how ECOWAS legally justified its intervention in Sierra Leone in 1997, it seems to have believed that its authority was based on a combination of non-UHI legal rationales: the invitation of Sierra Leone's government; ECOWAS's own constitutive documents, particularly the Protocol Relating to Mutual Assistance

⁶⁸ Villani, 'The ECOWAS Intervention in Liberia – 1990–97', in Ruys, Corten and Hofer, *supra* note 41, 441, at 441.

⁶⁹ *Ibid.*, at 444.

⁷⁰ *Ibid.*

⁷¹ Gazzini, 'Intervention in Iraq's Kurdish Region and the Creation of the No-Fly Zones in Northern and Southern Iraq – 1991–2003', in Ruys, Corten and Hofer, *supra* note 41, at 472.

⁷² SC Res. 688, 5 April 1991; SC Res. 687, 8 April 1991.

⁷³ Gazzini, *supra* note 71, at 473–474.

⁷⁴ Gray, *supra* note 10, at 36.

⁷⁵ *Ibid.*, at 38.

on Defence; and Security Council Resolution 1132, which imposed an arms embargo on Sierra Leone and delegated enforcement of the embargo to ECOWAS.⁷⁶

10 NATO's Intervention in Kosovo (1999)

NATO's intervention in Kosovo in 1999 is perhaps the most commonly invoked 'precedent' for the legality of UHI under customary international law.⁷⁷ But it actually provides UHI with little support, because only the UK and Belgium ever formally asserted the legality of unilateral intervention for humanitarian purposes.⁷⁸ Moreover, Belgium later insisted that Kosovo should not be seen as a precedent for UHI,⁷⁹ a position with which Germany, France⁸⁰ and the USA agreed.⁸¹ As for other NATO member states, they 'were more opaque in their attempt to offer a legal basis, and some appeared to admit that there was no legal basis for the action at all'.⁸² The reaction of the international community, by contrast, was anything but equivocal: NATO's intervention was explicitly condemned as unlawful by the G-77 (twice),⁸³ by the Non-Aligned Movement⁸⁴ and by the Islamic Conference⁸⁵ – 133 states in all.⁸⁶ Each statement reaffirmed that 'the so-called "right" of humanitarian intervention ... has no legal basis in the United Nations Charter or in the general principles of international law'.⁸⁷ As Daniel Franchini and Antonios Tzanakopoulos note, the international reaction to

⁷⁶ SC Res. 1132, 8 October 1997; Breaux, 'The ECOWAS Intervention in Sierra Leone – 1997–99' in Ruys, Corten and Hofer, *supra* note 41, 527, at 530. John Currie says the intervention is most likely 'an instance of unilateral intervention to restore a democratic government rather than to address a humanitarian crisis. As such, its precedential value in terms of unilateral humanitarian intervention is open to question'. Currie, *supra* note 43, at 316.

⁷⁷ Fernando Tesón, for example, calls it 'the most importance precedent for humanitarian intervention'. Tesón, 'Kosovo: A Powerful Precedent for the Doctrine of Humanitarian Intervention', 1(2) *Amsterdam Law Forum* (2009) 42, while Currie says it is 'a tremendously forceful precedent in shaping the content of customary international law on the issue. Currie, *supra* note 43, at 325. Relatedly, Robert Kolb has argued that Kosovo was 'the last in a sequence of events' establishing the customary legality of UHI. Kolb, 'Note on Humanitarian Intervention', 85 *International Review of the Red Cross* (2003) 119, at 125.

⁷⁸ Franchini and Tzanakopoulos, *supra* note 40, at 599.

⁷⁹ White, 'The Legality of Bombing in the Name of Humanity', 5 *JCSL* (2000) 27, at 37.

⁸⁰ Franchini and Tzanakopoulos, *supra* note 40, at 615.

⁸¹ Indeed, the USA once again reiterated that it 'had not accepted the doctrine of humanitarian intervention as an independent legal basis for military action'. See Matheson, 'Justification for the NATO Air Campaign in Kosovo', 94 *ASILP* (2000) 301, at 301.

⁸² *Ibid.*

⁸³ Ministerial Declaration Delivered at the 23rd Annual Meeting of the Ministers for Foreign Affairs of the Group of 77, New York, 24 September 1999, available at www.g77.org/doc/Decl1999.html.

⁸⁴ Final Document, Ministerial Conference, Cartagena, 8–9 April 2000, para. 11, available at www.nam.gov.za/xiiiminconf/minconf.pdf.

⁸⁵ Final Communiqué of the Ninth Session of the Islamic Summit Conference, Doha, 12–13 November 2000, para. 88, available at http://www1.oci-oci.org/english/conf/is/9/9th-is-sum-final_communique.htm.

⁸⁶ Goodman, 'Humanitarian Intervention and Pretexes for War', 100 *AJIL* (2006) 107, at 108, n. 7.

⁸⁷ It is remarkable how many scholars who assert the legality of UHI do not even mention, much less explain, these statements. See, e.g., Scharf, 'Striking a Grotian Moment: How the Syria Airstrikes Changed International Law Relating to Humanitarian Interventions', 19 *Chicago Journal of International Law* (2019) 586, at 602–603.

Kosovo alone should dispel ‘any lingering doubt’ that UHI is not permitted by customary international law.⁸⁸

11 *Collective Threats of Intervention in Syria (2013)*

A group of states threatened to intervene in Syria in 2013 in response to the use of the sarin, a chemical weapon, against civilians in Ghouta. Although no military action took place, the incident is important because the legality of UHI was formally asserted not only by one of the states that threatened to intervene, the UK, but also by an uninvolved state, Denmark.⁸⁹ Neither of the other states that made threats, France and the USA, invoked UHI: France’s statements implied that the Security Council would need to approve subsequent military action,⁹⁰ while the USA did not provide a clear legal explanation of why acting on the threats would be legal.⁹¹ The international response was generally unresponsive, ranging from silence to strong condemnation.⁹² Anne Lagerwall thus suggests that ‘[t]he significance of this crisis, if there is any, lies in the confirmation of the general reluctance adopted by states vis-à-vis unilateral military operations that are motivated by humanitarian goals’.⁹³

12 *Russia’s Intervention in Crimea (2014)*

Although Russia used language ‘associated with’ humanitarian intervention, it primarily justified its intervention in Crimea in 2014 as intervention by invitation, because it considered Viktor Yanukovich to be the *de jure* president of Ukraine despite his removal from office.⁹⁴ It is not surprising that Russia avoided formally invoking a right of UHI, because it has consistently condemned the existence of any such right in the context of Syria.⁹⁵

13 *Collective Intervention in Syria (2018)*

In defence of collective intervention in Syria in 2018, the UK reiterated its traditional post-Kosovo position that the destruction of Syria’s capacity to use chemical weapons could be justified as UHI.⁹⁶ The USA, by contrast, invoked three different legal rationales for its participation in the intervention: promoting regional stability, preventing

⁸⁸ Franchini and Tzanakopoulos, *supra* note 40, at 616.

⁸⁹ Denmark, ‘General Principled Considerations on the Legal Basis for a Possible Military Operation in Syria’, available at www.ft.dk/samling/20121/almdel/upn/bilag/298/1276299/index.htm.

⁹⁰ Lagerwall, ‘Threats of and Actual Military Strikes Against Syria – 2013 and 2017’, in Ruys, Corten and Hofer, *supra* note 41, at 834.

⁹¹ Kress, ‘The State Conduct Element’, in C. Kress and S. Barriga (eds), *The Crime of Aggression: A Commentary* (2017) 412, at 496.

⁹² Lagerwall, *supra* note 90, at 847.

⁹³ *Ibid.*

⁹⁴ O’Connell, ‘The Crisis in Ukraine – 2014’, in Ruys, Corten and Hofer, *supra* note 41, 855, at 864.

⁹⁵ *Ibid.*, at 867.

⁹⁶ See Syria Action – UK Government Legal Position, 14 April 2018, available at www.gov.uk/government/publications/syria-action-uk-government-legal-position/syria-action-uk-government-legal-position.

a humanitarian catastrophe and deterring the use and proliferation of chemical weapons.⁹⁷ France was similarly equivocal, citing both humanitarian concerns and Syria's violation of various chemical weapons treaties.⁹⁸ The intervention thus contributes little to the customary legality of UHI, despite claims to the contrary,⁹⁹ particularly as the international reaction was muddled at best. According to a thorough study by Alonso Gurmendi and colleagues, no other state explicitly relied on UHI to affirm the legality of the intervention.¹⁰⁰ By contrast, at least 12 states specifically condemned the intervention as unlawful, including Russia and China,¹⁰¹ while the other 64 reacting states limited themselves to taking a political position (pro or con) on the intervention.¹⁰²

These incidents, though complex and sometimes difficult to classify, reveal a common dynamic: intervening states avoiding clearly and exclusively relying on a right of UHI, even when they ostensibly intervened for humanitarian reasons, and the international community, particularly states in the global South, explicitly rejecting the idea that UHI is legal whenever the situation demanded a response.

States have also consistently expressed their opposition to UHI through international conventions and General Assembly resolutions concerning the *jus ad bellum*. The 1933 Montevideo Convention, which has been ratified by 16 American states, including the USA, provides that '[t]he territory of a state is inviolable and may not be the object of military occupation nor of other measures of force imposed by another state directly or indirectly or for any motive whatever even temporarily'.¹⁰³ The 1970 Declaration on Friendly Relations states that '[n]o State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State'.¹⁰⁴ And the more recent 2005 World Summit Outcome, adopted unanimously by the General Assembly, reaffirms 'that the relevant provisions of the Charter are sufficient to address the full range of threats to international peace and security', reiterates 'the authority of the Security Council to mandate coercive action' and stresses 'the importance of acting in accordance with the purposes and principles of the Charter'.¹⁰⁵

⁹⁷ Letter to Congressional Leaders on United States Military Operations in Syria, 2018 Daily Comp. Pres. Doc. 201800243, 15 April 2018, at 1.

⁹⁸ See Gurmendi *et al.*, 'Mapping States' Reactions to the Syria Strikes of April 2018: A Comprehensive Guide', *Just Security* (2018), available at www.justsecurity.org/55835/mapping-states-reactions-syria-strikes-april-2018-a-comprehensive-guide/.

⁹⁹ See, e.g., Scharf, *supra* note 85, at 612 (arguing, with regard to the creation of a customary exception for UHI, that 'all the ingredients necessary for a so-called "Grotian Moment" to come to fruition were not present until the April 2018 airstrikes on Syria').

¹⁰⁰ Gurmendi *et al.*, *supra* note 98.

¹⁰¹ *Ibid.*

¹⁰² *Ibid.* Responses ranged from explicit political support (33 states) to explicit political opposition (four states). *Ibid.*

¹⁰³ Montevideo Convention on Rights and Duties of States 1933, 165 LNTS 19, Art. 11.

¹⁰⁴ Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, GA Res 2625, UN Doc. A/8082, 24 October 1970.

¹⁰⁵ GA Res. 60/1, 24 October 2005, para. 79.

It is impossible to argue, in short, that there is sufficient state practice and *opinio juris* to establish that customary international law permits UHI. Only three states have ever formally endorsed that idea, and the vast majority of states have formally rejected it.

C *Manifest Violation*

Even genuinely humanitarian unilateral intervention, in short, violates the prohibition of the use of force in Article 2(4). But does UHI amount to a criminal act of aggression for purposes of Article 8*bis* of the Rome Statute? A use of force will be criminal under Article 8*bis*(1) of the Rome Statute if two requirements are satisfied: the use of force qualifies as an act of aggression, and the act of aggression qualifies as a manifest violation of the UN Charter. There is no question that UHI satisfies the first requirement because Article 8*bis*(2) simply defines an act of aggression as the ‘use of armed force’ in a manner prohibited by Article 2(4).¹⁰⁶ We have already established that UHI is a violation of the prohibition of the use of force.

The critical issue, therefore, is whether UHI qualifies as a ‘manifest violation’ of the UN Charter. Article 8*bis*(1) does not specify which acts of aggression should be considered manifest. Instead, it instructs the Court itself to make that determination based on three components of the aggressive act: its ‘character, gravity, and scale’. It is not completely clear from either the text of Article 8*bis*(1) or the drafting history whether an aggressive act must satisfy all three of the components to qualify as a manifest violation. Two of the three might be enough, given that Understanding 7, adopted by the Assembly of States Parties (ASP) at the Kampala Review Conference along with the aggression amendments, states that ‘[n]o one component can be significant enough to satisfy the manifest standard by itself’.¹⁰⁷ That is Carrie McDougall’s position.¹⁰⁸ Other scholars claim that all three must be satisfied¹⁰⁹ – or at least that the third must ‘almost’ be satisfied.¹¹⁰

A number of scholars have confidently claimed that UHI cannot be considered a manifest violation of the UN Charter.¹¹¹ Indeed, Joshua Root speaks for many when he insists that the manifest-violation requirement ‘must be read with the understanding

¹⁰⁶ See Murphy, ‘The Crime of Aggression at the International Criminal Court’, in Weller, *supra* note 6, 533, at 540 (‘[t]he first sentence of Article 8*bis*(2) essentially equates aggression with *any* violation of Art. 2(4) of the UN Charter’). That definition arguably differs from the Charter regime, which seems to consider an act of aggression more serious than a use of force. See, e.g., Akande and Tzanakopoulos, ‘The International Court of Justice and the Concept of Aggression’, in Kress and Barriga, *supra* note 91, 214, at 225.

¹⁰⁷ See, e.g., K. Ambos, *Treatise on International Criminal Law*, vol. 2: *The Crimes and Sentencing* (2014), at 189.

¹⁰⁸ C. McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court* (2011), at 129 (‘a strong argument can be made that the satisfaction of two of the three components would be sufficient to allow the Court to conclude that a use of force amounted to a manifest violation of the Charter’).

¹⁰⁹ See, e.g., Heinsch, ‘The Crime of Aggression after Kampala: Success or Burden for the Future?’, 2 *Goettingen Journal of International Law* (2010) 713, at 729.

¹¹⁰ See, e.g., Kress, *supra* note 91, at 511–512.

¹¹¹ See J. Trahan, *Existing Legal Limits to Security Council Veto Power in the Face of Atrocity Crimes* (2020), at 97.

that humanitarian intervention is the very sort of conduct the qualifier was intended to exclude'.¹¹² Arguments in favour of this position, however, do not withstand scrutiny. To begin with, if two of the three components of the manifest-violation test are sufficient, UHI likely qualifies as a manifest violation simply due to its gravity and scale. These components are fundamentally quantitative, referring to the means (scale) and effects (gravity) of a use of force.¹¹³ Together, they are designed to exclude '*de minimis*' uses of force from the crime of aggression,¹¹⁴ such as frontier incidents, individual drone strikes and the like.¹¹⁵ It is difficult to imagine how any genuinely humanitarian unilateral intervention could ever qualify as a *de minimis* use of force. As Sean Murphy notes, such intervention will normally be 'just as violent and intrusive as any other large-scale use of force, involving extensive aerial bombardment and the deploying of extremely large numbers of armed forces from one state to another'.¹¹⁶

UHI can avoid being a criminal act of aggression, therefore, only if Article 8bis(1) always requires the Court to find that a use of force has the 'character' of a manifest violation of the UN Charter. Claus Kress claims this is the case,¹¹⁷ and scholars who argue that UHI is not a manifest violation invariably invoke the ostensibly more qualitative 'character' requirement. Jennifer Trahan's argument, which draws on various statements made in the Special Working Group on the Crime of Aggression, is typical:

Here, the *travaux préparatoires* suggest that the word 'character' is intended to exclude anything of questionable legality in terms of the character of the intervention; put another way, it excludes something that falls 'within a grey area' of legality or 'borderline cases'. Thus, the definition of the crime does not cover a state act of aggression unless it is 'unambiguously illegal'. It is here, in the 'manifest' qualifier, particularly with the word 'character', that the definition of the crime of aggression clearly leaves a door open for 'humanitarian intervention' not to be covered by the crime of aggression.¹¹⁸

¹¹² Root, *supra* note 40, at 105.

¹¹³ Kress, *supra* note 90, at 520.

¹¹⁴ Trahan, 'Defining the "Grey Area" Where Humanitarian Intervention May Not Be Fully Legal, but Is Not the Crime of Aggression', 1 *JUFIL* (2015) 42, at 57.

¹¹⁵ See *ibid.*, at 57–59; Kress, *supra* note 91, at 513–514.

¹¹⁶ Murphy, 'Criminalizing Humanitarian Intervention', 41 *Case Western Reserve Journal of International Law (CWRJIL)* (2009) 341, at 362; see also Ruys, *supra* note 8, at 892 (noting that '[i]nasmuch as these criteria are primarily "quantitative" in nature, humanitarian interventions can undoubtedly be of sufficient "gravity and scale" in the sense of Article 8bis(2) of the Rome Statute'). It is possible to describe much more limited uses of force as unilateral humanitarian intervention, such as a brief cross-border incursion to secure vital food or medicine (my thanks to Talita de Souza Dias for this point). Such UHIs would require a slightly different legal analysis, one beyond the scope of this article. Nevertheless, the kind of UHIs that have been defended in the scholarly literature are much larger in scale.

¹¹⁷ See Kress, *supra* note 91, at 512 ('in order to determine the existence of the required qualitative dimension of the act of aggression, the unlawful use of force in question must, by its character, constitute a manifest violation of the UN Charter'). For present purposes, it does not matter whether the manifest-violation test requires all three components to be satisfied or deems two enough as long as one of them is character. The latter seems to be Kress's position, as the quote indicates.

¹¹⁸ Trahan, *supra* note 114, at 59–60; see also Van Schaack, 'The Crime of Aggression and Humanitarian Intervention on Behalf of Women', 11 *International Criminal Law Review* (2011) 477, at 486 ('[t]he term "character" ... is the most elastic of the three factors and might provide an opening to argue that an act of aggression was not committed with hostile intent or for aggressive purposes'); Weisbord, 'Judging

Unfortunately, most scholars who endorse this interpretation of the character component do not explain what distinguishes a use of force that is ‘unambiguously illegal’ from one that falls ‘within a grey area’.

The primary exception is Kress, who has suggested two very different tests for making that determination. The first focuses on the views of international lawyers: ‘a use of force whose legality under international law forms the object of genuine disagreement between reasonable international lawyers will *not* fulfil the state conduct element of the crime of aggression’.¹¹⁹ This test is problematic, however, because even if it is possible to define what makes a view reasonable in this context – which is unlikely – there is no justification for privileging the views of international lawyers over the views of states. As Michael Akehurst reminds us, ‘customary law is created by states, not by academics’.¹²⁰

Kress is on much firmer positivist ground with his second test, according to which ‘the grey area of the international law on the use of force is defined by a lack of solid state consensus on the existence of the prohibition of particular uses of force’.¹²¹ But he is wrong to insist that UHI is the ‘definitive’ example of legal ambiguity, because there is indeed a ‘solid state consensus’ that such intervention is illegal.¹²² As we have seen, the UN Charter leaves no room for exempting UHI from the prohibition of the use of force, and UHI cannot plausibly be described as self-defence – unlike, say, anticipatory uses of force and the use of force in unwilling or unable situations. And only three states (the UK, Belgium and Denmark) have ever specifically affirmed UHI’s legality, while a supermajority – including the entire G-77, Non-Aligned Movement and Islamic Conference – have consistently insisted that it is unlawful, whether by condemning specific ostensibly humanitarian unilateral interventions (such as East Pakistan or Kosovo) or by supporting generic resolutions of the General Assembly that preclude it (such as the Friendly Relations Declaration). Olivier Corten is thus correct to insist that, from a positivist perspective, the illegality of UHI is actually ‘one of the least complex issues of international law’.¹²³

It is also worth noting that the rejection of UHI’s legality is not limited to states. In the *Nicaragua* case, the ICJ specifically held that ‘the argument derived from the preservation of human rights in Nicaragua cannot afford a legal justification for the conduct of the United States’.¹²⁴ Moreover, the Report of the International Commission on Intervention and State Sovereignty and the Report of the UN Secretary-General’s

Aggression’, 50 *CJTL* (2011) 82, at 167 (‘if a judge determines that the “character” of the use of force is humanitarian, this could serve to exclude Kosovo-like situations from the ambit of the crime’).

¹¹⁹ Kress, *supra* note 91, at 524 (emphasis in original); see also Kress, ‘Time for Decision: Some Thoughts on the Immediate Future of the Crime of Aggression: A Reply to Andreas Paulus’, 20 *EJIL* (2009) 1129, at 1141 (arguing that a use of force cannot be considered ‘unambiguously illegal’ as long as ‘a reasonable international lawyer may hold the opposite view’).

¹²⁰ Akehurst, ‘Letter to the Editor-in-Chief’, 80 *AJIL* (1986) 147, at 147.

¹²¹ Kress, *supra* note 91, at 508.

¹²² *Ibid.*, at 488.

¹²³ O. Corten, *Le Droit Contre la Guerre* (2014), at 865.

¹²⁴ *Nicaragua*, *supra* note 19, para. 268.

High-Level Panel on Threats, Challenges and Change – commissions that included some of the most prominent proponents of the responsibility to protect – each insist that the use of force for humanitarian purposes must remain within the rules established by the UN Charter, particularly with regard to the Security Council's authority to authorize the use of force.¹²⁵ The high-level panel's report, for example, explicitly states that '[i]n all cases, we believe that the Charter of the United Nations, properly understood and applied, is equal to the task: Article 51 needs neither extension nor restriction of its long-understood scope'.¹²⁶

To his credit, Kress acknowledges the strength of the evidence that contradicts his position.¹²⁷ He thus adduces five specific counter-examples that he believes are sufficient to move UHI from 'unambiguously illegal' into a 'grey area': ECOWAS's intervention in Liberia; the coalition's intervention in northern Iraq; the European Union's (EU) decision in 2013 to lift the embargo on the supply of weapons to Syrian rebels; the Arab League's 2013 Doha Declaration on Syria; and Article 4(h) of the Constitutive Act of the African Union. From a positivist perspective, however, none of those counter-examples call into question the illegality of UHI.

We have already addressed the Liberia intervention. Kress emphasizes that 'the military intervention by ECOWAS was not internationally condemned as a violation of the prohibition of the use of force'.¹²⁸ That might be true, but it is not possible to interpret silence as support for UHI in this context because ECOWAS never formally invoked UHI as the legal rationale for its actions, citing instead President Doe's request for intervention and its own Protocol Relation to Mutual Assistance on Defence. Moreover, although ECOWAS did indeed mention humanitarian concerns as a reason to intervene, it also cited the need to protect foreign nationals and avoid transboundary refugee crises. So even if the failure of states to condemn the intervention indicated support for its legality, we have no idea what legal rationale they were supporting through their silence.

The same problem prevents the coalition's intervention in northern Iraq from helping push UHI into a legal grey area. Citing the UK's stance, Kress says that '[a]s in the case of Liberia, the legal claim to unilateral humanitarian intervention in a case of dire need was therefore articulated with sufficient clarity, and in this case again the international community at least implicitly condoned the military action'.¹²⁹ As noted earlier, however, the UK was the only intervening state to invoke UHI: the USA and France relied instead on the implicit authorization of the Security Council. It is thus impossible to know which legal rationale states were endorsing through their silence – if they were endorsing any at all. They might have remained silent because they

¹²⁵ Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty (ICISS Report), December 2001.

¹²⁶ A More Secure World: Our Shared Responsibility, Report of the UN Secretary-General's High-level Panel on Threats, Challenges and Change (High-Level Panel Report), UN Doc. A/59/565, 2 December 2004, at 53; see also ICISS Report, *supra* note 125, at xii–xiii.

¹²⁷ See Kress, *supra* note 91, at 489–496.

¹²⁸ *Ibid.*, at 493.

¹²⁹ *Ibid.*, at 494.

wanted to tacitly signal political support for the intervention or simply because they were afraid to legally condemn the actions of three very powerful states.¹³⁰

Kress's third counter-example, the EU's 2013 decision to permit the supply of weapons to Syrian rebels, is particularly unhelpful. Here is his explanation of why that decision supports the legality of UHI, despite 'EU practice only implicitly touch[ing] on the international legality of the supply of arms to Syrian rebels':

[T]he decision must have been based on the implicit assumption that such a supply of arms would also not be in breach of international law. In the light of the fact that the ICJ considers the delivery of weapons to rebels in a non-international armed conflict as a(n indirect) use of force, the assumption of the legality of a supply of arms must in turn have been based on the idea that in the case of Syria an exception to the prohibition of the use of force did in fact apply. As there was no other exception than humanitarian intervention even distantly in sight, it follows that, from the perspective of international law, the debate about the supply of arms to Syrian opposition forces is best seen as an 'indirect conversation about indirect unilateral humanitarian intervention'.

Kress's argument suffers from three flaws. To begin with, the EU's failure to specifically invoke a legal rationale for lifting the embargo prevents the decision from contributing *opinio juris* towards the customary legality of UHI. As noted above, the ICJ made clear in *Nicaragua* that it is not possible 'to ascribe to States legal views which they do not themselves advance'.

Kress is also wrong to insist that the EU's decision must have demonstrated support for UHI because no other exception to Article 2(4) was 'even distantly in sight'. On the contrary, the decision could have indicated the EU's legal support for a number of other exceptions: support for a people struggling for self-determination; recognition of the Free Syrian Army as the *de jure* government of Syria; intervention by invitation; or counter-intervention.¹³¹ Those exceptions are each legally questionable,¹³² but they are no more 'distant' than UHI. And unlike UHI, which no EU state cited in defence of lifting the embargo, the Netherlands specifically invoked the *de jure* government argument,¹³³ France suggested that it agreed with the Dutch¹³⁴ and the UK endorsed the counter-intervention argument.¹³⁵ If the EU's decision counts as *opinio juris*, therefore, it counts in favour of one of those exceptions, not UHI.

¹³⁰ See, e.g., Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation', 95 *AJIL* (2001) 757, at 778 ('[m]any plausible explanations can be made for a failure to protest intrastate breaches other than belief in the legality of the action, including lack of knowledge, political and economic self-interest, and realization of the futility of action. The lack of protest over intrastate breaches should not necessarily imply acquiescence in the legality of those breaches').

¹³¹ See Ruys, 'Of Arms, Funding and "Non-Lethal Assistance": Issues Surrounding Third-State Intervention in the Syrian Civil War', 13 *Chinese Journal of International Law* (2014) 13, at 36–47.

¹³² Tom Ruys carefully explains why. See *ibid.*

¹³³ *Ibid.*, at 36 ('[t]he lack of legitimacy of the Assad regime and the broad recognition of the [Syrian Opposition Council] as the legitimate representative of the Syrian people have led the government to conclude that the supply of military equipment to the SOC, in exceptional cases and under specific conditions, need not be contrary to international law').

¹³⁴ *Ibid.*

¹³⁵ The idea that Russia's supply of weapons to the Assad government permits states to supply weapons to the rebels. *Ibid.*, at 46. Ruys also notes that Austria explicitly condemned any support for the rebels as unlawful. *Ibid.*, at 16, n. 14.

Finally, even if the EU's decision to lift the arms embargo could somehow be viewed as supporting the legality of UHI, it would not support the legality of the kind of intervention that Kress believes falls into the 'grey area': the invasion or aerial bombardment of a state committing mass atrocity. As he acknowledges, the EU never suggested that humanitarian concerns would justify direct unilateral intervention in Syria. If Kress wants to rely on the EU's decision to argue that indirect humanitarian intervention is not 'unambiguously illegal', his argument might have merit. Indirect and direct UHI are, however, fundamentally different beasts, so support for the former does not necessarily imply support for the latter. Indeed, if anything, the EU's decision to endorse only indirect intervention is probably circumstantial evidence that EU states (the UK and Denmark aside) still reject the legality of intervening directly.

Kress's argument works no better for his fourth counter-example to the unambiguous illegality of UHI: the 2013 Doha Declaration, in which the Arab League stressed 'the right of each member state, in accordance with its wish, to provide all means of self-defense, including military support to back the steadfastness of the Syrian people and the free army'.¹³⁶ Like the EU's decision, the declaration does not endorse the legality of direct UHI; it only permits providing external material support to the rebels. That alone is sufficient to prevent the Doha Declaration from helping move UHI into a legal grey area. But that is not all: the declaration has to be read in light of the Arab League's decision in November 2011 – noted in the declaration itself – to suspend Syria's membership in the League and allow the rebel National Coalition to take its seat. This change in membership suggests that the league's decision concerning military support was based (justifiably or not) on the upgraded status of the National Coalition, not on indirect UHI.

Kress's final counter-example is Article 4(h) of the African Union's Constitutive Act of 2000, which acknowledges 'the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity'. According to Kress, Article 4(h) 'suggests that the African Union member states do not categorically exclude a customary exception to the prohibition of the use of force in case of overwhelming humanitarian need'.¹³⁷ In fact, it suggests no such thing. As Dan Kuwali explains, the right of intervention is based on the consent of member states, expressed through their decision to ratify the Constitutive Act:

[B]y consenting to Article 4(h) of the AU Act, AU States have transferred a certain part of their sovereignty to the supranational organ the AU. While the prohibition of the use of force has the status of *jus cogens* and thus cannot be contracted out by States, AU States waived their right to be free from intervention by the AU as a multilateral body in the face of mass atrocity crimes.¹³⁸

¹³⁶ 24th Arab Summit Issues Doha Declaration, 21–27 March 2013, available at <http://arableaguesummit2013.qatarconferences.org/news/news-details-17.html>.

¹³⁷ Kress, *supra* note 91, at 498.

¹³⁸ Kuwali, 'The End of Humanitarian Intervention: Evaluation of the African Union's Right of Intervention', 9 *African Journal on Conflict Resolution* (2009) 41, at 52; see also Amvane, 'Intervention Pursuant to Article 4(h) of the Constitutive Act of the African Union without United Nations Security Council Authorisation', 15 *African Human Rights Law Journal* (2015) 282, at 296–297 ('when ratifying its Constitutive Act, member states of the AU agreed with its content, including article 4(h), which gives the AU the right to intervene to stop massive crimes and other human rights violations').

Scholars have noted that this kind of antecedent treaty-based authorization for the use of force raises difficult international law issues.¹³⁹ But that does not matter here, because a treaty-based regime of collective security cannot contribute to the existence a general customary right of UHI – especially a regime like Article 4(h), which does not permit intervention in non-member states. Otherwise Article 42 of the UN Charter would itself contribute to a customary right, something no scholar has argued, for obvious reasons.

In short, none of the counter-examples that Kress cites call into question the unambiguous illegality of UHI. Even if the ‘moral reasons’ for not deeming criminal a genuinely humanitarian unilateral intervention are as strong as Kress believes¹⁴⁰ – which I reject, for reasons discussed below – the illegality of UHI is not a ‘grey area’ under customary international law.

The unambiguous illegality of UHI is enough to deem it a manifest violation of the UN Charter for purposes of the crime of aggression. But it is important to note that the ASP’s negotiations over the crime at Kampala also support this conclusion, because states consistently indicated that they were opposed to relying on purpose to determine whether an otherwise-aggressive use of force was a manifest violation. At the beginning of the Review Conference, for example, the USA tried to exclude UHI from the crime of aggression by introducing a draft Understanding that would have prohibited the Court from finding a manifest violation when it was ‘objectively evident’ that the use of force was ‘undertaken in connection with an effort to prevent the commission of any of the crimes contained in Articles 6, 7 or 8 of the Statute’.¹⁴¹ A ‘great majority’ of the ASP rejected the American proposal.¹⁴²

Undeterred, the USA then attempted to avoid criminalizing UHI by proposing a version of Understanding 6¹⁴³ that would have required the Court to examine why a state had decided to use force:

It is understood that aggression is the most serious and dangerous form of the illegal use of force; and that a determination whether an act of aggression has been committed requires consideration of all the circumstances of each particular case, *including the purposes for which force was used* and the gravity of the acts concerned or their consequences, in accordance with the Charter of the United Nations.¹⁴⁴

This proposal also failed, with the final version of Understanding 6 referring solely to gravity and consequences.

The reluctance of states to exclude even genuine UHI from the crime of aggression is not surprising, because the idea that the criminality of invasion and occupation

¹³⁹ See, e.g., Kuwali, *supra* note 138, at 65 ([t]he key question is whether a state can lawfully authorize forcible external intervention in its internal affairs by a treaty’).

¹⁴⁰ Kress, *supra* note 91, at 544.

¹⁴¹ See S. Barriga and C. Kress (eds), *Crime of Aggression Library: The Travaux Préparatoires of the Crime of Aggression* (2011), at 95.

¹⁴² *Ibid.*; cf. McDougall, *supra* note 108, at 162 ([i]t is also important to underline that States did not necessarily agree with the US on the substantive question of the exclusion of humanitarian intervention’).

¹⁴³ Review Conference of the Rome Statute, 13th Plenary Meeting, RC/Res. 6, Annex III (11 June 2010).

¹⁴⁴ Quoted in *ibid.*, at 120 (emphasis added).

should depend on why the state invaded and occupied is inconsistent with one of the fundamental principles of the *jus ad bellum* – namely, that motive is irrelevant to whether a state acted with the hostile intent (*animus aggressionis*) necessary for a prohibited use of force to qualify as aggression. In his 1952 report on the definition of aggression, for example, the UN secretary-general said that '[m]otive is essentially different from intention; it is the reason for which an act of aggression is committed. Intention exists only when the State committing the act has acted deliberately'.¹⁴⁵ A number of states similarly emphasized during the drafting of Resolution 3314 that *animus aggressionis* refers not to motive, but solely to whether the use of force in question was deliberate.¹⁴⁶ Thus France insisted that 'it would be sufficient ... to speak of deliberate aggression'.¹⁴⁷ And, of course, Article 5(1) of Resolution 3314, which was adopted by consensus, specifically provides that 'no consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression'.¹⁴⁸ Notably, at least one state at Kampala – Iran – specifically invoked this history as a reason to reject the American version of Understanding 6, pointing out that neither Article 2(4) nor Resolution 3314 permit reference to why a state committed an otherwise prohibited use of force.¹⁴⁹

Despite the repeated failure of the American proposals, some scholars still maintain that Understanding 6's emphasis on the consequences of a use of force is enough to exclude UHI from the crime of aggression. Beth Van Schaack's argument is typical:

The focus on 'consequences' in the Understandings allows for an opening to argue that a military operation that may have violated Article 2(4) of the U.N. Charter as a technical matter might not be deemed to constitute an act of aggression by virtue of the fact that it ultimately improved the situation on the ground by protecting civilians and vulnerable groups from further attack.¹⁵⁰

I have argued elsewhere that the Understandings have no legal status,¹⁵¹ but this is an open question. Regardless, Understanding 6 as adopted does not strengthen the case for considering UHI a non-manifest violation of the UN Charter. As McDougall notes, given the drafting history, it is impossible to read the reference to consequences in Understanding 6 as a covert instruction to the Court to consider why a state decided to use force.¹⁵²

¹⁴⁵ Report of the UN Secretary-General, UN Doc. A/2211, 3 October 1952, ss. 361–362.

¹⁴⁶ SC Res. 3314, 14 December 1974.

¹⁴⁷ See, e.g., UN Doc. A/AC.134/SR.79–91, 7 June 1971, at 48; see also *ibid.*, at 36 (as the Soviet Union stated, 'his delegation doubted whether there was any need to refer to motives in a definition of aggression. Aggressive intent would suffice').

¹⁴⁸ See Report of the UN Secretary-General, *supra* note 145, ss. 361–362.

¹⁴⁹ See McDougall, *supra* note 108, at 120–121.

¹⁵⁰ Van Schaack, *supra* note 118, at 495; see also C. Stahn, 'Syria and the Semantics of Intervention, Aggression and Punishment', *EJIL: Talk!* (2013), available at www.ejiltalk.org/syria-and-the-semantics-of-intervention-aggression-and-punishment/.

¹⁵¹ See, e.g., Heller, 'The Uncertain Legal Status of the Aggression Understandings', 10 *Journal of International Criminal Justice* (2012) 229.

¹⁵² McDougall, *supra* note 108, at 121.

It is also worth emphasizing that consequences are a very poor proxy for purpose, because there is no necessary correlation between positive humanitarian consequences and genuinely humanitarian concerns.¹⁵³ A genuinely humanitarian unilateral intervention can make the human rights situation in the territorial state worse; indeed, as we will see, that has been the case for UHI far more often than not. Conversely, it is at least conceivable that a flagrantly unlawful act of aggression, such as an invasion designed to annex territory, could improve the humanitarian situation in the territorial state. Determining the criminality of an act of aggression on the basis of its humanitarian consequences thus risks both over-inclusivity and under-inclusivity: the former by deeming criminal actual examples of genuine UHI; the latter by deeming lawful precisely the kind of aggression that the crime of aggression is designed to deter.¹⁵⁴ That outcome would be both legally and normatively perverse, even if one believes that UHI should be criminal.

Genuinely humanitarian unilateral intervention, in short, is not only a prohibited use of force. It is also a manifest violation of the UN Charter.

D Individual Criminal Responsibility

To convict a specific individual of aggression, of course, it is not enough to establish that a state committed a criminal act of aggression. The prosecution must also prove that the defendant was ‘in a position effectively to exercise control over or to direct the political or military action of a State’, was involved in ‘the planning, preparation, initiation or execution’ of the aggressive act and acted with the Rome Statute’s default *mens rea* – intent and knowledge.¹⁵⁵ A complete analysis of these requirements is beyond the scope of this article. The important point here is that, contrary to some suggestions,¹⁵⁶ a defendant would not be able to argue that she lacked the crime of aggression’s necessary *mens rea* because her motivation for participating in an aggressive act was humanitarian. The Elements of Crimes specifically provide that the prosecution does not have to prove the defendant ‘made a legal evaluation’ of either ‘whether the use of armed force was inconsistent with the Charter’ or ‘the ‘manifest’ nature of the violation’.¹⁵⁷ It is enough that the defendant was ‘aware of the factual circumstances’ that established those objective factors.¹⁵⁸ Indeed, as Kai Ambos notes,

¹⁵³ This is not to deny, of course, that in some situations the consequences of intervention can serve as circumstantial evidence of the intervening state’s motives. See Brenfors and Petersen, *supra* note 5, at 480.

¹⁵⁴ See Assembly of States Parties, Resumed Fifth Session, Discussion Paper Proposed by the Chairman, Doc. ICC-ASP/5/SWGCA/2, (1 January – 1 February 2007, at 3 (making clear such invasions that involve annexation are by definition manifest violations).

¹⁵⁵ Ambos, ‘The Crime of Aggression after Kampala’, 53 *German Yearbook of International Law* (2010) 463, at 497 (referencing Art. 30).

¹⁵⁶ See, e.g., Kostic, ‘Whose Crime Is It Anyway? The International Criminal Court and the Crime of Aggression’, 22 *Duke Journal of Comparative and International Law* (2011) 109, at 127 (‘those acts of aggression that – on the facts of the case – can accurately be determined as good faith efforts for the sake of humanitarianism will [not meet] the *mens rea* requirement’).

¹⁵⁷ ICC Elements of Crimes, Art. 8*bis*, introduction, available at <https://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf>.

¹⁵⁸ *Ibid.*, Elements 4 and 6.

the drafters of Article 8bis rejected a proposal requiring the prosecution to prove that the defendant acted with 'a specific aggressive intent or purpose, coupled with the aim of long-term subjugation or annexation'¹⁵⁹ – yet another failed attempt to exclude UHI from the crime of aggression. As long as the defendant intentionally participated in the aggressive act knowing that it involved invading and/or bombing another state, she possessed the *mens rea* necessary for the crime and can be held individually responsible for it.¹⁶⁰

3 Should UHI Qualify as a Criminal Act of Aggression?

Scholars who defend the positivist claim that genuinely humanitarian unilateral intervention is lawful normally also embrace the normative claim that such intervention *should* be lawful. In their view, in certain circumstances, UHI is desirable – an important, if exceptional, mechanism to end mass atrocities against civilians. Van Schaack's position, revealingly expressed in the conditional, is typical: 'If we hold out the possibility that humanitarian intervention might someday be deployed to protect women from the ravages of war and gender-based violence, we should be concerned about the threat of over-deterrence posed by the new provisions on the crime of aggression recently added to the ICC Statute'.¹⁶¹

The normative defence of UHI is predicated on two empirical assumptions: that states do, in fact, engage in interventions that are genuinely humanitarian; and that unilateral humanitarian intervention can be an effective mechanism for ending atrocity and promoting human rights.¹⁶² Neither assumption is persuasive.

A Does Genuine UHI Exist?

Whether states actually engage in UHI is an empirical question – one that can be answered only if we define with precision what it means for a unilateral intervention to

¹⁵⁹ Ambos, *supra* note 155, at 483; see also Van Schaack, *supra* note 118, at 486 (noting that because no proposal requiring specific intent was ever adopted, 'the purpose behind a particular use of armed force will be considered only with reference to the terms character, gravity, and scale').

¹⁶⁰ This does not mean that individuals responsible for the act will, or even should, be prosecuted. The question I address in this section is a strictly positivist one: does UHI qualify as a criminal act of aggression under Art. 8bis? In the (very unlikely) event that a unilateral humanitarian is both genuinely motivated by primarily humanitarian concerns and actually improves the humanitarian situation in the territorial state, I have little doubt that the ICC Prosecutor (or any prosecutor) would exercise discretion and decline to prosecute the leaders responsible for the intervention. That 'solution' is preferable to deeming UHI not criminal, given the negative consequences, discussed below, that would follow from decriminalization. Oscar Schachter says it best: 'It would be better to acquiesce in a violation that is considered necessary and desirable in the particular circumstances than to adopt a principle that would open a wide gap in the barrier against unilateral use of force.' O. Schachter, *International Law in Theory and Practice* (1991), at 126; see also Chesterman, *supra* note 56, at 231–232 (arguing that even if 'the international community may, in extreme circumstances, tolerate the delict', by 'affirming the prohibition of the use of force, recourse to military intervention is maintained as an extreme, and last, resort').

¹⁶¹ Van Schaack, *supra* note 118, at 478.

¹⁶² Cf. Kinclová, 'Legitimacy of the "Humanitarian Military Intervention": An Empirical Assessment', 21 *Peace Economics, Peace Science and Public Policy* (2015) 111, at 113 (arguing that the status of legitimate humanitarian intervention 'should be reserved only for such type of military interventions that

be genuinely humanitarian. There seem to be two basic possibilities: that protecting civilians is the sole purpose of the use of force, or that protecting civilians is the primary purpose of the use of force. It is difficult to consider genuine a unilateral intervention that is not even primarily intended to protect civilians, even if it incidentally improves the humanitarian situation in the territorial state.

The UK's statements concerning the legality of UHI seem to support the 'sole-purpose' test. As it said with regard to Syria, 'if action in the Security Council is blocked, the position of the Government is that it is permitted under international law to take exceptional measures *in order to* avert a humanitarian catastrophe'.¹⁶³ The sole-purpose test is also explicitly embraced by some scholars. Thomas Franck and Nigel Rodley argue, for example, that UHI requires the intervening state's humanitarian motives to be 'wholly pure'.¹⁶⁴

If protecting civilians must be the only purpose of the use of force, it is unlikely that any recent intervention qualifies as genuinely humanitarian – not even those authorized by the Security Council. Andreas Krieg recently conducted an empirical study of 10 modern uses of force that were ostensibly motivated by humanitarian concerns, half of which the Security Council had authorized: northern Iraq in 1991, Somalia in 1992, Haiti in 1994, Rwanda in 1994, Bosnia in 1995, Kosovo in 1999, East Timor in 1999, Sierra Leone in 2000, Afghanistan in 2001 and Iraq in 2003. He concludes that '[p]ure altruism cannot be observed in any of the cases presented in this study and appears therefore to be rather idealistic', because 'states always require a certain degree of national/self-interests so as to make a positive decision towards intervention'.¹⁶⁵

Most scholars, however, do not adopt such an uncompromising standard. In general, they believe a UHI should be considered genuine as long as its primary purpose is to protect civilians. That is the position of both the report of the International Commission on Intervention and State Sovereignty¹⁶⁶ and the high-level panel's report.¹⁶⁷ The International Law Association agrees, stating that '[t]he intervenor's primary goal must be to remedy a gross human rights violation and not to achieve some

demonstrated at least some degree of "humanitarian motives and means" and that achieved measurable positive humanitarian outcomes').

¹⁶³ Foreign and Commonwealth Office, Further Supplementary Written Evidence from the Rt Hon Hugh Robertson MP, Minister of State, Foreign and Commonwealth Office: Humanitarian Intervention and the Responsibility to Protect (2014), Annex A (emphasis added).

¹⁶⁴ Franck and Rodley, 'After Bangladesh: The Law of Humanitarian Intervention by Military Force', 67 *AJIL* (1973) 275, at 281.

¹⁶⁵ A. Krieg, *Motivations for Humanitarian Intervention: Theoretical and Empirical Considerations* (2013), at 131; see also Gromes and Dembinski, 'Practices and Outcomes of Humanitarian Military Interventions: A New Data Set', 45 *International Interactions* (2019) 1, at 3 ('[p]rotecting the citizens of the target state is sometimes narrowly viewed as the sole motive for intervention worth considering. Doing so reduces the number of humanitarian military interventions to approximately zero').

¹⁶⁶ ICISS Report, *supra* note 125, at 14 ('[t]he primary purpose of the intervention, whatever other motives intervening states may have, must be to halt or avert human suffering').

¹⁶⁷ High-Level Panel Report, *supra* note 126, para. 207 ('the primary purpose of the proposed military action [must be] to halt or avert the threat in question, whatever other purposes or motives may be involved').

other goal pertaining to the intervenor's self-interest'.¹⁶⁸ And Nicholas Wheeler notes that '[t]he primacy of humanitarian motives in determining the humanitarian credentials of an intervention is the conventional wisdom among realists and those international lawyers who write on humanitarian intervention'.¹⁶⁹

It is not easy, of course, to determine whether a state that engaged in a unilateral intervention was primarily motivated by humanitarian concerns. Three interpretive principles, however, seem particularly relevant to this inquiry. The first is that the starting point of the analysis must be how the state itself justified its intervention: it is more than a little hubristic to insist that a state's primary motivation for using force was humanitarian if that state did not even mention humanitarian concerns at the time. For example, although the American invasion of Grenada might have had positive humanitarian consequences, the USA not only did not invoke a right of UHI, it specifically disclaimed it.

The second principle is the corollary of the first: we should also avoid putting too much emphasis on how a state formally justified a particular use of force. Given the overwhelming evidence that UHI is both unlawful and criminal, a state acting for genuinely humanitarian reasons has a strong incentive to invoke a more traditional legal rationale, such as self-defence. Indeed, that state is better off invoking any rationale less clearly unlawful than UHI, such as consent of the legitimate government, if only to minimize the likelihood that its intervention could be deemed a manifest violation of the UN Charter.

The third and final principle follows from the first two: when assessing an intervening state's motives, we should avoid uncritically accepting a state's claim to be acting for humanitarian reasons. States that do not have to worry about legally justifying their uses of force – because their power effectively prevents them from being held accountable for violating the *jus ad bellum* – are very likely to use civilian protection as a pretext for pursuing more base interests. That was the case, for example, when Belgium invaded the Congo in 1964. Although Belgium claimed to be motivated solely by humanitarian concerns, scholars overwhelmingly believe that Belgium's real motivation was maintaining access to Congo's critical mineral resources.¹⁷⁰ And, of course, the USA tried to publicly sell its flagrantly illegal invasion of Iraq in 2003¹⁷¹ as a mission of hope for Iraqis suffering under Saddam's regime.¹⁷²

¹⁶⁸ International Law Association, Third Interim Report of the Subcommittee on the International Protection of Human Rights by General International Law, Report of the Fifty-Sixth Conference (1974), at 217.

¹⁶⁹ N.J. Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (2000), at 37. Elise LeClerc-Gagne and Michael Byers state, for example, that '[t]he test we are proposing ... asks whether the person's principal motivation for deciding to use force is a genuine humanitarian desire to prevent gross human rights violations'. Leclerc-Gagne and Byers, 'A Question of Intent: The Crime of Aggression and Unilateral Humanitarian Intervention', 41 *CWRJIL* (2009) 391, at 394.

¹⁷⁰ See, e.g., Chesterman, *supra* note 56, at 66.

¹⁷¹ See, e.g., Slaughter, 'The Use of Force in Iraq: Illegal and Illegitimate', 98 *ASILP* (2004) 262, at 262.

¹⁷² See Bellamy and Wheeler, 'Humanitarian Intervention in World Politics', in J. Baylis, S. Smith and P. Owens (eds), *The Globalization of World Politics: An Introduction to International Relations* (5th edn, 2011) 514, at 525.

Whether a particular use of force qualifies as UHI, in short, must be determined on a case-by-case basis, paying attention not only to the intervening state's public rationales – legal and otherwise – but also to the actual situation on the ground. Even so, it is still very difficult to find unilateral interventions that were motivated primarily by humanitarian concerns. Consider three early interventions that are often cited in defence of UHI.

1 *East Pakistan (1971)*

India claimed in the Security Council to have 'absolutely nothing but the purest of motives and the purest of intentions: to rescue the people of East Bengal from what they are suffering'.¹⁷³ Scholars generally agree, however, that India's primary motivation was to protect itself against a massive influx of refugees and also viewed the invasion as a way of expanding its influence in Southeast Asia.¹⁷⁴

2 *Uganda (1978)*

As noted earlier, although Tanzania occasionally condemned Idi Amin's human rights abuses, it justified recovering its territory and then invading Uganda as self-defence. It is also clear that Tanzania invaded Uganda intending to overthrow Amin and install a more friendly government. Simon Chesterman thus concludes that 'humanitarian motives may have been operative, but were far from paramount'.¹⁷⁵

3 *Democratic Kampuchea (1978)*

On balance, Vietnam's invasion of Democratic Kampuchea and subsequent destruction of the Khmer Rouge had positive humanitarian effects. The invasion itself, however, was not primarily humanitarian. On the contrary, as Stephen Morris notes, Vietnam was acting on imperial ambitions in the area and – as it publicly claimed – the need to defend itself against repeated Cambodian cross-border attacks.¹⁷⁶

A number of more recent interventions were arguably motivated, at least in part, by humanitarian concerns: northern Iraq, Somalia, Haiti, Rwanda, Bosnia, Kosovo, East Timor, Afghanistan, Iraq, Libya and Syria. Nevertheless, Krieg concludes that only three of the first 10 (his study did not include Libya or Syria) were primarily humanitarian: northern Iraq, Somalia and East Timor.¹⁷⁷ And this is true even though Krieg assumes the extent of a humanitarian crisis has a causal effect on the decision to intervene, yet provides no evidence in support of that relationship.¹⁷⁸ If we take away

¹⁷³ Quoted in Chesterman, *supra* note 56, at 73.

¹⁷⁴ See, e.g., Park, 'India's Intervention in East Pakistan: A Humanitarian Intervention or an Act of National Interest', 1 *Synergy: Journal of Contemporary Asian Studies* (2009) 1, at 1.

¹⁷⁵ Chesterman, *supra* note 56, at 78–79.

¹⁷⁶ S.J. Morris, *Why Vietnam Invaded Cambodia: Political Culture and the Causes of War* (1999), at 229.

¹⁷⁷ Krieg, *supra* note 165, at 128.

¹⁷⁸ That absence contrasts with the considerable empirical research that Krieg cites for the idea that the extent of media coverage and public awareness of a humanitarian crisis has a causal effect on the decision to intervene. See *ibid.*, at 64–65.

that factor – which seems inconsistent with the international community's long and ignoble willingness to ignore atrocity¹⁷⁹ – only one of the 10 interventions he examined was primarily humanitarian: the intervention in Somalia in 1992, which was authorized by the Security Council.¹⁸⁰ By contrast, the driving force for the coalition's intervention in northern Iraq in 1991 was regional security – in particular, the need to prevent Turkey from being destabilized by a massive influx of Kurdish refugees and to limit Iran's influence in the region.¹⁸¹ Similarly, the collective intervention in East Timor in 1999, though authorized by the Security Council, was driven primarily by Australia's interest in maintaining access to Timorese oil and in ensuring regional political and economic stability.¹⁸²

Krieg's conclusion that all the other interventions between 1991 and 2003 were driven primarily by non-humanitarian concerns is consistent with the available evidence.

4 Haiti (1994)

Despite comments by various states about the humanitarian crisis in Haiti, the Security Council-authorized intervention was primarily motivated by two American desires: to minimize the economic problems created by an influx of Haitian refugees,¹⁸³ and (later) to restore democracy to a state within the USA's sphere of influence.¹⁸⁴

5 Rwanda (1994)

Although France repeatedly insisted it intervened solely for humanitarian reasons, scholars generally agree that national self-interest predominated, particularly the desire to prevent Rwanda from moving into the Anglo-American sphere of influence.¹⁸⁵ Indeed, the lack of France's genuinely humanitarian concern is foregrounded by the fact that it not only supported the Hutu government even when it was threatened by the Rwandan Patriotic Front, but also chose not to intervene in Rwanda until the worst of the genocide was over.¹⁸⁶

¹⁷⁹ Cf. Chinkin, 'The State That Acts Alone: Bully, Good Samaritan or Iconoclast', 11 *EJIL* (2000) 31, at 37 ('[i]t seems that humanitarian intervention is a restricted notion, called up in situations where it is relatively cheap, is against a militarily weak nation, operates in a location that is accessible and strategically important, where public emotion is in favour and the intervention does not interfere with other political and economic objectives').

¹⁸⁰ Even here it is close, as Krieg notes that President George Bush had a very strong political interest in intervention, given the upcoming presidential elections and President Bill Clinton's constant criticism of Bush for neglecting foreign policy. Krieg, *supra* note 165, at 76.

¹⁸¹ *Ibid.*, at 71. In a rare show of transparency, the USA also openly admitted that it hoped the no-fly zones would help undermine Saddam's government. See Murphy, 'Contemporary Practice of the United States Relating to International Law', 93 *AJIL* (1999) 470, at 478–479.

¹⁸² Krieg, *supra* note 165, at 94–95.

¹⁸³ Hehir, 'Influencing Clients in Counterinsurgency', 38 *International Security (IS)* (2013) 137, at 143.

¹⁸⁴ Chesterman, *supra* note 56, at 153–155.

¹⁸⁵ Krieg, *supra* note 165, at 83.

¹⁸⁶ Bellamy and Wheeler, *supra* note 172, at 515.

6 Bosnia (1995)

Although the intervention in Bosnia might have had humanitarian effects, NATO stood on the sidelines for nearly three years while the Serbs engaged in atrocities. When NATO did finally intervene, it did so primarily to restore its battered credibility,¹⁸⁷ to prevent a wider conflict in the region and to staunch the flow of refugees into NATO states such as Germany.¹⁸⁸

7 Kosovo (1999)

Often held up as the ‘model’ UHI, there is no question that humanitarian concerns played a significant role in NATO’s decision to intervene. But it seems unlikely that such concerns were NATO’s primary motivation. On the contrary, scholars believe that NATO intervened unilaterally in Kosovo for substantially the same reasons that it had intervened four years earlier, with the Security Council’s blessing, in Bosnia: credibility, conflict containment and refugees.¹⁸⁹ Their scepticism seems warranted, especially as NATO limited its ‘humanitarian intervention’ to high-altitude aerial bombing despite having been warned that doing so was more likely to worsen the situation in Kosovo than to improve it.¹⁹⁰

8 Afghanistan (2001)

The intervention in Afghanistan was not primarily motivated by humanitarian concerns, despite occasional American suggestions to the contrary. Not only did the USA formally claim that it was acting in self-defence, it constantly emphasized that the goal of Operation Enduring Freedom was to destroy Al Qaeda’s ability to launch terrorist attacks against the USA and its allies.¹⁹¹

9 Iraq (2003)

The predominance of non-humanitarian motives for the US invasion of Iraq needs little comment. As Krieg says, the invasion ‘lack[ed] any altruistic component’ whatsoever.¹⁹² Instead, the USA was overwhelmingly motivated by the desire to remove Saddam Hussein from power and to protect its economic interests in the area.¹⁹³

NATO’s intervention in Libya in 2011, which Krieg does not discuss, presents a closer case. Security Council Resolution 1973 itself clearly had a humanitarian purpose, given that it authorized member states ‘to take all necessary measures ... to protect civilians and civilian populated areas under threat of attack’.¹⁹⁴ There is

¹⁸⁷ R. Menon, *The Conceit of Humanitarian Intervention* (2016), at 8.

¹⁸⁸ Krieg, *supra* note 165, at 87–88.

¹⁸⁹ Bellamy and Wheeler, *supra* note 172, at 516; see also Krieg, *supra* note 165, at 91.

¹⁹⁰ Chesterman, *supra* note 56, at 224.

¹⁹¹ Krieg, *supra* note 165, at 128.

¹⁹² *Ibid.*, at 106.

¹⁹³ *Ibid.*

¹⁹⁴ SC Res. 1973, 17 March 2011, para. 4.

considerable evidence, however, that the states that led NATO's intervention – the USA, the UK and France – were primarily motivated by the desire to remove Gaddafi from power.¹⁹⁵ As a number of scholars have noted, many of NATO's actions, particularly its refusal to heed Libya's almost immediate entreaties to negotiate a ceasefire, are difficult to explain on humanitarian grounds.¹⁹⁶

The other intervention that Krieg does not discuss – the intervention in Syria in 2018 – is even more difficult to classify as primarily humanitarian. As noted earlier, the UK was the only intervening state that exclusively cited civilian protection. France mentioned humanitarian concerns but emphasized the need to enforce international prohibitions on the use and proliferation of chemical weapons. And the USA, though also mentioning the ongoing humanitarian catastrophe in Syria, made very clear that its primary motivation was to prevent the use of chemical weapons against Americans, not against Syrians. As President Donald Trump said immediately after the attacks, '[t]he purpose of our actions tonight is to establish a strong deterrent against the production, spread, and use of chemical weapons. Establishing this deterrent is a vital national security interest of the United States'.¹⁹⁷

It is also important not to take the UK's ritualistic invocation of UHI in Syria at face value. As Marko Milanovic notes, had the UK truly been motivated primarily by humanitarian concerns, it would have supported a far more significant intervention. Instead, it chose to support a response that stood no chance of significantly improving the humanitarian situation on the ground:

[T]he UK government knows well that only a military intervention on a truly massive scale could (potentially!) alleviate the suffering caused by the Syrian war as a whole; what it wants to do instead is a very limited intervention focused specifically on chemical weapons, but that does almost nothing for the wider humanitarian catastrophe – only a minuscule proportion of all human casualties in the war, probably less than 1%, were caused by chemical weapons.¹⁹⁸

Given the limited nature of the intervention and the fact that it (conveniently) focused solely on the one type of weapon that posed a threat outside of Syria's borders, it is reasonable to assume that the UK was motivated less by the desire to protect civilians than by the same anti-proliferation motives as the USA and France.

B Does Genuine UHI Work?

As the previous sections indicate, there are only three interventions in the modern era that can be even plausibly described as motivated primarily by humanitarian concerns: northern Iraq, Somalia and East Timor. Somalia and East Timor are not

¹⁹⁵ See, e.g., Deeks, 'The NATO Intervention in Libya – 2011', in Ruys, Corten and Hofer, *supra* note 41, 749 (collecting statements).

¹⁹⁶ Kuperman, 'A Model Humanitarian Intervention? Reassessing NATO's Libya Campaign', 38 *IS* (2016) 105, at 135.

¹⁹⁷ See Q. Jurecic, 'Transcript: President Trump's Remarks on Syria Airstrikes', *Lawfare* (2018), available at www.lawfareblog.com/transcript-president-trumps-remarks-syria-airstrikes.

¹⁹⁸ M. Milanovic, 'The Syria Strikes: Still Clearly Illegal', *EJIL: Talk!* (2018), available at www.ejiltalk.org/the-syria-strikes-still-clearly-illegal/.

examples of UHI because they were authorized by the Security Council. And two of the three members of the coalition in northern Iraq seem to have believed that their humanitarian efforts were authorized by previous Security Council resolutions.

The extreme rarity of UHI is enough to question whether it should be lawful. The normative case for UHI also assumes, however, that such intervention is likely to be effective. If UHI exists but almost always makes the humanitarian situation in the territorial state worse, it is difficult to see why it would be normatively problematic to criminalize it.

Yet this is precisely what the historical record indicates. It is difficult enough to find even one example of successful *non-unilateral* humanitarian intervention. The only credible exception is East Timor, where the intervention helped bring stability to the area and made possible Timorese independence from Indonesia. Even there, though, there is reason to temper praise for the intervention: as Wheeler notes, Australia helped create the humanitarian problem in the first place, because it ‘knew Indonesia was preparing to conquer East Timor in 1975, may have provided tacit approval, and were willing to arm Suharto’s regime in the years preceding the conquest’.¹⁹⁹

By contrast, it is easy to identify unsuccessful Security Council-authorized humanitarian interventions. Somalia and Libya are indicative examples. With regard to Somalia, Alex Bellamy and Nicholas Wheeler note that, although some scholars believe US intervention initially saved some civilians from starvation – a claim they do not accept – ‘[w]hat is not disputed is that the mission ended in disaster’.²⁰⁰ Despite the intervention leading to the UN’s most significant state-building operation to date, Somalis have rarely had a functioning central government, have experienced almost endless violence and conflict and have routinely suffered from mass starvation.²⁰¹

If anything, the consequences of NATO’s ‘humanitarian’ intervention in Libya have been even worse:

[S]ince the toppling of Muammar Gaddafi, there is no functioning state to speak of. The resulting vacuum has been filled by militias that defy the central government and by armed Islamist groups that pursue a millenarian agenda and have no tolerance for those of different faiths or even for coreligionists following different interpretations of Islam. And the rest of the Maghreb has become a more dangerous place because of the fallout from Libya. Today the whole region is more hospitable to groups trafficking in religious extremism and violence than it had been while Gaddafi was in power.²⁰²

Rajan Menon published this description in 2016. Since then, the situation in Libya has continued to deteriorate.

There is little reason to believe that genuinely humanitarian unilateral intervention is or can be any more effective at ending mass atrocity. The three most successful UHIs – East Pakistan in 1971, Uganda in 1978 and Democratic Kampuchea in 1978 – took

¹⁹⁹ Wheeler, *supra* note 169, 100.

²⁰⁰ Bellamy and Wheeler, *supra* note 172, at 517.

²⁰¹ C. Besteman, ‘The Costs of War in Somalia’ (2019), at 3, available at https://watson.brown.edu/cost-sofwar/files/cow/imce/papers/2019/Costs%20of%20War%20in%20Somalia_Besteman.pdf.

²⁰² Menon, *supra* note 187, at 14.

place more than four decades ago, and none of the intervening states were primarily motivated by humanitarian concerns. By contrast, the USA, the UK and France's collective intervention in northern Iraq in 1991 might have had a genuinely humanitarian purpose, but it did not solve the Kurdish problem, as the subsequent decades have made clear. Moreover, as James Cockayne and David Malone explain, Operation Provide Comfort convinced the USA and the UN that successful humanitarian intervention could be accomplished with relative ease using primarily air power and/or lightly armed peacekeepers. This 'creeping unilateralism' later proved disastrous in Somalia, Srebrenica and Kosovo.²⁰³

Indeed, it is difficult to overstate the failure of NATO's intervention in Kosovo, which was deliberately limited to high-altitude bombing in order to protect NATO soldiers. To begin with, as Alan Kuperman explains, the mere prospect of intervention led to serious – and likely avoidable – violence by both the Kosovo Liberation Army and the Serbs:

The rebels expected to benefit from humanitarian intervention if they provoked the violence because of precedents and signals from the international community. ... Because the KLA strategy was based on attracting humanitarian intervention, but the rebels harbored no hope of prevailing themselves, violence might well have been averted if not for the moral hazard of humanitarian intervention. Even after the outbreak of violence, had the international community eschewed such intervention, Belgrade probably could have stanching the rebellion at the cost of a few hundred lives, mostly rebels, as it appeared to have done by mid-1998.²⁰⁴

As predicted by many, including the presidents of Slovenia and Macedonia, NATO's 'post-heroic' bombing campaign not only failed to improve the humanitarian situation on the ground, it made it vastly worse.²⁰⁵ In the three months after the first bombs began to fall, Serbs killed nearly 10,000 Kosovar civilians – five times the number killed before the campaign began. The bombing also displaced another 1.4 million, almost 90 per cent of Kosovo's population, many of whom fled to neighbouring states, creating a massive refugee crisis.²⁰⁶ And, of course, NATO did nothing to stop violent reprisals against Serb civilians after the conflict, even 'as NATO troops were moving into police Kosovo'.²⁰⁷

The UK, the USA and France's limited intervention in Syria has also failed to create positive humanitarian effects. At least 5,000 civilians have been killed since the April 2018 airstrikes.²⁰⁸ That number is not surprising, given that the intervention, as discussed above, was primarily motivated by the desire to limit the proliferation of chemical weapons, not to protect Syrian civilians from harm. And even that purpose

²⁰³ Cockayne and Malone, 'Creeping Unilateralism: How Operation Provide Comfort and the No-Fly Zones in 1991 and 1992 Paved the Way for the Iraq Crisis of 2003', 37 *Security Dialogue* (2006) 123, at 136.

²⁰⁴ Kuperman, 'Mitigating the Moral Hazard of Humanitarian Intervention: Lessons from Economics', 14 *Global Governance* (2008) 219, at 225.

²⁰⁵ Edward Luttwak, quoted in Menon, *supra* note 187, at 132.

²⁰⁶ *Ibid.*, at 132–133.

²⁰⁷ *Ibid.*, at 134.

²⁰⁸ See 'Death Toll Archives', *Syrian Network for Human Rights*, available at <http://sn4hr.org/blog/category/report/monthly-reports/victims-death-toll/>.

has been a qualified success: the Syrian government has continued to use chemical weapons against civilians despite the airstrikes.²⁰⁹

4 Conclusion: Another Ticking Time-Bomb Scenario

As this article has demonstrated, the positivist claim offered by proponents of unilateral humanitarian intervention is unpersuasive: such intervention, even when genuinely motivated by humanitarian concerns, violates the prohibition of the use of force in Article 2(4) of the UN Charter and qualifies as a criminal act of aggression under Article 8bis of the Rome Statute. In a very real sense, therefore, the normative claim offered by UHI's proponents is beside the point: even if it should be lawful, it is not.

The normative claim, however, is equally problematic. As we have seen, there is little evidence that genuine UHI actually exists and even less evidence that it is an effective tool for ending mass atrocity. By contrast, the historical record is littered with examples of states using force unilaterally for self-interested reasons and in a manner that simply exacerbated a humanitarian disaster.

Yet scholars continue to advocate for UHI – particularly in Syria,²¹⁰ but also elsewhere.²¹¹ In doing so, they unwittingly make clear that UHI is little more than a well-meaning version of the ticking time-bomb scenario, in which the need to avert a terrible terrorist act justifies committing torture despite torture's categorical impermissibility under international law. Here is how David Luban describes the legal and normative assumptions made by those who believe that the ticking time-bomb scenario justifies permitting torture in exceptional circumstances:

[T]hat the sole purpose of torture must be intelligence gathering to prevent a catastrophe; that torture is necessary to prevent the catastrophe; that torturing is the exception, not the rule, so that it has nothing to do with state tyranny; that those who inflict the torture are motivated solely by the looming catastrophe, with no tincture of cruelty; that torture in such circumstances is, in fact, little more than self-defense; and that, because of the associations of torture with the horrors of yesteryear, perhaps one should not even call harsh interrogation 'torture'.²¹²

The only significant difference between these assumptions and the assumptions made by proponents of UHI is that, by most accounts, UHI does not even require the intervening state to be solely motivated by 'right intention'. A primarily humanitarian motivation is enough.

²⁰⁹ See, e.g., 'Assad Regime Used Chlorine as a Chemical Weapon, Says US', *The Guardian* (26 September 2019), available at www.theguardian.com/world/2019/sep/26/syria-assad-chlorine-chemical-weapon.

²¹⁰ See, e.g., H. Koh, 'Humanitarian Intervention: Time for Better Law', 111 *AJIL Unbound* (2017) 287, at 290.

²¹¹ See generally Sarkina and Pietschmann, 'Legitimate Humanitarian Intervention under International Law in the Context of the Current Human Rights and Humanitarian Crisis in Burma (Myanmar)', 33 *Hong Kong Law Journal* (2003) 371.

²¹² Luban, 'Liberalism, Torture, and the Ticking Bomb', 91 *Virginia Law Review* (2005) 1425, at 1439–1440.

As Luban notes, the ticking time bomb is an intellectual fraud, one that opens the door to unnecessary, pretextual torture by using a non-existent factual situation to justify creating an exception to one of the few absolute prohibitions in international law.²¹³ UHI is equally fraudulent, and for the same reason. We cannot completely exclude the possibility that a state will someday engage in the perfect UHI – intervening exclusively for humanitarian reasons and dramatically improving the humanitarian situation in the territorial state. But that likelihood is vanishingly small – and by any measure pales in comparison to the near certainty that weakening the prohibition of the use of force would encourage powerful states to engage in pre-textual UHIs that have terrible human consequences. As Ian Brownlie explains, '[w]hatever special cases one can point to, a rule allowing humanitarian intervention ... is a general license to vigilantes and opportunists to resort to hegemonial intervention'.²¹⁴ On balance, therefore, UHI not only qualifies as an act of aggression, it absolutely should.

²¹³ *Ibid.*, at 1452.

²¹⁴ See, e.g., Brownlie, 'Thoughts on Kind-Hearted Gunmen', in R.B. Lillich (ed.), *Humanitarian Intervention and the United Nations* (1973) 139, at 147–148; see also Chesterman, *supra* note 56, at 231 (noting that 'the provision of additional justifications for intervention appears likely to increase the number of interventions undertaken in bad faith'). But see Goodman, *supra* note 84, at 110 ('contend that encouraging aggressive states to justify using force as an exercise of humanitarian intervention can facilitate conditions for between those states and their prospective targets').

