

INTERNATIONAL LAW AND THE LEGITIMATION OF EXTERNAL COERCIVE MEASURES IN AID OF INTERNAL CHANGE

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I. INTRODUCTION

I first met Professor Henry J. Richardson III (affectionately called “Hank” by colleagues and friends) about thirty years ago in one of those ubiquitous Washington, D.C. conference rooms, where gatherings of lawyers, academics, government bureaucrats, and so-called “policy wonks” not only shape, but have determined outright, the fate of now uncountable population groups far removed from the District of Columbia. My recollection is of a far too warm windowless room in which as many lawyers sat on camp-style plastic chairs at the fringes of the room as did on cushioned chairs around an overly long and narrow conference table. We gathered on Saturday mornings to discuss how a recalcitrant Reagan Administration might be compelled to enforce a congressionally mandated “Comprehensive Apartheid Sanctions Act” against a South African regime that, although universally decried for its odious racist policies, was thought by the Administration to be amenable to “constructive engagement” through less coercive measures.

Fresh out of law school, and self-assured that if the cause be right, the law will provide justice, I thrilled in listening to disquisitions on the practical applications of principled legal rules in the displacement of expedient and immoral politics: that American power was subject to the rule of international law; that the executive branch was bound to comply with judicial interpretations of domestic and international law; that the President must obey the Congress; and that the role of the lawyer was to provide arguments with which courts could compel compliance. I marveled in citations to nineteenth century cases that purportedly so held, and to the more contemporaneous decisions of the 1970s and 1980s that seemingly confirmed the continuing vitality of those venerable decisions. I learned (or at least heard about) more case law in those Saturday morning sessions than I recall having picked up in two years of classroom discussions at Harvard Law School and the Fletcher School of Law and Diplomacy at Tufts University. And it was the stentorian declamations of Hank more than any other voice that cinched

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those cases in my memory.

About this time, as fate would have it, the International Court of Justice (ICJ) rendered its judgment on the merits in a case that a group of American lawyers, spearheaded by a law professor, had brought on behalf of Nicaragua against the United States of America (U.S.).¹ Deftly avoiding numerous jurisdictional hurdles, the court held that, as a substantive legal matter, a host of hostile actions taken by the U.S. to undermine the Sandinista Government of Nicaragua violated the international customary law norms that regulated the capacity of one state to interfere in the domestic politics of another.² Again, international law had seemingly vindicated the maxim that “might does not make right.” Apparently of secondary importance was the political reality that, no less than in the South African case, U.S. policies in Nicaragua embedded and reflected an ongoing conflict within the U.S. political order between a radically conservative presidency and a more liberally inclined Congress.³ These differences among American politicians were to disappear in the subsequent quarter-century. “Mainstream” American politicians of all shades of beliefs heralded a new world order in which the spread of democracy, the fostering of “human rights” and “regime change” in “rogue,” “pariah,” or “illiberal” states were paraded as laudable missions for an “indispensable sole superpower.”⁴ More recently, however, events in such places as Afghanistan, Iraq, Libya, Ukraine, Syria, and Yemen (among other societies),⁵ and the apparent reemergence of a “cold war” that was hitherto buried by the triumph of the West in the 1990s, have forced back on the agenda of the international system issues that were at the heart of the civil conflict in Nicaragua and in the enactment and enforcement of the Comprehensive Antiapartheid Sanctions Act.⁶ These are the issues that, as a tribute to Hank Richardson, the intellectual lawyer and teacher, I want to discuss in this paper.⁷

1. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14 (June 27, 1984).

2. *Id.* ¶ 292(3).

3. See *An Endless Tug of War with Congress*, N.Y. TIMES: CAMPAIGNING FOR HISTORY (May 9, 2007, 6:33 PM), <https://campaigningforhistory.blogs.nytimes.com/2007/05/09/an-endless-tug-of-war-with-congress/> (describing how Reagan’s actions in Nicaragua led Congress to amend laws to strengthen its authority).

4. See Mark P. Lagon, *Promoting Democracy: The Whys and Hows for the United States and the International Community*, COUNCIL ON FOREIGN RELATIONS (Feb. 2011), <http://www.cfr.org/democratization/promoting-democracy-whys-hows-united-states-international-community/p24090> (examining the balance that needs to be struck in U.S. foreign policy regarding how to promote democracy).

5. See James Dobbins, *Taking it One Crisis at a Time*, U.S. NEWS (Aug. 19, 2014, 11:45 AM), <http://www.usnews.com/opinion/blogs/world-report/2014/08/19/obamas-foreign-policy-checklist-in-ukraine-iraq-and-the-middle-east> (describing the many world events that present a challenge to U.S. foreign policy).

6. Comprehensive Anti-Apartheid Act of 1986, 22 U.S.C. § 5001 (1986) (repealed 1993).

7. Professor Richardson was kind enough to deliver a lecture on the subject of intervention at the school where I teach. See Henry J. Richardson, III, *Critical Perspectives on Intervention*, 29 MD. J. INT’L L. 12 (2014) (discussing intervention in foreign government around the world). I thus view this essay as the continuation of an ongoing dialogue. See also Maxwell O. Chibundu,

I start with the delineation of the problem of intervention as one that is multidisciplinary in nature. While the primary focus of this paper is jurisprudential in character, the moral and political foundations of the issues at stake cannot be ignored. I therefore present a typology of forms or variations in interventions that I find useful in ruminating through what is undoubtedly a conceptual minefield: the motivations that fuel the impulse to intervene, the forms interventions take, and the consequences that flow from them. I then explore the treatment in international law of the varied forms of interventions, with the specific objective of inquiring into the extent, if any, international law rules and norms take account of these factors—motivation, method, and consequence. Finally, I offer a normative evaluation of emerging trends in the customary law of intervention, such as those now being justified under the rubric of “regime change” for “humanitarian,” “democratic,” and “rule of law” purposes.

II. ON “INTERVENTION” AND “NONINTERVENTION”

For any legal scholar working within the Western “liberal” tradition—and that is virtually all such scholars today, whatever they may think or say—the problem of “intervention” revolves around the proper meshing of two core values: autonomy and community. Liberalism privileges the autonomy of the “person” as a decision-maker.⁸ All of its institutions function on the assumption that a decision-maker is best situated to make the right decision, and that absent exceptional reasons, society ought to accept a decision arrived at by the decision-maker.⁹ In order to protect the integrity of this principle, interference from those outside of the decision-making zone is actively discouraged.¹⁰ While privileging personal autonomy, liberalism nonetheless is obliged to recognize the social reality that human societies operate as communities and that, in such a setting, the zone of the autonomous decision-maker necessarily must be circumscribed by the demands of communal coexistence.¹¹ “No man is an island,”¹² goes the phrase, and the freedom of the individual must sometimes yield to social necessities.

Negotiating the appropriate distribution or balance among these often-conflicting interests and values is at the core of a scholar’s perspective on doctrines of intervention and nonintervention. Different disciplines and sub-disciplines in Western liberalism approach the problem through different prisms that themselves undergo change over time and space. Although much of the rest of this essay will

Critical Perspectives on Intervention: Thoughts in Response to Professor Richardson’s Keynote Lecture, 29 MD. J. INT’L. L. 50 (2014) (discussing the author’s response to Professor Richardson’s reflections on the problem of interventions in civil conflict).

8. Harry K. Girvetz, Terence Ball, Richard Dagger & Kenneth Minogue, *Liberalism*, in BRITANNICA ENCYC., <https://www.britannica.com/topic/liberalism> (last visited Feb. 18, 2017).

9. *Id.*

10. *Id.*

11. *Id.*

12. John Donne, *No Man is an Island*, POEMHUNTER.COM (1964), <https://www.poemhunter.com/poem/no-man-is-an-island/>.

elucidate the problem by focusing on contemporary norms in international law, many of the same issues are at the heart of theological, moral, philosophical, political, and ethical discourses—to name the most obvious centers of intellectual thought on the subject. Regardless of the discipline, time, or space, however, I want to suggest that any reasonably stable understanding of the propriety of intervention (or, for that matter, nonintervention), struggles with four basic defining criteria: (1) the definition (and hence identification) of a change to the status quo, (2) the motivation behind the change, (3) the form of the change, and (4) its consequences for those with interest in the status quo or the new order emerging from the change.

First, the idea of intervention makes sense only when evaluated against reasonably well-defined, settled expectations. Faced with any action, the question of “intervention” arises as a social concern only when the action in question is viewed as a departure from an established or conventional norm or “status quo.” “Intervention” thus becomes a *problématique* only against the backdrop of a status quo, implied or explicit. Put another way, “intervention” is viewed as such, not necessarily because of the content of the action taken, but because that action is seen as running counter to expectations under the relevant circumstances. To concretize the idea: a parent that compels a child to eat her broccoli, in our current age, cannot be said to be “intervening” in the life of the child, even though the child protests vehemently against such a compulsion. On the other hand, a mother-in-law who insists that her daughter-in-law feed her son vegetables may well be accused of interventionism, even when the funds for the purchase of the vegetables are provided by the parents-in-law. One can of course conceive of differences among disciplines and societies (and indeed across time within the same society) in analyzing or reaching a conclusion as to the propriety of distinguishing among these situations, but the point is that the idea of interventionism—and certainly of its propriety—is entirely situational.

Secondly, even when intervention is determined to exist, judgment must be made as to its propriety. That judgment requires evaluating the intervention along three additional dimensions, each of which may yield competing assessments. The first of these is the motivation for the intervention. At one level, this is a descriptive project. But since motivation or purpose often seeks to probe the subjective intentions of an actor, the description may be laced with prescriptive and normative overtones. Such overtones may themselves provide a loop back into the initial question of whether a particular act in fact constitutes a recognizable form of intervention. So, in evaluating whether a mother’s insistence that a child eat her broccoli should be viewed as constituting “intervention,” the mother’s motivation may be taken into account in some settings, while ignored in others.

But beyond the actor’s motivation, a second consideration in determining the propriety of intervention—and one which clearly assumes intervention exists—is the form in which the intervention occurs. Here, we can distinguish, at a basic level, those interventions that are voluntary and those that are necessary; those that are invited, and those that are forced upon an unwilling subject; those that occur through persuasion, and those that are coercive in character; those that are economic, and those that are militarized. Other forms can be imagined, depending

on the toolkit of the particular discipline through which the issue of intervention is examined in the particular case.

Finally, the issue of the validity of an intervention invariably implicates evaluative conclusions as to its consequences. Issues of normativity, efficacy, and of the lasting effects of the intervention are often provided to gauge the propriety of the intervention. Although the focus of such inquiries is often on the subject of the intervention, a no less significant consideration should be on the consequences intervention may impose on the intervening person. The remainder of this essay explores these issues in the context of the rules under international law of interventions by states or groups of states in the internal political conflicts of another state.

III. THE INTERNATIONAL LAW OF INTERVENTIONS—THE RECEIVED WISDOM

Currently extant international law doctrines relating to intervention, like much else in the discipline, reflect and owe their existence and specifications to the particularized historical experiences of the European state system. That system emerged from the fragmentation of the Roman Empire and the subsequent attempts of competing fiefdoms to enlarge their territories through warfare.¹³ Intervention by one overlord in the affairs of the other was, at least prior to the twentieth century, the norm, the Treaty of Westphalia notwithstanding.¹⁴ International politics, functioning through diplomatic relations, rather than through international law, provided what limited checks to interventionism that were required by a functioning international order.¹⁵ National might, and the balance of power systems, acted as superintendents of interventionism run rampant. It was left to an American President, Woodrow Wilson, to resuscitate in the twentieth century, the

13. *State and Society in the High Middle Ages (1000-1300)*, BLOOMSBURG UNIV., http://facstaff.bloomu.edu/hickey/state_and_society_in_the_high_mi.htm (last visited Mar. 12, 2017) (describing the transition from local fiefdoms to feudal national monarchies).

14. The Treaty of Westphalia embodied and foreshadowed a classic paradox of international law. The treaty may have succeeded in the immediate resolution (or more accurately, deferment) of the disputes that had led to the devastations that necessitated it, but it failed to provide lasting mechanisms for avoiding those disputes. Specifically, the enforcement of its terms was left to the desires and might of the strong. See Sasha Safonova, *Relevance of the Westphalian System to the Modern World*, ARTICLE MYRIAD (Jan. 15, 2012) <http://www.articlemyriad.com/relevance-westphalian-system-modern-world-sasha-safonova/> (posted by Nicole Smith) (discussing the Westphalian system of sovereign states as established in the Treaty of Westphalia).

15. Broadly speaking, interventionism can take one of two forms. In the first, the foreign state intervenes in the affairs of a home state with the object of running the affairs of the latter. This, we might call aggression. This form of interventionism is not the subject of this paper. In the second, the foreign state intervenes in the affairs of the home state with the object of influencing the internal affairs of the home state. Typically, in this scenario, the foreign state sides with one or more factions in what is essentially a domestic conflict. It is this form of intervention that the paper addresses. In some instances, of course, the lines of demarcation between “intervention” of this latter type and “aggression” of the former type are not always clear. See generally Richardson, *supra* note 7.

attempts at a legal regulation of the phenomenon. In this context, the fourteenth of his famous “Fourteen Points,” proposed “[a] general association of nations must be formed under specific covenants for the purpose of affording mutual guarantees of political independence and territorial integrity to great and small states alike.”¹⁶ This idea was carried forward in the tenth article of the Covenant of the League of Nations. Under that provision, the response to interventionism strictly was not its outlawry, but its deterrence through measures of collective response.¹⁷ The idea was that a state that might otherwise be inclined to intervene in the affairs of another state would pause and take a second look if such intervention was likely to generate the hostility of all other states.

“Collective security” thus came to replace the “balance of power” as the international institutional ideology for dealing with problems associated with interventions. This created significant demands on the nascent system of international cooperation that the Covenant of the League of Nations was intended to foster. Achieving collective consensus as to when a politically—let alone a legally—impermissible intervention had occurred constantly bedeviled the system. Similarly, even when there was widespread agreement, states nonetheless disagreed about the appropriate means and measures for responding to the intervention.¹⁸ And, of course, since the distribution of the costs and burdens (not to speak of the benefits) of providing even agreed-to responses differed among states, marshalling the requisite response often proved impossible.¹⁹ These difficulties plagued the system, often in the most obvious cases (at least retrospectively speaking) of impermissible interventions in the interwar years.

These limitations of regulating intervention through the collective security mechanism were demonstrated repeatedly in the various crises of the interwar years, with those of Abyssinia, Spain, and Czechoslovakia being only the most notorious.²⁰ One might have thought that following the calamities of World War II,

16. Woodrow Wilson, Fourteen Points, Address to a Joint session of Congress (Jan. 8, 1918).

17. Notably, the obligation was phrased in article 10 as “[t]he members of the League respect and preserve against external aggression the territorial integrity and existing political independence of all members of the League.” *The Covenant of the League of Nations*, AVALON PROJECT, http://avalon.law.yale.edu/20th_century/leagcov.asp. Furthermore, the Covenant did not provide for a sure and certain response, but left it to the Council of the League to make recommendations on a case by case basis as to what the response ought to be. *Id.*

18. See *The Manchurian Crisis 1931–1933*, GCSEHISTORY.ORG.UK, <http://www.gcsehistory.org.uk/modernworld/appeasement/manchuriancrisis.htm> (last visited Mar. 12, 2017) (describing how the League of Nations could not decide on economic sanctions to be imposed on Japan for invading Manchuria).

19. See *id.* (stating that the only major powers with the means, Britain and France, were unwilling to mobilize their armed forces against Japan).

20. MARTYN HOUSDEN, *THE LEAGUE OF NATIONS AND THE ORGANIZATION OF PEACE* 106–08 (2012); see William Loren Katz, *The Forgotten Fight Against Fascism*, HUFFINGTON POST (June 11, 2014), http://www.huffingtonpost.com/the-zinn-education-project/the-forgotten-fight-again_b_5483988.html (describing the arrival of Italian fascist troops in Spain during 1936). See generally Félix Buttin, *The Polish-Czechoslovak Conflict Over Teschen Silesia (1918-1920): A Case Study*, 25 PERSPECTIVES 63 (Winter 2005/2006).

precipitated as they were in no small measure by the failings of the system, the new regime of the international order following that war would have been particularly cognizant of the challenges of interventionism. To some extent, this was so.

Although the Charter of the United Nations Organization (U.N.), the constitutive document of the post-World War II order, starts out by professing the lofty aspirations of “We the People,” it immediately and unequivocally assigns the realization of its objectives to the governments of the individual member states of the Organization, however constituted.²¹ At the core of those objectives are: (1) the maintenance of international peace and security, (2) the development of friendly relations among nations “based on respect for the principle of equal rights and self-determination of peoples,” and (3) achieving international cooperation in solving international problems in economic, social, cultural, humanitarian, and human rights realms.²² The means available for the realization of these objectives are explicitly spelled out in the provisions of Article 2 of the U.N. Charter. The Article begins with the categorical assertion that “[t]he Organization is based on the principle of the sovereign equality of all its Members.”²³ Building on this principle, Article 2 paragraph 4 of the Charter provides that “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”²⁴ Article 2 paragraph 7 similarly denies to the U.N. the authority to intervene in “matters that are essentially within the domestic jurisdiction” of any state.²⁵

The following can thus be provided as a summation on the treatment of issues of intervention in the aftermath of World War II. First, signatories to the U.N.

21. See generally CHARTER OF THE UNITED NATIONS, <http://www.un.org/en/sections/un-charter/un-charter-full-text/> [hereinafter U.N. Charter].

22. *Id.* art. 1, ¶ 3.

23. *Id.* art. 2, ¶ 1. Although this language would seem to apply only to those matters that are governed by the internal relations of the organization, the principle of the “sovereign equality” of states is too well established to be so narrowly construed. See GERRY J. SIMPSON, GREAT POWERS AND OUTLAW STATES: UNEQUAL SOVEREIGNS IN THE INTERNATIONAL ORDER (2004) (arguing that the concept of “sovereign equality” leads to the regulation of weaker states by larger, more powerful sovereign states). As the ICJ has recognized in analogous contexts, this is as much a statement of customary international law norm, as it is of a treaty undertaking. See, *Nicar. v. U.S.*, *supra* note 1 (finding that the U.S.’ support of a Nicaraguan rebellion violated international law); *The North Sea Continental Shelf Cases*, (*W. Ger. v. Den.*; *W. Ger. v. Neth.*), Judgment, 1969 I.C.J. Rep. 3 (Feb. 20, 1969) (rejecting the Equidistance Principle because it was not a rule of customary international law); U.N. Charter art. 2, ¶ 6 (requiring the Organization to “ensure that states which are not Members of the U.N. act in accordance with these principles so far as may be necessary for the maintenance of international peace and security.”).

24. U.N. Charter, art. 2 ¶ 4.

25. Paragraph 7 contains a proviso that exempts actions of the Security Council taken under Chapter 7 of the Charter from this prohibition. But since it is a proviso, the exemption cannot be read as affirmatively requiring or authorizing such intervention; it merely excuses it when necessary to discharge the Security Council’s obligations under Chapter VI. U.N. Charter, art. 2, ¶ 7.

Charter undertook, as a legal proposition, to refrain from the use of force or the threat of the use of force where such conduct would constitute interference with the political independence or territorial integrity of other states.²⁶ Second, commentators agreed that this prohibition applied independently of the Charter because it had become a norm of customary international law.²⁷ Third, these limitations were seen to flow from a core norm of the interstate system, that of self-determination.²⁸ Nation states were anthropomorphized with their rights and obligations analogized to those of individuals and other legal persons. The liberal principle of autonomy assigned to them the right to make decisions for themselves, free of coercion from others.²⁹

Fourth, the use of the term “force” (or “threat of force”), whether construed under Article 2 paragraph 4 of the Charter or as a norm of customary international law, was therefore not limited to military measures, but also applied to other forms of coercion, including those of an economic or of a judicial nature.³⁰ Fifth, given the sources of these prohibitions in the principles of autonomy and of self-determination, they do not apply to instances where a government, acting as a representative of the state, chooses to invite foreign assistance in dealing with matters that are within the government’s competence.³¹ Thus, foreign “intervention” in a civil war was permitted when solicited or “invited” by the government of the state, but prohibited when in support of a dissenting or rebellious group within the state.³² Finally, for much the same reason, a state may,

26. U.N. Charter, art. 2, ¶ 4.

27. See James A. Green, *Questioning the Peremptory Status of the Prohibition on the Use of Force*, 32 J. MICH. INT’L L. 215, 217 (2011) (providing a list of such commentators).

28. See *Self Determination (International Law)*, CORNELL UNIV. L. SCHOOL, https://www.law.cornell.edu/wex/self_determination_international_law (last visited Mar. 12, 2017) (defining self-determination and explaining it to be a core tenant of international law).

29. *Id.*

30. The doctrine of “state immunity” springs from the same vein. *Cf.* Democratic Republic of the Congo v. Belgium, Judgment, 2002 I.C.J. Rep. 3 (Feb. 2002) (finding that diplomatic immunity may only be waived by the individual’s home state). A highly contentious debate in the 1970s and 1980s revolved around whether the use of misleading information or “propaganda” directed at a state or the government of a state should be considered sufficiently coercive so as to be deemed in violation of the prohibition. See *The Debate Sharpens on a New World Information Order*, N.Y. TIMES (Feb. 15, 1981), <http://www.nytimes.com/1981/02/15/weekinreview/the-debate-sharpens-on-a-new-world-information-order.html?pagewanted=all> (discussing the fear that a few large western news agencies could distort information disseminated abroad). The inconclusive outcome of that debate may well parallel current controversies on government-sponsored “computer hacking,” the use of targeted “computer malware,” and other forms of “cyberwarfare” in support of a government’s policies.

31. See, e.g., Georg Nolte, *Intervention by Invitation*, OXFORD PUBLIC INT’L L., <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1702?prd=EPIL> (last updated Jan. 2010).

32. See G.A. Res. 2625 (XXV), Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (Oct. 24, 1970) (stating that each state must refrain from “forcible” action which deprives another state of its right to self-determination); Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1641–42 (1984) (concluding that unofficial and unsolicited external intervening force represents a violation of a country’s national sovereignty).

in its self-defense, encroach on the territory of another, or otherwise engage in activities that might otherwise run afoul of the prohibition, provided such encroachments go no further than is necessary to protect the state's right to self-defense.³³

States may have disagreed about the specific applications of these doctrines in particular cases, but there was remarkable consensus as to their formulations in general. When states were deemed to deviate from these principles, the state either denied that it was engaged in the alleged violative conduct, or sought to recharacterize the nature and scope of its involvement.³⁴ It rarely, if ever, challenged the legal constraints placed on its conduct by these doctrines and principles. This is of course not to argue that there were no clearly illegal interventions; there were many.³⁵ When the doctrines proved inconvenient, states avoided their force not by directly challenging their validity, but by “intervening” through covert actions that plausibly could be denied, or by seeking to fit the “intervention” within one of the accepted exceptions—invitation or self-defense.³⁶ The “balance of powers” mindset of the Cold War era which, notwithstanding the “collective security” ideology of the Charter, drove political behavior between 1945 and 1990³⁷ further encouraged covert interventions. In these situations, interventions were driven as much by a desire to deny the opposing camp a perceived advantage as to affirmatively benefit one's own camp. The end of the Cold War, however, altered the landscape and ideology for constraining interventions.

IV. INTERVENTIONS AND THE POST-COLD WAR ORDER

In 2017, we live and operate in a world order that is distinctly different from that which operated between 1945 and 1989. This is so, even though it might be difficult to pin down the specific moment of change. Unlike the dethroning of the post-World War I order by the U.N. system, we cannot point to a precise moment at which the changes can be said conclusively to have occurred, nor can we point to specific texts (or even clear-cut rules) in defining and framing those changes. Nonetheless, that the international system now operates under distinctly different norms—and perhaps objectives and aspirations—are, in my view, beyond cavil. While the U.N. system that emerged from the ashes of World War II aspired to an international order of “collective security,” that order was grounded in respect for

33. See, e.g., Oscar Schachter, *Self-Defense and the Rule of Law*, 83 AM. J. INT'L L. 259 (1989).

34. See Ewen MacAskill & Julian Borger, *Iraq War Was Illegal and Breached UN Charter, Says Annan*, GUARDIAN (Sep. 14, 2004, 9:28 PM), <https://www.theguardian.com/world/2004/sep/16/iraq.iraq> (stating that the U.S. defended the war in Iraq by claiming self-defense).

35. See Chibundu, *supra* note 7, at 63–64 (listing some of the interventions between 1950–1990).

36. MacAskill & Borger, *supra* note 34.

37. Chibundu, *supra* note 7, at 63–64.

the “territorial integrity” and “political independence” of states.³⁸ Assertions (or rhetoric) of “national sovereignty,” of “self-determination,” of “self-governance,” of national sovereignty over a people’s “national resources,” and of “national economic development” dominated the activist discourses of the post-World War II era.³⁹ These were enshrined in the international law rules, even when those rules purported to be of a “universal” character.⁴⁰ The internationalism of the post-World War II era was thus less one of “universal sameness,” as it was of collective coordination.

Over the last quarter century, on the other hand, the dominant “activists” and opinion-shapers of behavior in the international arena have framed and sought to act upon international law as a “universal” or “globalist” project. The globalist project advances international law as a unified project that is anchored in certain universal norms from which members of international society (or, as some prefer to call it “international community”) are not free to depart, and which may be coercively enforced on recalcitrant or “pariah” societies. And so, we encounter two fundamental differences between the ideas of international law espoused in the generation of international lawyers who reconstituted the world order following World War II, and those who have sought to reshape the international legal order over the last quarter century. This section of the essay explores the changes of the last quarter century, paying particular attention at the implications they have had on the doctrines of intervention. As I shall demonstrate below (and review more succinctly in the last part of the essay), those changes are more noteworthy for their *sub silentio*⁴¹ normative consequences on the doctrines than for their textual alterations to the law.

It is commonplace to date the beginning of the post-Cold War era to the “fall” of the Berlin Wall in October 1989.⁴² For the purposes of the discussion that follows, it is a convenient enough dividing line. The breach of the Wall, which permitted the unsupervised and free-flowing movement of persons across a universally recognized symbol of the global divide, affirmed and gave impetus to the emergence of what the then President of the U.S., George Herbert Walker Bush was to term two years later “the New World Order.”⁴³ It was the beginning of a

38. See U.N. Charter, art. 2, ¶ 1 (“The Organization is based on the principle of the sovereignty equality of all its members.”).

39. See, e.g., *id.*

40. Compare the language of the Human Rights Covenants, which obligate the state party to extend the relevant rights to all persons “within its territory and subject to its jurisdiction.” See, e.g., International Covenant on Political and Civil Rights art. 2 ¶ 1, Mar. 23, 1976, 999 U.N.T.S. 172.

41. See *Precedents sub silentio*, BLACK’S LAW DICTIONARY (2nd ed. 1910) (defining the term as a silent uniform course of practice which is uninterrupted but not supported by legal decisions).

42. See Andrew Kohut, *Berlin Wall’s Fall Marked the End of the Cold War for the American Public*, PEW RES. CTR. (Nov. 3, 2014), <http://www.pewresearch.org/fact-tank/2014/11/03/berlin-walls-fall-marked-the-end-of-the-cold-war-for-the-american-public/> (analyzing the American public’s reaction to the fall of the Berlin Wall and the American belief that the Cold War had ended).

43. George H.W. Bush, Address Before a Joint Session of the Congress on the State of the

series of well reported events in the mass media that left no doubt of the demise of a bipolar international system that had been based on the balance of “superpowers.” It launched an era that rightfully can be termed that of U.S. hegemony—an era that, with the arguable exception of a few years of Napoleonic dominance of continental Europe in the first decade of the nineteenth century, no other single power has ever so completely dominated and shaped modern history.⁴⁴ Two years earlier, President Bush’s predecessor, President Ronald Reagan, had called on the then-leader of the Soviet Union, Mr. Gorbachev to “tear down this wall.”⁴⁵ In the fall of the Berlin Wall, the ordinary people had mounted a “people’s revolution” and sent the wall tumbling down. The Communist governments of the other East and Central European satellites of the Soviet Union disintegrated, and by 1991, not even the mighty center could hold.⁴⁶ The Soviet Union, that once solid bastion of opposition to orthodox liberalism, also disintegrated,⁴⁷ and for at least the next ten years, its leadership headed by Boris Yeltsin was either ignored or simply provided fodder for laughter by editorial writers and policy makers in the West.⁴⁸ Simply put, one-half of the balance of power system was not merely impotent on the world scene, but was rendered effectively irrelevant in the making of international law.

The new era of unapologetic interventionism, however, began close enough to the U.S. In December 1989, following elections in Panama that supposedly were rigged by the Government, led by a former military commander, the U.S. military overthrew that leadership, replacing it with the opposition leader that it claimed had in fact won the elections.⁴⁹ Although the Caribbean has always been understood as “an American lake”⁵⁰ with its islands and the countries of Central

Union (Jan. 29, 1991).

44. See Salvatore Babones, *American Hegemony Is Here to Stay*, NAT’L INT. (June 11, 2015), <http://nationalinterest.org/feature/american-hegemony-here-stay-13089> (describing the American rise to power and naming only the former Soviet Union as ever coming close to being able to rival American hegemony despite never producing more than half of America’s total national output).

45. *Reagan Challenges Gorbachev to Tear down the Berlin Wall*, HISTORY.COM, <http://www.history.com/this-day-in-history/reagan-challenges-gorbachev-to-tear-down-the-berlin-wall> (last visited Feb. 27, 2017).

46. See *The Fall of Communism in Europe 1989-1991*, BBC, http://news.bbc.co.uk/1/hi/europe/09/timeline_eastern/swf/fall_of_communism_map.swf (last visited Mar. 12, 2017) (mapping the fall of communist regimes in Europe).

47. *Fall of the Soviet Union*, HISTORY, <http://www.history.com/topics/cold-war/fall-of-soviet-union> (last visited Mar. 12, 2017).

48. See Marilyn Berger, *Boris Yeltsin, Russia’s First Post-Soviet Leader, Is Dead*, N.Y. TIMES (Apr. 23, 2007), <http://www.nytimes.com/2007/04/23/world/europe/23cnd-yeltsin.html> (“To scholars on the left, he was an irksome distraction from the attempt to humanize socialism; to scholars on the right, his origins as a Communist functionary in the hinterlands made him deeply suspect. . .”).

49. Joseph A. Palermo, *The 25th Anniversary of the U.S. Invasion of Panama*, HUFFINGTON POST (Dec. 19, 2014, 4:28 PM), http://www.huffingtonpost.com/joseph-a-palermo/us-invasion-of-panama_b_6356232.html.

50. See *Roosevelt Corollary to the Monroe Doctrine*, UNITED STATES HISTORY, <http://www>

America subject to the whims of “the hovering giant”,⁵¹ the U.S.—at least since World War II—usually had offered a veneer of international legality when it violated the political independence of those countries. Thus, the U.S. either acted surreptitiously, or when the intervention was so blatant as to be beyond plausible deniability, it invoked such classic defenses as invitation by the government, or “collective self-defense.”⁵² In the Panama case, however, the U.S. did not bother with any of those recognized exceptions to the prohibition on interventionism. Rather, it asserted the right to overthrow a government to restore that, which in its view, had been properly elected, and to arrest the overthrown leader for narcotic offenses in violation of U.S. law.⁵³ These were new assertions under international law whose legitimacy will be discussed in the final part of this essay. But most of the events that have generated grounds for reevaluating international law norms on interventions occurred outside of the Americas, and those are examined below.

As already observed, the collapse of the Soviet Union left the U.S. as the sole and unchallenged superpower capable of projecting power in its multiple varieties across the globe.⁵⁴ An early test came with the bloody and thoroughly uncontrolled disintegration of the Socialist Federal Republics of Yugoslavia.⁵⁵ Despite being next door to the former Soviet Union, and well within the European landmass, it was left to the U.S., marshalling its military capabilities under the U.N. “peacekeeping” umbrella, and the skills of its diplomats to bring about anything close to a solution in the Balkans.⁵⁶ In many ways, the Yugoslav conflict was emblematic of the newfound interventionism. First, it clearly blurred the distinction between a “civil” conflict, outside intervention, which was prohibited under Article 2 paragraph 4 of the U.N. Charter, and conflict of an international character, which the U.N. may well be required to intervene under Title VII of the

.u-s-history.com/pages/h1449.html (last visited Mar. 12, 2017) (referring to the Caribbean as “an American lake”).

51. See, e.g., COLE BLASIER, *THE HOVERING GIANT: U.S. RESPONSES TO REVOLUTIONARY CHANGE IN LATIN AMERICA (1910–1985)*.

52. See, e.g., *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. V. U.S.), Judgment, 1986 I.C.J. Rep. 14, (June 27, 1984). See also Oscar Schachter, *The Legality of Pro-Democratic Invasion*, 78 AM. J. INT’L L. 645 (1984) (critiquing the idea that foreign force can be employed to remove a non-democratic government with a democratic one, while noting that not even the Reagan Administration employed that justification in explaining its blatant invasion of Grenada. Rather, the justification was of humanitarian intervention in order to protect U.S. nationals endangered in an ostensibly unstable political environment.).

53. Mark Beeson, *The Rise of the ‘Neocons’ and the Evolution of American Foreign Policy* (Asia Res. Ctr. Working Paper No. 107, 2004), https://www.murdoch.edu.au/Research-capabilities/Asia-Research-Centre/_document/working-papers/wp107.pdf.

54. See, e.g., Babones, *supra* note 44.

55. *The Breakup of Yugoslavia, 1990-1992*, U.S. DEP’T OF STATE: OFFICE OF THE HISTORIAN, <https://history.state.gov/milestones/1989-1992/breakup-yugoslavia> (last visited Mar. 12, 2017).

56. See DAVID HALBERSTAM, *WAR IN A TIME OF PEACE: BUSH, CLINTON, AND THE GENERALS*, 89–92 (Schriber ed., 2001) (discussing the role of the U.S. and the European Union (EU) in efforts to maintain a united Yugoslavia in which the EU underestimated its military capabilities and heavily relied on U.S. military prowess and finances).

Charter.⁵⁷ The decision of the European Union (EU) was to treat the constituent parts of the former Republics of Yugoslavia provisionally as independent states.⁵⁸ Creating a commission offered these Republics the opportunity to frame their entitlement to self-determination in terms familiar to international law,⁵⁹ offered a bridge between impermissible interventions under Article 2 paragraph 4 of the U.N. Charter, and permitted interventions well within the scope of the U.N. peacekeeping functions under Title VII.

Secondly, whatever confusion may have existed as to the status of the conflict in the former Yugoslavia between 1991 and 1995, this was not the case when, in 1999, a group of Western states led by the U.S., acting under the umbrella of the North Atlantic Treaty Organization (NATO), launched a military attack to sever Kosovo, hitherto an internationally recognized province of Serbia, from that country.⁶⁰ NATO acted notwithstanding the absence of authorization from the U.N. system, and in defiance of received wisdom on interventions in civil conflicts.⁶¹ The best arguments that proponents of the intervention could muster was that of “humanitarian” intervention; an idea that had gained sway in the 1990s, but which lacked support in the text of the U.N. Charter.⁶² A frequently cited report of jurists, thereafter, termed the intervention “illegal but legitimate.”⁶³ In that backhanded approval, the phenomenon of “humanitarian intervention” moved from the fringes of international law discourse to the forefront of it in the twenty-first century. In quick succession, arguments initially grounded on “necessity”, and that invoked as a limiting principle the “proportionality” of the measures taken in its accomplishment, began to be framed in terms of a “responsibility to protect,” implying as it did an obligation to intervene.⁶⁴ It was not unhelpful that the motivations were presented as pure, nor that its primary sponsors hailed from middle-tier powers motivated by supposedly altruistic concerns, and with no obvious geopolitical self-interest of their own to further. The idea of an international “responsibility to protect” overriding the international law limitations

57. U.N. Charter, *supra* note 21, art. 39–42.

58. Faton Bislimi, *EU Foreign Policy Towards the Balkans: An Opportunity or a Challenge?*, 1 THE WESTERN BALKANS POL’Y REV. 29, 33 (2010).

59. See Alain Pellet, *The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples*, 3 E.J. OF INT’L L. 178, 184 (1992) (quoting the entire second Opinion of the Committee, which stated that the Republics had a right to self-determination).

60. Patrick T. Egan, *The Kosovo Intervention and Collective Self-Defence*, 8 INT’L PEACEKEEPING 39, 40 (2001).

61. *Id.* at 41.

62. *Id.* at 39–41.

63. See Human Rights Council, *Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact-Finding Mission on the Gaza Conflict*, U.N. Doc. A/HRC/12/48 (Sept. 25, 2009) (summarizing the investigation of human rights violations in Gaza).

64. *An Introduction to the Responsibility to Protect*, INT’L COALITION FOR THE RESPONSIBILITY TO PROTECT, http://www.responsibilitytoprotect.org/index.php/about-rtop/learn-about-rtop#un_res (last visited Mar. 12, 2017).

on interventionism appeared to receive international endorsement in an abstruse declaration of the heads of states who met at the U.N. at the beginning of the twenty-first century.⁶⁵ The precise meaning and scope of the declaration, however, and whether it is in fact a statement of a legal rule is substantially open to question.⁶⁶ Now beyond debate, however, is that coercive intervention in the political independence of a state can be evaluated in terms of whether the intervention had, as a primary objective, the avoidance or minimization of the perpetration of widespread atrocities along lines of identifiable group cleavages.

It would be misleading to focus exclusively on events in the Balkans to explain the erosion of the principle of noninterventionism. The path, in fact, had been initiated in Africa and the Middle East. Beginning in the 1970s and stretching into the 1980s, African societies confronted debilitating economic problems that their political orders proved incapable of effectively addressing.⁶⁷ By the late 1980s, virtually all of them faced crises of legitimacy, but none more so than Somalia and Liberia.⁶⁸ The heads of state in both countries fled or were killed and were replaced by feuding “warlords.”⁶⁹ Faced with anarchy, the international system actively intervened in both situations, employing as its justification humanitarian concerns over the welfare of the ordinary people in these societies.⁷⁰ Neither intervention turned out to be successful,⁷¹ but in contrast to events in Rwanda, where the international system stood on the traditional teachings of noninterventionism, these failings appeared to be the lesser evils. Similarly, in Iraq, the three Western powers—Great Britain, France and the U.S.—again invoking humanitarian concerns, saw in the principle of nonintervention no impediment to ignoring claims of territorial sovereignty by the Government of Iraq as they dictated and enforced a “no fly zone” by military aircraft of that country

65. See generally G.A. Res. 63/308 (Sep. 14, 2009).

66. See, e.g., Chibundu, *supra* note 7.

67. See generally Carol Lancaster, *Africa's Economic Crisis*, 52 FOREIGN POL'Y 149 (1983).

68. FEDERAL RESEARCH DIVISION, SOMALIA A COUNTRY STUDY 141-48 (2010); Geepu-Nah Tiepoh, *The Liberian Economy: The Path From Loot to Development*, THE PERSPECTIVE, <http://www.theperspective.org/economy1.html> (last visited Mar. 12, 2017).

69. See Annabel Lee Hogg, *Timeline: Somalia, 1991-2008*, THE ATLANTIC (Dec. 2008), <https://www.theatlantic.com/magazine/archive/2008/12/timeline-somalia-1991-2008/307190/> (stating that dictator Mohammed Barre fled Somalia in 1991, leaving Mohamed Aideded and Ali Mohamed struggling for power); *Liberia Profile – Timeline*, BBC (June 30, 2006), <http://www.bbc.com/news/world-africa-13732188> (stating that after a military coup in 1980, President Tolbert of Liberia was executed and Master Sergeant Samuel Doe and Charles Taylor struggled for power).

70. See *Somalia – UNOSOM I*, UNITED NATIONS, <http://www.un.org/en/peacekeeping/missions/past/unosom1backgr2.html> (last visited Mar. 12, 2017) (describing the U.N.'s humanitarian intervention in Somalia); *UNMIL Background*, UNITED NATIONS, <http://www.un.org/en/peacekeeping/missions/unmil/background.shtml> (last visited Mar. 12, 2017) (describing the U.N.'s peacekeeping mission to Liberia).

71. See generally Chester A. Crocker, *The Lessons of Somalia – Not Everything Went Wrong*, PBS (May-June, 1995), <http://www.pbs.org/wgbh/pages/frontline/shows/ambush/reading/s/lessons.html>; Thomas W. Jacobson, *U.N. Peacekeeping: Few Successes, Many Failures, Inherent Flaws*, CTR. FOR SOVEREIGNTY & SECURITY 2 (Mar.-Apr. 2012).

over certain territories of the country.⁷² Indeed, by 1998, the U.S. Congress in a remarkable piece of legislation explicitly announced as U.S. policy the overthrow of the governments of Iran, Iraq, and Libya.⁷³ Thus, plausible arguments can be advanced for the proposition that, by the turn of the twenty-first century, the doctrine of nonintervention did not apply in situations considered by some members of the international society to pose humanitarian concerns.

Two additional developments in the post-Cold War doctrines of intervention deserve some attention. These relate to the means rather than the definition of intervention. It may be that the focus on defining the breadth of prohibited interventions in the age of the Cold War obviated any serious discussions of the legality of the means chosen to implement such interventions.⁷⁴ As the propriety of interventions raised fewer and fewer discordant notes, focus naturally shifted to the means available or chosen for their implementation in particular cases. Military interventions, although perhaps the most efficient and effective, clearly also imposed the most substantial costs for the interveners.⁷⁵ Plausible alternatives, notably the use of economic sanctions (especially the so-called “targeted” or “smart” sanctions) appeared to have the merit of limiting damages to the society being subjected to the intervention, while focusing the pains of intervention on the responsible miscreants.⁷⁶ This combination of costs and burdens had the additional benefit of increasing instances of intervention, a fact that many in the new world order deemed an international benefit.⁷⁷ This feeling reflected a second development in the new hegemonic world order.

One of the consequences of a hegemonic world order is that the values and aspirations of the hegemon become transmitted as those of the system. One of the central problems of international law has always been that of the effective enforcement of its rules. So significant a shortcoming has it been that, at least prior to the 1990s, most international lawyers contented themselves by arguing that the focus of the effectiveness of a legal regime should not be enforcement, but compliance.⁷⁸ But one of the consequences of having a dominant hegemon is the

72. Jules Lobel and Michael Ratner, *Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-Fires and the Iraqi Inspection Regime*, 93 AM. J. OF INT'L L. 124, 132 (1999).

73. *Id.*

74. The one episode that might have precipitated such a discussion—the use of a sea blockade or “quarantine” to deny Cuba the placement of missiles within its territory—involving as it did a superpower tussle in a matter that allegedly involved the “national security” of one of the superpowers, has focused on the rectitude of the latter claim rather than the legality of the former issue. *Id.*

75. See, e.g., Daniel Trotta, *Iraq War Cost U.S. More than \$2 Trillion: Study*, REUTERS (Mar. 14, 2013, 12:53 PM), <http://www.reuters.com/article/us-iraq-war-anniversary-idUSBRE92D0PG20130314>.

76. Kimberly A. Elliot, *Assessing UN Sanctions after the Cold War: New and evolving standards of measurement*, 65 INT'L J. 85, 89–95 (1999).

77. See *id.* (describing the effects in totality of issuing sanctions during the Cold War).

78. As Professor Louis Henkin famously observed in the context of compliance with international law: “Most nations observe most laws most of the time.” *Louis Henkin*, COLUM. L.

belief in its capacity to enforce the law; to be, as it is sometimes phrased “the world’s policeman.”⁷⁹ That belief is especially strong in a culture in which a central value is the individualization of punishment. If the dominance of the U.S. has left a distinctive signature in the international law of the last quarter century, it is the personalization of the consequences of its violation.⁸⁰ This has taken the form of the individualized adjudication of wrongdoing through such arrangements as the formation of international criminal tribunals, and indeed the use of targeted killings as a means for enforcing believed violations of international norms.⁸¹ Segregating the individual from the nation state—at least when it comes to punishment—makes interventionism more and more malleable and acceptable.

V. WHITHER INTERVENTIONS

It should now be evident that a central theme of any doctrine of interventionism must relate its understanding to the zeitgeist of the period. While a doctrine may be framed in prosaic textual rules, they can and do exist apart from (and indeed in subversion of) those rules. The functioning of international law over the last quarter century has been dominated by the actions of the U.S. as a singular hegemon.⁸² The dominant ideas, institutions, and ideologies of this period have been framed by and put in the service of “neoliberalism”; that is, as a post-industrial resuscitation on a global scale of eighteenth and nineteenth century ideas that had been crafted and were intended to function within emerging secular states being weaned away from the close-mindedness of clerically dominated societies.⁸³ In the international arena, the values of neoliberalism have been formulated by appeals to “democracy,” “human rights,” “rule of law,” and “market capitalism.”⁸⁴ It is these ideals, rather than those of self-determination or political independence, which have shaped contemporary concerns and evaluations over interventions. But it is in the nature of legal regimes that a dissonance between ideals and practice can be tolerated only so long as the power that supports the ideals remains in

SCHOOL (Oct. 14, 2010), <http://www.law.columbia.edu/louis-henkin>. See generally ABRAM CHAYES & ANTONIA CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1997); Andrew T. Guzman, *Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823 (2002).

79. Barbara Conroy, *U.S. “Global Leadership”: A Euphemism for World Policeman*, in CATO INSTITUTE POLICY ANALYSIS NO. 267 at 4 (1997).

80. See Rome Statute of the International Criminal Court art. 78 ¶ 1, July 1, 2002, 2187 U.N.T.S. 3 (“In determining the sentence, The Court shall, in accordance with the Rule of Procedure and Evidence, take into account such factors as the gravity of the crime and the individual circumstances of the convicted person.”).

81. *Id.*

82. See Nico Kirsch, *International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order*, 16 EU. J. INT'L L. 3 69, 399 (explaining that the U.S. often influences the rules of international law, particularly treaty law, though they tend to not agree to be bound by the law).

83. Nicola Smith, *Neoliberalism*, in ENCYCLOPAEDIA BRITANNICA (Mar. 23, 2016), <https://www.britannica.com/topic/neoliberalism>.

84. Joel Ngugi, *Policing Neo-Liberal Reforms: The Rule of Law as an Enabling and Restrictive Discourse*, 26 U. PA. J. INT'L ECON. L. 513, 514–97 (2005).

control.

The role of the U.S. as the international law's hegemonic power has been fraying over the last decade or so and indeed was bound to decay.⁸⁵ There are good historical reasons for believing that the international system will always elude hegemonic control for any prolonged period of time, and that twenty years is much more than can be expected for such domination. It is also highly debatable whether the structures of American government and society are suited (or can be adapted) to providing that domination. The unmistakable (if fragmented) unraveling of American hegemonic power over the last ten or so years strongly suggests the answers to be in the negative.

At any rate, it is unlikely that the hegemonic power can be deployed to counter effectively non-Western states such as Russia, Saudi Arabia, Iran, China (and, quite likely others) when, borrowing from the U.S. playbook, they assert the right to intervene in neighboring unstable societies. Such states are unlikely to find persuasive the argument that neoliberal ideals are so fundamental to world order (not to speak of their own particularized "national security" interests) that they trump competing norms of self-determination, self-governance, and regional stability. Double standards are inherent in politics and may sometimes be unavoidable in the pragmatic interpretation of rules, but they should not be foundational to a legal regime. Moreover, with the destabilizing and material costs of interventions now so glaringly obvious even to the most apolitical middle class citizens of the wealthy West as more and more of the displaced persons in civil strife-torn societies seek refuge among them, or as so-called "terrorists" bring their civil conflicts to those citizens, ascertaining the appropriate norms for interventions becomes less an abstract undertaking and more a choice among competing tradeoffs. It does not require penetrating foresight to wager on the winning choice.

In short, with obvious changes afoot in the structures of international power—both military and economic—we are at a moment when the international system must seriously consider refashioning its approaches to questions of interventionism. It is highly unlikely that the system can return to the post-World War II rhetoric of noninterventionism that is grounded on principles of self-determination or of anticolonial claims to territorial integrity and political independence. But it is equally clear that the rhetoric of "democracy," "rule of law," and "human rights" have lost their justificatory powers in the current environment of mass population displacements precipitated in the supposed pursuit of these norms. The highly selective use of these norms to resist criticism and to lambaste others, coupled with the fiscal and monetary costs of interventions, may however act as equilibrating checks in the system. Justifiable replacement doctrines of interventionism, I shall here suggest, will require their normative

85. See Charles A. Kupchan, *The Decline of the West: Why America Must Prepare for the End of Dominance*, THE ATLANTIC (Mar. 20, 2012), <https://www.theatlantic.com/international/archive/2012/03/the-decline-of-the-west-why-america-must-prepare-for-the-end-of-dominance/254779/> (opining that U.S. dominance in the world is declining).

grounding less in abstract universalisms and more in the shifting practical concerns that have always underlain the prohibitions. In what follows, I tease out those considerations by returning to the three facets that I identified as essential to any proper appreciation of why interventions are and should be regulated: the motivation behind the intervention, the means chosen to effect the intervention, and the consequences that flow from the intervention.

As suggested at the outset of this essay, doctrines of interventionism are necessarily dynamic because they are framed against the backdrop of the status quo. The current international legal order exhibits an amorphousness of power centers comparable perhaps only to the period between 1815 and 1870.⁸⁶ There clearly are dominant or “great” powers, and while the U.S. retains the greatest capacity among them to impose its preferences on others, its capacity and willingness to do so currently are under substantial challenges, both internally and externally. Interventionist doctrines framed against the backdrop of the balance of power, collective security, or hegemonic control would appear unresponsive to the current conditions on the ground. Moreover, the amorphousness of the current distributions of power within the international system is paralleled and emphasized by the internal fragmentation of power within and across dominant societies. The emergence and activism of so-called “civil society” as sites of engagement in international politics (and increasingly, international law), facilitated and democratized by the pervasive mobile and social network communications technologies have rendered obsolete any singular focus on foreign offices or heads of state as the determinants of doctrines of intervention.

Whatever else the period of American hegemonic control may have failed in achieving, it surely succeeded in expanding the acceptable grounds for interventions. Beyond the traditional ones of invitation by the government and self-defense, it is now accepted in practice that the promotion of some norms such as humanitarianism, democracy, and the avoidance of genocide (or other mass atrocities) may offer acceptable legal grounds for interventions.⁸⁷ The difficulties will be in drawing recognizable boundaries for the play of these norms, especially in a world in which non-governmental organizations or “civil society” has become the modern buccaneers of *la mission civilisatrice*.⁸⁸ This emergence of plural legitimating grounds for interventions and of multiple power centers both within and outside of countries means that more than ever, there will be regional differences in the assessments of the legitimacy and legality of interventions.

Already evident in the new order is that Africa will again stand apart—as indeed it did in the nineteenth and first-half of the twentieth century. Doctrines of

86. See Amos S. Hershey, *History of International Law Since the Peace of Westphalia*, 6 AM. J. INT'L L. 30, 30–69 (1912) (outlining the international order from 1648 until the 1900s).

87. See T. Modibo Ocran, *The Doctrine of Humanitarian Intervention in Light of Robust Peacekeeping*, 25 B.C. INT'L & COMP. L. REV. 1, 1–58 (2002) (explaining the different reasons for humanitarian intervention).

88. *La mission civilisatrice* is a French term meaning “civilizing mission.” It describes the French colonial policy of converting its colonial subjects into French people. “Mission Civilisatrice,” in ENCYCLOPEDIA OF THE MODERN MIDDLE EAST AND NORTH AFRICA, Encyclopedia.com (2004).

“humanitarian intervention” and the promotion of “democracy” are receiving less skeptical application in the African setting than elsewhere. In Security Council Resolution 1970, the Security Council finally accepted what it had declined to endorse in Kosovo—namely, that foreign powers may lawfully use force to overthrow the government of a country on so-called “humanitarian grounds.”⁸⁹ The elasticity of the concept is indisputably beyond cavil; but whatever those boundaries may be, surely they were shredded in Security Council Resolution 1975, which, in a contested domestic elections process, authorized the use of U.N. force to get rid of the government in power.⁹⁰ In Sudan, Southern Sudan, Somalia, Mali, Burundi, and the Central African Republic (to name only but the most current examples), the claims for intervention by the so-called “international community” seem equally insistent and obvious.⁹¹ Moreover, the availability of means of intervention at relatively less cost to the interveners makes the use of external interventions in these situations seemingly cost effective. Again, as in the heyday of colonial empire building, equipping and maintaining interventionist military forces appear puny when compared to national defense budgets. Economic sanctions—especially when targeted at identified individual wrongdoers—impose virtually no cost on the international economic system.⁹² And then, there is of course the pioneering use of adjudicatory tribunals as an additional coercive mechanism for interventions.⁹³ To be sure, the calls for interventions emphasize the possible resolution of immediate conflicts, but rarely do they pause to evaluate the longer-term effects of those interventions on the societies in question.

But even elsewhere, while claims of the right to intervene tend to be more disputed, there is no doubting the normative shift afoot. In Syria and Yemen, for example, the legitimacy of the obvious foreign interventions have been debated less by appeal to the traditional norms than by reference to utilitarian calculations as viewed from Paris, Washington, and Moscow.⁹⁴ Spurred initially by the ease with which international society acquiesced in the overthrow of the Libyan Government of Muammar Gaddafi, the West and some Sunni-dominated Arab countries, acting through the so-called “friends of Syria,” and borrowing from the old textbook of covert intervention, initially invoked the new legitimating claims

89. See S.C. Res. 1970, ¶ 26, U.N. Doc. S/RES/1970 (Feb. 26, 2011), available at undocs.org/S/RES/307 (stating that U.N. Member States should facilitate and support the return of humanitarian agencies in Libya).

90. See S. C. Res. 1975 (March 30, 2011), ¶¶ 3–4 (clearly taking a side in the civil conflict in the Ivory Coast, and expressly asking the military forces of the country to do likewise); cf. S.C. Res. 1973 ¶ 4, S/RES/1973 (Mar. 17, 2011) (authorizing U.N. Member States to use all necessary measures to protect civilians in Libya, though excluding the use of a foreign occupation force).

91. See Tomi Oladipo, *The UN's Peacekeeping Nightmare in Africa*, BBC (Jan. 5, 2017), <http://www.bbc.com/news/world-africa-38372614> (describing the many U.N. interventions on the African continent).

92. See, e.g., S.C. Res. 1970, ¶¶ 9, 10, 15, 17.

93. See *id.* at ¶ 4 (referring the case in Libya to the ICC).

94. See Josh Cohen, *In Syria, the Joke's on Washington*, REUTERS, (Nov. 24, 2015) <http://blogs.reuters.com/great-debate/2015/11/24/in-syria-the-jokes-on-washington/> (discussing how the Paris attacks fueled the U.S.-Russia debate about Syria).

of popular democracy and humanitarianism to fund internal opponents of the President Bashar al-Assad-led government.⁹⁵ The internal conflict, however, began to take on the traditional forms of balance of power rivalries, as Shi'a Muslims and Russia, acting purportedly by the invitation of the al-Assad government, funneled military support to it.⁹⁶ The resulting stalemate foreshadows the sort of calculus that might be expected in a post-hegemonic order. The elasticity of norms will provide willing actors with more than plausible normative arguments for intervention. It will be left to practical considerations such as their costs and their objective returns to cabin their utilization. Thus, in Syria (or Yemen, for that matter), neither humanitarianism nor the preference for democracy has been decisive in framing the levels of intervention. It is rather the available resources to the combatants, (including of course external ones), and the consequences of the conflicts on both internal and external actors that have been decisive in shaping those conflicts. Indeed, given globalization, we can expect internal conflicts to create greater spillover effects.

And here might be the ultimate, if paradoxical, gauge of future interventions. In settings where the effects of domestic conflicts can be confined to the immediate neighborhood, the likelihood of foreign intervention will depend greatly on the influence of international nongovernmental organizations. That influence, in turn, will depend on the perceived cost in material terms of the proposed intervention. African societies are most likely to satisfy the conditions for external intervention in this context. These societies remain mostly the preserve or wards of Western-based aid groups.⁹⁷

Intervention in these situations is framed and advocated as part of the "humanitarian mission" of these organizations.⁹⁸ The expectation is that by intervening, the harm that results from conflictual politics would be removed. Foreign intervention, like foreign aid, is thus seen as necessary to the construction of modern polities in these societies. Missing in the discussions of interventions are their long-term consequences. That conflict-ridden politics may be essential to organic nation building is rarely considered. Presumably, proponents of interventions in these situations conceive only of societies that will remain permanently dependent on international aid and succor. Yet, the limited empirical

95. See Ken Sofer & Juliana Shafroth, *The Structure and Organization of the Syrian Opposition*, CTR. FOR AM. PROGRESS (May 14, 2013), <https://www.americanprogress.org/issues/security/reports/2013/05/14/63221/the-structure-and-organization-of-the-syrian-opposition/> (discussing the coordination between the U.S. and Syrian rebel forces).

96. See Ayse Baltacioglu-Brammer, *Alawites and the Fate of Syria*, 7 ORIGINS: CURRENT EVENTS IN HISTORICAL PERSPECTIVE (Jan. 2014), <http://origins.osu.edu/print/2254> (explaining the conflict between the Shi'ite and Sunni Muslims and Bashar al-Assad's influence in such conflict).

97. See *Development At a Glance: Statistics by Region – Africa*, OECD 3–4 (2015), <https://www.oecd.org/dac/stats/documentupload/2%20Africa%20-%20Development%20Aid%20at%20a%20Glance%202015.pdf> (showing that Africa gets more foreign aid than any other region in the world, mostly from Western countries).

98. See *Why Countries Give Aid*, BBC: BITESIZE, http://www.bbc.co.uk/bitesize/standard/modern/international_relations/politics_of_aid/revision/3/ (last visited Mar. 13, 2017) (listing humanitarian considerations as one reason why countries give foreign aid).

social science studies on the subject strongly suggest that foreign interventions, regardless of their motivation, tend to prolong rather than shorten internal conflicts.⁹⁹

Independently of statistical evidence, however, anyone who has personally experienced the traumas of a civil war readily recognizes that the wounds of war are more likely to be readily bound up if the participants do not invest their hopes for the future in external exhortations that are often removed from facts on the ground. In most instances, neighbors will have to continue coexisting after the immediate crisis. Indeed, this pragmatic understanding of human nature probably best explains the linkage between the prohibition against foreign interventions in civil conflicts and the principles of self-determination and self-governance. Parties living in close proximity to each other are more likely to negotiate lasting political accommodations if they do not build their castles on expectations of foreign assistance.

But the likely sources of continuing debate in the international law of foreign interventions in internal conflicts are more likely to come from outside of Africa. While the proponents of interventions in African conflicts primarily will be non-state actors seeking to be heard in the international arena, civil conflicts such as those in Ukraine, Syria, and Yemen are of geostrategic import for governmental actors.¹⁰⁰ These conflicts seemingly reframe the Cold War proxy struggles between the West and the East.

Despite their shared geostrategic commonalities, there are nonetheless substantial differences between the Cold War and post-Cold War interventions. The often covert character of the former provided a ready-made, face-saving means for an intervener to extricate itself from a conflict, should that route prove necessary or expedient for it or for the subject of the intervention. By contrast, the current expansion of permissible normative grounds for intervention, superintended as they are by the active rhetoric of neoliberal ideals, will not only promote overt interventions, but will also guarantee unending quagmires of

99. See, e.g. Patrick M. Regan, *Third Party Interventions and the Duration of Intrastate Conflict*, BINGHAMTON U. 4 (2000).

100. See Eugene Rumer et al., *What Are the Global Implications of the Ukraine Crisis?*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Mar. 27, 2014), <http://carnegieendowment.org/2014/03/27/what-are-global-implications-of-ukraine-crisis-pub-55112> (describing the possible international ramifications of the Ukrainian conflict); Amanullah Khan, *Mapping Conflicts in Syria and Yemen*, FOREIGN POL'Y NEWS (Sep. 15, 2016), <http://foreignpolicynews.org/2016/09/15/mapping-conflicts-syria-yemen/> (talking about the conflicts in Syria and Yemen and the international community's involvement). Africa may of course also present geostrategic sites of conflict, as evidenced by concerns over the expansion of the Islamic State in Libya, or migration flows from the continent into Europe suggest. It is notable that the U.S. now operates an "Africa Command" as part of its military structure, and that NATO is being called upon to provide naval support in the Mediterranean to address migration flows not simply from the Middle East, but North Africa as well. Similarly, although not currently the case, it takes little foresight to forecast possible future civil conflicts in Southeast Asia pitting the West—again led by U.S. decision-makers—against China. Nothing in the text should be read to exclude these regions as being of geostrategic significance for the framing of future interventionist rules and policies.

interventionism. Having ostensibly gone in to save humanity while concurrently safeguarding national security interests, it will be the exceptional democratically-elected government that will opt to back down and risk the opprobrium of being called not simply weak, but immoral.¹⁰¹ Perhaps the difficulty that governments will thus face in disentangling from such foreign interventions may feature in their geostrategic calculations, and may result in fewer interventions; but past experience does not hold out much hope on this score.

Can these prognostications be reduced to doctrinal formulae? An American jurist famously opined that “[t]he life of the law has not been logic; it has been experience.”¹⁰² This is surely an apt observation in considering not just the past rules on intervention, but indeed its future development. The current fragmentation of international law regimes, and the absence—thankfully, I suppose—of an immediate worldwide cataclysm probably mean that the formal rules on the book will remain unchanged, while in practice, new but informal rules will dominate. The implication is that after a quarter century of heightened rhetoric on “the rule of law,” lawyers and law professors may find it more useful to learn and to instruct their students on the ways of diplomacy and practical politics than on formulaic statements about the use of force, state sovereignty or political self-determination.

101. See Con Coughlin, *Britain has a Moral Obligation to Intervene Militarily in Syria*, THE TELEGRAPH (Nov. 26, 2015, 12:33 PM), <http://www.telegraph.co.uk/news/worldnews/islamic-state/12018683/Britain-has-a-moral-obligation-to-intervene-militarily-in-Syria.html> (arguing that Britain has a moral obligation to fight ISIS in Syria).

102. OLIVER WENDELL HOLMES JR., THE COMMON LAW 1 (1881).