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### Humanitarian Intervention and International Law: The Moral Importance of an Intervener's Legal Status

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# Humanitarian Intervention and International Law: The Moral Importance of an Intervener's Legal Status

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**ABSTRACT** *Although states have recently agreed that there is a universal responsibility to undertake humanitarian intervention to protect populations from egregious violations of human rights, it is unclear who exactly in the international community should intervene. One option, favoured by many, is that intervention should be undertaken by those interveners whose action would be legal according to current international law. This article considers this option by assessing the moral importance of an intervener's legal status. I begin by suggesting that according to the current international law on humanitarian intervention, UN Security Council authorisation is required for an intervener's action to be legal. Then, in the main part of the article, I critically examine four reasons for treating an intervener's legal status as morally significant. Specifically, I argue that it is significantly less morally important that an intervener have UN Security Council authorisation, and therefore be legal, than is commonly assumed.*

**KEY WORDS:** Humanitarian intervention, international law, United Nations Security Council, the responsibility to protect

As the notion of universal human rights has grown in standing in the international community, the concept of sovereignty has been gradually evolving to one of sovereignty as responsibility, the responsibility to uphold one's citizens' basic human rights. A key development in this context has been the International Commission on Intervention and State Sovereignty's (ICISS) report in 2001, *The Responsibility to Protect*. Commissioned by the Canadian government in response to a call from the then UN Secretary-General, Kofi Annan, and led by former Australian Foreign Affairs Minister Gareth Evans, *The Responsibility to Protect* argues that if a state does not protect the human rights of its citizens, sovereignty is temporarily suspended and there is an international responsibility to respond. Accordingly, there is a universal responsibility to undertake humanitarian intervention to protect

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populations from genocide, war crimes, ethnic cleansing, and crimes against humanity. At the UN World Summit in 2005, the heads of the member states accepted that the international community has a universal responsibility to protect should national authorities be unwilling or unable to protect their populations (UN 2005: 30).<sup>1</sup>

Yet it remains unclear *who* exactly in the international community should undertake humanitarian intervention. Should it be the UN, NATO, a regional organisation (such as the African Union), a state or group of states (perhaps with the authorisation of the UN Security Council), or someone else? It is vital that we make this decision if we are to discharge effectively the responsibility to protect. Otherwise, as Alex Bellamy asserts, ‘there is a real danger that appeals to a responsibility to protect will evaporate amid disputes about where that responsibility lies’ (2005: 33).

The question of who should execute the responsibility to protect is ultimately a moral question. We need to look to those interveners whose intervention will be morally justifiable and, in particular, those interveners who possess morally relevant qualities. But what are these qualities? One quality frequently claimed to be morally significant is an intervener’s legal status according to the current international law on humanitarian intervention. On this approach, to decide who should execute the responsibility to protect, we should look to the interveners that can legally undertake intervention to protect human rights. Indeed, this is the preferred solution of ICISS. Having suggested that intervention authorised by the UN Security Council is legal, the authors of *The Responsibility to Protect* claim that ‘[t]here is no better or more appropriate body than the United Nations Security Council to authorize military intervention for human protection purposes’ (ICISS 2001a: XII).

Only two years previous to the publication of this report, however, NATO’s intervention in Kosovo was largely successful at preventing rights violations on the scale of the Bosnian war, despite lacking Security Council authorisation. This led the Independent International Commission on Kosovo to conclude that NATO’s action was ‘legitimate, but not legal, given existing international law’ (Independent International Commission on Kosova 2000: 289). Consequently, NATO’s intervention in Kosovo raises doubts over the significance that ICISS gives to an intervener’s legal status: if humanitarian action can be successful at halting egregious violations of human rights without having the proper legal basis, why should we care whether an intervener has the legal right to intervene? More recently, there has been a lack of effective action in response to the human rights violations in Darfur, the Democratic Republic of Congo, Northern Uganda, and elsewhere.<sup>2</sup> If an agent were willing to intervene in one of these states, whose intervention would be illegal but effective, should we support it? Or should we maintain that only those interveners whose intervention would be legal should take on the responsibility to protect? Kofi Annan sums up the dilemma we face:

To those for whom the greatest threat to the future of international order is the use of force in the absence of a Security Council mandate, one might ask – not

in the context of Kosovo – but in the context of Rwanda: If, in those dark days and hours leading up to the genocide, a coalition of States had been prepared to act in defence of the Tutsi population, but did not receive prompt Council authorization, should such a coalition have stood aside and allowed the horror to unfold?

To those for whom the Kosovo action heralded a new era when States and groups of States can take military action outside the established mechanisms for enforcing international law, one might ask: Is there not a danger of such interventions undermining the imperfect, yet resilient, security system created after the Second World War, and of setting dangerous precedents for future interventions without a clear criterion to decide who might invoke these precedents, and in what circumstances? (Annan 1999: 1).

The primary aim of this article is to assess this dilemma. More specifically, I answer the following question: when deciding who should execute the responsibility to protect, how important is it that those undertaking humanitarian intervention do so in accordance with current international law?

On one approach, an intervener's having proper legal authorisation is a *necessary* condition of, and *vital factor* in, its moral justifiability. On this position, which was largely taken by states at the 2005 UN World Summit, we should always look to an intervener's legal status when considering who should execute the responsibility to protect. It follows that illegal intervention is always unjustifiable.<sup>3</sup> On another position, which I defend in this article, an intervener's legal status according to current international law plays *little or no role* in its moral justifiability. It follows that an intervener's legal status is a poor basis on which to assess who should execute the responsibility to protect. It follows that we need to look instead to other factors to make this decision.

Note that throughout the article my concern is with the significance that we should give to *current international law* in determining where we should place the responsibility to intervene, not international law per se. Thus, I do not conduct a broad inquiry into the relationship between law and morality in international affairs. Although some of the issues that I raise can be applied to international law more generally, I focus on the specific issue of the moral significance of the current international law on humanitarian intervention when deciding who should execute the responsibility to protect.<sup>4</sup>

The article proceeds as follows. I start by briefly exploring the current status of the international law on humanitarian intervention. This analysis is necessary because we need to know what the law on humanitarian intervention is before we can assess its worth. Then, in the main part of the article, I critically examine four prevailing reasons for treating an intervener's legal status according to current international law as morally significant (and therefore an appropriate basis on which to decide who should intervene). In particular, I consider the arguments that an intervener's legal status is morally significant because: (1) legal interveners derive their authority from morally valuable procedures; (2) illegal humanitarian intervention is

itself abusive; (3) illegal humanitarian intervention leads to abusive intervention; and (4) illegal humanitarian intervention undermines international order.

### The Legal Picture

There are a number of different readings of the current law on humanitarian intervention. I shall focus on two of the most informative: international legal positivism and Fernando Tesón's human rights-based approach.

#### *An International Legal Positivist Reading of International Law*

International legal positivism is a subspecies of legal positivism. It holds the 'separability thesis', asserting that there is a conceptual distinction between what international law is and what morality demands. As such, *lex lata* – the law as it is – is not the same as *lex ferenda* – the law as it ought to be. Its account of legal validity, and therefore of what international law is, is highly voluntaristic. International law is said to emanate exclusively 'from the free will of sovereign independent states. There is no law except what is 'posited' by sovereign powers' (Wight 1991: 36). There are two ways in which sovereign states 'posit their will', i.e., consent to international law: the first is by agreeing to a treaty; the second is by engaging in a practice which becomes a customary rule of international law over time as it is repeated (and which meets the requirements of *opinio juris*).<sup>5</sup> In other words, for international legal positivism the two sources of international law are treaty and custom and, as such, moral considerations are not necessary for legal validity.

International legal positivists generally take the following position on the legality of humanitarian intervention. Article 2(4) of the UN Charter provides a general prohibition on the use of force. This states:

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.

There are only two legal exceptions: unilateral or collective self-defence and Security Council enforcement action under Chapter VII of the UN Charter.<sup>6</sup> Most international legal positivists reject the existence of a third possible exception to Article 2(4), which would hold that *unauthorised* humanitarian intervention is legal because there is a customary international law for this practice. Their argument, in brief, is that there is insufficient state practice to establish such a customary international law (e.g., Byers & Chesterman 2003; Danish Institute of International Affairs 1999). It follows that humanitarian intervention – which violates Article 2(4) – can be legal only when undertaken for self-defence or when the Security Council authorises it.<sup>7</sup> We can dismiss the former because humanitarian intervention will be very rarely, if ever, legal on the basis of self-defence, so defined in international law.<sup>8</sup> Interveners therefore need to have Security Council authorisation in order to be legal. Hence,

broadly speaking, on an international legal positivist reading of current international law, a humanitarian intervener is acting legally if its intervention is authorised by the UN Security Council and illegally if its intervention lacks such authorisation.<sup>9</sup>

### *A Naturalist Reading of International Law*

Some deem this understanding of the law on humanitarian intervention to be too restrictive. A prominent example is Fernando Tesón (1997), who, from the perspective of natural law, argues that those undertaking humanitarian intervention do not need to have express UN Security Council authorisation for their action to be legal.

Like all naturalist accounts, Tesón rejects the separation of legal validity and morality. His account, which is based on Ronald Dworkin's interpretive natural law theory, asserts that what the current status of the law is on a certain issue, such as humanitarian intervention, also depends, in part, on what the law ought to be. In other words, *lex ferenda* affects *lex lata*. Tesón's naturalism includes a large role for positive law, but in contrast to legal positivists, he argues that neutral analysis of the two traditional positive sources of international law – custom and treaty – is impossible, and we should therefore interpret these sources according to the best moral theory of the purposes of international law. This theory, according to Tesón (1997), is a human-rights-based approach that sees individuals as the subjects of international law and the role of international law as the protection of human rights.

On the basis of this human rights-based approach, Tesón argues that those undertaking humanitarian intervention act legally, even if they lack express Security Council authorisation, providing that they meet certain normative criteria.<sup>10</sup> He reaches this conclusion principally by claiming that the selection and reading of possible precedents, which could establish or deny the existence of a customary law permitting humanitarian intervention, is inevitably affected by the interpreter's views on the role of international law. Given that international practice tends to be chaotic and contradictory, and that any attempt to find normative patterns of behaviour is result-orientated (Tesón et al. 2003: 941), he claims that we need to appeal to moral-political values to interpret potential precedents (Tesón 1997: 166).

Using a human rights-based interpretation of state practice, Tesón argues that there are nine precedents for humanitarian intervention: India's 1971 intervention in East Pakistan; Tanzania's 1979 intervention in Uganda; France's 1979 intervention in the Central African Republic; the US 1983 intervention in Grenada; the US, UK and French 1991 intervention in northern Iraq to protect the Kurds; the US-led 1992–93 UN intervention in Somalia; the US-led 1994 action in Haiti; the French-led 1994 intervention in Rwanda; and NATO's 1994 intervention in Bosnia (Tesón 1997). On the basis of these precedents, Tesón asserts that there is a legal right to intervene in customary international law for *both* authorised and unauthorised interveners.

It is hard to see how he can sustain this conclusion, however. The central problem is this: whilst intervention authorised by the UN Security Council is legal, too few of the *unauthorised* humanitarian interventions cited by Tesón have met the

requirements of *opinio juris* for it to be plausibly claimed that unauthorised humanitarian intervention is legal according to customary international law. According to the International Court of Justice, the *opinio juris* condition of customary international law requires:

Either the States taking such action or other States in a position to react to it, must have behaved so that their conduct is ‘evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it’ (in Chesterman 2003: 58n.26).

Most of the unauthorised interveners that Tesón cites did not behave in a way that evidences a belief that humanitarian intervention is legally obligatory. In particular, they did not claim that their action was legal according to the international law on humanitarian intervention (they instead cited other legal justifications, such as self-defence), nor was world opinion inclined to regard these interveners’ actions as legal (Chesterman 2003: 49–50). For instance, neither Tanzania in Uganda, India in East Pakistan (at least primarily), nor France in Central Africa invoked a humanitarian justification for their action, nor was there support for the legality of humanitarian intervention in the international community at the time.

That said, it could be reasonably claimed that *some* unauthorised humanitarian interventions have met the requirements of *opinio juris*. For example: the 1992 intervention in northern Iraq by the UK, the US and France was justified in conformity with Security Council resolution 688, but also asserted a right of humanitarian intervention (albeit a limited one which required a supporting Security Council resolution) (Wheeler 2000: 169); the Economic Community of West African States (ECOWAS) declared a right of humanitarian intervention in its interventions in Liberia (1990) and Sierra Leone (1997); and NATO’s legal justification for intervening in Kosovo rested on some assertion of a right of humanitarian intervention or humanitarian ‘necessity’ (Stromseth 2003: 251).

It is doubtful, however, whether any customary right of unauthorised humanitarian intervention can be reasonably interpreted to exist solely on the basis of these few interventions. Customary international law is formed by states engaging in a repetitive and ongoing practice; as the practice is repeated over time, it becomes law. The problem is that there have been too few instances of unauthorised humanitarian intervention that meet the requirements of *opinio juris* for unauthorised humanitarian intervention to be said to be a *repetitive and ongoing practice*.

Hence, it seems clear then that legal positivists are right to conclude that, according to current international law, legal interveners are those with express UN Security Council authorisation and illegal interveners are those without it.

### **The Moral Significance of an Intervener’s Legality**

Having seen what the current international law on humanitarian intervention is, how important is it that those undertaking humanitarian intervention do so legally? Or, to

put it another way, is it morally significant that interveners have UN Security Council authorisation?

### *Legal Proceduralism*

It should be noted here that although I have defended a legal positivist understanding, this is not to presume the moral justifiability of the current international law on humanitarian intervention. To that extent, it is important to distinguish between international legal positivism and what I shall call 'legal proceduralism'. International legal positivism makes no direct normative claims itself; it is a theory of what constitutes international law, that is, of legal validity. It holds that the two sources of law are treaty and custom (rather than moral considerations), but does not make any normative claim about the moral significance of these procedures. Legal proceduralism, by contrast, is normative. It asserts that the procedures by which international law is formed are *morally* valuable and, consequently, international law has moral significance (because it is formed by these procedures).

Many legal positivists also happen to assert legal proceduralism, but the two need not go hand-in-hand. On the contrary, a legal positivist can coherently assert that an intervener needs to have UN Security Council authorisation in order to possess the legal authority to undertake humanitarian intervention, but, at the same time, hold that whether an intervener has UN Security Council authorisation – and therefore has the legal authority to undertake humanitarian intervention – is of little moral significance. Indeed, in this article, I adopt an international legal positivist reading of the current international law on humanitarian intervention, but reject the claim that this law is morally significant.

There are, in fact, significant problems with legal proceduralism in the context of humanitarian intervention. This approach asserts that an intervener's legal status is morally important because of the moral value of the processes by which this law is formed, that is, by, firstly, state consent to international law and, secondly, UN Security Council authorisation.

It is doubtful, firstly, whether state consent to international law provides reason for holding that the legality of an intervener matters. There is no clear analogy between individual consent and state consent, so it does not follow that because individual consent matters that state consent matters too.<sup>11</sup> Nor can it be plausibly claimed that state consent is somehow representative of individual consent, for many states are undemocratic and even some apparently democratic states are often unrepresentative of their citizens on specific issues, including foreign policy issues (Buchanan 2003: 152). David Chandler (2002) claims that state consent is necessary for the formal equality of states, but this merely shifts the problem from justifying state consent to justifying the formal equality of states, and it is unclear why the formal equality of states has moral value.

Second, it is doubtful whether the functioning of the UN Security Council is morally valuable and therefore able to legitimise the interveners it authorises. The most plausible argument for this position asserts: (1) the Council's functioning

includes powerful states in the international legal system and subjects them to a formalised decision-making procedure, while still being based on a sense of universal representation and the rule of law; and (2) interveners that are authorised by the UN Security Council are desirable because they gain their authority to intervene from this carefully-balanced and morally-valuable process.<sup>12</sup> But this argument fails. Given the arbitrariness of the veto, the Council's unrepresentative structure, and the lack of both coherence and consistency in its decisions, the functioning of the Security Council is clearly not carefully balanced. It is *too* much of a compromise with power and has *too* little concern for human rights concerns for its functioning to legitimise the interveners that it authorises.

Rather than adopting this problematic legal proceduralist position, I adopt an approach which holds that the likely consequences of an intervener's actions are central to its justifiability, and which also holds that other factors, such as whether the intervener uses suitable means to undertake the intervention, and whether it is welcomed by the victims of the humanitarian crisis, are morally significant.<sup>13</sup> The question, which I am concerned with in this article, is whether an intervener's legal status is also a morally significant factor. Is it, for instance, a necessary and vital factor in an intervener's moral justifiability, and therefore central to determining who should execute the responsibility to protect?

I have already suggested that this assertion cannot be plausibly justified by invoking legal proceduralism. I will turn next to consider whether this can be successfully demonstrated by arguments that claim that there are links between abusiveness and illegal humanitarian intervention. Unlike the procedural arguments, which are concerned with whether the intervener's legality derives from a morally valuable international legal process, these arguments are concerned with the moral value of the content of international law, and in particular, with its effects when obeyed and disobeyed, that is, with the consequences of interveners being legal or illegal.

### *Abusive Humanitarian Intervention – The Trojan Horse Objection*

One of the most common arguments given in favour of the importance of an intervener's legal status is that illegal humanitarian intervention involves abuse. This argument is best seen as involving two quite distinct objections to illegal humanitarian intervention. The first objection is that illegal humanitarian intervention is *itself* abusive. This is what I shall call the 'Trojan Horse' argument: states use humanitarian intervention as a cover to engage in abusive humanitarian intervention. Consequently, we should use an intervener's legal status to decide who should carry out the responsibility to protect because this avoids abusive humanitarian intervention.

This Trojan Horse Objection, although frequently made, is either (1) incoherent or (2) unconvincing. To see this, it is important to distinguish first between an intervener's *intention* and its *motive*.<sup>14</sup> If an intervener has a humanitarian intention, it has the purpose of preventing, reducing, or halting violations of human rights. The intervener's underlying reason, however, for having this humanitarian intention does not have to be humanitarian as well. It could, for instance, be motivated by

self-interest. State A might intervene to stop a humanitarian crisis in State B, but its reason for doing so is because it desires to decrease the number of refugees entering its borders. But if the intervener is to have a *humanitarian motive*, not only must its intention be humanitarian, but also its reason for having that intention. Hence, its motive is the *underlying reason* for taking the humanitarian action. In the example above, if State A is to have a humanitarian motive, the reason for it wanting to intervene in State B must be humanitarian.<sup>15</sup>

We tend to think that, to be engaged in ‘humanitarian intervention’, an intervener must have a humanitarian intention (whatever its underlying motives). The humanitarian objective cannot be incidental to another, nonhumanitarian objective, such as protecting national security.<sup>16</sup> Indeed, more broadly, intentions are key to classifying actions. As Tesón asserts, the concept of intention ‘allows us to *characterize* the act, to say that the act belongs to a certain class of acts, such as acts of rescue’ (Tesón 2005: 5). That is to say, a chief way to determine what a particular agent is doing – its action – is to look at its intentions. So, an intervener must have a humanitarian intention to be undertaking ‘humanitarian intervention’.<sup>17</sup>

Now, the Trojan Horse Objection’s accusation of ‘abusive humanitarian intervention’ is ambiguous. It is sometimes meant to imply (1) imperialistic or neo-colonial intervention, where the intervener’s primary intention is to gain territorial, economic, or strategic advantage (Chandler 2002; Krisch 2002). Such action is clearly not *humanitarian* – its intention is not to halt violations of human rights – and, as such, should not be regarded as an instance of ‘humanitarian intervention’ (Tesón 1997: 111). Accordingly, it is incoherent to claim that illegal humanitarian intervention is ‘abusive’ in the sense of being imperialistic. Although illegal *nonhumanitarian* intervention can be abusive in this sense, illegal *humanitarian* intervention cannot.

Another version of the Trojan Horse Objection uses ‘abusive’ to mean (2) motivated by self-interest: illegal humanitarian intervention is abusive because those undertaking such interventions do so with self-interested motivations. Ian Brownlie, for instance, asserts that when humanitarian justifications have been made by interveners, ‘circumstances frequently indicated the presence of selfish motives’ (Brownlie 1963: 339). This contrasts with legal humanitarian intervention, which, the argument runs, is much less likely to be self-interested given the processes of the UN Security Council. So, this second version of the Trojan Horse Objection claims that an illegal intervener’s *motives* undermine its legitimacy; self-interested reasons are inappropriate motives to conduct war in defence of human rights.

There are significant problems with this objection’s reliance on the concept of an intervener’s motivation. The first problem is ontological: *whose* motives should count? It is misleading to anthropomorphise the intervener, claiming that it has this or that particular motivation, for interveners are simply a collection of individuals. And the motivations of the individuals who collectively constitute the intervener cannot be easily collated so as to say that the intervener has a certain motive. As Shashi Tharoor and Sam Daws (2001: 24) suggest, every intervention arises from a complex and changing context of political aims, views, and positions in which motives are hard to isolate and interrogate.

The second problem is epistemological: there are grave difficulties in ascertaining an intervener's motives. Assume, for example, that we take an intervener's motives to be determined by its ruler's motives. Establishing what motivated a ruler to decide to intervene is notoriously difficult. Even if we overlook the banal point that we can never know what someone else is thinking, attempting to discover a ruler's motives for intervening is decidedly tricky. For instance, did Bill Clinton want to intervene in Kosovo because he really cared about saving the lives of the Kosovan Albanians? Or was he more concerned with reducing the domestic political heat after the Monica Lewinsky affair? It is extremely difficult to know and, as a result, making the justifiability of an intervention hang on such matters is problematic. The same applies, but on a much larger scale, if we were to take an intervener's motives as the motives of all those who collectively form the intervener; we would face the challenge of determining *all* these individuals' motives.

Moreover, even if we were to overlook these conceptual problems and assume that we can easily establish an intervener's motives, whether an intervener has a humanitarian motive is of little moral significance. In other words, the normative claim of the Trojan Horse Objection – that an intervener motivated by self-interest is morally objectionable – is unpersuasive. First, it is doubtful whether an intervener having a humanitarian motive has intrinsic value. The argument for humanitarian motives having intrinsic value revolves around the Kantian notion that people should do the right things for the right reasons. If, for instance, Jack rescues Jill from drowning, it should be because he wanted to save her life, not because Jack thought that Jill would give him a big financial reward. To be sure, there does seem to be something intuitively attractive about this Kantian notion. But, in the context of humanitarian intervention, the intrinsic importance of a humanitarian motive seems small. It is certainly not a *necessary* condition of legitimate humanitarian intervention. As Tesón argues:

It puts too much stock in the agent's subjective state and, in doing so, disallows many actions that are objectively justified under any plausible moral theory. Take this obvious case: a political leader decides to stop genocide in a neighboring country (or, even less controversially, to defend that country against aggression) because he thinks that is the best way to win reelection. If we require right *motive* and not merely right intent, that war would be unjust (Tesón 2005: 9).

Could an intervener's having a humanitarian motive nevertheless be a significant, if not necessary, condition of an intervener's legitimacy? Perhaps not, for humanitarian intervention is a response to grievous suffering or loss of life, typically on a massive scale. In this context, the intrinsic importance of an intervener's having a humanitarian motive pales into insignificance, especially when contrasted with other values that *are* important to an intervener's legitimacy. In short, the mindset of those intervening seems far less important than these other qualities. To see this, consider the following hypothetical example, which demonstrates the difference in

importance between an intervener's effectiveness and its motivation. There is a humanitarian crisis in Burundi. Zambia, for humanitarian reasons, wants to intervene, and has a reasonable expectation of saving 10,000 lives. Tanzania wants to intervene in Burundi as well, but this time for self-interested reasons (to stop border incursions) and has a reasonable expectation of saving 10,001 lives. Who should intervene, Zambia or Tanzania? Assuming, for the sake of example, that there are *no further differences* between the potential interveners, and that the different motivations for intervening have no impact on how the intervention is carried out, it seems clear that we ought to prefer Tanzania's intervention because, despite lacking a humanitarian motivation, one further life would be saved. Similar arguments can be made to demonstrate the importance of other factors affecting the legitimacy of an intervener, such as its representativeness and the means it uses. If we have a choice between a representative yet self-interested intervener, and a less representative but well-motivated intervener, we should prefer the former. Likewise, if we face a choice between an intervener who uses humanitarian means yet undertakes intervention for self-interested reasons, and an intervener who drops bombs indiscriminately but whose leader has a humanitarian motive, we should, again, prefer the former. My point, then, is that the value of an intervener's having a humanitarian motive is likely to be overshadowed by other, more morally important, factors affecting the legitimacy of an intervener. By comparison, then, having a humanitarian motive is of little *intrinsic* moral value.

In response, one could claim that, in practice, an intervener's motivation is *instrumentally* important since it affects these other normative qualities: an intervener with a humanitarian motivation is much more likely to be effective, representative, and to adopt humanitarian means. But on the basis of past evidence (e.g., India's probably selfishly motivated but generally successful intervention in Bangladesh and, antithetically, the US's perhaps altruistic yet largely ineffective intervention in Somalia), the motivation of the intervener (to the extent that we can ever determine what this is) seems to have less of an effect than one might think.

Indeed, some even suggest that it is morally desirable that an intervener is *not* purely motivated by humanitarian reasons. Their reasoning is that a strong element of self-interest makes it more likely that the intervener will secure the necessary commitment for effective humanitarian intervention (Stein 2004: 35). This claim does have some plausibility. An intervener with a humanitarian motive alone is unlikely to commit the resources required to prevent egregious human suffering beyond its borders. An intervener needs a political motivation to undertake humanitarian intervention as well, which means that it can justify its commitment in terms of the interests of its citizens (ICISS 2001a: 36).

So, if 'abusive humanitarian intervention' is meant to denote humanitarian intervention with a self-interested motivation (assuming that we can establish this), that sort of intervention is not necessarily objectionable. There is little stock then in the argument that an intervener's legal status is morally significant because illegal interveners are motivated by self-interest. Thus, the Trojan Horse Objection, which claims that illegal humanitarian intervention is abusive itself, is unconvincing

because if (1) it takes 'abusive' intervention to be imperialistic intervention, this is not *humanitarian* intervention, and if (2) it takes 'abusive' intervention to be self-interested, being abusive is not that morally problematic.

### *Future Abusive Intervention*

Let us now consider the second claim often made about illegal humanitarian intervention and abuse, which, like the next reason I consider, is instrumentalist. The allegation is that illegal humanitarian intervention *leads* to abusive intervention. 'Abusive' intervention here is meant to imply imperialistic or neo-colonial intervention, where the purpose of the intervention is to gain territorial, economic, or strategic advantage, as discussed above in the first version of the Trojan Horse Objection. This argument has become more popular recently, with some theorists suggesting that the illegal intervention in Kosovo led to the 2003 war in Iraq (e.g., Wheeler 2005).

The objection has two parts: (1) illegal humanitarian intervention leads to humanitarian reasons being regarded as more acceptable reasons for breaking the prohibition on the use of force (perhaps, but not necessarily, in the form of a legal right to undertake humanitarian intervention in international law); (2) if humanitarian reasons are regarded as more acceptable reasons for breaking the prohibition on the use of force, states will be more inclined to engage in abusive (nonhumanitarian) interventions. Therefore, we should prefer legal interveners because they do not have the negative effect of creating additional abusive interventions. It should be noted that the argument is not that it is impossible to distinguish between genuine humanitarian intervention and abusive intervention that is falsely claimed to be humanitarian; we can distinguish between the two by looking at the intervener's rhetoric, conduct during the intervention, and track record of waging war for humanitarian reasons. Rather, it is that by establishing humanitarian reasons as permissible reasons to breach Article 2(4) of the UN Charter, unauthorised humanitarian intervention increases the opportunities for abusive intervention because, in the future, other states will be able to cite humanitarian reasons to justify their abusive actions.

However, the two parts of the causal relationship between illegal humanitarian interveners and abusive intervention that underlie this argument are not strong. To start with, although it is probably true that (1) illegal humanitarian intervention leads to humanitarian reasons becoming more acceptable reasons to breach the prohibition on the use of force, this is also true of legal humanitarian intervention. Indeed, the Security Council-authorized interventions of the 1990s have already gone a long way towards establishing the acceptability of humanitarian reasons for the use of force in the international community.

The second part of the causal link (2) is also questionable. This objection to illegal humanitarian intervention is similar to the argument given by some of those who reject a new legal right to intervene: formally establishing humanitarian justifications as permissible justifications for using force (in the form of a legal right)

will lead to abusive (nonhumanitarian) interventions (Brownlie 1973: 147–148; Chesterman 2001: 6). The difficulty with this argument is that establishing humanitarian reasons as acceptable reasons for using force is unlikely to provide many *additional* occasions for states to engage in abusive interventions with the purpose of gaining territorial, material, or strategic advantage. This is not to deny that states have used humanitarian justifications mendaciously in the past. As Tom Farer (1973: 150) asserts, humanitarian justifications were frequently invoked to justify armed interventions by Western states in the rest of the world during the nineteenth and early twentieth centuries (when there was a better case for the existence a right of humanitarian intervention in international law), yet the majority of these interventions were in defence of property interests rather than human rights. Nor is it to deny that if humanitarian reasons became more acceptable reasons for breaking the prohibition on the use of force, sometimes states would maliciously and mendaciously invoke a humanitarian justification for their actions. Rather, my point is that, since states *already* invoke self-defence as the justification for so many actions, increasing the acceptability of humanitarian reasons for using force is unlikely to provide many new opportunities for abuse. During the period in which humanitarian justifications for using force were more accepted (in the nineteenth and early twentieth centuries), did states engage in abusive (nonhumanitarian) interventions that *they would not have otherwise engaged in*? In most cases, I doubt it. And while it might seem that there would be at least a few more cases of abusive (nonhumanitarian) intervention as a consequence of further establishing the permissibility of humanitarian reasons for using force, this has not been borne out by recent state practice. Humanitarian reasons have become increasingly acceptable (at least politically and perhaps legally too) reasons to violate the prohibition on the use of force, but there has not been a corresponding increase in the number of abusive interventions that mendaciously allege a humanitarian justification.<sup>18</sup> Wars and interventions in recent decades have instead relied on self-defence as the justification for their action.<sup>19</sup> As Mark Stein rightly asserts, the ‘idea that humanitarian interventions will lead to nonhumanitarian wars has been somewhat overtaken by events’ (Stein 2004: 37). Furthermore, and again as Stein asserts, in the future, the US’s recent interpretation of ‘anticipatory self-defence’ is far more likely to undermine the prohibition on the use of force and lead to abusive intervention than ‘the possibility, feared by opponents of unauthorized humanitarian intervention, that like cases will lead to unlike cases’ (Stein 2004: 37).

What is more, even if the two claims (1) and (2) were true, the good achieved by the original illegal humanitarian intervener could outweigh the harm done by subsequent abusive intervention. Although abusive intervention may lead to oppression, domination, and the violation of human rights, these negative, long-term effects could be balanced by illegal humanitarian intervention’s positive, immediate effects of ending serious violations of human rights, genocide, and ethnic cleansing. Furthermore, if it is true that (1) illegal interveners establish the acceptability of humanitarian reasons as reasons for breaching Article 2(4), then in addition to abusive interventions where humanitarian justifications are claimed mendaciously,

there may also be additional *genuine* humanitarian interventions. These genuine humanitarian interventions could further offset any harm done by abusive interventions. So, the worry that illegal humanitarian intervention will lead to abusive nonhumanitarian intervention is largely misplaced.

### *International Order*

Some, however, question the ability of humanitarian intervention to do more good than harm (e.g., Brownlie 1973: 146). Their argument, which is instrumentalist, is that illegal humanitarian intervention undermines international order. Kofi Annan, for instance, argues that ‘actions without Security Council authorization threaten the very core of the international security system founded on the Charter of the United Nations’ (in Wheeler 2000: 294).

We have just encountered and rejected one version of this argument – that illegal humanitarian intervention leads to additional abusive interventions, and therefore undermines international order. Chandler (2002: 157–191) offers a more general argument. He argues that by circumventing the international legal system, an illegal humanitarian intervener reintroduces chaos into international affairs and fundamentally challenges the pre-existing structures of international order, thereby pushing us towards a Hobbesian international system. This is because it leaves the judgment to the individual state, rather than deferring to the UN, and therefore removes consensus and certainty from international law.

This massively over-exaggerates the potential destabilising effects of illegal humanitarian intervention on international order. As Buchanan (2003: 147–148) argues, international law is not a seamless web: cutting one thread – violating one norm such as the law on humanitarian intervention – would not destroy the whole fabric and send us towards chaos. Indeed, the experience of illegal humanitarian intervention does not suggest that it destabilises the international legal system. On the contrary, illegal humanitarian intervention is often condoned by the international community, as in the cases of Tanzania’s intervention in Uganda and (to a certain extent) NATO’s intervention in Kosovo (Wheeler 2000).

That said, there might be a better argument relating to international order for the importance of an intervener’s legal status. This argument appeals to the *positive* effects of *legal* interveners (instead of the *negative* effects of *illegal* interveners) for international order, and runs as follows. Since legal interveners require UN Security Council authorisation in order to be legal according to current international law, when legal interveners act, it means that the Security Council is behaving as an effective system of international governance – it is fulfilling its purposes of governing and authorising the use of force. And although the functioning of the Security Council is *procedurally* problematic (for the reasons outlined above), in terms of the *substantive* question of international order, an effectively functioning Security Council is likely to be beneficial because it will strengthen the rule of law and the stability of the international system by centralising decision-making on the use of force. As such, legal interveners are preferable to illegal ones, not because illegal

interveners have disastrous effects on international order, but because legal interveners have a greater positive effect on international order.

It is important, however, not to overstate the force of this argument. It is highly speculative and cannot be easily verified. Even if it were accurate, it does not provide a strong reason for disfavouring illegal humanitarian intervention, but only a reason for favouring legal humanitarian intervention. Furthermore, the positive effects of a UN Security Council-authorized intervention on the international system and on international order would probably be insignificant, at least in a grand scale of things. Consequently, that the UN Security Council authorises a particular humanitarian intervention is unlikely to have an immediate, significant, and positive effect on overall international law and order.

### Conclusion

My suggestion, then, is that a humanitarian intervener's legal status according to current international law is of little moral importance, significantly less than commonly assumed. It is neither a necessary condition of, nor a morally significant factor in, an intervener's moral justifiability. All we can say is that an intervener with UN Security Council authorisation is mildly preferable to an intervener without such authorisation because it could perhaps have some positive effects on international order. But this reason does no more than establish the minor moral worth of an intervener's legality.

This is not to say that the Security Council, *in general*, has no moral value. On the contrary, for uses of force *apart from* humanitarian intervention (such as the 2003 war in Iraq and other security-related uses of force), it is probably morally desirable, for instrumental reasons at least, that the Council authorises the action. However, in cases of humanitarian intervention, if an intervener responds to a grave humanitarian crisis but is unable to achieve UN Security Council approval, perhaps due to the self-interested actions of the permanent five, it would be wrong to reject its action merely because it is illegal. Hence, Security Council authorisation should not to be considered a critical warrant for action. Similarly, if we face a choice between an ineffective but legal UN action, and a justifiable yet illegal humanitarian intervention by another agent, we should prefer the latter, other things being equal.

So, *contra* ICISS, when deciding who should intervene, an intervener's legal status according to the current international law on humanitarian intervention should play only a small role in our thinking. This is also true of an intervener's motives, which, as argued in this article, have neither intrinsic nor instrumental moral significance. We will need instead to look to other factors, such as the intervener's effectiveness, representativeness, and use of means to specify who should execute the responsibility to protect.

It follows then that there is too great a gap between the current international law on humanitarian intervention and the demands of morality: *lex lata* bears little relation to *lex ferenda*. If an intervener's legal status is to be a suitable candidate for

determining who should execute responsibility to protect, we will need to reform the current international law on humanitarian intervention, so that an intervener's legal status has greater moral significance.

But, given my arguments above, why should we want to an intervener's legal status to matter more? Recall here that the very limited significance I give to law relates primarily to international law and arrangements *in their current form*, not to international law *as such* (although there is, of course, some overlap). Therefore, international law and international legal institutions could be reformed such that we should give them greater moral significance. Indeed, a strong case can be made for the necessity of such reform. States and other international institutions have been reluctant to take on the responsibility to protect and the current international law exacerbates this situation. Interveners without express UN Security Council authorisation are widely regarded as illegal and this discourages agents that are unlikely to win UN Security Council approval from undertaking what could otherwise be justifiable humanitarian intervention. In addition, states use the difficulty of achieving UN Security Council authorisation as an excuse to avoid intervening. As such, reforming the current international law could potentially remove a barrier to the fulfilment of the responsibility to protect.

This reform is perhaps not best achieved by changes in customary international law; the problem with this approach is that it leaves too much to fortune.<sup>20</sup> Nor should reform simply be a matter of legalising all unauthorised humanitarian interveners or legalising all unauthorised humanitarian interveners that meet certain criteria. A more realistic, and desirable, solution is an approach that would develop additional formal bases for authorising humanitarian intervention in certain regional organisations, such as the African Union, ECOWAS, and the EU, which would supplement the powers of the Security Council. Additional treaty-based law would be created to give these organisations not only the legal authority to authorise and to undertake humanitarian intervention within their regions, but also the legal responsibility and duty to do so. This more integrated response would start to tackle the problems of a lack of state willingness and commitment to take on the responsibility to protect, as well as some of the legal issues raised in this article. And although this solution would not be ideal, it would be a lot better than the morally deficient international law on humanitarian intervention we have at the moment.

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### Notes

1. See Bellamy (2006) for a detailed account of how this agreement was reached (and watered down from the original concept).

2. Although there have been interventions in Darfur and the Democratic Republic of Congo by the African Union and the UN respectively, both missions, despite some success, have been unable to halt the egregious violations of human rights.
3. See UN (2005: 30). A weaker version of this position is taken by the ICISS (2001a). They hold that proper legal authorisation is a *highly significant* factor in an intervener's moral justifiability: we should look *primarily* to an intervener's legal status to decide who should execute the responsibility to protect. Although this leaves open the possibility that illegal humanitarian intervention could be justified in exceptional cases, it is generally regarded as morally unacceptable.
4. For the purposes of this article, I define humanitarian intervention as 'forcible military action by an external agent in the relevant political community with the predominant purpose of preventing, reducing, or halting an ongoing or impending grievous suffering or loss of life'. Note that the 2003 war on Iraq was not a 'humanitarian intervention' according to this definition, for its primary purpose was not humanitarian (see Roth 2004). For a thoughtful and interesting (if ultimately unsuccessful) argument to the contrary, see Fernando Tesón (2005).
5. See below for a statement of the requirements of *opinio juris*.
6. 'Unilateral' is sometimes used by international lawyers to refer to action by any number of states that lack UN Security Council authorisation. This usage is confusing. I will use 'unilateral' to refer to an intervention carried out by one state on its own and 'unauthorised' to refer to an intervention that lacks Security Council authorisation.
7. In fact, there are two additional (but less significant) exceptions to the prohibition on the use of force. The first is when the target state expressly agrees to the intervention. The second is intervention undertaken by the African Union. Article 4 (h) of the Charter of the African Union permits it to intervene in grave circumstances (war crimes, genocide, and crimes against humanity) in countries who have signed up to the treaty.
8. The International Court of Justice (ICJ) has ruled that claims of self-defence can be made only in response to 'an armed attack' (ICISS 2001b: 160).
9. This reading of the law on humanitarian intervention is disputed by some legal positivists who regard it as too broad (e.g., Joffe 1994). Their argument is that the Security Council is restricted by the UN Charter, which, in Article 2(7) claims that the UN cannot intervene "in matters which are essentially within the domestic jurisdiction of the state". And, although Chapter VII measures concerning 'international threats to peace and security' are excluded from this article, the argument runs, humanitarian intervention rarely constitutes an international threat to peace and security. As such, the Security Council has no legal basis to authorise humanitarian intervention. What this overlooks, however, is that according to Article 39 of the Charter, it is the Security Council that determines what constitutes an 'international threat to peace and security'. Since the early 1990s, the Council on occasion has broadened its interpretation of a threat to international peace and security to include intra-state war and internal oppression, and has been willing to authorise humanitarian intervention in such cases.
10. These require the intervener: (1) to have a humanitarian purpose and to adopt humanitarian means, (2) to use force effectively and only when necessary, (3) to be welcomed by the victims of the oppression, and (4) to be internally legitimate (Tesón 1997: 121–128; 1998: 59).
11. See Caney (2005: 236) on the problems of the domestic analogy.
12. See, for instance, Danish Institute of International Affairs (1999: 123).
13. See Buchanan (2004) for further criticisms of legal proceduralism.
14. It is worth noting that in practice interveners tend not to have pure humanitarian intentions or motives; they have – to varying degrees – a combination of humanitarian, security, economic, and political intentions and a mix of altruistic and self-interested motives. As Michael Walzer argues, there are 'only mixed cases where the humanitarian motive is one among several. States don't send their soldiers into other states, it seems, only in order to save lives' (Walzer 1992: 101–102).
15. Tesón (2005) also makes this distinction between an intervener's intention and its motive.
16. Its underlying motives for resolving the crisis might still be self-interested though – for instance, the leader of the intervener might wish to stop a humanitarian crisis because this would be popular with voters.

17. This assertion is well supported by the literature: Ellery Stowell says that humanitarian intervention is the 'reliance upon force for the justifiable *purpose* of protecting the inhabitants of another state'; Ian Brownlie states that humanitarian intervention has 'the *object* of protecting human rights'; and Adam Roberts says that humanitarian intervention has 'the *purpose* of preventing widespread suffering or death among the inhabitants' (in Chesterman 2001: 1–3; emphases added).
18. See, further, Tesón (2003: 113).
19. Self-defence was the main reason given for the following uses of force: the US in Nicaragua; Portugal's conflicts with Guinea, Senegal, and Zambia; South Africa in Namibia, Angola, Botswana, Mozambique and Zambia; Israel in Lebanon; Thailand in Burma; Senegal in Guinea-Bissau, Tajikistan in Afghanistan; and Iran in Iraq (Gray 2000). Self-defence was also the main reason given by the US and the UK for the 2003 war on Iraq (their attempts to justify the war for humanitarian reasons were always secondary to the main argument of self-defence).
20. See Buchanan (2003) for a detailed discussion of this sort of reform.

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