Maryland Journal of International Law

Volume 29
Issue 1 *Symposium: "The International Law and Politics of External Intervention in Internal Conflicts" and Special Issue: "Politics of Religious Freedom"*

Article 5

Critical Perspectives on Intervention: Thoughts in Response to Professor Richardson's Keynote Lecture

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INTRODUCTION

"*No man is an island, Entire of itself, Every man is a piece of the continent, A part of the main*."[1]

"I trust the president. I like the president. I think he's doing the right thing. We cannot allow thugs like Assad to gas his own people."[2]

As I write this response to Professor Henry Richardson's rousing reflections on the problem of interventions in civil strife,[3] two stories running side by side in the popular press capture the complexities of the problem. In the first, a piece of national legislation in Uganda that criminalizes homosexuality understandably has not only drawn the protests and ire of "gay rights activists" in the West, but also has seemingly generated consequential punitive actions by Western governments including the withdrawal or suspension of development assistance to the Ugandan state.[4] Of particular note, the World Bank, an institution currently run by a medical doctor and whose policies are shaped in Washington, D. C., reportedly has "suspended," as a

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1. JOHN DONNE, NO MAN IS AN ISLAND 1 (Keith Fallon ed., 1970).

2. Eliot Engel, *PBS Newshour* (PBS television broadcast Aug. 30, 2013), *available at* http://www.pbs.org/newshour/bb/world-july-dec13-syria2_08-30/.

3. *See See* Henry J. Richardson III, *Critical Perspectives on Intervention*, 29 MD. J. INT'L L. 12 (2014).

4. *See, e.g.*, Alan Cowell, *Uganda's President Signs Antigay Bill*, N.Y. TIMES, Feb. 25, 2014, at A9.

response to the Ugandan legislation, the disbursement of $90,000,000 of financial assistance already promised to the health sector of Ugandan society.[5] But since the "state" has no corporeal existence, the consequences of the suspension apparently will be visited primarily on the children, mothers and HIV patients who depend on government-funded centers for their health-care needs.[6] The second story is the dramatic denouement of a long-running strife within the Ukrainian state. Shortly after Professor Richardson delivered his lecture, fissures in Ukrainian society evident as early as 2004 in the so-called "Orange revolution" reasserted themselves with renewed vigor.[7] In November 2013, a significant portion of Ukrainian society began demonstrating against the policies of their Government regarding the scope of and choices in the relationships of the Ukrainian state and its two powerful neighbors: Russia and the European Union.[8] The street demonstrations ultimately led to the downfall of the then existing government, and fears of the carving up of the Ukrainian state into spheres of territorial influence—if not outright partition—between the "West" (as represented by the European Union" and Russia.[9]

What I find striking (and preliminarily wish to highlight here), is less the admittedly absorbing drama of the Ukrainian conflict, but rather the rhetoric of "nonintervention" coming out of Washington. That rhetoric which "warns" Russia not to "intervene" in matters that are purportedly about the "sovereignty," territorial integrity, political independence and "democratic" practices of Ukraine,[10] is in significant contrast to the calls for and policies of direct and unapologetic intervention in Syria. As the Syrian civil war has unfolded, politicians, and pundits in the United States (or, for that

5. Danielle Douglas, *Here is Why the World Bank Withheld Aid to Uganda*, WASH. POST (Apr. 3, 2014), http://www.washingtonpost.com/blogs/wonkblog/wp/2014/04/03/here-is-why-the-world-bank-withheld-aid-to-uganda/.

6. *Uganda Says Healthcare is For All Despite Anti-Gay Law*, BBC NEWS, (Feb. 25, 2014, 9:47 PM), http://www.bbc.com/news/world-africa-26349166 (predicting consequences for withholding aid).

7. David M. Herszenhorn, *Ukraine in Turmoil After Leaders Reject Major E.U. Deal*, N.Y. TIMES, Nov. 27, 2013, at A6.

8. *Id*.

9. David M. Herszenhorn, *As Ukrainian Election Looms, Western Powers and Russia Campaign for Influence*, N.Y. TIMES, May 7, 2014, at A4.

10. Andrew Higgins & David M. Herszenhorn, *U.S. and NATO Warn Russia Against Further Intervention in Ukraine*, N.Y. TIMES, Apr. 9, 2014, at A4; President Barack Obama, Statement on Ukraine (Feb. 28, 2014) ("It would be a clear violation of Russia's commitment to respect the independence and sovereignty and borders of Ukraine, and of international laws.").

matter, the West in general) have not framed the issue of external involvement in that strife-torn country as one of interference in the political independence or territorial integrity of the Syrian state or indeed of Syrian society. The various interventions that they advocate have been justified by appeals to pragmatic geopolitical considerations or claims about morally correct "humanitarian" policies. Indeed, remarkable by its absence from the vocabulary has been reference to international law rules; and this is so, even when resort to Security Council Resolutions have been sought. (At least this was the case until President Barack Obama's anticlimactic August 31, 2013 speech).[11]

The following Response reviews and comments on the issue of intervention in three parts. Part I outlines three possible prisms through which the question can be viewed. The summary seeks to point out in a descriptive sense the nature of the distinctions and the connections that are inherent in any attempt at a systematic comprehension of the subject matter of intervention. By setting out the various prisms through which the idea of intervention can be explored, this Part should be considered as an argument for subjecting the presumed objectivity of an academic statement to the tests of the validity of its underlying assumptions, the cohesion of the internal elements of the claim, and the reliability of those claims vis-à-vis outside realities. Parsing the prisms of intervention makes possible a nuanced evaluation of the competing claims for its appropriateness in varied settings, even if ultimately one concludes that myopia as to one or more of these lenses is the better approach. The second part of the essay employs the lens of the legal—more specifically of international law—to illuminate the dimensions of the problem of "intervention" and "nonintervention" as currently embedded in international politics. The presentation here eschews the objective sounding monocular focus on "the international community" which tends to obscure the nature of the problem.[12] Rather, the approach invites the reader to consider the relevant issues from two perspectives that should be but which are rarely juxtaposed in the discussion: that from within and from without a strife-torn

11. I take up this disparity below. See *infra* 76–77.

12. *Cf.* Richardson, *supra* note 3, at 12 ("Our current inquiry about intervention must start with the global community. It is a community in its comprehensive empirical, factual linkages and intersecting processes among all states and peoples of the world.").

society. In other words, I seek to explore the legitimacy of intervention from the perspectives of the outside actor and of the insider beneficiary or victim of the intervention. It is, after all, the particularized interests of these groups, not the abstractions of an over-imagined—if not illusory—"international community" that are ultimately at stake and which therefore drive the discussions. Finally, Part III explores the light that contemporary legal and philosophical stances on intervention sheds on a central interest of Professor Richardson's scholarship (and mine as well): namely, the place of power in shaping, defining and legitimizing the legally acceptable.[13] The focus here is on seeking to explain and understand the shift that philosophies of interventionism have undergone during the last quarter century: from the covert and (if reluctantly) use of intervention as a subterfuge for the exercise of power to the overt and avowedly unapologetic argument for intervention in the service of some asserted greater universal good.

I. THREE FACES OF INTERVENTION DISCOURSES

As is all too often the case in the humanities, a term is as likely as not to divide as to unify those who deploy it. Indeed, the ambiguity of meaning may be essential in order to permit those temporary but convenient alliances of interests and flexible coalitions without which virtually no complex society can function. Language thus exhibits a paradox. It must obscure its true meaning in order to permit temporary alliances. But that meaning must be susceptible of constant interrogation and reinterpretation if it is to avoid becoming irrelevant in a world of shifting interests, coalitions and arrangements. This is the paradox that is indisputably evident in attempting to give meaning to the concept of intervention. It is the paradox whose threads this part seeks to disentangle by examining the concept of intervention as it appears in three domains: the moral; the political; and the legal. First, let me provide a general statement of the concept that informs the pursuit of the disentanglement in all three epistemological realms.

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13. As Professor Richardson quite properly frames the issue:

> "An inescapable inquiry arising from this constitutive question is whether regarding intervention—however we define it—international law has ceased to reflect and bless the raw patterns of power, domination, subordination and race that it did structure and bless for some four centuries, prior to confirming the formal illegality of European and other colonialism in the mid-twentieth century."

Richardson, *supra* note 3, at 14.

At core, the idea of "intervention" implicates the propriety of the involvement of an outsider in the matters of another. There are certainly instances in which such involvement would be accepted not only as permissible, but indeed necessary. Not to intervene in such instances would be considered irresponsible, if not an outright wrong. But that in order to flourish, the "self" must be allowed some degree of autonomous existence (that is, independence of the self in the management of one's own affairs from interference by others, however well intended), is equally indisputable. Drawing the boundaries of permissible involvement and those of impermissible interference is the project of any discourse on "intervention.[14] This is a discourse that is no less applicable to issues relating to the autonomy of the individual or family, as it is to that of the society, state or community. At issue in these cases is the appropriate level of the involvement of an outsider in the self-realization of the person being acted upon. To frame the issue in this way is to introduce a second element of "intervention"; that is, the idea of involvement carries with it the propriety of the means with which the involvement is undertaken. Conduct that may be deemed proper if peacefully, quietly, or respectfully promoted, may be considered improper if noisily or coercively carried out. Similarly, even coercive conduct that at first glance may appear improper may be legitimate if undertaken in the exercise of legally conferred rights. Here, I want to briefly articulate frameworks for exploring the boundaries of the permissible and the impermissible when the other seeks to insert itself into the province of the self.

A. The Moral Dimensions of Intervention

That we are each the other's keeper is as close to a universally acknowledged moral imperative as there is.[15] As John Dunne's opening epigram to this essay nicely illustrates, the enfolding of one's life in the affairs of the other is at once both ontological and

14. There might be, of course, areas of overlapping uncertainties; that is, when it might be impossible to say categorically that involvement is permissible or impermissible. It is precisely for this reason that is essential not only to view the problem through different lenses, but to be clear-eyed as to the optics of the commentator's perception.

15. The idea of "the moral" as used here refers to a belief in the existence of an intrinsic "right" and "wrong" that is internal to the self. This criterion is necessarily subjective.

deontological. The instinct for self-development and self-preservation compels that we look out for our neighbors both as an expression of our moral worthiness and as a means for safeguarding the well-being of the other. The realization of both goals, it is generally thought, contribute to the happiness and ultimate well-being of the self.[16]

Involvement in the affairs of the other is thus justifiable as a moral undertaking circumscribed by two factors: the extent to which we are in fact motivated by the need to address the travails of the other, and the means that one chooses for doing so. But even presuming good intentions, one may nonetheless be concerned about the consequences of the intervention in terms of whether it undermines or promotes these dual but interrelated objectives. While the ultimate goal of what is morally proper is the satisfaction of the predilections of the self, that satisfaction cannot exist in the absence of the protection of the welfare of the other. Often, this requires a focus on the means employed to bring about the intersections of the interests of the self and of the other. Thus, a means that reduces the capacity of the other autonomously to make decisions for her own welfare may be deemed morally unacceptable even when it would appear to enhance the capacity of the self. Here, however, examination of those means often occur less through the prism of morality than that of politics.

But can intervention be discussed as a moral construct without viewing it as an imperative? Put another way, morality surely requires intervention in appropriate cases, just as much as it forbids it in appropriate cases. Yet, rarely do proponents of intervention on moral grounds see it in binary divisions. Even while vigorously urging intervention, the "right" to engage in it is almost always presented in permissive terms. There almost always is a claimed space for discretion: a situation where the self is free to intervene or to withhold intervention.

B. Intervention as a Political Construct

The dominant ethos through which intervention is considered and evaluated is frequently that of the political. This is because

16. It may be questioned whether the moral element is also implicated if, as an ontological fact, looking out for the other imposes pain or cost rather than pleasure on the self. Since the moral debate on intervention in contemporary western societies is never framed as a command to intervene (only as "right" to intervene), providing an answer to the question is thus readily avoided.

politics offers tools for the practical exploration of both of the moral considerations just presented: motivation and means. The environment for the exploration, however, is the polity rather than the person. Under this rubric, in matters of consequence for the idea of intervention, the self that matters is that constituted by and through politics. The nation state is, in our contemporary environment, the quintessential expression of the political community. International relations are of course premised on recognizing and accepting the interdependence of nation states and their constitution into a cooperative community. As Professor Richardson rightly observes, the international or "global" society is indeed a community because of the extant "factual linkages and intersecting processes" that bind peoples and states, and which crisscross trans-boundary relationships. To that extent, then, it is impossible to view the nation state in isolation and to take seriously any argument that frames the permissibility of intervention in terms of the absence of involvement by one state in the affairs of another. Indeed, cogent arguments for affirmative interventionist policies can be advanced for much of the same set of reasons that frame the moral argument for the self being involved with the other; that is, that trans-boundary involvements are necessary simultaneously to procure, secure and preserve the welfare of the self as well as of the other.

The state, however, is not a unitary or atomistic entity; certainly, as a political entity, it cannot and should not be considered as having a singular and wholly aggregated existence. The propriety of the involvement of one state in the affairs of another thus implicates measures of welfare—both of the self and of the other—that are absent in the uncomplicated morality equation. Defining the self and the other in the context of the state demands disaggregating a myriad of factors that typically are taken as givens in the moral setting. For example, how is "self-interest"—let alone the interest of the other—to be determined? How are plural interests to be weighed and balanced? What criteria are to be employed in evaluating the efficacy of costs incurred in intervening in the affairs of the other, the effectiveness of the returns on those costs, and the distributions of the costs and returns? Politics provides much more satisfactory answers to these questions because unlike morality, it is not internal to the self. Rather, politics necessarily engages the self with the other not by appeal to some internal rule of the self, but through negotiated and/or coerced interactions among the self and the other. The political prism thus evaluates intervention through a much more complex set of

standards and values than does a morally-channeled focus. The prism is sufficiently capacious to embrace even seemingly disparate values and standards as expediency, pragmatism, efficacy, and principle. The morality of the self may prefer one over the other, but the politics of the community accepts their possible coexistence, however uneasily or unsteadily the relationships might be.

C. Law as an Ordering Principle

Into the seeming chaos of possibilities offered up by politics, the legal framework steps in as an ordering principle. Like politics, but unlike morality, law offers a prism for decision-making that is externally induced rather than internally reflective. Law goes beyond politics by insisting on a binding set of routines that are not driven by the exigencies of pragmatism. Pragmatic considerations may be relevant—as indeed may moral ones as well – but such considerations do not trump established routines or bend to exigent concerns. The value of the legal prism lies in the analytical structure that it brings to what might otherwise appear to be free-flowing and entirely subjective decision-making. The routine of legal analysis requires identifying an operational text, evaluating that text against the backdrop of the operational environment of the text, and testing adherence or compliance with the requirements of the text by those subject to its prescriptions. It is to these tasks that the next part turns.

II. THE LAW OF INTERVENTION IN INTERNATIONAL SOCIETY

International law has a reasonably well-defined text (or, more accurately, series of texts) for the regulation of intervention by one state or group of states in the affairs of another. That text is the product of the rich and dynamic history of relations among states and the peoples they represent. Indeed, the foundational tale of not only contemporary international law, but of modern international relations not infrequently begins by reciting how the princes and potentates of Europe, worn out from thirty-years of chaotic wars over religion and rights of monarchical succession decided to reconstruct their relationships with each other by prohibiting the interference by one prince in the affairs of the other.[17] To be sure, the agreement was often honored in its breach (as in the Napoleonic wars of 1798-1815

17. The Treaty of Westphalia, signed in 1648, has long been understood as the foundation of modern international relations. *See* John W. Foster, *The Evolution of International Law*, 18 YALE L.J. 149, 153–55 (1909).

and the various Ottoman and Balkan conflicts of the nineteenth and early twentieth centuries), but the understanding (or, more accurately, the mindset that it generated) provided a standard by which the conduct of monarchs outside of their principalities, empires and kingdoms could be judged.[18] That standard, which lay somewhere in the interstices of law and of politics, gave rise to and reproduced three intertwined forces in the Europe-centered world history and international law of the succeeding three centuries, and which continue to exert critical influences after the diffusion of European power following World War II. These forces were "nationalism," "balance of power alliances," and "self-determination." It is easy enough to conclusorily present these forces in binary positive or negative terms, but in reality they represented complex amalgams, understandings of which are necessary in order to meaningfully evaluate of the various doctrines of intervention that remain extant.

In nationalism, the "nation state" asserted the right to embody and to represent the sole and material interests of a people or group of peoples.[19] That right had its justification in history, whether mythologized or real. The right was framed by and asserted against the existence of the rights of other peoples, each in turn seen as being represented by a separate entity with its own distinctive and divergent interests. Shared governance, geography, culture, and experiences were seen as glues of statehood. Nationalism thus asserted that right vis-à-vis other nation states, and it insisted a reciprocal commitment of unalloyed loyalty from the members of the group. The shield of non-interference inherent in the Westphalian structure gave to the emerging nation-states of Europe a wall of national identity behind which "patriotism" could be fostered, and experiments in leadership, governance and democracy could be tried out. The experiments and the realities they produced were by no means peaceful events, but

18. This rule of "noninterference" was not viewed by Europe as applying to events outside of the continent. Africa was partitioned and colonized without regard to the rule, and the United States' announcement of the Monroe doctrine notwithstanding, Europe felt perfectly comfortable interfering at on whim and at will in the affairs of Latin American and Asian states, as did the United States.

19. The literature on nationalism is rich and extensive. Illustrative are: BENEDICT ANDERSON, IMAGINED COMMUNITIES (3d ed. 2006) (noting that nations are creations of modern communication networks); ERIC HOBSBAWM, NATIONS AND NATIONALISM SINCE 1780 (1992) (detailing the history of nationalism); ANTHONY MARX, FAITH IN NATION: EXCLUSIONARY ORIGINS OF NATIONALISM (2003) (arguing that European nationalism began earlier than previously thought).

they did result in the strong institutional affiliations of nationhood that is now the envy of many emerging states.

There necessarily were variations in the successes and failures of nationality-based state formations. These depended, for example, on the wisdom or foolishness of the ruler, the cohesiveness of the population, its capacities for industry and for tolerance. These features in turn often reflected the pull of such sociological, historical, and geographical forces as the coherence or lack of coherence between imagined and provable histories, the practicalities of geographical boundaries and topology, and the existence (or lack) of a shared sense of fairness in the apportionment or distribution of economic resources and social wellbeing. This picture was complicated by the realities of history and politics, which did not make the interactions and coexistence of peoples a tidy package.

The philosophies of science and of commerce which shaped, dominated, and were transmitted by the European Enlightenment, in theory, should have fundamentally undermined the idea of nationalism. Those philosophies, after all, at core contested the validity of claims of preordained hierarchies, ineluctable certainties, and fixed determinisms in social and political relationships. Far from threatening nationalism, however, science and commerce proved to be allies in sustaining it, while reshaping its thrust. The internal group competition and views of superiority within Europe may have been mediated by enlightenment thinking, but scientific discoveries, technological advances, and commercial entrepreneurship simply expanded the theater of competition from metropolitan Europe to the quest for possessions and colonies in Africa and Asia. In these latter theaters, the nationalist ethos was given free reign.

The state as a homogenous entity that was imbued with the national spirit may have been a useful fiction, but that fiction quite often butted heads with the inconvenient realities of European political life. Great European states such as France, Prussia, and even Russia may have been expressive of the yearnings and interests of dominant nationalities, but the European political order embodied interests beyond those of the French or the English to embrace minority ethnic and confessional groups in such multinational and multiconfessional empire states as Austro-Hungary and Ottoman Turkey. Indeed, one of the consequences of the Napoleonic wars was to reveal the shallowness of the fiction of equating nationality with the state. The century following the Congress of Vienna can readily

be summarized as the century of European defragmentation and consolidation. Nationalism was decisive to the process, but it played out in quite complicated ways. For example, the idea of German nationality at best provided an unsatisfactory explanation for the contiguous existence of the Hansiatic states alongside the Austro-Hungarian Empire and the Prussian state. While Holland may have been expressive of Dutch nationality, no such singularity of shared nationality interests could comfortably explain the treatment of Belgium, Spain, Switzerland, or a host of other entities as states. The idea of Greek nationality may have been a romantic rallying cry for supporting that country's war of independence from Ottoman suzerainty, but it proved to be an unreliable basis for creating nation states out of the Balkan territories and provinces that the Ottoman Empire was compelled to divest at the twilight of its existence. The defragmentation of the Ottoman Empire, in particular, severely tested—as had the reign of Napoleon Bonaparte—the ethos of non-intervention. To Europe's credit, however, the idea of non-intervention was not enshrined as a legal principle. It was at best a political concept that shaped behavior as a matter of courtesy.

Nationalism may have provided the glue for cementing—and in some instances creating—great states, but it also nurtured among minority groups within multinational empires the yearning for the expression of their separate identities through the formation of their own nation states. Thus emerged the notion of self-determination that, in the twentieth century, came to be formulated as a "right." Meanwhile, in the nineteenth– and early–twentieth centuries, the defragmentation ethos allied itself with the ethos of the balance of power politics to create a European society of states that preached noninterference while unavoidably engaging in interventionist politics. The expedient character of nationality-based relations meant that intervention often came into play either to protect ethnic or religious minorities in a multiethnic state or to forestall such intervention by others. In the absence of authoritative norms or principles for determining when such intervention was necessary, and given the possibly existential consequence of a misjudged intervention, states often formed ad hoc coalitions to sponsor or to prevent intervention. Some of the best-known European statesmen of the nineteenth century—Talleyrand, Metternich, Disraeli, and Bismarck, among others—gained their reputations from the skill or craftiness they have been adjudged to have shown in their manipulation of these crises-driven temporary alliances. There were

of course other factors that went into alliance building, but the capacities of minority groups within empires and of minor national states to play off major powers against each other provided a singular source of stability within the European system. The faltering of the essential balancing act on which the system was built has been accepted as one of the major causes of the First World War.[20]

Unsurprisingly, a response to "the Great War" (whose century anniversary is now at hand) was to seek to rationalize the conflicting interactions of the forces of nationalism, self-determination, and balance of power by replacing the last with the concept of "collective security." Where competition among groupings of states had failed to tame nationalism, entrusting the task of intervention to a collective body—the Council of the League of Nations—was offered as a panacea.[21] The Council however proved ineffectual – indeed irrelevant – in containing the nationalist and imperial drive of such states as Germany, Italy, and Japan, and the result was yet another "world war."

In the ensuing peace arrangement, reflected in the Charter of the United Nations system, international society undertook to regulate both structurally and substantively the interventionist impulses that had given rise to two world wars. At the substantive level, the Charter declared as a foundational principle of international law the "right" of a people to self-determination."[22] At a minimum, this implied a people retained the capacity to avoid the subordination of their interests to those of another group. Although the means for the exercise of the right was not spelled out in the charter, the post-war process of decolonization, heavily relying as it did on the normative force of the right suggested a wide latitude for the construction of the right. Thus, the process could take the form of peacefully negotiated constitutional arrangements, or through so-called "wars of national liberation." In either case, self-determination there involved the removal of the subjugation of "natives" by outside imperial powers

20. *See generally* CHRISTOPHER CLARK, SLEEPWALKERS: HOW EUROPE WENT TO WAR IN 1914 (2012) (discussing the origins of World War I); MARGARET MACMILLAN, THE WAR THAT ENDED PEACE: THE ROAD TO 1914 (2013) (discussing the main people and personalities involved in World War I).

21. League of Nations Covenant art. 11 ("Any war or threat of war…is hereby declared a matter of concern to the whole League…").

22. U.N. Charter art. 1, para. 2.

and the rights of the natives to form nation states of their own, a process that has been referred to as "external self-determination."[23]

Alongside the declaration of the principle of self-determination, the Charter also required member states of the United Nations system to refrain from challenging the territorial integrity or political independence of other states through the use of force or the threat of the use of force.[24] This restriction was further extended to apply to the system, which is explicitly forbidden from interfering in the "domestic" affairs of a state, subject to a narrow exception for when the Security Council acts under the authorization of Chapter VII of the Charter.[25] Furthermore, it became accepted that the prohibition against a member state forcibly interfering in the internal affairs of another is not merely one under treaty law, but that it is an element of customary international law, perhaps one rising up to the status of a *jus* cogens norm.[26]

Understanding the boundaries of the regulation of intervention under international law following World War II thus entails appreciation of the shifting balance that participants in the international system sought to strike among competing principles of recognition. The view emerged that a people constituting a territorial state had a legal right to political independence that was insulated from interference by other states and by the international system as a whole. That right was protected under the principle of collective security, and is therefore subject to the overriding concern of the system with maintaining international peace and security. The nation state, under the banner of self-determination, emphasized the claim to be left alone to manage her politics free of interference from others. Within the polity, however, subgroups, invoking the same principle of self-determination and proto-nationalism, either asserted the right to form a territorial state of their own, or to substitute governance provided by their own group over that of the existing government. In disclaiming the right of intervention in both situations, the international legal order relied exclusively on the extent to which international security was compromised by the claims of the national

23. Reference re Secession of Quebec, [1998] 2 S.C.R. 217, ¶ 126 (Can.).

24. U.N. Charter art. 2, para. 4.

25. *Id*., art. 2, para. 7.

26. *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 190 (June 27).

groups. It feigned indifference to the sources of the internal insecurity within the state, and it pretended that the claims or interests of other states, however adversely affected, provided no justification for external involvement. Such wilful ignorance could be justified only if international society did in fact practice collective security.

The realities of the post-World War II world, however, in creating a bipolar regime of alliances, more approximated the balance of power system than that of collective security. Far from letting internal conflicts resolve themselves, external actors viewed them through the lens of their effects in the division of power between the West and the East. Indeed, internal conflicts were sometimes fomented by the one power or the other in order to provide leverage in the struggle between Western "democratic capitalism" and "soviet-led communism." And so, in a world in which under international law societies supposedly were left to address their internal politics free from outside interference, there were nonetheless such well known cases of external intervention as Iran in 1953, Guatemala in 1954, Hungary in 1956, Cuba in 1961, Dominican Republic in 1965, Czechoslovakia in 1968, Zaire in 1978, Afghanistan in 1979, Granada in 1982, Nicaragua-El Salvador in 1981-1983, and Panama in 1989. These examples are usually advanced as illustrating the failings of non-intervention as a legal doctrine because it did not prevent the big powers from doing what they could, while letting the weak suffer because they must. Yet, the doctrine of non-intervention has also been criticized for providing a shield for inaction and indifference in such cases as Indonesia (1965) and Biafra (1967-1970). Other instances such as Pakistan/Bangladesh (1973-1974), Cyprus (1974), Lebanon (1975-1982), Cambodia (1979-1980), and Uganda (1980) have generated significantly differing reactions. Whatever else may thus be said about the doctrine of non-intervention in the post-World War II world, the absence of instances of its application was not one of its features. And this conclusion can be reached based solely on the known instances of forcible intervention. Yet, there certainly were other instances of intervention that were undertaken covertly, and whose histories are yet to be disclosed. For example, while United States involvement in the change of the Mosadegh Government in Iran is no longer disputed, that is simply a consequence of fortuitous disclosures.[27] Extant evidence in such cases as Congo (1960), South Vietnam (1963), and

27. *See generally* STEPHEN KINZER, ALL THE SHAH'S MEN (2008) (discussing the 1953 C.I.A. coup in Iran, the rule of the Shah, and the rise of Islamic fundamentalism in Iran).

Afghanistan (1980-1989) provide support for claims of covert forcible action. While it is generally accepted that the non-intervention prohibited under the charter is one that involves the use of force,[28] there is no reason to doubt that the charter prohibits the covert application of force as readily as it does its overt use. Yet, the covertness of an intervention may have the fallback virtue of plausibly sustaining the normative force of the prohibition.

These numerous examples of forcible interventions notwithstanding, the persistence of the doctrine of noninterference as prescribed in the UN Charter can and has been vigorously defended, so much so that the doctrine has been claimed to be a jus cogens norm. The breadth of the acceptance of the principle, rather than a tallying up of its breaches, it can be argued, is the preferable indicator of its worth. An offender, it can be said, did not protest the existence of the principle, but instead invariably sought to justify the violation by appeal to a recognizable exception. The most obvious was that no actual interference had occurred. Because the language of Article 2(4) speaks of "the use of force" or "threat of the use of force" that violates the "territorial integrity or political independence" of a state, it was not uncommon to contend that no use of force was involved, or that such force was not directed at the territorial integrity or political independence of a state. The supply of weaponry or the use of sanctions—economic and/or military—was portrayed as being outside of the scope of the prohibition.[29] In those instances where the use of force was indisputable, the two most common justifications were that the intervention was in fact not an intervention because the outside force had been invited by a duly constituted government of the state (even where that government was brought about through outside pressure),[30] or that the force was an exigent measure

28. *E.g.*, Lori F. Damrosch, *Politics Across Borders: Nonintervention and Nonforcible Influence Over Domestic Affairs*, 83 AM. J. INT'L L. 1, 3 (1989).

29. *Cf.* Comment, *The Use of Nonviolent Coercion: A Study In Legality Under Article 2(4) of the Charter of the United Nations*, 122 U. PA. L. REV. 983 (1974) (discussing the rejection of a Brazilian proposal to extend article 2(4) to include economic coercion).

30. There are many examples of this throughout the 20th century. To name a few: the Soviet suppression of the Hungarian Revolution in 1956; Soviet invasion to halt Czech reform measures in 1968; Vietnamese support in Cambodia of newly created "Peoples Republic of Kampuchea" in 1978; and invasion in support of pro-Soviet government in Afghanistan (1979). In comparison, the United States' war

necessary to protect or safeguard foreign nationals within the territory of a disintegrating state.[31] Rarely did states candidly acknowledge that some necessity not contemplated or provided for under the prohibition might be in play. The doctrine of nonintervention thus came to be accepted as a cardinal rule of international law, even as it was frequently violated.

The story thus far told of the post-World War II order only takes one up to the end of the 1980s. The world made a new by the victors of that war was substantially revised in the throes of the collapse of one of its primary victors, the Union of Soviet Socialist Republics. That collapse was viewed and treated as the final—if overly delayed—triumph victory of the post-World War II era: a victory not simply of values, but also of political governance, economics, and of military might.[32] As was the case at the conclusion of World War II, the victors of the post-Cold War order felt empowered to dictate the terms of the peace, and to reorder the "new world" in its own image. Part of that reordering has been the reinterpretation of the concept of intervention, and with that reinterpretation, a reexamination of the underlying forces of nationalism, self-determination and collective security.

III. INTERVENTION AND THE NEOLIBERAL WORLD ORDER

If the treaty of Westphalia heralded the ascendance of liberalism as an organizing concept in international relations, the international system over the last quarter century has been shaped by a modified form of liberalism that is fairly characterized as "neoliberal." Classical liberalism had as its focus the prescription of workable principles for the constitution and governance of the state. Its primary focus was on the distribution of rights and responsibilities within the polity. Its application to international relations, while not inconsequential, was that of a second order process. s previously explained, the prohibition on intervention was as much intended to

in Vietnam was authorized in reaction to the "Gulf of Tonkin Incident" —an alleged attack by the North Vietnamese Navy in 1964.

31. Examples of this justification can be found in the U.S. occupation of the Dominican Republic in 1965 and the U.S. invasion of Granada in 1982.

32. For an assessment and critique of this take on the disintegration of the Soviet Union, see JACK F. MATLOCK JR., SUPERPOWER ILLUSIONS: HOW MYTHS AND FALSE IDEOLOGIES LED AMERICA ASTRAY – AND HOW TO RETURN TO REALITY (2010) (arguing that the collapse of the Soviet Union weakened American power).

further the internal development of the polity as it was to create a harmonious international society. The principle of non-intervention was thus a secondary product of state building. The principle operated in the political sphere, and did not take on its legal character until the period following World War I.[33] Neoliberalism, on the other hand, seeks to apply aggressively and extraterritorially the ideals that classical liberalism had enunciated for the internal constitution and governance of the state. Its proponents have crafted the doctrine explicitly for the purpose of creating a particularized structure of international society. Neoliberalism sees the liberal ideal not as a work-in-progress, but a completed structure that needs only to be transplanted and cemented into those societies currently lacking its foundations. Similarly, membership in international society, and the distribution of rights and privileges within the society are based on the extent to which a national society is seen to have fully absorbed the elements of neoliberalism.

Precisely because of its proselytizing mission, neoliberalism necessarily privileges interventionism. Neoliberalism has done so, however, without rewriting the post-World War II legal text. To the contrary, it has kept essentially intact the text of undifferentiated equal national sovereignties.[34] While ostensibly accepting the legal doctrine of nonintervention, neoliberalism in practice has sought to reorder international society through actions that in fact and in practice selectively reinterpret and rewrite the text of non-interventionism. Neoliberalism squares the circle of seemingly adhering to an unchanged legal text while radically reforming expected behavior by centering and indeed essentializing the contemporary European (or "Western") experience.

Two world wars made evident to Europe the futility—or at least the limits—of nationalism. Similarly, self-determination proved to be no solution to the intractable issues of political independence and national sovereignty. To the contrary, the experiences of former European colonies, coupled with the integrating ethos of an emerging European identity suggested that nationalism and self-determination had become outmoded and certainly not satisfactory grounds for an

33. See *supra* Part II.

34. For a nuanced exploration of this central concept of international law, see GERRY SIMPSON, GREAT POWERS AND OUTLAW STATES (2004) (examining the role of Great Powers and outlaw states in an international context).

international order that increasingly privileged the human rights of the individual over the purported national rights of the state. Rather than protecting the person by shielding the collective from outside interference, the emerging European experiment—emphasizing as it did, free movements across national territorial boundaries—amply demonstrated that the person is more secure when her ties to the collective are viewed as elastic and pragmatic. Neoliberalism thus fostered the internationalization of these insights which could only enrich individual liberty in otherwise authoritarian societies or dictatorial regimes.

But applying the lessons of the European experience to other societies has turned out not to be entirely salutary. The difficulties—indeed contradictions—of changing legal rules through selective practice rather than through a conscious rewrite of the text of the rules may be best demonstrated by a brief survey of interventionist moments in the post-Cold War period and in distilling the lessons they suggest for an understanding of current views on intervention.

In the aftermath of the disintegration of the Communist-led governments of Eastern Europe, the international order, in spite of its rhetoric of "universalism," in fact adhered to a practice of ideological segmentation. The blocs conveniently may be classified into four groupings of states. In the first were the continuing heirs of Westphalia and of liberalism. The core states in this block were in Western Europe and North America, but also included a handful of other rich industrial states, notably in Asia. Its center of gravity was the United States, and backed up by the North Atlantic Treaty Organization, this was by far the most influential block. It possessed the certainty of correctness that is conferred by success. It had not only the economic and military resources with which to propagate its views, but the intellectual foundations as well. Above all else, it confronted a demoralized cohort of rudderless states that hitherto had constituted enemies in a bipolar division of the world. For these states, the certainty of moral rectitude combined with political capacity to create legal legitimacy.

The second group of states was made up of the erstwhile opposition block consisting of communist-led European societies. Politics in these societies revealed profound fractures between the leaders and the ruled that had been submerged under communism. A reawakened "civil society" seemed determined to reassert a heritage of the classical liberal ideas that were interrupted by the two world

wars. This group of states viewed themselves as much heirs to the European enlightenment as were the West European states. Like reformed proponents of a creed, their zeal in announcing and promoting the good news of modern liberalism matched—if it did not exceed—that of their cousins in the first group. What they lacked in physical resources was made up, however, by appeal to experience. Any doubt as to the superiority of neoliberalism could always be laid to rest by the testimonials of the successes of the second in the transition from illiberal to liberal democracies and market capitalism.

The third group of states had constituted the core of the nonaligned states in a bipolar world. Pragmatic in outlook and uncommitted to any hard and fast ideology these states drawn primarily from what was referred to as "the third world" had, through their sheer numbers, sustained the balance of power in the international system through much of the 1960s and 1970s. Their support had been courted by both of the ideological blocs of the Cold War, even as they themselves sought to focus attention on the generation and distribution of wealth across borders. Drawn predominantly from Africa, Asia, and Latin America, the economic crises of the 1980s had greatly diminished the capacity of many of the states in this group to maintain the independence of action that they had so flamboyantly exhibited in the preceding two decades.[35] The disintegration of the Communist ideological bloc, coupled with the weak economic state many of these countries faced at the beginning of the 1990s with rare exceptions sidelined them in the emerging post-Cold War politics of international relations. In particular, they proved incapable of providing a countervailing response to the practical rewriting of the doctrine of non-intervention.

The current rewriting of the practice of intervention has occurred primarily in terms of relations with and within a fourth group of states. The group has been carved out almost exclusively from the third group (with a handful sharing similar experiences to some states in the second group); a phenomenon that itself deserves some attention. This fourth group of states is characterized by internal instability, but that is hardly a sufficient distinguishing feature. Many

35. *Cf.* David Fidler, *Revolt Against or From Within the West? TWAIL, the Developing World, and the Future Direction of International Law*, 2 CHINESE J. INT'L L. 29 (2003) (discussing the rise of "Third World" challenges to Western hegemony in modern international law).

of the states in the second and third groups have, over the course of the last twenty-five years experienced instances of instability. The sort of instability at play in the fourth group is what might be termed "state collapse" or "state failure." Whether intervention is in fact the cause or the effect of that failure is not always clear; what is evident—and clearly distinguishes the fourth group from the third—is the unapologetic claim for intervention that has emerged within policy-shaping and policy-making circles in the West, and as suggested by events in Crimea-Ukraine, perhaps in a re-energized East as well.

The "no apologies" (or "aggressive") disregard of non-interventionism over the last quarter-century has not of course been without reasonable justification. The question raised by the new approach is whether the textual rules ought not to be rewritten, or at least given formal reinterpretation. The answer may well lie in a closer look at some of the instances that have led to the intervention, and determining whether these instances are unique so that justified intervention in the particular case should be seen as aberrational, or whether these instances of state collapse meriting intervention may be sufficiently widespread that the rules of intervention—if they are not to be a mockery of themselves—ought to be rewritten.

The first significant indication of a change in attitude about the legal rules on intervention was manifested in the reaction to the international society's involvement in the governance of Somalia. In 1992, the UN Security Council, acting under Chapter VII of the organization's charter, authorized external intervention in what was entirely a domestic conflict among admittedly armed factions within the country.[36] The Council purported to be acting within the narrow carve out in the Organization's Charter for lawful involvement in the internal affairs of a member state. The justification offered for the intervention was "humanitarian," a rationale that a decade later was to be renamed "the responsibility to protect" (R2P).[37] But it is

36. S.C. Res. 794, U.N. Doc. S/RES/794 (Dec. 3, 1992) (authorizing UN intervention in Somalia).

37. *See generally* ANNE ORFORD, INTERNATIONAL AUTHORITY AND THE RESPONSIBILITY TO PROTECT (2011) (discussing the idea that the international community has an obligation to proect at-risk populations); *See* Alyse Prawde, *The Contribution of Brazil's 'Responsibility while Protecting' Proposal to the 'Responsibility to Protect' Doctrine*, 29 MD. J. INT'L L. 184 (2014). *Cf.* Ruth Gordon, *Saving Failed States: Sometimes a Neocolonialist Notion*, 12 AM. U. INT'L L. & POL'Y 903 (1997).

impossible to understand the Somali intervention outside of the then emerging hubris of a proclaimed "new world order." Having surprisingly acted in concert to reverse the invasion of Kuwait by Iraq— indisputably an international conflict that threatened international peace and security—the Security Council under the unquestioned leadership of the United States felt empowered to act in ways hitherto unknown to it. Somalia seemed to present on its face an easy case; the conjunction of a minimal call on resources, the purest of motives (verging on the altruistic), and a highly likely successful outcome. But Somalia did not turn out successfully. Indeed, the reverberations of the intervention continue as these lines are written.

When Rwanda next presented a "humanitarian" case for intervention, international society shied away from too close an involvement in the resolution of that internal conflict, even though there were United Nations "peacekeepers" already on the ground.[38] Hundreds of thousands of Rwandans were killed, and the reverberations of those killings continue. Seemingly paralyzed by these two experiences, the UN system stood by in indecision as a reinvigorated and assertive NATO, on the fiftieth anniversary of its creation, waged an air war against Serbia to compel her to give up control of Kosovo, a province with a dominant population of Albanians. The reason advanced by NATO and its sponsors was the need to forestall an imminent "genocide," or "ethnic cleansing"; although it is virtually impossible to validate this explanation against competing ones such as the need to bring the Serbian leader, Milosevic to heel for challenging the post-Cold War Order of Europe and the Balkans.

The Kosovo war was a military success. Yet, an influential review of its facts and logic concluded that it was an "illegal" if a "legitimate" undertaking.[39] Presumably, neither the rectitude of moral motivations nor military success sufficed to confer legal propriety on intervention. This, at any rate, appears to have been the political conclusion reached by the heads of states and governments of the

38. *See, e.g.*, ROMEO DALLAIRE, SHAKE HANDS WITH THE DEVIL: THE FAILURE OF HUMANITY IN RWANDA (2003) (detailing a UN worker's first-hand account of the genocide in Rwanda).

39. INDEP. INT'L COMM. ON KOSOVO, THE KOSOVO REPORT (2000) *available at* http://reliefweb.int/sites/reliefweb.int/files/resources/6D26FF88119644CFC1256989005CD392-thekosovoreport.pdf.

member states of the United Nations system at the turn of the twenty-first century. Imbued with a millennial spirit for the reconstruction of the international legal order, these leaders sought to reconcile the growing claim for intervention on humanitarian grounds with the preexisting legal prohibition. Doing so required that these politicians marry two philosophies that are at odds. In the first, relying on the work of a Canadian Government sponsored "independent" panel, they had to buy into the idea that humanitarian intervention was driven by altruistic motives. Secondly, they were confronted with the need to read just their conception of sovereignty as entailing the right of each state to determine for itself the terms of the relationship between the state and the citizen. The result was the compromise that has come to be termed "responsibility to protect."

Although the phrase is now routinely deployed to express the view that the "international community" has a "responsibility" to protect persons threatened by mass atrocities, a straightforward reading of the language actually employed makes plain the nature of the compromise. First, it reiterates a truism: that all states have the obligation to protect the vulnerable members of the society over whom the state claims sovereignty or jurisdiction. The RTP Declaration simply emphasizes that this incontestable international law obligation continues to exist even—and perhaps especially—at moments of mass atrocities.[40] Secondly, the Declaration recognizes and accepts the possibility that a state may be unable to discharge that responsibility; in which case, international society cannot rely on the shield of state sovereignty to evade stepping into the shoe of the ineffectual state.[41] Notably, nothing in the declarations of the heads of states and governments imposed an affirmative—let alone an imperative duty on any external state or group of states to employ the use of force against another state on humanitarian grounds. The prohibition of forceful intervention, even in so-called humanitarian situations, is especially apposite where the conflicts among the members of a society go to basic questions of the nature and structure

40. *See* 2005 World Summit Outcome, ¶ 138, G.A. Res. 60/1, U.N. Doc A/RES/60/1 (Sept. 16, 2005). Pointedly, the Resolution emphasizes the standard elements of cooperation in international law; the encouragement of pacific means for resolving disputes, whether internal or international; and the furnishing of assistance by the international society to the state in the latter's discharge of its obligations.

41. *Id*. ¶ 139.([The international community]…[is] prepared to take collective action…should peaceful means be inadequate…to protect [] populations from genocide, war crimes, ethnic cleansing and crimes against humanity.").

of the arrangements for the internal organization of a state; that is, to the source of a state's claim of sovereignty. But it is almost always in these situations that proponents of RTP, imbued with a substantive preference for a particular neoliberal outcome, have most often clamored for intervention. But it is perhaps unavoidable that in an age in which the so-called civil society, having the resources but lacking the generalized responsibility and accountability of the nation state, has come to play a central role in the definition of international law, established principles can be cavalierly reformulated. Such a conclusion seems inescapable given the ease with which the language of "responsibility to protect" has become interpreted as authorizing intervention by foreign states in the overthrow of governments in weak states. In any event, proponents of the "responsibility to protect" trot it out only in those situations in which they believe that the responsibility can be discharged at minimal costs to themselves. They do not assert it as a duty to be satisfied in situations where it would be at substantial inconvenience or hardship to international society or the foreign interloper.

The debate over humanitarian intervention is of course only a subset of the much broader issue of external involvement in the internal affairs of a state. If in fact we inhabited a "borderless world" in which persons and their governments have equal concern for the wellbeing of others without regard to nationality, the question of intervention (at least as framed in law through politics) would evaporate. But we do not. Indeed, the countries most likely to insist on the continuing force of national borders are those of the wealthy West, especially when confronted by the prospects of mass immigration from the much poorer rest. Nonintervention—the legal rules crafted in an age when legal positivism reigned supreme—sought to privilege sovereignty as an affirmation of the capacity and right of a self-determined population group to engage in self-government (and indeed misgovernment) free of the shackles of a superior society. One of the remarkable features of the post-Cold War international order has been the reaffirmation of a particular form of self-determination, which in popular parlance we call "democracy." Along with "humanitarian intervention," the promotion of "democracy" has furnished an additional argument for reordering and recalibrating the principle of nonintervention. At about the same time that neoliberalism was being touted as constituting the "end of

history,"[42] democracy was being presented as a "human right."[43] The elements of the "right" were never comprehensively articulated, but it was assumed that they more or less approximated those that were in practice in the liberal democracies of the West. Self-determination was seen to be available only to a people that were in fact democratic. Intervention might be appropriate then not only in furtherance of humanitarian norms, but of "democracy," so defined. Even in the absence of the threat of mass atrocities, intervention may be engaged in to rid a society of illiberal tendencies and pariah statesmen. The currency that appeared to matter was the capacity for successful intervention.

It is against this backdrop that the most recent instances of intervention should be evaluated. As it happens, the three that have generated the most controversy in the last three years implicate the most recognizable three political power centers of contemporary international society. These are the intervention by NATO (backed by the United Nations) in a Libyan civil war; the attempted intervention by an assortment of states in the Syrian civil war; and the ongoing civil crisis in Ukraine. Each challenges the continuing force of the prohibitions on intervention, even as modified by post-Cold War practice. These comments conclude by inquiring whether these examples suggest the need for textual clarification of emerging doctrines or whether the international system is better off by leaving well enough alone.

Both of the civil wars in Libya and in Syria are archetypes of the civil strife that beset much of the non-Western world in the wake of decolonization. For these inorganic states brought into being through the artificial manipulations of European powers, their current civil wars may not be unlike those experienced by and which shaped European national societies at the dawn of the modern era. They certainly are the sort of civil strife that have beset several post-colonial African and Asian states over the last two generations. These are wars in which population groups, finding themselves in proximity to each other, but set apart by such cleavages as religion, clan-based kinship relationships, and poorly distributed economic resources have, as is all-too-human, sought to restructure their relationships

42. *See generally* FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN (1992) (predicting the collapse of authoritarian regimes in favor of liberal democracies).

43. *See*, *e.g.*, Thomas Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 46 (1992) (presenting democracy as a "global entitlement").

through violence. In the case of Libya, the dominant cleavage was territorial; in Syria, religious. Rwanda, Bangladesh, Biafra, and Indonesia, to suggest a few examples, have undergone similar experiences. Similarly, alongside the civil wars in Syria and Libya were "uprisings" in Tunisia and Egypt, which collectively have come to be referred to as "the Arab Spring." These latter, as in the former, again reflected the working out of societal cleavages. In the latter two cases, they have been framed as questions of "modernity" and "secularism" in conflict with religious and/or political orthodoxy. In short, civil strife in the developing world is best viewed as continuation of the struggle to substitute the artificially created societies of the colonial era with modern organic communities. It is asking too much to hope or believe that the processes of national community formation in these societies will be any less violent than it had been in Europe.

What then, it might be asked, distinguishes Libya and Syria from the other examples, at least sufficiently so to make them paradigms for external intervention? The easy response is to assert that Libya and Syria have involved "mass atrocities" or, at least, their likelihood. But what made mass atrocities more likely in these two states than in the others experiencing socio-political upheavals? An equally easy response points to the character of the personalities in charge of these countries. Yet any serious evaluation of these explanations readily demonstrates their fallacies. The leaderships in Syria and in Libya had been in power and with as much contentment and dissatisfaction over the forty or so years of their reign, as had the leaderships in Tunisia and Egypt. If the leaderships differed among themselves, it was in the nature of the external alliances they had formed over those years. The Libyan and Syrian rulers had hitched their wagons to non-Western horses. They fell into that camp that neoliberal internationalists, with unwarranted virtuousness, referred to as "rogue" or "pariah states." Tunisian, Egyptian, and Bahraini rulers, on the other hand, had aligned themselves with the West. No sooner had the social uprisings in Libya and Syria commenced than leaders in the West openly demanded that these leaders step down. If external involvement was confined to demands for "regime change," however impolitic that might have been under the old standards, that would hardly in and of itself constitute impermissible intervention.

What made intervention in Libya and Syria distinctive was the active recourse to the use of force to bring about the overthrow of recognized governments. "Responsibility to protect" has been invoked as the justifying legal principle, but the chronology of events fairly raises the issue of cause and effect. Was the mass violence and inchoate mass atrocities in Libya precipitated by or in response the externally driven injection of force? Similarly, in the case of Syria, it should be asked whether external intervention by the West and the Gulf Arab countries through the direct supply of armaments and diplomatic support are not responsible for the scale of the violence and the substantial loss of lives and sufferings visited on that country. Can it be that far from preventing or remedying humanitarian catastrophes, the open and notorious interventions encouraged by the rhetoric of "responsibility to protect" may be creating the conditions for mass atrocities? The logic for finding an affirmative response to this question is not hard to see. In the first place, despite the claim of disinterested humanitarianism, it takes little tweaking of the imagination to see that the selective use of the doctrine serves primarily the interest of the outsider.

It is not accidental that of the four states at issue, the two over which assertions of the "right" to engage in a discharge of the so-called "responsibility" are those with which the outsiders had ulterior motives and interests in overthrowing the leadership. Nor is it accidental that those who spearheaded the claimed humanitarian intervention are countries with historical grievances against the leaderships of the countries In which interventions have been sought.[44] It was precisely concerns over such selective use of force

44. Muammar Qaddafi of Libya had of course been a bête noire in the West since his unilateral seizure of crude oil concessions that had been given to the Western oil companies. ANTHONY SAMPSON, THE SEVEN SISTERS (1976) (discussing and analyzing the history of the world's largest oil companies). He did not endear himself either to the United States or to France by apparently financing subversive activities against airlines of both countries. Similarly, the Assad family that had ruled Syria since 1970 had aligned the country during the Cold War with the Soviet Union, and unlike other Arab countries, such as Egypt, apparently did not switch allegiance to the West even after the collapse of the Soviet Union. That France led the West's thrusts in both Libya and Syria is especially noteworthy. As early as 2003, in the aftermath of the U.S. invasion and occupation of Iraq, one of France's most prominent intellectual on foreign affairs sought to carve up the projection of Western power between the United States and Western Europe. Notably, he argued for collaboration between the United States and France in matters of "enlightened intervention" in the Middle-East and Africa. Dominique Moïsi, *Reinventing the West*, FOREIGN AFFAIRS (Nov. 1, 2003),

that engendered the principles of nationalism and self-determination that have underpinned the doctrine of nonintervention. But of even more significance, whatever may be one's position on the causation conundrum, there is no denying that in Libya, as in Syria and Somalia, the consequences of the purported humanitarian intervention has been anything but remedial. All three countries continue to experience substantial instability and insecurity. Yet, having demonstrated Western might, those who called for humanitarian intervention pretty much lose interest in the welfare of the locals who are left to endure the consequences of the bombardment of their societies. At best, the result of "humanitarian intervention" appears to be the interruption of the organic formation of the state. Politics within these societies is shown to be dependent on outside intervention, which in turn does not last long enough to assure return to order. Again, the narrow domestic interests of the outside intervener, far more than the internal disorder of the broken society determines when help is to be withdrawn.[45] Might there be a lesson in the indisputable fact that Rwanda, the ignored case for humanitarian intervention is proving to be a good deal more resilient as a society, and more of an organic state than are Somalia and Libya.

From the perspective of an international lawyer, surely one of the most striking features of the resort to the use of force over the last quarter century is the paucity of its examination in legal terms by the politicians, policy-makers and academics who ordinarily invoke "the rule of law" as a distinguishing feature of life in Western societies. Nowhere has the absence of resort to legal arguments been more conspicuous by its absence than in the arena of discourses on the permissibility of interventions. In both Syria and Libya, as examples, it is notable that aside from the suspect justification of humanitarian intervention, international society ordinarily did not evaluate, even in

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http://www.foreignaffairs.com/articles/59367/dominique-moÃ¯si/reinventing-the-west.

45. An example is the debate over U.S. withdrawal of her forces from Iraq and Afghanistan. The debate has been framed primarily in terms of the continuing threat, if any, to the United States and the West from lingering "terrorists" in those states, not in terms of the security of life, liberty or property for the citizens of those states. *E.g.* Celeste Ward Gventer, *Adjusting the War on Terror to Fit the Times*, N.Y. TIMES (Mar. 4, 2014), http://www.nytimes.com/roomfordebate/2014/03/04/fighting-afghan-terrorism-without-troops/adjusting-the-war-on-terror-in-afghanistan-to-fit-the-times (describing anti-terrorism goals in the context of leaving Afghanistan).

the most cursory of terms, the propriety under international law of external intervention in Libya or in Syria. To be sure, the rhetoric of humanitarianism was occasionally invoked, but even here, the considerations were presented as self-evidently moral and practical in character, not as a discourse on the relevance of law to the decision-making process. In Syria, for example, despite the claims about providing "lethal" and "non-lethal" support, no "fly zones," and "punitive strikes" in "retaliation" for the use of chemical weapons, the policy-makers wrestling with these issues did not refer to international law as providing any relevant guidance.[46] The focus was in terms of the practicalities of implementation, and the likely effectiveness of the measures as sources of deterrence or of retribution. Internal political and military considerations, much more than the applicability of international law shaped the discourse.[47]

It should therefore gladden the heart of an international lawyer when a Western politician like Mr. Obama invokes the legal doctrine of nonintervention not as an afterthought, but as the driving explanation for a policy preference. This has been the position taken by the United States in its critique of Russian behavior in the current Crisis over the separation of Crimea from Ukraine and its absorption by the Russian Federation. As the United States has contended, a "fundamental principle" in play there—as elsewhere—is that the Ukrainian people deserve the opportunity to determine their own future."[48] That is the basic principle at stake in all cases where an outsider feels inclined to intervene in the internal conflict of any society. It is a principle that states are not at liberty to grant or withhold as they individually see fit. Rather, it applies to all except

46. About the only exception to this silence was President Barack Obama's terse and dismissive reference to international law in his August 31, 2013 speech: "I'm comfortable going forward without the approval of a United Nations Security Council that, so far, has been completely paralyzed and unwilling to hold Assad accountable"; "If we won't enforce accountability in the face of this heinous act, what does it say about our resolve to stand up to others who flout fundamental international rules?" President Barack Obama, Remarks on Syria (Aug. 31, 2013). The obvious internal inconsistency in this appeal to legality might be entertaining, except that this self-serving framing of international law as no more than the expression of U.S. foreign policy preferences has been the hallmark of the country's approach to legality over the last quarter-century.

47. *See id*. ("Now, after careful deliberation, I have decided that the United States should take military action against Syrian regime targets. . . . We would not put boots on the ground. . . . But having made my decision as commander-in-chief based on what I am convinced is our national security interests, I am also mindful that I am the President of the world's oldest constitutional democracy").

48. President Barack Obama, Statement on Ukraine (Feb. 28, 2014).

in the most exceptional of circumstances. As President Obama and his agents have aptly summarized the relevant international law doctrine, it is the obligation of all states to stand for the sovereignty, territorial integrity, political independence, and, if the people so choose, the "democratic future" of their state.[49] The pity is that these pronouncements come not as those of a member of the UN system with a principled stance on the doctrine of intervention, but as the expedient statement of a politician that has been caught off-guard by the capacity of an opponent to resort to the same unprincipled conduct and justification in which the West has been engaging for quite some considerable time.

Since the collapse of the Soviet Union, the West has acted and behaved like the colossus that bestrides a narrow world. In the process, rather than negotiating the rules of the road in international relations, it has tended to lay them down as edicts. Legal rules may be formulated through the use of power and political structures, but what distinguishes law from both power and politics is that once the rule is formulated, it takes a life of its own, and acts to constrain even the rule makers. In rewriting the rules of intervention to meet its immediate and narrow preferences, the West opened the door to Russia to make the arguments that it now advances, and which the West now finds unappetizing. In explaining its policies with regard to Crimea and Ukraine, Russia essentially mouths three of the same platitudes that the West has employed to justify neoliberal interventionism. First, the overthrow of an elected Government in Kiev by a street mob said to be sponsored or backed by the West (according to the Russians) rendered the replacement Government illegal and illegitimate. As a result, the predominantly Russian-speaking population of the Crimea in the application of the principle of self-determination was entitled to secede from Ukraine and to seek the protection of Russia. Secondly, the nature of the revolt in the Ukraine, mounted in the main by "right-wing nationalists" and "fascists" presented a threat to the human rights of the population group in Crimea. Third, given past historical associations, the Russian Federation retained continuing interests and rights in seeing to the well-being of Crimeans. These arguments may differ in their particulars from those that have been advanced to explain the role of former colonial powers in the interventionist politics of such societies

49. *Id*.

as Sierra Leone, Ivory Coast and even Syria, but it does not take a whole lot of stretching to draw analogies among them. The difference between 2014 and 1999 lies in Russia feeling empowered to rely on such arguments in explaining what might otherwise be thought as a clear violation of international law. In doing so it plausibly finds precedents in the conduct of Western states and NATO in the last quarter century.

CONCLUDING THOUGHTS: WHAT IS TO BE DONE?

As Professor Richardson frames the problem of intervention:

> The major continuing question for international law in our Global Village is whether as a *dynamic legal process* of authority and control, it will in its decisions, interpretations and large range of actors simply reflect the dominant patterns of power and control that arise from unappraised sources in the Village. Or, whether its decisions and interpretations will normatively aim to steadily shape a better global community towards greater sharing of human values …"[50]

I cannot say that my comments have seriously grappled with the binary characterization suggested by this framing of the problem. But there is, I think, no denying the dynamic character of international law and I hope this Comment has indicated the continuities as well as the discontinuities in the international law making process. Whether the process is essentially normative in character is, to my mind, highly debatable.

Words have a way of surviving their original usage. Sovereignty and self-determination are two obvious examples, as indeed is "intervention." These terms will continue to be extensively deployed in international law. It is equally likely that they will acquire over time meanings that are different from their current references. What are bound to remain effectively unaltered are the desires of human beings singly and collectively to coexist in an atmosphere of mutual support while retaining the right to negotiate their own separate futures as they best see fit. Similarly, contrary to the dominant ethos of global society after World War II, the move towards the even

50. Richardson, *supra* note 3, at 13 (emphasis added).

distribution of power and resources is by no means a guaranteed success. Indeed, as recent data indicates, while it may be that international society is becoming better able to assure the satisfaction of minimum basic needs to the vast majority of the population, there is little reason to be overly optimistic that the result would be the increased convergence rather than continuing (or even widening) divergence in the basic allocation and distribution of (again to borrow from Professor Richardson) of "basic values" and goods as "power, wealth, rights, loyalties, authority and access to global resources."[51] In international relations, no less than in domestic and private affairs, the post-Cold War neoliberal moment has demonstrated that there is nothing inexorable about the march toward progress of any particular kind. And yet, Professor Richardson is certainly right that all of humanity will have to work within a shared global space. There is no other choice. The question for intervention in this environment of continuing differences within a shared and sometimes claustrophobically confining space is how best to modulate the inequalities which can be quite glaring. At a minimum, the well-off will have to learn that the idea of humanity isn't simply about shaping the world in our preferred image, but genuinely making an attempt to understand the constraints within which the less well-off live their lives, and recognize and accept that the latter's values are no less worthy of comprehension and deference because of those constraints. Societies are organic creations. They do not come into being simply because one wills them to exist. Like chains, they are only as good as their weakest links, and like any metal, they are strengthened through patient tempering and nurturing, not simply by constantly being hammered down. But this is no license for indifference. One can show concern and interest by seeking to persuade rather than to punish. There might be satisfaction and a sense of self-fulfillment in the latter, but it is the former that creates the grounding for longer-term productive returns on expended resources.

For the purpose of trying to make less abstruse the thoughts expressed in the preceding paragraph, reconsider the concept of the "responsibility to protect." Witnessing the mass atrocities of Europe prior to and during World War II, and the internal conflicts incident to state formation in Africa and Asia after World War II, there is no

51. *Id.*

denying the need to provide mechanisms by which severely fragmented societies can address their problems. The text of R2P as articulated in the World Summit Conference outcome can hardly be faulted as a reasonable attempt to take account of the need for the responsibility of nation states to seek to address, in the first instance, the sources and causes of their fragmentation. Nor can one seriously argue against the requirement that the international system furnish whatever encouragement or assistance it can to the government and people of the fractured state as they seek to disentangle their society from the spider web of civil strife. One can debate the nature and scope of that encouragement and assistance, but as long as it remains secondary to the primary responsibilities of those whose lives and hopes are at stake, no genuine objection seriously can be taken. The difficulty with R2P arises with assigning to the international system the primary responsibility for restoring peace and security to an internally fragmented society. The international system, acting through the Security Council, and within the parameters of the Chapter VI functions of the Council arguably legitimately and legally can contribute to the prevention and protection of a citizenry whose government consents. The difficulty arises where the Council—and through it the international system—purports to act on its own mandate and independently of a functioning government in matters that would otherwise constitute an intervention in the sovereignty, territorial integrity or political independence of the state. Such exercise of power, which commentators in the West have become habituated to following the end of the Cold War is likely to continue to be resisted by others. The primary reason is the selective character of the intervention—probably an unavoidable human trait. But it should also be rejected because it denies agency and humanity to those whom it ostensibly intends to help. As already explained, the record of societies that at some point seemed fragmented beyond repair, but which were left to resolve their problems—the Indian sub-continent, Nigeria-Biafra, and Rwanda, to name a few examples—is, by measures of several magnitude, superior to those in which the West has felt itself called upon in the name of R2P or like to intervene: Somalia, Libya, and Syria. But there remains one possible situation in which R2P when narrowly and prudently construed may be necessary. It is where the internal fragmentation is so complete that there is in fact no Government or state worth its name. This may well have been the case in Somalia and possibly in the Central African Republic. Here, the principle of nonintervention may be inapposite because there is no state or society whose territorial integrity or political independence may be worth respecting. But even

here, R2P should be resorted to with care. The extent to which data is subject to self-deluding interpretation is all too obvious. One could have argued that Rwanda would have satisfied this condition in 1994, yet, in retrospect, it is obvious that Rwandans were perfectly capable of muddling through their problems and emerging at the end of it a much more solidified society.